Equitable apportionment in family law matters is far more complex than merely the use of a "Moore/Marsden" software program. To understand the complexity, one must understand the underlying foundation of equitable apportionment. This foundation includes the inherent right of reimbursement to the community for the use of its funds to pay any separate property debt; that constructive fraud is the underlying basis of equitable apportionment; the consent of the community property claimant to the use of community funds for separate purposes may eliminate the right of reimbursement to the community; the remedy for constructive fraud is restitution; and other family law principles, such as the lender intent doctrine, fiduciary duties and equitable offset affect the Moore/Marsden formula. In Volume E of Complex Issues in California Family Law, Equitable Apportionment and Reimbursement, The Use of Community Assets for Separate Property Purposes and Post-Separation Reimbursement Issues, to be released this summer, all of these issues are discussed and analyzed in detail.

The purpose of this column is to familiarize the family law practitioner with only one of the foregoing issues, the importance of restitution in equitable apportionment. It is important for the family law bench and bar to understand that the Moore/Marsden formula is a remedy resulting from the equitable remedy of restitution. However, the pro tanto remedy provided by the Moore/Marsden line of cases is but one of various remedies available under the general theory of restitution.

Summary of the Principles of Restitution. The Moore/Marsden formula was developed from the equitable remedy of restitution. The purpose of restitution is twofold: to prevent unjust enrichment of the party in the wrong and to fully compensate the party who has wrongfully been deprived of the property. However, the pro tanto remedy provided by the Moore/Marsden line of cases is but one of various remedies available under the general theory of restitution.

The remedy of restitution may also include interest from the time funds were wrongfully taken until the refunds are repaid. If the party took the funds willfully, interest can be compounded; this can amount to a substantial sum of money. Where the funds are invested rather than spent, a percentage interest in the investment based on the amount invested can be ordered in lieu of interest. However, in both situations, the community is first and foremost entitled to full reimbursement of the principal amount. The principles of restitution can be summarized as follows:

The use of community funds by a spouse for the benefit of his or her separate estate is a breach of the interspousal fiduciary duty.

Where there is a breach of a fiduciary duty, a constructive fraud occurs. The remedy for a constructive fraud is restitution.
The underlying purposes of restitution are (1) to return all funds taken to the wronged party, (2) to make the wronged party whole for the loss of use of his or her money, and (3) to avoid unjust enrichment to the wrongdoer.

The wronged party is always entitled to dollar-for-dollar reimbursement of the funds taken, absent extraordinary circumstances in which reimbursement would be inequitable or inappropriate.

In order to make the wronged party whole, the court has the discretion to award interest from the time that the money was wrongfully taken until the funds are repaid. This "prejudgment" interest must be at a reasonable rate, which is presumptively the legal rate. Normally it is also simple interest. However, if the wrongful conduct was willful but does not rise to the level of exemplary damages, the court can order compound interest.

If the funds are actually invested and the investment increases in value, the wronged party may be entitled to a pro tanto interest in the investment, and thus in its appreciation. If only the wronged party's funds were invested, he or she is entitled to request that the entire investment be transferred to him or her.

In determining what type of restitution to order, as a general rule, the wronged party is entitled to dollar for dollar reimbursement for the funds taken, and interest (simple or compounded) or a pro tanto share of the appreciation of the actual investment, whichever is greater. If the pro tanto share is greater than mere interest, the wronged party is entitled to the greater sum because the wrongdoer cannot be unjustly enriched by the constructive fraud. If the funds were invested and the actual growth of the investment is less than a reasonable rate of return, the wronged party is entitled to the interest instead of a pro tanto share of the actual increase in value because the wronged party is entitled to be made whole, which includes being compensated for the loss of use of the funds.

The foregoing rules must be balanced in an equitable manner consistent with the underlying principle of restitution.

In addition to restitution, a party has the right to request a full accounting from the other spouse as both are part of the other spouse's fiduciary obligations and as a remedy for breach of that duty. Various statutes, including several in the Family Code, and various cases authorize the court to order a party to provide an accounting to both it and to the other party. The wronged party may also seek to impose a constructive trust.

Constructive Fraud and Restitution: The basis for remedies for constructive fraud is restitution. Constructive fraud results from the breach of a fiduciary duty. In Dunn v. Mullan (1931) 211 Cal. 583, 590, the California Supreme Court noted that "(i)n California a distinction is made between the case where, as here, the husband has improved his wife's lands with community funds and where he improved his own lands with community funds. In the former case, he is presumed to have intended a gift. In the latter case, a right of reimbursement is granted to the wife upon the theory that to permit a husband to appropriate the community property under his management to his own separate use operates as a constructive fraud upon his wife." Emphasis added. Also see Wheeland v. Rodgers, 20 Cal. 2d 218, 222.

