

ASPEN CASEBOOK SERIES

**GEORGE  
KOROBKIN**

**K**  
**A Common Law Approach  
to Contracts**

*Second  
Edition*



**Wolters Kluwer**

# K

## A Common Law Approach to Contracts

**Tracey E. George**

---

Charles B. Cox III and Lucy D. Cox Family Chair in Law and Liberty  
Professor of Law and Political Science  
Director, Cecil D. Branstetter Litigation and Dispute Resolution Program  
Vanderbilt University

**Russell Korobkin**

---

Vice Dean and Richard C. Maxwell Professor of Law  
UCLA School Of Law



Wolters Kluwer

Copyright © 2017 CCH Incorporated. All Rights Reserved.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory US serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. ([www.WKLegaledu.com](http://www.WKLegaledu.com))

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at [www.WKLegaledu.com](http://www.WKLegaledu.com), or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail [customer.service@wolterskluwer.com](mailto:customer.service@wolterskluwer.com), call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-6819-4

#### **Library of Congress Cataloging-in-Publication Data**

Names: George, Tracey E., 1967- author. | Korobkin, Russell.

Title: K : common law approach to contracts / Tracey E. George, Charles B. Cox III and Lucy D. Cox Family Chair in Law and Liberty, Professor of Law and Political Science, Director, Cecil D. Branstetter Litigation and Dispute Resolution Program, Vanderbilt University; Russell Korobkin, Vice Dean and Richard C. Maxwell Professor of Law, UCLA School Of Law.

Description: New York : Wolters Kluwer, 2017. | Series: Aspen casebook series  
| Includes bibliographical references and index.

Identifiers: LCCN 2016028168 | ISBN 9781454868194 (alk. paper)

Subjects: LCSH: Contracts—United States. | LCGFT: Casebooks.

Classification: LCC KF801.A7 G46 2017 | DDC 346.7302/2—dc23

LC record available at <https://lcn.loc.gov/2016028168>



**SUSTAINABLE  
FORESTRY  
INITIATIVE**

**Certified Chain of Custody**  
Promoting Sustainable Forestry

[www.sfiprogram.org](http://www.sfiprogram.org)

SFI-01042

SFI label applies to the text stock

# About Wolters Kluwer Legal & Regulatory US

Wolters Kluwer Legal & Regulatory US delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

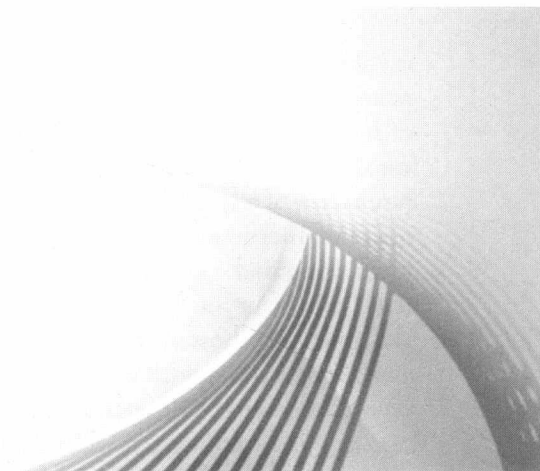
**To Chris and Elliot**

**—TEG**

**To Sarah and Jessica**

**—RK**

# Preface



The purpose of this book is—in conjunction with the guidance provided by your Contracts professor—to teach you the method of legal reasoning. The law of contracts provides the raw material for this endeavor.

This is, of course, the classic goal of the document known as a law school “casebook,” but we think that this goal has too often become obscured over the course of the last generation. Contracts textbooks, like those in many other fields, have tended to evolve and expand into longer and more sophisticated discourses on contract law and related theory, inching closer and closer to the model of the “hornbook” that provides a detailed and comprehensive description of the law and further away from the casebook model.

