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An Attorney's Right to Retain Fees Derived From a Fraudulent Law Suit

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AN ATTORNEY'S RIGHT TO RETAIN FEES DERIVED FROM A FRAUDULENT LAW SUIT

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I. INTRODUCTION

The remedy of restitution, used to prevent unjust enrichment, is a fundamental right firmly entrenched in the common law.[1] This is especially true in cases where a victim seeks equitable relief to require the return of money or property obtained as a result of fraud.[2] However, should the defrauded person always be entitled to be made whole?

Similarly, the remedy of forfeiture is also a deeply rooted legal concept, finding its beginnings in early English common law.[3] Originally, forfeiture was a punishment annexed by law to some illegal act. However, the concept of deodand[4] now not only includes forfeiture of "any personal chattel which was the immediate occasion of the death of any reasonable creature,"[5] but has also expanded to all monies and properties derived from criminal statutes, such as Racketeer Influenced and Corrupt Organizations Act[6] (RICO) or Continuing Criminal Enterprise[7] (CCE).[8] Under these statutes, a forfeiture need *not* be predicated upon a criminal conviction.[9] The government has the right to obtain the property suspected of being the fruit of ill-gotten gains, *before* it is

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1. DAN B. DOBBS, LAW OF REMEDIES § 4.2-4.3 (2d ed. 1993) (setting out the historical developments of restitution and unjust enrichment).

2. *Id.* § 9.3(4)(1)(a) (discussing the application of equitable remedies for "all unique tangible and intangible property" procured through fraud).

3. William Carpenter, *Reforming The Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1103 (1994) (outlining the remedy of forfeiture and its development in the English common law).

4. *See generally* Scott A. Hauert, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159 (1994) (discussing the common law concept of deodand and its application as a form of forfeiture).

5. BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

6. 18 U.S.C. §§ 1961-1968 (1994).

7. 21 U.S.C. § 848 (1994).

8. John R. Russell, *The Constitutionality of Attorney Fee Forfeiture Under RICO and CCE*, 22 J. MARSHALL L. REV 155, 159 (1988).

9. *Id.* at 157.

proved in court that the government's suspicions are true.[10] Some would argue that such prejudgment forfeiture results in the visceration of the presumption of innocence. Moreover, in terms of the ability to engage counsel, it works a terrible hardship on the possessor of the forfeited property.[11] However, should the doctrine of forfeiture always apply?

II. *MARTIN v. LENAHAN*:[12] A PARADIGM OF THE FORFEITURE DILEMMA[13]

In the example of *Martin v. Lenahan*, the lawsuit arose out of an incident that occurred in 1986, when the plaintiff was employed as a parking lot attendant at a local night club. A customer caught the plaintiff putting a note on her car and pushed him so forcefully that he tumbled to the concrete and injured his back. Subsequently, the defendant doctor performed a hemi-laminectomy[14] on the plaintiff's herniated disk at the hospital. While the plaintiff was recovering at home a few weeks after the surgery, he noticed a clear, odorless fluid oozing from the incision. His wife tried to stop the leakage by putting bandages over it; however, the leakage continued, forcing her to take her husband to the emergency room. At the hospital, the defendant doctor examined the incision, closed it with an additional stitch, gave plaintiff an antibiotic and told him to return home and rest.

The following day, the wife found her husband chilled, shaking and incoherent. She again transported him to the emergency room. At the hospital, doctors diagnosed the plaintiff's condition as Enterobacter[15] Meningitis and placed him on antibiotics. It was several months before he was discharged.

In January of 1988, the deputy commissioner for the Florida Department of Labor and Employment Security Division of Worker's Compensation conducted a hearing and concluded that the plaintiff had suffered a work-related injury. He further determined that the plaintiff had contracted spinal meningitis and would require twenty-four hour

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10. *Id.*

11. *Id.* (stating that "the defendant's practical ability to retain counsel is severely hampered by the forfeiture provisions of RICO and CCE").

12. 658 So. 2d 119 (Fla. 4th DCA 1995).

13. The following facts were compiled from materials supplied by the attorneys participating in the Trial Master's Seminar, sponsored by St. Thomas School of Law and the Federal Bar Association for the Southern District of Florida, which utilized the materials contained in the case of *Lenahan*, 658 So. 2d at 119.

14. AM. JUR. 3D *Proof of Facts: Taber's Cyclopedic Medical Dictionary* 803 (16th ed. 1989).

15. *Id* at 598.

attendant care during his lifetime. Consequently, the deputy commissioner awarded the plaintiff $315.00 weekly for the rest of his life. The plaintiff's wife was awarded $10.50 hourly so that she could provide her husband with such continuous care. The night club and its insurer were to pay these monies.

In 1989, the plaintiff and his wife commenced a civil suit against the doctor and her professional association. The plaintiff presented several experts who explained that a spinal fluid leak is a serious emergency, and that a doctor should act quickly to treat it by closing up the dura and starting the patient on antibiotics. Several experts also testified that under such circumstances, doctors should perform certain diagnostic tests. These experts concluded that the defendant doctor was negligent in her treatment of the post-operative complications. Specifically, the defendant doctor should have sent a sample of the plaintiff's spinal fluid to a lab for diagnosis.

