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LAW IN ACTION**

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Contracts: Law in Action

Third Edition

Volume I

The Introductory Course

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MATTHEW  BENDER

PREFACE TO THE THIRD EDITION

In this edition we continue the philosophy and coverage of the first two editions. We are republishing the preface to the second edition, in which that philosophy is described. It has been seven years since the second edition was published, and there have been major developments in several areas. This edition brings up to date our account of the developing law with respect to employment-at-will and enforceability of consumer arbitration agreements. We have also made a number of changes in the nature of improvements, replacing some of the cases with what we think are better teaching cases. But we have endeavored to limit our changes. Teachers accustomed to using these materials will find most or all of their old favorites still here.

The two most important changes deserve special mention. First, we have brought aboard Professor Jean Braucher of the University of Arizona as an editor. These materials have been known as the Wisconsin Contracts Materials in many circles, and they may continue to be so described. In keeping with the Wisconsin connection, Professor Braucher has accepted an appointment as a Fellow in the Institute of Legal Studies at the University of Wisconsin Law School. Professor Braucher has been a longtime user of these materials as well as a regular participant in the occasional contracts conferences at Wisconsin (funded in part by royalties from this book). She fits right in while at the same bringing a new perspective.

A second important change has been the delinking of the book from Richard Danzig's *The Capability Problem in Contract Law* (now co-edited with Geoffrey Watson). We owe a great intellectual debt to Richard Danzig, which we have frequently acknowledged and will continue to do. In ceasing to make many explicit references in our text to his *Capability Problem* book, we do not mean to express any dissatisfaction with that book. We also do not mean to express any lessening of our commitment to the importance of contextualizing cases in the study of law in the first year.¹ However, Danzig's pathbreaking book now has a respected competitor,² and an increasing number of law review articles contextualize important cases. We want to make it easy to let the teacher decide how to supplement these materials with thick descriptions of particular cases.

Among the other changes, there has been a decision to discontinue the one-volume hardcover edition of these materials. The two-volume edition has proved much more popular. We suggest that users of these materials who have grown accustomed to the one-volume edition contact Professor Jean Braucher at the University of Arizona for suggestions about how to adapt the two-volume edition to the course that you have traditionally taught.

Revisions to the Uniform Commercial Code have not prompted major changes in this edition. Revised Article 1 has been widely adopted, and we have updated cites to the revised version, but the sections discussed have not changed in substance. Amended

¹ We continue to contextualize many cases in the materials themselves, and in some respects we have added to our own contextualizations. An important example is contained in the Notes and Questions following *Hoffman v. Red Owl Stores*.

² DOUGLAS BAIRD, *CONTRACTS STORIES* (Foundation Press 2007).

PREFACE TO THE THIRD EDITION

Article 2 has not been enacted anywhere as of early 2010, so the interest in it is largely among scholars. Its provisions could be used as persuasive authority even without any enactments, but courts do not seem to be adopting that approach. Our Article 2 citations are to the existing statute. For discussion purposes, we have a few references to several interesting changes in the amended version.

As in previous editions, the cases have been edited to make them easier to read. We have used ellipses whenever substantive text has been omitted from the body of an opinion, but some case citations and many footnotes have been omitted without indication. The footnote numbers in our text do not match the footnote numbers in the cases, since we number our footnotes sequentially by chapter. When we reproduce footnotes from cases, we have indicated the original footnote number by putting it in brackets ([]). When we have added our own footnote to a case, it is indicated by an “Eds. note,” also in brackets.

As always, the most useful advice we receive in preparing a new edition comes from other law professors who have adopted the casebook. To facilitate that process, in preparing for this revision we invited all adopters of this casebook, and a few others, to a contracts conference at the University of Wisconsin Law School in February 2007. We have received much useful advice, both at the conference and at other times. We thank all. We also continue to receive useful advice from the many students we teach each year. In the preparation of this edition, we have enjoyed the extraordinarily useful assistance of Ellen Vinz (J.D., Wisconsin, 2011), who worked as a professional copyeditor before deciding on law. The reduced number of typographical glitches and the greater consistency in citations that we expect you will find are largely due to her efforts.

