Class Times and Office Hours

The class meets on Wednesdays from 3:00 to 4:10 p.m., and on Thursdays and Fridays from 10:30 to 11:40 p.m. in BLB Room 240. My office is Room 214 in the TUII second floor faculty suite, and my office hours will be from 2:00 to 2:45 p.m. on Wednesdays and 2:00 to 3:00 p.m. on Thursdays, though since I sometimes wander, it’s probably good to call and tell me you’re coming. My phone number is (713) 743-2176; our suite secretary Rose Verde’s number is (713) 743-2169. My e-mail UDP is Plinzer@uh.edu.

About the Reading Assignments

The books in the course are:


Steven Burton and Melvin A. Eisenberg, Contract Law: Selected Source Material 2006 (Thomson/West) (“Supp.”) (make sure you have the 2006 edition); and


Please brief all principal cases (i.e., cases that aren’t note cases), beginning with the case’s procedure, and read the note cases closely and carefully.

Use the Supplement to read the full text and any Comments whenever there is a reference to a section of the Restatement Second of Contracts (“Restatement Second” or if I get particularly hip, “R2K”); the Uniform Commercial Code (“UCC”); the proposed revisions of the Code, especially Articles 1 and 2 (“Rev. UCC”); recent statutes or proposed statutes on e-commerce (UETA, E-SIGN, UCITA) or various transnational authorities like the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) or the UNIDROIT Principles of International Commercial Contracts. (I will try to steer you, but it is your responsibility to find the text of the section in question.)

With respect to the Anthology, since I wrote it, I naturally think it’s important. I do, of course, understand that your time is a very scarce resource. I will give references that indicate how imperative it is that you read the article cited. “Read” or “Required” means that the
assignment is mandatory, and will be part of the class discussion. “Recommended but not required” means that you don’t have to read it, but that I would like you to. “Available, but not required” means that it’s purely your call.

From the Readings to the Classroom to the Practice of Contract Law

Contracts was for generations a six credit, two term course. The modern approach is to reduce it to a one term, four credit course, a change that most contract teachers dislike, but that the Law Center adopted about four years ago, and that we are stuck with. The advantage is that you get an elective in the spring term. The disadvantage is two-fold: first, we have to skip some topics or do them superficially; the second is that we don’t have the time to delve quite as deeply into the topics we do cover. That is why I don’t require many of the readings in my Contracts Anthology. I do think the great thing about law in general and Contracts in particular, is that it combines serious practical problems with philosophical and political aspects that make it into a humanity as well. It is also on the very cusp of e-commerce, surely the norm of the future, if not of the present. Trying to put all these things together, in a subject that has been in the forefront of law since the eighteenth century and earlier is a daunting job, but also a very exciting and satisfying one.

I will try to put in some comments either to help you understand some confusing matter or as background or to give you something to think about before we discuss it in class. While I won’t always discuss the questions I put forth, they are there to give you a chance to ponder them rather than giving a glib answer on the fly, so I will expect thoughtful responses in class.

Many contracts teachers – and most contract lawyers – are disturbed by the fact that the traditional course relies on appellate decisions in disputes, either over breaches of contract, over whether a contract was formed or over interpretation or excuse about matters left unclear in the document. In short, virtually every case in the casebook involves a busted deal. But real contracts lawyers (i.e., those who do transactions for a living) want to avoid litigation at all costs. They brag if they have never had a contract end up in court. They spend their time planning, negotiating, drafting, revising, modifying and administering contracts. I am going to make efforts to introduce you to the transactional side of contracts. It is important to know the law governing contracts, and for that the cases are appropriate, but there is a whole world of transactional contract law that most decidedly builds upon the law, but operates prospectively to create new exchanges that if done well, do not end up in contracts casebooks.

The Assignments

Wednesday, August 23, 2006: Lawyering Perspectives; What the Course Is About; Subjective and Objective Approaches to Contracts. KC&P xxi-xxiv, 1-15, 21-36; Anthology xvii-xviii, 1-3; Supp., Editors’ Introduction and Table of Contents.

William L. Prosser, a great figure in torts and Dean of Boult Hall School of Law at the
University of California, Berkeley, once said that the trouble with law students is that they only want one damn thing – to become lawyers. Those of us who teach you generally decided that we’d rather be teachers and thinkers about law than lawyers, so there are some who say that we are the worst people to teach you to be lawyers. But I remember when my dad asked one of my teachers why he went into teaching. The professor’s answer was that he didn’t have enough time to think about law when he was in practice. This professor was no ivory tower type. He was later described by a major Wall Street litigator as the best expert witness the lawyer had ever seen, and wrote a treatise that is widely used by practitioners. The point, I think, is that it’s important to know more than the rules; if rules were all that was involved, paralegals (or computers) could practice law. (It would be like a slot machine: three bells and plaintiff wins; three lemons and defendant wins.) While there certainly are clear rules, much of the practice of law involves compromise and nuance.

Today’s reading is an attempt to open to you the background of law and law practice: where law comes from; why rules are the way they are; how lawyers apply them and why.

**Thursday, August 24, 2006:** How to Brief a Case. Why Are Contracts Enforced?
Intention to Be Bound: KC&P 25-40; Anthology 16-17 (Arthur Corbin’s list of “Interpretation. Some general statements.”).

**How to brief a case**

Law students learn how to brief a case, that is, to prepare an abstract of it. A brief is not substitute for the opinion itself, but it can be a great help a) to understand the case; b) to enable you to “state the case” in class; and c) to help you to review for exams. Upper-class students get lazy and will tell you not to bother. Take it on faith that I can tell if you’ve briefed the case while I have my back turned. It will take you a long time at first, but you’ll also learn the case much better by **writing out your brief**. Do it as follows:

**First:** write the name of the case (in Texas we call it “the style of the case”), the court and date, and preferably the citation. (In *Ray v. William G. Eurice & Bros., Inc.* the first citation is the official report, volume 201 of the Maryland Reports, beginning at page 115. The second citation (the “parallel cite”) is the regional reporter published by the West Publishing Company, now part of Thomson/West, volume 93 of the Atlantic Reports, Second Series, beginning at page 272.) Many states no longer have official reports; in Texas we just cite the Southwestern Reporter, Third Series; if the Texas Supreme Court is involved, we follow the citation with “(Tex. 2006)” or whatever. If the Court of Appeals is involved, we cite it as“(Tex. Ct. App. – Fort Worth 2006)” and tell whether a petition to the Supreme Court followed. You’ll get more of this in Legal Research and Writing.

**Second:** Write out the procedure. Who is suing whom, for what? How did the case get started? What did the lower court do? Why is the case on appeal? (Understand that how the case got to the appellate court affects the standard it uses to review the decision below. An
appeal from a jury verdict is very deferential to the jury’s findings; an appeal from a grant of summary judgment or a motion to dismiss for failure to state a cause of action will be less deferential, since the losing party was deprived of its right to get to a jury.)

Third: State the facts. Put in only the relevant facts. (Was it important that Mrs. Ray had to sign the contract separately because she couldn’t get a sitter? Is it important that Mr. Ray was an aeronautical engineer?)

