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Restating the Civil Law of Quasi-Contract: Negotiorum Gestio and Unjust Enrichment

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RESTATING THE CIVIL LAW OF QUASI-CONTRACT: *NEGOTIORUM GESTIO* AND UNJUST ENRICHMENT

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ABSTRACT

This Article restates the Louisiana civil law of negotiorum gestio *and unjust enrichment, one decade after the common-law Third Restatement of Restitution and Unjust Enrichment. The Article first redefines and re-designates the term "quasi-contract" from a false source of obligations to a valid practical term describing the two separate institutions of* negotiorum gestio *and unjust enrichment. Based on this renewed understanding of quasi-contract, the Article proceeds to a detailed commentary on the revised Louisiana law of* negotiorum gestio *and unjust enrichment (which includes the special action for payment of a thing not due and the general action for enrichment without cause).*

Keywords: quasi-contract, implied and constructive contracts, *negotiorum gestio*, management of affairs, unjust enrichment, payment of a thing not due, enrichment without cause, condictio indebiti, actio de in rem verso, remedies, obligations, comparative law

I. INTRODUCTION

For centuries, legal systems have recognized two fundamental sources of obligations in private law—contract and tort—as well as a less defined "third pillar" that is based on the general principle of unjust enrichment and that lies somewhere in between.[1] This third source of obligations historically has gone by different obscure names. In civil-law systems and in mixed jurisdictions like Louisiana, it has been known as "quasi-contract," a misunderstood term that at times has been assigned a much broader meaning that it actually has.[2] This Article will show that the proper civil-law term "quasi-contract" is narrower, referring only to two distinct institutions—the management of affairs of another (*negotiorum gestio*)[3] and unjust enrichment.[4]

In common-law systems, terms such as "implied in law contracts" and "constructive trusts" have been used to describe a broader principle of unjust enrichment giving rise to a remedy of

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1. *See* Olivier Moréteau, *Revisiting the Grey Zone Between Contract and Tort: The Role of Estoppel and Reliance in Mapping Out the Law of Obligations*, *in* EUROPEAN TORT LAW 2004, at 60 (H. Koziol & B. Steinninger eds., 2005) (discussing various other legal sources of obligations, including reliance).

2. In civil-law systems, such as Louisiana, the area between contract and tort is vast, encompassing any legal obligation that is neither contractual nor delictual. The term "quasi-contract" has been misconstrued to include "innominate types" of quasi-contract outside the realm of *negotiorum gestio* and unjust enrichment. *See* ALAIN A. LEVASSEUR, LOUISIANA LAW OF UNJUST ENRICHMENT IN QUASI-CONTRACTS 9–15 and 36–52 (1991) [hereinafter LEVASSEUR, UNJUST ENRICHMENT] (criticizing the broad definition of quasi-contract in the Louisiana jurisprudence and correctly confining quasi-contract to cases of *negotiorum gestio* and unjust enrichment). *See infra* notes 54, 100 and 110.

3. *See* LA. CIV. CODE art. 2292 (2023).

4. This Article uses the term "unjust enrichment" in the Louisiana Civil Code context as a general category that includes two actions: (a) the special action for "payment for a thing not due" (*condictio indebiti*). LA. CIV. CODE arts. 2299–2305 (2023); and (b) the general action for "enrichment without cause" (*actio de in rem verso*). LA. CIV. CODE art. 2298 (2023). In the revised Louisiana Civil Code, the term "enrichment without cause" is used to identify both the general category as well as the specific *actio de in rem verso*. *See* LA. CIV. CODE bk. III, tit. V, ch.2 (2023); *id.* art. 2298. Use of the term "unjust enrichment" in this Article is thus intended to avoid confusion between the general category (hereinafter "unjust enrichment") and the *actio de in rem verso* (hereinafter "enrichment without cause").

restitution.[5] In both systems, this third source of obligations rests on the principle that a person who receives a benefit at the expense of another without legal justification may be obligated to restore that benefit or pay compensation.

Unlike obligations based on contracts or torts, this third source focuses on gain-based recovery rather than damages for loss sustained or profit deprived.[6] Despite its apparent simplicity, this third area of private law has been plagued by obscure terminology, historical misunderstandings, and the lack of a comprehensive legal doctrine, making it unappealing to law students and legal practitioners.[7]

Recent law reform in both systems has brought much needed clarity to this area of the law. A major development in the common law was the Third Restatement of Restitution and Unjust Enrichment of 2011.[8] The Third Restatement eliminated the older obscure terminology and clarified that unjust enrichment itself is the third source of obligations.[9]

Civil-law systems based on the Code Napoléon[10] have also revised their laws of quasi-contract. The French Civil Code[11] provisions on quasi-contract were revised in 2016.[12] The Quebec Civil

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5. *See* Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297 (2005) (hereinafter Kull, *Early Modern History*).

6. *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION §§ 4.1–4.2 (3d ed. 2018); PETER BIRKS, UNJUST ENRICHMENT 267–74, 301–07 (2d ed. 2005).

7. *See* BIRKS, *supra* note 6, at xi (observing the lack of enthusiasm among lawyers and scholars regarding the law and doctrine of unjust enrichment); Note, *The Intellectual History of Unjust Enrichment*, 133 HARV. L. REV. 2077, 2092 (2020) (identifying "the increased focus on public law in American law schools" as another reason for the lack of interest in unjust enrichment law).

8. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011).

9. *See id.* § 1 cmt. b.

10. CODE CIVIL [C. CIV.] [CIVIL CODE] (1804) (Fr.) [hereinafter CODE NAPOLÉON].

11. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] (2023) (Fr.) [hereinafter FRENCH CIVIL CODE].

12. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1300 to 1303-4.

Code[13] was revised in 1991.[14] Both systems introduced a separate section with special rules on restitution.[15]

The Louisiana Civil Code provisions on *negotiorum gestio* and unjust enrichment were revised in 1995.[16] The confusing term "quasi-contract," which was defined too broadly in the pre-revision law, was mostly removed from the civil code.[17] Under the pre-revision law, a quasi-contractual obligation was understood as an obligation arising directly from the law without any agreement of the parties. This rather broad definition of quasi-contract would include *negotiorum gestio*, unjust enrichment, as well as several other "innominate" types of quasi-contract. The revised law abandoned this broad notion of quasi-contract, and instead focused on delineating two distinct institutions: *negotiorum gestio*[18] and unjust enrichment, which, in turn, comprises two separate actions—payment of a thing not due (*condictio indebiti*)[19] and enrichment without cause

13. Civil Code of Québec, S.Q. 1991, c. 64 (2023) (Can.) [hereinafter QUEBEC CIVIL CODE].

14. *See* QUEBEC CIVIL CODE, *supra* note 13, arts. 1482–1496.

15. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

16. *See* LA. CIV. CODE arts. 2292–2305 (rev. 1995). 1995 La. Acts, No. 1041 (eff. Jan. 1, 1996). *See* Cheryl Martin, *Louisiana State Law Institute Proposed Revision of Negotiorum Gestio and Codification of Unjust Enrichment*, 69 TUL. L. REV. 181 (1994); Jeffrey Oakes, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum meruit as a Basis for Recovery in Louisiana*, 56 LA. L. REV. 873 (1995); Bruce V. Schewe & Vanessa Richelle, *The "New and Improved" Claim for Unjust Enrichment—Codified*, 56 LA. L. REV. 663 (1996).

17. Under article 2294 of the Louisiana Civil Code of 1870, quasi-contractual obligations were understood very broadly to include "[a]ll [lawful and purely voluntary] acts, from which there results an obligation without any agreement." LA. CIV. CODE art. 2294 (1870). According to this broad definition, quasi-contractual obligations potentially include most, if not all, obligations that are not contractual or delictual. Article 2294 has no counterpart in the Code Napoléon. This provision was clearly false and was repealed in 1995. The term "quasi-contract," however, still appears sporadically in the Louisiana Civil Code and in numerous revision comments. *See, e.g.*, LA. CIV. CODE arts. 2018, 2324.1, 3541 (2023). *See infra* notes 150–56 and accompanying text.

18. LA. CIV. CODE art. 2292 (2023).

19. *Id.* arts. 2299–2305.

(*actio de in rem verso*).[20] Nevertheless, this "third pillar" remains undertheorized in American private law doctrine—which includes the civil law of Louisiana.[21] Notably, although the pre-revision law has been thoroughly discussed,[22] little has been written on the revised post-1995 Louisiana law of *negotiorum gestio* and unjust enrichment. This is unfortunate for Louisiana judges, lawyers, and law students, who continue using the term "quasi-contract" and remain confused by the pre-revision doctrine and the overly broad understanding of quasi-contract under the pre-revision law.[23]

This Article restates the Louisiana civil law of *negotiorum gestio* and unjust enrichment, one decade after the common-law Third Restatement of Restitution and Unjust Enrichment.[24] Part I focuses on the culprit—the false term "quasi-contract" and its ensuing doctrine, which were both products of a gross misunderstanding of the early Roman-law sources. The mistranslation of the Roman term "*quasi ex contractu*"—which merely described a miscellany of unrelated obligations—into a single and independent source of obligations called "quasi-contract" by Medieval civil-law scholars has been documented as one of the most egregious misunderstandings in legal

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20. *Id.* art. 2298.

21. *See* Note, *Developments in the Law. Unjust Enrichment*. *Introduction*, 133 HARV. L. REV. 2062, 2062 (2020) (observing that "unjust enrichment has struggled to establish a consistent place for itself within American legal thought").

22. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2.

23. *See, e.g.*, Symeon C. Symeonides & Nicole Duarte Martin, *New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 116 (1993) ("[I]t could be argued that there is no longer a need for the doctrine of *negotiorum gestio* in Louisiana's law of co-ownership. This is probably not a great loss, as the doctrine is generally not well understood"); Katherine Shaw Spaht, *Matrimonial Regimes, Developments in the Law*, 48 LA. L. REV. 371, 386 (1987) ("The profession in Louisiana, however, unfortunately is informed insufficiently on the role of this ancient primary institution of the civil law [*negotiorum gestio*] and has not made much use of it"). *See also* Martin, *supra* note 16, at 183–85 (discussing the continued use of the term "quasi-contract" by Louisiana lawyers and the confusion this term has caused).

24. *Cf.* ANDREW BURROWS, A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT p. x (2012) ("The word 'Restatement' might suggest that one is purely concerned to state the present law. That would be marginally misleading. What is being aimed for is the best interpretation of the present law."); Kit Barker, *Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales,* 34 OXFORD J. LEGAL STUD. 155 (2013).

history.[25] This misleading terminology confused the courts and hampered the development of a robust doctrine in this area of the law.[26] Most scholars agree that the confusing term "quasi-contract" serves no practical purpose. Although the term "quasi-contract" no longer appears in most modern civil codes, judges and lawyers are accustomed to using this term. However, they oftentimes misunderstand a "quasi-contractual obligation" to mean any legal obligation that is not contractual nor delictual. They have also at times confused *negotiorum gestio* with unjust enrichment. As this Article will show, the true meaning of a "quasi-contractual" obligation is an obligation stemming from *negotiorum gestio* or unjust enrichment, and nothing more. Lacking a more suitable term, this Article proposes two corrections to the term "quasi-contract" that would allow its continued and proper use. First, "quasi-contract" should be redefined according to contemporary civil-law doctrine as a group of two distinct "licit juridical facts" whose underlying feature is the lack of cause for receiving a service or a benefit. These two distinct licit juridical facts are *negotiorum gestio* and unjust enrichment. Second, the original Roman descriptive function of "quasi-contract" should be restored. Because the only two quasi-contracts are *negotiorum gestio* and unjust enrichment, the category of "quasi-contract" has no other practical utility than to describe these two related yet distinct legal obligations. The Article thus re-designates quasi-contract from a false source of obligations to a valid practical term that merely describes the two separate legal institutions of *negotiorum gestio* and unjust enrichment.

Based on a renewed understanding of quasi-contract, the Article proceeds to a detailed commentary on the revised Louisiana law. Due to the lack of Louisiana doctrine on the post-revision law, this commentary will necessarily be more descriptive and intended to

25. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 1–51; 2 AMBROISE COLIN & HENRI CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS No. 6 (8th ed. 1935) [hereinafter COLIN & CAPITANT II].

26. *See* BIRKS, *supra* note 6, at 267–74.

clarify concepts that have bedeviled courts and scholars. The examination will also focus on a comparative analysis within civil-law systems—France and Germany—and with reference to common law, most notably the Third Restatement of Restitution and Unjust Enrichment. Part II of this Article is devoted to the management of affairs of another (*negotiorum gestio*), which developed as a separate institution in civil law that must not be confused with unjust enrichment.27 Indeed, in the case of *negotiorum gestio*, the manager intervenes without authority to protect the owner's interests. The law of *negotiorum gestio* gives rise to reciprocal obligations between the parties—the manager must act prudently, and the owner must reimburse the manager.[28] Importantly, the obligations of the parties exist regardless of any enrichment.[29] Therefore*, negotiorum gestio* in the civil law is not merely a remedy of restitution for unjust enrichment. It is an expression of the principle of good faith and a code of behavior holding the manager to a heightened standard of care.[30] The Louisiana law of *negotiorum gestio* might be used as a reference to disentangle the confusion that persists at common law concerning the legal treatment of restitution for unrequested interventions.[31] Part III focuses on the Louisiana law of unjust enrichment and restitution, which is based on the French legal tradition. In

27. *See* LA. CIV. CODE art. 2292 cmt. e (2023) (observing that the Louisiana courts have confused *negotiorum gestio* with unjust enrichment); ROGER BOUT, LA GESTION D'AFFAIRES EN DROIT FRANÇAIS CONTEMPORAIN Nos 247–56 (1972) (discussing the confusion of *negotiorum gestio* and unjust enrichment in the French legal doctrine).

28. *See* LA. CIV. CODE arts. 2295, 2297 (2023).

29. *See id.* art. 2292 cmt. e.

30. *See* 2 BORIS STARCK, DROIT CIVIL. OBLIGATIONS. CONTRAT ET QUASI CONTRAT, RÉGIME GÉNÉRAL No. 1779 (Henri Roland & Laurent Boyer eds., 2d ed. 1986); PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, DROIT DES OBLIGATIONS No. 1025 (10th ed. 2018) (all referring to *negotiorum gestio* as an expression of social solidarity, which must be encouraged and rewarded, but also held to higher standard to discourage officious intermeddlers).

31. *Cf.* Kull, *Early Modern History*, *supra* note 5, at 313–15 (discussing the role of Louisiana law in the accessibility of the idea of unjust enrichment in the nineteenth-century American law); James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1869–75 (2000) (arguing in favor of adopting civil-law solutions to common-law problems in the law of restitution).

Louisiana and France, unjust enrichment is not a unitary concept. Two separate actions now appear in the revised Louisiana Civil Code. First, the special action for payment of a thing not due (*condictio indebiti*) is available for restoration of money or other things that were given in payment without cause or for a cause that later failed.[32] This action occupies most of the space of the Louisiana law of unjust enrichment. Second, the general and subsidiary action for enrichment without cause (*actio de in rem verso*) is allowed only when no other remedy is available for the recovery of a benefit conferred on the defendant at the plaintiff's expense without lawful cause.[33] Restitution in Louisiana law is governed primarily by the theory of cause in contract and tort law and only exceptionally by a theory of unjust enrichment. According to the theory of cause, ownership of property that was transferred under a failed contract or was converted by tort automatically reverts to the original party who can recover it directly, without needing to resort to a theory of unjust enrichment. In short, most of Louisiana's law of restitution is already built into its laws of contract and tort, while restitution for unjust enrichment is generally restricted to cases falling outside the theory of cause.[34] On the other hand, the common-law version of unjust enrichment in the Third Restatement of Restitution and Unjust Enrichment is a unitary and more comprehensive concept. Restitution at common law cuts across several areas of the law, but its substantive basis is the theory of unjust enrichment. Therefore, instances of unjust enrichment under the Third Restatement—such as recovery of performances rendered under failed contracts[35]—may fall under the Louisiana theory of cause, the action for payment of a thing not due, or the subsidiary action for enrichment without cause. With these particularities in mind, the Third Restatement could serve as a helpful reference to Louisiana lawyers.

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32. *See* LA. CIV. CODE arts. 2299–2305 (2023).
33. *See id.* art. 2298.
34. *See id.* arts. 526, 1966, 1967, 2018, 2033, 2298, 2299 cmt. c.
35. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 4, topic 2, intro notes & §§ 37–39 (AM. L. INST. 2011).

Finally, Part IV clarifies some confusion in the Louisiana jurisprudence concerning *negotiorum gestio*, unjust enrichment, and the theory of cause, through a schematic depiction of the entire Louisiana law of quasi-contract. As mentioned, *negotiorum gestio* is an institution that is entirely separate from unjust enrichment. On the other hand, restitution in Louisiana law is mostly governed by the laws of contract and tort, pursuant to the broader theory of cause. Thus, recovery of performances rendered under a failed contract is achieved primarily through an action on the contract or by a real action for revendication.[36] Alternatively, the plaintiff may institute a quasi-contractual action for payment of a thing not due (*condictio indebiti*).[37] Conversely, the action for enrichment without cause (*actio de in rem verso*) is general and subsidiary, meaning that it can be brought only if no other remedy is available.[38]

II. REDEFINING QUASI-CONTRACT

In civil law systems such as Louisiana, France, and Quebec, quasi-contract historically has been understood too broadly as an independent source of obligations that is based neither on contract nor on tort.[39] At common law, the term "quasi-contract" never acquired any reliable and generally accepted meaning.[40] Instead, terms such

36. *See, e.g.*, LA. CIV. CODE arts. 526, 2018, 2033 (2023).
37. *See id.* art. 2299 cmt. c.
38. *See id.* art. 2298.
39. *See* Valerio Forti, Quasi-contrats, No. 1, *in* JurisClasseur Civil, Art. 1300, Fascicule unique, Jan. 25, 2018 (Fr.) [hereinafter Forti, Quasi-contrats].
40. This is true especially in the United States, where the term first appeared in Keener's influential treatise on the law of quasi-contract in 1893. *See* WILLIAM A. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS, intro. note (1893) (where the author explains that he adopted the term in place of "contract implied in law" in deference to the nineteenth-century English scholars Pollock and Anson). *See also* FREDERIC C. WOODWARD, THE LAW OF QUASI CONTRACTS 1–10 (1913) (discussing the origin, nature, and essential elements of "quasi contracts," as a term referring to "obligations arising from unjust enrichment"). Before 1893, "quasi-contract" was virtually unknown in the United States—except in Louisiana. *See* Kull, *Early Modern History*, *supra* note 5, at 313–15; BIRKS, *supra* note 6, at 267–68. "Quasi-contract" also appeared as a subtitle to the First Restatement, but was dropped in the Third Restatement. *Compare* RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (AM. L. INST.

as "implied in law contracts" or "constructive contracts" (and "constructive trusts" in equity) referred to a remedy for restitution on the basis of unjust enrichment.[41] These common-law terms, however, trace their history back to the civil-law misunderstanding of the Roman "*quasi ex contractu*."[42] Scholars from both systems agree that use of these obscure terms has sown confusion in the doctrine and the courts.[43]

The reason for this adverse effect is historical. The modern understanding of quasi-contract as a prescriptive concept referring to a single and independent source of obligations is grounded on a historical misunderstanding of the Roman law from which the concept originated. In fact, quasi-contract was never meant to serve as a legal term of art, much less an independent source of obligations in Roman law. Rather, it was merely a descriptive concept that grouped an amorphous variety of causative events—licit juridical facts—that lie between contract and tort. Based on this misconception, Medieval civil law scholars formulated a false doctrine that united the dissimilar institutions of *negotiorum gestio* and unjust enrichment under one heading of quasi-contract.[44]

As a result of this false doctrine, judges and lawyers understand quasi-contractual obligations very broadly to include any obligation that was created "without agreement" and that is not a delict. Within this broad definition, they also confuse *negotiorum gestio* with unjust enrichment. Naturally, such a broad and confusing category of quasi-contractual obligations is not also doctrinally false, but it also has no practical utility.

1937) *with* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011).

41. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2.

42. *See* BIRKS, *supra* note 6, at 268; Peter Birks & Grant McLeod, *The Implied Contract Theory of Quasi-Contract: Civilian Opinion in the Century before Blackstone*, 6 OXFORD J. LEGAL STUD. 46, 54 (1986).

43. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 1–51.

44. *See* HENRY VIZIOZ, LA NOTION DE QUASI-CONTRAT. ÉTUDE HISTORIQUE ET CRITIQUE Nos 75–79 (1912).

The true meaning of quasi-contract is much narrower in scope. A quasi-contractual obligation is a legal obligation to restore a benefit that was received without cause. According to this true meaning, the two genuine types of quasi-contract are *negotiorum gestio* and unjust enrichment. All other legal obligations—including obligations that have been characterized by some scholars as "innominate" types of "quasi-contract"—are not actual quasi-contracts; they are other types of legal obligations. Contemporary civil law doctrine places *negotiorum gestio* and unjust enrichment under a more accurate category of "licit juridical facts" whose underlying feature is the lack of cause for receiving a service or a benefit.[45] This modern doctrine better explains the function of these two separate institutions. As a result of this modern approach, the confusing term "quasi-contract" has been eliminated in most modern civil codes, with the notable exception of the revised French Civil Code, which still regularly uses the term,[46] and the Louisiana Civil Code, in which the term still appears sporadically.[47]

Importantly, Louisiana judges and lawyers frequently use this term today, and their confusion surrounding this area of law persists. Introducing the term "licit juridical fact" as an everyday term of art in the courtroom hardly seems realistic. Instead, it is recommended to retain the commonly used term "quasi-contract," but redefine it as a descriptive term that encompasses two distinct institutions, namely, *negotiorum gestio* and unjust enrichment. These separate institutions exist between contract and tort and provide a means for compensation or restitution in cases of a beneficial intervention or receipt of an unmerited benefit. In short, quasi-contract basically means *negotiorum gestio* or unjust enrichment, and nothing more.

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45. *See* 2 JEAN CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS No. 1213 (2d ed. 2017) [hereinafter CARBONNIER II]; 2 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, DROIT CIVIL. LES OBLIGATIONS. LE FAIT JURIDIQUE Nos 1–2 (14th ed. 2011) [hereinafter FLOUR ET AL., FAIT JURIDIQUE]; JEAN-LOUIS BAUDOUIN & PIERRE-GABRIEL JOBIN, LES OBLIGATIONS No. 538 (6th ed. 2005).

46. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300.

47. *See, e.g.*, LA. CIV. CODE arts. 2018, 2324.1, 3541 (2023). *See infra* notes 150–56 and accompanying text.

This redefinition of quasi-contract restores the original and true function of the term, as the Romans initially intended. In this light, the continued use of a redefined term "quasi-contract" that refers to the modern doctrine is perfectly appropriate. A historical and comparative examination of quasi-contract should establish this conclusion.

A. Comparative Law

The classical Roman law, influenced by Greek law and philosophy,[48] recognized two main sources of obligations—contract and delict (tort).[49] In his influential writings, the Roman jurisconsult Gaius acknowledges this classical dichotomy of sources,[50] but he also identified a third broad category of sources of obligations—"legal obligations stemming from various other events."[51]

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48. *See* ARISTOTLE, NICOMACHEAN ETHICS V, 1131a (c. 384 B.C.E.); PLATO, REPUBLIC VIII, 556a (c. 375 B.C.E.); 1 GEORGIOS PETROPOULOS, HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIOU [HISTORY AND INSTITUTES OF ROMAN LAW] 858 (2d ed. 1963, reprinted 2008) (Greece) [hereinafter: PETROPOULOS I]; JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 31 (1991) [hereinafter GORDLEY, PHILOSOPHICAL ORIGINS]; 1 MAX KASER, DAS RÖMISCHE PRIVATRECHT 522 (2d ed. 1971).

49. Contracts are a licit source of obligations whereas delict arises from an illicit act. *See* Jean Honorat, *Rôle effectif et rôle concevable des quasi-contrats en droit actuel*, REVUE TRIMESTRIELLE DE DROIT CIVIL [RTDCIV.] 1969, p. 653; Forti, Quasi-contrats, *supra* note 39, No. 2.

50. G. INST. 3.88 ("for every obligation arises either *ex contractu* [from a contract] or *ex delicto* [from an offense]". *But see also* G. INST. 3.91 (admitting that payment of a thing not due falls between contract and delict). *See* Forti, Quasi-contrats, *supra* note 39, No. 2.

51. DIG. 44.7.1 (Gaius, Aureorum 2) ("Obligations arise either from contract or from wrongdoing or *by some special law from various types of causes*") (emphasis added). Scholars routinely refer to the abbreviated version of "various types of causes" (*ex variis causarum figuris*) to identify this third group of sources of obligations. However, this abbreviated reference could be misleading. Indeed, reference to the entire passage of "some special law from various types of sources" (*aut proprio quodam iure ex variis causarum figuris*) reminds the reader that the actual source of these obligations is the law. The "various events" (causes) trigger the application of "special laws" that give rise to legal obligations. See PETROPOULOS I, *supra* note 48, at 860, 1035; Forti, Quasi-contrats, *supra* note 39, No. 2; VIZIOZ, *supra* note 44, Nos 23–25; MELINA DOUCHY, LA NOTION DE QUASI-CONTRAT EN DROIT POSITIF FRANÇAIS No. 2 (1997).

In later writings, presumably by Gaius,[52] the jurisconsult elaborates further on this third amorphous category, by explaining that some of these miscellaneous obligations have effects "*quasi ex contractu*" (as though from a contract), while others have effects "*quasi ex delicto*" (as though from a tort).[53] The management of affairs of another (*negotiorum gestio*) and various types of unjust enrichment (*condictio sine causa*), which included payment of a thing not due (*condictio indebiti*), were examples of miscellaneous obligations that had effects *quasi ex contractu*.[54] Gaius's updated categorization found its way into the Institutes of Justinian and the

52. Gaius's later writings appear in Justinian's Digest of the *Corpus Iuris Civilis*. Whether the passages were subject to interpolations during the compilation remains questionable. See PETROPOULOS I, *supra* note 48, at 860; BIRKS, *supra* note 6, at 268–70.

53. DIG. 44.7.5.4 (Gaius, Aureorum 3) (referring to negligence as an event giving rise to an obligation *quasi ex delicto*); DIG. 44.7.5.5 (Gaius, Aureorum 3) (referring to damage occurring from ruin of a building as an event generating obligations *quasi ex delicto*); and DIG. 44.7.5.6 (Gaius, Aureorum 3) (identifying delictual liability through acts of others as an event producing obligations *quasi ex delicto*). Today, quasi-delict falls under tort law and gives rise to delictual obligations. *Cf.* LA. CIV. CODE bk. III, tit. V, ch. 3 (2023) (titled "Of offenses and quasi offenses"). *See also* ERIC DESCHEEMAEKER, THE DIVISION OF WRONGS. A HISTORICAL COMPARATIVE STUDY 57–67, 139–85 (2009) (discussing the Roman law of quasi-delict and the modern French law of "civil liability" (*responsabilité civile*)).

54. It should be noted that obligations *quasi ex contractu* originally included a variety of legal obligations beyond *negotiorum gestio* and unjust enrichment. These legal obligations included co-ownership, tutorship, and legacies, among others. Gradually, these additional types of obligations *quasi ex contractu* were separated from *negotiorum gestio* and unjust enrichment and they now constitute distinct types of legal obligations that exist between contract and tort (but outside "quasi-contract"). This separation was noted in the Code Napoléon and the early Louisiana civil codes as well as in the jurisprudence. *See* CODE NAPOLÉON, *supra* note 10, art. 1370; LA. CIV. CODE art. 2292 (1870); Dean v. Hercules, Inc., 328 So.2d 69, 71–73 (La. 1976) (distinguishing the legal obligation of vicinage from quasi-contractual obligations and identifying the following types of obligations in Louisiana law: (1) contractual; (2) quasi-contractual; (3) delictual; (4) quasi-delictual; and (5) legal). *See also* DIG. 44.7.5.pr. (Gaius, Aureorum 3) (identifying *negotiorum gestio* as an event giving rise to obligations *quasi ex contractu*); DIG. 44.7.5.1 (Gaius, Aureorum 3) (referring to tutorship and curatorship as events generating obligations *quasi ex contractu*); DIG. 44.7.5.2 (Gaius, Aureorum 3) (recognizing testamentary legacies as events producing obligations *quasi ex contractu*); and DIG. 44.7.5.3 (Gaius, Aureorum 3) (identifying payment of a thing not due as an event giving rise to an obligation *quasi ex contractu*). *See infra* notes 100 and 110.

Corpus Iuris Civilis.[55]

Under Gaius and Justinian, there was no "quasi-contract" as an independent source of obligations.[56] Instead, there were miscellaneous events that gave rise to legal obligations having effects *quasi ex contractu* (as though from a contract).[57] In short, *quasi ex contractu* referred to the effects of various legal obligations, not to the source of the obligation itself.[58]

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55. J. INST. 3.13.2 ("[Obligations] arise from a contract or as though from a contract or from a delict or as though from a delict"). BIRKS, *supra* note 6, at 269; 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 443 (Richard Burn ed., 9th ed. 1783) [hereinafter BLACKSTONE II]. *See also* J. INST. 3.27 (identifying several events giving rise to obligations *quasi ex contractu*, including *negotiorum gestio*, tutelage, co-ownership, testamentary legacies, and payment of a thing not due). *See* PETROPOULOS I, *supra* note 48, at 861, 1035.

56. Admittedly, Gaius—or his later interpolators—could have expressed his ideas regarding quasi-contract more accurately. Certain parts of Gaius's texts correctly speak of the obligor being bound as if by contract (*tenetur quasi ex contractu*). *See, e.g.*, DIG. 44.7.5.1 (Gaius, Aureorum 3) (referring to the tutor as a debtor who is bound as if by contract); DIG. 44.7.5.3 (Gaius, Aureorum 3) (discussing the obligor of a payment not due being bound as if by a contract of loan). Other parts, however, refer to the obligation being born (*nascitur) quasi ex contractu*. *See, e.g.*, DIG. 44.7.5.pr. (Gaius, Aureorum 3) (identifying *negotiorum gestio* as an event giving birth to obligations *quasi ex contractu*); *cf.* J. INST. 3.13.2 ("[Obligations] arise from a contract or as though from a contract or from a delict or as though from a delict"). Several scholars thus note that the confusion as to quasi-contract already existed in the Roman texts. *See* PAUL FRÉDÉRIC GIRARD, MANUEL ÉLÉMENTAIRE DE DROIT ROMAIN 418 n.3 (8th ed. by Félix Senn, 1929); Emilio Betti, *Sul significato di "contrahere" in Gaio e sulla non-classicità della denominazione "quasi ex contractu obligatio"*, 25 BULLETTINO DELL'ISTITUTO DI DIRITTO ROMANO 65–88 (1912).

57. *See* PETROPOULOS I, *supra* note 48, at 860–61, 1035; FRANÇOIS TERRÉ, PHILIPPE SIMPLER, YVES LEQUETTE & FRANÇOIS CHENEDE, DROIT CIVIL. LES OBLIGATIONS No. 1262 (12th ed. 2019). *See also* Forti, Quasi-contrats, *supra* note 39, No. 2 (arguing that the various quasi-contracts have no common denominator other than their placement in this amorphous category of *quasi ex contractu*).

58. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 7–8; 4 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS. OBLIGATIONS § 305, at 93, *in* 1 CIVIL LAW TRANSLATIONS (La. State L. Inst. trans., 1965) (Etienne Bartin ed., 6th ed., 1942) [hereinafter AUBRY & RAU IV]; Forti, Quasi-contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, Nos 23–25; Michel Boudot, *La classification des sources des obligations au tournant du 20e siècle*, *in* L'ENRICHISSEMENT SANS CAUSE. LA CLASSIFICATION DES SOURCES DES OBLIGATIONS 131 (V. Mannino & C. Ophèle eds., 2007).

1. Historical Misunderstandings—Quasi-Contract as a Prescriptive Concept

When the Roman and Byzantine sources were rediscovered by Medieval scholars, the term *quasi ex contractu* was misunderstood to mean a single and independent source that generated obligations as if there were a contract between the parties.[59] In other words, the term "as though from contract" was not attached to the effects of the various obligation created, but rather to the source itself.[60] Quasi-contract thus emerged as an independent source of obligations. Suddenly, *negotiorum gestio* and unjust enrichment were not separate "miscellaneous events giving rise to legal obligations, the effects of which were as though from contract"—they were "quasi-contracts" themselves. The need quickly arose to identify a unifying legal theme for this independent source of obligations—what do *negotiorum gestio* and unjust enrichment have in common? What sets them apart as "quasi-contracts" from other categories of obligations?

To answer these questions, Medieval scholars advanced two distinct legal theories for quasi-contract.[61] First, the glossator Bartolus and his followers identified a fictitious contract as the basis for quasi-contract.[62] Under this "fictitious contract theory of quasi-contract," the parties to a quasi-contract actually do not have a contract;

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59. Some scholars argue that the misunderstanding had already started in Justinian's time. *See* BIRKS, *supra* note 6, at 268–71; Birks & McLeod, *supra* note 42, at 54 n.36; BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 224 n.2 (1962).

60. *See* PETROPOULOS I, *supra* note 48, at 861, 1035; Forti, Quasi-contrats, *supra* note 39, No. 3. Levasseur aptly observes that "*quasi ex contractu*" became *"ex quasi contractu."* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 5–7. As Birks notes, "it was only one short step from 'as though upon a contract' to 'upon a sort of contract', from *quasi ex contractu* to *quasi contract*." BIRKS, *supra* note 6, at 269.

61. *See* Forti, Quasi-contrats, *supra* note 39, No. 3; Emmanuel Terrier, *La fiction au secours des quasi-contrats ou l'achèvement d'un débat juridique*, RECUEIL DALLOZ [D.] 2004, p. 1179.

62. Justification for this theory may also be found in the—likely interpolated—texts of Gaius that refer to quasi-mandate and quasi-loan. *See* Forti, Quasi-

rather, the judge imposes the quasi-contractual obligation as if there were a contract between the parties.[63] Thus, *negotiorum gestio* is understood as an obligation between the manager and the owner as if there were a mandate (quasi-mandate). The special action for unjust enrichment from payment of a thing not due (*condictio indebiti*) is interpreted as an obligation between the payor and the payee as if there were a contract of loan (quasi-loan). This theory also appears in the writings of the French jurist Pothier,[64] whose work heavily influenced the redactors of the Code Napoléon.[65] Scholars argue that this theory also influenced early common law courts that developed the doctrine of "implied-in-law contracts," pursuant to which the court ordered the defendant to make restitution as if she had promised to do so.[66] Likewise, Chancery courts enunciated the equitable "constructive trust," which was the defendant's legal obligation to return certain identifiable assets as if she were a trustee.[67]

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contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, No. 38; Birks & McLeod, *supra* note 42, at 68–77.

63. *See* 31 CHARLES DEMOLOMBE, COURS DE CODE NAPOLÉON No. 53 (1882) [hereinafter DEMOLOMBE XXXI] ("A quasi-contract however is quasi a contract!").

64. *See* ROBERT JOSEPH POTHIER, TRAITÉ DU CONTRAT DE MANDAT No. 167 *in* 9 ŒUVRES COMPLÈTES DE POTHIER (nouvelle édition 1821) [hereinafter POTHIER, MANDATE]; ROBERT JOSEPH POTHIER, TRAITÉ DU CONTRAT DE PRÊT DE CONSOMPTION No. 132 *in* 5 ŒUVRES COMPLÈTES DE POTHIER (nouvelle édition 1821) [hereinafter POTHIER, LOAN]. *But see* Forti, Quasi-contrats, *supra* note 39, No. 3 (arguing that Pothier was influenced primarily by the "theory of equity").

65. *See* CODE NAPOLÉON, *supra* note 10, art. 1371 ("Quasi contracts are the purely voluntary acts of the party, from which results any obligation whatsoever to a third person, and sometimes a reciprocal obligation between the two parties"). *Cf.* LA. CIV. CODE art. 2293 (1870). *See* Forti, Quasi-contrats, *supra* note 39, No.4; Terrier, *supra* note 61, at No. 33 (explaining that article 1371 of the Code Napoléon had a didactic rather than a normative function).

66. Courts and scholars developed three elements for quasi-contract: (1) the plaintiff conferred a measurable benefit on the defendant; (2) the plaintiff conferred the benefit with the reasonable expectation of being compensated for its value; and (3) the defendant would be unjustly enriched if she were allowed to retain the benefit without compensating the plaintiff. *But see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. L. INST. 2011) ("Formulas of this kind are not helpful, and they can lead to serious errors").

67. *See* BIRKS, *supra* note 6, at 267–274, 301–307 (arguing that the common-law misunderstandings of quasi-contract are traced back to early civil-law sources); Kull, *Early Modern History*, *supra* note 5, at 313–16 (discussing the

The second legal basis is the "equity theory of quasi-contract," advanced by the glossator Azo[68] and by later civilian writers, especially scholars of the School of Natural Law.[69] Under this theory, equity underlies the concept of quasi-contract. The source of a quasi-contractual obligation is the law and the justification for imposing such an obligation is equity. The civil-law term "equity" refers to the Roman law *aequitas*—fairness, justice[70]—which finds its roots in the Aristotelian tradition.[71] The equitable principle forbidding unjust enrichment—known since Greek and Roman times[72]—appears in all types of quasi-contract.[73] Thus, the owner whose affair has been well-managed must give compensation to the manager as a matter of equity.[74] Likewise, the recipient of a payment that was

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Roman sources of the American doctrine of unjust enrichment). *See also* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 15–26; DOBBS & ROBERTS, *supra* note 6, §§ 4.2–4.3.

68. *See* Forti, Quasi-contrats, *supra* note 39, No. 3; VIZIOZ, *supra* note 44, Nos 34–35.

69. *See* VIZIOZ, *supra* note 44, Nos 39–48.

70. In civil-law systems, including Louisiana law, there is no separation between strict law and equity. Civilian equity is a set of general principles—based on justice, reason, and fairness—that is built into the law. *Cf.* LA. CIV. CODE art. 4 (2023) ("When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages."); LA. CIV. CODE art. 2055 (2023) ("Equity. . .is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another"). *See* A.N. YIANNOPOULOS, CIVIL LAW SYSTEM. LOUISIANA AND COMPARATIVE LAW 180–182 (2d ed. 1999) [hereinafter YIANNOPOULOS, CIVIL LAW SYSTEM] (discussing the functions of equity in Louisiana law).

71. *See* GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 33–40 (discussing Aristotle's influence on the medieval study of Roman law).

72. DIG. 12.6.14 (Pomponius, Ad Sabinum 21) ("For it is by nature equitable that nobody should enrich himself at the expense of another."); DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) ("By the law of nature it is equitable that no one become richer by the loss and injury of another."). *See also* GEORGES RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 249 (4th ed. 1949); JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 419 (2006) [hereinafter GORDLEY, FOUNDATIONS].

73. *See* Minyard v. Curtis Products, Inc., 205 So 2d 422, 432 (La. 1967). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 note c (AM. L. INST. 2011) ("A statement to the effect that 'restitution is equitable' is a harmless platitude so long as 'equity' means only 'fairness'").

74. *See* CODE NAPOLÉON, *supra* note 10, art. 1375; LA CIV. CODE art. 2299 (1870); POTHIER, MANDATE, *supra* note 64, No. 167; YIANNOPOULOS, CIVIL LAW

not due must give restitution to the payor to avoid any unjust enrichment.[75] This theory made its way into the Code Napoléon[76] through the writings of the French jurists Domat[77] and Pothier.[78] Similarly at common law, implied-in-law contracts and constructive trusts also substantively refer to the doctrine of unjust enrichment.[79]

While the two theories are not mutually exclusive, much scholarship has been devoted to delineating the importance of each theory to the development of the doctrine of quasi-contract.[80] On the other hand, many scholars from both civil and common-law systems challenged the validity of these theories and questioned the usefulness of the false, misleading, and inaccurate term "quasi-contract." The crux of this fierce criticism is the simple fallacy that invalidates both theories—there never was a unique source of obligations under the name "quasi-contract." Critics argued quite convincingly that neither theory was able to establish a common denominator to the various quasi-contracts.[81] For instance, the "fictitious contract theory" classifies payment of a thing not due as a quasi-loan, but fails to

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SYSTEM, *supra* note 70, at 181 (referring to the law of *negotiorum gestio* as an example of a legislative precept that is based on equity).

75. *See* CODE NAPOLÉON, *supra* note 10, art. 1376; LA. CIV. CODE art. 2301 (1870). Justification for this theory can be found in Gaius (or his interpolators) who refers to equity as the reason for the quasi-contractual obligations. *See* DIG. 44.7.5 (Gaius, Aureorum 3).

76. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; LA. CIV. CODE art. 2293 (1870). *See* Forti, Quasi-contrats, *supra* note 39, No. 4 (explaining that the "theory of equity" has the merit of simplicity—since quasi-contracts are based on the law and equity, no further legal justification was necessary for their inclusion in the Code Napoléon).

77. *See* VIZIOZ, *supra* note 44, No. 48 (discussing the doctrine of quasi-contract in Domat's scholarship).

78. *See* 1 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 69 (William D. Evans transl. 1806) (1761) [hereinafter POTHIER, OBLIGATIONS] ("The law alone, or natural equity, produces the [quasi-contractual] obligation, by rendering obligatory the fact from which it results").

79. *See* BIRKS, *supra* note 6, at 38–46 (arguing that unjust enrichment is a substantive source of the obligation to make restitution); Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1196 (1995) (arguing that the remedy of restitution corresponds to the substantive law of unjust enrichment).

80. *See* Forti, Quasi-contrats, *supra* note 39, Nos 1–9.

81. *See id.* No. 2.

explain why unjust enrichment in general is a type of "fictitious contract." On the other hand, the "equity theory" explains why unjust enrichment is a quasi-contract, but fails to account for the fact that unjust enrichment principles do not apply in their entirety in the case of *negotiorum gestio*.[82] In fact, *negotiorum gestio* and unjust enrichment have always been distinct legal institutions in the civil law. Doctrinal attempts to merge the two together under a broader principle of unjust enrichment only managed to confuse courts and scholars.

This confused state of the doctrine, coupled with the use of the obscure term "quasi-contract"—and the term "implied contract" at common law—by scholars and courts impeded the development of a robust doctrine of restitution and unjust enrichment in both systems.[83] Comparativists and legal historians have cautioned courts and legislators to avoid using the misleading term "quasi-contract."[84] Some scholars were even more critical, calling for immediate abolishment of this "monster" from the legal vocabulary.[85]

What makes the comparative law of quasi-contract even more complicated is its different taxonomy among the two most prevalent civil-law systems of Germany and France, as well as across civil and common-law systems.

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82. *See* LA. CIV. CODE art. 2292 cmt. e (2023) (explaining that a manager of the affairs of another "may be entitled to reimbursement of expenses even if the owner has not been enriched at his expense").

83. For instance, the common-law term "implied contract" could mean "implied in law contract" or "implied in fact contract." The two meanings must not be confused. "Implied in law contracts" are not contracts—they are quasi-contracts. "Implied in fact contracts" are veritable contracts that are made by conduct rather than by express words. *See* Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 546–47 (1912); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 23–26. *See also* BIRKS, *supra* note 6, at 267–74.

84. *See* MAURICE TANCELIN, DES OBLIGATIONS. ACTES ET RESPONSABILITÉ No. 25 (6th ed. 1997) ; Forti, Quasi-contrats, *supra* note 39, No. 6.

85. *See* 2 LOUIS JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS No. 10 (3d ed. 1939) [hereinafter JOSSERAND II]; 2 HENRI MAZEAUD ET AL., LEÇONS DE DROIT CIVIL, VOL. 1, OBLIGATIONS, THÉORIE GÉNÉRALE No. 649 (François Chabas ed., 8th ed. 1991); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 9–15; TERRÉ ET AL., *supra* note 57, Nos 1261–65.

German legal doctrine of the nineteenth century developed a robust theory of sources of obligations, rendering useless the adoption of the unscientific term "quasi-contract"[86] in the German Civil Code of 1900,[87] as well as in other civil codes based on the German model, such as the Greek Civil Code of 1945.[88] Instead, the term "other obligations arising by law" is used to describe a miscellany of obligations arising without agreement, other than torts. The two most significant such obligations are unjustified enrichment and "agency without authorization" (*negotiorum gestio*). German scholars originally identified a unitary and broad concept of unjustified enrichment (*condictio generalis*) that was intended to govern all restitutions of benefits obtained without legal justification (*condictio sine causa*), which included the actions for payment of a thing not due (*condictio indebiti*). The general action for unjustified enrichment was included in the German Civil Code.[89] This broad concept of unjust enrichment was developed by jurists who also expounded a very narrow German notion of cause in their contract theory. Thus, unjustified enrichment was the main remedy for restitution of performance under failed contracts.[90] However, the inability to apply one set of factors to all cases of unjustified enrichment under one general action forced later scholars to apply different factors to various types of unjustified enrichments, including mistaken payments (*condictio indebiti*), transfers without legal cause (*condictio sine causa*), and

86. *See, e.g.*, GERHARD DANNEMANN, THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT 210–12 (2009) (comparing the "absence of cause" approach in German law of unjust enrichment with the "quasi-contract" approach in English law, which never appeared in the German Civil Code).

87. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (2023) (Ger.) [hereinafter GERMAN CIVIL CODE].

88. ASTIKOS KODIKAS [A.K.] [CIVIL CODE] (2023) (Greece) [hereinafter GREEK CIVIL CODE].

89. *See* GERMAN CIVIL CODE, *supra* note 87, § 812; GREEK CIVIL CODE, *supra* note 88, art. 904.

90. *See* 2 FRIEDRICH CARL VON SAVIGNY, DAS OBLIGATIONENRECHT ALS TEIL DES HEUTIGEN RÖMISCHEN RECHTS 249, 253-54 (1853) [hereinafter SAVIGNY, OBLIGATIONS]; CHRISTOS FILIOS, E AITIA STIS ENOCHIKES SYMVASEIS [THE CAUSA CONTRAHENDI] 80–86 (2007).

others.[91] *Negotiorum gestio*, on the other hand, was left outside the law of unjust enrichment. It was renamed "agency without authorization" and was placed right after the provisions on mandate in the German Civil Code.[92] These advanced German ideas arrived in France after the promulgation of the Code Napoléon in 1804.[93] Meanwhile, the Medieval civil-law term "quasi-contract" had crept into the code and the writings of the early French commentators.[94]

In the French legal tradition—which includes Louisiana, Quebec, and several other jurisdictions—the confusing term "quasi-contract" has been used to group sources of obligations that are neither contractual not delictual. The Code Napoléon recognized two nominate types of quasi-contract—*negotiorum gestio*[95] and payment of a thing not due (*condictio indebiti*).[96] The French courts later devised a restricted and subsidiary action for enrichment without cause (*actio de in rem verso*).[97] The latter two actions make up the French law of unjust enrichment. Historically, French unjust enrichment law has been fragmented and restricted because restitution is governed primarily by contract law through the application of the

91. *See* DANNEMANN, *supra* note 86, at 3–20.

92. *Geschäftsführung ohne Auftrag*. *See* GERMAN CIVIL CODE, *supra* note 87, § 677; 2 BERNHARD WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS §§ 430–431 (Theodor Kipp ed., 8th ed., 1900); 1 LUDWIG ENNECCERUS & HEINRICH LEHMANN, DAS BÜRGERLICHE RECHT §§ 298–301 (2d ed. 1901). The literal translation of the German term would be "management without mandate." *See* LA. CIV. CODE art. 2292 cmt. a (2023). However, the term "agency without specific authorization" appears in the official English translation of the German Civil Code. *See* https://perma.cc/6QKM-QBXR (Nov. 1, 2022).

93. *See* HENRI CAPITANT, INTRODUCTION À L'ÉTUDE DU DROIT CIVIL Nos 230–321 (5th ed. 1927) (importing the German theory of juridical acts and facts into French legal doctrine).

94. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; DEMOLOMBE XXXI, *supra* note 63, Nos 33–42; 20 FRANÇOIS LAURENT, PRINCIPES DE DROIT CIVIL Nos 308–09 (1876) [hereinafter LAURENT XX].

95. *See* CODE NAPOLÉON, *supra* note 10, arts. 1372–1375. *Cf.* LA. CIV. CODE arts. 2295–2300 (1870).

96. *See* CODE NAPOLÉON, *supra* note 10, arts. 1376–1381. *Cf.* LA. CIV. CODE arts. 2301–2314 (1870). *See* TERRÉ ET AL., *supra* note 57, No. 1263.

97. *See* AUBRY & RAU IV, *supra* note 58, § 305, at 93; VIZIOZ, *supra* note 44, Nos 54–71; Forti, Quasi-contrats, *supra* note 39, No. 5; TERRÉ ET AL., *supra* note 57, Nos 1261, 1263.

broader French theory of cause.[98] Unjust enrichment is confined to the tight space of quasi-contract.[99] Although *negotiorum gestio* and unjust enrichment are both classified as quasi-contracts, they are distinct institutions in theory. Nevertheless, courts and scholars have frequently confused the two concepts and have come up with false types of "innominate quasi-contracts" based on an overly broad understanding of quasi-contract. For example, according to some scholars, when a contractual relationship is imposed by operation of law rather than by consent of the parties, the obligations stemming from such a "forced contract" are quasi-contractual. This assertion is false for two reasons. First, not all legal obligations falling between contract and tort are "quasi-contractual." If that were the case, then a myriad of other "forced relationships," such as co-ownership, community property, and parental authority would fall under quasi-contract. Such an overly broad category of quasi-contract would serve no practical purpose, as there is no unifying factor that would group together these radically different legal obligations. Second, these "forced contracts" do not involve a transfer of wealth or benefit without legal cause. In short, they do not give rise to a true quasi-contractual claim for restoration or restitution. Therefore, most, if not all, cases of "innominate quasi-contracts" are not quasi-contracts at all—they simply are separate legal obligations.[100]

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98. *See* JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER 161 (William Strahan trans., Luther Cushing ed., 1853); FILIOS, *supra* note 90, at 69–71; 2 GABRIEL MARTY & PIERRE RAYNAUD, DROIT CIVIL. LES OBLIGATIONS, VOL. 1 No. 347 (1962) [hereinafter MARTY & RAYNAUD II].

99. *See* Paul Roubier, *La position française en matière d'enrichissement sans cause*, *in* 4 TRAVAUX DE L'ASSOCIATION CAPITANT 38, 42 (Association H. Capitant ed., 1948); JEAN-PIERRE BEGUET, L'ENRICHISSEMENT SANS CAUSE No. 26 (1945); *See* MICHAEL P. STATHOPOULOS, AXIOSIS ADIKAIOLOGITOU PLOUTISMOU [CLAIM OF UNJUSTIFIED ENRICHMENT] 18–19 (1972) (Greece) [hereinafter STATHOPOULOS, UNJUST ENRICHMENT].

100. *See infra* note 110 (discussing the French category of "innominate quasi-contracts'). *See also* TERRÉ ET AL., *supra* note 57, Nos 1325, 1329–30 (criticizing the characterization of "forced contracts" and various other innominate legal obligations as "innominate quasi-contracts"). The confusion surrounding the existence of "innominate quasi-contracts" might also be attributed to the fact that the special action for enrichment without cause (*actio de in rem verso*) was not included in the Code Napoléon, but was first recognized by the French courts as an

Common-law courts in the seventeenth and eighteenth centuries were also misled by the civil-law misconceptions mentioned above when they enunciated an expanded writ of assumpsit which came to be known as "implied in law contract" for restitution at common law. Along the same lines, equity courts also created the "constructive trust" for specific restitutions and tracing of assets.[101] Although it was generally understood that the liability for such restitution was a general principle forbidding unjust enrichment, nineteenth and twentieth-century scholars in the United States developed the doctrine of unjust enrichment as the substantive counterpart to the remedy of restitution.[102] Unjust enrichment is a unitary concept at common law. English scholars have attempted to postulate a set of "unjust factors" and a categorization for unjust enrichment.[103] Other scholars, which included the drafters of the Third Restatement of Restitution and Unjust Enrichment, resisted calls for a strict categorization of the types of unjust enrichment.[104] Meanwhile, confusion persisted with regard to very definitions of restitution and of unjust

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additional ("innominate") quasi-contract. Under modern law, however, it is clear that all quasi-contractual obligations express the broader principle of unjust enrichment. In other words, all types of so-called innominate quasi-contracts are special types of unjust enrichment or *negotiorum gestio*. *See* 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW, PT. 1, No. 813 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter PLANIOL II.1]; Minyard v. Curtis Products, Inc., 205 So 2d 422, 432 (La. 1967). *See also supra* note 54 (discussing the historical separation of various legal obligations from *negotiorum gestio* and unjust enrichment). The same confusion seems to persist in Louisiana. *See*, *e.g.*, Martin, *supra* note 16, at 184 (observing the Louisiana false understanding of "quasi-contract" as "simply a shorthand method for distinguishing this particular type of obligation from a contract, which is an obligation created by agreement"). *See also* LA. CIV. CODE art. 2292 cmt. e ("Dicta in certain Louisiana decisions have confused the institution of *negotiorum gestio* with that of enrichment without cause").

101. *See* DOBBS & ROBERTS, *supra* note 6, §§ 4.1–4.2; BIRKS, *supra* note 6, at 267–74, 301–07.

102. *See* Kull, *Early Modern History*, *supra* note 5, at 313–16.

103. *See* ANDREW BURROWS, THE LAW OF RESTITUTION 86–117 (3d ed. 2011); BIRKS, *supra* note 6, at 38–46 (comparing the common-law approach of "unjust factors" with the civil-law method of "absence of basis").

104. *Compare* BIRKS, *supra* note 6, at 38–46 (enunciating a theory of a unitary concept of unjust enrichment) *with* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (acknowledging the existence of a unitary concept of unjust enrichment, but resisting a strict classification of cases of unjust enrichment).

enrichment.[105] Common-law systems also seem to recognize situations analogous to the civil-law *negotiorum gestio*, which are named "unrequested interventions."[106]

Meanwhile, comparative law scholars from both systems became highly critical of the continued use of the misleading term "quasi-contract."[107] The term was mostly removed in later revisions of civil codes modelled after the French Civil Code, such as the Louisiana and Quebec civil codes.[108] The Third Restatement of Restitution and Unjust Enrichment also avoids using the term "implied contracts." Nevertheless, the term survived the 2016 revision of the French law of obligations and remains in the revised French Civil Code.[109] It is also used by scholars and courts in civil law systems—especially French systems.[110]

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105. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. b, c (AM. L. INST. 2011) (explaining that restitution and unjust enrichment as terms of art have frequently proved confusing).

106. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–30 (AM. L. INST. 2011).

107. *See, e.g.*, VIZIOZ, *supra* note 44, Nos 75–79; BIRKS, *supra* note 6, at 267–68.

108. *See infra* notes 150–56 and accompanying text.

109. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300. French doctrine was split on the issue of retaining quasi-contract in the French Civil Code. Today, the revised French Civil Code is an isolated example of a modern civil code that still defines and makes use of the term quasi-contract. *See* Philippe Remy, *Des autres sources d'obligations*, *in* POUR UNE RÉFORME DU RÉGIME GÉNÉRAL DES OBLIGATIONS 32 (François Terré ed. 2013); Forti, Quasi-contrats, *supra* note 39, No. 9.

