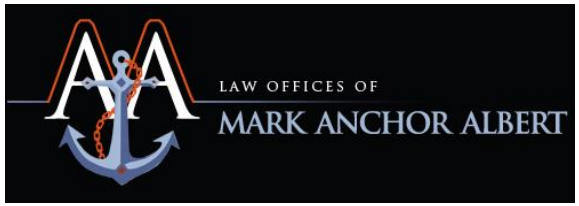

NATIONWIDE SURVEY OF DISGORGEMENT LAW

JURISDICTION	CASE LAW	NATURE OF CASE	SUMMARY
United States	Snepp v. U.S., 444 U.S. 507 (1980)	Disgorgement for contractual and fiduciary breach	Facts: As part of his employment contract with the agency, a CIA agent agreed not to publish any information about the agency without pre-approval. But the agent published a book about the agency containing non-classified information, without pre-clearance. The Supreme Court held that the agent thereby breached his contractual and fiduciary duties to the agency, ordering that he disgorge all profits made from the book and placing a constructive trust over future profits. Rule: Disgorgement for breach of contractual and fiduciary obligations is proper where the measure of legal damages is either too uncertain or insufficient to deter the breach.
Alabama	Coupounas v. Morad, 380 So. 2d 800 (Ala. 1980)	Constructive trust for breach of fiduciary duty	Facts: Certain shareholders, directors, and officers of Corporation A (defendants) set up Corporation B, which competed directly with Corporation A. A shareholder of Corporation A filed a derivative suit against defendants and Corporation B, alleging usurpation of a corporate opportunity in breach of their fiduciary duties. The shareholder sought a constructive trust over the entire business and assets of Corporation B. The court ruled that the proper remedy was a constructive trust only over Corporation B's net profits.

			Rule: "A constructive trust is a creature of equity that operates to prevent unjust enrichment; such a trust will be imposed when a property interest has either been acquired by fraud or where, in the absence of fraud, it would be inequitable to allow the property interest to be retained by the person who holds it." A constructive trust over all of a corporation's assets would be proper only if such assets were fraudulently acquired or, in the absence of fraud, if it would be inequitable for a corporation to retain them.
California	Landsberg v. Scrabble, 802 F.2d 1193 (9th Cir. 1986)	Disgorgement for breach of implied-in-fact contract	Facts: Plaintiff created a strategy book for the Scrabble game. Plaintiff contacted defendant (owner of Scrabble) for permission to use its copyright mark. After negotiations failed, defendant proceeded to copy and publish the manuscript itself without plaintiff's permission. The district court found defendant liable for breach of an implied-in-fact contract with plaintiff. Defendant's use and publication constituted a breach of that contract. The Ninth Circuit affirmed the district court's ruling and forced defendant to disgorge all profits made from the book (including profits made by the publishing house). Rule: Disgorgement of profits for the breach of an implied-in-fact contract is appropriate to prevent the sanctioning of forced exchanges.
	Women's Fed. Sav. & Loan Ass'n v. Nevada Nat'l Bank, 811 F.2d 1255 (9th Cir. 1987)	Disgorgement for breach of contractual and fiduciary duties	Facts: Two banks, one from Ohio and the other from Nevada, contracted to lend money, as co-lenders, to a casino venture. As part of the co-lending agreement, the Nevada bank agreed to act as the Ohio bank's trustee in administering and servicing the loan. Without notifying the Ohio Bank, the Nevada bank provided secondary financing

