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Book Review- United States Contract Law

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UNITED STATES CONTRACT LAW. By E.
ALLAN FARNSWORTH, Transnational Juris Publications, Inc.,

Reviewed by J. Clark Kelso.*

E. Allan Farnsworth, the Alfred McCormack Professor of Law at Columbia University, is one of our foremost scholars, and certainly the preeminent authority, on the law of contracts in the United States. He was the Reporter for much of the Restatement (Second) on Contracts;¹ he is a co-author of one of the most widely used casebooks on contracts;² and he is the author of what many consider to be the leading treatise on the law of contracts.³ Professor Farnsworth is also known to the international legal community through his work on various United Nations commissions, most notably his representation of the United States during the UNCITRAL negotiations leading to the Convention on Contracts for the International Sales of Goods.⁴ He currently is serving as a member of the Rome Institute on the Unification of Private Law (UNIDROIT).

His most recent book, United States Contract Law, is a relatively quick read at only 185 pages. Within those relatively few pages, Professor Farnsworth has compressed the law of contracts down to its bare essentials. Many details and refinements have been left out along the way, of course, but the book gives anyone unfamiliar with U.S. contract law an excellent first step towards understanding. Particularly helpful are Farnsworth’s illustrations of basic principles of contract law through the use of easy-to-follow-and-understand hypothetical contract situations.

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1. Professor Robert Braucher was Reporter for chapters 1-5, part of chapter 9, and chapters 13-15. Upon his appointment to the bench in 1971, Professor Farnsworth was appointed as Reporter, and he drafted chapters 6-8, the remainder of chapter 9, chapters 10-12, and chapter 16.

335
Farnsworth's prior books have been written for a relatively specific audience. His casebook is for U.S. law students, and his treatise is for U.S. law students and U.S. practitioners. United States Contract Law has been written for a very different audience. The book is not detailed enough for a U.S. law student, and it lacks the exhaustive citations to cases and statutory provisions that practitioners look for in a useful treatise. This book's audience is not the expert or soon-to-be expert on United States contract law; rather, the book is for the nonexpert, someone who needs or wants to know a little about U.S. contract law, but who does not need or want to develop an expertise in the subject. It is a good guess that Farnsworth wrote the book with an international audience in mind, and that he thinks the book can profitably be used by foreign lawyers and businesspersons. The book would also be good reading for a course on comparative contract law.

The first three chapters of the book set the stage for the remaining six chapters. Chapter One explores the general concept of what it means to have and enforce a contract. Chapter Two sets forth the English common-law heritage of U.S. contract law, a history that helps to explain some of the details of U.S. law. Chapter Three describes the legal sources of U.S. contract law (e.g., decisions by courts and certain statutes), and identifies some of the more important secondary sources which may be consulted for comprehensive explanations of U.S. contract law (such as the Restatement (Second) of Contracts). These introductory chapters take 68 of the book's 185 pages (37% of the book). The remaining 117 pages are devoted to substantive aspects of contract law and follow the typical pattern of contract topics: contract formation, policing the agreement, contract interpretation, performance, excuse, and remedies.

Finding fault with any of Farnsworth's writings is difficult because his mastery of the subject matter and his ability to

5. A little guesswork is necessary in determining the book's intended audience because Farnsworth does not identify his audience in the Preface, and the publisher does not identify the intended audience on the jacket cover.

6. Not surprisingly, this is the same order of subjects found in the RESTATEMENT (SECOND) OF CONTRACTS.
communicate it effectively are so extraordinary. I do find fault in United States Contract Law, however, because of its preoccupation with the bargained-for exchange, as virtually the sole paradigm of contracting practices, and the sole basis for many of the rules of contract law. The emphasis on the exchange begins early. In the second paragraph of chapter One, Farnsworth says that the law of contracts is "concerned primarily with exchanges because courts in the United States, as in other common law countries, have generally been unwilling to enforce a promise unless the promisee has given the promisor something in return for it." The enforcement of mutual promises for a future exchange becomes, for Farnsworth, the central focus of the law of contracts.

