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REMEDIES

Part I: Tort Remedies

I. Damages
   a. Compensatory Damages: an award of money to compensate P for loss or injury
      i. Damages must be:
         1. causal
         2. foreseeable
         3. certain
         4. unavoidable
   b. Categories of Compensatory Damages
      i. General Damages: compensate foreseeable noneconomic losses (eg, pain and suffering, emotional distress, loss of enjoyment)
      ii. Special Damages: compensate losses not necessarily foreseeable (eg, wage losses, medical expenses)
   c. Punitive Damages
      i. Awarded for "willful, wanton, or malicious conduct"
      ii. Usually for intentional torts (sometimes reckless conduct)
      iii. Courts require: "a reasonable relationship between punitive and compensatory damages awards"
      iv. Due Process Limitation: can't be "grossly excessive"
         1. Key: did D have "fair notice of the possible magnitude of the punitive damages?" Balancing elements:
            a. Reprehensibility of conduct
            b. Disparity between actual/potential harm suffered by P and the punitive award
            c. Difference between punitive award and criminal or civil penalties for comparable misconduct
         2. Rule of thumb: never more than 10x compensatory damages
   d. Nominal Damages (unless actual injury req'd)
   e. Interest and Atty Fees (by statute)
II. Restitutionary Remedies
   a. Definition
      i. May be legal or equitable
      ii. Object is to restore D's unjust gain to P
   b. Replevin (Claim and Delivery)
      i. Permits P to recover, before trial, possession of specific *chattel* wrongfully taken or detained
   c. Ejectment

i. Remedy to restore possession of *real property* from which P was wrongfully ousted

d. Quasi-Contract
   i. Obligates D to pay P reasonable value of benefit unjustly obtained
      1. Available only in tort situations where tort results in a benefit to D

e. Constructive Trust[1] [*actual property*]
   i. Equity creates trust to compel D to *reconvey* title to property unjustly retained
   ii. Elements:
      1. show that D has title to property;
      2. D's acquisition of title traced to property D wrongfully obtained;
      3. D's retention of property would result in unjust enrichment; and
      4. (most courts) D has no adequate remedy at law
   iii. P becomes a secured creditor and **gets any enhanced value** of the property
   iv. Defenses
      1. all equitable defenses apply (laches, unclean hands, transfer to BFP)

f. Equitable Lien[2] [*value of property taken*]
   i. A lien imposed on D's property to secure payment of a debt owed to P
   ii. Elements
      1. D holds title to property
      2. the wrongfully obtained property can be traced to that property
   iii. Comparison to Constructive Trust
      1. unlike CT, equitable lien can be imposed on property that was merely *improved with P's property* or the proceeds thereof.

g. Mandatory Injunction

III. Injunctive Relief in Tort

a. Elements:
   i. Inadequacy of legal remedy
      1. money damages inadequate
      2. damages highly speculative
      3. danger of multiplicity of suits
      4. irreparable injury
   ii. Property rights requirement
      1. traditional rule: equity courts only protect property rights
      2. now: some courts stretch rule or reject it altogether
   iii. Feasibility of enforcing the decree
      1. can't imprison for non-payment of debt
      2. use of contempt power to enforce negative (prohibitory) injunctions
      3. difficulty supervising mandatory injunctions requiring an affirmative act by D
      4. multi-jurisdictional enforcement problems

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[1] Use when property acquired at P's expense is worth as much or more than his claim
[2] Use when the property acquired at P's expense is worth as much as or less than his claim

iv. **Balancing of hardships**
    1. minority view: no balancing
    2. majority view: balance hardships *unless* D's conduct was *intentional*
        a. generally balance during Prelim or Permanent Injunction stage, but not during TRO stage

v. **No Defenses to Injunction**
    1. Laches
        a. An unreasonable delay by P in bringing claim that results in *prejudice* to D (effect of delay is key)
        b. <u>Timing</u>: Runs from time P knew right had been infringed
    2. Unclean hands
        a. P must not be guilty of "unfair dealing" with respect to *the transaction sued upon*[3]
    3. Freedom of Speech
        a. No injunctions on personal defamations
    4. Injunction against Criminal Prosecution
        a. Only issued if criminal prosecution will cause an "irreparable injury" to P
    5. Injunction against Crimes
        a. Would deprive D of procedural safeguards of criminal law system
        b. Public Nuisance Exception (court will enjoin)
    6. Injunction to Protect Political or Civil Rights
        a. Traditionally deemed "nonjusticiable"; modern trend is contra is certain situations like reapportionment of voting districts

