

Listening Before Intervening: A Restitutionary Framework for Ethical Financial Service Design

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Abstract

This article reframes restitution as a proactive framework for financial service design rather than a mechanism applied only after harm occurs. While traditional restitution operates *ex post* to address unjust enrichment arising from mistake and related doctrines, modern consumer financial markets pose a different challenge. In contexts shaped by information asymmetry, behavioral bias, and product complexity, enrichment often results from predictable patterns of consumer misunderstanding rather than isolated transactional errors.

Drawing on behavioral economics and financial literacy research, the paper argues that financial institutions may derive unjust gains when operating within conditions of bounded rationality and limited financial capability. It advances a “listening-based” approach, developed through a bank–university collaboration, in which consumer data identifies misunderstanding prior to product deployment, repositioning restitution as an *ex ante* governance tool. Doctrinally, the article highlights the limits of mistake and the voluntary payment rule and proposes recognizing foreseeable misunderstanding as a basis for unjust enrichment, aligning restitution with contemporary market realities.

Keywords: unjust enrichment, restitution, voluntary payment rule, unjust factors, financial services

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Introduction

This article reconceptualizes restitution not merely as a remedial doctrine, but as a progressive design principle in financial service provision. Traditional restitutionary frameworks operate *ex post*, correcting unjust enrichment after value has been transferred under mistake, failure of basis, or other recognized unjust factors (AlMajed, 2025). However, in contemporary consumer financial markets characterized by information asymmetry, behavioral biases, and complex product design, enrichment frequently arises not from discrete transactional error, but from systematically predictable consumer misunderstanding (Jaiswal, 2023; Salah, 2025).

Drawing on insights from behavioral economics and financial literacy research, this paper argues that financial institutions may be unjustly enriched where they knowingly benefit from conditions of bounded rationality and low financial capability (Agunsoye & James, 2024; Norbu, & Jena, 2022). It introduces a “listening-based” model

of financial service design, grounded in a recent bank–university partnership, in which consumer reported data is used to identify areas of misunderstanding before products are deployed or marketed (Chadwick et al., 2026). This model shifts restitution from an ex post corrective mechanism to an ex ante governance tool that reduces the likelihood of unjust enrichment arising in the first place (Financial Stability Board, 2018; Syed, 2024).

Doctrinally, the paper examines the limits of existing unjust factors, particularly mistake and the voluntary payment rule in addressing enrichment derived from informational and behavioral vulnerabilities (Page & Duus-Otterström, 2023; Selznick, 2025; Zemach, 2023). It proposes an expanded framework in which persistent, foreseeable consumer misunderstanding may function as a qualifying unjust factor, thereby aligning restitutionary principles with modern market realities (Namysłowska, 2025; van Heusden, 2025). The article concludes by outlining the legal and policy implications of embedding restitutionary thinking into financial product design, suggesting that institutions that “listen before intervening” not only enhance consumer outcomes but also mitigate legal and reputational risks associated with unjust enrichment.

I. Literature Review

Financial transactions in modern consumer markets increasingly occur under conditions of complexity, asymmetry, and cognitive constraint (Aharon, 2023; Johnson, et al.; 2024; Sironi, 2023). Nowhere is this more evident than in the domain of personal finance, where individuals routinely engage with credit products, fee structures, and digital banking interfaces that require a level of understanding that many do not possess. A substantial body of research in economics and finance demonstrates that financial literacy gaps are both widespread and persistent, cutting across demographic groups and remaining resistant to traditional educational interventions (Akerlof, 1970; Koskelainen et al.; 2023; Ilugbusi & Adisa, 2024). These gaps are not merely academic concerns; they have material consequences for consumer welfare, shaping borrowing decisions, savings behavior, and exposure to financial risk (Machireddy, J. R., 2023; Khan & Rabbani 2025).

Yet the legal system has been slow to fully grapple with the implications of these conditions. Consumer harm in financial markets frequently arises without the hallmarks of traditional legal wrongdoing (Pappalardo, 2022; Bar-Gill et al., 2023). There is often no fraud, no misrepresentation in the formal sense, and no overt coercion. Instead, harm emerges through a more subtle mechanism: individuals make decisions that appear voluntary and informed, but which are, in reality, influenced by limited understanding, behavioral biases, and the structural design of financial products (Enyiorji & Deloitte 2023; Packin, et al., 2025). Fees are incurred, interest accumulates, and value is transferred, not through deception in the classic sense, but through predictable patterns of misunderstanding (Banerji, et al., 2023).

