



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're walking through a California bar exam question on Remedies. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life. We are the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back! Today, we're walking through a Remedies question. This is another in our series of podcasts discussing how to approach questions on the California bar exam. Don't forget to subscribe to our podcast, so you won't miss any of our upcoming essay discussions!

Lee Burgess: Today we are addressing a remedies question. Students sometimes overlook remedies in their studies, but the topic is quite frequently tested on the California bar, either individually or as part of a crossover question. The bar examiners also tend to test certain remedies topics regularly, so it's key to have a good approach to these questions planned out in advance. To write a successful remedies essay, you will need accurate and concise rule statements and deep analysis.

Lee Burgess: Now, before we get into today's question, we need to do a quick review of the law you will need to know to answer it. First, you will need to understand the law surrounding temporary restraining orders (or TROs) and preliminary injunctions. These two topics are almost always tested together, so if you spot one issue, you'll want to make sure you address both.

Lee Burgess: A TRO is an equitable remedy, in which a plaintiff can ask the court to issue an order designed to maintain the status quo temporarily, until the court can resolve a preliminary injunction request. A court may issue a TRO only if all of the following elements are met: 1) specific facts in affidavit or verified complaint clearly show that – and this is key here – immediate and irreparable harm, injury or damage will occur to movant before the adverse party can be heard in opposition; 2) the movant is likely to prevail; 3) a balancing of the hardships favors the moving party; and 4) if the requesting party has not notified the adverse party, the movant's attorney certifies in writing the efforts made to give notice and reasons why it should not be required.



Lee Burgess: A TRO expires after the period the court sets, though it can't exceed 14 days, unless before that expiration the court extends it for a like period, or the adverse party consents to a longer extension. The court will require a bond if a TRO is granted.

Lee Burgess: Next, you'll need to understand the law of preliminary injunctions. A preliminary injunction can be issued prior to a full trial, but only after the adverse party is provided notice and an opportunity to be heard at an evidentiary hearing. The party requesting the injunction must show: 1) a likelihood of success on the merits; 2) a likelihood of irreparable harm to the movant if there is no injunction; 3) that balancing the hardships favors the moving party; and 4) that there are no viable defenses. The court will also impose a bond on the party seeking the preliminary injunction.

Lee Burgess: As you can probably see, the analysis for a preliminary injunction is very similar to a TRO. The difference is that the party seeking a TRO needs to meet the additional bar of showing that immediate and irreparable injury will occur before there is an opportunity for notice to the other party and a hearing.

Lee Burgess: We will also need to know the general rule that a contract for the sale of goods is governed by the UCC, and that the UCC allows a party to sue immediately upon anticipatory repudiation.

Lee Burgess: We also need to know about specific performance, which is another equitable remedy that requires a party to perform its obligations under a contract. In order to obtain specific performance of a contract, the movant must show: 1) that the contract is valid; 2) that conditions are satisfied or plaintiff is willing and able to perform – this is mutuality of performance; 3) that other remedies are inadequate; 4) that the court can feasibly enforce; and 5) that there are no applicable defenses.

Lee Burgess: Now, speaking of defenses, understanding the possible defenses will almost certainly be required on any remedies question. For this question, we will need to know about the unclean hands defense, misrepresentation, and unilateral mistake. Unclean hands means courts will usually not grant equitable relief if the party seeking the relief has engaged in inequitable behavior.

Lee Burgess: A party may seek to rescind a contract due to misrepresentation if: 1) the other party makes a misrepresentation; 2) about a material fact; 3) with the intent to induce reliance; and 4) where the other party did actually and justifiably rely on the misrepresentation.



