

UNJUST ENRICHMENT –  
MONEY HAD AND RECEIVED –  
CONTRACTS IMPLIED AT LAW

In *First National Bank of Dewitt v. Cruthis*, 360 Ark. 528, 203 S.W.3d 88 (2005), the Arkansas Supreme Court held that a right to jury trial attaches to the quasi-contractual claim for money had and received. Although the claim for money had and received arises from the common law action of assumpsit, the court recognized that it was based on equitable principles. *Id.* at 93-94, 203 S.W.3d at 535-36. The court also recognized that claims of unjust enrichment had been more frequently tried in the chancery courts of Arkansas than in the law courts. *Id.* at 94, 203 S.W.3d at 537.

Because the reported Arkansas cases involving claims of unjust enrichment most often arose from the chancery courts, where no right to jury trial existed, the elements of the claims in the cases include equitable principles, such as enrichment of the defendant that is “unjust and inequitable”. The Arkansas cases do not define “unjust and inequitable” in objective terms that are typically found in jury instructions. The drafters of the Restatement (Third) of Restitution prefer the term “unjustified enrichment” to unjust enrichment. In their discussion documents, the drafters state that “unjustified enrichment” means “the transfer of a benefit without adequate legal ground”. Restatement (Third) of Restitution & Unjust Enrichment § 1, Comment b (Discussion Draft, March 31, 2000). Not all enrichment of a defendant is therefore unjust or unjustified.

The Committee has found no corollary in the Arkansas Model Jury Instructions–Civil to elements of a claim such as “unjust and inequitable”. The role of the Committee, however, is not to criticize or to advocate any position. The role of the Committee is to state the law as it is.

The Committee has drafted a single jury instruction for the claim of money had and received in contracts implied at law, the claim before the Arkansas Supreme Court in *First Nat'l Bank of Dewitt*. As stated in the Comment following the instruction, the court must make threshold determinations of whether the claim alleged is one for which a contract should be implied at law and whether the claim should be presented to the jury. The Committee has further commented following the instruction that the existing Arkansas precedent should guide the courts in their threshold determinations. Alternatively, the authors of one article prefer instructions tailored to each factual circumstance recognized as appropriate for quasi-contractual recovery by the drafters of the Restatement (Third) of Restitution & Unjust Enrichment. *See The Arkansas Lawyer, Unjust Enrichment: A Suggested Approach for Instructing Juries in Claims at Law* (Vol. 43, No. 4, Fall 2008).

The Committee submits for comment to the members of the bench and bar the following draft jury instruction for the claim of money had and received in contracts implied at law.

UNJUST ENRICHMENT

INTRODUCTION

This set of instructions was prompted by *First Nat'l Bank of Dewitt v. Cruthis*, 360

Ark. 528, 203 S.W.3d 88 (2005), which held that a claim for restitution under the principle of unjust enrichment may be tried by a circuit court at law to a jury under Amendment 80 "where the assertion is wrongful retention of money" (corresponding to the common law action of assumpsit for money had and received). *First Nat'l Bank of Dewitt* did not break new ground in the substantive law of the law of restitution to avoid unjust enrichment - neither expanding nor contracting the universe of such cases - but addressed only the question of when such cases may be tried to a jury. The court ruled that the restitution claim, based as it was on a contract implied at law, could be heard by a jury; but an additional claim for an equitable lien, which historically was heard only in chancery court, ought not to have been submitted to the jury. *Id.* Because the court reversed on this latter ground, it did not reach appellant's challenge to the sufficiency of the evidence to support the jury's verdict that one of the appellees was not unjustly enriched.

In light of the court's discussion in *First Nat'l Bank of Dewitt* of the propriety of submitting to a jury claims for money had and received sounding in assumpsit, this set of instructions is limited in scope to claims implied at law for money had and received previously recognized by the Arkansas courts. For earlier examples of an action of assumpsit for money had and received, tried at law before a jury, see *Arkansas Nat'l Bank v. Martin*, 110 Ark. 578, 163 S.W. 795 (1914), and *Fite v. Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961).