			to the venture. The Ohio Bank sued for breach of contractual and fiduciary duties and, inter alia, for disgorgement of profits made on the secondary financing. Rule: The disgorgement of profits for breach of fiduciary duty is appropriate.
	Mullen v. Department of Real Estate, 204 Cal. App. 3d 295 (1988) California Government Code Section 11519(d) (used by the Mullen court to justify disgorgement)	Disgorgement for contractual and fiduciary breach	Facts: The seller of a house entered into a listing agreement with a real estate broker and opened an escrow account with the broker's firm. The broker found a buyer, who deposited money toward purchase of the house into the escrow account. A week before closing, the buyer could not obtain financing, and the deal fell through. At no time did the seller authorize the release of the escrow funds to the buyer. Nevertheless, the broker cancelled the existing escrow account and transferred the funds to a new account in order to enable the buyer to purchase a house from another seller. That sale was concluded, and the broker received a commission of $5,700. The seller complained to the California State Department of Real Estate, which charged broker with several statutory and regulatory violations. The administrative court found that the broker was "in breach of his contractual and professional obligations" to the seller, placing him on probation and forcing him to disgorge almost all his commission made as a result of breach ($5,500). Both the trial court and appellate court affirmed. Rule: Disgorgement for breach of contract and fiduciary obligations is appropriate to compensate for damages resulting from such breach.
Colorado	EarthInfo, Inc. v.	Disgorgement for breach of	Facts: Plaintiff and defendant agreed to develop and market

	Hydrosphere Res. Consultants, Inc., 900 P.2d 113 (Colo. 1995)	contract	certain products. Defendant agreed to pay plaintiff a fixed fee plus royalties on the net sales of the product as compensation for its work. A dispute arose as to the payment of royalties on a new derivative product, and defendant stopped paying plaintiff royalties on both the old and new products (but continued fixed-fee payments). Plaintiff sued for breach of contract. Court found royalties were due on the old product, but not on the new derivative product. Court ordered disgorgement of profits. Rule: Disgorgement of profits accrued as a result of a breach of contract is proper where such breach is "conscious and substantial."
	University of Colorado Found., Inc. v. American Cyanamid Co., 153 F. Supp. 2d 1231 (D. Colo. 2001)	Disgorgement for patent infringement	Facts: Defendant defrauded plaintiffs by secretly patenting their invention and profiting from it. Applying Colorado law and citing EarthInfo, the court held that the defendant had to disgorge its patent-related profits. Rule: "The extreme culpability" of defendant, and the "substantial" profits made as a result of its misconduct, justified disgorgement of its profits.
Connecticut	Dixon v. Kane, 1990 Conn. Super. LEXIS 1568 (1990)	Disgorgement for breach of fiduciary duty	Facts: Defendant real-estate broker agreed to work for plaintiff's primary real-estate agent in the sale of plaintiff's property. Defendant was also the buyer of the property. The court denied defendant's motion to strike, finding evidence that defendant was a sub-agent who owed a fiduciary duty to plaintiff. The court also found evidence that defendant breached her duty by withholding materials facts about the transaction, thereby making a large profit as a result. Rule: An agent who profits from the breach of his fiduciary duty to his principal can be compelled to disgorge those ill-

			gotten profits—even if the principal has not suffered any contractual damages.
	Spector v. Konover, 57 Conn. App. 121 (2000)	Constructive trust for wrongful holding of another's property	Facts: Rule: "[A] constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. . . . Moreover, the party sought to be held liable for a constructive trust must have engaged in conduct that wrongfully harmed the plaintiff."
Delaware	Sanders v. Wang, 1999 Del. Ch. LEXIS 203 (1999)	Disgorgement of profits for breach of fiduciary duty	Facts: Rule: It is, of course, fundamental that a fiduciary who breaches his duty is liable for any loss suffered by the beneficiary of his trust . . . [and] any profit made through the breach of trust may be disgorged through the device of constructive trust.
Florida	Burger King Corp. v. Mason, 710 F.2d 1480 (11th Cir. 1983)	No disgorgement for pure breach of contract	Facts: Franchisor properly terminated franchise agreement with franchisee. But franchisee continued to use franchisor's trademark. Franchisor sued franchisee, and lower court awarded franchisor profits as damages for breach of franchise agreement based on franchisee's post-termination use of trademarks. This court vacated damages ruling. According to the court, franchisee's profits did not equal franchisor's damages from the breach.

