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## Courtroom to Classroom: A Practitioner Teaches Remedies

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## **COURTROOM TO CLASSROOM: A PRACTITIONER TEACHES REMEDIES**

JOHN D. TAURMAN\*

### INTRODUCTION

Like many practicing lawyers, for years I carried around the notion that I should try my hand at teaching law. It was not until 2007, after more than thirty-five years of practice, that I did anything about it. I made a list of the telephone numbers of the several law schools in the city where I work (Washington, D.C.) and readied a pitch for hiring me as an adjunct professor—perhaps for a small seminar on commercial litigation. My first call was to Georgetown University Law Center, the only law school I could walk to from my apartment. The call unearthed an unexpected opportunity: because of a professor’s recent shift in priorities, Georgetown needed someone to teach the one doctrinal course for which I could hope to claim sufficient expertise.

The course was Remedies. Through a mix of fortuity and concerted effort, I had become, as noted by Professor Douglas Laycock, “that rarity in practice, a litigator who more or less specializes in remedies issues.”<sup>1</sup> The genesis of my

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1. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS xxix (4th ed. 2010). There should be more remedies specialists in private practice. Every lawsuit has a bottom line—some are routine (e.g., the judgment in a collection suit), but many require careful development and the use of expert witnesses. Typically, the knowledge gained in handling complex remedies issues is dispersed among the litigators within a law firm and disconnected rather than aggregated. For some types of knowledge gained by individual litigators (e.g., the preferences and idiosyncrasies of judges), centralized databases or even the occasional e-mail inquiry may ensure the firm makes full use of what its practitioners have learned. But knowledge about remedies is different. Like recognized specialties in private practice such as antitrust and intellectual property, the practice of remedies is a field in which study and experience build valuable expertise. In this regard, law practice needs to catch up with law schools, which decades ago recognized the modern Remedies course as a separate, integrated domain. *See* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 267 (2008) [hereinafter Laycock, *How Remedies Became a Field*]. A remedies specialty in private practice can develop only if a law firm is willing to look beyond practice group or team boundaries to involve the specialist whenever complex remedies issues arise. The payoff from centralizing institutional knowledge that otherwise will not accumulate can be realized in not only the firm’s litigation practice, but also its transactional practice.

unusual niche was my interest in numbers (an early ambition was to be a statistician) and in the analytical puzzles of causation. So I naturally gravitated toward the remedies issues in the cases that came my way. A turning point came in the mid-1980s, when I was asked to handle the damages issues and a team of damages experts in a plaintiff's contingent fee antitrust case. The success of that case, including entry of a billion dollar treble damages judgment, raised my profile within my firm as the "damages guy." There followed a string of lawsuits in which I have been responsible for developing the remedies case and handling the relevant expert witnesses on both sides. Sometimes our client has been the defendant, but more often I have worked on the plaintiff's side, and the remedies in play have ranged from lost profits (most often) to replacement cost, reasonable royalty, restitution, punitive damages, and declaratory and injunctive relief.

Of course, none of this ensured that I was qualified to *teach* Remedies.

#### I. PRACTICE → TEACH → PRACTICE

The use of practicing lawyers as adjunct professors is on the rise.<sup>2</sup> I have a few reflections on my experience, both on how well practice prepares one to teach law and on how teaching law enhances practicing law.

To start with the most basic hurdle: What do practitioners know about what effective law professors do in the classroom? Lawyers with the most experience in practice have the dimmest recollections of their last time in a law school classroom, and those recollections, from a different time and a different perspective, may not be the most helpful guides in any event.<sup>3</sup>

Fortunately, Georgetown has an excellent program for orienting new adjuncts. During lunch seminars, experienced professors disabuse new adjuncts of preconceptions about teaching they may harbor from the world of practice or their long-ago days as law students. Bring your practical insights to the classroom, but do not over-rely on war stories. Avoid the temptation to follow a CLE presentation format of lecture and detailed PowerPoint presentations. Do not take "Socratic revenge" for your own law school traumas; even cold-calling students should be a last resort.<sup>4</sup> This and similar

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2. David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 U. DAYTON L. REV. 285, 285 (2008).

3. See Andrew F. Popper, *The Uneasy Integration of Adjunct Teachers into American Legal Education*, 47 J. LEGAL EDUC. 83, 84 (1997).

4. This advice gave me the most difficulty. While I had no desire to play Socrates, the "all volunteer" classroom seemed inefficient. My initial announced policy of seeking volunteers, but reserving the right to cold-call if necessary, fell far short of achieving broad class participation. (I have resisted the temptation to tell my classes that back when I was in law school, cold-calling was not called "cold-calling," it was called "law school.") Distributing questions to ponder about the reading assignment in advance of class did not produce more volunteers. Oddly, the only

advice, along with a comprehensive *Handbook for Adjunct Faculty*, gave me comfort as I set on the path to teaching.

Another early critical step was the selection of a Remedies casebook. For me, this was easy. I had met Professor Laycock in the early 1990s in the way I have met many brilliant people, by taking his deposition. Being a thorough type and a bibliophile, I bought and studied his casebook, *Modern American Remedies*, to prepare. After the case settled, Professor Laycock and I worked together on a number of cases, and as new editions of the casebook came out, I followed their development and used them as resources. Choosing Professor Laycock's casebook was a no-brainer. On this score, at least, practice prepared me well to teach the Remedies course.<sup>5</sup>

On the whole, however, there is an inherent limit on how well practice can serve as a preparation to teach, even when the practitioner is a specialist in the field to be taught. Clients pay lawyers to solve their problems, not to achieve a deep or comprehensive understanding of the law. What a practicing attorney learns depends in large measure on what problems his clients have; even for a specialist, gaps in knowledge are inevitable. Moreover, although solving these myriad problems often offers glimpses of important underlying principles, clients do not pay a lawyer to connect the dots among the lawyer's cases.

