PREFACE

A. OVERVIEW

You are undoubtedly already familiar with the concept of a contract. After all, you have probably created a Facebook or Twitter account and agreed to the terms of use. Those terms of use likely constitute contracts. In addition, you have probably signed a written document labeled "Contract" with your cell phone company. That written document also sets out the terms of a contract, meaning the promises that you and the phone company have made to one another. Even your order of a menu item when dining out might constitute a contract with the restaurant.

While you might identify those arrangements as contracts, you might not have thought about what makes them contracts. In short, what makes them contracts is that they set out promises that, if breached, would be enforced by a court. In other words, a contract exists only where a party makes a promise, and only where the other party could receive a remedy in court if the first party failed to perform that promise.

Yet not every promise that appears to be a contract is enforceable. For example, suppose your cell phone company locked the front door and would not let you escape unless you signed the cell phone "contract." Would you be bound to pay your cell phone company then? Your gut probably is telling you that you should not be bound by the contract in that circumstance due to the threat to your safety that caused you to agree. Your gut would be right.

This book will provide you with knowledge and skills so that you can analyze whether these and other arrangements are contracts that a court will enforce. In addition, this book goes beyond the law to teach you typical contracting practices, as well as typical contract structure and terms. By studying these practices, structures, and terms, you will learn how lawyers help clients use contracts to achieve their goals. This book will also help you develop skills such as problem identification and solving as well as client counseling—skills that are essential to lawyers advising clients on contracts. It will also help you start to develop your professional identity as a transactional lawyer, so that you begin to develop appropriate habits and values. As you will see, that includes being sensitive to other parties' cultural backgrounds, practices, and beliefs.

This book uses problems as well as a simulation to help you develop this knowledge and these skills. Through these problems and simulation, you will engage in a hands-on, active learning experience. Through tasks such as reviewing draft contracts and suggesting provisions, you will be able to apply the knowledge and skills taught in this book to typical situations encountered in practice. Moreover, you will have the opportunity to think through some of the ethical dilemmas you might face as a lawyer representing a client on a contract and how you might solve those dilemmas in accordance with your professional responsibilities.

It is our hope that this material will give you a strong foundation in contract law and practice that you can use to help advance your future clients' goals.

B. DESIGN AND CONTENT CHOICES OF THIS TEXTBOOK

This section explains the more important design and content choices we made in writing this book. We include this discussion because many of these features are unique and are not typical for a 1L textbook on contracts. As such, we felt we should explain these design and content choices up front so you understand the bases for our decisions. We hope this material will convince you as to the wisdom of our choices.

We also include this material to help set your expectations for what this book will do—and not do. We believe that it is important to explore these expectations so you can better understand our goals as you proceed through this material.

1. Includes Extensive Problems and a Simulation

One of the unique aspects of our book is the extent of the practice problems it contains. We include problems after each case to test your understanding of the law from the case, the court's holding and reasoning from the case, and your ability to analyze a new situation using that law. We also include a large number of problems outside of cases, after we discuss substantive aspects of contract law and practice. In addition, we include a simulation with questions in Appendix A. A simulation is a scenario that presents evolving facts modeled on a real-life situation. It then places you in the role of lawyer and asks you to perform certain tasks for your simulated client.

We include extensive problems and a simulation for many reasons.

First, we believe that students can obtain a higher mastery of the skills of legal analysis and reasoning—core lawyering skills—by actually performing those skills. Here the problems and the simulation introduce facts and pose specific questions designed to help you practice these skills.

Second, one of the key attributes of a good lawyer is her ability to solve problems. Legal problems are not solved by simply knowing the law. Instead, legal problems are solved by a lawyer who, when presented with all of the facts, identifies her client's interests and helps her client further that interest in compliance with law. A lawyer simply cannot develop this problem-solving skill without practicing it. The simulation and problems presented in this book are designed to provide many opportunities for you to practice these problem-solving skills.

As you perform these problem-solving tasks, you will see that a complete solution to a problem often does not come from contracts and contract law alone. Instead, you will learn that problem-solving requires that a lawyer keep her eyes open for solutions in other areas of the law, as well as outside the law. Moreover, a lawyer must always use her own common sense, all to help the client protect its interests. This result-oriented perspective is most effectively practiced through the kind of problem-solving activities we include in this book.

Third, through the simulation and other practice problems included in this book, you will begin to see the types of ethical and moral dilemmas that a lawyer faces. You can then begin to think about how to resolve those dilemmas in the safety of a classroom, where you are free from the risks of lawyer discipline or malpractice claims. In addition, our practice problems will allow you to begin to develop your professional identities as you perform tasks customarily assigned to attorneys.