The term "unjust enrichment" originally referred to the reason – the avoidance of unjust enrichment – underlying several different causes of action, such as those sounding in quasi contract or constructive trust, for which restitutionary remedies were available. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement of Restitution § 1 (1937). See *Frigillana v. Frigillana*, 266 Ark. 296, 307, 584 S.W.2d 30, 35 (1979) (quoting Restatement). This formulation is carried forward in the Restatement (Third) of Restitution & Unjust Enrichment § 1 (Discussion Draft March 31, 2000). As noted in *Comment b* to the Discussion Draft, "The law of restitution is the law of unjust enrichment, but 'unjust enrichment' is a term of art. The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability." As the Arkansas Supreme Court put it, in unjust enrichment cases, "the simple, but comprehensive, question is whether the circumstances are such that equitably the defendant should restore to plaintiff what he has received." *Frigillana v. Frigillana*, 266 Ark. at 306, 584 S.W.2d at 34 (quoting 77 C.J.S. Restitution § 322). For an overview of the substantive law of restitution to avoid unjust enrichment, see D. Dobbs, *Law of Remedies* § 4.1(2) (2d ed. 1993) (organizing many unjust enrichment cases into four categories of benefits to defendants: those in which title remains in the plaintiff; those in which title passes through misconduct; those resulting from breach of contract, such as partial performance by plaintiff before breach or repudiation by defendant; and those resulting from money or services in the absence of misconduct, such as mistake or other disruption in contracting), and G. Palmer, 1 *The Law of Restitution* § 1.1 (1978).

Courts sometimes use the term "unjust enrichment" to denominate the cause of action itself. *E.g.*, *Fite v. Fite*, 233 Ark. 469, 470, 345 S.W.2d 362, 363 (1961) ("This is

a suit to recover money on the ground of unjust enrichment."). "An action based on unjust enrichment is maintainable in all cases where one person has received money under such circumstances that, in equity and good conscience, he ought not to retain it." *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 61, 876 S.W.2d 603, 606 (Ark. App. 1994) (citing *Frigillana v. Frigillana*, 266 Ark. at 307, 584 S.W.2d at 35).

As a general rule, unjust enrichment does not apply when the parties have entered into a valid, legal, and binding contract. *Glenn Mechanical, Inc. v. South Arkansas Regional Health Center, Inc.*, 101 Ark. App. 440, 445, \_\_\_ S.W.3d \_\_\_ (2008) (2008); *Varner v. Peterson Farms*, 371 F.3d 1011, 1018 (8th Cir. 2004) (citing *Hall Contracting Corp. v. Entergy Services, Inc.*, 309 F.3d 468, 475 (8th Cir. 2002)); and *Lowell Perkins Agency, Inc. v. Jacobs*, 250 Ark. 952, 958, 469 S.W.2d 89, 92 (Ark. 1971) ("[The] principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties, however harsh the provisions of such contract may seem in the light of subsequent happenings."). The court has applied this general rule to a subcontractor's quasi-contract claim against the landowner, given the existence of a valid contract with the general contractor, in the absence of the landowner's agreement to pay the general contractor's debt or circumstances surrounding the parties' dealings that could be found to have given rise to an obligation to pay. *Servewell Plumbing, LLC v. Summit Contractors, Inc.*, 362 Ark. 598, 612-13, 210 S.W.3d 101, 112 (2005) (citing *U.S. East Telecomm'n's v. U.S. West Communications Services, Inc.*, 38 F.3d 1289, 1296-98 (2d Cir. 1994)). As noted in *Varner*, however, exceptions to the general rule are when there has been a rescission of the contract at law, when the contract has been discharged by impossibility or frustration of purpose, or when the parties to the contract have made a fundamental, mutual mistake about something material to the contract. *E.g.*, *Friends of Children, Inc. v. Marcus*, 46 Ark. App. 57, 61, 876 S.W.2d 603, 605 (1994) (allowing restitution in equity where the contract between the parties had been effectively rescinded by the parties).