			Rule: Disgorgement is not a remedy for breach of contract; disgorgement's underlying purpose – to prevent "unjust enrichment" – "does not comport with the compensatory nature of breach of contract damages."
Illinois	Avery v. State Farm Mut. Auto. Ins. Co., 321 Ill. App. 3d 269 (2001)	Disgorgement of profits for breach of contract	Facts: A class of State Farm Auto policyholders sued State Farm for breach of contract, alleging that State Farm had, in contravention of their policies, specified inferior "crash parts" for policyholders' damaged vehicles. The class sought disgorgement of profits—i.e., State Farm's total savings made from specifying inferior parts. The court held that disgorgement of profits was improper because an adequate remedy at law was available. Rule: Disgorgement of profits for breach of contract is a proper remedy when there is no adequate remedy at law and legal damages would enable the breaching party to profit from his conduct. (An "adequate remedy at law" is one that is "clear, complete and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." Hill v. Names & Addresses, Inc., 212 Ill. App. 3d 1065, 1082 (1991)).
	Rowe v. Maremont Corp., 850 F.2d 1226, 1241 (7th Cir. 1988). (applying 7th Circuit law)	No disgorgement where seller would have sold securities even with defrauder's full disclosure	Facts: The court denied stock seller's request for disgorgement of profits made by buyer through fraud. The court found that seller would have sold the stocks even absent buyer's fraud. The court emphasized that the sole purpose of disgorgement is to put seller back in the position he would have been in were it not for the fraud, and to prevent unjust enrichment: "To make [buyer] pay back profits that it would have made even if it told the truth is harsh and punitive. Equity requires only that a defendant give up its unjust enrichment."

			Rule: "[D]isgorgement is meant to place a defrauded seller in the same position he would have occupied had the buyer's fraud not induced him to enter the transaction."
	Graham v. Mimms, 111 Ill. App. 3d 751 (1982)	Constructive trust on profits made as result of fiduciary breach	Facts: Defendant was the majority shareholder in Mimco. After failing to force out plaintiffs, who were minority shareholders in Mimco, defendant formed a new corporation, Wyclif. Defendant proceeded to use Mimco's assets to pursue certain business opportunities that the minority shareholders claimed belonged to Mimco. The trial court agreed, imposing a constructive trust over all profits made by defendant after incorporating Wyclif. The appeals court reversed to the extent the constructive trust covered profits *not* generated by defendant's usurpation of Mimco's business opportunities. Rule: When a fiduciary breaches his duty of loyalty by misappropriating corporate assets, restitution can be compelled by means of a constructive trust.
	Lux v. Lelija, 14 Ill. 2d 540 (1958)	When constructive trusts apply	Relevant Dictum: "Constructive trusts are divided into two classes: one, where there is a fiduciary or confidential relationship and the subsequent abuse of that confidence; and the other, where actual fraud is a basis for raising a constructive trust."
Massachusetts	CRS Steam, Inc. v. Engineering Resources, Inc., 225 B.R. 833 (D. Mass. 1998)	Constructive trust for pure breach of contract	Facts: Plaintiffs, debtors in possession, challenged a court-ordered patent assignment made to defendant ex-employer, arguing that the assignment was a preference under the bankruptcy laws. The ex-employer, claiming to be the beneficiary of a pre-existing constructive trust which had not received a "transfer," sought summary judgment on that and on fraudulent transfer claims.

			Relevant Dicta: In its discussion of the nature of constructive trusts in general, the court stated: "[C]ourts occasionally employ constructive trusts as a remedy for breach of contract. They do so when the benefit derived by the party in default exceeds the other's loss."
	Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965)	Disgorgement of profits made as the result of fraudulent concealment	Facts: Shareholders agreed to sell their steel company to the company's president, who had concealed the company's true value. The president in turn sold the steel company for almost 20 times the amount for which he bought it. Applying Massachusetts law, the court forced the president to disgorge his net profits on the sale (even though the president owed no fiduciary duty to shareholders in the purchase of the company). Rule: Even absent a fiduciary relationship, a wrongdoer should disgorge his fraudulent enrichment.
Nebraska	Dethmers Mfg. Co. v. Automatic Equip. Mfg. Co., 73 F. Supp. 2d 997 (N.D. Iowa 1999) (applying Nebraska law)	No disgorgement of patent-infringement profits	Facts: Plaintiff sued defendant for patent infringement on three separate causes of action: (1) breach of contract; (2) promissory estoppel; and (3) unjust enrichment (a.k.a. breach of quasi-contract/"implied-in-law" contract). At issue was whether Nebraska law allowed for disgorgement of all profits made from defendant's improper use of plaintiff's patent on any of these claims. The court ruled in the negative as to all three claims. Rule: (1) The proper measure of damages for a breach of contract claim is not disgorgement of all profits, which "would constitute a windfall [to plaintiff] not authorized under Nebraska law," but rather what plaintiff expected to receive under the contract—i.e., a reasonable royalty or licensing fee. (2) Promissory estoppel damages cannot

