

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.

Lawrence A. Cunningham is the Henry St. George Tucker III Research Professor at the George Washington University Law School. Cunningham is the author of a dozen books, including the classic work, *The Essays of Warren Buffett: Lessons for Corporate America*, and he served as editor for seven years of the leading treatise on contract law, *Corbin on Contracts*. His op-eds have appeared in leading periodicals including *The Financial Times*, *The National Law Journal*, *The New York Times*, and *The Wall Street Journal*. Professor Cunningham's research has been published in journals of leading universities including Columbia, Cornell, Duke, Harvard, Michigan, UCLA, Vanderbilt, and Virginia.

Cambridge University Press
978-1-316-50658-5 — Contracts in the Real World
2nd Edition
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Contracts in the Real World

STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER

Second Edition

Lawrence A. Cunningham

George Washington University Law School



CAMBRIDGE
UNIVERSITY PRESS

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[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi - 110002, India
79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781316506585

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First published 2012

Second Edition First Published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Names: Cunningham, Lawrence A., 1962– author.

Title: Contracts in the real world : stories of popular contracts and why they matter / Lawrence A. Cunningham, George Washington University Law School.

Description: Second edition. | Cambridge : New York :

Cambridge University Press, 2016. | Includes bibliographical references and index.

Identifiers: LCCN 2016001234 | ISBN 9781107141490 (hardback) |

ISBN 9781316506585 (paperback)

Subjects: LCSH: Contracts – United States. | BISAC: LAW / Contracts.

Classification: LCC KF801.C86 2016 | DDC 346.7302/2–dc23

LC record available at <http://lcn.loc.gov/2016001234>

ISBN 978-1-316-50658-5 Paperback

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*For Stephanie,
My Dream Come True,
And to the loving memory of her Dad, Fred Cuba.*

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Cambridge University Press
978-1-316-50658-5 — Contracts in the Real World
2nd Edition
Frontmatter
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ANNOTATED CONTENTS

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

How contracts can be used to promote business relationships with parties who can become an embarrassment and why this does not excuse the obligation, using the example of the contretemps over the deal Citicorp made to name The New York Mets' home field, at the crest of the 2008 financial crisis.

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!"

Contract law's remedies for breach of contract designed to protect interests in expectancy, reliance, and justice, subject to limitations requiring losses to be shown with reasonable certainty and foreseeable as a result of breach, using the example of Paris Hilton's agreement to promote the raunchy film "Pledge This!"

B. Compensation: Paris Hilton and Hairtech

Differences between how contract claims award remedies to compensate and tort claims that can include damages to punish, using the case of claims by Hairtech International against Paris Hilton for failing to promote hair care products as promised.

C. Markets and Mitigation: Redskins Season Tickets

Standard market references contract law uses to measure damages from breach and associated limitations on recovery for losses that can be avoided with reasonable diligence, using the case of claims by the Washington Redskins against season ticket buyers who breached their agreements to buy tickets.

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

Limited times that courts require contract parties to perform their promises specifically, as opposed to paying money damages, when money would not be adequate to protect an interest because of unique features of the bargain, using the case of a merger agreement between Tyson Foods and IBP.

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

A body of law intertwined with contracts, called restitution, available to promote justice when contract law's standard tools break down,

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

A. Gratuuity or Exchange: Caring for Aunt Frances

Difference between those conferring benefits gratuitously and those doing so in the expectation of compensation or reimbursement, using the example of family caretakers.

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

Why promises made after someone else has conferred a benefit are rarely valid, using the case of one neighbor saving another neighbor's life.

D. Novel Ideas: The Making of "The Sopranos"

When no contract is formed, but one person shares ideas with another who exploits them for gain, a claim in restitution can arise so long as the ideas were novel but not otherwise, using the example of a municipal judge's claim to a share of the profits from the hit HBO television series "The Sopranos."

E. Off-Contract Remedies: Rod Stewart at the Rio

When a contract is too indefinite to resolve a dispute over entitlement to money, off-contract remedy of restitution to prevent unjust enrichment can apply, using the example of a \$2 million advance paid to Rod Stewart for a concert he could not perform because of complications arising after his throat surgery.

Synthesis: Why formal rules of contract should be resisted to enable the flexible protection of interests that the doctrine of restitution enables.

6. WRITING IT DOWN: INTERPRETATION, PAROL, FRAUDS

The significance, problems, and requirements of putting a deal in writing.

