CONTRACTS 6080-4
FALL 2011
MTW 1:50-3:05
Room CHC

SYLLABUS

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DESCRIPTION OF THE COURSE

This course covers the fundamentals of contract law, that is, the law courts use to enforce private agreements between two or more parties. Most of contract law can be organized around four principal questions:

1. Is there a contract?
2. What are its terms, and have all of them been performed?
3. If not, can the non-performing party avoid its duty to perform?
4. What -- if anything -- should the court do about the failure to perform?

We will spend approximately the first half of the semester on the first question, Is there a contract? We will begin by looking at the two basic requirements under classical contract doctrine: mutual assent and consideration. We will then examine how the doctrine of reliance, also known as promissory estoppel, has supplemented these two basic concepts: reliance can alter the rules of mutual assent and it can substitute in some circumstances for consideration. We will then look at another substitute for consideration, the doctrine of restitution. Finally, we will consider when a contract needs to be in writing.

We will then spend approximately two weeks on each of the other three questions. The second question (What are the contract terms?) includes such questions as: How should a court decide what terms were agreed upon? How decide between different meanings? Are contract terms covenants (or promises to do something) or conditions?

The third question (Can a party avoid performance?) includes these topics: Did the parties have the capacity to enter into a contract? Was there any misconduct in the bargaining process, such as duress, undue influence, fraud or concealment? Is the contract so unfair as to be unconscionable, or is it in violation of public policy? Were the parties mistaken about a fact fundamental to the contract? Has there been an unanticipated change of circumstances that has made performance impossible or impracticable?

The final question (What, if anything, should the law do about a failure to perform?) includes: How should the court determine the remedy to award a wronged party? If the remedy is damages, how should they be computed?

TEXTS

There are two texts for this course. The primary text is a “casebook,” which is a collection of edited versions of appellate cases from both federal and state courts from numerous different jurisdictions. The authors of the casebook chose the cases for a variety of different reasons: a case could be fundamental, controversial, etc. The authors have also
included other materials, such as explanatory notes, essays, and problems. Our casebook is **PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (6TH ED.)** by Knapp, Crystal, and Prince.

The second text is a companion text to the casebook that includes sections of the Restatement of Contracts 2d, the Convention on Contracts for the International Sale of Goods (the CISG), and the Uniform Commercial Code (the UCC). The UCC is state legislation, drawn up by a team of scholars and experts, and adopted, at least partially, by every state's legislature. In this sense, it is "national" -- although it is not federal legislation. Conversely, the Restatement is not legislation at all; it is a compilation of generally accepted contract principles. Although not "law" in the sense of legislation, it can be very persuasive with judges and, as you will see as you read the cases, it is frequently cited in judicial opinions.

If, after reading the assigned materials and taking part in class discussion, you feel the need of additional guidance, I recommend **Contracts: Examples & Explanations** by Brian Blum. In addition to discussions of the rules and policies of contract law, it includes numerous problems for you to work through (along with an explanation of the answer). This makes the text a valuable aid in preparing for exams (but only if you work through the problems before looking at the answers). Keep in mind that law school exams are less about testing your knowledge of contract rules and more about testing your ability to use those rules to solve problems.

I do not recommend the commercial outlines. Some students believe that using the commercial outlines will save you the time of making your own; that would be true if the only value to an outline were the finished product. But the value of making an outline is the process of assimilation and comprehension you have to go through in order to make it. (Learning to do law is a hand's on experience, like driving a car. Using a commercial outline is like driving a car in virtual reality; it gives you the impression you can drive but it's no substitute for driver's ed.) Besides, I distribute the beginning of an outline, tailored specifically for this class. I would suggest using this as the basis for your outline, rearranging it if that makes more sense to you, and adding material from your case briefs, the Restatement, CISG, and UCC provisions we cover, material from your class notes, and anything else you feel is of value.

**CLASS PARTICIPATION AND ATTENDANCE**

I expect everyone to have read and thought about the problems and the cases and other readings assigned for each day's class and to be prepared to discuss what advice they would give regarding each problem.

As far as class attendance goes, I expect that you will come to class unless you have a legitimate reason for not doing so. If you are ill, please have consideration for the rest of us and stay home; get notes from a classmate or see me when you are well.

