

## Remedies Outline

- 1) Choice of law
  - a) In federal court, remedies are considered a part of substantive law
  - b) Equitable claims are before a judge and subject to constitutional considerations
  - c) Constitutional jurisdictions consideration
- 2) Procedure
  - a) Remedies usually have to be asked for in the pleadings
  - b) One satisfaction rule, though background rule is that Plaintiff and Defendant and
- 3) Factors in injunctions
  - a) Purpose
    - i) Compensatory damages is to make Plaintiff whole
    - ii) Punish
    - iii) Theories of remedies
      - (1) Traditional ethical views of life
        - (a) Concept of corrective justice
        - (b) If there is a wrong, there is a remedy
        - (c) Having remedies has a moral force
      - (2) Marketplace justice (law and economics)
        - (a) Remedies are simply alternatives to action, in general
        - (b) Has to do with alternatives
          - (i) If one is willing to pay for taking certain kinds of actions that is fine.
          - (ii) Cutting neighbor's trees is not *wrong* but an alternative
          - (iii) Problem comes in Pinto case wherein it was slightly less to let people die
  - b) Purpose
    - i) there are parameters to discretion
      - (1) sound legal principles
      - (2) if there is a law the objectives of the law
      - (3) meaningful standards
    - ii) limitations
      - (1) meaningful standards
      - (2) should only aim for the rightful position and no more
      - (3) court should do whatever is effective
  - c) Limitations
    - i) Timing
      - (1) A court can become a roving commission to do good
        - (a) Once a court exercises jurisdiction, all of the remedies are open to it – whether or not the underlying wrong has disappeared momentarily<sup>1</sup>
        - (b) *equity delights to do justice and not by halves*
        - (c)
    - d) Effect on nonparties
    - e) Public policy considerations
- 4) Legal compensatory damages (Substitutionary v. specific)
  - a) Needs to be a specific way of determining damages<sup>2</sup> -- not based on emotion
  - b) Factors in determining whether substitutionary v. specific remedies are necessary
    - i) What makes something irreplaceable is that there is no legal remedy for it  
What makes something irreplaceable is that there is no legal remedy for it
      - (1) Note that with property than you not only have a right to possession and dominion, you also have immunity from injury to that property
  - c) Substitutionary

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<sup>1</sup> Baily v. Proctor

<sup>2</sup> Hathaley

- i) Attempt to put parties in Rightful position
- ii) With respect to value, one looks to fair market value
  - (1) Fair market value fails in some cases
    - (a) However, can calculate fair market value even if the physical good doesn't exist<sup>3</sup> -- and can get tort damages
  - (2) Examples where fair market value fails
    - (a) Bad or defective property
      - (i) **Lemon** effect: if the car is damaged to the extent that it can no longer be used, but because the fact that it is used (and depreciated property) they get book value – which won't be exactly the same as the car that they have
    - (b) Used property
      - (i) note: if damages are building up over time, it is good that each person who does damage to it pays because otherwise the last tortfeasor will be responsible for the full amount<sup>4</sup>
    - (c) Depreciated property
      - (i) note: if damages are building up over time, it is good that each person who does damage to it pays because otherwise the last tortfeasor will be responsible for the full amount<sup>5</sup>
    - (d) Eminent domain
      - (i) No consequential damages
    - (e) Discounted value
    - (f) Fluctuate property -- various rules
      - (i) We set the value at the time that the damage occurred
      - (ii) Highest value between time of the value and filing of complaint
      - (iii) NY: time of the loss is where there is the highest value, from when you learn of the loss, and when you take reasonable steps to mitigate the loss
      - (iv)
    - (g) Special purpose property is defined as as used for a purpose that people wouldn't normally use it for (for example residence or business)
      - (i) in this case the cost of reproduction less depreciation has been utilized as appropriate measure of damages<sup>6</sup>
      - (ii) note: if damages are building up over time, it is good that each person who does damage to it pays because otherwise the last tortfeasor will be responsible for the full amount<sup>7</sup>
    - (h) Negotiated damages
      - (i) Can limit consequential damages in uniform commercial code 1-106
      - (ii) Replacement cost would be what would measure the rightful position
      - (iii) If you have an insurance policy, and the policy is for replacement or repairs, than you would get more money than possibly fair market value
      - (iv) If you had a policy that didn't cover repairs, you might get depreciated value (for example book value for what the property is worth given its condition)
      - (v) Can negotiate to have no damages (for example airline tickets)
    - (i) In some cases sentimental value is determined in this area
- iii) In looking for damages there is the concept of mitigating damages
  - (1) With respect to the heard there was a discussion that the families should have tried to do something
  - (2) Need to take steps to mitigate damages because the defendant should only pay for the harm that they have created, and to do otherwise would be unfair
    - (a) With respect to otherwise would be unfair
- iv) Unjust enrichment

