

Syllabus For

CONTRACTS I

(Course No. 6202-20; 3 credits)

Professorial Lecturer Gregory E. Maggs

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of the Law of Contracts § 1.

Content of the Course:

Contracts I covers most of the common law of contracts. Topics include the requirement of a basis for enforcing contracts, the formation of bargains, the requirement of a writing under the statute of frauds, various doctrines for policing the bargain, and the remedies available for breach of contract.

Contracts II, which is offered in the spring, covers more advanced topics in the common law of contracts. It also addresses most of the law of sales under article 2 of the Uniform Commercial Code.

Learning Outcomes (ABA Accreditation Standards 301 & 302)

Syllabus Appendix 11 identifies the expected "learning outcomes" for this course.

Class Schedule:

This class will meet every Thursday from **6:10-8:00 p.m.** and on the following Wednesdays from **6:00-8:00 p.m.:** 8/22, 9/5, 9/19, 10/3, 10/24, 11/7, and 11/28. **Please note the later start time on Thursdays.**

The class will not meet during the week of first-year mid-term examinations (10/15-10/19) or the week of Thanksgiving, (11/19-11/23). On Thursday, 11/28, the class will meet from 7:05-8:00 p.m.

Office Hours, Telephone, and Email:

I am available to discuss the class in person or by telephone on Friday afternoons. My office is at the U.S. Court of Appeals for the Armed Forces, 450 E Street, N.W., Washington, D.C. (near the Judiciary Square Metro station). Please contact my assistant, Ms. Veronica Sevier, to schedule an appointment. Her telephone number is (202) 761-1458. You may reach me directly by email at gmaggs@law.gwu.edu.

Required Books:

We will use two books this semester, one casebook and one supplement:

Casebook: Farnsworth, et al., Cases and Materials on Contracts (Foundation Press 8th ed. 2013)

Supplement: Burton & Eisenberg, Contract Law: Selected Source Materials Annotated (West 2017) [Earlier or later editions are equally usable.]

Final Examination:

This course will have a "open-book" final examination on Wednesday, 12/5 at 6:30 pm. In completing the examination, you may use any written materials that you bring with you.

The final examination will have the same format as previous final examinations that I have given in this course. You can find copies of my previous final examinations (and their grading guides) on the Law School class portal and also at my website (<http://maggs.us/gwlaw/home.htm>).

Review Videos

I have prepared five short review videos that summarize the material in this course. You can find links to these review videos on the Law School class portal and also at my website (<http://maggs.us/gwlaw/home.htm>).

Class Participation:

You are expected to come to class prepared to discuss the assigned reading. If you are unprepared or if you are going to be absent, let me know before class.

You will need to bring your casebook and supplement to class every day because we will be looking at them very closely.

Recording of Classes:

This course will follow the Law School's "Class Recording Policy," which is available at the Student Affairs Office website. This policy permits students to request the recording of classes when they will be absent for religious reasons, family emergencies, and certain other causes. Please make requests for recording and address questions about the policy to the Student Affairs Office.

Reading Assignments:

At the end of each class, I will tell you how far on the following outline to read for the next class.

You should read and study each section of the Restatement (Second) of the Law of Contracts assigned below. You can find the sections in your supplement.

You do not have to read the notes and problems following the assigned text and cases in our casebook unless they are specifically assigned.

Please look up any legal words or phrases that you do not understand in a law dictionary. Look up other words in a regular dictionary.

I. BASES FOR ENFORCING PROMISES

A. HISTORICAL BASES

Text, pp. 31-33

B. CONSIDERATION AS A BASIS FOR ENFORCEMENT

1. Promise or Performance Bargained for in Exchange

Hamer v. Sidway, pp. 35-38

Note (1), p. 38

Restatement §§ 71(1) & (2), 79(a) & (b)

Note (4), pp. 39-40

Text, p. 41

Text, p. 42

Restatement §§ 72, 74(1)

Dyer v. Nat'l By-Products, Inc., pp. 43-46

Note (1), p. 46

Syllabus Appendix No. 10

2. Distinguishing Bargains from Non-Bargains

Feinberg v. Pfeiffer Co., pp. 48-51

Notes (1)-(2), p. 51

Mills v. Wyman, pp. 52-53

Note (1), p. 53

Kirksey v. Kirksey, pp. 58-59

Notes (1)-(2), p. 59

Syllabus Appendix No. 1, Part 1

Text, pp. 61

Lake Land Employment v. Columber, pp. 62-67

Syllabus Appendix No. 1, Part 2

3. Promises as Consideration

Text, p. 73

Strong v. Sheffield, pp. 73-75

Note (1), pp. 75

Restatement § 2(1)

