**Remedies**

**Overview**

*Specific, Substitutionary, and Declaratory Remedies*

**Specific relief** remedies the wrong by requiring the defendant to perform a legal duty. Since it is a court order, if the defendant does not comply, the defendant can be held in contempt. **Substitutionary relief** substitutes money for the specific relief. The plaintiff can only levy execution on the judgment. **Declaratory relief** tells people what rights exist.

*Equitable Remedies*

Usually specific (but see, e.g., royalties, back pay, etc.). There is no 7th Amendment right to a jury trial in an equitable action. An equitable remedy takes the form of a court order that is enforceable by the contempt powers of the court.

*Legal Remedies*

Usually substitutionary in the form of money (but see, e.g., replevin, ejectment, etc.). Guaranteed 7th Amendment right to jury trial in actions at law. Not enforceable by contempt, but rather a judgment lien on property, executed by sheriff.

*Tortious Conduct and Breach of Contract*

The remedial rules in tort law serve to make the plaintiff whole, as if there had not been a tort. At times, those rules will also punish. In contract law, the remedial rules serve to compensate people for breaches of contract as though the contract had been performed (i.e., benefit of the bargain) without deterring commerce/social efficiency with punitive damages. Today, remedies may be legal, equitable, or both, stemming from a single lawsuit in a single courtroom.

*Unjust Enrichment*

In unjust enrichment, the remedial rules focus on defining a gain and determining whether it should be disgorged.

**Injunctions**

An injunction is a remedy in the form of an in personam order, usually issued by a trial court of general jurisdiction. It directs the defendant to act, or to refrain from acting in a specified way, and it is enforceable by the contempt power. The injunction must be obeyed until it is stayed, dissolved, or reversed, even if it is erroneously issued.

**Mandatory Injunction—** orders an affirmative act or course of conduct (e.g., to permit something)

**Prohibitory Injunction—** forbids an act or course of conduct (e.g., to prevent something)

**Reparative Injunction—** requires defendant to restore plaintiff to a preexisting entitlement

**Preventive Injunction—** attempts to prevent the loss of an entitlement in the future

**Structural Injunction—** attempts to remodel existing institution into conformity with constitutional demands

Pre-trial 🡪 “irreparable harm” 🡪 not monetizable & unjust to wait

Permanent 🡪 “inadequate remedy at law” 🡪 not monetizable after trial on the merits

Contract: Rarely issued, except for real/unique property.

Property: Usually issued, but no presumptions.

Tort: May be issued for reasonably feared injury, but not past harm.

**Provisional Injunctions**

*Preliminary Injunctions and Temporary Restraining Orders*

FRCP 65(a): Preliminary injunction—notice to the enjoined party is required; usually results in an adversarial hearing.

FRCP 65(b): Temporary restraining order—may be issued ex parte (i.e., without notice) to the enjoined party. Initially expires after 14 days but may be extended another 14 days for “good cause,” or longer with consent. A TRO is likely to be in effect until the final decision in a case. Permanent injunction only results after a final dispositive ruling.

Procedure: Complaint → ex parte hearing by court → if granted → P posts bond & serves TRO on defendant.

Party who obtained order must proceed. Enjoined party can file motion to dissolve/modify with 2 days notice.

If a case is removed to Federal Court while TRO is in play, apply federal procedure rules. Gil Pharmaceutical.

FRCP 65(c): Bonding requirement for movant to compensate in case harm results to a wrongfully enjoined party.

FRCP 65(d): Injunctions bind the party, agents of the enjoined party, successors in interest of the enjoined party, and third parties “acting in concert”—i.e., actual knowledge of judicial decree and defiance for benefit of enjoined party.

**Bonds**

When a plaintiff moves for a pretrial injunction, she must post a bond if required by the court. (US Gov. doesn’t have to post bond.) Defendants may request a bond and/or increases if costs run up (Sprint). Failure to move for a bond waives that right. Court has obligation to (1) hold requested bond hearings; and (2) explain the bond amount it has selected.

3 Federal Court approaches to the “mandatory” bond requirement under FRCP65(c): ( 1) mandatory posting requirement + discretionary amount (nominal if indigent); (2) mandatory posting with exceptions (nonprofit public interest group) + discretionary amount; and (3) discretionary posting + discretionary amount.

*Recovery of Damages*

Defendant can recover damages against a bond under FRCP 65(c) only if: (1) wrongfully enjoined; (2) prevails on rebuttable presumption that defendant can recover against the bond, i.e., plaintiff can show bad faith, failure to mitigate, etc.; (3) what is the actual amount of Δs loss? compensatory damages for harm actually caused.

Nintendo v. Galoob: Face value of bond = ceiling on damages defendant can recover for wrongful injunction.

Purpose—Assures enjoined party that it may readily collect damages in event it was wrongfully enjoined w/o further litigation/insolvency. Provides plaintiff with notice of maximum extent of its potential liability.

**Notice (Procedural Due Process)**

*Mathew v. Eldrige Balancing Test*

Procedural due process is established by (1) the importance of the interest at stake; (2) the risk of an *erroneous* deprivation of the interest because of the procedures used, and (3) the government's (police powers) interest.

*Mitchell 4 Factor Test*

(1) Participation by a judicial officer; (2) a prompt post-deprivation hearing; (3) verified petitions or affidavits containing detailed allegations based on personal knowledge, and (4) risk of immediate and irreparable harm.

**Temporary Restraining Order**

(1) Substantial likelihood of success on the merits; (2) irreparable harm by (i) inadequate legal remedy or (ii) emergency; (3) balance of hardships tips in favor of the plaintiff; and (4) issuance of the injunction is in the public interest. Ex parte—

No notice under Marquette for actual or threatened injury; loss of parental visitation outweighed by Eldrige test.

No notice required under Vuitton when risk of imminent sale, removal, or destruction of disputed property.

Rule 65(b): (1) immediate and irreparable injury, loss, or damage will result before adversarial hearing;

(2) attorney must certify in writing the reasons supporting the claim that notice should not be required.

“The sole method of preserving the state of affairs in which the court can provide effective final relief.”

 However, speculation is not enough; particularized evidence is required, e.g., a history of similar conduct.

 The “specific terms” and “reasonable detail” mandated by Rule 65(d) should be understood by the lay person.

Similarly, McCord says no civil contempt if action based on good faith & reasonable interpretation of order.

**Preliminary Injunction**

Test: (1) A substantial likelihood that it will prevail on the merits; (2) that it will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the moving party outweighs whatever damage the proposed injunction will cause the opposing party; and (4) that the injunction would not be adverse to the public interest.

Nonsolicitation agreements: restraint of trade, anticompetitive; trade secrets, protecting investments in people.

 Frisby: Loss of income does not constitute irreparable harm. / Rothe: Customer trust and goodwill is irreparable.

**Permanent Injunction**

Permanent Injunction Test: (1) P suffered irreparable injury (i.e., trial on merits required before issue perm injunction);

(2) Inadequate legal remedy; (3) Balance of hardships tips for P; (4) Issuance of the injunction is in the public interest.

Cost/benefit analysis: Benefits—cheap private negotiation for market price; Costs—Supervision, unrepresented 3rd parties burdened, bilateral monopoly may be inefficient. Damages: Trial prep and adjudication expensive.

 Walgreen: The costs (including forgone benefits) of the damages remedy would exceed the costs of injunction.

Exclusivity clauses generally favor injunctions b/c damages are difficult to estimate and little judicial supervision.

 Ebay: The 4 factor test always applies. No categorical presumptions or automatic injunctions. Patent trolls lose.

 Suicidal Stalker: In tort law, Δ may be enjoined for irreparable harm that a reasonable person *fears* will happen.