IV. Application of Remedies to Specific Torts
    a. Misappropriation of Money
        i. Damages
            1. available if P can show that *identifiable* money was taken
        ii. Restitutionary Remedies
            1. Quasi-Contract
            2. Constructive Trust
                a. If P can specifically identify and trace stolen money
            3. Equitable Lien
                a. Used where stolen funds commingled
    b. Injuries to Personal Property
        i. Destruction of chattels
            1. value of chattel at time destroyed, less salvage, plus interest
            2. loss of use not recoverable unless income-producing
        ii. Injury to Chattels
            1. diminution in value; OR
            2. cost of repair plus loss of use
        iii. Dispossession of Chattels

[3] unfair dealing in other transactions, even if similar, is not a basis for asserting the unclean hands defense

1. Conversion for major dispossession
    a. Market value at time of conversion, plus interest and expenditures in pursuit of the property
    b. No duty to mitigate
    c. Punitive damages available for malicious conduct
2. Trespass to Chattel for minor dispossession
    a. Nominal damages; OR
    b. Damages for loss of use
3. Restitutionary remedies
    a. Self-help (reasonable force only); replevin, quasi-contract, constructive trust (if title obtained), equitable lien, mandatory injuction (if chattel unique)

c. Injuries to Real Property
    i. Trespass to land
        1. Simple
            a. nominal damages and/or injunction
        2. Trespass causing severence (eg, cutting timber)
            a. Diminution in value of land OR conversion
            b. Also, replevin, quasi-contract, and injunction
        3. Trespass causing injury
            a. Cost of removing an obstruction OR rental value of land
            b. Mandatory injunction if damages inadequate
        4. Trespass effecting ouster
            a. Ejectment if P proves:
                i. right to possession; and
                ii. wrongful withholding by D
            b. P recovers property and mesne damages
    ii. Encroachments
        1. Where a D's structure invades a P's land or airspace
        2. Damages
            a. Rental value of occupied land; OR
            b. Market value of occupied land
        3. Ejectment
        4. Injunction
    iii. Destruction of or Interference with Easements
        1. Damages
            a. Diminution of value of land; OR
            b. Cost of restoration of easement
        2. Injunction
    iv. Waste
        1. Voluntary: diminution in value, cost of repair, or injunction
        2. Permissive: cost of repair
        3. Ameliorative: no damages since value increased
    v. Nuisance
        1. Damages

            a. Loss of use and enjoyment, costs of abatement, emotional distress
        2. Injunction
        3. NB: coming to nuisance not a good defense, but may limit damages recovery if purchase price reflected claimed nuisance
d. Injuries to Personal Interests
    i. Compensatory damages for personal injuries
        1. Economic loss (special damages)
            a. Medical expenses; lost earnings
        2. Noneconomic loss (general damages)
            a. Pain, suffering, emotional distress, loss of enjoyment
e. Fraud
    i. requires proof of *actual injury*.
        1. If shown, then compensatory and punitive damages available
f. Business Torts
    i. Inducing Breach of Contract
        1. Damages for *all* loses proximately caused
    ii. Interference with Prospective Advantage
        1. Damages usually too speculative
        2. Restitution
            a. Available for any benefit D obtained
    iii. Trade Libel
        1. need proof of special damages (ie, pecuniary loss), normally shown by loss of particular customers

