

Mastering Contract Law

Carolina Academic Press Mastering Series

RUSSELL L. WEAVER, SERIES EDITOR

Mastering Administrative Law

William R. Andersen

Mastering Appellate Advocacy and Process

Donna C. Looper, George W. Kuney

Mastering Bankruptcy

George W. Kuney

Mastering Civil Procedure

David Charles Hricik

Mastering Constitutional Law

John C. Knechtle, Christopher J. Roederer

Mastering Contract Law

Irma S. Russell, Barbara K. Bucholtz

Mastering Corporate Tax

Reginald Mombrun, Gail Levin Richmond, Felicia Branch

Mastering Corporations and Other Business Entities

Lee Harris

Mastering Criminal Law

Ellen S. Podgor, Peter J. Henning, Neil P. Cohen

Mastering Criminal Procedure, Volume 1: The Investigative Stage

Peter J. Henning, Andrew Taslitz, Margaret L. Paris,

Cynthia E. Jones, Ellen S. Podgor

Mastering Elder Law

Ralph C. Brashier

Mastering Employment Discrimination Law

Paul M. Secunda, Jeffrey M. Hirsch

Mastering Evidence
Ronald W. Eades

Mastering Family Law
Janet Leach Richards

Mastering Intellectual Property
George W. Kuney, Donna C. Looper

Mastering Legal Analysis and Communication
David T. Ritchie

Mastering Legal Analysis and Drafting
George W. Kuney, Donna C. Looper

**Mastering Negotiable Instruments (UCC Articles 3 and 4)
and Other Payment Systems**
Michael D. Floyd

Mastering Products Liability
Ronald W. Eades

Mastering Professional Responsibility
Grace M. Giesel

Mastering Property Law
Darryl C. Wilson, Cynthia G. Hawkins DeBose

Mastering Secured Transactions (UCC Article 9)
Richard H. Nowka

Mastering Statutory Interpretation
Linda D. Jellum

Mastering Tort Law
Russell L. Weaver, Edward C. Martin, Andrew R. Klein,
Paul J. Zwier II, Ronald W. Eades, John H. Bauman

Mastering Contract Law

Irma S. Russell

DEAN AND PROFESSOR
UNIVERSITY OF MONTANA SCHOOL OF LAW

Barbara K. Bucholtz

PROFESSOR
UNIVERSITY OF TULSA COLLEGE OF LAW

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2011
Irma S. Russell and Barbara K. Bucholtz
All Rights Reserved.

Library of Congress Cataloging in Publication Data

Russell, Irma S.

Mastering contract law / Irma S. Russell, Barbara K. Bucholtz.

p. cm.

Includes index.

ISBN 978-1-59460-287-0 (alk. paper)

1. Contracts--United States. 2. Contracts. I. Bucholtz, Barbara Kay, 1939-
II. Title.

KF801.R87 2010

346.7302--dc22

2010032402

Carolina Academic Press
700 Kent Street
Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Table of Authorities	xvii
Table of Cases	xix
Series Editor's Foreword	xxi
Preface	xxiii
Introduction	xxv
Chapter 1 • Preliminary Matters	1
Roadmap	1
Sequential Analysis of Contract Law	1
The Seriousness of Promising	2
Interest Protected	2
Implied-in-law Contracts and Implied-in-facts Contracts	4
Sources of Contract Law	5
Common Law	5
Statutory Law and Regulatory Law	6
Reading the UCC and Statutes Generally	7
The Movement toward Uniform Law	7
International Law	9
Tensions among Different Sources of Law	9
Checkpoints	11
Chapter 2 • Basic Concepts and Guiding Principles	13
Roadmap	13
Defining a Contract	13
Defining an Agreement	14
Freedom of Contract	15
Illegal Contracts	15
Checkpoints	17

