AMERICAN CASEBOOK SERIES

CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE

Sixth Edition

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Robert S. Summers
Robert A. Hillman

WEST

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AMERICAN CASEBOOK SERIES®

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A Thomson Reuters business

Mat #40880895

610 Opperman Drive
St. Paul, MN 55123
1–800–313–9378

Printed in the United States of America

ISBN: 978–0–314–90710–3

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WHO ALWAYS FULLY PERFORMED

Herman D. Hillman
(1911–1977)

Orson William Summers
(1909–1975)

Preface to Sixth Edition

The Sixth Edition updates the materials with new cases, excerpts, and notes on important developments dealing with, among other things, promissory estoppel, warranties, the statute of frauds, remedies, the battle of the forms, disclosure, and excuse. We also introduce material on the Principles of the Law of Software Contracts. Finally, we have omitted some cases and materials that have outlived their usefulness. But the book's structure and much of the materials remain as in the earlier editions.

We hope (and believe) that students will find that these materials introduce theory, doctrine, and practice in an accessible, interesting, and enjoyable manner.

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September 2010

Preface to Fifth Edition

As with the Fourth Edition, this edition primarily updates important developments and supplements some excerpts, notes, and problems. For example, we have new cases or materials on the nature of a bargain, electronic standard forms, parol evidence, interpretation, incomplete contracts, mistake, and novation. Notwithstanding the new material, the book's structure and purposes remain as described in the preface to the first edition.

We have kept materials on current and amended Article 2 in this edition, although the focus is on the former in light of the lack of state adoptions of the latter. Amended Article 2 nonetheless serves as an excellent vehicle for observing and analyzing possible developments in the evolution of sales law.

We hope you enjoy these materials.

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August 2006

Preface to Fourth Edition

Primarily, the fourth edition updates the materials to include major recent developments in the law of contracts as we begin the 21st century. One new development involves electronic contracting over the Internet and through electronic mail. We have included new cases, excerpts, and notes on electronic contracting and related topics.

Another area of increased importance concerns the relationship between tort and contract, including the modern law of misrepresentation and recent "trends" concerning bad faith breach as a tort, especially in the employment area. We have supplemented and revised our existing materials in these areas too. We also include provisions of the new Restatement (Third) of Torts concerning developments in strict-tort liability.

A third recent development is the revision of Article 2 of the Uniform Commercial Code on the sale of goods. As this edition goes to press, the National Conference of Commissioners on Uniform State Laws and the American Law Institute are scheduled to review the final draft in Spring 2001. We continue to include ample materials on existing Article 2, but we have supplemented them with draft revisions where these involve substantial proposed changes in existing law. For example, Section 2–207, dealing with the "battle of the forms," has been thoroughly revised and we include materials on these changes. We also include new developments concerning the problem of "terms in the box," also called "rolling contracts," where a buyer purchases an item only to have new terms appear on or in the container.

We have also updated and supplemented many of our notes, added some new cases to substitute for others that have worn thin, and included new secondary sources that contribute to the themes of our book and that have appeared since the third edition. We have also revised the order of the sections in a few of the chapters in minor ways.

Notwithstanding these revisions, the book remains essentially the same in structure and purpose. For those interested in reading more about our goals in these materials, please see the preface to the first edition. The co-editors (on view at page 949) believe this fourth edition is an improvement and we hope you find it stimulating and rewarding.

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October 2000

Preface to Third Edition

In this third edition, we continue to emphasize contract doctrine, contract theory, and problems of contract practice of general educational value. We include twenty-four new cases and omit several others. This edition includes additional passages on contract theory as well. These and other theoretical writings in the book invite students to think beyond the nuts and bolts, yet are neither too lengthy nor, in our experience, too difficult for the first-year student.

The third edition also contains new materials on the various roles of the practitioner of contract law. We thus add to what we believe is already a rich and distinctive assortment of actual contracts, opinion letters, portions of briefs, and comments from lawyers that require students to consider concrete problems of contract planning, drafting, counseling, negotiating, as well as litigating.

