

Alison Monahan: Welcome to the Bar Exam Toolbox podcast. Today, we're walking through a Civil Procedure question. This is another in our series of podcasts talking about how to approach questions on the California bar exam. Your Bar Exam Toolbox host today is Alison Monahan, and often I'm here with Lee Burgess. 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.

Alison Monahan: Together, we're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). I also run [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review or rating 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 always reach us via the [contact form](#) on BarExamToolbox.com, and we would love to hear from you. With that, let's get started.

Alison Monahan: Welcome back. Today, we're walking through a Civil Procedure question. This is another in our series of podcasts talking about how to approach questions on the California bar exam. And don't forget to subscribe to our podcast so that you won't miss any upcoming discussions. I know you usually have Lee for these, but she doesn't like Civ Pro, so I'm pitch hitting.

Alison Monahan: In this question, we have a contract dispute that forms the basis of a civil procedure question, but no "contract law" was actually required to write a passing answer. We note this to emphasize the importance of carefully reading the question you're asked and pre-writing before you start your answer, so that you don't lose track of key issues. It would have been pretty easy to miss in this question.

Alison Monahan: Now, before we walk through today's question, we need to do a quick review of the law you'll want to know for this question. First up, joinder of claims. A party asserting a claim, a counterclaim, a crossclaim, or third-party claim may join as independent or alternative claims, as many claims as it has against an opposing party, regardless of whether they arise out of the same transaction or occurrence. But joinder will not extend or limit jurisdiction.

Alison Monahan: Now let's talk about the pleading requirements. You might remember some cases called *Twombly* and *Iqbal*, and they state the requirements for a valid pleading. These are as follows: One, a statement of the subject matter; two, a short and plain statement of the claim showing entitlement to relief; and three, a demand for judgment. However, certain claims including fraud must be pleaded with additional specificity. A claim for fraud in a contract dispute



requires that the defendant, one, knowingly; two, misrepresented; three, a material term in the contract. That's going to need to be in the pleadings.

Alison Monahan: Now let's talk about subject matter jurisdiction. So, federal courts must have subject matter jurisdiction over the claim before the court. This is not waivable. Subject matter jurisdiction may be established either through federal jurisdiction, diversity jurisdiction, or supplemental jurisdiction. Now, federal question jurisdiction exists where the cause of action, as stated in the complaint, arises under a federal law or federal issue.

Alison Monahan: Diversity jurisdiction requires complete diversity between the parties, and the amount in controversy must exceed \$75,000. Complete diversity means that all plaintiffs are domiciled in different states from all defendants. And to meet the amount in controversy, a plaintiff may aggregate claims, as long as they are against the same defendant.

Alison Monahan: Now, supplemental jurisdiction – that only exists when a lawsuit consists of more than one claim, and the federal court had valid jurisdiction, either through diversity or federal question, over at least one of the claims. If the federal claim and the other claims arise out of "a common nucleus of operative fact", then the court may exercise supplemental jurisdiction to hear the other claims as well.

Alison Monahan: And you might remember from your Civ Pro class the Erie Doctrine. What this says is that a federal court, when they're exercising diversity jurisdiction or supplemental jurisdiction, must apply the substantive law of the state in which it is sitting. However, federal courts will apply federal procedural law in diversity cases.

Alison Monahan: Now finally, we need to talk about the right to a jury trial. So in civil matters, the Seventh Amendment preserves the right to a jury trial in a civil matter as to legal relief, such as damages, but a judge decides equitable relief, such as injunctions.

Alison Monahan: Okay, now let's move on to reading the question. This is a question from the [July 2017 California bar exam](#), and we will link to a webpage where you can find this question in the show notes. Here we go.

Alison Monahan: "Buyer, who was living in New York, and Seller, who was living in California, entered into a valid contract, agreeing to buy and sell a painting claimed to be an original Rothko, supposedly worth \$1 million, for that amount. In a separate



valid contract, Buyer agreed to buy from Seller a parcel of California real property worth \$5 million, for that amount. Buyer and Seller completed the purchase of the painting on June 1. They were to complete the purchase of the real property on June 30.

Alison Monahan: On June 15, Buyer resold the painting but obtained only \$200 because the painting turned out to be a fake. Buyer promptly notified Seller of his intent to sue Seller for damages of \$1 million. Seller then informed Buyer that Seller would not go through with the purchase of the real property. Buyer filed suit against Seller in federal court in California. Buyer claimed fraud as to the painting, alleging only that Seller committed "fraud in the supposed value", and sought \$1 million in damages. Buyer also claimed breach of contract as to the real property and sought specific performance. Buyer demanded a trial by jury on all issues."