Fourth: State the legal issue. This, turned from question into a declarative sentence, is the rule of law that comes out of the case. While each case doesn’t necessarily produce only one “rule of law,” and while some rules will come from other sources (notes, comments, the Restatements and the Uniform Commercial Code), this part of your briefs will help you to outline the course as it develops.

Fifth: Paraphrase the court’s reasoning. Try to use your own words. Sometimes, quoting the court makes sense, but usually you’d be better putting it into your words.

Sixth: Do the same with any concurrences or dissents.

Seventh: Put in your own comments. Do you agree with the court? Can you justify the decision and reasoning?

Brief every principal case.

With respect to our two principal cases, are the two cases consistent? Explain your answer in detail.

Friday, August 25, 2006: Consideration: KC&P 40-59; Restatement Second § 71 (in Supp.). Available, but not required: Lon L. Fuller’s important and influential article, Consideration and Form, which is briefly excerpted on KC&P 52-53, is reprinted at greater length at Anthology 284-96.

What is consideration? What function does it play in contracts? Why do we require it? In reading and thinking about Hamer v. Sidway, understand that the benefit/detriment theory of consideration is not the dominant theory. Today, it almost is an idiosyncrasy of New York State law, though it still is used in England. How does ben/detr. differ from the “bargained for and given in exchange” approach of Restatement Second § 71? (This section, then numbered § 75, was the keystone of the First Restatement, but couldn’t even keep its number in the Second.) One additional confusion is the fact that Hamer in fact is a perfect bargain and exchange, though some of the cases it cites (particularly Shadwell v. Shadwell) are not. Would the benefit/detriment approach have saved the promise in either Baehr v. Penn-O-Tex or Dougherty v. Salt? Explain your analysis.

Wednesday, August 30, 2006: More on Bargain; Gratuitous or Donative Promises:

Why should Mrs. Batsakis have to pay so much for the drachmas? (There is considerable dispute about exactly how many drachmas an American dollar would buy in Athens while it was occupied by the Nazis? Can you see why? There is also dispute about how much the 500,000 drachmas would have bought. It appears that it would have provided a few days’ worth of food, more than a single meal, but not a great deal more.)

Why don’t we enforce promises of gifts? Note that no lawyers were involved in any of our principal cases, Plowman, Kirksey or Greiner. (A fair amount of research has been done on Kirksey and it shows to my satisfaction that the brother-in-law wasn’t hitting on Sister Antillico, and that her name wasn’t even Antillico. Does any of that mean she shouldn’t have won? Can she win on a bargain theory? Explain in detail. If not, what is the difference with a reliance theory?

It’s generally agreed that a lawyer can almost always structure a promise of a gift in a way to satisfy the consideration requirement without materially increasing the promisee’s obligations. This raises a question whether the requirement of consideration for donative promises is just a trap for the unwary and those too poor to have a family lawyer around to structure gifts. While this may be a strong argument for changing the law, the Transactional Problem, below, gives you an opportunity to structure a transaction in light of the existing law.

**Transactional Problem**

You are consulted by the workers in Plowman v. Indian Ref. Co., KC&P 64, to write up the company’s promise (as the workers described it in the second paragraph of the case) so as to make it binding. Write out a short contract (one or two sentences should suffice) in the basic form of “In exchange for ____________ by the employee, the Indian Refining Company agrees to ________________ [pick up the substantive promise allegedly made from the cited paragraph].” Be prepared to read your draft in class.

**Thursday, August 31, 2006:** Charitable Subscriptions. KC&P 85-100 (skip Problem 2-1); read Anthology 219-35.

First read quickly through Cardozo’s famous opinion in The Alleghany College Case, KC&P 86, and then read it again, slowly, using Professor Alfred Konefsky’s paragraph by paragraph guide to it, Anthology 219. Note Cardozo’s use of Hamer v. Sidway and his playing with the differences between benefit/detriment and bargain and exchange. As noted almost everywhere, Cardozo’s opinion is viewed as a very important way-station on the road to the wide-spread use of reliance or promissory estoppel, even though the case does not so hold. We will go through King v. Trustees of Boston University rather more quickly.
Friday, September 1, 2006: Promissory Estoppel in Commercial Contexts; Restitution. KC&P 101-16; Read Anthology 338-49 (American Law Institute debate on Section 90 (then § 88); Available but not required: Anthology 349-83 (several good articles exploring and debating aspects of reliance and promissory estoppel – feel free to browse, based on the introductory notes).

We begin with several cases involving the use of reliance in non-family, non-charitable contexts. Then, we read Williston’s spirited defense of Section 90 at the ALI Meeting in 1926. Except that it is not quite as formal and that there are more members today, the ALI Meeting this year (some eighty years later) will not be terribly different in the care and intensity of the discussion of proposed Restatement texts than the one we read from. In a 1961 letter to Judge Robert Braucher, the first Reporter of the Second Restatement, Corbin said that Williston “often said that § 90 was my Section, but the fact is that it is now in exactly the form in which he first submitted it. Every other adviser opposed it; but we bludgeoned them until they seemed to be convinced.” (Corbin’s wonderful letters to Braucher about the Restatement (and the 1964 presidential election), written when he was between 85 and 91, are reprinted in the Anthology on pp. 13-20. They are well worth reading, either now or later in the term, but are not required.)


Restitution. Restitution is an interesting and increasingly important amalgam of concepts in which liability is based, not on a promise or a tort, but on the idea that the defendant should not be allowed to be “unjustly enriched.” In Credit Bureau v. Pelo, why should Mr. Pelo, who was mentally ill, have to pay? Is his liability based on contract? If not, what is it based on? Dean Wade’s classic article, summarized in the casebook, is printed out in the Anthology, if you feel like reading it.

Implied-in-fact contracts. It is important to understand both that there is a clear conceptual difference between an implied-in-fact contract and restitution, which used to be called a contract implied in law, but also that a given fact situation may support either or both characterizations. An implied-in-fact contract is as much of a contract as an express one, except that it is non-verbal. (I have a charge account at a grocery store in West U. I stop in and pick out an apple, but the line is fairly long and I know the clerk. I catch his eye, point to the apple, make a scribbling gesture and walk out with the apple. The clerk makes no effort to stop me, but doesn’t actually say anything or even nod. Is it not clear that I have promised to pay for the apple if they put it on my account and that they have implicitly given me permission to walk out with the apple?) Thus, an implied-in-fact contract is based on assent, though not expressly stated.
On the other hand, restitution (also known as quantum meruit, quasi-contract, unjust enrichment and several other things) is based, not on assent, but on the law’s desire to prevent unjust enrichment. (In my apple scenario, if I had just walked out with the apple, the store would have been entitled to restitution for the value of the apple. It could probably have also recovered in tort for conversion, and had me prosecuted for petty larceny.) Restitution can even be imposed when the defendant has expressly refused to pay for something. Imagine that your neighbor throws his eight-year old out of the house, and when you complain, says “If you take him in, don’t expect me to pay for anything.” In fact, if you provide the boy’s “necessaries” (among them, food and lodging) you can recover them from his father in restitution despite his advance refusal to pay.)

