Twenty Years After *Bowen v. Massachusetts*—Damages or Restitution: When Does It Still Matter? When Should It?

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"One consequence of the *Bowen* case has been to create a sort of cottage industry among lawyers attempting to craft suits, ultimately seeking money from the Government, as suits for declaratory or injunctive relief without mentioning the money."[1]

I. INTRODUCTION

In 1988, the United States Supreme Court handed down a decision in *Bowen v. Massachusetts*,[2] which dealt with how the characterization of monetary relief as either restitution or damages determined whether the United States Court of Claims[3] or the United States District Court had jurisdiction to hear the claim. Twenty years later, courts throughout the country continue to struggle with whether a claim for monetary relief constitutes restitution or damages with varying results and interesting twists.

Courts have commonly confronted this classification controversy when the following issues are at stake: (1) do the federal district courts have jurisdiction under the Administrative Procedure Act to hear the claim, or does the Court of Federal Claims have jurisdiction under the Tucker Act?; and (2) is the monetary relief sought unavailable *because* of its classification? In most of the cases, *Bowen*'s authority and vitality are implicitly, if not explicitly, called into question.

This Article examines the *Bowen* legacy in these cases to determine whether a coherent approach to the classification of

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1. Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1124 (Fed. Cir. 2007).

2. 487 U.S. 879 (1988).

3. In 1992, the United States Court of Claims name was officially changed to the United States Court of Federal Claims. UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLE'S COURT, http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf.

monetary remedies has emerged and identifies when the classification of monetary remedies as either damages or restitution continues to be a meaningful distinction.

II. BACKGROUND

The principal question presented in *Bowen* was whether a federal district court had jurisdiction to review a final order of the Secretary of Health and Human Services where the Secretary had disallowed coverage for a category of expenditures under its Medicaid program.[4] Although federal funding to a state under the Medicaid program was called "reimbursement," the payments were actually made as an advance on a quarterly basis of anticipated future expenditures. In *Bowen*, the Secretary of Health and Human Services initiated a compliance proceeding, and the payment advances to the State were withheld.[5]

The State filed a complaint under the Administrative Procedure Act (APA)[6] in Federal District Court for the District of Massachusetts seeking to set aside the disallowance order and seeking declaratory and injunctive relief to prohibit the Secretary from continuing to disallow the contested category of medical assistance expenditures.[7] The district court reversed the disallowance decision on the merits, holding that the category of expenditures did in fact comply with the requirements of the Medicaid program.[8] On appeal, the First Circuit Court of Appeals affirmed the district court holding on the

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4. *Bowen*, 487 U.S. at 882. The Court stated that:

> In 1965 Congress authorized the Medicaid program by adding Title XIX to the Social Security Act, 79 Stat. 343. The [Medicaid] program is "a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons." Subject to the federal standards incorporated in the statute and the Secretary's regulations, each participating State must develop its own program describing conditions of eligibility and covered services.

Id. at 883 (citations omitted).

5. The disallowance in *Bowen* involved medical and rehabilitative services to patients in intermediate care facilities for the mentally retarded. The services at issue in *Bowen* were training in the activities of daily living (such as dressing and feeding oneself) and were performed by the State Departments of Mental Health and Education. The Secretary would have considered these services covered if they had solely been performed by the Department of Mental Health; however, the Secretary's auditors classified them as uncovered educational services and they were disallowed. *Id.* at 885–86.

6. 5 U.S.C. § 702 (2006).

7. Commonwealth v. Heckler, 616 F. Supp. 687 (D. Mass. 1985).

8. *Bowen*, 487 U.S. at 888.

merits.[9] The Secretary of Health and Human Services also challenged the district court's subject matter jurisdiction claiming that the United States Court of Claims had exclusive jurisdiction over the State's claim under the Tucker Act.[10] The First Circuit rejected the jurisdictional challenge on the grounds that the relief requested was *prospective* rather than *wholly retrospective* in nature, explaining that

> the disallowance decision at issue in this case . . . represents an ongoing policy that has significant prospective effect. The structure of the Medicaid program (in which the Secretary "reimburses" the states in advance) makes it inevitable that disallowance decisions concern money past due. Yet the Secretary uses these decisions to implement important policies governing ongoing programs.[11]

The federal government's position before the First Circuit and the Supreme Court was that the State's claim for payment could only be brought against the United States if sovereign immunity had been waived. The APA waived sovereign immunity, so the argument continued, only for actions "seeking relief other than money damages;" the State's claim was essentially for money damages. Further, the Secretary argued that even if the claim was not for money damages, and thereby was not precluded under the APA on that basis, the State had an adequate remedy in the Court of Claims.[12]

Acknowledging that Congress intended to broaden avenues for judicial review of agency action by eliminating the defense of sovereign immunity in the 1976 amendment to the APA, the Court first held that because the complaint sought declaratory and injunctive relief, the "plain language" of the amendment did not foreclose judicial review. More significantly, the Court held that the monetary aspects of the relief were not money damages. Recognizing "the fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages,'"[13] the Court determined that the State was seeking "specific relief," not damages, and that the APA exclusion should not be broadened beyond claims strictly for money damages to preclude claims for all monetary relief.

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9. Commonwealth v. Sec'y of Health & Human Servs., 816 F.2d 796, 804–05 (1st Cir. 1987).
10. 28 U.S.C. § 1491 (2006).
11. *Bowen*, 487 U.S. at 889.
12. *Id.* at 891.
13. *Id.* at 893.

The Court's conclusion was based first on the use of the word "restitution" in the statute, and further, the recognition that recoupment of overpayments or underpayments, or reimbursement for belated pay expenses were historically considered "equitable action(s) for specific relief."[14] The Court distinguished these types of payment obligations from the compensatory goal of money damages, recognizing that "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are 'not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'"[15]

The Court's determination that the case was properly within the jurisdiction of the federal courts under the APA and not the Court of Claims under the Tucker Act was primarily based on its analysis of the legislative history of the 1976 amendment to the APA—the Court found that the terms "money damages" and "monetary relief" were not intended to be used interchangeably to limit APA jurisdiction.[16] The Court found further congressional intent to include contested Medicaid coverage claims in the Congressional committee reports, which indicated that the amendment would allow for judicial review of the "administration of Federal grant-in-aid programs."[17] Thus, "the fact that grant-in-aid programs were expressly included in the list of proceedings in which the Committees wanted to be sure the sovereign-immunity defense was waived is surely strong affirmative evidence that the members did not regard judicial review of an agency's disallowance decision as an action for damages."[18] Ultimately, the Court reiterated:

> The State's suit to enforce the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.[19]

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14. *Id.*
15. *Id.* at 895 (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973)).
16. *Bowen*, 487 U.S. at 895–902.
17. *Id.* at 898.
18. *Id.*
19. *Id.* at 900.

The federal obligation sought to be enforced was for the payment of money, which did not transform the nature of the relief sought into damages.[20]

Lastly, the Court rejected the Secretary's position that the State had failed to prove that the Court of Claims was an inadequate substitute for review in the district court.[21] Recognizing that when Congress enacted the APA it did not intend for the general grant of jurisdiction to duplicate previously established special statutory procedures, the Court nonetheless reiterated earlier holdings that any exception to avoid duplication should not be construed to defeat the central purpose of judicial review of agency action.[22] Moreover, Congressional intent to codify the exhaustion of remedies requirement should not be construed to defeat the intent to broaden jurisdiction under the APA.[23] Perhaps most pertinent to the particulars of the case, the Court rejected the Court of Claims as an adequate forum because that court did not have the equitable power to grant the prospective relief necessary for resolution of the merits of the claim.[24] Finally, the Court found that, especially since disallowance decisions involved the State's governmental activities, the district court would be in a better position than the Court of Claims to review the complex federal-state interaction involved.[25] Thus, the Court adhered to the "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."[26] This last point discussed the ongoing prospective nature of the relief necessary; however, the Court did not embrace the distinction of prospective versus retrospective relief as a means to settle the question of whether the Court of Federal Claims was an adequate forum.

Justice Scalia's dissent in *Bowen* was significant, particularly because he eventually held sway for the majority in two significant cases that also took up the question of whether or not the remedy sought was damages.[27] Justice Scalia's primary point of departure from the *Bowen* majority dealt with the characterization of the monetary relief sought as specific relief rather than damages as the means to remove the claim from the jurisdiction of the Court of

20. *Id.* at 901.
21. *Id.* at 901.
22. *Id.* at 903–04.
23. *Id.*
24. *Id.* at 904–05.
25. *Id.* at 907–08.
26. *Id.* at 908.
27. *See infra* notes 32–34 and accompanying text.

Claims.[28] Justice Scalia's position was that the State's claim was for compensatory *reliance* damages because the State sought to recover for the monetary loss it sustained when it expended its resources to provide services in reliance on the government's duty to reimburse it. Thus, the argument was that the State's claim was essentially one for payment of money, which was a suit for damages and not specific relief.

