Remedies Outline

Jacobs, Fall 2012

1. Overview
   1. Declaratory remedy: gives п a declaration of rights without providing the basis for transferring anything of value
      1. Most common: declaratory judgment, which performs much like an injunction without coercion
   2. Money damages: the money substitutes for the action thing п lost (i.e. good health, lost wages, bills etc. in tort cases; tangible items)
   3. Specific remedy: give п the actual thing п lost or wants
      1. Injunction: prohibits/requires conduct
      2. Specific performance: compels performance of K
      3. Replevin: return of personal property
      4. Ejectment: return of possession of real property
      5. Constructive trust: return of money/property
   4. Remedies:
      1. Compensatory remedy: compensate for past harm, measured by loss to п; money damages most common
      2. Preventative remedy: prevent future harm, such as via injunction
      3. Restitutionary remedy: remove ∆’s gain; purpose is to disgorge gain to ∆ rather than compensate п for a loss; can be substitutionary or specific
      4. Remedies to deter/punish: usually in criminal justice system, but punitive damages can be imposed in civil justice system
      5. Supplemental remedy: assists in accomplishing objectives of other remedies; enforcement remedies are supplemental
   5. Legal vs. Equitable
      1. Rule of thumb: substitute remedies are usually legal; specific remedies are usually equitable
      2. Legal: substitute remedy of money is almost the only civil “legal” remedy; replevin and ejectment are the two exceptional legal remedies that give specific relief
      3. Equitable: specific remedies are almost always equitable, with the exceptions of replevin and ejectment (see above); money awards, if specific, can be equitable
      4. Differences
         1. Which type of remedy will determine (1) whether you can get the remedy; (2) who will be the fact finder; (3) how the remedy will be enforced; and (4) what defenses the opposing party may raise
         2. Inadequate legal remedy is an explicit part of some equitable remedy tests, such as injunction; rescission, constructive trust and equitable lien require special grounds for a court to grant the remedy
         3. Jury trial: not a right under equity system
         4. Enforcement
            1. Law: courts issue writs directed at law enforcement to enforce remedies
            2. Equity: contempt
         5. Defenses: unclean hands and laches apply *only* in equity
2. Tort Damages Overview
   1. Tort damages are a legal remedy; either party can demand jury trial
   2. Remedies
      1. Compensatory Damages: give п money in substitute for injuries/losses suffered because of the tort
         1. Purpose is to put п in rightful position
         2. General damages: cannot be quantified, such as emotional distress or pain/suffering
         3. Special damages: can be reduced to an identifiable number, such as medical bills, lost wages
            1. Special damages must be specially pleaded in the complaint
         4. Requirements
            1. Cause in fact: ∆’s tortious conduct must have been the “but-for” cause for which damages are awarded
            2. Certain: (1) certainty as to the fact that the losses actually happened or will happen; and (2) certainty as to the precise amount
            3. Foreseeability/Proximate Cause: reflects a policy judgment about how far the scope of liability for tort damages should extend

Economic loss rule: pure economic loss cannot be recovered

* + - * 1. Unavoidable: п must have made reasonable efforts to mitigate damages; cannot recover for damages that were reasonably avoidable
      1. Damages
         1. Offsetting benefits: if п benefits from the tort, that amount reduces the damages recovery
         2. Nominal damages: where п can prove the tort, but does not cause actual, compensable injury, courts may allow award of nominal damages to vindicate the right or provide a basis for awarding costs, attorney’s fees, or punitive damages
         3. Punitive damages: may go along with either compensatory or nominal damages to punish and deter malicious/intentional or wantonly reckless behavior
         4. Attorneys’ fees: American rule is that losing party does not have to pay these; some statutes provide for recovery of attorneys’ fees
         5. Costs: generally authorize prevailing parties to recover costs and fees associated with the lawsuit
         6. Taxes: personal injury awards not subject to tax; most others are
         7. Adjustments for time:

Interest: award of interest on amount of judgment compensates п for receiving money later than if the tort had not occurred; interest compensates for the reality that ∆ has had the use of “п’s” money from the time of the tort until judgment is paid

Pre-judgment: common law says no interest for this time period unless amount was liquidated; jurisdictions differ on the extent to which they allow recovery of pre-judgment interest

Post-judgment: always allowed, rate often set by statute

1. Punitive Damages
   1. Purpose is to punish and deter intentional bad conduct (willful, wanton, malicious, oppressive)
   2. Burden of proof: states differ on whether it must be proven by “clear and convincing evidence” or “preponderance of the evidence” standards
   3. Amount
      1. State statutes may limit amount
      2. Federal constitutional limits, three-part test
         1. Degree of reprehensibility
            1. Type of harm; reckless disregard for health and safety of others; financially vulnerable targets; repeated misconduct; intentional malice, trickery, or deceit
         2. Ratio of punitive to compensatory damages
            1. Should not exceed 9:1
            2. **Roby v. McKesson Corp**: low degree of reprehensibility makes limit 1:1
         3. Comparison to sanctions for similar misconduct
            1. Include civil and criminal penalties for similar misconduct
2. Contract Damages Overview
   1. Compensatory damages: give п money substitute for value that performance would have had at time of breach – “expectancy” or “benefit of the bargain” damages
      1. General vs. Specific
         1. General: measure value lost because of breach; subdivided into base and incidental damages
         2. Special: consequential damages measure value lost to nonbreaching party because of the breach in interchanges with 3d parties.