Text, p. 76

Mattei v. Hopper, pp. 76-79

Text, p. 86

Wood v. Lucy, Lady Duff-Gordon, pp. 86-88

Note (3), p. 88-89

Restatement §§ 202(1), 205

C. RELIANCE AS A BASIS FOR ENFORCEMENT ("Promissory Estoppel")

1. Development of Reliance as a Basis for Enforcement

Text, p. 92

Syllabus Appendix No. 2

Ricketts v. Scothorn, pp. 92-94

Syllabus Appendix No. 1, Part 3

Text, pp. 95-97

[Allegheny College v. Nat'l Ch. C. Bank]

Syllabus Appendix No. 1, Part 4

Restatement § 90

2. Elements of Promissory Estoppel

Feinberg v. Pfeiffer, pp. 97-98

Text, p. 99

Problem, p. 100

Cohen v. Cowles Media Co., pp. 104-105

Note (1), p. 105-106

Note (3), p. 100

D. RESTITUTION AS AN ALTERNATIVE BASIS FOR RECOVERY

Text, pp. 112-113

Syllabus Appendix No. 3

Cotnam v. Wisdom, pp. 114-116

Note (1), p. 116

Callano v. Oakwood Park Homes Corp., pp. 117-119

Problem, p. 117

[Schott v. Westinghouse Electric]

E. "MORAL OBLIGATION" AS A BASIS FOR ENFORCEMENT

Text, pp. 90-91

Notes (1) & (3), pp. 53-54

Restatement §§ 14, 82, 83, 85

Webb v. McGowin, pp. 54-57

Harrington v. Taylor, p. 57

Note (1), p. 58

Restatement § 86

Problem, p. 92

[Dementas v. Estate of Tallas]

Video Review Lecture # 1 (on class portal)

II. CONTRACT FORMATION

A. ASSENT

Restatement § 21

Text, pp. 125-126

Lucy v. Zehmer, pp. 126-129

B. OFFERS

Text, pp. 140-141

Restatement §§ 24, 26

Owen v. Tunison, pp. 142-143

Note, p. 143

Harvey v. Facey, p. 144

Note (1), p. 144

Fairmount Glass v. Crunden-Martin, pp. 145-147

Text, p. 148

Lefkowitz v. Great Minn. Surplus, pp. 148-149

C. ACCEPTANCE

Text, pp. 156-157

Restatement §§ 4, 30, 32, 54(1), 56, 60

International Filter v. Conroe Gin, pp. 157-160

Notes (1) & (3), pp. 160-161

White v. Corlies and Tift, pp. 162-164

Note (2), p. 164

Ever-Tite Roofing v. Green, pp. 164-165

Note, p. 166

Text, pp. 166-167

[Carlill v. Carbolic Smoke Ball Co.]

Note (1), p. 167

Restatement § 60

Allied Steel v. Ford Motor Co., pp. 167-169

Notes (1) & (2), pp. 169-170

Text, pp. 175-176

[Hobbs v. Massasoit Whip Co.]

Restatement § 69(1)

Note, p. 176

D. LAPSE, REVOCATION, AND REJECTION OF OFFERS

Text, pp. 177-178, 179-181

Restatement §§ 36, 41, 42, 43, 48

Dickinson v. Dodds, pp. 181-183

Text, p. 193

Problem, pp. 193-194
[Earle v. Angell]

Note (4), p. 140

Text, pp. 194-195, 199-201

Restatement §§ 38, 39, 59

Syllabus Appendix No. 4
[Minn. & St. L. v. Columbus Rolling-Mill]

E. MAILBOX RULE

Restatement § 63

Text, pp. 195-197

F. LIABILITY DESPITE APPARENTLY FAILED NEGOTIATIONS

Text, pp. 186-188

Restatement §§ 45

Drennan v. Star Paving, pp. 188-192

Text, pp. 234-236

Hoffman v. Red Owl Stores, pp. 236-239

Channel Home Centers v. Grossman, pp. 252-257

G. DEFINITENESS

Restatement § 33

Text, pp. 258-259
[Varney v. Ditmars]

