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A Short and Happy Guide to Contracts

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A SHORT AND HAPPY GUIDE TO CONTRACTS

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Ackno

We would like to thank the professor who “invented” this incredibly nice friend at and Yvette.

And, Epstein would like to thank Juliet, a law professor who made the book better. Juliet, a law professor with his part of the book, the help he can get.

Ponoroff, although not like to thank Carol Lamoreaux for several helpful suggestions on a fine editing job. He further also an Arizona law student UCC § 2-207, which appeared

Finally, and most in professors assigned to teach referred to teach constitution could devote more time to the book necessary.

Introduction

Welcome to law school. In your first year, you'll have several courses, such as Civil Procedure, Torts, Criminal Law, and, of course, your most important course: Contracts. Why is Contracts so important? Just think about the last month. We're betting that during that time you did not: (1) sue anyone in federal court, (2) run down a pedestrian while driving under the influence, or (3) commit any major felonies. But we are willing to bet that during that same time you probably signed (1) an apartment lease, (2) an agreement for broadband wireless service, or (3) a promissory note for your student loans, and maybe all three. Each of those transactions, and perhaps several more in which you've engaged in the last month, involves a *contract*. So, as you can see, contract law pervades daily life from shelter to occupation to creature comforts.

Now, what does each of those "contracts" you may have entered into over the last month have in common? Each involved at least one *promise*. A promise, in its most elemental form, is an undertaking or commitment to do or not do something in the future. Generally speaking, a promise, once made, should be kept, right? But not all promises are equal in the eyes of the law; not every promise made can be enforced in a court of law. That's what contract law is all about—liability for promises, or, more accurately, broken promises. At its core, contract law is the system of rules and policies governing the legal enforcement of promises. And, bear in mind, contract cases range from very simple deals, like those described above, to highly complex transactions, such as corporate mergers, technology transfer agreements, or construction financing arrangements, to name just a few.

In this book we will reveal those rules to you in as straightforward and clear a fashion as they permit. But we will also talk some about *policy* and the difference between the two. For now, think of them this way: policy reflects the normative objectives we want to attain, and the rules are the vehicles for getting us there. For example, one of the foundational policies behind contract law is that of "freedom of contract." That phrase refers to the right of a person to make a legally binding agreement with one or more other persons without governmental interference as to what type of obligations she can take upon herself or impose upon the other.

No policy, however, is absolute or without limitation. There are some areas where the law restricts the ability of private individuals to make a deal because of countervailing policy considerations. To use an extreme example, freedom of contract does not include the freedom of Epstein to enter into a contract with Markell to steal Ponoroff's huge royalties from sales of this book. Therefore, it is not inaccurate to think of the rules of contract law as mediating between achieving the principle favoring freedom of contract while not exceeding the restraints that society must necessarily place on that same freedom. Basically, the rules of contract law keep the ball in play.

Because not all promises can be enforced in court, each society must decide which promises it will legally enforce and which promises will be left to more informal incentives for compelling a party's performance, such as the promisor's conscience or concern for her reputation. For the most part, our legal system is concerned with promises that arise out of *exchange* transactions. So Epstein's promise to sell his car to Markell for \$100 is typically enforceable, whereas Epstein's promise to *give* his car to Markell likely would not be. This tells you that contract law is most concerned with private bargains of exchange that transfer or allocate resources. Indeed, a free market economy depends on the predictable enforcement of private exchange transactions.

Most contract law is common law; which is to say, judge made law, developed over hundreds of years in individual cases. Contract law in this country was originally inherited from England at the time of the founding of the republic, and then continued to be developed by American courts. The early 20th Century saw the promulgation by the American Law Institute of *Restatements* of the law in several fields, including contracts. The *Restatements* are code-like documents that attempt to set out the law as it currently exists. They are influential, but without the force of law. In other words, a court is not bound to apply the *Restatement*. The first *Restatement of Contracts* was published in 1932, and the *Restatement (Second) of Contracts*, to which we will sometimes refer in this book, was approved in 1981. Generally speaking, the first *Restatement* reflected the more traditional or "classical" view of contract law, which favored hard and fast rules to resolve contract disputes in a predictable and consistent fashion. The *Restatement (Second)*, by contrast, is much less rule-bound. It adopts a more flexible approach; that is, one that emphasizes malleable standards over fixed and unbending rules, and encourages courts to take into account considerations external to the parties' contract in order to promote equity and fairness.

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The middle of the 20th Century saw the adoption by its
sponsoring agencies of the Uniform Commercial Code (the UCC),
which is a model statute available to the states for enactment as
law. Of importance for us, Article 2 of the UCC has been adopted
by every state except for Louisiana. Article 2 governs contracts for
the sale of goods; that is to say, moveable tangible things. Some
provisions of Article 2 apply only to merchants—persons in the
business of selling goods of the kind that are the subject of the
contract—but Article 2 applies to *every* contract for the sale of
goods, *even if* one or both parties are not merchants.

In this book, we are going to break the subject of contracts into
seven short questions:

1. Has a deal been made?
2. Is the deal enforceable?
3. Are there defenses to enforcement of the deal?
4. What are the terms of the deal?
5. When will performance of the deal be excused?
6. How does the law enforce the deal?
7. Who else is affected by the deal?

Once you can answer these questions, you will have mastered
contract law. We realize it seems a little daunting to you right now,
but, hey, if the three of us could get through it, you'll do just fine.
So, sit back and enjoy.

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