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A SET OF PROBLEMS TO TEACH PERMISSIBLE REMEDIAL COMBINATIONS

JEFFREY E. LEWIS*

INTRODUCTION

Law professors write examinations that usually include questions requiring students to synthesize the course material. The good synthesizing question provides an opportunity to bring disparate parts of a broad topic together and to reveal relationships within a coherent picture of the whole. A useful synthesizing question in the context of the law of Remedies will inquire whether a certain combination of remedies is permissible and consistent with the rightful position of the plaintiff.¹

This Essay proposes that our Remedies courses conclude with cases and/or problems that require this synthesis as a finishing touch and as a warm-up for the final examination, and it offers a vehicle for doing so.

Another approach to teaching permissible remedial combinations is to do so throughout the course when the opportunity is presented. This is a little more difficult because typically the student will not have enough knowledge of the alternative remedies until towards the end of the course. For example, the combination of specific and compensatory relief is best taught only after both types of relief are examined in the course. Likewise, the combination of restitution with other remedies will be difficult to teach until restitution itself is taught. On the other hand, most of the Remedies casebooks do provide a

* This is dedicated to the late Vincent C. Immel. Dean Immel served on the Saint Louis University law faculty from 1958 to 2004; he served as dean of the School of Law from 1962 to 1969. He was a masterful teacher of Contracts and Remedies and an inspiration to colleagues and thousands of students.

1. For the purposes of this exercise, I adopt Professor Douglas Laycock's definition of plaintiff's rightful position, as explained in his casebook as "the position he rightfully would have come to but for defendant's wrong." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15 (4th ed. 2010). The goal of the law of Remedies should be to assure that, as nearly as practicable, the relief awarded neither falls short of this position nor exceeds this rightful position. The rightful position principle applies equally to substitutionary and specific relief. It can also be properly applied to restitutionary relief, albeit with a different emphasis. As the Restatement (Third) of Restitution and Unjust Enrichment explains, "[T]he wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. k (2011).

modest opportunity to present the combination of remedies issue *ad seriatim*. While most of us, I suspect, seize these opportunities, I propose that there will be an educational benefit to emphasizing this at the end of the course as well. For the first time in my thirty-one years of teaching Remedies, I will do so in the spring semester of 2013.

How can we best provide this synthesizing opportunity? In my view, problems are the best vehicle. Problems provide a natural transition to the final examination, and unlike cases, problems do not present the already solved case; the student must solve the problems in light of her studies over the semester. Nine problems offering this synthesizing opportunity follow this Introduction.

The issue of permissible remedial combinations is presented only when multiple remedies are actually available under the rules that govern availability; it is then that it is necessary to inquire whether they are available in combination consistent with the plaintiff's rightful position.

This topic of permissible remedial combinations is not the same as the choice of remedy topic that is so much a focus in the traditional Remedies course. In other words, this is not like the choice between damages and injunctive relief, where the inadequacy rule is one of the limits on the availability of an injunction.²

Some remedies are inconsistent. For example, in an action on a contract, the plaintiff cannot seek specific performance and/or damages and at the same time seek rescission of the contract. Professor Dan Dobbs explains:

The two remedial approaches, one based on affirmance, the other on avoidance, are inconsistent in the sense that they point in different directions. In some cases and with some claims they are inconsistent in the added sense that the plaintiff who recovered both kinds of remedies might be getting more remedial desert than he should.³

It is this second form of inconsistency that is the subject of this Essay—where a remedial combination exceeds the plaintiff's rightful position.

Also, this topic is not fundamentally about measurement of a remedy, but rather it is about coordination of remedies so as to be true to the goal of achieving the plaintiff's rightful position. Certainly measurement will often be

2. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.").

3. 3 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 12.7(6), at 186 (2d ed. 1993).

an imbedded task, but given the normal measurement rules properly applied, the question is: When can multiple remedies be used to accomplish the proper remedial result?

This topic is not, therefore, about the measurement of the scope of an injunction, or the measurement of the plaintiff's loss for the calculation of damages, or the measurement of the defendant's unjust enrichment for restitution purposes. Once the measurement has properly occurred, the question to be addressed is whether multiple remedies may be used in combination to achieve the proper remedial result.

