I. INTRODUCTION

Jury instructions play a key role in the legal process. These instructions may be used in a variety of ways, including an attorney discussing the merits of a particular case with his client, a judge deciding whether a claim should survive a motion to dismiss, or a jury evaluating whether the plaintiff has proven every element of his claim. In an Arkansas civil case, jury instructions take the form of the Arkansas Model Jury Instructions (AMI). Since a court must follow the AMI when submitting claims to a jury, these instructions are significant for the entire legal process.

An issue arises, however, when no AMI applies to the cause of action or when the AMI fails to state the law.

* The author thanks Professor Mary Beth Matthews, Sidney Parker Davis Jr. Professor of Business & Commercial Law, University of Arkansas School of Law, for her guidance and keen insight in the drafting of this comment.

1. ARK. MODEL JURY INSTRUCTIONS—CIVIL iii (2012) [hereinafter AMI].

2. Id. (Per Curiam Order of Supreme Court of Arkansas, Apr. 19, 1965) (“If Arkansas Model Jury Instructions (AMI) contains an instruction applicable in a civil case, and the trial judge determines that the jury should be instructed on the subject, the AMI instructions shall be used unless the trial judge finds that it does not accurately state the law.”); see also Allstate Ins. Co. v. Dodson, 2011 Ark. 19, at 6, 376 S.W.3d 414, 420 (“AMI instructions are to be used as a rule, and non-AMI instructions should only be used when an AMI instruction does not exist or cannot be modified.” (citing Barnes v. Everett, 351 Ark. 479, 492, 95 S.W.3d 740, 748 (2003))); Newman v. Crawford Constr. Co., 303 Ark. 641, 643-44, 799 S.W.2d 531, 533 (1990) (“When instructions are requested which do not conform to the Arkansas Model Jury Instructions (AMI) they should be given only when the trial judge finds the AMI instructions do not contain an essential instruction or do not accurately state the law applicable to the case.” (citing Ross v. State, 300 Ark. 369, 376-77, 779 S.W.2d 161, 164 (1989); Henderson v. State, 284 Ark. 493, 496, 684 S.W.2d 231, 232 (1985))).

accurately. In either scenario, a judge will typically instruct a jury based on well-defined elements established by precedent. Yet for some causes of action, well-defined elements and bright-line rules are nonexistent, and the judge must apply a standard that evolves from case to case. This problem of lacking a standard rears its head particularly when a judge submits to a jury an unjust-enrichment claim based on an implied-in-law contract. The absence of a consistent standard forces judges to instruct juries on an ad hoc basis, allowing juries to decide cases based on fairness rather than requiring plaintiffs to prove specific elements. This comment addresses the problems raised by the lack of a uniform standard for unjust-enrichment claims based on implied-in-law contracts and proposes a model jury instruction to alleviate these problems.

Part II of this comment provides a succinct history of the development of unjust-enrichments claims and implied-in-law contracts in Arkansas. Part III discusses contemporary problems that the unarticulated standard in this area of law has created in Arkansas. Next, Part IV analyzes an approach adopted by a majority of states that use concrete elements for unjust-enrichment claims based on implied-in-law contracts. Part IV also addresses the contrasting minority approach and discusses Arkansas’s current approach to this area of law. Part V proposes a suggested model jury instruction and discusses the rationale behind the proposed instruction. Furthermore, this Part discusses the merits of adopting specific elements as the standard for unjust-enrichment claims based on implied-in-law contracts in Arkansas. Part VI concludes.

4. See AMI, supra note 1.
5. See Calhoun & Waddell, supra note 3, at 10-11 (discussing the “general instructions,” which judges may provide in the absence of an applicable AMI).
6. See id.
7. See id. at 10 (explaining that a jury cannot decide a case properly using abstract unjust-enrichment principles).
8. Id. at 11.
II. HISTORY

Explaining how to alleviate the problems posed by the lack of a model jury instruction first warrants a brief overview of unjust enrichment. Historically, courts of law have developed the doctrine of unjust enrichment, but the doctrine finds expression in parallel equitable remedies of constructive trusts, equitable liens, and subrogation. Although similar to a contract implied-in-fact, a contract implied-in-law—or a quasi-contract or constructive contract—does not hinge on the express or implied agreement of the parties; rather, it “is strictly a legal fiction, created by the law to do justice.” This legal fiction derives from the principle “that one person should not be free to unjustly enrich himself at the expense of another.”

