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Equitable Remedies and Principled Discretion: The Michigan Experience

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I. INTRODUCTION

The term "equity" is often misunderstood and, as a consequence, often misapplied by courts when asked to grant an equitable remedy. In a broad jurisprudential sense, equity means the power to do justice in a particular case by exercising discretion to mitigate the rigidity of strict legal rules. In this broad sense, equity means the power to adapt the relief to the circumstances of the particular case, "individualized justice," in effect. However, equity jurisprudence is not an open-ended system of boundless discretion vested in a single judge. Professor Zechariah Chafee, one of the leading writers on equity, once remarked in the context of a court sitting in equity, "O, it is excellent [t]o have a giant's strength; but it is tyrannous [t]o use it like a giant."[1] In more prosaic terms, equity is not a roving commission that empowers a judge to dispense his or her own brand of justice in a particular case as he or she sees fit. The Michigan Supreme Court made this very point some 35 years ago:

> [N]o court of chancery would consciously attempt to correct the severity of the law, or to supply its defects, to any extent or under any circumstances, "beyond the already-settled principles of equity jurisprudence." Of course this is true. No one has ever suggested, so far as our reports disclose, that

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1. ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 303 (1950).

> any chancellor of Michigan should step beyond or over the *settled principles of equity.*[2]

All writers on the subject of equity, regardless of their philosophical persuasion, agree that the terms "equity" and "equitable" are difficult to define. The loose use of the terms "equity" and "equitable" to mean "fair," "compassionate," and "flexible" has resulted in decisions by equity courts whose rationale remains hidden when "equity" is offered as the reason for the decision. For a court to say that it has decided to relieve a party from a contract because the bargain was too hard and rest that decision on the ground of "equity" says nothing about equitable principles, equitable precedents, or equitable remedies. A decision that rests solely on "equity" is an analytically naked, and analytically suspect, decision. It is a decision that rests on nothing more than the judge's subjective feelings of what is fair under the circumstances. While one of the hallmarks of equity is its flexibility, it is a flexibility that is exercised against a backdrop of specific rules on fraud, misrepresentation, mistake, duress, undue influence, unreasonable delay, and estoppel.

In Anglo-American law equity means the system of distinctive concepts, doctrines, rules, and remedies developed and applied by the court of Chancery in England and by American courts sitting in equity. In short, "equity" and "equitable" refer to the whole body of equitable precedent and practice which lawyers and judges can only understand once they know such precedent and practice. Thus, for example, when an equity court grants an equitable remedy, that term has a precise meaning. It refers to a remedy such as an injunction, an order reforming a contract, an order rescinding a contract, or an order requiring specific performance of a contract. To gain a better appreciation of modern equity, a helpful start would be to review the origins of equity.

II. WHAT ARE THE ORIGINS OF EQUITY?

Two systems of courts once existed in Anglo-American law. One court system was the law courts presided over by judges. The other court system was the equity court presided over by the Chancellor. The Chancellor, who was a high minister of the king and often a bishop of the church, invented a body of substantive rules and remedies which in effect (but not in theory) could trump the decisions of the law courts. In attempting to define "equity," most commentators provide an historical answer—which is in effect no answer—that equity is the system of jurisprudence originally adminis-

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2. Spoon-Shacket Co. v. Oakland County, 97 N.W.2d 25, 30 (Mich. 1959) (citation omitted).

tered by the High Court of Chancery in England and now administered in courts of this country having equity jurisdiction. Even today with the merger of the two court systems into a single court of general jurisdiction in Michigan[3] and in federal and most other state courts, lawyers and judges still speak of "legal" remedies, meaning those traditionally administered by the law courts, and "equitable" remedies, meaning those remedies available in an equity court.

In that light, equity is a system of jurisprudence that originated and developed outside the common law courts of England to furnish plaintiffs a remedy not available in the common law courts. The law courts of England derived their power directly from the king. In order to bring a complaint before the law courts, a plaintiff would purchase a writ from the Chancellor (today's equivalent of the Prime Minister), which was then presented to the law courts. The law courts in turn had the responsibility of hearing the case and granting the appropriate relief. Where a new fact situation arose, the Chancellor provided a new writ. The issuance of a new writ tended to expand national power at the expense of local power.[4] The lords objected to this development.

Over time, the system for dispensing justice in the law courts ossified. This hardening was attributable in large part to a 1258 prohibition issued to the Chancellor in the Provisions of Oxford directing the Chancellor not to issue new writs to meet new situations without the consent of the king and his council. As England moved from an agrarian to a commercial economy, the pace of economic development overtook the legal system's ability to provide new writs, together with new remedies, to meet new situations.[5]

The upshot was that as new situations arose, it became common to petition the king, through his Chancellor, for relief, invoking the king's arbitrary power to do good and dispense justice. The Chancellor was a powerful man whose decisions were as much political as they were judicial. The Chancellor eventually developed some specific rules for specific situations, but many persons criticized equity as a lawless thing where only the Chancellor's discretion mattered and for which there was no law by which to measure a person's rights or entitlements. As a bishop of the church, the Chancellor often relied on appeals to conscience, which of course offered little guidance to

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3. *See* MICH. CT. R. 2.101, which provides: "There is one form of action known as a 'civil action'." This simple rule, modeled after Rule 2 of the Federal Rules of Civil Procedure, abolishes the distinction between actions at law and suits in equity and merges the two court systems in Michigan. *See generally* CHARLES A. WRIGHT & ARTHUR R. MILLER, 4 FEDERAL PRACTICE & PROCEDURE § 1041 (1987).

4. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 2.2, at 58 (2d ed. 1993).

5. *Id.* at 59-66.

petitioners. Equity in its early days was indeed a "roguish thing."[6]

The Chancellor gradually became a judicial officer and his department, the Chancery, a court for dispensing remedies not available in the law courts. The remedies available in the courts of law had narrowed. Relief was inevitably retrospective and in the form of damages. No prospective relief of any kind was available. For example, reformation of contracts for mutual mistake was not available. The contract either was enforced as written or was completely invalidated.

As the number of appeals to the king grew, so too did the court of Chancery. The court of Chancery rose to the meet the exigencies of the day by providing preventive (injunctive) relief and specific relief. That this court was attempting to do "equity," that is to accomplish justice, gave rise to the term "equity" as the designation for the system of jurisprudence involved, and the court that dispensed it as a court of equity. In court systems such as Michigan's that have merged legal and equitable procedure into one form of civil action in a single court with both legal and equitable powers, the term "a court of equity" means the merged court exercising its equity powers.

Over time, law courts were perceived as being "writ-bound." The effect was that the less rigid equity courts became increasingly popular with litigants. A rivalry soon developed between the law courts and chancery,[7] reaching a point where the two court systems often issued contradictory rulings in the same matter.[8] This state of affairs finally came to a head in the seventeenth century when King James I ordered the Lord Chancellor Ellesmere and the Lord Chief Justice Coke to submit their dispute to the Attorney General, Sir Francis Bacon.[9] The crux of the dispute was that Coke attempted to prohibit the Chancellor, Ellesmere, from enjoining enforcement of judgments rendered by the law courts. King James I, an autocrat of the highest order, naturally favored his Chancellor over the Chief Justice, much to the contrary, Coke was a supporter of Parliament and believed that the King was subject to common law. To no one's great surprise, Bacon recommended that, in the event of a conflict, equity should prevail.[10] The King accepted Bacon's recommendation, and the attractiveness of equity has persisted ever since.

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6. *Id.* at 61 (quoting J. Selden, Table Talk (Pollock Ed. 1927)).

7. John J. Farley, III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN'S L. REV. 997, 1001 (1991).

8. *Id.*

9. *Id.*

10. *See* John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127, 137 n.43 (1941).

A. When a Court is Asked to Grant Equitable Relief, What Factors Guide the Court in the Exercise of Its Discretion?

During the period of its greatest development, Chancery viewed the chief function of equity as a vehicle for mitigating the harshness and smoothing the rough edges of the common law in those cases where the Chancellor believed that such mitigation was required by conscience or natural law. From equity's earliest days, one can find biting criticisms about the flexibility of equity, probably the most famous of these being John Selden's indictment that the chancellor's conscience varied with the length of his foot. In a similar vein in this country many years later, Chief Justice Fuller was quoted as saying, "Brother B. would codify all laws in an act of two sections: 1st, All people must be good; 2d, Courts of equity are hereby given full power and authority to enforce the provisions of this act."[11]

Many commentators would argue that even in Selden's day the criticisms of equity courts were probably overblown. In any event, Selden's and Fuller's shaft eventually went home, but the message reached the brain of the beast only after years and years of equity decisions. Their criticisms are clearly inaccurate today. The development of a court system with unbridled discretion would have been intolerable in any free society such as the United States, and no court of equity would have survived had it exercised the kind of unfettered, free-wheeling power of which Selden and Fuller complained. Even in the early days of equity's development, a court of equity did not exercise unfettered discretion. The equity courts insisted on citation of legal authorities. In that sense, "equitable" referred simply to the body or precedent and practice of equity courts and the remedies administered by those courts, and not to some vague, subjective notion of fairness, morality, or justice.

The single most important characteristic of equitable relief to emerge as the system of equity developed was—and to this day still is—that such relief is deemed extraordinary, not ordinary. The first corollary to this axiom is that equitable relief was, and is, considered a matter of judicial discretion, not a matter of right. Thus, a party who sought equitable relief could not demand it as a matter of right simply upon a showing of specific facts that would fit the case into one for equitable relief. This is what commentators mean when they say that granting or denying equitable relief is within the discretion of the court. They do not mean that the court has the power to grant equitable relief in every type of case presented as the spirit moves the

11. Charles Nobel Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 510 (1898).

judge; rather, what they mean is that parties who have placed their case within the category of cases traditionally qualifying for equitable relief were not automatically entitled to it. Parties could not *demand* equitable relief; to the contrary, they always *requested* it. And parties who successfully made a case for equitable relief—showed that theirs was the type of case where equitable relief had been granted in past cases—still had to invoke the discretion of the court to grant such relief.

In a democratic society, this brand of seemingly unfettered discretion vested in a single person does not sit well. Can it be the case that a single judicial officer has the power to grant or withhold equitable relief as the spirit moves him? The short answer is, of course, a resounding "no." A more complete explanation requires an examination of what the term "discretion" means in the context of equity.

B. In the Context of Equity, What Does "Discretion" Mean?

Before turning to a discussion of what "discretion" means in the equity context, it is important to be clear on what the term "discretion" does not mean. "Discretion" does not include the judge's mere *personal* discretion. The term "discretion" when used in the context of equitable relief does not mean unfettered, unbridled discretion to do what the judge feels is best. What discretion does mean in this context, however, is *PRINCIPLED DISCRETION.* Principled discretion is the guiding principle for any judge asked to grant equitable relief. Although courts of equity are often regarded as courts of good conscience, they may not grant equitable relief in the absence of either a statute authorizing such relief or a clear precedent establishing a right to the relief requested. Indeed, when exercising discretion in the grant or denial of equitable relief, discretion refers to the judge's *sound judicial* discretion, a limited discretion. As explained by Professor Henry McClintock in his treatise on equity, this means that the judge consults precedent to find the principles that are applicable to a particular situation, and then determines, from all the facts of the case, what relief will best give effect to the principles involved.[12] Professor Karl Llewellyn perhaps said it best when he observed that the decisions of equity judges should have "reasoned regularity."[13] In exercising judicial discretion, as opposed to personal discretion, courts apply established principles of equity to the facts presented by the particular case.

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12. HENRY L. MCCLINTOCK, MCCLINTOCK ON EQUITY 51-52 (2d ed. 1948).

13. KARL LLEWELLYN, THE COMMON-LAW TRADITION: DECIDING APPEALS 216 (1960).

Beyond fundamental common law principles of deciding like cases in a like manner based on precedent, there is also a serious due process consideration that an equity court must factor into its decision-making process. As noted by the 4th Circuit in *Mattison v. Dallas Carrier Corp.*[14]:

> The first principle of due process embraces a rule of law which contains standards that can be known in advance, conformed to, and applied rationally. The doctrine of the supremacy of law is "a doctrine that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice."[15]

Professor Dan Dobbs has made similar observations regarding the role of discretion in equity:

> The chancellor's discretion to deny relief is a peculiar tradition to encounter in a democratic society where citizens possess rights under the law, not merely the hope of indulgence. . . .
>
> Few American citizens, however, would think of themselves in court as humble petitioners, on their knees before the judge who may deny relief on grounds that cannot be stated as principles or applied even-handedly to all suitors.[16]

Can the exercise of discretion by a judicial officer be reconciled with the concept that we hold as fundamental that we are a society whose members have rights under law? Only if the judge exercising that discretion is very wise, and the range of discretion is very narrowly circumscribed. Adherence to precedent and to the principles of equity will prevent courts from legislating through the exercise of equitable powers and will force them to reach decisions that have reasoned regularity.[17]

C. *Why Shouldn't a Judge Reach a Decision That He Sincerely Believes is Fair, Moral, and Just?*

Why in all cases involving the exercise of equitable powers shouldn't a judge reach a decision that he sincerely believes is fair, moral, and just—in other words equitable—under the circumstances? A system of justice that permits an equity court to dispense justice as it sees fit in a given case without the constraints of legal rules and

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14. 947 F.2d 95 (4th Cir. 1991).
15. *Id.* at 101 (quoting ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 183 (1963)).
16. 1DOBBS, *supra* note 4, § 2.4(7), at 115.
17. *See* GEORGE KEETON, JUDGING 112 (1990).

principles allows courts to decide cases as their biases and attitudes dictate, without analysis and without law. While it is true that judges do not generally act in bad faith, judges are not free to act without stated reasons. Without reliance on guidelines and meaningful rules, judges who instead reach decisions based merely on their intuitive feel of what the right thing to do is in a case will leave lawyers at a loss about the proper evidence to introduce and the legal arguments to make, one of the main advantages of rules and principles. More importantly, in a system of unlimited discretion judges do not have to explain themselves, either as to how they reached their decision or in public justification for what they do. By hiding the process of judging from public scrutiny under the rubric of "discretion," no member of the public or the legal profession can evaluate the judge. Unlimited discretion makes possible decisions that are devoid of analysis, decisions that are neither explained nor thoughtful. In this connection it is well worth keeping in mind the origins of equity: Equity originated in a society where authority counted more than democracy, and where the wishes of the powerful counted more than sound explanations for judicial action. That society is not the one within which an equity court operates today.