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<sup>3</sup> Penzoil

<sup>4</sup> Trinity Church

<sup>5</sup> Trinity Church

<sup>6</sup> Trinity Church

<sup>7</sup> Trinity Church

- (1) Benefits that may be a form of unjust enrichment -- election belongs to the Plaintiff<sup>8</sup>  
 (they can change theories in the middle of the suit unless there is prejudice to the defendant)
- (a) Profits
  - (b) From unlawful acts (conversion as in *Orwell*)
  - (c) Crime
  - (d) Fraud
  - (e) Extortion
  - (f) Tort
    - (i) Breach of fiduciary duty
    - (ii) Mistake
      - 1. Maxim restitution is not available to a mere volunteer
      - 2. There is a statute in NY
  - (g) Reasons why restitution is good
    - (i) Defendant's gain exceeds Plaintiff's loss
    - (ii) Sometimes the only reason (esp. where one is the breacher)
- (2) Possible remedies
- (a) Constructive trust – goes beyond bankruptcy, but must be a real constructive trust, not just a trust in name<sup>9</sup>
    - (i) Violation of agreement or non-compete or non-disclosure<sup>10</sup>
    - (ii) Probably not a good idea for BREACH OF CONTRACT because it ignores the doctrine of efficient breach
    - (iii) Will be ahead of bankruptcy creditors and is not subject to ratable distribution
    - (iv) Presumption is that any money withdrawn is not the Plaintiff's money
      - 1. All you have to do is figure out is that it went into a general account, and things can be traced from there. – everything else is a compartment in a cash register
        - a. Cash on hand and deposit in the bank
        - b. Securities and other forms of intangibles are another fund
      - 2. Does not apply to Erisa issues: If they had invested in assets that were exempt from execution (e.g. ERISA accounts) there is some point that by operation of law that they can't be traced
      - 3. There are no limits, but it does get harder and harder to trace
        - a. It would be considered that they use the money that belonged to the trust and not the money that belonged to the defendant
        - b. If there is less than 20k, than the estate might lose their money
        - c. If the money is identified as money that is from a specific statute, the presumption still operates that the money that was lost not the taken money
  - (b) Accounting for profits for example in trademark cases<sup>11</sup>
    - (i) Statutory remedy for Trademark violations can recover profits, even if the profits didn't come directly from the injured party's sales
  - (c) Rescission – will reverse the transaction
    - (i) Reasons for rescission
      - 1. Fraud
      - 2. Impossibility
      - 3. Substantial breach of something with really inadequate consideration (e.g. \$1 and love and affected)
        - a. Fundamental breaches at the contract at the Plaintiff's option (e.g. termites in the house)
        - b. Remedy can also be to equitable lien on the property

