Remedies outline, Spring 2006. Monique Lillard.

I. ELECTION OF REMEDIES

A. Legal vs. Legal

1. *Brook v. James A. Cullimore & Co.* (Okla. 1967) (p374): where the plaintiff chose replevin (a legal remedy) as his remedy, the defendant, if he had the property, did not have the choice to compensate instead with money.

B. Legal vs. Equitable

1. Restitution:

a) *Olwell v. Nye & Nissen Co.* (Wash. 1946) (p569): "respondent here had an election. He chose to waive his right of action *in tort* and sue *in assumpsit* on the implied contract."

b) Contract rescission: plaintiff gets to choose whether to rescind or sue for damages (if rescission is available). (Note, though, that although rescission is often treated as an equitable remedy, it was often available at law.)

2. Double recovery:

a) *Forster v. Boss* (8th Cir. 1996) (p264): a court refuses to allow both money damages for a dock built on property that breached a land-sale contract *and* an injunction ordering removal of the dock. The court remands to allow the plaintiffs to elect which remedy they want. However, the court says that the punitive damages awarded were *not* duplicative of either the compensatory or injunctive relief, and allowed those to stand (but under state law, compensatories were required for there to be any punitives).

(1) Note that the general rule is that plaintiffs must take their legal remedy if they have one. But because this case is about land, where a legal remedy is prima facie inadequate, the plaintiffs get to choose between the legal and equitable remedy.

b) *Ariola v. Nigro* (Ill. 1959) (p401): plaintiffs get both (1) an injunction requiring defendants to remove encroachments onto plaintiffs' land and (2) damages for the damage that the encroachments caused. Note that this is not, of course, double recovery-- there are two separate aspects of harm (the past damage and the future (continuing) encroachment).

II. COMPENSATORY DAMAGES

A. STANDARD

1. **"Rightful Position"**: the fundamental principle of damages is to restore the injured party as nearly as possible to the position he would have been in but for the wrong-- for short, this is the plaintiff's "rightful position."

B. MEASURES

1. **Value**: the standard tort measure.

a) *United States v. Hatahley* (10th Cir. 1958) (p11): the plaintiffs here "were entitled to the market value, or replacement cost, of their horses and burros as of the time of taking, plus the use value of the animals during the interim between the taking and the time they, acting prudently, could have replaced the animals."

b) Possibilities

(1) Market value

(a) *United States v. Fifty Acres of Land* (1984) (p19): "just compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money. Deviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in a manifest injustice to owner or public."

i) The standard, FMV measure "achieves a fair balance between the public's need and the claimant's loss."

(b) Less than total loss: measure the diminution in market value. See *Trinity Church* (Mass. 1987) (p26).

(c) Used goods: there may be a market in a given used good (e.g., eBay, or see the Kelly Blue Book). If not, then you can look to replacement cost.

i) The Lemon Effect: "In the second hand market, full and fair market value cannot generally be obtained and sales are usually at a sacrifice." *DeSpirito* (R.I. 1967) (n5p32). However, courts usually ignore this and award used FMV anyhow.

(d) Flucuating FMVs: the standard rule is to value property at the time of the *loss*.

i) Crops: *Decatur County Ag-Services v. Young* (Ind. 1981) (p33): the court sticks to the traditional rule for crops--measure damages at the time of harvest--even though here the plaintiff had planned to hold his beans in hopes of benefiting from a price spike that did, in fact, come to pass. The court says that the defendant shouldn't have to bear plaintiff's speculation risk (although note that the price could have gone *down*, to the benefit of the defendant).

a. Note that, given the time-of-harvest rule, the plaintiff-farmer here could have covered at the time of harvest--but he very well may have been cash poor.

(e) Adjustment to old FMVs: when using an old FMV, you must adjust it to account for (1) inflation and (2) depreciation. Apparently, though, you do not adjust for *a*ppreciation (see *The Helen B. Moran* (2d Cir. 1947) (n6p23)).

i) Depreciation adjustments: book and tax depreciations are not controlling--the court will try to determine the *actual* depreciation

(f) Values unique to the owner: these may often move a court away from market value and to another measure.

i) Sentimental values: these can be verifiable in the market, sometimes. If not directly verifiable, you can look to related industries (such as businesses that convert Super8 film to DVD). The general rule is that sentimental value not verifiable in the market is not recoverable, but many courts will award something even if the only value of the loss was sentimental.

ii) *Trinity Church v. John Hancock Mut. Life. Ins. Co.* (Mass. 1987) (p26): "the general rule for measuring property damage is diminution in market value, . . . but for certain categories of property, termed special purpose property, there will not generally be an active market

from which the diminution in market value may be determined."

iii) *King Fisher Marine Service, Inc.* (5th Cir. 1984) (n13p26): "where one who has arrived at a bargain or unique value to him is deprived of it by the fault of another, and where he can convince the trial court that its value to him was real and not speculative or later devised, he should recover it."

(2) Repair (or restoration) cost

(a) *Trinity Church v. John Hancock Mut. Ins. Co.* (Mass. 1987) (p26): where a church--a "special purpose property"--was damaged, the court held that diminution in market value was not sufficient to measure loss, and so used restoration cost with a reasonableness limit: "Trinity is entitled to be compensated for the reasonable costs of restoring the church to the condition it was in prior to the Hancock excavation."

(3) Replacement cost

(a) Used goods: use FMV, if there's a "used" market; but if not, consider replacement cost.

(b) Component parts: courts will award replacement cost only for the damaged components or a larger whole. See *Untied States v. Ebinger* (2d Cir. 1967) (n11p26).

(4) Stream of income (capitalized earnings): the money that the owner stood to make from the property less the costs of running that business, all extended out for the useful life of the property. This could often be too speculative.

(5) Use value

(a) *United States v. Hatahley* (10th Cir. 1958) (p11): the plaintiffs here "were entitled to the market value, or replacement cost, of their horses and burros as of the time of taking, *plus the use value* of the animals during the interim between the taking and the time they, acting prudently, could have replaced the animals."

(6) Rental value

c) Rules

(1) Lowest valuation: a losing defendant is entitled to pay the lowest accepted value that will make the plaintiff whole.

(a) *O'Brien Bros. v. The Helen B. Moran* (2d Cir. 1947) (n6p23): during WWII, barges could not be had at any price. But when the United States sunk plaintiff's barge, it argued that it was only worth its purchase price, $16K, less 12 years of depreciation--and that it should not have to pay for the repair cost, $43K. The court agreed: plaintiff is entitled to be make whole, but defendant is usually entitled to have plaintiff made whole in the least expensive way.

(b) *United States v. Fifty Acres of Land* (1984) (p19): here, a city's landfill was condemned by the federal government. The landfill's FMV at the time of the taking was $225K, but the reasonable cost of a new, substitute one was $723K. The Court rejected the city's urging of $723K discounted to account for the longer useful life of a new landfill, and stuck with the traditional, objective, FMV measure.

(2) One satisfaction: plaintiff is entitled to only one recovery on each item of damage, even if the damage is an aspect of multiple legal claims.

(a) *Bender v. City of New York* (2d Cir. 1996) (n9p19): plaintiff allowed to recover only once for the same emotional distress, even though it was caused by multiple counts (false arrest, malicious prosecution, etc.)

(b) *United States v. Hatahley* (10th Cir. 1958) (p11): the court here did not allow a general pain and suffering award for the entire group of plaintiffs, divided equally--rather, the court required individual determinations for each plaintiff.

(3) Future losses: defendant is entitled to have damages for future losses reduced to present value. See *Trinity Church* (Mass. 1987) (p26).

(a) *Van Wagner Advertising Corp. v. S & M Ent.* (NY 1986) (p394)

2. Expectancy: or, the benefit of the bargain. The standard contract measure.

a) *Neri v. Retail Marine Corp.* (N.Y. 1972) (p37): a buyer's breach.

(1) UCC 2-708:

(a) (1) [The general rule] The measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages . . ., but less expenses saved in consequence of the buyer's breach.

(b) (2) [Lost-volume seller exception] If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages . . ., due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

b) Excessive expectancies

(1) *Chatlos Systems v. NCR* (3d Cir. 1982) (p48): seller's breach, under contract, giving expectancy compensation even though excessive.

(a) UCC 2-714: The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(b) Cf. *Texaco v. Pennzoil* (Tex. 1987) (n4p52): another example of seller's breach, under contract, giving expectancy even though excessive.

(2) *Smith v. Bolles* (1889) (p53):seller's breach, under tort, giving only reliance compensation (even though for an intentional tort--fraud).

c) Lost volume sellers: generally, dealer having an unlimited supply of standard-priced goods have do not have to offset their recoveries by the amount they receive in reselling the item they would have sold but for the breach.

(1) *Neri v. Retail Marine Corp.* (N.Y. 1972) (p37): the court plays with the UCC provisions a little bit to make sure a the recovery of a dealer, victim of a breaching buyer, is not offset by resale proceeds.