Chapter 3 • Interpretation	19
Roadmap	19
Purpose of Interpretation	19
Interpretive Rules for Statutes	21
1. Plain Meaning and the Canons of Statutory Construction	21
2. Definitions	22
3. Legislative History	23
4. Case Law	23
5. Common Law	23
Public Policy Considerations	24
Contract Interpretive Rules	24
1. Canons (or Maxims) for (Contract) Construction	24
2. Extrinsic Evidence of Contract Construction	29
UCC Rules for Construing Contracts	29
Parol Evidence Rule	32
Checkpoints	33
Chapter 4 • Formation: Mechanics of Mutual Assent	35
Roadmap	35
Capacity	35
Ability of Other Party to Disaffirm	37
Minors	37
The Exception for Necessaries	38
Other Cases Binding a Minor	39
Mental Impairment	39
Adjudicated Incompetents	40
Non-Adjudicated Incompetents	41
Intoxicated Persons	42
Formation	42
O + A + C = K	43
Mutual Assent	43
Misunderstandings	45
Intent as to Legal Effect	46
Offers and Acceptance	47
What Constitutes Acceptance	48
Silence Not Ordinarily Acceptance	48
Terminating Offers	49
1. Rejection or Counter-Offer	50
2. Lapse of Time	51
Lapse and the Power of Revocation	52

Lapse in the Face to Face Setting	53
3. Revocation	53
General Offers	54
4. Death or Incapacity	54
5. Acceptance	54
Options and Irrevocable Offers	55
Option Contracts	56
Firm Offers under the UCC	57
Effectiveness of Communications—Timing	59
Applying the Rules	60
Mailbox Rule	67
Change of Rules on Timing for Options	69
Unilateral Contracts	69
The Mirror Image Rule	70
Formation under the UCC: The Battle of the Forms and Abrogation of the Mirror Image Rule	71
Unilateral and Bilateral Contracts	74
Distinction between Unilateral and Bilateral	74
The Key to Distinguishing between Unilateral and Bilateral Offers	75
Unilateral and Bilateral Offers: What Difference Does it Make?	79
The Offer	79
Preliminary Negotiations	80
Particular Contexts: Advertisements, Auctions, and Other Examples	81
Checkpoints	82
Chapter 5 • Consideration	85
Roadmap	85
Introduction: Considering Consideration	86
What Is Consideration?	87
Two Tests for Consideration	89
The Benefit/Detriment Test	90
Legal Benefit and Legal Detriment	92
Refraining from Acting and Unilateral Contracts	93
Acting, Forbearing to Act, or Changing a Relationship	94
Psychic Benefit	94
The Bargain Test	95
Enforcement for a Benefit Received	96
Adequacy of Consideration	99
Examples of Lack of Consideration	100
Moral Obligation	101

Exchanges versus Gifts	101
Conditional Gifts (Conditional Gratuitous Promises)	104
Illusory Promises	105
Contracts with a Condition of Satisfaction	107
Requirements and Output Contracts	108
Exclusive Dealing Contracts	110
Nominal versus Sham Consideration	111
Recitation of Consideration	112
Past Consideration and Pre-existing Debts	112
Pre-existing Duties and Legal Obligations	113
Claims Proved to Be Invalid	114
Rescission	115
Conclusion	115
Checkpoints	116
Chapter 6 • Defenses and Obstacles to Performance Liability	117
Roadmap	117
Introduction	118
Strict Liability	119
The Pivotal Concept of Consent	120
Fraud and Misrepresentation	122
Negligent Misrepresentation	123
Non-disclosure	124
Facts, Opinions, and Predictions	126
Promissory Fraud	127
Duress, Force, Threat, and Other Unfair Advantage	128
Threats to Prosecute or Breach the Contract	129
Undue Influence	130
Mistake	131
Two Categories of Mistake	132
Bilateral Mistake (Mutual Mistake)	133
Unilateral Mistake	134
Relevance of Fault to a Claim of Mistake	135
Experts	136
Impossibility and Impracticability	136
Examples of Impossibility and Impracticability	137
Relevance of Fault to a Claim of Impracticability	138
Requirement of Objective Impossibility	139
The Modern Approach	140
Actual Impossibility or Actual Impracticability	140

