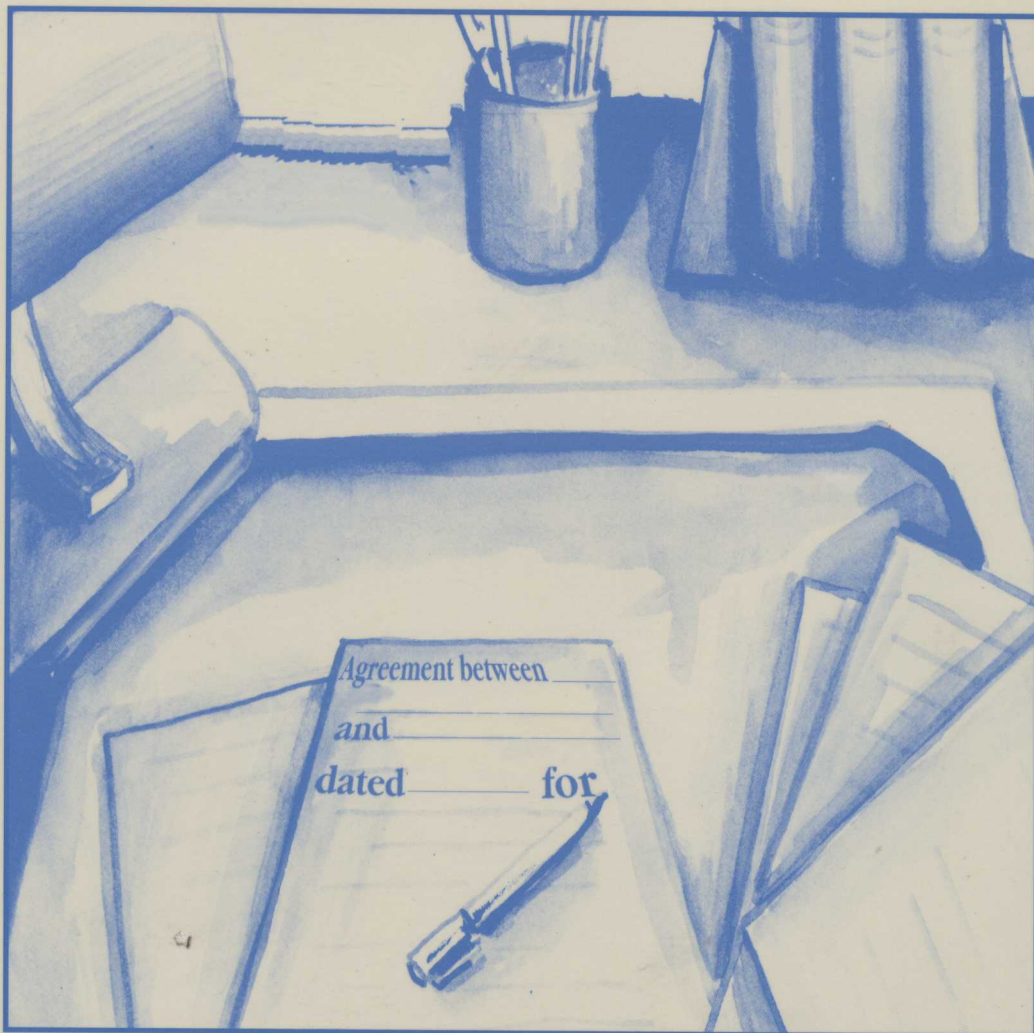


EXAMPLES & EXPLANATIONS

Contracts

Fifth Edition

Brian A. Blum



Wolters Kluwer
Law & Business

Contracts

Fifth Edition

Brian A. Blum

Professor of Law
Lewis & Clark Law School



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

© 2011 Brian A. Blum.

Published by Aspen Publishers. All Rights Reserved.

www.AspenLaw.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 any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers
Attn: Permissions Department
76 Ninth Avenue, 7th Floor
New York, NY 10011-5201

To contact Customer Care, e-mail customer.service@aspenpublishers.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Aspen Publishers
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 978-0-7355-8852-3

Contracts

EDITORIAL ADVISORS

Willi Rees

William Rees, Professor of Law

New York University School of Law

John C. Langbein

Dean and Distinguished Professor

Richard A. Epstein

James E. Beeson Distinguished Chair in Professor of Law

University of Chicago Law School

Paul H. Robinson and Michael J. Trebilcock

The University of Toronto

Richard L. Posner

Richard L. Posner

Charles F. McHugh Professor of Law and Economics

University of Chicago

John H. Garvey, Jr. and John H. Garvey, Jr.

