Problems in Contract Law

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Problems in Contract Law

Cases and Materials

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To my law-school and law-firm classmates, Walter McNeill and Bob Smith: excellent lawyers and lifelong faithful friends.

C.L.K.

To Chuck and H.G. — Great teachers, terrific scholars, and — most important — fine people.

N.M.C.

To Andrew, James and Callie — with love.

H.G.P.

The book you are holding (or perhaps reading in electronic form) is the ninth version of this collective work, which we call *Problems in Contract Law*. This book is "collective" not merely because it represents the long and happy collaboration of three friends and colleagues, but also "collective" because, like any law casebook, its content is the aggregate of the industry and insights of hundreds of judges, lawyers, and legal commentators, gathered from the accumulated wisdom of decades, even centuries. From the literally "cut-and-paste" days of the 1970s to the virtual world of the twenty-first century's second decade, we have seen information technology undergo vast, even cataclysmic, change. And although contract law is commonly considered one of the more stable areas of law, it too, has undergone tremendous change and remains today in a state of flux. Technological and sociopolitical developments are rapidly merging the American marketplace into a global one, and new forms of communication and data management have revolutionized the way contracts are made and administered, so much so that many now question whether the basic principles of the contract law of the last century can provide an adequate framework for the future. All of this makes a realistic survey of contract law for present-day law students a complicated and challenging undertaking.

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 and foremost 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 this purpose, we continue to present a varied collection of judicial opinions for study and analysis, and we have added seven new principal cases (plus citations to many more). As in previous editions, introductory text summarizes basic concepts, enabling the cases to focus on more challenging applications of doctrine, while 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. This edition includes eight new problems to offer teachers more flexibility in making assignments as well as provide more contemporary fact patterns. 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. Again in this edition, Review Questions at the end of each

chapter enable students to test their understanding of the concepts and rules presented.

With contract law — as with all areas of law — 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 repeatedly 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 pre-dispute 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 essay-type 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 is comprised of 12 chapters, which fall generally into the following parts:

Introduction	Chapter 1
Formation	Chapters 2-4
Interpretation and implication	Chapters 5-6
Defenses and grounds for nonenforcement	Chapters 7-8
Breach and remedies	Chapters 9-11
Third parties	Chapter 12

Material on the Uniform Commercial Code (UCC) is integrated throughout wherever it is relevant to our understanding of the general law of contract. 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 and other relevant Restatement subjects, along with the Articles of the Convention on International Sales of Goods (CISG), the Principles of International Commercial Contracts, and other relevant statutes. It also presents material on contract drafting, a selection of sample law school examination questions (some with suggested answers), and additional background material on the arbitration of contract disputes.

The first edition of *Problems in Contract Law*, prepared by Professor Knapp, appeared more than forty years ago, in 1976, under the publishing imprint of Little, Brown and Company. Beginning with the second edition in 1987, Professor Crystal joined him as co-author, and made significant contributions to the book, both in substance and in style. With its third edition in 1993, the book first appeared — as it continues to do — under the auspices of the Aspen Casebook Series. In 1999, with the fourth edition, Professor Prince became the third co-author of the book, and made significant contributions of his own, both to the successive editions of the book itself and also to its supplement, Rules of Contract Law. Between the three of us, we thus have a combined total of over nine decades of experience in shaping and re-shaping the way that we present the body of contract law to successive generations of law students through these materials.

For each of us, collaboration on these materials has always been, and continues to be, not only an educational experience but a great pleasure as well. We hope that those who use this new volume will likewise find enjoyment as well as information in its pages. As our closing word to students and teachers about to embark on this journey with us, we sound once again the note that has introduced every edition of this book from the very start:

> 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 today.

Charles L. Knapp
Nathan M. Crystal
Harry G. Prince

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Problems in Contract Law

An Introduction to the Study of Contract Law

Since you're reading this book, the odds are that you're a first-year student in an American law school. If so, you are about to embark on a task that will be long (probably three "academic years"), arduous (requiring a lot of reading and thinking and discussion), often rewarding, but inevitably sometimes discouraging as well. We—the authors of these materials—know that; we've been there too. First as law students ourselves, then as law teachers watching several generations of students wrestle with new and sometimes puzzling concepts, we are well aware that even to students with something of a "law background" (family members who are lawyers, work experience as a paralegal or in law-related activity, etc.), a lot of what lawyers think and talk about can seem complicated, confusing and—perhaps most troubling—often counter-intuitive.

Besides all that, the way in which law is traditionally taught and learned in American law schools may seem at first to be circuitous and inefficient. Instead of just reading and memorizing rules, we study "cases." Why should that be so? At least for some of the traditional first-year, "building block" subjects—such as Contracts, but also Torts and Property—it is for two reasons: One is because in the Anglo-American tradition the law in these areas developed from court decisions. This kind of law we traditionally call "common law"; it was created and shaped over time by judicial actions in individual cases, and in large measure remains so. And indeed, some of the decisions we will present for you to study have been landmarks in this process. By itself, however, that factor surely would not justify the degree of concentration on cases that this and other "casebooks" exhibit. There is another, stronger reason for studying the decisions of courts in actual cases: Reading and discussing opinions rather than merely reading "rules" enables us better to see that in the real world, *rules alone are often not determinative of outcomes*. There are plenty of easy cases, to be sure, where once you know the rule and the facts you will know (or should know, if you have

been paying attention) the outcome of the case. But the case-disputes we will consider in these pages are not, by and large, of that kind. They are cases where reasonable persons—lawyers and judges—did *and reasonably could* disagree as to the proper outcome. It's not (just) the outcomes that we care about here, it's how the court got there. This is what is meant when people sometimes say that law school is about learning to "think like a lawyer": Not that law students should forget everything they knew before law school, but rather that they need to experience and master the process of reasoning toward a legal conclusion, using the modes of reasoning (and the terminology) that lawyers employ. And in the course of that study, hopefully, students can learn—*you* will learn—to understand and appreciate what the tools of lawyering feel like in the hand, and how to work with them.

Like other modern casebooks, these materials present not only case reports, but explanatory text, problems, and supplementary readings. (And our accompanying volume, Rules of Contract Law, contains other relevant and useful material as well.) Employing all these materials, we hope to stimulate you to think about both the theoretical and the practical side of contract law. We hope also to convey our shared sense that contract law is not merely a static set of rules. It is rather at any given moment a complex composite of what was in the past, what is now, and what is in the process of becoming. Law students of today will, when they enter practice, deal with lawyers and judges who recall clearly the last century's Seventies and Eighties, while themselves becoming the lawyers of this century's Twenties, Thirties, and beyond. We hope therefore to set before you at least some glimpses of the history of our law of contract, a reasonably accurate picture of its present state, and some suggestions of what a contract law of the future might look like.

Certainly it is possible to talk for hours about something without ever defining it. Many terms in everyday use—"justice," "love," "medium-rare"—are notoriously elusive in meaning. Nevertheless, at the risk of spelling out what to many students may already be obvious, we would like at the outset to present some working definitions of terminology we will be using throughout these materials.