Both the majority and the minority positions in *Bowen* equated the characterization of the claim as specific monetary relief with being an equitable claim. Both opinions ignored a more apt characterization of the reimbursement sought as a legal claim for restitution that is neither specific relief nor equitable. As several commentators have argued,[29] the claim for reimbursement was restorative and not compensatory, as the latter term should be understood in the context of damages. Compensatory relief seeks to "make up for" an injury by substituting compensation for a loss incurred. Restorative, or restitutionary, relief seeks to realign an unjustly retained benefit by transferring it from the defendant to the plaintiff. But, restorative or restitutionary relief is not necessarily specific relief. The vast majority of restitution claims are both legal and substitutionary, with the plaintiff entitled to no more than a money judgment serving as the measured substitute of the defendant's unjustly retained benefit.[30] Had this distinction been properly observed in *Bowen*, the question of whether the Court of Federal Claims provided an adequate forum to hear the case would have been the only issue for the Court to resolve. While the Court of Federal Claims does have the *power* to hear legal claims for restitution,[31] jurisdiction of the federal district courts under the APA is not necessarily precluded as the APA's exclusion from the waiver of sovereign immunity for actions involving money damages did not extend to all forms of monetary relief.

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28. *Bowen*, 487 U.S. at 913–30 (Scalia, J., dissenting). Justice Scalia also disputed the majority's conclusion that the Court of Federal Claims could not provide an adequate remedy for the claim presented. Not only did he argue that the Court of Federal Claims had the authority to order the Secretary to reimburse the State for the monies owed, but he rejected the notion that the Medicaid Act is more complex than other statutes the Court of Federal Claims typically hears. However, it is the characterization of the relief sought as specific rather than money damages which is the aspect of *Bowen*, and not the adequacy of the Court of Federal Claims to provide relief which continues to haunt the jurisprudence.

29. *See infra* note 48.

30. *Id.*

31. *See Bowen*, 487 U.S. at 901 n.31, 905 n.42.

The extent to which the Supreme Court itself remains unsettled about the distinctions it drew in *Bowen* is reflected in how often it revisits the problem. In fact, almost every five years since *Bowen* the Supreme Court has been confronted with the need to determine the nature of the monetary relief sought in the cases before it.

In two cases involving ERISA,[32] the Court considered claims seeking reimbursement from employee benefits plans. Justice Scalia wrote the majority opinions in both cases and concluded that the relief sought was unavailable under ERISA because, in most cases, the statute only authorizes courts to issue equitable relief. The reimbursement claims were for legal monetary claims and thus unavailable.

In *Mertens v. Hewitt Associates*, fearing a retirement plan was underfunded, the plaintiffs ostensibly sought injunctive relief to require an employer to fully fund the plan.[33] Ultimately, however, the plaintiffs sought the injunctive relief as a means to an end: they wanted to be able to access retirement funds from the plan. The Court found that "although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of legal relief."[34] The Court rejected the classification of the relief sought as equitable, "such as an injunction or restitution."[35] Again, the Court ignored the distinction of legal restitution from equitable restitution and consequently described the monetary relief sought as damages rather than restitution. The distinction may not have been essential to the ERISA jurisdiction question because the ERISA statute might well preclude any monetary legal relief—damages or restitution—but the legacy of the classification error lives on.

In *Great-West Life & Annuity Insurance Co. v. Knudson*, the benefit plan sought injunctive relief to compel reimbursement from an employee who had recovered medical expenses from a third-

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32. Employee Retirement Income Security Program, 29 U.S.C. §§ 1001–1461 (2006). ERISA was enacted to protect individuals that are participants in private pension and health plans by establishing standards and regulations of the industry, such as requiring plans to provide participants with plan information and establishing a fiduciary duty for plan managers. U.S. Dep't of Labor—Find It By Topic—Health Plans—ERISA, http://www.dol.gov/dol/topic/health-plans/erisa.htm (last visited Mar. 12, 2009).

33. 508 U.S. 248 (1993).

34. *Id.* at 255.

35. *Id.*

party health insurance plan.[36] The Court again found the bid for injunctive relief was merely a means to a monetary end—without the presence of any need for equitable intervention—making jurisdiction under ERISA unavailable.[37] This time, however, Justice Scalia was on the right track. Acknowledging that what the plan sought was for *restitution* of benefits that the employee owed to the plan, Justice Scalia recognized "not all relief falling under the rubric of restitution is available in equity . . . restitution [is] available in certain cases at law. . . ."[38] Clearly in *Great-West*, the plaintiff did not seek compensation to make up for an injury. Rather, it sought transfer of an unjustly retained benefit—in this case insurance proceeds—which, while monetary relief, is not damages. While Justice Scalia may have cleared up the legal versus equitable distinction problem that was born in *Bowen*, the damages versus restitution classification problem lingers.[39]

In *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Supreme Court recognized that restitution might require equitable protection in an ERISA case when it held that a health plan could recover third party insurance benefits paid to an injured plan participant if injunctive relief was necessary to secure restitution.[40] In this case, the Court found that a mere money judgment for restitution was inadequate and that a constructive trust or equitable lien was necessary to protect the plan.[41] Again, the Court did not need to address whether the reimbursement sought was properly characterized as damages or restitution.

The damages versus restitution confusion remained unresolved in the Supreme Court's decision in *Department of the Army v. Blue Fox.*[42] There, an unpaid subcontractor of a government construction project sought an equitable lien on funds held by the Army.[43] The plaintiff, relying on *Bowen*, sought relief in federal

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36. *See* 534 U.S. 204, 213–14 (2002). Typically an ERISA health plan has a subrogation or reimbursement clause, and section 502(a)(3)(B) of ERISA allows the plan to enforce the reimbursement provision as "appropriate equitable relief." One mechanism for recovery is putting a lien on third party funds received by the plan participant.

37. *Id.* at 212–19.

38. *Id.* at 231.

39. *See infra* Part III.A–B.

40. 547 U.S. 356 (2006).

41. *Id.* at 362–68.

42. 525 U.S. 255 (1999). Chief Justice Rehnquist delivered the majority opinion.

43. *Id.* at 257–59. The prime contractor did not get a bond for the contract. The Miller Act requires contractors to obtain performance and payment bonds for construction projects; however, here the Department of the Army did not require the prime contractor to obtain Miller Act bonds. Instead, the Army

district court under the APA.[44] The Supreme Court held that an equitable lien was again a means to an end, in that it establishes a security interest to protect recovery of a money judgment. This was correct, so far as it went. The Court held that because the plaintiff ultimately sought a money judgment, the proper forum was the Court of Federal Claims and that sovereign immunity was not waived under the APA.[45] The problem was that the Court characterized the plaintiff's claim for payment as damages rather than restitution.[46] Had the Court properly characterized the claim, its ultimate decision might have remained, in any event, unaffected: the Court of Federal Claims has jurisdiction to hear legal restitutionary claims.[47] But, clarity would have triumphed over confusion.

Several excellent scholarly works have examined the correctness of these judicial classifications of monetary remedies in recent years.[48] Most agree that the central focus for determining

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amended the contract to call it a "services contract," even though the work to be performed included building a concrete building. After the work was completed, the subcontractor notified the Army that it had not been paid by the prime contractor, but the Army still disbursed the money to the prime contractor. The subcontractor tried to get an injunction to stop the Army from disbursing all funds owed to the prime contractor, but before an injunction was granted the Army disbursed all of the funds to the prime contractor.

44. *Id.* at 260–62.

45. *Id.* at 263–64.

46. The only way the subcontractor could have recovered damages would have been as a third party beneficiary to the contract between the Army and the prime contractor. The well-established and general rule, however, is that subcontractors are not third party beneficiaries of the contract between prime contractor and property owner. The subcontractor can *only* pursue against a property owner for restitution, and then only if the property owner has not already paid the prime contractor. In this case, to the extent that the Army had already paid the prime contractor, the plaintiff could not have recovered restitution, regardless of the forum. *See* JOHN CALAMARI & JOSEPH PERILLO, THE LAW OF CONTRACTS 621 (2d ed. 1977).

47. *See supra* note 28.

48. The most comprehensive work was Colleen P. Murphy's *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577 (2002). Murphy gave a thorough account of the development of the law of restitution generally, and traced both the legal and equitable origins of restitution claims. *Id.* She reviewed the scholarly work which identified the substantive basis for restitution as being grounded in unjust enrichment. *Id.* at 1588. Murphy argued for a classification approach that identifies a claim as restitution when the disgorgement or restoration of the defendant's gain is the primary point of inquiry. *Id.* Murphy argued that labeling restitution as an exclusively equitable remedy served to confuse the jurisprudence. *Id.* at 1598–1600, 1635–38. The failure to correctly distinguish between legal and equitable restitutionary claims, she found, created confusion and error. *Id.* at 1636–38. Claims of equitable restitution should be

whether a monetary claim is properly classified as damages or restitution should be on its remedial function or goal. If the claim seeks the goal of transferring a defendant's gain (or savings) from the defendant to the plaintiff, it is properly characterized as restitution. If the claim seeks the goal of compensating a plaintiff for losses incurred, it is properly characterized as damages. Most commentators agree that characterization of the relief sought in *Bowen* should have been for restitution and, further, that the relief sought was legal and not equitable in nature.

