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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ELIZABETH J. MCANULTY,

Plaintiff - Counter Defendant - Appellant,

v.

STANDARD INSURANCE COMPANY,

Defendant - Counterclaimant,

and

MELANIE RAE MCANULTY,

Defendant - Cross Defendant - Appellee.

No. 22-1099

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:21-CV-01048-RMR-KLM)

M. Gabriel McFarland, McFarland Litigation Partners, LLC, Golden, Colorado (Frederick T. Winters with him on the briefs), for Plaintiff - Counter Defendant - Appellant.

Samuel M. Ventola, Ventola Law, Denver, Colorado, for Defendant - Cross Defendant - Appellee.

Before **HARTZ**, **MATHESON**, and **McHUGH**, Circuit Judges.

HARTZ, Circuit Judge.

This case presents a dispute over life-insurance proceeds between two women who married Steven J. McAnulty (Husband). The marriage between Husband and Elizabeth J. McAnulty (Plaintiff) ended in divorce. His marriage to Melanie Rae McAnulty (Defendant) ended with his death.

Husband's only life-insurance policy (the Policy) named Defendant as the beneficiary. But the Missouri divorce decree between Plaintiff and Husband required Husband to procure and maintain a $100,000 life-insurance policy with Plaintiff listed as sole beneficiary until his maintenance obligation to her was lawfully terminated (which never happened). Plaintiff sued Defendant and the issuer of the Policy, Standard Insurance Company (Standard), claiming unjust enrichment and seeking the imposition on her behalf of a constructive trust on $100,000 of the insurance proceeds. The district court dismissed the complaint for failure to state a claim. Plaintiff appeals. By stipulation of the parties, Standard has been dismissed with respect to this appeal.

The only question is whether Plaintiff has stated a claim. Resolving that issue requires us to predict whether the Colorado Supreme Court would endorse Illustration 26 in Comment g to § 48 of the Restatement (Third) of Restitution and Unjust Enrichment (Am. L. Inst. 2011) (the Restatement (Third)), which would recognize a cause of action in essentially the same circumstances. We reverse.

I. BACKGROUND

Except where noted, the relevant facts come from Plaintiff's complaint, whose well-pleaded allegations we accept as true for purposes of resolving the motion to dismiss. *See Smallen v. W. Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020). Plaintiff

married Husband in 1994. They divorced in 2008. The schedule governing the division of property and debt, entered by a Missouri state court as part of the divorce decree, stated in relevant part: "[Husband] shall procure and maintain a life insurance policy with a death benefit of no less than $100,000 and shall name [Plaintiff] as the sole beneficiary of said policy until [Husband's] obligation for payment of maintenance to [Plaintiff] shall terminate by order of this court or by operation of law." Aplt. App. at 19–20.[1]

Husband later married Defendant. Their marriage continued until his death in 2020. "At no time was [Husband's] obligation to pay maintenance [to Plaintiff] terminated by order of that court or by operation of law. In fact, [Husband] made maintenance payments to [Plaintiff] until the date of his death." *Id.* at 24 (Plaintiff's complaint). Husband died intestate, and no probate estate was opened on his behalf. When he died, the benefit payable under the Policy was $207,000.[2] Defendant was listed as the Policy's sole beneficiary. Husband had no other life-insurance coverage.

Plaintiff did not learn that Husband had failed to obtain a life-insurance policy in her name—and thus had violated the divorce decree—until after his death. Upon

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[1] The schedule was not attached as an exhibit to Plaintiff's complaint, but Plaintiff included it in her appellate appendix. We may consider the schedule for purposes of resolving the motion to dismiss "because it is mentioned in the complaint, it is central to [Plaintiff's] claims, and its authenticity is not disputed. Moreover, we examine the document itself, rather than the complaint's description of it." *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013).

[2] The complaint states that the Policy "contain[ed] death benefits in excess of $100,000." Aplt. App. at 24. In its notice of removal filed in district court, Standard said that the benefit under the policy was $207,000. Plaintiff repeated this figure in her opening appellate brief, and Defendant never denies its accuracy.

making this discovery Plaintiff sued Defendant and Standard in Colorado state court, claiming unjust enrichment and seeking the imposition of a constructive trust on the life-insurance proceeds in the amount of $100,000 and payment to her of that amount. Standard then removed the case to the United States District Court for the District of Colorado based on diversity of citizenship. *See* 28 U.S.C. §§ 1332(a)(1), 1441(a).[3]

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[3] We note that Standard filed the notice of removal by itself, without Defendant joining the notice or otherwise expressly manifesting her consent to removal. The apparent failure of Defendant to consent to the removal may have made removal improper. *See* 28 U.S.C. § 1446(b)(2)(A) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action."). But there is no question of jurisdiction, since the parties have diverse citizenship—Plaintiff is a citizen of Missouri, Defendant is a citizen of Colorado, and Standard is an Oregon corporation with its principal place of business in Oregon—and the amount in controversy exceeds $75,000; and there has been no timely challenge to the possible procedural defect. *See* 28 U.S.C. § 1447(c) (motion to remand based on nonjurisdictional defect must be made within 30 days of filing of notice of removal); *Harvey v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 797 F.3d 800, 805 (10th Cir. 2015) ("lack of unanimity is a procedural defect," not a jurisdictional one); *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009) ("unless a party moves to remand based on [the lack of consent to removal by all defendants], the defect is waived and the action may proceed in federal court"); *Sheldon v. Khanal*, 502 F. App'x 765, 770 (10th Cir. 2012) ("For the first time on appeal, Sellers argue that Option One's cure was insufficient to avoid a remand and that Melo did not properly join in the removal petition. We need not address these belated arguments. Nonjurisdictional defects must be raised within 30 days after the filing of the notice of removal or they are waived.").

We also note that Defendant's presence in this suit could have thwarted removal under the forum-defendant rule, since Defendant is a citizen of Colorado. *See* 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [establishing diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."); *Woods v. Ross Dress for Less, Inc.*, 985 F.3d 775, 779 (10th Cir. 2021) (Hartz, J., dissenting) (the forum-defendant rule "reflects the view that the purpose of removal under diversity jurisdiction is to protect defendants who fear parochial bias in state courts, so local defendants have no legitimate need to remove cases to federal court"). But the forum-defendant rule is not jurisdictional and is waived if, as here, it is not timely raised. *See Am. Oil Co. v.*

Defendant filed a motion to dismiss for failure to state a claim, which the district court granted. *See McAnulty v. Standard Ins. Co.*, No. 21-cv-1048-RMR-KLM, 2022 WL 1078174, at *2 (D. Colo Mar. 8, 2022). The court stated that "in the absence of fraud or duress, a constructive trust will attach only upon a showing of unjust enrichment"; and "the claimant must also be able to trace the wrongfully held property to the claimant's own property—that is, she must establish that she is rightfully entitled to the property at issue." *Id.* After announcing these propositions, the court said:

> The Court finds that the Plaintiff here has failed to establish that [Defendant] received a benefit at Plaintiff's expense, and it finds further that she cannot trace the funds sought from the Standard Insurance Policy to her own property. The existence of the Standard Insurance Policy naming [Defendant] as a beneficiary did not prevent [Husband] from maintaining another policy with the Plaintiff as the beneficiary. The Plaintiff thus has failed to establish that [Defendant] was enriched at Plaintiff's expense, nor has she established an entitlement to the proceeds of the Standard Insurance Policy, specifically.

