CONTRACTS: LAW IN ACTION

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Volume II
The Advanced Course

Fourth Edition

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Carolina Academic Press
Durham, North Carolina

ISBN: 978-1-5221-0407-0
e-ISBN: 978-1-5221-0408-7
LCCN:

Carolina Academic Press, LLC
700 Kent Street Durham, NC 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplaw.com

Printed in the United States of America

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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,

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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.