

# Specific Performance

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Generally, courts grant expectation damages as the default remedy to put the promisee in the position she would have occupied but for the promisor's breach. This result is arguably consistent with the aim of contract law. A contract allows parties to rely on one another to perform, but within limits. The promisor obligates herself only to keep the contract or pay damages for breaking it. To the extent that is true, a rational promisee should, in many cases, be indifferent to receipt of the promisor's performance or an amount of money that provides the same benefit of the bargain. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, 300–02 (1881); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

Courts could instead order specific performance and require the promisor to perform. Indeed, one might wonder: if the goal of contract remedies is to give the promisee the benefit of her bargain, why isn't specific performance the preferred remedy? Indeed, it is the preferred remedy under both the Convention/Contracts for the International Sale of Goods! See Art. 46, CISG. and under the law of most Civil Law countries. There are several reasons courts are sometimes reluctant to order specific performance. Ordering performance is costly for courts to monitor. It also interferes with the freedom of the promisor. In some contexts, an order of specific performance might require parties to work together when neither party trusts the other. Finally, in the American system, where each litigant pays its own costs, the winner might need a damages award to pay her attorneys.

Nonetheless, specific performance may be granted when damages are not an adequate remedy for the breach. Damages may be inadequate when there are unique qualities to the subject matter of the contract, whether real estate, personal (moveable) property, or the promisor's services. Damages may also be inadequate when there is uncertainty with regard to value, or the value is subjective or sentimental. The following cases will help you understand when and why an order of specific performance might be granted.

## **Curtice Brothers Co. v. Catts**

66 A. 935 (N.J. Court of Chancery 1907)

### **Synopsis**

Complainant is engaged in the business of canning tomatoes, and seeks the specific performance of a contract wherein defendant agreed to sell to complainant the entire product of certain land planted with tomatoes. Defendant contests the power of this court to grant equitable relief.

### Opinion

LEAMING, Vice Chancellor.

The fundamental principles which guide a court of equity in decreeing the specific performance of contracts are essentially the same whether the contracts relate to realty or to personalty. By reason of the fact that damages for the breach of a contract for the sale of personalty are, in most cases, easily ascertainable and recoverable at law, courts of equity in such cases withhold equitable relief. Touching contracts for the sale of land, the reverse is the case. But no inherent difference between real estate and personal property controls the exercise of the jurisdiction. Where no adequate remedy at law exists, specific performance of a contract touching the sale of personal property will be decreed with the same freedom as in the case of a contract for the sale of land....

... In our own state contracts for the sale of chattels have been frequently enforced and the inadequacy of the remedy at law, based on the characteristic features of the contract or peculiar situation and needs of the parties, have been the principal grounds of relief (citations omitted).

I think it clear that the present case falls well within the principles defined by the cases already cited from our own state. Complainants' factory has a capacity of about 1,000,000 cans of tomatoes. The season for packing lasts about six weeks. The preparations made for this six weeks of active work must be carried out in all features to enable the business to succeed. These preparations are primarily based upon the capacity of the plant. Cans and other necessary equipments, including labor, must be provided and secured in advance with reference to the capacity of the plant during the packing period. With this known capacity and an estimated average yield of tomatoes per acre the acreage of land necessary to supply the plant is calculated. To that end, the contract now in question was made, with other like contracts, covering a sufficient acreage to insure the essential pack. It seems immaterial whether the entire acreage is contracted for to insure the full pack, or whether a more limited acreage is contracted for and an estimated available open market depended upon for the balance of the pack. In either case a refusal of the parties who contract to supply a given acreage to comply with their contracts leaves the factory helpless, except to whatever extent an uncertain market may perchance supply the deficiency. The condition which arises from the breach of the contracts is not merely a question of the factory being compelled to pay a higher price for the product. Losses sustained in that manner could, with some degree of accuracy, be estimated. The condition which occasions the irreparable injury by reason of the breaches of the contracts is the inability to procure at any price at the time needed and of the quality needed, the necessary tomatoes to insure the successful operation of the plant. If it

should be assumed as a fact that upon the breach of contracts of this nature other tomatoes of like quality and quantity could be procured in the open market without serious interference with the economic arrangements of the plant, a court of equity would hesitate to assume to interfere; but the very existence of such contracts proclaims their necessity to the economic management of the factory. The aspect of the situation bears no resemblance to that of an ordinary contract for the sale of merchandise in the course of an ordinary business. The business and its needs are extraordinary in that the maintenance of all of the conditions prearranged to secure the pack are a necessity to insure the successful operation of the plant. The breach of the contract by one planter differs but in degree from a breach by all.

The objection that to specifically perform the contract personal services are required will not divest the court of its powers to preserve the benefits of the contract. Defendant may be restrained from selling the crop to others, and, if necessary, a receiver can be appointed to harvest the crop.

A decree may be advised pursuant to the prayer of the bill.

By reason of the manner in which the facts on which this opinion is based were stipulated, no costs will be taxed.

### Notes and Questions

1. As the court notes in *Curtice v. Catts*, specific performance was more readily granted for contracts governing sales of real property than sales of ‘personalty,’ i.e., personal or chattel property. But that’s not to say specific performance was never granted for contracts over sales of goods in the latter category, as *Curtice* demonstrates.
2. The tomatoes in *Curtice* are not unique—they don’t differ substantially from any other tomatoes. Why does the court grant specific performance?

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### **Copylease Corp. of America v. Memorex Corp.**

408 F.Supp. 758 (S.D.N.Y. 1976)

LASKER, District Judge.

By Memorandum Opinion dated November 12, 1975, 403 F.Supp. 625, we determined that Memorex Corporation (Memorex) breached its contract with Copylease Corporation of America (Copylease) for the sale of toner and developer and directed the parties to submit

proposed judgments with supporting documentation relating to the availability of injunctive relief, or, more precisely, specific performance. We have studied the submissions and conclude that further testimony is necessary to determine the propriety of such relief.

Memorex takes the position that under California law Copylease is not entitled to specific performance of this contract. Copylease argues that the remedy is available – if not under California law, then under our general federal equitable powers.

It is not settled whether a federal court in a diversity case may grant equitable relief which is unavailable under the law of the state governing the substantive rights of the parties. [But w]e are inclined to agree with Memorex that the law of California controls the issuance of the equitable relief sought here by Copylease.