"Contract," as we will use that term, ordinarily means an *agreement* between two or more persons as to something that is to be done in the future by one or both of them. Sometimes, the word *contract* is used also to refer to a *document*—the set of papers in which such an agreement is set forth. For lawyers, *contract* usually is used to refer to an agreement that has *legal effect;* that is, it creates obligations for which some sort of legal enforcement will be available if performance is not forthcoming as promised. Thus, it will sometimes be necessary to distinguish among three elements in a transaction, each of which might be called a "contract": (1) the agreement *in fact* between the parties, (2) the agreement *as written* (which may or may not correspond accurately to

the agreement-in-fact), and (3) the *set of rights and duties* created by (1) and (2). In these materials we will survey the ways in which such agreements are made and enforced in our legal system—the role of lawyers and judges in creating contracts, in deciding disputes that may arise with respect to their performance, and in fashioning appropriate remedies for their breach.

Contract law is but one of several subjects that make up the traditional first-year law curriculum. Besides the course in contracts, most law schools have first-year courses in torts, criminal law, and property (as well as courses in procedure—civil procedure and perhaps criminal procedure as well). Where does contract law fit into this pattern?

In the Anglo-American legal system, a great number of things—both tangible and intangible—are susceptible of "ownership." A diamond ring, the Empire State Building, "Spider-Man," computer software—all may be the "property" of one person or group of persons, which means that the state will protect the right of the owner to use, enjoy, and even consume that thing, to the exclusion of all other persons. The first-year property course traditionally focuses on the rules that in Anglo-American law govern the ownership of "real property" (land and the buildings on it), as well as some types of "personal" property, such as "goods" (tangible moveable property). Later you will have the opportunity to explore bodies of law relating to ownership of other, less tangible kinds of property, such as copyrights, patents, and shares of corporate stock.

Any society that recognizes property rights must also address the question of how it should respond when someone violates those rights. And property rights are not the only kind of individual rights that may need legal protection. Not all societies permit private ownership of wealth to the degree that ours does, but they are still likely to recognize the personal rights of individuals to be free from certain kinds of harmful conduct, such as the infliction of physical injury or other interferences with their individual freedom or dignity. The courses in criminal law and torts deal with different aspects of this question: Criminal law focuses on those violations of personal and property rights that society deems serious enough to be deterred by the threat of punishment for their commission (robbery, rape, and murder are obvious examples); tort law considers what remedy should be made available to the individuals who have been so injured. Because of the nature of the conduct regulated, criminal law and tort law overlap to a great degree, but they are not congruent. Many acts are criminal but not tortious, because they are offenses not against individuals but against the state—treason, for example, or tax evasion. Other acts, such as slander, may be tortious but not necessarily criminal.

Where does contract law fit into this picture? We have noted already that our society recognizes and protects a variety of types of property and personal rights. Ownership of property ordinarily includes the right to use and consume the thing owned, but in many cases it will be more to the advantage of the owner to transfer, or "convey," the right of ownership to some other person in exchange for something else of value (most likely money, but perhaps other goods or services). A piano is more valuable to one who can play it than to one who cannot, and two lots of adjoining real property may be worth much more when

combined into one parcel than when held separately. Similarly, the ownership of factory machinery may be much more valuable when it is combined with a right to the work of skilled technicians and laborers, a dependable source of supply of raw materials, and licenses to use patented processes in the manufacturing of goods. Agreements for exchange are the means by which such resources are assembled and put to productive use. Some such agreements call for the immediate and simultaneous exchange of money for goods or services (your purchase of a newspaper, for instance, or of a hamburger). Where exchanges of any significant size are concerned, however, it is much more common for both the planning and the performance to be spread over a considerable period of time. The law of contracts is our society's legal mechanism for protecting the expectations that arise from the making of agreements for the future exchange of various types of performance, such as the conveyance of property (tangible and intangible), the performance of services, and the payment of money. (Agreements that call for future performance are often referred to as "executory" contracts, because their performance is not yet "executed"—i.e., not yet carried out.)

Before proceeding to examine contract law in more detail, we should point out that this description of the relationship between the various "substantive" bodies of law that you will be encountering this year is necessarily an oversimplified one. Legal problems do not always fit neatly into the pigeonholes that legal theorists have created; frequently they raise issues involving more than one body of law. For instance, you will learn in this course that some types of conduct that we call "fraud" can constitute both a breach of contract and a tort. Lease agreements between landlord and tenant have historically been governed by rules of property law, but recently courts have tended to analyze their legal effect more in the manner traditionally applied to contracts. The web of the law may not be quite as "seamless" as the old saying would have it, but students and teachers alike must beware of falling into the trap of believing that our various legal categories are ironclad and unchanging; they are not.

The preceding text suggests that in these materials we will ordinarily use the term "contract" to mean an agreement between two or more persons, as to something that is to be done in the future by one or more of them, which potentially has legal enforceability.

Think about your activities during the last week, before the first session of your contracts class. Using the above working definition, what types of contracts did you enter into?

Consider the following hypothetical transactions. In which ones is a "contract" (again, using that term in the sense suggested above) involved?

Amalgamated Rubber Products, Inc., agrees to buy 35 percent (700,000 shares) of the outstanding common stock of Fargo Petroleum Corp. for $85 million.

Behnaz Salimian buys a used car from Tiptop Motors, Inc. She pays $2,500 down and agrees to pay the balance in installments of $300

per month for 24 months. Tiptop assigns its rights under that document to Sunshine Finance Corp. As required by the laws of her state, Salimian obtains a policy of auto liability insurance from Fidelity Underwriters Co.

Melissa Gant is hired as a driver for Interstate Motorfreight, Inc. The Teamsters Union acts as the bargaining representative of all employees of Interstate, and Gant becomes a dues-paying member of the union.

On her way to work on Monday morning, Darah Protas leaves an overcoat at the neighborhood laundry/dry-cleaning shop. The proprietor gives Protas a ticket with a serial number on it and says "Friday."

Avraham Hersh signs up for a free Facebook account, agreeing to Facebook's "Terms and Conditions," which allow Facebook to use his "likes" in marketing activity.

Sondra Michaels accepts Jay Krieger's proposal of marriage, and he gives her a lovely sapphire engagement ring. Sondra's parents send out invitations to 400 people, inviting them to the wedding on May 28. About 150 of those people are also invited to a reception, "R.S.V.P." Nearly 130 of the invitees do respond, indicating their intention to attend the reception. All the invited guests who attend the wedding send (or bring) presents to Sondra and Jay.

Before leaving for work in the morning, Kris Kovacks promises to take his entire family out to dinner that evening. Kris takes the family to a local fast-food restaurant for dinner. Numerous hamburgers, French fries, and sodas are consumed; the bill is $77.85, which Kris pays with a credit card.

Jack Clawson, a wealthy resident of Tucson, dies unexpectedly, leaving a will providing that his considerable estate is to go three-quarters to his daughter Maria and one-quarter to his son John. John is thinking of challenging the will because his father had told him that he was going to leave everything to his two children equally.

Aurooj Gulzar and Jennifer Lien, law students, decide to go skiing together over the weekend. Aurooj says she will drive her car, and Jennifer says that she will pay for gas and bring some snacks for the two-hour drive. They agree to split the hotel bill evenly.

Edelmira Diaz, a candidate for President, promises not to raise taxes. Diaz wins the election with more than 60 million votes.

Unlike the law of torts or crimes, where the obligations imposed are defined by the state, contract law exists to enforce obligations created by individual persons (both flesh-and-blood people and corporations). Although many would argue that the state through its courts also plays a vital role in defining those obligations, nevertheless the core task of contract law is the enforcement of obligations voluntarily assumed by private agreement. So the body of principles

and rules that we call "contract law" is essentially concerned with identifying and enforcing those agreements that do have legal effect.

