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Steven L. Emanuel



Wolters Kluwer
Law & Business

CONTRACTS

NINTH EDITION

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The Emanuel[®] Law Outlines Series



Wolters Kluwer

Law & Business

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Dedication

To my son Michael,
who was conceived after this book was
and who was born before this book was

S.L.E.

Abbreviations Used in Text

CASEBOOKS

- CP&B — Calamari, Perillo & Bender, *Cases and Problems on Contracts* (4th Ed. 2004 — West / Thomson)
- D,H&H — Dawson, Harvey and Henderson, *Contracts, Cases and Comments* (7th Ed. 1998 — Foundation)
- F&E — Fuller and Eisenberg, *Basic Contract Law* (6th Ed. 1996 — West Publishing)
- F&Y — Farnsworth and Young, *Cases and Materials on Contracts* (5th Ed. 1995 — Foundation)
- FY&S — Farnsworth, Young & Sanger, *Cases and Materials on Contracts* (6th Ed. 2001 — Foundation)
- K&C — Knapp and Crystal, *Problems in Contract Law* (3d Ed. 1993 — Little, Brown)
- K,G&K — Kessler, Gilmore and Kronman, *Contracts, Cases and Materials* (3rd Ed. 1986 — Little Brown/Aspen)

HORNBOOKS & TREATISES

- C&P — Calamari and Perillo, *The Law of Contracts* (4th Ed. 1998 — West Publishing)
- Corbin — Arthur Corbin, *Corbin on Contracts* (One-Volume Ed., 1952 — West Publishing)
- Duesenberg & King — Richard Duesenberg and Lawrence King, *Sales and Bulk Transfers Under the UCC* (1980)
- Farnsworth — E. Alan Farnsworth, *Contracts* (3rd Ed. 1999 — Aspen)
- Murray — John Murray, Jr., *Murray on Contracts* (3rd Ed. 1990 — Michie)
- Simpson — Laurence Simpson, *Handbook of the Law of Contracts* (1965)
- W&S — White and Summers, *Uniform Commercial Code* (4th Ed. 1995 — West Publishing)
- Williston — Samuel Williston, *Williston on Contracts* (3rd. Ed. 1957)

RESTATEMENTS AND CODES

- Rest. 1st — *First Restatement of Contracts* (1932)
- Rest. 2d — *Second Restatement of Contracts* (1981)
- UCC — *Uniform Commercial Code* (2001 and 2003)

Preface

Thank you for buying this book.

It's a big book. But don't panic — the book has lots of special features that you can decide to use or not, depending on how much time you have.

We think the special features that are part of this edition will help you a lot. These include:

- **Capsule Summary** — We've boiled the black-letter law of Contracts down to about 80 pages. We've designed this Capsule Summary to be read in the last week or so (maybe even the last night) before your exam. If you want to know more about a topic, cross-references in the Capsule point you to the pages in the main text that cover the topic more thoroughly.
- **Casebook Correlation Chart** — This chart shows you, for the leading Contracts casebooks, where in the *Emanuel* any topic from your casebook is covered.
- **Exam Tips** — We've compiled these by reviewing dozens of actual past essay questions, and hundreds of multiple-choice questions, asked in past law-school and bar exams. The *Exam Tips* are at the end of each chapter.
- **Quiz Yourself** questions — We've adapted these short-answer questions from the *Law in a Flash* flash-card deck on Contracts. (We've re-written most answers, to better mesh with the outline's approach). You'll find these distributed within each chapter, usually at the end of a roman-numeraled section. Each "pod" of Quiz Yourself questions can easily be located by using the Table of Contents.

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:¹

1. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* at the front of the outline to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will

1. The suggestions below relate only to this book. I don't talk here about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that on this one page I've chosen to focus on how I think you can use this outline.

probably take you all or part of two days.

4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. When you do these questions: (1) record your short “answer” in the book after the question, but also: (2) try to write out a “mini essay” on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.
5. A couple of days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step (4), so that you use the *Tips* to help you spot the issues in the short-answer questions. You’ll also probably want to follow up from many of the *Tips* to the main outline’s discussion of the topic.
6. Some time during the week or so before the exam, do some or all of the full-scale essay exams at the back of the book. Write out a full essay answer under exam-like conditions (e.g., closed-book if your exam will be closed book.) If you can, exchange papers with a classmate and critique each other’s answer.
7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your writing juices flowing; and (2) re-read the various *Exam Tips* sections (you should be able to do this in 1-2 hours).

