INDEX

| Abrams, Ruth (Judge), 19 |
| acceptance(s), 22–28, 47, 191 |
| acceptance by shipment, 249 |
| accord and satisfaction, 189–194, 198 |
| acts of God, 81–84, 141 |
| adhesion contracts, 38–39, 42 |
| advertisements, 20–23, 26–27, 35–36, 47 |
| Aftermath Records, 144–148 |
| agreed damages. See liquidated damages agreement to agree, 178 |
| ambiguity, 174 |
| American International Group (AIG), 88–93 |
| amnesty clauses, 86–88, 233–239 |
| Andrews, William (Judge), 8 |
| Angelou, Maya, 175–179 |
| annuity contract, 49–55 |
| Anschutz, Philip, 179–184 |
| arbitration, 213 |
| Arden, Elizabeth, 172 |
| Arenas, Gilbert, 96 |
| Arizona State University, 94 |
| assent, 32–37, 45, 54, 62, 101, 129, 235 |
| assignment, 225–229, 239 |
| assurance of due performance, 209, 211 |
| Aurand, Scott, 168 |
| Avery Fisher Hall, 98–99 |
| avoidable damages, 114, 121 |
| Bacer, Robert, 136–140 |
| Bank of America, 94 |
| bargain, 5–7, 16–17. See also consideration |
| Basquiat, Jean–Michel, 173 |
| Bass, Lee M., 97 |
| battle of the forms, 249 |
| Beatles, The, 111–112 |
| Behrakis, George, 94 |
| Berg, Sharyn, 85–68 |
| Berkson, Adam, 37–42 |
| Bernstein, Jed, 99 |
| Besencon, Laurent, 191 |
| best interests of the child (standard), 68–72 |
| bilateral contract, 30, 244 |
| blackmail, 55–58 |
| Blank, Laura, 73–81 |
| Bloomberg, Michael, 185 |
| “Boardwalk Empire,” 107 |
| Boston Museum of Fine Arts, 94 |
| Boston Symphony Orchestra, 105–106 |
| Boston University, 15–20 |
| Bovis Lend Lease, 185–189 |
| Breach. See also conditions costs avoided by, 113–114 |
| lost volume despite, 114–116 |
| mitigation of, 112–117 |
| partial versus total, 208–211 |
| remedies for breaching party, 216 willful, 218–220 |
| browse-wrap, 40 |
| Brown, Frank Reginald “Reggie,” 11–13 |
| Bullock, Sandra, 213–220 |
| Busch family (St. Louis), 94 |
| Bush, George W., 148 |
| Cablevisión, 225–229 |
| capacity, 85–88 |
| Cardozo, Benjamin (Judge), 6, 8, 9, 177–179, 183, 216, 219, 220 |
| Carolina Panthers, 94 |
| Case, Justin (Scott Aurand), 167 |
| case method, 3–4, 9 |
caveat emptor ("let the buyer beware"), 75, 78–83, 100
CBS, 148–150
cell phone service contracts, 117–122
certainty (of damages), 104–107, 110, 119–120, 121
charitable pledges, 17–19
Chase, David, 136–140
Chicago Bulls, 55–56
child entertainers, 88
children, 86–88
Citigroup, 93–96
Clark, Dick, 150–154
Cleveland Plain Dealer, The, 43–48
click-wrap, 40–41
co-habitation, 59–63
Cooley LLP, 12
common law, 4, 9, 69–71
compensation
purpose of damages, 103, 109–112, 114, 118–121, 124, 143
in restitution, 128–129, 132, 143
conditions, 199–220
assurance of due performance, 208, 210
business performance, 122–123
constructive, 206–208
divisibility and, 215–216
forfeiture and, 202, 215–217
implied, 206–208
interpretation of, 199–203, 206–207, 212
order of performance, 203–208
perfect tender rule, 216, 273n27
performance and partial breach, 208–210
personal satisfaction (of), 271n14
promises compared, 199–203
simultaneous performance, 122–125
substantial performance, 213–220
waiver of, 96
confidentiality, 46–47, 55–58
consent, 226–228
consequential damages, 105–106
consideration
adequacy of, 50–51, 53
bargained-for, 6–7, 16–19, 26, 45, 53
exclusive dealing context, 175–179
forbearance, 57–58
formality of, 16
gambling contracts, 65
gift compared, gratuitous promises, 17–20, 57, 127–136
good faith dispute settlement, 191–193
good faith duty supplying, 175–179
gratuity compared, 17–20, 56, 127–136
love and affection, 54–55, 60–62
meretricious, 61
moral obligation, 130, 133–136
nominal, 54–55, 71
past, 133–136
preexisting duty, 187–189
reliance compared, 7–9, 16–20, 44–45, 47
unconscionability compared, 49–55
waiver and, 211–212
constructive conditions, 206
constructive discharge, 90–91
consumer contracts, 33–37, 112–122, 233–239
contra proferendum, 153, 266n9
contract drafting. See also words and phrases
anticipating impasses, 184
anticipating technological change, 147
contract formation. See formation
Corbin, Arthur, 6–8
corporate policies, 43–47
Cosby, Bill, 97, 256n13
cost avoided (on breach), 117, 140, 147
cost of completion, 217–219
cost-plus contract, 214
Costner, Kevin, 199–203
costs of contract disputation, 67, 117, 140, 147, 184
counteroffer, 30, 244–245
course of performance and, 154
covenant not to compete, 196–197
Cronkite, Walter, 150
cross-defaults, 91
Cruz, Penelope, 180
Cuomo, Andrew 89
Curry, Ann, 24
Cussler, Clive, 179–184

