Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana

Jeffrey L. Oakes
COMMENTS

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I. INTRODUCTION

This comment presents the new version of Louisiana Civil Code article 22981 to the reader. The new Article 2298 appears in the recent revision to the Louisiana Civil Code articles on quasi-contracts, which became effective January 1, 1996.2 Article 2298 incorporates the existing Louisiana jurisprudence concerning unjust enrichment, and replaces quantum meruit as a basis for recovery in quasi-contractual settings. Since Louisiana courts have previously used quantum meruit in most cases for which no specific statutory basis of recovery can be found, this comment should interest those members of the bench and bar whose cases commonly involve construction contracts, commercial contracts, voided or annulled contracts, contracts for services, and the like.

Quantum meruit and unjust enrichment are the kudzu in the garden of Louisiana jurisprudence. They appear everywhere, entangle all in their path, and are seemingly unmanageable. Few subjects in any jurisdiction have led to as much confusion as quasi-contracts in Louisiana. The cases provide frequent examples of haphazard analysis. Furthermore, courts have often used weak precedents to resolve disputes while ignoring available techniques of codal analysis.3

1. Article 2298 provides:

Art. 2298. Enrichment without cause; compensation
A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less. The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.


One frequently ignored analytical technique is the quasi-contractual remedy known as the actio de in rem verso. The actio de in rem verso provides general guidelines for courts wishing to invoke the principle forbidding unjust enrichment. The principle forbidding unjust enrichment provides a theoretical basis for the law of quasi-contracts. Quasi-contracts are legal obligations that fall on a spectrum between contracts and delicts. Quasi-contracts differ from contracts in that they are created without agreement among the parties. Likewise, quasi-contracts differ from delicts and quasi-delicts in that quasi-contractual obligations may arise even though neither party is legally at fault. A court's creation of a quasi-contractual obligation may be justified by policy or by notions of equity triggered by the act of one of the parties.

The actio de in rem verso has been ignored in Louisiana, while the more widely known common-law remedy, quantum meruit, has appeared in its place. The existence of a Louisiana concept called quantum meruit, distinct from the common law version, has increased the confusion apparent in some applications of quasi-contractual remedies. The distinctions among the three remedies appear below.

At common law, courts use quantum meruit to compensate a person for services rendered in the absence of a contract. To that extent, quantum meruit

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5. The standard usage is "the principle (or theory) of unjust enrichment," rather than "the principle (or theory) forbidding unjust enrichment." Nevertheless, the above usage will be employed throughout this comment. The standard usage is ambiguous. The principle is not a mere elaboration upon the definition of unjust enrichment. It encompasses the definition, the proposition that an enrichment of this type is undesirable, and the remedy used to prevent such enrichment. Some have argued that the word "unjust" provides the proper connotation, since an equitable principle will naturally be opposed to anything unjust. While this argument may have some utilitarian merit, the development of law will be hindered if the use of imprecise language is condoned.
10. See, e.g., S. Mercantile Group, Inc. v. Gulf S. Catalyst Servs., Inc., 471 So. 2d 728 (La. App. 1st Cir. 1985); Clarke v. Shaffett, 37 So. 2d 56 (La. App. 1st Cir. 1948); Pasquier, Batson, & Co. v. Ewing, 430 So. 2d 724 (La. App. 2d Cir. 1983).
12. In this comment, use of the words "common law quantum meruit" or simply "quantum meruit" without modification will signify the common law version of quantum meruit. The words "the Louisiana version of quantum meruit" signify the Louisiana version.
COMMENTS

resembles the *actio de in rem verso*. Unfortunately, quantum meruit lacks readily ascertainable rules for the determination of the proper amount of compensation. The technique used to determine recovery varies according to the circumstances of each case.14

In Louisiana, courts employ a distinct remedy also called quantum meruit, but only if a contract *does* exist. Courts use the Louisiana version of quantum meruit to supply a missing price in an otherwise valid contract. If the parties contest the price to be paid under a contract for goods or services, a court may use the Louisiana version of quantum meruit to supply the missing price, thus completing the contract.15 According to the Supreme Court of Louisiana, the equitable principles upon which the Louisiana doctrine is based appear in Louisiana Civil Code articles 1903 and 1967.16 The price determined by this method usually equals the fair market value for the good or service that was the object of the contract.

The *actio de in rem verso* has a purpose and scope somewhat broader than those of common law quantum meruit. While quantum meruit serves only to compensate for services rendered in the absence of a binding contract,17 the *actio de in rem verso* corrects all forms of unjust enrichment. The *actio de in rem verso* is analogous to a common law action for restitution. Quantum meruit, on the other hand, is a specific example of an action based upon principles of restitution.18 The *actio de in rem verso* also provides a specific method for determining proper compensation. The new Article 2298 incorporates the *actio de in rem verso*, and eliminates the need for quantum meruit as a basis for recovery in Louisiana.19

The Louisiana Supreme Court, in a line of cases beginning in 1967, issued guidelines to govern quasi-contractual settings.20 These judicial guidelines did

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16. *Id.* at 574.
17. Quantum meruit is technically only one remedy among the many available in an action for restitution. However, modern courts use the terms “restitution,” “unjust enrichment,” and “quantum meruit” almost interchangeably. *See infra* note 18.
18. The word “restitution” is, in most American jurisdictions, used to convey the same idea that “unjust enrichment” conveys in Louisiana. In other words, if a party is found to owe restitution, it is because he has been unjustly enriched. For a general discussion of the confused state of the law of restitution, *see* Dobbs, *supra* note 6, at 224-25. Since 1980 Louisiana courts have used the word “restitution” almost exclusively to refer to the compensation a convicted criminal or juvenile delinquent must pay to his victim. *See, e.g.*, State v. Diaz, 615 So. 2d 1336 (La. 1993); State v. Hardy, 432 So. 2d 865 (La. 1983); State v. Freeman, 577 So. 2d 216 (La. App. 1st Cir. 1991); State v. Bryan, 535 So. 2d 815 (La. App. 2d Cir. 1988); State v. J.B., 643 So. 2d 402 (La. App. 3d Cir. 1994); State v. Johnson, 479 So. 2d 378 (La. App. 4th Cir. 1985); State v. Schmidt, 558 So. 2d 255 (La. App. 5th Cir. 1990). *But see* Aetna Cas. & Sur. Co. v. M & A Farms, Ltd., 462 So. 2d 1323 (La. App. 3d Cir. 1985); Garner v. Hoffman, 638 So. 2d 324 (La. App. 4th Cir. 1994).
20. The first modern Louisiana case to attempt a rational and reasoned distinction among the *actio de in rem verso* and the two forms of quantum meruit was Minyard v. Curtis Prods., Inc., 251
not receive the acceptance that might have been expected. Undoubtedly the fact that courts still commonly use quantum meruit as a basis for recovery, even though it has been in disfavor for years,\(^1\) provided some impetus for the revision of the Louisiana Civil Code. One can not speculate whether the revision of the Civil Code articles concerning quasi-contracts will provide a suitable framework for the systematic application of quasi-contractual remedies in Louisiana. However, this revision presents the best opportunity the Louisiana legal community has ever have to bring order to the field of quasi-contractual obligations.

Part II of this comment traces the development of prior law, focusing on the development of unjust enrichment and quantum meruit from their roots to the present day. Part III presents the new article 2298 in detail, examines its impact on prior law, and offers a brief conclusion.

II. HISTORICAL DEVELOPMENT

A. The Roman Era

The notion of a quasi-contract dates from Roman times.\(^2\) Roman law recognized quasi-contractual obligations as early as 100 A.D. The major distinction among legal obligations of private persons before that time was the one between contractual obligations, which were created by mutual agreement, and delictual obligations, which resulted from the wrongful act of one of the parties.\(^3\) By the end of the fifth century, legal theorists clearly distinguished between contractual obligations and obligations resulting from a lawful non-consensual action. In the sixth century A.D., with the publication of the *corpus juris civilis*, the Emperor Justinian created the category of obligations known as *obligationibus quasi ex contractu*, thus formally classifying quasi-contracts.\(^4\)

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\(^1\) See *La. 624, 205 So. 2d 422 (La. 1967).* The *actio de in rem verso* was further developed in *Morphy, Makofsky, & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569 (La. 1989); Creely v. Leisure Living, Inc., 437 So. 2d 816 (La. 1983); Edmonston v. A-Second Mortgage Co., 289 So. 2d 116 (La. 1974);* and *Brignac v. Boisdore, 288 So. 2d 31 (La. 1973).*

\(^2\) See, e.g., *Oil Purchasers, Inc. v. Kuehling, 334 So. 2d 420, 425 (La. 1976); Fogleman v. Cajun Bag & Supply, Co., 638 So. 2d 706, 708 (La. App. 3d Cir. 1994).*


