Table of Contents

I. Introduction 2

A. Specific, Substitutionary, and Declaratory Remedies 2

B. Remedies for Tortious Wrongs, Breach of Contract, and Unjust Enrichment 3

II. Basic Principles of Specific Equitable Remedies 4

A. Introduction to FRCP 65 4

III. Injunctions 4

A. Temporary Restraining Orders (TROs) – FRCP 65(b) 4

1. Substantive merits of obtaining a TRO under FRCP 65 7

B. Preliminary Injunctions 8

C. Bonds 10

1. Mandatory bond requirement under Rule 65(c) with exceptions 10

2. Injunction bond rule 10

3. The court *must* conduct a hear under Rule 65(c) if defendant asks for bond to be posted by plaintiff 11

4. Recovery damages 11

D. Permanent Injunctions 12

1. Differences between a preliminary and permanent injunction 12

E. Defenses to Equitable Relief 14

1. Unclean hands 14

2. Laches 14

F. Appeals 16

1. Jurisdiction over appeals from permanent and preliminary injunctions rulings 16

2. Jurisdiction over appeals from TRO rulings 16

3. Procedures and standards for issuing pre-appeal injunctive relief 18

G. Modifications 18

1. First Amendment considerations 18

2. Modification and dissolution of permanent injunctions 19

H. Contempt\*\*\* 20

1. The nature of contempt 20

2. Violations of judicial rules and orders relating to the administration of justice 21

3. Violations of equitable remedial decrees 23

4. Persons bound by an equitable remedial decree 27

I. Collateral Attacks 27

IV. Damages 29

A. Legal Relief Defined 29

B. Goals of Damages 29

C. Terminology and Limitations 29

1. Importance of terminology 29

2. General and special damages 30

3. Contract v. tort 31

D. Damages Calculations 33

1. Speculation, certainty and difficulty in measurement 33

2. Adjustments for time 34

E. Collateral Source Rule 37

1. Defenses 39

F. Punitive Damages\*\* 40

1. Tort 41

2. Contract 43

G. Damages for Harm to the Person\*\* 44

1. Compensatory damages for physical injury 44

2. Compensatory damages for emotional distress 48

3. Loss of consortium 49

H. Survival and Wrongful Death 50

V. Restitution and Unjust Enrichment 52

A. Quasi-contract (terminology) 52

1. Restitution as the only cause of action 53

2. Contracts relating to services – restitution 53

3. Defendant’s gain measures recovery 53

B. Constructive Trust, Equitable Lien, Services Rendered Without Expectation of Compensation 54

1. Types of equitable remedies 55

VI. Declaratory Judgments 59

VII. Remedies for Harm to Personal Property 61

A. Personal Property 61

1. Items of relatively stable value 61

2. Items not of relatively stable value 61

3. No market for the item 62

(b). Goods with sentimental value 62

(c). Personal property that was not destroyed 63

B. Specific Relief 63

1. Legal replevin 63

2. Equitable replevin 65

C. Remedies for Trespass 66

1. Damages 66

2. Specific relief 66

3. Restitution 68

D. Remedies for Nuisance 68

# Introduction

## Specific, Substitutionary, and Declaratory Remedies

Specific remedy: requires the defendant to perform some activity or refrain from performing some type of activity

* + E.g., an order instructing the defendant return a specific book owned by the plaintiff
	+ E.g., an order stating the defendant must complete construction of the plaintiff’s house

Substitutionary remedy: this means a substitution for a specific remedy – means a monetary award

* + Not perform a specific act, but pay a monetary amount as a substitute for an item or an act

Declaratory remedy: a statement from the court stating a plaintiff does or does not have a duty or did/did not breach/infringe.

* + No monetary payment or specific performance required

Legal remedies: the remedy is a “judgment” which is not enforceable by the court’s contempt power

* + The plaintiff must enforce the legal remedy through liens (i.e., the plaintiff becomes an ordinary creditor)
		- Note that the defendant may declare bankruptcy
	+ The parties are guaranteed a jury trial for a legal remedy under the 7th Amendment.
		- Note that if both parties agree, the jury trial may be waived and the judge may decide the remedy

Equitable remedies: almost always specific performance (e.g., injunctions), however there are some substitutionary remedies (e.g., ongoing payments for patent infringement)

* + These remedies are determined by a judge (not a jury, however an advisory jury may be used to recommend a remedy but the recommendation will not be binding).
	+ The remedy is enforced via *court order* (i.e., the court’s contempt power).

## Remedies for Tortious Wrongs, Breach of Contract, and Unjust Enrichment

Tort

The goal is to make the plaintiff whole, as if the tort never happened. It also incorporates punitive damages (punishment). It may also include equitable and legal remedies.

Contract

This should put the plaintiff in the situation the plaintiff would have been in had the contract been performed and not breached. No punitive damages (punishment). This can be an equitable or legal remedy.

Unjust enrichment

This identifies a particular gain and decides whether the plaintiff or defendant should get that gain. This is mostly a legal remedy but technically can be equitable.

# Basic Principles of Specific Equitable Remedies

## Introduction to FRCP 65

* FRCP 65(a) – Preliminary restraining order
* FRCP 65(b) – Temporary restraining order
* FRCP 65(c) – Bonds
* FRCP 65(d) – Holds an enjoined party may not hire a non-enjoined third party to carry out the enjoined activity

# Injunctions

The court defines this as an ***in personam order***

* *In personam* means “directed to a specific person”
* Remember: the opposite of *in personam* is *in rem* (“directed to a specific property”)

Injunctions are enforced by the court’s contempt power and may be mandatory or prohibitory.

Mandatory

A mandatory injunction is an injunction that requires one to perform a particular act – an affirmative order.

Prohibitory

A prohibitory injunction is an injunction that prohibits one from performing a particular act.

## Temporary Restraining Orders (TROs) – FRCP 65(b)

A TRO issued under FRCP 65(b) ***may*** be issued without noticed to the enjoined party – *ex parte* (i.e., enjoined party does not have to be present with the court decides to grant the injunction).

* A TRO may be issued *ex parte* when: (a) notice is impossible, (b) there is danger to life or limb, or (c) when notice might render suit moot.

The TRO may last up to (i.e., no longer than) 28 days. Generally, a TRO is granted for 14 days but the court may give the party another 14 days *for good cause*.

* *Marquette v. Marquette*
* Husband and wife divorce, allegations of domestic violence and a TRO issued without notice to husband, it lasted 21 days and effectively prevented the husband from seeing his kids.
* ***RULE***: ***The court applies a 3-part balancing test to determine whether an ex parte TRO is warranted:***
1. Importance of interest at stake
2. Risk of erroneous deprivation
3. Government’s interest
* Interest at stake (seeing kids) is very important but the deprivation is very short and the risk of erroneous deprivation is relatively low (the judge is able to weigh the credibility of the wife and physical evidence of the harm is typically visible). The gov’t interest is important and wants to prevent domestic violence (it is cyclical) and the gov’t wants to break the cycle of domestic violence.
* ***NOTE***: ex parte TROs are almost always permissible procedurally for violence or threats (e.g., “danger to life or limb”).
* *In re Vuitton*
* Vuitton wants to stop the counterfeit of Louis Vuitton bags but every time one seller of counterfeit bags is served with process of a court order, they gave the bags to someone else and plead ignorance.
* Vuitton wanted to get a TRO without giving notice so that the seller (the person enjoined) would be in contempt of court if they gave the bags to another and plead ignorance. The district court said no but the federal court said issue the TRO.
* A TRO is appropriate when the case involves a piece of personal property that is;
1. In imminent danger of destruction,
2. In danger of being removed beyond the confines of the state/nation (authority of court)
3. In danger of being sold to an innocent third party
* Why do the above reasons make sense?
	+ They each would render the case moot
	+ *Reno Air Racing v. McCord*
		- Reno Air has 2 registered trademarks and allow licensed vendors to sell goods with the trademarks inside the property of the racing show. McCord is an unlicensed seller that sets up shop across the street from the racing show.
		- Reno Air gets a TRO without notice arguing that McCord will flee and destroy his merchandise if he finds out there is a lawsuit against him
			* McCord decides to stop selling merchandise with the exact same logo as the registered trademarks but sells merchandise with logos related to air racing but not trademarked
			* McCord is found by the district court to have violated the TRO and must pay $6K plus Reno Air’s legal fees.
		- The appellate court overturned the district court’s finding because Reno Air presented no evidence that the McCord would flee or dispose of evidence.
			* ***Look to see if D has a history of doing such? A mere assertion that the person might do this or that unrelated others have is insufficient – must have evidence that the defendant has done this sort of thing before or others similarly situated to the defendant have.***
			* How close must the relation be?
				+ Same person/organization? – sufficient
				+ Middle ground – grey area
				+ Unrelated person at similar event – insufficient
* ***RULE: The application for the TRO must sufficiently described the trademark as issue***.
* The court stated that the application did not sufficiently describe the trademark at issue. The application referenced a picture of a shirt and it was not sufficiently clear what part of the logo was covered (e.g., the entire logo, the words “Reno Air Racing,” part of the cartoon picture, only the cartoon picture as a whole, etc.)

NOTE: An application for a TRO cannot reference other documents when describing the trademark at issue.

65(b)(3) and (b)(4)

* An ex parte TRO expires at the time after entry, not to exceed 14 days, that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.
* The party who obtained the TRO must proceed with the application for a preliminary injunction when the motion therefore comes up for a hearing; if the party does not, the court must dissolve the order.
* *Gil Pharmaceutical v. Generic*
* TRO against Generic obtained by Gil in Puerto Rico Commonwealth court. The lawsuit was then removed to federal court and neither party makes a motion for several weeks.
* The court then dissolved the TRO because:
	+ Gil did not make any motions (move to extend TRO or move for a prelim. injunction) pertaining to the injunction therefore under 65(b) the court will dissolve the TRO.
* NOTE: a state court TRO stays in effect when the case is removed to federal court *but* after the case is removed to federal court, FRCP 65 governs the TRO from that point forward.
	+ Federal court required to lift according to FRCP 65 timing requirements

### Substantive merits of obtaining a TRO under FRCP 65

* *Morgan Stanley v. Frisby*
* Frisby leaves Morgan Stanley for a competitor, messes with the phone systems to make it difficult to reach those at Morgan Stanley, and attempts to recruit clients to leave Morgan Stanley and come with Frisby to the new business.
* Frisby signed a non-compete agreement stating he would not solicit clients within a certain geographic radius for a year (NOTE: non-competes are not enforceable in CA)
* MS moves for a TRO (not ex parte) but the court refuses based on the 4 factor test for the substance of getting a TRO (court claims MS fails all 4)
1. Substantial likelihood for success
2. Irreparable harm
3. Balance of hardships
4. Public interest
* The court finds (1) the TRO is overbroad, (2) mere loss of income does not constitute irreparable harm, (3) tilts in D’s favor because the TRO would lead to Frisby losing his job/livelihood where MS only a tiny percentage of MS’s clientele, and (4) MS does the same thing – stealing clients from Frisby or other competitors.

Note: in a note case, *Roth*, the same facts are presented to a different court and that court finds all 4 factors are satisfied (1) this factor is a modest-restriction, (2) MS is losing trust and goodwill, (3) Frisby can work elsewhere, and (4) the public has an interest in honoring contracts.

## Preliminary Injunctions

A preliminary injunction is essentially a non-*ex parte* TRO. FRCP 65(a)(1) requires that to obtain a preliminary injunction, ***there must be an adversarial hearing***.

There are two tests used to determine whether a preliminary injunction should be issued: (1) traditional test, and (2) “sliding scale” test.

**The traditional test is a four-factor test**:

* + - (1) Substantial likelihood of success
		- (2) Irreparable harm if no injunction issued
		- (3) Balance of hardships tips in the plaintiff’s favor (benefit to plaintiff exceeds the cost to the defendant)
		- (4) Issuing the injunction has to be in the public’s best interest
			* NOTE: these “factors” are more like *elements* to satisfy
* *Save Our Sonoran v. Flowers*
* District court issues a TRO and preliminary injunction against Flowers developing the land. SOS was required to put up a bond in case the court decides an injunction should not have been issued. The 9th Cir. held the preliminary injunction may stand.
* The sliding scale the court uses:
* (1) Substantial likelihood of success ***v.*** [combination of (2) irreparable harm and (3) balance of hardships]
* The 9th Cir. says SOS has not shown a substantial likelihood of success only “serious questions” but has strong evidence of irreparable harm
	+ - * “Serious questions” means the party has a chance to win but the chance is less than “most likely than not” (10% - 50%)
* *CDI Energy Services v. West River Pumps*
* District court grants TRO, denies preliminary injunction, the 8th Cir. affirms. The 8th Cir. says there is a very high likelihood of success but denies the injunction because every other factor weighs against issuance.
	+ - * + Is there going to be irreparable harm?

No because the harm already happened (the customers already left)

* + - * + Balance of hardships?

It tilts in the defendant’s favor because an injunction would likely drive the defendants out of business and it would not incur any benefit to the plaintiffs because the plaintiffs do not have anyone in the state to sell their products.



The above figure represents the sliding scale test after *CDI*. The shaded area represents the combination of success on the merits and irreparable that will warrant the issuance of an injunction. *CDI* states that the sliding scale may only go so far. There has to be some possibility of irreparable harm and the probability of success must at least arise to “serious questions.”

* *Winter v. Natural Resources Defense Council*
	+ - District court: applies sliding scale test (greater than 50% + “possibility” of irreparable harm) and the 9th Cir. affirms.
		- Supreme Court says the “possibility” of irreparable harm standard is too lenient and that all of its case law has stated that ***irreparable harm must at least be “likely.”***

Professor Love states that we’re not sure how *Winter* affects the sliding scale: either (1) the sliding scale is no longer good law or (2) we just need to shift the standard for irreparable harm to the right (“some possibility” of irreparable harm to a finding of irreparable is “likely”).

