Journal of Korean Law | Vol. 16, 349-373, June 2017

A Fresh Start for Restitution in Three-Party Situations under German Law

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Abstract

With its ruling from June 6, 2015, the 11th Senate of the German Federal High Court of Justice (Bundesgerichtshof, BGH) has overturned its principles on restitution of unjust enrichment in cases of revoked payment orders in payment services law. The article argues that this significant departure from previous case law opens the door for a general revision and redesign of the German law of restitution in three-party situations. The article proceeds from an explanation of the classic "instruction model" (Anweisungsmodell) as the general German model of restitution in three-party situations. By means of the instruction (Anweisung), the debtor/instructor links two relationships, i.e. the cover relationship (Deckungsverhältnis) between the debtor/instructor and the instructee/payer with the underlying debt relationship (Valutaverhältnis) between the debtor/instructor and the recipient/payee. As a consequence, both relationships are simultaneously performed by a single transfer of benefit between instructee and recipient. In such three-party instruction situations, restitution of unjust enrichment is generally carried out "around the corner" ("übers Eck") under German Law if the instruction is valid. An exception of direct restitution between instructee and recipient only applies if the instruction is lacking and principles of estoppel do not apply in favor of the recipient. This rule has, however, been seriously challenged by the Federal High Court of Justice's ruling from June 6, 2015. Contrary to the current practice to apply the principles of estoppel to revoked payment orders, the instructed bank from now on cannot demand restitution from the instructing payer even if the payee is in good faith. The payee is, in other words, no longer shielded from a direct restitution claim of the bank even if his good faith merits protection. Rather, in all cases of unauthorized payment, restitution now is carried out exclusively between the bank and the payee by way of a direct claim of non-performance restitution. The article evaluates the consequences of this novel ruling against the background of recent academic critique. It argues that the Court has hit the right spot by reversing the established relationship between the rule of restitution "around the corner" and the exception of direct restitution for unauthorized payment orders. However, there remains something unsatisfactory and preliminary in the Court's reasoning which points to deeper problems within

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the general system of three-party restitution under German law. This is also reflected in the academic comments to the ruling. Their criticism is not so much directed at the outcome of direct restitution against the payee, but rather at the Court's lacking willingness to coherently integrate this outcome into the traditional principles on restitution in three-party situations. In fact, this lack of willingness is so striking that it seems likely that the Court's decision will provoke a general revision of the traditional principles on restitution in future. At a closer look, it is indeed impossible to reconcile the Court's ruling with the traditional system of restitution. After all, the pivot of the instruction model is to give priority to restitution "around the corner," i.e. to restitution involving the instructor and excluding direct recovery. Yet this very certainty is called into question by the recent decision. Indeed, the underlying constellation of a revoked payment order illustrates that excluding direct restitution does not distribute litigation and defense risks more equitably than by allowing direct restitution. On the one hand, the bank will mostly end up making a direct claim against the payee anyway. On the other hand, the questionable abstract protection of the bona fide payee via restitution "around the corner" comes at the cost of a considerable, unjustifiable gap in the protection of the supposed payer. If, on the other hand, there is direct restitution between the bank and the payee from the outset, the revoking payer is not affected by the restitution, but can always and with legal certainty make a claim against the bank to have the mistaken booking cancelled. There should be no doubt as to which of the two solutions can claim the charm of simplicity and legal clarity. The recent decision, therefore, gives reason to put to the test the entire regime of restitution in three-party situations – a regime that has hit a dead end of doctrinal construction that does not further but rather veil the adequacy of the underlying restitution mechanisms. Starting point of a new conception of third-party restitution under German law is a return to the general provisions on performance (Erfüllung) in the law of obligations. In the case of third-party involvement, BGB §§ 267, 362 para 2 offer clear rules as to who is the performing party and who the recipient: In both cases, it is not the contractual partner, but rather the third party. An unbiased look at the BGB, therefore, yields an understanding of the concept of performance and of the distribution of the performance relationships between the parties that considerably departs from the prevailing view on restitution in three-party situations. Contrary to the doctrine of restitution "around the corner," the central performance relationship, which also gives rise to the primary claim of restitution, should hence be situated in the third party relationship between the instructee and the recipient. Assuming that the function of the concept of performance is to identify both the object of performance and the parties of the restitution claim, it seems fundamentally wrong to separate the performance relationships in three-party situations from the actual object of performance by attributing performance "around the corner" on normative grounds. From a point of view of legal clarity and efficiency in adjudication, it would make much more sense to start litigation of restitution where the lost object actually ended up: That is – obviously – with the recipient. On this basis, the present a rticle concludes that the time is ripe for a fundamental rethinking of three-party situations in German restitution law. In particular, courts and scholars should consider to drop the doctrine of restitution "around the corner" modeled on the instruction situation and to reverse rule and exception between restitution "around the corner" and direct restitution in favor of the latter.

KEY WORDS: Restitution, three-party situations, unauthorized payment, payment services law, estoppel, German restitution law

Manuscript received: Feb. 21, 2017; review completed: May 11, 2017; accepted: May 19, 2017.

It is a familiar story: For decades, rarely has a piece on the doctrinal evergreen of restitution of unjust enrichment in three- or multiple-party situations appeared without pointing right away at the "lack of systematic coherence"[1], the "state of orderlessness"[2] or the "immense complexity"[3] of the subject matter, that – as *H.H. Jakobs* poignantly put it in 1992 – "overtaxes even professors specialized in the law of restitution."[4] Has all the academic work of the last decades left us with nothing but a "highly intelligent doctrinal pyre"[5]? Has the recent incremental shift of the German Federal High Court of Justice (*Bundesgerichtshof*, BGH, hereinafter: the Court) from a doctrine based on performance and fairness towards a value-based solution along the lines of the instruction model (*Anweisungsmodell*), as favored by academics, failed to bring clarity?[6] The Court had almost appeared to finally yield legal certainty in line with academic literature: The same 11th Senate that now has rejected the doctrine of instruction for revocation of payment orders[7] had recently started omitting the notorious

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1) *Thomale*, Leistung als Freiheit, 2012, 1 ("fehlende systematische Kohärenz"). Thomale's work exemplifies that regardless of all doctrinal work of the last decades, there is still room for monographs on the foundations of the law of restitution. The same is true for *Schall*, Leistungskondiktion und „sonstige Kondiktion" auf der Grundlage des einheitlichen gesetzlichen Kondiktionsprinzips, 2003; *Solomon*, Der Bereicherungsausgleich in Anweisungsfällen, 2004; *Winkelhaus*, Der Bereicherungsausgleich bei fehlerhafter Überweisung nach Umsetzung des neuen Zahlungsdiensterechts, 2012.

