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STATUTORY CHANGES IN THE LAW OF RESCISSION IN CALIFORNIA

Prior to 1961, sections 1689 to 1691 of the California Civil Code provided for the rescission of a contract by the mutual consent of the parties or by a unilateral act of the party seeking the rescission. An action brought under these provisions was usually referred to as “rescission in pais” or an action to enforce a prior rescission. Former sections 3406 to 3408 of the Civil Code provided for the adjudication by the court of the rescission of a contract. This type of rescission is usually referred to as an action for rescission. The action for rescission was deemed primarily one in equity, while the action to enforce a prior rescission was an action at law based on the rights arising from a prior out-of-court rescission.

The dual system of rescission gave rise to considerable confusion since the courts had difficulty in distinguishing the two types of actions. There were both substantive and procedural differences between the two types of actions, and the rescinding party could seriously affect the rights of the defendant by the way he phrased the complaint. The most important of these rights was, and still is, the right to a jury trial. Since a jury trial can only be demanded as a matter of right in an action at law, the defendant could have been precluded from a jury trial if the complaint stated an action in equity for rescission. The type of action could also determine such matters as the availability of the provisional remedy of attachment and the jurisdiction of the trial court. Because of the difficulty of

1 Enacted 1872, repealed 1961.
4 Comment, Failure to Distinguish Between Actions at Law Based on Prior Rescissions and Suits in Equity to Rescind, 21 CALIF. L. REV. 130 (1933).
5 3 CAL. LAW REVISION COMM’N, REPORTS, RECOMMENDATIONS, & STUDIES D-6 (1961) [hereinafter cited as CAL. L. REVISION COMM’N].
7 The availability of attachment has been granted in actions to enforce a prior rescission because of the quasi-contractual nature of the action, but it has been denied in actions for rescission. McCall v. Superior Court, 1 Cal. 2d 527, 534, 36 P.2d 642, 645-46 (1934).
8 3 CAL. L. REVISION COMM’N D-28: “The superior court has exclusive jurisdiction of all actions respecting rescission where the amount in controversy exceeds $3,000. Municipal courts have jurisdiction over all rescission actions involving an amount in controversy not in excess of $3,000. Justice courts have jurisdiction concurrent with the municipal courts over all actions to enforce a rescission, other than those involving title to real property, where the amount in controversy does not exceed $500. . . . [W]hether the action
the courts in distinguishing the two types of actions, the California Legislature amended the procedures for the rescission of contracts in 1961.\(^9\) This note will explore these changes as they affect: (1) whether the action remaining is in law or in equity, (2) the requirement of a prior offer to restore the benefits received, and (3) the election of remedies doctrine as it applies to rescission.

**1961 Changes in the California Codes**

The 1961 amendments to the California Civil Code and Code of Civil Procedure followed the recommendations of the California Law Revision Commission.\(^10\) The legislature repealed sections 3406 to 3408 of the Civil Code leaving a single statutory type of rescission.\(^11\) Section 1689 of the Civil Code retains all its prior grounds for rescission, and was amended\(^12\) to include two additional grounds under subdivisions 5 and 6. These subdivisions provide that a party to a contract may rescind:

1. If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.
2. If the public interest will be prejudiced by permitting the contract to stand.

These grounds for rescission were previously available only under the repealed section 3406.\(^13\)

Section 1691, as amended, provides for a single notice and offer to restore procedure, and also provides that service of pleading can be substituted for notice or an offer to restore the benefits received.\(^14\) Section 1692 was added\(^15\) and provides that if the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which he may be entitled under the circumstances.