* *Citigroup Global Markets v. VCG Special Opportunities Master Fund*
	+ - District court grants the injunction using the sliding scale test
			* This case slides the opposite way as *Winter*, so if there is a lot of evidence of irreparable harm but less than 50% chance of success on the merits, a preliminary injunction should be granted.
		- 2nd Cir states that *Winter* doesn’t discuss this case’s situation and affirms the District court’s ruling
			* The 2nd Cir is stating that at least 50% chance of irreparable harm

***Summary of tests for issuance of a preliminary injunction***

1. Traditional test – essentially 4 elements
	1. Greater than 50% chance of success on the merits (“more likely than not”)
	2. Greater than 50% chance of irreparable harm (“more likely than not”)
	3. Balance of hardships
	4. Public interest
2. Sliding scale (most circuits have at least adopted in some measure) – an injunction may be issued in *either* of the following situations (depends on circuit):
	1. Greater than 50% chance of winning on the merits + “possibility” of irreparable harm, or
	2. Less than 50% chance of winning on the merits but at least “serious questions” + [strong evidence of irreparable harm and balance of hardships substantially tips in plaintiff’s favor]

## Bonds

Why are bonds required?

* + - We’re basically saying, “put your money where your mouth is.”
		- If injunctions are easy to get, plaintiffs would be seeking them regularly for tactical reasons (e.g., put the defendant in a position such that they have to settle or go out of business).
		- However, if we require plaintiffs to put up tens of thousands or even millions of dollars, it deters plaintiffs from always seeking injunctions

### Mandatory bond requirement under Rule 65(c) with exceptions

Although Rule 65(c) *requires* a bond requirement, case law has determined that there are times when the requirement is impractical and at times may be waived.

Two ways court handle waiving the bond requirement:

1. Bond is mandatory but the bond is a nominal amount - $0 or $1; or
2. Waive the bond requirement altogether

When or to whom is the bond requirement typically waived?

* + - Indigent individuals
		- Public interest entities (e.g., non-profit groups)
* Borough of Palmyra Board of Education v. FC

### Injunction bond rule

* *Sprint Communications Co. v. Cat Communication Int’l*
* Sprint is a long distance provider, CAT is a local provider
* There was a technical glitch and those who signed up for CAT local service were able to access Sprint’s long distance network for free
* The Court set the bond at $250k, representing what they believed to be the cost of blocking the long distance calls.
* However, the bond was far too low (actual cost was $5 million) and the court tried to retroactively require a $5 million bond from Sprint
* The appellate court uses the “*injunction bond rule”* to say that Sprint only has to pay $250k.
* The injunction bond rule states that the “original” bond caps the amount the plaintiff must set forth
* What CAT should have done:
* Went to the court when they first realized the cost of blocking the calls would exceed $250k and ask for the court to lift the injunction and reissue the injunction with a higher, more accurate bond requirement.

### The court *must* conduct a hear under Rule 65(c) if defendant asks for bond to be posted by plaintiff

* *Rathmann Group v. Tanenbaum*
* ***RULE: the burden falls on the defendant to ask for a bond – if there is no request for a bond, the lack of request is viewed as a waiver***
* ***RULE: If the defendant asks:***
* ***The court must hold a hearing (may be same as preliminary injunction hearing), and***
* ***The court must pick a dollar value for the bond and given an explanation for that dollar value***
* If the court fails to do either of the above, the appellate court may reverse for abuse of discretion.

### Recovery damages

* *Nintendo of America v. Lewis Galoob Toys*
* Nintendo sues Lewis (maker of Game Genie which allowed users to make free cheats in games) for copyright violation (creating a derivative work).
* Nintendo gets an injunction against Lewis, preventing them from selling Game Genie (for almost a year).
	+ Twice during the year, Lewis had the injunction dissolved and reissued with a higher bond – *this is what CAT’s lawyers should have done*
* Nintendo loses the lawsuit and the court gives the entire $15 million bond to Lewis.
* ***RULE: regardless of whether the plaintiff litigates in good faith, there is a rebuttable presumption that the defendant gets the entire bond amount***.
	+ The burden falls on the plaintiff to calculate the actual damages and show that the actual damages were less than the bond.
* The type of damages the defendant is entitled to is “compensatory damages” and determined according to general common law principles (based on the injunction because it was wrongfully issued).

## Permanent Injunctions

In what scenarios can a plaintiff get a permanent injunction when they did not have enough to get a preliminary injunction?

### Differences between a preliminary and permanent injunction

* After winning a case, the plaintiff is no longer worried about proving likelihood of success, or obtaining a bond
* The court is not looking at “irreparable harm” but is instead looking at whether the plaintiff is faced with an “inadequate remedy at law”
	+ “Irreparable harm” means “no adequate remedy at law” *and* it is unfair/unjust to make the plaintiff wait for an injunction
	+ “Inadequate remedy at all” means the plaintiff’s harm is not readily monetized.
* Some situations in which “inadequate remedy at law” arises:
	+ Bodily injury
	+ Inability to work
	+ Environmental harm
	+ Destruction of property
	+ Requirement to project damages years into the future (*Walgreens*)
	+ Public embarrassment (e.g., publishing facts that may not be true)
* *Walgreen Co. v. Sara Creek Property*
* This is a contract case, and typically contract cases are not given permanent injunctions because damages can be readily monetized (e.g., difference between amount plaintiff had to pay to third party for goods and amount contracted with defendant for same goods)
* Wal-greens has leasing contract with mall which prevents the mall from leasing space to another pharmacy. The anchor tenant in mall leaves and the mall wants to lease space to fill vacancy with a store/pharmacy.
* Permanent injunction issued against filling vacancy with pharmacy until Wal-greens’ lease is up
* Why? Because it would be very, very tough to calculate how much money Wal-greens would lose (the lease had 10 years remaining on it).
* Note: comparing similar situations (i.e., other malls with pharmacies and Wal-greens) is not sufficient because each mall is different

So even though contract cases typically lend themselves to readily calculable damages, it is sometimes virtually impossible to calculate.

* This is especially true for unique goods (e.g., real estate)
* But not for readily available commodities (e.g., corn, flour, wheat) – this can just be bought from someone else and the damage is the difference in value

***It is really hard in contract cases to get an injunction. However, it is sometimes possible with very unique goods, real estate, etc.***

***NOTE: Courts will NEVER issue a permanent injunction (or injunction otherwise) for personal service contracts.***

* Example: P has a personal service contract with Singer X to sing at P’s wedding. X breaks the contract by refusing to sing.
	+ The court will *never* force X to sing at P’s wedding.
* *eBay, Inc. v. MercExchange*
* Side note: 2006 NTP (patent troll) v. RIM case – an injunction was placed on RIM using NTP’s patent and RIM pays $612 million to NTP to lift the injunction
* Similar scenario – MercExchange (patent troll) comes after eBay for infringing its patent – in wake of NTP v. RIM, the Supreme Court steps in and addresses the situation
* SCOTUS says that there are no presumptions or general rules: ***courts must balance each and every factor for each case***
* ***Permanent injunctions are never automatic or presumed, every plaintiff in every case must satisfy the traditional factors***.
* The holding from *eBay* requires a patent owner seeking a permanent injunction must satisfy the following factors:
1. *That it has suffered an irreparable injury;*
2. *That remedies available at law, such as monetary damages, are inadequate to compensate for that injury;*
3. *That, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and*
4. *That the public interest would not be disserved by a permanent injunction.*
* *Smith v. Western Electric*
* Smith has an allergy to tobacco smoke and is having reactions to smoke in the workplace
* He exhausts his remedies with the employer (even wears a respirator) but still the problem is not remedied
* The court issues an injunction because we do not want to require Smith to develop cancer or have a serious injury as a result of the smoke
* ***RULE: Courts want to prevent injury or destruction to property – in these cases, injunctions are OK***
* ***Note: If there has been past injury or harm, the court awards money***
* *Matlock v. Weets*
* Matlock was basically being stalked by Weets (going to home, sending letters, following, going to her work); nothing is technically illegal, no physical harm or threat of such
* Court issues injunction against Weets doing such activities
* ***RULE: if there is legitimate fear, the court can issue an injunction to prevent harm or damage***

## Defenses to Equitable Relief

### Unclean hands

* *Salomon Smith Barney v. Vockel*
	+ - Vockel leaves employer 1 for employer 2 and brings clients
		- Vockel leaves employer 2 for employer 3 and brings clients again
		- Employer 2 precluded from collecting in a court of equity because employer 2 has unclean hands since they benefited from the same inequitable conduct previously

***Test for unclean hands***

* This doctrine only applies to bad conduct (by plaintiff) in the case at hand – misconduct must be related to the lawsuit at hand
* Applies generally without regard to defendant’s conduct (it doesn’t matter that there was a back and forth of inequitable conduct, the court will only consider whether the plaintiff’s actions were in equitable or in bad faith).

***Exceptions to unclean hands doctrine***

* The public interest trumps unclean hands
* Example: if the defendant’s conduct is harming the public interest, the court may waive the unclean hands defense
* Note: the unclean hands defense only bars ***equitable*** remedies (majority), however, a minority (CA) allows unclean hands to apply in both law and equity

### Laches

* *Jarrow Formulas v. Nutrition Now*
	+ - 1985 – Nutrition Now start selling
		- 1993 – Jarrow does lab testing, sends Nutrition Now letters

Clock starts ticking here because the plaintiff knew here that Jarrow could have filed a lawsuit (i.e., letter sent to Nutrition Now)

* + - 2000 – Jarrow files suit
		- Reasons Jarrow claimed for delay:

Lab that ran testing wouldn’t allow results in litigation, changed policies and then Jarrow filed suit

* The court said Jarrow should have hired another lab and applied laches to bar the case – yes?

#### Elements of laches

* + 1. *Unreasonable delay*
* How long? The clock starts running when the plaintiff knew or should have known that they had a potential cause of action against the defendant
* Was the delay unreasonable?
	+ - * + Does the plaintiff have a legitimate excuse for the delay?
				+ Reasonable will be measured against SoL

Filed within SoL – presumed reasonable, presumption against laches

Filed after SoL runs – presumed unreasonable, presumption of laches

* + - * + Equity = ongoing harm
				+ SoL is act-by-act
				+ Laches = case by case

Example: *Jarrow v. Nutrition Now* case – Jarrow knew he had a cause of action in 1993 and assuming the SoL is 3 years for the claim, there is a presumption of laches 3 years from the date Jarrow knew he had a claim. This means that the presumption of laches attaches in 1996. When this situation occurs, the *whole case goes away*.

Compare: repeated acts of harm – laches may make the whole case and equity remedy go away but SoL is act by act so for any single act that the SoL has not run will still be available in a court of law

* + 1. *Prejudice to defendant*
* Costly investment made in reliance on no one suing
* Defendant witnesses not available or defendant’s docs have been destroyed
* Courts are to consider public interest
* Defendant with unclean hands cannot bring laches
* *Daingerfield Island Protective Society v. Lujan*
	+ - 1970 – National Park Service (NPS) gets land from real estate developer and developer gets right to build highway interchange
		- 1978 – No construction on the site, environmental group sues on the right to build the highway interchange and loses
		- Developer continues to spend some money on planning but there is no construction work
		- 1986 – Environmental groups sue again on the trade of land for highway interchange

Developer asserts laches here and district court agrees, DC circuit reverses and holds laches should not apply (although agreeing there was unreasonable delay – environmental groups knew or should have known about the trade arguments in 1978)

DC circuit says there has been no prejudice (developer spent $690,00). DC Cir said amount of money spent isn’t dispositive

* + - ***RULE: In environmental cases, consider:***

***Ratio of money spent to total cost of project***

***Degree to which the project is complete***

## Appeals

### Jurisdiction over appeals from permanent and preliminary injunctions rulings

28 USC §1291 – appellate courts may hear appeals of “all final decisions”

* This includes permanent injunctions

28 USC §1292 – “interlocutory orders” re: injunctions

* Preliminary injunctions (this is federal law, states differ but CA follows federal law)
* What is ***not*** included?
	+ Temporary restraining orders
	+ General rule: TROs are not appealable (however, lots of exceptions)

### Jurisdiction over appeals from TRO rulings

* *Chicago United Industries v. City of Chicago*
* TRO issues – 10 days and then given a 10-day extension (*note*: this statute was changed after this case was decided changing the TRO period from 10 to 14 days).
* Approximately 2 months later (extension of TRO by consent of Chicago), but during second month the court modifies injunction. Chicago appeals at this point
* Normally cannot appeal a TRO, except:
	+ - When TRO extends beyond duration authorized by FRCP if defendant consents (no appeal), but when TRO extends beyond duration authorized by FRCP without defendant’s consent, this is essentially a preliminary injunction there an appeal is allowable (under §1292)
* ***Holding: because the city modified the TRO, it was not the injunction the defendant consented to and it was beyond the time allowed by the FRCP therefore the appeal was allowable***.

General exception: A TRO may be appealed if the TRO is for greater than 28 days without defendant’s consent (appeal under §1292)

What about an appeal of a TRO within 28-day period?

* May appeal if TRO is initially issued for more than 14 days, it is viewed as a preliminary injunction which can be appealed
	+ - Normally, a court may grant an extension but this extension must be after a showing of good cause
* May appeal if defendant is in contempt
* May appeal if the TRO is a particularly, onerous mandatory TRO
	+ - Example: court orders defendant to take affirmative action
		- *Adams v. Vance*
		- *Belknap v. Leary*
		- What these cases are saying? TROs should be used to prevent people from doing things, not usually ordering them to do something. When the TRO mandates action, an appeal may over turn it (this is pretty rare).

When can a TRO be viewed as a permanent injunction and therefore be appealed under §1291?