<sup>8</sup> Orwell

<sup>9</sup> North American Coin and Currency

<sup>10</sup> Schepp v. US

<sup>11</sup> Maer Brewing

4. Breach of contract there usually isn't rescission as a remedy
  - a. Equity abhors a forfeiture
  - b. Breaches of a losing contract end up being good for contractors since they get the value of their work<sup>12</sup>
- (ii) No rescission for the following
  1. No rescission for misrepresentation to an insurance company<sup>13</sup>
  2. Statute of limitations and statute of frauds
    - a. But if the recovery is based on an equitable claim such as quantum meruit, the statute of frauds and the statutes of limitations do not apply<sup>14</sup>
    - b. Dissent in *Farash*: if the parties were all institutions there is no reason to resort to Quantum Meruit
  3. *Laches*
    - a. E.g. if the situation involved fraudulently sold stock, this would provide an opportunity for the buyer to choose between rescission and damages
  4. Practical impossibility<sup>15</sup>
- (d) Restitution – won't get future benefits
  - (i) Since this is a reversal of the contract any liens that were placed on the property after the contract evaporate<sup>16</sup>
    1. Will get deduction for benefits conferred on the property
  - (ii) Restatement: a party who has not conferred a benefit may not obtain restitution, but may have an action for damages, including reliance<sup>17</sup>
    1. Can make award in quantum meruit<sup>18</sup>
  - (iii) Restitution Usual measure of damages in intellectual property cases
  - (iv) Shifts the burden of determining where profits came from to the defendant (to show that they didn't come from the misappropriated property)<sup>19</sup>
    1. Will disgorge completely if there is no showing of loss<sup>20</sup>
      - a. Taxes cannot be deducted as they are difficult to calculate and not apportionable
  - (v) Other things that can't be deducted
    1. Note: partnership shares cannot be deducted from unjust enrichment restitution
    2. Fixed costs can't be deducted – unless there is a showing
    3. If there is a deliberate destruction of records they get all the records
- (e) Equitable lien
- d) Specific
  - i) Specific performance
    - (1) Requirements
      - (a) Unique good
        - (i) Uniqueness should have conditional significance<sup>21</sup>
        - (ii) But something isn't a personal service contract if it is just a requirement to sell something<sup>22</sup>
      - (b) Whether or not it is controlled by one party

<sup>12</sup> Boomer

<sup>13</sup> Mutual Benefit Life Insurance Corporation:

<sup>14</sup> Farash

<sup>15</sup> Farash

<sup>16</sup> Hicks

<sup>17</sup> Restatement SOCntracts § 370

<sup>18</sup> Farash

<sup>19</sup> Sheldon v. MGM

<sup>20</sup> Sheldon v. MGM

<sup>21</sup> Campbell Soup

<sup>22</sup> Thompson

- (c) Can't really enforce a ldc in equity for specific performance
- (d) Specific performance becomes unavailable in a lease where damages are not an adequate remedy<sup>23</sup>
- ii) Note: in federal eminent domain cases replacement cost of the land is not the proper remedy unless there is<sup>24</sup>
  - (1) No ascertainable value<sup>25</sup>
    - (a) Would be necessary to determine the fair market value of the old property to provide a basis for comparison
    - (b) Problems with eminent domains
      - (i) cost of replacement is not how you measure value, but it leaves the door open for the way that you possible can measure value but O'conner says that the 5<sup>th</sup> amendment requires a make whole remedy
        - 1. There are exceptions to the general rule that fair market value in eminent domain cases
        - 2. There are no consequential damages – if the government takes it you get nothing for the business
          - a. The sense of stopping the business would be a consequence of the taking of the property
          - b. In trade secrets cases there is no concept of consequential damages
      - (ii) With respect to compensatory damages, if there are various ways of measuring damages, **one is made whole is the least expensive way** – and the defendant will be interested in that
    - (2) Duty to replace<sup>26</sup>
  - iii) Various types of remedies – but ii) there is a rule that applies that the defendant is usually intended to have Plaintiff made whole in the least expensive way<sup>27</sup> (might not be an implied to duty to restore the same property back to its original conditions)
    - (1) Value of the property taken
    - (2) Value of the property destroyed
    - (3) Difference between the contract price and the market price
    - (4) Others in uniform commercial code and caselaw
    - (5) There are situations where market value will fall short of reaching what the rightful position is
    - (6) There are some rules that will apply to these situations
    - (7) Value is the aspirational goal in bringing Plaintiff back, but in reality this doesn't happen
  - iv) Tort damages
    - (1) Constitutional issue
      - (a) In § 1983 actions, actual damages are required<sup>28</sup>
      - (b) Cause of harm must be the denail of civil rights
      - (c) Are entitled to nominal damages for no extensive damages
        - (i) Can get attorney's fees and punitive damages
  - e) Reliance damages
    - i) Essential reliance
    - ii) Incidental reliance
  - f) Expectancy
    - i) **Old fraud and expectancy**
      - (1) **theory is that you can't have expectancy damages in something that could never have happened**
      - (2) now under § 10(b)(5) you can get expectancy

