

# CONTENTS

---

<i>Preface</i>	xxiii
<i>Acknowledgments</i>	xxix

## CHAPTER 1

---

<b>INTRODUCTION</b>	<b>1</b>
The Role of Remedies	1
Classifying Remedies	2
Substitutionary and Specific Remedies	5
Legal and Equitable Remedies	6
Note on the Nature of Remedies	6
The Modern Remedies Course	8

## CHAPTER 2

---

<b>PAYING FOR HARM: COMPENSATORY DAMAGES</b>	<b>11</b>
A. The Basic Principle: Restoring Plaintiff to His Rightful Position	11
<i>United States v. Hatahley</i>	11
Notes on the Basic Principle	14
B. Value as the Measure of the Rightful Position	18
<i>In re September 11th Litigation</i>	18
Notes on Market Value	21
Notes on “Value to the Owner”	25
<i>Trinity Church v. John Hancock Mutual Life Insurance Co.</i>	28
Notes on Special-Purpose Property	31
Notes on Repair Costs	32
Notes on Property That Fluctuates in Value	34
C. Expectancy and Reliance as Measures of the Rightful Position	35
<i>Neri v. Retail Marine Corp.</i>	35
Notes on §2-708(2) and Attempts to Codify Remedies	37
Notes on Expectancy and Reliance	40
Notes on Compensating Expectancies	43
<i>Chatlos Systems, Inc. v. National Cash Register Corp.</i>	46
Notes on Excessive Expectancies	48
<i>Smith v. Bolles</i>	50
Notes on Expectancy in Tort	51

D.	Consequential Damages	53
	<i>Buck v. Morrow</i>	53
	Notes on General and Special Damages	54
	Notes on the Vocabulary of Damages	55
	<i>Meinrath v. Singer Co.</i>	59
	Notes on Consequential Damages from Failure to Pay Money	61
	<i>Texaco, Inc. v. Pennzoil Co.</i>	64
	Notes on an 11-Figure Verdict	67
E.	Limits on Damages	68
1.	The Parties' Power to Specify the Remedy	69
	<i>Kearney &amp; Trecker Corp. v. Master Engraving Co.</i>	69
	Notes on Limitation-of-Remedy Clauses	73
	<i>Commercial Real Estate Investment, L.C. v. Comcast         of Utah II, Inc.</i>	76
	Notes on Liquidated-Damage and Penalty Clauses	80
	Notes on Underliquidated-Damage Clauses	85
2.	Avoidable Consequences, Offsetting Benefits, and Collateral Sources	86
	<i>S.J. Groves &amp; Sons Co. v. Warner Co.</i>	86
	Notes on Avoidable Consequences	89
	Notes on Offsetting Benefits	94
	<i>Oden v. Chemung County Industrial Development Agency</i>	96
	Notes on the Collateral-Source Rule	98
3.	The Scope of Liability	102
	<i>Pruitt v. Allied Chemical Corp.</i>	102
	Notes on the Scope of Liability	106
	Notes on the Economic-Loss Rules	110
	<i>Sunnyland Farms, Inc. v. Central New Mexico         Electric Cooperative, Inc.</i>	114
	More Notes on the Scope of Liability	117
4.	Substantive Policy Goals	120
	<i>Brunswick Corp. v. Pueblo Bowl-O-Mat</i>	120
	Notes on Remedial Implications of Substantive Policy	123
5.	The Requirement of Reasonable Certainty	126
	<i>Bigelow v. RKO Radio Pictures</i>	126
	Notes on the Requirement of Reasonable Certainty	130
	Notes on Litigating Commercial Damages	133
F.	Taxes, Time, and the Value of Money	136
1.	The Impact of Taxes	136
	<i>Norfolk &amp; Western Railway v. Liepelt</i>	136
	Notes on Taxes	140
2.	Interest on Past Damages	143
	<i>City of Milwaukee v. Cement Division, National Gypsum Co.</i>	143
	Notes on Interest	146
3.	The Net Present Value of Future Damages	150
	<i>Jones &amp; Laughlin Steel Corp. v. Pfeifer</i>	150