We also agree with Memorex that the provision in the contract granting Copylease an exclusive territory, on which Copylease places primary reliance in its request for specific performance, is not in itself an adequate basis under California law for an award of such relief. *Long Beach Drug Co. v. United Drug Co.*, 13 Cal. 2d 158, 88 P.2d 698, 89 P.2d 386 (1939). California law does not consider a remedy at law inadequate merely because difficulties may exist as to precise calculation of damages. *Hunt Foods, Inc. v. Phillips*, 248 F.2d 23, 33 (N.D. Cal.1 957) (applying California law); *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d 300, 63 Cal. Rptr. 148, 152 (4th Dist.Ct.App.1967) and cases cited there. *Long Beach Drug* and *Thayer Plymouth* also demonstrate the more fundamental refusal of California courts to order specific performance of contracts which are not capable of immediate enforcement, but which require a ‘continuing series of acts’ and ‘cooperation between the parties for the successful performance of those acts.’ *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*, *supra*, 255 Cal. App. 2d at 303, 63 Cal. Rptr. at 150; *Long Beach Drug Co. v. United Drug Co.*, *supra*, 13 Cal.2d 158, 88 P.2d 698, 703-05, 89 P.2d 386. Absent some exception to this general rule, therefore, Copylease will be limited to recovery of damages for the contract breach.

An exception which may prove applicable to this case is found in Cal. U.C.C. § 2716(1). That statute provides that in an action for breach of contract a buyer may be entitled to specific performance ‘where the goods are unique or in other proper circumstances.’ Cal. U.C.C. § 2716(1) (West 1964). In connection with its claim for interim damages for lost profits from the time of the breach Copylease argues strongly that it could not reasonably have covered by obtaining an alternative source of toner because the other brands of toner are distinctly inferior to the Memorex product. If the evidence at the hearing supports this claim, it may well be that Copylease faces the same difficulty in finding a permanent alternative supplier. If so, the Official Comment to § 2716 suggests that a grant of specific performance may be in order:

‘Specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting. The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation . . . However, uniqueness is not the sole basis of the remedy under this section for the relief may also be granted ‘in other proper circumstances’ and inability to cover is strong evidence of ‘other proper circumstances.’ Cal.U.C.C. § 2716, Comment 2 (West 1964). (emphasis added).

If Copylease has no adequate alternative source of toner the Memorex product might be considered ‘unique’ for purposes of § 2716, or the situation might present an example of ‘other proper circumstances’ in which specific performance would be appropriate.

If such a showing is made it will be necessary to reconcile California’s policy against ordering specific performance of contracts which provide for continuing acts or an ongoing relationship with § 2716 of the Code. Although we recognize that the statute does not require specific performance, the quoted portion of the Official Comment seems clearly to suggest that where a contract calls for continuing sale of unique or ‘noncoverable’ goods this provision should be considered an exception to the general proscription. Output and requirements contracts, explicitly cited as examples of situations in which specific performance may be appropriate, by their nature call for a series of continuing acts and an ongoing relationship. Thus, the drafters seem to have contemplated that at least in some circumstances specific performance will issue contrary to the historical reluctance to grant such relief in these situations. If, at the hearing, Copylease makes a showing that it meets the requirements of § 2716, the sensible approach would be to measure, with the particulars of this contract in mind, the uniqueness or degree of difficulty in covering against the difficulties of enforcement which have caused courts to refrain from granting specific performance. It would be premature to speculate on the outcome of such analysis in this case.

### Notes and Questions

1. Section 2-716 of the Uniform Commercial Code, (adopted in 49 states, including California) allows for a grant of specific performance when the goods in question are unique, or in other proper circumstances. For example, in *Sedmak v. Charlie’s Chevrolet, Inc.*, 622 S.W.2d 694 (Mo. Ct. App. 1981), the court held that due to the rarity of the car in question – a limited edition 1977 Corvette “Indy Pace car”—it might be

“difficult, if not impossible” to replace the car “without considerable expense, delay and inconvenience.” But in *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 588 P.2d 939 (1978), the court did not order specific performance because the plaintiff did not allege facts suggesting the truck in question was unique or why damages would not be adequate relief.

2. What arguments do you anticipate Copylease might make, and what evidence might it present to establish that the court should order Memorex to deliver the toner and developer promised? What counter-arguments might Memorex raise, and what evidence might Memorex present to the contrary?
3. Comment 2 to Section 2-716 notes that uniqueness is not the only factor in determining whether specific performance should be granted. “The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract. Output and requirements contracts involving a particular or peculiarly available source or market present today the typical commercial specific performance situation, as contrasted with contracts for the sale of heirlooms or priceless works of art which were usually involved in the older cases. ... [R]elief may also be granted ‘in other proper circumstances’ and inability to cover is strong evidence of ‘other proper circumstances’.”
4. As the court in *Curtice* notes, real property is generally treated as unique. No parcel of land is exactly the same. Thus, breach of a contract to convey real property is generally remedied with specific performance. See, e.g., *Gartrell v. Stafford*, 12 Neb. 545, 11 N.W. 732, 734 (1882):

[A] purchaser of a particular piece of land may reasonably be supposed to have considered the locality, soil, easements, or accommodations of the land, generally, which may give a peculiar or special value to the land to him, that could not be replaced by other land of the same value, but not having the same local conveniences or accommodations.... An action for damages would not, therefore, afford adequate relief.

Idaho is an outlier with regard to land contracts. Courts in Idaho will not assume the land in question is unique, but the buyer must instead establish that the land is needed for some “particular, unique purposes.” *Watkins v. Paul*, 95 Idaho 499, 511 P.2d 781 (1973).

