

REMEDIES (LAW 628)

FALL 2023

Prof. Conley

anna.conley@mso.umt.edu

Office Hours: Monday 1:30-2:30 pm & Thursday 9:00-10:00 am

Learning Goals: This class adds important tools to students' tool box that will make them more effective practitioners in all areas of practice. Learning goals include:

- Understanding foundational concepts of types of remedies, including equitable, restitutionary, declaratory and damages.
- Learn and apply the federal and Montana state rules for permanent and preliminary injunctions, temporary restraining orders, declaratory judgments, restitution, compensatory damages, including tort, contract and property, statutory damages, punitive damages and attorneys fees.
- Develop understanding of contract remedies including specific performance, expectation and reliance damages, foreseeability and contractual limitation of damages.
- Develop understanding of categories of damages recoverable in tort actions including compensatory damages, punitive damages, and nominal damages.
- Develop the ability to issue spot issues relating to these remedies and consider remedies as part of litigation strategy, including identifying key research questions and engaging in legal research
- Practice drafting legal documents relating to remedies, including proposed orders and contract provisions.
- Hone oral advocacy skills through class discussions and in class exercises.
- Reflect on the nature of judicial power in the federal and state legal systems and better understand historical and policy developments relating to courts' remedial powers.

Assigned Reading:

- Nicholas Emanuel, Remedies: Basic Principles, Authorities and Problems (Carolina Academic Press 2022)
- Provisions of the Montana Code Annotated are set forth below and accessible on lexis, westlaw, or <https://leg.mt.gov/bills/mca/index.html>
- Cases are set forth below and accessible on lexis or westlaw

They are listed in the syllabus for each class and posted on moodle for each class. Each student is expected to come to class having read and analyzed the text and assigned cases and/or statutes and be prepared to discuss the assigned reading.

In Class Workshops: Throughout the semester we will do in class workshops to synthesize and apply what we have learned. Students will be expected to come to class having outlined the key rules in applicable statutes and cases studied in preparation for each workshop. The workshop will provide practice exams to students to apply rules and concepts as we learn them. The practice questions will be posted on moodle and distributed in class. Students will work individually and in small groups in each in class workshop.

Graded Assessments: There will be an open book mid-term exam (50%) and an open book cumulative final exam (50%).

Attendance: Students will struggle to succeed in this class if they do not attend class regularly. As such, regular attendance is expected.

In class expectations: Each class will have a heavy class participation component. This will include in class applied learning in groups and individually in **every class**. The only way this works is if every student comes to class having fully read and synthesized the readings. There is intentionally less reading in this class to provide space for significant in class applied learning. Due to the significant amount of in class participation, respectful and supportive communication among all class participants is important and expected.

Office hours: Office 207, Monday 1:30-2:30 pm & Thursday 9:00-10:00 am and by appointment.

Accommodations: The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and the Office for Disability Equity (ODE). If you think you may have a disability adversely affecting your academic performance, and you have not already connected with ODE, please contact ODE through one of the options listed at <https://www.umt.edu/disability/Students/inquire/default.php>. The Law School will work with you and ODE to provide an appropriate accommodation. Retroactive accommodation requests will not be honored, so please, do not delay.

Academic honesty: ABIII Honor Code and UM Conduct Code apply. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code of the University of Montana. The Code is available for review online at <https://www.umt.edu/campus-life/community-standards/default.php>.

We will utilize generative AI as a class during in-class exercises. As set forth in the ABIII Honor Code, students are expressly prohibited from utilizing generative AI for any graded assessments.

Class Schedule and Reading

Class 1 - Introduction

- Emanuel, 3-9
- Montana Constitution, Article II, Section 16
- MCA 1-3-214

Class 2 – Equitable Remedies and Injunctive relief – General introduction and federal standard

- Emanuel, 237-252

Class 3 - Injunctive relief – state standard

- City of Whitefish v. Town Pump, Inc., 2001 MT 58
- Montana Code Annotated provisions regarding injunctions
 - Definition of injunction. MCA 27-19-101
 - When final injunction may be granted to prevent reach of obligation. MCA 27- 19-102
 - When injunction may not be granted. MCA 27-19-103
 - Form and scope of injunction of restraining order. MCA 27-19-105

Class 4 – Temporary Injunctive Relief – Introduction and Temporary Restraining Orders

- Emanuel, 252-262

Class 5 – Temporary Injunctive Relief – Preliminary Injunctions

- Emanuel, 263-280

Class 6 – Temporary Injunctive Relief – Preliminary injunctions and TROs – State Standard

- Preliminary Injunction Procedural Requirements
 - Mont. R. Civ. P. 65
 - Notice of application – hearing. MCA 27-19-301
 - Time of granting injunction, evidence required. MCA 27-19-303
 - Security for damages. MCA 27-19-306
- Montana preliminary injunction standard
 - When preliminary injunction may be granted. MCA 27-19-201
- Temporary Restraining Orders – Materials to be posted on moodle

Class 7 – In Class Injunctive Relief Workshop

Class 8 - Specific Performance – General and state standard

- Emanuel, 357-366
- Montana Code Annotated provisions regarding specific performance
 - When specific or preventive relief permitted. MCA 27-1-401
 - How specific relief given. MCA 27-1-402
 - How preventative relief given. MCA 27-1-403
 - When specific performance of an obligation may be compelled. MCA 27-1-411
 - Obligations which cannot be specifically enforced. MCA 27-1-412