- Lee Burgess: A unilateral mistake means that if one party is mistaken about a material fact, and the other party knew that the original party was mistaken, courts will often allow the contract to be reformed to reflect the intention of the mistaken party.
- Lee Burgess: Alright, now let's move on to reading the bar exam question. This is a question from the [July 2017 bar exam](#). We will link to a webpage where you can find this question in the show notes.
- Lee Burgess: "Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set. Six existing Anituck queens are owned by collectors. The last one was sold in 1983 for \$175,000. The current owners have refused to sell their queens to anyone.
- Lee Burgess: If Rick could exhibit a complete Anituck chess set, he would draw people worldwide who would buy memorabilia with pictures of the full chess set and other products. It is impossible to know exactly how much Rick would make, but a complete Anituck chess set would be worth in excess of \$1 million.
- Lee Burgess: Last week, Sam Seller brought to Rick an Anituck queen that he found in his attic and asked if it was worth anything. Rick asked what Sam wanted for the queen. Sam asked whether \$450 would be fair. Rick replied that \$450 would be fair and offered to write a check immediately. Rick and Sam entered into a valid contract and Sam agreed to hand over the queen the next day. The next day, Sam called Rick and said, "I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to a different collector."
- Lee Burgess: Rick has sued Sam for specific performance, for breach of contract, and he has sought a temporary restraining order and a preliminary injunction. What is the likelihood that Rick will obtain:
1. A temporary restraining order? Discuss.
 2. A preliminary injunction? Discuss.
 3. Specific performance? Discuss."
- Lee Burgess: Now, once you finish reading the question, the first thing that you should do is mark up your fact pattern to assess what is legally significant about each fact in the fact pattern. Now, this question is tightly written, so nearly every fact is useful in some way. We know this question is about remedies. We also have read the call of the question, which tells us we will be using the tests for TROs, preliminary injunctions, and specific performance of contracts. Keep those in mind as you mark up your paper.



- Lee Burgess: First, the examiners are giving us a lot of background information about the chess set. We know that for both a TRO and a preliminary injunction, we will need to address the likelihood of irreparable harm to Rick if Sam doesn't sell him the queen, as well as the balancing of hardships between the two parties. So, let's list out those facts.
- Lee Burgess: Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set. Six existing queens are owned by collectors. The last one was sold in 1983 for \$175,000. And the current owners have refused to sell their queens to anyone. If Rick could exhibit a complete chess set, he would draw people worldwide who would buy memorabilia with pictures of the chess set and other products. It is impossible to know exactly how much Rick would make, but a complete chess set would be worth in excess of \$1 million.
- Lee Burgess: Next, the examiners provide some background about the deal between Rick and Sam, and we will probably need these facts to determine if Sam has any successful defenses to Rick's claims.
- Lee Burgess: Last week, Sam Seller brought to Rick a queen that he had found in his attic and asked if it is worth anything. This shows us that there's an imbalance of knowledge between the parties. Rick asked what Sam wanted for the queen, and Sam asked whether \$450 would be fair. Rick replied that \$450 would be fair and offered to write him a check immediately. Now remember, we were told earlier that the last queen sold for \$175,000, and now Rick is saying that \$450 is fair. So, think again about those defenses.
- Lee Burgess: Rick and Sam then entered into a valid contract. Sam agreed to hand over the queen the next day. This tells us that the contract is valid, and what Sam agreed to do. We won't have to spend any time analyzing whether the contract is valid, but remember, a valid contract may still be unenforceable if there's an appropriate defense.
- Lee Burgess: The next day, Sam called Rick and said, "I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to another collector." This is telling us why Sam is attempting to rescind the contract and what he intends to do with the queen instead of selling it to Rick under the contract.



- Lee Burgess: Alright, now let's look at how to actually answer this question. You would start any outline or answer by breaking your paper into segments. If, as here, there are multiple questions, one section for each question is a great place to start.
- Lee Burgess: So again, what was our call of the question? What is the likelihood that Rick will obtain:
1. A temporary restraining order?
 2. A preliminary injunction?
 3. Specific performance?
- Lee Burgess: So, let's take each of these issue separately. The first issue is whether Rick will likely succeed in obtaining a temporary restraining order preventing Sam from selling the Anituck queen to a different dealer. Our rule here is to remember that a TRO is an equitable remedy granted to preserve the status quo until a preliminary hearing can occur. A court may issue a TRO only if each of the following elements is met: First, the party seeking the injunction must set forth facts in an affidavit or a verified complaint clearly showing that immediate and irreparable injury, harm, or damage will occur to the movant before the adverse party can be heard in opposition.
- Lee Burgess: Now, Rick should argue that if Sam is not enjoined from selling the Anituck queen, then he will sell it and Rick will not be able to purchase another. There are only six or seven of these queens in existence, with the last one selling over 35 years ago. If he can't purchase Sam's queen, he will lose out on the massive profit he could earn from having a full chess set. For these reasons, he's likely to show that Sam's breach of their contract will cause him irreparable injury. Additionally, this harm is likely to be immediate, because Sam already has another buyer lined up.
- Lee Burgess: Next up: Second, the movant must show that he or she is likely to prevail. Rick will argue that he and Sam entered a valid contract, and that Sam's threat to sell the queen to someone else is an anticipatory breach of their contract. Defenses are not considered when a court considers a TRO ex parte, so Rick can likely argue successfully that he will prevail on the merits at this stage.
- Lee Burgess: Third, the movant must show that a balancing of the hardships favors the moving party. Rick will successfully argue that the balance of the hardships favors him. A TRO would be, at most, a temporary delay in Sam's ability to sell the queen – which is in high demand, whereas the absence of a TRO will likely result in Rick forever losing the chance to acquire an Anituck queen.



