

**CONTRACTS:
LAW IN ACTION**

CONTRACTS: LAW IN ACTION

Volume II
The Advanced Course

Fourth Edition

Stewart Macaulay
Professor of Law Emeritus
University of Wisconsin Law School

William Whitford
Professor of Law Emeritus
University of Wisconsin Law School

Kathryn Hendley
William Voss-Bascom Professor of Law and Political Science
University of Wisconsin Law School

Jonathan Lipson
Harold E. Kohn Chair and Professor of Law
Temple University Beasley School of Law



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Table of Contents

Preface to the Fourth Edition	xiii
Preface to the Second Edition	xvii
Chapter 1 · Formation of Contract	1
A. Choice, Fault, or Something Else?	4
<i>Embry v. Hargadine, McKittrick Dry Goods Co.</i>	4
Notes and Questions	7
Stewart Macaulay, <i>Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts, and Credit Cards</i>	14
B. The Risk of Ambiguity or Misunderstanding	20
1. Choice and the Careless Use of Language	21
<i>Raffles v. Wichelhaus</i>	22
Notes and Questions	23
2. Flat Rules to Allocate Losses	26
<i>WPC Enterprises, Inc. v. United States</i>	26
Notes and Questions	30
3. When Is It Too Late to Discover a Mistake and Avoid the Contract?	31
a. Introducing the Problem of the Mistaken Bid	31
b. The Mailbox Rule	33
c. The Firm Offer	37
The <i>Virginia Law Review</i> Study of Construction Bidding	40
Technology Applications: Internet Bidding	43
<i>Janke Construction Co. v. Vulcan Materials Co.</i>	47
Notes and Questions	54
<i>Marana Unified School Dist. No. 6 v. Aetna Casualty and Surety Co.</i>	59
<i>Glasgow, Inc. v. Pennsylvania Department of Transportation</i>	65
Notes and Questions	69
d. Unilateral Mistakes in Communicating: I Meant “X” but Said “Y”	70
Malcolm Pitman Sharp, <i>Promissory Liability II</i>	78
Culpa in Contrahendo?	79
The Restatement’s Synthesis of Common Law Rules	81
<i>S.T.S. Transport Service, Inc. v. Volvo White Truck Corp.</i>	81
Notes and Questions	87
C. Unenforceable Contracts, Restitution, and Reliance	88

<i>Vickery v. Ritchie</i>	89
Notes and Questions	91
Chapter 2 · Incomplete Planning, Flexibility, and Enforceability	97
A. Specifying Ends But Not Means: “We Can Work It Out!”	97
1. Building Construction and Ordinary People	97
<i>Klimek v. Perisich</i>	97
Notes and Questions	99
2. The UCC and Indefiniteness: Transactions in Goods between Major Corporations	102
<i>Bethlehem Steel Corp. v. Litton Industries, Inc.</i>	102
Notes and Questions	116
B. Flexible Price and Quantity: “I’ll Buy What I Want at a Fair Price”	122
1. Flexible Pricing	125
<i>Shell Oil Co. v. HRN, Inc.</i>	127
Notes and Questions	134
2. Flexible Quantity	138
a. Blanket Orders	138
Stewart Macaulay, <i>The Standardized Contracts of United States Automobile Manufacturers</i>	138
Notes and Questions	145
b. Requirements and Output Contracts	145
<i>Empire Gas Corp. v. American Bakeries Co.</i>	147
Notes and Questions	153
c. Distributorships — Is a Distribution Contract a Requirements Contract?	157
<i>Lorenz Supply Co. v. American Standard, Inc.</i>	158
Notes and Questions	167
C. Business Documents and Forming Contracts	170
1. Formation Doctrine and “Letters of Intent”	173
<i>Logan v. Sivers Co.</i>	174
Notes and Questions	186
2. Business Documents and Commercial Practices	187
a. The Battle of the Forms: Magic through Contract Drafting	190
b. Section 2-207 of the Uniform Commercial Code	197
<i>McCarty v. Verson Allsteel Press Co.</i>	199
Notes and Questions	207
<i>Steiner v. Mobil Oil Corp.</i>	208
Notes and Questions	218
<i>Scientific Components Corp. v. ISIS Surface Mounting, Inc.</i>	225
Notes and Questions	229
c. Lawyers Cope with § 2-207: Business Procedures and Drafting Practices	230
Frederick D. Lipman, <i>On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code</i>	230

