

**University of Miami  
School of Law**

CONTRACTS  
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*Fall 2010*

**Syllabus**

[Unless otherwise indicated, all page #'s refer to MACAULEY, ET.AL. CONTRACTS: LAW IN ACTION (2<sup>ND</sup> ED., 2003)].

**YOU ARE TO READ ALL SECTIONS of the UCC and RESTATEMENT 2d REFERENCED IN THE READINGS**

**Introduction**

*Common Law Reasoning: Duty – Breach – Remedy*

Come to the first class prepared to discuss: (1) the last contract you entered into, (2) the last contract that you breached, **and** (3) “*Big Landlord Gouged Tenants, Court Rules*” ((on course website: <http://contracts.lawinaction.law.miami.edu/>) (This is under “Course Materials” on the right hand side).

**Remedies: What can your client get?**

Introduction: “*The Harry Potter Case or What are you going to do? Cast a Spell?*” (on the course website)

1. *Duty to Mitigate Damages*: 40-51,  
Be prepared to answer the two questions (A & B) at p. 47.  
Consider whether the mitigation doctrine imposes a duty to forgive the promise-breaker. (A presentation on Mitigation of Damages is available on the course website)
2. *Specific Performance*: 61-68, Article on “Specific Performance: A Comparative Analysis” (on course website:  
<http://faculty.law.miami.edu/rrosen/courses/ContractsCourseMaterials.htm> )  
  
When is specific performance the preferred remedy in the U.S.? Be prepared to answer the questions in note 5, pp. 67-68
3. Contract Theory: 1-24 (we will not directly discuss this in class)
4. *The UCC*: 25-38, Article on Is Electricity a Good on course website

What is special about “goods”? What is special about statutes? Who’s husband is Karl Llewellyn? Be prepared to answer the questions at 34-36.

5. *The Expectation Interest*: 38-39

What is it to be “made whole” after someone broke their promise? Be prepared to answer the questions at 38-39. Can your expectations not be met even if you are not certain what it is you are getting? (Think Christmas trees).

6. *Consequential Damages*: 79-85

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? How do you feel about these questions if you know that the dominant party to a contract will always contract out of consequential liabilities?

7. *Party Chosen Remedies in Courts*:

*Liquidated Damages Clauses or Penalty Clauses*: 69 -78

The law calls damages set and contemplated by the parties that it will enforce “liquidated damages” and those it will not enforce “penalty clauses.” Be prepared to reproduce Judge Posner’s argument for why the court should refuse to enforce the remedy fashioned by the parties. You need not fully understand the economics of the situation. 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?

8. *Contract Law in Life*: 91-98

Should the law care about how people behave? How do you explain the patterns discovered by the law students that were reported in the Yale Law Journal? What does Llewellyn mean by law as partial insurance? How does this compare to Macauley’s findings? Consider what empirical projects you (alone or with others) might undertake to explore the law in action. The Yale students, in this reading, and the Virginia students, about whose project you will read later (p. 597), are some of the most cited law students of all time.

9. *The Reliance Interest*: 98-108

What was the expectation interest in *Security Stove*? Should the court enforce FedEx’s limitation of liability (107-08)? How is a limitation of liability clause different from a party set damages clause? When are you likely to sue for reliance, not expectation, damages?

10. *The Restitution Interest*: 115-116, 135-143

Answer the questions at 115-116. When is enrichment “unjust?” From whose perspective is “benefit” determined?

11. *Choosing Interests*: 150-165

The plaintiff can plead in the alternative, seeking expectation, reliance or restitution damages. What view of “voluntary,” “promise,” “agreement,” and “freedom” is involved in a court’s choice between these remedies? What meaning does the court in *Peevyhouse* assign to these words?

**Is There a Contract?**

12. *The Rules of Contract Formation*: 178-189, 200- 212, 218-219;

Read and compare UCC 2-204 and Restatement 2<sup>nd</sup> sections 24, 26, 27, 33, 35, 36, 39, 50, 57, 58, 59, 61, 69

The reading for today is largely discursive. The rules of law of offer/acceptance are mechanical. It develops by 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 it is reasonable to believe that an offer has been made?

Do not get lost in legal metaphors. “Meeting of minds” is a metaphor of contract. Consider how you measure whether minds have met? Contrast the Restatement and the UCC.

When was the contract formed in Marvin v. Marvin? What were its terms?

Why wasn’t a contract formed in Leonard v. Pepsico?

13. *Consideration I*: 229-238, 189-197, 219-226

The doctrine of consideration is a mess. Read the Doctrinal Note carefully.

There are three opinions in Balfour. For each of them, decide how the judge understands consideration and relate that understanding to one of Chaffee’s (198-90) policies.

Consideration is a doctrine of form. Examine how this formalism works in cases like Balfour and Hamer v. Sidway.

14. *Consideration II: What is bargained for?* 227-229, 239-246

With what does the Hamer case replace the benefit/detriment understanding of consideration? Pay careful attention to the tramp case at 227-29. What should Antillico have done to protect herself? Why wasn’t the IOU in Ricketts bargained for?

