CONTRACTS
SECTION ONE
FALL 2017
PROF. BROOK E. GOTBERG
HULSTON HALL ROOM 4
MWF 2:00 – 2:50

PROFESSOR’S CONTACT INFORMATION
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COURSE OVERVIEW

The law of contracts is an essential feature of the American legal system, and one of the building blocks for a significant portion of legal practice (i.e., commercial law, family law, employment law and more). Contracts are a part of virtually every business transaction, but also arise in social interactions and within public law. A contract can be viewed as both a straightforward mechanism to increase wealth and/or as a moral promise enforceable by law. The way contracts are viewed can have major ramifications on argument and decisions regarding contractual policy, particularly proper remedies for breach. The importance of contract law to your legal education and its potential for complexity are demonstrated by the fact that you will spend two semesters studying the topic. During this first semester, we will concentrate on both black-letter law regarding contracts and its philosophical underpinnings. We will also develop strategies for legal analysis and legal argument, intended to prepare you for the rest of your law school career and beyond.

In this course, you will:

- Become familiar with classic doctrinal components of the law of contracts, including consideration, mutual assent, remedies, and the statute of frauds;
- Apply and analyze learned concepts in cases and problems;
- Develop the ability to construct arguments based on contract law, and practice delivering those arguments in both oral and written form; and
- Learn to take a position on a given legal question and to defend that position persuasively and respectfully.

As a first-year law student, you will be learning much more in this class than simply the law of contracts. In addition to studying the principles described in these course materials, you will simultaneously be developing a familiarity with legal expressions and methods of argument, as well as your ability to learn legal principles and apply them to a given set of facts. You should anticipate a steep learning curve, and may not fully appreciate the extent to which you have developed as a legal scholar until the semester is over. I encourage you to be patient
with yourselves and with others as you begin what will prove to be a challenging, but ultimately rewarding, law school career.

COURSE MATERIALS

The following materials are required for the course:

- **Casebook**: E. A. Farnsworth, et. al., Contracts Cases and Materials (8th ed. 2013), Foundation Press;


You should not feel obligated to search out additional study materials, but if you find them helpful, you may also wish to consult the library’s online study tools, available at [http://libraryguides.missouri.edu/StudyAids](http://libraryguides.missouri.edu/StudyAids). The library also has some hard copy treatises available. Titles I would recommend include:

- E. Farnsworth, Contracts, Aspen Law & Publishing;
- B. Blum, Contracts Examples and Explanations, Aspen Law & Publishing (available online);

ATTENDANCE AND CLASSROOM PARTICIPATION

Attendance:

I will send around an attendance sheet at the beginning of every regularly scheduled class. (Attendance will not be taken at makeup classes.) Unexpected absences are sometimes necessary; accordingly, every student will have a total of four automatically excused absences during the semester. This means that you are not required and should not feel obligated to explain these absences or to notify me in advance. More than four absences – for whatever reason – will result in the reduction of your grade, as explained below in the grading section.

I expect to be out of town multiple times this semester for a series of previously scheduled work obligations (conferences, recruiting trips, etc.). I expect to cancel class on the following days (this schedule may be subject to adjustment):

- August 21
- September 15
- September 25
- October 27
- November 1
- November 3
I have scheduled **make up classes** as follows:

August 29, 1:00 – 1:50, Room 4  
September 12, 1:00 – 1:50, Room 4  
September 28, 1:00 – 1:50, Room 4  
November 14, 1:00 – 1:50, Room 3

Following the last class we will also conduct a two-hour final review session, where you will have the opportunity to ask questions and review practice exams. This will be held either on Saturday, December 2, or Monday, December 4, depending on the preferences of the class as a whole.