Id.

The district court distinguished *Scott v. Scott*, 428 P.3d 626 (Colo. App. 2018), the case "which the Plaintiff relie[d] on almost exclusively" in her opposition to Defendant's motion to dismiss, *McAnulty*, 2022 WL 1078174, at *2. *Scott* was also a dispute between a widow and a prior wife over a life-insurance policy. In that case the

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McMullin, 433 F.2d 1091, 1093–95 (10th Cir. 1970); *accord Holbein v. TAW Enters., Inc.*, 983 F.3d 1049, 1053 (8th Cir. 2020) (en banc) ("Nine other circuits have addressed whether the forum-defendant rule is jurisdictional in nature. All of them have held that violation of the rule is a nonjurisdictional, and thus waivable, removal defect. We [agree and therefore] conclude that violation of the forum-defendant rule is a nonjurisdictional defect in removal that is waived if not raised in a motion to remand made within 30 days after the filing of the notice of removal." (original brackets, ellipsis, citations, and internal quotation marks omitted)).

separation agreement recognized that the husband was "presently insured under several life insurance policies." 428 P.3d at 630 (internal quotation marks omitted). The agreement provided that "[t]hese policies will be maintained in their current status until" certain conditions were met, none of which came to pass. *Id.* (internal quotation marks omitted). Yet the husband changed the named beneficiary on the identified insurance policies to his second wife. *See id.* The Colorado Court of Appeals held that the first wife stated a claim against the second wife for unjust enrichment and the imposition of a constructive trust. *See id.* at 636. The *Scott* court invoked § 48 of the Restatement (Third), which provides: "If a third person makes a payment to the defendant to which (as between claimant and defendant) the claimant has a better legal or equitable right, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment." *See Scott*, 428 P.3d at 637. *Scott* also pointed to Illustration 22 in § 48, which states:

> In a property settlement incorporated in a divorce decree, Husband promises to maintain his presently existing life insurance in the amount of $50,000 with ABC Co. for the benefit of First Wife as beneficiary. After his remarriage, Husband designates Second Wife as beneficiary of the ABC policy. The designation is legally effective, and on Husband's death the policy proceeds are properly paid by ABC to Second Wife. Husband leaves no assets apart from the disputed insurance proceeds. First Wife is entitled to recover the insurance proceeds from Second Wife, the usual form of remedy being constructive trust.

Restatement (Third) § 48 cmt. g, illus. 22, *See Scott*, 428 P.3d at 637. The court noted that the illustration "explicitly articulate[d] the exact circumstances of this case as an example of a proper claim for unjust enrichment." 428 P.3d at 637. Rejecting the argument by the widow that her claim to the insurance benefit should not be denied

since it was the decedent (not she) who was the "main wrongdoer," the court explained that "claims for unjust enrichment and constructive trust do not require wrongdoing on the part of the person receiving the benefit." *Id.*

In this case the district court said that *Scott* was distinguishable because, unlike the insurance policies at issue in *Scott*, "the Standard Insurance Policy did not exist at the time that the Missouri court issued its order, and the Plaintiff therefore [could not] show that the order entitled her to the proceeds of that policy." *McAnulty*, 2022 WL 1078174, at *3. It continued: "Plaintiff . . . fail[ed] to allege that [Defendant] received a benefit *at Plaintiff's expense*, because the existence of a policy benefitting [Defendant] does not preclude a policy benefiting the Plaintiff." *Id.* Nor had "Plaintiff alleged facts tracing the Standard Insurance Policy proceeds to her own property." *Id.*

Plaintiff appealed. We have jurisdiction under 28 U.S.C. § 1291. After the parties completed their briefing, we ordered them to submit supplemental briefs "addressing the relevance of Illustration 26 and the related reporter's note in Restatement (Third) of Restitution and Unjust Enrichment § 48, cmt. g (Am. L. Inst. 2011) and their effect on the issues in this appeal." Order, *McAnulty v. McAnulty*, No. 22-1099 (10th Cir. Feb. 14, 2023). The parties complied.

II. DISCUSSION

A federal court sitting in diversity must apply federal procedural law and state substantive law. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). "We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6)." *Smallen*, 950 F.3d at 1305. "To survive a motion to dismiss, a

complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Plaintiff and Defendant agree that Colorado substantive law applies. We review de novo the district court's interpretation and application of state law. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

Plaintiff argues that her complaint alleges sufficient facts to support a claim for unjust enrichment and for the imposition of a constructive trust as a remedy. We agree because we predict that the Colorado Supreme Court would endorse Illustration 26. To justify our conclusion, we begin by introducing a few concepts in the law of restitution and unjust enrichment. We then discuss life-insurance policies required by divorce decrees and explain why we think the Colorado Supreme Court would agree with Illustration 26.

A. General Principles of the Law of Restitution and Unjust Enrichment

Although the law of restitution and unjust enrichment has deep roots in Anglo-American common law and equity, *see The Intellectual History of Unjust Enrichment*, 133 Harv. L. Rev. 2077, 2078–89 (2020) (*Intellectual History*), the unjust-enrichment cause of action first received substantial recognition in 1937 with the publication of the original Restatement of Restitution (the Restatement (First)). The work's "central achievement" was "[t]he identification of unjust enrichment as an independent basis of liability in common-law legal systems—comparable in this respect to a liability in contract or tort." Restatement (Third) § 1 cmt. a. To be sure, "[t]he Reporters of the

1937 Restatement of Restitution, Warren Seavey and Austin W. Scott of the Harvard Law School, were not the first to identify and describe a principle of liability for unjust enrichment, cutting across the division between law and equity." Andrew Kull, *Three Restatements of Restitution*, 68 Wash. & Lee L. Rev. 867, 868 (2011). Still, the concept "came as news to most of the legal profession in 1937," which nonetheless greeted the Restatement (First) with "prompt and seemingly unhesitating acceptance." *Id.*; *see also Intellectual History*, *supra*, at 2091 (recognizing the Restatement (First)'s "tremendous impact in the United States and abroad").

Both then and now, "[t]he fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff. Restitution rectifies unjust enrichment by forcing restoration to the plaintiff." 1 Dan B. Dobbs, *Law of Remedies* § 4.1(2), at 557 (2d ed. 1993). Thus, the Restatement (Third) § 1 states: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." *Accord* Restatement (First) § 1 ("A person who has been unjustly enriched at the expense of another is required to make restitution to the other."). (There is no Restatement (Second).) For example, suppose that A transfers property to B in a transaction that complies with all the requisite legal formalities. As a result, B has a "legal" interest in the property. Nonetheless, a court may recognize that A has a superior "equitable" interest in the property if B's acquisition and retention of the property results in B's

unjust enrichment at A's expense.[4] In such a case, A may seek recovery in restitution from B.