	Notes on the September 11 Calculations	156
	Notes on Discounting to Present Value	159
	Notes on Race- and Sex-Based Data	162
	Notes on Periodic Payments and Structured Settlements	164
	Notes on Damages in Foreign Currency	166
G.	Damages Where Value Cannot Be Measured in Dollars	167
1.	Personal Injuries and Death	167
	<i>Debus v. Grand Union Stores</i>	167
	Notes on Pain and Suffering	170
	Notes on Wrongful Death	175
2.	The Controversy over Tort Law	185
	<i>Arbino v. Johnson &amp; Johnson</i>	185
	Notes on the Constitutionality of Limiting Tort Remedies	192
	Notes on the Empirical Debate: How Big Is the Problem?	195
	Notes on Valuing Pain and Suffering and Human Life	201
3.	Dignitary and Constitutional Harms	205
	<i>Levka v. City of Chicago</i>	205
	Notes on Valuing Emotional Distress	208
	Notes on Judicial Review of Jury Verdicts	212
	Notes on Recovering for Emotional Distress	213
	<i>Carey v. Piphus</i>	216
	Notes on Valuing Constitutional Rights	220
	Note on Defamation Damages	222

### CHAPTER 3

---

	<b>PUNITIVE REMEDIES</b>	<b>223</b>
A.	Punitive Damages	223
1.	Common Law and Statutes	223
	<i>Exxon Shipping Co. v. Baker</i>	223
	Notes on Punitive Damages	231
	Notes on Measuring Punitive Damages	236
2.	The Constitution	240
	<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i>	240
	Notes on Constitutional Limits on Punitive Damages	244
	<i>Phillip Morris USA v. Williams</i>	248
	More Notes on Constitutional Limits on Punitive Damages	252
3.	Punitive Damages in Contract	256
	<i>Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.</i>	256
	Notes on Punitive Damages in Contract	260
B.	Other Punitive Remedies	265
1.	Statutory Recoveries by Private Litigants	265
2.	Civil Penalties Payable to the Government	268

## CHAPTER 4

<b>PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF</b>		<b>273</b>
A.	The Scope of Injunctions	273
1.	Preventing Wrongful Acts	273
	<i>Almurbati v. Bush</i>	273
	Notes on Ripeness	275
	<i>Marshall v. Goodyear Tire &amp; Rubber Co.</i>	279
	Notes on the Scope of Injunctions to Prevent Wrongful Acts	281
	Notes on Individual Injunctions, Class Injunctions, and Nationwide Injunctions	285
	<i>United States v. W.T. Grant Co.</i>	288
	Notes on Voluntary Cessation of Wrongful Acts	290
2.	Preventing Lawful Acts That Might Have Wrongful Consequences	293
	<i>Nicholson v. Connecticut Half-Way House, Inc.</i>	293
	Notes on Ripeness and Uncertain Consequences	294
	<i>Pepsico, Inc. v. Redmond</i>	297
	Notes on Prophylactic Injunctions	301
	An Aside: Preventive Relief at Law	307
3.	Repairing the Consequences of Past Wrongful Conduct	309
	<i>Forster v. Boss</i>	309
	Notes on Reparative Injunctions	312
	Notes on Coordinating Multiple Remedies	314
	<i>Winston Research Corp. v. Minnesota Mining &amp;     Manufacturing Co.</i>	315
	Notes on Reparative Injunctions and the Rightful Position	318
	<i>Bailey v. Proctor</i>	319
	Notes on Equitable Discretion	321
4.	Institutional Reform Litigation (Structural Injunctions)	323
	Introductory Note: The School Desegregation Cases	323
	<i>Brown v. Plata</i>	326
	Notes on the Prison Cases	340
	Notes on Paying for the Remedy	344
	Notes on the Future of Institutional Reform Litigation	346
B.	Modifying Injunctions	348
	Introductory Notes	348
	<i>Horne v. Flores</i>	351
	Notes on Modification of Degrees	359
	Notes on Modification Under the Prison Litigation Reform Act	362
	Notes on Modifying School Desegregation Decrees — and Maybe Decrees More Generally	364
C.	The Rights of Third Parties	366
	<i>Hills v. Gautreaux</i>	366
	Notes on Relief Against Third Parties	369
	<i>General Building Contractors Association v. Pennsylvania</i>	372
	More Notes on Relief Against Third Parties	376