University of California

John H. Garvey, Jr.

and William E. Shafer, Jr. Professor of Law

The University of California at Berkeley

Richard L. Posner, Jr.

University of Chicago

Richard L. Posner, Jr. School of Law

Robert H. Stein

John F. Kennedy School of Government

Harvard University

David A. Weisbach

University of Chicago

University of California at Berkeley School of Law

Kenneth D. Susskind

Dean and Edward A. Stearns Professor of Law

Washington University School of Law

Richard L. Posner

University of Chicago School of Law

Richard L. Posner

EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law
New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law
University of California, Irvine, School of Law

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law
University of Chicago Law School
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Stanford University

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law
Hofstra University School of Law

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Professor of Law
University of California at Berkeley School of Law

Kent D. Syverud

Dean and Ethan A. H. Shepley University Professor
Washington University School of Law

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard Law School

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading provider of research information and workflow solutions in key specialty areas. The strengths of the individual brands of Aspen Publishers, CCH, Kluwer Law International and Loislaw are aligned within Wolters Kluwer Law & Business to provide comprehensive, in-depth solutions and expert-authored content for the legal, professional and education markets.

CCH was founded in 1913 and has served more than four generations of business professionals and their clients. The CCH products in the Wolters Kluwer Law & Business group are highly regarded electronic and print resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and health-care reimbursement and compliance professionals.

Aspen Publishers is a leading information provider for attorneys, business professionals and law students. Written by preeminent authorities, Aspen products offer analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International supplies the global business community with comprehensive English-language international legal information. Legal practitioners, corporate counsel and business executives around the world rely on the Kluwer Law International journals, loose-leafs, books and electronic products for authoritative information in many areas of international legal practice.

Loislaw is a premier provider of digitized legal content to small law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Wolters Kluwer Law & Business, a unit of Wolters Kluwer, is headquartered in New York and Riverwoods, Illinois. Wolters Kluwer is a leading multinational publisher and information services company.

To Bryce, Kylie, and William

with love

Preface

I expect that most readers of this book will be first-year law students who will use it as a resource to assist in learning and understanding the law of contracts—to prepare for class, to unravel and supplement class materials and discussion, and to review and prepare for exams. In deciding on the scope, depth, and approach of the book's coverage, I have aimed at their needs. My focus has been on what is likely to be most appropriate and helpful to a person who approaches contract law as a novice and is trying to assimilate and understand not only the details but also the larger issues of this complex subject.

Changes in the Fifth Edition

There are two notable additions to the fifth edition. I have expanded the treatment of standard contracts and contracts formed through electronic media, which are now the subject of a new Chapter 5. I have also added notes on the transnational perspective of contract law, which can be found in most chapters of the book. Apart from this, in my revisions for the fifth edition, I have renewed my efforts to provide an accessible and helpful treatment of the law of contracts. I have not changed the focus or approach of the prior editions, or the extent or nature of their coverage. Instead, I have concentrated on matters of detail, altering text and diagrams to the extent necessary to update and clarify textual materials, adding new cases, and refining the examples and explanations by adding new ones and changing or eliminating some of the older ones.

The Treatment of the Sale of Goods in the Fifth Edition: The Revisions of UCC Articles 1 and 2

Article 2 of the Uniform Commercial Code (UCC), which governs contracts for the sale of goods, is an important part of the contracts course. Article 1, the general article of the UCC, is also relevant to the contracts course to the extent that it contains general principles and definitions applicable to sales of goods. The Official Text of Article 1 was revised in 2001, and the Official Text of Article 2 was revised in 2003. However, these revisions do not become law in a state until enacted by the state's legislature. (This is explained in Chapter 2.) Most states have enacted revised Article 1, but no state has enacted the revisions to Article 2. As each year passes without the

Preface

adoption of revised Article 2 by state legislatures, the likelihood that it will ever become law diminishes. The fourth edition of this book focused on the pre-revision versions of Articles 1 and 2 but included footnotes throughout that identified proposed changes in the revisions. In the fifth edition, I focus on the revised version of Article 1, because it has become the law in most states. I continue to focus on the pre-revision version of Article 2. Where the revision would make a significant change in the law, I mention this (usually in a footnote), with a reminder that the revision is not the law but should be treated merely as a proposal for change by the drafters of the Official Text.

