§ 39 Profit From Opportunistic Breach

Restatement (Third) of Restitution and Unjust Enrichment § 39 (2011)

Restatement of the Law - Restitution

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Part II. Liability in Restitution

Chapter 4. Restitution and Contract

Topic 2. Alternative Remedies for Breach of an Enforceable Contract

§ 39 Profit From Opportunistic Breach

Comment:

Reporter's Note

Case Citations - by Jurisdiction

(1) If a deliberate breach of contract results in profit to the defaulting promisor and the available damage remedy affords inadequate protection to the promisee's contractual entitlement, the promisee has a claim to restitution of the profit realized by the promisor as a result of the breach. Restitution by the rule of this section is an alternative to a remedy in damages.

(2) A case in which damages afford inadequate protection to the promisee's contractual entitlement is ordinarily one in which damages will not permit the promisee to acquire a full equivalent to the promised performance in a substitute transaction.

(3) Breach of contract is profitable when it results in gains to the defendant (net of potential liability in damages) greater than the defendant would have realized from performance of the contract. Profits from breach include saved expenditure and consequential gains that the defendant would not have realized but for the breach, as measured by the rules that apply in other cases of disgorgement (§ 51(5)).

Comment:

a. General principles and scope; relation to other sections. In exceptional cases, a party's profitable breach of contract may be a source of unjust enrichment at the expense of the other contracting party. The law of restitution treats such cases in the same way that it treats other instances of intentional and profitable interference with another person's legally protected interests, authorizing a claim by the injured party to the measurable benefit realized as a result of the defendant's wrong. The claim described in this section is accordingly an instance of restitution for benefits wrongfully obtained (§ 3). It is identical in principle to the claims described in Chapter 5, §§ 40- 44 (authorizing a disgorgement remedy in cases of profitable torts and equitable wrongs), and it is properly understood and delimited by analogy to those claims.

The rule of this section has been placed in Chapter 4 rather than Chapter 5 in order to group together, for clarity of exposition, the divergent themes of restitution in a contractual context. But § 39 differs from the other sections of the present Chapter in fundamental respects. See Chapter 4, Introductory Note. Unlike §§ 31- 36 , the present section recognizes a claim in unjust
enrichment as an alternative remedy for breach, potentially available to an injured party who might otherwise enforce the contract by an action for damages or specific performance. Unlike §§ 37-38, which describe contract remedies that are independent of unjust enrichment, a primary object of § 39 is to prevent the unjust enrichment of the defendant at the expense of the plaintiff. Like the other rules of restitution for benefits wrongfully obtained, § 39 describes a disgorgement remedy: a claimant under this section may recover the defendant's profits from breach, even if they exceed the provable loss to the claimant from the defendant's defaulted performance. Restitution exceeding the claimant's loss is authorized nowhere else in Chapter 4, though it is a distinguishing feature of the rules stated in Chapter 5.

Judged by the usual presumptions of contract law, a recovery for breach that exceeds the plaintiff's provable damages is anomalous on its face. A breach of contract—whatever the actor's state of mind—is not usually treated in law as a wrong to the injured party of a sort comparable to a tort or breach of equitable duty. There is substantial truth, though not of course the whole story, in the Holmesian paradox according to which the legal obligation imposed by contract lies in a choice between performance and payment of damages. But the observation is most accurate where it matters least: in those transactional contexts where damages can be calculated with relative confidence as a full equivalent of performance.

By contrast, there are numerous legal relations—including some created by contract—in which a legal entitlement receives insufficient protection when the remedy for violation is limited to compensation in the form of damages. The traditional “inadequacy” test for the availability of equitable remedies may be largely a historical artifact, but it appropriately emphasizes this vital justification for supplemental relief. It is not generally the case, in short, that a person is free to choose whether to respect another's legal entitlement or pay damages for interference. It is precisely where a potential damage claim affords inadequate protection to a recognized entitlement that a court will enjoin a threatened interference. If a profitable interference has already occurred, the law of restitution allows a claim to disgorgement of profits, as an alternative to damages, in cases of intentional interference with legal entitlements of any kind. See §§ 3, 40-44.

Compared to other forms of legal entitlement, contract rights may often be easier to value in money; but they would be vulnerable to the same risks of underenforcement if the exclusive remedy for breach were an action for money damages. Where a party's contractual entitlement would be inadequately protected by the legal remedy of damages for breach, a court will often reinforce the protection given to the claimant by an order of injunction or specific performance. Restitution affords comparable protection after the fact, awarding the gains from a profitable breach of a contract that the defendant can no longer be required to perform.

The restitution claim described in this section is infrequently available, because a breach of contract that satisfies the cumulative tests of § 39 is rare. See Comment f. At the same time, the cases in which such a remedy is appropriate are generally uncontroversial and in some instances even well known. The innovation of the present section consists, not in proposing that defendants in such cases be liable to disgorge profits derived from a deliberate breach, but in stating a rule to generalize these commonly accepted outcomes.

There are cases of unintentional breach of contract, outside the scope of this section, in which the measure of recovery applied in this section may furnish an appropriate measure of contract damages. See Comment g.

b. Opportunistic breach. The common rationale of every instance in which restitution allows a recovery of profits from wrongdoing, in the contractual context or any other, is the reinforcement of an entitlement that would be inadequately protected if liability for interference were limited to provable damages. Cases in which restitution reaches the profits from a breach of contract are those in which the promisee's contractual position is vulnerable to abuse. Vulnerability in this context stems from the difficulty that the promisee may face in recovering, as compensatory damages, a full equivalent of the performance for which the promisee has bargained. A promisor who was permitted to exploit the shortcomings of the promisee's damage remedy could accept the price of the promised performance, then deliver something less than what was promised. Such an outcome
results in unjust enrichment as between the parties. The mere possibility of such an outcome undermines the stability of any contractual exchange in which one party’s performance may be neither easily compelled nor easily valued.

A promisor who recognizes this possibility and attempts to profit by it commits what is here called an “opportunistic breach.” The label suggests the reasons why a breach of this character is condemned, but there is no requirement under this section that the claimant prove the motivation of the breaching party.

In countering this form of opportunism, the rule of § 39 reinforces the contractual position of the vulnerable party and condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort. A restitution claim in response to a profitable tort typically operates to protect property from deliberate interference: standard examples include the claim to profits from trespass or infringement. See §§ 40 and 42. The rule of § 39 extends an analogous protection to contract rights, where what the wrongdoer seeks to acquire is not “property” but the modification or release of his own contractual obligation. The two situations have much in common. Confronted with a situation—in either context—in which the appropriate course of action would be to negotiate regarding legal entitlements, the wrongdoer takes without asking. The opportunistic calculation in either setting is that the wrongdoer's anticipated liability in damages is less than the anticipated cost of the entitlement, were it to be purchased from the claimant in a voluntary transaction. Restitution (through the disgorgement remedy) seeks to defeat this calculation, reducing the likelihood that the conscious disregard of another's entitlement can be more advantageous than its negotiated acquisition. See § 3, Comment c.

