

## Contracts

*Fall 2020*

*Tu/W 8:00 AM – 9:50 AM*

*Zoom Meeting ID: 987 8207 0148*

Professor Manisha Padi

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Welcome to Contracts! This course covers the role of legal institutions in private agreements. We will study (1) the difference between enforceable contractual obligations and unenforceable promises, (2) valid and invalid methods for creating a formal contract, (3) the requirements imposed by contractual obligations, (4) breach of these obligations, and (5) remedies for breach of contract.

### **General information:**

All course materials (including this syllabus) are available on [bCourses](#). Reading assignments for each class will be posted weekly. An overview of readings for the course are below.

The assigned readings throughout the course are from Ayres & Klass, Studies in Contract Law (9<sup>th</sup> ed. 2017). The Restatement (Second) of Contracts and the Uniform Commercial Code will also be covered in class. Their full text and notes are available on Westlaw and Bloomberg, but may also be accessed through the Burton supplement (not required). Supplemental readings, practice questions, and other materials will be posted on bCourses.

Class meetings will be offered online via web conference with Zoom at Zoom meeting ID 987 8207 0148, or <https://berkeley.zoom.us/j/98782070148>. I will record each meeting and post it on bCourses. You are strongly encouraged to attend classes live on Zoom, which will provide the most engaging and enriching experience. If you are unable to attend in real-time, you should provide me with timely advance notice (or subsequent notice of an unanticipated emergency). As a substitute for real-time attendance and participation, you will be required to participate in our online discussion board.

Our midterm exam will be a take-home given at any two hour period between Thursday-Friday, October 8-9. Our scheduled review session will take place on Thursday, December 3, 8:00 AM – 9:50 AM. The final exam will be a three hour take-home on Saturday, December 12.

### **Office hours:**

Office hours are valuable opportunities to talk about specific topics within contracts, or to discuss law school more generally. My “open door” office hours will be Tuesday afternoons from 3:30 PM to 5:30 PM in Zoom room 987 8207 0148 (same as class). I am also available by appointment for “closed door” office hours, typically individual meetings not directly related to class material, via the “Calendar” function in bCourses.

### **Objectives:**

Contracts encompass a wide variety of legal topics, and a comprehensive study of these areas would take many semesters. This course is intended to provide an overview into the law of contractual obligations. By the end of this course, you should be able to read a fact

pattern and discern:

- ◊ whether a legally enforceable contractual obligation exists
- ◊ what steps were taken to form a valid contract
- ◊ which legal challenges exist to the contract's formation
- ◊ what performance of the contract entailed
- ◊ which conduct constitutes a breach of contract
- ◊ which remedies are available for breach of contract

These skills are directly relevant to Berkeley Law's overall learning objectives:

- ◊ Knowledge and understanding of substantive and procedural law
- ◊ Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context
- ◊ Exercise of proper professional and ethical responsibilities to clients and the legal system
- ◊ Other professional skills needed for competent and ethical participation as a member of the legal profession
- ◊ Using the law to solve real-world problems and to create a more just society

### **Grading:**

Grades will be based on class participation (4%), completion of regular problem sets (16%), a midterm exam (20%), and a cumulative final take-home exam (60%).

These assessments will test your ability to take what you read in the casebook and *apply* it to new situations. Success in this course depends on analyzing new fact patterns and applying case law repeatedly, including failed attempts. To facilitate this, we will use panel-based cold calls and utilize online polls to engage with the material.

### **Online learning policies:**

Remote learning requires more than technology - we must also exercise good communication, judgment, and professionalism. To that end, we will do our best to adhere to the following Zoom guidelines:

- ◊ Please join with video and a virtual background, if possible
- ◊ Note that recordings of Zoom classes typically capture images of participants, screen-shared material, and a transcript of all chats that are displayed to the meeting host
- ◊ Keep yourself on "mute" when you are not speaking
- ◊ When you would like to speak in class, use the "raise hand" function in the "participants" pane and wait for me to call on you
- ◊ Wait until we pause for questions before asking for clarification in chat

### **Student technology help:**

If technical difficulties prevent you from completing course work, please alert me immediately. However, understand that I cannot assist you with technical problems. Please use the technical support resources described below. Be sure to document (save emails and transaction numbers) for all interactions with tech support.

Berkeley Law students are entitled to general software support for their computers from the law school, and certain free software downloads from UC Berkeley, while enrolled. If you have issues with internet access or computer equipment required to participate in

classes remotely, they should contact [studentcomputing@law.berkeley.edu](mailto:studentcomputing@law.berkeley.edu). Information, links, and instructions for many common computer/technical questions can be found in the law library's online computing guide. For bCourses, Zoom, and technical support questions, please email [studentcomputing@law.berkeley.edu](mailto:studentcomputing@law.berkeley.edu) or you can use the Student Computing chat. In both cases, someone will respond to you during our regular business hours.