This Article argues that the Court's classification of legal restitution as "specific" relief was erroneous and unnecessary: when a plaintiff seeks the transfer or reimbursement of money that the defendant has been "saved" from having to pay, the claim is for legal, substitutionary restitution. Resorting to specific relief is

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limited, she argued, to those times when equitable devices, such as the constructive trust or equitable lien, were necessary under the "irreparable injury rule" to protect restitution. *Id.* at 1601–07. These tools result in specific relief. Citing *Bowen* in a footnote, Murphy acknowledged "the possibility of a monetary award being classified as 'specific relief.'" *Id.* at 1592–93 n.79. Nonetheless, Murphy concluded that "the concept of restitution as 'restoring' a specific thing to the plaintiff [is] generally inapplicable to a loss of money." *Id.* at 1593. Murphy re-examined this position in a later article, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119 (2006). Arguing that the distinction between specific and substitutionary relief "should depend on whether the remedy will give the plaintiff its original entitlement or something else," Murphy articulated three categories in which "specific monetary relief generally falls: (1) when the plaintiff seeks non-fungible coins or bills; (2) when the plaintiff seeks the return of money that was transferred to, or taken by, the defendant; and (3) when the plaintiff's original entitlement was that the defendant pay money to the plaintiff." *Id.* at 121–22. Analyzing various and often conflicting meanings of the remedy of damages, Murphy offered the rather unhelpful conclusion that specific monetary relief could be a "subset of damages or the opposite of damages." *Id.* at 158. *See also* Tracy A. Thomas, *Justice Scalia Reinvents Restitution*, 36 LOY. L.A. L. REV. 1063 (2003). Thomas argued that the Supreme Court's approach to classifying relief as equitable restitution erroneously relied on a historical approach that was outdated and excessively formalistic. Thomas proposed a "purpose-determinative test," which would focus "on the goal of the remedy rather than on the superficial form of the relief." *Id.* at 1083. For example, "money can be used to satisfy a variety of purposes: compensate for loss (compensatory damages), punish reprehensible behavior (punitive damages), coerce specific acts (civil contempt), or disgorge unjust benefit (restitution)." *Id.* Thus, if the court asks the plaintiff what goal he or she is seeking to further by requesting a certain amount of money, then the court could properly classify that claim. Finally, see Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602 (2003). Sisk argued that to determine proper jurisdiction for claims, the Court should restore a bright line between retrospective monetary relief and prospective equitable relief. *Id.* at 606.

unnecessary, except in extraordinary circumstances, to accomplish that transfer. The more serious problem of misclassifying remedies spawned in *Bowen*, however, continues to be that courts frequently fail to appreciate that the claim sought is not compensatory at all. Since the end of the twentieth century, courts have been consumed with the *Bowen* inquiry into the classification of the relief sought. Despite the considerable scholarship devoted to the subject and the United States Supreme Court's chronic re-examination of the issue, the courts seem unable to put the issue to rest.

III. THE MEANING OF "COMPENSATORY," "RESTORATIVE," "SUBSTITUTIONARY," AND "SPECIFIC" RELIEF

Before examining the *Bowen* legacy, a brief examination of the meaning of damages as a "compensatory" remedy is required. Similarly, the "restorative" aspect of restitution requires elaboration. Finally, the distinction regarding "substitutionary" versus "specific" relief must be understood.

The term "damages" comprises the monetary remedies aimed at making up for the plaintiff's legally recognized losses.[49] The compensatory goal of damages is to fully indemnify a plaintiff for his loss without recovering a windfall; thus, "damages is an instrument of corrective justice, an effort to put the plaintiff in his or her rightful position."[50] For a layperson, compensation is often associated with the earned payment of money. Webster's Dictionary provides several variations on the definition of "compensatory:" "to be equivalent to: counterbalance; to make an appropriate and usually counterbalancing payment to; to neutralize the effect of; to supply an equivalent; [and] to offset an error, defect, or undesired effect."[51] In a remedial sense, compensation is payment "to make good a loss and also payment for failure to harvest a gain to which the plaintiff was entitled."[52]

In terms of restitution, the very word "restitution" means restoration.[53] "Restitution is a return or restoration of what the defendant has gained in a transaction. It may be a return of a specific thing or it may be a 'return' of a money substitute for that thing."[54] Also, restitution restores the plaintiff to his or her original position by recapturing the gains the defendant unjustly procured

49. DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1, at 1–9 (2d ed. 1993).
50. *Id.* § 3.1, at 210.
51. MERRIAM-WEBSTER DICTIONARY 253 (11th ed. 2008).
52. DOBBS, *supra* note 49, § 3.1, at 210.
53. *Id.* § 4.1(1), at 365.
54. *Id.*

in a particular transaction.[55] "A person obtains restitution when he is restored to the position he formerly had or by the receipt of its equivalent in money."[56] "Restoration" may include reimbursement of monies owed.[57] Additionally, the restorative nature of restitution at times requires the defendant to be disgorged (either partially or fully), which means he must transfer the gain received from property, assets, or money that he improperly owns.[58]

Compensation and restoration are different approaches to provide relief to a plaintiff; while at times they may reach what appears to be the same end result, the process for arriving at the conclusion is the significant distinction.[59]

> Although an award of restitution may in fact provide compensation for the plaintiff in some cases, the restitutionary goal is different. The restitutionary goal is to prevent unjust enrichment of the defendant by making him give up what he wrongfully obtained from the plaintiff. So restitution is measured by the defendant's gains, not by the plaintiff's losses.[60]

The dichotomy between specific versus substitutionary relief, at its most basic level, relates to the differing mechanisms for enforcement of the plaintiff's rights. The difference is best summarized as follows: "specific relief gives the plaintiff the original thing to which the plaintiff is or was entitled; substitutionary relief gives the plaintiff something other than its

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55. *See* RESTATEMENT OF RESTITUTION § 1 (1937). *See also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279–80 (1989) (explaining that a complete definition of restitution includes both the restoration and unjust enrichment aspects).

56. RESTATEMENT OF RESTITUTION § 1 cmt. a (1937).

57. "This equitable conception of the law of restitution is crystallized by Lord Mansfield's famous statement in *Moses v. Macferlan* (1761): 'In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'" RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (2008)

58. *See* Laycock, *supra* note 55, at 1282–83.

59. *See* CALAMARI & PERILLO, *supra* note 46, § 9-23, at 376.

> "Restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done. Often, the result under either meaning of the term would be the same. If the plaintiff has been defrauded into paying $1,000 to the defendant, his loss and the defendant's gain coincide.

Id.

60. *Id.*

original entitlement."[61] Thus, a claim for substitutionary relief results in a money judgment which can be satisfied by the forced sale of any (non-exempt) property or garnishment of funds.[62] *In personam*[63] relief is not required because collection does not require the defendant's personal compliance with a specific order of the court. A claim for specific relief, by contrast, requires the defendant's personal compliance and can be enforced by an *in personam* order of contempt.[64] Additionally, the goals behind the remedies differ, which can be determinative in a court's reasoning. "With substitutionary remedies, plaintiff suffers harm and receives a sum of money. Specific remedies seek to avoid this exchange. They aspire to prevent harm, or undo it, rather than let it happen and compensate for it."[65]

Damages are universally considered substitutionary relief.[66] Not so readily appreciated is the substitutionary nature of restitution. But, most restitution claims result in a money judgment,[67] which is satisfied by the same enforcement procedures as a damage award: the procedures operate *in rem*.[68]

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61. Colleen Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 119–20 (2006).

62. *See id.* at 120; DOBBS, *supra* note 49, § 4.1(3), at 378–79.

63. "A decision *in personam* imposes a responsibility or liability on a person directly and binds such individual personally with regard to every property he or she possesses, even that over which the court has no jurisdiction in rem and which its decision cannot directly affect." 20 AM. JUR. 2D *Courts* § 72 (2008) (emphasis added).

64. Some courts and scholars classify certain historic legal claims, the writs of ejectment and replevin for example, as "specific remedies." These actions do not require the defendant's personal compliance. Rather, an official (typically the sheriff) is commanded to seize specific property. Still, the action is considered "*in rem*" because it acts upon the property. For a fuller explanation of the historic treatment of in rem/in personam terminology, see June F. Entman, *Abolishing Local Action Rules: A First Step Toward Modernizing Jurisdiction and Venue in Tennessee*, 34 U. MEM. L. REV. 251, 258–60 (2004).

65. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 696 (1990).

66. Murphy, *supra* note 61, at 120.

67. *See* DOBBS, *supra* note 49, § 4.2(3), at 384–88. The so-called "common counts" for restitution—money paid to the defendant's use, money had and received, use and occupation of land, goods sold and delivered, *quantum meruit*, and *quantum valebant*—are legal actions which result in a money judgment. *See also* Paul T. Wangerin, *The Strategic Value of Restitutionary Remedies*, 75 NEB. L. REV. 255 (1996). Occasionally, a money judgment for restitution is inadequate and it becomes necessary to protect restitution through specific relief, e.g., a constructive trust or an equitable lien.

68. 20 AM. JUR. 2D *Courts* § 72 (2008).