Contract law has several principal divisions with which the student needs to become familiar. These materials will address them in the following order (although some instructors may choose a different arrangement):

Chronologically, the history of any particular contractual transaction begins with an agreement by the parties (there are usually two parties, but there may be more) that something will be done by one or more of them in the future. There are a variety of ways in which that sort of agreement can be reached. Sometimes the parties will negotiate by making "offers" and "counter-offers" back and forth until they reach an agreement sufficiently final and complete to form a basis for their future actions (and perhaps eventually for legal enforcement if necessary). Sometimes one party will prepare a form of agreement that it is willing to commit to without further negotiation, and invite the other party to express his/her assent to also being bound by it. Or perhaps one person—a "promisor"—will simply make a promise to another person in a form, or in circumstances, that make legal enforcement available to the "promisee" if that promise is not kept. There are a wide variety of kinds of agreements that have potential legal effect. Chapters 1-3 of these materials will survey some of the ways by which those agreements are formed, and some of the pitfalls along the way. Chapter 4 will consider a related topic—the possibility that some rule of law requires that an agreement be expressed in a writing or other kind of "record" to be legally enforceable.

Once it appears that an agreement susceptible of legal enforcement has been made, it is also necessary before enforcement takes place to know just what obligations the parties have undertaken. Of course that inquiry begins with the words that the parties have used, but often their conduct is also expressive of their intentions. Besides simply knowing the parties' own words and actions, it may be necessary for the court both to interpret those words and actions—they may be ambiguous or unclear—and to consider also whether there are additional rights or duties that the law might permit or even require a court to interpolate into that agreement. Chapter 5 will address some of the methods a court can use to give more precise meaning to the parties' own agreement. Chapter 6 considers a few of the principal "implied terms" that a court might find to be part of a contract.

Even if the parties have apparently entered into the kind of agreement that a court could enforce applying the traditional rules of contract law, it may be that one of the parties claims to have some basis for avoiding enforcement against

it. Those defenses are many and varied, but they fall into two main categories. One consists of defenses that are based either on some misconduct by one party in the making of the agreement that allows the other party to "avoid" the contract, or on some aspect of the agreement itself that violates a public policy strong enough to justify withholding enforcement. Chapter 7 addresses many defenses of this type. There are also defenses to enforcement based on events that take place after the agreement has been formed, events which affect the parties in a way that could justify a court in deciding to deny enforcement of their agreement. These defenses are not based on misconduct by either party, but simply on the failure of the parties to foresee and provide for events that alter the effect of their agreement. Although this latter group of defenses is applied relatively rarely, they are part of the body of contract law that a lawyer should be familiar with; they are considered in Chapter 8.

If the parties have made a potentially enforceable agreement, and one (or perhaps both) of them fails wholly or in part to perform what that agreement calls for, what are the legal consequences? Sometimes the agreement itself provides that the duty of performance will not arise until certain circumstances—typically called "conditions" to performance—are met. In that case, failure of the condition to occur may simply mean that performance will not take place. If there is an unexcused failure to perform, however, this is typically regarded as a "breach," the consequences of which may vary depending on its seriousness and a variety of other factors. These matters are explored in Chapter 9. Once a court concludes that a wrongful nonperformance has taken place, it will face the question of what remedy is appropriate to compensate the party injured by that nonperformance, or to otherwise protect it from the consequences of the other party's breach. This most often consists of the award of money damages (discussed in Chapter 10), but it can also involve other remedies as well (some of which we will consider in Chapter 11). The question of what remedies should be available for the wrongful nonperformance of contractual obligations is so central to the social utility of contract law that many contracts teachers believe it should be studied first, even before the various other issues of formation, defenses, and the like. In these materials, the study of remedies is mostly left for the later chapters. It should be clear, however, that a general understanding of the scope and nature of contract remedies is essential to an appreciation of contract law as a whole.

Whatever their order of presentation, when a student has learned the essentials of the above four aspects of contract law, she will have "closed the circle," so to speak—acquired a sense of contract law as a coherent whole. There are other topics, however, that as a practical matter are significant parts of modern contract law. These involve the possibility that persons other than the original contracting parties may acquire rights and/or become subject to duties under

that contract. One issue is whether as part of their contract the original parties intended to confer enforceable rights of some sort on one or more "third parties"—to make other persons "beneficiaries" of that contract. Sometimes this intent is clear from the parties' agreement, but it often involves a difficult judgment call for the court. Of considerably more commercial significance is the power that contracting parties often possess to transfer their rights under a contract (to "assign" those rights to someone else) or to arrange for someone else to perform their obligations (to "delegate" performance of their contractual duties). Much of our modern credit economy is based on the fact that many important types of contractual rights can be transferred from person to person—can be sold, in effect, or used as security ("collateral") for a loan. This collection of third-party doctrines (which we will explore in Chapter 12) is in a sense tangential to the theoretical structure that makes up the main body of contract law but, like the tail that transforms the letter "O" into the letter "Q," it makes a big difference.

Having surveyed the components of general contract law, we next face the question: Where is this law to be found? From what sources—what "authority"—do courts derive the rules of law they apply to decide contract disputes? The types of authority we will consider fall generally into two categories: "primary" and "secondary." Primary authority, commonly viewed by lawyers and judges as "the law" itself, consists of prior judicial decisions (which collectively make up what we call the "common law") and statutes, ordinances, and the like (expressions of the will of a duly constituted legislative body on a subject within its proper sphere of action). Secondary authority might be very loosely defined as anything else that could appropriately influence a court; the examples we will consider, however, consist mainly of the two principal types of persuasive authority that have had marked influence on the common law of contract: commentary by legal scholars and the American Law Institute's Restatements of the Law.

Historically, contract law developed in the Anglo-American system as judge-made law, rules distilled from a composite of court decisions in prior cases. Thus, one of your principal tasks in using these materials will be to learn how to read, understand, and apply judicial decisions. Our judicial system of decision making is commonly said to be one of *stare decisis*—adherence to past decisions, or "precedents." A precedent is a prior decision with facts sufficiently similar to the case *sub judice*—under adjudication—that the court feels obliged to follow it and to render a similar decision. A regime of law based primarily on precedent is commonly justified on two grounds. First, it offers a high degree of predictability of decision, enabling those who so desire to order their affairs in accordance

with ascertainable rules of law. Second, it puts a rein on what might otherwise be the natural proclivity of judges to decide cases on the basis of prejudice, personal emotion, or other factors that we might regard as improper grounds for decision. Such a system also will obviously have the characteristic (which may sometimes be a virtue, sometimes a defect) of being static and conservative, generally oriented toward preservation of the status quo.

There will be times, however, when a common law judge concludes that blind adherence to precedent would produce an unjust result in the case presented for decision. There are a number of ways such a result may be avoided. To begin with, a precedent is considered to be "binding" on a court only if it was decided by that same court or by an appellate court of higher rank in the same jurisdiction. Other precedents—from lower courts or from other jurisdictions—are said to be merely "persuasive." If a precedent of the latter type is in fact *un*persuasive, the judge is free to disregard it. If the precedent is not merely persuasive, but binding, it cannot simply be ignored. It may, however, be avoided: If the facts of the present case do not include a fact that appears to have been necessary ("material") to the earlier decision, the court may "distinguish" the precedent and render a different decision. If the earlier precedent is indeed binding, but is difficult or impossible to distinguish, there is one other way to avoid its effect: If the court of decision is the one that created the precedent (or is a higher court), it can simply "overrule" the earlier decision. (This does not retroactively change the outcome for the parties to that earlier case, but it does change the rule for the case under decision and subsequent similar cases.) Overruling is considered a relatively drastic action and is usually reserved for instances in which the court feels that the rule established by the earlier precedent is simply wrong, that is, unjust in its general application because either it was ill conceived at the outset or it has been outmoded by later developments.