Section 1692 also states that “[a] claim for damages is not inconsistent with a claim for relief based upon rescission.”\(^16\) Section 1693 was added to provide that relief based on rescission shall not be denied because of a delay in giving notice of the rescission or an offer to restore the benefits received unless the other party has been substantially damaged by the delay. Section 1693 also permits the courts to render conditional judgments when it states, “but the court may make a tender of restoration a condition of its judgment.”\(^17\)

There were also several changes in the Code of Civil Procedure. The statute of limitations was set at 4 years for rescission of contracts in writing\(^18\) and 2 years for oral contracts.\(^19\) The statute of

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\(^9\) 3 CAL. L. REVISION COMM’N D-6.
\(^12\) CAL. Stats. 1961, ch. 589, § 1, at 1734.
\(^13\) CAL. Stats. 1953, ch. 588, § 1, at 1835.
\(^14\) See text accompanying notes 65-75 infra.
\(^15\) CAL. Stats. 1961, ch. 589, § 3, at 1734.
\(^16\) See text accompanying notes 77-92 infra.
\(^17\) See text accompanying notes 74-76 infra.
\(^18\) CAL. CODE CIV. PROC. § 337.
\(^19\) CAL. CODE CIV. PROC. § 339.
limitations begins to run in both statutes from the date the rescinding party gained his right to rescind. The Code of Civil Procedure was also amended to provide that an action brought pursuant to section 1692 of the Civil Code shall be deemed to be an action upon an implied contract for joinder and attachment purposes.

Paularena v. Superior Court is the major case construing these changes. Suit was brought by the purchasers of homes under land sale contracts. The action was based on a prior bona fide contract of rescission, and included an offer to restore the benefits received under the contract. While in possession of the property the plaintiffs made improvements on the property, and they asked for the value of the benefits conferred upon the defendant. The court concluded that the action was one at law and that a jury trial was required, however the reasoning seems unclear. Quoting from the California Law Revision Commission report, the court stated that "the right of the parties to a jury and the court in which the action must be brought will be determined by the nature of the substantive relief requested and not by the form of the complaint." The court construed "nature of the substantive relief requested" to mean whether the "gist of the action" would be determinable in an action at law or one in equity. Since the action was basically one for a money judgment the court concluded that it was an action at law. Although this determination was correct, the court implied that there still might be an action in equity for rescission. In order to determine whether an action in equity still exists it is necessary to analyze the historical basis of jurisdiction in rescission, the nature of the cause of action, and the specific amendments to the California Codes.

Paularena raises two other issues relating to the 1961 amendments that will be discussed in this note. It is not clear whether Paularena recognizes that California has abolished the requirement of a prior offer to restore the benefits received. The court said:

The bringing of this action, as well as the allegations contained therein, constituted compliance with the requirements that the party rescinding must give notice of rescission and an offer to restore the benefits received under the contract.

Paularena also recognizes the application of section 1692 to the allowance of consequential damages, and the language used would tend to reject the section's application to the election of remedies problem.

Action at Law or in Equity?

Historical Basis of Jurisdiction

Although California has but one form of action, and only one

20 CAL. CODE CIV. PROC. § 427.
21 CAL. CODE CIV. PROC. § 537.
23 Id. at 914, 42 Cal. Rptr. at 371.
24 Id. at 913, 42 Cal. Rptr. at 370. See text accompanying notes 49-60 infra.
25 Id. at 913, 42 Cal. Rptr. at 371.
26 Id. at 914, 42 Cal. Aptr. at 371.
27 Id. at 913, 42 Cal. Rptr. at 370.
28 Id. at 915-16, 42 Cal. Rptr. at 372. See text accompanying notes 77-92 infra.
The distinctions between actions at law and actions in equity still remain. The determination whether a particular action is one at law or in equity depends upon the common law as it existed at the time of its adoption in California, and the subsequent modifications which have taken place under California law.

Equity rendered decrees of rescission prior to the law courts. Equity jurisdiction in matters of fraud can be traced back to the very existence of the court of chancery. This jurisdiction was recognized as early as the reign of Henry VI, when chancery afforded a remedy for the recovery of land alleged to have been obtained by means of a forged deed. But the early law courts of England did not recognize that fraud and misrepresentation could affect the validity of a contract, and it was only by bringing an action of deceit on the case that fraud could be remedied. Hence equity jurisdiction in rescission cases initially arose because of the inadequacy of the remedy at law.