\(^4\) Robert W. Lee, *The Elements of Roman Law* 371-75 (1956); Richard W. Leage, *Roman Private Law* 382-86 (1961). See generally Levasseur, *supra* note 6, at 333-437. Professor Levasseur is fond of saying “Note the placement of the *ex*.” This admonition refers to the Latin expression *obligationibus quasi ex contractu*. A translation of the expression into English yields “obligations that seem as if they arose from a contract.” This placement of the *ex* is crucial because it provides a different conceptual understanding of quasi-contracts than would be provided by the expression *obligationibus ex quasi contractu*. Such an expression would mean “obligations arising from something similar to a contract.” The first expression emphasizes that the obligations are similar to contractual obligations in their effects on the parties, even though they arise
Although the term originally served as a label for a variety of unrelated legally imposed obligations, it evolved into a separate theoretical basis for an obligation, equivalent to contract, delict, and quasi-delict.25

In the Roman Empire, a slave owner could benefit from the financial arrangements made by his slave, since he could lawfully appropriate a slave's property at will. Before 100 A.D. courts did not hold the owner responsible for the slave’s failings, shortcomings, or breaches of contract unless the owner had also joined with the slave in the slave's contract. To take advantage of this situation, property owners would give title to certain property to a slave and require him to transact business, form contracts, or hire out as a laborer. Assets transferred from slave owner to slave were called peculium.26 By means of such a transfer the slave owner could avoid legal responsibility for the peculium while still deriving economic benefit therefrom.27

The inequity of this situation, from which wealthy property owners could derive financial gain without liability for any wrongdoing, led Roman courts to recognize an action against an owner for the behavior of his slave under a doctrinal theory similar to agency. This action was called the actio de peculio, or action concerning peculium. The actio de peculio provided aggrieved parties with recourse against the owner, but limited his liability to the amount of the peculium.28 Procedural developments led to the innovation of the actio de peculio et de in rem verso.29 This new action allowed a third party to bring a direct action against the owner to the extent that he had derived any economic benefit from the slave's transaction, even if his benefit exceeded the amount of the peculium.30

The actio de peculio et de in rem verso was the forerunner of the modern actio de in rem verso, or action to prevent unjust enrichment.31 It led to the codification of the principle forbidding unjust enrichment in the last book of Justinian's Digest.32

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From a setting that has no resemblance at all to a contract. The second expression erroneously gives rise to the idea that there must be an "implied contract." A "contract implied in fact" is a perfectly good contract, and creates contractual obligations rather than quasi-contractual ones. A "contract implied at law," which is suggested by the erroneous expression ex quasi contractu, is a legal fiction that symbolizes a court's attempt to recognize that the obligation it is imposing is similar to a contractual obligation. The expression "contract implied at law" has the unfortunate consequence of focusing attention on a non-existent contract, and away from the factual circumstances that led the court to impose the obligation. A quasi-contractual obligation has the same effect as a contractual obligation, but its origin has nothing in common with that of contractual obligations. Thus, "Note the placement of the ex." (Translation by J. Oakes).

25. Leage, supra note 22, at 313.
26. Id. at 71.
27. Lee, supra note 22, at 359.
28. Leage, supra note 22, at 374.
29. Id.; Lee, supra note 22, at 359; Levasseur, supra note 6, at 335.
30. Lee, supra note 22, at 359-60.
31. See supra note 4.
32. "Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorum."
B. The French Era

The law of France forms a link between the laws of the Roman Empire and the laws of Louisiana. French law exemplifies the Roman legal heritage. In turn, early Louisiana law draws heavily upon the French law of the eighteenth and nineteenth centuries. The Napoleonic Code provided inspiration to the drafters of the original Louisiana Civil Code. Therefore, a proper understanding of quasi-contracts in Louisiana's legal history requires a survey of the French treatment of the subject.

Pothier's Civil Law treatise provided the primary inspiration for the French Civil Code chapters on obligations. Pothier asserted that the quasi-contractual obligation naturally derived from equitable principles. In the late nineteenth century, some French legal realists suggested that legislators artificially created quasi-contractual obligations, that the subject had no theoretical significance, and that the distinction between quasi-contractual and contractual obligations should be abandoned. Other French scholars disagreed, arguing that the quasi-contractual obligation arises from a set of factual circumstances. For these scholars, legislation did not create quasi-contractual obligations. Instead, legislation signified the lawmaker's acknowledgment of the factual circumstances which created the quasi-contractual obligation. According to Planiol, the basic legal principle that no person should be allowed to enrich himself at the expense of another justifies the enforcement of quasi-contractual obligations. Modern French law has followed the path of Pothier and Planiol. Today, the modern formulation of French quasi-contractual theory envisions the equitable principle forbidding unjust enrichment as the ultimate source of all quasi-contractual doctrine.

Surprisingly, French doctrinal writers of the early nineteenth century overlooked the principle forbidding unjust enrichment. Although the French developed a limited treatment of quasi-contracts, they never undertook a comprehensive study of the field. Pothier wrote extensively on two specific examples of quasi-contracts: payment of a thing not due (actio indebiti), and management of another's affairs (negotiorum gestio). However, he never developed a systematic treatment of the principles that gave rise to quasi-contracts.
contracts. In general, the French approach to quasi-contractual obligations was uncharacteristically practical, rather than theoretical. The lack of doctrinal development, particularly in the works of Pothier, resulted in the absence of provisions dealing with unjust enrichment in the French Civil Code until the late nineteenth century. This gap in the French law led to the adoption of the common law version of quantum meruit as a basis for recovery in Louisiana.

C. The Historical Development of Quantum Meruit

At early common law, substantive innovations were dependent upon procedural developments. Procedural developments took the form of new writs of action. As human interaction intensified, new writs were developed. One of the earliest writs was the writ of trespass, applicable in cases involving forcible interference with a person's rights. The writ of trespass led to "trespass on the case," or simply "case." In the fourteenth century a plaintiff who had been the victim of professional malpractice relied upon a writ of case. Case was applicable when the defendant had undertaken to do something and failed, and the plaintiff had suffered harm as a result. The plaintiff had to allege an undertaking by the defendant to make case an available action. The Latin word used to represent undertaking was *assumpsit.* Eventually *assumpsit* developed into a separate writ distinct from case. *Assumpsit* became an extremely versatile writ, used in a variety of situations. For example, litigants commonly used the writ of *assumpsit* in an action to recover the payment of a thing not due. In addition to the action to recover the payment of a thing not due, the writ of *assumpsit* served to bring actions to enforce actual contracts in which a price was not agreed upon (analogous to the Louisiana version of quantum meruit), to compensate for performance of services rendered in the absence of a contract (quantum meruit), and to compensate for delivery of goods in the absence of a contract (quantum valebant). Courts generally measured recovery in these situations by the fair market value of the goods or services.

Assumpsit came to North America with the ubiquitous Blackstone. A change in emphasis may have led to a change in terminology. While the most...
common claim under the writ of assumpsit in Britain was for payment of a thing not due, in the early years of our nation currency and negotiable instruments were not readily available in all areas. Labor, however, was cheap and plentiful. Therefore, the most common form of quasi-contractual action brought through assumpsit was most likely a quantum meruit action to recover for services rendered. In time, quantum meruit became synonymous with all forms of restitution in the United States, and the terms “assumpsit” and “quantum valebant” fell into disuse.

D. Quantum Meruit and Unjust Enrichment in Louisiana Law

As explained earlier, no provisions of the early French Civil Code dealt explicitly with unjust enrichment. Doctrinal writers focused on a practical application of the principle forbidding unjust enrichment to certain factual circumstances, rather than on theoretical development. Since the Louisiana Civil Code was based on the French model, it is not surprising that early Louisiana legal scholars overlooked the principle forbidding unjust enrichment. However, problems involving unjust enrichment arise in almost every walk of life and Louisiana courts had to adopt some legal principle to deal with these problems. They naturally chose quantum meruit; it was the only general quasi-contractual remedy available to them.

In 1820, quantum meruit indirectly appeared in the Louisiana jurisprudence in the case of Gilly v. Henry,51 which involved a sale of flour. The plaintiff delivered to the defendant one hundred barrels of flour. No price was set but the defendant accepted it anyway. Later the plaintiff attempted to collect, quoting a market price of thirteen dollars per barrel. The defendant initially asked for more time to pay, then refused to pay at all. The plaintiff sued. The Gilly court cited no statutory or codal authority; it resolved the issue by referring to the common law principle of quantum valebant. Quantum valebant is closely related to quantum meruit. Quantum meruit generally involves a personal action for services rendered. However, quantum valebant is restricted to recovery for the value of goods when the putative buyer is unable or unwilling to return them and the parties have not agreed upon a price.54 The Gilly court’s usage of the principle of quantum valebant indicated to contemporary attorneys that quantum meruit was acceptable.