Alison Monahan: Now here come our interrogatories. One: May Buyer join claims for fraud and breach of contract in the same suit against Seller? Discuss. Two: Is Buyer's allegation sufficient to state a claim for fraud involving the painting? Discuss. Three: Does the federal court have subject matter jurisdiction over the suit? Discuss. Number four: May the federal court apply California law to decide the breach of contract claim involving the real property? Discuss. Number five: On what issues, if any, would Buyer be entitled to a jury trial? Discuss.

Alison Monahan: Although there are five calls of the question in this essay, each sub-issue is actually relatively narrow. Now, because of this, your analysis will be fairly shallow, but that makes the accurate rule statements even more important. While most California essays include some wiggle room to argue each side, there's very little ambiguity about the correct ruling for each of these questions. So the first thing that you should do is mark up your exam question and assess what is legally significant about each fact in the fact pattern. So let's do that together.

Alison Monahan: Number one. So we've got the buyer, who was living in New York, and the seller, who was living in California, entered into a valid contract, agreeing to buy and sell a painting claimed to be an original Rothko, supposedly worth \$1 million, for that amount. What does this tell us? Well, this fact number one establishes that the parties are domiciled in different states for the purposes of diversity. It also establishes there is a valid contract between these parties, governed by the UCC, because the contract is for the sale of goods worth over \$500.



Alison Monahan: So what do we know next? In a separate valid contract, the buyer agreed to buy from Seller a parcel of California real property worth \$5 million, for that amount. So this fact establishes that there is a second valid enforceable contract, and it's governed by the common law because it deals with real property. We also know that this states the value of the real property, which establishes the amount in controversy for the lawsuit seeking to enforce this contract. And it's also worth noting that aside from involving the same buyer and seller, these two contracts are completely unrelated.

Alison Monahan: Alright, next up. Buyer and Seller completed the purchase of the painting on June 1. They were to complete the purchase of the real property on June 30. Here the facts tell us the parties have performed on the painting contract and will close, if they close as scheduled, on the real property contract later in the same month. Now on June 15, Buyer resold the painting but obtained only \$200 because the painting turned out to be a fake. Buyer promptly notified Seller of his intent to sue Seller for damages of \$1 million. Now, here we are establishing the painting was not worth anywhere close to the \$1 million purchase price, and this creates the basis for the fraud lawsuit.

Alison Monahan: Alright, next up. The seller then informed Buyer that Seller would not go through with the purchase of the real property. This fact establishes that in response to the lawsuit for fraud, Seller will now refuse to perform on the other valid contract for the sale of real property. Remember, these are two distinct contracts, so performance or lack of performance on one should actually have no legal impact on the other.

Alison Monahan: Next up. Buyer filed suit against Seller in federal court in California. Now, this fact is important because it establishes that we need to use the rules of federal civil procedure for this case. And don't forget that California will sometimes test California civil procedure, so it's important to really pay attention to what rules you're applying here.

Alison Monahan: Our next fact is that the buyer claimed fraud as to the painting, alleging only that Seller committed "fraud in the supposed value", and sought \$1 million in damages. Now, these facts are important because they show what type of suit was filed against Seller, which was for fraud. It also illustrates the specific allegations in the complaint for the fraud claim, and this is going to be relevant to the second question about whether these allegations are sufficient. And again, it establishes the amount in controversy.

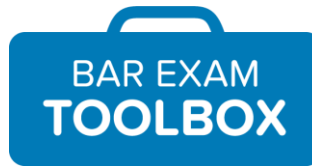


Alison Monahan: Next up, Buyer also claimed breach of contract as to the real property and sought specific performance. Now this fact establishes that Buyer is also suing to enforce the second contract, and that he wants specific performance. In this case, specific performance means the sale of the property would go through as scheduled. Buyer is not seeking any monetary compensation for this breach of contract. And finally, Buyer demanded trial by jury on all issues. So here we learn that the buyer seeks a jury trial on both pieces of the lawsuit, not just adjudication by a judge.

Alison Monahan: Alright, so now we've got the law out of the way and we've looked at some facts, and let's look at how we're going to actually answer this question. You would start any outline or answer by breaking your paper into five segments. Most of the calls of the question did not have any sub-issues. So, the setup for those questions is actually pretty easy. The third and final call do include multiple sub-issues, so the analysis for these are divided into separate sections.

Alison Monahan: Now, here's the basic breakdown of the outline. One: May Buyer join the claims for fraud and breach of contract in the same suit against seller? That's straight out of the question. Two: Is Buyer's allegation sufficient to state a claim for fraud involving the painting? Also directly from the question. Now, three you're going to split because you've got two different pieces to worry about. 3a: Does the federal court have subject matter jurisdiction over the fraud suit? 3b is going to be: Does the federal court have subject matter jurisdiction over the suit involving real property? Number four we're going to take straight from the question, which is: May the federal court apply California law to decide the breach of contract claim involving the real property? And then five, again, we're going to split: Is Buyer entitled to a jury trial on the fraud claim for damages of \$1 million? 5b: Is Buyer entitled to a jury trial on the property claim seeking specific performance?