Recognizing and wanting to overcome the practical limits of private practice provide an excellent motivation to teach and to teach well.<sup>6</sup> Filling gaps on subjects not encountered in practice (restitution for mistake, for example) is worthwhile, but not as challenging or rewarding as uncovering and exploring the organizing concepts and recurring policy choices that cut across the field of Remedies. These concepts and policies are rarely argued in practice. Indeed, recourse to them usually signals that the cases most nearly on point to the position you are advocating have come out the "wrong" way. Put less negatively, understanding the concepts and policies embedded in remedies law facilitates thinking, and arguing, creatively.

In other words, I have been learning as well as teaching over the five semesters I have taught Remedies at Georgetown, plus a semester teaching a

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student feedback I have received on this issue favored *less* reliance on volunteer participation. I have adopted an "on-call" approach.

5. One of the virtues of the Laycock casebook is its adaptability to a variety of courses focused on different parts of the remedies landscape. As my competence does not conceivably extend beyond commercial remedies, neither does my course. While this approach sacrifices attention to remedies issues peculiar to other contexts, such as personal injury and public law, I am teaching what I know and have personally experienced, and I can teach in greater depth.

6. The same cannot be said of wanting to return to the classroom in order to command the stage without the indignities of the adversary system—the debatable tactics of some opposing lawyers and the highly visible thumbs-down occasionally delivered by a judge or jury. I suspect I am not alone in feeling this lure to academia, but hoping to achieve this objective alone will doubtless lead to a short stay.

remedies-focused commercial litigation course at SMU Dedman School of Law.

For example, after (and while) litigating numerous damages cases, teaching impelled me to think more deeply about what it means to be made “whole.” What does it mean to become as well off as if one’s entitlement had not been violated? As I learned, one way to think about making a plaintiff whole is to provide a remedy that makes the plaintiff “indifferent” between having his entitlement intact and suffering the violation but receiving the remedy.<sup>7</sup> This ideal (what I call in class the “bull’s-eye” of the compensation target) exposes the limits of the damages remedy in a way rarely discussed in judicial opinions.

This analysis provides a context for discussing valuation, and in particular the differences between fair market value, a staple of commercial litigation, and value to the owner (i.e., minimum acceptable selling price), which is rarely applied to income-producing property in litigation.<sup>8</sup> To introduce the implications of the make-whole standard (what Professor Laycock calls the “rightful position” principle<sup>9</sup>), on the first day of class I ask my students to imagine that they are lawyers in southeastern Utah in 1952 and are consulted by Navajo families after the first day of the unlawful roundup of their horses as depicted in *United States v. Hatahley*.<sup>10</sup> What should they do for their clients? How does what they can do then compare to recovery of the market value of the horses as of the time of their taking, plus loss-of-use damages, several years later?<sup>11</sup>

Exploration of the make-whole concept extends to the relationship between damages formulas and party-specific measures of damages—that is, damages based on the actual impact on the plaintiff of not having the violated entitlement.<sup>12</sup> The natural tendency, especially among clients and experts, is to

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7. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 389 (5th ed. 2008); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 979 (2005).

8. I assign *King Fisher Marine Service, Inc. v. NP Sunbonnet*, 724 F.2d 1181 (5th Cir. 1984), as an aberrational exception awarding value to the owner as compensatory damages for the loss of commercial property. It is noteworthy that economists view minimum willingness to accept as the measure of economic value. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12 (5th ed. 1998) (“The economic value of something is how much someone is willing to pay for it or, if he has it already, how much money he demands for parting with it.”). Understanding the law’s shortfall in reaching ideal compensation has practical benefits in mollifying disappointed clients and restraining over-eager experts.

9. See LAYCOCK, *supra* note 1, at 14–15.

10. 257 F.2d 920, 921 (10th Cir. 1958), as reprinted in LAYCOCK, *supra* note 1, at 11.

11. This distinction is revisited later when comparing specific to substitutionary relief in general and analyzing the irreparable injury rule in particular.

12. The choice between a damages formula and measuring party-specific actual impact is illustrated in *Meinrath v. Singer Co.*, 87 F.R.D. 422 (S.D.N.Y. 1980), as reprinted in LAYCOCK,

see the measurement of actual impacts as the only sensible path to achieving compensation. Yet, as is also true of the acceptance of fair market value over value to the owner, process concerns (e.g., reducing the cost and uncertainty of administering the private justice system) often override the make-whole principle.<sup>13</sup>

My basic point here is that teaching enriches practice. In practice, I have encountered problems of valuation, damages formulas, and measures of the financial impacts of wrongful conduct, but always in the highly fact-specific ways in which litigation contests are fought. In the same way, I have dealt with a range of remedial devices but by no means have even sampled the full remedies menu. An integrated and comprehensive understanding of the field of remedies opens the practitioner's mind to options and opportunities that would otherwise be overlooked, as well as to the pitfalls of proposed avenues likely to lead to wasted effort. It is not enough to know the various tools in the remedies toolbox, or to know how to use one of the tools particularly well.<sup>14</sup> Remedies are not merely a collection of different tools, each having a specific function unrelated to the utility of the others.<sup>15</sup>

## II. A MORE PRACTICE-ORIENTED CASE METHOD

By adopting Professor Laycock's casebook, I was making an almost unconscious decision to follow the traditional case method of teaching law. I now know I had and still have other options and that the case method is not without its detractors, who believe studying judicial opinions does not adequately prepare students to become practitioners.<sup>16</sup> An alternative developed since my law school days is relying extensively on problems,

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*supra* note 1, at 58–60, and *Decatur County AG-Services, Inc. v. Young*, 401 N.E.2d 731 (Ind. Ct. App. 1980), *rev'd*, 426 N.E.2d 644 (Ind. 1981). These cases are assigned under the heading "Formulas versus Consequences" in my syllabus. For further illustration, see *KGM Harvesting Co. v. Fresh Network*, 42 Cal. Rptr. 2d 286 (Cal. Ct. App. 1995).

