

Remedies
Law 314-001 (21024)

Prof. Claeys
Spring 2022

Syllabus
Current as January 7, 2022

Meeting Times: Tuesday, Thursday 6:05 – 7:05 p.m.
Exam: Tuesday, May 3, 2022, 6:00 p.m.

Office hours and contact information

My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site. Please register for the TWEN site; it is my primary medium for group communications with students.

This semester, I will hold office hours Thursdays, 4 – 5 p.m. These are “drop-in” hours, meaning that I do not have any other appointments during them. You are free to come in to my office without appointment; I will also have my Zoom program on, I will have my Personal Meeting Room open, and you may virtually-join my meeting room. However, I am happy to schedule appointments if you have a conflict during office hours or if you prefer for other reasons.

Course coverage

A really, really thorough study of remedies covers (1) the civil procedures by which remedies are executed; (2) remedial issues in private civil litigation; (3) civil causes of action for unjust enrichment/restitution; and (4) remedial issues in public civil litigation. I cover all of these issues at least superficially, but I don’t cover them all in depth. (It would take 5-6 credit hours to cover all 4 issues in depth, and we have only 3 hours.) I cover topic (4) only superficially, topic (1) in superficial-to-medium depth, and topics (2) and (3) in depth.

Learning outcomes

Learn the basic doctrines for remedies in civil litigation, and demonstrate capacity to analyze legal remedies issues while applying those doctrines.

Learn doctrines for *prima facie* claims of unjust enrichment and restitution, and learn how they relate to parallel doctrines in property and contract.

Understand the policy arguments made most often by prevailing plaintiffs and losing defendants in controversial remedies topics.

Understand the relations between opinions about policy, the rights to which people are entitled as a matter of substantive civil law, and the remedies doctrines that carry those rights into effect.

Cancellations and make-up classes

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of our classroom, and I will send an email to the class via the course TWEN page's email system.

Class reading

Reading will vary anywhere from 7 pages per class session to 40 pages per class session.

Class attendance

Regulation 4.1 in the law school's Academic Regulations requires that students attend class at our law school on a regular basis. The same regulation specifically states: "If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course." For a 26-class-session course like Remedies, AR 4.1 requires that students not be absent for more than 6 classes. I do not enforce this requirement when I need to reschedule class due to illness or non-GMU commitments. Otherwise, however, I do follow this regulation, and I administer it by asking you to sign an attendance sheet during class.

AR 4.1 applies to absences "for any reason." In other words, it is your responsibility to keep track of your absences. It is also your responsibility to anticipate possible absences. You may decide you need to be absent to explore professional opportunities, to observe holidays in your religion, or to take care of personal matters. It is your responsibility to limit the number of class days for which you're absent for such reasons, and also to factor in the possibility that you may be absent from class unexpectedly for illnesses or personal emergencies.

I do not need to be notified in advance if you're going to be absent. Ordinarily, over the course of the semester, I communicate with you about the number of classes for which you've been absent. In such correspondence, I am not interested in knowing the grounds for absences; my intention is to administer AR 4.1, and that being so my intention is simply to get on the same page with a student about the number of class-hours attended and missed.

I reserve authority to take measures reasonably appropriate to ensure compliance with the law school's attendance requirements. If a student misses more classes than allowed by AR 4.1-1, the student is not eligible to sit for this course's examination. In extraordinary circumstances, I reserve discretion to have a student ineligible for the exam under AR 4.1-1 perform substitute work equivalent to class attendance ... as long as the student does not miss more than 30% of classes (meaning eight (8) 85-minute class sessions total). Students who believe they are eligible for this exception should petition me in writing and explain why (AR 4.1-2) they "have merit" in their request to substitute work for class lectures missed over the 6-class limit.

If a student misses more classes than allowed by AR 4.1-1, and does not receive the benefit of an exemption consistent with AR 4.1-2, I notify the law school's administration and the student is not eligible to sit for this course's final examination.

