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SUEM - Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose

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ESSAY

SUEM—SPITZ'S ULTIMATE EQUITABLE MAXIM:* IN EQUITY, GOOD GUYS SHOULD WIN AND BAD GUYS SHOULD LOSE

ROGER YOUNG AND STEPHEN SPITZ**

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I. INTRODUCTION

This article introduces a new equitable principle named SUEM, which stands for Spitz's Ultimate Equitable Maxim. SUEM asserts that "in equity, good guys should win and bad guys should lose."

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* Admittedly, even the title of this article is a little mysterious. Judge Young and Professor Spitz were both discussing equitable maxims, and Spitz suggested that "in equity, good guys should win and bad guys should lose" was the ultimate equitable maxim. Judge Young came up with the title: " SUEM—Spitz's Ultimate Equitable Maxim." The title has stuck, and for better or worse, it is the title of this article.

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SUEM is not necessarily an argument to make directly to a court or, heaven forbid, to cite by name in a reported case. SUEM's goal is much more modest: practitioners and judges alike might find the maxim useful to "double check" a proposed outcome of any specific equitable case. SUEM works in a somewhat similar manner to the long ago math teacher that always urged you in elementary school to "double check your math." By that phrase, you were supposed to see if your answer made common sense—often, by adding up the numbers in the problem in a different manner to double check your prior mental thought process. SUEM is similar, as it suggests a method to check whether or not the case fits a common sense model of what equitable cases are supposed to do, but SUEM only works for certain types of cases, and only in certain specific circumstances.

It is surprising just how consistently SUEM explains the actual results of a wide variety of cases. In addition to often predicting what a court might actually do in a particular case, SUEM may also offer helpful insights into the appropriate use of other equitable maxims. Accordingly, before discussing SUEM itself, a brief overview of a number of other equitable maxims might prove to be useful.

II. EQUITABLE MAXIMS

It is by no means clear how many legal and equitable maxims exist. Some authorities say the number is nine, others argue that many more maxims exist.[1] Furthermore, there is additional conflict among judges and others as to the utility of maxims. Many judges and practitioners proclaim the view that maxims are of little practical value in the real world.[2] We disagree. Although

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1. Maxims have long been used as rules of thumb by lawyers and judges. The list of maxims that have been cited is almost endless. Some include:

> The reason ceasing, the law itself ceases.
> No one can take advantage of his own wrong. No one should suffer by the act of another.
> An injury cannot be done to a willing person.
> The law compels no one to do anything which is useless or impossible.
> The law does not recognize trifles.
> A thing similar is not exactly the same.
> That is certain which can be made certain.

BLACKSTONE'S COMMENTARIES ON THE LAW 952 (Bernard C. Gant ed., Wash. Law Book Co. 1941) (1892).

> Equity delights to do justice and not by halves.
> Between nights otherwise equal, the earliest is preferred.
> Equity aids the vigilant, not those who slumber on their rights.
> Equity abhors a forfeiture.

EQUITY: CASES AND MATERIALS (Zechariah Chaffee, Jr. & Edward D. Re eds., Foundation Press, 5th ed. 1967).

2. There is certainly no end to jokes about equitable maxims. See, for example, Eugene Volokh's recent delightful list of "Lost Maxims of Equity," Eugene Volokh, *Lost Maxims of Equity*, 52 J. LEGAL ED. 619 (2002), which includes all of the following:

maxims often conflict with each other, and it is admittedly true that sometimes applying one maxim results in ignoring another, we nevertheless think that equitable maxims have some value. As proof, we point to the following nine equitable principles used, sometimes quite explicitly, by South Carolina courts.[3]

1. Equity follows the law.
2. Equity will not suffer a wrong to be without a remedy.
3. Equity acts in personam, not in rem.
4. Equity is equality.
5. Equity regards as done that which ought to be done.
6. Equity regards substance rather than form.
7. She who seeks equity must do equity.
8. He who comes into equity must come with clean hands.
9. Equity aids the vigilant and diligent.

The rest of this paper explores each of these maxims and reviews them through the lens of the SUEM principle. At the end of this analysis, readers can decide for themselves whether SUEM adds anything to the analysis, and whether it indeed helps one double check a proposed outcome when applied to the facts of a specific case.

