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A Crib Sheet for Contracts Profs

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A generation ago, Judge Posner bemoaned the mismatch of the facts as presented in judicial opinions with the actual facts, and argued that this had adverse consequences for the development of doctrine:

> If factual uncertainty is disproportionately characteristic of litigated cases . . . then, given the difficulty of dispelling such uncertainty by the methods of litigation, we can expect the factual recitals in published judicial opinions to be wrong much of the time.
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> And especially in cases where there is no published dissent, judicial opinions exemplify "winners' history." The appellate court will usually state the facts as favorably to its conclusions as the record allows, and often more favorably. . . . The tendency I have described is abetted by the reluctance of academic commentators to expand their study of cases beyond judicial opinions. Rarely will the commentator get hold of the briefs and record to check the accuracy of the factual recitals in the opinion.[1]

For the last couple of decades I have taken up his challenge and dug deeply into a number of cases. What the judge failed to say is that law student editors hate this stuff. It is really hard to get it published. For my most recent foray I dug into the facts of a case featured in all the casebooks, *Jacob & Youngs v. Kent*.[2] This, I thought, would be a slam dunk. Silly me.

Still, I have carried on. Most of that research has been collected in two books, *Framing Contract Law* and *Rethinking Contract Law and Contract Design*. Perusing a number of casebooks, I have noticed that in many instances the authors proceed as if they were unaware of the new (some of it not so new) material. Since for many of the folks who teach Contracts it is a secondary field, their knowledge of the cases does not go much beyond what is in their casebook and teacher's manual, I thought that it would be useful to link the cases analyzed in the two books (plus the afore-mentioned *Jacob & Youngs* and two others) to the casebooks. To do so, I have gone through the 25 casebooks listed in Appendix Table A-1) to determine which of these cases they featured.

Some of the material is just gossip, anecdotes with no relevance to doctrine or contractual analysis, but nonetheless fun. Examples include the fact that Otis Wood's father appointed Cardozo's father to the bench (Framing, chapter 2), the possibility that the New York Yankees might have been moved to Buffalo (Rethinking, chapter 9), and

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[1] Richard A. Posner, *The Problems of Jurisprudence*. Cambridge, Mass: Harvard University Press, pp. 210-211.

[2] 230 N.Y. 239

the terms of one of Michael Jordan's endorsement contracts (Rethinking, chapter 4). But most of the material bears directly on the decisions and the doctrinal implications. So, for example, Cardozo's finding that Wood had an implied duty to use reasonable efforts is at least problematic when it is recognized that when Wood entered into his agreement with Lucy he was in litigation on another contract which had an explicit best efforts clause. (Framing, chapter 2) Likewise, the notion that the postponement of Edward VII's Coronation Procession was beyond the reasonable contemplation of the parties is belied by the fact that thousands of insurance policies had been sold in the six months preceding the event. (Rethinking, chapter 11).

And then there's *Alcoa*. The court praised the parties for including a price adjustment mechanism that accurately tracked historical data. It did not, however, note that the data were from Alcoa's other smelters which used a different power source. Moreover, none of the parties noted a more significant problem. The issue they all focused on was the failure of one component of the price adjustment mechanism (the WPI-IC price index) to accurately track the non-labor cost of production. But even if it had done so perfectly the contract was bound to fail. The contract left sixty percent of the base price unindexed in an era of high inflation; this was not a good idea in a twenty-one-year contract. (Framing, chapter 20)

A recurring theme in the two books is that parties designing their contractual relationships must deal with change. In the post-execution period, circumstances can change as can the information available to the parties. Based on the updated facts, one or both parties might want to have an option to terminate the arrangement. The counterparty might be willing to grant that option, but it might insist upon some compensation to take into account its reliance upon the continued performance, in effect pricing the option. Examples of explicit termination clauses include pay-or-play contracts in the movie business (Framing, chapter 15), severance clauses in employment contracts (Framing, chapter 16 and Rethinking, chapter 2), early termination of a lease (Framing, chapter 17), and a book publisher's option not to publish (Rethinking, chapters 5 and 6). In the absence of an explicit termination clause, the remedy for breach would, in effect, be the option price. (Rethinking, chapter 2)

Under some circumstances a party could opt to terminate by invoking a force majeure clause or one of the various excuse doctrines—impossibility, impracticability, or frustration. Some commentators emphasize the foreseeability of the intervening event or the magnitude of the market price changes and support an expansive excuse doctrine. My arguments are for a more restrictive application of the excuse doctrines. (Framing, chapters 19, 20, and 21; Rethinking, chapter 11) In the event that performance has been excused, there remains the question of how to deal with expenditures that had been made prior to the excusing event—both restitution and reliance. Both English and American law call for restitution and would (possibly) offset that with expenditures incurred in reliance. I argue that the proper default rule would be to award neither. (Rethinking, chapter 12)

Instead of the all-or-nothing termination option, the contract could give one party the option of varying the quantity. In effect, the counterparty sells flexibility at a price that reflects the costs of supplying it. (Framing, chapter 5; Rethinking, chapter 7). The contract could give the flexibility to the buyer (requirements contract) or the seller (output contract). The flexibility could be constrained, say by limiting the requirements to a single factory or by imposing a maximum or minimum. The costs of granting that flexibility can be conveyed by a number of contractual devices, for example a take or pay clause. Contract doctrine has not been helpful, relying on good faith to restrict the quantity determining party's discretion (Framing, chapter 5) and the penalty clause doctrine to undermine the way the parties choose to price the flexibility (Rethinking, chapter 7).

