CHAPTER 1: APPROACH; ISSUES TESTED

A. Approach to Essays

1) Determine and analyze the cause(s) of action in the question
2) Discuss legal damages (money damages) and limitations
3) Discuss equitable remedies and equitable defenses
4) Discuss restitution-based remedies (legal and equitable) and defenses (equitable)

B. Summary of the Issues Tested

1. Causes of Action
   o Contracts: Anticipatory Repudiation and/or Breach of Contract related to Sale of Land, Personal Property, Building (Construction), Employment, and Mistake
   o Torts: Harm to Land; Harm to Personal Property; Misappropriation of Money; Personal Injury; Financial Harm

2. Money Damages (Legal Remedies)
   o Compensatory (Torts and Contracts)
   o Consequential (Torts and Contracts)
   o Reliance (Contracts)
   o Incidental (Contracts)
   o Nominal (Torts and Contracts)
   o Punitive (Torts, rarely Contracts)
   o Restitution (Torts and Contracts)
   o Limitations on damages

   ▪ Causation, Foreseeability, Certainty, Avoidable Consequences (Duty to Mitigate)

3. Equitable Remedies
   o Injunctive Relief and Defenses (Torts and Contracts)
   o Specific Performance, Rescission, Reformation (Contracts)
   o Equitable Defenses (Torts and Contracts)

   ▪ Unclean Hands; Laches

4. Restitution (Legal and Equitable Remedies)
   o Money Damages
   o Constructive Trust/Equitable Lien
   o Replevin
   o Equitable Defenses
C. Causes of Action

The exam question may require you to analyze the cause of action that is the basis of the remedies being sought by the party(s). Read the fact pattern carefully and determine if you are being asked to discuss the underlying causes of action, or if you are only being asked to discuss the potential remedies.

1. Contracts (Frequently tested)

Contracts and Remedies are frequently tested together. The typical question involves the anticipatory repudiation or breach of a contract. You must analyze the anticipatory repudiation or breach first, and then discuss potential remedies. In past questions, you were asked to discuss the remedies available to both parties (non-breaching and breaching). The contract usually involves the Sale of Land, Personal Property, Building (Construction), Employment, or Mistake.

2. Torts

When Torts and Remedies are tested together, the torts include: Trespass to Land, Trespass to Chattels, Conversion, Nuisance (Public/Private), Misappropriation of Money, Intentional Torts and Negligence that harm a person, and Fraud (Intentional Misrepresentation). You should analyze each tort one at a time and discuss the relevant remedies for each tort.

3. Legal Remedies and Equitable Remedies

The typical Remedies question will ask you to discuss “Legal Remedies” and “Equitable Remedies”. For purposes of the CA bar, “Legal Remedies” generally refers to money damages and “Equitable Remedies” generally refers to court ordered remedies, such as injunctions and specific performance. Restitution-based Remedies are based on unjust enrichment and include Legal and Equitable Remedies. You should discuss both Legal Remedies and Equitable Remedies (including Restitution-based Remedies), unless the question clearly limits you to one type of remedies.

D. Money Damages (Legal Remedies)

Exam Tip 1: When analyzing money damages, be sure to use the specific dollar amounts provided in the question and explain the math (addition/subtraction) that you are using to determine the amount of money damages to be awarded to the party(s).

1. Compensatory Damages (Torts and Contracts)—Always discuss Compensatory Damages

Torts: In a tort action, compensatory damages compensate a plaintiff for harm or injury. These damages include pain and suffering, medical expenses, and lost wages.
Contracts: In a breach of contract action, compensatory damages most often take the form of expectation damages. They are intended to put the injured party in the same position as if the contract was performed. Generally, the amount of damages will be based on the contract price for performance and the fair market value of performance.

Exam Tip 2: After discussing Compensatory Damages, discuss all relevant types of damages below.

2. Consequential Damages (Torts and Contracts)—Consequential Damages are frequently tested.

Consequential damages are reasonably foreseeable damages other than expectation damages that are related to the tort or breach of the contract (example, loss of profit). In order to recover consequential damages, three elements must be met:

- Foreseeability: The damages must be natural and probable consequences of the tort or breach of contract or contemplated by the parties at the time the contract was formed.
- Causation: Plaintiff must show that the damages were caused by the defendant’s tort or breach; if the damages would have occurred without defendant’s tort or breach, there can be no recovery.
- Certainty: Plaintiff must prove the dollar amount with reasonable certainty. When the amount of money is too speculative (example: a new business), the court will not award consequential damages.

