Contracts

Spring 2018
Alabama Law
Room 188

Prof. Yonathan Arbel
Email: yarbel@law.ua.edu, Assistant Ms. Henderson mhenderson@law.ua.edu
Office: 318; anonymous comments link
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Readings
- Reading assignments are listed below. Some changes to the syllabus are anticipated; the latest version of the syllabus is always available via this link.
- The recommended statutory source book is Burton and Eisenberg, Contract Law: Selected Source Materials Annotated (2016 ed.) (hereinafter: BE). You do not have to own this book; using Lexis, Westlaw or Google can get you the same materials at no extra cost and will hone your research skills at the same time.
- A few assigned cases are not in the textbook. These cases are followed by full legal citations. Please locate the cases yourself.
- Optional Reading:
  - For students interested in Law & Economics: Steven Shavell, Foundations of Economic Analysis of Law (2014), Chapter III.

Names & Pronouns
- I use last names in class; if you have a special preference regarding your name, its pronunciation, or a preferred pronoun, please inform me in advance.

Attendance, Participation, and Laptops
- Class participation and attendance are required. Attendance registration is done via this link http://tiny.cc/k2018, during the first 5 minutes of class time (late registration will be marked as an absence). The registration will include the daily token provided at the beginning of class.
- You should attend all classes. However, if you choose to miss a class, you need not notify me. If you miss 4 classes, I ask that you will meet with me to discuss. Missing 5 classes or more entails a meeting with the Dean for Academic Affairs; 8 absences will result in loss of credit.
- You will be called on randomly to discuss the reading materials. If are unable to prepare for a certain class, you are expected to notify me and my assistant in advance. Coming to class unprepared without notifying me in advance will result in grade reduction.
- Excessive absences will similarly result in grade reduction.
• Laptops are allowed for note taking purposes only. You are not allowed to directly or indirectly circulate class materials, slides, or outlines, whether online or offline.

Office Hours, Communication, and Individual Meetings Policy
• My office is located in Room 318.
• My faculty assistant is Ms. Marquita Henderson mhenderson@law.ua.edu.
• Office hours are Monday and Wednesday between 2:15 – 3:15 pm.
• If you want to arrange a meeting outside the official office hours, I’d be happy to do so. Please email my Assistant to arrange a time.
• If you grapple with the issues, you are welcome to send your questions via email. I reserve the right—unless you explicitly ask me otherwise—to share an anonymized version of your question with the class.
• Feedback, comments, concerns or special questions can be communicated in one of two ways:
  o Email: varbel@law.ua.edu
  o Anonymously, through this link. This is routed via Google and I have no way of identifying your identity. Naturally, I will not be able to respond.
  o Any issue relating to schedule, absences, missing materials, etc., please also CC my assistant, Ms. Henderson.

Assignments
• Throughout the semester, there will be several assignments that will help with learning the material through practice before the final exam.
• These assignments are not graded and you will not receive individual feedback. I will use these assignments to identify gaps in the class’ overall understanding of the material and may address these issues in class.
• Despite not being graded, submission and a good faith effort to solve the assignment are mandatory.

Examination & Grading
• The final exam is a four-hour, open book, in-class test.
• The final grade will be based on 90% final exam and 10% class attendance and participation.
• In exceptional cases (≤ 5% of students), participation and punctuality will affect grade determination.

On Virtue
• Students are expected to practice the virtues of The Good Lawyer: Professionalism, punctuality, diligence, honesty (yes, honesty), courtesy and collegiality, and tolerance to views even when those are false or offensive. The classroom is a professional environment and the observation of industry norms and professional codes is expected.
• As long as keeping with professional standards, students are expected to critically engage with the materials, do not defer blindly, and express their own values, even when those are minority views.
• Plagiarism is strictly prohibited. The single, limited exception is the use of outlines. While I discourage this practice on pedagogical grounds, you are allowed to use parts of outlines written by others. To do so, you must have obtained the author’s permission in writing.

Slides
• I use slides that will be shared with the class using a link to the latest version of the slides; the slides are constantly reworked.

Make Up Classes
There are several planned make up classes. The latest schedule is always posted here. If you have any specific questions about dates and locations, please consult Ms. Henderson.

