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PROBLEMS IN CONTRACT LAW

Cases and Materials

Fifth Edition

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Problems in Contract Law
Cases and Materials

Fifth Edition

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To my colleagues, students, and friends here at Hastings—with gratitude for their warm welcome to this new chapter of my life.

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Preface

When the first edition of these materials was being prepared, more than a quarter-century ago, many American social institutions had recently been called into serious question by those—students and others—who had heard in the spirit of "the Sixties" a call to action. Legal education at that time faced serious challenge: traditional modes of instruction were under attack; traditional curricula had been questioned; the rules of law as taught in law school were widely derided as not "relevant" to modern life. In those circumstances, it seemed necessary to stress the extent to which the rules of contract law could still be important to lawyers and their clients in the modern world and to suggest that the study of law in law school could provide a solid foundation for a lawyering career. The title *Problems in Contract Law* was chosen to reflect two related notions: that the rules of contract law could be usefully studied through analysis of multi-issue, integrative problems, and that those rules, once mastered, could be creatively used by attorneys to solve the problems of their clients.

Between that time and today, much has changed. When we embarked on the second edition, the Seventies had already given way to the seeming consensus of the Reagan-era Eighties; by the time of the third edition, however, that consensus was evaporating as both political struggles and "culture wars" became more strident in the post-Reagan era. The fourth edition appeared as a new century and a new millennium were on the horizon; new developments in technology, in the global economy, and in social attitudes held the promise of far-reaching and possibly beneficial changes in American society. But the optimism of a new century was quickly tempered by political division and calamitous world events, and it has become sadly clear that whatever our technological advances, the evils of poverty, bigotry, and hatred were not left behind as the century turned over.

Contract law is commonly considered one of the more stable areas of law, but it, too, is visibly in a state of flux. Two decades ago, continuation of the gradual movement away from "classical" contract law seemed a foregone conclusion. During the Eighties and Nineties, however, both contract scholarship and judicial decisions took a more conservative tack; new voices and new approaches questioned and often sharply opposed both the theoretical and practical assumptions underlying much of "modern" contract law. Today, early in the twenty-first century, differences among judges and commentators remain deep, and in the underlying philosophical differences one can clearly discern sharp political and social conflicts as well. As technological and political changes gradually merge the American marketplace into

a global one, judges and lawyers will have to keep pace. All of these undercurrents make a realistic survey of contract law today a substantially more complex and challenging undertaking than it was (or seemed to be) a quarter century ago.

To give the student some sense of the complexity of our legal world, this new edition attempts, like its predecessors, to sound several themes. The first of these, of course, is to give an overview of contract doctrine—the rules and principles, both common law and statutory, that make up what we think of as "contract law." For those instructors who rely substantially on the case method for this purpose, we continue to present a varied collection of judicial opinions for study and analysis. As in previous editions, introductory text summarizes basic concepts, enabling the cases to focus on more challenging applications of doctrine; the Notes and Questions after each case help the student to analyze that case and to place it in context with other parts of the material. Complementing case study with the problem method, we present throughout the book a series of lengthy, multi-issue Problems, to help the student understand and apply the principles reflected in the text and cases studied. And through text, Notes, and occasional Comments we point out some of the places where contract law overlaps with or is affected by other areas of law, such as Tort, Agency, Professional Responsibility, and forms of Alternate Dispute Resolution.

With contract law, as with all areas of law, however, knowledge of doctrine is not the end of study, but only the beginning. Starting with the introduction in Chapter 1 and continuing throughout the book, we urge the student to view the material from a variety of other perspectives. The first of these is *historical.* Text, cases, and Comments describe the development of our common law of contract in the English courts of Law and Equity, and trace the historical progression of American contract law from Holmes and Williston through Corbin and Llewellyn to the present day. With this added historical perspective, students may better see contract law for what it really is—not simply a collection of discrete rules, but a complex and constantly evolving system.