As a general rule, if a valid, legally binding contract covers a situation or relationship, one may not assert an implied theory. Thus, unjust enrichment generally cannot circumvent an express contract. However, “the mere existence of a contract between the parties does not automatically foreclose a claim of unjust enrichment.” Therefore, when an express contract does not exist, is void,

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11. BRILL, supra note 9; see also Dews v. Halliburton Indus., Inc., 288 Ark. 532, 536, 708 S.W.2d 67, 69 (1986) (“Quasi-contracts, or contracts implied in law, are legal fictions, created by the law to do justice.”).
12. BRILL, supra note 9 (citing Mitchell v. Mitchell, 28 Ark. App. 295, 299, 773 S.W.2d 853, 855 (1989)); see also Dews, 288 Ark. at 536, 708 S.W.2d at 69 (“[T]he underlying principle is that one person should not unjustly enrich himself at the expense of another.” (citing Dunn, 213 F. Supp. at 952)).
14. Id. (citing Hall Contracting Corp. v. Entergy Servs., Inc., 309 F.3d 468, 475 (8th Cir. 2002) (holding that a basis for an unjust-enrichment claim did not exist where a construction contract clearly covered the possibility of extra work).
or does not provide an answer, one may assert these alternative theories.  

In Arkansas, the doctrine of unjust enrichment under implied-in-law contracts applies to a broad spectrum of circumstances. These circumstances range from a defendant keeping insurance money and her repaired car after the plaintiff pays her for car repairs to a defendant devising a phony poker game designed to bamboozle the plaintiff out of his money. Similarly, doctors may successfully bring such a claim to recoup money after they have furnished medical services to save an unconscious person’s life. Professor Dan Dobbs, discussing remedies, states that the doctrine is generally applicable to four categories:

(1) cases in which title remains in the plaintiff but the defendant benefits by conduct such as taking the plaintiff’s property; (2) cases in which title passes to the defendant through misconduct; (3) cases in which the defendant is unjustly enriched as a result of a breach of contract; and (4) cases in which the defendant unjustly

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19. Cotnam v. Wisdom, 83 Ark. 601, 605-07, 104 S.W. 164, 165-66 (1907) (finding that a surgeon was entitled to restitution for medical services rendered unofficiously to an unconscious person who was thrown from a car); see also Restatement (Third) of Restitution & Unjust Enrichment § 20 (2011) (stating that a person who renders professional service to save another’s life is entitled to restitution). The First Restatement of Restitution clearly defines elements for a restitution claim in a medical situation:

A person who has supplied things or services to another, although acting without the other’s knowledge or consent, is entitled to restitution therefrom if

(a) he acted unofficiously and with intent to charge therefor, and
(b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
(c) the person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent; and
(d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other’s consent would have been immaterial.

Restatement (First) of Restitution § 116 (1937).
receives a benefit by mistake or other circumstance, regardless of his wrongdoing.20

Significantly, no specific AMI exists for an unjust-enrichment claim based on an implied-in-law contract. Arkansas has adopted a model instruction for an implied-in-fact contract in AMI 2445;21 however, the “note on use” in AMI 2445 states that courts should not use this instruction for unjust-enrichment claims based on implied-in-law contracts.22 Moreover, the Arkansas Supreme Court Committee on Jury Instructions—Civil has stated that it will wait for “guidance from the courts regarding the categories of unjust enrichment claims to be submitted to juries, as well as the elements of those claims, before drafting additional instructions in this area.”23

III. ISSUES IN ARKANSAS

Arkansas courts have not articulated a comprehensive list of elements for unjust-enrichment causes of action based on implied-in-law contracts; therefore, determining whether retention of a benefit is unjust and, thus,

21. AMI, supra note 1, 2445. The jury instructions for an unjust-enrichment claim for an implied-in-fact contract provide:
   (Plaintiff) claims that (defendant) has been unjustly enriched to (plaintiff)'s detriment and has the burden of proving four essential elements:
   First, that (plaintiff) provided (describe the services, goods, or money) to (defendant), who received the benefit of such (services|goods|or|money);
   Second, that the circumstances were such that (plaintiff) reasonably expected to be paid the value of such (services|goods|or|money) by (defendant);
   Third, that (defendant) was aware that (plaintiff) was providing such (services|goods|or|money) with the expectation of being paid and accepted the (services|goods|or|money); and
   Fourth, the reasonable value of such (services|goods|or|money) received by the defendant.
   Id.
22. See id., 2445 note on use (“Do not use this instruction when the obligation to make restitution is implied by law.”).
23. Id. 2445 cmt.
compensable is often left to the whim of juries. The lack of black-letter law and use of broad jury instructions in this area have allowed juries to reward almost anyone in an “unhappy predicament” as long as the facts of the case appeal to the juries’ sense of fairness. Arkansas courts have failed to remedy this lack of jury instructions and continue to apply vague and inconsistent requirements to establish unjust-enrichment claims under implied-in-law contracts.

