REMEDIES OUTLINE

I. OVERVIEW

II. TORT REMEDIES
   A. OVERALL TORT APPROACH
   B. DAMAGES AND EQUITABLE REMEDIES
      1. COMPENSATORY DAMAGES
      2. RESTITUTION
      3. REPLEVIN
      4. EJECTMENT
      5. CONSTRUCTIVE TRUST
      6. EQUITABLE LIENS
      7. INJUNCTIVE RELIEF

III. CONTRACT REMEDIES
    A. OVERALL CONTRACT APPROACH
    B. DAMAGES AND EQUITABLE REMEDIES
       1. COMPENSATORY DAMAGES (COMPENSATION)
       2. RESTITUTION
       3. REPLEVIN
       4. EJECTMENT
       5. CONSTRUCTIVE TRUST
       6. EQUITABLE LIENS
       7. SPECIFIC PERFORMANCE
       8. RESCISSION
       9. REFORMATION
I. OVERVIEW

1. Determine the area of **substantive law** (may be more than one, normally torts, property or contracts)

2. Make sure Plaintiff has a case and a **relief is needed**.

3. Determine **appropriate remedies** (based on available remedies for that substantive area of law).
   - 1. Discuss **legal** remedies first.
   - 2. Discuss **restitutionary** remedies
   - 3. Discuss **pure equitable** remedies.

   **Discuss ALL potentially available remedies unless the question asks for only a specific type of remedy.**

II. TORT REMEDIES

A. OVERALL TORT APPROACH

1. Has **Plaintiff** been/being **injured**? ANSWER: Compensatory Damages

2. Has **Defendant** derived an **Unjust Enrichment**? ANSWER: Restitutionary Damages

3. Does **Plaintiff** want the **property back**? ANSWER: Replevin, Ejectment, Specific Performance

4. Does **Plaintiff** need an **Injunction**? ANSWER: Preliminary, TRO, Permanent
B. DAMAGES AND EQUITABLE REMEDIES

1. COMPENSATORY DAMAGES (COMPENSATION)

a. Plaintiff is entitled to compensatory damages to put him/her in the position he/she would have been had the wrong not occurred.

b. Must Show:

1. **Causation:** The injury must have been caused by the tortious act (“BUT FOR...” test, i.e., “but for the tortious action, the injury would not have happened”);

2. **Foreseeability:** The injury must been foreseeable at the time of the tortious act (“proximate cause”); and

3. **Certainty:** The damages cannot be too speculative.

   i. **Non-Economic Damages** (general pain and suffering, disfigurement) – Certainty requirement does not apply. Only required for economic losses (special damages).

   ii. **Future Damages:** “All or Nothing Rule”- For future damages, Plaintiff must show that the damages “are more likely to happen than not.” Failure to demonstrate this will result in no award.
   1. Discuss probability of future events occurrence
   2. Lost Profits
   3. Historical Records helps – i.e., no new business
   4. Medical Expenses
4. **Unavoidability:** The Plaintiff must take reasonable steps to **mitigate** the damage. Damages limited to those that could not reasonably have been avoided.

**Calculation:** Single lump sum payment, discounted to present value. No accounting for inflation.

**c. Nominal Damages:** Where the Plaintiff has no actual injury, the court may award nominal damages to serve to establish or to vindicate the Plaintiff’s rights.

**d. Punitive Damages:** Where the Plaintiff’s injury results from “**willful, wanton, or malicious conduct**” on the part of the Defendant, the court may award punitive damages to **punish** the Defendant.

- Plaintiff must first have been awarded compensatory, nominal, or restitutionary damages.

- **Calculation:** Must be relatively proportional to actual damages. USSC: **single-digit multiple** of actual damages unless the Defendant’s conduct is extreme.

2. **RESTITUTION**

1. **Restitutionary Damages:** Where the Defendant has been unjustly enriched, the court may award damages based on the **benefit** to the Defendant.

2. **Calculation:** The amount is calculated based on the **value** of the benefit. However, where both compensatory and restitutionary damages are available, Plaintiff cannot get both. Instead, he/she must make an election of the two. Generally, the Plaintiff should be awarded the larger sum of the two.
3. No Restitution for **Encroachment or Nuisance**.

3. **REPLEVIN**

1. Action to recover possession of *specific personal property*.

2. Must show:
   a. Plaintiff has a *right to possession*; and
   b. there is *wrongful withholding* by Defendant.

3. **Timing**: As long as Defendant is still in possession, Plaintiff can recover the chattel *before* trial. (Sheriff recovers property.)
   - But, to do so, Plaintiff will have to post a *bond*.
   - And, Defendant may defeat an immediate recovery by posting a *re-delivery bond*. Through which, the Defendant can keep the chattel until after the trial.