      2. Requirements
         1. Caused by the breach, Certain
            1. П must prove the fact of damages and amount of damages with reasonable certainty
            2. To get consequential damages, п must show both causation and quantity
            3. New business rule: modernly, new business can show lost profits through evidence relating to profits made by similar businesses or expert testimony
         2. Foreseeable
            1. General damages are inherently foreseeable
            2. Consequential damages: п must prove that ∆ knew/should have known, when entering into K, that special circumstances would give rise to the damages
         3. Unavoidable
            1. П cannot recover for damages he reasonably could have avoided
   2. Liquidated damages: purpose is to enforce parties’ bargain
   3. Punitive damages: generally not available for breach of K
3. Short Term Injunctions
   1. Types
      1. Temporary restraining order (TRO): may only last 14 days, with 1 extension, without enjoined party’s consent. Informal notice required unless moving party shows that giving notice will result in irreparable injury prior to hearing, in which case TRO ex parte may be issued
      2. Preliminary injunction: directs conduct from time court issues it until final relief; statutory notice and adversary hearing required
      3. Stay or injunction pending appeal: directs conduct from the time issued until decision on appeal
   2. Party seeking short term injunction must post a bond; exceptions for indigent persons, non-profit/public interest orgs
   3. Persons bound: parties to the action, their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with them who receive actual notice by personal service or otherwise
   4. Traditional test: all jurisdictions follow some form; moving party must show
      1. Likelihood of success on merits
      2. Likelihood of irreparable harm
         1. Nature of injury is one for which courts will not require a party to wait and accept money damages or money damages will not be available; and
         2. Timing of injury is such that it will likely occur before next opportunity for court to hear a fuller presentation
      3. Balance of hardships tips in its favor
         1. Looks to irreparable injuries
      4. Injunction is in public interest
   5. Sliding scale test: some federal circuits follow; moving party must show
      1. Case represents a serious question on merits
      2. Likely that irreparable harm will occur
      3. Balance of hardships tips sharply in its favor
      4. Injunction is in public interest
      5. More of factor (ii) means less of (iv) required; vice versa
4. Bond Requirement
   1. Purpose: protect enjoined party from injuries caused by decision made with less than DP
   2. Amount: set at damages enjoined party proves it is likely to suffer
   3. Modifying: enjoined party must offer whatever evidence available at time to argue for sufficient bond amount; can move to increase amount if circumstances change
   4. Exceptions to requirement:
      1. Indigents: all jsdx allow this exception
      2. Public interest п: most jsdx allow this exception
      3. Domestic Violence: against public policy to require bond in this case
      4. US Govt
   5. Recovery
      1. Wrongfully enjoined: may presumptively recover if prevail on merits
      2. Execution on Bond: see above; Ct has discretion to refuse
      3. Amount, subject to Injunction Bond Rule: amount of provable damages, limited to amount of bond
5. Specific Types of Short Term Remedies
   1. Asset Freeze Order: TRO/Preliminary Injunction preventing enjoined party from transferring certain assets; must meet 4-part test for TRO/Prelim Injunction
      1. Moving party shows irreparable injury by showing that, absent the order, enjoined party is likely to transfer assets so there will not be enough to satisfy later judgment
   2. Replevin/Writ of Possession/Claim and Delivery: all same legal remedy
      1. Specific legal remedy giving pre-trial possession of item; п must present proof of title, post bond, and Ct issues writ for sheriff to seize; sheriff holds item for a few days, during which ∆ has opportunity to request a hearing and post counter bond
         1. Irreparable injury not required because legal remedy
         2. Legal title required
         3. Must be tangible property, capable of identification and seizure
         4. Ex parte issuance: ∆ entitled to prompt adversary hearing within a few days to contest
   3. Attachment: legal remedy creating judicial lien on the property of the party subject to the attachment; no pre-existing legal right to possession of property required