Part II: Contract Remedies

V. Damages
    a. Compensatory Damages
        i. Awards of money to protect P's expectation interest
        ii. Elements
            1. **foreseeable**: at time contract entered into
            2. **certain**
            3. **unavoidable**: ie, mitigation would not have helped
        iii. <u>Liquidated Damages clause</u> is valid if, at time of contracting,:
            1. actual damages would have been extremely difficult to ascertain; and
            2. the amount stipulated was a reasonable forecast of the actual harm
    b. Punitive Damages
        i. Not available in contract action
    c. Interest and Atty Fees
        i. By statute or clause in the contract
VI. Restitutionary Remedy – Quasi-Contract
    a. D's unjust enrichment commonly results from:
        i. Mistake
        ii. Fraud

iii. Material breach
iv. Performance of an unenforceable contract

b. Measure of benefit
   i. Material Breach
      1. Nonbreaching party: recover value of performance, even in excess of contract rate
      2. Breaching party: recover value of benefit conferred in excess of other party's damages
   ii. Unenforceable contract
      1. Restitution of property, where benefit is tangible property
      2. value of service, where benefit was services

VII. Specific Performance
   a. Mandatory decree/injunction ordering a contracting party to perform as promised
   b. Elements:
      i. Contract must be valid
      ii. Terms must be definite and certain
      iii. Contract conditions of P must be satisfied
         1. ie, P must have performed
      iv. Legal remedy is inadequate
         1. NB: a liquidated damages clause does NOT preclude a grant of specific performance. LD clauses are to insure performance; they are not a *substitute* for performance
      v. **Mutuality of remedy** (no longer required)
         1. used to require that D could have obtained like relief, but most states reject this
      vi. Enforcement must be feasible
      vii. No defenses
         1. laches
         2. unclean hands
         3. hardship
            a. <u>sharp practices</u>: consideration is either "grossly inadequate" or is coupled with an unconscionable contract or "sharp practices"
            b. <u>disproportionate hardship</u>: will D or the public suffer hardship that greatly outweighs that suffered by P is specific performance not granted?
         4. mistake
         5. misrepresentation

VIII. Rescission
   a. Cancels the contract where it results from mistake, fraud, duress, or where there is material breach
      i. Legal rescission: by the parties
      ii. Equitable rescission: by a court
   b. Rescission terminates the contract AND restores to P the consideration given by him to D
   c. Grounds for rescission:

i. The contract is voidable by one party:
    1. mistake
        a. mutual mistake: mistake affecting the *basis of the bargain*
        b. unilateral mistake: rescission normally denied *unless* other party knew or should have known of the mistake
    2. misrepresentation
        a. P must show actual reliance on a material misrepresentation (ie, a false assertion OR concealment)
    3. less popular: illegality, impossibility, lack of capacity

d. Defenses to Rescission
    i. Laches
    ii. Unclean hands
    iii. Election of remedies
        1. legal remedy of damages is inconsistent with equitable remedy of rescission
        2. action for damages *affirms the contract*; therefore, if sought first, bars rescission
        3. if rescission sought first, no binding election occurs until entry of judgment
    iv. Choice of substantive rights (Estoppel)
        1. rescission barred on estoppel theory where P <u>by word or conduct</u> *affirms* the contract *with knowledge* of facts justifying rescission

IX. Cancellation

X. Reformation
    a. An equitable remedy to modify a written instrument to reflect the parties' true agreement
    b. When is reformation available?
        i. Contract must be *valid* and *free from grounds of rescission* before it can be reformed
        ii. Contract cannot be ambiguous or incomplete
        iii. No mutual mistake as to meaning of words in contract
        iv. Cannot be used to cure SF problem
    c. Grounds for reformation
        i. Mistake of fact
            1. scrivener's errors
        ii. Mistake of law
            1. mistake in legal meaning of a term in agreement
        iii. Fraud
            1. instrument fraudulently represented as incorporating the prior agreement of the parties
    d. Defenses to Reformation
        i. Laches
        ii. Sale of subject matter to BFP
        iii. SF not a defense under majority view