In summary, the modest goal of the exercise offered by the following problems is to provide students an opportunity to learn to recognize permissible remedial combinations.

The problems assume the traditional coverage found in the leading Remedies casebooks. The students can draw upon their knowledge and understanding acquired through their study during the semester.

Some of the problems are variations on actual cases, and those cases are noted. The remaining problems are simply creatures of my imagination and probably find their source in some combination of factual situations I have encountered over the years.

After each problem I offer a brief discussion and solution. In each instance, the answers are supported by considerable precedent, and my audience of law professors does not, of course, need an extensive citation to that precedent. I have, however, provided at least one authority as an example of that considerable precedent for each solution. I hasten to add that, while I do not anticipate that any of my proposed solutions will be viewed as controversial, I solicit any disagreement from readers.

REMEDIAL COMBINATION PROBLEMS

Instructions:

The following problems are designed to focus your attention on permissible remedial combinations. Assume that the plaintiff has a valid cause of action against the defendant. Assume that the remedies are available under the rules that govern availability. For example, if specific relief is listed as a remedy, assume that the legal remedy will not adequately address the same harm or threatened harm.

Identify the remedy or remedies that will accomplish the plaintiff's rightful position.

Problem 1: The Case of Beef Cattle Without a Place to Graze

Plaintiff (hereinafter “P”) and Defendant (hereinafter “D”) entered into a contract for a two-year lease of pastureland at the price of \$5000 per year; P intended to graze beef cattle on the land and did so during the first year of the lease. Just before the beginning of the second year of the lease, D sold the property to another, and P was denied access to the land. For the first six weeks of the second year of the lease, and before substitute pasturage was obtained, P paid a feedlot operator \$500 to hold and feed the cattle. For the remaining period of the second year, P obtained substitute pasturage for \$7500.

P’s evidence will support a finding that the market value of the pastureland under contract with D was \$6000 per year. Transportation of the cattle to the feedlot cost \$1000, and two cattle valued at \$750 each were lost in transport. P filed a lawsuit seeking recovery of the contract-market differential of \$1000, the extra cost of substitute pasturage of \$2500, the feedlot cost of \$500, and the \$2500 for transportation and lost cattle.

What can P recover upon proper proof?

Problem 1 Discussion:

The contract-market differential may be recovered as general damages and the transportation costs and value of lost cattle may be recovered as special damages, without overlap. Three distinct and separate losses are present; they are addressed by the combined general-special damage recovery.

On the other hand, the extra cost of the substitute pasturage and the feedlot represent the cost alternative to general damages and cannot be recovered in addition to general damages based on the traditional value approach to measuring the lost contract expectancy. Recovery of both would constitute double recovery for a single loss under two distinct measures.⁴

Problem 2: The Case of the Missing Commodity

Buyer and Seller entered into a contract under which Seller promised delivery of a commodity needed by Buyer in its manufacturing business. After the contract was executed, the market price of the commodity increased significantly over the contract price because of a serious shortage. Seller refused to deliver at the contract price. Buyer could not immediately find cover in the market and shut down its production line for two weeks until cover was found; the shutdown caused the loss of \$10,000 in net profits. Buyer filed a lawsuit seeking specific performance and the lost net profit of \$10,000.

What can Buyer recover upon proper proof?

4. See *Buck v. Morrow*, 21 S.W. 398 (Tex. Civ. App. 1893).

Problem 2 Discussion:

This is a situation where both damages and specific performance may appear to be inconsistent and duplicative, but they are not. Seller's failure to perform caused harm to Buyer in the form of lost net profit; this loss cannot be addressed by a decree of specific performance. Both remedies together accomplish the plaintiff's rightful position.⁵

Problem 3: The Case of the Toxic Real Estate

Buyer and Seller entered into a contract of sale for real estate for \$750,000. The real estate was represented to be free of toxic wastes. After the closing occurred, Buyer discovered that the property was contaminated. Evidence supported the proposition that the contaminated land was worth only \$250,000 and that the cost of removing the toxic wastes would be \$100,000.