Notes and Questions	233
d. Remember the UN Convention on Contracts for the International Sale of Goods	236
D. Closing the Deal But Leaving a Way Out	238
<i>Architectural Metal Systems, Inc. v. Consolidated Systems, Inc.</i>	239
Notes and Questions	244
Chapter 3 · The Deal Is Closed — But What Is It?	251
A. Introduction	251
B. Textual or Contextual Interpretation of Contractual Language?	255
Edwin W. Patterson, <i>The Interpretation and Construction of Contracts</i>	255
Notes and Questions	265
<i>Federal Express Corp. v. Pan American World Airways, Inc.</i>	267
Notes and Questions	270
<i>Nanakuli Paving and Rock Co. v. Shell Oil Co.</i>	274
Notes and Questions	290
C. The Parol Evidence Rule	292
John D. Calamari & Joseph M. Perillo, <i>A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation</i>	295
1. Search for Truth or Defense of Form?	302
<i>Binks Manufacturing Co. v. National Presto Industries, Inc.</i>	302
Notes and Questions	308
2. Of Partial Integrations and Side Agreements	310
<i>Mitchill v. Lath</i>	310
Notes And Questions	315
<i>Masterson v. Sine</i>	317
Notes And Questions	324
3. A More Recent California Decision	330
<i>Dore v. Arnold Worldwide, Inc.</i>	330
Notes and Questions	337
D. Subversive Doctrines: Exceptions to the Parol Evidence Rule	338
1. Reformation	338
<i>Belk v. Martin</i>	338
Notes and Questions	341
<i>Johnson v. Green Bay Packers</i>	342
Notes and Questions	347
2. Promissory Estoppel	349
<i>Ehret Co. v. Eaton, Yale & Towne, Inc.</i>	349
Notes and Questions	355
3. Fraud	359
<i>Anderson v. Tri-State Home Improvement Co.</i>	359
Notes and Questions	362
E. Conclusions about the Parol Evidence Rule	366

<i>AM International, Inc. V. Graphic Management Associates, Inc.</i>	366
Notes And Questions	371
Chapter 4 · Problems Concerning the Adjustment or Modification of Performance Terms	377
A. Waiving Conditions Contrasted with Modifying Contracts	378
<i>Clark v. West</i>	378
Notes and Questions	381
B. “Written Modifications Only” Clauses	386
<i>Universal Builders, Inc. v. Moon Motor Lodge, Inc.</i>	386
Notes and Questions	390
<i>Central Illinois Public Service Co. v. Atlas Minerals, Inc.</i>	392
Notes and Questions	406
Chapter 5 · Performance and Breach of Contract	407
A. The Main Themes — Promises, Conditions, and the Role of Courts	407
1. The Logic of “Conditions”	407
2. Interpretation and Construction	412
<i>Jacobs Associates v. Argonaut Insurance Co.</i>	413
Notes and Questions	418
3. Conditions and Forfeitures: Free Contract, Material Breach, and Fairness	420
<i>Davis v. Allstate Insurance Co.</i>	422
Notes and Questions	426
<i>Van Iderstine Co. v. Barnet Leather Co.</i>	432
Notes and Questions	434
4. Conditions of Satisfaction	436
<i>Helprin v. Harcourt</i>	436
Notes and Questions	444
B. Conditions and the Uniform Commercial Code	447
1. The General Pattern	447
2. Inspection and Acceptance of the Goods	448
<i>Ardex Cosmetics of America v. Logotech, Inc.</i>	449
Notes and Questions	453
3. Cooperation and Good Faith	453
<i>Admiral Plastics Corp. v. Trueblood, Inc.</i>	453
Notes and Questions	456
4. Notice: § 2-607(3)(a) — And a Note on § 2-608(2)	459
<i>Eastern Air Lines, Inc. v. McDonnell Douglas Corp.</i>	459
Notes and Questions	470
<i>Paulson v. Olson Implement Co., Inc.</i>	477
Notes and Questions	480
5. Section 2-508: The Seller’s Right to Cure	486
<i>T.W. Oil, Inc. v. Consolidated Edison Co. of New York, Inc.</i>	486