Equity abhors a nudnik.
Equity delights in a good practical joke.
He who seeks equity must do so with full pockets.
Equity is not for the squeamish.
Equity, schmequity.
Equity can be grumpy before its first cup of coffee.
Equity is crunchy on the outside, soft and chewy on the inside.
Equity is a mean drunk.
Equity, like all of us, prefers the rich and good-looking.

3. This article focuses on a single jurisdiction, South Carolina, where Professor Spitz teaches and where Judge Young judges. Nonetheless, SUEM may have a wider application.

Examples where courts applied SUEM, even if not by name, appear in numerous cases. *See, e.g.*, McCann v. Chasm Power Co., 105 N.E. 416, 417 (N.Y. 1914) (noting, "[a] court of equity can never be justified in making an inequitable decree. If the protection of [even] a legal right . . . would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies."). A more recent case (and one that property professors will recognize because it is routinely used in a number of standard first year property textbooks) is *Brown v. Voss*, 715 P.2d 514 (Wash. 1986). The Washington Supreme Court reversed the Washington Court of Appeals despite a settled rule of law that an easement cannot be expanded beyond the original dominant estate. Instead, the court determined the plaintiffs had acted reasonably in building a house on both the dominant parcel and an acquired additional parcel. The court noted the plaintiffs would suffer considerable hardship if an injunction were granted while no appreciable hardship or damages would flow to the defendants from its denial, and further, the defendants had raised the claim to gain "leverage" against the plaintiffs. Ultimately, the supreme court held that, given "equities of the case," the trial court properly did not grant an equitable injunction against the plaintiffs. Although not stated in so many words, but obvious in fact, the court concluded that in equity good guys should win and bad guys should lose.

A. *Equity Follows the Law*

Consider the first of the nine equitable principles cited above, "equity follows the law," in relation to the interesting case of *Indigo Realty Co. v. Charleston*[4] and the SUEM doctrine. Remember, in equity good guys should win and bad guys should lose.

Turning to the facts of *Indigo Realty Co.*, it may appear that the case called out for equitable intervention because the situation was unfair. Under the immediate and direct threat of condemnation, private landowners reluctantly agreed to sell property to the City of Charleston. However, within six months of this forced and highly reluctant sale, the city determined it no longer had a public purpose (or the requisite public funds required) for the recently condemned property. When the private landowners learned of the city's decision to resell the property, the landowners requested the right to repurchase the property at the former sale price. After all, this was the price agreed upon by both parties just six months before.[5] The city, however, refused to resell to the previous owners and claimed the right to sell the property to whomever it desired. The lower court determined that the former property owners had been treated "unfairly" and entered an order permitting the original owners to reacquire the property at the price paid just six months previously.[6] The South Carolina Supreme Court, however, reversed the lower court decision. The court held the city had no legal obligation to resell the property to the original owners.[7] While agreeing in dictum that this result might very well be "unfair," the supreme court nonetheless concluded that the lower court's use of equity to solve this problem "undermines the legal rule and exceeds the court's equity powers."[8] The court noted that a statutory method of condemnation was at all times in place, that the statute had been strictly followed, and that the statute failed to contain any duty on the part of the condemning authority to resell the land back to the original owners.[9]

Although the supreme court never cited the equitable maxim "equity follows the law" in its opinion, it is clear this was the core underlying principle used to justify the reversal of the lower court. SUEM validates this result. In fact, SUEM predicts the outcome of this case. Recall that the principle of SUEM is that "in *equity*, good guys should win and bad guys should lose." Even assuming, strictly for the sake of argument, the highly debatable conclusion that the condemning authority was a "bad guy" in refusing to do the "fair" thing and resell the property to its original owners, SUEM requires that the question of fairness arise in a true case of equity. *Indigo Realty Co.*, while

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4. 281 S.C. 234, 314 S.E.2d 601 (1984).
5. *Id.* at 235, 314 S.E.2d at 602.
6. *Id.* at 236, 314 S.E.2d at 602.
7. *Id.* at 237, 314 S.E.2d at 603.
8. *Id.* at 236, 314 S.E.2d at 602.
9. *Id.*

appearing to be an equitable case, really turned on the scope of an existing, valid, clear-cut, and utterly unambiguous statute that set forth the law relating to condemnation. The statutory law failed to mention a right of repurchase. A correlative principle of SUEM is that it only applies in true cases of equity and is inapplicable to law cases. Although the parties presented this case as a matter of equity, it was in truth a case of law. The court thus correctly applied the equitable principle that "equity follows the law," leaving the city free to do with the property as it deemed appropriate, pursuant to the applicable statutory law in place.