* *Romer v. Green Point Savings Bank*
* Bank wants to issue stock, begin making preparations (spending money), but bank depositors sue
* Once the state approves the issuing of stock, the deal must go through in 45 days (have until 1/29 to complete deal)
* Plaintiffs ask for TRO, district court says no but federal court grants TRO on 1/26 (cannot complete deal by 1/29)
	+ - Thus, plaintiffs win without proving their case on the merits (well until an appeal…). Bank appeals on 1/27, the TRO was waived and the deal went through on 1/29
* Why did the court hear the appeal to waive the TRO?
	+ - ***The TRO was essentially a permanent injunction because it made the case moot*** (prevented the deal) and that is a more drastic effect than what a TRO should have
* ***RULE: where a TRO makes the lawsuit moot, treat TRO as a permanent injunction and appeal under §1291***

### Procedures and standards for issuing pre-appeal injunctive relief

Pre-appeal injunctive relief allows a plaintiff to get some relief while waiting for the appeal.

General rules:

* Federal level – no automatic stay – denial/stop of injunction takes place immediately upon decision
* FRCP 62(c) – first, appeal and ask district court to change mind (odds are low); second, ask appellate court to stay injunction (Federal Rule of Appellate Procedure – FRAP 8(a)(2))
* State rules differ – CA rule distinguishes between mandatory and prohibitory injunctions
* Mandatory – automatically stayed pending appeal
* Prohibitory – no automatic stay
* *Michigan Coalition of Radioactive Material Users v. Griepentrog*
* District court grants permanent injunction
* Appeal: district court says no stay, 6th circuit stays the injunction
* Stand for pre-approved relief – preliminary injunction standard
	+ - ***Sliding scale (first 2 factors)***:
			* Likelihood of success (reversal – what?)
			* Irreparable harm – very strong – plaintiff only has to deal with temp storage but defendant’s storage will be permanent
			* Balancing hardships (leans in favor of d based on permanent storage)
			* Public interest – doesn’t seem dangerous to store temporarily

## Modifications

### First Amendment considerations

When a court issues an injunction that allegedly interferes with a defendant’s free speech, the injunction can be characterized as a “prior restraint.” The Supreme Court has declared that “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.”

* *Carroll v. President and Commissioners of Princess Anne*
* White supremacist rally began on Aug 6, 1966 in Maryland, and was to resume Aug 7. City officials applied for and received an ex parte TRO for 14 days (service seems impossible) and then got an extension for 10 months
* ***RULE: when you have a prior restraint, there is a heavy presumption that is unconstitutional***
	+ - Prior restraint must be as narrow as possible
			* ***Need adversarial hearing – no ex parte hearings***
			* Even if for a very short period of time
		- It doesn’t matter how long the TRO is, when it is enough to stop the speech, that is sufficient for a court to look at it and potentially overturn it
* *National Socialist Party of America (Nazis) v. Village of Skokie*
* Nazis planned march on May 1 in Skokie (60% Jewish)
* City officials get an injunction (TRO) (broad – cannot show swastika, hand out pamphlets, etc.) – April 29
* Appeal goes to state court then state SC – no stay at either; SCOTUS grants stay
* The case was pretty clearly unconstitutional but because of the discriminatory purpose of the march, the Nazis didn’t get much sympathy.
* NOTE: state court had jurisdiction to hear appeal over TRO because it was effectively a permanent injunction. It would have prevented the march and made the issue moot.

***Prior restraints MUST be either:***

1. ***Immediately appealable, or***
2. ***Automatically stayed***

### Modification and dissolution of permanent injunctions

A permanent injunction spans for an indefinite duration and it, therefore, may become necessary to modify or dissolve it. FRCP 60(b) states that a court may relieve a party from a permanent injunction when applying it prospectively is no longer equitable, or any other reason that justifies relief.

* *Board of Education of Oklahoma City Public Schools v. Dowell*
* 1965: OK City ordered to desegregate schools
* Plan required complex busing routes
* 20 years later in 1985, the school system wants to exchange the injunction
* District Ct approves modification even though there is some segregation (due to neighborhood set-up, not intentionally)
* 10th Cir reverses and wants to go back to permanent injunction of desegregated schools
* Relies on *US v. Swift* (1932) that states permanent injunctions should not be changed “unless there is grievous wrong to the defendant.”
* SCOTUS – FRCP does not codify the *Swift* test and FRCP 60 overrules *Swift*
* ***RULE: A permanent injunction may be modified or dissolved if the circumstances, whether of law or fact, since the time of its issuance have changed, or new ones have since arisen***.

Note: courts do not have the discretion to expand a permanent injunction when it is unfair to the plaintiffs

## Contempt\*\*\*

### The nature of contempt

A person may be found in contempt for either of two reasons (Federal Rules of Crim. Pro. 42):

1. Interference with the trial of a case (disrupting court) – summary procedure (includes disruptive conduct in court, or obstruction of the court’s process), or
2. Disobeying a court order
* No one can be held in contempt for failing to pay some debts as adjudicated (final order) by the court of law. However, many equity decrees are person *orders*, which, if disobeyed ***knowingly and with the power to comply*** (e.g., actually has the money) will constitute contempt for which fines and imprisonment are appropriate.

Contempt can be civil or criminal:

* Civil
* Goals: (1) coerce defendant and (2) compensate
* Coerce: ends when the proceedings end or when it is provable the defendant is incoercible (Professor Love says never happens)
* There are no constitutional criminal protections
* Criminal
* The goal is to punish
* Constitutional protections (Federal Rules of Crim. Pro. 42):
* 42(a) – summary contempt without a jury trial
* 42(b) – criminal contempt other than that of 42(a)
* 42(a) – a criminal contempt may be applied summarily (while the trial is on-going) if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. This was is reserved for *exceptional circumstances* such as acts threatening the judge or disrupting a hearing or obstructing court proceedings. ***Summary contempt is for misbehavior in the actual presence of the court.***
* 42(b) – a criminal contempt not found in 42(a), must:
* Give notice to the person being placed in contempt
* The notice can be given orally by the judge in open court, by order to show cause by the US Attorney, or by a prosecutor appointed by the court (*Young* – this prosecutor must be un-biased)
* Must give the person in contempt a trial by jury
* If the contempt charged involves disrespect to or criticism of the judge, that judge is disqualified from presiding at the trial or hearing except with the defendant’s consent

### Violations of judicial rules and orders relating to the administration of justice

* *Harris v. US*
* Harris pled the 5th at a ***grand jury hearing***. He was not disturbing the court, or rude or threatening to the judge.
* Therefore, a 42(a) contempt (summary contempt without a jury trial) was inappropriate.
* Criminal punishment as contempt requires notice and a hearing. The only exceptions are disruptive acts that occur in the presence of the judge.
* *US v. Wilson*
* In contrast to *Harris*, Wilson, a witness for the prosecution who had received immunity, refused to testify during a ***criminal trial***, and the Court held that the witness could be held in summary contempt.
* The trial judge had witnessed the contemptuous conduct and therefore summary contempt was appropriate.
* The refusal to testify in a criminal trial is contemptuous because it literally disrupted the progress of the trial.

#### Civil v. criminal contempt

Typically, civil contempt is either (1) jail until the witness agrees to testify or (2) per diem fine until the witness agrees to testify – the purpose of both is to ***coerce***.

Criminal contempt is typically either (a) a fixed prison sentence without the ability to be released upon agreeing to testify or (b) a fixed fine payable to the gov’t – the purpose of both is to ***punish***.

* *Bloom v. Illinois*
* Bloom convicted of criminal contempt and sentenced to 24 months in prison. His request for a jury trial was denied.
* ***RULE: If the contempt lasts more than 6 months or involves fines greater than $5k for individuals and $10k for corporations or unions, it is so nearly like other serious crimes that it demands a jury trial.***
* ***RULE: Oppositely, if the contempt is petty, less than above, it does not require a jury trial.***
* *Shillitani v. US*
* In contrast to *Bloom*, Shillitani was found to be in civil contempt but would only be held until he testified.
* ***RULE: if a witness is held in contempt until he testifies, the contempt is civil – the purpose of the contempt is to coerce.***
* The civil contempt can only last as long as the trial (or if for refusal to testify in front of a grand jury, as long as the grand jury proceeding lasts)
* NOTE: after one is released from civil contempt, the court can find criminal contempt (but then given notice, hearing, etc.)

Look from the perspective of the court, not the contemnor. In civil contempt, the intent of the defendant does not matter (doesn’t matter if they believed they were standing on their rights, had a good intention, etc.). By contrast, criminal contempt is punishable only where it is willful.

* *Simkin v. US*
* Simkin refuses to testify against a friend for alleged drug charges. Simkin found to be in civil contempt and imprisoned until he testifies. Simkin refused to testify regardless.
* ***RULE: when it becomes obvious that civil sanctions are not going to compel compliance, they lose their remedial characteristic and take on a nature of punishment. Thus, a jury trial is required.***
	+ Note: the burden is on the contemnor to convince the court he is un-coercible
	+ Note: when a civil contempt becomes criminal is at the discretion of the judge.

**Civil contempt penalties must end when**:

1. Compliance is no longer possible (e.g. once the grand jury investigation is over you have to be let free), or
2. If you demonstrate, to the satisfaction of the judge, that you won’t comply no matter how long you are imprisoned

### Violations of equitable remedial decrees

#### Criminal contempt sanctions

* *Young v. US ex rel. Vuitton*
* Settlement from previous case involving same parties: $100,000 and consent decree to stop violating trademark rights
* Young moves to FL and continues their trademark infringement so LV wants to get a criminal contempt
* Judge in settled case tells LV to ask US Attorney to go after them first, US Attorney says no
* LV lawyers become “special prosecutors” (because US Attorney said no) and go after Young via criminal contempt
	+ - LV obtains 6 month to 5 year sentences
* Young appeals arguing the judge cannot deputize private lawyers to prosecute criminal contempt
* The court says no it is OK to do so [***Federal Rule***]
	+ - Why? Because the federal prosecutors are too busy
		- ***RULE: it is not OK for the plaintiff’s lawyers to do the prosecuting because a prosecutor is supposed to consider the public’s interest first and the court believes LV’s corporate lawyers will have a hard time not representing LV’s interests first – conflict of interest***
* Note most states follow this federal rule but a few states hold that it is OK for the plaintiff’s lawyer to prosecute (CA follows the federal rule)

#### Civil compensatory contempt sanctions

* *Cancer Research Institute v. Cancer Research Society*
* CRS ordered not to use “CRI” name in phone books moving forward and to cancel orders with phone book publishers
* CRS hires 3rd party to cancel the orders, 3rd party messes up and the name appears in 178 phone books
* Also, the defendant wasn’t checking in with the 3rd party to ensure they were cancelling the orders
* ***The court lays out a test to determine whether contempt is warranted***
	+ - ***Elements***
			* ***(1) Was the order “clear and unambiguous”?***
			* ***(2) Was there noncompliance by clear and convincing evidence?***
			* ***(3) Was there a lack of reasonable diligence?***
				+ ***This, (3), gives the defendant an excuse if there was noncompliance but he tried to comply***
		- Other than lack of reasonable diligence, there is no intent requirement and the defendant can be still commit civil contempt (i.e., ***there is no requirement of willfulness to commit civil contempt***).
			* In this case, it is was just lack of reasonable diligence by failing to check in with the 3rd party
			* It is ***irrelevant*** that the third party screwed up
* The Court found CRS in contempt because of the lack of reasonable diligence

Compensatory civil contempt is like criminal contempt in that both types of sanctions operate “retroactively.” Criminal contempt sanctions, however, are “punitive” in nature: fixed jail terms or fixed fines payable to the gov’t. Civil compensatory judgments assessed in accord with the financial losses caused by the contemnor’s misconduct and payable to the people who suffered those losses.

***The compensation is either***:

1. The plaintiff’s actual harm; ***or***
2. Disgorgement of defendant’s profits by committing civil contempt

**NOTE**: The majority view is that the plaintiff will be awarded attorney’s fees but a minority holds only if *willfulness* is shown.

#### Civil coercive contempt sanctions

* *Wronke v. Madigan*
	+ Wronkey was $44k behind on child support payments and supposedly had the money to pay it; he was jailed until he paid, lasts 3 years
	+ He is arguing his constitutional rights were violated because he was not given a jury trial
	+ ***RULE: Jailing is not punitive but still coercive civil contempt when the defendant “holds the key” to ending his sentence***
	+ The court said the jailing was not punitive but still coerce civil contempt because D held the key to ending his sentence (just pay the $44k)
		- Furthermore, the jailing may continue indefinitely (until impossible or incoercible)

**NOTE**: Jailing for civil contempt as a result of failure to testify in a grand jury proceeding is capped at 18 months.

* However, the defendant may then be sent to criminal contempt after 18 months to punish the person for not testifying

#### Criminal v. civil contempt sanctions

***A criminal coercive fine is a lump sum amount handed down unconditionally after the conduct took place***. This is NOT ok without a jury trial.