This phenomenon presents a challenge for private law, and for restitution in particular. The doctrine of unjust enrichment is traditionally concerned with correcting transfers of value that lack a sufficient legal basis (Nadler, 2024). However, its operation is largely retrospective. Courts intervene after enrichment has occurred, asking whether the benefit received by the defendant should be returned to the claimant under established unjust factors such as mistake, failure of basis, or duress (Ching, 2024; Visser & Scott, 2025). While this framework has proven adaptable in many contexts, it remains

oriented toward discrete transactions and identifiable errors, rather than systemic conditions that give rise to repeated and diffuse forms of enrichment.

The limitations of this *ex post* orientation are especially pronounced in consumer finance (Fernández-López, et al., 2024). By the time enrichment is realized, through fees, interest, or other revenue streams, the underlying transactions have often been normalized as part of ordinary market behavior (Machireddy, 2023). Individual losses may be small, claims may be impractical to pursue, and the doctrinal categories available to courts may not readily capture the nature of the harm. As a result, patterns of enrichment that are foreseeable, replicable, and embedded in product design often escape meaningful legal scrutiny.

This article advances a central claim: restitution should not be confined to its traditional role as a remedial doctrine, but should also function as a design principle capable of informing financial service provision *ex ante*. If unjust enrichment is fundamentally concerned with the legitimacy of value transfers, then that inquiry should not begin only after those transfers have occurred (Mitchell, 2022; Swain & Peari 2024). Rather, it should inform how transactions are structured in the first place, particularly in environments where misunderstanding is not accidental, but predictable (Youvan, 2024).

To develop this argument, the article introduces a “listening-based” restitution framework, grounded in the systematic use of consumer-reported data to identify and address areas of misunderstanding prior to product deployment or modification. This approach draws on emerging institutional practices, including collaborations between financial institutions and universities, in which large-scale surveys and segmentation tools are used to assess financial knowledge, confidence, and behavioral tendencies (Koskelainen et al., 2023; Chadwick et al., 2026). By incorporating these insights into product design, institutions can reduce the likelihood that consumer error will generate enrichment, thereby aligning their practices with the underlying principles of restitution.

The contribution of this article is both doctrinal and conceptual. Doctrinally, it builds on existing developments in unjust enrichment law, particularly the expansion of mistake and the flexible approaches adopted in Commonwealth jurisdictions, to argue that persistent, foreseeable misunderstanding should be recognized as a relevant unjust factor. Conceptually, it reframes restitution as part of a broader governance framework, one that operates not only through judicial intervention, but through the design choices of market participants.

In doing so, the article bridges a gap between law and economics, integrating insights from behavioral finance and financial literacy research into the structure of private law analysis (Ingale & Paluri, 2022). It also responds to a broader policy concern: how to ensure that financial markets function not only efficiently, but fairly, in an environment where informational and cognitive disparities are the norm rather than the exception.

The argument proceeds as follows. Section II outlines the doctrinal foundations of unjust enrichment across UK, U.S., and Commonwealth jurisdictions. Section III examines the role of behavioral vulnerability and financial literacy in shaping consumer decision-making. Section IV identifies the limitations of *ex post* restitution in addressing systemic enrichment. Section V introduces the listening-based model of financial service design, and Section VI develops the case for recognizing foreseeable misunderstanding as

an unjust factor. The article concludes by considering the implications for financial institutions, regulators, and the future development of restitution law.

II. Doctrinal Foundations of Restitution and Unjust Enrichment: A Comparative Perspective

Restitution and unjust enrichment occupy a central, though evolving, position within private law (Swain). Across common law jurisdictions, the doctrine is generally structured around a tripartite framework: (1) the defendant has been enriched; (2) the enrichment occurred at the claimant's expense; and (3) the enrichment is unjust (Visser & Scott, 2022). While this structure is widely accepted, its application, particularly the identification of what renders enrichment "unjust" varies across jurisdictions and remains doctrinally contested.

A. The Core Structure: Enrichment, Expense, and Unjust Factors

The modern articulation of unjust enrichment is most clearly expressed in English law and has been influential across Commonwealth jurisdictions. In *Benedetti v Sawiris*, the UK Supreme Court clarified that enrichment is to be assessed by the objective value of the benefit received, rather than the subjective intentions or expectations of the parties. This emphasis on objective valuation is particularly significant in financial contexts, where institutions derive measurable gains, fees, interest, and other revenues irrespective of whether the underlying transaction was fully understood by the consumer.

Similarly, the House of Lords in *Lipkin Gorman v Karpnale Ltd* provided a foundational modern framework, recognizing unjust enrichment as a unifying principle while also acknowledging the role of defenses such as change of position. However, these doctrinal developments largely assume discrete, identifiable transactions, rather than systemic or repeated patterns of enrichment arising from structural conditions such as information asymmetry.