Five years after Gilly, in Morgan v. Mitchell,55 a Louisiana court explicitly recognized quantum meruit. Necessity had forced Louisiana courts to import a remedy to deal with a commonly arising situation that the Louisiana legislature

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51. Gilly v. Henry, 8 Mart. (o.s.) 402 (La. 1820).
52. Id. at 418. Quantum valebant is Latin for “as much as they were worth.” Black’s Law Dictionary 1244 (6th ed. 1990).
53. Dobbs, supra note 6, at 237.
54. Id. at 238.
55. 3 Mart. (n.s.) 576 (La. 1825).
had not addressed. If the Louisiana Civil Code of 1825 had contained an express provision concerning unjust enrichment, perhaps quantum meruit would never have appeared in Louisiana.

Quantum meruit was almost the exclusive remedy in Louisiana for quasi-contractual disputes until 1967. In fact, between 1820 and 1967 only two Louisiana Supreme Court cases resolved quasi-contractual disputes by referring to civilian doctrine: Payne & Harrison v. Scott and Garland v. Estate of Scott.

In Payne, a merchant sought to recover the value of goods and merchandise that the defendant and his minor children had used. The Louisiana Supreme Court first found that no contract had been established. The court then turned to the plaintiff's possible remedies in the absence of an enforceable contract: "If the plaintiffs can recover at all, it is in the form of the action known in the civil law as de in rem verso." The court concluded that the plaintiffs could not recover at all. However, the decision served to establish the civilian actio de in rem verso in the Louisiana jurisprudence. The decision also created two limitations: the actio de in rem verso was available only in cases where no contract had been formed, and recovery was limited to the benefit actually conferred upon the defendant.

The second case, Garland v. Estate of Scott, involved a dispute over the validity and extent of a power of attorney. The defendants argued that because the power of attorney was invalid, the actions of the deceased's purported agent did not bind the estate. The supreme court reinforced its holding from Payne and stated that even if the power of attorney were invalid, the court would hold the estate liable to the extent that it had gained from the agent's actions. The procedural mechanism the court used to support the plaintiff's claim was the actio de in rem verso. The court cited the Digest of Justinian for the principle that no man should be enriched by the loss or injury incurred by another.

Although one might expect the Louisiana Supreme Court to further develop this abbreviated line of cases, there is no additional treatment of the actio de in rem verso in the Louisiana jurisprudence until 1967. In the interim, although

59. Id.
60. Id.
61. Since one of the fundamental principles of civilian methodology is the idea that legislation is the primary source of law, it is ironic that a court, rather than the legislature, would introduce this civilian concept into Louisiana. Here we see a court acting in opposition to civilian principles, motivated in part by a desire to preserve Louisiana's civilian heritage. The development of the law in any mixed jurisdiction is undoubtedly filled with such contradictions.
64. Id.
65. See Minyard v. Curtis Prods., Inc., 251 La. 624, 205 So. 2d 422 (La. 1967).
courts referred occasionally to "unjust enrichment," they invariably used quantum meruit to resolve the disputes before them.\(^\text{66}\)

While quantum meruit can be used as a quasi-contractual remedy, it does not provide a neutral, generally applicable method of determining the appropriate amount of compensation in a given case. A survey of the jurisprudence reveals inconsistencies. In fact, one commentator has written:

The decisions have variously explained quantum meruit as one of the quasi contracts described in Civil Code articles 2292-95, as an outgrowth of the moral maxim incorporated in article 1965, or as an admitted common law solution to an inequitable set of circumstances. Under the one heading of quantum meruit, the courts have measured recovery sometimes by the market value of the goods and services including a reasonable profit, sometimes by the amount of the plaintiff's impoverishment including profit, sometimes by the plaintiff's impoverishment excluding profit, and sometimes by the amount of benefit retained by the defendant.

Despite the differing measures of recovery, however, no comprehensive explanation of the divergent awards appears in the jurisprudence.\(^\text{67}\)

Close study of the case law suggests that courts have tended to rely on precedents with similar factual circumstances, without giving consideration to the need for a consistent application of rational legal principles.\(^\text{68}\) Consequently, courts have used quantum meruit to give widely diverging and sometimes irreconcilable awards. Some examples follow.

While courts routinely grant quantum meruit recovery to attorneys\(^\text{69}\) for services rendered in the absence of a binding contract, the same courts deny quantum meruit recovery to real estate brokers and agents who are determined

\(^{66}\) See Clarke v. Shaffett, 37 So. 2d 56 (La. App. 1st Cir. 1948). There the court explains that the plaintiff has stressed the defendant's "unjust enrichment," and resolves the case by finding that recovery under quantum meruit would be inappropriate.

\(^{67}\) Burke, supra note 14, at 636-37 (citations omitted).

\(^{68}\) Id.

to have acted without a binding contract.\textsuperscript{70} In cases involving services rendered or work done, where the courts have found no valid contract, they have measured quantum meruit recovery in the following ways: the percentage of the contract price that equals the percentage of work completed;\textsuperscript{71} the cost of materials, labor, and equipment rental incurred by the contractor, increased by a reasonable profit;\textsuperscript{72} the cost of materials and labor incurred by the contractor, increased by a reasonable profit;\textsuperscript{73} the cost of materials and labor incurred by the contractor, without profit;\textsuperscript{74} the lesser of the contractor's impoverishment and the owner's benefit;\textsuperscript{75} the appropriate compensation as determined by expert testimony;\textsuperscript{76} the contract price less damages caused by the breach;\textsuperscript{77} the price of the same services in previous transactions between the parties;\textsuperscript{78} the invoice price;\textsuperscript{79} the market value for services rendered;\textsuperscript{80} and a "fair" award for services rendered.\textsuperscript{81} In cases involving real property, courts generally measure recovery by determining the rental value of the property.\textsuperscript{82} However, at least one court


\textsuperscript{72} See, e.g., Coastal Timbers, Inc. v. Regard, 483 So. 2d 1110 (La. App. 3d Cir. 1986).


\textsuperscript{74} See, e.g., Merrydale Glass Works, Inc. v. Merriam, 349 So. 2d 1315 (La. App. 1st Cir.), writ denied, 350 So. 2d 1211 (1977); Harper v. J.B. Wells Estate, 575 So. 2d 894 (La. App. 2d Cir. 1991); Kibbe v. Lege, 604 So. 2d 1366 (La. App. 3d Cir.), writ denied, 606 So. 2d 540 (1992); Hagberg v. John Bailey Contractor, Inc., 499 So. 2d 1132 (La. App. 3d Cir. 1986); Alonzo v. Chifici, 541 So. 2d 303 (La. App. 5th Cir. 1989) (wherein the court states that Louisiana courts have erroneously labeled the applicable equitable principles "quantum meruit," and then proceeds by using quantum meruit techniques).

\textsuperscript{75} See, e.g., Smith v. Hudson, 519 So. 2d 783 (La. App. 1st Cir. 1987); Smith v. McMichael, 381 So. 2d 898 (La. App. 2d Cir. 1980); Brankline v. Capuano, 656 So. 2d 1 (La. App. 3d Cir. 1995).

\textsuperscript{76} See, e.g., Gulf States Util. Co. v. Delcambre Tel. Co., 546 So. 2d 613 (La. App. 3d Cir. 1989).

\textsuperscript{77} See, e.g., Kesting v. Miller, 339 So. 2d 955 (La. App. 4th Cir. 1976), writ denied, 341 So. 2d 904 (1977).

\textsuperscript{78} See, e.g., Laga v. Village of Loreauville, 571 So. 2d 212 (La. App. 3d Cir. 1990).

\textsuperscript{79} See, e.g., Bar-Tow, Inc. v. Roy's Transp., Inc., 616 So. 2d 203 (La. App. 5th Cir. 1993).


\textsuperscript{81} See, e.g., Sims-Smith, Ltd. v. Stokes 466 So. 2d 480 (La. App. 5th Cir. 1985).

