UNDERSTANDING REMEDIES

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UNDERSTANDING REMEDIES

Third Edition

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MATTHEW BENDER

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Dedication

To Sue, Adam, Evan, Allison, and Zachary
with Love, Gratitude, and Affection; without Blame or Responsibility for
errors and omissions.

JMF

Preface to Third Edition

Three generations of Prefaces are enough.*

* *Cf.* Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.).

Preface to Second Edition

The goal of this book is modest — a descriptive account of the law of remedies. Much modern scholarship is more ambitious seeking a normative account of the law of remedies, i.e., how much redress should the law allow to vindicate legal wrongs and restore individuals harmed by those wrongs to their rightful position.

Yet, to state that a work is descriptive is not to suggest that it is not difficult or complex. A descriptive account can illustrate the chance element of law; the fact that "law" is often either uncertain or unresolved. This open-endedness is particularly common with remedies. Much of the "law" here is stated in capacious language leaving much to individual interpretation. Remedies law tends to be situation-sensitive; here, the usual feature is that the facts of the case control the result more than the remedies rule.

All this creates a large amount of uncertainty as to how remedies issues will be resolved. Law students (and lawyers) need to be comfortable with uncertainty. It is ever-present in the law, but "uncertainty" does not undermine the case for knowing the "law," such as it is. Chance, after all, does favor the prepared mind.*

This book states the "law," but also gives examples that illustrate that the "law" often bends, is bent, and courts often disagree as to how the issue before the court should be resolved. In other words, what is the law? This view of the "law" reflects, no doubt, the authors own biases. All authors simplify by collecting materials and omitting data based on their own view of what the end product should resemble. I have tried to be attentive to that bias. How successful I have been is, ultimately, for the reader to judge.

An early Rolling Stone's song provides a compass that helps in learning, and ultimately understanding, the law of remedies:

> You can't always get what you want
> You can't always get what you want
> And if you try sometime you find
> You get what you need.**

Sometimes the law of remedies provides full redress, and perhaps even then some for harm sustained. Most often, however, other values conflict with a full recovery (or restoration). Even here, however, the law does not leave the plaintiff unprotected. The law of remedies is a search (and a determination) as to what the law permits as rectification and reparation when legal wrongs have been committed.

Although this text is marketed primarily to law students, I have chosen to add extensive footnote references to authorities that support the propositions asserted, as well as references to other work that develop the materials further than can be accomplished in a single volume text that aspires to some degree of comprehensiveness. Any tour through the legal landscape is a sail through waters infested with legal icebergs. This book

* Attributed to Louis Pasteur.

** Rolling Stones "You Can't Always Get What You Want," Let It Bleed Album (1969).

discusses the tips of those icebergs. As every sailor of the law, whether lawyer or judge, knows, much more lies beneath.

James M. Fischer
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Los Angeles, California

Preface to First Edition

Remedies are fundamental; yet, remedies are frequently overlooked. We often discuss remedies without realizing that it is a remedy about which we are talking. Consider, for example, the exclusionary rule, which is a staple of constitutional criminal procedure jurisprudence. The exclusionary rule is, at root, a remedy designed to vindicate the values courts have identified in the text of constitutional provisions. It rectifies the harm inflicted by excluding evidence acquired by the state in violation of constitutional and statutory guarantees. It is remedial in its field of operation as much as an injunction or damages award in the cases in which they apply.

Should it make a difference whether a legal issue is classified and analyzed as a remedy or as a substantive right or procedural device? There is the argument that the difference is simply one of category classification, no different from tort versus contract, substance versus procedure, or civil versus criminal. Yet, the very persistence of these category classifications tells us that there is more going on here than mere categorization or arrangement. Separate identification of a legal issue in the remedies category helps us focus on the essential nature of that legal issue and its role in the larger legal framework. By looking at an "issue" as a "remedies issue" we gain a better understanding of the capabilities of remedies, as well as their limits.

The approach taken in these materials is neither doctrinal nor theoretical; rather, the focus is educative. The objective is to identify the basic legal principles, rules, and standards that constitute the law of remedies as applied by courts in the United States. Of necessity, the focus is on general principles and general rules of application. This approach permits readers to begin the analysis of a problem by deciding which facts are relevant. General principles and general rules also enable the reader to discover the more precise rules that determine the particular case. Most importantly, however, general principles and general rules enable the reader to both gain a sense of the ambit of remedies and establish a base from which the relationship between the general and the particular may be investigated to determine whether the specific application of a remedial principle or rule is consistent and coherent with the larger body of substantive and remedies law.

Stating rules and principles is easy; it is their application that is difficult. Neither the most complex nor the most basic "How to" book can avoid that gap between knowledge and application. Yet, if knowledge of rules and principles is not a sufficient condition to the proper application of law, it is necessary condition. Even the most gifted athlete will be frustrated if his performance is crippled because he violates the rules of the game. The knowledge of law, particularly its component rules, principles, guidelines, and standards enables the good lawyer to practice her profession with skill and confidence. Knowing what a client's remedies are, has an obvious connection to the work litigation lawyers do, but remedies are not solely the concern of trial lawyers. Transaction lawyers must know what consequences are likely to result if the transaction fails, or the deal the transaction spawns, is breached. Remedies are not the sum of a lawyer's work, but they are an important constituent part of what good lawyers do and think about when representing their clients.

I have attempted to provide in these materials a comprehensive, and I hope, readable

overview of the law of remedies. I have selected those rules and principles that I believe are of general application, noting whenever possible significant splits and disagreements regarding the accepted canons of law. In this regard, Newton's law works here as elsewhere: for every stated principle of law, there is an equal, and opposite, statement of the principle elsewhere. I have tried to bring many of these disagreements to the surface by presenting the views evenly. When I believe that a particular view is wrong, I have not, however, hesitated to say so, but always as my opinion, not disguised as a restatement of the law. I cite all, in my opinion, useful sources, oblivious (actually indifferent) to the critique that some sources are beneath academic usage.*

If courts use it, this text cites it.

I hope readers will find the work useful and interesting. I certainly encourage readers of this work to contact me at Southwestern University School of Law if they have comments or observations regarding the book.

James M. Fischer
Professor of Law

Conventions Used in This Book

Footnotes are consecutively numbered within each section. For example, all footnotes within Section 13.0 are consecutively numbered through that Section's subsections e.g., 13.1, 13.2, etc. Footnotes for each section begin with the number one.

The first time an authority is cited in a section, it is set forth in full; thereafter, *within that same section*, the authority is abbreviated, with only the page cite given. For example, a decision will be cited in full the first time it appears in Section 13.0, but only an abbreviated citation if the authority again is referenced in Section 13.1 or 13.2, etc. If that same authority is also cited in Section 14.0, it would again be fully set forth and abbreviated citations used for further references within Section 14.0's subsections.

Unless otherwise noted, all cross references are within the same section only. Thus, a reference in a footnote in Section 13 "to footnote 15" is a reference to footnote 15 in Section 13. A reference in a footnote in Section 21 "to text and notes 5-7" is a reference to text and notes 5-7 in Section 21.

Unless otherwise noted, I have deleted internal quotation marks, footnotes, and internal citations in quoted material reproduced in the text or footnotes. I have also deleted brackets and ellipses when it did not change the meaning of the reproduced material. Occasionally I will make small editorial changes in quoted material when doing so does not interfere with the accuracy of the quote, e.g., change a party's name to "plaintiff," without putting the change in brackets.

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* *See* Patrick McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1755 n.9 (observing, I hope tongue in cheek: "Woe to the scholar who cites American Jurisprudence."

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