

Contracts (Temporary Syllabus)

Spring 2020
Alabama Law
Room 175

Prof. Yonathan Arbel

Email: yarbel@law.ua.edu,

Assistant Ms. Henderson mhenderson@law.ua.edu

Office: 308. Office Hours: Tuesday, 9-12; 2-4

If you want to send anonymous comments, use this [link](#)

Last update 12/27/2019

Readings

- Reading assignments are listed below. Some changes to the syllabus are anticipated and will be announced.
- The assigned readings are from AYRES AND KLASS, STUDIES IN CONTRACT LAW (9th ed., 2017) (hereinafter: AK). It is absolutely fine (even encouraged) to use an older edition, but it is your responsibility to read the cases assigned, even if your edition misses them.
- 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:*
 - A hornbook or other supplemental materials might be helpful but are not necessary. Indeed, these sources may contain materials that are not covered in class or might emphasize different points. Still, if you feel you would benefit from an easy-to-read companion to this class and you are cognizant of the potential differences, one recommendation is MARVIN CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS (CONCEPTS AND INSIGHTS) (7th, ed., 2013).
 - 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. I use my judgment for pronouns, and I'm more than happy to use your preferred pronouns. Please inform me if you have one. As for myself: he/him.

Attendance, Participation, and Laptops

- Class participation and attendance are required.
- You should attend all classes. However, if you choose to miss a class, you do not need to notify me. If you miss four classes, I ask that you meet with me to discuss the reasons and

find a plan to cover lost material. Missing five classes or more requires a meeting with the Dean for Academic Affairs. Eight absences will result in loss of credit.

- You will be called on **randomly** to discuss the reading materials. I understand that it will not always be possible to be fully prepared for class—indeed, it is a theme of contract law that unanticipated circumstances arise even for the most sophisticated and responsible of individuals. You are responsible, however, to notifying me in *advance* of class. Coming to class unprepared without notifying me in advance may 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. Please use your own judgment as to your use of electronics; some research suggests that it is less optimal than note taking.

Office Hours, Communication, and Individual Meetings Policy

- My office is located in Room 308.
- My faculty assistant is Ms. Marquita Henderson mhenderson@law.ua.edu.
- 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.
- As a hard rule, *all meetings are open-door*. If you want to arrange a private meeting, please arrange in advance with my assistant.
- 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:
 - Email: yarbel@law.ua.edu
 - 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.
 - 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 pass/fail, so you can treat them as stress-free exercises of the material. Exemplary performance may count towards one's grade as part of the class participation requirement. I will provide group feedback, and when I spot that an individual student is struggling, I might use these to arrange a meeting to identify and resolve the gaps.

Examination & Grading

- The final exam is a three-hour, open book, in-class test.
- The final grade will be based on 100% final exam.
- Participation in class accounts for part of the final grade. I reserve judgment to either increase or decrease the final grade by half a letter (e.g., B to B+ or vice versa).

On Virtue

- Students are expected to practice the virtues of The Good Lawyer: Professionalism, punctuality, diligence, honesty (yes, honesty), courtesy, collegiality, and tolerance to views even when those are false or offensive. Please note that agreement, deference to authority, and conformity are *not* among these virtues.
- The classroom is a professional environment and the observation of industry norms and professional code 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 and beliefs, even when those are minority views.
- Plagiarism is strictly prohibited.

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 and Cancellations

- All make-up classes will be announced in advance. Due to planned class overtime, five classes are cancelled in advance (see below).

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.

The following is the roadmap of the readings for the semester. At the end of each class, I will announce the required readings for our next meeting, but you are always welcome to read ahead.

The textbook contains various notes and problems, and you may consult them if you find them useful. You are only expected to read and know the cases and notes outlined below.

I. Introduction: The Importance of Promise

- AK 1-16
 - Section 1: Introduction
- Restatement (Second) of Contracts (hereinafter: R2K) §§ 1-2
- Uniform Commercial Code (hereinafter: UCC) § 2-102

Does a Contract Exist?

II. Agreement

A. The Objective Test of Assent 187

- Introductory Comment 197
- Embry v. Hargadine, McKittrick Dry Goods Co. 188-190
- Lucy v. Zehmer 190-193
- Raffles v. Wichelhaus 199-200
- Kolodziej v. Mason 774 F.3d 736 (11th Cir. 2014)
 - (Please locate independently on Lexisnexis or Westlaw)
- R2K §§ 17-20, 201

B. Offer and Acceptance

1. Offer

- a. General
 - Lonergan v. Scolnick 209-212
 - Lefkowitz v. Great Minneapolis Surplus Store 219-221
 - Leonard v. Pepsico, Inc. 223-231
 - Harris v. Time, Inc. - 191 Cal. App. 3d 449, 237 Cal. Rptr. 584 (1987)
 -
- R2K §§ 24, 26, 33
- Uniform Commercial Code (hereinafter UCC) § 2-204
- b. Definiteness requirement
 - Varney v. Ditmars 365-370
 - M-G-M. v. Scheider 388-389
 - Martin Jr. Delicatessen v. Schumacher 389-392
 - Comment: Open Terms Other Than Price 380
 - Comment: How Should the Law Set “Default” Rules? 381
- R2K §§ 33, 204