5. In some cases, an order of specific performance might over-compensate the promisee. Consider the following: The town of Mingus, CA, contracts with Tatum for a bridge to an island that Mingus thought it was acquiring. The contract price was \$1M. Tatum's costs would be \$750K. If Mingus learns it isn't getting the island after all and it would be a huge waste of \$1M for the town to have a bridge to nowhere, shouldn't we encourage the breach and let Mingus pay Tatum off to the tune of \$250K instead of \$1M? If Tatum can secure specific performance, is he likely to build the bridge? What might he do instead? What do you think the risks might be if we regularly gave the aggrieved party the right to demand specific performance? Does that help us understand why Anglo-American law prefers damages?
6. Inadequacy for purposes of determining whether specific performance shall be ordered is not the layman's definition of adequacy. It is not a question of whether a damages amount can be fixed. An expert hired by a party seeking to avoid performance will certainly be able to justify a number. Instead, "[i]n asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee." *Van Wagner Adver. Corp. v. S & M Enterprises*, 67 N.Y.2d 186, 492 N.E. 2d 656, 193 (1986).

Factors that courts evaluate in determining whether a monetary remedy would be adequate include the difficulty of proving damages with reasonable certainty, the difficulty of purchasing substitute performance, and the likelihood that the plaintiff cannot collect damages from the defendant. *See* Restatement (Second) of Contracts § 360.

7. Sometimes parties elect specific performance as a remedy for breach of contract. Professors Theodore Eisenberg and Geoffrey Miller examined 2,347 contracts of public corporations and found that while 68.5% of them did not refer to specific performance, significant variations exist, with high rate of specific performance clauses in merger transactions (53.4%), and assets sales (45.1%) and a much lower rate in loan agreements. Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUD. 29, 32 (2015). Another study examined a more recent dataset and found that 85%–95% of Merger and Acquisition transactions included such a specific performance provision. Theresa Arnold et.

al., “*Lipstick on A Pig*”: *Specific Performance Clauses in Action*, 2021 WIS. L. REV. 359, 363 (2021).

Courts give significant weight to such specific performance provision, although they still hold the power to refuse to do so on equitable grounds. The Court of Chancery of Delaware (which is one of the most important courts in corporate law) explained:

[I]t should come as no surprise that, where feasible, our courts favor enforcement of remedy provisions calling for specific performance.... The existence of these provisions is sufficient to support a decree of specific performance, although a court can decline to issue one if there are supervening equities or other considerations.

*L-5 Healthcare Partners, LLC v. Alphatec Holdings, Inc.*, No. 2019-0412-NAC, 2024 WL 3888696, at \*7 (Del. Ch. Aug. 21, 2024); see also Chancellor Kathaleen St. Jude McCormick & Robert Erikson, *Delaware's Approach to Specific Performance in M&A Litigation*, 20 N.Y.U. J.L. & BUS. 7, 9 (2023) (exploring Delaware Contractarian approach, but noting that “equitable principles will continue to play a role in suits for specific performance of M&A agreements, although perhaps a less prominent role than called for historically.”)

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The next cases deal with what is sometimes called “negative” specific performance. Specifically, they explore whether courts will enforce a covenant not to compete which binds an employee not to enter the same business in competition with the employer for a specified length of time and in a specified geographic area. As you read them consider if there are there policy reasons that justify more regularly awarding “negative” specific performance?

**Reier Broadcasting Co., Inc. v. Kramer**

72 P.3d 944 (Montana Supreme Court 2003)

LEAPHART, Justice.

**FACTUAL AND PROCEDURAL BACKGROUND**

... Appellant, Reier Broadcasting Company, Inc., owns several radio stations in Gallatin County and, until 2002, had exclusive rights to broadcast Montana State University athletic events. Respondent, Michael Kramer, is the head football coach at MSU. In January 2001,



Reier Broadcasting and Kramer entered into an employment contract at the behest of MSU, whereby Reier agreed to pay Kramer \$10,020 per year in exchange for exclusive broadcast rights with Kramer. Pursuant to the contract, Reier agreed to employ Kramer as an announcer and talent on the weekly, one-hour “Cat Chat” program, which airs during the MSU football season. In addition, Kramer agreed to record commercials for several of Reier’s advertisers. The agreement remains in force and effect until November 2004. Section Two of the contract contains an exclusivity clause that provides the following:

That Coach shall diligently and faithfully serve Station in such capacity, shall devote his entire skill and energies to such service, and shall not perform on or permit his name to be used in connection with any other radio or television station or program, or to accept any other engagement which will conflict with his performance or effectiveness for Station, without prior approval and consent in writing by the Station.

Reier Broadcasting had earlier purchased exclusive broadcast rights to all MSU athletic events. These rights expired in the summer of 2002, at which time MSU began seeking competitive bids from other broadcasting companies. After reviewing MSU’s Request for Proposal, under which these bids were to be obtained, Reier notified the university that there was a potential conflict between the Request for Proposal and Reier’s contract with Kramer. According to Reier, the Request for Proposal required the successful offeror to broadcast interviews and conduct a commentary program with Kramer in violation of Section Two of the Reier–Kramer employment agreement, under which Kramer was contractually prohibited from announcing, or otherwise providing talent for Reier’s competitors.

MSU declined to amend the Request for Proposal to address this conflict. MSU then disqualified Reier Broadcasting as a potential bidder, and awarded broadcast rights to the university’s athletic events to Clear Channel Communications. MSU also notified Kramer that he was expected to provide interviews to Clear Channel despite the exclusivity clause contained in his contract with Reier.

Reier Broadcasting subsequently filed a Complaint and Application for Temporary Restraining Order with the Eighteenth Judicial District Court in an effort to protect its rights under the employment agreement, and to prevent Kramer from providing services to Clear Channel. The District Court granted the request for a TRO, pending an evidentiary hearing on the matter. In August 2002, the court held an evidentiary hearing on the question of whether or not to convert the TRO into a preliminary injunction. The TRO was later amended to allow

Kramer to “engage in audio, video or printed media obligations in connection with his coaching job....”

After hearing testimony and reviewing the parties’ pleadings, the court concluded that § 27–19–103(5), MCA, prohibited the issuance of an injunction under the circumstances. The court also dissolved the TRO. Reier Broadcasting moved to alter or amend the court’s judgment. The court denied the motion, and Reier appealed.