"Most instances of unjust enrichment result from two-party transactions in which benefits in the form of property or services—whether conferred or 'taken'—move from the [plaintiff] to the defendant." Restatement (Third) ch. 6 intro. note. We see this in many of the familiar examples described in the Restatement (Third) where one person has been unjustly enriched at the expense of another. Chapter 2 addresses cases where the defendant receives benefits through "a transfer that is imperfectly voluntary on the part of the [plaintiff]." *Id.* ch. 2 intro. note. A transfer may be "imperfectly voluntary" for several reasons including mistake, *see id.* §§ 5–12; fraud, *see id.* § 13; duress, *see id.* § 14; undue influence, *see id.* § 15; and lack of capacity or authority, *see id.* §§ 16–17. Chapter 3 covers cases where the plaintiff "has acted intentionally to confer an unrequested benefit," as when providing protection in an emergency. *Id.* ch. 3 intro. note. Chapter 4 discusses the rules governing restitution in the context of a contractual relationship, including situations in which a plaintiff—

[4] For centuries, Anglo-American courts were divided into courts of law and courts of equity. The two types of courts followed different rules, applied different doctrines, and provided different remedies. *See* 1 Dobbs, *supra* § 2.2, at 66–74; *Intellectual History*, *supra*, at 2081. "In the federal court system and in most state court systems today, the separate courts of law and equity have long since been merged into a single court of general jurisdiction." 1 Dobbs, *supra* § 2.1(1), at 58. Colorado is no exception: "Law and equity have been merged in [Colorado] since the earliest times of statehood." *Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014). Still, vestiges of that history remain, including the formal distinction between legal interests and equitable interests. What matters for our purposes is that someone with a legal interest in property may be liable in restitution to someone else with a superior equitable interest in that property.

unable (for one of several possible reasons) to enforce the contract—nonetheless seeks to recover for performance, *see id.* §§ 31–36; and situations where a plaintiff "might enforce the contract but . . . chooses not to," preferring instead a restitution-based remedy, *id.* ch. 4 intro. note; *see id.* §§ 37–39. Chapter 5 addresses claims for a defendant's gains "realized by . . . violation of another's legally protected rights," including through torts (such as trespass, conversion, or misappropriation) and other breaches of duty (such as duties arising out of a fiduciary relationship). *Id.* ch. 5 intro. note; *see id.* §§ 40–44.

Two-party transactions, however, are not the only context in which restitution may be available; the requirement that the benefit to defendant come "at the expense of" the plaintiff, *id.* § 1, does not mean that the plaintiff must have directly conferred that benefit on the defendant. The Restatement (Third) identifies "[t]wo important categories of liability in restitution" where "the source of the unjust enrichment in each is a transaction between the [plaintiff] or the defendant, on the one hand, and some third person on the other." *Id.* ch. 6 intro. note. "The first such category . . . consists of cases in which the defendant's enrichment at the [plaintiff's] expense results from the [plaintiff's] performance of an obligation owed by the defendant to someone else." *Id.* If, for example, A and B are jointly and severally liable to C, and A pays C in full, A may seek restitution from B "as necessary to prevent unjust enrichment." *Id.* § 23(1); *cf. LB Rose Ranch, LLC v. Hansen Constr., Inc.*, 477 P.3d 739, 742–43 (Colo. App. 2019) (discussing the Uniform Contribution Among Tortfeasors Act adopted in Colorado).

The second such category of liability, which encompasses the dispute before us, involves "the converse case, in which the defendant's enrichment at the [plaintiff's] expense results from the defendant's receipt of a benefit from someone else. If the benefit in question is one to which the [plaintiff] has a superior entitlement, the defendant is unjustly enriched." Restatement (Third) ch. 6 intro. note. Thus, "[i]f a third person makes a payment to the defendant to which (as between [the plaintiff] and defendant) the [plaintiff] has a better legal or equitable right, the [plaintiff] is entitled to restitution from the defendant as necessary to prevent unjust enrichment." *Id.* § 48.

B. Constructive Trusts

Although the common use of the term *restitution* to label the doctrine of restitution and unjust enrichment (as in the title of the Restatement (First)) has created some confusion by suggesting that the doctrine is concerned only with remedies, the above summary demonstrates that the doctrine recognizes causes of action. Once a cause of action is recognized, however, there remains the question of what remedies are available. One useful remedy is the remedy sought by Plaintiff in this case—a constructive trust. As described by Judge Cardozo, "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest[,] equity converts him into a trustee." *Beatty v. Guggenheim Expl. Co.*, 122 N.E. 378, 380 (N.Y. 1919), *superseded by statute on other grounds as recognized by Israel v. Chabra*, 906 N.E.2d 374, 380 (N.Y. 2009); *see Page v. Clark*, 592 P.2d 792, 798 (Colo. 1979) (favorably quoting this language

from *Beatty*); Restatement (Third) § 55 cmt. a (same). More prosaically, "a constructive trust is an equitable device used to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." *In re Est. of Feldman*, 443 P.3d 66, 70 (Colo. 2019).

Several features of the constructive-trust remedy should be emphasized. To begin with, not every instance of unjust enrichment can be remedied by imposition of a constructive trust. The defendant must have been "unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights." Restatement (Third) § 55(1). Thus, after the plaintiff establishes a cause of action under one of the substantive provisions of unjust-enrichment law, she must still "show that the transaction that is the source of the liability is one in which the defendant acquired [the] *specifically identifiable property*" upon which the constructive trust is to be imposed. *Id.* § 55 cmt. a (emphasis added); *see id.* cmt. f ("Constructive trust is a means to recover specific property from the holder of legal title, when the acquisition of title results in the unjust enrichment of the holder. . . . [C]onstructive trust is not an available remedy unless the transaction that gives rise to liability is one in which the defendant acquires ownership of the trust property."); 1 Dobbs, *supra* § 4.3(2), at 591 ("The constructive trust is only used when the defendant has a legally recognized right in a particular asset."). Absent such identifiable property, the plaintiff becomes no more than a general creditor. *See id.* § 60(3); Restatement (First) § 215 cmt. a.

On the other hand, when a constructive trust can be imposed, it provides several benefits that make it a more attractive remedy than a money judgment. First, the beneficiary of a constructive trust may recover specific property. *See* 1 Dobbs, *supra* § 4.3(2), at 589. Such a result is desirable if "the asset has increased in value," in which case "the plaintiff gets the increase." *Id.* And even if the property's market value has not changed, the plaintiff may prefer recovery of specific property "when the property in question has special value for the [plaintiff]; . . . when its value might be difficult to establish; or when recovery of a specific thing is merely less costly than proof and recovery of its value." Restatement (Third) § 55 cmt. c.