- Specific performance not to be oppressive. MCA 27-1-413
- Parties who cannot be compelled to perform. MCA 27-1-415
- Parties who cannot obtain specific performance. MCA 27-1-416

Class 9 – Restitution

- Emanuel, 301-325, 339-356
- Cause of action for breach of promise abolished – right to damages for fraud and unjust enrichment preserved. MCA 27-1-602

Class 10 – Restitution cont'd – Constructive Trusts

- Emanuel, 325-326
- Constructive trust. MCA 72-38-123
- Volk v. Gosser, 382 P.3d 378 (2016) (skip paragraphs 29-34, concurrence and dissent)
- Northern Cheyenne Tribe v. Roman Catholic Dioceses 296 P.3d 450 (2013)

Class 11 – In class Specific Performance and Restitution Workshop

Class 12 - Contempt - federal and state standard

- Emanuel, Chapter 12, **excluding** *Ex parte Daniels* and *Wronge v. Madigan*
- Contempt under Federal Law
 - 18 USC 401
 - Fed. R. Crim. P. 42
 - Fed. R. Civ. P. 70
- Contempt under Montana Law
 - Contempt Standard What Acts or Omissions are Contempts – Civil and Criminal Contempt. MCA 3-1-501
 - Contempt Committed in Presence of Court. MCA 3-1-511
 - Procedure – Contempt not in the Presence of the Court. MCA 3-1-512
 - Hearing on Contempt Not Committed in Immediate View and Presence of Court or Judge at Chambers. MCA 3-1-518
 - Penalty to Compel Performance. MCA 3-1-520.
 - Judgment And Orders In Contempt Cases Final – Family Law Exception. MCA 3-1-523

Class 13 - Declaratory Relief – general federal standard

- Emanuel, 281-291
- 28 USC 2201
- Fed. R. Civ. P. 57

Class 14 - Declaratory Relief – state standard

- *Gryczan v. State*, 283 Mont. 433 (1997)
- *Yellowstone v. Hannen*, 291 P.3d 1253 (2012)
- Mont. R. Civ. P. 57
- Purpose – liberal construction. MCA 27-8-102
- Scope of power to render declaratory judgments. MCA 27-8-201
- Who may obtain declaratory judgment. MCA 27-8-202

- When a contract may be construed. MCA 27-8-203
- Supplemental Relief. MCA 27-8-313

Class 15 – Declaratory Relief, Injunctive Relief and Contempt Workshop

Class 16 - Damages – Introduction, Compensatory Damages

- Emanuel, 15-29
- Detriment defined MCA 27-1-201
- Right to Compensatory Damages MCA 27-1-202
- Right to Damages for Detriment Resulting After Suit Brought and for Future Detriment. MCA 27-1-203
- Damages to be Reasonable. MCA 27-1-302

Class 17 – Damages – Tort damages – Special and general damages

- Emanuel, 29-37
- §1310 Pleading Special Damages – In general, Fed. Prac. And Proc. Wright and Miller
- MT. R. CIV. P. 9(G), F.R.C.P. 9(G)

Class 18 - Damages – Tort damages – Bodily Injury

- Emanuel, 39-52, 59-62
- Breach of obligation other than contract. MCA 27-1-317
- Albinger v. Harris, 310 Mont. 27 (2002)

Class 19 Damages – Tort damages – Real and Personal Property and Economic Loss and Emotional Distress Damages

- Emanuel, 62-80

Class 20 – Damages cont’d – Tort damages, Real and Personal Propety and Economic Loss and Emotional Distress Damages cont’d.

- Childress v. Costco Wholesale Corp. 493 P.3d 314 (2021)
- Romo v. Shirley, 2022 MT 249

Class 21 - Damages cont’d – Contract damages

- Emanuel, 91-106
- Damages for emotional or mental distress prohibited from contract actions – exception MCA 27-1-310
Breach of contract. MCA 27-1-311
- AWIN Real Estate LLC v. Whitehead Homes, Inc., 2022 MT 225

Class 22 – Compensatory Damages In Class Workshop

Class 23 - Statutory damages, nominal damages

- Statutory damages Provision Examples
 - Damages – Montana Consumer Protection Act. MCA 30-14-133
 - Limitation on Government Liability for damages in Tort. MCA 2-9-108

- Nominal Damages
 - Nominal damages when no appreciable detriment. MCA 27-1-204
 - Carey v. Phipps, 435 U.S. 247 (1978)

Class 24 - Punitive damages – Process and Liability

- Emanuel, 197-199, 203-217
- SB 169, available at <https://leg.mt.gov/bills/2021/sesslaws/ch0254.pdf>
- Punitive damages – when allowed – limitation. MCA 27-1-220
- Punitive damages – liability – proof – award. MCA 27-1-221(1)-(7)(a)
- Insurance Coverage of Punitive Damages. MCA 33-15-317

Class 25 – Punitive damages – Award Amount

- Emanuel, 217-225
- Punitive damages – when allowed – limitation. MCA 27-1-220(3)
- Punitive damages – liability – proof – award. MCA 27-1-221(7(a)-(c)
- McCulley v. U.S. Bank of Montana, 347 P.3d 247 (2015)

Class 26 - Attorneys fees

- Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist., 359 Mont. 393 (2011) (skip paragraphs 8-17)
- Mahach-Watkins v. Depee, 593 F.3d 1054 (9th Cir. 2010)