CONTRACT LAW

SYLLABUS AND COURSE OUTLINE
VERSION 1.0

2020-21

PROFESSOR LIPSHAW

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ANNOYING AND PROCEDURAL PREFACE TO THE PREFACE

Welcome to one of the really annoying aspects of being a lawyer. Arbitrary procedural details matter. Here is an example. If you become a litigator, you will discover that each court has its set of annoying procedural rules, like limits on the number of pages in a brief, or the width of the margins, or the size of the type. If you miss the picky little details and happen to be filing a complaint at 5:00 p.m. on the last day before the statute of limitations runs, and the clerk rejects your filing because it fails to comply with the picky little details, you are in, as we say technically, deep doo-doo. That is when you might hear the phrase "notify your malpractice carrier."

To drive the point home in a moderately fun way, the first of the multiple-choice quizzes you will take online this semester is about the picky little details in this syllabus. Don't worry, like all of my exams and quizzes, it is open book, and the only restriction is that you are obliged under the Honor Code to do it yourself. You will find further details, including the due date, under Quizzes on Blackboard.

COVID-19 PANDEMIC CONTINGENCIES

As I prepare this syllabus in the spring of 2020, there is the distinct possibility that this class will be taught remotely at least in the fall 2020 semester. If so, I will announce changes in procedures designed to replicate some semblance of human contact between you students and me the professor.

COURSE OBJECTIVES AND LEARNING OUTCOMES

I have decided to do away with the traditional and very expensive casebook in this course. Rest assured, however, that you will not miss anything that matters.

The purpose of this document is to provide you with the precise structure of the course. Our classes will follow the topics that you see here. Consider this your bible for purposes of this course.

1. Lawyering is a practice to be learned not a subject to be studied.

The first and most important thing to understand, from my standpoint, is how different this is from what you did as an undergraduate.

New students are often surprised by (and sometimes struggle with) the contract law class. **It's not a class about how to write or make contracts, at least directly.** It is really a class that covers what 150 years of law professors think are the principles that govern the *practice* of resolving a particular set of problems, namely those that arise when people have fights about real or alleged voluntary transactions. (I say "voluntary" to distinguish most of torts, which involves involuntary relationships, like causing somebody injury through negligence.) Examples:

- Was your promise to give me something legally enforceable or just a social obligation?

- Did our conversation actually satisfy the requirements for creating a legally binding contract (see "offer and acceptance" below)?

- Was the oral promise I made to you that turned out not to be included in the written document legally part of our contract?

- When we used the word "inflation" in the agreement as part of the price adjustment mechanism, what did we mean?

- I made a mistake about whether the washer/dryer I bought from you would fit in my house; can I rescind the contract?

Your job is NOT to learn a mass of material and then regurgitate it back to me on the exam, as though you were writing a report on contract law. I will repeat this over and over again, but the substance of what you are learning here, the body of rules that make up "contract law" is only secondary to the main goal. In fact, we could make this a twelve-hour course and just maybe we'd get to everything that's in the Blum text. What I've done is to pick out the most important things (in my view) with the understanding that you have your bar review and then an entire career to fill in the details as you need them.

Yes, you need to know what many of the rules are (but you don't need to memorize them because everything here is always "open book" as in real life). But what you will be tested on is how you employ the rules to solve hypothetical problems, as though a client were walking into your office and presenting a tale of woe to you. That is the primary distinction between using the rules as tools in your practice, on one hand, versus an undergraduate study of what the law "is," on the other.

And when I refer to legal rules as "tools in your practice," perhaps the most profound piece of learning is at §4.2.2 of the Blum book, which says the following:

> Upon learning the rules of offer and acceptance, an inexperienced student may be tempted to waste time and effort in trying to unravel the sequence of offer and acceptance in every case or problem. However, not every contract dispute raises formation issues, because the parties may not be in disagreement over the facts of formation.

At this point, "the rules of offer and acceptance" are likely a mystery to you, but the point Professor Blum makes is critical to every topic you learn in this course, whether the subject is contract formation, the frustrating concept of "consideration," the Statute of Frauds, the parol evidence rule, or the many, many other things you will learn by the end of the year. The rules are only meaningful in the context of the problem you are trying to solve.

All the rules you will learn are instruments in the attempt to resolve issues like those. You will hear all sorts of metaphors from me over the course of the year, and I keep making up new ones. Several years ago, it was the idea that you, as a lawyer, are a painter. The body of rules of law is your palette, and the rules are your paints. What you want to do with the rules is to paint a legal picture of the situation that is favorable to your client. If the situation calls for mauve, don't use black. It may be that using yellow is a clever way to get a result that even the professor didn't think of. Blue may be a possibility, but after you take a look at it, it turns out it doesn't work. But it was worth considering.

What usually isn't helpful is an exegesis on the nature of paint, or the theoretical relationship of mauve to yellow. In other words, you will find yourself over and over again (very likely) trying to make sense of all the rules together as a coherent system. You are not alone. Many contract law professors do the same thing. Be forewarned that I, personally, am skeptical of that effort. I believe that contract law, like most human institutions, has flaws and inconsistencies and failings that can only be resolved by stepping outside the subject matter and approaching it critically.

