CONTRACT LAW
SECTION 1C

SYLLABUS AND COURSE OUTLINE
VERSION 1.0.1
(LAST UPDATED 12/3/2024)

SPRING 2025

PROFESSOR LIPSHAW

TUESDAY AND THURSDAY, 12:00-1:50 PM
(EXCEPT AS NOTED ON CALENDAR)

"I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience."

> - BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921)

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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 Canvas.

YOUR BIOGRAPHICAL INFORMATION

There is a journal on Canvas where I have asked you to submit some basic information about yourself.

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. Contract 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 and, perhaps, even from what you did in the first semester.

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 something Professor Blum used to include in earlier editions at §4.2.2 of his book:

> 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

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[*] One of your classmates has already impressed me by catching that Professor Blum edited this sentence out of the 8th edition. Having written and published a casebook, I know that the publishers impose word limits. Perhaps he needed to add something elsewhere and this was a frill he could discard. If so, I'm sorry. Nevertheless, §4.2.2 of the 8th edition still makes the same point, albeit not as wonderfully as the earlier editions.

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 Canvas. 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 Canvas 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. I believe very much 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.

3. How does so-called "IRAC" relate to what we cover in class?

A student once asked this very good question: "As a class, we were introduced to IRAC during Orientation; however, I believe that every law school and lawyer has their own personal approach. I am very interested in learning your take on IRAC, and what you believe is the best 'lawyerly-approach' to IRAC?"

Warning: You may be better off reading this section of the syllabus AFTER we study *Lucy v. Zehmer* in Unit 1.

IRAC is simply a convenient acronym or mnemonic for the "if-then" or modus ponens logic of the law. Modus ponens logic is the following: "If x, then y. x. Therefore y." The IRAC "R" is the legal rule you are looking to apply: "if x, then y." The "x" represents an antecedent condition; the "y" represents the legal consequence if "x" is present in the narrative. An example would be "if there is a promise (x_1) and consideration (x_2), then there is an enforceable contract (y)." (That is a fair characterization of both R2K §1 and R2K §17.) The IRAC "A" is determining whether the fact situation supports the existence of the x_1 and the x_2. If x_1 and x_2 are present, the inexorable logic of your argument is that, indeed, the consequence is y, and that is your IRAC "C" conclusion.

I caution you about "naive IRAC". The rules I just used are a prime example. It's likely that the situation presents an overarching IRAC "I" issue - like "is there an enforceable contract here?" Spotting an IRAC "I" is the lawyering gift, and it is very hard to teach. But once you have the I, it's not too hard to realize that you need an "if x-then y" rule (R) to do the modus ponens logic whereby you do the analysis (A) to see if the x factors are present to support the conclusion (C) that the legal consequence is y. Naive IRAC is thinking that you are done as soon as you find the top-level or meta IRAC "I". Because it turns out that the x_1 and x_2 in the rule are themselves legal conclusions (promise and consideration) that need to be assessed in the same logical manner. Which means you have to drill down another level. Now there are two questions: "is there a promise?" and "is there consideration?" What antecedent conditions, x_1, x_2, etc. need to be present to conclude there is a y promise? So you have to repeat the entire process again, treating the lower-level embedded issues with their own IRAC "I". Which entails finding the appropriate "if x-then y" rules (R) (here, perhaps R2K §2 and R2K §71) which you would analyze (A) and upon which you would conclude (C).

An example is the analysis of *Lucy v Zehmer*, which we will study in Unit 1. Overall the question is whether there is the parties formed a contract. But the case really turns on the lower-level issue of whether Lucy properly understood Zehmer to have made a promise rather than a joke. Whether some words or actions constitute a "promise" is itself a legal conclusion. Under

R2K §2, the rule that defines promise, the legal conclusion depends on whether Zehmer "manifest" an intention to be bound such that Lucy would be justified in thinking a commitment had been made." That suggests an even lower-level analysis. What is the "if x-then y" rule (R) of "manifest?" Well, you might do legal research to find a case with a helpful holding. In our class, you are allowed to turn to R2K §19 which supplies a rule (R) that tells you what a manifestation is. Now you have to analyze (A) whether the facts support a legal consequence of manifestation. If you are Zehmer, and you can argue that there is no fact that supports the legal consequence of "manifestation" under R2K §19, then there can't be a promise under R2K §2, and there can't be a contract under either R2K §1 or R2K §17. The entire logical chain falls apart.[1]

So... do I care whether on an exam you label what you are doing as IRAC? Absolutely not. You can (like students before you) write an exam answer that gets the highest grade in the class without ever using the IRAC acronym. Because that is just a convenient acronym or mnemonic for the underlying logic of the rule application exercise that lawyers do. And the logic and the rule application in the answer is what I care about.