110. As discussed *supra* note 99, in French law, quasi-contract is a broader concept that includes nominate and innominate types. The nominate quasi-contracts listed in the French Civil Code (*negotiorum gestio*, payment of a thing not due, and unjustified enrichment) provide for restitution of wealth that changes hands without cause. French doctrine classifies these nominate types as "quasi-contracts of exchange" (*"quasi-contrats échange"*). Innominate quasi-contracts provide for the partition of wealth among parties in an involuntary or *de facto* co-ownership ("quasi-contracts of partition"–*"quasi-contrats partage"*). Examples of innominate quasi-contracts include legal co-ownership, *de facto* community property of unmarried couples, *de facto* partnerships, accession to movables, and obligations to restore performances from a dissolved or null contract. The French law of quasi-contract is still developing. Scholars and courts have identified additional innominate quasi-contractual obligations in cases where the conduct of a person could create the illusion or appearance of a binding contractual commitment. A celebrated example in the French jurisprudence is the announcement of winning a lottery. *See* CYRIL GRIMALDI, QUASI-ENGAGEMENT ET ENGAGEMENT EN DROIT PRIVÉ. RECHERCHE SUR LES SOURCES DE L'OBLIGATION Nos 150–351 (2007) (arguing that non-binding unilateral promises—commitments—can

This brief comparative excursus shows beyond question that the critics of quasi-contract have carried the day, at least formally. Indeed, quasi-contract as a source of obligations is an inaccurate and false legal term that has unnecessarily complicated the law. A term, however, that has been used consistently in civil-law systems for more than two centuries. It is submitted here that a proper redefinition and re-designation of quasi-contract may inform the appropriate use of this term by courts and scholars. The correction is simple—the original Roman descriptive use of the term "quasi-contract" must be revived. As long as it is understood that quasi-contract is not a prescriptive and dogmatic homogenous source of obligations, but rather an amorphous group of separate legal obligations that arise neither from contract nor from tort, this term remains useful in the legal lexicon to describe a variety of "licit juridical facts" that lie between contract and tort and that provide for the restitution of a benefit obtained without a lawful cause.[111]

become binding as quasi-commitments if the promisee reasonably relies on the promise to her detriment). *But see* Forti, Quasi-contrats, *supra* note 39, No. 42; Philippe le Tourneau, Quasi-contrat, *in* RÉPERTOIRE CIVIL DALLOZ No. 56 (5th ed. 2014) [hereinafter le Tourneau, Quasi-contrat] (arguing that liability for "detrimental reliance" sounds in tort, not quasi-contract). *See also* TERRÉ ET AL., *supra* note 56, Nos 1319–30 (identifying certain cases of "innominate quasi-contracts" and criticizing various false "innominate quasi-contracts," including "forced contracts" and "detrimental reliance"). In Louisiana, the revised law of co-ownership specifically governs the relations between co-owners, leaving virtually no room for "innominate" types of quasi-contract. Thus, in Louisiana law, these "innominate" types of obligations are not quasi-contractual in nature. Instead, they are legal obligations that are regulated primarily by specific rules and only by exception by the rules of the nominate quasi-contracts of *negotiorum gestio* and unjust enrichment. *See*, *e.g.*, LA. CIV. CODE arts. 507–516, 797–818, 1967, 2018, 2033, 2802, 2814. *See also* Symenonides & Martin, *supra* note 23, at 116 (explaining that co-ownership issues ought to be resolved on the basis of the special law of co-ownership rather than on quasi-contractual principles). Thus, there is no practical need for such an "innominate" category in Louisiana.

111. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 28–31; BAUDOUIN & JOBIN, *supra* note 45, No. 538.

2. Modern Trends—Quasi-Contract as a Descriptive Concept

Quasi-contract is better understood as a descriptive term that refers to a category of distinct "licit juridical facts" involving compensation or restitution of a service or benefit received without legal justification. This modern view is doctrinally sounder than the older and confusing theories of "fictitious contract" and "equity."

Traditional as well as contemporary legal theory identifies two sources of obligations—manifestations of consent and events which operate independently of consent.[112] Manifestations of consent—known as "juridical acts" in the civil law—include contracts, conveyances, and testaments (donations mortis causa).[113] Events which operate independently of consent—"juridical facts" in the civil law—include torts, unjust enrichment, *negotiorum gestio*, and miscellaneous others.[114] Juridical facts constitute a residual and vast source of obligations, encompassing any event that is not a juridical act.[115] Juridical facts might occur independently of any human act. For instance, natural events—e.g., earthquake or fire—can give rise to legal obligations or modify pre-existing obligations.[116] Juridical facts, however, usually involve a voluntary or involuntary human act. The act may be illicit, in which case the juridical fact is illicit and falls under the category of tort (in civil law terms, delict or quasi-delict).[117] Juridical facts, however, may also involve licit human conduct, in which case they are styled "licit juridical facts."

112. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48; 4 ROSCOE POUND, JURISPRUDENCE § 128 (1959); ALAIN A. LEVASSEUR, LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A COMPARATIVE CIVIL LAW PERSPECTIVE 9–11 (2020) [hereinafter LEVASSEUR, OBLIGATIONS].

113. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48; *See* SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 105–32 (1969); BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 33–38 (2d ed. 1992); POUND, *supra* note 112, § 128; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 9.

114. *See* BIRKS, *supra* note 6, at 21; YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, 447–48; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 9–10.

115. *See* 2 GABRIEL BAUDRY-LACANTINERIE & JULIEN BONNECASE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL : SUPPLÉMENT No 366 (1925).

116. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 447–48.

117. *See* POUND, *supra* note 112, § 129.

Licit juridical facts are not torts because the human act involved is not unlawful or *contra bonos mores*. Licit juridical facts, however, are not juridical acts because the maker's intention, or lack thereof, is irrelevant; the legal obligation is created by operation of law regardless of such intent. In a licit juridical fact, the actor's capacity is also irrelevant, because her intent to acquire a right or to incur an obligation is simply inoperative.[118] It is thus clear that licit juridical facts fall between contract (juridical acts) and tort (illicit juridical fact).[119]

Quasi-contracts fall within the category of "licit juridical facts."[120] This categorization is evident from the older language in the French and Louisiana civil codes, describing quasi-contracts as "lawful and voluntary acts."[121] In essence, the term "quasi-contract," as redefined here, may be used to describe a variety of licit juridical facts that give rise to legal obligations. Thus, a manager of another's affairs (*negotiorum gestor*) is held to the obligations of a mandatary regardless of whether she intended to be a mandatary.

Likewise, the owner of the affair is bound as a principal even if she had no such intent. The payee of money not due must make restitution even though she had no intent to "borrow" the money from the payor and made no promise to repay. An enriched party at another's expense had no intent to make restitution for the enrichment, but is liable nevertheless. These "quasi-contractual obligations," as they came to be known, derive from licit juridical facts, that is, licit acts—sometimes voluntary, other times involuntary—giving rise to legal obligations regardless of the intention or capacity of the actor.

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118. *See* GRIMALDI, *supra* note 110, Nos 62–68; BAUDRY-LACANTINERIE & BONNECASE, *supra* note 115, No. 366.

119. *See* BAUDRY-LACANTINERIE & BONNECASE, *supra* note 115, No 366; CARBONNIER II, *supra* note 45, No. 1213.

120. *See* CARBONNIER II, *supra* note 45, No. 1213; Forti, Quasi-contrats, *supra* note 39, Nos 15–16 (explaining that quasi-contracts are juridical facts, not juridical acts).

121. *See* CODE NAPOLÉON, *supra* note 10, art. 1371; LA. CIV. CODE art. 2293 (1870); Forti, Quasi-contrats, *supra* note 39, No. 17.

The term "quasi-contract" in this descriptive context is perhaps accurate, because it merely describes licit acts that resemble contracts, but are clearly not contracts.

The category of juridical facts is vast. There are numerous licit juridical facts that give rise to legal obligations, but are not quasi-contracts.[122] What sets apart quasi-contracts—as a group of licit juridical facts—from other licit juridical facts is the existence of an unjustified benefit, that is, an intervention in another's affairs or a disposition of wealth without a legal cause.[123] Indeed, *negotiorum gestio* entails the unauthorized, albeit useful, management of another's affairs without legal cause—without mandate. Enrichment without cause, as the name suggests, involves a patrimonial shift that has no legal cause in a juridical act or the law. This common theme of a lack of legal cause is noticeably broader than the traditional "equity theory of quasi-contract," as it also encompasses *negotiorum gestio*.[124]

Quasi-contract is thus properly redefined, pursuant to contemporary civil-law doctrine, as a variety of licit juridical facts giving rise to legal obligations. The voluntary and licit character of these juridical facts resembles contracts, which are veritable juridical acts. However, these juridical facts are not contracts because the obligations of the parties are created independently of

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122. *See* Forti, Quasi-contrats, *supra* note 39, No. 16; le Tourneau, Quasi-contrat, *supra* note 110, No. 12.

123. *See* CARBONNIER II, *supra* note 45, No. 1213; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, Nos 1–2. *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (explaining that the concern of restitution is with unjustified enrichment, that is, an enrichment without legal justification).

124. *See* Forti, Quasi-contrats, *supra* note 39, No. 20. Some French scholars, however, have challenged the idea that *negotiorum gestio* is included in this common theme of an unauthorized benefit. These scholars argue that the law of *negotiorum gestio* might also impose additional obligations on the manager of the affair—e.g., the obligation to provide an account or the obligation to continue the management—that do not necessarily find justification in an unauthorized benefit received by the owner. *See* Forti, Quasi-contrats *supra* note 39, No. 21; REMY CABRILLAC, DROIT DES OBLIGATIONS No. 186 (12th ed. 2016); LIONEL ANDREU & NICOLAS THOMASSIN, COURS DE DROIT DES OBLIGATIONS No. 1724 (2016).

their consent.[125] Redefining quasi-contracts as types of licit juridical facts better explains their characteristic features and is doctrinally sounder that the "fictitious—or implied—contract" theory.

Another common characteristic feature that is present in all quasi-contracts is a benefit without cause. That benefit may take the form of an enrichment or of a useful intervention in one's affairs.[126] Quasi-contract is thus distinguished from contract, because "while contracts organize, in a prospective manner, the justified transfer of wealth between the parties, quasi-contracts correct, in a retrospective manner, an unjustified transfer of wealth among the parties."[127]

On the other hand, quasi-contract is separated from tort, because the source of delictual liability is damage unfairly caused to others, whereas the source of quasi-contractual liability is the benefit unduly received from others.[128] Thus, lack of cause seems to be a

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125. A similar understanding of "implied in law contracts" exists at common law. *See* ALFRED WILLIAN BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT. THE RISE OF THE ACTION OF ASSUMPSIT 491, 504–505 (1975) (explaining that implied in law contracts are not promises and that they lack the element of mutual assent).

126. The French jurist Toullier first expressed the idea that the common feature found in all quasi-contracts is an undue benefit that must be restored. *See* 11 CHARLES-BONAVENTURE-MARIE TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE No. 19 (4th ed., 1824).

127. TERRÉ ET AL., *supra* note 57, No. 1263, at 1332 (emphasis removed).

128. *See* CARBONNIER II, *supra* note 45, No.1213. *See also* YVAINE BUFFELAN-LANORE & VIRGINIE LARRIBAU-TERNEYRE, DROIT CIVIL. LES OBLIGATIONS No. 2011 (16th ed. 2018) ("the quasi-contracts inscribed in the Civil Code proceed from the same idea: to compensate for the advantage received from someone without sufficient justification"); EUGÈNE GAUDEMET, THÉORIE GÉNÉRALE DES OBLIGATIONS 295 (1937); RIPERT, *supra* note 72, No. 111; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, Nos 1–2; Forti, Quasi-contrats, *supra* note 39, Nos 6, 19. *See also* TERRÉ ET AL., *supra* note 57, No. 1263, at 1332 (criticizing the position argued by some French scholars that quasi-contractual liability is based on delict); Forti, Quasi-contrats, *supra* note 39, No. 21, explaining that:

> quasi-contractual obligations are viewed from the side of the debtor—the owner in negotiorum gestio, the recipient of an undue payment, the enriched party in enrichment without cause, whereas delictual obligations are viewed from the side of the creditor—the victim. . .The real difference between quasi-contract and delict or quasi-delict would then be the origin of the impoverishment: spontaneous in one case, imposed in the other.

preferable substitute to the "equity theory of quasi-contract."[129] As a result, quasi-contract is appropriately re-designated from a prescriptive legal concept denoting an independent source of obligations to a descriptive concept connoting a group of various juridical facts, which themselves are sources of legal obligations.[130]

Under this modern understanding, one may distinguish the appropriate legal liability—among a variety of licit juridical facts for the restitution of a benefit that was obtained without a lawful cause—from the remedy of restitution in money or in kind as the case may be.[131] When viewed through this lens, legal systems seem to converge with regard to the law of quasi-contract. Civil-law systems, which originally defined quasi-contract as a substantive concept, are now developing a unified law of restitution. Interestingly, the French and Quebec civil codes have enacted a separate section devoted to "restitution."[132] German and Greek scholars also observe the functional and flexible application of their law of unjustified enrichment, thus placing more emphasis on the restitution itself rather than the enrichment.[133] Conversely, common-law doctrine initially focused on the law of restitution as a remedy. Following the First

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129. *See* Gérard Cornu, *Quasi-contrats (art. 1371 à 1339)*, *in* AVANT-PROJET DE RÉFORME DU DROIT DES OBLIGATIONS ET DU DROIT DE LA PRESCRIPTION 62, 64 (Pierre Catala ed., 2006) ("[I]t is the theory of cause which, in the final analysis, unites the trilogy [*negotiorum gestio*, payment of a thing not due, and enrichment without cause]. . .The presence of the cause in the contract corresponds to the absence of cause in the quasi-contract.").

130. *See* BAUDOUIN & JOBIN, *supra* note 45, No. 538; Forti, Quasi-contrats, *supra* note 39, No. 22 (affirming the usefulness of the idea that quasi-contractual obligations arise when a person benefits from the quasi-contractual fact without being entitled to such benefit).

131. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011) (explaining the different types of "restitution").

132. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352–1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707; Valerio Forti, Régime général des obligations - Restitutions, *in* JurisClasseur Civil, Art. 1352 à 1352-9, Fascicule unique, Jan. 25, 2018 (Fr.) [hereinafter Forti, Restitution]. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303–1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

133. *See* MICHAEL P. STATHOPOULOS, GENIKO ENOCHIKO DIKAIO [GENERAL LAW OF OBLIGATIONS] 1080 (5th ed. 2018) (Greece) [hereinafter STATHOPOULOS, OBLIGATIONS].

Restatement of Restitution, however, the common law is now forming a substantive law of unjust enrichment.[134] This comparative overview of the laws of quasi-contract and restitution is particularly useful when examining the doctrinal and jurisprudential development in mixed jurisdictions, such as Louisiana.

B. Louisiana Law

The Louisiana law of quasi-contract was revised in 1995.[135] Prior to this revision, this area of the law was influenced primarily by French law, although certain common-law concepts, such as the doctrine of quantum meruit, appeared in the Louisiana jurisprudence. Thus, Louisiana inherited the confusion and misunderstandings from both civil and common-law systems.[136]

Following the French model, the Louisiana Civil Code of 1870 identified quasi-contracts that lay between contract and tort.[137] A broad definition of quasi-contract in the Louisiana Civil Code of 1870 comes verbatim from the Code Napoléon. Quasi-contracts are "the lawful and purely voluntary act of a man, from which there results any obligation whatever to a third person, and sometimes a reciprocal obligation between two parties."[138] This definition con-

134. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b (AM. L. INST. 2011) (discussing the conceptual framework on the First Restatement of Restitution, 1937); BIRKS, *supra* note 6, at 307–08 (concluding his thesis for a substantive theory of unjust enrichment as the legal basis for the remedy of restitution); *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(2), at 392 (distinguishing between unjust enrichment as the basis for liability and restitution as the remedy); GOFF & JONES, THE LAW OF UNJUST ENRICHMENT Nos 8-01 to 26-06 (Charles Mitchell et al. eds., 9th ed. 2016) (analyzing several ground for restitution found in the law of unjust enrichment).

135. *See* LA. CIV. CODE arts. 2292–2305 (rev. 1995). 1995 La. Acts, No. 1041 (eff. Jan. 1, 1996).

136. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 15–16.

137. *See* LA. CIV. CODE art. 2292 (1870); LA. CIV. CODE art. 2271 (1825); LA. CIV. CODE p. 318, arts. 1, 3 (1808).

138. LA. CIV. CODE art. 2293 (1870). *Cf.* LA. CIV. CODE art. 2272 (1825); LA. CIV. CODE p. 318, art. 2 (1808). For a critical analysis *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 26–36. For a comparative analysis that emphasizes on codification techniques, *see* Gérard Trudel, *Usefulness of Codification: A*

fused some Louisiana courts, which turned to common-law elements of quasi-contract.[139] Other Louisiana courts developed a doctrine of quasi-contractual quantum meruit, that is, an action for compensation for services rendered in the absence of an enforceable contract.[140] This broad definition of quasi-contract meant that several nominate and perhaps innominate types of quasi-contract existed in Louisiana. Nevertheless, Louisiana jurisprudence steadily identified three principal types of quasi-contract—management of affairs of another (*negotiorum gestio*);[141] payment of a thing not due (*condictio indebiti*);[142] and enrichment without cause (*actio de in rem verso*) which was "inherent but not fully expressed in the Louisiana Civil Code 1870,"[143] and was developed by the jurisprudence of the Louisiana Supreme Court.[144]

The 1995 revision moves away from common-law approaches and realigns Louisiana law with modern civil-law systems. The French model is followed primarily. However, certain German and Greek influences are also noticeable. Importantly, the term "quasi-contract" is eliminated as it served no practical purpose according

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Comparative Study of Quasi-Contract, 29 TUL. L. REV. 311 (1955). Under article 2294 of the Louisiana Civil Code of 1870, quasi-contractual obligations were understood very broadly to include "[a]ll [lawful and purely voluntary] acts, from which there results an obligation without any agreement." LA. CIV. CODE art. 2294 (1870). According to this broad definition, quasi-contractual obligations potentially include all obligations that are not contractual or delictual. Article 2294 has no counterpart in the Code Napoléon. This provision was clearly false and was repealed in 1995.

139. *See, e.g.*, Teche Realty & Investment Co., Inc. v. A.M.F., Inc., 306 So. 2d 432, 436 (La. App. 3d Cir. 1975); Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3d Cir. 1980):

> The essential elements of quasi contracts are a benefit conferred on the defendant by the plaintiffs, an appreciation by defendant of such benefits, and acceptance and retention by the defendant of such benefits under circumstances such that it would be inequitable for him to retain the benefits without payment of the value therefor.

140. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 271–372 (discussing extensively the Louisiana jurisprudence on *quantum meruit* and the confusion caused by the use of this common-law concept).

141. *See* LA. CIV. CODE arts. 2294–2300 (1870).

142. *See id.* arts. 2294, 2301–2314.

143. *See* LA. CIV. CODE art. 2298 cmt. a (2023).

144. *See* Minyard v. Curtis Products, Inc., 205 So 2d 422 (La. 1967); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 351–56.

to the committee.[145] Title V of Book III of the Louisiana Civil Code is renamed "Obligations Arising Without Agreement," consisting of three chapters. Chapter 3 is devoted to torts (offenses and quasi-offenses).[146] The first two chapters occupy "quasi-contract." Chapter 1 is designated as "Management of Affairs (*Negotiorum Gestio*).[147] Chapter 2 is titled "Enrichment Without Cause," containing two sections—Section 1 is named "General Principles" and contains the general remedy for enrichment without cause, and Section 2 is titled "Payment of a Thing Not Owed" and contains provisions on payment of a thing not due (*condictio indebiti*), which is now expressly recognized as a special rule of unjust enrichment.[148]

Meanwhile, the revised Louisiana law of co-ownership specifically governs the relations between co-owners, leaving virtually no room for "innominate" types of quasi-contract in Louisiana. By eliminating the term "quasi-contract" and recognizing *negotiorum gestio* and unjust enrichment as the only available actions, the revised law effectively (and correctly) repealed the false concept of "innominate quasi-contracts." Thus, in modern Louisiana law, "quasi-contract" means *negotiorum gestio* or unjust enrichment (payment of a thing not due or enrichment without cause), and nothing more.[149] Despite the fact that the revised Louisiana Civil Code does not attach any general regime to the notion of quasi-contract, the term still appears sporadically in the civil code provisions. Thus, quasi-contract remains a term of art in Louisiana law. For instance, other sources outline certain common rules to quasi-contracts in matters of dissolution of contracts,[150] damages,[151]

145. *See* Martin, *supra* note 16, at 183–85.
146. *See* LA. CIV. CODE arts. 2315–2324.2 (2023).
147. *See id.* arts. 2292–2297.
148. *See id.* art. 2298; *id.* arts. 2299–2305.
149. *See supra* notes 54, 100, and 110.
150. *See* LA. CIV. CODE art. 2018 (2023) (explaining that recovery of a performance when a contract is dissolved may be made "in contract or *quasi-contract*") (emphasis added).
151. *See id.* art. 2324.1 ("In the assessment of damages in cases of. . .*quasi contracts*, much discretion must be left to the judge or jury") (emphasis added).

choice-of-law,[152] civil procedure,[153] evidence,[154] and liberative prescription.[155]

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152. *See id.* art. 3541 (applying by analogy the choice-of-law principles on conventional obligations to quasi-contractual obligations). *See id.* cmt. c:

> Other more complete conflicts codifications contain separate rules for. . .quasi-contractual obligations. In this state, the relative scarcity of conflicts cases involving such issues militates against the drafting of such special rules. Nevertheless, a general 'catch-all' article is needed to govern these classes of cases. This Article is intended to meet this need.

Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 221 (AM. L. INST. 1977); *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1185–95 (6th ed. 2018). *Cf. also* European Parliament and Council Regulation 864/2007, arts. 10–11, 2007 O.J. (199) 40–49 (containing separate special choice-of-law rules for *negotiorum gestio* and unjust enrichment, which includes payment of a thing not due). *See* Peter Mankowski, *Article 10: Unjust Enrichment* 363–389, *in* 3 EUROPEAN COMMENTARIES OF PRIVATE INTERNATIONAL LAW. ROME II REGULATION (Ulrich Magnus & Peter Mankowski eds., 2019); Lubos Tichy, *Article 11: Negotiorum Gestio* 389–408, *in id.*; Forti, Quasi-contrats, *supra* note 39, No. 25. *See also generally* RESTITUTION AND THE CONFLICT OF LAWS (Francis Rose ed., 1995); HÉLÈNE CHANTELOUP, LES QUASI-CONTRATS EN DROIT INTERNATIONAL PRIVÉ (1998); GEORGE PANAGOPOULOS, RESTITUTION IN PRIVATE INTERNATIONAL LAW (2000); CHRYSSAFO TSOUCA, TO EFARMOSTEO DIKAIO STON ADIKAIOLOGITO PLOUTISMO [THE LAW APPLICABLE TO UNJUSTIFIED ENRICHMENT] (Greece).

153. Courts have held, for instance, that the alternate venue for actions on contract is also proper for actions based on quasi-contract. *See, e.g.*, Tyler v. Haynes, 760 So. 2d 559 (La Ct. App. 3d Cir 2000) (*negotiorum gestio*); Bloomer v. Louisiana Workers' Compensation Copr., 767 So. 2d 712 (La. Ct. App. 1st Cir. 2000) (*negotiorum gestio*); Arc Industries L.L.C. v. Nungesser, 970 So. 2d 690 (La. Ct. App. 3d Cir. 2007) (enrichment without cause). *See* LA. CODE CIV. PROC. art. 76.1 (2023). *Cf.* 42 C.J.S *Implied and Constructive Contracts* § 15 (Oct. 2022 update).

154. Quasi-contract is a juridical fact that can be proven by any means of evidence, including parol evidence. See Forti, Quasi-contrats, *supra* note 39, No. 29.

155. Actions on quasi-contract are personal actions that are subject to the general liberative prescription of ten years. *See* LA. CIV. CODE art. 3499 (2023); Roussel v. Railways Realty Co., 115 So. 742 (La. 1928); Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); Burns v. Sabine River Authority, 736 So. 2d 977, 980 (La. Ct. App. 3d Cir 1999); Kilpatrick v. Kilpatrick, 660 So. 2d 182, 186 (La. Ct. App. 2d Cir. 1995); Smith v. Phillips 143 So. 47 (La. 1932); Lagarde v. Dabon, 98 So. 744, 746 (La. 1923); Julien v. Wayne, 415 So. 2d 540, 542 (La. Ct. App. 1st Cir. 1982); State v. Pineville, 403 So. 2d 49, 55 (La. 1981); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 207–09. *Cf.* Forti, Quasi-contrats, *supra* note 39, Nos 30–32. *See infra* notes 488, 796, 920, and accompanying text. Some of these cases refer to "quasi-contract" without clarifying whether they apply to *negotiorum gestio*, unjust enrichment, or to the older (and false) "innominate" type of quasi-contract. *See supra* notes 100 and 110 (discussing the French category of "innominate quasi-contracts"). Be that as it may, true quasi-contractual actions (*neogotiorum gestio* and unjust enrichment) as well as other legal actions (the former "innominate quasi-contractual actions") would still fall under the general liberative prescription of ten years, because of the residual nature of the general rule, unless these legal

As mentioned, judges and lawyers are also accustomed to using term "quasi-contract," perhaps for lack of a better term.[156] To facilitate continued use of this term, Part I of this Article proposed a redefinition of the term "quasi-contract" as a descriptive term referring to two distinct "licit juridical facts"—*negotiorum gestio* and unjust enrichment.

As the revised rules are now in their third decade of existence, there has been little doctrinal attention to their proper interpretation and application. Meanwhile, Louisiana courts have often confused *negotiorum gestio* with unjust enrichment or have not distinguished the type of unjust enrichment (*condictio indebiti* or *actio de in rem verso*). Based on a redefined concept of quasi-contract under modern civil-law doctrine, Parts II and III of this Article offer a first comprehensive commentary on the revised Louisiana law of quasi-contract—*negotiorum gestio* and unjust enrichment. Because the revision comments to the new provisions often cite to foreign—especially French—doctrine, the discussion will refer to foreign sources when necessary to fill gaps in the Louisiana doctrine and jurisprudence.

III. MANAGEMENT OF AFFAIRS (*NEGOTIORUM GESTIO*)

The management of affairs (*negotiorum gestio*) is the unrequested intervention of a person, the "manager" (*negotiorum gestor*), who acts usefully and appropriately to protect the interests of another person, the "owner" of the affair (*dominus negotiorum*),

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actions are considered delictual in nature. *See* Dean v. Hercules, Inc., 328 So.2d 69, 71–73 (La. 1976) (holding that actions under article 667 of the Louisiana Civil Code are delictual in nature and prescribe in once year).

156. *See* Martin, *supra* note 16, at 184 ("If used uniformly to denote [a description of obligations that arise without agreement and are not contractual], quasi contract presents no doctrinal problem"). *Cf.* Corbin, *supra* note 83, at 544–46; SAMUEL J. STOLJAR, THE LAW OF QUASI-CONTRACT 1–2 (2d ed. 1989); RICHARD M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW 130 (1936); Dan Priel, *In Defence of Quasi-Contract*. Research Paper No. 22/2011, *in* COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY (2011) (all preferring the term "quasi-contract" for lack of a better term).

usually in situations of necessity. Under certain conditions, the manager is entitled to compensation from the owner and also incurs certain obligations toward the owner. These conditions are laid out in the law of *negotiorum gestio*.[157] The classic examples dating back to Roman law are urgent repairs to an absent neighbor's home and the provision of medical care to an unresponsive patient.[158]

Negotiorum gestio is perhaps the most misunderstood part of the already confused law of quasi-contract.[159] Comparativists often argue that *negotiorum gestio* is a purely civilian institution with no common-law counterpart. A manager of affairs would thus be

157. *See* LA. CIV. CODE art. 2292 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1301; QUEBEC CIVIL CODE, *supra* note 13, art. 1482; GERMAN CIVIL CODE, *supra* note 87, art. 677; GREEK CIVIL CODE, *supra* note 88, art. 730. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–22 (AM. L. INST. 2011). *See* 7 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS No. 721 (Paul Esmein ed., 2d ed. 1954) [hereinafter PLANIOL & RIPERT VII]; 6 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS. CONTRATS CIVILS DIVERS, QUASI-CONTRATS, RESPONSABILITÉ CIVILE No. 295 (André Ponsard & Noël Dejean de la Bâtie, 7th ed. 1975) [hereinafter AUBRY & RAU VI]; 15 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME QUATRIÈME No. 2790 (3d ed. 1908) [hereinafter BAUDRY-LACANTINERIE & BARDE XV]; XENOPHON LIVIERATOS, PERI DIOIKISEOS ALLOTRION [ON MANAGEMENT OF AFFAIRS OF ANOTHER] 34–36 (1968) (Greece).

158. These examples date back to Justinian's Digest. Other examples from the Digest include providing necessaries for the support of a family, paying the debt of another to avoid seizure or receiving payment on behalf of another. *See* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). No doubt, these examples were in the minds of the redactors of the Code Napoléon when drafting the provisions on *negotiorum gestio*. *See* 8 PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 453, 466 (1836). Nevertheless, French courts and scholars have developed a doctrine of *negotiorum gestio* that well exceeds these examples. *See* Roger Bout, Quasi-Contrats, Gestion d'affaires, Conditions d'existence, *in* JURISCLASSEUR CIVIL, ART. 1372 À 1375. FASCICULE B-1 (Aug. 1986); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2790; MARTY & RAYNAUD II, *supra* note 98, No. 337; LIVIERATOS, *supra* note 157, at 12–20, 68–69. Some examples from the French jurisprudence include juridical acts (such as making or receiving payments, taking out insurance, hiring a contractor to make urgent repairs, providing suretyship for a debt past due to avoid executory process, chartering an aircraft to repatriate a person in distress, hiring a physician to provide urgent care) as well as material acts (such as making urgent repairs, capturing and returning a runaway animal or providing care to a lost animal, putting out a fire, rescuing persons in danger). *See* STARCK, *supra* note 30, Nos 1769–70.

159. *See, e.g.*, JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 55 (1951) (warning his common-law audience that the topic of *negotiorum gestio* "will seem completely strange").

repudiated by a common-law court as an "officious intermeddler" or "volunteer." This assertion is a generalization and, as such, it is far from accurate.[160] Such sweeping statements fail to consider the legal nature and scope of application of *negotiorum gestio* across legal systems. In fact, the starting point of analysis in both civil and common-law systems is the Roman maxim forbidding intervention in another's affairs.[161] Both systems developed exceptions to this rule. Civil-law systems received the Roman concept of *negotiorum gestio*, but its reception was far from uniform in the major civil-law systems of France and Germany.[162]

Although there is no institution of *negotiorum gestio* at common law, similar concepts are found scattered in several areas of the law, some of which have been recently grouped under the heading of the law of restitution.[163] The following brief comparative discussion illustrates the convergences and divergences of *negotiorum gestio* among legal systems. The comparative conclusions also inform the proper analysis of the revised Louisiana law on this topic.

A. Comparative Law

Negotiorum gestio has direct Roman roots.[164] Although little is known about the early history of this institution, sources indicate

160. *See* Samuel J. Stoljar, *Negotiorum Gestio* Nos 3, 24–25, *in* 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Ernst von Caemmerer & Peter Schlechtriem eds., 2007).

161. *See* DIG. 50.17.1.36 (Ulpian, Ad Sabinum 27) ("It is culpable to involve oneself in an affair with which one has no concern").

162. *See* LIVIERATOS, *supra* note 157, at 9–11.

163. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011) (unrequested emergency intervention to protect another's life or health); *id.* § 21 (unrequested emergency intervention to protect another's property); *id.* § 22 (unrequested emergency intervention to perform another's duty). *But see* BIRKS, *supra* note 6, at 22–24 (arguing that *negotiorum gestio* does not fall within the scope of the law of unjust enrichment and restitution).

164. For a detailed account of the history of *negotiorum gestio*, See LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58–60; Stoljar, *supra* note 160, Nos 26–27; DAWSON, *supra* note 159, at 55–61; John P. Dawson, Negotiorum Gestio: *The Altruistic Intermeddler*, 74 HARV. L. REV. 817, 819–23 (1961); Ernest G. Lorenzen, *The Negotiorum Gestio in Roman and Modern Civil Law,* 13 CORNELL L.Q. 190 (1928) [hereinafter Lorenzen, Negotiorum Gestio]; J. Menalco

that it developed in the courtrooms, when absentee litigants, who often were drafted as soldiers, were represented by a manager (*gestor*) of their affairs.[165] This institution later developed and broadened significantly in the post-classical Roman era as an action to protect the manager's altruistic intervention in the owner's affairs outside the courtroom.[166]

Importantly, the Roman law granted two actions—the direct legal action (*actio negotiorum gestorum directa*) that the owner had against the manager compelling the manager to execute the management prudently and to account to the owner; and the equitable contrary action (*actio negotiorum gestorum contraria*) that the Praetor gave to the manager for compensation for services rendered.[167] The direct action was later based on a "fictitious theory of quasi-contract," whereas the contrary action lay on the basis of the "equity theory of quasi-contract."[168]

This broadened notion of *negotiorum gestio* found its way into the French Civil Code through the writings of Domat and Pothier in the form of a "quasi-mandate."[169] Conversely, the German Pandectists imported a more restricted "agency without authorization" that appeared in the German Civil Code.[170]

Solid, Comment, *Management of the Affairs of Another*, 36 TUL. L. REV. 108 (1961); LIVIERATOS, *supra* note 157, at 9–33; JEROEN KORTMANN, ALTRUISM IN PRIVATE LAW: LIABILITY FOR NONFEASANCE AND NEGOTIORUM GESTIO 99–103 (2005); PETROPOULOS I, *supra* note 48, at 1035–41.

165. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58; Dawson, *supra* note 164, at 819.

166. *See* PETROPOULOS I, *supra* note 48, at 1036–37 (arguing that the institution of *negotiorum gestio* is a product primarily of interpolations to Ulpian's texts that were made at the time of Justinian's compilation).

167. *See* LIVIERATOS, *supra* note 157, at 13–14.

168. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 58-59; KORTMANN, *supra* note 164, at 99–100.

169. *Gestion d'affaires*. *See* CODE NAPOLÉON, *supra* note 10, art. 1372; DOMAT, *supra* note 98, at 573–80; POTHIER, MANDATE *supra* note 64, No. 167; 2 GEORGES RIPERT & JEAN BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 1217 (1957) [hereinafter RIPERT & BOULANGER II].

170. *Geschäftsführung ohne Auftrag*. *See* GERMAN CIVIL CODE, *supra* note 87, § 677. *See supra* note 92.

1. Civil Law

In the French legal tradition, *negotiorum gestio* is the most representative application of the "fictitious contract theory of quasi-contract."[171] French doctrine and jurisprudence steadily characterize this institution as a "quasi-mandate," that is, a legal source of obligations that binds the parties as if there were a mandate.[172] Under the Code Napoléon and the revised French Civil Code, *negotiorum gestio* is subject to the rules of mandate that apply by analogy.[173] French doctrine is careful to note, however, that *negotiorum gestio* remains an autonomous juridical fact, although it does resemble the juridical act of mandate. Thus, the source of the obligations of the parties is the law and not the unilateral will of the manger or the owner.[174] Nevertheless, French doctrine and jurisprudence still require contractual capacity of the manager, even though the source of the obligation is not contractual.[175] One significant consequence of the "quasi-mandate" characterization is that the manager has the power to bind the owner to contracts with third persons.[176] This is a

171. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 53–54. For a detailed discussion of the legal foundation of *negotiorum gestio*, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 66–69.

172. *See* DEMOLOMBE XXXI, *supra* note 63, No. 53; TERRÉ ET AL. *supra* note 57, No. 1279.

173. *See* CODE NAPOLÉON, *supra* note 10, art. 1372; FRENCH CIVIL CODE, *supra* note 11, art. 1301. *Cf.* LA. CIV. CODE art. 2293 (2023).

174. *See* François Goré, *Le fondement de la gestion d'affaires source autonome et générale d'obligations*, RECUEIL DALLOZ [D.] 1953, p. 40; PLANIOL & RIPERT VII, *supra* note 157, No. 725; LIVIERATOS, *supra* note 157, at 12–33; Stoljar, *supra* note 160, Nos 31–36. Some French scholars have characterized *negotiorum gestio* as a unilateral juridical act. *See, e.g.*, JOSSERAND II, *supra* note 85, No. 1448; 1 RENE DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL No. 17, at 46–47 (1923).

175. If the manager lacks capacity, compensation is only available under a theory of unjust enrichment. On the other hand, capacity of the owner is not a requirement for *negotiorum gestio*. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2799–2800; PLANIOL & RIPERT VII, *supra* note 157, No. 729; DEMOLOMBE XXXI, *supra* note 63, No. 94. *But see* AUBRY & RAU VI, *supra* note 157, No. 295, at 440 n.3 (questioning the requirement of capacity for all cases of *negotiorum gestio*).

176. *See* CODE NAPOLÉON, *supra* note 10, art. 1375; FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1486; LA. CIV. CODE art. 2297 (2023).

salient feature of the French model of *negotiorum gestio* that is not found in the German civil-law system.[177]

As a result, *negotiorum gestio* in French law captures a wide variety of unsolicited altruistic acts, potentially including interventions by intermeddlers and other volunteers with "predatory" intentions.[178] French doctrine is aware of this criticism and has attempted to restrict the scope of application to acts that are "useful" and "appropriate," having the express or implied intent of the owner in mind.[179] Furthermore, contemporary French scholars concede that pure altruism cannot be the legal foundation for *negotiorum gestio*.[180] The precise intent of the manager, who might have a personal interest in the affair managed, must be scrutinized carefully.[181] On the contrary, if the manager had a purely gratuitous intent, she should not be able to recover any compensation from the owner.[182]

Other French scholars have posited that *negotiorum gestio* is a subset of the more general doctrine of unjust enrichment.[183] Indeed, it is true that the Roman contrary action enforcing *negotiorum gestio* (*actio negotiorum gestorum contraria*) was a praetorian action to prevent the owner's unjust enrichment.

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177. *See* LA. CIV. CODE art. 2297 cmt. b (2023); AUBRY & RAU VI, *supra* note 157, No. 300.

178. *See* DAWSON, *supra* note 159, at 61–62.

179. *See* AUBRY & RAU VI, *supra* note 157, No. 295; KORTMANN, *supra* note 164, at 103–05.

180. *See* Stoljar, *supra* note 160, No. 19. *See also* MALAURIE ET AL., *supra* note 30, No. 1025 (observing that "encouraging altruism risks encouraging indiscretion, a great social plague; many people have a natural, even unhealthy inclination to take care of others. . .Because philanthropy is often a beautify mask under which selfish interests hide").

181. *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726.

182. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798.

183. *See, e.g.*, Maurice Picard, *La gestion d'affaires dans la jurisprudence contemporaine*, *in* RTDCIV 1922, p. 33. Indirect support for this position can also be found in the text of the revised French Civil Code. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303 ("En dehors des cas de gestion d'affaires. . .celui qui bénéficie d'un enrichissement injustifié au détriment d'autrui. . .") ("Except in cases of management of affairs. . .he who benefits from an unjustified enrichment at the expense of another. . .").

Pothier himself stated that the foundation for this quasi-contract was "natural equity."[184] Nevertheless, *negotiorum gestio* should be kept separate from the actions for unjust enrichment (payment of a thing not due and enrichment without cause).[185] First, *negotiorum gestio* presupposes a voluntary act of the manager and it imposes reciprocal obligations to both parties. Unjust enrichment, however, does not necessarily require any voluntary act of the parties and it gives rise only to one obligation for restitution. Thus, *negotiorum gestio* comes much closer to a quasi-contract (or implied contract at common law) than unjust enrichment. Second, the contrary action brought by the manager against the owner is for compensation for the useful management, with reference to the time the act of management was performed and regardless of whether any benefit from the management was later maintained.[186] Thus, compensation is due to a neighbor who repairs a house even if the house later burns down. Likewise, a physician is entitled to compensation for spontaneous medical aid to a patient who does not survive.[187] Conversely, compensation for enrichment without cause is due only to the extent of the enrichment that subsists when the action is brought.[188] Finally,

184. *See* POTHIER, MANDATE, *supra* note 64, No. 167.

185. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 723; DEMOLOMBE XXXI, *supra* note 63, No. 48; BOUT, *supra* note 27, Nos 247–56.

186. *See* LA. CIV. CODE art. 2292 cmt. e (1995); PLANIOL & RIPERT VII, *supra* note 157, No. 723. In fact, there was no express requirement of the defendant's enrichment in the Roman categories of quasi-contract and in early French civil law. *See, e.g.*, DOMAT, *supra* note 98, at 541 (tutor recovers expenses regardless of minor's enrichment); *id.* at 601 (restoration of a thing not due depends on the nature of the thing as consumable or nonconsumable and resembles the obligations of a borrower from a loan); *id.* at 579 (*negotiorum gestor* recovers regardless of owner's enrichment). *But see* Valerio Forti, Gestion d'affaires. Généralités. Conditions Nos 45–46, *in* JurisClasseur Civil, Art. 1301 à 1301-5. Fascicule 10, Jul. 27, 2020 (Fr.) [hereinafter Forti, Requirements for Negotiorum Gestio] (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

187. *See* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1486.

188. *See* LA. CIV. CODE art. 2298 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 723.

negotiorum gestio holds the manager to a heightened standard of care and potentially imposes liability for breach of the manager's duties. Thus, *negotiorum gestio* is not merely a remedy in restitution. It is a code of behavior, an expression of the principle of good faith and altruism. The action for enrichment without cause (*actio de in rem verso*), on the other hand, is concerned with restitution and is a gap-filling subsidiary action that is brought when no other remedy—including a remedy for *negotiorum gestio*—is available.[189] Therefore, the two institutions are separate in the civil law. Doctrinal attempts to merge *negotiorum gestio* with the *actio de in rem verso* only created confusion in the courts and the doctrine.[190] Although *negotiorum gestio* is inspired by a principle of unjust enrichment in its broader sense, it is unrelated to the more specific actions of payment of a thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*). Common law scholars have also encountered difficulty in accurately explaining liability in unjust enrichment for unrequested interventions.[191] Perhaps a civil-law approach of separating these two institutions would facilitate that discussion.

German legal doctrine in the nineteenth century had espoused the theory of juridical acts and had thus dispelled with the notion of quasi-contract. *Negotiorum gestio* was therefore at odds with the

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189. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Symeonides & Martin, *supra* note 23, at 100, 151.

190. Because the action for enrichment without cause (*actio de in rem verso*) was not expressly recognized in the Code Napoléon, early French scholars attempted to introduce the action either as an abnormal *negotiorum gestio* or an extension of the action for recovery of a payment of a thing not due. Naturally, this only confused the courts. *See* Barry Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law: Part I*, 36 TUL. L. REV. 605, 618–21 (1962) [hereinafter Nicholas I] (discussing the development of a theory of abnormal *negotiorum gestio* (*negotiorum gestio utilis*) in the French jurisprudence); Barry Nicholas, *Unjustified Enrichment in Civil Law and Louisiana Law, Part II*, 37 TUL. L. REV. 49, 49–62 (1962) [hereinafter Nicholas II] (discussing the foundation of enrichment without cause on the basis of several quasi-contractual theories in the early Louisiana jurisprudence). *See infra* note 806.

191. *See* Priel, *supra* note 156 (arguing that in cases of unrequested interventions at times of emergency, the principles of restitution and unjust enrichment are not only unhelpful, but misleading).

German scientific classification of operative facts.[192] Being faithful Romanists, however, German scholars maintained the concept, which was named "agency without authorization" and appeared in the German Civil Code as an independent title next to mandate.[193] In its typical systematic fashion, German doctrine also carefully categorizes types of *negotiorum gestio*. Thus, a "genuine agency without authorization" exists when the manager conducts the affair of another knowing that the affair is foreign and intending to manage it as such.[194] Conversely, a "false agency without authorization" exists when the manager treats the affair as her own although she knows that she is not entitled to do so.[195] The latter category is a tort giving rise to claim for damages that includes disgorgement of profits.[196]

At first blush, the German version of *negotiorum gestio* seems markedly narrower than its French counterpart. Management is authorized only for emergencies, and it must conform with the owner's actual or presumed will.[197] The manager has a duty to notify the owner and to wait for the owner's directions when possible.[198] Importantly, the manager has no power to bind the owner toward third

192. *See* KORTMANN, *supra* note 164, at 106. For a detailed comparative examination of the German law of *negotiorum gestio*, *see* Dawson, *supra* note 164, at 824–43.

193. *See* GERMAN CIVIL CODE, *supra* note 87, § 677; KORTMANN, *supra* note 164, at 106; Stoljar, *supra* note 160, Nos 31, 42.

194. An example is when a person sells a perishable item belonging to her friend for her friend's account. *See* ENNECCERUS & LEHMANN, *supra* note 92, § 298. If the genuine management conforms with the owner's actual or intended wishes and was for the owner's benefit, the manager will be reimbursed for her expenses. Otherwise, the manager who failed to act prudently will be liable to the owner for damages. *See* GERMAN CIVIL CODE, *supra* note 87, §§ 677–686. *See also* Dawson, *supra* note 164, at 824 (preferring the term "pure *negotiorum gestio*").

195. *See* GERMAN CIVIL CODE, *supra* note 87, § 687 para. 2. For example, a person sells her friend's item wanting to keep the price for herself. *See* ENNECCERUS & LEHMANN, *supra* note 92, § 298. *See also* DANNEMANN, *supra* note 86, at 104–105 (preferring the term "unjustified *negotiorum gestio*"); Dawson, *supra* note 164, at 826 (using the term "impure *negotiorum gestio*").

196. *See* DANNEMANN, *supra* note 86, at 104–105.

197. *See* Stoljar, *supra* note 160, No. 43; KORTMANN, *supra* note 164, at 106.

198. *See* GERMAN CIVIL CODE, *supra* note 87, § 681. *Cf.* LA. CIV. CODE art. 2294 (2023).

persons.[199] A closer look, however, may reveal a broader scope of application in certain cases. For instance, incapacity of the manager does not exclude the application of the German provisions on *negotiorum gestio*.[200] Notably, the element of altruism is a salient feature of the German law of *negotiorum gestio*, which gave rise to a "theory of human help."[201]

While no objection can be raised against altruism on moral grounds, the use of pure altruism as a legal basis for compensation might generate questionable results.[202] A well-known and criticized example from the German courts involved a motorist who swerved to avoid a child and was severely injured as a result. The court held that the motorist managed the affair of the child and was awarded compensation for her "expenses" that included her loss.[203]

Negotiorum gestio is thus an independent legal source of obligations—a veritable licit juridical fact. If the conditions for its application are met, the owner has a direct action against the manager for prudent conclusion of the management, and the manager has a contrary action against the owner for compensation. If the conditions are not met, then the owner may have an action in tort against an officious intermeddler, if the manager did not manage the affair to protect the interests of the owner, or if the manager

199. *See* Stoljar, *supra* note 160, No. 43; KORTMANN, *supra* note 164, at 110.

200. *See* GERMAN CIVIL CODE, *supra* note 87, § 682 (providing that a manager with limited capacity may be held liable to the owner in tort and unjust enrichment; however, the manager maintains her action against the owner in *negotiorum gestio*).

201. *Theorie der Menschenhilfe*. Josef Kohler, *Die Menschenhülfe im Privatrecht*, 25 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS 1, 43 (1887); Stoljar, *supra* note 160, No. 18; KORTMANN, *supra* note 164, at 106.

202. *See* Stoljar, *supra* note 160, No. 19 (criticizing the use of pure altruism as the legal basis for a claim of *negotiorum gestio*).

203. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 27, 1962, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 390, 1963 (Ger.). *See* KORTMANN, *supra* note 164, at 110. *See also* Stoljar, *supra* note 160, No. 20 (criticizing this German decision as a dangerous overreach of *negotiorum gestio* into tort law and an imposition of a great financial burden on the recipient of unrequested interventions, and observing that recent German jurisprudence has moved away from a pure altruistic theory of *negotiorum gestio*).

intervened despite the owner's prohibition. Alternatively, the manager might be able to claim restitution for any unjust enrichment that the owner obtained by the manager's services.

2. Common Law

A popular opinion among scholars is that the altruistic institution of *negotiorum gestio* has no place in the individualistic common law.[204] A civil-law manager is thus branded as an "officious intermeddler," "interloper," "busybody," or "volunteer."[205] This is an oversimplified and inaccurate statement of comparative law. Perhaps a more accurate statement of the orthodox position at common law is that the intervenor in another's affairs generally has no action for compensation against the owner of the affair.[206] In other words, the Roman contrary action of the manager against the owner for compensation is not authorized at common law.[207] The validity of this more accurate statement, however, can also be challenged.

Although no special institution called *negotiorum gestio* officially exists at common law, various theories of recovery reach comparable results, especially when the intervention served a public-policy purpose.[208] The main example is the action for compensation

204. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS. ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 448 (1992). *See also* Dawson, *supra* note 164, at 817, 1073; Edward W. Hope, *Officiousness*, 15 CORNELL L.Q. 25 (1929); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Francis D. Rose, *Restitution for the Rescuer*, 9 OXFORD J. LEGAL STUD. 167 (1989); Robert A. Long, Jr., *A Theory of Hypothetical Contract*, 94 YALE L.J. 415 (1984).

205. *See* Stoljar, *supra* note 160, No. 54.

206. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2(3) (AM. L. INST. 2011).

207. *See* Duncan Sheehan, *Negotiorum Gestio: A Civilian Concept in the Common Law?*, 55 INT'L & COMP. L. Q. 253, 260 (2006) (observing that the direct action of the owner against the manager is available in English law, and examining whether the contrary action is also available).

208. *See* DAWSON, *supra* note 159, at 140–41. *See also* KORTMANN, *supra* note 164, at 115–18 (discussing implied contract and agency by necessity as two

of a vessel for rescuing another vessel in distress, under the law of maritime salvage.[209] Another older and less known example concerned unattended burials, importing the Roman *actio funeraria* into the common law.[210] The doctrine of "agency by necessity" is also a candidate for a common-law analogue to *negotiorum gestio*.[211] Cases of agency by necessity originally involved the supply of necessaries and preservation of property in favor of certain persons unable to tend to their affairs.[212] Lastly, unjust enrichment seems to be gaining momentum as a suitable ground for the manager's recovery at common law.[213] This is particularly the case in the United States. The Third Restatement of Restitution and Unjust Enrichment devotes several sections to the restitution for "unrequested intervention," especially in emergency cases of protection of another's life or health, and property.[214] These provisions strongly resemble a civil-law *negotiorum gestio* approach, even though the relevant Restatement comments and notes make no such reference.[215] Interestingly, the manager's recovery under the Restatement—which is

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significant analogues to *negotiorum gestio*); GOFF & JONES, *supra* note 134, Nos 18-01 to 18-71; BURROWS, *supra* note 103, at 469–87.

209. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 21 cmt. e (AM. L. INST. 2011); Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 129–34. *See also* DAWSON, *supra* note 159, at 141 ("Our law of maritime salvage not only permits but encourages intervention by giving it a generous reward. Our good neighbor policy applies on the sea but not on land").

210. *See* Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 118–20.

211. Just like the "implied in law contract" referred to an implied promise in the absence of consent, "agency by necessity" implies authority of the intervenor in certain cases of necessity. *See* Stoljar, *supra* note 160, No. 58; Sheehan, *supra* note 207, at 267–71; KORTMANN, *supra* note 164, at 127–36.

212. The traditional cases involved married women, shipmasters, and holders of negotiable instruments. *See* Stoljar, *supra* note 160, No. 58; KORTMANN, *supra* note 164, at 127–36.

213. *See* Sheehan, *supra* note 207, at 263–67; KORTMANN, *supra* note 164, at 123–27. *But see* BIRKS, *supra* note 6, at 23–24 (endorsing the civil-law view that *negotiorum gestio* does not fall within the purview of unjust enrichment).

214. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011); *id.* § 22 (performance of another's duty). *See also* 2 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 10.1–10.11 (1978 & Suppl.) [hereinafter PALMER II].

215. *See* Stoljar, *supra* note 160, No. 60–65 (commenting on similar provisions in the First Restatement of Restitution).

"measured by the loss avoided or by a reasonable charge for services provided"—might be more generous than a claim for reimbursement that is allowed in most civil-law cases.[216] In any event, common-law lawyers and scholars might turn to Louisiana doctrine to better understand why an unrequested intervention is a distinct case that may not fit well in an unjust enrichment analysis. What is recoverable here is not the enrichment of the beneficiary—whose change of position is irrelevant—but the expense and resources of the intervenor who acted spontaneously and appropriately.

Finally, it should be noted that a civil-law manager is only granted compensation when she is not an "officious intermeddler."[217] On the other hand, a volunteer who is moved by a gratuitous intent to help her neighbor and who did not intend to claim reimbursement has no action for reimbursement against the owner.[218] Regardless of her gratuitous intent, however, a civil-law manager is liable to the owner for the prudent management of the affair either

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216. *Compare* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011) *with* LA. CIV. CODE art. 2297 (2023).

217. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 93–109 (explaining that the requirement of "usefulness" coupled with the altruistic nature of *negotiorum gestio* would disqualify "officious interlopers" from any action for compensation).

218. *See* GERMAN CIVIL CODE, *supra* note 87, § 685. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 21 cmt. c (AM. L. INST. 2011). Gratuitous intent is not presumed. *See* KORTMANN, *supra* note 164, at 105–06. When discussing the topic of *negotiorum gestio*, scholars often refer to good (and bad) Samaritans. *See* Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152 (1999). This reference is certainly accurate with respect to the legal duty to rescue others ("Good Samaritan laws"), which exists in most civil-law jurisdictions (but not in Louisiana), as opposed to common-law jurisdictions. *See* Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U. L. REV. 77, 88–106 (2005). However, *negotiorum gestio* has no direct correlation with the legal duty to rescue. *See* KORTMANN, *supra* note 164, at 105, 108 (observing that a private rescuer's claim for reimbursement under *negotiorum gestio* is independent of the legal duty to rescue). *But see* MALAURIE ET AL., *supra* note 30, No. 1025 (arguing that rescuers should not qualify as *negotiorum gestores* for several reasons: first, because they have a preexisting legal (or moral) duty to rescue, thus their management is not "spontaneous"; second, because they are performing a public policy function of a gratuitous nature rather than a private management of the victim's affair; third, because in some cases rescuers might be mandataries when their intervention was made with the victim's valid consent).

under the law of *negotiorum gestio* or, if the conditions of *negotiorum gestio* are not met, under tort law.[219]

B. Louisiana Law

The revised Louisiana law of *negotiorum gestio* primarily follows the French approach.[220] Thus, the rules of mandate apply by analogy to *negotiorum gestio*.[221] The manager has a fiduciary duty toward the owner to manage the affair under a heightened standard of a prudent administrator.[222] The owner is bound by juridical acts made by the manager with third persons, as if the manager were given an express mandate.[223] Furthermore, the manager must have full legal capacity; otherwise, the rules of *negotiorum gestio* do not apply.[224] Nevertheless, the revised law has borrowed certain elements from German and Greek law. Most notably, the manager's act must conform with the owner's actual or presumed wishes.[225] The manager must give prompt notice to the owner and await instructions, unless there is immediate danger. In other words, the full extent of *negotiorum gestio* is limited to acts that protect the owner or her patrimony from immediate danger.[226]

The coexistence of French and German elements in the revised Louisiana law become apparent in the following overview of the requirements and effects of *negotiorum gestio*.

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219. *See* LA. CIV. CODE art. 2295 & cmt. c (2023).
220. *See* LA. CIV. CODE arts. 2292–2297 (rev. 1995). *Cf.* LA. CIV. CODE arts. 2295–2300 (1870); LA. CIV. CODE arts. 2274–2278 (1825); LA. CIV. CODE p. 318–20, arts. 5–9 (1808); DeBlanc v. Texas, 121 F.2d 774, 775–76 (5th Cir. 1941) (observing that the jurisprudence of the Louisiana Supreme Court on *negotiorum gestio* is in accord with French doctrine); Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana,* 56 LA. L. REV. 257, 277–80 (1995). For an excellent analysis of the pre-revision law, which is still a valuable resource today, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 53–141.
221. *See* LA. CIV. CODE art. 2293 (2023).
222. *See id.* art. 2295.
223. *See id.* art. 2297.
224. *See id.* art. 2296.
225. *See id.* art. 2292.
226. *See id.* art. 2294 & cmt.