***A civil coercive fine may be any of the following and is ok without a jury trial***:

* + A per diem fine imposed until compliance
	+ A flat, lump sum that is *conditional* on whether the enjoined party complies (no payment if party complies)
	+ Fines that are “purge-able”
* The notes say: when this occurs with a *prohibitory* injunction, the “purging” occurs when a public statement stating the prohibited actions will not be continued
* *Int’l Union, United Mine Workers v. Bagwell*
* Company gets injunction prohibiting union from (blocking entrances, threatening and throwing things, slashing tires, etc.)
* In one month, the Union violated the injunction 72 times. The court found the Union in contempt - fine was $642,000.
* Court says future violations will result in a fine of - $100,000 – 200,00 each
	+ - This was presumably to deter the union from violating the injunction
		- NOTE: None of these amounts were not set as a result of any damage – therefore not compensatory
* In the following 7 months, there were more than 400 violations and the Union was fined $64 million
	+ - Court decides $12 million goes to Company, and $52 million goes to state and counties
* Before any money is paid, the underlying issue settles (CBA signed) but the court says the union still has to pay the $52 million to the state
* Court appoints a special prosecutor to go after the $52 million
* The Union argues the suit was actually criminal not civil and therefore they should have been allowed a jury trial
* The court dodges the question of whether the fines were criminal or civil but holds the Union should have been given a trial and does not have to pay the fines.
* ***RULE: When there is no evidence regarding amount of damage caused and contempt (fines or prison) is a lump sum amount handed down unconditionally after the conduct took place or fixed prison sentence, the contempt is criminal because it is not to coerce***

Civil coercive fines that ***don’t*** require criminal constitutional protections:

* Per diem fines
* Lump sum fines (1) entered before conduct and (2) suspended pending compliance
* Fines that are “purge-able” or conditional (only if conduct occurs)

Fines that require criminal constitutional protections:

* Lump sum fines that are entered after conduct took place
* Fines that will be announced before conduct but are not actually entered (i.e., *threatens a fine*) – why?
* *US v. Tennessee*
	+ Court tentatively rules for US and enters injunction:
	+ The case settles with a consent decree which is a “stipulated remedial order.” Only 5 of 65 requirements were completed on time. Court extends time with a “plan of correction” but Tennessee doesn’t comply again and court issues an “emergency order” – another consent decree
	+ Tennessee continually fails to comply with decrees
* ***RULE: When using coercive sanctions, a party’s history of compliance may be taken into account. A court may also take an attitude of intent not to comply into account as well***.

### Persons bound by an equitable remedial decree

Who can be in contempt?

* The people who are bound by the injunction may be held in contempt. This may be a person, an institution, an entity, a corporation, etc.
* Who is bound by an injunction?
	+ FRCP 65(d)(2):
		- The parties
		- The parties’ officers (*current*), agents, servants, employees, and attorneys; and
		- 3rd parties “in active concert” with anyone above
* “Acting in concert” – (1) actual knowledge of injunction, (2) acting to assist or benefit the defendants (or defendants’ agents)
	+ NOTE: not included in the rule is “successors” **but** courts have essentially written successors into the rule
		- Example: if a corporation’s management just forms a new corporation, the new corporation is still bound
* NOTE: before nonparties may be held in criminal contempt, it must be proven that they had actual knowledge of the terms of the injunction and that they willfully violated it.

## Collateral Attacks

***The collateral bar rule***: the principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated. This acts a way to prevent contemnors from violating a criminal contempt order and then challenging its validity after the violation.

The collateral bar rule is relevant only in criminal contempt proceedings. It not does apply to a civil contempt proceeding because, when a defendant attacks a court order imposing a coercive or compensatory contempt sanction, and the order is overturned, there is no basis for any continuing coercion, and the plaintiff is no longer entitled to compensation.

A contemnor must challenge the validity of a criminal contempt order before violating it but he may challenge the validity of a civil contempt order after violating it.

* However, if the court does not have jurisdiction to give the contempt order, a contemnor does not have to challenge a criminal contempt order before violating it.

NOTE: the collateral bar rule does not apply in CA state courts but does apply in CA federal courts.

* *Walker v. City of Birmingham*
* Walker held a press conference announcing the injunction against himself and his plans to violate it – it prohibited a march. He proceeded to violate it and then attempted to contest its constitutionality.
* ***RULE: a contemnor must challenge the validity of a criminal contempt order before violating it; no challenge may be brought after violation***.
* The court found Walker in criminal contempt.

NOTE: When an injunction prohibits free speech (*prior restraint*) it must be:

1. Immediately appealable, or
2. Automatically stayed
* *In re Providence Journal*
* The Journal obtained a memorandum regarding a deceased mob boss, the son of the deceased mob boss obtained a TRO against the Journal’s publication and dissemination of a story using the facts in the memorandum. The Journal violated the memorandum.
* ***RULE: an order entered by a court clearly without jurisdiction over the contemnors or the subject matter is not protected by the collateral bar rule.***
* ***RULE: an order that is transparently invalid is not protected by the collateral bar rule***.
* The court held the TRO was transparently invalid as an individual’s right to protect his privacy from damage by private parties is less important than protecting pure speech.
* ***RULE: When the court order is a transparently invalid prior restraint on pure speech, the delay and expense of an appeal is unnecessary***.

NOTE: Again we encounter a prior restraint. SCOTUS has never upheld a prior restraint on pure speech – e.g., publication of news (*Walker* was “speech involving conduct” not “pure speech”).

* SCOTUS listed 2 situations where it would uphold a prior restraint on pure speech: (i) national security measures or (ii) if an individual’s right to a fair trial was at stake.

# Damages

## Legal Relief Defined

As a general matter, legal relief is substitutionary and involves money damages. Typically, a defendant has the option of a jury trial and a plaintiff may obtain a judgment lien on the defendant’s property.

## Goals of Damages

1. Compensation
* Tort: “making the plaintiff whole”
* Contract: giving the plaintiff the “benefit of the bargain”
1. Punish
* Note: contract law does not support punitive damages but tort law does

## Terminology and Limitations

### Importance of terminology

* *Molzof v. US*
* Molzof received negligent hospital care and was left permanently brain damaged. His guardian ad litem filed suit seeking damages for supplemental medical care, future medical expenses, and loss of enjoyment of life (brought under Federal Tort Claims Act (FTCA): “no punitive damages”).
* The Court awards damages only for “supplemental care” because the hospital admits liability
	+ - The “supplemental care” is the care that was required to be obtained outside of the VA hospital (physical therapy, respiratory therapy, etc.). However, the court was not going to award damages for the care that could be obtained for free at the VA hospital
		- The Court held that forcing the gov’t (i.e., VA hospital) to pay for care that could be obtained for free at the VA hospital would have been *punitive*
* On appeal, SCOTUS says this is *not* punitive
* ***RULE: Punitive damages do not equal excessive compensatory damages (just because a compensatory damage is high, it is not automatically converted to punitive damages).***
	+ - The distinction between punitive and compensatory damages is the *motive* behind the damages
			* Punitive damages look to punish and based on the defendant’s culpability
* The Court said the issue was simple negligence by the hospital. Case was remanded to determine appropriate award under state law.

Types of damages:

1. Nominal damages – constitutional (Title 7)
2. Compensatory damages
	* Reasonably approximate to the harm to the plaintiff
	* The focus is on the plaintiff’s injury
3. Punitive
	* Purpose is to punish the defendant’s conduct or mental state
	* The focus is *not* of the plaintiff’s injury but on the defendant’s conduct or mental state

Compare compensatory or actual damages with nominal damages – compensatory or actual damages measure a loss while nominal damages indicate that the plaintiff was wronged but either had no loss or could not prove it.

### General and special damages

1. General damages (“market damages”): general damages everyone would have had
2. Special damages (“consequential”): compensatory harm not normal but did happen to you
* Things that were indirectly consequences from the breach – i.e., breaching a contract to a purchaser for a whole product because defendant breached a contract to supply a specific part (damages for your breach to purchaser of whole product are special damages)
* American List Corp. v. US News & World Report
* Wheeler v. Huston

### Contract v. tort

#### Contract and tort as alternative actions

##### Contract law application

1. General contract damages
	* + Amount of money that was to be paid under contract
		+ Market value (product or service)
2. Special damages
	* + Harm that indirectly flows form the breach, indirect consequences of the breach, only recoverable when:
			- The damages are foreseeable when contract was made; and
			- The damages provable to a reasonable certainty
* *Hadley v. Baxendale*
* ***FACTS***
* General damages: market value of mill crank on the open market (i.e., from another source)
* Special damages: indirect results of not receiving the crank on time, in particular lost profits from the mill being shut down
	+ - * Only recoverable if:
		- Foreseeable (at time contract made); and
		- Maybe – for all the delivery co knew, they may have thought that it was a spare – *fact specific* (Prof. Love is not sure of whether the test is subjective or objective)
			* Provable to a reasonable certainty
		- Maybe – again, fact specific. Maybe the amount of work the mill did on a daily basis varied greatly; or maybe it was steady for that particular time of the month

##### Tort law

1. General damages – *everyone suffers these damages*
	* Example: everyone that suffers a disfigurement is disfigured
	* Non-economic damages (e.g., pain and suffering, emotional damages, etc.)
2. Special damages – *these damages are specific to the person*
	* Example: everyone has a different job and therefore the salary differs
	* Economic damages (e.g., lost wages, medical bills)

 ***NOTE: If no general damages, no special damages***

Both Contract and Tort

* Legal malpractice
* Insurance
* Both:
	+ Agreement
	+ Special relationship between both parties

Related concerns

* What is the Statute of Limitations?
* What are the types of damages potentially obtainable?
* General Nutrition Corp. v. Gardere Wynne Sewell

#### Limitations on tort recovery in contract actions without harm to body or property

##### Emotional distress and pain and suffering

* *Erlich v. Menezes*
* Erlich had worked done on his home but the builder was horrible and the house leaked. The job was negligently completed (no evidence of intent to build the crappy house or defraud the plaintiffs).
* The court held that this was *only a breach of contract case* but as a result the husband had/developed a heart conditioned, wife developing delusions of earthquakes ruining the house
* District Court – jury verdict awarded money for repairs *and* for emotional distress; but no emotional distress on appeal.
* ***RULE: where there is a breach of contract, plaintiffs cannot recover non-economic damages (e.g., no emotional distress)***
	+ - Had there been a tort (i.e., defrauded), the plaintiffs would have had a tort case and therefore the opportunity for non-economic damages
* ***EXCEPTION***: if the contract was entered into to protect someone’s emotional state, then damages concerning emotional distress may be recoverable
	+ - E.g., funeral home negligently handled the body of a deceased relative because the contract between the parties was to protect the mental state of the living relatives
		- E.g., someone who contracts to protect or store special, personal jewelry and *knew of such importance* (e.g., grandmother’s jewelry from the Holocaust)

Policy behind rule above

Contract law is about business and we want to encourage the formation of business. Businesses like predictable costs. Awarding non-economic damages is not predictable therefore we want to limit non-economic damages

The court does not want to make a sweeping change and allow any party harmed by a breach of contract to sue for tort-style damages.

NOTE: a breach of contract accompanied by an intentional tort, including fraud, or physical injury (except to a product that could be warranted in the contract) would allow a court to award tort damages to the plaintiff.

## Damages Calculations

### Speculation, certainty and difficulty in measurement

“Reasonable certainty” in regards to damage calculations refers to:

* + Whether the injury occurred at all
	+ *Does not* pertain to the size of injury

For the standard of proof regarding the size or extent of the damages, we only need to have a “sound basis for measurement.” We do not need certainty.

* *Johnson v. Baker*
	+ Divorce settlement agreement written but was never signed, the ex-husband refuses to pay for college for the daughters (part of the settlement) but because it was not signed there was no enforceable contract.
	+ The ex-wife sues her attorney for malpractice for not getting the settlement signed and the ex-wife wins.
	+ Damages
		- 2 years of college expenses but no award of future expenses
		- The daughter is currently in a 2 year program and no evidence was presented that the daughter would continue on to get a 4-year degree
* *Lewis River Golf v. O.M. Scott & Sons*
	+ Lewis buys seeds from Scott; uses Lewis’ seed for 200/275 acres
		- Seed grows into grass plus weed; Lewis sues for merchantability and Scott admits liability
	+ Damages:
		- Scott says that there should be no damages for loss of goodwill to Lewis’s company because the damage to the goodwill is too uncertain. The court disagrees and awards Lewis $1 million

Why did the two courts differ in their holdings?

* In *Johnson*, the damages (future expenses of college to complete 4-year degree) are uncertain *to their existence* because we are not sure whether the daughter would accumulate such expenses by continuing on in school
* In *Lewis*, the damages were uncertain as *to their extent*, not their existence. The court knew that such damages existed unlike in *Johnson*.
* We only need “*reasonable certainty*” that such damages *existed* – this only pertains to the existence of the damage, not the amount of the damage

### Adjustments for time

Simple interest – interest is only owed on the principle

Compounding interest – interest that is paid each year is added to the total and interest the next year is calculated using (principle + interest\_year1)

Two periods of interest:

* Interest pre-judgment
* Interest post-judgment but before the losing party pays

#### Prejudgment interest

* Federal Rule
	+ - Diversity case
		- Use the rule of the state the case was removed from (or where it could have been brought)
		- Federal question case
		- There is no rule, it is entirely discretionary for the judge
		- What is discretionary?
			* Whether to award
			* The rate at which to award
			* Simple or compound
		- As a practical matter, most judges either:
			1. Do it consistent with the rules of the state in which the judge sits; or
			2. Use the federal post-judgment rate
* California (Cal. Code §3287)
	+ - In contract, Cal. Code §3289(a)
		- Either the rate specified in the contract, or
		- 10% simple interest
		- In tort, Cal. Const. Art. 15 §1
			* 7% simple interest

#### Which cases are eligible for pre-judgment interest

##### Old common law rule (no longer the rule)

The old common law states prejudgment interest is only available in a contract case when damages are liquidated (i.e., specific amount stated in the contract – “fixed” and no fact-finding required) (*Kansas v. Colorado* – overturns this rule).

##### Modern rule

* *Encon Utah v. Flour Ames Kraemer*
* Flour is forced to breach contract, Econ sues and wins (awarded pre-judgment interest)
* ***RULE: prejudgment interest is appropriate where damages are “subject to mathematical calculation.”***
	+ - * Examples include lost profits and breach of contract

What cases do not qualify for prejudgment interest?

* + - * Where the award is calculated by the jury:
* Non-economic tort damages

Personal injury

Wrongful death

Defamation

* Breach of constitutional rights

#### Calculating prejudgment and post-judgment interest

##### Prejudgment interest – above

##### Post-judgment interest

Post-judgment interest is calculated from the day of judgment until the day of payment is completed.