Commonwealth jurisdictions, particularly Canada, have adopted a more flexible and policy-oriented approach. In *Pettkus v Becker*, the Supreme Court of Canada emphasized the equitable foundations of unjust enrichment, allowing courts greater latitude in identifying circumstances where retention of a benefit would be unjust. This flexibility provides an important doctrinal foothold for extending unjust enrichment principles into modern financial contexts characterized by diffuse and recurring transfers of value.

In the United States, the Restatement (Third) of Restitution and Unjust Enrichment similarly adopts a broad and evolving conception of unjust enrichment, defining liability in terms of enrichment that lacks an adequate legal basis. While U.S. courts have historically been more fragmented in their application of restitutionary principles, the Restatement reflects an increasing willingness to treat unjust enrichment as a coherent and adaptable doctrine capable of responding to new economic realities.

B. Mistake and the Limits of Knowledge

A central unjust factor in restitution law is mistake. The early case of *Kelly v Solari* established that payments made under a mistake of fact are recoverable, even where the mistake results from the payer's own negligence. This principle reflects a recognition that enrichment grounded in error may be unjust, regardless of fault.

Subsequent developments have expanded the scope of mistake. In *Deutsche Morgan Grenfell Group plc v IRC*, the House of Lords confirmed that restitution may also

be available for mistakes of law, signaling a broader and more flexible understanding of the doctrine. This evolution demonstrates the capacity of restitution law to adapt to increasingly complex forms of misunderstanding.

Despite this doctrinal expansion, the law continues to conceptualize mistake primarily as a discrete cognitive error; a misapprehension of fact or law at the moment of transaction. It does not readily accommodate forms of misunderstanding that are systematic, predictable, and behaviorally induced, such as those arising from low financial literacy or complex product design. This limitation is particularly significant in consumer financial markets, where misunderstanding is not incidental but structurally embedded.

C. The Voluntary Payment Rule and Its Discontents

The voluntary payment rule presents a further constraint on restitutionary recovery. Traditionally articulated in *Bilbie v Lumley*, the rule provides that money paid voluntarily, with full knowledge of the facts, is not recoverable. The doctrine reflects a strong commitment to transactional finality and personal responsibility.

However, modern refinements have softened the rigidity of this rule. In *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, the court recognized that payments made under a mistake may be recoverable, even where they appear voluntary in form. This shift acknowledges that apparent consent may be undermined by underlying error.

Nevertheless, the voluntary payment rule continues to rest on assumptions that are increasingly untenable in contemporary financial markets; namely, that payers possess sufficient information and cognitive capacity to make fully informed decisions. Where payments are made under conditions of informational asymmetry or behavioral vulnerability, the distinction between voluntary and involuntary transfer becomes blurred. This raises the question of whether the doctrine adequately captures the realities of modern consumer finance (Levitin, 2024).

D. Failure of Basis and the Breakdown of Transactional Assumptions

Another recognized unjust factor is failure of basis, which arises where the underlying purpose of a transfer is not fulfilled. In *Roxborough v Rothmans of Pall Mall Australia Ltd*, the High Court of Australia held that restitution may be available where the expected basis of payment, such as the assumption of a valid tax, fails to materialize.

This doctrine is particularly relevant in contexts where transactions are predicated on implicit assumptions about fairness, transparency, or mutual understanding. In consumer financial markets, individuals often engage with products under the expectation that key terms are comprehensible and that outcomes are reasonably predictable. Where these expectations are systematically undermined, whether through complexity, framing, or behavioral manipulation, the basis of the transaction itself may be called into question.

E. Knowledge, Responsibility, and Emerging Norms

Although unjust enrichment is distinct from fault-based doctrines, considerations of knowledge and responsibility have long played an implicit role in shaping its boundaries. In *Royal Brunei Airlines Sdn Bhd v Tan*, the Privy Council emphasized that liability in equity may arise where a party acts unconscionably in light of what they knew or ought to have known. While this case concerns breach of trust rather than restitution per se, it illustrates a broader principle: that legal responsibility may be heightened where one party possesses superior knowledge.

This insight has particular relevance in financial markets, where institutions routinely operate with greater informational and analytical capacity than consumers (Goldstein, 2023). Where firms design and market products with awareness of consumer misunderstanding or where such misunderstanding is reasonably foreseeable, the retention of resulting gains may raise questions not only of policy, but of doctrinal coherence within unjust enrichment law.