Restitution is the remedy when one party has been unjustly enriched at the expense of another. "The right to restitution or quasi-contractual recovery is based upon unjust enrichment. Where a person obtains a benefit that he or she may not justly retain, the person is unjustly enriched. The quasi-contract, or contract 'implied in law,' is an obligation (not a true contract) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money ... Restitution may also be awarded in contract actions, where it often follows rescission (which typically applies only in contract actions). However, restitution is also available as a remedy to redress statutory violations. And in a statutory action, rescission is not a prerequisite to granting restitution." 1 Witkin, Summary of Cal. Law (10th ed., 2005) Contracts, § 1013. Emphasis added.

Constructive fraud is a "statutory violation." Constructive fraud is defined by Civil Code § 1573(1) as "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." Emphasis added.
In the context of family law, the Moore/Marsden line of cases addressing equitable apportionment have long required restitution. In *Marriage of Frick* (1986) 181 Cal. App. 3d 997, 1010, 226 Cal. Rptr. 766, the First District said that

(prior to 1975, when the husband used community funds to improve his own separate property, the community was entitled to be reimbursed for this expenditure unless the wife consented to the use of the funds. *In re Marriage of Jafeman* (1972) 29 Cal. App. 3d 244, 256 [105 Cal. Rptr. 483].) This rule was premised on the fact the husband was the manager of the community funds. (*Ibid.*). To permit the husband to improve his separate property with community funds operated as a constructive fraud upon his wife. *In re Marriage of Warren* (1972) 28 Cal. App. 3d 777, 781-782 [104 Cal. Rptr. 860].) The community's right to reimbursement was measured either by the increased value of the property or the amount expended, whichever is greater. (*Ibid., at pp. 782-783.*) Beginning in 1975, both spouses were granted equal management and control of the community real and personal property, with limited exceptions. (Civ. Code, §§ 5125 and 5127.) However, we do not believe this change in the law should alter the basic principles discussed above. Indeed, we believe the effect of this change should be to place each spouse in the same position as the husband was before 1975. If either spouse appropriates community funds for his or her own benefit, without the consent of the other spouse, the community should be reimbursed. Even if in theory both spouses have an equal right to management and control, if one spouse acts in his or her self-interest to the detriment of the community interest, the community should be entitled to restitution. Emphasis added.

**The Purpose of Restitution.** The purpose of restitution is twofold: to prevent unjust enrichment of the party in the wrong and to fully compensate the party who has wrongfully been deprived of property. In *Dunkin v. Boskey* (2000) 82 Cal. App. 4th 171, 198, 98 Cal. Rptr. 2d 44, the First District said that

'\textit{the measure of damages to which appellant is entitled for unjust enrichment `is synonymous with restitution.'} (*Dinosaur Development, Inc. v. White*, supra, 216 Cal. App. 3d at p. 1314.) Restitution is defined 'as restoration of the status quo by the awarding of an `amount which would put plaintiff in as good a position as he would have been if no contract had been made and restores to plaintiff value of what he parted with in performing the contract.'* *\textit{...} (People v. Martinson* (1986) 188 Cal. App. 3d 894, 900 [233 Cal. Rptr. 617], citation omitted.)' *\textit{In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.}*' *(*Dinosaur Development, Inc. v. White*, \textit{supra, at p. 1315.)} 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result ... is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' (Rest., Restitution, § 1, comm. d, p. 13; see also 1 Witkin, \textit{Summary of Cal. Law} (9th ed. 1987) Contracts, § 95, p. 125.) *(*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal. App. 4th 612, 627 [12 Cal. Rptr. 2d 741].)\textit{Equitable considerations govern the award of unjust enrichment, however. (First Nationwide Savings v. Perry, supra, 11 Cal. App.4th at p. 1663.) Thus, a party seeking restitution "must generally return any benefit" that it has received.} *(Rest.2d, Contracts, § 376, com. a, § 384, com. a.)' Emphasis added.