CONTACT INFORMATION

Cell Phone: 317-694-4976

Email: jlipshaw@suffolk.edu

TEACHING ASSISTANT

The teaching assistant for this class will be Winki Chan. She is a 2L who excelled in this class a year ago. She will be in touch with you directly. Her job is to be available to answer questions, hold office hours and, if they choose, study sessions, and other things to aid you. She won't do any of the actual grading. That is, for better or worse, entirely my responsibility.

Winki is a student like you. She took my class as a 1L and did very well, but nobody ever does perfectly. She is not a professor. As she herself will tell you, occasionally she gets things wrong or inconsistent with something in the Blum text, my class notes, or class discussion. In fact, I encourage her to call her sessions "study halls" rather than "review sessions." That means you should not expect to be able to learn the materials comprehensively from her. Instead, use the study halls as an opportunity to clarify points of confusion with a student like you who was highly successful in the course.

I do not get involved with interactions between the TA and students, so it is your responsibility to question the TA if you perceive there is an inconsistency. The quizzes and

[1] Note, by the way, as will come up often, there isn't much mileage in the second meta-issue "is there consideration?" Zehmer wants to avoid the contract. His only real option is to contest the promise issue. The essence of consideration is that the transaction reflected a bargain and not a gift or gratuity. If the manifestations in Lucy v. Zehmer is found to be a promise and not a joke, objectively speaking, then Zehmer is going to lose, because it's almost certainly the case that this looks like a bargain. The lesson is that you will learn not to waste time analyzing issues that don't have mileage.

the exam questions are based on what I say, not on what you may gather from the TA, other students' outlines, commercial supplements, etc.

Be aware that I impose two requirements on my TAs. First, they may only use my materials and are not permitted to create their own. Second, their work ends completely as of the end of the last class of the semester. They may not have any class-related contact with students after that time.

COURSE INFORMATION

RECORDING AND CLASS NOTES

I want to remove some of the note-taking (particularly the "transcription" kind) pressure. All classes are video recorded, and Media Services will make the recordings available (I believe through a link on Canvas).

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 WATCH OR 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

There is a link to a signup sheet on Canvas. My office is 250F, which is back in the corner past classroom 265, and I'm all the way down at the end of the hall.

BRUNCH WITH LIPSHAW

Each [*TBD when I see the Spring 2025 class schedule] at 11:00 am, I will grab a table in the Sargent Hall Cafeteria and hope that seven students join me. There is a signup link on Canvas. The school will pay for your food!

CLASS MANAGEMENT SYSTEM

I use Canvas, 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 Canvas. (Of course, if you are reading this, then you may have already found your way to Canvas.)

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, 8th 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.

I recognize that not using a casebook is unusual, and many students ask how I expect them to use or study from Blum. Let me illustrate that with an example of a past student question about the material. We had just talked about the rule for the rejection of any offer. The student's question after class was this: "if the offeree rejects the offer, thus ending the power of acceptance, can the offeree somehow reinstate the power of acceptance or retract the rejection?" My simple answer to that was "no." The whole process has to start again. It's possible the offeree's attempt to reinstate or retract the rejection could be interpreted as a new offer, but then the original offeror would have a power of acceptance and have to accept to form a contract. I answered that question without looking at Blum or even knowing (at the time) what Blum says about it.

That question also turns out to have been a good example of how you can use Blum as a resource.