* Federal Rule (28 USC §1961)
	+ “Interest *shall* (mandatory) be allowed on any money judgment in a civil judgment recovered…calculated from the day judgment was entered until the final day of payment…”
	+ At a rate of the federal treasury bill the week *before* the judgment was entered
		- Compounds annually
	+ NOTE:
		- Mandatory
		- Each day counts, pro rata; not just calculated for full months (begins on the day judgment entered)
		- Compounds annually
		- Rate:
			* “Rate is set at average rate of a 1 year treasury bill the week before the judgment”
			* Conservative rate – today approximately 0.15% (so *very* small)
* California Rule (Cal. Code of Civ. Pro. §685.010, 685.020)
	+ §685.010
		- Simple interest, 10%
* Federal v. California
	+ Similarities
		- Mandatory, not discretionary
		- Begins to accrue on day of judgment
	+ Differences
		- CA is simple; Federal is compound
		- CA is fixed 10%; Federal varies with federal treasury bill rate
* Gatti v. Community Action Agency of Greene County

## Collateral Source Rule

* *Helfend v. Southern Rapid Transit District*
	+ - Helfend was in a car accident and 80% of medical bills were covered by insurance. However, he is suing for the entire amount of damages (including the amount his health insurance already paid) – recovers 20% insurance didn’t pay and 80% insurance did pay
		- Defendant wants to introduce evidence that insurance paid 80%, not allowed to do so
		- ***RULE: (collateral source rule) a court/jury cannot take into account what payments a collateral source (third party) makes when considering how much the plaintiff is owed – so the fact that the plaintiff ultimately received 180% of his medical bills is OK***
		- ***RULE: amount plaintiff receives from a jury is not reduced by the amount he/she receives from a collateral source (e.g., insurance company). Generally, evidence of collateral source payment is excluded from trial***.

The policy is that the defendant was smart and got insurance and he had to pay years of premiums. Some object claiming plaintiffs shouldn’t be entitled to a windfall. However, court state this is not a windfall because it is likely that the defendant had a *subrogation clause* in is insurance contract such that he would have to pay back the 80% that he won in court.

Why even have this rule if the outcome is generally the same (with or without the collateral source rule) – meaning the plaintiff receives the same amount of money?

* + - * We don’t want to influence the jury and have them think the plaintiff is acting greedy – and have them likely give the plaintiff a small recovery or no recovery at all, and
			* There is a high correlation between the amount awarded for medical bills and amount awarded for pain and suffering – so if we got rid of collateral source rule, the jury award would likely be lower and therefore, following the correlation, the non-economic (pain and suffering) damages would also decrease. So there is a worry that there would be an under-compensation for non-economic damages.
				+ If this is the case, there may be a risk that attorneys will not take on the case because the recovery will only be 20% of the total damages and then the attorneys will be paid very little (compared to their current payments).
				+ Plaintiffs may not bring the suit because of the subrogation clause and the fact he/she may have to bring the case himself/herself
				+ The two above result in less deterrence of torts

The collateral source rule to bar evidence of a collateral payment applies even when the payment is 100% gratuitous.

* *Arambula v. Wells*
	+ - * + Arambula works for family business, gets injured and cannot work but the business pays his salary anyway.
				+ Arambula sues other party in accident resulting in the injury seeking lost wages. The court applies the collateral source rule to prohibit evidence the business is paying Arambula because they want to encourage charitable giving
		- The court reasoned that if they did not apply the collateral source rule, they were essentially giving the money to party that caused the accident
			* + Is this a windfall?
		- ***The court says no again***. Why?
			* They say charitable giving in one instance leads to another instance of charitable giving; essentially “what comes around goes around.”
			* Alternatively, he may pay it back to the family who charitably helped him out
				+ ***RULE: the collateral source rule applies even when there is a purely charitable giving (no expectation of repayment)***.
		- Examples: monetary gifts, gratuitous medical care (e.g., parent stays home to be 24-hr nurse for child instead of paying for a nursing institution – value of nursing institution could be recovered by child).

**Exceptions to collateral source rule**

1. Some courts say the rule doesn’t apply to completely free gov’t services (CA is not one of these states)
	* Examples: Medicaid, welfare, value of public school special education
	* Court ***do*** apply the rule to gov’t services that the plaintiff (at least partially) did pay for
* Examples: Medicare, social security, veterans benefits
1. [*California exception*] The collateral source rule does not apply in any medical malpractice case in California
	* The policy is that we want to be nice to doctors who are sued for medical malpractice
	* This was enacted by statute in 1975 – Cal. Civ. Code §3333.1
	* This generally decreases the amount of damages awarded in medical malpractice cases (this is theoretical – based on theory of introducing collateral payments will decrease the jury award and the correlation of economic and non-economic means the non-economic award will decrease).

Note: the above illustrates that the collateral source rule applies in tort cases

The collateral source rule also applies in contract cases.

* *Metoyer v. Auto Club Family Insurance Co.*
	+ P’s house damaged in hurricane Katrina; P received $150,000 from the state of Louisiana and $10,000 from the federal gov’t
	+ P also has homeowners insurance, gets into a dispute with them, and sues them for breach of contract (insurance agreement). Insurance wants to introduce the fact P received $160,000 from collateral sources
	+ ***RULE: Collateral source rule applies in breach of all contract cases***.
		- The policy is that most breach of contract cases typically have some sort of negligence involved in them (e.g., negligent construction of a building).
		- Also, the breach may not be efficient for the injured party or for society as a whole; and at the time of breach, the breaching party may not know whether a collateral source would pay the injured party
		- Minority: do not permit collateral source rule in contract cases

### Defenses

#### Offset the benefits rule

***“Offset of the benefit” rule***: when calculating damages, offset damages/harm by any benefit conferred on the “injured party” as a result of the event (tort or breach of contract)

* *Chaffee v. Seslar*
	+ - Suing for medical malpractice – hysterectomy didn’t work, woman had baby and she is suing for money to raise the child
		- ***Majority rule***: court awarded money for pregnancy and childbirth costs but not for raising child
		- ***Minority (California)***: can recover all costs (raising child too)
		- *Minority rule 2*: can recover all costs (raising child too) but is offset by the “offset of the benefit” rule.
			* Benefits of having a child: love, joy, elder care, etc.

#### Avoidable consequences or mitigation

The injured party has a duty to mitigate the damages (i.e., take reasonable steps to reduce the damage).

* *Albert v. Monarch Federal Savings & Loan Ass’n*
	+ - Plaintiff tripped on sidewalk in front of a bank and sued claiming carpel tunnel syndrome (wants recovery for the rest of her life from the pain but did not want to have corrective surgery)
		- Plaintiff wins at trial but defendant appeals claiming the plaintiff did not mitigate the damages by refusing corrective surgery
		- ***Rule: the plaintiff has an obligation to obtain surgery to minimize damages***
		- ***Exceptions***: ***Not required to undergo surgery if***:
			* It is “risky” (if there is any realistic peril to life)
			* There is an extremely painful recovery
			* There is no reasonable chance of success
		- The court held that carpel tunnel surgery is mandatory (no risk, not painful recovery, likelihood of success).

Note: this rule applies in both torts and contracts cases

Contracts example:

* + - P is buyer and D contracted to bake a cake – P has duty to find a substitute replacement cake if D breaches contract; or
		- P is seller (real estate agent) and has a duty to find substitute buyer/renter; if it the buyer rents at a lower price it still mitigates damages to some extent.

## Punitive Damages\*\*

There are no punitive damages in contracts cases, only in tort cases. This is because punitive damages are to punish and we do not want to punish for breach of contract because we want to promote a breach of contract if there is a more efficient deal elsewhere.

Punitive damages and compensatory damages are two separate types of damages:

* Compensatory: focusing on compensatory P’s injury
* Punitive: focus on punishing D’s state of mind

### Tort

Majority rule:

* P can be awarded punitive damages even when P is only awarded nominal compensatory damages in an intentional tort case

Minority rule:

* If no compensatory damages (must be more than nominal), no punitive damages
* *Jacque v. Steenberg Homes*
	+ - The Jacques are an old couple living in Wisconsin, neighbors buy a mobile home, there is 7 feet of snow on the ground, and the public road took too sharp of a curve for the mobile home to be delivered on it
		- Steenberg Homes is to deliver the mobile home and ask to cross the Jacques’ property, the Jacques say no over and over; Steenberg delivers the home via crossing the Jacques’ property anyway
		- Jacques call the police, Steenberg receives a $30 fine; the Jacques then sue for intentional trespass
			* Jacques receive: $1 nominal compensatory damages and $100,000 punitive damages
		- Steenberg appeals:
			* ***Minority rule – state level***: if no compensatory (even if nominal damages), then no punitive damages
		- Jacque appeals to Wisconsin Supreme Court:
			* ***MAJORITY RULE: intentional torts may support punitive damages even if no compensatory damages***

Policy for majority

There was an injury that took place, just not of the legally cognizable variety. If we don’t allow for punitive damages, society will have less respect for the law. We also do not want plaintiffs taking the law into their own hands because the legal system will take no action. Without punitive damages, there is too little deterrence. Furthermore, police/prosecutors usually ignore these situations and worry about more serious crimes such as drug busts and murders. Finally, without punitive damages, there would be no incentive to sue.

* *State Farm Mutual Auto v. Campbell*
	+ - Campbell caused a car accident, killed one and injured another
		- State Farm refuses to pay the $50k insurance payment, which is part of a nationwide plot to reduce insurance payouts
		- Jury awards the injured party $185k (State Farm covers $50k and Campbell has to pay $135k)
		- Campbell sues State Farm for fraud and uncovers their plot to reduce insurance payouts nationwide
		- Campbell wins: $1 million compensatory, $145 million punitive
		- State Farm appeals claiming this was an excessive punitive award
* ***TEST*** Punitive awards are unconstitutional if they are “grossly excessive.” (This is because due process requires fair notice of the conduct that will subject a person to punishment, but also of the severity of the penalty a State may impose)
	+ - ***In reviewing punitive damages, an appellate court is to consider the following three guideposts (Gore):***
1. The degree of the reprehensibility of D’s misconduct;
2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases (what the state typically fines a D for a similar act).
	* + Determine the reprehensibility of D’s misconduct by considering whether: the harm caused was physical as opposed to economic, the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, the target of the conduct had financial vulnerability, the conduct involved repeated actions or was an isolated incident, and the harm was the result of intentional malice, trickery, or deceit, or me accident.
		+ **NOTE**: a defendant cannot be punished for conduct that did not harm the plaintiff – so here, State Farm should not be punished for conduct not harming Campbell (i.e., the numerous other scams)
		+ ***RULE: damage awards should not exceed a single-digit ratio between punitive and compensatory damages***
* Mathias v. Acor Economy Lodging
* Philip Morris USA v. Williams
* Exxon Shipping v. Baker

### Contract

#### Rule of no punitive damages for breach of contract

* Francis v. Lee Enterprises

#### Liquidated damages

* *NPS LLC v. Minihane*
* A contract was entered into regarding the purchase of season tickets - $3,750 per year for 10 years. The contract had a liquidated damages clause that stated if the contract is breached, all remaining money is due immediately.
* The contract was breached after the first year ($3,750 x 9 due immediately)
* ***RULE: liquidated damages are OK if:***
1. ***The damages are uncertain up front; and***
2. ***The liquidated amount is reasonable, and not so big as to be punitive (defendant has burden of showing it is punitive)***
* The court held the damages were hard to ascertain and the liquidated damages were reasonable
* Hard to ascertain because unsure of how valuable the season tickets will be in 10 years; and
* Reasonable because the defendant did not present evidence that they were unreasonable
* ***RULE: Courts are lenient on liquidated damages that vary with the severity of the breach, but are very strict on lump sums***.
* Example: a court favors paying 1 month’s rent for a breach of contract in the last month of a lease, whereas a court disfavors a lump sum of a fixed amount for a breach in the last month.
* Energy Plus Consulting v. Illinois Fuel – **did we read this?**

## Damages for Harm to the Person\*\*

### Compensatory damages for physical injury

1. General
* Non-economic tort damages (i.e., pain/suffering) that are felt by everyone in a similar situation
* May obtain *past and future* general damages
1. Special
* Economic damages (i.e., lost wages and medical expenses) that are unique to the individual in that situation
* May obtain *past and future* specific damages
* Medical damages must be provable to a “reasonable certainty as to their existence, not to their magnitude or size”

NOTE: remember to include pre- and post-judgment interests

NOTE: damages *always* given in 1 lump sum of money

***Total recovery*** = [past + future pain & suffering] + [Past economic damages] + [future economic damages]

* + *Past economic damages*: past medical bills + past lost wages + pre-judgment interest
	+ *Future economic damages*: anticipated medical bills + anticipated lost wages (but neither are adjusted for interest or inflation)

***General formula – total recovery in tort cases***

[Past and future pain & suffering in one lump sum with no inflation or adjustments] +

[Past economic loss (lump sum) includes *pre-judgment interest*: medical bills and expenses that have already been incurred; wages already lost] +

[Future economic loss (lump sum) *no inflation or interest*: future wages (including salary, benefits and uncompensated work such as household duties) – *note*: can be incremented to adjust for increasing productively to the rate they would increase above inflation; future medical bills (drugs, treatments, doctors, nurses, accommodations (van, remodeled house, etc.)]