Impracticability under the UCC	141
Change of Market Price	142
Temporary or Partial Impracticability	143
Duty to Notify Contract Partner of Impracticability	143
Frustration of Purpose	143
Failure of Purpose for the Recipient	144
Existing Impracticability or Frustration	146
Comparison of Existing Impracticability or Frustration with Mistake	147
Insecurity, Modification, and Impracticability	147
International Sale of Goods	147
Economic Analysis	148
Risk Allocation	148
Conditions and Contingencies	151
Rescission, Avoidance, and Reformation	152
Checkpoints	153
Chapter 7 • Modification	155
Roadmap	155
Changes to a Contract	155
A Change on Each Side	157
Enforceability of Modified Contracts versus Original Contracts	158
Who Are the Parties to the Dispute?	158
How the Issue Arises	159
A Sample Matrix of Changes of Modifications	160
Tests for Enforceability of Modified Contracts	162
1. The Pre-Existing Duty Rule and Rescission	162
2. The Standard of UCC Section 2-209	164
3. The Restatement Approach to Modification	165
4. Bad Faith and Coercion	166
5. Reliance	168
Changes in Circumstances	169
Refusal to Modify	170
Relationship of Modification to Consideration	171
Modification and Risk Allocation	172
Economic Analysis and Public Policy	172
“Not Fully Performed” Limitation	173
No Oral Modification Clauses	174
What Should a Party Do When the Other Party Seeks a Modification?	174
Modification and Freedom of Contract	175
Relationship of Modification and Obstacles to Performance	176

Accord and Satisfaction	176
Checkpoints	179
Chapter 8 • Exceptions to Bargain Theory: Contracts	
without Consideration	181
Roadmap	181
Enforcement without Consideration	181
Historical Note: Equitable Estoppel	182
Contracts under Seal	183
Charitable Subscriptions	183
Restitution (Quasi-contract)	184
Modifications to Sales Contracts	186
Estoppel and Promissory Reliance	186
Reliance as a Basis for Enforcing a Promise	187
<i>Restatement 90 (First) of Contracts</i>	188
<i>Restatement 90 (Second) of Contracts</i>	190
Application of the Doctrine	190
Preliminary Negotiations and the Intent to Be Bound	191
Checkpoints	193
Chapter 9 • Special Issues of Enforceability	195
Roadmap	195
Introduction	195
The Statute of Limitations and the Doctrine of Laches	196
The Statute of Limitations under the UCC	197
Statute of Frauds	198
Introduction	198
Terminology	200
A One-way Street	200
Principal Classes of Contracts	201
1. The Executor or Administrator Promise to Answer for the Debt of Another	202
2. Surety Contracts	202
3. Contracts in Consideration of Marriage	204
4. Transfers of an Interest in Land	204
5. Contracts Not to Be Performed within a Year	205
Lifetime Contracts	207
Other Provisions	208
Exceptions to the Statute	209
Satisfying the Statute	209

Requirements of the Writing	210
Disappearing Memorandum	211
Sales of Goods for \$500 or More	211
What Does the Statute Require for a Writing?	213
Parol Evidence Rule	215
The Role of Writings in Contract Law	215
Title of the Rule	215
Effect of the Rule	216
Purposes of the Rule	217
Exceptions to the Rule	218
What the Parol Evidence Rule Does Not Do	218
Purpose of the Evidence Presented	219
Interpretation: Plain Meaning or Reasonably Susceptible	220
The Plain Meaning Rule	221
The Reasonably Susceptible Approach	221
Comparing the Parol Evidence Rule with the Rule on Modification	221
Visualizing the Parol Evidence Rule	222
Applying the Parol Evidence Rule	223
Unintegrated Agreements	223
Integrated Agreements	223
Completely Integrated Agreements	224
Signatures Not Required	224
The Parol Evidence Rule of the UCC	224
Favorable Admission Rule on Course of Transactions under the UCC	225
Merger or Integration Clauses	225
Criticisms of the Rule	227
Checkpoints	228
Chapter 10 • Performance and Breach	229
Roadmap	229
Introduction	230
Contract Enforcement	231
The Temptation to Breach Promises	233
The Theory of Efficient Breach of Promises	234
Promises and Conditions	235
Relation of Condition and Performance	236
Conditions	236
Terminology Relating to Conditions	237
Condition Precedent	238