## CHAPTER 5

<b>CHOOSING REMEDIES</b>		<b>381</b>
A.	Substitutionary or Specific Relief	381
1.	Irreplaceable Losses	381
a.	Injunctions	381
	<i>Pardee v. Camden Lumber Co.</i>	381
	<i>F.W. Maitland, Equity</i>	384
	Note on Equity in the United States	386
	Notes on the Reasons for the Irreparable Injury Rule	387
	<i>Brook v. James A. Cullimore &amp; Co.</i>	391
	Notes on Replevin and Injunctions	392
	<i>Continental Airlines, Inc. v. Intra Brokers, Inc.</i>	394
	Notes on the Content of the Irreparable Injury Rule	395
b.	Specific Performance of Contracts	399
	<i>Campbell Soup Co. v. Wentz</i>	399
	Notes on Specific Performance of Contracts	401
	Notes on Efficient Breach of Contract	404
	Notes on Specific Performance Where Cover Is Possible	408
	<i>Van Wagner Advertising Group v. S &amp; M Enterprises</i>	410
	Notes on Irreparable Injury and Undue Hardship	412
	Notes on Personal Service Contracts	415
2.	Burdens on Defendant or the Court	416
	<i>Whitlock v. Hilander Foods, Inc.</i>	416
	Notes on Undue Hardship	418
	Notes on the Economics of Undue Hardship	421
	<i>Lord &amp; Taylor LLC v. White Flint, L.P.</i>	423
	Notes on Practicality and Private Litigation	427
3.	Other Policy Reasons	430
	<i>Willing v. Mazzocone</i>	430
	Notes on Defamation Damages and Insolvent Defendants	434
	Notes on Prior Restraints	436
	Notes on the Right to Jury Trial	438
	Notes on Avoiding a “Multiplicity of Suits”	439
4.	eBay, Inc. v. MercExchange LLC: A New Federal Standard for Permanent Injunctive Relief?	440
	<i>eBay Inc. v. MercExchange, LLC</i>	441
	Notes on Confusion in the Supreme Court	443
B.	Preliminary or Permanent Relief	449
1.	The Substantive Standards for Preliminary Relief	449
	<i>Winter v. Natural Resources Defense Council, Inc.</i>	449
	Notes on Preliminary Relief	453
	Notes on Preserving the Status Quo	459
	<i>Coyne-Delany Co. v. Capital Development Board</i>	461
	Notes on Injunction Bonds	463
2.	The Procedure for Obtaining Preliminary Relief	466
	<i>Carroll v. President and Commissioners of Princess Anne</i>	466
	Notes on Temporary Restraining Orders	469
	<i>Sampson v. Murray</i>	471

	More Notes on Irreparable Injury	476
	Notes on Preliminary Procedure	476
C.	Prospective or Retrospective Relief	484
1.	Suits Against Officers in Their Official Capacities	484
	<i>Edelman v. Jordan</i>	484
	Notes on Prospective-Only Remedies	488
	Notes on the Evolution of Eleventh Amendment Doctrines	492
	Notes on the Reasons for Sovereign Immunity	500
2.	Suits Against Officers in Their Personal Capacities (and the Doctrine of Qualified Immunity)	501
	<i>Harlow v. Fitzgerald</i>	501
	Notes on Qualified Official Immunity	505
	Notes on Enforcing New Rules of Law	514
	Notes on the Fear of Damage Remedies	518

