

CONTRACTS CRASH COURSE

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I. When is the promise enforceable?

- Enforceable in contract if there's mutual assent (i.e., offer and acceptance) and consideration:
 - **Offer** – communication that would cause a reasonable person in the position of the hearer to believe she has the power to close the deal. Confers “power of acceptance.”
 - **Acceptance**
 - Offer determines how offeree may exercise the power
 - Power is terminated by:
 - Death of the offeror or offeree
 - Lapse
 - Revocation (direct or indirect) by offeror
 - Rejection by offeree
 - Different or additional term?
 - CL: Mirror image rule, last shot rule
 - UCC 2-207: Alters these rules for contracts for the sale of goods
 - **Consideration:** The promise is given in exchange for a performance or return promise, where the performance/return promise induces the promise at issue and is induced by the promise at issue.
 - “Past” consideration doesn’t work (wasn’t “induced by” the promise at issue).
 - Illusory promises don’t work (e.g., “I’ll refrain from collecting the debt until I want to do so”), but courts will stretch to find them non-illusory (e.g., “I’ll pay if I’m satisfied”).
 - **NOTE:** Absent consideration, the promise may be enforceable (to some degree) if it induces reliance on the part of the promisee. See Restatement § 90, “promissory estoppel.”
- If the contract is “within the statute of frauds,” it is generally not enforceable unless in writing and signed by the party to be charged: “MYLEGS.”
- The contract may be voidable if a “policing the bargain” defense applies:
 - Status-based defenses: infancy, intoxication
 - Behavior-based defenses: misrepresentation (including failure to speak when doing so involves bad faith), duress, undue influence
 - Substance-based defenses: violative of public policy, unconscionability
- Performance may not be required if things are different than expected at execution:
 - Mistake—mutual, unilateral.
 - Impracticability
 - Frustration of purpose

II. What is the promise?

- Are side agreements that don't make it into the final writing included? Apply "parol evidence rule":
 - If agreement is *integrated*, all *inconsistent* prior agreements are discharged.
 - If agreement is *completely integrated*, all prior agreements *within the scope* of the agreement are discharged.
- When can we look to extrinsic evidence (e.g., negotiating history, trade usage) to interpret the contract? Apply "plain meaning rule":
 - Judge decides, as a matter of law, if the contract is ambiguous. If so, factfinder may consider extrinsic evidence.
 - Two views on what judge may consider in step one: "four corners rule" vs. Justice Traynor's view (followed by Restatement).

III. When is the promise *kept* so as to bind the other party to perform?

- The promises in a contract are *presumed* to be conditions of one another (so, if one party doesn't perform, the other party doesn't have to). It is possible, though, to make independent covenants.
- Assuming covenants are dependent:
 - The first party's *perfect* performance normally is not required to obligate the second party to perform. She must do so if the first party's breach is "immaterial" (though she may be entitled to damages).
 - If first party's breach is *material*, the second party may *suspend* her performance while she gives the first party a "cure" opportunity. If he cures, she must perform.
 - If the first party's material breach remains uncured, the second party may *terminate* her performance.

IV. What happens when the promise is *broken*?

- Victim of breach may not have to perform, as explained above.
- Victim of breach is entitled to *expectancy damages*: The amount of money necessary to put her in the position she would have been in had performance occurred. NO PUNITIVE DAMAGES!
 - Lost value of performance + incidental loss + consequential loss – cost avoided – loss avoided.
 - **NOTE:** If promise is enforceable on promissory estoppel grounds, damages are limited "as justice requires," usually reliance damages only.
- If a damages remedy would be inadequate (say, because the promised performance is unique and can't be purchased elsewhere), a court may order specific performance.
 - Uniqueness is not a *sufficient* condition for specific performance. Court won't order it if assuring adequate performance would require judicial monitoring (e.g., suppose Justin Bieber breaches a contract to sing at your wedding).