Toys, Inc. v. F.M. Burlington Co., pp. 259-260

Note (1), p. 261

Video Review Lecture # 2 (on class portal)

III. THE REQUIREMENT OF A WRITING FOR ENFORCEABILITY

A. PROMISES TRADITIONALLY COVERED BY A STATUTE OF FRAUDS

Restatement §§ 110, 111, 112, 124, 125, 130

Text, pp. 273-279, 280-281, 288-289
Syllabus Appendix No. 5, Parts 1 & 2
C.R. Klewin v. Flagship Properties, pp. 281-286
Beaver v. Brumlow, pp. 315-321
Note (4), pp. 321-322
Text, pp. 292-294
Langman v. Alumni Ass'n, pp. 294-295
Restatement § 125

B. REQUISITES OF WRITING AND SIGNING

Text pp. 299-300, 301-302
Restatement § 131

C. EXCEPTIONS TO THE WRITING REQUIREMENT

Text, p. 322
Restatement §§ 139, 375
Monarco v. Lo Greco, pp. 323-325
Syllabus Appendix No. 10
Video Review Lecture # 3 (on class portal)

IV. POLICING THE BARGAIN

A. CAPACITY

1. Introduction

Text, pp. 339-340

2. Infancy

Text, pp. 340-341

Restatement §§ 7, 14

Syllabus Appendix Nos. 6 & 7

Douglass v. Pflueger Hawaii, pp. 342-346

Notes (1), (2), (4), pp. 346-348

3. Mental Infirmary

Restatement § 15(1)

Ortelere v. Teachers' Retirement, pp. 349-351

Cundick v. Broadbent, pp. 352-354

B. DURESS, MODIFICATION, AND ATTEMPTED MODIFICATION

Text, pp. 356-357

Restatement §§ 73, 175(1), 176(1)

Text, p. 359

Alaska Packers' Ass'n v. Domenico, pp. 359-361

Text, pp. 363-364

[Schwartzreich v. Bauman-Basch]

Note (1), p. 364

Watkins & Sons v. Carrig, pp. 365-368

Restatement § 89

C. UNDUE INFLUENCE

Restatement § 177(1) & (2)

Odorizzi v. Bloomfield School Dist., pp. 380-385

Note (2), p. 385

D. MISREPRESENTATION, CONCEALMENT, NON-DISCLOSURE

Text pp. 387, 395-396

Restatement §§ 159, 160, 162, 164(1)

Swinton v. Whitinsville Savings Bank, pp. 388-389

Kannavos v. Annino, pp. 391-394

Restatement § 161(d)

E. MISTAKE

Text, pp. 849-850

Restatement §§ 151, 152, 154

Steas v. Leonard, pp. 850-852

Text, p. 856

[Wood v. Boynton]

[Sherwood v. Walker]

Note (1), p. 857

Restatement §§ 153, 161(b)

F. DENYING SPECIFIC PERFORMANCE

Text, pp. 489-490, 617-618

Restatement §§ 359(1), 360, 364

McKinnon v. Benedict, pp. 491-493

Notes (1)-(2), p. 493

Tuckwiller v. Tuckwiller, pp. 494-495

G. PUBLIC POLICY

Restatement § 178(1)

Syllabus Appendix No. 8

Text, p. 496

Black Industries, Inc. v. Bush, pp. 496-498

Note (1), pp. 498-499

H. EXCULPATION CLAUSES IN ADHESION CONTRACTS

Text, pp. 501-502

Restatement §§ 178, 206, 208, 211

Note (3), pp. 507-508

[Galligan v. Arovitch]

Text, pp. 510-512
[Klar v. H & M Parcel Room]
O'Callaghan v. Waller & Beckwith, pp. 503-507
Note (2), p. 507
Henningsen v. Bloomfield Motors, pp. 482-485
U.C.C. § 2-302(1) & cmt. 1, supp. pp. 38-39
Video Review Lecture # 4 (on class portal)