3. **Reliance**: an alternative contract measure. Note that a contracts plaintiff gets to elect whether to seek expectancy or reliance damages; the lowest-cost-alternative rule from tort damages does not apply here.
   a) Quasi-contract: *Farash v. Sykes Datatronics, Inc.* (NY 1983) (p629): the court, over a strenuous dissent, allows a plaintiff to recover his reliance costs for work done, even though the statute of frauds was triggered but not met and even though defendant did not benefit from the work. The dissent argues that there can be no recovery in quasi-contract unless the defendant benefited.
4. **Consequential Damages**: always viewed with skepticism, but less so in tort than in contract. Recall that *Hadley v. Baxendale* (Exch. 1854) (p121c) set out the general rule, for contracts at least, that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them.
   a) *Buck v. Morrow* (Tex. 1893) (p56): (limited) consequentials, for buyer's costs in covering, allowed to the extent they are the "natural and proximate" result of the breach.
   b) *Meinrath v. Singer Co.* (SDNY 1980) (p63): consequentials not allowed, because it is inefficient to prove them because they are so "remote" from the "main injury" (and therefore too speculative), the court says.
   c) *Texaco v. Pennzoil* (Tex. 1987) (p68): a tortious interference with contract case, giving the plaintiff the benefit of the more liberal view toward consequentials found in tort.
   d) *Evra Corp. v. Swiss Bank Corp.* (7th Cir. 1982) (p119): the court says that the "animating principle" of *Hadley* is that "the costs of the untoward consequence of a course of dealings should borne by that party who was able to avert the consequence at least cost and failed to do so." Here, the court (through Posner) felt that a delayed wire transfer that caused severe consequences to the plaintiff business did not justify consequentials: "these were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department."
      (1) Another rule emanating from this case is that courts will look "through" the pleadings to determine if a business tort is really a contract claim (as here). If so, it will apply the *Hadley* rule.
   e) Interest: in failure to pay money owed cases, actual interest paid or not earned may be allowed as consequentials (instead of the legal interest rate, which is generally given as a matter of course).
   f) "General" and "special" damages: although Lillard does not like these terms, they are used frequently. "General" damages are those that "necessarily result from the violation complained of" or that the "law implies or presumes." "Special" damages are those that "proximately resulted, but do no always immediately result" from the wrong.
5. **Intangible Losses**: we translate these into money, despite the certainty problems.
   a) Justifications
      (1) Deterrence
      (2) Compensation
      (3) Force internalization of conduct costs

(4) Retribution

b) Taxonomy

(1) Personal injury and other physical pain and suffering

(a) *Debus v. Grand Union Stores* (Vt. 1993) (p146): the court here allows plaintiff to make a per diem argument--an argument to the jury made in terms of *daily* pain and suffering--and says no specific jury instructions must accompany it.

(2) Mental pain and suffering

(a) Bystander liability

(3) Wrongful death

(4) Fears

(5) Triggering events

(6) Sorrows

(7) Lost dignity

(a) *Levka v. City of Chicago* (7th Cir. 1984) (p181): the court reviews a jury award for an unconstitutional strip search, comparing the facts and result here to those of similar cases. The court says the it will defer to the jury unless the "award is monstrously excessive or so large as to shock the conscience of the court." The court thought that this award was excessive, mainly due to the lack of aggravating circumstances found in similar awards, and ordered a remittitur from $50K to $25K.

(b) Defamation

(8) Lost constitutional rights

(a) *Carey v. Piphus* (1978) (p193): the Court considers the proper remedy for a procedural due process violation (lack of an adequate hearing before suspending pot-smoking students). It concludes that "rules governing compensation for [constitutional injuries] should be tailored to the interests protected by the particular right in question." Here, the Court says that the plaintiff has to prove actual, compensable damages, such as emotional distress, but can at least get nominal damages.

i) Note that if damages are "de minimis," there is no tort because there is no injury. But if damages are merely low, there is a tort, but the award may be only nominal damages.

(9) Lost companionship

(10) Lost consortium

(11) Lost enjoyment of life (hedonic damages)

c) Limits

(1) Evidence rules

(a) *Debus v. Grand Union Stores* (Vt. 1993) (p146): the court here allows plaintiff to make a per diem argument--an argument to the jury made in terms of *daily* pain and suffering--and says no specific jury instructions must accompany it.

(2) Remittitur

(3) Tort reform

(a) Methods of tort reform:

i) Limited recovery for "noneconomic damages"

ii) Abolish the collateral source rule

iii) Limit (or abolish) punitive damages

iv) Provide that judgments may be paid out as needed over the plaintiff's life (resulting in smaller recovery to early-dying plaintiffs and those with fewer medical bills than expected)

v) Abolish joint and several liability (leaving each defendant liable for only its proportional share of fault, and so placing the risk of loss from co-defendant insolvency on the plaintiff rather than the other defendants)

vi) Allow defendants to recover attorney fees from losing plaintiffs

vii) Limit contingency rates in fee agreements

viii) Shorten statutes of limitations

(b) Constitutionality: is tort reform constitutional? It could potentially violate:

- Right to jury trial
- Separation of powers
- Equal protection
- Due process
- Right to public trial and open court

i) *Etheridge v. Medical Center Hospitals* (Va. 1989) (p162): the court considers constitutional challenges to a state statute capping damages in medical malpractice actions.

a. Right to jury trial: the court rejects this challenge because "although a party has the right to have a jury assess his damages, he has no right to have a jury dictate the legal consequences of its assessment."

b. Due process: the court rejects this challenge, grounded on the theory that the damage cap statute established an "irrebuttable presumption" that plaintiff will be deprived of a full recovery, because there is no fundamental right to a full recovery and the statute satisfied rational basis scrutiny.

c. Separation of powers: the court rejects this challenge because the legislature has the power to modify the common law by statute, and thus is not interfering with the judiciary's powers.

d. Special law prohibition: the court rejects this challenge after determining that the classification here-- giving special privileges to physicians and insurers-- survives rational basis scrutiny.

e. Equal protection: the court says that the statute survives rational basis scrutiny here, too.

ii) *Smith v. Department of Insurance* (Fla. 1987) (p168): the court strikes down a cap on "noneconomic" damages, saying that it violates state constitutional provisions guaranteeing "access to courts" and "trial by jury." The court says that even a rational basis for the cap will not

make it constitutional: "we are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so."

C. LIMITS

1. **Avoidable Consequences**: if the plaintiff didn't actually benefit from the defendant's wrong (see offsetting benefits), would a reasonable person have avoided certain costs or even gained from the wrong?
   - **a)** *S.J. Groves & Sons v. Warner Co.* (3d Cir. 1978) (p92): the court recognizes the general rule that "when a seller refuses to deliver goods, the buyer must attempt to secure similar articles elsewhere as a prerequisite to receiving consequential damages." However, it also recognizes that, as UCC 2-715 says, a buyer can recover consequentials if they "could not *reasonably* be prevented by cover or otherwise." Considering all of the mitigation options that plaintiff had here, the court determines that none of them were sufficiently reasonable from the *plaintiff's, not the court's,* perspective at the time, and so allows consequentials.
     - **(1)** A second rule: the court notes that the *defendant* could have also avoided damages, by finding another supplier.
     - **(2)** Burden of proof: "the burden of proving that losses could have been avoided by reasonable effort and expense must be borne by the party who has broken the contract."
   - **b)** Eggshell plaintiffs: these are taken into account here.
   - **c)** Burden of proof: usually, avoidable consequences is treated as an affirmative defense, and so the burden is on the defendant to prove them.
     - **(1)** Uncertainty: it is resolved *against* the wrongdoer here.
       - **(a)** *S.J. Groves & Sons* (3d Cir.1978) (p92): "the rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interest of the defaulter to his own probable detriment."
       - **(b)** *Bigelow v. RKO Radio Pictures* (1946) (p129): "even where the defendant by his own wrong has prevented a more precise computation [of damages], the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data." Yet, still, "the wrongdoer must bear the risk of the uncertainty which his own wrong has created."
2. **Offsetting Benefits**: did the plaintiff save anything, or make any money, as a result of defendant's wrong? E.g., in a lost wages claim, plaintiff's recovery will be offset by any wages he earns in other jobs that he couldn't have held if he hadn't lost the first job.
   - **a)** Matching offset to the harm:
     - **(1)** Second Torts Restatement: take account only of benefits to the interest of the plaintiff that was harmed. E.g., a surgeon who operates without consent and causes pain and suffereing cannot show that the operation averted further pain

and suffering. But a defamation defendant can show that the publicity caused by the defamation helped the plaintiff earn large lecture fees *if* the plaintiff alleges lost income, but *not* if the plaintiff alleges only emotional distress and loss of reputation.

(2) Second Contracts Restatement: no such limitations.