> [A] decision *in rem* does not impose responsibility or liability on a person directly but operates directly against the property in question, which is called the "res," irrespective of whether the

Finally, it is important to note the nature of relief that is incidental to an equitable decree: it can be a damages or a restitution award. For example, damages resulting from a breach of contract can be awarded as part of specific performance or rescission to provide "complete relief."[69] Commonly, restitution accompanies a rescission decree, as the benefits of performance of a contract are each restored to the original parties.[70] But in the end, neither the incidental damages nor restitution award is "specific," as that term is understood for enforcement purposes. Enforcement of the award would proceed *in rem*.[71]

The *Bowen* Court explained that "damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not *substitute* remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'"[72] *Bowen*'s mistake was to describe the remedy as specific, when the issue was whether the Court had jurisdiction to award incidental restitutionary relief. Certainly, the Court never contemplated that a state would acquire *in personam* enforcement rights against the United States Government by virtue of the award.

IV. *BOWEN* IN THE TWENTY-FIRST CENTURY

A. Does the Court of Federal Claims Have Jurisdiction?

> For jurisdictional purposes between the district courts under the APA and the Court of Federal Claims under the Tucker Act, the money distinction seemed to provide a relatively watertight barrier. In 1988 the barrier sprang a

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> owner is subject to the jurisdiction of the court *in personam*. While mere involvement of real property in an action does not render such action *in rem*, an action will be considered *in rem* where its purpose is to require the court to act directly on property or the title to property. The res may be a status or relation. A judgment *in rem* affects the interests of all persons in the property in question.

Id. (emphasis added).

69. *See* 24 WILLISTON ON CONTRACTS § 64:2 (4th ed. 2008).

70. Andrew Kull, *Rescission and Restitution*, 61 BUS. LAW. 569, 578–80 (2006).

71. *See* DOBBS, *supra* note 49, § 4.1(3), at 378–79.

72. Bowen v. Massachusetts, 487 U.S. 879, 895 (1988) (citing Md. Dep't of Human Res. v. Dep't of Health & Human Servs., 763 F.2d 1441 (1985) and DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973)).

> leak, a leak that has threatened to become gusher. *Bowen v. Massachusetts* is the source of the leak.[73]

Not surprisingly, the most direct impact of the *Bowen* legacy has been in cases that implicate the jurisdictional contest between the Court of Federal Claims and the district courts in claims seeking review of government agency actions that involve denial of monetary claims. *Bowen* is obviously "on point" in these cases. Whether *Bowen* has proven *helpful* is less certain. The vast majority of these cases have held that the district court did *not* have jurisdiction to hear the claim because sovereign immunity was not waived under the Administrative Procedure Act. While Courts frequently grapple with the "proper" question of whether or not the Court of Federal Claims provides an adequate remedy,[74] the classification of the remedy sought as being compensatory or restorative is a chronic theme. Even where the result would have remained unchanged because, as has been noted, the Court of Federal Claims has jurisdiction to hear monetary claims for restorative relief (i.e., restitution), the discussion about classification continues to muddy the waters.

This problem was best appreciated in *Suburban Mortgage Associates, Inc. v. United States Department of Housing & Urban Development*.[75] The court in that case was faced with whether APA or Tucker Act jurisdiction was proper in a case between a commercial mortgage lender and HUD for breach of an insurance contract. Sharply criticizing the *Bowen* analysis, the court stated:

> Once we discern the true nature of a plaintiff's claim as a claim for money, because of *Bowen*, we still must determine whether the claim is excluded from APA jurisdiction . . . by asking first whether the claim is for other than "money damages . . ." *The problem with that approach is that it turns on a linguistic distinction between "money damages" and a claim that happens to be for*

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73. Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1122 (Fed. Cir. 2007).

74. It is beyond the scope of this Article to examine the proper tests for determining whether the Court of Federal Claims provides an adequate forum. Sisk provided a test which many courts have found useful: whether the plaintiff is seeking retrospective or prospective relief. *See generally supra* note 48. *See also* Transohio Sav. Bank v. Dir., Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992) (articulating a test for whether, despite the presence of a contract, plaintiffs' claims are founded only on a contract, or whether they stem from a statute or the Constitution, as a basis for analyzing whether the Claims Court provides an adequate remedy).

75. 480 F.3d 1116 (Fed. Cir. 2007).

> *money, a distinction that is at best murky, and at worst without a difference*.[76]

The *Suburban Mortgage* court argued that the analysis should begin with whether there is an "adequate remedy" in a court other than the district court.

> One reason for beginning the analysis with the "adequate remedy" issue is that its resolution often will be dispositive. If the suit is at base a claim for money, and the relief available through the Court of Federal Claims under the Tucker Act—a money judgment—will provide an adequate remedy, the inquiry is at an end.[77]

While that approach has some appeal, in the jurisdictional contest between the Court of Federal Claims and the district courts, recent cases demonstrate that courts continue to struggle over the characterization of monetary relief.[78]

The opinion in *District of Columbia v. United States*[79] is illustrative. There, the plaintiff sought jurisdiction in the Court of Federal Claims; the United States protested the Claims Court's jurisdiction. At issue was whether a statute requiring the United States Department of Health and Human Services (HHS) to transfer responsibility for the operation of Saint Elizabeth's Hospital (an inpatient mental health facility) to the District of Columbia was "compensation mandating" as opposed to merely "money mandating." The Act[80] required the United States to pay

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76. *Id.* at 1124–25 (emphasis added).
77. *Id.* at 1125.
78. On the other hand, several courts have been content to dispose of the plaintiff's claim for jurisdiction in the district court by primarily examining whether there is another adequate remedy, in the Court of Federal Claims or elsewhere, without any particular effort to characterize the relief sought. *See, e.g.*, Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004); Consol. Edison Co. of N.Y., Inc. v. U.S. Dep't of Energy, 247 F.3d 1378 (Fed. Cir. 2001); Neb. Pub. Power District v. United States, 73 Fed. Cl. 650 (Fed. Cl. 2006); Hirschberg v Commodity Futures Trading Comm'n, No. 02 C 6483, 2003 WL 22019310 (N.D. Ill. Aug. 27, 2003); Kielczynski v. U.S. Cent. Intelligence Agency, 128 F. Supp. 2d 151 (E.D.N.Y. 2001). And, to the extent that the plaintiff's claim is found to be exclusively based on a claim for breach of contract, *see infra* note 74, courts have denied district court jurisdiction in favor of the Claims Court, again without particular analysis of how plaintiff's monetary claim should be categorized. *See, e.g.*, Gengler v. U.S. Dep't of Defense, 453 F. Supp. 2d 1217 (E.D. Cal. 2006); Lockheed Martin Corp. v. Defense Contract Audit Agency, 397 F. Supp. 2d 659 (D. Md. 2005); Morial v. U.S. Dep't of Hous. & Urban Dev., No. Civ.A. 01-3820, 2002 WL 506809 (E.D. La. Mar. 28, 2002).
79. 67 Fed. Cl. 292 (Fed. Cl. 2005).
80. 24 U.S.C. §§ 225–255(h) (2006).

the District of Columbia for a share of the costs of the transition including the treatment costs for specific patients and the cost to repair and renovate the Hospital. Federal funds were specifically appropriated for these purposes along with the authority given to HHS to transfer these funds to the District. When the United States failed to transfer payment for treatment and repair costs, the District brought suit in the Court of Federal Claims. Initially, the court acknowledged "that not all statutes which provide an economic benefit are compensation mandating,"[81] but quickly ignored the distinction when it classified a statutory mandate "to pay the District" as *compensation* mandating. Although the court retained jurisdiction because it found that its forum qualified as an "adequate remedy," the court did not squarely characterize the relief sought as being either damages *or* restitution. Rather, the monetary judgment sought was merely described as "reimbursement." One aspect of the case, however, strongly suggests that the court did not consider "reimbursement" the equivalent of damages. In addition to its claim that the federal government wrongfully failed to transfer money for repairs, the plaintiff sought escalation costs for inflation, which the court denied. The court recognized this claim for what it was: a claim for damages to compensate the plaintiff for injury resulting from the delay in payment.

In *Bank of New Hampshire v. United States*,[82] the confusion over the classification of monetary relief is even more apparent. There, the plaintiff brought an unjust enrichment claim against the United States seeking return of monies that a debtor paid to the IRS to satisfy a tax lien, which the plaintiff claimed was properly the subject of a security agreement. The court held that *Bowen* did not permit a waiver of sovereign immunity and relied instead on *Blue Fox* finding that "the Bank's unjust enrichment claim . . . is plainly one for monetary damages, as compensation for the loss it sustained when [the debtor] defaulted on its loan."[83] Like *Blue Fox*, the court may have correctly intuited that the plaintiff's unjust enrichment claim would fail in any event; however, to characterize the remedy for an unjust enrichment action as "damages" demonstrates a fundamental misunderstanding of an unjust enrichment claim. On the merits, because the IRS was itself owed money from the debtor, the plaintiff probably could not have established that the IRS was unjustly enriched. Regardless, the

81. *District of Columbia*, 67 Fed. Cl. at 303 (citing Bowen v. Massachusetts, 487 U.S. 897, 905 n.42 (1988)).
82. 115 F. Supp. 2d 214 (D.N.H. 2000).
83. *Id.* at 220.

plaintiff sought the transfer of monies it claimed were improperly diverted from the reach of its secured interest—it was not seeking redress for an injury, but restoration of a benefit or restitution.