To begin, you are not ever going to be tested on your "mastery" of the Blum text. I STRONGLY encourage you to go to "Exams and Exam Practice" online and look at the Unit 1-4 Practice Question. You won't have the all the tools to answer it until we finish Unit 4, but the exam questions are ALWAYS going to be in the form of a story in which you have to apply the rules of contract law, using the facts in the narrative to assess the possible legal consequences for the parties involved (according to the questions that get called in the problem). In the Unit 1-4 Practice Question, it is going to be a memo to a law firm partner assessing whether Jill owes money to Steve for two actions Steve took for Jill's benefit. Your "tools" in crafting that answer are the rules, whether they come from the Restatement, statutes like Article 2 of the UCC, or the

holdings in cases.* Sometimes (or even often) the facts are going to be such that more than one answer is possible. Conceivably, in such hard cases, you won't be able to draw a definite conclusion, and will have to say so in your analysis.

So, let's return to that question about the effect of rejection. Let's assume that in the story you are analyzing, it's not clear from the facts whether the actual words used by the offeree were a rejection of the offer. And it appears that the offeree may have rejected the offer and then tried to retract the rejection or reinstate the offer. Jane says to Sam, for example, "I know it sounds like I rejected your offer yesterday to sell me the carpet, but on second thought, I accept the offer." Assuming that she did reject the offer yesterday, is she allowed to do that? You are certainly welcome to ask me what I think. But Blum is another resource. Chapter 4 of Blum explains and gives examples of the rules of offer and acceptance, in the same way I would if you came and asked me. So, if you open Blum and go either to the index or to the Table of Contents, you'd ultimately find your way to "§4.6.1 Rejection." And there you would find this answer: "Once rejection has been communicated, the offeree cannot recant the rejection and accept, because the offer has come to an end. A purported acceptance could, of course, qualify as a new offer by the former offeree." And that answer is almost exactly the same one that you would get if you came to me as a resource or went to another contract law treatise.

But Blum (and class recording and class notes and PowerPoints) are all resources for the application of rules that you use in solving the problems. I will never ask you a question, either in class or on an exam, to effect of something like, "So, what is Blum's view on the tension between certainty and fairness when it comes to the doctrine of frustration of purpose?" Rather, you may have a narrative in which somebody wants to be relieved of a contract obligation because the whole point of the contract has disappeared (this will be a subject of Unit 11), and you will want to use the "frustration of purpose" rules in Restatement Second §265. If you want some help in seeing how those rules get used, you'll be able to turn to my exposition in class. But you can also turn to §15.8 in Chapter 15 of Blum.

Finally, Blum and I are both professors. Both of us are trying to explain to you how to use competing rules competitively to win the game in real (or hypothetical disputes). About 98% of the time, we agree. Occasionally we don't and in those cases I tell you explicitly where we disagree.

Cases. I have edited all of the cases as though I were a casebook author and posted them under Course Materials by unit on Canvas. 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. **Do not use my edits of the cases for any purpose other than this class. For your ease of reading, I edit out non-relevant material, citations, footnotes, or shorten or clarify sentences or paragraphs. And I do not usually show those edits with ellipses or other marks for the same reason: ease of reading.**

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* This, by the way, is one of the reasons I don't use a casebook. Casebooks tend to make it appear that the point is to learn cases, rather to see how lawyers and judge use rules to decide disputes, and how cases reflect the symbiotic relations of facts to the application of rules in different contexts. The other reason is the cost of the books.

Restatement and UCC Supplement. Knapp, Crystal, & Prince, Rules of Contract Law: 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. (The publisher advises me that the supplement will be available electronically with the option for students to upgrade to "print on demand.)

Two observations. The supplement, at least in hard copy, used to cost $58. As of this writing, I am not sure what the electronic version will cost. 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 Canvas before, during, and after we use them in class.

Other Materials. There have been semesters in which, when reading the answers to the exam questions, I see the same "trope" over and over again, usually on the more difficult subjects in the class, and they are remarkably similar from student answer to student answer. It is obvious that somebody other than me has given those students a template for answering a particular issue. However, they are (a) clearly not from materials I provided, (b) often not quite correct, and (c) even when correct (for example, materials that the TA gives you), often requiring extensive discussion of issues that are not relevant to the resolution of the problem in the question. If you use commercially available supplements like Glannon Guides or download from the ubiquitous law school online, please be on notice that you rely on or quote this material on exams at your own risk. I am not saying that those materials can never be helpful. But nothing substitutes for your own thinking and your own critical assessment, particularly if the materials do not align with what you have understood me to be teaching.

