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MAKING AND DOING
DEALS:
CONTRACTS IN CONTEXT

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Making and Doing Deals: Contracts in Context

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Preface

Our primary objectives¹ in writing this book were to give you a better understanding of:

(1) how to do contract law in law school—what legal issues arise when there is a dispute² over a deal and what legal concepts law students should use in addressing these issues; and

(2) how to do contract law in the “real world”—what a lawyer can do to minimize the possibility that her client will be involved in disputes and maximize the possibility that if disputes nonetheless arise, resolution will be favorable to her client.

The book, like most law school “case books,” is mostly cases.³ Some of the cases are “classics,” part of a legal culture shared by lawyers regardless of the law school they attended or the case book their contracts professor selected. Other cases have been selected because they raise interesting questions or contain insightful analysis of important legal issues. We have also tried, whenever possible, to include recent cases that involve contemporary issues such as shrinkwrap contracts and arbitration clauses. We don’t agree with the reasoning or result of all of the cases in the book; your teacher won’t; you shouldn’t.

¹The objectives of making money, gaining academic prestige, convincing David Kelley to develop a new television series about contract law professors were, of course, secondary.

²People may disagree about (i) whether they ever made a deal or (ii) what the terms of the deal are or (iii) whether the other guy did what he agreed to do or (iv) if there is some legal excuse for not doing what you agreed to do or (v) how courts should enforce deals.

³Additionally, the book has both textual notes before the cases to give you some idea of what you are supposed to look for in the case and also questions after the cases to give you some idea of whether you found it. While we are of course proud of every word we have written, we want to single out the material in the Appendix on what is a contract, what is contract law, and what is a law school course on contracts. We urge you to read these pages at some point during the first few weeks of the semester.

We just want you to think about the cases. Not “think like a lawyer,” just think.

Through law school and beyond, we have heard the phrase “think like a lawyer.” We still don’t know what it means. Each of us practiced law for more than eight years, and have been partners in large law firms; each of us approaches legal issues differently. While we disagree over the phrase “think like a lawyer,” we agree with the phrase that “lawyers think.”

A big part of that thinking is questioning constantly what you read. It is important that you read the cases and other materials in this book, asking yourself questions such as:

- (1) What facts in this case are important?
- (2) What were the questions that the court decided?
- (3) What were the reasons for the decision? Do I agree with the result? Do I agree with the reasons for the result?
- (4) Why is this case in the book? How is it similar to and different from other cases in the book?
- (5) How can the decision in this case be helpful in avoiding other disputes or in resolving other disputes?
- (6) How come Epstein, Markell and Ponoroff are funnier and more interesting than my contracts teacher?

One last point before you turn the page. When communicating in writing, people often use footnotes. In this book, the footnotes that are noted with asterisks contain material that we, the casebook editors, have written for explanatory or other purposes. Footnotes with actual numbers are the footnotes from the original material, be it actual cases, articles, or the like. In addition, we have retained the original numbers of these footnotes. You should keep this in mind because, due to our sometimes heavy editing, these numbered footnotes do not always appear in consecutive numerical order.

We have had fun writing this book, and we learned a lot. We hope that you have fun using the book and that you also learn a lot.

HAVE A GREAT FIRST YEAR.

David G. Epstein

Bruce A. Markell

Lawrence Ponoroff

Tuscaloosa, Las Vegas and New Orleans,

February 2002

Acknowledgments

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