Here's another metaphor (and I apologize for the baseball analogy). If you are trying to get on base, you use a bat. If you are trying to catch a ball, you use a glove. If I ask you to explain how to catch, giving me a long exegesis on bats isn't going to help much. The same applies when you do your legal analysis. If the problem presented doesn't involve the rules, then there's no need to invoke them.

Or here's another one. Suppose you went to the doctor with a problem of bursitis in your knee and wanted a treatment plan. You'd probably scratch your head if the first thing you read in the doctor's report was the definition of a knee. But that's often how "inexperienced students" approach the legal analysis that they have to do on exams. I don't know how many answers I've read where the first sentence defines a contract, even though the definition of contract has nothing to do with solving the problem. There could be a problem in which the definition of a contract in §1 of the Restatement (Second) of Contracts is relevant to the solution, but it's not a given, even in your Contracts class!

This is the most critical aspect of judgment you can learn in this class. Some categories of rules will obviously apply in the context of the problem, and some obviously won't. Some may fall in a kind of gray area where it makes sense to consider the rule, even though ultimately it won't help solve the problem.

There is no quick and easy answer for making that call; it's the kind of professional intuition you will develop by practicing giving advice over and over and over again in your classes and during your career.

The other aspect of good judgment is believing that I have no intention of testing you on material that, for example, shows up in Blum, the Restatement, or cases we read that I don't focus on in class. Trust me when I tell you that I can adequately test your abilities to do what I've just outline without sneaking in tricks like expecting you to study things I haven't talked about.

You can find examples of my tests on Blackboard. The essay questions are always complex stories in which multiple parties are doing a transaction or in conflict over one. You have to act as the lawyer and, in a short amount of time, figure out what legal problems (i.e. issues) are embedded in the story, and then act as a lawyer (or sometimes, but rarely, as a judge) to figure what set of rules might solve the problem, or what you can explain the other side is going to do in the same manner, and try to anticipate or respond to it.

As I tell first year students every year, you can write your exam answers without ever specifically referring to a case name and get an A, and you can also recite chapter and verse of the material and get a C-. Because the game is all about solving problems put before you, not about memorizing and spitting it back.

2. You are entitled to approach the subject matter of the law critically but not at the expense of learning how to practice with the rules.

There is another element to your introduction to this human-created system of rules designed to resolve certain kinds of disputes. As I said earlier, I believe that contract law, like most human institutions, has flaws and inconsistencies and failings that can only be resolved by stepping outside the subject matter and approaching it critically.

In my view, the intellectual trap of contract law (and law in general) is the illusion that it is a neutral (and coherent) system of principles that you should be able to master the same way that you can master biochemistry or programming with Python. My metaphor here would be that you can use biochemistry either to find a cure for the coronavirus or to wage chemical warfare, and you can write computer programs either to teach languages or undermine free elections. The "tools" are neutral, but the goals are not.

My theory is that law is a hybrid system – a "model" – that incorporates both social norms and pure logic. We will be spending the overwhelming portion of time in this course learning to use the logic. It is probably the case that the logic itself is as race- or gender- or morality- neutral as quantum physics or computer code. But because it's logic in service of a social institution, it can be used for good or for evil.

Let me offer one (oversimplified) example. There is a (very widespread but certainly not universal) that the purpose of contract law is economic and designed to maximize a society's wealth. That purports to be based in economic theory that itself purports to be "social scientific" and therefore more "rational" than other approaches. But the "science" really stems from 19th century utilitarian philosophy - Bentham and John Stuart Mill (both old white guys). It is a normative conclusion draped in supposedly objective or scientific clothing. And there are legitimate philosophical responses to that. The area of legal scholarship called Critical Race Theory is one. CRT looks skeptically at law as a means of dominant segments of society expressing and exerting power at the expense and even the oppression of minority or non-dominant groups. (If you are interested in the subject, I recommend an article, Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1 (2008). It is on Blackboard under Course Materials for Unit 1.)

Full disclosure. I don't agree with much of Professor Florestal's CRT assessment of contract law, but that is mainly because I have never bought into the economic basis for contract law - the acceptance of that normative goal as objectively superior. Consistent with my metaphor of biochemistry or Python, I view the "algorithms" of the law as tools that can be employed for good or evil. I don't think pure is white or male or Western. It is a way our minds have come up with moving from assumptions to consequences using certain rules of inference. This will be a major topic in Unit 1 ("Neutral Principles versus Public Disgust"). If you have a case where part of the consideration for the sale of a piece of property was a racial exclusion covenant, and all you focus on is whether there was a bargain, and courts won't remake bargains (as part of the doctrine), that is the result of the employment of the logic, but the logic isn't the problem. The disgusting purpose or ends for which the logic got used is the problem. To the extent that dominant segments of society have tried to cloak their political or normative goals in seemingly neutral objective principle, CRT makes a completely legitimate point.

In sum, critical theory has influenced many things in my philosophy of law influenced by critical theory. I believe very much mainly that there are limits to reason and logic in resolving private and public problems or disputes, and that there are affective or emotional or narrative sequences in how we act and relate to each other that pure reason and logic can't accommodate.

Nevertheless, the primary focus of the class necessarily involves teaching and learning the logic. What you do with it during the remainder of your careers as law students and lawyers is up to you.