FIRST ASSIGNMENTS

You should read the three cases and course materials for Unit 1. It will take us two 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.

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.

Fortunately, the school has solved my issues by instituting a QR system that you can use. 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.), that will be the record.

There is a small bonus, as noted in the next section, for being present in class and participating in my polling questions throughout the semester.

GRADING AND ASSESSMENT

I calculate grades based on a point system. The final essay exam counts as two-thirds of the total and the series of online multiple-choice quizzes plus the bonus for Poll Everywhere during the semester, in the aggregate as adjusted, counts as one-third of the total.

Exam. The final exam 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. It 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. It is 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. A portion of your grade (as noted above) will be based on a series of quizzes to be administered online through Canvas over the course of the semester. There will be the first one about the syllabus and then at the end of each unit. Some of the units are long enough to justify two quiz segments, but each segment is worth ten points. I drop the two lowest segment scores.

Ultimately, I adjust the quiz scores so that the total in the denominator for "perfect" performance is the designated percentage of the total grade.

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 quiz scores (before adjustment) by participating in 90% or more of the questions over the semester.

The URL to join my polls is: 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 the Zoom class. I will make accommodations for health, disability, or other emergencies if you promptly contact me about them and give me the dates and polling question numbers you missed. I also make accommodations for job interviews but only if you notify me ahead of time. I will not count the following (or anything similar) as an emergency: studying for other classes; preparing LPS assignments; extra-curricular activities, even those with an educational component like moot court; Red Sox Opening Day; hangovers; arguments with significant others; solar eclipses.

Practice Exam Questions. In prior years, there was enough extra time in each semester to allocate a class period at the end to my review with you of a practice essay question that you could take on your own at some time before the review. The review consisted of my demonstrating how I would go about issue-spotting and outlining a complete answer to the question.

Our compressed schedule makes that more difficult. As a substitute, I have converted my review to three separate interactive online exercises that will be available to you over the course of the semester (and linked under Exams and Exam Practice on Canvas). The first one covers Units 1-4, and I will make it available when we are close to finishing those units. The second one covers Units 6-7 - the thorny and related issues of the parol evidence rule and the rules of contract interpretation. The third one covers Units 5-13, and I will make it available toward the end of the semester. In each case, you ought first to answer the question on your own. When you are done, you will be able to follow the prompts through the review in a way that will replicate my talking to you about how I would have organized the answer.

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**

Office of Health and Wellness Services --**http://www.suffolk.edu/offices/932.html**

Law Students may also wish to access the services of Lawyers Concerned for Lawyers – **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 4th floor, within the Dean's Suite – **LawDeanOfStudents@suffolk.edu**),

COURSE ORGANIZATION

PART I – INTRODUCTION TO THE PRACTICE OF CONTRACT LAW

Unit 1: **Introduction - Playing the Contract Lawyering Game**

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")/Contracts without Promises (Herein of "quasi-contract")**