Smith Smoking Policy: Deterioration of health is irreparable. *Future* threat of physical injury has no legal remedy.

 Secretary of Labor: Farmworkers’ injuries outweigh minimal inconvenience. Public interest against exploitation.

 Note: Permanent injunctions are never issued for personal services contracts (e.g., unique performers.)

**Modification and Dissolution of Permanent Injunctions**

*FRCP 60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding*

On motion, the court may relieve a party due to: (1) mistake; (2) new evidence; (3) fraud; (4) voidness;

(5) applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

*Swift Standard*

Modifying a consent decree requires a clear showing of grievous wrong evoked by new and unforeseen conditions.

Note: When modifying a provisional injunction, a court exercises the same discretion that it exercised in granting or denying the injunctive relief in the first place. It is only when modifying a final or permanent injunction that the court must consider whether there has been a significant change in conditions.

*Changed Conditions Standard*

Modifications are permitted if the injunction is harmful/no longer equitable in light of changes in the law or the facts.

Dowell: Oklahoma City sought dissolution of decree imposing school desegregation plan. Swift abandoned.

Rufo: (1) Change in law—new cases w/ contrary conclusions; (2) Change in facts—jail population has increased.

**Appeals**

**Appealing Permanent and Preliminary Injunctions**

Authority: 28 U.S.C. § 1291—Appellate courts have jx over district court final decisions, including permanent injunctions

Authority: 28 U.S.C. § 1292—and interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions.

Defendant may *immediately* (1) challenge grant to the trial court judge; or (2) appeal to appellate court. On appeal:

Motions Panel—awards pre-appeal injunctive relief to restore/preserve status quo until hearing by merits panel.

Merits Panel—reviews appeal from injunction ruling; reviews trial court’s decision for “abuse of discretion.”

**Appealing Temporary Restraining Orders**

An order granting, continuing, modifying, refusing, or dissolving a temporary restraining order (TRO) is not appealable.

Exceptions: (1) TRO extends beyond length granted by FRCP without consent; (2) TRO has the “effect” of a final decision; (3) Δ found in contempt; (4) especially onerous mandatory injunctions (e.g., objection, police action).

*Exception 1: TRO extended beyond length granted by FRCP without consent*

Chicago Contract: Debarment enjoinment became preliminary injunction because TRO extended by agreement beyond FRCP length (28 days) & judge modified the injunction *without* agreement. City may appeal during extension period.

*Exception 2: TRO has the “effect” of a final order*

Savings Bank: Bank gets state approval for converting into a public stock company with 45 day deadline. Class action for breach of fiduciary duty. Judge issues TRO that has the effect of a final decision because it extends past state’s deadline.

 Note: TRO *denial* may also be considered a “final order” and treated like a permanent injunction on appeal.

*Exception 3: Defendant is in contempt*

If you are in contempt of court, you can appeal.

*Exception 4: TRO is especially onerous mandatory injunction*

Adams v. Vance: TRO ordering the U.S. to take a position on a treaty (too much interference with political branch).

Belknap v. Leary: TRO ordering the police department to protect anti-war protestors (too much judicial oversight).

**Moving to obtain Pre-Appeal Injunctive Relief**

FRCP 62(a) – Appellant must move to obtain pre-appeal injunctive relief in order to prevent immediate effectiveness of trial court’s injunction ruling. Under 62(c), the motion is first submitted to the trial court judge. Only when the appellant shows that moving first in the district court would be impracticable may appellant submit directly to the appellate court.

*Automatic Stays*

At federal level, there are no automatic stays of an interlocutory or final judgment for injunction actions pending appeal.

California provides automatic stay of mandatory injunctions & a stay of prohibitory injunctions on a showing of hardship.

**Requesting a Stay pursuant to FRAP 8**

An appellant may request to stay a preliminary or permanent injunction. The stay prevents the judgment from going into effect until after the merits panel holds a hearing. Its function is to maintain the status quo pending the hearing.

Toxic Sludge: Michigan’s low-level radioactive waste denied access to facilities in disposal states. Stay granted.

Traditional 4-Factor Test: (1) Likelihood of success on appeal; (2) Irreparable harm to the moving party if the stay is not granted; (3) Balance of hardships btwn opponents/others if the stay is granted; (4) Public interest in granting the stay.

**Injunctions & First Amendment Considerations**

Prior restraints are presumptively unconstitutional. A prior restraint is an administrative system or a judicial order that prevents speech from occurring. The Court has held that licensing systems constitute a prior restraint if they serve no important purpose or if they leave too much discretion in the hands of the administrators of the system.

**Prior Restraints on Speech**

An injunction prohibiting someone from exercising the right to free speech is a prior restraint.

Carroll: City obtains ex parte TRO to enjoin KKK rally. Notice was required to advise them of the proceeding.

*Notice Requirement*

If there is going to be a TRO for a prior restraint on speech, it cannot be issued ex parte, unless a showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate. The participation of both sides is necessary to narrowly tailor the essential needs of public order (permitted by constitutional mandate).

*Strict Procedural Safeguards*

Skokie: County enjoins Nazi parade in Jewish town. State courts wrongly denied Nazi application for stay pending appeal.

If a court issues an injunction against defendants claiming free speech rights, “strict procedural safeguards” require:

(a) Immediate and expedited review by merits panel; or

(b) Absent immediate appellate review, the state must instead allow a stay.

**Barring Collateral Attacks on Injunctions**

Defendant can challenge injunction by: (1) direct attack—motion to dissolve/modify; (2) collateral attack—exceptions.

Collateral Bar Rule: This rule bars someone who violates a court order from arguing that the order was unconstitutional. An injunction must be obeyed, no matter how erroneous or unconstitutional. Disobedience is punishable by contempt.

*Exceptions to Collateral Bar Rule*

(1) The wrongful exercise of subject matter jurisdiction; (2) The collateral bar doctrine is only relevant in criminal contempt proceedings—civil proceedings only have direct attacks; (3) This is a federal and majority jurisdiction rule.

 Note: California does not follow the Collateral Bar Rule. See, e.g., In re Berry.

*Prior Restraint Doctrine*

Birmingham: Alabama issued TRO prohibiting civil rights marches and demonstrations. MLK made no effort to dissolve the injunction or to comply with it by applying for a permit. Despite vagueness and unfettered discretion, in contempt.

 Dissent #1: Respect for the courts and judicial process was not increased by the history of the labor injunction.

 Dissent #2: Requiring a person to pursue a judicial remedy before he may speak simply moots the controversy.

 Dissent #3: A valid state interest must give way when it infringes on rights guaranteed by the U.S. Constitution.

Providence Journal: FBI conducted warrantless electronic surveillance. FBI wrongfully released the memoranda to the Journal’s request under the Freedom of Information Act. After an adversary hearing, a TRO was issued enjoining the Journal from publishing the memoranda. New exception: May challenge constitutionality at the contempt proceeding when dealing with (1) Pure speech; and (2) Timely emergency relief unavailable. If the party chooses to violate the order and the order turns out not to be transparently invalid, the party must suffer the consequences of a contempt citation.

Note: This case was distinguished from Birmingham because (1) the Journal was enjoined from speech as opposed to conduct; and (2) the Journal only had 8 hours as opposed to 2 days to modify/dissolve the injunx.

**Contempt**

**Statutory Authorization**

A federal court has the power to punish by fine or imprisonment (1) misbehavior by any person in its presence;

(2) misbehavior by officers in their transactions; and (3) disobedience of writ, process, order, rule, decree, or command.

**Procedure**

Civil contempt and criminal contempt must be administered within the framework of their respective procedures. This distinction is important in determining parties, pleading and practice, particularity of the charge, burden and quantum of proof, availability of the privilege against self-incrimination, jury trial, terms of the order, and scope of appellate review.