In Watts v. Watts, written by one of America’s best judges, Wisconsin’s Shirley Abrahamson, the court discusses both an implied-in-fact contract approach and recovery based on unjust enrichment. Note that while it is imperative that you understand the difference between the approaches (as Judge Abrahamson clearly does), it is also clear that they often overlap, with courts finding that the parties probably intended to do (implied-in-fact contract) what they should have done in good conscience (restitution). Watts also leads us into the thicket of cohabitation agreements outside of marriage. Texas permits a cohabitation contract, but requires that it be in writing. Should this bar the courts from enforcing restitution claims? What about finding implied-in-fact contracts?

Thursday, September 7, 2006: Promises for benefits previously conferred. KC&P 146-160. Restatement Second §§ 82, 83 and 85. We will do Problem 2-2 in class.

Why is past consideration not good enough? Mills v. Wyman, 180 years old, states the law of its time, including its attempt to make the exceptions seem consistent with the basic rule. On these exceptions, see the relevant Restatement Second sections in the Supplement. Can Webb v. McGowin be reconciled with Mills? Do you see how restitution is lurking in the background? The exchange between Lon Fuller and Judge Posner on pp. 156-67 is from articles that are in the Anthology and were previously not required. They still aren’t, but they are useful.

Then do Problem 2-2.


As the Anthology explains, Wesley Hohfeld was a brilliant legal philosopher who wrote stuff that is somewhere between hard to read and almost unintelligible. Arthur Corbin, however, found his system very valuable, and after Hohfeld’s early death in the Spanish Flu pandemic, wrote a short article, cited in the Anthology note, that made Hohfeld accessible. The note on pages 271-72, explains the system. We will discuss it in class, because it is quite useful in contract analysis, especially the offer-acceptance process. Corbin used it in his classic 1917
article, Offer and Acceptance, and Some of the Resulting Legal Relations, which is required.

What is wrong in Lonergan v. Scolnick? Can the mailbox rule be justified, other than in purely historical terms? In Izadi v. Machado (Gus) Ford, Inc. the last full sentence on page 168 is misleading. What the court is trying to say in its convoluted way is that the “usual rule” is that advertisements are not offers, but that, based on the pleadings, this case is like others in which the usual rule should not be followed. Assuming that the advertisement is an offer, why is the small print not part of the offer? What is the second contract ground about? Note also the statutory deceptive trade practices ground. (The Texas DTPA is an important weapon for consumers, though it has been watered down over the years. Our own Professor Richard Alderman is probably the leading authority on it.)

Wednesday, September 13, 2006: Bilateral and Unilateral Contracts; Reliance in Commercial Transactions, KC&P 177-99. Restatement Second §§ 45, 90. Review Corbin’s description of the unilateral contract issue in the article in the Anthology assigned for the last class.

What is the difference between a bilateral contract and a unilateral one? Professor Maurice Wormser’s famous Brooklyn Bridge Hypothetical is a classic of classical contract ideology, as the editors’ rather tongue-in-cheek comments following it show. It is illustrated by Petterson v. Pattberg. (By the way, what should Petterson have done when “the defendant demanded the name of his caller”?) What is the response to the majority of Judge Irving Lehman, the distinguished judge who succeeded Cardozo as Chief Judge of the New York Court of Appeals? (Note that Cardozo joined the majority.) What is Corbin’s analysis, in his article in the Anthology? What is the solution of Section 45 of the First Restatement (KC&P 183)? A certain amount of effort was made to keep the numbers 45 and 90 for those sections when the Second Restatement was written, while no effort was made to keep Section 75’s number constant. Does that suggest a shift away from strict bargain? Do you see a similarity between Sections 45 and 90? We then look at a real estate brokerage case to see Section 45 in action, and read about the current developments in unilateral contract theory.

We then read a brief note on remedies, which is useful. As the editors point out, there has, since about 1947, been a continuing debate, started by Lon Fuller, whether the course in Contracts should begin with remedies, since the definition of contract is a promise for the breach of which the law gives a remedy. Many of my closest friends among contracts teachers are firm believers in remedies first, and I tried it once, to my disaster and the general annoyance of my students. That experience confirmed my intuition that starting with remedies is confusing to students, creating cognitive dissonance as they are required to discuss remedies for substantive factors that they haven’t yet studied. None of that makes remedies any less important, so it is important that you digest this little note.

One of the great things about law is how the same fact situation can reappear after a generation, with two great judges reaching the opposite conclusions. James Baird Co. v. Gimbel
Bros. is written by the great Learned Hand in 1933, just as the First Restatement is published. Learned Hand was a vice-president of the ALI and took part in the discussion that we read earlier. His ruling that section 90 did not apply to commercial promises was the dominant point of view for twenty-five years, until Justice Roger Traynor wrote Drennan v. Star Paving Co.. How does each judge reason? Is Traynor conscious of Baird? How does he use § 45?

**Thursday, September 14, 2006:** Reliance on Promises That Don’t Become Part of Bargains. KC&P 199-202, 208-19. Do Problem 3-1. Read Anthology 45-53 (note on Macaulay and a later article by him). Several of the articles not required for Friday, September 1, 2006, discuss the matters raised by today’s assignment.

While the Drennan holding has been criticized as giving general contractors too much power over subcontractors, it has carried the day and is by far the dominant rule. We then get a note about business practices and contract law, focusing on the “Wisconsin School” and particularly the famous 1963 American Sociology Rev. article by Stewart Macaulay. Read more about him, and his more recent article, An Empirical View of Contract, in the Anthology.

We then read a recent case applying §90, Pop’s Cones, Inc. v. Resorts International. Pop’s Cones builds on a famous Wisconsin case, Hoffman v. Red Owl Stores, Inc., the facts of which are almost literally tracked in Illustration 10 to Restatement Second § 90, KC&P 212, and which is discussed in Note 2 on page 214. What kind of damages is Pop’s Cones seeking from Resorts International? What would have been its expectation damages? Was there a promise at all? What is the legal effect of the letter that Resorts signed? the court refers to it as “a written offer” but what about the italicized words in the third block quotation on page 210? Did Pop’s accept any offer? If not, what happened to create liability on Resorts’s part? The notes following the case are important and useful.

Then do Problem 3-1.

**Friday, September 15, 2006:** The Battle of the Forms. KC&P 221-23, 229-40, 248-54. UCC 2-207, Rev. UCC 2-202 and 2-207.

The Battle of the Forms. The basic point is this: At common law, if A made an offer (“I’ll sell you 100 widgets for $1000,” and B replied with different or even additional terms (“I accept if you can have them here by March 1”), the response was deemed a “counter-offer” and normally was also considered a rejection of the original offer. As commercial practices developed in the late nineteenth century, however, buyers and sellers frequently had many different deals going on at once, some perhaps with each other, some with third parties. Sellers often got tens or hundreds of purchase orders and buyers often got as many acknowledgements from sellers. Both buyers and sellers put terms on the back of their forms favoring their position. Neither looked at the boilerplate of the other’s form. Since the forms disagreed, at common law there would be no contract at all, and occasionally, this was the court’s decision in Poel v. Brunswick-Balke-Callender Co., KC&P 229. More typically, the court treated the purchase
order as an offer that the seller’s acknowledgment rejected by making a counteroffer. Even though the buyer never formally accepted the counteroffer, the courts often treated its receiving the goods as an acceptance of the counteroffer by performance and an implied promise. (This became known as the last-shot rule.) While I have skipped several of the cases, the notes explain much of the background. It is critical to realize that typically neither buyer nor seller ever looks at the other party’s form, except to check the price, quantity and delivery terms. The boilerplate goes unread, and could not be read regularly, since there is an enormous volume and the people dealing with the forms are not legally trainedm but rather are low-level clerks.