The law courts never considered themselves competent to enter decrees terminating contracts. Early in the 18th century the use of the action of indebitatus assumpsit arose to allow the plaintiff to recover at law the consideration that had been paid under the contract, but in the case of rescission the plaintiff had to show that the contract had already been terminated. The application of indebitatus assumpsit resulted in a curious situation where the payment of money was made pursuant to a contract but the repayment could not rest on the contract because it had ceased to exist. Repayment rested on the quasi-contractual obligation which arose from the prior out-of-court rescission.

When the law courts granted restitutionary relief, their jurisdiction in rescission cases became concurrent with that of the courts of equity. Although it is generally held that equity only has jurisdiction when there is no adequate remedy at law, the subsequent granting of relief by the law courts did not oust the jurisdiction originally assumed by the courts of equity. It is important to emphasize that the distinction developed at common law between an action in equity to rescind an existing contract and an action at law based upon a quasi-contractual obligation resulting from a prior termination of the contract. In 1872 California adopted the Field Code, and in the area of rescission it attempted to codify the com-

29 Philpott v. Superior Court, 1 Cal. 2d 512, 514, 36 P.2d 635, 636 (1934).
30 Id. at 515-16, 36 P.2d at 637.
33 8 id. at 67.
34 See generally R. Jackson, History of Quasi-Contract §§ 18, 21-23 (1936).
35 Id. § 23.
36 Id.
37 Id.
38 See generally 1 J. Pomeroy, Equity Jurisprudence § 175 (5th ed. S. Symons 1941).
39 Id. at 276.
40 Harrison, The First Half-Century of the California Code, 10 Calif. L. Rev. 185 (1922).
mon law as administered in other American jurisdictions.\textsuperscript{41}

**California Interpretation Prior to 1961**

Confusion developed in California both as to the requirement of a prior offer to restore the benefits received and to the basic nature of the action at law based on quasi-contract. The confusion was shown in the case of *Stone v. Superior Court*.\textsuperscript{42} In that case the plaintiff alleged both fraudulent representations and failure of consideration as grounds to enforce the prior rescission of a contract for the sale of stock. The complaint was in two counts, one to enforce a prior rescission and recover the consideration and the other for money had and received. The California Supreme Court held that the suit was basically one "sounding in fraud and deceit" and hence equitable in nature.\textsuperscript{43} The court in the *Stone* case confused the grounds for rescission with the requested relief, which was based on quasi-contract. By implication, the reasoning in the *Stone* case would hold that an action to enforce a rescission based on fraud is equitable, and yet retains the legal remedy for rescission based on all other grounds.

The leading cases of *Philpott v. Superior Court*\textsuperscript{44} and *McCall v. Superior Court*\textsuperscript{45} seemed to clarify the distinctions between the two types of actions. In an action to enforce a rescission based on fraud, the court in the *Philpott* case said:

> It is undoubtedly true that a litigant may invoke the power of a court of equity to effect a rescission which has not theretofore been made. This is especially provided for by Civil Code, sections 3406-3408, inclusive. But where the plaintiff himself has pursued the method provided by sections 1688-1691 of the Civil Code to effect a rescission of the contract he may come into a court of law for all the relief that court is competent to give, and in the instance where he merely asks for a return of the consideration parted with by reason of the fraud, mistake, failure of consideration or any other set of facts authorizing rescission, he is entitled to the action of assumpsit.\textsuperscript{46}

The court clearly recognized that an action based on an out-of-court rescission under sections 1689 to 1691 of the Civil Code was an action at law regardless of the grounds for the rescission. The *McCall* case went further and expressly overruled the *Stone* case.\textsuperscript{47} In *McCall* the plaintiff alleged a prior rescission based on fraud and joined that with a prayer for the ancillary equitable relief of an injunction. The court ruled that the action was still one at law in that the plaintiff was entitled to attachment based on the quasi-contractual obligations.\textsuperscript{48}

\textsuperscript{42} 214 Cal. 272, 4 P.2d 777 (1931).
\textsuperscript{43} Id. at 275, 4 P.2d at 779.
\textsuperscript{44} 1 Cal. 2d 512, 36 P.2d 635 (1934). See generally Annot., 95 A.L.R. 1000 (1935).
\textsuperscript{45} 1 Cal. 2d 527, 36 P.2d 642 (1934).
\textsuperscript{46} Id. at 523, 36 P.2d at 641.
\textsuperscript{47} Id. at 538, 36 P.2d at 647.
\textsuperscript{48} Id. at 538-39, 36 P.2d at 647-48.
Nature of the Relief Requested