1. Requirements

The relationship of the parties—manager and owner—is governed by the provisions on *negotiorum gestio* only when certain requirements are met. If the requirements for *negotiorum gestio* are not met, the rights and obligations of the parties are determined by other legal provisions, such as tort law or unjust enrichment law.[227] Civil-law doctrine enumerates several basic conditions for *negotiorum gestio*. In Louisiana law, the requirements for *negotiorum gestio* fall into two categories—the first set of requirements refers to the act of management of affairs of another; and the second set of requirements refers to the parties (manager and owner).

a. The Act of Management of Affairs of Another

Negotiorum gestio requires one act or several acts of management of the affairs of another person. Civil-law doctrine and jurisprudence construe these terms broadly.[228] "Management" entails voluntary acts of the manager. These acts can be simple material acts, as in the case of a repair of a dilapidated building or putting out a fire.[229]

The manager's acts can also be juridical acts, such as the sale of perishable goods,[230] the hiring of services of third parties to manage

227. *See id.* arts. 2292 cmt. d, 2295 cmt. c, 2296. *See also* Lee v. Lee, 868 So. 2d 316, 319–20 (La. Ct. App. 3d Cir. 2004).

228. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728; AUBRY & RAU, *supra* note 157, No. 295; TERRÉ ET AL., *supra* note 57, No. 1271.

229. *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003) (rescuing a boat from sinking).

230. *See, e.g.*, Leon Godchaux Clothing Co. v. De Buys, 120 So. 539, 637–38 (La. Ct. App. Orl. 1929) (holding that a seller becomes a *negotiorum gestor* of a buyer who rejected the thing, and that seller has the duty to sell the thing if it is perishable); LA. CIV. CODE art. 2608 cmt. b (2023) ("A merchant buyer who proceeds to sell perishable things that he has rejected acts as the seller's negotiorum gestor"); DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES, §§12:10, *in* 24 LOUISIANA CIVIL LAW TREATISE (Oct. 2021 update). *Cf.* UCC § 2-603 (AM. L. INST. & UNIF. L. COMM'N 1977).

the affair,[231] or the payment of the owner's debt.[232] Naturally, when the manager makes juridical acts, she must have the requisite contractual capacity.[233] Frequently, the management will entail a mixture of juridical and material acts.[234] For instance, a neighbor wishing to repair the owner's house, may use her own personal labor and may also contract with third parties to purchase materials or hire workers for the project.[235] The management may consist of a single act or a series of related acts. When the acts are related, the management is deemed indivisible—the manager must complete the entire management as a prudent administrator, if directions from the owner have not been received.[236] If the several acts are separate, then each act constitutes its own management that is separate from the others.[237]

Acts of management routinely involve conservatory acts, that is, necessary acts tending to preserve a thing or prevent its damage or loss.[238] Acts of management are sometimes administrative acts,

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231. *See* LA. CIV. CODE art. 2292 cmt. b (2023); *cf. id.* 2989 cmt. e ("The contract of mandate may involve the performance of material acts as well as the making of juridical acts"). In Roman law, only juridical acts were contemplated as acts of management. By the time of Justinian, civil law jurisprudence and doctrine expanded the definition to also include material acts. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 59.

232. *See* Hebert v. Hollier, 976 So. 2d 1256, 1259 (La. 2007); Armstead v. Roche, 302 So. 3d 539, 542–43 (La. Ct. App. 4th Cir. 2020).

233. *See* LA. CIV. CODE arts. 27, 1918 (2023).

234. The party invoking *negotiorum gestio* carries the burden of proving the acts of management. Material acts can be proved by any means, including testimonial evidence, whereas special rules apply for the proof of juridical acts. *See* LA. CIV. CODE arts. 1831–1853 (2023); AUBRY & RAU VI, *supra* note 157, No. 298; PLANIOL & RIPERT VII, *supra* note 157, No. 734; MARTY & RAYNAUD II, *supra* note 98, No. 343; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 209–26; SAÚL LITVINOFF & RONALD J. SCALISE, JR., THE LAW OF OBLIGATIONS §§ 12.1–12.69, *in* 5 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update) [hereinafter LITVINOFF & SCALISE, OBLIGATIONS].

235. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728; AUBRY & RAU, *supra* note 157, No. 295.

236. *See* LA. CIV. CODE art. 2294 (2023).

237. *See* DEMOLOMBE XXXI, *supra* note 63, No. 107; LIVIERATOS, *supra* note 157, at 59, 71–72.

238. *See* AUBRY & RAU, *supra* note 157, No. 295; TERRÉ ET AL., *supra* note 57, No. 1271. Examples include rescuing, preserving, and safeguarding property, taking out insurance, and satisfying creditors to avoid seizure. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 444; A.N. YIANNOPOULOS & RONALD

which are acts of ordinary management of the property.[239] Because most cases of management involve necessary acts in emergency situations, the period of administration will usually be brief.[240] Acts of disposition of the property, on the other hand, are permitted only if they are necessary and useful.[241]

The "affair" of the owner is usually patrimonial in nature, involving an asset or a right of the owner.[242] The affair can also be extra-patrimonial, as in the case of rescuing a person from harm, or providing medical services to an unconscious patient.[243] When the

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J. SCALISE, JR., PERSONAL SERVITUDES § 3:2, *in* 3 LOUISIANA CIVIL LAW TREATISE (5th ed., Oct. 2022 update) [hereinafter YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES].

239. *See* TERRÉ ET AL., *supra* note 57, No. 1271. Administrative acts exceed conservatory acts, but they are less than an alienation of the property, unless the property is consumable or perishable. Examples include usual and foreseeable expenses, useful improvements, production of income without depletion of the property, collection of natural and civil fruits, insuring the property, and collecting payments. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 444; YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 3:2.

240. *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726; MARTY & RAYNAUD II, *supra* note 98, No. 340.

241. An oft-quoted example is the sale of a perishable thing. *See* LA. CIV. CODE art. 2292 cmt. b (2023). *See* AUBRY & RAU VI, *supra* note 157, No. 295; PLANIOL & RIPERT VII, *supra* note 157, No. 726; TERRÉ ET AL., *supra* note 57, No. 1271. A *negotiorum gestor* does not have the power to establish predial servitudes, but she may acquire servitudes for the benefit of the owner. *See* LA. CIV. CODE arts. 711 cmt. b, 735 cmt. c (2023). Courts have held that a unit operator may act as a *negotiorum gestor* when selling mineral interests of an unleased owner. *See* Taylor v. Woodpecker Corp., 633 So. 2d 1308, 1313 (La. Ct. App. 1st Cir. 1994); Taylor v. Smith, 619 So. 2d 881, 887–88 (La. Ct. App. 3d Cir. 1993); Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022).

242. The term "affair" is also used in the revised law of mandate, and it connotes juridical as well as material acts. *See* LA. CIV. CODE art. 2989 cmt. d (2023); Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1108–09 (1999). The original draft of the proposed revision of the law of *negotiorum gestio* substituted the word "interests," which potentially has a broader meaning. *See* Martin, *supra* note 16, at 190–91. Nevertheless, strictly personal obligations of the owner cannot be performed by another person—including a *negotiorum gestor*—unless the other party agrees to receive such performance. *See* LA. CIV. CODE art. 1766 (2023). *Cf.* MALAURIE ET AL., *supra* note 30, No. 1030.

243. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011). In any event, however, manager's services and expenses must be susceptible of being measured in money. Strictly personal affairs, such as personal family relations, are not susceptible to management by another. *See* Bout, *supra* note 158, No. 116.

affair is patrimonial, the term "owner" must not be misconstrued to mean that only the property right of ownership is contemplated. An "owner" is any person, natural or juridical,[244] whose real or personal rights are involved in the management.[245] Thus, the term "owner" here is broader than the traditional term "owner" in property law.[246] Naturally, the owner of a dilapidated home that is repaired by the manager, or the owner of an animal that is rescued is an "owner."[247] Likewise, a lessee or a usufructuary of land that was urgently repaired are "owners" for the purposes of *negotiorum gestio* when their interests are protected by the management.[248]

Furthermore, an obligee or an obligor of an obligation may become "owners" for the same purposes. Thus, the voluntary payment of the debt of another may qualify as an act of *negotiorum gestio* on the obligor's behalf.[249] Likewise, protecting third parties from an animal may constitute a management of the affair of the owner of the animal who would otherwise be liable for the damage

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244. *See* LA. CIV. CODE art. 24 (2023).

245. *See* AUBRY & RAU VI, *supra* note 157, No. 295; Bout, *supra* note 158, Nos 114–15; LIVIERATOS, *supra* note 157, at 57–60.

246. It should also be clear that *negotiorum gestio* does not give the manager any ownership rights in the thing managed. *See* McGraw v. City of New Orleans, 215 So. 3d 319, 330 (La. Ct. App. 4th Cir. 2017). At best, the manager is a precarious possessor of the owner, who administers the thing on the owner's behalf and who may retain the thing until reimbursed. *See* LA. CIV. CODE art. 3004 (2023); Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016); Ligon v. Angus, 485 So. 2d 142, 145 (La. Ct. App. 2d Cir. 1986); A.N. YIANNOPOULOS & RONALD J. SCALISE, JR., PROPERTY § 12:20, *in* LOUISIANA CIVIL LAW TREATISE (5th ed. Sep. 2022 update) [hereinafter YIANNOPOULOS & SCALISE, PROPERTY]; 3 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 177 (Maurice Picard ed., 2d ed 1952) [hereinafter PLANIOL & RIPERT III].

247. *See* PLANIOL & RIPERT VII, *supra* note 157, at 11 n.6. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 (AM. L. INST. 2011).

248. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 728.

249. *See* Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865); Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 438–40 (La. Ct. App. 1st Cir. 1957). *Cf.* DIG. 3.5.42 (Labeo, Posteriorum Epitomatorum 6); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 22 (AM. L. INST. 2011); PLANIOL & RIPERT VII, *supra* note 157, at 12 n.1. For a detailed comparative analysis, *see* Stoljar, *supra* note 160, Nos 96–133. Conversely, the mistaken payment of the debt of another is recovered pursuant to an action for payment of a thing not due. *See* LA. CIV. CODE art. 2302 (2023). *See infra* notes 720, 838.

in tort.[250]

The affair must be "of another," that is, it must be foreign to the manager.[251] The usual case is when the manager has no real or personal right in the affair managed—e.g., the neighbor has no right in the house she is repairing.[252] Nevertheless, *negotiorum gestio* may also apply when the manager has some interest in the managed affair,[253] as long as the manager has the common interest in mind when managing the affair.[254] For example, the manager may co-own the home that she is repairing or may be a usufructuary.[255]

The rules of *negotiorum gestio* may apply in this case to the extent that other rules—e.g., co-ownership or usufruct—do not govern

250. *See* MARTY & RAYNAUD II, *supra* note 98, No. 339; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 10 n.6; Cour de cassation [Cass.] [supreme court for judicial matters] civ., Mar. 14, 1914, RGAT 1915, p. 464 (Fr.).

251. *See* Burns v. Sabine River Authority, 614 So. 2d 1337, 1340 (La. Ct. App. 3d Cir. 1993); Tate v. Dupuis, 195 So. 810, 813 (La. Ct. App. 1st Cir. 1940).

252. *See* LIVIERATOS, *supra* note 157, at 58.

253. *Cf.* LA. CIV. CODE art. 2991 (2023) (mandate may serve the interest of the principal, the mandatary, or both); Holmes & Symeonides, *supra* note 242, at 1119–21; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 73–74.

254. *See* Illinois Central Gulf Railroad Co. v. Deaton, Inc., 581 So. 2d 714 (La. Ct. App. 4th Cir. 1991); Oliver v. Central Bank, 658 So. 2d 1316, 1322 (La. Ct. App. 2d Cir. 1995); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008). The revised French Civil Code specifically regulates the management of a common affair. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-4 (providing that the personal interest of the manager in the affair managed does not exclude the application of the rules of *negotiorum gestio*, and that in such a case, the obligations of the parties are proportional to their interest in the affair managed).

255. *See* Taylor v. Taylor, 739 So. 2d 256, 261 (La. Ct. App. 1st Cir. 1999) (observing that the legal principles governing co-ownership are generally based on notions of quasi-contract, particularly *negotiorum gestio*); City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860) (residuary co-legatee acted as *negotiorum gestio* when incurring expenses in protecting the joint interest of both legatees); Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980) (co-owner of mineral interests acted as a *negotiorum gestor* when cleaning, plugging, and abandoning wells); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (co-owner acted as *negotiorum gestor* when purchasing insurance for the co-owned property). *See also* TERRÉ ET AL., *supra* note 57, No. 1276. The usufructuary has no authority to act in a representative capacity by virtue of her real right of enjoyment, but her contracts may bind the naked owner under the rules of *negotiorum gestio*. YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, §§ 2:3, 3:5, 3:6; *cf.* Kelley v. Kelley, 3 So. 2d 641 (La. 1941).

the management.[256] A management having the characteristics mentioned above will fall within the scope of *negotiorum gestio* only if the management is spontaneous, useful, and licit.

i. Spontaneous

The management is "spontaneous" when it is purely voluntary, that is, not authorized or imposed by a pre-existing juridical act—e.g., contract of mandate—or by law.[257]

Indeed, if the manager is already authorized or bound by contract or by law to perform the acts of management, then these acts are governed by the contractual or legal source, and not by the rules of *negotiorum gestio*.[258] Revised article 2292 of the Louisiana Civil

256. The relationship between co-owners is governed by the specific provisions of the Louisiana Civil Code on co-ownership as *lex specialis*. *See* McCurdy v. Bloom's Inc., 907 So. 2d 896, 900 (La. Ct. App. 2d Cir. 2005); LA. CIV. CODE art. 800 cmt. (2023). Nevertheless, it is generally accepted that a co-owner may become a *negotiorum gestor* when her acts exceed the authority granted by the provisions on co-ownership. *See* Symeonides & Martin, *supra* note 23, at 99–102, 108 n.197, 115–16, 150–52 (1993); Taylor v. Taylor, 739 So. 2d 256, 261–62 (La. Ct. App. 1st Cir. 1999); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008); LA. CIV. CODE art. 806 cmt. c (2023). Management of community property is also governed by special rules. *See* ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 7:17, *in* 16 LOUISIANA CIVIL LAW TREATISE (5th ed., Dec. 2021 update); LA. CIV. CODE arts. 2334–2369.8 (2023); Mendoza v. Mendoza, 249 So. 3d 67, 72–74 (La. Ct. App. 4th Cir. 2018); Lee v. Lee, 868 So. 2d 316, 318–19 (La. Ct. App. 3d Cir. 2004); Lemoine v. Downs, 125 So. 3d 1115, 1117–19 (La. Ct. App. 3d Cir. 2012).

257. *See* Tyler v. Haynes, 760 So. 2d 559, 536 (La. Ct. App. 3d Cir. 2000) (observing that in *negotiorum gestio* "[t]he management is purely voluntary"). This was the meaning of the terms "voluntary act" and "of his own accord" that appeared the pre-revision law. *See* LA. CIV. CODE arts. 2293, 2295 (1870); CODE NAPOLÉON, *supra* note 10, arts. 1371, 1372. *See* TERRÉ ET AL., *supra* note 57, No. 1274.

258. *See* Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 21 (La. Ct. App. 1st Cir. 2001); Darce v. One Ford Automobile, 2 La. App. 185, 186–87 (La. Ct. App. 1st Cir. 1925); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 92–93; PLANIOL & RIPERT VII, *supra* note 157, No. 727. Determining whether and to what extent a statute authorizes a person to act requires careful interpretation of the authorizing statute. For instance, it has been held that a special statute on "forced pooling" that derogates from the Louisiana Mineral Code authorizes the unit operator to sell mineral interests of all owners, including unleased owners. *See* LA. REV. STAT. § 30:10(A)(3) (2023); Taylor v. Woodpecker Corp., 562 So. 2d 888, 890–92 (La. 1990). Some courts have also held that in cases of "forced pooling" under the same special statute, the legal

Code, following the German approach, uses the term "without authority" to describe a spontaneous act.[259] The term "authority" does not only refer to authority by representation and mandate. Instead, spontaneity ought to be understood broadly to incorporate any act that is not already authorized or imposed by contract or by law.[260]

The act may be authorized or imposed by a pre-existing contract, usually between the owner and the manager.[261] For instance, if the

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relationship between the unit operator (who is authorized to sell mineral interests) and the unleased owners (who were placed in the forced pooling without their consent) is "quasi-contractual." *See* LA. REV. STAT. § 30:10(A)(3) (2023); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); King v. Strohe, 673 So. 2d 1329, 1339 (La. Ct. App. 3d Cir. 1996). Other courts have further held that the unit operator who sells mineral interests of unleased owners under that same special statute may be classified as a *negotiorum gestor* having a legal obligation to account that derives from the special statute and from the provisions on *negotiorum gestio*. *See* LA. REV. STAT. § 30:10(A)(3) (2023); Taylor v. Woodpecker Corp., 633 So. 2d 1308, 1313 (La. Ct. App. 1st Cir. 1994); Taylor v. Smith, 619 So. 2d 881, 887–88 (La. Ct. App. 3d Cir. 1993; Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022). It should be clear that a "forced pooling" relationship is not quasi-contractual merely because the obligations are imposed by law. As discussed *supra* note 99, obligations arising from "forced contracts" do not constitute an innominate category of quasi-contractual obligations—they are separate legal obligations. It is less clear whether the unit operator who sells unleased mineral interests under the special statute does so exclusively as a legal representative who is authorized by the statute and whose rights and obligations are strictly confined within the statute (LA. CIV. CODE art. 2986), or exclusively as an unauthorized *negotiorum gestor* under the provisions of *negotiorum gestio* (LA. CIV. CODE art. 2292), or as a legal representative whose rights and obligations are governed primarily by the statute and also by the rules of co-ownership, mandate or *negotiorum gestio*, and enrichment without cause on all issues for which the statute is silent. *See supra* note 110. *Cf.* LA. CIV. CODE art. 806 cmt. c (2023). *Cf. also* LA. CODE CIV. PROC. art. 3422.1 para. E (2023) (referring to the "laws of negotiorum gestio and mandate applicable to co-owners" of immovables that are damaged by disaster and are subject to a small succession). Answering this question requires careful interpretation of the statute. The interpreter might be pleased to know, however, that the rules of mandate will generally apply to both authorized legal representatives and unauthorized *negotiorum gestors*, to the extent those rules are compatible. *See* LA. CIV. CODE art. 2293 (2023); Holmes & Symeonides, *supra* note 241, at 1101–03.

259. *See* LA. CIV. CODE art. 2292 (2023); Menard v. Hyatt, 773 So. 2d 908, 911 (La. Ct. App. 3d Cir. 2000); Martin, *supra* note 16, at 189–90.

260. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301; GAËL CHANTEPIE & MATHIAS LATINA, LE NOUVEAU DROIT DES OBLIGATIONS. COMMENTAIRE THÉORIQUE ET PRATIQUE DANS L'ORDRE DU CODE CIVIL No 709 (2d ed., 2018).

261. The act of management may also be imposed by a contract between the manager and a third party. Thus, if A hires B to manage C's affair, and if all other requirements for *negotiorum gestio* are met, then the manager of C's affair is A,

parties have agreed to a contract of mandate or other contract of services, then the obligations of the parties are clearly governed by contract law.[262] This does not mean, however, that any pre-existing contract between the parties will automatically exclude the possibility of *negotiorum gestio*.[263] If the management exceeds the duties imposed by a contract, then the requirement of spontaneity may be met.[264] For instance, a mandatary might perform acts of management that exceed her authority.[265] Furthermore, *negotiorum gestio* may apply in circumstances where the pre-existing contract is null

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who acted through her mandatary B. On the other hand, if this triangular relationship between A, B, and C is a third-party beneficiary arrangement (*stipulation pour autrui*), then *negotiorum gestio* ought to be excluded for two reasons. First, A's stipulation toward B in C's favor will only be effective toward C, if C manifests her intent to avail herself of the benefit. LA. CIV. CODE art. 1979 (2023). Thus, the purported "owner" has consented to the management. Second, a third-party beneficiary (C) is only an obligee, whereas an "owner" in a *negotiorum gestio* obligation is also an obligor. *See* J. Denson Smith, *Third Party Beneficiary in Louisiana: The* Stipulation Pour Autrui, 11 TUL. L. REV. 18 (1936). *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 724; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2791 (both discussing the distinction between management of affairs and third-party beneficiary contracts).

262. *See* MJH Operations, Inc. v. Manning, 63 So. 3d 296, 300–01 (La. Ct. App. 2d Cir. 2011); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 90 n.89. The act of the manager may also create a contractual or legal relationship that excludes *negotiorum gestio*. Thus, an act of accepting appointment as trustee must be made in writing and not by other acts of *negotiorum gestio*. Valid acceptance creates a legal relationship of trust. *See* Succession of McLean, 580 So. 2d 935, 941 (La. Ct. App. 2d Cir. 1991).

263. *See* AUBRY & RAU VI, *supra* note 157, No. 295.

264. *See* Eylers v. Roby Motors Co., Inc., 11 La. App. 442, 444 (La. Ct. App. 2d Cir. 1929); Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003). Certain additional duties, however, might be imposed by good faith or by suppletive rules. For instance, the seller may owe a duty in good faith to store the item sold for a brief time or to provide instructions or other services to the buyer. These duties arise from the contract and good faith; they do not constitute acts of *negotiorum gestio*. Conversely, certain additional "spontaneous" acts of one party might constitute breach of the contract and would thus be disallowed. *See* LA. CIV. CODE arts. 1759, 1983, 2054, 2055 (2023); Citizens Discount Co., Inc. v. Royal, 230 So. 2d 857, 859 (La. Ct. App. 4th Cir. 1970); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 92.

265. *See* LA. CIV. CODE art. 3019 (2023); Holmes & Symeonides, *supra* note 242, at 1145–50; TERRÉ ET AL., *supra* note 57, No. 1274; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2797; AUBRY & RAU VI, *supra* note 157, No. 295; DEMOLOMBE XXXI, *supra* note 63, No. 72; LAURENT XX, *supra* note 94, No. 319. If these acts are advantageous despite divergence from authority, they may still fall within the purview of the mandate contract. *See* LA. CIV. CODE art. 3011 (2023).

or if it has expired.[266] Thus, a "depositary" in a null deposit or a continuing depositary after termination of the deposit might qualify as a *negotiorum gestor*.[267]

The act may also be authorized or imposed directly by operation of law. Thus, a parent who has parental authority by law to administer the child's affairs is a legal representative, and not a *negotiorum gestor* of the child or of the other parent.[268] A government authority that is charged with paying child support,[269] performing a rescue operation, or clearing a public road[270] is acting

266. *See* TERRÉ ET AL., *supra* note 57, No. 1274; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2797; DEMOLOMBE XXXI, *supra* note 63, Nos 68–73. *Cf.* Hobbs et al. v. Central Equipment Rentals, Inc., 382 So. 2d 238 (La. Ct. App. 3d Cir. 1980) (granting recovery under a theory of *negotiorum gestio* to the plaintiff who undertook to clean-up and plug an abandoned mineral well, presumably upon termination of contract with defendant). For a critical review of this case, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 89–92.

267. *See* LIVIERATOS, *supra* note 157, at 92–93. Special rules apply for mandate. *See* LA. CIV. CODE arts. 3021, 3024–3032 (2023); Holmes & Symeonides, *supra* note 242, at 1113, 1150–57. Thus, termination of the mandate by the principal—when coupled with the principal's express or tacit opposition to any further intervention—excludes acts of *negotiorum gestio*. On the other hand, a person who acts in good faith under the erroneous belief that she is a mandatary may qualify as a *negotiorum gestor*, if all other requirements are met. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 68–73; 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW PT. 2, No. 2277 (La. State L. Inst. trans., 12th ed. 1959, reprinted 2005) [hereinafter PLANIOL II.2]; RIBERT & BOULANGER II, *supra* note 169, No. 1227; Lorenzen, Negotiorum Gestio, *supra* note 164, at 193; DIG. 3.5.5.pr (Ulpian, Ad Edictum 10). Conversely, fraud or duress against the manager exclude the spontaneous nature of the act. *Cf.* LA. CIV. CODE art. 1761 cmt. b (2023) (explaining that a person acting without outside compulsion by fraud or violence (but not error) is acting "freely").

268. *See* TERRÉ ET AL., *supra* note 57, No. 1274; AUBRY & RAU VI, *supra* note 157, No. 295.

269. *But see* City & County of San Francisco v. Juergens, 425 So. 2d 992, 993–94 (La. Ct. App. 5th Cir. 1983) (holding that the government authority that paid child support acted as a *negotiorum gestor* of the child's father, and not as a *gestor* of the child's affair which was not susceptible of management under *negotiorum gestio*). *See* Martin, *supra* note 16, at 191 (observing correctly that the plaintiff in the preceding case was not entitled to reimbursement as a *negotiorum gestor* because it had a legal obligation to manage the affair; the plaintiff could have recovered however under a special statutory provision or, alternatively, under a theory of enrichment without cause).

270. However, a private towing company who tows and stores a stalled vehicle upon instruction by the police was held to be a *negotiorum gestor. See* Tyler v. Haynes, 760 So. 2d 559 (La Ct. App. 3d Cir 2000) (holding that the state police who cleared the public road of a stalled vehicle had a legal duty to do so and were not a *negotiorum gestor*; however, the private tow company who was instructed

by operation of law, and not as a spontaneous gestor.[271] An executor of a will or an administrator of an estate fulfills her legal duty to defend the will or represent the estate as a court-appointed legal representative, not as a *negotiorum gestor*.[272] A solidary obligor who pays the entire amount of the debt to the obligee does so because she is bound by law or contract. Her right of recourse is found in the law of subrogation, and not *negotiorum gestio*.[273] Likewise, an obligee who has a legal duty to mitigate her damages from breach of contract is not managing the obligor's affairs when she performs such mitigating acts.[274] Finally, fulfillment of a natural

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by the police to tow and store the vehicle was entitled to reimbursement as a *negotiorum gestor* of the owner). Similar results are also reached by French and German courts in identical cases. *See* KORTMANN, *supra* note 164, at 104-05 ("Unless the instructions [by the police] amounted to a public command. . .the breakdown service should be regarded as merely having been informed of the opportunity for rescue, and therefore as having acted voluntarily [and spontaneously]"); *id.* at 109–10 (explaining that German courts have also held in a similar way).

271. Furthermore, persons acting in their official capacity or function, as well as private individuals who voluntarily assist them, do not qualify as *negotiorum gestores*. Thus, a private individual who assisted law enforcement in the pursuit and capture of a thief was deemed to be a mere volunteer assisting the authorities and a manager of the victim's affair. *See* AUBRY & RAU VI, *supra* note 157, No. 295, at 441 n.4; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 10 n.6. In another case, however, a customer of a department store who chased after a thief in response to the owner's plea for help was considered a *negotiorum gestor* and was entitled to compensation for his injury. *See* STARCK, *supra* note 30, No. 1779.

272. *See* Kilpatrick v. Kilpatrick, 660 So. 2d 182, 187 (La. Ct. App. 2d Cir. 1995); Gale v. O'Connor, 9 So. 557, 558–59 (La. 1891). Furthermore, other court-appointed administrators of property are not *negotiorum gestores*. *See* SMP Sales Management, Inc. v. Fleet Credit Corp., 960 F.2d 557, 561 (5th Cir. 1992).

273. *See* LA. CIV. CODE arts. 1804, 1829 (2023). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 85. *But see* Standard Motor Car Co. v. State Farm Mutual Automobile Ins. Co., 97 So. 2d 435 (La. Ct. App. 1st Cir. 1957) (holding that a garageman who voluntarily repaired a damaged vehicle—and was thus subrogated to the rights of the other of the vehicle against the tortfeasor—could recover against the tortfeasor under a theory of *negotiorum gestio*). For a critique of this holding, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 71–72, 86–88. For a comparative analysis of subrogation in the context of suretyship, *see* Johann A. Dieckmann, *The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse,* 27 TUL. EUR. & CIV. L. F. 49 (2012).

274. Interestingly, there is Louisiana jurisprudence holding that a lessor who re-lets the leased property that has been abandoned by lessee is a *negotiorum gestor* of the first lessee for the purposes of mitigation of the damages and, as such,

obligation ought to exclude the application of the rules of *negotiorum gestio*.[275]

ii. Useful

The purpose of the law of *negotiorum gestio* is to balance two conflicting legal policies—the policy encouraging intervention by good neighbors (altruism) and the policy disfavoring interference in the affairs of others (individualism).[276] As a rule, interference is not allowed, unless the management is useful.[277] The utility of the act of management is, therefore, a salient feature of *negotiorum gestio*. The act must "protect the interests" of the owner,[278] that is, the act must be reasonable, appropriate, and beneficial to the owner at the

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lessor must credit any rents received by the second lessee. *See* Overmeyer Co., Inc. v. Blakeley Floor Co., Inc., 266 So. 2d 925, 926–27 (La. App. 4th Cir. 1972); Benton v. Jacobs, 3 La. App. 274, 277 (La. Ct. App. Orl. 1925); Bernstein v. Bauman, 127 So. 374, 377–78 (La. 1930). Although it is true that in the case of an abandoned lease, the lessor has no duty to mitigate, it is questionable whether the lessor who re-lets the abandoned leased property is managing an affair of the first lessee with the intent to benefit that lessee. Perhaps a more suitable legal basis under the revised civil code that would prevent the lessor from collecting rent twice would be enrichment without cause. *See* LA. CIV. CODE art. 2298 (2023); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 78, 104–06.

275. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 85–86. Thus, if the purported "manager" already had a natural obligation to act—e.g., an obligation that was extinguished by prescription or involved another moral duty rising to the level of a natural obligation—and the "manager" acted freely, then the rules of *negotiorum gestio* will not apply. *See* LA. CIV. CODE arts. 1761–1762 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–25; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 2.5, 2.22. *But see* Bout, *supra* note 158, No. 49 (arguing that the manager's preexisting natural obligation to act does not by itself exclude the application of the provisions on *negotiorum gestio*; however, the gratuitous nature of performing a natural obligation would preclude the manager's reimbursement).

276. *See* MARTY & RAYNAUD II, *supra* note 98, No. 337; TERRÉ ET AL., *supra* note 57, No. 1268; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 69–70.

277. *See* Tucker v. Carlin, 14 La. Ann. 734, 735 (1859). *Cf.* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner *whose business has been well-managed* to [compensate the manager]") (emphasis added); CODE NAPOLÉON, *supra* note 10, art. 1375. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 93.

278. *See* LA. CIV. CODE art. 2292 cmt. c (2023) (the management is useful "when there is a necessity or when the owner derives some benefit from the acts of management"). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 726; MAURICE MARUITTE, LA NOTION JURIDIQUE DE GESTION D'AFFAIRES 288 (1930).

time the management was undertaken.[279] Additionally, and importantly, the "interest" of the owner must be determined according to the actual or presumed wishes of the owner.[280] This requirement of utility distinguishes a true *negotiorum gestor* from an officious intermeddler, whose conduct is tortious in the civil law.[281] Indeed, if the intervener acts against the owner's interests, the provisions on *negotiorum gestio* do not apply; instead, the intervener may be liable in tort for any damage caused.[282]

Determining the usefulness of the act of management is therefore crucial. Civilian scholars have debated whether the usefulness is determined objectively, considering what the interests and wishes of a reasonable owner would be, or subjectively, based on the actual interests and wishes of the owner.[283] Early French doctrine tended to prefer the subjective approach,[284] but later scholars correctly adopted a mixed approach.[285] Louisiana law also follows a mixed

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279. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* 2, at 93; TERRÉ ET AL., *supra* note 57, No. 1277; STARCK, *supra* note 30, No. 1771. Usually, but not always, the acts will be urgent and necessary acts that are made by a manager who is unable to contact the owner. *See* MARTY & RAYNAUD II, *supra* note 98, No. 340; PLANIOL & RIPERT VII, *supra* note 157, No. 726.

280. This requirement applies especially in German and Greek civil law. For example, remodeling the owner's house is certainly "beneficial" to the owner and in her "interest;" however, the actual owner or a reasonable owner might have not wished to make such an expense, especially if the expense is luxurious or superfluous. *See* Ioannis Sakketas, Article 730, No. 44, *in* 3 ERMINEIA ASTIKOU KODIKOS. TMEMA 2, TEFCHOS 5 [COMMENTARY ON THE CIVIL CODE. PART 2, ISSUE 5] (Alexandros Litzeropoulos et al. eds., 1957) (Greece); LIVIERATOS, *supra* note 157, at 71.

281. *See* Webre v. Graudnard, 138 So. 433, 434 (La. 1931) ("An 'intermeddler' is one who takes possession 'of a vacant succession, or a part thereof, without being duly authorized to that effect, *with the intent of converting the same to his own use*.'") (emphasis in the original); LA. CIV. CODE art. 1100 (1870).

282. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931). In such a case, *negotiorum gestio* law does not apply. The rights and liabilities of the parties, including the prescriptive period for the action, fall under the law of delictual obligations. *See* LA. CIV. CODE art. 2292 cmt. d. (2023).

283. *See* LIVIERATOS, *supra* note 157, at 72.

284. *See, e.g.*, DEMOLOMBE XXXI, *supra* note 63, No. 185.

285. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 17:

> To say that the affair was well-managed, we must place ourselves at the moment of the management, and assess what a diligent administrator had to do then, taking into account, since it is the affair of another, the owner's habits and intentions that the manager could or should know.

approach—the interest and wishes of the owner are determined objectively,[286] unless the manager knows or should know what are the actual interests and wishes of the owner,[287] which would include the owner's opposition to any acts of management of her affairs.[288]

The obligations of the owner are also determined accordingly. Thus, the owner whose affair was managed appropriately is obligated to reimburse the manager only for necessary and useful expenses,[289] that is, for acts that were necessary or useful for the owner's affair.[290] Conversely, luxurious or exorbitant acts are not protected, unless of course the owner had made known her subjective interest for such acts to the manager.[291]

The determination of the usefulness is made with reference to the time the act is performed,[292] and not necessarily with reference to the result of such acts.[293] Preservation of the benefit is

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286. To make this objective determination, the manager must act as a prudent administrator, taking into account the circumstances of the situation, the nature and extent of the acts to be performed, the presumed wishes of the owner, and good faith. *See* City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860); Sakketas, *supra* note 280, Article 730, No. 4; TERRÉ ET AL., *supra* note 57, No. 1277.

287. *See* TERRÉ ET AL., *supra* note 57, No. 1277. *See* LA. CIV. CODE art. 2292 (2023) ("the manager. . .acts. . .to protect the interest of. . .the owner, *in the reasonable belief that the owner would approve of the action if made aware of the circumstances*") (emphasis added).

288. The owner's opposition excludes *negotiorum gestio*, unless the opposition is illicit. *See infra* note 334–43 and accompanying text.

289. The distinction between necessary, useful, and luxurious expenses is well-known in Louisiana law. *See* LA. CIV. CODE art. 1259 (2023). *See infra* note 424.

290. *See* LA. CIV. CODE art. 2297 (2023); Succession of Mulligan v. Kenny, 34 La. Ann. 50, 51 (1882) (holding that a temporary and ineffective repair of owner's roof was useless); LIVIERATOS, *supra* note 157, at 71–72. *Cf.* LA. CIV. CODE art. 2299 (1870); FRENCH CIVIL CODE, *supra* note 11, art. 1301-2.

291. *See* LIVIERATOS, *supra* note 157, at 71–72.

292. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. Ct. App. 3d Cir. 1980) (focusing on the acts of the manager at the time they were performed); AUBRY & RAU VI, *supra* note 157, No. 297; MARTY & RAYNAUD II, *supra* note 98, No. 340; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 94–97.

293. *See* City of New Orleans v. City of Baltimore, 15 La. Ann. 625, 627 (1860):

> It is very possible that, without [the manager's] services, the [affair managed] might have had the same result; but we think that, considering the magnitude of the interests at stake, the protracted nature of the [affair],

irrelevant.[294] Thus, as noted, the act of repairing a house may qualify as an act of *negotiorum gestio*, even if the house is later destroyed or the repair later becomes useless for the owner.[295] A useless management runs contrary to the owner's interest and does not qualify as *negotiorum gestio*—the owner is not bound to the acts of the manager, unless she ratifies these acts;[296] the putative manager is liable to the owner in tort, and may have a claim against the owner in unjust enrichment for any remaining benefit the owner received.[297]

> the complicated matters under adjudication, and the manner in which the services were performed, the course pursued by the [manager] was deserving of commendation. . .It was the conduct of a prudent 'negotiorum gestor'.

294. This separates *negotiorum gestio* from enrichment without cause. *See* LA. CIV. CODE art. 2292 cmt. e (2023) ("A negotiorum gestor may be entitled to reimbursement of expenses even if the owner has not been enriched at his expense"). *See* TERRÉ ET AL., *supra* note 57, No. 1277; MAZEAUD ET AL., *supra* note 85, No. 683. *But see* Forti, Requirements for Negotiorum Gestio, *supra* note 186, Nos 45–46 (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

295. *Cf.* DIG. 3.5.9, § 1 (Ulpian, Ad Edictum 10). *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2818, at 465 ("To assess the utility or uselessness of the manager's acts we must put ourselves at the moment when the acts were made, without regard to posterior events that may have negated the acts' usefulness"). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1486.

296. *See* LA. CIV. CODE art. 1843 (2023). *See* AUBRY & RAU VI, *supra* note 157, No. 299; PLANIOL & RIPERT VII, *supra* note 157, No. 733; LIVIERATOS, *supra* note 157, at 73. For ratification in general *see further* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–222; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.58–12.60.

297. *See* TERRÉ ET AL., *supra* note 57, No. 1277; On the other hand, a useful management can be faulty, when it commences in the owner's interests, but the manager fails to carry out the management prudently. Such a management still qualifies as *negotiorum gestio*, having the effects discussed herein, including the owner's obligation to fulfill the obligations undertaken by the manager. LA. CIV. CODE art. 2297 (2023). The owner then has recourse against the manager for damages. LA. CIV. CODE art. 2295 (2023); Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (manager acted usefully when purchasing insurance but later committed faulty management when she failed to distribute the insurance proceeds to the owners). Admittedly, the line separating useless and faulty management can become blurred because imprudent acts of the manager might also be useless acts. Be that as it may, French doctrine—and jurisprudence to an extent—observe this distinction. *See* Bout, *supra* note 158, No. 24; Valerio Forti,

iii. Licit

Finally, the act of the management must be licit, that is, not unlawful or *contra bonos mores*. Indeed, an unlawful or immoral act may never qualify as an act of *negotiorum gestio*, even if made to "protect the interest" of the owner.[298] Thus, tortious acts—including self-help—exercised on behalf of another does not constitute *negotiorum gestio*.[299]

As a logical extension of this rule, the owner can never be held vicariously liable for acts of the manager. Thus, if a manager commits a tort while managing the affairs of the owner, the owner is not liable toward the victim.[300]

b. The Parties

The second set of requirements of *negotiorum gestio* refers to the parties—the manager and the owner. The requirements concerning the manager are positive—she must intend to manage the owner's affair and she must have contractual capacity. Conversely, the requirements pertaining to the owner are negative—she must neither authorize nor oppose the management.

*i. The Manager (*Gestor*)*

The manager can be a natural or a juridical person. Usually, the manager is one single person; however, it is possible to have two

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Gestion d'affaires - Effets, No. 6, *in* JurisClasseur Civil, Art. 1301 à 1301-5, Fascicule 20, Jul. 27, 2020 (Fr.) [hereinafter, Forti, Negotiorum Gestio]. *See also infra* notes 360–63 and accompanying text.

298. *See* DEMOLOMBE XXXI, *supra* note 63, No. 123.

299. *See* Madden v. Madden, 353 So. 2d 1079, 1080–81 (La. Ct. App. 2d Cir. 1977); PLANIOL & RIPERT VII, *supra* note 157, No. 732; AUBRY & RAU VI, *supra* note 157, No. 300; TERRÉ ET AL., *supra* note 57, No. 1277; LIVIERATOS, *supra* note 157, at 61.

300. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; AUBRY & RAU VI, *supra* note 157, No. 300. Naturally, the answer would be different if the owner had appointed the manager as her employee. *See, e.g.*, LA. CIV. CODE art. 2320 (2023); Holmes & Symeonides, *supra* note 242, at 1114–15.

managers who jointly manage an affair of another. In such a case, the co-managers are joint obligors and joint obligees vis-à-vis the owner.[301]

The manager must have intent to manage the affair of the owner. This intent contains two elements. First, the manager must know that the affair managed is the affair of another, and not her own exclusive affair.[302] It suffices that the manager is aware that the affair is foreign.[303] Knowledge of the precise identity of the owner is not required.[304] Likewise, error on the part of the manager as to the identity of the owner is inoperative.[305] On the other hand, *negotiorum gestio* is excluded when the purported manager is managing a foreign affair believing that the affair is her own.[306] For example, a "manager" who performs acts of management on certain property in

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301. *See* LA. CIV. CODE art. 3009 (2023) (multiple mandataries are not solidarily liable unless the mandate provides otherwise). *See also* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2809. Likewise, a *negotiorum gestor* who manages the affair of more co-owners is not solidarily liable. *See* 13 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME DEUXIÈME No. 1192 (3d ed. 1907) [hereinafter BAUDRY-LACANTINERIE & BARDE XIII]. However, the rules on solidarity may apply in certain cases. *See, e.g.*, LA. CIV. CODE arts. 1789, 2324 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 123–28; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.25, 7.66.

302. *See* Tate v. Dupuis, 195 So. 810 (La. Ct. App. 1st Cir. 1940); Chance v. Stevens of Leesville, 491 So. 2d 116 (La. Ct. App. 3d Cir. 1986). As discussed *supra* notes 251–56 and accompanying text, an affair is "foreign" even if the manager has some interest in the affair, as in the example of the management by a usufructuary or the management of a co-owned thing by one of the co-owners.

303. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295.

304. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2793; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295. Thus, the rescuer of a motorist who was involved in an accident might be managing the affairs of the injured motorist, the motorist at fault, or their insurers. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, at 13.

305. *See* Kirkpatrick v. Young, 456 So. 2d 622, 625 (La. 1984); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727.

306. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295. Conversely, a person who in good faith intervenes in another's affair under the erroneous belief that she is a mandatary may qualify as a *negotiorum gestor*, if all other requirements are met. *See supra* note 267.

the mistaken belief that she inherited the property has no recourse against the true successor under the provisions on *negotiorum gestio*.[307] Likewise a garageman who repaired an automobile at the request of a thief had no intent to manage the affair of another, and therefore does not qualify as a *negotiorum gestor*.[308] The purported "manager" in such cases may seek compensation against the true owner based on the provisions on enrichment without cause, if the requirements for that action are met.[309] Likewise, a person who pays the debt of another in the mistaken belief that she is the debtor may have recourse against the payee and the true debtor pursuant to the provisions of payment of a thing not due and enrichment without cause.[310]

Second, the manager must intend to manage the affair for the owner's benefit. As explained in the Louisiana jurisprudence, a person does not qualify as a *negotiorum gestor* unless she undertakes the management "with the benefit of [the owner] in mind."[311] Contemporary doctrine and jurisprudence have correctly moved away from the requirement of a purely altruistic intent.[312] A manager will

307. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792.

308. *See* Darce v. One Ford Automobile, 2 La. App. 185, 186–87 (La. Ct. App. 1st Cir. 1925). Additionally, the acts of the garageman were not spontaneous, as they were imposed by the preexisting contract with the thief. *See supra* notes 261–67 and accompanying text.

309. *See* LA. CIV. CODE art. 2298 (2023); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2792; DEMOLOMBE XXXI, *supra* note 63, No. 82; LAURENT XX, *supra* note 94, No. 324.

310. *See* LA. CIV. CODE art. 2302 (2023). *See infra* notes 747–57 and accompanying text.

311. *See* LA. CIV. CODE art. 2292 cmt. c (2023); Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865); Kirkpatrick v. Young, 456 So. 2d 622, 624–25 (La. 1984); MJH Operations, Inc. v. Manning, 63 So. 3d 296, 300–01 (La. Ct. App. 2d Cir. 2011); Johnco, Inc. v. Jameson Interests, 741 So. 2d 867, 869–70 (La. Ct. App. 3d Cir. 1999). *But see* Symeonides & Martin, *supra* note 23, at 100–101 n.156 (observing that when the manager is also a co-owner of the managed property, "the intent to 'benefit' the other co-owners is imputed by law to the acting co-owner, even when he subjectively harbors a contrary intent"); *cf.* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008); Armstead v. Roche, 302 So. 3d. 539, 543 (La. Ct. App. 4th Cir. 2020); Succession of Walker v. Walker, 524 So. 2d 907, 910 (La. Ct. App. 5th Cir. 1988).

312. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 61, 108. A purely selfish intent, however, such as the management of a foreign affair as one's own, excludes the application of the rules of *negotiorum gestio*. *See* LA. CIV. CODE art.

recover her expenses—which may include compensation for her services—if she managed the affair for the interest and the benefit of the owner, with the expectation of reimbursement.[313] A purely gratuitous intent, on the other hand, would exclude any claim of the manager for compensation.[314] Also, interventions prompted by sheer curiosity or meddling do not qualify as acts of *negotiorum gestio*.[315]

Finally, according to long-standing French doctrine, the manager must have capacity to act. The prevailing view is that "capacity" means contractual capacity.[316] This view is also expressed in revised article 2296 of the Louisiana Civil Code, pursuant to which,

> [a]n incompetent person or a person of limited legal capacity may be the owner of the affair, but he may not be a manager. When such a person manages the affairs of another, the rights and duties of the parties are governed by the law of enrichment without cause or the law of delictual obligations.[317]

2292 cmt. d (2023); Woodlief v. Moncure, 17 La. Ann. 241 (1865); Transport Insurance Co. v. Ford Motor Co., 259 So. 2d 606, 609 (La. Ct. App. 4th Cir. 1972); PLANIOL & RIPERT VII, *supra* note 157, No. 727; AUBRY & RAU VI, *supra* note 157, No. 295.

313. *See* AUBRY & RAU VI, *supra* note 157, No. 297. *See also* Lorenzen, Negotiorum Gestio, *supra* note 164, at 193 (explaining that this requirement also applied in Roman law).

314. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016). Such gratuitous intent, however, is not presumed. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798; AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 38–40. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 cmt. c (AM. L. INST. 2011). The manager, however, remains liable to the owner for the prudent management of the affair, even if the manager waived her right to receive reimbursement. The court may enforce the manager's duty less rigorously. *See* LA. CIV. CODE art. 2295 (2013). *See also* DEMOLOMBE XXXI, *supra* note 63, No. 87.

315. *See* American Mfrs. Mut. Ins. Co. v. United Gas Corp., 159 So. 2d 592, 596 (La. Ct. App. 3d Cir. 1964); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 70–71, 84–85.

316. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2799; MARTY & RAYNAUD II, *supra* note 98, No. 342; PLANIOL & RIPERT VII, *supra* note 157, No. 729.

317. LA. CIV. CODE art. 2296 (2023). The same rule applies in France, even though the revised French Civil Code contains no such specific provision. As a result of this rule, an incapable manager who performs acts of management will

Such a requirement does not exist in German and Greek law.[318]

The approach followed in France and Louisiana is problematic. Contractual capacity is required by necessity when the manager is making juridical acts, as when the manager must alienate perishable goods belonging to the owner.[319] Contractual capacity should not be required, however, when the manager is performing material acts, as when the manager herself performs physical acts to protect her neighbor's property. Therefore "capacity" ought to be interpreted more broadly to refer to the manager's general understanding of her actions. This approach actually protects the incapable manager, who thus maintains her action for reimbursement.[320]

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not be reimbursed if there is no subsisting enrichment at the end of the management. *Cf.* LA. CIV. CODE art. 2292 cmt. e (2023).

318. *See* LA. CIV. CODE art. 2296 cmt. b (2023). *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 682; GREEK CIVIL CODE, *supra* note 88, art. 735 (both providing that a manager with limited capacity is responsible toward the owner in tort and unjust enrichment; however, the manager maintains her action against the owner in *negotiorum gestio*).

319. *See* MAZEAUD ET AL., *supra* note 85, No. 676. However, limited capacity is sometimes sufficient when performing certain juridical acts. *See, e.g.*, Hellwig v. West, 2 La. Ann. 1 (1847) (holding that the incapacity of a married woman did not extend to quasi contracts such as *negotiorum gestio*). Furthermore, a mandatary may have limited contractual capacity in some cases. It ought to follow that the manager of another's affairs can possess limited capacity by greater force. *Cf.* LA. CIV. CODE art. 2999 (2023); Holmes & Symeonides, *supra* note 242, at 1133–34.

320. *Cf.* LA. CIV. CODE art. 2300 (1870) (using the term "the use of reason" instead of capacity). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 99–102; MAZEAUD ET AL., *supra* note 85, No. 676; AUBRY & RAU VI, *supra* note 157, No. 295, at 440 n.3; 13 PHILIPPE-ANTOINE MERLIN, RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE 739 (5th ed. 1828); Leland H. Ayres & Robert E. Landry, Comment, *The Distinction Between Negotiorum Gestio and Mandate*, 49 LA. L. REV. 111, 118 (1988). A provision requiring the manager's capacity no longer appears in the revised Quebec Civil Code; however, it is argued that this requirement is implied by reference to the general rules on administration of the affairs of another. *See* BAUDOUIN & JOBIN, *supra* note 45, No. 543. *But see* Trudel, *supra* note 138, at 323 (characterizing the requirement of the manager's capacity "an unfortunate innovation which must be amended as soon as possible" and positing that:

> [t]he only capacity admissible in this matter is the one which characterizes the reasonable man, i.e., the power to distinguish between right and wrong. The same way that this power carries the legal obligation to rectify the consequences of a faulty act, it must also confer the right to demand compensation for certain services rendered without intention of gratuity.

*ii. The Owner (*Dominus*)*

The owner can be a natural or a juridical person. The owner can be one single person or multiple "co-owners"[321] who are joint obligors and obligees vis-à-vis the manager.[322] As noted, the owner need not have the right of ownership. It suffices that the owner has a real or personal right in the affair managed.[323] Substitution of the owner by way of a succession in universal or particular title does not affect the validity of *negotiorum gestio*.[324] A requirement for capacity does not exist for the owner—she can be capable or incapable of making juridical acts.[325]

The owner must be absent when the manager initiates the management of the owner's affair and throughout the management. Absence might be physical, as in the classic example of urgent repairs

321. A mandatary who was hired by one co-owner without authorization by the other co-owner is at the same time mandatary of the former and *negotiorum gestor* of the latter. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

322. Conversely, multiple principals are solidarily bound to their mandatary. *See* LA. CIV. CODE art. 3015 (2023). However, under prevailing French doctrine interpreting the similar provision of article 2002 of the Code Napoléon, this provision is not compatible with the noncontractual nature of *negotiorum gestio*. See BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2819; BAUDRY-LACANTINERIE & BARDE XIII, *supra* note 301, No. 1192; AUBRY & RAU VI, *supra* note 157, No. 297 at 447; DEMOLOMBE XXXI, *supra* note 63, No. 180; LAURENT XX, *supra* note 94, No. 315. Nevertheless, the rules on solidarity may apply in certain cases. *See, e.g.*, LA. CIV. CODE arts. 1789, 2324 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 123–28; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.25, 7.66. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 18 (observing that each owner is liable to the manager for the full amount of the manager's expenses if it is not possible to divide the management).

323. *See supra* notes 244–56 and accompanying text.

324. Transfer of the owner's rights *inter vivos* or *mortis causa* does not affect an ongoing management of affairs. The transferee is the new owner. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2804; MARTY & RAYNAUD II, *supra* note 98, No. 344. The pre-revision law had a specific provision on this issue. *See* LA. CIV. CODE art. 2297 (1870); Martin, *supra* note 16, at 193–94. *See also* LA. CIV. CODE art. 3506(28) (2023) (defining universal and particular successors).

325. Management of affairs does not require the capacity of the owner. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2800; PLANIOL & RIPERT VII, *supra* note 157, No. 729; MARTY & RAYNAUD II, *supra* note 98, No. 342.

to a home while the owner was away and could not be reached.[326] Nevertheless, absence ought to be understood broadly to encompass the owner's actual or legal inability to care for her affairs. The classic example of the provision of medical aid to an unconscious person illustrates this type of absence.[327] Thus, absence basically means that the management occurs without the owner's authorization or opposition.[328]

If the owner—who has contractual capacity—expressly authorizes the manager to act—either before an event occurs or when the necessity for action arises—then the relationship between owner and manager is clearly a contract of mandate.[329] The owner in this case provides an express mandate. The mandate, however, can also be tacit, when the owner—who has contractual capacity—is aware of the acts of management and accepts such acts by not objecting, although she was able to object.[330] Some scholars have argued that the owner's actual knowledge of the management by itself amounts to

326. The owner is not "absent" if communication with the owner was feasible prior to any act of management. Thus, the provisions on *negotiorum gestio* do not apply if the "manager" who made the repairs could have made reasonable efforts to contact the owner beforehand for the owner's directions. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); STARCK, *supra* note 30, No. 1778; BUFFELAN-LANORE & LARRIBAU-TERNEYRE, *supra* note 128, No. 2028. If the owner could not be reached and the management commenced, the manager—who is now a *negotiorum gestor*—remains bound to make reasonable efforts to give notice to the owner and seek instructions. *See* LA. CIV. CODE art. 2294 (2023). *See infra* notes 386–410 and accompanying text.

327. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 (AM. L. INST. 2011).

328. *See* LIVIERATOS, *supra* note 157, at 96.

329. Permission granted by the owner after the management commenced is also a ratification of the acts of the manager. There is no formal requirement for such permission and ratification. *See* LA. CIV. CODE arts. 2989, 2993, 1843 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 733; AUBRY & RAU VI, *supra* note 157, No. 299. However, if the management was made at the request of a third person who had no authority, then the manager is acting as a *negotiorum gestor*. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

330. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2795; TERRÉ ET AL., *supra* note 57, No. 1275. Thus, a passerby who lends a hand to motorist who has been in an accident—but whose capacity is not impaired—with the latter's express or tacit consent is not a *negotiorum gestor,* but a mandatary. *See* STARCK, *supra* note 30, No. 1772 (referring to such a mandate as an "innominate contract to provide assistance").

a tacit mandate that negates any claim based on *negotiorum gestio*.[331] This view is partly true. While in most cases knowledge without objection on the part of the owner may amount to a tacit mandate, it is possible that the owner knows of the acts of management, provides directions to the manager,[332] but is unwilling or legally incapable to engage the manager in a contract of mandate.[333]

On the other hand, the owner's opposition to the management usually excludes the manager's claim of *negotiorum gestio*.[334] Indeed, the rule remains that intervention in a foreign affair is disallowed, unless there is good reason to permit and reward such intervention on the basis of *negotiorum gestio*.

Thus, if the owner forbade any intervention, the purported manager cannot claim spontaneity or usefulness of the act of management.[335] Opposition can be expressed beforehand, in which case management is excluded altogether, or during the management, in which case the management terminates prospectively.[336] Usually, the owner will communicate her opposition to the manager directly.

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331. *See* Ayres & Landry, *supra* note 320, at 121–22; Martin, *supra* note 16, at 191.

332. *See, e.g.*, LA. CIV. CODE art. 2294 (2023) (imposing a duty on the manager to contact the owner and await owner's directions). This provision is based on the German and Greek Civil Codes. Pursuant to German and Greek doctrine, however, providing directions without the intent to engage in a mandate does not negate the *negotiorum gestio* relationship. *See infra* note 386–410 and accompanying text. *But see* Martin, *supra* note 16, at 195–96 (arguing that "Article 2294 obliges a potential manager to obtain an express or, at least, tacit mandate prior to undertaking the management without authority").

333. *See* PLANIOL II.2, *supra* note 267, No. 2273; TERRÉ ET AL., *supra* note 57, No. 1275. This was the rationale of the pre-revision law, which allowed *negotiorum gestio* "whether the owner be acquainted with the undertaking or ignorant of it." LA. CIV. CODE art. 2295 (1870); CODE NAPOLÉON, *supra* note 10, art. 1372. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2795.