Karl Llewellyn fully understood that there was no assent involved as far as the “non-dickered” terms were concerned. He came up with UCC 2-207, but this is probably the worst-drafted provision in the Code, and to the extent that it requires a party to object to terms, ignores the fact that no one reads the boilerplate. Read UCC 2-207 and its Comments. Then read the casebook’s notes surrounding Brown Machine v. Hercules. What is wrong with 2-207 as written and what have the courts done with it? What do the proposed amendments of Article 2 do?

Do Problem 3-4.

**Wednesday, September 20, 2006:** *Contracts of Adhesion and Electronic Contracting.* KC&P 255-70. Restatement Second § 211(3); Selected Amendments to UCC Article 2–Sales, Note on the Revision of UCC Article 2, Official Comment to Proposed Revised UCC 2-103; UCITA (Uniform Computer Transactions Act) §202, Comment 4; § 209 and Comments; UETA (Uniform Electronic Transactions Act) § 7; E-SIGN (Electronic Signatures in Global and National Commerce Act) § 7001 (all in Supp.).

A form contract that you (typically the consumer) can’t do anything to change is often called a contract of adhesion. They have been used for a very long time, and we couldn’t carry on business without them. (If you wanted to rent an apartment the landlord and you would each have to hire lawyers, which would greatly increase your rent. If you wanted to rent a car, you’d have to negotiate with the clerk at Avis.) Some people say that there is no difference with e-commerce, but it seems to me that with on-line buying and the use of credit cards, many transactions that would have been done with a minimum of paperwork now are subject to elaborate provisions that may appear only on line. A specialized terminology has developed. In the old days (ten or fifteen years ago, maybe less), software came on floppy disks that were sealed in shrink-wrapped plastic, and contained some explanation of terms on the outside with a notice that if the buyer tore the shrinkwrap, he would be deemed to have accepted the terms. Now, whether the buyer buys a tangible disk or downloads software from the Internet, a window appears during the installation process requiring the installer to click on a popup window that says “Yes” to the question “Do you accept the terms of the End User License Agreement [“EULA”] shown below?” If the installer doesn’t click the yes window, he can’t go ahead with the installation. On the analogy of “shrinkwrap,” this process has become known as “clickwrap.” The terms of the EULA are sometimes easily downloadable, sometimes available only on the screen of your computer, and sometimes rather difficult to find and read.
Our two main cases, Hill v. Gateway 2000 and Klocek v. Gateway, actually don’t involve clickwrap. They involve terms that appeared in an owner’s manual packed with a computer days after the buyer purchased the hardware over the telephone and gave his credit card number. In Hill, Judge Frank Easterbrook, a former law and economics law professor at the University of Chicago, relied heavily on his earlier opinion in ProCD v. Zeidenberg. Compare R2K § 211 (3) with the UCITA solution. (Unconscionability, which is a hard standard to meet, is not required in the Restatement Second provision). Note the discussion of “rolling transactions” in Comment 4 to UCITA § 202. Should it be applied in these cases? How should we deal with clickwrap in future e-commerce, especially sales (or licenses) of software sold via the Internet?

The Uniform Commercial Code is a joint venture of the American Law Institute and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). It has been a fabulously successful venture, but as the Code, and particularly Articles 1 and 2, were revised in the 1990s and early 2000s, serious disputes developed between the two organizations. NCCUSL, which is made up of state commissioners appointed by governors or legislatures, seemed more subject to pressure from industry lobbyists and threats to fight the revisions in state legislatures unless pro-consumer items were dropped or diluted. The ALI, which is an elite organization that has been derided as a private legislature, seems much more sensitive to consumer and small business demands that are opposed by industry representatives.

UCITA was originally proposed as a new Article 2B of the UCC. It was written by Dean Ray Nimmer and supported by the leadership of NCCUSL (but derided as the Microsoft Act by its opponents). It was opposed by a coterie of ALI backbenchers (which included me), and the ALI passed a motion disapproving of Article 2B’s’s attitude toward electronic consent. The following year, the ALI pulled out of the co-sponsorship of Article 2B, and NCCUSL proposed the provision as as free-standing proposed uniform law, UCITA, which did not require ALI co-sponsorship. Nonetheless, the ALI later announced its opposition to UCITA as a free-standing proposed uniform law. (UCITA has been passed only in Virginia and Maryland, and has apparently been withdrawn by NCCUSL from further consideration by legislatures.)

An earlier draft of a revision to Article 2 as a whole was pulled off the table by the NCCUSL management when General Motors and General Electric announced that they would oppose the draft in every state legislature. Even when a series of watered-down amendments was proposed, the joint venture seemed on the edge of collapse over whether computer software would be covered by the amended Article 2. (Generally, pro-consumer and pro-small business groups wanted Article 2 to govern software, while the software industry wanted software excluded, which would strengthen the case for UCITA or encourage courts to use its approaches even if it is not enacted by state legislatures.) At the last minute, the leaders of the ALI and NCCUSL agreed on an amendment to the scope section of Revised Article 2 that excluded “information” from the definition of “goods,” but did not define “information,” except to the extent that it is referred to in the Official Comment to Proposed Revised UCC 2-103, which you are asked to read. How does this compromise work?
So far, no state has passed Revised Article 2.

**Thursday, September 21, 2006:** Letters of Intent, Preliminary Agreements and “Agreements to Agree.” KC&P 270-285 n.1. Write out an letter of intent that answers the problems raised by Note 1 on page 285.

As you can see, older cases refused to enforce what they pejoratively called “agreements to agree.” But newer cases do sometimes find that incomplete contracts impose a duty to bargain in good faith upon the parties, even though the parties are not required to reach an agreement. These kinds of documents are often called letters of intent (“LOI”), term sheets, heads of agreement or preliminary agreements. Are they binding? The answer varies and can often be “yes in part, and no in part.” The most critical thing to do when writing an LOI is to make clear whether or not it is binding or whether part is and part is not. Why would the parties in Walker v. Keith want to provide for negotiation of the ten-year extension? Why did the parties in Quake sign the LOI? What do you make of the last sentence of the LOI? Should it make the whole deal unenforceable? How does Justice Stamos differ from the majority? Who is right?

**Friday, September 22, 2006:** Drafting Preliminary Agreements. KC&P 285 n.2 - 293. Do Problems 3-6 and 3-7 (skip Problem 3-8). **Strongly Recommended:** Anthology 304-27 (the Knapp and Farnsworth articles summarized on KC&P 285-87).

Both Justice Stamos and the casebook refer to two excellent articles on the topic, Chuck Knapp’s pioneering 1969 article and Allan Farnsworth’s 1987 one. Both are summarized in the casebook, and both are reprinted at length in the Anthology. Problem 3-6 asks you to analyze an LOI. Do that, using what you learn from the articles, either as summarized or as reprinted.

