REMEDIES: DAMAGES, EQUITY, AND RESTITUTION

FOURTH EDITION

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Leonard Gross
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REMEDIES: DAMAGES, EQUITY, AND RESTITUTION

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Dedication

To our wives, Abbie, Robin, and Amanda, for their support and encouragement and for keeping us focused on what is important in life.

Preface

As we worked on the Third Edition of this book, which was published in 2002, we realized that we had let far too much time — thirteen years — elapse between the Second and Third Editions, and we vowed not to let that happen again. So now we are pleased to offer the Fourth Edition, only six years after the publication of its predecessor.

The basic structure of the book has served well and remains unchanged. The first half of the book, Chapters 1 through 4, focuses on generally accepted principles and is organized around the three core types of remedy — damages, equitable relief, and restitution. The second half of the book, Chapters 5 through 9, concentrates on the application of those general remedial principles in specific contexts and is organized around remedies for particular wrongs — personal injury, invasion of property rights, fraud and misrepresentation, mistake, and breach of contract.

In the Third Edition, we made significant organizational changes to Chapter 3, Introduction to Equitable Remedies, incorporating material from a formerly separate chapter into Chapter 3 in order to provide in one chapter a comprehensive introduction to all of the major issues related to equitable remedies. In this Fourth edition, Chapter 8, Remedies for Mistake, has been substantially revised and reorganized. Section 8.01, Mistake in Performance, has been retained, but the former sections on unilateral mistake and mistake in basic assumption have been consolidated in a new Section 8.02, Mistake of Fact in the Formation of a Contract. This change in part reflects the fact that more jurisdictions are adopting a standard for rescission of contracts for unilateral mistake that is based on Section 153 of the Restatement (Second) of Contracts, thus making the standards for rescission for unilateral mistake and mistake in basic assumption more similar than different.

Another major development reflected in the Fourth Edition is the American Law Institute's very successful project to develop the Restatement (Third) of Restitution and Unjust Enrichment. The Fourth Edition incorporates materials from the Third Restatement through Tentative Draft No. 6, published in March 2008. These materials will primarily be found in Chapter 4, Introduction to Restitution, and in Section 9.05[A], concerning restitution as a remedy for a plaintiff who is harmed by defendant's breach of contract.

There also are significant revisions to other chapters. Chapter 2, Introduction to Damages, contains a new problem on punitive damages, and Section 2.05 includes new material from recent Supreme Court and lower federal court decisions on due process and punitive damages. Chapter 3, Introduction to Equitable Remedies, contains two new problems and two important new decisions concerning preliminary injunctions. Chapter 5, Remedies for Harm to Persons, includes a new decision on the collateral source rule, an excerpt from an excellent recent article on "the past and future of tort retrenchment," and new material on statutory damage caps. Throughout the other chapters, new problems and cases have been added, and some cases and problems have been deleted.

The Fourth Edition continues to reflect the major themes of the first three editions. Thus, we regularly compare and contrast remedies available for different types of wrongs (particularly tort and contract) and encourage inquiry into whether, and to what extent, there remain rational bases for differences that have their origins in history or categorization. We also continue throughout the book our dual emphasis on theory and practice, and the inescapable relationship between the two. The Fourth Edition continues to provide excellent vehicles for discussion of law reform as well as for careful consideration of counseling and litigation strategy. Chapters 6 through 9 in particular continue to provide numerous opportunities for identifying ways in which the ability to exercise remedial options might be preserved.

Preface

Also as in prior editions, the Fourth Edition continues to place some emphasis on, and to provide opportunities for evaluating, the application of principles of economic analysis to assist in the determination of remedial policy or outcomes. None of us is a true believer, nor a facile cynic. Each of us recognizes, however, that economic theory provides insights that can be very useful in making some policy decisions concerning remedies, that some judges are significantly influenced by ideas grounded in economic theory, and that some scholarship founded upon economic analysis has been extremely influential in some areas of remedies, and particularly in contract remedies.

As would be true of any book that has existed for over twenty-five years, we have added new co-authors — with Lenny Gross and R.J. Robertson of Southern Illinois University School of Law joining Bob Thompson and John Sebert beginning with the Third Edition — and responsibilities for particular portions of the book have changed. We began work on the Third Edition just as John Sebert had assumed his new, and more than full-time, position as Consultant on Legal Education to the American Bar Association. So for the Third Edition Bob Thompson came out of retirement to undertake the revision of Chapter 4, Lenny and R.J. managed the revisions of the other chapters, and John provided occasional editorial advice.

As we began work on the Fourth Edition, John had again moved to a new position, as Executive Director of the Uniform Law Commission. Not wanting to disturb Bob Thompson's well earned retirement, John has taken the lead in revising Chapter 4, and Lenny and R.J. have again taken responsibility for the revisions of the other chapters. Although Bob Thompson did not actively participate in the preparation of the Fourth Edition, his many contributions to prior editions continue to be evident in the new edition, and particularly in Chapters 1, 3, and 5 of the Fourth Edition.

All of us express our appreciation to the publishers and authors who have permitted us to include excerpts from their works. Individual credit lines appear at each excerpt. In general, footnotes have been omitted from cases and other reprinted material without express indication of the deletion.

John A. Sebert Leonard Gross R.J. Robertson, Jr.

October 2008

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