<sup>23</sup> Van Wagner

<sup>24</sup> US v. 50 Acres

<sup>25</sup> US v. 50 Acres

<sup>26</sup> US v. 50 Acres

<sup>27</sup> O'Brien

<sup>28</sup> Carey

- ii) two-sale rule: where there are commodities, and demand is limited the measure of damages is the profit<sup>29</sup> -- from uniform commercial code § 2-718
- iii) buyer can produce evidence that the tendered value exceeded the agreed upon price<sup>30</sup>
  - (1) it would seem that the more representations that a seller makes, the higher damages that a buyer is entitled to
- g) consequential
  - i) In trade secrets cases there is no concept of consequential damages
  - ii) important issues<sup>31</sup>
    - (1) Causation<sup>32</sup>
    - (2) Foreseeability<sup>33</sup>
    - (3) Remoteness<sup>34</sup>
      - (a) When you are dealing with a debt, you are only entitled to the principle plus the interest, not any possible money made from other investments<sup>35</sup>
        - (i) Damages that result from non-payment may include consequential damages – as the Plaintiff will sustain additional damages due to an unavailability of funds, but this must be foreseeable
        - (b) If there are unique items that are necessary to complete the project there might be consequential damages that were accrued because of the breach of the contract (for example can't say "I will give you back your money with principle and interest")
          - (i) LDC might eliminate interest
        - (c) Unique goods might be necessary to complete a project
        - (d) However, can calculate fair market value even if the physical good doesn't exist<sup>36</sup> -- and can get tort damages
      - (4) Avoidability<sup>37</sup>
    - iii) Laycock: more speculative, less certain, more remote, and more likely to have been avoidable if Plaintiff had been more diligent
- 5) Equitable damages
  - a) Restitution
    - i) Restores to the Plaintiff all that the Defendant gained at the Plaintiff's expense
  - b) Sovereign immunities
    - i) Can award equitable recoupment, not damages (but can't really look at equity) things have to be couched in terms of prospective relief<sup>38</sup>
      - (1) SC doesn't care whether or not something is called *equitable*—question is whether or not it takes money from the state treasury for something done in past *Edelman*
    - ii) Federal court action is not unconstitutional that seeks to enjoin the state if it is prospective only<sup>39</sup>
    - iii) Waiver of sovereign immunity
      - (1) Can waive explicitly
        - (a) Comes in the form of the tort claims act
        - (b) Constructive waiver of sovereign immunity doesn't exist because 11<sup>th</sup> amendment changed the law about sovereign immunity
      - (1) **taxes**: state has to provide some remedy where citizens want to sue for taxes
      - (2) definition of government
        - (a) Can sue a local government official in his official capacity

<sup>29</sup> Neri

<sup>30</sup> Chatlos

<sup>31</sup> Buck

<sup>32</sup> Buck

<sup>33</sup> Buck

<sup>34</sup> Buck

<sup>35</sup> Meinrath

<sup>36</sup> Penzoil

<sup>37</sup> Buck

<sup>38</sup> *Adelman v. Jordan*

<sup>39</sup> *Ex Parte Young*

- (i) Has to be the state that you are suing, not the state or the village for SI to kick in
  - (ii) Can't hold the state in contempt
  - (iii) Heads of agency are named in their official capacity, since they can be held in contempt
  - (iv) Government agencies that are separately incorporated can be sued directly (e.g. Port Authority)
- 6) Legal coercive relief
- a) Article 78 Proceedings
  - b) writs of mandamus to order officials of corporations or courts to perform ministerial duties
  - c) prohibition is defined as order to prevent a court or quasi-judicial agency from exceeding its authority
- 7) Injunctions
- a) Time to grant
    - i) Goals of injunctions
      - (1) Temporary injunctions before litigation
        - (a) Usually no review of a TRO, except if there is a problem with the procedure for granting<sup>40</sup>
          - (i) **always have to give notice to the government about a TRO**
          - (ii) may review prior restraint issues for the societal questions involved
        - (b) If the procedure is acceptable, but the result is not, one needs to go through the normal procedures<sup>41</sup>
      - (2) Preliminary injunction to preserve the status quo pending litigation
        - (a) Conventional criteria
          - (i) Strong likelihood of success on merits
            - 1. This might really be dispositive of everything – the less chance the court is wrong the greater the chance that this is right
            - 2. Possibility of irreparable injury to the Plaintiff if the preliminary relief is not granted
            - 3. balance of hardships
            - 4. Advancement of a public interest
          - (ii) 9<sup>th</sup> circuit's view<sup>42</sup>
            - 1. combination of success on merits and irreparable injury
            - 2. serious questions are raised and the balance of hardships tips sharply in its favor
        - (b) defining status quo
          - (i) normal: "last uncontested status which preceded the pending controversy"<sup>43</sup>
          - (ii) might compel injunctions for exceptional circumstances: Normal seems to be defined as the way things normally are (e.g. having claws, etc.)<sup>44</sup>
          - (iii) can be asked to maintain the state of action in some way or another
        - (c) court may require that a bond be posted, which is akin to an LDC
          - (i) in the case of malicious prosecution there is no requirement for a bond
      - (3) Preventative injunctions seek to maintain the status quo
        - (a) Maxim: equity follows law. First have to establish that there is a legal harm
        - (b) Rule of ripeness: Usually whatever harm is to be prevented has not occurred yet<sup>45</sup>
          - (i) Injury is real, or there is a propensity to commit this injury by the defendant
          - (ii) By a real threat
            - 1. Can prove by showing that it has happened in the past<sup>46</sup>
            - 2. Or that the defendant has a propensity to commit certain acts<sup>47</sup>