Alison Monahan: So, let's go through each part separately. Alright, on the first call of the question, the issue is whether Buyer can join claims for fraud and breach of contract in the same suit against this seller. Now, remember your rule. The rule states that a party asserting a claim, counterclaim, crossclaim, or third-party claim may join as independent or alternative claims as many claims as it has against an opposing party, regardless of whether they arise out of the same transaction or occurrence. Joinder will not extend or limit jurisdiction. Here the plaintiff, Buyer, is the same party for both claims, and Seller is the same defendant in both claims. Joinder's permissible because the same plaintiff is asserting multiple independent claims against the single defendant.



Alison Monahan: Now on the second call, the issue is whether Buyer's allegation that Seller committed "fraud in the supposed value" is sufficient to state a claim for fraud. Now remember your rule under *Twombly* and *Iqbal*. Requirements for statement of claim are as follows: one, statement of the subject matter; two, a short and plain statement of the claim showing entitlement to relief; and three, demand for judgment. But don't forget a fraud claim has additional requirements and must be pled with specificity. So, fraud in the contract dispute requires the defendant, one, knowingly; two, misrepresented; three, a material term in the contract.

Alison Monahan: So if we do our analysis, here, the claim would be valid under the standards of *Twombly* and *Iqbal*. Buyer alleged that Seller committed fraud when representing the painting is an "original Rothko", but then the painting only sold for \$200 and the buyer is claiming monetary damages as a result. However, let's not forget about the fraud aspect here. This lawsuit alleges that Seller committed fraud and we know there are heightened specificity requirements that the buyer failed to meet in his pleading. The facts state only that Seller committed "fraud in the supposed value". Buyer did not allege that the defendant, the seller, knowingly misrepresented a material term of the contract.

Alison Monahan: To have a valid fraud complaint, Buyer will likely be required to plead facts pertaining to, one, the fact that Seller claimed to be selling an original Rothko when in fact it was a forgery; two, that Seller knew the painting was a forgery; three, that the seller presented the painting to the buyer as a Rothko, which we might need to learn more about when and how the painting was authenticated; and four, the buyer would not have paid the purchase price if he knew the painting was a forgery. Without these additional facts, his claim is insufficient.

Alison Monahan: Now, there are limited facts pertaining to the purchase and subsequent sale of the "Rothko" in the complaint. Buyer will need to include information about these additional facts in an amended complaint before the court will allow Buyer to move forward with this specific lawsuit. As a quick reminder, Buyer does not need to prove these facts in the complaint. An opportunity to prove their merit will occur at trial. This is merely a gatekeeping rule which determines what must be specifically stated in order to move forward with a claim for fraud. Therefore, Buyer's pleading is insufficient.

Alison Monahan: On the third call, the issue is whether the court has subject matter jurisdiction over the suit. Let's remember the rule. Federal courts must have subject matter jurisdiction over the claims, and this may be established either through federal



question jurisdiction, diversity jurisdiction, or supplemental jurisdiction. Federal question jurisdiction exists where the cause of the action, as stated in the complaint, arises under federal law or federal issue. Here there are no federal claims, so this part of the rule does not apply.

Alison Monahan: Moving on to diversity jurisdiction. Diversity jurisdiction requires complete diversity between the parties, and that the amount in controversy must exceed \$75,000. There is no diversity of citizenship jurisdiction if any plaintiff is a citizen of the same state as any defendant. Remember, citizenship is based on domicile, meaning physical presence in the state and a subjective intent to make that his or her permanent home. Now, for organizational purposes, we recommend addressing both claims individually, even though both claims use the same rule and have the same outcome. This is to ensure you don't miss any points by combining multiple sections into a single IRAC.

Alison Monahan: So for the claim involving the painting, first, let's address the amount of controversy issue because that's an easy "raise it and dismiss it" issue. Here, Buyer is suing for \$1 million, which is clearly more than \$75,000. Additionally, this appears to be a good faith claim because \$1 million is actually the amount Buyer paid for the painting.

Alison Monahan: Next, we need to examine whether there was complete diversity. Here, physical presence is satisfied because Buyer lives in New York and Seller lives in California. However, it is unclear if buyer has a subjective intent to remain in New York, considering that Buyer is purchasing California real property. However, remember that domicile is determined at the time the lawsuit is filed, and as of that date we can infer that Buyer is domiciled in New York. Also, it is unclear if Seller has a subjective intent to remain in California, as seller must either live at a different California property or potentially move out of state once this property is sold to Buyer.