Second, the constructive trust gives the plaintiff a priority over other creditors. *See id.* § 55 reporter's note cmt. d (noting "[t]he vital role of constructive trust as a means to order priorities among competing claimants to a debtor['s] assets"). "If the defendant has other creditors who might exhaust his assets in satisfying their claims, the [constructive-trust-beneficiary] plaintiff gains priority over them as to assets covered by the constructive trust." 1 Dobbs, *supra* § 4.3(2), at 589; *see* Restatement (Third) § 60(1) (with a few exceptions, "a right to restitution from identifiable property is superior to the competing rights of a creditor of the recipient who is not a bona fide purchaser or payee of the property in question"); Restatement (First) § 160 cmt. f ("The creditors of the constructive trustee are not bona fide purchasers . . . and take subject to the rights of the beneficiary.").

Third, the plaintiff's constructive-trust remedy is not necessarily destroyed if the constructive trustee transfers the entrusted property to someone else. On the

contrary, the beneficiary may (1) obtain a constructive trust on the proceeds of what is received in exchange for the transfer or (2) claim that the transferred property is still subject to her constructive trust even when the property is in the hands of a third party. Under the first alternative, "[t]he beneficiary of a constructive trust . . . may follow property into its product. The trust can attach to proceeds of the property or to other property purchased by the trustee into which the original property or its proceeds can be traced." *In re Marriage of Allen*, 724 P.2d 651, 657 (Colo. 1986) (citation and internal quotation marks omitted). Thus, if A is the beneficiary of a constructive trust on X and B sells X, then A may be the beneficiary of a constructive trust on the proceeds earned from the sale of X. If B uses those proceeds to buy Y, then A may be the beneficiary of a constructive trust on Y. *See* Restatement (First) § 202 cmt. i, illus. 11 ("A obtains Blackacre by fraud from B. He sells Blackacre for $10,000, and with $5000 of the proceeds he purchases Whiteacre and with the other $5000 purchases bonds. He exchanges Whiteacre for Greenacre. B can enforce a constructive trust of Greenacre and the bonds, or he can hold A liable for the value of Blackacre and enforce an equitable lien upon Greenacre and the bonds."); Restatement (Third) § 58 cmt. d (discussing "[w]hat is a 'traceable product'?"). As for the second alternative, the mere fact "that a transferee was not 'the original wrongdoer' does not insulate [the transferee] from liability for restitution." *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 251 (2000). When a constructive trust is imposed, "a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder," unless that subsequent holder is

a bona fide purchaser. *Id.* (internal quotation marks omitted). Thus, if B holds specific property under a constructive trust for the benefit of A, and B then gifts the property to C, C also holds the property under a constructive trust for the benefit of A. *See* Restatement (Third) § 58(2); Restatement (First) § 168 cmt. b; *Askins v. Easterling*, 347 P.2d 126, 127–28, 131 (Colo. 1959) (plaintiff and his wife agreed to buy a home, but wife "surreptitiously took title in her name only," despite telling plaintiff that "she had taken title in joint tenancy"; later, "wife executed a warranty deed to herself and the defendant [her son from a prior marriage] in joint tenancy"; wife's "conduct deprived plaintiff of an undivided one-half interest in the property, and she became subject to an equitable duty to convey it to plaintiff"; son was "an innocent donee of the property, impressed with the trust, [and thus was] subject to the same equitable duty"); *Jaffe v. Weld*, 116 N.E. 73, 73–74 (N.Y. 1917) (Cardozo, J.) (plaintiff bought forged bills of lading from third party; third party used proceeds from sale to buy cotton; third party then gave cotton to defendant; plaintiff could seek imposition of constructive trust on cotton owned by defendant).

The beneficiary's right to obtain a constructive trust after the original property has passed from the person who was unjustly enriched is limited, however, by two constraints, both of which have already been alluded to. One constraint is that if the constructive trust is to be imposed on substitute property (acquired with the proceeds of the disposition of the original entrusted property), the original property must be *traced* to *specifically identifiable* property. The requirement that the substitute property be specifically identifiable is in keeping with the requirement that the initial

constructive trust (on the property by which someone was unjustly enriched at the expense of the plaintiff) can be imposed only on specifically identifiable property. *See* Restatement (Third) § 55(1); *id.* cmt. a; *id.* cmt. g ("Constructive trust permits the [plaintiff] to assert ownership of (i) specifically identifiable property for which the defendant is liable in restitution or (ii) its traceable product."). As for tracing, "[i]f the property the [plaintiff] seeks to recover via constructive trust is a substitute for the property originally acquired by the defendant, its continued identification depends on the tracing rules," which can be intricate and need not be described here. *Id.* § 55 cmt. a.

The other constraint is that if the original entrusted property has been transferred from the unjustly enriched person, a beneficiary cannot continue the constructive trust on the property once it has been acquired by a bona fide purchaser. *See id.* § 66 cmt. a ("One who purchases an asset for value, without notice of competing claims, takes that asset subject to prior legal interests, but free of equitable interests to which the asset was subject in the hands of the grantor."); *Allen*, 724 P.2d at 657 (a constructive trust "cannot operate against a third party who acquired the property in good faith, for value, and without notice of the circumstances under which the property originally was wrongfully acquired"). At that point, "the constructive trust is cut off." Restatement (First) § 172 cmt. a.

One final comment on constructive trusts. The district court apparently assumed that a claim of unjust enrichment requires a showing that the defendant's property can be traced back to the plaintiff. But this is not so. The constructive-trust doctrine,

including the practice of tracing, arises only *after* the plaintiff has established a cause of action for unjust enrichment. "The first step [in an unjust-enrichment constructive-trust claim] is to establish that the defendant is liable in restitution." Restatement (Third) § 55 cmt. a. Only once a cause of action has been shown does the inquiry turn to whether "the transaction that is the source of the liability is one in which the defendant acquired specifically identifiable property." *Id.* If the answer is yes, that property can be subject to a constructive trust with no need for any tracing analysis. But that entrusted property can then be traced forward to other property upon which a constructive trust can be imposed. It is important to keep in mind (particularly for the resolution of the case before us) that tracing "is neither a source of liability nor a distinct restitutionary remedy. Rather, tracing is an adjunct remedial device or technique, supplementing the remedies that permit restitution from property as opposed to restitution via money judgment." *Id.* § 58 cmt. a. That a "constructive trust is a remedy," Restatement (Third) § 55 cmt. f, not a prerequisite to a showing of unjust enrichment, is underscored by the Restatement (Third)'s placement of § 55 (the section dedicated to constructive trusts) in Chapter 7, which is titled "Remedies."

