

## REMEDIES OUTLINE

### INTRODUCTION

The central purposes of a remedy are to put the wronged party in their rightful place and to deter bad behavior. Remedies are like a toolbox; it may be that the plaintiff has to use multiple tools in a certain setting, and it may be that both parties have tools to use.

Usually courts will allow plaintiffs a free choice between a legal and an equitable remedy when both types are appropriate.

### LEGAL REMEDIES

Damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong; also called substitutionary remedies.

Defendant has the right to a jury trial

- I. **Compensatory.** Compensatory damages compensate the plaintiff for the harm already suffered. In other words, they are designed to put the plaintiff in the position he would have occupied but for the harm. They are backwards looking.

The value of such damage is determined by finding the lowest of (1) market cost, (2) replacement cost, and (3) capitalized value of the income stream; and is determined at the time the damage occurred (exception: crops)

- A. Market Cost. The item in question is worth what a willing buyer would pay a willing seller for the same item.

The market fails when: (1) there is no market for the item; (2) the item is unique; (3) personal value of specific item is higher than market value (must be more than sentimental value); (4) a damaged part affects the greater whole; (5) damage does not immediately decrease the usefulness of the item; or (6) damage causes loss of future profits, but not current.

- i. *Special Purpose Property.* A special purpose property is a noncommercial property for which there is no market. Courts will be creative in determining the amount of the damage caused
- ii. Replacement Cost. The item in question is worth what the plaintiff would have to pay to make or build the item.
- Builders, manufacturers, and merchants expecting a profit on wares worth more than their cost can get market cost instead of replacement.
- iii. Capitalized Value of the Income Stream. This is the current worth of money expected to be earned or received in the future, calculated by using an appropriate discount rate to express current value accurately.

II. **Contracts.** Plaintiff can get compensatory damages for loss or injury resulting from the breach in addition to those below.

A. **Expectation.** Expectation damages is generally used in breach of contract cases, and seek to put the plaintiff in the position he would have been in had defendant performed. In other words, these seek to give the plaintiff the benefit of the bargain.

Calculation: (1) the loss in the value to plaintiff caused by failure to perform plus, (2) consequential damages (see below, minus (3) any cost or loss avoided by not having to perform.

B. **Reliance.** Reliance damages are based on the actual amount the promisee has expended in reliance on a promise; they award the plaintiff the cost of his performance; i.e., they are designed to put the plaintiff in the position she would have been in had the contract never been formed.

C. **Consequential.** Consequential damages are damages that flow from the harm, but are not the harm itself, and are granted in addition to other damages, so long as the consequential damages are foreseeable.

D. **Liquidated Damages.** Liquidated damages are an amount of money agreed upon by both parties to a contract which one will pay to the other upon breaching.

III. **Torts.** Plaintiff can get compensation damages for the injuries suffered from the tort.

A. **Actual.** Actual damages are another name for compensatory damages. They are an amount awarded to a plaintiff to compensate for a proven injury or loss; damages that repay actual losses. These are also called compensatory damages, and include medical expenses.

B. **General.** General damages are damages that the law presumes follow from the type of wrong complained of; specifically, compensatory damages for harm that so frequently results from the tort that the harm is reasonably expected and need not be alleged or proved (don't need to be specifically claimed).

C. **Emotional Distress.** A plaintiff who suffers physical injury can generally recover for associated emotional distress.

About half of states permit recover to bystanders who see a loved one injured or killed; about a quarter of states per recovery for persons within the "zone of danger" created by defendant's negligence.

C. **Future Damages.** Future damages is money awarded to an injured party for an

injury's residual or projected effects, such as those that reduce the person's ability to function

Examples: expected pain and suffering, loss or impairment of earning capacity, and projected medical expenses.

- i. **Pain and Suffering.** These are not precisely measurable but are determined by the subjective judgment of a jury.

