

**CONTRACT LAW**  
**SYLLABUS AND COURSE OUTLINE**  
**VERSION 1.0**

**2021-22\***

**PROFESSOR LIPSHAW**

**\*SECTION 1B: THIS SYLLABUS WILL APPLY FOR BOTH THE FALL 2021 AND SPRING 2022 SEMESTERS. PROFESSOR LIPSHAW WILL TEACH SECTION 1B FOR THE ENTIRE YEAR.**

**\*SECTION 1D: THIS SYLLABUS ONLY APPLIES TO THE FALL 2021 SEMESTER AND NOT TO THE SPRING 2022 SEMESTER. PROFESSOR LIPSHAW WILL TEACH SECTION 1D FOR THE FALL 2021 SEMESTER. PROFESSOR FRANCO WILL TEACH SECTION 1D FOR THE SPRING 2022 SEMESTER. FOR SECTION 1D, YOU CAN DISREGARD ANYTHING THAT APPLIES TO THE SPRING SEMESTER IN THESE MATERIALS.**

**ALTHOUGH PROFESSOR FRANCO WILL ADDRESS SIMILAR SUBJECT MATTER OVER THE SPRING SEMESTER, HE WILL BE USING A DIFFERENT CASEBOOK AND ORGANIZING THE COURSE DIFFERENTLY THAN YOU SEE HERE. YOU DO NOT HAVE TO BE CONCERNED ABOUT THIS UNTIL AFTER THE COMPLETION OF THE FALL SEMESTER IN DECEMBER 2021. PROFESSOR FRANCO WILL BE FAMILIAR WITH THE MATERIAL YOU COVERED IN THE FALL SEMESTER AND THE TRANSITION WILL BE SEAMLESS.**

## TABLE OF CONTENTS

Annoying and Procedural Preface to the Preface .....	4
Course Objectives and Learning Outcomes.....	5
Teaching Assistant .....	9
Course Information .....	9
Recording and Class Notes .....	9
Office Hours.....	9
Class Management System .....	10
Course Materials .....	10
First Assignments .....	11
About Me .....	11
Socratic Method .....	11
Participation and Attendance .....	12
Grading and Assessment.....	13
Accommodations .....	14
Mental Health, Stress, and Substance Abuse.....	14
Course Organization .....	15
Fall Semester.....	17
Unit 1 - Introductions.....	17
Unit 2 - The Classical Contract Law Approach to Formation Disputes .....	19
Unit 3 - The Classical Contract Law Approach to Enforceability Disputes.....	20
Unit 4 - Contracts Without Bargains .....	21
Unit 5 - Contracts Without Promises .....	22
Spring Semester .....	23
Unit 6 - Parol Evidence Rule .....	23
Unit 7 - Interpreting the Terms of a Contract .....	24
Unit 8 - Implied Contract Terms Under the Common Law .....	25

Unit 9 - Implied Contract Terms Under the Uniform Commercial Code.....	26
Unit 10 - The Implied Obligation of Good Faith.....	27
Unit 11 - Unconscionability.....	28
Unit 12 - The Statute of Frauds.....	29
Unit 13 - Void and Voidable Contracts, Power of Avoidance, and Examples.....	30
Unit 14 - Mistake .....	31
Unit 15 - Impossibility, Impracticability, and Frustration .....	32
Unit 16 – Conditions, Breach, and Anticipatory Repudiation .....	33
Unit 17 - Common Law Remedies .....	34

## **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.

## COURSE OBJECTIVES AND LEARNING OUTCOMES

I have done 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 entire package 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. There is a kind of “pure” logic to them. 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](mailto:jlipshaw@suffolk.edu)

## TEACHING ASSISTANT

The teaching assistant for this class will be Bob Cunha. Bob 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.

Bob did this last year and he is really good at it.

## COURSE INFORMATION

Fall: Section 1B: Mondays and Wednesdays from 12:00 - 12:55 p.m.  
Section 1D: Mondays and Wednesdays from 10:00 - 10:55 a.m.

Spring (Section 1B only): Mondays and Wednesdays from 12:00 – 1:25 p.m.

## RECORDING AND CLASS NOTES

I want to remove some of the note-taking (particularly the “transcription” kind) pressure. I audio record and make ALL face-to-face classes available via an MP3 posted under “Course Recordings” on Blackboard.

At the end of each unit, I also post my class notes. I don't do it until the end of the unit because I'm always tweaking them and so I don't have the final until then.

If you take notes, concentrate on engaging with what's important - you can always go back and pick up details later.

