CONTRACTS:
LAW IN ACTION

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Contracts: Law in Action

Third Edition

Volume I

The Introductory Course

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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.

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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

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

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.

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