damages, 102–126. See also remedies; specific performance
avoidable, 114, 121
certainty, 104–107, 110, 119–120, 126

good faith duty supplying, 175–179
# Index

consequential, 105–106

cost of completion, 217–220
delay, 118–119
difference in value, 217–220
delay, 118–119
difference in value, 217–220

emotional distress, 109–110

equity, 105–106

foreseeability, 106, 110, 126

lost profits, 103, 104, 106, 110, 114, 120, 121

lost volume seller, 114–116

market measures, 113

mitigation, 112–117, 195–196

new business rule, 104

off-contract, 145–147

pain and suffering, 109–110

pre-contractual reliance damages, 106–107

punitive, 109–110

reliance, 106–108, 111, 202, 211

restitution (see in this index)
tort, compared, 109–112

“Dances with Wolves,” 199

Daneshjou, Benny, 214–220

“Dateline NBC,” 24–27

Dempsey, Jack, 106

Detmers, Peggy, 199–203

Deutsche Bank, 81–85, 184–187
difference in value, 217–220

disclaimer (of reliance), 152

discretion, 22, 63, 132, 138, 143, 177–178

Dumas, Cliff, 167–173
duress, 189
duty to read, 34–35, 39, 236

eternal termination fees, 117–122

Easterbrook, Frank (Judge), 36
electronic contracting, 38, 42–43, 144–148, 173

Eminem (Marshal Mathers), 144–148

employee handbook, 43–45

employment agreements, 43–45, 88–89, 119–120, 171–172

employment at will, 43–45

Enron Corporation, 96


equitable remedies, 108, 123–124, 133, 165 estoppel, 252n17

“except as . . .,” 150

exclusive agency agreements, 175–179, 227–229

exculpation, See amnesty clause

excuses, 91

duress, 189

fraud, 58

frustration of purpose, 82, 83, 91

illegality, 41–44 (blackmail), 49–52 (gambling)
impossibility, 7, 81–85, 91, 101, 170

impracticability, 82–83

incapacity (infancy, mental illness), 85–88

mistake, 7, 73–82, 91, 101, 165–166, 170, 174, 198

public policy, 67–71 (human reproduction)