3. Collateral Sources: the traditional rule is that there will be *no* offset for money from a collateral source. At least some tort reformers would abolish this rule.

a) *Helfend v. Southern California Rapid Transit District* (Cal. 1970) (p103): the court reaffirms its adherence to the collateral source rule, even when the plaintiff paid for the source (e.g., an insurance contract). This court, though, says that the collateral source "must be wholly independent of the tortfeasor"; but that is not the majority rule, which says that "application of the collateral source rule depends less upon the *source* of funds than upon the *character* of the benefits received."

b) The synagogue case (n9p109): here, a synagogue with inadequate insurance raised $20 million in donations after a negligently caused fire burned the old synagogue down.

c) Subrogation: many states have subrogation statutes, which allow insurance companies to collect the money that a plaintiff-insured later recovers from a lawsuit-- leaving the plaintiff with one recovery and the insurance company with the second.

d) Justifications:

(1) Make the wrongdoer pay for the wrong he wrought.

(2) Avoid punishing prudence (in retaining collateral sources, like insurance), and punish the wrongdoing instead.

(3) That it's "none of [defendant's] business" where plaintiff is getting his money.

(4) Deterrence, through forced internalization of conduct costs.

(5) Encourage generosity (where the collateral source is not an insurance policy).

(6) Provide tacit compensation for attorney fees and hassle costs.

4. Scope of Liability: limiting the scope of liability is a way to limit damages, obviously.

a) Proximate cause: requires "directness" and "foreseeability."

(1) *Pruitt v. Allied Chem. Corp.* (E.D. Va. 1981) (p110):

b) The (pure) economic harm rule: a negligence plaintiff who suffers no physical impact to his person or property cannot recover for other losses, i.e. so-called "economic harm."

(1) *Pruitt v. Allied Chem. Corp.* (E.D. Va. 1981) (p110): "it is commonly stated," the court says, "that the general rule has been that a plaintiff cannot recover for indirect economic harm." This court, though, is skeptical of the rule, but applies proximate cause ideas to stop the liability *somewhere*: "the court thus finds itself with a perceived need to limit liability, without any articulable reason for excluding any particular set of plaintiffs." It draws the line between the boat, bait shop, and marina owners suffering from this defendant's pollution, and seafood purchasers. The seafood purchasers suffered damages too indirect from the defendant's wrong, it says.

(2) *Evra Corp. v. Swiss Bank Corp.* (7th Cir. 1982) (p119)

5. **Certainty**: the general rule is that the wrongdoer has to bear the risk of uncertainty from his own wrong. But pure speculation is still forbidden.
   - **a)** *Bigelow v. RKO Radio Pictures* (1946) (p129): "even where the defendant by his own wrong has prevented a more precise computation [of damages], the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data."
   - **b)** *Brink's Inc. v. City of New York* (2d Cir. 1983) (n5p137): here, the defendant's employees were stealing coins from the parking meters it was contracted to unload. The city argued for damages in the amount of money that its collections went up when it changed contractors. The court rejected the defendant's argument that, because a bunch of other things (like a transit strike and the end of gas rationing) changed at the same time the city changed contractors, this measure was too speculative.
   - **c)** Justifications for the general rule: it prevents windfalls to defendants and prevents inducing worse wrongdoings (so bad that it's impossible to determine how bad they were).
   - **d)** Lost profits: these are always speculative to some extent, and plaintiff must overcome this. Common evidence offered is before-and-after profits, comparisons to similar businesses, expert testimony, and statistical modeling.
     - **(1)** New businesses rule: some courts have an absolute no-recovery rule here, on the grounds that it would be purely speculative. The more recent trend, though, has been to abandon the per se rule and allow proof, if possible, of lost profits to a new business.
       - **(a)** What is a "new business," though? Do new product lines fall within the rule? New geographic marketing areas? Is a one-year old business still new? A two-year old business?

6. **Private Limits**
   - **a) Taxonomy**
     - **(1)** Product warnings
     - **(2)** Contract disclaimers
     - **(3)** Arbitration agreements
     - **(4)** Contractual limitations: such as those limiting a consumer to repair or replacement.
     - **(5)** Liquidated damages: these provisions can specify either an amount or a formula for reaching a specific amount.
       - **(a)** Over- and under-liquidated damages:
         - **i)** Liquidated damages are *overliquidated* if the estimate of damages turns out to be too high. A court will scrutinize these to determine whether they serve as a penalty, looking at two factors:

           (1) Certainty: was the amount of damages difficult to ascertain at the time of contracting? If so, it's more likely that the provision will be upheld.

           (2) "Ballparking": does the amount bear a reasonable relationship to the loss? If so, it's more likely that the provision will be upheld.

a. *Ashcraft & Gerel v. Coady* (D.C. Cir. 2001) (p83): a court upholds a high liquidated damages amount in a lawyer's employment contract, finding it reasonable after considering the lawyer's position in the firm (head of its Boston office) and the expected loss the firm would suffer from the lawyer's breaching departure.

b. Second Contracts Restatement: "A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

ii) Liquidated damages are *underliquidated* if the estimate of damages turns out to be too low. A court will scrutinize these to determine the parties' intent and whether they were unconscionable.

a. *N. Ill. Gas Co. v. Energy Cooperative* (Ill. 1984) (p88): the court allows an underliquidated formula damages provision in a UCC Article 2 contract.

1) UCC 2-718(1): Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

2) UCC 2-719(1): . . .

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(b) *Kearney & Trecker Corp. v. Master Engraving Co.* (N.J. 1987) (p74): here, a contract for goods both (1) excluded consequential damages and (2) limited remedies to repair or replacement. The good turned out to be so bad that the buyer ultimately no longer wanted it repaired or replaced. The court held that even though the remedies provision failed, it did not invalidate the provision excluding consequential damages (other jurisdictions, however, are split on this issue). This court specifically noted that the plaintiff was a sophisticated buyer.

i) UCC 2-719(3): Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

III. EQUITABLE REMEDIES

A. STANDARD

Comment: Note the various maxims of equity:

* 1 Equity regards as done that which ought to be done.
* 2 Equity will not suffer a wrong to be without a remedy
* 3 Equity is Equality (Aequitas est aequalitas)
* 4 Equity regards substance rather than form
* 5 One who seeks equity must do equity
* 6 Equity aids the vigilant, not those who slumber on their rights (Vigilantibus non dormientibus aequitas subvenit.)
* 7 Equity imputes an intent to fulfill an obligation
* 8 Equity acts in personam (Aequitas agit in personam)
* 9 Equity will not concern itself with abstract wrongs
* 10 Equity abhors a forfeiture
* 11 Equity does not require an idle gesture
* 12 One who comes into equity must come with clean hands
* 13 Equity delights to do justice and not by halves
* 14 Equity will take jurisdiction to avoid a multiplicity of suits
* 15 Equity follows the law (Aequitas sequitur legem)
* 16 Equity will not aid a volunteer
* 17 Between equal equities the law will prevail
* 18 Between equal equities the first in order of time shall prevail (Qui prior est tempore, potior est iure)
* 19 Equity abhors superfluous things (Aequitas supervacua odit)

1. **Irreparable Injury**, or irreplaceable loss, or no adequate remedy at law. Laycock argues that "a legal remedy is adequate only if it is as complete, practical, and efficient as the equitable remedy."
   - **a)** *Pardee v. Camden Lumber Co.* (W.Va. 1911) (p363): the court declines to follow the traditional rule for irreparable injury from trespass-- that the trespass must either be irreparable injury in itself or else the trespasser must be insolvent-- because that the timber here was standing. The court analogizes standing timber to heirlooms, and also justifies its result by saying that the timber was connected to real estate, to which an injury is prima facie irreparable. "The error [of the old rule] has been revealed by the great change of conditions. Timber having become scarce and of great value, the layman, lawyer, and judge has in recent years given the subject more careful, critical, and profound consideration."
   - **b)** *Continental Airlines v. Intra Brokers* (9th Cir. 1994): the court finds injunctive relief appropriate where a broker violated the non-transferability provisions of airline coupons. The court said that even though the airline could not demonstrate financial harm, it could show other harm and that because that harm was immeasurable in dollars it was irreparable.
   - **c)** *Winston Research v. Minnesota Mining & Mfg. Co.* (9th Cir. 1965) (p271): in this case about breaching departing employees who left with trade secrets, the court determines that damages would be too remote or speculative-- because of these certainty problems, an injunction better addressed the harm.
   - **d)** *Brook v. James A. Cullimore & Co.* (Okla. 1967) (p374): replevin, because it's a legal remedy, is not subject to the irreparable injury rule.
   - **e)** Unique property: there is no adequate remedy for harm to unique property, especially real estate. See *Pardee*.
     - **(1)** But see *Van Wagner Advertising Corp. v. S & M Enterprises* (N.Y. 1986) (p394): "the word 'uniqueness' is not a magic door to specific performance. A

distinction must be drawn between physical difference and economic interchangeability . . . . at some level all property may be interchangeable with money."

(2) But see also *Boomer v. Atlantic Cement Co.* (NY 1970) (p405): the court refuses to enjoin a major nuisance, affecting land and property values, because the defendant had invested $45 million and employed more than 300.

f) Insolvency: a wrong that might otherwise be remedied with money may have no inadequate remedy at law if the defendant is insolvent. See *Pardee v. Camden Lumber*; but see *Willing v. Mazzocone* ("insolvency of a defendant does not create a situation where there is no adequate remedy at law. In deciding whether a remedy is adequate, it is the remedy itself, and not its possible lack of success that is the determining factor.")

