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APPROACHES TO TEACHING CONTRACTS

ENRICHING CASE REPORTS

ROBERT A. HILLMAN*

Judicial opinions in contract matters often fail to reflect the intricacies of a dispute, the nuances of the lawyer's strategies in court and the general realities of litigation. This, of course, is not a novel point[1] and many students intuit it. Nevertheless, the absence of supporting materials about the cases creates an aura of unreality about many things discussed in class. In my contracts course, I emphasize this point and try to remedy it.

When Bob Summers and I began to prepare our casebook some fifteen years ago,[2] we decided to write to the lawyers who litigated the more recent cases selected for our book to ask them to share their files on the cases. We have repeated the process for each of the editions. Over the years, these lawyers have been incredibly cooperative and have showered us with a wealth of material. Although we saw immediately that only a small fraction of the materials could successfully find their way into our book, the materials we selected (including legal briefs, other court documents, letters, transcripts, and, of course, actual contracts and other lawyer work-product) have greatly enriched our teaching of the contracts course. The purpose of this essay is to explain how I have used the supplementary materials in the classroom and how they have enhanced students' understanding of the cases, helped spur the

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1. *See, e.g.*, RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (1978).

2. ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION (3d ed. 1997).

students' interest in the issues and better prepared students for the world of practice of contract law.

LEGAL BRIEFS

The briefs included in our materials refine and expand legal arguments mentioned by the court. Sometimes the briefs include effective legal arguments missed or ignored by the court. Of course, briefs also help teach the art of advocacy by offering a sample text to analyze and criticize.

In *Vaskie v. West American Insurance Co.*,[3] for example, West American reiterated its offer of $25,000 to settle Vaskie's tort claim against West American's insured one month before the statute of limitations was to run on the claim. West American did not expressly place a time limit on its offer. Vaskie attempted to accept the offer eight days after the statute had run.[4] The issue before the Superior Court was whether the offer had terminated because a reasonable time for acceptance had expired when the statute of limitations had run. In reversing a summary judgment in favor of Vaskie and remanding the case for a factual determination of this issue, the court was undoubtedly persuaded by West American's argument in its brief to the court:

> [A]lthough the Defendant's settlement offer did not specify a time for acceptance, the nature of the proposed settlement agreement, the purposes of the parties thereto, and the relevant usages of trade all dictate that [Plaintiff] could not have reasonably expected that the settlement offer would be held open after the expiration of the Statute of Limitations, unless a timely action for Plaintiff's personal injuries had been commenced.[5]

Hardly a revelation, the insurance company's argument nonetheless lends credence to the kind of question I often ask in analyzing opinions: what arguments would the student make if he or she could appeal the decision? Students see that in law practice they will be called upon to take positions much like those we discuss in class.

A more telling point was made in defendant's brief to the Appellate Court of Illinois in *Forman v. Benson*.[6] Forman sought specific performance of Benson's agreement to sell certain land. The contract included a term that conditioned the sale on "seller's approving buyer's credit report."[7] Benson claimed that he was not satisfied with the report, which showed liabilities of $80,000 and "liquid assets" of $24,000. In addition, Forman's corporate tax return revealed a $2000 loss for the previous year. Notwithstanding Forman's dubious financial standing and the court's recognition that Benson's

3. 556 A.2d 436 (Pa. Super. Ct. 1989).
4. *Id.* at 437.
5. SUMMERS & HILLMAN, *supra* note 2, at 443.
6. 446 N.E.2d 535 (Ill. App. Ct. 1983).
7. *Id.* at 537.

satisfaction with the credit report should be tested subjectively, the court held that Benson acted in bad faith in attempting to renegotiate a higher price.[8] The court concluded that "while [Benson] may have had a basis in his personal judgment for rejecting plaintiff's credit . . . his attempted renegotiation demonstrates that his rejection was based on reasons other than plaintiff's credit rating and was, therefore, in bad faith."[9]

The court apparently ignored an important point in Benson's brief, in which he argued that Benson was fully justified in seeking a higher price in light of Benson's greater-than-anticipated credit risk:

> The obvious innocent interpretation of any discussion of change in price or rates is that the Defendant saw a greater risk than anticipated and wished to have a greater return for that risk. There is no evidence of duplicity on the part of the Defendant, although the inference is attempted to be made by the Plaintiff. In any event it is clear from the facts that the seller sought additional financial information and examined it at length before rejecting the buyer's credit. Discussions regarding additional compensation, if any took place, would not necessarily suggest that the Defendant had approved the credit but wanted more money.[10]

