NAILING  THE BAR

Simple REMEDIES Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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Simple
REMEDIES
Outline

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Published by Practical Step Press

--www.PracticalStepPress.com--

ISBN 978-1-936160-30-3

NINETY PERCENT of the LAW in NINETY PAGES. ®

This outline gives a simple explanation of the **BLACK LETTER LAW** and **BRIGHT LINE RULES** of **REMEDIES**, possibly one of the more confused or at least confusing areas of law.

Remedies Law is explained in **plain English** with **examples**. Other than that, this eBook has --

- **AN ABREVIATED EXPLANATION OF HISTORICAL DEVELOPMENT**
- **NO CHECK LISTS**
- **NO EXTENSIVE CITATION OF CASE LAW**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason is those are often **UNNECESSARY** and **more CONFUSING than helpful** for law students just trying to gain a basic understanding of the law. The purpose of this eBook is to help you **pass your course and the Bar Exam** NOT to teach you to be an expert on remedies.

YOUR PROFESSOR will probably focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS BOOK HAS ALL THAT YOU NEED to really understand **Remedies** for law school and Bar examinations.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law using this eBook, you MUST make additional efforts to prepare for your law school exams. To do that, use Nailing the Bar's **How to Write Essays for Remedies Law School and Bar Exams (Le).**

Details on that publication and how to obtain it are given inside the back cover of this book.

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Chapter 1: Remedies Overview

Remedies may be the most difficult area of law to understand. Concepts evolved from a convoluted historical development, and the cases and discussion of Remedies is filled with more "legal slang", "terms of art", old terms, confused classifications and confusing terminology than many other areas of law. The result is a logically inconsistent body of court decisions.

The purpose of this book is to give you a concise, effective explanation to the extent possible. Unfortunately this requires explanation of old legal terms more than many other areas of law.

The overall purpose of the "remedies" provided by Courts is to:

Compensate and protect those who act righteously and punish and deter those who act wrongfully.

This overall purpose is often reflected in the following concepts:

- **Compensate** those injured by illegal acts for the **damages** they have suffered;
- Prevent those who act wrongfully from enjoying an **unjust enrichment**;
- **Punish** and **prevent** wrongful and malicious acts; and
- Compensate those who righteously act with **reasonable expectation of compensation**.

While these concepts are very simple and straightforward, the term "remedies" is often used to mean different things in different contexts and this can be very confusing. One meaning is <u>why</u> the Court should provide a party relief. Another is <u>what</u> the Court can do to provide relief. And yet another is <u>how</u> the Court would measure the amount of relief to be provided.[1] The "relief" may be intended to compensate for past injury, prevent future injury, right an injustice, enforce property rights, punish wrongful acts or clarify or alter the legal rights of the parties.

> **For Example:** Contractor sues Owner for breaching a contract to pay him to build a house. Breach of contract is Contractor's stated cause of action, WHY he believes the Court should provide him a remedy. And a money judgment is WHAT the court can do to provide him a remedy. And either an award of damages actually suffered or an award in restitution is HOW the Court would measure the appropriate size of a money judgment. [2]

The party seeking or requesting "relief" or asking the Court to do something or grant some request is the **moving party** or "movant". The movant is often the "plaintiff" or "petitioner" in a legal action, but the defendant is also a movant when presenting an affirmative defense or seeking affirmative relief. All that matters is that the movant is the party asking the Court to provide a "remedy" of some sort. Some times the movant is called a "petitioner", as in "She petitioned for a divorce".

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[1] Note that the term "relief" is used somewhat synonymously with "remedy" so that a person who can obtain an equitable "remedy" is said to obtain equitable "relief".

[2] The strict meaning of "restitution" is to return property or the monetary value of loss to the "proper owner", which would return them to the position they were originally in. But the term is used much more broadly than that in "Remedies" classes and case decisions. In fact some "authorities" restrict the term "restitution" to the opposite situation, an award intended to prevent an "improper" party from enjoying an unjust enrichment.

Once a movant asks the Court to provide a remedy or "relief", the opposing party becomes the "respondent". Since the movant is usually a "plaintiff", and the respondent is usually the "defendant" in Remedies classes, the terms "plaintiff" and "defendant" will be used below.

The study of Remedies is **confined strictly to civil actions.** The only relationship between criminal acts and the study of remedies is that sometimes a civil action arises from a criminal act.

> **For Example:** OJ is arrested and charged with murdering his wife. But the dead wife's family also sues OJ for wrongful death in a civil action. The study of "remedies" focuses on the "relief" the dead wife's family can be awarded by the Court in that civil action and does not involve the punishment OJ may suffer in the criminal prosecution.

1. Suggested Use of this Outline: Read it First

When practical this outline explains the **legal remedies first** and the **equitable remedies last**. A moving party may seek only if legal remedies are unavailable or inadequate. So the moving party must convince the Court no legal remedies are adequate **first** before the Court has any power (jurisdiction) to provide equitable remedies. Sometimes this is obvious, but it should never be ignored.

Unfortunately many Remedies classes discuss injunctions, an equitable remedy, first, along with enforcement of court orders and defenses to contempt findings without teaching students anything about the legal remedies. So in your class you likely will be taught about injunctions, contempt and defenses to contempt first before you are taught anything about the legal remedies the Court must first consider and reject before it can issue an injunction at all.

Discussing injunctions before discussing the legal remedies the Court must first consider and find to be inadequate is "backwards" and creates unnecessary confusion.

Therefore, this outline will discuss legal remedies first and injunctions last. That may not agree with the order in which your class will discuss the subject matter so the best way to use this outline is to **read it all first at the beginning of your class**. The outline is short enough to read in a day or two, and if you read this outline first you will be forewarned and forearmed when you run into confused terminology such as "quasi-contract", "quantum meruit" and "restitution".

2. The Overriding Issue: Can Plaintiff Obtain Equitable Relief?

There are two types of remedies, the "legal" remedies and the "equitable" remedies. A legal remedy is one a plaintiff has a <u>legal right</u> to receive but it must be **enforced by the plaintiff** without help from the Court. An equitable remedy is one the plaintiff has <u>no legal right</u> to receive, but the Court has <u>discretion to grant</u> as necessary to <u>prevent injustice</u> or <u>protect the public interest</u> and which **the Court may help enforce**.[3]

[3] This is not always true. If the Court grants "equitable" relief in the form of a money judgment the movant must collect on the judgment. In that situation the Court does not enforce its own "equitable" remedy.

The overwhelming question in the law school study of Remedies is whether the plaintiff can only obtain a "legal" remedy or whether the plaintiff can obtain an "equitable" remedy instead. That is the central issue in the vast majority of cases, and it is the distinction that is heavily tested on exams.

And this all depends on the **Basic Rule of Remedies**:

> **A Court has no jurisdiction (i.e. authority, power or right) to provide an "equitable" remedy unless it is first shown that the plaintiff has no adequate "legal" remedy.**

Therefore, it is critical to understand which remedies are the "legal" remedies, and if no "legal" remedies are available and adequate, what the "equitable" remedies can the plaintiff seek.

3. The Measure of Relief is a Different Consideration

Besides the central issue of whether a plaintiff can obtain equitable relief, another important consideration in the study of Remedies (and on exams) is the **proper measure of relief** and whether the plaintiff is **barred from obtaining certain types of relief** in certain types of situations. For example, **punitive damages** are allowed in certain tort situations (e.g. torts done intentionally with malicious intent) and not in others (e.g. negligence). [4]

The issue of measure of remedy primarily concerns how money judgments are calculated, but can be based on both legal and equitable considerations.

If a plaintiff can show that no available legal remedy is adequate to prevent them from suffering a wrongful and irreparable harm, the plaintiff has established **equitable jurisdiction** and the Court may provide equitable relief. But when a Court is able to provide equitable relief, the remedy provided is almost **always limited to the minimum relief necessary to prevent injustice.**

> **For Example:** Don orally promised to sell Blackacre to Paul for $100,000, but after Paul paid him $5,000 down payment Don refused to sign the deed. Paul has no adequate legal remedy because the Statute of Frauds required a written contract. Paul may only plead equity to recover his $5,000 to prevent Don from reaping an unjust enrichment. The Court cannot give Paul any more relief than that because nothing more is necessary to prevent injustice.

4. Remedy Classification Approaches

Inconsistent terminology and alternative methods for classifying remedies causes a lot of confusion in Remedies classes. This is especially a problem when reading case law because different cases will use different terms to refer to "remedies" in different ways. As students read different case decisions this produces a very confused jumble.

Here are different logical "remedy" classification approaches that you may come across. They will each be explained below:

[4] Note the term "punitive damages" is misleading because it is not measured by any actual "damage" the plaintiff has suffered.

- Classification by different actions a Court can take to provide relief
- Classification by Legal vs. Equitable remedies
- Classification by Declaratory, Substitutionary or Specific Remedies
- Classification by Cause of Action
- Classification into Legal Damages, Restitution, Implied-in-Law Contracts, and Injunction (usually ignoring other Miscellaneous Remedies).

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A. Classification of Remedies by Actions Courts Take

There are only six actions a Court can take to provide a party with "relief", whether it is "legal" or "equitable" relief. [5] These can be "grouped" in other ways, but basically there are only five things a Court can actually do, and often discussions of "remedies" are ordered along these lines:

1. **Award of Money Judgment.** A Court may award a plaintiff a money judgment as **compensation** for damages actually suffered, in **restitution** to the plaintiff to prevent unjust enrichment or protect an innocent party or the public interest, or as **punishment**, to punish the defendant for wrongful acts. These should be called "judgments" but are often called "damages", and that causes confusion since there are three measures and only one of those three measures reflects "damages suffered".
2. **Repossession of Chattels (Replevin)**. A Court may issue a writ giving plaintiffs the right to repossess **chattel** belonging to the plaintiff (**legal replevin**) or a Court may order that someone (often but not always the defendant) must give possession and/or title to unique chattel to the plaintiff (**specific performance**). [6]
3. **Ejection from Land**. A Court may issue an order allowing the plaintiff to retake possession of land or to remove the defendant's property from the plaintiff's land (**eviction**), or an order that the defendant must **remove an encroachment** from the plaintiff's land.
4. **Injunction.** A Court may order the defendant do something, not do something, or stop doing something, typically to prevent future injury to the plaintiff.
5. **Order of Specific Performance**. A Court may issue an order giving plaintiffs title to property (and usually possession as well). This is actually a specific type of injunctive order.
6. **Declaratory Relief**. A Court may issue a finding as to legal rights and status without any further action. For example a "divorce decree" or a "quiet title" action.

This classification approach is based on "what the Court can do to give relief" rather than "why the plaintiff deserves relief".

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[5] If a Court can do anything other than what I have listed here I have not been able to think of it.
[6] The term "replevin" has been abandoned by modern courts. Legal and equitable replevin are essentially synonymous with "recovery of possession".

B. Classification of Remedies as Legal or Equitable

As stated above, the overriding issue in Remedies classes (and exams) is usually whether the plaintiff can obtain equitable relief or must accept a "legal" remedy. Some remedies are strictly equitable. Often discussion is based on whether a remedy is legal or equitable.

You might be wondering which of the remedies above are "legal" remedies and which are the "equitable" remedies. The answer is that there is often no easy answer! [7] Of the five possible remedies listed above, **injunction** and **specific performance** are always "equitable remedies".

An award of a **money judgment** is usually considered by law professors to be a "legal remedy" but it is not always. Money judgments are also issued by courts of equity based on the equitable theories of **detrimental reliance**, **promissory estoppel**, **implied-in-law contract**, **recovery of property**, or **equitable servitude.** In those situations the Court is clearly awarding a money judgment as an equitable remedy.[8]

Other remedies listed above, **repossession (replevin)**, **ejection** and **declaratory** relief may be either "legal" or "equitable" remedies depending on the circumstances. One might think that "declaratory relief" is always equitable but in the case of quiet title statutes often control entirely and a judge has no "discretion" to deny or grant a plaintiff a remedy.

So whether a remedy is a "legal" or "equitable" remedy depends entirely on whether the plaintiff had a "legal right" to the remedy or not. If the plaintiff has no legal right to a remedy any remedy the Court provides is equitable, based on the Court's inherent discretion to fashion a remedy to prevent injustice or protect the public interest.

However, there are many situations in which the broadly adopted modern view has evolved to consider some remedies as being a "right" that were historically regarded as "equitable". This is often referred to as the **merging of law and equity** so that there is no longer as sharp a distinction between them as before.

> **For Example:** Buffy petitions for and is granted a divorce from Bevis. This is "declaratory relief" because it is a court finding that she is now "legally free" from the marriage. Historically a Court had discretion to deny a petitioner a divorce but modernly a person has a virtual "right" to be granted a divorce. But this is never discussed in law school "Remedies" classes or tested on Bar Exams. [9]

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C. Classification of Remedies as Declaratory, Substitutionary or Specific

Some text books classify remedies into three groups as "declaratory", "substitutionary", or "specific". This classification is based on considerations from the plaintiff's perspective as to

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[7] This may be frustrating to hear this, but if things were really simple everyone would be a lawyer and you wouldn't need this book.

[8] If a Court awards a money judgment it is the movant's burden to collect on the judgment and the Court is not going to take any further action, whether the judgment is based on "legal" or "equitable" considerations.

[9] If you consider how many divorce lawyers there are compared to those seeking "injunctions" you realize law school "Remedies" classes and Bar Exams may emphasize situations many lawyers never face.

"what the relief accomplishes" rather than "what relief the Court can grant" or "why the Court should grant relief".

It is not clear that classifying remedies in this manner adds much to understanding, and some remedies do not fit into this categorization. That is explained in this section below.

1) Declaratory Relief

"Declaratory" relief simply means **a court finding** as to the legal rights of the parties without any further holding. It is seldom discussed or tested in law school Remedies classes but very important in the real world.

> **For Example:** Bevis claims an interest in Blackacre by adverse possession. He brings a "quiet title" action and the Court issues an Order declaring his interest to be good. This is "declaratory relief" that gives him legal title to the land the same as if the previous title holder was ordered to convey the land to him by deed in specific performance. All Bevis has to do is record the Order with the County Recorder to establish clear title to the land.

2) Substitutionary Relief

"Substitutionary" relief means an **award of a money judgment** to compensate the plaintiff for the injury or wrong suffered. You may also hear this called an award of "compensatory damages". If a money judgment is awarded to compensate a party for **damages suffered** the remedy is compensatory or substitutionary.

A money judgment simply establishes that the defendant "owes" the plaintiff that amount of money. That judgment does not automatically give the plaintiff compensation. The party awarded the judgment must take further steps to "execute" the judgment by finding and proceeding against the defendant's property or income sources. If the defendant has no property or money that can be reached by the plaintiff, the judgment is a hollow victory.

3) Specific Relief

"Specific" relief simply means **a court order** awarding the plaintiff a specific thing being sought.[10] The "thing" sought may be an object (chattel), a specific money holding, an action by the defendant (**mandatory injunction, specific performance**), or a lack of action by the defendant (**prohibitory injunction**). This may involve the remedies of **replevin** (repossession), **specific performance, ejection** (eviction), **injunction** or even **declaratory relief**.

Specific relief might also include an award of a specific asset, which might even be a money holding, in **restitution**. This would be a situation where the defendant would reap an unjust enrichment if allowed to keep the asset. If the plaintiff is awarded the right to a specific asset in restitution, the defendant (or perhaps a third party like a bank or bailee) must give the plaintiff that specific asset.

[10] Specific relief is an "equitable remedy" but for two very narrow exceptions seldom discussed in "Remedies" classes – the **legal right** to repossession of chattel from a debtor (legal replevin) and eviction of a tenant (legal ejection).

> **For Example:** Bevis stole $1 from Butthead and used it to buy a lottery ticket that won $1 million. Butthead's cause of action is **conversion**. He has a **legal right** to a **money judgment** for the actual **damages** he has suffered, but that is just $1. He also has a right to **legal restitution** in the alternative, a **money judgment** for $1 million to prevent Bevis from reaping an "unjust enrichment" from his tortuous act. And he can also seek a Court order that would have the Lottery pay him the future payment stream instead of Bevis. That is **specific relief**, a form of **equitable restitution** instead of **legal** (money judgment) **restitution** since the Court would have to order the Lottery to act instead of just awarding Butthead a money judgment in legal restitution.

Specific relief is discussed extensively in law school Remedies classes, and it can be very different in different situations.

4) Gaps in This Classification Approach

A problem with this three-category classification system based on "what does the relief accomplish" is that it has gaps. Some remedies don't 'fit' into this scheme. One situation it does not adequately handle is an award of a **money judgment** based on **restitution.**

> **For Example:** Bevis stole $1 from Butthead, used it to win $1 million in the lottery, and Butthead seeks **legal restitution** in the form of a money judgment for $1 million to prevent Bevis from reaping an **unjust enrichment**. That is **not substitutionary** (or compensatory) **relief** (since Butthead never lost $1 million), and it is **not specific relief** (since Butthead is seeking a money judgment, not a specific asset). It is **not declaratory relief** either. So the three-category "substitutionary-specific-declaratory" approach fails to recognize this "legal restitution" type of situation.

This three-category classification system also fails to account for awards of **punitive damages**.

> **For Example:** Bevis stole a Ford from Butthead and wrecked it. Butthead's cause of action is **conversion** so he can get a money judgment for the **damages** he has suffered. That would be **substitutionary relief**. But he also can seek an award of **punitive damages**. Punitive damages are not substitutionary relief because they do not compensate Butthead for any loss he actually suffered. And it is not specific relief or declaratory relief either.

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D. Classification of Remedies by Cause of Action

Text books also may classify remedies substantially according to the cause of action that justifies the Court in awarding a remedy. Specifically, some texts focus on whether remedies are based on **legal causes of action** or **equitable** considerations (causes of action).

A "cause of action" is the theory as to "WHY the plaintiff should be awarded relief". If the plaintiff has a "legal right" to relief it must be based on a "legal cause of action" such as **tort, breach of contract, breach of covenant running with the land, statute, etc.)**. If the plaintiff has no "legal right" to relief the Court only has discretion to fashion a remedy based on the **equitable considerations** of **detrimental reliance**, **promissory estoppel**, **implied-in-law contract**,

recovery of property, or **equitable servitude** (the latter being strictly confined to real property situations).

"Why" a Court should give a plaintiff relief is often completely unrelated to "what" relief a court can or "should" provide. But some remedy rules apply only to certain causes of action. Those rules limit the type of damages, amount of damages, or measure of relief that can be awarded in certain circumstances.

While it is important to recognize that the cause of action determines the possible remedies to some extent, there is so much overlap that it is not clear that this classification approach is the best.

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E. Classification as Legal Damages, Restitution, Implied-in-Law Contracts and Injunction

While you may read case decisions that use the four classification approaches explained above, I feel the simplest and best approach is to consider remedies based on these categories:

- Legal damages,
- Restitution (legal and equitable),
- Implied-in-Law Contracts, and
- Injunction.

This approach ignores various miscellaneous remedies that are of little or no interest in Remedies classes. Those miscellaneous remedies will be discussed very briefly in a following chapter.

This outline will explain remedies in this order.

5. Odd and Archaic Terminology

As you read case law and hornbooks regarding "remedies" you will run across odd and archaic terminology that is apparently intended to impress, mystify and confuse you. Terms such as "replevin", "assumpsit", "trover", and "dentinue" certainly sound important, like the secret code words members of the legal profession use to distinguish themselves from outsiders.

These terms primarily arose long ago when certain "form pleadings" were required for certain actions. This has been done away with, primarily by statute, and <u>many of these terms no longer have any real meaning</u>.

The term "**legal replevin**" means the process used to repossess cars and other goods (chattel) sold on credit under a financing agreement by which the seller retained a "security interest". That process is strictly statutory, and it will be explained very briefly (and in general terms) later.

The term "**equitable replevin**" has a much less consistent meaning and should just be avoided.

Chapter 2: Legal and Equitable Remedies Distinguished

Distinguishing between legal remedies and equitable remedies, and determining when each may be provided is often the main issue taught and tested in courses on Remedies.

The basic distinction between legal and equitable remedies is that **plaintiffs with legal causes of action** have **legal rights to a legal remedy** if they meet the burden of proof established for those causes of action. No judge can deny them that right.

Plaintiffs do not have any right to remedies other than legal remedies, and parties that cannot prove the elements of any legal cause of action have **no "right" to any remedy at all** and can only plead equity. In those situations a Court of equity may have **discretion** to grant them an equitable remedy.

The distinction between legal and equitable remedies applies in much the same way to defendants. **Defendants with legal defenses** have **legal rights to be sheltered by those defenses** if they meet the burden of proof established for those defenses. No judge can deny them that right.

Otherwise, defendants that cannot prove a legal defense have no "right" to a defense and can only plead equity, and a Court of equity may have discretion to grant them an equitable defense.

This distinction between "legal" and "equitable" causes of action and defenses arose from the historical development of English law as explained below.

1. Historical Development of Courts of Law and Equity

Historical discussion usually is a confusing (and boring) waste of time. But to understand your Remedies class a basic understanding of the history helps more than it hurts.

In England the Courts of LAW arose from tribal or village law based on tradition and custom. Upon this basic foundation, other royal decrees and statutes enacted by Parliament were interpreted by Courts established by the Crown to produce "the LAW of the land".

The remedies provided by Courts of LAW were just and fair in the view that if they are understood and predictable. It is hard to argue a remedy is unfair if everyone knows or should know what it is. It is a maxim of law that every person has a duty to know the law, and ignorance is no excuse.

Since the concept of justice in a Court of LAW was based on remedies that were "established, proscribed, traditional, understood and predictable" the judges in a Court of LAW **did not have discretion to fashion unusual remedies of their own choice.**

But the Crown was also "defender of the faith" and head of the Church of England. So simultaneous with the development of the Courts of LAW, there was a second group of Courts established by the Crown within that role. The focus of those Courts became more attuned to preventing injustice and providing equity based on moral doctrine. These arose to become the Courts of EQUITY.

The remedies provided by Courts of EQUITY were more based on moral considerations and the good of the realm than on traditional customs or official enactments.

Since the concept of justice in a Court of EQUITY was less based on tradition, statutes and royal decrees, the judges in a Court of EQUITY had **discretion to fashion remedies that were unavailable in a Court of LAW.**

In England, these two types of Courts were physically different Courts in different buildings with different courtrooms and different justices and different laws and rules.

Since there were two Courts with different standards of "justice" plaintiffs had two avenues for seeking relief and could play one Court against the other. It was only a matter of time before conflicts developed, and this actually created situations of injustice that the Courts of equity were dedicated to prevent.