The broader function of disgorgement in the Illustrations that follow is not merely to frustrate conscious wrongdoers but to reinforce the stability of the contract itself, enhancing the ability of the parties to negotiate for a contractual performance that may not be easily valued in money. The result is to expand the range of transactions for which parties may effectively bargain. The point is seen by considering the position of the parties at the bargaining stage. Where the value of the promised performance is easily demonstrated—and substitutes are readily available—it may be plausible to attribute to the parties an understanding that the promisor shall be free, as a practical matter, to elect between performance and payment of damages. In other transactions, represented by the Illustrations to Comment e, the proposition that the promisor should be free to choose whether or not to perform would be incompatible with fundamental objectives of the promisee, ultimately making it impossible to fix a price for the promisor's contractual obligation. Absent an enforceable agreement on liquidated damages, the bargain in question is then less likely to be made.

Not by coincidence, the contractual entitlements that are vulnerable in the manner just described are those for which the promisee would most often be entitled to protection by injunction, or to a remedy by specific performance; or in which well-advised parties would most often provide by contract (where permitted to do so) for liquidated damages or specific enforceability. Disgorgement by the rule of this section serves the same contract-reinforcing objectives as the devices just mentioned, at a different stage of contractual performance.

c. Adequacy of a remedy in damages. If the promisee's contractual entitlement is adequately protected by a judgment for money damages, there is no claim to restitution by the rule of this section. (If the promisee's contractual entitlement is adequately compensated by an award of damages, there is no remedial vulnerability to be exploited, no opportunism, and no unjust enrichment.) The adequacy of a damage remedy in particular circumstances is a determination for the court, applying its governing law to its own understanding of the case before it; but § 39(2) provides the standard baseline of the inquiry.

In contract cases, questions about the adequacy of legal remedies traditionally arise when the plaintiff asks the court to prevent a threatened breach by injunction or specific performance. Disgorgement yields a remedial equivalent after the fact, returning the breaching party to the same position that (enforced) adherence to the contract would have produced. One way to examine the adequacy of a damage remedy in disgorgement cases is therefore to conduct a hypothetical test for the availability of specific
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relief. If a court with the benefit of hindsight would have granted a remedy by injunction or specific performance, restitution by the rule of this section is appropriate after the fact.

Important parallels between specific performance and disgorgement make this a helpful test, but it cannot be an exclusive one. Disgorgement will be appropriate in many cases where specific performance would not have been available, because specific performance is often denied for reasons having nothing to do with the adequacy of the damage remedy. Most importantly, specific performance may appear impractical, or too difficult to enforce; or the cost of performance to the defendant may not match its benefits to the plaintiff. These considerations do not apply to the disgorgement remedy. Disgorgement is a monetary remedy enforceable only against the defendant's property, not by attempting to coerce the defendant's conduct, and the value of the judgment is the same for each side.

Disgorgement is also an after-the-fact remedy, so that the problems of litigation delay that often make specific performance impractical do not affect disgorgement. If the promisee seeks to solve timing problems by requesting preliminary relief without a full trial, the sharp restriction on the defendant's procedural rights and the resulting risk of error offer substantial reasons for caution—so much so that holdings on the adequacy of legal remedies at the preliminary relief stage are fundamentally different from holdings on the adequacy of legal remedies at the final judgment stage. Disgorgement is awarded at final judgment after full procedural rights; it is not subject to the reasons for withholding preliminary relief.

Although the inquiry directed by this section into the adequacy of a damage remedy resembles the traditional threshold test for equitable jurisdiction, stated in terms of "adequacy of remedy at law," it would be erroneous and anachronistic to regard this newly-formulated rule as a species of equitable relief, or to limit its availability by reference to obsolete jurisdictional boundaries. Properly interpreted, there is no conflict between the requirements of § 39 and the general proposition of § 4(2).

d. When disgorgement is available. The cases in which the law allows disgorgement for breach of contract are susceptible of various particularized explanations; the purpose of § 39 is to frame a rule that will identify them all. It has been suggested, for example, that a contractual entitlement to acquire real property may sufficiently resemble ownership of the property (by the doctrine of equitable conversion or otherwise) that it is natural to treat a breach of the sales contract as an interference with the property right—thereby justifying recourse to the restitution claim that would be available in a case of interference with real property. See Illustrations 1 and 2 and compare § 40. The rule of this section offers a complementary explanation. In cases of this kind, where specific performance is routinely available, it has long been assumed that damages are inadequate to protect the contractual entitlement of the promisee. Restitution gives the protection after the fact that specific performance would have given ahead of time.

In other contexts as well, contract rights may resemble noncontractual entitlements that are routinely protected against interference by a disgorgement remedy in restitution. Thus a promise not to disclose or utilize confidential information is the usual form by which trade secrets are protected; allowing restitution for breach of the contract is equivalent to restitution for misappropriation of the trade secret. See Illustration 3 and compare § 42. Again, if one party's contractual obligation to another has a fiduciary or confidential character, disgorgement for breach of the contract might be justified by observing that it resembles a liability to account for profits derived from a breach of fiduciary duty. See Illustration 4 and compare § 43.

Illustrations:

1. Vendor and Purchaser agree on a sale of Blackacre for $100,000. Two weeks before the scheduled closing date, Vendor conveys Blackacre to a second purchaser for $110,000. Purchaser is entitled to recover $10,000 from Vendor by the rule of this section. Purchaser need not prove the value of Blackacre on the scheduled closing date; nor could
Vendor reduce or avoid his liability under this section by proving that the market value of Blackacre on that date was something less than $110,000.

2. Vendor and Purchaser agree on a sale of Blackacre for $100,000. The contract expressly provides that existing timber and gravel are to be conveyed with the property. Vendor removes timber and gravel which he sells for a net gain of $10,000. Purchaser takes title and commences an action against Vendor. Under local law, the contract of sale gives Purchaser no interest in the property prior to conveyance: accordingly, Purchaser has no action for conversion, being limited to the available remedies for breach of contract. Purchaser is entitled to recover $10,000 from Vendor by the rule of this section. It is irrelevant that the removal of timber and gravel did not appreciably diminish the value of Blackacre.

