Preface

First and foremost, the student should understand that a contract is a legally enforceable promise. Our parents and kindergarten teachers instilled in us very early that we should honor our promises. The justice system echoes this sentiment in making these agreements enforceable between the parties to a contract. In order to create certainty in society when we make agreements or promises between parties who may be strangers to each other, the justice system binds parties to their contractual obligations by enforcing penalties on those who break their side of the bargain.

Contracts are not foreign abstractions to us. They are not relegated to large boardrooms filled with executives and lawyers negotiating for millions of dollars. We are surrounded by them every day—large, complex ones and tiny, simple ones. We live in a contract essentially—the social contract that allows people to interact with each other and have consistency and dependability. Our most esteemed document, the Constitution of the United States, is, at its core, nothing more than a contract. The government of the United States agrees to grant liberties and freedoms to its citizens in exchange for their promise to abide by the laws of the nation. Remedies are granted for breaches by either party. With every election, we continue the negotiation processes for changes in terms of this social contract.

On the other end of the spectrum, our morning coffee and newspaper are sales contracts. As we plunk our $1.25 on the counter, we have completed an entire contract from offer through complete performance: the entire conceptual text of this book in the blink of an eye.

While it appears that the study of contract law is not an easy one when a newly introduced paralegal student first reads the Table of Contents, be assured that the complexity is superficial. A contract can be understood by breaking it down into manageable parts.

Just as a complex jigsaw puzzle may look daunting at first, once the pieces have been sorted out, it becomes understandable and manageable. Indeed, construction of the puzzle, just like the construction of a contract, becomes formulaic. Let's suppose you and your friend set out to put a large puzzle together. First you would put the border together, much like you first need to set the parameters of a contract. Then you would fill in the important and prominent features of the picture, the material elements of the contract. Background elements like the sky or grass can then be sorted and fit in to the picture to

complete the puzzle. These basic rules of construction apply just as neatly to contract formation.

If, for some reason, one or more of the pieces are found to be defective, you simply will be unable to form the puzzle. If one of the necessary elements of a valid contract is defective, you simply will be unable to form a contract.

Naturally, if either you or your friend loses or withholds any pieces, the puzzle will not be completed. Assuming the completion of the puzzle was of importance to you, the innocent party will want some sort of consequence to befall the careless or hostile co-creator. After all, you will not get the desired benefit—the completion of the puzzle—and you depended on your "friend" to help you reach that goal. Ironically, the term used in contract law to describe the desired outcome of a contractual dispute is to "make the innocent party whole"—just as the goal of the jigsaw puzzle maker is to make the project whole.

Of all the areas of the law, it is most consistent, partly due to its formulaic logic and partly because the law of contracts is a cold-hearted creature. I can recall the disgusted tone in my contracts professor's voice as she coolly responded to a question about punitive damages: "This is *not* torts class; contract law does not succumb to emotional pleas." In other words, injured parties must show that they were legally wronged and base the request for monetary judgment on a solid mathematical formula. There, of course, will be a discussion of the role of equity (the notion of justice in enforcement despite a lack of a "true" contract).

So where does contract law come from? And, perhaps more importantly for the legal student, where can it be found? The bulk of contract law can be found within case law. The practice of law is one of the oldest professions.[1] Therefore, there is a very long history of judges making decisions regarding the enforcement of promises between people. The courts have rendered innumerable decisions regarding the basic precepts of contract law. From these opinions, contract law has been distilled. Our legal system, like many others, rests upon the principle of *stare decisis*[2]; judges follow precedent, looking to past decisions to determine the rule of application in the current situation. Reliance on precedent gives contract law (and, indeed, other areas of law) its consistency. Knowing the rationale of previous decisions allows a measure of predictability in similar situations. However, the doctrine of *stare decisis* and reliance on precedent do not guarantee a certain result in any case, as the courts can distinguish the matter at hand from the precedent and find differently. This is particularly true where the court has determined that following precedent will result in an unjust result. And why have I discussed all of this with you? Because now you, the student, will understand why it is so important to learn to read and analyze case law. It is not merely a sadistic academic rite of passage for initiation into the practice of law.

---

[1] The Code of Hammurabi contains 282 "laws" and dates back to 1780 B.C.E. It prescribes, among other things, the rules for the creation and enforcement of contracts.

[2] From the Latin, meaning "to stand by things decided."