2. Real Danger of Real Harm

a) Real Danger:

(1) *Humble Oil v. Harang* (E.D. La. 1966) (p233): the court refuses to issue a preliminary injunction to enjoin a litigant from destroying relevant documents, saying that injunctions are "not justified merely because it is alleged that, in the absence of judicial prohibition, an event may occur, the consequences of which cannot be reveresed . . . . [the movant] must demonstrate that there is *real danger that the acts to be enjoined will occur*, [and] that there is no other remedy available." "It does not suffice to say "Issue it because it won't hurt the other party."

(2) *Marshall v. Goodyear Tire & Rubber Co.* (5th Cir. 1977) (p241): this case shows the nexus between injunction scope and imminence of harm: the plaintiff had evidence of age discrimination at only one of defendant's stores, and this did not warrant, the court seemed to think, a nationwide injunction. "An injunction's scope should not exceed the likely scope of future violations."

(3) Proving real danger:

(a) Previous instances of the same bad act by the same defendant

(b) Defendant previously lying about what it was going to do, especially if it lied to a court

(c) Acts by the defendant showing contrary intent--intent to do the harm sought to be enjoined

b) Real Harm:

(1) *Nicholson v. Connecticut Half-Way House, Inc.* (Conn. 1966) (p252): the court refuses to enjoin a halfway house from beginning operation, in a motion by residents in the neighborhood. The court distinguishes cases where a dump and an undertaker were enjoined, saying that those were known quantities--known to be nuisances. "No court of equity should ever grant an injunction merely because of the fears or apprehensions of the party applying for it. Those fears or apprehensions may exist without any substantial reason."

c) Voluntary cessation

(1) *United States v. W.T. Grant Co.* (1953) (p247): "Along with its power to hear

the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs . . . . *The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive*."

(a) Jurisdictional mootness: "voluntary cessation of allegedly illegal conduct does *not* deprive the tribunal of power to hear and determine the case, i.e., does *not* make the case moot."

3. Favorable Balance of the Hardships that the remedy will cause.

a) *Ariola v. Nigro* (Ill. 1959) (p401): here, the court must balance the hardships of an injunction requiring defendant to remove encroachments onto plaintiffs' land, saying that although "an injunction will be denied where the encroachment is slight and the cost of removing it great as compared with any corresponding benefit to the adjoining owner, if the encroachment is *intentional*, neither the expense involved, nor the absence of damage to the land encroached upon will defeat the right to an injunction." Moreover, the court also awarded damages to plaintiff to cover the cost of repair to damage caused by the encroachments to for the cost to restore the premises to their original condition.

b) *Boomer v. Atlantic Cement Co.* (NY 1970) (p405): the court refuses to enjoin a major nuisance, affecting land and property values, because the defendant had invested $45 million and employed more than 300.

c) *Van Wagner Advertising Corp. v. S & M Ent.* (NY 1986) (p394): "specific performance should be denied on the ground that such relief would be inequitable in that its effect would be disproportionate in its harm to defendant and its assistance to plaintiff," even though the case was about real estate. The court, instead, awards damages for the duration of the plaintiff's lease.

d) *Willing v. Mazzocone* (Pa. 1978) (p421): the court refuses to enjoin an (arguably defamatory) insolvent, lone protestor. The hardship on the plaintiff is continued protesting and inability to collect damages even if provable (because of the defendant's insolvency), but the hardship on the plaintiff is a prior restraint on her speech.

4. Other Considerations

a) "Give it a chance": *Nicholson v. Connecticut Half-Way House* (Conn. 1966) (p252): the court refuses to enjoin a halfway house opposed by its neighbors. The court says that the neighbors haven't proved that the house will be a nuisance (that is, they did not prove "real harm"), and tacitly seems to be saying that the halfway house should get at least one chance to work.

b) Local interest in managing own affairs: *Hutto v. Finney* (1978) (p307): Rehnquist, dissenting in this affirmance of an injunction requiring structural reform of the Arkansas prison system's "punitive isolation," called for a "proper respect for the interests of state and local authorities in managing their own affairs."

(1) See also *Lewis v. Casey* (1996) (p313), where the Court refused to uphold a structural injunction in part because it "failed to give sufficient substantive deference to the legitimate penological interests" of the prison authorities.

c) Intentionality: torts that are intentional (and, possibly, contract breaches that are

flagrantly intentional) may militate in favor of an injunction. See, e.g., *Ariola v. Nigro* (tort) and *Campbell Soup* ("We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has *deliberately* broken his agreement.")

d) Notice to defendant: if the defendant has notice that he is breaking the law or infringing plaintiff's rights, a court may be more likely to grant an injunction. See *Ariola v. Nigro*.

e) Plaintiff's diligence or acquiescence in asserting his rights: see *Ariola v. Nigro*.

f) Administrative efficiency: whether or not an injunction will be efficient for the court to administer may be considered by a court in determining whether or not to issue an injunction. See *Ariola v. Nigro* and *Campbell Soup* ("We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes . . . .").

g) Benefit to the public

h) Constitutional policy:

(1) *Willing v. Mazzocone* (Pa. 1978) (p421): the court refuses to enjoin an insolvent defendant from marching around in the town square with a sandwich board, whistle, and cowbell in protest of a law firm's treatment of her. The court has grave concerns because an injunction against this would be a prior restraint on speech, and ignore the defendant's insolvency on both doctrinal and policy (that your freedom of speech should not depend on your net worth) grounds.

(a) *Mazzocone v. Willing* (Pa. 1976) (p425): the lower court decision in this case granted the injunction. This court characterized the defendant's accusations as false and defamatory, and the harm to the plaintiff law firm as difficult to measure and irreparable. It also mentioned the risk of a multiplicity of suits.

(2) First Amendment analysis:

(a) Is it speech?

(b) If so, how does it rank on the hierarchy of speech?

(c) Is it protected speech?

(d) Was the speech restrained or abridged by the government?

(e) If so, is the restraint content-based?

(f) What's the government interest in the restraint?

(g) Now, balance the speaker's interests against the government's.

i) Preference for jury trials: which are not available in equity, under the Sixth Amendment.

B. INJUNCTIONS

1. Taxonomies

a) Legal Taxonomy

(1) Anticipated Injunctions

(a) *Griffin v. County School Board* (4th Cir. 1966) (p802): here a court holds a defendant in contempt *before an injunction is even issued*. "Although

this court had not issued an injunction against the appropriation of moneys . . . the Board knew that if the plaintiffs succeeded this would be the ultimate decree . . . . The diversion of the res was held to be contumacious because it tended to defeat *any* decree which the court *might ultimately* make in the cause." That is, "the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court."

(2) Temporary Restraining Orders

(3) Preliminary Injunctions

(a) Temporary Restraining Orders

i) FRCP 65:

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be hear in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, *not to exceed 10 days*, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period . . . . In case a [TRO] is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time . . . . On 2 days' notice to the party who obtained the [TRO] without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification . . . .

a. Thus, the duration of a no-notice TRO can be no more than 10 days, unless an extension is granted. The maximum duration of a noticed TRO is unclear, because the rule does not specify.

1) *Sampson v. Murray* (1974) (p464): "a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions." Thus, the TRO (preventing a federal agency from dismissing the plaintiff-employee)here became a preliminary injunction, was scrutinized for irreparable harm and none was found; so the injunction was lifted.

2) *Granny Goose v. Teamsters* (1974) (p471): a TRO with only informal notice, not limited by its terms to ten days' duration, is still a TRO and expires in ten days. To be real "notice" for FRCP 65(b) purposes, there would have to be a "hearing in which the defendant is given a fair opportunity to oppose the application and prepare for such opposition." (How come this TRO expired, and didn't become a preliminary injunction, as it did in *Sampson*??)

b. Review: TRO's are not appealable, but this is merely a judge-made rule.

ii) *Carroll v. President of Princess Anne* (1968) (p459): the Court here sets aside a TRO against a white supremacist organization because of procedural defects: the order was issued ex parte but no reason was given why the defendants couldn't have been notified. The TRO, however, would have acted as a prior restraint on speech, so this case may be limited to free speech (or perhaps all First Amendment, or perhaps all due process) cases.

(b) Standard: see *Los Angeles Coliseum v. NFL*. See also Posner's formula: grant a preliminary injunction if-- P x Hp > (1 - P) x Hd, where P is the probability that the plaintiff will win, Hp is the potential harm of denial to plaintiff and Hd the potential harm of issuance to defendant.

i) Strong likelihood of success on the merits

ii) Possibility of irreparable injury to plaintiff if preliminary relief is not granted

a. This potential harm must be greater than the harm that will suffice for a permanent injunction. That is, preliminary injunctions are harder to get than permanent injunctions.

iii) Balance of hardships favoring the plaintiff

a. *Los Angeles Memorial Coliseum Comm'n v. NFL* (9th Cir. 1980) (p440): "At least a minimal tip in the balance of hardships must be found even when the strongest showing on the merits is made."

b. It is okay to consider hardship to third parties. See *Los Angeles Coliseum*, where the court considered harm to the City of Oakland, not a party to the suit.

iv) Advancement of the public interest (in certain cases)

v) Preservation of the *status quo ante litem* (or the last peaceable and uncontested state between the parties): as opposed to alteration of it

a. But see *Lakeshore Hills v. Adcox* (Ill. 1980) (p447): here, in affirming an injunction requiring a homeowner to remove his pet black bear, the court said that although "the injunction here altered rather than preserved the status quo, . . . this does not require reversal."

