THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIFICATION OF QUESTIONS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
J. Michelle Childs, United States District Court Judge

Appellate Case No. 2017-001652

Beattie B. Ashmore, in his Capacity as
Court-Appointed Receiver for Ronnie Gene Wilson
and Atlantic Bullion & Coin, Inc., Plaintiff,

v.

Jim Dodds, Defendant.

DEFENDANT'S BRIEF ON CERTIFIED QUESTIONS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF CERTIFIED QUESTIONS iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

ARGUMENTS 3

I. SOUTH CAROLINA CHOICE OF LAW REQUIRES THE APPLICATION OF FLORIDA LAW TO THE SUBSTANTIVE CLAIM OF FRAUDULENT CONVEYANCE 3

A. Fraudulent Conveyances Should be Viewed as a Tort of Choice of Law Purposes 3

B. The Rule of Lex Loci Delicti Requires the Application of Florida Law 4

II. THE FLORIDA UNIFORM FRAUDULENT TRANSFER ACT CONTAINS A STATUTE OF REPOSE 10

III. SOUTH CAROLINA CHOICE OF LAW REQUIRES APPLICATION OF FLORIDA LAW TO THE RECEIVER'S UNJUST ENRICHMENT CLAIM 11

A. The Receiver's Claim for Unjust Enrichment Should be Viewed as a Tort under the First Restatement for Choice of Law Purposes 11

B. Application of the Second Restatement 13

C. Application of Lex Loci Contractu 14

D. Conflict Between South Carolina and Florida Law 15

1. The limitations periods differ 15

2. Substantive law. 16

E. Florida Statute of Repose for Unjust Enrichment 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Arant v. First Southern Co., 249 S.C. 305, 153 S.E.2d 919 (1967) 15
Bannister v. Hertz Corp., 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994) 5
Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A., 938 So. 2d 571 (Fla. Dist. Ct. App. 2006) 15, 18
Bedwell v. Rucks, 127 So.3d 533 (Fla. Dist. Ct. App. 2012) 7
Blusal Meats, Inc. v. United States, 638 F.Supp. 824 (S.D.N.Y.1986) 12
Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798 Ct. App. (1989) 16
Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 628 S.E.2d 38 (2006) 10
Carpenter v. Granderson, 214 B.R. 671 (Bankr.D.Mass.1997) 11
Credit Bureau Enters., Inc. v. Pelo, 608 N.W.2d 20 (Iowa 2000) 12
Continental Commodities, Inc., In re, 841 F.2d 527 (4th Cir. 1988) 8
Davis v. Monahan, 832 So. 2d 708 *(Fla. 2002)* 16, 18
Dawkins v. State, 306 S.C. 391, 412 S.E. 2d 407 (1991) 5
Diamond "S" Dev. Corp v. Mercantile Bank, 989 So. 2d 696 (Fla. Dist. Ct. App. 2008) 16
Donovan v. Fla. Peninsula Ins. Co., 147 So. 3d 566 (Fla. Dist. Ct. App. 2014) 18
Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 703 S.E.2d 221(2010) 17
Engstrom v. Wiley, 191 F.2d 684 (9th Cir.1951) 8
First Sw. Fin. Servs. v. Pulliam, 912 P.2d 828, 830 (N.M.1996) 11
First Union Nat'l Bank v. New York Life Ins. & Annuity Corp., 152 F.Supp.2d 850 (D. Md. 2001) 8
Forman v. Jeffrey Matthews Fin. Grp., LLC, 254 B.R. 104 (Bankr.D.N.J.1999) 11
Hadidi v. Intracoastal Land Sales, Inc., 2014 U.S. Dist. LEXIS 86173 (D.S.C. June 25, 2014) 13
Hanna v. Plumer, 380 U.S. 460 (1965) 6
Hughes v. Doe, 281 S.C. 488, 316 S.E.2d 383 (1984) 10, 17
Hume v. Durwood Medical Clinic, Inc., 282 S.C. 236, 240, 318 S.E.2d 119, 121 (Ct. App. 1984) 5
In re International Management Associates, LLC, 495 B.R. 96 (Bankr.N.D. Georgia 2013) . 4, 12
In re Jamuna Real Estate LLC, 365 B.R. 540 (Bankr.E.D.Pa.2007) 10
In re Std. Jury Instructions-Contract & Bus. Cases, 116 So. 3d 284 (Fla. 2013) 16
In Re: Burton Wiand Receivership Cases, 2008 U.S. Dist. Lexus 27929 (M. D. Fl., 2008).. 16, 18
In Re White River Corp., 799 F.2d 63 (10th Cir.1986) 8
Iowa Waste Sys., Inc. v. Buchanan County, 617 N.W.2d 23 (Iowa Ct.App.2000) 12
Jones v. ETS of New Orleans, Inc., 793 So.2d 912 (Fla.2001) 11
Kaliner v. Load Rite Trailers (In re Sverica Acquisition Corp.), 179 B.R. 457 (Bankr.E.D.Pa., 1995) 4
Kush v. Lloyd, 616 So.2d 415, 419 (Fla. 1992) 18
Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993) 10