\textsuperscript{82} See, e.g., Theriot v. P & R Farms, Inc., 527 So. 2d 3 (La. App. 3d Cir.), writ denied, 528 So. 2d 154 (1988); Dixie Sav. and Loan Ass'n v. Bonura, 549 So. 2d 424 (La. App. 5th Cir. 1989).
measured recovery by referring to the loss in the appraised value of the plaintiff’s land caused by the defendant’s conduct. 83

Given the factual circumstances of each case, each of the above remedies was undoubtedly equitable. The wide range of possibilities, however, provides little guidance to attorneys preparing for a case or to courts seeking to apply an established rule. In Fullerton v. Scarecrow Club, Inc., 84 the plaintiff sought recovery through quantum meruit. The court stated:

The jurisprudence has adopted several different approaches for determining quantum meruit awards. . . . Perhaps the most astute basis for determining quantum meruit was articulated in Jones v. City of Lake Charles, wherein the court acknowledged that there is no mathematical formula for computing quantum meruit awards: “The general rule is that the plaintiff who establishes his right to be compensated on quantum meruit should recover as much as he reasonably deserves for his services and for the time and labor required for them. There is no specific test which must be applied to determine the reasonable value of such services. It is a matter of equity depending upon the circumstances of each case.” . . . Guided by this expression of quantum meruit recovery, we determine that the plaintiff was entitled to a judgment of $1,700. 85

The preceding passage amply demonstrates the drawbacks of the quantum meruit remedy. “Quantum meruit” is a Latin expression meaning “as much as he deserves.” 86 Therefore, the observation made by the Jones court, that a plaintiff who is entitled to quantum meruit should recover “as much as he reasonably deserves,” is a mere tautology. One who is entitled to quantum meruit recovery is, by definition, entitled to as much as he deserves. This observation provides little guidance for determining how much the plaintiff deserves. Recovery may be “a matter of equity depending upon the circumstances of each case,” 87 but litigants are still entitled to know the rules of recovery before the judgment is rendered. Attorneys should be able to read the Fullerton opinion and understand exactly how the court arrived at its $1700 figure. Parties cannot understand the basis for a decision when the court simply states that it has determined that such an award is reasonable.

The actio de in rem verso as presented in Article 2298 does not solve all of the problems of quasi-contractual remedies. It will, however, provide the members of bench and bar with a universal vocabulary. They can now clearly

85. Id. at 950 (quoting Jones v. City of Lake Charles, 295 So. 2d 914, 917 (La. App. 3d Cir. 1974)).
86. See supra note 4.
87. Jones v. City of Lake Charles, 295 So. 2d 914, 917 (La. App. 3d Cir. 1974).
discuss the pertinent issues, rather than arguing over "reasonableness" and "equity." Unless supported by a clearly defined standard, reasonableness and equity are too vague to be of much use in predicting the outcome of litigation or planning one’s affairs. Article 2298, which replaces quantum meruit as a basis for recovery, provides the necessary standard.

Unfortunately, this codal solution did not arrive until 1996. The first attempt to revive the actio de in rem verso and to create a consistent set of standards for its application came from the judiciary. After a delay of over a century, the Louisiana Supreme Court reintroduced the actio de in rem verso in Minyard v. Curtis Products, Inc. Curtis Products, the defendant, was the successor to two corporations: Plastoid Products and Plastic Products. These two companies were closely related in name and in function. Plastic Products manufactured a faulty caulking compound and Plastoid Products distributed and sold that compound. Minyard (who had no direct contractual link to Plastic Products), a subcontractor at a construction project, purchased the caulking compound from Plastoid Products.

In 1953, Minyard applied the faulty caulking compound to a public construction project. Minyard had guaranteed the quality of the compound to the public agency, relying on the assertions of the manufacturer, Plastic Products. Because of this guarantee, Minyard was held liable to the contractor for the damages suffered by the public agency. Minyard then sought indemnity against Curtis Products as the successor to the manufacturer of the compound, Plastic Products. The district court determined that although Minyard’s petition was styled “Petition for Indemnity,” it actually stated a cause of action in redhibitation or in breach of contract. The Court of Appeal agreed. Based on this finding, and the fact that the contract was formed in 1953, both courts found for the defendant because Minyard’s claim had prescribed.

Minyard’s liability to the contractor arose in March 1965. Minyard filed the indemnity action on November 17, 1965 against Curtis as the successor of Plastic Products. Minyard did not allege a claim against Curtis as the successor to Plastoid, the seller and distributor. The Louisiana Supreme Court found that because Minyard had never entered into a contract with Plastic Products, no claim based on redhibitation or breach of contract was possible. The lower

89. 251 La. 624, 205 So. 2d 422 (La. 1967).
90. Id. at 636-37, 205 So. 2d at 427.
91. The court specifically found that Minyard had not been at fault in applying the compound. Id.
92. Id. at 635, 205 So. 2d at 426.
93. Id.
94. If the suit had been against Curtis as the successor to Plastoid, then the pleas of prescription for redhibitation and breach of contract may have been appropriate. Minyard had no contract with Plastic Products, so redhibitation and breach of contract, with their corresponding prescriptive periods, were not applicable. Minyard, 251 La. at 636-37, 205 So. 2d at 427.
95. Id. at 637, 205 So. 2d at 427.
courts had erroneously characterized the action as one sounding in redhibition or breach of contract. Consequently, the lower courts had erred in finding that prescription had run.96

The supreme court characterized Minyard's claim as an action for indemnity. Because the Louisiana Civil Code did not provide an explicit prescriptive basis for actions seeking indemnity, the court examined the theoretical basis for indemnity in order to determine the appropriate prescriptive period.97 The court first distinguished indemnity from contribution.98 The court explained that contribution was based upon the concept that of several faulty parties, each should bear a fair share of the responsibility. Indemnity claims involve cases where only one party is at fault. The other party is blameless, but is held responsible due to some legal relationship with the party at fault. Here, Minyard was held liable because it had guaranteed the faulty caulking compound manufactured by Plastic Products. The court concluded that Minyard was blameless, but that Louisiana law provided no express statutory remedy.99 The court stated that a statutory basis for an action in indemnity could be constructed from Articles 21 and 1965 of the Louisiana Civil Code of 1870.100 Since this action was based on the principle forbidding unjust enrichment, it was subject to the general ten year prescriptive period. Prescription on the action for indemnity did not begin to accrue until Minyard's liability was determined, which was in March 1965. Consequently, the prescriptive period had not yet elapsed.101

Although the above analysis would have solved the problem presented by Minyard, the Louisiana Supreme Court used the opportunity to resurrect the actio de in rem verso. The court surveyed the jurisprudence and observed that although prior treatment had been inconsistent, some decisions had used the actio de in rem verso to resolve quasi-contractual disputes.102 The court cited several French sources,103 and remarked that the Louisiana Civil Code articles on the quasi-contracts were "copied"104 from the French Civil Code. The court then adopted the modern French version of the actio de in rem verso.105 The court granted Minyard recovery against Curtis Products by resorting to the newly adopted actio de in rem verso.106

As presented in Minyard, the actio de in rem verso has five elements.107 To invoke the remedy, the plaintiff must establish (1) that the defendant has been

96. Id.
97. Id. at 636-49, 205 So. 2d at 427-31.
98. Minyard, 251 La. at 640-44, 205 So. 2d at 428-29.
99. Id. at 648-49, 205 So. 2d at 431.
100. Id.
101. Id. at 636, 205 So. 2d at 427.
102. Id. at 637-38, 205 So. 2d at 427.
103. Minyard, 251 La. at 650, 205 So. 2d at 432.
104. Id. at 651, 205 So. 2d at 432.
105. Id. at 653, 205 So. 2d at 433.
106. Id.
107. Id. at 651-52, 205 So. 2d at 432.
enriched, (2) that the plaintiff has been impoverished, (3) that there is a causal connection between the enrichment and the impoverishment, (4) that the enrichment and impoverishment are without lawful cause, and (5) that there is no other remedy available to the plaintiff. The court found that all of these requirements were satisfied and ruled in favor of Minyard. Significantly, as this comment will discuss below, the new Article 2298 codifies the five Minyard elements.

One of the first cases to suggest that the application of quasi-contractual remedies would continue to be troublesome after Minyard was North Development Co., Inc. v. McClure. The case involved a dispute between several corporations and a subcontractor. The subcontractor sought recovery for work done on a paving project, while the corporations counterclaimed based on breach of contract. The court found that upon entering into the contract the subcontractor had made a significant error of fact that vitiated consent. Therefore, the contract was relatively null. Since the court found that the subcontractor was without a contractual remedy, the correct remedy would have been to determine whether the subcontractor could recover through the actio de in rem verso. Instead, the Louisiana Second Circuit Court of Appeal invoked quantum meruit. No discussion of the actio de in rem verso appeared in the decision. The subcontractor’s proper recovery in quantum meruit was not the amount by which the corporations had been enriched, or even the amount by which the subcontractor had been impoverished. The court awarded the subcontractor the cost of its efforts, increased by a reasonable profit. Since the contract was void, the rationale behind this decision is difficult to understand. The court explained its decision to award expenses incurred and a reasonable profit in the following passage:

The general rule on the amount of recovery allowed under the doctrine of quantum meruit is the value of the services or materials which have inured to the benefit of another. In making a determination of what is a reasonable value of the services performed, the court must look to the circumstances involved in each individual case.