Conditions Subsequent	238
Types of Conditions	239
Express Conditions	240
Example of an Express Condition	240
Strict Enforcement of Express Condition	241
Obligation of Good Faith	242
Waiver of a Condition	242
Failure of Express Condition	244
Implied Conditions	244
Constructive Conditions of Exchange	245
Terminology	245
Modern Approach	246
Order of Performance	246
Two Situations and Two Defaults	247
Independent Obligations	247
Unilateral Promises and Conditions	248
Types of Remedies	249
Material Breach	249
Immaterial Breach	251
Substantial Performance	252
Comparison with Contract Formation	254
Perfect Tender Rule	255
Contract Condition Function	256
Condition of Satisfaction	256
The Choice of a Subjective or Objective Standard	258
Requirement of Good Faith	260
Claims of Conditions Rendering a Contract Illusory	261
Forfeiture	262
Distinguishing Conditions from Timing Devices	263
An Exercise to Identify Conditions	264
Promises Implied in Conditions	265
Promissory Conditions	265
Anticipatory Repudiation	266
Assurances of Performance	268
Warranties as Conditions	270
Checkpoints	271
Chapter 11 • Remedies	273
Roadmap	273
Introduction	274

Specific Performance	275
Historical Background	275
Constitutional Dimensions	276
Necessary Showings	276
Expectation Interest Damages	277
Purpose	277
Types	278
Limitations on Contract Damages	281
1. The Foreseeability Limitation	281
2. The Degree of Proof Limitation (The “Reasonable Certainty” Test)	283
3. The Compensation Limitation/Punitive Damages Bar	285
4. The Disproportionality Limitation	285
5. The Measure of Damages Limitation (Cost of Completion versus Diminution of Value and the Problem of Waste)	286
6. The Avoidable Consequences Limitation	288
The Lost Volume Seller Exception	289
7. The Emotional Harm Limitation	290
Alternatives to Expectation Damages	290
Reliance Interest Damages	291
Restitution Interest Damages	293
Discharge and Rescission	294
Liquidated Damages	294
Nominal Damages	295
Attorney Fees and Court Costs	295
The Issue of Election of Remedies and the Problem of Double Recovery	296
Remedies under the UCC	298
Summary	300
Checkpoints	301
Chapter 12 • Third Parties’ Interests	303
Roadmap	303
Introduction	303
Part I: Contractual Benefits for Third Parties	304
Privity and the Problem of Third Party Benefits	304
Changes by the Parties	310
Difficulty of Intent	311
Government Contracts	311

Construction Bonds	312
Consumer Contracts	313
Part II: Rights and Duties of Third Parties	314
Other Enforceable Interests of Third Parties: Assignments of Rights and Delegation of Duties	314
Assignments of Rights	315
Delegation of Duties	316
Novations	317
Checkpoints	319
Conclusion	321
Mastering Contracts Master Checklist	323
Index	329