The *Bowen* characterization of money as a "specific remedy" was acknowledged in *Bautista-Perez v. Mukasey*, but did not provide a particularly helpful basis for the court's resolution of the plaintiffs' claims for relief.[84] The plaintiffs challenged Department of Homeland Security regulations that authorized collection of registration fees required for aliens in the United States to gain "Temporary Protective Status."[85] The plaintiffs sought a refund of fees that they claimed were in excess of the $50 amount authorized by the Immigration Act of 1990.[86] The court rejected the plaintiffs' claim that the relief requested was a claim for "specific equitable relief" (albeit money) under *Bowen*.[87] Rather, the court described the plaintiffs' claim as an "illegal exaction," which may be maintained when "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation."[88] An exaction claim is the quintessential example of restitution: an involuntary overpayment is restored to the party from whom it was obtained. Yet the court in *Bautista-Perez* never once described the overpayment as restitution. Indeed, the court explicitly refused to specifically characterize the relief sought: "Plaintiffs argue at length [about] questions that would require the Court to make fine distinctions about the nature of the Plaintiffs' claims . . . . But because the Court has jurisdiction no matter how the claims are characterized, the Court need not reach these issues."[89]

By contrast, in *Fletcher v. United States* the Tenth Circuit adopted the *Bowen* concept of money as "specific relief" wholesale.[90] The plaintiffs were descendants of the Osage Indian Tribe who challenged Bureau of Indian Affairs (BIA) regulations that diminished their individual mining interests protected under

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84. No. C 07-4192 TEH, 2008 WL 314486 (N.D. Cal. Feb. 4, 2008).
85. *Id.*
86. *Id.* at *2–3.
87. *Id.* at *4.
88. *Id.* at *4–5 (citations omitted). The court concluded that it could retain jurisdiction, because the "Little Tucker Act" gives concurrent jurisdiction to the district court for non-tort claims involving less than $10,000, citing 28 U.S.C. § 1346(a)(2) (2006).
89. *Bautista-Perez*, 2008 WL 314486, at *6 n.4.
90. 160 F. App'x. 792 (10th Cir. 2005).

the Osage Allotment Act of 1906.[91] Characterizing the BIA's action as a breach of trust and an unconstitutional taking, the court agreed with the plaintiffs' claim that the defendants failure to perform the statutory duty to pay them money, specifically royalties from oil and gas production, was not for "money damages;" in this way, the district court's jurisdiction under the APA was permitted.[92] But again, the plaintiffs' claim would have been more accurately characterized as restitution rather than as "specific relief." The BIA regulations resulted in the government's unjustified retention of royalties, which the court was asked to restore to the plaintiffs. Though this would not have changed the result in the case, it would have served to help lift the jurisprudence out of the morass that results from calling restitution an unspecified type of specific relief.

Several cases have rejected an alternative approach acknowledged in the *Bowen* analysis: whether the Court has the power to award the relief depends on whether the payment of money is "a mere by-product" or incidental to the court's primary equitable function. In *United States v. Hall*, for example, a criminal defendant made a motion for return of unlawfully seized property under the Federal Rule of Criminal Procedure 41(e);[93] however, since the government was no longer in possession of the property, the defendant sought "money damages in lieu of the missing property."[94] The court noted that Rule 41(e) proceedings are "equitable in nature" and acknowledged its inherent power to afford adequate equitable relief by awarding "money damages" when the return of the property is no longer possible.[95] Despite the government's failure to raise a sovereign immunity defense to the defendant's motion, however, the court rejected the suggestion that *Bowen* would permit an equitable award of incidental monetary relief without an explicit waiver of sovereign immunity.[96] Citing instead to *Blue Fox* as controlling authority, the court held that the substitute of money for return of the property was monetary

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91. *Id.*

92. *Id.* Additionally, because plaintiffs sought an order directing the defendants to comply with the requirements of the 1906 Act from the date of the filing of the complaint in this case, the court held that "the prospective nature of the relief sought by the plaintiffs further supports their argument that they have not sought 'money damages.'" *Id.* at 797.

93. Rule 41 contains detailed provisions governing the issuance, contents, execution, and return of search warrants in federal criminal cases. Subsection (e) allows for an aggrieved person to move for return of property. FED R. CIV. P. 41.

94. 269 F.3d 940 (8th Cir. 2001).

95. *Id.* at 942.

96. *Id.*at 942–43.

compensation and not specific relief for purposes of sovereign immunity.[97]

Blue Fox does not extend too comfortably to these situations. In *Blue Fox*, the Supreme Court held that an equitable lien was a tool to secure a money judgment and thus cannot be used to circumvent Court of Claims jurisdiction. The issue in *Hall* and similar cases[98] illustrates a completely different but common scenario that arises in equitable proceedings: the equitable "clean-up" of a claim.[99] Where equitable relief would not be complete without an incidental monetary award, equity courts may order incidental monetary relief.[100] Alternatively, where equitable relief is no longer possible, equity courts have jurisdiction to award monetary relief as a substitute for the equitable relief.[101] The issue that typically arises in these cases is whether or not the court may award a monetary substitute for equitable relief without providing the right to jury trial.[102] *Blue Fox* did not speak to this issue, nor

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97. For a similar result that did *not* rest on *Blue Fox*, see Leveris v. England, 249 F. Supp. 2d 1 (D. Me. 2003). The plaintiff, a commissioned ensign in the United States Naval Reserve, challenged his dishonorable discharge from the Navy and sought reinstatement with back pay. *Id.* Finding the back pay claim was a claim for damages, the court refused to treat the claim as "incidental" to the equitable claim for reinstatement and held that the federal district court was without jurisdiction to hear the claim. *Id.* See *infra* notes 113–28 for further elaboration of the issue of equating back pay claims with claims for damages.

98. *See also* United States v. Chambers, 92 F. Supp. 2d 396 (D.N.J. 2000) (arriving at the same conclusion).

99. DOBBS, *supra* note 49, § 2.6(4), at 117–24. An equity court asserts "clean-up" jurisdiction in order to decide all of the issues presented in a case, even if that includes legal issues. If the court finds the essence of case to be equitable, and the legal and equitable claims ancillary, then the entire case is decided by a judge and not a jury.

100. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir. 1971) (citing to FED. R. CIV. P. 54(c)); Wells v. Schmidt, 80 F.R.D. 463, 465–66 (W.D. Wis. 1978); 3 BARRON & HORTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1194 (rev. ed. 1958); 6 MOORE'S FEDERAL PRACTICE 54–62 (2d ed. 1966). *See also* Buttron v. Sheahan, No. 00CV4451, 2001 WL 111028 (N.D. Ill. Feb. 2, 2001).

101. *See* Tull v. United States, 481 U.S. 412, 424–25 (1987); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 470–73 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

102. *Compare* Vineyard v. Ford Motor Co., 703 F. Supp. 40 (E.D. Mich. 1988) (holding that a jury must be empanelled) *with* Entergy Ark., Inc. v. Nebraska, 358 F.3d 528 (8th Cir. 2004) (holding that defendants did not have right to jury trial under Seventh Amendment); Chrysler Workers Ass'n v. Chrysler Corp., 663 F. Supp. 1134 (N.D. Ohio 1986) (holding that the court may hear the case without a jury); *and* State v. Irving Oil Corp., 955 A.2d 1098 (Vt. 2008) (holding that the State's claims for money were either incidental to or intertwined with its equitable claims, and thus the right to a jury trial did not attach).

did it address equitable clean-up as it might affect a sovereign immunity challenge.

Some courts, while recognizing *Bowen's* use of "specific relief" to characterize monetary claims, have nonetheless made the APA versus Tucker Act determination without conflagrating a claim for damages with restitution. For example, in *Cobell v. Kempthorne*, the plaintiffs, beneficiaries of individual Indian money (IIM) trust accounts, brought a class action against the United States alleging that the Secretaries of Interior and Treasury breached their fiduciary duties by mismanaging the accounts.[103] Holding that the plaintiffs were entitled to an accounting of funds, the court recognized that the plaintiffs were seeking restitution and not damages: "Plaintiffs are aware of the jurisdictional wire they walk, and they carefully do not seek compensation for the *accounting* they have not received. Instead, they demand the restitution of monies collected for their benefit that the trustee failed to distribute to them or to post to their IIM accounts."[104] Indeed, the court explicitly distinguished claims that might have constituted *damages* from the restitution sought in this case.[105] Without confusing damages for restitution, the court nonetheless rejected the notion that *any* remedy classifiable as restitution or disgorgement comes within the sovereign immunity under the APA.[106]

In *Holly Sugar Corp. v. Veneman*, the plaintiffs challenged a United States Department of Agriculture (USDA) assessment of interest on the repayment of certain farm loans claiming that the interest rate violated a statutory provision, which limited the amount of interest that could be exacted for the loans.[107] The plaintiffs sought restitution of the excessive interest that had been

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103. 569 F. Supp. 2d 223 (D.D.C. 2008).

104. *Id.* at 242.

105. For example, such claims would include claims for income never collected, assets sold or leased below market, assets mismanaged, lost or stolen funds, failure to enforce lease terms, and money not paid on direct contracts. *Id.* at 226 n.1.