In *Dinosaur Development*, cited in the above quote, the appellate court held (at 1314, 1315):

Although the word itself is never mentioned in its complaint, plaintiff is in essence pleading its entitlement to restitution. \textit{Unjust enrichment, the term used by plaintiff, is synonymous with restitution.} (See Goff & Jones, \textit{The Law of Restitution} (1966) p. 12; 1 Palmer, \textit{The Law of Restitution} (1978) § 1.1, pp. 2-3; id. (1988 supp.) p. 3; Rest., Restitution (1937) § 1.) ...
The concept of restitution needs no translation from the legal to the vernacular. It is said that the word 'restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. The phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. [P] It is a general principle, underlying various legal doctrines and remedies, 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. As expressed by some authorities, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation." [Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 885 [53 Cal. Rptr. 628].] Emphasis added.

Restitution Includes Interest: Family law cases have traditionally applied the pro tanto right of reimbursement to the community where community funds have been wrongfully used for separate property purposes. However, no family law case has yet addressed the fact that the remedy of restitution also includes the right to receive "prejudgment" interest for the wrongful taking of community funds as an alternative to a pro tanto share of the appreciation. In Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 214 Cal. Rptr. 177, the appellate court said that full restitution as a remedy for fraud by a fiduciary includes the greater of interest or a constructive trust on the profits produced by their use:

Money damages are also inadequate if, by that term, it is meant plaintiff is entitled to a judgment equal to the amount of money defendant wrongfully acquired plus the legal rate of interest. The purpose of the constructive trust remedy is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrong. Thus, under a constructive trust upon money, the plaintiff is entitled to trace the fund to its ultimate product or profit. By the time plaintiff obtains a final judgment, the original fund may have grown far greater than the legal rate of interest would recognize. To allow the defendant to pocket the difference would reward the defendant for his wrongdoing. Emphasis added.

In the context of family law and equitable apportionment, in a market where homes have greatly increased in value, the Moore/Marsden line of cases apply the pro tanto interest portion of restitution. However, during times of economic slow down the family law practitioner may want to keep in mind that interest, simple or compound, may yield a better result than the traditional pro tanto analysis.

Civil cases involving restitution almost always require interest on the amount restored. "Since mandate is the most expeditious and the most frequently used procedure of relief for persons improperly discharged from their positions, such persons should not be subjected to the loss of full restitution, by the denial of interest, merely because of the selection of this procedure for redress." Mass v. Board of Education (1964) 61 Cal. 2d 612, 627, 39 Cal. Rptr. 739. Interest is imposed to compensate for the loss of use of the withheld funds or property. "Prejudgment interest is awarded to compensate a party for the loss of the use of his or her property." Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 815, 148 Cal. Rptr. 22.

In addition, there are two statutes that deal with prejudgment interest as an element of damages. Civil Code § 3287(a) states that

(c)very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest

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from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

More on point to breach of duty situations, Civil Code § 3288 says that "(i)n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Emphasis added. Under these sections, interest can be imposed to compensate the harmed party for the lost investment power of the funds wrongfully withheld. "It is commonly recognized that prejudgment interest represents the accretion of wealth that particular property could have produced during a period of loss." Newby v. Vroman (1992) 11 Cal. App. 4th 283, 289, 14 Cal. Rptr. 2d 44.

Section 3288 recites, 'In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.' We have recently affirmed that, unlike Civil Code section 3287, which relates to liquidated and contractual claims, \textit{section 3288 permits discretionary prejudgment interest for unliquidated tort claims. (Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814-815 [148 Cal. Rptr. 22, 582 P.2d 109].) In Bullis, we characterized prejudgment interest as 'awarded to compensate a party for the loss of his or her property.' (Id., at p. 815, italics added; see also Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665 [121 Cal. Rptr. 794] ['deprived of the use of his money or property'].) The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation. Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal. 3d 86, 102, 103, 603 P.2d 1329. Emphasis added.

There does not appear to be any reason why that portion of the remedy of restitution which permits "prejudgment" interest to be awarded should not be applied in appropriate family law matters.