Lister v. Nation Bank of Delaware, NA, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) 4, 9
Livingston v. Atlantic Coast Line R.R. Co., 176 S.C. 385, 180 S.E. 343 (1935) 15
McDaniel v. Allen, 265 S.C. 237, 217 S.E.2d 773 (1975) 7
Midlantic Bank, N.A. v. Strong, 1996 U.S. Dist. LEXIS 22384 (E.D.N.Y. 1996) 4
MSKP Oak Grove, LLC v. Venuto, No. 10–6465(JBS/JS), 2014 WL 4385979 (D.N.J. Sept. 5, 2014) 10
Nathan v. Whittington, 408 S.W.3d 870 (Tex. 2013) 11
Nat'l Auto Serv. Ctrs. v. F/R 550, LLC, 192 So. 3d 498 (Fla. Dist. Ct. App., 2016) 10, 11
O'Briant v. Daniel Constr. Co., 279 S.C. 254, 305 S.E.2d 241 (1983) 15
O'Neill v. Nestle Libbys P.R., Inc., 729 F.2d 35 (1st Cir., 1984) 8
Peddinghaus v. Peddinghaus, 692 N.E.2d 1221 (Ill. App. Ct. 1998) 12
Perkins v. Champagne (In re Int'l Magmt. Assocs., LLC), 495 B.R. 96 (Bankr. N.D. Ga. 2013) .. 4
RCA Corp. v. Tucker, 696 F.Supp. 845 (D.N.Y.1988) 4
Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416 (1937) 5
Rogers v. Lee, 414 S.C. 225, 777 S.E.2d 402 (Ct. App. 2015) 5, 6, 7
Smith v. United States, 508 U.S. 223 (1993) 11
State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001) 12
Swafford v. Schweitzer, 906 So. 2d 1194 (Fla. Dist. Ct. App. 2005) 15, 17
ThunderWave, Inc. v. Carnival Corp., 954 F.Supp. 1562 (S.D. Fla. 1997) 16
Tow v. Rafizadeh (In re Cyrus II Partnership), 413 B.R. 609 (Bankr.S.D.Tex.2008) 4
Wellin v. Wellin, 2016 U.S. Dist. LEXIS 138117 (D.S.C. March 8, 2016) 9
Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp., 737 F.Supp. 1272 (W.D.N.Y.1990) . 11
Williams Carpet Contrs., Inc. v. Skelly, 400 S.C. 320 (Ct. App. 2012) 17

Statutes

Fla. Stat. § 95.031 16
Fla. Stat. § 95.11 ..... 15, 16, 18
S.C. Code Ann. § 15-3-530 (2005) 16

Other Authorities

17 Am. Jur. 2d Contracts § 3. 16
86 C.J.S. Torts Section 25; Restatement (First) of Conflict of Laws § 377 (1934) 5
Restatement (First) of Conflict of Laws § 377 (1934) 5
Restatement (First) of Conflict of Laws 12 Intro. Note (1934) 5
Restatement (Second) of Conflict of Laws § 221 (1971) 13, 14
Restatement (Second) of Conflict of Laws § 6 13
Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 Am. J. Comp. Law 697, 712, 2006 13

STATEMENT OF CERTIFIED QUESTIONS

I. UNDER SOUTH CAROLINA CHOICE OF LAW RULES, THE SUBSTANTIVE AND PROCEDURAL LAW OF WHICH JURISDICTION APPLIES TO THE RECEIVER'S FRAUDULENT CONVEYANCE CLAIM?

II. UNDER SOUTH CAROLINA CHOICE OF LAW RULES, THE SUBSTANTIVE AND PROCEDURAL LAW OF WHICH JURISDICTION APPLIES TO THE RECEIVER'S UNJUST ENRICHMENT CLAIM?

STATEMENT OF THE CASE[1]

Jim Dodds, as a Florida resident, decided to invest in silver bullion with a South Carolina Company, Atlantic Bullion & Coin ("AB&C"), then run by Ronnie Gene Wilson. The oral agreement was that he would not take possession of the silver, but that it would be held by AB&C in a Delaware depository. After 16 years without incident, Wilson, to the shock of all of his investors, plead guilty to mail fraud and was ordered to pay restitution to investors in AB&C arising out of a Ponzi scheme.

The federal court appointed a Receiver in an action related to the criminal prosecution and authorized him to "proceed against individuals...that the Receiver may claim to have wrongfully, illegally, or otherwise improperly be in possession of ... proceeds directly or indirectly transferred from investors in the Ponzi scheme." The Receiver then filed the appointment order on August 6, 2012 in the United States District Court for the Southern District of Florida pursuant to §28U.S.C 754.

A Complaint was filed against Jim accusing him of wrongful, illegal, or otherwise wrongfully possessing the proceeds of his investment with AB&C. The Receiver asserts claims

[1] Rule 244(b)(1)(C) SCACR states that that Statement of the Case shall not contain contested matters. However, the Receiver's Statement of the Case is rife with contested issues. For example, the Receiver states that AB&C encouraged clients to invest in bogus silver accounts and that AB&C sent account statements to clients reflecting trades of silver that never occurred. This overlooks the fact that Wilson ran a legitimate silver business until 2001. Jim moved to Florida before he began investing with AB&C, not afterwards. The Receiver fails to state that Jim and Ron Wilson primarily met in South Carolina for personal reasons unrelated to the silver investment. The Receiver claims that Jim is a net winner when he actually lost over $2million dollars he thought his investment had earned and now faces being a double victim.

for fraudulent conveyance pursuant to the Statute of Elizabeth, and/or the Florida Uniform Fraudulent Transfer Act, and unjust enrichment. An Answer was timely filed on March 26, 2015. Cross motions for summary judgment were filed in which issues of choice of law were raised, since Jim is a Florida resident and AB&C was a South Carolina company.