Some cases cannot be decided on the basis of precedent alone, either because no precedent exists (even in our litigious society it is surprising how often undecided issues arise) or because the applicability of precedent to the case at hand is unclear. In these cases, courts turn to "policy" to resolve the case. Policy may be regarded generally as any societal goal that will be furthered by a particular decision. These goals may be economic, political, social, moral, or some combination thereof, and may have to do with the particular parties themselves or the good of society as a whole (or of some definable segment of it). Lawyers and scholars often disagree on issues of policy (and you will soon find yourself engaging in this debate). As you review the court decisions in these materials and participate in class discussion, try to articulate the policy grounds for decisions or arguments that are being made.

In 1677 the English Parliament enacted what is commonly referred to as the "statute of frauds." Subsequently adopted in virtually every American state, this statute requires certain types of contracts to be evidenced by a signed writing to be enforceable in court. With this notable exception, until the twentieth

century, contract law was largely judge-made. As we shall see, even the statute of frauds has itself become so overlaid by court decisions that it has more of the quality of common law than of a modern statute.

The common law character of contract law changed significantly in the twentieth century, although it is still accurate to characterize contract law as predominantly judge-made rather than statutory. Probably the most important inroad on the historical character of contract law was the development of the Uniform Commercial Code ("UCC"), begun in the 1940s. (We will have much more to say about the UCC later in these materials.) In the 1960s, a wave of consumer-protection statutes at both the federal and state levels modified traditional contract principles. Other statutory influences on contract law will be mentioned throughout these materials. It should also be noted that in a few states (California is one important example), significant principles of the common law have been "codified," enacted into statutory form.

When a court decides a case governed by a statute, its reasoning differs from that used when common law principles are applied. If it chooses to do so, a legislature may if it wishes modify or eliminate any of the rules of common law. However, any court, even the highest court of the jurisdiction, is bound to follow the provisions of a valid statute that apply to the dispute before it. This duty stems from a fundamental political tenet of our society: The legislature has ultimate lawmaking power so long as it acts within the bounds of its constitutional authority. Sometimes, of course, the language of a statute may be subject to differing interpretations; in such cases, courts ordinarily seek to ascertain the legislature's purpose in enacting it, in order to adopt a construction that will best effectuate that purpose. Sometimes there is "legislative history" (legislative debates, committee reports, and the like) which sheds light on that purpose. It should be noted, however, that a few judges and scholars believe that courts should not resort to legislative history, but should only examine the text of a statute in deciding what it means. These critics of the use of legislative history argue that such sources are often self-serving and in any event only the language of the statute, not its history, has been enacted into law. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997). Nonetheless, most judges continue to resort to legislative history when interpreting statutes.

As we shall see, the UCC (as well as other "model" statutes) represented a response to the growing uncertainty and lack of uniformity in commercial law. In the early twentieth century, another institutional effort emerged to address these problems in a different way. In 1923, the American Law Institute (ALI) was formed. The major project undertaken by this organization was the preparation and promulgation of "Restatements of the Law"—what purported to be accurate and authoritative summaries of the rules of common law in various fields, including contracts, torts, and property. The first such Restatement

to be issued was the Restatement of Contracts, officially adopted by the ALI in 1932. A revised version (the "Restatement (Second) of Contract Law") was promulgated in 1979. In form, the Restatements resemble a statute, consisting of "black-letter" statements of the "general rule" (or, where the cases appeared to conflict, the "better rule"), supported by commentary and illustrations. However, unlike a statute or a court decision, the ALI Restatements are only secondary authority, without the force of "law." Still, the Restatements have in fact proved to be remarkably persuasive; a court will often justify its decision of an issue of common law by simply citing and relying on the Restatement's rule on a given point.

Although they are only a secondary authority, the Restatements of Contracts have clearly had a powerful effect in shaping judicial views of what the common law of contract ought to be. Probably no other secondary authority has had quite that much impact on the law, but over the years a variety of published articles, textbooks, and treatises has been devoted to analyzing, evaluating, and synthesizing the immense body of contract cases that has accumulated in the reported decisions of American courts. Authors of these works have sought to clarify the law, to propose solutions for unresolved issues, and in some cases to argue strenuously and often effectively for legal change. In the aggregate, such commentary has been extremely influential in shaping the course of the common law of contract.

During the twentieth century, the most influential of these commentaries were clearly two multi-volume treatises, by Professors Samuel Williston and Arthur Corbin, respectively. Williston was the Reporter for the original Restatement of Contracts, and his ideas were reflected in its organization and content. Professor Corbin's treatise was not published until 1950, capping a long and distinguished scholarly career. Although he and Williston were friends and associates, and Corbin himself took part in the writing of the first Restatement, the two differed in fundamental philosophy. Williston tended to regard the law as a set of abstract rules that courts could by deduction use to decide individual cases; Corbin regarded his task as a legal scholar to be to discover what the courts were actually doing and to attempt to weave those findings into what he called "working rules" of law. The Williston treatise has been updated by Professor Richard A. Lord; the Corbin treatise has been revised and updated by scholars under the leadership of the late Professor Joseph M. Perillo.

Besides the works of these two giants of contract law, many shorter commentaries have appeared over the years. Among those currently in print, perhaps the most influential have been three one-volume treatises, originally written in the mid-twentieth century but periodically updated: one by the late Professor E. Allan Farnsworth, who served as Reporter for the Restatement (Second) of Contracts; one by the late Professor Joseph M. Perillo; and one by the late Professor John E. Murray, Jr. For issues arising under the UCC, lawyers

and courts frequently turn to James J. White & Robert S. Summers, Uniform Commercial Code (6th ed. 2010).

Most transactions in which American lawyers are involved take place entirely within the United States, but international commercial transactions are of growing importance to our economy. Today, exports and imports of goods are a significant percentage of gross domestic product. Moreover, it is likely that international business will continue to grow in importance as various legal and technological barriers to cross-border dealings diminish. Students entering the practice of law in the twenty-first century must be familiar with the sources of law for international transactions.

Lack of uniformity of the rules governing international commercial transactions has been a major barrier to international trade. Attempts to overcome this problem go back at least to the 1930s. In 1980, under the sponsorship of the United Nations Commission on International Trade Law (UNCITRAL), a number of countries adopted a treaty, the United Nations Convention on the International Sale of Goods ("CISG"). The Convention formally became effective January 1, 1988. The CISG is analogous to the UCC. Like the UCC's Article 2 it applies to the sale of goods. Also, like the UCC it has the force of law, because it is a treaty. On the other hand, there are important differences between the CISG and the UCC. For example, the CISG does not apply to consumer transactions, while the UCC does. See CISG Article 2(a). The CISG generally applies when the parties to a contract have places of business in countries that have adopted the Convention. Thus, the CISG would apply to a sale of a machine from an American manufacturer to a French company, since both countries are parties to the CISG. The text of the CISG is reprinted in the Rules Supplement; we will also refer to various articles of the CISG throughout these materials to compare its provisions with domestic law.