unconscionability, 49–55

warranty, 78–79

expectancy (damages), 103, 105, 108, 112, 119, 124

extortion, 55–56

extra work, 184–189

extrinsic evidence, 157, 162

Facebook, 1, 14, 29, 40–41

family member rule, 130

family members, 54, 127–130

FedEx (field), 94

Feinberg, Kenneth, 92

50 Cent (Curtis Jackson), 59–63

firm offers, 244, 249n1

Fisher, Avery, 98–99

Fisher, Charles Avery, 99

Fisher Electronics Co., 98

Fisher, Nancy, 99

fixed costs, 120

fixed price contract, 185, 214

Fonda, Jane, 169–170

force majeure, 81–85, 101, 105, 141–142

formalism (formalist) approach to contracts, 6, 7, 8, 47, 71, 100

formality, 16–17
### Index

| formation (of contract), 14–48 | exercising discretion, 180, 183–184, 195–198, 200 |
| acceptance, 22, 23, 24, 27, 37, 45, 47, 191 | express terms and, 179–184 |
| consideration (see in this index) | factor in damages, 219 |
| definiteness, 22, 63, 132, 138, 143, 177–178 | implied duty of, 175–179, 227–228 |
| mutual assent, 32–37, 45, 62, 129, 235 | good Samarians, 127 |
| offer, 22–24, 27, 33, 36, 66 | goods, definition of, 248 |
| unilateral contract, 25–33 | goods, transactions in, 169, 247–250 |
| foreseeability | gratuitous promises, 17–21, 56, 127–136 |
| of damages, 105, 110, 125 | gross negligence, 234, 237 |
| of reliance, 16, 17, 18 | grubstake contracts, 52 |
| of risks, 82–84 | Guarnerius, Joseph, 78 |
| forum selection clause, 39, 40 | Hallmark Greeting Card Co., 175–179 |
| four corners rule, 7–8, 145, 173 | handshakes, 11, 47 |
| Franklin, Aretha, 19 | Harriet jet, 20–24 |
| Fraud | Helô, Carlos Slim, 226 |
| basis for showing mistake, 73–74, 165–166 | Herbert, Vince, 191 |
| excuse from contract, 58, 91 | Hilton, Paris, 102–112 |
| factor in damages, 219 | Hobbit, The (Tolkien), 155, 158–159 |
| in the inducement of a contract, 58 | Holliday, Jennifer, 19 |
| freedom from contract, 5–6, 225, 239, 241 | Holmes, Oliver Wendell (Judge), 6 |
| frustration of purpose, 82, 83, 91 | Houseman, John, 110 |
| Fusari, Rob, 189–194 | Houston Astros, 94 |
| gambling, 63–67 | Hurricane Katrina, 81 |
| gaps in contractual expression, 181, 183, 195, 197, 198 | hyperbole, 28, 92 |
| exclusive agent context, 175–179 | IBP, 122–125 |
| good faith as filler, 178, 183, 195 | illegal bargains, 55–58, 63–67 |
| incomplete contracts, 178 | implied conditions, 206 |
| silence concerning assignment, 227–228 | impossibility, 1, 7, 81–85, 91, 101, 170 |
| Geffen, David, 100 | impracticability, 82–83 |
| Germanotta, Stefani (aka Lady Gaga), 189–194 | indefiniteness, 22, 63, 132, 138, 143, 177–178 |
| gift promises. See gratuitous promises gifts, 5–7, 14–19, 47, 48, 54, 65, 97, 100, 127, 130, 200, 240n1 | infancy (doctrine), 85–88 |
| Gilmore, Grant, 253n26 | Infinity Broadcasting, 167–173 |
| Gogo, 37–43 | inquiry notice, 38, 42 |
| Golden Globe Awards, 150–155 | insurance contracts, 202–203 |
| good faith | integration, 152 |
| as consideration generally, 57–58, 175–179 | integration clause, 152 |
| as consideration in dispute settlement, 57–58, 192–194 | intent |

| conditions and, 203–213 | consideration suggesting, 54–55 |
| determination of, 44–45 (employee handbook cases), 45–47 (corporate and web policies) | expectation of payment and, 133, 135 |
| implying duties, 177–179 |
Index