Class preparation and participation

I expect you to be prepared for class. For any case excerpted at any length longer than a page, I expect you to understand the facts, the lawsuit, the theories of the case adopted in the majority and any separate opinions.

When the casebook presents a "squib" case—that is, a case consolidated into a paragraph or so, I expect you to know the facts, the holding, the rationale, and the contribution to the general line of doctrine covered in class. When the casebook refers to statutes, I expect you to read them closely enough to answer questions about them.

I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class. (I prefer emails, at least an hour before class.)

Classroom decorum

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

I reserve the authority to take actions reasonably appropriate to ensure compliance with the participation and decorum policies discussed in this section. In particular, if a student refuses on several occasions to participate in class when called on, that refusal may justify lowering the student's final grade below the grade earned on the final examination.

This respect and courtesy also extend to dress. (I'm sorry I need to raise the subject, but it became an issue with online teaching.) Please dress in a manner appropriate for a classroom setting. Some examples: Please be clothed as fully as you'd be if going to an ordinary store or office. Please avoid attending class (in person or virtually) in sleep wear, gym wear, or beach wear. I reserve the authority to ask students to leave class if they are dressed inappropriately (with appropriate repercussions following for class attendance.)

Virtual Classroom Management and Logistics

As I write this syllabus, I understand that our class is going to be in-person. In a world with COVID, however, I can't rule out the possibility that I may be directed to teach you remote or hybrid. Herewith some policies for online or virtual learning:

- If I need to teach hybrid, I'll teach synchronously in person and on Zoom. I'll set up the meeting links on Zoom, and I'll send those to everyone in advance of class.
- *Everyone* will be expected to sign in and join class on Zoom. This requirement applies to students attending in person and also students attending virtually.
- On your videoconference platform account, please make sure that your first name, last name, and school profile picture are all uploaded.
- *If you are attending in person*, please keep your computer microphone muted at all times. Keep your microphone muted even when you speak; we'll rely on ceiling microphones to carry your comments on Zoom. You may have your video feed OFF when you are not speaking in class. However, whenever you speak in class, please turn your video feed back ON.
- *If you are attending on line*, when class is in session, you are expected to have your computer camera ON and your microphone OFF. (Of course, please do turn your microphone on when you participate in class discussion.)
- If you're attending in person and have something to say, please put your hand up.
- If you're attending on line and have something to say, please send me a message via Zoom's chat function. I prefer that you send a short message that you have a question, and that you ask the question orally. (If you don't, I'll read your question back to the class anyway before answering it.)
- You are encouraged (though not mandated) to use a microphone or earphone/mike headset during class.
- To a large extent, we'll need to play things by ear if we need to go to remote learning for the whole class. That said, it is very likely that, for reading assignments that DON'T already have problems assigned, I'll construct problems in advance of class and we'll discuss those in addition to the materials assigned in the reading schedule below.

Recording classes

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded. I like to encourage free and frank discussions of class materials, and in my experience the recording of class tends to chill discussions. However, I will grant permission in specific cases when a student can demonstrate a special need. If you think you have such a need, please inquire.

How you should inquire depends on the nature of the need. If your need is COVID-related, please let me know a.s.a.p. I'll record class and make the lecture available.

If you think you have a disability-related need, please contact GMU's [Office of Disability Services](#). ODS has a process for administering disability-related requests for accommodations, and in that process ODS serves as a go-between between a student-applicant and that student's instructor.

If your need is neither COVID- nor disability-related, you are free to ask me in personal communication or to ask me anonymously. To make an anonymous request, please contact Annamaria Niels, Associate Dean for Student Affairs (ანიელს@gmu.edu) or Christine Malone, Director, Student Affairs (cmalone4@gmu.edu). Deans Niels and Malone will be happy to explain the basis for a recording request to me while leaving a student's identity out of the request.

Grading

The grade for this class will be based exclusively on a 3-hour examination. (The only exception to the exclusivity of the exam is for serious breach of the class participation policy, see above.) If it is possible for the exam to be administered in person, it will be, and it will be a closed-book closed-note exam. It may not be possible for the exam to be administered in person. If so, it will be administered on line with Exam Pro (or some similar software program if the Records Office surprises me and gives up on Exam Pro). If the exam is online, it will be open-book, open-note.