Table of Authorities

Black's Law Dictionary, 247	§ 43, 63
CISG (United National Convention on the International Sale of Goods) Article 79	§ 45, 77 § 63, 64, 65, 66, 69 § 71, 99
Hillman, Robert A., Contract Modi- fication under the <i>Restatement</i> (<i>Second</i>) of <i>Contracts</i> , 67 Cornell L Rev. 680 (1982), 165	§ 86, 99, 188 § 89, 163, 167, 168, 170, 194 § 90, 185, 192, 293 § 115, 206
Magnuson-Moss Act, 6, 24	§ 116, 205
Uniform Commercial Code, 7, 22, 24, 29, 71, 143, 185, 215, 269, 271, 290, 300, 315, 324	§ 139, 215 § 145, 211 § 151, 133
1-303	§ 152, 124, 135
<i>Restatement (1st) of Contracts</i> , 184, 191, 310	§ 153, 124, 135 § 154, 136
§ 90, 3, 90	§ 155, 154
§ 133, 310	§ 157, 137
<i>Restatement (2d) of Contracts</i> , 13, 70, 121, 165, 186, 192, 240	§ 188, 112 § 200, 19
§ 3, 14	§ 201, 45
§ 12, 35	§ 202, 29
§ 13, 40	§ 204, 246
§ 14, 37	§ 209, 225
§ 15, 41	§ 210, 225
§ 16, 42	§ 213, 226
§ 20, 124, 135	§ 214, 220
§ 24, 79, 239	§ 215, 225
§ 26, 80	§ 216, 225, 226
§ 35, 55	§ 226, 246
§ 36, 50	§ 227, 246, 264
§ 37, 69	§ 228, 260
§ 40, 48	§ 232, 250

*Restatement (2d) of Contracts,
continued*

§ 241, 221, 252
§ 250, 270
§ 261, 139, 140, 141, 142, 151
§ 266, 149
§ 302, 310
§ 311, 312
§ 349, 293
§ 351, 284, 287
§ 580, 15

*Restatement of Restitution 2-706–2-
716, 300, 301*

English Statute of Frauds, 201, 204
Tennessee Code 29-2-101, 203, 211
UNCCitral, 9

Table of Cases

- Agroindustrias Vezel, S.A. de C.V. v. H.P. Schmid, Inc., 15 F.3d 1082 (9th Cir. 1994) (unpublished), 172
- Alaska Packers Assn. v. Domenico, 117 F. 99 (9th Cir. 1902), 165
- Aluminum Co. of Amer. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), 154
- Angel v. Murray, 322 A.2d 630 (R.I. 1974), 168, 171
- Austin Instrument, Inc. v. Loral Corp., 272 N.E.2d 533 (N.Y. 1971), 131, 171
- Beachcomber Coins, Inc. v. Boskett, 400 A.2d 78 (1979), 138
- Comcoa, Inc. v. Coe, 587 So. 2d 474 (Fla. Dist. Ct. App. 991), 32
- Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907), 187
- Crabtree v. Elizabeth Arden Sales Corp., 110 N.E.2d 551, (N.Y. 1953), 212
- Ellis v. Tower Health Club, Inc., 342 N.Y.S.2d 135 (N.Y. Civ. Ct. 1973), 253
- Ever-Tite Roofing Corp. v. Green, 83 So. 2d 449 (La. App. 2d Cir. 1955), 66
- Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. 1959), 90
- Florida Power & Light Co. v. Westinghouse Elec. Corp., 517 F. Supp. 440 (E.D. Va.1981), 151
- Gibson v. Cranage, 39 Mich. 49 (1878), 260, 261
- Hadley v. Baxendale, 9 Exch. 341 [1845] 156 ER 145, 284
- Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891), 96
- Hochster v. De La Tour [1853] EWHC QB J72 [1853] 118 ER 922, 269
- Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958), 268
- Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921), 289
- Jamestown Farmers Elevator v. General Mills, Inc., 552 F. 2d 1285 (8th Cir. 1977), 169
- Kingston v. Preston [1773] 99 ER 437, 248
- Kirksey v. Kirksey, 8 Ala. 131 (1845), 105
- Krell v. Henry [1903] 2 KB 740, 147
- Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954), 2, 44, 212
- Luttinger v. Rosen, 316 A.2d 757 (Conn. 1972), 243
- Neri v. Retail Marine Corp., 285 N.E.2d 311 (N.Y. 1972), 292