(c) Injunction bonds: these are used to soften the possibility of a mistakenly issued preliminary injunction.

i) FRCP 65(c): "No restraining order or preliminary injunction shall

issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

a. Even though this language doesn't suggest the possibility, a court can *waive* an injunction bond (e.g., for a very wealthy plaintiff).

ii) *Coyne-Delaney Co. v. Capital Development Board* (7th Cir. 1983) (p450): the court says that a defendant generally must get damages on the bond if the preliminary injunction is reversed. "The judge must have a good reason for departing from such a principle in a particular case. It is *not* a sufficient reason for denying costs or damages on an injunction bond that the suit had as in this case been brought in good faith . . . . A good reason for not awarding such damages would be that the defendant had failed to mitigate damages."

a. But, though, the bond will generally be "the limit of the damages the defendant can obtain for a wrongful injunction, even from the plaintiff, provided the plaintiff was acting in good faith." (Note that some states have a statutory exception to this rule.)

(d) *Los Angeles Memorial Coliseum Comm'n v. NFL* (9th Cir. 1980) (p440): the court reverses an injunction prohibiting the NFL from preventing the Raiders from moving to LA, saying that (1) there was an insufficient possibility of irreparable injury because all potential harms (e.g., lost revenues) could be remedied with money damages and (2) the balance of the hardship has to tip at least a little bit in plaintiff's favor, and it did not here.

(e) *Humble Oil v. Harang* (E.D. La. 1966) (p233)

(4) Permanent Injunctions

(a) Perpetual Injunctions: these are permanent injunctions that go on forever.

(5) Specific Performance: a specialized kind of injunction, and a disfavored remedy.

(a) <u>The standard</u>: is basically the general equitable remedy standard, but there is at least tacit special emphasis on the inadequacy of the legal remedy--specific performance will be granted only if it is *virtually impossible* to replace the property on the open market.

i) <u>Granting specific performance</u>:

a. *Campbell Soup Co. v. Wentz* (3d Cir. 1948) (p383): the court here grants specific performance for Campbell's against a carrot seller, articulating the standard thus: "A party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate." The court mentioned, in reaching its conclusion, that Campbell's contracted for a specific type of carrots and needed to maintain uniformity in the appearance of its food.

1) Also, the court made deterrence and efficiency points: "We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or

other time-consuming processes against one who has *deliberately* broken his agreement."

b. *Kaiser Trading Co.* (n4ap386): granted where world supply of the good was limited and mostly committed in long-term contracts.

c. *Eastern Airlines* (n4bp386): granted where full was scarce due to the Arab-Israeli war. Even though the court said cover wasn't impossible, it said that breach would cause "chaos and irreparable damage."

d. *Curtice Bros.* (n4cp386): granted where the court doubted that reliable supply was available on the open market.

e. *Frame* (n4dp386): granted to preserve a road contractor's access to a gravel pit it owned in common with the defendant, merely because plaintiff had no other source of gravel.

ii) Denying specific performance:

a. *Van Wagner Advertising Corp. v. S & M Ent.* (NY 1986) (p394): the court (1) denies that all real estate is unique and that thus harm involving it automatically calls for an equitable remedy; and (2) says that the hardship to the defendant of specific performance here, where defendant canceled plaintiff's lease in order to demolishing the property and improving it, outweighed the hardship to the plaintiff of losing its advertising space. Thus, it refused to grant specific performance and instead gave plaintiff damages through the end of its lease.

1) Note how the post-judgment bargaining between these parties will be drastically different depending on whether specific performance or damages are awarded.

b. *Duval & Co.* (n4ep386): *not* granted where cotton was scarce due to drought-- "the mere fact that cotton prices soared after this alleged contract is not in itself adequate."

(b) Efficient breach:

i) Efficient vs. "opportunistic" breach?:

b) Purpose Taxonomy

(1) Preventive

(a) *Humble Oil v. Harang* (E.D. La. 1966) (p233):

(b) *Marshall v. Goodyear Tire & Rubber Co.* (5th Cir. 1977) (p241):

(c) *Nicholson v. Connecticut Half-Way House, Inc.* (Conn. 1966) (p252):

(2) Reparative

(a) *Bell v. Southwell* (5th Cir. 1967) (p260): here, a federal court asserts that it does have the power to set aside a state election and order a new, special election--at least when there was gross and unconstitutional discrimination during the course of the original election. And it uses that power to make just such an order.

(b) *Forster v. Boss* (8th Cir. 1996) (p264): the court will not allow double recovery in the form of both an injunction and money damages for the same harm. Punitives, though, were not duplicative and could be had in

addition to money damages or an injunction (as long as there was at least some money damages, because of a state law requirement).

(3) Structural

(a) *Hutto v. Finney* (1978) (p307): the Court affirms a broad injunction requiring the Arkansas prison system to reform its "punitive isolation" policies, saying that especially due to the history in this case of injunctions that had not worked, the district court "had ample authority to go beyond earlier orders and to address each element contributing to the violation."

2. Scope

a) Court's power:

(1) *Bailey v. Proctor* (1st Cir. 1947) (p276): the court broadly reads its power to liquidate a trust. Indeed, the trust here had been grandfathered in as okay by Congress, but the court, looking to an old receivership (the company had since become solvent again and removed trustees guilty of abuse), finds jurisdiction to supervise the trust. "Once having properly assumed jurisdiction of a corporation or trust by appointing receivers under its general equity power, a court should not terminate its supervision until or unless it becomes satisfied that equity has been done."

(a) The court here doesn't even really look at the underlying violations of law. Rather, it seems to act as a "roving commission to do good," saying that "the important question is not the personal honesty, integrity or ability of appellants or their proposed management, but rather the lack of balance and equality of control in the capital structure of the trust."

(b) Contrast with *Winston Research Corp. v. Minnesota Mining & Mfg. Co.* (9th Cir. 1965), where the court required very specific evidence before issuing a quite narrow injunction. This court does not consider itself a "roving commission to do good," but rather is simply seeking to restore the plaintiff as near as may be to the position it would have occupied but for the violation.

(c) See also *Bell v. Southwell* (5th Cir. 1967) (p260): here, a federal court asserts that it does have the power to set aside a state election and order a new, special election--at least when there was gross and unconstitutional discrimination during the course of the original election. And it uses that power to make just such an order. This court's take on equitable discretion seems to fall somewhere in between *Winston Research* and *Bailey*.

(2) *Milliken I* (p311c): a court can't order people who have not been proved to have done wrong.

(3) *Missouri v. Jenkins* (*Jenkins III*) (1995) (p295): a court can order a tax to pay for structural injunctions (desegregation orders, at least).

b) *Marshall v. Goodyear Tire & Rubber Co.* (5th Cir. 1977) (p241): the court remands for consideration of injunction scope where the Secretary of Labor is seeking a *nationwide* injunction, gainst age discrimination by Goodyear, based only on evidence of age discrimination at one particular store. The court distinguished this case from prior cases granting broader injunctions, on the grounds that in those cases the evidence indicated company policies were discriminatory and that hiring was done centrally. "Absent a showing of a policy

of discrimination which extends beyond the plants at issue, there is no basis for a nationwide injunction."

c) *NLRB v. Express Publishing Co.* (1941) (p243): "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

d) *Hutto v. Finney* (1978) (p307): the Court affirms a broad injunction requiring the Arkansas prison system to reform its "punitive isolation" policies, saying that especially due to the history in this case of injunctions that had not worked, the district court "had ample authority to go beyond earlier orders and to address each element contributing to the violation." For example, the injunction ordered that punitive isolation could not last more than 30 days.

(1) Rehnquist, dissenting, argued that limiting punitive isolation to 30 days "in no way related to any condition found offensive to the Constitution," and that "a district court may go no further than is necessary to eliminate the consequences of official unconstitutional conduct."

(2) Compare *Lewis v. Casey* (1996) (p313): where the Court refused to uphold an injunction ordering systemwide reform of a Arizona's prison library system, saying that the injunction was too broad. "The nature of the remedy is to be determined by the nature and scope of the constitutional violation," and thus because "the constitutional violation has not been shown to be systemwide, granting a remedy beyond what was necessary to provide relief to [the specific plaintiffs] was improper."

(a) The Court also mentioned that the order "failed to give sufficient deference to the legitimate penological interests" of the prison authorities.

e) *United States v. Microsoft Corp.* (DDC 2000) (p327): the district court ordered a broad injunction ordering Microsoft to do a number of specific things to remedy antitrust violations. The appellate court, though, vacated the order because it didn't specifically enough address the specific purposes that antitrust remedies must have.

f) <u>"Obey the law" injunctions</u>: even though not technically permissible, these are often used.