family relationship and, 130
meeting of the minds, 34
misunderstanding, 34–35
objective manifestations, 34–35, 47
risk allocation and, 73–85
subjective, 33
third parties, 221–224
interference with contract, 229–230
interpretation
ambiguity, 145
conditions and promises, 199–203, 212
conflicting meanings, 149–150
construction compared, 184, 266n9
construing contract as a whole, 153
courts of performance and, 153–154
implication given silence, 227–228
linguistic cues, 145–147, 150, 201–202
meaning of words, 16–17, 21, 45, 177, 195, 203
multiple documents, 171–173
parol evidence rule, 152–153
plain meaning rule, 144–148, 149–150, 173
technology changes and, 147
invitations to negotiate, 29–30, 243
Island Def Jam, 191
Jackson, Curtis (aka 50 Cent), 59–63
Jackson, Mahalia, 19
Janeway, Katie, 233–239
jesting (jokes), 23–24
Johnson, Lyndon, 41
Jordan, Michael, 55–58, 114–115
JP Morgan, 225–229
judicial decisions, 3–4, 9
Kennedy, John F., 93
Kennedy, Robert F., 93
Kerry, John, 148
King, Coretta Scott, 15–20
King, Dr. Martin Luther, Jr., 15–20
Kirkendall, Ann, 247
Kirkendall, Dee Franklin, 247
Kolodziej, Dustin, 25–27
Kucinich, Dennis, 93
Lady Gaga (Stefani Germanotta), 189–194
Langdell, C. C., 3, 4, 6, 9
"law in action," 9
lease agreements, 82–83, 123–125
legislation. See statutory law
Lehman, Irving (Judge), 8
Leno, Jay, 103, 194, 196
Lerner, Sandra, 13–14
Leslie, Ryan, 29–30
Letterman, David, 56–57, 103, 194
Lewis, Butch, 175–179
Lincoln Center, 98–99, 261n50
liquidated damages, 118–122, 196–197
loan agreements, 50–52, 84–85, 225–229
Lord of the Rings, The (Tolkien), 158, 159
L’Oréal, 14
Lorre, Chuck, 204–205, 208–213
Los Angeles Dodgers, 163–167
lost profits, 103, 104, 106, 110, 113, 120, 121
lost volume seller, 114–116
lottery contracts, 63–67
Lower Manhattan Development Corp. (LMDC), 184–189
MacLaine, Shirley, 116–117
Madison Square Garden, 94
Madoff, Bernard, 73
mailbox rule, 31, 244–245
Major League Baseball, 163
“Malcolm in the Middle,” 85–88
Mansfield, Lord (Judge), 271n10
market-contract difference, 112
Marin, Lee, 61, 63
master of the offer, 36
material adverse change, 122
Mason, James Cheney, 24–27
Mathers, Marshall (aka Eminem), 144–148
McConaughey, Matthew, 180
McCourt, Frank & Jamie, 163–167
meeting of the minds, 34
mental incapacity, 86
“Merchant of Venice;” “The,” 3, 125
Mercury, Freddy, 190
merger agreement, 122–125
merger clause, 152
minors, 85–88
Miramax, 158–160, 267n16
mirror image rule, 30, 245
misrepresentation, 86, 90
mistake, 73–81
misunderstanding, 21, 116
mitigation, 112–117, 195–196
Index