3. Analyst develops a pricing model enabling it to appraise complex financing leases which it acquires at auction for investor clients. Bank and Analyst discuss the possibility of Bank's retaining Analyst to acquire such leases as agent for Bank. To enable Bank to evaluate its services, Analyst communicates full details of its pricing model; Bank promises that it will neither disclose the information nor bid on its own in future lease auctions. Advising Analyst that it has decided against investing in leases, Bank surreptitiously enters its own bid at auction and purchases leases in competition with Analyst. The nondisclosure and noncompetition agreement is valid and enforceable, and Bank's breach of contract is deliberate. Bank argues that Analyst has not proved damages: Analyst was only the third highest bidder, so Analyst would not have won the auction even if Bank had not participated. Analyst has a claim in restitution to the profits realized by Bank from the purchase of leases in breach of its contract with Analyst.

4. Agent is employed by an agency of the United States for work that involves access to classified information. By the express terms of his contract of employment, Agent undertakes to maintain the confidentiality of such information and to refrain from publishing information obtained in the course of his employment without the prior consent of the agency. Acting in deliberate disregard of his contractual obligations, Agent publishes a book about his government service without seeking or obtaining the necessary consent. The book reveals confidential information whose publication is potentially harmful to the United States, though the resulting injury is impossible to quantify. By the rule of this section, the United States is entitled to the profits (in the form of royalties or otherwise) earned by Agent from publication of the book. Agent's breach of contract may simultaneously constitute a breach of fiduciary duty (§ 43), but it is not necessary that Agent's obligations be characterized as fiduciary to justify liability under this section.

In a further set of cases, the nature of the underlying transaction makes it fair to surmise that the plaintiff has (in effect) paid the defendant in advance for a performance that the defendant has failed to render. If the circumstances of the transaction are such that the plaintiff can obtain neither rescission nor a meaningful remedy in damages, restitution by the rule of § 39 yields a monetary substitute for the performance the plaintiff paid for and should have received. See Illustrations 5-7. The three cases illustrate one of the principal justifications for the rule of this section, because they exemplify transactions in which the parties' bargain would be inherently insecure if enforcement were limited to damages for breach.

Illustrations:

5. Landowner and Mining Company enter a contract for strip-mining. The agreement authorizes Mining Company to remove coal from Blackacre in exchange for payment of a specified royalty per ton. A further provision of the agreement, included at Landowner's insistence, obliges Mining Company to restore the surface of Blackacre to its preexisting contours on the completion of mining operations. Mining Company removes the coal from Blackacre, pays the stipulated royalty, and repudiates its obligation to restore the land. In Landowner's action against Mining Company it is established that the cost of restoration would be $25,000, and that the diminution in the value of Blackacre if
the restoration is not performed would be negligible. The contract is not affected by mistake or impracticability. The cost of restoration is in line with what Mining Company presumably anticipated, and the available comparisons suggest that Mining Company took this cost into account in calculating the contractual royalty. Landowner is entitled to recover $25,000 from Mining Company by the rule of this section. It is not a condition to Landowner's recovery in restitution that the money be used to restore Blackacre.

6. Buyer pays Seller $500,000 cash in exchange for (i) Seller's existing business as a going concern and (ii) Seller's promise not to compete with Buyer for a period of three years. The restraints thus imposed on Seller are reasonable, and the promise not to compete is enforceable under local law. Acting in deliberate disregard of his contractual obligations, Seller operates a new business in competition with Buyer for the final year of the three-year term, realizing profits of $50,000. Buyer is entitled to recover $50,000 from Seller by the rule of this section. It is not a condition of restitution that Buyer prove damages as a result of Seller's breach.

7. City contracts with Firefighters’ Association for fire protection services to be furnished during the ensuing 12 months. The contract specifies the number of men, horses, and wagons to be kept in readiness at specified times and places, and the contract price is negotiated as a function thereof. After the 12 months have elapsed and the full contract price has been paid, City discovers that Association consistently devoted fewer men, horses, and wagons to City's fire protection than the numbers required by contract. Association acted in deliberate breach of its contractual obligations, calculating—accurately as it turned out—that the resources specified by contract were in excess of City's firefighting needs. In consequence, Association saved $100,000 over the life of its contract with City; while City suffered no increased loss from fire as a result of Association's disregard of the contract specifications. City is entitled to recover $100,000 from Association by the rule of this section.

In a final set of transactions, the existence of an explicit negative covenant points to the limited nature of rights granted to the paying party under the contract. The purpose of the limitation may be to enable the promisee to sell the rights reserved at an additional price to be negotiated in the future, as in Illustrations 8-9; or simply to protect the promisee against potential injuries that are difficult to quantify, as in Illustration 10. If the remedy for breach were limited to provable damages in either case, the defaulting promisor would obtain the benefit of rights that were neither bargained nor paid for; while the promisee would be manifestly unable to purchase a substitute for the promised performance with the damage award. The inadequacy of judicially-determined damages is particularly evident in cases involving breach of a negative covenant, where the promisee has manifestly bargained for the right either to set his own price for the conduct in question or to prohibit it altogether.

Illustrations:

8. Landlord leases Blackacre to Tenant at an annual rent of $100,000. The lease provides that Tenant shall not sublet the property without Landlord's prior consent. Tenant sublets Blackacre for one year at an annual rent of $110,000. Landlord learns of this transaction after the sublease has expired and commences an action in restitution. Landlord is entitled to recover $10,000 from Tenant by the rule of this section. It is not a condition of recovery that Landlord prove damages as a result of Tenant's breach.

9. A licensing agreement between Coca-Cola and Bottler provides that products produced under license shall be manufactured in strict conformity to Coca-Cola's specifications, one of which calls for the use of cane sugar as the sweetening ingredient. In the course of renegotiating various aspects of the licensing agreement, Bottler asks to be allowed to substitute artificial sweeteners for sugar in the manufacture of certain licensed products. The parties fail to reach agreement on this point, and the amendment to the license resulting from their negotiations omits any modification of the product specifications. Acting in conscious disregard of its contractual obligations, Bottler
substitutes low-cost artificial sweetener for sugar in the manufacture of licensed products. The products manufactured from these different materials are for all practical purposes indistinguishable. By the time the practice comes to light, Bottler has saved $5 million by the use of the less expensive ingredients. Coca-Cola may require Bottler to disgorge $5 million by the rule of this section. It is not a condition of recovery that Coca-Cola prove damages as a result of Bottler's breach.

