

Contracts II

Spring 2024

LAW 103 (004)
Tuesday-Thursday, 1:50 –3:15 am

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Contracts II is the second part of a two-part course, following Contracts I in the prior Fall Term. The two courses are separate, with different exams and different subject matters.

The casebook is Robert E. Scott and Jody S. Kraus, *Contract Law and Theory* (6th ed.), as well as the statutory supplement from first term. If I thought it helpful, I'd assign a treatise. I don't and I won't. On occasion I'll refer you to an article you might read. Apart from that, the assiduous student can easily find further readings on the web, and at times I'll assume that you've done that. I'll also assume that you've been taught how to access periodical literature off Lexis and (from the GMU Library web site), JSTOR and HeinOnline.

Administrative Matters

The class will be an extended conversation about a fundamental institution of private ordering. For the most part, the problems we'll encounter can be answered by the application of common sense—a proposition I'll test by asking you to think about the contours of contract law before and during class. Each student is expected to be prepared for every class, and to be ready, willing and able to answer any questions regarding the assigned reading material. Occasionally you'll encounter unfamiliar legal terms in your

readings, and when this happens you are responsible for looking them up in a legal dictionary such as Blacks (which is available on Lexis and Westlaw).

When you speak in class, address yourself to the entire class. If you're in the front row and whisper, people at the back won't hear you. Neither will I, for that matter. You are aspiring members of a profession whose members must speak out, if they are to be successful. We aren't meant to be potted plants.

In the Syllabus I provide the readings in segments of two classes at a time.

Once each year a student tells me he's erased a file—which is why I recommend saving files on the cloud, through programs such as Dropbox.

I use PowerPoint, and will post my slides on my web site after each class. You'll find them at my (discontinued) blog at <http://buckleymix.com> (“blog”), under “Contracts II.” These may be downloaded and saved by you, but not shared with anyone outside of this class.

PowerPoint has its pluses and minuses. It's useful to highlight a point, and invaluable when illustrating a technical issue in economics. That said, it can lull students into a state of passivity. Don't let that happen. For my part I'll try to avoid that by calling on you to answer questions. For your part, you should want to discuss ideas and cases in class. It's the only way to learn.

You are not permitted to tape our classes or record them by any electronic means.

I'll check with you on office hours. Unless a matter requires immediate personal attention, I encourage you to contact me at fbuckley@gmu.edu. If you anticipate that you will be stopping by my office, please drop me an email or let me know after class that you will be coming. If my door is open and I'm not on the phone, feel free to drop in.

Grading and Exam

The Final Exam will be on Wednesday, April 24 at noon. Your grade in the class will be based on the final exam. I reserve the right to increase (but not decrease) a student's grade by one mark (e.g., B+ to A-) on the basis of exemplary class participation, and on average have done so for 10-15 per cent of the students.

First Assignment

The assignment for the first class is the readings for Class 1 below.

Reading Assignments

Contracts II (Spring 2023)

Classes (two at a time)	Questions	Assignments
<p>1. Jan. 16-18 A81</p>	<p><i>Exam Review</i></p> <p><i>Contract Law Illegality</i></p> <p>Contracts might be void either for illegality as a matter of common law (“contract law illegality”) or statute (“statutory illegality”). But when should a contract, freely entered into by parties of full capacity, and mutually beneficial, be held to be unenforceable? Explain the <i>in pari delicto</i> and the <i>ex turpi causa</i> maxims.</p> <p>Should every contract that violates a statute be unenforceable?</p> <p>Should a state seek to shape the moral character of its citizens? Note that those who think that it should are called perfectionists, while those who think not are called neutralists.</p>	<p>Pericles, Funeral Oration, at blog</p> <p>John Stuart Mill, at blog</p> <p>Scott 526-33</p> <p>Virginia Code, at blog</p> <p>Rest. §§ 178-79</p> <p>Revised UCC § 1-103(b)</p> <p>Scott 534-48</p> <p>Humane Society, Animal Fighting at https://www.humanesociety.org/all-our-fights/ending-animal-fighting</p>