I will be happy to help anyone catch up who has missed class due to illness or other crises. You do not need to contact me in order to tell me that you will be missing class. As I said, if you are not in class, I will assume you have a good reason for not being there, BUT I do keep formal attendance and if I notice significant absences by any student I will ask for a personal conference to discuss the reasons why. The American Bar Association, which accredits law schools, requires law schools to adopt and enforce an attendance policy; this law school allows a student to miss no more than 20% of scheduled classes, INCLUDING absences due to illness or personal emergencies. Absences in violation of this policy may be sanctioned.
by a reduction in the final grade or, in egregious cases, by involuntary withdrawal from the class.

**EXAMS AND GRADING**
I will give a practice exam toward the midpoint of the course. It will be ungraded but we will go over the exam in class.

There will be one final exam on December 8, 2011. At this time I anticipate that the December exam will be an open book take-home (8 hours) short answer/essay exam, but this is subject to change with advance notice.

Exceptional class participation may result in the award of "push points." The award of push points could push the grade over into the next highest category: for example, with push points, a B- would become a B.

**USEFUL INFORMATION**
My office hours are on Mondays, Tuesdays and Wednesdays from 3:15-4:15. You may schedule an appointment with me during those times. My office is on the second floor of the law school, room 202, the first door to the right at the top of the stairs from the main lobby. The best way to contact me is by email: debora.threedy@law.utah.edu. You may also contact me by my office phone, 801-581-5165, or by leaving a note in my mailbox, which is in the front office.

The University of Utah seeks to provide equal access to its programs, services and activities for people with disabilities. If you will need accommodations in this class, reasonable prior notice needs to be given to Barbara Dickey, Associate Dean for Student Affairs, and to the Center for Disability Services (CDS) to make arrangements for accommodations. CDS is located at 200 S Central Campus Drive, Room 162, or you can call (801) 581-5050. All written information in this course can be made available in alternative format with prior notification.

**CLASS GOALS**
I have four goals for this class:

1. to facilitate development of the skill of legal reasoning;
2. to facilitate your learning of contract doctrine;
3. to develop your critical (which is not the same thing as cynical) faculties; and
4. to guide your socialization into the practice of law.

**FIRST (and most important) GOAL: LEGAL REASONING.** Scholars have written articles and books defining legal reasoning, so I'm not sure I'll be able to do it justice here. Legal reasoning is also called "thinking like a lawyer." It is what lawyers do when they're doing law. It is the foundational lawyering skill and it involves the skill of analyzing legal problems and constructing legal arguments. I say legal reasoning is foundational, because under the Rule of Law, judges must give reasons for their decisions. Legal reasoning is the process of identifying and articulating the reasons why an issue or a case should be decided in a particular way rather than another.

It will take you years to develop this skill of legal reasoning because there is no substitute for experience. It is a highly complex process that defies neat definition or compartmentalization. Some writers use metaphors to try to convey the concept; for example, you can draw an analogy between legal reasoning and weather predicting. Forecasters predict
what the weather is going to do; lawyers predict what a judge or jury is going to do. Both have
a reputation for unreliability -- and the reason is that neither is an exact science; there are too
many variables and their interaction is not completely understood.

A commonly used acronym for the components of legal reasoning is IRAC which
stands for Issue/Rule/Analysis/Conclusion. The format for analyzing a legal problem always
involves some variation on this basic formula. You will learn a different variation of this in
Legal Methods. IRAC, however, is the formula I will expect you to use when answering the
essay exam questions in this class. Notice I keep saying formula; in a very real sense legal
writing (especially writing the answers to exam questions!) is very formulaic. Start practicing
that formula now.

When you are answering problems, whether in class, on the practice exam, or on the
final, you should be using IRAC. You should notice that some of the elements of IRAC are
basically the same as some of the elements of a typical casebrief: issue=issue;
rule=rule/holding; analysis=reasoning; conclusion=prediction as to likely outcome/holding.
When you prepare a case brief, you are operating in historical mode; you are figuring out what
some judge actually did in a prior case. When you prepare an IRAC analysis, you are
operating in predictive mode; you are trying to anticipate what some judge would do if she
were deciding this problem. But in both instances the formula for analysis is remarkably
similar. In other words, case briefing and IRAC analysis are the flip sides of legal analysis. This
is one reason why you should be briefing the cases we read: it will give you practice in
organizing your analysis around IRAC. (The other reason is you will be prepared to answer
questions in class.)