Notes and Questions	491
<i>Head v. Phillips Camper Sales & Rental, Inc.</i>	492
Notes and Questions	498
6. CISG and Imperfect Performance	499
7. Two Classic, But Troublesome, Problems	500
a. Installment Contracts and the Failure to Perform Part of the Deal	500
<i>Palmer v. Watson Construction Co.</i>	501
Notes and Questions	503
b. Installment Contracts and the UCC	507
<i>Midwest Mobile Diagnostic Imaging, L.L.C. v. Dynamics Corp. of America</i>	507
Notes and Questions	519
c. The Long Wait: Delay and Calling Off the Deal after One Has Given Extensions	524
<i>Fairchild Stratos Corp. v. Lear Siegler, Inc.</i>	524
Notes and Questions	529
<i>Bead Chain Manufacturing Co. v. Saxton Products, Inc.</i>	532
Notes and Questions	535
C. “Anticipatory Breach” and “Reasonable Grounds for Insecurity”	538
1. Repudiation and the Power to Walk Away from the Deal	538
<i>Ewanchuk v. Mitchell</i>	538
Notes and Questions	542
2. Insisting on My Interpretation of the Contract as a Form of Repudiation	545
<i>Bill’s Coal Co., Inc. v. Board of Public Utilities of Springfield, Missouri</i>	545
Notes and Questions	549
<i>Cosden Oil & Chemical Co. v. Karl O. Helm Aktiengesellschaft</i>	551
3. Uncertainty about the Other Side’s Performance — The Code’s Framework	557
<i>AMF, Inc. v. McDonald’s Corp.</i>	557
Notes and Questions	560
<i>Brisbin v. Superior Valve Co.</i>	562
Notes and Questions	569
4. Uncertainty about Performance — At Common Law	569
<i>McNeal v. Lebel</i>	569
Notes and Questions	574
D. Self-Help in the Face of Default	576
1. Deducting Damages from What Is Due	577
2. Checks in Full Satisfaction of All Claims	578
3. Using the Goods to Avoid Loss after Revocation of Acceptance	578
<i>Johannsen v. Minnesota Valley Ford Tractor Co., Inc.</i>	578
Notes and Questions	580
E. A Critical Review of the Issues	582

Arthur I. Rosett, <i>Contract Performance: Promises, Conditions, and the Obligation to Communicate</i>	582
Chapter 6 · Adjusting to Changed Circumstances:	
Risks Assumed and Imposed	591
A. History, Conflicting Positions, and Unacknowledged Legal Change	591
1. The Paper versus the Real Deal: Formalism, Realism, and Changing Approaches	593
a. A Deal Is a Deal — Enforce the Literal Text of the Written Contract	593
<i>Paradine v. Jane</i>	593
Notes and Questions	594
b. What Was the Real Deal? Basic but Unspoken Assumptions	600
<i>Taylor v. Caldwell</i>	600
Notes and Questions	606
<i>Handicapped Children’s Education Board of Sheboygan County v. Lukaszewski</i>	609
Notes and Questions	615
2. Cleaning Up after the Unexpected: Allocations, Restitution, and Reliance Recovery	617
a. Allocations: Solutions with a High Potential for Dispute	617
b. Restitution after an Excuse	619
B. Impracticability, the UCC, and Legal Realism, Checked by Demands for Form and Certainty	631
1. “[M]ade Impracticable by the Occurrence of a Contingency the Non-Occurrence of Which Was a Basic Assumption on Which the Contract Was Made”	631
<i>Transatlantic Financing Corp. v. United States</i>	631
Notes and Questions	635
2. The Threat of Terrorism	637
<i>7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc.</i>	637
Notes and Questions	645
3. Force Majeure Clauses as the Solution?	647
<i>Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.</i>	650
Notes and Questions	658
4. Coping with Changed Circumstances: Judicial Rewriting of Contracts	660
<i>Aluminum Co. of America v. Essex Group, Inc.</i>	660
Notes and Questions	687
5. Coping with Changed Circumstances: “Coercive Mediation” by Judges to Push Parties to Rewrite the Contract	701
Notes and Questions	704
<i>In the Matter of Westinghouse Electric Corp.</i>	
<i>Uranium Contracts Litigation, Florida Power & Light Co. v. Westinghouse Electric Corp.</i>	710

Notes and Questions	730
6. The 2008 and Following Meltdown of the Economy	736
<i>Hoosier Energy Rural Electric Co-op., Inc. v. John Hancock Life Ins. Co.</i>	737
<i>Hoosier Energy Rural Electric Co-op., Inc. v. John Hancock Life Ins. Co.</i>	748
Notes and Questions	754
Table of Cases	765
Table of Statutes	781
Index	787

Preface to the Fourth Edition

New editions of *Contracts: Law in Action* allow us to offer new cases and statutes to keep our materials up to date. In this edition, we continue the philosophy and the coverage of the first three editions; once again, we are republishing the preface to the second edition, in which that philosophy is described.