The preoccupation with the bargained-for exchange leads Farnsworth to neglect the other principal basis for enforcement of contracts, the doctrine of promissory estoppel. The sentence quoted above from chapter One is technically accurate because Farnsworth claims only that U.S. courts have "generally" been unwilling to enforce promises in the absence of a bargained-for exchange. The word "generally" will indicate, to one familiar with U.S. contract law, that there are indeed situations in which courts will enforce promises absent bargained-for exchanges. To the nonexpert, however, the word "generally" will not set off any alarm bells; the nonexpert is likely to believe, incorrectly, that the bargained-for exchange is the sole basis for enforcement of contracts.

No one would contend that promissory estoppel and the reliance-based contract has the same practical importance as the bargained-for exchange, especially in the world of commercial and international transactions. But it is difficult fully to appreciate the flexibility of U.S. contract law and the resourcefulness of common law courts without having a full appreciation of promissory estoppel. The tension between a requirement of bargained-for exchanges and the doctrine of promissory estoppel (which does not require a bargained-for exchange) simply cannot be swept under the rug.

Farnsworth does not entirely neglect promissory estoppel, of course, but his references to it are generally buried near the end of various sections and speak of promissory estoppel in somewhat negative terms. It is surprising, for example, that the very first reference to promissory estoppel and justifiable reliance as a basis for enforcing contracts appears on page 56 of the book, and even then only in the middle of a discussion about whether provisions of the Restatement (Second) on Contracts should go beyond existing precedent. In this reference, Farnsworth characterizes section 90 of the Restatement (which contains the principle of promissory estoppel) as a "departure from precedent" and a "creative formulation."

Farnsworth later protests that section 90 set forth a rule "in terms generally applicable to all promises" even though the principle contained in section 90 had been applied in only "a few categories of cases." He concludes that "Section 90 was the first contract Restatement's most significant departure from its stated policy of following precedents."

It would have come as a surprise to Professor Corbin, who most forcefully advocated for the inclusion of section 90 in the Restatement, that section 90 was a departure from the precedents. To the contrary, Corbin's most potent argument for its inclusion was that there were hundreds or thousands of cases, the results of which could not be explained solely by reference to the doctrine of consideration and the bargained-for exchange, and which could be explained only by reference to the promissory estoppel principle. The story is most engagingly told in Grant Gilmore's classic work, *The Death of Contract.*

Professor Farnsworth would no doubt respond to this criticism by pointing out that the cases Corbin cited fell into only a "few categories," and that the problem with section 90 was not the principle of promissory estoppel, but was the failure to limit the application of section 90 to the few categories of cases which had

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8. *Id.* at 56.
9. *Id.* at 75.
10. *Id.*
11. *Id.* at 75.
actually applied the doctrine. Whatever the merits of this argument, a more complete explanation of the theoretic dispute, and a greater recognition of the importance of section 90 in the development of U.S. contract law, would have been welcomed by this reader.

Apart from this one criticism, the book’s treatment of the substantive law provides a good, if somewhat brief, introduction to U.S. contract law. *United States Contract Law* is a good investment for anyone who wants, or needs, to develop a limited understanding of U.S. contract law and who does not have a year of study to devote to the project.

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12. Section 90 does not by its terms suggest that it should be applied to all cases. Instead, it provides that a promise which induces reasonable reliance will be enforceable only “if injustice can be avoided.” Restatement (Second) of Contracts § 90. Farnsworth’s complaint thus comes down to the failure of section 90 to identify specifically the categories of contracts to which it applies. But such a specific listing would have been contrary to the spirit of the Restatement project, which was intended to produce volumes containing “statements of general principle . . . .” Farnsworth, supra note 7, at 54-55 (emphasis added).