Other South Carolina cases can be explained in this manner as well. *Santee Cooper Resort*[10] is a similar case where, although it appeared that something was "unfair," the South Carolina Supreme Court rejected the lower court's proposed equitable remedy on the ground that a "court's equitable powers must yield in the face of an unambiguously worded statute."[11] The Court held that the "rights of the parties in the Public Service Commission were expressly given by statute; therefore, the courts may not invoke equitable remedies."[12]

B. *Equity Will Not Suffer a Wrong to Be Without a Remedy*

The second equitable maxim in our list of nine is the famous maxim that "equity will not suffer a wrong to be without a remedy." This maxim is the foundation of equitable jurisdiction developed in the ancient English Courts of Chancery[13] and is derived from cases where it was clear that the common law

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10. Santee Cooper Resort v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989).

11. *Id.* at 185, 379 S.E.2d at 123.

12. *Id.* Any number of South Carolina cases have followed this maxim, often without even citing to it explicitly. For example, the essence of the maxim is found in *Ex parte Bowers*, 320 S.C. 360, 465 S.E.2d 354 (1995), where the South Carolina Supreme Court created an equitable remedy to solve an obvious problem that lacked an adequate legal remedy. In *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983), the court of appeals reaffirmed this maxim, even if not by express citation, by noting that "[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Id.* (citing State *ex rel.* Gentry v. Becker, 174 S.W.2d 181 (Mo. 1943)).

13. Equitable pleas for restitution certainly existed by at least 1292. In the famous case of *Fesrekyn v. Richard the Carpenter* 1292, *reprinted in*, SELDEN SOCIETY, EYRE OF KENT: 6 & 7 EDWARD II (1912), it was already common to make an equitable claim of restitution directly to the Chancellor, as the following plea suggests:

> Dear Sir, of you who are put in the place of our Lord the King to do right to poor and to rich, I cry mercy. I John Fesrekyn make my complaint to God and to you, Sir Justice, that Richard the carpenter that is clerk of the bailiff of Shrewsbury detains from me six marks which I paid him upon receiving from him an undertaking in writing by which he bound himself to find me in board and lodging in return for the money he had from me; and he keeps not what was agreed between us, but as soon as he had gotten hold of the money he abandoned me and constrained my person and gave me a scrap of bread as though I had been but a pauper begging his bread for God's sake, and through him I all but died from hunger. And for all this I cry you mercy, dear Sir, and pray, for God's sake, that you will see that I get my money

courts were incapable of providing an adequate remedy. Consider the following two cases:

In *Taff v. Smith*,[14] the South Carolina Supreme Court confronted an insured's attempt to change the beneficiary in his life insurance policy. Under the insurance company's internal rules, a request for a change in the beneficiary required that the actual insurance policy be physically attached to the request. Although the policy owner sent a written request for a change of beneficiary to the company, the party requesting the change could not attach the policy itself because the policy owner's ex-wife, who was the named beneficiary of the policy, had physical possession of the policy and refused to surrender it to her former husband.[15]

After the policy owner's death, his mother, the newly intended beneficiary, sued to reform the policy. The court employed the legal fiction of leaving the legal title in the former beneficiary (the ex-wife) but then concluded that the equitable owner of the policy was the newly intended beneficiary (the mother).[16] This result permitted the court to conclude that the equitable title should prevail over the legal title under the special circumstances of that case.[17]

SUEM agrees with the court's decision in *Taff*. In fact, SUEM predicts that the mother will prevail. First, the claim was for reformation of an insurance policy, an equitable matter. Second, a "good guy" (the mother) clearly existed who would have been named the new beneficiary but for the actions of the "bad guy" (the ex-wife) who had no vested interest in the policy and no justification for her refusal to surrender it. In short, this is an equitable case, where it was clear that a good guy and a bad guy existed, and SUEM would immediately suggest the mother would find some equitable method to prevail, and she did.

By contrast, in *State ex rel. Daniel v. Strong*,[18] the Attorney General moved to set aside the sale of a substantial amount of stock held in trust.[19] Acting on behalf of a public charity that was the named beneficiary of the trust, the Attorney General argued that the trust stated a very clear preference that the

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> back before you leave this town, or else never shall I have it back again, for I tell you that the rich folk all back each other up to keep the poor folk in this town from getting their rights. As soon, my lord, as I get my money I shall go to the Holy Land, and there I will pray for the King of England and for you, by your name, Sir John de Berewick; for I tell you that not a farthing I have to spend on a pleader; and so for this dear Sir, be gracious to me that I may get me my money back.