We also update our explanatory notes, add new problems, and include more photographs and cartoons! These materials reinforce our view that the study of contract law can be enjoyable as well as stimulating.

The co-editors (on view at page 967) certainly enjoy teaching these materials. Measured on this scale, too, we believe that the third edition is an improvement.

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November 1996

Preface to Second Edition

There is no sharp break between this second edition and the first. Our goals and philosophy remain the same. (See the Preface to the First Edition.) We have mainly sought to improve upon the implementation of our earlier goals and philosophy, and to update the materials. This edition is slightly shorter than the first.

We have expanded or revamped the sections dealing with the statute of frauds, interpretation, agreements to agree, and the battle of the forms. Many other sections have been revised in less ambitious ways. We have added further materials from the archives of practitioners. As in the first edition, these include extracts from briefs, opinion letters, and draft agreements. We have also added twenty-three new cases, most relatively recent. To make way for these cases, we have omitted some cases past their prime. In addition, we include fresh contributions from scholars and some new and revised problems throughout the book.

We hope that the first edition has been a successful teaching tool for a wide variety of teachers. We believe the second edition is an improvement.

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February 1992

Preface to First Edition

Goals. Five primary goals have guided the design and content of this book. We have sought to provide materials that will enable students to:

—understand the leading rules and principles governing contract and related obligation, including the substantive reasons behind these rules and principles;

—develop substantially the basic lawyer skills required to plan, draft, interpret, counsel, litigate, and negotiate in this field;

—understand and deploy general theories of the nature, functions, and limits of contract and related law;

—develop the general analytical and critical abilities and attitudes (including a keen regard for facts) that typify the good lawyer;

—learn not only the deficiencies of, but also some of what is best about, American contract law, including its intellectual richness and what it teaches us about ourselves and our society.

Our Philosophy of Instruction. We believe in the case method, and in extensive dialectical exchange between teacher and student, and between student and student. Accordingly, this is predominantly a case book. The book also provides a framework, and numerous opportunities, for concentrated dialogue on the justificatory reasoning, authoritative and substantive, to be found in the opinions. (See Appendix A: "Judicial Reasons".)

We have generally chosen not to impose our own personal pedagogical grid on the cases and other materials, so that, except in the first chapter, we pose very few questions of our own. In each chapter, we have inserted several problems devoted to planning, drafting, and other roles of lawyers.

Criteria Affecting Selection of Materials. We have selected cases with an eye to the usual factors: the richness of the facts (including their potential for hypothetical variation), the quality of the opinion, the doctrinal, transactional, or relational significance, the depiction of lawyer performances, historical or social import, and more. Occasionally, we have included a case partly for cultural reasons. Various statutes appear here, including many sections from Article Two of the Uniform Commercial Code. The book includes additional materials on the sale of goods, for the teacher who chooses (or is required) to cover this subject.

We also include extracts from the two Restatements of Contracts. For students who acquire too much of a taste for the ready-made formulas of a restatement, and thus tend to think of the common law case merely as something to be "boiled down" into a sentence or phrase, we also offer Appendix C: "The Restatement Idea—Some Skepticism".

The book includes some sample documents drawn from the world of practice. These consist of actual contracts, opinion and other letters, portions

of briefs, and some comments from lawyers who litigated a few of the cases in the book.

Role of Text. We have seldom relied on text to convey knowledge of law. More often, we have used text to introduce the subject of each chapter, to treat lawyer' roles, to convey a sense of structure within an area, and to provide background material to facilitate discussion.

Organization. The organization of our book furthers our primary goals. In Part One, called "Foundations of Contract and Related Obligation," we include three chapters. The first opens with an actual agreement and stresses the function of contracts as social exchange devices frequently planned and drafted by lawyers, but which the parties normally perform without any involvement of lawyers, let alone courts. The second chapter systematically presents the major general theories of obligation operative in contract and related areas. (Of course, remedies inevitably enter here, too.) The emergence and development of one general theory of obligation—promissory estoppel—is treated historically. Some of the major forms of interplay between contract and tort are also considered. The third chapter treats the general law of remedies as it applies to each theory of obligation.

