

Teaching Contracts

Marvin Chirelstein

By actual count (but with no guarantee of perfect accuracy), there are now in print at least 15 casebooks addressed to students taking the first-year course in Contracts. An impressive array, certainly, and the more impressive when one observes that most of those casebooks, especially the new editions, run over 1,000 pages—in one case over 1,600! As to the principal cases, the average number is around 170 per casebook. If Note cases are included, the number may actually reach 1,000. It follows, obviously, that many teachers in the Contracts field want volume and coverage, and apparently the more the better.

How well this meets the interests of first-year law students I am not so sure. On the basis of totally unsystematic sampling, I have found over the years that there are only a few, a very few, Contracts cases that students remember by the time they reach their second year. It is a remarkably consistent list, which I attribute in part to the emphasis those cases apparently get from instructors, in part to the fact that almost every casebook includes those cases and gives them prominence—often by placing one or more at the very beginning of the casebook—and in part to the outright silliness of many of the cases themselves. The cases I have in mind—*Hamer v. Sidway*, *Hawkins v. McGee*, *Jacob & Youngs*, *Wood v. Lucy*, *Peerless*, *Peevyhouse*, *Alaska Packers*, *Sherwood v. Walker*, *Lucy v. Zehmer*, *Lefkowitz v. Great Minneapolis Surplus Store*, and a few others—will be recognized at once and with a groan by anyone who has ever taught the course. Many instructors, I believe, would be likely to view the cases just named, however memorable to students, as wrong in outcome, or at least doubtfully reasoned, or perhaps better explained on other grounds and for other reasons than those expressed in the opinions themselves.

The point I am suggesting is that the decisions best remembered by our students are largely freaks—that is, single instances unlikely ever at any time to be repeated in the same form. But then why do we teach them? Could it be, as one leading scholar has suggested to me, that the cases, or at least a fair number of them, are actually selected for their amusing narrative value rather than as illustrations of something more serious? If that is true, then I suppose I should say so to my students—we can all have a chuckle—and warn them that what is truly serious and important in the Contracts field will be reserved for an advanced course, assuming there is such a course and assuming anybody takes it.

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As you know, a small but growing number of law teachers have lately suggested that the great days of Langdell and the case method have begun to show their age. I wish to join the rising chorus, at least as far as teaching Contracts is concerned. Putting it differently, how many appellate decisions—along with the Restatement and Article 2 of the UCC—do we really need to teach Contracts? My guess: no more than ten or 15—certainly not a cascade of more than 170—and despite their comic appeal, none of those cited just above.

The cases of my selection would have one consistent theme, to-wit, *the inadequacy of legal draftsmanship*. Under that heading, the relevant classroom questions would be:

1. Why did the litigated issue arise?
2. Could the problem have been foreseen?
3. If foreseeable, could it have been dealt with through further negotiation despite some added cost (though less, presumably, than the cost of litigation)?
4. Even if the answer to 2 and/or 3 is no, would there be any contractual means or mechanism that could have been adopted to deal with unforeseen or unresolved contingencies?

But suppose that even 4 fails us. Then, finally, the instructor has an opportunity to state at length how he or she, in the person of a court, would approach and resolve the great and pervasive issue of contract interpretation, which is inevitably, in one form or another, the central question in almost every case that arises. At this point, one or more of my (or your) selected cases can be revived and used as a basis for discussion. *Policy at last*—technical, to be sure, but policy nonetheless and as such very welcome. The current scholarly debate between textualism and contextualism could be the framework for a useful and far-reaching discussion, but there are of course many other policy themes that the instructor might prefer.

The result: our students receive both a practical and a theoretical introduction to the field of Contracts. Theory and practice are joined at the hip, which I think is as it should be.