Example 1: Based on a past CA bar exam question: Restaurant enters a contract with Fisherman for the delivery of 1,000 pounds of crab for $10 per pound every week. Fisherman catches the crab but decides to sell it to another buyer instead. After a one-month delay, Restaurant is able to find another source for the crab for $12 per pound. Restaurant seeks expectation damages for the increased cost of the crab $2 per pound and consequential damages for lost business profits during the one month when it did not have crab on the menu.

3. Reliance Damages (Contracts)

Damages that non-breaching party incurs in reasonable reliance upon the promise that the other party would perform. Note: a party cannot recover reliance and compensatory (expectation) damages; it must choose between reliance or expectation damages. [You should discuss both items of damages on the exam].

4. Incidental Damages (Contracts)

Damages that arise when the non-breaching party is trying to remedy the breach. For example, in a commercial contract, the cost of finding a replacement seller of goods.
5. **Nominal (Torts and Contracts)**

   If a plaintiff established the elements of a cause of action, but the harm or loss is slight, the plaintiff may be awarded a “nominal”, or small/trivial amount of money.

6. **Punitive (Torts, rarely Contracts)**

   Punitive damages are meant to punish the defendant who engages in serious misconduct with an improper state of mind (such as malice). Punitive damages are usually not granted in contract actions, but if the defendant has also committed a tort, punitives may be awarded for the tortious behavior.

7. **Restitution (Torts and Contracts)**

   Restitution damages are measured by the benefit conferred on the defendant by plaintiff and awarded on an unjust enrichment theory (not based on tort or breach of contract). Note: a party cannot recover restitution and compensatory (expectation) damages; it must choose between restitution or expectation damages. [You should discuss both items of damages].

   **Example 2:** Based on a past CA bar exam question: P agrees to landscape D's housing development for $15,000. The project will take three months to complete. Two months into the contract, D repudiates the contract. P can seek restitution damages for the value of the landscaping he has performed to avoid unjust enrichment of D. Or, P can seek compensatory damages under the contract terms.

8. **Limitations on damages**

   When you discuss each type of money damages that a party can seek (compensatory, consequential, reliance, etc.), you should discuss the relevant the limitations that may apply.

   a. **Causation – Actual (Torts and Contracts)**

      The defendant must be the actual “but for” cause of plaintiff’s injuries.

   b. **Causation – Proximate (Torts)**

      In a torts question, the plaintiff must show proximate cause. A defendant is only liable for harms that were reasonably foreseeable at the time defendant breached his duty.

   **Example 3:** From a past CA bar question: Plaintiff grants Defendant permission to move logs across Plaintiff’s property during the summer. At the end of the summer Defendant leaves a pile of logs on Plaintiff’s property, blocking a small stream on Plaintiff’s property. In the winter, there is normal rainfall and the stream overflows due to the logs blocking it. The water floods Plaintiff’s house and Plaintiff sues Defendant for Trespass to Land and Trespass to Chattels for the damage to his house. **Plaintiff must show that Defendant is the proximate cause of the damages**
to his house (it is foreseeable that leaving the logs in the stream would result in flood damage to his house).

c. Certainty (Torts and Contracts)

The plaintiff must establish damages with reasonable certainty. Lost profits and earnings for a new business are an example of uncertain damages.

d. Avoidable Consequences - Duty to Mitigate (Torts and Contracts)

- The plaintiff has a duty to avoid or mitigate its damages, to the extent possible, by minimizing its harm (seeking medical attention) or seeking replacements/substitutes for goods and/or services.
- The plaintiff will be held to a standard of reasonable conduct.
- A failure to mitigate damages will reduce the damages recovered by the plaintiff.

CHAPTER 2: SUBSTANTIVE ISSUES CONTINUED

A. Equitable Remedies

1. Injunctive Relief (Torts and Contracts)

An injunction is a court order directing a person to act or refrain from acting. It can be used to maintain the status quo until further judicial proceedings can take place.

Examples from past CA bar exams:

**Example 4:** Contracts: P contracts with D to purchase a unique car from D. Later, D anticipatorily breaches the contract when she tells P that she will not deliver the car to P on the date agreed on in the contract. Instead, she intends to sell the car to a different buyer for more money. P seeks injunctive relief prohibiting D from selling the car to the other buyer.