2) *Jakobs*, NJW 1992, 2524 ("Zustand der Regellosigkeit"); opposing reply from *Canaris*, NJW 1992, 3143.

3) *Schall*, JZ 2013, 753 (760) ("unermessliche Komplexität").

4) *Jakobs*, NJW 1992, 2524 ("selbst Professoren mit einer Spezialisierung im Kondiktionsrecht (sind) überfordert.") *Lorenz* does not find that very amusing in Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, revised edition 2007, § 812 note 36. This does not change the accuracy of the statement, though.

5) *Wesel*, NJW 1994, 2594 (2595) ("hochintelligenten Scheiterhaufen der Dogmatik").

6) On this observation *Lorenz*, in Staudinger, BGB, 2007, § 812 note 5, 36; similarly *Jansen*, JZ 2015, 952 (955).

7) BGH, decision from June 16, 2015 – XI ZR 243/13, BGHZ 205, 377 = NJW 2015, 3093 with case note from *Kiehnle* = JZ 2015, 950, with case note *Jansen* = WM 2015, 1631; see also *Hadding*, WuB 2015, 1631; *Kropf*, WM 2016, 67; *Omlor*, EWiR 2015, 595; *Schnauder*, JZ 2016, 603;

clause that, regarding restitution in three-party situations, "any schematic solution is out of question and primarily the particularities of the individual case ought to be considered."[8] Is all that old news now? And, if not, are there deeper reasons to fundamentally revise the current solution guided by the instruction model? This essay argues that that is the case. Even though not convincing on its grounds, the new ruling of the Court is convincing in its fundamental thrust and offers the opportunity for a fresh start in the law of restitution in three-party situations.

I. The instruction situation as a problematic model

Why do we need to take a fresh look here? At first sight, despite numerous disputes on details, all solutions largely correspond as to their outcome, so the scope of possible doctrinal revision seems to be limited from the outset. In impaired three-party situations, restitution is based on the instruction model. In the instruction situation (*Anweisungslage*), the debtor, who owes performance to his creditor (underlying debt relationship, *Valutaverhältnis*), instructs a third party, who herself owes the debtor performance (cover relationship, *Deckungsverhältnis*), to directly transfer the benefit to the creditor (transfer relationship, *Zuwendungsverhältnis*). Therefore, by means of the instruction, the debtor/instructor links two relationships, i.e. the cover relationship between the debtor/instructor and the instructee/payer with the underlying debt relationship between the debtor/instructor and the recipient/payee. As a consequence, both relationships can be simultaneously performed by a single transfer of benefit between the instructee and the recipient.[9] In such three-party

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Reuter/Martinek, Ungerechtfertigte Bereicherung, vol. 2, 2nd ed. 2016, § 2 IV 1 a, pp. 82-3; *Grigoleit/Auer*, Schuldrecht III, 2nd ed. 2016, note 462, pp. 161-2; concisely also *Jansen*, AcP 216 (2016), 112 (154-5).

8) Phrase of the Court ("jede schematische Lösung verbietet (sich) und in erster Linie (sind) die Besonderheiten des einzelnen Falles zu beachten"), used in this wording or similarly since BGHZ 61, 289 (292), but increasingly omitted in decisions since 2001; cf. especially BGHZ 147, 145; on that decision *Lorenz*, in Staudinger, BGB, 2007, § 812 note 5; *Jansen*, JZ 2015, 952 (955 note 22) with further references.

9) *Larenz/Canaris*, Schuldrecht II/2, 13th ed. 1994, § 62 I 2 e, p. 39; *Grigoleit/Auer* (note 7)

instruction situations, restitution of unjust enrichment is generally carried out "around the corner" ("*übers Eck*") under the German Law if the instruction is valid, i.e. between the parties of the respective impaired legal relationship.[10] Except for the case when the recipient receives a benefit free of charge according to BGB § 822 (section 822 of the German Civil Code, *Bürgerliches Gesetzbuch*), there is no direct restitution between the instructee and the recipient unless the instruction is defective itself. If that is the case, it is necessary to further distinguish the following: Only some particularly serious defects, such as the complete lack or forgery of the instruction, the action of an unauthorized agent or of an incompetent instructor always lead to direct restitution irrespective of whether the recipient was in good faith or not.[11] However, for other defects such as the revocation of an initially valid instruction, this rule of direct restitution is disputed. The predominant view is that for, such defects of validity of an originally attributable instruction, there should be a counter-exception: Restitution should run "around the corner" and exclude direct restitution between the instructee and the recipient at least in cases where the recipient had been in good faith regarding the validity of the instruction, i.e. if she did not know about the defect (according to case law) or did not have to know about it (according to academia).[12]

And now there goes the clarity. Even if one leaves aside, for the time

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note 431, p. 148; for a more detailed description, see also *Solomon* (note 1) 5, 84.

10) Settled case law; for example BGHZ 205, 377 (382, note 17); BGHZ 176, 234 (236-7, note 9); from academic literature *Schwab*, in Münchener Kommentar zum Bürgerlichen Gesetzbuch, 7th ed. 2017, § 812 notes 60 et seq.; *Reuter/Martinek* (note 7) § 2 II 1, pp. 48-9; *Lorenz*, in Staudinger, BGB, 2007, § 812 notes 49-50; *Larenz/Canaris* (note 9) § 70 II 1, 2, 5, IV 1, 5, pp. 201, 210, 224-5, 235; *Grigoleit/Auer* (note 7) note 434, p. 149; *Thomale* (note 1) 292; *Solomon* (note 1) 16-7.

11) This is also the new line of case law since BGHZ 147, 145, that has dropped the previous distinction between good and bad faith, confirmed by BGHZ 205, 377 (383, note 18); from academic literature see e.g. *Schwab*, in Münchener Kommentar (note 10), § 812 notes 80 et seq.; *Reuter/Martinek* (note 7) § 2 III 4, pp. 63 et seq.; *Lorenz*, in Staudinger, BGB, 2007, § 812 note 51; *Larenz/Canaris* (note 9) § 70 II 3, IV 2, 5, pp. 206, 225, 235-6; *Grigoleit/Auer* (note 7) note 437, pp. 150-1; *Thomale* (note 1) 305; *Solomon* (note 1) 17-8.