Moreover, these vague, case-specific instructions for unjust-enrichment claims based on implied-in-law contracts can produce inconsistent outcomes and cause courts to struggle in deciding whether to dismiss a restitution claim or allow it to survive. Further, attorneys may be unable to properly evaluate a viable restitution claim; therefore, reaching settlement becomes more difficult. Additionally, a trial court may apply one standard while an appellate

24. See Calhoun & Waddell, supra note 3, at 11 (“[T]he failure to identify essential elements for the jury to consider, can result in a restitution claim being decided on nothing more than a particular jury panel’s view of what is ‘unjust’ or what it views as ‘equity and good conscience.’”).


26. See, e.g., Campbell v. Asbury Auto., Inc., 2011 Ark. 157, at 21, 381 S.W.3d 21, 36. (“To find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. . . . In short, an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain.”); El Paso Prod. Co. v Blanchard, 371 Ark. 634, 646, 269 S.W.3d 362, 372 (2007) (“There must also be some operative act, intent, or situation to make the enrichment unjust and compensable.”); Pro–Comp Mgmt., Inc. v. R.K. Enters., LLC, 366 Ark. 463, 469, 237 S.W.3d 20, 24 (2006) (“It is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.” (quoting Servewell Plumbing, LLC v. Summit Contractors, Inc., 362 Ark. 598, 612, 210 S.W.3d 101, 111 (2005))); Sanders v. Bradley Cnty. Human Servs. Pub. Facilities Bd., 330 Ark. 675, 682, 956 S.W.2d 187, 190 (1997) (“The amount of a quantum meruit recovery is measured by the value of the benefit conferred upon the party unjustly enriched.”).

27. See Calhoun & Waddell, supra note 3, at 10-11.

28. See id.

29. See id. at 12.
court may apply another,\textsuperscript{30} culminating in unnecessary
litigation and hampering judicial economy.

IV. STATES’ APPROACHES TO IMPLIED-IN-LAW
UNJUST-ENRICHMENT CLAIMS

A. Majority Approach

The majority of states have addressed—or avoided
entirely—the problems created from the lack of a uniform
standard by adopting jury instructions or by articulating
comprehensive elements for implied-in-law, unjust-
enrichment claims. For example, under New York caselaw,
a plaintiff seeking relief under an implied-in-law theory of
unjust enrichment must show: “(1) that the defendant
benefitted; (2) at the plaintiff’s expense; and (3) that equity
and good conscience require restitution.”\textsuperscript{31}

Similarly, under Delaware law, to establish unjust
enrichment, the plaintiff must show: “(1) an enrichment;
(2) an impoverishment; (3) a relation between the
enrichment and the impoverishment; (4) the absence of
justification; and (5) the absence of a remedy provided by
law.”\textsuperscript{32} Under this paradigm, a remedy at law is adequate if
it: “(1) is as complete, practical and as efficient to the ends
of justice and its prompt administration as the remedy in
equity; and (2) is obtainable as of right.”\textsuperscript{33}

In Michigan, “[a] contract may be implied in law where
there is a receipt of a benefit by a defendant from a plaintiff
and retention of the benefit is inequitable, absent
reasonable compensation.”\textsuperscript{34} Similarly, Pennsylvania courts
require a plaintiff to prove: “(1) benefits are conferred on
one party by another; (2) appreciation of such benefits by
the recipient; and (3) the acceptance and retention of these

\textsuperscript{30} See id. at 11.
\textsuperscript{33} In re Wife, K., 297 A.2d 424, 426 (Del. Ch. 1972) (citing City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 (1898)).
\textsuperscript{34} In re Lewis, 423 N.W.2d 600, 603 (Mich. 1988).
benefits under the circumstances such that it would be inequitable or unjust for the recipient to retain the benefits without payment of value.'

And in Wisconsin, the elements are: “(1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of the benefit, under circumstances such that it would be inequitable to retain the benefit without payment of the value thereof.”