Many of these are impressive works of scholarship, but we believe that what contracts textbooks have become is not the tool best suited for a contracts course as it is usually taught in the modern American law school. As a first-year course now often taught in one semester, Contracts must help you learn to read judicial opinions, distinguish material from immaterial facts, and apply holdings from one case to others that bear substantial similarities but also notable differences. At root, this means that first and foremost, Contracts is a course in analogical reasoning, the fundamental skill of lawyering. Learning the details of contract law, *per se*, is a worthy objective—and you will learn a great deal of law in the course—but this is clearly the secondary objective.

It is our view, embodied in this casebook, that many prominent features of contemporary casebooks do not advance the goal of teaching the lawyerly skill of analogical reasoning and can often hinder the pursuit of that goal. Many Contracts texts include excerpts of law journal articles that provide normative theories of law. These can be illuminating for more advanced scholars, but they are rarely helpful to first-year law students, who are focused on understanding and applying precedent rather than critiquing it. To the extent that scholarly articles are more doctrinal in nature and carefully distinguish between case precedents, they sometimes model analogical reasoning, but we believe this is something that the classroom instructor can do, using these materials, in a way that makes a stronger impression.

Nearly all Contracts texts include extended note material that often follows primary cases and describes holdings of various courts on related issues. This type of material can give students the false impression that the law always—or even just usually—provides a clear, determinate answer to the question of what is the proper resolution of any dispute that arises. Such material only fuels the sometimes frantic quest of the new law student to learn the “rule” or the “black letter law,” as if identifying and memorizing said “law” is sufficient to make him or her a competent lawyer. As you will learn in this course, the critical skill to master as a first-year law student is how to apply rules of law to new and unfamiliar fact patterns.

Textual passages that provide string cites of relevant judicial opinions or that pose a long series of hypothetical questions—yet another standard feature of Contracts textbooks—are not necessarily harmful to your goal of learning the fundamental method of legal reasoning, but they are usually distracting and, at best, wasted space. Professors lack the time to discuss more than a small fraction (if any) of these tidbits in class, and students balancing a series of challenging courses lack the time to chase down and read all the cited opinions or to carefully think through all of the rapid-fire hypotheticals. As a result, you would quickly learn to largely ignore these materials.

You will quickly notice that this book contains none of these items. Each section is limited to three types of materials, which best promote the teaching and learning of the method of legal reasoning. Each section begins with a brief narrative that states a basic, fundamental proposition of contract law and provides some guidance as to the second order doctrinal issues that the fundamental proposition raises. This is followed by a set of edited judicial opinions, from which you, with guidance from your instructor, should tease out ways in which judges have dealt with these issues. In some situations, cases that deal with just slightly different issues are juxtaposed to illustrate the fault lines of contract doctrine. In others, cases that (arguably) deal with the same issue but reach different outcomes are juxtaposed to illustrate the conflict. Finally, each section concludes with a small number of discussion problems. These are designed to include enough factual detail that you can analyze them from the perspective of the opposing parties and the judge while, at the same time, being brief enough that you can carefully think through the problems in light of the preceding judicial opinions when preparing for class. These problems simulate (albeit in somewhat briefer form) the type of fact patterns that you will be expected to analyze during your final exam, and the opportunity to discuss and debate these in class will give you practice making exactly the form of argument your professor will expect you to make on the final exam. All of the problems present summarized facts from real cases, which allows your professor the opportunity, if he or she feels it is appropriate, to reveal how courts actually resolved the disputes in question following class debate.

In addition to believing that most contemporary contracts casebooks include too much of the wrong type of material for first-year law students, we also believe that most casebooks include too much material, period, given the ever-shortening number of contact hours allowed for the course. Most Contracts casebooks attempt to teach many provisions of Article 2 of the Uniform Commercial Code (which

applies specifically to contracts for the sale of goods) in addition to the fundamental rules and principles of the common law of contracts. This book contains a few brief interactions with the UCC—just enough, we believe, to teach students its scope and illustrate a few points of contrast between the UCC and common law principles. Some also attempt to incorporate study of international sales law as exemplified by the Convention on International Sale of Goods. More recently, some casebooks have begun to emphasize the skill of contract drafting. We have omitted these peripheral topics.