4. **Loss of Use**: Almost always coupled with damages for *lost use OR benefit* to Defendant during time of wrongful withholding.

5. **Bona Fide Sale**: No recovery if sale to a Bona Fide Purchaser

4. **EJECTMENT**

1. Action to recover possession of *real property* (land)

2. Must show:
   a. Plaintiff has a *right to possession*; and
   b. There is a *wrongful withholding* by Defendant. (Only available against Defendant who has *possession* of the property.)
3. Usually coupled with damages for lost use of the benefit during the wrongful withholding. (Note, ejectment does not give rise to punitive damages.)

5. CONSTRUCTIVE TRUST

1. Equitable remedy imposed by the courts when the retention of property by Defendant (wrongdoer) would result in unjust enrichment. Defendant serves a “trustee” and must return the property to Plaintiff.

2. Legal remedies must be inadequate (e.g., the Defendant is insolvent or the property is unique).
   - Note: Land is always unique. Personal property is typically not unique unless it:
     o Is one of kind or very rare.
     o Has personal significance to Buyer.

3. Tracing: Plaintiff can follow the property to whatever form it takes, as long as the trust recan be identified.

4. Bona fide purchasers prevail over Plaintiff.

5. Plaintiff prevails over unsecured creditors.

6. EQUITABLE LIEN

1. Where Defendant has improperly acquired title to a property, an equitable lien allows the court to order an immediate sale of the property, and the monies received will go to the Plaintiff.

2. Must show:
   a. Defendant misappropriated Plaintiff’s property creating a
debt or obligation to pay;
b. Plaintiff’s property can be traced to property held by Defendant; and
c. Retention by Defendant would result in unjust enrichment.

3. **Sale Price and Damages.** If the proceeds from 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.

4. Where misappropriated money is used to **improve property** (e.g., house remodel), only an equitable lien is available.

5. Same rules as constructive trusts:
   a. Tracing allowed.
   b. Bone fide purchaser prevails.

### 7. INJUNCTIVE RELIEF

1. **Temporary Injunctive Relief:** To recover temporary injunctive relief, Plaintiff must meet a two-part test:

   1. **Irreparable Injury:** Plaintiff must show that without the injunction, she will incur irreparable injury while waiting for a full trial on the merits.
      i. **Balancing Test:** harm to Plaintiff if injunction is denied v. harm to the Defendant if injunction is granted.
      ii. Where Defendant created the hardship – even if substantial – balance likely to weigh in Plaintiff’s favor.

   2. **Likelihood of success:** Plaintiff must show that he/she has a strong likelihood of success on the merits. The court will look to the probability of this success.
i. This is not an inquiry on success of obtaining a permanent injunction.

ii. The court should also impose a bond requirement on the Plaintiff to reimburse the Defendant if the injunction injured him/her and the Plaintiff does not succeed.

2. **Permanent Injunctive Relief**: Plaintiff must meet a **five-part test**:

   [I Put Five Bucks Down]

   1. **Inadequate Legal Remedy**: Money damages may be too speculative; Defendant may be insolvent; the sheriff may be unable or unwilling to enforce a replevin or ejectment action.

   2. **Property Interest/Protectable Interest**:
      
      i. **Traditional View**: Equity will grant relief only where there is a protectable property right involved.
      
      ii. **Modern View**: Any protectable interest will suffice.

   3. **Feasibility of Enforcement**: Only an issue with mandatory injunction. Enforcement problems may stem from: (1) the difficulty of supervision or (2) concern with effectively ensuring compliance.

   4. **Balancing of Hardships**: Plaintiff’s benefit v. Defendant’s hardship + the public’s hardship [But, if the Defendant’s conduct was willful, no balancing]

   5. **Defenses**, lack thereof:
      
      i. **Laches**: Where there has been an unreasonable lapse of time between when the Plaintiff learned of the injury and when the Plaintiff filed the lawsuit, and that
lapse of time is prejudicial to the Defendant, laches will cut off the right to injunctive relief (but not $ damages).

ii. **Unclean hands**: The persons seeking equitable relief must not be guilty of any improper conduct that is related to the lawsuit.

iii. **Impossibility**: It would be impossible for the Defendant to carry out the terms of the injunction.

iv. **Free Speech**: Injunction may be denied on free speech grounds.