	<p>What reasons can you give for refusing to enforce a contract, from an economic perspective? Are there other, non-economic reasons why a contract should be unenforceable?</p>	<p>Externalities, at http://www.econlib.org/library/Enc/Externalities.html</p> <p>Social Capital, at https://www.investopedia.com/terms/s/socialcapital.asp</p> <p>Slippery Slopes, at http://en.wikipedia.org/wiki/Slippery_slope</p>
<p>2: Jan. 23-25 B:101</p>	<p>Capacity</p> <p>What are the assumptions behind the claim that contracts entail Paretian improvements?</p> <p>A contract is not enforceable if one of the parties lacked capacity to enter into it (“paternalism”). How broad should the capacity barrier be? Could you improve on age-related standards of capacity for minors? Are merchants adequately protected against the defense of incapacity, and who pays if they are not?</p> <p>Is there a stronger argument for merchant protection when the defense of lack of capacity is raised with respect to the mentally incapable?</p>	<p>Rational Choice, at blog</p> <p>Kaldor-Hicks Efficiency, at http://en.wikipedia.org/wiki/Kaldor%E2%80%93Hicks_efficiency</p> <p><u>Children</u></p> <p>Scott 508-18</p> <p>Rest. §§ 12-14</p> <p><u>The Mentally Incapable</u></p> <p>Scott 518-26, 16-21</p> <p>Rest. §§ 15-16</p>

	<p>Should the definition of incapacity be broadened, to take account of new studies in behavioral law-and-economics?</p> <p>Do we need the state to reinforce our strength of will? Might the state get it wrong?</p>	<p><u>Cognitive Paternalism</u></p> <p>Self-serving bias, at https://www.psychologytoday.com/us/blog/in-practice/201301/the-self-serving-bias-definition-research-and-antidotes</p> <p>Hindsight bias, at http://www.youtube.com/watch?v=MW_w5CO0-fI</p> <p>Gerg Gigerenzer, at http://www.youtube.com/watch?v=DdEEwoKkfMA (up to minute 10.08)</p> <p><u>Akrasia (weakness of the will)</u></p> <p>Resisting Temptation, at http://www.youtube.com/watch?v=G7LN96jEXHc</p> <p>The Divided Self: St Augustine, Confessions, at blog</p> <p>Rational Addiction, at http://en.wikipedia.org/wiki/Rational_addiction</p> <p>Baby M, Scott 534-42</p> <p>Self-binding</p> <p>Ulysses and the Sirens, The Odyssey XII, paragraphs 5, 13-16, at blog</p>
<p>3: Jan. 30-Feb. 1 C:112</p>	<p><i>Fraud</i></p> <p>What constitutes a representation? When should a promisee be responsible for his own excessive reliance? What is a “mere puff”? What is the parol evidence rule? Can the parties bargain around liability for fraud?</p>	<p>Scott 439-41, 461-91</p> <p>Rest. §§ 159, 162-64, 167-70, 211</p> <p>UCC § 2-316</p>

	<p>When should silence be a defense and when is an omission to speak actionable as fraud?</p>	<p>Scott 491-508</p> <p>Rest. §§ 160-70</p> <p>Cicero, Offices, at blog</p> <p>Aquinas, Summa, at blog</p>
<p>4: Feb. 6-8 D:58</p>	<p><i>Duress</i></p> <p>When is duress actionable, in the absence of physical force? Can a defense of duress be asserted against one who merely threatens to do that which he otherwise has a right to do? Can you explain why the admiralty rule as to rescues at sea might make economic sense?</p> <p>Are there some callings that should be subject to price controls and regulation because they lend themselves to duress? Can you think of some unregulated industries that should properly be considered natural monopolies in need of regulation?</p>	<p>UCC §§ 2-201, 1-201(37)</p> <p>Scott 441-61, 416-27</p> <p>Rest. §§ 174-77, 73, 89</p> <p>The Highwaymen, at https://www.youtube.com/watch?v=UDPgJ8g91ek</p> <p>The Highwayman, at https://www.youtube.com/watch?v=aFkcAH-m9W0</p> <p>Hale, de Portibus Maris, at blog</p> <p>Natural Monopoly, at https://en.wikipedia.org/wiki/Natural_monopoly</p>