Additionally, the plaintiffs presented testimony to show that the injuries were extensive. Their expert witness, a neurologist, testified that the plaintiff had to use a cane when walking. According to the neurologist, the plaintiff did not know the month, year or president of the United States, could not figure out how many dimes were in a dollar and could not spell the word "boy." The neurologist also stated that the plaintiff had trouble removing his own jacket, remembering current events and following simple commands to close his eyes or stick out his tongue. As the neurologist explained, the plaintiff suffered a serious disorder of the higher cortical function, which manifested itself in impaired behavior, impaired memory and impaired intellectual functions.

The plaintiff's wife also testified in the civil suit. She stated that her husband had lost his peripheral vision, had an impaired memory and required twenty-four hour care. She had to dress him, feed him and take him to the bathroom. She also testified that she could not allow her husband to drive an automobile or operate household appliances.

In the civil suit, the jury awarded the plaintiff and his wife $3,000,000. Subsequent to the jury verdict, the Fraud Division of the Florida Department of Insurance conducted an investigation of this matter and learned that, while the lawsuit was pending, the plaintiff and his wife had discussed the possible purchase of a forty-six foot yacht with a Florida yacht broker.

In a sworn deposition, the yacht broker stated that he had known the plaintiff for about two years and had not seen any indication of a mental or physical impairment. According to the yacht broker, the

plaintiff not only asked numerous questions about the yacht, but had also engaged in a discussion of the boat's electronics and its propulsion and generating systems. In addition, the yacht broker specifically recalled the plaintiff boarding and deboarding a display model of the boat on several occasions with no difficulty and without assistance from any one.

The Fraud Division also discovered two witnesses who observed the plaintiff piloting a yacht and docking a boat in a boatslip. The investigator obtained videotapes and photographs of the plaintiff driving, climbing four flights of stairs with no assistance, running, playing with a dog, eating, drinking and performing normal everyday routines with no sign of mental or physical impairment.

In 1990, an independent doctor who had previously conducted a medical examination of the plaintiff in 1989 reviewed the surveillance videotapes, photographs and the Fraud Division's reports. In a sworn statement, the doctor stated that based upon the materials he reviewed, the plaintiff did not have, nor did he ever have, a dementing syndrome related to his postoperative illness and that the plaintiff's clinical presentation—both prior to and at the time of trial—was most likely a fabrication.

In 1991, both the plaintiff and his wife were charged with grand theft and conspiracy to commit grand theft. The insurance company now seeks the return of the $3,000,000 award paid to the plaintiffs. There can be no question that the remedies of both restitution and forfeiture can be applied to prevent these plaintiffs from being unjustly enriched. However, the plaintiffs had paid their lawyer, from the proceeds paid by the insurance company, a contingency fee and costs that exceeded $1,000,000.

Should lawyers be allowed to retain monies received as fees derived from this fraudulent law suit?

III. COMPETING LEGAL PRINCIPLES

A. RESTITUTION

Beyond the field of law, two "often interchangeable" usages of the word restitution exist.[16] The concept may be applied to mean either restitution of "a thing or person to an earlier condition" or "restitution of a thing to a person."[17] For the purposes of this article, the focus centers upon the connotation of restitution which addresses the

16. PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 10 (1985).
17. *Id.*

"restitution of a thing to a person."[18] Restitution in this context is defined as "the response which consists in causing one person to give back something to another."[19] The definition, however, may also be expanded to include the "giv[ing] up to another something received at his expense."[20] In order for restitution to occur, there must exist some degree of unjust enrichment.[21] In determining whether unjust enrichment has occurred, three requirements must be satisfied.[22] First, the defendant must have "been enriched by the receipt of a benefit."[23] Second, the defendant must be enriched at the plaintiff's expense.[24] Third, the enrichment must be to the point where it would be unjust for the defendant to retain the benefits.[25]

The classic example of the interrelation of restitution and unjust enrichment is where a defendant benefits as a result of a plaintiff's mistake.[26] It would be unjust enrichment to allow a defendant to re-

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18. *Id.*

19. *Id.* at 11 (emphasis omitted). The simple definition "speaks of something to be given back, implying that the person to whom restitution is to be made is to regain something which he previously had and which passed from him to the other." *Id.* at 12. The classic definition is that found in the 1937 American Law Institute's *Restatement of Restitution*, which states that a "'person who has been unjustly enriched at the expense of another is required to make a restitution to the other.'" RESTATEMENT OF RESTITUTION § 1 (1937).

20. BIRKS, *supra* note 16, at 12.

> The phrase "give back something to another" tacitly explains how the plaintiff gets into the story. He is the person who has lost something. That is all in "back." He had it before and now he is to have it again. The change from "give back" to "give up" leaves the plaintiff high and dry. "At his expense" takes over from "back." It explains why the plaintiff makes his claim.