F. Synthesis: Toward an Expanded Conception of Unjust Enrichment

Taken together, these doctrinal strands reveal both the strengths and limitations of existing restitutionary frameworks. On the one hand, the law has demonstrated a capacity to evolve, expanding the scope of mistake, recognizing flexible unjust factors, and accommodating equitable considerations. On the other hand, it continues to rely on assumptions of rationality, informed consent, and transactional clarity that are increasingly misaligned with the realities of modern financial systems.

The comparative perspective underscores this tension. While UK doctrine provides analytical precision, Commonwealth jurisdictions offer greater flexibility, and U.S. law reflects an emerging synthesis through the Restatement. This diversity suggests that unjust enrichment is not a closed category, but a dynamic and adaptable doctrine.

Building on this foundation, the following sections argue that persistent, foreseeable consumer misunderstanding, particularly in the context of financial literacy should be recognized as a relevant unjust factor. In doing so, restitution may be reoriented from a purely remedial doctrine toward a broader framework capable of addressing systemic patterns of enrichment in contemporary markets.

III. Financial Markets, Behavioral Vulnerability, and the Limits of Consumer Understanding

Modern consumer financial markets operate at the intersection of complexity, asymmetry, and scale. While traditional restitution doctrine presumes that parties transact with a baseline level of understanding, contemporary evidence from behavioral economics and financial literacy research suggests that this assumption is frequently misplaced (Dharmapala & Garoupa, 2024). Consumers do not merely lack information; they often face structural and cognitive constraints that render even disclosed information ineffective. This section situates financial literacy within a broader framework of behavioral vulnerability, arguing that persistent and predictable misunderstanding is not incidental, but endemic to many financial transactions.

A. Information Asymmetry Revisited

The foundational economic insight of information asymmetry where one party possesses superior knowledge has long been recognized as a source of market inefficiency (Akerlof, 1970). In financial services, this asymmetry is particularly acute. Institutions design products with layered fee structures, contingent penalties, and complex repayment mechanisms, while consumers must interpret these features under conditions of limited time, attention, and expertise (Lee et al., 2026).

Traditional legal doctrine addresses asymmetry primarily through disclosure. Yet disclosure assumes that consumers can process and act upon the information provided. In practice, however, disclosure often fails to correct asymmetry because it does not account for how individuals actually make decisions (Omri Ben-Shahar & Carl E. Schneider). As a result, enrichment may occur not despite disclosure, but alongside it.

B. Behavioral Economics and Predictable Error

Behavioral economics further complicates the picture by demonstrating that individuals systematically deviate from rational decision-making (Khalil & Brüne 2025). Concepts such as bounded rationality, present bias, and framing effects reveal that consumers are not simply uninformed, but are predictably influenced by how choices are structured (Kiky, et al., 2024; Salah, 2025.)

For example, credit card statements that emphasize minimum payments exploit present bias by encouraging short-term affordability over long-term cost minimization (Bansal & Varghese, 2026). Similarly, overdraft programs that reorder transactions can amplify fees in ways that are difficult for consumers to anticipate (Griffith-McCreery, 2024). These are not isolated anomalies; they are design features that interact with cognitive tendencies, producing outcomes that are both foreseeable and, in many cases, profitable.

From a restitutionary perspective, these insights challenge the assumption that payments reflect fully informed consent. Where error is systematic and predictable, the distinction between voluntary and mistaken transfer becomes increasingly tenuous.

C. Financial Literacy as Structural Condition

Financial literacy is often framed as an individual deficit or a lack of knowledge to be remedied through education. While education remains important, this framing obscures a more fundamental reality: financial literacy operates as a structural condition of the market. Levels of understanding vary widely across populations, and institutions routinely segment consumers based on these differences.

Recent research emphasizes that financial capability encompasses not only knowledge, but also confidence, behavior, and context (Lusardi & Mitchell, 2023). Individuals may possess partial knowledge yet still make suboptimal decisions due to complexity or cognitive overload (Renzini, et al., 2024). In this sense, misunderstanding is not merely a failure of the individual; it is a predictable outcome of the interaction between product design and human cognition.

This reconceptualization has significant implications for restitution law. If misunderstanding is structural and foreseeable, then enrichment derived from such misunderstanding may warrant closer scrutiny under the doctrine of unjust enrichment.

D. Implications for Restitution

The doctrinal categories discussed in Section II particularly mistake and the voluntary payment rule are ill-suited to capture the dynamics described above. Mistake is typically understood as a discrete error at the point of transaction, while voluntariness presumes a level of informed choice that behavioral evidence calls into question.

The gap, therefore, is not merely empirical but conceptual. Restitution law lacks a mechanism to address enrichment that arises from **systemic, behaviorally mediated misunderstanding** (Hagos, 2025). Bridging this gap requires rethinking the role of knowledge, consent, and foreseeability within the unjust enrichment framework. The following sections build on this insight by proposing a model that integrates these considerations into both doctrine and practice.