There is no question that these are all topics that a commercial lawyer should know, but we believe that attempting to teach these subjects in first-year contracts course distracts from building the fundamental skills that all lawyers need to learn regardless of their practice area. We believe—as does your professor, as evidenced by the fact that he or she has chosen from many alternatives to assign this book—that it is better for law students to study these topics in advanced courses rather than shoe-horning them into the basic contracts course and diluting the training in analogical reasoning that should be the primary pedagogical goal.

The Second Edition remains lean, like the First Edition, but in response to requests by our adopters, we have added a chapter on the rules related to third-party beneficiaries and assignees. “Contract Rights of Non-Parties” makes its debut as Chapter 7 (pushing “Alternative Bases for Liability: Non-Contract Claims” to Chapter 8). Instructors who wish to introduce this subject now have the ability to do so. In response to feedback from students, we have slightly expanded some of the narrative materials that introduce and provide guidance to the study of various topics.

TRACEY E. GEORGE  
RUSSELL KOROBKIN

June 2016

# Acknowledgments

An abstract graphic in the top right corner of the page. It features a series of curved, parallel lines that create a sense of depth and movement, resembling a stylized architectural element or a close-up of a curved surface.

Although we like to think we bring some unique insights to the material that follows and the accompanying teacher's manual, our views about the substance of contract law and how to best teach it are highly derivative of those who have both taught and assisted us over the years.

We owe a particular debt to Charles Calleros, Barbara Fried, Bob Gordon, Bill Henning, and Dick Speidel, who taught us contracts as students at Stanford Law School and/or shared their teaching notes and insights with us when we first started teaching the subject ourselves in the 1990s. We have studied from or taught out of "Cases and Materials on Contracts" (now by Allen Farnsworth, Carol Sanger, Neal Cohen, Richard Brooks, and Larry Garvin) and "Studies in Contract Law" (now by Ian Ayres and Gregory Klass).

We have learned a great deal from colleagues who have used and/or reviewed the book. We are especially grateful to Rebecca Haw Allensworth, Michael Bressman, and John Halley at Vanderbilt and Alex Stremitzer at UCLA for their valuable insights and wise counsel (and great patience). With apologies to anyone whom we may be forgetting, we also thank Ron Brown, Deborah Curtis, Bob Danforth, Robin Effron, Jonathan Fine, Jeffrey Harrison, Frederick Jonassen, Mark Matthews, Ron Micon, Nell Jessup Newton, Daniel P. O'Gorman, Katherine Pearson, David Pimentel, Larry Pittman, Veronica Root, Lawrence Solan, and Urska Velikonja.

Our Contracts students were a source of inspiration and constructive criticism, for which we are grateful. We have benefitted greatly from the research assistance provided for this edition by Vanderbilt law students David Adams, Cyle Catlett, Ojeaga Longe, Sam Mallick, Ashley Malone, David Mitchell, Danny Rheiner, and Deborah Yang. We want to single out Ellen Hunter (Vanderbilt Law '15) for an exceptional job providing astute commentary on the first edition. John Devins, Nicole Pinard, and the outstanding sales representatives at Wolters Kluwer, Darren Kelly at Bullpen Publishing Solutions, and Andrew Blevins at The Froebe Group all played important roles in the process of creating this edition.

Sarah and Jessica, Chris and Elliot, provided support and inspiration, and helped us to keep the whole thing in perspective.