Modernly this conflict has been resolved by the following **fundamental law of remedies**.

2. Equitable Jurisdiction and the Fundamental Law of Remedies

The conflict between the Courts of LAW and the Courts of EQUITY has been resolved modernly, and in the vast majority of States the Courts of LAW and EQUITY have been consolidated into a single judge in a single courtroom in a single courthouse.

But the dichotomy between "legal" remedies versus "equitable" remedies has been preserved, and the judge plays a dual role. The judge will "sit in LAW" applying the rules of "LAW" unless that produces an inadequate remedy. Then if the legal remedies are proven to be inadequate the judge has discretion to "sit in EQUITY" applying the rules of "EQUITY" to "fashion" a remedy that would otherwise be unavailable.

This consolidation and resolution is based on this **fundamental LAW OF REMEDIES**:

> **A Court only has jurisdiction (authority) to "sit in EQUITY" or to "fashion" an "equitable" remedy after plaintiffs first prove the balance of interests favor them and they will suffer irreparable injustice because they have no adequate "legal" remedy.** [11]

This is called **EQUITABLE JURISDICTION**. It means that plaintiffs must prove 1) the **balance of interests** favors them and 2) they will suffer **irreparable injustice** because 3) they have **no adequate legal remedy**. Otherwise the Court has no equitable jurisdiction and no discretion to "fashion" any "equitable" remedy at all.

Courts of EQUITY are effectively the "**Courts of last resort**" because one can only seek a remedy (or defense) in a Court of EQUITY if no adequate remedy (defense) could be obtained in a Court of LAW.

[11] This same concept applies equally to defenses. A Court has no equitable jurisdiction to grant an equitable defense unless and until defendants show they will suffer injustice because they have no adequate "legal" defense.

The fundamental rule of remedies is that if the established, proscribed, traditional, understood and predictable "legal" remedies available in "LAW" are adequate, the Court can only "sit at LAW" and has no power to "sit in EQUITY" and no discretion to "fashion" an "equitable" remedy.

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A. The Balance of Interests

A Court of equity will not grant an injunction or other equitable remedy unless it determines the **balance of interests** justify it. That simply means that the plaintiffs (moving parties, movants) have presented a **prima facie case** showing that they deserve relief. That often is simply based on the pleadings or other claims of the plaintiff.

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B. Irreparable Harm / No Adequate Legal Remedy

The plaintiffs must also plead or claim that they face **irreparable harm** unless the Court grants an equitable remedy. The remedy sought may be an award of a **money judgment in equity** if the plaintiffs have **no legally enforceable cause of action**, an order of **specific performance** if a money judgment would be an inadequate remedy, or an **injunction** to make the defendants do or not do some act.

An alternative way of stating the same principal is that the Court must find that the plaintiffs have **no adequate legal remedy** because they either have **no legally enforceable cause of action** or else award of a **money judgment would not provide adequate compensation** for the losses suffered or threatened.

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C. Equitable Jurisdiction Limited to Necessary Relief

A Court of equity can only provide relief to the **minimum extent necessary** to avoid injustice.

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D. Equitable Defenses Require the Same Considerations

The discussion here focuses on **plaintiffs** seeking equitable remedies, but a Court of equity must apply the same type of analysis when **defendants** seek equitable **defenses**. There are certain defenses that can only be granted in equity. They will be explained later in the outline. Before defendants can plead **equitable defenses** they must first prove they face irreparable harm because they have no adequate **legal defenses**.

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E. Terminology to Distinguish Law from Equity

You must be very careful in your study of Remedies to **discern how the words "law", "legal", "equity" and "equitable" are being used** in lectures and texts. For example, the word "legal"

can simply be used to mean "not illegal" or it can be used to mean "proscribed remedies". And the word "equitable" can be used to mean "fair and just" or it can be used to mean "remedies fashioned by the Court". This distinction is very important to understand and law professors can zip from one meaning to the other at light speed.

3. The Fundamental Distinction between Legal and Equitable Remedies

It is imperative that you understand which remedies are "legal" remedies available in a Court of LAW, and which remedies are "equitable" remedies available only in a Court of EQUITY.

LEGAL remedies are those a plaintiff has a right to receive based on a legal cause of action. A **legal cause of action** is one that by tradition or statute gives the plaintiff a legal right to a remedy. Some **legal causes of action** are **breach of contract**, **breach of covenant**, **tort claims**, **eviction proceedings**, **repossession of chattel** (legal replevin), and **quiet title actions**. In addition the plaintiff and/or defendant **often have a legal right to a jury trial** in a Court of LAW.[12]

> **For Example:** Bevis negligently hits billionaire Trump with his car causing $10,000 in medical bills. On these facts the trial court judge dismissed the case saying, "I am denying Mr. Trump damages because he is so much richer than the defendant that it would violate considerations of equity to award him damages." This decision is totally wrong and would be overturned on appeal because Trump has a legal right to recover from Bevis for negligence. A Court of law has no discretion to deny Trump the remedy that is his legal right. [13]

EQUITABLE remedies are those based a plaintiff has no legal right to demand, but which a Court has discretion to provide based on consideration of fairness. They are based on circumstances in which the plaintiff has no adequate legal remedy but in which the Court has discretion to provide relief as necessary to prevent injustice. The plaintiff and/or defendant **never have a right to a jury trial** in a Court of EQUITY.

> **For Example:** Susie Sucker entered into an oral contract to buy Blackacre from Shifty. After she made "payments" for a year that far exceeded market rental rates, Shifty moved to evict her. Susie has no legal right to enforce the contract because it violates the Statute of Frauds. But a Court of equity has discretion to enforce the oral agreement to the extent it would prevent injustice.

[12] One does not always have a right to a jury trial in a Court of Law. It depends on the cause of action.
[13] Note that Bevis has no legal defense so he could raise equitable defenses if any applied. But none apply here.

4. Legal Causes of Action Distinguished from Equitable Theories

For plaintiffs to prove they deserve award of a remedy they must FIRST prove to the Court that they have a valid **cause of action**. A cause of action is the reason WHY a Court should provide a remedy at all.

A cause of action must be distinguished from WHAT remedies a Court can provide once a cause of action is proven (e.g. award of a money judgment, an eviction order, and orders of specific performance). And a cause of action must also be distinguished from the PURPOSE of a remedy (e.g. damages to compensate the plaintiff, restitution to prevent unjust enrichment, and exemplary awards to punish and deter the defendant from future wrongful acts).

Moving parties must prove either a **legal cause of action** or an **equitable cause of action**. The term "equitable cause of action" is often referred to as an "**equitable theory**" or "**equitable consideration**", and the phrase "cause of action" may be avoided or objected to by your professor.

Common **legal causes of action** discussed in Remedies classes are **breach of contract**, **breach of covenant** and **tort**. Other legal causes of action that are discussed briefly in a following chapter on miscellaneous remedies are such things as repossession of chattel (legal replevin), eviction, and quiet title actions. To receive a legal remedy, plaintiffs must prove a legal cause of action. **All <u>legal</u> remedies must** (by definition) **be based on a legal cause of action**, but some equitable remedies (e.g. **specific performance**) can also be based on legal causes of action if the legal remedies afforded by the cause of action are inadequate.

Moving parties that cannot prove a legal cause of action must prove (establish) an **equitable cause of action**. Common equitable causes of action (theories) are **detrimental reliance**, **promissory estoppel** (not based on tort or contract), **implied-in-law contract**, **recovery of property**, and **equitable servitude**. Of these you may never hear of **recovery of property** as being an equitable theory at all, and **equitable servitudes** are only relevant to real property law.

All remedies based on equitable causes of action are (by definition) **equitable remedies**, but some equitable remedies (e.g. **specific performance**) can result from legal causes of action in situations when the legal remedies afforded by the cause of action (award of a money judgment) are inadequate.

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A. Detrimental Reliance

Detrimental reliance is an **equitable cause of action** in two possible situations:

- The first possible situation is when defendants make **unfulfilled promises** to plaintiffs or else **make false statements of fact** to plaintiffs, **with intent** or at least **knowledge with reasonable certainty** the plaintiffs will act based on the promise or statement of fact.
- The second possible situation is when defendants **know plaintiffs misunderstand the true facts** and **<u>deliberately</u> do not reveal the truth** with the **malicious intent** of causing the plaintiffs to act based on their misunderstanding either to **injure** the plaintiffs or else to **seek unjust gain**.

In both situations plaintiffs must prove they **reasonably relied** on the promises, statements of fact or deliberate silence of the defendants, and that as a result they EITHER **suffered injury** OR ELSE the defendants reaped **unjust enrichment**.

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B. Promissory Estoppel

Promissory estoppel is an equitable cause of action when a defendant made an **unfulfilled promise** to the plaintiff **with intent or knowledge with reasonable certainty** the plaintiff would act based on the promise or statement of fact, the plaintiff **reasonably relied** on the promise and that as a result they EITHER **suffered injury** OR the defendant reaped an **unjust enrichment**.

Promissory estoppel is a subcategory of detrimental reliance because every time promissory estoppel can be proven, plaintiffs detrimentally relied on the defendants' unfulfilled promises. But detrimental reliance can also be proven in other situations where promissory estoppel cannot. And when promissory estoppel is raised the emphasis is on the "estoppel" element that the defendants should be stopped (estopped) from taking some action or asserting some defense that would cause the plaintiffs injury.

> **For Example:** Susie Sucker entered into an oral contract to buy Blackacre from Larry the Lawyer. Larry assured her that they did not need a written contract. Susie relied on Larry's promise. Larry later repudiates the contract and raises the Statute of Frauds as a defense. Susie could plead **detrimental reliance**, since she relied on Larry's promise. But the more on-point cause of action would be **promissory estoppel** because she would want to "estop" Larry from raising the Statute of Frauds as a defense against her.

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C. Implied-in-Law Contract

An **implied-in-law contract** is not a real contract. It is an equitable cause of action (justifying theory) when plaintiffs (movants) **acted to convey benefits** to defendants (respondents) with a **reasonable belief** they **would be compensated in exchange**, but there is **no enforceable legal contract** between the parties. A Court of equity has discretion to award **equitable restitution** to return the parties to their original positions or to prevent frustration of reasonable commercial expectations. [14] An implied-in-law contract is sometimes called a "quasi-contract". But the term "quasi-contract" is sometimes misused to include **implied-in-fact contracts**, and that is entirely wrong. Consequently the term "quasi-contract" causes confusion and should probably be avoided.

Since implied-in-law contracts may involve a breached promise they may overlap with promissory estoppel. And promissory estoppel is a subcategory of detrimental reliance. But not all implied-in-law contracts involve actual promises by defendants. Plaintiffs may act with a good faith belief they will be reimbursed, even if defendants never promised to reimburse them.

The measure of money judgments awarded based on implied-in-law contract theory may be referred to as "quantum meruit" but that term is used very inconsistently.

[14] The "value of their services" here is a "reasonable" amount or "normal compensation", not the actual value enjoyed by the defendant, who might have actually received no benefit from the services at all.

D. Recovery of Property

There are certain "**recovery of property situations**" when the plaintiff seeks to recover property they own from the defendant and there is no legal cause of action, no basis to claim detrimental reliance (including promissory estoppel), no basis to claim implied-in-law contract, and no basis to claim any other cause of action. These situations are not expressly recognized in Remedies classes or texts, so when they pop up on an exam you can be totally lost.

A "recovery of property" situation arises when the plaintiff **owns property** that is in **the defendant's possession** through **no fault of the defendant**, and the **defendant refuses to return** to the plaintiff. Since the defendant gained possession innocently, there is **no unjust enrichment** or wrongdoing by the defendant. In fact, the defendant may have gotten possession because of wrongdoing by the plaintiff.

These odd situations will be explained in more detail below.

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E. Equitable Servitudes

An **equitable servitude** is a promised restraint on the use of land that runs with the land to bind future occupants. It is an equitable cause of action and a real property law issue. But it will never be tested on a "Remedies" question so there is not much more to say about it.

5. Adequate Legal Remedy is usually Available

In most situations there is an adequate legal remedy for the moving party based on a legal cause of action. Usually it is an award of a **money judgment**. And typically that is based on causes of action for **breach of contract**, **breach of covenant** or a **tort**.

The legal remedies besides an award of a money judgment are legal replevin (repossession of chattel) and ejectment (eviction from land). But they are not of much interest in the study of Remedies.

The fact that the plaintiff might not be able to collect a money judgment is not alone sufficient to conclude no adequate legal remedy was available.

Consequently most Remedies classes focus on those unusual situations where legal remedies are NOT available or adequate.

6. Common Situations without Adequate Legal Remedies

Some common situations where no adequate legal remedy is available are as follows: [15]

- **Legal but unenforceable contracts.** A legal but legally unenforceable contract leaves the plaintiff without a legal cause of action. The plaintiff usually has to plead **implied-in-law contract** as a cause of action. [16]
    - **Statute of Frauds.** A contract is unenforceable at law if it violates the Statute of Frauds (e.g. oral contracts for sale of land, guarantees of debts, multi-year contracts).
        - **Exception: Part Performance Doctrine.** An oral contract for sale of land may be completely enforceable in equity (or by statute) just as it would in law if certain strict criteria are met.
    - **Lack of capacity.** A contract is unenforceable at law against a minor or other party lacking legal capacity.
        - **Exception: Necessity of Life.** A contract may be enforced against a person lacking capacity if it is for a necessity of life.
        - **Exception: Ratification.** A contract becomes enforceable against a person lacking capacity if the incapacity ends (e.g. the minor becomes an adult) and the party does not affirmatively repudiate the contract.
    - **Supervening illegality.** A legal contract is unenforceable if it has become illegal.
    - **Impossibility, frustration of purpose and other failure of condition.** A contract is not enforceable if a material condition has failed.
    - **Major breach.** A party that commits a major breach of a contract cannot enforce the contract against the non-breaching party.
    - **Known unilateral mistake.** A contract cannot be enforced by a party who knows or should know that the other party entered into the contract based on a mistake.
- **Invalid contracts.** An agreement or promise did not form a valid contract. The plaintiff may or may not have a legal cause of action.
    - **Mutual mistake.** No valid contract forms if there was no meeting of the minds;
    - **Intended illegality.** No valid contract forms if the parties knew from the beginning ("ab initio") their purpose was illegal;
        - **Exception: Not In Pare Delicto.** A Court of equity will not enforce an illegal contract at all if the parties were in pare delicto (equally in the wrong), but may enforce in equity if one party was not as "guilty" as the other;
    - **Duress, fraud, unconscionability.** No valid contract forms if a party was forced to enter into the contract;
    - **Lack of consideration, illusory contracts, gift promises.** No valid contract forms if it is illusory and no contract or modification is legally enforceable if it is not supported by consideration; This includes gift promises and exchanges of gift promises;

[15] This list may not be exhaustive but it probably represents over 90% of all fact patterns in which legal remedies are inadequate. Understanding this single list is probably enough to succeed in any Remedies class.

[16] Law students often assume that every valid contract is enforceable and every unenforceable contract is invalid. That is totally wrong. For example, in contracts between minors and adults the minor has a valid enforceable contract against the adult but the adult only has a contract that can be enforced at law against the minor if it is for a "necessity of life".

    - **Lapsed offers.** No valid contract forms if an offer lapses before the offeree tries to accept it.
- **Contracts for unique property or services.** A valid, enforceable contract exists but a money judgment is not an adequate remedy because the agreement was for sale of unique property or for unique services; Specific performance (equitable relief) is the typical remedy.
    - **Exception: Not for personal services.** A Court cannot order personal services by a natural person because it is barred by the 13th Amendment;
    - **Exception: Not if mutuality of remedy is lacking.** A Court of equity will not order specific performance against one party if failure of performance by the other party in exchange is likely.
- **Contracts for which damages cannot be proven with certainty.** A money judgment may not be an adequate remedy when damages clearly will occur but the damages cannot be proven with any degree of certainty.
- **Preventing tortuous injury.** Money judgments are not an adequate legal remedy when future injury or continuing injury is reasonably likely. Injunctive relief is always the appropriate remedy.
    - **Example: Indigent tortfeasor.** The threat of a money judgment award has no deterrent effect to stop an indigent tortfeasor from inflicting repeated injury in the future injunctive relief may be necessary to prevent future wrongful acts.
    - **Example: Personal injury or denial of fundamental rights.** The threat of an award of money judgment is not an adequate legal remedy if personal injury or denial of fundamental rights is threatened.
- **Preventing unjust enrichment.** An award of money judgment is not adequate to prevent unjust enrichment in some circumstances.
    - **Example: Specific property.** The plaintiff may have right to title to specific property to prevent unjust enrichment.
    - **Example: Assets shielded by law.** The plaintiff may have a right to damages or restitution but the defendant's assets are shielded by law because of legal exemptions such as "homestead exemptions".
- **Reimbursement otherwise when no legal cause of action is available.** In some situations there is no legal cause of action;
    - **Detrimental reliance.** This applies when the defendant deliberately said or did things intending to induce the plaintiffs to act in reliance, the plaintiffs reasonably acted based on the things the defendant said or did, and **equitable restitution** is necessary to either prevent unjust enrichment by the defendant or to restore the innocent plaintiffs to their prior conditions; [17]
    - **Promissory estoppel.** This is actually a subcategory of detrimental reliance when the defendant made a promise to the plaintiff intending to induce reliance, the plaintiff reasonably acted based on the promise or statement. Usually the plaintiff wants the court to stop the defendant from taking actions contrary to their earlier promise.
    - **Implied-in-law contract.** This applies when plaintiffs acted to bestow benefits on the defendant with reasonable belief they would receive compensation in exchange.

[17] The terms "detrimental reliance" and "promissory estoppel" may be used in vague and contradictory ways. Both involve situations in which the movants "relied" on unfulfilled promises, false statements or deliberately misleading behavior by the respondent, and they are both equitable arguments. If the movant wants to be awarded a money judgment or given specific relief the term **detrimental reliance** is generally used. If the movant wants the respondent to be stopped (estopped) from asserting a claim or defense the term **promissory estoppel** is generally applied.

This is also called **quasi-contract**. The Court may award **equitable restitution** to return the parties to their original positions. If that is not possible the Court may award a money judgment for reasonable compensation to parties that provided services to prevent frustration of reasonable expectations (to protect the public interest). This is called **quantum meruit** reimbursement, meaning "the value of services performed".

- **Recovery of property**. This is seldom if ever discussed in Remedies classes but a situation may arise when a party is simply trying to recover their property from parties who have gained possession without any fault of their own. **Equitable restitution** is necessary to restore possession of the property to the proper owner.
- **Equitable servitudes.** A violation of an equitable servitude is usually prevented by an injunctive order. But in certain circumstances **equitable restitution** to the injured party may be the more appropriate remedy.
- **Unintentional encroachment.** A deliberate encroachment is a "continuing trespass" and the appropriate legal remedy for the land owner is ejectment. That is a legal remedy. But when an encroachment occurs accidentally and through no fault of the defendant, ejectment may be an inequitable remedy and **equitable restitution** may be a more just remedy;

7. Legal Remedies Typically Enforced by Plaintiff

Legal remedies require the plaintiff to "execute the judgment", typically by availing themselves of the services of the County Sheriff to execute a writ of execution, to hold a foreclosure sale against property of the defendant, or to repossess chattel. [18]

Legal remedies usually are "money judgments" that the Court "grants". But it might also be an eviction order or a writ to repossess chattel. Those will be discussed briefly below.

But **once the Court grants a legal remedy, it has no further involvement**. If a defendant fails to pay a judgment, fails to vacate an apartment, or fails to return a car, despite the findings (e.g. judgment) of a Court of LAW, that is the plaintiff's problem. The Court does not take any action to find the defendant "in contempt" of Court. [19]

The bottom line is after a Court of LAW grants a "legal" remedy, its involvement in the whole affair ends, and the plaintiff can not expect the Court to enforce the remedy.

If a plaintiff cannot find any assets to seize to "satisfy" the judgment, then the judgment the plaintiff has obtained is a rather hollow victory.

[18] After all these are "law enforcement" officers, so why shouldn't they "enforce" the findings of a Court of "law"?

[19] A money judgment is considered a "debt" and the Court will never "order" a defendant to pay the debt. However, there is a fine line between "debts" and other financial obligations defendants may owe such as child support. The Court may order a parent to pay child support, and may enforce that order by threatening the defendant parent to be in contempt of court. This is explained in more detail in the chapter on injunctions.

For Example: Bevis causes a traffic accident that makes Butthead a quadriplegic. Butthead is awarded a $10 million judgment against Bevis. Bevis then declares bankruptcy. Butthead's judgment is erased and he gets nothing.[20]

8. Monetary Awards in Equity Typically Enforced by Plaintiff

A Court of equity may award a money judgment even if there is no legal cause of action to compensate for **injury suffered** as **equitable restitution**. [21] While the remedy is based on purely equitable considerations (causes of action) the plaintiff would still have the burden of collecting on the judgment the same as in the case of a judgment awarded by a Court of law.

For Example: Benny promised to give Church $1 million. In reliance Church spent $50,000 to remodel the meeting hall. Then Benny refused to pay. Church has no legal remedy because there was **no contract**. Benny just made a gift promise. But Church may be awarded a money judgment in **equitable restitution** based on a cause of action for **detrimental reliance**. The Court cannot award Church the entire $1 million promised because the Church has only suffered $50,000 in damages. [22]

9. Specific Relief Orders Generally Enforced by Court

Equitable orders for **specific relief** are Orders by the Court **that the defendant do or not do some specific act** or that possession and/or title to some **specific property** be conveyed to the plaintiff. They are generally enforced by the Court under threat of a finding of **contempt** of court. The defendants (or occasionally third parties) are always ordered to do or not do something. And if they disobey the Court, the Court can either fine or incarcerate them as punishment for being in contempt of court.

Typically the plaintiff must petition the Court to issue an Order to Show Cause (OSC) summoning the plaintiffs (or third parties) to appear in court to show why they should not be held in contempt for having failed to obey the Court's prior order.

For Example: Homer Homeowner obtains a restraining order (injunctive relief) telling Homeless Harry to stay off his property. Homeless Harry keeps entering the property anyway. Homer can petition the Court to issue an **Order to Show Cause** that orders Harry to appear in Court and explain why he should not be punished for contempt. If Harry does not show up to answer the Order the judge can issue a **bench warrant** to have him arrested and brought

[20] A large portion of all money judgments go uncollected because the moving party cannot locate and seize any assets from the defendants. Large damage awards can cause defendants to be instantly bankrupt and the plaintiff gets little or nothing.

[21] You may be told that Courts of equity cannot award "money damages". That is only true if "damages" means "legal damages" in the narrow sense of that term. A Court of equity can obviously award a "money judgment" in restitution for injury actually suffered, which has the same effect as an award for "damages".

