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**CONTRACTS**  
**Cases and Doctrine**

*Sixth  
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# CONTRACTS

## *Cases and Doctrine*

*Sixth Edition*

Randy E. Barnett

*Carmack Waterhouse Professor of Legal Theory  
Georgetown University Law Center*

Nathan B. Oman

*Professor of Law  
William & Mary Law School*



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*To my wife, Beth, and my kids, Laura and  
Gary, for all their love and support.*

*— Randy E. Barnett*

*For Jacob and Beth, third party  
beneficiaries.*

*— Nathan B. Oman*

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# PREFACE

In the beginning there was the textbook. It consisted of explanatory text. Students studied contracts largely on their own using treatises such as those by Blackstone and Kent or summaries of these treatises written by learned practitioners. Next came the casebook. It consisted of cases. Casebooks were developed for teaching contracts in the university classroom setting using the “case method.” Then came the multivolume modern specialized treatises, the Restatements, the Realist Revolution, the Uniform Commercial Code, and, most recently, an explosion of legal scholarship with an increasing emphasis on legal theory.

As contracts casebook authors struggled to cope with each of these developments, contracts casebooks were transformed into an amalgam of highly edited cases and “squibs,” fragments of law review articles, excerpts from the Uniform Commercial Code and the Restatement — and, of course, the ubiquitous “note material.” The idea was to integrate the diverse sources of contract law in a single tightly edited volume. However, this evolution from casebook to integrated snippets of material has resulted in several undesirable consequences.

First, contracts teaching materials are now predigested. Practicing lawyers and legal scholars must scan whole cases, whole articles, and whole statutes to glean the information relevant to their problem. Unfortunately, to get everything into a single volume, cases, articles, and other materials are so heavily edited that students are not required to sift through the materials themselves. The scanning has already been done for them by the casebook author. Rather than gleaning the message of a case or an article, the challenge posed to students and professors by today’s casebooks is to decipher the casebook *author’s* message hidden in the structure of the materials.

Further, because highly edited casebooks inevitably take on a heavy dose of their authors’ views of contracts, novice professors are forced either to learn and accept the author’s viewpoint or to swim heroically against the tide. Experienced professors with independent minds are less likely to engage in fighting the casebook and are more likely to supplement it with their own materials, perhaps eventually abandoning the casebook altogether. While it is inevitable that the author’s views will be reflected in any casebook, the more heavily edited and integrated a casebook is, the more difficult it becomes for teachers to project to students their own views of contract.

Finally, to make room for more cases about complex commercial transactions, contracts casebooks have increasingly abandoned the classic cases that contracts professors still debate to this day. Complicated commercial fact patterns make contracts seem remote from the life experience of



average first-year law students, who are required to take the course but may or may not be interested in pursuing careers practicing commercial law. As a result, contracts professors are at a competitive disadvantage with their colleagues who teach seemingly more engaging first-year subjects such as criminal law or torts.

This book charts a different course. It contains far fewer cases that are more lightly edited than has become the norm. In addition to commercial transactions, we have favored a mix of classic and very recent cases involving provocative controversies,<sup>1</sup> memorable fact patterns,<sup>2</sup> and public figures.<sup>3</sup> These are cases that lend themselves to discussing both basic contract doctrine and the broad philosophical, economic, and political implications of adhering to these legal rules and principles.

In place of vexatious note material, students will find “Study Guides” before most cases and, after each topic, “Reference” citations to the most popular and respected contract treatises.<sup>4</sup> In this way, students receive useful questions and suggestions *before* they read a case and ready access to more comprehensive and authoritative explanations of the material than is possible in a casebook. Each section also includes relevant provisions of the Uniform Commercial Code and the Restatement (Second) of Contracts.

We believe it is safe to say that this casebook contains a larger portion of the scholarship providing context on the famous contracts cases than any other. These “relational background” materials will enrich the students’ understanding of the cases and will stimulate a deeper classroom discussion than will cases or statutes alone. Students actually *enjoy* them! They also illustrate that opinions of appellate courts are often surprisingly incomplete and that one’s sympathies for the parties may shift upon learning more about the facts. In addition, historical, comparative, ethical, economic, statutory, procedural, empirical, commercial, and theoretical “background materials” were selected and edited to engage students with the subject of contracts and spark debate, but also to be accessible. They can be assigned as required or optional reading, or they may be skipped altogether without detracting from doctrinal coverage, thereby greatly shortening the book.

This sixth edition makes a few changes. Chief among these has been an effort to improve the “modularity” of the book, making it easier to teach sections independent of one another and allowing professors to pick and choose which doctrinal areas to cover, particularly those teaching shorter, one-semester courses. We have created a free-standing section on public policy defenses, which were covered only in the introduction of earlier

1. For example, surrogacy agreements, failed vasectomies, involuntary servitude, palimony claims, sexual harassment, reporters’ promises of confidentiality, and children’s rights.