When commentators and courts speak of the discretion of an equity court, they are not referring to the broad discretion of a common law court in the many matters committed to the judge's discretion in the course of a trial and which can only be reviewed for an abuse of discretion. The discretion of an equity court to grant or refuse equitable relief is regulated by well-settled principles. As a consequence, in the setting of equity, the standard of appellate review is far less deferential and is usually de novo.[18]

III. WHAT ARE THE ESTABLISHED PRINCIPLES AND MAXIMS OF EQUITY?

Equity developed a number of substantive maxims.[19] The

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18. *See* Lenawee County Board of Health v. Messerly, 331 N.W.2d 203 (Mich. 1982); *See also* Attorney General v. Ankersen, 385 N.W.2d 658 (Mich. 1986).

19. The maxims have been formulated in different ways by different authors. This monograph deals with nine of the maxims that have been discussed in the Michigan case law. In his treatise, INTRODUCTION TO EQUITY, George Keeton lists fourteen maxims of equity: 1. Equity does not suffer a wrong without a remedy. 2. Equity regards substance rather than form. 3. Equity regards as done that which ought to be done. 4. Equality is equity. 5. Where the equities are equal, the first in time will prevail. 6. Where the equities are equal, the law will prevail. 7. Equity follows the law. 8. One who comes into equity must come with clean hands. 9. One who seeks equity must do equity. 10. Equity aids the vigilant not those who sleep on their rights. 11. Delay defeats equity. 12. Equitable remedies are given as a matter of grace or discretion, not right. 13. Equity acts in personam, not in rem. GEORGE KEETON, INTRODUCTION TO EQUITY 87-117 (6th ed. 1965).

maxims of equity are short statements or rules of thumb that guide courts of equity in the exercise of their sound judicial discretion.[20] It would be a serious mistake, however, to place too much reliance on them as ultimate guides to decision. Their brevity makes them easy to remember, but their generality and lack of focus at the same time give them limited utility as judicial guides. Indeed, it is this brevity and generality that make them potentially dangerous as tools for reaching decisions if overreliance is placed on them.

It is frequently true that the maxims of equity are not very useful analytical tools. Take for example, the maxim, "Equity follows the law." This maxim states a truism and beyond that, little more. It is obviously true that a court sitting in equity cannot depart from substantive rules of law when rendering a decision. The Michigan Supreme Court, in *Blunt v. Brown*,[21] made this very point regarding the limits of equitable relief: "A court of equity will not relieve a party from the [legal] consequences of a risk which he voluntarily assumes."[22]

A judge should not be seduced or distracted by the charming tone of equitable maxims. They may be pleasing to the ear, but they are not to be taken too literally because they lack precision and analytical value.[23] They are meant to be illustrative, not dispositive. A court, when asked to grant equitable relief, cannot depart from the substantive law by relying on an ancient maxim of equity, any more than a court of law can depart from statute or precedent when asked to resolve a dispute. Only after the underlying principles that these maxims represent have been mastered can these maxims then serve the purpose for which they were intended, namely, useful shorthand devices for jogging one's memory, and not a substitute for principled and thoughtful decision making.

The following are nine equitable maxims invoked in Michigan case law. The first four equitable maxim spring from a common source. Their shared goals are, first, to ensure that a court sitting in equity is not made an instrument of sharp practice and, second, to prevent one party's unjust enrichment at the expense of another party.

A. *Equity Regards as Done Which Ought to be Done*

This first maxim finds its source in the doctrine of equitable

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20. For a discussion of the equitable maxims, *see* 1 DOBBS, *supra* note 4, § 2.3(4).
21. 37 N.W.2d 671 (Mich. 1949).
22. *Id.* at 673 (citing McCredic v. Buxton, 31 Mich. 383, 388 (1875)).
23. For a criticism of equitable maxims, *see* Zechariah Chafee, *Coming into Equity with Clean Hands*, 47 MICH. L. REV. 1065, 1092 (1949).

estoppel, discussed below. Illustrative is *Kent v. Klein*,[24] where the Michigan Supreme Court imposed a constructive trust on property given by a mother to her daughter for the benefit of her incompetent son, the defendant's brother. The Court observed:

> [C]hancery will not permit one to enrich himself at the expense of another by closing its eyes to what is clear to the rest of mankind. Equity, to paraphrase, regards that as seen which ought to be seen, and, having so seen, as done that which ought to be done. . . .
>
> It is enough, to compel the surrender [of the property], that one feed and grow fat on that which in good conscience belongs to another, that he enjoy a windfall resulting in his unjust enrichment, that he reap a profit in a situation where honor itself furnishes rich reward . . . .[25]

B. Equity Looks to the Intent, Rather Than to the Form

Illustrative is *Charles E. Austin, Inc. v. Kelly*.[26] There, the Michigan Supreme Court disregarded the distinct corporate form of two entities that had common ownership where the two corporations were created as devices to violate and evade state tax law.[27]

C. He Who Seeks Equity Must Do Equity

This maxim of equity simply means that a plaintiff who seeks equitable relief must be prepared to return the defendant to the status quo ante, or be barred from such relief. Where the plaintiff is unable to restore the defendant to the status quo ante, rescission or cancellation of an agreement will be denied. This maxim—which is designed to prevent the unjust enrichment of the plaintiff at the expense of the defendant—has found expression in several reported Michigan cases. Most of these deal with quiet title actions, foreclosure actions, and suits for rescission of contracts induced by defendant's fraud. Illustrative are *Grabendike v. Adix*,[28] and *Michigan Mobile Homeowners Ass'n v. Bank of the Commonwealth*.[29] In *Grabendike*, the plaintiffs delayed in seeking rescission of mineral leases until after the leased property proved to have no oil. The value of the leases was thus drastically reduced. The Michigan Supreme Court denied the plaintiffs' request for rescission of the leases because the plaintiffs

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24. 91 N.W.2d 11 (Mich. 1958).
25. *Id.* at 13-14. *See also* Warren Tool Co. v. Stephenson, 161 N.W.2d 133 (1968).
26. 32 N.W.2d 694, *cert. denied*, 335 U.S. 828 (1948).
27. *Id.* at 697. *Accord* Duro Steel Products, Inc. v. Neubrecht, 6 N.W.2d 474, 476 (Mich. 1942).
28. 55 N.W.2d 761 (Mich. 1952).
29. 223 N.W.2d 725 (Mich. 1974).

could not restore to defendant the leases with the same value they had as when the plaintiffs received them, stating:

> The mere inability of the plaintiff to make restoration does not relieve him of his obligation to do so, or permit the court to grant him relief. . . .
>
> Where the circumstances of the case are such that the parties cannot be placed in substantially the same situations they occupied when the contract was made, as a general rule a court of equity will not rescind the contract . . . .[30]

In the *Michigan Mobile Homeowners Ass'n* decision, the plaintiffs sought rescission of installment purchase contracts that provided for an allegedly usurious rate of interest. The Michigan Court of Appeals refused to rescind the sales contracts because, *inter alia*, the plaintiffs had failed to do equity, namely, tender the unpaid balance plus interest at the legal rate.[31]

D. He Who Comes Into Equity Must Come With Clean Hands

The "clean hands" maxim, together with the doctrine of laches and estoppel (both of which are discussed below), is one of the three principal defenses to requests for equitable relief. The clean hands maxim is most often cited in contract cases.[32] It requires that plaintiffs seeking equitable relief must themselves be free of any unconscionable conduct. Application of the maxim is thus not restricted to illegal, void, or voidable transactions only.[33] At the other end of the misconduct spectrum, however, mere negligence on plaintiff's part will not trigger the application of the clean hands maxim.[34]

The clean hands defense exists not so much for the benefit of the defendant who will, of course, directly benefit if the defense is successful in blocking a plaintiff's request for equitable relief, but rather is for the protection of the court to ensure that it does not expend its time and public resources in determining how the proceeds of an inequitable transaction should be awarded. An equity court "must decline to lend its aid to either party to a transaction that in its inception offends concepts of decency and honest dealing."[35] Since the clean hands maxim is designed to preserve the integrity of the

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30. *Grabendike*, 55 N.W.2d at 767 (citation omitted).
31. Mich. Mobile Homeover Ass'n, 223 N.W.2d at 731.
32. *See* EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 5.9 (1989).
33. Stanchik v. Winkel, 230 N.W.2d 529, 534 (Mich. 1975).
34. *See* Attorney General v. Ankersen, 385 N.W.2d 658, (Mich. Ct. App. 1986).
35. New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 472 (5th Cir. 1961).

judiciary, courts may apply it on their own motion.[36] In the words of the Supreme Court: "The clean hands doctrine is more than just another defense to be used by the party seeking to block specific performance. It is a doctrine to be *invoked by* the Court in its discretion to protect the *integrity of* the Court."[37]

Because the clean hands maxim is designed primarily to protect the integrity of the judicial process, unlike other equitable defenses, the clean hands maxim focuses on the plaintiff's conduct, not on any harm to the defendant caused by that conduct. "[T]he primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party[,] not whether that party relied upon plaintiffs' misrepresentations."[38]

For example, in *Isbell v. Brighton Area Schools*,[39] the plaintiff, who was denied a high school diploma for excessive absences, was awarded injunctive relief (issuance of a high school diploma) because the trial court concluded that the attendance policy was unreasonable. However, the court of appeals reversed because regardless of the reasonableness of the school's attendance policy, the plaintiff had unclean hands: she admittedly had forged excuse notes. Her deceit, not the defendant's reliance on the forged notes, disqualified her from receiving equitable relief.[40]

E. Equality is Equity

Although no recent Michigan cases discuss this equitable maxim, the policy underlying the maxim is that persons who are similarly circumstanced should be treated equally, and that none among them should receive preferential treatment at the hands of a court sitting in equity. In the early case, *Turnbull v. Prentiss Lumber Co.*,[41] the Michigan Supreme Court held that among unsecured creditors of an insolvent corporation, "equality is equity," and that they were each entitled to a fair distribution of the corporate assets. Likewise, in *Comstock v. Potter*,[42] the court held that a surety was entitled to contribution from its cosureties, resting its holding on the maxim,

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36. *Stanchik* 230 N.W.2d 529, 532 (Mich. 1975). In that case, the plaintiffs' request for specific performance was rejected because "in their efforts to acquire property from an elderly couple, [they] intentionally misrepresented themselves as agents of the timber company in order to enhance the chances of success. This conduct leaves them with unclean hands." *Id.* at 534-35.

37. *Id.* at 534.

38. *Id.*

39. 500 N.W.2d 748 (Mich. 1993).

40. *Id.* at 749.

41. 21 N.W. 375 (Mich. 1884).

42. 158 N.W. 102 (Mich. 1916).

"equality is equity."[43]

F. Where There Are Equal Equities, The First In Time Shall Prevail

This equitable maxim is so time honored and well understood that the courts have seen little need to expound on it (as reflected in the dearth of reported cases that discuss or analyze the maxim). The principle is simple: As between two equally innocent persons, both of whom have acted in good faith, to whom should a remedy be given? Equity employs the "first-in-time" rule as the tie-breaker.[44]

G. Where the Equities Are Equal, The Law Must Prevail

If two parties have equal, but conflicting, equities with regard to the same subject matter, and one of them also obtains legal right to that subject matter, an equity court will not upset that legal right.[45] The most commonly cited illustration of this maxim in operation involves cases where legal title to property that is subject to an equitable right (such as property held in trust) is sold to a bona fide purchaser for value without notice of the outstanding equity. As between the two parties holding the equitable right, the bona fide purchaser prevails because he holds legal title to the transferred property. Differences in time in the origin of the respective equities do not render them unequal. Consequently, this maxim trumps the maxim that where the equities are equal, the first in time shall prevail.[46]

H. Equity Aids the Vigilant, Not Those Who Slumber on Their Rights

This eighth equitable maxim expresses the equitable doctrine of laches which is the policy in equity against delay in the assertion of rights, analogous to the common law policy embodied in the statute of limitations. Laches differs from limitations, however, in that "limitations are concerned with the *fact* of delay," while "laches [is concerned] with the *effect* of delay."[47] The linchpin of the laches defense is prejudice to the defendant as a result of plaintiff's lack of due diligence in bringing her claim.[48] For example, if all the

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43. *Id.* at 105.