      1. Protects п’s priority so a judgment ultimately obtained will be enforceable against the attached property
      2. CA law: no showing of necessity required except when п seeks order ex parte; remedy limited to commercial creditors with claims based upon a k, express or implied; п must show likelihood of prevailing on merits and must post bond
   4. Receivership: equitable remedy under which a court appoints a neutral 3p to run an institution or enterprise pending the outcome of litigation
6. Permanent Injunctions
   1. Two tests to use
      1. SCotUS 4-part test п must meet to obtain permanent injunction: п must show
         1. П suffered irreparable injury
            1. Nature of injury is one for which courts will not require п to accept $ damages
            2. Timing of injury is ongoing or likely to occur
         2. Inadequate legal remedy
         3. Balance of irreparable injuries: П would be more harmed than ∆
         4. Public interest would not be disserved
      2. Sliding scale test
         1. Use same factors as SCotUS test; balance factors 1 and 4 – more of 1 means less of 4 and vice versa
   2. Policy considerations
      1. Supervision difficulties: permanent injunctions require courts to retain jurisdiction over the case, imposing a cost on the court; can also be difficult to supervise over a long term
      2. Freedom of speech: can only enjoin speech if it falls within an unprotected category; strict scrutiny test
   3. Modifications/Dissolution: standard is change of law or facts; courts dissolve them when the injunction is no longer necessary
7. Remedial Defenses
   1. Unclean Hands: equitable defense (CA allows for legal remedies as well)
      1. ∆ must prove (1) misconduct by п (2) relating to subject matter of claim
      2. In Pari Delicto (“in equal fault”) distinguished: based on same policy concern as unclean hands – a court should not assist a wrongdoer; bars both legal and equitable remedies and requires п’s wrongdoing be at least as bad as ∆’s
      3. Unconscionability distinguished: this defense is particular to Ks.
   2. Laches: equitable defense
      1. ∆ must show (1) unreasonable (2) delay that results in (3) prejudice to ∆
   3. Estoppel: legal and equitable defense
      1. Requires (1) statement/conduct by п on which ∆ (2) relies to its (3) detriment
      2. Laches distinguished: laches requires unreasonable delay
      3. Waiver distinguished: intentional relinquishment of a known right
      4. Promissory estoppels distinguished: this is not a defense, but a way of establishing a cause of action
8. Contempt
   1. Types of Contempt
      1. Criminal contempt: purpose is to punish the disobedient party
         1. Direct: must occur in presence of judge and disrupt ongoing proceedings; does not require a hearing
         2. Indirect: out of court; judge may only impose serious penalty (6+ months in jail or serious fine) if ∆ given right to jury trial
            1. Collateral Bar Rule: majority jsdx follow; bars ∆s from offering as a defense proof that the underlying injunction was invalid
         3. Sanctions distinguished: sanctions are not criminal convictions and imprisonment is not a possible remedy
      2. Civil contempt: civil enforcement remedy to put beneficiaries in rightful position
         1. Coercive: to coerce disobedient party to comply with prior court order; must contain a purge clause allowing disobedient party to avoid further sanctions by choosing to comply
            1. Civil/criminal overlap: if ∆ cannot comply, then sanction must stop; if it is to continue past this, ∆ must be allowed criminal procedures
         2. Compensatory: not all jsdx recognize; п gets the $ award and the computation of amount is based on compensating п’s loss from ∆’s failure to perform
9. Legal Unjust Enrichment/Quasi-Contract
   1. Quasi-contract is not an actual k; it is implied in law
      1. elements: (1) п confers benefit, (2) ∆ gets a gain, and (3) transfer is unjust
      2. Restitution: includes quasi-k cause of action and money award; refers to any remedy that removes ∆’s gain and includes specific legal remedies of replevin and ejectment, and also equitable remedies to prevent unjust enrichment
   2. Circumstances that constitute unjust enrichment
      1. Transfer by mistake: general rule is someone who receives something by mistake must return it (or its value) if it is possible to do without incurring additional hardship
         1. For personal property, replevin is the remedy to receive the property; unjust enrichment is the remedy to receive its value
