REMEDIES

DEAN MICHAEL WATERSTONE
HOW TO SPOT A REMEDIES QUESTION

The “call-of-the-question” line will do one of three things:

One: Use the word “remedies”

Two: Use the word “relief”

Three: State a specific remedy

   e.g., specific performance, injunction.

Bar Exam Tip: The remedies issues will be incorporated into a substantive law fact pattern. The most relevant areas for bar exam purposes are torts and contracts (and the related property areas).

The question may be a pure remedies question or a crossover. The “tip-off” will be found in how the call-of-the-question lines are worded.

The remedies issues are also a lock to be tested on the Multistate Bar Exam.
3 STEPS TO APPROACH A REMEDIES QUESTION

STEP 1

**Determine** what substantive area of law is involved

and

**What** specific type of problem is at issue within that substantive area, i.e., what tort or what type of contract.

*Bar Exam Tip:* The fact pattern may be susceptible to more than one substantive law interpretation, e.g., torts and contracts.

Hypo: P is real estate developer with dream parcel, believes he can sell condos for big money; enters into construction contract where contractor agrees to use high quality materials, but contractor is crook and intentionally uses substandard materials. Could be contract and tort.

STEP 2

**Make sure** that P is going to win case.

e.g., a tort committed, a contract breached.

*Bar Exam Tip:* On crossover questions P will always have a good case.

STEP 3

**Determine** what remedies require discussion.

This must be done in the right chronological order as follows:

**FIRST:** legal Remedies

**SECOND:** restitutionary Remedies

(2 categories: legal restitutionary & equitable restitutionary)

**THIRD:** equitable Remedies
THE TORT REMEDIES

1. THE LEGAL REMEDIES

   Damages

2. RESTITUTIONARY REMEDIES

   A. LEGAL RESTITUTIONARY REMEDIES

      Restitutionary damages
      Replevin
      Ejectment

   B. EQUITABLE RESTITUTIONARY REMEDIES

      Constructive trusts/
      Equitable liens

3. EQUITABLE REMEDIES

   Injunctive relief

LEGAL REMEDIES (TORTS): DAMAGES

**Definition:** Defendant is ordered to pay money to plaintiff.
Three types: (i) compensatory (ii) nominal (iii) punitive
FIRST TYPE OF DAMAGES: COMPENSATORY

BASIC CONCEPT

These are based on the damage to the plaintiff. (They put the injured party in the position he/she would have been in had the injury not occurred.)

4 REQUIREMENTS CHECKLIST

1st) CAUSATION
This refers to actual causation. (The “but for” test)

2nd) FORESEEABILITY
This refers to proximate causation. (The injury must have been foreseeable at the time of the tortious act.)

3rd) CERTAINTY
Damages cannot be too speculative.

BAR EXAM TIPS

Tip 1: Past losses have to be established with more certainty than future losses.

Tip 2: A “historical” record that helps provide certainty.
X: old vs. new business.

Hypo: Defendant causes plaintiff’s restaurant to burn to the ground. Restaurant has been in business for three years vs. three days.

Tip 3: For future damages, plaintiff must show that they are more likely to happen than not.
This is the “all or nothing” rule.

Hypo: Injured plaintiff is an outstanding undergraduate student who has been accepted to law school. Basis of future lost income calculation?
P argues that more likely than not would succeed in law school.

4th) UNAVOIDABILITY

Plaintiff must take reasonable steps to mitigate the damages.

Hypo: Plaintiff injured in car accident. What should plaintiff do?
Go to doctor, not wait three weeks.
COMPENSATORY DAMAGES – PARTICULAR PROBLEM AREAS: PERSONAL INJURY TORTS

I. THE “CERTAINTY” RULES:

ECONOMIC LOSSES (SPECIAL DAMAGES)

X: Medical Expenses/Lost Earnings

Basic certainty rules apply here, i.e., calculation must be with sufficient certainty.

Vs. NON-ECONOMIC LOSSES (GENERAL DAMAGES)

X: Pain and Suffering, Permanent Disfigurement

Basic certainty rules do not apply here. The jury may award any amount it wishes subject to proper instructions.

II. FORM OF JUDGMENT PAYMENT

The award must be a single, lump sum payment. Installment payments are not allowed.

2 “CALCULATION” ITEMS:

Calculation Item 1: The award must be discounted to present value.

Calculation Item 2: Inflation is not taken into account. (Exception - under the more modern view it is.)

Write: “The judgment must be a single lump sum payment that will be discounted to present value without taking inflation into account (except under the modern rule).”
SECOND TYPE OF DAMAGES: NOMINAL

BASIC CONCEPT

These are awarded where **plaintiff** has **no actual injury**. They serve to establish or to vindicate the plaintiff's rights.

Hypo: Defendant regularly walks across dirt road on plaintiff’s land to get to a bus. P bothered, but no actual injury. But can lead to easement, so P wants to establish rights.

THIRD TYPE OF DAMAGES: PUNITIVE

BASIC CONCEPT

These are awarded to **punish the defendant**.