PART II – ISSUES IN DETERMINING THE SCOPE OF CONTRACT OBLIGATIONS

Unit 5: **Parol Evidence Rule**

Unit 6: **Interpreting the Terms of a Contract**

Unit 7: **Implied Terms**

PART III – DEFENSES TO ENFORCEMENT

Unit 8: **Statute of Frauds**

Unit 9: **Abuse of Contract and Contract Avoidance**

Unit 10: **Mistake**

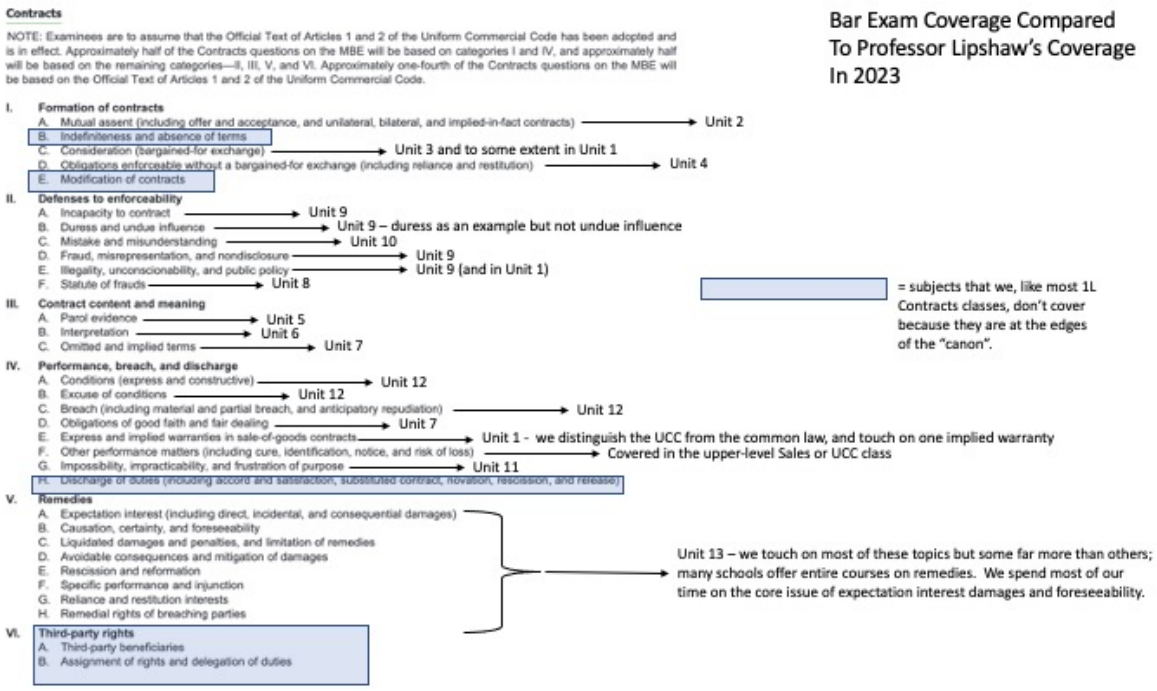
Unit 11: **Impossibility, Impracticability, and Frustration**

PART IV – ISSUES IN PERFORMANCE AND BREACH OF THE CONTRACT

Unit 12: **Conditions, Breach, and Anticipatory Repudiation**

Unit 13: **Common Law Remedies**

COMPARISON OF COURSE TO UNIFORM BAR



UNIT 1 - INTRODUCTION - PLAYING THE CONTRACT LAWYERING GAME (2 Classes)

I. The Objectives of the Course

II. Lawyering is the Game of Applying Competing Rules Competitively

A. The Game - Translating Narratives into Legal Outcomes

B. Legal Rules and the Logic of their Application

C. The Venn Diagram Approach to Hard Cases

D. Playing the Game - Is Sam a Merchant?

III. Private Ordering and Public Disgust

A. Manifestations and Objectivity – *Lucy v. Zehmer; Leonard v. Pepsico; South West Terminal*

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*

Reading:

Blum, Examples and Explanations: Contracts, 8th edition ("Blum").

Chapter 1 (all sections)

§§ 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 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

Carrozza v. CVS Pharmacy, Inc.
Lucy v. Zehmer
Leonard v. Pepsico, Inc.
South West Terminal v. Achter
Batsakis v. Demotsis
Corrigan v. Buckley

Restatement ("R2K") §§1, 2(1), 3, 4, 16, 17, 19(1), 50(1), 71

Uniform Commercial Code ("**UCC")** §§1-103(b), 2-102, 2-104, 2-105, 2-106, 2-107, 2-314

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).