12) E.g. BGHZ 61, 289 (293-4); BGHZ 87, 246 (249-50); BGHZ 89, 376 (380); on the criteria for good faith by analogy to BGB §§ 170 et seq. *Wilhelm*, AcP 175 (1975), 304 (338, 347); thereafter especially *Canaris*, WM 1980, 354 (356); *id.*, JZ 1984, 627; *id.*, JZ 1987, 201; *Larenz/Canaris* (note 9) § 70 IV 3 b, pp. 231-2.

being, doctrinal doubts, the solutions of the predominant view peter out in a grey zone of application doubts where the seemingly clear line between an instruction that is defective, but attributable to the instructor, on the one hand, and a completely non-caused and therefore non-attributable instruction, on the other hand, turns out to be illusory. Applying the principles of causation and estoppel (*Veranlasser- und Rechtsscheinprinzip*) to a mistaken overpayment by the instructee under a valid instruction amounts to a *petitio principii* since it is hardly possible to distinguish between the instruction itself and the overpayment without assuming from the outset that the instruction is attributable, but not the overpayment[13]. There is in fact no principled difference between a mistaken overpayment and a mistaken disregard of a valid revocation by the instructee given that in both cases, there is a primary, attributable act of causation by the instructor.[14] Hence, it is no coincidence that in its recent ruling, the Court treats both cases the same and considers them both cumulatively applicable without any further distinction, which would hardly be possible anyway.[15]

Even putting aside these doubtful distinctions, another doubt regarding fact arises: What are the requirements for good faith of a recipient? From a viewpoint of systematic coherence, it seems tempting not to refer to positive knowledge, but rather to negligent ignorance on the part of the recipient by analogy to BGB §§ 170 et seq., 173.[16] Yet the obstacles to proof of evidence, which are already considerable when having to prove knowledge on the part of the recipient, become entirely insurmountable when it comes to whether the recipient was allowed to rely on the transfer being an authorized performance of the instructor or whether she could have realized its defectiveness on account of questionable circumstances or

13) In this vein already *v. Caemmerer*, JZ 1962, 385 (387); likewise *Schwab*, in Münchener Kommentar (note 10), § 812 note 90; *Larenz/Canaris* (note 9) § 70 IV 2, pp. 225-6; *Canaris*, JZ 1987, 201 (202-3); differently, however, BGHZ 176, 234 (241 et seq., notes 22 et seq.), where direct restitution is denied in the case of overpayment and a bona fide payee; this case is hence ultimately treated the same as a revoked instruction. On the merits, this in line with the view taken in this article; the outcome will have to be corrected after BGHZ 205, 377, though.

14) On the impossibility of a clear distinction, see also *Wilhelm*, AcP 175 (1975), 304 (348-9); *Jansen*, JZ 2015, 952 (953, 955).

15) BGHZ 205, 377 (384, note 19); see for a more critical view *Kiehnle*, NJW 2015, 3095.

16) For references, see supra note 12.

obvious inquiries.[17] Drawing a doctrinal line on such an unclear, hypothetical basis is not only prone to arbitrary manipulation, but will necessarily slide into a blanket clause of uncontrollable case law.[18] Therefore, in theory, it might seem reasonable to grant the recipient the "abstract" protection not to be subject to direct restitution by the instructee when the recipient was in good faith and the instruction attributable to the instructor by estoppel. Yet this protection will quite likely remain merely theoretical because it cannot be realized in practice. Where even professors fail at drawing a clear line as to the relevant criteria of good faith of the recipient, an average attorney of the instructee cannot be expected to waive the direct claim against the recipient, accompanied by a third party notice against the instructor, in order to resolve the *abstract* issue of who is the right defendant – an issue that requires assessment of the *concrete* bona fide circumstances that can hardly ever be determined with legal certainty prior to the legal proceedings. This is what happened in the case that was now decided by the German High Court.[19]

II. BGHZ 205, 377: Departure from previous case law on revoked payment orders

To be clear: We have not yet touched on the doctrinal doubts directed at the predominant solution for restitution in three-party situations according to the instruction model. These doubts concern the issues of how to interpret the concept of performance (*Leistung*) and where to situate the performance relationships (*Leistungsverhältnisse*) between the involved

17) Concisely denying a duty to inquire *Larenz/Canaris* (note 9) § 70 IV 2 b, p. 231; see also for a not exhaustive comment on the burden of proof *Canaris*, JZ 1984, 627 (628-9). More generally on the problem of proof of evidence *Schwab*, in Münchener Kommentar (note 10), § 812 notes 120-1: Partly, it is even controversial *what* has to be set forth to begin with.

18) See for a criticism of how to actually handle random case law already *Wilhelm*, JZ 1994, 585; similarly also *Schall*, JZ 2013, 753 (760); *Schnauder*, JZ 2016, 603 (605-6).

19) In the underlying case, the payment service user, whose payment order had been executed despite valid cancelation, had joined the bank's direct claim against the payee as intervenor; cf. BGHZ 205, 377 (377, note 1).

parties – issues that have not been satisfactorily resolved yet.[20] However, the 11th Senate does not touch upon these questions in its recent decision, but generally confirms the settled principles of restitution along the lines of the instruction model. Particularly, this means that the cover relationship between instructor and instructee and the underlying debt relationship between instructor and recipient are both conceived as performance relationships. Hence, restitution of the respectively transferred benefits can generally be claimed only "around the corner" by means of restitution claims on the account of "performance without legal ground" (*Leistungskondiktion*). An exception only applies if the instruction is lacking. In the latter case, direct restitution between the instructee and the recipient is possible by means of restitution based on "other modes of enrichment" ("*in sonstiger Weise,*" cf. BGB § 812 para 1), i.e. on the grounds of a non-performance restitution claim (*Nichtleistungskondiktion*).[21] This up-front confirmation of settled principles does not come as a surprise, though, given that the decision already offers enough revolutionary content through quashing the above-mentioned rule of restitution "around the corner" for revoked instructions in payment services law:

According to the Court and contrary to the current practice of applying the principles of estoppel to revoked payment orders, the instructed bank from now on cannot make a restitution claim against the supposedly instructing payer even if that payer did not cause the unauthorized payment and if the payee is in good faith.[22] In other words, the payee is no longer shielded from a direct restitution claim of the instructed bank even if his good faith merits protection. Rather, in all cases of unauthorized payment, restitution now is carried out exclusively between the bank and the payee by way of a direct claim as non-performance restitution. Therefore, revoking the authorization is tantamount to its initial non-existence; the distinction between initially non-existent and later revoked instructions is abandoned for the law of payment services. The Court substantiates its ruling by referring to BGB §§ 675j, 675u that have come into force with the revision of payment services law in 2009. According to

20) On these issues see hereinafter IV.