In addition to the material in the two books I include a few other pieces. My paper on *Jacob & Youngs v. Kent,* written too late to appear in the books, will appear in the Case Western Reserve Law Review sometime around Christmas. In the meantime it remains available on SSRN. The other two I include in this paper as the next two sections. Neither had meat enough to warrant its own chapter. The cases appear in only a handful of casebooks, but I found the facts sufficiently puzzling to warrant investigation. The first, *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.,*[3] involved a limitation on the recovery of consequential damages, an issue that is treated in both books (Framing, chapters 13 and 14) and Rethinking, chapters 8, 9, and 10). In the second, *Southern Concrete Services, Inc. v. Mableton Contractors, Inc.,*[4] the judge attempted to distinguish one of my least favorite decisions, ***Columbia Nitrogen Corp. v. Royster Co***.,[5] by misrepresenting its facts. The big puzzle was the huge discrepancy between the contract quantity and the actual quantity; the explanation turned out to be somewhat interesting.

Following that brief detour I turn to the relationship between the cases I have analyzed and the casebooks. I first provide a table that identifies the cases that appear most frequently in the casebooks. Then I turn to coverage in specific casebooks. Most casebooks include over ten of the cases as either main cases or note cases. The Farnsworth and Scott books lead the way with over twenty. I have included tables showing which of the cases are included in three of the casebooks. To make it even easier for the readers, the tables include the chapters in the casebooks that treat those cases.

I. Czarnikow-Rionda Co. v. Federal Sugar Refining Co.

In *Rethinking* I argued in favor of the "tacit assumption" test for the recovery of consequential damages. Today, most American jurisdictions have rejected the approach, the big outlier being New York. Writing in 1932, Professor Bauer[6] asserted that the tacit

[3] 255 N.Y. 33, 173 N.E. 913 (1930).
[4] 407 F.Supp. 581 (1975).
[5] 451 F.2d 3 (4th Cir. 1971). (Framing, chapter 7)
[6] Ralph S. Bauer, Consequential Damages in Contract, 80 U. Pa. L. Rev. 687, 1931-1932.

assumption approach embodied in *Globe Refining Co. v. Landa Cotton Oil Co.*[7] was dominant. A New York case, *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.,*[8] of that era exemplified this approach. The decision rarely makes it into the casebooks nowadays. When the facts are presented properly, the decision provides a nice illustration of an instance in which consequential damages should not be awarded.

My initial exposure to the case was its use as a problem in the Farnsworth casebook.

> *Sweetening a Damage Claim.* Federal contracted to sell 75,000 tons of sugar to Czarnikow, to be delivered directly to Czarnikow's customers. In the contracts that Czarnikow then made in turn with its customers, it provided that the sugar was to be "Federal" brand, but this provision was not known to Federal. . . . When the sugar delivered by Federal turned out to be defective, Czarnikow spent $340,000 in the settlement of claims and the defense of law suits brought by its customers, an amount that was inflated because Czarnikow's obligations to them could not be met by delivery of sugar from other suppliers, which it might have obtained on the market. Is Federal liable for $340,000? Czarnikow-Rionda Co. v. Federal Sugar Refining Co..[9]

The facts seemed odd. Why would Czarnikow promise to deliver Federal brand and why would Federal not know about it? Was there something unique about Federal brand sugar? How is sugar "defective" and why would that result in damages? Why would the damages have been less if Czarnikow could have delivered sugar from other refiners? Why could it have delivered from other refiners but not Federal? Or could it?

The Court of Appeals decision helped fill in some of the gaps, but it too left some holes. The facts, as culled from the opinion, were these. The parties entered into tolling contracts in which Czarnikow-Rionda (CR) would sell raw sugar to Federal which would then sell refined sugar back to CR. More precisely, they entered into back-to-back contracts in which CR agreed to sell a certain quantity to Federal and Federal agreed to sell back the same quantity, less about nine percent shrinkage.[10] The contracts were dated September 15, 1919, March 8, 1920, and April 21, 1920. The tolling fee (the difference in price of the raw sugar coming in and the refined sugar going out), was about two cents per pound of refined sugar. CR "had never before sold to the domestic trade, having been engaged exclusively in the business of importing raw sugar and exporting the refined."[11]

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7 190 U.S. 540, 543, 23 S. Ct. 754, 47 L. Ed. 1171 (1903)
8 255 N.Y. 33, 173 N.E. 913 (1930).
9 The most recent edition is E. Allan Farnsworth, et al Contracts, 8th ed., 2013, p. 694.
10 There was some dispute as to whether these were true tolling contracts, but the court held that it did not matter.
11 PP. 39-40.