106. *Id.* at 243–44. The court used the following "test" to decide the ultimate question of where jurisdiction for the restitution sought in this case—under the APA or the Tucker Act—should properly lie: "A helpful mnemonic for the rule of *Bowen* is to consider whether payment of money was to remedy a wrong, or whether non-payment *was* the wrong. It is the latter case—of continuing nonpayment in violation of the law—that can properly be reviewed under the APA's waiver of immunity." *Id.* at 247. Again, it is beyond the scope of this Article to examine the efficacy of this test.

107. 355 F. Supp. 2d 181 (D.D.C. 2005), *rev'd on other grounds*, 437 F.3d 1210 (D.C. Cir. 2006).

collected.[108] The court agreed that the remedy at issue was for restitution.[109] A claim for "reimbursement" of the additional interest charged in violation of the statute, the court held, was not a claim to recover money damages.[110] Unfortunately, the court characterized restitution an exclusively equitable remedy, thus concluding that because the Court of Federal Claims lacked the general equitable powers of the district court, it was "not a forum that [could] provide an adequate remedy to the plaintiffs."[111] This conclusion, as has been previously discussed, was erroneous—restitution is not *exclusively* an equitable remedy. The proper inquiry was whether or not the Court of Federal Claims *should* hear the restitution claim, not whether it *could* hear it.[112]

The foregoing review of the *Bowen* legacy in the contest between federal district courts and Court of Federal Claims jurisdiction suggests that the characterization of monetary claims as "specific" causes more harm than good. The *Bowen* classification of a monetary claim as "specific" is only accurate when monetary relief is *incidental* to an equitable claim for injunctive or declaratory relief. When equitable relief is not involved, courts should focus on whether the monetary claim is compensatory or restorative in nature to first determine whether the remedy sought is damages or restitution. Once the court determines that the claim involves damages, then the only impediment to granting jurisdiction to the Court of Federal Claims is an issue that neither *Bowen* nor any other court has specifically addressed: whether the "equitable clean-up" doctrine permits a federal court to retain jurisdiction and *substitute* a damage award when equitable relief is unavailable.[113] Once a court correctly identifies the monetary claim as restitution, Court of Claims jurisdiction is neither precluded nor mandated. The inquiry, when restitution is involved, should properly focus on whether or not there is an adequate remedy in the Court of Federal Claims or another specific forum for that matter, or whether the case is

108. *Id.*
109. *Id.*
110. *Id.* at 191 n.8.
111. *Id.* at 190.
112. Inasmuch as the court applied the test enumerated in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, to conclude that the case was not appropriate for Court of Claims review, the limited view the court took of restitution had little impact beyond adding confusion to the jurisprudence. 967 F.2d 598 (D.C. Cir. 1992).
113. This determination has not seen the light of day in large part because courts continue to confuse restitution and damages. Sound analytical arguments support the federal district court's retention of jurisdiction in these cases.

appropriate for federal district court jurisdiction.[114] The attempt to categorize restitution as a "specific remedy" is not merely an unnecessary distraction; it contributes to an enduring confusion over the nature of restitution itself.

B. Whether or Not There Is Liability for Relief Sought

In the cases that follow, *Bowen* is cited or discussed with diminishing frequency. Some cases have focused on definitions for monetary claims that were never discussed in *Bowen*. Whether the requested monetary remedy is available, however, rests on several of the themes that *Bowen* introduced into the jurisprudence. Monetary liability in claims for back pay, front pay, and indemnification, to name a few, is described as: damages or restitution; equitable or legal; or, substitutionary or specific relief, without much disciplined consistency, and with little regard for *Bowen* and its progeny.

Classification of "back pay" is a classic example of judicial inconstancy. Back pay, as an incident to reinstatement, has been regarded as part of an equitable remedy.[115] But when reinstatement is not an option, courts have disagreed as to whether back pay remains an equitable remedy or has become a legal remedy.[116]

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114. *See, e.g.*, Hirschberg v. Commodity Futures Trading Comm'n, No. 02 C 6483, 2003 WL 22019310 (N.D. Ill. Aug. 27, 2003) (holding that the Commodity Futures Trading Commission provided an adequate forum for a commodities floor broker's appeal of an agency refusal to restore his registration with the Chicago Mercantile Exchange).

115. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 571 (1990).

116. Cases finding back pay equitable include: Equal Employ. Opp. Comm'n v. Detroit Edison Co., 515 F.2d 301, 308 (6th Cir. 1975) ("The relief provisions of Title VII . . . do not specifically authorize an award of either compensatory or punitive damages for discrimination in employment practices. Back pay in Title VII cases is considered a form of restitution, not an award of damages."); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971) ("The back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination . . . . The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury."); Harkless v. Sweeney Indep. Sch. District, 427 F.2d 319, 324 (5th Cir. 1970) ("The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement."). Cases finding back pay legal include: Eichorn v.

Equally inconsistent has been the characterization of back pay as damages or as restitution.[117] When a court's jurisdiction is statutorily limited to equitable claims *only*, or when a statute has authorized awards for damages *only*, these issues take on crucial importance.

Harris v. Finch, Pruyn & Co., Inc. provides a recent illustration of judicial inconstancy in back pay cases when reinstatement is not available.[118] Fourteen former employees brought claims against their employer for breach of fiduciary duty under ERISA.[119] The plaintiffs sought to rescind resignations and retirements that were allegedly based on the employer's misrepresentations regarding access to the employees' retirement accounts.[120] In addition to rescission and reinstatement, the employees sought back pay and lost benefits.[121] Having found that reinstatement was unavailable, the court was left with the question of whether back pay was available under ERISA, which, as has been previously noted, precludes legal remedies.[122] The court engaged in an extensive review of judicial treatment of back pay and concluded that back pay in this case was "compensatory in purpose and effect and,

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AT&T Corp., 484 F.3d 644, 654–55 (3d Cir. 2007) (Plaintiffs sought a decree which was "in essence, a request for compensatory damages merely framed as an 'equitable' injunction"); Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1254 (10th Cir. 2004) ("Plaintiffs' freestanding claim for backpay is thus in the nature of compensatory damages. At common law, the award of compensatory damages was peculiarly within the province of the law courts. Plaintiffs' backpay claim is therefore appropriately classified as legal relief."); Michaelis v. Deluxe Fin. Servs., Inc., 446 F. Supp. 2d 1227, 1231 (D. Kan. 2006) (relying on the reasoning in *Millsap*, the court states "that ordinarily back pay, as a legal remedy, is unavailable under ERISA Section 502(a)(3) unless plaintiff can satisfy the limited exception for relief that is 'incidental to' a claim for reinstatement." Here, the court found that plaintiff's claim for back pay and lost benefits were not incidental to or intertwined with plaintiff's claim for reinstatement.).

117. *Compare Chauffeurs, Teamsters & Helpers*, 494 U.S. 558 (back pay is restitution); Tull v. United States, 481 U.S. 412 (1987) (same); Curtis v. Loether, 415 U.S. 189 (1974) (same); Schwartz v. Gregori, 45 F.3d 1017 (6th Cir. 1995) (same) *with* Crocker v. Piedmont Aviation, 49 F.3d 735 (D.C. Cir. 1995) (back pay is damages); Waldrop v. S. Co. Servs., 24 F.3d 152 (11th Cir. 1994) (same); Hubbard v. Adm'r, Envtl. Prot. Agency, 982 F.2d 531 (D.D.C. 1992) (same). *See also* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1628–35 (2002).

118. No. 1:05-CV-951 (FJS/RFT), 2008 WL 4155638 (N.D.N.Y Aug. 26, 2008).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id. See supra* notes 32–34 and accompanying text.

therefore, legal in nature."[123] At least implicitly recognizing that back pay would be compensable under ERISA if the back pay was "incidental" to a reinstatement claim, the court rejected the suggestion that back pay should be considered "as compensatory damages typically allowed as incidental to equitable relief" for several reasons.[124] First, the court examined the relative values of the legal and equitable relief requested and concluded that because the plaintiffs sought back pay for multiple years during which they did not work, the extent of the monetary relief could not be considered incidental to the reinstatement and rescission claims.[125] Second, the court concluded that because back pay was not part of a "prospective" injunctive remedy—"back pay and lost benefits address past losses while reinstatement addresses future losses and the parties' continuing relationship"—it was not incidental to the reinstatement remedy.[126] Additionally, the court found that "unlike the damages incident to specific performance, back pay and lost benefits can exist independently from reinstatement."[127] Thus, the court granted the defendants' motion for summary judgment, finding that relief was unavailable under ERISA.[128]

Since restitution focuses on the defendant's unjustified gain, back pay would rarely seem to be restitutionary in nature. Characterizing back pay as restitution rests on the assumption that the employer has received the discharged person's labor from someone else while saving the salary costs that would have been spent on the discharged employee. In most instances, this is not the

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123. *Harris*, 2008 WL 4155638 at *7.

