

UNIVERSITY OF MIAMI
SCHOOL OF LAW

CONTRACTS

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Syllabus¹

[Unless otherwise indicated, all page #'s refer to MACAULEY, ET.AL. CONTRACTS: LAW IN ACTION, Volume 1 (4th ED., 2016)].

YOU ARE TO READ ALL SECTIONS of the UCC and RESTATEMENT REFERENCED IN THE READINGS

1. Introduction

A. Common Law Reasoning: Duty – Breach – Remedy

Come to the first class prepared to discuss: (1) the last contract you entered into, (2) a contract that you breached (legal language for “broke” or “didn’t fulfill”), and (3) what happened after you breached.

B. A contract lawyer’s work: Read “Lease” (To be found on our course website: (<http://contractslawinaction.law.miami.edu/>) (under “Course Materials” on the top right hand side of the home page). The revisions were made by a lawyer. Why were they made?

C. Can there be a contract with no legal remedy? Read “The Harry Potter Case, or What are you going to do? Cast a Spell?” (on our course website)

Remedies: What can your client get?

2. Duty (?) to Mitigate Damages: Read “Big Landlord Gouged Tenants, Court Rules” (on course website); 48 - 61; and please view powerpoint “Mitigation of Damages” (on course website).

Come to class prepared to argue the two questions (A & B) at p. 56.

¹ Syllabus originally prepared by Professor Robert Rosen.

Why should there be a duty to mitigate damages (if there is one)? Consider whether the mitigation doctrine imposes a duty to forgive the promise-breaker.

3. *Studying Law: What am I here for?* 2-29.

(to be discussed throughout course, not specifically now. At this time, you should carefully consider 21-23, on why we begin with remedies).

4. *The UCC: 32-45; "Is Electricity a Good?"* (on course website).

What is special about "goods"? What is special about statutes? Be prepared to answer the questions at 43-44. Why is there no definitive answer as to whether electricity is a good? Why does it matter if electricity is a good?

5. *Specific Performance: 85-95; "Specific Performance: A Comparative Analysis"* (on course website).

When is specific performance the preferred remedy in the U.S.? Why? Is the Civilian approach more just? Be prepared to answer the questions in note 7, p. 94.

6. *The Expectation Interest: 31-32; 46-47*

What is it to be "made whole" after someone breaks their promise? Perhaps, think about divorce. Be prepared to answer the questions at 46-47. Can your expectations not be met even if you are not certain what it is you are getting? (Think Christmas trees).

7. *Consequential Damages: 108-125*

Why in contract should damages caused by the breach be limited to what the parties agreed at the time the contract was formed? Is explicit agreement required? In Hadley, who knew what and when did they know it? Why shouldn't all damages proximately caused by the breach be recoverable? What about damages that the breaching party knew would occur at the time they decide to breach (but not when they entered into the contract)? How do you feel about your answers to these questions if you know that the dominant party to a contract almost always will contract out of their liability for consequential liabilities? It is time, again, to read a contract to which you are or have been a party. Any liability for the other party if they breached? What liability?

8. *Party Chosen Remedies: Is it a Liquidated Damages or is it a Penalty Clause?* 95-108

The law calls damages set in the contract that it will enforce "liquidated damages" and those that it will not enforce "penalty clauses." Be prepared to reproduce Judge Posner's theoretical reasons for why the court should refuse to enforce the remedy fashioned by the parties. You need not fully understand the mathematics, but try to understand the business realities. The phrase "variable costs" might help. In this contract, the parties may have made an economic mistake. What other reasons are

suggested for refusing to enforce an agreement reached by the parties? Would Shylock have made the loan without the agreed to remedy?

9. *Expectation Damages in Action*: 125-133 (to be discussed only briefly at this point)

Should the law care about how people behave? How do you explain patterns of behavior in which people do not enforce their legal rights? What does Llewellyn mean by law as partial insurance? How does this compare to Macaulay's findings? Consider what empirical projects you (alone or with others) might undertake to explore the law in action, as contrasted to the law on the books.

10. *The Reliance Interest*: 133-142

What was the expectation interest in *Security Stove*? How is a limitation of liability clause different from a party chosen remedy clause? When are you likely to sue for reliance, not expectation, damages?

11. *The Restitution Interest*: 148-155; 174-186.

Answer the questions at 149. When is enrichment "unjust?" If enrichment is not unjust, does that mean it is just? From whose perspective is "benefit" determined? Pay careful attention to n.6, p. 179-180.

12. *Choosing Interests*: 186-202; 211-216

The plaintiff can plead in the alternative, seeking expectation, reliance or restitution damages. What views of "voluntary," "promise," "agreement," and "freedom" is involved in a court's choices between these remedies? What meanings does the court in *Peevyhouse* assign to these words? Compare tort and contract in *Sullivan*.

13. *Review*: 216-220

Be prepared to answer these questions.

Is There a Contract? Of Contractual Duty

14. *The Rules of Contract Formation*: 221-237; 574-589; Compare UCC 2-204 and Restatement 2nd sections 24, 26, 27, 33, 35, 36, 39, 50, 57, 58, 59, 59, 61, and 69.

The rules of law of offer/acceptance are mechanical. The rules depend on creating opposing pairs. Find as many paired opposites in the reading as you can, e.g., offer/preliminary negotiation.

Pay attention to whose perspective is used in the legal test, e.g., from whose perspective is it determined whether an offer has been made?

Do not get lost in legal metaphors. “Meeting of minds” is a metaphor of contract. Consider what that literally means. When was the last time that you met another mind? Contrast the Restatement and the UCC.

Be prepared to advise Rodney Brown (234-236) and to answer why a contract was not formed in *Leonard v. Pepsico* (236-237). (You may wish to view the commercial on the web).