- Ortelere v. Teacher's Retirement Board, 250 N.E.2d 460 (N.Y. 1969), 41
- Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968), 25
- Peacock Construction v. Modern Air Conditioning, Inc., 353 So.2d 840 (Fla. 1977), 265
- Ralston Purina Co. v. McNabb, 381 F. Supp. 181 (W.D. Tenn. 1974), 169
- Roth Steel Products v. Sharon Steel Corp., 705 F. 2d 134 (6th Cir. 1983), 169
- Sherwood v. Walker, 33 N.W. 919 (1887), 134
- Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987), 45
- Southworth V. Oliver, 587 P.2d 994 (Or. 1978), 81
- Strong v. Sheffield, 39 N.E. 330 (1895), 108
- Sullivan v.O'Connor, 296 N.E.2d 183 (Mass. 1973)
- Sunflower Elec. Coop. v. Tomlinson Oil Co., Inc. 638 P.2d 963 (Kan. App. 1981), 152
- T & S Brass and Bronze Works, Inc. v. Pic-Air, Inc., 790 F.2d 1098 (4th Cir. 1986), 170
- Taylor v. Caldwell [1863] 122 ER 309, 140, 152
- Transatlantic Financing Corp. v. United States, 363 F. 2d 312 (D.C. Cir. 1966), 150
- Watkins & Son v. Carrig, 21 A.2d 591 (N.H. 1941), 153
- White v. Corlies & Tift, 46 N.Y. 467 (1871), 77
- Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280 (7th Cir. 1986), 169
- Wood v. Lucy Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917), 4, 108

Series Editor's Foreword

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. A “Checkpoint” at the end of each chapter encourages you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver
Professor of Law & Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law

Preface

The authors dedicate this book to their families and colleagues and to their students, past, present, and future. They appreciate the ideas and suggestions on earlier versions of this work from many colleagues and friends, especially Professors Frank Snyder, Martin Frey and Robert Spoo. The authors thank their research assistants, Brittany Littleton Woodard, Anthony Craiker, Jared Nelson, Todd Musick, Avon “Chauncy” Whitworth, Bradford Dickson, and Julie Rostad for their dedicated research on the project and Cyndee Jones and Rebecca Krantz for their work on the manuscript. We also express gratitude to Professor Russell Weaver for inviting us to be authors in the *Mastering Series* and for his tireless work in legal education.

Introduction

This book covers the major points included in first year courses in contracts. It is intended to give students an overview of contract doctrine and analysis rather than exhaustive coverage of the myriad details of this vast field of law. The book explores basic principles and purposes of contract law including discussions of background principles and traditions of private ordering. It explains contract formation, interpretation, the requirement of written evidence for enforcement of certain types of promises. It examines the themes and doctrines of reliance, restitution and the importance of public policy in contract law. The text includes the bargained-for exchange, unenforceable contracts, performance and breach, obstacles to performance, modification, pre-contractual obligation, remedies and damages, and stakeholders other than contracting parties, which is to say the third party beneficiary doctrine, delegation, and assignment.

While no introductory book covers every point of law relating to its subject, we hope that this text prepares you to master both the framework of contract doctrine and the themes that inform contract law. The book is designed to be a comprehensive but accessible introduction to the law of contracts. In addition to explaining the major concepts traditionally covered in Contracts classes, the authors present common sense examples linking intuitions about fairness and competition to the law of contracting.

Casebooks and courses in Contracts are organized in a variety of ways. Some courses begin with the principles of contract formation. Some begin with the doctrine of consideration. Some begin with contract remedies. It does not matter where you start; you will need to learn it all, and it is all part of the whole. This book is organized according to the typical approach used in many contracts classes. It takes up the issues of contract law and contracting in the sequence in which courts consider a dispute or claim based on contract law.

Despite the organization built on the elements of proving a contract claim, the book also explores in depth the transactional aspects of contract law. It discusses practice pointers and aspects of contract law from the viewpoint of lawyers putting together contracts and deals as well as from the perspective of lawyers litigating contract disputes.