[22] The general meaning of "restitution" is "returning property or the monetary value of loss to the proper owner". In criminal cases it includes the return of stolen property and payment to the victim for harm caused. But the literature is inconsistent. Most authors refer to the situation in this example as **equitable restitution** because Church is being awarded the loss it suffered because of reliance on Benny's promise. But some authors insist the term "restitution" should only be applied to situations when awards are intended to prevent unjust enrichment. Here Benny did not benefit from his promise so he got no "unjust enrichment". So those authors would not call this "restitution".

before the Court. If the Court finds Harry in contempt of its Order, it may order him jailed as punishment for being in contempt of court.

10. Statutory Causes of Action and Remedies

If a statute establishes a cause of action, it is typically a "legal" cause of action because a "law" affirmatively states that the plaintiff has a right to bring a claim. Usually statutory causes of action provide "legal" remedies. Nevertheless, a statute may specifically provide for both legal and equitable remedies. Courts typically have discretion to "issue orders" as necessary to enforce statutes, those orders would be typically be equitable remedies that the Court may enforce under threat of a contempt order. This situation is referred to as a **merging of law and equity**.

For Example: The Legislature enacts a statute defining the dumping of toxic waste as a "nuisance", providing that persons injured as a result have a right to a money judgment and giving Courts discretion to issue orders as necessary to stop such nuisances. Bevis sues Butthead under the statute and is awarded a money judgment of $10,000. [23] In addition, the Court issues an order telling Butthead to stop dumping toxic waste. It is up to Bevis to collect the $10,000 and the Court is not going to help him collect that money damage award. But if Butthead keeps dumping toxic waste, Bevis (or anyone else for that matter) can petition the Court to find Butthead in contempt, and the Court can order Butthead fined and/or jailed for being in contempt of the Court's order.

11. No Right to Jury Trial in Equity

Equitable remedies are "fashioned" by the Court (judge) and generally **neither party has a right to a jury trial** as to those issues that are "in equity". Judges have the power of equity, not juries.

However, a plaintiff has no right to an equitable remedy until it is first proven there is no adequate legal remedy. And during the trial deliberation that produces the conclusion there is no adequate legal remedy, the defendant may have a right to a jury trial as to those facts that lead to that conclusion.

Therefore, parties often have a right to a jury trial to determine their legal remedies before the Court can turn to a consideration of equitable remedies.

[23] The terms "damages" and "an award of damages" are almost universally used synonymously to mean the award of a money judgment. But that leads to great confusion in the teaching of law. The term "damages" logically means compensation to the plaintiff measured by the amount of damage or injury caused by the defendant's wrongful act. And all "awards of damages" are money judgments. But not all money judgments are awards of damages. Money judgments may also be awards in restitution (measured by the amount of benefit wrongfully enjoyed by the defendant, not the injury to the plaintiff) or punitive ("exemplary" awards measured to punish the defendant and "make an example" of his to deter future wrongful acts by both the defendant and others).

But as to the equitable remedy that might result from a legal cause of action, the jury has no say in the matter and it is strictly up to the Court (i.e. the judge) to decide whether to grant equitable relief or not. [24]

> **For Example:** Bevis sues Butthead for breach of contract. This would be a typical action "at law", and the parties may have a right to a jury trial on the issues of fact. But if the Statute of Frauds (or perhaps section 2-201 of the UCC) required a writing this contract might be unenforceable at law. A jury might be allowed to decide if there was a written contract or not. But if the jury decides there was no written contract, Bevis has no legal remedy. In that case **equitable jurisdiction** would be proven and Bevis could plead for an equitable remedy. The Court has discretion whether to provide such a remedy, and **the jury has no say in that**.

Another situation when a party has a right to a jury trial in an equity setting is when a defendant has been charged with criminal contempt of an injunctive order. In many cases the defendant has a right to a jury trial as to whether they committed criminal contempt or not. But once the jury decides that issue the judge alone determines the appropriate punishment.

12. The Same Court May Sit Alternatively in Both Law and Equity

A given Court (i.e. a particular judge hearing a particular matter) may provide a variety of both legal and equitable remedies. For example the Court may grant both a legal money judgment as a matter of right and an equitable injunction as a matter of discretion. But in doing so the Court is alternatively shifting back and forth between "legal" considerations of "rights" and "equitable" considerations of "justice". [25] The "term of art" for this is to say the Court is "sitting" both in "law" and in "equity."

Conceptually, while the Court is sitting in LAW it cannot provide the equitable remedies. And while the Court is sitting in EQUITY cannot provide the legal remedies. This is, of course, only a theoretical or conceptual consideration.[26]

13. Merger of Law and Equity

As stated briefly earlier the modern view of remedies often results in a merger of law and equity in some situations. In situations such as probate and family law matters statutes give judges broad discretion to fashion a remedy. The fact the remedy is defined by statute suggests it is a legal remedy. But the fact the judge is given broad discretion suggests it is an equitable remedy. While certain remedies may be historically considered "equitable" in some situations the judge has little or no discretion to deny that remedy.

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[24] For example, in a breach of contract action a jury may decide the contract existed, that it was breached, and the monetary measure of damages. But only the Court (i.e. judge) can decide to order specific performance on a finding that a money judgment would be an inadequate remedy.

[25] A "legal" remedy is a remedy a party has a legal right to, and the judge has no discretion to deny it. And an "equitable" remedy is a remedy a party has no legal right to receive, but that a judge has discretion to grant, as necessary to prevent injustice or to protect the public interest by preventing frustration of reasonable expectations.

[26] Technically the Court cannot "sit" in both law and equity at the same time but a judge may mentally switch back and forth between the two so fast it is virtually instantaneous.

Chapter 3: Legal and Equitable Defenses

There are "passive" defenses and "affirmative" defenses, "legal defenses" and "equitable defenses". A legal defense is a defense established by statute or recognized at common law that can defeat a plaintiff's legal cause of action, rendering it unenforceable. When this happens plaintiffs can only seek equitable remedies based on equitable theories (causes of action).

Passive defenses are arguments that **opposing parties with the burden of proof have failed to** adequately present adequate evidence to **prove required legal elements** of their action or defense.

> **For Example:** Seller sues Buyer for breach of contract. Seller has the burden of proving that there was a legally enforceable contract. An **argument** by Buyer that Seller has failed to prove a contract existed in Seller's case-in-chief is a **passive defense**.

Affirmative defenses are recognized **legal or equitable defenses** that shift the burden of proof to the party claiming the defense.

> **For Example:** Victim sues Aggressor for battery. Victim presents evidence to support every required legal element of the tort case. Then Aggressor raises the **affirmative legal defense** of **defense of others** claiming Victim was attacking Friend and he acted to protect Friend. If Aggressor proves the elements of his defense (i.e. that he was not the aggressor and used reasonable force) it is an **absolute defense** that makes Aggressor immune from any finding of fault.

When defendants claim and prove legal defenses it makes the plaintiff's legal cause of action **unenforceable** and plaintiffs can only seek a remedy based on an **equitable cause of action** (theory).

> **For Example:** Seller orally agrees to sell Blackhawk to Buyer and promises he would never use the lack of a writing as a defense. After Buyer tenders payment Seller refuses to deliver the Deed. Buyer's legal cause of action is breach of contract but if Seller raises the Statute of Frauds as a defense it will render the oral sales agreement unenforceable. Buyer would be forced to switch to the equitable cause of action (theory) of **promissory estoppel**. [27]

In other situations defendants have no legal defenses and their only recourse is to plead equitable defenses.

> **For Example:** The California Franchise Tax Board (FTB) sends Taxpayer a notice that FTB's records don't show that he filed a tax return 25 years earlier so he owes $1 million in penalties and interest. There is no statute of limitations to prevent FTB from pressing stale claims like this, and by statute the burden is on the Taxpayer to prove he filed a return. Taxpayer discarded all of his tax records years earlier so he cannot prove that he filed a return in the year in question. His bank and employers don't have any remaining records either, so Taxpayer has no defense at law. Taxpayer can only plead for a remedy (a defense) in equity on the basis of

[27] Buyer may also raise the "equitable defense to the legal defense" of **promissory estoppel**.

laches, the defense that FTB waited an **unreasonable period of time** before pursuing an action **causing prejudice** to Taxpayer's ability to defend himself. [28]

Consequentially there is an interplay between legal causes of action, legal defenses, equitable causes of action, and equitable defenses.

1. Legal Defenses

The recognized legal defenses vary substantially between contract, real property and tort law. Legal defenses are **never defenses against equitable causes of action** (theories).

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A. Contract Law Defenses

For breach of contract actions **legal defenses** seem to fall into three categories, either no contract ever existed, a contract existed but it became void because of later events, or a valid contract exists but it is unenforceable against the breaching party:

- No valid contract existed from the beginning (ab initio) because of -
    - Fraud
    - Deceit
    - Duress
    - Illegality
    - Concealment
    - Lack of intent
    - Mutual mistake
    - Fatal ambiguity
    - Lack of consideration (gift promises)
- A valid contract was created but it became void later because of -
    - Impossibility
    - Legal rescission
    - Frustration of purpose
    - Supervening illegality
    - Known unilateral mistake (asserted by mistaken party)
- The contract is valid but it is unenforceable at law against the breaching party –
    - Statute of Frauds
    - Breaching party lacks capacity (asserted by the party lacking capacity)

The line between passive defenses and affirmative defenses is somewhat blurred in contract law. For example, the Statute of Frauds is a legal defense because it is established in statute. But when a defendant to a breach of contract claim raises the lack of a writing as a defense, the defendant does not have to prove there was not a written contract. Instead the burden is shifted to the plaintiff to prove there was a written contract.

[28] As ridiculous as this is, this is exactly what FTB did in about 2005. The IRS is bound by a 10 year statute of limitations but FTB has successfully dissuaded the California Legislature from establishing any similar rule.

It can also be argued that **unconscionability** is a legal defense. But unconscionability also it seems to be more of an equitable defense against enforcement of a contract at law.

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B. Breach of Covenant Defenses

A few of the defenses for breach of contract may apply to breach of covenant (covenants running with the land) but the only defense in most cases is an argument the covenant did not run with the land to bind the defendant or give standing to the plaintiff.

Since the plaintiff claiming breach of covenant must prove the covenant ran with the land, standing, and breach, the legal defenses of the defendant are almost all passive defenses.

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C. Tort Law Defenses

For tort actions there are only three affirmative legal defenses for negligence but there are a lot of legal defenses for intentional torts.

Some other "defenses" in tort are actually passive defenses such as "legal impossibility":

The three **legal defenses to negligence** are:

- Contributory negligence
- Comparative negligence, and
- Assumption of the risk.

The **legal defenses to other tort actions** (affirmative defenses) are: [29]

- Fraud
- Duress
- Deceit
- Consent
- Authority
- Necessity
    - Public
        - Defense of others
        - Defense of property
    - Private
        - Self defense
        - Defense of property
- Concealment
- Prevention of crime
- Involuntary intoxication

[29] **Mistake of fact** is not listed because it is actually a passive defense – an argument that the defendant did not act intentionally, and that actions that implied intent were done were actually the result of a mistake of fact.

- Public figure / lack of actual malice
- Privilege (as to defamatory statement)

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D. Effect of Legal Defense

The effect of a legal defense, if each and every required element of the defense is proven to the level demanded by the burden of proof (usually "by a preponderance of the evidence"), is that **it defeats the legal cause of action** and the opposing party (usually the plaintiff) is either defeated or forced to resort to **equitable causes of action** (theories).

> **For Example:** Farmer discovers his cows in Neighbor's pasture. Neighbor refuses to let him have them back. Farmer sues for **conversion** and proves Neighbor has taken his cows and refused to return them. Neighbor raises the defense of **public necessity**, the **defense of others** and **defense of property** because he found the cows wandering on the road and put them in his pasture to prevent an auto accident. That is a valid (and absolute) legal defense and it will defeat Farmer's claim of conversion. Farmer will have to resort to an **equitable cause of action** for **recovery of property**. [30]

2. Equitable Defenses

There are only three (3) recognized equitable defenses, and they **can always be effective against both legal and equitable causes of action**.

There recognized equitable defenses are **laches**, **unclean hands**, and **estoppel**.

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A. Laches

The defense of **laches** means that the opposing party **unreasonably delayed taking action** and the failure to put the defendant on notice of a potential claim **caused the defendant to be unable to adequately defend** against the claim. Laches is intended to bar "stale claims" when unreasonable delay has caused the defendant's ability to defend to be "prejudiced".

> **For Example:** After years of counseling Lizzy suddenly "remembers" events that she claims happened long ago. She sues her former high school teacher, Sam Senile, for $1 million claiming he sexually molested her 34 years earlier when she was 16 years old. No statute of limitations bars the claim. [31] Sam Senile is 90 years old and has Alzheimer's Syndrome. Sam would have to plead **laches** because Lizzy delayed acting for an unreasonable period of time causing him to be unable to defend himself. [32]

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[30] If Farmer knew of Neighbor's claim that he found the cows in the road he probably would probably petition the Court for recovery of property in equity without claiming conversion at all.
[31] Because the Legislature didn't want to be accused of being on the side of child molesters.
[32] Sexual molestation is a terrible crime but people also make false accusations of such acts. Sometimes it is done by people who are mentally ill and other times by people deliberately misusing the legal system for financial gain.

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B. Unclean hands

A Court of equity will not enforce a **claim that is the product of wrongful acts** by the party seeking to benefit.

> **For Example:** Contractor agrees to renovate Homey's bathroom for $5,000. After he rips out the toilet he tells Homey he underbid the job and will not complete it unless Homey agrees to pay him $6,000. Homey agrees at first but repudiates the agreement after the work is complete. Since there was no promise of additional consideration to support the contract modification, Homey can defend against Contractor's breach of contract claim by raising the **legal defense of lack of consideration**. That leaves Contractor without an enforceable legal cause of action so he would have to counter in equity with a claim of **detrimental reliance**. Homey would counter that with the **equitable defense of unclean hands** (since Contractor is trying to get the Court to enforce a claim that is a product of his own threat to breach). Contractor is defeated in both law and equity.

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C. Estoppel

A party that makes an assertion of fact, including a promise that the party will do or not do something, may be barred by Court of equity from repudiating the promise. This is a "defense" when asserted by a party to prevent the opposing party from either pleading a cause of action or raising a defense.

> **For Example:** Seller orally agrees to sell Blackhawk to Buyer and promises he would never use the lack of a writing as a defense. After Buyer tenders payment Seller refuses to deliver the Deed and raises the Statute of Frauds as a defense. If Buyer pleads **promissory estoppel** it is an "equitable defense" to stop Seller from raising the Statute of Frauds as a legal defense.

Chapter 4: Miscellaneous Remedies of Little Interest

There are some "remedies" that are simply not of interest in "Remedies classes" and little or nothing is said about them even though they are the main livelihood of many attorneys. It is best to identify these "miscellaneous" issues and get them out of the way first.

The "miscellaneous" remedies that are of little or not interest in "Remedies" classes are:

- Legal remedies provided by the UCC (important on UCC answers, not on Remedies answers);
- Gifts;
- All real property actions except for covenants and servitudes running with the land and unintentional encroachments:
    - Intentional encroachment;
    - Eviction (ejection of a tenant);
    - Foreclosure;
    - Quiet title actions (adverse possession);
    - Partition actions;
    - Easements;
- Repossession of chattel (legal replevin);
- Declaratory relief, including:
    - Divorce, Custody and other Family Law matters, and
    - Probate Actions;
- Criminal law matters;
- Tax matters;
- Federal actions:
    - Bankruptcy,
    - Civil rights actions, and
    - Patent matters.

Some of the above are purely legal remedies (e.g. UCC remedies, eviction, legal replevin, foreclosure) and others involve more of a merger of law and equity (e.g. divorce, quiet title). They are seldom if ever the subject of discussion in a Remedies class.

1. Gift Remedies

Remedy classes and Remedy texts seldom discuss "gifts" as opposed to "gift promises". There is not much to say but a few words on the subject may prevent a lot of confusion.

"Gift promises" often raise the issue of equitable remedies based on promissory estoppel or detrimental reliance. That will be discussed in the chapter on restitution.

In contrast to "gift promises" a "gift" is a thing of value that is actually gratuitously given from one person (the donor) to another (the donee), not in exchange for anything of value.

The general rule is that once the thing of value has been physically or symbolically conveyed to the donee it becomes the property of the donee and cannot be recovered by the donor. In other words, there are no "take backs". [33]

A symbolic conveyance takes place by the giving (delivery) of a "token chose" which is a token that symbolically represents the property given. Typical items constituting a token chose are keys to cars, deeds to land, or passbooks to savings accounts.

There are a few exceptions to the general rule:

- A person cannot "give" away anything that they do not own, so any conveyance by a person without legal title does not convey legal title. While there is no "legal right" to recover the property it can generally be recovered by **equitable restitution** if the property is unique in some way. This is true even against a **bona fide purchaser for value without knowledge**. [34]

- A **gift made in contemplation of death** can generally be recovered, and this is especially true if the person commits suicide. There is a general presumption at law that a person who acts to give away property in contemplation of death (other than by a testamentary gift by will or trust) is not of sound mind. As a result such gifts can generally be recovered by the donors (if they did not actually die) or by their heirs (if they did die). This may be provided for in statute (a legal remedy) or at the discretion of the Court (an equitable remedy).

- **Statutory prohibitions** such as California community property law prohibit gifts of property of the marriage without the consent of both spouses and the right to recover is provided for by statute so these are legal remedies more than "equitable" remedies the Court has discretion to deny.

Other that these few exceptions the general rule holds that there is no remedy to recover property voluntarily given away by a person.

2. Ejectment

Ejectment means a court action to remove someone or something from the land of another person. The only types of ejectment actions of interest in Remedies classes are the **removal of encroachments** from land. This issue is discussed below as part of the discussion of **equitable restitution** in the chapter on restitution, and also in the chapter on injunctions.

3. Repossession (Replevin)

Replevin means the recovery of possession and/or title to chattel, moveable property. It is not of much interest in Remedies classes.

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[33] This is just like when you were a kid. Once you give someone a gift you have no right to take it back.

[34] While plaintiffs have no "legal right" to recover property wrongfully taken from them, a Court of equity will almost always order the property returned to the rightful owner.

Chapter 5: Legal (Money) Damages

Since the miscellaneous legal actions listed in the prior chapter such as repossession of chattel are not discussed much if at all in "Remedies" classes, the only "legal remedy" of any interest is the award of a **money judgment**.

This chapter will discuss money judgments awarded to compensate plaintiffs for the **legal damages** they have actually suffered as the result of defendants' wrongful acts. The purpose of "damage awards" is to compensate plaintiffs and return or restore them to the positions they were in before the plaintiffs' wrongful acts. Since the purpose is to "compensate", you may hear damage awards called **compensatory remedies**. And if the award of a money judgment is a substitute for a non-monetary loss, such as pain and suffering, it may also be referred to as a **substitutionary remedy**. However, these terms do not add much to understanding.

This chapter will only discuss how damage awards are calculated for breach of contract, breach of covenant and tort causes of action. Those are about the only situations in which they are of much interest.

1. Confusion in the Literature

There is a lot of conflicting use and misuse of terms in the literature used to teach Remedies. Much confusion can be eliminated if you are aware of this before you get too deeply immersed in your studies.

Money judgments are about the only "legal remedies" discussed in Remedies classes so the terms "legal remedy" and "money judgment" are often used synonymously. This is wrong for two reasons. First, some of the "miscellaneous" remedies listed in the prior chapter are legal remedies other than money judgments. But if you ignore those miscellaneous legal remedies (e.g. eviction, legal replevin), then it is true that all other legal remedies are in the form of money judgments. But a second problem is that money judgments can also be awarded in equity. So even though a "money judgment" can be awarded as a "legal remedy", it can also be awarded as an equitable remedy.

Another source of confusion is the use of "money judgment" and "money damages" synonymously. Legal damages measured by the amount of actual injury to the plaintiff (usually the plaintiff) are always awarded as a money judgment, but **money judgments are not always awards of legal damages**. They can also be awards of **legal restitution** to prevent unjust enrichment, awards of **equitable restitution** to restore parties to their original condition, or awards of **quantum meruit reimbursement** to compensate a party for services rendered. So money judgments are only awards of "damages" in one of several situations.

The point to note here is that a "money judgment" can either be a legal remedy or an equitable remedy. And when it is a legal remedy it can be measured (i.e. calculated) to EITHER compensate the injured party for **damages actually suffered** OR as **legal restitution**, as explained in the following chapter.

When a "money judgment" is awarded as an equitable remedy most of the literature refers to it as either **equitable restitution** or **quantum meruit reimbursement**. Some authors only use the term

"restitution" to refer to a remedy intended to prevent unjust enrichment by the defendant. They refer to remedies in other situations as "equitable awards" or some other general term.

This chapter will only discuss money judgments awarded as **legal damages**. The other possible reasons a money judgment might be awarded, as **legal or equitable restitution** or as **quantum meruit reimbursement** will be explained in later chapters.

2. Damages for Breach of Contract

Only the non-breaching party to a valid, legally enforceable contract can be awarded legal damages. If the contract is not valid or not legally enforceable the only possible remedies would be in equity. And if a breach is major the breaching party has no legal remedy and can only seek a remedy in equity.

The calculation of legal damages to the non-breaching party depends on whether the breach is minor or major, and whether the breach occurs before or after a party has fully performed.

Generally one party has a duty to perform first, and completion of that performance is an **express** or **constructive condition precedent** that must occur before the other party has any duty to perform in exchange. In the more unusual case both parties have a duty to perform simultaneously, and in that case the tender (offer) of performance by each is a **constructive condition concurrent** that must occur before the other party has a duty to perform in exchange. [35]

The calculation of damages to the non-breaching party depends to some extent on whether they are the first or second party to perform.

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A. Express and Implied-in-Fact Contracts

To avoid confusion between "implied-in-fact" contracts and "implied-in-law" contracts it may be good to review that there are two types of **legally enforceable contracts**, express and implied-in-fact.

An **express contract** is a legally enforceable contract based on an express offer by an offeror and an express acceptance by an offeree.

> **For Example**: Merchant says, "I will sell you this sweater for $30", and Buyer says, "It's a deal." That is an express contract.

An **implied-in-fact contract** is one based on actions by the parties that support a finding that one offered to convey something of value to the other, expecting compensation in return, and the offeree willingly and knowingly accepted the benefits offered.