         2. For real property: reformation or rescission are remedies to cancel/correct the mistaken transfer of title; ejectment is the legal remedy to remove people mistakenly occupying the property; quasi-k only becomes an issue when one party mistakenly builds an improvement on another party’s land
      2. Knowing transfer: presumption is that the one making the transfer bore the risk of loss absent a valid k to get paid; special circumstances can overcome this presumption
         1. Emergency services: unjust enrichment when a professional renders emergency services, but not when a lay person does
         2. Double recovery (double indemnity): if party receiving the benefit also receives another payment for its value, retaining both is unjust
         3. Domestic/Family relationships: presumption that transfers among family are gifts
      3. Transfer by tort or wrongful conduct: unjust enrichment is alternate option for tort п
         1. Gain to ∆: this option is attractive when (1) ∆ gains value from committing a tort and (2) the value is greater than what п lost
         2. Measure of benefit: when ∆ consciously commits a tort/wrongful conduct, punitive element enters into calculating the amount of benefit to ∆
            1. Fruits of ∆’s labors: courts take into account the fruits of ∆’s labors and apportion the profits to take into account both ∆’s culpability and cost/effort added by ∆ to make the profits
         3. Defenses: bear on whether the transfer was unjust
            1. Volunteer/Officious intermeddler: one who transfers value without entering into k is presumed to be a volunteer
            2. Change of position: ∆ (1) without knowledge of the benefit (2) changes financial position so that the value received cannot be returned
            3. Innocent 3P creditor: negligence on part of one who transfers benefit is not usually a defense, but if ∆ has parted with benefit, relative negligence becomes relevant
            4. Equitable defenses do not apply
10. Equitable Unjust Enrichment
    1. Constructive trust: analog to legal quasi-k
       1. Fiction that separates legal and equitable title to property in instances where the one who holds legal title acquired it wrongfully; from the moment of wrongful acquisition, wrongdoer was acting as rightful owner’s “constructive trustee,” holding and guarding property for rightful owner’s benefit
       2. Requirements:
          1. Inadequate legal remedy
          2. Grounds: transfer was in some fundamental way unknowing (fraud, duress, undue influence, etc)
          3. Res: must have actual property
          4. Tracing: п must be able to trace the res
          5. Percentage of commingled asset: where ∆ commingles п’s property and the asset appreciates, п gets % of appreciation
             1. Depreciating asset: % rule does not apply; п can still receive full amount of contribution
          6. Lowest intermediate balance: where п traces asset into ∆’s account, court will impose constructive trust up to the lowest balance the account had between the time of deposit & imposition of trust
          7. Legal title: ∆ must hold legal title
       3. Advantages: provides security for payment when ∆ is in bankruptcy/has limited assets – courts give priority to constructive trusts
    2. Equitable lien: gives п right to force sale of ∆’s property to collect value of the thing taken, or some portion of it
       1. Reasons to use equitable lien instead of constructive trust
          1. Overkill: constructive trust captures entire property; equitable lien doesn’t give п too much
    3. Accounting: requires ∆ itemize all dealings with п’s assets, which helps п trace
    4. Subrogation: in instances where one party (surety) has paid the debt owed by another (principal obligor) to a creditor, subrogation allows surety to bring creditor’s claims against the principal obligor to recover up to the amount paid
11. Jury Trial
    1. Simple cases: legal = right to jury trial; equitable = no right to jury trial
    2. Mixed cases: where cases involve both legal and equitable remedies, jsdxs disagree on how to handle
       1. Federal: jury trial is a priority
          1. Facts/issues necessary to determine whether to award a legal remedy must be decided first by a jury; if they are common to equitable remedy, jury finding are binding on judge
          2. Derivative Action – (1) Judge decides if shareholders can properly bring suit; (2) if shareholders ask for damages, jury
          3. Nuisance Action – (1) Jury decides facts/issues; (2) judge decides whether injunction appropriate; (3) jury decides the damages.