<sup>40</sup> Harold v. President of Princess Anne

<sup>41</sup> W. T. Grant

<sup>42</sup> LA Memorial Coliseum v. NFL

<sup>43</sup> Foundary Services

<sup>44</sup> Lakeshore hills

<sup>45</sup> Humble Oil

<sup>46</sup> Humble Oil

- (iii) Imminent or immediate
- (iii) Or of substantial certainty that the injury is **irreparable** -- that this isn't something that can be prepared<sup>48</sup>
- (f) Preventative injunctions against an employer or the government will probably not issue either
  - (i) for deference reasons
    - 1. Justice Marshall points out that the only grounds for appealing a TRO is if the TRO decides the merits of a case<sup>49</sup>
  - (ii) or for freedom of contract reasons<sup>50</sup>
  - (iii) because there is assumed to be no irreparable harm
- (4) Reparative (prophylactic) is defined as if the harm already has happened
  - (a) Prevent the occurrence of a wrong (constitutional or legal)<sup>51</sup> -- but equity should do justice and not by halves, so it should take care of the whole wrong at once
    - (i) A reparative injunction may be thwarted by a showing of *laches* -- if the defendant failed to act while the harm was occurring<sup>52</sup>
    - (ii) Must also balance the equities, and even the concept that the remedy would be so destructive and so dangerous that and so difficult to enforce, that it would not be granted
      - 1. If something was deliberate (such as encroachment) there will be no balancing of the equities<sup>53</sup> -- even if there are situations where one could take proper precautions (that might raise a defense in *laches*)
    - (iii) Court won't impose an undue hardship
    - (iv) Contracts must be precise to be enforced in specific performance<sup>54</sup> -- and they create a burden on the court if they do
  - (b) "head start" injunctions to enforce public policy goals (for example trade secrets)<sup>55</sup>
    - (i) one alternative is to demand that the employers never work on a product which would be inequitable<sup>56</sup> -- however, there should be minimal restraints of how the employees can utilize their skills
- ii) mootness: just because the harm has stopped doesn't mean that the harm can't be granted<sup>57</sup>
  - (1) if the defendant is free to go back to his own ways than mootness won't apply
  - (2) will look at the need for such an injunction
  - (3) will look at the certainty of the harm occurring -- must be shown in an objective way<sup>58</sup>
    - (a) will look at propensity to commit harm
    - (b) There is uncertainty as to whether a particular act itself is, or will be harmful
    - (c) The future action is harmful, but does the defendant intend this harmful act
    - (d) Fear or apprehension alone isn't enough<sup>59</sup>
  - (4) Two maxims of mootness
    - (a) Equity aids the vigilant -- *laches*
    - (g) "must do so him in equity" -- must be prepared for defendant counterclaims
  - (5) review based on discretionary nature of injunction
    - (a) deference will be show to the lower court in making this determination -- a deference that is different and stronger than *Chevron* deference