21) BGHZ 205, 377 (382-3, notes 17-8).

22) BGHZ 205, 377 (385 et seq., notes 22 et seq.).

the Court, these provisions yield the value judgment that, at least within their scope of application, it is irrelevant whether the payee's good faith merits protection. Rather, from now on, only the validity of the payment order as judged by principles of valid authorization matters.[23] The Court thereby endorses a view that has been progressing in case law and literature after the revision of the payment services law. This progressing view considers the revision of BGB §§ 675c et seq. to be a fundamental amendment with respect to the protection of interests that underlie electronic payment.[24]

In this vein, there have been voices in the academic literature since 2009 that have argued even beyond the Court that the purpose of the revision was to strengthen the supposed payer's legal position by completely shielding her from restitution in cases of unauthorized payment, regardless of the payee's situation.[25] This viewpoint, much like the recent Court decision, crucially based on BGB § 675u. BGB § 675u, excludes the payment service provider from claiming reimbursement of expenses against the seemingly instructing payer and instead grants the latter an action to immediately get reimbursement for the amount of the mistaken payment. In light of the fully harmonizing effect of the EU directive on payment services as implemented through BGB § 675u,[26] the academic literature

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23) BGHZ 205, 377 (385-6, notes 23-4).

24) BGHZ 205, 377 (385, note 22); previously already *LG Hannover*, ZIP 2011, 1406; *LG Berlin*, WM 2015, 376; *AG Schorndorf*, WM 2015, 1239; from academic literature see e.g. *Winkelhaus* (note 1) 129, 222; *Bartels,* WM 2010, 1828; *Belling/Belling,* JZ 2010, 708; *Linardatos,* WuB 2015, 246; *Madaus,* EWiR 2011, 589; *Casper*, in Münchener Kommentar zum BGB, 6th ed. 2012, § 675u note 22; opposing view e.g. *AG Hamburg-Harburg*, WM 2014, 352; *Fornasier,* AcP 212 (2012), 410; *Grundmann,* WM 2009, 1109; *Rademacher,* NJW 2011, 2169; *Thomale* (note 1); *Schwab*, in Münchener Kommentar (note 10), § 812 note 123b; *Omlor*, in Staudinger, BGB, 2012, § 675z note 6.

25) In this vein especially *Casper*, in Münchener Kommentar (note 24), § 675u notes 22, 24; with the same outcome *Grigoleit/Auer* (note 7) note 464, p. 162; differing view *Jansen*, JZ 2015, 952 (954).

26) Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007, OJ L 319/1, implemented by law from 29 July 2009, BGBl. (Federal Law Gazette) I, 2355, come into force on 31 October 2009. The importance of interpreting national law in accordance with directives is stressed by *Winkelhaus* (note 1) 157; *Linardatos*, WuB 2015, 246; *Casper,* in Münchener Kommentar (note 24), § 675u note 22. The BGH has apparently left this argument aside in order to avoid a submission to the ECJ; cf. BGHZ 205, 377 (385, note 22). This is correct in its outcome; cf. hereinafter at note 36.

came to read into that rule a general value judgment – namely that if the payment is not authorized, not only the explicitly mentioned reimbursement claims, but rather all claims of the bank against its customer, including any claims of restitution, should be excluded.[27] The customer's reimbursement claim against the bank pursuant to BGB § 675u sentence 2 would be to no avail if the bank were able to offset it with a claim against its customer on account of restitution of performance or by way of recourse (*Leistungskondiktion oder Rückgriffskondiktion*) or on account of a right of retention.[28] On this basis, BGB § 675u sentence 1 has partly been interpreted to exclude any restitution claim between the bank and the customer from the outset.[29] In that view, the traditional way of recovering defective but attributable payments "around the corner" is rendered void in all constellations of lacking authorization.

This line of argument – as will be detailed later on – is certainly open to criticism in many ways, if not simply wrong. And yet, the High Court of Justice is ultimately on the safe side insofar as its change in case law can also draw on the considerable doctrinal criticism that had previously been raised in the academic literature against the application of the principles of causation and reliance on revoked payment orders – a critique that has preceded even the amendment of the payment services law.[30] The impossibility to draw a clear line between the cases of initially non-existent and later revoked payment orders put the case for direct restitution already under former law, especially as the payee finds herself in the exact same situation in both cases and as the payer has no reason to doubt the bank's compliance with an order of revocation more than with any other case of

27) E.g. *Winkelhaus* (note 1) 129, 222 et seq.; *Belling/Belling,* JZ 2010, 708 (710-1).

28) *Belling/Belling,* JZ 2010, 708 (711).

29) *Winkelhaus* (note 1) 130, 222; *Belling/Belling,* JZ 2010, 708 (710); *Madaus,* EWiR 2011, 589 (590); *Casper*, in Münchener Kommentar (note 24), § 675u note 24. The 11th Senate has rightly not endorsed this view; cf. hereinafter at notes 35 et seq.

30) BGHZ 205, 377 (385, note 22); criticism had already been voiced e.g. by *Flume*, AcP 199 (1999), 1 (6-7); *Müller*, WM 2010, 1293 (1300 et seq.); *Lieb*, in Festschrift 50 Jahre BGH, vol. 1, 2000, 547 (552-3); *Langenbucher*, in Festschrift Heldrich, 2005, 285 (293); *Solomon* (note 1) 76; *Lorenz*, in Staudinger, BGB, 2007, § 812 note 51; cf. also *Jansen*, JZ 2015, 952 (955); *Winkelhaus* (note 1) 206 et seq.

instruction.[31] Finally, it is crucial that at least with single payment orders in modern electronic payment transactions, there is no operative fact that could give rise to liability under estoppel in favor of the bona fide payee by analogy to BGB §§ 170 et seq.[32] The mere account statement, which the payee receives from its bank and which is the only record documenting the payment of the debtor/payer, is not enough for that purpose. The account statement only asserts that the instructed bank was seemingly authorized to communicate as a messenger a supposed declaration of will by the debtor to pay off his debt to the payee (*Tilgungsbestimmung*). Such a mere transmission of a declaration without authorization (*Botenerklärung ohne Botenmacht*), that at most entails claims for reliance damages pursuant to BGB §§ 120, 122, 179 et seq., does not constitute an operative fact that could estop the supposed payer pursuant to BGB §§ 170 et seq.[33]

III. The literature's criticism and the general questionability of restitution "around the corner"

Having said all that, it becomes clear that the Court – at least in its outcome – has hit the right spot with its recent decision by simply reversing the established relationship between the rule of restitution "around the corner" and the exception of direct restitution for unauthorized payment orders. Now, the bank always has a direct claim of restitution against the payee. And yet, there is something unsatisfactory and preliminary about this outcome that is clearly reflected in the reactions of academic literature published to date.