> **For Example**: Contractor knocks on Homey's door and says, "I am here to install your new air conditioner", and Homey allows the air conditioner to be installed. That is an

[35] A situation when there are constructive conditions concurrent is the sale of real property. The seller must **tender** marketable title to the property before the buyer has a duty to **pay**, and the buyer must **tender** payment before the seller has a duty to **deliver** marketable title.

> implied-in-fact contract because Contractor impliedly expected to be paid and Homey impliedly agreed to pay him for the service. Homey cannot claim there was no contract because Contractor did not say "I want to be paid" or because he did not expressly say, "I will pay you". The fact that he allowed installation implied that he agreed to pay for the air conditioner.

Both express and implied-in-fact contracts are **legally enforceable contracts**. But there is a different type of implied contract called an **implied-in-law contract** that is not a legally enforceable contract. It is an equitable pretext, theory or cause of action upon which an Court of **equity** can justify an equitable remedy.

Implied-in-law contracts will be explained later.

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B. Types of Contract Damages

The non-breaching party in a contract situation may be able to seek a damage award based on four different concepts: **expectation** damages, **reliance** damages, **consequential** damages, and **incidental** damages. When two or more of these concepts apply the non-breaching party has a legal right to be awarded **the sum** of them, or in the alternative to seek **legal restitution** instead. But legal restitution is only going to be a larger amount in certain situations. That will be explained in the chapter on restitution.

1) Expectation Damages

Expectation damages are measured by the contract benefits the non-breaching party expected to receive and lost because the other party breached the contract. Expectation damages are measured at the time of the breach by the increased amounts the non-breaching party would have to pay to acquire the same goods or services from an alternative source, whether it is paid for or not. These are always a factor in the case of every breach of contract, whether major or minor.

> **For Example**: Traveler agrees to pay Agency $2,000 for a tour of China. At the time of the agreement Traveler could have arranged a similar tour with other agencies for the same price. Agency reneges on the agreement. At the time of the breach Traveler would have to pay another tour agency $3,000 for a comparable tour. This is a major breach and Traveler would have to spend $1,000 more than he had expected to take the trip. Traveler has a legal right to award of **expectation damages** of $1,000, whether he actually pays another agency to take the trip or not.

2) Reliance Damages

Reliance damages are expenses incurred by a non-breaching party **before a breach of contract** in reliance on the existence of the contract that are made worthless because of the breach. These are never a factor in the case of a minor breach of contract because **when a breach is minor the non-breaching party is not denied the expected benefits of the bargain**.

> **For Example**: Traveler agrees to pay Agency $2,000 for a tour of China and posts a $400 deposit. To prepare for the trip he pays the Chinese embassy $100 for a visa. Agency

> reneges on the agreement. Traveler is unable to go to China and the visa is worthless. This is a major breach, and Traveler has a legal right to award of **reliance damages** of $500, the sum of the $400 deposit and the $100 visa. But if Traveler had been able to go to China anyway, his payment for the visa would not have been wasted, and he could not claim that as an injury.

A plaintiff who suffers both expectation damages and reliance damages has a right to a money judgment equal to the **sum** of them.

> **For Example**: Traveler agrees to pay Agency $2,000 for a tour of China and pays $100 for a visa. Agency reneges on the agreement. At the time of the breach Traveler would have to pay another tour agency $3,000 for a comparable tour. Traveler would have a legal right to award of **expectation damages** of $1,000, whether he actually pays another agency to take the trip or not. If he pays the other agency and takes the trip his visa is not worthless and he cannot claim that expense as **reliance damages**. But if he does not make the trip the visa is worthless and he **has a right to reliance damages** of $100 for the worthless visa in addition to his expectation damages. So the total damage award would be $1,100 in that case.

3) Consequential Damages

Consequential damages are **lost profits or benefits** the non-breaching party expected to receive from **collateral agreements** because of the breach of contract. [36] Under *Hadley v. Baxendale* the non-breaching party only has a right to receive consequential damages if they were **contemplated** (known of) by the breaching party at the time the contract was executed. In addition, the non-breaching plaintiff must prove damages with **certainty**, that they were **caused** by the breach, and that they **could not be avoided**. [37] This necessarily requires that the non-breaching party have the "collateral" contracts in place or at least planned at the time the breached contract was executed, that the breaching party is informed of that fact, and the "collateral" contracts must be fully executed before the breach occurs.

> **For Example**: Wholesaler orders 10,000 widgets from Manufacturer for $1 each. Wholesaler expects to sell them retail, and Manufacturer knows that. That means Manufacturer could **contemplate** at the time of execution that if he breaches the agreement Wholesaler will lose profits. Then Wholesaler agrees to sell 5,000 of the widgets to Retailer for $2 each. Manufacturer fails to deliver. Manufacturer's breach caused Wholesaler to lose $5,000, and Wholesaler can not avoid it if he can't get the widgets on time from any other source. Wholesaler can prove his loss with certainty because he already had Retailer locked into a contract. So in this case Wholesaler has a legal right to **consequential damages**. But Wholesaler cannot claim consequential damages on the other 5,000 widgets that Manufacturer failed to deliver because he did not have those sold at the time of the breach and <u>cannot prove with certainty he could have sold them at any price</u>.

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[36] You may hear consequential contract damages referred to as "special damages". That is a very bad idea. It is both unnecessary and it causes untold confusion because special damages in tort law are entirely different and almost the opposite idea.

[37] These are the FOUR C's: Contemplated at execution, Caused by breach, Couldn't be avoided, and known with Certainty.

4) Incidental Damages

Incidental damages are expenses incurred by the non-breaching party **after a breach of contract** because of the breach. They are different from expectation damages because they have nothing to do with the loss of contract benefits the non-breaching party expected to enjoy. They are usually storage or shipping charges, travel and telephone expense, court costs, etc. They are seldom of interest in Remedies classes.

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C. Damages for Minor Breach

A breach of contract is a failure to perform contractual duties as promised. But a breach is minor if the breaching party has substantially performed so that the non-breaching party will still substantially enjoy the expected benefits of the bargain, AND the breach is not a violation of a material condition. A material condition is either an "express condition" or an "implied material condition". [38]

Reliance damages are almost never an issue in the case of a minor breach because the non-breaching party has not been denied the benefits of the bargain. Consequently, any expenses they incurred in reliance on the contract are not rendered worthless by the breach. There may be exceptions, but this is generally true.

1) Minor Breach by First Party to Perform

If the first party to perform commits a minor breach, substantial performance (as determined by the Court) excuses the constructive condition precedent of full performance and the duty of the other party to perform in exchange (e.g. to pay the contract price) ripens. But the non-breaching party has a right to damages to compensate them for actual injury caused by the breach. Consequently, the non-breaching party must pay **the contract price LESS AN OFFSET for the damages actually caused by the breach.**

> **For Example**: Bevis promises to paint Butthead's house by September 1 for $3,000. He does not complete painting until September 15. He breached the contract, but since he did complete painting it is a minor breach (assuming the contract did not expressly require timely performance). Therefore, Butthead will have to pay Bevis the contract price of $3,000 less an offset for the damages he can prove he actually suffered as a result of the delay. If he cannot prove he suffered any damages he has no "expectation damages" and does not get any offset.

[38] Most conditions expressly stated in a contract are considered "express conditions" that if violated constitute a major breach. Two common exceptions are conditions of timely performance and "satisfactory" performance. Tardy performance is not a major breach unless timely performance is unequivocally required by the contract agreement or otherwise absolutely required by the circumstances of the contract. And promises of "satisfactory" performance will be interpreted to mean "reasonably satisfactory" performance unless "personal satisfaction" is unequivocally required by the contract or otherwise implied by the nature of the contract. Implied material conditions include the implied duties of each party to take reasonable steps so the other party will enjoy the benefits of the bargain, and not act to prevent the other party from performing the contract.

2) Minor Breach by Second Party to Perform

If the first party to perform completes performance the duty of the other party to perform in exchange ripens. In the case of conditions of concurrent performance, the duty of the second party ripens as soon as the first party "tenders" (offers) performance. If the second party to perform then fails to completely perform as promised, but does substantially perform, the breach is minor. Consequently, the non-breaching party has a contractual right to be paid **the contract price (less amounts already received) PLUS AN ADDITION for the damages actually caused by the breach to the non-breaching party.**

> **For Example**: Bevis promises to paint Butthead's house by September 1 for $3,000. He performs as promised, but Butthead only pays him $1,000 and does not pay him the balance for a year. Butthead breached the contract (because he did not pay in full immediately), but since he did finally pay the entire amount his breach is a minor breach (assuming the contract did not expressly require timely performance). Therefore, Bevis has been paid the contract price, but Butthead will still have to pay him for the damages caused by the late payment. Usually this would be the interest value on the sum of $2,000 for one year.

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D. Damages for Major Breach

A major breach is any contract breach that is not a minor breach. That means it either substantially denies the non-breaching party the expected benefits of the bargain, OR is a violation of a major condition, express or implied.

A breaching party that commits a major breach has no legal rights under the contract and can only seek **equitable restitution** or otherwise **quantum meruit reimbursement** on an **implied-in-law contract** theory. That will be explained in a later chapter.

1) Major Breach by First Party to Perform.

If one party has a duty to perform first as a constructive or express condition precedent before the second party's duty to perform ripens, and the first party to perform commits a major breach the other, non-breaching party is excused from all contract obligations and has a right to legal damages measured as the **sum of expectation, reliance, consequential** and **incidental** damages, as appropriate. As an alternative to damages the non-breaching party has a legal right to seek an award in **legal restitution** instead. Legal restitution will be discussed in the following chapter on restitution.

> **For Example**: Bevis promises to build a house for Butthead for $100,000. Bevis has a duty to perform first before Butthead's duty to pay the full contract price will ripen. Suppose Butthead gives Bevis an advance of $20,000 and pays $12,000 for drapes and window shades to go in the house. Before he has completed any substantial work suppose Bevis repudiates the contract, and Butthead finds he would have to pay another contractor $150,000 to build the same house. Suppose he cannot afford to go forward and does not build the house at all. Then the drapes and window shades are worthless to him. Butthead has a right to **reliance damages** of $12,000 to reimburse him for those wasted expenses,

and **expectation damages** of $50,000, the extra amount it would have cost him to finish the house. In all he has a right to damages of $62,000.

2) Major Breach by Second Performing Party

If the first party to perform completes performance the duty of the other party to perform in exchange ripens. In the case of conditions of concurrent performance, the duty of the second party ripens as soon as the first party "tenders" (offers) performance. If the second party commits a major breach the non-breaching party is excused from any remaining contract obligations, but there may not be any. In most cases the no-breaching party is entitled to an award of **money damages equal to the contract price** plus any additional damages caused by the breach.

> **For Example**: Bevis promises to paint Butthead's house by September 1 for $3,000. When Bevis finishes painting Butthead refuses to pay him without reason. Butthead committed a major breach because his repudiation completely denied Bevis the expected benefits of the bargain. Bevis has a right to a money judgment for expectation damages of $3,000, and since Butthead owed that amount from the time of the breach, Bevis may also be awarded interest on that amount from the time of the breach to the time of judgment. [39]

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E. Legal Restitution as an Alternative Remedy for Non-Breaching Party

The non-breaching party has a legal right to request restitution as an alternative remedy to an award of damages when there has been a major breach. This is a right to **legal restitution**. This will all be covered again in the chapter on restitution below.

> **For Example**: Bevis agrees to build a house for Butthead for $100,000 expecting to earn a profit of $20,000. Bevis invests $50,000 in labor and materials. Then Butthead repudiates the contract and refuses to pay. Bevis' **expectation damages** are $20,000, the lost profits he expected, his **reliance damages** are $50,000, the money he is out-of-pocket in reliance on the contract, and his **total damages** are $70,000. But if expert testimony shows Butthead would only have to pay another contractor $10,000 more to finish the house, Bevis has actually conveyed $90,000 worth of benefits to Butthead. If Butthead only paid Bevis $70,000 in damages he would reap an **unjust enrichment** of $20,000 for breaching the contract, so Bevis has a legal right to request $90,000 in **legal restitution** as an alternative to receiving only $70,000 in damages. [40]

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[39] If tardy actually performance causes a non-breaching party to incur out-of-pocket expenses or lost income those will be the measure of damages. They might be considered expectation damages or else consequential damages. If the non-breaching party is just delayed in receiving money or being able to use property damages would be based on imputed interest value for late payment or imputed rental value for loss of use of property.

[40] Butthead's enrichment would be "unjust" because it would result from breach of the contract, an illegal act.

F. Equitable Restitution or Quantum Meruit Reimbursement as Remedy for Breaching Party

A party that commits a major breach of contract after conveying benefits to the non-breaching party has no legal right to restitution but can seek **equitable restitution** or **quantum meruit reimbursement** based on an **implied-in-law contract** theory to the extent they have conveyed benefits that exceed the damages caused by the breach.

> **For Example**: Student is accepted to attend Storefront Law School so she leases an apartment from Landlord on May 15 posting a deposit of $1,000 with occupancy to begin August 1. The next day she is accepted to attend Snob Law School with a full-ride scholarship. She immediately repudiates the lease agreement with Landlord. He leases the same apartment to another student on the same terms, and suffers no damages, but he refuses to return the deposit. Student committed a major breach so she has no legal rights and must plead for **equitable restitution** of her deposit. Her equitable cause of action (theory) is **implied-in-law contract** because she paid the $1,000 expecting to receive compensation in return. A Court of equity has discretion to grant Student a money judgment against Landlord in the amount of her deposit. That will return Student to the position she was in before she entered into the agreement, and Landlord is returned to his original position as well because he suffered no damages. If Landlord had suffered damages as a result of the breach (e.g. he had to pay $50 for another advertisement to rent the apartment) the money judgment to Student would be reduced by that amount. Landlord would still be returned to the original position and Student would be returned to the original position.

If a party commits a major breach after **performing services benefiting the non-breaching party**, and the benefits conferred by the services exceed the damages caused by the breach, restitution cannot return the parties toward their original positions because nothing was conveyed to the non-breaching party that can be "given back". In that case a Court of equity may grant a money judgment for **quantum meruit reimbursement** based on an **implied-in-law contract**. This will all be covered again in the chapter on implied-in-law contracts below.

> **For Example**: Painter agrees to paint Homey's house with Kelly-Moore paint. But Painter paints the house with Fuller-O'Brien paint instead. That is a major breach of contract because it violated an express condition. Painter has no legal rights under the contract. If Fuller-O'Brien paint is just as good as Kelly-Moore paint, Homey has suffered no actual damage. Painter acted with a good faith belief he would be compensated so he must plead for **quantum meruit reimbursement** based on **implied-in-law contract**. The Court (judge) would have discretion to award Painter a money judgment to compensate him for the benefits he has conveyed to Homey. The purpose here is not to prevent "unjust enrichment" because Homey has done nothing "unjust" at all. Rather, the purpose is to prevent frustration of Painter's reasonable expectations that he would be compensated for his services. Among the factors a Court of equity (the judge) would consider here is why Painter did not use Kelly-Moore paint as promised. If the paint was simply unavailable, the Court would be inclined to award complete compensation. If Painter used Fuller-O'Brien because it was cheaper, the Court would be reduce compensation to Painter to prevent him from reaping an unjust enrichment by substituting cheaper materials.

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G. No Punitive or Non-Monetary Damages

No awards of punitive damages or damages for non-monetary claims such as worry, distress or inconvenience are awarded in contract law. [41]

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H. Generally No Award of Attorney Fees in Contract Law.

No awards of attorney fees are allowed in contract law unless it is provided for in the contract or else in statute. [42] The prevailing party generally is awarded the "costs" of suit, but attorney fees are not considered one of those "costs".

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I. No Unreasonable Liquidated Damages

A liquidated damages clause is a contract provision that a non-breaching party's only remedy for a breach is a pre-determined amount of money.

Generally, no **liquidated damage** agreement is enforceable, at all, if it produces an unreasonable result.

In particular, a non-breaching party cannot retain a "deposit" or down payment as liquidated damages if it unreasonably exceeds the actual damages caused by a breach of contract. Conversely, a non-breaching party cannot be unreasonably limited to an amount of liquidated damages that is inadequate to compensate for damages actually suffered.

An extension of this concept is that a liquidated damage agreement is generally unreasonable, per se, if the breached contract was for a sale of **unique property** because a money judgment is generally an inadequate remedy when a contract is for sale of unique property. [43]

> **For Example:** Art agreed to sell his original oil painting "Sunflowers" to Collector for $25,000 with an agreement that if either party breached the non-breaching party's sole remedy would be an award of $5,000. Art repudiates the agreement. This liquidated damage agreement is unenforceable against Collector because the property being sold is unique and money is not an adequate remedy.

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[41] An extreme minority of Courts held in the past that punitive damages may be awarded for a "bad faith breach of contract", but it is not clear that any Court today would support those holdings. If a party enters into a contract in bad faith, without any intention of performing the agreement, the appropriate cause of action would be in tort for fraud, not in contract for breach.

[42] Certain statutes will allow the Court to award reasonable attorney fees in certain situations. But the general rule is that unless a statute or contract provides otherwise, the Court has no discretion to award attorney fees.

[43] I have never heard this pronounced as a "rule" of law but it might as well be because it is always the case that no liquidated damage agreement is "reasonable" if money damages would not be an adequate remedy.

J. Survival of Claims

Contract rights and remedies always survive the death of contract parties. The personal representative of the decedent (i.e. the "executor" if the decedent dies testate and the "administrator" otherwise) has the duty to fulfill the contract obligations of the decedent and recover contract damages from breaching parties for the estate.

3. Damages for Breach of Covenant Running with the Land

Remedies for breaches of contract are discussed at length in Remedies classes but little or nothing is said about remedies for breaches of covenants running with the land. Consequently, if you run into this sort of question on a Bar exam you may be unprepared.

A covenant is a contractual agreement between two people concerning land. For example, a landlord agrees to rent land to a tenant and in exchange the tenant agrees to pay rent. Or perhaps a seller of land agrees to sell land to a buyer, and in return the buyer agrees to maintain a right of way for the use of the seller. In these situations the original parties have a contract, so any breach by one of them is a breach of contract, and all of the remedies discussed above concerning breaches of contract apply.

But as soon as one of the original parties to the agreement conveys his interest in the land to another party, that new party is not a party to the original agreement. So the new interest holder is not bound by the covenant unless it "runs with the land" to bind future interest holders. This is a peculiar feature of real property law that does not exist otherwise.

If a covenant runs with the land the remedies of a non-breaching party are exactly the same as they would be in contract law except that the concepts of "contract price", "major breach" and "minor breach" do not have application.

> **For Example**: Don Corleone divides his Tahoe estate in half. He keeps half and gives the other half to his son Fredo with the mutual agreement that each of them, and future owners of the two parcels, will always pay half of the expense of maintaining the boat dock on the lake. The covenant is put in the deed so that it satisfies the Statute of Frauds and otherwise is sufficient to form a covenant running with the land. Later Don Corleone dies and leaves his own holding to his other son Michael. Fredo pays $1,000 to have the dock repaired. Michael refuses to pay his half of the expense. Fredo can sue Michael for **money damages** the same as he could have if the agreement had been between Fredo and Michael.

Remedy rules for **legal restitution** apply to breaches of covenants the same way they apply to breaches of contracts. Parties that do not breach the covenant usually pay money or otherwise act to convey benefits to other parties that may breach the covenant. If the value of benefits conveyed by the non-breaching party exceeds the damages caused by the breach of covenant, the non-breaching party can seek **legal restitution** to prevent the breaching party from reaping an unjust enrichment from their wrongful act. This is discussed more in the chapter on restitution.

4. Damages in Tort

A tort plaintiff can be awarded **legal damages**, and the damage award will always be in the form of a money judgment. In tort "legal damages" and "money damages" are synonymous the same as in contract and real property law.

The victim of the tort also has a right to seek an award in **legal restitution** as an alternative to an award of damages. The victim (plaintiff) is said to "waive the tort and seek restitution". [44] Legal restitution is simply an alternative measure of remedy available to the tort victim the same way legal restitution is an alternative measure of remedy when there is a breach of contract. We do not say that non-breaching parties "waive the contract" when they ask for legal restitution instead of damages, so it makes little sense to say tort victims "waive the tort". But that is what it is commonly called.

The victim of a tort also may seek possession and title to property in some situations, rather than a money judgment to compensate them for the loss of the property. In this situation the Court has discretion to award them possession and title, but it is not an absolute right. This is **equitable restitution**, a form of **specific performance**. If the property sought is chattel this may also be called **equitable replevin** although the term "replevin" is dated if not obsolete.

Conversely, a tortfeasor can never be awarded legal damages. This is only common sense. Damages are an award to compensate a party for the injury caused by the wrongful acts of another, not to compensate the wrongdoer for injury they caused themselves. And since tortfeasors have no right to receive damages, they also have no right to **legal restitution**. There does not appear to be any situation in which a tortfeasor can be awarded **equitable restitution** either. If a tort is committed intentionally the tortfeasor has dirty hands and no right to plead equity at all. And if the tort was the result of negligence there is no "injustice" if the victim receives a windfall.

> **For Example**: Bevis mows the weeds on Butthead's vacant lot without his consent and then demands $100 on the argument Butthead was going to have to pay someone else that much or more to mow the lot anyway. There was no contract between them so if Bevis sues for reimbursement it has to be in equity. And Bevis is barred in equity by **dirty hands** because he is trying to be rewarded for his own illegal act, trespass to land. A Court of equity will not reward a party for a wrongful act. If Bevis claims he "accidentally" mowed the wrong field there still is no reason Butthead should be made to pay for Bevis' "mistake". [45]

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A. Types of Tort Damages

There are two actual types of "damages" in tort, **special damages** and **general damages**. The plaintiff (tort victim) has a legal right to a money judgment for the **sum** of the two types of damage. However, a plaintiff may also be awarded a money judgment to punish a defendant that acted deliberately and maliciously to cause injury, and that is generally referred to as **punitive**

[44] This may be called "in assumpsit" but that is an obsolete, medieval term for a breach of contract action.
[45] Thinking outside the box, what do you think would happen if people could get rewarded for making "mistakes"? Wouldn't every huckster start mowing fields without permission and demanding payment for their "mistakes"?

damages even though the intent of the award has nothing to do with compensating the plaintiff for the injury they actually suffered.

1) Special Damages in Tort

Special damages are measured by the **actual monetary losses** suffered by the tort victim (plaintiff), both prior to trial and estimated or projected into the future.

> **For Example**: Suzy negligently goes through a red light and collides with Victor. Victor suffers $10,000 worth of damage to his auto and $35,000 in medical expenses. Victor has a legal right to a money judgment in the amount of $45,000 to compensate him for his **special damages**.