Problem 3-7 gives you a fact situation in which you can see why the parties need to do something if they are not both to lose a good deal and have to settle for second best. Draft the LOI called for in part (a). Make it fair, so that Marigold will be inclined to sign it, but make it valuable for StepRite. As always, avoid legalese when writing the “Memorandum of Intent.”


Spend a good deal of time carefully reading the text of the various Restatement, statutory and treaty provisions. Then read the casebook, both notes and cases assigned. It is important to understand that the traditional Statute of Frauds is law in every state. But the original Statute of Frauds goes back to 1677, and covers a variety of situations, some of which are anachronistic (the marriage provision), while others, especially the one-year provision, are traps for the unwary, and still others, such as the land sale provision, have picked up a large amount of judge-made exceptions and interpretations over the last three hundred thirty years. In addition, the Statute was written at a time when parties could not testify in their own cases, most people were illiterate and most contracts involved land. For all these reasons, the courts have often treated
the Statute of Frauds as if it were a common law doctrine (though not one that they can abandon, since it is, in fact, a statute). Since they can’t overrule it, but recognize the inequities that it often produces, the courts frequently manipulate the traditional Statute.

On the other hand, the requirement of writing has frequently been expanded, e.g., in New York State, for business brokerage (“finder’s fee”) contracts, and in Texas, for contracts for non-marital cohabitation. Frequently, these modern writing requirements have aspects of consumer protection (or in the case of the Texas provision, public policy), and they are often enforced more rigorously than the older provisions. The original Statute had a separate provision for sales of goods, and UCC 2-201 also has provisions that are different from the other provisions, as listed in R2K § 110. We read two cases, Crabtree v. Elizabeth Arden Sales Corp., a Stanley Fuld opinion on memoranda satisfying the Statute; and Alaska Democratic Party v. Rice, an Alaska case involving reliance and R2K § 139, but spend most of your time on the texts and on the comments about them in the casebook.

Please understand that you must internalize the Statute of Frauds. That doesn’t mean memorize the categories, though that is no harm. The critical thing is that any time you hear about an oral contract, you must instantly think Statute of Frauds. It may well turn out that no writing is needed, or it may turn out the reverse, but you must always think about the Statute of Frauds if there is no signed writing. (Is a signed writing needed for a service contract worth $10 million and to be performed over a ten year period? Is it required for your selling your laptop to your brother for $500? Is it required for a contract to wash my car for $5.00 when you graduate from the law school? How about selling me one square inch of land for $1?)


Much of contract litigation deals with disputes over interpretation. In this class we consider some basic principles of interpretation and some maxims that are useful, though far from definitive. In the subsequent classes we will deal with the parol evidence rule. We begin with a discussion of our old friend the subjective/objective debate. Raffles v. Wichelhaus, the famous case of the two ships Peerless, is often seen as a vestige of subjectivity (“no meeting of the minds”), but A. W. Brian Simpson, in the article in the Anthology, makes out a good case that the differences between the two ships were crucial because of their sailing dates in a volatile cotton market made unstable by the Union blockade of New Orleans during the Civil War. See the assigned note on Anthology 199. The extreme objectivity of the First Restatement is shown by its famous Illustration 1 to § 230, involving the sale of patents (KC&P 351). Corbin’s stinging response is printed below it. What do you think? What is Corbin’s solution? The Restatement Second’s sections, which follow him, are discussed on KC&P 352. Read the sections assigned. Joyner v. Adams applies these sections.

Joyner also introduces us to one of the best-known maxims of contract interpretation, the
“contra proferentum” rule. Why does the Court of Appeals refuse to apply this maxim? See note 3 on page 357. The following two pages go through the best-known maxims. Nos. 2, 3 and 5 are commonly known by their Latin names, and it’s worth learning what they mean. These maxims are pretty commonsensical and shouldn’t be viewed as Holy Writ. They also sometimes collide with each other. But they are useful, generally sensible and often cited and applied by courts.

Then we read a great favorite, Frigaliment Importing Co. v. B.N.S, International Sales Corp., in which Circuit Judge Henry Friendly, who was wicked smart and very sure of himself, sat as a district judge just to see what it was like, and asked “what is chicken?,” producing this famous opinion, which is in most casebooks. As you can see from his opening paragraph, Friendly finds the case rather amusing, but he does a great job of showing the various kinds of extrinsic evidence that can be used to interpret what is clearly an ambiguous term. At the same time, I challenge you to explain his holding. In stating it, he writes ambiguously himself. We will discuss what the holding is, so be prepared on this point. You may get some help from note 1 on page 364, following the case.

**Friday, September 29, 2006:** Ambiguity, trade usage and reasonable expectations. KC&P 365 n. 2 -381. R2K § 211 (3) and Comment j to § 211. Read: Anthology 511-12 (note on the UCC and trade usage). Recommended: Anthology 512-26 (Amy H. Kastely’s excellent article on trade usage. In contrast, you may want to go on line or to the Law Library and look up Lisa Bernstein’s Penn Law Review article, summarized on KC&P 369, which is much more skeptical toward trade usage.

Frigaliment, which we read for the previous class, is followed by several pages of notes discussing important concepts like ambiguity, plain meaning and trade usage. We then consider the “reasonable expectations” concept, embodied in R2K § 211 (3), but most commonly used in interpreting insurance contracts, as is explained in C & J Fertilizer, Inc. v. Allied Mut. Ins. Co. The literal words of the insurance policy clearly barred the plaintiff’s claim. Why does he win? Should he? Should we apply a similar rule whenever a contract of adhesion is involved? On contracts of adhesion, see note 5 on page 380.


More than 100 years ago, John Henry Wigmore, in the first edition of his great treatise on evidence, quoted his predecessor, James Bradley Thayer on the parol evidence rule, and added his own comment: “‘Few things,’ wrote Professor Thayer, ‘are darker than this, or fuller of subtle difficulties’; and this condition of the law all members of the profession will concede.” The introductory pages of the casebook’s PER discussion give you a good overview, while the first case, Thompson v. Libby, shows the rule being applied rigidly and harshly. As you can see, a key concept is whether the parties intended a writing to be their final and entire word on the subject, “an integration.” Does the agreement in Thompson seem that integrated to you? What
is the rationale for the rule? Does the Thompson court give the same rationale as R2K § 213? The Second Restatement strongly adopts Corbin’s view of the rule, which is much looser than that of Williston, especially on the question of integration and “merger clauses.” The notes following Thompson flesh this out and give you some very important information about the rule. Taylor v. State Farm Mut. Auto. Ins. Co., from Arizona, very much adopts the R2K/Corbin approach.


The notes following Taylor discuss the famous, and still controversial opinion of Roger Traynor in Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., which was famously attacked by Judge Alex Kozinski in Trident Center v. Connecticut General Life Ins. Co. Professor Harry Prince, one of the co-authors of your casebook, wrote an attack on Kozinski, and the brouhaha is discussed on pages 402-05. After reading the Pacific Gas/Trident discussion, go to the Anthology and read the three page Wall Street Journal op-ed piece on the exchange. I love its title, Saving Contracts From High Weirdness. I skipped an important Montana case that takes a much more rigid approach toward parol evidence than that of the Second Restatement, Corbin or Chief Justice Traynor. The notes following the Montana case (KC&P 411-14) tell you about some exceptions to the parol evidence rule, and discuss the pendulum swings on the rule in recent years.

