**Remedies Outline**

1. **Tort Remedies**
   1. **Legal: Damages**
      1. **Compensatory**: to put in position as if no tort
         1. Requirements: (1) actual causation, (2) foreseeability, (3) certainty, and (4) unavoidability.
            1. Certainty: cannot be too speculative. For past damages, look to any analogous historical evidence (e.g. similar prior business). For *future damages*, plaintiff must show they are *more likely to happen than not*.

Economic Losses: basic certainty rules apply.

Non-Economic Losses: for pain and suffering, or permanent disfigurement, basic certainty rules do not apply. Jury can award whatever amount it wishes.

* + - 1. Form of Award: “The judgment must be a single, lump-sum payment, discounted to present value without taking inflation into account (but modern view is to take into account).”
    1. **Nominal**: where no actual injury, to establish rights.
    2. **Punitive**: to punish defendant for fault greater than negligence, in amount *relatively proportionate* to actual damages. Must have first been awarded compensatory, nominal, or restitutionary damages. Sup. Ct. has limited punitive damages to a single-digit multiple of actual damages, unless conduct is extreme.
  1. **Restitutionary Remedies-No Unjust Enrichment**
     1. **Legal**
        1. **Restitutionary Damages**: value of benefit to *defendant*. Sometimes occurs where there is no real injury to plaintiff. However, often occurs where both compensatory and restitutionary are theoretically available, such as where BaskinRobbins steals Carvel’s ice cream machine, but rule is that plaintiff *cannot* recover both compensatory and restitutionary, so discuss both, and give plaintiff the larger sum. Punitive, however, can be paired with restitution.
        2. **Replevin**: recover possession of specific *personal property* through sheriff where (1) plaintiff has a right of possession and (2) defendant has wrongfully withheld. Replevin can occur *before trial* if plaintiff posts bond, but defendant can defeat pre-trial replevin by posting a re-delivery bond. Replevin is usually coupled with damages for lost use or benefit to defendant.
        3. **Ejectment**: plaintiff recovers possession through sheriff of specific *real property* where (1) plaintiff has right to possession and (2) defendant wrongfully withholds. No ejectment if defendant just crosses plaintiff’s lawn, because no possession. But if would-be-adverse-possessor or holdover tenant, ejectment available. Ejectment often coupled with damages.
     2. **Equitable**: **Constructive Trust or Equitable Lien**: money damages inadequate because (1) property is unique or (2) defendant is insolvent.
        1. **Constructive Trust**: imposed on improperly acquired property to which defendant has *title*. Defendant serves as “trustee” and must return property to plaintiff.
        2. **Equitable Lien**: imposed on improperly acquired property to which defendant has *title*. Property subject to immediate, court-directed sale, and proceeds go to plaintiff. If proceeds less than FMV when defendant took, deficiency judgment will issue. This is a good remedy if the property has gone down in value.
        3. **Tracing**: is permitted. Plaintiff can seek specific proceeds of sale. However, when defendant’s property cannot be traced *solely* to plaintiff’s property, only an equitable lien is available.
        4. **Status**: Plaintiff becomes a secured creditor with priority to the specific property or proceeds (but on equal footing for any deficiency judgment).
        5. **BFPs** of property prevail over plaintiff. No equitable remedies against BFP.
  2. **Injunctive Relief**: an order to do or not do something
     1. TRO: issued for 10 days pending preliminary hearing. Test is identical to preliminary injunction, but may be ex parte provided good faith effort.
     2. **Preliminary Injunction**: must show (1) irreparable injury while waiting for trial, (2) balance of hardships favors plaintiff, and (3) likelihood of success. Court should impose bond. Notice + hearing required.
     3. **Permanent Injunction**: after full trial on merits: awarded if (1) inadequate legal remedy, (2) enforcement is feasible, (3) balance of hardships favors plaintiff, and (4) no applicable defenses. This is most likely on the bar exam, and should be discussed first unless clearly stated.
        1. **Inadequacy of Legal Remedies**: Replevin may be inadequate if sheriff cannot locate property or the defendant has filed a redelivery bond. Ejectment may be inadequate if sheriff refuses to act. Money damages might be inadequate because too speculative, defendant insolvent, irreparable injury, or avoiding a multiplicity of actions (e.g., prior history of litigation between parties).
        2. **Feasibility of Enforcement**
           1. **Negative Injunction**: no enforcement problem.
           2. **Mandatory Injunction**: may be an enforcement problem, based either on the difficulty of supervision or concern with effectively ensuring compliance. If the act involves great taste, skill, or judgment, injunction is denied. If is involves a series of acts over a period of time, injunction denied unless plaintiff’s case is otherwise great. If it involves an out of state act, injunction granted if defendant is resident (jurisdiction), denied otherwise.
        3. **Balance of Hardships**: balance plaintiff’s benefit against defendant’s hardships. Injunction will only be denied where there is a gross disparity. However, *no balancing if defendant’s conduct was willful*. Hardship to the public is also taken into account.
        4. **Defenses**
           1. **Unclean Hands**: plaintiff committed related improper conduct.
           2. **Laches**: concerned with prejudicial passage of time, and will never be greater than SOL. Clock starts to run when plaintiff learns of injury. Delay cuts off right to relief when *unreasonable and prejudicial*.
           3. Impossibility
           4. Free Speech: if tort is defamation of privacy publication.
        5. **If Denied**: go back and find some other remedy, if appropriate.
     4. **Miscellaneous Injunctive Relief Issues**
        1. **Crime**: equity will *not* enjoin a crime (but check if it is also a tort).
        2. **Who Bound**: parties, employees and agents of parties acting with notice, others acting in concert with notice.
        3. **Erroneous Injunction**: *must* still obey until modified or resolved.
        4. **Contempt**: both have fines and or imprisonment.
           1. Civil: goal is to coerce. Can get out of jail by agreeing to comply.
           2. Criminal: goal to punish. Cannot get out of prison until set time is over.
        5. Injunctive relief is often coupled with damages for injuries incurred in the time prior to obtaining the injunction.