**Example 5:** Torts: D starts to build a dam across a stream that is on her property. The dam will prevent water from flowing to her Neighbors who use the water for farming. The Neighbors claim that the dam is a nuisance and seek a permanent injunction requiring D to stop building the dam and remove the part that has been built.

a. Prejudgment Injunctions

- A prejudgment injunction is sought to prevent irreparable harm to the plaintiff until a court action is resolved. The two types are: TRO and preliminary injunction.

1) TRO (Temporary Restraining Order): An injunction issued for a short period of time (10 days or less) that does not require notice to the defendant or an opportunity to be heard. A TRO is usually issued to maintain the status quo until a preliminary injunction hearing is held.
2) Preliminary Injunction: An injunction issues before or during a trial that is effective until the final judgment of the court. Defendant must be given notice and an opportunity to be heard.

- To obtain a TRO or Preliminary Injunction, a plaintiff must show:
  a) The plaintiff will suffer irreparable harm if the injunction is not issued.
     • If money damages would be adequate, there is no irreparable harm. Real property and unique items of personal property (a unique piece of art) are examples of when money damages are inadequate.

b) Balancing the hardships: The court will look at the hardship on plaintiff if the injunction is not issued and the hardship on the defendant (and third parties) if the injunction is issued. The plaintiff must show that his hardship outweighs the defendant’s.

  **Exam Tip 3:** Be sure to thoroughly analyze and explain the arguments that the plaintiff and defendant would make regarding hardship. Also, remember that a defendant can reference hardship to third parties to help his side of the argument.

c) The plaintiff must show a likelihood of success on the merits.
   • This factor requires a court to analyze whether plaintiff is likely to win his case against the defendant at trial.

  **Exam Tip 4:** This factor requires you to discuss the plaintiff’s underlying cause(s) of action and explain why he/she is likely to win on them at trial. If you have already analyzed the cause(s) of action, you can briefly state why plaintiff is likely to win at trial.

d) Enforceability: A request for a TRO or preliminary injunction may be denied if it is not feasible for the court to enforce the injunction. Courts prefer to not issue injunctions if they require extensive involvement or continued supervision by the court.

b. Permanent Injunction

After the Plaintiff has won his/her case, a permanent injunction is granted to prevent the violation of plaintiff’s rights or to restore to the plaintiff rights that have been violated. To obtain a permanent injunction, plaintiff must show:

1) Irreparable harm if the injunction is not granted. (Same as the analysis under Preliminary Injunction)

2) Her hardships if the injunction is not issued will be significantly greater than the hardships on the defendant and third parties if the injunction is issued. (Same as the analysis under Preliminary Injunction)
2. **Specific Performance, Rescission, Reformation**

   a. **Specific Performance (Contracts)**

   Exam Tip 5: Specific Performance is a frequently tested remedy on the exam; you should discuss all elements of the rule to earn full credit.

   - Under the remedy of Specific Performance, the non-breaching party can ask a court to order the breaching party to perform the contract. The following elements must be met:
     
     a) There must be a valid contract.
        o This requires you to discuss whether a valid contract (offer, acceptance, consideration) exists.
     
     b) The terms of the contract must be certain/clear enough to allow a court to make an order.
     
     c) The non-breaching party has satisfied any conditions precedent (or the condition has been excused), so the breaching party’s performance is now due.
     
     d) Money damages are inadequate (this usually means the item(s) involved in the contract are unique.
        o Examples of situations where money damages are inadequate: Land, pieces of art, antique cars.
     
     e) It is feasible for the court to enforce and supervise the breaching party’s performance.
        o Courts will not grant specific performance if it will be required to supervise the performance for a long period of time, or if it will be difficult to enforce.
        o Specifically, courts will not require people to perform service contracts (for example, employment) because it is not feasible to enforce/supervise a person’s service and forcing a person to work can rise to the level of indentured servitude under the 13th Amendment.
     
     f) No defenses exist: A court will not grant specific performance if the breaching party can assert defenses of Laches or Unclean Hands.
        o Laches: If the non-breaching party waited an unreasonably long time to seek specific performance and the delay prejudiced the breaching party, the court may deny specific performance.
        o Unclean Hands: If the non-breaching party itself engaged in unethical or immoral acts relating to the contract, the court may deny specific performance.