> There is a circuit split on the issue of back pay and lost benefits in ERISA § 503(a)(3) cases. The Third and Tenth Circuits examine back pay and lost benefits separately from rescission and reinstatement. They have held that, unlike rescission and reinstatement, back pay and lost benefits are legal remedies because they are measured according to the employee's loss rather than the employer's gain. Such make-whole remedies are compensatory, and, therefore, not traditionally equitable. Additionally, although the Third Circuit did not have occasion to consider the issue, the Tenth Circuit has held there is an exception to this general rule when the monetary relief is incidental or intertwined with reinstatement . . . . The Fourth Circuit, on the other hand, conflates the issues of rescission and reinstatement with lost benefits. Under this line of cases, reinstatement of benefits does not simply amount to a return to an employee's pre-election position; it amounts to compensation for unearned benefits that would have been earned over the years.

Id. at *6 (citations omitted).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at *7.

case. Usually, the work has gone undone, or the employer has paid someone else to do it. Thus, the employer has not been enriched.[129] The *Harris* court and others have pointed out that back pay, no matter the benefits the employer might reap from not having to pay the discharged employee, is more properly characterized as a damage remedy—designed to "make up for" the worker's lost wages—whether it is an incidental accompaniment to reinstatement or a substitute for reinstatement.[130] The court's conclusion that back pay stops being part of the equitable remedy when it is not tied to reinstatement ignores the equitable clean-up doctrine previously discussed. Equity can substitute back pay for the injunctive remedy of reinstatement when the latter is unavailable. The court's conclusion that ERISA precluded relief in this case misunderstands the nature of the clean-up doctrine.

By contrast, when the issue of front pay is considered, courts characterize the remedy more consistently. "Front pay,"[131] although seldom defined, is generally described as an equitable remedy.[132] Without exception, front pay is recognized as a compensatory *substitute* for reinstatement. Indeed, in *Carpenter v. Tyler Independent School District*, where the court ordered front pay for a teacher who was discharged in violation of the Uniformed Services Employment and Reemployment Rights Act,

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129. *See* Waldrop v. S. Co. Servs., 24 F.3d 152, 154–59 (11th Cir. 1994); Dana M. Muir, *ERISA Remedies: Chimera or Congressional Compromise?*, 81 IOWA L. REV. 1, 33 (1995).

130. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990); Millsap v. McDonnell Douglas Corp., 368 F.3d 1246 (10th Cir. 2004); Hubbard v. Adm'r, Envtl. Prot. Agency, 982 F.2d 531 (D.C. Cir. 1992); Anderson v. Consol. Rail Corp., No. Civ. A 98-6043, 2000 WL 1622863 (E.D. Pa. Oct. 25, 2000).

131. Pollard v. E.I. Du Pont de Nemours & Co., 532 U.S. 843, 846 (2001). "Front pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement." *Id.*

132. Front pay has been described as an equitable remedy in civil rights cases. *See, e.g.*, U.S. Equal Employ. Oppor. Comm'n v. W & O, Inc., 213 F.3d 600 (11th Cir. 2000); Thomas v. Istar Fin., Inc., 508 F. Supp. 2d 252 (S.D.N.Y. 2007); Kennedy v. Ala. State Bd. of Educ., 78 F. Supp. 2d 1246 (M.D. Ala. 2000); Prine v. Sioux City Cmty. Sch. District, 95 F. Supp. 2d 1005 (N.D. Iowa 2000); Fernandez v. N. Shore Orthopedic Surgery & Sports Med., 79 F. Supp. 2d 197 (E.D.N.Y. 2000). For an example of a case arising under the Family and Medical Leave Act, codified at 29 U.S.C. §§ 2600–2654 (2006), see Bordeau v. Saginaw Control & Eng'g, Inc., 477 F. Supp. 2d 797 (E.D. Mich. 2007). For cases arising under the Uniformed Services Employment and Reemployment Act, codified at 38 U.S.C. § 4301–4335 (2006), see Maher v. City of Chicago, 463 F. Supp. 2d 837 (N.D. Ill. 2006); Carpenter v. Tyler Indep. Sch. District, 429 F. Supp. 2d 848 (E.D. Tex. 2006). *But see Harris*, 2008 WL 4057125 at *8 (holding that front pay was unavailable under ERISA because front pay "could not be incidental to equitable relief").

the court insisted that: "A court will consider an award of front pay or other monetary damages *only* if it concludes that reinstatement is inappropriate."[133]

The principal issue in most front pay cases is whether or not the matter should be tried to a jury. Specifically, while most courts agree that the judge should decide whether front pay is appropriate,[134] they disagree on whether a judge or a jury should decide the *amount* of front pay.[135] Few, if any, acknowledge the relevance of the clean-up doctrine to resolving the dispute.[136]

In both back pay and front pay claims, the compensatory nature of these remedies trumps any restorative aspect of these claims. As was stated previously, an employer's "gain" from an unlawful discharge is theoretical at best in most cases. Whatever benefits the employer has reaped by a wrongful discharge, the focus in these cases remained on the employee's losses and how to make up for the injury suffered. Any excursion into discussions of whether these remedies are restitutionary is misplaced and unnecessary.

The remaining cases under consideration in this Article involve a party's bid for indemnification for monetary liability. What is striking in each context is how the monetary liability is characterized and how that characterization determines whether indemnification will be allowed. The first examples deal with enforcement of insurance contracts. In each case, an insured sought indemnification from its insurance company, which denied coverage because of a policy limitation to coverage for "damages" only.

In *Johnson Controls, Inc. v. Employers Insurance of Wausau*,[137] the context involved indemnification for environmental "response costs" for which the insured was liable under the Environmental Response, Compensation, and Liability Act (CERCLA).[138] Under CERCLA, a property owner can be held monetarily liable for the costs of remediation of a contaminated site.[139] These response costs can include not merely restoring property to its original, uncontaminated condition, but also complying with regulatory

133. 429 F. Supp. 2d 848, 852 (E.D. Tex. 2006) (emphasis added).

134. *See Thomas*, 508 F. Supp. 2d 252.

135. *Compare Maher*, 463 F. Supp. 2d 837 (holding that a jury should determine the amount of front pay) *with Kennedy*, 78 F. Supp. 2d 1246 (denying the right to a jury trial to determine the amount of front pay). *See also* cases collected in Bordeau v. Saginaw Control & Eng'g, Inc., 477 F. Supp. 2d 797 (E.D. Mich. 2007).

136. It is beyond the scope of this Article to engage in an analysis of the various approaches courts take in resolving the jury trial issue in "clean-up" cases.

137. 665 N.W.2d 257 (Wis. 2003).

138. 42 U.S.C. §§ 9601–9613 (2006).

139. *Johnson Controls*, 665 N.W.2d at 262–63.

requirements, which are aimed at preventing future environmental problems from occurring.[140] Under CERCLA, the property owner may be enjoined to undertake remediation, or the government may undertake to remediate the property and then sue the property owner for the costs of remediation.[141] Strictly speaking, the remedy the government seeks in that recovery action is restitution: reimbursement of the costs that the property owner "saved" because the government undertook the remediation on the owner's behalf. The insurance policy at issue required indemnification "of all sums which the insured shall become legally obligated to pay as 'damages' because of . . . property damage to which the policy applies."[142] The insurance company argued that monetary liability that resulted from *restitution* was not *damages* as that term should be interpreted under the contract.[143] The company further argued that, to the extent the property owner sought coverage for costs directly undertaken pursuant to an injunction, these costs also did not constitute "damages."[144] The Wisconsin Supreme Court's foray into this issue was not an isolated example.[145] It was not even the

140. *See id.* at 274.
141. 42 U.S.C.§ 9607.
142. *Johnson Controls*, 665 N.W.2d at 270.
143. *Id.*
144. *Id.*
145. From the time of CERCLA's introduction to the present, the issue as to whether "damages" in an insurance contract includes CERCLA clean-up costs has been debated in the courts. For cases finding that "damages" does not include CERCLA clean-up costs, see Bituminous Cas. Corp. v. Tonka Corp., 9 F.3d 51 (8th Cir. 1993); Hays v. Mobil Oil Corp., 930 F.2d 96 (1st Cir. 1991); Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988) (applying South Carolina law); Continental Ins. Co. v. Ne. Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988) (en banc) (applying Missouri law); Md. Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) (applying Maryland law). But for cases findings that "damages" includes CERCLA clean-up costs, see Indep. Petrochem. Corp. v. Aetna Cas. & Surety Co., 944 F.2d 940 (D.C. Cir. 1991) (applying Missouri law); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989) (applying New York law); U.S. Fed. & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988). For a more extensive discussion and list of cases, see Carol A. Crocco, *Liability Insurance Coverage for Violations of Antipollution Laws*, 87 A.L.R. 4TH 444 (1991) (for a state law emphasis); William B. Johnson, *Indemnification or Release Agreement as Covering Liability Under § 107(e) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 139 A.L.R. FED. 123 (1997) (for a federal law emphasis). Overall, the prevailing issues that concern the courts have been dictionary definitions of "damages," the presumed intent of the parties, and the characterizations of the functions of a CGL policy. JEFFREY W. STEMPEL, STEMPEL ON INSURANCE CONTRACTS § 14.21[A] (3d ed. 2008).

first time the Wisconsin Supreme Court had considered the precise issue, except that now it reversed itself.[146]

The court rejected as "overly technical" a definition of damages that excluded an insured's monetary liability for response costs.[147] The court held that an insured's costs of restoring and remediating damaged property, whether the costs were based on remediation efforts by a third party (including the government) or were incurred directly by the insured, are covered "damages" under comprehensive general liability (CGL) policies, provided other policy exclusions do not apply.[148] The court explicitly rejected the notion that the insured's monetary liability for restitution from the government's clean-up should be treated differently from the insured's own remediation costs:

> This distinction is arbitrary. If we were to honor this distinction, coverage for CERCLA response cost liability would turn on the fortuity of whether the insured had ever been contacted in some manner by the government regarding the remediation of a site for which the insured was a potentially responsible party. In short, government contact would mean loss of coverage . . . . This is not what a reasonable insured would expect. It makes little sense in determining whether "damages" have occurred under the policy whether the party bringing a legal action for *contribution* to remediate damaged property is a governmental agency or some other entity. The nature of the relief sought against an insured for damage that it caused should not change based on the identity of the claimant in a CERCLA cost recovery action.[149]

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146. Edgerton v. Gen. Cas. Co. of Wis., 517 N.W.2d 463 (Wis. 1994), *overruled by Johnson Controls*, 665 N.W.2d 257.