Calculation theories: (1) *per diem*, based on daily pain and suffering multiplied by number of days the plaintiff will probably live; (2) *golden rule*, based on how much a juror would want if he had suffered plaintiff's injuries (disallowed); (3) *market value*, what it would cost to hire someone to suffer plaintiff's injuries (no market, not helpful); (4) *majority rule*, counsel may suggest figure for totally pain and suffering.

- D. **Presumed.** Presumed damages that are sometimes awarded where the actual damages are hard to quantify; plaintiff cannot get both presumed and compensatory damages.

- E. **Wrongful Death.** All states allow recovery for funeral expenses and some measure of compensation for the financial support that decedent would have provided.

Most states allow recovery for value of services decedent would have provided to spouse and children (if adult), or to parents (if child). If decedent's assets are large enough, courts may allow for loss of inheritance (when decedent's earnings exceed what would be spent on him and his dependants).

Small majority of states allow recovery for loss of society, which includes, love, affection, care, attention, companionship, and protection (important for death of child, retiree, and adults without dependants).

- i. **Hedonic.** Damages that attempt to compensate for the loss of the pleasure of being alive (not allowed in most jurisdictions).

- F. **Dignitary and Constitutional Harms.** A dignitary tort is a tort involving injury to one's reputation or honor. A constitutional tort occurs whenever a constitutional right of the plaintiff has been violated.

In either case, there is no physical injury, and so no general damages.

- IV. **Punitive.** Punitive damages are designed to punish the wrongdoer.

Determining amount: (1) degree of moral reprehensibility of the act; (2) wealth of the defendant; (3) amount of compensatory damages; (4) amount needed to deter the

wrongful act; (5) monetary penalties under government regulation; and (6) other cases where punitive damages were awarded against defendant

Reviewing amount: (1) reprehensibility; (2) ratio to compensatory damages; (3) comparison between punitive award and civil or criminal penalties that can be imposed

i. **Ratio.** 9:1 punitive to compensatory is the general cap; exceptions: (1) egregious act with small damages; (2) injury is hard to detect; or (3) monetary value of noneconomic harm is difficult to determine.

A. **Malice.** Malice is the conscious disregard of the probability of harm or injury; jury must find malice in order to award punitive damages.

B. **Corporate Liability.** Corporation can be liable for punitive damages when: (1) principle or agent authorizes the wrongful act; (2) principle or agent recklessly authorizes an unfit employee to wrongfully act; (3) principle or agent wrongfully acts and it was within the scope of employment.

V. **Replevin and Ejectment.** Replevin is a legal remedy that forces defendant to return personal property, pay for the value of damage to the property, and pay for loss of use of the property. Ejection is a legal remedy to remove the occupier of property and return possession to the true owner.

VI. **Quasi-Contract.** SEE "RESTITUTION" BELOW

### EQUITABLE REMEDIES

Equity will not act if there is an adequate remedy at law

In some jurisdictions, defendant has no right to a jury trial

I. **Irreparable Injury.** There is irreparable injury to the plaintiff when there is no adequate legal remedy, which means that the legal remedy is not as complete, practical, and efficient as the injunction.

Examples: (1) loss of unique items such as real estate and family heirlooms; (2) loss of items difficult to replace due to shortage, monopoly, or unique benefit to plaintiff; (3) violation of intangible rights, such as civil rights; (4) bodily injury; (5) risk of multiple subsequent litigations, such as continuing nuisance or trespass; (6) where damages are difficult to measure; and (7) insolvent defendants.

II. **Undue Hardship.** Undue hardship is a defense to the granting of a legal remedy; defendant's hardship must be substantially disproportionate to plaintiff's benefit from the equitable remedy.

Factors: (1) defendant's hardship; (2) plaintiff's benefit; (3) defendant's culpability; (4) relationship between the parties; (5) plaintiff's diligence to avoid injury; and (6) whether

injunction provides public or private benefit.