CONTACT INFORMATION

Cell Phone: 317-694-4976

Email: jlipshaw@suffolk.edu

TEACHING ASSISTANT

The teaching assistant for this class will be Robert (Bob) Cunha. He will be in touch with you directly. His job is to be available to answer questions, hold office hours and review sessions, and other things to aid you. He won't do any of the actual grading. That is, for better or worse, entirely my responsibility.

COURSE INFORMATION

Fall: Wednesdays from 8:00 – 9:50 p.m., Room TBD

Spring: Mondays from 8:00 – 8:55 p.m., Room TBD
Wednesdays from 6:00 – 7:50 p.m., Room TBD

OFFICE HOURS

In the fall, Wednesdays, 4:05-5:45 pm. Walk in (physically but more likely via Zoom) or sign up via SignUpGenius, linked on Blackboard.

Spring, TBD

CLASS MANAGEMENT SYSTEM

I use Blackboard, on which you are automatically registered. All of my non-oral communication, including e-mails, syllabus updates, unit outlines, supplemental materials, etc., with you occurs via Blackboard. (Of course, if you are reading this, then you may have already found your way to Blackboard.)

COURSE MATERIALS

Our learning tools will be the following:

Syllabus and Course Outline. This is the thing you are reading now. It will provide the entire structure of the course – where we are and what we are studying. Among other things, it substitutes for the table of contents in a casebook.

Text. Even if I assigned a casebook, many of you would still go out and buy a commercial text or supplement. I'm going to make life simpler by using one of the best of them – Blum, Examples and Explanations: Contracts, 7th edition – as our textbook. Remember, however, what I said before. Law school is NOT about regurgitating what you learned in a textbook. Which is one of the reasons I don't think it's that important which one we use.

Nevertheless, I have discovered that some students want the security of a casebook. I originally used the prior edition to Bishop & Barnhizer, Contracts 2d ed. (West Academic). You will find many of the cases we read there in edited form. I don't think you need to buy it, but the bookstore will stock some copies, and it is available on reserve in the library.

Cases. I have edited all of the cases as though I were a casebook author and posted them under Course Materials by unit on Blackboard. You get the benefit of a law professor editing the cases to make them easier to read, without having to pay the price of a casebook for the privilege.

Restatement and UCC Supplement. Knapp, Crystal, & Prince, Rules of Contract Law, 2019-2020: Selections from the Uniform Commercial Code, the CISG, the Restatement (Second) of Contracts, and the UNIDROIT Principles, with Material on Contract Drafting, Sample Examination Questions, and Supplement CISG Cases.

Two observations. The supplement, at least in hard copy, costs $58. I am not sure about e-versions. You will very much need to have access to the Restatement and the UCC, but you don't necessarily have to buy the supplement. The Restatement is also available on Westlaw, and the advantage there is that all of the comments and examples are included (which is not true in the supplement). If you are struggling with understanding a rule, look at the comments and the examples. The entire Uniform Commercial Code (but without the comments) is available online here: https://www.law.cornell.edu/ucc.

Graphics. These are Power Point documents prepared by me, also available under Course Materials by unit on Blackboard before, during, and after we use them in class.

Technology. Occasionally I use a technology called Turning Point to poll the class about an issue. Participation is up to you, but to participate you must have a ResponseWare license or a "clicker."

FIRST ASSIGNMENTS

You should read the three cases and course materials for Unit 1. It will take us several class sessions to finish Unit 1 so it is not critical that you have all three cases read before the first class. In addition, there is open book online quiz which is based on this syllabus and the course outline.

ABOUT ME

I'm a little unusual in that I am a full-time faculty member but I practiced law a lot longer than most people who end up becoming law professors. I graduated from the University of Michigan with a bachelor's degree in 1975, and from the Stanford Law School in 1979. I began my career as a business, securities, and antitrust litigator with the large Detroit firm of Dykema Gossett, where I became a partner in 1987. In 1989, I moved from litigation to transactional work within the firm, and did corporate and mergers and acquisitions work.

In 1992, I moved in-house and became the Vice President and General Counsel of AlliedSignal Automotive, a very large automotive parts supplier. (AlliedSignal has since become Honeywell.) I returned to Dykema in 1998, after we had sold off much of the business. In 1999, I became the Senior Vice President, General Counsel and Secretary of Great Lakes Chemical Corporation, a Fortune 850 company whose stock traded on the New York Stock Exchange. In 2005, another company acquired Great Lakes Chemical, and I left the corporate world for academia.

I was a visiting law professor at Wake Forest in 2005, teaching contracts and sales, and at Tulane in 2006-07, teaching sales, secured transactions, and business associations. This is my thirteenth year at Suffolk. I have been teaching Contracts for a long time. Right now, I am teaching two upper level courses, our introduction to business entity law and a highly participatory course called "Entrepreneurship, Venture Capital, and the Law." I have written extensively on the subject of promises and contracts, particularly in the business setting.

For more information about me, see http://www.professorlipshaw.com.

SOCRATIC METHOD

You may have heard about the Socratic method – in my class, the closest we will get to it is a high level of participatory interaction. Please don't worry. I do not believe in hiding the ball or in making you feel bad. You will learn quickly that I am a smart-aleck from way back, and like banter. But this is *professional* training, in which you are learning how to process information and exercise professional judgment in anticipation of when, several years from now, clients ask you: "what should I do?" There are rarely any simple rules. If things are confusing, it ought to be because the material itself is confusing, not because I'm trying to trick you.