13. This outcome is well illustrated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (rejecting the passing-on defense in Sherman Act price-fixing cases), an antitrust case I knew well before teaching Remedies but whose doctrinal setting became clear only in the context of teaching the otherwise disparate *Meinrath*, *Young*, and *KGM* cases. See *supra* note 12.

14. Many practitioners (myself included) succumb to the clichéd hammer/nail problem: if you have only a hammer (e.g., extensive experience with lost profits cases), every problem looks like a nail (another lost profits case).

15. The roles and relationships among the remedies available in commercial cases will be the subject of my work in progress for practitioners, JOHN D. TAURMAN, COMMERCIAL REMEDIES: CHOICES AND METHODS (forthcoming).

16. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 131 (2007); Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 354–55 (2012).

professor-created fact patterns of varying detail, as the focal point of teaching.<sup>17</sup>

My unconscious choice of the case method, and my conscious decision not to abandon it, are natural for a practitioner. Judicial opinions are the raw material of our trade—finding them (happily now delegated to newer attorneys and their computers), dispassionately analyzing them, and then deploying them for our clients' needs. True, in the first instance, opinions reveal how judges, not advocates, think,<sup>18</sup> but in the classroom the same opinions may be the springboard for exploring lawyers' choices. Moreover, even the distilled facts of most judicial opinions often enliven students' engagement with the issues. No trial lawyer would fail to appreciate the pithy power of the testimony of the plaintiff in *Jacque v. Steenberg Homes, Inc.*,<sup>19</sup> recounting how he responded to the defendant's employees' persistent requests to take a shortcut across his land to deliver a mobile home: “[F]ollow the road, that is what the road is for.”<sup>20</sup>

The challenge, then, is to import some of the reality of practice into the case method. What follows are a half dozen ways I have tried to do that.

#### A. *Advocacy Role-Playing in Class*

A classroom technique that came readily to mind was to assign the roles of plaintiff's counsel and defense counsel for classroom discussion of the cases. Remedies is an inexorably zero-sum game; the more the plaintiff gets, the more the defendant gives. The concerns, strategies, and even ethos of the contending remedies advocates are fundamentally different. Students should be made familiar with both sides of the divide as they address the perennial remedies questions: What can we/they get, and how much?<sup>21</sup>

Some of the in-class advocacy is designed to expose the pros and cons of doctrine, such as the rule against consequential damages for a buyer's failure to pay as promised.<sup>22</sup> Often, the roles call upon the students to recognize and critique the choices counsel made in formulating their cases. Could counsel have done a better job? How? Being advocates in class supplements, but does not supplant, the traditional role of being students of the law, striving to

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17. See, e.g., James M. Fischer, *Teaching Remedies Versus Learning Remedies*, 39 BRANDEIS L.J. 575, 582–83 (2001); Russell L. Weaver & David F. Partlett, *Remedies as a “Capstone” Course*, 27 REV. LITIG. 269, 276–77 (2008).

18. See STUCKEY, *supra* note 16, at 139; Holmquist, *supra* note 16, at 354–55.

19. 563 N.W.2d 154 (Wis. 1997).

20. *Id.* at 157.

21. “How much” usually means “how high” for monetary awards and “how broad” for specific and declaratory relief.

22. See *Meinrath v. Singer Co.*, 87 F.R.D. 422, 427 (S.D.N.Y. 1980), as reprinted in LAYCOCK, *supra* note 1, at 60.

discern rules and outcomes that are best for the legal system and for society at large.

Advocacy role-playing is admittedly a small, and hardly novel, extension of the traditional case method.<sup>23</sup> But it works.

#### B. *Factual Development Projects*

Progressing somewhat deeper into the world of the practicing lawyer, I have asked my students to take on short (one-half page or less) written assignments in their role as advocates.

For example, I assign the remedial portion of the First Circuit's opinion in *Redgrave v. Boston Symphony Orchestra, Inc.*,<sup>24</sup> which rejected, for failure to prove causation, the bulk of Vanessa Redgrave's claim for consequential damages arising from the Boston Symphony Orchestra's breach of contract.<sup>25</sup> An initial topic of discussion is whether Redgrave's counsel dropped the ball on causation, which leads in turn to the difficulty of proving why events that did not occur (offers to Redgrave to appear in movies and Broadway shows after the breach) would have occurred but for the breach.<sup>26</sup> Taking it one step further, I ask the students in the "plaintiff's counsel" group to each draft a short hypothetical email (including hypothetical author and date) that Redgrave's counsel would have hoped to find through discovery as a "smoking gun" supporting Redgrave's causation argument. Each student "defense counsel" is asked to draft a defendant's "smoking gun" email. I have received many creative submissions.

In a similar vein, I assign the restitution chestnut, *Edwards v. Lee's Administrator*,<sup>27</sup> an interesting opinion applying a somewhat ambiguous standard for apportioning the defendant's profits.<sup>28</sup> I ask my students, in their advocate roles, to submit plans for a consumer survey that could have been conducted in the mid-1930s to provide evidence on the apportionment issue. The plans must address the practical problems of producing a reliable survey (such as identifying and contacting a representative group of respondents) and specify up to five survey questions. Drafting the questions enables the students to see the problem of apportionment in more concrete terms and implicitly

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23. See, e.g., Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 237 (2008); Holmquist, *supra* note 16, at 377–78.