If you have research-related questions, please contact the reference librarians by filling out the reference request form. You can also reach reference librarians during business hours by using the law library's chat service.

### **Berkeley policies:**

- 1) A "credit hour" at Berkeley Law is an amount of work that reasonably approximates three to four hours of work per week for 15 weeks, including a) classroom time, b) time spent preparing for class, c) time spent studying for, and taking, final exams, d) time spent researching, writing, and revising papers and other written work, and e) time spent preparing for and completing any other final project, presentation, or performance. For the purposes of these calculations, 50 minutes of classroom instruction counts as one hour, and the 15 weeks includes the exam period. You can expect to spend this amount of time per unit per week on in-class and out-of-class, course-related work as described above.
- 2) Students who need classroom accommodations or want to discuss implementation of their accommodations in this class, including exam accommodations for documented medical reasons or for religious observance, are advised to contact Kyle Valenti, Associate Director of Student Services ([kvalenti@law.berkeley.edu](mailto:kvalenti@law.berkeley.edu)) or Kyle Kate Dudley, Assistant Director of Student Services, Accessible Education ([kylekatedudley@law.berkeley.edu](mailto:kylekatedudley@law.berkeley.edu)) as soon as possible. PROFESSORS DO NOT HAVE THE AUTHORITY TO RESCHEDULE EXAMS.
- 3) The [Academic Honor Code](#) governs the conduct of all students during examinations and in all other academic and pre-professional activities at Berkeley Law. We expect students to adhere to this code scrupulously. If you have any question about whether your conduct may violate the code, please contact your professor or the Dean of Students before you act. You may face severe consequences, including a failing grade in this class or removal from the program, and the Bar will receive notification of your conduct.

As of Fall 2020, Rule 7 of the Academic Rules has been updated to include this restriction on distribution of class content:

*During emergencies and disasters, class recordings may be created and provided to students to allow asynchronous attendance. Recordings may also be made available under other circumstances to augment instruction. Students shall not distribute video or audio recordings or screenshots for any reason unless authorized in connection with a disability accommodation.*

- 4) If you are in need of economic, food, or housing support, you can find help at [the basic needs center](#). You may be eligible for money to buy groceries via [CalFresh](#) or our Food Assistance Program. If you are in need of food immediately, please contact our UC Berkeley [Food Pantry](#).

- 5) The University of California is committed to creating and maintaining a community dedicated to the advancement, application and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation, or intimidation. Every member of the community should be aware that the University prohibits sexual violence and sexual harassment, retaliation, and other prohibited behavior (“Prohibited Conduct”) that violates law and/or University policy. The University will respond promptly and effectively to reports of Prohibited Conduct and will take appropriate action to prevent, to correct, and when necessary, to discipline behavior that violates this policy. For the complete UC Policy, definitions, compliance and procedures, please access the [Sexual Violence and Sexual Harassment Policy](#).

Resources: If you have further questions or concerns about reporting behavior related to sexual harassment, sexual violence, and/or protected category discrimination, please contact the Office for the Prevention of Harassment and Discrimination (OPHD) by phone 510-643-7985 or email [ask\\_ophd@berkeley.edu](mailto:ask_ophd@berkeley.edu).

[Path to Care Center](#) Confidential Advocates provide affirming, empowering, and confidential support for those that have experienced gendered violence, including: sexual harassment, emotional abuse, dating and intimate partner violence, sexual assault, stalking, and sexual exploitation. Advocates bring a non-judgmental, caring approach to exploring all options, rights, and resources. They can be reached by phone at (510) 642-1988.

## Course outline and readings:

### I. Introduction to Contract Law

- ◊ Introduction (pp. 1-12)
- ◊ *Bailey v. West* (Bascom’s Folly) (pp. 12-16)
- ◊ *Williams v. Walker-Thomas Furniture Co.* (furniture installment sale) (pp. 23-26)
- ◊ Comments: *ex ante* and *ex post* contract law (pp. 27-29)
- ◊ Comments: Article 2 (pp. 39-41)
- ◊ Comments: default rules, approaches to contract law (pp. 47-49, 51-62)