THE THREE RULES

1st RULE: In order to get punitive damages, plaintiff must have **first** been awarded compensatory or **nominal** damages.

Note: Punitive damages can also be attached to **restitutionary** changes.

2nd RULE: In order to get punitive damages, defendant’s type **fault** must be greater than negligence.

3rd RULE: Generally, punitive damages are awarded in an amount **relatively proportionate** to actual damages. (As actual damages go up, punitive damages go up.) U.S. Supreme Court would limit punitive damages to a **single digit** multiple of actual damages unless conduct facts are extreme.
THE RESTITUTIONARY REMEDIES

BASIC CONCEPT

These remedies are based on the theory that the defendant should not be unjustly enriched.

RESTITUTIONARY DAMAGES:
“LEGAL” RESTITUTIONARY REMEDY

BASIC CONCEPT

These are based on the benefit to the defendant. And the amount is calculated based on the value of the benefit.

Contrast this with compensatory damages which focus on the injury to the plaintiff.

“COMPENSATORY” vs. “RESTITUTIONARY” DAMAGES

THREE BAR EXAM FACT PATTERN POSSIBILITIES

1) Only compensatory damages are available.

Hypo: Defendant destroys plaintiff’s car. Remedy? Value of the car

2) Only restitutionary damages are available.

Hypo: P buys land (doesn’t use) with private dirt road through middle. Defendant manufacturing company drives trucks across road on plaintiff’s vacant property to get to railroad reducing trip from ten miles to one-half mile. Remedy? No injury to P; benefit to D

Note: Nominal damages might technically be available on these facts.

3) Both compensatory and restitutionary damages are available.

Hypo: Defendant steals your machine to use in its business. Remedy? P injured—need to make whole D benefited—unjust enrichment

Can you be awarded both? No
Bar Exam Tip: How to Write Your Answer:

Write about both compensatory and restitutionary damages. Give plaintiff the larger sum.

Bar Exam Tip: Punitive damages can be attached to restitutionary damages as long as the underlying cause of action is in tort.

REPLEVIN: “LEGAL” RESTITUTIONARY REMEDY

Definition: Plaintiff recovers possession of specific personal property.

Replevin requires a 2 part test

Establish that: (1) The plaintiff has a right to possession.
(2) There is a wrongful withholding by defendant.

MOST LIKELY BAR EXAM ISSUE:

“Timing” of Recovery
Plaintiff can recover the chattel before the trial.

Bar Exam Tip: If this is in issue, mention in your answer that:

(i) Plaintiff will have to post a bond.

(ii) Defendant can defeat an immediate recovery by posting a redelivery bond. (The defendant can then keep the chattel until after the trial.)

Note: The sheriff repossesses the property for plaintiff.

Bar Exam Tip: Replevin is almost always coupled with damages (compensatory or restitutionary) for lost use or benefit to the defendant during the time of detention.
EJECTMENT: “LEGAL” RESTITUTIONARY REMEDY

**Definition:** Plaintiff recovers possession of specific real property.

Ejectment requires a 2 part test.

Establish that:  
1. The plaintiff has a right to possession.
2. There is a wrongful withholding by defendant.

**MOST LIKELY BAR EXAM ISSUE:**

**Status of Defendant**

Ejectment is available only against defendant who has possession of property.

Hypo: Defendant crosses plaintiff’s lawn on way to bus every day.

No ejectment—D has no possession.

Hypo: (i) Defendant is adverse possessor. (ii) Holdover tenant at expiration of lease term.

Ejectment available

**Note:** The sheriff ejects defendant from property.

**Bar Exam Tip:** Ejectment is almost always coupled with damages (compensatory or restitutinary) for lost use or benefit to defendant during time of wrongful withholding.

CONSTRUCTIVE TRUSTS AND EQUITABLE LIENS:  
“EQUITABLE” RESTITUTIONARY REMEDIES

**Definitions:**

**Constructive Trust:** Imposed on improperly acquired property to which defendant has title. Defendant serves as “trustee” and must return the property to the plaintiff.

**Equitable Lien:** Imposed on improperly acquired property to which defendant has title. Property will be subject to an immediate court-directed sale. The monies received go to the plaintiff. If the proceeds of the sale are less than the fair market value of the property when it was taken, a deficiency judgment will issue for the difference and can be used against defendant’s other assets.

**Bar Exam Tip:** Please note that constructive trusts and equitable liens can be used only when the fact pattern indicates that the defendant has title to the property.
Hypo: Doofus improperly acquired title to Bowater’s property. Doofus is now insolvent.

THE RULES

RULE 1: Inadequate legal remedy alternative.

Basic Alternative: money damages.

The 2 Reasons:

(i) Defendant is insolvent; or

(ii) For constructive trusts: The property is unique.

RULE 2: Tracing is allowed.

Hypo: Doofus sold the property for $50,000, which he put in a bank. What can Bowater do?

Trace money right into bank

RULE 3: Bona fide purchasers prevail over plaintiff.

Hypo: Doofus sold the property to Lulu, a BFP. Bowater wants to have a constructive trust imposed on the property. Can he?