10. Attempting to stabilize the market for new automobiles at a time of postwar shortage, members of a dealers' trade association impose resale restrictions in their contracts with retail customers. (The restrictions in question are valid and enforceable under local law.) Dealer sells Customer a new automobile for £5000. Customer agrees not to resell the car within two years of purchase except to Dealer. Should Customer wish to sell during this period, Dealer agrees to repurchase the car from Customer at a scheduled percentage of its original price. The price at which the car may thereafter be resold by Dealer is limited to the repurchase price paid to Customer plus a 10 percent commission. One month after taking delivery of the car, Customer resells it on the black market for £10,000. The price fixed by contract for repurchase of the car by Dealer is £4000; the damage to Dealer from Customer's breach cannot exceed £400 (Dealer's lost commission from a costless resale). Dealer may recover £6000 from Customer by the rule of this section.

e. Measure of recovery. The purpose of the disgorgement remedy for breach of contract is to eliminate the possibility that an intentional and opportunistic breach will be more profitable to the performing party than negotiation with the party to whom performance is owed. For this reason, “profit realized … as a result of the breach” includes the gains that motivated the promisor's decision to breach the contract. If the defendant's liability in restitution were limited to the amount that might have been paid to obtain the necessary contractual modification in a voluntary transaction, there would be inadequate incentive to bargain over the entitlement in question. See Illustration 11.

While the rule of this section is intended to make breach unprofitable, it does not seek to punish a breach of contract by requiring forfeiture of the defendant's profit from the transaction as a whole. See Illustration 12.

The inherent problems of measuring consequential gains—including questions of apportionment, remoteness, and deductions and credits—are the same in the application of the present rule as in other instances of disgorgement. See § 51(5); § 53, Comment d.

Illustrations:

11. Landowner sells part of his land to Developer for subdivision; Developer agrees to build no more than 100 houses on the property. Developer's covenant to this effect is valid and enforceable by Landowner. Acting in deliberate disregard of his contractual obligations, Developer builds 120 houses. In a subsequent lawsuit between the parties, the court finds that (i) Developer's breach of contract enabled Developer to realize an additional $200,000 profit from the transaction, and (ii) Landowner would have agreed to permit the construction of an additional 20 houses on payment of $20,000. Landowner's recovery from Developer by the rule of this section is $200,000. If Developer's liability in restitution were limited to the $20,000 that would have been paid in a voluntary transaction, a party disposed to breach in these circumstances would have inadequate incentive to bargain over a release from the covenant.

12. Buyer and Seller engage in difficult negotiations about the price of goods to be supplied next season. Intending to put pressure on Seller, Buyer delays payment of Seller's current invoices, advising Seller that their account will be settled only when “all outstanding issues” have been resolved. Seller breaks off negotiations and justifiably withholds further deliveries under the parties' existing contract. Seller thereupon sues Buyer on a theory of unjust enrichment, seeking disgorgement of the profits realized by Buyer on resale of goods previously supplied by Seller for which Buyer has not made timely payment. Buyer is liable to Seller for breach of contract, but Buyer is not liable to disgorge
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profits by the rule of this section. Such a claim fails for three reasons: (i) Buyer's resale profits have not been realized as a result of the breach. (ii) Buyer's breach of the payment obligation is not itself profitable, because Buyer's liability in direct damages (measured by the amount due plus prejudgment interest) will equal or exceed the temporary savings to Buyer from failure to pay. (iii) Outside certain exceptional circumstances, the breach of an obligation to pay money is the paradigm case in which money damages furnish an adequate remedy.

f. The exceptional nature of the claim. Of the available remedies for breach of contract, the disgorgement claim described in § 39 is the least frequently encountered. The cumulative requirements of § 39 will exclude the great majority of contractual defaults.

By itself, the requirement that the breach be profitable eliminates most instances of breach. The basic calculation of compensatory damages makes it highly unlikely, in any transaction for which there are market-based substitutes, that the gain to the defendant as a result of default will exceed the injury to the plaintiff from the same cause. The defendant's potential liability for incidental and consequential damages, over and above the cost of a substitute performance, limits the occurrence of profitable breaches almost to the vanishing point. It bears repeating that the profits at which § 39 is directed are profits realized by the defaulting party as the result of the breach. There is no claim in restitution to profits derived by the breaching defendant from the contractual performance rendered by the claimant. See Illustration 12, supra.

The scope of the present rule is further restricted by the requirement that breach be deliberate—thereby excluding cases in which breach results from the defendant's inadvertence, negligence, or unsuccessful attempt at performance. Such a limitation is consistent with the general principle that the disgorgement remedies in restitution are principally addressed to instances of conscious wrongdoing. See §§ 3, 51. (Profit realized as a result of an unintentional breach may still be an appropriate measure of damages in particular cases, though these are outside the rule of the present section. See Comment g.)

Even when breach is both profitable and deliberate—in the sense that it results from a conscious choice not to perform—there is no opportunism and no claim under this section if a damage remedy affords adequate protection to the promisee's contractual entitlement, by allowing the promisee "to acquire a full equivalent to the promised performance in a substitute transaction." See Comment i and Illustrations 16-17.

g. Saved expenditure as a measure of damages for unintentional breach. Although the rule set forth in § 39 is limited to instances of deliberate breach of contract, there are cases of unintentional breach in which the amount of the promisor's saved expenditure may furnish an appropriate measure of damages—comparing the cost of the defective performance to the more costly performance that was promised. Measuring damages by saved expenditure may be particularly suitable when the breach relates to specific aspects of the promised performance that have visibly entered into the calculation of the contract (price, and when damages measured either by loss in value or cost of cure would not yield an effective remedy to the promisee. See Illustration 13; compare Illustration 7, supra, on the hypothesis that the breach there described is the result of the promisor's negligence.

Illustration:

Illustration:

13. Builder and Owner agree on the construction of a house at a price of $2 million. The specifications call for foundations to be made of Vermont granite, and the work has been bid and priced on that basis. By mistake and inadvertence, Builder constructs the foundations of granite quarried in New Hampshire. This fact comes to light when construction has been completed. The difference in the appraised value of Owner's property as a result of the nonconformity is nil. The cost to cure the default would far exceed the total price of the house. Because New Hampshire granite is less expensive than comparable stone from Vermont, Builder has saved $15,000 as a result of his
negligent breach of contract. Owner may recover damages of $15,000 for Builder's breach. The case is not within the rule of § 39 (because Builder's default is unintentional), but principles of unjust enrichment reinforce the conclusion that saved expenditure makes an appropriate measure of contract damages in such a case.

h. Efficient breach. Modern American contract scholarship devotes considerable attention to a hypothetical case in which breach of contract is “efficient.” The scenario most often debated involves a seller who is offered a higher price for goods or services that he has sold but not yet delivered to the buyer. The seller—it is suggested—ought to breach the contract whenever the anticipated profits from resale at the higher price would be more than sufficient to pay the buyer's damages, thereby leaving some parties better off and nobody worse off. An efficient breach of contract by this definition is easy to hypothesize but difficult to find in real life. In a market context, gain to one party is normally offset or exceeded by loss to the other; while the test of efficiency will not be met unless the injured party is fully indemnified against the cost of resolving the resulting dispute. American practice regarding the allocation of litigation expense makes satisfaction of the latter condition especially unlikely.

