

# Remedies Fall 2006

## Modern American Remedies Introduction

A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged.

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There are four fundamental remedies:

Damages,  
Coercive  
Restitution  
Declaratory

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Non-fundamental remedies:  
ancillary

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Paying for Harm: Compensatory Damages

The Basic Principle: Restoring Plaintiff to His Rightful Position

United States v. Hatahley

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Original  
Position  
Rightful  
Position  
Current  
Position  
Time Absent Wrong  
Wrong  
Remedy

Tort damages are based upon the principle that the injured party be placed in the same position he would have been in had the tort not occurred (not the original position).

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Here, the trial judge erred by making a blanket damage determination instead of considering the damages actually incurred by each plaintiff: each had different levels of economic damage incurred as each had differently valued animals, and each suffered a different level of mental distress.

General damages: market value of the animals.

Special damages: everything else.

Value as the Measure of the Rightful Position

United States v. Fifty Acres of Land

The proper measure of loss is the value of the property. The value method avoids windfall gain to the plaintiff and windfall loss to the defendant (Law and economics theorist like the value method because it creates "economic dislocation").

Trinity Church v. John Hancock Mutual Life Insurance Co.

When diminution in value cannot be reasonably determined, Reasonable costs of reconstruction or replacement may be used as the measure of damages.

Decatur County Ag-Services v. Young

The proper time for valuation of the lost crop was the time of harvest.

Reliance and Expectancy as Measures of the Rightful Position

Neri v. Retail Marine Corp.

Expectancy damages is the loss that could have been avoided if the contract had been performed.  
Essential Reliance Damages are those costs that would not have been incurred if a contract had not been entered into.  
Incidental Reliance damages are those miscellaneous expenses that result of a breach such as storage costs, etc.

Chatlos Systems v. National Cash Register Corp.

The correct measure of damages for contract breach is the difference between the fair market value of the goods accepted and the value they would have had if they had been as warranted.

Smith v. Bolles

The proper measure of damages for the tort of fraud is the actual loss to the buyer, not the purported value of the goods. If this action were brought in contract, expectancy damages would probably be awarded today.

### Consequential Damages

Three limiting rules for the award of special damages.

- 1.) Certainty,
- 2.) Remoteness, and
- 3.) Avoidable consequences.

### Buck v. Morrow

The plaintiff may recover for the full market/contract damages even though loss is not realized. The recovery of special damages, however, will be limited to a reasonable time in which the rancher could cover.

General Damages: Contract/Market Damages

Special Damages: Value of lost cattle, extra wages.

### Meinrath v. Singer Co.

The only damages available for failure to pay money is money plus interest.

### Texaco v. Pennzoil Co.

In an action for tortious interference, the plaintiff is not limited to the same damages recoverable in a contract action.

### Limits on the Basic Principle

#### The Parties' Power to Specify the Remedy

### Kearney & Trecker Corp. v. Master Engraving Co.

The contract between the plaintiff and the defendant limited general damages to "repair or replace" and special damages were disclaimed. The court ruled that these two limitations were separate limitations, and the invalidation of one did not automatically invalidate the other. Therefore, plaintiff was able to get general damages under the UCC, but special damages remained unavailable.

Only if the limit on special damages were shown to be unconscionable would the disclaimer be invalidated.

### Farmers Export Co. v. M/V Georgis Prois

Because the goal of damages in contract is to put the plaintiff in the place they would have been had the contract been performed, a liquidated damages clause will only be upheld if it is:  
reasonable

at the time of contract, or  
in hindsight when compared to actual damages, and

2.) actual damages would be difficult to determine.

### Northern Illinois Gas Co. v. Energy Cooperative

Absent a contract provision to the contrary, a liquidated damages clause prevents a party in a breach of contract action from seeking an alternative measure of damages.

### Avoidable Consequences, Offsetting Benefits, and Collateral Sources

The Avoidable consequences doctrine provides that the harmed party must take reasonable steps under the circumstances to minimize damages. This doctrine acts as a means of avoiding waste by giving the wronged party an incentive to avoid loss and minimize waste (expenses incurred in an effort to minimize damages may be recovered). The avoidable consequence doctrine is a limitation on special damages only; not on general damages  
The Offsetting Benefit doctrine provides that a plaintiff's damages will be reduced by an offsetting benefit.  
The Collateral Sources rule allows for an award to the plaintiff from both the tortfeasor and a second completely independent source (note how the Collateral Source rule acts as an exception to the "rightful position rule").