Buyer filed a lawsuit seeking damages of \$500,000 and the cost of decontamination.

What can Buyer recover upon proper proof?

Problem 3 Discussion:

Recovery of either the contract-market differential or the cost of decontamination achieves Buyer's contract expectancy. Recovery of both would be a duplicate recovery since they address the same harm and represent the value and cost alternatives to measurement of that harm.⁶

Problem 4: The Case of the Destroyed Apartment Building

An apartment building was destroyed in an explosion caused by the leakage of natural gas from a pipe that supplied the building. Owner sued Gas Company seeking damages for the value of the building and lost rentals for the period from the time of destruction until the building was rebuilt and fully rented.

What can Owner recover upon proper proof?

Problem 4 Discussion:

The market value of the property necessarily includes the present value of the lost rentals. Recovery of both would exceed Buyer's rightful position; it would amount to a double recovery of the lost rentals.⁷

5. See 3 DOBBS, *supra* note 3, § 12.8(1), at 193.

6. See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.3(7), at 312 (2d ed. 1993) ("One way damages recoveries can be duplicated occurs when both general market damages and substitution cost damages are awarded for the identical underlying loss.").

7. See *In re September 11th Litig.*, 590 F. Supp. 2d 535, 544 (S.D.N.Y. 2008).

Problem 5: The Case of the Tardy Machines

In order to expand its capacity to recondition old rubber, Buyer needed four unique machines to add an extra production line. Buyer and Seller entered into a contract under which Seller undertook to manufacture the machines and to deliver all four no later than a date certain, at the price of \$15,000 per machine. Two of the machines were delivered on time, but the other two were delivered twenty-four months late. When the first two machines were delivered by Seller, Buyer placed them in storage pending the delivery of the remaining two machines. Buyer subsequently refused delivery of the second two machines, returned the first two, and purchased four comparable substitute machines for \$20,000 each.

Assume that Buyer was justified in not accepting all four because of the delay in delivery. Buyer filed a lawsuit seeking recovery of \$20,000 in general damages, the cost incurred for storage of the first two machines, and the lost net profit caused by the delay in starting the new production line. It took Buyer six months to obtain and install substitute machines.

What can Buyer recover upon proper proof?

Problem 5 Discussion:

Buyer may recover all of the relief. The \$20,000 in general damages and the special damages for lost net profits represent separate and distinct losses.⁸ The cost of storage was a distinct incidental reliance expense.⁹

Each element of the relief requested by Buyer covers a discrete loss. There is no duplication, and Buyer's rightful position is accomplished with the three ingredients of relief.¹⁰

Problem 6: The Case of the Converted Silver

P sued D for conversion of antique silver; the silver was stolen from P's home and sold to D by a dealer. P's evidence supported a finding that D knew the silver was stolen, and that D damaged the silver by attempting to remove initials from it and used the silver for a period of five years until its discovery by P.

P filed a lawsuit seeking return of the silver by way of replevin, damages for diminution in the value of the silver, and damages for loss of use during the five-year period of time.

What can P recover upon proper proof?

8. See *Buck*, 21 S.W. at 398.

9. See generally *Neri v. Retail Marine Corp.*, 285 N.E.2d 311 (N.Y. 1972) (discussing the recovery of incidental reliance expenses).

10. This problem is a variation of *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949).

Discussion of Problem 6:

The return of the silver can be accompanied by damages for diminution in value and loss of use damages. This combination of restitution and damages places P in her rightful position. The damages award which addresses plaintiff's loss of use and the loss in value caused by the disfigurement do not overlap with replevin.¹¹

Problem 7: The Case of the Leaky Roof

D sold a home to P and in so doing fraudulently represented that the roof of the home was in good condition with a life expectancy of "at least ten years" from the time of the sale.

P brought a lawsuit to rescind the contract of sale when he discovered that the roof had numerous and substantial leaks. P also sought damages in the amount of the diminished value of the home resulting from the defective roof and for the diminished value of furnishings that were water-damaged.

What can P recover upon proper proof?