#### Basic categories of recovery

* *McDonald v. US*
* Woman had a vaccine and had an extremely rare and horrible reaction to it leaving her paralyzed
* [Past + future pain & suffering]
* Note: only 1 amount for pain & suffering (not split into past and future)
* The court just determines this to be (one lump sum) of $600k
	+ - Why no precise formula? Courts say this figure is derived just from a gut-feeling so attempting to determine this via a formula would be a charade
* [Past economic damages]
* Past medical bills – stipulated at $56k
* Past lost wages – known
* Prejudgment interest – *note*: in this case (because it arose under the federal tort statute), there is no prejudgment interest
* [Future economic damages]
* Future medical bills –
	+ - First, ask how long is she going to live?
* Use expert testimony
* Life expectancy – to be 79 years old
	+ - How much are medical bills going to cost per year?
* Take into account: medication, medical evaluations, surgeries, medical treatments, etc.
* Future lost wages –
	+ - First, ask long would she have worked?
* Actuarial tables state another 15.9 years
* Court: until she was 65 years old – so 26 years
	+ - At the time, salary is $13,650/year
* The court says no benefit of inflation for the next 26 years
* But the court does let her salary rise over time 2% per year at a *compounded rate* (calling this a “productivity increase” – *not inflation*)
	+ - Add in benefits from employer – 15%
		- Why no inflation?
* Historically, inflation is down 3% per year
* That’s also the rate of 30 year treasury bonds raise, so we assume that they offset each other
* Assuming offset is beneficial for plaintiffs – why? The stock market is typically 11% raise

#### General damages for physical injury

* *Debus v. General Union Stores of Vermont*
* Debus hurt in a tort accident, her lawyer made a per diem argument regarding damages, Grand Union contends the per diem argument is overly prejudicial
* “*Anchoring*”: idea that people latch onto the first piece of evidence or figure they are given and uses that as a base line for any further comparisons or negotiations
* ***RULE: per diem arguments are OK, there is nothing inherently improper or prejudicial about them***
* Note: plaintiff’s attorney making the per diem argument should not assert that the pain is constant, uniform and continuous.

Note: if a plaintiff can secure a *per diem* award, it typically *doubles* the amount the plaintiff obtains

**Majority rule (CA): *per diem* arguments are permitted**

* However, in CA, non-economic tort damages are capped at $250k
* *Boan v. Blackwell*
* Majority rule: two kinds of non-economic tort damages
1. *Pain and suffering*
* Physical/emotional response to feeling pain
1. *Loss of enjoyment of life*
* Missing out on fun/social/hobbies
* NOTE: this is an objective test – it does not matter than the plaintiff does not understand they are experiencing a loss of enjoyment of life (e.g., a person in a coma does not know they are not experiencing life but based on an objective test, they are still awarded damages for loss of enjoyment of life
* Scenarios – plaintiff *loves* to play tennis, plaintiff may receive:
	+ *Both* (1) and (2) – pain in arm and prevents him from playing tennis
	+ Only (1) – pain in arm but can still play tennis
	+ Only (2) – arm is numb (no pain), and cannot play tennis

#### Special damages for physical injury

* *Earl v. Bouchard Transportation Company*
* Plaintiff (a deck hand on a tug boat) is injured 1-month before his 62nd birthday, jury award assumes that P will work until he is at least 70
* ***RULE: Lost wages = [“earning capacity” – as adjusted for changes over time] x [# of years left of working]***

***Earning capacity: “what could the plaintiff have earned if they were able to work?”***

* No proof necessary and not limited to current job (or lack thereof)
* Examples:
* Homemaker (stay at home mom/dad) – this can also be compensated because this could have been done for someone else and she/he could have been compensated for doing it
* Students: look at future educational and job plans
	+ - * + 40 years of lost wages (32 full time, 8 part time)
				+ AND, one case took into account future plans to go to graduate school (some evidence needs to be provided)
		- Infants
		- Even if employed post-injury:
			* + Can obtain award because of: less salary, worse benefits, less opportunity for promotion, worse job security
				+ However, *there is a duty to mitigate damages by working*
* “Work-life expectancy”
	+ - Usually based on statistics but also on particularized evidence (if available); may increase or decrease the award
			* + Example: a pre-existing back-injury may decrease the work expectancy to decrease from 65 to 60
		- ***RULE: if no children, the work-life expectancy increased*** *(McDonald)*
		- ***RULE: use particularized evidence*** (*Earl*)
* Earnings change over time
	+ - Usual baseline: current salary/wages
			* + But particularized evidence may increase or decrease that baseline
				+ Example to decrease:

Downturn of industry in which the plaintiff belongs

* + - * + Examples to increase jury award:

P is young with good education and in a job which typically promotes

*Rappold*: increase salary/wages 47% - he was a 2L, so the court assumed that he was going to get a job as an attorney

*Bernard*: [there is a cap though] she was doing part-time substitute teaching for 2 years but claimed she was going back to school and get a masters, PHD and MD – the court said based on the evidence presented, she was not going to do that

*Earl* as another example

* Taxes
	+ - Should we tell the jury that income is taxes but damage awards are not and thus ask the jury to take tax rates into consideration?
			* + Federal rule: Yes, tell jury to take taxes into account
				+ Majority state rule: No, do not tell jury

### Compensatory damages for emotional distress

* *Larsen v. Banner Health System*
	+ Common law rule: A plaintiff may only receive damages for emotional distress that resulted from a physical injury (essentially just pain and suffering)
	+ Expansion of rule 1 (minority rule): physically contacted/touched you
	+ Expansion of rule 2 (Zone of danger): P was not touched or contacted but feared that he were in imminent danger
	+ Expanded to 3rd party: 3rd party bystander was in the “zone of danger,” saw injury and the injury was to a *close family member*.

Expansion of rule 3:

* + *Intentional infliction of emotional distress*
		- Elements
			* Intentional or reckless conduct
			* “Extreme or outrageous” (i.e., beyond all bounds of decency)
			* The above must cause emotional distress; this is so even if there is no actual harm or threat of physical harm (i.e., telling someone that their significant other was killed in a car accident when you know that is false)
			* (*Majority*) Must have some physical manifestation of emotional distress (due to society’s skepticism of faking emotional distress)
	+ *Negligent infliction of emotional distress*
		- Elements
			* “Negligent conduct”
			* Breach of duty between parties with deeply-emotional relationship (nursing-newborn, funeral home-family of deceased)
				+ *Foreseeability is the keystone*
			* The above must cause emotional distress
			* (Majority states) Must have some physical manifestation of emotional distress (due to society’s skepticism of faking emotional distress)
			* Zone of danger applies if P not in a deeply-emotional relationship
		- Examples:
			* Delivering a notice (negligently to the wrong house)
			* Presenting the wrong body at calling hours
			* Negligent switching of babies in a hospital

Ways to show a physical manifestation of physical symptoms:

* + - Insomnia
		- Anxiety attacks
		- Ulcers
		- Massive weight loss
		- Having a miscarriage

### Loss of consortium

States vary greatly on how they award loss of consortium.

* *DuPont v. US*
* ***Loss of spousal consortium (most recognized)***: applies to legalized marriages, some states recognize is for state-sanctioned domestic partnerships
* Loss of sexual consortium: the ability to have sex as well as the ability to have children
* *Belcher v. Goins*
* ***Loss of parental consortium***: the child has a cause of action when his/her parent(s) are injured or killed
	+ - * (Large) minority rule (not in California)
				+ Typically limited to minor children and disabled adults only
				+ Typically limited to parent’s death
			* (Small) minority of states allow for loss of parental consortium when grandparent injured if raised by grandparents and not parents
			* ***California: no loss of parental consortium whatsoever***

Loss of a child’s consortium: a *small* minority of states allow parents to bring a loss of consortium for the loss of a child (not in California)

* + - * Why allow this? Compensating the parent for what the child will do for the parent when the parent is old
* So this can be for loss of a minor or adult
	+ - * Typically the child has to be killed

## Survival and Wrongful Death

Survival and wrongful death issues arise when a party involved in the tort dies. Previously, common law applied but has since but removed by state law.

3 traditional common law rules

1. If the tortfeasor dies, the victim has no claim
2. If the victim dies, the victim has no claim
3. If either of the above applies, no claim at all, not even for the family members

However, all 50 states have removed the common law rules. Instead, they have at least one of the following:

* + - * “***Survivor statute***” – this statute states that the claim of the deceased victim survives death (does *not* give a cause of action to the surviving family members)
		- The victim’s estate brings the claim on behalf of the victim
		- Majority rule
			* “***Wrongful death statute***” – separate cause of action for family members
			* ***Hybrid between the above two*** (California has a hybrid statute)

**California statute (CA code of civ pro)**

* + - * § 377.20 – reverses common law (1)
		- When the tortfeasor dies, the victim *does* have a claim still
			* § 377.30 – “survivor statute” – reverses common law (2)
		- This allows the victim’s estate to sue
		- What damages are allowed? Everything (all economic tort damages) *but* not pain and suffering
			* § 377.60 – “wrongful death statute” – reverses common law (3)
		- Who can bring this claim? A spouse or domestic partner, children, grandchildren, great grandchildren (etc.)
* Note: if the child brings a claim, the grandchild (that child’s child) cannot bring one. However, if the victim has 2 children (child A and child B), 1 is deceased (child A) but has a child (grandchild C) – Child B and grandchild C may both bring claims.
* For other situations, follow California’s intestacy statute
	+ - What damages?
* The statute does not say much other than recovery should be “just.” There is no double recovery.

***Loss of consortium - California***

A loss of consortium claim is only obtainable when the victim is injured but does not die. This claim is limited to only the spouse and domestic partners in California (other states allow parents and children). The purpose is to compensate the spouse/domestic partner for the loss they incur as a result of their significant other being injured.

***Wrongful death - California***

Recovery for wrongful death is only for a deceased family member. This is essentially loss of consortium in the situation where the victim dies. This claim is limited to:

* Surviving spouse or domestic partner
* Surviving child (or potentially grandchild)
* Surviving parent (if above are not living)
* *Quiroz v. Seventh Ave Center*
* The victim, the son (Gilbert), died at a nursing home. The claim arose from alleged negligent or abuse at the nursing home. The plaintiff is the mother (Maria) and brings a 1st complaint based on wrongful death. She later amends the complaint to include a cause of survivorship but by the time the complaint was amended, the SoL had run.
* The court states that the claims are based on the same facts but NOT the same injury
	+ - Survivor – injury to Gilbert (victim)
		- Plaintiff – injury to Maria
* In the survivorship claim M is bringing the case on behalf of the estate, whereas in the wrong death claim, M is bringing the cause of action on behalf of herself, as a mother
* Survivorship clause
	+ - Injury to Gilbert
		- Damages limited to economic loss (limited in CA), *not* pain and suffering
		- However, EXCEPTIONS do exist (for policy reasons – encouraging lawyers to take the certain cases based on a contingent fee). CA has an exception to allow the recovery of pain and suffering when the claim arose as a result of *elder abuse*
		- Note: the majority of states (not CA) does permit the recovery of pre-death pain and suffering
* Wrongful death
	+ - Injury to Gilbert’s family member
		- What damages?
		- Loss of consortium (companionship, domestic services, teaching, advice, etc.)

Should punitive damages be awarded when the tortfeasor dies?

States are divided on this issue. Some feel punitive damages punish the tortfeasor and if he/she is dead, it serves no purpose. However, some states believe that a large punitive award deters others

* Jordan v. Baptist Three Rivers Hosp. ***– neither of these are in my notes…***
* Durham v. Marberry

# Restitution and Unjust Enrichment

## Quasi-contract (terminology)

Restitution prevents a defendant’s unjust enrichment by enabling a plaintiff to seek recovery, in law or equity, of a benefit that the defendant unjustly gained or retained at the plaintiff’s expense. If the benefit to be recovered is money, the action is at law and is often referred to as quasi-contract. If the benefit to be recovered is specific property or money that has been traced, the action is in equity and it often referred to as a constructive trust.

***A claim for restitution requires the following three elements:***

* + - 1. The defendant has been enriched by the receipt of a benefit;
			2. The defendant’s enrichment is at the plaintiff’s expense; and
			3. It would be unjust to allow the defendant to retain the gain.

***Plaintiff’s recovery is generally measured by the amount of the defendant’s gain, not by the amount of the plaintiff’s loss***.

Note: the word “restitution” is used to refer both to a cause of action and a remedy.

* “A person who is unjustly enriched at the expensive of another is subject to liability in restitution.” (Restatement (*Third*) of Restitution)

### Restitution as the only cause of action

* *Harrison v. Pritchett*
* There was an oral agreement to set up a trust fund for Harrison for services performed around the how and business. Harrison and Pritchett never married.
* ***RULE: an action founded on quantum meruit (restitution) is not subject to the Statute of Frauds, and the statute does not generally affect the remedy***.
* ***RULE: a party can bring an action in quantum meruit when an action on an oral contract is excluded by the operation of the statute of frauds***.

### Contracts relating to services – restitution

* *Maglica v. Maglica*
	+ - Plaintiff (female) and defendant (male) were together for 21 years in business as a couple but never married – company was in D’s name. P had a position with the company and a salary but no equity in the company. P and D split and P sued D on basis of (i) breach of contract and (ii) breach of quasi-contract. Court said no to breach of contract because there was no formal contract.
* Breach of quasi-contract (quantum meruit; restitution) was allowed because such a claim does not require a contract.
* ***RULE: The restitution award is limited to the value of P’s services, not to the entire benefit conferred on D***.

### Defendant’s gain measures recovery

The goal of restitution is to deprive wrongdoers of their ill-gotten gains, that goal is not appropriate when the recipient is innocent. Thus the Restatement (Third) would limit the claimant’s recovery against an innocent recipient to the amount of the claimant’s loss.

* *Olwell v. Nye & Nissen Co.*
* P owned egg packaging business and sold it to D. The sale excluded a particular machine, but D used it for three years. P is suing not for conversion but elected to sue under restitution for the benefit conferred upon P for use of the machine.
* ***RULE: in cases where the defendant tortfeasor has benefited by his wrong, the plaintiff may elect to “waive the tort” and bring an action in restitution***.
* Note: It must be shown that (1) defendant benefited and (2) plaintiff incurred a loss – the use of any of P’s property without permission is sufficient to show a loss.