**NOTICE: YOU MAY ONLY LISTEN TO THE RECORDINGS VIA THE LINK PROVIDED, AND MAY NOT DOWNLOAD OR RECORD THEM. THE CLASS NOTES AND THE RECORDINGS ARE MY PROPERTY, AND YOU ARE PERMITTED TO USE THEM FOR THIS CLASS ONLY. ANY REBROADCAST, REPUBLICATION, OR RETRANSMISSION WITHOUT THE EXPRESS WRITTEN CONSENT OF ME IS STRICTLY PROHIBITED.**

## OFFICE HOURS

Monday and Wednesday, 11:00-11:45 am. You can sign up for 15 minute blocks on SignupGenius.com or just drop by.

## 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, 8<sup>th</sup> 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, 2021-2022: 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.

**Other Materials.** There have been semesters in which I find myself reading the same “trope,” usually on the more difficult subjects in the class, remarkably similar from student answer to student answer, but (a) clearly not from materials I provided, and (b) often not quite correct. I don’t know if these come from supplements like Glannon Guides or from prior student outlines that people download from the ubiquitous law school outline pools, but please be on notice that you rely on or quote this material on exams at your own risk.

## **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**

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. In short, I have an attendance monitoring system because the university requires it, not because I care. It will only come into play if there is an issue with the school that involves your class attendance.

Attendance in this class will be monitored by way of an online attendance sign-in sheet maintained on a shared Google Docs spreadsheet. The link giving you access to it appears on the left-hand sidebar 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 and XI 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 do not count (subject to any adjustment announced by the Dean of Students on account of emergencies like the pandemic lockdowns).
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**

**I calculate grades in each semester based on a point system that weights the final essay exam as two-thirds of the total and a series of online multiple choice quizzes during the semester as one-third of the total.**

**Exams.** Each semester will conclude with a 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 or have available if administered as a take-home, and the only restrictions are those that the school requires in proctored exams, mainly relating to electronics). I have not determined whether the exams will be administered in a classroom (proctored) or as a take-home. The exam in the fall semester is intended to be completed within a two-hour time span. The exam in the spring semester is intended to be completed with a three-hour time span. If administered as a take-home, each question will have a word limit for the answer that will be a proxy for the time limits. The final exams are all entirely essay questions in the typical law school "issue-spotting" mode. We will discuss this along the way.

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 and then at the end of each unit. In each semester, I drop the lowest quiz score. In the fall semester, Units 2, 3, and 4 have two quiz segments scored separately as individual quizzes.

Ultimately, I adjust the quiz scores so that the total in the denominator for "perfect" performance is one-third of the total points for the semester.

**Polling.** You can affect your grade by participation in the Poll Everywhere questions. While I do not monitor attendance, I use Poll Everywhere as a means of class participation. I will share it on the screen (from a web browser window) but the best way for you to participate is to download the Poll Everywhere app on your computer or mobile device. You will receive a separate email from Poll Everywhere to register as a participant.

You **MUST** register to get credit for your participation. I **DO** download participation reports from Poll Everywhere, but I do not designate "correct" answers in the app, and therefore

have disabled any grading of the response. Hence, there is no grade associated with your giving correct answers to the polling questions.

The benefit of participation is that you earn an additional ten points added to your adjusted quiz scores by participating in 90% or more of the questions over the semester.

The URL to join my polls is: [pollev.com/jeffreylipsh561](http://pollev.com/jeffreylipsh561). The software will ask you to join the presentations.

You can only receive credit for polling question participation by doing so live and in-person during class. I will make accommodations for health, disability, or other emergencies if you contact me about them. I will not count the following (or anything similar) as an emergency: studying for other classes; preparing LPS assignments; jobs; extra-curricular activities, even those with an educational component like moot court; Red Sox Opening Day; hangovers; arguments with significant others; solar eclipses.

### **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)** -- <http://www.suffolk.edu/offices/989.html>

**[Office of Health and Wellness Services](http://www.suffolk.edu/offices/932.html)** -- <http://www.suffolk.edu/offices/932.html>

Law Students may also wish to access the services of Lawyers Concerned for Lawyers – [www.lclma.org](http://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 4<sup>th</sup> floor, within the Dean's Suite – [LawDeanOfStudents@suffolk.edu](mailto:LawDeanOfStudents@suffolk.edu)),

## **COURSE ORGANIZATION**

### **FALL SEMESTER (2 CREDIT HOURS\*)**

#### **PART I – INTRODUCTION TO THE PRACTICE OF CONTRACT LAW**

- Unit 1: Introduction**
- Unit 2: The Classical Contract Law Approach to Formation Disputes (Herein of “offer and acceptance”)**
- Unit 3: The Classical Contract Law Approach to Enforceability Disputes (Herein of “consideration”)**
- Unit 4: Contracts without Bargains (Herein of “promissory estoppel”)**
- Unit 5: Contracts without Promises (Herein of “quasi-contract”)**