The CISG does not purport to cover all issues of international contract law. To fill in the gaps left by the CISG, a private organization, the International Institute for the Unification of Private Law (UNIDROIT), has sponsored the preparation of Principles of International Commercial Contracts. Published in 1994, revised in 2004 and revised again in 2010, the Principles are analogous to the Restatements, providing scholarly opinion as to what the law is (or should be), but without the force of law that the CISG has. The Principles are also reprinted in the Supplement.

Throughout our study of contract law, we will of course be centrally concerned with learning to understand and apply the body of rules that courts and lawyers commonly regard as making up the present-day law of contract, both common

law and statutory. At the same time, students and teachers should be aware that many commentators and analysts have tried over the years to go beyond mere identification and classification of such rules of law to examine the fundamental nature of contract law itself: what it consists of; how it has evolved; what goals and policies it serves; and where it fits into the broader picture of law as viewed through the lens of legal or moral philosophy, economics, political or social science, historiography, or any of the various other branches of inquiry into human life and thought.

From time to time in the course of these materials, we will attempt to paraphrase the conclusions of those writers or will present excerpts from their writings. Such descriptions and quotations will of necessity fail to do justice to the arguments and analyses presented in those works; the best evidence is always the original writings themselves. Any attempt at "thumbnail sketching" must be open to the charge that it omits significant matters and inaccurately summarizes or generalizes about the matters that it does include. Nevertheless, the following discussion is our attempt briefly to introduce you to some of the points of view you will see reflected in the commentaries that are cited and quoted in the chapters that follow.

During the Willistonian period, contract law was viewed as a set of universal rules distilled from decided cases; it did not appear necessary either to explain or to justify its existence. Because cases were to be decided by the virtually mechanical application of rules to reach a doctrinally "correct" result, judges had no need to use—indeed, were in effect forbidden to use—moral or political values in reaching their decisions. This "formalist" approach to law is initially identified with Christopher Columbus Langdell, Dean of Harvard Law School, father of the case method and author of the first legal casebook, on contracts. Professor Williston is usually regarded as the heir to the Langdellian tradition; his ideas, as we have seen, in turn permeated the original Restatement of Contracts.

In the early years of the twentieth century, legal scholars began to produce works that rejected the tenets of formalism. Dean Roscoe Pound of the Harvard Law School argued for a "sociological jurisprudence," in which rules of law would be evaluated on the basis of the social interests that they served. In the 1920s and 1930s, a group of scholars working in diverse fields of law called for a "realistic" jurisprudence. The "Legal Realists," as they came to be called, had a view of the legal system different from that of Langdell and Williston. They saw court decisions not as products of the application of neutral principles to given sets of facts, but rather as the end results of a decisionmaking process in which both the finding of facts and the application of rules were affected by the personalities, points of view, interests, and goals of the decisionmakers. Since all lawmaking was in effect policymaking, they argued, the formation of legal rules should be the result of a conscious application of all relevant knowledge of human affairs—including that furnished by other disciplines such as economics, political science, psychology, and anthropology—rather than a process (real or pretended) of "discovering" neutral principles from which abstract rules could be deduced.

Not surprisingly, the Realists were particularly critical of the "black-letter" law approach of the Restatements. One of the most influential of the Realists was Karl Llewellyn, who later became the principal drafter of the UCC. In his numerous books and articles, Llewellyn propounded the notion that judges should reach their decisions only after having immersed themselves in the factual details of the disputes before them. From this process, he believed, would come the "situation sense" that would lead to the right result. Llewellyn's influence on the UCC can be seen in its emphasis on general standards (such as "good faith" and "unconscionability") rather than on mechanical rules, and in the Code's reliance on such broad sources of "law" as trade custom and business practice.

Because they focused almost exclusively on the impossibility of achieving true objectivity in legal decisionmaking, the Realists were criticized by many—including even Dean Pound—for failing to address the social purposes and goals of the legal process. This criticism may not have been well founded, however, because at least some of the Realists appear to have had a social program of their own; they believed that by the application of "scientific" knowledge, the decisionmaking process could be tamed and (along with other social institutions) made to serve the ideal of a perfectible, "liberal" state. Events during and after World War II dealt a sharp blow to the liberal belief in the progressive improvement of human institutions, however, and the Vietnam War and the social ferment we know as "the Sixties" probably also contributed to this process. As a result, legal scholarship in general and contract scholarship in particular have appeared over the last several decades to be engaged in a process of deconstruction and reconstruction, attempting both to show the inherent failings of the old system and to find some new basis on which to give theoretical legitimacy to a body of legal principles applicable to contract disputes.

One school of thought that gained many adherents during this period advocates the application of methods of economic analysis to legal issues. Central to this economic approach to law is the notion of "efficiency." (While writers differ over the appropriate definition of "efficiency," generally efficiency is thought to be increased when the cost of transactions in society is reduced, and resources are allocated to their most highly valued uses.) Scholars identified with the economic-analysis school of legal thought ordinarily make two claims about the relationship between law and economics: (1) the "positive" or empirical argument that legal rules (particularly those of the common law) tend in general to reach "efficient" outcomes and (2) the "normative" claim that "inefficient" rules of law should be modified in the direction of greater efficiency.

Economic theorists differ among themselves on a number of issues in contract law. The predominant wing, the "Chicago school," led originally by former University of Chicago Professor (now Judge) Richard Posner, reached conclusions that are generally regarded as conservative, politically as well as economically. Thus, Chicago school theorists argued that courts should not refuse to enforce agreements merely because they are unfair or "unconscionable";

enforcement should be withheld only when an agreement is the product of such defined bargaining misconduct as "fraud" or "duress." However, other economic scholars have challenged the Chicago school's noninterventionist conclusions, arguing for statutes that require disclosure of information to consumers, regulate the language of contracts, and impose increased warranty obligations on manufacturers.

Other scholars, without necessarily rejecting the possibility that useful insights can be gained from economic analysis, argue that the focus on efficiency is much too narrow. Professor Ian Macneil claimed that most significant modern contracts arise in settings in which the parties have long-term commercial or personal relationships. Relying on this insight, Macneil and other scholars have argued that contract law should embody principles designed to preserve such relationships. Thus, relational scholars place emphasis on concepts such as good faith and fair dealing. Other scholars have turned to moral philosophy to construct principles of contract law. Professors Melvin Eisenberg, Charles Fried, and Randy Barnett—just to name three who have proceeded independently, and from diverse perspectives—have argued for principles of contract law based primarily on the concepts of fairness, morality, and consent.

Beginning in the 1970s, a loosely connected group of scholars engaged in work in a variety of fields of law that came to be known as "Critical Legal Studies" (CLS). Acknowledging a debt to the Legal Realists of an earlier day, the CLS scholars went even further with the process of deconstruction, to argue that attempts to justify the existing legal process are essentially a form of political ideology, mere rhetoric having as its consequence the preservation of existing distributions of power and wealth in society.