mode of acceptance, 244, 245
modification
  accord and satisfaction, 189–194
  adjustments, 194–198
  preexisting duty rule, 184–189
  waiver, compared, 212
Moet-Hennessy Louis Vuitton, 14
moral obligation, 130, 134–136
preexisting duty rule, 184–189
waiver, compared, 212
Murphy, Robert Cornelius, 11–13
New England Patriots, 93, 229–232
New Line Cinema, 158, 267n16
New York Mets, 93
New York Yankees, 93
nominal consideration, 54–55, 256n10
off-contract remedies, 145–147
O'Brien, Conan, 194–197
O'Brien, Conan, 194–198
O'Brien, Conan, 194–198
occurrences (under insurance policies), 156, 157
offer(s)
  advertisements as, 22–24
  knowledge requirement, 33
  master of the offer, 37
  of rescission, 79
  for unilateral contract, 32
  officious intermeddler, 128
open price term, 249n3
order of performance, 203–208
 Osborne, John Jay, Jr., 110
pacta sunt servanda (“promises are kept”), 82, 100, 134–135
Pafundi, Robert, 86
palimony, 59–63
“Paper Chase,” “The,” 110
Parker, Amelia, 177
parol evidence rule, 7–8, 146, 149, 152–155, 166–167, 173
pacta sunt servanda (“promises are kept”), 82, 100, 134–135
Pafundi, Robert, 86
palimony, 59–63
“Paper Chase,” “The,” 110
Parker, Amelia, 177
parol evidence rule, 7–8, 146, 149, 152–155, 166–167, 173
partial breach, 208–211
partnership, 14, 260n28
past consideration, 133–136
paternity, 55–58
patrimony, 59–63
pay or play clause (aka play or pay clause), 148–150, 203–206, 263n20
penalties, 117–122
Pepsico, Inc., 20–24
perfect tender rule, 215, 273n27
personal satisfaction (conditions of), 272n14
plain meaning rule, 144–150, 173
Poe, Ted, 93
power of acceptance, 31, 243, 244, 245
pre-existing duty (rule), 187–189
prevention, 82
Princeton University, 97, 98, 252n13, 261n49
ProCD, 36–37
promissory estoppel, 129, 138, 215
promotional contracts, 102–107, 109–112, 175–179, 189–192
prostitution, 61, 63
public interest, 4, 5, 7, 72, 111, 235, 237–238
public outrage, 88–93
public policy. See also statutory law
child rearing, 67–72
child support, 57
extortion (and confidentiality), 56, 256n13
forfeiture (avoiding), 202
good faith, 181
infancy doctrine, 86
moral hazard, 237–238
performance (promoting), 208, 271n10
releases (from liability), 235–238
reliance (protecting), 202
settlements (promoting), 191, 197–198, 271n10
tort law, 111, 234, 237–238
puffery, 24
punitive damages, 109–110
quantum meruit, 139–141, 166
quasi contract, 129, 138, 215
quid pro quo, 16
Rakoff, Jed (Judge), 228–229
Rather, Dan, 148–150
.jpg
Index

Reagan, Ronald, 36, 259n14
real property contracts, 54, 123, 166–167, 201–202, 206–207
Redgrave, Vanessa, 105–106
Reed, Robert, 107
reformation, 163–167
Reid, L.A., 191
rejection, 31, 243, 244, 245
releases (from liability), 86–88, 233–239
reliance
as basis for liability, 7–9, 16–20, 44–45, 47
as basis for remedy (damages), 106–108, 111, 202, 211
pre-contractual reliance damages, 106–108
Reliant Energy, 94
remedies, 102–126
damages (see in this index)
equitable, 108, 122–125, 165
reformation, 163–167
rescission, 65, 74–77, 79–81
restitution (see in this index)
specific performance, 122–125
rescission, 65, 74–77, 79–81
restitution, 127–143
absent contract, 108, 129
for benefit conferred, 108
breaching party entitled to, 216
compensation by, 128–130, 132, 138, 143
equitable remedy, 108
moral obligation, 130, 134
officious intermeddlers, 128
past consideration, 133–136
quantum meruit, 139–140, 166
quasi-contract, 129, 138
volunteers, 128, 131–133
unjust enrichment, 142, 143, 165
revocation of offers, 244, 245
reward cases, 26–27
risk allocation
assignment, 225–229
conditions, 199–213
impossibility, 81–85
mistake, 73–81
pricing method, 184–189, 213–220
unconscionability, 55
Robertson, Charles and Marie, 97, 98, 261n49
Robinson, Jackie, 95
rolling contract, 35–37, 246n69, 255n37
Rosenthal, Richard, 169
Saffold, Shirley Strickland, 43, 47
Sandomir, Richard, 93
Sarubin, Joshua, 191
Schaefer Brewing Company, 93
scrivener’s error, 163–167
scroll-wrap, 40, 42
self-help, 209, 220
September 11, 2001, 46, 155, 184
sequential performance (conditions), 122–125
Shakespeare, William, 3, 125
Sheen, Charlie, 204–205, 208–211
shrink-wrap, 255n40
signatures, 3, 17, 19
electronic, 173
statute of frauds, 173
sign-in-wrap, 40, 42
Silverstein, Larry, 163–167
Silverstein Properties, Inc., 156, 157
Simkin, Steven, 73–81
simultaneous performance, 122–125
“60 Minutes,” 148–149
Sirius XM, 155, 160, 161, 162, 163, 267n17
Snapchat, 11–12, 253n1
Snow, Barbara Fisher, 99
Snyder, Dick, 150–155
social control, 5–6, See also public interest; public policy
“Sopranos,” “The,” 136–140
Sotomayor, Sonia (Justice), 35
Sparks Regional Medical Center, 247
Spelman College, 97
Spiegel, Thomas, 11, 12, 13
Spitzer, Eliot, 185
Springer, Ashton, 19
Sprint, 117–122
stadium naming rights, 93–100
stare decisis, 4, 252n9
Starland, Wendy, 190
start-up businesses, 12–14
statute of frauds, 167–174
statute of limitations, 134
statutory law
child adoption and surrogacy, 69–70
child entertainers, 87
executive compensation, 92
gambling, 65
infancy doctrine exceptions, 260n30
maternal child custody, 58
Index