AMI \_\_\_\_\_

ISSUES – MONEY HAD AND RECEIVED –

CONTRACT IMPLIED AT LAW

\_\_\_\_\_ claims that \_\_\_\_\_ has been unjustly enriched to  
(Plaintiff) (Defendant)

Plaintiff's detriment and has the burden of proving three essential propositions:

First, that \_\_\_\_\_ received [money][or][the equivalent of]  
(Defendant)

money] to which [he][she][it] was not entitled and which should be restored

to \_\_\_\_\_;

(Plaintiff)

Second, that there was some operative act, intent, or situation that made the enrichment of \_\_\_\_\_ unjust and inequitable;  
(Defendant)

Third, that the unjust enrichment of \_\_\_\_\_ was at the expense of [to the  
(Defendant)  
detriment of] \_\_\_\_\_; and  
(Plaintiff)

Fourth, the amount by which \_\_\_\_\_ was unjustly enriched.  
(Defendant)

[One who is free from fault is not unjustly enriched merely because [he][she][it] has chosen to exercise a legal or contractual right. One is not unjustly enriched by receipt of that to which [he][she][it] is legally entitled.]

## NOTE ON USE

Use this instruction in cases corresponding to the common law action of assumpsit for money had and received.

Use the bracketed last paragraph when supported by the evidence.

For the reasons outlined in the Comment, care should be taken to determine whether the claim is appropriate for jury determination and, if so, whether the facts of the case indicate that the instruction must be modified or supplemented. The publication of this instruction should not be regarded as persuasive authority for the propriety of submitting the claim to the jury in all cases sounding in contract. See the Introduction to this Chapter and the Comment to this instruction.

## COMMENT

The language of this instruction derives from a number of Arkansas cases, including *Hatchell v. Wren*, 363 Ark. 107, 117, 211 S.W.3d 516, 522 (2005), and *Guaranty Nat'l Ins. Co. v. Denver Roller, Inc.*, 313 Ark. 128, 138, 854 S.W.2d 312, 317 (1993). Because there are few Arkansas cases for money had and received tried to a jury and there is no clear statement of the elements of this claim in that context, the Committee has relied upon chancery cases of unjust enrichment in drafting the instruction.

As explained in the Introduction, the Arkansas Supreme Court has held that claims for unjust enrichment sounding in assumpsit for money had and received may be submitted to a jury. *First National Bank of DeWitt v. Cruthis*, 360 Ark. 528, 203 S.W.3d 88 (2005). Thus, important threshold determinations for the trial court are whether the claim of unjust enrichment is one for money had and received and, if so, whether the claim should be submitted to a jury.

The quasi-contractual claim for money had and received developed for those exceptional circumstances when neither the law of contract nor the law of tort provided redress but “in equity and good conscience” redress was required. *See Hatchell v. Wren*, 363 Ark. 107, 117, 211 S.W.3d 516 (2005); D. Dobbs, *Law of Remedies* § 4.1(1) at 370 (2d ed. 1993). Therefore, this instruction should not be used when the parties have entered into an enforceable oral or written agreement. *See Glenn Mechanical, Inc. v. South Arkansas Regional Health Center, Inc.*, 101 Ark. App. 440, 445, \_\_\_ S.W.3d \_\_\_ (2008). This instruction should be modified when a contract may be implied in fact from the conduct of the parties. *See Dews v. Halliburton Ind., Inc.*, 288 Ark. 532, 536, 708 S.W.2d 67 (1986) (noting in the context of a quantum meruit claim for the value of services rendered of the necessity of conduct of the defendant creating a reasonable expectation of payment in the plaintiff). This instruction should be used when the law will imply a contract between the parties, i.e., where there was no agreement or conduct between the parties from which an agreement to pay could in fact be inferred, but the defendant should have agreed to pay the plaintiff because of the defendant’s inequitable and unjust enrichment at the plaintiff’s expense. The Arkansas courts have implied such contracts in law in the following contexts: void contract, impossibility of performance, failure of consideration,

fiduciary relationship, confidential relationship, double recovery, duress, mistake of fact, deceit and extortion, unlawful conduct, knowing receipt of money/services of another. *See* H. Brill, Arkansas Law of Damages § 31:2 at 568-69 (5<sup>th</sup> ed. 2004). The court must determine whether the circumstances of each case are appropriate for a quasi-contractual recovery and whether modification of the instruction is appropriate before the instruction is submitted to the jury.