Id.

21. "The principle of unjust enrichment is placed in the forefront of the American Restatement of Restitution. Paragraph 1 provides that 'a person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" ROBERT GOFF & GARETH JONES, THE LAW OF RESTITUTION 12 (1966). Principle authorities for the unjust enrichment conception, including most notably the Restatement itself, appear to accept the idea that the act of restoration forms at least a subsidiary part of the law of restitution, despite the fact that the restoration remedies (replevin, ejectment, and so forth) operate without regard to the defendant's enrichment. Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1194 (1995).

22. GOFF & JONES, *supra* note 21, at 14.

23. *Id.*; *see also* Stephen L. Camp, *The Voluntary-Payment Doctrine in Georgia*, 16 GA. L. REV. 893, 908 (1982) (defining enrichment as necessitating "the transfer of a measurable benefit").

24. GOFF & JONES, *supra* note 21, at 14.

25. *Id.* "Three requirements must be met before the action of unjust enrichment allows restitution. First, the transfer of a measurable benefit must be present—i.e., an enrichment. Second, the conferrer must not intend the benefit to be a gift. Third, the recipient must have no choice about retaining the benefit." Camp, *supra* note 23, at 908.

26. DOBBS, *supra* note 1, § 4.1(2); *see also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1284 (1989) (supporting the notion that unjust enrichment may come by way of mistaken payment).

tain such a benefit, therefore the principle of restitution evolved to afford the plaintiff a means of redressing such a wrong.[27] The underlying premise behind this rational is the notion "that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[28]

Restitution for unjust enrichment further works to fill the gap where remedies available in contract and tort law leave off. For instance, if a person unjustly received $200 through a bank error, that individual would be obliged to pay back the monies.[29] Recovery for such a civil wrong cannot be premised upon either tort or contract law,[30] hence interrelated concepts of restitution and unjust enrichment[31] provide the legal means for recovery.[32]

Restitution may apply directly as a remedy for unjust enrichment "[w]here the plaintiff has himself conferred the benefit on the defendant."[33] Under this scenario, unjust enrichment can be divided into four distinct categories: (a) "where the plaintiff was mistaken;" (b) "where the plaintiff acted under compulsion;" (c) "where the plaintiff intervened as a matter of necessity;" and (d) "where the plaintiff conferred a benefit under an ineffective transaction."[34] Restitution for unjust enrichment may also be applied to cases "[w]here the [d]efendant

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27. William J. Woodward, Jr., *"Passing-on" the Right to Restitution*, 39 U. MIAMI L. REV. 873, 911 (1985) (discussing the central policy of restitution, which implies a denial of relief if that relief would constitute an unjust enrichment); *see, e.g.*, Allan Kanner, *New Developments in Toxic Torts and the Use of Science*, CA51 ALI-ABA 177, 254 (1995) (stating that courts have generally supported the notion "that one party who has received benefits under circumstances that make it unjust to retain them, is obligated to pay the reasonable value of the benefits received").

28. GOFF & JONES, *supra* note 21, at 12 (quoting Moses v. Macferlan, 2 Burr. 1005, 1012 (1760)).

29. Kull, *supra* note 21, at 1192.

30. "Liability cannot be in orthodox tort, since the passive recipient has breached no independent duty; nor can it be in contract, since the recipient has promised nothing (and may indeed be a total stranger to the bank." *Id.* at 1192. *See also* Kanner, *supra* note 27, at 254 (stating that "[r]estitution may also serve as an independent remedy for unjust enrichment when there is no other wrong and when there are no other potentially available remedies").

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> My proposition is that the law of restitution be defined exclusively in terms of its core idea, the law of unjust enrichment. By this definition it would be axiomatic (i) that no liability could be asserted in restitution other than one referable to the unjust enrichment of the defendant, and (ii) that the measure of recovery in restitution must in every case be the extent of the defendant's unjust enrichment.

Kull, *supra* note 21, at 1196.

32. "The conventional explanation is to say that the recipient would be unjustly enriched if he retained the money." *Id.* at 1192.

33. GOFF & JONES, *supra* note 21, at 27.

34. *Id.* (emphasis omitted).

has [r]eceived the [b]enefit from a [t]hird [p]arty."[35]

Additionally, restitution may be applied where a defendant has benefitted as a result of his own wrongful act.[36] However, what remains unanswered is a situation such as what occurred in *Martin v. Lenahan*. In the *Lenahan* case, the unjust enrichment came to the innocent defendant by way of a judgment that was premised upon the fraudulent claim of a third party.[37]

The *Restatement of Restitution* states that "[a] person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final."[38] This provision addresses instances where, subsequent to a judgment being entered, monies are paid by the losing party and the judgment is later reversed.[39] This section applies regardless of whether the subsequently reversed judgment was "originally valid or was void."[40] Furthermore, the Restatement notes that "[i]n the absence of an agreement that payment of a judgment is to be final, upon a reversal of the judgment anything paid by way of settlement can be recovered from any person not a bona fide purchaser."[41] As in the case of *Lenahan*, an attorney is exempted from liability where: a) the original judgment was valid and b) the attorney was unaware it was a fraudulent lawsuit.[42]