**Right to Jury Trial**

Two tests: (1) Common law historic test [Majority Jx]; (2) 7th Amendment Test [Minority Jx/Federal Jx]

Ross 3 part test: (1) pre-merger custom; (2) remedy sought; (3) practical abilities/limitations of juries.

**Civil contempt:** Used to coerce; operates prospectively; Per Diem fines and conditional imprisonment okay until ∆ complies/term of grand jury; inability to perform or a resolute unwillingness to perform may lead to criminal contempt.

**Criminal contempt:** Used to punish; operates retroactively; serious offenses (more than 6 months jail time) or serious fines (more than $5,000 for an individual and $10,000 for an organization/corporation) trigger the right to a jury trial.

Violation of court rules may be summary or nonsummary.

Violation of a court order/consent decree must be nonsummary.

**Summary proceeding:** (1) Judge saw or heard (2) conduct constituting contempt (3) in the actual presence of the court.

Rationale: Speedy punishment is necessary in order to achieve summary vindication of the court’s dignity and authority.

**Nonsummary proceeding:** Less urgency for other conduct that is not highly disruptive—requires notice and a hearing.

The following cases address violations of judicial rules and orders relating to the administration of justice:

*Notice & Hearing as a general rule*

Harris: Witness who was granted immunity refused to answer questions at grand jury proceeding on the ground of self-incrimination. Later found guilty of criminal contempt for failure to testify in front of the judge in an ancillary, summary proceeding. Rule 42(a) summary dispositions are reserved for exceptional circumstances. Dissent: It is appealable.

*Right to Jury Trial for Serious Criminal Contempt*

Bloom: Lawyer willfully tried to probate a false will. Held in criminal contempt after notice & hearing but denied jury trial. Sentenced to two years. Due process trumps judicial economy and efficiency—severe punishment needs jury.

Note: Punishment for criminal contempt (willful misbehavior) is limited to one year in a majority of the states.

*No Right to Jury Trial for Civil Contempt*

Shillitani: Witness appeals after bench trial sentencing him to two years with the proviso that if he answered the questions before a grand jury, he would be released. This is civil because the sentence operates prospectively to coerce him to obey the order to testify, rather than punish. No jury REQ. However, this sanction is limited to grand jury term.

*Civil Sanctions (coercive) 🡪 Criminal Contempt (punitive)*

Simkin: Cokehead ordered to snitch. When sanctions are not going to compel compliance, remedial characteristics are lost and contempt becomes punishment. The burden is placed on the contemnor to demonstrate there is no realistic possibility that continued confinement might cause the contemnor to testify. There remains broad discretion in district courts to determine whether a civil contempt sanction has lost its coercive effect. But an individualized decision must be made in each case. Note: Once the term of the grand jury ends, ∆ may be tried again for criminal contempt. Patrick.

The following cases address violations of equitable remedial decrees that lead to (1) criminal contempt sanctions,

(2) civil compensatory contempt sanctions, and (3) civil coercive contempt sanctions.

(1) Criminal Contempt Sanctions

*A Special (Private Attorney) Prosecutor must be an Independent Third Party*

Vuitton: Consent decree (i.e., settlement in the form of an injunction) prohibiting trademark infringement. Vuitton finds probable cause of contumacious conduct. U.S. attorney declines to prosecute. The court appoints Vuitton’s lawyers to represent the U.S. in the investigation and prosecution of such activity. ∆ appeals. SCOTUS says courts possess inherent power of self-protection to appoint a private attorney to prosecute contempt. Principle of restraint says this should be a last resort (i.e., after U.S. attorney denies appointment). Rationale: Judiciary needs the ability to enforce its own power. Caveat: The prosecutor must be disinterested; only ethical duty to public interest in vindication of the court’s authority.

 Note: Min jx allow ∏’s lawyer to prosecute where fiscal/administrative burdens outweigh ∆’s liberty. (Not CA.)

(2) Compensatory Civil Contempt Sanctions

*Compensatory damages disgorge contemnor of benefits derived from noncompliance*

Cancer Research Society: Injunction to protect tradename. The institute hired a third party advertising agency to remove infringing phone book listings. Found in civil contempt by clear and convincing evidence that “the defendant has not been reasonably diligent” in complying with order. No actual damages. Plaintiff entitled to compensatory damages under an unjust enrichment theory. No right to jury trial. No requirement of (willful) intent. Majority jx: attorney’s fees.

Civil compensatory contempt for violating an injunction: (1) Clear and unambiguous injunction that a layperson can understand; (2) Noncompliance—lack of reasonable diligence to comply by clear and convincing evidence; (3) Willful intent not required, but in minority jx required for attorney’s fees. Compensatory sanctions operate retroactively; Actual harm or unjust enrichment caused by misconduct is payable to the people who suffered.

(3) Coercive Civil Contempt Sanctions

*Incarceration for civil contempt may continue indefinitely*

Wronke: Stubborn contemnor owes $44k in child support. Denied jury trial. 3 years in jail. Petitions for writ of habeas corpus. The court says incarceration for civil contempt may continue indefinitely because the contemnor has the ability to secure his release by (1) complying with the court order; or (2) adducing evidence as to his inability to comply.

 Note: Legislative caps exist—e.g., state/federal 18 month caps on civil contempt in child custody hearings.

**Fines**

Administering Coercive Civil Contempt Fines

(1) Court issues equitable decree.

(2) Court finds Δ violated decree & issues conditional order threatening to impose penalty unless Δ purges contempt.

(3) Court exacts threat if purging doesn’t occur by imposing a “non-compliance” fine in a fixed amount.

*Minority Rule: Coercive civil fines in complex injunctions require a jury trial*

*Majority Rule: Serious criminal contempt fines, even if announced in advance, require a jury trial*

United Mine Workers v. Bagwell: VA court enjoins unlawful strike activities. Prospective fine schedule. Contempt hearing without jury found 400 violations. Labor dispute settled with joint motion to vacate contempt fines. VA Supreme Court refuses because $52 million in civil fines were payable to the public. “The union’s ability to avoid the contempt fines was indistinguishable from the ability of any citizen to avoid a criminal sanction.” Violated 6th Amendment right to jury trial.

Criminal fine: Unconditional, fixed amount, imposed retrospectively for conduct (*even if* announced in advance.)

 Civil fines: (1) Per Diem fines; (2) Fixed amount *awarded*, but suspended pending compliance; (3) Compensatory.

*Internal Split—What triggered the right to a jury trial?*

Scalia: Widespread violations over a long-term period of time of a complex injunction requiring detailed fact-finding.

Ginsburg: Serious criminal sanction under Gompers’ “Character and Purpose Test,” where the civil contempt sanction is designed to coerce the defendant to do the thing required by the order for the benefit of the complainant, the criminal contempt sanction, by contrast, operates to uphold the dignity of the law by punishing the contemnor’s disobedience.

Since *Bagwell*, the ability to purge is the dominant approach to defining the distinction btwn civil and criminal contempt.

Tennessee: Arlington mental retardation facility cited for unconstitutional conditions. Structural injunction. Consent decree includes remedial plan. State in contempt despite “partial compliance.” Courts unsympathetic to less-than-substantial compliance where contemnor participated in drafting the order b/c they understood reasonable terms.

$1k Per Diem fines (penalizing taxpayers and individuals in need of public services.) Doesn’t work; creative sanctions:

“Commissioner Cardwell sentenced to spend every 4th weekend at Arlington facility until compliance is achieved.”

 (1) Courts may ratchet up coercion, i.e., shape an appropriate contempt sanction based on noncompliance.

 (2) Civil contempt sanctions can include more than fines and jail time; common for government institutions.