The initial contracts restricted CR to selling for export only, but that condition was modified. Prior to April 21 (the last date of its Federal contracts), CR had not entered into any resale contracts. When it did so, CR's contracts with the sub-buyers defined the product as "Eastern cane fine granulated sugar, Federal Sugar Refining Co. brand." Federal would send the sugar directly to CR's customers. The sugar was sold in 100-pound bags; of the 1,670,000 bags covered by the contracts, 29,691 (about 1.7%) contained discolored sugar. CR's customers sued asking either for rescission or damages. CR paid out over $300,000 and incurred litigation costs in excess of $30,000. It, in turn, sued Federal and the trial court held that it could recover those costs from Federal; since the litigation lasted ten years, after interest was included it was awarded $442,000. To put things in perspective, the price risk on the remaining 98.3% of the sugar was borne by the sub-buyers, and they, as we will see, took a bath. Czarnikow made millions—the record does not provide the data to calculate its gains, but they were probably on the order of $10-$20 million. Federal's tolling fee was roughly two cents per pound which would have yielded it about $3 million for all the sugar, but only about $60,000 for the rejected sugar.

The court noted that the refined sugar was a standardized article, identical regardless of who had manufactured it. However, CR's resale contracts had narrowed the market for replacement by specifying Federal brand. Since Federal's capacity was 30,000 bags per day, it should not, in normal circumstances, have been difficult for Federal to replace the sugar. The problem was in the timing. CR's contracts with Federal called for delivery by August as did its contracts with the sub-buyers. So, noted the court, "replacement by Czarnikow, during August, 1920, of sugars found defective on September first, would, of course, have been impossible."[12] The real problem was not the brand name—given the delivery dates on the contracts with the sub-buyers, CR could not have replaced the defective sugar in a timely manner. CR settled claims with the sub-buyers and then sued Federal, arguing that the breach of warranty caused the losses. In a 5-2 decision, reversing the lower courts, the court found for Federal, holding that if circumstances precluded CR making replacement sales, as they did, then these were circumstances that Federal could not have foreseen at the time of contracting. Ergo, no liability.

That's a little better. There are still some holes in the story, but there is enough to make the legal conclusion clear. Of course, foreseeability was irrelevant; it would have been foreseeable that CR would resell. The problem was the tight window. The damages arose because of the tight window and that window was not known to Federal at the time it entered into the contracts. Once Federal had entered into its contract with CR, CR could increase the risk by the timing of the resale contracts.

The decision does not mention that the language of the back-to-back contracts differed. CR noted this in its Brief, and downplayed it:

[12] P. 47.

> "The contracts between plaintiff and defendant . . . speak of 'fine granulated sugar'. Plaintiff's resale contracts to the sub-buyers use in the case of one (Leavitt) the same words, viz., 'fine granulated sugar', but in all the other cases the phrase is 'Standard Eastern Cane Fine Granulated Sugar, Federal Sugar Refining Company Brand'.
>
> The evidence is, also, that these phrases . . . mean identically the same thing in the trade, viz., a white sugar of fairly uniform granulation, dry and free running."[13]

So, if the court were to take the plaintiff's view seriously, the Federal brand was irrelevant.[14] What was relevant was the timing, a point to which I will return.

CR's liability to its purchasers was spelled out in its Brief: "Seven sub-buyers sued Czarnikow alleging that the sugar thus delivered was not 'fine granulated sugar.' Four of them rescinded their contracts with Czarnikow and sued for the recovery of their purchase price, which they had paid in advance by means of letters of credit. The other three, keeping the sugar, nevertheless sued for breach of warranty."[15] But why were the damages so high? Was it a matter of the poor quality of the sugar? Would replacement after the August deadline have been a logistical problem? No. The court barely hinted at what was at stake. Sugar prices had collapsed and the sub-buyers were desperate to get out of their contracts. The existence of a defect and the passing of the contract deadline provided an escape route. The trial judge, Peter Schmuck, confessed to a "smouldering suspicion that rejection and rescission and claims for breach of warranty on the part of plaintiff's sub-buyers were greatly stimulated by the staggering fall in the price of sugar."[16] Judge Schmuck concluded nonetheless that "plaintiff is entitled to be reimbursed for the sums paid in liquidating the judgments obtained against it with interest besides a reasonable counsel fee paid for defense." [17]

Under normal conditions discolored sugar was no big deal. The defect was not fatal. There were two ways of dealing with the defective sugar. It could have been incorporated into products in which the off-color would not be a problem. The record suggests that the price differential for the off-color sugar so used would have been about one cent per pound.[18] Or it could have been returned to the refinery and reprocessed;

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13 Czarnikow Brief, p. 28

14 The notion that a brand name might only refer to a quality standard shows up elsewhere. Recall that the contract in *Jacob & Young v. Kent* stated: "Where any particular brand of manufactured article is specified, it is to be considered as a standard."