It is a well-settled rule that "an attorney acting under employment at the direction of his clients and in a legal manner is not liable for the consequences of his client's actions."[43] Where an attorney has reaped the rewards of a fraudulent tort claim, which at the time of judgment was unbeknownst to him, statutory as well as common law

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35. *Id.* "In cases of this kind, the plaintiff will generally be entitled to recover from the defendant only if some special relationship existed between the parties, or if the plaintiff can assert a right of property in an object whose receipt has benefited the defendant." *Id.*

36. *Id.*

37. *See generally Lenahan*, 658 So. 2d at 119.

38. RESTATEMENT OF RESTITUTION § 74 (1937).

39. *Id.* at cmt. a.

40. *Id.* at cmt. b.

41. *Id.*

42. *Id.* at cmt. h.

> An illustration of comment h would be a situation where: A obtains a valid judgment against B for $3000. B pays the amount of the judgment to C, A's attorney. At A's direction C expends $1000 to satisfy A's creditors and retains $2000 as compensation for his services in this suit and in previous ones. Upon reversal of the judgment, B is not entitled to restitution from C.

Id. at cmt. h, illus. 20.

43. Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897, 903 (11th Cir. 1987).

authorities make it clear that he is not required to pay restitution.[44] Under the principles of restitution, an attorney who retains payment for services should not be obligated to return any portion of the proceeds of a judgment subsequently reversed on the basis of client fraud. This results in an adverse effect upon the defrauded party (or his insurance carrier), since he suffers the loss of payment despite being an innocent party. However, the question remains—is such a result fundamentally fair?

1. Arguments in Favor of Restitution

Those in favor of the application of the restitution remedy argue that in situations where a party receives proceeds from a fraudulent claim, the court is vested with the authority to order restitution after a judgement has been set aside. The Supreme Court of Florida has held that even if a party succeeds in executing a judgement which is later set aside by an appellate court, the trial court still has the right to order restitution to the defendant so as to obviate the advantage obtained by the plaintiff through the court's error.[45] In *Sundie v. Haren*[46] this basic principle resurfaced, here restating that once an erroneous judgement had been reversed, a party was entitled to have his property returned to him by his adversary.[47]

Advocates further maintain that the principles underlying restitution are particularly appropriate when a plaintiff's lawyer has signed a contingency agreement with his client. From this vantage point it is reasoned that by signing a contingency contract, the attorneys have acquired a beneficial interest in the final judgement and, therefore, become beneficial owners of the judgement. Since the attorneys are entitled to a percentage of the judgement, they are also responsible for restitution should the judgement be subsequently reversed. The attorneys can have no greater right than the validity of judgment.

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44. *See* Consolidated Am. Ins. Co. v. Hinton, 845 F. Supp. 1515, 1518 (1994) (citing Wall v. Johnson, 80 So. 2d 362 (Fla. 1955) (stating that "an attorney who does not act in good faith in obtaining a judgment may be liable to make restitution")); *see also* RESTATEMENT OF RESTITUTION § 74 cmt. h (1937).

45. Hazen v. Smith, 135 So. 813 (1931).

46. 253 So. 2d 857 (Fla. 1971).

47. *Id.* at 858 (citing Florida E. Coast Ry. v. State, 82 So. 136 (1919)).

2. Arguments Against Restitution

In situations where a party is the recipient of proceeds which flow from a fraudulent claim, even those arguing against the application of the restitution remedy would agree that it is a time honored remedy. Opponents of restitution would not contest the application of the restitution remedy in situations where a third-party attorney is a party to or has knowledge of the client's fraudulent legal claim. However, in situations such as *Lenahan*,[48] opponents of the application of the remedy of restitution point out that where restitution is sought from an attorney who *was not* a party *nor had knowledge* of the fraudulent claim, the application of restitution would be unduly harsh and would deny compensation to a completely innocent party. In the absence of an establishment of either fraud or bad faith on the part of a third party attorney, it is argued that it would be unjust to require the restitution of a fee earned, regardless of the legitimacy of the claim, in a judgment subsequently reversed; the attorney legitimately worked for and earned the fee.[49] Requiring the restitution of fees that are the result of subsequently reversed fraudulent claims incorrectly imposes liability upon an innocent third party for the unscrupulous acts of a client. Unless it is established that the third party attorney is a successor in interest to the original judgment of the court, there is no obligation imposed upon this otherwise innocent third party to pay restitution in the form of fees earned, regardless of whether the claim be fraudulent or legitimately brought before the court.