No

RULE 4: Plaintiff will prevail over unsecured creditors.

Note: To the extent you have a deficiency judgment in connection with an equitable lien, you stand on equal footing with other unsecured creditors.
(i) If the property value subsequent to taking goes up, go with a constructive trust.

(ii) If the property value subsequent to taking goes down, go with an equitable lien.

(iii) When defendant’s property cannot be traced solely to plaintiff’s property, only an equitable lien is available.

Hypo: Doofus misappropriates money and uses it to remodel his house. Since title to the home was not obtained by use of the money, the proper remedy is an equitable lien on it.
THE EQUITABLE REMEDIES

INJUNCTIVE RELIEF: “EQUITABLE” REMEDY

**Definition:** Defendant is ordered (enjoined) to do or refrain from doing something.

**THRESHOLD INQUIRY**

Determine if you’re required to discuss “permanent” or “temporary/preliminary” injunctive relief.

- **Permanent Injunction:** Issued after full trial on merits.
- **Temporary (Preliminary, Interlocutory) Injunction:** Issued pending trial on merits.

**Bar Exam Tip:** If in doubt: Go with a permanent injunction.

**TEMPORARY INJUNCTIVE RELIEF**

Temporary/preliminary injunctive relief requires a 2-part test.

**PART 1**

Establish that there is irreparable injury.

**Exam Fact Discussion:** Facts must be discussed in a time frame context. In short, one must show that he or she will incur irreparable injury while waiting for a full trial on the merits – and that’s why he or she needs relief now.

**Note:** Balancing of Hardships: Irreparable injury is weighed against any hardship defendant will suffer if a temporary injunction is granted.
PART 2

Establish plaintiff’s likelihood of success.
(Plaintiff must establish this “probability.”)

**Bar Exam Tip: Bond Requirement:** If a preliminary injunction is sought on the exam: Mention that the court should impose a bond requirement on plaintiff to reimburse defendant if the injunction injures him/her and the plaintiff does not succeed.

**Bar Exam Writing Tip:** Same structure for Replevin and Ejectment.

**TEMPORARY/PRELIMINARY INJUNCTION: MODEL BAR EXAM ANSWER**

**Temporary Injunction:** In issue is whether plaintiff can obtain temporary/preliminary injunctive relief. To do so, plaintiff must meet a 2-part test:

(i) **Irreparable Injury:** (Discuss facts in time-frame context; balance hardships)
(ii) **Likelihood of Success:** (Discuss the “probability.” Impose bond requirement.)

**CONTRAST – TEMPORARY RESTRAINING ORDER WITH TYPICAL TEMPORARY INJUNCTION**

**Temporary Restraining Order (TRO):** Issued pending a hearing to determine whether preliminary injunction should issue.

**The Test for Obtaining a TRO:** Identical to that for preliminary injunction.

**TRO proceeding can be ex parte.** Thus

(i) **Notice:** not required.

(ii) **Adversarial Proceeding:** not required.

**Note:** Please note that even though a TRO can be issued ex parte, if there’s an opportunity to give the defendant notice and a chance to appear and contest the injunction, a good faith effort must be made to do so.

**Note:** TROs are limited to 10 days (14 in federal court). Must have regular temporary injunction hearing by then.
PERMANENT INJUNCTIVE RELIEF

THE PERMANENT INJUNCTION: 4-PART CHECKLIST

FIRST: INADEQUATE LEGAL REMEDY ALTERNATIVE

THE 3 LEGAL REMEDIES ALTERNATIVES

(1) REPLEVIN
(2) EJECTMENT
(3) MONEY DAMAGES

1st ALTERNATIVE: REPLEVIN
Q: Why Would It Be Inadequate? (2 Reasons)

(i) The sheriff may not be able to recover it, e.g., find or identify the chattel.

(ii) Defendant can file a redelivery bond (and then, e.g., run off with or destroy chattel in the interim).

2nd ALTERNATIVE: EJECTMENT
Q: Why Would It Be Inadequate?

The sheriff may refuse to act.

Hypo: Defendant builds structure which slightly encroaches on plaintiff’s property. Will sheriff rip it down? No

3rd ALTERNATIVE: MONEY DAMAGES
Q: Why Would They Be Inadequate? (4 Reasons)

(i) They are too speculative.

(ii) Defendant is insolvent.

(iii) Irreparable injury.
Hypo: Factory emits clouds of smoke containing metallic particles harmful to the lungs. Are money damages adequate? No

(iv) Avoiding a multiplicity of actions.

**Bar Exam Tip: How to Spot the Fact Pattern:** They will tell you there has been:

Prior history of litigation between the parties.

**Bar Exam Tip:** It is much easier to show money damages are inadequate if plaintiff is protecting an interest in land, e.g., injunctive relief against nuisance, trespass to land.
SECOND: FEASIBILITY OF ENFORCEMENT

CHARACTERIZATION NOTE: 2 TYPES OF INJUNCTIONS

(1) **Negative Injunction**: Ordering defendant to stop doing what doing

(2) **Mandatory Injunction**: Ordering defendant to affirmatively do something

**Rules:**

(1) **Negative Injunction**: There is **no** enforcement problem.

