

## SYLLABUS FOR CONTRACTS II, SECTION ONE (SPRING 2021)

PROFESSOR THOMAS A. LAMBERT  
UNIVERSITY OF MISSOURI LAW SCHOOL

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### Course Overview

Contract law is the set of rules governing legally enforceable promises. Last semester, you focused primarily on how promises become legally enforceable. Specifically, you considered:

- how contracts are created (i.e., through mutual assent—offer and acceptance);
- various bases for enforcing promises (i.e., consideration, reliance, unjust enrichment);
- potential pre-contractual liability (e.g., Restatement § 45; liability for failed negotiations); and
- the formal requirements for enforcement of certain contracts (i.e., the statute of frauds).

This semester, we will consider a number of matters related to the performance, interpretation, and breach of legally enforceable promises. Among other things, we will examine:

- reasons a party might void a contract in light of the status of the parties, their behavior in executing the contract, or the substance of the deal itself;
- how to determine what the deal between the parties actually is;
- the remedies for breach of contract;
- when parties may refuse to perform because some condition was not satisfied;
- appropriate responses to breach or repudiation;
- defenses based on mistake, impracticability, and frustration of purpose; and
- the circumstances under which outsiders may enforce or become liable on the promises in a contract to which they are not a party.

## Required and Recommended Texts

The required texts for this semester are the same as those from last semester:

- **Casebook:** FARNSWORTH, SANGER, COHEN, BROOKS, AND GARVIN, CONTRACTS: CASES AND MATERIALS (8<sup>th</sup> ed. 2018) (Foundation Press). [NOTE: The 9<sup>th</sup> ed. (2019) is also acceptable; I will give page numbers for both versions of the casebook];
- **Statutory Supplement:** FARNSWORTH, SANGER, COHEN, BROOKS, AND GARVIN'S SELECTIONS FOR CONTRACTS (2020 ed.) (Foundation Press). [NOTE: If you used a different statutory supplement last semester, that should suffice.]

An excellent supplemental source, which I highly recommend but do not require, is:

- E. ALLAN FARNSWORTH, CONTRACTS (4<sup>th</sup> ed. 2004).

## Assignments and Topics to be Considered

I will give specific reading assignments every day. **If we do not finish the material assigned for a particular class, you should, for the next class, review any material we did not cover and complete any newly assigned reading.** (In other words, "We read that a couple of days ago" is not an adequate excuse for being unfamiliar with previously assigned material.)

Following is a list of topics we will consider, along with the corresponding pages from the casebook (I have provided page numbers from both the 8<sup>th</sup> and 9<sup>th</sup> editions of the casebook). Please note two things: (1) I may alter these reading assignments; you should always prepare the specific assignment posted on the board for the next class. (2) I have not listed below selections from the statutory supplement (e.g., Restatement provisions and UCC sections); I will assign those as we proceed through the material.

### **I. Policing the Bargain**

#### a. Status-based defenses

- i. Infancy [8<sup>th</sup>: 339-49] [9<sup>th</sup>: 415-26]
- ii. Incapacity [8<sup>th</sup>: 349-56] [9<sup>th</sup>: 426-34]

#### b. Process-based defenses

- i. Duress [8<sup>th</sup>: 356-63, 374-80] [9<sup>th</sup>: 435-42; 455-61]
- ii. Undue Influence [8<sup>th</sup>: 380-86] [9<sup>th</sup>: *Odorizzi*]

- iii. Misrepresentation [8<sup>th</sup>: 387-95, 400-03] [9<sup>th</sup>: 468-77; 483-86]
- c. Substance-based defenses
  - i. Unfairness and Standard-Form Contracts [8<sup>th</sup>: 500-08, 510-16, *Galligan, Henningsen*, 508-10] [9<sup>th</sup>: 607-15, 618-23, *Galligan, Henningsen*, 616-18]
  - ii. Unconscionability [8<sup>th</sup>: 522-36] [9<sup>th</sup>: 633-52, *Star Credit*]
  - iii. Public Policy Limitations on Enforcement [8<sup>th</sup>: 574-80, 588-94] [9<sup>th</sup>: 697-706, 716-23]

## II. What is the promise?

- a. What promises are part of the deal? (Parol Evidence Rule, “No Oral Modification” Clauses) [8<sup>th</sup>: 405-20] [9<sup>th</sup>: 487-507]
- b. When may extrinsic evidence be used to interpret a promise? (Plain Meaning Rule) [8<sup>th</sup>: 421-33] [9<sup>th</sup>: 507-20]
- c. Principles of Interpretation and Construction [8<sup>th</sup>: *White City*, 433-39, 467-70] [9<sup>th</sup>: *White City*, 524-35, 567-71]
- d. The Limits of Objective Evidence: “Misunderstanding” [8<sup>th</sup>: 459-67] [9<sup>th</sup>: 558-67]