C. Insurance Policies, Divorce Decrees, and Illustration 26

Having provided a general overview of unjust enrichment and restitution, we turn next to the particular issue of insurance policies ordered by divorce decrees. We begin with a proposition assumed by the district court and undisputed by the parties. As discussed above, the Colorado Court of Appeals in *Scott*, 428 P.3d at 636-38, denied a motion to dismiss a claim for unjust enrichment based on a marital-separation

agreement in which the husband promised to maintain "in their current status" several listed life-insurance policies naming the first wife as beneficiary, *id.* at 630 (internal quotation marks omitted). The first wife brought the claim against the husband's second wife, who had received the policy payment because the husband had broken his promise and substituted her for the first wife as the beneficiary. An identical claim, with identical result, is presented in Illustration 22 in § 48 of the Restatement (Third), and *Scott* explicitly noted that it was following § 48. *See* 428 P.3d at 637. We note that a significant majority of states to have considered the issue concur with *Scott* and Illustration 22 in upholding an unjust-enrichment claim when a spouse violates a divorce decree by changing the beneficiary on the policy or letting the policy lapse and acquiring a new policy naming a later spouse as the beneficiary. *See, e.g.*, *Foster v. Hurley*, 826 N.E.2d 719, 724, 725 n.9 (Mass. 2005) (collecting cases); *Smithberg v. Ill. Mun. Ret. Fund*, 735 N.E.2d 560, 566 (Ill. 2000); *Bailey v. Prudential Ins. Co. of Am.*, 705 N.E.2d 389, 392 (Ohio. Ct. App. 1997); *Bernal v. Nieto*, 943 P.2d 1338, 1341 (N.M. App. 1997) (calling this "the majority rule"); *Jones v. Harrison*, 458 S.E.2d 766, 770 (Va. 1995); *Hile v. DeVries*, 836 P.2d 1219, 1220–21 (Kan. Ct. App. 1992); *Aetna Life Ins. Co. v. Bunt*, 754 P.2d 993, 999 (Wash. 1988); *Torchia ex rel. Torchia v. Torchia*, 499 A.2d 581, 583–84 (Pa. Super. 1985) (collecting cases taking this approach, followed in "most jurisdictions"); *Simonds v. Simonds*, 380 N.E.2d 189, 192–94 (N.Y. 1978). *But see, e.g.*, *Weiner v. Goldberg*, 306 S.E.2d 660, 661 (Ga. 1983) (by a 4–3 majority: "[W]here the deceased has allowed a policy to lapse in derogation of the decree and has acquired a new policy and designated a new beneficiary, this,

without more, will not give rise to a constructive trust."); *Rau v. Rau*, 429 So.2d 593, 594–95 (Ala. Civ. App. 1982) (as part of divorce judgment, husband required "to keep in force and effect a then existing life insurance policy on his life with the parties' minor children named as irrevocable beneficiaries"; husband subsequently remarried, acquired new policy, and made second wife beneficiary of new policy; fate of original policy was unknown; court denied children's request for constructive trust on second insurance policy because it was "unable to find any property interest, either legal or equitable, of [the children] in the proceeds of a policy of insurance which did not exist at the time of the decree of divorce"), *questioned by Brown v. Brown*, 604 So.2d 365, 368 (Ala. 1992) (per curiam) (declining to "adopt all of the reasoning of the Court of Civil Appeals in *Rau*" and affirming imposition of constructive trust on life-insurance policy intended as replacement of court-ordered policy that had lapsed); *Pilot Life Ins. Co. v. Scott*, 581 S.W.2d 910, 911 (Mo. Ct. App. 1979) (at time of divorce, husband's employer carried group life-insurance policy with Company X; in divorce agreement, husband agreed "to keep in force all life insurance policies he presently has and keep [first wife] as his sole beneficiary of said insurance policies"; later, employer canceled Company X group policy and acquired Company Y group policy; husband named second wife as beneficiary of Company Y policy; first wife's claim rejected because Company X policy "no longer existed," and first wife "was never the beneficiary" of Company Y policy (internal quotation marks omitted)). We think we can safely assume that the Colorado Supreme Court would endorse *Scott*. *See CIR v. Bosch's Est.*, 387 U.S. 456, 465 (1967) ("the State's highest court is the best authority on its own law";

but when it has not decided the Issue, we give "proper regard to relevant rulings of other courts of the State" when making a prediction about the content of state law (internal quotation marks omitted)); *Eckard v. State Farm Mut. Auto. Ins. Co.*, 25 F.4th 1275, 1278 (10th Cir. 2022) ("State appellate court decisions . . . do not bind us, but we look to them unless we are convinced by other persuasive data that the highest court of the state would decide otherwise." (internal quotation marks omitted)).

There is a difference, however, between the situation here and in *Scott*, a difference that the district court and Defendant believed to be dispositive. At the time of the divorce decree in this case there was no insurance policy on Husband's life naming Plaintiff as beneficiary. Our task is to predict how the Colorado Supreme Court would react to this difference. *See Van Zanen v. Qwest Wireless, L.L.C.*, 522 F.3d 1127, 1130 (10th Cir. 2008) ("Where the state's highest court has not addressed the issue presented, the federal court must determine what decision the state court would make if faced with the same facts and issue." (internal quotation marks omitted)). We conclude that it would reach the same result despite the difference.

To begin with, we know how the issue would be resolved by the principal authority relied on by *Scott*—namely, the Restatement (Third). Illustration 26 in comment g of § 48 states:

> In a property settlement incorporated in a divorce decree, Husband promises to obtain and thereafter maintain a life insurance policy in the amount of $50,000 with ABC Co. for the benefit of First Wife as beneficiary. In breach of his undertaking, Husband either fails to obtain the promised policy or else, having obtained it, allows it to lapse and does not replace it. After 10 years in which he owns no insurance at all, Husband obtains insurance in the amount of $100,000 from XYZ Co.,

> naming Second Wife as beneficiary. Husband dies, and XYZ pays $100,000 to Second Wife. Ordinary tracing rules (§ 58) do not permit First Wife to identify the proceeds of the XYZ policy as the product of anything in which she previously had an interest. But other doctrines of equity authorize the court to find that—as between Husband and First Wife—First Wife was equitably entitled to the first $50,000 of beneficial interest in the XYZ policy, from the moment that policy came into existence. If First Wife had such an equitable interest in the XYZ policy as against Husband, she retains the same interest as against any transferee or successor who is not a bona fide purchaser for value. If Second Wife took her interest in the XYZ policy as donee, First Wife may assert an equitable lien on the proceeds in the amount of $50,000.

The district court did not mention Illustration 26, and the parties were apparently unaware of it until we requested supplemental briefing. But the reasons given by the district court and Defendant for rejecting this result are not persuasive. The gist of their argument is that a claim to impose a constructive trust based on unjust enrichment requires tracing the entrusted property back to property held by the plaintiff. That argument, however, is based on a misconception of the cause of action for unjust enrichment. As explained above, tracing concerns only the *remedy* for unjust enrichment. It is useful only after the plaintiff establishes that the defendant is unjustly enriched by holding specifically identifiable property. A constructive trust can be imposed on that property and, if certain other requirements are satisfied, on property that can be traced back to the original entrusted property.