15 Czarnikow Brief, p. 5.

16 P. 8837.

17 P. 8839.

18 "Five of the *plaintiff's* witnesses testified that the differential in value between fine granulated sugar and off-grade sugar was from 1/4¢ per pound to 1 ¢ per pound. One witness testified it was 1 1/3 ¢ and one witness that it was from 1 ¢ to 2 ¢ per pound…. If a differential of 1 ¢ per pound be accepted as a fair average according to the testimony of plaintiff's witnesses, the plaintiff's recoverable damages would be

again, the cost would have been in the one-penny range. Had sugar prices not collapsed, CR and the sub-buyers almost certainly would have ignored the August deadline and resolved the problem with replacement sugar or a slight price concession.

Sugar prices did, in fact, collapse after first soaring. "The year 1920 will stand out in sugar history as one in which sensational fluctuations and an astronomical level of prices were experienced."[19] The briefs provide substantial information on sugar prices in the relevant time frame.[20] Price controls were imposed on sugar during the War and regulation continued through the end of 1919.[21] The lifting of controls led to turmoil in the market. At the time of the first contract, September 15, raw sugar was selling at 7 cents per pound.[22] After the regulations were lifted, the prices soared. The March contract price was 12 cents and for April the price had increased to 19 cents. The price peaked on May 19 at 23.57 cents, but by September 8 had fallen to 10.76 cents.[23] By December it had fallen further to 3.5 cents.[24] Refined sugar prices had been fixed at 9 cents per pound through the end of 1919.[25] Prices rose to 27 cents per pound in June, but then began to fall. By August the price had fallen to 17.1 cents and fell further to 8.75 cents in November.[26]

CR had entered the domestic market attracted by the potential gains from deregulation. Tolling, which had been rare in the domestic market, became common, especially for East Coast refiners, like Federal. Rather than sell through traditional distribution channels, CR and others sold to jobbers and an active secondary market developed.[27] The disruption of distribution channels resulted in substantial uncertainty in the market. High demand projections and fears regarding the Cuban sugar crop led to the rapid run-up in prices.[28] The FTC Report blamed speculators and the multiple markups as sugar went through the hands of numerous jobbers and speculators. I doubt that. More likely, the changed environment—deregulation and new marketing channels—meant that market participants had trouble processing information. The problems were exacerbated

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$29,691; whereas the plaintiff has been allowed special damages amounting to $335,070.17, exclusive of interest." Federal Brief, p.32.

19 Janes, Hurford and H.J. Sayers. *The Story of Czarnikow*., London, England: Harley Publishing Company, 1963, p. 72.)

20 The briefs were hardly brief. Federal's brief clocked in at 135 pages. Not to be outdone, Czarnikow responded with a 149-page tome.

21 Federal Brief, p. 62.

22 Federal Brief, p. 35.

23 Czarnikow Brief, p. 147.

24 Janes and Sayers, p. 74.

25 Report of the Federal Trade Commission on Sugar Supply and Prices, November 15, 1920 (hereafter FTC Report), p. 130.

26 Federal Brief, p. 63.

27 FTC Report, pp. 83-93.

28 In October, 1919, Herbert Hoover, the Food Administrator, testified that "prohibition had the effect of increasing the consumption of candy and sweet drinks to such an extent that a minor shortage in sugar existed." (FTC Report, p. 62)

when new firms, like CR, entered the domestic market with limited knowledge of how that market worked. When the information on the Cuban crop turned out to be better than expected and sugar from other parts of the globe came pouring in to the America market, the market crashed.[29]

The sub-buyers' rejection of the non-conforming sugar was purely opportunistic. The fact that Federal could not get them conforming sugar in a timely manner did not affect them. By late August, when the sub-buyers recognized the quality of the sugar, time was no longer of the essence (if it ever was). There obviously was no desperate need for the sugar; otherwise the market would not have crashed. A sympathetic court could have softened the contract language and found that CR's liability to the sub-buyers was limited to the replacement of the non-conforming sugar with fine white sugar in a reasonable time after the flaw was discovered. The price risk on the defective sugar would then have been borne by the sub-buyers, not CR. None of the courts dealing with these claims permitted such a modification. (I happen to believe the courts were correct not to permit such modifications).

With the facts spelled out more clearly than in the opinions (and much more clearly than in the treatises) the result is more transparent. The timing of the two sets of contracts was critical. Federal sold sugar to Czarnikow with the promise that it would deliver directly to Czarnikow's customers. Czarnikow subsequently entered into contracts with those customers but imposed a time frame that precluded Federal's curing any quality problems. The narrower the time frame, the greater the risk—a risk controlled by the delivery dates set in CR's contracts with their sub-buyers. Czarnikow's sales contracts are analogous to the tort notion of "coming to the nuisance." It took Federal's contract as given and then entered into agreements that increased the risk that the warranty of quality would be breached.