**Class participation:**

I will use the Socratic Method and group discussion as the primary means of teaching this class. In my experience, students get the most out of the classroom experience when everyone is engaged in a structured dialogue. Each student should anticipate being called on at least once every class to give thoughts, explain a case, or interpret a statutory provision. You should come to class prepared, attentive, alert, and ready to answer questions pertaining to the discussion. This form of participation may be more demanding than simply sitting and listening to a lecture, but it will also provide a bigger educational payout for you and your fellow students. For an interesting article on the benefits of so-called “active learning” over traditional lecture, see Craig Lambert, *Twilight of the Lecture*, Harvard Magazine, March-April 2012, available at [<<http://harvardmagazine.com/2012/03/twilight-of-the-lecture>>].

At the beginning of each class, I will write the assigned reading for the next class on the board. I expect that you will do the reading assignment and be prepared to discuss it in class. If you are not prepared to participate in class discussion, (i.e., because you have not done the reading, have developed laryngitis, or intend to spend the class pretending to listen while you answer emails) you may sign a sheet in the front of the class and take a “pass” for the day. You may sign the pass sheet twice without it affecting your grade, as explained below in the grading section. Please note that in some classes we may not make it through all the assigned reading for that day. This information will be covered at the beginning of the next class period. Accordingly, if our class discussion does not cover all the material that has been assigned for a particular day, you should review the remaining material for the following class period (in addition to that day’s assigned reading) so that you are prepared to discuss it.

If you do not sign the pass sheet and are not prepared in class, your grade may be affected. **Note:** I do not punish students for wrong answers – ever. We all occasionally make mistakes when asked to think on our feet, and wrong answers are often a valuable teaching tool for both the student and the class at large. Part of the goal of active learning is to encourage facility in giving answers in front of a group, even when you are unsure that the answer is correct. However, when a student demonstrates that they have neglected to prepare and accordingly are wasting the time of the entire class, or otherwise demonstrates blatant disrespect to me or to other class members, I may determine that a reduction of the final grade is appropriate. On the flip side, students that consistently demonstrate thoughtful contributions
to the class discussion may warrant an upward adjustment of their grades. I reserve the right to make these determinations.

**OFFICE HOURS**

Because I have small children, my time in the office can be unpredictable. Accordingly, rather than assign set office hours, I will maintain an open door policy, meaning I will be generally available to visit with students while in the office. (Even if my door is shut.) On occasion, I may be tied up and unable to entertain student questions, in which case I will try to schedule an alternative time. It is always a good idea to contact me in advance if you would like to drop by with questions or thoughts. My office phone number is (573) 882-3914. My email address is gotbergb@missouri.edu.

**GRADING**

You will receive a separate grade for each of the two semesters of Contracts. The fall semester grade will be based on the final examination. I will adjust grades to account for the attendance policy stated above with the reduction of one grade point per absence for four or more absences, and for class participation with the reduction of one grade point per “pass” after two freebies. I also reserve the right to adjust grades to reflect extremely good or extremely poor classroom participation, as referenced above.

There will no mid-term examination during the fall semester of Contracts. I will, however, provide you with some sample examination questions that will resemble (format-wise) the final examination.

**ASSIGNMENTS**

Contracts is a two-semester course. I will teach the first semester; Professor Thom Lambert will teach the second. The outline that follows lists the topics that will be covered during both semesters. I list second-semester material just so that you will know where the course is eventually going. Professor Lambert will make determinations regarding the order of the material and the pages assigned, based in part on how far we get this semester. He will give you a new syllabus, reflective of second-semester materials only, in January. For the fall semester, I have listed the pages from the casebook I expect we will read and discuss. I do not include readings from the statutory supplement, but you are expected to read and be prepared to discuss statutory provisions mentioned in the reading. As I like to say in my higher-level courses, there is no substitute for looking to the law. Statutory language is something you will need to master. Learning to read statutes can be painful, but the only way to learn is to do it.
I. INTRODUCTION TO CONTRACTS – WHAT DOES IT MEAN TO “ENFORCE” A PROMISE?