334. *See* Tucker v. Carlin, 14 La. Ann. 734, 735 (1859) ("no man ought to be held responsible for the acts of another done to his prejudice *and against his will*") (emphasis added).

335. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); Tucker v. Carlin, 14 La. Ann. 734, 735 (1859); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2796; PLANIOL & RIPERT VII, *supra* note 157, No. 726. *See also* FRENCH CIVIL CODE, *supra* note 11, art. 1301.

336. *See* Woodlief v. Moncure, 17 La. Ann. 241 (1865); Tucker v. Carlin, 14 La. Ann. 734, 735 (1859); Lee v. Lee, 868 So. 2d 316, 319 (La. Ct. App. 3d Cir.

Nevertheless, the owner's knowledge of the opposition will suffice.[337] For instance, the owner may have communicated her opposition publicly or to a third person who then relayed the communication to the manager.[338] Civilian scholars are in agreement as to this negative requirement. German and Greek laws, however, have carved out one crucial exception—if the owner's opposition is illicit or *contra bonos mores*, then it should be ignored.[339] In such a case, management of the owner's affairs over an illicit prohibition is protected under the rules of *negotiorum gestio*.[340]

Thus, a rescuer of a drowning victim will qualify as a *negotiorum gestor* despite the victim's vocal opposition to her rescue.[341] Likewise, the owner's legal capacity ought to be taken into account when assessing his opposition to the intervention. Thus, a hospital might seek recovery for treating a severely injured, delirious patient despite his refusal.[342] French doctrine is also in accord with these exceptions.[343] They ought to apply, therefore, in Louisiana as well.

2004); LIVIERATOS, *supra* note 157, at 96. The manager may be entitled to reimbursement and compensation for useful acts of management made prior to the communication of the owner's opposition.

337. *See* Succession of Mulligan v. Kenny, 34 La. Ann. 50, 51 (1882); Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); *See* Sakketas, *supra* note 280, Article 730, Nos 58–60.

338. *See* Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); LIVIERATOS, *supra* note 157, at 100–101.

339. *See* GERMAN CIVIL CODE, *supra* note 87, § 679; GREEK CIVIL CODE, *supra* note 88, art. 730 para. 2.

340. *See* LIVIERATOS, *supra* note 157, at 102–105; Sakketas, *supra* note 280, Article 730, Nos 61–66; 2 APOSTOLOS GEORGIADES, ENOCHIKO DIKAIO. EIDIKO MEROS [LAW OF OBLIGATIONS. SPECIAL PART] 878–879 (2007) (Greece).

341. *See* WINDSCHEID, *supra* note 92, § 430, at 857; Sakketas, *supra* note 280, Article 730, No. 62.

342. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. d (AM. L. INST. 2011).

343. *See* Bout, *supra* note 158, No. 112; MARUITTE, *supra* note 278, at 285; MALAURIE ET AL., *supra* note 30, No. 1027; STARCK, *supra* note 30, No. 1775.

2. Effects

Negotiorum gestio gives rise to legal obligations[344] that present two characteristic features. First, both parties—manager and owner—incur obligations toward each other. This feature dates back to the distinction in Roman law between the owner's direct action against the manager (*actio negotiorum gestorum directa*) and the contrary action of the manager against the owner (*actio negotiorum gestorum contraria*).[345] The direct action was a legal action compelling the manager to execute the management prudently and to account to the owner. The contrary action lay in equity and authorized the manager's reimbursement and compensation.[346]

The coexistence of the two Roman actions, as further developed under the "equity theory of quasi-contract," continues to permeate the modern law of *negotiorum gestio*, which provides for legal obligations of the manager and the owner.[347] Importantly, these two actions remain distinct in the Louisiana jurisprudence. The owner's action derives from the manager's intervention in her affairs whereas the manager's action depends on the utility of the management.[348]

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344. The obligations arising from *negotiorum gestio* are legal because they stem from a juridical fact. The obligations from *negotiorum gestio* are not conventional obligations precisely because there is no juridical act (e.g., contract) between the parties. *See* LA. CIV. CODE art. 1757 (2023).

345. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 3; PETROPOULOS I, *supra* note 48, at 1038.

346. *See* PETROPOULOS I, *supra* note 48, at 1038.

347. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 3. *But see* Goré, *supra* note 174, at 39 (observing that the obligations of the owner truly derive from *negotiorum gestio* whereas the obligations of the manager result directly from the law).

348. *See* Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 439 n.9 (La. Ct. App. 1st Cir. 1957); Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); Chance v. Stevens of Leesville, Inc., 491 So. 2d 116, 122–24 (La. Ct. App. 3d Cir. 1986). *See also* Bruce V. Schewe & Kent A. Lambert, *Obligations. Developments in the Law*, 54 LA. L. REV. 763, 766–67 (1994). Furthermore, the owner has no action to compel a person who has not intervened to act as *negotiorum gestor*. *Cf.* Hodges v. Southern Farm Bureau Casualty Ins. Co., 411 So. 2d 564, 567 (La. Ct. App. 1st Cir. 1982); LeBlanc v. Audubon Ins. Co., 357 So. 2d 29, 29–30 (La. Ct. App. 3d Cir. 1978).

The second characteristic feature of *negotiorum gestio*—peculiar only to the French civil-law systems, including Louisiana—is that the obligations of the manager and owner might also extend to third parties. This is so because in France and Louisiana *negotiorum gestio* is recognized as a "quasi-mandate," under the "fictitious contract theory of quasi-contract." Thus, under the French Civil Code, the manager is subject to "all the obligations of the mandatary."[349] French doctrine has observed that this statutory directive ought not be taken literally.[350] The Louisiana Civil Code adopted more accurate language when providing that *negotiorum gestio* "is subject to the rules of mandate to the extent those rules are compatible with management of affairs."[351] The civil codes of France and Louisiana do not specify which rules of mandate are indeed compatible with *negotiorum gestio*. Nevertheless, it is clear in both systems that the manager and the owner may incur obligations toward third parties.[352]

a. Obligations of the Manager

The laws of *negotiorum gestio* and, in the absence of a provision in those laws, the laws of mandate impose three obligations on the manager toward the owner[353]—the obligation of diligence, the obligation of perseverance, and the obligation to account.[354] These obligations are fiduciary in nature.[355] They derive from the Roman

349. FRENCH CIVIL CODE, *supra* note 11, art. 1301; *cf.* LA. CIV. CODE art. 2293 (2023).

350. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 4 ("[T]he comparison with the mandate can be interpreted as a simple directive given to the judge inviting him to draw inspiration from the system of this contract when the rules of *negotiorum gestio* themselves are insufficient").

351. *See* LA. CIV. CODE art. 2293 (2023).

352. *See, e.g.*, LA. CIV. CODE art. 2297 cmt. b (2023).

353. *See* TERRÉ ET AL., *supra* note 57, No. 1279.

354. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 5. Interestingly, under Quebec law, the administration of property of others is grouped into one set of provisions that also apply to *negotiorum gestio*. *See* QUEBEC CIVIL CODE, *supra* note 13, arts. 1484, 1299.

355. *Cf.* Holmes & Symeonides, *supra* note 242, 1135 n.264 (discussing the fiduciary nature of mandate and agency in civil and common law); Elizabeth

direct action of the owner against the manager (*actio negotiorum gestorum directa*),[356] which was later based on the legal fiction of a "quasi-mandate."[357]

Under article 2295 of the Louisiana Civil Code, the manager is bound to manage the affair of the owner with prudence and diligence[358] and is answerable for any loss that results from failure to do so.[359] Thus, the manager is liable for faulty management.

French doctrine carefully distinguishes "faulty management" from "useless management."[360] Liability for faulty management under *negotiorum gestio* presupposes that the requirements for *negotiorum gestio* have been met, including the requirement that the management be useful.[361]

If the management is useless, then there is no *negotiorum gestio*—the putative manager may be held liable in tort[362] or unjust

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Carter, *Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees*, 80 LA. L. REV. 661 (2020). A mandatary and, by extension, a *negotiorum gestor* of the owner's property is the owner's precarious possessor. *See* Ligon v. Angus, 485 So. 2d 142, 145 (La. Ct. App. 2d Cir. 1986); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 12:20; PLANIOL & RIPERT III, *supra* note 246, at 177.

356. *See* PETROPOULOS I, *supra* note 48, at 1038.

357. *See* LA. CIV. CODE art. 2295 (1870). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1372.

358. *See* LA. CIV. CODE art. 3001 (2023).

359. *See id.* art. 2295.

360. *See* Bout, *supra* note 158, Nos 21–24; Forti, Negotiorum Gestio, *supra* note 297, No. 6. *See supra* note 297.

361. The distinction between useless and faulty management is not always straightforward. Indeed, an imprudent act, especially at the commencement of the management, can equate to a useless management. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 6; Bout*, supra* note 158, No. 22; Marianne Lecene-Marénaud, *Le rôle de la faute dans les quasi-contrats*, RTDCIV 1994, p. 531. The party claiming *negotiorum gestio* must prove the element of usefulness. When the management is useful but faulty, the provisions on *negotiorum gestio* apply, but the owner can claim damages against the manager. The owner bears the burden of proving the manager's fault. *See* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008) (finding that manager acted usefully when purchasing insurance but later committed faulty management when she failed to distribute the insurance proceeds to the owners); Bout, *supra* note 158, No. 24.

362. *See* LA. CIV. CODE art. 2295 cmt. c (2023) ("The manager may also be liable under the law governing delictual obligations for his fraud, fault, or neglect, but not for slight fault."). *See* LA. CIV. CODE art. 2315 (2023); LA. CIV. CODE art. 3506(13) (1870).

enrichment.[363]

The standard of care of the manager is that of a prudent administrator,[364] which is a fiduciary standard that is higher than the standard for liability in tort.[365] The manager's diligence is determined objectively, with reference to an attentive and careful person taking care of her own affairs.[366] This diligence may also require positive acts of the manager, who is also liable for neglect.[367] Thus, a co-

363. *Cf.* LA. CIV. CODE art. 2296 cmt. c (2023). The distinction between faulty management and useless management has evaded the French courts on certain occasions. *See, e.g.,* Cour de cassation, civ., Jun. 23, 1947, JCP 1948, II, 4325 (holding that the rules of *negotiorum gestio* were inapplicable to the case of a person managing his brother's business without due care and incurred liabilities).

364. *See, e.g.,* LA. CIV. CODE art. 576 cmt. b. (2023). The "prudent administrator" standard in the Louisiana Civil Code and the corresponding *bon père de famille* in the Code Napoléon reflect the Roman law notion of *homo diligens et studiosus paterfamilias*. DIG. 22.3.25.15 (Paul, Quaestionum 3). This standard generally applies in all situations of administration of the property of others. *See* LA. CIV. CODE art. 229 cmt. b (2023); *cf.* QUEBEC CIVIL CODE, *supra* note 13, arts. 1299, 1309, 1484. *See* YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; LA. CIV. CODE art. 2930 cmt. b (2023). *See also* JOEL EMANUEL GOUDSMIT, THE PANDECTS. A TREATISE ON ROMAN LAW, AND UPON ITS CONNECTION WITH MODERN LEGISLATION 213–16 (R. de Tracy Gould trans. 1873) (discussing the various degrees of fault in Roman law); TOOLEY-KNOBLETT & GRUNING, *supra* note 230, §§ 11:8 ("The reason for the higher duty of the true prudent administrator is that such a person holds and uses a thing that belongs to another.").

365. *See* Lococo v. Lococo, 462 So. 2d 893 (La. Ct. App. 4th Cir. 1984); Beavers v. Stephens, 341 So. 2d 1278, 1281 (La. Ct. App. 3d Cir. 1977); Carter, *supra* note 355, at 672–76; TERRÉ ET AL., *supra* note 57, No. 1280. The standard of care is the same in the law of mandate, which applies by analogy to *negotiorum gestio*. *See* LA. CIV. CODE arts. 3001, 2293 (2023); Bayon v. Prevot, 4 Mart. (o.s.) 58, 63, 65 (La. 1815); SAÚL LITVINOFF & RONALD J. SCALISE JR., THE LAW OF OBLIGATIONS. PUTTING IN DEFAULT AND DAMAGES §§ 15.12–15.13, *in* 6 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update) [hereinafter LITVINOFF & SCALISE, DAMAGES]; Holmes & Symeonides, *supra* note 242, at 1136.

366. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 116–18; YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 15:13. *See also* Forti, Negotiorum Gestio, *supra* note 297, No. 9 (explaining that the court is called upon to compare the behavior of the manager with the behavior of a reasonable and attentive person).

367. *See* LA. CIV. CODE art. 2295 & cmt. c (2023); Carbajal v. Bickmann, 187 So. 53 (La. 1939); Lococo v. Lococo, 462 So. 2d 893 (La. Ct. App. 4th Cir. 1984); Beavers v. Stephens, 341 So. 2d 1278, 1281 (La. Ct. App. 3d Cir. 1977); YIANNOPOULOS & SCALISE, PERSONAL SERVITUDES, *supra* note 238, § 4:14; Symeonides & Martin, *supra* note 23, at 107–08.

owner of mineral interests who located a contractor with necessary expertise to perform cleaning, plugging and abandoning of the wells at a minimal cost, used all the care of a prudent administrator.[368] A family friend who, upon request of one co-heir, sold bonds belonging to the estate at fair market value was a prudent *negotiorum gestor* of the other co-heirs.[369] Conversely, a co-owner commits faulty management when she fails to distribute insurance proceeds from a policy that she purchased for all co-owners as their *negotiorum gestor*.[370] A son commits faulty management of his ailing father's assets when he enters into speculative financial transactions rather than selecting a safer investment.[371] Likewise an employee of a store is an imprudent manager when she returns a lost bag to a third person claiming to be the owner without making a reasonable inquiry as to the validity of the third person's assertion of ownership.[372]

Nevertheless, revised article 2295 of the Louisiana Civil Code continues to say that, "The court, considering the circumstances, may reduce the amount due the owner on account of the manager's failure to act as a prudent administrator."[373] This special rule does not introduce a lesser standard of diligence for the manager.[374] Rather, it grants discretion to the court to enforce the liability of the manager "less rigorously," taking into account the gratuitous nature of *negotiorum gestio*, and the similar rule applicable to gratuitous mandate.[375] The court may exercise its discretion "considering the

368. *See* Hobbs v. Central Equipment Rentals, Inc., 382 So. 2d 238, 244 (La. App. 3 Cir. 1980).

369. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931).

370. *See* Netters v. Scrubbs, 993 So. 2d 334, 341 (La. Ct. App. 4th Cir. 2008).

371. *See* Cour de cassation, req., Apr. 13, 1899, D.P. I 1901, p. 233, note Boistel (Fr.).

372. *See* Cour de cassation, 1e civ., Jan. 3, 1985: Gaz. Pal. 1985, 1, p. 90, note Piedelièvre (Fr.); also published in RTDCIV 1985, p. 574, note Mestre.

373. LA. CIV. CODE art. 2295 (2023). A similar provision is found in the French Civil Code. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-1 para. 2 ("The judge may, depending on the circumstances, reduce the compensation owed to the owner of the affair due to the fault or negligence of the manager").

374. *See* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 15.13 (discussing the liability of the gratuitous mandatary and the manager of affairs).

375. *See* LA. CIV. CODE art. 2295 cmt. b (2023); LA. CIV. CODE art. 3003 (1870) (providing that the responsibility of a mandatary with respect to fault is

circumstances" of the case.[376] Article 2295 does not identify exactly what circumstances should be considered. An indication might be drawn from the provision's predecessor—article 2298 of the Louisiana Civil Code of 1870, upon which the current provision is based.[377] Old article 2298, in its second paragraph refers to "circumstances of friendship or of necessity [that] have induced [the manager] to undertake the management."[378] Based on this language, it would seem that the circumstances surrounding the manager's decision to perform the act of the management should weigh more heavily than the circumstances involving the actual fault of the manager.[379] Thus, the compensation due to the owner may be more easily reduced when the affair managed is solely in the owner's interest. Conversely, reducing the compensation due to the owner seems less appropriate when the manager also has an interest in the affair managed.[380]

Under the French Civil Code, the manager "must continue the management until the owner or his successor is able to provide for it."[381] The manager thus has an obligation of perseverance. She must

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"enforced less rigorously" when the mandate is gratuitous); Mechanics' Bank v. Gordon, 5 La. Ann. 604 (1850). *See* LA. CIV. CODE art. 3002 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1995; QUEBEC CIVIL CODE, *supra* note 13, art. 2148.

376. LA. CIV. CODE art. 2295 (2023).

377. *See id.* art. 2295 cmt. a.

378. LA. CIV. CODE art. 2298 (1870). A similar rule was found in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, art. 1374. *See* Webre v. Graudnard, 138 So. 433, 434–35 (La. 1931); Woodlief v. Moncure, 17 La. Ann. 241 (La. 1865) (identifying the *negotiorum gestor* as a friend who took upon himself the management of the affair solely in the interest of the owner).

379. *See, e.g.*, Chance v. Stevens of Leesville, Inc., 491 So. 2d 116, 123 (La. Ct. App. 3d Cir. 1986) (reducing the damages owed by the *negotiorum gestor* who undertook the acts of management as a good-will measure); Ayres & Landry, *supra* note 320, at 113.

380. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 10; CHANTEPIE & LATINA, *supra* note 260, No 721. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-4 (providing that the personal interest of the manager in the affair managed does not exclude the application of the rules of *negotiorum gestio*, and that in such a case the obligations of the parties are proportional to their interest in the affair managed).

381. FRENCH CIVIL CODE, *supra* note 11, art. 1301-1; *cf.* CODE NAPOLÉON, *supra* note 10, arts. 1372–1373.

continue—or, if necessary, complete—the management of the affair in its entirety[382] until the owner or the owner's successor is able to take over.[383] The rationale for imposing this obligation of perseverance is to discourage thoughtless initiatives or superficial interference, and to encourage useful management.[384] The French approach was followed in the Louisiana Civil Code of 1870,[385] and it is still applied today in the revised provisions of the Louisiana Civil Code, with one important exception—revised article 2294. According to this provision, "The manager is bound, when the circumstances so warrant, to give notice to the owner that he has undertaken the management and to wait for the directions of the owner, unless there is immediate danger."[386] As the revision comment explains,[387] this rule is based on similar provisions in the Greek and German civil codes.[388]

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382. The manager must manage the entire affair with all its extensions. *See* CODE NAPOLÉON, *supra* note 10, art. 1372 ("[The manager] must himself be responsible in like manner of all the dependencies of the same affair"); Forti, Negotiorum Gestio, *supra* note 297, No. 13. Incomplete or partial management is faulty management. *See* TERRÉ ET. AL., *supra* note 57, No. 1280.

383. *See* Burns v. Sabine River Authority, 736 So. 2d 977, 979–80 (La. Ct. App. 3d Cir. 1999) (referring to the courts earlier opinion on the same case—614 So. 2d 1337); American Mfrs. Mut. Ins. Co. v. United Gas Corp., 159 So. 2d 592, 596 (La. Ct. App. 3d Cir. 1964). Thus, the manager has an affirmative duty to preserve and to manage the property. Usufructuaries also have a duty to preserve and prudently administer the property. In contrast, a co-owner has a right but not a duty to preserve the property. *See* LA. CIV. CODE arts. 576, 581, 800, 2295, 2369.3 cmt a (2023); Symeonides & Martin, *supra* note 23, at 138–48; Forti, Negotiorum Gestio, *supra* note 297, Nos 11–12.

384. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 11. *See also* MALAURIE ET AL., *supra* note 30, No. 1025 (observing that "it is better to do nothing than to begin [a management of an affair] without finishing it").

385. *See* LA. CIV. CODE arts. 2295–2297 (1870).

386. LA. CIV. CODE art. 2294 (2023). *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003).

387. *See* LA. CIV. CODE art. 2294 rev. cmt. (2023).

388. *See* GREEK CIVIL CODE, *supra* note 88, art. 733 ("The manager is bound to give notice, as soon as he can, to the owner that he has undertaken the management and to wait, if there is no immediate danger from the delay, for the directions from the owner"); GERMAN CIVIL CODE, *supra* note 87, § 681:

> The manager must notify the owner, as soon as feasible, of his undertaking of the management and, if postponement does not entail danger, wait for the decision of the principal. Apart from this, the provisions relating to a mandatary in sections 666 to 668 apply to the duties of the manager with the necessary modifications.

Revised article 2294 of the Louisiana Civil Code imposes two additional obligations on the manager. First, the manager has the duty to notify the owner of the commencement of the management, "when the circumstances so warrant."[389] Greek and German scholars explain that the rationale for this obligation is to secure the management of the affair according to the actual will of the owner, whenever possible.[390] The manager has the legal obligation to notify the owner as soon as possible—at the commencement of the management or, if notification at that time is impossible, at the earliest possible time during the management.[391] The notification must identify the affair managed, but it need not be detailed.[392] There is no formality requirement for the notification—it may be oral and it may be addressed to the owner's legal representative.[393] The manager is relieved of this obligation if, because of the circumstances, notification of the owner is unattainable.[394] This usually occurs when the

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Cf. QUEBEC CIVIL CODE, *supra* note 13, art. 1483 ("Duty to inform – The manager shall as soon as possible inform the principal of the management he has undertaken").

389. LA. CIV. CODE art. 2294 (2023). *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 399–400 (La. Ct. App. 4th Cir. 2003).

390. *See* LIVIERATOS, *supra* note 157, at 123; Sakketas, *supra* note 280, Article 733, No. 1; GEORGIADES, *supra* note 340, at 880; 2 PANAGIOTIS ZEPOS, ENOCHIKON DIKAION. EIDIKON MEROS [LAW OF OBLIGATIONS. SPECIAL PART] 643 (2d ed. 1965) (Greece); Panagiotis Papanikolaou, Article 733, No. 1, *in* 4 ASTIKOS KODIX. ERMINEIA KAT'ARTHRO [CIVIL CODE. ARTICLE-BY-ARTICLE COMMENTARY] (Apostolos Georgiades & Michael Stathopoulos eds. 1999) (Greece); JAN KROPHOLLER, STUDIENKOMMENTAR BGB, § 679–681, No. 1 (4th ed. 2000); Hans Hermann Seiler, BGB § 681, *in* 5 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Kurt Bermann et al. eds., 4th ed. 2005); Hans Carl Nipperdey, BGB § 681, No. 5, *in* 2 STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Franz Brändl et al. eds, 11th ed. 1955); 2 KARL LARENZ, LEHRBUCH DES SCHULDRECHTS. BESONDERER TEIL 354–55 (12 ed. 1981); Johannes Friesecke, BGB § 681, *in* PALANDT BÜRGERLICHES GESETZBUCH KURZKOMMENTAR (Peter Bassenge et al. eds, 37th ed. 1978). *See also* HANS JOACHIM MUSIELAK, GRUNDKURS BGB 326–29 (4th ed. 1994) (discussing the primacy of the owner's real will in comparison with the owner's presumed will).

391. *See* Sakketas, *supra* note 280, Article 733, No. 2.

392. The manager is essentially giving notice of the event that she has undertaken the management of the affair. *See* GEORGIADES, *supra* note 340, at 880.

393. *See* Apostolos Tasikas, Article 733, No. 4, *in* 1 SYNTOMI ERMINEIA TOU ASTIKOU KODIKA [SHORT COMMENTARY OF THE CIVIL CODE] (Apostolos Georgiades ed., 2010).

394. *See* GEORGIADES, *supra* note 340, at 880.

owner or her legal representative cannot be found,[395] or the urgent nature of the affair, which would include an "immediate danger,"[396] does not allow time for notification.[397] Whether notification was possible is a matter of fact to be determined by the special circumstances of the case.[398] Although some scholars are not in agreement, it seems that the owner should not bear the burden the proving that notification was or became possible. Instead, the manager ought to bear the burden of proving that notification was not possible.[399]

If notification is possible, failure of the manager to notify the owner timely does not negate or terminate the *negotiorum gestio* relationship between manager and owner.[400] The manager, however, may be liable to the owner for damages sustained because of the manager's failure[401] to notify the owner timely.[402]

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395. The owner's identity or contact details might be unknown or she may not be reached. *See* Sakketas, *supra* note 280, Article 733, No. 2. The owner might be unconscious, and her family cannot be reached. *See* GEORGIADES, *supra* note 340, at 880.

396. LA. CIV. CODE art. 2294 (2023).

397. *See* GEORGIADES, *supra* note 340, at 880 (referring to the example of an unconscious owner who receives emergency medical treatment from the manager); KROPHOLLER, *supra* note 390, No. 4 (observing that the factors to be taken into consideration are the availability of the owner and the importance of the affair).

398. *See* Gulf Outlet Marina v. Spain, 854 So. 2d 386, 400 (La. Ct. App. 4th Cir. 2003); GEORGIADES, *supra* note 340, at 880; Papanikolaou, *supra* note 390, No. 2.

399. The owner must prove that the manager failed to give timely notification. *See* GEORGIADES, *supra* note 340, at 880; Papanikolaou, *supra* note 390, No. 5. *But see* ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 10; Nipperdey, *supra* note 390, BGB § 681, No. 5 (all arguing that the owner must prove that the notification was or became possible, whereas the manager must prove that an immediate danger rendered notification impossible).

400. The manager maintains her claim of compensation against the owner, if the requirements of *negotiorum gestio* are met. *See* Nipperdey, *supra* note 390, BGB § 681, No. 13; ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 7; Tasikas, *supra* note 393, No. 7.

401. *See* LIVIERATOS, *supra* note 157, at 123; ZEPOS, *supra* note 390, at 643; Sakketas, *supra* note 280, Article 733, No. 7; Tasikas, *supra* note 393, No. 7. The standard of the manager's care is that of a prudent administrator. LA. CIV. CODE art. 2295, 576 cmt. b (2023). *Cf.* LIVIERATOS, *supra* note 157, at 123; Nipperdey, *supra* note 390, BGB § 681, No. 5; Sakketas, *supra* note 280, Article 733, No. 7.

402. The owner's damages may be any loss sustained or cost that the owner would have avoided had she been notified timely and was able to provide directions to the manager. *See* Tasikas, *supra* note 393, No. 7. An interesting example comes from the German jurisprudence. A power company continued to provide

When notification is possible, the manager must notify the owner timely and must await the owner's directions, unless there is immediate danger.[403] The obligation to wait for further directions is only applicable if the management is still ongoing.[404]

If the owner communicates directions to the manager, a careful legal assessment of the owner's communication is warranted. If the owner gave simple directions to the manager without expressing an intent to give a mandate to the manager, or if the owner was legally incapable of providing a mandate, then the parties still remain in a relationship of *negotiorum gestio*—the manager must follow the owner's directions precisely, unless these directions are illicit or impossible.[405] In the latter case, the manager is still charged with managing the affair according to "the reasonable belief that the owner would approve the action"[406] On the other hand, if the owner's directions rise to the level of a mandate, the parties are bound to a contract of mandate[407] that terminates the relationship of

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electricity to a retirement home after the retirement home's electricity provider—who purchased electricity from the power company and resold it to its customers—became insolvent. The power company delayed several weeks to notify the retirement home that it had taken over as the electricity provider. Meanwhile, the retirement home allegedly continued to pay the original provider. The court held that the power company acted as a *negotiorum gestor* for the retirement home and was entitled to compensation for the electricity it provided. The court, however, noted that the manager (power company) failed to notify the owner (retirement home) of the management in a timely fashion. Thus, the manager was liable for any damage that the owner sustained during this delay, which would include the payments made to the insolvent former provider that could not be recovered, if the owner could have proved this loss. Bundesgerichtshof, Jan. 26, 2005, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [NJW-RR] 639, 2005. Later amendments to the German energy legislation have legislatively overruled the German jurisprudence that energy providers can act as *negotiorum gestor*. *See* BGH May 10, 2022, EnZR 54/21, https://perma.cc/RD3A-XZFN (Nov. 1, 2022).

403. *See* LA. CIV. CODE art. 2294 (2023).

404. *See* KROPHOLLER, *supra* note 390, No. 4 (observing that the obligation to wait for the owner's instructions is "without real practical significance. . .because in most cases the management is limited to individual measures taken before the owner can provide directions"); Seiler, *supra* note 390, No. 5.

405. *See* Tasikas, *supra* note 393, No. 5; Sakketas, *supra* note 280, Article 733, No. 9; Nipperdey, *supra* note 390, BGB § 681, No. 5.

406. LA. CIV. CODE art. 2292 (2023).

407. *See* LA. CIV. CODE art. 2989 (2023).

negotiorum gestio.[408] If the owner fails to provide directions, the manger must continue the prudent management of the affair in the interest of the owner, according to the presumed intention of the owner.[409] The manager is released from both obligations to notify the owner and to wait for directions when the delay poses an immediate danger.[410] Finally, the manager has the obligation to account to the owner for the management.[411] This obligation is not provided specifically in the civil code articles on *negotiorum gestio*; however, it derives from the provisions on mandate,[412] which apply

408. The owner's intent to provide a mandate must be determined by the circumstances surrounding the parties' communication. For instance, the owner may have provided a procuration to the manager. LA. CIV. CODE art. 2987 (2023). The owner may have given very detailed instructions that included the making of a juridical act with third persons or the payment of a substantial sum of money. *See* Sakketas, *supra* note 280, Article 733, No. 5; GEORGIADES, *supra* note 340, at 881; Tasikas, *supra* note 393, No. 6; LIVIERATOS, *supra* note 157, 124 n.2. A mandate between the parties may also act as a ratification of the manager's previous acts. Tasikas, *supra* note 393, No. 6; LA. CIV. CODE art. 1843 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 12.58.

409. This means that the manager must act as a prudent administrator, which also includes the obligation to wait for further instructions from the owner if there is no immediate danger and if the affair is not urgent. *See* Nipperdey, *supra* note 390, BGB § 681, No. 5; Sakketas, *supra* note 280, Article 733, Nos 4–5; GEORGIADES, *supra* note 340, at 880; Tasikas, *supra* note 393, No. 5.

410. The immediate danger must concern the person or patrimony of the owner and it may also affect the manager and third persons for whose damage the owner will be held liable *See* LIVIERATOS, *supra* note 157, at 123. For instance, the owner's building might be in danger of collapsing or might catch fire, threatening damage to the neighboring manager and third persons. *See* ZEPOS, *supra* note 390, at 643; GEORGIADES, *supra* note 340, at 881; Sakketas, *supra* note 280, Article 733, No. 6. The danger may be real or merely perceived as real by the manager, as long as the manger's perception is based on good faith. The manager is still entitled to compensation even if the danger was not eventually avoided by the management, if she acted as a prudent administrator. Sakketas, *supra* note 280, Article 732, Nos 2–6; Nipperdey, *supra* note 390, BGB § 680, Nos 1–8. However, if there is no immediate danger, and if the affair is not urgent, the manager must continue to wait for the owner's directions Sakketas, *supra* note 280, Article 733, No. 6 (noting that the manager may not engage in further management simply on the basis that the owner delayed in providing directions).

411. *See* Saint v. Martel, 53 So. 432 (La. 1910); Gaudé v. Gaudé, 28 La. Ann. 181 (1876).

412. *See* LA. CIV. CODE arts. 3003–3009 (2023); Holmes & Symeonides, *supra* note 242, at 1135–37. An obligation to account may also derive from other statutes. For instance, a special statute provides for accounting of a unit operator who sells mineral interests of unleased owners. LA. REV. STAT. § 30:10(A)(3) (2023); Dow Construction, LLC v. BPX Operating Co., 603 F.Supp.3d 442, 447–

by analogy.[413] The obligation to account flows from the fiduciary nature of the relationship between manager and owner.[414] Thus, the manager must provide information to the owner, which includes an account of the management.[415] The manager must turn over to the owner everything that she received by virtue of the management, which might include disgorgement of profits,[416] except sufficient property to pay her expenses.[417] The manager owes interest on the

48 (W.D. La. 2022); Self v. BPX Operating Co., 595 F.Supp.3d 528, 533–37 (W.D. La. 2022).

413. *See* LA. CIV. CODE art. 2293 (2023). A similar approach is followed in other civil-law jurisdictions. *See, e.g.*, FRENCH CIVIL CODE, *supra* note 11, arts. 1301, 1993; QUEBEC CIVIL CODE, *supra* note 13, arts. 1484, 1299, 1301; GERMAN CIVIL CODE, *supra* note 87, § 681 para. 2; GREEK CIVIL CODE, *supra* note 88, art. 734; Forti, Negotiorum Gestio, *supra* note 297, No. 14; Sakketas, *supra* note 280, Article 734, No. 5 (discussing similar rules found in several civil codes).

414. *Cf.* Holmes & Symeonides, *supra* note 242, 1135 n.264 (discussing the fiduciary nature of mandate and agency in civil and common law).

415. *See* LA. CIV. CODE art. 3003 (2023); Holmes & Symeonides, *supra* note 242, at 1136. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; Forti, Negotiorum Gestio, *supra* note 297, No. 15.

416. *See* LA. CIV. CODE arts. 3004, 2293 (2002). In common-law systems, the plaintiff may sometimes pursue a restitution-based disgorgement remedy. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (AM. L. INST. 2011) (opportunistic breach of contract); *id.* § 43 (breach of fiduciary duties); *id.* §§ 49(4) & 51(4)–(5) (conscious wrongdoing); Andrew Kull, *Disgorgement for Breach, the Restitution Interest, and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001); DOBBS & ROBERTS, *supra* note 6, § 4.4(3) (discussing consequential benefits measures of restitution). In civil-law systems, disgorgement of profits is generally not possible under a theory of unjust enrichment, although such claims might be allowed for breach of a fiduciary duty (e.g., *negotiorum gestio* or mandate). *See generally* DISGORGEMENT OF PROFITS: GAIN-BASED REMEDIES THROUGHOUT THE WORLD (Ewoud Hondius & André Janssen eds., 2015). In Louisiana, a remedy of disgorgement of profits may be available in the law of mandate and, by extension, *negotiorum gestio*. *See* LA. CIV. CODE arts. 3004 and 2293 (2002); Carter, *supra* note 355, at 688–89. Disgorgement of profits may also be available in the case of restoration of a payment not due. *See infra* notes 774–76 and accompanying text. Disgorgement of profits, however, is not an available remedy in cases of enrichment without cause. *See infra* notes 908–09 and accompanying text. *But see infra* note 919 and accompanying text. Special statutes may also allow a disgorgement remedy. *See, e.g.*, LA. REV. STAT. §§ 9:2790.5 and 9:2790.6 (2023) (providing a civil remedy to the state to recover profits obtained through the commission of certain criminal offenses).

417. *See* LA. CIV. CODE art. 3004 (2023); Holmes & Symeonides, *supra* note 242, at 1136; Forti, Negotiorum Gestio, *supra* note 297, No. 15. Nevertheless, the manager need not turn over things she received beyond the scope of the management—e.g., gratuities received from third persons in the course of her proper management acts. *See* Sakketas, *supra* note 280, Article 734, No. 5. *Cf.* DIG. 3.5.2

owner's money diverted to the manager's own use.[418] The manager is personally bound for the management.[419] She may appoint her own mandataries, if necessary for the prudent management of the affair, but she is answerable to the owner for the acts of her mandataries.[420]

b. Obligations of the Owner

Under the laws of *negotiorum gestio* and mandate, the owner has two obligations toward the manager—to reimburse expenses and to compensate for damage.[421] These obligations date back to the Roman contrary action of the manager against the owner (*actio negotiorum gestio contraria*),[422] which was founded on equity.[423]

(Gaius, Ad Edictum Provinciale 3) ("[I]t is proper that the manager give an account for his activity and be condemned for whatever he. . .keeps for himself *from these transactions*) (emphasis added).

418. *See* LA. CIV. CODE art. 3005 (2023); Holmes & Symeonides, *supra* note 242, at 1136; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2; Forti, Negotiorum Gestio, *supra* note 297, No. 15. *But see* Webre v. Graudnard, 138 So. 433, 434 (La. 1931) (finding that the *negotiorum gestor* does not owe interest if he had previously tendered payment to owners and the owners refused to accept). The manager is also liable for interest on the owner's money that she actually collected or could have collected as a prudent administrator, taking into consideration the actual or presumed wishes of the owner and the circumstances of the management. For example, the prudent manager will deposit the owner's money that she received during the management—e.g., by selling the owner's perishable goods—in an interest-bearing bank account, unless it was the owner's wishes to keep the money in her personal safe. *See* Sakketas, *supra* note 280, Article 734, No. 4. *Cf.* DIG. 3.5.18.4 (Paul, Ad Neratium 2) ("[the manager] shall hand over not only the principal amount but also the interest received on the owner's money or even interest that [the manager] could have collected"). Unauthorized use of the owner's property beyond the scope of the managed affair constitutes faulty management for which the manager is liable in *negotiorum gestio* and potentially in tort. *See* LA. CIV. CODE art. 2295 cmt. c (2023).

419. *Cf.* LA. CIV. CODE art. 3006 (2023).

420. *Cf. id.* art. 3007; Sakketas, *supra* note 280, Article 730, No. 6. It should be noted that the manager does not appoint "substitutes," as is the case in the law of mandate, because the manager was not chosen by the owner.

421. *See* LA. CIV. CODE arts. 2297, 3012, 3013 (2023); Burckett v. State, 704 So. 2d 1266, 1268 (La. Ct. App. 2d Cir. 1997); Forti, Negotiorum Gestio, *supra* note 297, No. 20.

422. *See* PETROPOULOS I, *supra* note 48, at 1038.

423. *See* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by

The owner must reimburse the manager for all necessary and useful expenses424 that the manager incurred as a *negotiorum gestor*.[425] The manager is entitled to reimbursement for necessary expenses par excellence; it is the usual case that the manager intervened to preserve or protect the owner's affair.[426] The manager is also reimbursed for useful expenses incurred during the management of the affair.[427] Both necessary and useful expenses must be incurred within the framework of a "useful management," considering the necessity and reasonableness of the expense and the actual

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the manager, in his name; to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses"). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1375; DIG. 44.7.5 (Gaius Aureorum 3).

424. The distinction between necessary, useful, and luxurious expenses is well-known in Louisiana law. *See* LA. CIV. CODE art. 1259 (2023):

> Necessary expenses are those which are indispensable to the preservation of the thing. Useful expenses are those which increase the value of the [thing], but without which the [thing] can be preserved. Expenses for mere pleasure are those which are only made for the accommodation or convenience of the owner or possessor of the [thing], and which do not increase its value.

id. art. 527 (2023) (necessary expenses incurred by adverse possessor); *id.* art. 528 (useful expenses incurred by adverse possessor); *id.* art. 581 (necessary expenses incurred by usufructuary); *id.* art. 806 (expenses incurred by co-owner); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11:21.

425. LA. CIV. CODE art. 2297 (2023); CODE NAPOLÉON, *supra* note 10, art. 1375. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 (abandoning the terms "useful and necessary expenses" and instead providing that the owner must reimburse the manager for "expenses incurred in his interest"). French scholars observe, however, that the distinction between useful, necessary, and luxurious expenses still informs the application of the new rule. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21.

426. *See* Succession of Erwin, 16 La. Ann. 132 (1861) (reimbursement of taxes paid by manager); Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985) (co-owner of property may take out insurance for other co-owners as their *negotiorum gestor*); Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, No. 7.

427. *See* LA. CIV. CODE art. 2297 (2002); Moody v. Arabie, 498 So. 2d 1081, 1084–85 (La. 1986); Symeonides & Martin, *supra* note 23, at 151–52. One court recently read article 2297 of the Louisiana Civil Code *in pari materia* with a special statute when allowing a unit operator who sold unleased mineral interests to deduct post production expenses (recoverable under Louisiana Civil Code article 2297) from the proceeds of the sale owed to the owner (owed under the special statute). *See* LA. REV. STAT. § 30:10(A)(3) (2023); Johnson v. Chesapeake Louisiana, LP, 2022 WL 989341 (W.D. La. Mar. 31, 2022); Dow Construction, LLC v. BPX Operating Co., 602 F.Supp.3d 928, 937–38 (W.D. La. 2022); Self v. BPX Operating Co., 595 F.Supp.3d 528, 536 (W.D. La. 2022).

or presumed wishes of the owner.[428] Recovery of these expenses is actionable even if the affair is not managed successfully, as long as no fault is attributed to the manager.[429] The owner owes interest on all these expenses from the date of the expenditure.[430] The manager has a right of retention for repayment of these expenses.[431]

Conversely, luxurious and unreasonable expenses, as well as expenses made in violation of the owner's directions, cannot be recovered under the law of *negotiorum gestio*.[432] Furthermore, the manager is only entitled to reimbursement for the necessary and useful expenses actually incurred; not for future expenses or for the increased value of the owner's property.[433]

The manager might maintain an action in unjust enrichment against the owner for expenses that the manager could not recover under the law of *negotiorum gestio*.[434] Finally, the manager is not

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428. These expenses include attorney fees incurred by the manager in the useful management of the affair. *See* Bank of the South v. Fort Lauderdale Technical College, Inc., 301 F.Supp. 260, 261 (E.D. La. 1969). *See also* Sakketas, *supra* note 280, Article 730, No. 52; *id.*, Article 736 Nos 7 and 9 (observing that a manager who intentionally hinders the gratuitous management of the owner's affair by another is acting against the owner's presumed wishes and is thus not entitled to reimbursement for any expenses).

429. *See* LA. CIV. CODE art. 3012 (2023); *Cf.* DIG. 3.5.21 (Gaius, Ad Edictum Provinciale 3). *But see* Forti, Requirements for Negotiorum Gestio, *supra* note 186, Nos 45–46 (explaining that under French jurisprudence, when the management is conducted in the common interest of the manager and the owner, reimbursement of the manager depends on whether the owner actually received a benefit at the end of the management).

430. *See* LA. CIV. CODE art. 3014 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16; Forti, Negotiorum Gestio, *supra* note 297, No. 22 (explaining that the charging of interest as of the date of the expenditure encourages the altruistic management of another's affairs); Sakketas, *supra* note 280, Article 736, No. 11; Nipperdey, *supra* note 390, BGB § 683, No. 23. *Cf.* DIG. 3.5.18 § 4 (Paul, Ad Neratium 3) ("[The manager] is entitled to. . .interest [he has] paid out or interest [he] could have received on money of [his] own which [he] spent on the other person's business").

431. *See* LA. CIV. CODE art. 3004 (2023).

432. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, No. 7.

433. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 21.

434. *See* LA. CIV. CODE art. 2298 (2023); Lee v. Lee, 868 So. 2d 316, 319 (La. Ct. App. 3d Cir. 2004); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2817; DEMOLOMBE XXXI, *supra* note 63, No. 190. *Cf.* OBLIGATIONENRECHT [OR], CODE DES OBLIGATIONS [CO], CODICE DELLE OBLIGATIONI [CO] [CODE OF OBLIGATIONS] art. 423 para. 3 (2023) (Switz.) ("Where the [manager's] expenses

entitled to reimbursement if she managed the affair with a gratuitous intent, that is, without an intent to recover expenses.[435]

An interesting question is whether the manager is also entitled to a salary or fee for her services. Traditional civil-law doctrine has answered this question in the negative, insisting on the gratuitous nature of *negotiorum gestio*.[436] As an eminent authority has aptly noted, a manager who volunteers her services must not be in a better position than a gratuitous mandatary who was appointed by the principal.[437]

Based on this reasoning, French[438] and Louisiana jurisprudence[439] has steadily refused to grant a remuneration to the manager, as a rule. An ostensible exception to the rule is whenever the manager is a professional acting within her trade and when from the circumstances it can be inferred that both manager and owner should expect that a fee be paid to the manager.[440]

The traditional example from French doctrine and jurisprudence is that of a physician or an attorney who provide emergency services

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are not reimbursed, he has the right of repossession in accordance with the provisions governing unjust enrichment"); Sakketas, *supra* note 280, Article 736, No. 8.

435. *See* Monumental Task Committee, Inc. v. Foxx, 157 F.Supp.3d 573, 595–96 (E.D. La. 2016). Gratuitous intent is not presumed. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2798; AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 38–40; *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 cmt. c. (AM. L. INST. 2011).

436. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 125; AUBRY & RAU VI, *supra* note 157, at 447.

437. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 125.

438. *See*, Forti, Negotiorum Gestio, *supra* note 297, No. 24 (discussing French jurisprudence).

439. *See, e.g.*, Succession of Kernan, 30 So. 239 (La. 1901); Kirkpatrick v. Young, 456 So. 2d 622 (La. 1984); Baron v. Baron, 286 So. 2d 480 (La. Ct. App. 1st Cir. 1973). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127 n.165.

440. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126; AUBRY & RAU VI, *supra* note 157, at 447 (citing French jurisprudence). As explained in the revision comments to the law of mandate, remuneration may be awarded "also in accordance with usages, customary law, or even under the law of enrichment without cause." LA. CIV. CODE art. 3012 cmt. b (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–21 (AM. L. INST. 2011) (providing that restitution for emergency intervention may include payment of a fee).

with no gratuitous intent.[441] This exception also appears in the Louisiana jurisprudence, but under the heading of quantum meruit.[442] Scholars have offered two justifications for this narrow exception. First, a professional who is devoting her time to the management of an affair without a gratuitous intent is technically entitled to a fee as an "expense" she has incurred.[443] Second, and more convincing, the manager is entitled to a fee as a matter of equity. Indeed, if the professional manager is refused a fee, her only recourse would be to recover the lesser of the owner's enrichment or her own impoverishment;[444] such a result would be manifestly unfair and would discourage professionals from providing their emergency services.[445]

Based on the above observations, it seems reasonable to award a fee to the professional manager under certain limited circumstances. However, the onerous character of this management must

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441. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126–27. *See, e.g.*, LA. CODE CIV. PROC. arts. 3171–3174 (2023) (appointment of attorney for absent heirs and legatee). *Cf.* La. State Mineral Bd. v. Albarado, 180 So. 2d 700 (La. 1965) (awarding compensation to an attorney who provided legal services to heirs in the absence of a contract under a theory of quasi-contractual *quantum meruit*). *But see* Kirkpatrick v. Young, 456 So. 2d 622, 624–25 (La. 1984) (dismissing action in *negotiorum gestio* of attorney who provided legal services to additional heirs because attorney was already obligated to act by his contract with heirs who were his clients). Additionally, a person who finds lost property and takes care of it for the unknown owner (e.g., straying livestock or a drifting sailboat) may be entitled to recover the fee she would customarily charge for such services. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 21 (AM. L. INST. 2011).

442. *See* State Mineral Bd v. Albarado, 180 So. 2d 700 at 707 (La. 1965). For a critical review of this decision, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127.

443. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126; AUBRY & RAU VI, *supra* note 157, at 447; Forti, Negotiorum Gestio, *supra* note 297, No. 24.

444. *See* LA. CIV. CODE art. 2298 (2023); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 126.

445. LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 127 n.165. Levasseur noted that allowing a fee to professionals who act as managers within the scope of their trade of profession:

> would encourage professionals to act as gestors. . .However, there may exist a risk that such a rule would encourage interference by professionals at too high a cost to principals. Nevertheless, by applying the requirement of usefulness of the management, the courts ought to be able to avoid this consequence.

be considered by the court when enforcing the manager's obligation to act as a prudent administrator.[446] The owner is liable to compensate the manager for any loss she has sustained as a result of the management.[447] This obligation to indemnify is drawn from the law of mandate.[448] The manager is entitled to damages for loss involving her patrimony[449] and for injuries sustained in the course of the management.[450] However, the manager's compensation may be reduced or excluded if the manager's own fault contributed to her loss,[451] or if she failed to take reasonable steps to mitigate the loss.[452]

In all of the above obligations of the owner toward the manager, it should be noted that the manager bears the burden of proving the

446. *See* LA. CIV. CODE art. 2295 cmt. b (2023).

447. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 25. The owner's liability is strict—no fault of the owner is required; however, the owner is not liable for fortuitous events. *See* Sakketas, *supra* note 280, Article 736, No. 12.

448. *See* LA. CIV. CODE art. 3013 (2023); Holmes & Symeonides, *supra* note 242, at 1138. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2, para. 2 (providing that the owner "compensates [the manager] for damages he has suffered as a result of his management").

449. The owner is also bound toward the manager to perform the manager's personal obligations that the manager contracted as prudent administrator. Thus, the manager has a direct action against the owner for performance of these obligations or for damages. *See* LA. CIV. CODE art. 3010 (2023); Holmes & Symeonides, *supra* note 242, at 1137–38; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 129.

450. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* 2, at 128–29. In one case, the plaintiff witnessed an auto accident and rescued the driver of one of the vehicles. The driver, being in a temporarily deranged state, assaulted the plaintiff. The plaintiff brought a delictual action against both drivers and was awarded damages from the other driver who was at fault for the accident. *See* Lynch v. Fisher, 34 So. 2d 514 (La. Ct. App. 2d Cir. 1948), *modified*, 41 So. 2d 692 (La. Ct. App. 2d Cir. 1949). A more suitable and straightforward ground for recovery in this case would be the law of *negotiorum gestio*. *See* Edward A. Kaplan, Comment: *Recovery by the Rescuer*, 28 LA. L. REV. 609, 611, 624 (1968); *Cf.* Forti, Negotiorum Gestio, *supra* note 297, No. 25 (discussing the relevant French jurisprudence on this issue); KORTMANN, *supra* note 164, at 142–49 (surveying the common-law cases of recovery by rescuers under tort law doctrine). *See also* Martin, *supra* note 16, at 190 n.52 (observing that the Louisiana courts have resorted to tort theories when considering recovery by a rescuer of human life).

451. *See* LA. CIV. CODE arts. 3013 cmt. b, 2003 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33. *Cf.* KORTMANN, *supra* note 164, at 144–46 (discussing the contributory negligence of the rescuer in common-law tort doctrine).

452. *See* LA. CIV. CODE art. 2002 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 10.1–10.22.

elements of *negotiorum gestio*, as well as the nature and extent of her expenses and damages. The owner can raise defenses involving the lack of the elements of *negotiorum gestio*—especially his contrary directions to the manager—or the manager's comparative fault.[453] If the affair managed is in the common interest of the manager and the owner, then the expenses or damages are allocated in proportion to the interests of the parties.[454]

c. Obligations to Third Persons

Perhaps the most salient effect of *negotiorum gestio* as a "quasi-mandate" in the French legal tradition is that it imposes obligations on the manager and the owner toward third persons with whom the manager contracted as a *negotiorum gestor*.[455] The Code Napoléon did not fully regulate the contours of the parties' relationship with third persons.[456] French doctrine and jurisprudence developed the

453. *See* Hartford Ins. Co. of Southeast v. Stablier, 476 So. 2d 464, 466–67 (La. Ct. App. 1st Cir. 1985); Bryan Properties of Shreveport, LLC v. Keith D. Peterson & Co., Inc., 2011 WL 13243817, at *2 (W.D. La. Aug. 30, 2011); Forti, Negotiorum Gestio, *supra* note 297, No. 21; Sakketas, *supra* note 280, Article 736, Nos 17–19.

454. *Cf.* LA. CIV. CODE art. 806 (2023). The revised French Civil Code addresses this issue specifically. FRENCH CIVIL CODE, *supra* note 11, art. 1304-2 ("[T]he burden of commitments, expenses and damages is shared in proportion of the interests of each in the common affair"). *See* Forti, Negotiorum Gestio, *supra* note 297, Nos 23, 26.

455. *See* Succession of Kernan, 30 So. 239, 243–44 (La. 1901). As noted, under the German approach, *negotiorum gestio* and mandate are clearly distinguishable institutions, even though certain provisions governing mandate apply to *negotiorum gestio* by analogy. GERMAN CIVIL CODE, *supra* note 87, §§ 681, 683; GREEK CIVIL CODE, *supra* note 88, arts. 734, 736; *cf.* LA. CIV. CODE art. 2297 cmt. b (2023). Thus, the manager lacks the authority to bind the owner in juridical acts with third persons. The owner may only be bound if she ratifies the manager's act. GERMAN CIVIL CODE, *supra* note 87, §§ 177–185; GREEK CIVIL CODE, *supra* note 88, arts. 229–239. In Roman law, the third person who transacted with the manager had a direct action against the manager, but was also granted an *actio de in rem verso* against the owner. DIG. 15.3.3 § 2 (Ulpian, Ad Edictum 29). *See* Sakketas, *supra* note 280, Article 737, Nos 13–14.

456. The obligation of the owner toward third persons with whom the manager contracted appears in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, article 1375 ("The owner whose affair has been well-managed must fulfill the engagements that the manager has contracted in his name"); *cf.* LA. CIV. CODE art. 2299 (1870). On the other hand, the obligations of the manager toward third

classic distinction between "management with representation" and "management without representation."[457]

According to this distinction, if the manager transacted "with representation," that is, in the name and on behalf of the owner with third persons, then the manager is not bound to the obligations generated from this transaction.[458] Instead, the owner is liable to perform these obligations and is given a direct action against the third person for performance of their obligation.[459] If the manager made juridical acts with third persons "without representation," that is, in her own name but on behalf of the owner, then the owner is not directly liable to third persons and has no direct action against them, unless the owner ratifies the acts of the manager.[460] The manager is bound to perform these obligations, and has a claim against the owner for reimbursement and compensation.[461] Nevertheless, the owner is not liable for the manager's offenses or quasi-offenses against third persons.[462] In both cases, the manager's "authority" to bind the owner lies in the utility of the management. If the act of management is useless, the requirements of *negotiorum gestio* are not met and the owner is not bound.[463]

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persons were not codified. *See* Forti, Negotiorum Gestio, *supra* note 297, Nos 16, 27.

457. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 16.

458. French jurisprudence elaborated further on the details of management with representation. To establish such management, it is sufficient for the manager to reveal to her co-contracting party, even implicitly, that she is acting in the name of the owner. *See, e.g.*, Cour de cassation, req., Dec. 4, 1929, D.H. 1930, p. 3; 1e civ., Jan. 1959, Gaz. Pal. 1959, 1, p. 153; Cour d'appel [CA] [regional court of appeal] Poitiers, civ., May 28, 1996, JurisData No. 1996-056302.

459. *See* Bout, *supra* note 158, No. 92; Forti, Negotiorum Gestio, *supra* note 297, Nos 17, 28.

460. *See* TERRÉ ET AL., *supra* note 57, No. 1282. *Cf.* LA. CIV. CODE art. 1843 (2002); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 12.58.

461. The owner's voluntary performance of these obligations toward third parties was interpreted by French jurisprudence as a tacit ratification of the manager's acts. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 29.

462. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; Bout, *supra* note 158, No. 94; Forti, Negotiorum Gestio, *supra* note 297, No. 28.

463. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 732; TERRÉ ET AL., *supra* note 57, No. 1282. FRENCH CIVIL CODE, *supra* note 11, art. 1301-2. The act of management may be useful but faulty, when the manager acted in the owner's

The revised Louisiana law of *negotiorum gestio* departs noticeably from the traditional French approach. The new Louisiana provisions abandon the French distinctions of management with or without representation, at least with regard to the obligations of the owner.[464]

Additionally, the new law of mandate—revised two years after the revision of the law of *negotiorum gestio*[465]—imports several concepts from the common law of agency, including the distinction between "disclosed" and "undisclosed mandate."[466]

Under revised article 2297 of the Louisiana Civil Code, the owner is bound to fulfill the obligations undertaken by the manager who has acted as prudent administrator, regardless of whether the manager acted in her own name or in the name of the owner.[467]

The same provision remains silent as to the liability of the manager toward third parties. The revised law of mandate applies to this issue.[468] Thus, a manager who transacts with third persons in the name of the owner and as a prudent administrator is not bound for

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interest but may have transacted imprudently. In such a case, the owner might be held liable toward third persons if the management was "with representation," but maintains a claim against the manager for damages. The distinction between useless and faulty management is not always clear and it has often eluded the French jurisprudence. *See* Bout, *supra* note 158, Nos 21–24. *See also supra* notes 297, 360–63 and accompanying text.

464. *See* LA. CIV. CODE art. 2297 (2023).

465. The revised law governing *negotiorum gestio* went into effect on January 1, 1996. *See* 1995 La. Acts, No. 1041 § 1. The new law of mandate took effect on January 1, 1998. *See* 1997 La. Acts, No. 261 § 1. *See* Martin, *supra* note 16, at 181; Holmes & Symeonides, *supra* note 242, at 1089.