Black Letter Law of Civil Procedure

(Or, My Students Keep Making the Same Mistakes on their Final Exams)

Larry Dessem

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- I. While not constitutionally mandated, the federal diversity jurisdiction statute (28 U.S.C. §1332) requires more than \$75,000 in controversy and complete diversity (with no plaintiff being a citizen of the same state as any defendant.)
- II. While the supplemental jurisdiction statute (28 U.S.C. §1367) allows federal district courts to hear state-law claims “that form part of the same case or controversy under Article III,” it does not require a federal court to hear such claims.
- III. Even though there is complete diversity of citizenship, 28 U.S.C. §1441(b) does not allow a defendant to remove an action to federal court within defendant’s state of citizenship.
- IV. For a court to exercise personal jurisdiction over a defendant, such jurisdiction must be constitutional (see *International Shoe* and *McIntyre v. Nicastro*) and there must be a statute or rule authorizing the exercise of personal jurisdiction (e.g., Mo. Rev. Stat. §506.500).
- V. “*Twqba*” has “retired” federal notice pleading; “[T]he tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions;” “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” 556 U.S. at ____.
- VI. Federal courts can exercise supplemental jurisdiction over Rule 13(a) compulsory counterclaims, but there must be separate jurisdictional basis for Rule 13(b) permissive counterclaims.
- VII. Rule 26(b)(2)(C)(iii) requires court and parties to consider whether “the burden or expense of the proposed discovery outweighs its likely benefit.”
- VIII. “Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), quoting Rule 1 of the Federal Rules of Civil Procedure.
- IX. You can only sue on the same claim once (and sometimes you haven’t even brought the claim once!). *Restatement of Judgments (Second)* §24.
- X. Absent a specific exception, only final judgments can be appealed within federal system.

Multistate Bar Examination News (September 2013)

<http://www.ncbex.org/home/multistate-bar-examination-news/>

Effective with the February 2015 bar exam, Civil Procedure will appear on the Multistate Bar Examination (MBE) along with the current MBE topics. The subject matter outline for Civil Procedure is shown below. Sample Civil Procedure questions will be released in fall of 2014.

The MBE contains 200 multiple-choice questions, 190 of which are scored (the 10 unscored questions are being evaluated for future use and are indistinguishable from the scored questions). With the addition of Civil Procedure, the 190 scored questions on the MBE will be distributed as follows: Civil Procedure (27), Constitutional Law (27), Contracts (28), Criminal Law and Procedure (27), Evidence (27), Real Property (27), and Torts (27).

Also effective with the February 2015 bar exam, the Multistate Essay Examination (MEE) Federal Civil Procedure subject matter outline will be modified to conform to the MBE Civil Procedure subject matter outline so that there will be one unified set of Civil Procedure specifications for both exams.

Multistate Bar Examination Civil Procedure Subject Matter Outline (effective February 2015)

NOTE: Examinees are to assume the application of 1) the amendments to the Federal Rules of Civil Procedure through 2012; and 2) the sections of Title 28 to the U.S. Code pertaining to jurisdiction, venue, and transfer. Approximately two-thirds of the Civil Procedure questions on the MBE will be based on categories I, III, and V and approximately one-third will be based on the remaining categories II, IV, VI, and VII.

I. Jurisdiction and venue

- A. Federal subject matter jurisdiction (federal question, diversity, supplemental, and removal)
- B. Personal jurisdiction
- C. Service of process and notice
- D. Venue, forum non conveniens, and transfer

II. Law applied by federal courts

- A. State law in federal court
- B. Federal common law

III. Pretrial procedures

- A. Preliminary injunctions and temporary restraining orders
- B. Pleadings and amended and supplemental pleadings

C. Rule 11

D. Joinder of parties and claims (including class actions)

E. Discovery (including e-discovery), disclosure, and sanctions

F. Adjudication without a trial

G. Pretrial conference and order

IV. Jury trials

A. Right to jury trial

B. Selection and composition of juries

C. Requests for and objections to jury instructions

V. Motions

A. Pretrial motions, including motions addressed to face of pleadings, motions to dismiss and summary judgment motions

B. Motions for judgments as a matter of law (directed verdicts and judgments notwithstanding the verdict)

C. Posttrial motions including motions for relief from judgment and new trial

VI. Verdicts and judgments

A. Defaults and involuntary dismissals

B. Jury verdicts—types and challenges

C. Judicial findings and conclusions

D. Effect; claim and issue preclusion

VII. Appealability and review

A. Availability of interlocutory review

B. Final judgment rule

C. Scope of review for judge and jury