The second perspective these materials stress is the *theoretical* one. From the outset, the student encounters the various strands of modern academic thought about contract law. The materials present extended quotations from scholars representing all modern schools of analysis (some notion of their number and variety can be gained from the Acknowledgments, which follow this Preface), and text, Notes, and Comments provide citations to dozens of other scholarly works, for the guidance of instructors or students who wish to pursue these questions further. (For easy reference we have again included in the back of the book a table of scholarly authorities cited, along with the usual tables of cases and statutes.)

Besides the historical and theoretical aspects, these materials focus on the *lawyering* perspective—reminding the student constantly that the rules of law we encounter have an impact on real people in real disputes, and that creative lawyering in the contract area requires not merely knowledge of the rules of law but the ability to analyze and predict the effects of various courses of conduct that a client might undertake, in the light of those rules. Many of the Notes following the cases invite the student to consider two practice-related questions: How could an attorney have either prevented this dispute from arising or helped her client to obtain a better outcome than was achieved in the actual case? How will this decision affect attorneys in the future, in their roles as counselors, negotiators, and advocates? The Problems,

which often cast the student in the role of an attorney at the predispute stage, also raise questions of both law and lawyering, but without the benefit of already reached judicial outcomes. The Problems can serve a number of functions for the student, such as integrating various strands of doctrine and providing a useful preparation for law school examinations. Probably their most important purpose, however, is to suggest that in real life there is likely to be not just one answer to a client's problem but a whole range of possible answers, some of which are clearly wrong, but many of which are at least plausibly right, in varying degrees. Living with ambivalence and uncertainty is not always pleasant, but the ability to do so is surely a more necessary lawyering skill than mastering the niceties of citation form.

The book comprises 12 chapters, which fall generally into the following parts:

Introduction	Chapter 1
Formation	Chapters 2-4
Interpretation and implication	Chapters 5-6
Defenses or grounds for nonenforcement	Chapters 7-8
Third parties	Chapter 9
Breach and remedies	Chapters 10-12

Earlier editions of these materials presented first an introduction to basic concepts of American contract law, as those developed in the "classical" period (roughly from 1880 through 1930), followed by the presentation of "modern" contract law as it evolved in the mid-twentieth century (roughly 1930 through 1980), under the influence of the Uniform Commercial Code (UCC) and the revised Restatement of Contracts. We continue in this edition to compare and contrast these approaches to contract adjudication, but have somewhat revised our organization of the first few chapters, to avoid the impression—which earlier editions might, albeit unintentionally, have given—that somehow "modern" contract law was both necessarily better and in any case inevitably ascendant over the "classical" variety. The fact is that courts and writers today are divided, sometimes bitterly so, over the relative merits of these rival approaches. We will try to indicate as we go along where these differences can be seen, and why they matter to all of us as students, as lawyers, and as citizens.

Material on the UCC is integrated throughout wherever it is relevant to our understanding of the general law of contract. (Treatment of Article 2 warranties and remedies in a separate chapter has been discontinued, in favor of more extended consideration of those topics in earlier chapters.) A separate supplement, *Rules of Contract Law,* reprints important provisions and comments from Articles 1, 2, and 9 of the UCC and the Restatement (Second) of Contracts, along with the Articles of the Convention on International Sales of Goods (CISG) and the Principles of International Commercial Contracts. It also presents material on contract drafting, and a selection of sample law school examination questions (some with suggested answers).

For all three of us, collaboration on these materials continues to be not only an educational experience but a great pleasure as well. We hope that those who use this volume will likewise find enjoyment as well as information in its pages. As our last word to students and teachers about to embark on this journey with us, we repeat once again the admonition of the preface to the first edition:

> No study of law is adequate if it loses sight of the fact that law operates first and last *for, upon,* and *through* individual human beings. This, of course, is what rescues law from the status of a science, and makes its study so frustrating—and so fascinating.

It was true in 1976, and it still is.

Charles L. Knapp
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