3. Injunctive Relief Issues

A. **Crimes.** Equity will not enjoin crimes.
   - Recharacterize as a tort.
   - Exception for nuisance/public nuisance and partial exception for crime that is also a tort.

B. **Who is bound?** Parties, agent/employees, and others acting in concert w/ notice.

C. **Erroneous Injunctions.** Injunctions must be complied with until modified or dissolved.

D. **Contempt**
   a. Civil Contempt – To Coerce
      - Fines (money) to coerce
      - Imprisonment (Defendant holds keys to the jailhouse door)
   b. Criminal – To Punish
      - Fines (money) to punish
      - Imprisonment – Remain in jail for set amount of time (Note, Constitutional safeguards apply.)
** Note, no contempt for failing to comply w/ $ judgment,
unless child support or alimony.

E. **Dispossession of Loan.** Injunction not allowed since ejectment is adequate.

F. **Encroachment.** Restitution is not allowed. Injunctions allowed.

G. **Nuisance.** Consider traditional damages, permanent damages, and past damages. Restitution – Not allowed.

H. **Personal Injury.**
   a. Special Damages – Economic losses (more certainty)
   b. General damages – Non economic losses (no certainty required)
   c. Look to mitigation of damages.

I. **Fraud.** Some jurisdictions use benefit of bargain, some apply out of pocket loss. Punitive damages allowed.

### III. CONTRACT REMEDIES

#### A. OVERALL CONTRACT APPROACH

1. Has Plaintiff been/being injured? Answer: Expectation Damages

2. Has Defendant derived an Unjust Enrichment? Answer: Restitution

3. Does Plaintiff want the property back? Answer: Replevin, Ejectment, Constructive Trust, Equitable Lien
4. Does Plaintiff want the Contract performed? Answer: Specific Performance

5. Does Plaintiff want the Contract ripped up? Answer: Rescission

6. Does Plaintiff want the Contract re-written? Answer: Reformation

B. DAMAGES and EQUITABLE REMEDIES

1. COMPENSATORY DAMAGES (COMPENSATION)

a. Based on injury to the Plaintiff
b. Requires: (1) causation; (2) foreseeability (tested at the time of formation; (3) certainty; (4) unavoidability (mitigation)
c. Consequential damages: Available for related damages that were foreseeable at the time of formation (e.g., damage to reputation).
d. Incidental Damages: Available for “hassle” involved in dealing with breach.
e. Seller breaches a land sale contract: Compensatory Damages = out-of-pocket loss OR benefit-of-the-bargain
f. Nominal damages are also allowed. But, punitive damages are NOT allowed (Note: If Defendant’s conduct is willful, characterize as a tort as well, so you can get punitive damages.)
g. Liquidated damage clauses are permissible, if they are valid. Must Show:
   i. Damages are difficult to ascertain at the time of contract formation
   ii. Estimate was a reasonable forecast of what the damages would be. (If liquidated damages are too
high, they will be viewed as a penalty.)

iii. **Result:** If valid $\rightarrow$ only liquidated damage amount. If invalid $\rightarrow$ dismiss liquidated damages clause and determine actual damages. (Can’t recover both compensatory and liquidated damages. But can get other remedies outside of actual damages, such as specific performance.)

2. RESTITUTION

   a. **Unenforceable Contract**

      i. If a contract is **unenforceable** AFTER the Plaintiff has performed (e.g., mistake, capacity, illegality), Plaintiff can get restitutionary damages for property/money given to Defendant, or for services rendered for Defendant for the VALUE of the BENEFIT.

      ii. Not necessary to find that the Defendant actually benefited, only that Defendant received a benefit.

      iii. If the value of the services is greater than the Contract rate, Plaintiff can still recover that value.

      iv. Plaintiff can get specific property back if it is unique, or Defendant is insolvent.

   b. **Quasi-Contract.** Plaintiff awarded the reasonable value of Defendant’s ill-gotten gain or the difference between the present value of the good less the value before the benefit conferred by Plaintiff.
c. **Breach of Contract**

- Where Plaintiff is the non-breaching party:
  - Plaintiff may recover restitutionary damages for property/money given to, or services rendered for Defendant for the VALUE of the BENEFIT.
  - Plaintiff can get the property back if it is unique or Defendant is insolvent.

- Where Plaintiff is the breaching party:
  - Traditional View – **No recovery** allowed.
  - Modern View – **Recovery allowed**, but limited to Contract price and must be offset to reflect Defendant’s damages. Cannot be greater than Contract rate.