Stewart Macaulay
Jean Braucher
John Kidwell
William Whitford
June 1, 2010

PREFACE TO THE SECOND EDITION

We revised our book for a number of reasons. Most importantly, our original book and this revision reject the idea that contract law is no more than a small collection of timeless principles. Contracts problems change as the society changes. Corporate lawyers also have been busy, seeking ways to use the form of contract to ward off liability to employees and consumers. Fashions in scholarly work reflect changes in the academy as we move through cycles of classical contract; realist judging in the grand style; dedication to the consumer movement; reductionist pursuits of efficiency, default rules, and formalism; and, perhaps, the coming new realism that reflects a law and society perspective. We have reviewed the entire book to see where we should reflect these changes and new developments, but the major effort has been devoted to bringing up to date our materials on such matters as unconscionability, form contracts printed in fine print or hidden in other ways (particularly in the area of computer programs), and the growing uses of arbitration to repeal the reform statutes of earlier decades. These are the interesting and important matters coming before the courts when this revision was prepared, and we expect these topics to have a fairly long shelf life.

At the same time, those who have used *Contracts: Law in Action* in the past will find much of the book unchanged or only slightly modified. After teaching *Contracts: Law in Action* and earlier photocopied versions for about 20 years, the authors think that the book works. Moreover, it has worked for instructors who emphasize very different approaches in their teaching. The original book and the revision both take the “Law in Action” part of the title seriously. Putting contract problems in context makes the course both more theoretical and more practical at the same time. Whatever a person’s theoretical outlook, there is a high price to be paid if he or she forgets such things as that law is not free; most disputes end in settlement; crafting nice-sounding legal standards is one thing but finding evidence to establish a cause of action is another; and that all institutions, including the market, are flawed. American contract law is messy and often contradictory. Even when the form of the rules stay more or less the same, their application varies from court to court over time. Yet the flaws in our contract law have not blocked great economic progress or caused recessions. We quote Wittgenstein near the beginning of the course: “Is it even always an advantage to replace an indistinct picture by a sharp one? Isn’t the indistinct one often exactly what we need?” At the very least, the answer to this question cannot just be assumed away. We also have been pleased to discover that many of our former students find that our course prepares them to hit the ground running when they begin practice. We have tried to focus on live contracts problems that our students will face when they become lawyers.

We are heavily in debt to contracts teachers at schools other than Wisconsin who have used *CLA*. We have had an e-mail list for those interested in the book. Our friends at other schools have contributed ideas and suggestions, and they have asked us to explain why we did certain things. Sometimes we have been able to explain choices we made long ago, and when we could not we rethought what we had done. We have learned a great deal from these friends. While we risk leaving out people who deserve mention, we wish to thank particularly Tom Russell, Tom Stipanowich, Bill Woodward, Sandy

PREFACE TO THE SECOND EDITION

Meiklejohn, Alan Hunt, Jean Braucher, Peter Linzer, and Carolyn Brown. In addition, we staged a conference in the fall of 2001. We gathered many who had used the book and other friends whose contributions we wanted to hear. The papers were later published in 2001 *Wisconsin Law Review* 525-1006. The papers, discussions, and final articles helped us in the revision process.

The authors are not the only people at Wisconsin who have taught from the book. We have a small-group program in which each first-year student gets one class of around 20 students, and Contracts 1 often has been that class. This means that we have many contracts teachers at Wisconsin. Those teaching the course have met for lunch once a week during the semester. The authors have been challenged by the experiences and questions of their colleagues. In addition to Joe Thome, who was thanked in our original preface and who continued to teach from the materials until recently, we should acknowledge the many contributions of Kathryn Hendley, Lawrence Bugge, Gordon Smith, and Lori Ringhand (now at the University of Kentucky Law School). Lori was a beginning law teacher when she joined us, and she helped us rewrite the employment-at-will material and paid particular attention to the teaching notes that we have made available to those who use the book. She has revised them, pulling together the one set created by John Kidwell and the other by Stewart Macaulay. Our colleague Marc Galanter decided not to participate in the second edition of *Contracts: Law in Action*. He has not taught contracts for some time. However, he did present a paper at our 2001 contracts conference, and the revision still reflects his many contributions to the original version of the book. Also, Nicole Denow (J.D., Wisconsin, 2001) was a talented and hard-working research assistant in the revision of the materials dealing with policing contracts, and Nora Kersten (J.D., Wisconsin, 2002) did many memos that were helpful in expanding some of the notes, or in verifying that no changes were required.

We also owe a debt to the thousands of law students who have worked their way through *Contracts: Law in Action* and its photocopied predecessors. For example, Donovan Bezer, then a student at Rutgers Law School, sent us his reactions, which we found provocative. Other students have known one or more of the parties who appear in the cases in the book, or they have known much about the kinds of transactions involved. We have been reassured that the book has prompted students to see the hard choices lurking behind what seem to be the simple rules of contract law.