California caselaw denotes that no cause of action exists for unjust enrichment. However, California courts recognize that unjust enrichment is “synonymous with restitution”, therefore, an individual seeking to recover for unjust enrichment must bring an action for restitution based on a theory of unjust enrichment. Under California’s law of restitution, courts may require an individual “to make restitution if he is unjustly enriched at the expense of another.” Despite not recognizing a cause of action for unjust enrichment, California courts repeatedly apply a consistent standard for their restitution theory—a theory that is synonymous with what Arkansas courts call unjust enrichment. Specifically, in California, a person is

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40. Compare Pro–Comp Mgmt., Inc. v. R.K. Enters., LLC, 366 Ark. 463, 469, 237 S.W.3d 20, 24 (2006) (“[Unjust enrichment] is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.” (quoting Servewell Plumbing, LLC v. Summit Contractors, Inc., 362 Ark. 598, 612, 210 S.W.3d 101, 111 (2005)), with Ghirardo, 924 P.2d at 1003. (“A person is enriched if he receives a benefit at another’s expense.” (citing RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. a)).
enriched if he receives a benefit at another's expense.\(^{41}\) "The term ‘benefit’ ‘denotes any form of advantage.’"\(^ {42}\) Thus, a person confers a benefit not only when he adds to the property of another but also when he saves the other person from an expense or loss.\(^ {43}\) "Even when a person has received a benefit from another, he is required to make restitution ‘only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.’"\(^ {44}\)

B. Minority Approach

In contrast to applying a uniform standard, a minority of states has not adopted specific elements for unjust-enrichment claims based on implied-in-law contracts. Often, these states simply permit the jury to do equity rather than requiring that the plaintiff prove specific elements. For example, under Texas caselaw, “[u]njust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay.”\(^ {45}\) Further, “[t]he unjust enrichment doctrine applies principles of restitution to disputes where there is no actual contract and is based on the equitable principle that one who receives benefits which would be unjust for him to retain ought to make restitution.”\(^ {46}\) Since Arkansas is one of the states that have not adopted specific elements, this comment analyzes the minority approach through Arkansas caselaw.

C. Arkansas’s Approach

Because Arkansas does not have a comprehensive list of elements for unjust-enrichment claims based on implied-in-law contracts—and, thus, the Arkansas Supreme Court

\(^{41}\) Ghirardo, 924 P.2d at 1003 (citing RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937)).
\(^{42}\) Id. (quoting RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b).
\(^{43}\) Id.
\(^{44}\) Id. (quoting RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. c).
\(^{46}\) Id.
has not adopted a Model Jury Instruction—Arkansas lawyers have difficulty determining whether a specific unjust-enrichment claim is meritorious. Navigating the shifting standard is difficult. As lawyers grasp for a concrete definition of all the elements, the Arkansas Supreme Court has repeatedly applied different standards.

For instance, in the 1997 decision *Sanders v. Bradley County Human Services Public Facilities Board*, the Arkansas Supreme Court stated that “there must be some enrichment or benefit to the party against whom the claim is made.”47 But in 2004, the court emphasized a different standard, stating: “one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right.”48 In the 2006 case *Pro–Comp Management, Inc. v. R.K. Enterprises, LLC*, the Arkansas Supreme Court underscored an amorphous standard for these unjust-enrichment claims, stating that the basis of recovery is:

> [T]he principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.49

In 2007, the court shifted again, requiring “some operative act, intent, or situation to make the enrichment unjust and compensable.”50 Yet in another case, the court doubled down on its undefined “equity and good conscience” standard, maintaining that “an action based on unjust enrichment is maintainable where a person has received money . . . under such circumstances that, in equity and good conscience, he or she ought not to retain.”51

Furthermore, in 2011, the court stated that “[t]o find unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore” and that “an action based on unjust enrichment is maintainable where a person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain.” This piecemeal, pick-and-choose judicial practice by the Arkansas Supreme Court is not the ideal method for providing consistent legal rules for Arkansas lawyers because it requires the trial judge to fashion a jury instruction on an ad hoc basis. Instead, Arkansas courts should distill a comprehensive, clearly defined list of these various elements.

V. A PROPOSED MODEL JURY INSTRUCTION FOR ARKANSAS

A. Adoption Process of Arkansas Model Jury Instructions

The Arkansas Supreme Court Committee on Model Jury Instructions—Civil (Committee) is tasked with drafting the Model Jury Instructions. The drafting process is not an independent mechanism free from the shackles of legal precedent; rather, it is an apparatus engineered to provide clarity and consistency to the judicial process by drafting instructions grounded in prior Arkansas caselaw and statutory law. Therefore, the Committee previously has taken a conservative approach and indicated it will await clear guidance from the courts regarding specific