The Style, Approach, and Purpose of This Book

Like many other law school courses, contract law is typically taught by means of discussing and debating cases and other materials that have been assigned for reading in advance of the class session. A terrible flood of information is unleashed by this process, and few students can assimilate and appreciate it all by simply studying the casebook and listening in class. Supplementary reading is indispensable to understanding and digesting what is covered in class. To be most useful, such a supplementary text should be written with an awareness of the coverage, depth, and scope of most contracts courses, and with a sense of what students are likely to need by way of additional reading. In writing this book, I have tried to keep that goal in mind. Relying on my own experience as a teacher of contract law, and on the content of casebooks, I have tried to maintain the discussion in this book at the level that may be expected in a typical contracts class.

To achieve this purpose, it is not enough to outline legal rules or to state doctrine. Although it is surely one of the aims of a contracts class to teach the current rules of law governing contracts, a knowledge of current legal rules is only one of the components of an adequate understanding of contract law. Students are also expected to learn the derivation and development of the rules, their historical and contemporary rationale, the public policies that they are meant to serve, and the way in which they coalesce to form a coherent body of law. Because neither rules nor their underlying policies are static, and are often unsettled and the subject of controversy, students must also be exposed to the uncertainties of the law and must learn to develop the ability to evaluate critically and to form judgments. In addition, like so many other courses in law school, a contracts course serves the goal of exposing students to broader issues of legal process, legal analysis, dispute resolution, and lawyering skills such as drafting, advising, and evaluating the strength of a case. This book attempts to encompass this range of learning.

Although this book contains much textual discussion of the rules and policies of contract law and of the themes mentioned above, it is not a

Preface

traditional treatise. Its purpose is not to provide a highly detailed and comprehensive exposition of the law of contracts with exhaustive citation of authority. Its principal aim is the clear and accessible explanation of the fundamentals of the law, with a particular concentration on what information is likely to be helpful to a student who approaches the subject for the first time. For this reason, it tries to articulate assumptions and to express doctrine and policy accurately, while avoiding finicky distinctions and qualifications that are more likely to confuse than to elucidate.

As part of the effort to clarify legal principles and the relationships between contracting parties, I have used diagrams extensively. I believe that visual representations can be a great help in clarifying and reinforcing verbal exposition.

The Use of Examples and Explanations

It is difficult to learn the law by studying abstract principle. Concrete examples are needed to place doctrine in context and to show how it operates to affect behavior and resolve disputes. Examples are therefore used extensively in the text itself to illustrate concepts under discussion. In addition, a distinctive feature of this book is the “examples and explanations,” which take up a substantial part of each chapter. Their purpose is not only to provide further illustration and discussion of the subject matter of the text but also to give students a means of self-testing on the topics covered. The examples pose questions based on hypothetical facts, and the explanations analyze and offer a resolution to the problems. As a general rule, the examples and explanations do more than simply provide a means of reviewing what has been stated in the text. To resolve them adequately, one must use reasoned argument and must thoughtfully apply the principles set out in the text. You will therefore benefit the most from them if you do not merely read through them but rather take the time to formulate your own answer to an example before reading its explanation. This will allow you to test your knowledge and understanding of the material, to practice identifying issues, and to develop skills in composing and organizing answers to the kind of questions commonly found in exams.

The Organization of This Book in Relation to Your Contracts Course

There are a number of different ways to organize a contracts course, and the casebooks reflect quite a diverse approach to the sequence in which material may be covered in class. It is therefore quite possible that your contracts course will not follow the same sequence as the chapters in this book. (For example, some courses begin with remedies for breach of

contract, which is not covered here until Chapter 18, and some begin with consideration doctrine, which is not reached until Chapter 7.) This book has been written with an eye on the divergent ways in which the topics of contract law are presented in class, so a student should have no trouble reading chapters out of order. To use this book in the same sequence as your contracts course, simply refer to the table of contents or index to find the part of the book that deals with the subject under discussion in class. Cross-references are included in each chapter to help give you an idea of where to find allied topics or further reference to the subject under discussion.

A Recommendation About Chapters 1 Through 3 and the Glossary

Irrespective of the organization of your class, I do recommend, however, that you read Chapters 1, 2, and 3 as soon as possible. These short chapters are intended as an introduction to some of the root principles of contract law and legal analysis. They contain basic information and guidance on core concepts, terminology, and case analysis that may not be articulated fully or at all in your class materials or discussion. A little time spent in working through these chapters at the beginning of the semester may save you needless puzzlement and confusion. Also, you should refer to the glossary at the end of the book for short definitions of terms that may be unfamiliar to you.