## III. Remedies for Breach

- a. Specific Performance and Negative Injunctions [8<sup>th</sup>: 617-30, 636-39] [9<sup>th</sup>: 885-904]
- b. Measuring Expectation
  - i. The Basic Common Law Formula [8<sup>th</sup>: 639-47] [9<sup>th</sup>: 905-13]
  - ii. Losing Contracts [8<sup>th</sup>: 657-60] [9<sup>th</sup>: 938-42]
  - iii. Damages for Partial or Deficient Performance [8<sup>th</sup>: 661-64, 666-74] [9<sup>th</sup>: *Jacob & Youngs*, 923-32]
- c. Limitations on Damages
  - i. Avoidability [8<sup>th</sup>: 674-76, 682-87] [9<sup>th</sup>: 942-45, 958-64]
  - ii. Foreseeability [8<sup>th</sup>: 687-92, 695-700] [9<sup>th</sup>: 964-70, 973-78]

- iii. Emotional Distress and Uncertainty [8<sup>th</sup>: 701-09] [9<sup>th</sup>: 980-88]
- d. Liquidated Damages [8<sup>th</sup>: 709-10, 712-18] [9<sup>th</sup>: 995, 997-1004]
- e. Damages Under Article 2 of the UCC [8<sup>th</sup>: 647-57] [9<sup>th</sup>: 913-18, 932-37]

#### **IV. Performance and Breach**

- a. Conditions
  - i. Express Conditions [8<sup>th</sup>: 725-28] [9<sup>th</sup>: 755-59]
  - ii. Problems of Interpretation
    - 1. Condition, Duty, or Both? [8<sup>th</sup>: 728-33] [9<sup>th</sup>: 759-66]
    - 2. Condition or Timing? [8<sup>th</sup>: 733-38] [9<sup>th</sup>: 766-68]
    - 3. Satisfaction as Condition [8<sup>th</sup>: 738-42] [9<sup>th</sup>: 770-74]
  - iii. Mitigating Doctrines for Conditions Generally [8<sup>th</sup>: 742-49] [9<sup>th</sup>: 836-42]
  - iv. Constructive Conditions [8<sup>th</sup>: 749-51, 755-56] [9<sup>th</sup>: 778-80, 784-86]
  - v. Mitigating Doctrines for Constructive Conditions Only [8<sup>th</sup>: 756-62, 767-75] [9<sup>th</sup>: 796-802, 822-31]
- b. Responses to Breach [8<sup>th</sup>: 779-89] [9<sup>th</sup>: 803-13]
- c. Anticipatory Breach [8<sup>th</sup>: 799-808] [9<sup>th</sup>: 846-53, 857-60]

#### **V. Defenses Based on Mistaken Facts and Post-Contract Developments**

- a. The Background Rule [8<sup>th</sup>: 849-53] [9<sup>th</sup>: 1021-25]
- b. Mistake [8<sup>th</sup>: 853-60] [9<sup>th</sup>: 1026-29, 1039-44]
- c. Impracticability [8<sup>th</sup>: 865-76, 879-80, 882-84] [9<sup>th</sup>: 1050-62, 1064-66]
- d. Frustration of Purpose [8<sup>th</sup>: 899-904] [9<sup>th</sup>: 1087-94]

#### **VI. Rights and Duties of Third-Parties**

- a. Third-Party Beneficiaries [8<sup>th</sup>: TBA] [9<sup>th</sup>: TBA]
- b. Assignment and Delegation [8<sup>th</sup>: TBA] [9<sup>th</sup>: TBA]

## **Attendance and Classroom Participation**

**Attendance** – Regular class attendance (in person or via Zoom) is expected. Each class will be recorded and posted to Canvas in the event you are incapacitated and unable to join during the scheduled class time. *[NOTE: Extensive experience has shown that students who miss more than a handful of classes perform poorly on my exams.]*

**Class Participation** – I expect that you will complete the reading assignment each day and be prepared to discuss it in class. I will “cold call” on students to discuss the reading. When a student is called on and is unprepared, the entire class suffers. Accordingly, if you have not done the reading, please let me know in advance of class that you would like to take a “pass” for the day. You may avail yourself of this option *twice* without it affecting your grade. Thereafter, or if you are unprepared when called upon, you risk being penalized for deficient classroom performance. In general, I reserve the right to reward exceptional class participation or penalize poor or inappropriate class participation<sup>1</sup> in determining the final grade.

## **Office Hours**

I maintain an “open door” office policy, which means that you may come by my office (Room 316) at any time to discuss questions concerning the course material. I trust you’ll be understanding if I’m busy at the moment and suggest that we get together later. I am frequently out of the office, so feel free to call or email me to set up a pre-arranged meeting time. You’re always welcome to call or text my mobile number, 773.580.7123. I turn the phone off when I don’t want to be disturbed.

