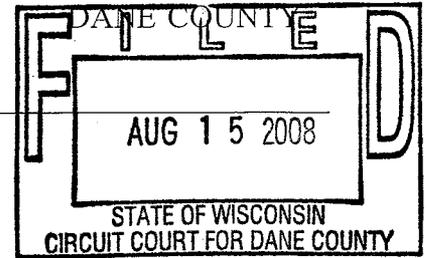


STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9



STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

ABBOTT LABORATORIES, et al.,

Defendants.

**PLAINTIFF STATE OF WISCONSIN'S REPLY TO
DEFENDANTS' SUPPLEMENTAL SUBMISSION REGARDING PLAINTIFF'S RIGHT TO
A JURY TRIAL ON ITS UNJUST ENRICHMENT CLAIM**

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The State's unjust enrichment claim regarding money the Defendants obtained through illegal acts is an action regarding "money had and received." It is legal in nature and was so in 1848. Thus, the State is constitutionally entitled to a jury trial on this claim. The Defendants offer no properly supported argument in opposition. The Defendants do not dispute that a constitutional right to a jury exists for an unjust enrichment claim for "money had and received." They contend instead that the State's claim is not for "money had and received," and that based on its "specific underlying theory of recovery," is equitable in nature and would not have received a jury in 1848. As the State shows below, these arguments have no merit.

I. Contrary to the Defendants' Assertions, Claims for Unjust Enrichment Regarding Money Had and Received Were Tried to a Jury in Wisconsin prior to 1848.

It is established law that a party has a constitutional right to have a statutory claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848; and (2) the action was regarded as at law in 1848. *State v. Schweda*, 2007 WI 100, ¶20 303 Wis.2d 353, 362, 736 N.W.2d 49, 54 (Wis. 2007). The State first addresses several incorrect assertions regarding this right raised by the Defendants before moving on to Defendants' arguments.

First, contrary to Defendants' statement that actions for unjust enrichment did not exist in 1848 (Def. Br. at 2, 3), the Wisconsin Supreme Court has recognized that "the doctrine of quasi contract for unjust enrichment has been a part of Wisconsin law since 1844." *Lawlis v. Thompson*, 137 Wis.2d 490, 497, 405 N.W.2d 317, 319 (Wis. 1987). The court cites as an example *Rogers v. Bradford*, 1 Pinney Wis. 418 (1844), in which a claim for "money had and received" was *tried before a jury*. 1 Pinney Wis. 418.

Second, the Defendants object that the State is "*not* seeking traditional money damages, measured by the harm it allegedly suffered as a result of Defendants' conduct—rather, it is seeking a sum equal to Defendants' gain from the alleged misconduct." (Def. Br. at 2) (emphasis in original.) However, "a sum equal to Defendants' gain from the alleged misconduct" is precisely the traditional measure of damages for an unjust enrichment claim.

Schwigel v. Kohlmann, 254 Wis.2d 830, 254, 647 N.W.2d 362, 367 (Wis. App. 2002) (“For unjust enrichment, the measure of damages is the ‘reasonable value’ of the benefit conferred.”).

Third, the Defendants contend that the State’s unjust enrichment claim is not a claim for “money had and received” because “the benefit Defendants allegedly received was an increased market share, not money wrongly paid by Plaintiff to Defendants. (Def. Br. at 5.) However, the State’s unjust enrichment claim *does* complain of money wrongly paid to Defendants: “As a result of Defendants’ unlawful conduct, Defendants obtained increased sales, market share and profits at the expense of Wisconsin and its citizens.” Second Amended Complaint at ¶99. As the Defendants are well aware, increased “sales, market share and profit” received through unlawful conduct are all forms “money wrongly paid.” Indeed, the Defendants admit that the State is “seeking a sum equal to Defendants’ gain from the alleged misconduct” (Def. Br. at 2.)

Finally, the bulk of the cases on which the Defendants rely are cases interpreting unjust enrichment or the right to a jury under the laws *of other jurisdictions*. Such law cannot overcome clear Wisconsin law that an unjust enrichment claim complaining of money had and received is a legal claim, that it existed prior to 1848, and that it was heard by a jury at that time. *See e.g., Boldt v. State*, 101 Wis.2d 566, 573, 305 N.W.2d 133, 138 (Wis. 1981); *Lawlis v. Thompson*, 137 Wis.2d 490, 497, 405 N.W.2d 317, 319 (Wis. 1987); *Rogers v. Bradford*, 1 Pinney Wis. 418 (1844).

