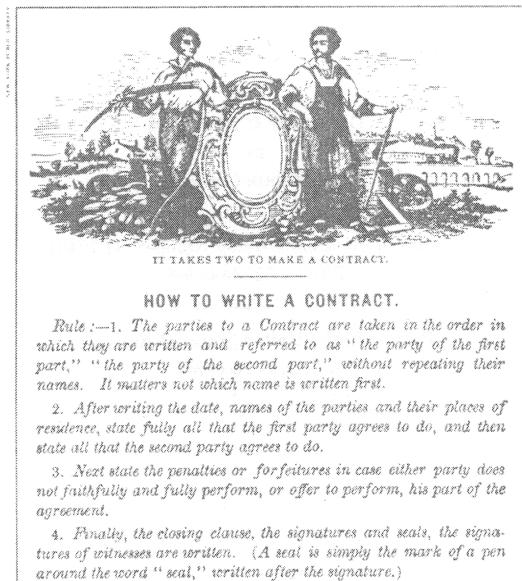


DRAFTING AND ANALYZING CONTRACTS

A Guide to the Practical Application of the Principles of Contract Law

Third Edition



Scott J. Burnham
Professor of Law
The University of Montana School of Law



LCCCN#: 2003111179

ISBN#: 0-8205-5788-9

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are trademarks of Reed Elsevier Properties Inc, used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2003 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All Rights Reserved.

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material exceeding fair use, 17 U.S.C. § 107, may be licensed for a fee of 10¢ per page per copy from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Offices

744 Broad Street, Newark, NJ 07102 (973) 820-2000

201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200

701 East Water Street, Charlottesville, VA 22902-7587 (434) 972-7600

www.lexis.com

To my parents, whose New England minds always took a
practical turn

ACKNOWLEDGMENTS

This work began to take shape as I taught Contracts at the University of Montana School of Law. Dean John O. Mudd gave particularly strong encouragement to curriculum development that emphasized application as well as doctrine. In the summer of 1984, I was assisted by a grant from the National Institute for Dispute Resolution, which recognized the preventive law value of good drafting.

Other than these two, specific acknowledgments seem out of place, for to list is to limit. I would have to acknowledge not only those individuals who helped directly with the work, but those who have helped me to see a need and to fill it. I am grateful to them, the many teachers and students I have profited from as a law student, practitioner, and professor.

Excerpts from the following materials appear with the kind permission of the copyright holders. Additional permissions appear in the text.

Am. Jur. Legal Forms (2nd ed.). Copyright © 2000 West Group. Reprinted with permission.

Material from Bender's Uniform Commercial Code Service is reprinted with permission from Forms and Procedures Under the Uniform Commercial Code by Frederick M. Hart and William F. Willier. Copyright © 2003 by Matthew Bender & Co., Inc. All rights reserved.

Corbin, Contracts. Copyright © 1962, 2001 Matthew Bender & Co., Inc. All rights reserved.

Restatement (Second) of Contracts. Copyright © 1981 The American Law Institute. Reprinted with the permission of The American Law Institute.

Uniform Laws Annotated. Copyright © 1995 West Group. Reprinted with permission.

West's Legal Forms. Copyright © 1998 West Group. Reprinted with permission.

White & Summers, Uniform Commercial Code (5th ed.). Copyright © 2000 West Group. Reprinted with permission.

TABLE OF CONTENTS

	Page
<i>Acknowledgments</i>	v
<i>Table of Contents</i>	ix
<i>Introduction</i>	1
PART I	
How the Principles of Contract Law Are Exemplified in Drafting	
Chapter 1. Offer and Acceptance	11
Chapter 2. Consideration	29
Chapter 3. Indefiniteness	43
Chapter 4. Enforceability	57
Chapter 5. Capacity	71
Chapter 6. Parol Evidence	77
Chapter 7. Interpretation	89
Chapter 8. Mistake	117
Chapter 9. Force Majeure	125
Chapter 10. Promise and Condition	135
Chapter 11. Modification and Discharge	157
Chapter 12. Warranties	169
Chapter 13. Damages	191
Chapter 14. Third Parties	203
PART II	
How the Principles of Drafting Are Exemplified in Contracts	
Chapter 15. The Framework of a Contract	215
 Chapter 16. Operative Language and Boilerplate Terms	235

	Page
Chapter 17. The Language of Drafting	251
Chapter 18. Plain Language	271
Chapter 19. Drafting with a Computer	297
PART III	
How to Read and Analyze a Contract	
Introduction	317
Outline of the Passes	319
First Pass: Orientation	323
Second Pass: Explication	330
Third Pass: Implication	344
Fourth Pass: Remediation	347
Fifth Pass: Evaluation	354
Conclusion	360
Appendix A: Sample Contract	361
Appendix B: Exercises	367
<hr/>	
<i>Bibliography</i>	381
<i>Index</i>	I-1