### STANDARD OF REVIEW

Generally, when reviewing a trial court’s grant or denial of an injunction, our standard of review is for abuse of discretion. *Spoklie v. Montana Dep’t of Fish, Wildlife & Parks*, 2002 MT 228, ¶ 15, 311 Mont. 427, ¶ 15, 56 P.3d 349, ¶ 15. However, when a trial court “bases its decision to grant such relief upon its interpretation of a statute, no discretion is involved and we review the [ ] court’s conclusion of law to determine whether it is correct.” *Spoklie*, (citing *Hagener v. Wallace*, 2002 MT 109, ¶ 12, 309 Mont. 473, ¶ 12, 47 P.3d 847, ¶ 12). Accordingly, we review a trial court’s statutory interpretations and the resulting conclusions of law for correctness. To the extent that the court’s conclusions are correct, “we will not interfere with the court’s exercise of discretion unless there is a showing of manifest abuse of discretion.” *Spoklie*, (citing *Montana Tavern Ass’n v. Dep’t of Revenue* (1986), 224 Mont. 258, 263, 729 P.2d 1310, 1314).

### DISCUSSION

This appeal concerns the scope and effect of § 27–19–103(5), MCA, which provides the following: “An injunction cannot be granted: ... (5) to prevent the breach of a contract the performance of which would not be specifically enforced...” The paramount issue raised by the appellant, Reier Broadcasting, is whether, within the context of a personal services contract such as the employment agreement between Reier and Kramer, the language of § 27–19–103(5), MCA, may be interpreted as prohibiting the use of injunctive relief to prevent one of the contracting parties (in this case, Kramer) from performing services elsewhere during the life of the contract.

Characterizing the Reier–Kramer employment agreement as a personal services contract and not subject to specific enforcement, the District Court concluded that the prohibition contained in § 27–19–103(5), MCA, precluded the issuance of the injunction sought by Reier. The court relied, in part, on § 27–1–412(1), MCA, which states that, “[t]he following obligations cannot be specifically enforced: (1) an obligation to render personal service....”

Combining this restriction with the language of § 27–19–103(5), MCA, the court concluded that it “may not enjoin one from doing something in violation of a contract if the [c]ourt cannot enforce the contract by specific performance.... The [a]greement between Kramer and [Reier] is a personal services contract and cannot be enforced by specific performance.” The court explained that it could not prevent Kramer from violating the terms of that contract without improperly enforcing the affirmative obligations of the Reier–Kramer agreement through indirect means.

Reier Broadcasting argues that neither § 27–1–412(1), MCA, nor § 27–19–103(5), MCA, applies in the present case. Reier contends that by seeking an injunction, the company did not intend to require Kramer to render personal services, but rather to prevent Kramer from providing the same services to Clear Channel. Accordingly, Reier asserts that § 27–1–412(1), MCA, and its prohibition against the specific enforcement of personal services contracts, has no bearing on the present case, and thus § 27–19–103(5), MCA, is equally irrelevant.

Reier characterizes its request for an injunction as an attempt to enforce a negative covenant which, according to Reier, is appropriate given that Kramer’s services are special or unique. According to Reier, contracts based on special or unique personal services, or in which a person holds a unique position, may be indirectly enforced by restraining the person from providing services to another. In support of this, Reier cites Volume 71, Section 165 of the American Jurisprudence, Second Edition, which states the following:

Contracts calling for personal services or acts of a special, unique, or extraordinary character, or by persons in eminence in their profession or calling who possess special and extraordinary qualifications, may be indirectly enforced by restraining the person employed from rendering services to another....

71 Am.Jur.2d Specific Performance § 165, 213 (1973).

Reier also cites a 1972 decision, *Nassau Sports v. Peters* (E.D.N.Y. 1972), 352 F.Supp. 870, 875 (citations omitted), in which the federal district court for the eastern district of New York noted that “it has long been settled that injunctive relief may be granted to restrain an employee’s violation of negative covenants in a personal services contract....” On this basis, Reier concludes that although Kramer should not be forced to fulfill his contractual obligations to the company, he nonetheless may be prevented from providing his unique services to Reier’s competitors until the employment agreement expires in 2004.

...[T]he point of contention, here, is whether these statutory prohibitions also apply to the enforcement of negative covenants, such as the exclusivity clause contained in the Reier–Kramer employment agreement. Given the absence of any relevant Montana case law, we turn to the California and Arizona courts, which have interpreted statutes similar to § 27–19–103(5), MCA, to prevent the enforcement of negative covenants in personal services contracts.

In *Anderson v. Neal Institutes Co.* (1918), 37 Cal. App. 174, 173 P. 779, the California Court of Appeals construed an early version of § 3423 of the California Civil Code, which provided that “[a]n injunction may not be granted ... to prevent the breach of a contract the performance of which would not be specifically enforced...” In *Anderson*, the court of appeals identified two conflicting lines of authority under which § 3423 could have been construed at the time. The first suggested that although a court cannot specifically enforce an affirmative agreement by compelling one party to perform, the court can enjoin a party from breaching a negative covenant and performing elsewhere. *Anderson*, 37 Cal. App. at 177, 173 P. at 780. The second line of authority suggested that since a court cannot enforce the positive part of a personal services contract, it cannot restrain by injunction the negative part. 37 Cal. App. at 178, 173 P. at 780. The court of appeals adopted the later rationale, concluding that in light of the unambiguous language of § 3423, a court cannot “interfere by injunction to prevent the violation of an agreement of which, from the nature of the [contract], there could be no decree of specific enforcement.” 37 Cal. App. at 178–79, 173 P. at 781.

The Arizona Supreme Court followed *Anderson* in *Titus v. Superior Court, Maricopa County* (1962), 91 Ariz. 18, 368 P.2d 874. The court reasoned that § 12–1802(5) of the Arizona Revised Statutes, like § 3423 in California, was intended “to deprive the court of jurisdiction to enjoin breaches of covenants not to compete during the original term of the contract (where enforcement would indirectly enforce the promise to render services).” *Titus*, 91 Ariz. at 23, 368 P.2d at 878. The court noted that the purpose of this rule is to prevent parties from “seeking injunctive relief to force the course of affirmative action.” *Titus*, 91 Ariz. at 21, 368 P.2d at 876.