24. 855 F.2d 888 (1st Cir. 1988).

25. See *id.* at 896–900.

26. Cf. JIMMY BUFFETT, *If the Phone Doesn't Ring, It's Me*, on LAST MANGO IN PARIS (MCA Records 1985) (noting that "[i]f the phone doesn't ring [y]ou'll know that it's me").

27. 96 S.W.2d 1028 (Ky. 1936).

28. See *id.* at 1032–33.



exposes the relative merits of the choice between incremental and pro rata approaches to measuring recoverable gains.<sup>29</sup>

### C. *The Quantitative Arts*

On the first day of class, I tell my prospective students “there *will* be math,” but assure them only of the simplest kind. I do not have the time, or sufficient competence, to delve deeply into financial and statistical analysis, but all forms of commercial monetary relief have a simple imperative: using quantitative evidence and techniques, the plaintiff must prove a number.

On the remedies side of commercial litigation, the computer spreadsheet is king. Like every Remedies casebook I have seen, Professor Laycock’s casebook does not expose students to this pervasive element of remedies practice. While constructing complex spreadsheets is the province of experts, practitioners cannot effectively “talk to the natives” of the expert community without some familiarity with what’s going on beneath the surface of the very top-level spreadsheet, the one page containing the highest-level calculations and the bottom-line number for the relief that should be awarded.

To bring this reality home to students, I supplement the Laycock casebook with two lost profits opinions, *Energy Capital Corp. v. United States*<sup>30</sup> and *Celebrity Cruises Inc. v. Essef Corp.*<sup>31</sup> The plaintiff’s damages expert’s report in *Energy Capital* was available on Westlaw, and plaintiff’s counsel in *Celebrity Cruises* kindly shared the report of their damages expert. The top-level spreadsheets from the reports are attached to the two opinions in the assigned reading. The spreadsheets allow the students to see firsthand the application of ex ante and ex post measurements of lost profits, the use of yardsticks to estimate hypothetical profits but for the wrong, and discounting to present value.<sup>32</sup>

Usable spreadsheets from the real world are not always available to illustrate specific points about monetary relief, so to fill the gap I construct mini-problems with an accompanying graphic and spreadsheet. Included as an Appendix to this article is one of these exercises, which lays out the math of a failure-to-mitigate defense.

Another relatively simple quantitative technique pervasive in remedies litigation is an expert appraisal of fair market value. Except in active exchanges where fungible goods are traded, market value is an expert opinion,

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29. See LAYCOCK, *supra* note 1, at 676 (comparing the two methods of calculating recoverable gains).

30. 302 F.3d 1314 (Fed. Cir. 2002).

31. 478 F. Supp. 2d 440 (S.D.N.Y. 2007).

32. For an explanation of the ex ante and ex post measurements of lost profits, the use of yardsticks, and discounting, see LAYCOCK, *supra* note 1, at 131–32.

not a fact.<sup>33</sup> Law students, most of whom have never applied for a mortgage, have often never seen a real estate appraisal report, which demonstrates a readily understandable application of market valuation based on comparable sales. I assign a sample Uniform Residential Appraisal Report<sup>34</sup> for a house under contract in Columbus, Ohio—photographs, maps, and all—and ask what an appraisal report for a “one-of-a-kind painting”<sup>35</sup> would look like by comparison.

#### D. Case Studies

The traditional case method has been criticized as presenting students only with the culmination of a lawyer’s work (i.e., the court’s opinion), leaving hidden from view the doctrinal and strategic choices the lawyer made along the way.<sup>36</sup> In a course aimed at teaching doctrine, especially in a field as broad and diverse as remedies, only so much time can be devoted to deeper dives into how a case was litigated. And, truth be told, much of what transpires while remedies issues are being thrashed out in court, even at the highest professional levels, does little to advance a better understanding of remedies law.

Recognizing these challenges, I have developed “case studies” that provide a behind-the-scenes look at how remedies are litigated. Most of the case studies are derived from my practice. While not coming close to rigorous legal archeology,<sup>37</sup> the case studies include summary procedural histories and excerpts from oral argument transcripts, briefs, and expert reports. The following are examples.

##### 1. *In re September 11th Litigation*

In the fourth edition of his casebook, Professor Laycock added an opinion in *In re September 11th Litigation*,<sup>38</sup> addressing the valuation of property interests in the World Trade Center buildings destroyed on September 11, 2001. Although the opinion easily and correctly rejects the argument for recovery of reproduction cost based on the specialty property rule,<sup>39</sup> the

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33. See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.5, at 238–40 (abr. 2d ed. 1993).

34. To obtain such a report, see, e.g., SELECT BUS. SERVICES, <http://www.sbs-cbc.com> (last visited July 31, 2012).

35. See LAYCOCK, *supra* note 1, at 22–23 (discussing uses and measures of “value”).

36. See, e.g., Holmquist, *supra* note 16, at 373–74.

37. See, e.g., Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995); Debora L. Threedy, *United States v. Hatahley: A Legal Archeology Case Study in Law and Racial Conflict*, 34 AM. INDIAN L. REV. 1 (2009); Bruce Ziff, *The Great Onyx Cave Cases—A Micro-History* (Feb. 2, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=1998381>.

38. 590 F. Supp. 2d 535 (S.D.N.Y. 2008), as reprinted in LAYCOCK, *supra* note 1, at 18–22.

39. See *id.* at 541–43, as reprinted in LAYCOCK, *supra* note 1, at 20–21.

treatment of what the court called “lost rental payments” and ambiguities about the entitlement being valued were both puzzling. In hopes of achieving a better understanding of the opinion, I obtained what pleadings I could on Westlaw and then contacted plaintiffs’ counsel, who were very accommodating.