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53. See Calhoun & Waddell, supra note 3, at 11.
54. AMI, supra note 1.
55. Interview with Committee Member, Ark. Supreme Court Comm. on Model Jury Instructions—Civil, in Fayetteville, Ark. (Jan. 27, 2013). The Arkansas Supreme Court created the Committee through a standing order. Id. The court appoints the members; therefore, the Committee is a committee of the court. Id. Since 2000, fifteen members, appointed for two, three-year staggered terms, have comprised the Committee, with the exception of one permanent member. Id. Additionally, the Committee is geographically diverse (consisting of members from across Arkansas) and professionally diverse (comprised of defense and plaintiff lawyers, judges, and an academic). Id. All members, except the permanent one, are voting members. Interview with Committee Member, supra. The Committee meets from December or January through July and then sends the current edition of the AMI to the publisher. Id.
elements of a cause of action before drafting instructions in that area of law.\textsuperscript{56}

The Arkansas Supreme Court’s requirement that trial courts follow the approved Model Jury Instruction when submitting instructions to a jury justifies the conservative approach taken by the Committee.\textsuperscript{57} Since a litigant’s case relies heavily on the instruction given to the jury, the instruction has a profound impact on the case. Thus, the Committee’s desire for the courts to clearly define the specific elements before drafting a jury instruction is well-founded and reasonable.

The Committee perceives itself strictly as a group of advisors, rather than as scribes of judicial opinions.\textsuperscript{58} Further, the Committee sets its own agenda and decides what areas or issues in the law it needs to address or update.\textsuperscript{59} After choosing the areas in need of scrutiny, the Committee assigns these sections to subcommittees, with one person normally taking the lead within each subcommittee.\textsuperscript{60} The Committee may assign a team to a particularly difficult or unclear area of the law.\textsuperscript{61} Although nothing requires the members to submit any drafts to the court, they routinely post AMI sections for public comments and solicit comments from the Arkansas legal community.\textsuperscript{62} After the Committee updates and submits the sections to the publisher, the court can inform the Committee that it disagrees with a particular section, though this rarely occurs.\textsuperscript{63}

Since an instruction has presumptive applicable force and imposes weight on a trial court’s judgment,\textsuperscript{64} the Committee must balance different competing interests.\textsuperscript{65} These interests include the following: (1) whether the area of law is already clear; (2) if the need for an instruction is

\begin{itemize}
\item \textsuperscript{56} See AMI, supra note 1, 2445 cmt.
\item \textsuperscript{57} See supra note 2 and accompanying text.
\item \textsuperscript{58} Interview with Committee Member, supra note 55.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Interview with Committee Member, supra note 55.
\item \textsuperscript{64} See supra note 2.
\item \textsuperscript{65} Interview with Committee Member, supra note 55.
\end{itemize}
apparent; and (3) whether courts have indicated a direction and the extent to which an instruction will provide clarity for lawyers or the courts.\textsuperscript{66} Nevertheless, if the area of law is still developing, then the Committee counterbalances any potential advantages that a model instruction might provide with the need to leave the issues to the adversarial system for sharpening the law.\textsuperscript{67}

The Committee has tackled unjust enrichment recently, but it focused primarily on unjust-enrichment claims based on implied-in-fact contracts.\textsuperscript{68} Particularly noteworthy is that this unjust-enrichment section—AMI 2445—took years to revise with a dedicated team because the distinction between implied-in-fact and implied-in-law contracts is sometimes blurred.\textsuperscript{69} Even though the Committee chose not to draft an instruction for implied-in-law claims, it acknowledged that some elements were more prevalent and that the Arkansas Supreme Court cited these elements more often than others.\textsuperscript{70} The Committee’s acknowledgement of common recurring elements indicates that Arkansas courts may have already given a clear direction in this area of law. However, the Arkansas Supreme Court has stated these elements inconsistently.

\textbf{B. Proposed Elements for an Implied-in-Law Unjust-Enrichment Cause of Action}

Generally, Arkansas courts must adopt elements for a claim before the Committee drafts a Model Jury Instruction. Although Arkansas caselaw has used a piecemeal approach for unjust-enrichment claims based on

\begin{itemize}
\item That Defendant received [money][or][the equivalent of money] to which [he][she][it] was not entitled and which should be restored; [t]hat there was some operative act, intent, or situation that made the enrichment of Defendant unjust and inequitable; [t]hat the unjust enrichment of Defendant was at the expense of [to the detriment of] Plaintiff; and [t]he amount by which Defendant was unjustly enriched.
\end{itemize}
implied-in-law contracts, one can synthesize a comprehensive list of elements. The Arkansas Supreme Court should adopt such a comprehensive list, and the Committee should draft a new AMI based on this list. Distilling Arkansas caselaw identifies the following list of elements: (1) the defendant was enriched by the plaintiff from the receipt of a benefit; 71 (2) the defendant retained the benefit; 72 (3) the defendant is not entitled to that benefit; 73 (4) circumstances make the enrichment unjust and compensable; 74 and, as a result, the defendant must restore—i.e., pay restitution to the plaintiff in the amount by which the defendant was unjustly enriched. 75 This synthesis of Arkansas courts’ piecemeal, implied-in-law unjust-enrichment elements should form a new AMI on such claims. Thus, this comment proposes the following model jury instruction:

Id.