Notwithstanding the important substantive point made by Benson in the brief, the brief is not, of course, a model of effective advocacy. In fact, it is difficult to imagine a more ambivalent presentation of the point that Benson was fully justified in rejecting the credit report and asking for a higher price ("the obvious innocent interpretation"; "would not necessarily suggest"). I point out that language in a brief that demonstrates the author's own uncertainty will rarely persuade a court. This leads to a discussion of why Benson's lawyer chose to use such language. Here we surmise that the lawyer simply was ineffective or, perhaps, the lawyer actually believed that Benson was in bad faith. A letter Benson's lawyer wrote him after the court's decision, which advised Benson to settle the case because Benson's "chances for success [were] not substantial," reinforces the latter conclusion.[11]

8. *Id*. at 540.

9. *Id*.

10. SUMMERS & HILLMAN, *supra* note 2, at 787.

11. *Id*. The Summers's and Hillman's casebook also includes *Lenawee County Bd. of Health v. Messerly*, 331 N.W.2d 203 (Mich. 1982), which held that the purchasers of real property agreed to accept the risk of latent defects by virtue of the following clause: "Purchaser has examined this property and agrees to accept same in its present condition." *Id*. at 205. But the purchasers' brief, set forth after the case, asserted a point often missed by the class: The purchasers may have agreed to accept the risk only of "conditions that would have been revealed by reasonable inspection." SUMMERS & HILLMAN, *supra* note 2, at 907.

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OTHER COURT DOCUMENTS

Our casebook begins by setting forth materials tracing the dispute in *White v. Benkowski*[12] from beginning to end. The parties entered into a simple contract for the Benkowskis to supply water to the Whites' home through a well on the Benkowskis' property. After the parties' relationship deteriorated, the Whites claimed that the Benkowskis maliciously withheld water from them. The Whites then brought a lawsuit against the Benkowskis that culminated in a decision of the Wisconsin Supreme Court mostly adverse to the Whites. We present most of the supporting court documents in the case, including the complaint, answer, excerpts from the trial judge's charge to the jury, excerpts from and a synopsis of the trial transcript, the special verdict and excerpts from the trial judge's decision with respect to motions after the verdict. Among other things, students learn about the requisites of a complaint and answer in contractual matters, the division of labor between the judge and jury, the methods for reviewing jury verdicts, and, perhaps most importantly, how cases arrive at appellate courts. This background better prepares students to understand the procedural posture of cases that follow and to isolate legal issues that are the subject of review.

The record in *White v. Benkowski* also helps acquaint students with the sometimes-concealed realities of litigation. For example, students learn about the nature of judging, the shortcomings of some judges and the role and importance of appellate courts. Remarkably, the trial judge made several rulings with respect to the availability of punitive damages in contracts cases, all of them incorrect. First, he charged the jury that the Whites could recover punitive damages on a *contract theory* when the breach was malicious.[13] Next, he submitted a special verdict form to the jury allowing for punitive damages. Finally, the judge reversed himself in deciding a motion after the verdict and held that punitive damages, although in his view generally available for malicious breach of contract, were not awardable to the Whites because they proved only nominal damages.[14] The Wisconsin Supreme Court affirmed the denial of punitive damages, but on the ground that punitive damages cannot be awarded in a contracts case under any circumstances.[15] Adding insult to injury, the court referred to the "overwhelming weight of authority" to this effect.[16]

Although I stress that lawyers do not always confront poorly informed or headstrong judges, students learn from the outset that judges are not

12. 155 N.W.2d 74 (Wis. 1967).
13. SUMMERS & HILLMAN, *supra* note 2, at 22.
14. *Id*.
15. *White*, 155 N.W.2d at 77.
16. *Id*.

automatons that apply the law to a set of facts and spit out correct resolutions. In fact, sometime they do not even apply the appropriate rule!