I would like to thank Professor Ward Farnsworth of Boston University Law School for his extensive and very useful suggestions about what should be revised in this new Ninth Edition.

Good luck in your Contracts course. If you’d like any other publication from Aspen, you can find it at your bookstore or at **www.aspenlaw.com**.

Steve Emanuel

Larchmont NY

April 2010

CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

Emanuel's Contracts Outline (by chapter and section heading)	Barnett Contracts: Cases and Doctrine (4th Ed. 2008)	Farnsworth, Young & Sanger Cases and Materials on Contracts (7th Ed. 2008)	Calamari, Perillo & Bender Cases and Problems on Contracts (5th Ed. 2007)	Crandall & Whaley Cases, Problems, and Materials on Contracts (5th Ed. 2008)	Knapp, Crystal & Prince Problems in Contract Law (6th Ed. 2007)
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CASEBOOK CORRELATION CHART (continued)

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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1

INTRODUCTION

I. MEANING OF “CONTRACT”

A. Definition: A “contract” is an agreement that the law will enforce.

1. **Written v. oral contracts:** Although the word “contract” often refers to a written document, a writing is not always necessary to create a contract. An agreement may be binding on both parties even though it is oral. Some contracts, however, must be in writing under the Statute of Frauds.

II. SOURCES OF CONTRACT LAW

A. The UCC: Contract law is essentially common law, i.e. judge-made, not statutory. However, in every state but Louisiana, sales of *goods* are governed by a statute, Article 2 of the Uniform Commercial Code.

1. **State enactments:** A national drafting body, the National Conference of Commissioners of Uniform State Laws (NCCUSL) proposes revisions to various UCC Articles from time to time. Each state legislature then makes its own decision about whether and when to adopt the proposed revision.
 - a. **2003 Revision:** The most recent NCCUSL revision of Article 2 is the *2003 Revision*, which made some significant changes, especially in the area of electronic commerce. However, *no state has yet adopted this revision*, and it does not look as though that revision will be adopted anywhere in the next few years.
 - b. **Our text:** Therefore, when this Capsule (or this book) refers to an Article 2 provision, nearly always (and unless otherwise specifically noted) the reference is to the *pre-2003 version* of Article, which has remained essentially unchanged since its original promulgation in 1957.
2. **Common law:** If the UCC is silent on a particular question, the common law of the state will control. See UCC § 1-103.

CHAPTER 2

OFFER AND ACCEPTANCE

I. INTENT TO CONTRACT

A. Objective theory of contracts: Contract law follows the *objective theory of contracts*. That is, a

party's intent is deemed to be what a **reasonable person** in the position of the other party would think that the first party's objective manifestation of intent meant. For instance, in deciding whether *A* intended to make an offer to *B*, the issue is whether *A*'s conduct reasonably indicated to one in *B*'s position that *A* was making an offer. [8-9]

Example: *A* says to *B*, "I'll sell you my house for \$1,000." If one in *B*'s position would reasonably have believed that *A* was serious, *A* will be held to have made an enforceable offer, even if subjectively *A* was only joking.

- B. Legal enforceability:** The parties' intention regarding whether a contract is to be **legally enforceable** will normally be effective. Thus if both parties intend and desire that their "agreement" not be legally enforceable, it will not be. Conversely, if both desire that it be legally enforceable, it will be even if the parties mistakenly believe that it is not. [9-10]

Example: Both parties would like to be bound by their oral understanding, but mistakenly believe that an oral contract cannot be enforceable. This arrangement will be enforceable, assuming that it does not fall within the Statute of Frauds.

- 1. Presumptions:** Where the evidence is ambiguous about whether the parties intended to be bound, the court will follow these rules: (1) In a "**business**" context, the court will presume that the parties intended their agreement to be legally enforceable; (2) but in a **social** or **domestic** situation, the presumption will be that legal relations were **not** intended.

Example: Husband promises to pay a monthly allowance to Wife, with whom he is living amicably. In the absence of evidence otherwise, this agreement will be presumed not to be intended as legally binding, since it arises in a domestic situation.