<p>E 104</p>	<p><i>Unconscionability</i></p> <p>What do you think of Peter Birks' claim that unconscionability is to lawyers as "small brown birds" are to ornithologists?</p> <p>Can signaling theories explain why parties might enter into what seem as one-sided bargains? Can courts do anything intelligently to police one-sided bargains?</p> <p>Are fairness constraints hard-wired in all of us, and if so does that have implications for common law rules?</p>	<p>Scott 61-75, 548-63</p> <p>Lloyds Bank v. Bundy, at blog</p> <p>Rest. §§ 205-08</p> <p>UCC § 2-302</p> <p>Moral hazard, at blog</p> <p>Signaling, at blog</p> <p>Dictator game, at http://en.wikipedia.org/wiki/Dictator_game</p> <p>Background reading: Kahneman, Knetsch and Thaler, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, 76 Am. Econ. Rev. 728 (1986)</p> <p>Adam Smith, Theory of Moral Sentiments, at blog</p>
<p>5: Feb. 13-15</p> <p>F:79</p>	<p><i>Terms</i></p> <p>How does one distinguish a collateral contract from an integrated agreement?</p> <p>Under Traynor's interpretation of integration, can the parties opt into the parol evidence rule? Under Burke's interpretation, can one opt out of the parol evidence rule? Do</p>	<p><u>Collateral Contracts</u></p> <p>Scott 589-98</p> <p><u>Integration</u></p> <p>Scott 599-605</p> <p>Rest. §§ 209-17</p>

<p>G: 90</p>	<p>the parties have a sufficient incentive to memorialize their agreement in a writing? What is the difference between an integrated and an unintegrated agreement? Between complete and partial integration?</p> <p>How do the Restatement and the UCC differ on these questions?</p> <p>Can the parties, through a merger clause, bargain around the threshold question of whether a contract is completely integrated? Does “fraud corrupt all”?</p> <p><i>Interpretation</i></p> <p>In interpreting a contract (or a poem), should one seek to capture the writer’s intention or merely look at the text? Are bright-line legal rules to be preferred to vague legal standards in contract law? When does it make most (least) sense to admit oral evidence as to the intention of the parties? When might a court look to trade usage in interpreting a contract?</p>	<p>UCC §§ 2-202, 2-316</p> <p><u>Merger Clauses</u></p> <p>Scott 606-22, 469-73</p> <p>Rest. § § 216, 209</p> <p>Scott 623-52</p> <p>Rest. §§ 200-04, 219-23</p> <p>Scott 652-70</p> <p>UCC §§ 1-303, 2-202, 2-208</p>
<p>6: Feb. 20-22</p> <p>H:160</p>	<p><i>Conditions</i></p> <p>Some “conditions” are promises and some not. What’s the difference and how does one tell them apart? Can these distinctions be understood as</p>	<p>Scott 85-96, 675-96 (exclude Bell v. Elder)</p> <p>Restatement §§ 152, 154, 261</p> <p>UCC §§ 2-507(1), 2-511(1)</p>

	<p>an attempt to provide the default rules that the parties would have specified had they put their minds to it? When is a contract severable, where one condition fails?</p> <p>Of conditions that are not promises, how can one tell the difference between conditions precedent and subsequent?</p> <p>What are the differences between modification, estoppel and waiver?</p>	<p>Scott 698-700</p> <p>Restatement §§ 152, 154, 261</p> <p>UCC §§ 2-507(1), 2-511(1)</p> <p>Rest. §§ 224-27, 230, 234, 237-38, 240</p> <p>UCC §§ 2-307, 2-612</p> <p><u>Modification, Estoppel, Waiver</u></p> <p>Scott 700-714</p> <p>UCC § 2-209</p>
<p>7: Feb. 27-29</p> <p>I: 161</p>	<p><i>Warranties</i></p> <p>What is expected monetary value? Do you always accept a bet with the highest expected monetary value; and if not, why not? What is the “insurance idea” in tort law? As between a manufacturer/seller and a consumer, how many different reasons can you think of for placing the risk of loss on the manufacturer/seller?</p> <p>What is “merchantability” and “fitness”? What is an “as is”</p>	<p>Expected Monetary Value, at https://www.youtube.com/watch?v=jGagFcTmfWM</p> <p>Risk Neutral, at http://en.wikipedia.org/wiki/Risk_neutral</p> <p><u>Express and Implied Warranties</u></p>