(2) **Mandatory Injunction**: There **may be** an enforcement problem based on (i) the difficulty of supervision, or (ii) concern with effectively ensuring compliance.

THE 2 EXAM FAVORITE “MANDATORY” INJUNCTION FACT PATTERNS

(1) Act involves the application of **great taste, skill, or judgment**.

   **Bar Exam Answer**: Injunction denied.

(2) An **out-of-state** act is required.

   **Bar Exam Answer**:

   (i) **Resident** Defendant: Injunction **granted**.

   (ii) **Non-Resident** Defendant: Injunction **denied**.
THIRD: BALANCING OF HARDSHIPS

Plaintiff’s *benefit* vs. Defendant’s *hardship* if relief granted.

**THE 4 BALANCING OF HARDSHIPS RULES**

1) There must be *gross disparity* between defendant’s detriment and plaintiff’s benefit.

2) Even then, there will be no balancing if defendant’s conduct was *willful*.

**Hypo:** Doofus informs Bowater that he’s going to build a building going up to their joint boundary line. Bowater returns from vacation to discover that, due to Doofus’s willful conduct, the now completed building encroaches slightly onto his property. What results?
No balancing of hardships.

3) If you decide to balance hardships, in whole or in part, consider awarding plaintiff *money damages*.

4) Hardship to the *public* is also taken into account.

**Hypo:** A factory spews out clouds of smoke and fumes. There is no cost-effective way to sufficiently abate this nuisance. An injunction would force the factory to close down. It is located several miles from a small town and employs 500 persons. The only nearby structure is Plaintiff’s small home. Result?

First: Discuss the defendant’s hardship.

Second: Discuss the public’s hardship.

Third: **Deny** the injunction.

Fourth: Award the plaintiff *money damages*.

**Bar Exam Tip:** Balancing of hardships defense is *almost always* a primary discussion item when the tort is *nuisance* or *trespass to land*.
FOURTH: DEFENSES

A. UNCLEAN HANDS

*The Bar Exam Trick Fact Pattern:* bad guy plaintiff.

*The Rule:* The “unclean hands” defense is available **only** if plaintiff’s alleged improper conduct is related to the lawsuit.

B. LACHES

Preliminary Note: Laches/Statute of Limitations

(a) Laches is a “running of a period of time” defense. Unlike the statute of limitations, however, which involves the mere passage of time, laches is concerned with the *effect* of the passage of time.

(b) The laches time period will **never** be greater than the statute of limitations time period. (No need for laches—the statute will bar the claim.)

THE 3 LACHES ISSUES

1) **When does the “clock start to run”?**

When plaintiff learns of the injury.

2) **When does the delay cut off the right to relief?**

When it has been both unreasonable and prejudicial to the defendant.

*Hypo:* Same as balancing of hardships hypo above, where structure encroaches plaintiff’s land. Plaintiff is home the entire time and watches construction proceed. Delay cuts off right to equitable relief; deny injunction.

3) **If laches applies, consider:**

Awarding P money damages.
C. **IMPOSSIBILITY**

Impossible for defendant to carry out terms of injunction.

D. **FREE SPEECH**

If the tort is *defamation* or a *privacy publication branch* tort (false lights, private facts), your best exam answer is:

Injunction denied based on free speech grounds.

**PERMANENT INJUNCTION “MEMORIZER”**

I’m Feeling Bold & Determined!

1. _______I_______  Inadequate Legal Remedy
2. _______F_______  Feasibility of Enforcement
3. _______B_______  Balancing of Hardships
4. _______D_______  Defenses
MISCELLANEOUS INJUNCTIVE RELIEF PROBLEMS

A. CRIMES:

Equity will not enjoin a crime.
(Check to see if the conduct could be characterized as a tort.)

B. WHO WILL BE BOUND BY AN INJUNCTION?

(1) Parties - Defendant
(2) Employees and agents acting with notice
(3) Others acting “in concert” with notice

Hypo: Manufacturer makes Lebron James t-shirts without James’s permission and is enjoined from doing so. Vendor at stadium buys t-shirts for resale and continues selling them even though he knows of the injunction. Result? Bound by injunction

C. “ERRONEOUS” INJUNCTION

If there is an erroneous injunction, does one have to obey it? Yes

Therefore, what one must do is have it modified or resolved.

D. CONTEMPT (This issues for disobeyance of a court order.)

Civil Contempt (to coerce)

Money (Fine)

Imprisonment: Defendant “holds keys” to the jailhouse, i.e., can get out by agreeing to comply.

Criminal Contempt (to punish)

Money (Fine)

Imprisonment: Cannot get out of prison. Remain for set amount of time.

Bar Exam Tip: Injunctive relief is almost always coupled with damages for injuries incurred in the time period prior to obtaining the injunction.
SPECIFIC TORT FACT PATTERN POSSIBILITIES

EXAMSMANSHIP: GENERAL THOUGHTS

2 SETS OF BASIC BAR EXAM QUESTIONS

1st SET:

1) Has/is **plaintiff** been/being injured?
2) Has **defendant** derived a **benefit**?
3) Does **plaintiff** want the property **returned**?
4) Is **plaintiff** still being **harmed**?