We determine that § 27–19–103(5), MCA, like its California and Arizona counterparts, prohibits the use of injunctive relief to prevent a party to a personal services contract from performing services elsewhere during the life of the contract. The exclusivity clause in the Reier–Kramer employment agreement, if enforced vis a vis an injunction, would prevent Kramer from performing for Clear Channel or any of Reier’s other competitors until the summer of 2004 when the Reier–Kramer agreement expires. Thus, if Kramer were to perform at all, he would have to perform for Reier. In that sense, an injunction would amount to the indirect enforcement of the affirmative part of the contract. It was this sort of indirect

enforcement that the California court sought to avoid in *Anderson*, stating that “to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the ... contract.” *Anderson*, 37 Cal. App. at 178, 173 P. at 780.

Following the lead of California and Arizona, we conclude that the issuance of an injunction, preventing Kramer from working for Clear Channel during the period remaining on his contract with Reier, would result in the indirect specific enforcement of the Reier–Kramer employment agreement. Contrary to the dissent’s characterization, we do not hold that the underlying contract was invalid. The issue presented is not whether the contract is valid, but rather, whether the contract can be specifically enforced by means of an injunction. We conclude that pursuant to the explicit language of § 27–19–103(5), MCA, Montana courts may not enjoin the violation of a contract, the specific enforcement of which is barred by Montana law. The issue of whether Reier has other legal remedies for the alleged breach of contract is not before the Court.

### CONCLUSION

In summary, we hold that § 27–19–103(5), MCA, prohibits the use of injunctive relief to enforce negative covenants contained in personal services contracts. Accordingly, the District Court correctly concluded that Reier Broadcasting was not entitled to enjoin Kramer from performing services elsewhere during the life of the contract.

We concur: KARLA M. GRAY, C.J., JAMES C. NELSON and JIM REGNIER, JJ.

Justice PATRICIA O. COTTER dissents.

I dissent.... I would conclude that the enforcement of the negative covenant in the contract between RBC and Kramer would not run afoul of § 27–19–103(5), MCA.... I disagree [] with the ensuing conclusion the Court reaches, which is that an injunction would amount to the indirect enforcement of the affirmative part of the contract because, if Kramer were to perform at all, he would have to perform for Reier. I respectfully submit that this is a stretch. RBC is not seeking to compel Kramer to perform under the contract. It is simply seeking to prevent him from violating the non-competition provisions of the contract – provisions which were specifically bargained for by Kramer, at the encouragement and behest of MSU.

**Aero Kool Corporation v. Oosthuizen**

736 So. 2d 25 (Florida District Court of Appeal 1999)

PER CURIAM.

Aero Kool is engaged in the business of overhauling commercial aircraft engine and airframe accessories. In March 1993, Oosthuizen began work at Aero Kool. Prior to this employment, Oosthuizen had worked at a restaurant and had no experience or training in aviation repair. Aero Kool provided Oosthuizen with over 195 hours of specialized training, enabling him to become skilled in repairing and overhauling aircraft components, particularly heat exchangers. He received a Temporary Airman Certificate from the Federal Aviation Administration (FAA), authorizing him to exercise the privileges of a Repairman “for manager of Heat Exchanger and accessories [while] employed at Aero Kool.”

Oosthuizen was subsequently promoted to repair manager. On March 4, 1997, as a condition of continued employment with Aero Kool, Oosthuizen entered into an Employment Agreement containing a covenant not to compete, which provided:

During the Term of Employment and for a period of six (6) months thereafter, the Employee shall not, within any jurisdiction in which the Company is transacting business or has authorized others to do business on behalf of the Company, directly or indirectly ... be employed by ... any business or [sic] the type of character engaged in and competitive with that conducted by the company....

The Employment Agreement also contained an express provision regarding the company’s right to an injunction restraining any violation of the covenants contained therein.

In mid-December 1998, Oosthuizen’s employment by Aero Kool was terminated after he failed a random drug test. Thereafter, he worked for about a month as a telemarketer with another employer. In late-January 1999, he began work for Aero Kool’s competitor, Airmark Components, Inc. At Airmark, Oosthuizen receives training and performs work regarding the repair of air coolers rather than heat exchangers.

On February 19, 1999, Aero Kool filed a verified complaint and emergency motion for temporary injunction seeking to enjoin Oosthuizen from continuing to violate the six month covenant not to compete by working for Airmark. The trial court conducted an evidentiary hearing. On March 9, 1999, the court entered an order denying Aero Kool’s emergency motion. In pertinent part, the court found that: (a) Aero Kool had failed to prove the existence

of any legitimate business interest, as required by section 542.335, Florida Statutes (1997); and (b) Oosthuizen's employment by Airmark does not cause Aero Kool any harm. We disagree.

As the trial court recognized, the validity of the employment agreement is controlled by section 542.335. Section 542.335(1)(b) provides that "the person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant." This provision defines the term "legitimate business interest" to include: "Extraordinary or specialized training." § 542.335(1)(b) 5.

In this case, the record clearly demonstrates that Aero Kool has a legitimate business interest in the extensive, specialized training in aircraft component repair that it provided to Oosthuizen. *See* § 542.335(1)(b) 5; *Balasco v. Gulf Auto Holding, Inc.*, 707 So.2d 858 (Fla. 2d DCA 1998) (upholding injunction enforcing covenant not to compete protecting legitimate business interest of an auto dealership in the specialized training provided to sales personnel). Oosthuizen had no prior experience in this heavily regulated service industry, and as a result of Aero Kool's training, received certification by the FAA. The trial court's reliance on *Austin v. Mid State Fire Equip. of Central Fla.*, 727 So.2d 1097 (Fla. 5th DCA 1999), in finding that Aero Kool failed to prove a legitimate business interest, was misplaced. In *Austin*, the former employee had not received training or other specialized knowledge from the employer, had been in the industry for sixteen years, and had worked for other competitors before going to work for Mid State. *Id.* at 1098.

We find that the employment agreement and its six month covenant not to compete furthered the legitimate business interests of Aero Kool in protecting its investment in this specialized training. We reverse the trial court's denial of temporary injunctive relief and remand with directions to issue a temporary injunction.

**University of Florida Board of Trustees v. Sanal**  
837 So. 2d 512 (Florida District Court of Appeal 2003)

WEBSTER, Judge.