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.

The list of authors has changed; we have added Kathryn Hendley and Jonathan Lipson to our group. Each of them brings something new to the enterprise. Professor Hendley is one of the foremost scholars of law in the transition from socialism to capitalism in Russia. Professor Lipson has long experience as a corporate lawyer and transaction planner. Each has used earlier editions of *Contracts: Law in Action* for a number of years.

Sadly, two of the authors of our third edition have died since it was published. John Kidwell’s participation in the creation and development of the book dates back to its earliest days. First and foremost, John was a great and award-winning teacher, and he insisted that the materials had to work in class. We knew that if John had a problem teaching something in the book, it had to be fixed.

John also wrote bar exam questions, and he insisted that our course had to play a real part in transforming beginners into skilled lawyers. John was sympathetic to the goal of fashioning a modern contracts course that emphasized law in action, but he worried about losing something important if and when we abandoned what had long been in the traditional course.

He was a wonderful colleague, always prepared to go above and beyond any possible call of duty to get the manuscript to the publisher in a timely manner, to get a jointly composed exam completed, or to help newly minted law school professors cope with their first classes. John wrote the following about himself for his law school profile:

“He enjoys reading, listening to music,¹ idle conversation, and the game of poker. His favorite composer is J.S. Bach, and his favorite writer is John McPhee. He subscribes to too many magazines.”

Jean Braucher first used a photocopied version of *Contracts: Law in Action* in 1992 at the University of Cincinnati Law School, and she continued teaching from it when she moved to the University of Arizona in 1998. We appreciated her kind words about the book when it was first published:²

[*Contracts: Law in Action*] weaves the history, philosophy, sociology, and doctrine of contract into a vibrant if troubling picture, confronting students with the conflicts, complexities, and above all, the limits of the subject. [The authors] challenge students to become “skeptical idealists” in the practice of law. Their approach is both theoretically sophisticated and thoroughly practical.

Jean had done empirical research on the practices of lawyers in consumer bankruptcy,³ and she worked on law reform in many places, including the American Law Institute and the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws).

In November 2007, Jean accepted our offer to become an author and editor for the third, and all subsequent, editions of *Contracts: Law in Action*. The publisher had insisted that the new edition of the book not be any longer than the previous one: if we added anything, we had to take something out. Jean enforced this rule, pushed us to bring the book up to date, and was always on the lookout for ways in which new statutes, new standard contracts clauses—and especially recent advances in technology—presented new settings for the classic problems dealt with in traditional contracts courses.

Jean used these materials for 22 years and edited them for seven. She concluded from this and other experiences: “The law does not march forward so much as stumble on . . . Law is about social struggle, and we never get neat, perfect conclusions.”⁴

We have missed, and will continue to miss, John and Jean. Both contributed so much to this project. In the preparation of both this edition and the third edition, we also had the extraordinary assistance of Ellen Vinz (J.D., University of Wisconsin Law School, 2011), a professional copyeditor as well as a former lawyer. We were also assisted by Erica Maier at Temple University Beasley School of Law and the following student research assistants: Andrew Brehm (J.D., University of Wisconsin Law School,

1. John often opened class by playing a song that fit one or more of the cases for that day. For example, when he taught *Vokes v. Arthur Murray*, he treated students raised on rock and roll to an ancient Jimmy Dorsey big band recording of “Arthur Murray Taught Me Dancing in a Hurry.”

Jonathan Lipson carries on John’s tradition, albeit with a lower brow. He opens the class on *Hadley v. Baxendale* with the “Theme from Shaft,” for example.

2. Jean Braucher, *The Afterlife of Contract*, 90 Nw. U.L. REV. 49, 52–53 (1995).

3. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

4. See William Whitford, *Jean Braucher’s Contracts World View*, 58 ARIZ. L. REV. 13, 31 (2016).

2015); Miranda Bullard (J.D., Temple University Beasley School of Law, 2017); Nicholas Zuiker (J.D., University of Wisconsin Law School, 2015); Nicholas Korger (J.D. University of Wisconsin Law School, 2017); and Chelsea Zielke (J.D. University of Wisconsin Law School, 2018).

Stewart Macaulay

William Whitford

Kathryn Hendley

Jonathan Lipson

November 9, 2016

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.