Nanakuli Paving & Rock Co. v. Shell Oil Co. can be viewed as a highly relational case, a case allowing extrinsic evidence to contradict the plain words “Shell’s Posted Price at time of delivery,” or an outstanding application of Article 2’s trade usage and course of performance rules to interpret the quoted words. Read it carefully. You may want to refer back to Amy Kastely’s article on trade usage and Lisa Bernstein’s counter-view, cited in last Friday’s assignment.


I require that you read Corbin’s last substantive article, actually put together by the Cornell Law Review from three pocket parts that he wrote for his treatise in 1963, when he was 89. The old man had his wits about him and wrote an excellent discussion of Frigalimant and “semantic stone walls.” You might also review the list of “some general statements” about interpretation that he enclosed in a letter to Judge Robert Braucher. I had you read it for the second class of the term, but it may mean more to you now. The list appears on pages 16 and 17 of the Anthology.
I believe strongly in Corbin’s approach, and am, in fact, revising the volume of Corbin On Contracts dealing with the parol evidence rule. Many courts, undoubtedly a majority of the American jurisdictions, do not buy into Corbin’s approach, though not all are rigid plain meaning enthusiasts, either. You are not, in any event, required to agree with me. I never penalize anyone on an exam for not parroting me. In fact, I dislike mindless repetition of what I have said or written. I’ll give a higher grade to someone who writes an intelligent (even if benighted) criticism of my position than I would to another student who doesn’t have a clue, but tells me how much he agrees with me, and what a fine fellow I am.

E. Allan Farnsworth, who died last year, was the leading figure in contracts in the years following Corbin’s death in 1967. He also wrote a very fine article that is also in the Anthology. I don’t require that you read Farnsworth’s piece (which substantially appears in his one-volume treatise, if you own it), but I do recommend it strongly.

Finally, do Problems 5-1 and 5-2, KC&P 426-28. Write out the parts you are asked to draft and be prepared to read them and defend them in class.


What do we mean by implied terms? Bear in mind that “imply” normally means to suggest something by indirection, so that another person may “infer” what you mean. As used in law, the word imply often means “create” and usually means that a court is the creator. If our main concern is what the parties intended, why should we be implying terms at all? As the editors note on the first page of the assignment, it is difficult to draw the line between the terms “implied-in-fact” (which really means “inferred by the court from facts”) and “implied-in-law” (meaning “imposed upon the parties by the court as a matter of public policy”). Where does Wood v. Lucy fit in? Walter Pratt’s excellent article discusses how business practices changed contract law at the turn of the twentieth century. The article is mentioned in note 1 on KCP 433, and reprinted more substantially in the Anthology. It explains how courts reacted to requirement and exclusive dealing contracts and eventually avoided the problem of an illusory promise by imposing common sense duties of good faith. Was Cardozo imposing a society-based rule on the parties or inferring what the parties would have agreed to if the issue had been called to their attention while they were bargaining? If, in fact, Cardozo was doing the latter, that is, merely filling a gap, does UCC 2-306 (2) turn a factual inference into a rule of law? Or is that section a default rule? What do we mean by a default rule? See note 2 on page 439.

Leibel v. Raynor Mfg. Co. doesn’t look like a sale of goods case, but since a distributor normally buys for his own account and resells to retailers, the transaction is a “transaction in goods.” See UCC 2-102. How does the court get from the text of Article 2 to a rule applying to
the relationship itself? The rule that is stated in the case is commonly applied. Is it based on the
text of the Code or based on some social value, or is it also trying to figure out what the parties
would have done if they’d thought about the question of termination? If the court is imposing a
social rule, what is the social value? Reconsider it when we study the at-will employment norm
two classes from now. The notes following Leibel discuss various aspects of “gap-filling” and
default rules. Are they the same thing, with default rules just being a trendy name for the cyber-
age or is there a subtle difference between creating rules to cover situations the parties forgot
about and creating standardized rules that the parties or their lawyers may consciously adopt
through silence to avoid the transaction costs of customizing contract terms?

We then move to the best known implied term, the duty of good faith. The Anthology
has a summary of the Steven Burton-Robert Summers debate on pages 441-43. We will discuss
it more in the next class. Do read it and think about it. Apply it to Locke v. Warner Bros. What
constituted bad faith? Why should it matter to Ms. Locke’s case? (Is it at all relevant that
everyone I’ve spoken to who has seen Ratboy says it’s one of the worst movies ever made?)

UCC 1-103 (the Comment is very important); 1-201 (19). Proposed Revised UCC 1-201 (20) (in
Supp.). UCC 2-306 (1) and Official Comments 1-3. Not required but important and useful,
Anthology 470-87 (the Summers-Burton debate over good faith).

The notes following Locke v. Warner Bros. raise useful questions about good faith in the
contexts of discretionary rights, open price terms and sex discrimination. Review the Summers-
Burton debate, summarized on KCP 442-43. There is a more thorough excerpt from their
articles in the Anthology, though it is not required. What is Judge Posner’s approach to the
question in Empire Gas Corp. v. American Bakeries Co.? Where do you come out on the general
question of good faith? Is it simple or should it be carefully applied in each fact situation?
Consider Posner’s close reading of UCC 2-306 and its important comment. The notes
following Empire Gas flesh out the issues raised by output and requirements contracts and
exclusive dealing contracts. They fit in nicely with the Pratt article included as suggested
reading in the previous assignment. Note that “best efforts” and “reasonable efforts” may not be
the same thing, depending on the jurisdiction involved. It is important to be aware of this if you
are drafting a contract clause involving the efforts required of one or both of the parties.

Note that the existing UCC has two definitions, the “pure heart and empty mind”
standard of UCC 1-201 (19) and an additional definition in Article 2, limited to merchants and
transactions in goods, that added the words “the observance of reasonable commercial standards
of the trade.” This latter provision disappeared a few years ago, and the definition of “good
faith” in Proposed Revised Article 1 (Rev. 1-201 (20)) had added to the “honest in fact”
language, “the observance of reasonable commercial standards of fair dealing.” This general
language, while it sounds sensible to me, has been attacked, primarily, I think, because it might
be used against consumers by giant corporations claiming that the little guy overreached them in
some way. The upshot is that out of the 10-20 states that have adopted Revised Article One,
approximately half have rejected the change and stuck to the old “honesty in fact” and nothing else definition. So much for uniformity, not to mention the question what definition governs Article 2 transactions involving merchants if the language about them observing the reasonable standards of the trade is no longer there.

**Friday, October 13, 2006:** *At-Will Employment.* KC&P 466-82. **Do both problems thoroughly.**

*Donahue v. Federal Express Corp.* is a very conservative opinion, but gives a pretty good view of at-will employment. Exactly what are Donahue’s arguments, and why does the Pennsylvania court reject them? The notes following Donahue flesh out the issues raised there, and show that some courts (by no means all) have been less niggardly in finding violations of public policy, and in holding employers to promises in employee handbooks. While the United States is the only industrialized country in the world not to have some form of job security for private employees, very few observers really expect us to adopt a full tenure system in all private employment. Nonetheless, we have already statutorily forbidden employers to fire people because of their race or religion or because they resisted sexual harassment, and a sizable proportion of the work force already has job security: civil servants, school teachers, university professors and union members are major examples. In fact, unions have been quite cool to the assertion of at-will employment rights, since it undercuts a great argument for unionization with grievance procedures and arbitrations generally required for permanent employees. However, in a nation of shrinking union membership and an increase in service industries that are mostly nonunionized, the issue of at-will employment is a major and recurring one.