***Distinctions in restitution recovery***

1. *Quasi-contract when the defendant was blameless*

When the defendant was blameless, D is not required to pay for losses in excess of the benefit received and is permitted to retain gains which result from his dealing with the property.

1. *Unintentional tortious conduct by defendant*

When the defendant was unintentionally tortious in his acquisition of the benefit, D is required to pay for what P has lost, regardless of whether that is more or less than what D benefited

1. *Intentional tortious conduct by defendant*

When the defendant was *intentionally* tortious in his acquisition of the benefit, D is required to pay for what P has lost *and* D is deprived of any profited derived from the subsequent dealing with the property.

## Constructive Trust, Equitable Lien, Services Rendered Without Expectation of Compensation

***Unjust enrichment***

Unjust enrichment occurs when the defendant was enriched (received some sort of benefit) at the expense of the plaintiff and it would be unfair or unjust to not do something about that.

What can we do?

* + Make the defendant give back the benefit (constructive trust)
	+ Make the defendant pay for the benefit (quasi-contract)

***Constructive trust***

* + ***The benefit must be legal title to specific, identifiable property (i.e., the property must be traceable to bring an action for a constructive trust)***
	+ If a defendant is unjustly enriched by the acquisition of legal title to specifically identifiable property at the expense of the plaintiff or in violation of the plaintiff’s rights, the defendant may be declared a constructive trustee, for the benefit of the plaintiff, of the property in question and its traceable product. (Restatement *Third* of Restitution)

**Traceable** means a piece of property we can “trace” down its location (e.g., real property, personal property such as a boat or a car that we can physically go see).

Note: if the property *appreciates* in value while in possession of the defendant, the plaintiff captures all of the appreciation as well as the traceable property.

### Types of equitable remedies

* *Hunter v. Shell Oil*
* Hunter is an employee of Shell and his position is to go out and find land containing oil wells so Shell can buy the land. Hunter decides to buy the land on which he finds potentially profitable oil wells instead of telling Shell. Shell discovers this, fires Hunter and sues him for breach of fiduciary duty.
* The court states that everything Hunter did, he did it on behalf of Shell so Shell should receive all of the benefit.
* Issue: what remedy does Shell get?
	+ One remedy could be that Hunter must give Shell the interests he has in such land (Shell pays the price Hunter paid for the land)
		- Why? This is like Hunter being Shell’s agent and as long as Shell pays for the land, it is theirs
	+ For the interests in land Hunter has already sold to others, Hunter must give Shell the profits from those interests Hunter sold.
* *G&M Motors v. Thompson*
* Thompson is an employee of GM and embezzles money from GM. Thompson uses the embezzled money to buy a life insurance policy and GM does not find out until Thompson dies and his wife attempts to obtain a payout
* Issues:
	+ Is this situation just money spent or is it traceable?
		- The Court says the money is traceable because he used the money to buy something that is traceable
* ***RULE: whether D spent the money isn’t dispositive - look at what was purchased, if the purchased item is traceable, apply a constructive trust (assuming all other requirements are met)***
* The policy value has increased from the original amount that was embezzled. What do we do about this?
	+ - Note: today’s figures – a $1 million policy is approx. $625/month for a young male
		- Thompson only embezzled money for 2 years
		- The court held that GM gets the money Thompson he embezzled *and* the profits as well
	+ ***RULE: when the embezzled money and D’s money are commingled, P and D share the profits pro-rata***
* ***RULE: Any money and profits go to the plaintiff, and any losses go to the defendant***
	+ Policy: discourage stealing money to invest, do not want people believing they can steal money and then if caught they may still keep the profits

**Traceability – commingled funds**

What if Thompson had commingled the embezzled funds with his bank account (because the total bank account value fluctuates)?

* Is this traceable? If so, to what extent is it traceable?

***RULES***: (essentially every possible doubt goes to plaintiff)

1. *Lowest intermediate balance rule*

The defendant always spends his own money first; never spends the “unlawfully acquired funds” until he runs out of his own money. Once the “unlawfully acquired funds” are spent, the defendant does not replenish them.

Analysis:

If the amount in the bank account remains above the amount embezzled, the defendant has not spent any of the embezzled funds.

If the amount in the bank account ever dips below the amount embezzled/unlawfully acquired, the defendant has spent some embezzled money.

Example:

Defendant has $5k of his own money and steals $4k from employer, so defendant has $9k total. Defendant spends $3k on a vacation and has $6k total in his account [*account*: $2k own money, $4k embezzled].

Defendant spends $4k on medical bills (note: *untraceable* because this is a service and the benefits cannot be removed) and has $2k total [*account*: $0 own money, $2k embezzled (owes $2k)].

D earns (lawfully) $2.5k in wages, and now has $4.5k total [*account*: $2.5k, $2k embezzled (owes $2k)].

Employer learns of embezzlement, sues and wants constructive trust for $4k. Court says constructive trust is only for $2k

* + - * Rationale: ***bank account dipped below amount embezzled and the amount of the embezzled funds spent cannot be recovered via constructive trust***.
1. *If defendant buys a traceable asset, assume he spent trust funds*

Example: if the defendant has $5k of his own money and embezzles $4k and then buys a boat for $3k. We assume that he spent $3k of the embezzled funds as opposed to his personal money. *Apply a constructive trust on the boat*.

* + What was the rule about depreciation of funds?

***Equitable lien***

If a recipient is unjustly enriched by a transaction which the plaintiff’s money or services has contributed to purchasing or improving the value of the particular property to which the defendant has legal title, the plaintiff may be granted an equitable lien on the property in question (Restatement *Third* of Restitution).

An equitable lien creates an obligation on the defendant to pay the plaintiff the amount the plaintiff was unjustly enriched.

* *Verity v. Verity*
* Wife alleges the couple purchased properties jointly and with funds mutually earned. The two worked on the properties and the wife managed the properties for many years. However, all properties were recorded in the husband’s name.
* ***RULE: where a person has never had title to a property but expended money or service in improving the property on the basis of an oral promise to convey (or hold jointly), and the money expended does not constitute the entire purchase price or interest claimed of the property, that person is entitled, not to a conveyance of the property, but only to an equitable lien on the property for the amount expended***.
* The wife receives a lien on the properties for the amount of her contribution in relation to the purchase price and improvements of the property (not a conveyance of the property to her name).

#### Defenses – services rendered without an expectation of compensation

Actions undertaken by a plaintiff that benefit the plaintiff may give rise to a claim in restitution (*quantum meruit*) if the plaintiff expected compensation for the action at the time the action was undertaken.

However, if the plaintiff performs the action but was not expecting compensation (i.e., *performed voluntarily*), the plaintiff is not entitled to a claim in restitution.

* *Vortt Exploration v. Chevron*
* Vortt and Chevron were in discussions for a joint venture for many years but never reached an agreement. In the course of the discussions, Vortt supplied Chevron with confidential information with the belief the joint venture would be reached.
* Chevron then decided against the joint venture and used the confidential information to find ideal locations to drill oil.
* The court held that Vortt was not volunteering the information but that they gave Chevron the information with the expectation of payment in form of the joint venture.
* Vortt was due in *quantum meruit* the value of the confidential information.
* ***RULE: the expectation of payment does not have to be immediate and does not have to be solely in the form of money – payment may be expected in the future and in any form***.
* *Dusenka v. Dusenka*
* Action brought by wife against step-son. The husband and step-son owned a bar 50/50. The wife worked at the bar for many years without pay.
* The husband transferred his ownership to the step-son and the wife continued to work for free. She eventually brought suit for payment for all of her labor over the years.
* The court held that she was performing these services voluntarily to help the husband and step-son and had not expected payment previously. She had not asked for a share in ownership either. ***The court held she was not entitled to any claim in quantum meruit because of her lack of expectation of repayment***.
* Kuder v. Schroeder

**NOTE**: another defense is that the defendant is a third-party *bona fide purchaser*. If the defendant purchased the property in good faith without knowledge of the unjust enrichment, the plaintiff has no claim against the third-party bona fide purchaser in restitution (*quantum meruit*).

# Declaratory Judgments

The primary purpose of the declaratory judgment remedy is to determine rights, obligations, and status. Thus, it is “preventive,” rather than a “coercive,” remedy (such as injunctive relief or damages).

Courts will only render declaratory judgments when there is a “case of actual controversy.”

* *Aetna Life Insurance v. Haworth*
* ***RULE: The term “cases of actual controversy” means “definite and concrete” such that the case is “real and substantial”***
	+ - Approximately: there must be a ***reasonable fear of imminent suit between the parties***
* What is not a case of actual controversy: a case that is abstract, hypothetical, academic or moot
	+ - Example: think of advocacy groups attempting to nail the law
* *Maryland Casualty Co v. Pacific Coal & Oil Co.*

***Defenses***

The statute of limitations is a defense to a declaratory judgment action. An action for declaratory relief will be barred to the same extent the applicable statute of limitations bars the concurrent legal remedy.

Laches is also a defense to a declaratory judgment action.

***Declaratory judgment actions are discretionary***

Courts have discretion as to whether they hear a declaratory judgment action. Courts typically refuse to hear an action when (1) the federal declaratory judgment action is based on diversity jurisdiction and there is a duplicate matter in state court; (2) when seeking a declaratory judgment for an act that is negligent or a breach of contract and the act has not yet happened; and (3) the declaratory judgment seeks a declaration that an act was unconstitutional and the actor has some sort of immunity.

* 1. *Diversity jurisdiction and duplicate matter in state court*
* *Wilton v. Seven Falls Co.*
* Declaratory judgment action in federal court based on a breach of contract, and there was a duplicate matter in state court; a hearing on the federal action was denied
* *Steffel v. Thompson*
	+ - Criminal law version of *Wilton*
		- Declaratory judgment was being sought stating a Georgia state criminal statute was being applied unconstitutionally. Petitioner was threatened with arrest under the statute if he couldn’t to pass out handbills, and he believed this to be an unconstitutional application of the law.
		- Petitioner succeeded in showing that there was an actual controversy because his companion had been arrested for the same act, and the police had warned him that if he returned again he would be arrested.
		- ***RULE: a threat of prosecution is not enough to confer standing but a declaratory judgment may be appropriate if there is a “specific warning of an intent to prosecute.” – how do we differentiate here?***
		- Note: when a criminal prosecution is pending, both state and federal courts tend to be unwilling to grant declaratory relief for purposes of testing the validity of a criminal statute.
	1. *Declaratory judgment for an act that was negligent or a breach of contract and the act has not yet happened*

In this situation, courts assume the reason the action is being brought is because the plaintiff cannot prove damages

Example: funeral home loses dead body of your child but you did not get an ulcer or have any other physical harm so you cannot recover for negligent infliction of emotional distress

* 1. *The declaratory judgment seeks a declaration that an act was unconstitutional and the actor has some sort of immunity*

As above, courts assume the reason for the declaratory judgment is to drag the potential defendant’s name through the mud and that the plaintiff cannot prove damages.

Example: a police offer that has qualified immunity or a gov’t entity that has sovereign immunity

# Remedies for Harm to Personal Property

## Personal Property

The general rule for personal property that is completely destroyed is the plaintiff shall be awarded damages equal to the fair market value of the good.

* ***Tricky parts***: when do we calculate the fair market value? The time of purchase, at the time the good was destroyed, etc.?
* The answer depends on the type of property at issue.

### Items of relatively stable value

* *Terrell v. Tschirn*
	+ - A 16-month-old Camaro gets stolen and 1 year later, some portion ends up at defendant’s scrapyard. The plaintiff sues for the tort of conversion.
		- The value of the car at the time of purchase before any improvements was $22.5K and the jury awarded $14.5K.
		- ***RULE: determine the free market value (FMV) at the time of the tort***
			* Evidence that should have been brought include anything that shows characteristics that play to the FMV at the time of the tort:

Mileage

Condition (***does this include improvements?***)

Blue book value

* + - ***RULE: Use this rule for items of relatively stable value***

### Items not of relatively stable value

* *Fawcett v. Heimbach*
* Fawcett and Heimbach jointly buy stock at $1.90/share. H sells half without telling F when stock is $11.50/share. H uses other half of stock as credit and that eventually gets repossessed when stock is at $14.50/share. F does not find out until stock is at $6.75/share.
* ***RULE: when item at issue does not have a relatively stable value (e.g., stock), the plaintiff receives the higher of: (1) the market value at the time of the tort (e.g., conversion or breach of contract), or (2) the highest replacement value between the discovery of the conversion and a reasonable period for replacement (what plaintiff could have paid to reverse tort, e.g., buy new stock, at the time P discovered the tort)***.

### No market for the item

#### Used household goods

Examples include clothing and personal items (e.g., toothbrush, toothpaste, shampoo, bedding, etc.) for which there is no secondary market. Because the FMV is so low for these items, giving the plaintiff the FMV would be unfair.

* *DeSpirito v. Bristol County Water Co.*
* P’s home was flooded and all of his household and personal items were destroyed.
* ***RULE: when used household goods are destroyed, the plaintiff is awarded the replacement or repair value of the goods. Note: this will be higher than the FMV of the goods***.
* Note: there is no award for sentimental value for these goods (e.g., “lucky shirt” is not given any extra value and P still only receives the replacement value).

### Goods with sentimental value

* *Campins v. Capels*
* Campins has three Indy Car Championship rings stolen. The rings were subsequently melted down before recovering them.
* ***RULE: when there is no secondary market and the item’s value is based solely on its sentimental value, the court will allow an exception to the repair/replacement value rule and award sentimental value***.

*What items qualify for recovery under the sentimental value exception?*

The item’s value should consist almost entirely of sentimental value. Examples include heirlooms *family papers/photographs*, handicrafts, and trophies (e.g., Oscar trophy, Heisman trophy, an Olympic medal).