# Summary of Contents

Contents xi

Preface xix

Acknowledgments xxiii

**Introduction 1**

**Chapter 1. Promise 9**

**Chapter 2. Contract Formation: Consideration and Mutual Assent 15**

**Chapter 3. Affirmative Defenses to Contract Enforcement 127**

**Chapter 4. Contract Interpretation 257**

**Chapter 5. Defining Performance Obligations: Conditions and  
Excuses 383**

**Chapter 6. Remedies 481**

**Chapter 7. Contract Rights of Non-Parties 607**

**Chapter 8. Alternative Bases for Liability: Non-Contract Claims 657**

Table of Cases 711

Index 717

# Contents

Preface xix  
Acknowledgments xxiii

## Introduction. Fundamentals 1

### Chapter 1. Promise 9

*Hawkins v. McGee* 10  
Problems 13

### Chapter 2. Contract Formation: Consideration and Mutual Assent 15

#### A. Consideration 15

##### 1. Bargained-for Exchange and Gratuitous Promises 16

*Hamer v. Sidway* 17  
*Langer v. Superior Steel Corp.* 20  
*In re Greene* 21  
*Mills v. Wyman* 25  
*Levine v. Blumenthal* 27  
*Alaska Packers' Ass'n v. Domenico* 28  
Problems 31

##### 2. Conditional Promises 32

*Kirksey v. Kirksey* 34  
*Allegheny College v. National Chautauqua County Bank of Jamestown* 35  
Problems 39

**3. Illusory Promises 40***Strong v. Sheffield* 41*Wood v. Lucy, Lady Duff-Gordon* 43*Rehm-Zeiher Co. v. F.G. Walker Co.* 44*Mattei v. Hopper* 47

Problems 49

**B. Mutual Assent 50****1. The Theory of Mutual Assent 50***Embry v. Hargadine, McKittrick Dry Goods Co.* 51*Lucy v. Zehmer* 54*Empro Manufacturing Co. v. Ball-Co Manufacturing, Inc.* 59*International Casings Group, Inc. v. Premium Standard Farms, Inc.* 62*Joseph Martin, Jr., Delicatessen v. Schumacher* 69

Problems 72

**2. Offer 74***Interstate Industries, Inc. v. Barclay Industries, Inc.* 75*Nordyne, Inc. v. International Controls & Measurements Corp.* 78*Craft v. Elder & Johnston Co.* 80*Lefkowitz v. Great Minneapolis Surplus Store, Inc.* 81*Consolidated Freightways Corp. of Delaware v. Williams* 83*Leonard v. Pepsico, Inc.* 86*Harris v. Time, Inc.* 95

Problems 99

**3. Acceptance 100***Carlill v. Carbolic Smoke Ball Co.* 102*Glover v. Jewish War Veterans of the United States of America,*  
*Post No. 58* 107*Corinthian Pharmaceutical Systems, Inc. v. Lederle Laboratories* 109

Problems 113

**4. Termination of Offers 114***Ever-Tite Roofing Corp. v. Green* 116*Dickinson v. Dodds* 118*Morrison v. Thoele* 121

Problems 124

**Chapter 3. Affirmative Defenses to Contract Enforcement 127****A. The Statute of Frauds 128***C.R. Klewin, Inc. v. Flagship Properties, Inc.* 129*McInerney v. Charter Golf, Inc.* 134*Bazak International Corp. v. Mast Industries, Inc.* 139*Waddle v. Elrod* 148*Chomicky v. Buttolph* 153

Problems 155

**B. Infancy 156**

- Halbman v. Lemke* 157
- Dodson v. Shrader* 162
- Webster Street Partnership, Ltd. v. Sheridan* 164
- Problems 168

**C. Incapacity 168**

- In re Marriage of Davis* 169
- Hauer v. Union State Bank of Wautoma* 174
- Farnum v. Silvano* 180
- First State Bank of Sinai v. Hyland* 183
- Problems 187

**D. Duress 188**

- Duncan v. Hensley* 189
- Austin Instrument, Inc. v. Loral Corp.* 192
- Centech Group, Inc. v. Getronicswang Co.* 197
- Problems 198

**E. Misrepresentation 199**

- Swinton v. Whitinsville Savings Bank* 200
- Weintraub v. Krobatsch* 201
- Stambovsky v. Ackley* 205
- Stroup v. Conant* 210
- Vokes v. Arthur Murray, Inc.* 212
- Problems 215

**F. Unconscionability 216**

- Williams v. Walker-Thomas Furniture Co. (1964)* 217
- Williams v. Walker-Thomas Furniture Co. (1965)* 219
- Frostifresh Corp. v. Reynoso (1966)* 222
- Frostifresh Corp. v. Reynoso (1967)* 223
- Zapatha v. Dairy Mart, Inc.* 224
- Problems 227