74. See, e.g., El Paso Prod. Co. v. Blanchard, 371 Ark. 634, 646, 269 S.W.3d 362, 372 (2007); Pro–Comp Mgmt., Inc., 366 Ark. at 469, 237 S.W.3d at 24; Hatchell, 363 Ark. at 117-18, 211 S.W.3d at 522 (holding that operative act by defendant, which made the enrichment unjust, was keeping both the insurance money and a repaired car after the plaintiff paid the defendant by personal check to get the car repaired); Guar. Nat’l Ins. Co., 313 Ark. at 138, 854 S.W.2d at 317; Dews, 288 Ark. at 536, 708 S.W.2d at 69; Lewis, 2011 Ark. App. 756, at 7, 387 S.W.3d at 238-39.

75. See, e.g., Campbell, 2011 Ark. 157, at 21, 381 S.W.3d at 36; Pro–Comp Mgmt., Inc., 366 Ark. at 469, 237 S.W.3d at 24; Guar. Nat’l Ins. Co., 313 Ark. at 138, 854 S.W.2d at 317; Dews, 288 Ark. at 536, 708 S.W.2d at 69; see also BRILL, supra note 9, § 31:2, at 567.
(Plaintiff) claims that (defendant) has been unjustly enriched to (plaintiff’s) detriment and has the burden of proving five essential elements:

First, that (plaintiff) provided [services][goods][money][or][other benefit] to (defendant), who received the benefit of [services][goods][money][or][other benefit];

Second, that (defendant) retained the [services][goods][money][or][other benefit];

Third, that (defendant) is not entitled to [services][goods][money][or][other benefit];

Fourth, retention of the [services][goods][money][or][other benefit] by (defendant) would be unjust under the circumstances and require [compensation][restoration][payment]; and

Fifth, the reasonable value of the [services][goods][money][or][other benefit] received by (defendant).

If you find that (plaintiff) has proved each of these elements, then your verdict should be for (plaintiff). If, however, (plaintiff) has failed to prove any one or more of these elements, then your verdict should be for (defendant).

Courts should apply this instruction to a range of situations, including when a defendant or third party retains money that belongs to the plaintiff, when a prospective defendant has received something—that a court can value in terms of dollars—to which he is not entitled; and when claims sound in quantum meruit or quantum valebant.

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76. See 1 DAN B. DOBBS, LAW OF REMEDIES § 4.2(3), at 581-82 (2d ed. 1993) (stating that these actions are appropriate when the defendant himself or a third party received money that belonged in good conscience to the plaintiff and, therefore, the plaintiff was entitled to restitution of the money).

77. Black's Law Dictionary defines “quantum meruit” as: “The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.” BLACK'S LAW DICTIONARY 1361-62 (9th ed. 2009).

C. Rationale for Specific Elements

Under this comment’s proposed model jury instruction, a plaintiff must first prove that he enriched the defendant by providing him a benefit. The benefit or thing of value that the plaintiff conferred upon the defendant is often money, but it may also include the equivalent of money or, more clearly, a benefit that one can readily value in terms of money. If a claim is devoid of enrichment and, thus, the plaintiff has not enriched the defendant to the plaintiff’s detriment, no reason exists for recognizing an unjust-enrichment cause of action. Therefore, under the proposed jury instruction, the first element is the threshold for unjust-enrichment claims based on implied-in-law contracts.

Second, a plaintiff must prove that the defendant retained the benefit. If the defendant did not retain the benefit and has already returned the benefit to the plaintiff, then an award by the court for the plaintiff would result in a windfall. Because a defendant could have transferred the benefit to a third party or disposed of it so that the benefit is no longer traceable, this element of retention focuses on whether the defendant has returned the benefit to the plaintiff, not on whether the defendant actually retains possession.