Course materials

We will rely primarily on a casebook: Douglas Laycock & Richard L. Hasen, *Modern American Remedies* (Aspen 5th ed. 2019). ISBN-13: 978-1-4548-9127-7.

PLEASE NOTE: Aspen sells not only a full version of *Modern American Remedies* but also a 'Concise 5th edition.' DO NOT buy the Concise 5th edition. (If in doubt, please do check the ISBN before buying!)

I will assign a few supplemental readings. As of now, I anticipate assigning only about half a dozen supplemental readings. Because there are so few supplemental readings, I'll just post them to TWEN. If this causes you inconvenience, however, please let me know and I'm happy to print copies.

Reading schedule

What follows is a list of reading units I hope to cover in this class. We will average slightly fewer than 2 units per class session. All references to "pp." are to Laycock & Hasen, *Modern American Remedies* (not-concise) 5th edition.

For our session on January 25, please read units 1, 2, and 3. After that, I'll make an announcement each Wednesday at the end of class what is assigned for the next Monday and Wednesday. Then, at the end of Monday classes, I reserve the right to modify slightly the assignment for the Wednesday.

(Unit 1): **Ch. 1. Introduction**

Reading: pp. 1-9. I expect you'll have read this material, I'll lecture on it for 5-10', and I'll take questions on it during our first class. But you should expect we'll take very little class time on it.

Ch. 2. Paying for Harm: Compensatory Damages

(Unit 2) A. The Basic Principle: Restoring Plaintiff to His or Her Rightful Position

Reading: pp. 11-18 (top)

Supplemental assignments: Aristotle, *Nicomachean Ethics*, 2 pages on corrective justice

Blackstone, *Commentaries on the Laws of England*, 2 pages on rights and wrongs

(Unit 3) B. Value as the Measure of the Rightful Position

Reading: pp. 18-25 (middle), 28-34 (middle)

(Unit 4) C. Reliance and Expectancy as Measures of the Rightful Position

Reading: pp. 35-37, 40-42, 46-50, 50-51.

(Unit 5) D. Consequential Damages

Reading: pp. 53-63

(Unit 6) E. Limits on the Basic Principle

1. The Parties' Power to Specify the Remedy

Reading: pp. 69-85 (middle)

(Unit 7) E.2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

Reading: pp. 86 (middle) – 93, 96-102.

(Unit 8) E.3. The Scope of Liability

Reading: pp. 102 (bottom) – 108 end n. 10, 114-20 (top)

(Unit 9) F. Time and the Value of Money

Reading: pp. 150-164 (middle) (focus on problem, pp. 163-164)

(Unit 10) G. Damages Where Value Cannot Be Measured in Dollars

1. Personal Injuries and Death

Reading: pp. 167 (middle) – 185

(Unit 11) G.2. Dignitary and Constitutional Harms

Reading: pp. 205-11

Supplemental assignments: *Alcorn v. Mitchell*

Ch. 3. Punitive Remedies

(Unit 12) A. Punitive Damages

1. Common Law and Statutes

Reading: pp. 223-240 (top)

(Unit 13) 2. The Constitution

Reading: pp. 240-46 end n.2, 248-52 (bottom)

Ch. 4. Preventing Harm: The Measure of Injunctive Relief

(Unit 14) A.1 Preventive Injunctions

Reading: pp. 273-74, 279-85, 288-91 end n. 3

(Unit 15) A.2 Prophylactic Injunctions

Reading: pp. 293 (middle) - 307

(Unit 16) A.3 Reparative Injunctions

Reading: pp. 309 (bottom) - 318

(Unit 17) B. Modifying Injunctions

Reading: pp. 348-60

Ch. 5. Choosing Remedies

(Unit 18) A. Substitutionary or Specific Relief

1.a The Irreparable Injury Rule

Reading: pp. 381-86, 391-99

(Unit 19) A.1.b Specific Performance of Contracts

Reading: pp. 399-404, 410-15 (middle)