## CHAPTER 6

---

	<b>REMEDIES AND SEPARATION OF POWERS</b>	<b>521</b>
A.	More on Governmental Immunities	521
1.	Consented Suits Against the Government	521
	<i>Stone v. North Carolina Department of Labor</i>	521
	Notes on the Public Duty Doctrine	525
	Notes on the Governmental/ Proprietary Distinction	529
	Notes on the Discretionary Function Exception	530
	Notes on Federal Waivers of Immunity	533
2.	Suits Against Officers — Absolute Immunity	538
	<i>Van de Kamp v. Goldstein</i>	538
	Notes on Prosecutorial Immunity	544
	Notes on Other Absolute Immunities	548
B.	Creating Causes of Action	555
	<i>Bivens v. Six Unknown Named Agents</i>	555
	Notes on Implied Remedies for Constitutional Violations	558
	Notes on Implied Remedies for Statutory Violations	562
	<i>Armstrong v. Exceptional Child Center, Inc.</i>	566
	Notes on Enforcing Federal Statutes with Injunctions	571
C.	The Right to Jury Trial	574
	<i>Chauffeurs Local No. 391 v. Terry</i>	574
	Notes on the Evolution of the Federal Right to Jury Trial	580
	Notes on Characterizing Claims as Legal or Equitable	584
	Notes on Specialized Tribunals	587

---

**CHAPTER 7**


---

**PREVENTING HARM WITHOUT COERCION:  
DECLARATORY REMEDIES 591**

A. Declaratory Judgments	591
1. The General Case	591
<i>Nashville, Chattanooga, &amp; St. Louis Railway v. Wallace</i>	591
Notes on Declaratory Judgments and Ripeness	593
Notes on Declaratory Judgments, Irreparable Injury, and Supplemental Relief	595
<i>Cardinal Chemical Co. v. Morton International, Inc.</i>	596
Notes on the <i>Young</i> Dilemma	600
Notes on Declaratory Judgments, Judicial Discretion, and Tactical Advantage	605
2. The Special Case of Interfering with State Enforcement Proceedings	607
<i>Steffel v. Thompson</i>	607
More Notes on the <i>Young</i> Dilemma	611
Notes on the <i>Steffel</i> Solution	614
<i>Doran v. Salem Inn, Inc.</i>	617
Notes on Preliminary Injunctions Against Prosecution	619
Notes on Federal Litigation After State-Court Judgments	622
B. Quiet Title and the Like	623
<i>Newman Machine Co. v. Newman</i>	623
Notes on Bills to Quiet Title and Related Actions	626
C. Reformation	630
<i>Hand v. Dayton-Hudson</i>	630
Notes on Reformation	633
D. Declaratory Relief at Law	636
Notes on Nominal Damages	636
Notes on Quo Warranto	637
Note on Coram Nobis	638

---

**CHAPTER 8**


---

**BENEFIT TO DEFENDANT AS THE MEASURE  
OF RELIEF: RESTITUTION 641**

A. Restitution from Innocent Defendants — and Some Who Are Treated as Innocent	641
1. Introducing Restitution — Mistake	641
<i>Blue Cross Health Services, Inc. v. Sauer</i>	641
Introductory Notes on Restitution	643
Notes on the Grounds for Restitution	647
<i>Somerville v. Jacobs</i>	649
Notes on Mistaken Improvers	652
Notes on Other Grounds for Restitution	656

2.	Measuring Restitution from the Innocent — and More Restitutionary Causes of Action	658
	<i>Bonina v. Sheppard</i>	658
	Notes on Measuring Restitution from Innocent Defendants	662
	<i>Farash v. Sykes Datatronics, Inc.</i>	665
	Notes on the Benefit Requirement	667
	More Notes on the Murky Borders of Contract and Restitution	671
B.	Recovering More than Plaintiff Lost	673
1.	Disgorging the Profits of Conscious Wrongdoers	673
	<i>Owll v. Nye &amp; Nissen Co.</i>	673
	Notes on Recovering More than Plaintiff Lost	675
	Notes on the Restitutionary Causes of Action Against Wrongdoers	679
	<i>Maier Brewing Co. v. Fleischmann Distilling Corp.</i>	683
	More Notes on Recovering More than Plaintiff Lost	686
2.	Measuring the Profits	693
	<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i>	693
	Notes on Apportioning Profits	697
	<i>Hamil America, Inc. v. GFI</i>	700
	Notes on Calculating Profits	704
3.	Breach of Contract	707
a.	Disgorging the Profits from Opportunistic Breach	707
	<i>May v. Muroff</i>	707
	Notes on Disgorging the Profits from Breach of Contract	708
b.	Rescission	712
	<i>Mobil Oil Exploration &amp; Producing Southeast, Inc. v. United States</i>	712
	Notes on Rescission for Breach of Contract	714
	Notes on Election of Remedies	717
	Notes on Losing Contracts Where the Benefit Cannot Be Returned	719
	Notes on Other Grounds for Rescission	722
C.	Restitutionary Rights in Specific Property	723
1.	Constructive Trusts	723
	<i>Paoloni v. Goldstein</i>	723
	Notes on Constructive Trusts	724
	<i>Ruffin v. Ruffin</i>	728
	More Notes on Constructive Trusts	729
	<i>In re Leitner</i>	730
	Notes on Constructive Trusts in Bankruptcy	734
2.	Tracing the Property	737
	<i>In re Erie Trust Co.</i>	737
	Notes on Tracing	740
	<i>In re JD Services, Inc.</i>	743
	Notes on the Mechanics of Tracing	746
	Notes on Advanced Tracing Issues	748
	Tracing Problems	752
3.	Equitable Liens and Subrogation	753
	<i>In re Mesa</i>	753