The first two steps of the analysis are what I call “diagnostic.” They are the steps you
use to translate a real life problem into its legal category, or pigeon-hole. The remaining two
steps can be called “predictive.” They are the process you use to predict what the likely
outcome of the problem will be. A fuller description of each step follows.

Issue spotting. Issue spotting is the skill of being able to recognize the legal
issue embedded in a factual situation. The trick to issue spotting is to realize that, for every
subject like Contracts, there is a finite number of possible legal issues, and that every legal
issue has an associated pattern of facts. To spot the issue, you have to recognize the fact pattern
associated with the issue. Some people do this intuitively; others have to hone this skill with
deliberate practice.

Once you have spotted an issue, begin your analysis/exam answer with a
statement of the issue. The issue in this case is... The issue is always stated in the form of a
question: “The issue in this case is whether there was consideration for A’s promise to...”; or
“The issue in this case is: Was there consideration for A’s promise to...?” Issues can be stated
broadly or narrowly: “Was there consideration?” is a narrower issue than “Was there a
contract?” You will have to develop a feel for what is the appropriate level of
generality/specificity called for in each case. If there is more than one issue, your analysis will
begin: “The first issue in this case is...” and then you will go through the following steps for
each issue you identify.

Rule/Knowledge of doctrine. This is the only part of legal analysis where a
knowledge of the law is called for. For every issue, there is at least one rule. The
rule is sometimes called the black letter law and usually there is no dispute as to what the
rule is. (In more complicated cases, there can be a dispute as to what the applicable rule is; in
such cases, the first issue is: “what is the rule?”) The rule can be either statutory (e.g., the
UCC) or it can be based upon the holding in an earlier case, that is, precedent. I expect you to state the elements of the rule or rules that will resolve the issue. Sometimes the rule will be in the nature of a definition.

**Analysis.** The heart and soul of any exam answer. Analysis is the application of rules to facts, the solving of the legal problem described in the issue through the use of the legal rule you’ve just identified, and the marshaling of persuasive arguments to support the conclusion. This is where most of the points on an answer are won (or lost).

In the beginning you will need to master three types of legal analysis: analogical reasoning, deductive reasoning, and policy-based reasoning. In any particular problem, you must be able to employ at least one kind of these three types of legal analysis; a better answer will usually involve at least two and maybe even all three kinds of analysis.

(A) Analogical Reasoning, or the ability to use precedent. This is the ability to argue by analogy, to draw comparisons or distinctions between the fact situations in the exam questions and the cases we have read and the problems or hypos we have discussed in class. If the outcome in a case supports A’s position, when reasoning analogically, A will explain how the facts in the problem are comparable to the facts in the case, therefore justifying the court to come to the same outcome in the problem as occurred in the case. Conversely, when reasoning analogically, B will point out how the facts in the problem are sufficiently distinct from the facts in the case to justify the opposite outcome. It is not enough to simply state “This problem is like (or unlike) Case X and so the plaintiff here should win (or lose), too.” You must identify specific facts and explain how they are like or unlike the facts in Case A -- which means that you must actually know what were the relevant facts (as well as the outcome/holding) in Case A, which takes us back to the case brief again.

(B) Deductive Reasoning. This is the ability to determine whether the elements of the rule are met/satisfied by the facts of the question. All rules can be restated as a syllogism: If A, then B. If there is (A) consideration and mutual assent, then there is (B) a binding promise. Deductive reasoning involves determining whether A exists so as to justify the conclusion that there is B: promising to mow the grass is consideration for the promise to pay and the handshake constitutes mutual assent(A); therefore, there is (B) a binding promise to pay.

(C) Policy-based Reasoning. I expect you to identify the policy reasons (e.g., promoting certainty or predictability; policing or discouraging opportunistic behavior) that each side would argue supports their position. (E.g., requiring a contract to be in writing will promote greater certainty in transactions, but it may also allow a glib-talking con artist to take advantage of a vulnerable person. Is it more important to require certainty by not enforcing oral agreements, even if it means some victims will be hurt; or is it more important to prevent fraud by holding a con artist liable, even if it means there may be less certainty in future oral transactions like this one? That is a policy-based question.)