In its July 5, 2017 Order, the federal trial court stated that it would certify questions to the South Carolina Supreme Court as to choice of law.[2] The court asked the parties to submit a joint statement with questions to be certified by Order dated July 12, 2017 and by Order dated August 2, 2017, the federal court certified two questions to this Court.[3]

STATEMENT OF THE FACTS

Jim Dodds ("Jim") is an 82-year old retired small business owner residing in Florida who invested $378,200.00 in silver with a highly reputable businessman. Like all investors, Jim risked the chance that silver would go up or down. Fortunately, the price of silver was rising[4]. The investment was part of Jim's overall retirement planning. He decided to open an individual silver account with AB&C in 1996, while retired and residing in Florida. AB&C mailed Jim's statements to his addresses in Florida or Michigan. Jim expected any issues over his investments would be subject to the law in his home state. In fact, the Receiver filed a claim to his Florida

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[2] Jim requested in his Memorandum in Opposition to the Receiver's Motion for Summary Judgment (Doc. 74) that, if South Carolina law was found to apply (due to the lack of controlling South Carolina Supreme Court authority), the federal trial court should certify questions to this Court regarding the application of South Carolina fraudulent conveyance and unjust enrichment claims to an investor in an alleged Ponzi scheme.

[3] The Receiver attempts in his first footnote to change the nature of the certified questions before this Court. The federal trial court clearly requested this Court to determine which jurisdiction applies to the Receiver's claims for fraudulent conveyance and unjust enrichment and not just for "guidance" on how the federal court should apply the choice-of-law rules.

[4] The spot price of silver rose 830% from early 1996 ($5.82) when Jim invested in 5,000 ounces of silver to the highest point in 2011 ($48.28).

property on August 6, 2012 pursuant to 28 U.S.C §754 and sued (alternatively) under the Florida Uniform Fraudulent Transfer Act.

For the entirety of the time he invested with AB&C, Jim requested funds from Wilson by telephone or mail from outside South Carolina. He received statements from AB&C outside of South Carolina. The silver was supposed to be held outside of South Carolina.

Jim began making withdrawals from him AB&C account eight years after he began investing. None of the checks Jim received from AB&C were deposited in South Carolina, instead the vast majority were deposited in Florida. From 1996 through 2011, Jim made decisions about the investing and how to handle the proceeds with AB&C as a Florida resident.

Jim thought his investment with AB&C was worth over $2 million in 2012 when he was shocked to learn that he was a victim of Ron Wilson's scheme. He was then sued by the Receiver, seeking to make him a double victim by demanding he repay over $1 million in proceeds he received from AB&C.[5] Jim is being accused of "wrongfully, illegally, or otherwise improperly" being in possession of proceeds from other investors in AB&C. This possession is, of course, not in South Carolina.

ARGUMENTS

I. SOUTH CAROLINA CHOICE OF LAW REQUIRES THE APPLICATION OF FLORIDA LAW TO THE SUBSTANTIVE CLAIM OF FRAUDULENT CONVEYANCE

A. Fraudulent Conveyance Should be Viewed as a Tort For Choice Of Law Purposes

South Carolina courts have not determined whether an action under the Statute of Elizabeth is akin to a tort or a contract claim for purposes of choice of law. However, a claim of

[5] The Receiver alleged the Statute of Elizabeth or the Florida Uniform Fraudulent Transfer Act in his Complaint, acknowledging that Florida law was applicable.

fraudulent conveyance resembles an action in tort in that the ultimate issue is not whether the conveyance from grantor to grantee was formally valid as a matter of property law, but rather whether it was done for the purposes of defrauding one's creditors. The South Carolina Court of Appeals has treated a claim for fraudulent misrepresentation as a tort. *See Lister v. NationsBank of Del., N.A.* 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

Many other courts have agreed with this approach and have classified these claims as sounding in tort. *See, e.g., In re International Management Associates, LLC*, 495 B.R. 96 (N.D. Georgia 2013) (finding that because the rights and obligations of the parties in a fraudulent transfer action depend on the operation of noncontractual rules and may result in consequences quite different from those that the parties contracted for, the claim more closely resembles a tort matter than a contractual one.); *Perkins v. Champagne (In re Int'l Magmt. Assocs., LLC), 495 B.R. 96, 105* (Bankr. N.D. Ga. 2013)*; RCA Corp. v. Tucker,* 696 F.Supp. 845, 853 (D.N.Y.1988); *Midlantic Bank, N.A. v. Strong,* 1996 WL 697940, "7-8, 1996 U.S. Dist. LEXIS 22384, at *21-22 (E.D.N.Y. 1996); *Tow v. Rafizadeh (In re Cyrus II Partnership),* 413 B.R. 609, 613 (Bankr.S.D.Tex.2008) (fraudulent transfer action sounds in tort); *Kaliner v. Load Rite Trailers (In re Sverica Acquisition Corp.),* 179 B.R. 457, 469-470 (Bankr.E.D.Pa., 1995). Therefore, Jim respectfully requests this Court to hold that an action for fraudulent conveyance should be viewed as a tort for choice of law purposes.

