第一章　合同与其他债

第一节　合同与准合同

准合同（quasi-contract）是衡平法上的概念，原意为“所得不应多于应得”。在准合同的关系下，当事人之间既不存在明示的合意，也不存在事实上的默示合意；双方之间的“合意”只是法律上的虚构。其结果是，受益人必须归还从他人处取得的财产或者利益。在英美法上，准合同又称为不当得利（unjust enrichment），即没有法律所承认的正当理由而获得他人的利益。

在下面案例中，上诉人 Lyle Dews 显然从原告处获得了利益，但是双方并没有订立合同，法院会如何认定他们之间关系的性质呢？

案例一

Lyle Dews v. Halliburton Industries, Inc.

Supreme Court of Arkansas

288 Ark. 532, 708 S. W. 2d 67 (1986)

HOLT, CHIEF JUSTICE

At issue in this case is who is to pay eleven different companies approximately half of a million dollars for work performed while

drilling an oil well. The chancellor held the appellant, Lyle Dews and Bruce Massey are responsible for the debt. We agree. It is from that judgment that this appeal is brought. Our jurisdiction is pursuant to Sup. Ct. R. 29 (1) (c) and (d).

Crystal Oil Co. owned certain leases covering lands in the southeast quarter and the north half of the southwest quarter, section 10, township 20S, range 25W, in Lafayette County, Arkansas. Crystal executed a farmout agreement of these leases with Dews on May 4, 1982. The terms of the farmout required Dews, at his expense, to drill a test well by May 15, 1982 and continue drilling to a depth sufficient to test the Cotton Valley Formation. If production was obtained, Crystal was required to assign Dews an interest in the leasehold estate. Crystal reserved an overriding royalty interest. If the first well was drilled, the agreement gave Dews the option to drill additional wells on the remaining acreage. The agreement was extended until July 15, 1982. Dews paid no consideration for this farmout.

Dews then entered into an agreement with Bruce Massey whereby Massey would pay Dews $50,000.00 in exchange for Dews assigning to Massey his right to the leasehold estate under the Crystal-Dews agreement and subject to the terms of the Crystal-Dews agreement. Dews reserved 5% of the leasehold estate as an overriding royalty interest. Massey agreed in return to cause the well to be drilled as required by the Crystal-Dews farmout agreement.

Drilling operations began prior to July 15, 1982 and the well was completed as a producing well on November 14, 1982. All of the claimants in this case were hired by Massey to supply labor or material for drilling the well.

As a result of the drilling and completion of the well, Dews received his assignment of leases from Crystal. Dews never assigned his right to Massey pursuant to their agreement, because Massey never paid Dews the $50,000.00 in a manner satisfactory to Dews.

Some of the various companies responsible for drilling the well filed suit against Massey in an attempt to collect the money owed to them. Dews was brought in as a party defendant and Dews then cross-claimed against all of the companies.

The chancellor found that Massey did not appear and defend and was therefore in default, and that Massey and Dews were jointly and severally liable for the companies' claims. Each company was awarded a money judgment, for a total of $519,397.60 plus interest. In addition, all but one of the companies were allowed statutory liens against the leasehold estate, and all claimants were granted constructive, equitable liens upon all funds held by any purchaser of the oil or gas produced from the well.

Numerous issues are raised on appeal and on a cross-appeal filed by one of the companies. The chancellor based Dews' liability for the money owed on four alternative grounds. We agreed with one of the reasons, therefore, the chancellor is affirmed as to the money judgment.

I. Quasi-contract

In holding Dews liable under a quasi-contract theory, the chancellor found that the claimants provided valuable services and materials to the well, which services and materials were anticipated by the parties and were necessary to the completion of the well. Since Dews claims ownership of the well by virtue of the assignment from Crystal, and has accepted the well and the work performed by the claimants, the court held Dews would be unjustly enriched if he

were not required to pay for the work.