TABLE OF CONTENTS

	Page
<i>Acknowledgments</i>	v
<i>Summary Table of Contents</i>	vii
Introduction	1
PART I	
How the Principles of Contract Law	
Are Exemplified in Drafting	
Chapter 1. Offer and Acceptance	11
§ 1.1 Introduction	11
§ 1.2 Firm offers — U.C.C. § 2-205	12
§ 1.3 Did negotiating parties intend an agreement?	13
§ 1.4 Objective manifestation of assent	14
§ 1.5 The Battle of the Forms — U.C.C. § 2-207	15
§ 1.6 Ethics in offer and acceptance	23
§ 1.7 Exercises	24
Chapter 2 Consideration	29
§ 2.1 Introduction	29
§ 2.2 Statutes dispensing with consideration	30
§ 2.3 Recital of consideration	31
§ 2.4 The adequacy of consideration	31
§ 2.5 Drafting the recital of consideration	32
§ 2.6 Illusory contracts	33
§ 2.7 Distributorship agreements	34
§ 2.8 Output and requirements contracts	36
§ 2.9 Satisfaction clauses	37
§ 2.10 Exercises	38

	Page
Chapter 3 Indefiniteness	43
§ 3.1 Introduction	43
§ 3.2 The parties do not intend to enter into a contract	44
§ 3.3 The parties intend to enter into a contract	46
§ 3.4 The parties intend to enter into a contract with some provisions to be agreed upon at a later time	47
§ 3.5 The resources of the law: The U.C.C.	48
§ 3.6 Other resources to make an agreement definite	49
§ 3.7 Ethics in drafting	50
§ 3.8 Exercises	51
 Chapter 4 Enforceability	57
§ 4.1 Introduction	57
§ 4.2 Regulation of form	57
§ 4.3 Regulation of substance	58
§ 4.4 Surrendering a right	59
§ 4.5 Unconscionability	60
§ 4.6 Severability	61
§ 4.7 Consumer Protection Acts	61
§ 4.8 Ethics in drafting	62
§ 4.9 Application: Exculpatory clauses	66
§ 4.10 Exercises	67
 Chapter 5 Capacity	71
§ 5.1 Introduction	71
§ 5.2 Behavior	71
§ 5.3 Fraud	72
§ 5.4 Mental capacity	73
§ 5.5 Minority	73
§ 5.6 Authority	74
§ 5.7 Exercise	75

	Page
Chapter 6 Parol Evidence	77
§ 6.1 Introduction	77
§ 6.2 Is the agreement final?	78
§ 6.3 Is the agreement complete?	78
§ 6.4 Merger clause	79
§ 6.5 Exception: Formation issues	80
§ 6.6 Adhesion contracts	81
§ 6.7 The U.C.C. parol evidence rule	82
§ 6.8 Collateral agreement	83
§ 6.9 Interpretation	83
§ 6.10 Modification	84
§ 6.11 Exercises	84
 Chapter 7 Interpretation	89
§ 7.1 Introduction	89
§ 7.2 Recitals	91
§ 7.3 General and particular	92
§ 7.4 Ambiguity	93
§ 7.4.1 Connectives	95
§ 7.4.2 And/or	97
§ 7.4.3 Describing characteristics or classes	97
§ 7.4.4 Listing conditions or criteria	97
§ 7.4.5 Modifiers	98
§ 7.5 Cures for ambiguity	99
§ 7.5.1 Definition	100
§ 7.5.2 Tabulation	103
§ 7.5.3 Application of tabulation	104
§ 7.5.4 Normalized drafting	108
§ 7.6 Vagueness	111
§ 7.7 Exercises	112
 Chapter 8 Mistake	117
§ 8.1 Introduction	117

	Page
§ 8.2 Putting the assumptions in the contract	117
§ 8.3 Assuming the risk	118
§ 8.4 Releases	119
§ 8.5 Ethical issues	120
§ 8.6 Exercises	123
 Chapter 9 Force Majeure	125
§ 9.1 Introduction	125
§ 9.2 Qualifying an obligation	126
§ 9.3 Absolute performance	127
§ 9.4 Force majeure	129
§ 9.5 Drafting for specific situations	130
§ 9.6 Exercises	133
 Chapter 10 Promise and Condition	135
§ 10.1 Introduction	135
§ 10.2 Promise	136
§ 10.3 Condition	136
§ 10.4 Conditions precedent and conditions subsequent	138
§ 10.5 Drafting promises and conditions	139
§ 10.6 Remedies	141
§ 10.6.1 Who is supposed to go first?	141
§ 10.6.2 If one party doesn't perform, must the other party perform anyway?	144
§ 10.6.3 How much or what kind of nonperformance by one party excuses performance by the other party?	149
§ 10.7 Drafting clear conditions	151
§ 10.8 Exercises	153
 Chapter 11 Modification and Discharge	157
§ 11.1 Introduction	157
§ 11.2 Common law modification of executory agreements	158
§ 11.3 The modern rule	159