2) General Damages in Tort

General damages are measured to compensate the victim (plaintiff) of a tort for all of the damages suffered that are NOT special damages. In other words, for all injuries suffered that are not actual monetary losses. The general term for this is "**pain and suffering**" although it includes aggravation, irritation, fuss, bother and any other inconvenience caused by the tort.

> **For Example**: Suzy negligently goes through a red light and collides with Victor. Victor loses his right leg. Victor has a legal right to a money judgment in the amount the finder of fact (jury or judge sitting at a "bench trial") decides the leg is worth. That award is **general damages** because it is not intended to compensate Victor for a monetary loss.

Sometimes there is a statutory exception for this when the basis of the claim is **elder abuse**. [46] The obvious fact is that many elderly people who are battered and abused (e.g. in a nursing home) will not live long enough for law suits filed on their behalf to get to trial. So some Legislatures have provided for the award of general damages to their estates.

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B. Survival of Claims

The term "survival of claims" refers to whether or not a plaintiff's claim can (and must) be pursued by the personal representative of the plaintiff's estate (i.e. executor or administrator of the estate) after the plaintiff has died.

1) Special Damages Survive Death.

Under most **survival statutes** claims for special damages survive the tort victim (plaintiff) so that if Victor in the above example died his **estate** would continue to have a claim against Suzy. And if Suzy died, too, Victor's estate would have a claim against Suzy's estate. The personal representative appointed by a probate court (i.e. the "**executor**" if the decedent died testate or "**administrator**" if the decedent died intestate) is responsible to recover or pay special damages.

[46] These statutes also often include the severely disabled along with the elderly.

2) General Damages Generally Fail to Survive Death

In contrast, most **survival statutes** claims for general damages DO NOT SURVIVE the tort victim (plaintiff). That means the plaintiff has to survive until the jury (or judge) awards damages. So if Victor died in the above example before trial his **estate** would NOT be able to collect for the "pain and suffering" he endured when he lost his leg, no matter how intense it was or how long it lasted.

3) No Defamation After Death

Further, **no defamation action can be brought on behalf of a dead person**. The "injury" claimed in a defamation action is embarrassment, damage to reputation, lowered social standing and reduced income. But a deceased plaintiff cannot suffer any of those damages, and the general rule is that a defamatory statement about a deceased person is not actionable.

4) Wrongful Death Actions Distinguished

The issue of "survival of claims" must be distinguished from wrongful death suits. Survival of claims concerns **whether or not a personal representative of an estate can be a plaintiff** on behalf of a decedent's estate.

A wrongful death action is NOT brought by the personal representative of a deceased plaintiff on behalf of the estate. Rather, wrongful death suits are brought by members of the **surviving family** of a decedent on their own behalf.

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C. Punitive Damages in Tort

Punitive damages are not really "damages" in the sense they are not intended to compensate the tort victim (plaintiff) for any injury they have suffered, and they may even be awarded in a situation where the tort victim suffered only nominal injury. They are awarded to **punish** the defendant for deliberate, wrongful acts and **deter** the defendant (and others) from committing such acts in the future.

1) No Punitive Damages without Proof of Malice, Oppression or Fraud

A Court cannot award punitive damages unless the plaintiff proves the defendant deliberately acted to cause injury. Generally that is referred to as proof of "malice, oppression or fraud".

2) Generally No Punitive Damages for Mere Negligence

Conversely, **no punitive damages can be awarded for mere negligence** in most cases because that is not a deliberate act.

> **For Example:** Buffy goes through a red light and accidentally injures Bevis in an auto accident. Bevis cannot obtain punitive damages against her. This is the general rule.

Punitive damages can be awarded to punish **recklessness**. The distinction between recklessness and negligence is very important. A reckless act is a **deliberate, wrongful act** creating extreme

risks to others. In contrast a negligent act is one that **accidentally creates risks** to others. Punitive damages are justified in to reckless defendants for deliberately creating risks to others and to deter others from doing the same thing in the future.

> **For Example**: Suzy deliberately goes through several red lights and drives down the oncoming lanes of the freeway to avoid pursuing police. [47] She collides with Victor. She may not have actually intended to hit Victor (which would be the intentional tort of battery) but she drove recklessly. Punitive damages could be awarded against her to both punish her for what she did, and to deter others from doing the same thing. [48]

Something of an exception to this general rule is a cause of action for **defamation**. Defamation that is both negligent and malicious may support an award of punitive damages. However that is subject to the other limits on defamation awards.

> **For Example:** Kevin wants to gain custody of his children from his hated ex-wife Britney. He hears she has been using cocaine. He assumes this to be true and makes no effort to confirm it. And he does not bring his concerns to the attention of the Court. Instead he tells Britney's employer she snorts cocaine. Britney loses her job. If Britney denies the rumors and sues Kevin for defamation she may be awarded punitive damages because Kevin's act was both negligent and malicious.

3) Constitutional Limits on Punitive Damages

The 8th Amendment Constitutional prohibition against "cruel and unusual punishment" limits the size of punitive damage awards. Whether a punitive damage award is excessive or not depends on a **balancing** of several considerations. These include:

- The **deliberately malicious nature** of the act being punished;
- The **severity of the injury** the act caused the plaintiff (usually measured by the size of the "substitutionary" damage award);
- Whether the defendant was also subject to **other punitive actions**, such as criminal prosecution or civil awards to other plaintiffs;
- The **wealth** of the defendant; and
- The size of punitive damage awards in **other similar actions**;

4) Special Limits on Damages for Defamation Cause of Action.

Under ***New York Times*** and its progeny, no damages may be awarded, at all, to a **public figure** plaintiff unless there is proof of **actual malice**, and that means that the defendant made false statements about the plaintiff knowing that they were false or at least with a total disregard for whether they were false or not.

[47] Like in the "Wildest Police Chases" sort of TV shows.

[48] People who don't have any money (losers) are not punished by a punitive damage award because it can never be collected from them. And there is no deterrent effect because they just don't care anyway. So punitive damages only have some effect when the defendant is a more successful person (like a lawyer).

Further, if a defamatory statement concerns a matter of **public concern** or public interest, no damages can be awarded unless the plaintiff proves the defendant was **negligent or acted with actual malice**.

And in all cases for **punitive damages** to be awarded in a defamation action, the plaintiff must prove the defendant was **negligent or acted with actual malice**.

While punitive damages are generally not awarded in a negligence action, they may be awarded in an action for defamation, if the defamatory statement was made maliciously, even if the defendant honestly believes the statement was true because of negligence.

> **For Example:** Buffy hears Bevis is a child molester. Without investigating further or asking Bevis if the information is true she posts notices stating "Bevis is a child molester!" This was negligent because a "reasonable person" does not say such things without carefully investigating to determine the truth. But it is also malicious because she acted for the purpose or with knowledge with reasonable certainty this would injure Bevis. She will be liable to Bevis for defamation, and he can also seek punitive damages, even though she might argue she "honestly" believed she was telling the truth.

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D. Generally No Award of Attorney Fees in Tort Law

As with contract actions, **no award of attorney fees** is allowed in tort law unless it is provided for in statute. [49] The prevailing party generally is awarded the "costs" of suit, but attorney fees are not considered one of those "costs".

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E. Legal Restitution as an Alternative to Damages in Tort

As stated above, the tort victim (plaintiff) has a right to seek an award in **legal restitution** rather than an award of **damages** actually suffered to prevent tortfeasors (defendants) from reaping unjust enrichment from their wrongful acts. This rarely occurs in a negligence situation. The most common scenarios would involve torts like **misappropriation of likeness**, **conversion**, or **trespass to chattel** or **land**. This may be referred to as "waiving the tort and suing in assumpsit". Some cases may "rationalize" this as a remedy for tort cause of action based on a contract concept but that is entirely unnecessary.

> **For Example**: Ford wants Bette Midler to sing in one of its commercials. But she is too expensive. So it hires one of Bette Midler's back-up singers and pays her to imitate Midler in its TV ad. Midler has no monetary losses as a result, and has no "pain and suffering". So Midler has no damages. But she can still seek restitution to prevent Ford from profiting from her likeness without her consent.

[49] Certain statutes will allow the Court to award reasonable attorney fees in certain situations. But the general rule is that unless a statute provides otherwise, the Court has no discretion to award attorney fees.

This will be covered more in the next chapter.

Chapter 6: Restitution

The meaning of the term "**restitution**" depends on the context and area of law (or equity) in which the term is used. In some situations there is a legal right to receive restitution, and in those situations it is called **legal restitution**. In other situations parties have no "right" to receive restitution, but a Court of equity may have discretion to award a remedy in restitution. In this case it is called **equitable restitution**.

1. Legal Restitution

Legal restitution is an award of a **money judgment** to **plaintiffs** (only) with **legally enforceable causes of action**, generally for **breach of contract**, **breach of covenant** or a **tort**, to prevent defendants from **enjoying an unjust enrichment** from their wrongful acts (only).

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A. Legal Restitution in Contract Law

In contract law a non-breaching party who proves the other party has breached the contract always has a right to demand a money judgment as **legal restitution** as an **alternative to an award of damages**. While damages are calculated to compensate the non-breaching party for injury actually caused by the breach, restitution is calculated to **prevent the breaching party from reaping an unjust enrichment** from breaching the contract.

> **For Example**: Bill agrees to build a house for Owen for $100,000. Bill expects to make a profit of $20,000. After Bill has spent $50,000 on labor and materials Owen repudiates the contract. Bills damages are his lost profit of $20,000 (expectation damages) plus his expenses of $50,000 (reliance damages) for **total damages** of $70,000. But if Bill can prove his efforts (up to the date of breach) gave Owen $90,000 worth of benefit (because Owen would only have to pay $10,000 to finish the house), he can demand **legal restitution** of $90,000. Otherwise Owen would reap an unjust enrichment by breaching the contract.

In contract law a breaching party that substantially performs has no right to an award of damages. But the breaching party that substantially performs always has a right to receive an award of **legal restitution**, calculated by **the amount of benefit the breaching party has conveyed** to the non-breaching party, **up to but not exceeding the contract price**. Generally this is described as "award of the contract price less an offset for damages".

> **For Example**: Bill agrees to build a house for Owen for $100,000. Bill fails to complete the house. If Bill can prove Owen would only have to pay $10,000 to finish the house, he has substantially performed and can demand **legal restitution** of $90,000. Otherwise Bill's reasonable commercial expectations would be frustrated.

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B. Legal Restitution in Tort Law

In tort law a plaintiff who prevails in a tort action has a right to demand and receive an award of **legal restitution** as an **alternative to an award of damages**. While damages are calculated to compensate the non-breaching party for injury actually caused by the tortious acts of the defendant, restitution is calculated to **prevent the tortfeasor from reaping an unjust enrichment** from tortious acts.

> **For Example**: Rich makes a profit of $100,000 selling pirated videotapes of movies produced by MGM in Africa. MGM cannot prove that Rich's actions have caused its sales or profits in Africa to decline. Therefore MGM cannot prove it has suffered any **damages**. Nevertheless MGM has a right to a money judgment in the amount of $100,000 to prevent Rich from reaping an unjust enrichment from his tortious acts.

Tortfeasors have no right to any award of either damages or restitution.

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C. Legal Restitution in Real Property Law

Plaintiffs have a right to seek legal restitution for breaches of covenants running with the land or for encroachments. A breach of covenant is similar to a breach of contract, and an encroachment is a trespass to land, a tort, the placement of a structure or something on the plaintiff's land without consent.

Legal restitution for the breach of a covenant is measured by the benefit the breaching party has enjoyed, and is awarded to prevent an unjust enrichment, even if the plaintiff has suffered no actual damages, the same as in a contract action.

If an encroachment is deliberate the landowner has a legal right to remove it, and a right to a money judgment for legal damages for the removal expenses. In the alternative landowner can ask for a money judgment for legal restitution equal to the benefits the defendant has enjoyed as a result of the encroachment.

If the encroachment is left in place the landowner has a right to a money judgment for **legal damages** measured by the permanent decrease in land value caused by the encroachment. And in the alternative landowner can seek a money judgment for **legal restitution** measured by the benefits the defendant has enjoyed as a result of the encroachment in the same manner as when the encroachment has been removed.

Removal of encroachments is a legal right of landowners, and if encroachments are the result of deliberate acts by defendants they have "dirty hands" and cannot seek injunctive relief to prevent the removal. But if the encroachment is accidental, the defendants may seek injunctive relief, and a Court of equity may require defendants to pay **equitable restitution** to the landowner. This is explained more below in the section on equitable restitution and in the chapter on injunctive relief.

2. Equitable Restitution

In the general view, **equitable restitution** is an award of EITHER 1) a **money judgment** or 2) an order of possession and/or title to **property** to accomplish two goals, to 1) prevent defendants from **enjoying an unjust enrichment** from their wrongful acts, or 2) restore plaintiffs (or both parties) to the **positions they would have been in** but for events beyond their control. Some authorities disagree with this and they call some of these situations "equitable awards" but not restitution.

In either case, before parties can obtain **equitable** restitution they must be able to show that they have **no adequate legal remedy**. If they have an adequate legal remedy, they are restricted to that remedy, the Court lacks equitable jurisdiction, and the Court cannot grant equitable restitution or any other equitable remedy.

Orders of **specific performance** giving possession and/or title to property to a plaintiff are a **particular type of equitable restitution** that usually requires that the property be unique in some way so that award of a money judgment would not be an adequate remedy.

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A. Equitable Restitution when Money Judgment is Inadequate Remedy

Parties can only seek equitable restitution when they have no adequate legal remedy because it is an equitable remedy. Parties may have no legal remedy because they have **no legally enforceable cause of action** (i.e. they have no cause of action for a tort, breach of contract, or breach of covenant). But parties with legally enforceable causes of action can still seek equitable restitution if award of a **money judgment would not be an adequate remedy**.

> **For Example:** Seller agreed to sell Blackacre to Buyer for $500,000 in a legally enforceable written contract. Buyer was thrilled, even though the land actually declined in value to $495,000 after the agreement. Buyer "just loved" the estate and tendered payment. But Seller refused to tender the Deed. Buyer has no right to **legal damages** because the value of the land at the time of the breach was less the contract price. Buyer also has no right to **legal restitution** to prevent Buyer from reaping an unjust enrichment, because Seller is not actually reaping any "unjust enrichment" in terms of money. Legally Buyer has no remedy at all. Therefore, Buyer can turn to concepts of "equity" and seek an order of **specific performance** to get title and possession of the land. This is possible because the subject matter is unique property, and the Court recognizes that money alone can neither compensate Buyer for her actual loss of the land she wanted. This is **equitable restitution** conveying property, not just award of a money judgment, for the purpose of putting Buyer, the "proper owner", in the position she would have been in but for the breach.

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B. Equitable Restitution when No Legal Cause of Action

Equitable restitution is also a possible remedy in other situations because a party has **no legally enforceable cause of action**. That may be because parties have **no legal cause of action** or because their causes of action are **unenforceable due to a valid legal defense**.

> **For Example:** Radio station XYZ advertised that the third caller would win an "all expenses paid trip" to New Orleans in the middle of August. [50] Hope called in and was selected to win the prize. She was elated and spent $500 preparing to take on the trip. But then XYZ revoked its offer and said it would not pay for the trip. She **has no legal cause of action** because XYZ made her a gift promise, not a contract promise. Her act of "calling" was necessary to win the prize, but not anything of value conveyed to XYZ in exchange for the prize. Therefore, she can only seek an equitable remedy. Her theory or "cause of action" WHY she should be given a remedy would probably best be stated as **detrimental reliance** because she relied on the promise of XYZ. WHAT the Court can do is award her **equitable restitution** as necessary to restore her to the position she was in before she was promised the prize. The amount of restitution necessary to return her to her prior condition depends on what she spent the $500 for. If she spent it for something that would fully benefit her anyway, whether she took the trip or not, she is no worse off that before the promise and no restitution is necessary.

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C. Equitable Restitution when Valid Contracts are Unenforceable at Law

Equitable restitution may be necessary when a promise creates a valid but **unenforceable contract**. Some reasons valid contracts can be unenforceable are failure to satisfy the Statute of Frauds, failure of an implied material condition, supervening illegality, or contracts with parties lacking legal capacity.

> **For Example:** Minnie Minor agreed to pay Bevis $500 for his car, and Bevis agreed to wait 30 days to be paid. Bevis gave Minnie the car and title. After a month Minnie refused to pay and Bevis cannot enforce the contract against Minnie because she is a minor. He has no cause of action in tort either because Minnie did not misrepresent herself to be an adult. He cannot repossess the car (by legal replevin) because he transferred title without reserving a security interest. He can only seek recovery of the car by **equitable restitution**. The reason WHY the Court would return the car to Bevis could be argued under at least two "causes of action", **implied-in-law contract** and **detrimental reliance**. **Implied-in-law contract** is suggested because Bevis conveyed the car with a reasonable expectation of compensation in return. But **detrimental reliance** is also suggested because Bevis relied on Minnie's promise.

Oral Agreements to Convey Land as a Special Case

An oral agreement to convey an interest in land (e.g. to sell land, grant an easement, etc.) generally cannot be enforced at law because it fails to satisfy the Statute of Frauds. But statutory provisions can make this a special case enforceable as equitable restitution.

The **part performance doctrine** is the main exception to this rule. It allows the oral agreement to be enforced **at law** if the agreement was to sell land (not convey as a gift), and certain statutory requirements have been met. Those requirements vary by State, but generally require that the party seeking enforcement to act in a manner that conclusively proves there was an oral agreement to sell the land. Generally these statutory requirements are **strictly construed**, and if they are proven by clear and convincing evidence the oral contract is enforceable at law. The remedies arising

[50] This is a sick joke. New Orleans is one of my favorite places to visit, but never in August.

from this situation are usually just contract remedies for award of money judgments measured by either damages or in legal restitution. In that case there is still no legal right to possession of the land and the plaintiff must plead equitable restitution to obtain possession by an order of specific performance. And if the part performance doctrine does not apply or the requirements cannot all be met, the only remedies are still in equitable restitution the same as any other legally unenforceable agreement.

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D. Equitable Restitution to Compensate for Accidental Encroachment

As explained above, it is the legal right of a landowner to remove an encroachment, a trespass to land involving placement of a structure or other improvement on the land without the landowner's consent.

But if the encroachment is accidental the defendant may be able to obtain an **injunction** preventing the landowner from removing it, depending on the circumstances. In rare situations (often dreamed up by law school professors) a structure belonging to one party ends up on the land of another through no fault of either party. In these situations the remedies of the party are determined by considerations of equity, not law.

> **For example:** An earthquake causes Bevis' house to move partially onto Butthead's land.[51] Butthead has a clear legal right to tear Bevis' house down, but a Court of equity would almost always stop him because Bevis is an innocent party. Bevis might be given title to the land he gained from Butthead, and ordered to pay compensation for it in **equitable restitution**.

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E. Equitable Restitution by Specific Performance

Equitable restitution may involve an order of **specific performance** requiring a party (usually a defendant) to convey possession and possibly title to property to the plaintiff, or possibly to perform services. It would only be awarded when a money judgment would be an inadequate remedy, and almost always because the property in dispute (or service) is unique.

An order of specific performance requiring a defendant to provide **services** is only possible when the defendant is an organization because the 13th Amendment prevents the involuntary servitude of a natural person. However, in appropriate circumstances the court may issue an injunctive order preventing a breaching party from performing services that would further injure the non-breaching party.

The Court will only issue an order of specific performance if it is feasible for the Court to enforce the order and it is physically and legally possible for performance to take place.

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[51] As ridiculous as this seems, the 1906 San Francisco earthquake displaced property lines as much as 16 feet.

F. Generally no Equitable Restitution for Deliberate Wrongdoers

A party cannot be awarded equitable restitution to benefit from a deliberate wrongful act because the party has "unclean hands" and is generally barred from equity. Consequently, equitable restitution is usually only a remedy for the victims of torts and non-breaching parties and not a remedy for tortfeasors and breaching parties. But there can be exceptions when tortfeasors and breaching parties can still seek equitable restitution to recover property that rightfully belongs to them. And since these are odd situations, you may see them on exam questions!

> **For Example:** Rancher puts his cows in Farmer's field to graze without Farmer's consent. Farmer discovers the cows and refuses to let Rancher have them back. Rancher committed a trespass to land and Farmer did not act to take Rancher's cows. Farmer is not getting an "unjust enrichment" because he did not commit any "unjust" act. Farmer is just not letting Rancher have the cows back. Even though he is the wrongdoer, Rancher can still seek **equitable restitution** to get the cows back. Rancher would be required to pay Farmer for the value of the benefits he illegally enjoyed by putting his cows on Farmer's land (so he does not reap an unjust enrichment from his wrongful act), and he may have to pay punitive damages. But otherwise a Court of equity would let him have his cows back. [52] This is a **recovery of property** type situation. [53]

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G. Equitable Restitution Not Possible after Services Performed

Equitable restitution is not possible after plaintiffs have performed services (expended labor) because they have not conveyed property to the defendants that can be "returned" to restore the parties performing services to their original positions. And sometimes the defendant has reaped permanent benefit. There are two basic scenarios.

1) Plaintiff Performs Services Reasonably Expecting Compensation

The first scenario when equitable restitution is not possible is when plaintiffs perform services intended to convey benefits to defendants with reasonable expectations of receiving compensation in exchange without a legally enforceable contract. In this situation they can only seek equitable relief based on an **implied-in-law contract**. The plaintiffs may act in reliance on a void or voidable contract, in reliance on a contract that subsequently becomes void because of failure of a major condition, or under a contract that they have breached by violating a major condition.

In these situations a Court of equity may award plaintiffs a money judgment for **quantum meruit reimbursement** to compensate the plaintiffs for their services based on the **implied-in-law contract** causes of action. Implied-in-law contracts are also called "quasi-contracts". [54]

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[52] A person with "dirty hands" generally cannot plead equity but that means a Court of equity will not help one perpetrate a scheme to reap an unjust enrichment. That does not bar Rancher from getting his cows back here.

[53] None of the typical "equitable causes of action" of detrimental reliance, promissory estoppel, implied-in-law contract and equitable servitude apply here.

[54] Be aware that the term "quasi-contract" means an "implied-in-law" contract. But some authors misuse the term to also refer to **implied-in-fact contracts**. That is incorrect. Implied-in-fact contracts are valid, enforceable contracts and "quasi-contract" is an equitable concept used only when there is no valid, legally enforceable contract.

The distinguishing feature of implied-in-law contract causes of action is that the plaintiffs have provided **services** (not goods that could be returned) based on a **reasonable belief** that they **would be compensated in return** (and were not 'volunteers' instead). If the plaintiffs have provided goods, the plaintiffs can be returned to their original position by simply returning them (**equitable restitution**).