(There are other circumstances, typically involving an unexpected increase in the seller's individualized costs, in which a deliberate and profitable breach of contract may be not only efficient but uncontroversial. See Illustration 16. Cases of this kind satisfy the usual definition of “efficient breach,” but they are not the ones in question when a general conception of “efficient breach” tends to be invoked.)

The rationale of the disgorgement liability in restitution, in a contractual context or any other, is inherently at odds with the idea of efficient breach in its usual connotation. Given the pervasive risk of undercompensation by standard damage measures, not to mention the deadweight loss from the cost of litigation, the law of restitution strongly favors voluntary over involuntary transactions in the adjustment of conflicts over any form of legal entitlement. A voluntary transaction in the present context requires a negotiated release or modification of the existing obligation. The obligor who elects instead to take without asking—calculating that his anticipated liability for breach is less than the price he would have to pay to purchase the rights in question, and leaving the obligee to the chance of a recovery in damages—engages in precisely the conduct that the law of restitution normally condemns.

Whether the promisor's decision to modify or withhold a given performance infringes the contract rights of the promisee is a preliminary question of contract law and interpretation. If it does, the promisor's liability in restitution follows from the same principles as restitution for other instances of conscious and profitable interference with legally protected rights. See Illustration 14. The rule of § 39 does not automatically punish every “efficient breach” with a disgorgement remedy, because it applies only when a remedy in damages is inadequate to protect the promisee's entitlement. See Illustration 15; compare Illustrations 16-17.

Illustrations:

14. Farmer sells Buyer his entire crop of carrots for the coming season at a price of $500 per ton. It is in Buyer's interest to be the exclusive distributor of Farmer's carrots, and Farmer's obligation to tender his entire output is a material term of the parties' agreement. Bad weather results in a reduced harvest and higher prices. Farmer delivers 20 tons of carrots to Buyer, then sells a further 10 tons to a competing buyer at $800 per ton. (Had Buyer discovered the facts in time, Buyer would have been entitled to a decree of specific performance. See U.C.C. § 2-716, Official Comment 2.) Buyer is entitled to recover $3000 from Farmer by the rule of this section. It is irrelevant to the recovery in restitution that Buyer's provable contract damages (measured by the contract-market differential or by Buyer's cost to cover) might be less than $3000.
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15. On April 1, Farmer sells his entire crop of wheat to A at a price of $5 per bushel, for delivery after the June harvest. On May 1, an unexpected rise in the price of June wheat allows Farmer to sell the same crop to B at $10 per bushel. On June 15, Farmer harvests his wheat and delivers it to B. On June 16, when A learns of the breach, the spot price of wheat of the kind grown by Farmer has fallen back to $6 per bushel. A is entitled to market or cover damages of $1 per bushel (plus incidental damages as appropriate). On the assumption that Farmer's wheat is fungible with goods readily available on the market—and that Farmer has assets from which a damage judgment can be satisfied —A is not entitled to restitution of Farmer's profit from the sale to B, because A's contractual entitlement (wheat at $5 per bushel) is fully protected by a damage award. Assuming on the contrary that Farmer's wheat is unique, or that Farmer's wheat crop was his only asset at the time of the sale to B, A is entitled to restitution of the profit realized by Farmer's breach ($5 per bushel).

i. Equitable limitations. If a contract is one that a court would decline to enforce by specific performance or injunction on the ground that such relief would impose undue hardship or would otherwise be inequitable to the defaulting party, disgorgement by the rule of § 39 will be inappropriate for the same reasons, notwithstanding the fact that the breach is both profitable and deliberate.

One important case in which equitable limitations preclude disgorgement involves the uncontroversial version of “efficient breach.” Where contractual performance would be manifestly wasteful—imposing unexpected costs on the performing party that yield no corresponding (or bargained-for) benefit to the recipient—a court will refuse specific performance on the ground of disproportionate hardship. Under such circumstances, it is the party who insists on specific performance who is behaving opportunistically. See Illustration 16.

Even if a promised performance is fully within the scope of the parties' bargain, specific enforcement may be denied for policy reasons that would make it anomalous to order disgorgement after the fact. See Illustration 17. By contrast, some of the most frequent reasons for the unavailability of specific performance—either the burden of supervision, or the sheer difficulty of obtaining timely relief—have no application to a remedy via disgorgement after the fact. Unlike the all-or-nothing remedy of specific performance, moreover, a claim to disgorgement of profits under § 39 permits some shaping of the remedy to accord with the equities between the parties, if only in the measurement of the profits “realized … as a result of the breach.”

Illustrations:

16. Seller agrees to manufacture and deliver to Buyer 1000 widgets at $500 each. Seller's normal cost of production is $250 per widget. Unexpected problems with Seller's equipment increase Seller's cost of manufacture to $350 per widget. Seeking to minimize his own cost of performance, Seller acquires similar widgets from Supplier at $300 each and tenders them to Buyer. Although Seller's conduct is evidently self-interested, it is consistent with reasonable commercial standards of fair dealing. Buyer accepts the goods—which are suitable for his intended purposes—and sues for breach of warranty. Buyer proves that the goods did not conform to the contract and that each of Supplier's widgets was worth $10 less than those Seller promised to deliver. Seller's breach of contract is deliberate and profitable (saving $50,000 by comparison with the cost of making a conforming tender), but on the facts supposed there is no reason to conclude that Buyer's entitlement is inadequately protected by an ordinary damage remedy. (Damages measured by difference in value give Buyer “a full equivalent to the promised performance.”) Buyer is entitled to damages of $10,000 (U.C.C. § 2-714(2)), but not to disgorgement of Seller's saved expenditure of $50,000.

17. A employs B for a term of one year at a salary of $10,000 per month. B abandons his employment with A to take a job with C at $15,000 per month. A is obliged to pay $12,000 per month to hire B's replacement. By the contract law
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of the jurisdiction, A is entitled to damages in the amount of $2000 per month for the remainder of the contract term. Because of limits to the enforceability of personal service contracts, however, A is not entitled to specific performance of B's contract nor to an injunction prohibiting B's employment with C. B's breach of the contract with A is both profitable and deliberate, but it fails to meet the test of § 39(1) because the limited enforceability of personal service contracts gives B (in effect) an election between performance and payment of damages. Because A's contractual entitlement is limited accordingly, it is adequately protected by the damage remedy. A has no claim to the $5000 per month realized by B as a result of the breach.