The test used in *Paularena v. Superior Court* attempts to distinguish between the legal and equitable remedies based on the “nature of the substantive relief requested.” California has never recognized this distinction, but has afforded the rescinding party a complete election as to which remedy to pursue. For example, it is clear that where the rescinding party desired only an unconditional money judgment he could have proceeded by way of an action at law to enforce a rescission. And if more complete relief were desired, such as the restitution of a specific chattel, an accounting, or execution of particular documents to clear a cloud on the title to real property, the rescinding party had the right to proceed by way of an action in equity for rescission. In order to prove that the rescinding party had a complete election, it is necessary to show that he could have brought suit at law where the gist of the action was equitable and that he could have brought suit in equity where the gist of the action was legal.

California has permitted the rescinding party to bring an action at law coupled with prayers for “ancillary” equitable relief. The *McCall* case held that a request for the ancillary equitable remedy of cancellation did not prevent the action from being one at law to enforce a rescission. And in *Bennett v. Superior Court* the court held that the action was still one at law “regardless of the fact that the exercise of equitable powers of the court are also incidentally involved.” A request for “ancillary” equitable remedies did not make the legal remedy unavailable.

An equitable action for rescission could probably have been brought even though only an unconditional money judgment was sought by the rescinding party. Although equity will generally not assume jurisdiction if there is an adequate remedy at law, no case was found raising this specific issue in California rescission cases. But the cases tend to support the position that the rescinding party could have proceeded in equity and nothing in the language of sections 3406 to 3408 of the Civil Code could have been construed to mean that the equitable remedy was available only if the action to enforce a rescission was inadequate.

The California courts have made no distinction between the two

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49 231 Cal. App. 2d at 913, 42 Cal. Rptr. at 366. See text accompanying notes 24-26 supra.


52 1 Cal. 2d 527, 36 P.2d 642 (1934).


54 Id. at 161, 21 P.2d at 949.


types of actions based on the substantive relief requested.\footnote{57} The basic relief requested in both types of actions is the rescission of a contract and restoration to the position held prior to the contract. Pomeroy classifies the power of equity in rescission cases in the class of actions

which the legal procedure recognizes, but does not directly confer, and the beneficial results of which it obtains in an indirect manner. \ldots Here the remedy of cancellation is not expressly asked for, nor granted by the court of law, but all its effects are indirectly obtained in the legal action.\footnote{58}

The essential criterion the California courts have used to distinguish the two types of actions has been based on the form in which the plaintiff phrased his complaint.\footnote{59} The court has noted that, "Such words as 'equitable relief' and 'equitable action', found in court opinions, have only led to confusion."\footnote{60}

Only the Legal Remedy Remains

The legislature by repealing the procedure of judicial rescission under Civil Code sections 3406 to 3408 abolished the procedure that had previously been deemed equitable in nature. The changes made in the procedure to enforce a prior rescission do not change the essential character from being one at law based on quasi-contract. The changes in the Code of Civil Procedure emphasize this point. Section 427 of the Code of Civil Procedure now specifies that an action based on rescission shall be deemed an action on implied contract for joinder purposes, and section 537 provides for attachment in actions brought under section 1692 of the Civil Code.

The goals of the California Law Revision Commission were to eliminate the dual system of rescission and to establish a single simplified system.\footnote{61} The Commission stated that a jury trial should be provided in all cases of rescission.\footnote{62} This is in direct conflict with the portion of the Law Revision Commission's study which was quoted in \textit{Paularena}\footnote{63} which would determine the rights of the parties by the "nature of the substantive relief requested." It is true that "[t]he current code sections governing an action based upon rescission do not expressly declare whether it is in law or equity,"\footnote{64} but from an analysis of the quasi-contractual nature of the action to enforce a rescission, the repeal of the code provisions formerly deemed equitable in nature, and the overriding intent of the Revision Commission to establish a single simplified system, one may conclude that California has retained only the legal action to enforce a rescission.