B. The Rule of Lex Loci Delicti Requires the Application of Florida Law

South Carolina choice of law rules, as to torts, will apply the substantive law of the state where the injury occurred. *See Lister, supra*, 329 S.C. at 143, 494 S.E.2d at 454;[6] *see also*

[6] In *Lister*, the South Carolina Court of Appeals found that the injury in question centered around the relationship between the credit-card company and the Listers in South Carolina. The Court of Appeals found that the actual injury to the Listers occurred in South Carolina. The place of injury and the manifestation of the effect of the injury happened to both occur in South Carolina

Dawkins v. State, 306 S.C. 391, 392, 412 S.E. 2d 407, 408 (1991) ("It is well established in South Carolina that in tort cases the law of the place where the injury was occasioned or inflicted governs in respect of the right of action, and the law of the forum in respect to matters pertaining to the remedy only."). The place of injury is also referred to as the place where the last act required to complete the tort occurred. *See Hume v. Durwood Medical Clinic, Inc.*, 282 S.C. 236, 240, 318 S.E.2d 119, 121 (Ct. App. 1984) citing 86 C.J.S. Torts Section 25; Restatement (First) of Conflict of Laws § 377 (1934) (stating that the "place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place").[7] As set forth below, application of the Second Restatement would also lead to the application of Florida law. (See Section III. B.)

The First Restatement requires "reference to the foreign law deemed appropriate to protect parties against a substantial change of position because of the fortuitous circumstance that suit is brought in that particular state." Restatement (First) of Conflict of Laws 12 Intro.

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where the Listers lived. As the Court of Appeals pointed out in *Rogers v. Lee*, 414 S.C. 225, 231, 777 S.E.2d 402, 405 (Ct. App. 2015), the occurrence of the injury and where its effects are felt may be two different states. In the present case, the alleged injury occurred in Florida (where he received and retained the proceeds and any imputation would have to occur), even though AB&C claims to have felt its effects in South Carolina.

[7] The Receiver cites *Rauton v. Pullman Co.*, 183 S.C. 495, 191 S.E. 416 (1937) for the proposition that the law of the place where the injury was occasioned governs. The Plaintiff in *Rauton* purchased a round-trip ticket from Greenwood, South Carolina to Mexico City. On the return trip, he learned that his berth had been sold to other parties and he was forced to travel in an upper berth, which he claims made him sick. Although the Plaintiff was a resident of South Carolina, purchased the ticket in South Carolina, and felt the effects of his injury throughout his return journey, the South Carolina Supreme Court found the law of Mexico should be applied. The Receiver also cites *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994) for the same proposition. The South Carolina Court of Appeals found that North Carolina law would apply to an accident that occurred in North Carolina involving New York residents who rented a van in New York and were traveling to South Carolina, even though the manifestation of the injuries would have been felt elsewhere. In the present case, the alleged injury was inflicted in Florida where Jim received and retained the proceeds from his investment, despite the fact that AB&C claims to have felt the injury in South Carolina.

Note (1934). Jim established the account, and as a portion of his retirement planning, received and retained the proceeds in question as a resident of Florida. As such, he expected to be subject to Florida law regarding his receipt and retention of investment funds. To find otherwise would potentially subject him to the laws of all 50 states for the receipt of investment proceeds in Florida, depending on the location of each entity in which an investment was held. Justice Harlan stated in his concurrence in *Hanna v. Plumer*, 380 U.S. 460 (1965):

> *Erie* recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs.
> *Hanna,* 380 U.S. at 474 (Harlan, J., concurring).

Because the place of injury under the First Restatement is the place where the last event necessary to make an actor liable for an alleged tort takes place, South Carolina Courts have stated that the place where the injury occurs is not necessarily the place where the results of the injury are felt. *Rogers v. Lee*, 414 S.C. 225, 231, 777 S.E.2d 402, 405 (Ct. App. 2015).

Lee, a South Carolina lawyer, represented Mark Malloy in a North Carolina workers' compensation claim after Malloy sustained injuries while employed in North Carolina. Malloy entered into a settlement agreement with the North Carolina employer and carrier in full satisfaction of any claims as a result of the accident. Lee disbursed Malloy's settlement funds from the firm's South Carolina office to Malloy's South Carolina home.

Rogers, as GAL for Malloy, asserted Malloy's financial injury stemming from Lee's professional negligence and breach of fiduciary duty occurred in South Carolina, where Lee resided. He asserted that the injury was felt in South Carolina. The Court of Appeals found the alleged injury to Malloy was the loss of his opportunity to further pursue his claim or settle for a greater sum of money. This injury occurred in North Carolina where Lee undertook

representation of Malloy, where Malloy accepted attorney Lee's advice to settle his claim, and where Malloy entered into the binding settlement agreement.

The Court of Appeals held:

> We disagree with Rogers' assertion that the *lex loci delicti* is determined simply by the location of manifestation of a plaintiff's financial damages in a legal malpractice action. South Carolina law clearly provides *lex loci delicti* is determined by the state in which *the injury occurred,* not where the results of the injury were felt or where the damages manifested themselves. [citations omitted]

Rogers v. Lee, 414 S.C. at 231.[8] The Receiver cites *Rogers v. Lee* but erroneously argues that the *lex loci delicti* is determined by the place where the results of the injury were felt.

The alleged injury to AB&C was the wrongful retention of funds imputed to Jim, not where the results of the wrongful retention were felt. In order to be liable under the Statute of Elizabeth for the return of his investment proceeds, Jims must have received a transfer and any fraudulent intent by Wilson or AB&C must be imputed to him. See *McDaniel v. Allen*, 265 S.C. 237, 243, 217 S.E.2d 773, 776 (1975) ("'To annul for fraud a deed based upon a valuable consideration, it must not only be shown that the grantor intended thereby to hinder, delay, or defraud creditors, but it must also appear that the grantee participated in such fraudulent purpose.'").[9] Jim received the transfers mostly in Florida, and any fraudulent intent imputed to Jim would be imputed in Florida.[10]

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[8] The District Court of Appeal of Florida, Fourth District, has held that the place where damages occurred was irrelevant to determining when and where a fraudulent transfer claim accrued. *Bedwell v. Rucks*, 127 So.3d 533, 535 (Fla. App. 2012).