466. *See* LA. CIV. CODE arts. 3016–3023 (2023); Holmes & Symeonides, *supra* note 242, at 1138–58.

467. *See* LA. CIV. CODE art. 2297 cmt. c (2023). Interestingly, a similar provision was enacted in the revised French Civil Code, replacing article 1375 of the Code Napoléon. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 ("Anyone whose business has been usefully managed must fulfill the commitments entered into in his interest by the manager"). French scholars question whether this expands the owner's liability toward third parties in cases of "management without representation," that is, when the manager transacts with third parties in her own name but on behalf of the owner. This question still remains open in French doctrine and jurisprudence. *See* Forti, Negotiorum Gestio, *supra* note 297, No. 27; CHANTEPIE & LATINA, *supra* note 260, No. 722.

468. *See* LA. CIV. CODE art. 2297 cmt. b (2023). *See also id.* art. 3020; Holmes & Symeonides, *supra* note 242, at 1150–51.

the performance of the obligations generated from the transaction.[469] In this case, the owner is solely bound to third persons and is also given a direct action against third persons for their performance.[470] A manager who transacts prudently with third persons in her own name but on behalf of the owner whose identity is not disclosed is solidarily liable together with the owner[471] for the performance of the obligations created from the transaction.[472] The manager has a direct action against third persons for performance of their obligations. The owner is also given this action, unless the obligation of the third person was strictly personal.[473]

The manager's "authority" to bind the owner, under article 2297 of the Louisiana Civil Code, extends to the limits of the manager's prudent administration of the affair.[474] The term "prudent admin-

469. *See* LA. CIV. CODE art. 3016 (2023) (disclosed mandate). The manager can also be held liable if she promised the performance of the contract. *See id.* art. 3016 cmt. c. Under French doctrine and jurisprudence, a manager who acts "with representation" remains liable to a third person if the manager assumed personal liability for the performance or if the manager committed a fault against the third person. For example, the manager might have led the third person to believe that there was a mandate, or the manager might have misrepresented the owner's solvency. *See* AUBRY & RAU VI, *supra* note 157, No. 300; PLANIOL & RIPERT VII, *supra* note 157, No. 732; 31 DEMOLOMBE XXXI, *supra* note 63, No. 193; LAURENT XX, *supra* note 94, No. 332.

470. *See* LA. CIV. CODE arts. 3016, 3022 (2023); Holmes & Symeonides, *supra* note 242, at 1141–42, 1157–58.

471. The manager and owner are solidarily liable to the third person for the performance of the obligation. The same rule applies with regard to the principal and the undisclosed mandatary. *See* Travis v. Hudnall, 517 So. 2d 1085 (La. Ct. App. 3d Cir. 1987); Frank's Door & Bldg. Supply, Inc. v. Double H. Const. Co., Inc., 459 So. 2d 1273 (La. Ct. App. 1st Cir. 1984); GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 33:4 n.6, *in* 8 LOUISIANA CIVIL LAW TREATISE (Jul. 2022 update). The manager also has a direct action against the owner for performing the entire obligation that she can enforce either before or after being sued by the third person. *See* LA. CIV. CODE art. 3010, 1805 (2023); LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 7.82; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15.

472. *See* LA. CIV. CODE art. 3017 (2023); Holmes & Symeonides, *supra* note 242, at 1141–42.

473. *See* LA. CIV. CODE art. 3023 (2023); Holmes & Symeonides, *supra* note 242, at 1157–58.

474. *See* LA. CIV. CODE art. 2297 (2023) ("The owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken *as a prudent administrator*") (emphasis added). To be sure, the revision comment to

istration" in this context ought to be understood as "useful management," in accordance with the traditional rule.[475] As noted, the management is useful when the manager acts in the actual or presumed interests of the owner. Determination of the presumed interests of the owner is objective, under a standard of prudent administration.[476] Article 2297 should be interpreted in this light.[477] If the requirements of *negotiorum gestio* are met—especially the requirement of useful management—then the owner is bound to the juridical acts made by the manager with third persons in the context of the useful management.[478] If the management is useful but faulty,

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this provision explains that, "When the manager acts as a prudent administrator, whether in his own name or in the name of the owner, the owner is bound to fulfill the obligations undertaken by the manager." *Id.* art. 2297 cmt. c.

475. *See* AUBRY & RAU VI, *supra* note 157, No. 297; Bout, *supra* note 158, Nos 21–24; Forti, Negotiorum Gestio, *supra* note 297, No. 6. The old French and Louisiana laws clearly distinguished between a "good management," as a useful management, and a "prudent management," which was the standard of care of the manager. *Cf.* LA. CIV. CODE art. 2299 (1870) ("Equity obliges the owner, *whose business has been well managed*, to comply with the engagements contracted by the manager, in his name. . ."); CODE NAPOLÉON, *supra* note 10, art. 1375 (containing identical language); LA. CIV. CODE art. 2298 (1870) ("In managing the business, [the manager] is obliged to use all the care of a prudent administrator"); CODE NAPOLÉON, *supra* note 10, art. 1374 (containing identical language).

476. *See* TERRÉ ET AL., *supra* note 57, No. 1277. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 731, at 17; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2818, at 465:

> The owner is only bound by the manager's acts when the affair has been well-managed. The affair is well-managed when the manager has done useful acts in the owner's interest. . .To assess the utility or uselessness of the manager's acts we must put ourselves at the moment when the acts were made, without regard to posterior events that may have negated the acts' usefulness.

477. *See* LA. CIV. CODE art. 2297 (2023); The law of mandate ought to apply here with necessary adaptations. *Cf.* LA. CIV. CODE arts. 3019, 3021 (2023); Holmes & Symeonides, *supra* note 242, at 1145–57. Here, the manager's "authority" is not express, implied, or apparent. Rather, it depends on whether the manager acted in the owner's actual or presumed interest, taking into consideration the circumstances of the management, any directions provided by the owner or the owner's presumed wishes, the nature, purpose, and reasonableness of the transaction, and good faith. *See* TERRÉ ET AL., *supra* note 57, Nos 1277, 1282; *cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-2 (providing that an owner whose affair was usefully managed, "must fulfill the obligations contracted *in his interest*") (emphasis added).

478. The wording in the Quebec Civil Code perhaps is more accurate. *See* QUEBEC CIVIL CODE, *supra* note 13, art. 1486:

the owner is still bound toward third parties, but has recourse against the manager for damages.[479] Because "faulty" and "useless" management more than often converge, third persons contracting with a manager would be well-advised to secure the manager's legal commitment to perform the act, preferably *in solido* with the owner.[480]

3. Termination

Negotiorum gestio terminates when the management of the affair is completed or if the owner or her representative take over the affair or communicate opposition to the management prior to the completion of the management.[481] *Negotiorum gestio* also terminates when the owner provides a mandate to the manager through contract or procuration. In such a case, the relationship becomes contractual and is governed by the law of mandate.[482] The owner may also ratify previous acts undertaken by the manager.[483]

Death of the manager also terminates the relationship of *negotiorum gestio*.[484] The manager's successors are not bound to continue

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> When the conditions of management of the business of another are fulfilled, even if the desired result has not been attained, the principal shall reimburse the manager for all the necessary and useful expenses he has incurred and indemnify him for any injury he has suffered by reason of his management and not through his own fault. The principal shall also fulfill any necessary and useful obligations that the manager has contracted with third persons in his name or for his benefit (emphasis added).

479. On the issue of "useful" and "faulty management," *see supra* notes 297, 360–63 and accompanying text.

480. *See* Bout, *supra* note 158, No. 92.

481. *See* LIVIERATOS, *supra* note 157, at 139.

482. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1301-3; TERRÉ ET AL., *supra* note 57, No. 1277, at 1346.

483. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 733; AUBRY & RAU VI, *supra* note 157, No. 299.

484. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2805; PLANIOL & RIPERT VII, *supra* note 157, No. 730; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113–14. Likewise, a contract of mandate terminates upon the death of the mandatary. *See* LA. CIV. CODE art. 3024 (2023). On the other hand, death of the owner does not terminate *negotiorum gestio*, although death of the principal would terminate mandate. This is so because the *negotiorum gestor* has a legal obligation to continue the management until the owner or her successors are able to take control of the affair. *See* LA. CIV. CODE art. 2297 (1870); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113. *See also supra* note 324.

the management, unless they elect to do so and the requirements for a new *negotiorum gestio* are met.[485] Nevertheless, the parties' existing obligations—which include the owner's obligation to reimburse the manager and the manager's obligation to account for the management—are heritable.[486] As a result of the legal requirement for the manager's capacity, interdiction of the manager also terminates *negotiorum gestio*.[487]

Actions in *negotiorum gestio* are personal actions that are subject to the general liberative prescription of ten years.[488]

IV. UNJUST ENRICHMENT

In its broader sense, unjust (or unjustified[489]) enrichment is a general principle of law, the expression of which is found in several areas of the law, including the civil law of quasi-contract.[490] The

485. The manager's successors, however, may be obligated to notify the owner and perform conservatory acts for the preservation of the property until the owner assumes the affair. *See* LA. CIV. CODE art. 3030 (2023); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2804–05; PLANIOL & RIPERT VII, *supra* note 157, No. 730; DEMOLOMBE XXXI, *supra* note 63, Nos 140–141; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 113–14.

486. *See* Reed v. Taylor, 522 So. 2d 1262, 1265 (La. Ct. App. 4th Cir. 1988); BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2805.

487. *See* LA. CIV. CODE art. 2296 (2023).

488. LA. CIV. CODE art. 3499 (2023); Wells v. Zadeck, 89 So. 3d 1145, 1149 (La. 2012); Gaudé v. Gaudé, 28 La. Ann. 181, 182 (1876); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 207–09.

489. The term "unjustified" enrichment is a faithful translation of the German term *ungerechtfertigte Bereicherung* and the French term *enrichissement injustifié*. The term "unjust" appears more frequently in the common-law systems. *See* BIRKS, *supra* note 6, at 274–75 (explaining that the term "unjust(ified)" is of limited normative value and "one might just as well speak of pink enrichment").

490. *See, e.g.,* LA. CIV. CODE art. 2055 (2023); COLIN & CAPITANT II, *supra* note 25, No. 232; Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 42–47 (1994) (referring to unjustified enrichment as an example of the application of the principle of equity by Louisiana courts); David W. Gruning, *Codifying Civil Law: Principle and Practice*, 51 LOY. L. REV. 57, 64 (2005) (using the principle of unjustified enrichment as an example of a principle of law interacting with practice); *see also* STARCK, *supra* note 30, No. 1797 (referring to accession improvements by possessors, community property, co-ownership, nullity especially for incapacity, payment of a thing not due, and improvements made by lessees as expressions of the general principle of unjustified enrichment).

idea of unjust enrichment as a general principle first appeared in Roman law at the time of Justinian.[491] It is in this broader sense that the common law has traditionally understood the term unjust enrichment.[492] In this Article, unjust enrichment is discussed in its more technical meaning of a specific source of legal obligations for the recovery of displaced wealth.[493] This has been the traditional civil-law understanding of the term, which the common law is now gradually embracing, although unjust enrichment is still construed rather broadly in the common-law tradition.[494]

Furthermore, according to some English writers, the method of determining an unjust enrichment differs among the two systems. These common-law scholars employ a list of "unjust factors"—which can be intent-based or policy-based—to determine whether the enrichment is unjust, whereas the civil-law approach inquires

491. *See* DIG. 12.6.14 (Pomponius, Ad Sabinum 21) ("For it is by nature fair that nobody should enrich himself at the expense of another"); DIG. 50.17.206 (Pomponius, Ex Variis Lectionibus 9) ("By the law of nature it is fair that no one become richer by the loss and injury of another"). *See also* RIPERT, *supra* note 72, at 249; BIRKS, *supra* note 6, at 268–70.

492. *See* DAWSON, *supra* note 159, at 3–5 (comparing Pomponius' statement in Justinian's Digest with Section 1 of the First Restatement of Restitution). Contemporary scholars continue to disagree on the definition of "unjust enrichment." *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2084–86 (2001); *Developments in the Law. Unjust Enrichment*. *Introduction*, *supra* note 21, at 2063–64.

493. *See* LA. CIV. CODE arts. 2298, 1757 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 7–11; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 1.6 (discussing the sources of obligations). *See also* Albert Tate, Jr., *Louisiana Action for Unjustified Enrichment: A Study in Judicial Process*, 51 TUL. L. REV. 446, 458–59 (1977) [hereinafter Tate II] (observing that the action for enrichment without cause finds its source in the law [see current article 1757 of the Louisiana Civil Code] and not in "equity"); Roberson Advertising Service, Inc. v. Winnfield Life Ins. Co., 453 So. 2d 662, 666–67 (La. Ct. App. 5th Cir. 1984).

494. *See Developments in the Law. Unjust Enrichment*. *Introduction*, *supra* note 21, at 2063 ("[W]e understand "unjust enrichment" as a *source of an obligation*. In other words, the term describes circumstances in which the private law finds that an individual owes something to another party") (emphasis in original, footnote omitted); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) ("The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what might more appropriately be called *unjustified enrichment"*) (emphasis in original).

into the existence of an explanatory basis (*iusta causa*) for retention of the enrichment.[495]

Several comparativists observe a convergence of methods toward a "no basis" approach. Under this view, the cases in which common-law unjust enrichment and the civilian version will actually yield different outcomes—disregarding terminology and classification, and setting aside the issue of disgorgement of profits[496]—is vanishingly small.[497]

The term "restitution" is also understood differently in civil and common law. To a civilian, restitution is a broader concept that originates from the Roman *restitutio in integrum* and refers to the restoration of the parties to their pre-existing situation.[498] Civil-law restitution entails restoring a thing that belongs to the plaintiff, such as

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495. *See, e.g.*, BURROWS, *supra* note 103, at 86–117, 201–522 (analyzing unjust factors); GOFF & JONES, *supra* note 134, Nos 2-01 to 3-59 (analyzing various "justifying grounds").

496. Disgorgement for wrongs is generally available at common law. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (AM. L. INST. 2011). In the civil law, disgorgement of profits is available in *negotiorum gestio* (*see supra* note 416) and payment of a thing not due (*condictio indebiti*) (*see infra* notes 774–76 and accompanying text). It is generally not available in enrichment without cause (*actio de in rem verso*) (*see infra* notes 908–09 and accompanying text). *But see* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 (allowing disgorgement of profits also in the case of the *actio de in rem verso* if the enriched defendant was in bad faith). *See infra* note 919 and accompanying text.

497. *See* BIRKS, *supra* note 6, at 40–43 (discussing the developments in English law and Canadian law). *See also* Andrew Kull, *Consideration Which Happens to Fail*, 51 OSGOODE HALL L.J. 783, 797–801 (2014) (framing the issue as the choice between "unjust enrichment" and "unjustified enrichment", and explaining that the two approaches are not incompatible). Interestingly, the Third Restatement of Restitution and Unjust Enrichment identifies unjustified enrichment as "enrichment that lacks an adequate legal basis," but it also loosely categorizes the types of liability for restitution in a way that resembles the English unjust factors (imperfect intent, qualified intent, fault-based, policy-based factors). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011).

498. *See* 14 GABRIEL BAUDRY-LACANTINERIE & LOUIS-JOSEPH BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL. DES OBLIGATIONS, TOME TROISIÈME No. 1934 (3d ed. 1908) [hereinafter BAUDRY-LACANTINERIE & BARDE XIV]. "Restitution" in the context of the revised French and Quebec civil codes refers to restoration of specific property ("specific restitution" or "proprietary restitution") as well as restoration of payments not due. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. a, c, e (AM. L. INST. 2011) (discussing the potential misunderstanding of the term "restitution").

in the case of restoring performances from a failed contract or returning a thing that was wrongfully obtained by the defendant. This is the meaning of the term "restitution" in the French and Quebec civil codes.[499] Restitution in the civil law also entails surrendering a thing or money that has exited the plaintiff's patrimony and is being held by the defendant without cause. In France, Quebec, and Louisiana such restitution takes the form of a compensation awarded to the plaintiff.[500] In German law, the defendant must surrender whatever she holds without just cause.[501] Disgorgement of profits may occur occasionally, but it is not an element of the civil law of restitution.[502]

At common law, the meaning of "restitution" has proved confusing.[503] Generally, restitution is understood as gain-based recovery as opposed to loss-based recovery in the law of damages.[504] It includes giving back a thing or a money substitute of that thing to plaintiff (restoration); it can also include giving up a profit from a transaction (disgorgement).[505] It should be clear, therefore, that unjust enrichment and restitution present interesting differences across legal systems.

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499. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707.

500. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496; LA. CIV. CODE art. 2298 (2023).

501. *See* GERMAN CIVIL CODE, *supra* note 87, § 812. *See* Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1773 (2001) [hereinafter Birks, *Wrongful Enrichment*] (explaining that the German term *Herausgabe*—literally translated as "surrender"—"denotes a giving up and extends even to those givings up which are not givings back"). *See also* DANNEMANN, *supra* note 86, at 13 (explaining that the German law provides for the remedy of restitution in cases other than unjust enrichment).

502. *See supra* notes 416 and *infra* notes 774–76, 908–09, 919 and accompanying text.

503. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011).

504. *See* BIRKS, *supra* note 6, at 3–4; DOBBS & ROBERTS, *supra* note 6, § 4.1(1).

505. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011); Birks, *Wrongful Enrichment*, *supra* note 501, at 1773; DOBBS & ROBERTS, *supra* note 6, § 4.1(1).

A. Comparative Law

In the French legal tradition—which includes Louisiana and Quebec—unjust enrichment is not a unitary concept. Rather, it is divided into two specific quasi-contractual actions—payment of a thing not due (*condictio indebiti*)[506] and enrichment without cause (*actio de in rem verso*).[507]

These actions, however, are limited in scope because restitution is governed primarily by the doctrines of cause and nullity of juridical acts.[508] Notably, in France and Quebec there are now uniform rules of restitution for failed contracts and the payment of a thing not due.[509]

In the German legal tradition and at common law, unjust enrichment is in theory a unitary concept, encompassing cases of displaced wealth and providing the direct legal basis for restitution.[510] Nevertheless, cases of unjust enrichment cut across several areas of the law and defy systematic categorization.[511] This is why German doctrine has pulled away from the notion of a *condictio generalis* in favor of a taxonomy that entails several subcategories of enrichment.[512]

The Third Restatement of Restitution and Unjust Enrichment, which construes unjust enrichment more broadly than the German Civil Code, wisely avoided a tight categorization of cases of unjust

506. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492; LA. CIV. CODE arts. 2299–2305 (2023).

507. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496; LA. CIV. CODE art. 2298 (2023).

508. *See* LA. CIV. CODE arts. 2018–2021, 2033–2035 (2023).

509. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707.

510. *See* Brice Dickson, *Unjust Enrichment Claims: A Comparative Overview*, 54 CAMBRIDGE L. J. 100, 119 (1995).

511. *See* DAWSON, *supra* note 159, at 111–27 (comparing the German and common-law concepts of unjust enrichment).

512. *See* DANNEMANN, *supra* note 86, at 11–12, 156–58 (presenting the German law of unjustified enrichment and the German taxonomy of enrichments in a nutshell).

enrichment.[513] This stark contrast in the comparative treatment of unjust enrichment is attributed to historical reasons, tracing back to the Roman actions of *condictio* and *actio de in rem verso*, as well as to the development of the Roman notion of *causa*.

1. Roman Law

The *condictio* was a nominate action of the classical Roman law that authorized recovery by the plaintiff of a certain object or money in the hands of the defendant.[514] By the time of the *Corpus Iuris Civilis*, several nominate types of *condictio* were developed as an expression of the general principle forbidding unjust enrichment. Thus, a *condictio* could be instituted when the plaintiff had given a thing or money to the defendant: (a) by mistake because payment was not actually due;[515] or (b) for a cause that failed,[516] or was illicit,[517] or was absent.[518]

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513. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. c (AM. L. INST. 2011).

514. *See* ALAN WATSON, THE LAW OF OBLIGATIONS IN THE LATER ROMAN REPUBLIC 10 (1965, reprinted 1984); LEOPOLD WENGER, INSTITUTES OF THE ROMAN LAW OF CIVIL PROCEDURE 166 (Otis Harrison Fisk trans., rev. ed. 1986); GIRARD, *supra* note 56, at 649 n.1. The purpose of the *condictio* was restoration of the object held by the defendant to the plaintiff, who had never lost ownership of the object. *See* MAX KASER, DAS ALTRÖMISCHE JUS 286–88 (1949). The defendant in a *condictio* was considered a borrower who had a *propter rem* obligation to return the object. *See* KASER, at 287; SAÚL LITVINOFF, OBLIGATIONS. BOOK 1, § 199, at 360, *in* 6 LOUISIANA CIVIL LAW TREATISE (1969) [hereinafter LITVINOFF, OBLIGATIONS I]; GASTON MAY, ÉLÉMENTS DE DROIT ROMAIN 416 (18th ed. 1935). For a discussion of real obligations (*propter rem*), see generally YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 9:29; A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161 (1963); A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 618 (1963); L. David Cromwell & Chloé Chetta, *Divining the Real Nature of Real Obligations*, 92 TUL L. REV. 127 (2017).

515. *See* DIG. 12.6 (*condictio indebiti*). This is the most ancient type of *condictio* in the Roman law. *See* PETROPOULOS I, *supra* note 48, at 1044–48.

516. *See* DIG. 12.4 (*condictio causa data causa non secuta*—otherwise known as *condictio ob causam datorum*). *See* PETROPOULOS I, *supra* note 48, at 1048–49.

517. *See* DIG. 12.5 (*condictio ob turpem vel iniustam causam*). *See* PETROPOULOS I, *supra* note 48, at 1048.

518. *See* DIG. 12.7 (*condictio sine causa*). *See* PETROPOULOS I, *supra* note 48, at 1049. This type of *condictio* was a residual category, encompassing situations in which the enrichment was attributed to a cause that had expired (*causa finita*)

The classical Roman *actio de in rem verso* lay for the restitution of the plaintiff's assets that were found in the defendant's patrimony through acts of the defendant's servant.[519] By Justinian's time, this action covered instances in which third parties were enriched at the expense of the impoverished plaintiff without a "just cause" (*iusta causa*).[520]

The term *causa*[521] was not ascribed any technical or significant meaning in the Roman law, because of the strict formalism in the creation of contracts.[522] *Causa* became relevant later, especially in the time of the glossators, when the old formalism was abandoned

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or where the enrichment itself was not a thing given by the plaintiff, but a promise made by the plaintiff, from which he is now seeking a release (*causa liberationis*). *See* STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 3–4.

519. *See* DIG. 15.1.41 (Ulpian, Ad Sabinum 43); GIRARD, *supra* note 56, at 710–22, 715–76; 2 HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 245–46 (1902, reprinted 1975); WILLIAM W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 533-34, 536 (2d ed. 1932). Since its inception, this action directly entailed the element of restitution of assets that had exited the patrimony of the plaintiff and entered the defendant's patrimony through the acts of the defendant's servant. It is aptly said, therefore, that this action more closely resembles modern concepts of unjustified enrichment, especially in civilian systems modeled after the Code Napoléon. *See* ZIMMERMANN, *supra* note 204, at 878–84; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 6–7; PAUL JÖRS & WOLFGANG KUNKEL, RÖMISCHES PRIVATRECHT 267 (3d ed. 1949).

520. Dig. 17.2.82 (Papinian, Responsorum 3); CODE JUST. 4.26.7 (Diocletian & Maximian 290/293) (*actio de in rem verso utilis*). *See* 2 GEORGE PETROPOULOS, HISTORIA KAI EISIGISEIS TOU ROMAIKOU DIKAIOU [HISTORY AND INSTITUTES OF ROMAN LAW] 1146–47 (2d ed. 1963, reprinted 2008) (Greece). *See* GORDLEY, FOUNDATIONS, *supra* note 72, at 419 (2006).

521. Cause of conventional obligations is a topic extensively discussed and debated elsewhere. *See, e.g.*, LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 196–242; John Denson Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 2, 4 (1951); Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919) [hereinafter Lorenzen, Cause]. For the purposes of this Article, the discussion adopts the prevailing theory of cause as accepted in Louisiana. *See* Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3 (1987) [hereinafter Litvinoff, Cause].

522. *See* FRITZ SCHULZ, CLASSICAL ROMAN LAW 471 (1951); LITVINOFF, OBLIGATIONS I, *supra* note 514, § 202; Smith, *supra* note 514, at 4. In classical Roman law, the term *causa*, when used to describe the *condictio*, was not a technical term of art. Depending on the context, *causa* referred to the Latin word for "reason," "situation," or specific objects—*res*. *See* MAX RADIN, HANDBOOK OF ROMAN LAW 297–300 (1927).

and was gradually replaced with the civilian theory of cause.[523] The glossators and post-glossators laid the foundation for a theory of cause with their commentaries of several—original or interpolated—excerpts from the *Corpus Iuris Civilis*.[524]

Perhaps the most notable and debated excerpt comes from Ulpian's "Commentary of the Edict."[525] In this text, the Roman jurisconsult Ulpian explains that only the nominate contracts are enforceable in Roman law.[526] Ulpian continues to explain that certain innominate contracts may by exception become enforceable if one of the parties has already performed.[527] In other words, Ulpian simply suggests that performance of an innominate contract by one party is the cause for demanding performance from the other party.[528] This passage was grossly misinterpreted by commentators to mean that every contract required a cause.[529]

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523. *See* ZIMMERMANN, *supra* note 204, at 553; SCHULZ, *supra* note 522, at 471; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 208; Smith, *supra* note 514, at 4.

524. *See* FILIOS, *supra* note 90, at 17–35; *cf.* GORDLEY, FOUNDATIONS, *supra* note 72, at 292–93 (discussing Aristotle's influence on the postglossators' theories of cause).

525. DIG. 2.14.7 (Ulpian, Ad Edictum 4). *See* WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW § 119 (2d ed. 1953, reprinted 1981).

526. DIG. 2.14.7.1 (Ulpian, Ad Edictum 4) (explaining nominate contracts, such as sale, lease, partnership, loan, and deposit are actionable if formed properly). *See* PETROPOULOS I, *supra* note 48, at 873–1000 (providing a detailed discussion of all Roman nominate contracts); Ronald J. Scalise, Jr., *Classifying and Clarifying Contracts*, 76 LA. L. REV. 1063, 1068–72 (2016) (providing an overview of the Roman categories of contracts).

527. DIG. 2.14.7.2 (Ulpian, Ad Edictum) (referring to "synallagmatic contracts," that is, innominate contracts for the exchange of performances). Under this type of agreement, the parties exchanged promises to give, do, or not do something (*do ut des*, *facio ut facias*, *do ut facias*, and *facio ut des*). *See* BUCKLAND, *supra* note 525, § 119; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 200. *Cf.* LA. CIV. CODE art. 1908 (2023) (bilateral or synallagmatic contracts); *id.* art. 1911 (commutative contracts).

528. DIG. 2.14.7.4 (Ulpian, Ad Edictum 4) ("when no cause exists, it is settled that no obligation arises from the [innominate] contract").

529. *See* WILLIAM W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 229–30 (Frederick H. Lawson, 2d rev. ed. 1952) (referring to Ulpian's excerpt as "the famous passage on which the whole theory of cause was based" and noting that "[it] was taken to mean that every contract must have a cause, [when] in reality [it] says nothing of the kind"); GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 49–50; LITVINOFF, OBLIGATIONS I, *supra* note 514, §

Two prominent jurists formulated their decisive theories relying on conflicting interpretations of this same passage—the French judge and jurist Domat and the German law professor Savigny. Domat interpreted Ulpian's text expansively and enunciated his theory of cause, which formed the basis of the French model of a restricted unjust enrichment, also applicable in Louisiana.[530] Savigny, on the other hand, construed Ulpian's text more narrowly and formulated his theories of abstraction and separation, from which the German model of a broader unjust enrichment emerged and was later expanded by German and Greek legal scholars.[531] As a result, the concept of unjust enrichment is historically and fundamentally different in the two major civil law systems of France and Germany.

2. French Law

In France, unjust enrichment is limited to cases not governed by the expanded doctrines of cause and nullity of juridical acts. Generally, the provisions on cause, nullity, and dissolution of contracts provide for restoration of contractual performances due to lack, failure, or illegality of cause.[532] Thus, if a contract that transfers ownership fails, ownership automatically reverts to the transferor who can revendicate the thing in the hands of the transferee.[533] This enlarged function of cause and nullity displaced the Roman *condictio*, with the exception of restoration of a payment not due (*condictio indebiti*), which is another available remedy for recovery of performances from failed contracts and mistaken payments outside the

205; Lorenzen, Cause, *supra* note 521, at 624-25; FILIOS, *supra* note 90, at 25–35.

530. *See* FILIOS, *supra* note 90, at 69–71.

531. *See id.* at 80–86.

532. *See* Roubier, *supra* note 99, at 42; BÉGUET, *supra* note 99, No. 26; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 18–19. Occasionally, however, the provisions on dissolution and nullity may authorize recovery under a theory of unjust enrichment. *See infra* notes 539, 626–28, 824–25, 828, 932–36, and accompanying texts.

533. *See* Eric Descheemaeker, The New French Law of Unjustified Enrichment, 25 RESTITUTION L. REV. 77, 81–82 (2017).

realm of a contract under French law.[534] Delictual actions lie for the recovery of damages or the restoration of property as a result of an offense or quasi-offense. The remaining cases of restitution may fall within the purview of the restricted and subsidiary French action for enrichment without cause (*actio de in rem verso*).[535] This French model of a restricted enrichment without cause traces its roots to Domat's reading of Ulpian.

According to Domat, all contracts—nominate or innominate—must have a valid cause.[536] Cause is not the fact that one of the parties has already performed, as Ulpian had suggested—rather it is the obligation of the other party to perform.[537] If there is no valid cause or if cause fails, the contract is null and the parties ought to be restored to the situation that preexisted the dissolved contract (*restitutio in integrum*).[538]

Essentially, Domat's expanded theory of cause and nullity of juridical acts deals with most cases of restoration of a performance due to a lack or failure of cause or an undue payment, leaving little room for development of a separate doctrine of enrichment without

534. Domat cites the excerpts from Justinian's Digest on *condictio sine causa* alongside Ulpian's passage to support his theory of cause. *See* DOMAT, *supra* note 98, at 162; HENRI CAPITANT, DE LA CAUSE DES OBLIGATIONS 166–67 n.1 (3d ed. 1927) [hereinafter CAPITANT, CAUSE]; DIG. 12.7 (*condictio sine causa*). This reference has been interpreted to mean that the Roman *condictiones* are instances of a nonexistent or faulty *causa* and, therefore, ought to be governed by the provisions on nullity. *See* MARTY & RAYNAUD II, *supra* note 98, No. 347. This observation admits at least one exception—the payment of a thing not due, which is treated separately under the heading of quasi-contract. *See* DOMAT, *supra* note 98, at 595–603; DIG. 12.6 (*condictio indebiti*).

535. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 370–427 (discussing the several requirements for the *actio de in rem verso*).

536. *See* DOMAT, *supra* note 98, at 161 (dispensing with the Roman categorization of contracts and identifying four types of contracts based exclusively on the former innominate category of the Roman law). *See also* PLANIOL II.1, *supra* note 11, Nos 1029–32; LITVINOFF, OBLIGATIONS I, *supra* note 514, § 209.

537. *See* CAPITANT, CAUSE, *supra* note 534, at 166–67 n.1.

538. *See* DOMAT, *supra* note 98, at 161–62 (citing Ulpian in DIG. 2.14.7.4); *id.* at 191 (discussing the restoration of performances under an annulled contract); *id.* at 195 (examining the restoration of performances as a result of dissolution of a contract). *See also* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 1934 (explaining that the French actions for nullity and dissolution find their origin in the praetorian *restitutio in integrum* of the Roman law).

cause.[539] Through the writings of Pothier, Domat's expanded theory of cause found its way into the Code Napoléon.[540] The notion of enrichment without cause remained forgotten and uncodified,[541] only to be introduced by the jurisprudence of the Cour de Cassation in the late nineteenth century as a limited *actio de in rem verso*.[542] This jurisprudence was very recently codified in France.[543]

Thus, under modern French law, restoration of performances due to absence or failure of cause is achieved pursuant to the contractual actions for nullity and/or dissolution of the contract.[544]

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539. The provisions on dissolution and nullity of contracts may authorize, directly or indirectly, a recovery under a theory of enrichment without cause. *See* AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018 and 2033 (2023). *See supra* note 532. *See also infra* notes 626–28, 824–25, 828, 932–36, and accompanying texts.

540. *See* CODE NAPOLÉON, *supra* note 10, arts. 1108, 1131–1133. *See* POTHIER, OBLIGATIONS, *supra* note 78, at 28–33, 72–73; DAWSON, *supra* note 159, at 95–98; LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 210–211; ANDRÉ MOREL, L'ÉVOLUTION DE LA DOCTRINE DE L'ENRICHISSEMENT SANS CAUSE. ESSAI CRITIQUE 34-36 (1955); ZIMMERMANN, *supra* note 204, at 883.

541. As mentioned, the only exception was the payment of a thing not due (*condictio indebiti*), which appeared in the Code Napoléon. *See* CODE NAPOLÉON, *supra* note 10, arts. 1376–1381. *But see* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 2849VI (observing that Domat was aware of a limited number of unjustified transfers of wealth that gave rise to a general remedy of restitution outside the doctrine of cause). *See* DOMAT, *supra* note 98, at 598 (discussing the restitution of a things received without just cause—*condictio sine causa*—such as a dowry received for a marriage that did not occur).

542. This action was discovered in the seminal decision of the French Cour de cassation in the case of *Boudier*. *See* Cour de cassation, req., June 15, 1892, D. 1892, 1, 596, S. 1893, 1, 281, note J.-E. Labbé (Fr.) (impoverished provider of fertilizer performed at the request of an agricultural lessee on the land of the enriched lessor and subsequently claimed compensation from the lessor after the lessee became insolvent). For a detailed discussion of this case, *see* Nicholas I, *supra* note 190, at 622–24.

543. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4 (rev. 2016) (*enrichissement injustifié*). *See* Valerio Forti, Enrichissement injustifié, Généralités, Conditions matérielles No. 1, JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 10, Jun. 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Material Conditions].

544. *See* CODE NAPOLÉON, *supra* note 10, arts. 1108, 1131–1133, 1304–1314; FRENCH CIVIL CODE, *supra* note 11, arts. 1128, 1162–1171, 1178–1187, 1224–1240, 1352 to 1352-9. *Cf.* LA. CIV. CODE arts. 1966–1970, 2018–2021, 2023–2023 (2023); QUEBEC CIVIL CODE, *supra* note 13, arts. 1385, 1410–1411, 1416–1424, 1604–1625, 1699–1707. It is noteworthy that the requirement of cause has been removed from the French Civil Code in the latest 2016 revision. Though many commentators describe this revision as a "revolution," the concept of cause as a mandatory requirement still appears in the revised provisions. *See, e.g.*,

Restoration of a payment not due can be made by a separate quasi-contractual action for payment of a thing not due (*condictio indebiti*).[545] Interestingly, the revised French law of obligations introduced common rules on "restitution" of performances in cases of nullity, dissolution, payment of a thing not due and various other situations.[546] The term "restitution" that appears in the revised French Civil Code originates from the Roman *restitutio in integrum* and refers to the restoration of the parties to their pre-existing situation.[547]

Indeed, as a result of nullity and dissolution of the contract, ownership of any property that had been transferred under the contract is restored to the transferor, who can reclaim it by a personal action for nullity and dissolution, or a quasi-contractual action for payment of a thing not due, or a real action to revendicate the property.[548] In all these cases of restoration, the element of the defendant's enrichment is irrelevant. The action for enrichment without cause is limited to those cases that fall outside the scope of cause and nullity.

By means of this action, the impoverished plaintiff is seeking restitution in its narrower sense—compensation from the defendant

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FRENCH CIVIL CODE, *supra* note 11, arts. 1162, 1169; see also Solène Rowan, *The New French Law of Contract*, 66 INT'L & COMP. L. Q. 805 (2018); TERRÉ ET AL., *supra* note 57, No. 403.

545. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492. *Cf.* LA. CIV. CODE art. 2299–2305 (2023).

546. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1677–1707; Forti, Restitution, *supra* note 132, No. 1. These provisions, however, do not govern restitution for enrichment without cause, for which there are more specific provisions. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

547. *See* BAUDRY-LACANTINERIE & BARDE XIV, *supra* note 498, No. 1934. "Restitution" in the context of the revised French Civil Code refers to restoration of specific property ("specific restitution" or "proprietary restitution") as well as restoration of payments not due. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmts. a, c, e (AM. L. INST. 2011) (discussing the potential misunderstanding of the term "restitution").

548. *Cf.* LA. CIV. CODE art. 2299 cmt. c (2023). *See infra* notes 624, 663, 687, 701–06, 932–36, and accompanying texts.

for the enrichment that she now owns or its traceable product.[549]

3. German Law

In Germany, unjust enrichment is a broader concept, encompassing the restitution or restoration of property as a result of failed juridical acts, interference with the plaintiff's property, expenses otherwise avoided, and mistaken payments.[550] This expanded German understanding of unjust enrichment encompasses most cases of restitution.

The provisions on nullity and dissolution of contracts either directly cite to the provisions on enrichment without cause or provide for analogous solutions.[551] The broad German understanding of unjust enrichment dates back to Savigny's interpretation of Ulpian.[552]

Savigny read Ulpian's passage very narrowly to mean that some juridical acts are causal, but not all. Certain juridical acts, such as acts for the conveyance of movables, are abstract juridical acts, which are valid without reference to the validity of its cause.[553] This proposition formed the basis for Savigny's famous principle of

549. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4. *Cf.* LA. CIV. CODE art. 2298 (2023); QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496. *See also* PLANIOL II.1, *supra* note 100, No. 938A.

550. *See* KASER, *supra* note 48, § 139.3.

551. German scholars observe that restitution is a broader concept than unjust enrichment. For instance, certain provisions in the German Civil Code that are technically outside the realm of unjust enrichment provide for restitution—and in some cases disgorgement of profits. *See, e.g.*, GERMAN CIVIL CODE, *supra* note 87, § 346 (dissolution of contracts); *id.* § 687 (unjustified *negotiorum gestio*—disgorgement of profits available); *id.* § 985 (revendication of property by means of a real action); *id.* § 285 (substitution of the object of contract in cases of impossibility with or without the fault of the obligor—disgorgement of profits available); *id.* §§ 268, 426, 774, 1607 (legal subrogation). Likewise, the German Copyright Act provides for restitution for infringement of copyright that may also include disgorgement of profits. As to all of the above, *see* DANNEMANN, *supra* note 86, at 13–18. Nevertheless, even these "other" events of restitution are either based on the broader notion of unjust enrichment or they cite or apply the provisions on unjust enrichment by analogy.

552. *See supra* notes 525–31 and accompanying text.

553. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 450.

abstraction.[554] Based on his principle of abstraction, Savigny further posited that the act of conveyance must be distinguished from the promise of such conveyance, even if promise and conveyance occurred in one transaction.

This second proposition formed Savigny's famous "principle of separation."[555] Finally, Savigny recognized the importance of unjust enrichment as an essential remedy in the case of a failed abstract juridical act. In essence, even if the cause of an abstract juridical act involving transfer of property fails upon performance, the transferee will maintain ownership of the thing. The transferor can only recover the property under a theory of unjust enrichment.[556] Savigny postulated that the several Roman abstract *condictiones*, if read together, stand for the proposition of a general action of unjustified enrichment as a *condictio generalis*, which ought to be available if the actual cause of an abstract juridical act is nonexistent or invalid.[557]

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554. "*Abstraktionsprinzip.*" *See* SAVIGNY, OBLIGATIONS, *supra* note 90, at 249, 253–54; ARCHIBALD BROWN, AN EPITOME AND ANALYSIS OF SAVIGNY'S TREATISE ON OBLIGATIONS IN ROMAN LAW 122-24 (1872); FILIOS, *supra* note 90, at 80–86; BASIL MARKESINIS ET AL., THE GERMAN LAW OF CONTRACT, A COMPARATIVE TREATISE 27–37 (2d ed. 2006); ZIMMERMANN, *supra* note 204, at 866–68.

555. "*Trennungsprinzip.*" *See* 3 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 312–13 (1840); *see also* JOHN B. MOYLE, THE CONTRACT OF SALE IN THE CIVIL LAW 3, 110, 135 (1892, reprinted 1994) (discussing the difference between the Roman promissory concept of sale with the English sale as an "ipso facto transfer of property"); ZIMMERMANN, *supra* note 204, at 271–72; MARKESINIS ET AL., *supra* note 554, at 27–37 (explaining that the promissory act usually serves as the principal and objective cause of the dispositive act, while, through the dispositive act, the obligation incurred in the promissory act is discharged).

556. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 450. Several exceptions apply in cases of failed abstract juridical acts. For instance, if the act of conveyance is absolutely null or voidable on grounds of fraud or duress, then ownership of the property reverts to the transferor, who can bring a real action to revendicate the property. The transferee may have an action in unjustified enrichment for restitution of the price for the transfer. *See* GEORGIOS BALIS, GENIKAI ARCHAI TOU ASTIKOU DIKAIOU [GENERAL PRINCIPLES OF CIVIL LAW] § 75 (8th ed. 1961) (Greece); STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1083–85.

557. *See* 5 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 503, 522-23, 526–27, 567 (1841); Nicholas I, *supra* note 190, at 611.

Conversely, in the French legal tradition, the promise is not separated from the conveyance, as a rule.[558] If a contract of sale of a movable fails, ownership automatically reverts back to seller who can recover the movable by means of a real action, an action for dissolution or nullity of the contract as the case may be, or an action for payment of a thing not due.[559]

German legal doctrine bases its theory of unjust enrichment on the Roman *condictiones* from which a general action of unjustified enrichment appeared in the German Civil Code.[560] Thus, payment of thing not due (*condictio indebiti*), absence or failure of cause (*condictio sine causa*) and illicit cause (*condictio ob turpem causam*) fall within the purview of a unitary *condictio generalis* in German law.

Although this approach is doctrinally sound, setting the contours of such a unitary remedy that would govern a multitude of different cases has not been an easy task for German scholars and courts.[561] Contemporary scholars now distinguish between several types of enrichment.[562] German, Austrian, and Greek legal doctrines, for example, follow a more flexible approach, recognizing four broad categories of enrichment: (a) performance or other benefit conferred on the enriched obligor at the expense of the impoverished obligee; (b) enriched obligor's interference with the impoverished obligee's patrimony; (c) expenses incurred by the impoverished obligee on the property of the enriched obligor; and (d) obligee's performance of

558. *See* Descheemaeker, *supra* note 533, at 81–82 (explaining the difference between the French transfer of ownership *solo consensu* and the German principles of abstraction and separation of promise and conveyance).

559. *Cf.* LA. CIV. CODE art. 2299 cmt. c (2023).

560. *See* GERMAN CIVIL CODE, *supra* note 87, § 812; Martin Schwab, *in* 5 MÜNCHENER KOMMENTAR ZUM BÜRGELICHEN GESETZBUCH § 812 (Franz Jürgen Säcker et al. eds., 6th ed. 2013); DANNEMANN, *supra* note 86, at 3-20; ZIMMERMANN, *supra* note 204, at 887–91 (1990, reprinted 1992).

561. *See* GORDLEY, FOUNDATIONS, *supra* note 72, at 419–21, 426–32; STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 22–27; Nicholas I, *supra* note 190, at 614–17.

562. *See* DANNEMANN, *supra* note 86, at 21–44; BIRKE HÄCKER, CONSEQUENCES OF IMPAIRED CONSENT TRANSFERS 25–35 (2009).

obligor's obligations to third persons.[563]

Civil-law scholars also observe the functional and flexible application of the remedy for unjustified enrichment. Indeed, the requirement of "lack of cause" should not be confined to the cause of the juridical act or the separation between promise and conveyance. Instead, the cause should refer to the substantive and practical reason for retaining the enrichment or giving restitution. Thus, more emphasis is now placed on the restitution itself rather than the enrichment.[564] As noted, the French Civil Code now includes a separate section devoted to "restitution" for failed juridical acts. The civil law is therefore moving closer to incorporating a "law of restitution" into its notion of unjust enrichment.

4. Common Law

In a somewhat similar fashion with the German approach, a unitary concept of unjust enrichment also appears at common law. Comparativists attribute this similarity to the restricted application of the doctrine of cause. Indeed, in both systems, the delivery of goods transfers ownership even if the contract is for some reason invalid.[565] However, the similarity ends there. In contrast to the civil law, the common-law tradition—especially in the United States—identifies a broader notion of unjust enrichment.[566] Based on this

563. This broad categorization of enrichments is known as the "Wilburg/von Caemmerer taxonomy." *See* WALTER WILBURG, DIE LEHRE VON DER UNGERECHTFERTIGTEN BEREICHERUNG NACH ÖSTERREICHISCHEM UND DEUTSCHEM RECHT--KRITIK UND AUFBAU (1934); Ernst von Caemmerer, Grundprobleme des Bereicherungsrechts, *in* ERNST VON CAEMMERER: GESAMMELTE SCHRIFTEN 370 (H.G. Leser ed., 1968); Ernst von Caemmerer, *Problèmes fondamentaux de l'enrichissement sans cause*, 18 REVUE INTERNATIONALE DE DROIT COMPARÉ 573 (1966); STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 37–39; STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1058–59; ZEPOS, *supra* note 390, at 686, 690–91. For a comparative analysis of this taxonomy, *see* James Gordley, *Unjust Enrichment: A Comparative Perspective and a Critique*, 41, 54–60, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020); Descheemaeker, *supra* note 533, at 96–98.

564. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1080.

565. *See* Dickson, *supra* note 510, at 119.

566. *See* DANNEMANN, *supra* note 86, at 156–57 ("[T]he German law of unjustified enrichment and the English law of unjust enrichment show an overlap

broader understanding, restitution is a remedy for cases of unjust enrichment that can appear in several areas of the law, including contract, tort, and property.[567]

This core idea of unjust enrichment, as an "enrichment that lacks an adequate legal basis"[568] permeates the Third Restatement of Restitution and Unjust Enrichment. The premise of this idea can certainly be challenged doctrinally. Indeed, if unjust enrichment is construed more narrowly to mean a specific cause of action within certain strict parameters, then restitution certainly becomes a broader concept, unless one then decides to restrict restitution and tailor it to fit this unjust enrichment paradigm.[569] As the German experience has shown, however, unjust enrichment and restitution can be elusive legal concepts that defy strict categorizations and tailor-made straightjackets.[570]

The common-law tradition historically approached unjust enrichment from the viewpoint of the law of remedies.[571] The First Restatement of Restitution was the first step converging toward a substantive theory of unjust enrichment.[572] Just like the history of the civil law of unjust enrichment, the development of the law of

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which is substantial, but far from complete. . .the German law of unjustified enrichment is substantially smaller in scope than would be what many still call the law of restitution in English law").

567. *See* Kull, *Rationalizing Restitution*, *supra* note 79, at 1191, 1196.

568. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) (defining unjust[ified] enrichment as "enrichment that lacks an adequate legal basis; it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights").

569. *See* Birks, *Wrongful Enrichment*, *supra* note 501, at 1776–78.

570. *Cf.* Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L & COM. REG. 273 (1995) (discussing legislative techniques and judicial flexibility in civil-law and common-law systems).

571. *See* SIMPSON, *supra* note 125, at 491.

572. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b & § 1 cmt. e (AM. L. INST. 2011). Interestingly, the name "restitution" for the First Restatement was chosen virtually by accident. In fact, what was being "restated" was the law of unjust enrichment. However, the name "restitution" caught on with judges and scholars in the common law world. *See* Andrew Kull, *Restitution and Unjust Enrichment* 62, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020).

restitution in the common law is fraught with historical misunderstandings, obscure terminology, and unnecessary complication in the law.[573]

Historically, restitution was available at common law and in equity.[574] When the plaintiff had legal title to assets withheld by the defendant, restoration at common law was achieved primarily by means of the ejectment and replevin actions.[575] No action existed in the early common law for restitution of assets in which the plaintiff had no legal title.[576] Especially for the case of money withheld by the defendant, however, a plaintiff with no legal title was entitled to restitution under a sub-form of the writ of assumpsit.[577] This law was shaped decisively in the eighteenth century case of Moses v. Macferlan,[578] in which Lord Mansfield enunciated the action for "money which ought not be kept," which largely corresponds to the modern notion of unjust enrichment.[579] English case-law in the seventeenth and eighteenth centuries solidified this connection of the

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573. *See* BIRKS, *supra* note 6, at 267–308 (discussing "competing generics" and "persistent fragments" which hinder the proper evolution of the doctrine of unjust enrichment).

574. For an excellent exposition of the legal history of restitution, *see* RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS, pt. 1, intro. note (AM. L. INST. 1937).

575. In Louisiana, a dispossessed plaintiff may institute several real actions, such as the possessory action or the petitory action for recovery of an immovable and the revendicatory action for the recovery of movables. *See* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:6–11:25, 12:32–12:44, 13:1–13:16.

576. *See* BIRKS, *supra* note 6, at 284–85.

577. *See* Slade v. Morley (Slade's Case), 76 Eng. Rep. 1074 (K.B. 1602) (establishing an action in assumpsit without need for a contractual promise). *See* BIRKS, *supra* note 6, at 270 and 286–90; DOBBS & ROBERTS, *supra* note 6, § 4.2(1).

578. 97 Eng. Rep. 676, 679 (K.B. 1760). Per Lord Mansfield:

> This kind of equitable action, to recover back money. . .lies for money paid by mistake or upon a consideration which happens to fail; or for money got through imposition (express or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word. . .the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

579. *See* BIRKS, *supra* note 6, at 270 (explaining that Lord Mansfield's opinion was based on the convoluted civil-law doctrine of "quasi-contract"). *See also* BLACKSTONE II, *supra* note 55, at 443 (referring to the civil-law category of obligations *quasi ex contractu* in his discussion of implied in law contracts).

unjust enrichment action to assumpsit—which was traditionally a writ specifically designed to enforce contracts—through the fiction of "implied contract."[580] In short, to fit the action under a writ of assumpsit, courts implied a fictitious contract between the parties that compelled restitution of the moneys withheld by defendant.[581] Under another seminal English case, the plaintiff whose money is wrongfully withheld may, in certain cases, waive the action of tort and bring suit for an "implied contract" instead.[582] This fictitious concept of "implied contract"[583] only managed to confuse courts and scholars.[584] To add to this confusion, courts also devised other subcategories of assumpsit for very specific restitution claims. These subordinate categories came to be known as the "common counts."[585]

Restitution of things other than money in which the plaintiff had no title was achieved by the Chancery courts in equity. Rather than

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580. To avoid confusion with "implied in fact contracts," which are actual contracts that are not expressed in words, courts and scholars oftentimes use the term "implied in law contracts" instead. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391; 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.2 (1978 & Suppl.) [hereinafter PALMER I]. The confusion, however, persisted. *See supra* note 83 and *infra* notes 583–85, 590 and accompanying texts.

581. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391 (giving the example of payment of money by mistake, which could not be recovered by replevin; in such cases, the court would imply a contractual obligation of defendant to make restitution to plaintiff).

582. *See* Lamine v. Dorrell, 92 Eng. Rep. 303 (K.B. 1706). *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 395–97; PALMER I, *supra* note 580, §§ 2.2–2.4.

583. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 161–64 (Richard Burn ed., 9th ed. 1783) [hereinafter BLACKSTONE III] (using the terms "implied contract" and "implied assumpsit"). *See also* BIRKS, *supra* note 6, at 272–73 (explaining that Blackstone's use of the terms "implied contract" and "implied assumpsit" contributed to the confusion).

584. *See* DOBBS & ROBERTS, *supra* note 6, § 4.2(1), at 391–92; BIRKS, *supra* note 6, at 270–74 (discussing the civil-law origin of this confusing terminology).

585. Examples include "money paid to defendant's use" when plaintiff by mistake or otherwise pays defendant's debt; "money had and received" when defendant received money that belonged in good conscience to plaintiff; "*quantum meruit*" when plaintiff has performed services to the defendant either at defendant's request (implied in fact contract) or without defendant's request but to defendant's benefit (implied in law contract); and "*quantum valebant*" for the value of goods transferred. *See* in more detail BLACKSTONE III, *supra* note 583, at 161–64; SIMPSON, *supra* note 125, at 493–94; BIRKS, *supra* note 6, at 285–90; DOBBS & ROBERTS, *supra* note 6, § 4.2(2), at 392–94.

adjudicating title, equity courts gave the plaintiff an action *in personam* against the defendant to make restitution of property that in good conscience belonged to the plaintiff.[586] To achieve this result, equity courts developed their own fiction—the "constructive trust."[587]

Generally, if the defendant has secured legal title to a particular asset by unconscionable acts, the court will declare defendant to be a "constructive trustee" for the benefit of the plaintiff of the asset in question and its traceable product. In short, the defendant is ordered to restore the thing and/or its traceable product to plaintiff, as if defendant were a trustee and plaintiff were a beneficiary.[588] This fictional connection to the trust in the law of equity contributed even further to the existing confusion surrounding "implied contracts" at common law.[589]

Although the "forms of action" have been abolished long ago, the contemporary law of restitution is still haunted by the continued use of obscure terminology and the bifurcation of remedies at law and in equity.[590] Contemporary scholars have shifted their attention from remedies to substance, identifying unjust enrichment as the unifying concept of most of the law of restitution.[591]

The Third Restatement of Restitution and Unjust Enrichment has brought much needed order to the chaos. The Restatement's

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586. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(1). *But see also* BIRKS, *supra* note 6, at 292–907 (distinguishing between equitable actions *in personam* and *in rem*).

587. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(2); BIRKS, *supra* note 6, at 301–07; PALMER I, *supra* note 580, § 1.4 (discussing constructive and resulting trusts).

588. *See* DOBBS & ROBERTS, *supra* note 6, § 4.3(2); BIRKS, *supra* note 6, at 302–04. Equity courts had also developed similar remedies, such as the equitable lien, subrogation, and the accounting for profits. *See* BIRKS, *supra* note 6, at 292–307; PALMER I, *supra* note 580, § 1.5.

589. *See* BIRKS, *supra* note 6, at 301–07.

590. *See* BIRKS, *supra* note 6, at 282 (referring to this problem as a "persistent fragment"). *See also The Intellectual History of Unjust Enrichment*, *supra* note 7, at 2089 (arguing that "the fusion of law and equity in the United States plays an explanatory role in unjust enrichment's relative lack of popularity.").

591. *See* BIRKS, *supra* note 6, at 38–46 (enunciating his theory of a unitary concept of unjust enrichment).

approach is very balanced and linear, connecting liability (unjust enrichment) with the remedy (restitution). In its introductory Part I, the Restatement identifies unjust enrichment as the basis for liability for restitution.[592] Restitution is not unlimited,[593] and can be legal and/or equitable.[594] Part II focuses on the substantive aspect of the liability in restitution. Here, the drafters very wisely resisted calls for a taxonomy of a unitary concept of unjust enrichment.[595] Instead they identified four broad categories of unjust enrichment—transfers subject to avoidance due to a vice of consent;[596] unrequested intervention;[597] restitution for failed contracts;[598] restitution for wrongs;[599] and special cases of benefits conferred by a third person.[600] Part III divides the remedies in restitution via money judgment (restitution)[601] and restitution via rights in identifiable property (restoration).[602] Finally, Part IV lists the available defenses to restitution.[603]

More importantly, the Restatement is written in clear language, and it outlines the law in a comprehensive manner. Some of the ideas and concepts in the Restatement might also be useful to Louisiana courts, with the necessary civil-law adaptations.