3. **REPLEVIN** (See above, same principles available in contract disputes.)

4. **EJECTMENT** (See above, same principles available in contract disputes.)

5. **CONSTRUCTIVE TRUST** See above, same principles available in contract disputes.)

6. **EQUITABLE LEAN** See above, same principles available in contract disputes.)

7. **SPECIFIC PERFORMANCE**

   a. Five Part Checklist

   1. **Inadequacy of Legal Remedies.** Damages may be inadequate because: (1) they’re speculative, (2) Defendant
is insolvent; (3) multiple suits are necessary; and (4) the thing bargained for is unique (tested at the time of litigation, not during contract formation). Liquidated damage clause ≠ $ is inadequate.

2. **Definite and Certain Terms.** Terms of the Contract must be sufficient certain to constitute a valid Contract.

3. **Feasibility of Enforcement.** Is this possible? Too much court supervision needed?

4. **Mutuality of Remedy:** must show the other side can also secure performance. Only an issue where Plaintiff lacks capacity. Court will reject mutuality if it feels secure that Plaintiff can and will perform.

5. **Lack of Defenses:** Unclean hands; laches; unconscionability; mistake; misrepresentation; equitable conversion (sale to bona fide purchaser); SoF (satisfied if (i) part performance (ii) in reliance on Contract)).

b. Special Problems

1. **Deficiencies Fact Pattern**

   - Seller as Plaintiff: CAN enforce Contract if the defect is minor. CANNOT enforce Contract if the defect is major unless the seller can cure the Contract before closing.

   - Buyer as Plaintiff: CAN enforce the Contract even if the defect is major (abatement – court will lower the purchase price to take into account this defect). CANNOT enforce the Contract if the defect is very major.
2. “Time of the Essence” Clause

- Includes forfeiture provision. Equity abhors forfeiture. Avoid forfeiture (and award specific performance), where:
  (1) loss to the seller is small; (2) tardiness is de minimis; (3) waiver – seller has accepted late payments in the past; (4) buyer would suffer undue hardship.

- Modern trend: Courts will give Plaintiff restitutionary relief if specific performance were not granted. But, if buyer has not made even an initial payment – the forfeiture clause will be strictly enforced.

3. Equitable Conversion

- Real property interest of the buyer and seller are switched upon execution of the land contract.
- Thus, the buyer will be regarded as having the real property interest (the specifically enforceable right to the land).
- Seller will be regarded as having the personal property interest (the specifically enforceable right to the money).

4. Covenants Not to Compete (Employment Contracts / Personal Services Contracts)

- Pose enforcement problems
- Can be viewed as involuntary servitude
- Two-Part Test for Validity
  - The covenant must protect a legitimate interest
  - The covenant must be reasonable in both geographical and durational scope.
8. RESCISSION

A. **Equitable Remedy** whereby one who is fraudulently induced into entering a Contract may rescind Contract.

B. **Two-Step Analysis:**

1. Determine if there are *grounds* for the rescission (improper formation of contract):
   a. Mistake
   b. Misrepresentation
   c. Coercion
   d. Undue Influence
   e. Lack of Capacity
   f. Failure of Consideration
   g. Illegality

C. **Mutual Mistake of Fact**
   - Mutual mistake of material fact = grounds
   - Mutual mistake of collateral fact ≠ grounds
   - Unilateral mistake ≠ grounds UNLESS the non-mistaken party knows or should have known of the mistake.

D. **Defenses:** Determine if there are *valid defenses*: Unclean hands; laches (negligence is NOT a valid defense).

E. **Special Problems:**

a. **Timing and Election of Remedies**
   - If Plaintiff sues for damages first, rescission is NOT allowed.
   - If Plaintiff sues for rescission first, damages ARE
allowed.

b. **Availability of Restitution**: If a Plaintiff who is entitled to rescission has previously rendered performance on the Contract, he/she can get compensated for it or get the property back via restitution.

c. **Legal Rescission**: Plaintiff accomplishes this by her own actions. Plaintiff gives notice and tenders back any consideration received. Plaintiff then sues for restitution for anything given to Defendant.

9. **REFORMATION**

a. The Court may modify a written agreement to conform w/ the parties’ original understanding.

b. Three Steps:
   1. Determine if there is a **valid contract**.
   2. Determine if there are **grounds** for reformation.
      a. Mutual mistake
      b. Unilateral mistake IF non-mistaken party KNOWS of mistake
      c. Misrepresentation
   3. Determine if there are **valid defenses**: unclean hands, laches.