paternal child support, 57
privacy, 33
prostitution, 61
releases from tort liability, 234, 238
statute of frauds, 167–173
statute of limitations, 134
ticket scalping, 230–231
uniform commercial code, 251n8
usury, 50–51
Stewart, Rod, 140–143
stubhub, 229–232
subjective intent, 23, 28
substantial performance, 213–220
supply agreements, 221–225
surrogacy contracts, 67–71

Tate Britain Museum, 20
termination clause, 95–96
terms of use, 36–47
third-party beneficiaries, 221–225
Töbriner, Matthew (Judge), 235
Tolkien, J. R. R., 158, 159
“The Tonight Show,” 103, 194–198
tortious interference with contract, 229–232
torts
contractual limitations on, 233–239
fraud and contract, 109–112
interference with contract, 229–232
remedies for, 109–111
Treaylor, Craig Lamar, 85–88
Treaylor, Meshiel, 85–88
Trump, Donald, 81–85
Tunney, Gene, 106
“Two and a Half Men,” 203, 208, 210
Tyson Foods, 122–125
Tyson, Mike, 59, 175

unanticipated circumstances, 184–189
unconscionability, 49–55
uniform commercial code, 251–252, 251n8
unilateral contract, 25–30
United Blood Services, 247
University of Washington, 94
Uniform Commercial Code, 247

unjust enrichment, 108, 142, 143, 165
Urban Decay, 13–14
usury, 50–51
Vanderbilt University, 119–120
variable costs, 120
Vivendi International, 144–148
volunteers, 127–136
Waits, Tom, 182
waiver, 211–213
Wake Forest University, 175
Wal-Mart, 221–225
Ward, David, 180
Warner Brothers, 140–143
Washington Capitals, 95
Washington & Lee University, 212
Washington Mutual, 247
Washington Redskins, 94, 112–117
Washington Wizards, 95
web site policies, 43–48
Weinstein, Jack (Judge), 41–42
Wells Fargo, 94
willful breach, 218–219
Williston, Samuel, 6–8
Wills, Harry, 106
Wonder, Stevie, 3
Wood, Kimba (Judge), 24
Woods, Tiger, 95
words and phrases
consent not to be unreasonably withheld, 180–182
except as, 150
extra work, 184–189
notwithstanding, 145–148
shall (compared to must), 201–202
sole and absolute discretion, 180–182, 200
World Trade Center, 155, 184, 266n15
Wrigley family (Chicago), 93
Yale University, 6, 97
YouTube video offer, 29

Zimbalist, Efram, 78