[9] The Receiver appears to be arguing the merits of the case regarding imputation, however, that question is not before this Court.

[10] The Receiver acknowledges that the imputation of fraud is a necessary element to make Jim liable under the Statute of Elizabeth.

The transfers occurred when the checks were received and deposited by Jim. He invested $377,800 with AB&C not knowing if the market would go up or down. The Fourth Circuit concluded, in considering when a transfer occurs for purposes of a Section 547(c) defense to a preference action in bankruptcy, that a transfer of funds by check is effective on the date that the check is received as long as the debtor's bank honors the check. See *Continental Commodities, Inc.*, In re, 841 F.2d 527 (4th Cir. 1988). This view recognizes that "in the commercial world receipt of a check . . . is customarily looked upon as the date of payment of an obligation." *Id. citing In Re White River Corp.*, 799 F.2d 631, 634 (10th Cir.1986). See also *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37 (1st Cir., 1984) citing *Engstrom v. Wiley*, 191 F.2d 684 (9th Cir.1951) ("Since checks are normally considered present payments between parties . . . the delivery of a check should supply the time of transfer.") The checks to Jim were honored and the benefits received and retained by Jim outside of South Carolina.

At least two District Courts have found that the location where a check was received was the last act necessary to complete the alleged tort in cases in which the causes of action were for a conversion or misappropriation. In *First Union Nat'l Bank v. New York Life Ins. & Annuity Corp.*, 152 F.Supp.2d 850 (D. Md. 2001), First Union made a loan to Mr. Baldwin in Maryland that was secured in part by an interest in Baldwins account with New York Life in New York. Baldwin later requested that New York Life pay from New York him the surrender value of the account to him in Maryland. New York Life did so. Baldwin then agreed to extend his loan with First Union and represented that his annuity account in New York continued to serve as collateral for the loan. First Union in Maryland alleging it wrongfully paid Baldwin the surrender value of the policy.

The District Court of Maryland found under the *lex loci delicti* rule that the alleged misappropriation of property occurred in Maryland, where New York Life delivered the check to Baldwin, and not in New York where Baldwin's surrender request was processed. Likewise, the alleged imputed transfer occurred when the checks were delivered to Jim in Florida, and not in South Carolina, where Jim's requests were processed.

In *Wellin v. Wellin*, the Wellin children lived in Maine, Pennsylvania and Washington state during the time in question. Keith Wellin, along with his children, were alleged to have improperly orchestrated the dissolution of Friendship Partners, LLP and the sale of Berkshire Hathaway stock, converting the proceeds to their own use. The Special Master, appointed by the District Court of South Carolina addressed the last event necessary for the tort of conversion:

> These actions, culminated in the . . . deposit of the checks drawn upon the account of Friendship Partners, LLP, to the individual defendants, would be the last events necessary to make them liable for the alleged tort of conversion. *See Lister v. Nation Bank of Delaware, NA*, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997) (holding South Carolina law applied under the *lex loci delicti* analysis where unauthorized charge on Plaintiff's credit card account occurred in South Carolina).

Wellin v. Wellin, 2016 U.S. Dist. LEXIS 138117 * 38-39 (D.S.C. March 8, 2016), adopted by, in part, modified by, rejected by, in part, Motion granted by, in part, Motion denied by, in part *Wellin v. Wellin,* 2016 U.S. Dist. LEXIS 135604 (D.S.C., Sept. 30, 2016). None of the checks were received by Jim in South Carolina. The majority of the checks were deposited in Florida.

In order for Jims to be required to disgorge the investment proceeds under the Statute of Elizabeth, there must be a transfer and imputation of fraudulent intent. Any alleged imputation of fraud to Jims must have occurred in Florida where he resides.

II. THE FLORIDA UNIFORM FRAUDULENT TRANSFER ACT CONTAINS A STATUTE OF REPOSE

South Carolina courts will respect the limitations in the state where the alleged tort occurred if the limitations period is recognized by the law of that state as a substantive requirement of the cause of action. *Hughes v. Doe*, 281 S.C. 488, 316 S.E.2d 383, 384-85 (1984). A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* 313 S.C. at 404, 438 S.E.2d at 243. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citing *Langley v. Pierce,* 313 S.C. 401, 403–04, 438 S.E.2d 242, 243 (1993). FUFTA section 726.110(1) is a statute of repose, which is substantive. *See Nat'l Auto Serv. Ctrs. v. F/R 550, LLC*, 192 So. 3d 498, 514 (Fla. Dist. Ct. App., 2016).