Apart from some few favorable statements, criticism prevails, sparked off mainly by the Court's reasoning in overturning settled principles of restitution on the basis of the supposedly mandatory regulations in BGB §§

31) It would especially be unrealistic to oblige the payer in this case to separately notify the payee; in this vein rightly *Solomon* (note 1) 78 against *Larenz/Canaris* (note 9) § 70 IV 3 a, p. 231.

32) See especially *Lieb*, in Festschrift 50 Jahre BGH, vol. 1, 2000, 547 (552-3); *Wilhelm*, AcP 175 (1975), 304 (349); *Jansen*, JZ 2015, 952 (955-6).

33) In detail *Wilhelm*, AcP 175 (1975), 304 (349-50); *Jansen*, JZ 2015, 952 (955-6).

675j, 675u.[34] Indeed, it is more convincing to assume that the recent amendment of the payment services law did not intend, nor necessarily implied a revision of the traditional principles on restitution of unjust enrichment.[35] Not only judging by the legislative materials, but also taking into account the underlying directive on payment services, the legislative intent is explicitly restricted to "contractual obligations and responsibilities between the payment service user and his payment service provider."[36] Therefore, it is quite compelling that the amendment of BGB §§ 675j, 675u was only supposed to verbalize what has always been an established part of agency law (cf. BGB §§ 665, 666, 667, 670, 675c para 1), and therefore, was supposed to be compatible with restitution "around the corner" and protection of the bona fide payee vis-à-vis the payer.[37] However, it is remarkable that, at least since the ruling of the Court, the return to restitution "around the corner" for revoked payment orders has only seldom been unequivocally advocated. The criticism is not so much directed at the outcome of direct restitution against the payee, but rather at the Court's lacking willingness to coherently integrate this outcome into the traditional principles on restitution in three-party situations according to the instruction model.[38]

In fact, this lack of willingness is so obvious in light of the Court's reference to BGB §§ 675j, 675u that it seems likely that the Court's decision

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34) For a critical view see *Jansen*, JZ 2015, 952; *Kiehnle*, NJW 2015, 3095; *Omlor*, EWiR 2015, 595; *Schnauder*, JZ 2016, 603; *Reuter/Martinek* (note 7) § 2 IV 1 a, pp. 82-3; *Hadding*, WuB 2015, 1631.

35) This view had already been taken before the ruling of the BGH by *Fornasier,* AcP 212 (2012), 410 (433 et seq.); *Grundmann,* WM 2009, 1109 (1117); *Rademacher,* NJW 2011, 2169; *Schwab*, in Münchener Kommentar (note 10), § 812 note 123b; now also those mentioned in note 34.

36) Directive 2007/64/EC, OJ L 319/1, recital 47; cf. also BT-Drucks. (Bundestag publication) 16/11643, p. 113 on the draft version of § 675u BGB, that states that the provision already reflects the existing legal situation in Germany; on this issue, see e.g. *Fornasier*, AcP 212 (2012), 410 (433 et seq.).

37) In particular, the authorization pursuant to BGB 675j merely authorizes to debit the payer's account (*Casper*, in Münchener Kommentar (note 24), § 675f note 42, § 675j note 9; *Winkelhaus* (note 1) 40) and hence does not absolutely exclude, contrary to the BGH's interpretation, attribution in the underlying debt relationship; see also *Hadding*, WuB 2015, 1631; *Omlor*, EWiR 2015, 595 (596); *Reuter/Martinek* (note 7) § 2 IV 1 a, pp. 82-3.

38) See especially *Jansen*, JZ 2015, 955-6.

might provoke a general revision of the traditional principles on restitution in three-party situations. Looked at more closely, it is indeed impossible to reconcile the ruling with the traditional system of restitution without fundamentally questioning its underlying principles. After all, the pivot of the instruction model is to give priority to restitution "around the corner," i.e. restitution involving the instructor and excluding direct recovery. There is an almost unanimous consensus regarding the merits of this model from a viewpoint of equitable reconciliation of interests. It should suffice here to shortly mention the generally recognized significance of a just distribution of litigation, defense, and insolvency risks[39] that seem to dictate restitution between the parties of the defective relationship and to only exceptionally allow a direct restitution claim, when the defects of the instruction cannot be cured under principles of estoppel. Yet this very certainty is called into question by the recent decision, because it now apparently does not seem to be appropriate to refer the bank to the payer for restitution, even in the case of an attributable instruction and a bona fide payee.[40]

Indeed, the very constellation of a revoked payment order with an existing claim in the underlying debt relationship illustrates that excluding direct restitution does not distribute litigation and defense risks more equitably than allowing it. On the one hand, given what was said above about unfeasible distinctions between types of cases, the bank will mostly end up making a direct claim against the payee anyway,[41] where the academic question will be decided just who the correct defendant is. On the other hand, the questionable abstract protection of the bona fide payee via restitution "around the corner" comes at the cost of a considerable, not justifiable gap in the protection of the supposed payer. The latter's reimbursement claim on account of BGB § 675u sentence 2 would always be offset by a right of retention on the basis of restitution of performance or by way of recourse (*Leistungskondiktion oder Rückgriffskondiktion*). Therefore, the payer would himself be subjected to a simultaneous, double risk of litigation vis-à-vis both the bank *and* the payee – without having caused the

39) For a seminal account of this significance see *Canaris*, in Festschrift Larenz, 1973, 799.

40) Different view in *Jansen*, JZ 2015, 952 (956).