II. * The State’s Unjust Enrichment Claim Is a Claim for “Money Had and Received,” Not for “Accounting for Profits” or “Constructive Trust.”

Defendants admit that an unjust enrichment claim for “money had and received” is legal in nature, but argue that the increased money Defendants received from their illegal actions is not “money had and received,” but instead a form of “accounting for profits” and “constructive trust,” which are equitable in nature. (Def. Br. at 5-6.) In support of this proposition, Defendants rely on *CleanSoils Wisconsin, Inc. v. State Dept. of Transp.*, 229 Wis.2d 600, 613, 599 N.W.2d 903, 910 (Wis. App. 1999), stating that “where no money is had and received, the

assertion of a claim based solely on unjust enrichment remains categorized as an equitable doctrine.” (Def. Br. at 5) (quoting 229 Wis.2d at 613.)

However, *CleanSoils* simply held that in a claim for unjust enrichment for “money had and received,” the benefit received by the defendant must be “money” and not services rendered. Wis.2d at 613. *See also Koshick v. State*, 287 Wis.2d 608, 618, 706 N.W.2d 174, 179 (Wis. App. 2005) (“the receipt of a benefit by the State was not the same as the receipt of money, ... and, therefore, the [plaintiff’s] claim for unjust enrichment was not a claim for money had and received.”) (citing *CleanSoils*, 229 Wis.2d at 612-13). Since the State’s unjust enrichment claim against the Defendants alleges that the Defendants received increased *money* through their illegal actions, the holding in *CleanSoils* supports, not defeats, the fact that the State’s unjust enrichment claim is a legal claim of “money had and received.”

Defendants have no support for their contention that the State’s claim is a form of “accounting for profits” and “constructive trust,” which concern the inapposite concept of property titles. These doctrines, the Defendants themselves explain, were “developed at equity due to the inadequacy of remedies ‘at law’ in situations where a defendant *obtained formal title to property* through misconduct (such as fraud), and *used such property to generate profit*.” (Def. Br. at 4 n.12) (citing DOBBS at § 4.3(1), pp. 586-88) (emphasis added.) “Courts at law,” the Defendants continue, “could not grant relief in such situations, because their jurisdiction was limited by the conception of *formal title*.” (Id.) (emphasis added.) The State’s unjust enrichment claim has nothing to do with “obtain[ing] formal title to property” or with generating profit from ill-gotten property. The State’s claim is simply that the Defendants received increased money from their illegal pricing actions—*i.e.*, “money had and received.”

III. There Is No Requirement in an Unjust Enrichment Claim for “Money Had and Received” that the Money Come Directly from the Plaintiff.

Defendants contend—without support—that the State’s unjust enrichment claim is not a claim for “money had and received” because “the benefit Defendants allegedly received was ... not money wrongly paid *by Plaintiff* to Defendants,” emphasizing that “Plaintiff never paid

Defendants any money, it paid providers.” (Def. Br. at 5) (emphasis added.) However, the fact that providers were a conduit through which money passed from the State to the Defendants is immaterial.

The Court has already rejected the notion that there is a requirement in an unjust enrichment claim that the benefit conferred on the defendant must come *directly* from the plaintiff. (See Remainder of the Decision and Order on Defs.’ Motions to Dismiss, May 18, 2006, at 5) (“Defendants assert but cite no authority for the proposition that to state a claim for unjust enrichment Plaintiff must allege that it conferred a benefit directly upon Defendants.”) Further, in *Nelson v. Preston*, 262 Wis. 547, 553, 55 N.W.2d 918, 921 (Wis. 1952), which formed the basis for Wisconsin’s jury instructions on unjust enrichment,¹ the Wisconsin Supreme Court stated that unjust enrichment involves money or the equivalent being “placed in the possession of” a person by “the acts of the parties *or others*” 262 Wis. at 553. The Defendants have no support for their contention that since the “money had and received” by Defendants did not come directly from the State, it is not a legal claim.

IV. A Request for an Injunction in a Legal Claim Does Not Deprive the State of its Right to a Jury Trial on the Legal Claim.

The Defendants contend that requesting an injunction in a legal cause of action converts the legal cause of action to an equitable one. Although Defendants’ theory, if valid, would apply to more claims than the just State’s unjust enrichment claim, the Defendants did not raise this issue in its initial submission regarding the State’s right to a jury trial. Instead the Defendants waited until their response to the State’s jury trial brief, and the State did not have a right to reply to that brief. However, since the Defendants raise this issue again in their brief regarding unjust enrichment, the State addresses their arguments here.