Czarnikow is cited with approval in *Kenford Co., Inc. v. Cnty. of Erie*,[30] the modern New York decision adopting the tacit assumption approach. But the key factor—timing—has been lost: "the defendant supplier of sugar was not made aware at the time of the contract that the plaintiff purchaser could not acquire sugar on the open market and, therefore, was not liable for the plaintiff's special damages arising out of the breach

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[29] "Fears were entertained that a very serious sugar shortage would develop later in the season and what amounted to a scramble for supplies took place with little regard to the cost. Speculators had joined in, cargoes changing hands several times whilst crossing the Atlantic, and the market began to boil, the raw sugar price eventually rising to 22.50 cents … f.o.b. Cuba…. Sugar came out of all sorts of corners including stocks of White Javas lying in store in China, Japan, and India, to take advantage of these prices and speculators were not slow to unload their holdings at prices which some felt were beginning to reach exaggerated levels." (Janes & Sayers, p. 73)

[30] 73 N.Y.2d 312, 537 N.E.2d 176 (1989).

of contract."[31] The defendant was not simply unaware; the plaintiff hadn't even entered into the subsequent contracts. The decision that reintroduced the tacit assumption approach into English law, *The Achilleas*,[32] also turned on the timing issue. For more on the tacit assumption approach to consequential damages and *Kenford* and *Achilleas*, see Rethinking, chapters 8, 9, and 10.

II. Southern Concrete Services, Inc. v. Mableton Contractors, Inc.

Columbia Nitrogen Corp. v. Royster Co.[33] is notorious for allowing evidence of trade usage and course of performance to trump clear contractual language. In *Southern Concrete Services, Inc. v. Mableton Contractors, Inc.,*[34] rather than simply rejecting the *Columbia Nitrogen* analysis, the court attempted to distinguish it. The decision raises two questions. First, did the distinguishing work? Answer: No; to do so, the court had to misrepresent the *Columbia Nitrogen* facts. Nonetheless, the rejection was surely justified. Second, the facts seem peculiar; there is no explanation for the huge gap between the contract quantity and the actual quantity.

Turning to the first question, the court misrepresented the *Columbia Nitrogen* contract language and characterized the seller's behavior in an unflattering way:

> In *Royster*, the court noted that the contract default clause dealt only with the buyer's failure to pay for delivered phosphate, thus raising the possibility that the contract was not meant to require the buyer to accept the entire contract amount. In addition, the court was faced with a situation where the equities were strongly in favor of the defendant. In previous dealings between the parties, the defendant had apparently never insisted on purchase of the entire contract amount by plaintiff. Now that plaintiff was the seller it was insisting on strict compliance with the literal terms of the contract. The plaintiff also enjoyed the protection of an escalation clause in the contract which allowed it to raise prices to compensate for increased production costs, while plaintiff refused to allow the defendant to renegotiate for a lower price to reflect market conditions. Thus the court in *Royster* faced a situation in which one party may have been trying to take unfair advantage of a long-standing customer.
>
> Such a situation is not present in this case, however, and this court has grave doubts about applying the reasoning of *Royster* to different fact situations. Here, no prior dealings are alleged by either party; the contract by its terms does not intimate that the buyer would only be liable for

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[31] Pp. 320-21.

[32] *Transfield Shipping Inc v Mercator Shipping Inc. (The Achilleas)*, (2007) EWCA Civ 901, (2008) All E.R. (Comm) 685, rev'd, (2008) UKHL 48 (12)

[33] 451 F.2d 3 (4th Cir. 1971). (Framing, chapter 7)
[34] 407 F.Supp. 581 (1975).

> concrete actually delivered, and the contract does not contain provisions granting one party special repricing rights. Instead, the contract sets out fairly specific quantity, price, and time specifications.[35]

Regarding the Columbia Nitrogen contract language, the role of the default clause was to give the seller the option of deferring further delivery or cancelling the contract if the buyer failed to make timely payment for goods delivered. It had nothing to do with the obligation of Columbia Nitrogen to purchase and Royster to furnish the minimum quantities specified in the contract. The escalation clause, contrary to the court's characterization, was symmetrical. Prices could go up or down, depending on the costs of inputs. Moreover, in the first year Royster chose not to increase the price when one of the components of the price adjustment mechanism, the price of sulfur, rose. The statement regarding the previous dealings is technically correct (and was given great weight in the *Columbia Nitrogen* decision), but it was misleading. The contracts in which Royster was a purchaser were very different from this one. As a buyer Royster had forty contracts over a six-year period, the average sale being less than $100,000. As a seller it had one three-year contract for nearly $2 million per year.[36] Royster was not taking advantage of a "long-standing customer." It was, at worst, attempting to enforce a written agreement against a buyer that was an occasional supplier.