Casebook pp. 8-14, 21-24
Casebook pp. 2-4, 14-21

II. THREE PRINCIPAL BASES OF LIABILITY RELATED TO THE MAKING OF PROMISES

A. Contract Formation
   2. Mutual Assent by Offer and Acceptance
      a. Offer or Preliminary Negotiation?: 140-56
      b. Acceptance: 156-67; 170-76
      c. Terminating the Power of Acceptance
         (i) Death or Incapacity: 193-94
         (ii) Lapse: 177-79
         (iii) Revocation: 179-86
         (iv) Rejection and Counteroffer: 194-95, 199-204
         (v) Varying Acceptances Under the UCC: 204-234
         (vi) Mailbox Rule: 195-99
   3. Consideration
      a. Generally: 31-48
      b. Req’t of a Present Exchange: 48-58
      c. Req’t of a Bargain: 58-61
      d. Req’t of Mutual Obligation: 61-71, 73-80, 86-90
   4. Definiteness: 258-71

B. Promissory Estoppel
   1. Traditional Approach: 92-98

C. Restitution: 112-23

II. POTENTIAL LIABILITY PRIOR TO CONTRACT FORMATION

A. Option Contracts: 186-93
B. Failed Negotiations: 234-47

III. DEFENSES TO CONTRACT ENFORCEMENT

A. Formalities – The Statute of Frauds
   1. Contracts Subject to Statute: 273-99
   2. Req’t of a Sufficient Writing: 293-312
   3. Exceptions to SOF: 312-34

*** END OF FIRST SEMESTER ***
B. Unfair Bargaining
   1. Generally
      a. Capacity to Contract
         (i) Minority
         (ii) Mental Incapacity
      b. Improper Coercion
         (i) Duress
         (ii) Undue Influence
         (iii) Pre-Existing Duty Defense to K Modifications
      c. Misrepresentation
   2. Unfairness Presented by Use of Standardized Contracts
      a. Contracts of Adhesion – Policing Techniques
         (i) Traditional Policing Techniques
         (ii) Modern Reasonable Expectations Technique
      b. Modern Unconscionability Doctrine

C. Public Policy
   1. Public Policies Derived from Legislation
   2. Judicially-created Public Policy

IV. ENFORCING THE CONTRACT—WHAT IS THE APPROPRIATE REMEDY FOR A BREACH?
   A. Equitable Remedies
   B. Measuring Expectation Damages
   C. Measuring Reliance Damages
   D. Limitations on Damage Awards
      1. Avoidability
      2. Foreseeability
      3. Ascertainability
   E. Liquidated Damages

V. RESOLVING DISPUTES OVER THE TERMS OF A CONTRACT—WHAT PERFORMANCE IS REQUIRED?
   A. Parol Evidence Rule
   B. Principles of Contract Interpretation
   C. Supplying Missing Contract Terms

VI. WHEN IS NON-PERFORMANCE A BREACH
   A. Express Conditions
   B. Constructive Conditions of Exchange
   C. Responses to Breach
   D. Anticipatory Breach

VII. BASES FOR EXCUSING NON-PERFORMANCE
   A. Mistake
   B. Impracticability of Performance
C. Frustration of Purpose

VIII. RIGHTS & DUTIES OF NON-PARTIES TO A CONTRACT
   A. Third-Party Beneficiaries
   B. Assignment & Delegation

INFORMATION REGARDING DISABILITIES

If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share, or if you need to make arrangements in case the building must be evacuated, please contact Associate Dean Rafael Gely as soon as possible.

If disability related accommodations are necessary (for example, a note taker, captioning), please register with the Disability Center (http://disabilitycenter.missouri.edu), S5 Memorial Union, 573.882.4696, and then notify Dean Gely or Law School Registrar Denise Boessen of your eligibility for reasonable accommodations. (Please do not discuss examination accommodations with me. Notice of special accommodations may impair the “blind grading” policy we use at the law school.) For other MU resources for persons with disabilities, click on “Disability Resources” on the MU homepage.