B. FORFEITURE

Forfeiture is the divestiture, without compensation, of property that was used in a manner not in accordance with the laws of the sovereign.[50] A substantial connection must exist between any property seized and the illegal activity; mere suspicion is not enough.[51] Civil forfeitures need not be predicated upon the conviction of the wrongdoer, and seizure need not be postponed until the disposition of the litigation.[52] Once an order is entered at the end of a civil forfeiture pro-

48. In *Lenahan*, the attorneys who represented a fraudulent plaintiff were not required to give restitution for their fee, which was earned in good faith. *Lenahan*, 658 So. 2d at 122.

49. *See Pickard*, 161 So. 2d at 239.

50. United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 195 (C.D. Cal. 1978).

51. United States v. One 1976 Ford F-150 Pickup, 769 F.2d. 525, 527 (8th Cir. 1985).

52. JOEL M. ANDROPHY, WHITE COLLAR CRIME 836 (1992).

ceeding, it is good against everyone, not just the wrongdoer.[53]

Forfeiture law has its roots in the English "Crown's adoption of the 'deodand,' the payment to the Crown of the cash equivalent of the instrument of accidental harm."[54] The focal point to the history of civil forfeiture is the exercise of the "sovereignty through condemnation proceedings, rather than the forced surrender of guilty objects."[55] Some of the earliest forfeiture laws were created well before the existence of the United States. For instance, "Edward III provided for the forfeiture of illegally imported cloth and unauthorized fur coats."[56] Similarly, "Statues of Edward IV provided for the forfeiture of underpriced foreign grain and dozen of imported manufactures."[57]

In the United States, civil forfeiture was established pursuant to statute early in the country's history.[58] After the adoption of the Constitution, ships and vessels involved in customs offenses were made subject to forfeiture under federal law.[59] It was the property that was considered the wrongdoer, regardless of the culpability of the owner.[60] Proceedings under these statutes are in rem actions against the seized property, rather than in personam actions against the property owners.[61] The theory behind civil forfeiture, therefore, rests on the notion that the owner of the property has been negligent in allowing his property to be misused and that he must be punished for that negligence.[62]

Modern statues have gone beyond the common law bases of forfeiture and are now justified, "to prevent further illicit use of the property, to render illegal behavior unprofitable by imposing a harsh economic penalty, and to induce innocent owners to exercise greater care."[63] More specifically, modern statues "provide for the forfeiture of property necessary to the commission of an offense, of property that

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53. *Id.*

54. Carpenter, *supra* note 3, at 1104.

55. *Id.*

56. *Id.* at 1105.

57. *Id.*

58. Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 270-71 (1993).

59. *Id.*

60. Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation and Forfeiture*, 44 DUKE L.J. 744, 748 (1995).

61. Lois S. Woodward, *Attention Trustees: Is Real Property in the Corpus Secure from Civil Forfeiture Under 21 U.S.C. § 881?*, 56 ALA. L. REV. 83, 87 n.4 (1995).

62. *Austin v. United States*, 113 S. Ct. 2801, 2806-08 (1993).

63. OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 6A.01 (1995) (citing Austin v. United States, 509 U.S. 602 (1993)).

is 'involved' in a crime, and of 'interest' in a criminal enterprise."[64] An example of a modern forfeiture statute is the RICO act. This statute was designed to thwart the organized crime economy through the use of criminal penalties.[65] It "provid[es] the government with bold civil enforcement powers, and creat[es] a private civil cause of action through which injured parties could recover treble damages and the cost of suit."[66] Under this statute and civil forfeiture proceedings, many cases of hardship and even absurdity are spawned. As this is an everlasting struggle "that exists between the avarice, enterprize [sic] and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature."[67] Third parties wishing to avoid the harshness of such rules often attempt to assert an innocent owner defense. In *Calero-Toledo*,[68] the Supreme Court suggested that forfeiture of an innocent owner's property would violate due process if (1) prior to the illegal activity, the property had been taken without the owner's consent, or (2) the owner was unaware of the illegal activity and took all reasonable steps to prevent it.[69]

1. Arguments in Favor of the Forfeiture Remedy

Those advocating for the application of the forfeiture remedy assert it is necessary to institute forfeiture proceedings against attorneys who benefit from the fraudulent claims of their clients. Forfeiture proceedings must be instituted for two reasons: 1) "to prevent further illicit use of the property . . . " and 2) "to render illegal behavior unprofitable by imposing a harsh economic penalty," in order to induce innocent owners to exercise greater care.[70] If attorneys are allowed to keep the property gained through the fraud of their clients, they would be furthering the crime itself. Of course, as a society, we do not want attorneys to have any part in criminal activity. Civil statutes such as RICO are necessary in order to impose penalties on attorneys who attempt to profit from ill-gotten gains. Injured parties, through the implementation of statutes, are able to recover treble damages and the

64. *Id.*
65. KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME 353 (1990).
66. *Id.*
67. Carpenter, *supra* note 3, at 1108.
68. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).
69. *Id.* at 689.
70. OBERMAIER & MORVILLO, *supra* note 63, § 6A.01 (citing *Calero-Toledo*, 416 U.S. at 688).

cost of the law suit.[71]