**G. Public Policy 229**

- In the Matter of Baby M.* 230
- Johnson v. Calvert* 240
- Marvin v. Marvin* 246
- Hewitt v. Hewitt* 249
- Problems 255

**Chapter 4. Contract Interpretation 257****A. Standard Form Contracts 258****1. Lack of Notice 259**

- Healy v. N.Y. Central & Hudson R.R. Co.* 259
- Hill v. Gateway 2000, Inc.* 262

*Specht v. Netscape Communications Corp.* 265

## **2. Lack of Choice 269**

*Carnival Cruise Lines, Inc. v. Shute* 270

*Armendariz v. Foundation Health Psychcare Services, Inc.* 278

*O'Callaghan v. Waller & Beckwith Realty Co.* 287

*Tunkl v. Regents of the University of California* 291

Problems 295

## **B. The Battle of the Forms 297**

*Leonard Pevar Co. v. Evans Products Co.* 299

*Klocek v. Gateway, Inc.* 304

Problems 307

## **C. The Parol Evidence Rule 309**

*Gianni v. R. Russell & Co.* 310

*Masterson v. Sine* 313

*Nelson v. Elway* 316

*Davis v. G.N. Mortgage Corp.* 321

Problems 325

## **D. Interpretation 327**

*W.W.W. Associates, Inc. v. Giancontieri* 328

*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* 331

*In re Soper's Estate* 334

*Frigalimont Importing Co. v. B.N.S. International Sales Corp.* 337

*Atmel Corp. v. Vitesse Semiconductor Corp.* 342

*Beanstalk Group, Inc. v. AM General Corp.* 345

*Oswald v. Allen* 351

Problems 352

## **E. The Implied Duty of Good Faith and Fair Dealing 355**

*Dalton v. Educational Testing Service* 355

*Eastern Air Lines, Inc. v. Gulf Oil Corp.* 358

*Carmichael v. Adirondack Bottled Gas Corp.* 362

*Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Associates* 368

*Jordan v. Duff & Phelps, Inc.* 375

Problems 380

# **Chapter 5. Defining Performance Obligations: Conditions and Excuses 383**

## **A. Conditions 384**

### **1. Types of Conditions 384**

*Irving v. Town of Clinton* 385

*Main Electric, Ltd. v. Printz Services Corp.* 387

*Kingston v. Preston* 390

*Goodisson v. Nunn* 392

Problems 393

## **2. Substantial Performance and Material Breach 395**

*Maxton Builders, Inc. v. Lo Galbo* 397

*Sahadi v. Continental Illinois National Bank & Trust Co. of Chicago* 398

*Jacob & Youngs v. Kent* 403

*O.W. Grun Roofing & Construction Co. v. Cope* 407

*Dove v. Rose Acre Farms, Inc.* 409

Problems 412

## **3. Excusing Conditions: Prevention, Waiver, Divisibility, and Restitution 413**

*Cantrell-Waind & Associates, Inc. v. Guillaume Motorsports, Inc.* 414

*Clark v. West* 417

*Gill v. Johnstown Lumber Co.* 420

*Lowy v. United Pacific Insurance Co.* 422

*Stark v. Parker* 424

*Britton v. Turner* 427

Problems 429

## **B. Excuse of Non-Performance of Duties 431**

### **1. Mistake 432**

*West Coast Airlines, Inc. v. Miner's Aircraft & Engine Service, Inc.* 433

*City of Everett v. Estate of Sumstad* 434

*Wood v. Boynton* 436

*Smith v. Zimbalist* 439

*Beachcomber Coins, Inc. v. Boskett* 442

*Donovan v. RRL Corp.* 444

Problems 450

### **2. Impracticability 452**

*Taylor v. Caldwell* 453

*U.S. Bancorp Equipment Finance, Inc. v. Amerquest Holdings LLC* 456

*Bush v. Protravel International, Inc.* 459

Problems 464

### **3. Frustration of Purpose 465**

*Krell v. Henry* 466