V. REMEDIES FOR BREACH

A. EXPECTATION, RELIANCE, AND RESTITUTION INTERESTS

Restatement §§ 344, 346, 347, 349, 359, 364, 371

Text, pp. 639-642

Text, pp. 14-15

Sullivan v. O'Connor, pp. 15-20

Note (1), p. 20

B. EXPECTATION DAMAGES AND INCENTIVES ("EFFICIENT BREACH")

Text, p. 21-23

Syllabus Appendix No. 9

Note (2), p. 24

C. LIMITATIONS ON DAMAGES

1. Avoidability

Restatement § 350

Text, pp. 674-675

Rockingham v. Luten Bridge, pp. 675-676

Text, pp. 682-683

Parker v. Twentieth Century-Fox, pp. 683-686

2. Incomplete or Defective Performance

Restatement § 348(2)

Text, p. 661

Jacob & Youngs v. Kent, pp. 661-662

Notes (1) & (3), pp. 662-664

Groves v. John Wunder Co., pp. 666-670

Note (1), pp. 670-671

Problem, p. 671

Peevyhouse v. Garland Coal, pp. 671-673

3. Unforeseeability

Restatement § 351

Text, p. 687

Hadley v. Baxendale, pp. 688-690

4. Uncertainty

Restatement §§ 346(2), 348(3), 349, 352

Text, pp. 703-704

Note (2), p. 704

[Collatz v. Fox Wisconsin Amusement Corp.]

Note (2), p. 27

Fera v. Village Plaza, Inc., pp. 705-708

Note (1), p. 708

D. LIQUIDATED DAMAGES AND PENALTIES

Text, pp. 709-710

Restatement § 356(1)

Dave Gustafson & Co. v. State, pp. 710-711

Problem (2), pp. 711-712

Video Review Lecture # 5 (on class portal)

APPENDIX No. 1 : Commentary on Consideration Issues

Part 1: Commentary on Kirksey v. Kirksey

"It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration. . . . In case of doubt, where the promisee has incurred a detriment on the faith of the promise, courts will naturally be loath to regard the promise as a mere gratuity, and the detriment incurred as a mere condition. But in some cases it is so clear that a conditional gift was intended that even if the promisee incurred detriment, the promise has been held unenforceable." 1 Samuel Williston, Contracts § 112 (1924).

Part 2: Commentary on Lake Land Employment Group v. Columber

Lake Land Employment Group v. Columber is an example of a case that does not follow the bargain theory of consideration. Professor Richard A. Lord has criticized the reasoning of the decision, but not its result. He writes: "It would be better for the courts to forthrightly acknowledge that they are holding the employee to his or her restrictive covenant despite the absence of consideration, on the policy ground that the employer has a reasonable expectation that its secrets and competitive advantages will be respected and preserved. Of course, this makes a restrictive covenant--long said to be a disfavored species of agreement--enforceable without consideration. But this is what the courts are doing, and they might as well be honest about it. . . . [Lake Land Employment Group v. Columber] held that the employer's forbearance from firing an at-will employee constituted consideration sufficient to enforce the restriction despite the fact that the employer's forbearance was, by its nature, illusory. . . . This is not to say that such agreements ought not to be enforced. In most of the cases where the courts do enforce such agreements, the employees engage in patently bad faith conduct--stealing customer lists, pirating trade or secret information, contacting customers prior to departure, and so forth--and deserve to be held to their covenants. However, there is simply no consideration, at least in the traditional bargained-for benefit or detriment sense, for the employee's promise. Nevertheless, the majority of courts indulge the fiction that consideration is present." Richard A. Lord, The At-will Relationship in the 21st Century: a Consideration of Consideration, 58 Baylor L. Rev. 707, 766-67 (2006). Must the Ohio Supreme Court follow the bargain theory of consideration?

APPENDIX No. 1 : Commentary on Consideration Issues (cont.)

Part 3: Commentary on Ricketts v. Scothorn

"These decisions [i.e., decisions like Ricketts v. Scothorn] . . . involved far more than the usual application of 'equitable estoppel.' That concept applied to a representation of fact made by one party and relied on by the other. The estopped party was precluded from alleging or proving facts that contradicted its representation. But cases like Ricketts involved a promise, not a representation of fact. The promisor was 'estopped' to raise the defense of lack of consideration in his promise. This type of estoppel came to be known as 'promissory estoppel.' . . . In 1933, on the authority of cases such as these, the American Law Institute promulgated § 90 of the Restatement of Contracts, which was destined to become its most notable and influential rule." E. Allan Farnsworth, Contracts 92-93 (4th ed. 2004) (footnotes omitted).