Accommodations

The Law School provides appropriate accommodations to students with physical, learning and other disabilities. Students with disabilities are encouraged to contact the Associate Dean for Academic Affairs. In addition, students with disabilities or special difficulties who need special accommodations are welcome to discuss those issues with me.
Meeting Times:

Tue, 09 January 2018, 14:00 – 15:10, Room 188
Thu, 11 January 2018, 14:00 – 15:10, Room 188
Fri, 12 January 2018, 14:00 – 15:10, Room 188
Tue, 16 January 2018, 14:00 – 15:10, Room 188
Thu, 18 January 2018, 14:00 – 15:10, Room 188
Fri, 19 January 2018, 13:00 – 15:20, Room 188
Tue, 23 January 2018, 14:00 – 15:10, Room 188
Thu, 25 January 2018, 14:00 – 15:10, Room 188
Fri, 26 January 2018, 13:00 – 15:20, Room 188
Tue, 30 January 2018, 14:00 – 15:10, Room 188
Thu, 01 February 2018, 14:00 – 15:10, Room 188
Fri, 02 February 2018, 13:00 – 15:20, Room 188
Tue, 06 February 2018, 14:00 – 15:10, Room 188
Thu, 08 February 2018, 14:00 – 15:10, Room 188
Fri, 09 February 2018, 13:00 – 15:20, Room 188
Tue, 13 February 2018, 14:00 – 15:10, Room 188
Thu, 15 February 2018, 14:00 – 15:10, Room 188
Fri, 16 February 2018, 13:00 – 15:20, Room 188
Tue, 20 February 2018, 14:00 – 15:10, Room 188
Thu, 22 February 2018, 14:00 – 15:10, Room 188
CANCELLED: Fri, 23 February 2018, 14:00 – 15:10, Room 188
Tue, 27 February 2018, 14:00 – 15:10, Room 188
Thu, 01 March 2018, 14:00 – 15:10, Room 188
Fri, 02 March 2018, 14:00 – 15:10, Room 188
Tue, 06 March 2018, 14:00 – 15:10, Room 188
Thu, 08 March 2018, 14:00 – 15:10, Room 188
Fri, 09 March 2018, 14:00 – 15:10, Room 188
Tue, 20 March 2018, 14:00 – 15:10, Room 188
Thu, 22 March 2018, 14:00 – 15:10, Room 188
Fri, 23 March 2018, 14:00 – 15:10, Room 188
Tue, 27 March 2018, 14:00 – 15:10, Room 188
Thu, 29 March 2018, 14:00 – 15:10, Room 188
Fri, 30 March 2018, 14:00 – 15:10, Room 188
Tue, 03 April 2018, 14:00 – 15:10, Room 188
Thu, 05 April 2018, 14:00 – 15:10, Room 188
Fri, 06 April 2018, 14:00 – 15:10, Room 188
Tue, 10 April 2018, 14:00 – 15:10, Room 188
Thu, 12 April 2018, 14:00 – 15:10, Room 188
CANCELLED: Fri, 13 April 2018, 14:00 – 15:10, Room 188
CANCELLED: Tue, 17 April 2018, 14:00 – 15:10, Room 188
CANCELLED: Thu, 19 April 2018, 14:00 – 15:10, Room 188
CANCELLED: Fri, 20 April 2018, 14:00 – 15:10, Room 188
Note: the following roadmap is subject to change with advance notice.

I. Introduction: The Importance of Promise (11 pages)

- AK 1-12
  - Section 1: Introduction
- Restatement (Second) of Contracts (hereinafter: R2K) §§ 1-2
- Assignment 1: DUE Date: Thursday, January 11th, 2018 at 11:59PM.
  - Review the contract on AK pp. 63-65. For each part of the contract, explain in simple words what it does; why did the parties choose to include it? What is the function of this part?
  - If you were representing the buyer, what are some ways you could edit or redraft the contract to advance her goals?

Does a Contract Exist?