	Notes on Equitable Liens	756
	<i>Mort v. United States</i>	760
	Notes on Subrogation	763
	Notes on Indemnity and Contribution	767
D.	Defenses and the Rights of Third Parties	769
1.	Bona Fide Purchasers	769
	<i>Newton v. Porter</i>	769
	Notes on Tracing into the Hands of Third Parties	771
2.	Payment for Value	776
	<i>Banque Worms v. BankAmerica International</i>	776
	Notes on Paying Debts with Other People's Property	780
E.	Replevin, Ejectment, and the Like	783

## CHAPTER 9

---

### ANCILLARY REMEDIES: ENFORCING THE JUDGMENT 787

A.	Enforcing Coercive Orders: The Contempt Power	787
1.	The Three Kinds of Contempt	787
	<i>International Union, United Mine Workers v. Bagwell</i>	787
	Notes on the Three Kinds of Contempt	794
	Notes on Coercive Contempt	797
	Notes on the Yonkers Confrontation	801
	<i>Colin Diver, The Judge as Political Powerbroker:</i> <i>Superintending Structural Change in Public Institutions</i>	803
2.	How Much Risk of Abuse to Overcome How Much Defiance?	804
a.	Perpetual Coercion?	804
	<i>Anyanwu v. Anyanwu</i>	804
	Notes on Perpetual Coercion	807
b.	Anticipatory Contempt	813
	<i>Griffin v. County School Board</i>	813
	Notes on Contempt of Anticipated Injunctions	817
	Notes on Contempt Statutes	821
3.	The Collateral Bar Rule	821
	<i>Walker v. City of Birmingham</i>	821
	Notes on the Duty to Obey Erroneous Injunctions	829
	<i>John Leubsdorf, Constitutional Civil Procedure</i>	835
4.	The Rights of Third Parties	836
	<i>Planned Parenthood Golden Gate v. Garibaldi</i>	836
	Notes on Contempt Proceedings Against Third Parties	841
	Notes on the Array of Theories for Binding Third Parties	844
	Notes on the Notice Requirement	850
5.	The Maxim That Equity Acts in Personam	851
6.	Drafting Decrees	853
	Notes on the Requirement That Injunctions Be Specific	853
	Notes on the Rule Against Incorporating Other Documents	860
	Drafting Your Own Injunction	863

B. Collecting Money Judgments	864
1. Execution, Garnishment, and the Like	864
<i>Credit Bureau, Inc. v. Moninger</i>	864
Notes on Execution	866
Notes on Exemptions	869
<i>Dixie National Bank v. Chase</i>	872
Notes on Garnishment	874
Notes on Other Means of Collecting	876
Note on Bankruptcy	881
Notes on Collecting Money from the Government	882
2. Coercive Collection of Money	883
<i>In re Marriage of Logston</i>	883
Notes on Collecting Family Support	888
Notes on Coercing the Payment of Money in Other Contexts	894
More Notes on the Irreparable Injury Rule	899
3. Preserving Assets Before Judgment	899
<i>In re Hypnotic Taxi, LLC</i>	899
Notes on Attachment	906
Notes on Prejudgment Freeze Orders	908
<i>W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.</i>	910
Notes on Receivership	912
Notes on Ne Exeat	915