			exceed damages available under a contract; thus disgorgement is not the proper remedy. (3) An unjust enrichment claim gives rise to damages only to the extent of profits *unjustly* held by the defendants—i.e., a reasonable royalty; thus, disgorgement of *all* profits is not a proper remedy.
North Carolina	Rhone-Poulenc Agro S.A. v. Monsanto Co., 2000 U.S. Dist. LEXIS 21330 (M.D.N.C. 2000)	Disgorgement of fraudulently obtained profits	Facts: Defendant agreed to test a technology invented by plaintiff. Without revealing the success of the tests, defendant fraudulently induced plaintiff to grant defendant rights to use the technology. Defendant profited from the technology. Plaintiff sued defendant on various grounds, including fraud. The court forced defendant to disgorge its profits. Rule: "[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment."
New York	Pencom Sys. v. Shapiro, 193 A.D.2d 561 (N.Y. App. Div. 1993) Gomez v. Bicknell Advisory Servs., 2001 N.Y. Misc. LEXIS 496 (2001) (agreeing with Pencom).	Disgorgement for breach of fiduciary duty No disgorgement for pure breach of non-competition agreement (with no fiduciary breach)	Facts (of *Pencom*): Employee left employer and began competing with it, in violation of employee's covenant not to compete. The court awarded employer the net profits of which it was deprived as a result of employee's improper competition (using employer's loss -- not employee's gain -- as the measure of recovery). Relevant Dictum: "Disgorgement of defendant's profits would be the proper measure of damage if defendant had used the trade secrets for his own benefit while still in plaintiff's employ."
Pennsylvania	Atacs Corp. v. Trans World Communications, Inc., 1997 U.S. Distr.	Disgorgement of profits for contractual and fiduciary breach	Facts: (The following facts were detailed in the subsequent appeals court decision at Atacs Corp. v. Trans World Communications, Inc., 155 F.3d 659 (3d Cir. 1998). The Greek government opened bidding for a project. Plaintiffs

	LEXIS 13580 (E.D. Pa. 1997) (applying Pennsylvania law)		and defendant entered into a teaming agreement, as evidenced by a series of draft agreements, but no final executed contract. Plaintiffs promised to provide defendant with the technical expertise and contacts necessary to bid and perform the contract; in exchange, defendant, who met the financial requirements to bid as the prime contractor, promised to make plaintiffs the primary subcontractor. No price for plaintiffs' subcontract was ever agreed to. Defendant obtained the Greek contract, but did not give the primary subcontract to plaintiffs. Plaintiffs sued defendant for breach of the agreement, and sought damages under various theories. The court held that a valid contract existed and that defendant breached it. But the court rejected plaintiffs' claim that disgorgement of all of defendant's profits made from the transaction was a proper remedy. Rule: Pennsylvania law has recognized disgorgement of profits for breach of contract only where a party breached a fiduciary duty.
	Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241 (Pa. 1992)	Disgorgement for contractual and fiduciary breach	Facts: Defendant law firm had represented plaintiff for 10 years. Defendant then began representing several of plaintiff's competitors. Plaintiff sued defendant. The court held that injunctive relief against plaintiff for its breach of fiduciary duty was proper, Relevant Dictum: The court recognized and seemed to approve of the fact that "[c]ourts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests."
Texas	Meadows v.	Constructive trust over profits	