- III. **Injunctions.** An injunction is a court order directing the defendant to do or refrain from doing something in order to prevent a future harm (forward looking).

Injunctions will be granted upon a showing of irreparable injury without undue hardship, ripeness, and without a showing of mootness.

Some important factors include: (1) more likely to be granted when there is a public interest at stake; (2) less likely to be granted to compel performance of a service; (3) less likely to be granted if difficult to draft or monitor; (4) less likely to be granted if the subject matter is outside court's expertise; (5) less likely to be granted when there are separation of powers concerns.

- A. **Ripeness.** An injunction can only be granted when there is a substantial or realistic threat of harm to plaintiff; does not require that defendant already committed a violation, just a propensity to act wrongfully.

Burden of proof is on plaintiff.

- B. **Mootness.** An injunction will not be granted where defendant has voluntarily stopped the objected to behavior with no real threat of returning to that behavior.

Courts will look at: (1) bona fide intent to stop; (2) effectiveness of the discontinuance; and (3) character of past violations.

Burden of proof is on defendant.

- C. **Scope.** Injunctions should be narrowly tailored to fit the scope of the injunction to the scope of the harm.

Two theories: (1) injunctions should put plaintiff in rightful position, no further; and (2) when equity steps in, court should use powers to do good even if it puts plaintiff in better than rightful position.

- D. **TRO.** A TRO is issued, sometimes without notice to restrained party, to preserve status quo until hearing on preliminary or permanent injunction, and is effective upon service to restrained party.

With notice: must provide declaration of notice with application for TRO.  
Without notice: issued if (1) it clearly appears that irreparable injury will be suffered before hearing on preliminary injunction and (2) applicant certifies to the court in writing what efforts, if any, have been made to give notice and reasons why notice should not be required.

Length: without notice can only last for 10 days, but may be extended for good

cause. With notice is not specifically addressed by statute. TROs that last beyond 10 days can either be ignored by defendant or treated as a preliminary injunction.

Appeal: TROs are not appealable unless they effectively dispose of the case.

- i. Status Quo. “Status Quo” means the last peaceable moment between the parties.
- ii. Order to Show Cause. Issued to restrained party upon service of the TRO; requires restrained party to explain why a preliminary injunction should not be granted.
- ii. Bond. A bond is an amount of money plaintiff puts up to protect defendant from a wrongfully awarded TRO or preliminary injunction. It is defendant’s responsibility to ask for a bond.

Amount: courts look at: (1) potential loss to defendant; (2) financial hardship on plaintiff; and (3) public importance.

Courts can increase or decrease amount based on changes in above, or extension of length of the TRO or preliminary injunction.

Liability, two views: (1) similarity of final judgment to TRO or preliminary injunction (but may require hearing on bond issue); (2) only if TRO or preliminary injunction vacated before final judgment (but may be vacated for reasons separate from facts at the time of their being granted).

Waiver, two views: (1) lawsuit brought in good faith, not frivolous; (2) only for good reason (e.g., failure to mitigate damages).

- E. **Preliminary**. A preliminary injunction is issued while the case is pending, last only until final judgment, is heard on noticed motion, and is issued to preserve status quo during litigation.

Preliminary injunction will be issued if: (1) plaintiff shows irreparable injury will occur while case is pending, before final judgment will be issued; (2) plaintiff shows strong likelihood of success on merits; (3) hardship to plaintiff is at all greater than hardship to defendant; and in some cases (4) public interest in granting the injunction.

Free speech: a preventative injunction that seeks to prohibit speech is usually unconstitutional.

- i. Bond. See TRO above

- F. **Permanent**. A permanent injunction is issued at the time of, and lasts beyond, final judgment, and is subject to the discretion of the judge. The irreparable

injury standard is lowest for permanent injunctions.

Theoretical distinctions: there are (1) preventative, which seek to prevent a possible harm happening; (2) reparative, which seek to prevent an already existing harm from continuing; and (3) structural, which restructure an institution that either systematically violates the law or whose very structure is unlawful, using a combination of preventative and reparative injunctions.