44. *See* Commercial Investment Trust v. Bay City Bank, 62 F.2d 735 (6th Cir. 1933).

45. Hudson v. Village of Homer, 87 N.W.2d 72, 76 (Mich. 1957).

46. MCCLINTOCK, *supra* note 12, at 70.

47. Lothian v. City of Detroit, 324 N.W.2d 9, 14 (Mich. 1982) (quoting Sloan v. Silberstein, 141 N.W.2d 332, 340 (Mich. Ct. App. 1966)); *See also* Great Lakes Gas Transmission Co. v. MacDonald, 485 N.W.2d 129, 133 (Mich. Ct. App. 1992).

48. Eberhard v. Harper-Grace Hospitals, 445 N.W.2d 469, 475 (Mich. Ct. App. 1989); *See also* City of Holland v. Manish Enterprises, 436 N.W.2d 398, 400 (Mich. Ct.

witnesses to an event have died, or memories have faded, due to plaintiff's lack of due diligence, laches will be found to exist. McClintock succinctly summarizes the defense of laches as follows:

> Where a party has unreasonably delayed the assertion of an equitable claim until the other party has acted, or the circumstances have changed, so as to result in prejudice because of the delay, equity will hold the party claiming the right to be guilty of laches, and will deny relief to him.[49]

Along with the unclean hands doctrine discussed above, laches is the chief defense to equitable claims brought by a plaintiff who has unreasonably delayed his claim. It is closely related to the doctrine of estoppel.[50]

Historically, equity usually foreclosed a plaintiff from bringing a claim after the period equal to the analogous statute of limitations. The Michigan legislature codified the traditional rule by providing that the same limitations period applies equally to legal and equitable actions, thus eliminating a trial court's discretion to entertain an equitable claim after the applicable period of limitations has run.[51] This change is a reflection of the familiar principle that equitable relief will not be granted where there is an adequate remedy at law. Prejudice to the defendant is conclusively presumed if the plaintiff brings an action for equitable relief beyond the limitations period. By the same token, even though the analogous limitations period has not run, a trial court retains the discretion to dismiss a claim on the ground of unreasonable and prejudicial delay in bringing it.

I. Equity Follows the Law

Of all the equitable maxims discussed, the maxim that equity follows the law is perhaps the most important because it expresses a significant barrier to the grant of equitable relief: Equity cannot be used to deprive a person of a legal right. While equity in a proper case may reform a contract on the ground of mutual mistake of fact, or rescind a contract for fraud in the inducement or duress, equity cannot impose a new contract on the parties or supply deliberate omissions.

According to the Michigan Supreme Court, "[i]t is fundamental that equity follows the law. The purpose of the rule is to prohibit vexatious litigation."[52] An even more compelling explanation for this

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App. 1988).

49. MCCLINTOCK, *supra* note 12, at 71.

50. Seaman v. Ironwood Amusement Corp., 278 N.W. 51, 59 (Mich. 1938).

51. *See* MICH. COMP. LAWS ANN. § 600.5815 (West 1987).

52. La Bour v. Michigan Nat'l Bank, 55 N.W.2d 838, 840 (Mich. 1952).

maxim is that it is intended to prevent equity courts from straying from the plain, unambiguous language of a statute in those cases where adhering to the statutory command might work a hardship in the particular case. Courts of equity are no more exempt from following clear expressions of legislative intent than are courts of law. Even if an equity court questions the wisdom of the legislature, the court may not interfere.[53] The Michigan Supreme Court made this point abundantly clear in *City of Lansing v. Twp. of Lansing*:[54] "Courts of equity, as well as of law, must apply legislative enactments in accord with the plain intent of the legislature. An argument that a statute as construed may, in certain instances, work great hardship is one that should be addressed to the legislature rather than the court."[55]

In an even more dramatic fashion, the court of appeals rejected a plaintiff's claim to a $1.5 million prize in a Michigan lottery drawing where the plaintiff had lost the winning ticket.[56] Despite solid evidence that he had purchased the winning ticket, the court concluded that equity follows the law and held that "[w]hile plaintiff's predicament in the instant case is heartbreaking, we are unable to afford him the relief he requests because the law is clear" [i.e., in order to claim a lottery prize, a winning ticket must be presented].[57]

J. Summary

These nine equitable maxims represent in shorthand form the principles by which equitable relief is granted or denied. The policy for each of them acts as a guide and governor on the exercise of an equity court's discretion. Against this backdrop, the discussion now turns to a review of equitable remedies and defenses. What remedies are available from an equity court? What is the interplay of equitable principles and precedent in the administration of these remedies? And finally, what are the equitable defenses to requests for equitable relief? We turn to a consideration of equitable defenses first.

IV. EQUITABLE REMEDIES AND DEFENSES

A. Generally, What Defenses Are Available to Defeat an Equitable Claim?

The defenses most commonly raised to defeat a claim for equitable relief are estoppel, unclean hands, and laches. Regardless of the nature of the equitable relief sought, these three defenses may

53. Senters v. Ottawa Savings Bank, 503 N.W.2d 639, 644 (Mich. 1993).
54. 97 N.W.2d 804 (Mich. 1959).
55. *Id.* at 809 (citations omitted).
56. Ramirez v. Bureau of State Lottery, 463 N.W.2d 245 (Mich. Ct. App. 1990).
57. *Id.* at 250.

always be raised when the facts warrant. Besides these three defenses that have across-the-board application, other specific defenses also exist. For example, defenses that are specific to the contract setting are mistake, misrepresentation, and unconscionability. These defenses will be discussed below.

The three common defenses—equitable estoppel, unclean hands, and laches—are close relations of each other. For example, estoppel means that a party is "stopped" from claiming or saying something, even if it is the truth or a lawful claim, because of some prior inconsistent statement or activity that the other party relied on to his detriment. Similarly, the equitable doctrine of laches, as previously mentioned, bars a plaintiff who has unreasonably delayed asserting a claim where prejudice to the defendant would result. On the other hand, unlike the estoppel or laches defense, reliance or prejudice is not required to successfully raise the unclean hands defense.

1. Equitable Estoppel

Equitable estoppel seeks to prevent one person from gaining an advantage over another by misleading conduct. No single definition can govern every case, but at its core the doctrine of estoppel has four key elements. First, the actor, with knowledge of the facts, communicates something to another in a misleading way, either by words, conduct, or silence. Second, the other person reasonably relied on that communication. Third, the other person would be materially harmed if the actor is permitted to assert a claim inconsistent with his earlier conduct. Fourth, the actor should have known that the other party would rely on the misleading communication.[58] Although equitable and promissory estoppel share in common the element of inducement, what distinguishes equitable from promissory estoppel is that with the latter there is detrimental reliance on a *promise*, whereas with the former there is detrimental reliance on *representations*.

Because estoppel is so easy to invoke, and so likely to proceed without analysis, the use of estoppel may actually work an injustice. It is worth emphasizing that estoppel is not meant to put either party in a better than rightful position. And what is the rightful position of the parties? That cannot be judged without analysis, which should include an assessment of all the remedies available. Equitable estoppel should be applied only in cases where the facts calling for it and the wrong to be prevented are both unquestionable.[59]

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58. 1DOBBS, *supra* § note 4, § 2.3(5) at 85. *See, e.g.*, Dellar v. Frankenmuth Mutual Ins. Co., 433 N.W.2d 380 (Mich. Ct. App. 1988).

59. 1 DOBBS, *supra* note 4, § 2.3(5), at 90.

2. Unclean Hands

The unclean hands defense has been discussed above. The defense is closely related to other equitable defenses, such as unconscionability in contracts. Like most of the equitable maxims, the term "unclean hands" can too easily become a substitute for analysis.[60] Its limitations must be clearly understood: it is a defense to equitable relief only, and not a bar to legal claims. In the words of Professor Dobbs:

> If judges had the power to deny damages and other legal remedies because a plaintiff came into court with unclean hands, citizens would not have rights, only privileges. . . . The merger of law and equity . . . does not suggest that a judge has discretion to bar [legal] rights as well as to limit [equitable] remedies.[61]

Dobbs suggests a three-step analysis to guide courts when asked to determine whether the plaintiff has unclean hands.[62] First, a court should ask whether the defense being invoked is really legal rather than equitable. For example, if the plaintiff attempts to enforce an illegal contract, then the analysis should proceed on the basis of the illegality defense not unclean hands. Second, if the defense is really the equitable one of unclean hands, then it should only bar equitable relief, not legal relief. Third, if the defense is purely the equitable one of unclean hands, then three subsidiary questions should be asked: (a) Is the misconduct serious? (b) Is the misconduct closely related to the claim such that it injured the defendant, or is it merely collateral to the claim? (c) Will invocation of the unclean hands defense interfere with the vindication of legal goals, such as support obligations?

The plaintiff's misconduct need not rise to the level of a crime to successfully invoke the clean hands doctrine,[63] although many cases in which the unclean hands defense is invoked are cases where the plaintiff's conduct was illegal. At the least, the plaintiff's improper conduct must be substantially and significantly related to the claim being asserted. Equitable relief is not reserved exclusively for saints. Sinners are also entitled to equitable relief. Moreover, to further corral the discretionary element inherent in ruling on the defense, the wrongdoing must have been directed against the defendant himself

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60. *See* Zechariah Chafee, Jr., *Coming Into Equity with Clean Hands* (pts. 1 & 2), 47 MICH. L. REV. 877, 1065 (1949) [hereinafter Chafee].

61. 1 DOBBS, *supra* note 4, § 2.4(2), at 94.

62. *Id.* § 2.4(2), at 97-99.

63. *Stachnik*, 394 Mich. 375, 230 N.W.2d 529, 534 (Mich. 1960).

and not some third party.[64] In Michigan, a defendant will not be precluded from invoking the clean hands defense even though he himself was guilty of misconduct in the transaction.[65] The defense is viewed as a means of protecting the reputation of the court,[66] and for that reason the court will not grant equitable relief to a plaintiff who is guilty of misconduct even if the defendant also committed a wrong.[67]

The danger of the clean hands doctrine is that it is "a slogan that avoids analysis . . . [that] may lend itself to misapplication."[68] In addition, it is a doctrine that may be superfluous insofar as other better defined rules exist to cut off a plaintiff who has engaged in misconduct, such as misrepresentation and illegality.

3. Laches

As noted, laches is an unreasonable delay by the plaintiff in prosecuting a claim of which the plaintiff knew or should have known, causing prejudice to the defendant.[69] A plaintiff guilty of laches may be barred from receiving any equitable relief; injunctions, specific performance, rescission, and reformation. The laches rule finds its origins in equity because there was no statute of limitations applicable to claims seeking equitable relief. In Michigan, the legislature closed this lacuna by enacting M.C.L. § 600.5815, which provides that the prescribed limitations period applies equally to all actions, regardless of the relief sought, and that the doctrine of laches also applies in equitable proceedings. Thus, even though the claim might not be time barred by the applicable statute of limitations, it may nevertheless be barred because of unreasonable, prejudicial delay by the plaintiff in bringing his claim.

The same conduct that might give rise to a defense of laches could equally qualify as an estoppel or waiver. For example, if the plaintiff delays in bringing a claim, suggesting that he does not intend to pursue it, and the defendant relies on this to her detriment, all the elements of estoppel are present.

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64. Chafee, *supra* note 60, at 881.
65. *See* Rockwell v. Crestwood School Dist., 227 N.W.2d 736, 746 (Mich. 1975).
66. Isbell v. Brighton Area Schools, 500 N.W.2d 748, 748 (Mich. Ct. App. 1993).
67. *Id.* at 189, 227 N.W.2d at 748; *See* Leland v. Ford, 223 N.W. 218, 221 (Mich. 1929).
68. 3DOBBS, *supra* note 4, at § 12.8(4), at 221.
69. Great Lakes Gas Transmission Co. v. MacDonald, 485 N.W.2d 129, 132 (Mich. Ct. App. 1992); Eberhard v. Harper-Grace Hospitals, 445 N.W.2d 469, 475 (Mich. 1989); Bennington Twp. v. Maple River Inter-County Drain Board, 386 N.W.2d 599, 603 (Mich. Ct. App. 1986).

B. Generally, What Remedies Are Available From an Equity Court?

Equitable remedies can be divided into two kinds: coercive and restitutionary. Coercive, or injunctive, remedies are the most common. Injunctions can be prohibitory, enjoining a defendant from doing specific acts either permanently or provisionally pending the outcome of the litigation; or mandatory, commanding a defendant to perform specific acts. Examples of prohibitory injunctions include ordering a defendant to cease a repeated trespass or to desist from acts that constitute a nuisance. The classic mandatory injunction is, of course, an order requiring the seller of land to specifically perform the contract by conveying the land as promised. An injunctive order always carries with it the implicit threat of being held in contempt of court for violating the order.

The second broad category of equitable remedies is restitutionary in nature. Restitutionary remedies prevent the defendant's unjust enrichment at the expense of the plaintiff by requiring the defendant to restore to the plaintiff something that belongs to him. When a contract is rescinded, for example, each party must make restitution of what she received under the contract. Reformation is also a form of restitution: the defendant is required to return to the plaintiff the agreement the parties actually entered into but for a mutual mistake of fact.