- UCC §§ 2-201(1), 2-204, 2-305, 2-306, 2-308, 2-309(1)

2. Acceptance

a. General

- R2K §§ 50, 63(a), 64
- UCC § 2-204

b. Acceptance by Performance

- Hendricks v. Behee 239-240
- Carlill v. Carbolic Smoke Ball Co. 241-246
- Ever-Tite Roofing Corp. v. Green 297-
- R2K §§ 45, 54, 62
- UCC § 2-206

c. Acceptance by Conduct or Silence

- Russell v. Texas Co.
- Ammons v. Wilson & co.
- R2K § 69
- UCC § 2-206

3. Termination of Offer: Destruction of Power of Acceptance 282

- Introductory Comment
- Hendricks v. Behee (just review) 282
- Dickinson v. Dodds 282-286
- https://www2.bostonglobe.com/business/2019/04/29/late-letter-old-rules-stymie-couple-trying-cancel-contract/CuULYJrT8LrT2e3OvWPtLN/story.html?s_campaign=8315
- James Baird Co. v. Gimbel Brothers, Inc. 305-309
- Drennan v. Star Paving Co. 309-313
- R2K §§ 36, 38, 39, 41-43, 87
- UCC § 2-205
-

4. Special Problems in the Agreement Process 321

a. Counter-Offers, Form Battles and UCC § 2-207 322

- Minneapolis & St. Louis Railway v. Columbus Rolling-Mill 322-324
- Comment: Problems in the Interpretation of UCC § 2-207 333
- Textile Unlimited, Inc. v. A...BMH & Co., Inc. 336
- R2K §§ 39, 59
- UCC § 2-207

b. Latent Terms: Shrinkwrap and Browsewrap 341

- Hill v. Gateway 2000 342-345

- Klocek v. Gateway 345-348
- Specht v. Netscape Communications Corp. 350-357
- UCC §§ 2-204, 2-207

2. Pre-contractual Liability 388

- Last names: A-M:
 - Nusbaum v. E-LO Plaintiff's Memorandum of Law (2-8)
 - Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 70 (2007) pp. 71-74 394
- Last Names N-Z:
 - Nusbaum v. E-Lo Memorandum of Law in Opposition (unmarked passages)
- AK 394-400
 - Hoffman v. Red Owl Stores, Inc. 394-400
 - Comment: Preliminary Agreements
- R2K § 90

III. The Bases of Contract Liability

A. Consideration

1. The Consideration Requirement

- Introductory Comment
- Historical and Definitional Note
- When is an Act or Promise Bargained for and Given in Exchange?
 - Kirksey v. Kirksey 71-72
 - Hamer v. Sidway 73-74
 - Langer v. Superior Steel 77-80
- <https://thegrio.com/2019/08/26/student-with-nothing-to-lose-asks-lil-uzi-vert-to-pay-his-tuition-rapper-agrees/>; alternative [link](#)
- Intent to Contract and the Seal
 - In re Greene
- R2K §§ 17, 71

2. Limits of the Consideration Doctrine

- Mixed Motives & Adequacy of Consideration
- Pre-Existing Duty Rule
- Discretion, Mutuality, and Implied Obligations
- skip Fine Penny & Home-Run Ball
 - ~~Thomas v. Thomas~~ (alternative reading might be assigned)
 - Browning v. Johnson 121-125
 - Levine v. Blumenthal 132-135
 - Angel v. Murray 140-144
 - Rehm-Zeiher Co. v. F.G. Walker Co. 147-150

- McMichael v. Price 150-152
- Batsakis v. Demotsis, 226 S.W.2d 673 (Tex. Civ. App. 1949)
- Socko v. Mid-Atlantic Systems of CPA, Inc., (PA, 2014) [Link](#) (3)

Assignment (due after class on discretion and mutuality)

- Marketing Contract (link)

- R2K §§ 73, 77, 79

B. Detriment in Reliance (Promissory Estoppel)

- Ricketts v. Scothorn 164-167
- Langer v. Superior Steel 168
- Comment: The Evolution of Promissory Estoppel
- R2K § 90

C. Moral Obligation (optional)

- Mills v. Wyman
- Webb v. McGowin
- R2K § 86

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

A. The Statute of Frauds

- (skip Problem Jane Fonda),
 - Comment: Introduction to the Statute of Frauds
 - Bullriders v. Autozone 437-441
 - Crabtree v. Elizabeth Arden Sales Corp. 443-447
 - The Writing Requirement, Sale of Goods
 - Comment: Satisfying the Statute
- R2K §§ 110, 131, 132, 139
- UCC § 2-201

B. Mistake

- Introductory Comment
- Beachcomber Coins, Inc. v. Boskett 494-496
- Sherwood v. Walker 496-500
- Lenawee County Board of Health v. Messerly 496-500
- R2K §§ 152-154

C. Misrepresentation and Nondisclosure

- Introductory Comment
- Laidlaw v. Organ 518-520
- Vokes v. Murray 528-532
- Hill v. Jones 537-542
- Comment Unfair and Deceptive Acts
- R2K §§ 161-164