Although a request for an injunction in a legal claim does not deprive the state of its right to a jury trial, to simplify matters, the State has moved to amend its complaint regarding unjust enrichment, removing the requests for disgorgement and an injunction and replacing them with a

¹ See *Lawlis v. Thompson*, 137 Wis.2d 490, 496-97, 405 N.W.2d 317, 319 (Wis. 1987).

request for damages—the traditional request for money under unjust enrichment. However, as discussed below, even if the State had not done so, it would have been entitled to a jury trial on its unjust enrichment claim. With regard to the request for disgorgement, when a money judgment is sought, “any distinction that might exist between ‘damages’ and monetary relief under a different label is purely semantic” *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989).

With regard to the previous request for an injunction, contrary to Defendants’ contention, a request for an injunction incident to a legal claim does not deprive the State of its right to a jury trial on the legal claim. In their Response to Plaintiff’s Brief Regarding its Claim to a Jury Trial, Defendants incorrectly claim that “where there are claims seeking both equitable and legal relief, no jury trial right exists because such claims would have been considered “at equity” in 1848, rather than at law, and would have been tried by an equity court without a jury.” (Resp. to Plf’s Br. re. its Claim to a Jury Trial, July 23, 2008.) However, as explained below, requesting an injunction incident to a legal cause of action does not convert that cause of action into an equitable cause of action, and the test for determining the constitutional right to a jury for a particular cause of action does not involve examining the *remedies* requested.

A. Requesting an injunction incident to a legal cause of action does not convert that cause of action into an equitable cause of action

Requesting an injunction incident to a legal cause of action for unjust enrichment does not convert that cause of action into an equitable cause of action. Defendants admit that a claim for unjust enrichment is legal or equitable “depending on the legal theory underlying the claim,” (Def. Br. at 3.) (As the court in *CleanSoils* points out, an unjust enrichment claim regarding a person wrongly benefited by money is a legal claim, whereas one in which the person is wrongfully benefited by services is an equitable claim. 229 Wis.2d at 612-13.) Accordingly, the nature of the claim is dependant on the “legal theory underlying the claim,” not on the type of *relief* requested pursuant to the claim.

Accordingly, legal claims are routinely tried by a jury and any requested injunctive relief is awarded by the court. *See, e.g., Sunnyside Feed Co., Inc. v. City of Portage*, 222 Wis.2d 461,

464, 588 N.W.2d 278, 280 (Wis. App. 1998) (“At trial, the jury found the City created a nuisance and awarded Sunnyside \$10,000 in damages,” and the “trial court ... denied Sunnyside's motion for injunctive relief.”). In the same way that adding an equitable remedy to a legal cause of action does not change the nature of the cause of action, it has long been established that the existence of an equitable cause of action in the same lawsuit as a legal cause of action, does not change the nature of the legal cause of action:

The complaint, therefore, contains two distinct causes of action, the one equitable, the other legal, which in strictness should have been separately stated. R. S., ch. 125, sec. 29. That for the reformation of the contract is equitable, and was for trial by the court, unless formally submitted to the jury in the manner prescribed by the statute. R. S., ch. 132, sec. 6. The other cause of action, for the recovery of money, is legal, and was for the jury, unless that mode of trial was waived.

Harrison v. Juneau Bank, 17 Wis. 340, 1863 WL 1136, *6 (Wis. 1863).

Despite the established practice and law, Defendants attempt to establish that legal causes of action are converted to equitable causes of action when equitable remedies are requested. The only case on which they rely for this proposition is a case dealing with an *equitable* cause of action. In *Neff v. Barber*, 162 N.W. 667, 668 (Wis. 1917), the court dealt with a claim for “ruining” a corporation, which all parties agreed was an *equitable* cause of action. 162 N.W. at 668. Although the cause of action included an allegation that the defendants “conspired” to ruin the corporation—a legal issue—the court held that a legal *issue* in an *action at equity* is triable by the court. Since the State’s unjust enrichment claim is not an equitable cause of action, this case is inapposite.

B. The constitutional test of the right to a jury trial does not involve the remedies presently requested for the particular legal cause of action, only the remedies that existed for the pre-1848 counterpart.