Third, a plaintiff must prove that the defendant is not entitled to the benefit or thing of value. The inclusion of this element safeguards a defendant—who has a valid claim to keep the conferred benefit—against a plaintiff’s claim of unjust enrichment that may appeal to a jury’s sense of

Black’s Law Dictionary also notes that courts still use quantum valebant as an equitable remedy to provide restitution for another’s unjust enrichment. Id. 79. See, e.g., Campbell, 2011 Ark. 157, at 21, 381 S.W.3d at 36; Hatchell, 363 Ark. at 117, 211 S.W.3d at 522; Sanders v. Bradley Cnty. Human Servs. Pub. Facilities Bd., 330 Ark. 675, 683, 956 S.W.2d 187, 191 (1997); Dews, 288 Ark. at 536, 708 S.W.2d at 69.

80. See, e.g., Campbell, 2011 Ark. 157, at 21, 381 S.W.3d at 36; Hatchell, 363 Ark. at 117, 211 S.W.3d at 522; Sanders, 330 Ark. at 682, 956 S.W.2d at 191; Dews, 288 Ark. at 536, 708 S.W.2d at 69.


fairness. Some courts, when deciding whether a plaintiff should succeed on a claim, use the phrase “ought not to retain.”\textsuperscript{83} Without this safeguard, a skilled plaintiff’s attorney armed with a mellifluous narrative based only on the facts of the case could turn the tide against a defendant who may be entitled to the benefit.

For example, in \textit{Lewis v. AT&T Mobility}, AT&T received payment by means of a stolen credit card.\textsuperscript{84} One of its customers stole a credit card belonging to the plaintiff, who was also an AT&T customer, and used that card to pay his own AT&T mobile-phone bill.\textsuperscript{85} The Arkansas Court of Appeals held the defendant, AT&T, was not unjustly enriched because it was entitled to payment for the mobile-phone services it provided to the thief.\textsuperscript{86} The court stated that the unauthorized user of the card—rather than AT&T—was unjustly enriched.\textsuperscript{87} Although the customer did not succeed on his unjust-enrichment claim since the judge granted summary judgment for AT&T,\textsuperscript{88} this case illustrates facts by which a jury might do equity in spite of a defendant’s entitlement to the benefit. Thus, if a plaintiff is not required to prove that the defendant was not entitled to the benefit, a jury could find that a large corporation, such as AT&T, should bear the loss instead of the unlucky customer who was a victim of theft.

Fourth, the proposed AMI requires a plaintiff to prove circumstances exist that make the enrichment unjust and compensable.\textsuperscript{89} This element is the heart of an unjust-enrichment claim. Courts use the language “operative act, intent, or situation to make the enrichment unjust and compensable,”\textsuperscript{90} which the term “circumstances” can cover. Including this element in the AMI would allow a jury to

\textsuperscript{83} See, e.g., \textit{Hatchell}, 363 Ark. at 117, 211 S.W.3d at 522.
\textsuperscript{84} 2011 Ark. App. 756, at 1, 387 S.W.3d 234, 236.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 7, 387 S.W.3d at 239.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 2, 387 S.W.3d at 236.
decide whether a plaintiff should succeed based on the specific facts of the case, assuming that the plaintiff has proven the other elements. Moreover, this element preserves the equitable nature of the remedy for unjust-enrichment claims—even though it is a remedy at law—and provides the jury with latitude to determine whether compensating the plaintiff is fair and just.

If a plaintiff can prove the four aforementioned elements, then the defendant must restore the plaintiff by paying him restitution in the amount by which the defendant was unjustly enriched. If a plaintiff can prove the four aforementioned elements, then the defendant must restore the plaintiff by paying him restitution in the amount by which the defendant was unjustly enriched. This compensation is unlike that of an express-contract action, in which a court will enforce the contract terms, or an implied-in-fact contract action, in which a court will imply a term promising to pay the reasonable value of the services or goods tendered. Instead, courts quantify recovery for a contract implied-in-law by the value of the benefit conferred upon the party that is unjustly enriched. Courts do not base the measure of recovery upon expectation damages but, rather, limit it to restitution damages.

Accordingly, if the benefit conferred on the defendant is measurable in dollars, the restitution damages may equal the plaintiff’s out-of-pocket losses or the reasonable value of goods or services that the plaintiff provided to the defendant. In addition, the price of any contract may be