Quasi-contracts, or contracts implied in law, are legal fictions, created by the law to do justice. They do not rest upon the express or implied assent of the parties. Rather, the underlying principle is that one person should not unjustly enrich himself at the expense of another. To find unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore. There must also be some operative act, intent, or situation to make the enrichment unjust and compensable. The basis for recovery under this theory is the benefit that the party has received and it is restitutionary in nature. Recovery may be had under quasi-contract where services have been performed, whether requested or not, which have benefited a party. Courts, however, will only imply a promise to pay for services where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary. Quasi-contracts rest on the equitable principle that "whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do. Where a party has in good faith rendered a service, not illegal or contrary to public policy, and the other party has accepted and used the service, the former may recover."

That is the situation we are confronted with here. The appellees provided valuable services and materials for the well, without which the well never would have been drilled. Because the well was drilled and is producing, Dews received his assignment. Dews was undoubtedly enriched by appellees' actions.

As to the unjust aspect, the testimony at the trial demonstrated that Dews was aware that the companies were rendering valuable

services to the well. Because Massey never paid Dews the $50,000 pursuant to their agreement, Dews at all times knew that Massey was in breach. Since Massey's authority to drill the well stemmed from the same agreement he had breached, Dews could not stand by and watch the companies perform services based on their agreements with Massey. Dews testified he decided to let Massey continue drilling in the hopes that he would finish the well. By making a conscious decision not to inform the companies that Massey was in breach of their agreement, and would therefore never receive the assignment, Dews allowed the debts to be incurred. He cannot permit such an injustice and still receive the benefit of the services rendered. Dews admitted as much during the course of the trial when he testified as follows:

Q: If the situation occurs what I just said and you don't have to pay any lien claimants any money because you didn't contract with them according to your statement and you don't have to pay Mr. Massey because he is in breach of your contract and you have got an assignment from Crystal and the well is in [your] name, then you just get a free fall in this whole thing, is that just? Is that fair?

For you to get something when you have got nothing in it except an assignment?

Dews: I would say if I am paid I feel like.

Q: That is not my question.

Dews: No sir, that is not fair.

The appellee companies, in good faith, performed services on the well. As the owner of the majority of the working interest in the producing well, Dews has accepted and used their services. The companies, therefore, may recover from him.

思考题

1. 本案涉及的当事人有哪些？请指出哪些当事人之间有合同关系，哪些没有？

2. 在本案中，Lyle Dews 获得了什么利益？他有没有付出？本案争议的焦点是什么？

3. 从本案分析，准合同的构成要件有哪些？在本案中，这些要件都得到满足了吗？

第二节　合同与欺诈

在英美法上，欺诈既可能成为合同法上的诉因，又可能成为侵权法上诉因。这首先取决于原告的主张，其次取决于法律规定的某一诉因的构成要件是否都具备。在下面这个案例中，欺诈之诉由合同一方对另一方提起，但法官是从侵权法的角度讨论的。

案例二

Ollerman v. O'rourke Co. , Inc.

Supreme Court of Wisconsin, 1980

94 Wis. 2d 17, 288 N. W. 2d 95

ABRAHAMSON, Justice.

I.

This appeal is from an order overruling the motion of O'Rourke

Co., Inc., the seller, brought to dismiss Roy Ollerman's, the buyer's, amended complaint for failing to state a claim upon which relief can be granted. We conclude that the complaint states a claim, and we affirm the order of the circuit court.

The buyer alleges that he entered into a written offer to purchase a vacant to build a house; and that in the process of excavating for the house, a well on the property was uncapped and water was released.

The complaint further alleges that the seller is a corporation engaged in the business of developing and selling real estate; that it is experienced in matters of real estate; that it had owned and subdivided the area of real estate in which the subject lot is located; that it was offering the subject lot and other lots in the same area for public sale; that it is familiar with the particular area of real estate in which the lot is located; that the area is zoned residential and that the seller knew it was zoned residential.

The complaint further states that the buyer "was a stranger to the area"; that he was inexperienced in matters of real estate transactions; that he purchased the lot to construct a house; that he did not know of the existence of a well under the land surface hidden from view; that if he had known of the well, he either would not have purchased the property or would have purchased it at a lower price; that the well constituted a defective condition of the lot; that the well made the property worth less for residential purposes than he had been led to believe; that the well made the property unsuitable for building without added expense; and that the seller's failure to disclose the existence of the well was relied upon by the buyer and he was thereby induced to buy this lot in ignorance of the well.