Together, Chapters One, Two, and Three introduce most of the basic themes of the book. Although we follow many of the ideas of the late Professor Fuller, we emphasize that the reality of contract obligations resides more in their voluntary observance and in the force of the normative reasoning the obligations generate, than in the predicted efficacy of remedies for their breach.

Parts Two through Four are organized to reflect the main chronological stages of contractual activity: agreement, performance, and cessation. In Part Two, "The Agreement Process," we stress contract planning, the law governing the formation of agreements, the private administration of agreements (with and without the aid of lawyers), and the theories on which agreements are policed. Part Three, "The Performance Process," deals mainly with the parol evidence rule, the interpretation of agreements, the general obligation of good faith, the law of conditions, and breach and the permissible responses thereto. Part Four, "The Cessation Process," presents the grounds of rightful cessation and any remedies available thereafter. Here we offer systematic treatment of the complex interplay between such grounds of cessation as mistake, impracticability, and frustration on the one hand, and general theories of obligation and remedies on the other. (See especially Chapter Nine.)

Part Five is devoted to the rights and duties of third parties.

Hours. The book is designed for a six semester hour course, but the book can, of course, readily suit other hour allocations.

Some Words of Justification. There are already some outstanding teaching books in this field. Why add to them? Here we undertake briefly to explain ourselves, and perhaps we may be forgiven if we sometimes overstate a bit.

(1) We include much material designed to acquaint students with the entire range of lawyer roles in contractual matters, and to foster the develop-

ment of sophistication and skill required in most of these roles. We stress the lawyer's planning role. Our effort here is reflected in a variety of forms, including various planning problems and some materials gathered from practitioners who handled recent cases included in the book.

(2) We focus on privately-made law in the form of agreements and customary norms. For example, as already noted, we begin with detailed consideration of an actual agreement. We emphasize that lawyers not only create and apply state-made law but create and apply the terms of private agreements as well. We stress, too, that judges frequently invoke the terms of privately created law as authoritative reasons for judicial decisions.

(3) We draw on the writings of Atiyah, Corbin, Dawson, Eisenberg, Farnsworth, Fried, Fuller, Gilmore, Llewellyn, Macneil, Posner, and others, all of whom have contributed significantly to the enrichment of contract theory. In addition, we add some theorizing of our own. For example, we introduce the concept of a multi-dimensional general theory of obligation in Chapter One, explore and compare a variety of such theories in Chapter Two, and regularly return to these theories in later chapters.

(4) We believe that today there is far less dialectical teaching in the first year of law school than was true only twenty years ago. In our view, the students are the main losers in this development. Gradual and cumulative changes in the nature of published teaching materials help explain this decline. The smaller proportion of principal cases, the heavy editing of those cases, the inclusion of numerous summaries and notes after each principal case, the extensive use of general textual notes on the law aimed at covering ground, the frequent resort to extracts from black-letter Restatements, the use of numerous lengthy excerpts from articles, and the infrequent sequences of principal cases on a single topic, all illustrate what we perceive to be an unfortunate trend. We have tried to prepare a book that will maximize analysis, criticism, and dialogue, both in and out of the classroom.

(5) In our view, contract teaching materials should not present all valid law as something essentially laid down or acted upon by officials, nor present formal legal reasoning and substantive moral reasoning as sharply distinct. Contrary to these positivist views, contract and related law comprise a complex intermixture of private agreement (tacit as well as express), custom, case law, statute, regulatory law, *and* substantive reasoning—moral, political, economic, and other. We show from the beginning that substantive reasoning is far from "extra-legal" in nature. It is intrinsic to law, and no sharp line can be drawn here between the legal and the non-legal.