More recently, other scholars have expanded upon the insights of Critical Legal Studies. Arguing from perspectives of race and gender, these theorists have maintained that the law has often served the interests of white males at the expense of women and members of minority groups. This new group of critical scholars contends that both the substance and teaching of law should become more sensitive to the values and goals of these groups. By contrast, Professors Robert Scott, Lisa Bernstein, and Omri Ben-Shahar have recently argued for a return to formalism in contract law. Professor John Murray, on the other hand, finds that most theoretical scholarship creates "products that are useless to courts and practitioners." At the same time he finds "no redeeming virtue" in a revival of formalism because that approach would ignore the context in which disputes and transactional matters arise. John E. Murray, Jr., Contract Theories and the Rise of Neoformalism, 71 Fordham L. Rev. 869, 912 (2002). Murray argues instead for a return to the practical reasoning used by Corbin and Llewellyn.

Although standardized forms have been used in contractual transactions for well over a century, and the related problem of "contracts of adhesion" has received much attention from academics over the years, the explosive growth in online transactions since the turn of the century has engendered a sizeable literature addressing the many aspects of "boilerplate" contracting. Everyone agrees that boilerplate is entrenched in contracting behavior, and

clearly here to stay, but there is less agreement about what that should mean to the legal system, both to contracting generally and to consumer contracting in particular. Authors who have confronted these issues in the past few years include Nancy S. Kim, Wrap Contracts: Foundations and Ramifications (Oxford Univ. Press 2013), Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton Univ. Press 2012), and Omri Ben-Shahar, Regulation Through Boilerplate: An Apologia, 112 Mich. L. Rev. 883 (2014).

As teachers, students, and scholars, it is necessary and appropriate for us to consider the theoretical bases that may explain, justify, or even help to create our law of contract. However, we assume that most readers of these materials will have the goal of becoming practicing attorneys. If you are indeed an aspiring lawyer, you should from the very beginning of your law studies be addressing the material not only from the perspective of a student or scholar, but also from the standpoint of what the law as you encounter it may mean to you as a practicing attorney, to your clients, and to the judges before whom you may appear.

As a practicing attorney, you can be sure that you will be called on to play all of the following roles:

Counselor. Your first task will invariably be to assist your client in identifying the nature and scope of her legal problem(s), ascertaining the client's legal position as objectively as you can. If your client is already a party to a dispute, this may involve predicting how a court is likely to respond to the case if presented; if the client is merely looking toward entering into a commercial transaction, this may mean exploring the legal consequences of the different forms that transaction might take. In any case, it will mean identifying the options available, making sure the client understands the legal and practical consequences of each, helping the client to choose between those alternatives, and then helping her to implement that choice.

Negotiator. You might be called on to represent your client in discussions looking toward an agreement with some other party. These might be attempts to reach an agreement on some sort of contractual arrangement, or they might be discussions aimed at settling a dispute that has already arisen. Negotiation requires first understanding the client's needs and aspirations, then working out with the client the parameters for an acceptable agreement; only then can you be ready to meet with the opposing party in an attempt to reach an agreement within those parameters. In negotiations, the lawyer's analytical skills will of course be called on, but rational legal analysis is only one aspect of negotiation. The skills of a bargainer include the ability to employ a variety of negotiating techniques. The skills of a negotiator may to some extent be inborn, but skills training programs in law school address the possibility that they can also be taught.

Drafter. Perhaps your client has already reached an agreement; perhaps your skill as a negotiator has produced an agreement on your client's behalf. In either case, it will ordinarily appear necessary for a variety of legal and practical reasons to reduce that agreement to a writing that the parties can adopt as the final and complete expression of their bargain. Here is perhaps the greatest call on the lawyer's skill with words—the ability to organize a complicated package into a coherent, accessible structure; the ability to write with economy, clarity, and precision; sometimes, the ability to say as little as possible on a point where this is preferable in the circumstances. For some types of agreement a "form book" or other source may supply a useful pattern, but even then the attorney must fully understand the ways in which the form needs to be modified to serve a client's own particular needs.

Advocate. For many years in the English system, certain attorneys served as "barristers" and argued cases in court; others were known as "solicitors" and had only an office practice. (Recent changes have modified this system.) Except in the largest of firms, law practice in the United States is usually not so specialized, so the chances are that you will from time to time find yourself in court. In approaching the case, you must of course engage in rigorous and completely objective analysis, in order to know what legal arguments there may be and the relative strengths and weaknesses of each. As an advocate, however, you will be required to present the most persuasive arguments you can on behalf of your client. While bound to represent your client's interests zealously, you may not engage in illegal or fraudulent conduct on your client's behalf. Your advocacy may take the form of oral argument or of written briefs and trial memoranda addressed to the court; you will also have to prepare formal written pleadings in the action.

We have stressed the role of the lawyer as counselor, negotiator, and drafter as well as advocate in the hope of making you aware from the outset of a very simple but important truth: Contract law in action is not just a body of rules. It is a complicated process by which attorneys and their clients make, perform (or sometimes fail to perform), and enforce exchange agreements. While contract litigation is an important component of practice for many attorneys, you should never forget that the vast majority of disputes that the rules of contract law *could* solve are *never submitted to a court for decision.* On any given day, the number of individual contracts entered into in even one of the United States must number in the millions. Of that huge total, a tiny fraction (but still a large number, in absolute terms) will eventually give rise to a dispute between the parties. Of these relatively few disputes, the overwhelming majority will be resolved without even coming to the threshold of a court, much less to judgment or a decision on appeal. The number of written opinions on which the common law is based, incredibly large though it may be, is to the commercial life of our country as is a sand castle, not just to the beach on which it sits, but to the globe of which that beach is a part.

This observation should not be taken to mean that case law is therefore irrelevant to commercial practice. Once a dispute has arisen, a lawyer's estimate of how that dispute would be resolved in court will be one of the most important

factors she weighs in advising her client on what terms that dispute should be settled. It will not, however, be the only factor. Knowledge of the rules of law is an important, indeed indispensable, tool for the lawyer, but it may be no more important than a number of other ones, such as knowledge of business practices, human understanding, and simple common sense.

We have suggested above a variety of perspectives from which the law student (as well as the law teacher, the lawyer, and the judge) can attempt to understand, evaluate, and apply the work of judges as expressed in the reports of decided cases. Reproduced below are two written opinions from different courts in different periods of time, one from the Supreme Court of Utah in 1923 and another from the Second Circuit federal appellate court in 2017. First read the opinions carefully, with an eye toward the following questions: (1) What happened between the parties that brought about the lawsuits? (2) What are the legal issues that each court is called on to decide? (3) How do the courts decide those issues, and why? And finally, (4) Does it appear that the passage of more than 90 years between these two decisions has resulted in changes in the manner in which the asserted contracts were made, or in the law that was applied? Then consider the Notes and Questions that follow the opinions in light of our discussions above.

Allen v. Bissinger & Co.

Supreme Court of Utah 62 Utah 226; 219 P. 539 (1923)

Before CHERRY, J., WEBER, C.J., and GIDEON, THURMAN, and FRICK, J.J.

CHERRY, J.

This is an action at law by the plaintiff to recover fees for furnishing defendant a copy of the official report of certain proceedings before the Interstate Commerce Commission. A trial before the court resulted in findings and judgment for the plaintiff, from which the defendant has appealed. The sufficiency of the evidence to support the findings is the only question to be determined. There is no substantial conflict in the evidence, the most important part of which consists of written communications between the parties.

The plaintiff resided in New York and was the official reporter for the Interstate Commerce Commission, and the defendant was a corporation engaged in buying and selling pelts, hides, and furs at Salt Lake City, Utah.