\footnote{57} Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635 (1934).
\footnote{58} \textit{1 J. Pomeroy, Equity Jurisprudence} § 110 (5th ed. S. Symons 1941).
\footnote{59} See generally Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635 (1934).
\footnote{60} \textit{Id.} at 521, 36 P.2d at 640.
\footnote{61} 3 \textit{CAL. LAW REV. COM'MN D-23}.
\footnote{62} \textit{Id.}
\footnote{63} See text accompanying note 24 \textit{supra}.
Offer to Restore the Benefits Received

In some jurisdictions a distinction is made between the two types of actions, based on the requirement of a prior offer to restore the benefits received. Actions to enforce a rescission can only be brought if there is an offer to restore the benefits received prior to the commencement of the action. However, in actions for rescission the mere bringing of the suit is deemed to be notice of the rescission and offer to restore. But prior to the amendments under discussion, California failed to distinguish the two types of actions on this basis and had required, with certain exceptions, the prior notice or offer to restore in both types of actions.

Although dicta in Pauarena and the recent case of Modoc Mineral & Oil Co. v. Cal-Vada Drilling & Exploration Co. imply that California has retained the requirement, this implication is inaccurate. Following the lead of New York, Civil Code section 1691 was amended to read:

When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.

This language seems straightforward, and the New York courts, construing a similar provision, have come to the conclusion that the prior offer to restore is no longer required in either type of action. It was also the intent of the California Law Revision Commission to abolish the requirement.

Once the notice and offer to restore procedure was abolished it became desirable to give the law court the power to grant conditional judgments in order to protect the rights of the defendant. For example, in an action to enforce a rescission where the title to real property had been transferred, the defendant might have been required to proceed in another action to obtain a reconveyance of the property. But if the action was for rescission in equity, the court would have had the power to protect the defendant by making the judg-

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65 E.g., Annot., 95 A.L.R. 1000 (1934); 1941 N.Y. LAW REVISION COMM’N, REPORTS 283.
66 Id. at 1003.
67 Id. at 1010.
68 Crouch v. Wilson, 183 Cal. 576, 191 P. 916 (1920); Kelley v. Owens, 120 Cal. 502, 507, 47 P. 369, 370 (1898). Although many exceptions developed to the requirement of a prior offer to restore in actions for rescission, they are not important in the light of the recent amendment to section 1691.
69 231 Cal. App. 2d at 913, 42 Cal. Rptr. at 370. See text accompanying note 27 supra.
71 3 CAL. L. REVISION COMM’N D-34; see N.Y. CIV. PRAC. § 3004 (McKinney 1963).
73 3 CAL. L. REVISION COMM’N D-34: “It would seem, therefore, that the most expeditious and equitable solution to the uncertainties arising out of the restoration requirement would be to do away with the requirement of a pre-judgment offer to restore . . . .”
ment conditional upon the plaintiff's restoring the consideration.\textsuperscript{74}

Although conditional judgments are generally equitable devices, the California courts have effectively granted conditional decrees in actions to enforce a rescission by the rather dubious method of denying the defendant's motion for a new trial on the condition that the plaintiff tender the consideration received.\textsuperscript{75} To eliminate the necessity for this procedure Civil Code section 1693 was added to provide for conditional judgments regardless of the relief requested.\textsuperscript{76}

Election of Remedies

The doctrine of election of remedies usually refers to cases where a person has two inconsistent remedies available, and at some time before judgment he is required to elect the one he desires to pursue.\textsuperscript{77} The cases of concern here result from the choice of whether to seek damages based upon the contract or to disaffirm the contract and seek rescission. Once the election is made the plaintiff is barred from bringing the other action.\textsuperscript{78} For an election it must be shown that the plaintiff intended to affirm the contract.\textsuperscript{79} The doctrine has been applied in California to cases where the plaintiff has first elected to affirm the contract and then later decides to rescind,\textsuperscript{80} but it has not been applied to cases where the plaintiff first attempts unsuccessfully to disaffirm the contract and then later seeks damages pursuant to the contract.\textsuperscript{81}

Paragraph three of section 1692 states:

A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery.

