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GREGORY KCLASS



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Gregory Klass

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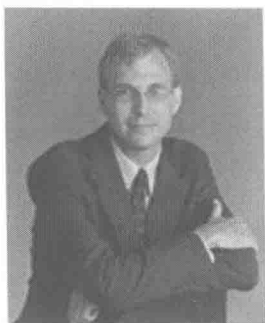
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Contract Law in the United States

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Professor Klass's legal scholarship focuses on contract law, with particular attention to fraud liability between contracting parties, remedies for bad-faith breach, intent to contract requirements, and the general theory of contract law. In 2006, Professor Klass was awarded the Scribes Book Award for *Insincere Promises: The Law of Misrepresented Intent*, which he co-authored with Ian Ayres. Professor Klass is admitted to practice in New York and in the Second Circuit Court of Appeals.

The Author

List of Abbreviations

Special Abbreviations

This text largely follows the citation form in The Bluebook: A Uniform System of Citation (Eighteenth Edition), including its abbreviations. In the interest of economy, secondary sources that are used frequently will be cited using the following abbreviations. Full citations for these works are available in the bibliography. Where a different edition or version of a source is used, the full citation appears in the notes.

I. Treatises

Corbin	Corbin on Contracts, Revised Edition
Farnsworth	Farnsworth on Contracts, Third Edition
Williston	Williston on Contracts, Fourth Edition

II. Restatements

First Restatement	Restatement of the Law of Contracts
Second Restatement	Restatement (Second) of Contracts
Restatement of Agency	Restatement (Third) of Agency
Restatement of Landlord-Tenant	Restatement (Third) of Property: Landlord & Tenant
Draft Restatement of Restitution	Draft Restatement (Third) of Restitution and Unjust Enrichment
Restatement of Suretyship	Restatement (Third) of Suretyship and Guaranty
Restatement of Trusts	Restatement (Third) of Trusts

List of Abbreviations

General Abbreviations

I. Case Reporters

Citations to Supreme Court decisions are to the United States Reports. Citations to other federal cases are to the Federal Reporter. Citations to state decisions are to the regional reporter where available. Following U.S. convention, case citations note the volume number, the source, the page number, and in parentheses the court and year. Case reports are abbreviated as follows. Most of the below reports are now in their third series.

A./A.2d	Atlantic Reporter/Atlantic Reporter (Second Series)
F./F.2d	Federal Reporter/Federal Reporter (Second Series)
N.E./N.E.2d	North Eastern Reporter/North Eastern Reporter (Second Series)
N.W./N.W.2d	North Western Reporter/North Western Reporter (Second Series)
P./P.2d	Pacific Reporter/Pacific Reporter (Second Series)
S.E./S.E.2d	South Eastern Reporter/South Eastern Reporter (Second Series)
S.W./S.W.2d	South Western Reporter/South Western Reporter (Second Series)
So./So.2d	Southern Reporter/Southern Reporter (Second Series)
U.S.	United States Reports

II. Federal Statutes and Regulations

C.F.R.	Code of Federal Regulations
FAA	Federal Arbitration Act
FAR	Federal Acquisition Regulation
Fed. R. Civ. Pro.	Federal Rules of Civil Procedure
Fed. R. Evid.	Federal Rules of Evidence
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated

III. Uniform Laws

UAA	Uniform Arbitration Act
UCC	Uniform Commercial Code
UETA	Uniform Electronic Transactions Act
UFTA	Uniform Fraudulent Transfers Act
ULPA	Uniform Limited Partnership Act
UPA	Uniform Partnership Act
UPAA	Uniform Premarital Agreement Act

IV. Journal Articles

In accordance with Bluebook conventions, citations to journal articles include the following information in the following order and typeface: Author, Title, [volume number] Journal Name [first page], [cited page] ([year]). For example, a citation to page 510 in Samuel Williston's 1914 article titled "Consideration and Bilateral Contracts," which appeared in volume twenty-seven of the Harvard Law Review starting at page 503, would read:

Samuel Williston, *Consideration in Bilateral Contracts*, 27 Harv. L. Rev. 503, 510 (1914).

V. Other Abbreviations

ALI	American Law Institute
A.L.R.	American Law Reports
Am. Jur. 2d	American Jurisprudence, Second Edition
CISG	United Nations Convention on Contracts for the International Sale of Goods
NCCUSL	National Conference of Commissioners on Uniform State Laws
UDAP Acts	Unfair and Deceptive Acts and Practices Acts
U.L.A.	Uniform Laws Annotated

List of Abbreviations

Preface

The attempt to describe, in summary fashion, contract law in the United States faces two practical challenges. First, contracts are governed in the United States by the common law. The lion's share of contract law is therefore found not in statutes, but scattered through tens of thousands of case holdings and the judicial opinions explaining them. As a result, not only is U.S. contract law hard to find; it is also extremely fine grained. An Appellate Court's decision on the most minor question of law has precedential weight, and is therefore part of the law of contracts. Second, there is not a single law of contract in the United States. Most contracts are governed by state, not federal law. And while there is considerable overlap among the contract law of the fifty states and other U.S. jurisdictions, there are also important differences that defy easy summary.

