**Advanced Contracts**

*Spring 2019*

Professor Kimberly D Krawiec

Duke University School of Law

Course Description: Each course segment will consider in depth a foundational tenet of contract law, but applied to a new and modern fact pattern. For example, does an agreement to exchange one kidney for another (as in the increasingly common kidney paired donation) involve consideration? Is it void as against public policy? What is the obligation of airlines, hotels, and third-party providers (such as Expedia) to honor “mistake fares” in an age when technology allows potentially millions of purchases before the offeror discovers the error?

We’ll begin each segment with a modern fact pattern in which the law is unclear or in flux. We’ll read the classic contracts cases and scholarly articles on point, with application to the new fact pattern in mind. Are the old doctrines still a good fit for the new world? Are the public policy rationales behind the law still relevant? What new considerations are present?

The fact patterns are designed to hit on the essential elements of contract law, but force the students into roles of problems-solvers, policymakers, or judges considering real-life, current disputes. There will be substantial writing, teamwork, and oral presentations.

**Topics and Readings**

**Week 1 (Jan 10)**: *Introduction and Background: A Look Back At Dominant Contract Law Theories*

(1) Douglas Baird, *Reconstructing Contracts,* “Introduction: The Young Astronomer”

(2) Fried, Charles, “Contract as Promise Thirty Years On”, *Suffolk University Law Review*, Vol. 45, Issue 3 (2012), pp. 961-978

(3) Eric Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?," 112 *Yale Law Journal* 829 (2003).

**Week 2 (Jan 17):** *Foundations: Objective Intent, Consideration*

(1) ***Raffles v Wichelhaus*** [1864] EWHC Exch J19

(2) Baird, Chapter 1, *Objective Intent*

(3) *Hamer v. Sidway*

(4) Douglas G. Baird, Reconstructing Contracts, Ch. 2, *The Bargained For Exchange*

**Week 3 (Jan. 24):** *Foundations: Duress, Renegotiation And**Introduction to the First Assignment*

1. Omri Ben-Shahar, *Consumers Are Suing Apple For Slowing Down Their iPhones. Did Apple Break The Law?*, Forbes (December 29, 2017)
2. Apple Inc. Ios Software License Agreement
3. Seeking Alpha, *Apple's Liability For The Recent Battery Scandal*
4. Paul Santos, Seeking Alpha, *Apple: All You Wanted To Know On The iPhone Throttling Scandal*
5. *Alaska Packers Association v. Domenico*, 117 F. 99 (9th Cir 1902)
6. Baird, Chapter 7, *Duress and the Availability of the Legal Remedy*

**Week 4 (Jan. 31):** *Good Faith and**Disclosure*

(1) *Baird, Chapter 5, Terms of Engagement*

(2) *Laidlaw et al. v. Organ*, 15 U.S. 178 (1817)

(3) Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts,* 7 J. LEGAL STUD. 1(1978).

(4) Vokes v. Arthur Murray, Inc., 212 So.2d 906 (1968)

(5) Debora L. Threedy, *Dancing around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 Wake Forest L. Rev. 749 (2010)

**Week 5 (Feb. 7):** *Policing The Bargain: Undue Influence, Unconscionability*

*(1)* POSNER, Sections 4.9 & 4.10

*(2) Williams V. Walker-Thomas Furniture Co.*

*(3)* Anne Fleming*, The Rise and Fall of Unconscionability as the 'Law of the Poor,'* 102 Geo. L.J. 1383-1441 (2014) (portions)

*(4)* McCullough, Colleen*. "Unconscionability as a Coherent Legal Concept*." U. Pa. L. Rev. 164 (2015): 779.

**Week 6 (Feb 14):** *Boilerplate*

1. Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (excerpts)
2. Omri Ben-Shahar, *Regulation through Boilerplate: An Apologia*, Mich. L. Rev (2013)
3. Margaret Jane Radin, *What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis)* (2014)
4. Baird, Chapter 8, *Fine Print in Mass Markets*
5. Oman, Ch. 7, *Boilerplate*

**Week 7 (Feb 21):** *Presentations of First Assignment*

**\*\*\*Meet at 12:30 – lunch will be provided**

**Week 8 (Feb. 28):** *Mistake*

Baird, Chapter 6, *Mistake, Excuse, and Explicit Terms*

Michigan Historical Society, *Sherwood v. Walker: Cows and Contracts*

A Kull, *Unilateral Mistake: The Baseball Card Case*, Wash. ULQ, 1992

**Week 9 (March 7): NO CLASS**

**Week 10 (March 14): Spring Break**

**Week 11 (March 21):** *Introduction to The Second Assignment: Mistake Fares*

(This looks like lots of reading, but other than the last two, each is only a page or two)

(1) United States Of America, Department Of Transportation, Office Of The Secretary, *Enforcement Policy Regarding Mistaken Fares*

(2) 14 CFR § 399.88 Prohibition on post-purchase price increase.