          4. TEST for jury trial determination:
             1. Whether action would have been deemed legal or equitable in 18th century Engl& (nature of issues test);
             2. Whether remedy sought is legal or equitable in nature.
       2. State: equity first
          1. Derivative Action – State courts have rejected right to jury trial.
          2. Nuisance Action –judge decides merits of claim, whether injunction is appropriate, & amount of damages.
          3. CA– ct may decide equitable issues first & this may result in factual & legal findings that effectively dispose of legal claims
12. Personal Property (PP) Tort Remedies
    1. Types of PP torts
       1. Negligent injury to PP: damage without intent; п retains possession
       2. Negligent destruction of PP: total destruction, п retains possession
       3. Trespass to chattels: minor dispossession of PP with intent; п retains possession
       4. Conversion: major dispossession with intent to exercise dominion/control so п doesn’t retain possession; requires identifiable property
          1. Property identifiable: does not apply to $ because not identifiable
          2. Property converted but available: п may choose whether to accept return and get trespass to chattels damages or force the sale to ∆ and receive conversion damages
          3. Multiple conversions: п can demand return and, if not returned, can recover value of item at time converter acquired it; BFP is liable regardless of whether paid value for it – knowledge doesn’t matter
       5. Misappropriation of funds: intentional taking of п’s funds for ∆’s own use
    2. Remedies: temporary damages if п has possession; if п does not have possession, may obtain possession and therefore temporary damages; if п does not obtain possession, permanent damages
       1. Remedies to regain possession
          1. Self-help: state law allows, if п has legal title, and taking does not result in commission of crime or breach of peace
          2. Replevin
          3. Injunction (replevin and damages must be inadequate)
       2. Temporary Damages
          1. Base measure: either diminution in value (Fair Market Value [FMV] pre-tort minus post-tort) or cost of repair (as long as ≤ diminution in value)
          2. Loss of use: п also receives compensation for the time п did not have the property due to the tort; measure at reasonable rate for reasonable time, corresponding to how п used the item
       3. Permanent Damages
          1. Base measure: п receives the FMV of the property at time of tort
          2. Interest or loss of use
             1. Old rule: п gets pre-jdgmt interest on value instead of loss of use
             2. Modern rule: cts may award loss of use where п shows that the property was used to produce income or that the item was difficult to replace
       4. Valuation
          1. FMV at tort – used market price OR replacement cost – depreciation (for property that produces income)
          2. Relevant market – cost of п to replace item in its pre-tort position
          3. Fluctuating value – Majority/NY rule – п recovers highest FMV of item during reasonable replacement time, measured from time of tort (or discovery of tort)
          4. Household goods/Items with sentimental value – courts allow value higher than market price called actual value to owner. Juries receive instruction as to replacement cost, condition, market value, cost to create (with handmade items)
       5. Consequential – additional damages available if п can show causation, foreseeability, certainty, & unavoidability.
          1. Emotional distress – only available if п can show intentional or negligent infliction of emotional distress.
          2. Punitive damages may be available
       6. Unjust enrichment
          1. Quasi-contract – waive tort damages & recover gain to ∆ or FMV at the time of tort
             1. Punitive damages not available
          2. Constructive trust/Equitable lien: mostly not available
             1. Money – available for stolen money or money from sale of stolen item; thief gains legal title to money
13. Real Property (RP) Tort Remedies
    1. Types of RP torts
       1. Trespass: ∆ physically occupies п’s land, either with person or object
       2. Nuisance: substantial & unreasonable interference with п’s use and enjoyment of п’s land
    2. Trespass remedies
       1. Self-help: allowed as long as п does not commit a breach of the peace
       2. Ejectment: п must show title, ct issues writ to sheriff to deliver possession
       3. Injunction: generally issued
          1. Irreparable injury at law: if ejectment is feasible, then adequate remedy at law exists and injunction is inappropriate; damages are inadequate for real property
             1. One-time repair costs: legal remedy is appropriate
          2. Balance of hardships
             1. Willful ∆: no balancing
             2. Innocent ∆: will balance

If de-minimis encroachment, ct may require acceptance of damages

* + 1. Damages
       1. Permanent: trespass is permanent or п chooses to collect damages
          1. Diminution in value: FMV pre-tort – FMV post-tort
       2. Temporary
          1. Cost of repair & lost rental value