108. This last element, that there is no other remedy available to the plaintiff, is known as the requirement of subsidiarity. It is a practical requirement, designed to prevent the actio de in rem verso from swallowing up the entire realm of contract and tort law, since it is general enough to be used in almost any private cause of action. The requirement of subsidiarity presented some analytical problems for the court in Minyard, which will be discussed later. "The fifth requirement, that there be no other remedy available at law, is simply an aspect of the principle that the action must not be allowed to defeat the purpose of a rule of law directed to the matter at issue. It must not, in the language of some writers, "perpetrate a fraud on the law.' Article 21 of the Louisiana Civil Code prohibits a reference to principles of equity in cases which would allow application of more specific legal action." Id. at 652, 205 So. 2d at 432.


110. Id. at 400.

111. Id. at 400-01.
Our language in the Ward case inferring [sic] that under the doctrine of unjust enrichment a claimant is only allowed to recover actual cost is not in accord with the majority of the jurisprudence, and although it may have been appropriate under the facts of that case, we do not deem it to apply to the facts of this case. In Swan v. Beaubouef, the Fourth Circuit Court of Appeal allowed a contractor to recover a reasonable profit as well as his actual cost of labor and materials in the application of the doctrine of quantum meruit.

La.C.C. Art. 1965 is the source of the doctrine of quantum meruit in this State and is intended to afford relief under appropriate circumstances in equity when there is no remedy under the general law. We believe it would be inequitable to relegate the subcontractor in this case to only actual cost of labor and material. This would in effect allow the adverse parties to enrich themselves at his expense for the amount of reasonable profit usually made by the subcontractor in return for his undertaking.112

This argument is not persuasive. It ignores the fact that the subcontractor is partially to blame for the fact that the contract between the parties was vitiated. The error of fact was his. The result in this case, if taken to its logical conclusion, suggests that contracts are useless. If a subcontractor can recover expenses and a reasonable profit without a contract, and even if the purported contract was abrogated due to his error, why should he bother with negotiations at all? The recent codification of the principle forbidding unjust enrichment addresses the problem. The result under the new Article 2298, which limits recovery to the lesser of the amount of the enrichment and the amount of the impoverishment, is preferable to the result in the North case.

Another important Louisiana Supreme Court opinion concerning the actio de in rem verso is Morphy, Makofsky, & Masson, Inc. v. Canal Place 2000.113 In that case, the plaintiff sought recovery for services rendered under an alleged oral contract on a construction project. The trial court and court of appeal held that the lack of agreement on the amount of compensation vitiated the consent of the parties and abrogated the contract. While the plaintiff sought $75,000 as the fair market value of its services, the trial court awarded only $45,000 in quantum meruit. The court of appeal found the requirements for the actio de in rem verso were satisfied, and affirmed the $45,000 award.114 The Louisiana Supreme Court disagreed, finding a valid oral contract.115 The lack of agreement concerning compensation was insufficient to abrogate the contract because the law assumes that a contracting party will be paid a reasonable sum for his

112. Id. at 400 (italics added) (citations omitted).
114. Id. at 570-71.
115. Id. at 573.
services. The court expressed its exasperation with the ubiquity of common law quantum meruit, and distinguished it from the Louisiana version. The court then criticized three cases, Custom Builders & Supply, Inc. v. Revels, Swiftships, Inc. v. Burdin, and Houma Armature Works & Supply v. Landry, which had confused the two forms of quantum meruit and had improperly limited the plaintiff's recovery. In each of these cases, a contract lacked a term regarding compensation. Thus, the Louisiana version of quantum meruit should have been utilized to determine a reasonable compensation under the contract. However, in each case the court of appeal incorrectly used a variant of the common law quantum meruit or the actio de in rem verso to limit the plaintiff's recovery to the amount of the enrichment.

The Morphy court concluded that since the contract between the parties was valid, the actio de in rem verso was inapplicable. The plaintiff should recover a reasonable amount for the services it rendered under the contract.

More than any other case, Morphy clearly established that the Louisiana Supreme Court prefers the actio de in rem verso to quantum meruit. The recent revision of Article 2298 reinforces that preference. Henceforth, any Louisiana court using the expression "quantum meruit" should first determine whether a contract exists. If not, quantum meruit is inapplicable. If so, the court should be referring to the Louisiana version of quantum meruit, which is used only to supply a missing compensation term for an otherwise valid contract.

III. ARTICLE 2298

The long line of cases extending from Minyard to Morphy suggests that the actio de in rem verso has become firmly rooted in the Louisiana jurisprudence.

116. Id. at 574.
117. The court stated: "Unfortunately for the purity of our civilian concepts, the cases in our jurisprudence which have applied these codal provisions have often referred to this reasonable value of services or equitable ascertainment of compensation or price as 'quantum meruit' or an action in quantum meruit." Id. at 574.
118. Id. at 574-75.
119. 310 So. 2d 862 (La. App. 3d Cir. 1975).
120. 338 So. 2d 1193 (La. App. 3d Cir. 1976).
121. 417 So. 2d 42 (La. App. 1st Cir. 1982).
122. Compare the above three cases with North Dev. Co. v. McClure, 276 So. 2d 395 (La. App. 2d Cir. 1973), wherein the court made the opposite mistake. After determining that there was no binding contract, the North court applied the Louisiana version of quantum meruit, which is only applicable when there is an existing contract. See supra text accompanying notes 104-109.
123. Murphy, 538 So. 2d at 575.
124. "There is no specific test which must be applied to determine the reasonable value for such services. It is a matter of equity depending upon the circumstances of each case." Murphy, Makofsky, & Masson, Inc. v. Canal Place 2000, 538 So. 2d 569, 575 (La. 1989), quoting Jones v. City of Lake Charles, 295 So. 2d 914 (La. App. 3d Cir. 1974). After noting that there was substantial evidence to support the position that Morphy was charging an unusually low rate for its services, the court awarded Morphy the invoice price. Morphy, 538 So. 2d at 575.
Even after *Morphy*, however, courts have used quantum meruit in a wide variety of situations, particularly in disputes concerning attorney fees. The Louisiana State Law Institute began work on a revision of the Civil Code Articles concerning quasi-contracts in 1991. After years of committee meetings and revisions, the Institute submitted a proposal to the Louisiana Legislature in 1995. That proposal became 1995 Louisiana Acts 1041. The most important article revised by 1995 Louisiana Acts 1041 is Article 2298, which codifies the general principles underlying quasi- contractual remedies.

**Art. 2298. Enrichment without cause; compensation**

A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without
cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.126

A. Enrichment, Impoverishment, and Causal Connection

Article 2298 codifies the actio de in rem verso. The article incorporates the five elements listed in Minyard: enrichment, impoverishment, a causal connection between the two, lack of legal cause, and subsidiarity.127 The first three elements, although not explicitly listed, are required by the first sentence of the article and the accompanying comments.128 Before a plaintiff can recover under this article he must establish (1) that he has been impoverished, (2) that the defendant has been enriched, and (3) that there is a causal connection between the two. The first sentence provides that “A person who has been enriched without cause at the expense of another person is bound to compensate that person.”129 This sentence contains each of the first three Minyard elements. First, if the plaintiff cannot prove he has been impoverished, he cannot prove the defendant has been enriched at the expense of another person, and hence he cannot recover damages.130 Second, if

128. Comments (a) and (b) provide as follows:
   (a) This provision is new. It expresses the principle of enrichment without cause that was inherent but not fully expressed in the Louisiana Civil Code of 1870. The formulation of the principle accords with civilian doctrine and jurisprudence.
   (b) A person is enriched within the meaning of this Article when his patrimonial assets increase or his liabilities diminish. Correspondingly, a person is impoverished when his patrimonial assets diminish or his liabilities increase. There must be a causal connection, whether direct or indirect, between a person’s enrichment and another person’s impoverishment.

La. Civ. Code art. 2298. Although the comments to Article 2298, which are written by the article’s principal drafter, explicitly state that the actio de in rem verso has been incorporated, the following discussion attempts to demonstrate that the first three elements of the actio de in rem verso, enrichment, impoverishment, and a causal connection, are all required by the first sentence of the Article. Since comments do not have the force of law, it is generally preferable to determine whether the text of the article in question can support the suggested interpretation. In the case of Article 2298, the text and the comments harmonize perfectly.
130. The plaintiff could theoretically attempt to prove that the defendant had been enriched at the expense of some third party. However, this would create two problems. The first is that the
the plaintiff cannot prove that the defendant has been enriched, then of course Article 2298 by its own terms is inapplicable. Finally, the phrase “enriched at the expense of another” establishes the necessity of a causal connection between the enrichment and the impoverishment. This language clearly contemplates a situation in which the gain of one party is the cause of the loss to the other party. Below, each of the first three elements is discussed at length. In the following discussion, the word “plaintiff” signifies the party alleging entitlement to recovery under Article 2298, while the word “defendant” signifies the alleged enrichee.

1. Enrichment

Article 2298 requires that the plaintiff establish that the defendant has been “enriched without cause.” To prevail, therefore, the plaintiff must prove that the defendant has been enriched.