I decided to share what I uncovered with my students—a fascinating confrontation between plaintiffs seeking a lost profits recovery for damage to a property management business and a judge dealing with the overwhelming burdens of the World Trade Center litigation and resolute in viewing the case as one involving damages for the destruction of real estate. The progression from the plaintiffs’ initial lost profits damages disclosure through status conference, opposing briefs and expert declarations, and oral argument, revealed counsel’s tactical choices as well as the power and impediments of neat doctrinal categories. The case study includes plaintiffs’ counsel’s futile attempt to re-orient the judge’s view of the case on reconsideration of the opinion in the casebook.<sup>40</sup>

## 2. *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*

My firm, Vinson & Elkins LLP, represented Huntsman Corporation in *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*,<sup>41</sup> a declaratory judgment action Hexion filed in Delaware Chancery Court. Hexion sought rulings that would avoid or limit Hexion’s liability if Hexion failed to close its pending agreement to acquire Huntsman.<sup>42</sup> Hexion filed its complaint on June 18, 2008,<sup>43</sup> and with an October 2, 2008 closing date looming,<sup>44</sup> the court of chancery set an expedited trial on the most urgent issues for early September.<sup>45</sup> The case study includes excerpts from the pleadings and from the transcript of a critical pretrial conference, as well as an edited version of the court’s opinion in late September.

A classic defensive declaratory action, *Hexion* provides a concrete setting to explore the benefits, limitations, and tactical implications of making declaratory relief available to prospective defendants. For example, absent the right to go to court for a defensive declaration, what would Hexion’s options have been, other than to repudiate the acquisition agreement or to not show up at closing? Tactically, both parties were motivated to do battle on the merits of whether Hexion’s failure to close would be a breach, despite a lurking ripeness

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40. *See* In re September 11 Litig., No. 21 MC 101 (AKH), 2009 WL 2058385, at \*1 (S.D.N.Y. May 26, 2009) (Order Denying Motion for Reconsideration or for § 1292(b) Certification).

41. 965 A.2d 715 (Del. Ch. 2008). The lead trial counsel for Huntsman were Harry M. Reasoner and David T. Harvin, partners in the Houston office of Vinson & Elkins LLP.

42. *See id.* at 721.

43. *Id.* at 723.

44. *Id.* at 731.

45. *See id.* at 723.

problem; the court had a different perspective and held that issue not ripe.<sup>46</sup> On the other hand, the court did reach and decide the issue of whether Hexion's pre-suit conduct seeking to justify its threatened termination of the contract constituted a "knowing and intentional" breach of the acquisition agreement.<sup>47</sup> Under the agreement, Hexion's damages liability for a "knowing and intentional" breach was not capped by the liquidated damages clause and could be in the billions of dollars.<sup>48</sup> On the surface, it would appear odd that an issue going to damages, a remedy not at issue in the expedited trial, was ripe for declaratory relief. The court, however, correctly understood that a declaration on that issue would serve the prime function of declaratory relief—providing guidance to the parties. The finding of a "knowing and intentional" breach and the resulting prospect of unlimited liability in the billions certainly changed Hexion's calculus on whether to close the transaction.<sup>49</sup>

### 3. *Conoco Inc. v. United States*

My firm initiated the litigation that culminated in the Supreme Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,<sup>50</sup> the case in the Laycock casebook on rescission and restitution for breach of contract.<sup>51</sup> We filed suit on behalf of Conoco in the United States Court of Federal Claims, seeking return of payments to the government to acquire rights to explore for oil and gas on forty offshore lease tracts, return of annual rental payments on the leases, and recovery of exploration expenditures.<sup>52</sup> The government's alleged breach was to block, or to materially impede, necessary approvals of plans to explore on the leases, which were located in politically sensitive areas off the coasts of North Carolina, Florida, and Alaska.<sup>53</sup> In *Conoco Inc. v. United States*,<sup>54</sup> the Court of Federal Claims held that the government had committed a material breach and that plaintiffs

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46. See *Hexion*, 965 A.2d at 758.

47. See *id.* at 746–57.

48. *Id.* at 746. For a contemporaneous estimate of Hexion's billion-dollar exposure, see *Hexion v. Huntsman*; *Round Two: Hexion v. Credit Suisse and Deutsche Bank*, M&A LITIG. COMMENT. (Oct. 29, 2008, 9:37 AM), <http://mandalitigationcommentary.blogspot.com/2008/10/hexion-v-huntsman-round-two-hexion-v.html>.

49. See *Hexion*, 965 A.2d at 722 (noting that Hexion "may now regard closing the deal to be a superior outcome to not closing").

50. 530 U.S. 604 (2000).

51. See LAYCOCK, *supra* note 1, at 686–88.

52. See First Amended Complaint at 1–2, 19, 21–23, *Conoco Inc. v. United States*, 35 Fed. Cl. 309 (Fed. Cl. 1996) (No. 92-331C).

53. *Id.* at 2–3, 18–19.