Fourth, the simulation and practice problems are designed to give you a sense for the types of tasks lawyers perform every day. Those tasks might include, for example, drafting a provision of a contract or advising your client as to whether a contract adequately protects its interests. Similarly, with respect to a contract dispute, a client may seek advice about

settlement and negotiation strategy (and whether or not to settle) in addition to the litigation attorney's task of pursuing or defending a contract claim. Through these experiences, you will see that what you do for your client has a real impact on your client's success. Moreover, performing these tasks will make you a more active participant in the learning process.

Keep in mind that the facts of the simulation evolve as your client makes decisions based on your prior advice. Thus, where the book discusses contract formation, the corresponding sections of the simulation present facts and problems relating to contract formation. Later, as the book discusses the terms of the contract, the corresponding sections of the simulation presents facts and problems focusing on the terms of the contract. In addition to allowing us to explore contractual concepts as they unfold in the book, those changes make the simulation more realistic. Thus, they will give you some sense for how a transaction develops in real life and how your relationship with your client evolves with the transaction.

2. Reviews Typical Contract Structure and Terms

Any lawyer who deals with contracts must be familiar with the typical structure of a contract. She is also expected to be familiar with some terms that are common among contracts. That is because, as you will learn in Chapter 2, contract law is largely private law. In other words, parties create the terms they would like to govern their business relationship, and courts will enforce those terms so long as they meet the mandatory (i.e., required) aspects of contract law.

With this in mind, this textbook devotes an entire chapter — Chapter 3 — to the study of the typical contract structure and terms. Moreover, this textbook presents sample contract language throughout, often showing how parties customize their contracts in light of the law studied in a particular section.

We include this material on contract structure and terms to help ready you for practice. In fact, even before then, many of you will participate in internships, clinics, and practicums throughout your law school careers. In those positions, as well as in practice, you will often be asked to review a contract. In some cases, you might be asked to draft or comment on a contract. In all of these cases, it would be difficult to undertake the task without having a basic understanding of the contract's design or a familiarity with some of the terms you can expect to see in that contract. That familiarity will allow you to begin to see how lawyers can use contract structure and terms to help clients achieve their goals.

In addition, being familiar with the typical design and content of contracts can enhance your comprehension of the legal doctrines that arise in the dispute context. The opposite is true as well: you will better understand the reason for contractual provisions if you understand the legal basis for, or limits on, that provision. For example, as you will see in Chapter 3, when drafting a contract, parties often include a nonbinding background section called recitals that sets out the parties' purpose for entering into the contract. They do that for a number of reasons, including to help third parties and courts interpret the contract. Thus, as you will see in Chapter 12, courts commonly look to recitals to determine the parties' intent, where it is not clear from the parties' respective obligations. Such a purpose provision could also impact the court's decision whether a supervening event, such as the passage of a new law, should excuse one of the parties from its obligations under that contract.

However, as a word of caution, this book is not designed to make you an expert on contract structure or terms. You will need to undertake many other experiences, both in law school and in practice, to achieve that status. But it is designed to lay a foundation for that expertise.

3. Presents Role of Transactional Attorneys

As the discussion above explained, this textbook not only presents material about contract law, but also explains how contracts can actually be used to achieve clients' goals. The "transactional" perspective, as noted in the book's title, captures this notion: that contracts are used to achieve clients' goals in a transaction. Moreover, it captures the notion that lawyers—called transactional lawyers—represent those clients in helping them enter into and perform those transactions.

By considering contracts and contract law from the transactional perspective, this textbook will enable you to learn how contracts are used to protect clients' interests, how clients obtain information about their contractual counterparties through due diligence, and how lawyers facilitate the negotiation and drafting of contracts, among other typical contract lawyering tasks. These tasks are different than for the litigator, whose knowledge and skills are applied against a backdrop of a developed factual record. In contrast, a transactional lawyer performs important problem-solving and other skills in the context where the parties' relationship will develop in the future. Thus, the material contemplates a whole new role and practice setting for the lawyer, creating a more complete picture of what lawyers actually do for clients. This book will also present you with some of the ethical dilemmas transactional lawyers face and give you the opportunity to consider how to resolve those dilemmas. Through this material, this textbook will help you begin to develop your professional identity.