41) Supra at note 19; on the de facto priority of a direct claim see also *Thomale* (note 1) 329.

bank's mistake![42] The first litigation risk is vis-à-vis the bank since the payer cannot tell at first whether the payee was in bad faith and hence has to restore the unjustified advantage to the bank directly, with the consequence that the bank's restitution claim against the payer would be void for lack of enrichment on the part of the payer. The second litigation risk is vis-à-vis the payee since the payer would still have to perform under the underlying debt relationship, where he could raise against the payee the defenses that probably led to the revocation in the first place. If, however, restitution is ultimately carried out "around the corner," the supposed payer is not only forced to accept performance and loss of defenses in the debt relationship vis-à-vis the payee. He is also forced to introduce those defenses into his litigation with the bank, since he can only avert their final loss by holding them against the restitution claim of the bank by analogy to BGB §§ 404 et seq. This is a clear violation of the dogma to confine litigation and defense risks to the respective underlying legal relationships.[43]

Just by way of comparison: If there is direct restitution between the bank and the payee from the outset, the revoking customer is not affected by the restitution, but can always and with legal certainty make a claim against the bank to have the mistaken booking cancelled pursuant to BGB § 675u sentence 2. The remainder of the case can usually be disposed of in *one* single litigation between the bank and the payee, where the latter is not in a less favorable position than with restitution "around the corner": If there is a valid claim in the underlying debt relationship and performance has been rendered, e.g. by virtue of a declaration to pay off that debt (*Tilgungsbestimmung*), the payee can invoke loss of his claim against the instructor as loss of enrichment on the basis of BGB § 818 para 3, i.e. as "specific" protection

42) *Flume*, AcP 199 (1999), 1 (7) correctly points out the bank's responsibility.

43) On non-performance restitution based on recourse to an unjust enrichment (*Rückgriffskondiktion*) against the instructor and the analogous applicability of BGB §§ 404 et seq. in case of an instruction that can be attributed by estoppel, see *Reuter/Martinek* (note 7) § 2 IV 1 a, p. 81; *Larenz/Canaris* (note 9) § 70 IV 3 f, pp. 232-3. If the instruction is valid, however, restitution of performance (*Leistungskondiktion*) will be carried out between instructor and instructee. This differentiation of the predominant view is not convincing, though, since the defective instruction does not change the purpose of the transfer. For the analogous problem with direct restitution, see hereinafter at note 72.

of good faith. This defense, sensible from a viewpoint of efficiency in adjudication, is tantamount to the classic defense of *suum recepit* or *good consideration* or *discharge for value* that had already been recognized in Roman Law and is valid until today under Common Law. [44] Only when this defense holds, the bank can make a claim of restitution against the payer, who only then is discharged from his obligation in the underlying debt relationship. There should be no doubt as to which of the two solutions can claim the "charm" [45] of simplicity, legal clarity and efficiency in adjudication.

These considerations illustrate that it is a *petitio principii* to deny the bank a direct claim against the payee on the grounds that the payee is worthier of protection than the seeming payer from a viewpoint of equitable risk distribution between the parties. In fact, the evoked principle of equitable distribution of litigation risks is an empty phrase. [46] Why should the payee necessarily have to be shielded from proceedings with a person she does not have a contract with if she ultimately is not allowed to keep the received benefit anyway? Why should not the payee generally be expected to be ready to restore a benefit, and, moreover, obviously to the same person whom she received the benefit from in the first place? On the basis of these and similar questions, [47] it becomes clear that questioning the dogma of restitution "around the corner" puts all other constructive dogmas of traditional restitution in three-party situations to the test as well. These dogmas include the construction of performance relationships along the underlying contractual relationships, the normative attribution of a

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44) For an instructive account on this, see *Schall*, JZ 2013, 753 (757-8) as well as *id.*, Restitution Law Review 2004, 110; *Solomon* (note 1) 143; with further references and a detailed discussion of the English landmark case *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] Q.B. 677.

45) Concisely *Winkelhaus* (note 1) 130; concurring *Schnauder*, JZ 2016, 603 (606).

46) Especially the reference to insolvency risks – that will not be discussed further here – is misleading because these risks are not assumed by entering a contract; cf. *Schwab*, in Münchener Kommentar (note 10), § 812 note 55; *Thomale* (note 1) 276; *Wilhelm*, AcP 175 (1975), 304 (318-9). For a detailed criticism of the relevance of risk attribution, see *Schall*, JZ 2013, 753 (757); *Seinecke*, in *Rückert/Seinecke*, Methodik des Zivilrechts – von Savigny bis Teubner, 3rd ed. 2017, notes 1071 et seq., pp. 420 et seq.; *Thomale* (note 1) 278-280.

47) Further questions regarding the example of BGHZ 113, 62 can be found at *Seinecke* (note 46) note 1075, p. 421.

transfer as a performance outside of the transfer relationship, as well as the famous doctrine of subsidiarity of non-performance restitution vis-à-vis performance restitution. It is mainly this doctrine that constructively establishes the priority of restitution within the performance relationships and the subordination of direct restitution.[48)]

The crucial point is: All these considerations are completely independent from BGB § 675u. However, now that they become so vividly evident for payment services law in the Court's reading of BGB § 675u, it seems hardly possible to ignore them in other three-party situations once one acknowledges the Court's line of argument on the fairness of direct restitution in the case of revoked payment orders.[49)] Against this background, the alarmed reactions of some writers, speaking of a "vast doctrinal damage" [50)] or erosion of the doctrine of attribution "in its very foundations"[51)], become comprehensible. *Schnauder* gets to the heart of the matter by conjecturing that the 11th Senate apparently "seized the first chance that came along to get rid of its reliance-based case law, that – one seems to read between the lines – had not be deemed worthy to uphold anymore."[52)] Indeed: It is difficult not to draw this conclusion from the new decision of the High Court in the long term.[53)]

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48) For a criticism of this subsidiarity in more recent literature, see *Schall* (note 1) 92 et seq.; *Thomale* (note 1) 258 et seq.

49) For this consequence, see also *Kiehnle*, NJW 2015, 3095 (3096).

50) *Omlor*, EWiR 2015, 595 (596) ("dogmatischer Flurschaden").

51) *Jansen*, JZ 2015, 952 (956) ("in ihren Grundfesten").

52) *Schnauder*, JZ 2016, 603 (606) ("die erstbeste Chance ergriffen und zum Anlass genommen, sich seiner – wie man zwischen den Zeilen zu lesen meint – nicht verteidigungswürdigen Veranlassungsrechtsprechung mit einem Schlag zu entledigen").