*Northern Indiana Public Service Co. v. Carbon County Coal Co.* 469

*Sub-Zero Freezer Co. v. Cunard Line Ltd.* 474

Problems 477

## **Chapter 6. Remedies 481**

### **A. Punitive Damages 482**

*White v. Benkowski* 482

*Delzer v. United Bank of Bismarck* 486

*Freeman & Mills, Inc. v. Belcher Oil Co.* 487

Problems 497

**B. Specific vs. Substitutional Performance 498**

- Van Wagner Advertising Corp. v. S & M Enterprises* 499
- Laclede Gas Co. v. Amoco Oil Co.* 501
- Walgreen Co. v. Sara Creek Property Co.* 507
- City of Columbus v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co.* 510
- Ryan v. Ocean Twelve, Inc.* 513
- Problems 515

**C. Expectation Damages 517**

- J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.* 518
- Egerer v. CSR West, LLC* 521
- Groves v. John Wunder Co.* 527
- Peevyhouse v. Garland Coal & Mining Co.* 531
- Problems 537

**D. The Mitigation Principle 539**

- Rockingham County v. Luten Bridge Co.* 539
- Bomberger v. McKelvey* 543
- Parker v. Twentieth Century-Fox Film Corp.* 547
- In re Worldcom, Inc.* 552
- Problems 557

**E. The Foreseeability Requirement 559**

- Hadley v. Baxendale* 559
- C. Czarnikow, Ltd. v. Koufos* 562
- Allen v. Jones* 571
- Jackson v. Royal Bank of Scotland* 574
- Problems 582

**F. The “Reasonable Certainty” Requirement 584**

- Kenford Co. v. County of Erie* 584
- Florafax International, Inc. v. GTE Market Resources, Inc.* 587
- Deitsch v. The Music Co.* 591
- Sullivan v. O’Connor* 593
- Problems 597

**G. Stipulated Damages 598**

- Tal Financial Corp. v. CSC Consulting, Inc.* 598
- NPS, LLC v. Minihane* 601
- Problems 605

**Chapter 7. Contract Rights of Non-Parties 607****A. Third-Party Beneficiaries 608****1. Status as a Third-Party Beneficiary 608**

- Lawrence v. Fox* 610
- Choate, Hall & Stewart v. SCA Services, Inc.* 612

*H. R. Moch Company, Inc. v. Rensselaer Water Company* 616  
*Raritan River Steel Co. v. Cherry, Bekaert & Holland* 618  
*Donnalley v. Sterling* 622  
 Problems 625

## **2. Rights of a Third-Party Beneficiary 626**

*John F. Clark & Co. v. Nelson* 627  
*Benton v. Vanderbilt University* 631  
 Problems 637

## **B. Assignment and Delegation 637**

*Evening News Association v. Peterson* 639  
*Sally Beauty Company, Inc., v. Nexxus Products Company, Inc.* 642  
*Henderson v. Roadway Express* 647  
*In re: Doctors Hospital of Hyde Park, Inc., Debtor* 652  
 Problems 654

# **Chapter 8. Alternative Bases for Liability: Non-Contract Claims 657**

## **A. Promissory Estoppel 658**

*Ricketts v. Scothorn* 658  
*Feinberg v. Pfeiffer Co.* 661  
*Maryland National Bank v. United Jewish Appeal Federation of Greater  
 Washington, Inc.* 666  
*Alaska Airlines, Inc. v. Stephenson* 672  
*Grouse v. Group Health Plan, Inc.* 674  
 Problems 676

## **B. Pre-Contractual Negotiations Liability 678**

*Drennan v. Star Paving Co.* 678  
*Corbin-Dykes Electric Co. v. Burr* 682  
*Hoffman v. Red Owl Stores, Inc.* 685  
 Problems 693

## **C. Quasi-Contract 694**

*Cotnam v. Wisdom* 695  
*Pyeatte v. Pyeatte* 697  
*Farese v. McGarry* 705  
 Problems 707

## **Table of Cases 711**

## **Index 717**