Reporter's Note

a. General principles and scope; relation to other sections. Section 39 has no counterpart in either the first or second Restatement of Contracts. Although case authority for the particular Illustrations is reasonably extensive, courts have hesitated to formulate a rule—seemingly at variance with longstanding assumptions about liability in contract—that would generalize the outcomes these Illustrations represent. Increased scholarly attention to the question in recent years has nevertheless produced a consensus that it is appropriate (in some circumstances, at least) to treat a deliberate and profitable breach of contract by analogy to an intentional and profitable interference with other legally protected interests.


b. Opportunistic breach. An “opportunistic breach,” for purposes of this section, is one that meets the three tests stated in § 39(1): a breach that is profitable and deliberate, for which damages do not yield an adequate remedy. The word “opportunistic” is used in the heading of § 39 because it points toward the case that is the principal object of the remedy—one in which the defaulting promisor perceives and attempts to exploit the inadequacies of the promisee's remedy in damages.
Not all breaches of contract are involuntary or otherwise efficient. Some are opportunistic; the promisor wants the benefit of the bargain without bearing the agreed-upon cost, and exploits the inadequacies of purely compensatory remedies (the major inadequacies being that pre- and post-judgment interest rates are frequently below market levels when the risk of nonpayment is taken into account and that the winning party cannot recover his attorney's fees).

Patton v. Mid-Continent Systems, Inc., 841 F.2d 742, 751 (7th Cir. 1988) (Posner, J.). The list of “major inadequacies” may be expanded to include the likelihood of undercompensation in any case in which the promisee faces difficulty in proving or quantifying the extent of his injury. In extreme cases, a remedy limited to quantifiable damages allows the promisor to extract payment for a promise that he may then choose either to perform or not. The destabilizing effect of any such remedial regime must be accounted a major inadequacy, for the reasons stated in the text.

Disgorgement of profits enabled by breach is in important respects the post-breach equivalent of a pre-breach remedy by injunction or specific performance, and the same considerations that support specific relief (rather than damages) \textit{ex ante} support restitution (rather than damages) \textit{ex post}. This equivalence has been widely noted by commentators who may or may not identify the \textit{ex post} remedy in terms of “disgorgement.” See, e.g., Beatson, The Use and Abuse of Unjust Enrichment 17 (1991) (“giving the plaintiff the defendant's gains is in reality a monetized form of specific performance”); 2 Maddaugh & McCamus, Law of Restitution ¶25:300 (looseleaf ed. 2008) (“disgorgement measure may … be seen as an alternate means of responding to [the] problem of inadequacy … [where] the granting of equitable relief is either impossible or, for other reasons, unattractive”); Brooks, The Efficient Performance Hypothesis, 116 Yale L.J. 568, 583 (2006) (observing that “the familiar remedy of disgorgement” amounts to “giving the promisee the option of compelling performance … or being paid the breacher's (opportunity) cost of performance”); Katz, Reflections on Fuller and Perdue's The Reliance Interest in Contract Damages: A Positive Economic Framework, 21 U. Mich. J.L. Reform 541, 547 (1988) (referring to the disgorgement of profits from breach as “liquidated specific performance”); Kronman, Specific Performance, 45 U. Chi. L. Rev. 351, 380 (1978) (“constructive trust approach” to breach of contract—meaning liability for disgorgement—“resembles the injunctive remedies that are commonly used to prevent the conversion of property rules to liability rules”); Waddams, Profits Derived from Breach of Contract: Damages or Restitution, 11 J. Contract L. 115, 124 (1997) (pointing out “the connections among the concept of proprietary interest, the availability of specific relief, and the obligation to account for profits”). Compare McChesney, Tortious Interference with Contract Versus “Efficient” Breach: Theory and Empirical Evidence, 28 J. Legal Stud. 131, 170 (1999) (pointing out that “disgorgement of Inducer's gains”—a remedy within § 44 of this Restatement—“means that tortious—interference remedies accomplish just what specific performance against Promisor would, even if specific performance itself is not available”).

In Schachter v. Krzynowek, 958 So.2d 1061 (Fla. Dist. Ct. App. 2007), a contract for the sale of real property included a provision limiting the purchaser's remedies for breach to rescission or specific performance. The court granted restitution of the profits realized through breach, reasoning that disgorgement was “part and parcel of the specific performance remedy.” Id. at 1065.

c. Adequacy of a remedy in damages. Most observers agree that a disgorgement remedy should be (and in fact is) available as a response to some set of contract breaches. There is wide disagreement about how that set is or should be identified. For reasons that should be apparent, the present section intentionally describes a conservative rule. Seen against the conventional accounts of contract remedies (including the Restatement of Contracts), even a narrow disgorgement rule will be challenged as an innovation. \textbf{Section 39} attempts to state a rule that is easy to defend within the existing framework of contract remedies and the accepted principles of unjust enrichment.
An important limitation of § 39 restricts it to cases in which damages are an inadequate remedy. The idea of restitution in cases of profitable breach runs counter to the common understanding that the primary remedy for breach is an award of damages. The obvious answer is that the available remedies for breach of contract—taking equitable remedies together with legal ones—have always recognized circumstances in which damages are inadequate; these are the circumstances in which a promisee is traditionally entitled to specific relief. The present section does not attempt to readjust the basic structure of contract remedies by imposing a new test of adequacy. Rather it states a rule of restitution based on the observation that disgorgement of breach-enabled profits yields a functional equivalent of specific relief, without the difficulties of timing, practicality, enforceability, or disproportioned hardship that often weigh against equitable remedies in contract cases.

Courts sometimes conflate the reasons for refusing specific relief: when they find specific performance impractical or burdensome, they may also say that legal remedies are adequate. When considering the adequacy of the damage remedy for purposes of a disgorgement remedy that is not subject to the practical difficulties that limit coerced performance, the more relevant precedents are therefore those in which such practical difficulties were not significant—so that the adequacy of a legal remedy might be considered in isolation, unaffected by other issues.

Although modern American decisions continue to recite that specific performance is available only when damages are inadequate, the force of the traditional limitation is dissipated by the rigorous standard by which adequacy is measured. By the test most commonly applied, “Injury is irreparable if plaintiff cannot use damages to replace the specific thing he has lost.” Laycock, The Death of the Irreparable Injury Rule 37 (1991). While the reach of § 39 is linked at some level to the availability of specific performance in a given jurisdiction, it should permit appropriate results even in a jurisdiction that lags (by Professor Laycock's standards) in its acknowledged doctrine regarding specific performance. This is because—given the nature of the remedy—a court’s judgment about the adequacy of damages in a disgorgement case is necessarily made after the fact. In other words, the plaintiff who seeks disgorgement is already in a position to demonstrate both the defendant's profits from breach and the inadequacy of a damage remedy. (By contrast, the plaintiff who seeks specific relief in the normal course of events will usually be asking the court to anticipate a risk of inadequacy that may or may not be encountered in the event.)