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

Quiz 1

UNIT 2 - THE CLASSICAL CONTRACT LAW APPROACH TO FORMATION DISPUTES
(Herein of "offer and acceptance")
(3 Classes)

I. Distinguishing Formation and Enforceability Disputes - Prototypical Narratives
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*
  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) – Presumptions of Bilateral Contract or Not? *Davis*

Reading:

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, 24, 25, 26, 30, 32, 35, 36, 38, 39, 40, 41, 43, 45, 50, 62, 63

(Quizzes 2a and 2b)

UNIT 3 - THE CLASSICAL CONTRACT LAW APPROACH TO ENFORCEABILITY DISPUTES
(Herein of "consideration")
(3 Classes)

I. The Classical Rules of Enforceability Disputes
  A. Prototypical Enforceability Narratives (Reprise)
  B. Manifestations of Commitment
    1. Promises – *King v. BU*
    2. Opinions, Predictions, and Other Things That Aren't Promises
  C. Cutting to Core of the Confusing Crap about Consideration
    1. The Prototypical Disputes - Bargains vs. Gratuities
    2. Some History
    3. Hard Cases
      a. The Syntactical Challenge of Conditional Promises (*Kirksey, Carlisle*)
      b. Past Consideration – *X Corp., Hayes*
      c. Illusory Consideration - *Harris*

II. Formation and Enforceability Combined – Option Contracts

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 7); review §§4.13.1, 4.13.2, 4.13.3 as to options.

Cases

King v. Boston University
Kirksey v. Kirksey
Carlisle v. T and R Excavating Inc.
X Corp. v. Wachtell, Lipton (complaint only; subject to update)
Hayes v. Plantations Steel
Harris v. Blockbuster, Inc.

R2K §§ 1, 2, 3, 71, 86(1), 87(1)

(Quiz 3a and 3b)

UNIT 4 - CONTRACTS WITHOUT BARGAINS/CONTRACTS WITHOUT CONTRACTS
(Herein of "promissory estoppel" and "quasi-contract")
(3 Classes)

I. Promissory Estoppel
   A. The prototypical narrative of a relied-upon gratuity
      1. Origins: *Ricketts*
      2. The "Moulds" of Legal Theories: Allegheny College
   B. Promissory Estoppel as Alternative to Classical Rules in Commercial Settings: *Barker and Cohen*
   C. Promissory Estoppel in Bilateral Formation Disputes: *Baird and Drennan*

II. Quasi-Contract
   A. The terminology morass – contracts implied in fact versus all the different names for so-called contracts implied in law
   B. The Prototypical unjust enrichment, intermeddling, Good Samaritans, self-promoters - *Bloomgarden*
   C. Pure restitution (obligation without promise) vs. promissory ("moral obligation") restitution

Reading:

Blum §§ 8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.8, 8.9, 8.10, 9.1, 9.2, 9.4, 9.5, 9.7

Cases

Ricketts v. Scothorn
Allegheny College v. Nat'l Chautauqua County Bank
Barker v. CTC Sales Corp.
Cohen v. Cowles Media Co.
Baird v. Gimbel's
Drennan v. Star Paving
Bloomgarden v. Coyer

R2K §§86, 87(2), 90(1)

(Quizzes 4a and 4b)

UNIT 5 - PAROL EVIDENCE RULE
(2 Classes)

I. Overview of "Scope of Agreement" Issues
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*
    2. Collateral agreements - *Mitchill*
    3. Exclusions from and exceptions to the PER
  C. The "modern" PER - *Masterson*

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 5)

UNIT 6 - INTERPRETING THE TERMS OF A CONTRACT
(2 Classes)

I. The Context of Interpretation
   A. "Plain meaning" versus "vagueness" and "ambiguity"
   B. Objective, subjective, and inherent meaning
   C. Meaning in context

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.
Frigaliment Importing Co. v B.N.S. Int'l Sales Corp.
Individual Health Care Specialists, Inc. v. Blue Cross Blue Shield of Tennessee, Inc.

RESTATEMENT

R2K §§200-203

(Quiz 6)

UNIT 7 - IMPLIED TERMS
(2 Classes)

I. Interpretation and Parol Evidence versus Implied Terms
II. When Are Courts Inclined to Imply Terms?
    - Wood v. Lucy, Lady Duff-Gordon
    - B. Lewis Productions v. Angelou
III. Default and Immutable Terms
IV. Good Faith
    A. Basics
    B. Pretext – *Big Horn Coal*
    C. Contested interpretation
    D. Bluffing
    E. "Sole discretion" contracts – *Locke v. Warner Bros.*

Reading:

Blum

§§10.1.1, 10.2.1, 10.2.2, 10.3.2, 10.5.3, 10.6

Cases

Wood v. Lucy, Lady Duff-Gordon
B. Lewis Productions v. Angelou
Big Horn Coal Co. v. Commonwealth Edison
Locke v. Warner Bros.