Id. at xxiii–xxiv. Clearly, this pleader had learned a lot—he cried mercy, he promised to pray for the judge (and God) in the Holy Land—if he only could obtain the court's assistance and prevail on his claim. He asserted that he was a poor man who needed the equitable jurisdiction of the court to assist him in the recovery of his money.

14. 114 S.C. 306, 103 S.E. 551 (1920).
15. *Id.* at 309, 103 S.E. at 552.
16. *Id.* at 312, 103 S.E. at 553.
17. *Id.*
18. 185 S.C. 27, 192 S.E. 671 (1937).
19. *Id.*

stock not be sold. However, the trustee countered this argument by noting that it had been granted discretion to sell the stock when it was "manifestly to the interest of [the] estate." The South Carolina Supreme Court used this language to uphold the trustee's actions to sell the stock.[20]

SUEM fully confirms this result. Of course, since the issue in this case concerns a trust, the case is one in equity.[21] Further, the prayer for relief requested the court rescind a sale, and this prayer also sounds in equity. The Attorney General could certainly be declared a good guy given that the officer was wearing the "white hat" in acting on behalf of a public charity. The problem is that there was simply no bad guy. The facts demonstrated that the trustee had valid business reasons for the sale. The facts also suggested that the sale itself was an arms-length, bona fide, good faith transaction. Thus, although the case was an equitable one, and the Attorney General was a good guy, the absence of either a bad guy or actual wrongdoing permitted the court to leave the parties where it found them: the good guy suffered no real equitable wrong and no bad guy existed to be punished.

One final example of this second equitable maxim and its application to SUEM is the famous United States Supreme Court decision of *International News Service v. Associated Press*.[22] In that case, two rival news services, who fiercely competed in every major city in the country, were involved in a suit brought by the Associated Press (AP). The AP claimed that International News Service (INS) was deliberately stealing news from the early editions of newspapers published on the east coast and then selling that information, as its own news, in subsequent editions all around the country.[23]

Since news was not copyrighted, INS claimed that no one had any rights in the news of the day. Therefore, INS alleged it was free to buy an early AP newspaper and do whatever it desired with the public information found in that material.[24] A majority of the United States Supreme Court disagreed.[25] The Court found that this was "unfair competition in business," and said that "[s]tripped of all disguises, the process amounts to an unauthorized interference with the normal operation of [a] business precisely at the point where the profit is to be reaped."[26] The Court held that even if the public could do with the news whatever it wanted, as between the two competitors, this was "*quasi* property" which could not be stolen.[27] The Court said "the transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition," and upheld an injunction prohibiting this unfair practice.[28]

20. *Id.* at 54, 192 S.E. at 682.
21. BLACKSTONE'S COMMENTARIES ON THE LAW, *supra* note 1, at 735–36.
22. 248 U.S. 215 (1918).
23. *Id.* at 231.
24. *Id.* at 239.
25. *Id.* at 240.
26. *Id.*
27. *Id.* at 242.
28. Int'l News Serv. v. Associated Press, 248 U.S. 215, 240 (1918).

SUEM again predicts the result. The case was in equity. The good guy and the bad guy are as clear as night and day. To use the actual words of the Supreme Court, one party was taking the work of its competitor and was "endeavoring to reap where it ha[d] not sown."[29] Finding it necessary to enjoin the practice, the Court indulged in a true fiction—the creation of a new term of law, "*quasi* property," to forbid what was highly inequitable.[30] SUEM, in fact, suggests that when a court is confronted in equity with a true good guy–bad guy dichotomy, courts may very well be willing to indulge in unusual legal fictions—even to the extent of creating entirely new categories such as "*quasi* property" to achieve a fair result.

C. *Equity Acts In Personam, Not In Rem*

This maxim suggests a significant limitation on the inherent equitable powers of a court. At the same time, if the conditions of SUEM have been met, it is likely the court may be willing to use this maxim to enlarge the equitable powers necessary to reach a fair result. Indeed, there are cases in South Carolina that do just that.

A classic application of both SUEM and the equitable maxim, "equity acts in personam, not in rem," is found in *Thornton v. Thornton*.[31] There the South Carolina Supreme Court was confronted with several equitable matters including contempt of court and an attempt by the family court to directly order the transfer of property from one spouse to another as security for alimony and child support payments.[32] To further complicate the facts of this case, much of the land at issue was in another state.[33] The supreme court found the lower court technically exceeded its authority since it lacked in rem power to order the husband to transfer title to land located in another state.