Americans, of course, always want to have their cake and eat it too. One student, who identified herself as a liberal, sent us an e-mail saying, “This class has put me in touch with my inner Republican, and I am not sure that I like *him*.” Students have also reminded us that most of them are twenty-something, and what we see as things “everyone knows” are but ancient history to them. Students stay about the same age while authors age. Thus, we have tried to change examples so that they will not date too fast and explain a little about such “commonplace things” as the Vietnam conflict, OPEC, the consumer movement, and other manifestations of pre-Reagan politics — as well as what were ice houses, dial telephones, and typewriters. While we find it hard to believe, many of our students have never heard of Shirley MacLaine, Lee Marvin, or Bette Davis. We, on the other hand, are not great followers of River Phoenix. All of these stars, of course, play the parts of litigants in contracts cases.

During the past decade or so, the National Conference of Commissioners on Uniform State Law and the American Law Institute have attempted to revise Article 2 of the Uniform Commercial Code. We debated what to do with the proposed revisions. Then

PREFACE TO THE SECOND EDITION

our friend Richard Speidel found the process intolerable and felt that he had to resign as the Reporter after twelve years of work. At the time this is being written, it seems unlikely that there will be ambitious changes to Article 2, with the possible exception of the addition of a highly controversial separate statute dealing with computer-related transactions. There is a risk that states may end up moving in the direction of creating “Un-Uniform Commercial Codes.” As a result, we decided not to include material on the proposed revisions. Instructors, of course, may want to offer their classes particular proposals as a way to raise policy questions about the current law. However, we think that it is hard enough finding your way around Article 2 without having to navigate two or more versions.

TABLE OF CONTENTS

Chapter 1	INTRODUCTION	1
A.	OVERVIEW OF LAW IN ACTION	1
B.	STUDYING LAW: WHAT AM I HERE FOR?	2
1.	Classical Legal Education	2
2.	Criticism of Classical Legal Thought: Other Perspectives	6
3.	Law School Examinations	12
C.	CONTRACTS COURSES	15
1.	The Goals of the Law in Action Approach to the Contracts Course	15
2.	The Law in Action Course in Historical Perspective	19
3.	Law in Action — Building on this History	25
Chapter 2	REMEDIES FOR BREACH OF CONTRACT	31
A.	PROTECTING THE EXPECTATION INTEREST	31
1.	A Long, But Necessary, Digression: Of Two Codes, Reading Statutes, and the Application of Article 2 of the Uniform Commercial Code	32
	Robert Braucher, <i>Legislative History of the Uniform Commercial Code</i>	35
	Richard E. Speidel, <i>Introduction to Symposium on Proposed Revised Article 2</i>	39
	Jean Braucher, <i>New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products</i>	41
	Ludwig Wittgenstein, <i>Philosophical Investigations</i>	48
2.	The Expectation Interest: The Substitute Contract as the Preferred Means to the End	49
B.	THE EXPECTATION INTEREST: OF INFERIOR SUBSTITUTES, OTHER ENDS, AND OTHER MEANS	50
	<i>Parker v. Twentieth Century-Fox Film Corporation</i>	51
	NOTES AND QUESTIONS	57
	<i>Neri v. Retail Marine Corporation</i>	65
	NOTES AND QUESTIONS	68
	<i>In Re Worldcom (Jordan v. Worldcom)</i>	77
	NOTES AND QUESTIONS	86
C.	THE EXPECTATION INTEREST: PERFORMANCE RATHER THAN DAMAGES	89
	<i>Copylease Corporation of America v. Memorex Corporation</i>	89
	NOTES AND QUESTIONS	91
D.	THE EXPECTATION INTEREST: BREACH DETERRENCE VERSUS LIQUIDATED DAMAGES	100