(6) This is not just a book about contract and related law. We also seek to develop a number of other more general perspectives and insights, including the power of general theory; the strengths and limits of a common law system; the recent rise of statutory and regulatory law, and the problems that this poses for lawyers and private parties; the differences between formalistic and instrumentalist legal method; the interactions of substantive right and judicial remedy in private law fields; the inevitable overlap among fields of private law; the subtlety and pervasiveness of the obligation of good faith; the

interactions of law and fact; the social uses and limits of private ordering; the multi-faceted character of contract as a social institution; and the decline of freedom of contract.

Conventions. Bracketed material in cases and excerpts are ours, as are lettered footnotes. Other footnotes by judges in opinions or by authors in excerpts have been renumbered. We omitted some footnotes from these materials without indication.

R.A.H.
R.S.S.

February 1987

General Acknowledgments to Sixth Edition

We gratefully acknowledge our indebtedness to the following authors and publishers who gave us permission to reprint excerpts from copyrighted articles: Albany Law Review, for excerpts from Note, Risk of Loss and Distribution of Insurance Proceeds Under Real Estate Contracts in New York, 28 Alb.L.Rev. 253 (1964); American Bar Association Journal, for excerpts from Williston, Restatement of Contracts is Published by the American Law Institute, 18 A.B.A.J. 775 (1932)—Reprinted with permission from the *ABA Journal,* The Lawyer's Magazine; The American Law Institute, for excerpts from 1970 Proceedings of the American Law Institute, 47 A.L.I.Proc. 489–91 (1970)—Copyright © 1970 by The American Law Institute, reprinted with the permission of The American Law Institute; The American Law Institute and Professor Stewart Macaulay, for excerpts from Macaulay, The Use and Non–Use of Contract in the Manufacturing Industry, 9 Practical Lawyer, Nov. 1963—Copyright © 1963 by The American Law Institute, reprinted with the permission of *The Practical Lawyer.* Subscription rates $25 a year; $5.00 a single issue (this article appeared in 9 *The Practical Lawyer*; Annual Survey of American Law and Professor Charles L. Knapp, for excerpts from Knapp, Judgment Call: Theoretical Approaches to Contract Decisionmaking, 1988 Ann.Surv.Am.L. 307, 333, 336; Boston University Law Review and the Trustee of the Literary Estate of John P. Dawson, for excerpts from Dawson, Judicial Revision of Frustrated Contracts: Germany, 63 B.U.L.Rev. 1039 (1983); Boston University Law Review and the Trustee of the Literary Estate of John P. Dawson, for excerpts from Dawson, Judicial Revision of Frustrated Contracts: The United States, 64 B.U.L.Rev. 1 (1984); Boston University Law Review and the Trustee of the Literary Estate of John P. Dawson, for excerpts from Dawson, Restitution Without Enrichment, 61 B.U.L.Rev. 563 (1981); Boston University Law Review and Professor Mark Pettit, Jr., for excerpts from Pettit, Modern Unilateral Contracts, 63 B.U.L.Rev. 551 (1983); California Law Review and Professor Andrew Kull, for excerpts from Kull, Rationalizing Restitution, © 1995 by California Law Review Inc., reprinted from California Law Review, Vol. 83 No. 5; California Law Review, for excerpts from Whittier, The Restatement of Contracts and Mutual Assent, 17 Cal.L.Rev. 441 (1929)—1929 by 17 California Law Review, reprinted by permission; Columbia Law Review and Professor E. Allan Farnsworth, for excerpts from Farnsworth, Disputes Over Omission in Contracts, 68 Colum.L.Rev. 860 (1968)—Copyright © 1968 by the Directors of the Columbia Law Review Association, Inc. All rights reserved (this article originally appeared at 68 Colum.L.Rev. 860 (1968)), reprinted by permission; Columbia Law Review, for excerpts from Fuller, Consideration and Form, 41 Co-

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