In each of the Illustrations to § 39 that authorize a claim in restitution, part of the point of the Illustration is that a court—viewing the facts at the point when the promisee seeks disgorgement—will recognize the inadequacy of damages to protect the promisee's contractual entitlement, even if the same court might have refused specific relief at an earlier stage of the dispute.

d. When disgorgement is available. Illustration 1 is based on Coppola Enterprises, Inc. v. Alfone, 531 So.2d 334 ( Fla. 1988), and Gassner v. Lockett, 101 So.2d 33 (Fla. 1958). See also Seaside Community Development Corp. v. Edwards, 573 So.2d 142 (Fla. Dist. Ct. App. 1991); Timko v. Useful Homes Corp., 114 N.J.Eq. 433, 168 A. 824 (Ch. 1933). Illustration 2 is based on Laurin v. DeCarolis Constr. Co., 372 Mass. 688, 693, 363 N.E.2d 675, 679 (1977) (noting that the breach was “deliberate and wilful,” and that a disgorgement remedy on these facts is not punitive: “it merely deprives the defendant of a profit wrongfully made, a profit which the plaintiff was entitled to make”). See also May v. Muroff, 483 So.2d 772 (Fla. Dist. Ct. App. 1986) (vendor's unauthorized removal of gravel prior to closing yields $240,000 while reducing value of land by only $120,000; purchaser recovers $240,000).

The restitution claims underlying Illustrations 1 and 2 might alternatively be analyzed in light of the doctrine of equitable conversion, according to which “[t]he purchaser is deemed in equity to be the owner of the land, and a court of equity will … adjust the respective rights and liabilities of the parties upon this assumption.” Worrall v. Munn, 53 N.Y. 185, 191 (1873) (vendor held liable for value of timber and minerals severed during period in which purchaser wrongly kept out of possession, inasmuch as liability restricted to diminished value of the land would frequently be inadequate).

Illustration 3 is based on Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556 (4th Cir. 1990); 973 F.2d 359 (4th Cir. 1992) (appeal, following remand, limited to determination of defendant's profits). The decision is noteworthy because
it allows “a constructive trust on Sumitomo's profits … as an equitable remedy for their breach of the agreement.” 914 F.2d at 558. The plaintiff had advanced additional, alternative theories of misappropriation of trade secrets and breach of fiduciary duty; the same relief should be available under any of these headings. A similar intermingling of theories appears in Ocor Products Corp. v. Walt Disney Productions, Inc., 682 F.Supp. 90 (D.N.H. 1988), where a contract for the sale of specially-designed shopping bags prohibited the defendant buyer from disclosing the design to other suppliers. The defendant submitted samples of the bag to another manufacturer and eventually bought a large quantity at a lower price. Explaining the defendant's liability primarily on the basis of breach of contract, the court allowed the plaintiff seller to recover the defendant's savings in purchasing bags at a lower price, without having to prove the extent of its damages (in the form of lost profits or otherwise).

Illustration 4 is based on Snepp v. United States, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980), and on Attorney General v. Blake, [1998] Ch. 439 (C.A. 1997), appeal dismissed, [2001] 1 A.C. 268 (H.L. 2000). For additional decisions in which the defendant's breach of contract is also described as a breach of fiduciary duty, see, e.g., Lerner Corp. v. Three Winthrop Properties, Inc., 124 Md.App. 679, 688, 723 A.2d 560, 565 (1999) (management agent refuses to abide by contractual termination provision and continues its agency “by exploiting its previous position and access to confidential information”; restitution via forfeiture of management fees paid to agent during period of disloyalty); Automatic Laundry Serv., Inc. v. Demas, 216 Md. 544, 141 A.2d 497 (1958) (exclusive dealing arrangement in which profits were to be shared; breach of contract is also breach of duty of loyalty).

Illustration 5 combines the facts of Peeyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962), with the results in Groves v. John Wunder Co., 205 Minn. 163, 286 N.W. 235 (1939), and American Standard, Inc. v. Schectman, 80 App. Div. 2d 318, 439 N.Y.S.2d 529 (1981). An analogous case is presented whenever the promisor refuses to render some aspect of performance that has evidently been taken into account in the parties' overall agreement as to price. In Joyner v. Weeks, [1891] 2 Q.B. 31 (C.A.), a tenant agreed to make specified repairs to the premises during the term of the lease, then refused to do so; the landlord sold the building to a purchaser who intended to tear it down. The landlord recovered the cost of the omitted repairs, the court observing that in such a case “it is plainly immaterial that at the commencement of an action for a breach of contract the plaintiff is in fact no worse off than he would have been if the contract had been performed.” Id. at 33. The seeming paradox dissolves if we assume that the anticipated cost of the repairs was reflected in the parties' negotiation over the rent.

Illustration 6 is based on Y.J.D. Restaurant Supply Co. v. Dib, 98 Misc.2d 462, 413 N.Y.S.2d 835 (Sup. Ct. 1979), and Morgan v. Stagg, 1987 WL 18703 (Tex. Ct. App.). See also Uinta Oil Refining Co. v. Ledford, 125 Colo. 429, 244 P.2d 881 (1952) (manufacturer sells in competition with distributor within exclusive territory granted to the latter); Oscar Barnett Foundry Co. v. Crowe, 80 N.J.Eq. 258, 86 A. 915 (Err. & App. 1912) (owner of unpatented invention grants exclusive license to manufacture, then manufactures in competition with his licensee); Ingram v. Bigelow, 138 N.Y.S.2d 217 (Sup. Ct. 1954) (franchisee competes with franchisor in violation of valid territorial restraint).

Illustration 7 adopts the facts and reverses the result in City of New Orleans v. Firemen's Charitable Ass'n, 43 La. Ann. 447, 9 So. 486 (1891).


Illustration 9 is based on Coca-Cola Bottling Co. of Elizabethtown v. Coca-Cola Co., 988 F.2d 386 (3d Cir. 1993). Illustration 10 is based on British Motor Trade Ass'n v. Gilbert, [1951] 2 All E.R. 64 (Ch.).

e. Measure of recovery. Illustration 11 adopts the facts and the holding of Wrotham Park Estate Co. v. Parkside Homes Ltd., [1974] 2 All E.R. 32 (Ch. 1973), while expanding the measure of recovery. Restitution in Wrotham Park was limited—incorrectly, on the view here adopted—to “such a sum of money as might reasonably have been demanded by the plaintiffs … as a quid pro quo for relaxing the covenant.”
Illustration 12 simplifies the facts and reverses the result of *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113 (Colo. 1995). The anomalous result in *EarthInfo* was anticipated in these terms by Palmer:

A question could arise as to whether [the party injured by breach of contract] is entitled to recover profits made through the defendant's use of [the claimant's] performance, instead of limiting him to restitution of that performance, in specie or in value. There seems to be no case authority supporting such a claim and it should not be supported. Courts should not in effect put the defendant at work for the plaintiff, involuntarily, for mere breach of contract, even though this is sometimes warranted for more serious forms of wrongdoing such as fraud or breach of a fiduciary duty.