2. Arguments Against the Forfeiture Remedy

Those opposing the application of the forfeiture remedy argue that under any civil forfeiture proceeding, many cases of hardship and even absurdity can result.[72] What if an attorney was without any knowledge of the client's attempt at fraud? Should an innocent attorney forfeit those proceeds? If an attorney was without such knowledge, then the taking of his or her fees would violate due process under the law. In accordance with a general rule of law, "an attorney acting under employment, at the direction of his client and in a legal manner is not liable for the consequences of his client's actions."[73] As long as the attorney acted in good faith in connection with the action, he should not have to worry about forfeiture at a later date. It would be too high a standard that every attorney prove, prior to an action being commenced, that his client's claim was not fraudulent. It is the attorney's good faith and reasonable belief which should be controlling.

IV. CONSTRUCTIVE TRUST

It is difficult to define the exact meaning of a constructive trust.[74] Stated loosely, a constructive trust is a device utilized by courts of equity to resolve issues of property ownership and unjust enrichment.[75] The Restatement of Restitution states that a constructive trust should be applied to situations "[w]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."[76] Constructive trusts are often imposed in situations where one who has "obtained money or other property from another by fraud or other unconscionable conduct" is treated as an "express trustee" and ordered to return the ill-gotten gains.[77] A constructive trust operates as a vehicle for providing restitution to those who fall victim to another's unjust enrichment.[78] The doctrine of constructive trust has its origin in

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71. BRICKEY, *supra* note 65, at 353.

72. *Id.*

73. *Pickard*, 161 So. 2d at 241.

74. GBOLAHAN ELIAS, EXPLAINING CONSTRUCTIVE TRUSTS 3 (1990).

75. Frank E. Miller, *Reclaiming Attorney's Fees Paid Out on Fraudulent Claims*, 60 DEF. COUNS. J. 97, 98 (1993).

76. RESTATEMENT OF RESTITUTION § 160 (1937).

77. *Id.*

78. ELIAS, *supra* note 74, at 16; RESTATEMENT OF RESTITUTION § 160 cmt. c (1937) (stating that "[a] constructive trust is imposed upon a person in order to prevent his unjust

English common law and traditionally required a breach of a fiduciary duty.[79] The English doctrine, however, has evolved somewhat in that there is no longer a requirement that the parties be in a fiduciary relationship with one another.[80] The influence of the constructive trust doctrine has also become entrenched in the American legal system, through both common law usage and statutory enactment.[81]

The *Restatement of Trusts* states that "[i]f the trustee in breach of trust transfers trust property to a person who is not a bona fide purchaser," the trust's beneficiary may recover damages for breach of the trust against either the trustee or the transferee.[82] Accordingly, a third party who is unjustly enriched by way of fraud or wrongdoing may be required to pay restitution under the doctrine of constructive trust.[83] An illustration of this concept can be found in the case of *Bridgman v. Green*.[84] In *Bridgman*, an employer was fraudulently induced into paying a sum of money to an employee's wife, brother, and attorney on the condition that it was to be held in trust for that employee's son.[85] The court, in holding that the employer was entitled to recover all the money paid, stated, "[l]et the hand receiving be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it."[86]

A. ARGUMENTS IN FAVOR OF CONSTRUCTIVE TRUST

Advocates of the application of the constructive trust remedy argue that the remedy has long been imposed by courts of equity in situations where a party has come into possession of property which, in fairness, they should not be permitted to retain.[87] Courts have often-

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enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him.").

79. Miller, *supra* note 75, at 99; RESTATEMENT OF RESTITUTION § 160 cmt. a (1937).

> The term "constructive trust" is not altogether a felicitous one. It might be thought to suggest the idea that it is a fiduciary relation similar to an express trust, whereas it is in fact something quite different. . . . A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment. A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation.

Id.

80. Miller, *supra* note 75, at 99.

81. *Id.*

82. RESTATEMENT (SECOND) OF TRUSTS § 294 (1957).

83. Miller, *supra* note 75, at 100.

84. *Id.* at 100 n.19 (citing Bridgman v. Green, 2 Ves.Sr. 627 (1755)).

85. *Id.* at 100.

86. *Id.* (citing *Bridgman*, 2 Ves.Sr. at 627).

87 *Id.* at 98.

times imposed constructive trusts on parties who have obtained money or property by way of a fraudulent claim.[88] In such a case, the fraudulent parties are found to have been express trustees since the first day of their unlawful acts.[89] In the case of *Beatty v. Guggenheim Exploration Company*,[90] Justice Cardozo eloquently stated that "[a] constructive trust is the formula through which the conscience of equity finds expression."[91] According to Cardozo, "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscious retain the beneficiary interest, equity converts him into a trustee."[92]

Often times, the existence of a contingency arrangement between the third party attorney and the fraudulent claimant supports the imposition of the constructive trust remedy.[93] The remedy applies because the third party attorney has a proprietary interest in the judgment, since he will be compensated only through a favorable judgment or settlement. In a situation where the judgment is fraudulently obtained, the constructive trust doctrine serves as a means of placing the responsibility upon the third party attorney to return the ill-gotten fees.[94] The justification for this application of the constructive trust doctrine lies in the premise that upon knowledge of the fraud, third party attorneys should be required to make restitution of all proceeds taken from the fraudulently obtained settlement, even if they had no knowledge of the fraud until after the time judgment was rendered.