But there is no mention of tracing in the elements of a cause of action for unjust enrichment in Restatement (Third) or Colorado law. In *Scott*, for example, the court stated: "'To prevail on an unjust enrichment claim, a party must prove that (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that

would make it unjust for the defendant to retain the benefit without commensurate compensation.'" 428 P.3d at 636 (quoting *Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc.*, 382 P.3d 821, 833 (Colo. 2016) (further internal quotation marks omitted)). Tracing is not mentioned in the discussion of the unjust-enrichment claim in *Scott*. That discussion can be compared to the discussion of the conversion claim in the same case. For a plaintiff to state a conversion claim, the plaintiff must show previous ownership of the property allegedly converted. *See id.* at 634. Thus, when *Scott* upheld the plaintiff's conversion claim, it emphasized that the plaintiff had a "vested right" under the divorce decree in the policy proceeds. That ultimately went to the defendant. *See id.* at 635. In contrast, there is no mention of vesting in that opinion's discussion of the unjust-enrichment claim. As we have already noted, the law of unjust enrichment recognizes that A can be unjustly enriched at the expense of B when C transfers property to A even when B never had a legal interest in the property.

The question to be resolved in the unjust-enrichment context is whether Plaintiff has a "superior entitlement" to the property—here, insurance proceeds—transferred to the defendant. It is hard for us to see why the answer to that question should depend on whether the insurance policy required by the divorce decree was ever acquired. What broader legal ends or social goals would be served by such a difference in outcomes? We share the view of the Tennessee Supreme Court that there is "no significant difference . . . between circumstances in which an identifiable life insurance policy existed at the time of the divorce and the circumstances of the present case." *Holt v. Holt*, 995 S.W.2d 68, 77 (Tenn. 1999) (citations omitted). The injury to the first

wife is certainly no less. One would think that Husband's failure to *ever* acquire a policy with Plaintiff as beneficiary could hardly provide a justification for later evasion of the requirements of the divorce decree.

Granting relief to Plaintiff in these circumstances is not some radical innovation. On the contrary, it is supported by traditional equitable principles. In explaining the result suggested by Illustration 26, the Restatement (Third) analogizes to the after-acquired-interest doctrine (also known as the estoppel-by-deed doctrine). "If, at the time of a conveyance, a grantor does not own all or part of the interest that the grantor purports to convey, but the grantor later acquires the interest that was the subject of the earlier conveyance, the grantor may be estopped from denying the claim of the grantee to the after-acquired title." 1 Joyce Palomar, *Patton and Palomar on Land Titles* § 219, at 519 (3d ed. 2003). For example, suppose A sells Blackacre to B, but at the time of sale A's parent (rather than A) actually owns Blackacre. A's parent later dies and A inherits Blackacre, at which point A gifts Blackacre to C. In a contest between B and C, B wins—even though A technically lacked authority to sell Blackacre to B at the time of the earlier transaction. In other words, equity provides that B has an entitlement to Blackacre superior to that of C. The doctrine has long been embraced by Colorado courts. *See Amada Fam. Ltd. P'ship v. Pomeroy*, 494 P.3d 633, 640–43 (Colo. App. 2021); *Colo. Trout Fisheries v. Welfenberg*, 273 P. 17, 18 (Colo. 1928); *Phillippi v. Leet*, 35 P. 540, 541 (Colo. 1893) ("Where one conveys lands with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee the instant the grantor acquires his title."

(internal quotation marks omitted)). And it has deep roots in Anglo-American jurisprudence more generally. *See, e.g.*, *Van Rensselaer v. Kearney*, 52 U.S. (11 How.) 297, 322–25 (1850) (collecting cases).

The Restatement (Third) draws on this doctrine as support for Illustration 26: "When the decedent acquires subsequent insurance that comes within the terms of the previous promise to the claimant, the decedent may be estopped . . . to deny the claimant's rights as beneficiary." Restatement (Third) § 48 cmt. g. And "[t]he rights acquired by estoppel give the claimant an equitable interest in the subsequently acquired policy, enforceable against the decedent (during his lifetime) and against any successor not qualifying as a bona fide purchaser. Claimant therefore prevails against a subsequent donee." *Id.* The reporter's note expands on the analogy to estoppel by deed, stating that "[r]eal property law is helpful in the present context, because it demonstrates that a claimant may indeed assert a 'springing' equitable interest (so to speak) in subsequently acquired property of the defendant that is *not* the product of anything in which the claimant previously had an interest." *Id.* § 48 reporter's note cmt. g. The reporter's note also observes that the logic of estoppel by deed "may be applied to transactions in personal property, including intangibles," and it points to leading decisions by two notable American jurists. *Id.*; *see Barnes v. Alexander*, 232 U.S. 117, 119, 121, 123 (1914) (Holmes, J.) (attorney B promised attorneys A and S that if they helped B on a case, B would give them one third of the total fee, which itself would be one quarter of whatever amount was recovered by B's clients; as soon as the clients paid the fee to B, A and S had an enforceable claim to their one-third

share; "it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing"; "[h]aving a lien upon the fund, as soon as it was identified [A and S] could follow it into the hands of [B]"); *Baldwin v. Childs*, 163 N.E. 737, 737–38 (N.Y. 1928) (Cardozo, C.J.) (A entered into a contract to sell cotton to B; before cotton was delivered to it, C (a steamship company) issued bills of lading to B (who turned out to be insolvent), which were then sold to D; the "bills of lading, when issued, did not pass the title to the" cotton, but "the effect of delivery [to C] when subsequently made was to give vitality to the bills by relation and estoppel, and confirm the title of the holders"; thus, D had better title to the cotton than A did). Indeed, as the reporter's note points out, the Uniform Commercial Code—in a provision adopted in Colorado—incorporated the rule of *Baldwin*. *See* Restatement (Third) § 48 reporter's note cmt. g; Colo. Rev. Stat. § 4-7-502(a)(3).

We consider the Restatement (Third)'s reasoning to be persuasive. Note that the subsequently acquired policy is not "traced" back into anything; instead, the subsequently acquired policy is treated (because the husband is estopped from asserting otherwise) as being *the same policy promised originally*, as if it had been in existence at the time that the divorce decree was entered. And, we would add, there are additional equities peculiar to the marital-dissolution context that support the result of Illustration 26. Here, Husband has not merely violated an agreement to obtain an insurance policy in favor of the other spouse—he has violated a court decree, thus potentially subjecting himself to contempt of court or other sanctions. Also, the result

reflects public policy in other areas in the law in which special preference is afforded to family debts owed as a result of the dissolution of a marriage. *See, e.g.*, 11 U.S.C. § 523(a)(15) ("A discharge under [various provisions of the Bankruptcy Code] does not discharge an individual debtor from any debt . . . to a spouse, former spouse, or child of the debtor . . . that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.").

Although Defendant characterizes Illustration 26 as a radical revision of the law of restitution, we have found no criticism of it in the legal literature regarding the Restatement (Third) or the proceedings of the American Law Institute. (We cannot speak to the response of appellate courts to Illustration 26, because we have found no appellate decisions addressing the situation in the illustration since publication of the Restatement.) Moreover, Illustration 26 appears to follow the majority rule of court decisions pre-dating the Restatement (Third). *See Boehme v. USPS*, 343 F.3d 1260, 1264 (10th Cir. 2003) (when predicting state law, we may consider "the general weight and trend of authority" (internal quotation marks omitted)).