### II. The Bases of Contract Liability

#### A. The Consideration Requirement

##### a. Acts and Promises, Bargained-For or Given in Exchange

- ◊ Definitions (pp. 68-71)
- ◊ *Kirksey v. Kirksey* (moving inconvenience) (pp. 71-72)
- ◊ *Hamer v. Sidway* (promise of clean living) (pp. 73-77)
- ◊ *Langer v. Superior Steel Corp.* (repudiated pension) (pp. 77-80)
- ◊ Comments: consideration (pp. 84-88)

##### b. Moral Obligation

- ◊ *First Hawaiian Bank v. Zukerkorn* (stale debts) (pp. 103-05)
- ◊ *Mills v. Wyman* (sick son’s care) (pp. 107-09)
- ◊ *Webb v. McGowin* (falling pine block) (pp. 112-15)

### c. Adequacy of Consideration

- ◇ *Apfel v. Prudential-Bache Securities, Inc.* (computerized securities bookkeeping) (pp. 126-29)
- ◇ Comments: adequacy (p. 130)

### d. Pre-Existing Duty Rule

- ◇ Comments: pre-existing duty rule (pp. 131-132)
- ◇ *Alaska Packers' Association v. Domenico* (fishing raise) (pp. 135-38)
- ◇ *Angel v. Murray, Jr.* (city waste collector) (pp. 140-44)

### e. Discretion, Mutuality, and Implied Obligation

- ◇ *Wood v. Lucy, Lady Duff-Gordon* (fashion endorsements) (pp. 154-57)
- ◇ *Omni Group, Inc. v. Seattle-First National Bank* (feasibility condition) (pp. 157-61)

## B. Promissory Estoppel

- ◇ Introduction (pp.163-164)
- ◇ *Ricketts v. Scothorn* (grandfather's gift) (pp. 164-66)
- ◇ *Allegheny College v. National Chautauqua County Bank of Jamestown* (college pledge) (pp. 170-76)
- ◇ Problem: The Case of the Disappointed Mortgagee (pp. 181-82)

## III. Agreement: Offer and Acceptance

### A. Mutual Assent

#### a. The Objective Test

- ◇ Introduction (p. 187)
- ◇ UCC §§2-204, 2-205, 2-206
- ◇ R2d §§19-24.
- ◇ *Embry v. Hargadine, McKittrick Dry Goods Co.* ("Get your men out. You're ok.") (pp. 188-90)
- ◇ *Lucy v. Zehmer* ("high as a Georgia pine") (pp. 190-93)
- ◇ Comments: objective test (pp. 193-197)
- ◇ *Raffles v. Wichelhaus* (Peerless) (pp. 199-200)

#### b. What Is an Offer?

- ◇ *Southworth v. Oliver* (ranch offer?) (pp. 212-17)
- ◇ *Lefkowitz v. Great Minneapolis Surplus Store* (fake fur sale) (pp. 219-21)
- ◇ *Leonard v. Pepsico* (a Harrier jet!) (pp. 223-32)

#### c. Modes of Acceptance

- ◇ *Carlill v. Carbolic Smoke Ball Co.* (flu puff) (pp. 241-46)
- ◇ *Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories* (lots of vaccine) (pp. 247-51)

#### **d. Termination and Timing**

- ◇ *Ever-Tite Roofing Corp. v. Green* (roofing acceptance) (pp. 259-62)
- ◇ R2d §69.
- ◇ *Ammons v. Wilson & Co.* (shortening silence) (pp. 268-70)
- ◇ *Beneficial National Bank, U.S.A. v. Payton* (cardholder notice) (pp. 275-80)
- ◇ R2d §§35-50.
- ◇ Comments: assent in the Restatement (pp. 302-304)
- ◇ *Adams v. Lindsell* (misdirected missive) (pp. 315-16)

### **B. Special Problems in Assent**

#### **a. Counteroffers, Timing and UCC §2-207**

- ◇ UCC §§2-207
- ◇ *Minneapolis & St. Louis Railway Co. v. Columbus Rolling-Mill Co.* (Steel rail exchange) (pp. 322-24)
- ◇ *Textile Unlimited, Inc. v. A. BMH and Company, Inc.* (yarn battle of the forms) (pp. 336-40)

#### **b. Shrinkwrap and Browsewrap**

- ◇ *Hill v. Gateway 2000* (shrink-wrap terms) (pp. 342-44)
- ◇ *Klocek v. Gateway* (shrink-wrap terms) (pp. 345-48)
- ◇ *Specht v. Netscape Communications Corporation* (browse-wrap terms) (pp. 350-57)
- ◇ *Cairo, Inc. v. Crossmedia Services, Inc.* (browse-wrap terms) (pp. 357-62)