### S.J. Groves & Sons Co. v. Warner Co.

Plaintiff need not choose the best means of mitigating damages, only one that is reasonable under the circumstances.

### Helfend v. Southern California Rapid Transit District

When the plaintiff is reimbursed or compensated by a source completely independent of the tortfeasor, the reimbursement or compensation will not reduce the damage award due from the plaintiff.

### Proximate Cause and Related Problems

In Tort, remoteness (proximate cause) does not cover amount of recovery but whether liability will be imposed or not. In Contract, remoteness (foreseeability) is determined under the doctrine of Hadley v. Baxendale whereas special damages are not recoverable unless reasonably foreseeable (general damages are always recoverable).

Pruitt v. Allied Chemical Corp.

Recovery may be obtained for damages that are proximately caused by the defendants negligence.

Evra Corp. v. Swiss Bank Corp.

Remoteness -- Here, the court looked to Hadley v. Baxendale and determined that special damages must be specifically foreseeable to the defendant for the defendant to be liable for them.

Avoidable Consequences -- Secondly, the defendant should not be allowed to recover from the defendant when the plaintiff had the power to avoid the consequences and failed to do so.

Southwestern Bell Telephone Co. v. Norwood

The foreseeability doctrine keeps damage awards in line with the amount for which the contracting party reasonably believed it might be liable for when the contract terms were created.

### The Certainty Requirement

A Plaintiff must prove with reasonable certainty the amount of the loss sustained.

Bigelow v. RKO Radio Pictures

A jury may make a just and reasonable estimate of damages based upon the evidence presented, and its award need not be based on precise mathematical calculations so long as there is no uncertainty as to liability.

Damages Where Value Cannot Be Measured in Dollars

Personal Injuries and Death

Beagle v. Vasold

Pain and suffering is considered general damages. Special damages are those damages resulting from the pain and suffering (medical bills, lost wages, etc.).

Etheridge v. Medical Center Hospitals

Statutory limitations on the amount of recovery for medical malpractice are constitutional so long as the statute's classification is not arbitrary and it bears a reasonable and substantial relation to the purpose of the law.

Smith v. Department of Insurance

There must be an overpowering public necessity in order to create a statute that limits a fundamental constitutional right.

Dignitary and Constitutional harms

Levka v. city of Chicago

A court may exercise its discretion in reducing a jury verdict when the evidence indicated the verdict is grossly excessive.

A verdict essentially punitive in nature cannot stand.

Variables to explain the range of awards are:

- 1.) nature of the defendant's conduct,
- 2.) nature of the plaintiff's reaction to the defendant's conduct, and
- 3.) the importance of the interest involved.

Carey v. Phipus

Violation of a right does give you the right to receive compensatory damages unless you can prove that there are damages caused by the violation. Absent such damages, the plaintiff is only entitled to nominal damages. Violation of due process

w/ following suspension

Actual Damages caused by the suspension

No damages caused by the suspension

If a suspension would have resulted even after due process, then plaintiff would have to show damages resulting from the violation alone.

If no suspension would not have resulted after a hearing, then the suspension alone is damages enough.

If there were no damages resulting from the suspension then only nominal damages would be awarded unless damages resulted from the violation itself.

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Taxes, Time and the Value of Money

Norfolk & Western Railway v. Liepelt

Income taxes which would have been paid must be considered to determine the measure of damages when the award is non-taxable (after tax dollars are used to calculate damages when the damage award is non-taxable).

Cavnar v. Quality Control Parking

There are three types of interest:

- 1.) Conventional "contractual interest such as that paid on a loan.
- 2.) Post-judgment "an statutory interest rate automatically paid on a judgement from the date of entry of the judgement to the date the judgment is satisfied.
- 3.) Pre-Judgment "a statutory interest rate paid on the judgment from the date of the cause of action until the date of the entry of the judgment. The pre-judgment interest payment is due and payable at the time of entry of the judgment and is subject to post-judgment interest (this is either judicially imposed or created by contract and is a fairly rare occurrence). Prejudgment interest should be awarded in a personal injury action on damages that have accrued by the time of judgment (this is in line with the rightful position rule because a dollar today is worth more than a dollar tomorrow).

Jones & Laughlin Steel Corp. v. Pfeifer

Generally, future damages are awarded in a lump sum, discounted to present value (PV). PV is the amount today necessary to have X dollars at some time N periods from now. In some cases, Installment payments may be awarded thereby avoiding the necessity of discounting to PV.

