CONTRACTS IN THE REAL WORLD

Contracts, the foundation of economic activity, are vital, fascinating, and misunderstood. Through a series of engaging stories – involving such captivating individuals as the late Maya Angelou, Clive Cussler, Lady Gaga, Paris Hilton, Martin Sheen, and Donald Trump – this book corrects the misunderstandings. Capturing the essentials of this subject and reviewing the classic cases, the book explores recurring issues people face in contracting. It shows how age-old precedents and wisdom still apply today and how contract law’s inherent dynamism cautions against exuberant reforms. The book will appeal to the general reader and specialists in the field alike, and especially to teachers and students of contracts.

Contracts in the Real World

STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER

Second Edition

Lawrence A. Cunningham

George Washington University Law School
For Stephanie,

My Dream Come True,

And to the loving memory of her Dad, Fred Cuba.
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1. GETTING IN: CONTRACT FORMATION

Tools to distinguish enforceable promises from others – seals, writings, deals, and reliance – and to evaluate intention to bargain: offer, acceptance, and mutual assent.

A. Handshakes and Feuds from Snapchat to Facebook

On the value of forming thoughtful contracts, using the context of feuds among entrepreneurs who bungled the job at companies such as Snapchat, Urban Decay, and Facebook.

B. Gifts, Bargains, Reliance: Martin Luther King, Jr. and Boston University

Why bargains but not promises to make gifts are enforceable as contracts and how to tell the difference, using the case of Martin Luther King’s donation of his papers to Boston University.

C. Ads or Offers: Pepsi and Harrier Jets

The difference between an unenforceable ad and an enforceable offer, using the case of a consumer’s effort to hold Pepsi to a deal for a military fighter jet based on a humorous television commercial.
D. Frolic or Acceptance: Boasts on “Dateline NBC”

The difference between mere talk and valid offers that can be accepted to form a contract, using the case of a law student taking up prominent criminal defense lawyer J. Cheney Mason’s boast on “Dateline NBC” about the strength of his defense in a capital murder trial.

E. Offers: Comedians and Drunks

Why the offers of jokesters and inebriated persons may not create the power of acceptance, using the case of Donald Trump attempting to accept an offer made in jest by comedian Bill Maher along with a classic case of a sizable business transaction jotted down on a diner check.

F. Mutual Assent: Spyware and Secret Clauses

Why mutual assent is required to form contracts and how it is tested, using controversial cases of software users subject to restrictions buried electronically or appearing inside the product’s packaging.

G. Assent, Acceptance, and Digital Terms of Use

Prevailing practices and approaches to electronic contracting on the Internet, using a classic case involving a cruise line ticket to assess the terms of use of companies such as Facebook and Gogo.

H. Policies or Pacts: The Cleveland.com Blogger

The rising struggle about whether corporate policies, especially about privacy on the Internet, are enforceable as contracts, using the example of a blogger at Cleveland.com and analogizing today’s challenge to contract law’s resolution during the 1990s of disputes about whether employee handbooks are enforceable as contracts.

Synthesis: Why neither formal rules and pure objectivity nor pure context and subjectivity are sufficient to determine the existence of an enforceable contract and how these ideas combine to forge powerful and capacious tools to govern contract formation.
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2. FACING LIMITS: UNENFORCEABLE BARGAINS

Boundaries of enforceable contracts, which exclude those merely disguised as bargains and those bordering on illegality or violating prevailing sense of public policy.

A. Unconscionability: Gail Waters’s Annuity Swap

Why courts rarely examine the fairness of exchange but will probe contracts on massively lopsided terms plagued with bargaining irregularities, using the example of an impressionable young woman’s agreement to sell for $50,000 cash an annuity contract with a cash surrender value of $189,000.

B. Blackmail: Michael Jordan’s Paternity

Why courts resist enforcing bargains amounting to blackmail and how to distinguish those from valid contracts, highlighting the context of patrimony, and illustrated using a case involving Michael Jordan.

C. Palimony: The Rapper 50 Cent

Why courts struggle against enforcing contracts for personal services among unmarried cohabitants except when other elements of a bargain appear conspicuously, using the example of claims of a paramour against the rapper 50 Cent.

D. Gambling: Octogenarian Powerball Sisters

Why courts defer to people’s freedom of contract yet still identify a class of cases as illegal bargains that courts would not enforce, using the case of two elderly sisters who made an agreement about lottery tickets.

E. Making Babies: Baby M, Baby Calvert

Continuing struggles in law, society, and technology concerning human reproduction, addressing contracts involving multiple participants in
child bearing, contrasting competing approaches states take, from banning, to regulating, to endorsing this field of human endeavor.

_Synthesis:_ Why neither pure freedom of contract nor excessive judicial second-guessing of the legitimacy of contracts is desirable.