\textbf{Interest May Be Simple or Compound:} Where restitution is justified but punitive damages may not be, even compound interest is authorized. In \textit{Baker v. Pratt (1986) 176 Cal. App. 3d 370, 383, 222 Cal. Rptr. 253}, the Second District distinguished between awards of interest for constructive versus actual fraud. In \textit{Baker,} P sued D for wrongfully excluding him from a construction corporation of which he owned half of the shares, and thereafter operating the business as his own, including using corporate goodwill to bid on his own jobs, thus usurping opportunities which belonged to the corporation. The trial court entered judgment against D, including lost profits, and also interest from the date of the exclusion. It said that "West Coast Construction Company, Inc., existed for some time after respondent was excluded from its operation. The trial court found that appellant used the corporation's goodwill to his own advantage which is a breach of a fiduciary duty owed to the corporation. Respondent was properly due an award because of the deprivation of this property interest. The law makes no distinction between goodwill and other property with respect to the right of the owner thereof to recover damages for its impairment or destruction." \textit{As to the prejudgment interest portion of the order, it held that compound interest was appropriate for intentional breaches of fiduciary duty:}

The trial court clearly had the discretion to add interest to certain of the sums awarded. Civil Code section 3288 states that "[(i)n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." It is well established that where a litigant proceeds on a theory of a violation of a fiduciary relationship which constitutes constructive fraud, an award of interest is discretionary with the trier of fact. (Pepitone v. Russo (1976) 64 Cal. App. 3d 685, 690 [134 Cal. Rptr. 709].) The fact that the sum is unliquidated does not remove the discretion to award interest in such instances. (Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 587 [140 Cal. Rptr. 330]; Redke v. Silvertrust (1971) 6 Cal. 3d 94, 106 [98 Cal. Rptr. 293, 490 P.2d 805].)

The rationale for awarding interest has been stated in strong terms. "When, by virtue of the fraud or breach of fiduciary duty of the defendant, a plaintiff has been deprived of the use of his money
or property and is obliged to resort to litigation to recover it, the inclusion of interest in the award
is necessary in order to make the plaintiff whole. It is for this reason that it is proper to have such
interest run from the time the plaintiff parted with the money or property on the basis of the
Rptr. 794].)

The trial court specifically found that appellant 'violated the provisions of Civil Code Section 2228
as it relates to directors and officers of corporations as fiduciaries, and must account to said business
entities for the profits so made.' Civil Code section 2228 provides that '[i]n all matters connected with his
trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any
advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse
pressure of any kind.' Civil Code section 2234 defines any violation of section 2228, or of any other
section of the article, as a fraud against the beneficiary of a trust. The court's findings are such that it
clearly had the discretion to award interest pursuant to Civil Code section 3288.

When a trustee wilfully converts trust property to his own use, he is liable for interest, even though it
may not have been prayed for in the complaint. The circumstances of the case determine whether the
interest awarded is simple or compound. In cases of mere negligence, no more than single interest
is ever added to the loss or damage resulting therefrom, but if the trustee is guilty of some positive
misconduct or wilful violation of duty, the court may award compound interest. (Katz v. Enos
(1945) 68 Cal. App.2d 266, 278-279 [156 P.2d 461].) Baker, at 384, 385 (some citations omitted,
emphasis added).

However, compound interest is only authorized in situations involving intentional breaches of fiduciary duty; where
the breach is "merely" negligent, only simple interest may be imposed.

We find the applicable principles well expressed in Wheeler v. Bolton, 92 Cal. 159, at 172 [28 P. 558]:
"The general rule applicable to an executor, as well as to any other trustee, is, that, except in cases in
which he has been guilty of some positive misconduct or wilful violation of duty, he is not to be
charged with compound interest. In cases of mere negligence, no more than simple interest is ever
added to the loss or damage resulting therefrom. In cases where he has mingled moneys belonging to
his trust with his own funds, and used them for his own advantage, courts have charged him with
compound interest, upon the theory that in the absence of evidence to the contrary, he will be
presumed to have received such profits from their use. [Citation.] This rule is of modern growth, and
is applied more frequently in this country than in England. It has been adopted, not for punishing the
delinquent trustee, but for the purpose of attaining the actual or presumed gains, and to make certain that
nothing of profit or advantage remains to the trustee, except, perhaps, his commission or compensation.'
[Citations.] But even in such case, if the executor can show that he has acted in good faith, and has not
made any greater profit by the use of the funds, he will be charged only simple interest. The rule charging
him with interest is, however, limited to cases in which it is either shown or presumed that the executor
has himself profited by his acts, or has been guilty of such willful misfeasance as to justify the court in
requiring from him compensation therefor. Douglas v. Westfall (1952) 113 Cal. App. 2d 107, 112-113,
248 P.2d 68 (citation omitted). Emphasis added.

Equitable apportionment is a complex area. It is not as simple as using a software program to perform the
Moore/Marsden formula. The proper application of the principles of equitable apportionment mandates an
understanding of the principles related thereto. Restitution is but one of many principles to consider in the proper
analysis of family law equitable apportionment issues.

FOOTNOTES:
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