There are two notable exceptions to this generalization that contract law comes from common law: (1) the Statute of Frauds and (2) the Uniform Commercial Code. However, note that these two pieces of legislation relate to only specific types of contracts. The Statute of Frauds is discussed in Chapter 6 and the Uniform Commercial Code (Article Two—Sale of Goods) in Chapter 15.

These are the two primary sources of law (cases and statutes) and answer the question: "where does contract law come from?" Going back to case law for a moment to discuss another place to *find* contract law: You may find, quite often actually, that judges are relying on something called the *Restatement (Second) of Contracts*. While this publication from the ALI (American Law Institute) is only secondary authority, it has, for all practical purposes, the influence of primary law. As a student, you may find the comments and illustrations extremely helpful, as they explain the why's and how's of the principles of contract law.

The last place to find a secondary interpretation of the law is legal treatises. The most authoritative scholars in this area of law are Williston, Farnsworth, and Corbin.[3] These authors seek to clarify the law by detailing the development of the law and the complex principles associated with it.

This text takes a chronological approach to understanding contracts. We will discuss each contractual consideration as it would come up in the "real world." Additionally, attention must be paid during each step to the avoidance of litigation, a common and laudable goal in contractual relationships. Therefore, the text will discuss these practical matters as they arise during the course of constructing the contract in Parts One and Two of the text. Parts Three and Four deal with analyzing the failure of the contract and the remedies available to the non-breaching party. Again, emphasis will be placed on how to construct the contract to provide for remedies while avoiding litigation. This, of course, underscores the apparent dichotomy between the elements of certainty and freedom in contract. The rules of construction and enforcement are relatively confined when the court must step in to settle the dispute, while the parties, outside of litigation, are free to contract for whatever subject matter and provide for a myriad of their own remedies.

After having read all this, the paralegal student may be asking: "Yes, but what does all this have to do with me?" As a paralegal, which one day you will be, and a competent one at that I hope, you will be required to understand all the pieces of the puzzle so that you can draft an initial agreement, make appropriate changes after negotiations, perform the initial analysis of the contract to determine the rights and liabilities of the parties in the execution of the contract, and, finally, to determine the remedies available to the non-breaching party should a problem arise. This list of tasks assigned to a paralegal is not all-inclusive, but it is indicative of the importance of the work involved.

---

[3] However, the Calamari and Perillo *Hornbook* is more digestible as it is one book, whereas the others are multivolume sets. Indeed, the Williston series consists of 18 volumes and the Corbin series consists of 14.

WHAT'S NEW?

What's new in this, the second edition? While contract law is incredibly stable in theory, modern technologies have influenced how contracts are made, stored, and enforced. I have included in almost every chapter a feature called "Crypto Contracts" that discusses the impact of blockchain technology and the rise of "smart contracts."

Additionally, technology has crept into our social lives as well. I have updated cases and examples to demonstrate how social media can influence contract origination, performance, and evidence.

Also note that each case from the first edition was reviewed for continued relevance. Where there was a more illustrative or modern case, those changes were made.

ORGANIZATION OF THE TEXT

What do each of the textbook sections have in store for the paralegal student?

Part One

> "*The secret of getting ahead is getting started. The secret of getting started is breaking your complex overwhelming tasks into small manageable tasks, and then starting on the first one.*" —*Mark Twain.*

The first task in analyzing a contract is to determine whether the requisite elements are present. There must be a valid offer supported by legally recognizable consideration and properly accepted with conditions and third-party interests, if any, satisfactorily set forth. Without these basic elements, there is nothing for a court to enforce. An improperly formed contract is not a contract at all; the inquiry ends without a remedy in contract law.

Part Two

Once the parameters of a valid contract have been set, the student can examine the affirmative defenses that may available to the defendant. Affirmative defenses are facts and circumstances set forth that essentially defeat the plaintiff's claim, even if all the allegations against the defendant are true. Certain defects in the formation of the purported agreement will nullify the attempt at creating a legally binding contract. This means that while all the requisite elements exist; a valid offer has been made, supported by legally recognizable consideration and that the offeree has accepted, something in the surrounding circumstances has gone wrong.

This goes to the heart of enforceability of a contract. Once a party has brought the contract before the court, the party against whom the suit was filed can assert that there were defects in the formation of the contract, although it

appears that the requisite elements are present, there were circumstances affecting the formation which make it impossible to enforce performance.

