Empire College School of Law
Professor Hardcastle
Remedies – Issue Outline
Fall 2014 Midterm

Question 1

The facts are taken from the course text, pages 413-414. "**Undue hardship in damage cases.** The conventional wisdom is that undue hardship is a problem only of specific relief. But similar concerns underlie rules against disproportionate measures of damage. Consider Peevyhouse v. Garland Coal & Mining Co. 382 P. 2d 109 (Okla. 1962). The coal company breached a promise to restore plaintiff's land to its prior condition after exhaustion of a strip mine. Restoration would have increased the value of the land by $300 at a cost of $29,000; the court held, 5-4, that plaintiffs were not entitled to the cost of restoration. The court did not say that plaintiffs get the lesser of restoration cost or lost value. That would be the usual tort measure, but it would disregard the contract; the parties bargained for restoration. The court denied restoration cost because that cost was "grossly disproportionate" to the lost value. Similarly, the *Restatement (second) of Contracts* says plaintiff can recover the cost of completing construction contracts unless that cost is "clearly disproportionate" to benefit. Section 348 (2) (b) (1981). The restatement's standard for refusing specific performance is "unreasonable hardship or loss." Section 364(1) (b). *Van Wagner* and other cases use such phrases interchangeably.

Lawyers can argue either way on whether the disproportion between cost and value should matter in *Peevyhouse.* But should the answer to that question depend on whether they seek specific performance or damages for the cost of restoration?"

The *Peevyhouse* opinion is not written like September 11, in terms of the cheapest measure of damages or the lesser of two; rather it talks in terms of disproportion. The possibility of a specific performance claim also highlights the folly of distinguishing law and equity. It is hard to see why specific performance should be treated differently from damages based on the cost of performance. Here the defendant refused to perform and says that performance would be wasteful. This is an issue where the distinction between tort and contract might matter: if the parties agreed to do it, how can one side now say it is wasteful?

Empire College School of Law
Professor Hardcastle
Remedies – Issue Outline
Fall 2014 Midterm

Question 2

The facts are similar to the case text, pages 298-299. *Bell v. Southwell* (1967) 376 F. 2d 659. As Prof. Laycock writes, defendants occasionally argue that the courts cannot order reparative relief – that it cannot attempt to undo the past violation. Such an argument is either frivolous, or, more commonly, an overly broad statement of some more serious argument, such as an argument about practicality.

A court generally will not issue an injunction to prevent an election that has already occurred. Injunctive relief operates prospectively and a plaintiff must show that there are future acts, or future consequences of completed acts, that the requested relief will prevent or repair. The fact that the threatened act has occurred does not absolutely preclude injunctive relief, but the plaintiffs' focus must move from the act to the consequences of the act. The plaintiff must show that the injunction will restore them to the position they were legally entitled to have and would have had but for the defendant's wrongdoing. If the completed act, the election, is itself a continuing violation of plaintiffs' rightful position, they may seek injunctive relief to have the election done over. In *Bell* a new election was ordered.

As to the identification cards, is not required that the plaintiff show that a defendant will engage in conduct analogous to the law of criminal attempt before the case will be deemed ripe. The critical issue is the likelihood that the defendant will engage in conduct that will violate the plaintiffs' legally protectable interest.

Issues related to public employee/governmental immunities should be discussed.

Empire College School of Law
Professor Hardcastle
Remedies – Issue Outline
Fall 2014 Midterm

Question 3

1. Preliminary injunctions and TROs are subject to specific requirements imposed by rule and case law. In order to obtain either a TRO or a preliminary injunction, a plaintiff must show that immediate and irreparable injury will result absent the injunction. When a preliminary injunction is sought, plaintiff must show that this injury will occur during the tendency of the lawsuit. When a TRO is sought, plaintiff must show that it will occur before a hearing can be heard on whether to grant a preliminary injunction.
   Under rule 65, in order to obtain a TRO or preliminary injunction, the plaintiff must show:1) they will suffer irreparable harm; 2) that the hardship they will suffer absent the order outweighs any hardship the defendants would suffer if the order were to issue; 3) that they are likely to succeed on the merits of their claims; 4) that the issuance of the order will cause no substantial harm to the public; and 5) that they have no adequate remedy at law.

2. Ex Parte? Requirements? Arguments in favor. Rule 65 allows courts to issue ex parte TRO's, but creates a strong presumption in favor of contested hearing. Rule 65 prohibits courts from issuing ex parte preliminary injunction. Notice may be excused when the giving of notice would frustrate plaintiff's ability to protect its rights. Rule 65(b) provides a court cannot issue a TRO without notice unless it "clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that parties attorney can be heard in opposition."

3. To whom should injunction apply? Generally a TRO or preliminary injunction is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. Because injunctions are in personum orders, they typically do not bind people or entities not party to the litigation. Courts have traditionally recognized those categories of persons listed above.

   Other than the organizers? Notice to neighbors could be accomplished by personal service. As to party goers either posting or handing out of fliers similar to Union litigation.

   How framed? Looking for arguments as to a broad or narrow injunction.

Bar event or limitations? Looking for arguments either way. Unlikely the entire event would be barred given its positive effect in the community.

Bond? How large? At both the federal level and the state level, one who obtains a preliminary injunction or a TRO must usually post security to protect the defendant against loss. Courts have created exceptions to the mandate generally for those who are indigent or those who are wealthy and can easily afford to pay damages. The amount of bond will vary from case to case just as a defendant's potential damages can vary. Generally courts do not require plaintiff to pay for all losses sustained by defendant.

4. Answering as plaintiff attorney: how do you go about legally binding notice? As to notice generally to requirements must be satisfied for the order for notice to be adequate. First the notice must come from a source that is entitled to credit. Second it must adequately informed defendant of the act or acts sought to be prohibited. Usually, the defendant will be in court when the order is entered and will hear the judge entering. If the defendant is not in court, actual service with a copy of the order is sufficient. In some cases, posting of the order has deemed to be sufficient to give notice. Additionally, a defendant cannot thwart service by conduct trying to prevent notice.

Notice to anyone else?