PARTICIPATION AND ATTENDANCE

Part of the socialization process in law school is getting called on in class. I do it, but I'm not a maniac about it. I will assign "on call" panels, i.e. a group of students upon whom I may call to discuss the materials on given days. I don't reward or punish students in connection with participation. You are paying a lot of money for this education; you can decide whether you want to get out of it. I should also note that my enthusiasm (if it ever existed) for cold calling tends to peter out over the course of the year.

I also don't care where you sit, but I do like to know your names, and so I like the custom of your having name cards in front of you, at least until later in the year when I know some or all of your names. I'm getting old and my brain cells aren't what they used to be, so forgive me if I see you in the hall and don't remember your name. I do tend to remember names of students who participate actively, and I think that makes it more pleasant for both of us. [See, however, COVID-19 Contingencies....]

The Law School's student attendance policy is set forth in Section II.B of the Rules and Regulations, which can be found at the following URL: http://www.suffolk.edu/law/student-life/rulesandregs.php#rule2B. I am required by the University Faculty Handbook to establish a system monitoring student attendance in order to comply with federal student loan regulations. The precise nature of the system is up to me. While I believe that attending class is highly correlated to getting the best possible grade you can get (i.e. it ought to be clear that all of my evaluations of you in quizzes and exams flow from what I talk about in class), I do not take your attendance into account when calculating grades. I believe that attendance in a graduate level professional school, like where you sit or how you take notes, is a matter of your own personal choice, responsibility, and accountability. I don't believe that my taking attendance is a productive use of class time. I do believe that the process of passing around a sign-in sheet before, during, or after class is distracting.

Attendance in this class will be monitored by way of an online attendance sign-in sheet maintained on a shared Google Docs spreadsheet. It is accessible through a link on Blackboard. Here are the rules:

1. This system is governed by the provisions of the Suffolk Law School Academic Rules and Regulations, Sections II B andXI A, https://www.suffolk.edu/law/academics-clinics/student-life/policies-rules/academic-rules-regulations.

2. It is your obligation to go to the spreadsheet and record that you attended class on the dates indicated.

3. You may not enter an "x" for attendance if you did not attend class. Listening to the recording or downloading and reading my notes doesn't count.

4. You may only enter an "x" for yourself. You may not do it for anybody else.

5. You may not mark, erase, or otherwise affect anybody else's entries.

6. To the extent that there are any administrative or other issues in this course that relate to your attendance (i.e., getting credit for the course; compliance with regulations in connection with any student loans, etc.), this will be the record.

GRADING AND ASSESSMENT

Exams. Each semester will conclude with the usual proctored final examination, which will be open book as provided in Suffolk's student handbook (that is, I place no restrictions on what you can bring into the exam room and the only restrictions are those that the school requires, mainly relating to electronics). The exams in both semesters are three hours long, with 180 points (which you can use to allocate your time). The final exams are all entirely essay questions in the typical law school "issue-spotting" mode. We will discuss this along the way.

The final exam will count for two-thirds (2/3) of your grade for the semester.

Here is a bit of advice. I have a reputation for giving very long and difficult exams. On the other hand, I am never quite sure how hard the exam is, so I let the students' results set the curve, and I follow the school's guidelines on grade distributions. The best predictor, in my experience, of doing well, is reading the material, attending class, and being active in the discussions.

Quizzes. One-third of your grade will be based on a series of quizzes to be administered online through Blackboard over the course of the semester. There will be the first one about the syllabus, one at the end of each unit, and a "final" quiz you will need to complete on your own before the final exam. Of the eight "unit" quizzes in the first semester, I will drop the one with the lowest score. Of the twelve "unit" quizzes in the second semester, I will drop two.

ACCOMMODATIONS

If you anticipate issues related to the format or requirements of this course due to the impact of a disability, it is important that you contact the Law School's Dean of Student Office for further information and assistance, including information on disability-related accommodations. We can then plan how best to coordinate any accommodations.

MENTAL HEALTH, STRESS, AND SUBSTANCE ABUSE

As a student, you may experience a range of issues that can cause barriers to learning, such as strained relationships, increased anxiety, health issues, alcohol/drug problems, feeling down, difficulty concentrating, lack of motivation, or feeling ill. These concerns or other stressful events may lead to diminished academic performance or may reduce your ability to participate in daily activities. Suffolk University services are available to assist you in addressing these and other concerns you may be experiencing. You can learn more about the broad range of medical services and confidential mental health services available on campus at the following websites:

Counseling Center -- **http://www.suffolk.edu/offices/989.html**

Office of Health and Wellness Services --**http://www.suffolk.edu/offices/932.html**

Law Students may also wish to access the services of Lawyers Concerned for Lawyers – **www.lclma.org**

In addition, the Law School Dean of Students Office is available to discuss resources and possible approaches to address the academic/enrollment impact of the above issues. (The Law Dean of Students Office is on the 4th floor, within the Dean's Suite –**LawDeanOfStudents@suffolk.edu**),

COURSE ORGANIZATION

FALL SEMESTER (2 CREDIT HOURS*)