15. *Reliance as a Means to Form a Contract*: [240-246], 297-312

Understand why the law hesitates at equitable estoppel (as in *Ricketts*) before it invents promissory estoppel.

Why was there no contract in Red Owl? Do the questions in the special verdict form (at 302) mirror R2 90? Do the actions of businesses reveal their acceptance of the reliance principle?

16. *Reliance and the Option Contract: The Problem of the Mistaken Bid: 589-609*

Please note that the rest of the world rejects the common law mailbox rule. UETA provides that a message is sent when it leaves the sender's server and is received when it enters the receiver's server.

Compare Restatement 2<sup>nd</sup> sections 90 and 87. What is the debate between Hand and Traynor? Is what the Virginia Law discovered relevant to the resolution of that debate?

17. *Unilateral Contracts: 258-264, 282-286, 471-484*

Why are unilateral contracts rare in real life? Are they normally the invention of clever lawyers and judges?

Be prepared to provide advice to the wife in the problem at n.3, pp. 285-6.

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

18. *Mediation and Arbitration: 291-296, 373-380* (not to be directly discussed in class)

What effect do courts give to arbitration clauses such as Gateway's? Should companies like Gateway be able to remove these disputes from judicial proceedings? How do these ideas relate to the readings on "Contracts in Real Life" (91-98)?

### **Defenses to Contract Formation**

19. *Reliance and The Statute of Frauds: 246-251* (not including the Rodman case), 254(note 3)-258, 327-333

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?

20. *Illegal Contracts and Capacity: 381-384, 391-408*

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 to 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?

21. *Duress and Undue Influence*: 408-414, 422-433

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 (429-430). Did the lawyer act ethically in so characterizing his client?

22. *Active Misrepresentation and Failure to Disclose*: 433-453

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

23. *Misunderstanding and Mistake*: 615-618, 622-625, 610-615, 580-589

What are the elements that must be proven to establish unilateral mistake? Bilateral mistake? What is the difference between what must be shown? In both cases, are courts applying tort concepts?

24. *Unconscionability*: 534-552, 556-561, 652-563 (notes 3 and 4).

What must be demonstrated to find a contract unconscionable? There are ridiculously few cases finding contracts unconscionable. Yet, lawyers often allege it. Why? Why do law professors also discuss it, given its limited relevance to practice?

25. *Employment-at-will and illegality*: 339-356, 359-365

The employment-at-will doctrine is judicially created. And, as the reading indicates, much judicial creativity has been used to limit the effect of the employment-at-will doctrine. The employment-at-will doctrine is also limited by legislative and self-help (organizing labor) actions. If you take labor and employment law courses you will learn about them. Here, consider the evolution of the law and the alternative legal strategies that have been applied to respond to the judge-made rule that “a contract of indefinite duration is terminable-at-will.”

26. *Review*: 453-460, 571-580, 565-567

Be prepared to argue for and against each cause of action in *Arthur Murray*.

## What's in a contract?

27. *Interpretation*: 748-764, 484-494

Make a list of the standards of interpretation. Examine how some of the standards can be deployed against each other. What standards are used to interpret the insurance contract in C& J Fertilizer?

28. *Extrinsic Evidence Rule*: 771-780, 792-803, 806-810

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

29. *Trade Usage*: 764-771, 811-829

What standards are used to interpret the contract in Federal Express? What is Justice Traynor's logic? Is Nanakuli consistent with Federal Express?

30. *Warranties*: 494-513, 872-881

Make a chart of the UCC's provisions regarding warranties. What does the court imply that Allstate promised to those it insured?

31. *Battle of the Forms*: 695-713, 720 (note 3) – 732, 736-737

Make a chart of UCC 2-207. Is it important to determine which communication is the offer and which one is the acceptance? When do you go to 2-207(3)? What must be said to invoke the exception to an acceptance in 2-207(1). How do you deal with additional terms? Different terms? Why don't businesspeople decide on the terms to which they actually agree?

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

32. *Performance*: 865-872, 962-966, 888-900, 132 (note 10), 133-134, 966-968

Note the differences between the sale of goods and construction contracts. Do they make sense to you? Study the chart at 132 and apply it to Ardex. Consider the doctrine of anticipatory repudiation and consider whether the courts are imposing a duty of the parties to communicate with each other? What is the obligation of good faith during performance?

33. *Modification, Waiver*: 849-855, 856-863

When should courts not enforce “Written Modification Only” clauses? What do you need to show to demonstrate a waiver of conditions? What should the editor have done in West? What needs to be shown to constitute anticipatory repudiation?

### **Defenses to Non-Performance**

34. *Changed Circumstances*: 1017-1019, 1032-1041, 1050-1052, 681-689

Impossibility, impracticability and frustration all refer to the same doctrine. According to the UCC, what are the elements that must be demonstrated to take advantage of the doctrine? How do these differ from the elements of bilateral mistake? Unilateral mistake? The duty of good faith?