B. ARGUMENTS AGAINST CONSTRUCTIVE TRUST

Opponents of the application of the constructive trust remedy reason that a prerequisite to recovery under the third party theory of constructive trust is the requirement that the third party cannot be a bona fide purchaser. The restatement defines a bona fide purchaser to be one who is "a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction."[95] If the third party can establish that he has been paid "as con-

88. *Id.*

89. Miller, *supra* note 75, at 98; RESTATEMENT OF RESTITUTION § 160 (1936).

90. 122 N.E. 378 (N.Y. 1919).

91. *Beatty*, 122 N.E. at 380.

92. *Id.*

93. Memorandum in Support of Restitution at 14, Martin v. Lenahan, 658 So. 2d 119 (Fla. 4th DCA 1995).

94. Miller, *supra* note 75, at 102 (citing Dabney v. Levy, 191 F.2d 201 (2nd Cir.), *cert. denied*, 342 U.S. 887 (1951)).

95. RESTATEMENT (SECOND) OF TRUSTS § 284 (1) (1957).

sideration for the transfer of trust property"[96] and that has unwittingly taken part in an illicit transaction,[97] then he is not required to pay restitution to the wronged party. Thus, a "defrauded insurance company's actions to recover the plaintiff attorney's portion of the settlement" hinges upon the establishment of whether the attorney is a bona fide purchaser or not.[98] Consequently, if the attorney can establish that "providing legal services constitutes 'value'" under the *Restatement of Trusts*[99] and that he had no notice of his client's fraudulent claim, he will not be required to pay restitution in the form of a constructive trust. According to the *Restatement of Trusts*, a person is on notice of a breach of trust if "he knows or should know of the breach of trust."[100] In cases involving fraudulent insurance claims, "plaintiff's attorneys would have notice of a breach of trust at the moment they receive their share of the settlement or judgment known to have been obtained by fraud."[101] Traditionally, courts have been reluctant to impose liability upon third parties who unknowingly assist in the misappropriation of claims.[102]

IV. RECOMMENDED REMEDY FOR UNJUST ENRICHMENT BY AN INNOCENT THIRD PARTY ATTORNEY

In adjudicating cases where benefits have been paid to third party attorneys unjustly, a two-step process is recommended. First, the court could conduct a hearing to determine whether the third party attorney was a party to the fraudulent claim. If the court finds that the attorney was not a party to the client's fraud, the next step should be for the court to conduct a fee hearing. The first step of this process would place the burden upon the party seeking restitution to establish that the third party attorney had knowledge of the client's fraudulent claim.[103]

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96. *Id.* § 298.

97. *Id.* § 284 (1).

98. Miller, *supra* note 75, at 100-01.

99. *Id.*

100. *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS § 297 (1957)).

101. *Id.*

102.

> The real difficulty in each case is to determine what is sufficient to fix the solicitors with the liability of constructive trustees. As I have said, they must have been parties to either a breach of trust or fraud, on the part of the trustee . . . a mere suspicion or intimation that something is wrong will not, to my mind, be sufficient to deprive the solicitor of his rights to accept payment out of the trust estate or costs, charges, and expenses properly incurred.

Id. at 101 (citing *In re* Blundell, 40 Ch.D. 370, 382 (Ch. 1888)).

103. RESTATEMENT OF RESTITUTION § 13(a) (1937) (stating "that a person who innocently has acquired the title to something for which he has paid value is under no duty to restore it

If the plaintiff can successfully meet this burden, the burden shifts to the third party to prove that he had no knowledge of his client's fraudulent claim. If the third party attorney is unsuccessful in satisfying this burden, the court should require the attorney to pay back any fees received as restitution to the defrauded party. If the fee agreement was based on a contingency contract, a third party attorney who has knowledge that his client perpetrated a fraudulent claim should be required to repay whatever percentage of the plaintiff's settlement he recovered[104] because the contract would be rendered void.

Conversely, if the third party attorney can establish to the court that he had no knowledge of the client's fraudulent claim, he would be entitled to retain all fees earned. Applying this principle to a situation such as the previous example, where there existed a contingency fee contract, the third party attorney would be entitled to retain the entire amount of the contingency fee recovered. But, is this remedy equitable? While it is true that equity would justify the enforcement of the contingency agreement, does the payment of a contingency fee that is the result of a fraudulent claim run contrary to the very principles restitution seeks to protect? Although awarding the contingency fee to the innocent third party attorney is an equitable remedy for the legitimate work done by the attorney, it still works a substantial hardship to the party who uncovered the fraudulent claim and sought restitution of the money he paid out in damages. This hardship stems from the fact that although the party seeking restitution may recover all of the monies paid to the fraudulent tortfeasor, he cannot regain the percentage of those monies which were retained by the innocent third party attorney as attorney's fees pursuant to the contingency contract.