Lee Burgess: If the requesting party has not notified the adverse party, the movant's attorney must certify in writing the efforts made to give notice and the reasons why it should not be required. Now, the fact pattern doesn't tell us whether or not Rick is seeking a TRO ex parte. When a fact pattern is silent on such a key piece of information, or where there is ambiguity in the facts, you shouldn't ignore it; you should address it, acknowledge the ambiguity, and provide brief analysis. So here, we would simply state that if Rick is seeking an ex parte TRO, then his attorney must certify that either good faith efforts were made to give notice, or reasons why notice should not be given. The facts are silent as to whether he made this certification. And if he has not yet made this certification, he should do so, arguing that notice to Sam would only serve as an incentive for Sam to accelerate his sale of the Anituck queen. Now, on the other hand, if notice was provided, then Sam is likely to make a successful argument against the TRO, as we will discuss below. Rick's suit for specific performance is unlikely to succeed.

Lee Burgess: Now, note that we have to at least mention the analysis for specific performance here, even though we haven't addressed it yet, because we are talking about the merits of Rick's claim. This is why it is important to do your basic outlining and analysis before you start writing; that way you can avoid wasting time doing the same analysis more than once.

Lee Burgess: So, our conclusion to this first one is likely that because Rick can show each of the requirements for granting TROs is met, he would likely receive a TRO if he seeks it ex parte, he can certify why Sam should not receive notice, and he can post any bond that the court will require. Now, we do have the opportunity here for an alternative conclusion: If he did notify Sam, his request for a TRO would likely be denied, because Sam could make a compelling argument that his claim will not prevail on the merits.

Lee Burgess: Alright, let's move on to issue number two. The second issue is whether Rick will likely succeed in obtaining a preliminary injunction preventing Sam from selling the Anituck queen. A preliminary injunction can be issued prior to a full trial, but only after the adverse party is provided notice and an opportunity to be heard at an evidentiary hearing. The facts do not state whether or not Rick has notified Sam regarding the preliminary injunction. If not, the injunction will be denied because notice and a hearing are required.

Lee Burgess: Now, the party requesting the injunction must show a likelihood of success on the merits and that there are no viable defenses to its case. Now, assuming Sam received the proper notice, Rick would then need to argue that his case is likely to succeed on the merits. That means he would need to show that he would likely win at trial and receive the remedy of specific performance. Courts



applying this requirement have used a sliding scale approach to determine what “likelihood” means. It means, at minimum, more likely than not.

Lee Burgess: So, let’s take a moment here. This part is a little tricky, especially if you’re only listening and not jotting down your own outline as we talk. To get a preliminary injunction, Rick would have to show likelihood of success, and likelihood of success is basically question number three on this essay. So here I’ve decided to simply state the preliminary injunction rule, and then state why one element would not be met, although without doing the underlying analysis. That’s very rarely a winning strategy, but I think it’s called for here, because you do not want to do the specific performance analysis twice, but you do want to do it under the question where it is asked. But be clear and let the grader know that they can find the specific performance full analysis under prompt number three.

Lee Burgess: Okay, let’s go back to discussing this question. Although the underlying contract is valid, Sam will likely make strong arguments that he can raise the defenses of misrepresentation and unilateral mistake to prevent enforcement of the contract and the equitable defenses of unclean hands to prevent specific performance, which will be discussed below in Section 3.

Lee Burgess: Now, another rule we want to talk about here: The court will also impose a bond on the party seeking the preliminary injunction. Finally, the facts are silent as to whether Rick has posted a bond. The court would require that Rick post a bond before issuing a preliminary injunction.

Lee Burgess: Now, note that we didn’t discuss balancing the hardships. The key to managing your time successfully on these complicated questions is to address all of the relevant issues and dismiss the irrelevant ones. Here, we are about to conclude that for one or more reasons, it is unlikely Rick will be granted a preliminary injunction, so we don’t need to continue our analysis of each element; we want to move on. If you do have time, you should quickly move through the other elements and do a brief analysis of why or why not they would be met.