Do Problem 6-1 in light of the materials that you have read and do Problem 6-2 as a transactional planning matter. Answer the questions posed in the book.


The introduction gives you some background, and also cites an article by our own Professor Tony Chase, which is reprinted in the Anthology. We will discuss it in class. As I pointed out on the first day of class, incapacity is a get out of jail free card, but it also means that you can’t enter into contracts without someone else signing for you. How do the issue Professor Chase discusses fit in with the problems of incapacity?

*Dodson v. Shrader*, like almost every minority case, involves a teenaged boy buying a lemon from a used car dealer. Many courts do not allow any setoff for the use of or damage to the vehicle. I originally thought that this was too formalistic (if the minor has no capacity to enter into the contract, how can he breach the contract?), but Stewart Macaulay has made a persuasive case that a hard and fast rule is better, since the minor would otherwise be discouraged from asserting his rights because of the cost of litigating, and the car dealer probably
has a lawyer on retainer to handle these small cases. Since almost all the cases do involve
teenaged boys and used cars, can you see an argument why the hard and fast rule is not unfair to
used car dealers? When the age of majority was 21, these cases sometimes involved twenty-year
olds who might be working and married, but now they involve no one over 17. Does that add to
the argument? How can the used car dealer protect himself?

**Hauer v. Union State Bank** involves the question of mental incapacity. Note 3 on page
523 raises the issue of the difference between cognitive and volitional test of mental incapacity.
Note the difference between mental incapacity and minority. What is it, and does it make sense?
Also note the interaction with good faith, and with the federal Americans with Disabilities Act.

**Thursday, October 19, 2006: Economic Duress and Undue Influence**. KC&P 526-43,
Restatement Second §§ 174-77. Read Anthology 487-94. As Robert Hale notes in the article in
the Anthology, which is required reading, the concept of economic duress is in tension with the
idea of a market economy. Hale gives a thoughtful analysis of the problem. The note preceding
his article also discusses the other two famous articles (Dawson and Dalzell) on the topic, all
three of which came out about the same time. How does the concept fit in **Totem Marine**?
Should the test be one of free will, of unfair terms or of good faith?

Do you think that the **Totem Marine** court would have agreed with the California court
that there was no duress involved in **Odorizzi v. Bloomfield School District**? Why does Odorizzi
win? How does the contractual (or is it tort-like?) misconduct in Odorizzi differ from that in
**Totem Marine**? What would you say is the first rule in avoiding a claim for either undue
influence or some form of duress? Why isn’t constructive fraud available according to the
**Odorizzi** court? Do note the role of the concept of a “confidential” or “special” relationship
(included within Restatement Second § 117 and discussed in note 1 on page 541). As the note
indicates, this often tips the scale. Note that other states might reach the same result under a
different rubric. I don’t think the label is very important, though of course it would be important
in litigating the issues in a given jurisdiction.

Lawyers are particularly vulnerable when they do business with clients, but they often
make a lot of money in such deals. I worked for a very good, if often irascible, lawyer named
Jerome L. Greene, who frequently took a piece of his clients’ real estate deals (whether by
investment or in barter for services or both I don’t know). I do know that Jerry gave so much
money to Columbia Law School that its main building is now called Jerome L. Greene Hall, and
Columbia University just named a $220 million dollar medical facility after him as well, after his
widow and foundation paid for it.) It is generally very wise to insist (even stronger – it is often
disastrous not to insist) on your client getting separate legal representation. Lawyers, however,
usually don’t want to do this, since: a) it cuts into the profits, b) the new lawyer may impress the
client and take business away, and c) the new lawyer may convince the client that the deal is a
bad one. These, of course, are all good reasons for being very skeptical when lawyers don’t do
it. (The note at the end of the assignment covers both the problems of confidential relationship
and of misrepresentation and non-disclosure.)

What are the differences among fraud, misrepresentation, and non-disclosure? In briefing (that’s right, briefing, even this late in the term!) Syester v. Banta, pay attention to procedure. What is the suit for? How does contract enter into the case? What is the difference between fraud as a tort cause of action and as a contract excuse? Exactly what was the “fraudulent overreaching” and what does that term mean? How does Hill v. Jones differ? What is the role of the merger (“contract integration”) clause? How does a duty to disclose differ from a duty not to lie? Consider John Marshall’s famous opinion in Laidlaw v. Organ. The dictum quoted in the block on page 559 is very important and was heavily relied on by Anthony Kronman, later the Dean of Yale Law School, in the article discussed in note 3 on page 560, and reprinted in the Anthology beginning at 565. Why did Marshall send the case back for retrial? Important transactional question: How can a party seeking information avoid the “no duty to disclose” defense?


Williams v. Walker-Thomas Furniture Co. is justly famous, in every casebook, and discussed at length (and critically) in the great Arthur Leff article that summarized and discussed on KCP 570-71. (I’ve assigned the article for tomorrow, just to keep you from having too long an assignment for today, but you obviously can read it for today.) An important point, made early on by Leff, is the patronizing quality of the Williams case, see note 2 on page 571. Leff created the substantive/procedural unconscionability dichotomy, which has taken hold in most courts, but is often criticized (see p. 575 n. 5). Apply the concepts to Williams and tell me what is substantive and what is procedural unconscionability in that case.

Common law contract has been greatly affected in this area by “outside” influences, first that of equity (frequently protecting improvident sons of noblemen who had sold off their expectations of inheritances to pay gambling debts), then that of UCC 2-302 and most recently, by consumer protection legislation, discussed in the Comment beginning on page 576. The Texas Deceptive Trade Practices Act (“the DTPA”), cited at the very end of the Comment, is an important tool in consumer and small business litigation. Though in the last 15 or 20 years it has been cut back, both by the courts and by the Legislature, it remains attractive, since it offers attorney’s fees and possible trebling of damages. Our own Associate Dean Richard Alderman is probably the leading expert on the DTPA.

Unconscionability is not limited to adhesion contracts, but that is its most common target. The most common contemporary issue involves arbitration clauses in adhesion contracts. I
skipped two federal court opinion reaching opposite conclusions on whether an arbitration clause was unconscionable, but gave you the notes after them. Dean Alderman has also become a major critic of arbitration clauses, and is quoted extensively on page 595. In the voluntary, truly commercial context, arbitration has a lot to go for it, but it is still frequently imposed on small businesses through non-negotiable boilerplate.

**Thursday, October 26, 2006:** Arthur Leff on Unconscionability: Contracts Against Public Policy. Read Anthology 494-510 (Arthur Leff article). KC&P 598-611, 618-19. Read Anthology 432-33 (Note on Public Policy); not required but interesting and useful, Anthology 433-441 (Walter Gellhorn’s classic article on the general concept of public policy).