Section 726.110 is a repose statute on its face. The introductory clause of the statute provides that "[a] cause of action with respect to a fraudulent transfer ... *is extinguished* unless action is brought" within the time periods provided in subsections (1) through (3). § 726.110 (emphasis added). The unambiguous text extinguishes the cause of action rather than merely barring the remedy.[11]

[11] Courts in other jurisdictions interpreting various state codifications of the Uniform Fraudulent Transfer Act have held that the statute is one of repose. *See, e.g., MSKP Oak Grove, LLC v. Venuto,* No. 10–6465(JBS/JS), 2014 WL 4385979, at *5 (D.N.J. Sept. 5, 2014) ("The use of the term 'extinguished' manifests legislative intent to eliminate a cause of action after a predetermined time period, a distinctive characteristic of a statute of repose."); *In re Jamuna Real Estate LLC,* 365 B.R. 540, 567 (Bankr. E.D.Pa.2007) (holding that provision is a statute of

The fact that the statute contains a one-year savings clause from the date the claimant discovers or reasonably could have discovered the transfer that is the subject of its cause of action does not render section 726.110(1 a statute of limitations.[12] Instead, the Florida Court of Appeals found that section 726.110(1) is a statute of repose in its entirety with a limited exception to the four-year period of the statute of repose. *Nat'l Auto Serv. Ctrs.* 192 So. 3d at 512. Therefore, Jim requests this Court to rule that the substantive law of Florida applies to the fraudulent transfer claim.

III. SOUTH CAROLINA CHOICE OF LAW REQUIRES APPLICATION OF FLORIDA LAW TO THE RECEIVER'S UNJUST ENRICHMENT CLAIM.

A. The Receiver's Claim for Unjust Enrichment Should be Viewed as a Tort under the First Restatement for Choice of Law Purposes

South Carolina Courts have not previously applied South Carolina's choice of law to a claim for unjust enrichment. Other jurisdictions have held that a claim based on unjust enrichment can be predicated on either tort or contract law. *Compare*: *Westwood Pharms., Inc. v. Nat'l Fuel Gas Distrib. Corp.,* 737 F.Supp. 1272, 1284-85 (W.D.N.Y.1990) (applying New York law and finding that an unjust enrichment claim predicated on defendants' intentional or negligent acts sounded in tort); and *State ex rel. Palmer v. Unisys Corp.,* 637 N.W.2d 142, 154

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repose and noting that "[t]he word 'extinguished' is emphasized because of its substantive effect"); *Forman v. Jeffrey Matthews Fin. Grp., LLC,* 254 B.R. 104, 123 (Bankr. D.N.J.1999) (holding that statute was one of repose "because it embodies the most distinctive characteristic of a statute of repose, the barring of the right to bring an action rather than the remedy prescribed"); *Carpenter v. Granderson,* 214 B.R. 671, 675 (Bankr. D.Mass.1997) (holding that provision "has the characteristics of a statute of repose"); *see also First Sw. Fin. Servs. v. Pulliam,* 912 P.2d 828, 830 (N.M. 1996) ("[T]he UFTA operates in the same manner as other statutes of repose that extinguishes a cause of action ... rather than simply blocking the remedy."); *Nathan v. Whittington,* 408 S.W.3d 870, 874 (Tex.2013) (holding that provision is a statute of repose because "[b]y its own terms, the provision does not just procedurally bar an untimely claim, it substantively 'extinguish[es]' the cause of action").

[12] A statute must be read in its entirety. *See Jones v. ETS of New Orleans, Inc.,* 793 So.2d 912, 915 (Fla.2001) ("Accordingly, 'statutory phrases are not to be read in isolation, but rather within the context of the entire section.' " (quoting *Smith v. United States,* 508 U.S. 223, 233 (1993))).

(Iowa 2001) (holding that the doctrine of unjust enrichment can arise from contracts, torts, or other predicate wrongs)

To determine if an unjust enrichment claim sounds in tort or contract, some jurisdictions look to the factual basis underlying the claim. *See, e.g., Blusal Meats, Inc. v. United States,* 638 F.Supp. 824, 832 (S.D.N.Y. 1986) (holding that plaintiff's unjust enrichment claim was predicated on tort and that it was therefore subject to the statute of limitations for tort actions). The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation. *Credit Bureau Enters., Inc. v. Pelo,* 608 N.W.2d 20, 25 (Iowa 2000). Although it is referred to as a quasi-contract theory, it is equitable in nature, not contractual. *See Iowa Waste Sys., Inc. v. Buchanan County,* 617 N.W.2d 23, 29 (Iowa Ct.App. 2000). It is contractual only in the sense that it is based on an obligation that the law creates to prevent unjust enrichment. *See id.* at 29-30.

In the present case the Receiver is not alleging unjust enrichment in order to enforce a quasi-contract. Rather he is alleging that fraudulent acts by Ron Wilson and AB&C made it unjust for Jim to retain the proceeds from his investment. This is similar to the analysis given to fraudulent transfer actions where the rights and obligations of the parties depend on the operation of noncontractual rules and not on enforcement of the contract. See *In re International Management Associates, LLC,* 495 B.R. 96 (Bankr. N.D. Georgia 2013). *See also, Peddinghaus v. Peddinghaus,* 692 N.E.2d 1221, 1225 (Ill. App. Ct. 1998) (holding that unjust enrichment claim alleging fraudulent inducement was based on tort theory). As set forth above, Florida law would apply under the rule of *lex loci delicti.* Therefore, Jim requests this Court to find, for unjust enrichment, that it be viewed as a tort.