54. 35 Fed. Cl. 309 (Fed. Cl. 1996), *rev'd sub nom.* *Marathon Oil Co. v. United States*, 177 F.3d 1331 (Fed. Cir. 1999), *rev'd sub nom.* *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000). The lead trial counsel for Conoco was Harry M. Reasoner.

were entitled to monetary relief.<sup>55</sup> The Federal Circuit reversed<sup>56</sup> and was itself reversed in *Mobil Oil*.<sup>57</sup>

The Supreme Court's *Mobil Oil* opinion presents and resolves an apparently straightforward question: the availability of rescission and restitution for a material breach of contract, without regard to whether the breach caused actual harm to the plaintiff. Of course, down in the trenches at the trial court level, the facts and issues had not been so neatly distilled, as the *Conoco* case study shows. Conoco was focused on the simple remedy of restitution of its payments to the government and recovery of its exploration expenditures. Some of the oil companies who joined Conoco's suit wished to pursue more complex takings claims to recover the fair market value of their lease interests. A number of remedies issues were hotly debated at the trial level, raising doctrinal and tactical points about expectancy and reliance damages as well as restitution.<sup>58</sup>

#### 4. *David's Supermarkets, Inc. v. Fleming Cos.*

In the *David's* case,<sup>59</sup> Vinson & Elkins represented a small grocery chain against a leading national grocery distributor in Texas state court.<sup>60</sup> David's alleged that the defendant fraudulently inflated its invoices to David's, leading to overcharges under their cost-plus contract.<sup>61</sup> To avoid prejudice to the defendant, whose net worth was over \$1 billion,<sup>62</sup> the trial court bifurcated David's claim for punitive damages.<sup>63</sup> After a four-week trial, the jury awarded the full amount of David's claimed compensatory damages, over \$50 million.<sup>64</sup> That night, the defendant, a publicly-held company that first disclosed the *David's* litigation in its SEC filings made earlier that same day, was compelled

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55. *Id.* at 331.

56. *Marathon Oil Co. v. United States*, 177 F.3d 1331, 1333 (Fed. Cir. 1999), *rev'd sub nom. Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000).

57. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000).

58. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 cmt. c, illus. 8 (2011) (illustrating remedies in a comparable situation).

59. *David's Supermarkets, Inc. v. Fleming Cos.*, No. 246-93 (Johnson County Dist. Ct., 18th Jud. Dist., Tx. Mar. 14, 1996). Lead trial counsel for David's was Bill Sims, a partner in the Dallas office of the firm.

60. *See City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1250–52 (10th Cir. 2001) (providing an overview of the *David's* litigation).

61. *Id.* at 1250.

62. *See id.* (stating that the \$110 million damage request represented 10.37% of Fleming's total net worth as reported in its 1993 Annual Report).

63. *See* Trial Transcript at 3671, *David's Supermarkets, Inc. v. Fleming Cos.*, No. 246-93 (Johnson County Dist. Ct., 18th Jud. Dist., Tx. Mar. 14, 1996) (on file with author) [hereinafter Transcript]. For a discussion on the increasing use of bifurcated trials, see LAYCOCK, *supra* note 1, at 232.

64. *See* Transcript, *supra* note 63, at 3664–65.

to issue a press release, stating that the company was “extremely disappointed with the verdict.”<sup>65</sup>

The problem that bifurcation posed for the defendant was now obvious: the next day, the trial resumed on David’s punitive damages claim before the same jury that had rendered the “extremely disappoint[ing]” verdict. The *David’s* case study asks students in their roles as advocates to address this problem, given that the first witness David’s intended to call was the defendant’s former CEO, who had testified earlier at trial that the defendant had done nothing wrong. What questions should David’s counsel ask the former CEO? What advice should defense counsel give about how to testify? After the assignments were handed in, the scene was reenacted in class using the trial transcript.

### E. Field Study

Students who forego the Remedies course will not graduate wholly ignorant of remedies. They will almost certainly be exposed to the subject in their first-year Contracts, Torts, and Property courses, as well as upper-level courses in fields such as Antitrust and Intellectual Property. The consequence, which carries over into private practice,<sup>66</sup> is a “silo” effect: Remedies in these substantive fields are viewed as devices peculiar to and intimately shaped by the underlying entitlements being protected. The Remedies course counteracts this insular perspective, fruitfully examining “broadly applicable remedial principles” and techniques.<sup>67</sup>

I have come to believe, as a practitioner and now as an adjunct professor, that knowledge of basic remedies concepts, policies, and methods enhances practicing lawyers’ abilities to serve their clients’ needs, even in highly specialized fields. One way to test this hypothesis is to examine how the law of remedies developed in a discrete substantive field in light of the learning acquired in the Remedies course.

Accordingly, toward the end of the semester, I assign cases from a single, highly specialized field, patent infringement.<sup>68</sup> Although perhaps not as walled-off as it was before commercial litigators invaded the patent bar, the law of patent infringement remedies has developed with little attention to the broader remedies landscape, or even remedies in other specialized fields. Patent cases on remedies tend to cite only other patent cases. My students,

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65. *Fleming Cos.*, 264 F.3d at 1253–54 & n.11.

66. See Laycock, *How Remedies Became a Field*, *supra* note 1, at 167.

67. See *id.* at 165.

68. The cases are accompanied by a three-page background memorandum on patent law and a sample patent, U.S. Patent No. 4,872,422 (“Scratching and Petting Device for Household Pets”) featured in Christopher Cooper’s *Patently Absurd*. See CHRISTOPHER COOPER, *PATENTLY ABSURD: THE MOST RIDICULOUS DEVICES EVER INVENTED* 31 (2004); *Scratching & Petting Device for Household Pets*, U.S. Patent No. 4,872,422 (filed Mar. 4, 1988) (issued Oct. 10, 1989).

unlike patent specialists, evaluate patent cases on lost profits,<sup>69</sup> injunctions,<sup>70</sup> and declaratory relief<sup>71</sup> from a broader perspective, circling back to remedial concepts and methods covered in a host of non-patent cases.