*Brignac v. Boisdore* is a Louisiana Supreme Court decision which provides an edifying discussion of enrichment. In *Brignac*, a lessor filed an action to recover rent due under a lease. The lessee filed a third-party demand against its sublessee for rent on the same premises. The sublessee reconvened against the lessee and third-partied the lessor, seeking reimbursement for the costs of repairing a badly deteriorated floor on the leased premises. The trial court rendered judgments in favor of all three parties, but the Court of Appeal reversed the judgment in favor of the sublessee. The Supreme Court affirmed. Since the sublessee had not furnished notice of the required repairs, it could not recover under the lease, which had a notice requirement. The sublessee could not recover by statute from the owner, since the applicable statute also had a notice requirement. Furthermore, the Supreme Court found that the sublessee had not demonstrated that the lessor had been enriched. Substantial evidence suggested that the floor was not salvageable, and that the repairs had been futile. Quoting at length from *Minyard*, the court held that the sublessee could not recover through the *actio de in rem verso* because it had failed to prove the lessor’s enrichment. Even though the plaintiff would probably lack standing to bring such a claim before the court. The second is that the plaintiff would be unable to prove any recoverable damages, since by assumption he has not been impoverished.

132. 288 So. 2d 31 (La. 1973).
133. *Id.*
134. *Id.* at 34.
135. *Id.*
136. The court suggested in a footnote that the sublessee had also failed to prove the correct form of impoverishment, since the loss it incurred was largely the result of its own failure to abide by the terms of the sublease. The sublease had been drafted by the sublessee’s attorneys, so the court was unwilling to relieve the sublessee from its terms. *Id.* at 35 n.2.
137. *Id.* at 36.
138. *Id.* at 35.
sublessee had been impoverished by his action in repairing the floor, and even though he was no longer entitled to use the premises, he would not have recovered under the new Article 2298. The fact of impoverishment alone is insufficient. The plaintiff must clearly demonstrate that the defendant has materially benefited from the act which gave rise to litigation. In Brignac, the floor remained unusable even after the plaintiff's attempted repairs. Since the plaintiff's work was of no use to the defendant, there had been no enrichment.

Professor Levasseur identifies three conceivable kinds of enrichment sufficient to create liability under Article 2298: increase in the economic and monetary value of the assets owned by the defendant, decrease in the defendant's liabilities, or an intellectual or moral benefit susceptible of monetary evaluation.\(^{139}\)

By far the most common form of enrichment will be an increase in the monetary value of the defendant's assets. Professor Levasseur offers the following examples of increased assets: the defendant's retention of the full price paid for a defective good; the defendant's acquisition of a large billboard which, although located so that it caused a net economic loss to the defendant when left in place, was capable of being removed and sold for a net gain; and the incorporation by a city of pre-existing facilities into its water and sewerage system.\(^{140}\) Generally, any situation that increases the value of the defendant's patrimony can be termed an enrichment for purposes of Article 2298.

The second form of enrichment is a decrease in the defendant's liabilities. The most common factual situation that would create this form of enrichment is one in which the plaintiff pays a debt owed by the defendant. Since this situation is covered by the Louisiana Civil Code articles governing payment of a thing not due, which are beyond the scope of this comment, no further discussion of this form of enrichment will be undertaken here.\(^{141}\)

The third possible form of enrichment is an intellectual or moral benefit susceptible of pecuniary evaluation. Although contractual recovery for nonpecuniary loss is recognized in the Louisiana Civil Code,\(^ {142}\) extension of the concept of nonpecuniary damages and nonpecuniary benefits into the realm of quasi-contractual obligations seems troublesome. When a plaintiff can prove no contractual basis for recovery, and can prove no enrichment to the defendant other than an intellectual or moral benefit, a court should be faced with compelling circumstances before granting the plaintiff monetary damages under Article 2298.

2. Impoverishment

The plaintiff must prove not only enrichment, but enrichment “at the expense of another person.”\(^ {143}\) The defendant, if liable, will be “bound to compensate

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139. Levasseur, supra note 6, at 371.
140. Id. at 372.
that person,” meaning the person at whose expense the enrichment occurred. Therefore, the plaintiff must prove that he is that person at whose expense the enrichment occurred and that he has been impoverished as a result of that enrichment.

A compensable impoverishment may take the form of a decrease in the plaintiff’s patrimonial assets, an increase in the plaintiff’s liabilities, or a missed opportunity to increase the plaintiff’s patrimonial assets. Minyard v. Curtis Products provides two examples of impoverishment. The subcontractor, Minyard, paid for a faulty caulking compound. Since the caulking compound eventually proved unusable, Minyard suffered a net decrease in its patrimonial assets. Minyard paid more for the compound than it was worth. In addition to the loss in patrimonial assets, Minyard suffered an increase in its liabilities when it was held liable for the damage caused by the caulking compound. This second impoverishment formed the basis for Minyard’s eventual recovery from Curtis Products.

The third type of impoverishment, a missed opportunity to increase the plaintiff’s patrimonial assets, might occur when a plaintiff with limited resources has the opportunity to form a contract to render services for either Party A, or Party B, but not for both. Plaintiff chooses to pursue contract negotiations with Party A, and declines Party B’s offer. If Party A then rejects the plaintiff’s services without cause, the plaintiff has been unjustly impoverished because he has missed the opportunity to derive a profit from Party B. Of course, the plaintiff’s recovery is contingent upon his ability to prove Party A’s enrichment, and that will be difficult. The purpose of this illustration is to demonstrate the third type of compensable impoverishment.

Not all impoverishments will entitle a plaintiff to recovery under Article 2298. For example, in Charrier v. Bell, an amateur archaeologist unearthed and removed over two tons of Indian artifacts from a burial site on the Trudeau Plantation. The Tunica Indians contested ownership of the artifacts, and eventually prevailed. The plaintiff alleged, among other things, that the Tunica Indians had been unjustly enriched by his efforts. His impoverishment consisted of the lost time and labor he had expended in unearthing the artifacts. The Louisiana First Circuit Court of Appeal denied his claims on other grounds. The court noted that, although it did not specifically address the issue, it doubted that

144. Id.
145. Levasseur, supra note 6, at 378.
146. Minyard v. Curtis Prods., Inc., 251 La. 624, 205 So. 2d 422, 427 (La. 1967). While Minyard may have suffered an impoverishment in purchasing the caulking compound, it could not have recovered for that impoverishment under Article 2298. Recovery of the price paid for defective goods is governed by the Louisiana Civil Code articles on redhibition. See La. Civ. Code arts. 2520-2548. Minyard’s claim in redhibition against Plastoid Products had prescribed, and Article 2298, which is a purely subsidiary remedy, cannot be used to circumvent prescription. La. Civ. Code art. 2298.
147. Minyard, 251 La. at 624, 205 So. 2d at 433.
the plaintiff's impoverishment could support recovery, because he had continued excavation long after he learned that he was trespassing on private property.\footnote{Charrier, 496 So. 2d at 606-07.} The court suggested that the plaintiff's impoverishment, if any, resulted directly from his delictual conduct.\footnote{Id. at 606.} Such an impoverishment is not compensable under Article 2298.

3. Causal Connection

The third of the "factual elements" of Article 2298 is the existence of a causal connection between the enrichment and the impoverishment. This element is derived from the language "enriched without cause at the expense of another."\footnote{La. Civ. Code art. 2298.} The clear meaning of the words is that one party, the defendant, has been enriched while another party, the plaintiff, has borne the expense of that enrichment. Since Article 2298 requires that the plaintiff must be impoverished by the same set of factual circumstances that caused the defendant’s enrichment, there is a need for a causal connection between the two.