       3. Nominal: can be a hook for punitive damages
       4. Valuation: generous to subjective value as compared to PP
       5. Punitive: available
       6. Consequential: if п proves causation, foreseeability, certainty, unavoidability, then may recover
          1. Emotional distress: only if п can show intentional/negligent infliction of emotional distress
    2. Quasi-k: may waive tort & seek ∆’s gain
    3. Alternate remedies
       1. Trespass that remove items: can choose conversion; statutory remedies may also be available
       2. Improvements
          1. Common law: allowed п to keep improvements
          2. Modern betterment statutes/innocent improvers: allowed to recoup the value added by ct order or allowed to remove improvements
  1. Nuisance remedies
     1. Requires balancing competing land uses before looking at remedy
     2. Injunction is only remedy available
        1. In test, court will balance even with a willful nuisance
        2. Tailored injunction: ct may stop some activities of ∆, not all
        3. Conditional injunction: may take effect in future if condition is violated
     3. Damages
        1. Permanent
           1. Diminution in value: FMV pre-nuisance – FMV post
           2. Permanent loss subjective value
        2. Temporary
           1. Lost rental value: FMV with nuisance – FMV without
           2. Subjective loss of enjoyment if п occupied during nuisance
        3. Public nuisance distinguished: substantial/unreasonable interference with a public right
           1. Proper п: private person is proper if Cx standing requirement is met

1. Torts to the Person Remedies
   1. Remedies
      1. Criminal law
      2. Injunction: usually not available because most torts to the person are one-time occurrence; if ongoing, then appropriate
      3. Damages
         1. Economic (special): quantifiable, must be specially pleaded
            1. Medical: п can recover for past medical expenses reasonably incurred; to recover for future, must prove (1) reasonable probability that future medical services will be required and (2) the reasonable estimated cost of those expenses
            2. Loss of earnings: п may recover for actual earnings lost in the past due to injury and for loss of earning capacity into the future
         2. Noneconomic (general): presumed to flow from the tort
            1. Pain and suffering, emotional distress, loss of enjoyment
         3. Collateral source rule: payments to п from collateral sources (sources other than ∆) should not be presented to jury to reduce compensatory damage award
         4. Taxes: personal injury generally not taxable
      4. Recovery beyond physical impact
         1. Wrongful death: persons specifically listed can recover damages for their injuries due to wrongful death of someone close to them
         2. Survival of tort action: survivors can recover for injuries suffered by the tort victim up to the victim’s death
         3. Loss of consortium: limited to certain people spelled out in the statute; CA – only a spouse/registered domestic partner can recover; some jsdxs allow children/parents to recover
         4. Bystander recovery: iied/nied allow individuals who witness torts committed against other to recover (common limitation is zone of danger)
   2. Dignitary torts
      1. Defamation: intentional false communication that harms п’s reputation
         1. Injunction: cts hesitant because of First Amendment considerations
         2. Presumed damages: common law presumed statement was false
         3. Constitutional limits: 1st Amendment imposes limits on when state common law may permit damages awards for defamation
            1. Actual malice: public figure пs must prove actual malice (∆ had knowledge that it was false/reckless disregard to truth)
2. Rescission
   1. Rescission cancels a k; purpose - put parties in pre-k positions; most are equitable
   2. Grounds: available only upon a showing of grounds that undermine the legitimacy of the original bargain
   3. Defenses
      1. Equitable: unclean hands and laches may bar an action for equitable rescission; estoppels may be a bar no matter which type of rescission
      2. Election of remedies: п has choice of rescinding k, or affirming & suing for damages; modern rule allows п to do both & wait until trial verdict to choose
   4. Restoration of benefits: ability to substantially restore other side to pre-k position is requirement of rescission
      1. Reliance damages: courts will generally allow recovery
      2. Profits: courts differ on whether ∆ must give back profits gained through k when these were not experienced as a loss to п
   5. Punitive damages: jsdx’l split
   6. Rescission or breach of k damages: where k is voidable, п may be able to choose
3. Reformation
   1. Equitable remedy whereby a court changes a written k to make it conform to parties’ previous meeting of the minds
   2. Requires valid prior agreement proven by clear and convincing evidence; mistake must be in the writing and may be of fact or legal meaning of terms
   3. Rescission distinguished: rescission is appropriate when the writing is correct, but mistake/fraud induced parties to enter k with those terms; reformation is appropriate when writing does not reflect the agreement