Nuisance: must be substantially certain to occur before a court will issue an injunction to prevent it.

- G. **Prophylactic.** A prophylactic injunction is one that prohibits the defendant from doing something that he normally would be allowed to do; orders the party to do more than it may be legally required to do

#### IV. **Injunction-Like Remedies.**

- A. **Writ of Mandamus.** A writ of mandamus orders a public or corporate official to perform a ministerial duty.
- B. **Writ of Habeas Corpus.** A writ of habeas corpus orders a person holding another in custody to bring the prisoner to court and justify the prisoner's detention.

#### V. **Contracts.**

- A. **Specific Performance.** Defendant is ordered to perform his precise contractual obligation.

Granted for: (1) rare or unique items; (2) rare or unique contracts; (3) real estate contracts; (4) services when public interest is at stake (rare); (5) consumer Goods; or (6) other proper circumstances

Irreparable injury rarely bars specific performance because legal remedies are rarely adequate.

- B. **Restitution.** Restitution damages are based on the concept of unjust enrichment, which is the benefit that plaintiff conferred on defendant; plaintiff can get any money given or benefit conferred on the defendant.

Examples: (1) plaintiff gives money by mistake; (2) plaintiff performs under a voidable contract; (3) money paid pursuant to a judgment that is later reversed; (4) plaintiff provides emergency services without a contract; (5) plaintiff pays more than his share of a joint obligation; and (6) when defendant committed a wrongful act and plaintiff elects restitution instead of another remedy (e.g., fraud, conversion, duress, etc.).

- i. Unjust Enrichment. Unjust enrichment is the retention of a benefit conferred by another, without compensation, in circumstances where compensation is reasonably expected; or a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.

Legal fictions and disgorging profits: restitution works to disgorge profits by creating legal fictions; (1) quasi-contract, (2) accounting for profits, and (3) constructive trusts.

- i. Quasi-Contract. Legal remedy (no irreparable injury) where courts will imply a contract in the absence of one; important when there is no other cause of action (no enforceable contract and no tort).
- ii. Accounting for Profits. Equitable remedy to recover defendant's profits that result from his wrongful actions; plaintiff is entitled to all profits, unless defendant can prove what amount of profits due to his own actions so long as plaintiff receives all due to him.
- iii. Constructive Trust. Equitable remedy that a court imposes against one who has obtained property by wrongdoing; it can be used to trace proceeds of specific assets through a series of exchanges.

**Tracing:** the process of tracking property's ownership or characteristics from the time of its origin to the present; where improperly converted assets of a trust estate or a constructive trust can be traced, preference will be given over unsecured creditors.

Requirements: (1) victim of fraud, misappropriation, or mistake; (2) can identify where money or property went.

- i. Lowest Intermediate Balance Rule. When property that is wrongfully acquired is commingled in wrongdoer's account, plaintiff is entitled to the lowest intermediate balance of that account; two presumptions: wrongdoer spends his own money first, and wrongdoer invests plaintiff's money first (if investment is successful).

Equitable lien, windfalls, and insolvent defendants: Plaintiffs who trace property into an account that goes up in value, plaintiff is entitled to the windfall, unless the defendant is insolvent and has other creditors, in which case plaintiff gets an equitable lien instead of a constructive trust.

Bona fide purchaser: plaintiff is allowed to trace through as many transactions as possible, but must stop when property is transferred to a bona fide purchaser; can only receive profits of the sale in such a case.

- C. **Reformation.** Reformation is an equitable remedy by which a court will modify a written agreement to reflect the actual intent of the parties, usually to correct fraud or mutual mistake in the writing (e.g., an incomplete property description in a deed).

Mutual mistake: reformation is the only available remedy; intended agreement must be proved by clear and convincing evidence.