53) A distinction is in order, though: The doctrine of estoppel will continue to be relevant in instruction cases with regard to the instructor's declaration to pay off her debt (*Tilgungsbestimmung*); cf. *Reuter/Martinek* (note 7) § 2 IV 1 a, p. 81. Good/bad faith is unsuited, though, as BGHZ 205, 377 should have made obvious, to be the criterion to determine whom the instructee's restitution claim should be directed at. Similarly, *Flume*, AcP 199 (1999), 1 (10) argues that there can be no bona fide rights protection that could justify which of several parties should be granted a restitution claim against the bona fide party.

IV. A fresh start for restitution in three-party situations

The recent decision provides reason to put to the test the entire regime of restitution in three-party situations – a regime that has hit a dead end of doctrinal constructions that do not further but rather veil and suppress the adequacy of the underlying restitution mechanisms. The starting point of such a new conception is a return to the general provisions on restitution and performance (*Erfüllung*) in the German law of obligations. In the case of third-party involvement, the BGB offers clear rules as to who is the performing party and who is the recipient: If the obligor need not perform in person, then, pursuant to BGB § 267 para 1, a third party may also render performance; pursuant to the clear wording of the provision, performing party is not the obligor, but rather the third party who renders performance to the obligee. Inversely, the same follows from BGB § 362 para 2: If, with the obligee's consent, "performance is rendered to a third party for the purpose of performing the contract," then performance is not rendered between obligor and obligee, but between obligor and the receiving third party.[54)]

Therefore, an unbiased look at the BGB yields an understanding of the concept of performance and of the distribution of the performance relationships between the parties that considerably departs from the prevailing view on restitution in three-party situations. Contrary to restitution "around the corner," the central performance relationship, giving rise to the primary claim of restitution, should hence be situated in the *transfer relationship* between the instructee and the recipient (!).[55)] Moreover, the instructor/debtor is also a performing party vis-à-vis the recipient because the recipient receives the transferred object (*erlangtes Etwas*, cf. BGB § 812 para 1) from the instructor for the purpose of

54) Arguing in this vein already *Schall*, JZ 2013, 753 (755) and *id*. (note 1) 21.

55) See also *Schall*, JZ 2013, 753 (755-6); *id*. (note 1) 22; *Kupisch*, Gesetzespositivismus im Bereicherungsrecht, 1978, 19-20, has the same argumentative starting point, but his further conclusion to eventually come back to restitution "around the corner" by analogy to BGB § 812 is to be rejected from the viewpoint outlined in this article. For a methodological criticism, see *Larenz/Canaris* (note 9) § 70 VI 4, p. 251.

performance in the underlying debt relationship.[56] However, the instructor does not receive performance by the instructee in the cover relationship for the reason that she never receives the object of performance herself. Rather, by virtue of her instruction, she explicitly consents to performance being rendered to the recipient as third party. Restitution of performance (*Leistungskondiktion*) is therefore possible – depending on the nature and extent of the underlying defect – both in the transfer relationship between the instructee and the recipient and in the debt relationship between the instructor and the recipient. The possible conflict of both claims can be resolved according to the rules of joint and several creditors as set forth in BGB § 428.[57] Furthermore, if performance in the debt relationship is valid, the recipient can always avail himself of the defense of loss of enrichment pursuant to BGB § 818 para 3 – *suum recepit* – based on the fact that he lost his own claim against the instructor.[58]

Nevertheless, in the cover relationship between the instructor and the instructee, there is no restitution of performance, but rather non-performance restitution by way of recourse (*Rückgriffskondiktion*). This applies to cases of defects in the cover relationship, defects affecting both the cover and underlying debt relationships, as well as defects of the instruction that cannot be invoked due to estoppel. The restitution claim of the instructee is aimed at recovering what the instructor has obtained as enrichment in lieu of the actual object of performance, e.g. the discharge in the debt relationship or a restitution claim against the recipient.[59] This is not a claim of restitution of performance because none of the possible objects were rendered by the instructee to the instructor by way of performance of the underlying debt relationship. In the view taken here, the actual object of performance cannot be normatively attributed to the instructor as performance rendered by the instructee in the cover

56) This value judgment is confirmed by BGB § 788, pursuant to which the performance relationships in the case of an accepted order are situated between drawee and payee as well as between drawer and payee; cf. *Schall*, JZ 2013, 753 (756); *id.* (note 1) 22.

57) *Schall*, JZ 2013, 753 (757-8); *id.* (note 1) 55, 95.

58) *Schall*, JZ 2013, 753 (757-8); see also *Flume*, AcP 199 (1999), 1 (12) as well as supra note 44 with further references.

59) See also *Schall*, JZ 2013, 753 (757 note 28).

relationship.[60] Assuming that the function of the concept of performance in restitution is to identify both the object of performance and the parties of the restitution claim,[61] it seems fundamentally wrong to separate the performance relationships between parties in three-party situations from the actual object of performance by attributing performance on normative grounds.[62] The resulting uncertainty regarding the performance relationships is one of the core reasons for the flawed present state of the doctrine of three-party situations. From a point of view of clarity, practicality and efficiency in adjudication, it would make much more sense to start litigation of restitution where the lost object actually ended up: That is – obviously – with the recipient.

This conclusion might seem odd at first sight given the resulting asymmetry between cover and debt relationships – No to performance (and restitution of performance) between instructor and instructee, but Yes between instructor and recipient. However, one should always have in mind that the doctrinal urge to see performance in three-party situations where the underlying legal relationships are, i.e. "around the corner," is based on the illusion that restitution in three-party relationships should be modeled on a comprehensive analogy to the case of chain performance.[63] In cases of chain performances, i.e., several subsequent performance relationships pertaining to the same object, but not linked together by instruction, restitution is naturally conducted only on a two-party basis between the parties involved in a failed performance relationship (restitution of performance); and this obviously cannot change only on the grounds that several two-party relationships are performed in series. The underlying interests change fundamentally, however, when the involved

60) This runs counter the predominant view, as e.g. in *v. Caemmerer*, JZ 1962, 385 (386); *Canaris*, in Festschrift Larenz, 1973, 799 (813); *Kupisch*, JZ 1997, 213 (219); *Schwab*, in Münchener Kommentar (note 10), § 812 notes 66, 72; *Reuter/Martinek* (note 7) § 2 I, pp. 43 et seq.; *Lorenz*, in Staudinger, BGB, 2007, § 812 note 55; *Larenz/Canaris* (note 9) § 70 II 2 b, pp. 205-6; *Thomale* (note 1) 290.

61) *Schall* (note 1) 15; *Grigoleit/Auer* (note 7) note 23, p. 12.

