

UNIVERSITY OF HOUSTON LAW CENTER

CONSTRUCTION LAW – FALL 2021

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**SYLLABUS**

Please find the Fall 2021 Construction Law schedule of classes – assignments to be updated periodically during the semester:

Course Textbook: Texas Construction Law Manual  
(2020-2021 Edition – Thomson Reuters)  
Joe F. Canterbury, Jr.  
Robert J. Shapiro

**CLASS 1: INTRODUCTION TO COURSE/ CHAPTER 1 – CONSTRUCTION LAW AS THE LAW OF CONTRACTS** (August 24, 2021)

\*\*Entire class preparation/ participation required for Chapter 1; Individual student assignments to be issued for Chapters 2 and beyond.

- Contractual Hierarchy on the Construction Project
- CHAPTER 1: CONSTRUCTION LAW AS THE LAW OF CONTRACTS
  - Contract Formation
    - Mutual Assent
      - *Lerma v. Boarder Demolition & Envtl., Inc.*, 459 S.W.3d 695, 698-99 (Tex. App. – El Paso 2015), review denied, (Oct. 9, 2015)
      - *B & B Developers v. Ego Res. Corp.*, 613 S.W.2d 797, 800-01 (Tex, Civ. App. – Waco 1981)
      - *Calvin v. Koltermann, Inc. v. Underream Pilig Co.*, 563 S.W.2d 950 (Tex. Civ. App. – San Antonio 1977), writ refused n.r.e., (July 26, 1978)
    - Consideration
      - *Robert W. Payne Co. v. J.W. Hill Const.*, 387 S.W.2d 92 (Tex. Civ. App. – Dallas 1965).
  - Impact of Texas Business and Commercial Code

- Defenses to Contract Enforceability
  - Authority
    - Actual and Apparent Authority
    - *Robert W. Payne v. J. W. Hill Const.*, 387 S.W.2d 92 (Tex. Civ. App. – Dallas 1965).
  - Fraud and Misrepresentation
    - *Cobb v. Thomas*, 565 S.W.2d 281 (Tex. Civ. App. – Tyler 1978), writ refused n.r.e., Sept. 13, 1978)
  - Duress
    - *King Const. Co. v. W.M Smith Elec. Co.*, 350 S.W.2d 940, 941-42 (Tex. Civ. App. – Texarkana 1961), writ refused n.r.e., (Apr. 11, 1962)
    - *Thomas Const. Co., Inc. of Missouri v. Kelso Marine, Inc.*, 639 F.2d 216 (5<sup>th</sup> Cir. 1981)
  - Statute of Frauds
    - Contract must be in writing: 1) Cannot be performed within 1-year; 2) Texas Business and Commercial Code sale of goods exceeding \$500; 3) Sale of real property (ie, land/home sale).
    - *Heritage Constructors, Inc. v. Chrietzberg Elec., Inc.*, 2015 WL 3378377 (Tex. App. – Texarkana 2015) (mem. Op.).
    - Tex. Bus. & Com. Code Ann 2.201
    - *Walzem Dev. Co., Inc. v. Gerfers*, 487 S.W.2d 219, 222 (Tex. Civ. App. – San Antonio 1972), writ refused n.r.e., (Mar. 28, 1973).
  - Execution Issues
    - *Seale v. Nichols*, 505 S.W.2d 251, 14 U.C.C. Rep. Serv. 457 (Tex. 1974).
  - Rules of Contract Construction
    - *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (tex. 1987).
    - Ambiguity and Intent of Parties
      - *Nat'. Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 41 Env't. Rep. Cas. (BNA) 1279 (Tex. 1995).
    - Interpretation against drafter: *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 38 U.C.C. Rep. Serv. 971 (Tex. 1984).

- Alternative Forms of Relief
  - Quantum Meruit: “As much as is deserved” *Prairie Valley Indep. School Dist. v. Sawyer*, 665 S.W.2d 606, 16 Ed. Law Rep. 983 (Tex. App. – Fort Worth 1984), writ refused n.r.e, (July 11, 1984).
  - Promissory Estoppel:
    - Restatement, Contracts 90:
      - A promise;
      - Foreseeable reliance by the promisor; and
      - Substantial reliance by the promisee to his or her detriment.
    - *Fretz Const. Co. v. S. Nat’l Bank of Houston*, 626 S.W.2d 478 (Tex. 1981).