Fraud: rescission is a possibility (see below); intended agreement must be proved by clear and convincing.

- D. **Subrogation.** Subrogation is the substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant.

Elements: there must be a (1) claim or debt, (2) paid in full by subrogee, (3) on behalf of defendant, (4) not voluntarily, where (5) subrogor had an enforceable right against the defendant, and (6) subrogee steps into subrogor's shoes to enforce that right.

- i. Collateral Source Rule. The collateral source rule is the doctrine that if an injured party receives compensation for the injuries from a source wholly independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay.

## VI. **Contempt.**

- A. **Criminal.** Criminal contempt is criminal punishment for a past offense. The defendant is a criminal defendant and gets substantially all the protections of criminal procedure, including a jury trial and proof beyond a reasonable doubt
- B. **Civil.** Civil contempt is prosecuted in the name of the plaintiff and largely controlled by the plaintiff. He initiates it with a motion, and up to a point he can abandon it or settle it. Violations must be proved by clear and convincing evidence.

There are two kinds of civil contempt: compensatory and coercive.

- i. Compensatory. Compensatory civil contempt is like an action for damages or restitution; it compensates the plaintiff for the harm suffered from defendant's violation of a court order. The court can also disgorge the contemnor of any profit gained from the contempt. There is no jury trial for compensatory civil contempt.
- ii. Coercive. Coercive contempt depends on a conditional penalty; defendant

is coerced to comply because the penalty will be bigger if he doesn't, or he won't get out of prison if he doesn't comply. Coercive fines are payable to the government, not to the civil plaintiff.

Indefinite imprisonment: coercive imprisonment must end if there is no reasonable prospect of successful coercion.

- C. **Distinguishing Civil and Criminal.** The distinction is in the proceeding, not in the contempt. The only difference that relates to defendant's act is the required state of mind: even inadvertent violations of the injunction are civil contempt, but only willful violations are criminal contempt.

Characteristics of criminal: (1) the contempt is punitive; (2) the contempt occurred beyond the court's view; (3) the complexity of the contempt; (5) deals with matters outside the needs of the case; (6) if it is determined or fixed; (7) the contempt is retrospective; (8) it is a big fine or punishment; (9) the necessity of criminal intent; and (10) prosecuted by the sovereign or a public party.

Characteristics of civil: (1) the contempt is compensatory, remedial, or coercive; (2) the contempt occurred in the court's view; (3) the simplicity of the contempt; (4) deals with the court's ability to supervise litigation; (5) the contempt is indeterminate (the key to ending the contempt is in the defendant's pocket); (6) the contempt is prospective; (7) the lack of the necessity of criminal intent; and (8) the parties are both private parties.

- D. **Collateral Bar Rule.** A defendant cannot violate an injunction and then challenge its validity; only applicable to criminal contempt.

Exceptions: (1) the injunction is transparently invalid; (2) the injunction has only a frivolous pretense of validity; (3) the issuing court does not have jurisdiction; or (4) when an attempt to challenge the injunction is only met with delay, indifference, and frustration.

## DECLARATORY RELIEF

A binding adjudication that establishes the rights and other legal relations of the parties; it is a statutory remedy available whether or not other adequate remedies exist.

- I. **Requirements.** There must be an actual case or controversy with real adverse legal interests; otherwise, the suit will be barred by the Constitutional ban on advisory opinions.
- II. **Ripeness.** A case is ripe when there is a real and substantial controversy; the suit cannot be speculative or frivolous, and generally cannot seek to resolve a dispute about procedures or substantive guidelines.

III. **Order.** The court order is a simple and short statement of the rights of the parties. There is no contempt for violating such an order, but it does provide the plaintiff with some claim or issue preclusion.

IV. **Declaratory-Like Remedies.** The following can probably be replaced by declaratory relief, but they remain individualized remedies.

A. **Quiet Title.** A statutory action that determines ownership of property; the court has the power to also complete relief by ordering the turnover of the property to the true owner.