2. For example, Chevy Corvettes, Carboloc Smokeballs, custom stereos, oil embargoes, cancelled coronations, football players, opera singers, college catalogues, employment manuals, computer software, and pregnant cows.

3. For example, Shirley Maclaine, Robert Reed, Brooke Shields, Jack Dempsey, Lee Marvin, Lillian Russell, and Elvis.

4. References are provided to Randy E. Barnett, *The Oxford Introduction to U.S. Law: Contracts* (2010), E. Allan Farnsworth, *Contracts* (4th ed. 2004), John D. Calamari & Joseph M. Perillo, *Contracts* (6th ed. 2009), and John E. Murray, *Murray on Contracts* (5th ed. 2011).

editions. We have also added a few new cases, included some classics overlooked by previous editions, and added newly published background materials.

- In Chapter 1, *In re Baby M* and the associated material has been replaced by *Jordan v. Knafel* along and background materials by Lawrence Cunningham.
- In Chapter 2, *Tonglish v. Thomas* has been replaced by *KGM Harvesting Co. v. Fresh Network* and *Mistletoe Express Service v. Locke* has been replaced by the classic case of *Security Stove & Mfg. Co. v. American Ry. Express Co.*
- Chapter 4 includes new background materials on *Lucy v. Zehmer* by Barak Richman, and has added *Arnold Palmer Golf Company v. Fuqua Industries Inc.*, *Copeland v. Baskin Robbins USA*, the classic case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, and *Nguyen v. Barnes & Noble Inc.*, which replaces *Specht v. Netscape*. We have also added a drafting problem based on *Arnold Palmer Golf Company*, and a summary of empirical research by Florencia Marotta-Wurgler on online contracting replaces the ABA Working Materials on that topic.
- In Chapter 6, we replaced *Brown v. Oliver* with *Masterson v. Sine* and omitted *In re RealNetworks*.
- In Chapter 7, we added *Lawrence v. Fox*, along with historical background materials on this seminal case. We have omitted the section on Agency.
- In Chapter 9, we added *Boothe v. Fitzpatrick* and *Harris v. Watson*.
- In Chapter 11, we added *Pitts v. McGraw-Edison Co.*
- In Chapter 12, we replaced *Step-Saver Data Sys. Inc. v. Wyse Technology* with *Vlases v. Montgomery Ward & Company*.
- Finally, in Chapter 16 we added *Samaniego v. Empire Today LLC* to the section on arbitration agreements and added a new section on public policy defenses consisting of *A.Z. v. B.Z.* and *Meyer v. Hawkinson*.

For those professors who wish to teach contract theory by means of excerpts from legal scholarship, the anthology *Perspectives on Contract Law*<sup>5</sup> continues to mesh harmoniously with the organization of this casebook. In contrast to the complex and sometimes idiosyncratic organization of some other casebooks, a great effort was made to adhere to a comprehensible organization reflecting the cause of action for breach of contract: Enforcement, Mutual Assent, Enforceability, Performance and Breach, and Defenses. While starting with enforcement or remedies is sometimes controversial (and we explain this choice in the introduction to Chapter 2), the modular construction of the casebook permits professors easily to reorder these topics as they see fit.

*Randy E. Barnett & Nathan B. Oman*

November 2016

5. Randy E. Barnett, *Perspectives on Contract Law* (4th ed. 2009).

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Many improvements to previous drafts of this book were stimulated by class discussion with my contracts students at Northwestern University, Harvard Law School, Boston University School of Law, and Georgetown University Law Center. Finally, I wish also to thank my extraordinary research assistants: Dan Brown at Chicago-Kent College of Law (Class of 1994), at Boston University, Saba Khairi (Class of 1995), Kristin Taylor, Andrew White, Kathleen Eagan (Class of 1996), Leslie Ravestein (Class of 2000), Lourdes German (Class of 2004) and, at Harvard Law School, Jaime Byrnes (Class of 2004). In addition to their other contributions, these students are solely responsible for researching and writing the wonderful judicial biographies that set this casebook apart by giving readers a sense of the men and women who struggled both to decide the cases before them and to justify their decisions. The idea to include judicial biographies in a casebook

was innovated by Professor Curtis R. Reitz and a few of his biographies are included here as well. The cases and materials on legal ethics in Chapters 6, 7, and 16 were suggested by the W. M. Keck Foundation's project on legal ethics, which is administered by Geoffrey Hazard, Jr. and Susan Koniak.

Finally, with this edition, I welcome aboard Nate Oman as a coauthor. I have long held Nate in high regard and was most grateful when he accepted my invitation to join the book. I encouraged him to bring a fresh eye to everything in the last edition, while being mindful that we did not want to change things too much for existing users. I believe he has added enormous value with the revisions we've made to the Sixth Edition, which were all done at his behest.

Speaking for Nate and myself, we also wish to thank the following authors and publishers for permitting us to include excerpts from these works:

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*Randy E. Barnett*

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