*Bar Exam Note:* Remember, these questions are **not** mutually exclusive.

2nd SET:

1) Do the wrongs relate to the **past** only? If so, think about damages.
2) Do the wrongs relate to the **future** only? Prospective—replevin, ejectment, INJ relief.
3) Do the wrongs relate to **both** the **past** and the **future**?
SPECIFIC TORTS: POTENTIALLY AVAILABLE REMEDIES
THE “CHEAT SHEET”

PROPERTY TORTS: PERSONAL/REAL

PERSONAL PROPERTY TORTS

THE 3 BASIC BAR EXAM FACT PATTERNS

1) DESTROYED PROPERTY
   AVAILABLE REMEDIES
   (i) Compensatory Damages

2) DAMAGED PROPERTY
   AVAILABLE REMEDIES
   (i) Compensatory Damages

*3) DISPOSSESSION
   AVAILABLE REMEDIES
   (i) Compensatory Damages
   (ii) Restitutionary Damages
       If defendant benefits
   (iii) Replevin
   (iv) Mandatory Injunction
       If chattel unique and damages and replevin won’t work
   (v) Constructive Trusts/Equitable Liens
       Particularly if defendant is insolvent and/or “tracing” facts are involved
   (vi) Self-Help
       Reasonable force to recapture
REAL PROPERTY TORTS

THE 5 BASIC BAR EXAM FACT PATTERNS: (Encroachment & Nuisance most common)

1) SIMPLE TRESPASS
AVAILABLE REMEDIES
(i) Nominal Damages
(ii) Restitutionary Damages
(iii) Injunction: Avoiding multiplicity of actions

2) DESTRUCTION/DAMAGE OF REALTY
AVAILABLE REMEDIES
(i) Compensatory Damages
(ii) Injunction

3) DISPOSSESSION
AVAILABLE REMEDIES
(i) Compensatory Damages
(ii) Restitutionary Damages
(iii) Ejectment: Since it’s available, no injunction
(iv) Constructive Trusts/Equitable Liens

4) ENCROACHMENT
AVAILABLE REMEDIES
(i) Compensatory Damages
(ii) Injunction: Probably emphasize balancing of hardships

Bar Exam Note: No Restitution

5) NUISANCE
AVAILABLE REMEDIES
(i) Compensatory Damages
(ii) Injunction: Probably emphasize balancing of hardships

Bar Exam Note: No Restitution
PERSONAL INJURY TORTS

AVAILABLE REMEDIES

(1) Compensatory Damages

Economic Losses/Special Damages (e.g., lost wages): Certainty rules apply.

Non-Economic Losses/General Damages (e.g., pain & suffering): Certainty rules do not apply.

Lump Sum Payment: Discounted to present value. Inflation not taken into account.

(2) Injunction

Only against prospective intentional tortious conduct.

FRAUD

AVAILABLE REMEDIES

(1) Damages

(2) Constructive Trusts/Equitable Liens

Important Bar Exam Tip: Always consider (i) whether punitive damages should be awarded and (ii) if it also could be analyzed as a contracts case.
THE CONTRACT REMEDIES

1. **THE LEGAL REMEDIES**
   
   DAMAGES

2. **THE RESTITUTIONARY REMEDIES**

3. **THE EQUITABLE REMEDIES**
   
   SPECIFIC PERFORMANCE
   RESCISSION
   REFORMATION
THE LEGAL REMEDIES

DAMAGES: “LEGAL” REMEDY

FIRST TYPE OF DAMAGES: COMPENSATORY

Once again, these are based on the injury to the plaintiff.

The 4 requirements: (i) causation (ii) foreseeability (tested at time of formation) (iii) certainty (iv) mitigation—basically the same analytically as for torts.

DIRECT DAMAGES

Those damages that flow inherently from the wrong.

Bar Exam Tip: The most common measure of damages is the expectation measure.

CONSEQUENTIAL DAMAGES

Available for related damages foreseeable at the time of formation.

Bar Exam Favorite Fact Pattern: The lost reputation fact pattern.

SECOND TYPE OF DAMAGES: NOMINAL

Are allowed

THIRD TYPE OF DAMAGES: PUNITIVE

Not allowed

Bar Exam Tip: If defendant’s conduct is willful, you should always try to see if you can characterize it as a fraud case.
THE LIQUIDATED DAMAGES CLAUSE FACT PATTERN:
2 PART TEST FOR VALIDITY:

Part 1: Damages are very difficult to ascertain at time of contract formation.

Part 2: This was a reasonable forecast of what they would be. If amount is excessive this would be a “penalty.”

RESULTS:
(i) If Valid: Only liquidated amount available.
(ii) If Invalid: Only actual damages available.

Bar Exam Trick Fact Pattern:

Clause provides that one can get either actual damages or liquidated damages.