   4. Defenses
      1. Equitable defenses apply
      2. Sale to a BFP: because it’s an equitable remedy, sale of the subject matter of the k to a BFP cuts off reformation remedy
      3. Parole Evidence Rule: cts will grant reformation despite this rule, but will require that prior oral agreement be proved by clear/convincing evidence
4. Specific Performance
   1. This is an injunction by which a court order a party to comply with a valid k
   2. Requirements
      1. П must show breach of a valid k and success on the merits; k must also have definite and certain terms; п must be able to perform/compensate ∆
      2. Inadequate legal remedy: damages presumed adequate for breaches involving PP, unless buyer cannot cover; if calculating damages is too difficult, then $ may be inadequate
      3. Where legal remedy is inadequate, presumption that specific performance is appropriate; hardship considerations can rebut that presumption
5. Personal Property Contract Remedies
   1. UCC governs remedies for breach of k for sale of goods; does not include services, RP, or intangible property
   2. Buyer’s remedies
      1. Goods not accepted: § 2-711 contains remedies for when (1) seller breaches and (2) buyer has not yet accepted the goods
      2. Damages
         1. Cover, 2-712: buyers are generally expected to cover by acting reasonably to purchase substitute goods; damages calculated by cover-minus-k price, plus incidentals and consequential, minus expenses saved due to breach
         2. Market, 2-713: if buyer doesn’t cover reasonably, or doesn’t cover, may still receive damages calculated by market price at time of breach minus k price plus incidentals minus expenses saved due to breach
            1. Incidental & consequential damages, 2-715: buyer may obtain incidental, but may obtain consequential only if cover was not reasonably available
      3. Specific relief
         1. Replevin, 2-716: buyer has right to replevin of goods identified to k if cover not reasonably available
         2. Specific performance, 2-716: if goods are unique
      4. Goods accepted, 2-714: once goods are accepted and revocation is no longer possible, damages are only remedy
      5. Nonconformity, 2-714(1): where buyer has accepted goods and given notice of nonconformity, may recover damages calculated reasonably
      6. Breach of warranty, 2-714: where buyer has accepted goods, damages for a defect are calculated by FMV of goods as warranted minus as delivered
   3. Seller’s remedies, § 2-703
      1. If goods have not been delivered, seller may withhold delivery, stop delivery by a bailee, or cancel
      2. Damages
         1. Resale, 2-706: seller expected to resell; damages is k price minus resale price plus incidentals minus expenses saved; sellers do not get consequential damages
         2. Market: if seller fails to make effective resale, damages measured by k price minus market price at time of breach plus incidentals minus expenses saved
         3. Lost volume seller: seller had capacity to make another sale and would have, can recover profit from breached k instead of being held to k/resale difference
      3. Specific remedies
         1. Price, 2-709: where goods are accepted or identified to the k, and reasonable resale is not possible, seller may recover k price minuse salvage value
         2. Self-help repossession, 9-609: okay for sellers with a security interest so long as does not result in a breach of the peace
   4. Rescission: UCC allows parties to rescind and obtain benefit of the bargain damages
6. Real Property Contract Remedies
   1. Damages
      1. Buyer: Majority (American) rule – buyers can recover benefit of the bargain damages; old (English) rule – buyer can only get out of pocket damages
         1. Calculation: real property is presumed unique, so cover not available; calculation is marked price of the exact property at time of breach minus k price, plus incidentals and consequential, minus expenses saved
         2. Loan rate differential: buyers are entitled to different loan rate if caused by the breach
      2. Seller: damages are k price minus market price at time of breach, plus incidentals and consequential, minus expenses saved
   2. Specific performance
      1. Inadequate legal remedy presumed because buyers entitled to unique property, sellers entitled to be rid of property
   3. Equitable defenses apply
   4. Equitable conversion: majority jsdx follow
      1. Once buyer signs the land sale k, buyer becomes equitable owner of the RP and seller becomes equitable owner of PP interest in proceeds of sale; during escrow, seller continues to hold legal title to property and buyer holds legal title to PP; upon closing, when buyer tenders the k price, buyer becomes legal owner of RP and seller becomes legal owner of PP
         1. Risk of loss
            1. Majority rule: buyer bears risk if seller is not at fault for destruction of property during escrow
            2. Minority rule (CA follows): if destruction of property occurs during escrow, seller bears risk of loss

Exceptions: when buyer has possession of property or legal title to property