 (3) When a court issues a structural injunction, it is common for it to appoint a monitor/temporary receiver.

**Affirmative Defenses**

**Unclean Hands**—Closes doors of an equity court to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief (regardless of defendant’s behavior). “He who comes into equity must come with clean hands.”

 Smith Barney: Both employers gave Vockel a signing bonus for violating his antisolicitation agreements.

Public Interest Exception: The doctrine may be relaxed in the interest of fairness, justice, or substantial rights.

Note: California (minority jx) extends this doctrine to actions at law, barring both equitable and legal remedies.

**Laches**—Equitable time limitation on party’s right to bring suit. Designed to promote diligence and prevent stale claims.

 (a) Accrual date—plaintiff knew or should have known about potential cause of action; (b) Length of delay—if the delay is longer than the (analogous) statute of limitations, it is presumptively unreasonable under Jarrow v. Nutrition Now; (c) The party asserting laches must show it suffered prejudice as a result of the plaintiff’s unreasonable delay in filing suit.

 Types of prejudice: (i) Injurious reliance (change in position from lack of suit); (ii) Loss of evidence or witnesses.

 Environmental approach: (i) Reliance compared to future reliance; (ii) Degree to which construction is complete.

Public interest exception: (i) Do not apply if contrary to public interest; (ii) Do not apply if ∆ has unclean hands.

Note: Laches will bar the party’s entire lawsuit whereas the statute of limitations bars damages for specific acts.

**Damages**

(1) Nominal – no actual harm; does not preclude attorney’s fees or punitive damages

(2) Compensatory – attempt to compensate for injury; does not preclude attorney’s fees or punitive damages

(3) Punitive – punishes certain types of conduct; not nominal or compensatory in nature

**Adjustments for Time**

**Pre-Judgment Interest**

Federal Rule

Pre-judgment interest is a substantive rule, which means the state’s pre-judgment interest rule applies in diversity jurisdiction cases. Its use is discretionary in federal question jurisdiction cases. Possible approaches to the latter include:

(1) State rate (majority); (2) Same rate as post-judgment rate (majority); (3) No interest; (4) Any other interest.

California Rule

Cal. Code of Civ. Proc. § 3287: Contract—Any legal rate of interest stipulated by contract, otherwise 10% simple interest. Tort—The California Constitution says that in all non-contract cases, including torts, the rate is set at 7% simple interest.

*Prejudgment Interest Appropriate for Measurable Damages*

Econ Utah: Damages do not have to be known at the time of their accrual or remain static throughout litigation. Pre-judgment interest is available as long as the damages are capable of being calculated with some mathematical accuracy. It may not be awarded, however, for noneconomic tort damages based on the broad discretion of the trier of fact.

**Post-Judgment Interest**

Federal Rule

28 U.S.C. § 1961: Post-judgment interest is mandatory for a money judgment in civil district court cases. The interest is calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield for the calendar week preceding. Interest is computed daily until payment and compounded annually.

California Rule

Cal. Code of Civ. Proc. § 685.010: Post-judgment interest is mandatory for a money judgment in civil state court cases. Interest accrues at the rate of 10% per annum on the principal amount of a money judgment remaining unsatisfied. For installments, interest accrues on the date each installment is due. This is a simple interest, not a compound interest.

Simple interest is interest paid only on the original principal, not on the interest accrued. Compound interest is calculated on the initial principal and also on the accumulated interest of previous periods of a deposit or loan.

**Compensatory Damages**

*Excessive Compensatory Damages are not Punitive in Nature*

Molzof: Wife sues government under Federal Tort Claims Act (which waives sovereign immunity) for damages after veteran hospital’s *negligence* results in husband’s brain death. State law determines liability but federal law determines definition of “punitive damages” which are prohibited by the FTCA, a federal statute. Under common law, punitive damages punish intentional or egregious misconduct. Here, the wife simply seeks excessive compensatory damages.

 Excessiveness principles affect only the amount, and not the nature, of the damages that may be recovered.

*Compensatory Damages in Contract Cases*

American List: Start-up agreement breached. U.S. News claims “lost future profits,” which are special damages, are not compensable absent a showing they were reasonably foreseeable and contemplated by the parties at time of contract formation. However, when the non-breaching party seeks only to recover money that the breaching party agreed to pay under the contract, the damages are general. Here, American List seeks value of performance, not additional losses.

 General: market value of the performance promised; Special: additional losses incurred as a result of the breach.

*Compensatory Damages in Tort Cases*

Wheeler: Milkman fell during delivery. Jury violated Eisele rule by awarding special damages without general damages. Majority: Flexible approach allows juries to deny general damages if unsupported by evidence. Minority: Reversal per se.

 General: noneconomic—pain and suffering, emotional distress; Special: economic—medical bills; lost wages.

*Contract and Tort as Alternative Actions*

GNC: Legal malpractice action. Breach of contract may be breach of duty to client. Special relationship between contracting parties gives rise to separate duty of one party to the other. Note: Different statutes of limitations/damages.

*Limitations on Negligence Recovery in Contract Actions*

Erlich: Breach of contract to build a house—negligently built dreamhouse caused economic injury and property damage. Buyers want damages for emotional distress, but foreseeability does not create an independent tort duty. Thus, the available damages for defective construction are limited to cost of repair/diminution in value. Rationale: Predictability.

 Majority/general rule: Emotional distress damages are not available in breach of contract actions.

Exception: Emotional distress damages permitted when emotional tranquility was the purpose of the contract.

*Economic Loss Rule*

A preexisting contractual relationship, without more, will not support a recovery for mental suffering where the defendant’s conduct results only in economic injury (e.g., medical bills, lost wages, etc.) to the plaintiff. Note that a breach of contract accompanied by an intentional tort, such as fraud, would allow a court to award tort damages.

*Principles of Measurement (Fact of Damage and Measure of Damage)*

Johnson/Baker: Wife loses daughter’s college tuition during divorce due to lawyer’s negligence. Daughter enrolled in 2 year program with no reasonable certainty she will transfer to a 4 year college. Thus, she cannot prove fact of damage.

Takeaway: Plaintiff must prove (1) fact of damage to a reasonable certainty; and (2) measure of damages.

*Reasonable Certainty (Fact of Damage) vs. Reasonable Estimate (Measure of Damage)*

River Golf: Express warranty for sod seed. UCC recognizes goodwill as an inconsequential damage. Defendant concedes fact of damage. Plaintiff measures damages with expert testimony. Defendant objects to credibility—a question for jury. The court holds reasonable certainty only required for the fact of damage. Jury may fix amount with less certainty. The plaintiff need only show a stable foundation for a reasonable estimate of the damage incurred as a result of the breach. It may not be too conjectural or speculative to form a sound basis for measurement. It must be just and reasonable.

 Caveat: The New Business Rule requires lost profits for a new business to be proved with reasonable certainty.

**The Collateral Source Rule**

The collateral source rule is a substantive rule of damages and a rule of evidence. As a rule of damages, it forces the defendant to pay for the entire loss to the plaintiff, even if the plaintiff has received compensation for some or all of the loss from an independent, collateral source. As a rule of evidence, it precludes the introduction of evidence that could be prejudicial to the plaintiff regarding compensation for the loss that the plaintiff has received from a collateral source.

Helfend: The rule does not promote double recovery. Underlying policy rationales are (1) encouraging the purchase of insurance; (2) protection from subrogation clauses; (3) compensating legal fees; and (4) deterring potential tortfeasors. Likewise, juries tend to use economic damages as a metric for noneconomic damages.