Alison Monahan: On this question, you will need to recognize this ambiguity in your analysis and address it directly. However, since the facts are not clear for either argument, both conclusions are valid. A quick word of caution on this topic. This question has the potential to bait students into trying to argue both sides because of this ambiguity. Now, sometimes when students attempt to argue both sides, they actually end up with two weak and rather incomplete arguments, rather than one persuasive argument. Now, remember that bar graders are looking for well-written, strong legal arguments. Once you've addressed this factual ambiguity in the question, be sure to pick whichever conclusion you find most persuasive and come to a strong conclusion. So, in conclusion here, there is complete diversity



and the amount in controversy is over \$75,000. Therefore, the court has valid subject matter jurisdiction over the claim involving the painting.

Alison Monahan: Now let's look at the claim on the real property in California. The same rules apply to this claim. There must be complete diversity and an amount in controversy greater than \$75,000. Here, buyer entered into a valid contract to purchase real estate for \$5 million. Although the purchase is not yet completed, the property in dispute is definitely worth more than \$75,000. The amount in controversy element is clearly met. Analysis for the issue of complete diversity is exactly the same as stated before, because the parties are identical in both of these suits. You can reference your discussion above and come to the same conclusion as before. Therefore, the court has subject matter jurisdiction over the lawsuit involving real property.

Alison Monahan: Finally, you want to very quickly address the issue of supplemental jurisdiction. Remember, the rule is that supplemental jurisdiction allows a state law claim that does not otherwise have jurisdiction to be attached to a federal claim that does have subject matter jurisdiction. Both legal claims independently meet the requirements for diversity jurisdiction, so supplemental jurisdiction is not relevant here.

Alison Monahan: Alright, moving on to number four: May the federal court apply California law to decide that breach of contract claim involving the real property? Alright, going back to our favorite Erie Doctrine. Pursuant to the Erie Doctrine, a federal court, when exercising diversity jurisdiction or supplemental jurisdiction, must apply the substantive law of the state in which it is sitting. However, federal courts will apply federal procedural law in diversity cases. Here, the applicable law will depend on whether the legal issues before the court are substantive or procedural. Regarding the fraud claim, a breach of contract issue addresses legal rights, so it is substantive, not procedural. Thus, the federal court must apply state substantive law for the state (California) in which it is sitting.

Alison Monahan: Next, we must look at the choice of law involving property. To the extent there's a choice of law issue, which is actually unclear in the facts, California law should apply because that's where the property is located. You may also note that if there was a choice of law provision in either contract, that provision might dictate the outcome of this issue. However, there are no facts to indicate the contracts included a choice of law provision. Because breach of contract is a substantive law issue and the federal court sits in California, the federal court is going to apply California law, particularly for the property sale contract, because



that's where the disputed property is located. Federal law will, of course, dictate any procedural questions.

Alison Monahan: Alright, we're making good progress. Finally, let's turn to the issue of whether Buyer is entitled to a jury trial. Again, we want to split this question into two sub-issues. First sub-issue: Is Buyer entitled to a jury trial on the issue of fraud with regard to the contract for the sale of the painting? And the rule here – in civil matters, the Seventh Amendment preserves the right to a jury trial in a civil matter as to legal relief, such as damages, but a judge decides equitable relief, such as an injunction. Here with respect to the fraud claim, the buyer seeks monetary damages and has the right to have a jury trial under the Seventh Amendment.

Alison Monahan: The second sub-issue is whether Buyer is entitled to a jury trial on the breach of contract claim over the real property. Now, the difference here is that Buyer's seeking equitable relief, meaning he wants the court to issue an injunction forcing the defendant, Seller, to sell the property to Buyer. Because the plaintiff seeks equitable relief instead of monetary relief, Buyer is not entitled to a jury trial on this issue.

Alison Monahan: So, to wrap it up, in conclusion, Buyer has a right to a jury trial on the issue of damages in the fraud claim, but a judge will decide whether Buyer is entitled to the injunctive relief sought in conjunction with the sale of real property.

Alison Monahan: Now, as you surely noticed with so many short but specific calls of the question, organization and knowing the rules accurately was really critical to this essay. With so many specific questions to address, it can be easy to get lost in the details and fail to address an issue, which would of course be devastating to your score. So, remember to stay focused, organized, and you will have no trouble tackling long essay questions such as this one.

Alison Monahan: With that, we are out of time. We're taking a couple of weeks off for the holidays, so we'll see you again in January in a whole new decade. 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 California or UBE bar exams.

Alison Monahan: 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 would



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