In one case there was no policy in effect at the time of the divorce. The first wife was named in a subsequently acquired policy, but that policy was canceled and, two years later, the husband purchased another policy, naming the second wife as beneficiary. *See Pernick v. Brandt*, 506 N.W.2d 243, 244 (Mich. Ct. App. 1993) (per curiam). The court determined that the first wife "was vested with an equitable interest"

in the proceeds of the policy, because the husband had "failed to comply with the express terms and intent" of the divorce decree by substituting the second wife as beneficiary, even though "there was no life insurance policy naming plaintiff as beneficiary at the time of the divorce[,] [n]or was plaintiff ever named beneficiary of the policy at issue in this case." *Id.* at 245. Other courts have similarly concluded that the first spouse (or child of the first marriage) had an enforceable equitable interest by virtue of the divorce decree in a post-divorce policy naming the second wife as beneficiary when the first spouse (or child) was *never* named as the beneficiary of a policy. *See Equitable Life Assurance Soc'y of the U.S. v. Flaherty*, 568 F. Supp. 610, 611, 613, 615 (S.D. Ala. 1983) (applying Florida law); *Holt*, 995 S.W.2d at 74–77; *Appelman v. Appelman*, 410 N.E.2d 199, 201, 203 (Ill. App. 1980); *Tupper v. Roan*, 243 P.3d 50, 60 (Or. 2010).[5] On the other side of the ledger, we have located just two

[5] We acknowledge that the facts of *Tupper* differed from those of our case. In *Tupper* there were two provisions of note in the divorce decree. The first provision obligated the decedent to "maintain *an* insurance policy" in favor of the first wife and their child. 243 P.3d at 60 (internal quotation marks omitted). The second provision specified that a "constructive trust shall be imposed over the proceeds of *any* insurance owned by either party at the time of either party's death if either party fails to maintain insurance in said amount, or if said insurance is in force but another beneficiary is designated to receive said funds." *Id.* (internal quotation marks omitted). The Oregon Supreme Court opined that "the wording of the first statement by itself [did] not, as a matter of law, confer on plaintiff any equitable interest in the policy at issue." *Id.* "But the second statement [was] a different matter," and its "express[] contemplat[ion]" of the decedent's failure to abide by the divorce decree meant that the plaintiff had "an equitable interest in the policy at issue." *Id.* at 61. The Oregon Supreme Court's treatment of the first clause was dictum—indeed, the court expressly declined to announce a rule for "cases in which a dissolution agreement does not refer to any particular policy but, instead, contains a simple promise to obtain *some* policy in a specified amount that names the ex-spouse as beneficiary," *id.* at 60—but that dictum

state courts that have adopted the same rule as *Scott* but have not extended that rule to this proposition and squarely held that constructive trusts may not attach to after-acquired insurance policies when no policy ever named the first spouse; both cases were decided by one-vote margins in decisions predating 2007, when the first draft of § 48 was released. *See Foster*, 826 N.E.2d at 727–30 (dividing 4–3 on the issue); *Parge v. Parge*, 464 N.W.2d 217, 219–20 (Wis. Ct. App. 1990) (dividing 2–1 on the issue). In short, the Illustration 26 approach is favored by the (concededly not overwhelming) majority of courts and judges to have considered this issue.

In addition, the Colorado Supreme Court has often cited favorably the Restatement (First) of Restitution, which was the sole completed Restatement of Restitution until the release of the Restatement (Third) in 2011.[6] Given the frequency

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nonetheless cautions against assigning too much weight to *Tupper* in making our state-law prediction here.

[6] *See, e.g.*, *Beren v. Beren*, 349 P.3d 233, 247 (Colo. 2015) (§ 74 & cmt. d); *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008) (§ 1 cmt. a); *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000) (§ 1 & cmt. a); *DCB Constr. Co., Inc. v. Cent. City Dev. Co.*, 965 P.2d 115, 118–19, 120 n.5, 121–22, 121 n.8 (Colo. 1998) (chs. 2–4; §§ 1 & cmt. a, 110); *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113, 119 n.10 (Colo. 1995) (§§ 65, 66 illus. 9, 157–59); *Allen*, 724 P.2d at 657–58, 660 (§§ 160 & cmts. c, d, h, 161 & cmt. d, 168, 172). To date the Colorado Supreme Court has cited just once to the Restatement (Third), in a case where it distinguished—but did not disparage—§ 32. *See Cap. Sec. of Am., Inc. v. Griffin*, 278 P.3d 342, 347 (Colo. 2012). Several Colorado Court of Appeals decisions (in addition to *Scott*) have positively cited the Restatement (Third) as supporting authority. *See Air Sols., Inc. v. Spivey*, 529 P.3d 644, 666 & n.28 (Colo. App. 2023) (§§ 1 & cmts. a, b, 25); *Gravina Siding & Windows Co. v. Gravina*, 516 P.3d 37, 45-46 (Colo. App. 2022) (§§ 1, 36); *Indian Mountain Corp. v. Indian Mountain Metro. Dist.*, 412 P.3d 881, 888 (Colo. App. 2016) (§ 1 cmt. d); *Rocky Mountain Nat. Gas, LLC v. Colo. Mountain Junior Coll. Dist.*, 385 P.3d 848, 855 (Colo. App. 2014) (ch. 4 intro. note); *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1195, 1197 (Colo. App. 2011) (§ 39 (Tentative Draft No. 4)); *cf.*

with which the Colorado Supreme Court and the Colorado Court of Appeals look to the various Restatements as authoritative, and in the absence of some good reason to suppose that Colorado would reject the Restatement (Third) here, we believe that "it would be too adventurous on our part to assume that Colorado would depart from the Restatement[]" on this point. *June v. Union Carbide Corp.*, 577 F.3d 1234, 1245 (10th Cir. 2009).

Because we predict that the Colorado Supreme Court would endorse Illustration 26, we hold that Plaintiff has stated a claim of unjust enrichment. As previously noted, "[t]o prevail on an unjust enrichment claim [under Colorado law], a party must prove that (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." *Pulte*, 382 P.3d at 833 (internal quotation marks omitted). Here, Defendant "received a benefit": the Policy. *Id.* (internal quotation marks omitted). Per Illustration 26, this benefit could reasonably be described as coming "at [Plaintiff's] expense." *Id.* (internal quotation marks omitted). And it is plausible to say that it would be unfair for Defendant to keep all $207,000 from the Policy while Plaintiff ended up with nothing (despite being promised $100,000 in the divorce order).