Nevertheless, the supreme court found an indirect method to do what the lower court attempted to do, by applying the maxim "equity acts in personam." The supreme court held that the family court lacked in rem authority to transfer directly property from one spouse to another as security for alimony and child support payments.[34] However, as a court of equity, the court also found that authority did exist to act upon the person and thus indirectly act upon real estate by placing an equitable lien upon the property, accomplishing the very same purpose.[35] Although this is a complex case, for purposes of SUEM, the key facts are very simple: (1) this case was in equity, (2) there was clearly both a good guy (the wife, who bore five children, including quadruplets), and (3)

29. *Id.* at 239.

30. *Id.* at 242. Courts continue to follow the *INS* doctrine. *See* Mercury Record Prod., Inc. v. Econ. Consultants, Inc., 218 N.W.2d 705, 709 (Wis. 1974).

31. 328 S.C. 96, 492 S.E.2d 86 (1997).

32. *Id.* at 106, 492 S.E.2d at 91.

33. *Id.*

34. *Id.* at 108, 492 S.E.2d at 92.

35. *Id.*

a bad guy (the ex-husband, who was found to have an extensive history of lying to virtually everyone about his assets and was an adulterous lawyer to boot).[36] The husband's claims that he could not afford either alimony or support, in light of the facts which suggested he made well over $100,000 a year and owned property in this state and another state, rang hollow and appeared inequitable.[37] Needless to say, SUEM forecasts the wife would find some way to win and that the supreme court would find some equitable rules to permit this result to take place. That is exactly what happened.

D. SUEM and the Exceptions to Equity Acts In Personam

The maxim "equity acts in personam, not in rem" has developed a number of exceptions. Nonetheless, SUEM both complies with and explains the maxim *and* its exceptions. In *Prudential Insurance Co. v. Berry*,[38] an out-of-state purchaser defaulted on a contract to purchase real property in South Carolina. The seller, an in-state resident, brought a suit against the out-of-state defendant both for damages and specific performance of the contract.

The South Carolina Supreme Court rejected the seller's claim for monetary damages on the grounds that a court of equity cannot impose a monetary judgment against an out-of-state defendant when it does not have personal jurisdiction over the defendant.[39] In spite of that, the court upheld the lower court's equitable power to clear the title and cut off the defaulting purchaser's equitable interest in the property so the seller's title would not be tied up indefinitely with the defaulting buyer's claim.[40]

SUEM is entirely consistent with both results. In the equity part of the lawsuit, the good guy (the ready, willing, and able in-state seller) should prevail over the bad guy (the defaulting out-of-state purchaser) at least so far as necessary to clear the equitable claims on the title to the property. At the same time, SUEM would not address the good guy and bad guy part of the analysis in the legal portion of the case because that dealt strictly with monetary damages.

Bush v. Aldrich[41] offers a second exception to the equitable maxim "equity acts in personam, not in rem." There the seller was an out-of-state resident and the buyer was an in-state resident.[42] The seller refused to complete a land purchase contract, even though the buyer had fully performed his side of the bargain. At first glance, the equitable maxim "equity acts in personam, not in

36. *Id.* at 112, 492 S.E.2d at 94. Is there anyone who does not see where this is headed?

37. Thornton v. Thornton, 328 S.C. 96, 104, 492 S.E.2d 86, 90 (1997). The husband filed a financial declaration that stated he had a negative gross income, a situation which the court said "cannot exist;" he owned lien-free an office worth $250,000 as well as a half-interest in a Colorado vacation home worth $600,000. *Id.* at 102, 104, 492 S.E.2d at 89, 90.

38. 153 S.C. 496, 151 S.E. 63 (1930).

39. *Id.* at 499, 151 S.E. at 64.

40. *Id.*

41. 110 S.C. 491, 96 S.E. 922 (1918).