## **Grading**

The grade for this class will be based on a student’s examination grade, potentially adjusted for class participation, as noted. The examination will be a mix of multiple choice questions and “issue spotter” essay questions. It will be administered on an

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<sup>1</sup> Please note that I will not penalize you for getting an answer wrong, provided that you made a mistake *despite* having done the reading. All of us make occasional mistakes when asked to think on our feet. I have found that one of the toughest parts of being a lawyer is learning to give an answer (oral or written) in the face of uncertainty. One of the goals of Socratic method is to help you overcome the fear of speaking when you’re uncertain, so I will not penalize good faith efforts that prove unsuccessful. That said, you may be penalized if it is apparent that your wrong answer is the result of poor preparation.

“open book” basis.

### **Learning Outcomes**

In this course, you will:

- Learn the substantive rules of contract law, including both common law rules and rules in Article 2 of the Uniform Commercial Code;
- Master the economic logic (or lack thereof) underlying various contract doctrines;
- Practice the art of policy analysis;
- Hone your analytical skills;
- Practice arguing both sides of an issue;
- Practice oral communication;
- Learn to identify which facts are legally relevant.

As explained above, assessment in this course is summative (a final examination). The course is not Standard 303 compliant (field placement/law clinic/simulation).

### **Information Regarding Disabilities**

If you need accommodations because of a disability, if you have emergency medical information to share with me, or if you need special arrangements in case the building must be evacuated, please inform me immediately. Please see me privately after class, contact me via email ([lambertt@missouri.edu](mailto:lambertt@missouri.edu)) or telephone (773.580.7123), or come by my office (Room 316). Alternatively, you may contact Associate Dean Ben Trachtenberg to discuss appropriate accommodations.

### **Decreasing the Risk of Covid-19 in the Classroom**

MU cares about the health and safety of its students, faculty, and staff. To provide safe, high-quality education amid COVID-19, we will follow several specific campus policies in accordance with the advice of the Center for Disease Control and Boone County health authorities. This statement will be updated as information changes.

- **If you are experiencing any COVID-related symptoms**, or are otherwise feeling unwell, do not attend in-person classes and contact your health care provider and/or student health immediately. COVID symptoms include:

fever greater than 100.4 or chills; cough, shortness of breath or difficulty breathing; fatigue; unexplained muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea.

- We will all wear **face coverings while in the classroom**, unless you have a documented exemption due to a disability or medical condition.
- We will maintain a **6-foot distance from each other at all times** (except in specific lab/studio courses with other specific guidelines for social distancing).
- We will enter the classroom and **fill the room starting at the front, filing all the way across a row**. When class ends, we will exit the row nearest to the door first; the instructor will give the signal for the next row to exit, in the same manner.
- Online office hours will be available for all students.
- This course may be recorded for the sole purpose of sharing the recording with students who can't attend class. The instructor will take care not to disclose personally identifiable information from the student education records during the recorded lesson.

Compliance with these guidelines is required for all; anyone who fails to comply will be subject to the [accountability process](#), as stated in the University's [Collected Rules and Regulations](#), Chapter 200 Student Code of Conduct.

### **Statement Regarding Academic Inquiry, Course Discussion, and Privacy**

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in Section 200.015 of the Collected Rules and Regulations. In this class, students may make audio or video recordings of course activity unless specifically prohibited by the faculty member. However, the redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course is prohibited without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of [section 200.020](#) of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

## **Statement Regarding Intellectual Pluralism**

The School of Law community welcomes intellectual diversity and respects students' rights. Students who have questions concerning the quality of instruction in this class may address concerns to either the Dean or the Director of the Office of Students' Rights and Responsibilities. All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of the semester.

You are encouraged to think for yourself in this course. You need not agree with me, and you are most welcome—encouraged, even—to argue different sides on the issues we will confront. I will endeavor to treat you with respect, even when I disagree with your arguments, and I will expect you to afford similar treatment to me and your classmates. Participants in this course—including me—should endeavor to *understand* each other, not necessarily to *agree* with one another. If you believe at any point that your point of view (or that of another student) is being stifled or is not being given a fair hearing, please let me know. But please do not expect to avoid all offense; lawyers (and all adults, really) must learn to deal with offensive ideas.

## **Academic Integrity**

Academic integrity is fundamental to the activities and principles of the School of Law. All members of the Law School community must be confident that each person's work has been responsibly and honorably acquired, developed and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The Law School Community regards breaches of the Law School's Honor Code as extremely serious matters. In the event that you violate our Academic Integrity Rules on any portion of the work required for this class, you may expect a failing grade, as well as possible disciplinary sanctions ranging from probation to expulsion.

## **Pivot Plan**

In the event that law school classes may not continue in person due to Covid-19 (or for any other reason), we will continue our course via Zoom. The course will be taught synchronously (i.e., at the regularly scheduled time), and sessions will be recorded and posted to Canvas for those who are unable to participate synchronously.