147. *Johnson Controls*, 665 N.W.2d at 281.

148. *Id.* at 264. Insurance companies have re-drafted comprehensive general liability (CGL) policies to explicitly exclude CERCLA response costs; however, numerous cases involve the contaminating event(s) that arose prior to these CGL amendments. This is particularly problematic since the existence of hazardous wastes on a property may go undetected for many years. Now, "billions of dollars continue to hinge on litigation over the meaning of 'damages' under the old CGL." STEMPEL, *supra* note 145, § 14.12[A]–[B].

149. *Johnson Controls*, 665 N.W.2d at 278 (emphasis added). The court quotes DOBBS, *supra* note 49, § 5.2(5), at 727, for further support:

> [I]t is important to characterize a liability as restitutionary only if restitution differs in amount from damages or if there is no substantive basis for recovery as damages. Under [CERCLA], there is a substantive basis for recovery of "response costs," which are not otherwise characterized by the statute. The amount to be recovered does not differ

In addition, the court rejected the notion that the term "damages" does not encompass the cost of complying with an injunctive decree as too broadly stated and overly restrictive: "[I]f the *purpose* of a remedy is to compensate a party for some loss, the purpose of the remedy overshadows the *form* of the action."[150] To the extent that compliance required by an injunction involves *reparative* costs—as distinguished from efforts exclusively confined to preventing future injuries—these costs were considered "legal recompense for injuries sustained."[151] Finding there was both a prospective and a remedial element to an insured's response cost liability, and noting CERCLA proceedings seek the costs of repairing damaged property and not merely the cost of conforming one's future conduct, the court stated, "the nature of the relief is, at least in part, compensatory."[152] The court made this holding even while acknowledging that the CERCLA goal of "the protection of human health and welfare is a future benefit from remediating damaged property, shifting the focus from remediating past damages to preventing future injury from contamination does not change the remedial nature of CERCLA response costs for *completed* past actions."[153] Thus, the court construed the term "damages" in the insurance policy to include CERCLA response costs.

Outside the environmental response costs context, there has been little support for the notion that costs for complying with an injunction should be considered "damages" for indemnification purposes. Unlike the CERCLA cases, these cases do not involve a debate over whether the relief sought is damages versus restitution. Rather, the debate focuses on whether the relief sought should be considered *damages* at all.

For example, in *In re Consolidated Objections to Tax Levies of School District No. 205*, a school district sought indemnification

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> according to the characterization as restitution or damages. Attempts to characterize the recovery of response costs as either restitution or damages do not seem helpful. Usually the attempt is made only to determine whether an insurance policy covers liability for release of hazardous substance. It is doubtful that the term "damages" in an insurance policy carries with it any such inchoate set of distinctions and the question whether response costs are covered by the policy probably cannot turn on proposed definitions of those costs as restitution without distorting the remedial concepts involved.

Johnson Controls, 665 N.W.2d at 276.

150. *Id.* at 272.
151. *Id.* at 274.
152. *Id.*
153. *Id.* at 275.

for the cost of remedial measures incurred to comply with a federal court desegregation order by seeking to levy additional property taxes under a state Tort Immunity Act.[154] The Illinois Supreme Court upheld a challenge to the levies holding that the Tort Immunity Act, which empowered the local public entity "to pay any tort judgment or settlement for compensatory damages for which it . . . is liable in the manner provided in this Article," did not permit indemnification for the compliance costs ordered in the desegregation case.[155] The court resorted to a dictionary definition for "compensatory damages" to construe the Act as allowing for indemnification for a monetary award "paid to a person as compensation for a loss or injury."[156] Since the federal court litigation did not result in an award to any injured student, the court reasoned, the costs to comply with the desegregation order did not come within the taxing power authorized by the Tort Immunity Act.[157] The court explicitly rejected the application of an environmental CERCLA case, which, for indemnification purposes, held that response costs constituted damages.[158] The dissent argued that the majority erroneously failed to recognize the remedial, and thus compensatory, nature of the desegregation order.[159] The order was not purely designed to prevent prospective future injury, but was designed to repair the past injuries done to minority students who were denied educational opportunity.[160]

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154. 739 N.E.2d 508 (Ill. 2000).

155. *Id.* at 508.

156. *Id.* at 513.

157. *In re* Consolidated Objections to Tax Levies, 739 N.E.2d 508 (Ill. 2000).

158. *Id.* (citing Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204 (Ill. 1992)).

159. *Id.* (Freeman, J., dissenting).

160. *Id. See also* Commonwealth Condo. Trust v. Aetna Cas. & Surety Co., 742 N.E.2d 76 (Mass. 2001). There, a trust sought indemnification under its directors and officers general liability policy for the legal fees and costs associated with defending against an injunction claim brought by one of the unit's owners. The trust contended these costs fell within the policy's coverage for loss incurred by suits for "damages." The court disagreed, holding that "damages" unambiguously "expresses in dollars and cents the plaintiff's injury." *Id.* at 79. The court distinguished without analysis its own environmental response cost case, *Hazen Paper Co. v. U.S. Fidelity & Guaranty Co.*, 555 N.E.2d 576 (Mass. 1990), stating that those "damages" are "the expenses incurred in cleaning up existing conditions, whereas expenses incurred in complying with an injunction against future activities are not 'damages.'" *Condo Trust*, 742 N.E.2d at 79. Thus, the trust was unable to recover the attorneys' costs and fees for defending the injunction lawsuit from the insurance company.

The relevance to the environmental response cost cases in this instance is questionable. Costs to defend an injunction have no remedial consequence,

The cases that deny that compliance costs should be indemnified because they are not "damages" ignore several long-resolved issues regarding injunctive relief. First, a defendant who incurs compliance costs under an improvidently granted injunction can be indemnified under an injunction bond. These costs are, without debate, considered "damages."[161] Second, courts have long recognized that injunctive relief is not exclusively prospective. Granted, injunctions are invariably *preventive* in that they seek to prevent a wrongful act from causing harm in the future. Some injunctions, however, are *reparative* in that they seek to prevent future harm by requiring the defendant to correct or repair a past wrong.[162] Third, incidental expenses considered necessary to provide the *plaintiff* compete relief under an injunctive decree are, as previously discussed, not denied because they are not considered "damages."[163] The costs that defendants, like plaintiffs, incur to correct completed past actions should be compensable under an insurance policy, a statute allowing for reimbursement through an assessment procedure, or an injunction bond (in the event the injunction proves to have been improvidently granted).

V. CONCLUSION

Several observations and recommendations emerge from the foregoing examination. First, *Bowen*'s classification of monetary relief as a "specific remedy" has outlived its usefulness. The traditional classification of monetary relief as either damages or restitution, with the further recognition that restitution is not *necessarily* an equitable remedy, provides more meaningful guidance for judicial resolution of jurisdictional questions. In the jurisdictional contest between the federal district courts and the United States Court of Federal Claims, recognizing that either

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reparative or prospective, as regards the injury that the injunction seeks to prevent. The distinction is clearly acknowledged when a defendant seeks recovery for *damages* under a bond for a wrongfully issued injunction. *See infra* note 162. Courts readily regard compliance costs and losses as compensable damages, but rarely allow recovery for the legal expenses for defending the injunction. *See, e.g.*, Pro Edge L.P. v. Gue, 451 F. Supp. 2d 1026 (8th Cir. 2006) (where the Court allowed the defendant to recover lost profits suffered in compliance with an injunction, but denied attorney fees, under the injunction bond).

161. DOBBS, *supra* note 49, § 2.11(3), at 196–205.

162. *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 8–12 (1978); Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1073–75 (1979).

163. *See supra* notes 69–71 and accompanying text.

court may hear claims for legal restitution will help courts more properly focus on which forum is *appropriate* in a given context. Beyond the APA versus Tucker Act conflict, however, the fundamental *compensatory* function of monetary relief needs to be better appreciated. Debates over whether back pay, environmental response costs, or injunction compliance costs are “damages” can and should be resolved by examining whether the monetary relief sought is reparative of a prior action. Finally, courts need to embrace and apply the historic equitable clean-up doctrine when faced with a jurisdictional challenge to awarding incidental monetary relief as part of, or as a substitute for, an injunctive decree.