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92. BRILL, supra note 9, § 31:2, at 569.
93. Id.
94. See, e.g., City of Damascus v. Bivens, 291 Ark. 600, 603, 726 S.W.2d 677, 679 (1987) (citing Yaffe Iron & Metal Co. v. Pulaski Cty., 188 Ark. 808, 67 S.W.2d 1017 (1934)).
95. BRILL, supra note 9, § 31:2, at 569.
96. Id.; see also Hatchell v. Wren, 363 Ark. 107, 118, 211 S.W.3d 516, 522 (2005) (stating that the plaintiff was entitled to $4844.54—the same amount that he paid by check to the defendant).
97. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 20(2) (2011) (stating that unjust enrichment “is measured by a reasonable charge for the services in question”); see also Royal Manor Apartments v. Powell, 258 Ark. 166, 167, 170, 523 S.W.2d 909, 910-11 (1975) (awarding $16,290.22 based on the reasonable value of the subcontractor’s contribution to the project minus what he had already been paid).
some evidence of the value of the conferred benefit. 98
“However, although the result may be the same, the
emphasis from the outset is upon the benefit received by
the defendant.” 99

Some critics may argue that this comment’s proposed
instruction, or any model instruction for that matter, may
not safeguard against allowing a jury to decide a case upon
equity instead of following the law. However, this problem
currently exists in Arkansas because of a lack of an AMI
concerning unjust-enrichment claims based on implied-in-
law contracts. Therefore, the proposed instruction seeks to
bring clarity and consistency to these claims.

Most unjust-enrichment claims based on implied-in-
law contracts will fall within this proposed instruction.
Nonetheless, some may contend that the proposed
instruction fails to cover all unjust-enrichment claims in an
area of law that may require additional or unique elements
not present in the proposed instruction. However, the
firmly rooted exception in Arkansas caselaw—that a trial
judge is not required to give the AMI if it does not contain
an essential instruction or does not accurately state the law
applicable to the case 100—alleviates these concerns and
sufficiently safeguards any unjust-enrichment claim that
may not fit within the instruction. Because this safety net
exists for the courts and litigants if the proposed instruction
does not state the law sufficiently, the fear of crafting a one-
size-fits-all AMI that may not adequately address
complicated or novel issues is not a sufficiently compelling

98. Brill, supra note 9, § 31:2, at 569 (citing Woodhaven Homes, Inc. v.
Kennedy Sheet Metal Co., 304 Ark. 415, 418, 803 S.W.2d 508, 510 (1991) (holding
that the burden is on the defendant to demonstrate the benefit received is less than
the contract price); Bivens, 291 Ark. at 603, 726 S.W.2d at 679).
99. Id. In determining the reasonable value of the benefit received, a court
may consider not only direct costs (such as labor and materials) but also direct
overhead expenses (such as rental equipment and supervision) and indirect
overhead expenses (such as office costs). See Woodhaven Homes, Inc., 304 Ark. at
419, 803 S.W.2d at 511. However, an award of profits is inappropriate because the
court would be enforcing an unenforceable contract. See Farmer v. Riddle, 2011
Ark. App. 120, at 3-5, 2011 WL 548521, at *3-5 (calculating an award of $47,719 for
improvements made to convert a garage into an apartment by determining the value
of the square footage of the house before the improvements were made and
comparing it with the value after the improvements were made).
100. See supra note 2.
reason to abandon the process altogether or to shy away from the well-defined elements.

VI. CONCLUSION

Arkansas and its legal community will benefit from adopting specific elements for unjust-enrichment claims based on implied-in-law contracts. As a direct result of adoption by the Arkansas Supreme Court or the Committee, a new AMI would light the way for a more comprehensive, and more consistently adjudicated, implied-in-law unjust-enrichment claim. Although, normally, Arkansas courts must adopt elements before the Committee drafts a Model Jury Instruction, the caselaw provides a sharp and well-defined picture from the recurring elements that the court or the Committee can synthesize into a clearly defined jury instruction. The proposed model jury instruction clearly identifies and aligns itself with the elements in Arkansas’s caselaw.

Hopefully, the Arkansas Supreme Court’s adoption of concrete elements will better equip juries to apply a bright-line rule rather than a shifting, piecemeal standard that only awards a plaintiff based on what a jury thinks is fair under the circumstances. Additionally, concrete elements will better equip lawyers to decide if their clients have valid unjust-enrichment causes of action, instead of merely hoping that a trier of fact will decide their cases are unjust enough to reward their clients.

Furthermore, clear elements will enable attorneys to advise their clients more precisely, saving time and money. Clear elements will also equip judges with the tools for deciding whether to dismiss or allow the claim earlier in the proceedings. Adoption of this proposed instruction would produce consistent results across all levels of Arkansas courts. Moreover, a consistent standard will reduce unnecessary litigation, which hampers judicial economy.

This comment encourages Arkansas courts to adopt these elements, paving the way for the Committee to draft a new AMI that will allow courts to instruct a jury

consistently rather than on an ad hoc basis. Alternatively, this comment urges the Committee to adopt the proposed jury instruction.

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