B. Application of the Second Restatement

A number of states have adopted some form of the Restatement (Second) of Conflict of Laws.[13] Under Restatement § 221 (Second) the "most significant relationship test" governs the choice of law analysis for unjust enrichment claims. See *Hadidi v. Intracoastal Land Sales, Inc.*, 2014 U.S. Dist. LEXIS 86173 (D.S.C. June 25, 2014). Section 221 requires that the applicable law is the law of the State that has "the most significant relationship to the occurrence and the parties under the principles stated in § 6" Restatement (Second) of Conflict of Laws § 221 (1971).[14] Section 221 provides:

> (1) In actions for restitution, the rights and liabilities of the parties with respect to the particular issue are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> > (a) the place where a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship,

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[13] Some version of the Second Restatement is followed by New York, Delaware, Colorado, Connecticut, Alaska, Arizona, California (contracts only), Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, South Dakota, Ohio, Texas, Utah, Vermont, and Washington. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 Am. J. Comp. Law 697, 712 (2006).

[14] Section 6 of the Restatement (Second) of Conflict of Laws provides that when two or more jurisdictions have an interest in applying their law to a case, the following factors are relevant in choosing which rule of law to apply:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of the interested states and the relative interests of those states in the determinations of the particular issue,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability[,] and uniformity of result, and
(g) ease in determination of the law to be applied." Restatement (Second) of Conflict of Laws § 6, at 10 (1971).

(b) the place where the benefit or enrichment was received,

(c) the place where the act conferring the benefit or enrichment was done,

(d) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(e) the place where a phyal thing, such as land or a chattel, which was substantially related to the enrichment, was situated at the time of the enrichment.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. at 18.

The most significant relationship test weighs in favor of applying Florida law. Jim's relationship with Ron Wilson did not center around his silver investment. They first met because they were both members of the same organization. Jim moved to Florida in the mid to late 1980s, is a Florida resident, and entered into the oral investment contract while in Florida. He received statements from AB&C outside of South Carolina. Jim requested funds from Wilson by telephone or mail from outside South Carolina. The funds (or benefits) were conferred in Florida. AB&C was incorporated in South Carolina, however, Jim is a Florida resident. The physical money from AB&C, relating to the enrichment, is situated in Florida.

Jim received the benefit most often in Florida where the checks were deposited. None of the checks were deposited in South Carolina. The transfer of the benefits was concluded in Florida when Jim deposited the checks and retained the funds. Therefore, Jim requests this Court to apply Florida law to the unjust enrichment claim, even under the Restatement Second Standard.

C. Application of Lex Loci Contractu

Florida law would apply even if the Court were to determine that the rule of *lex loci contractu* should apply. In contract actions, South Carolina courts apply the substantive law of

the place where the contract at issue was formed. *See, e.g., O'Briant v. Daniel Constr. Co.*, 279 S.C. 254, 255, 305 S.E.2d 241, 243 (1983). This rule applies where a contract's formation, interpretation or validity is at issue. However, where performance is at issue, the law of the place of performance governs. *Livingston v. Atlantic Coast Line R.R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (1935).

As a general rule of law, the place of contracting is the place where the minds of the parties meet or the place where the final act occurred which made a binding contract. *Arant v. First Southern Co.*, 249 S.C. 305, 153 S.E.2d 919 (1967). Jims was living in Florida when he began investing with AB&C, therefore Florida is the place where he accepted AB&C's offer to invest. Florida is also the place where the contract was performed as that was where the investment proceeds were deposited.

D. Conflict Between South Carolina and Florida Law

The Receiver overlooks the significant differences between South Carolina and Florida law which make a choice of law necessary.

1. The limitations periods differ

The limitations period for unjust enrichment in Florida acts as a statute of repose. Florida Statute § 95.11(3)(k) provides a four year limitations period for "[a] legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, merchandise, and on store accounts." *See Swafford v. Schweitzer,* 906 So. 2d 1194, 1195 (Fla. Dist. Ct App. 2005). Under Florida law an unjust enrichment claim accrues when the benefit is conferred. *See e.g., Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 577 (Fla. Dist. Ct. App. 2006).

The Receiver's unjust enrichment claims are not subject to the delayed discovery rule in Fla. Stat. § 95.031(2)(a) or the doctrine of equitable tolling. *In Re: Burton Wiand Receivership Cases*, 2008 U.S. Dist. Lexus 27929 (M. D. Fl., 2008); *see also Davis v. Monahan,* 832 So. 2d 708, 712 (Fla. 2002) (rejecting application of delayed discovery doctrine to unjust enrichment action). Florida's limitations' period for unjust enrichment under Fla. Stat. § 95.11(3)(k) is, therefore, a statute of repose.

Under South Carolina law, a party must commence an action within three years of the date that the cause of action arises. S.C. Code Ann. § 15-3-530 (2005). The time to bring an action in South Carolina begins running once a party is on inquiry notice that a loss may have been suffered. This standard is objective rather than subjective. *Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (S.C. Ct. App. Dec. 4, 1989). Therefore, Jim requests this Court to recognize the distinction and apply Florida's substantive law regarding the Statute of Repose for unjust enrichment.

2. Substantive law

Under Florida law an "unjust enrichment claim [is] precluded by the existence of an express contract between the parties concerning the same subject matter". *Diamond "S" Dev. Corp v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. Dist. Ct. App. 2008).[15] In this regard, a party may plead in the alternative for relief under an express contract and for unjust enrichment, but the parties' theory of unjust enrichment drops out under Florida law when an express contract is proven. See *ThunderWave, Inc. v. Carnival Corp.*, 954 F.Supp. 1562, 1565-66 (S.D. Fla. 1997) ("under Florida law, a party may simultaneously allege the existence of ... [a]

[15] When an agreement is arrived at by words, oral or written, the contract is said to be "express." *In re Std. Jury Instructions-Contract & Bus. Cases*, 116 So. 3d 284, 308 (Fla. 2013) citing 17 Am. Jur. 2d Contracts § 3.

contract and seek equitable relief under the theory of unjust enrichment... However, upon a showing that an express contract exists, the quasi contract fails". (citation omitted)). Because the existence of an oral contract between Jim and AB&C extinguishes the unjust enrichment claim under Florida law, the choice of law may be determinative of the outcome of the case.