PART I – INTRODUCTION TO THE PRACTICE OF CONTRACT LAW

Unit 1: Introduction

PART II – ISSUES IN THE ENFORCEABILITY OF PROMISES, AGREEMENTS, AND UNDERSTANDINGS

Unit 2: The Basic Elements of Enforceability – Promise and Consideration

Unit 3: Testing the Limits of Enforceability Doctrine in Enforceability Disputes

Unit 4: Enforceability Without Bargains: Promissory Estoppel

Unit 5: Enforceability Without Any Promises: "Quasi-Contract"

PART II – ISSUES IN THE FORMATION OF CONTRACTS

Unit 6: The Classical Model of Contract Formation – Offer, Acceptance, Termination of Acceptance, and Counter-Offer

Unit 7: Beyond the Classical Model of Formation – Pre-acceptance Reliance in Unilateral Contracts

Unit 8: Beyond the Classical Model of Formation – Pre-acceptance Reliance in Bilateral Contracts

SPRING SEMESTER (3 CREDIT HOURS*)

PART III – ISSUES IN DETERMINING THE SCOPE OF CONTRACT OBLIGATIONS

Unit 9: Parol Evidence Rule

Unit 10: Interpreting the Terms of a Contract

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* I am required by the school administration to advise you that a "credit hour" is an amount of work that reasonably approximates not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time.

Unit 11: Implied Contract Terms Under the Common Law

Unit 12: Implied Contract Terms Under the Uniform Commercial Code

Unit 13: The Implied Obligation of Good Faith

PART IV –DEFENSES TO ENFORCEMENT

Unit 14: Unconscionability

Unit 15: The Statute of Frauds

Unit 16: Void and Voidable Contracts, Power of Avoidance, and Examples

Unit 17: Mistake

Unit 18: Impossibility, Impracticability, and Frustration

PART V – ISSUES IN PERFORMANCE AND BREACH OF THE CONTRACT

Unit 19: Conditions, Breach, and Anticipatory Repudiation

Unit 20: Common Law Remedies

FALL SEMESTER

UNIT 1 - INTRODUCTION

I. Getting Acquainted
II. Practicing (Contract) Law – the Lawyerly Art of Applying Competing Rules Competitively
    A. A Little Background on What Contract Law Is
    B. Applying Rules in the Context of the Dispute – Enforceability versus Formation (Making Sense of R2K §17)
    C. The Venn Diagram Approach to Competing Rules
    D. Bargains vs. Gifts – The "Going Out to Dinner" Case
III. Private Ordering and Public Disgust
    A. "Neutral Principles" of Contract Law
        1. Objective Theory – *Lucy v. Zehmer*
        2. The "Joke" Defense – *Leonard v. Pepsico, Inc.*
    B. Are Principles of Contract Law Really Neutral?
        1. "Neutral" Principles in Service of Disgusting Ends
            a. Bargain or exploitation? – *Batsakis v. Demotsis*
            b. Racially restrictive covenants – *Corrigan v. Buckley*
    C. "Is" and "Should Be" Statements about the Law – Justifiable Skepticism about what the "Law" is

Reading:

Blum, Examples and Explanations: Contracts, 7th edition ("Blum").

Chapter 1 (all sections)
§§ 2.2, 2.3, 2.4, 2.5, 2.6, 2.8
§§ 3.1, 3.2, 3.3* (*I disagree with Blum's description of the role of inductive reasoning)
§§ 4.1.1, 4.1.2, 4.1.3, 4.1.4, 4.1.6
§§ 7.7.1, 7.7.2 (in connection with *Batsakis* and *Corrigan* – you will be reading much of Chapter 7 in the next unit anyway)

Cases

Lucy v. Zehmer
Leonard v. Pepsico, Inc.
Batsakis v. Demotsis
Corrigan v. Buckley

Restatement

Restatement (Second) of Contracts ("**R2K**") §§1, 3, 17, 71 (including comment c), 79, 208

Additional Reading:

Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1 (2008).

UNIT 2 - THE BASIC ELEMENTS OF ENFORCEABILITY – PROMISE AND CONSIDERATION

I. Existence of a Promise
   - A. The Fundamental Lawyering Skill: Breaking a Case Down into Legal Theories and Elements
     1. What Makes a Legal Claim?
     2. The Procedure for Resolving Legal and Factual Claims
   - B. Elements of Promise – *King v. Trustees of Boston University*
   - C. The Venn Diagram Approach - Promises versus Opinions, Predictions, and Other Things That Aren't Promises

II. Bargains versus Non-Bargains – Consideration
   - A. A Brief History of the Development of the Theory of Consideration – *Hamer v. Sidway*
   - B. Bargained-For Exchange – *Dougherty v. Salt*
   - C. Cutting to Core of the Confusing Crap about Consideration – the Venn Diagram Approach to "Bargain" versus "Not-A-Bargain" (herein of avoiding the search for the Platonic ideal of consideration and looking at a couple examples where the issue might show up) – *Lowry; Socko*

Reading:

Blum

§§7.1, 7.2, 7.3, 7.4

Cases

King v. Trustees of Boston University
Hamer v. Sidway
Dougherty v. Salt
Lowry Computer Products, Inc. v. Head
Socko v. Mid-Atlantic Systems of CPA, Inc.