Invalid clause – throw it out – get actual, compensatory damages
THE RESTITUTIONARY REMEDIES: TO PREVENT UNJUST ENRICHMENT

THE BASIC BAR EXAM RESTITUTIONARY “CONTRACT” FACT PATTERN

Contract “fails” after plaintiff has rendered performance (partial or complete).

2 WAYS THIS OCCURS ON THE BAR EXAM:

(1) The contract is unenforceable.

(2) The contract is breached.

(1) UNENFORCEABLE CONTRACTS

The contract is unenforceable due to, e.g., mistake, lack of capacity, Statute of Frauds, illegality.

THE 2 QUESTIONS:

1) Can plaintiff get restitutionary damages for property/money given to, or services rendered for, defendant?

Yes, for value of benefit.

Hypo 1: Plaintiff sells store fixtures to Defendant for new store, pursuant to an unenforceable contract. What can Plaintiff recover?

Restitutionary damages for value of benefit.

Hypo 2: Plaintiff renders services pursuant to an unenforceable contract. Their value is greater than the contract rate. Can Plaintiff recover it? Yes.

2) Can plaintiff get the property back?

Yes, if it is unique or defendant is insolvent.

(2) BREACHED CONTRACTS

Bar Exam Threshold Inquiry: Who is the plaintiff? Is she the non-breaching or breaching party?

Plaintiff As “NON-BREACHING” Party:

The 2 Questions:

1) Can plaintiff get restitutionary damages for property/money given to, or services rendered for, defendant?
Yes, for the value of the benefit
Note: Again, the value of the recovery may be greater than the contract rate.

2) Can plaintiff get the property back?

Yes, if it is unique or defendant is insolvent.

Vs. Plaintiff As “BREACHING” Party:

Hypo: Contract for land, price = $100,000. Plaintiff, after paying 30% of the purchase price, defaults.

Can plaintiff get any restitutionary damages?

Traditional View: No recovery.

Modern View: Recovery is allowed.
But: (a) Cannot be greater than contract rate and (b) is reduced by any damages suffered by defendant as a result of the breach.

SPECIFIC PERFORMANCE: “EQUITABLE” REMEDY

Definition: Defendant is required to perform the contract.

THE SPECIFIC PERFORMANCE 5-PART CHECKLIST

FIRST: CONTRACT IS VALID/CERTAIN & DEFINITE

Plaintiff must be able to show the contract is valid.

Bar Exam Note: In order to obtain specific performance plaintiff must be able to show the contract terms with more certainty and definiteness than would be the case in an action for money damages at law.
SECOND: CONTRACT CONDITIONS OF PLAINTIFF MUST BE SATISFIED

Plaintiff must be able to show her contract conditions have been fulfilled (already performed, ready and able to perform, or excused from performing).

THE 2 FAVORITE BAR EXAM “CONDITIONS” FACT PATTERNS

Bar Exam Tip: Both fact patterns typically involve land sale contracts.

1. DEFICIENCIES FACT PATTERN

Seller cannot deliver the agreed upon consideration.
(Usually involves the quantity of land.)

Threshold Inquiry: Who is the plaintiff? Is it the seller or buyer?

a. SELLER as Plaintiff
   (i) Can specifically enforce the contract if the defect is minor.
   (ii) Cannot, however, enforce the contract if the defect is major.
        unless: The seller can cure defect by closing.

b. BUYER as Plaintiff
   (i) Can enforce the contract even if the defect is major.
   (ii) Cannot, however, enforce the contract if the defect is very major.

Bar Exam “Imperative”: If you decide that specific performance should be granted under the rules above even though a defect still remains, you must include a sentence noting that the court will lower the purchase price to take into account this defect in consideration.

Bar Exam Buzzword: Abatement in the purchase price.

2. TIME OF THE ESSENCE CLAUSE FACT PATTERN

Buyer does not meet contract condition of timely performance.
THE “FACT LINE-UP”

(i) There will be a land sale contract.

(ii) The contract will contain an express “time is of the essence clause.” (If this is not contained in fact pattern, this problem is not at issue.)

(iii) This clause will contain a forfeiture provision. (In short, it will provide for the forfeiture of all performance rendered to date if performance is not timely.)

(iv) There will have been partial performance which is now potentially subject to forfeiture.

Note: Who partially performs land sale contracts? It is the buyer who has made payments towards the purchase price.

(v) Buyer will have made a late payment.

This triggers the time of the essence clause and its forfeiture provision. Seller wants to keep both the land and any performance rendered to date.

(vi) Buyer will bring a lawsuit for specific performance.

WHAT RESULT?

Note: Equitable Maxim: “Equity Abhors Forfeitures.”

What Factors Court Can Look at to Avoid the Harsh Result of a Forfeiture?

(1) Loss to seller is small.
(2) Tardiness is de minimis.
(3) Waiver (seller has accepted late payments in past).
(4) Buyer would suffer undue hardship.

Bar Exam Tip 1.
On the bar exam you should almost always award specific performance.