For both non-statutory and statutory *legal* causes of action, the test of whether there is a constitutional right to a jury trial is whether an essential counterpart to the “cause of action” existed prior to 1848 and then whether the *remedies for that counterpart in 1848* were legal or equitable. The existence of requests for equitable remedies, such as injunctions, in the present-day legal cause of action is immaterial.

This is made clear in the controlling case of *State v. Schweda*, 303 Wis.2d 353, 388-89, 736 N.W.2d 49, 67 (Wis. 2007). In *Schweda*, the Wisconsin Supreme Court examined whether the State had a right to a jury on causes of action under several environmental statutes. As in the present case, in *Schweda* the “State also asked the court to order appropriate injunctive relief.” 303 Wis.2d at ¶85. This request for injunctive remedy in *Schweda* did not convert the statutory causes of action into equitable causes of action, nor did it cause the court look for a counterpart in 1848 that included an injunction. The Wisconsin Supreme Court in *Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 254 Wis.2d 478, 647 N.W.2d 177, (Wis. 2002), also states that it is the remedy for the pre-1848 counterpart that must be examined to determine whether the counterpart was legal or equitable:

[C]onsistent with the second prong in *Ameritech*, we also conclude that the party seeking the jury trial must additionally show that the action existed “at law.” ... In *Town of Burke*, 17 Wis.2d 623, 117 N.W.2d 580, we recognized that the action at issue—a contest to a referendum election—may have existed at the time the state constitution was enacted, but that the remedies available *at the time* for such a challenge were obtained through writs of quo warranto, mandamus, or other equitable actions—not legal actions. Similarly, in 1889, this court analyzed a garnishment action in *La Crosse National Bank v. Wilson*, 74 Wis. 391, 399, 43 N.W. 153 (1889), where we recognized that garnishment cases existed prior to 1848, but noted that the type of garnishment in this case—that of non-leviable assets—*would have been remedied* by creditor's bills or other equitable proceedings.

254 Wis.2d at 486-87 (emphasis added).

The law on which the Defendants rely does not support their position. First, the Defendants’ citation to Pomeroy’s Treatise on Equity Jurisprudence, stating that at some point in history only courts of equity could grant equitable relief (Resp. to Plf’s Br. re. its Claim to a Jury Trial, July 23, 2008 at 3 n.7.) is irrelevant to whether the pre-1848 counterpart to the current-day cause of action was a legal or equitable claim.

Second, the Defendants’ reliance on *Stilwell v. Kellogg*, 14 Wis. 499, (Wis. 1861). (Resp. to Plf’s Br. re. its Claim to a Jury Trial, at 3-4), is inapposite because it deals with the irrelevant fact that a statute of the Territory of Wisconsin combined the legal claim for “mortgage debt” with the equitable remedy of foreclosure, and then assigned the combination to an equity court.

The court in *Stilwell* was tasked with determining whether a right to a jury trial existed for a claim that “seem[ed] to be uniting a legal cause of action for the debt with the equitable remedy to cut off the right of redemption.” 14 Wis. 499, at *4 . The court stated that the specific “practice of uniting the legal cause of action for the debt with the equitable remedy of foreclosure ... was introduced and prevailed in this territory before the adoption of our state constitution.” 14 Wis. 499, at *4 (citing Statutes of the Territory of Wisconsin of 1839, p. 292, sec. 82). The statute provided:

When a bill shall be filed for the satisfaction of a mortgage, the court shall not only have power to decree and compel the delivery of the possession of the mortgaged premises to the purchaser thereof, but on the coming in of the report of sale, the court shall also have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary executions as in other cases against other property of the mortgagor, or against his person.

Statutes of the Territory of Wisconsin of 1839, p. 292, sec. 82 (attached as Exhibit A). The court stated that that particular “legal remedy was adopted as an extension of the powers of a court of equity in an equitable suit, so that under that practice the whole became an equitable proceeding, in which the parties could not claim a jury.” 14 Wis. 499, at *4.

The fact that such a statute existed has no application to this case. There is no statute assigning the State’s combination of legal claims and legal/equitable remedies to a court of equity. Indeed the court itself expressed the opinion that the holding in the case was not generally applicable:

But whatever doubt there may be as to the power of the legislature to authorize the joining of a legal cause of action, with respect to which no such practice existed prior to the constitution, with an equitable one, and then have the whole tried by the court without a jury, against the express demand for a jury by the defendant, we think the defendants here were not entitled to a jury for the following reason [of the specific mortgage statute.]