#### F. Experts

Experts—retained witnesses and consultants, as well as fact witnesses with relevant expertise—are critical players in litigation over remedies. Especially when the task is to measure monetary relief, experts are virtually indispensable to developing, presenting to judge and jury, and defending the client’s remedial objectives. The expert can make or break the case.<sup>72</sup>

Despite probably retreading ground covered in Civil Procedure and Evidence courses, I assign my students the federal discovery rules applicable to expert witnesses and consultants and Federal Rules of Evidence 702 and 703, along with the most pertinent passages from the Advisory Committee Notes. I also assign two opinions applying the *Daubert* admissibility test<sup>73</sup> to damages experts: *Uniloc USA, Inc. v. Microsoft Corp.*,<sup>74</sup> which ruled inadmissible an established methodology for deriving reasonable royalties in patent cases, and *Celebrity Cruises Inc. v. Essef Corp.*,<sup>75</sup> the pre-trial ruling on damages experts that preceded the post-trial opinion on lost profits assigned earlier in the semester. To illuminate the broad impact of *Daubert* on remedies practice, I assign excerpts from the annual survey of *Daubert* challenges to financial experts published by PricewaterhouseCoopers.<sup>76</sup>

At the end of the semester, I bring to class as guest lecturers a testifying expert specializing in remedies and a trial graphics consultant experienced in creating demonstrative aids to explain complex evidence and calculations to juries. Before the testifying expert’s visit, I assign two excellent articles by

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69. See, e.g., *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341 (Fed. Cir. 1999); *BIC Leisure Prods., Inc. v. Windsurfing Int’l, Inc.*, 1 F.3d 1214 (Fed. Cir. 1993).

70. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), as reprinted in LAYCOCK, *supra* note 1, at 423–26.

71. See, e.g., *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372 (Fed. Cir. 2007).

72. The unfortunate choice of a non-financial expert (a marine surveyor) may explain the plaintiff’s failure to prove that the economic value of its damaged barge easily exceeded its book value and the money spent to repair it in *O’Brien Brothers, Inc. v. The Helen B. Moran*, 160 F.2d 502, 506–07 (2d Cir. 1947).

73. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–95 (1993).

74. 632 F.3d 1292 (Fed. Cir. 2011).

75. 434 F. Supp. 2d 169 (S.D.N.Y. 2006).

76. PRICEWATERHOUSECOOPERS LLP, *DAUBERT CHALLENGES TO FINANCIAL EXPERTS: A YEARLY STUDY OF TRENDS AND OUTCOMES* (2012), available at [http://www.pwc.com/en\\_US/us/forensic-services/publications/assets/daubert-study-2011.pdf](http://www.pwc.com/en_US/us/forensic-services/publications/assets/daubert-study-2011.pdf).

practitioners on expert management and strategy,<sup>77</sup> and I ask the students to submit questions for the expert about the real world of presenting and rebutting claims for monetary relief. Before the graphics consultant's visit, I ask the students to submit their own (hand-drawn or computer-generated) demonstrative aids depicting the plaintiff's damages model in the *Celebrity* lost profits case.<sup>78</sup> The graphics consultant critiques their submissions and displays demonstrative aids the consultant developed for the class. From my vantage point sitting with my students, with some reluctance I have to admit that the expert visits produce the best classroom experiences of the semester.<sup>79</sup>

#### CONCLUSION

The Remedies course is an excellent launch pad for future practitioners,<sup>80</sup> be they prospective trial or deal lawyers. The case method can be structured to boost the inherent practical (and doctrinal) utility of the course. Nonetheless, my impression is that the Remedies course has not taken its rightful place in the classrooms of many of our law schools. Perhaps the special role of the Remedies course in preparing students to practice law, a perennial point of concern,<sup>81</sup> will raise the profile of Remedies within the academic community. It would also help if practitioners would tell the law students they meet, "Be sure to take Remedies." In that regard, I will continue to do my part.

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77. Richard B. Miller, *The Damages Dilemma in the Bet-the-Company Case*, LITIG., Winter 1991, at 12; Robert J. Shaughnessy, *Dirty Little Secrets of Expert Testimony*, LITIG., Winter 2007, at 47.

78. See *supra* note 31 and accompanying text.

79. All four of the volunteers for these visits have done outstanding jobs: testifying experts Keith R. Ugone in Dallas and John C. Jarocz in Washington, both of Analysis Group, and trial graphics consultants Jason Barnes of Barnes & Roberts, LLC, Dallas, and Ross Noble in the Washington office of TrialGraphix.

80. See Weaver & Partlett, *supra* note 17, at 270–73.

81. For the most recent example, see Press Release, Am. Bar Ass'n, ABA President Names Task Force on the Future of Legal Education (July 31, 2012), available at <http://abanow.org/2012/07/aba-president-names-task-force-on-the-future-of-legal-education>.



## APPENDIX

## FAILURE TO MITIGATE

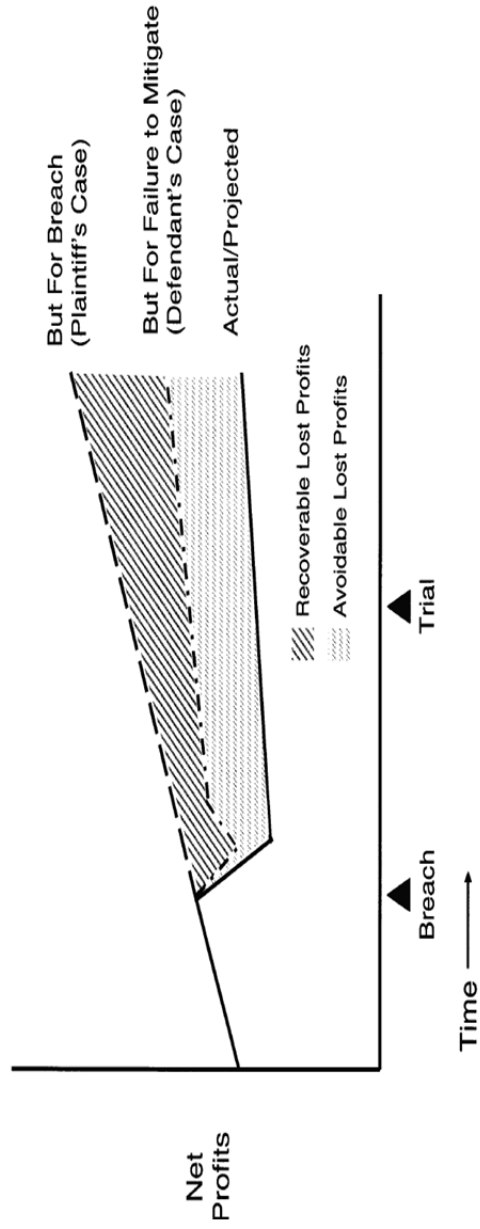
*P* manufactures high-performance steering wheel components made to its customers' specifications. *P*'s best customer is *D*, by far the most successful supplier of steering wheels to the manufacturers of Formula 1 racing cars. At the beginning of 2006, *P* and *D* enter into a contract in which *D* commits to buy its requirements of steering wheel components from *P* for nine years. At the end of 2008, *D* decides to switch suppliers and terminates the contract. *P* sues *D* for breach, and the case goes to trial at the end of 2011.