Part Three

Assuming that all the elements of a valid contract exist as discussed in Part One, and that there are no defenses to formation as discussed in Part Two, the parties stand on solid ground to perform their mutual contractual obligations. If the parties perform their obligations in accordance with the contract's terms, there is no further analysis needed. The contract has been executed upon and the parties owe no further legal duties to each other. Both have received the benefits they expected and have no need to resort to the legal system to resolve any issues.

However, just as "*the course of true love never did run smooth*,"[4] neither does the course of performance of many contracts. Broadly speaking, any performance that does not perfectly conform to the contract's requirements can be considered a breach of contract and potentially give rise to a claim for legal relief. Part Three is the discussion of what happens when a party does not tender "perfect performance."

Part Four

Finally, the last step in contract analysis has been reached. Now that a breach has been established, the non-breaching party needs to recover damages from the breaching party. Damages are the legal remedies available and they may take many forms. Remedies in the law attempt to put the non-breaching party in the same position they would have been in had the breach not occurred.

The first step in this process of recovery is to file a lawsuit, as any attempt at "self-help" by agreement of the parties (as discussed in the preceding chapter) has not solved the problem. Alternatively, with the rise in alternate dispute resolution, a party may elect to arbitrate the matter to avoid the expense and time involved in litigation. The non-breaching party must resort to the courts or other tribunal in order to establish the enforceable right to recoup losses incurred by the breach.

Once the lawsuit is filed, the plaintiff (non-breaching party bringing the lawsuit) will need to establish that harm has occurred due to the breach. This is the element of causation. The breach must have been the thing that caused the plaintiff's harm. If the plaintiff was harmed due to another independent occurrence then the breaching party may not be at fault for the harm. Without any real harm done by the defendant (breaching party), the plaintiff's case must be dismissed.

Lastly, this attribution of fault must show that the court can make the breaching party either pay money or perform an act to compensate the plaintiff

[4] Shakespeare, *A Midsummer Night's Dream* (I, i, 134)

for the harm that the defendant caused. If there is nothing the court could do to help the plaintiff recoup the losses, then there are no legal remedies available, the law is simply not equipped to act on behalf of the plaintiff. The case, therefore, must be dismissed.

Part Five

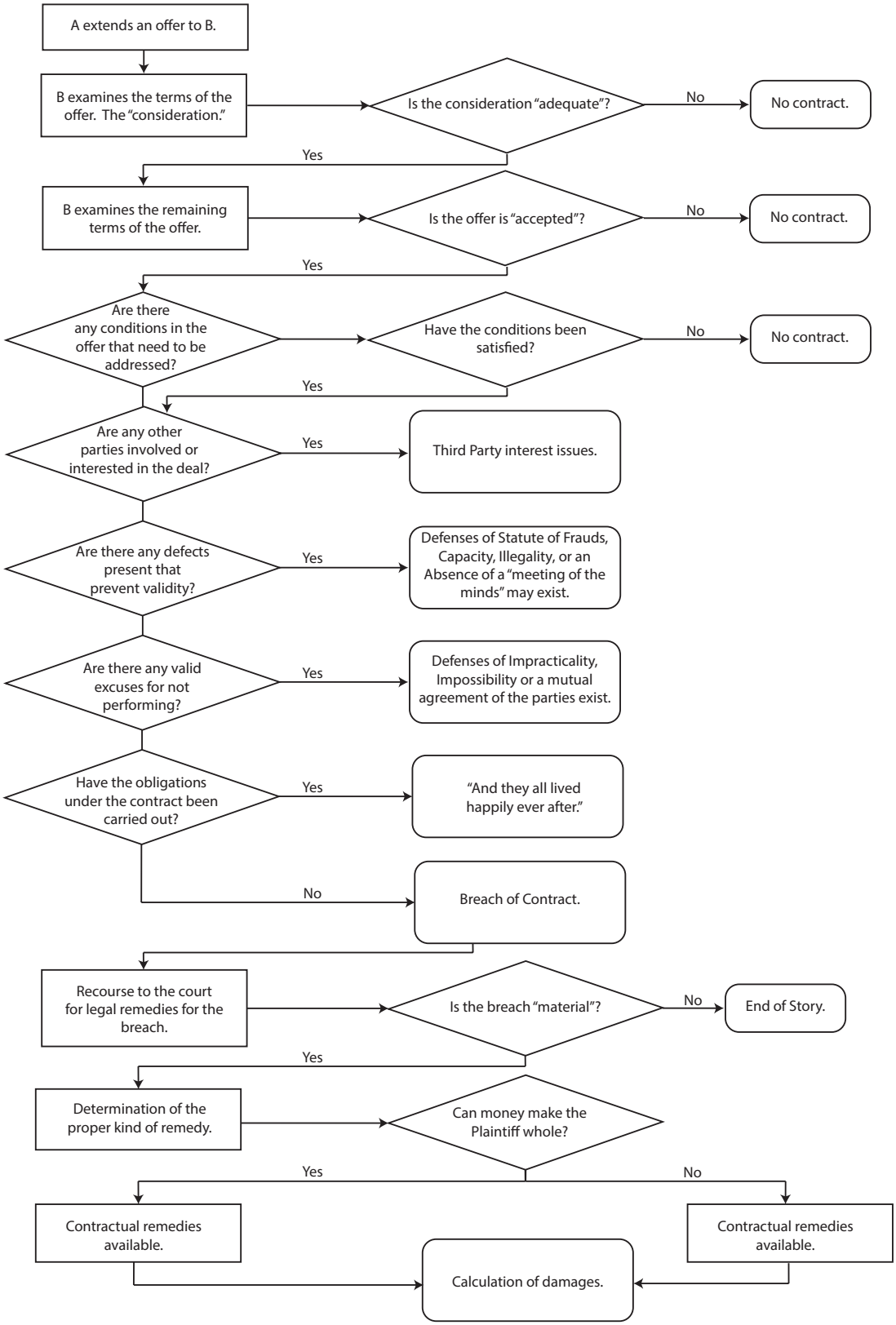
The first four parts of the text have discussed and are governed by the common law principles of contract law. Throughout this final chapter, it will appear that the Uniform Commercial Code (UCC) carves exceptions out from the stringent rules of contract law. Why? The underlying purpose of the entire UCC is practicality. These rules have been propagated in response to the very nature of commercial transactions. The "exceptions" to the general rules of contract law better reflect what really happens in commercial transactions. The UCC tries to protect and preserve these agreements and the expectations of the parties involved.