	<p>clause?</p> <p>What is the perfect tender rule? What are Cardozo’s “dependent” and “independent” promises, and how do they compare to the different kinds of conditions we saw? Do you think that, had the parties specified their remedies in Jacob & Youngs v. Kent, they would have arrived at Cardozo’s result? Or did Cardozo rewrite their bargain?</p>	<p>Scott 714-35</p> <p>UCC §§ 2-314 – 2-316, 2-501, 2-504</p> <p><u>Substantial Performance vs. Perfect Tender</u></p> <p>Scott 76-85, 735-45</p> <p>UCC §§ 2-601</p> <p>Rest. §§ 237, 241-42, 227</p> <p>Signaling, at blog</p> <p>Adverse selection, at http://en.wikipedia.org/wiki/Adverse_selection</p> <p>Just for fun: The Reading Pipe flyer, at https://archive.org/stream/ReadingPipeGenuineWroughtIronKnurledForInstantAndPositive/ReadingPipe#page/n0/mode/2up</p>
<p>8. March 12-14 I 161-208</p> <p>J. 109</p>	<p><i>Acceptance, Waiver, Cure</i></p> <p>How is the UCC’s perfect tender rule modified by its rules about acceptance and cure? Might cure rights at times be asserted opportunistically?</p> <p><i>Mistake</i></p>	<p>Scott 745-55</p> <p>UCC §§ 2-106, 2-503, 2-507, 2-508, 2-601, 2-602, 2-606-08, 2-703, 2-705, 2-708, 2-709, 2-711-715</p>

	<p>Were they to put their minds to it, what events would the parties specify in their bargain as ones that would bring their obligations to an end? When, by contrast, would they assign the risk of an event to one of the parties? Can the parties contract around the doctrine of mistake? What is the difference between unilateral and mutual mistake, and why should it matter? When should clerical mistakes absolve a party?</p>	<p>Force Majeure clauses (example 1 only), at http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses</p> <p>Scott 759-98</p>
<p>9: March 19-21 K:98 L:41 ++</p>	<p><i>Impossibility and Impracticability</i></p> <p>What is the difference between mistake (on the one hand) and impossibility and impracticability (on the other)? What is the difference between impossibility and impracticability?</p> <p>Should there be an expanded doctrine of impracticability to deal with large price fluctuations?</p> <p><i>Frustration</i></p>	<p>Restatement § 20, illustration 1-3</p> <p>Restatement §§ 151-4, 157</p> <p>UCC §§ 2-613-615, 2-107, 2-501</p> <p>Scott 96-106, 798-832</p> <p>Restatement §§ 261-66, 152-53, 224, 230</p> <p>Scott 832-64</p> <p>Just for fun: Coronation of Edward VII, at https://www.youtube.com/watch?v=rVNFeQe4Nhk</p>

	<p>Can you tell when to apply the doctrine of frustration and when the “work before pay” rule? How would you account for the common purpose requirement?</p> <p>Did the COVID pandemic change things?</p>	
<p>10: March 26-28 M:67 +++</p>	<p><i>Anticipatory Breach</i></p> <p>Were bargaining costless, would the parties want to specify what remedies are available on breach? If the court knew what they would choose, should that inform its decision about remedies? When there is a breach, what rule would the parties want to adopt—one that gave the breaching party an incentive to minimize damages or one that did not do so in order to punish him for the breach? If the goal is cost reduction, how would the party in breach be incentivized to minimize costs?</p>	<p>Scott 867-926</p> <p>Rest. §§ 237, 241, 250-57, 350</p> <p>UCC §§ 2-507, 2-511, 2-609-611, 2-702</p>
<p>11. April 2-4</p>	<p><i>The Contractual Measure of Damages</i></p>	

	When might reliance and restitutionary claims succeed when they would the expectation measure?	Scott 965-88
13 April 16-18 Q: 43 R:57	<p><i>Punitive Damages</i></p> <p>Would efficient contract remedies seek to deter wasteful conduct?</p> <p><i>Lost Volume Sellers</i></p> <p><i>Uncertainty, Foreseeability, Mitigation, Penalty Clauses</i></p> <p>Should contract law damages be awarded for emotional distress</p>	<p>Scott 988-98</p> <p>UCC 2-706, 2-708, 2-710</p> <p>Scott 998-1008</p> <p>Scott 1016-55, 130-39</p> <p>Rest. § 353</p> <p>Rest. § 352, 350, 351, 356</p> <p>UCC § 2-704, 2-718</p>