On July 20, 1918, plaintiff sent letters to various large shippers of freight, including defendant, as follows:

> "Re Consolidated Classification, Case No. 10204.
>
> Dear Sir: At the request of the Director General of Railroads the Interstate Commerce Commission will conduct an investigation concerning the reasonableness and propriety of the descriptions, rules, regulations, ratings, and

minimum weights provided in proposed consolidated freight classification No. 1, prepared by the special committee appointed by the United States Railroad Administration to consolidate the official, western, and southern classifications. Hearings will be held in several cities beginning at Boston, August 1, and concluding at Atlanta, September 19.

"A summary of the changes recommended in the proposed consolidated classification is inclosed. As these are of unusual interest and importance, those who want copies of the official reports of these hearings, which will be furnished at the usual rate fixed by the Commission, should advise us at once so that we may make enough to supply them without delay."

On July 31, 1918, the defendant wrote plaintiff:

"We will be interested in your official report of the different changes in the handling of freight and would ask you to put our name down for a copy of same."

On August 5, 1918, the plaintiff wrote defendant:

"Please accept our thanks for your order of July 31, for one copy of the official report of the proceedings in the Consolidated Classification Case No. 10204, which will have our prompt attention."

In pursuance of the correspondence, the plaintiff prepared a copy of the official report of the hearings held up to August 17, which was shipped to defendant by express on September 13, 1918; and later prepared a copy of the official report of the hearings held subsequently, which was shipped to defendant by express on October 5, 1918.

On October 10, 1918, the defendant wrote the plaintiff:

"We are just in receipt of another allotment of your Interstate Commerce Commission, and want to say to you that this is something that we cannot use at all and there is no use of you sending us anything further. We wish to return you what we have on hand at present and pay you anything that is reasonable for the trouble that you have been put to.

"In ordering these from you in the first place we expected to find all the information we wanted in one volume and did not think we were going to get a full library.

"Trusting you will look at this matter as a business proposition, with kindest regards."

To this the plaintiff replied on October 15, 1918:

"Replying to your letter of October 10, if agreeable to you, we will accept your cancellation effective at the end of the hearing of September 27. A copy of the report having already been made for you up to that point. We cannot accept cancellation of your order for that part of the report, because we cannot return to our employees and get credit for the labor which they have expended in making the copy for you." . . .

On November 4, 1918, and November 13, 1918, plaintiff prepared and shipped the copy of official reports of the remaining hearings had up to September 27, 1918, the various shipments together making one complete copy of the official

reports of the hearings had between August 1, and September 27, aggregating 8,380 pages, for which plaintiff was permitted to charge at the rate of 12 1/2 cents per page. Plaintiff sent defendant a statement of the amount due, amounting to $1,047.50, and received in response the following letter dated December 20, 1918:

> "Your first and only statement of prices and account under date of December 14, just received. We are certainly surprised at the price you attempted to charge for same, and amount of these goods attempted to be put upon us. Referring once again to this matter, as stated before, these reports are absolutely useless to us, and we absolutely refuse to pay this account, and hold these goods subject to your orders."

On January 3, 1919, the plaintiff wrote:

> "Replying to your letter of December 20, our charge for these reports is the rate fixed by the Commission in the inclosed order, and no lower rate has been paid by any one for the official reports of hearings before the Commission in the last ten years. . . . Obviously no one could tell in advance how extensive the reports of this investigation would be, but our letter of July 27th gave you all the information we had, including the places of the hearings and the dates they were to begin, from which you must have seen that hearings were to be held all over the country and last a couple of months." . . .

It is insisted by appellant that the correspondence did not create a contract because the offer contained in plaintiff's letter was not accepted, and hence the minds of the parties never met. It is not contended that the letter relied upon as an acceptance contained anything which changed, added to, or qualified the terms of plaintiff's offer, but it is claimed that plaintiff offered to furnish a copy of the hearings, etc., of the Interstate Commerce Commission, and that the defendant agreed to take a copy of an "official report of the different changes in the handling of freight," and that therefore the parties did not refer to the same thing in the transaction, and never agreed upon the subject-matter of the contract. . . .

In 13 C. J. 265, the rule is stated as follows:

> "The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts. It judges of his intentions by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind upon the subject."

The offer of the plaintiff was to furnish one specific thing, viz. a copy of the official report of the hearings. There was no uncertainty or ambiguity in the offer. The thing offered was described with fairness and verity. The defendant's response to the offer was that —

> "We will be interested in your official report of the different changes in the handling of freight, and would ask that you put our name down for a copy of same."

The defendant's letter does not describe the official report with exactness. Considered by itself, its meaning in that respect might be doubtful. But viewed in the light of the plaintiff's offer the reply is responsive and relevant. Plaintiff described and offered but one official report. Defendant referred to and requested a copy of "your official report," etc., which phrase in ordinary commercial practice would be understood to sufficiently identify the matter referred to. The additional descriptive words used, "of different changes in the handling of freight," while lacking in precision, are fairly referable to the subject of the plaintiff's offer. Especially is this true, since it is not made to appear that there was any other official report known to the parties to which the acceptance could refer. Under the circumstances, we think the communications of the parties above referred to, judged by a reasonable standard, manifest an intention to agree upon the same thing, and that the evidence was sufficient, as a matter of law, to support the finding of the trial court that the plaintiff's offer was accepted by the defendant. . . .

The later complaints of defendant were that the reports were of no value to defendant, that it could not use them, and that the price charged was surprising. No objection upon the grounds that the defendant did not contract for the particular reports furnished was made until this action was filed. There is no claim of misrepresentation or fraud against the plaintiff. It may well be that the reports proved useless and of no value to defendant, and that in volume and price they exceeded its expectations, but, in the absence of some misconduct on the part of the plaintiff, the defendant cannot be relieved from the consequences of its improvidence, merely because the bargain is burdensome and unprofitable.

Judgment affirmed.

WEBER, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

Meyer v. Uber Technologies, Inc.

United States Court of Appeals 868 F.3d 66 (2nd Cir. 2017)

CHIN, Circuit Judge:

OPINION

In 2014, plaintiff-counter-defendant-appellee Spencer Meyer downloaded onto his smartphone a software application offered by defendant-counter-claimant-appellant Uber Technologies, Inc. ("Uber"), a technology company that operates, among other things, a ride-hailing service. Meyer then registered for an Uber account with his smartphone. After using the application approximately ten times, Meyer brought this action on behalf of himself and other similarly situated Uber accountholders against Uber's co-founder and former Chief Executive Officer, defendant-appellant Travis Kalanick, alleging that the Uber application allows third-party drivers to illegally fix prices. The district court joined Uber as a defendant and denied motions by Kalanick and Uber to compel arbitration. In doing

so, the district court concluded that Meyer did not have reasonably conspicuous notice of and did not unambiguously manifest assent to Uber's Terms of Service when he registered. The district court held that Meyer therefore was not bound by the mandatory arbitration provision contained in the Terms of Service.

For the reasons set forth below, we vacate and remand for further proceedings consistent with this opinion.

BACKGROUND

A. The Facts

The facts are undisputed and are summarized as follows:

Uber offers a software application for smartphones (the "Uber App") that allows riders to request rides from third-party drivers. On October 18, 2014, Meyer registered for an Uber account with the Uber App on a Samsung Galaxy S5 phone running an Android operating system. After registering, Meyer took ten rides with Uber drivers in New York, Connecticut, Washington, D.C., and Paris.