Id.

Thus, the State is entitled to a jury on its unjust enrichment claim. The Court can and should try the legal claims to the jury. After the verdict, and based on the evidence presented

(and after receiving additional evidence if necessary), the Court should decide any equitable issues, such as whether an injunction should issue.

CONCLUSION

The State's cause of action—a claim for unjust enrichment complaining of money had and received—is not converted to an equitable cause of action by the request for an injunction and the State's claim had an essential counterpart in 1848, and the counterpart's remedy in 1848 was "at law." For these reasons, and those in the State's other briefs, the State is constitutionally entitled to a jury trial for its unjust enrichment claim, and indeed on all four causes of action.

Dated this 15th day of August, 2008.

Respectfully submitted,



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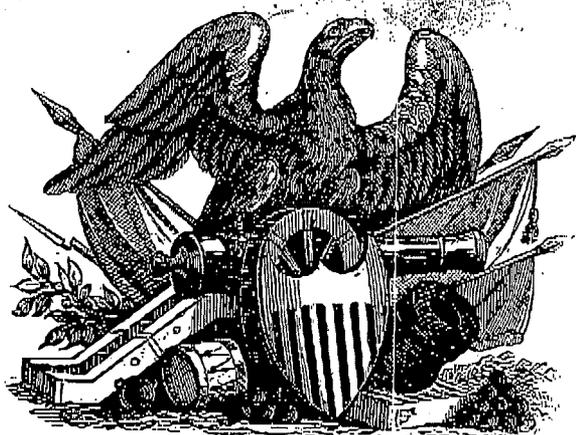
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STATUTES

OF THE

TERRITORY OF WISCONSIN,

PASSED BY THE LEGISLATIVE ASSEMBLY THEREOF, AT A
SESSION COMMENCING IN NOVEMBER 1836, AND AT
AN ADJOURNED SESSION, COMMENCING
IN JANUARY, 1839.



PUBLISHED BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY.

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1839.

Damages, how ascertained.

§ 75. The damages to be paid upon the dissolution of such injunction shall be ascertained by reference to a master, and shall include not only the reasonable rents and profits of the land recovered by such verdict, but all waste committed thereon after the granting of the injunction.

Judge may direct execution of bond in certain cases.

§ 76. The judge shall have power to dispense with any deposits of moneys required by either of the preceding sections, and in lieu thereof to direct the execution of a bond with sureties, conditioned to pay the amount so required to be deposited, whenever ordered by the court; or if a bond is already required in addition to such deposit, then to direct the enlargement of the penalty and condition of such bond as may be requisite. But whenever such deposit shall be dispensed with, the bond so substituted or enlarged shall be executed by at least two sufficient sureties.

la.

§ 77. Whenever an injunction shall be applied for to stay proceedings at law in any action after judgment or verdict, on the ground that such judgment or verdict was obtained by actual fraud, the judge shall have power to dispense with the deposit of any moneys or the execution of any bond.

Sufficiency of sureties, how ascertained.

§ 78. The sufficiency of the sureties in any bond executed under the provisions of this act shall be ascertained, either,

1st. By the certificate of any master in chancery, stating that he has inquired into the circumstances of such sureties, and is satisfied with their sufficiency; or,

2. By the affidavit of each surety, stating that he is a householder resident within this territory, and that he is worth a sum equal to the amount in which the bond shall have been required, over and above all debts and demands against him.

Every such certificate and affidavit shall be annexed to or endorsed on the bond.

Bond, when to be filed in case of injunction issued.

§ 79. Whenever a bond shall be required to be executed pursuant to the provisions of this act, prior to the issuing of an injunction, the same, with the certificate or affidavit above required, shall be filed with the clerk of the court before the sealing and delivery of the injunction.

To whom bond to be delivered.

§ 80. The judge shall direct the delivery of any bond executed under the provisions of this act to the person entitled to the benefit thereof for prosecution, whenever the condition of such bond shall be broken or the circumstances of the case shall require such delivery.

When court may decree sale of mortgaged premises.

§ 81. Whenever a bill shall be filed for the foreclosure or satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the costs of suit.

When may decree payment of balance due.

§ 82. When a bill shall be filed for the satisfaction of a mortgage, the court shall not only have power to decree and compel the delivery of the possession of the mortgaged premises to the purchaser thereof, but on the coming in of the report of sale, the court shall also have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary executions as in other cases against other property of the mortgagor, or against his person.

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