## CHAPTER 10

---

<b>MORE ANCILLARY REMEDIES: ATTORNEYS’ FEES AND THE COSTS OF LITIGATION</b>	<b>919</b>
A. Fee-Shifting Statutes	919
<i>City of Riverside v. Rivera</i>	919
Notes on the American Rule	923
Notes on Exceptions to the American Rule	925
Notes on One-Way Fee Shifting	928
Notes on the Amount of the Judgment as a Constraint on Attorneys’ Fees	932
Notes on the Prevailing-Party Requirement	934
Notes on Calculating the Lodestar	937
B. Attorneys’ Fees from a Common Fund	939
<i>In re Cabletron Systems, Inc. Securities Litigation</i>	939
Notes on the Common-Fund Rule	944
Notes on Contingency Enhancements	946
Notes on Competing Approaches to Calculating Fee Awards	947
Notes on Costs	953
C. Ethical Issues in Fee Awards	955
<i>Evans v. Jeff D.</i>	955
Notes on Ethical Problems in Fee-Shifting Cases	963
Notes on Ethical Problems in Common-Fund Cases	968

---

**CHAPTER 11**


---

	<b>REMEDIAL DEFENSES</b>	<b>975</b>
A.	Unconscionability and the Equitable Contract Defenses	975
	<i>James v. National Financial, LLC</i>	975
	Notes on the Reach of Equitable Defenses	982
	Notes on Unconscionable Contracts	983
	Notes on Arbitration Clauses	985
B.	Unclean Hands and <i>In Pari Delicto</i>	986
	<i>Pinter v. Dahl</i>	986
	Notes on Unclean Hands and <i>In Pari Delicto</i>	989
C.	Estoppel and Waiver	993
1.	Equitable Estoppel	993
	<i>Geddes v. Mill Creek Country Club, Inc.</i>	993
	Notes on Equitable Estoppel	996
	Notes on Estoppel Against the Government	998
2.	Waiver	999
	<i>Carr-Gottstein Foods Co. v. Wasilla, LLC</i>	999
	Notes on Waiver	1003
	Notes on Waiver by the Government	1006
D.	Laches	1007
	<i>Arizona Libertarian Party v. Reagan</i>	1007
	Notes on Laches	1009
	Notes on the Relation Between Laches and Statutes of Limitations	1012
E.	Statutes of Limitations	1015
1.	Continuing Violations	1015
	<i>Klehr v. A.O. Smith Corp.</i>	1015
	Notes on Continuing Violations	1017
	Notes on Limitations of Federal Claims	1022
2.	The Discovery Rule	1023
	<i>Debiec v. Cabot Corp.</i>	1023
	Notes on the Discovery Rule	1029
3.	Fraudulent Concealment	1033
	<i>Knaysi v. A.H. Robins Co.</i>	1033
	Notes on Fraudulent Concealment	1036
	Notes on Estoppel to Assert Limitations	1038
	Notes on the Policy Choices in Statutes of Limitations	1039

---

**CHAPTER 12**


---

	<b>FLUID-CLASS AND CY PRES REMEDIES</b>	<b>1043</b>
	<i>In re Pharmaceutical Industry Average Wholesale         Price Litigation</i>	1043
	Notes on Class Actions for Damages	1047
	Notes on Fluid-Class Recoveries and Cy Pres Distributions	1050
	Notes on Affirmative Action as a Fluid-Class Remedy	1055
	Notes on Partly Identifiable Victims	1058

## APPENDIX

---

<b>PRESENT VALUE TABLES</b>	<b>1061</b>
<i>Table of Cases</i>	<i>1065</i>
<i>Table of Statutes, Rules, Constitutions, Treaties, Restatements, and More</i>	<i>1085</i>
<i>Table of Secondary Authorities</i>	<i>1091</i>
<i>Index</i>	<i>1103</i>