4. Explanatory Text Presents Material

While this textbook presents some legal principles through cases, it presents a significant amount of content through explanatory text. This contrasts with the typical contracts textbook's approach, which is to present nearly all of the law through cases.

We present contract law through explanatory text because we believe it is a practical and efficient way to present the law. A study of cases simply cannot provide the breadth of law that an explanatory presentation can, for the law presented in each case is limited to the specific legal doctrine or doctrines at issue in that case.

Nevertheless, a lawyer must be able to read a case and distill the law from that case. Therefore, this book includes many cases to allow you to develop these skills. However, we believe there are diminishing returns on having students repeat this skill throughout a contracts course. Thus, we focus much more of our book on the solving of legal problems using the law rather than on the distillation of law from cases.

Moreover, presenting the law of contracts only through cases potentially gives the impression that all contracts end up in litigation. Nothing could be further from the truth. In fact, only a tiny fraction of contracts will end up in litigation. To negate this false impression, we believe it is important for you to study contracts and contract law by seeing how both can be used to achieve parties' goals, in addition to seeing some of the instances of failed contracts in litigation.

In addition, because of this book's transactional perspective, some material is most effectively presented through explanatory text rather than cases. For example, the material on contract structure and terms is presented to demonstrate how contracts can be used to help the client achieve its goals. While the law provides some limits on structure and terms, so long as those limits are met, the parties can agree on an endless number of terms. Indeed, apart from the baseline limits imposed on parties under the law, parties are free to contract however they wish. For that reason, it would be odd to present that material by only considering contract terms that have been litigated.

Despite these benefits of a textual description of the law, we must caution the reader up front that contract laws are often complex and nuanced, making them tricky to describe through explanatory text. However, that challenge also exists for courts, which have to describe those same laws in their decisions. At least with explanatory text, we can omit the nuances in the law that are either aberrational or of limited applicability. To the extent that you need to know those nuances or specific rules, you can certainly research them.

5. Presents Law from Different States

While this design feature is not unlike other textbooks, we do want to close with a brief discussion of which states' laws this book covers.

Like most 1L contracts textbooks, this textbook does not rely solely on the law of one state. Rather, it incorporates contract law from different states. It takes this approach for many reasons. First, looking at the laws in different states allows us to look at generally applicable rules without focusing on the specific state from which that rule came. Second, looking at different states' laws allows you to make a judgment about the wisdom of different approaches to the law. Third, seeing a variety of approaches to the same legal principle will reveal the diversity that exists in contract law. That revelation should make it clear why you always need to research the law of the applicable jurisdiction, given the variation in states' laws. Finally, looking at the law in many jurisdictions gives us a much broader and richer pool of law from which to draw. That, in turn, allows us to select the law that serves as the most effective teaching tool.

Because this book presents much material in an expository manner, without case headings indicating the jurisdiction of the case, there is a risk that the reader will see the law discussed textually as if that law is universal. We want to caution the reader against drawing this conclusion. In most instances, we describe the law as it is in effect in a majority of jurisdictions. However, sometimes we explain the minority approach to the law, where the courts are trending toward that minority approach. We also sometimes contrast the majority and minority approaches.

We present the material in this way to achieve our goal of helping you learn the structure of contract law, the policies served by contract law, and the typical approach to specific contract law doctrines. However, it is not intended to be used as a resource for the law of any particular jurisdiction. Thus, you will *always* have to research the law that is applicable in your jurisdiction when an issue of contract law arises.

C. OVERVIEW OF BOOK ORGANIZATION

This book's organization generally tracks the life cycle of a contract, from formation to performance to (in some cases) dispute. However, it begins in Part I with some background on what contracts are and why they are used (Chapter 1), how contract law is structured and which contract law governs a particular contract (Chapter 2), and how contracts are typically structured and the types of terms they typically contain (Chapter 3).

Part II delves into contract formation. First, Chapter 4 walks through mutual assent, explaining why and how parties fulfill that requirement of contract formation. The next two chapters also address mutual assent, each focusing on specialized rules that apply in different situations. In particular, Chapter 5 speaks to mutual assent to sale-of-goods transactions in light of the specialized rules that apply to those contracts, while Chapter 6 focuses on mutual assent for contracts that are formed electronically. Chapter 7 then discusses the other

requirement of contract formation: consideration. Chapter 8 discusses specialized rules on mutual assent and consideration that apply to option contracts.