	Page
§ 11.4 Settlement of claims	160
§ 11.5 Unliquidated or disputed obligations	161
§ 11.6 Accord and satisfaction contrasted with substituted contract	162
§ 11.7 Liquidated and undisputed obligations	163
§ 11.8 Drafting a conditional check	163
§ 11.9 Provisions barring modification and waiver	165
§ 11.10 Exercises	166
 Chapter 12 Warranties	169
§ 12.1 Introduction	169
§ 12.2 Express warranty — § 2-313	169
§ 12.3 Implied warranty of merchantability — § 2-314	170
§ 12.4 Implied warranty of fitness for a particular purpose — § 2-315	171
§ 12.5 Disclaimer of warranties	172
§ 12.5.1 Disclaimer of express warranties — § 2-316(1)	172
§ 12.5.2 Disclaimer of implied warranties	174
§ 12.5.3 The “conspicuousness” requirement	176
§ 12.6 Conflicts among warranties — § 2-317	177
§ 12.7 Limitation of remedies — § 2-719	178
§ 12.8 The Magnuson-Moss Warranty Act	179
§ 12.9 Non-U.C.C. “warranties”	182
§ 12.10 Exercises	182
 Chapter 13 Damages	191
§ 13.1 Introduction	191
§ 13.2 Specific performance	192
§ 13.3 Money damages: Application of the <i>Hadley</i> rules	193
§ 13.4 Liquidated damages	195
§ 13.5 Arbitration	197
§ 13.6 Attorneys’ fees	197
§ 13.7 Punitive damages	198

	Page
§ 13.8 Exercises	199
Chapter 14 Third Parties	203
§ 14.1 Introduction	203
§ 14.2 Third party beneficiaries	205
§ 14.3 Assignment of rights	206
§ 14.4 Delegation of duties	208
§ 14.5 Is an assignment a transfer?	209
§ 14.6 Contractual prohibitions	209
§ 14.7 Novation	211
§ 14.8 Exercises	212
PART II	
How the Principles of Drafting Are Exemplified in Contracts	
Chapter 15 The Framework of a Contract	215
§ 15.1 Introduction	215
§ 15.2 The use of forms	216
§ 15.3 Zero-base drafting	217
§ 15.4 The structure of a contract	218
§ 15.4.1 Description of the instrument	218
§ 15.4.2 Caption	219
§ 15.4.3 Transition (language of agreement)	222
§ 15.4.4 Recitals	223
§ 15.4.5 Definitions	226
§ 15.4.6 Operative language and boilerplate terms	227
§ 15.4.7 Closing	227
§ 15.5 Exercises	228
Chapter 16 Operative Language and Boilerplate Terms	235
§ 16.1 Introduction	235
§ 16.2 Stating obligations	236
§ 16.3 Representations and warranties	239

	Page
§ 16.4 Example: Providing for the consequences of breach	240
§ 16.5 Boilerplate	243
§ 16.5.1 Headings	244
§ 16.5.2 Choice of law	244
§ 16.5.3 Choice of forum	245
§ 16.5.4 Waiver of jury trial	245
§ 16.5.5 Notice	245
§ 16.6 Example	247
§ 16.7 Exercises	248
 Chapter 17 The Language of Drafting	251
§ 17.1 Introduction	251
§ 17.2 Use the present tense	252
§ 17.3 Use the active voice	252
§ 17.4 Draft in gender-neutral language	253
§ 17.5 Language of agreement	256
§ 17.6 Language of obligation, authorization, and condition	257
§ 17.6.1 Language of obligation	258
§ 17.6.2 Language of authorization	258
§ 17.6.3 Language of condition	259
§ 17.7 Fleshing out the agreement for completeness	260
§ 17.8 Declarations	261
§ 17.9 Remedies	262
§ 17.10 Cross-references	262
§ 17.11 Example of the language of drafting	263
§ 17.12 Exercises	265
 Chapter 18 Plain Language	271
§ 18.1 Introduction	271
§ 18.2 Subjective standards of plain language	271
§ 18.3 Objective standards of plain language	272
§ 18.4 Plain language and substance	274
§ 18.5 The process of plain language drafting	278