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Total Offset Method:  
(No Discount to PV / No adjustment for inflation)  
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Simple  
Almost certain to miss the rightful position by overstating damages  
Assumes future inflation will offset future market gains.  
Assumes wage increases would be offset by inflation.  
Market Interest Rate = inflation + real interest rate.

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Real Interest Rate Approach:  
(This is the most used method)

Â (Market Rate  $\hat{=}$  Inflation)  
minus (Wage  $\hat{=}$  Inflation)  
equals Real Interest Rate  
Step 1. Determine individual's future income flow.  
Step 2. Deduct inflation from the market interest rate to get the real interest rate.  
Step 3. Deduct inflation from the wage increase.  
Step 4. Net real interest rate and wage increase rate.  
Step 5. Use the net figure as the discount rate.

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Market Interest Rate Approach:  
Market interest rate is used as the discount rate w/o consideration of wage increase or inflation.

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Preventing Harm: the Measure of Injunctive Relief

Preventive Injunctions

The goal of damages is to put the plaintiff in the position which he would have been in, but for the defendant's harm.  
The goal of a preventive injunction is to put the plaintiff in his rightful position by preventing the defendant's harm.  
Four Essential Conditions for issuance:  
Real Danger of Injury  
The Injury must be Irreparable / No other Available or Adequate Remedy  
The Circumstances must Justify the Judges Exercise of Discretion in Granting this form of Relief.

Irreparable: Consequences of the harm can't be undone (money damages can't replace loss)  
Ripeness: A real danger that the feared injury will occur.

Humble Oil & Refining Co. v. Harang

A preliminary injunction will not issue absent a substantial likelihood of irreparable harm. The possibility of irreparable



harm is not enough; a showing that the irreparable harm will occur is needed.

Today, FRCP provides enough of a remedy for a situation when the defendant destroys evidence so that a preventive injunction would not be necessary.

In the end, the judge must use his own discretion in weighing the benefit to the plaintiff against the harm to the defendant.

Marshall v. Goodyear Tire & Rubber Co.

Because injunctive relief is a drastic remedy, the scope of injunctive relief should not be broader than the evidence warranting it.

Here, since the evidence only showed discrimination in one store, the issuance of a nationwide injunction was far broader in scope than was necessary.

Three Questions to ask when drafting an injunction:

- 1.) Is there a ripe threat of injury?
- 2.) What is the scope of the injury?
- 3.) What should be the scope of the injunction?

United States v. W.T. Grant Co.

For a permanent injunction to issue, there must be some cognizable danger of recurrent violations.

While the voluntary cessation of an illegal activity does not render an action to enjoin it moot, proof that the relief is needed must be shown.

Notice that the amount of proof to avoid mootness for justiciability purposes is not necessarily the same as that for injunctive relief.

Nicholson v. Connecticut Half-Way House

Speculation plus fear of future harm does not satisfy the requirements of ripeness necessary to grant injunctive relief.

The injury must be real and current.

In *Brainard v. Town*, the court issued an injunction preventing the opening of a garbage dump in a residential neighborhood because there was grounds to know what the result of a dump would be (smell, rats, etc.).

Reparative Injunctions

The goal of a reparative injunction is to prevent future harm caused by prior acts.

Bell v. Southwell

Here, the court issued an injunction voiding the election and ordering a new one even though that was not the state's substantive policy because it was the only way to put the plaintiff in the rightful position. Note that ripeness is less of an issue in reparative injunctions because the wrongful act has already occurred.

Winston Research Corp. v. Minnesota Mining & Manufacturing Co.

The court in this case issued a permanent injunction with a limited life of 24 months because the court believed that 24 months was the period of time necessary to put the wronged plaintiff back into their rightful position.

Bailey v. Proctor

Here, the court ordered that an unjustly created trust agreement be terminated even though it was currently under new and better management than when it had gone into receivership. The court said that it was the creation of the trust itself that was inequitable so the only way to put the wronged parties back into their rightful position was to dissolve the trust agreement.

Structural Injunctions

The Reach of the Injunction When Issued

Swann v. Charlotte-Mecklenburg Board of Education

The essence of equity jurisdiction is the power of the court of equity to mold each decree to the necessities of each case. Sometimes, as is here, the decree will go beyond the rightful position of the wronged party in order to correct a prior wrong.