62) Similarly *Schall*, JZ 2013, 753 (758).

63) Cf. *Schwab*, in Münchener Kommentar (note 10), § 812 notes 52 et seq.; *Larenz/Canaris* (note 9) § 70 I, pp. 200-1; *Grigoleit/Auer* (note 7) notes 419, 430, pp. 144 et seq.; *Kupisch*, JZ 1997, 213 (218-9).

parties themselves cut short the path of performance by means of an instruction and direct performance to a third party recipient. This way of shortcutting the transaction is not, as the chain performance model might suggest, a merely coincidental, "technical" simplification of the transfer without normative relevance.[64] As the rules pertaining to third-party performance in BGB §§ 267 para 2, 362 para 2, 185 show, it is rather a deliberate risk decision to let the object of performance go into other hands than as provided in the contract. Consequently, when it comes to restitution, the instructor also has to expect the risk situation to be different from the contractual and transfer relationships of a supply chain.[65]

This consideration also reveals the deeper reason behind the ongoing dispute over the concept of performance.[66] This dispute pertains to the academic critique of the concept of performance based on the concept of purpose (*Leistungzweck*, *finaler Leistungsbegriff*). On the basis of this critique, almost all voices in current academic writing try to reconnect the concept of performance in three-party situations to the underlying contractual relationships. This can be done either by directly referring to the underlying contractual relationships,[67] or by indirectly alluding to the declarations of purpose by the parties in performance,[68] or, finally, by doctrinal construction on the basis of risk distribution,[69] thereby referring back to the respective bilateral contractual relationships as well. Yet, all these approaches lead up to the same problem: They miss the crucial point that the distribution of restitution risks has to be modified when a third party gets involved. In this vein, it is generally correct to connect the concept of performance to the law of performance (*Erfüllungsrecht*) and to carry out

64) This is, however, what *Larenz/Canaris* (note 9) § 70 II 1 a, p. 201 argue.

65) Rightly arguing in this vein *Schall*, JZ 2013, 753 (757).

66) Cf. e.g. *Lorenz*, in Staudinger, BGB, 2007, § 812 note 4, who describes this quite unrewarding merely conceptual as "typical German phenomenon" ("typisch deutsches Phänomen"); concisely also *Schall*, JZ 2013, 753 (754-5).

67) *Lorenz*, in Staudinger, BGB, 2007, § 812 note 37; *Schwab*, in Münchener Kommentar (note 10), § 812 note 60.

68) *Reuter/Martinek* (note 7) § 1 I 2, p. 6; *Thomale* (note 1) 163; *Jansen*, AcP 216 (2016), 112 (160).

69) *Canaris*, in Festschrift Larenz, 1973, 799 (857); *id*., WM 1980, 354 (367); *Larenz/Canaris* (note 9) § 70 VI 2, 3, p. 248.

restitution where performance has been rendered. However, this generally correct consideration fails precisely when performance is rendered by or to a third party. In the latter case, for example, the obligation between the obligee and the obligor is fulfilled pursuant to BGB § 362 para 1, but performance is not rendered to the obligee, but rather to a *third party* pursuant to BGB § 362 para 2.[70] In spite of the general concurrence between performance in restitution and performance of contracts under the German law, it does not follow from the clear wording of the BGB that the two necessarily have to be situated in the same two-party relationship when *more* than two parties are involved. Similarly, it is not compelling to conclude that performance always has to be rendered in the same two-party relationship where the purpose of performance originates.[71]

Against this background, the actual "charm" of the Court's decision to give a direct claim of restitution for revoked payment orders becomes apparent: Though disguised in a questionable use of concepts, but with an astonishing accuracy as to the outcomes it produces, this new path sketches out a new solution for restitution in three-party situations that not only has the merits of simplicity and legal certainty, but is favorable with regard to deeper aspects of fairness and systematic coherence as well. Moreover, the latter aspects can be generalized far beyond payment services law. There is just one aspect where the Court might have decided differently: The claim of direct restitution between the bank and the payee should not have been qualified as non-performance restitution pursuant to BGB § 812 para 1 sentence 1 alternative 2, but as restitution of performance pursuant to BGB § 812 para 1 sentence 1 alternative 1. This is irrespective of the revocation because the lacking instruction does not change the fact that the intention of the bank had been performance.[72] Unrelated to this is the final question

70) See also *Schall*, JZ 2013, 753 (758 note 34) against *Thomale* (note 1) 57.

71) At least on a conceptual basis, there is nothing wrong with rendering the performance from instructee to recipient in pursuit of the purpose underlying the *cover relationship* between instructee and instructor.

72) Its failure does not render the bank's performance a non-performance enrichment (*in sonstiger Weise*); cf. also *Flume,* AcP 199 (1999), 1 (10). BGHZ 55, 176 (177) ("Jungbullenfall") is an example of how this consideration is disregarded with respect to the transfer of ownership to a bona fide third party transferee that fails because of BGB § 935; for criticism, see e.g. *Larenz/Canaris* (note 9) § 70 III 2 d, p. 215.

whether performance could have been attributed in the debt relationship between the instructor and the payee according to principles of estoppel. The performance then would have to be taken into account in favor of the payee as defense of *suum recepit* pursuant to BGB § 818 para 3. In the case at hand, however, the Court correctly denied this question.[73)]

V. Conclusion

A quick look at the BGH's recent case law on restitution in three-party situations suffices to reveal: There is hardly a decision without extensive theoretical discussion of the correct parties of litigation, the right criteria of attribution, bona fides and risk, and the correct object of enrichment. But can it really be the purpose of the German restitution law to produce a new scholarly textbook on third-party restitution with every new case? If not, then we should ask whether the time might be ripe for a fundamental "disarmament"[74)] and rethinking of three-party situations in restitution. In particular, courts and scholars should consider dropping the doctrine of restitution "around the corner" modeled on the instruction situation and to reversing rule and exception between restitution "around the corner" and direct restitution. The Court's recent decision on restitution of revoked payment orders opens the door for such a fresh start. It is now the turn for legal academia and adjudication to seize the opportunity and walk through that door with the right reasoning.

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73) BGHZ 205, 377 (385, notes 24-5); critically *Omlor*, EWiR 2015, 595 (596); *Kiehnle*, NJW 2015, 3095.

74) In reference to the poignant title of *Schall*, JZ 2013, 753; cf. also *Wesel*, NJW 1994, 2594 (2595) pleading for a simplification of the law of restitution.

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