Bar Exam Tip 2.
In your answer, you should note that under the modern trend courts would give plaintiff restitutionary relief if specific performance were not granted.
THIRD: INADEQUATE LEGAL REMEDY ALTERNATIVE

What Is The Basic Alternative? Money damages

Why Would They Be Inadequate? (The Four Reasons)
  (1) Damages are speculative.
  (2) Defendant is insolvent.
  (3) Multiple suits are necessary.
  (4) The thing bargained for is unique.

THE FAVORITE BAR EXAM ISSUE: THE “UNIQUENESS” PROBLEM

The Concept: If the property is “unique,” then even if plaintiff received money damages, he could not simply go out and buy it. It would not be available.

Threshold Inquiry: Determine whether contract was for the sale of real or personal property.

a. REAL PROPERTY

The Rule: Land is unique!!

The Bar Exam Trick Fact Pattern: Every parcel of land will be made to look identical.

The Special “Seller’s” Rule: Sellers of land can get specific performance even though all they have coming is money (i.e., the purchase price).

b. PERSONAL PROPERTY

General Rule: Personal property is not unique (and damages are adequate).

Exceptions:

(1) One of a Kind or Very Rare

Hypo: Doofus contracts to buy a Rembrandt painting from Bowater, who now refuses to transfer it. Specific performance? Yes
(2) **Personal Significance to Buyer**

Hypo: I contract to buy from you my old purple felt-tip pen which I used to write my bar exam. Can I get it if you refuse to convey? **Yes**

*Bar Exam Tip:* Do not write bar exam with purple felt-tip pen.

(3) **Circumstances Make Chattel Unique**

Hypo: (i) OPEC decides to dramatically cut down oil production, causing severe gas shortages. Can buyer get specific performance of contract to purchase gasoline?  **Yes.**

(ii) Seller, however, contends that there was nothing unique about gasoline when the contract was entered into.

Uniqueness tested at **time of litigation**, not **time of contract formation**.

**BAR EXAM FAVORITE ISSUE: LIQUIDATED DAMAGES CLAUSES**

**General Rule:** A liquidated damages clause does not make money damages adequate. Specific performance is still available.

**Exception:** Where the clause provides that this is to be the “only remedy.”

**FOURTH: FEASIBILITY OF ENFORCEMENT**

**PERSONAL SERVICES CONTRACT ENFORCEABILITY**

**Rule:** They are **not specifically enforceable**.

**Reasons:**

(1) Enforcement Problem

(2) Involuntary Servitude

**VS. COVENANTS NOT TO COMPETE**

**Rule:** These are enforceable if a **2-part test** is met:
(1) The services are unique, and

(2) The scope (geographic & duration) is reasonable.

FIFTH: DEFENSES

EQUITABLE DEFENSES

1) UNCLEAN HANDS
2) LACHES
3) UNCONSCIONABILITY
   (i) More than simply a “bad deal.” There must also be some “smell factor” facts that brought it about.
   (ii) Tested at the time of contract formation.

CONTRACT DEFENSES

1) MISTAKE
2) MISREPRESENTATION
3) STATUTE OF FRAUDS

BAR EXAM FAVORITE:
STATUTE OF FRAUDS/PART PERFORMANCE DOCTRINE PROBLEM

How Do You Spot The Problem?

(i) The contract must involve land. It could be either a land sale contract or one to make a testamentary deposition of land.

(ii) This contract will have been an oral contract.

Defendant now raises the Statute of Frauds as a defense to specific performance.

Once you have spotted and set out the problem, discuss the Rule.
The Rule: If one has rendered (i) valuable part performance, (ii) in reliance on the contract, this will take the case out of the Statute of Frauds and specific performance will be granted.

What is Valuable Part Performance?

(i) Payment (in whole or part)  
(ii) Possession  
(iii) Valuable Improvements  
(iv) Valuable Services

Any 2 of the top three taken together.

SPECIFIC PERFORMANCE “MEMORIZER”

CHA CHA IS FAIRLY DIFFICULT

1. _____C_____Contract is Valid
2. _____C_____Conditions of Plaintiff Satisfied
3. _____I_____Inadequate Legal Remedy
4. _____F_____Feasibility of Enforcement
5. _____D_____Defenses
RESESSIION: “EQUITABLE” REMEDY

**Definition:** The original contract is considered voidable and rescinded.

Rescission requires a 2-step analysis.

**STEP 1: DETERMINE IF THERE ARE GROUNDS FOR RESCISSION**


   What do these grounds have in common?

   They all relate to contract formation.

2. **MISTAKE**

   **MUTUAL MISTAKE:**

   (i) **Material Fact:** Rescission granted.

   (ii) **Collateral Fact** (going to quality, desirability, or fitness of property for a particular purpose): Rescission denied.

   **Hypo:** Bowater and Doofus enter into a contract for the sale of a warehouse building which they both mistakenly believe is in good condition. In fact, it was so compromised structurally that it fell down the day before their agreement. Rescission? Yes

   **Hypo:** Bowater enters into a sale contract with Doofus for a warehouse. Both believe it’s only use is as a warehouse. One week later, developer offers Doofus three times the sale price because he intends to convert it into expensive loft apartments. Rescission? No
UNILATERAL MISTAKE:
Rescission denied.