The record in *White v. Benkowski* also exposes the complexities of contract breakdown and what lawyers can and cannot do to avert disputes. For example, the agreement in the case broke down partially because of a dispute over water usage. The agreement was not drafted by lawyers and we discuss how lawyers could have drafted language pertaining to water usage that might have helped to avoid the dispute. On the other hand, the trial transcript reveals that the parties simply could not get along, a matter almost completely missing from the court's report of the facts.[17] The nature of the parties' quarreling captures the students' imagination, increases their interest in the case and alerts them to the special challenges of a planning lawyer:

> Gwynneth [White] testified that the relationship of the families was good until . . . the Whites' daughter picked an apple in the Benkowskis' yard. Ruth Benkowski then called the daughter an "S.O.B." Gwynneth told Ruth that "she didn't like this." Later, Ruth called Gwynneth "a redheaded bitch." Virgil White stated that Paul Benkowski lodged a complaint with Virgil's superior that Virgil had tried to run over Paul's child. The district attorney's investigation absolved Virgil. Paul Benkowski also complained to the police chief that Virgil . . . had wild parties at home. Virgil was again absolved of any wrongdoing.[18]

We include various court documents from cases other than *White v. Benkowski* as well. For example, we include excerpts from the deposition of the insured Vaskie's lawyer in the *Vaskie* case. Recall that Vaskie sought to accept an offer of settlement from West American after the statute of limitations had run. Quite dramatically, the deposition reveals a lawyer attempting to fight off insinuations of malpractice from West American for failing to advise Vaskie to accept the settlement offer before the statute of limitations had run. The air of reality and the stakes for the lawyer rivet the attention of students to the facts and legal issues in the case.[19]

LETTERS FROM LAWYERS

We include lots of letters from the litigating lawyers in cases in our book. Some of the most interesting are cover letters written to us in response to our request for materials. These letters often include additional details and insights

17. The court reports only that the parties relationship had "deteriorated." *Id.* at 75.

18. SUMMERS & HILLMAN, *supra* note 2, at 17.

19. We also include excerpts from the defendant's amended findings of fact and conclusions of law in Baker v. Bailey, 782 P.2d 1286 (Mont. 1989), which illustrate a role of litigating lawyers, often hidden from the students, namely that lawyers prepare what they believe should be the court's findings of fact and legal conclusions and that judges can pick and choose from these offerings.

about the cases. For example, West American's lawyer in the *Vaskie* case wrote to tell us that the case was settled for "$15,000, in compromise of the full claim of $25,000."[20] The letter also revealed that Vaskie's lawyer, who was also her cousin, paid the difference to her (suggesting, of course, the questionable representation offered by the lawyer). Further, the letter shows how rules emanating from cases influence lawyers' advice to clients:

> We have since advised West American and a number of our other insurance company clients that they should set a definite date when their settle-offers would expire, rather than leaving them open-ended, as was the case in the instant matter.[21]

In *Hield v. Thyberg,*[22] the court allowed purchaser Hield to introduce evidence that the parties intended the $15,000 purchase price of a half-interest in a corporation to mean "$15,000 cash at closing and $35,000 in a promissory note."[23] The following letter from Thyberg's attorney cannot help but reinforce students' suspicion about the leakiness of the parol evidence rule:

> As a result of this case, we have concluded that virtually no written contract is safe from attack regardless of the clarity of its wording. It appears that anyone wishing to escape the consequences of a written contract can get to the jury with an argument that there was a parol agreement for something which is directly at variance with the terms of the written contract since it does not seem difficult to be able to show some latent ambiguity or lack of integration.[24]

Noroski v. Fallet[25] involved whether Noroski agreed to $754.40 as the full settlement of his claim resulting from injuries sustained in an automobile accident. Noroski had agreed to that amount during the following telephone conversation with the defendant's insurance company: "Do you agree that the draft I will be sending you in the total amount of $754.40 is the full and complete settlement for your bodily injuries as well as the property damage resulting from this accident? A. Yes."[26] The court held that the conversation did not constitute a release because Noroski did not understand that it constituted a release of future as well as present claims.[27] Drawing on this case, Fallet's lawyer's letter to us emphasized the uncertainties of litigation and contained an additional insight for students:

> What strikes me as being of particular significance in this case and which is difficult for laymen to comprehend, is that a total of eleven judges reviewed

20. SUMMERS & HILLMAN, *supra* note 2, at 444.
21. *Id*.
22. 347 N.W.2d 503 (Minn. 1984).
23. *Id*. at 505.
24. SUMMERS & HILLMAN, *supra* note 2, at 698-99.
25. 442 N.E.2d 1302 (Ohio 1982).
26. *Id*. at 1304.
27. *Id*.

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> the evidence in this case [in the trial and appellate courts]. Presumably, all are applying the same legal principles to the same set of facts. Yet, seven of the judges felt there was a valid and binding release which terminated the plaintiff's ability to further prosecute a personal injury claim against the defendant. A minority of four of the judges, who unfortunately for my client, comprised the majority of the seven Ohio Supreme Court justices, felt there was no contract whatsoever because there was no meeting of the minds.