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592. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011). *See* Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929 (2012).
593. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 2–3 (AM. L. INST. 2011).
594. *Id.* § 4.
595. *See* Birks, *Wrongful Enrichment*, *supra* note 501, at 1777–82 (attempting a legal taxonomy of unjust enrichment as to other causative events).
596. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5–19 (AM. L. INST. 2011).
597. *Id.* §§ 20–30.
598. *Id.* §§ 31–39.
599. *Id.* §§ 40–46.
600. *Id.* §§ 47–48.
601. *Id.* §§ 49–53.
602. *Id.* §§ 54–61.
603. *Id.* §§ 62–70.

B. Louisiana Law

The Louisiana law of unjust enrichment follows the French civil-law tradition.[604] As a result, the distinction between strict law and equity is unknown in Louisiana law.[605] Thus, there is no separate equity-based restitution, such as the constructive trust and the equitable lien.[606] Instead, Louisiana law provides for the recovery of displaced wealth primarily by application of the doctrines of cause and nullity, and in more limited circumstances under a theory of unjust enrichment.[607]

The doctrines of cause and nullity of contracts, as they appear in the Louisiana Civil Code, occupy most of the law of restitution.[608]

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604. *See* LA. CIV. CODE art. 2298 cmt. a (2023) (explaining that "the principle [of enrichment without cause] accords with civilian doctrine and jurisprudence"). *See also* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 5–15, 146–52, 333–60 (detailing the history of Louisiana law of quasi-contract, payment of a thing not due, and enrichment without cause with reference to French law); Oakes, *supra* note 16, at 878–79; Martin, *supra* note 16, at 200–04 (explaining the historical connection between French and Louisiana law of unjust enrichment).

605. The term "equity" in the Louisiana Civil Code refers to civilian principles of fairness, justice, reason, and the general principle forbidding unjust enrichment. *See* LA. CIV. CODE arts. 4, 2055 (2023). Use of this term in Louisiana law does not imply incorporation of the rules developed in Chancery courts in England and in the United States. *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 182–84; LeBlanc v. New Orleans, 70 So. 212 (La. 1915). *See supra* note 70.

606. *See, e.g.*, Succession of Gaston v. Koontz, 49 So. 3d 1054, 1058 (La. Ct. App. 3d Cir. 2010); Matter of Oxford Management, Inc., 4 F.3d 1329, 1336 (5th Cir. 1993); EDWARD E. CHASE, JR., TRUSTS § 1:10, *in* LOUISIANA CIVIL LAW TREATISE (3d ed. Dec. 2021 update). *See* also LA. CIV. CODE art. 3185 (2023) (privileges are only granted by statute); In re Liquidation of Canal Bank & Trust Co., 160 So. 609 (La. 1935); In re Hagin, 21 F.2d 434, 437–38 (E.D. La. 1927) (equitable liens are unknown to the law of Louisiana). Subrogation, on the other hand, is regulated in the Louisiana Civil Code. *See* LA. CIV. CODE arts. 1825–1830 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 180–208; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 11.1–11.71.

607. *See, e.g.*, Trust for Schwegmann v. The Schwegmann Family Trust, 905 So. 2d 1143, 1147–49 (La. Ct. App. 5th Cir. 2005) (observing that a recovery in a case resembling a "constructive trust" may be authorized under a theory of unjust enrichment in Louisiana law).

608. For a fuller discussion of these doctrines in Louisiana law, *see* ALAIN A. LEVASSEUR, LOUISIANA LAW OF CONVENTIONAL OBLIGATIONS, A PRÉCIS 102–12 (2d ed. 2015) [hereinafter LEVASSEUR, CONVENTIONAL OBLIGATIONS]; LITVINOFF, OBLIGATIONS I, *supra* note 514, §§ 196–399; Litvinoff, Cause, *supra* note 521, at 3; Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663 (2014) [hereinafter Scalise, Nullity]. For discussion of the various

Under these doctrines, dissolution of a contract[609] may occur in several situations, such as breach of contract,[610] impossibility of performance,[611] notice of termination,[612] expiration,[613] fulfillment of a resolutory condition,[614] and certain other special cases for dissolution of donations.[615]

A contract is absolutely null (void) when it violates a rule of public order, such as when the contract is illegal[616] or when mandatory form is not observed.[617] A contract is relatively null (voidable) when it violates a rule for the protection of private parties,

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events that extinguish obligations, *see* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 227–334; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.1.

609. In Louisiana law, donations *inter vivos* are also enforceable contracts, if the requirements for donations are met. *See* LA. CIV. CODE art. 1468 (2023). Special rules apply for wills. *See id.* art. 1469. *See* ELIZABETH R. CARTER, LOUISIANA LAW OF SUCCESSIONS AND DONATIONS. A PRÉCIS 59–60, 68–82 (2021). Furthermore, the rules on contracts also apply to unilateral juridical acts that convey rights. *See* LA. CIV. CODE art. 1917 (2023).

610. *See, e.g.*, LA. CIV. CODE arts. 2013–2017, 2497, 2561–2564, 2615, 2719 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 36–38 (AM. L. INST. 2011); BURROWS, *supra* note 103, at 341–60; PALMER I, *supra* note 580, §§ 4.1–5.15; Andrew Kull, *Restitution as a Remedy for Breach of Contract*, 67 S. CAL. L. REV. 1465 (1993).

611. *See* LA. CIV. CODE arts. 1873–1876 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 34 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 15-01 to 15-11; BURROWS, *supra* note 103, at 361–70; PALMER II, *supra* note 214, §§ 7.1–7.10.

612. *See, e.g.*, LA. CIV. CODE arts. 2024, 2718, 2727–2729, 2747, 3025, 3061 (2023). Here, termination usually does not have retroactive effect. Thus, restitution of performances is usually not contemplated. *See id.* art. 2019.

613. *See, e.g.*, LA. CIV. CODE arts. 1777, 2720 (2023). Restitution of performances is usually not contemplated in such cases, unless a performance was made after the termination of the contract.

614. *See, e.g.*, LA. CIV. CODE arts. 1767, 2572, 2588, 1532, 1533 (2023). Fulfillment of a resolutory condition will not always have retroactive effect. *See id.* arts. 1775–1776; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 83–87; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.12–5.13.

615. *See, e.g.*, LA. CIV. CODE arts. 1562–1564 (2023); CARTER, *supra* note 609, at 121–23.

616. *See* LA. CIV. CODE arts. 1968, 1971, 2030 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 32 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 25-01 to 25-18; BURROWS, *supra* note 103, at 488–97; PALMER II, *supra* note 214, §§ 8.1–8.9.

617. *See, e.g.*, LA. CIV. CODE arts. 1927, 1839, 1541, 2030 (2023). *But see id.* art. 1845 (allowing confirmation of a donation that is defective for want of form). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 (AM. L. INST. 2011); BURROWS, *supra* note 103, at 381–84.

as in the case of a vice of consent[618] or incapacity.[619]

Dissolution can be judicial or extrajudicial,[620] whereas nullity must be declared by a court.[621] When a contract that transfers ownership of a thing is dissolved or is declared null, the provisions on dissolution and nullity generally provide that the parties be restored to their preexisting situation.[622] Ownership of the contractual object reverts back to the transferor who may recover it by her original action for dissolution or nullity, or by a separate real

618. *See* LA. CIV. CODE arts. 1948–1965, 2031 (2023) (error, fraud, and duress). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5, 13, 14, 34, 35 (AM. L. INST. 2011). *See* Saúl Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1 (1989) [hereinafter Litvinoff, Vices of Consent].

619. *See* LA. CIV. CODE arts. 1919, 1921, 2031 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 16, 33 (AM. L. INST. 2011). Contracts made by minors for necessaries or contracts made by minors who falsely misrepresent their majority are valid and enforceable contracts in Louisiana as a matter of law. *See* LA. CIV. CODE arts. 1923, 1924 (2023); LA. CIV. CODE art. 1785 (1870). *See* LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 19–21. Capacity to donate and vices of consent for donations (which include undue influence as an additional vice) are governed by more specific rules. *See* LA. CIV. CODE arts. 1470–1484 (2023); KATHRYN VENTURATOS LORIO & MONICA HOF WALLACE, SUCCESSIONS AND DONATIONS §§ 9:1–9:6, *in* 10 LOUISIANA CIVIL LAW TREATISE (2d ed. Jan. 2022 update); CARTER, *supra* note 609, at 85–99. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 11, 15, 46 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 9-01 to 11-58, 24-01 to 24-39; BURROWS, *supra* note 103, at 201–99, 311–17; PALMER I, *supra* note 580, §§ 3.1–3.20; PALMER II, *supra* note 214, §§ 9.1–9.19, 11.1–11.6.

620. *See* LA. CIV. CODE arts. 2013–2021 (2023); SAÚL LITVINOFF, OBLIGATIONS. BOOK 2 §§ 270, 272, 279–91, *in* 7 LOUISIANA CIVIL LAW TREATISE (1975) [hereinafter LITVINOFF, OBLIGATIONS II]; LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 101–102.

621. Actions to declare a contract absolutely null are imprescriptible whereas an action to rescind a relatively null contract is subject to liberative prescription. Absolute nullity is usually incurable, whereas a relatively null contract can be confirmed. *See* LA. CIV. CODE arts. 1842, 2029–2035 (2023); LITVINOFF & TÊTE, *supra* note 113, at 162–90; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.3; LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 104–112; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57; Litvinoff, Vices of Consent *supra* note 618, at 35–49, 75–79, 101–05; Scalise, Nullity, *supra* note 608, at 689–700.

622. The provisions on dissolution and nullity regulate the method of restoration, its retroactivity, and its effect on third parties. *See* LA. CIV. CODE arts. 2018–2021 and 2033–2035 (2023). *See* LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 102–104 and 108–112; Scalise, Nullity, *supra* note 608, at 678–85.

action.[623]

Alternatively, the transferor can recover by means of the quasi-contractual action of payment of a thing not due.[624] If restoration in kind is impossible or impracticable, the court may award a monetary substitute in the form of damages.[625] In certain cases, the provisions on dissolution and nullity authorize recovery under a theory of unjust enrichment. Thus, if partial performance has been rendered under the failed contract, and that performance is of value to the recipient, recovery for that performance may be made in restitution for unjust enrichment.[626]

Likewise, when the performance consists of services or another similar benefit to the recipient, recovery of the value of such services or benefit is made in the form of compensation for enrichment without cause.[627] Finally, a mandatory law that nullifies a contract may authorize recovery under a theory of unjust enrichment.[628]

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623. For instance, the plaintiff may institute a possessory action or a petitory action for the recovery of immovables. *See* LA. CODE CIV. PROC. arts. 3651–3671 (2023). The plaintiff may bring the revendicatory action for the recovery of movables. *See* LA. CIV. CODE art. 3444 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:7–11:25, 12:33–12:44, 13:7–13:12.

624. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20. *See supra* note 528 and *infra* notes 663, 687, 701–06, 932–36, and accompanying texts.

625. *See* LA. CIV. CODE arts. 2018, 1921, 2033 (2023).

626. *See* LA. CIV. CODE arts. 2018, 1878, 2033 cmt. b (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 102–03, 110–12; LITVINOFF, OBLIGATIONS II, *supra* note 620, § 271; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.63. *See also* Onstott v. Certified Capital Corp, 950 So. 2d 744, 749 (La. Ct. App. 1st Cir. 2006) (observing that "Articles 2033 and 2018 [of the Louisiana Civil Code are consistent with. . .[articles] 2298–2305, which establish a cause of action against one who has been enriched without cause at the expense of another").

627. *See* Sylvester v. Town of Ville Platte, 49 So. 2d 746, 750 (La. 1950); McCarthy Corp. v. Pullman-Kellogg, Div. of Pullmann, Inc., 751 F2d 750, 760 (5th Cir. 1985); AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018, 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 9 (AM. L. INST. 2011). *See also supra* notes 532, 539; *see infra* notes 824–25, 828, 932–36, and accompanying texts.

628. For instance, contracts involving unlicensed contractors are absolutely null under the Contractors Licensing Law. LA. REV. STAT. § 37:2163 (2023). The

Restitution as an available remedy is provided in other areas of Louisiana law as well.

Examples include legal subrogation;[629] lack of authority of a mandatary;[630] revocatory action;[631] simulated contracts;[632] revocation of donations *inter vivos* for ingratitude of the donee;[633] declaration of unworthiness of a successor;[634] rescission of a sale of a corporeal immovable due to lesion beyond moiety;[635] improvements to land made by adverse possessors, lessees and other

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scope of this invalidating statute is to protect against incompetence, inexperience, or fraudulence. For cases not falling within this scope of a "substandard work exception" or "fraudulently obtained contract exception," courts have allowed recovery of the contractor's costs of materials, services, and labor, with no allowance for profit or overhead, under a theory of unjust enrichment. *See* Quaternary Resource Investigations, LLC v. Phillips, 316 So. 3d 448 (La. Ct. App. 1st Cir. 2020); Hagberg v. John Bailey Contractor, 435 So. 2d 580, 586–87 (La. Ct. App. 3d Cir. 1983); Dennis Talbot Const. Co. v. Private Gen. Contractors, Inc., 60 So. 3d 102, 104–05 (La. Ct. App. 3d Cir. 2011); Boxwell v. Dep't of Highways, 14 So. 2d 627, 631 (La. 1943); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25. *But see also* Maroulis v. Entergy Louisiana, LLC, 317 So. 3d 316 (La. 2021) (holding that the clean hands doctrine may prevent the unlicensed contractor from invoking the nullity of the contract with the owner).

629. *See* LA. CIV. CODE art. 1829 (2023). Legal subrogation includes the action for contribution for payments made by solidary obligors, including sureties. *See id.* arts. 1804, 1805, 1829(3), 3047–3054 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 188–95; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.78–7.84, 11.51–11.59. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 23–25 (AM. L. INST. 2011).

630. *See* LA. CIV. CODE arts. 3004, 3008, 3031, 3032 (2023); Holmes & Symeonides, *supra* note 242, at 1145–50. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 (AM. L. INST. 2011).

631. *See* LA. CIV. CODE arts. 2036–2043 (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 119–125. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 1 cmt. g & 48 (AM. L. INST. 2011).

632. *See* LA. CIV. CODE arts. 2025–2028 (2023); LEVASSEUR, CONVENTIONAL OBLIGATIONS, *supra* note 608, at 81–84.

633. *See* LA. CIV. CODE arts. 1557–1560 (2023); LORIO & WALLACE, *supra* note 619, § 8:12. *See also* CARTER, *supra* note 609, at 118 (explaining that the term "revocation" is misleading and properly characterizing the action "as a type of rescission of contract that is permitted as a remedy for the donee's delictual actions").

634. *See* LA. CIV. CODE arts. 941–946 (2023); LORIO & WALLACE, *supra* note 619, § 5:3; CARTER, *supra* note 609, at 45–50. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 (AM. L. INST. 2011).

635. *See* LA. CIV. CODE arts. 1965, 2589–2600 (2023); TOOLEY-KNOBLETT & GRUNING, *supra* note 230, §§ 13:1–13:25.

precarious possessors;[636] expenses incurred by co-owners;[637] ex-spouse's claim for contribution to education and training of other ex-spouse;[638] and recovery of property of an absent person who reappeared.[639]

Restitution under a theory of unjust enrichment in Louisiana law is restricted to cases that fall outside the realm of cause, dissolution, nullity, and restitution by application of a specific legal rule. Louisiana law recognizes two actions for unjust enrichment—the action for a payment not due (*condictio indebiti*)[640] and the subsidiary action for enrichment without cause (*actio de in rem verso*).[641] These two actions are distinct.[642]

Payment of a thing not due is at the crux of Louisiana law of unjust enrichment.[643] Indeed, most cases of restitution under German law and common law—such as mistaken payments and performances under a failed contract—fall under this Louisiana action.[644] Under this action, recovery is authorized: (a) for payments of non-

636. *See* LA. CIV. CODE arts. 483–498, 2695 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:17–11:24. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (AM. L. INST. 2011).

637. *See* LA. CIV. CODE arts. 804, 806 (2023); Symeonides & Martin, *supra* note 23, at 99–101. For co-ownership of community property and former community property, *see* CARROLL & MORENO, *supra* note 256, §§ 7:16–7:20.

638. *See* LA. CIV. CODE art. 121 (2023).

639. *See id.* arts. 57–59 (2023); Monica Hof Wallace, *A Primer on Absent Persons in Louisiana*, 64 LOY. L. REV. 423, 436–39 (2018).

640. *See* LA. CIV. CODE arts. 2299–2305 (rev. 1995). *Cf.* LA. CIV. CODE arts. 2301–2314 (1870); LA. CIV. CODE arts. 2279–2293 (1825); LA. CIV. CODE p. 320, arts. 10–15 (1808). For an excellent analysis of the pre-revision law, which is still a valuable resource today, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 143–232.

641. LA. CIV. CODE art. 2298 (rev. 1995). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 233–327 (*quantum meruit*) & 329–437 (*actio de in rem verso*).

642. *See* Chrysler Credit Corp. v. Whitney Nat. Bank, 1993 WL 70050, at *4 (E.D. La. Mar. 4, 1993) (observing, however, that "the Louisiana jurisprudence is somewhat muddled on the question of whether these are, in fact, two distinct causes of action.").

643. *See* Descheemaeker, *supra* note 533, at 78–79.

644. *Cf., e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 5–8, 11, 18, 19 (AM. L. INST. 2011). *See also* BIRKS, *supra* note 6, at 3 ("The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt").

existent debts (payment not due objectively);[645] and (b) for the mistaken payment of an existing debt of another (payment not due subjectively).[646] Finally, cases of restitution that do not fall under any of the above actions are relegated to the subsidiary action for enrichment without cause (*actio de in rem verso*). This subsidiary action was created by the jurisprudence of the Louisiana courts and was only recently enacted.[647]

*1. Payment of a Thing Not Due (*Condictio Indebiti*)*

In an action for payment of a thing not due, the court orders the defendant payee to restore a thing that belongs to the plaintiff payor, who gave the thing to the payee in payment of a non-existent debt or in mistaken payment of the debt of another.

The precise legal foundation for the action of a payment of a thing not due has not been settled in French doctrine.[648] Three theories have been supported.[649] The traditional theory characterizes payment of a thing not due as a quasi-contract in the form of a quasi-loan.[650] Under this theory, the recipient of a payment not due is liable for returning what was paid to the person who made the payment as if the recipient had borrowed the thing.[651] The redactors of the

645. *See* LA. CIV. CODE art. 2299 (2023). The action for payment of a thing not due is not subsidiary. Thus, the quasi-contractual action for recovery of payments not due objectively overlap with the broader theory of cause. *See id.* art. 2299 cmt c. *See also supra* notes 548, 624 and *infra* notes 663, 687, 701–06, 932–36, and accompanying text.

646. *See* LA. CIV. CODE art. 2302 (2023).

647. *See* LA. CIV. CODE art. 2298 (rev. 1995).

648. *See* 2 GABRIEL MARTY, PIERRE RAYNAUD & PHILIPPE JESTAZ, DROIT CIVIL. LES OBLIGATIONS No. 226 (2d ed. 1989); NICOLE CATALA, LA NATURE JURIDIQUE DU PAYEMENT No. 203 (1961); Yves Strickler, Paiement de l'indu, No. 4, *in* JurisClasseur Civil, Art. 1302 à 1302-3, Fascicule unique, Aug. 27, 2018 (Fr.).

649. *See* MALAURIE ET AL., *supra* note 30, No. 1041.

650. *See* POTHIER, LOAN, *supra* note 64, No. 132 (characterizing payment of a thing not due as a "promutuum").

651. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 203. Pothier obviously had in mind an obligation to repay money which would be likened to a loan of a consumable (*mutuum*). *Cf.* LA. CIV. CODE art. 2904 (2023). Nevertheless, the object of the payment can also be a non-consumable thing, in which case the obligation to repay, under Pothier's theory,

Code Napoléon were influenced by this theory when they included payment of a thing not due in the chapter on quasi-contracts.[652] Although this theory is the least popular among French scholars,[653] payment of a thing not due is still listed as a quasi-contract in the revised French Civil Code.[654] A second theory considers payment of a thing not due as a subset of the doctrines of cause and nullity.[655] This view focuses on the legal nature of payment as a juridical act.[656] When the obligation for which the payment is made does not exist, the juridical act of payment has no cause and is therefore null. Restoration is thus governed by the provisions on cause and nullity.[657]

Acceptance of this theory rests on the precise legal nature of payment as a juridical act or a juridical fact, an issue that has not been settled in French doctrine.[658] Finally, a third theory identifies payment of a thing not due as an expression of the principle of unjust enrichment. Most scholars support this theory,[659] but they are not in

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would resemble a loan of a nonconsumable (*commodatum*). *Cf.* LA. CIV. CODE art. 2891 (2023). This distinction becomes pertinent in the discussion of restoration of the thing owed. *Cf.* LA. CIV. CODE arts. 2304, 2305 (2023).

652. *See* CODE NAPOLÉON, *supra* note 10, art. 1376. *See* CATALA, *supra* note 648, No. 203.

653. *See* VIZIOZ, *supra* note 44, No. 53; RIPERT & BOULANGER II, *supra* note 169, Nos 1241–42; PLANIOL & RIPERT VII, *supra* note 157, No. 719; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 203.

654. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1300.

655. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, Nos 205–208; RIPERT & BOULANGER II, *supra* note 169, Nos 1241–42.

656. *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 227–28 and 230; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.2 (characterizing payment as a juridical act).

657. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, Nos 205–208.

658. The legal nature of payment is controversial in France. The prevailing view considers payment a juridical act, especially when it comprises separate implementing acts, such as transfer of ownership or execution of documents. See 12 CHARLES AUBRY & CHARLES RAU, DROIT CIVIL FRANÇAIS § 762 (Paul Esmein ed., 6th ed. 1958); Benoît Moore, *De l'acte et du fait juridique ou d'un critère de distinction incertain*, 31 REVUE JURIDIQUE THÉMIS, 277, 307–12 (1997); CATALA, *supra* note 648, Nos 159–164.

659. *See* COLIN & CAPITANT II, *supra* note 25, No. 398; PLANIOL & RIPERT VII, *supra* note 157, No. 736; VIZIOZ, *supra* note 44, No. 70; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 204.

agreement as to the precise delineation between payment of a thing not due and enrichment without cause.[660]

Each of these three theories contributed in part to the development of payment of a thing not due in French and Louisiana law and, it is submitted here, to the confusion surrounding this institution. First, under the theory supporting the application of the doctrines of cause and nullity, the payment of a thing not due has expanded its scope. Originally, payment of a thing not due was restricted to the restitution of a payment made in error because no debt was due. Gradually, this remedy has extended to cases of lack of cause or illicit cause. As a result, payment of a thing not due now encompasses three remedies—the action for restitution of a payment made for a nonexistent debt (*condictio indebiti*); the action for restoration or restitution of payments made in performance of a contract whose cause was absent or failed (*condictio sine causa*); and the action for restoration or restitution of payments made in performance of an illicit contract (*condictio ob turpem causam*).[661] The latter two actions overlap with the actions for dissolution and nullity of contracts, as well as with the delictual action in cases of illicit conduct.[662] Because the action for payment of a thing not due is not subsidiary, the plaintiff can choose the theory of recovery that best suits her interests.[663]

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660. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 226; CATALA, *supra* note 648, No. 204.

661. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 232–36 (distinguishing between the quasi-contractual remedy for restitution of payments of nonexistent debts (*condictio indebiti*) and the contractual remedies for restitution of payments made in performance of failed or illicit contracts (*condictio sine causa, condictio ob turpem causam*)); AUBRY & RAU VI, *supra* note 157, §§ 442, 442*bis* (distinguishing between "the action for restitution of the undue payment properly speaking" (*condictio indebiti*) and the "actions for restitution of payments made without cause, or for an illegal or illicit cause" (*condictio sine causa, condictio ob turpem causam*)).

662. *See* AUBRY & RAU VI, *supra* note 157, No. 313.

663. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941). *But see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20 (noting that Louisiana is a "fact pleading" system requiring no technical form of pleadings—

Second, the traditional theory of quasi-contract still informs the nature and function of the remedy for restitution. The recipient of a thing not due is liable to restore what she received as if she were a borrower in a contract of loan. Thus, the recipient must restore the thing itself if nonconsumable or its value if consumable or if the nonconsumable cannot be returned.[664] These rules of restoration are markedly different from the rules of restitution for enrichment without cause.[665]

Third, the modern theory of unjust enrichment correctly characterizes payment of a thing not due as a special remedy for enrichment without cause.[666] Acceptance of this theory would suggest that payment of a thing not due is simply a special case of unjust enrichment that is measured differently in different circumstances. This would align the French approach with what the German and common-law model of a broader unjust enrichment. However, the revised Louisiana law of quasi-contract remained faithful to the French legal tradition in this respect and has thus inherited the confusion surrounding the remedy for restitution of a payment not due. A brief overview of the requirements and the effects of this remedy under the revised law should prove this point.

a. Types of Undue Payments

There are two requirements for the action to recover a payment not due. The first requirement is a payment for which there is no

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the court knows the law (*jura novit curia*)). LA. CODE CIV. PROC. arts. 854, 862 (2023). *Cf.* PALMER I, *supra* note 580, §§ 2.2–2.4. *See supra* notes 548, 624 and accompanying text; *see also infra* notes 687, 701–06, 932–36 and accompanying text.

664. *See* LA. CIV. CODE art. 2304 (2023).

665. *See id.* art. 2298.

666. The 1995 revision of the former title on "quasi-contracts" of the Louisiana Civil Code correctly places payment of a thing not due in the chapter titled "Enrichment Without Cause." The *actio de in rem verso* occupies "Section 1. General Principles." LA. CIV. CODE art. 2298 (2023). Payment of a thing not due is found in "Section 2. Payment of a Thing Not Owed." LA. CIV. CODE arts. 2299–2305.

justification in law or contract.[667] The second requirement, which is not always necessary, is error on the part of the payor.[668]

The term "payment" is understood as performance of an obligation.[669] In this context, payment refers to the payment of money or the giving of an individualized thing that can be corporeal or incorporeal, consumable or nonconsumable, movable or immovable.[670] Conversely, performances of obligations to do, such as the rendition of services or obligations not to do, are generally not within the scope of the remedy for an undue payment. Restitution for such performances is available via the action for enrichment without cause.[671]

A payment can either be undue objectively or subjectively. Payment is not due objectively when no debt existed between payor and payee or when the debt was not enforceable when the payment was made. In either case, the payor is not an obligor, and the payee is not an obligee. Payment is not due subjectively when the debt exists and the payee is the true obligee, however the payor is not the true obligor. In essence, the payor is paying the debt of another

667. A provision of law or contract as well as a judgment can justify a payment. *See, e.g.*, McKinney Saw & Cycle v. Barris, 626 So. 2d 786, 790 (La. Ct. App. 2d Cir. 1993).

668. In civil-law terminology, the payor of a thing not due is referred to as the *solvens* and the payee is referred to as the *accipiens*. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 159. This Article will refer to the parties as "payor" and "payee" solely for purposes of simplicity and not in derogation of the civil-law traditional terminology.

669. *See* Descheemaeker, *supra* note 533, at 80 ("[Payment] is used to refer to the performance (execution, fulfillment, discharge, satisfaction) of any obligations, whether monetary or not").

670. *See* Strickler, *supra* note 648, No. 10; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 232–35; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.2.

671. *See* PLANIOL & RIPERT VII, *supra* note 157, at 24 n.1; CATALA, *supra* note 648, No. 214; Strickler, *supra* note 648, No. 10. *But see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 162–63 (observing that the rendition of services is a performance that may fall under the scope of an action for payment of a thing not due and citing Smith Constr. Co. v. Maryland Gas Co., 422 So. 2d 697, 698 (La. Ct. App. 3d Cir. 1982)); Descheemaeker, *supra* note 533, at 80 n.7 (noting that under the revised French law of obligations, restitution of the value of services now falls under an action for payment of a thing not due).

person.[672] The practical significance of this distinction is twofold—first, the requirement of error only applies to subjectively undue payments; and second, the aforementioned overlap with the doctrines of cause and nullity is found in certain objectively undue payments.

i. Payment Not Due Objectively—Debt Does Not Exist

When payment is not due objectively, there is no enforceable obligation between the parties to justify the payment. This type of undue payment is contemplated in revised articles 2299 through 2301 of the Louisiana Civil Code.[673] In this type of payment, error of the parties is irrelevant.[674] Focus instead is placed on the objective factor of the lack of an obligation between the payor and the payee.[675]

Several reasons exist for the lack of such obligation. These reasons may be placed in three categories—nonexistent obligations (*condictio indebiti*), obligations for a cause that failed (*condictio sine causa*), and obligations for an illicit cause (*condictio ob turpem causam*). The latter two categories overlap with the doctrines of nullity and cause, as discussed.

First, the obligation may be nonexistent because the parties either never had a contract or other legal relationship giving rise to an enforceable obligation, or the obligation between the parties was

672. In traditional French doctrine, a subcategory of subjectively undue payments also included cases in which the true debtor paid a non-creditor. Contemporary French doctrine correctly assimilates this case with the objectively undue payment. *See infra* note 677.

673. *See* LA. CIV. CODE arts. 2299, 2300 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, arts. 1302, 1302-1; QUEBEC CIVIL CODE, *supra* note 13, art. 1491–1492; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 6 & 11 (AM. L. INST. 2011).

674. Thus, recovery under article 2299 of the Louisiana Civil Code exists regardless of whether payment was made knowingly or through error. *See* LA. CIV. CODE art. 2299 cmt. d (2023); Leisure Recreation & Entertainment, Inc. v. First Guaranty Bank, 339 So. 3d 508, 518 (La. 2022); Ark-La-Tex Timber Co., Inc. v. General Electric Capital Corp. et al., 482 F.3d 319, 329–30 (5th Cir. 2007).

675. *See* LA. CIV. CODE art. 2300 (2023).

not enforceable when the payment was made.[676]

Examples from this category include: accidental payments to third persons who are not true obligees,[677] such as payment of a non-enforceable debt by a surety to a creditor;[678] payments of imaginary or nonexistent debts,[679] such as the mistaken payment of taxes[680] and

676. *See* Strickler, *supra* note 648, No. 16. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 6, 9 (AM. L. INST. 2011). Here, no conventional obligation ever existed between the parties because the parties never negotiated a contract, or their negotiations fell through. Alternatively, payment may be premature, as when the parties agreed to an obligation with a suspensive condition that had not yet been fulfilled. *See* LA. CIV. CODE art. 2301 (2023). Another theoretical example is when the contract between the parties is "inexistent," that is, when an essential constituent element of the contract is lacking. However, the concept of "inexistent contracts" has not been accepted by French and Louisiana legal doctrines. *See* LITVINOFF & TÊTE, *supra* note 113, at 186–88; Scalise, Nullity, *supra* note 608, at 699; 1 JACQUES FLOUR, JEAN-LUC AUBERT & ERIC SAVAUX, DROIT CIVIL. LES OBLIGATIONS. L'ACTE JURIDIQUE No. 326 (16th ed. 2014).

677. *See, e.g.*, Jackson v. State, Teachers' Retirement System of Louisiana, 407 So. 2d 416, 417–18 (La. Ct. App. 1st Cir. 1981). In traditional French doctrine, payment by a true obligor to a person who was not the true obligee is a subcategory of subjectively undue payments referred to as *indu subjectif actif*. The other subcategory of subjectively undue payments is when the payor is paying the debt of another to the true obligee. This subcategory is identified as *indu subjectif passif*. Contemporary French doctrine, however, assimilates the *indu subjectif actif* with the objectively undue payment. Indeed, when the true debtor is paying a non-creditor, there is objectively no debt between payor and payee. This doctrinal opinion finds support in the revised French Civil Code and the revised Louisiana Civil Code. *Compare* FRENCH CIVIL CODE, *supra* note 11, art. 1302-1 and LA. CIV. CODE art. 2299 (2023) (imposing an obligation of restitution on a person who has received a payment not owed to him) *with* FRENCH CIVIL CODE, *supra* note 11, art. 1302-2 and LA. CIV. CODE art. 2302 (2023) (providing specifically for the case of mistaken payment of the debt of another). *See* TERRÉ ET AL., *supra* note 57, Nos 1292, 1293; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 26.

678. Furthermore, a surety who has lost her right of subrogation and reimbursement from the debtor may recover from the creditor under a theory of unjust enrichment. *See* LA. CIV. CODE arts. 3050, 3051 (2023); Michael H. Rubin, *Ruminations on Suretyship*, 57 LA. L. REV. 565, 588–89 (1997). *See infra* note 736.

679. *See* TERRÉ ET AL., *supra* note 57, No. 1284 (referring to examples of incorrect electronic payments of utility bills, automated banking transactions, insurance payments, etc.).

680. *But see* Clark v. State, 30 So. 3d 812 (La. Ct. App. 1st Cir. 2009) (holding that refund of state taxes is governed by special provisions, and not by the Louisiana Civil Code provisions on payment of a thing not due). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 19 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 22-01 to 22-17.

the delivery of a gift to the wrong person;[681] and advance payments for a transaction that was never completed.[682]

Another frequent example are duplicate payments and overpayments. Duplicate payments are repeated payments of a debt that was already paid.[683] Overpayments are payments of sums greater than what was actually due.[684] Overpayments can be made by accident or knowingly, such as in the everyday case of an overpayment in cash with the anticipation of being paid change.[685] Finally, payment may be premature, such as in the case of an obligation subject to a suspensive condition that has not yet been fulfilled.[686] The action for restitution of this category of objectively undue payments is the traditional *condictio indebiti*, which exists outside the doctrines of cause and nullity. In other words, restitution of this category of objectively undue payments is not available by an action in contract. Instead, restoration is possible by means of a personal quasi-contractual action for payment of a thing not due, a real action for

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681. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 (AM. L. INST. 2011); *See* 3 GEORGE E. PALMER, THE LAW OF RESTITUTION §§ 18.1–18.10 (1978 & Suppl.) [hereinafter PALMER III].

682. *See, e.g.*, Head v. Adams, 275 So. 2d 476 (La. Ct. App. 2d Cir. 1973); Busse v. Lambert, 773 So. 2d 182 (La. Ct. App. 5th Cir. 2000). *Cf.* QUEBEC CIVIL CODE, *supra* note 13, art. 1491 ("A payment made in error, *or merely to avoid injury to the person making it while protesting that he owes nothing*, obliges the person who receives it to make restitution") (emphasis added).

683. *See*., *e.g.*, Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447 (M.D. La. 1990); LA. CIV. CODE art. 2300 cmt. b (2023); CARBONNIER II, *supra* note 45, No. 1219.

684. *See, e.g.*, Shatoska v. International Grain Transfer, Inc., 634 So. 2d 897, 899 (La. Ct. App. 1st Cir. 1993); Bell v. Rogers, 698 So. 2d 749, 757 (La. Ct. App. 2d Cir. 1997); Strickler, *supra* note 648, No. 23.

685. *See* Strickler, *supra* note 648, No. 25 (also discussing other examples of overpayment as a preventive measure). Payments made by solidary obligors that exceed their virile portion in the debt are recovered under the theory of legal subrogation. *See* LA. CIV. CODE arts. 1804, 1829, 1830 (2023). *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 109–15, 188–89; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 11.55.

686. *See* LA. CIV. CODE arts. 2301, 1767 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 80; Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447 (M.D. La. 1990); Merrill Lynch Realty, Inc. v. Williams, 526 So. 2d 380, 382–83 (La. Ct. App. 4th Cir. 1988); Strickler, *supra* note 648, No. 20. Naturally, this rule does not apply when the obligation to pay was subject to a suspensive term, *See* LA. CIV. CODE arts. 1781, 2301 cmt. d (2023); Texas General Petroleum Corp. v. Brown, 408 So. 2d 288 (La. Ct. App. 2d Cir. 1981).

revendication of the thing, or a personal delictual action for conversion, as the case may be.[687]

Next, payment may have been made to discharge an obligation that once existed, but the cause for that obligation was either absent or it failed at a later time.[688] Examples from the area of conventional obligations abound.[689] The contract giving rise to the conventional obligation that justified the payment could have expired,[690] or it might have been judicially declared absolutely null due to lack of its cause or object.[691] Thus, an insurer may demand restitution of payments made to the insured under a void insurance policy.[692] A potential buyer may demand restitution of her down-payment for the

687. *See* Dual Drilling Co. v. Mills Equip. Inv., 721 So. 2d 853 (La. 1998) (enunciating "principles of civilian conversion," which can be exercised through one of the following actions: (a) by means of a revendicatory action under LA. CIV. CODE art. 526; (b) by an action for *restitution* based on payment of a thing not due under LA. CIV. CODE art. 2299; or (c) by a delictual action for damages under LA. CIV. CODE art. 2315). *See also* LA. CIV. CODE art. 2299 cmt. c (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13–13:16 (discussing the several theories for recovery of movables). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 40, 41 (AM. L. INST. 2011). *See infra* notes 701–06, 932–36, and accompanying text.

688. For a more detailed discussion of absence and failure of cause, *see* Litvinoff, Cause, *supra* note 521, at 5–8. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 13–16, 31, 35 (AM. L. INST. 2011).

689. Examples also exist outside the area of conventional obligations. One example is the restitution of a legacy under a will that was invalid. *See* LA. CIV. CODE art. 2300 cmt. b (2023). Another example is the restitution of the payment for a judgment that was later annulled or reversed. *See* Gootee Const., Inc. v. Amwest Sur. Ins. Co., 856 So. 2d 1203, 1206–07 (La. 2003); Louisiana Health Service & Indem. Co. v. Cole, 418 So. 2d 1357, 1359–60 (La. Ct. App. 2d Cir. 1982); City Financial Corp. v. Bonnie, 762 So. 2d 167, 169–70 (La. Ct. App. 1st Cir. 2000); FRANK L. MARAIST, CIVIL PROCEDURE, §§ 12:6 and 14.15, *in* 1 LOUISIANA CIVIL LAW TREATISE (2d ed., Nov. 2021 update); Strickler, *supra* note 648, No. 29. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (AM. L. INST. 2011); GOFF & JONES, *supra* note 134, Nos 26-01 to 26-06.

690. *See, e.g.*, Wall v. HMO Louisiana, Inc., 979 So. 2d 536 (La. Ct. App. 5th Cir. 2008).

691. *See, e.g.*, Coleman v. Bossier City, 305 So. 2d 444 (La. 1974).

692. *See, e.g.*, Shelter Ins. Co. v. Cruse, 446 So. 2d 893, 895 (La. Ct. App. 1st Cir. 1984). Likewise, payments by the insurer to third persons who do not have a valid claim against the insured are recoverable as payments not due objectively. Conversely, mistaken payments by the insurer to a third person with a valid claim against an insured whose policy was void are recoverable as payments not due subjectively, falling under article 2302 of the Louisiana Civil Code. *See* Continental Oil Co. v. Jones, 191 So. 2d 895 at 897–98 (La. Ct. App. 1st Cir. 1966). *See also infra* notes 717–18, 785–88 and accompanying text.

purchase of a thing that was fortuitously destroyed at the time of the sale.[693] The contract could have been rescinded as relatively null,[694] such as in the case of incapacity or a vice of consent.[695] The conventional obligation could be null due to nonfulfillment of a suspensive condition.[696] The conventional obligation may be subject to a resolutory condition that was fulfilled having retroactive effect to the inception of the obligation.[697] On the other hand, the contract giving rise to the conventional obligation may have failed later in whole or in part. In such cases, care must be taken to determine whether the dissolution of the failed contract has only prospective effect as in the case of contracts for continuous performance,[698] or

693. *See* LA. CIV. CODE arts. 1966, 1873, 1876 (2023); LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.61; Litvinoff, Cause, *supra* note 521, at 6.

694. Payments made in performance of a relatively null contract can be reclaimed if the contract is rescinded. However, if the payment was made as an express or tacit confirmation of the contract, then rescission is excluded, and the payment is not recovered. *See* LA. CIV. CODE art. 1842 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57; Strickler, *supra* note 648, No. 28.

695. *See* LA. CIV. CODE arts. 1918–1926, 1948–1964, 1470–1484, 2031–2035 (2023). Thus, an obligee who discharged the debt by mistake can demand restitution by rescinding the relatively null tacit remission of debt that was made by mistake. *See* LA. CIV. CODE art. 1889 cmt. b (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 1308, at 719; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 297–98, 302–03; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 18.2. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 8 (AM. L. INST. 2011). *See also* Strickler, *supra* note 648, No. 15 (giving the example of misrepresentation by the insured in a contract of insurance).

696. Likewise, the obligation might be null due to impossibility or illegality of the condition. *See* LA. CIV. CODE arts. 1767–1774 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 257–63, 267–87; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.1, 5.4–5.6, 5.14.

697. However, retroactive fulfillment of the condition does not affect certain payments, such as administrative expenses and fruits. Furthermore, restitution is excluded if fulfillment of the condition had no retroactive effect. *See* LA. CIV. CODE arts. 1775, 1776 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 83–86; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 5.12–5.14; Strickler, *supra* note 648, No. 20. Naturally, if the obligation is with a term, any voluntary payments cannot be recovered. *See* LA. CIV. CODE arts. 1781, 2301 cmt. d (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 63–65; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 6.9; Strickler, *supra* note 648, No. 21.

698. *See* LA. CIV. CODE art. 2019 (2023); *id.* art. 2714 (providing for termination of a lease due to destruction of the thing leased without damages or restitution); *id.* 2715 (providing for partial termination of a lease in the case of partial destruction).

retroactive effect, such as when the performance of a contract becomes partially or fully impossible due to a fortuitous event.[699]

Finally, a party to a contract may have dissolved the contract because of the other party's failure to perform.[700] In all of the above cases, recovery of performances made without a valid cause (condictio sine causa) is authorized pursuant to the provisions on nullity[701] and dissolution[702] of contracts. If the defendant is withholding the thing, the plaintiff can also institute a real action for its revendication or a delictual action for conversion and damages, as the case may be.[703] Nevertheless, these same instances also give rise to an action for recovery of a payment not due.[704] Thus, in this category of lack of obligation known as condictio since causa, the action for recovery of a payment not due is available alongside other personal or real actions, but there can be no double recovery. The plaintiff may therefore elect the theory of recovery that best suits her interests.[705] The same result seems to apply in France, although several scholars and some courts have noted that restoration of performances following the rescission or the dissolution of the contract is governed only by the rules of dissolution and nullity.[706]

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699. *See* LA. CIV. CODE arts. 1876–1878 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 260–63; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 16.61–16.63.

700. *See* LA. CIV. CODE arts. 2013–2024 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 36–38 (AM. L. INST. 2011).

701. *See* especially LA. CIV. CODE art. 2033 (2023) (providing for the effects of nullity of contracts).

702. *See* especially LA. CIV. CODE arts. 2018–2024 (2023).

703. *See supra* note 687and *infra* notes 932–36, and accompanying texts.

704. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 158 (explaining the confusion in the French legal tradition that was prompted by merging together the *condictio indebiti* and the *condictio sine causa*).

705. *See* LA. CIV. CODE art. 2299 cmt. c (2023); Morgan's Louisiana & T.R. & S.S. Co. v. Stewart, 119 La. 392, 407–09 (1907); Kramer v. Freeman, 3 So. 2d 609 (La. 1941). *But see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20 (noting that Louisiana is a "fact pleading" system requiring no technical form of pleadings—the court knows the law (*jura novit curia*)). LA. CODE CIV. PROC. arts. 854, 862 (2023). *Cf.* PALMER I, *supra* note 214, §§ 2.2–2.4. *See supra* notes 548, 624, 663, 687 and accompanying text; *see also infra* notes 932–36 and accompanying text.

706. *See* Strickler, *supra* note 648, No. 42; CATALA, *supra* note 648, No. 224.

Finally, payment may have been made for an illicit cause. For instance, payment could have been made in performance of an unlawful or immoral contract, such as a gambling contract not authorized by law.[707] Recovery of payments made under such contracts is governed by the law of nullity, which expressly embraces the "clean hands doctrine."[708]

Thus, a performing party who knew or should have known of the defect making the contract absolutely null may not recover her performance, unless she invokes the nullity to withdraw from the contract before its purpose is achieved, or in exceptional cases when recovery is would further the interests of justice.[709] The special provisions on nullity limit any possible recovery under a theory of quasi-contract.

Therefore, restitution of a payment for an illegal cause (*condictio ob turpem causam*) is available via the action for payment of a thing not due only when recovery is permitted under the law of nullity.[710]

In all of the above cases of payments not due objectively, it should be noted that there is no requirement of error either on the part of the person who paid or on the part of the recipient of the payment. Furthermore, the payor's negligence is not a bar to recovery.[711] Here, restitution is grounded on the objective lack of legal

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707. *See* LA. CIV. CODE arts. 1968, 2033 (2023). *Cf.* LA. CIV. CODE art. 2984 (1870). *See also* Prudential Ins. Co. of America v. Harris, 748 F.Supp. 445, 447–48 (M.D. La. 1990) (insurance fraud). On the other hand, a lender who in good faith has lent money to a borrower who uses the money for unlawful gambling may recover the money lent. *See* West v. Loe Pipe Yard et al., 125 So. 2d 469 (La. Ct. App. 3d Cir. 1960).

708. *See* LA. CIV. CODE art. 2033 cmt. c (2023); Strickler, *supra* note 648, Nos 18, 19. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 32, 63 (AM. L. INST. 2011).

709. *See* LA. CIV. CODE art. 2033 (2023); Scalise, Nullity, *supra* note 608, at 682–83.

710. *See* Coleman v. Bossier City, 305 So. 2d 444 (La. 1974); STARCK, *supra* note 30, No. 244–45; Strickler, *supra* note 648, Nos 18 and 19.

711. *See* Eilts v. Twentieth Century Fox TV, 349 So. 3d 1038 (La. Ct. App. 2d Cir. 2022); *cf.* Wall v. HMO Louisiana, Inc., 979 So. 2d 536, 538–39 (La. Ct. App. 5th Cir. 2008).

justification for the payment. Therefore, the subjective element of error is inoperative.[712]

On the other hand, if payment was made knowingly with the express or implied intent to provide a gratuity or to confirm a relatively null juridical act, then no action is allowed for restitution of the payment.[713] Also, restitution is excluded when the payment was made freely to discharge a natural obligation.[714]

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712. *See* LA. CIV. CODE art. 2299 cmt. d (2023) ("a person who *knowingly or through error* has paid or delivered a thing not owed may reclaim it from the person who received it") (emphasis added); Leisure Recreation & Entertainment, Inc. v. First Guaranty Bank, 339 So. 3d 508, 518 (La. 2022) (holding that article 2299 of the Louisiana Civil Code legislatively overruled the common-law "voluntary payment doctrine" that had previously been adopted by Louisiana courts). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 cmt. e (AM. L. INST. 2011) (discussing the doctrine of voluntary payment).

713. *See, e.g.*, Allen v. Thigpen, 594 So. 2d 1366, 1371 (La. Ct. App. 3d Cir. 1992). Such gratuitous intent, however, is not presumed. Payments of disputed debts made under protest exclude any such presumption of "voluntary payment." *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 (AM. L. INST. 2011); QUEBEC CIVIL CODE, *supra* note 13, art. 1491. Contemporary French jurisprudence and doctrine also agree that the requirement of error is not necessary in cases of payments that are not due objectively. *See* Strickler, *supra* note 648, Nos 37–41 (discussing the evolution of French doctrine and jurisprudence on this issue). For confirmation of relatively null juridical acts, *see* LA. CIV. CODE art. 1842 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 215–18; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 12.52–12.57.

714. *See* LA. CIV. CODE arts. 1761, 1762 (2023); LA. CIV. CODE art. 2303 (1870). *See, e.g.*, Muse v. St. Paul Fire & Marine Ins. Co., 328 So. 2d 698, 705–06 (La. Ct. App. 1st Cir. 1976). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1302; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 62 (AM. L. INST. 2011). A person "freely" performs a natural obligation when performance was not induced by fraud or duress. Performance by error in principle still constitutes a performance "freely" rendered. *See* LA. CIV. CODE art. 1762 cmt. b (2023). Obligations that are unenforceable due to the accrual of liberative prescription and obligations discharged in bankruptcy are common examples of natural obligations. *See* LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–26; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 2.22; PLANIOL & RIPERT VII, *supra* note 157, No. 741; Strickler, *supra* note 648, Nos 2, 12. *Cf.* Gallo v. Gallo, 861 So. 2d 168 (La. 2003) (refusing recovery of child support payments by putative father whose disavowal action was perempted); Coffey v. Coffey, 554 So. 2d 202 (La Ct. App. 2d Cir. 1989) (denying recovery of spousal support payments that were made in the absence of a judicial decree ordering such payments); Roy E. Blossman, *An Unborn Child's Right to Prove Filiation: Malek v. Yehaki-Ford*, 44 LA. L. REV. 1777, 1788–89 (1984).

ii. Payment Not Due Subjectively—Payment of the Debt of Another

Payment is not due subjectively when there is an enforceable obligation that is due to the payee (who is the true obligee), but the payor is not the true obligor.[715] In this case, the payor pays the debt of another by mistake.[716] A frequent example is when an insurer by mistake pays a third person who has a valid claim against an insured whose policy was void.[717] The third person is a true obligee of the insured; however, the insurer is not a true obligor because the insured's policy had lapsed.[718] Restitution in this situation is contemplated in revised article 2302 of the Louisiana Civil Code.[719] Because the debt to the payee existed and was enforceable, restitution cannot be granted here on objective factors having to do with the debt. As a matter of fact, objective factors would exclude a claim for restitution of a payment made for the debt of another. With respect to the payor, it would be reasonable to assume that she paid the debt

715. *See* Strickler, *supra* note 648, No. 30. Traditionally, this category also included the case in which the true debtor paid a non-creditor. Modern doctrine treats this case the same as an objectively undue payment. *See supra* note 677.

716. *See* Continental Service Life and Health Ins. Co. v. Grantham, 811 F.2d 273, 275–76 (5th Cir. 1987); DeVillier v. Highland Ins. Co., 389 So. 2d 1133 (La. Ct. App. 3d Cir. 1980); New York Life Ins. Co. v. Gulf States Utilities, Co., 336 So. 2d 320 (La. Ct. App. 1st Cir. 1976); *Mathews v. Louisiana Health Service & Indem. Co.,* 471 So. 2d 1199, 1203 (La. Ct. App. 3d Cir. 1985); CARBONNIER II, *supra* note 45, No. 1219.

717. *See, e.g.*, Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945).

718. Another example is when a bank mistakenly pays a debt of judgment debtor to judgment creditor pursuant to garnishment proceedings, even though the judgment debtor did not have an account with the bank. *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1236–37 (La. Ct. App. 2d Cir. 1983).

719. LA. CIV. CODE art. 2302 (2023). *See* Dauphin v. Lafayette Ins. Co., 817 So. 2d 144, 147–48 (La. Ct. App. 3d Cir. 2002) (explaining the difference between the action for "payment of a thing not due" of article 2299 and the action for "payment of the debt of another person" of article 2302 of the Louisiana Civil Code). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

in order to help the debtor—as a *negotiorum gestor*,[720] a delegate,[721] or a donor[722]—or to secure a subrogation[723] to the rights of the payee.[724] In all these cases, payment is justified, thus excluding any claim of restitution against the payee.[725] This hypothesis as to the motives of the payor is grounded upon the logical proposition that no reasonable person would pay a debt that is not hers without justification.[726] When examining the situation of the payee, it should be remembered that the payee—who is also the true obligee—has no duty to investigate the details of payment.[727] On the contrary, the payee is bound to accept payment from a third person payor, unless

720. *See supra* notes 232, 249 and *see infra* note 838 and accompanying texts.

721. *See* LA. CIV. CODE art. 1886 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 283–85, 292–94; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 10.32; MALAURIE ET AL., *supra* note 30, No. 1043.

722. Payment of the debt of another may be characterized as an indirect liberality made by the payor in favor of the debtor. *See* MALAURIE ET AL., *supra* note 30, No. 1043; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 228–30; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

723. *But see* LA. CIV. CODE art. 1855 (2023) ("Performance rendered by a third person effects subrogation only when so provided by law or by agreement"); LA. CIV. CODE art. 2302 cmt. b (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 228–32; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

724. Under modern French law, there seems to be a presumption that a payment of a debt of another is a service (e.g., management of affairs) or an indirect liberality, unless the payor can prove that she paid in error. *See* TERRÉ ET AL., *supra* note 57, Nos 1292, 1293 (arguing that the language of revised articles 1302-1 and 1302-2 of the French Civil Code support this proposition).

725. *See* CARBONNIER II, *supra* note 45, No. 1219; Strickler, *supra* note 648, Nos 35. If the payor made the payment as a gift to the true debtor, restitution is excluded, unless the donation is revoked, rescinded, or dissolved. On revocation, rescission and dissolution of donations, *see* LORIO & WALLACE, *supra* note 619, §§ 8:12, 9:3, 9:5, 11:1–11:9; CARTER, *supra* note 609, at 116–23.

726. *See* TERRÉ ET AL., *supra* note 57, No. 1292; Strickler, *supra* note 648, No. 31. This principle was expressly stated in the old provisions of the French and Louisiana Civil Codes. *See* CODE NAPOLÉON, *supra* note 10, art. 1235; LA. CIV. CODE art. 2133 (1870) ("Every payment presupposes a debt; what has been paid without having been due, is subject to be reclaimed"). Indeed, a person would logically pay the debt of another as a *negotiorum gestor*, or as an indirect liberality in favor of the true obligor, or in anticipation of a conventional or legal subrogation to the rights of the payee. *See* TERRÉ ET AL., *supra* note 57, No. 1292; PLANIOL & RIPERT VII, *supra* note 157, No. 740; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 26; Strickler, *supra* note 648, No. 35.

727. Even an obligor of limited capacity can validly accept payment. *See* LA. CIV. CODE art. 1858 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 230–32; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.9.

the payee has an interest in a personal performance by the obligor.[728] It is clear, therefore, that restitution of a payment of the debt of another cannot be based on objective factors. Instead, restitution of the payment finds justification in a subjective factor—the error of the payor.[729]

Under revised article 2302, the payor has a claim in restitution if she pays the debt of another in the mistaken belief that she was the actual obligor. When this error is excusable, it seems equitable to protect the party in error, even though payment was tendered to the true obligee. Thus, the error of the payor rebuts the objective presumption that the payor intended to make the payment and gives rise to a claim in restitution against the payee. The same result should follow by even greater force if the payor made the payment under fraud or duress.[730] On the other hand, if the payor knowingly and voluntarily pays the debt of another, a claim of restitution against the payee is excluded. The payor might then seek recovery from the true debtor under a theory of *negotiorum gestio*, enrichment without cause, or subrogation, as the case may be.[731]

To be entitled to recovery from the payee, the payor of the debt of another must be laboring under "the erroneous belief that he was

728. *See* LA. CIV. CODE art. 1855 (2023). Under this provision, the payor is subrogated to the rights of the obligee only by law or agreement. *See* LA. CIV. CODE art. 2302 cmt. b (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 230; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 13.3.

729. *See* Strickler, *supra* note 648, Nos 30–31.

730. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302–2 ("One who *by error or under duress* pays the debt of another can bring an action in restitution against the creditor") (emphasis added). For example, the paying non-obligor may have been defrauded by the obligee, the true obligor, or a third person. Alternatively, the non-obligor could have been forced to pay by threat of seizure of her own assets. *See* CARBONNIER II, *supra* note 45, No. 1219; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 181–83. Although a threat of exercising a lawful right might not constitute duress, it still might give rise to error which allows for restitution of the payment. *See* LA. CIV. CODE art. 1962 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 90–94.

731. *See* CARBONNIER II, *supra* note 45, No. 1219; Strickler, *supra* note 648, No. 35. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

himself the [true] obligor."[732] In other words, the payor must prove that she thought she was bound to pay a debt when in reality the payment was not her responsibility.[733] To make that determination, the general rules of error apply.[734] Thus, the error could be bilateral among the payor and payee or unilateral only on the side of the payor.[735]

The error can be an error of fact or of law.[736] Under the general law of error, only substantial and excusable errors are actionable.[737] An error is substantial when it concerns a cause that affected the party's action.[738] The payor must establish that, had it not been for her error, she would not have made the payment.