At first glance it would appear that this section is concerned with the problem of election of remedies, but a more careful analysis indicates that this section was intended only to allow the court to grant consequential damages in addition to restitution.

A similar statute was adopted in New York in 1941.\textsuperscript{82} The statute was designed\textsuperscript{83} to overcome the hardship brought about by the application of the election of remedies doctrine in the case of \textit{Weigel v. Cook}.\textsuperscript{84} In that case the defendant, by fraudulent statements, induced the plaintiff to purchase certain land. Prior to the discovery


\textsuperscript{75} E.g., Engle v. Farrell, 75 Cal. App. 2d 612, 171 P.2d 588 (1946).

\textsuperscript{76} 3 CAL. L. REVISION COMM’N D-34.

\textsuperscript{77} Note, Election of Remedies: The California Basis, 19 Hastings L.J. 1233 (1968).

\textsuperscript{78} Lenard v. Edmonds, 151 Cal. App. 2d 764, 768, 312 P.2d 308, 310 (1957).

\textsuperscript{79} Montgomery v. McLaury, 143 Cal. 83, 76 P. 964 (1904).

\textsuperscript{80} Id.


\textsuperscript{82} N.Y. Civ. Prac. § 3002(e) (McKinney 1963).

\textsuperscript{83} 1941 N.Y. LAW REVISION COMM’N, REPORTS 285, 287.

\textsuperscript{84} 287 N.Y. 136, 142 N.E. 444 (1923).
of the fraud, the plaintiff expended money for the improvement of the land. In an action for rescission the plaintiff asked for restitution of the consideration he had paid the defendant plus the amount expended on the improvements. The court held that the plaintiff was bound to make an election—either to rescind the contract and seek restitution or to seek damages.85. The decision misapplies the doctrine of election of remedies since there is nothing inconsistent with disaffirming the contract and also seeking damages incurred in reliance on the fraudulent representations. Consequential damages are not based on the contract but are merely designed to return the plaintiff to the position he was in prior to the contract.86 The New York cases since the adoption of the statute have all been concerned with the issue of allowing consequential damages.87

Paulerena v. Superior Court88 recognized the election of remedies doctrine as it applies to rescission. The court seemed to reject the application of section 1692 to this problem when they said:

These statutory provisions do not purport to declare that a claim for damages based upon an affirmation of the contract is not inconsistent with a claim for damages based upon a rescission of the contract. To the contrary they recognize that any relief awarded "shall not include duplicate or inconsistent items of recovery," and thus eliminate an award of damages based upon inconsistent causes of action.89

It must be concluded that the California Law Revision Commission was concerned only with the issue of consequential damages, and two recent cases have applied section 1692 to allow such damages.90 One can assume that if the Law Revision Commission was referring to the complicated doctrine of election of remedies they would have presented a full and detailed discussion. In the only possible reference to this provision in their study, the Commission stated that the purpose of the legislation was "[t]o dispel any doubt concerning the scope of relief that may be given in an action to enforce rescission, the statute should also indicate that the court may award consequential damages as well as a restoration of any consideration that has been given."91 But it does not seem that this section of the code was necessary since the California courts have never adopted the New York doctrine of Weigel v. Cook. California courts had previously given the plaintiff all the relief necessary to return him to his position prior to the formation of the contract.92

Conclusion

By the 1961 amendments to the law of rescission, California has retained only the legal remedy of rescission. Thus a jury trial can

85 Id. at 141, 142 N.E. at 446.
86 See 3 S. Williston, CONTRACTS §§ 1478-79 (1924).
89 Id. at 915-16, 42 Cal. Rptr. at 372; see Doctor v. Lackenridge Constr. Co., 252 A.C.A. 788, 60 Cal. Rptr. 824 (1967).
91 3 CAL. L. REVISION COMM’N D-7-8.
be demanded as a matter of right in all rescission actions. The amendments have abolished the requirement of a prior offer to restore the benefits received, and allow the law courts the power to grant conditional judgments in rescission cases. Section 1692 reinforces the position that the plaintiff can obtain complete relief in one action by permitting consequential damages in addition to restitution.

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