Lee Burgess: Now, our conclusion: Because there are no facts to show that Sam was notified that Rick was seeking a preliminary injunction or that Rick had posted bond, and because Sam has viable defenses that make it unlikely Rick’s lawsuit will prevail, it is unlikely that a court would grant Rick a preliminary injunction.

Lee Burgess: Alright, issue number three. The final issue is whether Rick would be able to obtain specific performance requiring Sam to sell the Anituck queen to him for \$450. The answer is likely “No”, because Sam has compelling legal and equitable



defenses to this contract, including misrepresentation, unclean hands, and unilateral mistake.

Lee Burgess: So, our rule is: In order to obtain specific performance of a contract, the movant must show that each of the following elements is met. Alright, next: The contract at issue must be valid. The facts state that there was a valid contract.

Lee Burgess: The next rule: The conditions of the contract are satisfied or the plaintiff is willing and able to perform. This is also called mutuality of performance. Now, although the contract had not yet been performed when Sam repudiated it, Rick was and claims to remain willing to perform by paying \$450 for the queen. Rick therefore will meet this element as well.

Lee Burgess: The next element: Other remedies are inadequate. Rick must prove that legal remedies, such as monetary damages, would be inadequate. Sam could argue that damages could be calculated based on the agreed-upon price or the market value of the queen, but Rick would argue (convincingly) that the rarity of the Anituck queen and the slim chance of one coming to market would make specific performance the only appropriate remedy.

Lee Burgess: Our next sub-issue: The court can feasibly enforce specific performance of the contract. Now, Rick should be able to show this element with little difficulty. Court-ordered sales of property happen frequently, and court-ordered sales of property for a value that the court determines happen frequently as well.

Lee Burgess: The next sub-rule: The movant must also show that there are no applicable defenses to enforcement of the contract. Now, based on the fact pattern, Sam appears to have several viable defenses to enforceability of the contract, including unclean hands, misrepresentation, and unilateral mistake. So, let's start with unclean hands.

Lee Burgess: Unclean hands means the courts will usually not grant equitable relief if the party seeking the relief has engaged in inequitable behavior. Now, Rick is seeking specific performance, which is a form of equitable relief. But Rick knowingly sought to take advantage of Sam's ignorance, which would result in a windfall to Rick. Sam would argue that Rick's behavior was inequitable, and that he should not be rewarded with equitable relief. It's unlikely that a court would grant specific performance on these facts.

Lee Burgess: Now, a party may also seek to rescind a contract due to misrepresentation if the other party makes a misrepresentation about a material fact, with the intent to induce reliance, and where the other party did actually and justifiably rely on



the misrepresentation. Here, Sam specifically asked if \$450 would be a fair price for the queen, and Rick answered affirmatively, even offering to write a check right then and there. Although Rick knew the true value of the queen, his answer misrepresented a material fact – whether or not \$450 was fair, and that misrepresentation was designed to induce Sam to rely on that information. Sam did rely on it when he agreed to the contract. So on these facts, Sam has a strong argument that the contract should be rescinded for misrepresentation.

Lee Burgess: The next sub-rule: Unilateral mistake, which means that if one party is mistaken about a material fact, and the other party knew that the original party was mistaken, courts will often allow the contract to be reformed to reflect the intent of the mistaken party.

Lee Burgess: Unilateral mistake is generally not a defense to a contract. However, when one party is mistaken about a material fact, and where the non-mistaken party knew that the other party was mistaken, courts will often allow the contract to be reformed to reflect the intention of the mistaken party. Here, Sam intended to get a fair price for his Anituck queen and was mistaken about its value. Not only did Rick know of this mistake, he reinforced Sam’s mistake when Sam relied on Rick’s statement that \$450 was a fair price. So, on these facts, it is unlikely that the court would order specific performance.

Lee Burgess: Phew, that was a tough one! And one where a good, solid outline would be really important helping you keep things straight and making your organization clear.

Lee Burgess: Now, with that, we are out of time. I want to take a second to remind you to check out our [blog](#) at BarExamToolbox.com, which is full of helpful tips to help you prepare and stay sane as you study for the bar exam. You can also find information on our website about our courses, tools, and one-on-one tutoring programs to support you as you study for the UBE or California bar exam.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We’d really appreciate it. And be sure to subscribe so you don’t miss anything. If you are still in law school, you might also like to check out our popular [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don’t hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!



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