The University of Florida seeks review of a summary final judgment entered against it on its complaint seeking enforcement of an agreement not to compete included in a contract by which it employed Dr. Sanal. Because we conclude that the trial court correctly determined that the University failed to carry its burden to prove that a "legitimate business interest," as

that term is defined in section 542.335(1)(b), Florida Statutes (1999), supported enforcement of the non-compete agreement, we affirm.

\*\*\*

The University hired Dr. Sanal (who is a physician specializing in hematology and oncology) in August 1999 as a clinical associate professor of medicine in the division of hematology/oncology at the University of Florida Health Science Center/Jacksonville. The written employment contract specified that Dr. Sanal's responsibilities would "include teaching, research, patient care and some administrative duties." It also contained the following non-compete provision:

Upon termination of your employment with the University, whether through your resignation, your retirement from employment with the University, or the non-renewal or termination of this or any succeeding agreement, you (including an organization in which you are a shareholder, partner, employee or agent) agree that for a period of two years from the termination, you will not engage in a community based clinical practice within a radius of fifty miles from any location which has been the situs of your major faculty clinical teaching assignment with [sic] the two years preceding the date of termination.

Dr. Sanal's employment with the University ended on July 20, 2001. On July 23, 2001, Dr. Sanal began working with Jacksonville Oncology Group as a hematologist/oncologist treating disease processes comparable to those he treated while employed by the University. Jacksonville Oncology Group is "a community based clinical practice" located less than 50 miles from the University's Jacksonville facility.

The University filed its complaint seeking preliminary and permanent injunctive relief pursuant to section 542.335, Florida Statutes, alleging that Dr. Sanal was violating the non-compete agreement and causing irreparable injury to its "legitimate business interests," which it identified as "substantial relationships with prospective and existing patients within the geographic area defined by the [a]greement." Dr. Sanal filed an answer in which he denied the foregoing allegations, and asserted, as an affirmative defense, that the non-compete agreement was "not reasonably necessary to protect any legitimate business interest of the [University] and [wa]s, therefore, unenforceable as a matter of law." Subsequently, Dr. Sanal filed a motion for summary judgment, in which he claimed that "[t]he undisputed record before th[e] [c]ourt



demonstrate[d] that the subject non-competition covenant [wa]s not supported by any legitimate business interest and [wa]s, therefore, void and unenforceable.”

The University was unable to establish that Dr. Sanal had provided care to any of its former patients since joining Jacksonville Oncology Group. It was unable to identify a single patient treated by Dr. Sanal during his employment with it who had followed him for continuing care. It was unable to identify any patient who was unaccounted for, such that it would have reason to believe that the patient had left the University to follow Dr. Sanal. Moreover, the University had not realized any marked decrease in its hematology/oncology patient population since Dr. Sanal had begun working for Jacksonville Oncology Group. In fact, it was undisputed that Dr. Sanal had treated only established patients of Jacksonville Oncology Group or new patients referred to the Group under the name of a senior member of the Group.

Unable to establish that any relationship with any existing patient had been affected, the University argued that it was, nevertheless, entitled to injunctive relief because it “ha[d] a legitimate, protectible business interest in its prospective patient base.” However, it presented no evidence to identify any specific prospective patients. Rather, the University’s position appears to have been that “its prospective patient base” included all persons residing within a 50-mile radius of its Jacksonville facility, because they might need the services of a hematologist/oncologist in the future.

The trial court concluded that Dr. Sanal was “practicing medicine in violation of the terms of the non-compete agreement.” However, it concluded, further, that the University had failed to establish that it had any “legitimate business interest,” as that term is defined in section 542.335(1)(b), Florida Statutes, that would be affected unless the relief requested by the University was granted. Rather, it concluded that the University was essentially seeking to eliminate “generic competition in the medical marketplace,” a result not permitted by section 542.335. Accordingly, the trial court denied the University’s request for temporary injunctive relief, and granted Dr. Sanal’s motion for summary judgment. In doing so, however, the trial court stated that its actions were not intended to prevent the University “from filing another action in the event that [Dr. Sanal] either actively or passively solicits business from patients he formerly treated while employed by [the University].” This appeal follows.

The parties agree that the outcome of this appeal is controlled by section 542.335(1)(b) 3, Florida Statutes (1999), which, to the extent pertinent, reads:

(1) ... [E]nforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable

in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

....

(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term “legitimate business interest” includes, but is not limited to:

....

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

....

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

The parties disagree, however, as to how this language should be read. The University contends that subparagraph 3 should be construed as including within the term “prospective patients” all persons residing within a given geographic area, because they might need medical care in the future. Dr. Sanal, on the other hand, argues that the term “prospective patients” is modified by the adjective “specific”; that the phrase “specific prospective patients” is clear and unambiguous; and that we must, therefore, apply that language accordingly. We agree with Dr. Sanal.

The issue thus limited appears to be one of first impression. We have been unable to find any cases which either address the issue directly or provide meaningful insight. Although the parties have cited cases which they contend support their respective positions, we find them all to be inapposite....

We can discern no ambiguity in the language of section 542.335(1)(b)(3). It strikes us as relatively clear that the adjective “specific” used to modify “prospective patients” was intended to have its plain or ordinary meaning of “particular.” In such a situation, there is nothing to construe. *See, e.g., A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931) (“The intention and meaning of the Legislature must primarily be determined from the language of the statute itself and not from conjectures aliunde. When the language of the

statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.”). Courts are “without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.” *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So.2d 777, 778 (Fla. 1st DCA 1968). Moreover, the construction advocated by the University would render meaningless the words “[s]ubstantial relationships” at the beginning of subparagraph 3 because one cannot have “substantial relationships” with “prospective patients” who are unidentified, and unidentifiable. Accordingly, we hold that, to qualify as a “legitimate business interest” pursuant to section 542.335(1)(b) 3, a “relationship” with a “prospective patient” must be, in addition to “substantial,” one with a particular, identifiable, individual.

We note that such a result appears to be consistent with what the principal senate sponsor and the bar’s principal drafter of section 542.335 have said they intended. In an article written for *The Florida Bar Journal* shortly after the adoption of section 542.335, Senator John Grant and Thomas Steele stated that a plaintiff seeking to enforce a restrictive covenant should be entitled to do so only if “it can demonstrate that the defendant has misappropriated (or threatens to misappropriate) *identifiable* assets” of the plaintiff’s business. John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original “Unfair Competition” Approach for the 21st Century*, Fla. B.J., Nov. 1996, at 53, 54. (emphasis added). According to Grant and Steele, the statute was not intended to “unnecessarily impede competition, the ability of competitors to hire experienced workers, or the efforts of employees to secure better-paying positions.” *Id.* at 55.