A. Plain Meaning I: Eminem's Digital Records

How courts interpret written contracts, evaluating whether contractual expressions manifest a plain meaning or require additional evidence, using the case of rapper Eminem's claim against his record producer about whether recordings marketed as iTunes and ringtones are "sales" or "licenses."

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

Example of plain meaning interpretation that complements the preceding story, showing how telltale linguistic cues convey a plain meaning, using the example of CBS's termination of Dan Rather following controversial news broadcast about President Bush's Vietnam-era military service two months before the 2004 presidential election.

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

Challenges of drafting contracts to reflect intended agreements clearly and interpreting them later, using examples that pose numeric questions: whether the September 11, 2001 attacks on New York's World Trade Center were one occurrence or two under applicable insurance policies; whether a film based on Tolkien's "The Hobbit" was a single

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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.

E. Scrivener's Error: Who Owns the L.A. Dodgers?

Effects of fraud and mistake on determining obligations, using the example of scrivener's error in preparation of postnuptial agreement between Jamie and Frank McCourt about ownership of the Los Angeles Dodgers baseball team.

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

Limited but important circumstances where contracts must include a writing to be valid, along with exceptions and how the requirement is met, using the example of country music radio personality Cliff Dumas's employment with a local radio station.

Synthesis: Why "putting it in writing" is not always the surest path to contractual certainty, but how it remains an appealing way to iron out the details, contract law taking the pragmatic middle ground between those who invest full faith in written expression and those incapable of believing that sometimes words have plain meanings.

7. PERFORMING: DUTIES, MODIFICATION, GOOD FAITH

What having a contract entails and how duties may be adjusted during performance.

A. Implied Terms: Butch Lewis and Maya Angelou

The role good faith can play to fill in gaps in indefinite, incomplete, or tentative agreements, using the case of the entertainment impresario Butch Lewis's deal to promote the late poet Maya Angelou's work as greeting cards with Hallmark, in a deal that generated hundreds of millions of dollars for the card company and many millions of dollars in royalties.

B. Express Terms: Clive Cussler's Movie "Sahara"

The relation between express contract terms and standards of good faith, using the case of best-selling adventure novelist Clive Cussler's deal with billionaire Philip Anschutz's Crusader Entertainment to make a movie of Cussler's book, "Sahara."

C. Unanticipated Circumstances: Deutsche Building

Why unanticipated circumstances can justify departing from literal terms of a contract, but how promises extorted by duress are unenforceable, using the example of Bovis Lend Lease's fixed-price contract to demolish the Deutsche Bank building in Lower Manhattan, rendered dangerous by 9/11.

D. Accord and Satisfaction: Lady Gaga

Why parties may settle bona fide disputes by contracts called "accord and satisfaction," using the example of disputes between music producer Rob Fusari and pop performer Lady Gaga.

E. Adjustment: Conan and "The Tonight Show"

Renegotiation of contracts, role of good faith, covenants not to compete, and remedies using the 2010 dispute between Conan O'Brien and NBC over "The Tonight Show."

Synthesis: Why the prevailing scope of the duty of good faith and respect for the express terms of a bargain properly balance the need for flexibility in contractual relationships with aversion to holding contracting parties to standards of conduct to which they did not assent.

8. HEDGING: CONDITIONS

Why and how parties limit the scope of their promises with conditions, express or implied, and how contract law's tools reinforce bargains and protect their fruits rather than encourage parties to walk away and scatter losses.

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A. Interpretation and Effect: Kevin Costner's Bison

How to determine whether a contractual expression makes a promise, whose breach entitles the injured party to remedies, or states a condition, whose non-occurrence excuses duties, using the case of Kevin Costner's commission of fine rural American sculpture inspired by his film "Dances With Wolves."

B. Order of Performance: Charlie Sheen and Warner

How to minimize problems arising from finger-pointing about who breached first with constructive conditions to regulate the order of performance, using the example of the saga of actor Charlie Sheen's role on the Warner Brothers television show "Two and a Half Men."

C. Partial or Total Breach: Sheen and Warner II

Why contract law encourages parties to use self-help and other steps to promote performance and protect the bargain, highlighting different calibers of breach, especially partial and total breach, continuing the example from the saga of Sheen and Warner.

D. Waiver: Sheen and Warner III

How parties can make minor adjustments, but not major modifications, to their ongoing deals by waiver, opening disputes about whether some commitments are promises or conditions, rounding out the saga of Sheen and Warner.