(Unit 20) A.2 (cont'd) Undue Hardship and Burden on Court

Reading: pp. 416-21, 423-29

(Unit 21) A.3 & -.4. More Reasons, and the *eBay* standard

Reading: pp. 430-34 (top), 440-49 (middle)

(Unit 22) B. Preliminary or Permanent Relief (The Law of Preliminary Injunctions and TROs)

1. The Substantive standards

Reading: pp. 449 (bottom) – 455 end n. 5, 461 – 66 (bottom)

Supplemental reading: I'll pick and assign 2-3 U.S. Supreme Court orders (from the last 2-3 years) about preliminary injunctions.

(Unit 23) B.2. The Procedures

Reading: pp. 466 (bottom) – 484 (middle)

Ch. 7. Declaratory Remedies

(Unit 24) A. Declaratory Judgments

Reading: pp. 591-95, 596-605

(Unit 25) B., -C, -D Other “Declaratory” Remedies (including Reformation)

Reading: pp. 623 – 637 (middle, end of the discussion of nominal damages)

Ch. 8. Restitution

(Unit 26) A. Restitution from Innocent Defendants

1. Why Restitution?

Reading: pp. 641-656 (top)

(Unit 27) A.2. Measuring Restitution from Innocent Defendants

Reading: pp. 658 (middle) – 673 (middle)

(Unit 28) B. Disgorging Profits of Conscious Wrongdoers

1. Why Disgorgement?

Reading: pp. 673 (bottom) – 693 (middle)

(Unit 29) B.2. Measuring the Profits (Apportionment)

Reading: pp. 693 (bottom) – 707 (middle)

(Unit 30) B.3. Restitution and Breach of Contract (including more on Rescission)

Reading: pp. 707 (middle) – 723 (top)

(Unit 31) C.1 Constructive Trusts

Reading: pp. 723-730

Supplemental reading: Riggs v. Palmer.

(Unit 32) C.2 Constructive Trusts: Tracing the Property

Reading: pp. 737-743 (bottom), 746-48, 752-53

(Unit 34) C.3 Equitable Liens and Subrogation

Reading: pp. 753 (bottom) – 767 (bottom)

(Unit 35) D. Defenses and Rights of Third Parties

Reading: pp. 769 (bottom) – 783 (top)

Ch. 9. Ancillary Remedies

(Unit 36) A. Enforcing the Judgment

1. Enforcing Coercive Orders

The Legal Basis for Contempt Powers

Supplemental reading: Taggart v. Lorenzen excerpts

(Unit 37) A. Enforcing the Judgment

1. Enforcing Coercive Orders

Standards for Finding a Party in Contempt

Supplemental reading: People v. Calvary Chapel San Jose

Hayes v. Skywest Airlines

PlayNation Play Systems, Inc. v. Velez

(Unit 38) A. Enforcing the Judgment

1. Enforcing Coercive Orders

a. Due Process Constraints on Contempt

Reading: pp. 787-801 (top)

(Unit 39) B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

Reading: pp. 864 (middle) – 881 (middle)

(Unit 40) B.2 Coercive Collection of Money

Reading: pp. 883 (bottom) – 897 end n.9

(Unit 41) B.3 Preserving Assets Before Judgment

Reading: pp. 899 (bottom) – 915 (middle)

Ch. 11. Remedial Defenses

(Unit 42) A. Unconscionability, Unclean Hands, In Pari Delicto, and Abuse of Right

Reading: pp. 982-83 (note on equitable defenses), 986 – 993.

Supplemental reading: Edwards v. Allouez Mining Co.

(Unit 43) B. Estoppel and Waiver

Reading: pp. 993-1006

(Unit 44) C. Laches and Limitations (class 1)

Reading: pp. 1007-22

(Unit 45) C. Laches and Limitations (class 2): Limitations, discovery, and fraudulent concealment. *Reading:* pp. 1023-38.

Supplemental reading: Dunn v. Ray.