Arkansas case law regarding the elements of the claim as it may be asserted in different circumstances is relatively undeveloped and therefore at present provides only a general statement of unjust enrichment on which to base a model instruction. Arkansas case law has, however, developed several general principles. It is a truism under Arkansas law that “in the realm of unjust enrichment, the word ‘unjust’ means ‘unlawful.’” *Colonia Ins. Co. v. City Nat’l Bank*, 13 F. Supp. 2d 891, 900 (W.D. Ark. 1998). There the court denied defendant’s motion for summary judgment on plaintiff’s unjust enrichment claim. Plaintiff claimed that defendant, the vice president of an insurance agency that had commingled premium payments with its own operating funds rather than holding them in trust for the insurers, was unjustly enriched by payments he received from the agency. The court held that there was a genuine issue of material fact regarding defendant’s legal entitlement to those amounts.

This principle does not mean, however, that the one against whom the claim is asserted must be shown to have acted tortiously or illegally. As the court stated in *Frigillana v. Frigillana*, 266 Ark. 296, 306, 584 S.W.2d 30, 34 (1979) (quoting 77 C.J.S. *Restitution* § 322, “It is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled?”).

For example, an unjust enrichment claim was upheld in *Hatchell v. Wren, supra*, brought by a motorist who damaged another’s automobile, paid for its repair, and sought recovery of the insurance proceeds for the damage paid by the motorist’s insurer to, and retained by, the vehicle owner. The “operative act” in that case was the vehicle owner’s “act of retaining both the money and the repaired car and refusing to pay over the proceeds to Appellee.” 363 Ark. at 118, 211 S.W.3d at 522. Another example is *Fite v. Fite*, 233 Ark. 469, 345 S.W.2d 362 (1961), in which the court upheld a jury verdict on an issue based on unjust enrichment. There, the mother-in-law advanced to the account of her son and daughter-in-law a sum for down payment on a house. When the son died soon thereafter, the daughter-in-law refused to repay the money. The court reasoned that “[t]he vital question” was whether the evidence supported the jury in concluding that the daughter-in-law “had knowledge of the source and purpose of the advancement” from the mother-in-law, and that if the daughter-in-law did have such knowledge, “then she was undoubtedly obligated to repay.” *Id.*, 233 Ark. at 474, 345 S.W.2d at 365. *But see id.*, 233 Ark. at 476-79, 345 S.W.2d at 367-68 (Smith, J., dissenting) (objecting to the “sweeping instruction” given and arguing that an obligation to repay could be based only on an express or implied promise to repay).

Unjust enrichment nevertheless is not necessarily coextensive with the claims of moral duty. As the court explained in *Whitley v. Irwin*, 250 Ark. 543, 550, 465 S.W.2d 906, 911 (1971), “one is not unjustly enriched by receipt of that to which he is legally entitled.” The Whitleys had conveyed a house to the Irwins for cash, assumption of a note secured by

mortgage, and execution of a note to the Whitleys secured by a lien (in effect a second mortgage), but did not transfer a fire insurance policy on the property. The Irwins took no action to effect transfer of the policy. When the house burned, the Whitleys successfully sued the fire insurer and recovered the proceeds. The court concluded that the Whitleys were not unjustly enriched, even though the Irwins had paid the balance due on both notes, because as mortgagees who maintained insurance on the mortgaged property for their own benefit, the Whitleys had a legal interest in the insurance proceeds that was not limited to their interest as mortgagees. *Compare Whiteley with Smith v. Whitener*, 42 Ark. App. 225, 856 S.W.2d 328 (1993) (current owner of a parcel of land encumbered by a previous mortgage provided collateral which was applied to mortgage debt, allowing the debtor to retain all of the additional collateral by paying off only the net obligation, and the parcel-owner was held to have an unjust enrichment claim against the debtor for the value of his collateral).