Plaintiff has also adequately alleged facts supporting her request for a constructive trust. To be sure, Illustration 26 identifies an equitable lien as the proper

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Zeke Coffee, Inc. v. Pappas-Alstad P'ship, 370 P.3d 261, 268–70 (Colo. App. 2015) (distinguishing § 50 as "inapposite" but not rejecting the principle stated in § 50).

remedy rather than a constructive trust. But "[w]hen imposed to prevent unjust enrichment, an equitable lien is a special and limited form of a constructive trust." *Allen*, 724 P.2d at 658. An equitable lien "operates like the constructive trust in affording a preference over other creditors and in utilizing the rules for following property into its product." *Leyden v. Citicorp Indus. Bank*, 782 P.2d 6, 10 n.8 (Colo. 1989) (internal quotation marks omitted). "The difference is that where the constructive trust gives a complete title to the plaintiff, the equitable lien only gives [the plaintiff] a security interest in the property, which [the plaintiff] can then use to satisfy a money claim." *Id.* (internal quotation marks omitted). Ultimately, the choice of equitable remedy falls within the sound discretion of the district court. *See Clark v. State Farm Mut. Auto. Ins. Co.*, 433 F.3d 703, 709 (10th Cir. 2005). We need not now decide what specific remedy Plaintiff should receive if she prevails.

This is not to say, of course, that Plaintiff necessarily *will* prevail in her unjust-enrichment claim. There are a multitude of factors that may affect the equities here. Evaluation and weighing of those factors "should be left to a fact finder's determination of equity under the totality of the circumstances." *Scott*, 428 P.3d at 638.

D. Defendant's Arguments

To avoid this conclusion, Defendant makes two arguments. Neither persuades.

Defendant first contends that a pair of past Tenth Circuit decisions—*In re Foster*, 275 F.3d 924 (10th Cir. 2001), and *Coriell v. Hudson*, 563 F.2d 978 (10th Cir. 1977)—established requirements for the institution of constructive trusts that plaintiff

failed to meet. But neither *Foster* nor *Coriell* has the decisive force that Defendant gives it.

We begin with *Foster*, a bankruptcy case where we reversed the imposition (on summary judgment) of a constructive trust on the proceeds of a Ponzi scheme. *See* 275 F.3d at 926. We stated (in language upon which Defendant relies) that "[t]o warrant imposition of a constructive trust over the property of a debtor, a claimant must (1) show fraud or mistake in the debtor's acquisition of the property; and (2) be able to trace the wrongfully held property." *Id.* at 926–27. Defendant insists that the first requirement is not satisfied because "Plaintiff admits in her allegations that [Defendant] was the named beneficiary of the subject insurance policy, and [Plaintiff does] not contend that [Defendant] being so named was the result of any fraud or mistake." Aplee. Br. at 6. But there was no question in *Foster* that the funds had been obtained by fraud—indeed, the parties agreed on this point, *see* 275 F.3d at 927—so there was no need for the court to consider all the various other ways that a person can be unjustly enriched. We decline to read the dictum relied on by Defendant as overriding long-established and widely recognized grounds for an unjust-enrichment cause of action.

As for the second requirement suggested by *Foster*, we were addressing a *remedy* for unjust enrichment, not the *elements* of a cause of action. The funds obtained by the fraudster through his Ponzi scheme could clearly be subjected to a constructive trust; the problem was how to trace those funds into a bank account. We held that the method of tracing used by the district court was a legal fiction that might be inequitable

if applied under the specifics of the case, so we remanded for further consideration. *See id.* at 928. Thus understood, *Foster* presents no obstacle to our holding that tracing was unnecessary to establish Plaintiff's cause of action.

We turn next to *Coriell*. There, the plaintiff claimed that the defendant was "a constructive trustee with a fiduciary duty to [the plaintiff], which [the defendant] breached when he sold [two tracts of land] and fraudulently converted the proceeds to his own use." 563 F.2d at 982. We said that a constructive trust "is one that arises when a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself." *Id.* (internal quotation marks omitted). Latching onto this language, Defendant protests that she did not gain the advantage for herself; she "is not alleged to have been a party to the Missouri divorce proceeding or even of knowing of the Orders of that Court." Aplee. Br. at 6. Contrary to Defendant's reading, however, *Coriell* did not say that gaining an advantage for oneself through fraud or breach of fiduciary duty is the exclusive ground for establishing a constructive trust. Indeed, the very next sentence of the opinion states: "Constructive trusts are such as are raised by equity in respect of property which has been acquired by fraud, or *where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it*." 563 F.2d at 982 (internal quotation marks omitted; emphasis added). Hence, *Coriell* is fully consistent with imposing a constructive trust in this case.

Defendant's sole remaining argument is a broadside attack on § 48, which she says "calls for unpredictable ad hoc judgments," Aplee. Supp. Br. at 2, contrary to "Colorado law, and this Court's decisions interpreting Colorado law," *id.* at 3. She

further argues that "the Restatement approach should be rejected, even if it did not contradict Colorado law, because it is overly broad, loose and unprincipled. The Restatement would require redistribution any time one party received a benefit instead of another, when it can be asserted that benefiting the other party would be more 'equitable.'" *Id.* at 5. Defendant's sole support for this caricature of the Restatement (Third) is Comment a to § 1, which provides some theoretical observations about the nature of unjust enrichment and restitution. *See* Restatement (Third) § 1 cmt. a.[7] We see nothing in Comment a, however, that is inconsistent with anything in Colorado law. Many legal texts begin by broadly discussing the topic at hand; that does not automatically render the subsequent doctrinal discussion "loose and unprincipled." And to the extent that Defendant suggests that Colorado has a less flexible conception of courts' equitable authority, the case law is to the contrary. *See, e.g.*, *Beren v. Beren*, 349 P.3d 233, 240 (Colo. 2015) ("The purpose of a court sitting in equity is to promote

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[7] Defendant takes particular issue with the following paragraph:

> Such is the inherent flexibility of the concept of unjust enrichment that almost every instance of a recognized liability in restitution might be referred to the broad rule of the present section. The same flexibility means that the concept of unjust enrichment will not, by itself, yield a reliable indication of the nature and scope of the liability imposed by this part of our legal system. It is by no means obvious, as a theoretical matter, how "unjust enrichment" should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system. Such questions preoccupy much academic writing on the subject. This Restatement has been written on the assumption that the law of restitution and unjust enrichment can be usefully described without insisting on answers to any of them.

Restatement (Third) § 1 cmt. a.

and achieve justice with some degree of flexibility, according to the particular circumstances of each case."); *DCB Constr. Co., Inc. v. Cent. City Dev. Corp.*, 965 P.2d 115, 120 (Colo. 1998) (for purposes of an unjust-enrichment claim, "[t]he notion of what is or is not 'unjust' is an inherently malleable and unpredictable standard"); *Norman, Inc. v. Holman*, 97 P.2d 739, 743 (Colo. 1939) ("A chancellor should never hesitate to direct that equity be done in a case before him whenever natural justice requires it, [and] if he finds no precedent for so doing he should establish one."). There is no basis for Defendant's characterization of the Restatement (Third) as intrinsically incompatible with Colorado law. In any event, a great virtue of the Restatement (Third) is that it gives concrete expression to general principles, providing guidance to practitioners and courts alike. There is nothing vague and unpredictable about Illustration 26, even if Defendant would prefer that it reached the opposite conclusion.

III. CONCLUSION

We **REVERSE** the district court's order and **REMAND** for further proceedings consistent with this opinion.