Before we turn to public policy, I want you to read and discuss Arthur Leff’s famous Emperor’s New Clause article, which is followed by a brief note on defenses of unconscionability. No one doubts how brilliant Leff was, but as I suggest in the note preceding his article, he was sort of too clever by half. Does his cleverness outweigh the substance of his article, or is it correct in its criticism of UCC 2-302? Apply it to our cases from yesterday as well as more generally.

The unenforceability of contracts against public policy shows clearly the interaction of society with the supposed freedom of the contracting parties to make whatever deal they want. As the opening note points out, The Dyer’s Case made this point nearly six hundred years ago. Recall Morris R. Cohen’s article The Basis of Contract, which we read early in the term. That very case involved a covenant not to compete, which remains a major area of litigation and is discussed at length in Valley Medical Specialists v. Farber and the notes following it.

**Friday, October 27, 2006:** Surrogate Parenting Contracts. KC&P 620-29 (top), 630-32 (do Problem 7-4). Read Anthology 441-43 (Note on Surrogacy and Public Policy). Not required but worth reading: Anthology 444-70 (the debate over surrogacy contracts between Martha Field and Marjorie Maguire Schultz).

The most controversial modern topic involving public policy is surrogate parenting contracts, well discussed in R.R. v. M.H., and the notes following it. The most famous case remains Baby M., discussed, together with more recent cases showing technological developments, in the casebook on pages 627-29 and in the Anthology on pages 441-43. The Martha Field and Marjorie Schultz articles, which are not required but are good and worth reading (the authors are at Harvard and Berkeley, respectively) explore the issue from differing feminist perspectives.

I admire the editors of the casebook (and one of them, Harry Prince, is African-American). Nonetheless, I find the Samantha Brown Problem (Problem 7-4) rather patronizing. I know they don’t mean it and it’s realistic and an excellent problem, so let’s do it.

**Wednesday, November 1, 2006:** Changed Circumstances I: Mistakes. KC&P 633-52.
Restatement Second §§ 151-58.

At the very end of his life Professor E. Allan Farnsworth published two books called “Changing Your Mind” and “Alleviating Mistakes.” (He wanted to call the second one “Oops,” but the Oxford University Press was too stuffy; he did use that much better title in a shorter version of the book that he published in the Ohio Northern Law Review. See E. Allan Farnsworth, Oops! The Waxing of Alleviating Mistakes, 30 Ohio Northern U. L. Rev. 167 (2004). The shorter version is better than the book.) That Farnsworth, the greatest figure in contracts in the last third of the twentieth century, spent his last days musing about getting out of contracts, is noteworthy. We spend a full week, a sizable portion of a four credit course, on the topic, in its various contexts.

We start with a modern Michigan case, Lenawee County Board of Health v. Messerly, in which the Michigan Supreme Court revisits a great contracts war horse, Sherwood v. Walker, the famous pregnant barren cow case, which has produced a huge amount of sexist humor. (For an example, see Anthology 590 n. 90.) How does the modern case differ in its thinking, and in its verbal formula, from Sherwood? Should merger or “as is” clauses be given as much weight as the court gives the one in Lenawee County? Wil-Fred’s, Inc. v. Metropolitan Sanitary District shows the modern willingness to let parties out of their contracts because of their mistakes. How does Wil-Fred’s differ from Drennan v. Star Paving Co., KC&P 193? This phenomenon was what Allan Farnsworth called “alleviating mistakes,” and about which he wrote his last book.

Thursday, November 2, 2006: Changed Circumstances II: Impracticability, Impossibility and Frustration of Purpose; Supervening Governmental Regulation. KC&P 652-76 n.3. Problem 8-1 (KC&P 677-79) is not required, but is a useful way of learning impracticability.

What are the differences among impossibility, impracticability and frustration of purpose? How do all of them differ from mistakes? Or are they all aspects of the same thing in different temporal contexts? Karl Wendt Farm Equip. Co. v. International Harvester Co. discusses many aspects of these questions in a modern context. Note that the governing law is that of Michigan and that the dissenting judge is the same Justice Ryan who wrote the Lenawee County opinion when he was on the Michigan Supreme Court. Are the two cases compatible?

Read the very interesting notes following Wendt, especially those based on 9-11. What are the parameters of the disputes over foreseeability? How does government regulation affect the impracticability issue?

Friday, November 3, 2006: Changed Circumstances III: Contract Modification. KC&P 677 n.4. Read Anthology 572-73 immediately after Note 4 on KC&P 677. Not required but available: Speidel and Dawson articles debating cutting the baby in half, Anthology 574-90. KC&P 679 (middle) -95; 702 n. 2 -704 n. 5. UCC 2-209, including Comment.

We begin with an interesting wrinkle on impracticability, but one that is related to the
topic for today. In traditional contract law the only impracticability issue is zero sum: either a party is fully excused or he has to perform fully. Should the court force compromises? They often attempt this by indirect pressure, but should they be able to force it? Read note 4 on page 677 of the casebook and the note, Adjusting Long-Term Contracts: Impracticability and Freedom of Contract, in the Anthology, pp. 572-73. Two leading articles follow the Anthology note, but are not required.

The problem of contract modification involves a different type of changed circumstance. Alaska Packers v. Domenico shows the way classical courts pretended not to interfere with party autonomy but actually manipulated consideration doctrine to achieve a result. From the tone of the opinion, do you have any doubt that the Ninth Circuit disapproved of the workers’ conduct? But what is the holding? UCC 2-209 changes the substantive law of consideration as to modifications, but as Problem 8-3 shows us, it makes it incumbent upon a party facing a veiled threat to set up an economic duress defense, rather than just signing and trying to get out for lack of consideration. Earlier ways out of the pre-existing duty rule are shown in the notes following Alaska Packers. Kelsey-Hayes Co. v. Galtaco Redlaw Castings Corp, is willing to allow economic duress as a defense to an agreed modification, but other cases, such as United Staes v. Progressive Enterprises, discussed in Kelsey-Hayes, have required the unwilling party to make an unequivocal protest in advance. See note 4 on page 695. Will that be the equivalent of refusing the modification? What advice would you give to Schweitzer’s in Problem 8-3? “No oral modification” clauses are discussed in the notes beginning on page 702.


Thursday, November 9, 2006: Demands for Assurances; Express Conditions I: KC&P 768 n. 1 - 787 n. 4. Restatement Second § 251, UCC 2-609, both with Comments.


Note on mitigation of damages and unrecoverable damages. We have to skip these
interesting and important topics, but I want you to have at least an awareness that they exist, and I will add a short discussion of these topics.]

**Friday, November 17, 2006:** Disgorgement and Reliance Damages. KC&P 919-34 (top).

**Thanksgiving Vacation**

**Wednesday, November 29, 2006:** The Measure of Reliance Damages: Restitutionary Damages Under a Breached Contract. KC&P 934-53 (top). You may want to review the discussion of Johnny and the Car during Williston’s defense of what would become § 90, Anthology beginning at the bottom corner of page 343, beginning with “Mr. Coudert;”.

**Thursday, November 30, 2006:** The Intersection of Restitution, Reliance and Contract Damages; the Basics of Specific Performance. KC&P 953-75.

**Friday, December 1, 2006:** Specific Performance; Liquidated Damages; Commercial Arbitration. KC&P 976-89 (through introductory note on agreed remedies); 998-1006 (top).