> **For example:** Pedestrian is hit by a car. Ambulance arrives and the unconscious pedestrian is taken to the hospital. Pedestrian is dead on arrival. Ambulance bills Pedestrian's estate for payment. Since Pedestrian was unconscious no legal contract formed. Ambulance has no legal cause of action and can only recover in equity based on an **implied-in-law contract** cause of action (theory). The fact Pedestrian died is irrelevant. A Court of equity has discretion to award **quantum meruit reimbursement**. [55]

2) Plaintiff Performs Services in Detrimental Reliance

The second scenario when equitable restitution is not possible is when plaintiffs perform **services** in detrimental reliance on false statements made by defendants, but without any expectation of receiving compensation in exchange. In this situation, plaintiffs without clear legal causes of action can only seek equitable relief based on a **detrimental reliance** cause of action. And since the plaintiffs have not conveyed property they cannot be awarded a money judgment in return to restore them to their original positions.

> **For Example:** Preacher Pat plans to host the Church's August revival on some land Pat owns. [56] He asks church member Mike if he will help by clearing the brush off the land and building a brush arbor for the revival. [57] Mike agrees, but Pat soon learns the revival has been cancelled. Pat decides not to tell Mike the revival has been cancelled because it would otherwise cost him $900 at market rates to clear the land and he wants it cleared for free. Mike clears the land and builds the brush arbor before he discovers he has been taken advantage of. Mike does not have a cause of action based on implied-in-law contract because he cleared the land as a gift to the Church without any expectation of compensation in exchange. And he does not have a cause of action in tort for deceit because Pat honestly did intend to host the revival on his land originally. But Pat deliberately failed to tell Mike the truth and kept quiet to gain an **unjust enrichment**. Mike's only possible cause of action is in equity based on **detrimental reliance**. But the nature of the remedy depends on how Mike cleared the land. If Mike just paid some workers $1,000 to clear the land he could be awarded a money judgment for $1,000 against Pat in **equitable restitution**, Mike would be restored to his original position, AND Pat would not get an unjust enrichment. But suppose Mike used his own labor to clear the land; he cannot be "given his labor back". So equitable restitution would be impossible and the only way to prevent Pat from getting an unjust enrichment is to award Mike at least the $900, the amount Pat would have had to pay to have his land cleared. This award might be called **equitable restitution** by some people but it would more appropriately be called **quantum meruit reimbursement** since neither Mike nor Pat are being "returned" to their original positions.

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[55] "Quantum meruit" means "the value of services performed".

[56] A "revival" is a Protestant Christian religious celebration of prayer, preaching and songs typically held outdoors over several days during the summer in rural areas.

[57] A "brush arbor" is a shade structure with open sides made with a roof of branches and leaves cut from cleared brush often used to shelter church members during a revival ceremony.

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H. Contract Remedies Distinguished from Equitable Restitution

Remedies based on legally enforceable contracts are fundamentally different from remedies based on equitable reimbursement in the general case.

The breach of a legally enforceable contract gives the non-breaching party a right to **damages** to put them in the position they would have been in if the promisor had fully performed the agreement. That remedy is intended to put the non-breaching parties in the position they **would have been in** if the contract had been performed, NOT to return them to the position they were in before the contract formed.

The non-breaching party also has a right to **legal restitution** in the alternative to put the breaching party in the position they would have been in if the promisor had fully performed the agreement. That remedy is intended to put the breaching parties in the position they **would have been in** if the contract had been performed, NOT to return them to the position they were in before the contract formed.

But a person who seeks equitable restitution otherwise, because of acts done in reliance on an unenforceable contract, gift promise or other misunderstanding, has no legal right to a remedy, and if a Court of equity provides **equitable restitution** it is only to the extent necessary to return or "restore" one or both parties to the positions they would have been in if the contract, promise or misunderstanding had never occurred in the first place **NOT the position they had expected** to be in.

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I. Legal Rescission and Restitution

A contract is rescinded when it becomes null and void. If one of the parties lawfully declares the contract null and void it is a **legal rescission**.

> **For Example**: Rancher agrees to buy a cow from Farmer for $100 with the provisions that Rancher can cancel the agreement within three days after he receives delivery of the cow. Two days after he receives the cow Rancher cancels the agreement. That is a legal rescission.

If a Court declares the contract null and void it is an **equitable rescission**.

Often this situation is described as "rescission and restitution" but restitution is not always an issue as explained below.

1) Rescission Because of Major Breach

If a party or Court declares a contract void because the other party has committed a major breach, the situation is no different from those situations explained earlier and the non-breaching party has a right to an award of a money judgment for **legal damages** or **legal restitution**. In this situation the term "rescission" is seldom used and equitable restitution is only an issue if the Court finds a money judgment to be an inadequate remedy and orders specific performance.

2) Restitution after Failure of Condition

If a contract is void from the beginning or becomes null and void because of a the failure of a material condition, express or implied, and not because of a breach by either party, neither party is a "breaching party", and neither party has a right to an award of either damages or legal restitution.

It might seem that parties are entitled to legal restitution if the contract was originally valid, but for a right to legal restitution to exist, the contract must be both valid and legally enforceable at the time a remedy is granted. If the contract has become void there is no legal remedy and the parties must turn to equity for relief.

However, each party may seek **equitable restitution** for the benefits they conferred on the other party prior to the failure of the contract if it is possible to return the parties to their original positions. This is the context within which the phrase "rescission and restitution" has proper application.

> **For Example**: Painter agrees to paint Homey's house for $3,000 and Homey pays an initial payment of $500. Homey's house burns down before Painter does any work. The contract is void for failure of an implied material condition (that the contract would be possible to perform). Neither party is in breach, and neither has a right to an award of damages or legal restitution. But Homey may seek **equitable restitution** to recover his $500 payment. Painter would not be getting an "unjust" enrichment, because he has done nothing wrong. But why should he be paid for services he did not perform? Restitution is possible because if the Court awards Homey a $500 judgment against Painter both parties would be returned financially to the positions they were in before entering into the contract.

3) Equitable Restitution after Failure of Condition

If a contract is void from the beginning, or becomes null and void, and not because of a breach by either party, equitable restitution cannot return the parties to their original positions after one of the parties has provided services to confer benefits on the other party with reasonable expectation of compensation in exchange. The only remedy in that situation is for the Court to award **reimbursement** based on an **implied-in-contract** theory. The phrase "rescission and restitution" is often misapplied to this situation because the parties are not being "returned" to their original positions at all. This is more properly called **quantum meruit reimbursement** but that term is often misused as well. This will be explained further in the next chapter.

> **For Example**: Painter agrees to paint Homey's house for $3,000 and Homey pays an initial payment of $500. Homey's house burns down after Painter does $700 worth of work. The contract is void for failure of an implied material condition. Homey may want to recover his $500 payment but Painter already provided services worth more than that amount and has not received an unjust enrichment. Painter may want **quantum meruit reimbursement** for an additional $200, the value of additional services he performed and was not paid for. A Court of equity has discretion to fashion a remedy and may refuse to provide a remedy to either party on a finding that both "assumed the risks" this could happen. Or it may award Painter a judgment for $200 on the basis that Homey alone

assumed the risks his house might burn down (and could have obtained insurance for that risk).

4. Constructive Trusts

Constructive trust is a Court finding that **specific property** and all profits, rents and issue of that property is held by a defendant in an **implied, equitable trust** because it "rightfully belong" to the plaintiff and **in equity** should be returned in its entirety to the plaintiff as **equitable restitution** by an order of **specific performance**. [58]

The term "constructive trust" means an **implied** trust deemed to exist **in equity** even though there is no actual, express trust. Actual, express trusts are **legal concepts** governed by the concepts of trust law taught in "Wills and Trusts" classes. If they are tested on Bar exams, use the trust law you were taught in those classes. [59] In contrast, constructive trusts are **equitable concepts** governed by the common law concepts of equity taught in "Remedies" classes. If they are tested on Bar exams use the law discussed in this outline.

If a Bar exam question asks you to answer based on "trust concepts" and there are no facts showing that an express "legal" trust is the subject of the question, it is a "Remedies" question, not a "Trust" question, and you are to answer using **constructive trust** concepts.

For a Court to find that the defendant holds specific property in constructive trust for the plaintiff, the entire value of the specific property must be **directly traceable** to some or all of the original property wrongfully taken from the plaintiff. In that case a Court of equity has discretion to award possession of the specific property to the plaintiff to compensate for the original amount wrongfully taken.

Constructive trusts are a more certain recovery in equity because the Court orders the property conveyed to the plaintiff rather than awarding a money judgment that might never be collected. It might also be a larger recovery in some cases.

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A. Misappropriated Property Converted into Appreciated Asset

One type of situation when **constructive trust** might be claimed is when a defendant wrongfully takes property from the plaintiff and **converts** it into a different asset of greater value.

> **For Example:** Bevis steals $10,000 from Butthead, spends $1,000 on beer and wastes the rest on stock that increases in value to $12,000. Butthead' cause of action is for conversion, but if he got a money judgment against Bevis for **legal damages** he would just get back the $10,000 taken from him. [60] If Butthead sought **legal restitution** instead he would just get a money judgment for $13,000 to prevent Bevis from reaping an unjust

[58] A "constructive trust" is a "finding" that the defendant is holding property in trust for the plaintiff. It is not a "cause of action" and it is not an "award". The "cause of action" would possibly be a legal cause of action for conversion. The "award" of the Court would almost always be an order of specific performance to make the defendant or some third party (e.g. a bank) convey the specific property in dispute to the plaintiff.
[59] On the California Bar Exam use the California Probate Code to discuss actual, express trust questions.
[60] All "damage" awards are for "legal damages" but I am saying "legal damages" to emphasize this is a legal remedy.

enrichment. That would be calculated as the sum of the $10,000 he stole plus the $3,000 profits he made on his investment. But Butthead can seek a finding that $9,000 taken from him is directly traceable to the stock so the stock rightfully belongs to him and Bevis is holding the original $9,000 for Butthead in **constructive trust** in the form of stock. A Court of equity can order Bevis to give Butthead the stock in **specific performance**. But that only represents the $9,000 Bevis invested so the Court (sitting in law, not equity) should award Butthead an additional money judgment of $1,000 as **legal damages** for the other $1,000 Bevis spent on beer. Butthead might never collect on the money judgment but at least he would get the stock (worth $12,000).

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B. Misappropriated Property Produces Profits

Another situation when constructive trust might be claimed is when defendants wrongfully take property from the plaintiff and it **produces profits**, **rents**, or **issue** that are still in the defendants' possession.

For Example: Angus stole Timmy's dog, Lassie, worth $1,000, spent $300 to have the dog bread, and it gave birth to six puppies, each worth $500. Timmy's cause of action is conversion, and he could recover **legal damages** of $1,000, the value of the dog Angus stole from him. And he could also recover **legal restitution** of $2,700 to prevent Angus from reaping an unjust enrichment ($500 for each of six puppies less breading fees of $300). But Timmy can plead equity instead because Lassie "rightfully belongs" to him along with her "issue", the six puppies. A Court of equity can find that all seven dogs are held by Angus for Timmy in **constructive trust**, and order Angus to return them to Timmy in **specific performance**. Since the seven dogs are worth $4,000 Timmy would get a better remedy in equity than he would in a Court of law.

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C. Finding of Constructive Trust Affords More Certain Remedy

Equitable restitution based on a finding of **constructive trust** is a more preferable remedy to an award of a money judgment because it affords a certain (guaranteed) recovery. A money judgment may never be collected for a variety of reasons. The defendant may be immune from collection because of legal exemptions (e.g. the homestead exemption) or may owe other creditors holding superior claims.

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D. Equitable Liens: Relation to Constructive Trust

For a Court of equity to find that defendants hold specific property in constructive trust for plaintiffs the property must be directly traceable in its entirety to property rightfully belonging to the plaintiffs. Until (or if) that is proven plaintiffs may ask the Court to grant an **equitable lien** against the property in dispute to secure the plaintiffs' claim. And after that, even if only **a portion** of specific property held by the defendants can be directly traced to property rightfully belonging to the plaintiffs, the Court may still grant an **equitable lien** to give the plaintiffs **a secured**

interest in the property. This situation might arise when defendants **commingle** property taken from the plaintiffs with other property of their own.

5. Equitable Liens

An **equitable lien** is a Court award of a **secured interest** in specific property held by respondents. It might be granted on a temporary basis pending a determination whether all of a specific property in dispute rightfully belongs to the movants and is being held, in its entirety, in **constructive trust** by the respondents. Or it might be granted permanently on a final finding that only a portion of the property in dispute "rightfully belongs" to the movants. [61] As with a finding of constructive trust, an equitable lien gives the movants a more certain remedy because it effectively gives them a secured interest in an existing asset. [62]

> **For Example:** Rosie embezzles $100,000 from Trump and uses the money to buy Blackacre for $200,000. Trump sues Rosie for conversion. She hires Larry the Lawyer to defend her, granting him a Deed of Trust against Blackacre as security for his legal fees. Normally Trump must first obtain a money judgment against Rosie and then record a **judgment lien** against Blackacre in an effort to collect on the judgment. But his judgment lien would be subordinate to Larry's claim because Larry's claim was recorded first. And it is possible the claims against Blackacre equal or exceed its value. Trump can ask the Court to grant him an **equitable lien** against Blackacre that is superior to Larry's claim on the grounds that Rosie bought the property with his money, Larry knew or should have known that fact, and it would be an injustice for Rosie to give Larry a claim against the property that was legally superior to his own when his money was used to buy it in the first place.

Constructive Trust Compared to Equitable Lien

Law students often believe a finding of constructive trust is better for the plaintiff when the disputed specific property held by the defendants has increased in value and grant of an equitable lien is better for the plaintiffs when the disputed specific property has decreased in value. This is not entirely correct. An **equitable lien pending determination of a claim of constructive trust** is always preferable because it secures the plaintiff's claim pending trial of the underlying claim. And a final finding of **constructive trust** is always better for plaintiffs because it supports an order of specific performance that will gain possession of the entire property. An equitable lien only gives the plaintiff a lien against the property, and the burden remains for the plaintiff to collect on that lien.

> **For Example:** Rosie embezzles $100,000 from Trump and uses the money along with $20,000 of her own to buy Blackacre for $120,000. Then Blackacre declines in value to $90,000. Trump sues Rosie for conversion. He can seek a finding of **constructive trust**. The Court may award him the property (by **specific performance**) and an additional money judgment of $10,000 for the additional money Rosie took from Trump and lost when Blackacre went down in value. The sum of these two amounts (the $90,000 property and the $10,000 judgment) equals the $100,000 Rosie stole in the first place. In the

[61] An "equitable lien" is a remedy awarded by a Court of equity, not an "action" or a "finding". The underlying cause of action may be a legal action for conversion.

[62] An equitable lien pending trial of a claim of constructive trust is similar in effect to the filing of a "notice of action", often called a *lis pendens*. A *lis pendens* can only be filed in situations specified by statute. A Court of equity may grant an equitable lien in situations that a *lis pendens* would not be possible.

alternative Trump may be awarded an **equitable lien** against Blackacre for $100,000. Now suppose Blackacre increases in value to be worth $120,000 again. If Trump obtained the property through a finding of **constructive trust** he would end up with both the property and the money judgment, worth a total of $130,000. But if he just obtained an **equitable lien** he would be limited to recovery of only $100,000 [63]

6. Misstatements about Restitution in the Literature

Remedies texts and case decisions often have **incorrect, inconsistent or misleading statements** about restitution. It is important that you be aware of that to avoid confusion. Here are some typical incorrect, inconsistent or misleading statements found in very "authoritative" texts:

- **"Restitution is a damage award to prevent unjust enrichment."** This statement is incorrect in various ways.
    - First, an award in restitution is not an award of "damages" actually suffered by a plaintiff. If the plaintiff has a right to damages, and wants damages, restitution is not an issue. Restitution is only an issue when the plaintiff does not want damages or else an award of a money judgment for damages would be an inadequate remedy.
    - Second, legal restitution is always a money judgment awarded to prevent unjust enrichment by a defendant but equitable restitution may be an award of a money judgment or property, for the purpose of preventing unjust enrichment by a defendant or to restore plaintiffs to their original positions even if the defendant would not enjoy an unjust enrichment.
    - Third, equitable restitution may not be award of a money judgment at all. So if "damage award" in this statement was meant to mean "award of money judgment" it is still wrong unless "restitution" was also meant to mean "legal restitution". That is about the only interpretation that would be correct.

- **"If money is awarded in restitution the action is at law."** This statement is totally wrong.
    - Courts of equity often award money judgments in equitable restitution. In fact, if award of a money judgment would be an adequate equitable remedy, that is what the Court will award.
    - Courts of equity may also order property to be conveyed in equitable restitution by specific performance, but that is not the only equitable restitution remedy.
    - Third, the term "action" typically means "cause of action" and an award of a money judgment in restitution can arise from both legal causes of action and equitable causes of action such as equitable rescission of a contract for failure of an implied material condition.

- **"If money is sought as restitution the action is called quasi-contract."** This statement is totally wrong and so confused it is hard to fathom. Quasi-contract means an implied-in-law contract that would justify an equitable award of quantum meruit reimbursement. That will be explained in the next chapter.

[63] The moral here is that "a bird in the hand is worth two in the bush".

  - First, plaintiffs with legal causes of action for breach of contract, breach of covenant or a tort always have a right to a money judgment in legal restitution. That is a legal right that has nothing to do with "quasi-contract", an equitable concept. So money judgments are awarded in restitution every time in that case to plaintiffs without any basis in equity or any relevance to "quasi-contract".
  - Second, the purpose of restitution, in both law and equity, is to restore one party or the other to the position that party was in before disputed events occurred. If restitution is possible, either at law or equity, it may be accomplished by either an award of a money judgment and in equitable restitution also by an order awarding property to be conveyed in specific performance. In the parties can be returned to the positions they were originally in by restitution a Court of equity has no need or jurisdiction to award quantum meruit reimbursement based on "quasi-contract".
  - Third, a Court of equity has discretion to award quantum meruit reimbursement based on implied-in-law contract ("quasi-contract") only when a party has performed services that have given the other party an irreversible benefit such that both legal and equitable restitution are unavailable or inadequate remedies. In that case the Court has discretion to award quantum meruit reimbursement to either prevent unjust enrichment or to prevent frustration of reasonable expectations.

- **"If property is sought as restitution the action is in equity."** This statement is wrong in several ways.
  - First of all, "money" is "property" so "property" is awarded in legal restitution every time a money judgment is awarded in legal restitution. If the word "property" is used to mean "chattel" in this statement it would still be an incorrect statement.
  - Second, a party holding legal title to chattel as a security interest has a legal right to recover possession of the "property" from a purchaser who defaults on the sales agreement (legal replevin). That has nothing to do with equity.
  - Third, a landlord has a legal right to evict tenants that have breached a lease agreement to recover possession of real "property". That has nothing to do with equity.
  - Fourth, a buyer of goods has a legal right under the UCC to demand delivery of conforming goods. That has nothing to do with equity.
  - Lastly, if a party has a right to legal restitution the "action" is at law, not equity. If a money judgment would be an inadequate remedy the party may seek an order of specific performance in equity to obtain possession and/or title to chattel or real property. In that case the remedy sought is equitable, but the underlying "cause of action" is still at law.

- **"If property is sought in restitution the action is called constructive trust."** This statement is wrong for two reasons.
  - A "constructive trust" is a finding by a Court of equity, not an "action" or "cause of action" in its own right. A party may seek legal restitution based on either a legal cause of action (e.g. conversion). If specific property held by the defendant (whether it is chattel, real property or a specific money holding) can be directly traced to property wrongfully taken from the plaintiff, a Court may find that the defendant holds that property in constructive trust for the plaintiff. That is an "equitable" finding to support an equitable remedy (an order of specific performance) but the action by the plaintiff is at law, not equity.

- Secondly, a plaintiff can bring an action at law (based on a claim of conversion) seeking possession of property held by a defendant in express trust. A "constructive" trust is merely a finding that an "implied trust" exists when there is no express trust agreement. But if there is an express trust agreement, no finding of "constructive" trust is necessary or even relevant.

Chapter 7: Implied-in-Law Contract Theory

An **implied-in-law contract** is an equitable cause of action or "justifying theory" WHY a Court of equity has discretion to provide a remedy when no valid, legally enforceable contract actually exists and a plaintiff has **acted to confer benefits** (services, goods or property) to a defendant with a **reasonable expectation of being compensated** in return.

The two distinguishing and necessary factors for a Court to turn to an "implied-in-contract" theory is that the plaintiffs (i.e. parties seeking compensation) have acted 1) **with the intent of conferring benefits** to the defendant (i.e. party asked to pay), and 2) **with a reasonable belief they would be compensated in exchange**. In other words, they **cannot be a "volunteer"** at the time they act to confer benefits and form their belief they will be compensated after the fact.

> **For Example:** Boy Scout starts helping Old Lady across the street as a "good deed" and then in the middle of the street decides she should pay him for his services. He has no basis to claim he is entitled to compensation under an implied-in-law contract because he was a **volunteer** when he began providing his services and has **no reasonable basis to believe he deserves compensation** afterwards.

An implied-in-law contract is not a legal contract. It is an "equitable theory" or cause of action that is sometimes called a "quasi-contract". But the term "quasi-contract" is sometimes misused to include **implied-in-fact contracts**, and that is entirely wrong because implied-in-fact contracts are real, legal contracts. Consequently the term "quasi-contract" causes confusion and should probably be avoided.

The **purposes** for a Court finding in favor of an implied-in-law contract are to **prevent frustration of reasonable expectations** to 1) **protect the public interest** (because it is harmful to commerce to have those who provide services to go unpaid) and/or 2) to **prevent injustice** (because circumstances strongly show the plaintiffs should be compensated for their efforts).

1. Equitable Restitution for Goods or other Property

If the plaintiff has conveyed goods or other property reasonably expecting compensation in return a Court of equity has discretion to award **equitable restitution** to return the parties to their original positions based on an **implied-in-contract theory**. The restitution may be an award of a money judgment compensating the plaintiff for the value of the goods and property given to the defendant or it may be an award of **specific performance** to return specific property back to the plaintiff. In either case the remedy is **restitution** because plaintiffs are restored to their original conditions by recovery of their property or its monetary value.