(3) United States Of America Department Of Transportation, Office Of Aviation Enforcement And Proceedings, *Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2), Post-Purchase Price Increases* (pp. 40-43) only

(4) DoT NPRM, Amendments to 399.88 (pp. 112-113) only

(5) Gaby Del Valle, [*Thanks to a glitch, $16,000 first-class seats sold for $675. Errors like these are more common than you’d think*](https://www.vox.com/the-goods/2019/1/4/18168743/cathay-pacific-vietnam-error-fare-glitch). Vox.com (Jan 4, 2019)

(6) Palko Karasz, [*Cathay Pacific Surprised by Its Own Offer: $16,000 Fare for $675*](https://www.nytimes.com/2019/01/03/world/asia/airline-ticket-prices-cathay-pacific.html)*,* The New York Times *(Jan. 3, 2019)*

(7) Campbell, Avery. "Mistake Fares in Canada and the United States." (2016).

(8) Lau, Terence. "Mistakes, Airfares, and Consumers: Restoring the Department of Transportation's Role in Regulating Unfair Trade Practices." *Quinnipiac L. Rev.* 34 (2015): 371.

**Week 12 (March 28):** *Gift Exchange and**Donative Promises*

(1) *Allegheny College v. National Chautauqua County Bank Of Jamestown* (Nov. 22, 1927)

(2) Curtis Bridgeman, *Allegheny College Revisited* (2005)

(3) *Duke University Makes Claim on Estate of Aubrey McClendon*, W.S.J. (Aug. 24, 2016)

(4) Kelley Drye Client Advisory, *Enforcing Charitable Pledges: New York’s Shifting Landscape* (September 13, 2016)

(5) Robert A. Prentice, “*Law &” Gratuitous Promises,* Ill. L. Rev. (2007)

**Week 13 (April 4):** *Informal/Relational Contracts And The Role Of Close-Knit Groups*

Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991) (excerpts)

Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963)

**Week 14 (April 11):** *Presentations of Second Assignment*

**\*\*\*Meet at 12:30 – lunch will be provided**

First Assignment: The Apple iPhone and “Batterygate” (25% of final grade)

The relevant facts are detailed basically all over the internet. However, I’ll give you a few articles that explore some of the technological and legal issues (some of these are written by nonlawyers, so it will be a nice exercise in how laypeople – specifically, tech nerds – (mis)understand the law).

More than 60 lawsuits have been filed against Apple, bringing a variety of claims in a number of jurisdictions, both foreign and domestic. We are interested only in the U.S. contract claims (there are also claims based on, among other things, trespass to chattels, computer tampering laws, and consumer protection laws, which vary slightly from state to state).

Half of you are associates at MacLand, MacWorld, & MacPlanet (hereafter, “MacLand”), which represents Apple in this litigation. The other half of you are associates at Android, Rocks, & Associates (hereafter, “Android”), which represents a class of plaintiffs who allege injury due to Apple’s actions.

Your firm has asked you to prepare a memo on the current and possible future contract claims. Specifically, you have been asked to prepare a memorandum to the partners on possible claims of fraud, misrepresentation, and nondisclosure, and breaches of the covenants of good faith and fair dealing, detailing the basis for the claims, Apple’s possible defenses, and the probabilities of success.

Because suits are expected in nearly every jurisdiction, do not apply the law of any particular state. Instead, apply the general common law of contracts that you have learned in this and other classes.

Your task is to prepare a memorandum outlining answers to these and, potentially, other questions to the partners of either MacLand or Android, with a particular focus on either potential claims or potential defenses, depending on whether you work for Android or MacLand, respectively. The memorandum should be no longer than 7 pages (1.5 spacing), with a one-page executive summary or abstract at the front (making it 8 pages in total), using Times New Roman 12 font, 1-inch margins at the top and bottom of the page, and 1.25 inch margins on the sides.