TABLE OF CONTENTS

	<i>Lake River Corporation v. Carborundum Company</i>	100
	NOTES AND QUESTIONS	106
E.	THE EXPECTATION INTEREST: LOST ANTICIPATED PROFITS AND CONSEQUENTIAL DAMAGES	113
1.	The Foreseeability Test	113
	<i>Hadley v. Baxendale</i>	113
	NOTES AND QUESTIONS	115
2.	Proof of Damages with Reasonable Certainty: Of New Businesses and Experts	119
	<i>Evergreen Amusement Corporation v. Milstead</i>	120
	NOTES AND QUESTIONS	122
	<i>Chung v. Kaonohi Center Co.</i>	123
	NOTES AND QUESTIONS	130
F.	THE EXPECTATION INTEREST: SOME CONCLUDING PERSPECTIVES	133
1.	Should the Expectation Interest Be Always Fully Protected?	133
	David Campbell & Hugh Collins, <i>Discovering the Implicit Dimensions of Contracts</i>	133
	NOTES AND QUESTIONS	135
2.	Does It Make Any Difference Whether We Protect the Expectation Interest?	136
	Karl N. Llewellyn, <i>What Price Contract? — An Essay in Perspective</i>	137
	Stewart Macaulay, <i>The Use and Non-Use of Contracts in the Manufacturing Industry</i>	138
G.	THE RELIANCE INTEREST	139
	<i>Security Stove & Manufacturing Co. v. American Railways Express Co.</i>	141
	NOTES AND QUESTIONS	146
	<i>L. Albert & Son v. Armstrong Rubber Co.</i>	148
	NOTES AND QUESTIONS	152
H.	RESTITUTION AND EXIT AS ALTERNATIVE CONTRACT REMEDIES	155
1.	Introduction	155
2.	Walking Away From a Deal: Exit and Restitution	156
a.	Sales of Goods	156
	Bertell Ollman, <i>Class Struggle is the Name of the Game: True Confessions of a Marxist Businessman</i>	157
	NOTES AND QUESTIONS	160
	<i>Colonial Dodge, Inc. v. Miller</i>	162
	NOTES AND QUESTIONS	166
	<i>Colonial Dodge, Inc. v. Miller</i>	166

TABLE OF CONTENTS

	NOTES AND QUESTIONS	170
b.	Substantial Performance in Building Contracts	172
3.	Restitution as an Alternative Remedy for Breach of Contract	174
a.	The Remedy and its Impact	174
	<i>Oliver v. Campbell</i>	175
	NOTES AND QUESTIONS	180
b.	Difficulties with Restitution as a Remedy for Breach of Contract in Building Contracts	183
	NOTES AND QUESTIONS	184
I.	RESTITUTION FOR THE PLAINTIFF IN DEFAULT	188
	<i>De Leon v. Aldrete</i>	189
	NOTES AND QUESTIONS	193
J.	MEASURING DAMAGES FOR SUBJECTIVE LOSSES	195
	<i>Peevyhouse v. Garland Coal & Mining Company</i>	196
	NOTES AND QUESTIONS	203
	<i>Hawkins v. McGee</i>	210
	NOTES AND QUESTIONS	213
	<i>Sullivan v. Connor</i>	219
	NOTES AND QUESTIONS	224
K.	SOME REVIEW PROBLEMS	224
Chapter 3		CONTRACT AND CONTINUING RELATIONS 229
A.	INTRODUCTION	229
1.	The Vocabulary of Contract Formation	234
a.	An Introduction to the Rules of Offer-and-Acceptance	235
	<i>A Doctrinal Note — Contract Formation</i>	235
b.	Some Practice Problems	243
2.	A Policy Approach to Judicial Intervention	245
B.	CONTRACT IN THE FAMILY SETTING	246
1.	Which Promises Should the Law Enforce? Illustrations and Issues	246
a.	Courts and Contracts between Husband and Wife	247
	<i>Balfour v. Balfour</i>	247
	NOTES AND QUESTIONS	249
	<i>Mehren v. Dargan</i>	250
	NOTES AND QUESTIONS	252
b.	Marriage and Cohabitation Contracts	258
	<i>Marvin v. Marvin</i>	259
	NOTES AND QUESTIONS	269
2.	Which Promises Should the Law Enforce? — The Response of Contract Doctrine and the Role of Form	282
a.	“Bait”: Promises by a Family Member with Money to Influence the	