	Bierschwale, 516 S.W.2d 125 (Tex. 1974)	made from fraud or breach of confidential relationship	Facts: Rule: "It is not essential for the application of the constructive trust doctrine that a fiduciary relationship exist between the wrongdoer and the beneficial owner. Actual fraud, as well as breach of a confidential relationship, justifies the imposition of a constructive trust."
	International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567 (Tex. 1963)	Constructive trust over profits made from breach of fiduciary duty	Facts: Plaintiff insurance corporation sued defendants Sterling C. Holloway, D. D. Beasley and J. W. Walden for conspiracy, breach of fiduciary duties as officers and directors of plaintiff, mismanagement and misappropriation of corporate funds belonging to plaintiff, and the usurpation and appropriation of corporate opportunities. Rule: In a fiduciary breach case, the beneficiary is entitled to the profits resulting to the fiduciary from his breach, and to be the beneficiary of a constructive trust in such profits.
Virginia	Emtec, Inc. v. Condor Tech. Solutions, Inc., 1999 U.S. Dist. LEXIS 6523 (E.D. Pa. 1999) (applying Virginia law to breach of contract claim)	Disgorgement/constructive trust over profits made from breach of non-competition agreement	Facts: Plaintiff corporation had been in talks with two computer companies to acquire those companies, but the transaction did not go forward. Defendant corporations discovered plaintiff's failed attempt, and sent letters of intent to plaintiffs and computer companies proposing to purchase all three entities. Plaintiff and defendants signed a non-competition agreement, whereby plaintiff agreed to disclose the identities of computer companies and defendants agreed not to enter into any transactions with either computer company without plaintiff's approval. Plaintiff then provided defendants with confidential information. Plaintiff ultimately backed out of the proposed acquisition, and defendants proceeded to acquire computer companies without plaintiff's approval as per the agreement. Plaintiff

			sued for breach of contract, seeking the equitable remedy of disgorgement of benefits received by defendants as a result of the acquisition. The court concluded that, under Eden Hannon (*see infra*), plaintiff was entitled to "disgorgement of – or at the very least a constructive trust over – the benefits of [the acquisition]." Rule: Where money damages are speculative, either disgorgement of, or a constructive trust over, profits for breach of a non-competition agreement is a proper remedy.
	Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556 (4th Cir. 1990)	Constructive trust over profits made from breach of a non-competition agreement	Facts: Plaintiff investment company was in the business of bidding on investment portfolios based on its analyses, and selling the right to the income on those portfolios to institutional investors, like banks. Defendant bank expressed interest in purchasing an investment portfolio through plaintiff. After defendant signed a non-competition agreement with plaintiff, plaintiff provided defendant confidential analyses about the Xerox portfolio. In violation of the agreement, defendant directly bid for the portfolio based on plaintiff's analyses, and won. Applying Virginia law, the court placed a constructive trust over defendant's profits made as a result of its breach of the agreement with plaintiff: "[A] constructive trust will serve a two-fold remedial interest; it will force the transgressor to forfeit the illegally-gotten gains, and provide compensation for the plaintiff's injury." Rule: Where money damages are speculative, a constructive trust over profits for breach of a non-competition agreement is a proper remedy.
	X-IT Prod., LLC v. Walter Kidde	Constructive trust over profits as remedy for unjust enrichment	Facts:

	Portable Equip., Inc., 155 F. Supp. 2d 577 (2001) (applying Virginia law)		Rule:
Wisconsin	Community Nat. Bank v. Medical Benefit Admin., 242 Wis. 2d 626 (2001)	Disgorgement of profits for breach of fiduciary duty	Facts: Bank filed a collection action against MBA, a corporation, and moved for the appointment of a receiver on the grounds that MBA was insolvent. The court appointed PAS, a corporation and a creditor of MBA, as receiver. PAS negotiated the sale of MBA to Alliance. As part of the deal, Alliance also agreed to pay PAS $300,000 over four years in exchange for consulting services—an opportunity for which MBA had been in negotiations with Alliance. The court approved the sale and consulting agreement, and PAS's actions and final accounting. MBA appealed the court's approval. The appeals court reversed, holding that PAS had breached its fiduciary duty to MBA by dealing with receivership property—i.e., the corporate opportunity in the consulting agreement—and remanding for a determination of damages. As to damages, the court acknowledged that disgorgement of profits was the appropriate remedy. Rule: "When a receiver breaches its fiduciary duty to those to whom it owes such a duty, it must disgorge the profits resulting from the breach of duty. One method of accomplishing this is for the [court] to order the receiver to turn over all profits received as a result of the breach and apply them to the receivership estate."