Most equitable remedies and the manner in which they are granted or denied can be illustrated in the contract setting. The American legal system has a number of remedies that may be granted for breach of contract. Most often, the injured party receives compensation in the form of money damages. Specific performance or an injunction is an alternative equitable remedy to an award of money damages as a method of enforcing contracts. An order of specific performance usually directs the party in breach to render the promised performance. In the context of contract law, injunctions usually take the form of an order directing a party to refrain from doing a specified act. An example would be enforcing a covenant not to compete through an injunction directing the promisor to refrain from competition.[70]

Rescission, cancellation, and reformation of contracts are the other alternative, and mutually exclusive, equitable remedies. Rescission nullifies a contract completely and returns the parties to the position they would have been in had no contract been made. Rescission is the term generally used to void a contract that is executory. Cancellation describes the remedy for rescinding wholly

70. The subject of injunctions is discussed below.

executed contracts, or voiding legal instruments such as deeds. The same rules apply to both remedies. Reformation may be granted if a contract contains a term that was the product of a mutual mistake of fact or of fraud. An equity court has the power to reform a contract to make it conform to the agreement the parties actually made, but the court cannot make a new contract for the parties.

1. When Should a Court Order Specific Performance?

It is axiomatic that the remedy of specific performance is an extraordinary remedy; that it is not available as a matter of right, unlike the legal remedy of money damages; and that the grant of the remedy is within the discretion of the court. Nevertheless, the exercise of that discretion must be based on established equitable principles[71] and can be reviewed de novo on appeal. In that respect, the discretion exercised by an equity court in granting or denying equitable relief must be carefully distinguished from the discretion the trial judge exercises in such matters as are committed to his discretion at the trial and which can be reviewed only for abuse of discretion, such as orders permitting the amendment of pleadings and discovery orders. These two kinds of discretion are a far cry from one another. While the deference accorded the trial judge is great in such matters, that same level of deference does not exist in the context of an equity court's grant or denial of equitable remedies. The less deferential standard of review in equity cases is based on the principle that the appellate court in equity is to render the decree that should have been rendered below. In short, equity discretion is not as wide ranging as some of the reported cases would lead the casual reader to believe.

Moreover, to say that the remedy of specific performance is not available as a matter of right because it is an equitable remedy is too facile of a conclusion. That assertion overlooks a consistent line of cases involving the enforcement of contracts for the purchase of land. In those cases, specific performance is routinely granted. Specific performance of a contract relating to personal property, on the other hand, is generally denied because of the adequacy of the legal remedy of damages. An exception exists where the property is unique, rare, or has sentimental value.[72] Section 716(2) of the Uniform Commercial Code authorizes specific performance where goods are unique, and cryptically adds that specific performance can also be granted in

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71. *See* Continental & Vogue Health Studios, Inc. v. Abra Corp., 120 N.W.2d 835 (Mich. 1963); Blackwell v. Keyes, 91 N.W.2d 190, 192 (Mich. 1958); MCCLINTOCK, *supra* note 12, at 129.

72. Bayer v. Jackson City Bank & Trust Co., 55 N.W.2d 746, 751 (Mich. 1952); Kent v. Bell, 132 N.W.2d 601, 604 (Mich. 1965).

other proper circumstances.[73]

In ruling on requests for specific performance of a contract, courts must be vigilant and sensitive to the need to husband scarce judicial resources. Courts will not grant specific performance of a contract if they consider enforcement to be impracticable. For example, cases in which the court might be required to supervise enforcement over a long period of time might impose excessive demands on the court's resources. The practicability limitation surfaces in three typical cases: (1) when a landowner seeks specific performance of a contract for construction or repair work,[74] (2) where important contract terms are vague or uncertain, and (3) contracts for personal services where a rupture in the relationship has occurred making it difficult to monitor the quality of the services rendered.[75] The Second Restatement of Torts proposes a balancing test that calls for denying specific performance if the performance is so extensive that the burdens of supervision outweigh the plaintiff's advantages in having specific performance.[76] However, the Restatement's balancing test is subject to criticism, because evaluating the burdens of supervision and the plaintiff's advantage requires a judicial assessment that is based on bare discretion rather than the application of rules. The judge's only guide would be her own personal discretion, making the judge unaccountable. A better guide is to inquire whether the plaintiff has an adequate legal remedy in damages and, if not, to determine whether enforcement of the contract would in fact require long supervision.

In summary, if granting specific performance will enmesh a court in continuous and long-term judicial supervision of its order, the court should be very hesitant to grant the remedy of specific performance.[77] For example, equity courts often refuse to specifically enforce long-term contractual arrangements, such as construction contracts, commercial leases, and franchises, in order to avoid being

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73. MICH. COMP. LAWS ANN. § 440.2716(1) (West 1994). "Other proper circumstances" might include a situation where substitute goods are not available in the market and damages will not provide adequate compensation. *See, e.g.*, Jaup v. Olmstead, 55 N.W.2d 119, 120 (Mich. 1952) (pre-Code case).

74. *See* Eliot Axelrod, *Judicial Attitudes Toward Specific Enforcement of Construction Contracts*, 7 DAYTON L. REV. 33 (1981).

75. *See* 3 DOBBS, *supra* note 4, § 12.8(3), at 206-07. The refusal by courts to specifically enforce personal service contracts must be qualified by any statutory remedy of reinstatement in cases of unlawful employment discrimination. Pursuant to the maxim that equity follows the law, an equity court cannot ignore a clear statutory command.

76. RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981).

77. Laker v. Soverinsky, 27 N.W.2d 600, 601 (Mich. 1947); Edidin v. Detroit Economic Growth Corp., 352 N.W.2d 288, 291 (Mich. 1984).

drawn into long-term supervision of performance under the agreement.

2. *Assuming Specific Performance Would Otherwise Be An Appropriate Remedy, What Are the Grounds for Denying Such Relief?*

As a general matter, plaintiff's conduct in relation to the contract may bar the remedy of specific performance. The plaintiff must not have an adequate remedy at law. In other words, if damages would make the plaintiff whole, then the plaintiff has an adequate remedy at law. Moreover, the plaintiff must come into court with clean hands. In addition, specific performance will not be ordered unless the terms of the contract are clear and complete in all essential terms.

Mutual mistake as to material facts will also bar specific performance. Unconscionable or fraudulent contracts will not be specifically enforced. Finally, as discussed previously, the plaintiff who has unreasonably delayed to the detriment of the defendant in bringing a claim for specific performance will be barred by laches.

a. Does the Plaintiff Have an Adequate Legal Remedy?

Specific performance, and other injunctive remedies, will be denied unless the plaintiff demonstrates that the legal remedy would not be adequate. A legal remedy may be inadequate, and specific performance justified, if the contract involves the sale of something unique, such as land, a work of art, or an heirloom. In those cases, money is not an adequate substitute because the items are not fungible. The difficulty of finding a substitute in the market may render the legal remedy inadequate, but in such cases great care and sound discretion are called for on the part of the court in determining adequacy.

From a functional perspective, the adequacy test essentially reaches the same result the parties probably would have bargained for if bargaining for a remedy was possible. For example, a person buying something unique would probably have bargained for specific performance, but a person buying widgets would probably have bargained for (and would probably prefer) damages.

b. Does the Plaintiff Have Unclean Hands, or Is He Guilty of Unreasonable Delay?

As with all equitable remedies, a plaintiff who seeks specific performance must come to court with clean hands and must not be

guilty of unreasonable delay.[78]

c. Is the Contract Complete and Unambiguous in All Its Essential Terms?

At the risk of stating the obvious, courts cannot be expected, as a practical matter, to order the performance of a contract unless they can determine from the contract exactly what performance to order. An equity court simply cannot order the performance of a contract in which the terms are uncertain. This ground for denying specific performance has both a due process component (the order must reasonably guide the defendant) and a self-protective aspect (an equity court does not want to become bogged down in the task of overseeing its orders). A contract need not be so indefinite that even an action for breach seeking damages would fail. At the same time, however, a greater degree of certainty in contract terms is required when a party is seeking specific performance rather than damages.[79]

d. When is Duress a Proper Ground for Refusing to Order Specific Performance of a Contract?

Duress is "the use of improper threats or economic pressure to secure a contract or some other action."[80] Like the other two types of misconduct discussed immediately hereafter—undue influence and unconscionability—duress is largely defensive and is typically used to defeat a claim for specific performance. However, it may also be used offensively to rescind an agreement and seek restitution. To show duress, it is necessary to prove: (1) a wrongful act or threat, (2) that left the victim no reasonable alternative, and (3) to which the victim in fact acceded, (4) resulting in a transaction that was unfair to the victim.[81] The easy cases of a wrongful act or threat are those involving physical compulsion or the threat thereof. Interestingly, the most common variety of duress today is economic or business compulsion.

The two recurring issues in duress cases are the wrongfulness of the threat and coercion of the victim. Not all economic threats warrant the unmaking of an agreement. All bargaining involves a degree of compulsion.[82] Thus, the Restatement (Second) of Contracts adopts an objective test that questions whether the plaintiff was left with no reasonable alternative but to succumb to the defendant's

78. *See, e.g.*, Holy Cross Baptist Church v. D.V. Constr. Co., 117 N.W.2d 159 (Mich. 1962); Grade v. Loafman, 22 N.W.2d 746 (Mich. 1940).
79. Spaulding v. Wyckoff, 31 N.W.2d 71, 73 (Mich. 1948).
80. 2 DOBBS, *supra* note 4, § 10.1, at 632.
81. RESTATEMENT (SECOND) OF CONTRACTS §§ 175 & 176 (1981).
82. *See* John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237 (1942).

demand.[83] Generalizations in this area are hazardous because they may invite courts to become too involved in the parties' economic transactions. Nevertheless, with that caveat in mind, it is not ordinarily wrongful to threaten what one has a right to do. Further, it is not wrong to deal with a person who is in financial or emotional difficulty and who may accept an otherwise unattractive offer.[84] On the other hand, it is ordinarily wrongful to threaten a tort or criminal act, a criminal prosecution, or a civil suit that is unfounded.[85]

e. When is undue influence a proper ground for refusing to order specific performance of a contract?

Undue influence differs from duress in that duress involves overt coercion by threats, whereas undue influence involves covert persuasion by manipulation.[86] The issue of mental incapacity is often present in undue influence cases, as it is in cases of misrepresentation. Much of the law of undue influence arises in the context of confidential relationships. Thus, the most important evidence in undue influence cases is the existence of a confidential relationship in which the submissive party reposes trust in the dominant party. For example, a presumption of undue influence exists when a will is made by a patient in favor of a physician,[87] a client in favor of an attorney,[88] or a parishioner in favor of a clergyman.[89]

As with duress and unconscionability, discussed hereafter, too often courts describe the misconduct that constitutes undue influence in vague and moralistic terms, which prevents serious analysis of the policy reasons for these defenses. A less subjective and more analytical rationale for these defenses would focus on the misuse of information. One of the most important reasons for the defense of undue influence, for example, is to prevent the misuse of information in

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83. RESTATEMENT (SECOND) OF CONTRACT § 175, comment b (1981).

84. 2 DOBBS, *supra* note 4, § 10.2(2), at 640. For example, in *Musial v. Yatzik*, the Michigan Supreme Court rejected the plaintiff's claim of duress as a ground for rescission where "his acute need for money drove him to enter into the settlement. . . . [E]ven assuming duress, it was not caused by the [defendants] and cannot be raised as a basis for attacking the settlement contract." Musial v. Yatzik, 45 N.W.2d 329, 331 (Mich. 1951). *See also* Alpert Industries, Inc. v. Oakland Metal Stamping Co., 141 N.W.2d 671, 677 (Mich. Ct. App. 1966) ("[t]he mere fact that the defendant was in severe financial difficulty does not constitute undue influence or oppression on the part of the plaintiffs").

85. 2 DOBBS, *supra* note 4, § 10.2(2), at 640.

86. *Id.* § 10.3, at 656.

87. In re Hartlerode's Estate, 148 N.W. 774, 777 (Mich. 1914).

88. Creller v. Baer, 93 N.W.2d 259, 261 (Mich. 1958).

89. Hill v. Hairston, 299 Mich. 672, 1 N.W.2d 34, 36 (Mich. 1941).

reaching bargains.[90] In undue influence cases, which typically arise in the context of confidential or fiduciary relationships, the fiduciary or dominant party has an affirmative duty not only to disclose information but also to avoid the use of information that rightfully belongs to the beneficiary that would be to the advantage of the fiduciary at the expense of the beneficiary.

f. When is Unconscionability a Proper Ground for Refusing to Order Specific Performance of a Contract?

Early equity courts developed the formless defense of unconscionability to bar a plaintiff's request for specific performance. Since this was a matter of the chancellor's discretion, and not of principle, equity never developed a clear set of rules capable of rigorous analysis. In addition, the plaintiff who sued for specific performance might find his equitable remedy barred but still have his legal remedy of damages.