In contrast to the case described in Illustration 12, there may be special circumstances in which the breach of an obligation to pay money might properly lead to disgorgement liability within the rule of § 39. In *Eckert v. Miller*, 57 Ariz. 94, 111 P.2d 60 (1941), tenant acquired a tax title to the premises he occupied, then withheld rent as part of a deliberate scheme to frustrate landlord's attempt to redeem the property—by denying landlord the funds with which to do so. Landlord eventually paid the redemption price into court, and the court confirmed landlord's ownership via constructive trust.

*f. The exceptional nature of the claim.* Each element of the test stated in § 39(1) limits the scope of the present rule. The requirement that a breach be profitable screens out most cases at the threshold. The further requirement that the breach be deliberate makes it plain that there is no liability to disgorge profits when an *unintentional* breach of contract happens to result in profit to the breaching party rather than injury to the nonbreaching party. See *Rogillio v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 448 So.2d 1340 (La. Ct. App. 1984) (in rising market, broker mistakenly buys when client had instructed him to sell; client not entitled to broker's profit on shares bought by mistake).

There are a number of reasons why § 39 is restricted to cases of deliberate breach. The most important is that such a limitation makes “disgorgement for breach” an instance of “restitution for wrongs,” maintaining the parallels between § 39 and §§ 40-44. Disgorgement in cases of deliberate breach is visibly a response to “taking without asking,” making it easier to characterize the defendant's profit from breach as unjust enrichment. Most observers agree that the case for disgorgement as an alternative to damages is strongest when the breach is deliberate, and § 39 confines its rule to the strongest case. The drawback of this approach is that it leaves a case like Illustration 13 outside the scope of the rule; but the benefits of giving § 39 a narrower, more recognizable focus make this a price worth paying. (A case like Illustration 13 is likely to be decided correctly in any event, whether or not the court views the case as one of restitution and unjust enrichment. See Comment g.)

g. Saved expenditure as a measure of damages for unintentional breach. Restatement Second, Contracts § 348 does not include saved expenditure among the alternatives to loss in value as a measure of damages, though such a measure may be implied by statements elsewhere about the role of contract remedies in preventing unjust enrichment. See Restatement Second, Contracts § 344, Comment d; § 373, Comment a. Illustration 13 is suggested by the hypothetical case proposed in *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 244, 129 N.E. 889, 891 (1921) (Cardozo, J.). Cases awarding damages by this measure include Samson & Samson Ltd. v. Proctor, [1975] 1 N.Z.L.R. 655, 656 (H.C.) (restitution measured by “the difference in cost … of the actual work done and the work specified”); and *Castille v. 3-D Chemicals, Inc.*, 520 So.2d 1002 (La. Ct. App. 1987) (restitution measured by savings from substituted materials, where no difference in the value of the building could be shown). If the builder's substitution of materials results in a structure that the owner should not be required to accept, the proper remedy is damages measured by the cost of replacement or cure. See, e.g., *Kaiser v. Fishman*, 187 App. Div. 2d 623, 590 N.Y.S.2d 230 (1992).
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Illustration 14 is based on Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948), ignoring for purposes of this Illustration the issues of unconscionability and liquidated damages addressed in that case. One curious feature of the well-known opinion in Campbell Soup is that it purports to be concerned with the buyer's right to specific performance—although the goods have, in fact, already been delivered and consumed. The seller's profits from sale to a third party had been paid into court pending the outcome of the case. The real issue was accordingly not specific performance but the availability of restitution by the rule stated here; and the decision, reduced to its essentials, is authority in support of the rule. Illustration 15 is based on Acme Mills & Elevator Co. v. Johnson, 141 Ky. 718, 133 S.W. 784 (1911).

i. Equitable limitations. Illustration 16 is a hypothetical example designed to emphasize the point that a breach of contract may be deliberate and profitable (not to mention “efficient”) without being opportunistic. Facts along these lines are a staple of commentators' accounts of circumstances in which a party's intentional breach of contract should not be regarded as a wrong. See, e.g., Friedmann, Economic Aspects of Damages and Specific Performance Compared, in Contract Damages: Domestic and International Perspectives 65, 74-82 (Saidov & Cunnington eds., 2008) (addressing cases of “wasteful performance” and “tolerated breach,” in which specific performance will be denied); Posner, Economic Analysis of Law 120 (6th ed. 2003) (describing cases in which “the breach was committed only to avert a larger loss”). For illustrations of the problem in the traditional specific-performance context, see Laycock, The Death of the Irreparable Injury Rule 175-176 (1991) (collecting cases in which specific performance is denied on the ground of disproportionate hardship to the promisor).

On the facts of Illustration 16 it is the party who seeks specific performance (or its monetary equivalent), not the party in breach, who is attempting to improve on the terms of the contractual exchange. See Kull, Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts, 79 Tex. L. Rev. 2021, 2051 n.75 (2001); compare Friedmann, Economic Aspects of Damages and Specific Performance Compared, supra, at 81 (characterizing such a demand as “extortionate”). A similar idea may be seen in the requirement, expressed in some of the English decisions, that a plaintiff seeking disgorgement of breach-enabled profits demonstrate that it had “a legitimate interest in preventing” the defendant's profitable breach. Attorney General v. Blake, [2001] App. Cas. 268, 287 (H.L. 2000).

Illustration 17 is hypothetical, based on the discussion of such a claim by 1 Palmer, Law of Restitution § 4.9 at 444-446 (1978), and Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 Colum. L. Rev. 504, 519-521 (1980). Modern decisions on the measure of damages to the employer from the employee's breach of contract nowhere contemplate a claim to disgorgement of the employee's increased compensation, although the employee's new salary will sometimes be taken as evidence of the employer's damages. See Annot., 61 A.L.R. 1008 (1958).
Affirming in part and vacating in part, this court held that the disgorgement of guarantor's net profits was an appropriate remedy, where guarantor had entered into certain settlement agreements with developer in bad faith, had acted deliberately in breaching the contracts, and had made undocumented allegations that developer had, among other things, failed to pay real-estate taxes and resolve mechanics' liens; since, however, the trial court did not correctly determine guarantor's profits, the court remanded for a new trial on damages. Watson v. Cal-Three, LLC, 254 P.3d 1189, 1195, 1197.