Milliken v. Bradley

Again, even with the structural injunction, the decree may not go beyond the scope of the harm. Here, the court ordered integration of schools across county lines when the problem only existed in one county. On appeal, the court said that the scope of the injunction was too broad and the court could not order an inter-district decree.

## United States v. Virginia

The court ordered the integration of the Virginia Military Academy in order to put the female candidates in their rightful position of equal education.

## Lewis v. Casey

The remedy must be limited to correcting the violation that caused the violation in fact.

## Modifying Injunctions

### Rufo v. Inmates of the Suffolk County Jail

A party seeking a modification of a consent decree must establish that a significant and unforeseen change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstances.

## The Rights of Third Parties

### Hills v. Gautreaux

The scope of the order was not too broad because, although it extended beyond the complained of municipality, the order was directed at HUD, not the municipalities. The municipalities were merely effected by the order, not subject to it.

### General building Contractors Association v. Pennsylvania

Innocent third parties may not have significant burdens imposed upon them, but minor or ancillary burdens may be imposed against innocent third parties as a means of correcting a wrong.

### Missouri v. Jenkins

Three factors to consider when deciding to withdraw an injunction:

- 1.) Has there been satisfactory compliance?
- 2.) Is retention of control necessary?
- 3.) Does there appear to be a good faith commitment to the change?

Choosing Remedies

Substitutionary or Specific Relief

Irreplaceable Losses

Pardee v. Camden Lumber Co.

When the destruction of something irreplaceable, such as land, is threatened, equity will intervene.

Campbell Soup Co. v. Wentz

Specific performance of a contract for the sale of chattels is available if the legal remedy is inadequate due to the uniqueness of the chattels, or inability to acquire cover.

Thompson v. Commonwealth

Money damages are not sufficient to put a plaintiff in their rightful position if plaintiff would have to do make a significant effort to find cover.

Van Wagner Advertising Corp. v. S & M

Although the billboard space was unique, its economic value was measurable. Therefore, damages could compensate plaintiff with a great deal of certainty.

Undue Hardship

Factors that the court will look at to determine undue burden:

Disproportionality,  
Degree of intrusion  
Culpability of the defendant  
Who will benefit in no injunction?  
What effect on the public?

Ariola v. Nigro

Courts will not conduct the traditional balancing of equities in deciding whether an injunction should issue to remove encroachment on land where the encroachment is found to have been intentional.  
No intentional or negligent encroachment = Undue burden will be a defense to equitable relief.  
Intentional or negligent encroachment = No undue burden defense to equitable relief.

When a Public Nuisance is at issue

The court usually looks for situations that will result in more than a zero sum gain.  
In Boomer, the Court awarded damages instead of equitable relief because there was a public benefit (jobs) at stake as well as the interests of the plaintiff and the defendant.  
In Myers, the Court awarded damages instead of injunction because the defendants actions resulted in an overall societal gain.

Burden of the court

Northern Delaware Industrial Development Corp. v. E.W. Bliss Co.

The court will not grant specific performance if the order will result in the court having to take control of the carrying out of the daily operations.

Reasons of Substantive or Procedural Policy

Willing v. Mazzocone & Mazzocone v. Willing

Although specific relief would have been better for the wronged party, the wronged party had an adequate legal remedy in defamation. Also, the first amendment is a defense to equitable relief.  
In many jurisdictions, a remedy at law will be considered inadequate if the defendant is unable to pay a judgment or if a remedy at law will result in multiplicity of suits.

### American broadcasting Companies v. Wolf

Equity generally refuses to grant specific performance of personal services contracts but will issue "negative enforcement" thereby preventing an employee from performing a unique or extraordinary service for a competing employer during the term of the breached contract.

#### Preliminary or Permanent Relief

A preliminary injunction is a choice of remedies because it limits the harm that may occur until trial for which damages would be awarded.

The purpose of a preliminary injunction is to prevent or reduce the irreparable harm that may occur prior to final judgment.

### Los Angeles Memorial Coliseum Commission v. National Football League

The four basic criteria for granting a preliminary injunction are:

a strong likelihood of success on the merits,  
a possibility of irreparable harm to the plaintiff if the injunction is not granted,  
a balance of the hardships, and

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the advancement of public interests.

Note, each harm must be evaluated individually to determine if severe enough and irreparable so as to cause the issuance of an injunction.