The Use and Citation of Authority in This Book

To make this book as readable and accessible as possible, I have kept citation of authority to a minimum. You will find none of the detailed footnotes and citations that you would expect in a treatise or law review article. However, some sources of authority are such an integral part of the process of learning contract law that to omit them would impede understanding. These sources are referred to constantly throughout the book. They are:

1. The Restatement (Second) of Contracts (referred to in the book in abbreviated form as Restatement, Second), a compendious and highly influential formulation of the rules of contract law.
2. Articles 1 and 2 of the Uniform Commercial Code (UCC). Article 2 governs contracts for the sale of goods and is the principal focus of our study of the UCC. Article 1 is supplementary to Article 2. It has general provisions applicable to all Articles of the UCC, including Article 2.
3. Caselaw. Court opinions are a vital source of law in our system. I discuss cases selectively but regularly in the text and also, to a lesser extent, in the explanations. I do not use cases merely as authority for

Preface

legal rules but as factual illustrations and as a means of highlighting legal principles, argument, and reasoning. I selected many of the cases in this book because of their interesting or even entertaining facts. I have tried to use recent cases wherever possible to reflect the law in its contemporary state. However, there are many important or well-known older cases that are taught in almost every contracts course, and I have included those, too. I have also kept an eye on the content of casebooks and have made a point of mentioning some of the cases that have been chosen by casebook authors. You should therefore find that at least some of the cases discussed here are familiar from class.

Brian A. Blum
November 2010

Acknowledgments

I owe thanks to many people who have helped me with successive editions of this book. I have had able research assistance from a number of Lewis & Clark law school students for each edition of this book. I have also benefitted from the guidance and careful editorial work of several members of the staff of Wolters Kluwer Law & Business. Finally, I am grateful to the many students and professors who have used this book and who have offered comments and suggestions.

Contracts

Summary of Contents

<i>Contents</i>		<i>xi</i>
<i>Preface</i>		<i>xxix</i>
<i>Acknowledgments</i>		<i>xxxv</i>
Chapter 1	The Meaning of “Contract” and the Basic Attributes of the Contractual Relationship	1
Chapter 2	Facets of the Law of Contract and the Source of Its Rules, Processes, and Traditions	17
Chapter 3	The Doctrine of Precedent and a Contract Case Analysis	41
Chapter 4	The Objective Test and Basic Principles of Offer and Acceptance	59
Chapter 5	Standard Form Contracts and Contracts Through Electronic Media	125
Chapter 6	Mismatching Standard Terms: The “Battle of the Forms” Under UCC §2.207	147
Chapter 7	Consideration	173
Chapter 8	Promissory Estoppel as the Basis for Enforcing Promises	225
Chapter 9	Unjust Enrichment, Restitution, and “Moral Obligation”	263
Chapter 10	Interpretation and Construction: Resolving Meaning and Dealing with Uncertainty in Agreements	297
Chapter 11	The Statute of Frauds	349
Chapter 12	The Parol Evidence Rule	379
Chapter 13	The Judicial Regulation of Improper Bargaining and of Violations of Law and Public Policy	415
Chapter 14	Incapacity	481
Chapter 15	Mistake, Impracticability, and Frustration of Purpose	503
Chapter 16	Conditions and Promises	547

Summary of Contents

Chapter 17	Breach and Repudiation	603
Chapter 18	Remedies for Breach of Contract	655
Chapter 19	Assignment, Delegation, and Third-Party Beneficiaries	749

<i>Glossary</i>	791
<i>Index</i>	813

Contents

<i>Preface</i>	xxix
<i>Acknowledgments</i>	xxxv

Chapter 1 The Meaning of “Contract” and the Basic Attributes of the Contractual Relationship I

§1.1	Introduction	1
§1.2	The Legal Meaning of “Contract”	2
§1.2.1	An Oral or Written Agreement Between Two or More Persons	3
§1.2.2	An Exchange Relationship	4
§1.2.3	Promise	5
§1.2.4	Legal Recognition of Enforceability	6
§1.3	Contract as a General Body of Law Applicable to Diverse Transactions	8
§1.4	The Fundamental Policies and Values of Contract Law	9
§1.4.1	Freedom of Contract	9
§1.4.2	The Morality of Promise — <i>Pacta Sunt Servanda</i>	11
§1.4.3	Accountability for Conduct and Reliance	11
§1.4.4	Commercial and Social Values	12

Chapter 2 Facets of the Law of Contract and the Source of Its Rules, Processes, and Traditions 17

§2.1	The Purpose of This Chapter	17
§2.2	The Historical Perspective of Contract Law	18
§2.3	Classical and Contemporary Contract Law	18
§2.3.1	Classical Contract Law	18
§2.3.2	Contemporary Contract Law	19
§2.4	The Meaning of “Common Law”	22
§2.4.1	“Common Law” Used to Designate Our Legal System as a Whole	22