In essence, as one authority aptly observes, "[t]he proof of the solvens's error is tantamount to establishing that the performance was involuntary and ought to be returned because it was without

732. *See* LA. CIV. CODE art. 2302 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1302–2.

733. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; Strickler, *supra* note 648, No. 43.

734. *See* LA. CIV. CODE arts. 1948–1952 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 11–49 (discussing the general law of error).

735. *See* 3 RENE DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL No. 92 (1923) [hereinafter DEMOGUE III]. *See also* Litvinoff, Vices of Consent, *supra* note 618, at 34–35.

736. *See* LA. CIV. CODE art. 1950 (2023). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 740; DEMOLOMBE XXXI, *supra* note 63, No. 280; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2832; DEMOGUE III, *supra* note 735, No. 92. An example of error of law can be a misapplication of succession law. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 27; Litvinoff, Vices of Consent, *supra* note 618, at 12–30. Mistaken payments might arise in the context of multiple obligors owing the same debt. A joint obligor of a divisible obligation might demand restitution from the obligee for paying her co-debtor's virile share in the mistaken belief that the debt is solidary. *See* LA. CIV. CODE art. 1788 (2023). A person who paid the debt of another in the mistaken belief that she was a surety may demand restitution from the obligee. *See supra* note 678. On the other hand, reimbursements of payments made by a true solidary obligor or by an inferior creditor to a superior creditor are governed by special provisions of the laws of solidarity and subrogation, as the case may be. *See* LA. CIV. CODE arts. 1800–1806, 1825–1830, 3047–3054 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 103–15, 188–96; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 7.21, 7.23, 7.24, 7.29, 7.78–7.84, 11.1, 11.8–11.59.

737. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36–38.

738. *See* LA. CIV. CODE art. 1949 (2023); Litvinoff, Vices of Consent, *supra* note 618, at 12–13; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 171–80.

cause."[739] Determination of an excusable error is made according to the circumstances surrounding the parties and the transaction,[740] based on a reasonable person standard.[741] This general rule ought to apply for payments subjectively undue, but with some necessary adaptations concerning both parties. For instance, errors made by professionals, such as financial institutions and insurance companies, might more easily be characterized as inexcusable.[742]

On the other hand, automated payments in complex transactions might seem like a fertile ground for mistaken payments, which could be deemed excusable errors.[743] "Honest" mistakes made in the ordinary course of business are also generally excusable.[744] French scholars take account of these peculiarities and correctly observe that excusability of the error should not be a requirement for the action for restitution of a subjectively undue payment. Instead, the excusable or inexcusable character of the payor's error ought to be juxtaposed with the payee's good or bad faith, and together they should serve as factors for determining the appropriate award of restitution. A similar approach is found in the Third Restatement of Restitution and Unjust Enrichment.[745] This doctrinal approach seems to find support also in the revised French Civil Code.[746]

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739. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 177–78 (footnotes omitted).

740. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36–38.

741. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 178–80.

742. *See* Litvinoff, Vices of Consent, *supra* note 618, at 36; MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237.

743. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237.

744. *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1236–37 (La. Ct. App. 2d Cir. 1983); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 178–80.

745. *See* MARTY, RAYNAUD & JESTAZ, *supra* note 648, No. 237; Strickler, *supra* note 648, No. 36. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011) (considering the circumstances of the plaintiff's mistake when determining the extent of relief available with regard to the defense of change of position); *id.* § 52 (considering the recipient's bad faith or misconduct in the ultimate measure of unjust enrichment).

746. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302-3 ("[Restitution] may be reduced if payment was preceded by a fault"); TERRÉ ET AL., *supra* note 57, No. 1298; Strickler, *supra* note 648, Nos 36, 113–26.

Under the general law of error, the court may also consider whether the party not in error has changed her position in a good-faith reliance on the acts of the party in error.[747] This principle finds expression in the remaining language of revised article 2302 of the Louisiana Civil Code, pursuant to which, "The payment may not be reclaimed to the extent that the obligee, because of the payment, disposed of the instrument or released the securities relating to the claim. In such a case, the person who made the payment has a recourse against the true obligor."[748] This provision derives from the Code Napoléon[749] and is based on equitable considerations.[750]

Indeed, if the obligee—after being paid by the payor and prior to learning of the payor's error—changed her position substantially by impairing her ability to collect[751] or secure[752] her credit-right, the loss must be borne by the payor.[753] As an expression of equity, this

747. *See* LA. CIV. CODE art. 1952 cmt. d (2023); Litvinoff, Vices of Consent, *supra* note 618, at 40–42.

748. LA. CIV. CODE art. 2302 (2012). *See* Pioneer Bank & Trust Co. v. Dean's Copy Products, Inc., 441 So. 2d 1234, 1237 (La. Ct. App. 2d Cir. 1983).

749. *See* CODE NAPOLÉON, *supra* note 10, art. 1377; LA. CIV. CODE art. 2310 (1870).

750. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2829.

751. Physical destruction or cancellation of the instrument evidencing the obligation, might be considered as a tacit remission of the debt. Surrender of the instrument to the obligor might give rise to a presumption of remission or it might be considered as a receipt of full payment. *See* LA. CIV. CODE art. 1889 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 302–03; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 18.2, 18.3. The obligee "disposes of her title" also when she allows the prescriptive period to lapse without bringing suit against the true obligor. In any event, disposal of the instrument impairs the obligee's ability to prove her claim. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, Nos 2829, 2829i, 2830; PLANIOL & RIPERT VII, *supra* note 157, No. 742.

752. Releasing or failing to maintain the real or personal securities given for the performance of the obligation does not amount to a remission of the debt. *See* LA. CIV. CODE arts. 1891, 1892 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 299–303; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 18.4, 18.11–18.13. Nevertheless, it impairs substantially the obligee's ability to collect the debt from the true obligor. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2830; PLANIOL & RIPERT VII, *supra* note 157, No. 742.

753. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2828. However, a fortuitous impairment of the obligee's credit-right—such as the fortuitous destruction of the object of a real security, insolvency of a surety, or the fortuitous loss of the instrument—should not be imputed to the payor. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 742.

rule only operates if the obligee is in good faith, that is, if she did not know of the payor's error when she changed her position.[754] When that is the case, the payor cannot demand full restitution from the obligee. Instead, the payor must now seek recourse—for the full amount or for any amount not collected from the obligee—against the true obligor.[755] French doctrine steadily accepts that the appropriate recourse to pursue in this circumstance is an action against the true debtor for enrichment without cause (*actio de in rem verso*).[756]

This view seems correct. The payor in this case cannot possibly have an action against the true obligor in *negotiorum gestio* or subrogation. To have these actions presupposes that the payor voluntarily paid the obligee, which would exclude any claim for restitution against the obligee by an action under article 2302 of the Louisiana Civil Code. The true obligor must, therefore, compensate the payor to the extent of the obligor's enrichment or the payor's impoverishment, whichever is less.[757]

b. Restoration of Undue Payments

When the payment is not due in accordance with the above requirements, the payor has an action against the payee for recovery of the undue payment. If the action is successful, the court orders restoration of a thing or of its value that belongs to the plaintiff, as if the defendant had borrowed the thing. Thus, the payee's obligation to restore the undue payment is determined according to

754. If the obligee is in bad faith, the exception does not apply. Thus, if the payor can establish the obligee's bad faith, then the obligee is bound to make restitution to the payor and must seek to enforce the true obligor's debt. *See* BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2829. On the distinction of payees in good or in bad faith, *see infra* note 760.

755. *See* LA. CIV. CODE art. 2302 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

756. *See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4. *Cf.* LA. CIV. CODE art. 2298 (2023).

757. *See* LA. CIV. CODE art. 2298 (2023). *But see id.* art. 2302 cmt. c ("When the payment cannot be reclaimed from the obligee, the person who made the payment has 'a recourse against the true obligor,' that is, *he can recover from whatever he paid to the obligee*") (emphasis added).

the nature of the underlying object.

If the thing is an immovable or a nonconsumable movable, then the payee's obligation to restore the thing is likened to that of a borrower on a nonconsumable (*commodatum*).[758] Restoration must be made in kind (*in natura*) if the thing still exists.[759] If the thing has been damaged, destroyed or not returned, then the obligation of the payee is determined according to her good or bad faith.[760] A payee in good faith must restore the value of the thing if the loss was caused by her fault.[761] If the loss was not caused by her fault, a payee in good faith is obligated to return anything that remains of the thing, including any actions she might have or sums she received on occasion of the loss of the thing.[762] A payee in bad faith is liable to pay the value of the thing even if the loss occurred by a fortuitous event.[763] A payee in bad faith is also bound to restore the fruits and

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758. *See* LA. CIV. CODE art. 2891 (2023).

759. *See id.* art. 2304; Kramer v. Freeman, 3 So. 2d 609 (La. 1941); PLANIOL & RIPERT VII, *supra* note 157, No. 746. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352; QUEBEC CIVIL CODE, *supra* note 13, art. 1700.

760. A payee is in good faith when she honestly believes that the payment was due to her, or she had no reason to believe that the payment was not due. Good faith of the payee is presumed. A payee may receive the thing in good faith, but may fall out of good faith prospectively when she discovers the truth or when she should know that the payment was undue. A "bad faith payee" is a payee not in good faith according to the above definition, regardless of malicious intent of causing damage. *See* Broussard v. Friedman, 40 So. 2d 669 (La. Ct. App. 1st Cir. 1949); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257. *Cf.* LA. CIV. CODE art. 487 (2023). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 218–19, 221, 229; Strickler, *supra* note 648, No. 103. The universal successors of the payee continue the payee's good or bad faith. *See* Strickler, *supra* note 648, No. 104.

761. *See* LA. CIV. CODE art. 2304 cmt. b (2023); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); PLANIOL & RIPERT VII, *supra* note 157, No. 746. The value is estimated as of the day that restitution must be made. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352; QUEBEC CIVIL CODE, *supra* note 13, art. 1700.

762. *See* LA. CIV. CODE art. 2304 cmt. b (2023); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, Nos 365–68.

763. *See* LA. CIV. CODE art. 2304 (2023); Kramer v. Freeman, 3 So. 2d 609 (La. 1941); River Cities Const. Co., Inc. v. Ray, 428 So. 2d 1060 (La. Ct. App. 1st Cir. 1983); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257. However, the payee in bad faith is released from her obligation when the fortuitous event would have destroyed the object even in the hands of the payor. *See* LA. CIV. CODE arts. 2304 cmt. b, 1874 (2023); PLANIOL & RIPERT VII, *supra* note 157, No. 746;

products of the thing as of the day she was in bad faith.[764] Regardless of her good or bad faith, a payee who restores the thing in kind is entitled to reimbursement for her necessary expenses.[765]

A special rule governs the payee's liability when the payee alienates the thing by onerous or gratuitous title.[766] In such a case, a payee in good faith is bound to restore whatever she received from the alienation; if the alienation was gratuitous, she owes nothing.[767]

DEMOLOMBE XXXI, *supra* note 63, Nos 369–72; LEVASSEUR, OBLIGATIONS, *supra* note 112, at 257–63; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, § 16.47. *But see also* DEMOLOMBE XXXI, *supra* note 63, Nos 372–73 (arguing that a payee who received payment in good faith and fell out of good faith later is treated as a bad faith payee from that time, except that she is not responsible for a fortuitous loss of the thing).

764. *See* LA. CIV. CODE art. 2303 (2023); *See* Julien v. Wayne, 415 So. 2d 540, 543 (La. Ct. App. 1st Cir. 1982). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-3; QUEBEC CIVIL CODE, *supra* note 13, art. 1704. Conversely, a payee in good faith is only liable for fruits and products as of the time the suit is brought. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-7; PLANIOL & RIPERT VII, *supra* note 157, No. 746. Fruits include natural as well as civil fruits (e.g., interest on money). *See* LA. CIV. CODE arts. 488, 551 (2023).

765. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 231 (explaining that former article 2314 of the Louisiana Civil Code of 1870 was repealed in 1979 because its subject matter was covered by revised articles 527 and 528 of the Louisiana Civil Code); LA. CIV. CODE arts. 527–529, 2899 (2023); LA. CIV. CODE art. 2314 (1870). *Cf.* CODE NAPOLÉON, *supra* note 10, art. 1381; FRENCH CIVIL CODE, *supra* note 11, art. 1352-5; QUEBEC CIVIL CODE, *supra* note 13, art. 1703. *See also* PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, No. 378; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2847; DEMOGUE III, *supra* note 735, No. 123; LAURENT XX, *supra* note 94, No. 382. A payee in good faith, is also entitled to reimbursement of useful expenses (but not luxurious expenses) that improved the thing, but only up to the added value of the thing or the amount of expenses, whichever is less. To deny this right of the payee would result in unjust enrichment of the payor. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 232; LA. CIV. CODE art. 528 (2023). In French law, payees in bad faith are also entitled to reimbursement for useful expenses. *See* DEMOLOMBE XXXI, *supra* note 63, Nos 381–86; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2847. Large scale improvements, on the other hand, are governed by the law of accession. *See* LA. CIV. CODE arts. 487, 496, 497 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:21, 11:22; DEMOLOMBE XXXI, *supra* note 63, Nos 387. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 26 & 27 (AM. L. INST. 2011).

766. *See* LA. CIV. CODE art. 2305 & cmt. b (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1701.

767. *See* LA. CIV. CODE art. 2305 cmt. d (2023); Munson v. Martin, 192 So. 2d 126, 129 (La. 1966); Gaty v. Babers, 32 La. Ann. 1091 (1880); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746.

A payee in bad faith is bound to restore the value of the thing or the sum that she received for the alienation, if that sum is greater.[768] In all of the above cases, the payor, as owner of the thing, may also reclaim it by a real action.[769] Further, the payor may seek damages by instituting a delictual action where appropriate.[770]

Two substantive observations can be drawn from the rules discussed above. First, the rules consider the good-faith payee's change of position,[771] an approach that is also followed in other civil-law[772] and common-law systems.[773] Second, a payee might be compelled to disgorge her profits, particularly in the case of alienation of the thing for a price that exceeds the value of the thing,

768. Thus, a payee in bad faith who donated the thing is liable for its value. *See* LA. CIV. CODE art. 2305 cmt. d (2023); LITVINOFF, OBLIGATIONS II, *supra* note 620, § 257; PLANIOL & RIPERT VII, *supra* note 157, No. 746; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2843; LAURENT XX, *supra* note 94, No. 376.

769. *See* LA. CIV. CODE arts. 2304 cmt. c, 2305 cmt. c (2023). *Cf. id.* arts. 2021, 2035.

770. *See* LA. CIV. CODE art. 2304 cmt. d (2023).

771. In civil and common-law systems, it is a defense to an action of unjust enrichment that the defendant is no longer enriched. *See* James Gordley, *Restitution Without Enrichment? Change of Position and Wegfall der Bereicherung*, *in* UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE 227 (David Johnston & Reinhard Zimmermann eds., 2002); BURROWS, *supra* note 103, at 523–568.

772. The defense of change of position (or disenrichment) appears in the German and Greek civil codes in the context of measuring the surviving enrichment for which the defendant is liable. *See* GERMAN CIVIL CODE, *supra* note 87, §§ 818–822; GREEK CIVIL CODE, *supra* note 88, arts. 909–913. *See also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65, note a (AM. L. INST. 2011). This defense has been the topic of intense debate among German and Greek scholars, who argue that the scope of the defense is too broad. *See* Thomas Krebs, *Disenrichment in German Law* 437, 438–39, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020). It is recalled, however, that enrichment without cause is a broader concept in Germany and Greece, encompassing also the payment of a thing not due (*condictio indebiti).* In France and Louisiana, the defense of change of position is also available to a good faith defendant in a case of enrichment without cause under the "double ceiling rule." *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-4. *See infra* notes 902–07 and accompanying text.

773. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011); DOBBS & ROBERTS, *supra* note 6, § 4.5; Graham Virgo, *A Taxonomy of Defences in Restitution* 398, 403–04, 412–13, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020); Ross Grantham, *Change of Position-Based Defences* 418–36, *in id*.

and regardless of her good or bad faith.[774]

Thus, to paraphrase a proverbial common-law hypothetical,[775] if defendant, in good or in bad faith and without being so entitled, received plaintiff's watch, valued at $30, and defendant is able to sell the watch for $40, then plaintiff can reclaim defendant's gain ($40) under an action for payment of a thing not due.[776]

If the thing is a sum of money or other consumable, then the payee is responsible for returning sums or things of equal value.[777] Here, the obligation of the payee resembles that of a borrower of a consumable (*mutuum*).[778] The risk is on the payee, who is responsible regardless of any change of position, including fortuitous events.[779] A payee in bad faith is also responsible for

774. *See* LA. CIV. CODE art. 2305 (2023) ("A person who in *good faith alienated* a thing not owed to him is only bound to *restore whatever he obtained from the alienation*. If he received the thing in *bad faith,* he owes, *in addition*, damages to the person to whom restoration is due.") (emphasis added). *Cf.* LA. CIV. CODE article 2313 (1870); CODE NAPOLÉON, *supra* note 10, art. 1380. *See* DEMOLOMBE XXXI, *supra* note 63, No. 404 (observing that a payee in good or in bad faith who alienated the thing for a price that exceeds the value of the thing must restore that higher amount). In Louisiana, a remedy of disgorgement of profits may also be available in the law of mandate and *negotiorum gestio*. *See supra* note 416. Disgorgement of profits, however, is not an available remedy in cases of enrichment without cause. *See infra* note 908–09 and accompanying text. *But see also infra* note 919 and accompanying text.

775. *See* DOBBS & ROBERTS, *supra* note 6, § 4.1(1), at 371 (the hypothetical of the stolen watch— if defendant steals plaintiff's watch, which was valued at $30, and defendant is able to sell the watch for $40, then plaintiff can reclaim defendant's gain ($40) as a disgorgement of profit). As mentioned, the Louisiana action for payment of a thing not due is also available in cases of conversion. *See supra* note 687.

776. *See* LA. CIV. CODE art 2305 & cmt. d (2023) (explaining that a payee in good faith who alienated the thing is only liable for restoring the price whereas a payee in bad faith is liable for restoring the price or the value of the thing, whichever is higher). *See also supra* note 774.

777. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 746. Special rules of recovery exclude the application of the civil code provisions. *See, e.g.*, Taylor v. Woodpecker Corp., 562 So. 2d 888, 892 (La. 1990) (recovery of oil and gas proceeds by unleased mineral interest owners).

778. *See* LA. CIV. CODE art. 2904 (2023).

779. *See* LITVINOFF, OBLIGATIONS II, *supra* note 620, § 256; PLANIOL & RIPERT VII, *supra* note 157, No. 746; DEMOLOMBE XXXI, *supra* note 63, No. 391; BAUDRY-LACANTINERIE & BARDE XV, *supra* note 157, No. 2845. Thus, a collection agency is liable to make restitution of overpayments it received from withholding debtor's salary, even though it had disbursed the overpaid funds to the debtor. *See* Bossier Parish School Board v. Pioneer Credit Recovery, Inc., 161

interest as of the date she was in bad faith.[780]

Under the revised French Civil Code, the payee's obligation to give restoration may be reduced if payment was preceded by the payor's fault.[781] Thus, French courts have reduced, or even excluded, awards for restoration of payments that were made by an inexcusable error of the payor—usually a financial institution or other professional held to high standards—attributed to the payor's gross negligence.[782] Louisiana courts have also held on occasion that inexcusable errors committed by professionals might limit or bar recovery of undue payments.[783] The Louisiana Supreme Court, on

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So. 3d 1007 (La. Ct. App. 2d Cir. 2015). On the other hand, where a payee of funds pursuant to a judgment disposes of a portion of the funds to pay her attorney, the payor must pursue the payee and may not recover the payment in the hands of the attorney once the judgment is annulled or reversed. *See* Louisiana Health Service & Indem. Co. v. Cole, 418 So. 2d 1357, 1359–60 (La. Ct. App. 2d Cir. 1982); City Financial Corp. v. Bonnie, 762 So. 2d 167, 169–70 (La. Ct. App. 1st Cir. 2000). The defendant's change of position would be considered in the case of enrichment without cause, if that remedy were available. *See* LA. CIV. CODE art. 2298 (2023). Although, in principle, the obligation to restore an undue payment does not take account of the payee's enrichment, there seems to be no convincing reason why a good faith payee is liberated when she donates an immovable, whereas she is still bound if she spends money for a serious purpose (e.g., health related expenses). *See also* DEMOGUE III, *supra* note 735, No. 115. In Germany and in Greece, a change of position of a payee in good faith can, under certain circumstances, release the payee from the obligation to restore money received. *See* STATHOPOULOS, OBLIGATIONS *supra* note 133, at 1133–34 (explaining that a payee in good faith is not liable for restitution if she spent the money in good faith, that is, when she did not know or should have known that the payment was undue, and before she was served with an action for restitution). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. a, b, c (AM. L. INST. 2011).

780. *See* LA. CIV. CODE art. 2303 (2023). Conversely, a payee in good faith is only liable for fruits and products as of the time the suit is brought. *See* Julien v. Wayne, 415 So. 2d 540, 542 (La. Ct. App. 1st Cir. 1982); Futorian Corp. v. Marx, 420 So. 2d 702, 704 (La. Ct. App. 4th Cir. 1982); Hebert v. Jeffrey, 655 So. 2d 353, 355 (La. Ct. App. 1st Cir. 1995); Matthews v. Sun Exploration & Prod. Co., 521 So. 2d 1192, 1198–99 (La. Ct. App. 2d Cir. 1988); Festermaker & Assocs. v. Regard, 471 So. 2d 1137, 1140 (La. Ct. App. 3d Cir. 1985); Shelter Ins. Co. v. Cruse, 446 So. 2d 893, 895 (La. Ct. App. 1st Cir. 1984). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1352-7; PLANIOL & RIPERT VII, *supra* note 157, No. 746.

781. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1302-3; Strickler, *supra* note 648, Nos 113–115.

782. For cases, *see* Strickler, *supra* note 648, Nos 116–126.

783. *See* Metropolitan Life Ins. Co. v. Mundy, 167 So. 894 (La. Ct. App. 1st Cir. 1936); Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945).

the other hand, recently held that "an insurer's erroneous, or even negligent, payment of a claim to its insured does not bar the insurer from later recouping the amount paid."[784] A closer look at this jurisprudence, however, reveals that this recent Supreme Court decision and other decisions that allow recovery regardless of the payor's error or negligence involved objectively undue payments (under revised article 2299 of the Louisiana Civil Code).[785]

Indeed, when payment is not due objectively—e.g., payment of a nonexistent debt—the error of the payor, even if inexcusable, is not a requirement for recovery.[786] It is otherwise, however, when payment is not due subjectively, that is, when the payor erroneously paid the debt of another (under article 2302 of the Louisiana Civil Code).[787] When that is the case, the payor's error is a prerequisite to recovery. Thus, the nature of the payor's error as excusable or inexcusable ought to be taken into account when determining the amount of recovery under article 2302.[788] Another example of a defense to

784. Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018) (quoting with approval American Intern. Specialty Lines Ins. Co. v. Canal Indemnity So., 352 F.3d 254 (5th Cir. 2003)).

785. *See, e.g.*, Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018) (finding that an insurer does not, by virtue of making a payment on a claim, waive the right to assert coverage defenses to a subsequent claim); Dear v. Blue Cross of Louisiana, 511 So. 2d 73, 74–76 (La. Ct. App. 3d Cir. 1987) (holding than an insurer's erroneous payment of medical expenses that were excluded from coverage did not bar the insurer from recovering the amounts paid); Central Sur. & Ins. Corp. v. Corbello, 74 So. 2d 341, 344 (La. Ct. App. 1st Cir. 1954) (allowing insurer to recover erroneous payments made after the policy had expired).

786. *See* Eilts v. Twentieth Century Fox TV, 349 So. 3d 1038 (La. Ct. App. 2d Cir. 2022); LA. CIV. CODE art. 2299 cmt. d (2023) ("Under [this provision], a person who *knowingly or through error* has paid or delivered a thing not owed may reclaim it from the person who received it); Forvendel v. State Farm Mutual Automobile Ins. Co., 251 So. 3d 362, 366 (La. 2018). Thus, negligence per se is not a bar to recovery of an *objectively undue payment* under article 2299 of the Louisiana Civil Code. *Cf.* Wall v. HMO Louisiana, Inc., 979 So. 2d 536, 538–39 (La. Ct. App. 5th Cir. 2008).

787. *See* Dauphin v. Lafayette Ins. Co., 817 So. 2d 144, 147–48 (La. Ct. App. 3d Cir. 2002) (explaining the difference between the action for "payment of a thing not due" of article 2299 and the action for "payment of the debt of another person" of article 2302 of the Louisiana Civil Code).

788. If examined more carefully, some of the decisions that have barred recovery due to the payor's inexcusable error actually involved payments not due subjectively (now governed by revised article 2302 of the Louisiana Civil Code). *See,*

recovery—especially in cases of payment made in performance of an illegal or illicit contract—is when the payor has "unclean hands," that is, when she knew or should have known of the defect that makes the contract absolutely null.[789]

The more specific provisions on nullity apply in this case.[790] The obligation to restore an undue payment involves the payor and the payee.[791] The plaintiff in the action for restoration of the undue payment is the payor, that is, the person who made the payment or the person in whose name payment was made, if the payment was made by a mandatary or other representative.[792] Thus, a true obligee does not have standing to maintain an action for restoration against

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e.g., Pennsylvania Casualty Co. v. Brooks, 24 So. 2d 262, 263 (La. Ct. App. 1st Cir. 1945) (dismissing insurer's action for recovery of money paid erroneously by insurer to third party to whom the insured was actually indebted). *See also* Continental Oil Co. v. Jones, 191 So. 2d 895, 897–98 (La. Ct. App. 1st Cir. 1966) (distinguishing Pennsylvania Casualty Co. v. Brooks, as a case involving the erroneous payment to a third-party creditor). Naturally, the payor may still recover the payment from the true debtor under a theory of enrichment without cause. *See* LA. CIV. CODE arts. 2302, 2298 (2023).

789. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 214–17; LA. CIV. CODE art. 2033 cmt. c (2023); West v. Lee Pipe Yard, 125 So. 2d 469 (La. Ct. App. 3d Cir. 1960) (refusing recovery of money lent for illegal gambling); Lagarde v. Dabon, 98 So. 744 (La. 1924) (refusing to grant restitution of performances under an immoral contract); A Better Place, Inc. v. Giani Inv. Co., 445 So. 2d 728, 732 (La. 1984) (explaining the "clean hands doctrine").

790. *See* LA. CIV. CODE art. 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011).

791. *See* Franklin State Bank & Trust Co. v. Crop Production Services, Inc., 2018 WL 3244105 (W.D. La. Jul. 3, 2018). Third parties to whom the payment is traced may be liable in tort or enrichment without cause. *See* Soileau v. ABC Ins. Co., 844 So. 2d 108, 110–11 (La. Ct. App. 3d Cir. 2003).

792. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; DEMOLOMBE XXXI, *supra* note 63, Nos 245–246; Strickler, *supra* note 648, No. 54. A *negotiorum gestor* who made an undue payment on behalf of the owner can seek restoration herself, unless the owner has ratified the manager's acts, in which case the owner has the action whereas the *gestor* can claim reimbursement from the owner. *See* DEMOLOMBE XXXI, *supra* note 63, No. 250; Strickler, *supra* note 648, No. 57. The right to bring the action can also be assigned to a conventional subrogee, such as in the case of the insurer who indemnified the payor-insured for the undue payment and is now subrogated to the payor's rights against the payee. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; Strickler, *supra* note 648, No. 54. The payor's creditors can also claim restoration by way of the oblique action. *See* LA. CIV. CODE art. 2044 (2023). *See* PLANIOL & RIPERT VII, *supra* note 157, No. 744; Strickler, *supra* note 648, No. 55. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 47, 48 (AM. L. INST. 2011).

another obligee who was wrongly paid by the obligor.[793] The defendant is the person who received the payment as well as the person on whose behalf the payment was received.[794] Proof of the payment, its undue nature, and the payor's error, when required, rests with the plaintiff.[795] Actions for the recovery of a payment not due prescribe in ten years.[796]

*2. Enrichment Without Cause (*Actio de in Rem Verso*)*

The action for enrichment without cause (*actio de in rem verso*) was originally recognized and crafted by the French and Louisiana courts applying general principles of law.[797] This jurisprudence was

793. *See* Chrysler Credit Corp. v. Whitney Nat'l Bank, 1993 WL 70050, at *5 (E.D. La. Mar. 4, 1993); Nelson v. Young, 223 So. 2d 218, 223 (La. Ct. App. 2d Cir. 1969); Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989). In such a case, however, the true obligee may have recourse against the payee under an action for enrichment without cause (*actio de in rem verso*) if the requirements for this action are met. *See* Barton, at 385.

794. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 745; Strickler, *supra* note 648, No. 58. If payment was received by a mandatary or other representative, the principal is the proper defendant. *See* Strickler, *supra* note 648, No. 61. The obligation to make restoration is heritable. *See* Strickler, *supra* note 648, No. 60. Nevertheless, the defendant cannot be the person on whose behalf the payment was made. Thus, a physician who was paid by the insurer to provide medical services that were not covered is the proper party defendant in the insurer's action for payment of a thing not due. The insured patient, on the other hand, can only be sued for enrichment without cause. *See* Strickler, *supra* note 648, No. 64.

795. *See* Julien v. Wayne, 415 So. 2d 540, 543 (La. Ct. App. 1st Cir. 1982); Strickler, *supra* note 648, Nos 96–100.

796. *See* LA. CIV. CODE art. 3499 (2023); State v. Pineville, 403 So. 2d 49, 55 (La. 1981); Julien v. Wayne, 415 So. 2d 540, 542–43 (La. Ct. App. 1st Cir. 1982). For the problem of prescription in the case of "election of remedies," *see* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20.

797. In France, the *actio de in rem verso* was introduced in the seminal decision of the Cour de cassation in the *Boudier* case. *See supra* note 542. The Louisiana Supreme Court recognized the *actio de in rem verso* in the landmark cases Minyard v. Curtis Prod., Inc., 205 So. 2d 422 (La. 1967) and Edmonston v. A-Second Mortgage Co., 289 So. 2d 116 (La. 1974) (basing the action on former articles 21 and 1965 of the Louisiana Civil Code of 1870 – revised articles 4 and 2055). LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 344, 355–60; LA. CIV. CODE art. 2298 cmts. a and c (2023).

codified fairly recently in France[798] and Louisiana.[799] Generally, liability for enrichment without cause requires a displacement of wealth in favor of the enriched obligor at the expense of the impoverished obligee. Moreover, this displacement is not justified by the will of the parties or by operation of law.[800] The remedy provided is subsidiary. It is intended to correct this patrimonial imbalance pursuant to the moral directives of equity and commutative justice.[801] To explore the contours of enrichment without cause, one must first refer to its legal foundation, residual character, and purpose.

Scholars have debated the legal foundation of the theory of enrichment without cause.[802] The first doctrinal approach considered enrichment without cause closer to tort—a form of quasi-delict generating legal obligations on the basis of the acts of the enriched obligor.[803] This approach is historically accurate, especially with regard to the legal nature of the Roman *condictio*.[804] Nevertheless, the

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798. *Enrichissement injustifié. See* FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4 (rev. 2016); QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496 (rev. 1991).

799. *See* LA. CIV. CODE. art. 2298 (rev. 1995).

800. *See* Scott v. Wesley, 589 So. 2d 26, 27 (La. Ct. App. 1st Cir. 1991) ("The root principle of an unjustified enrichment. . .is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid."); Tate II, *supra* note 493, at 459.

801. *See* 9 CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS No. 578 (Etienne Bartin ed., 5th ed. 1897-1923) (introducing the doctrine of *actio de in rem verso*); AUBRY & RAU VI, *supra* note 157, Nos 314–24; GORDLEY, PHILOSOPHICAL ORIGINS, *supra* note 48, at 10–11, 30–31.

802. *See* LITVINOFF, OBLIGATIONS II, *supra* note 620, § 259.

803. *See, e.g.*, PLANIOL II.1, *supra* note 100, No. 937; Saúl Litvinoff, *Work of the Appellate Courts--1976-1968, Obligations*, 29 LA. L. REV. 200, 207–08 (1969); Georges Ripert & Michel Teisseire, *Essai d'une théorie de l'enrichissement sans cause*, RTDCIV 1904, p. 727 (arguing that the legal basis for unjustified enrichment can be found in the theory of risks); Stephen Smith, *Unjust Enrichment: Nearer to Tort than Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 181 (Robert Chambers et al. eds., 2009); Reinhard Zimmermann, *Unjustified Enrichment: The Modern Civilian Approach*, 15 OXFORD J. LEGAL STUD. 403, 403–04 (1995) ("The law of unjustified enrichment, in a way, is the mirror image of the law of delict").

804. *See* STATHOPOULOS, UNJUST ENRICHMENT, *supra* note 99, at 4–6 (explaining that the early *condictiones* were focused solely on the act of the defendant and sanctioned an illicit misappropriation of wealth).

quasi-delictual approach focuses too much on the subjective element of the obligor's behavior, thus failing to account for cases in which the enriched obligor must make restitution regardless of her capacity or fault.[805] The second doctrinal approach places enrichment without cause closer to contract—a quasi-contract generating obligations as if there were a fictitious contract between enriched obligor and impoverished obligee. This approach ultimately prevailed in civil law doctrine[806] and jurisprudence.[807] Contemporary scholars, however, take issue with the misleading term "quasi-contract"[808] and argue that unjust enrichment is an autonomous source of obligations—a third pillar alongside contract and delict.[809] In civil-law language,

805. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 752; PLANIOL II.1, *supra* note 100, No. 937; 9*bis* CHARLES BEUDANT & PAUL LEREBOURS-PIGEONNIÈRE, COURS DE DROIT FRANÇAIS No. 1759 (R. Rodière ed., 2d ed. 1951-52); RIPERT & BOULANGER II, *supra* note 169, No. 1272; MAZEAUD ET AL., *supra* note 85, No. 711 (all arguing that admissibility of the *actio de in rem verso* is independent of the capacity or incapacity of the defendant).

806. Enrichment without cause has been compared to an abnormal *negotiorum gestio*, and an extension of the action for recovery of a payment of a thing not due. *See* Nicholas I, *supra* note 190, at 618–21 (discussing the development of a theory of abnormal *negotiorum gestio* (*negotiorum gestio utilis*) in the French jurisprudence); Nicholas II, *supra* note 190, at 49–62 (discussing the foundation of enrichment without cause on the basis of several quasi-contractual theories in the early Louisiana jurisprudence); LITVINOFF, OBLIGATIONS I, *supra* note 514, § 199, at 360 (discussing real contracts—contracts *re*, such as the loan contract—and observing that "the idea of unjust enrichment lies at the heart of these contractual figures"). *See supra* note 190.

807. From the recent Louisiana jurisprudence, *See, e.g.*, Canal/Claiborne, LTD v. Stonehedge Dev., L.L.C., 156 So. 3d 627, 633–34 (La. 2014) ("That a claim of enrichment without cause under LA. CIV. CODE art. 2298 is a quasi-contractual claim is well-settled in our jurisprudence."); Arc Industries, L.L.C. v. Nungesser, 970 So. 2d 690, 694–95 (La. Ct. App. 3d Cir. 2007) (holding that a quasi-contractual claim of enrichment without cause is sufficient to support the application of LA. CODE CIV. PROC. art. 76.1 on venue); Our Lady of the Lake Reg'l Med. Ctr. v. Helms, 754 So. 2d 1049, 1052 (La. Ct. App. 1st Cir. 1999), observing that:

> there is a general concept of quasi contractual obligations; it is a concept based upon the principle that where there is an unjust enrichment of one at the expense or impoverishment of another, then the value of that enrichment or, in some cases, the amount of the impoverishment must be restituted.

808. *See, e.g.*, LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 9–15.

809. *See* BIRKS, *supra* note 6, at 3–19 (referring to unjust enrichment as the *tertium quid*). *See also* Canal/Claiborne, Ltd. v. Stonehedge Development, LLC, 156 So. 3d 627, 633–34 (La. 2014) (holding that a constitutional waiver of sovereign immunity from suits in contract and tort does not include the quasi-contractual claim of unjust enrichment).

this means that enrichment without cause, payment of a thing not due, and *negotiorum gestio* ought to be characterized as separate licit juridical facts.[810] As discussed earlier in Part I of this Article, the only usefulness of the term "quasi-contract" in the civil law is merely descriptive—to group those licit juridical facts that impose an obligation to compensate for a benefit that was received without cause.

The law of enrichment without cause is general and residual (*lex generalis*).[811] Courts steadily characterize enrichment without cause as a "gap-filling" device of equitable origin, having exceptional application, pursuant to a judicially crafted principle of substantive subsidiarity.[812] Expression of the general principle of unjust enrichment is found in more specific provisions as well as the more general rule on enrichment without cause. Therefore, application of the provision of revised article 2298 of the Louisiana Civil Code must yield to more specific rules on cause, nullity, and dissolution of juridical acts, as well as to legal rules on delictual or quasi-delictual liability and other special rules governing the restoration of benefits received.[813]

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810. *See supra* note 122–30 and accompanying text. Thus, *negotiorum gestio* is based on general principles of unjust enrichment in the broader sense, but it should not be confused with the specific actions for unjust enrichment (*condictio indebiti* and *actio de in rem verso*). *See supra* notes 183–91 and accompanying text.

811. Under general principles of statutory interpretation, a posterior general law does not abrogate the provisions of a prior special law (*lex posterior generalis non derogat priori speciali*). *See* YIANNOPOULOS, CIVIL LAW SYSTEM, *supra* note 70, at 239. Furthermore, exceptional provisions are not susceptible of expansive interpretation or analogous application (*exceptio est strictissimae interpretationis*). *See id.* at 258.

812. *See* Walters v. MedSouth Record Mgmt., L.L.C., 38 So. 3d 243, 244 (La. 2010) (citing Mouton v. State, 525 So. 2d 1136, 1142 (La. Ct. App. 1st Cir. 1988)); Bd. of Sup'rs of La. State Univ. v. La. Agric. Fin. Auth., 984 So. 2d 72 (La. Ct. App. 1st Cir. 2008); *see also* Carriere v. Bank of La., 702 So. 2d 648, 657 (La. 1996); Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001) ("[W]here there is a rule of law directed to the issue, an action must not be allowed to defeat the purpose of said rule. . .Stated differently, unjust enrichment principles are only applicable to fill a gap in the law where no express remedy is provided").

813. For example, claims of reimbursement for improvements to land made by adverse possessors are governed primarily by the special rules on accession. *See*

Finally, enrichment without cause binds the enriched obligor to make restitution for the unjustified enrichment she received. The enriched obligor must return the benefit she received—or its traceable product—which corresponds to an impoverishment of the obligee.[814] This observation necessarily means that the object of the enrichment has exited the obligee's patrimony and is now part of the obligor's patrimony.[815]

This particular consequence of restitution ought to be distinguished from restoration of a thing or benefit already belonging to the "obligee." When a benefit or a particular thing is merely withheld by another, it is still owned by the "obligee" in question, who can reclaim it from the "obligor" by bringing a real action.[816] Especially in the case of a null or failed juridical act, the provisions on dissolution, nullity, and payment of a thing not due govern the restoration of the parties' performances.[817]

These general principles should inform the understanding and proper application of the remedy of restitution for enrichment without cause. A brief overview of the requirements and effects of enrichment without cause follows.[818]

LA. CIV. CODE arts. 487, 496, 497 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11:22; Symeon Symeonides, *Developments in the Law: 1983–84, Property*, 45 LA. L. REV. 541, 542–43 (1984). Furthermore, valid claims of reimbursement based on *negotiorum gestio* or payment of a thing not due exclude recovery under a theory of enrichment without cause. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Symeonides & Martin, *supra* note 23, at 100, 151; LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 411–27. Finally, special statutes that impose a specific liability for unjust enrichment, such as the Louisiana Uniform Trade Secrets Act (LA. REV. STAT. § 51:1433 (2023)), are not displaced by the more general remedy for enrichment without cause in the Louisiana Civil Code. *See* Reingold v. Swiftships, 210 F.3d 320, 321–22 (5th Cir. 2000).

814. *See* PLANIOL II.1, *supra* note 100, No. 938A.

815. *See* Nicholas I, *supra* note 190, at 607–08.

816. *See* LA. CIV. CODE art. 526 (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 11:7, 13:7

817. *See* LA. CIV. CODE arts. 2018–2021, 2033–2035, 2299–2305 (2023); *See* TOOLEY-KNOBLETT & GRUNING, *supra* note 230, § 15:3 n.15; LITVINOFF, OBLIGATIONS II, *supra* note 620, § 271.

818. A detailed discussion of the requirements and effects of enrichment without cause would exceed the scope and space of this Article. For a fuller discussion of these topics in the Louisiana doctrine, *see* LEVASSEUR, UNJUST ENRICHMENT,

a. Requirements

The jurisprudence identifies five requirements for enrichment without cause:[819] (1) enrichment of the obligor; (2) impoverishment of the obligee; (3) causal link between the enrichment and the impoverishment; (4) lack of cause for the enrichment and the impoverishment; and (5) unavailability of another remedy at law.[820]

Enrichment of the obligor occurs when "his patrimonial assets increase or his liability diminishes."[821] The concept of enrichment is broad, encompassing any advantage appreciable in money and taking diverse forms that defy any systematic classification.[822]

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supra note 2, at 370–437; Nicholas I, *supra* note 190; Nicholas II, *supra* note 190; Barry Nicholas, *The Louisiana Law of Unjustified Enrichment Through the Act of the Person Enriched*, 6 TUL. CIV. L. F. 3, 10-13 (1991-1992); Albert Tate, *The Louisiana Action for Unjustified Enrichment*, 50 TUL. L. REV. 883 (1976) [hereinafter Tate I]; Tate II, *supra* note 493; Nikolaos A. Davrados, *Demystifying Enrichment Without Cause*, 78 LA. L. REV. 1223 (2018).

819. The plaintiff bears the burden of proving these requirements by a preponderance of the evidence. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 427–28; Berthelot v. Berthelot, 254 So. 3d 735, 738 (La. Ct. App. 1st Cir. 2018); Tandy v. Pecan Shoppe of Minden, Inc., 785 So. 2d 111, 117 (La. Ct. App. 2d Cir. 2001).

820. *See* Minyard v. Curtis Prod., Inc., 205 So. 2d 422, 432–33 (La. 1967); Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 120–22 (La. 1974). French legal doctrine has grouped these requirements into material requirements (enrichment, impoverishment, and causal link) and juridical requirements (lack of cause and inexistence of other remedy). *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 370. The usefulness of this classification lies in the burden of proof. Material conditions are positive, whereas juridical conditions are negative. Although the plaintiff must prove each of the five requirements, the defendant usually will base her defense on the lack of a juridical requirement and bears the burden of establishing peremptory exceptions against the action. Indust. Cos., Inc. v. Durbin, 837 So. 2d 1207, 1213-16 (La. 2003); Fagot v. Parsons, 958 So. 2d 750, 752-53 (La. Ct. App. 4th Cir. 2007) (both discussing the requirements for the success of a peremptory exception of no cause of action against an action for enrichment without cause). The plaintiff also shoulders the burden of proving the lack of a cause for the enrichment because the existence of the cause is presumed. *See* ALAIN BENABENT, DROIT DES OBLIGATIONS No. 485 (14th ed. 2014).

821. *See* LA. CIV. CODE art. 2298 cmt. b (2023).

822. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 39; *See* Valerio Forti, Enrichissement injustifié, Conditions juridiques, Nos 15, 17, *in* JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 10, June 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Juridical Conditions]. *Cf.* GOFF & JONES, *supra* note 134, Nos 5-01 to 5-54 (discussing types of enrichment at common law).

Civil-law doctrine recognizes four general types of enrichment that, in some cases, may overlap: performance conferred on obligor at obligee's expense; obligor's interference with obligee's property; obligee's expenses incurred on obligor's property; and obligee's payment of obligor's debts to third persons.[823] First, enrichment can consist of a performance or other benefit that was conferred on the enriched obligor at the impoverished obligee's expense, in the absence of a contractual or legal obligation to confer such performance or benefit.[824] The most usual cases are services rendered by the obligee directly to the obligor without a contract, or in excess of a contractual obligation, or under a contract that failed.[825] Unrequested but useful services rendered by an incapable person who cannot serve as a *negotiorum gestor*[826] may be placed in this category. Claims referred to in the old Louisiana jurisprudence as "quasi-contractual quantum meruit"[827] also neatly fall under this category.[828]

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823. These general categories—originally devised by the Austrian scholar Wilburg and the German scholar von Caemmerer—are often cited by comparativists as a useful taxonomy of unjust enrichments. *See supra* note 563.

824. If the contract is null, the special provisions on nullity may authorize recovery under a theory of enrichment without cause. For recovery by unlicensed contractors under a theory of enrichment without cause, *see supra* note 628.

825. When the performance consists of services or another similar benefit to the recipient, recovery of the value of such services or benefit is made in the form of compensation for enrichment without cause. *See* LA. CIV. CODE art. 2018 (2023); Sylvester v. Town of Ville Platte, 49 So. 2d 746, 750 (La. 1950); McCarthy Corp. v. Pullman-Kellogg, Div. of Pullmann, Inc., 751 F2d 750, 760 (5th Cir. 1985); AUBRY & RAU VI, *supra* note 157, No. 320; PLANIOL & RIPERT VII, *supra* note 157, No. 764. *Cf.* LA. CIV. CODE arts. 2018, 2033 (2023). Conversely, recovery of movables, immovables or money that were paid without a valid contract is made pursuant to the more special provisions on payment of a thing not due. LA. CIV. CODE arts. 2299–2305 (2023). *See also supra* notes 620–28 and *infra* notes 932–36, and accompanying texts.

826. *See* LA. CIV. CODE art. 2296 (2023).

827. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. e (AM. L. INST. 2011).

828. Reference is made here to the civilian concept of "quasi-contractual *quantum meruit*." *See* Baker v. Maclay Props. Co., 648 So. 2d 888, 896 (La. 1995) (finding that the civilian concept of *quantum meruit* in the absence of an agreement "is more correctly referred to as unjust enrichment, also known as *actio de in rem verso*"); Jackson v. Capitol City Family Health Ctr., 928 So. 2d 129, 132-33 (La. Ct. App. 1st Cir. 2005); Bayhi v. McKey, 2008 WL 2068076, at *4–5 (La. Ct. App. 1st Cir., May 2, 2008); Oakes, *supra* note 16, at 880–85 (1995). Louisiana law also recognizes "contractual *quantum meruit*" under a valid contract. *See*

The performance or benefit can also be indirect when it involves the patrimony of a third party.[829] The second type of enrichment entails an enriched obligor's interference with the impoverished obligee's patrimony through unauthorized use of the latter's property or services.[830] When such interference satisfies the requirements for delictual liability, the action against the obligor will sound in tort. Here, a subtortious interference is contemplated, usually because the requirements for delictual liability have not been met.[831] Examples include the unauthorized (but accidental) use of one's image, intellectual property,[832] or assets.[833] The unauthorized withholding of

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generally LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25; Nicholas II, *supra* note 190, at 56–62; Cent. Facilities Operating Co. v. Cinemark USA, Inc., 36 F. Supp. 3d 700, 707 (M.D. La. 2014) (discussing the types of *quantum meruit* in Louisiana law). For a critical review of the Louisiana law of *quantum meruit*, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 238.

829. Here, a third person receives an advantage from an unpaid performance rendered on an original contract. The facts in the seminal *Boudier* case of the French *Cour de cassation* provide a good example. In that case, a lessor was enriched from improvements made to her property by a contractor hired by the lessee who later defaulted on her obligations. *See supra* note 542. *See also* Vandervoort v. Levy, 396 So. 2d 480 (La. Ct. App. 4th Cir. 1981) (involving unjustified enrichment of owner of immovable property from additional work performed by contractor who was instructed by architect to perform additional work). An action based on indirect enrichment, however, often will stumble upon the usual existence of a lawful cause that will excuse retention of the enrichment in the hands of the third party. For a detailed discussion of third-party enrichments, *see* Nicholas I, *supra* note 190, at 626–33.

830. Use is "unauthorized" because the owner's permission was never granted, or it expired. *See, e.g.*, Masera v. Rosedale Inn, 1 So. 2d 160 (La. Ct. App. Orl. 1941) (continued use of leased property by the sublessee after expiration of the lease).

831. This category corresponds in an imperfect way to the common-law category of "restitution for wrongs." *See* Descheemaeker, *supra* note 533, at 96. *See also* DOBBS & ROBERTS, *supra* note 6, § 4.1, at 373–74; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 42, 44 (AM. L. INST. 2011).

832. For example, misappropriation of one's idea or proposal may give rise to a claim of enrichment without cause, so long as the element of enrichment and its connection to the plaintiff's impoverishment are facially plausible. *See* Boateng v. BP. plc., 2018 WL 3869499, at *3 (E.D. La. Aug. 15, 2018).

833. *See, e.g.*, Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534 (La. Ct. App. 1st Cir. 2001) (finding defendant liable in unjust enrichment for electricity expended on defendant's property by use of a meter on plaintiff's property that was paid by plaintiff); Granger v. Fontenot, 3 So. 2d 215 (La. Ct. App. 1st Cir. 1941) (allowing plaintiff to recover in quasi-contract for unauthorized use of plaintiff's tractor and pump). German and

funds may also fall under this category.[834] The third type of enrichment involves expenses avoided on the part of the enriched obligor or improvements to the obligor's property as a result of work performed by the impoverished obligee.[835] Here, the obligor's enrichment usually consists of her diminished liability.[836] A usual example is making improvements on the obligor's property.[837] Finally, the

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Greek scholars usually refer to the example of a stowaway using a means of transportation without paying a fare. A celebrated example is the German "air-travel case," in which an unsupervised 17-year-old boy somehow managed to fly from Hamburg to New York without a ticket. The airline flew the boy back to Germany and was compensated for the return flight under the laws of *negotiorum gestio*. But what about the outbound flight to New York? Because the boy's act did not constitute a tort under German law, the boy's parents were ordered to compensate the airline for the boy's unjust enrichment. Bundesgerichtshof, Jan. 7, 1971 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 609, 1971 (Ger.); DANNEMANN, *supra* note 86, at 242–49; MARKESINIS ET AL., *supra* note 554, at 235–36. Louisiana tort law seems more amenable to full recovery in such cases, based on the Louisiana law concept of the tort of conversion. *See* FRANK L. MARAIST & THOMAS C. GALLIGAN, LOUISIANA TORT LAW § 2-6(i) (1996, Supp. 2003); WILLIAM CRAWFORD, TORT LAW § 12:13, *in* 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 2009, Aug. 2022 update). It is only when the requirements for a delictual action are not met that an *actio de in rem verso* may become available. Based on the above, if the boy in the "air-travel case" had *mistakenly* boarded the wrong airplane and this mistake was not actionable under Louisiana Civil Code article 2316, then an action for enrichment without cause would likely be available.

834. *See* Industrial Companies, Inc. v. Durbin, 837 So. 2d 1207, 1213–15 (La. 2003) (finding that retention of plaintiff's funds without justification by defendant, who was plaintiff's attorney, gives rise to liability for enrichment without cause).

835. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 10, 26, 27 (AM. L. INST. 2011).

836. This third category of enrichments may overlap with the previous two categories. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1058–59. What sets this third category apart from the previous two, however, is that this category is more susceptible to cases of "imposed enrichments," that is, enrichments of the obligor's patrimony that occur without her consent, involvement, or knowledge. *See* O'Hara v. Krantz, 26 La. Ann. 504 (1874); STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1068–70; Descheemaeker, *supra* note 533, at 97–98.

837. The improvement can involve the plaintiff's movables. *See, e.g.*, Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008) (finding that defendant was enriched by plaintiff who paid off defendant's auto loan). Especially in cases of improvements to land by adverse possessors, the rules on accession will apply nevertheless as *lex specialis*. *See* YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, § 11.22; Symeonides, *supra* note 813, at 542–43; Descheemaeker, *supra* note 533, at 97–98. *See also* Davis v. Elmer, 166 So. 3d 1082, 1087–88 (La. Ct. App. 1st Cir. 2015); Rumore v. Rodrigue, 2015 WL 9435213, at *4 n.12 (La. Ct. App. 1st Cir. Dec. 23, 2015) (both cases observing that a remedy under article 2695 of the Louisiana Civil Code on improvements made by lessees excludes the application of article 2298 on enrichment without cause). For the specific issue of

fourth type, which may be seen as a subset of the third type, focuses on the special case of extinguishing an obligation of the obligor to a third party.[838]

Impoverishment of the obligee occurs when "his patrimonial assets diminish or his liabilities increase."[839] In this sense, impoverishment is the negative aspect of enrichment, and it is understood broadly.[840] Cases of impoverishment without a cause, therefore, should not differ from cases of enrichment without cause.[841] The plaintiff must establish that the transfer of value was made at the expense of her patrimony—either as a loss sustained, a profit deprived,[842] or a loss of exclusive enjoyment of an asset[843]—and this

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improvements to separate property of a spouse that were made with separate funds of the other spouse, s*ee* LA. CIV. CODE art. 2367.1 (rev. 2009); Lemoine v. Downs, 125 So. 3d 1115, 1117–19 (La. Ct. App. 3d Cir. 2012); CARROLL & MORENO, *supra* note 256, § 7:17.

838. Thus, a person who paid the debt of another person may recover that payment: (a) from the payee under a theory of payment of a thing not due, if the payor paid in error. LA. CIV. CODE art. 2302 (2023); (b) from the true debtor according to the internal relationship between the payor and payee (e.g., mandate, *negotiorum gestio*, or subrogation); (c) from the true debtor under a theory of enrichment without cause when recovery from the payee or true debtor is not otherwise available. *See* LA. CIV. CODE arts. 2302 cmt. c, 2298; Standard Motor Car Co. v. State Farm Mut. Auto Ins., 97 So. 2d 435, 438–40 (La. Ct. App. 1st Cir. 1957) (explaining the above options with reference to French doctrine); Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008) (allowing plaintiff who paid defendant's debt to a third person in the absence of any agreement between plaintiff and defendant to recover under a theory of "unjust enrichment"). *See also* Lee v. Lee, 868 So. 2d 316, 318–19 (La. Ct. App. 3d Cir. 2004) (finding that ex-spouse who used separate funds to make mortgage payments on his ex-spouse's home may recover under a theory of enrichment without cause). On this issue, reimbursement of separate funds is now authorized directly by law. LA. CIV. CODE art. 2367.1 (rev. 2009); CARROLL & MORENO, *supra* note 256, § 7:17. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 7 (AM. L. INST. 2011).

839. *See* LA. CIV. CODE art. 2298 cmt. b (2018); Nicholas I, *supra* note 190, at 643–44; Tate II, *supra* note 493, at 447 (noting that impoverishment is "the loss of assets, increase in liabilities, or the prevention of a justified gain").

840. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 754; MALAURIE ET AL., *supra* note 30, No. 1064.

841. *See* RIPERT & BOULANGER II, *supra* note 169, No. 1278 ("What shocks equity is not that a person is enriched, which is indeed permissible; it is that it be at the expense of others").

842. *See* STARCK, *supra* note 30, No. 1812.

843. Thus, cases of profitable but harmless trespass may give rise to an action for enrichment without cause. For instance, a defendant water company that made

claim must be appreciable in money.[844] Benefits received by the obligee or the obligee's gratuitous intent will reduce or might exclude recovery.[845] Scholars have observed that the separate examination of impoverishment is unique to the French model of unjust enrichment.[846]

This uniqueness manifests itself when measuring the amount of recovery, especially when enrichment and impoverishment do not correspond in value. Indeed, there can be instances in which the obligor's enrichment is either greater or lesser than the obligee's impoverishment, such as when an obligee expends a great effort that produces only minor value to the obligor, or, conversely, when the obligor generates profit from the obligee's property without causing any appreciable economic detriment to the obligee. This possible

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unauthorized use of the plaintiff's pipeline was obligated to make restitution regardless of whether the plaintiff was actually using the pipeline. Cour de cassation, req., Dec. 11, 1928, D.H. 1928, p. 18 (Fr.); Nicholas I, *supra* note 190, at 644. Likewise, a landowner is deprived of exclusive use (and thus impoverished) by an unauthorized lease of his land. *But see* Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989) (confusing the *actio de in rem verso* with the *condictio indebiti* and finding no impoverishment because the landowner maintained his rights against the lessee). *Cf.* Win Oil Co., Inc. v. UPG, Inc. 509 So. 2d 1023 (La. Ct. App. 2d Cir. 1987); Nelson v. Young, 223 So. 2d 218 (La. Ct. App. 2d Cir. 1969).

844. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, 29–35. If an impoverishment that is correlative to the enrichment cannot be shown, the action must fail. *See* Kirkpatrick v. Young, 456 So. 2d 622, 624 (La. 1984); St. Pierre v. Northrop Grumman Shipbuilding, Inc., 102 So. 3d 1003, 1013–14 (La. Ct. App. 4th Cir. 2012).

845. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 754. Thus, a plaintiff who built a home on his partner's land and resided there rent-free to several years could not recover her expenses on a theory of enrichment without cause. Cour de cassation, 1e civ., May 6, 2009, JurisData No. 2009-048116.

846. *See* Dickson, *supra* note 510, at 144; Descheemaeker, *supra* note 533, at 89. To the extent that unjust enrichment is "at the expense of another," impoverishment is a constant requirement, although it is not examined separately in German law and at common law. *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 812; GOFF & JONES, *supra* note 134, Nos 6–01 to 7-26; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 10, 26, 27 (AM. L. INST. 2011). *But see also id.* § 1 cmt. a:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss.

asymmetry of values is considered when measuring the amount of compensation, pursuant to the "double ceiling rule," that is, "by the extent to which one has been enriched or the other has been impoverished, whichever is less."[847]

There must be a connection, that is, a correlation between the enrichment and the resulting impoverishment, which must be the incontestable result of the same event.[848] The correlation can be direct or indirect, that is, through the patrimony of a third person.[849] Also, it does not matter that impoverishment has not been the only condition for enrichment, as long as there is a correlation between the two.[850] Nevertheless, there is no right to recover a clearly incidental benefit under a theory of unjust enrichment.[851] An established correlation can be impaired or severed when the obligee's impoverishment occurred as a result of her pursuit of her own personal interest, at her own risk, or by her own negligence or fault.[852] Thus, an obligee who imposes the enrichment on the obligor who normally would

847. *See* LA. CIV. CODE art. 2298 (2023). *See also infra* notes 881–93 and accompanying text.

848. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 36; FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 41; PHILIPPE MALINVAUD ET AL., DROIT DES OBLIGATIONS No. 812 (13th ed. 2014); BERTRAND FAGES, DROIT DES OBLIGATIONS No. 452 (5th ed. 2015).

849. *See* LA. CIV. CODE art. 2298 cmt. b (2023); Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 40.

850. *See* AUBRY & RAU VI, *supra* note 157, No. 317; Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 36. The impoverished obligee bears the burden of proving the correlation. When the correlation between enrichment and impoverishment emerges clearly from the facts of the case it is presumed to exist. *See* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 37.

851. For instance, heating expenses avoided by an upstairs condo owner who benefits from the rising heat from the downstairs neighbor, or free viewing of a concert from the balcony of an adjacent building, are not enrichments susceptible to restitution. *See* BIRKS, *supra* note 6, at 158–159 (characterizing these by-benefits as gifts).

852. This approach is steadily followed in the Louisiana and French jurisprudence, when examining the cause for the obligee's impoverishment. *See, e.g.*, Brignac v. Boladore, 288 So. 2d 31, 35 n.2 (La. 1973); Gray v. McCormick 663 So. 2d 480, 487 (La. Ct. App. 3d Cir. 1995); Tandy v. Pecan Shoppe of Minden, Inc., 785 So. 2d 111, 118 (La. Ct. App. 2d Cir. 2001); Quilio & Associates v. Plaquemines Parish, 931 So. 2d 1129, 1137 (La. Ct. App. 4th Cir. 2006); Bamburg Steel Buildings, Inc. v. Lawrence Gen. Corp., 817 So. 2d 427, 438 (La. Ct. App.

not incur such an expense cannot claim that her impoverishment is genuinely correlated to the obligor's enrichment—rather, her own personal interest caused her impoverishment.[853] Also, an obligee who assumed the risk of performing an act or who failed to take precautions to protect her rights should not rely on a claim of enrichment without cause.[854]

2d Cir. 2002). *See also* John St. Claire, *Actio de in Rem Verso in Louisiana: Minyard v. Curtis Products Inc.*, 43 TUL. L. REV. 263, 286 (1969). The rationale for this approach is explained in Charrier v. Bell, 496 So. 2d 601, 606–07 (La. Ct. App. 1st Cir. 1986) ("Obviously the intent is to avoid awarding one who has helped another through his own negligence or fault or through actions taken at his own risk"). This jurisprudence remains controlling after the enactment of revised article 2298 of the Louisiana Civil Code. *But see* New Orleans v. BellSouth Telecommunications, Inc., 2011 WL 2293134, at *3–4 (E.D. La. June 7, 2011) rev'd and vacated, 690 F.3d 312 (5th Cir. 2012); *see also* Parker Auto Body, Inc. v. State Farm Mutual Automobile Ins. Co., 2016 WL 4086777, at 12 n.76 (M.D. Fla., Apr. 5, 2016). Legislative basis for this approach can be found in the theory of comparative fault, as well as in the equitable "clean hands doctrine." *See* LA. CIV. CODE arts. 2002, 2003, 2033, 2323 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33, 10.6. A similar result is also reached under the revised French and Quebec Civil Codes. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; QUEBEC CIVIL CODE, *supra* note 13, art. 1494; TERRÉ ET AL., *supra* note 57, Nos 1308 and 1318.

853. Under French doctrine, the obligee's pursuit of her own interests and her own fault serve as a cause for her impoverishment, which excludes her claim of unjust enrichment. *See* TERRÉ ET AL., *supra* note 57, No. 1308. It is perhaps more accurate to state that the obligee's own fault impairs the connection between her impoverishment and the obligor's enrichment. *Cf.* Fox v. Sloo, 10 La. Ann. 11 (La. 1855) ("The equitable doctrine, that one at whose expense another is benefited must be indemnified, cannot be extended to a person who intrudes his services on another against his will and the policy of a statute"). *See also* Charrier v. Bell, 496 So. 2d 601, 603 (La. Ct. App. 1st Cir. 1986) ("[A]ny impoverishment claimed by plaintiff was a result of his attempts 'for his own gain' and that his presence and actions on the property of a third party placed him in a 'precarious position, if not in legal bad faith"'). This approach is preferable because it obviates a separate examination of the cause of the impoverishment, which is a French doctrinal oddity. *See* Dickson, *supra* note 510, at 144; Descheemaeker, *supra* note 533, at 89 (both explaining that a separate requirement of impoverishment is not one that is shared by other civil and common-law systems).

854. This approach is noticeable in the Louisiana jurisprudence. *See* Carriere v. Bank of La., 702 So. 2d 648, 672–73 (La. 1996) (holding that ground lessors who allowed the leasehold to be mortgaged cannot claim rentals from mortgagee under a theory of unjust enrichment); Rougeou v. Rougeou, 971 So. 2d 466 (La. Ct. App. 3d Cir. 2007) (dismissing unjust enrichment claim of homeowner who moved his home on defendant's property but abandoned it upon being evicted); MJH Operations, Inc. v. Manning, 63 So. 3d 296 (La. Ct. App. 2d Cir. 2011) (dismissing unjust enrichment action of car mechanic who neglected to take measures to protect his rights through a repairman's privilege and to collect his fee); Meyers v. Denton, 848 So. 2d 759 (La. Ct. App. 3d Cir. 2003) (dismissing

The most significant requirement for enrichment without cause is the lack of cause for the retention of the enrichment.[855] The term "cause" in this context should be understood in its broader sense, encompassing any legal justification for the retention of the enrichment in the hands of the enriched party.[856] The Louisiana Civil Code correctly identifies two instances of a lawful cause—a valid juridical act or the law.[857]

Juridical acts, such as contracts between the enriched and impoverished parties,[858] may serve as the lawful cause for retention of the enrichment.[859] Here, the enrichment was placed in the enriched party's hands voluntarily. The contract can be onerous,

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landowners' reimbursement claim for improvements made to road because they knew or should have known that the road was public); MKM, L.L.C. v. Revstock Marine Transp., Inc., 773 So. 2d 776 (La. Ct. App. 1st Cir. 2000) (dismissing reimbursement claim brought by sellers of vessel who refurbished vessel after parties had signed purchase option agreement); Zeising v. Shelton, 648 Fed. App'x 434, 441 (5th Cir. 2016) (finding that a business consultant cannot claim compensation for his impoverishment that was a result of a failed business deal). *See also* Kilpatrick v. Kilpatrick, 660 So. 2d 182, 187 (La. Ct. App. 2d Cir. 1995) (executor of will who failed to take legal steps to limit the estate's liability "cannot now resort to unjust enrichment to rectify his error"). *Cf.* Forti, Unjust Enrichment – Material Conditions, *supra* note 543, No. 37.

855. *See* Roubier, *supra* note 99, at 47. French legal doctrine examines separately the cause for enrichment and the cause for the impoverishment. *See* TERRÉ ET AL. *supra* note 57, No. 1306.

856. *See* Edmonston v. A-Second Mortg. Co. of Slidell, 289 So. 2d 116, 122 (La. 1974) ("'Cause' in not in this instance assigned the meaning commonly associated with contracts"). French and Louisiana doctrine understand "cause" as the broader and more descriptive *iusta causa* of the Roman law. *See* RIPERT & BOULANGER II, *supra* note 169, No. 1280; MARTY & RAYNAUD, *supra* note 98, No. 353.

857. *See* LA. CIV. CODE art. 2298 (2023); Gruning, *supra* note 490, at 57 (explaining the didactic, but useful, definition of the term "without cause" cause in revised article 2298 of the Louisiana Civil Code). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303-1 ("Enrichment is unjustified when it proceeds neither from the fulfillment of an obligation by the impoverished nor from his liberal intention").

858. Unilateral juridical acts, such as testaments, may also furnish a legal cause for retention of the enrichment. *See* Georges Bonet, *Enrichissement sans cause*, *in* JURISCLASSEUR CIVIL Articles 1370 à 1381, fascicule 8/1988, Nos 145–47 (1988) (Fr.).

859. *See* Drs. Bethea, Moustoukas & Weaver, L.L.C. v. St. Paul Guardian Ins. Co., 376 F.3d 399, 408 (5th Cir. 2004); Edwards v. Conforto, 636 So. 2d 901, 907 (La. 1993); Conn-Barr, LLC v. Francis, 103 So. 3d 1208, 1213–14 (La. Ct. App. 3d Cir. 2012).

such as a sale, or gratuitous, such as a donation.[860] The contract may also justify the enrichment even if it is a contract between the enriched party and a third party whose patrimony intervenes for the transfer of wealth.[861]

Enrichment may also find its justification in the existence of a legal rule. In this case, the enriched party retains the enrichment by operation of law. This category is vast, encompassing many situations involving the laws of property,[862] family,[863] and

860. "Cause" is understood broadly to include any type of "counter-performance" (*contrepartie*) given by a good faith enriched party or any liberal intention by the impoverished party, even in the absence of a juridical act. In short, the enrichment is not "without cause" if the enriched party is properly entitled to it. *See* Creely v. Leisure Living, Inc., 437 So. 2d 816, 822–23 (La. 1983). Thus, voluntary services or payments in exchange for some material benefit can constitute a "counter-performance" justifying retention of the enrichment. *See, e.g.*, Mendoza v. Mendoza, 249 So. 3d 67, at 72–74 (La. Ct. App. 4th Cir. 2018); Bourgeois v. Bourgeois, 40 So. 3d 150, 154–55 (La. Ct. App. 5th Cir. 2010); Troxler v. Breaux, 105 So. 3d 944 (La. Ct. App. 5th Cir. 2012). Conversely, voluntary services or performances—especially among family members, spouses, or partners—without a material benefit do not give rise to claims for unjust enrichment, if a liberal intent can be shown. *See* STATHOPOULOS, UNJUSTIFIED ENRICHMENT, *supra* note 99, at 102–30; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 8–18; TERRÉ ET AL., *supra* note 57, No. 1308. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1301-1; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10, 26, 27, 28 (AM. L. INST. 2011).

861. *See* Edmonston v. A-Second Mortg. Co., 289 So. 2d 116, 122 (La. 1974). A typical situation involves unpaid contractors hired by the lessee to make improvements to leased property. If the lease contract supplies a justification for the lessor's retention of these improvements, then the contractor's claim against the lessor must fail. *See* TERRÉ ET AL., *supra* note 57, No. 1307; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 19–21. Nevertheless, a contract between the enriched party and a third person will not furnish a valid justification if such contract is a product of collusion between the parties. *See* Bonet, *supra* note 858, No. 189.

862. For example, the law of acquisitive prescription vests ownership in the adverse possessor, who retains title and is not liable for unjust enrichment. *See* LA. CIV. CODE arts. 3473–3491 (2023). The laws of accession regulate the ownership and compensation for improvements to immovables and movables, as well as the right of retention of possession. *See* LA. CIV. CODE arts. 490–516, 529 (2023); Carriere v. Bank of La., 702 So. 2d 648, 672–73 (La. 1996). Likewise, the law of co-ownership regulates reimbursements and compensations for acts of the co-owners. *See* LA. CIV. CODE arts. 797–818 (2023).

863. For instance, the existence of spousal obligations to provide support and assistance during the marriage or upon divorce generally exclude any claim for unjust enrichment. *See* LA. CIV. CODE arts. 98, 111–124 (2023). Special rules on community property govern the rights and obligations of spouses in a matrimonial regime of community of acquets and gains. *See* LA. CIV. CODE arts. 2334–2369.8

successions.[864] In the law of obligations, examples can be found in the rules on nullity,[865] natural obligations,[866] and other quasi-contractual obligations.[867] Judicial decisions can also constitute lawful justification for retention of the enrichment.[868] Finally, the remedy for enrichment without cause is subsidiary, meaning that the action for enrichment without cause is allowed only when there is no other available remedy at law.[869] The principle of subsidiarity is accepted, with variations, in most civil law jurisdictions, but not without debate.[870] This rule appears in the civil codes of Louisiana

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(2023). *See also* Mendoza v. Mendoza, 249 So. 3d 67, 72–74 (La. Ct. App. 4th Cir. 2018).

864. Intestate succession to property finds its cause in the rules on the devolution of the estate, whereas testate succession refers to the testament. *See* LA. CIV. CODE arts. 847, 875 (2023).

865. Retention of a performance may be justified under the "clean hands doctrine." *See, e.g.*, LA. CIV. CODE art. 2033 (2023). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011).

866. A prescribed action gives rise to a natural obligation, thus justifying retention of the enrichment. Other natural obligations also justify retention of the enrichment and exclude an action for enrichment without cause. *See* LA. CIV. CODE arts. 1760–1762 (2023); LEVASSEUR, OBLIGATIONS, *supra* note 112, at 21–25; LITVINOFF & SCALISE, OBLIGATIONS, *supra* note 234, §§ 2.1, 2.5, 2.7; TERRÉ ET AL., *supra* note 57, No. 1307; Dugas v. Thompson, 71 So. 3d 1059 (La. Ct. App. 4th Cir. 2011); Webb v. Webb, 835 So. 2d 713 (La. Ct. App. 1st Cir. 2002). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 62 (AM. L. INST. 2011).

867. As discussed, the rules on *negotiorum gestio* and payment of a thing not due generally exclude the application of the general rules on enrichment without cause. Furthermore, a claim of enrichment without can compensate for an adverse claim of enrichment without cause. *See* LA. CIV. CODE art. 1893 (2023); Munro v. Carstensen, 945 So. 2d 961 (La. Ct. App. 2d Cir. 2006).

868. *See* TERRÉ ET AL., *supra* note 57, No. 1307; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, No 24.

869. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-3.

870. *See* FLOUR ET AL., FAIT JURIDIQUE, *supra* note 45, No. 54; PLANIOL II.1, *supra* note 100, No. 937A; PLANIOL & RIPERT VII, *supra* note 157, No. 763; Alexis Posez, *La subsidiarité de l'enrichissement sans cause : étude de droit français à la lumière du droit comparé*, 67 REVUE INTERNATIONALE DE DROIT COMPARÉ 185 (2014); P. Drakidis, *La "subsidiarité", caractère spécifique et international de l'action d'enrichissement sans cause*, RTDciv 1961, p. 577, 589. The initial draft of article 2298 of the Louisiana Civil Code, as proposed by the Quasi-Contracts Committee of the Louisiana State Law Institute, had eliminated subsidiarity as a requirement. *See* Martin, *supra* note 16, at 69; Oakes, *supra* note 16, at 900 n.175. *But see also* Tate II, *supra* note 493, at 466 (highlighting the functional value of subsidiarity). *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST

and France, and it is endorsed overwhelmingly by the jurisprudence.[871] Enrichment without cause, therefore, is excluded when the impoverished plaintiff can seek, or has sought,[872] or could have sought[873] another remedy against the enriched defendant,[874] or,

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ENRICHMENT § 4(2) (AM. L. INST. 2011) ("A claimant otherwise entitled to a remedy for unjust enrichment, including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law"); *The Intellectual History of Unjust Enrichment, supra* note 7, at 2089–90 (observing that the equitable "irreparable injury rule" that barred an action for unjust enrichment if another adequate remedy existed "makes little sense in the context of unjust enrichment if unjust enrichment was itself a 'legal remedy' stemming from the common law").

871. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1303-3; Carrier v. Bank of La., 702 So. 2d 648, 671 (La. 1996); Walters v. MedSouth Record Management, LLC, 38 So. 3d 241 (La. 2010); Morphy, Makofsky & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569, 575 (La. 1989); Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001). The subsidiary nature of enrichment without cause is attributed to remedy's accessory nature as a gap-filling device that is based on equitable considerations. It cannot be used to circumvent other, more specific legal rules. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 411–12; Tate I, *supra* note 818, at 904; Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, Nos 27–28.

872. *See* Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc., 818 So. 2d 12, 19 (La. Ct. App. 1st Cir. 2001) ("[I]n cases where a claim has been exercised and a judgment obtained, it is most apparent that there is a practical remedy available at law"); Pilgrim Life Ins. Co. of America v. American Bank and Trust Co. of Opelousas, 542 So. 2d 804, 807 (La. Ct. App. 3rd Cir. 1989); Central Oil & Supply Corporation v. Wilson Oil Company, Inc., 511 So. 2d 19, 21 (La. Ct. App. 3d Cir. 1987).

873. Legal obstacles preventing the impoverished plaintiff from seeking another remedy, such as prescription of the action or peremption of the right, do not waive the requirement of subsidiarity. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 422–26; Walters v. Medsouth Record Management, LLP, 38 So. 3d 241, 242 (La. 2010); Dugas v. Thompson, 71 So. 3d 1059, 1068 (La. Ct. App. 4th Cir. 2011); Jim Walter Homes, Inc. v. Jessen, 732 So. 2d 699, 706 (La. Ct. App. 3d Cir. 1999). In such cases, the legal obstacle (e.g., prescription) furnishes the legal title for retention of the enrichment. *See* MALAURIE ET AL., *supra* note 30, No. 1071. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303-3. Factual obstacles, however, such as the insolvency of the third person whom the impoverished party should sue may waive the requirement of subsidiarity. *See* Forti, Unjust Enrichment – Juridical Conditions, *supra* note 822, No. 29; MALAURIE ET AL., *supra* note 30, No. 1071. *But see* Carriere v. Bank of La., 702 So. 2d 648, 672 (La. 1996) ("The existence of a "remedy" which precludes application of unjust enrichment does not connote the ability to recoup your impoverishment by bringing an action against a *solvent* person. It merely connotes the ability to bring the action or seek the remedy") (emphasis in original).

874. The action can be legal, contractual, quasi-contractual, or delictual. *See* Edmonston v. A-Second Mortgage Co., 289 So. 2d 116, 122–23 (La. 1974); Gar-

in some cases, against a third person.[875] However, the requirement of subsidiarity does not impose any positive obligation of the parties to "act prudently and reasonably" and to seek other recourse or remedies before the dispute arises.[876] Finally, the rule of subsidiarity is substantive rather than procedural. Thus, the plaintiff should not be precluded from pleading enrichment without cause in the alternative.[877]

b. Effects

If the above requirements are met, the impoverished plaintiff has an action in restitution against the enriched defendant under a theory of enrichment without cause. It should be recalled here that the

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ber v. Badon & Rainer, 981 So. 2d 92, 100 (La. Ct. App. 3d Cir. 2008); LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 412–20; Symeonides & Martin, *supra* note 23, at 100, 151. Naturally, the expansion of available remedies by special statute would preclude the action for enrichment without cause. Thus, a consumer who can now bring a direct action against a manufacturer under special statute cannot recover under a theory of enrichment without cause. *See* Marseilles Homeowners Condominium Ass'n, Inc. v. Broadmoor, L.L.C., 111 So. 3d 1099, 1105–06 (La. Ct. App. 4th Cir. 2013):

> Today, however a contractor under these same circumstances [as the contractor in the seminal Minyard case who sought recovery against the manufacturer in unjust enrichment] does have a cause of action against a manufacturer under the Louisiana Product Liability Act, at least, and may have one if redhibition as well.

Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); LA. REV. STAT. § 9:2800.51 (2023).

875. *See* V & S Planting Co. v. Red River Waterway Commission, 472 So. 2d 331, at 335–36 (La. Ct. App. 3d Cir. 1985). Thus, a sublessee who has an action for reimbursement against her sublessor for improvements she made to the property cannot recover from the lessor on a theory of enrichment without cause. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 420–22; Brignac v. Boisdore, 288 So. 2d 31, 34 (La. 1973).

876. *See* Hidden Grove, LLC v. Brauns, 356 So. 3d 974, 979 (La. 2023) ("Article 2298 does not include any requirement that parties act as reasonably prudent persons or require any preventive action in advance of the dispute arising").

877. *See* LA. CODE CIV. PROC. art. 892 (2023). *See also* Onstott v. Certified Capital Corp., 950 So. 2d 744, 749 (La. Ct. App. 1st Cir. 2006) ("[T]he subsidiary nature of Article 2298 [of the Louisiana Civil Code] does not prohibit a plaintiff from asserting unjust enrichment as an alternative, albeit 'mutually exclusive' form of relief"). *But see* Nave v. Gulf Services, LLC, 2020 WL 4584294 (E.D. La. 2020) (observing that "the mere fact that there are alternative remedies precludes a claim for unjust enrichment").

objective of the remedy for enrichment without cause is not restoration of a particular thing or value that already belongs to the plaintiff, such as in the case of nullity, dissolution, or restoration of an undue payment.

Rather, the purpose of the remedy is equitable—it aims to correct the imbalance between the parties' patrimonies that resulted from the unjust transfer of wealth that now belongs to the defendant.[878] This goal is achieved by an award of a specifically calculated compensation[879] in favor of the plaintiff.[880]

Under revised article 2298 of the Louisiana Civil Code, the amount of compensation due is the lesser of two amounts—the enrichment or the impoverishment.[881] This formula for recovery—

878. The enrichment is unjust because a benefit is added to the defendant's patrimony to the detriment of the plaintiff's patrimony without a corresponding transfer or compensation. *See* Tate II, *supra* note 493, at 446. *See also id.,* at 459 ("The root principle of an unjustified enrichment is that the plaintiff suffers an economic detriment for which he should not be responsible, while the defendant receives an economic benefit for which he has not paid").

879. French legal doctrine distinguishes between restitution for enrichment without cause—which takes the form of indemnification for an enrichment that will usually not be a specific asset—and restoration of an undue payment of a specific thing that is usually made in kind. It is in this light that the term "compensation" should be understood. *See* Descheemaeker, *supra* note 533, at 99. *See also* Louisiana Specialty Hosp., LLC v. Adams, 2010 WL 3211077, at *3 (E.D. La. Aug. 13, 2010) ("Damages for conversion are intended to make the victim whole. . .Damages for unjust enrichment would amount to the lesser of [plaintiff's] impoverishment or [defendant's] enrichment"). At common law, restitution refers to gain-based recovery whereas compensation is loss-based recovery. *See* BIRKS, *supra* note 6, at 11–16; DOBBS & ROBERTS, *supra* note 6, § 4.1(1), at 375–76; Katy Barnett, Restitution, Compensation, and Disgorgement 459, 459–62, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., 2020).

880. As discussed, separate rules apply for restoration of undue payments and performances from failed contracts. *See* LA. CIV. CODE arts. 2018–2021 (2023) (dissolution); *id.* arts. 2033–2035 (nullity); *id.* arts. 2302–2305 (payment of a thing not due). In France and Quebec, these restorations are made pursuant to the common rules on restitutions. FRENCH CIVIL CODE, *supra* note 11, arts. 1352 to 1352-9; QUEBEC CIVIL CODE, *supra* note 13, arts. 1492, 1699–1707. The common French and Quebec rules on restitutions, however, do not apply to restitution for enrichment without cause. *See* Descheemaeker, *supra* note 533, at 98–99.

881. *See* LA. CIV. CODE art. 2298 (2023). *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303 ("[The] compensation [is] equal to the two values of the enrichment and the impoverishment"). *But see also* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 ("In cases of bad faith of the enriched party, the compensation due is equal

fashioned by well-settled French doctrine and jurisprudence[882]—is known as the "double ceiling" rule (or "double limit" rule).[883] Placing a limit on the amount of recovery is justified by French doctrine on equitable grounds.[884]

Indeed, because the purpose of the remedy is to restore equilibrium of the parties' patrimonies, the plaintiff should not be enriched by recovering more than her impoverishment, whereas the defendant should not suffer a loss greater than his actual enrichment.[885] Article 2298 also fixes the time of evaluation of the enrichment and the impoverishment. As a rule, both are "measured as of the time the suit is brought."[886] This rule generally corresponds with traditional French doctrine, especially pertaining to the value of the enrichment which can fluctuate over time.[887]

Alternatively, the evaluation can be made "according to the circumstances, as of the time the judgment is rendered."[888] At the time of the revision, only a minority of French scholars supported this alternative, which was endorsed in Louisiana doctrine by Professor

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to the greater of the two values [of enrichment and impoverishment]"); TERRÉ ET AL., *supra* note 57, No. 1316.

882. *See* AUBRY & RAU VI, *supra* note 157, No. 324; Nicholas I, *supra* note 190, at 641; Cour de cassation, civ., Jan. 19, 1954, D. 1953, 234 (Fr.).

883. *Principe du « double plafond » ou de la « double limite ». See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 430; TERRÉ ET AL., *supra* note 57, No. 1316; Valerio Forti, Enrichissement injustifié, Effets Nos 16–17, JurisClasseur Civil, Art. 1303 à 1304-4, Fascicule 30, Jun. 2, 2016 (Fr.) [hereinafter Forti, Unjust Enrichment – Effects].

884. Although the "double ceiling" rule is not endorsed by German and Greek civil law, similar results are reached, nonetheless, especially when the enriched defendant has changed her position. *See supra* notes 771–72.

885. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 430; Nicholas I, *supra* note 190, at 641.

886. LA. CIV. CODE art. 2298 (2023).

887. French and Louisiana scholars have noted that impoverishment can generally be measured as of the time it took place. The value of enrichment on the other hand can fluctuate, especially due to subsequent acts or omissions of the enriched party or fortuitous events. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 434–35. Fixing the time of evaluation at the date the action is brought is also the default rule in Greek and German laws. It is on this date that the defendant is placed on judicial notice that she might be obligated to make restitution. *Cf.* GERMAN CIVIL CODE, *supra* note 87, § 818; GREEK CIVIL CODE, *supra* note 88, art. 909.

888. LA. CIV. CODE art. 2298 (2023).

Levasseur.[889] The "circumstances" under which this alternative would be preferred might refer to practicability or the need for a more equitable evaluation, especially when the value of enrichment fluctuates.[890] As explained by Professor Levasseur, "[p]resumably this alternative timing in the evaluation would favor the impoverishee in times of economic downturn, recession, or inflation."[891] The revisers of the Louisiana Civil Code wisely espoused this approach.[892] The revised French Civil Code has also come around to this view.[893]

Louisiana courts have encountered no difficulties when awarding compensation for enrichment without cause, especially in the post-revision jurisprudence.[894] Most often, the court will have to evaluate the plaintiff's services.[895]

In observance of the "double ceiling" rule, courts have applied a two-fold limitation to recovery. First, the plaintiff cannot recover more than the actual value of services and materials, plus a fair profit; and, second, the plaintiff cannot recover more than defendant

889. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 435–36; Forti, Unjust Enrichment – Effects, *supra* note 883, Nos 12–15.

890. *See* Oakes, *supra* note 16, at 902 ("If the circumstances dictate that such an evaluation is impracticable, or that subsequent developments would render such an evaluation inequitable, the court may choose to evaluate the enrichment and impoverishment at the time the judgment is rendered").

891. *See* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 435–36 (observing that this alternative finds some support in the Louisiana laws of accession—e.g., LA. CIV. CODE art. 495).

892. *See* Oakes, *supra* note 16, at 902; Martin, *supra* note 16, at 209–11.

893. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4 ("The impoverishment that is determined on the date of the expense and the enrichment that subsists on the day when the action is brought, are evaluated as of the date of the judgment"); TERRÉ ET AL., *supra* note 57, No. 1317; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 15.

894. For a critical review of the pre-revision jurisprudence on this issue, *see* LEVASSEUR, UNJUST ENRICHMENT, *supra* note 2, at 429–34; Martin, *supra* note 16, at 209–11.

895. Older Louisiana jurisprudence—as well as some courts today—refer to these awards as "quasi-contractual *quantum meruit*." This common-law doctrine has been replaced with enrichment without cause. The method of evaluation of the services rendered, however, is similar. *See* Howell v. Rhoades, 547 So. 2d 1087, 1089–90 (La. Ct. App. 1st Cir. 1989); Ricky's Diesel Service, Inc. v. Pinell, 906 So. 2d 536, 539–40 (La. Ct. App. 1st Cir. 2005).

was enriched by plaintiff's services.[896] Thus, a contractor who wishes to recover under a theory of enrichment without cause must prove the value of the benefit her work conferred on the owner, which need not equal the contractor's cost of the work.[897]

There is no specific test that is applied to determine the reasonable value of the plaintiff's impoverishment or the defendant's enrichment.[898] Rather, courts must make an equitable case-by-case determination.[899] Nevertheless, speculative claims for compensation that have not been established with some degree of specificity are not awarded.[900] When assessing the award for compensation, much discretion is left to the trial court.[901] Apart from providing a method of calculation of the compensation, the "double ceiling" rule also furnishes two important substantive rules for recovery.

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896. *See* Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1151 (La. Ct. App. 3d Cir. 1998); Custom Builders & Supply, Inc. v. Revels, 310 So. 2d 862 (La. Ct. App. 3d Cir. 1975); Coastal Timbers, Inc. v. Regard, 483 So. 2d 1110, 1113 (La. Ct. App. 3d Cir. 1986); PLANIOL II.1, *supra* note 100, No. 937B.

897. *See* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 14.25.

898. For examples of evaluation of plaintiff's services and defendant's benefit from such services, *see* Arc Industries, LLC v. Nungesser, 2018 WL 1181737, at *10 (La. Ct. App. 3d Cir., Mar. 7, 2018); Ricky's Diesel Service, Inc. v. Pinell, 906 So. 2d 536, 539–40 (La. Ct. App. 1st Cir. 2005); Simon v. Arnold, 727 So. 2d 699, 702–05 (La. Ct. App. 3d Cir. 1999); Central Facilities Operating Co., LLC v. Cinemark USA, Inc., 36 F.Supp.3d 700, 709 (M.D. La. 2014).

899. *See* Brankline v. Capuano, 656 So. 2d 1 (La. Ct. App. 3d Cir. 1995); Jones v. Lake Charles, 295 So. 2d 914 (La. Ct. App. 3d Cir. 1974).

900. *See* Smith v. First Nat. Bank of DeRidder, 478 So. 2d 185 (La. Ct. App. 3d Cir. 1985); Badeaux v. BP Exploration & Production, Inc., 2018 WL 6267308, at *3–4 (E.D. La. Nov. 30, 2018). Prejudgment interest on recovery for enrichment without cause is also not allowed. Gulfstream Serv, Inc. v. Hot Energy Serv., Inc., 907 So. 2d 96, 103 (La. Ct. App. 1st Cir. 2005); Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1152 (La. Ct. App. 3d Cir. 1998); Howell v. Rhoades, 547 So. 2d 1087, 1090 (La. Ct. App. 1st Cir. 1989). *See also* LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 9.16 ("[I]nterest on the pertinent amount runs from the time of judgment, but may run from the date of judicial demand if it was then ascertainable.") (footnotes omitted).

901. *See* LA. CIV. CODE art. 2324.1 (2023); Willis v. Ventrella, 674 So. 2d 991, 995–96 (La. Ct. App. 1st Cir. 1996). Appellate review is limited to instances in which the record clearly reveals that the trial court abused its discretion. Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1261 (La. 1993); Gulfstream Serv, Inc. v. Hot Energy Serv., Inc., 907 So. 2d 96, 103 (La. Ct. App. 1st Cir. 2005); Arc Industries, LLC v. Nungesser, 2018 WL 1181737, at *11 (La. Ct. App. 3d Cir. Mar. 7, 2018); Bieber-Guillory v. Aswell, 723 So. 2d 1145, 1151 (La. Ct. App. 3d Cir. 1998).

First, the rule considers the defendant's change of position,[902] an approach that is also followed in other civil-law and common-law systems.[903] The extent of the enrichment is measured at the time of the action or judgment, taking into account the fluctuation or depletion of the enrichment.[904] Thus, it is a valid defense to an action for enrichment without cause that the defendant is no longer enriched at that time.[905] Under Quebec law and modern French law, however, a defendant in bad faith—who knows that he is not entitled to the enrichment—cannot avail himself of this rule.[906] This exception ought to apply in Louisiana law on the basis of the overriding principle of good faith.[907] Second, the "double ceiling" rule practically excludes

902. *See* Descheemaeker, *supra* note 533, at 102 ("The fact that enrichment is assessed at the time the action is brought means that a defence of change of position is built into the rule for good faith defendants").

903. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 (AM. L. INST. 2011). *See supra* notes 772–73.

904. The benefit received may have been expended or consumed, damaged or destroyed, lost or stolen, or diminished or depreciated, in whole or in part. *See* PALMER III, *supra* note 681, § 16.8; DOBBS & ROBERTS, *supra* note 6, § 4.5. According to German and Greek scholars, expenditure includes any expenses made by the defendant in reliance on the enrichment. *See* STATHOPOULOS, OBLIGATIONS, *supra* note 133, at 1132–33. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 note c (AM. L. INST. 2011).

905. Likewise, if the extent of the enrichment is reduced at that time, compensation will be reduced to that lower amount. *See* Gordley, *Restitution Without Enrichment?*, *supra* note 771, at 227.

906. *See* QUEBEC CIVIL CODE, *supra* note 13, art. 1495 ("The indemnity is due only if the enrichment continues to exist on the date of the demand. . .however, where the circumstances indicate the bad faith of the person enriched, the enrichment may be assessed as at the time he benefited therefrom"). Under traditional French jurisprudence, bad faith defendants were not treated differently from good faith defendants. A narrow exception focused on defendants who had fraudulently depleted their enrichment. In such cases, compensation was measured according to the extent of the original enrichment. *See* PLANIOL & RIPERT VII, *supra* note 157, No. 753 n.3; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20. Modern French law now sanctions bad faith defendants. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 21. *Cf. See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. f, g, h (AM. L. INST. 2011) (explaining that bad faith defendant may not rely on the change of position defense at common law). *See infra* note 919.

907. *Cf.* Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20 (observing that the exception carved out by doctrine and jurisprudence was a practical consequence of the adage *fraus omnia corruptit*—fraud defeats all the rules). The defense of change of position is not available to a bad faith defendant in other civil-law and common-law systems as well. *See* GERMAN CIVIL CODE, *supra* note

disgorgement of profits as a possible remedy.[908] This is so because the defendant's consequential gains will normally exceed the value of the plaintiff's impoverishment.[909]

Because compensation for enrichment without cause focuses primarily on benefits, not losses, it is a familiar proposition that liability for enrichment without cause is independent of capacity or fault.[910] Nevertheless, due to the equitable nature of this remedy, courts will often scrutinize the parties' behavior to determine whether full, limited, or no recovery is warranted under the circumstances.[911] The impoverished plaintiff may have contributed to her loss by her own actions or fault.[912] As discussed, the causal link between enrichment and impoverishment can be impaired or severed when the plaintiff's impoverishment occurred as a result of her pursuit of her own personal interest, at her own risk, or by her own negligence or fault.[913] The revised French Civil Code codified this approach.[914]

87, §§ 818; GREEK CIVIL CODE, *supra* note 88, arts. 911–912; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. f, g, h (AM. L. INST. 2011); Krebs, *supra* note 772, at 439–40; Grantham, *supra* note 773, at 427–30; DOBBS & ROBERTS, *supra* note 6, § 4.5. The revised French Civil Code also follows this approach. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-4. *See infra* note 919.

908. In Louisiana, a remedy of disgorgement of profits may be available in the law of mandate and *negotiorum gestio*. *See supra* note 416. Disgorgement of profits may also be allowed when restoring undue payments. *See supra* notes 774–76 and accompanying text.

909. *See* Descheemaeker, *supra* note 533, at 102.

910. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmt. h (AM. L. INST. 2011). As a juridical fact, liability for enrichment without cause does not require contractual capacity. *See* TERRÉ ET AL. *supra* note 57, No. 1316 n.3; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 1.

911. *But see* Hidden Grove, LLC v. Brauns, 356 So. 3d 974, 979 (La. 2023) ("Article 2298 does not include any requirement that parties act as reasonably prudent persons or require any preventive action in advance of the dispute arising").

912. *See* Jim Walter Homes, Inc. v. Jessen, 732 So. 2d 699, 706 (La. Ct. App. 3d Cir. 1999) (observing that plaintiffs who by their fault failed to secure other remedies, let their remedies prescribe, or wrote bad contracts should not be allowed to recover under a theory of unjust enrichment).

913. *See supra* notes 852–54 and accompanying text.

914. *See* FRENCH CIVIL CODE, *supra* note 11, art. 1303-2; TERRÉ ET AL., *supra* note 57, Nos 1308, 1318.

A similar result can be reached in Louisiana by application of the theory of comparative fault, as well as the equitable "clean hands doctrine."[915] On the other hand, the enriched defendant ought to make full restitution, without the benefit of certain defenses, especially if she is in bad faith, that is, if she knowingly benefited from an enrichment to which she knew she was not entitled.[916] Thus, as noted, in France and Quebec a bad faith defendant may not avail herself of the defense of a change of position.[917]

The revised French Civil Code, however, has taken the sanction of bad faith one step further—when the defendant is in bad faith, the compensation due is equal to the *greater* amount of enrichment or impoverishment as valued at the time of the judgment.[918] This inversion of the "double ceiling" rule practically excludes a change of position defense and it potentially—and perhaps inadvertently on the part of the drafters—allows claims for disgorgement of profits.[919]

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915. *See* LA. CIV. CODE arts. 2002, 2003, 2033, 2323 (2023); LITVINOFF & SCALISE, DAMAGES, *supra* note 365, §§ 5.32–5.33, 10.6. *See also* Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534, 543 (La. Ct. App. 1st Cir. 2001) (Wiemer, J., concurring) ("[T]he degree of fault of the parties in allowing this situation to continue is a relevant consideration in determining the extent of enrichment or impoverishment. Article 2298 and the comparative fault principles of 2323 are both in the title of the Civil Code which addresses 'Obligations Arising Without Agreement'").

916. *See* TERRÉ ET AL., *supra* note 57, No. 1316. Common-law doctrine draws a clear distinction between liability of an "innocent recipient" and a "conscious wrongdoer." The former is liable for cost or benefit, whichever is less. The latter is liable for all gains attributable to his misconduct, regardless of whether the plaintiff could show any impoverishment whatever. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. g, h (AM. L. INST. 2011).

917. *See supra* notes 906–07 and accompanying text. Likewise, a bad faith defendant at common law may not avail herself of the change of position defense. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 65 cmts. g, h (AM. L. INST. 2011).

918. FRENCH CIVIL CODE, *supra* note 11, art. 1303-4; TERRÉ ET AL., *supra* note 57, No. 1316; Forti, Unjust Enrichment – Effects, *supra* note 883, No. 20. The different treatment of good faith and bad faith defendants brings the rules of restitution for enrichment without cause closer to the rules of restoration for payment of a thing not due. *See* Descheemaeker, *supra* note 533, at 98–99.

919. *See* Descheemaeker, *supra* note 533, at 102–03.

An action for enrichment without cause prescribes in ten years.[920]

V. MAPPING THE LOUISIANA LAW OF *NEGOTIORUM GESTIO* AND UNJUST ENRICHMENT

Three conclusions may be drawn from the preceding analysis. First, the Louisiana term "quasi-contract" should be understood as a merely descriptive term referring to two distinct licit juridical facts that involve the receipt of a benefit without legal cause—*negotiorum gestio* and unjust enrichment.[921] Unjust enrichment encompasses the payment of a thing not due (*condictio indebiti*)[922] and the narrower action for enrichment without cause (*actio de in rem verso*).[923]

Conversely, in the modern common law, the older obscure terms "implied contracts", "constructive contracts," and "constructive trusts" have been eliminated in place of a broader substantive concept of unjust enrichment that gives rise to a remedy of restitution.[924] Second, because of the expanded application of the civilian theory of cause, most of Louisiana's law of restitution for failed contracts is found in the law of contract. Thus, the provisions on dissolution and nullity of contracts provide for restoration of performances from failed contracts—which include contracts that are absolutely null and contracts that are relatively null due to a vice of consent. The law of tort provides for damages in cases of misappropriated wealth. Restitution under a theory of unjust enrichment in Louisiana law is generally restricted to cases falling outside the theory of cause.

920. *See* LA. CIV. CODE art. 3499 (2023); Minyard v. Curtis Products, 205 So. 2d 422, 433 (La. 1967); State v. Pineville, 403 So. 2d 49, 55 (La. 1981).

921. *See* LA. CIV. CODE art. 2294 (1870); FRENCH CIVIL CODE, *supra* note 11, art. 1300.

922. *See* LA. CIV. CODE arts. 2299–2305 (2023); FRENCH CIVIL CODE, *supra* note 11, arts. 1302 to 1302-3; QUEBEC CIVIL CODE, *supra* note 13, arts. 1491–1492.

923. *See* LA. CIV. CODE art. 2298 (2023); FRENCH CIVIL CODE, *supra* note 11, arts. 1303 to 1303-4; QUEBEC CIVIL CODE, *supra* note 13, arts. 1493–1496.

924. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. b (AM. L. INST. 2011).

Third, although the Louisiana concept of quasi-contract is intended to exist outside the doctrine of cause, there is nevertheless a great degree of overlap between cause and quasi-contract. This third observation requires further commentary because the overlap between these concepts has been the source of confusion in the Louisiana jurisprudence.

Louisiana courts have sometimes confused *negotiorum gestio* with enrichment without cause.[925] As discussed, however, these institutions are meant to be separate. *Negotiorum gestio* exists entirely outside the realm of the doctrine of cause, in the sense that there is no contract (juridical act) or provision of law (juridical fact) that creates the relationship between the manager of the affair and the owner other than the provisions on *negotiorum gestio*.[926] Further, *negotiorum gestio* excludes the application of the provisions of a payment of a thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*).[927] Thus, when the manager voluntarily pays a debt of the owner to a third person as a *negotiorum gestor*, recovery of that payment is made under the law of *negotiorum gestio*, and not under a theory of unjust enrichment.[928] Also,

925. *See, e.g.*, O'Reilly v. McLeod, 2 La. Ann. 146 (1847); Hobbs v. Central Equip. Rental Inc., 382 So. 2d 238 (La. App. 3d Cir. 1980); Smith v. Hudson, 519 So. 2d 783 (La. App. 1st Cir. 1987); Police Jury v. Hampton, 5 Mart.(n.s.) 389 (La. 1827); Weber v. Coussy, 12 La. Ann. 534 (1857). *See also* LA. CIV. CODE art. 2292 cmt. e (2023); Martin, *supra* note 16, at 186–88; Alfredo de Castro Jr., Comment: *Negotiorum Gestio in Louisiana*, 7 TUL. L. REV. 253, 257 (1932–1933); Ayres & Landry, *supra* note 320, at 116–17, 132, 135–40. Some courts also use the generic term "quasi-contract" without qualifying the specific type—*negotiorum gestio* or unjust enrichment. *See, e.g.*, Masera v. Rosedale Inn, 1 So. 2d 160 (La. Ct. App. Orl. 1941); Teche Realty & Investment Co., Inc. v. A.M.F., Inc., 306 So. 2d 432, 436 (La. App. 3 Cir. 1975).

926. *See* LA. CIV. CODE art. 2292 (2023); FRENCH CIVIL CODE, *supra* note 11, art. 1301; QUEBEC CIVIL CODE, *supra* note 13, art. 1482.

927. *See* Symeonides & Martin, *supra* note 23, at 100. *Cf.* FRENCH CIVIL CODE, *supra* note 11, art. 1303 (providing that the rules on enrichment without cause apply "except for cases of management of affairs and payment of a thing not due").

928. *See* LA. CIV. CODE arts. 2297, 2302 (2023). However, in the inverse situation where the defendant made unauthorized use of plaintiff's property resulting in plaintiff's impoverishment (increased liability) and plaintiff's enrichment (expenses avoided), the defendant will be liable for enrichment without cause if an

the manager's claim for reimbursement of expenses is entirely independent of the owner's enrichment.[929] A claim for enrichment without cause (*actio de in rem verso*) may be possible when the management of the affairs does not fall under the provisions *on negotiorum gestio*. An example is the management of the affair by a person of limited legal capacity.[930] The idea of *negotiorum gestio* is not only civilian. This concept exists in the common law of restitution and in other areas of the law, including the law of agency.[931]

Dicta in certain decisions conflate payment of a thing not due (*condictio indebiti*) with enrichment without cause (*actio de in rem verso*).[932] Although both institutions are based on the principle of unjust enrichment, they do not overlap. In an action for payment of a thing not due, the court orders restoration of a thing or of its value that belongs to the plaintiff, as if the defendant had borrowed the thing. That thing was given in payment although payment was never due (objectively undue payments) or was made by mistake (subjectively undue payments). Thus, the action focuses on an individual thing and not on a broader notion of enrichment. For this reason, the

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action in tort is not available. *See* Commercial Properties Development Corp. v. State Teachers Retirement System, 808 So. 2d 534 (La. Ct. App. 1st Cir. 2001).

929. *See id.* art. 2292 cmt. e.

930. *See id.* art. 2296.

931. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–30 (AM. L. INST. 2011).

932. For instance, some courts have applied article 2298 of the Louisiana Civil Code (*actio de in rem verso*) to cases of mistaken payments that should fall under articles 2299 and 2302 (*condictio indebiti*). *See, e.g.*, New Orleans and Baton Rouge Steamship Pilots Association v. Wartenburg, 316 So. 3d 39 (La. Ct. App. 1st Cir. 2020). *See also* Louisiana Specialty Hosp., LLC v. Adams, 2010 WL 3211077 (E.D. La. Aug. 13, 2010); *cf.* Willis North America, Inc. v. Walters 2011 WL 1226032, at *5 (E.D. Va. Mar. 30, 2011). Other times, courts discuss "unjust enrichment" as a unitary concept, conflating the provisions on enrichment without cause and payment of a thing not due. *See, e.g.*, Bennett v. Dauzat, 984 So. 2d 215, 218 (La. Ct. App. 3d Cir. 2008); Our Lady of the Lake Regional Medical Center v. Helms, 754 So. 2d 1049, 1052–53 (La. Ct. App. 1st Cir. 1999); New Orleans and Baton Rouge Steamship Pilots Association v. Wartenburg, 316 So. 3d 39, 44 n.5 (La. Ct. App. 1st Cir. 2020); Fielding v. MTL Ins. Co., 261 F.Supp.2d 619, 625–26 (E.D. La. 2003); Barton Land Co. v. Dutton, 541 So. 2d 382, 383–85 (La. Ct. App. 2d Cir. 1989). *See also* Chrysler Credit Corp. v. Whitney Nat. Bank, 1993 WL 70050, at *4 (E.D. La. Mar. 4, 1993) ("[T]he Louisiana jurisprudence is somewhat muddled on the question of whether these are, in fact, two distinct causes of action").

rules of restoration of an undue payment differ noticeably from the rules of restitution for enrichment without cause. For instance, a change of position defense is not always available to a payee of a thing not due. Furthermore, the action is not subsidiary. There is a great degree of overlap between objective undue payments and the doctrine of cause. Thus, a plaintiff may recover an objectively undue payment under several theories of recovery—contract (dissolution or nullity of a contract), property (real action for revendication of a movable or an immovable), tort (action for conversion), and quasi-contract (payment of a thing not due).[933] Payments made entirely outside the realm of a cause (e.g., payment to a wrong person or mistaken payments of debts of others) that cannot be recovered by an action in contract can be restored under the provisions on payment of a thing not due. Therefore, payment of a thing not due is the Louisiana equivalent of several instances of unjust enrichment at common law, such as the recovery of performances under a failed contract and mistaken payments.

On the other hand, a subsidiary action for enrichment without cause involves the restitution of displaced wealth that now belongs to the defendant and that cannot be recovered by any other remedy, including the action for payment of a thing not due. For instance, the value of services rendered without a contract, in excess of a contractual obligation, or under a contract that failed is recovered by an action for enrichment without cause.[934] Benefits derived from interference with the plaintiff's property that are not actionable in tort may be recovered by an action for enrichment without cause. Likewise, a payor of the debt of a third person who may not recover the payment from the payee has recourse against the debtor under a theory of enrichment without cause.[935] The defendant may avail herself of a change of position, to the extent that the compensation owed is the

933. *See* LA. CIV. CODE art. 2299 cmt. c (2023); YIANNOPOULOS & SCALISE, PROPERTY, *supra* note 246, §§ 13:13, 13:15; LITVINOFF & SCALISE, DAMAGES, *supra* note 365, § 16.20.

934. *See* LA. CIV. CODE art. 2018 (2023).

935. *See id.* art. 2302 cmt. c.

lesser of her subsisting enrichment and the plaintiff's impoverishment.

Finally, because of the equitable (in the civil-law sense) nature of all quasi-contractual remedies, the court ought to look into the good or bad faith of the parties and the particularity of each individual case to reach a just result.

Therefore, there is a clear, albeit partial, overlap between "cause" (the laws of contract and tort)[936] and "quasi-contract" (*negotiorum gestio*, payment of a thing not due, and enrichment without cause), which is shown in Figure 1. The Venn diagram there shows that: (1) Damages for tort or breach of contract are recovered by an action in tort or in contract. (2) Restoration of movables and immovables that were transferred under a failed contract can be made by an action in contract, or by an action in tort if there was conversion, or by a real action, or by an action for payment of a thing not due. Here, there is an overlap between cause and part of the action for payment of a thing not due. (3) Restoration of mistaken payments and payments of nonexistent or non-enforceable obligations can be made by an action for payment of a thing not due or by a real action if available (or by an action in tort if there was conversion). (4) If the requirements for *negotiorum gestio* are met, recovery is possible only by the owner's direct action against the manager or the manager's contrary action against the owner. *Negotiorum gestio* is outside the realm of cause and unjust enrichment. (5) If none of the above remedies is available, restitution may be possible by an action for enrichment without cause.

936. The term "cause" used here is broader and it refers to recovery of a performance under a failed contract, and damages due to breach of contract or tort.

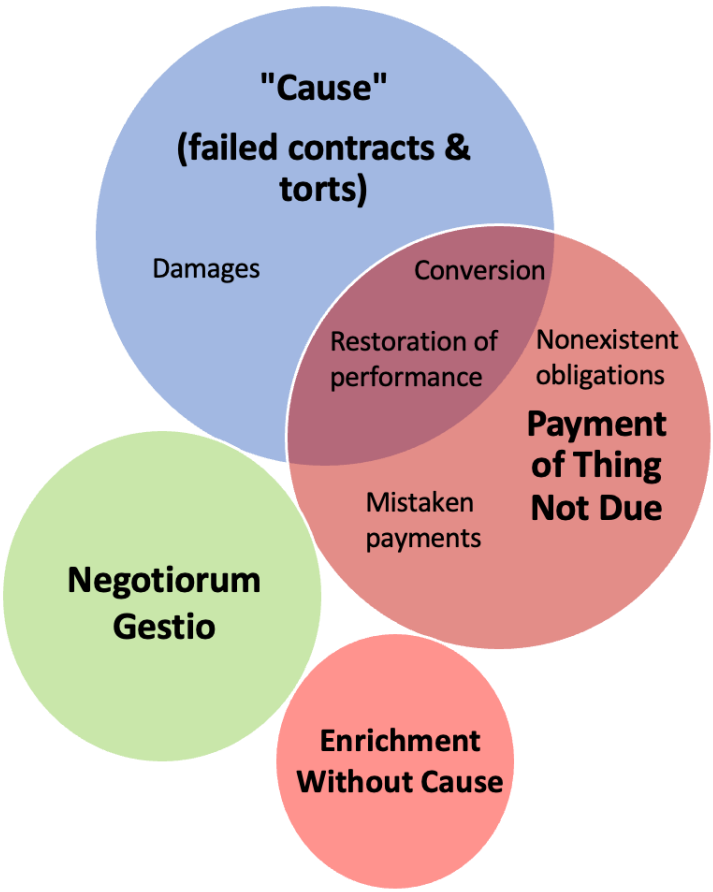

Figure 1. Overlap between "cause" and "quasi-contract"

VI. CONCLUSION

This Article has examined the revised Louisiana law of *negotiorum gestio* and unjust enrichment, through a historical and comparative lens. The purpose of this analysis was to provide a commentary on the revised law that should help clarify certain concepts and misunderstandings that have confused Louisiana courts and lawyers. The analysis traced the historical roots of this confusion back to the concept of "quasi-contract," a term that is still widely used by courts and scholars.

This Article proposed a redefinition and proper use of the concept "quasi-contract" as a term describing a group of two separate sources of obligations—*negotiorum gestio* and unjust enrichment, which consists of the actions for payment of thing not due (*condictio indebiti*) and enrichment without cause (*actio de in rem verso*).

This redefinition is intended to dispel the false impression among Louisiana judges and lawyers that quasi-contract is supposedly a broader concept that goes beyond *negotiorum gestio* and unjust enrichment and includes other "innominate types." Such an overly broad notion of quasi-contract is doctrinally unsound and has no practical utility.

The commentary on the revised law of *negotiorum gestio* expounded the precise requirements and the effects of a proper management of the affairs of another, with reference to civil-law and common-law sources. This analysis also aimed to disentangle the confusion in the Louisiana jurisprudence between *negotiorum gestio* and unjust enrichment. The commentary on the law of unjust enrichment clarified the distinction between the two separate actions of *condictio indebiti* and *actio de in rem verso*, which at times has eluded the Louisiana courts and has been misconstrued by comparativists. Drawing the precise contours of the Louisiana law of unjust enrichment will facilitate further research of this area of the law, particularly with comparative reference to the Third Restatement of Restitution and Unjust Enrichment.

Finally, this Article attempts to highlight Louisiana's unique position, and therefore capacity, as a "mixed-jurisdiction" to borrow useful elements from both civil-law and common-law systems for its own doctrines of restitution and unjust enrichment. These doctrines might then serve as a model for other jurisdictions. It is hoped that this Article will stimulate further scholarship in this area of the law that may lead to the addition of a Louisiana chapter to the national casebooks on restitution and unjust enrichment.[937]

937. *See, e.g.*, ANDREW KULL & WARD FARNSWORTH, RESTITUTION AND UNJUST ENRICHMENT. CASES AND NOTES (2018).