Part 4: Commentary on Allegheny College v. National Chautauqua County Bank:

a. "The Chief Judge finds in the expression, 'In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund,' an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a 'gift' by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. . . . To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration." 159 N.E. 173, 177 (N.Y. 1927) (Kellogg, J., dissenting).

b. "The decision pushed the doctrine of consideration to its limit. It is difficult to imagine what opportunity the college had lost by making its deal with Mary, but courts are not in the habit of inquiring closely into such matters. One wonders if in all the years that students have dutifully studied this case, there has never been one that asked, 'Surely Judge Cardozo, you cannot be serious!'" E. Allan Farnsworth, Promises to Make Gifts, 43 Am. J. Comp. L. 359, 366 (1995).

APPENDIX No. 2 : Equitable Estoppel and Promissory Estoppel

Black's Law Dictionary (7th ed. 2001) defines "equitable estoppel" as follows:

equitable estoppel. A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. . . . -- Also termed *estoppel by conduct*; *estoppel in pais*.

The Restatement (Second) of the Law of Torts § 894 gives the following illustration of equitable estoppel:

A owns Blackacre. By a mistake in a survey he fails to include within his fence a small field that he erroneously believes to belong to his neighbor B. B, who is uncertain of his boundaries, asks A whether the field belongs to A. In mistaken reliance upon the survey, A replies that it does not. Relying upon this statement, B cuts and disposes of the trees upon it. B is not liable to A for these acts

* * *

Black's Law Dictionary defines "promissory estoppel" as follows:

promissory estoppel. The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. . . .

The Restatement (Second) of the Law of Contracts § 90 gives the following illustration of promissory estoppel:

A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed.

APPENDIX No. 3 : The Law of Restitution

An alternative to contract liability is liability for unjust enrichment under the law of restitution. The following excerpts come from the Restatement of the Law of Restitution (1937):

GENERAL PRINCIPLE OF LIABILITY FOR UNJUST ENRICHMENT

§ 1. Unjust Enrichment

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

EXAMPLE OF LIABILITY FOR UNJUST ENRICHMENT

§ 22. Mistake As To Payee

A person who has paid money to or for the account of another not intended by him, is entitled to restitution from the payee or from the beneficiary of the payment

* * *

Illustrations:

* * *

2. A owes John P. Adams \$100. Desiring to pay the bill, A looks in the directory to find Adams' address and mails a check to the address of the John P. Adams whose name appears in the directory, but who is not the Adams intended. This Adams appropriates and cashes the check, believing it to be on account of a transaction which he has forgotten. A is entitled to restitution from the recipient.

COMMON INSTANCES IN WHICH THERE IS NO UNJUST ENRICHMENT

§ 2 Officious Conferring of a Benefit

A person who officiously* confers a benefit upon another is not entitled to restitution therefor.

*The word "officious" is defined as "volunteering one's services where they are neither asked nor needed: MEDDLESOME." Merriam-Webster Online Dictionary (2006).

APPENDIX No. 3 : The Law of Restitution (cont.)

§ 57 Gifts Made in Anticipation of Gratuity or Contract

A person who has conferred a benefit upon another, manifesting that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that the other will make a gift to him or enter into a contract with him is not realized.

§ 110 Restitution From Beneficiary of a Contract with Third Person Who Has Failed to Perform

A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.

EXCEPTION TO LIABILITY

§ 69. Change Of Circumstances

(1) The right of a person to restitution from another because of a benefit received because of mistake is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution. . . .

AMOUNT OF LIABILITY

§ 155. [Measure of Recovery by a Non-Tortious Recipient]

(1) Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, limited, if the recipient was not at fault or was no more at fault than the claimant, to its value in advancing the purposes of the recipient

* * *

Comment:

d. * * * Where the services of a physician have been rendered to an unconscious person in an emergency it is assumed that, if properly rendered, the one receiving them benefits by having had a better chance of recovery although in fact no recovery is effected.