> **For Example:** Dementia Aadams agrees to pay Uncle Fester $1,000 for his truck, which really is only worth $500. Fester gives Dementia title to his truck but then Dementia refuses to pay and reveals she has previously been declared mentally incompetent by a Court. Fester does not have an enforceable legal contract because Dementia lacked contractual capacity and has voided the agreement by repudiating it. He has no cause of action in tort either because Dementia did not say or do anything to deceive Fester. Still a Court of equity has discretion to either award Fester a money judgment for the value of the truck ($500, not the $1,000 Dementia promised to pay) or to award an order of **specific**

performance to make Dementia return the truck to Fester. In either case the purpose of the remedy is **equitable restitution** based on an **implied-in-law contract** to prevent unjust enrichment to Dementia. This returns the parties to their original positions as if the contract never existed because Fester gets his truck back (or the $500 it was worth) and Dementia will not reap an unjust enrichment. [64]

2. Quantum Meruit Reimbursement for Services

If a plaintiff **acts to convey benefits** to a defendant reasonably expecting reimbursement in return, the Court has discretion to award the plaintiff **quantum meruit reimbursement** in the form of a money judgment based on an **implied-in-law contract** theory.

Since implied-in-law contracts may involve a breached promise they may overlap with promissory estoppel. And promissory estoppel is a subcategory of detrimental reliance. But the key element of implied-in-law contracts is that the plaintiffs acted with a **reasonable belief they would be compensated in exchange**. Not all implied-in-law contracts involve actual promises by defendants because Plaintiffs may act with reasonable belief they will be reimbursed, even if defendants never promise to do that.

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A. Purpose of and Calculation of Quantum Meruit Reimbursement

Quantum meruit reimbursement may be calculated to **prevent frustration of the plaintiff's reasonable commercial expectations** as to the portion of performance completed, OR it may be calculated to **prevent unjust enrichment**, depending on the situation.

Quantum meruit reimbursement is NOT enforcement of a promise in equity as if it were a legal contract. It is **not calculated to put the plaintiff in the expected position** they would have been in if the unenforceable contract (or other promise or agreement) had been completely performed or otherwise fulfilled.

And quantum meruit reimbursement is NOT restitution because it is **not calculated to return the plaintiff to the original position** they were in before the unenforceable contract (or other promise or understanding) was established. They cannot be returned to that position because they have expended labor services that cannot be returned.

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B. Quantum Meruit Reimbursement when No Actual Benefits Conveyed

Plaintiffs may act to convey benefits to defendants expecting compensation in return but the defendants do not actually receive any benefit. In these situations quantum meruit reimbursement is amount the plaintiffs reasonably expected to receive for the efforts expended.

[64] Thinking outside the box, if this were not so everyone would want to be declared incompetent so they could buy things without having to pay for them.

For example: Pedestrian is hit by a car. Ambulance takes the unconscious pedestrian to the hospital expecting to be paid $1,000, the standard billing rate for this service. Pedestrian is pronounced dead on arrival. Ambulance has no legal cause of action because Pedestrian never entered into any contract. But Ambulance can still recover **quantum meruit reimbursement** for the market value of its services, $1,000, on an **implied-in-law contract** theory.

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C. Quantum Meruit Limited to Agreed Compensation if No Unjust Enrichment

Plaintiffs may provide services to defendants in an implied-in-law contract situation expecting to be paid more or less than the market value of the services. But unless it would give the defendant an unjust enrichment, quantum meruit reimbursement is **limited to the lesser of the agreed rate or the market rate**.

For Example: Dementia agrees to pay Uncle Fester to paint her mansion. Fester paints the house. But then it is revealed Dementia has previously been declared mentally incompetent. Fester does not have an enforceable legal contract because Dementia lacked contractual capacity and has voided the agreement. He has no cause of action in tort either because Dementia did not say anything to deceive him. Fester cannot be returned to his original position so equitable restitution is impossible. A Court of equity can only award Fester a money judgment in **quantum meruit reimbursement** based on an **implied-in-contract theory**. If Fester agreed to paint the house for less than other painters would have done the job, his reimbursement is limited to that amount because that is the amount necessary to prevent frustration of his expectations. But if Dementia agreed to pay him more than the market rate his reimbursement is limited to the market value because that is "reasonable reimbursement" and there is no "injustice" if he is being paid the market value of his services.

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D. Quantum Meruit Compensation at Market Value if Unjust Enrichment

Plaintiffs may provide services for free or at less than market value in reliance on a false understanding of the true facts, in a situation where defendants deliberately do not reveal the true facts seeking to gain advantage from the plaintiff's mistake. If the plaintiffs provided services expecting to be paid nothing in exchange, their only cause of action is **detrimental reliance**. If they performed the services reasonably expecting to be paid something in exchange, but less than market value, they may plead both **detrimental reliance** and **implied-in-law contract** causes of action. In either case **quantum meruit reimbursement** would be for the market value of the services performed, not the lesser amount the plaintiffs originally expected to receive because the defendant has acted wrongfully to gain an unjust enrichment.

For Example: Contractor agrees to provide free or discounted labor services to renovate the home of dear old Grandma Worthy, a needy individual. Grandma Worthy dies at the hospital before Contractor gets to her house but he is unaware of that. When Contractor arrives to begin work Grandma Worthy's son, Wastrel, deliberately avoids revealing she has died so they will complete the "free" or "discount price" renovation. If Contractor did not expect to be reimbursed at all, there is no basis to claim there was an **implied-in-law**

contract and the only cause of action is **detrimental reliance**. But if Contractor expected some reimbursement (e.g. for materials only) there is a basis for an implied-in-law contract. In either case Contractor may seek **quantum meruit reimbursement** to be paid at market rates for the work prevent Wastrel from reaping an unjust enrichment. [65]

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E. Implied-in-Law Contract Requires Balancing of Equities

An implied-in-law contract does not require "unjust enrichment" by the defendant and the defendant does not even have to enjoy any benefits at all (as with the Pedestrian who is dead on arrival at the hospital). But the balance of equities must favor the plaintiff **to protect the public interest** or perhaps **prevent unjust enrichment**.

> **For Example:** Poole goes to the wrong address and builds a swimming pool in Homer's yard when he was away on vacation. There is **no implied-in-fact contract** because Homer did not knowingly accept the benefits conferred by Poole. Poole reasonably expected compensation, but should he be compensated? Why should Homer pay for the pool when he is a totally innocent party? Maybe Homer doesn't even want the pool. If Homer reaps a windfall it is not an "injustice" because he did nothing wrong. Isn't Poole just an idiot? Shouldn't the Court favor Homer? If the Court did not favor Homer wouldn't it encourage Poole to continue "accidentally" putting swimming pools into the yards of innocent homeowners expecting the Court to reward him by awarding judgments in his favor?

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F. Services by Volunteers are Gifts

If a plaintiff bestows benefits on a defendant without a reasonable expectation of being paid in exchange the benefits bestowed are a gift and the plaintiff has no cause of action at either law or equity. Volunteers and intermeddlers have no reasonable expectation of compensation.

> **For Example:** Charitable Charley gives food to Homeless Harry. When Charley discovers Harry is a millionaire he demands compensation. He has no right to compensation because he gave the food as a gift.[66]

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G. "Quasi-Contract" and "Quantum Meruit" Confusion

There is substantial confusion in the literature regarding the use of the terms "quasi-contract" and "quantum meruit".

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[65] This outcome depends on the exact facts given. If Contractor arrived at Wastrel's house to do work expecting to be paid for it, and Wastrel knowingly accepted the benefits of the services, Contractor could claim there was an implied-in-fact contract, a legal cause of action, and quantum meruit reimbursement would be irrelevant. Also, if Wastrel affirmatively represented that Grandma was still alive to deceive Contractor, he would have a tort cause of action for deceit (fraud) and equitable remedies would still be irrelevant. And, if Contractor completed the work without Wastrel being aware of it, he would not be reaping an "unjust" enrichment and Contractor would only be entitled to get the original amount expected, if anything in an action against Grandma Worthy's estate, not against Wastrel.

[66] No good deed goes unpunished.

1) Quasi-Contract.

Implied-in-law contracts may be called "**quasi-contracts**" because they are "legal fictions" and not "real" contracts enforceable at law. They are equitable theories or causes of action that give a Court of equity discretion to fashion a remedy.

The term "quasi-contract" is misused by some authorities to include implied-in-fact contracts, and that is simply incorrect because those are real contracts enforceable at law to provide legal remedies. Why should a "real" contract be called a "quasi" contract? There is nothing "quasi" about them.

The term "quasi-contract" may also be misused to refer to almost any "unjust enrichment" situation, including tort actions for misappropriation of likeness. That is also entirely incorrect because a tort plaintiff has a right to legal remedies. A tort is not a contract and no tort remedy should be referred to as being based on any type of "contract".

The term "quasi-contract" should be restricted to implied-in-law situations when parties act **to convey benefits to others** (either services or property) with a **reasonable belief** they will be **compensated in exchange** but there is **no legally enforceable contract**.

Since the term "quasi-contract" is so frequently misused it might well be avoided. Your professor may insist on using it but that doesn't mean you have to use it too.[67]

2) Quantum Meruit.

The term "**quantum meruit**" is also often misused. The term "quantum meruit" means "the value of the services performed", and as explained above **quantum meruit reimbursement** is only relevant to a situation when parties act to convey benefits to others (provide <u>services</u>) with a reasonable belief they will be compensated in exchange, but there is no legally enforceable contract. In that situation, only, a Court of equity has discretion to award quantum meruit reimbursement based on an implied-in-law contract theory or cause of action.

But some authors and professors misuse the term "quantum meruit" to mean any situation where there is an implied contract, whether it is implied-in-fact or just implied-in-law, and whether it is for services or goods. And other authors and professors misuse the term "quantum meruit" to mean "restitution", whether the right to restitution arises in contract, in tort or in some other manner. Quantum meruit reimbursement never constitutes "restitution" because it never returns parties to their original positions. Rather it places the plaintiff (who is granted a money judgment in reimbursement for acts performed) in a different position.

The bottom line is you have to be prepared to hear these terms used with meanings that shift back and forth from one concept to the other.

[67] Humor the professor, and using this term may win you points. But realize the confusion of meaning.

Chapter 8: Injunction

Many "Remedies" classes begin with a discussion of **injunctive relief** so you may be reading this section of the outline first without reading the earlier chapters. If that is the case you really should read the outline from the beginning because injunctions are **equitable remedies**, and a Court has no jurisdiction (power, authority) to issue an injunction unless the plaintiffs (moving party) prove the Court has **equitable jurisdiction**.

Equitable jurisdiction means that the 1) **balance of interests favor the plaintiffs** and 2) they face **irreparable harm** because 3) they have **no adequate legal remedy**.

To prove that the plaintiffs have no adequate legal remedy one must first understand what the "legal remedies" are. That was all covered in the earlier parts of this outline.

Injunctions are **Court orders** telling defendants (respondents) to **do or not do some specific act**. They may also be called "injunctive relief", "injunctive orders", "court orders", "restraining orders", "protective orders", or "orders of specific performance".

Injunctions that tell defendants (respondents) to **NOT do some act** are called **prohibitory injunctions** and injunctions that tell defendants to **do some act** are called **mandatory injunctions**.

> **For Example:** If a Court orders Bevis to <u>get out</u> of town it is a **mandatory injunction** but if the Court orders him to <u>not go into</u> town it is a **prohibitory injunction**.

Mandatory injunctions are more difficult to obtain and are subject to certain limitations as will be explained below.

An order of **specific performance** is a particular type of **mandatory injunction** because it tells defendants to do **perform some act**, and that act is to either give the plaintiff possession and/or title to property or else (in the rare case) to perform some service for the plaintiff. [68]

Restraining orders are a particular type of **prohibitory injunction** that usually is issued to prevent domestic violence. They usually tell defendants to **not go near to or bother** the plaintiff. Restraining orders can usually be obtained quickly, easily and <u>for free</u> at the County Sheriff's Office. [69]

Plaintiffs may have **no adequate legal remedies** because they have **no legally enforceable cause of action**. Or they may have no legal remedy because they have a legally enforceable cause of action in contract, tort or real property law but a **money judgment would be an inadequate remedy**. [70]

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[68] An injunction can not order a natural person to perform services for plaintiffs because the 13th Amendment forbids involuntary servitude (slavery) so this is only possible when the defendant is an organization, not a natural person.
[69] I once talked to a woman who paid a large law firm in Sacramento $60,000 in attorney fees to sue an old boyfriend for "stalking" her. They had her and the boyfriend sign a "contract" that wasn't worth the paper it was written on. If she had just gone to the County Sheriff she could have gotten a restraining order that would do the same thing and do it better FOR FREE.
[70] Ignoring the miscellaneous legal causes of action listed above that might provide some remedy other than a money judgment.

Injunctions, whether they are mandatory or prohibitive, are either **provisional injunctions** or **permanent injunctions**.

Provisional injunctions are more often called "provisional relief" and they are only effective for a limited period of time. There are two types of "provisional relief": **temporary retraining orders** (TROs) and **preliminary injunctions**. These will be explained more below.

TROs are a particular type of **prohibitory injunction**.

A **permanent injunction** is one that once issued will remain effective permanently, unless the Court terminates or "lifts" it.

Injunctions are always **equitable remedies**, which means that a Court (judge) has broad discretion whether to grant or deny a request for injunctive relief. However, judges do not have unfettered discretion. Statutes and Constitutional considerations (e.g. the due process guarantees of the 5th and 14th Amendments) often control what judges can or cannot do.

Injunctions become effective when the defendants (parties to be bound by the injunction) receive **actual notice** of the Court's order. If defendants are not given actual notice of the Court's order the injunction has no effect.

All injunctive orders are enforced by the Court (by the judge) under **penalty of contempt**. That means that if the injunction is violated the Court may find the defendant in **contempt of court**, which is actually a criminal offense, and either fined or jailed as punishment.

1. Provisional Relief

"Provisional relief" means a short-term injunction that will be replaced later with a permanent injunction **provided that the evidence produced at trial supports** the granting of a permanent injunction. There are two types of provisional relief, **temporary restraining orders** (TROs) and **preliminary injunctions**.

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A. Temporary Restraining Orders

A temporary restraining order (TRO) is a short-term injunction that is usually prohibitory, although it may be or have some mandatory features in some situations. Often they are issued to protect plaintiffs from domestic violence. In that case the defendants are ordered to stay away from plaintiffs and not to bother them pending a hearing. In that sense it would be prohibitory. But defendants may also be required to turn their firearms into the County Sheriff pending the hearing on the TRO. So they may also be mandatory.

TRO might be issued for other purposes such as to stop the removal or demolition of a building, stop the military from discharging a soldier, stop the INS from deporting an alien, etc. But the most common purpose is probably to prevent domestic violence.

Plaintiffs seeking TROs have a duty to be fair and open concerning their claim that a TRO should be issued, they may be required to explain their efforts to resolve the matter in dispute, and they may be required to give the defendant notice that a TRO is being sought. But TROs are also often issued **ex parte** based only on the plaintiffs' sworn statements (declarations) that they face immediate harm from threatened or feared actions by the defendants, and that is usually the case when the TRO is sought to prevent domestic violence. [71]

In order to obtain a TRO a plaintiff must assert that 1) **irreparable harm is likely** if the TRO is denied, that the plaintiff has **no adequate legal remedy**, that 2) the plaintiff is **likely to succeed** in the underlying dispute that gives rise to the request for injunctive relief, 3) the **balance of hardship** favors the plaintiff, and 4) issuing the TRO is **not against the public interest**. The federal approach is that the Court should apply a balancing test to these four factors so that if one factor strongly favors the movant that would offset a weakness in another area. The California approach is more that the Court must find for the movant in each area with more of a "checklist" approach.

After the TRO is issued the defendants must be served with notice of that fact. Then they have a right to a hearing within a few days, and the TRO expires at the time of the hearing. The number of days between the issuance of the TRO and the hearing varies. In California defendants have a right to a hearing within 15 days from the date the TRO is issued, and in federal courts they have 10 days.

In federal courts defendants have a right to appear and oppose a TRO before the hearing if it was issued without notice to them. They have to give the plaintiff (the party who was granted the TRO) two days notice. So if a plaintiff obtains a TRO without giving the defendant notice, the plaintiff can immediately give notice they will appear to oppose, and two days later the defendant can appear to oppose the TRO.

If the defendants have been given proper notice of the hearing following issuance of a TRO and do not appear to oppose the claims of the plaintiff the Court (judge) has discretion to grant the plaintiff a permanent injunction. If the defendants do appear and dispute the plaintiffs' claims the Court may issue a temporary injunction pending trial of the evidence.

> **For Example:** Betty goes to the County Sheriff to complain that her daughter Louise beat and threatened her because Betty refused to give her money. Based on Betty's sworn statement that her account is true a TRO would be quickly issued ordering Louise to stay far away from Betty's house and not to contact her by telephone. Louise would also be told she had a right to object to Betty's claims and oppose the restraining order at a hearing within a few weeks.

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[71] After all, if Hubby has been beating up Wifey, requiring her to notify him she is seeing a TRO would probably cause her more injury yet.

B. Preliminary Injunctions

A temporary injunction is simply an **injunction issued pending trial** of the evidence to determine if the injunction should be made permanent. If the injunction is made permanent, it becomes a **permanent injunction**. If a TRO is initially issued and the defendants dispute the claims of the plaintiffs at the TRO hearing a preliminary injunction will generally be issued pending trial as explained above.

A plaintiff may file a petition for a permanent injunction without first seeking a TRO. This would often be the case if the plaintiffs are seeking a mandatory injunction, a Court order that the defendants are to do some act rather than a prohibitory injunction that would prevent the defendants from doing some act. The petition would be set for a hearing.

If defendants are given proper notice of a petition for a permanent injunction and do not oppose it at the hearing of the petition, the Court has discretion to grant the permanent injunction. If the defendants appear at the hearing and oppose the petition the Court will either decide the matter immediately or set the matter for an evidentiary hearing (a trial) at a later date.

After hearing the argument presented in support and opposition of a petition for a permanent injunction, either at the initial hearing at an evidentiary hearing later, the Court will either grant or deny the petition.

> **For Example:** Louise appears at the hearing following the issuance of a TRO to Betty. If she had not appeared, after being given notice of the hearing, the Court most likely would have issued a permanent injunction at the hearing. But she does file an objection denying that she ever mistreated Betty in any way. Louise claims Betty is accusing her of things that never happened because she is senile. And Louise presents a sworn statement by her friends that she is a wonderful person who has just been trying to help her mother. The judge sets the matter for an evidentiary hearing (trial) in 30 days and issues a temporary restraining order that requires Louise to stay away from Betty and not call her on the telephone until then.

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C. Posting Security for Provisional Relief

When a Court issues a TRO or preliminary injunction it must require the plaintiff to post a security deposit to compensate the defendant for costs or damages the defendant would suffer (if any) if the provisional injunction is wrongfully granted (i.e. the plaintiff fails to show a permanent injunction is justified).

Security deposits are also referred to as “undertakings”. They often consist of bonds from bonding companies but might also consist of the deposit of property, money or other property, as collateral.

> **For Example:** Two weeks before they are scheduled to perform Groucho petitions the Court to prevent the Rolling Stones from performing at the amphitheater near his home. He claims the loud music constitutes a nuisance. The Stones object and claim that if they are not allowed to perform they will lose $2 million in gate proceeds. Before a Court can issue a TRO or preliminary injunction to prevent the Stones from performing Groucho must post

security to compensate the Stones if he fails to convince the Court at trial that a permanent injunction is appropriate.

When a provisional injunction is wrongfully granted most states limit the damages the wrongfully bound party can recover to the amount of the bond unless the Court set the amount arbitrarily low, in bad faith or the injured party had no opportunity to seek an increase in the security.

Government entities do not have to post security deposits when they seek TROs. And Courts have discretion to waive the requirement of a bond when the movant is indigent or a charity or public interest group. The Court also does not have to require a bond if the provisional injunction poses no monetary risk to the party to be bound.

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D. Appeals of Provisional Injunctions

Generally the granting or denial of a preliminary injunction can be reviewed on appeal as a matter of legal right, but there is no legal right to appeal review of the granting or denial of a TRO.

Appeals courts have discretion to review the grant or denial of a TRO but usually decline because they are of very short term duration and there is no evidentiary record for an appeals court to review. All the appeals court could look at is the one-sided claim of the plaintiff.

Further, in the general case granting or denying a TRO does not cause or pose immediate injury to either party and the parties are free to seek or oppose the granting of a preliminary injunction within a relatively short time.

However, there are EXCEPTIONS when an appeal court will more often agree to review the granting or denial of a TRO.

One situation when the granting of a TRO will almost always be reviewed on appeal is when the party seeking review alleges the Court did not require the moving party to post an adequate security deposit. If the appeals court agrees, this is reversible error. But this is seldom if ever tested on law school or Bar exams.

The more tested situation on law school and Bar exams is when an order called a "TRO" is granted or denied, and the Court decision has **the effect of a preliminary injunction** because it gives or denies a party **all of the final benefits they could have received from if a preliminary injunction**. In that case one of the parties wins everything in dispute and the opposing party is left without any remedy at all. In these situations the TRO is called a "**de facto preliminary injunction**".

> **For Example:** INS agents seize Roberto Martinez, take him to the airport and prepare to put him on a plane to Mexico believing he is an illegal alien. Roberto's lawyer requests a TRO based on sworn declarations that it is a case of mistaken identity, and his client is another "Roberto Martinez" that was born in the U.S. The TRO is denied. An appeals court may agree to review the denial of the TRO in this situation because Roberto has had no opportunity for a hearing and once he is deported he will be stuck in Mexico without any legal way to get back into the United States to petition for relief.

An appeals court is also more likely to agree to review the granting or denial of a TRO when it threatens to cause an **immediate denial of fundamental rights**.

> **For Example:** One day before the presidential elections a group of Republicans obtains a TRO preventing Black people registered as Democrats in Florida from being allowed to vote. Since voting is a fundamental right, and the TRO would prevent the defendants from having any voice in the election the next day, an appeals court would be more likely to grant immediate review.

Finally, appeals courts are more likely to agree to review the granting of a TRO when the TRO is a mandatory injunction that **changes the status quo**.

> **For Example:** The Sierra Club obtains a TRO that orders the Federal Wildlife Service to immediately release water from Shasta Lake to benefit spawning salmon. Since the TRO is a mandatory injunction changing the status quo, and once the water is released it cannot be brought back to the lake, it is more likely that an appeals court would agree to review the matter even though the order is labeled a "TRO".

So the basic question of whether an appeals court will agree to review the denial or granting of a TRO depends on whether the decision is, in effect, a de facto preliminary injunction that leaves one party with all of the benefits a preliminary or permanent injunction would have given them. If so, then the appeals court may review it. If not the appeals court probably will refuse review.