The equitable doctrine of unconscionability has a long history in Michigan. In 1868, the Michigan Supreme Court refused to grant the specific performance of a contract that would have given the buyer an unconscionable advantage.[91] The doctrine was later adopted by the Michigan legislature when it enacted the Uniform Commercial Code (UCC)[92] and has been judicially extended to cover contracts outside the scope of the UCC.[93]

The narrow remedial limitations imposed by equitable-unconscionability are to be contrasted with the broad limitations of UCC-unconscionability. Under the latter, both legal claims for damages and equitable claims for specific performance may be barred.[94] Today in Michigan, there is a two-pronged test for determining whether a contract is unenforceable as unconscionable that incorporates both procedural and substantive unconscionability.[95] The first inquiry focuses on procedural unconscionability and asks the following questions: What is the relative bargaining power of the parties? What is their relative economic strength? What are their alternative sources of supply? What are their options? The second inquiry focuses on

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90. In the case of misrepresentation, on the other hand, one is prohibited from lying, but one generally has no duty to affirmatively disclose.

91. Eames v. Eames, 16 Mich. 348, 350 (1868).

92. MICH. COMP. LAWS § 440.2302 (1994).

93. Reed v. Kaydon Engineering Corp., 196 N.W.2d 487, 488 (Mich. Ct. App. 1972).

94. *See* 2 DOBBS, *supra* note 4, § 10.7, at 704-05.

95. *See* Paulsen v. Bureau of State Lottery, 421 N.W.2d 678, 682 (Mich. Ct. App. 1988); Northwest Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719, 723 (Mich. Ct. App. 1987); Stenke v. Masland Development Co., 394 N.W.2d 418, 423-24 (Mich. Ct. App. 1986).

substantive unconscionability and asks only one broad question: Is the challenged term substantively reasonable? Some of the more specific fact situations in which cases of substantive unconscionability arise involve a price term that is either grossly excessive or grossly inadequate. In actuality, such cases often involve misrepresentation, duress, or undue influence. Unconscionability in such cases serves as an analytical surrogate but is not very satisfying because of the subjective assessments called for in determining substantive reasonableness.

Other instances in which substantive unconscionability arises involve the limitation of remedies, such as liquidated damages clauses. Again, however, equity courts deal with such clauses under the rubric of the refusal to enforce forfeitures or penalties. Even if the contract is one of adhesion—thus satisfying the first prong—the challenged term is nevertheless enforceable if it is substantively reasonable at the time of contracting.[96]

While process unconscionability has a sound footing in basic contract principles of freedom of contract, substantive unconscionability is troubling because it invites courts to rewrite or rescind contracts it considers to be unfair without offering standards or rules for doing so. Everyone is a victim of his or her limited bargaining power. Everyone would like a lower price. As the foregoing discussion of undue influence and duress indicates, economic compulsion is behind every contract to some degree. Still, when judges relieve a party from what is, with the benefit of hindsight, an improvident bargain, the end-product may be an individualized decision of a well-intentioned judge but not a decision that rests on rules. As Professor Dobbs noted:

> In a discretionary regime, parties appear before judges as supplicants. In a rights regime, they demand their entitlements. . . . We need to believe that beneficent, wise, and just judges will eliminate technicalities in favor of justice. We also need to believe that we have rights that cannot be dispensed with when a judge's perception, beneficence, or wisdom fails. . . .
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> . . . .
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> [In that connection], [t]he problem with substantive unconscionability is perhaps not vagueness itself but the invitation to disrespect the parties' autonomy.[97]

Can discretion reposed in a judge to deny or grant relief be reconciled with rights under law? Only if the judge who exercises that discretion is extremely wise, and the range of his discretion when

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96. *Id.*

97. 2 DOBBS, *supra* note 4, § 10.7, at 708-10.

doing so is narrowly circumscribed.

g. Should a Court Refuse to Order Specific Performance of a Contract When It Considers the Contract to be "Unfair" or When It Believes There is a Disparity in the Overall Bargain?

Disparity in the overall bargain and unfairness in the contract terms have been cited as independent grounds for refusing to order specific performance.[98] However, disparity or unfairness alone are not a basis for denying specific performance. Simply stated, it is not wrong to enforce a hard bargain.

Rather than being the end-point of an analysis, contract disparity and unfairness should be viewed as the starting point of an analysis for examining a contract for possible misconduct in the formation stage. A contract that strikes a judge as one-sided or unfair in its terms may in fact be the product of misconduct, such as duress, undue influence, or unconscionability. Professor Yorio noted that "it is unusual in practice to find gross disparity without some evidence of procedural unfairness."[99] When placing reliance on objective factors that evidence misconduct in the contract formation stage rather than vague and formless notions of fairness, a judge rests his or her opinion on law, instead of personal justice.

Denying specific performance on grounds of unfairness is subject to heavy criticism. First, unfairness can too often be a naked appeal to a judge's personal discretion and sense of fairness, not to rules. Second, if courts refuse specific performance of valid and untainted contracts simply because they feel that the plaintiff negotiated a better deal than the defendant, that refusal acts to undermine the very foundation of contract stability. Unfairness of a contract should rarely be a stand-alone reason for denying specific performance.[100] It appeals too strongly to a judge's subjective notions of a "fair" result. On the other hand, a one-sided deal often suggests failures in the bargaining process, through misrepresentation or mistake. For example, a grossly inadequate price may be evidence of misrepresentation or mistake, two equitable defenses with well-defined criteria, as discussed below in connection with rescission.

Similarly, as possible grounds for denying specific performance,

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98. *See* YORIO, *supra* note 32, §§ 5.4.1, 5.4.3, at 106-08, 110-12. Although in theory a contract that is the product of misconduct may be rescinded, in practice rather than rescind contracts tainted by misconduct in the formation stage, courts may simply refuse to grant specific performance and dismiss the complaint.

99. *Id.* § 5.4.3., at 111.

100. *See* Ruegsegger v. Bangor Twp. Relief Drain, 338 N.W.2d 410 (Mich. Ct. App. 1983) (rejecting unfairness as ground for denying specific performance).

disparity in the overall bargain and unfairness are closely related to the clean hands and estoppel doctrines, which might be applicable in cases where the plaintiff has concealed important facts in the course of contract negotiations. In the past, in dealing with the fairness of a contract, Michigan court's have noted that unfairness, if any, is to be measured at the time of contracting[101] and that subsequent changes in the value of the property are not to be considered.

Unfairness grounds closely resemble the equitable doctrine of unconscionability. As is true with the unconscionability defense, the notion of unfairness has a procedural and substantive dimension.[102] The procedural dimension focuses on the process of forming the agreement in the first place. The substantive dimension focuses on contract terms that are too one-sided. Disparity grounds likewise resemble the unconscionability test insofar as terms that reflect a gross disparity in the overall bargain may be an indication of procedural unconscionability, substantive unconscionability, or both.

h. Is "Hardship" to the Defendant Grounds For Denying Specific Performance?

Some commentators state that an equity court may deny specific performance of an otherwise valid contract, even where the plaintiff does not have an adequate legal remedy, if granting the relief would cause undue hardship to the defendant.[103] Hardship grounds, as distinct from fairness grounds for denying equitable relief, consider changed circumstances that make the defendant's performance more burdensome. A burden or change in circumstances that was foreseeable at the time of contracting, however, is not grounds for relief, not even in equity. In such a case, the contract itself has allocated that risk, and the court should not be moved by unadorned hardship arguments to relieve the defendant from a bad bargain.[104] As noted by the Oregon Court of Appeals in *Puziss v. Geddes*:[105] "In order to avoid specific performance on a theory of harshness or oppression, [defendant] must show inequities which appeal to the legal, as contrasted with merely the subjective, discretion of the court.

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101. Stauch v. Daniels, 215 N.W. 311, 312 (Mich. 1927).

102. *See* 3 DOBBS, *supra* note 4, § 12.8(4), at 216-17.

103. *See, e.g.*, MCCLINTOCK, *supra* note 12, at 188.

104. Mohrlang v. Draper, 365 N.W.2d 443, 447 (Neb. 1985) (quoting Wilson & Co., Inc. v. Fremont Cake & Meal Co., 43 N.W.2d 657, 666-67 (Neb. 1950)) ("difficulties, even if unforeseen and however great, are no excuse, and that the fact that a contract has become more burdensome in its operation than was anticipated is not ground for its rescission").

105. 771 P.2d 1028 (Or. Ct. App. 1989).

It is not enough to show that she made a bad bargain."[106]

If the remedy at law is inadequate so that specific performance is needed, relieving the defendant from a contract on grounds of hardship is the equivalent of denying the plaintiff any remedy at all for an otherwise valid and enforceable contract.

Hardship grounds, like fairness grounds, is nothing more than a substitute for a genuine analysis and is a thinly-veiled excuse for exercising unfettered discretion in denying relief. In fact, sound non-discretionary reasons usually exist for denying relief when hardship grounds are invoked, such as misrepresentation or fraud.[107]

3. Generally, When Should a Court Order Rescission or Cancellation of a Contract?

Essentially, the equitable remedy of rescission results in the abrogation or "unmaking" of an agreement and attempts to return the parties to the status quo ante. As with all equitable relief, the remedy of rescission is granted only through the discretion of the court.[108] Common grounds for rescinding an agreement (in the case of executory contracts) or cancelling an agreement (in the case of executed contracts) are: (1) contracts that were procured through misconduct, such as fraud, misrepresentation, duress, undue influence, or unconscionability;[109] (2) contracts entered into because of a mutual mistake of fact; (3) contracts where one party has failed to perform; and (4) contracts entered into by a person who lacked capacity to contract. In accord with the equitable maxim, "[h]e who seeks equity must do equity," the law is well settled that a condition precedent to the granting of the remedy of rescission is that the other party be returned to the status quo.[110]

As is true with all equitable remedies, equity courts exercise sound judicial discretion to refuse to order rescission of a contract. As a matter of economic good sense, rescission could be too radical of a remedy, making monetary adjustment the preferable choice.[111] For example, a misrepresentation that Blackacre contains 100 acres when in fact it contains only 95 acres might be material and justify an award

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106. *Id.* at 1030 (quoting Shell Oil Co. v. Beyer, 381 P.2d 494 (Or. 1963)).

107. For example, the Michigan Supreme Court decision in *Lake Erie Land Co. v. Chilinski* has been cited as authority for hardship grounds. Lake Erie Land Co. v. Chilinski, 163 N.W. 929 (1917). See 11A CALLAGHAN'S MICH. PL. & PRAC. § 86.30 n. 1 (1990). In that case, however, the Court rejected the plaintiff's request for specific performance on grounds of misrepresentation. *Lake Erie Land Co.*, 163 N.W. at 932.

108. Harris v. Axline, 36 N.W.2d 154, 156 (Mich. 1949).

109. Duress, undue influence, and unconscionability are discussed above in connection with defenses to the remedy of specific performance.

110. Schimke v. Scott, 106 N.W.2d 142, 147 (Mich. 1960).

111. *See* 2 DOBBS, *supra* note 4, § 9.6, at 624.

of damages, but such a misrepresentation would not necessarily compel rescission.[112] Similarly, plaintiff's delay in seeking rescission may bar the remedy either because of changed circumstances that make restitution impossible, or because of the suspicion that the plaintiff is speculating at the expense of the defendant, rescinding only if the market drops, otherwise retaining the fruits of the bargain.

a. When May Fraud or Misrepresentation Be Invoked As Grounds For Rescinding a Contract?

Although the same misconduct may give rise to both a claim for damages and for rescission of an agreement, the discussion here is limited to claims for rescission based on fraud or misrepresentation. The authorities divide misrepresentation into two categories: intentional and innocent. Either type may be grounds for rescission.[113] Under Michigan law, the elements needed to establish intentional misrepresentation are the same as those needed to establish fraud: (1) a material misrepresentation, (2) which is false, (3) made with actual knowledge of its falsity or in reckless disregard of its truth, (4) with the intention that the plaintiff will rely thereon, and (5) upon which the plaintiff acts to his detriment.[114] In the case of innocent misrepresentations, Michigan law assumes the third and fourth elements of a fraud claim, i.e., scienter or that the defendant intended for plaintiff to rely on the defendant's statement.[115] Because innocent misrepresentation is easier to prove and has been restricted to contract cases, it, rather than intentional misrepresentation, will be invoked as grounds for contract rescission.

Regarding the first element of misrepresentation, expressions of opinion are not ordinarily a basis for rescission for misrepresentation. Statements relating to past or existing facts may form the basis for a misrepresentation claim, but statements of opinion, statements that are promissory in nature, or salesperson's "puffing" may not.[116] A

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112. RESTATEMENT OF RESTITUTION § 28, comment d & illustration 1 (1937).

113. *See* U.S. Fidelity & Guaranty Co. v. Black, 313 N.W.2d 77 (Mich. 1981); WILLISTON ON CONTRACTS §§ 1487, 1500 (3rd ed. 1970). The RESTATEMENT (SECOND) OF CONTRACTS states, "[i]f a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

114. *See* Hi-Way Motor Co. v. Int'l Harvester Co., 247 N.W.2d 813 (Mich. 1976); Arim v. General Motors Corp., 520 N.W.2d 695 (Mich. Ct. App. 1994); In re Allied Supermarkets, 951 F.2d 718 (6th Cir. 1991).