3. **Rescission (Torts and Contracts)**

   - Rescission is the avoidance or unmaking of a contract.
The plaintiff first must show grounds for rescission (such as mistake of fact, misrepresentation/fraud).

Exam Tip 6: To earn full credit, you must analyze the mistake of fact or misrepresentation first to show a basis for rescission, and then discuss the remaining rescission requirements below.

The plaintiff must give notice of rescission to the defendant as soon as the grounds are discovered; and

Return or deliver any of the benefits of the contract it has received from the defendant.

After a court grants rescission and rescinds the contract, a plaintiff can bring actions against the defendant:

- Replevin (recovery of specific property that was transferred to the defendant), or
- Restitution (monetary compensation for the value of the property transferred to defendant).

4. Reformation (Contracts)

Reformation is the judicial rewriting of a contract or other document (deed) to reflect the parties’ true intent.

1) Mutual Mistake: If both parties were mistaken as to the content or effect of a writing, court may rewrite the contract.

   - There must have been an agreement reached between the parties prior to the writing. The writing did not have to be a valid contract, but it has to be sufficiently certain to permit the court to restate the writing.

2) Unilateral Mistake: If one party is mistaken as to the content or effect of a writing, reformation will be allowed if the other party is aware of the mistake and either fraudulently induced the mistake or does nothing to correct the mistake. If the other party is unaware of the mistake, reformation will not be allowed.

5. Equitable Defenses (Torts and Contracts)

Exam Tip 7: After discussing all relevant Equitable Remedies, you should discuss the Equitable Defenses of Laches and Unclean Hands.

a. Laches:

If the plaintiff waited an unreasonably long time to seek specific performance and the delay prejudiced the defendant, the court may deny equitable relief.

Exam Tip 8: Read the facts carefully for indications of Plaintiff delaying his lawsuit an unreasonable amount of time.

b. Unclean Hands:

If the plaintiff himself engaged in unethical or immoral acts relating to the contract, the court may deny equitable relief.
B. Restitution (Torts and Contracts)

Restitution-based remedies are available if the defendant has been unjustly enriched at the plaintiff’s expense. The plaintiff must have conferred a benefit (money, land) on the defendant and the defendant must have been unjustly enriched (defendant wrongfully acquired the benefit). Legal and Equitable Remedies are available under a Restitution theory.

1. Money Damages (Legal Remedy)

   o Restitution damages are measured by the benefit conferred on the defendant by plaintiff.
     ▪ If the defendant received money from the plaintiff, the benefit conferred is the amount of money plaintiff paid defendant.
     ▪ If the defendant received goods or services from the plaintiff, the benefit conferred can be based on:
       • The cost to the plaintiff of providing the benefit
       • The market value of the benefit
       • The price listed in the agreement between the parties

2. Constructive Trust/Equitable Lien (Equitable Remedy)

   o A constructive trust is a judicially created remedy that imposes a duty to convey specific property to the plaintiff if the defendant would be unjustly enriched by retaining the property.

   Example 6: Based on a past CA essay: Defendant embezzles money from Plaintiff and buys a house with the money. Plaintiff can trace his money to its new form (the house) and obtain a constructive trust over the house. Plaintiff would take title to the house and receive any increased value in the house that had occurred.

   o Plaintiff must show:

   1) The defendant holds title to the property that is to be subject to the constructive trust;
      • The defendant must have title to seek a constructive trust against him/her. If the defendant transfers the title to a third party, a constructive trust can be sought against him/her unless she is a bona fide purchaser (a purchaser for value who takes the property without knowledge of defendant’s wrongdoing).
   2) The defendant’s retention of the property would unjustly enrich the defendant; and
   3) The legal remedy is inadequate (money damages are not adequate).
Tracing: A plaintiff can trace his property from its original form to its current form. For example, a plaintiff can trace his money to the purchase of a house and recover the house from the defendant.

Increase in Value: If plaintiff is granted a constructive trust, he acquires the defendant’s property (note: if the value of the property increased during the defendant’s ownership, plaintiff gets the property and this increase). Defendant is not liable to the plaintiff if the property decreased in value while owning it.

3. Equitable Lien (Equitable Remedy)

An equitable lien is a judicially created remedy that imposes a lien on the defendant’s property. The plaintiff is not seeking to take ownership of defendant’s property, but rather claiming a creditor-like interest in the defendant’s property.