#### **c. Precontractual Liability**

- ◇ *Hoffman v. Red Owl Stores, Inc.* (franchise negotiations) (pp. 394-400)
- ◇ Comments: preliminary agreements (pp. 402-406)
- ◇ *Frank Dixon v. Wells Fargo Bank, N.A.* (mortgage modification assurances) (pp. 411-17)
- ◇ *Kossian v. American National Insurance Co.* (fire cleanup windfall) (pp. 424-27)

### **IV. Formation Defenses**

#### **A. Statute of Frauds**

- ◇ Introduction (pp. 432-437)
- ◇ UCC §2-201
- ◇ *DF Activities Corp. v. Brown* (Frank Lloyd Wright chair) (pp. 460-63)
- ◇ Comments: UCC §2-201 (pp. 456-457)

#### **B. Capacity to Contract**

- ◇ Comments: infancy (pp. 467-8)
- ◇ R2d §§12-16
- ◇ *Bowling v. Sperry* (Larry's car) (pp. 469-71)
- ◇ Comments: incompetence (pp. 475-6)
- ◇ *Ervin v. Hosanna Ministry, Inc.* (drug-induced release) (pp. 482-83)

### **C. Mistake**

- ◊ Introduction (pp. 484-5)
- ◊ *Sherwood v. Walker* (barren cow) (p. 496-99)
- ◊ *Lenawee Country Board of Health v. Messerly* (leaky septic tank) (pp. 500-05)
- ◊ *OneBeacon America Insurance Co. v. Travelers Indemnity Co. of Illinois* (leased vehicle coverage) (pp. 508-511)

### **D. Misrepresentation and Nondisclosure**

- ◊ Introduction (pp. 517-18)
- ◊ *Laidlaw v. Organ* (war and tobacco) (pp. 518-20)
- ◊ *Vokes v. Arthur Murray, Inc.* (many dance lessons) (pp. 528-32)
- ◊ Comments: misrepresentation, rescission, and restitution (pp. 534-37)
- ◊ *Hill v. Jones* (termites, the silent saboteurs) (pp. 537-42)
- ◊ Comments: UDAP and RICO (pp. 545-548)

### **E. Duress and Undue Influence**

- ◊ Introduction (pp. 549-50)
- ◊ *Rubenstein v. Rubenstein* (arsenic threat) (pp. 550-53)
- ◊ R2d §§174-177
- ◊ *Austin Instrument, Inc. v. Loral Corp.* (urgently needed radar parts) (pp. 553-57)

### **F. Unconscionability**

- ◊ Introduction (pp. 561-562)
- ◊ UCC §2-302
- ◊ *In re Louis Fleet v. United States Consumer Council* (attorney referrals) (pp. 577-79)
- ◊ *Ferguson v. Countrywide Credit Industries, Inc.* (employment arbitration) (pp. 583-89)
- ◊ Comments: contracts of adhesion and Third Restatement (pp. 591-594)
- ◊ *Zapatha v. Dairy Mart, Inc.* (franchise termination) (pp. 595-99)

### **G. Illegality and Public Policy**

- ◊ Introduction (pp. 601-602)
- ◊ R2d §§178-199
- ◊ *Sinnar v. LeRoy* (beer license bribe) (pp. 603-05)
- ◊ Comments: aleatory, gambling, and insurance contracts (pp. 618-19)
- ◊ *Data Management, Inc. v. Greene* (broad no-compete) (pp. 630-32)
- ◊ Cal. Bus. & Prof. Code §§16600-16602

### **V. Performance**

#### **A. Scope and Content of Obligation**

- ◊ Introduction (pg. 659-60)
  - a. Integration and Parol Evidence**
- ◊ UCC §2-202

- ◇ *Alaska Northern Development, Inc. v. Alyeska Pipeline Service Co.* (Caterpillar part purchase) (pp. 671-77)
- ◇ Comments: consumer contracts and integration (p. 680)

### **b. Interpretation and Construction**

- ◇ UCC §2-208
- ◇ *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (steam turbine damage) (pp. 681-84)
- ◇ Comments: the hierarchy of contract construction (pp. 688-90)
- ◇ *Frigalment Importing Co. v. B.N.S. International Sales Corp.* (What is “chicken”?) (pp. 690-96)
- ◇ Comments: Second Restatement rules of interpretation (pp. 697-699)
- ◇ Comments: insurance contracts (pp. 699-701)
- ◇ *In re Katrina Canal Breaches Litigation* (Katrina Levies) (pp. 701-07)