1. **Contract Remedies**
   1. **Legal**: **Damages**: like torts, requires (1) actual causation, (2) foreseeability (at time of contract, (3) certainty, and (4) mitigation.
      1. **Compensatory**
         1. **Direct**: flow inherently from the wrong. Expectation damages.
         2. **Consequential**: available for related damages foreseeable at time of contract. Lost reputation can be recoverable if it was communicated to defendant and thus foreseeable.
      2. **Incidental**
      3. **Nominal**: are allowed.
      4. **Liquidated**: valid (1) difficult to ascertain at time of contract and (2) reasonable forecast of damages. If amount excessive, void as penalty. If valid, only gets liquidated, not actual, damages. If invalid, plaintiff gets actual damages. Clause providing either liquidated or actual is invalid, and give plaintiff actual.
      5. No Punitive Damages, but if willful, check if there is a tort such as fraud.
   2. **Restitutionary Remedies – No Unjust Enrichment**: on bar, typically arises where contract fails after plaintiff has rendered performance, partial or complete.
      1. **Contract is Unenforceable**: plaintiff gets value of benefit conferred, even if greater than the unenforceable contract rate. Plaintiff can also get any property back if unique or defendant is insolvent.
      2. **Contract is Breached**
         1. Non-Breaching Party: gets value of benefit conferred, even if greater than the breached contract rate. Plaintiff can also get any property back if unique or defendant is insolvent.
         2. Breaching Party: traditional view is no recovery for already-rendered performance, but modern view permits recovery, but *cannot* be greater than contract rate and is reduced by any damages to non-breaching party.
      3. Note: all other restitutionary tort remedies available if applicable.
   3. **Equitable Remedies**
      1. **Specific Performance**: defendant required to perform the contract. Requires that (1) contract is valid, certain and definite, (2) plaintiff’s duties have been satisfied; (3) inadequate legal remedy; (4) feasibility of enforcement, and (5) no applicable defenses.
         1. **Plaintiff’s Performance**
            1. Deficiency Fact Patterns: where seller cannot deliver precise consideration (e.g., 999 and not 1000 acres). If seller is plaintiff, can specifically enforce if defect is minor, but cannot enforce if major unless can cure by closing. If buyer is plaintiff, can enforce even if defect is major, but cannot enforce if defect is very major. If specific performance is ordered, court should *abate* purchase price to account for deficiency.
            2. Time of the Essence Fact Patterns: where buyer partially performs but not fully by deadline, and thus risks forfeiture of both property and performance, and buyer sues for specific performance. *“Equity abhors forfeitures.”* Court will order specific performance if favorable assessment of: loss to seller (small), tardiness (small), waiver (seller has accepted late payments in past, undue hardship (to buyer). If SP is not granted, courts would typically give restitutionary relief.
         2. **Inadequate Legal Remedy**: money damages might be inadequate because too speculative, defendant insolvent, irreparable injury, or avoiding a multiplicity of actions (e.g., prior history of litigation between parties).
            1. **Real Property**: *All* real property is unique, even if identical to others. Special Seller’s Rule: seller of land can get specific performance even though all he is getting is money.
            2. **Personal Property**: not unique unless one-of-a-kind, very rare, of personal significance to buyer, or circumstances make chattel unique (e.g. severe gas shortage). Uniqueness is tested *at time of litigation*, not at contract formation.
            3. Effect of Liquidated Damages Clause: does *not* make money damages adequate. Can still order equitable remedy, unless clause provides that it is to be the only remedy.
         3. **Feasibility**: personal services contracts are not specifically enforceable, but covenants not to compete are enforceable if (1) services are unique and (2) scope, geographic and duration, is reasonable.
         4. **Defenses**: unclean hands, laches, unconscionability (at time of formation), or contract defenses of mistake, misrepresentation, or statute of frauds. On statute of frauds, if oral contract involves land, specific performance can be ordered, but only if plaintiff has rendered valuable part performance in reliance on the contract: any 2 of payment, possession, or improvements. Modern trend, however, that valuable services alone can constitute valuable part performance.
      2. **Rescission**: original contract is voidable and rescinded. Must be (1) grounds for rescission (contract formation defenses showing lack of assent) and (2) no valid defenses.
         1. Mutual Mistake of Material Fact: rescission granted. If to collateral fact, rescission is denied.
         2. Unilateral Mistake: rescission denied, unless non-mistaken party knows *or should have known* of mistake.
         3. Misrepresentation: rescission granted if plaintiff actually relied.
         4. Defenses: laches, unclean hands, but not plaintiff’s negligence.
         5. **Election of Remedies**: if plaintiff sues for damages first, rescission is not allowed, but if sues for rescission first, damages are allowed. Plaintiff can sue for both, but must elect one before judgment.
         6. **Availability of Restitution**: if previously rendered performance but now entitled to rescission, can get restitution and rescission.
      3. **Reformation**: changes the written agreement to conform to the parties’ original understanding. Requires (1) a valid contract – meeting of the minds, (2) grounds for reformation (mutual mistake but not unilateral mistake unless other party knows of mistake), and (3) no defenses.
         1. Defenses: unclean hands or laches, but not plaintiff’s negligence, statute of frauds, or the parol evidence rule.

Essay Tips:

1. Always choose a remedy—the best one—but discuss all.
2. No duplicative principal remedies. Discuss election of remedies
3. Always look to compensate for damage for all time periods, e.g., loss of use of property while seeking remedies.