Teams may be comprised of no more than three individuals. I will allow you to choose which firm you work for, but because the class must be evenly divided we may have to use some sort of lottery system if too many teams select the same firm. Needless to say, your grade does not depend on which firm you work for – it is the strength and creativity of your analysis that matters, not which side you represent.

You will have to do a presentation on Feb. 21, revise your paper based on feedback from the class, and turn in your memo on or before 5 pm on Feb 25. Although the exact amount of presentation time will ultimately depend on how many groups are giving presentations, my hope is to allow about 15 minutes for each presentation and 15 minutes for Q&A. We’ll adjust those estimates based on the total number of presentations in the coming weeks. Assignments should be turned in to Danielle Schmid at Danielle.schmid@law.duke.edu.

Final Assignment: DOT and Airline Mistake Fares (50% of final grade)

You are a young lawyer with the Department of Transportation (DOT). On April 25, 2011, DOT issued a final rule on enhancing airline passenger protections which included a provision prohibiting airlines and other sellers of air transportation from increasing the price of air transportation after a purchase has occurred (hereafter, “DOT Mistake Fare Rule”). This provision has been held by the Supreme Court to preempt state laws governing airline pricing, including the common law rules regarding contract mistakes.

On May 23, 2014, DOT published a Notice of Proposed Rulemaking (NPRM) stating that it was contemplating revising the DOT Mistake Fare Rule. In that rulemaking, DOT expressed concern regarding how quickly mistaken fares are spread through postings on aviation and travel websites, forums, and blogs. It specifically solicited comment on how to address “bad faith” purchases of mistaken fares. The comment period on this NPRM closed on September 29, 2014, and DOT’s review of those comments is ongoing.

Recently, DOT announced that, as a matter of prosecutorial discretion, it would no longer enforce the DOT Mistake Fare Rule, so long as the airline or seller of air transportation: (1) demonstrates that the fare was a mistaken fare; and (2) reimburses all consumers who purchased a mistaken fare ticket for any reasonable, actual, and verifiable out-of-pocket expenses that were made in reliance upon the ticket purchase, in addition to refunding the purchase price of the ticket.

DOT is again considering what position it should take with respect to airline mistake fares. The airline industry has been lobbying hard for a reversal of the DOT Mistake Fare Rule. Consumer rights groups, in contrast, urge DOT to resume enforcing its own policy.

The airlines make several arguments in favor of a change:

1. The Internet age of travel means that it is easier for IT system errors to cause prices to display incorrectly and it is impractical to expect senior airline officials to monitor each point of possible error
2. The advent of the Internet also means that such mistakes can be shared, publicized, and purchased very quickly, often before the airline even has a chance to become aware of and correct the mistake.
3. Many consumers of mistake fares are not “mistaken” nor are they acting in good faith. Internet chat rooms, blogs, and other venues create communities of bargain hunters consisting of thousands of sophisticated purchasers who share information and seek out such mistakes.

For their part, airline consumer advocacy groups oppose any change, arguing that it is difficult for consumers to tell the difference between a promotion and a mistake, and that it is ultimately the airline’s responsibility to exert quality control over IT. They further argue that, in the absence of the DOT Mistake Fare Rule, airlines may pull a “bait and switch” in which consumers are lured in through ultra-cheap fares, then threatened with trip cancellation if they fail to pay additional money.

Your task as DOT lawyer is to prepare a memorandum outlining what the DOT should do and why. There are a number of options to consider, including following the common law rule of mistake, following the current DOT Mistake Fare Rule (to the extent that it differs from the common law, a point we will discuss), and maintaining its current reliance-based policy. Outline the reasons for your proposal, including the reasons for any deviations from common law precedent (for example, is it wrong? Is the airline business different in some relevant way?)

The memorandum should be no longer than 15 pages (1.5 spacing), with a one page executive summary at the front (making it 16 pages in total), using Times New Roman 12 font, 1-inch margins at the top and bottom of the page, and 1.25 inch margins on the sides.

Teams may be comprised of no more than three individuals.

You will have to do a presentation during the last week of class (approximately 15 minutes of presentation and 15 minutes of answering questions, though the exact time limits will be determined after we know how many presentations we will have). After you incorporate the feedback, turn in your final assignments prior to 5 pm on the last day of the exam period. Assignments should be turned in to Danielle Schmid at Danielle.schmid@law.duke.edu.