Discussion of Problem 7:

D can obtain either rescission of the contract or damages for the difference in the value of the home as represented and as it was, but not both. Rescission and general damages for breach are inconsistent and duplicative. Either one alone, but not both, accomplishes the rightful position of P.¹²

In addition, special damages for diminished value of the furniture may be combined with either principal remedy without duplication; this loss is separate from the contract expectancy of P.¹³

Problem 8: The Case of the Copied Grain Hauler

D manufactured a twin-hopper-bottomed semi-trailer for hauling grain and in so doing purposefully adopted a design and structure for the trailer that was virtually identical to that manufactured and sold by P. P and D sold the trailers in the same three Midwest states.

P sued claiming unfair competition and sought an injunction prohibiting manufacture and sale of a semi-trailer with an exterior design and structure identical to P's semi-trailer, compensatory damages for sales lost by P as a result of D's unfair competition, an accounting for net profits earned by D at the expense of P, and punitive damages in the amount of \$500,000.

The trial court entered a judgment granting the relief requested, including the injunction, damages for the net profits lost as a result of D's sales, and an

11. See *Welch v. Kosasky*, 509 N.E.2d 919, 921 (Mass. App. Ct. 1987).

12. See *supra* note 3 and accompanying text.

13. See *Buck*, 21 S.W. at 398.

accounting for all of the net profits realized by D in the three states. The evidence at trial supported D's contention that only twenty percent of the semi-trailers were purchased from D in the three-state market area because of their similarity in design and structure to P's product. The damages award was predicated on the twenty percent figure, but the restitutionary award was not.

Was the trial court's remedial decision correct?

Discussion of Problem 8:

There is an overlap between the damages award for P's lost sales and the restitutionary award for profits earned by D in the three-state area. The award of both is an excessive recovery to the extent of the overlap. P may recover the larger of the two, but not both.¹⁴

There is also a potential overlap between the restitutionary recovery and the punitive damage award. The accounting for lost profits included profits of D unrelated to the wrongful conduct; this exceeds the traditional measure of restitutionary disgorgement and, to the extent of the excess, it includes a punitive ingredient. The punitive damage award should be calibrated to provide the proper punishment in light of the nature of D's conduct and its effect on P; if it was, then there is an overlap between this and the punitive portion of the disgorgement. This is the only problem that includes a measurement issue. The measurement of restitutionary disgorgement, if it includes profits unrelated to defendant's wrongful conduct, creates an overlap with the punitive damages award.¹⁵

Problem 9: The Case of the Frozen Food Caper

P and D are competing kitchen appliance companies that sell and deliver food freezers filled with frozen food products. The parties stipulated that D came into possession of the customer list owned by P knowing that it was stolen at the time of purchase. At the time of the lawsuit, D had contacted 20% of P's customers and, as a result, generated a number of new sales.

P sued under the state trade secrets act and sought a permanent injunction prohibiting continued use of the customer list, damages for lost net profits stemming from lost sales, and damages for future lost sales by D to additional customers of P. Upon proper proof, the trial court entered an order granting a

14. See *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 108 n.7 (2d Cir. 1999) ("A plaintiff may not recover its full lost profits plus all of the defendant's profits, for this would constitute a forbidden double recovery." (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[A], at 14-10 (1996))).

15. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51(4) & cmt. k (2011); see also 1 DOBBS, *supra* note 6, § 4.5(5), at 655 (noting that when recovery of the defendant's profits includes profits derived from the defendant's own effort or investment, "it exceeds full disgorgement and therefore contains punitive elements").

permanent injunction against future sales to any customers on the list, \$30,000 damages for P's lost net profits, and \$10,000 as a reasonable royalty for the value of future sales to customers on P's customer list.

Was the trial court's remedial decision correct?

Discussion of Problem 9:

The permanent injunction against continued use of the customer list will prevent future lost sales stemming from use of the list; therefore, the award of damages for future use is inconsistent with the injunction. It also constitutes an award in the absence of a loss. On the other hand, since the injunction only looks forward and cannot address the losses already incurred, the award of damages for net profits already lost is not inconsistent with the injunction. Together, the forward-looking injunction and the backward-looking award of damages accomplish the plaintiff's rightful position.¹⁶

16. See *Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 784 (Neb. 2001).