(1) FRCP 65(d): "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

(2) *NLRB v. Express Publishing Co.* (1941) (p243): "The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally

charged."

g) Duration:

(1) *Winston Research Corp. v. Minnesota Mining & Mfg. Co.* (9th Cir. 1965): the court, in setting the duration of an order enjoining breaching departing employees from disclosing trade secrets, rejects the extremes (until public disclosure (zero days here) and perpetual). Instead, it bases the duration on testimony on the period that would be sufficient to deny unjust enrichment and protect the plaintiff from injury from wrongful disclosure and use of trade secrets. "The appropriate injunctive period is that which competitors would require after public disclosure to develop a competitive machine." The end result is an injunction for the time it would take to reverse engineer the defendant's products *plus* a little bit more time.

(a) The *Shellmar* rule (fn6p273): a perpetual permanent injunction is appropriate in trade secret disclosure cases.

(b) The *Conmar* rule (fn6p273): a trade secret disclosure permanent injunction should last only until public disclosure of the secrets.

3. Content

a) Components of a good injunction:

(1) Statement of the court's jurisdiction

(2) Statements and findings of facts

(3) Statements and conclusions of law

(a) With respect to the merits of the underlying case

(b) With respect to whether an injunction should issue

(4) Order: remember, there's no need to phrase in the negative; don't be chatty or too vague; and use broad, obey-the-law provisions along with detailed ones.

(5) Enforcement: here, you can remind of the possibility of contempt and even shortcut coercive civil contempt by putting prescribed daily penalties for violation in the injunction itself.

(6) Modification possibilities

(7) Duration

b) Goals of injunction drafting:

(1) Get as much as you can

(2) Ensure that the order will be upheld on appeal

(3) Ensure that the order will be valid in enforcement (e.g., contempt) proceedings

(4) Ensure that the order stands on its own--that it could be understood, upheld, and enforced by a different judge, in a different court, far in the future

(5) Make the order a teaching tool; e.g., order employee trainings in a sexual harassment suit

c) Positive and negative wording: despite sometimes-recited language to the contrary, positive wording can be used in an injunction. That is, injunctions can do more than just forbid something.

(1) *Bell v. Southwell* (5th Cir. 1967) (p260): "In this vital area of vindication of precious constitutional rights, we are unfettered by the negative or affirmative

character of the words used or the negative or affirmative form in which the coercive order is cast. If affirmative relief is essential, the Court has the power and should employ it."

4. Procedure

a) Burden of proof: on the plaintiff, and especially heavy with respect to jurisdictional mootness.

b) Review: injunctions are reviewed only for abused of the issuing court's discretion.

C. CONTEMPT

1. Taxonomy

a) Civil:

Goals: compensate the plaintiff.

Form: money to the plaintiff. The amount is set through a traditional damages inquiry, except that the courts may be a bit more pissed off than usual, and so might be more lenient on certainty. The amount of damages is usually based on the plaintiff's actual loss (from, e.g., a disobeyed injunction), but sometimes it is based on defendant's profits.

Standard of proof: The *fact of contempt* must be proved by clear and convincing evidence. The *amount of damages* must be proved by a preponderance of the evidence.

(1) *United Mine Workers v. Bagwell* (1994) (p776): "whether a contempt is civil or criminal turns on the character and purpose of the sanction involved. . . . A contempt sanction is considered civil if it is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."

(2) *Griffin v. County School Board* (4th Cir. 1966) (p802): here a court holds a defendant in contempt *before an injunction is even issued*. "Although this court had not issued an injunction against the appropriation of moneys . . . the Board knew that if the plaintiffs succeeded this would be the ultimate decree . . . . The diversion of the res was held to be contumacious because it tended to defeat *any* decree which the court *might ultimately* make in the cause." That is, "the res was in gremio legis and the conveyance of it in part was a disturbance of the constructive possession of the trial court."

b) Coercive Civil

Goals: threaten the defendant into complying with the court's order.

Form: money to the state or imprisonment. The amount of money, if any, is set by looking at (1) the character and magnitude of the harm and (2) the likelihood of the threat being effective.

Standard of proof: the *fact of contempt* must be proved by clear and convincing evidence.

(1) *Anyanwu v. Anyanwu* (NJ 2001) (p794): in this coercive civil contempt case, the contemnor had been jailed, to be let out only if he complied with various court orders regarding a child custody case. The court set out a variety of rules regarding civil contempt:

(a) Coercive civil contempt becomes punitive if it "does not have or has lost its coercive power." It "obviously [does so] where the party committed is unable to comply with the order he is charged with violating."

i) "Age, state of health and length of confinement are all factors to be weighed, but the critical question is whether or not further confinement will serve any coercive purpose." *Catena* (NJ 1975) (p797c).

(b) The *standard of review* of coercive civil contempt claimed to have become punitive is "whether there is a substantial likelihood that continued incarceration would accomplish the purpose of causing the person confined to comply with the order on which confinement is based."

(c) The *burden of proof* of proving that coercive civil contempt has become punitive is on the contemnor.

(2) *United Mine Workers v. Bagwell* (1994) (p776): "the paradigmatic coercive, civil contempt sanction involves confining a contemnor until he complies with an affirmative command such as an order . . . . Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies."

c) Criminal

Goals: punishment.

Form: a fine paid to the state or imprisonment. The amount of the fine, if any, is set at the contempt hearing, and the courts will consider a variety of factors.

Standard of proof: the *fact of contempt* must be proved beyond a reasonable doubt. Moreover, there will be more due process protections required with criminal contempt.

(1) *United Mine Workers v. Bagwell* (1994) (p776): looking not at the "subjective intent of a State's laws and its courts" but on the "character of the relief itself," the Court determined that contempt fines totaling about $52 million were criminal, and so the contemnor union was entitled to a criminal jury trial. The fines, the Court said, were most closely analogous to "fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purse once imposed," rather than mere coercive day or suspended fines. Also, the Court mentioned that the contumacious conduct didn't occur within the court's presence and so implicate the court's ability to maintain order and that the conduct did not involve simple, affirmative acts common on paradigmatic civil contempt.

2. Procedure

a) Underlying lawsuit.

b) Violation of an order emanating from the underlying lawsuit.

c) Motion for an order to show cause (from the winning party).

d) Order to show cause (from the court). With criminal contempt, this order must satisfy constitutional notice requirements.

e) Hearing. With criminal contempts involving potentially serious punishment, the contemnor is entitled to a jury trial.

3. The Collateral Bar Rule: you cannot challenge a property issued injunction except by directly appealing it.

a) Methods for attacking preliminary injunctions and TROs:

(1) Argue it at the initial hearing

(2) Move for immediate appeal

(3) If issued by a state court, appeal to federal court

(4) If a TRO, move as quickly as possible to the preliminary injunction stage, and challenge the injunction there

b) *Walker v. City of Birmingham* (1967) (p812): the Court here upheld contempt fines and jailings of protestors who violated an injunction ordering them not to protest, even though the injunction was unconstitutional (for procedural defects and overbreadth). "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be." Why? "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice *no man can be judge in his own case* . . . . respect for the judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."

(1) Exception: "This is not a case where a procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence."

(2) Possible exception: the Court mentions that the defendants had time (two days) to challenge the injunction here properly. Perhaps if they did not, they could have legitimately used self-help.

IV. RESTITUTION

Comment: When to seek restitution?
- When there is no other cause of action but df. has received a benefit a pf.'s expense.
- When df.'s gain exceeds pf.'s loss (get disgorgement of profits)
- When pf. wants to reverse a transaction rather than let it stand
- When df. is insolvent and pf. can get a creditor preference by seeking restitution of specific property that used to be pf.'s

A. Standard

1. *Olwell v. Nye & Nissen Co.* (Wash. 1946) (p569): the court awards restitution for what would otherwise be a conversion of an egg-washing machine, under the traditional rule that "where the defendant tort feasor has benefited by his wrong, the plaintiff may elect to 'waive the tort' and bring an action in assumpsit for restitution" and that "it is also necessary to show that while [defendant] benefited from its use of the egg-washing machine, [plaintiff] thereby incurred a loss." This loss, however, is satisfied merely because "the very essence of the nature of property is the right to its exclusive use." Although the court says that "actions of restitution are not punitive," it points out the defendant's culpability (its "conscious wrongdoing") in considering the restitutionary award.

a) Cf. *Edwards v. Lee's Administrator* (Ky. 1936) (n5p572): the court awards the plaintiff defendant's profits, rather than plaintiff's loss, saying that "the philosophy of [the restitution decisions] is that a wrongdoer shall not be permitted to make a profit from his wrong."

b) But see *Beck v. N. Nat. Gas. Co.* (10th Cir. 1999) (n12p575): the court does not award plaintiff defendant's profits because there was "no indication that, but for [defendant's] actions, profit gained as a result would have gone to [plaintiffs]." This is an example of the rule that *defendant's enrichment must be at plaintiff's*

expense. Note also here that the defendant's wrong was clearly entirely innocent (compare *Olwell* and *Edwards*, where it wasn't).