### Lakeshore Hills v. Adcox

Although a preliminary injunction is usually issued to preserve the status quo, a preliminary injunction may be framed so as to change the status quo if the situation requires it.

### Coyne-Delany Co. v. Capital Development Board

FRCP 65(c) requires the plaintiff to post a bond to cover the defendant's possible expenses if the defendant prevails. A prevailing defendant is entitled to damages on an injunction bond unless good reason for not awarding damages exists.

## TRO (Temporary Restraining Order)

A "TRO" is easier to get than a preliminary injunction because:

1.) there is a very informal hearing,  
the length of the restrain is shorter than that of the preliminary injunction.

FRCP 65 states that a TRO w/o notice to the defendant can't last more than 10 days.

## Carroll v. President of Princess Anne

In the absence of a showing of impossibility, an ex-parte abridgement of First Amendment rights without notice is improper.

## Sampson v. Murray

Irrespective of label, all 10 day TROs are not appealable. All other types of TROs are appealable and are actually preliminary injunctions.

## Preventing Harm without Coercion: Declaratory Remedies

### Declaratory Judgments

A declaratory judgment is similar in function to a preventive injunction. It is available where there is a need to resolve uncertainty and thereby prevent harm.

A declaratory judgment may be followed by an injunction to enforce the judgment. There is no contempt if the declaratory judgment is not followed, but it does have full res judicata effect.

## Nashville, Chattanooga, & St. Louis Railway v. Wallace

A federal court may issue a declaratory judgment when an actual controversy exists. A declaratory judgment is not a mere advisory opinion because an adjudication of actual rights is made.

## Cardinal Chemical Co. v. Morton International

A defendant can use a declaratory judgment as a counter claim against a plaintiff.

Steffel v. Thompson

Declaratory relief may be given when the threat of enforcement of a disputed state statute exists.

Quiet Title and the Like

Declaratory remedies seem to serve the same purpose as these other remedies:

Legal Remedies for real property

- 1.) Ejectment to recover possession
- 2.) Trespass to recover damages

Legal Remedies for Personal Property

- 1.) Replevin to recover possession
  - 2.) Trover to recover damages
  - 3.) Detinue to recover possession
- Equitable remedies for real property

- 1.) Bill to remove a cloud on title
- Equitable remedies for real or personal property

- 1.) Cancellation (cancels a document)
  - 2.) Rescission (undoes a document)
  - 3.) Reexecution
  - 4.) Quiet Title (adjudicates a claim)
- Statutory Remedies

- 1.) Declaratory Judgment
- 2.) Bill to quiet title
- 3.) Bill to determine adverse title.

Newman Machine Co. v. Newman

This is a case for the standard non-statutory quiet title declaratory remedy. The declaratory remedy of quiet title is used to declare ownership by a person who is still in possession of his own property (legal remedies don't apply in this case).

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Declaratory Remedy

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Hey World â€" this property belongs to X

Injunction

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Hey Y â€ you can't sue X for the Property

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Reformation

Reformation is predicated on mutual mistake except when a unilateral mistake is procured by fraud. The victim of the fraud, then gets the benefit of what they thought was the bargain.  
If there is mutual mistake, and an actual agreement existed, reformation will reform the writing to match the agreement.  
If there is mutual mistake, and no actual agreement exists, rescission is the only remedy.

Hand v. Dayton-Hudson

Reformation is allowed despite the lack of mutual mistake if there is fraud involved by the other party.

Benefit to Defendant as the Measure of Relief: Restitution

Restitution looks to the benefit to the defendant as the measure of relief for the plaintiff.

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The remedy of restitution is not available for

- 1.) Breach of Contract (except for a contract for the sale of real property), or
- 2.) Negligence.

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Restitution is attractive in three circumstances:

- 1.) No other cause of action.
- 2.) Defendants gain exceeds the plaintiff's loss (most common).
- 3.) Defendant is insolvent (restitution gives plaintiff preference over general creditors as to certain property).

The Basic Principle: Preventing Unjust Enrichment

Restitution prevents unjust enrichment by giving the plaintiff the defendants gain (this places the plaintiff in a position that is better than the rightful position).

Olwell v. Nye & Nissen Co.

Where a defendant tortfeasor has benefited by his wrong, the plaintiff can waive the tort and bring an action in assumpsit for restitution.

Maier Brewing Co. v. Fleishmann Distilling Corp.

Plaintiff was awarded defendant's gain in restitution even though there was no proveable damages to the plaintiff.