II. The Bases of Contract Liability (62+10 pages)

A. Consideration (62 pages)

1. The Consideration Requirement (16 pages + 5 optional)
   - Introductory Comment
   - Historical and Definitional Note
   - When is an Act or Promise Bargained for and Given in Exchange?
     - Kirksey v. Kirksey
     - Hamer v. Sidway
     - Langer v. Superior Steel
   - Intent to Contract and the Seal (2)
     - In re Greene
   - R2K §§ 17, 71

2. Limits of the Consideration Doctrine Assignment due. (34 pages)

   - Mixed Motives & Adequacy of Consideration
   - Pre-Existing Duty Rule
   - Discretion, Mutuality, and Implied Obligations
   - AK 118-126, 130-145 (skip Fine Penny & Home-Run Ball), 147-152
     - Thomas v. Thomas
     - Browning v. Johnson
     - Levine v. Blumenthal
     - Alaska Packers’ Assoc. v. Domenico
     - Angel v. Murray
     - Rehm-Zeiher Co. v. F.G. Walker Co.
     - McMichael v. Price
• Socko v. Mid-Atlantic Systems of CPA, Inc., (PA, 2014) Link (3)

Assignment (due for class on discretion and mutuality)
  ▪ Marketing Contract (link)

  ▪ R2K §§ 73, 77, 79

B. Detriment in Reliance (Promissory Estoppel) (12 pages)
  ▪ AK 163-172
    • Ricketts v. Scothorn
    • Langer v. Superior Steel (pp. 77-80)
    • Comment: The Evolution of Promissory Estoppel
  ▪ R2K § 90

C. Moral Obligation (10 pages) (optional)
  ▪ AK 103, 109-118
    • Mills v. Wyman
    • Webb v. McGowin
  ▪ R2K § 86

III. Agreement (108 pages)

A. The Objective Test of Assent (10 pages)
  ▪ AK 187-193, 199-203
    • Introductory Comment
    • Embry v. Hargadine, McKittrick Dry Goods Co.
    • Lucy v. Zehmer
    • Raffles v. Wichelhaus
  ▪ R2K §§ 17-20, 201

B. Offer and Acceptance (55 pages)

1. Offer (10 pages) Assignment
  ▪ AK 209-211, 223-231
    • Lonergan v. Scolnick
    • Lefkowitz v. Great Minneapolis Surplus Store
    • Leonard v. Pepsico, Inc.
  ▪ R2K §§ 24, 26, 33
  ▪ Uniform Commercial Code (hereinafter UCC) § 2-204
  ▪ Assignment: Copyrighting

2. Acceptance (15 pages)

   a. General
      ▪ R2K §§ 50, 63(a), 64
      ▪ UCC § 2-204
b. Acceptance by Performance (8 pages)
   - AK 241-246, 259-262
     - Hendricks v. Behee
     - Carlill v. Carbolic Smoke Ball Co.
     - Ever-Tite Roofing Corp. v. Green
   - R2K §§ 45, 54, 62
   - UCC § 2-206

  c. Acceptance by Conduct or Silence (7 pages)
   - AK 263-270
     - Russell v. Texas Co.
     - Ammons v. Wilson & co.
   - R2K § 69
   - UCC § 2-206

  3. Termination of Offer: Destruction of Power of Acceptance (10 pages)
   - AK 285-286, 305-313
     - Introductory Comment
     - Hendricks v. Behee (239-240)
     - Dickinson v. Dodds
     - James Baird Co. v. Gimbel Brothers, Inc.
     - Drennan v. Star Paving Co.
   - R2K §§ 36, 38, 39, 41-43, 87
   - UCC § 2-205

  4. Special Problems in the Agreement Process (20 pages)

  a. Counter-Offer, Form Battles and UCC § 2-207 (12 pages)
   - AK 321-326, 333-340 (Skip Problem)
     - Minneapolis & St. Louis Railway v. Columbus Rolling-Mill
     - Comment: Problems in the Interpretation of UCC § 2-207
     - Textile Unlimited, Inc. v. A...BMH & Co., Inc.
   - R2K §§ 39, 59
   - UCC § 2-207

  b. Shrinkwrap and Browsewrap (9 pages)
   - AK 341-350
     - Hill v. Gateway 2000
     - Klocek v. Gateway
     - Specht v. Netscape Communications Corp.
   - UCC §§ 2-204, 2-207