In *Southern Concrete* the contract was for delivery of "approximately 70,000 cubic yards" of concrete for the construction of a building foundation in the time period September 1, 1972 to June 15, 1973 at a fixed price of $19.60 per cubic yard. The contract had a simple integration clause: "No conditions which are not incorporated in this contract will be recognized." The buyer only ordered 12,542 cubic yards and the seller sued. The buyer's defense was that the custom of the trade was that both quantity and price were subject to renegotiation; the trial judge refused to allow it to introduce evidence on the alleged custom. As a result, Southern was compensated for losses based on the 70,000 figure.

There was no discussion in the decision of how such a huge discrepancy came about, nor about why the contract was structured as it was. That is not a criticism of the court. Since the language was clear, the reasons were legally irrelevant. But it is, nonetheless, puzzling. How could they have been so far off? The first piece of the explanation is that the project turned out less favorably than the buyer had anticipated. The buyer had planned on constructing four units in the nine-month period. This meant that it would dig a large number of holes that would be filled with the seller's concrete. Had it done so, it probably would have used about 70,000 cubic yards. However, there were two problems. First, because subsurface problems were greater than had been anticipated, there were substantial delays. As a result it finished less than two units in the nine-month period. It finally did finish the two units two years later, using 40,000 cubic yards from a different supplier. The remaining two units were cancelled. So, part of the explanation is that the buyer underestimated the difficulty in digging the holes and

[35] 583-584.
[36] Goldberg, Framing Contract Law, ch. 7.

overestimated the likelihood that its customer would want it to complete all four units. All these risks were to be borne by the buyer; the contract did not even include a force majeure clause.[37]

The other piece of the explanation is how the structure of the contract (which was on the seller's standard form) relates to the manner in which the concrete was to be provided. The approximate quantity and the fixed time period were both essential elements in pricing the goods. To provide the concrete the seller, a Michigan firm, had to set up a plant on site in Georgia. In addition to the plant it provided five cement trucks; these were site-specific, since they could not legally travel on state roads when loaded. It also had to have on hand five teamsters and six other employees for the entire period. These costs would be incurred regardless of whether the buyer took any concrete. By setting the quantity and the time period, the seller could determine the price that it would have to charge.

There were other ways to protect the seller's reliance. It could have used some variant on take-or-pay or nonlinear pricing. Or it could have set the price as it did and then included a "revert-back" clause, which would deal with the possibility that the buyer would take less. With a revert-back clause, if the quantities were below the volume presumed when the contract was entered into, the purchaser could then be assessed a higher unit price on its previous purchases.[38] The fact that Southern had been in business for a while and had been using this particular method in its standard form suggests that it was a pretty good way to deal with the problem. The significant point is that *any* pricing arrangement would have to take into account that the seller had significant ongoing costs that were independent of the quantity actually sold. If the buyer could unilaterally decide to take a lower quantity or extend the time period without altering the unit price, the seller would be harmed. The trade usage alleged by the buyer would have undermined the structure of the contract.

III. Me & the Casebooks

My choice of cases has in part been dictated by the casebooks I have used—first the Farnsworth, et al book and more recently the Scott-Kraus book. A number of the cases showed up in one form or another in over half the casebooks. In Table 1, I summarize the appearance of the most frequently included cases. All 25 casebooks include *Jacob & Youngs,* with only the Macaulay book relegating it to Note status.

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[37] The seller did, however, indemnify the buyer for damages resulting from its failure to comply with the contract.

[38] "Some volume contracts, to be performed on a 'release' basis, i.e., as called for by the buyer, cover price in detail. An overall price with a large volume purchase is sought in order to reduce the unit price. If there is a premature termination and the purchase is covered by a revert-back clause, the purchaser is then back-charged a higher unit price. The revert-back clause can embody a price schedule or refer to an identified price list covering procurement of lesser quantities." 2 Forms and Agreements for Architects, Engineers and Contractors § 14:39.

Despite the fact that Richard Danzig[39] had already provided some background information on the decision, I suspect most contracts professors will find there is much new here. The one surprise about *Wood v. Lucy, Lady Duff Gordon* is that one casebook, White and Frier, ignored it entirely. The excuse cases, *Taylor v. Caldwell*, *Krell v. Henry*, and *Alcoa v. Essex,* appeared in most casebooks. The one big surprise was that the Markovits casebook, which had far and a way the most pages, managed to completely ignore all of the excuse doctrines. I was somewhat surprised that two of Judge Posner's more prominent decisions, *Lake River v. Carborundum* and *Empire Gas v. American Bakeries*, barely managed to make the cut, appearing in just over half the casebooks.

Tables 2-4 show how specific cases are treated in three of the casebooks. The first column identifies where the case is covered: F is For Framing Contract Law; R is for Rethinking Contract Law and Contract Design; and Crib is for this document. The coverage of the other casebooks is on a spreadsheet which I will make available to those who want it. Perhaps casebook authors might want to include the information in their Teacher's Manuals. Or, God forbid, read the books themselves.