- C. Intent to put in writing later:** If two parties agree (either orally or in a brief writing) on all points, but decide that they will subsequently put their entire agreement into a more formal written document later, the preliminary agreement may or may not be binding. In general, the parties' **intention** controls. (*Example:* If the parties intend to be bound right away based on their oral agreement, they will be bound even though they expressly provide for a later formal written document.) [10]

- 1. Where no intent manifested:** Where the evidence of intent is ambiguous, the court will generally treat a contract as existing as soon as the mutual assent is reached, even if no formal document is ever drawn up later. But for very large deals (e.g., billion dollar acquisitions), the court will probably find no intent to be bound until the formal document is signed.

II. OFFER AND ACCEPTANCE GENERALLY

A. Definitions: [11]

- "Offer" defined:** An **offer** is "the manifestation of willingness to enter into a bargain," which justifies another person in understanding that his assent can conclude the bargain. In other words, an offer is something that creates a power of acceptance.
- "Acceptance" defined:** An **acceptance** of an offer is "a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."

Example: *A* says to *B*, "I'll sell you my house for \$100,000, if you give me a check right now for \$10,000 and promise to pay the rest within 30 days." This is an offer. If *B* says, "Here is my \$10,000 check, and I'll have the balance to you next week," this is an acceptance. After the acceptance occurs, the parties have an enforceable contract (assuming that there is no requirement of a writing, as there probably would be in this situation).

B. Unilateral vs. bilateral contracts: An offer may propose either a bilateral or a unilateral contract. [11-12]

1. **Bilateral contract:** A *bilateral* contract is a contract in which *both* sides make *promises*. (Example: A says to B, "I promise to pay you \$1,000 on April 15 if you promise now that you will walk across the Brooklyn Bridge on April 1." This is an offer for a bilateral contract, since A is proposing to exchange his promise for B's promise.)
2. **Unilateral contract:** A *unilateral* contract is one which involves an exchange of the *offeror's promise* for the *offeree's act*. That is, in a unilateral contract *the offeree does not make a promise*, but instead simply acts.

Example: A says to B, "If you walk across the Brooklyn Bridge, I promise to pay you \$1,000 as soon as you finish." A has proposed to exchange his promise for B's *act* of walking across the bridge. Therefore, A has proposed a unilateral contract.

III. VALIDITY OF PARTICULAR KINDS OF OFFERS

A. Offer made in jest: An offer which the offeree knows or should know is made *in jest* is not a valid offer. Thus even if it is "accepted," no contract is created. [19]

B. Preliminary negotiations: If a party who desires to contract *solicits bids*, this solicitation is not an offer, and cannot be accepted. Instead, it merely serves as a basis for preliminary negotiations. [25]

Example: A says, "I would like to sell my house for at least \$100,000." This is almost certainly a solicitation of bids, rather than an offer, so B cannot "accept" by saying, "Here's my check for \$100,000."

C. Advertisements: Most *advertisements* appearing in newspapers, store windows, etc., are *not* offers to sell. This is because they do not contain sufficient words of commitment to sell. (Example: A circular stating, "Men's jackets, \$26 each," would not be an offer to sell jackets at that price, because it is too vague regarding quantity, duration, etc.) [14]

1. **Specific terms:** But if the advertisement contains specific words of commitment, especially a promise to sell a *particular number* of units, then it may be an offer. (Example: "100 men's jackets at \$26 apiece, first come first served starting Saturday," is so specific that it probably is an offer.)
2. **Words of commitment:** Look for words of *commitment* — these suggest an offer. (Example: "Send three box tops plus \$1.95 for your free cotton T-shirt," is an offer even though it is also an advertisement; this is because the advertiser is committing himself to take certain action in response to the consumer's action.)

D. Auctions: When an item is put up for *auction*, this is usually *not* an offer, but is rather a solicitation of offers (bids) from the audience. So unless the sale is expressly said to be "without reserve," the auctioneer may withdraw the goods from the sale even after the start of bidding. See UCC §2-328(3). [15]

IV. THE ACCEPTANCE

A. Who may accept: An offer may be accepted *only by a person in whom the offeror intended to create a power of acceptance*. [18]