Folk Wisdom about Remedies

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Theresa Arnold, Amanda Gray Dixon, Hadar Tanne, Madison Sherrill and G. Mitu Gulati, '*Lipstick on a Pig': Specific Performance Clauses in Action*, __ Wisconsin L.R. __ (forthcoming, 2020), available at SSRN.

"Lipstick on a Pig": Specific Performance Clauses in Action, forthcoming in the Wisconsin Law Review, is a good example of how to pack a deep insight into a short essay. The authors—Theresa Arnold, Amanda Dixon, Hadar Tanne, Madison Sherrill and Mitu Gulati—have made a real contribution. That they were able to do so about an old topic—damages or injunctions in contract law—illustrates the continuing value of the Wisconsin-school tradition of looking at real contracts to teach us something about the state of doctrine.

As readers will be well-aware, we teach specific performance as a disfavored remedy, available rarely outside of the unique goods and real estate contexts. But, as the authors cogently show, this is a puzzle: the damages preference is both comparatively exceptional and theoretically hard to defend. It's also hard to know if it's a majoritarian default. The existing literature on the prevalence of specific performance opt-in clauses in contracts is sparse, being limited to Eisenberg and Miller's (2015) finding that lawyers drafted specific performance clauses in around 50% of a small sample of M&A clauses from 2002.

The author extend the Eisenberg and Miller analysis significantly. They hand-collect and code 1000 contracts from 2010-2019, randomly selected from the universe contained in the What's Market database on Westlaw set of deals from that time period, while balancing public deals and deals where at least one party was privately held.

Their empirical finding is striking: 85% of all deals contracted into specific performance. That number has increased slightly over the time period (particularly for private deals, where only 3 in 4 in in 2010 had such a clause but now greater than 9 in 10 do). The authors slice at this data in various ways (including the sort of deal, and rationale) without finding a particularly striking difference. Overall, sophisticated lawyers overwhelmingly prefer to contract into specific performance for breach of M&A deals.

The question is why? To begin to find out, the authors asked practitioners. As in previous work, these seasoned lawyers told stories. As one pointed out, when asked if what we're teaching in the 1L classroom is "wrong":

> I would not say that it is wrong. The law does prefer money damages. [But one learns how to get around that. To be granted the remedy] [o]ne has to pay homage to history, perform the right rituals. It is like saying at the front of contract that the parties acknowledge that there has been "full and adequate consideration." You are in the south, so you know the expression "putting lipstick on a pig."

The lawyers discussed the need for specific performance in light of the deal synergies. But, when pressed, their real concern was that that judges would not be comfortable with the kind of damage

numbers that a broken M&A transaction would entail—simply put, damages would never make them whole. Finally, many asserted that "Delaware was different," i.e., both thinking that the state's Chancery Court was open to enforcing specific performance, and the deals were likely to be litigated there.

Interestingly, Delaware's distinct approach is new: it appears to date from a 2001 opinion from then Vice Chancellor Leo Strine in the IBP/Tyson Merger. Both in the case, and in a series of talks given to M&A audiences afterwards, Strine welcomed the sellers and buyers alike to draft specific performance opt-ins, promising their swift enforcement in the Chancery Court. The authors posit that this welcome spurred adoption of clauses, which were thus revealed to be what practitioners wanted all along.

As the authors point out, the movement in Delaware (and, more slowly, New York) toward permitting specific performance in this important class of "service contracts" has implications for how we teach and think about remedies in contract law.

First, if it's true that specific performance isn't limited in practice to "unique goods" and "real estate" but rather is the preferred—and awarded—remedy in other classes of contract, we should ask some hard questions of what we teach in the 1L classroom. Rather than thinking of specific performance as a rare doctrine, we might want to consider if it is not, in fact, the rule in a large swath of litigated cases. And why not? Psychological research strongly suggests this is what even naïve parties prefer. The result would be that contract casebook authors should take more affirmative steps to find examples of the award of specific performance outside of the highly sentimental good cases one often sees.

We might also want to work on buttressing practice with a theory. One thing to note about the M&A context is that the request for specific performance is made against a firm. As VC Strine pointed out in IBP, though it's true that normally injunctions create monitoring concerns, firms can simply fire workers who don't like the order. In future work the authors might consider exploring the implications of this concept more generally. Might we consider limiting the preference against specific performance for services contracts to those with natural parties? Or is there something distinctive about the M&A context?

The authors only gesture at these ideas, but what they've given us, in a short and highly readable piece, is enough.

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