115. U.S. Fidelity & Guaranty Co., 412 Mich. 99, 313 N.W.2d at 77.

116. Hi-Way Motor Co. v. Int'l Harvester Co., 247 N.W.2d 813 (Mich. 1976); State-William Partnership v. Gale, 425 N.W.2d 756 (Mich. Ct. App. 1988); Van Tassel v. McDonald Corp., 407 N.W.2d 6 (Mich. Ct. App. 1987).

broken promise may constitute grounds for a breach of contract claim, but it does not give rise to a fraud claim.[117] The test of materiality does not require that the misrepresentation relate to the sole or major raison d'etre for the agreement, only that it relate to an important fact.[118]

The second element, falsity, is generally satisfied by an affirmative misstatement of fact, but is not satisfied by an omission.[119] However, concealing a fact that one is bound to disclose is an indirect representation that such fact does not exist and may constitute the falsity prong of a prima facie case of misrepresentation.[120] The third and fourth elements, knowledge of falsity and defendant's intention that plaintiff rely on the statement, respectively, have diminished importance in Michigan since a prima facie case of rescission on the ground of innocent misrepresentation—which is only available in the context of contract negotiations—does not require proof of these two elements.[121] Defendant's intention that plaintiff rely is conclusively presumed because statements made during contract negotiations are presumptively made with the intention that they be relied upon.

As observed by Professor Dobbs, an innocent representation is a form of mistake, a mistake by the innocent speaker and the recipient as well. Accordingly, if the innocent representation concerns a basic assumption of the contract, rescission may be justified just as it would be in the case of mistake.[122]

Consistent with the merger of law and equity, and with pleading in the alternative,[123] a victim of innocent misrepresentation may simultaneously pursue either of two alternative remedies: She may affirm the contract and sue for damages, or seek rescission of the agreement upon making restitution, but she may not be awarded double recovery.[124] When fraud or innocent misrepresentation as

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117. Michaels v. Amway Corp., 522 N.W.2d 703 (Mich. Ct. App. 1994); Marrero v. McDonnell Douglas Capital Corp., 505 N.W.2d 275 (Mich. Ct. App. 1993).

118. *See* Papin v. Demski, 169 N.W.2d 351 (Mich. Ct. App. 1969) aff'd, 177 N.W.2d 166 (Mich. 1969).

119. Platsis v. E.F. Hutton & Co., 946 F.2d 38 (6th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992).

120. *See* Overton v. Anheuser-Busch Co., 517 N.W.2d 308 (Mich. Ct. App. 1994) *appeal denied*, 527 N.W.2d 511 (Mich. 1994) (plaintiff sought $10,000, alleging defendant's misleading advertisements caused him physical and mental injury, emotional distress, and financial (155).

121. *See* Alpert Industries, Inc. v. Oakland Metal Stamping Co., 141 N.W.2d 671 (Mich. 1966), rev'd, 150 N.W.2d 765 (Mich. 1967).

122. 2DOBBS, *supra* note 4, § 9.3(1), at 580.

123. MICH. CT. R. 2.111(A)(2).

124. *See e.g.*, Gross v. Morosky, 113 N.W.2d 863 (Mich. 1962); See also Walraven v. Martin, 333 N.W.2d 569 (Mich. Ct. App. 1983) (Plaintiffs were permitted, despite a contrary ordinance to use apartment building consistent with their expectations

a ground for rescission is successfully invoked, it will have the effect of "unmaking" an agreement in a situation where the parties clearly intended serious consequences. A plaintiff who alleges fraud or misrepresentation makes a frontal assault on the stability and integrity of contracts. For this reason, such attacks are not favored in the law.[125] This judicial disfavor is reflected in the heightened pleading requirements for fraud and in the more demanding burden of proof placed on a plaintiff invoking fraud or innocent misrepresentation as a ground for rescission, who must prove the fraud or innocent misrepresentation by clear and convincing evidence.[126]

b. When is Mistake Properly Invoked as a Ground for Rescinding a Contract?

In everyday speech errors in judgment are called mistakes, but not all errors in judgment are mistakes within legal contemplation. The legal definition of mistake requires a mistake of *fact.* Expectations are not facts. Consequently, a person whose future expectations are frustrated cannot rescind a contract for mutual mistake. There can be no mutual mistake as to an event which is to occur in the future.[127] Such events may give rise to a justified excuse for nonperformance of a contract—the doctrines of impossibility, impracticability, and frustration come to mind—but future events cannot be the basis of mistake.

Ignorance may be bliss, but not when it comes to contracts. In non-legal settings a deliberate failure to be informed may be a person's right, but it is no excuse warranting contract rescission. One who acts knowing that he does not know certain matters is consciously ignorant of them. He therefore does not have a state of mind at variance with the facts, the very definition of mistake. Courts often speak of this situation as an assumption of the risk:[128] One who knows he doesn't know assumes the risk that the facts will turn out adversely to his interests. That person's options are clear: investigate and discover the facts, provide against adverse contingencies in the contract, or do not contract at all. An option that should not be

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resulting in an award of only nominal damages in their suit for fraudulent misrepresentation).

125. *See, e.g.*, MICH. CT. R. 2.112(B), which requires allegations of fraud and mistake to be stated with particularity.

126. *See* Hi-Way Motor Co. v. Int'l Harvester Co., 247 N.W.2d 813 (Mich. 1976); See also St. Paul Fire & Marine Ins. Co. v. CEI Florida, Inc., 864 F. Supp. 656 (E.D. Mich. 1994) (although Michigan has no cause of action for constructive fraud per se, it does recognize torts of innocent misreprenstation and silent fraud).

127. *See* Alpert Industries, 141 N.W.2d 671 (Mich. Ct. App. 1966).

128. *See, e.g.*, Lenawee County Board of Health v. Messerly, 331 N.W.2d 203 (Mich. 1982).

available is resort to an equity court to rescue the risk taker from his lack of good judgment. It should be difficult to rescind a contract on the basis of a mistake in formation. If a party to a contract fails to allocate risks of ignorance to the other party, the former should be forced to bear any subsequent loss attributable to that failure. Contracts are bargains to be routinely enforced, not routinely rescinded. An overly eager application of the mistake rule would undercut the process of risk allocation that constitutes the essence of contract negotiations.

Mistake cannot be a ground for rescission where the parties have allocated the risks of unexpected future events. When a buyer purchases widgets at $1.00 per unit and the market drops to $.50 per unit, that is a risk the buyer assumed. The seller assumes a similar risk in the case of a rising market. Risk allocation is the very essence of contract. Without risk, there would be no profit; and with no profit, there would be no contracts. According to Dobbs, "The mistake rule protects the parties' risk allocations . . . . It says that there is no mistake of fact at all when the parties misestimate the future. . . . The main point is to respect the parties' own risk allocations."[129] Mistake is not simply misjudgment.

Mistake may be invoked alternatively as a ground for reforming a contract or for rescinding it. As discussed below, reforming a contract because of mistake is designed to produce the agreement the parties truly intended. The parties have a good agreement, if not properly expressed. Reformation works to enforce the agreement the parties intended. Rescission, on the other hand, calls the deal off. Rescission of an agreement because of mistake is grounded in the logic of contract law: the mistake may be of such a nature that the parties failed to reach a meeting of the minds, so there is no contract at all. Rescission is warranted if the parties thought they understood one another but did not, but is not warranted if all that is required is a better expression of the parties' intentions. A mistake in expression is to reformation what a mistake in basic assumptions is to rescission.[130]

"When a claim is made that a contract is voidable because it was induced by mistake, the most important factor in determining whether the claim shall be allowed is the mutuality of the mistake."[131] If one party thought he was selling Whiteacre, and the other party thought he was buying Whiteacre, but in fact the subject matter of the negotiations turned out to be Suburbanacre, then both parties entered into the contract under the influence of the same mistake. Thus,

129. 2 DOBBS, *supra* note 4, § 11.2, at 717, 718.
130. 1DOBBS, *supra* note 4, § 4.3(7), at 618
131. MCCLINTOCK, *supra* note 12, at 238.

there is ordinarily no more fault on the part of one than on the part of the other, and the effect of the parties' contract is that there was no meeting of the minds. In such cases of mutual mistake, equity courts will grant relief much more freely by resting on basic principles of contract law than on loose principles of discretion. On the other hand, in cases where the mistake is unilateral, the contract reflects what one of the parties agreed to, suggesting negligence on the part of the other party. Equity courts are far more reluctant to grant relief in those cases.

The easy cases involving mutual mistake come in two varieties: (1) those where the mistake concerns the very subject matter of the contract, and (2) those where the mistake involves a fact which did not in any respect induce formation of the contract. For example, a contract for the purchase of patent rights which both parties assumed were valid will be rescinded after it is discovered that the patents are void. The test of materiality of the mistake is that it must relate to a basic assumption of the parties on which the contract was made and which materially affects the agreed performances of the parties.[132] The famous "barren cow" case of *Sherwood v. Walker*[133] is illustrative.

In that case the parties agreed to the sale and purchase of a cow which was thought to be barren, but which was, in reality, with calf. When the seller discovered the fertile condition of the cow, he refused to deliver her. In permitting rescission, the Michigan Supreme Court stated, "[I]n the case made by this record . . . the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was not worth over $80."[134] The *Sherwood* case thus distinguishes mistakes affecting the essence of the consideration from those which go to its quality or value, affording relief on a per se basis for the former but not the latter.

An example of a mistake going to the quality or value of the subject matter of the agreement can be found in *A & M Land Development Co. v. Miller.*[135] In that case, the parties agreed to the sale of land which both parties thought could be lucratively developed but which in fact could not because necessary county permits could not be obtained. The plaintiff purchased 91 lots of real estate, but sought partial rescission when it could not develop 42 of the lots because it could not obtain county health department permits to install septic tanks. The Michigan Supreme Court refused to allow rescission because the mistake, whether mutual or unilateral, related

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132. *Messerly*, 331 N.W.2d at 207.
133. *See, e.g.*, 33 N.W. 919 (Mich. 1887).
134. *Id.* at 922.
135. *See, e.g.*,94 N.W.2d 197 (Mich. 1959).

only to the value of the property. The fact that the property was of less value than the buyer expected was not a sufficient basis for granting equitable relief. In short, the mistake, even though mutual, did not warrant rescission because it did not affect the essence of the agreement.

The hard cases are the ones in between, where the mistake does not go to the very subject matter of the contract but which did serve as an inducement to the formation of the agreement. The Michigan Supreme Court attempted to cut this Gordian knot in *Lenawee County Board of Health v. Messerly.*[136] The Court adopted the position of the Restatement (Second) of Contracts[137] that even in those cases where a mutual mistake of fact exists that relates to a basic assumption of the parties, and which materially affects the agreed performances of the parties, rescission is nevertheless unavailable if the party seeking rescission on the ground of mistake has assumed the risk of loss in connection with the mistake.[138] In the *Messerly* case, a defective septic tank made the premises that were the subject of a land purchase agreement unsuitable for human habitation. A basic assumption of the parties' agreement was that the premises could be utilized to generate rental income. That assumption was frustrated. The Court nevertheless denied rescission, holding that as between two innocent parties the purchasers were not entitled to rescission because they had assumed the risk of loss by accepting an "as is" clause in the purchase agreement.[139] Because the contract had allocated this particular risk of loss to the purchaser, and the Court refused to upset the parties' bargain.

Finally, a mistake of law is generally not a ground for equitable relief.[140] In addition, there can be no relief in the case of a "unilateral" mistake, that is, a mistaken assumption by one of the parties in the course of contract formation of which the other party is unaware. However, where such knowledge of the other's mistake is present, the contract will be rescinded and restitution granted on a theory of fraudulent concealment.[141]

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136. 331 N.W.2d 203 (Mich. 1982).
137. RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981).
138. *See* Messerly, 331 N.W.2d 203 (Mich. 1982).
139. *Id.* at 210.
140. *See* Bomarko, Inc. v. Rapistan Corp., 525 N.W.2d 518 (Mich. 1994), appeal denied, 539 N.W.2d 373 (Mich. 1995).
141. *See, e.g.*, Windham v. Morris, 121 N.W.2d 479 (1963) (holding that purchasers of real property not entitled to relief when they learned one year later that husband/seller had placed a lower value on property in his divorce suit than they had been told); *See also* II GEORGE PALMER, THE LAW OF RESTITUTION § 12.3 (1978).

4. Generally, What is Reformation, and When is It Appropriate to Reform the Parties' Agreement?

Reformation is the judicial rewriting of a document to make it reflect the agreement the parties actually reached. The purpose of reformation is not to make a new contract for the parties, but rather to correctly express the contract they made. Reformation may be granted in cases of mistake or misrepresentation.[142] Indeed, reformation, and not rescission, is the only appropriate remedy for misrepresentation or mistake when a writing fails to reflect the parties' actual agreement. Conversely, if the parties failed to reach an agreement due to misrepresentation or mistake, then the appropriate remedy is rescission, not reformation.[143] Fraud or mistake in the expression of the parties' agreement warrants reformation, not rescission, because rescission would deny one of the parties the benefit of the bargain actually made. On the other hand, fraud or mistake in the formation of an agreement warrants rescission, not reformation, because granting reformation in such cases would result in the imposition on the parties of a bargain that neither agreed to. In some cases, neither reformation nor rescission is the appropriate remedy; rather, specific performance of the agreement as written is the correct remedy. The plaintiff does not have the option: the three remedies are mutually exclusive, and only one of them will correctly reflect the parties' agreement or the absence of it.