IV. The Limits of Ex Post Restitution in Consumer Finance

Despite its conceptual flexibility, restitution law remains fundamentally reactive. Its primary function is to correct unjust enrichment after value has already been

transferred, requiring claimants to fit their experiences within established doctrinal categories. While this framework has proven durable, it is increasingly strained when applied to modern consumer financial markets, where enrichment often arises not from discrete, identifiable errors, but from systematic, repeatable, and low-visibility interactions between consumers and financial products (Rocha, 2025). This section argues that the limitations of ex post restitution are not merely doctrinal, but structural, reflecting a misalignment between legal categories and contemporary market realities.

A. Doctrinal Constraints

At the doctrinal level, restitution's capacity to address consumer financial harm is constrained by its reliance on traditional unjust factors, particularly mistake and the voluntary payment rule (Dharmapala & Garoupa, 2024).

The doctrine of mistake, as articulated in *Kelly v Solari*, permits recovery where a payment is made under a mistaken belief of fact, even where the mistake arises from the payer's own negligence. This principle reflects a willingness to intervene where a transfer lacks a proper cognitive foundation. However, it presumes that the mistake is identifiable, bounded, and temporally discrete, a misapprehension that can be isolated at the moment of payment.

Subsequent developments have expanded the scope of mistake. In *Deutsche Morgan Grenfell Group plc v IRC*, the House of Lords recognized that restitution may be available for mistakes of law, thereby broadening the range of cognizable errors. Yet even this expansion retains the core assumption that misunderstanding is episodic, an event rather than a condition. It does not readily accommodate situations in which consumers repeatedly engage in transactions under conditions of persistent and foreseeable misunderstanding.

The voluntary payment rule presents an additional constraint. Rooted in *Bilbie v Lumley*, the rule holds that payments made voluntarily, with knowledge of the relevant facts, are not recoverable. This doctrine reflects a strong commitment to transactional finality and individual responsibility. Although modern courts have softened its rigidity, most notably in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, which allows recovery for payments made under mistake, the underlying premise remains largely intact: that consent, once given, is presumptively valid.

This premise becomes problematic in financial contexts where "knowledge" is formal rather than substantive. Consumers may technically receive disclosures yet fail to understand their implications due to complexity, framing, or cognitive limitations. In such cases, the distinction between voluntary and involuntary transfer becomes increasingly artificial. Payments appear voluntary in form, but are functionally shaped by conditions that undermine meaningful consent.

Taken together, these doctrines reveal a common limitation: they are calibrated to address isolated errors within otherwise well-functioning transactions, rather than systemic patterns of misunderstanding embedded within market design.

B. Structural Mismatch Between Doctrine and Market Reality

The doctrinal constraints outlined above are compounded by a deeper structural mismatch between the assumptions of restitution law and the characteristics of modern financial markets. Restitution doctrine developed in an era where transactions were relatively simple, bilateral, and transparent (Keim, 2022). By contrast, contemporary financial products are often: multi-layered, with complex fee structures and conditional

pricing; dynamic, with outcomes contingent on future behavior or market conditions; and behaviorally engineered, incorporating design features that interact with known cognitive biases (Taheri Hosseinkhani, 2025).

Examples include overdraft programs that reorder transactions to maximize fees, credit products that emphasize minimum payments, and subscription-based financial services that rely on inertia or inattention. These features do not necessarily involve deception in the traditional sense, yet they create environments in which consumers are systematically likely to misunderstand the consequences of their actions (Yoganandham & Elanchezhian, 2024).

In such contexts, enrichment does not arise from a single mistaken payment, but from a series of low-salience transactions that accumulate over time. Each individual transfer may appear trivial and voluntary, but collectively they reflect a pattern of value extraction grounded in predictable consumer behavior. This phenomenon challenges the transactional lens of restitution law, which tends to evaluate enrichment on a case-by-case basis rather than as part of a broader systemic process.

Moreover, the design of financial products increasingly incorporates data analytics and segmentation strategies that allow firms to anticipate consumer behavior with considerable precision (Theodorakopoulos, & Theodoropoulou, 2024). Where institutions can predict how consumers will respond to particular features, the resulting enrichment is not merely incidental; it is, in a meaningful sense, designed.

C. Practical Barriers to Restitutionary Recovery

Even where doctrinal pathways exist, practical barriers significantly limit the effectiveness of restitution as a corrective tool in consumer finance (Levlin, 2024).