*Extending the policy rationales to charity*

Arambula: Plaintiff injured in car accident and can no longer work at the family business. They continue to pay him, but he nevertheless sues the driver for lost wages. California held the rule applies to protect private charitable assistance, even if there is no expectation that the donors will be repaid upon recovery. Otherwise benefits go to the tortfeasor.

 Note: Charity includes gratuitous services, such as free nursing care provided by the family, not just money.

Exceptions: (1) Free government services (minority rule exception that is not applicable in California), e.g., special education classes at public school, Medicaid, welfare, etc. but not things like Medicare or social security; (2) By statute, as a part of tort reform, the collateral source rule does not apply in medical malpractice cases in California. § 3333.1.

*Majority/California apply CSR in Contract Cases*

Metoyer: The fact CSR has a deterrent purpose does not make it punitive in contract cases. Minority jx: Opposite result.

**Defenses to Compensatory Damages**

*Offset the Benefits Rule (i.e., offset benefits flowing from the tort or breach)*

Chaffee: Negligent sterilization. Unwanted healthy baby. Seeks (1) cost of pregnancy and delivery; and (2) cost of raising.

 Majority: Mom recovers cost of pregnancy/delivery, but not raising. 2nd Restatement: “mitigation of damages.”

 California: Mom recovers all costs incurred, including the cost of raising, without any offset for the benefits.

 Minority: Mom recovers nothing. Damages speculative, disparity btwn injury & conduct, children not damage.

*Duty to Mitigate Tort Damages*

Doctrine of Avoidable Consequences: A person injured by another’s wrong is obliged to exercise ordinary care to seek medical/surgical treatment to cure & minimize damages. Failure/refusal to do so bars recovery for the consequences.

Albert: Unless medical care poses risk of death, extraordinary suffering, or no reasonable prospect of success.

*Duty to Mitigate Contract Damages*

Seller: The seller has a duty to attempt to find a substitute buyer. Good faith efforts reimbursable as incidental damages.

Buyer: The buyer has a duty to attempt to find a substitute seller. Good faith efforts reimbursable as incidental damages.

**Punitive Damages**

Conduct constituting contract breach must constitute an independent tort where punitive damages are recoverable.

GENERAL COMMON LAW RULE: Punitive damages available in tort: (1) D acted at least recklessly and compensatory damages awarded; or (2) D acted intentionally and at least nominal damages awarded. Some jx statutory limitations.

 Exception: Cannot be grossly excessive based on (i) reprehensibility; (ii) damage ratio; (iii) crim/civil penalty.

*D acted intentionally and at least nominal damages awarded*

Jacque: Mobile home merchant trespassed across farm. Issued $30 citation. Jury awards $1 nominal and $100k punitive. When nominal damages are awarded for an intentional tort, punitive damages may be awarded at the jury’s discretion. Punitive damages must be fair and reasonable. Due process prohibits grossly excessive damages because too arbitrary.

 Majority policy: Punitive required to punish/deter minor intentional torts. Avoids vigilantes by enforcing rights.

 Minority jurisdiction: Compensatory damages required to recover punitive damages. Nominal alone insufficient.

*D acted at least recklessly and compensatory damages awarded*

State Farm v. Campbell: 3 Gore factors determine whether a punitive damages award violates the due process clause.

(1) Reprehensibility of misconduct; (2) Ratio between compensatory and punitive; (3) Similar civil/criminal penalties.

 Reprehensibility to plaintiff only—Damage physical or economic?; Conduct intentional or reckless?; Repeated?

 Punitive to compensatory ratio—Anything greater than 9:1 ratio is presumptively unconstitutional. Best if ≤3:1.

 Similar civil or criminal penalties—May not refer to evidence of dissimilar or out-of-state conduct; plaintiff only.

*“Nominal” Exception*

In TXO, the Supreme Court held it may be constitutionally permissible to award substantial punitive damages when only a small amount of actual damages has been awarded, e.g., a man firing a gun into a crowd is punished to deter bad acts.

Takeaway: >9:1 ratio may be okay when conduct is outrageous (in terms of potential harm) but injury is small.

*Post-State Farm Damage Awards*

The median award for punitive damages is 1:1.

80% of cases limit the punitive-to-compensatory ratio to 9-to-1 or less.

45% of cases limit the punitive-to-compensatory ratio to 3-to-1 or less.

*State Variations*

(A) No punitive damages; (B) No punitive damages unless provided by statute; (C) Dollar value caps; (D) Ratio caps

California (majority rule) has no bright-line cap at all. Federal constitution limits only (14th & 5th amendment DP).

**Liquidated Damages**

A contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty. A liquidated damages provision will usually be enforced provided two criteria are satisfied: (1) that at the time of contracting the actual damages flowing from a breach were difficult to ascertain; and (2) that the sum agreed on as liquidated damages represents a reasonable forecast of damages expected to occur in the event of a breach. Where damages are easily ascertainable, and the amount provided for is grossly disproportionate to actual damages, or unconscionably excessive, the court will award the aggrieved party no more than its actual damages. Defendant’s burden to show that the amount of liquidated damages is unreasonably and grossly disproportionate to the real damages from a breach or unconscionably excessive. Note: generally disfavored.

NPS: 10 year season tickets. Acceleration clause anticipates worst case scenario for actual damages. No duty to mitigate (unless unenforceable). Buyer breaches after 1st year. Liquidated damages enforceable when (1) actual damages uncertain at time of contract; (2) reasonable forecast of actual damages; not so disproportionate as to be punitive.

 General rule: Lump sum amounts struck down as punitive; flexible amounts (e.g., based on severity) upheld.

**Compensatory Damages for Physical Injury**

Compensatory, lump-sum award for all damages for personal injury, including damages expected to accrue in the future.

The same elements recognized as recoverable in any tort claim for personal injury (e.g., negligence, products liability.)

Elements: (1) Loss of wages or earning capacity; (2) Medical bills related to injury; (3) General pain and suffering.

 Past economic loss—pre-judgment interest; Future economic loss—no adjustment (because interest = inflation).

*General/Special Damages and Future Productivity Increases*

McDonald: Pain and suffering includes compensation for mental anguish, inconvenience, disfigurement, humiliation, and loss of enjoyment of life. Past and future general damages awarded in a lump-sum amount. No time value adjustment.

McDonald: Past medical bills, past loss wages (including benefits) awarded in lump-sum amount. Pre-judgment interest.

McDonald: Estimate of future medical bills and future lost wages awarded in today’s dollars. No post-judgment interest.

McDonald: Court divides future medical into (i) medical treatment; (ii) nursing care; (iii) equipment; (iv) architectural. Court divides lost wages into (i) actuarial table; (ii) fringe benefits; (iii) productivity factor increase, above inflation, including age, experience, skill, education, and industry. No award for domestic duties. No award for delay damages.

 Note: There were no delay damages because prejudgment interest is barred under the Federal Tort Claims Act.

**General Damages for Physical Injury**

Non-economic tort damages are often called pain and suffering. Generally non-formulaic, but per diem arguments ok.

2 elements: (1) Pain and suffering, i.e., physical discomfort and emotional response; (2) Loss of enjoyment of life, i.e., loss of ability to participate in and derive pleasure from the normal activities of daily life, including recreational activities.

 Pain and suffering is subjective; Loss of enjoyment of life is objective (e.g., coma patient unaware of loss OK).

*Per Diem Calculation of Pain and Suffering*

Debus: Pallet of boxes toppled over and caused permanent disability. A per diem argument is a tool of persuasion used by counsel to suggest to the jury how it can quantify damages based on the evidence of pain and suffering presented. Useful for “anchoring” large, seemingly reasonable damages. Maj: Sufficient safeguards. Min jx: Unfair gamesmanship.

Majority/CA rule: Permits per diem calculation of pain and suffering. CA medical malpractice cap 250k.