Thus, this case is a good object lesson to clients as to the uncertainties of litigation (as well as perhaps providing comfort to law students who felt that *their* examination answers were also correct).[28]

Other letters in our book come from the files of the case, such as communications to opposing counsel or to clients. For an example of the latter, consider the letter referred to earlier written by Benson's lawyer to his client, which advised Benson to settle the case because his "chances for success [were] not substantial."[29] The letter illustrates how lawyers advise clients, allows for a critique of these methods, and, as pointed out earlier, offers an explanation for why a lawyer pursued a particular strategy in a case.

DOCUMENTS FROM PRACTICE

Our book includes documents from practice such as contracts or terms (both business and personal), assignments and deeds. To acquaint students with real-world drafting issues, I ask them to evaluate whether these documents achieved their purposes. For example, the contract in *Lewis v. Carnaggio*[30] is particularly helpful in demonstrating the crucial importance of clear drafting, including the need for correct grammar. In that case, the party's placement of one comma determined the outcome of their litigation.[31]

The actual contract in *White v. Benkowski,* drawn by a real estate broker using a form book, sheds light on several aspects of contract practice. For example, students, who study the White and Benkowski contract on the first day of class, are struck by the truth that this document, created by the parties in order to achieve their goals, constitutes law that is "just as effective a means of creating or transferring rights . . . as the most solemn enactments of a legislature."[32] In addition, students begin to think about parties' motives for entering contracts, the importance of allocating risks and the efficiency of contract. Perhaps most important, by focusing on the actual contract, the teacher can present one important framework for analyzing the rest of the cases

28. SUMMERS & HILLMAN, *supra* note 2, at 911.
29. *Id*. at 787.
30. 183 S.E.2d 899 (S.C. 1971).
31. SUMMERS & HILLMAN, *supra* note 2, at 724.
32. David Cavers, *Legal Education and Lawyer-Made Law*, 54 W. VA. L. REV. 177, 179 (1952), *quoted in* SUMMERS & HILLMAN, *supra* note 2, at 4.

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in the book, namely the planning lawyer perspective. For example, why did this contract fail to protect the parties from litigation? What should the contract have contained that might have helped the parties to avoid breakdown? Would a lawyer, who is trained to plan and draft contracts, have produced a more adequate contract?

This last question is not meant to instigate a discussion that is merely propaganda for the legal industry. I also ask why the parties did not hire a lawyer, which leads to a nice discussion of the cost of legal advice, the potential for lawyers to upset the deal and the tendency of many parties to prefer informal relations.[33]

CONCLUSION

This essay stresses the pedagogical utility of supplementing case reports with supporting materials. I do not mean to suggest that the strategies discussed herein constitute the most important aspect of a contract law course or even that they are essential. However, they do enrich the contracts course.

The discussion above focuses on the use of supplementary materials to enrich students' understanding of the practice of contract law, but I want to close by pointing out that the materials contribute to an understanding of the theoretical as well. For example, the study of actual contracts helps demonstrate that law consists of more than enactments of officials in power.[34] The comments of the lawyers in *Hield v. Thyberg* and *Noroski v. Fallet*[35] highlight the relative indeterminacy of at least some legal rules and the similarities between rules and standards, as they are expanded or narrowed respectively by judicial interpretation and application. Benson's brief sheds light on the meaning of good faith.[36] The brief and letters in *Vaskie v. West American Insurance Co*.[37] emphasize how parties bargain "in the shadow" of contract law. No doubt the teacher employing supplementary materials can find numerous other uses of such materials to illuminate both the practice and theory of contract law.

33. I call the latter two points the "Rollie" principle, in light of the following revealing quotation from Rollie Massimino, a former head coach of Villanova University's basketball team, who explained why he declined an offer from the New Jersey Nets: "The Nets were very professional in all their dealings. We had some twenty telephone conversations and about five face-to-face meetings. Everything was agreed on verbally and then the lawyers took over with their legalese and there were snags." SUMMERS & HILLMAN, *supra* note 2, at 8, *quoting* ITHACA JOURNAL, June 26, 1985, at 16.

34. *But see* J. AUSTIN, I LECTURES ON JURISPRUDENCE 180-85, 225-26 (4th ed. 1873), *discussed in* SUMMERS & HILLMAN, *supra* note 2, at 7.

35. *See supra* notes 18-23 and accompanying text.

36. *See supra* notes 5-10 and accompanying text.

37. *See supra* notes 3-4, 15 and accompanying text.