- *Optional: Gerboc v. ContextLogic, Inc.*(2017)

D. Duress

- Introductory Comment
- *Austin Instrument, Inc. v. Loral Corp.* 553-557
- *Machinery Hauling v. Steel* 557-559
- R2K §§ 175(1), 176

E. Unconscionability

- Introductory Comment
- *Williams v. Walker-Thomas Furniture Co.* (two opinions) 562-568
- Comment: Renting-to-own As a Modern Method to ‘Profit on Poverty’
- *Jones v. Star Credit Corp.* 572-575
- *Ferguson v. Countrywide Credit Industries* 583-589
- 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)
 - Darren Bush, *Caught Between Scylla And Charybdis: Law & Economics As a Useful Tool for Feminist Legal Theorists*, 7 AM. U.J. GENDER SOC. POL’Y & L. 395 (1998)

Contractual Duties: What Does the Contract Say?

V. Performance

A. Battle of the Forms – Cont’d

B. The Parol Evidence Rule

- Introductory Comment
- *Mitchell v. Lath* 660-665
- *Masterson v. Sine* 663-668
- ~~*Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.* (to be replaced)~~
- Comment: Consumer Contracts and Integration
- R2K § 213
- UCC § 2-202

C. Interpretation and Construction

- ~~*Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging Co.* 681-684~~
- Comment: The Hierarchy of Interpretation Rules
- *Frigalment Importing Co. v. B.N.S. International Sales Corp.* 690-696
- R2K §§ 200-207

- UCC §§ 1-303, 2-208

D. The Duty of Good Faith

- Introductory Comment
- Patterson v. Meyerhofer 719-721
- Market Street Associates Limited Partnership v. Frey 724-732
- Feld v. Henry S. Levy & Sons, Inc. 745-748
- Hillesland v. Federal Bank 762-768
- R2K § 205
- UCC §§ 1-201(20), 1-304, 2-209 (Comment 1)

E. Warranties

- 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. **Assignment; Warranties & Conditions**

- Introductory Comment
- Dove v. Rose Acre Farms, Inc. 810-813
- ~~In Re Carter's~~ (to be replaced)
- Clark v. West 823-827
- R2K §§ 224-229, 237, 241
- UCC § 2-601

G. Impracticability and Frustration

- Introductory Comment
- Taylor v. Caldwell 869-873
- Krell v. Henry 901-904
- R2K §§ 261-266, 272
- UCC § 2-615(a)

VI. Remedies for Breach of Contract

A. Introduction to Remedies

- Hawkins v. McGee, 146 A. 641 (N.H. 1929)
- R2K §§ 344, 345

B. The Expectation Measure of Damages

1. Mitigation

- 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

- Hadley v. Baxendale
- R2K § 351
- UCC § 2-715(2)

3. Certainty

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

Special Comments:

1. Economic Waste, Construction Ks, and Value (12 pages)

- Jacob & Youngs v. Kent 1047-1048 (optional)
- Peevyhouse v. Garland Coal & Mining Co 1050-5054
- American Standard, Inc. v. Schectman 1055-1059
- Comment: Buyer's Remedies for Seller's Breach of Warranty
- R2K § 348(2)

D. Reliance Damages

- R2K § 349

E. The Restitution Remedy

- United States v. Algernon Blair, Inc., 479 F.2d 638 (4th Cir. 1973)
- R2K §§ 370, 371, 373
 - Britton v. Turner 1073-1077
 - Comment: Recovery in Restitution by a Plaintiff in Default
- R2K § 374(1)
-

F. Specific Performance

- Introductory Comment
- Curtice Brothers Co. v. Catts 1110-1112
- R2K §§ 357(1), 359(1), 367
- UCC § 2-716(1)

Remedies under the UCC

1. UCC Seller's Remedies

- Locks v. Wade 1029-1031
- 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)

2. UCC Measuring the Buyer's Expectation

- R2K § 347
- UCC §§ 1-305, 2-712, 2-713

G. Liquidated Damages

- Introductory Comment
- Southwest Engineering Co. v. United States 1131-1135
- Cellphone Termination Fee Cases
- Bertholet v Stefanko 1155-1157
- R2K § 356(1)
- UCC § 2-718(1)

Schedule for the Semester

The following classes are **cancelled**:

Friday, February, 21th
Monday, February, 24th
Friday, March, 6th
Wednesday, March, 11th
Monday, April 6th

Assignments:

1. K Analysis: **Mechanical Egg Cleaner Sale Agreement (First Day Assignment)**
2. Drafting Ads: **End of Offer & Acceptance**
3. Sham Exam: **One Man's Trash (End of Part**
4. Drafting exercise: **Gutters Business (end of Part II)**
5. Practice (optional): **Practice Questions – Formation (after offer & acceptance)**
6. Sham exam: **Conditions Warranties PER (end of Part III)**
7. Practice (optional): **House Fixing Hypo (Remedies Practice)+solution (Remedies)**
8. Practice (optional): **Practice Problems Remedies**