### **SPRING SEMESTER (3 CREDIT HOURS\*)**

#### **PART II – ISSUES IN DETERMINING THE SCOPE OF CONTRACT OBLIGATIONS**

- Unit 6: Parol Evidence Rule**
- Unit 7: Interpreting the Terms of a Contract**
- Unit 8: Implied Contract Terms Under the Common Law**
- Unit 9: Implied Contract Terms Under the Uniform Commercial Code**
- Unit 10: The Implied Obligation of Good Faith**

#### **PART III – DEFENSES TO ENFORCEMENT**

- Unit 11: Unconscionability**
- Unit 12: The Statute of Frauds**
- Unit 13: Void and Voidable Contracts, Power of Avoidance, and Examples**
- Unit 14: Mistake**

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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 15: Impossibility, Impracticability, and Frustration**

**PART IV – ISSUES IN PERFORMANCE AND BREACH OF THE CONTRACT**

**Unit 16: Conditions, Breach, and Anticipatory Repudiation**

**Unit 17: Common Law Remedies**

## FALL SEMESTER

### UNIT 1 - INTRODUCTIONS

- I. Objectives and Preliminaries
- II. Contract Lawyering is the Game of Applying Competing Rules Competitively
  - A. Translating Narratives about Transactions
  - B. The Game
  - C. Legal Rules and the Logic of their Application
  - D. The Venn Diagram Approach to Hard Cases
- III. Private Ordering and Public Disgust
  - A. Manifestations and Objectivity – *Lucy v. Zehmer*; *Leonard v. Pepsico*
  - B. Are Principles of Contract Law Really Neutral? (“Neutral” Principles in Service of Disgusting Ends)
    - 1. Bargain or exploitation? – *Batsakis v. Demotsis*
    - 2. Racially restrictive covenants – *Corrigan v. Buckley*
- IV. Justifiable Skepticism about what the “Law” is
  - A. “Is” and “Should Be” Statements about the Law
  - B. Contract Law is Not the Only Game in Town

#### Reading:

Blum, Examples and Explanations: Contracts, 7<sup>th</sup> 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 Unit 3 anyway)

#### Cases

*Lucy v. Zehmer*

*Leonard v. Pepsico, Inc.*

*Batsakis v. Demotsis*

*Corrigan v. Buckley*

Restatement (“R2K”) §§1, 2, 3, 17, 19(1), 24, 26, 71 (including comment c), 79, 202, 208

#### Additional Non-Required Reading:

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

948 (1992). *Linn Valley Lakes Property Owners Ass'n v. Brockway*, 250 Kan. 169, 824 P.2d

**Quiz 1**

**UNIT 2 - THE CLASSICAL CONTRACT LAW APPROACH TO FORMATION  
DISPUTES  
(Herein of “offer and acceptance”)**

- I. Identifying Legal Theories in Formation and Enforceability Disputes
  - 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. Distinguishing Formation and Enforceability Theories
- II. The Classical Rules of Formation Disputes
  - A. Overview
  - B. Promises and Offers – *Owen v. Tunison*
  - C. Power of acceptance
    - 1. Creation of the power
    - 2. Offeror as “master of the offer”
  - D. Termination of the power of acceptance
    - 1. Silence: acceptance or termination? *Day v. Caton*
    - 2. Offeror revocation/Mailbox rule – *Dickinson v. Dodds*
    - 3. Rejection and counter-offer – the last shot rule
  - E. Unilateral Contracts
    - 1. Walking Across the Brooklyn Bridge: Sorting out the Unilateral-Bilateral Models of Offer and Acceptance
      - 2. Coherence (and Symmetry) Over Fairness: *Petterson v. Pattberg*
      - 3. Being Fair (Coherently) – The Presumption of a Bilateral Contract: *Davis v. Jacoby*

**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, 4.12.1, 4.12.2, 4.12.3, 4.12.4, 4.13.1, 4.13.2, 4.13.3

**Cases:**

*Owen v. Tunison*  
*Day v. Caton*  
*Dickinson v. Dodds*  
*Petterson v. Pattberg*  
*Davis v. Jacoby*

