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Cases, Discussion,
and Problems

*Third
Edition*



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ASPEN CASEBOOK SERIES



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CONTRACTS

CASES, DISCUSSION, AND PROBLEMS

Third Edition

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*To Helen, Trevor, Nicole, Shelley, Matt,
Bryce, Kylie, William, and Lexie
—B.A.B.*

*In memory of Donald W. Bushaw, who was a consummate
teacher, thinker, wordsmith, and father
—A.C.B.*



Our Approach to the Third Edition

We find it hard to believe that this book was first published nearly nine years ago and that it is now entering its third edition. We are grateful to have had the privilege of developing and refining the book through successive editions and have enjoyed teaching from it. We think that our approach and selection of materials has worked well, and we are gratified to have received positive comments on the book from our own students as well as from professors who have adopted it and students who have used it at other schools. In revising for the third edition, we have maintained the tone, style, and approach of the book while seeking to improve aspects of it that we felt could be better. We have made changes that we found desirable in light of our own experience and suggestions from others, and we have refreshed the content by substituting some new cases, problems, and other material. The most pervasive change in the third edition is our abandonment of the 2003 revision of UCC Article 2, which we used in the second edition in the expectation that it might be adopted by state legislatures. Because it has now become clear that the revision will not take hold and in fact has been withdrawn as the Official Text of Article 2, we return to the current version in this edition.

Our philosophy and approach in writing this book has always been to present materials that are challenging and interesting but at the same time readable, clear, and accessible to students. We have tried to select cases that are modern (apart from some of the classic cases that all students should know, most of our cases were decided in the last 10 to 20 years), with engaging facts and strong legal exposition. We combine those cases with full interconnecting explanatory text and with questions and problems designed to encourage students to think about and apply the legal principles raised by the cases or by other materials in the assignment. We and our students have found that the combination of text, court opinions, questions, and problems allows for more focused class preparation and enhances class discussion. We have therefore been careful, in revising this book for its third edition, to preserve what we consider to be the strongly beneficial features of the book and to adhere to its philosophy and approach. In each of the following sections, we outline the changes we have made in the third edition. In short, in the third edition, we have made a number of additions and substitutions in our case selection; we have revised and updated the text, questions, and problems; we have reorganized materials in some of the chapters and have broken former Chapter 20, on remedies, into two chapters; we have expanded and reorganized our discussion of

electronic contracting; and (as noted above) we have reverted to the current version of UCC Article 2.

Our General Philosophy and Approach

Even a casual browsing of this book will reveal that it does not follow the traditional form of a casebook. It is not simply a collection of edited court opinions, extracts from law journal articles, and citations. Rather, it is an interwoven combination of explanatory text, edited court opinions, notes, questions, and problems. Throughout, we intend to provide a coherent and guided treatment of the subject of contract law and, more generally, of legal reasoning, argument, philosophy, and practice. In adopting this approach, we attempt to give students a sufficiently complete set of readings for each class assignment to enable them to prepare effectively for a rich and challenging class discussion.

The law is infinitely complex. We welcome the complexities and subtleties of contract law and recognize that it presents many questions that have no ready answers. However, we believe that there is no need to aggravate the law's complexity by keeping students in the dark about matters that, if presented clearly, can help them focus on more challenging issues, understand central rules, learn to apply principles and policies of law, and develop a sense of the overall structure and purpose of doctrine. We are confident that this book amply challenges any student but that it does so without creating undue confusion and consequent frustration. Having taught from this book for many years, we are convinced that this approach allows students to reach a subtler and more sophisticated appreciation of contract law and analysis.

This book is designed to foster, and to make more rewarding and effective, the collaborative discourse between the professor and students and among students. In our experience, the conversation is deeper, and the experience more enjoyable and enlightening, if the reading prepares students by providing context, background, and basic information and explanation that helps them understand the issues that will be tackled in class discussion. Although the book provides considerably more information and explanation than is commonly found in casebooks, this does not preempt class discussion or spoon-feed the students. On the contrary, it allows them to attain a level of knowledge and understanding before entering the classroom that greatly enhances their ability to make a meaningful contribution to class discussion and to engage in the kind of critical thinking and rigorous analysis that is so vital to an understanding of the law.

The Use of Case Analysis as a Teaching Tool

We continue to use the widely accepted pedagogy of case analysis as our principal teaching tool. Mastery of case analysis is fundamental, and it must

be taught thoroughly to any person who aims to function as a lawyer in our legal system. We have edited cases carefully and sometimes quite rigorously to keep them to a manageable length and to focus the students' attention on the issues relevant to class discussion. At times, where efficiency and space constraints call for it, we have chosen to provide case notes rather than full extracts of the opinions.