Because requests for reformation seek to alter what the parties have reduced to writing, the potential for undoing the parties' real bargain, as well as the threat to contract stability, is real. Consequently, in order to avoid making a new contract for the parties, not only must fraud and mistake be pleaded with particularity,[144] proof of fraud or mistake must be clear and convincing.[145] The uniform requirement of a burden of proof higher than the customary proof-by-a-preponderance standard in civil litigation reflects a judicial suspicion that the reformation remedy may be used to avoid a performance obligation. In the words of the Michigan Supreme Court, "Courts are required to proceed with utmost caution in exercising jurisdiction to

142. *See. e.g.,* Hartford Accident & Indemnity Co. v. Norris, 109 N.W.2d 790 (Mich. 1961).

143. 2 DOBBS, *supra* note 4, § 9.5, at 614-15.

144. MICH. CT. R. 2.112(B).

145. *See* Woolner v. Layne, 181 N.W.2d 907 (Mich. 1970); *See also* Progressive Mut. Ins. Co. v. Taylor, 193 N.W.2d 54 (Mich. Ct. App. 1971) (to obtain reformation, plaintiff must prove by clear and convincing evidence that a mutual and common mistake was made by both parties).

reform written instruments."[146] One party's word against that of the other ordinarily fails to satisfy the burden of proof for reformation. Reformation actions often are "swearing matches." Corroborative evidence supporting the assertions of the party seeking reformation is necessary.[147]

Neither the parol evidence rule nor the presence of a merger clause in the parties' agreement will prevent the plaintiff from showing that the writing is not in fact the one agreed upon and that it does not express the parties' contract.[148] Similarly, provided a writing exists that satisfies the formalities of the statute of frauds, the terms of that writing can be reformed to correct a mistake in the parties' expression.[149] However, the defenses common to all claims seeking equitable relief, unclean hands, laches, and estoppel, apply equally to claims for reformation.

a. When is Mistake a Proper Ground For Reforming a Document?

When parties reach agreement, reduce that agreement to writing, but write it down in a way that materially departs from their actual agreement, reformation beckons. "The mistake for which the relief of reformation is available must be a mistake in the expression of the actual agreement of the parties not a mistake entering into the agreement."[150] A condition precedent to the remedy of reformation is a valid agreement between the parties which the document they executed fails to express correctly. The mistake must be mutual, that is, the parties must have agreed to the same terms and have mistakenly assumed that those terms were properly expressed in the document.[151] Nevertheless, if the mistake is not mutual, reformation may still be granted where the unilateral mistake is coupled with knowledge of the mistake by the other party who fails to disclose the error (thus making unilateral mistake a species of estoppel).[152]

The mistake must be one of substance and of fact, and not one of law.[153] However, one Michigan case finessed the rule that reformation is not permitted for mistakes of law but characterizing such

146. Theophelis v. Lansing General Hospital, 424 N.W.2d 478, 486 (Mich. 1988).
147. ROBERT N. LEAVELL, JEAN C. LOVE, GRANT S. NELSON & CANDACE S. KOVACIC-FLEISCHER, EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 901 (5th ed. 1994) [hereinafter LEAVELL].
148. 2 DOBBS, *supra* note 4, § 9.6, at 623; *See generally* George Palmer, *Reformation and the Parol Evidence Rule,* 65 MICH. L. REV. 833 (1967).
149. MCCLINTOCK, *supra* note 12, at 276-77.
150. *Id.* § 95 at 256.
151. *Id.* § 96 at 259.
152. *See* Barryton State Sav. Bank v. Durkee, 37 N.W.2d 892 (Mich. 1949).
153. *See* Burns v. Caskey, 58 N.W. 642 (Mich. 1894).

mistakes as a "mutual mistake as to the legal import and meaning of the technical words."[154]

An illustration of when reformation for mistake is appropriate is the scrivener's error: the agreement reads "95 acres," when it should have read "9.5 acres." With the exception of wills, almost any document can be reformed—conveyances, negotiable instruments, releases, insurance policies, and other contracts.[155] On the other hand, as noted, if the mistake is one of formation, not expression, then rescission may be the proper remedy, but not reformation. For example, if a builder by mistake submits a bid too low because he omitted a cost item, he might have the bid rescinded; but he cannot get reformation and have a higher-priced contract foisted on the owner. Reformation corrects mutual errors; it does not create new obligations.

b. When is Misrepresentation a Proper Ground for Reforming a Document?

Where one of the parties to a transaction has misrepresented to the other that a provision to which the parties agreed has been incorporated in the agreement, or represents that the document properly expresses the parties' agreement, the document may be reformed. Reformation may be granted for fraud or misrepresentation as a way of requiring the party responsible for the misconduct to make his representations good. However, where the fraud or misrepresentation affects the terms of the actual agreement between the parties, then rescission, not reformation, is the proper remedy.

c. Is Unfairness or Disparity in the Overall Bargain a Proper Ground for Reforming a Contract?

As previously noted, the short answer to this question is "no." Outside of the largely unexplored innovation of the unconscionability provision of Section 2-302(1) of the UCC,[156] there is scant authority for reforming a contract found to be unreasonably costly to one of the parties by altering the consideration to make it "fairer."[157]

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154. Scott v. Grow, 3 N.W.2d 254 (Mich. 1942).

155. 2 DOBBS, *supra* note 4, § 11.6(1), at 745.

156. MICH. COMP. LAWS ANN. § 440.2302 (West 1994), provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

157. PALMER, *supra* note 141, at § 13.9, at 55-60; LEAVELL, *supra* note 147, at 911.

5. *What are the General Principles a Court Should Follow When Asked to Order Injunctive Relief?*

An injunction is "the strong arm of equity."[158] An injunction is an order issuing from a court addressed to the defendant and commanding the defendant to refrain from doing, or commanding him to perform, a certain act. Injunctions are thus divided into two kinds: prohibitory and mandatory. They are further classified by the stage in the proceedings when the injunction is issued and its duration: provisional (before a full hearing on the merits)[159] and permanent (after an adjudication on the merits). The Michigan legislature has enacted a host of statutes dealing with the issuance of injunctions under specific circumstances.[160]

Certain basic principles govern the grant or refusal of an injunction. An injunction is an extraordinary remedy the issuance of which rests in the sound discretion of the court.[161] An injunction should not be issued automatically. On the contrary, at the threshold the circuit court's initial decision to exercise its injunctive powers must be guided by the utmost discretion and reserve. Of all the equitable remedies, the injunction is the one which needs to be approached with the greatest degree of caution, deliberation, and sound discretion. This is true for the simple reason that to issue an injunction erroneously in a doubtful case will inflict irreparable injury on the enjoined party. Accordingly, the extraordinary relief of an injunction must be used "sparingly, cautiously and only . . . where both the right and the wrong claimed are clear and the necessity for the extraordinary relief of injunction is equally clear."[162]

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158. Bonaparte v. Camden, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1617).

159. Two types of provisional injunctions are the preliminary injunction and the temporary restraining order that is issued without notice in exigent circumstances to prevent immediate and irreparable injury, such as the imminent razing of an historical building.

160. For a list of citations to Michigan statutes authorizing and prohibiting injunctions in particular proceedings, *see* 10A CALLAGHAN'S MICH. PL. & PRAC. § 76.06, at 342-43 & n.1 (2d ed. 1991). The procedure for issuing temporary restraining orders and preliminary injunctions is governed by MICH. CT. R. 3.310. By statute, jurisdiction is expressly conferred on the circuit court to enjoin a private nuisance. MICH. COMP. LAWS ANN. § 600.2940 (West 1986). A plaintiff who prevails in a private nuisance action may obtain both damages and abatement. Injunctions against public nuisances is also expressly authorized by MICH. CT. R. 3.601. Similar statutory provision is made for enjoining threatening and continuing trespass to land. See MICH. COMP. LAWS ANN. § 600.2919 (West 1986).

161. Azzar v. Primebank, FSB, 499 N.W.2d 793, 797 (Mich. Ct. App. 1993).

162. Sharp v. Lucky, 266 F.2d 342, 343 (5th Cir. 1959).

a. Irreparable Injury and No Adequate Remedy at Law

Two prerequisites to the issuance of an injunction are that the plaintiff will suffer irreparable injury without the injunction and that the plaintiff has no adequate remedy at law. Although irreparable injury is listed as a separate prerequisite, in the context of the issuance of an injunction, irreparable injury and no adequate remedy at law have the same meaning. If the injury can be compensated by damages, then the injury is not irreparable.[163] If it cannot be so compensated, then the injury is deemed irreparable.[164] In cases where the plaintiff seeks a preliminary injunction, the irreparable injury must be real and the harm imminent. Moreover, in the context of preliminary injunctions, the irreparable harm requirement acts as a socially useful barrier to the issuance of an equitable remedy in a case where there has not yet been a trial on the merits.

There is no general formula for determining when a legal remedy is inadequate. In recalling the history of the adequacy rule, it becomes readily apparent that the original reasons for the requirement have little to do with today's cases. Before the merger of law and equity into a unitary system, equity courts would utter the self-serving statement, before granting equitable relief, that the plaintiff had no adequate remedy at law, and therefore equity was stepping in to fill the remedial void. By declaring that the plaintiff had no adequate remedy at law, the equity courts were demonstrating that they were not stepping over their jurisdictional boundaries by usurping the jurisdiction of the law courts. Today, with the merger of law and equity in a single court, an equity court need not be concerned with overstepping jurisdictional lines. Nevertheless, the adequate remedy at law and irreparable injury requirements still serve an important core policy of preferring legal remedies over injunctive remedies when a choice exists. This preference exists for the simple reason that injunctions are coercive, whereas legal remedies are noncoercive. Injunctions are a direct infringement on a defendant's liberty and autonomy. They command personal conduct and can require defendants to engage in affirmative conduct. Unlike money judgments, injunctions are enforceable by contempt proceedings which threaten the disobedient defendant with imprisonment.

Although the adequate remedy at law prerequisite is not well defined, four generalizations are possible. The plaintiff's legal remedy

163. Ainsworth v. Munoskong Hunting & Fishing Club, 116 N.W. 992, 994 (Mich. 1908).

164. *Id.*

is usually deemed inadequate in the following situations:[165]

1. The plaintiff seeks recovery of something that is unique, such as the conveyance of a parcel of land.

2. The defendant engages in repeated and continuous wrongful acts, such as a nuisance or trespass to land.[166]

3. The plaintiff could recover a money judgment from the defendant, but the judgment is uncollectible because the defendant is insolvent.[167]

4. Damages cannot be measured with reasonable certainty, such as lost sales or profits due to the defendant's infringement of the plaintiff's intellectual property (e.g., trade secrets or customer lists).

As noted by the Michigan Court of Appeals, Traditional equity principles are a circuit court's guide to whether injunctive relief is 'just and proper.'[168] One of the most important guides to the exercise of an equity court's discretion, and a serious policy consideration as well, is that when asked to grant an injunction the court must consider whether it will be involved in constant oversight of the performance of complex or continuing acts, such as the completion of a construction project.[169] New disputes may arise that could sap judicial resources, counseling against the issuance of injunctions in such circumstances. This concern has particular force in cases involving injunctions that attempt to reorganize social institutions. Courts should take great care to ensure that the time to administer and enforce an injunction does not become an administrative burden.[170]

b. Preliminary Injunctions

Michigan employs the traditional four-prong test to determine whether a preliminary injunction should issue: (1) harm to the public interest if an injunction issues; (2) whether harm to the applicant in the absence of an injunction outweighs the harm to the opposing

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165. *See* 1 DOBBS, *supra* note 4, § 2.5(2), at 130-31.

166. *See, e.g.*, Davis v. Frankenlust Twp., 76 N.W. 1045 (Mich. 1898). See also MICH. COMP. LAWS ANN. § 600.2919(3) (West 1996), providing for the issuance of injunctions in cases of continuing trespass.

167. *See, e.g.*, White Star Refining Co. v. Hansen, 231 N.W. 577 (Mich. 1930).

168. Local 229, AFSCME v. City of Detroit, 335 N.W.2d 695, 696-97 (Mich. Ct. App. 1983).

169. Bradfield v. Dewell, 11 N.W. 760 (Mich. 1882). See also Edelen v. W.B. Samuels & Co. 103 S.W. 360 (Ky. Ct. App. 1907), where the court refused to grant specific performance of a contract calling for the sale to plaintiff of the output of a distillery for five years because the order would require the court to supervise the business during that time to assure that it was being honored.