42. *Id.* at 493, 96 S.E. at 922.

rem" might seem to suggest that nothing can be done to aid the purchaser. However, SUEM demonstrates how the court reaches the exact opposite conclusion. An initial analysis shows that the buyer's claim is for specific performance of the contract, a classic equitable remedy, thus meeting the first prong of SUEM. Since we have a good guy (the purchaser who has fully performed) and a bad guy (the seller who refuses to convey the property), SUEM predicts the purchaser will win. The purchaser, in fact, did win. The South Carolina Supreme Court held that despite the fact the suit involved real property and was in essence an in rem action, a court could still act in personam over an out-of-state seller where necessary to grant full and equitable relief.[43]

E. *Equity Is Equality*

It has long been recognized that a court of equity will seek to secure equality among persons who are equally obligated or who are equally entitled to claim a benefit or share in a fund. The law of equitable contribution stems from this maxim. SUEM explains—quite easily—cases that cite this maxim.

In *Myers v. Sinkler*,[44] an executor asked the court to apportion estate taxes between the probate and trust estates. The task was difficult, since neither the will nor any statute provided guidance.[45] In the absence of controlling law, the court turned to equity and applied the doctrine of equitable apportionment, which was "simpl[y] one aspect of the familiar maxim that 'equality is equity'—a principle that has long been embodied in our jurisprudence."[46] The court justified its decision by noting that it was fair to apportion the tax burden between the parties because "those who have a common interest in a subject matter should bear in common any burden affecting it."[47]

Again, SUEM would have predicted this result because no bad guy existed in this case, and as the case was an equitable one, it made great sense to be fair and leave all the parties on equal footing so long as no one sought an unfair advantage or acted in bad faith.

F. *Equity Regards as Done that Which Ought to Be Done*

The maxim "equity regards as done that which ought to be done" deals with fairness and good conscience. It has been applied and rejected in several South Carolina cases. Consider the following two cases:

In *Kerr v. City of Columbia*,[48] a property owner operated a business, which was surrounded by other businesses, in the town of Eau Claire. Town officials

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43. *Id.* at 497, 96 S.E. at 924.
44. 235 S.C. 162, 110 S.E.2d 241 (1959).
45. *Id.* at 167, 110 S.E.2d at 242.
46. *Id.* at 175, 110 S.E.2d at 247.
47. *Id.* at 173, 110 S.E.2d at 246.
48. 232 S.C. 405, 102 S.E.2d 364 (1958).

inaccurately told the owner his property was zoned for business.[49] When the town subsequently merged with the City of Columbia, it turned out the property was zoned residential.[50]

The South Carolina Supreme Court treated the property as if the owner had applied for business zoning before the cities merged and the application had been granted, citing the maxim "the court will regard as done that which ought to have been done."[51] SUEM concurs: the owner was innocent and the town had made a misrepresentation of a material fact relied upon by the good guy.

In contrast, the court rejected the application of this maxim in *Wilkie v. Philadelphia Life Insurance Co.*[52] In *Wilkie*, the deceased had attempted to change the beneficiary on her insurance policy prior to her death but failed to complete the necessary paperwork as required by the terms of the policy.[53] The court held that the maxim stating "equity regards as done that which ought to be done" should only be applied when the party seeking to invoke it has established a clear obligation, based upon a valuable consideration, by another to do some act which has not been performed.[54] The insured failed to complete the policy modification, and since the policy clearly stated the requirements to effectuate the change, the insurance company did not have an obligation to make a change contrary to its own policy terms.[55]

SUEM would hardly disagree. While this is an equitable matter, there are no bad guys here.[56] Therefore, leaving the parties where they find themselves hardly seems to be unfair.

G. *Equity Regards Substance Rather than Form*

"Equity regards substance rather than form" is a useful and important equitable maxim. Ignoring a legal technicality, and looking at substance over form is something in which equity has taken pride for hundreds of years. A fairly recent case in which this maxim was discussed is *Peppertree Resorts, Ltd. v. Cabana Ltd. Partnership.*[57] The property owner, Cabana, hired a law firm to assist it in obtaining additional insurance proceeds which Cabana felt its policy should have paid.[58] Cabana's creditors knew of the law firm's efforts and allowed it to perform legal services, as a result of which, Cabana received an additional $615,000 in coverage.[59] Despite the additional coverage, Cabana became insolvent and a receiver was appointed. The creditors refused to pay

49. *Id.* at 409, 102 S.E.2d at 365.
50. *Id.*
51. *Id.* at 411, 102 S.E.2d at 366.
52. 187 S.C. 382, 197 S.E. 375 (1938).
53. *Id.* at 396, 197 S.E. at 381.
54. *Id.* at 397, 197 S.E. at 381 (citing Taff v. Smith, 114 S.C. 306, 103 S.E. 551 (1920)).
55. *Id.*
56. Compare the parties in *Taff*; *see supra* text accompanying note 15.
57. 315 S.C. 36, 431 S.E.2d 598 (Ct. App. 1993).
58. *Id.* at 39, 431 S.E.2d at 600.
59. *Id.* at 41, 431 S.E.2d at 601.