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<sup>47</sup> Humble Oil

<sup>48</sup> Humble Oil

<sup>49</sup> Sampson

<sup>50</sup> Sampson v. Murray

<sup>51</sup> Bell

<sup>52</sup> Hammer

<sup>53</sup> Ariola

<sup>54</sup> Morgan Deleware

<sup>55</sup> Winston Research Group

<sup>56</sup> Shellmar

<sup>57</sup> Grant

<sup>58</sup> Nicholson

<sup>59</sup> Nicholson



- (b) but can still review for an abuse of discretion
- b) parameters of injunctions
  - i) injunctions need parameters<sup>60</sup>
    - (1) behavior: with respect to specific, we go into this copy of statute or “obey the law injunctions” – the injunction has to give specifics, and it has to indicate what has to be done, or what cannot be done, and it can’t just be an injunction which says “don’t discriminate against older people” – it is too vague and not focused enough
    - (2) parties: an individual will litigate their particular problem and get an injunction – does that mean that it will only apply to them
      - (a) some views of this particular problem – it can only apply to this particular problem, or two individuals who were that part of the action
      - (b) the dominant view, however is that it can apply to a “putative class” – though it not a putative case in law
      - (c) he had sought to enjoin particular practices with respect to individuals
  - ii) Must look at the past violation to determine the future remedy – so a nationwide injunction to cover a local wrong may be excessive<sup>61</sup>
  - iii) Scope is limited to what happened in the past
  - iv) can’t give a remedy that applies to both things that are not complained of and are not litigated
- c) Equitable considerations
- d) Types of injunctions
  - i) Injunctions against ongoing behavior (for example repeated injunctions)
    - (1) Defamation
      - (a) There is usually a presumption that damages exist
      - (b) Can’t enjoin something from being said if you don’t know what it is unprotected speech – if it is libel (not slander) per se
        - (i) Methodology of damage actions
          - 1. Determine that speech was protected<sup>62</sup>
          - 2. Multiplicity of lawsuits: But requiring the Plaintiff go to court several times for nominal damages, might make the relief unavailable<sup>63</sup>
            - a. Most people are stopped by credit ratings and damages<sup>64</sup>
          - 3. Is there a public interest – and in this case there was a nonexistent public interest<sup>65</sup>
        - (ii) Note there is a right to a jury trial unless the speech is deemed to liable per se
    - (2) Non-compete agreements
      - (b) Constitutional reasons not to enforce personal service contracts<sup>66</sup>
        - (i) Application of the 13<sup>th</sup> amendment.
      - (c) Can write a negative covenant to restrict them from working for someone else
      - (d) Wolf discusses the criteria for enforcement of non-compete agreements
        - (i) They have to be specific in terms of what cannot be done
          - 1. Public policy issues
        - (ii) Individuals may need to be uninhibited
        - (iii) Other way to stop and employee from working from someone – other than restrictive covenants
          - 1. First refusal
          - 2. Long notice
          - 3. Arbitration provision
          - 4. Injunctions can be issued for arbitration
      - (e) Note: if someone isn’t an employee than it might be harder to get an injunction

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<sup>60</sup> Marshall

<sup>61</sup> Marshall

<sup>62</sup> Willing

<sup>63</sup> Willing

<sup>64</sup> Willing

<sup>65</sup> Willing

<sup>66</sup> Wolf

- ii) prophylactic injunctions
  - (1) just as discretion is checked by appellate review in other kinds of injunction, the same things happens with prophylactic injunctions
- iii) reparative injunctions
- iv) structural injunction
  - (1) there was a progression between the time that an injunction could only grant injunctions, to the time that it could become a *roving commission to do good*
    - (a) however, it must still be subject to same jurisdictional limitations
  - (2) court might not deal directly with the evil, but can require that an organization change its ways<sup>67</sup> -- it is possible to embed penalties into an injunction (for example requirement to do extra)
  - (3) considerations in complex cases
    - (a) Rights of 3<sup>rd</sup> parties
    - (b) Deference to state agencies
    - (h) Mootness
    - (i) Intrusiveness
    - (j) Constitutional issues such as separation of powers
      - (i) Considerations of the rightful positions, and also what was litigated
- v) We deal with the same considerations in determining whether the remedy of an injunction in this case can be fashioned
  - (1) Ginsburg: look at the past violations – a remedial decree must be shaped to place the persons unconstitutionally denied that they would have in the absence of the violation
  - (2) Look at whether it fits into the definition of what is necessary for a reparatory, prophylactic, structural injunction
  - (3) Aims to eliminate the discriminatory effects of the past, and to bar like discrimination in the future
- e) Enforcement is by contempt citation
  - i) Criminal contempt enforced by court – standard criminal procedure limitations apply
  - ii) Civil contempt enforced
    - (1) Compensatory civil contempt
      - (a) Plaintiff has to pay the defendant for losses incurred because of the violation of the order
    - (2) Coercive civil contempt where penalties are made conditional where the defendant can purge itself (for example keys to the jailhouse door)
- 8) Declaratory judgment: Not considered to be coercive, it tries to resolve problems without the resort to coercive activity
  - a) federal courts can issue injunctions when an actual controversy (tax issue) exists, regardless of the name given to them<sup>68</sup>
  - b) criteria for declaratory injunctions
    - i) Challenging something that would affect their rights
    - ii) Actual controversy
    - iii) Petitioner a party
    - iv) Capable of final adjudication by judgment or decree (they are looking at what the substance is)—would it terminate their case or controversy
      - (1) Look at the nature of the proceeding and the effect of it on the appellant
      - (2) Have to have an adversarial contest
      - (3) All necessary parties have to be a party
    - v) When a new state procedure is at issue, they can analogized between this and a similar procedure (e.g. injunction or determination of property between states) to see whether the remedy would be adequate
    - vi) Differences
      - (1) Injunction suspends enforcement