First, the cost of litigation often exceeds the value of individual claims. Many financial harms, such as overdraft fees or incremental interest charges are relatively small in isolation, making them economically irrational to pursue through formal legal channels. While collective actions may address some of these issues, they remain limited in scope and subject to procedural constraints.

Second, there are substantial informational burdens. Consumers may lack the documentation, expertise, or awareness necessary to identify and substantiate a restitution claim. Financial products are frequently opaque, and the causal link between misunderstanding and enrichment may be difficult to demonstrate within existing doctrinal frameworks.

Third, harms in this context are often diffuse and temporally extended. Unlike a single erroneous payment, enrichment may occur gradually, across multiple transactions, and over extended periods of time. This diffusion complicates both the identification of unjust factors and the calculation of restitution.

As a result, much of the enrichment generated in consumer financial markets remains effectively non-justiciable. It persists not because it is necessarily just, but because it falls outside the practical reach of existing legal mechanisms.

D. Implications: The Structural Limits of Ex Post Restitution

The limitations identified in this section point to a broader conclusion: the inadequacy of ex post restitution in consumer finance is not merely a matter of doctrinal refinement, but of structural fit. Restitution law, as currently configured, is ill-equipped to address patterns of enrichment that are embedded in product design and sustained through behavioral dynamics.

This does not imply that restitution is obsolete. On the contrary, its underlying concern with the legitimacy of value transfers remains highly relevant. What is required, however, is a reorientation of the doctrine's role. Rather than relying exclusively on after-the-fact correction, restitutionary principles should inform how financial transactions are structured in the first place.

This insight sets the stage for the following section, which introduces a listening-based model of financial service design. By identifying and addressing consumer misunderstanding *ex ante*, this model offers a means of aligning market practices with the normative foundations of restitution, reducing the likelihood that unjust enrichment will arise at all merely empirical but conceptual. Restitution law lacks a mechanism to address enrichment that arises from systemic, behaviorally mediated misunderstanding (Hagos, 2025). Bridging this gap requires rethinking the role of knowledge, consent, and foreseeability within the unjust enrichment framework. The following sections build on this insight by proposing a model that integrates these considerations into both doctrine and practice.

V. A Listening-Based Model of Financial Service Design: From Reactive Remedy to Preventative Restitution

If restitution has traditionally functioned as an *ex post* corrective mechanism, the realities of modern financial markets invite a reorientation toward *ex ante* prevention. This section introduces a “listening-based” model of financial service design, grounded in consumer-reported data, and argues that such a model can operationalize restitutionary principles before unjust enrichment occurs.

A. Conceptualizing “Listening Before Intervening”

The central premise of the listening-based model is straightforward: financial institutions should systematically gather and respond to consumer-reported information about understanding, confusion, and preferences prior to product deployment or modification. Rather than assuming what consumers need or relying solely on regulatory disclosure, institutions engage in structured “listening” through surveys, segmentation, and feedback mechanisms.

This approach has emerged in recent collaborative initiatives between financial institutions and universities, where large-scale student populations provide insights into financial knowledge, confidence, and areas of uncertainty (Zhang & Chatterjee, 2023; Chadwick et al., 2026). While such partnerships are often framed as educational outreach, they also function as informational infrastructures that can inform product design and delivery.

B. Mechanism: Identifying Misunderstanding Before It Generates Enrichment

The listening model operates by identifying patterns of misunderstanding before they translate into financial outcomes. For example, if a significant portion of consumers misinterpret overdraft policies or repayment terms, this information can be used to:

- redesign disclosures in more effective formats,
- adjust product features that rely on misunderstanding, or
- provide targeted interventions that clarify key decision points.

In doing so, institutions reduce the likelihood that consumer error will generate revenue streams, such as fees or interest that might otherwise be characterized as enrichment.

Importantly, this model does not eliminate profit; rather, it aligns profit with informed engagement rather than predictable error.

C. Restitution as a Design Principle

Reframing restitution as a design principle requires extending its core logic beyond the courtroom. The traditional inquiry whether enrichment is unjust can be translated into an *ex ante* question: Would the anticipated enrichment be considered unjust if it arose under current conditions of consumer understanding?

If the answer is yes, then institutions have a basis, both ethical and potentially legal, for redesigning the underlying transaction. In this sense, restitution becomes not merely a remedy, but a governance tool guiding how financial products are structured and offered.

This perspective is consistent with the doctrinal trajectory outlined in Section II. Courts have already demonstrated a willingness to expand unjust factors, as seen in the evolution of mistake doctrine and the flexible approaches adopted in Commonwealth jurisdictions (See *Deutsche Morgan Grenfell Group plc v IRC*; *Pettikus v Becker*). The listening model represents a parallel evolution at the institutional level, embedding similar considerations into decision-making processes.