Table 1. Most-included Cases

CASE	MAIN	NOTE	REFERENCE
Aluminium Company of America. v. Essex	4	10	3
Baird (James) Co. v. Gimbel Bros.	7	5	3
Campbell Soup Co. v. Wentz	3	1	8
Drennan v. Star Paving Co.	17	3	0
Empire Gas Corp. v. American Bakeries Co	4	2	7
Jacob & Youngs, Inc. v. Kent	24	1	0
Krell v. Henry	15	6	0
Lake River Corp. v. Carborundum Co	10	2	1
Mattei v. Hopper	6	2	6
Mineral Park Land Co. v. Howard	6	3	8
Neri v. Retail Marine Corp.,	9	5	1
Parker v. Twentieth Century-Fox Film Corp.	15	7	0
Taylor v. Caldwell,	17	4	0
Wood v. Lucy, Lady Duff-Gordon	21	2	1

[39] Danzig and Watson, The Capability Problem.

Table 2. Contract Law and Theory: Scott & Kraus				
Case Name	Cited At	Main	Note	reference
Aluminum Company of America. v. Essex Group	F, ch.20	x		
Baird (James) Co. v. Gimbel Bros.	R, ch. 15		x	
Bloor v. Falstaff Brewing Corp	F, ch. 6	x		
Brown v. Cara	R, ch. 14	x		
Carroll v. Bowersock	R, ch. 12		x	
Columbia Nitrogen Corp. v. Royster Co	F, ch. 7	x		
Cosden Oil & Chemical Company v. Helm	R, ch. 3	x		
Davis v. Diasonics	F, ch. 12, R, ch. 4	x		
Drennan v. Star Paving Co.	R, ch. 15	x		
Empire Gas v. American Bakeries	F, ch. 3; R, ch.2	x		
Feld v. Henry S. Levy & Sons, Inc.	F, ch. 5		x	
Freund v. Washington Square Press, Inc.	R, ch. 5	x		
Globe Ref. Co. v. Landa Cotton Oil Co.	R, ch. 2		x	
Jacob & Youngs, Inc. v. Kent	J&Y	x		
Klein v. PepsiCo, Inc.,	R, ch. 3		x	
Krell v. Henry	F, ch.19, R, ch. 11	x		
Lake River Corp. v. Carborundum Co	R, ch.7	x		
Mineral Park Land Co. v. Howard,	F, ch. 21			x
Nobs Chemical, U.S.A., Inc. v. Koppers Co.	F, ch. 11			x
Norcon Power Partners, L.P. v. Niagara Mohawk	R, ch. 13	x		
Parker v. Twentieth Century-Fox Film Corp.,	F, ch. 15,16	x		
Pavel Enterprises, Inc. v. A.S. Johnson Co.	R, ch. 15	x		
Rodriguez v. Learjet,	F, ch.12	x		
Southern California Acoustics Co. v. C. V. Holder	R, ch. 15		x	
Southern Concrete v. Mableton	Crib	x		
Taylor v. Caldwell	R, ch.11	x		
Wood v. Lucy, Lady Duff-Gordon,	F, ch.2	x		
WorldCom, Inc., In re	R, ch. 4		x	

Table 3. Contracts Cases and Materials: Farnsworth et al				
Case Name	Cited At	Main	Note	reference
Allied Canners & Packers, Inc. v. Victor Packing Co.	F, ch. 11			x
Aluminium Company of America. v. Essex	F, ch. 20		x	
Baird (James) Co. v. Gimbel Bros.	R, ch. 15		x	
Bloor v. Falstaff Brewing Corp	F, ch. 6	x	x	
Campbell Soup Co. v. Wentz	F, ch. 9	x		
Columbia Nitrogen Corp. v. Royster Co	F, ch.7	x		
Cosden Oil & Chemical Company v. Helm	R, ch.3	x		
Czarnikow-Rionda Co. v. Federal Sugar Refining Co	Crib		x	
Davis v. Diasonics	F, ch.12; R, ch. 4	x		
Drennan v. Star Paving Co.	R, ch. 15	x		
Empire Gas Corp. v. American Bakeries Co	F, ch. 5; R, ch.2			x
Feld v. Henry S. Levy & Sons, Inc.	F, ch.5			x
Fera v. Village Plaza Inc,	R, ch. 16	x		
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.	R, ch. 12		x	
Freund v. Washington Square Press, Inc.	R, ch. 5			x
Globe Ref. Co. v. Landa Cotton Oil Co.	R, ch. 2			x
Jacob & Youngs, Inc. v. Kent	J&Y	x		
Kenford Co., Inc. v. Erie County	R, ch. 9	x		
Klein v. PepsiCo, Inc.,	R, ch. 3	x		
Krell v. Henry	F, ch. 19; R, ch.11	x		
Lake River Corp. v. Carborundum Co	R, ch. 7	x		
Mattei v. Hopper,	F, ch. 4	x		
Mineral Park Land Co. v. Howard,	F, ch. 21	x		
Neri v. Retail Marine Corp.,	F, ch. 12, R, ch. 4			x
Nobs Chemical, U.S.A., Inc. v. Koppers Co.,	F, ch.11			x
Nolan v. Whitney	J&Y		x	
Parker v. Twentieth Century-Fox Film Corp.,	F, ch. 15 & 16	x		
Taylor v. Caldwell,	R, ch. 11	x		
Tongish v. Thomas,	F, ch. 11	x		
Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilleas)	R, ch. 10			x
Wasserman v. Township of Middleton,	F, ch. 17	x		
Wood v. Lucy, Lady Duff-Gordon,	F,. ch.2	x		