<sup>67</sup> Bundy

<sup>68</sup> Nashville Chattanooga v. Wallace:

- (2) Declaratory judgment says that the law is different
- c) Declaratory judgements made as counterclaims
  - i) Claims for declaratory judgment made as a counterclaim are allowed<sup>69</sup>
    - (1) One of the reasons here is to reduce multiplicity of suits (e.g. even though it was found that they couldn't continue using it, it was found that they took a risk that they could be sued again)
    - (2) Request for a Declaratory judgment will be allowed in counterclaim, unless other side can prove that the resolution of the case renders it moot
- 9) Punitive damages: and recklessness
  - a) Reasons for punitive damages
    - i) Compensate for low compensatory damages<sup>70</sup>
    - ii) Deterance
      - (1) They are discretionary
      - (2) Jury doesn't have to publish its logic and juries aren't told about other cases
      - (3) Will compensate for low criminal fines in malum prohibitum offenses that actually blossom into injuries
    - ii) Contrary to law and economics and efficient breach
    - iii) Also, sometimes the damages to individuals are quite small for each one
    - iv) Moral views is that they are good, and that they deter
  - b) Serve as a deterrent and as a way of punishing for bad conduct
    - i) Can be effective when the consumer protection laws are inadequate
    - ii) Way to enforce rules of law
      - (1) Deal with Malice
        - (a) California requires intention to injure as well as recklessness
        - (2) The law views reckless conduct as being blameworthy as intentional conduct
  - c) Criteria for review of punitive
    - i) If we don't know the basis of the punitive damage award, then you run into trouble, if you don't know how the jury reached it, then the trial court is not reviewing anything.
      - (1) Will reduce by extra-jurisdictional amounts
      - (2) Will be reduced by common law which reduces anything by pain or power
    - ii) factors
      - (1) Blameworthiness
        - (a) Punitive too high as a matter of law: Grossly disproportionate, or it raises the presumption that it is the product of passion and prejudice
      - (2) Factors
        - (a) Wealth
        - (b) Reprehensibility
          - (i) If there is a strong probability that this is going to hurt someone,
          - (ii) Note: omission of a face may be less reprehensible than a deliberate false statement<sup>71</sup>
      - (c) Compensatory damages
    - iii) There is a presumption of validity of a decision by a jury – unless the instructions are wrong
      - (1) Presumption that the judgment is correct
      - (2) Then you look at what factors may have been applied
      - (3) They feel that given the reprehensibility, it is not making the grade for deterrence and punishment
      - (4) Ford says that since the ratio is 1:4
        - (a) Ford says that the sanctions for product liability, you will see that they are much lower – but this doesn't necessarily take care of the maulm in se parts
  - d) Problems with punitive damages
    - i) Doesn't remedy problems without an injury
    - ii) Have a problem with capping the deterrence aspect of punitive damages