**CLASS 2:**      **CONTINUATION OF CHAPTER 1 – CONSTRUCTION LAW AS THE LAW OF CONTRACTS; CHAPTER 2 – DOING CONSTRUCTION BUSINESS IN TEXAS**  
(August 31, 2021)

- CHAPTER 2: DOING CONSTRUCTION BUSINESS IN TEXAS
  - Forms of Business: Texas Business Organizations Code
    - Sole Proprietorship
    - General Partnership
    - Limited Partnership
    - Joint Venture
      - Texas Dept. of Transp. v. Able, 35 S.W.3d 608, 618 (Tex. 2000).
    - Corporation
    - Limited Liability Company
  - Business Enterprises
    - Historically Underutilized Businesses
  - Disadvantaged Business Enterprises
    - Texas Unified Certification Program
  - Minority Business Enterprises
    - National Minority Supplier Development Council
  - Woman Business Enterprises
  - Piercing the Corporate Veil
    - *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986)
  - Commercial Licensing/ Registration Requirements
    - §§ 2:24-2:43
  - Foreign Companies Doing Business in Texas
  - Texas Companies Doing Business in Other States
  - Residential Construction Licensing
    - Texas Residential Construction Commission

- Residential Service Contracts
  - Residential Service Company Act

**Class 3: CHAPTER 5: NEGOTIATION AND FORM OF GENERAL CONTRACT**  
(SEPTEMBER 7<sup>th</sup>)

Contractual Hierarchy on the Construction Project

- Owner/ Developer (Prime Contract)
  - Design professionals (Design contracts incorporated into project documents)
  - General Contractor/ Construction Management (Prime Contract/ General Contract)
  - Subcontractors (Subcontracts)
  - Sub-subcontractors (Sub-subcontracts)
  - Vendors/ material suppliers (Material supply contracts/ invoice)
- CHAPTER 5: NEGOTIATION AND FORM OF GENERAL CONTRACT
  - Prime Contract (AKA, General Contract)
    - Intro
  - Selection of Contract Form
    - American Institute of Architects (AIA)
      - See page 356 (Appendix 5A)
    - Consensus Documents (Agreements drafted in conjunction with American General Contractor Association and other endorsing organizations such as American Subcontractor Association)
    - Engineer Joint Contract Documents Committee (EJCDC)
      - See page 358 (Appendix 5A)
    - Contractor Custom Contract Documents
  - Lump Sum
  - Cost Plus
    - *D.C. Edwards & Co v. Fisher*, 610 S.W.2d 546 (Tex. Civ. App. Houston, 1<sup>st</sup> Dist. 1980), writ refused n.r.e., (Mar. 18, 1981).
    - Guaranteed Maximum Price
  - AIA Documents
    - AIA A201-2017
    - General Provisions
      - Contract Documents
      - Work
      - Instruments of Service
    - Contractor
    - Owner
    - Administration of Contract
    - Subcontractors
    - Changes in Work

- Time of Performances
- Payments and Completion
  - *Anderson Dev. Corp. v. Coastal States Crude Gathering Co.*, 543 S.W.2d 402, 406 (Tex. Civ. App. Houston 14<sup>th</sup> Dist. 1976), writ refused n.r.e., (Feb. 9, 1977).
- Insurance and Bonds
- Termination of Suspension
- Claims and Disputes
- Implied Conditions, Duties, and Warranties
  - General: *Vaughn Bldg. Corp. v. Austin Co.*, 620 S.W.2d 678 (Tex. Civ. App. Dallas 1981), writ granted, (Feb. 10, 1982) and judgment aff'd, 643 S.W.2d 113 (Tex. 1982).
  - Duty to Perform in Good and Workmanlike Manner: *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399 (Tex. 1985).
  - Implied Duty to Provide Correct Design Documents: *Loneragan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907).