D. Knowledge, Foreseeability, and Institutional Responsibility

A key implication of the listening model is the elevation of knowledge and foreseeability in assessing enrichment. Where institutions actively collect data on consumer understanding, they cannot plausibly claim ignorance of widespread confusion. Even absent such data, certain patterns of misunderstanding may be sufficiently well-documented to be considered foreseeable.

This aligns with broader principles in private law, where liability often turns on what a party knew or ought to have known (*Royal Brunei Airlines Sdn Bhd v Tan*). While unjust enrichment is not a fault-based doctrine, incorporating elements of foreseeability can help bridge the gap between strict liability and equitable considerations.

Under this framework, enrichment derived from known or reasonably foreseeable misunderstanding occupies a different normative space than enrichment arising from fully informed transactions. The former raises concern not only of efficiency, but of fairness and legitimacy.

E. Institutional and Policy Implications

Embedding a listening-based restitution framework has implications across multiple domains: For financial institutions, it offers a pathway to reduce litigation risk, enhance trust, and align product design with long-term customer relationships. For universities, it positions them as critical intermediaries capable of generating quality data on consumer capability, thereby contributing to both education and market design. For regulators, it suggests a shift from purely reactive enforcement toward encouraging preventative compliance models, where firms demonstrate efforts to identify and mitigate sources of consumer misunderstanding.

More broadly, the model contributes to an emerging vision of financial markets in which efficiency and equity are not mutually exclusive, but jointly pursued through informed design.

VI. Toward a Restitutionary Design Principle

Building on the foregoing analysis, this article advances a central doctrinal and conceptual proposal: persistent, foreseeable consumer misunderstanding should be recognized as a qualifying unjust factor within the law of restitution. This recognition does not require a departure from existing principles, but rather an extension of them, one that aligns the doctrine with the structural realities of modern financial markets.

At its core, unjust enrichment is concerned with the legitimacy of value transfers. The inquiry is not merely whether a benefit has been conferred, but whether its retention is normatively justified. Traditional unjust factors such as mistake, failure of basis, and duress operate as proxies for identifying circumstances in which consent is impaired or the transactional foundation is defective. The argument advanced here is that systematic misunderstanding, where it is both persistent and foreseeable, performs a similar function.

A. Extending the Doctrine of Mistake

The doctrine of mistake provides the most natural point of extension. As established in *Kelly v Solari*, restitution is available where a payment is made under a mistaken belief, even in the absence of fault. Subsequent developments, including *Deutsche Morgan Grenfell Group plc v IRC*, have expanded the doctrine to encompass mistakes of law, reflecting an increased sensitivity to the complexity of modern transactions.

However, the prevailing conception of mistake remains tied to discrete cognitive error, a misapprehension that can be identified at a particular moment in time. This framing is increasingly inadequate in contexts where misunderstanding is not episodic but patterned and systemic. Consumers may repeatedly engage in transactions, incurring fees, entering credit arrangements, or maintaining suboptimal financial positions, not because of a single identifiable mistake, but because of an ongoing inability to fully comprehend the structure or implications of the product (Levlin, 2024).

Recognizing persistent misunderstanding as an extension of mistake does not require redefining the doctrine entirely. Rather, it involves acknowledging that the relevant “mistake” may be distributed across a series of decisions, each influenced by the same underlying informational and cognitive constraints. In this sense, the focus shifts from the moment of error to the conditions that make error predictable.

B. Reframing Voluntariness: From Formal Consent to Informed Engagement

A similar evolution is warranted with respect to voluntariness. The voluntary payment rule, rooted in *Bilbie v Lumley*, rests on the premise that payments made with knowledge are final. While this principle promotes certainty, it assumes that consent is meaningful whenever it is formally given.

As discussed in Section IV, this assumption is increasingly difficult to sustain in financial contexts where consumers face complexity, behavioral nudges, and informational overload. Courts have already recognized, in cases such as *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, that apparent voluntariness may be undermined by mistake. The argument here extends that insight further: consent should be evaluated not only in formal terms, but in light of the consumer’s capacity for informed engagement (Burkhardt, et al., 2023).

Under this reframing, a payment may be “voluntary” in the narrow sense that it was not coerced, yet still raise restitutionary concerns if it was made under conditions that systematically impair understanding. The relevant question becomes not simply

whether the consumer agreed, but whether the agreement reflects a reasonable level of comprehension given the complexity of the transaction and the foreseeability of misunderstanding (Wagner, 2022).