A solution to this equitable quagmire would be to change the procedural methods applied in adjudicating cases of third party unjust enrichment. Rather than awarding the attorney the entire contingency fee in situations where the plaintiff fails to establish knowledge on the part of the third party attorney, a more equitable remedy would be to merely compensate the third party attorney for the billable hours incurred in the case. This method would prove just in that both the innocent third party attorney and the victim of the fraudulent claim would both be compensated for their losses. The application of this alternative restitution theory to a case such as *Lenahan* would have

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to one who would be entitled to reclaim it if the one receiving it had not been innocent").

104. Judy B. Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 401 (1992) (discussing the application of quantum meruit to contract situations where unfairness would result from enforcement of a partially performed contract).

provided the victim of fraud with the possibility of recovering money from both the fraudulent tortfeasor and the innocent third party attorney. The victim of a fraudulent tort claim would then be able to recover a portion of the otherwise unrecoverable contingency fee from the innocent third party attorney. Conversely, the innocent third party attorney would be able to retain a portion of the judgment as a compensation for the work performed during the lawsuit. Rather than the court simply applying an all or nothing theory of restitution, a more equitable option would be to order a lodestar hearing at which a reasonable determination of attorney fees could be calculated based upon several relevant factors.

V. THE LODESTAR SYSTEM

Congress has enacted fee shifting statutes to provide the prevailing party with a "reasonable attorney fee."[105] The Lodestar method for determining a reasonable attorney's fee is the product of "reasonable hours times a reasonable rate."[106] The number of hours expended and the reasonable hourly rate must be supported by adequate records.[107] As a result, "counsel seeking a fee award should maintain time records in a manner that will identify the various tasks and work being performed."[108] Often times it is very difficult to determine what is reasonable in terms of an hourly rate. Other considerations remain that may lead a court to adjust the fee upward or downward. Such considerations include the time and labor required, skill requisite to perform the legal task properly and awards in similar cases.[109] The initial lodestar figure should normally be presumed a reasonable fee with the quality of representation and results obtained reflected in the lodestar.[110]

Since it is often difficult to determine an attorney's reasonable hourly rate of pay, other factors must be looked at by the courts.[111] Virtually all courts agree that the time spent by the attorney in performing the services for which compensation is sought is an important factor to be considered in fixing the reasonable value of the servic-

105. Guy T. Saperstein & Karen G. Kramer, *Multipliers and Adjustments to the Lodestar*, *in* LITIGATION 145 (PLI Litig. & Admin. Practice Handbook Series No. 324, 1987).

106. *Id.*

107. MANUAL FOR COMPLEX LITIGATION, SECOND § 24.1 (1985).

108. *Id.*

109. Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983).

110. Blum v. Stevenson, 465 U.S. 886, 897 (1984).

111. Lindy Bros. Bldrs., Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

es.[112] Actual time spent in obtaining the judgement is not the only factor to be considered in affixing a reasonable attorney's fee; "the amount involved, the difficulty of collection, the value of the services rendered to the client and other elements may be considered."[113] A further consideration in awarding fees has been the amount of effort expended in preparing and trying the case.[114] A related factor, which has often been referred to by the courts as one of the criteria that may be considered in determining the reasonable value of legal services, is the skill required to perform the legal services.[115] The more complex and novel the issues, the greater the skill that is required to properly perform the services.[116] Another factor in determining fees is the amount of money or value of property in issue.[117] Closely related to the amount at stake in the litigation are the importance of the litigation and the issues involved; these factors have been frequently mentioned as relevant considerations in determining the amount of the legal fee.[118]

In situations where a third party attorney is deemed by the court to not be a party to his client's fraudulent claim, these relevant factors could be considered in determining an equitable fee solution. The equitable benefits which come from applying the lodestar method to these types of cases are obvious. By limiting the recovery of a bona fide purchaser to strictly a fee based analysis, as opposed to a contingency fee based analysis, courts would be able to fashion a more equitable means of compensating all parties concerned.

112. Evans v. Sheraton Park Hotel, 503 F.2d 177, 187 (D.C. Cir. 1974).
113. Electronics Capital Corp., v. Sheperd, 439 F.2d 692, 693 (5th Cir. 1971).
114. Ellis v. Flying Tiger Corp., 504 F.2d 1004, 1008 (7th Cir. 1972).
115. F.H. Krear and Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1262 (2d Cir. 1987).
116. Clark v. American Marine Corp., 320 F. Supp. 709, 711 (E.D. La. 1970).
117. Orgel v. Clark Boardman Co., 301 F.2d 119, 122 (2d Cir. 1962).
118. E.H. Clarke Lumber Co. v. Kruth, 152 F.2d 914, 915 (9th Cir. 1946).