On the subject of causation, one commentator has written:

An action \textit{de in rem verso} can be granted only in those instances where it can be established that the impoverishment of one party and the enrichment of the other are the unquestionable result, or the cause and effect, of the same event. The enrichment must be so obviously connected to the impoverishment that, without the latter, it would not have occurred.\footnote{Levasseur, supra note 6, at 382.}

The various circumstances that satisfy the requirement of a causal connection in Article 2298 fit into two possible categories of causal connections: direct connections and indirect connections. Direct connections are those that involve no third party: the enrichee and the impoverishee interact directly. In \textit{Beacham v. Hardy Outdoor Advertising, Inc.},\footnote{520 So. 2d 1086 (La. App. 3d Cir. 1987).} the advertising company erected an immovable sign on Mr. Beacham’s property. The court found there was no contract between the parties, and by law Mr. Beacham became the owner of the sign.\footnote{Id. at 1088.} The connection between the enrichment and impoverishment is obvious. Mr. Beacham was enriched by the value of the same sign that the advertising company lost. Both the enrichment and the impoverishment derived from the placing of the sign on Mr. Beacham’s property without his permission.\footnote{Id.}

\begin{footnotes}
\item[149.] Charrier, 496 So. 2d at 606-07.
\item[150.] Id. at 606.
\item[151.] La. Civ. Code art. 2298.
\item[152.] Levasseur, supra note 6, at 382.
\item[153.] 520 So. 2d 1086 (La. App. 3d Cir. 1987).
\item[154.] Id. at 1088.
\item[155.] Id.
\end{footnotes}
Indirect causal connections are, as one might expect, less obvious. One example of an indirect causal connection can be found in *Minyard v. Curtis Products*. Minyard, the subcontractor, was found liable for the damages caused by the caulking compound it used in the construction project. The direct cause of Minyard's liability was the fact that it had guaranteed the quality of the compound. This fact would not entitle Minyard to recover from Curtis Products. Minyard had never conducted business with Curtis Products. Minyard had purchased the caulking compound from Plastoid Products. Plastoid Products had acquired the compound from Plastic Products. Plastic Products manufactured the compound that led to the damages Minyard ultimately suffered. Since Plastic Products would have been liable for the damages Minyard had to pay, Plastic Products was clearly, although indirectly, enriched by the same transaction that caused Minyard's impoverishment: the sale of the compound from Plastoid Products to Minyard. The connection becomes still more attenuated when one recalls that at the time of Minyard's indemnity action, Plastic Products no longer existed. Curtis Products was the defendant, as the successor company to Plastic Products. Curtis Products was unjustly enriched because it gained all of the patrimonial assets of Plastic Products, which included those assets unjustly gained at the expense of Minyard. Thus, the causal connection in *Minyard* runs from the lawsuit filed against Minyard to the guarantee issued by Minyard, then to the sale from Plastoid Products to Minyard, then from Plastoid Products to the manufacturer, Plastic Products, and finally from Plastic Products to its successor company, Curtis Products. *Minyard* provides a good example of an indirect causal connection.

B. "Without Cause"

The fourth element of the *actio de in rem verso*, the lack of a lawful cause, is explicitly stated in the text of Article 2298. The fourth element is additionally clarified by a definition. The second sentence provides: “The term ‘without cause’ is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law.” This terminology should suffice to codify the existing jurisprudence as represented by *Edmonston v. A-Second Mortgage Co.*

*Edmonston* involved a parcel of immovable property and a series of mortgages. The plaintiff and her husband had executed a first mortgage on the family home, and also incurred certain personal obligations which the lender set as preconditions of its loan. The plaintiff later arranged a second mortgage. Financial trouble ensued, and the plaintiff transferred ownership of the home to

157. Id. at 427-33.
the defendant, holder of the second mortgage, through a *dation en paiement*.

In exchange, the defendant canceled the second mortgage and assumed responsibility for the first mortgage. Upon the death of the plaintiff's husband, the holder of the original mortgage sought payment of the full amount due under the mortgage note, pursuant to its contract with the plaintiff. The plaintiff paid the amount due. She then brought an action against the defendant, seeking reimbursement for the amount she had paid, and alleging violation of the terms of the *dation en paiement*.

After the trial court and court of appeal found for the defendant, the Louisiana Supreme Court reversed, holding that the plaintiff was entitled to recover through the *actio de in rem verso*.

The court's discussion of the various elements of the *actio de in rem verso* was much more comprehensive than in the previous cases. The fourth element, which requires the absence of a lawful cause for the enrichment or impoverishment, was clarified. The court adopted the prevalent French position, defining "cause" differently than in general contract law. In contract law, cause is defined as "the reason why a party obligates himself."

For the purposes of the fourth element of the *actio de in rem verso*, "cause" means a lawful and binding juridical act between the enrichee and the impoverishee or the enrichee and a third party.

Article 2298 also encompasses the definition of cause found in the next significant Louisiana Supreme Court decision to apply the *actio de in rem verso*, *Creely v. Leisure Living, Inc.* A real estate broker contracted to sell a house, but after some time the builder/owner, no longer satisfied with the broker's efforts, elected to sell it directly. The trial court found that the broker was entitled to $1,500 in quantum meruit for services rendered, and the builder appealed. The Louisiana Fourth Circuit Court of Appeal reversed.

The Louisiana Supreme Court affirmed the court of appeal, holding that the broker was not entitled to the commission as a third-party beneficiary to the subsequent purchase agreement between the builder and the purchaser. In *Edmonston*, the court had stated that for purposes of the *actio de in rem verso*, "cause" meant a valid juridical act between the enrichee and the impoverishee, or between the enrichee and a third party. After a brief inspection of the other elements, the *Creely* court found that the fourth element of the *actio de in rem verso*, which requires absence of a lawful cause, was not satisfied because there was a

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162. Id. at 123.
164. *Edmonston*, 289 So. 2d at 122.
166. *Creely v. Leisure Living, Inc.*, 423 So. 2d 1224 (La. App. 5th Cir. 1982).
167. *Creely*, 437 So. 2d at 823.
168. Id. at 822.
lawful cause for the enrichment and accompanying impoverishment. The court found this cause to be “[the seller’s] investment of skill, time, labor and financing and his good fortune in his finding a buyer.” Although the court’s list may not seem to be composed of juridical acts, each of the listed items can be said to have contributed to the seller’s ability to sell the property. A sale of immovable property is clearly a juridical act, and to the extent that the listed items are components of the sale, they are also juridical acts. A more direct juridical act was the seller’s refusal to renew his agreement with the broker. Either choice would be sufficient to lead the court to the correct result: Article 2298 and the actio de in rem verso are inapplicable here.

C. Subsidiarity

The final element of the actio de in rem verso, subsidiarity, also explicitly appears in the text of Article 2298. The final sentence of the first paragraph provides: “The remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.”

Article 2298 remains a purely subsidiary remedy. The last portion of the last sentence characterizes the nature of the subsidiarity, and should correct a jurisprudential error that entered the jurisprudence with Minyard v. Curtis Products. The article makes clear that the actio de in rem verso is not available if any other remedy is available at law, or if a contrary rule has been established. Language in Minyard suggested that the word “subsidiary” indicated that the remedy should not be used if it would “perpetrate a fraud on the law.” The Minyard language is correct, but insufficiently comprehensive. It is true that the actio de in rem verso should never be used to allow recovery to a plaintiff whose recovery would be barred by positive law. However, the language used by the court in Minyard and Edmonston suggests that in a situation in which the plaintiff could recover under either the actio de in rem verso or under positive law, the rule of subsidiarity no longer applies, and the court should be free to use either remedy. For example, the language of Minyard suggests that a plaintiff who has paid a thing not owed would be able to prevail on an action under Article 2298, or alternatively on an action for the payment of a thing not owed. Since the plaintiff could satisfy the requirements of either cause of action, and since both theories of recovery favor the plaintiff, there would be no “fraud on the law.” Minyard suggests that if the plaintiff can recover under either theory, the choice is irrelevant. The suggestion is incorrect. A plaintiff who has a cause of action under the Louisiana Civil Code articles

169. id.
170. id.
173. id. at 652, 205 So. 2d at 433.
concerning payment of a thing not owed cannot bring an action under Article 2298. The danger in the interpretation suggested by Minyard is twofold. First, it substitutes a general remedy for a specific one. It encourages courts to use the actio de in rem verso in a variety of situations in which the Louisiana Legislature has provided precise statutory guidance. As the Minyard court recognized, unbridled judicial discretion is an enemy of the law. Second, the actio de in rem verso limits recovery to the lesser of the enrichment or the impoverishment. This limited recovery may work a hardship on a plaintiff, even if he is entitled to recover under this theory and under positive law.

The following example demonstrates the point. Suppose a landowner, O, desires to build a commercial center in an undeveloped area of southwestern Louisiana. He anticipates that the area will soon experience rapid growth, and he wants to be the first on the scene. He negotiates a contract with C, a local contractor, who agrees to build the project in return for one million dollars, to be paid in five installments. The project is plagued with supply problems, and C soon realizes he will be lucky to make a profit. Shortly before the final payment is due, and after the project is substantially complete, O announces that he will not honor the contract. C immediately files suit, and the court finds the following: O is in breach of contract, and O has been unjustly enriched. If the Minyard interpretation of the element of subsidiarity is used, then C is entitled to recover under either theory. However, the amount of recovery may differ substantially. Even if the court were to employ the actio de in rem verso, the result would not contradict positive law, because C will recover in either case. The language of Minyard permits the court to choose which remedy it will employ. The court chooses to employ the actio de in rem verso. Testimony establishes that C has spent $950,000 on this project, and has been paid $800,000 of the one million dollar contract price. Thus, C has been impoverished by $150,000. Experts demonstrate that the vacant land had a market value of $20,000. The improved land has a market value of only $830,000, due to the demographic projections which show that the area's population will never be large enough to make this venture profitable. O has paid $800,000 and the market value of his property has grown by $810,000. Thus, he has been unjustly enriched by $10,000. The court takes the lesser of the enrichment and the impoverishment, and awards C $10,000. Thus C has lost $140,000 on the project, while O has lost nothing.