Substantial Minority rule: Does not permit because it is unduly prejudicial illusion of certainty of constant pain.

**Special Damages for Physical Injury**

Earning capacity is determined by what victim could (not would) have earned from the date of the tort to his death.

Lost earning capacity formula = earning capacity (adjusted overtime) x number of years until retirement x (1 - tax rate).

 **Earning capacity:** Lost wages not limited to job, if any, plaintiff had pre-injury; not limited to actual salary/wage.

 Not capped at current salary/job; includes changes in benefits, opportunities for raises, chances of getting fired.

 E.g., homemaker gets damages for domestic duties; students/children get damages for future lost employment.

Mitigation Doctrine: The duty to mitigate requires tort victims find alternative employment whenever possible.

 **Years until retirement:** Statistical average; plaintiff-specific facts include pre-existing injury, kids, other plans.

 **Tax (damages not taxed):** Federal reduces the wages/salary for taxes. States do not reduce the award for taxes.

**Compensatory Damages for Emotional Distress**

Traditional rule: Emotional distress damages recoverable only when caused by a physical injury.

Extends to physical contact 🡪 actual contact required.

Extends to zone of danger 🡪 imminent threat of injury; no contact required.

Extends to bystanders 🡪 must be near danger and witness actual physical injury to a close family member.

Extends to intentional infliction of emotional distress 🡪 intentional/reckless, extreme/outrageous conduct.

Extends to negligent infliction of emotional distress 🡪 negligent conduct/willful violation of statutory standard.

*Negligent Infliction of Emotional Distress (Majority/California Rule)*

This exception is applied in circumstances involving contractual relationships for services that carry with them deeply emotional responses in the event of breach. E.g., negligent delivery of a telegram announcing the death of a loved one.

*Physical Manifestations*

To recover damages for emotional distress, you have to prove physical symptoms. E.g., insomnia, vomiting, ulcers, etc.

**Compensatory Damages for Loss of Consortium**

General damages = loss of consortium & loss of society/companionship; Special damages = loss of services and support

*Loss of Spousal Consortium (Majority Rule)*

Traditionally, loss of consortium was a chattel action protecting the husband’s legal interest in his wife’s services.

DuPont: Today, courts and legislatures have allowed that each spouse has a separate and actionable right for loss of the material support and services of the other, including loss of companionship, sexual relations, and ability to bear children.

 Note: Majority/California rule only recognizes spousal/RDP loss of consortium for uninjured spouse/partner.

The minority rule recognizes the loss of parental consortium, i.e., the right of a minor or disabled child to the intangible benefits of the companionship, comfort, guidance, affection, and aid of the parent (or grandparent).

*Loss of Parental Consortium (Minority Rule)*

Belcher: This case declined to extend loss of parental consortium to a plaintiff that was not a minor or disabled child.

*Loss of Child’s Consortium (Small Minority Rule)*

A cause of action for the parent of an injured child under theory that children are going to care for their elderly parents.

**Survival Statutes and Wrongful Death Statutes**

Common law: (1) Tort claims dies with tortfeasor; (2) Tort claim dies with victim; (3) Family’s tort claims die with victim.

Survivorship statute: Tort claim survives the death of the tortfeasor and victim. The plaintiff becomes the victim’s estate.

Wrongful death statute: Separate cause of action for family members. Not entitled to damages recovered by the estate.

**California’s Survival Statutes**

§ 377.20: A cause of action for/against a person is not lost by reason of the person’s death, but survives subject to SoL.

§ 377.30: A cause of action that survives the death of the person entitled to commence an action passes to the decedent’s successor in interest and an action may be commenced by the decedent’s personal representative.

§ 377.34: In an action by a decedent’s personal representative/successor in interest on the decedent’s cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive damages that the decedent would have been entitled to recover had they lived.

 Note: Only special, economic damages survive the victim’s death. Pain and suffering are not recoverable in CA!

 However, CA follows the minority rule. The majority rule is that you CAN recover pre-death pain and suffering.

**California’s Wrongful Death States**

§ 377.60: A separate cause of action is created for the death of a person caused by the wrongful act of another. It may be asserted by the (1) decedent’s personal representative; (2) surviving spouse/domestic partner; (3) children; (4) issue of deceased children; or (5) persons who would be entitled to the property of the decedent by intestate successions.

§ 377.61: Damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under section 377.35. No double recovery! The court determines the respective rights in an award.

Takeaway: Wrongful death is an action for loss of consortium where the family member died from the injury.

*Survivorship Claim =/= Wrongful Death*

Quiroz: Gilbert died in a Santa Cruz nursing facility. Initial complaint was for wrongful death. Complaint amended with survivorship claim that missed statute of limitations. Does NOT relate back because the initial complaint was for Gilbert’s mother’s injuries. New claim is for Gilbert’s injuries. Note: Elder Abuse Act allows decedent pain and suffering recovery.

**Restitution**

Prima facie case for unjust enrichment: (a) defendant received a benefit; (b) at plaintiff’s expense; (c) under circumstances that would make it unjust for defendant to retain the benefit without paying legal/equitable restitution.

(1) Legal restitution: Quasi-contract “at law” creates an obligation to pay money for the benefit.

(2) Equitable restitution: Constructive trust returns the particular property or specific pot of money.

**Legal Restitution**

*Quantum Meruit Recovery*

Harrison: Oral contract between cohabitating couple for trust fund and payment for household services. No breach of contract under statute of frauds but under quasi-contract entitled to recover quantum meruit for value of her services.

*Quasi-contract =/= Implied-in-fact contract*

Unlike an implied-in-fact contract which is an actual contract manifested in conduct, the “quasi-contractual” quantum meruit theory operates *without* an actual agreement of the parties, which is sometimes called a contract implied at law because the obligation is defined in equity and good conscience and is imposed by law to prevent unjust enrichment.

*Damages are limited to the Market Value of Services*

Maglica: Contract price and the reasonable value of services rendered are two separate things. The legal test for recovery in quantum meruit is not the value of the benefit, but the value of the services that benefited the defendant.

Passante: The attorney for a fledgling baseball card company gratuitously arranged a needed loan for 100k at a crucial point in the company’s history; because the loan was made, the company survived and a grateful board promised the attorney a 3% equity interest in the company. The court held there was no enforceable contract because lawyers are not supposed to lend money to their clients. Instead, the lawyer had a quasi-contract claim limited to the market value of his loan, i.e., had the services been bargained for on the market, the going price would have been a reasonable finder’s fee.

*FMV Exception for Tortious Acquisition*

Olwell: Wrongful use of an egg-washing machine resulted in higher profits. Where the defendant tortfeasor has benefited by his wrong, the plaintiff may elect to “waive the tort” and bring an action in assumpsit for restitution.

In such cases, the measure of restitution is determined with reference to the tortiousness of the conduct:

**(1) Tortious acquisition of the benefit:** required to pay for what other lost, even if more than he benefited.

**(2) Conscious tortious acquisition of the benefit:** also deprived of any profit derived from using the property.

**(3) No more at fault than claimant:** he is not required to pay in excess of fair market value of the benefit.

*Class Hypos*

(1) D blameless in eyes of the law (contract-type scenario)

Recovery: Market value of goods or services

(2) D was negligent (non-intentional tort scenario)

Recovery: Plaintiff’s actual losses (market value + additional incidental losses); may retain profits

(3) D acted intentionally (intentional tort scenario)

Recovery: disgorgement of all of D’s benefit

**Equitable Restitution**

Equitable remedies involve a concept known as “tracing.” These remedies are characterized as constructive trusts, equitable liens, or subrogation, depending in large part upon the extent of the tracing.