APPENDIX No. 4 : The Mirror Image Rule

On pages 194-195, the casebook cites Minneapolis & St. Louis Railway Co. v. Columbus Rolling-Mill Co., 119 U.S. 149 (1886). The Supreme Court stated the facts of this case as follows:

This was an action by a railroad corporation established at Minneapolis, in the state of Minnesota, against a manufacturing corporation established at Columbus, in the state of Ohio. The petition alleged that . . . the parties made a contract by which the plaintiff agreed to buy of the defendant, and the defendant sold to the plaintiff, 2,000 tons of iron rails, of the weight of 50 pounds per yard, at the price of \$54 per ton gross, to be delivered free on board cars at the defendant's rolling-mill in the month of March, 1880, and to be paid for by the plaintiff in cash when so delivered. . . . It was admitted at the trial that the following letters and telegrams were sent at their dates, and were received in due course, by the parties, through their agents:

December 5, 1879. Letter from plaintiff to defendant: "Please quote me prices for 500 to 3,000 tons 50-lb. steel rails, and for 2,000 to 5,000 tons 50-lb. iron rails, March, 1880, delivery."

December 8, 1879. Letter from defendant to plaintiff: "Your favor of the fifth inst. at hand. We do not make steel rails. For iron rails, we will sell 2,000 to 5,000 tons of 50-lb. rails for fifty-four (\$54) dollars per gross ton, for spot cash, F. O. B. cars at our mill, March delivery If our offer is accepted, shall expect to be notified of same prior to December 20, 1879."

December 16, 1879. Telegram from plaintiff to defendant: "Please enter our order for twelve hundred tons rails, March delivery, as per your favor of the eighth. Please reply."

December 18, 1879. Telegram from defendant to plaintiff, received same day: "We cannot book your order at present at that price."

December 19, 1879. Telegram from plaintiff to defendant: "Please enter an order for two thousand tons rails as per your letter of the sixth. Please forward written contract. Reply." The word "sixth" was admitted to be a mistake for "eighth."

December 22, 1879. Telegram from plaintiff to defendant: "Did you enter my order for two thousand

tons rails, as per my telegram of December 19th?
Answer."

After repeated similar inquiries by the plaintiff,
the defendant, on January 19, 1880, denied the
existence of any contract between the parties.

Question: Was there a completed offer and acceptance?

APPENDIX No. 5 : Understanding The Statute of Frauds

Part 1: The Marriage Provision

Restatement (Second) of the Law of Contracts § 124. Contract Made Upon Consideration of Marriage

A promise for which all or part of the consideration is either marriage or a promise to marry is within the Statute of Frauds, except in the case of an agreement which consists only of mutual promises of two persons to marry each other.

Comment:

a. Engagement to marry. Mutual promises to marry were within the words of the English statute, but were not within the statutory purpose and were soon excluded by judicial interpretation. A number of American statutes explicitly except such promises from the marriage provision. They may, however, fall within the one-year provision. Statutes in many states bar actions for breach of a promise to marry.

Illustrations:

* * *

4. In consideration of A's marrying B, C orally promises A a settlement.* C's promise is within the Statute of Frauds.

Part 2: The One-Year Provision

Restatement (Second) of the Law of Contracts § 130. Contract Not To Be Performed Within A Year

(1) Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.

(2) When one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of other parties.

Comment:

* In this context, the term "settlement" means a "conveyance of property . . . to provide for one or more beneficiaries, usu. members of the settlor's family, in a way that differs from what the beneficiaries would receive as heirs under the statutes of descent." Black's Law Dictionary (10th ed. 2014).

APPENDIX No. 5 (continued)

* * *

b. Discharge within a year. Any contract may be discharged by a subsequent agreement of the parties, and performance of many contracts may be excused by supervening events or by the exercise of a power to cancel granted by the contract. The possibility that such a discharge or excuse may occur within a year is not a possibility that the contract will be "performed" within a year. This is so even though the excuse is articulated in the agreement. This distinction between performance and excuse for nonperformance is sometimes tenuous; it depends on the terms and the circumstances, particularly on whether the essential purposes of the parties will be attained. Discharge by death of the promisor may be the equivalent of performance in case of a promise to forbear, such as a contract not to compete.

These rules often produce counter-intuitive results. Based on these rules, which of the following promises are "within" the statute of frauds and therefore not enforceable unless evidenced by a signed writing? Circle the correct answer.