	Page
§ 18.6 Example of plain language drafting	281
§ 18.7 Is plain language drafting worth the trouble?	288
§ 18.8 Computer assistance	289
§ 18.9 Summary: The elements of plain language	290
§ 18.10 Exercises	291
 Chapter 19 Drafting with a Computer	297
§ 19.1 Introduction	297
§ 19.2 Word processing	297
§ 19.2.1 Word processing guides you through original thought	298
§ 19.2.2 Word processing improves your written expression	298
§ 19.2.3 Word processing quickly repeats past experience	302
§ 19.3 Preparing a document for document assembly	304
§ 19.4 Document assembly	306
§ 19.5 Expert systems	307
§ 19.6 Other uses for computers in drafting	311
§ 19.6.1 Comparison by computer	311
§ 19.6.2 Virtual drafting	311
§ 19.7 Exercises	312
PART III	
How to Read and Analyze a Contract	
 Introduction	317
 Outline of the Passes	319
 First Pass: Orientation	323
§ 1.1 Ascertain the general theme	323
§ 1.1.1 The description of the instrument	324
§ 1.1.2 The caption	324
§ 1.1.3 Recitals	325
§ 1.1.4 The primary exchange of promises	325
§ 1.2 Detect the structure of the contract	326
§ 1.2.1 Foundation or cathedral?	326

	Page
§ 1.2.2 Stepping stone or final agreement?	327
§ 1.2.3 What are the parts of the contract?	327
§ 1.3 See the transaction against a larger background	328
§ 1.3.1 What are the goals of the parties?	329
§ 1.3.2 What are the applicable rules of contract law?	329
§ 1.3.3 Is there applicable regulation?	330
Second Pass: Explication	330
§ 2.1 Identify the boilerplate terms	330
§ 2.1.1 Merger	331
§ 2.1.2 Modification	332
§ 2.1.3 Assignment and delegation	332
§ 2.1.4 Force majeure	333
§ 2.1.5 Severability	333
§ 2.1.6 Headings	333
§ 2.1.7 Dispute resolution	334
§ 2.1.7.1 Arbitration	334
§ 2.1.7.2 Choice of law	334
§ 2.1.7.3 Choice of forum	335
§ 2.1.7.4 Attorneys' fees	335
§ 2.2 Ascertain the rights and duties of each party	335
§ 2.2.1 Identify promises	335
§ 2.2.2 Watch for promises that are beyond customary norms	337
§ 2.2.3 Determine the duration of the contract	339
§ 2.2.4 Identify conditions	340
§ 2.2.4.1 The event is within the control of neither party	340
§ 2.2.4.2 The event is within the control of the party whose performance is conditional on the event	341
§ 2.2.4.3 The event is within the control of the other party	342
§ 2.3 Consider creating a graphic	342
Third Pass: Implication	344
§ 3.1 Read in the default rules	344

	Page
§ 3.2 Read in the implied conditions	345
§ 3.2.1 Is one party's entire performance a condition of the entire performance of the other party?	345
§ 3.2.2 Who performs first?	346
§ 3.2.3 Did the party who performed first protect itself?	346
§ 3.3 Read in trade usage, course of dealing, and course of performance	347
Fourth Pass: Remediation	347
§ 4.1 Is a party's nonperformance breach?	348
§ 4.1.1 Changed circumstances	348
§ 4.1.2 Modification or waiver	348
§ 4.1.3 Nonoccurrence of a condition	348
§ 4.1.4 Trade usage	349
§ 4.2 If nonperformance is not excused, what happens?	349
§ 4.2.1 The nonbreaching party may recover damages	349
§ 4.2.1.1 Ask what the nonbreaching party would have had if the contract had been performed	349
§ 4.2.1.2 Look for express terms relating to damages	350
§ 4.2.2 The nonbreaching party's counterperformance may not be due	350
§ 4.2.2.1 The entire performance was not given	350
§ 4.2.2.2 A part of the performance was given	351
§ 4.2.2.3 The performance was not timely given	351
§ 4.2.3 Create a visual representation	352
§ 4.3 Look for terms that address remedies	352
§ 4.3.1 Specific performance	353
§ 4.3.2 Liquidated damages	353
§ 4.3.3 Limitation of remedies	353
§ 4.3.4 Dispute resolution	354
Fifth Pass: Evaluation	354
§ 5.1 Assemble your concerns	354

	Page
§ 5.1.1 Should you expressly state omitted terms?	355
§ 5.1.2 Do you understand and agree with all the stated terms?	355
§ 5.1.3 Do you understand and agree with the consequences of breach?	355
§ 5.1.4 Do you wish to alter any boilerplate terms?	355
§ 5.1.5 Are there terms you wish to negotiate?	356
§ 5.2 Check the document for completeness	356
§ 5.3 Detect weaknesses with language	356
§ 5.3.1 Plain English	356
§ 5.3.2 Ambiguity	357
§ 5.3.3 Definitions	358
§ 5.4 Explore opportunities to gain greater expertise	359
§ 5.4.1 Find an up-to-date form	359
§ 5.4.2 Find a book or expert on the subject	359
Conclusion	360
Appendix A: Sample Contract	361
Appendix B: Exercises	367
<i>Bibliography</i>	381
<i>Index</i>	I-1