R2K §§204, 205

(Quiz 7)

UNIT 8 - THE STATUTE OF FRAUDS
(1 Class)

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

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

Quiz 8

UNIT 9 - ABUSE OF CONTRACT AND CONTRACT AVOIDANCE
(2 Classes)

I. Unconscionability
   A. Background
   B. Williams v. Walker-Thomas
   C. Procedural versus Substantive Unconscionability
   D. Freedom/Autonomy/Duty to Read versus Compulsion/Power-Need/Paternalism - UBEO

II. Internet/Clickthrough Contracts and their Regulation – the Uber cases (*Kauders; Good*)

III. Contract Avoidance
   A. Void Contracts
   B. Voidable Contracts
   C. Prototypes and Gray Areas
   D. The Power to Affirm or Avoid
   E. Duress as Grounds for Contract Avoidance – Merry Gentlemen, LLC

Reading:

Blum

§§13.1, 13.2, 13.3, 13.4, 13.6.1, 13.8, 13.9.1, 13.9.2, 13.11, 13.12.1, 13.13.1, Chapter 14, §9.3.2

Cases

Williams v. Walker-Thomas Furniture Co.
UBEO Holdings, LLC v. Drakulic
Kauders v. Uber Technologies/Good v. Uber Technologies
Merry Gentlemen, LLC v. George and Leona Productions, Inc.

Restatement

R2K §§ 7, 8, 12, 14, 163, 174, 175, 176, 208, 378, 380, 381, 382, 383

Other

Lipshaw, *Conversation, Cooperation, or Convention? A Response to Kar and Radin*, 43 Australasian J. Leg. Phil. 90 (2018).

(Quiz 9)

UNIT 10 - MISTAKE
(1 Class)

I. Frames of Reference, Objectivity, and Subjectivity in Mistake Law
II. Mutual Mistake: Dichotomies in the Cases (Sherwood and Lenawee)
- Fact versus Prediction
- Material versus Immaterial
- Essence versus Quality
- Implicit versus Express
- Windfall versus Balanced
- Implausible versus Rational

III. Unilateral vs. Mutual Mistake
IV. Risk Allocation (Dahua)

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
Dahua Technology USA Inc. v. Zhang

Restatement

R2K §§151-157

(Quiz 10)

UNIT 11 - IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION (1 Class)

Unit 11: Impossibility, Impracticability, and Frustration (7 Polling Questions)

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
      2. Extraordinary Changes in Market Conditions - *Hemlock Semiconductor*
   B. Frustration versus Impracticability – *Mel Frank Tool & Supply*
   C. COVID-19 Impracticability and Frustration – *BU and the Lease Cases*

Reading:

Blum

§§15.7, 15.8

Cases

Hemlock Semiconductor Operations, LLC v. Solarworld Industries Sachsen GmbH
Mel Frank Tool & Supply Inc. v. Di-Chem Co.
In re Boston University COVID-19 Refund Litigation
A/R Retail LLC v. Hugo Boss Retail, Inc.
1877 Webster Ave. Inc. v. Tremont Center, LLC

Restatement

R2K §§261-265

(Quiz 11)

UNIT 12 - CONDITIONS, BREACH, AND ANTICIPATORY REPUDIATION (2 Classes)

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. Substantial Performance – *Jacob & Youngs v. Kent*
V. Anticipatory Repudiation
  A. Breach versus Repudiation: R2K §250
  B. Elements of Repudiation
  C. Retractions – *Truman L. Flatt & Sons*
  D. Adequate Assurance: R2K §251

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

UNIT 13 - COMMON LAW REMEDIES

I. Introduction to Common Law Remedies: Restitution, Reliance, and Expectancy
II. 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)
    C. Expectation Damages Versus Restitution
III. Mitigation Obligation – Rockingham County

Reading:

Blum

§§9.3.1, 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, 350, 351, 370, 371, 373-377

(Quiz 13)