**R2K** §§ 22-25, 29-36, 38-43, 45, 50-70

**(Quizzes 2a and 2b)**

**UNIT 3 - THE CLASSICAL CONTRACT LAW APPROACH TO ENFORCEABILITY  
DISPUTES  
(Herein of “consideration”)**

- I. The Classical Rules of Enforceability Disputes
  - A. Manifestations of Commitment
    - 1. Promises – *King v. BU*
      - a. Turning the narrative into legal theories
      - b. Elements of a promise
    - 2. Opinions, Predictions, and Other Things That Aren’t Promises
  - B. Bargains versus Non-Bargains - Consideration
    - 1. A Brief History of the Development of the Theory of Consideration
    - 2. The Bargain versus Gratitude Problem
      - a. Gratitude as Conditional Promise – *Kirksey*
      - b. Bargain as Conditional Promise – *Hamer v. Sidway*
      - c. Bargained-For Exchange – *Dougherty v. Salt*
    - 3. Cutting to Core of the Confusing Crap about Consideration
    - 4. Hard Cases in Consideration Theory
      - a. Past consideration – *Hayes*
      - b. Agreements to agree – *Phytelligence*
      - c. Illusory bargains - *Harris*
- II. Formation and Enforceability Combined – Option Contracts
- III. Examples of Modern Consideration Disputes – *Lowry, Socko*

**Reading:**

**Blum:** 7.1, 7.2, 7.3, 7.4, 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 Unit ).

**Cases**

*King v. Trustees of Boston University*  
*Kirksey v. Kirksey*  
*Hamer v. Sidway*  
*Dougherty v. Salt*  
*Hayes v. Plantations Steel*  
*Phytelligence, Inc. v. Washington State University*  
*Harris v. Blockbuster, Inc.*  
*Lowry Computer Products, Inc. v. Head*  
*Socko v. Mid-Atlantic Systems of CPA, Inc.*

**R2K** §§ 1, 2, 3, 71, 72, 86(1), 87(1)

**(Quiz 3a and 3b)**

**UNIT 4 - CONTRACTS WITHOUT BARGAINS  
(Herein of “promissory estoppel”)**

- I. Making Gratuities Binding – Promissory Estoppel
  - A. Origins: *Ricketts*
  - B. Development: *Allegheny College*
- II. Promissory Estoppel in Commercial Settings
  - A. Employment Promises: *Barker*
  - B. Reporter-Source Promises: *Cohen*
- III. Promissory Estoppel in Formation Disputes
  - A. Contorts Reviewed
  - B. The Paradigm Case: Offeree’s Reliance on a Non-Binding Bilateral Offer
  - C. Contorts Reappear: Bargain versus Reliance as the Appropriate Model
    - 1. The classical doctrine (“you disappointed me”) prevails - *James Baird*
    - 2. Reliance doctrine (“you hurt me”) prevails - *Drennan*

**Reading:**

**Blum** §§ 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.8, 8.9, 8.10, 8.11

**Cases**

*Ricketts v. Scothorn*  
*Allegheny College v. Nat’l Chautauqua County Bank*  
*Barker v. CTC Sales Corp.*  
*James Baird Co. v. Gimbel Bros., Inc.*  
*Drennan v. Star Paving Co.*  
*Cohen v. Cowles Media Co.*

**R2K** 25, 87(2), 90(1)

**(Quizzes 4a and 4b)**

**UNIT 5 - CONTRACTS WITHOUT PROMISES**  
**(Herein of “quasi-contract”)**

- I. The terminology morass (cause of action as distinguished from remedy)
- II. Prototypes: unjust enrichment, intermeddling, Good Samaritans, self-promoters - *Bloomgarden*
- III. 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*

**R2K** §§86

**(Quiz 5)**

## SPRING SEMESTER

### UNIT 6 - 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

#### (Quiz 6)

## UNIT 7 - 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 Approaches
- III. Proving Meaning of Ordinary Words and Phrases After the Fact (Frigaliment)

### Reading:

#### Blum

§§10.1.2, 10.1.3, 10.1.4, 10.5

#### Cases

*Raffles v. Wichelhaus*

*PG&E Co. v. G.W. Thomas Drayage & Rigging Co.*

*Individual Health Care Specialists, Inc. v. Blue Cross Blue Shield of Tennessee,*

*Inc.*

*Frigaliment Importing Co. v B.N.S. Int'l Sales Corp.*

#### Restatement

R2K §§200-203

### (Quiz 7)

## UNIT 8 - 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*

**R2K** §§204

**(Quiz 8)**

## UNIT 9 - 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

### (Quiz 9)

## UNIT 10 - 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

### (Quiz 10)

## UNIT 11 - 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

### (Quiz 11)

## UNIT 12 - 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

### (Quiz 12)

## UNIT 13 - 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

### (Quiz 13)

## UNIT 14 - 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

### (Quiz 14)

## UNIT 15 - 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

### (Quiz 15)

## UNIT 16 – 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

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\* 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.

### (Quiz 16)

## UNIT 17 - 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

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

#### 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

### (Quiz 17)