E. Substantial Performance: Sandra Bullock's Lake House

Why a party in default can recover anyway, at least if they substantially performed, compensating the other side in money, using the example of Sandra Bullock's contract to build a mansion in Austin, Texas.

Synthesis: Why parties should be encouraged to use self-help, backed by the strength of judicial enforcement.

9. CONSIDERING OTHERS: THIRD PARTIES AND SOCIETY

The limited rights and related duties third parties have concerning contracts to which they are strangers.

A. Beneficiaries: Supply Chain Abuse at Wal-Mart

Scope of rights of third parties to enforce contracts to which they are strangers, highlighting the case of foreign employees against Wal-Mart for violations of local labor laws by its suppliers.

B. Assignment: JP Morgan's Cablevisión Loan

Scope and limits of party's rights to transfer contract interests, using the example of JP Morgan's attempted sale of a loan contract to a competitor of the borrower.

C. Interference: New England Patriots and StubHub

Limitations on the rights of third parties to interfere with the contracts of others, using the example of the New England Patriots challenging the online ticket service StubHub for arranging sales of Patriots' season tickets.

D. Torts: Katie Janeway's Tragic Accident

Why courts police bargains that purport to exculpate people from civic obligation, like negligence, using the example of contracts purporting to relieve sports and recreational facilities from liability for grossly negligent behavior.

Synthesis: Why law rightly limits the rights of strangers to contracts to enforce them and protects the interests of parties in contractual relationships from impairment by assignment or by tortious interference from others and law's interest in standards of behavior that may trump freedom of contract.

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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.

Cambridge University Press
978-1-316-50658-5 — Contracts in the Real World
2nd Edition
Frontmatter
[More Information](#)

ACKNOWLEDGMENTS

Thanks to students, professors, and critics alike for their warm reception of this book's first edition and to my publisher for supporting this second edition. The book received the 2012 American Library Association Choice Award for Outstanding Title. In 2013, it was the subject of a printed symposium in volume 88 of the *Washington Law Review*, with contributions from Professors Aditi Bagchi (Fordham), Brian Bix (Minnesota), Larry DiMatteo (Florida State), Erik Gerding (Colorado), Charles Knapp (Hastings), Jake Linford (Florida State), and Jennifer Taub (Vermont). In an online symposium hosted by *Concurring Opinions*, additional commentary was offered by students Umo Ironbar (St. Louis University) and Lucy Martucci (Cardozo), as well as Professors Miriam Cherry (St. Louis), Ronald Collins (Washington), Susan Heyman (Roger Williams), David Hoffman (Temple), Nancy Kim (California Western), Donald Langevoort (Georgetown), and Tom Lin (Temple).

Among helpful notices of the first edition, thanks to Miriam Cherry (St. Louis) for a review in volume 35 of the *Hawaii Law Review*; Matthew Mantel of the University of Houston who reviewed the book in the O'Quinn Law Library's blog; and to journalists who referenced the book in their reporting, including Peter Lattman of *The New York Times* and Joe Barrett of *The Wall Street Journal*. For corrections to the text of the first edition, thanks to readers Colin Samuels and Steven Sholk.

For comments on all or portions of the manuscript of the first edition, thanks to many of those listed above as well as Ian Ayres (Yale), H. Jefferson Powell (Duke), James Steven Rogers (Boston College),

Michael Selmi (George Washington), Douglas Whaley (Ohio State), and several anonymous reviewers commissioned by Cambridge University Press. For editing the manuscript, thanks to my longtime book editor, Ira Breskin; my chief editorial aide, Stephanie Resnik; and my research assistants, Chris Davis, Christa Laser, and Zachary Stern.

For help identifying new story ideas in this second edition, thanks to Professors Renee Allen (Florida A&M), Jonathan Barnett (USC), Al Brophy (Alabama), Miriam Cherry (St. Louis), Enrique Guerra-Pujol (Florida Central), Tom Lin (Temple), Gregg Polsky (North Carolina), Jeremy Telman (Valparaiso), and John Wladis (Widener).

Thanks to the editors of the dozen casebooks on contracts that I examined in preparing this narrative. Their judgment helped me verify the canonical cases and doctrines and to test alternative ways to arrange the materials to juxtapose the classics with contemporary stories in modern settings. Thanks finally to 130 contracts professors who responded to the survey I prepared with the editors of the *Washington Law Review* about their interests and appetites for course materials in contracts.

Above all, thanks for patience, understanding, support, and editing to my wife Stephanie; and for joy, hope, and sustenance to our daughters Rebecca and Sarah.