To be entitled to the injunctive relief it sought, the University was obliged to prove that, absent such a remedy, it would suffer irreparable injury to a “legitimate business interest,” as that term is defined in section 542.335(1)(b). Because it failed to establish either that Dr. Sanal had interfered with “[s]ubstantial relationships with specific prospective ... patients” or that he had threatened to do so, the University failed to carry that burden. Accordingly, the trial court

correctly entered summary final judgment in Dr. Sanal's favor on the cause of action stated in the University's complaint.

AFFIRMED.

### Notes and Questions

1. Joanna Wagner, a well-known opera singer (and the niece of the renown composer Richard Wagner) entered into a contract with Benjamin Lumley, who was the lessee of Her Majesty's Theatre in London. The contract stipulated that for a period of three months, for two nights a week, Wagner would perform exclusively at Lumley's theatre. However, when Frederick Gye, who operated a competing venue, offered her better terms, she broke her contract with Wagner to perform exclusively for Gye. Lumley sued and asked for an injunction, which the English Court of Chancery famously granted, holding

Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give.... It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement.

*Lumley v Wagner* [1852], 42 Eng. Rep. 687 (Ch.)

2. In the United States, especially after the Civil War and the Reconstruction Amendments, some courts expressed hostility to the notion of granting specific performance in cases where the performance would resemble involuntary servitude or peonage (forced servitude to pay off a debt).

Like most modern courts, the Restatement rejects the holding of *Lumley v Wagner*, but it maintains a distinction between an order forcing personal services and one prohibiting service for a competitor:

### § 367 Contracts for Personal Service or Supervision

(1) A promise to render personal service will not be specifically enforced.

(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

Is the Restatement's approach comparable to that of *Reier Broadcasting*, *Aero Kool*, or *Sana*? How would that approach affect the final resolution of those cases?

3. Section 1 of the Thirteenth Amendment to the Constitution reads "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Lea VanderVelde argued that the Thirteenth Amendment could plausibly be interpreted to ban specific performance of labor contracts. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 448-50 (1989). *But see* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1481-87, 1491 (2010) (arguing that the Thirteenth Amendment did not clearly protect "the right to quit" and that the right to quit instead developed through interpretive choices of Congress and the courts and eventual public acceptance).
4. Lea VanderVelde argued that the history of negative injunctions against breaching employees in late 19th-century jurisprudence generally granted injunctions against female employees, but rarely against male employees. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992). The result was surprising in light of U.S. law's general bias in favor of free labor and the right to quit employment, but less surprising in light of a tradition of gender subordination. These cases eventually paved the way for more regressive rulings in employment cases across the board.
5. Many states passed statutes addressing the availability of injunctions to enforce a promise to refrain from competition. The *Reier Broadcasting* majority interpreted the Montana law as barring the use of injunctive relief to enforce a negative covenant in a personal service contract. Similarly, California and several other states implemented similar provisions which departed from the common law tradition which allowed a negative injunction to bar employees from taking a competing job in certain contexts.

6. Florida takes a different approach. In some cases, as outlined in section 542.355, Florida Statutes, an employer can enforce a non-compete contract against a former employee. *Kool Air* is a case in which the injunction was issued. But the provision was not enforceable in *Sanal*. Is it clear to you how those cases differ?
7. The footnote in *Reier Broadcasting* indicates that the California Legislature softened its stance against injunctions in cases where the promisor's services are "of a special, unique, [or] unusual ... character, which gives it peculiar value." Consider whether the following employees or contractors might provide services of a special, unique, or unusual character:
  - a. A mechanic by day and organist by night who contracts to play music in the evenings at a local bar. Other musicians in town have similar skill. See *Pingley v. Brunson*, 272 S.C. 421, 252 S.E.2d 560 (1979).
  - b. A baseball player with league-leading batting numbers and "a great reputation among the patrons of the sport." See *Philadelphia Base-Ball Club, Ltd. v. Lajoie*, 202 Pa. 210, 51 A. 973 (Pa. 1902).
  - c. A professional football player who is slightly better than the average professional player at his position.
8. Many sports contracts include clauses specifying that the player represents they have "special, exceptional and unique knowledge, skill, ability, and experience... the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages." This language is part of a collective bargaining agreement between the National Football League and NFL players. Collective Bargaining Agreement, NFL/NFLPA (Aug. 4, 2011), app. A, para. 2 (2011). The result of such language is that the League can generally prevent players from playing for one team if they are under contract with another. Do you suppose that players have the ability to negotiate that language out of their individual contracts? Does it matter?
9. Note that this section considers the availability of "negative" specific performance as a remedy for a breach of a non-compete provision. A separate (although related) question is whether such provisions are enforceable at all. That complex question is discussed in the section on public policy and illegality.

**Note: Efficient Breach and the Economics of Contract Remedies**

As explained in this module, in Anglo-American legal systems, damages are the primary remedy for contract breaches, with specific performance being an alternative under certain uncommon circumstances. However, in many other legal systems, particularly in civil law countries, specific performance is routinely available when a contract is breached, even if damages are adequate. Scholars have extensively discussed the advantages and disadvantages of each approach from various perspectives, including economic efficiency.

Law and economics scholars, in particular, focus on how the choice of remedies affects the possibility of an efficient breach. As the Second Circuit explained, “the notion that breaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and that such ‘efficient breaches’ occur when the breaching party will still profit after compensating the other party for its ‘expectation interest.’” *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985). Efficient breaches are also mentioned in the sections on liquidated damages and attorneys’ fees.

Consider a numeric example of an efficient breach: Lisa plans to sell her house and hires George, the most renowned gardener in town, to rejuvenate her front yard for \$2,000, anticipating it will increase her home’s sale value by \$2,500. Shortly after forming the contract, George is offered \$3,000 by Lucy, who also plans to sell her house and expects a raise of her house’s sale value by \$4,000. From a social welfare perspective, assuming all parties’ value assessments are accurate, it is better for George to perform the work for Lucy instead of Lisa.