any fee to the law firm because they did not have a contract with Cabana's attorneys. The South Carolina Court of Appeals held that "a court of equity may order the payment of reasonable attorney's fees out of a common fund created" through the attorney's efforts in which other parties are entitled to share.[60] Despite an unfortunate modern tendency to sometimes label lawyers as bad guys, SUEM would agree. This was an equitable matter and the good guy lawyers did all the work while the ungrateful bad guy creditors wanted to reap all the reward.

H. She Who Seeks Equity Must Do Equity

This is a broad principle and is used in a variety of situations. The premise is that a court may impose equitable obligations on a party as a condition for granting relief. In another fairly recent case, *Ingram v. Kasey's Associates*,[61] Ingram leased property with an option to purchase and told the optionee he had no plans to exercise the option.[62] Relying on this representation, the optionee entered into a new lease with another tenant and spent $135,000 to purchase adjacent land so the optionee could expand the leasehold estate.[63] Ingram then notified the optionee that he did, in fact, intend to exercise his option and sued for specific performance, an equitable remedy.[64] The South Carolina Supreme Court, also citing the unclean hands doctrine discussed next, said that Ingram's misrepresentation regarding his plans not to exercise the option precluded him from invoking equitable remedies.[65] Of course, under our SUEM analysis, Ingram's actions were bad, and bad guys often do not win in equity.

In *Griffith v. Griffith*,[66] a spouse in a divorce case tried to claim entitlement to alimony after invoking the Fifth Amendment when asked if she had committed adultery.[67] The South Carolina Court of Appeals cited the "'venerable maxim that one seeking equity must do equity.'"[68] Needless to say, SUEM concurs.

In *Williams v. Wylie*,[69] Lancaster County bought property for $42,000 from Wylie in 1945 to use as a courthouse.[70] A year later the property had risen in value to $70,000, and after a secret meeting, Wylie convinced the county to resell the property to him for $45,000.[71] A group of taxpayers sued to set aside

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60. *Id.*
61. 340 S.C. 98, 531 S.E.2d 287 (2000).
62. *Id.* at 103, 531 S.E.2d at 289.
63. *Id.*
64. *Id.*
65. *Id.* at 107, 531 S.E.2d at 292.
66. *Id.* at 634, 506 S.E.2d at 528.
67. 332 S.C. 630, 634, 506 S.E.2d 526, 528 (Ct. App. 1998).
68. *Id.* at 638, 506 S.E.2d at 530 (quoting Minor v. Minor, 232 So. 2d 746, 747 (Fla. Dist. Ct. App. 1970), *aff'd*, 240 So. 2d 301 (Fla. 1970)).
69. 212 S.C. 51, 46 S.E.2d 540 (1948).
70. *Id.* at 54, 46 S.E.2d at 541.
71. *Id.*

the reconveyance.[72] The South Carolina Supreme Court said the remedy of cancellation is usually subject to the maxim that "[he] who seeks equity must do equity," and generally a plaintiff must restore, or at least offer to restore, consideration when the plaintiff seeks to cancel an instrument.[73] However, the court held the rule did not apply to this case since the buyer and the seller were in cahoots and neither wanted to set aside the deed.[74] This presents a new twist on SUEM: two bad actors were conspiring to hide behind an equity rule and prevented the court from requiring strict adherence to the contract.

Likewise, in *Hayne Federal Credit Union v. Bailey*,[75] the South Carolina Supreme Court adopted the doctrine of judicial estoppel in a case in which one party met all the requirements necessary to establish an equitable resulting trust, but did so to defraud creditors. The court noted that a party could make out a resulting trust only if that party did not engage in fraudulent acts in effectuating the trust, and applied the well-known maxim, "she who seeks equity must do equity."[76]

I. He Who Comes Into Equity Must Come With Clean Hands

A litigant may be denied relief by a court of equity on the grounds that his conduct has been inequitable, unfair, dishonest, fraudulent, or deceitful. Consider the facts in *Whitlock v. Creswell*,[77] in which a debtor owing money fled the state. Fifteen years later a creditor found him in Tennessee and had him arrested.[78] The creditor agreed to drop charges if the debtor gave back a note and mortgage on property in South Carolina.[79] The creditor then tried to foreclose the mortgage in South Carolina. The South Carolina Supreme Court, citing the clean hands maxim, refused to allow the foreclosure. The court stated that "[c]ourts of equity watch with extreme jealousy all contracts made by a

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72. *Id.* at 53, 46 S.E.2d at 540.