The court in *Guaranty Nat'l Ins. Co. v. Denver Roller, Inc.* also applied the principle that “one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right.” 31 Ark. at 138, 854 S.W.2d at 317. In that case the party against whom unjust enrichment was claimed had stood ready to perform as required under a valid contract but refused to make an alternative performance that it was not contractually obligated to make but which was common practice in the industry.

A claim based on unjust enrichment was rejected in *Merchants & Planters Bank & Trust Co. of Arkadelphia v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990), both because the evidence did not show that Massey had been unjustly enriched and because M & P had “unclean hands.” Massey’s husband forged her signature on a promissory note and deed of trust, which M & P had allowed him to take home and which an M & P employee later notarized. In seeking to foreclose, M & P alleged that Massey was unjustly enriched because the loan proceeds had been used to pay family debts. Quoting *Whitley v. Irwin, supra*, the court upheld the chancellor’s ruling that Massey had not been unjustly enriched because she “was unaware that her name had been signed to the note. She accepted the benefits of what she thought was money her husband had obtained on a personal loan. It is also true that Mrs. Massey took no action that would indicate she intended to be bound by the note.” 302 Ark. at 424, 790 S.W.2d at 891. M & P had unclean hands because of its wrongful notarization of the note and deed of trust. *Id.*

The absence of culpability in a claim based on unjust enrichment, *see Frigillana v. Frigillana*, 266 Ark. at 306, 584 S.W.2d at 34, limits the recovery of the plaintiff to the direct benefit to the defendant of the plaintiff’s money or property. The law of restitution provides for the recovery of defendant’s profits and consequential gains from the money or property of the plaintiff, but the enhanced recovery is based on the equitable remedy of disgorgement. *See* Restatement (Third) of Restitution, Chp. 5 Introductory Note & §§ 40-44 (Tent. Draft No. 4, 2005). A conscious wrongdoer may be required to disgorge all gains, including consequential gains, which exceed the direct benefit of the money or property taken. *Id.* A right to jury trial, however, would not attach to the equitable remedy of disgorgement. A request for an equitable remedy may preclude any right to jury trial on the claim for money had and received. *See First National Bank of Dewitt*, 360 Ark. at 537, 203 S.W.3d at 94 (recognizing the right to jury trial on a claim for money had and received but reversing the submission of the claim to the jury on the basis that an equitable lien was sought as an additional remedy for the claim).

Further development of Arkansas law regarding this claim is likely. The case law of both Arkansas and other states already presents issues that may require modification of this instruction or additional instructions. *See, e.g.*, *Merchants & Planters Bank & Trust Co. v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990) (unclean hands); *Peerless Packing Co., Inc. v. Malone & Hyde, Inc.*, 180 W. Va. 267, 176 S.E. 2d 161 (1988) (holding that “absent truly egregious circumstances verging on actual fraud,” an unjust enrichment claim is not applicable in a case arising under Article 9 of the UCC); *Greer v. White Oak State Bank*, 673 S.W.2d 326 (Tex. Civ. App. - Texarkana, 1984) (addressing non-exclusivity of the remedy in UCC § 4-212 against bank customer, whether defendant had materially changed position in reliance on payment, and whether jury should have been instructed to effect that unjust enrichment has not occurred when money is paid voluntarily with full knowledge of facts); *Ninth District Production Credit Assn. v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo. 1991) (considering availability of unjust enrichment claim brought by unsecured creditor in circumstances in which claim would upset priority of claims under UCC Article 9 by creditors holding perfected security interests). Modification of this instruction and additional instructions may be required in other circumstances as well.