Example 7: From a past CA essay: Defendant embezzles money from Plaintiff and buys a house with the money. Plaintiff can trace his money to its new form (the house) and obtain an equitable lien against the house. The house would be sold and Plaintiff would receive his money back (but he would not be entitled to any increase in value).

Requirements: Same as a Constructive Trust.

Compared to a Constructive Trust

- Tracing: A plaintiff can trace his property from its original form to its current form. For example, a plaintiff can trace his money to the purchase of a house. The house would be sold and the plaintiff would recover the money owed from the sale proceeds.
- No Increase in Value: If plaintiff’s money is used to purchase property (a house), plaintiff would only be entitled to the amount of money that the defendant received from plaintiff under an equitable lien theory (he would not be entitled to any increase in value of the house).
- Additional Satisfaction: If a plaintiff has an equitable lien on defendant’s house that was purchased with plaintiff’s money, plaintiff would be able to force a sale of the house and receive the money he was owed. If the sale price of the house did not cover the money owed to plaintiff, he would be able to seek the additional money from the defendant.

Note: Under a constructive trust theory, a plaintiff would take the house itself from the defendant as full satisfaction of his claim and he would not be entitled to seek additional money from the defendant.

4. Replevin (Legal Remedy)

Replevin allows a plaintiff to recover his personal property from the defendant. The plaintiff regains possession of the property and can recover damages for the loss of use of his property.
5. **Equitable Defenses (Constructive Trust, Equitable Lien)**

Exam Tip 9: After discussing all relevant Equitable Remedies, you should discuss the Equitable Defenses of Laches and Unclean Hands.

- Laches: If the plaintiff waited an unreasonably long time to seek specific performance and the delay prejudiced the defendant, the court may deny equitable relief.

Exam Tip 10: Read the facts carefully for indications of Plaintiff delaying his lawsuit an unreasonable amount of time.

- Unclean Hands: If the plaintiff himself engaged in unethical or immoral acts relating to the contract, the court may deny equitable relief.

**Issue Checklists for Torts and Contracts (see Remedies outline for more details)**

A. **Torts**

1. **Harm to Land (Trespass to Land; Injury to Land; Nuisance)**
   - Money Damages
     - Compensatory
       - Cost to Repair or Loss in Value
     - Nominal
     - Consequential
     - Punitives
   - Injunction
   - Restitution

2. **Harm to Personal Property (Trespass to Chattels, Conversion)**
   - Money Damages
     - Compensatory
       - Cost to Repair or Loss in Value
   - Replevin
   - Constructive Trust/Equitable Lien
   - Restitution
   - Injunction

3. **Misappropriation of Money (Conversion)**
   - Money Damages
     - Compensatory Damages
     - Punitives
1. Restitution
2. Replevin
3. Constructive Trust/Equitable Lien

4. Personal Injury (Intentional Torts, Negligence, Strict Liability)
   a. Money Damages
      i. Compensatory Damages: Pain and Suffering, Medical Expenses, Lost Wages

5. Financial Harm (Intentional Misrepresentation; Negligent Misrepresentation)
   a. Money Damages
      i. Compensatory (Loss of Bargain or Out of Pocket)
      ii. Consequential Damages
      iii. Punitive Damages
   b. Reformation
   c. Rescission
   d. Replevin
   e. Restitution
   f. Constructive Trust/Equitable Lien

B. Contracts

1. Land Contracts
   a. Money Damages
      i. Compensatory: Difference between contract price and market value of land
   b. Specific Performance
   c. Rescission
   d. Restitution

2. Personal Property (Goods)
   a. Money Damages
      i. Compensatory
         * Difference between contract price and market value of goods
         * Cost of Cover: Difference between contract price and cost of substitute goods purchased by buyer (cost of cover)
         * Lost Profits
      ii. Consequential
      iii. Incidental
   b. Specific Performance
3. **Building (Construction) Contracts**
   - Money Damages
     - Compensatory
       - Loss of value or cost to complete/fix building defect
       - Loss of profit
   - Rescission
   - Restitution

4. **Employment Contracts**
   - Money Damages
     - Compensatory: Salary or wages under the contract
     - Consequential
     - Incidental
     - Limitations: Avoidable Consequences (Duty to Mitigate)
   - Rescission
   - Restitution
   - Injunctive Relief to enforce a Covenant not to Compete

5. **Mistake/Misrepresentation**
   - Reformation
   - Restitution

[END OF HANDOUT]