The South Carolina Supreme Court has affirmed the circuit court's decision to award damages under the theory of quantum meruit even though the circuit court found there was a contract between the parties. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010). Plaintiff has not plead breach of contract, making it unclear whether he can even claim equitable relief as an alternate remedy.[16] Because the potential of a different result under South Carolina and Florida law exists, however, it is necessary to determine the proper choice of law.

E. Florida Statute Of Repose For Unjust Enrichment

South Carolina courts will respect the limitations in another state if the limitations period is recognized by the law of that state as a substantive requirement of the cause of action. See *Hughes v. Doe*, 281 S.C. 488, 489, 316 S.E.2d 383, 384-85 (1984).

The Receiver's unjust enrichment claim is governed by Fla. Stat. § 95.11(3)(k), which provides a four year statute of limitations for "[a] legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, merchandise, and on store accounts." *See Swafford v. Schweitzer,* 906 So. 2d 1194, 1195 (Fla. Dist. Ct. App. 2005). The "period of time established by a statute of

[16] The South Carolina Court of Appeals has stated, "[i]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." *Williams Carpet Contrs., Inc. v. Skelly*, 400 S.C. 320, 328 (S.C. Ct. App. Oct. 24, 2012).

repose commences to run from the date of an event specified in the statute, such as delivery of goods . . . ." *Kush v. Lloyd*, 616 So.2d 415, 419 (Fla. 1992). Under Florida law an unjust enrichment claim accrues when the benefit is conferred. *See e.g., In re Burton Wiand Receivership Cases*, 2008 U.S. Dist. LEXIS 27929, * 25 (M.D. Fla. 2008); *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So. 2d 571, 577 (Fla. Dist. Ct. App. 2006).[17] Thus, unjust enrichment claims begin to run in Florida from a specified event, the date the benefit is conferred.

The Receiver's unjust enrichment claims are not subject to the delayed discovery rule in Fla. Stat. § 95.031(2)(a) or the doctrine of equitable tolling. *In Re: Burton Wiand Receivership Cases*, 2008 U.S. Dist. Lexus 27929 (M.D. Fl., 2008); *see also Davis v. Monahan, 832 So. 2d 708, 712 (Fla. 2002)* (rejecting application of delayed discovery doctrine to unjust enrichment action). Florida's limitations' period for unjust enrichment under Fla. Stat. § 95.11(3)(k) is, therefore, a statute of repose.

CONCLUSION

Jim made a retirement investment in AB&C, a legitimate business for the first six years, as a Florida resident. He requested and received withdrawals from his silver bullion account outside of South Carolina. The facts of the case lead to the application of Florida law whether the traditional or modern approach to conflict of laws is followed.

Jim is alleged to have violated South Carolina's Statute of Elizabeth, or in the alternative Florida's Uniform Fraudulent Transfer Act, and to have been unjustly enriched. Under the

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[17]Florida's Fourth District Court of Appeals has found that section 95.11(2)(e), providing that the limitations period in an action for breach of property insurance contract began running from the date of loss, is a statute of repose. *Donovan v. Fla. Peninsula Ins. Co.*, 147 So. 3d 566, 568 (Fla. App. 2014). Section 95.11(3)(k) runs from the date the benefit is conferred, likewise making it a statute of repose.

traditional rule of *lex loci delicti,* the last event necessary to make Jim liable for these causes of action was in Florida where he received and retained the proceeds from his investment and where any fraudulent intent would have to be imputed to him. Under the rule of *lex loci contractu*, Jim entered into a contract with AB&C in Florida when he accepted AB&C's investment offer in Florida, as a Florida resident. Finally, under the modern approach of the Second Restatement, Florida has the most significant relationship to the particular issues since Jim invested as a Florida resident and retained the benefit of his investment proceeds in Florida. Florida has a statute of repose for both the FUFTA and unjust enrichment. As substantive rights, Florida's statutes of repose would be applied rather than South Carolina's procedural statute of limitations.

Based on the foregoing, Jim Dodds respectfully requests that this Court find that Florida law applies to the Receiver's fraudulent conveyance and unjust enrichment claims.

Respectfully submitted,

December 18, 2017

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIFICATION OF QUESTIONS
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
J. Michelle Childs, United States District Court Judge

Appellate Case No. 2017-001652

Beattie B. Ashmore, in his Capacity as
Court-Appointed Receiver for Ronnie Gene Wilson
and Atlantic Bullion & Coin, Inc., Plaintiff,

v.

Jim Dodds, Defendant.

PROOF OF SERVICE

I certify that I have served Defendant's Brief on L. Walter Tollison, III, The Tollison Law Firm, P.A., 24 Vardy Street, Suite 203, Greenville South Carolina, 29601 and Thomas E. Vanderbloemen, Esq., Vanderbloemen Law Firm, PA, 330 East Coffee Street, Greenville, South Carolina 29601 by depositing a copy in the United States Mail, postage prepaid, on December 18, 2017.

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