XI. Application of Remedies to Particular Types of Contracts
    a. Contracts to buy and sell personal property

i. Damages typically adequate
ii. Specific performance
    1. if chattel unique; or
    2. damages highly speculative

b. Contracts to buy and sell Real Property
    i. Damages
        1. S breaches: B gets
            a. Out-of-pocket loss; or
            b. Benefit-of-bargain (Doj[4])
        2. B breaches: S recovers
            a. Difference between FMV and contract price, plus
            b. Consequential damages
    ii. Rescission and restitution
        1. B or S can use
    iii. Specific Performance
        1. inadequacy of legal remedy
            a. B: land is unique and wants it
            b. S: wanted to be rid of land and must bear burden to find new buyer
        2. feasibility of enforcing decree
            a. <u>suit by S</u>: can't force payment of debt, but can impose a lien on other of B's property
            b. <u>suit by B</u>: if land in jurisdiction, easy to enforce
        3. satisfaction of conditions
            a. S must show **marketable title** at closing
            b. Time of the essence condition:
                i. Wholly executory: late B can't get SP
                ii. Partly executory: B can get SP is will be able to pay soon and S suffers little loss
                iii. No time of essence clause: SP to B if tender made in a reasonable time and S compensated for delay
            c. Partial performance with price abatement
                i. Where S cannot fully perform[5]
        4. no defenses
            a. Statute of Frauds
                i. Exception: Part performance doctrine
                    1. possession *plus* payment; or
                    2. possession *plus* improvements
                ii. NB: land sale contracts not performable within one year
            b. Laches, unclean hands, sale to BFP, etc
        5. NB: *Equitable Conversion Issues*
            a. Arise where there is a specifically enforceable contract for sale of land

[4] depending on jurisdiction
[5] ie, claims to own 10 acres, but turns out S owns 9

b. When contracted entered into:
    i. B is equitable owner of real property;
    ii. S is equitable owner of right to payment secured by legal title to land
c. Death of party
    i. S dies
        1. title to person entitled to S's real property;
        2. right to payment to person entitled to S's personal property
        3. suit by B: join S's admin and heir
    ii. B dies:
        1. B's interest in land goes to heir entitled to real property
        2. suit by S: join B's admin and heir
    iii. B and S die
        1. both admins and heir must be joined in suit
    iv. Option to buy land
        1. majority: EC doesn't occur until option exercised
        2. minority: EC relates back to the time the option contract executed
d. Risk of loss
    i. Majority: B liable for purchase price
    ii. Minority/modern trend: ROL shifts to B only when B has possession
e. Insurance proceeds
    i. If S receives after ROL passes to B, then constructive trust imposed on them

c. Construction contracts
    i. Damages
        1. Owner breach
            a. Executory K: builder recovers lost profits
            b. Completed K: builder recovers contract price
            c. Partially complete K: builder recovers contract price less cost of completion
        2. Builder breach
            a. Substantial performance: owner recovers cost of restoration, *unless* this would cause economic waste, in which case O recovers diminution in value
            b. Material Breach: owner gets cost of completion, less payments due, plus delay damages
    ii. Restitution
        1. Owner breach
            a. Builder rescinds and recovers value of benefit conferred
        2. Builder breach
            a. No restitution b/c Owner got value for any payments

iii. Specific performance
    1. difficult to enforce, so rarely granted

d. Personal Services contracts
    i. Damages
        1. E breaches: R recovers cost of finding replacement
        2. R breaches: E recovers wages due or promised, less avoidable damages
            a. E may also get tort damages for wrongful discharge
    ii. Restitution
        1. R breaches: E entitled to reasonable value of services rendered
        2. E breaches: R gets return of any paid but unearned wages
    iii. Specific Performance
        1. Damages are inadequate only if services unique!!
        2. Feasibility problems:
            a. How to compel "best efforts"?
            b. Is this involuntary servitude
        3. Court may enforce negative covenants
    iv. Negative Covenants During Term of Employment
        1. specific enforcement of promise not to work for another
            a. E promised full-time or exclusive services
            b. Damages must be inadequate because services **unique**
            c. Feasibility is simple b/c simply enjoin E from accepting other employment
            d. Conditions of the E's performance must be satisfied
                i. Ie, R must provide E a place to work
            e. Normal Defenses
    v. Negative Covenant After Termination (Covenants not to compete)
        1. Damages
            a. Adequate if E's services are ordinary
            b. Inadequate if services are *unique* OR *trade secrets* or *goodwill* involved
        2. Injunctive relief if:
            a. Damages inadequate
            b. Restriction is *reasonable* as to *time* and *place*
                i. "Blue Pencil Rule" – allows courts to strike unenforceable portions and enforce remainder of covenant
            c. NB: some courts hold all CNC void as illegal restraints on trade

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