Restatement

R2K §§ 2, 71, 72

UNIT 3 – TESTING THE LIMITS OF CONSIDERATION DOCTRINE IN ENFORCEABILITY DISPUTES

I. Recapping the Bidding
   A. Consideration as Bargain
   B. The Law's (Somewhat) Laissez-Faire Attitude Toward Fair Bargain
   C. The Frame of Reference Problem – Coherence or Justice?

II. Examples (Not Exclusive) of Hard Cases
   A. Past Consideration – *Hayes v. Plantations Steel*
   B. Conditional Promises – *Kirksey v. Kirksey*
   C. Illusory Bargains – *Harris v. Blockbuster, Inc.*

Reading:

Blum

§§ 7.3.4, 7.3.5, 7.8, 7.9.1 (the *Wood* case discussed in 7.9.2, if you happen to read ahead, is something we will cover in the spring semester).

Cases

Hayes v. Plantations Steel
Kirksey v. Kirksey
Harris v. Blockbuster, Inc.

UNIT 4 - ENFORCEABILITY WITHOUT BARGAINS: PROMISSORY ESTOPPEL

I. Promissory Estoppel – Making Gratuities Binding
   A. Non-Commercial: *Ricketts*
   B. Charitable Subscriptions: *Allegheny*

II. Competing Frames: Promissory Estoppel in a Market Setting
   A. Employment Promises: *Barker*
   B. Reporter-Source Promises: *Cohen*
   C. What's Going On: The Clash of Competing Frames in Hard Cases

Reading:

Blum

§§ 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.8, 8.9, 8.10

Cases

Ricketts v. Scothorn
Allegheny College v. Nat'l Chautauqua County Bank
Barker v. CTC Sales Corp.
Cohen v. Cowles Media Co.

Restatement

Restatement §90

UNIT 5 - ENFORCEABILITY WITHOUT ANY PROMISES: "QUASI-CONTRACT"

I. Introduction to Restitution as Cause of Action – Obligation without Promise
   A. The terminology morass (cause of action as distinguished from remedy)
   B. Prototypes: unjust enrichment, intermeddling, Good Samaritans, self-promoters
   C. A case: *Bloomgarden*
   D. Pure restitution (obligation without promise) vs. promissory ("moral obligation") restitution

Reading:

Blum

§§9.2, 9.4, 9.5, 9.7.1, 9.7.2

Cases

Bloomgarden v. Coyer

Restatement

R2K §86

UNIT 6 - THE CLASSICAL MODEL OF CONTRACT FORMATION – OFFER, ACCEPTANCE, TERMINATION OF ACCEPTANCE, AND COUNTER-OFFER

I. Transition from the Consideration Models to the Mutual Assent Models
   A. Recap of the "bargain-gift" Venn diagram
   B. The "bargain-no bargain" Venn diagram
II. Overview of Classical Offer and Acceptance – The "Popping the Question" Metaphor of Objective Mutual Assent
III. Issues in the Classical Model
   A. Offers as promises – *Owen v. Tunison*
   B. Power of acceptance
      1. Creation of the power
      2. Offeror as "master of the offer"
   C. Termination of the power of acceptance
      1. Silence: acceptance or termination? *Day v. Caton*
      2. Offeror revocation/Mailbox rule – *Dickinson v. Dodds*
      3. Rejection or counter-offer

Reading:

Blum

§§ 4.2 (4.2.2 is really, really important), 4.4, 4.5, 4.6, 4.7, 4.8, 4.9, 4.10, 4.11, 4.13.1, 4.13.2, 4.13.3

Cases

Owen v. Tunison
Day v. Caton
Dickinson v. Dodds

Restatement

§§22-25, 29-36, 38-43, 50-70, 87(1)

UNIT 7 - BEYOND THE CLASSICAL MODEL OF FORMATION – PRE-ACCEPTANCE RELIANCE IN UNILATERAL CONTRACTS

I. Walking Across the Brooklyn Bridge: Sorting out the Unilateral-Bilateral Models of Offer and Acceptance
II. More Coherence versus Fairness in the Application of After-the-Fact Models
   A. Coherence (and Symmetry) Over Fairness: *Petterson v. Pattberg*
   B. Being Fair (Coherently) – The Presumption of a Bilateral Contract: *Davis v. Jacoby*

Reading:

Blum

§§4.12.1, 4.12.2, 4.12.3, 4.12.4

Cases

Petterson v. Pattberg
Davis v. Jacoby

Restatement

R2K §32, 45

UNIT 8 - BEYOND THE CLASSICAL MODEL OF FORMATION – PRE-ACCEPTANCE RELIANCE IN BILATERAL CONTRACTS

I. Contorts Reviewed
II. The Paradigm Case: Offeree's Reliance on a Non-Binding Bilateral Offer
III. Contorts Reappear: Bargain versus Reliance as the Appropriate Model
  A. The classical doctrine ("you disappointed me") prevails: *James Baird*
  B. Reliance doctrine ("you hurt me") prevails: *Drennan*

Reading:

Blum

§ 8.11

Cases

James Baird Co. v. Gimbel Bros., Inc.
Drennan v. Star Paving Co.