Additional allegations applicable to what is labeled in the complaint as the "first cause of action" are that the seller, through its agents, knew of the existence of the underground well and, in order to induce buyer to buy the land, "falsely and with intent to defraud", failed to disclose this fact which it had a duty to disclose and which would have had a material bearing on the construction of a residence on the property.

A "second cause of action" is that the defendant knew or should have known about the well; and had a duty to ascertain and a duty to disclose such information.

This court has recognized that misrepresentation is a generic concept separable into the three familiar tort classifications: intent (sometimes called fraudulent misrepresentation, deceit or intentional deceit), negligence and strict responsibility.

II.

We discuss first whether the complaint states a claim for intentional misrepresentation. Initially we observe, as did the seller, that the complaint does not allege the first two elements of the tort of intentional misrepresentation, namely that the seller made a representation of fact and that the representation was untrue. The gravamen of the wrong is the nature of the false words used and the reliance which they may reasonably induce. In lieu of these allegations of false words, the complaint recites that the seller failed to disclose a fact, the existence of the well. The general rule is that silence, a failure to disclose a fact, is not an intentional misrepresentation unless the seller has a duty to disclose. If there is a duty to disclose a fact, failure to disclose that fact is treated in the

law as equivalent to a representation of the non existence of the fact.

The question thus presented in the case at bar is whether the seller had a duty to disclose to the buyer the existence of the well. If there is a duty to disclose, the seller incurs tort liability for intentional misrepresentation (i. e. the representation of the non-existence of the fact), if the elements of the tort of intentional misrepresentation are proved.

The question of legal duty presents an issue of law.

We recognize that the traditional rule in Wisconsin is that in an action for intentional misrepresentation the seller of real estate, dealing at arm's length with the buyer, has no duty to disclose information to the buyer and therefore has no liability in an action for intentional misrepresentation for failure to disclose.

The traditional legal rule that there is no duty to disclose in an arm's-length transaction is part of the common law doctrine of caveat emptor which is traced to the attitude of rugged individualism reflected in the business economy and the law of the 19th century. The law of misrepresentation has traditionally been closely aligned with mores of the commercial world because the type of interest protected by the law of misrepresentation in business transactions is the interest in formulating business judgments without being misled by others that is, an interest in not being cheated.

Under the doctrine of caveat emptor no person was required to tell all that he or she knew in a business transaction, for in a free market the diligent should not be deprived of the fruits of superior skill and knowledge lawfully acquired. The business world, and the law reflecting business mores and morals, required the parties to a transaction to use their faculties and exercise ordinary business

sense, and not to call on the law to stand In loco parentis to protect them in their ordinary dealings with other business people.

"The picture in sales and in land deals is, in the beginning, that of a community whose trade is simple and face to face and whose traders are neighbors. The goods and the land were there to be seen during the negotiation and particularly in the case of land, everybody knew everybody's land; if not, trade was an arm's length proposition with wits matched against skill. Of course caveat emptor would be the rule in such a society. But caveat emptor was more than a rule of no liability; it was a philosophy that left each individual to his own devices with a minimum of public imposition of standards of fair practice. In the beginning the common law did grant relief from fraud and did recognize that if the seller made an express promise as to his product at the time of the sale he remained liable after the sale on this 'collateral' promise. Indeed covenants for title in the deed were such collateral promises which survived the sale." Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose, 37 Minn. L. R. 108, 110 (1953).

Over the years society's attitudes toward good faith and fair dealing in business transactions have undergone significant change, and this change has been reflected in the law. Courts have departed from or relaxed the "no duty to disclose" rule by carving out exceptions to the rule and by refusing to adhere to the rule when it works an injustice. Thus courts have held that the rule does not apply where the seller actively conceals a defect or where he prevents investigation; where the seller has told a half-truth or has made an ambiguous statement if the seller's intent is to create a false impression and he does so; where there is a fiduciary relationship

between the parties; or where the facts are peculiarly and exclusively within the knowledge of one party to the transaction and the other party is not in a position to discover the facts for himself.

