Coming to a Better Understanding of Remedies

Author : Marin K. Levy

Date : July 15, 2014

Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 **Duke L. J.** 1091 (2014).

Remedies is a vital, yet sometimes overlooked, area of study and scholarship. So often with law, we gravitate toward the substantive fields—constitutional law, property, contracts, torts, and the like. In academic writing and course offerings, there is less of a tendency to step back and consider the commonalities between these subjects.

Remedies is trans-substantive almost by definition. It looks across all areas of law and asks, once a liability or right has been established, now what? Is the victim, be she of trespass or breach of contract or malpractice, entitled to damages? If so, how much? Should she receive an injunction or declaratory relief or both? The goal of the field is to better understand how it is that our legal system can and should make aggrieved parties whole. Sam Bray's *The Myth of the Mild Declaratory Judgment* deftly brings us closer to that goal.

As Bray reminds us at the outset ofthe article, plaintiffs seeking prospective relief often request an injunction, a declaratory judgment, or both. Bray is prompted by this remedial fork in the road to ask a critical question: how are injunctive and declaratory relief different? The traditional answer is that declaratory judgments are "milder" than injunctions. The "mildness thesis," as Bray calls it, has been consistently advanced by the Supreme Court and embraced by several prominent scholars. The thesis has intuitive appeal. Because an injunction is a court order, a violation of which can result in a sanction, it seems "stronger" than the declaratory judgment, which only sets out the relative legal positions of the parties.

But Bray pushes beyond and unpacks these standard answers, ultimately finding them wanting. Beginning with the command rationale, Bray examines several scenarios in which a party would likely seek a declaratory judgment. For example, consider an inventor with a product design that she fears infringes another's patent; since she is concerned about being sued for patent infringement, she brings a declaratory judgment action to determine if the infringed patent is valid. As Bray shows, that a declaratory judgment lacks a command will ultimately be irrelevant in this scenario. If the inventor wins her suit, she can continue with her product design without fear of future suit or liability for patent infringement; if she loses, it is likely in her interest to cease work on the product (as liability for patent infringement involves treble damages). Accordingly, in this, and other scenarios in which parties commonly seek declaratory relief, the lack of a command is immaterial and therefore does not render declaratory relief a "milder" remedy.

Turning to the sanction rationale, Bray once more counters the standard justification for preferring one remedy to the other. While Bray notes that declaratory judgments cannot themselves be the basis for contempt proceedings, the potential for contempt is often irrelevant in the instances in which such judgments are sought. Consider the inventor above: if she loses her suit and can be sued for patent infringement for continuing work on her product, whether she can be held in contempt is just as immaterial as whether the court's judgment carries with it a command. In both instances, as Bray points out, what motivated the plaintiff to seek a declaratory judgment in the first place—the desire to avoid liability—is the true deterrent. Bray acknowledges that the incentives are different for losing defendants,

but convincingly shows that these parties, too, will likely not care about immediate sanctions. Because the Declaratory Judgment Act expressly allows plaintiffs who win declaratory relief to seek injunctive relief either simultaneously or subsequently, any losing defendant will know that the potential for sanctions is only one step away. As Bray concludes, there is no reason to think that the declaratory judgment is any less coercive—and therefore any more mild—than the injunction in actual practice.

After persuasively rejecting the mildness thesis as the difference between declaratory judgments and injunctions, Bray offers two other differences between the remedies: the ability of the court to manage the parties and the timing of the relief. On the first point, Bray clearly delineates how a court can manage parties with an injunction, crafting more detailed orders, responding to difficulties in implementation, and if necessary, responding to any violations. This managerial feature of injunctive relief is what sets it apart from declaratory relief. On the second point, Bray notes that it is theoretically possible to obtain a declaratory judgment earlier than an injunction in the life of a dispute. This is allegedly because an action in which a plaintiff seeks declaratory relief need only satisfy the constitutional ripeness requirement, whereas an action for injunctive relief must also satisfy the requirement of equitable ripeness. As such, Bray writes that an injunction can be understood as a "fruit that sometimes ripens more slowly" than the declaratory judgment. Though as Bray himself cautions, it is difficult to pinpoint the exact moment in the lifecycle of a case when declaratory but not injunctive relief would be available to a plaintiff.

In short, Bray not only persuasively takes down the mildness thesis as the distinction between declaratory judgments and injunctions, but replaces it with a new thesis—one that focuses on the managerial and timing aspects of these forms of relief. Bray therefore makes a great contribution to the literature and also to practice. It shows parties and courts that the primary rationale given for preferring one remedy to another is, in fact, a fiction. If one is choosing between remedies, the decision should be based on the relative need for management and, to a lesser extent, on concerns about timing.

In all, Bray clarifies the differences between two of the most important remedies. He does so by considering how parties use these remedies in the real world, and by considering these remedies together, across multiple areas of law. As such, Bray successfully makes the case not only for new distinctions between declaratory relief and injunctive relief, but also for the field of Remedies more generally. With scholars such as Bray in the field, one can look forward to what we will learn next about how courts can and should make injured parties whole.

Cite as: Marin K. Levy, *Coming to a Better Understanding of Remedies*, JOTWELL (July 15, 2014) (reviewing Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 **Duke L. J.** 1091 (2014)), https://courtslaw.jotwell.com/coming-to-a-better-understanding-of-remedies/.