Where there appears to be leniency, do not presume weakness. The UCC also sets certain standards of conduct. While the rules governing the formation of the transaction may be more flexible, the conduct must be of a certain quality in order to merit that leniency." Certain ground rules apply to this grant of freedom in construction and performance. Article 1 of the UCC sets these ground rules. § 1-203 requires that the parties adhere to the principles of "good faith and fair dealing." § 1-204 requires "reasonableness" in response times in acting upon the agreement. And § 1-205 requires that the parties should and can rely upon the normal course of dealing and trade practices in the industry. Thereby making some assumptions taken by one or both parties reasonable in light of what normally occurs in that type of commercial transaction. Note that all of these ground rules can change depending on the particular industry involved. It may be reasonable to delay a shipment in the shoe industry by one week, but this kind of delay in the produce industry might be completely unacceptable as the goods will be destroyed in that time.

Therefore, do not think of the UCC as putting holes in the fabric of contract law, but rather as weaving a safety net. The small transgressions against the strict principles of common law may slip through unnoticed, but the larger issues will be caught.

It is completely beyond the scope and page capacity of this text to explain every section in Article 2. The most important sections are presented so that the student can gain an understanding of the general requirements of the UCC.

An alternate way to view the formation of contracts is via a timeline. The book is set up chronologically; intuitively, we know that a contract must be formed before it can be breached. The following flowchart / decision tree may prove helpful.


A extends an offer to B.
B examines the terms of the offer. The "consideration."
Is the consideration "adequate"?
No
No contract.
Yes
B examines the remaining terms of the offer.
Is the offer is "accepted"?
No
No contract.
Yes
Are there any conditions in the offer that need to be addressed?
Have the conditions been satisfied?
No
No contract.
Yes
Are any other parties involved or interested in the deal?
Yes
Third Party interest issues.
Are there any defects present that prevent validity?
Yes
Defenses of Statute of Frauds, Capacity, Illegality, or an Absence of a "meeting of the minds" may exist.
Are there any valid excuses for not performing?
Yes
Defenses of Impracticality, Impossibility or a mutual agreement of the parties exist.
Have the obligations under the contract been carried out?
Yes
"And they all lived happily ever after."
No
Breach of Contract.
Recourse to the court for legal remedies for the breach.
Is the breach "material"?
No
End of Story.
Yes
Determination of the proper kind of remedy.
Can money make the Plaintiff whole?
Yes
No
Contractual remedies available.
Contractual remedies available.
Calculation of damages.