(1) But see *Snepp v. United States* (1980) (p585): here the Court awards restitution via a constructive trust to an author who bypassed the contractual CIA clearance procedure he had agreed to (as a former employee), even though the government essentially conceded that it had not been harmed.

2. *Neri v. Retail Marine Corp.* (N.Y. 1972) (p37): the court allows, under the UCC, restitution of paid purchase price to a breaching buyer.

a) UCC 2-718: the court says that this provision allows "the buyer, despite his breach, to have restitution of the amount by which his payment exceeds: (a) reasonable liquidated damages stipulated by the contract or (b) absent such stipulation, 20 percent of the value of the buyer's total performance or $500, whichever is smaller.

B. Measurement

1. *Sheldon v. Metro-Goldwyn Pictures Corp.* (1940) (p603): the Court, this copyright infringement case, says that not *all* profits must be disgorged-- rather, profits can be apportioned into those due to the wrong and those otherwise. Because the remedy is not meant to be a penalty, "both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine the profits which the infringer shall have made from such infringement." And only a "reasonable approximation" is required. Lastly, the Court finds significant that the defendant had added considerable value, on its own, to the infringed work.

2. *Hamil America v. GFI* (2d Cir. 1999) (p611): a copyright infringer's "profits are calculated as the gross sales of infringing goods minus the costs that the infringer proves are attributable to the production and sale of those goods."

3. *Maier Brewing v. Fleischmann Distilling Corp.* (9th Cir. 1968): the court in this trademark infringement case awards an accounting of *all* profits, not just those relating to the infringement, noting the deterrent purposes of the Lanham act. "In the case where there is direct competition between the parties, [the purpose of the act] can be accomplished by an accounting of profits based on the rationale of a a returning of diverted profits. Where there is infringement but no direct competition, this can be accomplished by the use of an accounting of profits based on unjust enrichment rationale."

4. *Snepp v. United States* (1980) (p585): the Court here awards disgorgement of all defendant's profits, via constructive trust, from books he wrote but did not have cleared with the CIA (in the process he had agreed to when an employee of the CIA). The Court awards this restitution even though the government conceded that the books had contained no secrets and so essentially conceded that it had not been harmed; the Court said that if it did not award disgorgement, then the government would be left "with no reliable deterrent against similar breaches of security": actual damages would be unquantifiable, nominal damages would not deter, and punitive damages are unusual and would leave the government at the mercy of a jury.

5. *Olwell v. Nye & Nissen Co.* (Wash. 1946) (p569): the court awards restitution for the defendant's savings in labor costs for washing eggs where the defendant converted the plaintiff's egg-washing machine-- not *all* of the defendant's profits.

6. Overhead, labor, etc.: the general rule is the "bought and paid for" standard-- that

defendant can deduct from the disgorgable profits money it spent in overhead, labor, and so on to make the profits. The courts, however, are divided here.

a) *Hamil America v. GFI* (2d Cir. 1999) (p611): the court sees a two-step process set out by *Sheldon*: (1) determine what overhead expense categories are actually implicated by the production of the infringing product, then (2) determine a fair, accurate, and practical method of allocating the implicated overhead to the infringement. This process "must be applied with particular rigor in the case of willful infringement"; that is, a strong nexus must be established between each overhead category and the production of the infringing product, and all presumptions are drawn against the infringer.

(1) Burdens of proof: "the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work."

b) *Sheldon v. Metro-Goldwyn Pictures Corp.* (1940) (p603): the Court allows a deduction for overhead based on the ratio that the cost of producing the infringing movie bore to the total costs of the movie studio.

c) Taxes: the federal rule is that conscious wrongdoers get no credit for taxes paid on profits they disgorge.

7. Plaintiff's lost profits: these may be rejected as too speculative in restitution cases. See *Hamil America*.

8. Contract: rescission or, apparently, reliance (see *Farash*).

a) *Farash v. Sykes Datatronics, Inc.* (NY 1983) (p629): the court, over a strenuous dissent, allows a plaintiff to recover his reliance costs for work done, even though the statute of frauds was triggered but not met and even though defendant did not benefit from the work. The dissent argues that there can be no recovery in quasi-contract unless the defendant benefited.

C. Mechanisms

1. Assumpsit: breach of (here an implied) promise, for disgorgement of profits. A legal remedy. See *Olwell*.

2. Accounting: an equitable remedy. See *Maier Brewing.* An accounting can be ordered *of* a constructive trust, giving the plaintiff both defendant's profits and tracing of the particular proceeds (and so preferential creditor treatment).

3. Lanham Act: for intellectual property infringements. A (statutory) equitable remedy. See *Maier Brewing*.

4. Constructive trust: a purely equitable remedy. See *Snepp*. These (1) are not real trusts, (2) can be used to trace the proceeds of specific assets through a series of exchanges, and (3) is useful when the defendant is insolvent.

a) Generally, disgorgement will not be available for breach of an actual contract. In contracts for the sale of land, however, it may be.

b) The family context: constructive trusts are commonly used here.

c) Nonfiduciary context: constructive trusts can still be used where there is no fiduciary duty or relationship.

5. Contract rescission: this cancels the transaction and reverses all benefits that have been exchanged pursuant to it (thus, it's sometimes called "rescission and

restitution").

a) *Mutual Benefit Life Ins. Co. v. JMR Electronics Corp.* (2d Cir. 1988) (p621): the court here allows rescission of a life insurance contract where the insured had lied about his smoking habit. "Even an innocent misrepresentation as to the applicant's medical history, if material, is sufficient to allow the insurer to avoid the contract of insurance."

b) Grounds for rescission

(1) Fraud: see *JMR Electronics*.

(2) Substantial breach:

(a) UCC 2-711(1): rescission for buyers "if the breach goes to the whole contract."

(3) Mutual mistake

(4) Unilateral mistake but no reliance

(5) Duress

V. PUNITIVE DAMAGES

A. Standard

1. Statutory standards: often, the standard for awarding punitive damages will be set out in state statute. The statute may specify:

- Burden of proof
- Maximum amount of punitives
- Entities that are immune from punitives (e.g., the government, M.D.s in some cases)
- Prescribed jury instructions
- And, of course, the standard of behavior (e.g., "malice," high "recklessness" of some kind, "gross negligence")

2. "Survival" of punitives: the general rule is that the defendant must still pay them if the plaintiff dies during litigation (payment goes to the plaintiff's estate), but the defendant's estate does not have to pay if the defendant dies during litigation. That is, the focus is on the particular defendant, not on "compensating" the plaintiff.

3. *Grimshaw v. Ford Motor Co.* (Cal. 1981) (p719): the court here says that punitives may be awarded when there is "conscious disregard of a probability that the actor's conduct will result in injury to others."

a) Other formulations:

(1) Second Torts Restatement: punitive damages against a principal can be awarded because of an agent's actions only if "(a) the principal authorized the doing and the manner of the act or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act."

(2) Ohio: "Conscious disregard for a great probability of causing substantial harm."

(3) Maine: "Clear and convincing evidence of express or actual malice, defined as actual motivation of ill will toward the victim, or conduct so outrageous that malice toward a person injured as a result of that conduct can be implied."

(4) Arizona: "An evil mind. Gross negligence or mere reckless disregard of the

circumstances is not enough. However, an evil mind will be inferred from consciously disregarding the unjustifiably substantial risk of significant harm."

(5) Texas (statute): "Malice means (A) a specific intent by the defendant to cause substantial injury to the claimant; or (B) an act or omission (i) which when viewed from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."

4. Constitutional Limits

a) *State Farm v. Campbell* (2003) (h/o): here the Court underlines the *BMW* "guideposts," is concerned that leaving juries with too much discretion in picking punitive amounts will allow them to express bias against big business, and comes close to issuing a bright-line rule on punitive amounts: "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Lillard thinks, further, that the Court expresses some skepticism of even modern *compensatory* awards.

(1) *BMW v. Gore* (1996) (p741): the Court sets out the "three guideposts" for determining whether a punitive damages award violated "the elementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." Here, the Court uses them to determine that a $2 million punitive award on a $4K compensatory, for delivering a new car that had been repainted and not saying anything about it, was "grossly excessive."

(a) Degree of reprehensibility

i) Whether the conduct was repeated, not isolated, is important here.

ii) But, in *State Farm*, the Court makes it clear that it wants to see a nexus between the reprehensibility evidence and the *specific harm* that plaintiff suffered.

a. The Court also makes it clear in *State Farm* that it is very concerned about the use of nationwide evidence to demonstrate this factor.

(b) Ratio (of punitive award to the actual harm inflicted on the plaintiff)

(c) Comparable misconduct: that is, comparing the punitives to the civil and criminal penalties that could be imposed for comparable misconduct.