On the basis of the complaint, the case at bar does not appear to fall into one of these well-recognized exceptions to the "no duty to disclose" rule. However, Dean Prosser has found a "rather amorphous tendency on the part of most courts toward finding a duty of disclosure in cases where the defendant has special knowledge or means of knowledge not open to the plaintiff and is aware that the plaintiff is acting under a misapprehension as to facts which could be of importance to him, and would probably affect his decision".

Dean Keeton described these cases abandoning the "no duty to disclose" rule as follows:

In the present stage of the law, the decisions show a drawing away from this idea (that nondisclosure is not actionable), and there can be seen an attempt by many courts to reach a just result in so far as possible, but yet maintaining the degree of certainty which the law must have. The statement may often be found that if either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose then his silence is fraudulent.

The attitude of the courts toward nondisclosure is undergoing a change. It would seem that the object of the law in these cases should be to impose on parties to the transaction a duty to speak whenever justice, equity, and fair dealing demand it. This statement is made only with reference to instances where the party to be charged is an actor in the transaction. This duty to speak does not result from an implied representation by silence, but exists because a refusal to speak constitutes unfair conduct. Fraud Concealment and Nondisclosure, 15

Tex. L. Rev. 1, 31 (1936).

The test Dean Keeton derives from the cases to determine when the rule of nondisclosure should be abandoned — that is "whenever justice, equity and fair dealing demand it" — presents, as one writer states, "a somewhat nebulous standard, praiseworthy as looking toward more stringent business ethics, but possibly difficult of practical application."

The draftsmen of the most recent Restatement of Torts (Second) (1977) have attempted to formulate a rule embodying this trend in the cases toward a more frequent recognition of a duty to disclose. Sec. 551 (1) of the Restatement sets forth the traditional rule that one who fails to disclose a fact that he knows may induce reliance in a business transaction is subject to the same liability as if he had represented the nonexistence of the matter that he failed to disclose if, and only if, he is under a duty to exercise reasonable care to disclose the matter in question. Subsection (2) of Sec. 551 then sets forth the conditions under which the seller has a duty to use reasonable care to disclose certain information. Sec. 551 (2) (e) is the "catch-all" provision setting forth conditions under which a duty to disclose exists; it states that a party to a transaction is under a duty to exercise reasonable care to disclose to the other "facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts." Comment L to sec. 551 recognizes the difficulty of specifying the factors that give rise to a reasonable expectation of disclosure:

The continuing development of modern business ethics has, however, limited to some extent this privilege to take advantage of ignorance. There are situations in which the defendant not only knows that his bargaining adversary is acting under a mistake basic to the transaction, but also knows that the adversary, by reason of the relation between them, the customs of the trade or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. In this type of case good faith and fair dealing may require a disclosure.

It is extremely difficult to be specific as to the factors that give rise to this known, and reasonable, expectation of disclosure. In general, the cases in which the rule stated in Clause (e) has been applied have been those in which the advantage taken of the plaintiff's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling, in which the plaintiff is led by appearances into a bargain that is a trap, of whose essence and substance he is unaware. In such a case, even in a tort action for deceit, the plaintiff is entitled to be compensated for the loss that he has sustained.

Section 551 (2) (e) of the Restatement (Second) of Torts limits the duty to disclose those "facts basic" to the transaction. Comment J to Sec. 551 differentiates between basic facts and material facts as follows:

"A basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction,

but not go to its essence. These facts may be material, but they are not basic."

However, the draftsmen of the Restatement recognized that the law was developing to expand the duty to disclosure beyond the duty described in Sec. 551.

"There are indications, also, that with changing ethical attitudes in many fields of modern business, the concept of facts basic to the transaction may be expanding and the duty to use reasonable care to disclose the facts may be increasing somewhat. This Subsection is not intended to impede that development." Comment L, Sec. 551, 3 Restatement (Second) of Torts (1977).