73. *Id.* at 57, 46 S.E.2d at 542.

74. *Id.*

75. 327 S.C. 242, 489 S.E.2d 472 (1997).

76. *Id.* at 251, 489 S.E.2d at 476 (citing Taff v. Smith, 114 S.C. 306, 312, 103 S.E. 551, 553 (1920)).

77. 190 S.C. 314, 2 S.E.2d 838 (1939). An interesting historical note: the trial court judge in this case was Strom Thurmond. The South Carolina Supreme Court thought so highly of his lower court opinion that they ordered that the lower court opinion be reprinted as their own: "the matter came on to be heard by Honorable J. Strom Thurmond, Circuit Judge. His decree is satisfactory to this Court and is adopted by it. It will be reported. . . . We shall not further discuss the case. The Circuit decree fully and carefully considered it, and has rightly decided it." *Id.* at 334–36, 2 S.E.2d at 846–47.

78. *Id.* at 318, 2 S.E.2d at 840. Yes, apparently that was the law in Tennessee back then. It seems the Volunteer state overlooked the whole "we don't want debtor prisons in America" aspect of the American Revolution.

79. *Id.* at 333, 2 S.E.2d at 846.

party while under imprisonment," and will set the contracts aside "if there is the slightest ground to suspect oppression or imposition."[80]

While a defaulting debtor typically does not qualify as a good guy under SUEM, remember here the bad guy sought to invoke the equitable right of foreclosure, and bad guys do not often win in equity.

J. Equity Aids the Vigilant and Diligent

Also known as the "you snooze, you lose" rule, the maxim "equity aids the vigilant and diligent ensures" that equity does not aid those who sleep on their rights. In essence, this maxim is merely a summary of the well-known equitable defense of laches.

In *Chambers of South Carolina, Inc. v. County Council for Lee County*,[81] two waste companies competed to win a contract with a county to build a landfill. The county awarded a contract and six months after the high bidder began work, the loser brought suit claiming the winning contract was void because it failed to follow the state procurement code. The South Carolina Supreme Court held that although the loser was probably right, laches barred the claim because the loser knew both that the other company was expending funds to build the landfill and that the county was under a very tight deadline to get a new landfill built.[82] The court held that the delay in challenging the award of a contract, although for only six months, was unreasonable under the circumstances and prejudicial because during the delay the other side incurred expenses and detrimentally changed its position.[83]

Clearly, SUEM would not easily reward someone who caused undue prejudice to another by sleeping on his rights.

III. CONCLUSION

No rule works all the time and this truth applies to the SUEM principle as well. Some limitations are obvious: (1) it is often difficult to know who is a bad guy and who is not; and (2) it is sometimes equally difficult to know if there really is a good guy in many cases. Nonetheless, in some cases, it is clear that a good guy and a bad guy exist. Similarly, in some cases it is clear that equitable jurisdiction is present. When the prerequisites of SUEM are met, and when one of the nine equitable principles fits the facts of that particular case, SUEM often predicts what the court will likely do. Parties that are truly unreasonable and cause real harm and prejudice and who, in the common-sense

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80. *Id.* at 335, 2 S.E.2d at 847 (quoting Williams v. Walker Fleming & Co., 18 S.C. 577, 578 (1882) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 239 (12th ed. 1877))).

81. 315 S.C. 418, 434 S.E.2d 279 (1993).

82. *Id.* at 421, 434 S.E.2d at 281.

83. *Id.* at 421, 434 S.E.2d at 280, 281.

use of the word, commit bad acts are frequently categorized as a "bad guy" under SUEM, making many such parties almost certain losers in equity.[84]

As stated at the beginning of this article, SUEM is not a maxim necessarily recommended for citing in a court brief. It is, however, an easy way to check an argument when evaluating whether to invoke an equitable maxim. If your argument cannot pass this simple test, a court of equity is probably not the place for your case.

84. Practice tip: when a court order starts using words like "unreasonable" and "prejudicial" to describe your client's actions, you really do not need to read any further to know the outcome.