We also continue our strong preference for modern cases and have added a number of new opinions decided in the years following the publication of the second edition. We like to use new cases where possible because students find them more relevant and have more confidence that the opinions provide up-to-date expositions of the law. This is not to say that we disregard those older cases that remain superb teaching tools or that have become so well known that they have achieved iconic status. You will find a number of these cherished cases in the book. However, where we include an older case, we make a point of providing contextual discussion or a newer case as well so that students are able to appreciate the older case's relationship to the current state of the law.

Apart from their value as analytical tools, cases are also narratives. They tell stories about real people and actual events. A good story helps brighten what might otherwise be a dry discourse. We therefore try to include cases, where possible, with provocative and interesting facts. If the facts are funny or outrageous, or if they involve a well-known public figure or a timely social issue, so much the better.

The Use of Questions and Problems

The cases are supplemented by questions and problems, many of which have been revised and updated for this edition. We encourage students to think of the questions and problems as tools with which to reason through cases critically and to evaluate whether the court has achieved the correct and best resolution of an issue. The questions are designed to aid the students' preparation for class by drawing their attention to difficult or crucial aspects of the doctrine and encouraging them to think about discussion points. Students should be able to answer every question from information provided in the book. Often, there is no one right answer to a question; thoughtful analysis can lead to different points of view.

We use problems to supplement associated cases or to raise issues that may be covered more effectively by a problem. Some problems test students' understanding of, or their ability to apply, principles drawn from cases or other materials. Many of the problems, like many questions, are open to more than one analysis. As students think through a problem, they should assume that they may need to justify their conclusion to someone with an opposite view. They should develop an explanation that considers all the issues and addresses all legitimate concerns that an opponent might raise.

The Purpose of the Interconnecting Text

The cases, problems, and questions are bound together by interconnecting text throughout the book. It concisely introduces and explains concepts, places materials in context, and informs an exploration of the genuinely subtle and challenging aspects of contract law. We try to make the text clear and concrete, so it often includes explanatory examples or hypotheticals. Exposition is also used to incorporate commentary, criticism, and theoretical perspectives from legal scholarship. Also, because we believe that it is vital for students to see the relationship among the many topics that form contract law, we use the text, problems, and questions to help students discover the connections and analogies among different aspects of the course.

The Exploration of Issues Beyond Contract Law

While we devote most of our effort to drawing out the principles, policies, norms, and theory of contract law, we make it a point to go beyond this primary subject matter to explore the broader legal and societal fabric of which contract law forms an inseparable part. We pay particular attention to legal process, analysis, and argument. We raise litigation and procedural questions to help students to realize that procedural issues can significantly affect the resolution of contract disputes and to encourage students to discover connections between their contracts and their civil procedure courses. As much as possible, we have integrated issues of legal ethics into discussion of cases. Where the cases are conducive to the introduction of other themes, such as agency, consumer protection, or the relationship between contract and tort, we take the opportunity to raise them.

Planning and Drafting Issues

Our primary focus on cases means that most contract issues appear through the lens of litigation. However, it is important to realize that most contracts do not end up in litigation. In this edition, we continue our approach of including questions and problems that raise transactional issues and that shift focus from doctrinal analysis or dispute resolution to provide exposure to the practical skills involved in negotiating and drafting contracts.

Law and Technology

As parties increasingly use communications technology in the formation of contracts, the application of legal principles to innovative means of entering contracts becomes more important. In this edition, we have expanded and

reorganized the material that addresses the response of the law to electronic contracting.

Remedies

Disputes over contracts almost always involve a “bottom line.” One of the parties seeks the payment of damages or some other remedy from the other. Contract remedies are therefore a major aspect of contract law. We follow the traditional organization of the contracts course by beginning with the formation of contracts and focusing on remedies toward the end of the book. However, the entire book is written with sensitivity to remedial issues, and we raise them throughout. Students will be quite familiar with basic remedial principles by the time they reach the remedies portion of the book. Because we realize that some professors prefer to begin this course with the study of remedies, we have designed the materials to allow early assignments to be made from the remedies chapters.