This court has moved away from the rule of caveat emptor in real estate transactions, as have courts in other states.

An analysis of the cases of this jurisdiction and others indicates that the presence of the following elements is significant to persuade a court of the fairness and equity of imposing a duty on a vendor of real estate to disclose known facts: the condition is "latent" and not readily observable by the purchaser; the purchaser acts upon the reasonable assumption that the condition does (or does not) exist; the vendor has special knowledge or means of knowledge not available to the purchaser; and the existence of the condition is material to the transaction, that is, it influences whether the transaction is concluded at all or at the same price.

...

Where the vendor is in the real estate business and is skilled and knowledgeable and the purchaser is not, the purchaser is in a poor position to discover a condition which is not readily discernible, and the purchaser may justifiably rely on the knowledge and skill of the

vendor. Thus, in this instant case a strong argument for imposing a duty on the seller to disclose material facts is this "reliance factor". The buyer portrayed in this complaint had a reasonable expectation of honesty in the marketplace, that is, that the vendor would disclose material facts which it knew and which were not readily discernible. Under these circumstances the law should impose a duty of honesty on the seller.

In order to determine whether the complaint states a claim for intentional misrepresentation we hold that a subdivider-vendor of a residential lot has a duty to a "non-commercial" purchaser to disclose facts which are known to the vendor, which are material to the transaction, and which are not readily discernible to the purchaser. A fact is known to the vendor if the vendor has actual knowledge of the fact or if the vendor acted in reckless disregard as to the existence of the fact. This usage of the word "know" is the same as in an action for intentional misrepresentation based on a false statement. A fact is material if a reasonable purchaser would attach importance to its existence or nonexistence in determining the choice of action in the transaction in question; or if the vendor knows or has reason to know that the purchaser regards or is likely to regard the matter as important in determining the choice of action, although a reasonable purchaser would not so regard it. See 3 Restatement (Second) of Torts, Sec. 538 (1977). Whether the fact is or is not readily discernible will depend on the nature of the fact, the relation of the vendor and purchaser and the nature of the transaction.

The seller's brief asserts that the well is not a material fact because it does not constitute a defective condition; that the existence of the well was well known in the community; and that the

buyer should have made inquiry about the lot. These are matters to be raised at trial, not on a motion to dismiss. The buyer must prove at trial that the existence of the well was a material fact and that his reliance was justifiable.

III.

We turn now to the second cause of action, an action in negligence based on misrepresentation. [The court observed that this was a more difficult duty to establish and deferred a ruling on its validity until the case had been tried.]

We have enumerated several public policy reasons for not imposing liability despite a finding of negligence as a causal factor producing injury:

"(1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point."

Courts have imposed liability in negligence actions for personal injury or property damage caused by false statements or caused by nondisclosure. However, courts have been more reluctant to impose liability in negligence actions for misrepresentations causing pecuniary loss (not resulting from bodily harm or physical damage to property).

Similarly, the draftsmen of the Restatement of Torts (Second), in discussing liability for information negligently supplied for the guidance of others in their business transactions, caution that the scope of liability for failing to exercise reasonable care in supplying correct information is not determined by the rules that govern liability for the negligent supplying of chattels that imperil the security of persons or property or other negligent misrepresentation that results in physical harm. When there is no intent to deceive, but only negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

The reason a narrower scope of liability is fixed for negligent misrepresentation than for deceit is to be found in the difference between the obligations of honesty and of care, and in the significance of this difference to the reasonable expectations of the users of information that is supplied in connection with commercial transactions. Honesty requires only that the maker of a representation speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he says. The standard of honesty is unequivocal and ascertainable without regard to the character of the transaction in which the information will ultimately be relied upon or the situation of the party relying upon it. Any user of commercial information may reasonably expect the observance of this standard by a supplier of information to whom his use is reasonably foreseeable.

On the other hand, it does not follow that every user of commercial information may hold every maker to a duty of care.

By limiting the liability for negligence of a supplier of