C. Insufficient Assent (43 pages)

  1. Indefiniteness and Gap-Filling (26 pages)
   - AK 365-387, 388-392
• Varney v. Ditmars
• Blinn v. Beatrice
• Oglebay Norton Co. v. Armco, Inc.
• M-G-M. v. Scheider
• Martin Jr. Delicatessen v. Schumacher
• Comment: Open Terms Other Than Price
• Comment: How Should the Law Set “Default” Rules?
  ▪ R2K §§ 33, 204
  ▪ UCC §§ 2-201(1), 2-204, 2-305, 2-306, 2-308, 2-309(1)

2. Pre-contractual Liability (17 pages)
  ▪ Last names: A-M:
    • Nusbaum v. E-LO Plaintiff’s Memorandum of Law (2-8)
  ▪ Last Names N-Z: Nusbaum v. E-Lo Memorandum of Law in Opposition (unmarked passages)
    ▪ AK 394-400
      • Hoffman v. Red Owl Stores, Inc.
      • Comment: Preliminary Agreements
    ▪ R2K § 90

IV. Formation Defenses / Defects in the Bargaining Process (94 pages)

A. The Statute of Frauds (24 pages) Assignment
  ▪ AK 431-455 (skip Problem Jane Fonda),
    • Comment: Introduction to the Statute of Frauds
    • Bullriders v. Autozone
    • Crabtree v. Elizabeth Arden Sales Corp.
    • The Writing Requirement, Sale of Goods
    • Comment: Satisfying the Statute
  ▪ R2K §§ 110, 131, 132, 139
  ▪ UCC § 2-201
  ▪ Assignment: Problems 1-8 on pp. 454-55. (Short responses)

B. Mistake (15 pages)
  ▪ AK 484-485, 494-507
    • Introductory Comment
    • Beachcomber Coins, Inc. v. Boskett
    • Sherwood v. Walker
    • Lenawee County Board of Health v. Messerly
  ▪ R2K §§ 152-154

C. Misrepresentation and Nondisclosure (18 pages)
  ▪ AK 517-520, 528-532, 537-548
    • Introductory Comment
• Laidlaw v. Organ
• Vokes v. Murray
• Hill v. Jones
• Comment Unfair and Deceptive Acts
  ▪ R2K §§ 161-164

D. Duress (10 pages)
  ▪ AK 549-550, 553-561
    ▪ Introductory Comment
    ▪ Austin Instrument, Inc. v. Loral Corp.
    ▪ Machinery Hauling v. Steel
  ▪ R2K §§ 175(1), 176

E. Unconscionability (27 pages)
  ▪ AK 561-577, 583-594
    ▪ Introductory Comment
    ▪ Williams v. Walker-Thomas Furniture Co. (two opinions – a 1964 opinion by the District of Columbia Court of Appeals and a 1965 opinion by the D.C. Circuit)
    ▪ Comment: Renting-to-own As a Modern Method to ‘Profit on Poverty’
    ▪ Jones v. Star Credit Corp.
    ▪ Ferguson v. Countrywide Credit Industries
    ▪ Comment: Contracts of Adhesion
    ▪ Comment: The Draft Restatement (Third) of Consumer Contracts
  ▪ R2K §§ 208, 211
  ▪ UCC § 2-302
  ▪ Optional Readings:
    ▪ Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991)

Large Assignment

**Contractual Duties: What Does the Contract Say?**

V. Performance (78+5 pages)

A. Battle of the Forms – Cont’d

B. The Parol Evidence Rule (19 pages) Assignment
  ▪ AK 659-677, 680-681
    ▪ Introductory Comment
    ▪ Mitchell v. Lath
• Masterson v. Sine
• Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.
• Comment: Consumer Contracts and Integration
  ▪ R2K § 213
  ▪ UCC § 2-202

C. Interpretation and Construction (15 pages) (Optional)
  ▪ AK 681-696
    • Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging Co.
    • Comment: The Hierarchy of Interpretation Rules
    • Frigaliment Importing Co. v. B.N.S. International Sales Corp.
  ▪ R2K §§ 200-207
  ▪ UCC §§ 1-303, 2-208