Restatement

R2K §25, 87

SPRING SEMESTER
UNIT 9 - PAROL EVIDENCE RULE

I. Overview of "Scope of Agreement" Issues
  A. Overlap with contract formation
  B. Topics
    1. What else is part of the agreement if we have a written contract?
    2. What do the terms of our agreement mean?
    3. Are there implied terms in our agreement?
    4. Is good faith implied in our agreement?

II. Parol Evidence Rule (PER)
  A. Evidence law versus contract law
    1. The PER is not an evidence rule.
    2. The problem the PER is trying to address
  B. The classical PER
    1. The base rule and the "four corners" integration test – Thompson v. Libby
    2. Collateral Agreements: The Distinction Between Final and Complete (Fully Integrated versus Partially Integrated) – Mitchell v. Lith
    3. Exclusions from and exceptions to the PER
      a. Evidence of meaning
      b. Post-writing agreements
      c. Condition precedent
      d. Invalidity
      e. Equitable remedies
  C. The "modern" PER - Masterson v. Sine

Reading:

Blum

§§12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 12.11, 12.12, 12.13

Cases

Thompson v. Libby
Mitchill v. Lath
Masterson v. Sine

Restatement

R2K §§209-216

UNIT 10 - INTERPRETING THE TERMS OF A CONTRACT

I. Words, Phrases, and Meaning – Before and After the Fact
   A. The Context of Interpretation
      1. "Plain meaning" versus "vagueness" and "ambiguity"
      2. Objective, subjective, and inherent meaning
      3. Meaning in context
   B. Community Standards and Private Languages

II. Legal Rules of Interpretation: Objective and Subjective Meaning (Pacific Gas; Individual Health Care)
   A. The Plain Meaning Rule
   B. Parol Evidence versus Interpretative Evidence
   C. Subjective and Threshold Approaches
   D. Modern Schizophrenia

III. Proving Meaning of Ordinary Words and Phrases After the Fact (Frigaliment/Horowitz)

Reading:

Blum

§§10.1.2, 10.1.3, 10.1.4, 10.5

Cases

PG&E Co. v. G.W. Thomas Drayage & Rigging Co.
Frigaliment Importing Co. v B.N.S. Int'l Sales Corp.
Horowitz v. Farbman
Individual Health Care Specialists, Inc. v. Blue Cross Blue Shield of Tennessee, Inc.

Restatement

R2K §§200-203

UNIT 11 - IMPLIED CONTRACT TERMS UNDER THE COMMON LAW

I. The Common Law of Implied Terms
   A. Interpretation and Parol Evidence versus Implied Terms
   B. When Are Courts Inclined to Imply Terms?
      - Wood v. Lucy, Lady Duff-Gordon
      - B. Lewis Productions v. Angelou
   C. Default and Immutable Terms

Reading:

Blum

§§10.1.1, 10.2.1, 10.2.2

Cases

Wood v. Lucy, Lady Duff-Gordon
B. Lewis Productions v. Angelou

UNIT 12 - IMPLIED CONTRACT TERMS UNDER THE UNIFORM COMMERCIAL CODE

I. The UCC as Alternative Model of Contract Law
   A. Background of the UCC
   B. Scope of the UCC – "Goods" and "Merchants,"
   C. UCC Implied Warranties and their Disclaimers
II. Inclusion of Implied Terms: The "Battle of the Forms"
   A. Typical Purchase Orders and Acknowledgments
   B. The Classical "Last Shot" Rule
   C. The 2-207 Flow Chart – Expression of Acceptance
   D. Electronic and Shrink Wrap Contracts as Written Confirmation: *Klocek*

Reading:

Blum

§§2.7, 6.1, 6.2, 6.3, 6.4, 10.2.3

Cases

Klocek v. Gateway 2000

UCC (*not* the revised version!)

§§1-103; 1-204; 2-102; 2-104; 2-105; 2-206; 2-207; 2-313; 2-314; 2-315; 2-316

UNIT 13 - THE IMPLIED OBLIGATION OF GOOD FAITH

I. Common law concepts of good faith
   A. Defining good faith
   B. Imposing a legal obligation of good faith
II. The conundrum of good faith
   A. "Fruits of the contract"
   B. Pretext
   C. Contested interpretation
   D. Bluffing and its consequences before and after the fact
   E. "Sole discretion" contracts – Locke v. Warner Bros.

Reading:

Blum

§§10.3.2, 10.5.3, 10.6

Cases

Big Horn Coal Co. v. Commonwealth Edison
Locke v. Warner Bros.

Restatement

R2K §205

UNIT 14 - UNCONSCIONABILITY

I. Unconscionability at Common Law and under the UCC
   A. Background
   B. Williams v. Walker-Thomas
   C. Procedural versus Substantive Unconscionability
II. More Dichotomy Conundrums
   A. Freedom/Autonomy/Duty to Read versus Compulsion/Power-Need/Paternalism
   B. Hard Cases

Reading:

Blum

§§13.11, 13.12.1

Cases

Williams v. Walker-Thomas Furniture Co.