1. a promise to do something for six months: YES / NO
2. a promise to do something for four years: YES / NO
3. a promise to do something for exactly one year: YES / NO
4. a promise to do something for life: YES / NO
5. a promise to pay money over a multi-year period: YES / NO
6. a promise that can be completed in less than one year which is exchanged for a promise that must take more than one year to complete: YES / NO
7. a promise that must take more than one year to complete which was exchanged for a promise or performance that has now been completed: YES / NO
8. a promise that realistically will take more than one year to complete but that the contract does not prohibit completing in less than one year (see C.R. Klewin v. Flagship Properties): YES / NO
9. a promise that could be discharged or excused in less than a year but that could not be fully performed in one year (see comment b. above and text, pp. 288-289): YES / NO

APPENDIX No. 5 (continued)

Part 3: The Part Performance Doctrine

Restatement (Second) of the Law of Contracts § 129 Action in Reliance; Specific Performance

* * *

Comment:

a. Historical note and modern justifications. This Section restates what is widely known as the "part performance doctrine." Part performance is not an accurate designation of such acts as taking possession and making improvements when the contract does not provide for such acts, but such acts regularly bring the doctrine into play. The doctrine is contrary to the words of the Statute of Frauds, but it was established by English courts of equity soon after the enactment of the Statute. . . . Enforcement has . . . been justified on the ground that repudiation after "part performance" amounts to a "virtual fraud." A more accurate statement is that courts with equitable powers are vested by tradition with what in substance is a dispensing power based on the promisee's reliance, a discretion to be exercised with caution in the light of all the circumstances. Compare § 90.

APPENDIX No. 6 : Voidable Contracts of Infants

Restatement (Second) of the Law of Contracts § 7

* * *

Comment:

b. Grounds of avoidance. Typical instances of voidable contracts are those where one party was an infant, or where the contract was induced by fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract.

* * *

c. Consequences of avoidance.

* * *

In many cases the power of avoidance exists only if the original situation of the parties can be and is restored at least substantially; but this is not necessarily the case. An infant, for instance, in many jurisdictions is allowed to avoid his contract without this qualification, so that when the infant exercises his power the parties frequently are left in a very different situation from that which existed when the contract was made.

Restatement of the Law of Restitution § 62

Comment:

b. * * * [A]n infant to whom a person has transferred a non-necessary in the course of a contract is not under a duty of restitution to the transferor upon failure to pay for it, if the subject matter or its product is not available at the time when restitution is sought.

* * *

Illustrations:

1. A sells to B, [an infant], an automobile which B uses advantageously in his business but which is destroyed in use. A is not entitled to restitution from B although B fails to pay for the car.

APPENDIX No. 7 : Liability of Infants in Tort

Restatement (Second) of the Law of Torts § 895I

One who is an infant is not immune from tort liability solely for that reason

Comment:

a. For the protection of infants against their inexperience and the undue advantage that might otherwise be taken of them, the law gives them the power of disaffirming their contracts and conveyances, except to the extent that they will be liable for the reasonable value of necessaries furnished to them. So far as their liability in tort is concerned, however, infants are given no similar immunity. As a general rule, infants are subject to liability for their torts, whether they are committed intentionally or negligently or as a matter of strict liability. Thus there may be recovery from an infant for assault or battery, false imprisonment, trespass to land or chattels, conversion, negligence, defamation, seduction or deceit.

b. The immaturity of the infant is, however, to be taken into consideration in determining, in the first instance, whether the tort has been committed at all. In intentional torts, the state of mind of the actor is an essential element. For example, an intent to bring about a harmful or offensive physical contact is essential to battery (see § 16), and knowledge of the falsity of a statement and an intent to deceive may be required for deceit. (See Chapter 22). A child may be of such tender years that he has no awareness of these matters and is in fact incapable of the specific intent that is required. It may thus be found that the tort has not been committed and the event should be treated as an unavoidable accident.

APPENDIX No. 8 : Public Policy Examples

Restatement (Second) of the Law of Contracts § 189

A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of marriage.

* * *

Illustrations:

1. A pays B, his twenty-one-year-old child, \$100,000 in return for B's promise not to marry for ten years. B's promise is unreasonably in restraint of marriage and is unenforceable on grounds of public policy.

Restatement (Second) of the Law of Contracts § 192

A promise to commit a tort or to induce the commission of a tort is unenforceable on grounds of public policy.

* * *

Illustrations:

* * *

2. A makes an agreement with B under which A promises that he will excavate a city street without permission from the city. A's promise is to interfere tortiously with an interest in property of the city and is unenforceable on grounds of public policy.