**Constructive Trust**

A constructive trust is one that arises by operation of law against one who, by fraud, breach of fiduciary duty, or bad faith, has obtained or holds the legal right to property which he ought not in equity and good conscience hold and enjoy. If a recipient is unjustly enriched by the acquisition of legal title to specifically identifiable property at the expense of the claimant, he may be declared a constructive trustee for the benefit of the claimant’s property and its traceable product.

To warrant imposition of constructive trust over debtor’s property, a claimant must (1) show fraud/mistake in debtor’s acquisition of property; and (2) be able to trace the dollars into property or pro rata share for percentage of proceeds.

*Proving Unjust Acquisition by Clear and Convincing Evidence*

Shell: After finding by clear and convincing evidence that Hunter unauthorizedly divulged confidential information so other persons could acquire royalty and mineral interests, the court treated Hunter’s actions as thought he did them as Shell’s trustee, i.e., unauthorized leases and profits for leases that were sold to bona fide purchasers are owned by Shell.

*Pro Rata Share of Comingled Proceeds (50% of the premium = 50% of the pay-out)*

G&M Motor Company: Proceeds of life insurance policies where a portion of the premiums were paid with wrongfully obtained funds are distributed pro rata but not to exceed the total amount of embezzled monies, interests, and costs.

 Takeaway: Defendant always bears any loss; Plaintiff gets any traceable product, i.e., profit, due to the transfer.

*Restatement (Third) of Restitution*

Claimants of insurance proceeds are limited to the amount of their loss if the claim is from assets that would otherwise go to innocent dependents of a deceased recipient who paid the insurance premiums with wrongfully obtained money.

**Lowest Intermediate Balance Rule**

The lowest intermediate balance rule permits a claimant to trace trust funds deposited into a general account. Under this rule, any funds removed from the account are presumed to be the debtor’s personal funds to the extent these funds exceed the beneficiary’s equitable interest. Although new deposits are not subject to the equitable claim of the trust beneficiary, subsequent withdrawals are presumed to draw first upon the new funds. Applying the rule, the constructive trust beneficiary may retrieve the lowest balance recorded after the funds were commingled.

*Equitable Fiction*

Courts refuse to employ the lowest intermediate balance fiction where the commingled account is comprised largely of funds acquired from other fraud victims. If the competing claimants to the fund had been business creditors, rather than similarly situated defrauded creditors, the equities support the lowest intermediate balance rule. The rationale is the fiduciary’s creditors have accepted the risk of his solvency, while his cestuis have accepted only the risk of his honesty.

**Equitable Lien**

When misappropriated funds are commingled with other funds, either in an account or through purchase of property, the constructive trust extends only to the portion traceable to the misappropriated funds. When a constructive trust extends only to a portion of the property, it is generally known as an equitable lien, but still requires tracing.

*Restatement (Third) of Restitution*

If a recipient is unjustly enriched by a transaction in which the claimant’s assets or services are applied to enhance the value of particular property owned by the recipient, the claimant may be granted an equitable lien on the property.

*Equitable Lien for Personally Expended Funds*

Verity: Wife managed decedent husband’s property under belief she was a joint owner. Where a relation of confidence has been abused, and a person has never had title to the property but expended money in the improvement on the basis of an oral promise to convey, but improvements do not constitute the entire consideration for the interest claimed, she is entitled not to a conveyance of the property, but to an equitable lien thereon for the amount expended.

**Defenses to Equitable Restitution**

(1) The beneficial services were conferred gratuitously (i.e., as a gift or as a volunteer)

Vortt: Services rendered during business negotiations; expected payment does not have to be immediate or monetary.

Lirtzman: Services rendered gratuitously in hopes of more future business; no quasi-contract or expectation of payment.

Dusenka: Wife #2 wants payment for family business service; no desire for payment until son’s inheritance; no recovery.

Kuder: Marriage means services between spouses are personal and not compensable; rebuttable gift presumption.

(2) Bona fide (third party) purchaser for value

**Declaratory Judgments**

The primary purpose of the declaratory judgment remedy is to determine rights, obligations, and status. Thus, it is a “preventive,” rather than a coercive remedy. Traditionally, the remedy was used to determine questions of status, property rights, and the validity of wills or other legal instruments.

Minority Law: California follows CA Code of Civil Proc § 1060

Majority Law: Uniform Declaratory Judgment Act; 28 U.S.C. § 2201; FRCP 57

Remedy: To determine status, rights, obligations, scope, and/or meaning of a law, contract, will, deed, or patent

Effect: The judgment is conclusively binding on the parties through res judicata/issue preclusion

Judicial Review: SCOTUS may exercise appellate jx over a high state court’s declaratory judgment (Nashville v. Wallace)

Defenses: (1) Statute of limitations (on concurrent legal remedy); (2) Doctrine of laches

*Issue Preclusion*

Restatement (Second) of Judgments § 76: A declaratory judgment is conclusive in a subsequent action as to the matters declared and any issues actually litigated by them and determined in the action. (The Restatement’s issue preclusion does not bar claims that were not adjudicated, even though they could have been asserted in the complaint.)

*Case or Controversy Requirement*

The Constitution (Article III, Section 2) limits the exercise of the judicial power to “cases” and “controversies.” Likewise, the Declaratory Judgment Act explicitly requires “cases of actual controversy” in federal court, i.e., may not be abstract, hypothetical, academic, or moot. The facts alleged must show a “real and substantial” controversy between the parties having adverse “definite and concrete” legal interests of sufficient immediacy to warrant a declaratory judgment.

 Steffel: The plaintiff must “reasonably fear an imminent suit” from the prosecutor or declaratory defendant.

*Declaratory Judgments are Discretionary*

A district court has broad discretion to grant (or decline to grant) a declaratory judgment. Discretion is typically not exercised when: (1) the action to interpret state law, filed in federal court, is duplicative of an action already in state court between the same parties; (2) the party seeks a declaration that an action taken by another party, that already happened, was negligent or a breach of contract; (3) the actions a declaration that a government actor, with qualified immunity, violated a constitutional right; (4) no threat of arrest/jail time, prosecution, or enforcement by private party.

*Right to Jury in Declaratory Judgments*

The right to jury varies b/c a declaratory judgment is a modern, statutory remedy that can be either legal or equitable.

Beacon Theatres Test: What remedy would the plaintiff have been seeking if declaratory judgment did not exist?

e.g., Trespass = nominal damages = legal (RIGHT TO JURY) / Nuisance = injunction = equitable (NO JURY RIGHT)

**Remedies for Tortious Wrongs**

Interference with PERSONAL property: When a plaintiff sues for interference with personal property interests, he or she can bring a cause of action for strict liability, negligence, recklessness, or for the commission of an intentional tort.

**Conversion**

Conversion requires an intent to exercise dominion or control over goods which is inconsistent with the true owner’s right. The intent required is not a matter of conscious wrongdoing, but willfulness entitles plaintiff to punitive damages.

**Compensatory Damages**

The general measure of damages for conversion is the market value of the personal property at the time of conversion. If the plaintiff is a merchant, the wholesale price may be the fair market value, but if the plaintiff is a consumer, the retail price may be the fair market value. Plaintiff is also entitled to prejudgment interest for compensatory damages.

*Fair Market Value at Time of Conversion*

Terrell: Tschirn’s Camaro was partially dismantled by Terrell, an auto salvage business owner. In a suit for conversion, plaintiff bears the burden of proof as to the amount of damages. The value of the personal property at the time and place of conversion must be shown to prove the extent of damages. Tschirn used a sales receipt instead of the car’s Blue Book price. As a result, the evidence was insufficient for the jury to “reasonably and competently” assess damages.