Snepp v. United States

The restitutionary remedy of constructive trust does not require a showing of damages to the plaintiff, but a measure of benefit to the defendant. The measure of damages that would go into constructive trust, however, must be traceable to the defendant's wrong.

Constructive trust is a powerful and flexible device that allows tracing through multiple transactions, and multiple people, creating a preference for the plaintiff even if the defendant is insolvent.

Measuring the Benefit

Apportioning Profits

The purpose of restitution is to prevent unjust enrichment, not to punish. Therefore, an apportionment of the defendant's profits between wrongful and rightful profits is necessary.

Sheldon v. Metro-Goldwyn Pictures Corp.

The burden is on the defendant to show that apportionment is required. If the defendant does not show the necessity of apportionment then there will not be any and all the profits will go to the plaintiff.

USM Corp. v. Marson Fastener Corp.

Defendant had 0 profits until it stole trade secret from defendant. Therefore, there was no necessity to apportion defendant's profits and 100% went to plaintiff.

Reversing Transactions: Rescission and the Like

Reasons for rescission:

Fraud,  
Substantial Breach,  
Mutual mistake of fact,  
Unilateral mistake known to the other side, and  
Duress.

Mutual Benefit Life Insurance Co. v. JMR Electronics Corp.

Rescission reverses a transaction and seeks to place each party in the position they occupied prior to the contract.

Farash v. Sykes Datatronics

A party may recover for the expenditures made in reliance on the promise of another, even though the promisor received no benefit from such expenditures (similar to the case where a party to an unprofitable contract waits for the other party to breach and then sues in quantum meruit for the benefit to the other party).

Tracing Defendant's Benefit: Restitution and Insolvency

Hicks v. Clayton

A constructive trust gives the plaintiff a place of priority over other creditors because it captures the property, rescinds the contract and then places the parties in their original position.

In re North American Coin & Currency

A constructive trust cannot be imposed unless there is fraud and the assets are traceable.  
Requirements for Constructive Trust:

- 1.) Fraud or misappropriation, and
- 2.) Property which is identifiable.

In re Erie Trust Co.

When funds are wrongfully converted and placed into multiple accounts, tracing fictions will be used by the courts to determine what amount will be put into a constructive trust and what will be put into equitable lien. If the defendant is in bankruptcy, the amount of the theft is a cap on the amount of the award.

Step 1. All cash accounts are treated as a single account.

Step 2. Lowest intermediate balance rule is used ( the cash expended is that of the defendant and the cash remaining belongs to the plaintiff).

Step 3. Trace the expenditures out of the fund to acquired assets (money spent was plaintiff's money so assets acquired are plaintiff's assets).

Rogers v. Rogers

A plaintiff must trace the equitable interest into the property over which a constructive trust is being requested (in certain circumstances, this tracing requirement has been relaxed).

Robinson v. Robinson

The difference between the constructive trust and the equitable lien is that the plaintiff gets the property that is subject to the constructive trust, but the plaintiff only gets an interest in the property that is subject to the equitable lien.

An Equitable Lien is a remedy that gives you a right to enforce a property right. It is not a property right in and of itself.

Other Restitutionary Remedies

Subrogation, Indemnity, and Contribution

Subrogation

Â Subrogor

Subrogee v. Defendant

Subrogation Relationship

Underlying

Claim

There are three parties involved in every case of subrogation: the subrogee, the subrogor, and the third party.

American National Bank & Trust v. Weyerhaeuser Co.

Legal subrogation is a child of the law, while conventional subrogation is born in contract.

Subrogee takes the claim of the subrogor subject to all defenses available against the subrogor (statute of limitations, etc).

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There are four requirements for legal subrogation:  
Claim paid in full by the subrogee,  
The underlying claim must be caused by the 3rd party,  
The subrogor must have a cause of action against the 3rd party, and  
The Subrogee must not be a volunteer.

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Indemnity and contribution

Indemnity and contribution are variations on the same theme. Contribution is merely partial indemnification. Indemnification usually flows from a relationship between the two parties. Contribution usually involves multiple parties all of whom are liable either in contract or tort.

Actions to Recover Specific Property: Replevin, Ejectment, and the Like

Welch v. Kosasky

Rightful owners may recover both converted property and its estimated appreciated value if subsequent alterations have damaged the property.