Exception: General:
The non-mistaken party knows or should have known of the mistake.

Hypo: Contractor submits a bid for a construction project, negligently leaving out a major cost item. The bid is far, far less than competing bids and is accepted. Rescission? Yes

MODERN TREND EXCEPTION
The mistaken party would suffer undue hardship if there is no rescission.

3. MISREPRESENTATION
Rescission: granted
In order to get rescission based on misrepresentation grounds, the plaintiff must show that they have actually relied upon the misrepresentation.

STEP 2: DETERMINE IF THERE ARE VALID DEFENSES
1. UNCLEAN HANDS
2. LACHES

NON-DEFENSE (Will Not Work)
Negligence of plaintiff is not a good defense.
2 SPECIFIC ITEMS

1. **ELECTION OF REMEDIES**

   **Plaintiff Sues For Damages “First”:** Rescission is not allowed. This is regarded as an **affirmance** of the contract.

   **Plaintiff Sues For Rescission “First”:** Damages are allowed.

   **Note:** Plaintiff can even sue for **both at the same time** but must **elect** the preferred remedy before judgment.

2. **AVAILABILITY OF RESTITUTION**

   If a plaintiff who is entitled to rescission has previously rendered performance on the contract (e.g., performance of services, advance on purchase price), **she can get compensated for it or get the property back via restitution.**

**REFORMATION: “EQUITABLE” REMEDY**

**Definition:** Changes written agreement to conform with the parties’ original understanding.

Reformation requires a 3-step analysis.

**STEP 1**

**DETERMINE IF THERE IS A VALID CONTRACT**

“meeting of the minds”

**STEP 2**

**DETERMINE IF THERE ARE GROUNDS FOR REFORMATION**

1. **MISTAKE**

   **MUTUAL MISTAKE:**

   **Reformation granted.**
UNILATERAL MISTAKE:

Reformation denied.

Exception: Where the non-mistaken party knows of the mistake.
   (This is regarded as fraud or inequitable conduct.)

Please Note: Unlike the rescission exception, this does not encompass the situation where the non-mistaken party should have known of the mistake.

2. MISREPRESENTATION

Reformation granted. Rewriting reflects expressed intent of the parties.

STEP 3
Determine if there are valid defenses

1. UNCLEAN HANDS

2. LACHES

NON-DEFENSES (Will Not Work)
   (i) Negligence of Plaintiff
   (ii) Statute of Frauds
   (iii) Parol Evidence Rule
RESCISSION “MEMORIZER”

GOOD DOG
1.____G____Grounds for Rescission
2.____D____Defenses

REFORMATION “MEMORIZER”

VERY GOOD DOG
1.____V____Valid Contract
2.____G____Grounds for Reformation
3.____D____Defenses

SPECIFIC CONTRACT FACT PATTERN POSSIBILITIES

EXAMSMANSHIP: GENERAL THOUGHTS

1) Has plaintiff been injured?
2) Has defendant derived a benefit?
3) Does plaintiff want the property returned?
4) Does plaintiff want the contract performed?
5) Does plaintiff want the contract ripped up?
6) Does plaintiff want the contract rewritten?
SPECIFIC CONTRACTS: POTENTIALLY AVAILABLE REMEDIES

THE “CHEAT SHEET”

PERSONAL PROPERTY SALE CONTRACTS

AVAILABLE REMEDIES

(1) Compensatory Damages
   Seller's Breach (Does not convey, delivers damaged goods)
   Buyer's Breach (Does not pay)

(2) Restitution
   Favorites: Unenforceable/Breached Contracts

(3) Specific Performance
   Property not unique, subject to exceptions

(4) Rescission

(5) Reformation

REAL PROPERTY SALE CONTRACTS

AVAILABLE REMEDIES

(1) Compensatory Damages
   Seller's Breach (Does not convey)
   Buyer's Breach (Does not pay)

(2) Restitution
   Favorites: Unenforceable/Breached Contracts

(3) Specific Performance
   Remember:
   1. Land is unique.
   2. Both Buyer and Seller can get specific performance.
   3. Favorites:
      (a) Deficiencies/Time of Essence Clause “Conditions” Fact Patterns

(4) Rescission

(5) Reformation
CONSTRUCTION CONTRACTS

AVAILABLE REMEDIES

(1) Compensatory Damages
   Owner's Breach (Does not pay)
   Builder's Breach (Non-completion, Defective completion)

(2) Restitution
   Only Builder for work done – unless Owner pre-paid

(3) Specific Performance
   Only Owner – but very difficult because of enforcement problems

PERSONAL SERVICES CONTRACTS

AVAILABLE REMEDIES

(1) Compensatory Damages
   Employer's Breach (Wrongfully terminates)
   Employee's Breach (Wrongfully quits)

(2) Restitution
   Only employee for services rendered – unless employer pre-paid

(3) Specific Performance
   “No”: Employment contract
   “Yes”: Valid covenant not to compete