In support of its motion to compel arbitration, Uber submitted a declaration from Senior Software Engineer Vincent Mi, in which Mi represented that Uber maintained records of when and how its users registered for the service and that, from his review of those records, Mi was able to identify the dates and methods by which Meyer registered for a user account. Attached to the declaration were screenshots of the two screens that a user registering in October 2014 with an Android-operated smartphone would have seen during the registration process.

The first screen, at which the user arrives after downloading the application and clicking a button marked "Register," is labeled "Register" and includes fields for the user to enter his or her name, email address, phone number, and a password (the "Registration Screen"). The Registration Screen also offers the user the option to register via a Google+ or Facebook account. According to Uber's records, Meyer did not sign up using either Google+ or Facebook and would have had to enter manually his personal information.[2]

After completing the information on the Registration Screen and clicking "Next," the user advances to a second screen labeled "Payment" (the "Payment Screen"), on which the user can enter credit card details or elect to make payments using PayPal or Google Wallet, third-party payment services. According to Uber's records, Meyer entered his credit card information to pay for rides. To complete the process, the prospective user must click the button marked "REGISTER" in the middle of the Payment Screen.

Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." *See* Addendum B. The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then

2. The screenshots attached to the Mi Declaration are larger than the actual size of the Samsung S5's screen, which is 5.1 inches, measured diagonally. The record does not contain accurately sized images of both screens. Uber submitted an accurately scaled screenshot of the Payment Screen with

display the current version of both Uber's Terms of Service and Privacy Policy.[3] Meyer recalls entering his contact information and credit card details before registering, but does not recall seeing or following the hyperlink to the Terms and Conditions. He declares that he did not read the Terms and Conditions, including the arbitration provision.

When Meyer registered for an account, the Terms of Service contained the following mandatory arbitration clause:

DISPUTE RESOLUTION

> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, **"Disputes"**) will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding**. Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement.

Appellants' App. at 111-12.[4] The Terms of Service further provided that the American Arbitration Association ("AAA") would hear any dispute, and that the AAA Commercial Arbitration Rules would govern any arbitration proceeding.

B. The District Court Proceedings

. . .

After the parties began to exchange discovery materials, Kalanick and Uber filed motions to compel Meyer to arbitrate. The district court denied the

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defendants' joint motion to stay the case pending appeal, which is reproduced below as Addendum A. In his brief on appeal, Meyer included what he represents are accurately scaled screenshots of both the Registration and Payment Screens. These are reproduced below as Addendum B. Although the parties have not challenged the accuracy of these images, we note that the screenshots in Meyer's brief are slightly smaller (approximately 4.8 inches, measured diagonally) than the screenshot of the Payment Screen in the record.

3. Although the hyperlink on the Payment Screen referenced "Terms of Service," the following screen referenced "Terms and Conditions." Because the initial hyperlink, which defendants argue notified Meyer of the arbitration clause, refers to the relevant agreement [as] the Terms of Service, we use that title throughout this opinion.

4. A copy of the Terms of Service in effect at the time Meyer registered for an account was attached to the declaration of Uber Operations Specialist Michael Colman, submitted in support of Kalanick's motion to dismiss the Amended Complaint. The applicable version of the Terms of Service had been updated last on May 17, 2013.

motions, concluding that Meyer did not have reasonably conspicuous notice of the Terms of Service and did not unambiguously manifest assent to the terms. *See Meyer v. Kalanick*, 200 F. Supp. 3d 408, 420 (S.D.N.Y. 2016). . . .

Defendants timely appealed the district court's July 29, 2016 order denying the motions to compel arbitration pursuant to 9 U.S.C. § 16, which permits interlocutory appeals from the denial of a motion to compel arbitration. The district court stayed the underlying action pending appeal on the joint motion of defendants, taking into account, *inter alia*, "the need for further appellate clarification of what constitutes adequate consent to so-called 'clickwrap,' 'browsewrap,' and other such website agreements." *Meyer v. Kalanick*, 203 F. Supp. 3d 393, 396 (S.D.N.Y. 2016).

DISCUSSION

We consider first whether there is a valid agreement to arbitrate between Meyer and Uber and then whether defendants have waived their right to enforce any such agreement to compel arbitration.

I. The Arbitration Agreement

We review *de novo* the denial of a motion to compel arbitration. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 26 (2d Cir. 2002). The determination of whether parties have contractually bound themselves to arbitrate is a legal conclusion also subject to *de novo* review. *Id.* The factual findings upon which that conclusion is based, however, are reviewed for clear error. *Id.*

. . . Although determinations regarding mutual assent and reasonable notice usually involve questions of fact, . . . the facts in this case are undisputed, and the district court determined as a matter of law that no reasonable factfinder could have found that the notice was reasonably conspicuous and the assent unambiguous. *Cf. HM DG, Inc. v. Amini*, 219 Cal. App. 4th 1100, 162 Cal. Rptr. 3d 412, 418 (Cal. Ct. App. 2013) ("[I]f the material facts are certain or undisputed, the existence of a contract is a question for the court to decide." (citation and internal quotation omitted)).

We therefore review the district court's conclusions *de novo*. *See Specht*, 306 F.3d at 27-28; . . .

A. Applicable Law

1. Procedural Framework

Under the Federal Arbitration Act (the "FAA"), "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA reflects "a liberal federal policy favoring arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and places arbitration agreements on "the same footing as other contracts," *Schnabel*, 697 F.3d at 118 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)). It thereby follows that parties are not required to arbitrate unless they have agreed to do so. *Id.*

Thus, before an agreement to arbitrate can be enforced, the district court must first determine whether such agreement exists between the parties. *Id.* This question is determined by state contract law. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016).

. . .

If the district court concludes that an agreement to arbitrate exists, "it should then consider whether the dispute falls within the scope of the arbitration agreement." *Specht*, 306 F.3d at 26 (quoting *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 844 (2d Cir. 1987)). In this case, the parties do not dispute that Meyer's claims would be covered by the arbitration provision of the Terms of Service.

2. State Contract Law

"State law principles of contract formation govern the arbitrability question." *Nicosia*, 834 F.3d at 231.... We agree with the district court's determination that California state law applies, and note that New York and California apply "substantially similar rules for determining whether the parties have mutually assented to a contract term." *Schnabel*, 697 F.3d at 119.

To form a contract, there must be "[m]utual manifestation of assent, whether by written or spoken word or by conduct." *Specht*, 306 F.3d at 29. California law is clear, however, that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." *Id.* at 30 (quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 101 Cal. Rptr. 347, 351 (Cal. Ct. App. 1972)). "Thus, California contract law measures assent by an objective standard that takes into account both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted." *Id.* at 30.

Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms. *Schnabel*, 697 F.3d at 120; *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Whether a reasonably prudent user would be on inquiry notice turns on the "[c]larity and conspicuousness of arbitration terms," *Specht*, 306 F.3d at 30; in the context of web-based contracts, as discussed further below, clarity and conspicuousness are a function of the design and content of the relevant interface. *See Nicosia*, 834 F.3d at 233.

Thus, only if the undisputed facts establish that there is "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" will we find that a contract has been formed. *See Specht*, 306 F.3d at 35.

3. Web-based Contracts

"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com,*