Punitive Remedies

Punitive Damages

Punitive damages are awarded for:

Outrageous conduct,  
Special need for an award beyond compensatory damages because of:

Under-compensation to the plaintiff, or  
Needed as an incentive for plaintiff to sue,

Needed to deter defendant from acting in a manner that is profitable even though wrongful.

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Procedural controls on punitive damages:  
Joinder of parties can be restricted (no punitive awards for class action suits),  
Remitturer,  
Bifurcation of the action between the jury, who decides liability, and the judge who makes the punitive award.

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Substantive limitations on Punitive damages:  
Increased burden of proof for punitive damages,  
Increased threshold of culpability necessary for a punitive award,

Increased threshold for vicarious liability,  
Caps on punitive damages, and  
Limits on the types of cases that can be awarded punitive damages:

Not available in contract,  
Not available in wrongful death,

Limits on the number of punitive awards for the same issue.

Common Law and Statutes

Grimshaw v. Ford Motor Co.

To determine the adequate amount of punitive damages, the court will consider:

Degree of reprehensibility,  
Wealth of the defendant,  
Amount of compensatory damages,  
Amount necessary to deter further wrongful behavior.

The Constitution

BMW v. Gore

An excessive punitive award violates the defendants substantive due process rights. To determine if an award is excessive, the court will examine the courts adherence to procedural due process and use a three part test for substantive due process:  
Degree of reprehensibility – BMW was not trying to defraud, they had merely chosen a reasonable standard of disclosure.  
Ratio – the court looks at the ratio of compensatory and punitive awards.  
Comparable sanctions for comparable misconduct – what would the criminal sanction be for similar conduct.

Punitive Damages in Contract

Transcontinental Gas PipeLine Corp. v. American National Petroleum Co.

Plaintiffs may only receive punitive damages for breach of contract if there is at least one finding of an independent tort with accompanying actual damages. Punitive awards are not recoverable for breach of contract.

Ancillary Remedies

Enforcing the Judgment

## Enforcing Coercive Orders: The Contempt Power

Contempt is the process by which a court enforces its decisions. To be enforced by contempt, the order must be a detailed order and the defendant must have had the ability to conform to the order.

Contempt may be either:

Civil contempt (prospective in nature) “ which is instituted by a private party, or

Criminal Contempt (retrospective in nature) “ which is part of the underlying procedure.

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If a civil contempt order is vacated, the underlying civil contempt is also discarded.

If a criminal contempt order is vacated, the underlying contempt is not discarded.

International Union, United Mine Workers v. Clinchfield Coal Co.

A party that is subject to coercive civil contempt holds the keys to the jail in his pocket. A party subject to criminal contempt does not because he is being punished for past actions.

Because they are punitive in nature, a person subject to criminal contempt is entitled to all of the due process available to criminal defendants.

## Collecting Money Judgments

In most states, a mere judgment creates neither a lien nor an attachment. To collect on the judgment, the plaintiff must seek a writ of execution or a writ of garnishment.

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## Execution, Garnishment and the Like

Credit Bureau of Broken Bow v. Moninger

An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor without knowledge of the security interest.

Dixie National Bank v. Chase

You can only garnish money that is owed to the defendant by the garnishee. Typically, garnishees are banks or employers.

## Coercive Collection of Money

Inability to pay is a defense to criminal and civil contempt. To determine inability to pay, the court must examine his assets, income and expenses.

In re Marriage of Logston

A court may also use its contempt power to enforce a money judgment when attachment or garnishment are not available or practicable.

Preserving Assets before Judgment

City of New York v. CitiSource, Inc.

Prejudgment attachment will create a lien with priority from the date of attachment. The court will weigh the undue hardship to the defendant before ordering the attachment and will require a bond from the plaintiff. Unlike the bond for the preliminary injunction, the prejudgment attachment does not limit the liability of the plaintiff if the defendant prevails. Furthermore, in some states, wrongful attachment is an independent tort w/ strict liability. There are two requirements for obtaining a prejudgment attachment:

defendant is about to hide, or dispose of the asset for the purpose of avoiding the judgment.  
There is a likelihood that the plaintiff will succeed on the merits and not be subject to the defendants counterclaim (Note: plaintiff's contention that the defendants counter claim will fail will not constitute a bar on the attachment).

W.E. Erickson Construction v. Congress-Kenilworth Corp.

Two requisites for the imposition of a receiver:  
There is a special fund,  
Income arising from the special fund is in danger of loss from neglect, waste, misconduct or insolvency.

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