### **B. Duty of Good Faith**

- ◇ *Centronics Corporation v. Genicom Corporation* (unreleased escrow) (pp. 709-16)
- ◇ *Market Street Associates Limited Partnership v. Frey* (old lease) (pp. 724-32)
- ◇ Comments: lender liability and good faith (pp. 740-44)
- ◇ *Feld v. Henry S. Levy & Sons, Inc.* (bread crumbs supply) (pp. 745-48)
- ◇ Comments: “best efforts” contracts (p. 750)
- ◇ *Beneficial National Bank, U.S.A. v. Payton* (cardholder notice) (p. 757)
- ◇ *Hillesland v. Federal Land Bank Association of Grand Forks* (dismissal for conflict) (pp. 762-68)
- ◇ Comments: “employment at will” (pp. 769-72)

### **C. Liability for Representations of Fact**

- ◇ *V.S.H. Realty, Inc. v. Texaco, Inc.* (oil leaks) (pp. 785-93)
- ◇ Comments: promissory fraud (pp. 795-800)

### **D. Express and Constructive Conditions**

- ◇ Introduction to express conditions (pp. 808-810, 822)
- ◇ *Dynamic Machine Works, Inc. v. Machine & Electrical Consultants, Inc.* (unsatisfactory lathe) (pp. 829-32)
- ◇ *Jacob & Youngs, Inc. v. Kent* (the Reading Pipe case) (pp. 850-55)

### **E. Changed Circumstances**

- ◇ *United States v. Wegematic Corp.* (“state of the art” computer) (pp. 864-66)
- ◇ UCC §2-615
- ◇ *Taylor v. Caldwell* (burnt music hall) (pp. 869-73)
- ◇ *Krell v. Henry* (delayed coronation) (pp. 901-04)

### **F. Arbitration Clauses**

- ◇ Introduction to arbitration (pp. 918-21)
- ◇ 9 U.S.C. §§1-15
- ◇ *Hall Street Associates, L.L.C. v. Mattel, Inc.* (lease arbitration dispute) (pp. 921-26)
- ◇ *AT&T Mobility LLC v. Concepcion* (class arbitration) (new) (pp. 940-46)



## **VI. Remedies**

### **A. Right to Suspend Performance or Cancel**

- ◊ Introduction (pp. 951-52)
- ◊ *Hochster v. De La Tour* (guided tour) (pp. 925-55)
- ◊ *Taylor v. Johnston* (premature breeding cancellation) (pp. 957-63)
- ◊ Comments: substantial impairment (pp. 972-73)

### **B. Theory of Remedies**

- ◊ Introduction (p. 975)
- ◊ *Sullivan v. O'Connor* (failed nose job) (pp. 29-35)
- ◊ Comments: efficient breach (pp. 979-82)
- ◊ Comments: Coase (pp. 990-91)
- ◊ Comments: damages (pp. 991-92)
- ◊ Comments: losing contracts (pp. 992-94)
- ◊ Comments: disgorgement (pp. 1001-03)

### **C. Seller Remedies for Buyer's Breach**

- ◊ UCC §2-708
- ◊ *American Mechanical Corp. v. Union Machine Co. of Lynn, Inc.* (foreclosure damages) (pp. 1023-26)
- ◊ *Bernstein v. Nemeyer* (negative cash flow guarantee) (pp. 994-96)
- ◊ *Locks v. Wade* (jukebox volume) (pp. 1029-32)

### **D. Buyer Remedies for Seller's Breach**

- ◊ UCC §2-715
- ◊ *Reliance Cooperage Corp. v. Treat* (bourbon staves) (pp. 1042-45)
- ◊ *Peevyhouse v. Garland Coal & Mining Company* (unmoved dirt) (pp. 1050-54)
- ◊ *American Standard, Inc. v. Schectman* (failing grade) (pp. 1055-59)
- ◊ *Hadley v. Baxendale* (late crank shaft) (p. 41)

### **E. Mental Anguish and Punitive Damages**

- ◊ *Kaplan v. Mayo Clinic* (no pancreatic cancer) (pp. 1080-85)
- ◊ *Plotnick v. Meihaus* (families' feud) (new) (pp. 1085-89)
- ◊ *Acquista v. New York Life Insurance Company* (reluctant insurers) (pp. 1091-95)

### **F. Injunctive Relief, Specific Performance, and Liquidated Damages**

- ◊ UCC §2-719
- ◊ *Curtice Brothers Co. v. Catts* (specific tomatoes) (pp. 1110-12)
- ◊ *Lumley v. Wagner* (singer's specific performance) (pp. 1116-17)
- ◊ *Cellphone Fee Termination Cases* (pp. 1138-44)