B. **Cancellation.** The act of defacing or obliterating a writing, rendering it void; e.g., cancelling a note or mortgage when the statute of limitations has run, cancelling a deed obtained by fraud and undue influence, or cancelling common stock issued without consideration.

C. **Rescission.** A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach, or a judgment rescinding the contract; rescission cancels the contract and reverses all benefits exchanged.

Restitution will be necessary when the parties have exchanged benefits (see "Restitution" above)

E. **Replevin and Ejectment.** Replevin is a legal remedy that forces defendant to return personal property, pay for the value of damage to the property, and pay for loss of use of the property.

VII. **Remedial Defenses.**

A. **Unclean Hands and *In Pari Delicto*.** Unclean hands: he who comes into equity must come with clean hands; plaintiff who acts inequitably cannot obtain relief in equity. *In pari delicto* is the same concept, but it applies to suits at law.

*In Pari Delicto* test: defense may be used when the plaintiff participated in some of the same wrongdoing as defendant (old test: substantially equal to defendant).

B. **Unconscionability.** An agreement will not be enforced when it is procedurally and substantively unconscionable.

Procedural: procedurally unconscionable where it is adhesive (boilerplate form writing, relatively small print, party is required to sign without negotiation) and there was unequal bargaining power between the parties (weak bargaining power, lack of legal counsel, lack of business acumen).

Substantive: substantially unconscionable if it is uncommon in the industry, overly harsh or one-sided, or does not serve a reasonable business purpose.

C. **Estoppel and Waiver.**

Estoppel: an affirmative defense alleging good-faith detrimental reliance by defendant on a misleading representation by plaintiff; defendant argues it would be unfair to allow plaintiff to recover.

Elements: (1) plaintiff had knowledge, notice, or suspicion of the true facts; (2) plaintiff misled defendant through words, conduct, or silence; (3) defendant reasonably relied; (4) plaintiff knows, expects, or reasonably could foresee that defendant would rely; and (5) defendant would be injured by plaintiff's claim.

Waiver: an intentional relinquishment of a known right, or intentional conduct inconsistent with a right; waiving party must have had both knowledge of the existing right and the intention of forging it.

Distinction: waiver is unilateral; estoppel arises from course of dealings between two parties.

D. **Laches and Statute of Limitations.**

Laches: plaintiff's claim is barred if he unreasonably delayed the assertion and defendant was prejudiced by the delay; defendant must have relied on the delay.

Statute of limitations: a fixed time in which a suit must be filed; time begins to run when the cause of action occurs and suit is barred when time runs out.

Defenses: continuing violation, discovery rule (no chance to discover wrong), or fraudulent concealment.

- i. Concurrency. If there is both a legal remedy and an equitable remedy for the same underlying wrong, then the statute of limitations applies to both remedies; if there is only an equitable remedy, then only laches can be used.

VIII. **Random Rules.**

- A. **Remittitur**. A court can overturn a jury damages award if it is monstrously excessive or shocks the conscience of the court.

Federal plaintiffs may choose a new trial instead of accepting the amount the court awards after remittitur.

- B. **Sovereign Immunity**. Remedies for suits against the government or a government official are limited to prospective injunctive relief; such remedies cannot be retroactive money damages.

C. **Collecting Money Judgments.**

- i. Execution. Plaintiff gets a judgment, court issues a writ of execution, writ is delivered to a sheriff or constable, and he levies on judgment debtor's property and sells it.

Proceeds: go first to sheriff for costs of the execution, then to pay off liens on the property; one such lien is the plaintiff's judgment lien.

Exemption: some of debtor's property will be exempt; debtor keeps exempt property even if judgment remains unpaid.

- ii. **Garnishment**. An independent action against a third party who owes money to judgment debtor; garnishee can argue that it does not owe debtor, but if admits to owing the debtor, it pays the plaintiff instead of judgment debtor.