APPENDIX No. 9 : More on Efficient Breach

Note (2) on page 24 refers to the case of United States Naval Institute v. Charter Communications, 936 F.2d 692 (2d Cir. 1991). The case concerned a best selling novel called The Hunt for Red October. The author of the book, Tom Clancy, sold the copyright to a private publisher called the United States Naval Institute. The United States Naval Institute published the first edition of the book in hardcover, and sold the right to publish subsequent paperback editions to the Berkley Publishing Group. Because the United States Naval Institute was worried that paperback sales would cause a decrease in hardcover sales, it made Berkley promise that it would not publish the paperback version before October 1, 1985. But Berkley broke this promise and began selling the paperback version on September 15, 1985.

Using the hypothetical figures given in note (2) on page 24, determine the damages Berkley would have to pay the United States Naval Institute. If Berkley knew that it would have to pay damages for breaching the contract, why did it breach the contract? Were the damages too small to discourage the breach? If the United States Naval Institute receives these damages, will it be put in the same position it would have been if Berkley had not breached? Is this a case of efficient breach?

APPENDIX No. 10 : Errata

Correction for Dyer v. Nat'l By-Products

Replace the fourth paragraph of case (which repeats most of the third paragraph) with the following paragraph:

Following extensive discovery procedures, the employer filed a motion for summary judgment claiming there was no genuine factual issue and that it was entitled to judgment as a matter of law. The motion was resisted by Dyer.

Correction for Monarco v. Lo Greco

In the last paragraph on page 323, the editors have added bracketed text suggesting that the promise at issue fell within the "lifetime clause" of the statute of frauds in a former version of California Civil Code § 1624(5). A lower court opinion in the case, however, indicates that the promise actually fell within § 1624(6) of this statute of frauds, which covered "an agreement . . . to devise or bequeath any property, or to make any provision for any person by will." See Monarco v. Lo Greco, 211 P.2d 361, 263 (Cal. App. 1949).

APPENDIX No. 11 : Learning Outcomes

This appendix identifies the "learning outcomes" for this course in accordance with ABA Accreditation Standards 301 and 302 and the "Guidance" to these Standards.

(a) Knowledge and understanding of substantive and procedural law

Upon completing Contracts I, students should know and understand the law pertaining to:

1. bases for enforcing promises (i.e., consideration, reliance, and special cases of moral obligation) and restitution as an alternative theory of recovery;
2. the formation of bargains (i.e., offer, acceptance, and definiteness),
3. typical statute of frauds provisions (e.g., the marriage, year, land, executor, goods, and suretyship clauses) and their exceptions;
4. policing the bargaining process (i.e., infancy, mental capacity, mistake, misrepresentation, undue influence, duress, public policy, unconscionability, and construction of terms against the drafter); and
5. enforcing contracts by specific performance and damages (including expectation, reliance, restitution, nominal, and liquidated damages)

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context

When assigned to read a contracts case, students should be able to:

1. identify and discuss the facts, the plaintiff's claim, the defendant's defense, the remedies sought, the pertinent legal rules, the issue for decision under these rules, the arguments of the parties, and the holding and reasoning of the court;
2. apply the holding to hypothetical variations of the facts;
3. discuss the logical strengths and weaknesses of the parties' arguments and the court's reasoning; and
4. identify and analyze competing policy considerations about what the law should be.

When given a hypothetical problem, students should be able to identify and discuss any claims and defenses that the parties

might assert and any remedies that they might seek.

Students should be able to identify ambiguities in contractual terms and propose alternative ways to draft the terms.

Students should be able to parse and explain statutory provisions, identify ambiguities in statutory provisions, and suggest improved ways of drafting statutory provisions.

Students should be familiar with the history of the courts of law and courts of equity, the common law method, and the relationship of statutes to the common law.

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system

Students should be able to evaluate the legal advice that was given in actual cases, suggest what would have been better legal advice, and formulate advice that should be given in the future in similar caeses.

Students should be able to identify and discuss ethical issues that arise in willfully breaking promises, in raising technical defenses to avoid liability, and in giving legal advice that might encourage perjury.

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession (including, but not limited to, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation)

Students should be able to present arguments as if they were representing clients in contract disputes.

Students should be able to discuss controversial legal and policy issues in a professional and respectful manner.

Students should understand the role of lawyers in advising clients as they enter into contractual arrangements and resolve or litigate disputes.

Students should understand the basic structure of common contractual transactions familiar to all competent lawyers, including those involving general contractors and subcontractors; franchise agreements; employment at will; contracts to sell real estate; insurance; and so forth.