B. Measurement

1. *Grimshaw v. Ford Motor Co.* (Cal. 1981) (p719): in reviewing a punitive damages award against Ford for the Pinto, the court says that "comparison of the amount to the amount awarded with other awards in other cases is not a valid consideration, but instead considers whether the award is excessive as a matter of law or is so grossly disproportionate as to raise the presumption that it was the product of passion or prejudice.

a) Factors:

(1) The degree of reprehensibility of the defendant's conduct

(2) The wealth of the defendant

(3) The amount of compensatory damages

(4) The amount which would serve as a deterrent effect on like conduct by the defendant and other who may be so inclined

2. Wealth of the defendant: evidence of defendant's wealth is allowed here, but it is an anomaly-- we generally consider it to be prejudicial (and irrelevant). There is, of course, a constitutional dimension to this, as the evidence rules are constructed to insure the constitutional promise of a fair trial. But, with punitives, wealth evidence helps a court tailor the award to deter and punish the specific defendant.

3. Double counting: a court will consider whether other juries may be awarding punitives against the same defendant for the same conduct.

a) See *Grimshaw*: "While the trial judge may not have taken into account Ford's potential liability for punitive damages in other cases involving the same tortious conduct in reducing the award, it is a factor we may consider in passing on the request to increase the award."

C. Justifications: for why we have punitive damages.

1. To make an example of the defendant.

2. To punish.

3. To deter-- both this defendant and similarly situated defendants. See *Grimshaw*: "Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles."

4. For revenge.

5. To shame.

6. To satisfy the plaintiff-victim.

7. To compensate: that is, punitives can be a stealth place to plaintiff to recover attorney fees.

8. To reward the plaintiff for brining the meritorious suit that may have a public benefit.

9. For restitution. See, e.g., *Grimshaw*, where the jury awarded punitives exactly equal to the amount of money Ford saved by not installing safety features.

10. Forced internalization.

VI. LITIGATION EXPENSES

A. COSTS: these are generally allowed to the victor as a matter of course. Costs include filing fees, fees for service of process, costs for duplicating documents, interpreter fees, witness fees and travel costs, and some expert fees (fees for lawyer-selected experts, as opposed to those appointed by the court, may not be shifted).

1. FRCP 54(d)(1): "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Most states have the same or a similar rule.

2. Exceptions:

a) Indigency of the loser

b) Needless inflation of costs

B. ATTORNEY FEES

1. **Standard**
   a) **The American Rule**: "at least absent express statutory authorization to the contrary, each party to lawsuit ordinarily shall bear its own attorney's fees (*Alyeska Pipeline*).
      (1) The prevailing party requirement: courts may split up portions of a lawsuit if the plaintiff recovers on some claims but not others.
         (a) "Catalytic" claims: the Court in *Buckhannon Board & Care Home v. West Virginia* (2001) (n3p921) said that when the mere filing of the suit spurs voluntary reform, the plaintiff has not "prevailed." Thus, plaintiffs should insist on injunctions even after the defendant voluntarily changes its conduct.
   b) **Exceptions and Ways Around**
      (1) Common Law Exceptions
         (a) Bad faith litigation: courts claim inherent power to award fees to punish bad faith litigation.
         (b) Contempt of court: a court may assess fees for willful disobedience of a court order.
         (c) Family law: it is common to award fees in divorce, and some states codify this.
      (2) Private Attorney General: this is not viable in the federal courts (*Alyeska*), but several states follow the theory.
         (a) Factors militating for PAG fee awards:
            i) Societal importance of the case
            ii) Need for private enforcement
            iii) Large number of people benefiting from the result
            iv) Plaintiff's pecuniary interest would not be enough to incentivize the lawsuit
      (3) Common Fund: when a case creates a common fund in which others will share, the plaintiff and his attorney are entitled to fees from the fund. This is basically as restitutionary idea-- the attorney is recovering fees for a benefit conferred on the beneficiaries of the fund.
         (a) *In re Synthroid Marketing Litigation* (7th Cir. 2001) (p924): the court rejects the "megafund" rule that fees in large common funds must be limited to 6 to 10% of the total recovery, saying that this does not reflect the market.
      (4) Collateral Recovery
         (a) Malicious Prosecution
         (b) Malicious Bringing of a Civil Action
         (c) Abuse of Process
         (d) Indemnification
      (5) Statutory Exceptions
         (a) Specific Exceptions within Substantive Statutes
         (b) General Exceptions: these may be statutes allowing attorney fees in certain cases, or more general exceptions (such as Alaska's statutory

rejection of the American rule).

i) 42 USC 1988: authorizes district courts to award reasonable attorney's fees to prevailing parties in certain civil rights litigation.

a. *City of Riverside v. Rivera* (1986) (p905): the Court considers whether an fee award is "reasonable" under the statute. It rejects the argument that fee awards should be proportionate to the damage awards, but says this is a factor in determining reasonableness. Noting that Congress wanted the statute to encourage civil rights suits, and that fee awards proportionate to damages would not be enough incentive, it upheld a large fee award

1) Factors for determining reasonableness (from *Johnson v. Georgia Highway Express*)

- Time and labor required
- Novelty and difficulty of the questions
- Skill requisite
- Preclusion of other employment by the attorneys
- Customary fee
- Whether the fee is fixed or contingent
- Time limitations imposed by the client or the case
- Amount involved and results obtained
- Experience, reputation, and ability of the attorneys
- "Undesirability" of the case
- Nature and length of the attorney-client relationship
- Awards in similar cases

2) The Court notes the rule that a defendant is not liable for attorney fees after a pretrial settlement offer if the result after trial is less than the offer.

ii) FRCP 11: although this does not expressly authorize fee shifting, sanctions can be awarded that equal the other side's fees.

(6) Private Agreements:

(a) Contracts: should have dispute resolution provisions, and these should include provisions addressing attorney fees.

(b) Settlements: settlements can (and should) specify amounts for attorney fees. For instance, insurance disputes usually settle for "three times the meds": one time for the medical expenses themselves, one time for intangibles, and one time for fees. Settlements must carefully specify what amounts are for fees, so that the client doesn't get stuck with that tax bill.

i) *Evans v. Jeff D.* (1986) (p940): demonstrating the use of a consent decree to approve fees (or not) in large cases.

(7) Injunctions

(a) Injunction content: the order may provide for fee shifting if the order must be enforced through contempt proceedings.

(b) Injunction bonds: *Coyne-Delaney Co. v. Capital Development Board* (7th Cir. 1983) (p450): the amount of the bond will generally be "the limit of

the damages the defendant can obtain for a wrongful injunction, even from the plaintiff, provided the plaintiff was acting in good faith." (Even though Posner, in this case, says he thinks plaintiff should be at risk for the entire amount of defendant's fees.)

i) Some states have a statutory exception to this "bond amount caps defendant's damages" rule.

(8) Tacit Recovery from Other Damages Components

(a) Punitives

(b) Intangibles

(c) Collateral Sources: cf. the collateral source doctrine, which does not offset for money from collateral sources.

2. Measurement

a) The Lodestar: multiply hours worked by the hourly rate. This means that you must have detailed time records in order to get fees; there will be bickering about line items. Paralegal fees are usually included here.

(1) *In re Synthroid Marketing Litigation* (7th Cir. 2001) (p924): the court insists on market-reflective fees, even in a "megafund" common fund case. "Any method other than looking to prevailing market rates assures random and potentially perverse results." The court also looks to set the proper fee amount by looking at what the parties would have contracted for *before* the case began: "the court must set a fee by approximating the terms that would have been agreed to *ex ante*, had negotiations occurred."

(2) *City of Riverside v. Rivera* (1986) (p905): the Court rejects the argument that, under 42 USC 1988, a fee must be proportionate to damages awarded in order to be "reasonable."

(3) Enhancements: the Court has said that enhancements should generally be built into the approved hourly rate, not as multipliers. With contingency fee cases, the Court said in *City of Burlington v. Dague* (1992) (n1p932) that enhancement are completely prohibited, because they are a way of paying the lawyer for cases he lost.

(4) Special situations:

(a) Contingency lawyers: courts may try to use the lodestar here, anyway, by looking to the non-contingency market.

(b) Government lawyers: prorate salary or compare to the market.

(c) Legal aid and public interest lawyers: prorate salary or compare to the market. *Blum v. Stenson* (1984) (n2p922) said that fee awards should be based on market rates, even if the lawyers worked for less than market.

b) Contingency: this is an alternative to the lodestar, where the fee is based on a percentage of the recovery. The Court has committed the federal courts to the lodestar, but the states go both ways.

3. Ethical Implications

a) Fee waivers: some state bars say that it is unethical for a defendant to request a fee waiver during settlement, and nowadays most legal aid organizations have no ethical problem with requiring clients to waive their right to waive fees (although such waivers of waiver rights should be obtained at the very beginning of the

representation).

(1) *Evans v. Jeff D.* (1986) (p940): the Court here says that a district court was within its jurisdiction in approving a consent decree that involved a fee waiver by a class represented by Idaho Legal Aid. The Court said that there was no ethical dilemma involved, as the plaintiffs' attorney had no ethical obligation to seek fees at all.

b) Luban: *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*