**Class 4: CHAPTER 6: NEGOTIATION AND FORM OF SUBCONTRACT; CHAPTER 7: NEGOTIATION AND FORM OF PURCHASE ORDER/ SUPPLY CONTRACT**  
(September 14<sup>th</sup>)

Contractual Hierarchy on the Construction Project

- Owner/ Developer (Prime Contract)
  - Design professionals (Design contracts incorporated into project documents)
  - General Contractor/ Construction Management (Prime Contract/ General Contract)
  - Subcontractors (Subcontracts)
  - Sub-subcontractors (Sub-subcontracts)
  - Vendors/ material suppliers (Material supply contracts/ invoice)
- CHAPTER 6: NEGOTIATION AND FORM OF SUBCONTRACT
  - Introduction
  - AIA Document A401-2017 – Standard Form of Agreement Between Contractor and Subcontractor
    - Subcontract Documents
    - Mutual Rights and Responsibilities
    - Changes in the Work
    - Claims and Disputes
    - Termination, Suspension, or Assignment
    - The Work
      - *Hanger Gen. Contractors v. Greater Swenson Grove Baptist Church*, 597 S.W.2d 32 (Tex. Civ. App. Austin 1980).
    - Subcontract Sum

- Progress Payments and Retainage
- Final Payment/ Interest
- CHAPTER 7: NEGOTIATION AND FORM OF PURCHASE ORDER/ SUPPLY CONTRACT
  - Introduction
  - Applicability of Texas Business and Commerce Code
    - “Essence” or “Dominate factor” test – *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 35 U.C.C. Rep. Serv. 342 (Tex. 1982) (overruled on other grounds by, *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 72 A.L.R. 4<sup>th</sup> 259 (Tex. 1987)).
    - Duty of Good Faith
    - Course of Performance, Course of Dealing, and Usage of Trade
      - *Pac. Prods., Inc. v. Great W. Plywood, Ltd.*, 528 S.W.2d 286 (Tex. Civ. App. Fort Worth 1975).
    - Warranties
      - Express Warranties
        - *Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446, 11 U.C.C. Rep. Serv. 75 (Tex. Civ. App. Austin 1972), writ refused n.r.e., (Jan. 31, 1973).
      - Implied Warranties
        - *Gunderland Marine Supply, Inc. v. Bray*, 570 S.W.2d 542, 545-546, 25 U.C.C. Rep. Serv. 57 (Tex. Civ. App. Corpus Christi 1978).
      - Disclaimers
        - *Prudential Ins. Co. of America v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156 (Tex. 1995).
      - Delivery, Acceptance or Rejection of Goods
      - Terms and Forms
        - Deal Points
      - Remedies and Damages
        - *Brooks Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Ins. Co.*, 832 F.2d 1358 (5<sup>th</sup> Cir. 1987), decision clarified on reh’g, 832 F.2d 1378 (5<sup>th</sup> Cir. 1987).
        - Consequential damages

**Class 5:**      **CHAPTER 3: SELECT STATUTES AFFECTING COMMERCIAL AND RESIDENTIAL CONSTRUCTION** (September 21)

- Commercial Building Codes/ Regulations
  - Building Permits
  - Accessibility for the Disabled
- Safety Laws

- OSH Act (OSHA)
- Workplace Issues
  - Immigration
  - E-Verify
- Payment
  - Prompt Payment
  - Contingent Payment
  - Construction Trust Fund Act
    - *Lively v. Carpet Servs., Inc.*, 904 S.W.2d 868 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1995), writ denied (Feb. 9, 1996).
  - Secured Transactions
    - *First Nat’l Bank in Dallas v. Whirlpool Corp.*, 517 S.W.2d 262 (Tex. 1974).
  - Independent Contractor Re-characterization under the FLSA
    - *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5<sup>th</sup> Cir. 1983).
  - Bankruptcy Code
    - Chapters 7, 11 and 13
    - The “automatic stay”
    - Property of the Estate and Voidable Transfers
      - *In re Contractor Tech., Ltd.*, 343 B.R. 573, 46 Bnkr. Ct. Dec. (CRR) 152 (Bankr. S.D. Tex. 2006), subsequently aff’d, 229 Fed. Appx. 294 (5<sup>th</sup> Cir. 2007)
    - Dischargeability Issues
    - Reclamation
  - Deceptive Trade Practices
    - Consumer Protection Act
    - Relief for Consumers
    - Express/ Implied Warranties
  - Disaster Remediation Contracts
  - Residential Construction Liability Act
    - *Gentry v. Squires Const., Inc.*, 188 S.W.3d 396 (Tex. App. – Dallas 2006)
    - *Hixon v. Tyco Int’l, Ltd.*, 2006 WL 3095326 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2006)
  - Statutes of Limitations
    - Discovery Rule
  - Statute of Repose

**Class 6:**        **CONTINUED - CHAPTER 3: SELECT STATUTES AFFECTING COMMERCIAL AND RESIDENTIAL CONSTRUCTION** (September 28)