Do you agree with the result in *McCutcheon*? How can you agree with something of which you are unaware?

Do you agree with the result in *Yauger*? With its reasoning? Have you been in a similar situation? Did you read the liability waiver? Understand it? Think it meant anything?

15. *Contract Formation and Context* 221-226; 252-276

Consider the interaction of the formal rules and context. What has to be said to reach agreement in different contexts? At a market, who makes the offer? Can the seller decide not to sell it to you?

When was the contract formed in *Marvin v. Marvin*? What were its terms? Is the case a feminist victory? Answer the questions in n.6, p. 274

Consider the Baby M case (275-6). Should such a contract be enforced?

16. *Consideration 1*: 288-296; 237-251

The doctrine of consideration is a mess. Read the Doctrinal Note carefully. Make a list of that which does not constitute consideration.

Consideration is a covert means for denying judicial intervention. Does Chafee provide a better alternative?

Consideration is a doctrine of form. Examine the alternative to formalism in *Ansin*.

17. *Consideration 2: What is bargained for?* 276-287; 297-300

With what does the *Hamer* case replace the benefit/detriment understanding of consideration? Pay careful attention to the tramp case at 290-92. What should Antillico have done to protect herself? Why wasn't the IOU in *Ricketts* bargained for?

18. *Reliance as a Means to Form a Contract*: 301-306; 365-383

Consider that the law hesitates at equitable estoppel (as in *Ricketts*) before it invents promissory estoppel. Is this conservatism?

Why was there no contract in *Red Owl*? Do the questions in the special verdict form (at 369) mirror R2 sec. 90?

19. *Reliance and Ending the Relationship*: 383-405

Note the importance of legislation. But the wisdom of the legislation raises the question of whether reliance and innovation are in tension. Should the law prefer one over the other?

20. *Unilateral Contracts*: 322-335; 590-599

Why are unilateral contracts rare in real life?

Be prepared to answer the questions at 344-5

Why do the shrink-wrap problems arise? Do you agree with the solutions? Does Easterbrook's legal analysis have any relation to reality?

21. *Planning for the Future: Family Context*: 335-356

On what grounds do we enforce contracts lacking in consideration?

Are Chaffee's ideas raised by the decision in *Brackenbury*?

22. *Mediation and Arbitration*: 356-364; 406-418, 471-480

How do these ideas relate to the readings on "Contract Law in Life" (133-139)?

How does context matter in these alternatives to law.

A pause: *Questions and Responses*: bring your questions on any subject so far covered.

Please remember, you are first-year students and are entitled to ask questions some might think are "stupid."

Defenses to Contract Formation

23. *Reliance and The Statute of Frauds*: 307-322, 419-425

Shouldn't the Statute of Frauds be called "The Statute for Defrauding the Innocent"?

Is McIntosh an example of judicial legislation?

How do sections 90 and 139 of the Restatement (Second) differ? Do you see why many courts do not follow section 139?

Do we need the statute of frauds?

24. *Illegal Contracts and Capacity*: 483-497; 502-522

Of course, the courts ought not enforce a murder for hire contract. But there are a lot of laws. What limits does the law impose on judges in their decisions to find an illegal contract?

Should courts refuse to enforce over-restrictive covenants not to compete, or ought they instead blue-pencil the clause? Which requires the court to exercise "more power"?

Why if you do not know that someone is drunk, may you enter into a

contract with her? Why if you do not know that someone is mentally unable to understand the consequences of the transaction, may you enter only into a voidable contract with him, unless the court judges the adequacy of consideration and decides that the contract is fair?

25. *Duress and Undue Influence: 522-545*

How is economic duress like and unlike physical duress? List the various standards that have been suggested for finding economic duress. Evaluate them.

How is undue influence different from duress? Construct an image of *Odorizzi* (p,544). Did the lawyer act ethically in so characterizing his client?

26. *Active Misrepresentation and the Failure to Disclose: 545-557*

What must be established to void a contract for active misrepresentation? For failure to disclose (passive misrepresentation)?

What precisely must be disclosed when one sells a house? What about a private person selling a used car? What about a private person selling a very expensive painting?

27. *Good Faith: 557-565*

Can't the General Electric Trust protect itself? Why should Market Street owe it any duties beyond those in the text of the contract?

Is good faith too mushy a concept for courts? What gives it content? Is it a way to bring life into law?

"Good Faith" in Germanic systems and "Abuse of Right" in Frankish systems are key concepts. Do they have a place in the common law?

28. *Unconscionability: 599- 607, 650-692*

What must be demonstrated to find a contract unconscionable?

There are ridiculously few cases finding contracts unconscionable. Yet, lawyers often allege it. Why?

How has Judge Easterbrook boxed himself into the result in *Gateway*? Pay careful attention to n.4, p.604. 25 million people cruised out of the U.S. in 2015. Where will their cases be heard?

29. *Review: 566- 573*

Be prepared to argue for and against each cause of action suggested by the facts in Arthur Murray.

What's in a contract?

30. *Interpretation*: 608-620

Why is “reasonable expectations relevant to insurance contracts? How does this doctrine undo Portia’s legalistic or formalistic arguments?

31. *Warranties*: 620-633, 642-650

Make a chart of the UCC’s provisions regarding warranties.

32. *Extrinsic Evidence Rule*: 633-642

Focus not on what the parol evidence rule excludes, but how you can get the court to admit your parol evidence. For what purposes may you not offer parol evidence? For what purposes may you?

**What is a Breach?
Performance/Non-Performance**

33. *Performance*: 156-168

What determines whether or not it was a breach of the contract not to deliver a spare tire?