<sup>69</sup> Cardinal Chemicals

<sup>70</sup> Gomez v. Gates

<sup>71</sup> BMW

- iii) Subsequent Plaintiff can get compensatory damages
        - (1) Sometime it is better to have them continue
    - e) Review of punitives
      - i) Entering a zone of arbitrariness
        - (1) they are grossly excessive
        - (2) problem is that instead of allowing the jury to reach a verdict based on law, it gives them unfettered discretion to do whatever it wants, and that violates the 14<sup>th</sup> amendment
          - (a) federal court may look at what the state interest is, which is to deter this unlawful conduct
            - (i) sovereignty
            - (ii) comity
            - (iii) fair notice
        - ii) Constitutional limitations on punitive damages
          - (1) Can't punish for activities outside the state, unless there is notice somehow
  - 10) Contempt – ancillary remedy. Consequences if the junction is not followed
    - a) Constitutionality of contempt
      - i) Collateral bar rule: cannot the constitutionality of an injunction without going first to the injunction and appealing it. – However erroneous the action is<sup>72</sup>
      - ii) Exceptions: valid order violating 1<sup>st</sup> amendment rights are void
        - (1) but the court may attempt to enforce a contempt charge<sup>73</sup> (often according subject to criminal procedures)
        - (2) if there is an injunction that is transparently invalid (such as when a militia issues a fake order)
        - (3) if the challenge is met with undue delay
        - (4) if the order is not appealable
          - (a) e.g. motions for discovery or interlocutory appeal, but there are consequences within the case
    - b) Types of contempt
      - i) Civil contempt will work if one can get the individuals to cave in
      - ii) Criminal: punishment
        - (1) Once the punishment is served, there is no legal remedy
        - (2) Constitutional fair trial protections – so contempt penalties that go to parties
          - (a) So if money goes to the state, it might be taking money that would go to the parties
            - (i) If there is a mixture of criminal and civil proceedings, it would seem that there is a mixture of criminal and civil proceedings
            - (ii) Contempt injunctions are subject to criminal proceedings, because of the potential for damage, and the judge can inflict a lot of damage.—and because of this, certain rules will apply (judge is making, enforcing, and interpreting the laws)
              - 1. reasons for restriction
                - a. necessity
                - b. the judge might not do what is fair because he is angry
              - 2. court needs to be balanced
                - a. might have a summary proceeding if there is no need for major fact-finding
              - 3. it ended up depriving the parties of the money to settle
          - (3) Can be unconditional fine
        - iii) Civil: for coercion, to comply in the future
          - (1) Purpose is remedial – want to fix
- 11) Attorney's fees – under the American rule this will put people back into rightful position0
  - a) Certain fees
    - i) Loadstar: presumed fee based on the service
      - (1) Hours \* rate (reasonable hourly rate)

<sup>72</sup> Walker

<sup>73</sup> UMV

- (2) Question over what constitutes a reasonable hourly rate – and whether or not the firm should be doing some things
    - (3) There is a problem of incentive not to settle or end cases
  - ii) Contingent fees: paid if you win – there are places where the Plaintiff's will have difficulty finding a lawyer
    - (1) Supposedly the market will determine things
    - (2) Where the lawyers is hired on a contingent fee basis, and there already are attorney's fees under the statute, where Plaintiff is successful they cannot get attorney's fees as well as contingent fees – they must get the statutory fees. But they are in the position of a lawyer in a contingent fee situation, so the judge can increase for the risk taken
- b) Fee shifting statute
  - i) Can be for state-funded work
  - ii) Some places there can be mandatory fee-shifting if the defendant is successful
  - iii) E.g. § 1988 – where there are attorney's fees awarded for handling constitutionally important questions
    - (1) But, there are some cases that are more important than other cases
  - iv) May wish to award attorney's fees based on making nominal damages worth it
  - v) Where the lawyers is hired on a contingent fee basis, and there already are attorney's fees under the statute, where Plaintiff is successful they cannot get attorney's fees as well as contingent fees – they must get the statutory fees. But they are in the position of a lawyer in a contingent fee situation, so the judge can increase for the risk taken
- c) Equitable kinds of fees
- d) Fees that arise from
- e) **common fund** exception to the American rule (deals with equity) because that if lawyers are instrument in creating, preserving the fund, than the lawyer should be reimbursed because if the lawyers were not reimbursed from the fund, than the beneficiaries of the fund would be unjustly enriched
  - i) usually class-action cases
  - ii) usually gets awarded through arbitration
  - iii) there isn't a need for an accounting of hours and the analysis necessary in loadstar