There is also a more scholarly concern. Perhaps in part because it is judge-made, U.S. contract law is extraordinarily flexible in its application. The great empiricist Arthur Corbin describes the work of the common law courts as follows: "Case by case, they have drawn a line, although like other lines, it is drawn with a wide and imperfect brush, not with a draftsman's pen. Being drawn by many hands, there are gaps in places and there are conflicting lines in other places." U.S. scholars have long argued that tangled lines of precedent and the use of standards rather than rules mean that case outcomes are often driven not only by "black-letter" rules, but by courts' and juries' social, political, moral and other judgments, intuitions, and biases. These aspects of contract law too defy easy summary.

My solution to these challenges is to limit this work's ambitions. This work does not attempt anything close to a complete description of the law of contracts in the United States. For that the reader is referred to the multivolume treatises of Samuel Williston and Arthur Corbin. And it gives itself over to a purely formalist account of contract law, focusing primarily on so-called black-letter rules and ignoring many complexities in their application. Such formalist statements – or restatements – of a rule are not the rule itself. A rule exists in its application to facts. But the application is guided by the statement, and the statement is of interest in its own right. I address the diversity of sources by focusing on the two most general and important: the American Law Institute's Restatement (Second) of Contracts (the "Second Restatement") and the National Conference of Commissioners on Uniform State Laws' (NCCUSL) Uniform Commercial Code (UCC). Neither is in itself legally binding unless specifically adopted by statute, as all states have done with part or all of the UCC, or by judicial decision. The Second Restatement and the UCC, however, describe a good portion of the law of contracts, enjoy considerable persuasive authority, and have driven many changes to the law in the second half of the twentieth century.

Preface

They therefore provide a useful entrance into the law. Finally, while this work is written for an international audience, I have largely avoided any comparativist claims. The goal is to provide easy access to the black-letter rules of U.S. contract law. Those familiar with other traditions will be more qualified than I to draw their own comparisons.

To write about U.S. contract law is to stand on the shoulders of giants. Because the common law of contracts exists primarily in judicial opinions, treatises on the subject enjoy considerable influence. In the United States, the monumental works of Samuel Williston and Arthur Corbin have been enormously important in the development of the law. Alan Farnsworth's more recent treatise has kept up the tradition. The text below occasionally cites one or another of these works for individual points of law or to indicate where the reader can find more detailed discussions of a topic. Those citations do not mark half of the places where this work has benefited from the labors of those authors.

In addition to the citations to Williston, Corbin, and Farnsworth, a number of footnotes direct the reader to relevant *American Law Reports* articles. These articles should be especially valuable to foreign lawyers and scholars, who might find it difficult to navigate U.S. case law. Each takes a narrow issue, which is identified in the title, and collects and summarizes a large number of judicial decisions on it. The text below also occasionally describes and discusses individual cases, either to illustrate a rule or because the case is the canonical source for it. The text does not cite as many authorities, and especially as many cases, as is common in works of this sort in the United States. This is in accord with the form of the *International Encyclopedia of Law* series. An attempt has been made throughout to reference sources that will provide additional authorities. Finally, the bibliography lists a number of scholarly works on individual subjects. I make no claim to completeness here, and have certainly missed influential and important works. On just about any given rule of U.S. contract law one can find a large and growing scholarship. The works cited should, however, provide the reader a path into those forests.

The structure of this work largely follows that of the other Contracts volumes in the *International Encyclopedia of Law* series, on the theory that a common pattern will better serve readers who are more familiar with other traditions, as well as comparativists who are using this volume together with others in the series. The result will at places feel odd to readers already familiar with U.S. law. In a U.S. textbook or treatise, for example, liquidated damages would usually be discussed in the section on money damages, while here the topic appears in a section on different types of clauses. The one place where I have departed significantly from the proscribed table of contents is in Part I, Chapter 6's discussion of remedies. The structure of the U.S. law of remedies is simply too different from that of the civil law. Rather than attempting to fit a square peg into a round hole, I have carved out a square one.

I have been helped in writing this work by a series of wonderful research assistants. Brie Ann Carey, Kevin Goldstein, and Conrad Deitrick all contributed to early research on the project. Addison Draper, Michael Holt, and Benjamin Szilagyi all worked on the middle stages, including helping me draft portions of Part II. And Allison Meredith, Erin Morgan and Gregory Zlotnick helped me with later edits. I have also benefited from the expertise of Adam Levitin, Sanjukta Misra, and Philomila Tsoukala. Whatever errors remain are of course mine.

Preface

What I have tried to present in this short work is something like the grammar of contract law: the fundamental rules that order and partly determine case outcomes. While that grammar occasionally discusses local dialects, it ignores many others. And the focus on syntax and semantics neglects the pragmatic considerations that often drive judicial decisions. To shift metaphors, as Wordsworth says, we murder to dissect. But a concise grammar can be helpful when learning a second language, and in the exercise of comparative linguistics. It is hoped that this work will serve those purposes.

1. 1 Corbin § 2.13, at 195.

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