*Fluctuating Value*

Fawcett: When converted goods have a fluctuating value, such as stocks, courts have supplemented the general rule to provide a more equitable remedy to the injured party. In a falling market, it would be inequitable to provide the injured party with less than the value of the stock at the time of the conversion. In a rising market, it is most equitable to both the perpetrator and the injured party to determine damages within a reasonable time after the injured party should have known of the conversion. Plaintiff may choose either measure of damages for property with value that fluctuates.

*No Secondary Market*

DeSpirito: The general measure for damages for destruction of personal property is the difference between its fair market value just before destruction and its fair market value immediately after. “Used household items” exception: Recovery of the owner’s actual value (i.e., replacement value/the cost of a new item), excluding sentimental value.

*Objective Sentimental Value*

Campins: Sentimental value is recognized where items are generally capable of generating sentimental feelings, not just emotions peculiar to the owner. The California/majority rule recognizes sentimental value damages generated by heirlooms, family papers, photographs, and trophies. Indy car championship rings fall under the rubric of trophies. Courts award damages based upon the consideration of the “blood, sweat, and tears” expended to win these objects.

*Damaged Property needing Repairs*

Farmers: Dealership car damaged during test drive. Recovery is whichever amounts to less: (1) cost of repairs only (usually repairs greater than value of the car); or (2) diminished market value (i.e., new vs. damaged/before vs. after).

In other words, if the cost of repairs are greater than the diminished market value, plaintiff may only recover the latter.

Restatement (Second) of Torts: When one is entitled to a judgment for harm to chattels not amounting to destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or the reasonable cost of repair or restoration, and (b) loss of use, e.g., cost of renting a substitute and/or loss of profit from no use until repairs or a new purchase is made.

**Legal Replevin**

General procedure: Complaint → ex parte hearing before judge → explains ownership of disputed goods → posts bond → sheriff enters property & seizes goods → adversary hearing → counterbond posted to recover property pending trial

 Common law overwritten by statute: California Code of Civ. Proc. § 572.010; Federal Rules of Civ. Proc. § 64.

 Constrained by Fourteenth Amendment due process.

*Replevin is not duplicative of Repossession*

Repossession is not a remedy

Repossession is strictly limited by law (e.g., laypersons may not enter private property, breach the peace, etc.)

*Replevin is not duplicative of Restraining Orders*

TROs maintain the status quo and do not repossess

May be used in conjunction with legal replevin to maintain personal property prior to seizure by the sheriff

Obtaining a TRO is more difficult than obtaining legal replevin

*Due Process*

Fuentes held due process requires prior notice and an adversary hearing before the sheriff can seize property.

Mitchell defines the procedural safeguards necessary to satisfy minimal constitutional due process requirements:

(1) The complaint must contain nonconclusory allegations of ownership/possessory rights (bare assertion not enough);

(2) The request for replevin must be presented to a judge who decides whether to authorize the seizure;

(3) Plaintiff must post a bond to protect the defendant against damages caused by an improper seizure;

(4) Defendant must be entitled to an immediate adversary hearing in which the plaintiff bears the burden of proof;

(5) Defendant must have the opportunity to counterbond in order to retain possession of the proper pending trial.

 Note: Modern Dust Bag denied counterbond when necessity for articles was personal, immediate, & continuing.

 “To permit the defendant to retain the receipts pending trial would cause plaintiff to suffer irreparable injury.”

*Monetary Recovery*

If granted replevin of personal property, plaintiff is allowed to recover general compensatory damages for depreciation in FMV and special compensatory damages including loss of use and attorney’s fees. No emotional distress. No punitive.

**Equitable Replevin**

The equitable replevin remedy compels the defendant to deliver a chattel when it has been demonstrated that the plaintiff has a special need for it. It operates in personam and is enforceable through the court’s contempt power.

Mandatory – Δ must deliver pending trial on merits

Prohibitory - Δ prohibited from alienating, selling, harming, or disposing of property pending trial on merits

**Interference with REAL Property & Environmental Interests**

**Trespass to Land**

*Cost of Repair vs. Diminution in Market Value*

Myers: Unwanted truckloads of concrete dumped on empty lot where plaintiff intends to build a house. The fact one-half acre of plaintiff’s property was covered with concrete would have no great effect on its value for resale purposes.

Permanent/nonpermanent dichotomy test: If permanent, the measure of damages is the market value of the realty before the injury less its market value after the injury. When the injury is nonpermanent, the measure of damages is the cost of restoring the property to its original condition, up to its full market value before injury, OR the diminution in market value, whichever is more. Policy: Real property is unique, sentimental, fixable, etc.

 Minority rule: Plaintiff must reside on the real property; only homesteads recover whichever is more.

 Minority rule: The same rule for personal property applies to real property; must choose lesser recovery.

*Special Consequential Damages*

In addition to general compensatory damages, other types of damages are available in trespass actions: (1) Cost of rent until repairs are complete; (2) Lost profits if for a business; and/or (3) Emotional distress and punitive damages if willful.

**Ejectment**

*Encroachments*

Ejectment is a legal remedy for trespass that affords a plaintiff specific relief after there has been a trial on the merits. It is the proper remedy for removal of an encroachment on the land of another where (1) a party is legally entitled to possession of the land in question; and (2) possession of the realty has been wrongfully detained. Executed by sheriff.

*Executed at Sheriff’s Discretion*

The sheriff will usually return an execution unsatisfied and refuse to deliver possession by taking down the encroaching structure because it would subject him to an unreasonable risk to do so. Therefore, there is no adequate remedy at law. In equity, the obligation to remove can be placed directly on the party through a mandatory injunction. This is an exception to the general rule that equity will not grant possession by injunction. Defenses: (1) Laches; (2) Hardship.

 If the injunction is denied, the court will order a forced sale of the land or a lien on encroaching structure.

 Goulding: When bad faith encroachment is significant, court can issue injunction without balancing hardships.

*Balance of Hardships (Good Faith Defendant)*

The balance of hardships tips in defendant’s favor if encroachment is *unintentional* and “truly minimal,” e.g., inches.

*Damages*

Legal: cost of repair or diminished market value, whichever is larger.

Equitable: Injunction (limited to “substantial” and/or intentional trespass)

Restitution: IF Δ wants to buy the improvements (building) → equitable lien;

IF Δ wants to sell the land under the improvements → conditional injunction

**Nuisance**

As a matter of substantive law, a nuisance is defined as an unreasonable interference with the use and enjoyment of land as distinct from an interference with possession, which has traditionally been allocated to the trespass action.

*Defenses*

Affirmative defenses: (1) coming to the nuisance; (2) statute of limitations; (3) doctrine of laches; (4) right to farm statutes, i.e., statutory immunity from being held liable for public nuisance if running a reasonable agricultural business.

*Statute of Limitations*

Temporary sporadic nuisance: Multiple claims are permissible

Permanent: One claim only; statute of limitations begins running when nuisance starts

**Nuisance Damages for Past Harm**

*General Compensatory Damages*

Permanent nuisance: Diminished market value or diminution in rental value

Repairable nuisance: [Majority] Cost of repair or diminished market value, whichever is less;

 [Minority/CA] Cost of repair, as long as repair conceivably at reasonable cost by reasonable means

*Special Compensatory Damages*

Most courts routinely allow the plaintiff to recover both depreciated value and physical discomfort or illness.

**Nuisance Injunctions (Specific Relief)**

(1) Unconditional, balancing of hardships tips in favor of plaintiff if the nuisance is at all “substantial”;

(2) Experimental decree, e.g., Boomer dissent wanted to give cement plant 18 months to find solution;

(3) Conditional, dissolvable, e.g., Boomer majority gave option to avoid injunction by paying permanent damages;

(4) Conditional, purchasable, e.g., Spur gets injunction based on proof of nuisance liability & paying cost of compliance.