*P* seeks lost profits of \$1,337,000, consisting of \$565,000 in lost profits during 2009–2011 and \$772,000 in lost future profits discounted at ten percent to December 31, 2011.

*D* raises the defense of failure to mitigate, arguing that by mid-2009 *P* could have found a substitute customer. *D*'s expert witness acknowledges that the substitute would not have been as lucrative for *P*, but the expert demonstrates that a substitute transaction would have been available and would have partially mitigated *P*'s asserted lost profits, reducing the lost profits to \$735,000.

The attached graph and spreadsheet reflect the evidence.

# FAILURE TO MITIGATE



**PLAINTIFF'S CASE**

(\$000)	2006	2007	2008	2009	2010	2011	2012	2013	2014	TOTAL
<b>ACTUAL/PROJECTED</b>										
Revenues	1,000	1,140	1,300	858	944	1,038	1,142	1,256	1,381	10,058
Cost of Goods Sold	500	570	650	429	472	519	571	628	691	5,029
Gross Profits	500	570	650	429	472	519	571	628	691	5,029
Variable Expenses	250	285	325	214	236	259	285	314	345	2,514
Fixed Expenses	100	100	100	100	100	100	100	100	100	900
<b>Net Profits</b>	<b>150</b>	<b>185</b>	<b>225</b>	<b>114</b>	<b>136</b>	<b>159</b>	<b>185</b>	<b>214</b>	<b>245</b>	<b>1,614</b>

**BUT FOR BREACH**

Revenues	1,000	1,140	1,300	1,482	1,689	1,925	2,195	2,502	2,833	16,085
Cost of Goods Sold	500	570	650	741	844	963	1,097	1,251	1,426	8,043
Gross Profits	500	570	650	741	844	963	1,097	1,251	1,426	8,043
Variable Expenses	250	285	325	370	422	481	549	626	713	4,021
Fixed Expenses	100	100	100	100	100	100	100	100	100	900
<b>Net Profits</b>	<b>150</b>	<b>185</b>	<b>225</b>	<b>270</b>	<b>322</b>	<b>381</b>	<b>449</b>	<b>526</b>	<b>613</b>	<b>3,121</b>

**LOST PROFITS**

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**PRESENT VALUE**

as of 12/31/2011 (at 10%)

				156	186	222	239	257	276	<b>1,337</b>
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	2006	2007	2008	2009	2010	2011	2012	2013	2014	TOTAL
<b>DEFENDANT'S MITIGATION DEFENSE</b>										
<b>(S000)</b>										
<b>HYPOTHETICAL</b>										
<b>REPLACEMENT CUSTOMER</b>										
Revenues				187	412	453	498	548	603	2,701
Cost of Goods Sold				94	206	226	249	274	301	1,350
Gross Profits				94	206	226	249	274	301	1,350
Variable Expenses				47	103	113	125	137	151	675
<b>Incremental Profit</b>				<b>47</b>	<b>103</b>	<b>113</b>	<b>125</b>	<b>137</b>	<b>151</b>	<b>675</b>
<b>BUT FOR FAILURE</b>										
<b>TO MITIGATE</b>										
Revenues	1,000	1,140	1,300	1,045	1,355	1,491	1,640	1,804	1,984	12,758
Cost of Goods Sold	500	570	650	522	678	745	820	902	992	6,379
Gross Profits	500	570	650	522	678	745	820	902	992	6,379
Variable Expenses	250	285	325	261	339	373	410	451	496	3,190
Fixed Expenses	100	100	100	100	100	100	100	100	100	900
<b>Net Profits</b>	<b>150</b>	<b>185</b>	<b>225</b>	<b>161</b>	<b>239</b>	<b>273</b>	<b>310</b>	<b>351</b>	<b>396</b>	<b>2,290</b>
Alleged Lost Profits	--	--	--	<b>156</b>	<b>186</b>	<b>222</b>	<b>263</b>	<b>312</b>	<b>368</b>	<b>1,507</b>
Profits from Mitigation	--	--	--	<b>47</b>	<b>103</b>	<b>113</b>	<b>125</b>	<b>137</b>	<b>151</b>	<b>675</b>
<b>LOST PROFITS W/MITIGATION</b>	<b>--</b>	<b>--</b>	<b>--</b>	<b>109</b>	<b>83</b>	<b>109</b>	<b>139</b>	<b>175</b>	<b>217</b>	<b>832</b>
<b>PRESENT VALUE</b>				<b>109</b>	<b>83</b>	<b>109</b>	<b>126</b>	<b>144</b>	<b>163</b>	<b>735</b>
as of 12/31/2011 (at 10%)										