**Class 7:**        **CHAPTER 4 – PUBLIC CONTRACTS** (October 5)

**Class 8:**        **CHAPTER 10 – MECHANIC’S LIENS AND BOND CLAIMS** (October 19)

**Class 9:**        **CHAPTER 11 – BOND CLAIMS ON TEXAS PUBLIC WORKS** (October 26)

**Class 10:**      **CHAPTER 12 – BOND CLAIMS ON FEDERAL PROJECTS** (November 2)

**Class 11:**      **CHAPTER 9 – NEGLIGENCE AND INSURANCE** (November 9)

**Class 12:**      **CHAPTER 8 – CONTRACT CLAIMS AND DISPUTES** (November 16)

**Class 13:**      **CHAPTER 13 – ARBITRATION; CHAPTER 14 – LITIGATION** (November 23)

*\*\*November 24-27 – Thanksgiving Holiday*

**Class 14:**      **REVIEW FOR FINAL** (November 30)

\*\*Classes will meet for fourteen (14) 2-hour sessions on Tuesdays from 8:30am to 10:30am.

### **GENERAL GUIDANCE**

#### *Diversity, Inclusion, and Wellness*

This is an inclusive learning space.

At UHLC, we are committed to ensuring inclusive online and classroom learning spaces, where you'll be treated with respect and dignity, and where everyone is provided the equitable opportunity to participate, to contribute, and to succeed.

In this course, all students are welcome regardless of socio-economic status, age, race, ethnicity, disability, religion, national origin, veteran's status, sex, sexual orientation, gender identity, gender expression, political affiliation, marital status and other diverse identities that we each bring to class. Our class is richer for this diversity.

Inclusive learning spaces facilitate the innovation and creative thought that enhance student success. This success arises from the participation, support, and understanding of you and your colleagues. I encourage you to speak up and to share your views, but also understand that you are doing so in a learning environment in which we're all expected to engage respectfully and with regard to the dignity of all others.

If you feel like your class performance is impacted in any way by your experiences inside or outside of class, please reach out to me. I want to be a resource for you. If you feel more comfortable speaking with someone besides me, Student Services is an excellent resource: 713- 743-2182. Finally, I encourage you to bring any issues negatively impacting UHLC's openness to diversity and inclusion to the Law Center's Diversity and Inclusion committee. The D&I committee's charge includes "[building] on the Law Center's strengths as a diverse and inclusive environment." You can contact the committee directly at [UHLCD&I@uh.edu](mailto:UHLCD&I@uh.edu).

Your suggestions are encouraged and appreciated. Please let me know ways to improve the effectiveness of this course for you personally, or for other students or student groups.



### *Accessibility and Accommodations*

UHLC is committed to ensuring that all students enjoy equal access and full participation.

If you anticipate or experience barriers based on a disability (including any chronic or temporary medical or mental health condition), please feel free to reach out to me so that we may discuss options. If you require any support services, you may contact Ms. Samantha Ary, Academic Records Coordinator. Ms. Ary is located in room 44A TU-II in the Office of Student Services suite, and she can be reached at [sary@central.uh.edu](mailto:sary@central.uh.edu) or 713-743-7466. Requests for accommodation that involve graded assignments must be directed to Ms. Ary and should be made as soon as possible to allow adequate time to document and to process the request.

If you observe religious or cultural holidays that will coincide with synchronous class sessions or conferences, please let me know as soon as possible, so that we may make arrangements.

### *Chosen Names and Preferred Pronouns*

I will gladly honor your request to address you by an alternate name or gender pronoun. Please advise me of this preference early in the semester so that I may make appropriate changes to my records.

### *Honor Code*

The UHLC Honor Code applies to all aspects of my class. You are responsible for knowing all Honor Code provisions and for complying with the Honor Code. Please ask me if you have any questions regarding how the Honor Code's provisions apply to specific activities or situations related to my course. It is an Honor Code violation to review the graded assignments distributed to, or written by, any of my students from prior years.

### *Counseling and Psychological Services*

Counseling and Psychological Services ("CAPS") can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus.

The Texas Lawyers' Assistance Program ("TLAP") also supports law students who are dealing with stress, anxiety, depression, substance abuse, and other mental health problems. You can reach TLAP at any time at 1-800-343-8527. TLAP's website includes a page with links to sources about mental health that are of interest to law students: <https://www.tlaphelps.org/lawstudents>.