Table 4. Basic Contract Law: Fuller et al				
Case Name	Cited	Main	Note	reference
Allied Canners & Packers, Inc. v. Victor Packing	F, ch.11			x
Bloor v. Falstaff Brewing Corp	F, ch.6		x	
Campbell Soup Co. v. Wentz	F, ch.9			x
Columbia Nitrogen Corp. v. Royster Co	F, ch.7			x
Drennan v. Star Paving Co.	R, ch.15	x		
Empire Gas Corp. v. American Bakeries Co	F, ch.5; R, ch. 2			x
Feld v. Henry S. Levy & Sons, Inc.	F, ch. 5			x
Fera v. Village Plaza Inc,	R, ch. 16		x	
Jacob & Youngs, Inc. v. Kent	J&Y	x		
Kenford Co., Inc. v. Erie County	R, ch.9	x		
Krell v. Henry	F, ch.19; R, ch. 11	x		
Mattei v. Hopper,	F, ch. 4	x		
Mineral Park Land Co. v. Howard,	F, ch. 21	x		
Neri v. Retail Marine Corp.,	F, ch. 12; R, ch. 4	x		
Norcon Power Partners, L.P. v. Niagara Mohawk	R, ch.13	x		
Parker v. Twentieth Century-Fox Film Corp.,	F, ch. 15&16	x		
Pavel Enterprises, Inc. v. A.S. Johnson Co.	R, ch. 15	x		
Southern Concrete v. Mableton	Crib			x
Taylor v. Caldwell,	R, ch. 11	x		
Wasserman v. Township of Middleton	F, ch. 17	x		
Wood v. Lucy, Lady Duff-Gordon	F, ch. 2	x		

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Brian A. Blum, Amy C. Bushaw	Contracts: Cases, Discussion, and Problems	3
Tracey E. George, Russell Korobkin	K: A Common Law Approach to Contracts	
Charles L. Knapp, Nathan M. Crystal, Harry G. Prince	Problems in Contract Law: Cases and Materials	
Gerald E. Berendt; Doris Estelle Long; Marie A. Monahan; Robert J. Nye; John H. Scheid; Michael E. Closen	Contract Law and Practice	2
Robert E. Scott; Jody S. Kraus	Contract Law and Theory	5
John Edward Murray, Jr.	Contracts: Cases and Materials	6
Stewart Macaulay; Jean Braucher; John A. Kidwell; William Whitford	Contracts: Law in Action (vol. 1 Introductory Course; vol. 2 Advanced Course)	3
William McGovern; Lary Lawrence; Bryan D. Hull	Contracts and Sales: Contemporary Cases and Problems	3
E. Allan Farnsworth; Carol Sanger; Neil B. Cohen; Richard R.W. Brooks; Larry T. Garvin	Contracts: Cases and Materials	8
John P. Dawson; William Burnett Harvey; Stanley D. Henderson; Douglas G. Baird	Contracts: Cases and Comment	10
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Daniel Markovits	Contract Law and Legal Methods	
Daniel J. Bussel; Arthur I. Rosett	Contract Law and its Application	8
Christina L. Kunz; Carol L. Chomsky	Contracts: A Contemporary Approach	2
John D. Calamari; Joseph M. Perillo; Helen Hadjiyannakis Bender; Caroline Brown	Cases and Problems on Contracts	6
David G. Epstein; Bruce A. Markell; Lawrence Ponoroff	Cases and Materials on Contracts: Making and Doing Deals	4
Lon L. Fuller; Melvin A. Eisenberg; Mark P. Gergen	Basic Contract Law (full and concise editions available)	9
Bruce W. Frier; James J. White	The Modern Law of Contracts	3
Steven J. Burton	Principles of Contract Law	4
George W. Kuney; Robert M. Lloyd	Contracts: Transactions and Litigation	3
Robert S. Summers; Robert A. Hillman	Contract and Related Obligation: Theory, Doctrine, and Practice	6
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TABLE A-2

FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE

TABLE A-3

RETHINKING CONTRACT LAW AND CONTRACT DESIGN

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   PART I. Direct Damages

2. The Reliance-Flexibility Tradeoff and Remedies for Breach
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