TABLE OF CONTENTS

	Lives of Those Without It	282
	<i>Hamer v. Sidway</i>	286
	NOTES AND QUESTIONS	289
3.	An Introduction to the Doctrine of Consideration	294
	<i>A Doctrinal Note — Consideration</i>	294
4.	The Conditional Gift Revisited	304
	<i>Kirksey v. Kirksey</i>	304
	NOTES AND QUESTIONS	305
	<i>Ricketts v. Scothorn</i>	306
	NOTES AND QUESTIONS	308
5.	The Statute of Frauds and Family “Bait” Promises	315
	NOTES AND QUESTIONS	325
6.	Family Bait: Reaching the Right Result by Manipulating Doctrines of Contract Formation	331
	<i>Davis v. Jacoby</i>	331
	NOTES AND QUESTIONS	336
7.	Contracts to Provide for the Old: Contract and Restitution as a Substitute for an Extended Family	345
8.	If Law is to Intervene, What Remedies are Appropriate?	355
a.	Reliance and the Expectation Interest in the Family Context	355
b.	Specific Performance and “Shotgun Marriages”	357
	NOTES AND QUESTIONS	359
	<i>Brackenbury v. Hodgkin</i>	360
	NOTES AND QUESTIONS	362
9.	Alternatives to Litigation in Family Matters	365
a.	Stories from Other Societies	365
b.	“Alternatives” in American Society	368
c.	Calls for New Approaches and the Practice of Law	369
i.	Calls for Mediation Rather Than Adjudication	369
ii.	Alternative Dispute Resolution and the Practice of Law	369
	Marc Galanter, <i>Worlds of Deals: Using Negotiation to Teach</i> <i>About Legal Process</i>	371
iii.	Effectiveness of Mediation	372
iv.	Compensating Care for the Old	375
C.	FRANCHISE AND EMPLOYMENT RELATIONS	376
1.	The Franchise	377
a.	Creating the Relationship	377
	<i>Hoffman v. Red Owl Stores, Inc.</i>	377
	NOTES AND QUESTIONS	386
b.	Ending the Relationship	395
	<i>Collins Drugs, Inc. v. Walgreen Co.</i>	400

TABLE OF CONTENTS

	NOTES AND QUESTIONS	411
2.	Grievance Processes Under Collective Bargaining	417
a.	Grievance Systems	418
b.	Arbitration versus Adjudication	419
	<i>In Re Trans World Airlines, Inc.</i>	419
	NOTES AND QUESTIONS	422
c.	Judicial Review of Arbitration	426
3.	Employment Relations	428
a.	Proving Employment Contracts and Gaining Meaningful Remedies	429
	<i>McIntosh v. Murphy</i>	430
	NOTES AND QUESTIONS	435
4.	Employment-at-Will	436
a.	Introduction	436
b.	Development of the At-Will Doctrine	438
c.	Attempts to Provide Meaningful Protections to Employees at Will	441
	<i>Wagenseller v. Scottsdale Memorial Hospital</i>	447
	NOTES AND QUESTIONS	457
d.	The Covenant of Good Faith Exception	464
e.	Reflecting on the Struggle Over Employment-At-Will	464
i.	Restatement § 90 to the Rescue?	466
ii.	Employment-At-Will and the Free Market	467
iii.	Employment-At-Will and the Idea of “Consent”	468
iv.	Farber and Matheson on the Employer’s Need to Build “Trust”	468
v.	Employment-At-Will as Protecting the Already-Protected	470
vi.	The Costs of Limiting the At-Will Rule	470
vii.	The American Rule(s) Contrasted with Other Industrialized Nations	471
f.	In Conclusion . . . A Hypothetical	472
D.	LONG-TERM RELATIONSHIPS IN COMMERCIAL TRANSACTIONS	474
1.	Relational Sanctions and Enforceable Contracts	474
a.	Business Views on Other-Than-Legal Sanctions	475
b.	Form Contract Provisions	477
c.	Contract Litigation and Appeals	479
	NOTES AND QUESTIONS	481
2.	Commercial Relationships and Private Governments	482
a.	Negotiation and Mediation	482
b.	Arbitration	486
	Marvin T. Fabyanske & Steven T. Halverson, <i>Arbitration: Is It an Acceptable Method of Resolving Construction and Contract Disputes?</i>	487