### *Anti-Discrimination and Sexual Misconduct Policies*

UHLC and the University of Houston are committed to maintaining and strengthening an educational, working, and living environment where students, faculty, staff, and visitors are free from discrimination and sexual misconduct. If you have experienced an incident of discrimination or sexual misconduct, a confidential reporting process is available to you. For more information, please refer to the University System's Anti-Discrimination Policy SAM 01.D.07 and Sexual Misconduct Policy SAM 01.D.08.

Please be aware that under the sexual misconduct policy, SAM 01.D.08, faculty and other University employees are required to report to the University any information received regarding sexual misconduct as defined in the policy. Due to this reporting requirement, faculty members and other employees are not a confidential resource. The reporting obligations under the sexual misconduct policy extends to alleged conduct by University employees and students.

### **PANDEMIC OPERATIONS PROTOCOL**

#### *Face Covering Policy*

To reduce the spread of COVID-19, the University requires face coverings on campus including classrooms for both faculty and students. Face coverings must cover your mouth and nose and be worn throughout the class session. A mask with a valve is not considered an adequate face covering and should not be used, as it can expel exhaled air, increasing the risk to others. Eating or drinking during class is discouraged and is not an excuse for removing the face covering for any extended length of time. For additional information on the use of face coverings, please see Face Covering FAQs.

Failure to comply with the requirement to wear a face covering in class will result in your being asked to leave the classroom immediately and a disciplinary referral through the Dean of Students Office. Requests for accommodations relating to the face covering policy may be directed to the Center for Students with Disabilities (CSD).

#### *Required Daily Health Self-Assessment*

Your presence in class each session means that you have completed a daily self-assessment of your health/exposure and you:

- ☐ Are NOT exhibiting any Coronavirus Symptoms
- ☐ Have NOT tested positive for COVID-19

☐ Have NOT knowingly been exposed to someone with COVID-19 or suspected/presumed COVID-19

If you are experiencing any COVID-19 symptoms that are not clearly related to a pre-existing medical condition, do not come to class. Please see COVID-19 Diagnosis/Symptoms Protocols for what to do if you experience symptoms and Potential Exposure to Coronavirus for what to do if you have potentially been exposed to COVID-19. Consult the (select: Undergraduate Excused Absence Policy or Graduate Excused Absence Policy) for information regarding excused absences due to medical reasons.

### *Excused Absence Policy*

Regular class attendance, participation, and engagement in coursework are important contributors to student success. Absences may be excused as provided in the University of Houston Undergraduate Excused Absence Policy and Graduate Excused Absence Policy for reasons including: medical illness of student or close relative, death of a close family member, legal or government proceeding that a student is obligated to attend, recognized professional and educational activities where the student is presenting, and University-sponsored activity or athletic competition. Additional policies address absences related to military service, religious holy days, pregnancy and related conditions, and disability.

### *Recording of Class*

Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor. If you have or think you may have a disability such that you need to record class-related activities, please contact the Center for Students with Disabilities. If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use instructor's recordings for their own studying and notetaking. Instructor's recordings are not authorized to be shared with anyone without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action.

### *Syllabus Changes*

Due to the changing nature of the COVID-19 pandemic, please note that the instructor may need to make modifications to the course syllabus and may do so at any time. Notice of such changes will be announced as quickly as possible through (specify how students will be notified of changes).

### *Webcams*

Access to a webcam is required for students participating remotely in this course. Webcams must be turned on (state when webcams are required to be on and the academic basis for requiring them

to be on). (Example: Webcams must be turned on during exams to ensure the academic integrity of exam administration.)

### *Honor Code Statement*

Students may be asked to sign an honor code statement as part of their submission of any graded work including but not limited to projects, quizzes, and exams:

"I understand and agree to abide by the provisions in the (select: University of Houston Undergraduate Academic Honesty Policy, University of Houston Graduate Academic Honesty Policy) Law Center Honor Code. I understand that academic honesty is taken very seriously and, in the cases of violations, penalties may include suspension or expulsion from the University of Houston."

### *Helpful Information*

COVID-19 Updates: <https://uh.edu/covid-19/>

Coogs Care: <https://www.uh.edu/dsaes/coogscare/>

Laptop Checkout Requests:

<https://www.uh.edu/infotech/about/planning/offcampus/index.php#do-you-need-a-laptop>

Health FAQs: <https://uh.edu/covid-19/faq/health-wellness-prevention-faqs/>

Student Health Center:

<https://uh.edu/class/english/lcc/current-students/student-health-center/index.php>