The most important step in legal analysis is to recognize that for every issue worth arguing about there are always two sides to the argument: to avoid losing points (up to half of them!) you must argue both sides.

(D) Conclusion. After having given both sides arguments, I expect you to decide which one will, or is most likely to, prevail. For most essay exam questions, the conclusion you come to is less important than the reasoning you used to get there. In other words, there is often NOT a single indisputably right answer; rather, there are at least two defensible answers. The trick is to identify those two and articulate the justifications for each.
SECOND GOAL: CONTRACT DOCTRINE. By this, I mean the law of contracts, the rules and principles, developed over time, that judges use to decide contract issues. It is a common misconception among first year law students that learning the rules is their primary goal. Learning the rules is important, but it is not the most important aspect of law school. The most important goal for you in law school is not to learn what the rules are, but rather to learn how to "do" law, that is, to use the rules to solve problems.

But given that you do need to know them, how do you go about learning the rules of contract law? The rules of Contract law are found in several places: the holdings of cases; the Uniform Commercial Code; and the Restatement of Contracts. In international cases, there may also be international law to consider, such as the CISG, and even the domestic law of other countries (e.g., French contract law, if one party is a French citizen).

THIRD GOAL: CRITICAL THINKING. One of the most common misconceptions about the law is that there is one "right" answer out there, if only you knew where to find it. I will try to disabuse any of you who may harbor this idea or any belief that the law is definite, true or final. Some of you will resist this knowledge; some of you have been led to expect that law offers certainty, right answers and objectivity, and so it may come as a shock to discover that these things are not to be found in law.

Every time you read a case I want you to ask yourself, "Is this the best possible resolution of the problem?" I hope that sometimes, at least, you will answer that question in the negative. Just because some judge said it, doesn't mean it's right -- it just means that it's the law, at least for now. Remember that at one point the U.S. Supreme Court held that African-Americans were not citizens; that was the law, but was it right?

Then I want you to think about what arguments you could make to convince others that the decision is wrong. It's not enough to say, "this is wrong" or "this is unfair"; you need to be able to articulate what you mean by "wrong" -- illogical? contrary to precedent? biased? short-sighted? -- or "unfair" -- unfair to whom? In what way? what would "fairness" in this case look like?

One final word on critical thinking: it is not the same as cynical thinking. Many third year students are heard to say that the experience of law school has made them cynical. Sometimes I think that they have confused critical thinking with cynicism. Perhaps they have learned so completely how to tear apart a judge's decision that they have come to believe that law itself is biased, self-serving and hopeless. Law is made by humans, and like humans, it has its faults; if you expect perfection from it you will be disappointed, but if you accept that it has limitations and is imperfect in practice, you will be able to value it realistically for its considerable advantages.

FINAL GOAL: SOCIALIZATION. Educational theorists recognize that, in every classroom situation, both formal and informal learning occurs. One of the most overlooked aspects of the first year law school experience is the amount of informal learning that goes on, about law and lawyering and what it means to be a lawyer.

Learning law is like learning a foreign language; it just so happens that most of the vocabulary looks and sounds like normal English. For example we will begin the year by learning what consideration is. Now consideration is a perfectly good English word; it means to
give something careful thought, or to treat others with affection and respect. But consideration in contract law is something else again.

The most efficient way to learn a foreign language is by the immersion method, and that's what law school is, the immersion method of learning the language of law. Soon it will seem like you are talking law all the time, in class, out of class, over meals, in your dreams. It is important for you to become fluent in talking law. (Just remember that you have friends and family who don't talk law, and if you talk law around them too much, they may become resentful or, worse, bored.)

But it's not just the language of law you'll be learning; you'll be learning the mores and culture of law. Question these informal lessons as closely as you question the cases you read. Will you learn to be a lawyer who can work co-operatively with others, for example by collaborating in a study group, or will you learn only the lessons of competitiveness? Will you learn to win at all costs, or will you learn the limits of zealous advocacy? Can you learn to disagree without being disagreeable?

Practice treating your classmates in the way you wish your future colleagues to treat you; in many cases, they will be your future colleagues.