In previous editions of the book, the remedies portion of the book was incorporated into a single large chapter (Chapter 20). In this edition, we have reorganized our treatment of remedies into two chapters. The new Chapter 20 focuses on fundamental principles of contract damages, with particular emphasis on expectation damages. The new Chapter 21 covers other remedial aspects of contract law, including noneconomic and noncompensatory damages, agreed remedies, and alternate remedies such as specific performance and injunctions. We believe that this reorganization will facilitate the effective teaching of remedies and will make it easier for professors to make selections from within those chapters.

Sales of Goods

Contracts to sell goods, governed by Article 2 of the Uniform Commercial Code (UCC), are commonplace and important transactions. We deal with sales of goods throughout the book and compare UCC provisions with analogous rules of general contract law. In some places, the materials integrate sales of goods and common law contracts. In others, we provide separate sections that focus on the principles that apply to sales of goods. We have found that a thorough treatment of sales of goods alongside common law contracts works well. It makes students constantly aware that sales of goods may be subject to different rules and allows the students to contrast those rules with the common law as we progress through the course. It also helps them appreciate the influence of the UCC on the development of the common law. Some professors may defer a significant portion of the coverage of sales of goods to an upper-class course. We have attempted to make this book adaptable so that a professor who wishes to limit the students’ exposure to sales of goods can do so.

We include in the materials the text of the applicable provisions of Article 2 of the UCC, together with relevant general provisions from Article 1. We have found that students appreciate having all the relevant statutory material in the book. They do not need a separate statutory supplement. (However, some professors still prefer to assign a statutory supplement that sets out the entire text and Official Comments of these articles.)

Article 1 was revised in 2001. That revision has been widely enacted by states, and it is used in this book. The American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated a revision of Article 2 in 2003. In the second edition of the book, we used the 2003 revision of Article 2 because it was the Official Text at the time and because it was possible that states might soon begin to adopt it. However, no state did enact it, and in 2011 ALI and NCCUSL withdrew their support of the revision. In the third edition, we revert to the current version of Article 2, which continues to serve as the basis for the law as enacted in the various states and is now once again the Official Text.

Global Perspectives

To introduce students to a global perspective on contract law, we include notes at the end of most chapters on the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods (CISG). We have updated the notes to reflect the promulgation of the third edition of the UNIDROIT Principles in 2010. The notes are brief and merely expose students in broad terms to the similarities and differences between domestic law and the law that may be applicable to transactions across international borders. We also refer to comparative law perspectives where we feel that it is illuminating to do so.

We have enjoyed writing this third edition. We hope that others enjoy it too and find it enlightening, supportive, and challenging.

*Brian Blum
Amy Bushaw*

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We owe thanks to many people who helped us with this book in all of its three editions. We have had able research assistance from several Lewis & Clark students. We have also benefited from the encouragement and comments of our colleagues at Lewis & Clark Law School and from financial support through the Law School's summer research program. Our students in successive contracts classes have challenged, encouraged, and informed us by their reactions to these materials. We have also received welcome and helpful comments and suggestions from colleagues at other schools who have adopted this book and sometimes from their students as well. We thank them for having taken the trouble to communicate with us.

We are grateful for the guidance, enthusiasm, and excellent editorial, publication, and postpublication work by many members of staff at Aspen Publishers. Provisions from the Restatement, Second, of Contracts and the Official Text of the Uniform Commercial Code (copyright © by the American Law Institute) are reprinted with permission.

To enhance the readability of cases and to minimize distractions, we have followed a number of editing conventions in our reproduction of court opinions:

1. We have eliminated all citations that we feel are not needed for teaching purposes. Although we indicate omission of text from an opinion by ellipsis, we do not indicate the omission of citations in cases.
2. We have eliminated footnotes in cases without indication. We have retained only those footnotes that we consider useful or necessary for teaching purposes. In many places, we have added our own footnotes to opinions as explanations or comments on the case. Within cases, our footnotes conclude with the abbreviation "Eds." to distinguish them from the court's footnotes. We have renumbered footnotes in cases so that all footnotes in each chapter are consecutive.
3. Where appropriate to reduce length or complexity, we have substituted our own summaries of the facts of cases or of discussion in opinions. Our own text within cases is enclosed in square brackets.
4. We have attempted to bring some uniformity to divergent citation forms in the cases, although many inconsistencies stemming from local court culture or citation rules remain.
5. We have altered paragraph breaks in opinions where appropriate, either because our editing made alteration desirable or because the original paragraph breaks struck us as unnecessarily awkward.
6. We have corrected obvious typographical or grammatical errors in opinions without indication.

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