Restatement

R2K §208

UCC

§2-302 (and comments), 2-309, 2-719

UNIT 15 - THE STATUTE OF FRAUDS

I. Genesis of the Statutes of Frauds
II. The Three Questions
    A. Is the Contract Within the Scope of the Statute of Frauds?
    B. Is There a Sufficient Writing or Memorandum?
    C. If (A) is Yes, and (B) is No, Is There an Exception? Partial Performance/Promissory Estoppel
III. Merchants' exception under the UCC

Reading:

Blum

§§11.1, 11.2, 11.3, 11.4

Cases

Coan v. Orsinger
Crabtree v. Elizabeth Arden
McIntosh v. Murphy

Restatement

R2K §§110, 130, 131, 134, 139

UCC

§2-201

UNIT 16 - VOID AND VOIDABLE CONTRACTS, POWER OF AVOIDANCE, AND EXAMPLES

I. The "Void" and "Voidable" Concepts
   A. Void Contracts
   B. Voidable Contracts
   C. Prototypes and Gray Areas
II. The Power to Affirm or Avoid
III. Duress as Grounds for Contract Avoidance – Totem Marine Tug

Reading:

Blum

§§13.1, 13.2, 13.3, 13.4, 13.6.1, 13.8, 13.9.1, 13.9.2, 13.13.1, Chapter 14

Cases

Totem Marine Tug and Barge v. Alyeska Pipeline

Restatement

R2K §§ 7, 8, 163, 174, 175, 176, 378, 380, 381, 382, 383

UNIT 17 - MISTAKE

I. Frames of Reference, Objectivity, and Subjectivity in Mistake Law
II. Dichotomies in the Cases (Sherwood, Lenawee, and Cummings)
    - Fact versus Prediction
    - Material versus Immaterial
    - Essence versus Quality
    - Mutual versus Unilateral
    - Implicit versus Express
    - Windfall versus Balanced
    - Implausible versus Rational
III. Risk Allocation

Reading:

Blum

§§15.1, 15.2, 15.3, 15.4, 15.5, 15.6

Cases

Sherwood v. Walker
Lenawee County Board of Health v. Messerly
Cummings v. Dusenbury

Restatement

R2K §§151-157

UNIT 18 - IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION

I. The Fundamental Risk Allocation Questions
   A. Default Rule Review
   B. Default Implied Risk Terms
II. Modern Law of After-the-Fact Excuse Doctrine
   A. Impracticability versus Impossibility
      1. Common Law and UCC 2-615 Similarities
      2. Transatlantic Financing Corp.
   B. Frustration versus Impracticability – Mel Frank Tool & Supply

Reading:

Blum

§§15.7, 15.8

Cases

Transatlantic Financing Corp. v. U.S.
Mel Frank Tool & Supply v. Di-Chem

Restatement

R2K §§261-265

UCC

§2-615

UNIT 19 – CONDITIONS, BREACH, AND ANTICIPATORY REPUDIATION

I. Overview of Conditions to Performance – The Context of "Playing Chicken"
II. Express Conditions
  A. Express Includes Implied in Fact
  B. Interpretive Issues
    1. Avoidance of Forfeiture – *Oppenheimer v. Oppenheim*
    2. Covenants versus Conditions
III. Constructive (Implied in Law) Conditions – Order of Performance
IV. Concepts in Contract Performance and Breach
  A. Elements of Total and Partial Breach
  B. Perfect Tender under the UCC – 2-601
  C. Substantial Performance – *Jacob & Youngs v. Kent*
V. Anticipatory Repudiation
  A. Breach versus Repudiation: R2K §250; UCC 2-610
  B. Elements of Repudiation
  C. Retractions – *Truman L. Flatt & Sons*; UCC 2-611
  D. Adequate Assurance: R2K §251; UCC 2-609
VI. A Real World Demonstration – *Village Parent Rodeo v. Rent-A-Center*[*]

Reading:

Blum

§§16.1, 16.2, 16.3, 16.4, 16.6, 16.8, 16.9, 17.1, 17.2, 17.3.1, 17.3.3, 17.3.4, 17.3.5, 17.4, 17.5.1, 17.7.1, 17.7.2, 17.7.3, 17.7.4, 17.7.5

Cases

Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.
Jacob & Youngs v. Kent
Truman L. Flatt & Sons v. Schupf

Restatement

R2K §§224, 225, 226, 227, 228, 229, 234, 235, 236, 237, 238, 243, 250, 251, 253, 256, 257

UCC

§§2-601, 2-609, 2-610, 2-611

[*] This is a challenging and only lightly edited case. I suggest you read it quickly as I use it primarily to put an exclamation point on the real world aspects of much of the doctrine we have studied.

UNIT 20 - COMMON LAW REMEDIES

I. Introduction to Common Law Remedies: Restitution, Reliance, and Expectancy
II. Restitution and Election of Remedies
III. The Expectancy Interest
    A. The Basic Principle: Hawkins v. McGee
    B. The Basic Algorithm
        1. Loss in Value: American Standard
        2. Plus Other Losses (Foreseeability – Hadley)
IV. The Reliance Interest
V. Mitigation Obligation – Rockingham County
VI. Liquidated Damages

Reading:

Blum

§§18.1, 18.2, 18.3, 18.5, 18.6 (skip 18.6.3d), 18.7, 18.9, 18.10.1 (intro only), 18.11.1

Cases

Hawkins v. McGee
American Standard, Inc. v. Schectman
Hadley v. Baxendale
Rockingham County v. Luten Bridge Co.

Restatement

R2K §§344, 345, 347, 348, 349, 350, 351, 376, 377, 378