Expectation damages allow efficient breaches. In the above example, if expectation damages are the available remedy, George would choose to breach his contract with Lisa, earn \$3,000 from Lucy, pay Lisa \$500 in damages, and retain the remaining \$2,500. Does this mean economists support the Anglo-American preference for damages over specific performance?

The situation is more nuanced. Ronald Coase, a Nobel-laureate economist, explained that if the transaction costs—meaning the costs of reaching a deal—are low, the socially efficient outcome will be reached regardless of the legal rules. If the law imposes an inefficient outcome, the parties will contract around it and share the benefits. This principle, known as *The Coase Theorem*, was first proposed in Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), which is the most cited article in legal studies and in the social sciences.

Professors Guido Calabresi and Douglas Melamed famously applied the Coase Theorem to legal remedies. They argued that when transaction costs are low enough, the law should prefer “*property rules*”—remedies, like injunctions, that compel parties to respect the other’s side legal

right. However, if making a deal is difficult, “*liability rules*”—remedies, like damages, that allow for a violation of a legal right subject to compensation—should be preferred. Their article, Guido Calabresi & A. Douglas Melamed, *One View of the Cathedral: Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089 (1972), is almost as influential and well-cited as Coase’s.

Thus, choosing between expectation damages and specific performance is a choice between protecting contracts with a property rule—specific performance—and a liability rule—expectation damages. The primary advantage of property rules is that they eliminate the need for courts to assess damages, a non-trivial task (as this chapter demonstrates). However, if we consider the parties might fail to renegotiate in the event of an efficient breach, specific performance might leave the parties in an inefficient state.

Returning to the example of Lisa and George, we saw that the contract would be efficiently breached under an expectation damages regime. What if specific performance were mandated? George would be obligated to perform his contract with Lisa, unless the two can agree on an alternative arrangement. Remember that Lisa expects to make \$500 from her deal with George, and that George will be making an additional \$1,000 from the deal with Lucy. Therefore, if George agrees to pay Lisa more than \$500 but less than \$1,000, all parties benefit. They might negotiate such a solution. However, if they fail to renegotiate, George will perform the less efficient contract with Lisa. Note also that while expectation damages are designed to make the breached-against party (Lisa) indifferent between a breach and performance, even in situations of efficient breach, under a specific performance regime, everyone is better off, including the breached-against party. Should that in itself make specific performance more desirable?

Judge Richard Posner, who is also an extremely prominent law and economics scholar, addressed these issues in *Walgreen Co. v. Sara Creek Property Co., B.V.*, 966 F.2d 273 (1992). The case involved a shopping mall owner, Sara Creek, who leased space to a competing pharmacy despite an agreement with Walgreen not to do so. Judge Posner analyzed the choice of remedy:

The benefits of substituting an injunction for damages are twofold. First, it shifts the burden of determining the cost of the defendant’s conduct from the court to the parties. If it is true that Walgreen’s damages are smaller than the gain to Sara Creek from allowing a second pharmacy into the shopping mall, then there must be a price for dissolving the injunction that will make both parties better off. Thus, the effect of upholding the injunction would be to substitute for the costly processes of forensic fact determination the less costly



processes of private negotiation. Second, a premise of our free-market system, and the lesson of experience here and abroad as well, is that prices and costs are more accurately determined by the market than by government. A battle of experts is a less reliable method of determining the actual cost to Walgreen of facing new competition than negotiations between Walgreen and Sara Creek over the price at which Walgreen would feel adequately compensated for having to face that competition.

That is the benefit side of injunctive relief but there is a cost side as well. Many injunctions require continuing supervision by the court, and that is costly. A more subtle cost of injunctive relief arises from the situation that economists call “bilateral monopoly,” in which two parties can deal only with each other: the situation that an injunction creates. The sole seller of widgets selling to the sole buyer of that product would be an example. But so will be the situation confronting Walgreen and Sara Creek if the injunction is upheld. Walgreen can “sell” its injunctive right only to Sara Creek, and Sara Creek can “buy” Walgreen’s surrender of its right to enjoin the leasing of the anchor tenant’s space to Phar–Mor only from Walgreen. The lack of alternatives in bilateral monopoly creates a bargaining range, and the costs of negotiating to a point within that range may be high. Suppose the cost to Walgreen of facing the competition of Phar–Mor [the competing pharmacy] at the Southgate Mall would be \$1 million, and the benefit to Sara Creek of leasing to Phar–Mor would be \$2 million. Then at any price between those figures for a waiver of Walgreen’s injunctive right both parties would be better off, and we expect parties to bargain around a judicial assignment of legal rights if the assignment is inefficient. R.H. Coase, “The Problem of Social Cost,” 3 J. Law & Econ. 1 (1960). But each of the parties would like to engross as much of the bargaining range as possible—Walgreen to press the price toward \$2 million, Sara Creek to depress it toward \$1 million. With so much at stake, both parties will have an incentive to devote substantial resources of time and money to the negotiation process. The process may even break down, if one or both parties want to create for future use a reputation as a hard bargainer; and if it does break down, the injunction will have brought about an inefficient result. All these are in one form or another costs of the injunctive process that can be avoided by substituting damages.

The costs and benefits of the damages remedy are the mirror of those of the injunctive remedy. The damages remedy avoids the cost of continuing supervision and third-party effects, and the cost of bilateral monopoly as well. It imposes costs of its own, however, in the form of diminished accuracy in the determination of value, on the one hand, and of the parties' expenditures on preparing and presenting evidence of damages, and the time of the court in evaluating the evidence, on the other.

*Id.* at 275–76 (citations and quotes omitted).

The debate over the preferred remedy for contract breaches is complex, with sophisticated arguments on both sides. Professor Theodore Eisenberg and Geoffrey Miller, for example, explored the literature on this question and listed eight main arguments for the rule preferring damages, and seven main arguments against it. Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUD. 29, 33–38 (2015). While it is quite difficult, maybe impossible, to identify a clear consensus on this question among law & economics scholars, it seems that many of them support expanding the situations in which specific performance will be granted. Judge Posner, for his part, granted Walgreen an injunction against Sara Creek.