C. Foreseeability and Institutional Knowledge

A critical element of this proposed framework is the role of foreseeability. Not all misunderstanding should give rise to restitutionary concern. The doctrine must distinguish between idiosyncratic errors and those that are systematically likely to occur.

Foreseeability provides this limiting principle. Where financial institutions know or reasonably should know that certain features of their products are likely to generate misunderstanding, the resulting enrichment occupies a different normative space than gains derived from fully informed transactions (Currie & Seddon, 2022; Al-Shebli & Alhajri, 2024). This insight is consistent with broader developments in private law, where liability often turns on what a party knew or ought to have known (Raz, 2023).

Importantly, foreseeability need not depend on actual knowledge in every case. It may be inferred from: established behavioral research, industry practices, or internal data analytics that reveal patterns of consumer behavior. As financial institutions increasingly rely on data-driven models to predict and influence consumer decisions, their capacity to anticipate misunderstanding correspondingly expands (Purwar, et al., 2024). This raises the expectation that they should also internalize the risks associated with that misunderstanding.

D. Comparative Support and Doctrinal Adaptability

Comparative analysis reinforces the plausibility of this doctrinal evolution. Commonwealth jurisdictions, particularly Canada, have demonstrated a willingness to adopt flexible and policy sensitive approaches to unjust enrichment, as reflected in *Pettkus v Becker*. These approaches emphasize the equitable foundations of the doctrine and allow courts to respond to novel forms of injustice.

In the United States, the Restatement (Third) of Restitution and Unjust Enrichment similarly reflects an open and evolving conception of unjust enrichment, one that is not confined to a closed list of unjust factors. This flexibility creates space for recognizing new forms of enrichment that lack a sufficient legal basis, particularly in rapidly changing economic environments.

Even within English law, the expansion of mistake and the ongoing debate over the taxonomy of unjust factors suggest that the doctrine is not static. Rather, it remains responsive albeit cautiously to shifts in social and economic conditions.

E. From Doctrine to Design: Operationalizing the Principle

Recognizing persistent, foreseeable misunderstanding as an unjust factor has implications that extend beyond adjudication. It provides the foundation for a broader restitutionary design principle, one that informs how financial products are structured and delivered. Under this principle, institutions would evaluate potential revenue streams not only in terms of legality and profitability, but also in terms of whether they depend on conditions that could render enrichment unjust. This aligns directly with the “listening-based” model developed in Section V, where consumer-reported data is used to identify and mitigate misunderstanding before it generates financial outcomes.

The shift can be summarized as follows:

From correction to prevention: addressing unjust enrichment before it occurs

From transaction to system: evaluating patterns of behavior rather than isolated events

From formal consent to substantive understanding: focusing on the quality of decision-making

In this way, restitution is transformed from a doctrine that merely responds to injustice into one that actively shapes the conditions under which transactions take place.

F. Doctrinal Modesty and Practical Significance

It is important to emphasize that the proposal advanced here is doctrinally modest but practically significant. It does not require courts to abandon established principles or to impose broad new duties on financial institutions. Rather, it invites a recalibration of existing concepts, mistake, voluntariness, and unjustness, in light of contemporary market realities. At the same time, the implications are far-reaching. By recognizing the role of persistent and foreseeable misunderstanding, restitution law can better account for forms of enrichment that are currently under-addressed. It can also provide a normative foundation for institutional practices that seek to align profitability with informed consumer engagement.

In sum, extending restitution to encompass systematic misunderstanding represents a natural and necessary evolution of the doctrine. It preserves the core concern with unjust enrichment while adapting its application to the conditions of modern financial markets. The following section considers the broader policy and institutional implications of this shift, including its potential to reshape the relationship between consumers, financial institutions, and regulators.

VIII. Conclusion

Restitution law has long functioned as a mechanism for correcting injustice after it occurs. Yet in modern financial markets, injustice increasingly arises not from isolated error, but from systematic and foreseeable misunderstanding embedded within product design. This article has advanced a reconceptualization of restitution as both a remedial and preventative doctrine. By introducing a listening-based model of financial service design, it demonstrates how institutions can identify and mitigate sources of unjust enrichment before they materialize, transforming restitution from a reactive tool into a proactive framework for market governance.

The central implication is clear: where enrichment depends on misunderstanding that institutions know, or ought to know, exists, its legitimacy is fundamentally in question. Addressing this challenge requires not only doctrinal refinement, but a reorientation of institutional responsibility toward anticipatory design. For regulators, this suggests a shift toward encouraging preventative compliance; for financial institutions, a pathway to align profitability with informed consumer engagement. In this sense, “listening before intervening” is not merely methodological, it is an emerging legal and ethical standard for equitable financial markets.

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