### 3. GETTING OUT: EXCUSES AND TERMINATION

Legitimate grounds to excuse an otherwise enforceable contract, such as mutual mistake, impossibility, infancy, mental illness, fraud, and express termination clauses – albeit not including hysteria resulting from public outrage or private embarrassment.

#### A. Mistake and Warranty: Madoff’s Ponzi Scheme

Why problems existing but unknown when a deal is made, owing to mutual mistake or warranty, can justify excusing contractual obligation, using the case of a divorcing couple’s settlement agreement based on the existence of a Madoff account that turned out to be fictional.

#### B. Impossibility and Force Majeure: Donald Trump

Why problems arising from supervening events like fire, flood, and other catastrophes that make performance impossible or impracticable can justify excusing contractual obligation, using the case of Donald Trump’s effort to delay loan repayment duties in light of the 2008 financial crisis.

#### C. Infancy: Craig Traylor of “Malcolm in the Middle”

Why minors and mentally ill persons have the right to elect to affirm or disaffirm otherwise valid contracts they make, using the case of child actor Craig Lamar Traylor who elected to disaffirm a contract with his personal manager, Sharyn Berg.

#### D. Outrage: AIG’s Employee Bonuses

Why public outrage is not a ground to rescind a bargain, and how the terms of a contract govern whether it must be performed or not, using
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the example of the bonuses AIG paid employees during the 2008 financial crisis.

E. Embarrassment: The New York Mets and Citi Field

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F. Pledge Agreements, Intent, and Change

Problems that arise when philanthropic relationships sour and how to handle changing attitudes and performances, using examples of Princeton University’s Pyrrhic litigation victory over a major donor compared with the successful renegotiation of a pledge agreement by Lincoln Center with the heirs of Avery Fisher.

Synthesis: Why ancient doctrines like caveat emptor (let the buyer beware) or pacta sunt servanda (promises are kept) are vital but cannot be absolute, and how contracts and contract law rather than politics and ideology rightly define the terms of bargains people make.

4. PAYING UP: REMEDIES

Remedies for breach of contract, primarily compensation for disappointed expectations, along with limits on remedies.

A. Interests and Limits: Paris Hilton and “Pledge This!”

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C. Markets and Mitigation: Redskins Season Tickets

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D. Stated Remedies: Sprint’s Early Termination Fees

The possibility of contracts stating the remedy for breach and how courts police these for excess, using the case of early termination fees in cell phone service contracts.

E. Specific Performance: Tyson Chickens and IBP Pork

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Synthesis: Why awarding money damages in most cases works while holding out the possibility of specific performance in extraordinary cases, as well as the possibility of restitution when all else fails.

5. REWINDING: RESTITUTION AND UNJUST ENRICHMENT

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recognizing obligations where contract law might not and awarding remedies to prevent unjust enrichment.

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B. Mere Volunteers: Battling Alaskan Beetles

Limits of restitution, not extending to cover mere volunteers, using the example of a prospective buyer of Alaskan timberland voluntarily preparing a site study amid Alaska’s beetle epidemic that threatened the state’s forests.

C. Trailing Promises: Lena Saves Lee’s Life

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D. Novel Ideas: The Making of “The Sopranos”

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6. WRITING IT DOWN: INTERPRETATION, PAROL, FRAUDS

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A. Plain Meaning I: Eminem’s Digital Records

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B. Plain Meaning II: Dan Rather’s Last Broadcast

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C. Parol Evidence: The Golden Globes

Why complete and final written agreements prevent consideration of evidence about previous or contemporaneous deal making, using the example of a production contract for the Golden Globes.

D. The Unruliness of Words – and Numbers

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film or three installments; and whether Howard Stern was really entitled to $300 million when his satellite radio partner doubled his audience by buying a rival.

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F. Statute of Frauds: Cliff Dumas’s Phantom Radio Deal

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7. PERFORMING: DUTIES, MODIFICATION, GOOD FAITH

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C. Unanticipated Circumstances: Deutsche Building

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D. Accord and Satisfaction: Lady Gaga

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E. Adjustment: Conan and “The Tonight Show”

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8. HEDGING: CONDITIONS

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B. Order of Performance: Charlie Sheen and Warner

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C. Partial or Total Breach: Sheen and Warner II

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D. Waiver: Sheen and Warner III

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E. Substantial Performance: Sandra Bullock’s Lake House

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9. CONSIDERING OTHERS: THIRD PARTIES AND SOCIETY

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B. Assignment: JP Morgan’s Cablevisión Loan

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C. Interference: New England Patriots and StubHub

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D. Torts: Katie Janeway’s Tragic Accident

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APPENDIX A: OFFERING AND ACCEPTING

A concise statement of the principal tools used to analyze contract formation, especially offer and acceptance.

APPENDIX B: BUYING AND SELLING GOODS

A concise statement of the principal differences between the general common law of contracts and the special rules of the Uniform Commercial Code that govern transactions in goods.
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