D. The Duty of Good Faith (20 pages)
  ▪ AK 707, 718-721, 724-732, 734-735, 762-768
    • Introductory Comment
    • Patterson v. Meyerhofer
    • Market Street Associates Limited Partnership v. Frey
    • Feld v. Henry S. Levy & Sons, Inc.
    • Hillesland v. Federal Bank
  ▪ R2K § 205
  ▪ UCC §§ 1-201(20), 1-304, 2-209 (Comment 1)

E. Warranties (5 pages) Self Learning module
  ▪ AK 772, 773-774, 780-781,
    • Introductory Comment
    • Introductory Comment: Express Warranties
    • Introductory Comment: Implied Warranties
  ▪ UCC §§ 2-313, 2-314, 2-315, 2-316, 2-719

F. Conditions and Substantial Performance (15 pages). Assignment; Warranties & Conditions
  ▪ AK 808-818, 822-827
    • Introductory Comment
    • Dove v. Rose Acre Farms, Inc.
    • In Re Carter’s
    • Clark v. West
  ▪ R2K §§ 224-229, 237, 241
  ▪ UCC § 2-601

G. Impracticability and Frustration (9 pages)
  ▪ AK 862-63, 869-873, 901-904
    • Introductory Comment
    • Taylor v. Caldwell
    • Krell v. Henry
  ▪ R2K §§ 261-266, 272
  ▪ UCC § 2-615(a)
VI. Remedies for Breach of Contract (79 pages)

A. Introduction to Remedies (5 pages)
   ▪ Hawkins v. McGee, 146 A. 641 (N.H. 1929)
   ▪ R2K §§ 344, 345

B. The Expectation Measure of Damages (22 pages)
   1. Economic Rationale

2. Seller’s Remedies (5 pages)
   ▪ AK 1021, 1029-1031, 1032-1035
     • Locks v. Wade
     • Comment: The Lost Volume Seller Under UCC Article 2 [1st page only]
   ▪ R2K § 347
   ▪ UCC §§ 1-305, 2-703, 2-706(1), 2-708, 2-709(1)

3. Measuring the Buyer’s Expectation
   ▪ R2K § 347
   ▪ UCC §§ 1-305, 2-712, 2-713

4. Buyer’s Remedies (12 pages)
   ▪ AK 1047-1048, 1050-1054, 1055-1061
     • Jacob & Youngs v. Kent
     • Peevyhouse v. Garland Coal & Mining Co.
     • American Standard, Inc. v. Schectman
     • Comment: Buyer’s Remedies for Seller’s Breach of Warranty
   ▪ R2K § 348(2)

5. Restitution in Favor of the Breaching Party (5 pages)
   ▪ AK 1073-1078
     • Britton v. Turner
     • Comment: Recovery in Restitution by a Plaintiff in Default
   ▪ R2K § 374(1)

C. The Expectation Measure of Damages – Limitations (25 pages)

1. Mitigation (18 pages)
   ▪ Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689 (Cal. 1970)
   ▪ Mary J. Frug, Re-Reading Contracts: Feminist Analysis of a Contracts Casebook,
     34 AM. U. L. REV. 1065, 1114-1119 (1984-85)
   ▪ R2K § 350
   ▪ UCC § 2-715(2)(a)
2. Foreseeability (3 pages)
   - AK 41-44
     - Hadley v. Baxendale
   - R2K § 351
   - UCC § 2-715(2)

3. Certainty (4 pages)
   - Kenford Co. v. Erie County, 493 N.E.2d 234 (N.Y. 1986)
   - R2K § 352

D. Reliance Damages
   - R2K § 349

E. The Restitution Remedy (5 pages)
   - United States v. Algernon Blair, Inc., 479 F.2d 638 (4th Cir. 1973)
   - R2K §§ 370, 371, 373

F. Specific Performance (5 pages)
   - AK 1107-112
     - Introductory Comment
     - Curtice Brothers Co. v. Catts
   - R2K §§ 357(1), 359(1), 367
   - UCC § 2-716(1)

G. Agreed Upon Remedies (17 pages)
   - AK 1126-1135, 1138-1144, 1155-1157
     - Introductory Comment
     - Southwest Engineering Co. v. United States
     - Cellphone Termination Fee Cases
     - Bertholet v Stefanko
   - R2K § 356(1)
   - UCC § 2-718(1)