170. *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2942, at 55 (1995).

party if an injunction is granted;[171] (3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and (4) demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted.[172]

The difficulty with the traditional four-factor analysis is that it does not tell the court what weight to place on each of the factors nor what kind of estimates the court is to make with each one. By citing one or more of the four factors and invoking equitable "discretion" to reach a decision on the request for injunctive relief, a court can neatly avoid analysis. The policies that bear on the propriety of granting a preliminary injunction are taken into account in this four-prong test, even if those policies are not explicitly explained by it. Of the four factors, clearly the plaintiff's probability of success on the merits, coupled with the respective harms to the plaintiff and defendant in the event an injunction is or is not granted, are the two most important.[173] A court that is asked to issue a preliminary injunction must be sensitive to the potential harm an erroneous injunction could cause the defendant. The judge should grant or deny preliminary relief with the possibility in mind that an error might cause irreparable loss to either party. The judge should, therefore, estimate the magnitude of that loss on each side as well as the risk of error.[174] For example, risk factors that the court should carefully consider before issuing an injunction include the possibility of undue intrusion and coercion, the possibility that the contempt power might have to be invoked, and the disruption of alternative dispute resolution processes that might dispose of the suit without the need for judicial intervention. In sum, even if the plaintiff has a very good chance of success on the merits, a preliminary injunction should not issue if on balance it will cause more harm to the defendant than good to the plaintiff. For example, if a defendant mistakenly and in good faith built a garage that encroaches on plaintiff's land, a court should inquire whether the plaintiff is using a request for injunctive relief to exact extortion.

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171. Jeffrey v. Lathrup, 108 N.W.2d 827 (Mich. 1961); Grand Haven Twp. v. Brummel, 274 N.W.2d 814 (Mich. Ct. App. 1978).

172. State Employees Ass'n v. Dep't of Mental Health, 365 N.W.2d 93, 96 (Mich. 1984); Campau v. McMath, 463 N.W.2d 186, 189 (Mich. Ct. App. 1990); City of Detroit v. Salaried Physicians Professional Ass'n, UAW, 418 N.W.2d 679, 683 (Mich. Ct. App. 1987); M & S, Inc. v. Attorney General, 418 N.W.2d 441, 444 (Mich. Ct. App. 1987).

173. Of course, the public interest factor can be a weighty consideration in cases involving a strike by public employees, or in cases involving a public nuisance that is causing widespread pollution.

174. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

In connection with this last point, a court that is asked to grant a preliminary injunction must always remain mindful of the risk of an erroneous legal decision. At the preliminary injunction stage of litigation, the court must make a best guess as to plaintiff's likelihood of success on the merits. Even after a full trial on the merits, the court may still be wrong despite its best efforts to find truth and achieve justice. An erroneous injunction might be especially harmful to the defendant, while offering no corresponding benefit to the plaintiff. The court must carefully consider whether the cost or hardship to the defendant that an injunction will impose sufficiently outweighs the benefit to which the plaintiff is entitled.

6. *Generally, What are the Restitutionary Remedies Available from an Equity Court?*

Together with the equitable remedies of specific performance, rescission, reformation, and injunctions, restitution rounds out the available remedies from an equity court. Although at its core the remedy of restitution is designed to prevent unjust enrichment, restitution had separate and distinct developments in the law courts and the equity courts. On the law side, the restitutionary remedies include ejectment, replevin, and pecuniary actions based on quasi-contract. But the law courts required that a plaintiff seeking restitution in property cases have legal title to the property. As a consequence, an ejectment or replevin claim was of no help to a plaintiff without good title at law to the property in question. Equity filled this remedial gap through the legal fiction that it did not decide title but acted on the person of the defendant.

The four major restitutionary remedies in equity are: (1) the constructive trust, (2) the equitable lien, (3) subrogation, and (4) the accounting for profits. The last three restitutionary remedies are closely related to the constructive trust. In the case of a constructive trust, the defendant has legal title to property that rightfully belongs to the plaintiff over which the court imposes a constructive trust, makes the defendant a "constructive trustee," and orders the defendant to transfer title to the plaintiff as the true owner. The equitable lien uses similar concepts to give the plaintiff a security interest in all or a portion of property held by the defendant. In subrogation cases the plaintiff seeks restitution by standing in the shoes of and pursuing the rights of another person. The accounting for profits takes the constructive trust remedy and applies it to property that produces profits or income. An equity court carefully chooses the restitutionary remedy that is appropriate under the particular circumstances of a case, calibrating the remedy to the wrong.

a. When Should an Equity Court Impose a Constructive Trust on Property Held by a Defendant?

In constructive trust cases, where the defendant by fraud, misrepresentation, duress, or undue influence induced the plaintiff to convey property to her, the court will rescind the contract, declare that the defendant holds the property in constructive trust for the plaintiff, and order a reconveyance of the property to the plaintiff.[175] When an equity court imposes a constructive trust upon an asset held by the defendant, the court is not in fact creating a trust but rather a remedy that is analogous to a trust.[176] The plaintiff ultimately recovers legal title to the very property identified as being subject to the constructive trust, not merely a money judgment equal to the value of the asset. Although specific restitution is also available at law, such restoration comes in replevin or ejectment actions where the plaintiff holds legal title to the property.

b. When Should an Equity Court Place an Equitable Lien on Property Held by a Defendant?

An equitable lien is essentially a special form of a constructive trust. The lien is imposed for the same reasons as those for imposing a constructive trust. The difference is that the constructive trust gives the plaintiff complete title to the property, whereas the equitable lien only gives the plaintiff a security interest in the property that he can foreclose upon and use the proceeds of which to satisfy a money claim. An equitable lien is frequently used as a device for tracing money belonging to the plaintiff that the defendant improperly obtained and used to purchase property.[177] For example, if the defendant owned a lot and used money improperly obtained from the plaintiff to build a house, the plaintiff would have an equitable lien (a security interest) on the house, but he would not have title to the house and the lot as well, as would be the case with a constructive trust. The constructive trust gives the plaintiff title to specific property, while the equitable lien only attaches to the property as security. However, both of these restitutionary remedies require that particular assets, or assets traceable to the original property, be identified as belonging to the plaintiff.

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175. *See, e.g.*, Herpolsheimer v. A.B. Herpolsheimer Realty Co., 75 N.W.2d 333 (Mich. 1956); Laude v. Cossins, 55 N.W.2d 123 (Mich. 1952); Burton v. Burton, 51 N.W.2d 297 (Mich. 1952).

176. *In re* Estate of Swantek, 432 N.W.2d 307, 311 (Mich. Ct. App. 1988).

177. Warren Tool Co. v. Stephenson, 161 N.W.2d 133, 138 (Mich. Ct. App. 1968).

c. *When Should an Equity Court Permit a Plaintiff to Seek Subrogation?*

Subrogation simply means substitution of one person for a creditor, so that the former succeeds to the rights of the creditor in relation to the debtor. Subrogation is appropriate in any case where restitution is warranted to prevent unjust enrichment because one person has paid the debt of another. Although subrogation can be required by contract, the inquiry here is subrogation to prevent unjust enrichment.[178] Under equitable, as opposed to contractual, subrogation, the plaintiff essentially receives an assignment of all the rights and remedies the creditor possessed against the defendant-debtor, subject to all the defenses the defendant has against the creditor. Unlike an ordinary assignment which is contractual, this equitable assignment occurs by operation of law through the court.

Subrogation cases typically arise in cases involving sureties and insurers.[179] For example, when a surety guarantees repayment of a promissory note in the event a borrower defaults on a loan, and the surety does in fact pay the borrower's debt upon the latter's default, the surety steps into the lender's shoes and acquires the lender's right to enforce the promissory note against the borrower.

d. *When Should an Equity Court Order an Accounting for Profits?*

An accounting for profits is a restitutionary remedy to prevent unjust enrichment by a fiduciary. The reason why an accounting is an equitable remedy, even though it so closely resembles an action for damages for breach of contract, is purely historical. The history of the accounting remedy in equity developed in cases where the accounts were complex and, therefore, beyond the ken of most jurors. Since no right to a jury trial exists in equitable proceedings, equity chancellors proceeded, unencumbered by the jury system, to adjudicate accounts.[180] Generally, a fiduciary or trust relation must exist between the parties, not merely a debtor-creditor or buyer-seller relationship. The action reaches monies owed by the fiduciary to the plaintiff, including profits produced by property that rightfully belongs to the plaintiff, in cases where the plaintiff has been defrauded by the

178. Smith v. Sprague, 222 N.W. 207 (Mich. 1928).

179. *See, e.g.*, Commercial Union Ins. Co. v. Medical Protective Co., 393 N.W.2d 475 (Mich. 1986), where the Court held that an excess insurer may sue a primary insurer as the equitable subrogee of an insured for the primary insurer's bad-faith failure to defend or settle a claim within policy limits. *Id.* at 483.

180. For a brief history of equitable accounting in the context of the right to a jury trial, *see* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

defendant. In this respect it closely resembles a constructive trust.

An equity court assumes jurisdiction to enforce a claim for an accounting of profits where there exists an equitable duty to account on the part of a fiduciary. Typical examples of where an accounting is an appropriate remedy include cases in which a corporate officer or director has misappropriated or misused property or assets belonging to the corporation, or when a partner has received money for which he has failed to properly account to the partnership. An accounting holds the defendant liable for profits, but not for damages.

V. CONCLUDING THOUGHTS — EXERCISING DISCRETION IN A DISCIPLINED WAY

Reflecting on the history and origins of equity, in some respects it seems remarkable that it ever took root in American soil. In 16th century England it probably seemed normal that the chancellor-bishop could arbitrarily refuse enforcement of a petitioner's rights. After all, he was the king's delegate who gave relief as a matter of grace and discretion to subjects of the Crown, not citizens of the State. As members of a democratic society Americans possess rights under law which they have an equal right to enforce. As litigants they do not appear before a judge as humble supplicants hoping to receive the judge's indulgence. As parties to a lawsuit they have a reasonable expectation that their claims won't be rejected on grounds that cannot be articulated in a principled way. It is probably asking too much to insist on perfection in the administration of equitable remedies. But citizens have a legitimate expectation that their claims will be disposed of according to traditional American jurisprudence that treats all similarly circumstanced litigants in a similar manner.

What is the appropriate role of discretion when a judge is asked to grant an equitable remedy? Although there is no pat answer to that question, some general conclusions can be drawn from the foregoing discussion of equitable principles, remedies, and defenses. Discretion in equity is not the personal discretion of the judge, as was so with the Chancellor. Rather, it is a sound judicial discretion that is governed by the settled rules of equity. Understood in this light, equitable discretion is in fact equitable restraint. For example, judges sitting in equity do not possess unlimited discretion in any case. On the contrary, in many situations the right to equitable relief is well established and granting such relief is routine. For example, specific performance of a contract to convey land is routinely granted, even though the remedy is concededly equitable in nature.

By the same token, in cases where the court finds that an equitable defense has been established, that defense will bar equitable remedies, but not legal ones as well. Although a judge may have the discretion to deny equitable relief in appropriate circumstances as

determined by equity precedents and practice, that discretion does not extend to denying a plaintiff all relief, legal and equitable, regardless of the circumstances. An example from Professor Dobbs illustrates the point: "Discretion to deny legal relief would mean that the judge might refuse to permit recovery of personal injury damages to a pedestrian struck down in a crosswalk on the ground that she was on her way to an illicit rendezvous and would not have been injured had she stayed home with her family."[181]

Many would applaud equity for its flexibility to award individualized justice. But a legal system of open-ended discretion with no standards is an open invitation for judges to reach decisions based on nothing more than their attitudes, predilections, and biases, without analysis and the constraints of legal rules and principles. Good intentions do not guarantee good results. Without a commonly agreed upon set of rules in place to guide their decision making, judges may achieve individualized justice. They will at the same time, however, frustrate the development of any sense of community that flows from a shared set of rules and a common understanding as to what our rights are in a particular case. Individualized justice may please a specific litigant, but it makes predictability and planning impossible. Individualized justice will not reflect community standards developed through the adjudicative process and reflected in precedent. With individualized justice precedent is not relied on to reach the case at hand and no precedent is created for future cases. The past, present, and future are divorced from each other.

The exercise of a judge's personal discretion may reveal an unsuspected truth in the occasional case. But when a judge exercises his personal discretion, the protection that the rule of law gives us from erroneous decisions or decisions that are the product of improper motives vanishes. When a judge exercises his personal discretion, his mental processes are hidden and the decision-making process is no longer transparent. When a judge is compelled to anchor his decisions in rules and principles, the opportunity for corruption is mitigated.

A judge attempting to factor the role of discretion into the equitable relief equation would do well to remember the origins of equity and equitable discretion. As Dobbs reminds us: "Discretion of the chancellor originated in a society where authority counted for more than democracy, and the wishes of the powerful for more than their explanations."[182] When a judge invokes discretion as the basis for his ruling, he in effect is tossing a wild card on the table and using

181. 1 DOBBS, *supra* note 4, § 2.4(2), at 94.
182. *Id.* § 2.4(1), at 92.

it to mean whatever he needs it to mean. Discretion makes possible decisions that are unanalyzed and unexplained, which are not the kind of decisions we expect or accept in a society ruled by law.

No system of jurisprudence can escape completely the curse of discretion. Courts that are asked to grant legal remedies are no less immune from the disease of discretion than courts sitting in equity. In the end, the integrity and wisdom of judges necessarily becomes relevant. Wisdom should tell a judge that when she grounds her decision-making process in well-articulated principles, doctrines, and rules, and in a long line of precedent, such a process holds far more promise of avoiding the use of personal discretion than does a system that turns a blind eye to the past. It is only through a fairly close adherence to principles, rules, and precedent that the goal of treating similar cases in a similar manner can be realized. And it is only then that modern equity can put some distance between itself and a system of justice where relief is measured by the length of the judge's foot.