This example illustrates the danger of using the actio de in rem verso when other, more specific legal remedies are available. C should have recovered the full amount remaining unpaid on the contract, and O should have borne the loss resulting from his lack of foresight. Article 2298 establishes the true subsidiary nature of this action. The article makes clear that the actio de in rem verso is

174. Id. at 650, 205 So. 2d at 432 (citing Barry Nicholas, Unjustified Enrichment in Civil Law, Part I, 36 Tul. L. Rev. 605 (1962)).
available only when no other legal rule or remedy exists, regardless of whether
the rule or remedy favors the enrichee or the impoverishee.

The Louisiana Legislature considered whether to maintain subsidiarity as an
element of Article 2298. In fact, the original version of the bill eliminated all
reference to subsidiarity, and the original comments to Article 2298 explicitly
stated that the remedy was no longer subsidiary. A reasoned consideration
of the ramifications of removing the requirement of subsidiarity from such a
generally applicable provision, however, led the Legislature to retain that element
in Article 2298.

D. The Proper Measure of Compensation

The proper measure of compensation, as illustrated by the second paragraph
of Article 2298, is the lesser of the enrichment or the impoverishment. Principles of equity help reach this double limitation on recovery, or the "double
ceiling rule," as it is commonly called. If the enrichee must return more
than he actually received, he would suffer an impoverishment. To remedy an
unjust enrichment by creating an unjust impoverishment would hardly serve to
implement the policies underlying Article 2298. Similarly, if the impoverishee
recovered more than his actual loss he would unjustly benefit at the expense of
another, namely the former enrichee. Article 2298 resolves this potential
difficulty by properly limiting recovery to the lesser of the enrichment and the
impoverishment.

To properly understand this rule, one must recognize that the amount of
enrichment is often not equivalent to the amount of the corresponding impover-
ishment. The well-known confrontation between the strip miner and the farmer
is a useful illustration. A strip miner contracted with a farmer to remove

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175. The debate concerning whether Article 2298 should be a subsidiary remedy was a lengthy one.
It began as early as September 1992, when the reporter to the Louisiana State Law Institute's Quasi-
Contract Committee "argued that the action for unjustified enrichment should not be subsidiary and
should not be only available if there were no other legal remedy." This idea was opposed by several
committee members. Memorandum from James J. Carter, Jr. to the Quasi-Contracts Committee and Mr.
Stan Raborn 4 (Sept. 28, 1992) (on file with the Louisiana State Law Institute) (emphasis in original).
In April 1993, "several Council members insisted that this article [2298] should be drafted so that this
remedy or cause of action would not be available or relied upon if another source of law was
applicable." Minutes of Louisiana State Law Institute Meeting of the Council 7 (April 23-24, 1993) (on
file with the Louisiana State Law Institute). The reporter won the original battle, and House Bill
713 as originally written included the following statement: "Under Article 2298, however, recovery for
'enrichment without cause' is no longer a subsidiary remedy." Telefacsimile transmission from Jim
Carter to Professor A.N. Yiannopoulos containing draft of proposed Act to amend and reenact Civil
Code Article 2292, at 4 (Feb. 20, 1995) (on file with the Louisiana State Law Institute). Of course,
Article 2298 as enacted is a subsidiary remedy. La. Civ. Code art. 2298.

177. Levasseur, supra note 6, at 430.
178. This illustration is based upon Peveyhouse v. Garland Coal & Mining Co., 382 P. 2d 109
certain minerals from the farmer's property, in return for valuable consideration. The farmer demanded and received contractual assurance that the strip miner would, when mining operations had ceased, return the land to its original configuration. When the time to fill in the land arrived, the miner refused to comply with the terms of the contract. The farmer sought damages of $25,000. The trial court awarded $5000, and both parties appealed. Testimony established that the cost of filling in the mine was $29,000, while the difference in the appraised value of the land was only $300. Although the court analyzed the case in terms of contract rights, the situation may usefully illustrate the operation of Article 2298. The defendant's breach of contract has enriched it by $29,000. The plaintiff has been impoverished by only $300. Clearly the enrichment and impoverishment are causally connected, since they both derive from the defendant's breach of contract. The enrichment is without a lawful cause, because there is no lawful juridical act between the parties which would justify the defendant's breach. For purposes of discussion, assume that the fifth element, subsidiarity, is satisfied. Should the court award the plaintiff any amount greater than $300, the plaintiff would be unjustly enriched in turn, because he would receive more money than was necessary to compensate him for his loss. Therefore, the proper result in this case under Article 2298 would be to find for the plaintiff in the amount of $300, the lesser of the enrichment and the impoverishment.

Some Louisiana courts have limited their inquiry to an evaluation of only one of the ceilings. For example, in Minyard, the Supreme Court granted to the impoverishee the amount of his impoverishment without ever focusing on the amount of the defendant's enrichment. The court did not attempt to determine Curtis' actual enrichment, possibly because the Court was thinking of a petition for indemnity rather than an actio de in rem verso. The court could have resolved Minyard without reference to the actio de in rem verso, since it had held that a petition for indemnity was subject to a ten year prescription claim. Since the court chose to use the opportunity to introduce the actio de in rem verso as understood in France into Louisiana's jurisprudence, one is left to wonder why the court did not also explicitly adopt the French limitation on recovery. If the court determined that the "double ceiling rule" was inappropriate for Louisiana, there is nothing in the opinion to reflect this finding. Regardless, Article 2298 clearly establishes that the "double ceiling rule" is now the law in this state.

Compare the result in Minyard with that of Boxwell v. Department of Highways, where the Supreme Court stated:

Under these circumstances it would clearly be unjust to permit the Commission to reap the mentioned benefits and escape liability for them

179. Peevyhouse, 382 P. 2d at 112.
altogether. There is imbedded deeply in our civil law the maxim that no one ought to enrich himself at the expense of another. Revised Civil Code Article 1965. On the other hand, considering the law’s expressed prohibition for making the sales in the manner shown it would also be improper for the vendor to profit by the transactions. Equity would favor, we think, the placing of the parties in the positions that they occupied prior to the carrying out of their engagements, or in other words in status quo: but, of course, this is impossible because of the materials having been used. The only alternative is to compel payment by the vendee, or its successor, of an amount that represents the materials’ actual cost to the vendor, without allowing any profits on or expenses connected with the sales.182

The result in Boxwell seems to be in accordance with the rule of recovery established in Article 2298.

E. The Time of Valuation

The third and final paragraph of Article 2298 provides: “The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.”183

Generally, impoverishment is much easier to evaluate than the enrichment. In most situations, the impoverishee will be able to clearly establish his loss. The value of the enrichment, on the other hand, is likely to generate some debate. A contractor can demonstrate to a high degree of certainty the amount of materials and labor expended on a construction project. Once he has ceased his operations, the amount of impoverishment is set. The corresponding enrichment is still subject to change. Assuming that the court measures the enrichment in terms of the increase in appraised land values, the enrichment could fluctuate from month to month, depending upon circumstances such as development of nearby land, zoning changes, and other events not necessarily related to the contractor’s efforts.

The third paragraph of Article 2298 attempts to provide the courts with some general guidance for making these difficult evaluations, while leaving enough flexibility to allow for the differing factual circumstances of each case. The preferred rule is to determine the value of the impoverishment and the enrichment at the time the action is filed. However, 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.

182. Id. at 773, 14 So. 2d at 632.  
The language of the third paragraph clearly indicates that both evaluations should be made at the same time.\textsuperscript{184} A court should not determine the amount of the impoverishment as of the date of the petition's filing, while simultaneously evaluating the enrichment as of the date of the judgment. Since the impoverishment is not likely to change, the practical implications of this observation are not likely to arise frequently.

IV. CONCLUSION

Quantum meruit has been a fixture in Louisiana jurisprudence for 175 years. Although it was undoubtedly a necessary importation from the common law in 1820, it is no longer necessary. Article 2298 is as broad, as flexible, and as utilitarian a basis for recovery as quantum meruit. Article 2298 brings the additional benefit of a specific analytical framework. Practitioners will no longer be forced to talk about equity and fairness, concepts that look good on paper but are impossible to prove in a courtroom. Instead, recovery will be determined by focusing on the amount of the defendant's enrichment, the amount of the plaintiff's impoverishment, and a causal connection between the two. If there is no juridical act to justify the enrichment, and if the plaintiff has no other recourse, he can recover under Article 2298. Quantum meruit should no longer be used as a basis for recovery in Louisiana. Its time has passed.

\textit{Jeffrey L. Oakes}