**NOTE**: family papers and photographs are the most tested items because they clearly fit into this category. There is virtually no value in old family photographs other than the sentimental value given to them by the family.

NOTE: a wedding ring will not be given sentimental value but is instead given recovery under the FMV rule.

NOTE: the sentimental value rule is the majority rule (CA included).

### Personal property that was not destroyed

* *Farmer’s Insurance v. R.B.L. Investment Co.*
* A car is damaged on a test drive. The car is repaired and later sells for $2k less than the cost to manufacture the car.
* **RULE**: Plaintiff can get (1) diminished market value (without repair), or (2) cost of repairs plus any remaining loss of market value, ***whichever is less***
* Policy: whichever is less is used because it is likely that the cost of repair is going to exceed the FMV of the item (especially so with cars).
* Note: a plaintiff may obtain consequential damages ***if foreseeable***.
* Example: if a plaintiff cannot use an item until repaired, the plaintiff may be awarded the cost of renting a substitute.

## Specific Relief

### Legal replevin

This is an old common law rule that was typically used by tenants against landlords.

Old procedure: (can be done ex parte)

The plaintiff files an affidavit asserting ownership in court and the plaintiff must post a bond for the value of the personal property at stake. The sheriff may then go and seize the personal property from the defendant at issue – sheriff may even break into defendant’s property. The sheriff seizes and keeps the property for a specified amount of time. The defendant may: (1) post a “counter-bond” and get the property back until the court reaches a decision or (2) defendant can explain via affidavit why the defendant has a superior ownership in the property.

TODAY: replevin has primarily been preempted by state statutes

* California – Cal. Code Civ. Pro. § 512.00
* Federal – FRCP 64

Today, this situation is typically not used by tenants in a landlord/tenant situation but instead is used by creditors.

**Difference between replevin and repossession**

Repossession is a *contractual* right, not a remedy. Repossession occurs when a contract is signed during a purchase/loan giving the creditor the right to repossess the personal item.

Creditors typically use replevin when they did not include a repossession provision in the contract.

There are a lot of legal restrictions on repossession.

Example: when repossessing an item, the repossessor cannot *breach the peace* for instance, if the current possessor screams and yells creating a fuss publically – the repossessor must leave.

Example: The repossessor cannot break into the current possessor’s property (e.g., cannot break into a garage, or if it is parked in the driveway, cannot get the car – trespassing). Remember: *a sheriff may trespass and break into the current possessors property*.

**14th Amendment Due Process Issue with Replevin**

With replevin today, the current possessor has *no notice* what is happening.

* *Fuentes v. Shevin*
* The defendant in the replevin claim had the property taken from him and was only given the option of posting a counter-bond in order to keep the property (no opportunity for a notice and hearing if no counter-bond. The counter-bond was set by the state statute to be twice as much as the value of the item.
* The Court held this violated the 14th Amendment.

***Avoiding a violation the 14th Amendment***

In order to avoid violating the 14th Amendment, states must require certain things in their ex parte application for replevin.

1. In the ex parte application, the plaintiff must bring more than conclusory allegations of plaintiff’s ownership rights.
2. A judge must decide (not a sheriff) that the allegations are sufficient and not merely conclusory
3. The plaintiff must post a bond
4. After the seizure of the personal property item, the defendant must have the right to choose:
	* To *immediately* challenge the seizure in a hearing without posting a bond (burden of proof is on plaintiff at hearing), or
	* To post a counter-bond (and get the property back) until decision on merits.

*If any of the above are not present, there is a constitutional violation.*

**Replevin v. ex parte TROs**

Why seek replevin instead of seeking a TRO?

* TROs are intended to maintain the status quo and not change it. Meaning, the purpose of a TRO is *not* hand over the property to a creditor; the TRO will instead say don’t move it out of the jurisdiction, don’t destroy it, don’t sell it
* So a creditor that wants the property back immediately will seek replevin.

**USUALLY**, a plaintiff will seek ***both*** – a TRO to maintain the status quo (no selling, destroying, moving) and replevin so the sheriff can get the personal property item (*Textron Financial Corp. v. Unique Marine*)

* Remember, a TRO is enforced via a court’s contempt power so if the defendant is served with the TRO and disobeys, the defendant can be jailed

**Issues with ex parte TRO 4 factor test** (*Morgan Stanley – supra*)

Factors: (1) substantial likelihood for success, (2) irreparable harm, (3) balance of hardships, and (4) public interest

* Usually a plaintiff will not be able to show an inadequate remedy at law (i.e., why can the plaintiff not just take money for the item)?
* Balancing of hardships may tip in favor of the defendant if the plaintiff is a large company and the personal property item is only a number on a balance sheet whereas the defendant may need the item (i.e., a car to get to work)
* SO, ***when dealing with only personal property, it is much harder to get an ex parte TRO as opposed to replevin***.

### Equitable replevin

* *Modern Dust Bag v. Commercial Trust*
* Plaintiff needs a special type of paper and defendant is the only person who supplies this type of paper
* The defendant decides not to supply the paper due to a money dispute. The plaintiff can either stop production and fight the action in court or post a bond to get the paper. The plaintiff tries replevin, but the defendant counter-bonds to keep the paper.
* Court sees that the defendant is just holding the counter-bonded paper over the plaintiff’s head not because defendant believes it is his but because defendant wants plaintiff to pay the money in the dispute first. The court holds this is be inequitable (to use the paper as a litigation tactic), so defendant can have the paper via an equitable replevin.
* Equitable replevin is actually an injunction and is therefore enforceable via contempt.
* ***RULE: if the defendant posts a counter-bond for inequitable reasons, not because he actually believes it belongs to him, the court may impose an equitable replevin and retrieve the item***.

## Remedies for Trespass

### Damages

* *Myers v. Arnold*
* P landowner and wants “a couple loads of debris-free concrete.” D brings 70 truckloads with debris; P did not want that amount or concrete with debris. At trial, P wants damages for “the cost of repair” which would be the cost of removal of the concrete – approx. $18K.
* D’s expert states that the property damaged is ½ acre and the value of ½ acre of land in the town is $375. D claims he should only have to pay $375.
* ***Majority rule: If trespass is reparable, the plaintiff is given the cost of repair so long as the value of repair is less than pre-injury market value [entire parcel, not just the ½ acre]; or diminished value whichever is larger (because real estate is unique). If trespass is permanent, diminished market value***.
* Remember, with personal property the rule is *whichever is smaller* because the plaintiff may just buy a replacement item
* Minority rule: Some states award the cost of repair but this is only available if you live on the property. Other states apply the rule for personal property.
* **ALSO** – don’t forget ***consequential damages*** (applicable to both majority and minority)
	+ Example: rent (car or house) for time being
	+ Example: loss profits if land was used to cultivate crops
	+ Example: loss profits if land was rented to others and they can no longer live there and do no pay rent

### Specific relief

#### Ejectment

Ejectment is a legal remedy but seems like equity. An ejectment is *not an injunction* but is a judgment that empowers sheriff to cure trespass. For example, a plaintiff landowner may be suing a squatter or a tenant who won’t leave or a neighbor who built an encroaching structure

In the situation of a squatter or tenant, this is essentially eviction – police tell person to leave, if they don’t leave the sheriff arrests them.

In the situation of a neighbor who built an encroaching structure, the sheriff is empowered to remove the structure (*not an injunction telling the neighbor to remove trespass*).

* *Heroux v. Katt*
* 450 sq. foot encroachment, plaintiff awarded ejectment remedy

*Modern practice for encroaching structures*

Assume that ejectment is not an adequate remedy at law. Sheriffs began to refuse to remove encroachments because of the possibility of injury, taking down too much of the encroachment, not being paid to do so, etc. Instead, the plaintiff seeks an injunction.

When the plaintiff receives an injunction against the defendant, the cost and risk of removing the encroachment is on the defendant. However, D can raise the following defenses:

* + Laches (because now in the world of equity as requiring D to tear down the encroachment may be unjust)
	+ Property law doctrines
		- Prescriptive easement
		- Adverse possession
	+ Balance of hardships

*Balance of hardships for encroaching structures*

1. When does this tip in the ***defendant’s*** favor?

When there is “***truly minimal encroachment***.”

* + (1) A few inches up to several feet and (2) innocent (the innocent standard is low: negligence or better – typically the surveyor will be wrong when surveying property lines, this is innocent)

Why? An injunction is a weapon to get more money even though the plaintiff doesn’t care about the encroachment; this money would be more than the market value of encroached land.

1. When does this tip in the ***plaintiff’s*** favor?

When (1) there is ***more than minimal encroachment***, or (2) ***intentional encroachment*** (careless or worse), no matter how minimal (this is to avoid having a neighbor force the sale of the land by building the encroaching structure and then just paying damages for the minimal encroachment)

### Restitution

The situation may arise where the plaintiff neighbor accidentally builds an encroaching structure on defendant landowner’s land and defendant landowner wants to keep the structure and not pay plaintiff neighbor. In this case, the plaintiff neighbor may seek damages in restitution for the improvement of defendant landowner’s land.

* *Somerville v. Jacobs*
* Surveyor incorrectly surveys the land, which causes plaintiff to build a Coke bottling factory on defendant’s land. Defendant claims ownership of the factory because it is on his land and refuses to pay for it.
* ***RULE: plaintiff gets equitable lien on defendant’s parcel in the amount of the improvement (i.e., defendant has to pay for factory)*.**
* Court proposed another equitable remedy – switching titles of plots of land.

Summary of remedies for trespass

*Legal remedies*

* + Damages: lesser of (1) repair or (2) lost market value (always plus consequential damages)
	+ Ejectment
		- This is fine for squatter (essentially eviction)
		- Usually never used for encroaching structures

*Equitable remedies*

* + Injunction ordering D to cure encroaching structures (this happens for all large encroachments or any intentional encroachments regardless of size)
		- Limited by: property doctrines, laches, balance of hardships

*When encroachment improves property value, the trespasser can get an equitable lien on the value of the encroachment*

## Remedies for Nuisance

Nuisance v. trespass

1. Nuisance

A nuisance claim arises when one’s actions harm to your right to use (although not preventing you from standing on that piece of property) and enjoy. The harm must be *intangible* (i.e., not of a physical nature like a brick). Some examples include bright light, odor, and pollution in the ground water.

*How many causes of action do you have (one or multiple)?*

***Permanent nuisance: one cause of action***.

Examples of a permanent source of a nuisance include: living next door to an oil refinery that is pumping out black smoke 24/7 and you can smell the smoke on your property all of the time; or living next door to a cattle ranch and it permanently smells like manure.

***Temporary nuisance: potential for multiple causes of action.***

Examples of a temporary source of a nuisance (e.g., nuisance comes and goes sporadically) include: living next door to a neighbor that throws parties with laser light displays once a month, not every day but only once in awhile).

The distinction between a permanent nuisance and a temporary nuisance is an issue because they have different implications regarding laches and SoL.

*General rule for remedies for nuisance*

***A plaintiff’s remedy for nuisance is: (damages for past nuisance) + (injunction) + (physical discomfort/illness)***

*Past nuisance*

This depends on whether the harm from the nuisance is permanent or repairable.

Permanent – damages are diminished market value

Repairable – cost of repair or diminished market value whichever is less (majority)

* Note: this is not the same rule for trespass but is the same as the rule for personal property – “*personal property rule.*”

Note – minority (***California***): cost of repair so long as cost of repair is “reasonable” – may exceed diminished market value

Policy: trespass context, typically P is landowner, D performs bad act (irrelevant if D is landowner); but with nuisance, P and D are both landowners and we don’t want to weigh one property owner’s rights against another – we wanted each to enjoy their property as they see fit

*Injunction – prohibiting person creating nuisance from continuing*

* + - * + *Boomer v. Atlantic Cement*
* 8 landowners live near a cement plant and are suing for cement dust always on their property. The landowners win and court awards damages at $40-150/month per plaintiff (*for past harm*).
* The court says they are not entitled to an injunction because it would be inequitable to cause the plant to shut down.
* ***RULE: when you prove nuisance, you get an injunction***
* ***EXCEPTION: in certain situations in which it would be inequitable to give the injunction, one will not be given; determine whether it would be inequitable by balancing the hardships.***

Balancing of hardships: if “substantial harm” to plaintiff then award an injunction; if “insubstantial harm,” no injunction

* ***RULE: If P does not obtain the injunction against D, P gets “permanent damages” (forward looking damages).***
* “Permanent damages” are the amount of money to compensate the plaintiff for the rest of his life (the court is saying D is essentially “buying a servitude” on P’s land)

Note: because this is “buying a servitude,” it should carry with the property so P will have to disclose to the buyer. The buyer and seller will take this into account with the sale price of the property (e.g., lower price of house by the amount P was awarded, or a portion of it).

Note: the buyer will not be able to sue for the nuisance because he will be “coming to the nuisance” (below)

*Physical discomfort/illness*

This is separate from diminished market value or repair; this is if the neighbor (D) “goes over the line” and harms P.

*“Coming to the nuisance”*

* + *Spur Industries v. Del Webb*
* Del Webb built a retirement community near a pre-existing cattle feed lot (Spur)
* ***RULE: a defense to remedies of a nuisance claim is that the P came to the nuisance.***
	+ - * P knew of the nuisance and P knowingly came to the nuisance, so P cannot complain about the nuisance
* This serves to immunize farms, ranches, oil refineries, etc. that were initially built in the middle of nowhere and society has expanded to the nearby area such that they are affected by the nuisance created by the pre-existing landowners
1. Trespass

A trespass claim arises when one’s actions harm your right to possess the property. This is a physical, tangible invasion of your property (e.g., fence, building, pavement).

Some examples include: someone has built something on your property and you are not able to stand on that piece of property (e.g., a fence or a shed).