Part III, which is comprised of three chapters, also addresses contract formation, but it is geared toward the role of the lawyer in that process. Namely, Chapter 9 discusses the role of the lawyer as transactional advisor. Next, Chapter 10 explores precontract formation activities that parties often undertake, usually with the help of lawyers, to prepare to enter a contract, while Chapter 11 discusses the role of the lawyer in negotiating and drafting a contract. That material also discusses the role of the client in those situations, as a basis to better understand the role of the lawyer.

The next part of the book—Part IV—covers the performance of a contract. Chapter 12 first explains how a lawyer helps a client perform a contract. As that chapter explains, the terms of a contract are not merely the expressed terms, but also terms implied by law. That chapter also explains how parties modify a contract to change its terms. Chapter 13 then explores what happens when the parties attach different meanings to one another's words or conduct in creating a contract or to one of the contract terms: in other words, where there is an ambiguity. That chapter explains how a court resolves each of these situations. Chapter 14 also discusses contract terms and performance, but it does so in the context of a sale-of-goods transaction, to which specialized rules apply. Chapter 15 then discusses what evidence a court will exclude at trial to prove the existence of a contract where the parties have prepared a final writing reflecting that contract.

Part V of the book contemplates what happens when one of the parties has failed to perform an obligation under that contract. In that situation, the disappointed party sues, and the parties invoke one or more of the doctrines in Part V.

Chapter 16 reviews the various excuses a party might have to its performance. From an act of God to the other party's material breach, these doctrines excuse a party from performing even though its behavior otherwise appears to be a breach. Chapters 17 through 21 then discuss defenses to enforcement that arise out of public policy concerns that are viewed as superseding the policies underlying contract enforcement.

Chapter 17, after introducing the concept of a defense to enforcement, discusses the defense known as the Statute of Frauds, which is a defense tied to the satisfaction of required formalities. Next, Chapter 18 discusses the defense of incapacity, which is a defense based on the age or mental condition of the party seeking out of its contractual obligation. Chapter 19 then discusses the defenses of duress and undue influence, both of which involve some defect in the process of contract formation involving some amount of excessive pressure that induces the other party to assent to the contract. Chapter 20, which discusses the defense of misrepresentation, also focuses on a defect in the process of contract formation, focusing on the information provided (or not provided) to a party to induce it to enter into the contract. Finally, Chapter 21 discusses the defenses of unconscionability and public policy, both of which, to some extent, look to the terms of the contract.

Sometimes a party in litigation is not successful in her claim of breach. Typically, that party will argue other causes of action as well; that is, the party will allege not only that the other party breached an agreed-upon term of a contract, but that there is another basis to recover apart from a breach of contract. Part VI, composed of two chapters, explores the most commonly argued alternative theories of recovery. The first one, discussed in Chapter 22, is known as promissory estoppel. The second, discussed in Chapter 23, is restitution. These chapters will also explain how those theories might exist even where no bargained-for contract is alleged to exist.

Part VII assumes a party has breached a contractual obligation, as no excuse or defense to enforcement has justified that party in not performing that obligation. It then explores what remedy or remedies the injured party might receive. Chapter 24 first discusses the purposes

for remedies, as well as what types of remedies a court may award. As that discussion explains, courts typically award monetary damages for breach. Chapter 25 then explores limits on the recovery of those damages. Next, Chapter 26 reviews two alternative remedies to damages: specific performance and agreed remedies, while Chapter 27 lays out types of damages that are disallowable.

Part VIII contains only one chapter—Chapter 29. That chapter discusses rights, duties, and responsibilities of third parties, a term that refers to people who are not parties to a contract.

D. OVERVIEW DIAGRAM

The following page contains a flowchart that shows a contract's life cycle, which, again, generally tracks this book's organization. You can use this flowchart not only to see visually the logic of this book's organization, but also to see how each topic relates to each other topic covered in this course. As you can see, each topic is interrelated with each other topic, all converging around the issue of whether a court will enforce a promise.[1] This contrasts with other courses, such as torts and criminal law, where you study the elements of multiple torts and crimes during the course. In this course, with the exception of restitution, your entire study is devoted to determining whether a court will enforce a party's promise and award the other party a remedy for breach.

This flowchart will be expanded at each new part of the book, to show how the material from that part of the book fits in. That should help you to see how each doctrine you study relates to the material you already studied, so that you can start to synthesize the course as you progress through it.

1. The only exception to this is restitution, which need not involve a promise. But restitution *can* involve a promise. Moreover, restitution sometimes protects a party in a situation resembling a bargain relationship. These are the likely reasons why contracts textbooks cover restitution, and why we continue that practice.

PART I—OVERVIEW DIAGRAM