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E. Stay on Appeals

Generally no automatic stay takes place when a provisional injunction is appealed. Movants must ask the Court that issued the provisional injunction to stay it pending appeal, and the Court generally has discretion to deny the request for a stay.

However, California statutes provide for an **automatic stay** of **mandatory provisional injunctions**. Consequently, to prevent an appeal from creating an "automatic stay" plaintiffs seeking provisional relief should phrase their request so that the injunction appears to be "prohibitive" rather than "mandatory".

> **For Example:** School refuses to let Rosie play on the football team in the big game on Saturday because she is a "girl". If Rosie gets a TRO that says School "must let her on the team" it is a mandatory injunction and would be subject to an automatic stay if School files an appeal. Then Rosie would miss the big game. But if she obtains a TRO that says School "cannot stop her from playing" it is a prohibitive injunction and not subject to the automatic stay provision.

2. Permanent Injunctions

A permanent injunction is any injunction (injunctive order) that is issued after a final evidentiary hearing. Conversely, it is an injunction that is **NOT issued pending an evidentiary hearing** on

the underlying dispute. The party seeking an injunction must prevail on the merits of the case or the Court will not issue a permanent injunction.

Disputes involving infringement of 1st Amendment rights require the Court to expedite the evidentiary hearing for a permanent injunction. This may be called a "fast track" situation.

Permanent injunctions may not actually be permanent. They may be issued for a fixed period of time or for as long as some condition exists.

> **For Example:** Witnesses for both Louise and Betty appear at trial. After hearing the testimony the judge finds an injunction keeping Louise away from Betty is justified by the evidence and he issues an injunction that prevents Louise from going near or calling her mother on the telephone for three years. [72]

3. Injunctions Peculiar to Contract Law

The most common injunctive relief arising out of a contract situation is an order of specific performance. But orders of specific performance may also arise in a tort situation. In either case the order requires someone (usually a defendant) to convey possession and/or title to unique property to the plaintiff in **equitable restitution**.

But there are some other contract situations involving injunctions that merit discussion. They all involve conflicts with business competitors.

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A. Injunctions Prohibiting Employment by Competitor

When a natural person (not a corporation) breaches an employment contract, the 13th Amendment prohibits a Court from issuing an injunctive order requiring the person to work against their will. But the Court may order them to NOT work for a competitor of the non-breaching party.

> **For Example:** Barry contracts to record rock albums for Motown. He breaches his contract and switches to Decca Records. Barry is a celebrity with a unique persona, but Motown cannot force Barry to continue working for them because the 13th Amendment prohibits "forced servitude". But to induce Barry to return to Motown it can get an injunction preventing Barry from working for any competing label.

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[72] California statutes provide that restraining orders (injunctions) issued to protect the elderly and disabled from abuse automatically expire after three (3) years but the plaintiff may petition the Court to have the injunction extended for another three year period. If the plaintiff petitions the Court to extend the restraining order the defendant is entitled to a hearing on the matter in the same manner as if a new TRO had been issued.

B. Non-Competition Agreements

When a person enters into a valid "non-competition" agreement, a court will issue an injunction to prevent a breach of the agreement. The agreement may be invalid because it is overbroad but that is a different issue.

> **For Example:** Plumber Paul advertises that he wants to sell his lucrative Drain-Rooter franchise. Contractor Carl buys Paul's franchise and Paul signs a non-competition agreement that he will not work for competing drain cleaning services in the same city for five years. If Paul breaches the agreement Carl may get an injunction preventing Paul from competing against him for the agreed period of time. [73]

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C. Injunction to Protect Trade Secrets

A theft of trade secrets (e.g. customer lists) by a former employee is a tort law situation (conversion), but often employees sign employment agreements promising to not reveal or use trade secrets learned during their employment. That is a contract law situation very similar to a non-competition agreement. In the same manner a Court may issue an injunction preventing a former employee from misusing trade secrets learned while working for an employer.

4. Injunctions Peculiar to Tort Law

Injunctions may be granted to prevent defendants from deliberately inflicting tortuous injury on plaintiffs in the future.

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A. Injunctions to Prevent Intentional Torts

The intentional torts recognized by the common law were assault, battery, false imprisonment, trespass to land, trespass to chattel, conversion and intentional infliction of emotional distress. Other torts can also be intentional (but are not always intentional) such as nuisance, defamation, invasion of privacy and interference (with contract, prospective advantage, etc.). In the case of each an injunction to prevent future intentional torts may be issued by the Court on a finding that future injury is likely to occur and an award of money damages would be an inadequate remedy.

> **For Example:** Ike holds his wife Tina hostage and beats her. She sues him for **assault, battery, intentional infliction of emotional distress** and **false imprisonment.** She is awarded a money judgment for damages, but he still beats her again and again. Since the award of a money judgment is not an adequate remedy, Tina can obtain a restraining order (a form of injunctive relief) ordering Ike to not approach her. If he violates it he can be jailed for contempt of Court.

[73] Note this example does not apply to lawyers. California Rule of Professional Conduct 1-500 generally prohibits an attorney from entering into any agreement that would prevent them from working as an attorney, and it is an ethical violation for an attorney to even suggest or demand such an agreement.

Injunctive relief is often the sole reason an action is brought for trespass to land, trespass to chattel or conversion.

> **For Example:** Hunter comes onto Farmer's land without permission to hunt rabbits. Farmer tells Hunter to stay off his land. Hunter responds, "I ain't hurtin' nothin'," and keeps coming onto Farmer's land. Farmer has suffered no actual monetary damages but can still bring a trespass to land action against Hunter seeking both nominal damages (supporting an award of costs of filing the action) and an injunctive order (injunction) that Hunter must stay off his land. If Hunter reenters the land he can be held in contempt of court and jailed or fined by the Court.

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B. Never in Mere Negligence Actions

Only deliberate acts can be enjoined. As a result, an injunction is never an appropriate remedy for a tort action based on "mere" negligence. Mere negligence is only a cause of action when the acts complained of were **not intentional**. However it is important to distinguish between negligence, gross negligence and recklessness.

"Mere" **negligence** simply means an inadvertent breach of a duty.

> **For Example:** Buffy forgets to have her little boy, Butthead, vaccinated for measles. This is **mere negligence**. A Court cannot issue an injunction ordering Buffy to "not forget" to vaccinate her child because an unintentional act cannot be "enjoined".

Gross negligence is a deliberate breach of a pre-existing duty.

> **For Example:** Buffy deliberately fails to have her little boy, Butthead, vaccinated for measles. She has a pre-existing duty to have him vaccinated because he is her child and her duty is to act reasonably to protect him from harm. So her deliberate failure is **gross negligence**. A Court CAN issue an injunction ordering Buffy to vaccinate her child because a deliberate act can be enjoined.

Recklessness is a deliberate act creating risks to others.

> **For Example:** Buffy deliberately allows her little boy, Butthead, to be exposed to another child that has measles. She has deliberately acted to expose him to risk, so she has been **reckless**. A Court CAN issue an injunction ordering Buffy to not expose her child to disease because a deliberate act can be enjoined.

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C. Enjoining Future Defamation or Invasion of Privacy

The torts of defamation and the invasion of privacy torts (false light, intrusion, misappropriation of likeness and public disclosure of private facts) may be based on negligent acts rather than on intentionally injurious acts. In those situations injunctive relief is inappropriate.

> **For Example:** Paula's husband, Rocky, is a silver miner. Meddler quips to Reporter that Paula, a local teacher, "has sex with a minor." Reporter smells a big story so he "bugs" Paula's bedroom and records her activities. Then Tribune publishes Reporter's story that Paula is having sex with "a minor". Paula is fired from her job. Oops. Tribune is not going to publish the same story in the future so the Court would not award an injunction. It would just award money damages.

But when the tortuous acts are intentional and defendants may repeat the intentional acts in the future, injunctive relief is appropriate.

> **For Example:** Izzy Indigent has various complaints against many people. He asks Larry Lawyer to represent him and help him sue.[74] Larry refuses. Now Izzy stands in front of Larry's office days at a time passing out fliers that say, "Larry Lawyer cheated me! Don't let him cheat you, too!" Since Izzy is indigent an award of money damages would not deter him, and he would just continue to defame Larry. As a result injunctive relief is appropriate. If Izzy violates the injunction he can be jailed as punishment. [75]

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D. Enjoining Nuisance

Injunctive relief is probably the most common remedy to stop or prevent a public nuisance, and it is often a remedy in the case of private nuisance too because it necessarily involves interference with the use and enjoyment of land, unique property.

If a nuisance only deprives a plaintiff of the use and enjoyment of land for a limited period of time, the appropriate remedy is a money judgment, not an injunction. The measure of damages in that case is the **imputed rental value** of the land during the period the nuisance existed.

Injunctive relief to prevent a continuing nuisance may be denied by the Court because of the impact on third parties. Before the Court issues an injunction stopping a nuisance, it must balance the plaintiff' interest against the interests of other parties affected.

If the Court refuses to issue an injunction to prevent a nuisance the typical remedy is to award the plaintiff money damages in an amount measured to **compensate for lost property values**.

In some cases the Court issues a **conditional injunction** ordering the defendant to purchase the property of the plaintiff at the value it would have had but for the nuisance, or else to pay money damages if the plaintiff decides to keep title.

> **For Example:** Asthmatic Annie buys a house next to a small factory for $10,000. Over time the factory grows until it employs 200 people and produces fumes that drift into Annie's yard. That lowers the value of Annie's house $20,000 below what it would have been. The fumes also harm Annie's health and she incurs medical expenses of $100,000. She seeks money damages of $120,000 and an injunction to shut down the factory completely. The Court may refuse to issue an injunction because of the effect it would

[74] People like Izzy invariantly want you to represent them on a contingency basis.
[75] This is not "prior restraint" if the injunctive order clearly and specifically only prevents Izzy from making false and defamatory statements, which are not "protected speech".

have on local employment. In that case the Court may award Annie money damages for the medical expenses of $100,000 and order the factory to either buy her house for what it would have been worth but for the fumes or else to pay her $20,000 for reduced property values if she is not willing to sell the house to the factory.

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E. Enjoining Other Torts and Injuries

An injunction may be obtained to prevent any deliberate future act by a defendant that threatens to cause plaintiffs injury. Usually those acts are torts. In other cases they may only "sound in tort" or establish legal causes of action based on statutory or Constitutional guarantees.

> **For Example:** Federal law provides that an action for damages may be brought against any person who acts to deprive an individual of their right to vote because of race. Maddox, a Registrar of Voters, refuses to let Bubba register to vote because he hates people of Bubba's race. Bubba can obtain an injunction preventing Maddox from denying him his right to vote. While being denied the right to vote (or any denial of due process and equal protection) is an "injury" it is not one of the common law torts. But the injury does "sound in tort".

A mandatory injunction may also be obtained to force the defendant to take some future action because the plaintiff would otherwise be injured.

> **For Example:** Bevis and Buffy divorce. The property settlement requires Bevis to deed their joint residence to Buffy. If Bevis later won't sign the deed, Buffy can obtain a court order (injunction) directing Bevis to sign and deliver the deed. His failure to sign the deed is not a tort, but it "sounds in tort" because it would cause her to be deprived of her rightful property.

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F. Never to Prevent Crimes

An injunction is never an appropriate remedy to just prevent crime. Criminal laws and the criminal justice system are established to prevent crimes. If criminal laws are not adequate to prevent crimes that is the Legislature's concern and no individual judge can put himself before the legislative process.

> **For Example:** A statute establishes a fine of $100 for driving in the "car pool lane" without at least two people in the car. Trump has been cited for violating the statute several times. Judge Smug orders Trump to not violate the "car pool lane" rules under threat of contempt. This is an abuse of discretion because the Legislature has the authority to decide what the statutory penalty should be and no judge can act to the contrary.

However, an injunction is appropriate to protect specific individuals from specific injurious acts, even though the act itself may be a crime.

5. Motions to Modify, Stay and Lift Injunctions

After a permanent injunction has been issued parties may still petition the Court to modify, lift or stay the injunction based on changed circumstances of law or fact that make the appropriateness of the original injunction questionable.

Generally injunctions involving disputes in which a **government entity** (State, federal) is a party are **easier to modify, stay or lift** because the Courts are reluctant to bind government entities in ways that no longer appear appropriate.

But if an injunction was issued based on a **consent decree**, an agreement between private parties, and neither is a government entity, the **Court will be less inclined to modify, lift or stay** the injunction. The parties may be seen as having "assumed the risks" that circumstances might change in the future. This would be especially true if the changes were relatively foreseeable.

6. Enforcement by Finding of Contempt

After a Court has issued an injunctive order it will is enforced by the threat that the Court may find any party that violates the order to be found in **contempt of court**. This extends to the agents of parties bound by the injunctive order and any other parties that knowingly assist or encourage the parties to violate the order.

There are three types of "contempt": **criminal** contempt, **civil** contempt, and **direct** contempt.

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A. Criminal Contempt

A person who violates an order of the Court may be punished by fines or imprisonment for **criminal contempt** if it is proven **beyond a reasonable doubt** that they **willfully disobeyed** the order.

The distinguishing feature of a finding of criminal intent is that the **purpose is punishment** of past violations of the injunction, not to coerce the defendant to obey the injunction in the future.

A person charged with criminal contempt generally has a right to a **jury trial** unless the potential penalty is minor.

Under federal law the defendant has a right to a jury if the potential penalty is more than six months in jail or a fine of more than $500. Under California law the defendant has a right to a jury trial if the potential punishment is more than five days in jail.

> **For Example:** Buffy obtains a restraining order that Bevis is not to come within 300 yards of her house. Afterwards Bevis goes to her house in the night and beats on the door threatening to kill her. Bevis can be charged with criminal contempt.

— o0o —

B. Civil Contempt

A person who violates an order of the Court may be fined or imprisoned for **civil contempt** if there is **clear and convincing evidence** the defendant failed to obey the order, regardless of why the order was not obeyed.

The distinguishing feature of a finding of criminal intent is that the **purpose is coercion**, to make the defendant to obey the Court, **not punishment** for failing to obey the Court, or to **compensate plaintiffs** for damages caused by violation of the injunction.

A finding of civil contempt may be appealed on a claim that a fine or imprisonment for contempt is criminal, not coercive, in nature. If the appeals court finds that the defendant lacked reasonable ability to obey the Court's order, it will find that the fine or imprisonment is punitive, not coercive, and the defendant has the right to counsel guaranteed by the 6th Amendment and other criminal protections.

On the other hand if the appeals court finds the defendant had the ability to obey the Court order it will find the finding of contempt was civil and the criminal protections of the Constitution do not apply.

Parties charged with civil contempt have **no right to a jury trial** and there is no clear time limit on the length of time they can be jailed.

The purpose of a threat of civil contempt is to **coerce the defendant to comply** with the Court's order or to **compensate the plaintiff** for losses caused by the failure to comply with the Court's previous order. [76]

> **For Example:** The Court issues an order telling Deadbeat Dad to start paying Wifey at least $400 a month until he has made up the past child support he has failed to pay for several years. If Dad fails to pay the Court can find him in civil contempt and threaten to jail him every weekend for the rest of his life unless he starts paying like he has been ordered to do.

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C. Direct Contempt

Direct contempt is a holding of contempt when a party **in court** refuses to obey the orders of the judge. The defendant has no right to a jury trial if the punishment is minor.

> **For Example:** Bevis gets angry in Court at a divorce hearing, jumps up and starts shouting obscenities at his soon-to-be ex-wife Buffy. The judge tells him to shut up and sit down. He does not obey the judge, so the judge finds him in **contempt** of court and directs the bailiff to take Bevis into custody. When the hearing is over the judge has Bevis returned to the courtroom and he is sentenced by the judge to a weekend in jail.

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[76] This is the situation newspaper reporters sometimes find themselves in when they refuse a Court directive to divulge their "sources" for news stories.

D. Findings of Contempt to Coerce Payment of Debts

A finding of contempt generally cannot be used to force defendants to pay debts because imprisonment for debt is forbidden by most State constitutions. But this depends on the definition of "debt", and Courts do not always agree on this issue.

The payment of **child support** and **spousal support** can usually be coerced by a threat of imprisonment for failure to pay because payment of those amounts is required by law, not because of "debts" reduced to a money judgment.

Likewise, sentences of imprisonment for **fraud** or other **felonies** may be conditioned on the repayment of claims. The failure to repay such claims may result in arrest an imprisonment because the sentence was conditional on compensating the victims for losses caused by the defendant.

A breach of a fiduciary responsibility may also result in a money obligation that is not technically a "debt".

7. Defenses to Contempt

A person accused of contempt of court can either raise a defense in the Court that issued the injunction (the trial court) or, in some cases, on collateral attack in a different court.

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A. Direct Defenses

All of the following defenses can be raised in the trial court.

1) The Defendant was not Aware of the Order

Perhaps the simplest defense argument to an accusation of contempt is that parties to be bound were not aware of the order or what it required them to do or not do.

2) The Defendant was not in the Class Bound by the Order

Defendants may claim that they are not in the **class of people** who were bound by the order. Injunctions are issued for a **reason**. The reason helps define what **class of defendants** must obey the injunction and the acts they must do or not do. Defendants charged with contempt may claim they are not members of the class bound by the injunction.

> **For Example:** The Court issues a restraining order that prohibits three or more members of the Broderick Boys gang from congregating or loitering in public places. [77] Bevis, Butthead and Gomer were hanging around in front of the High School. They were arrested

[77] This is actually the essence of an injunction issued by Yolo County Court to prevent the Broderick Boys from being a continuing nuisance in West Sacramento, California in 2006.

by police for violating the injunction. Even if they were well aware of the injunction they can still claim that they are not members of the Broderick Boys so it did not prevent them from hanging around.

3) The Order was not Violated

Another defense argument to an accusation of contempt is that the party to be bound **did not violate the injunction**.

> **For Example:** The Court issues a restraining order telling Bevis to not go near or call Buffy on the telephone. Buffy receives a series of crank calls. If accused of contempt Bevis may claim that he is not the one who called Buffy and had nothing to do with it.

4) The Order was Fatally Vague

Defendants accused of contempt may argue the injunction was **so vaguely written** they could not reasonably understand what the Court required them to do or not do. An injunctive order must be clear and unambiguous.

> **For Example:** The Court issues a restraining order telling Bevis to not harass Buffy. Bevis drives past her house. Bevis may argue that the order was so vague no reasonable person could tell that merely driving past her house was a prohibited form of "harassment".

5) The Order was Fatally Overbroad

Defendants accused of contempt may argue the injunction was **fatally overbroad**. An injunctive order must be narrowly tailored to avoid infringing on protected expression and other behavior that has no rational relationship with the reason the injunction was issued.

> **For Example:** Reverend Roy has been causing a nuisance picketing the local abortion clinic night and day screaming into a bullhorn. The Court issues a restraining order telling Roy that he cannot say anything to anyone at any time within six blocks of the abortion clinic. If Roy violates the injunction he can raise the defense that the injunction was so overbroad it unnecessarily violated his rights to free expression.

6) The Order was Impossible to Obey

Defendants accused of contempt may argue the injunction was **impossible to obey** due to **circumstances beyond his control**.

> **For Example:** Hubby is ordered to pay his ex-wife $1,000 a month in spousal support. He fails to pay. The Court may charge him with contempt, but he may argue that it was impossible for him to pay that amount of money. If he proves that to be true he cannot be punished (criminal contempt) for not doing the impossible or coerced (civil contempt) into doing the impossible. But if the Court finds that his low income is due to his own failure to obtain and maintain employment he will be found to have **caused his own inability**. In that case his defense of impossibility will fail.

7) The Court Charging Contempt Lacks Jurisdiction

Defendants accused of contempt may argue that the Court that issued the injunction **lacked jurisdiction**. Jurisdiction is the authority of the Court over both the subject matter (**subject matter jurisdiction**) and the defendant (**personal jurisdiction**).

> **For Example:** Bevis is a resident of Nevada, and a Nevada court issues a restraining order prohibiting Bevis from calling Buffy on the telephone. Bevis calls Buffy in violation of the injunction. In response to a petition from Buffy a California court finds Bevis in contempt of the injunction. Bevis can challenge the finding on the grounds that the California court **lacks subject matter jurisdiction** to make a finding of contempt when the order in dispute was issued by a totally different court.

8) The Injunction Unconstitutionally Infringes on Freedom of Expression

Defendants accused of contempt may argue that the injunction violated was **an invalid infringement of freedom of expression**.

> **For Example:** Judge Frump orders the Times to not publish "any stories about him". The Times publishes a story about him anyway and Judge Frump orders publisher Paul arrested for contempt. Paul can challenge the injunction on the grounds it was an **unconstitutional prior restraint** infringing on the **freedom of the press**.

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B. Defenses in Collateral Attack

The following defenses can be raised in a **collateral attack**. **Collateral attack** means a challenge that the holdings of a court are improper in some court other than the court assigned appeal jurisdiction over the court that issued the holding. Generally court holdings cannot be challenged in any manner except filing an appeal in the court that has appeal jurisdiction. But the following situations are exceptions to that rule.

1) The Order was Transparently Invalid

Defendants accused of contempt may argue in a collateral attack that the injunction violated was **transparently invalid** because it was overbroad, fatally vague, or otherwise violated equal protection or due process. If the injunction was transparently invalid it is ineffective and a violation of it cannot be found to be contempt.

2) The Order was Issued in Bad Faith

Defendants accused of contempt may argue in a collateral attack that the injunction violated was **issued in bad faith**. There would have to be some showing that the injunction was issued for a wrongful purpose.

3) The Defendants had no Opportunity to Appeal

In certain circumstances defendants may argue in a collateral attack that the injunction violated **could not be appealed because there was no opportunity**.

> **For Example:** Judge Frump issues an injunction preventing the Gay Freedom Parade from being held the next day. The organizers of the parade have **no time to file an appeal**, they believe the injunction has been issued in **bad faith**, and they believe it is an **unconstitutional infringement of freedom of expression**. They may be able to challenge a finding of contempt in a collateral attack.

Chapter 9: Conclusion

This outline provides a summarized explanation of the black letter law and bright line rules of **REMEDIES**.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion historical development has been ignored to the extent possible. Nevertheless the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law and equity for you to pass any bar examination.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the general rules of law and equity set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of **Remedies**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You are urged to consult Nailing the Bar's **"How to Write Evidence, Remedies, Business Organization and Professional Responsibility Law School Exams"**. Information about that publication is available inside the back cover of this outline.

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Case Briefs, Commercial Outlines, and Law School

Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

A big part of your "law school education" is the gradual realization that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com**. Why not read what the justices really said instead of trying to decipher a hacked up version?

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