TABLE OF CONTENTS

Chapter 4	SOCIAL CONTROL OF FREE CONTRACT	491
A.	SOCIAL CONTROL AND THE INTERESTS OF OTHERS	493
1.	Illegal Contracts	493
a.	Introduction	493
b.	Illegality: Form and Substance	493
	<i>Carroll v. Beardon</i>	494
	NOTES AND QUESTIONS	496
c.	Comparative Fault	498
	<i>Coma Corporation v. Kansas Department of Labor</i>	499
	NOTES AND QUESTIONS	507
	<i>Karpinski v. Collins</i>	508
	NOTES AND QUESTIONS	510
2.	Contracts Against Public Policy	510
a.	Introduction	510
b.	Covenants by Employees Not to Compete	511
	<i>Fullerton Lumber Co. v. Torborg</i>	511
	NOTES AND QUESTIONS	518
B.	SOCIAL CONTROL, CONTRACT, AND CHOICE	521
1.	Introduction	521
2.	Capacity to Contract	524
a.	Mental Incapacity to Contract	525
	NOTES AND QUESTIONS	526
b.	Contracts Made Under the Influence of Drugs	529
c.	Contracts Made with Minors — Infancy	530
3.	Duress	531
a.	The Search for a Standard	531
	<i>Mitchell v. C.C. Sanitation Company, Inc.</i>	533
	NOTES AND QUESTIONS	538
b.	The Wisconsin Rule?	541
	<i>The Selmer Company v. Blakeslee-Midwest Company</i>	541
	NOTES AND QUESTIONS	544
4.	Undue Influence	551
5.	Misrepresentation	553
	<i>Obde v. Schlemeyer</i>	557
	NOTES AND QUESTIONS	560
6.	Good Faith	565
	<i>Market Street Associates v. Frey</i>	565
	NOTES AND QUESTIONS	572
7.	Most of the Theories at Once: A Review	574
	<i>Vokes v. Arthur Murray, Inc.</i>	574
	NOTES AND QUESTIONS	578

TABLE OF CONTENTS

C.	SOCIAL CONTROL IN THE GUISE OF SEEKING CHOICE: CHOICE AND FORM CONTRACTS	583
	Stewart Macaulay, <i>Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts, and Credit Cards</i>	583
	<i>McCutcheon v. David MacBrayne Ltd.</i>	583
	NOTES AND QUESTIONS	591
	<i>Yauger v. Skiing Enterprises, Inc.</i>	592
	NOTES AND QUESTIONS	596
	<i>Procd, Inc. v. Zeidenberg</i>	599
	NOTES AND QUESTIONS	605
	<i>Hill v. Gateway 2000, Inc.</i>	609
	NOTES AND QUESTIONS	612
	<i>C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.</i>	616
	NOTES AND QUESTIONS	624
D.	WARRANTY, DISCLAIMERS, AND REMEDY LIMITATIONS: THE UCC PATTERN	629
1.	Warranties as a Tool to Guard Expectations	629
2.	Warranties, Express and Implied	631
a.	The Buyer’s Expectations and Fair Dealing: Creating Warranties . . .	631
b.	The Seller’s Free Contract and Fair Dealing — Warranty Disclaimers and Remedy Limitations	632
c.	The Necessary Steps	633
3.	Conspicuous Disclaimers and Conscionable Remedy Limitations	634
	<i>Hunt v. Perkins Machinery Co., Inc.</i>	634
	NOTES AND QUESTIONS	637
4.	Parol Evidence, Warranties, and Standard Forms	642
	<i>Boud v. Sdnco, Inc.</i>	643
	NOTES AND QUESTIONS	648
5.	Regulating Warranties in Consumer Transactions	650
E.	UNCONSCIONABILITY	658
1.	Retailing and the Poor	659
	Federal Trade Commission, Bureau of Economics Staff Report, <i>Executive Summary, Survey of Rent-to-Own Customers</i>	659
	NOTES AND QUESTIONS	664
2.	The First Cases	668
	<i>Williams v. Walker-Thomas Furniture Co.</i>	668
	NOTES AND QUESTIONS	671
	<i>Jones v. Star Credit Corp.</i>	675
	NOTES AND QUESTIONS	677
3.	Evaluating Unconscionability	678
	Arthur Leff, <i>Unconscionability and the Crowd — Consumers and the</i>	

TABLE OF CONTENTS

	<i>Common Law Tradition</i>	679
	NOTES AND QUESTIONS	684
4.	Unconscionability and Consumer/Employee Arbitration Agreements ..	686
	Barry Meier, <i>In Fine Print, Customers Lose Ability to Sue</i>	686
	<i>Shroyer v. New Cingular Wireless Services, Inc.</i>	691
	NOTES AND QUESTIONS	698
	NOTES AND QUESTIONS	706
5.	Remedies for Victims of Unconscionable Contracts, Including Under	
	State Statutes	710
a.	Are Punitive Damages Recoverable?	710
b.	Statutes and Unconscionability	714
	NOTES AND QUESTIONS	717
<hr/> Table of Cases		TC-1
<hr/> Table of Statutes		TS-1
<hr/> Index		I-1