

# COWBOY CONTRACTS: THE ARIZONA SUPREME COURT'S GRAND TRADITION OF TRANSACTIONAL FAIRNESS

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*Arizona common law insists upon transactional fairness, a tradition in keeping with the iconic ethos of the American cowboy as straightforward, trustworthy and self-reliant when necessary but also dependent on the surrounding community. Although not conventionally justified in economic terms, the Arizona approach to contract law is also efficient, increasing predictability, reducing transaction costs, and compensating for information asymmetries. In this 50<sup>th</sup> anniversary of the Arizona Law Review, and only four years from the state's centennial, this Article celebrates the Arizona Supreme Court's grand tradition of insisting upon transactional fairness and seeks to understand its elements and the structural features of the Arizona legal system that have allowed it to flourish, as well as the limits of the common law as a means to achieve policy goals.*

## I.

U.S. Supreme Court Justice Sandra Day O'Connor and her brother H. Alan Day grew up on The Lazy B, a cattle ranch that straddled the Arizona-New Mexico border.<sup>1</sup> A few years ago, Justice O'Connor was inducted into the National Cowboy and Western Heritage Museum Hall of Fame.<sup>2</sup> In their memoir of their early years on the ranch, O'Connor and Day describe how their father and mother,

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1. SANDRA DAY O'CONNOR & H. ALAN DAY, *THE LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* vii–xi (2002).

2. Hall of Great Westerners, <http://www.nationalcowboymuseum.org/info/awards-hof/Great-Westerners.aspx> (last visited Feb. 12, 2008) (click on "View Inductee Details" for a list of inductees).

nicknamed DA and MO,<sup>3</sup> would make a handshake deal to sell half a year's production of calves:

[W]e would see the dust cloud forming on the ranch road that signaled the arrival of a car. It would eventually arrive in the gravel area in front of the house or the bunkhouse, and the driver would get out and walk around a bit. DA would go out and greet the visitor and invite him inside for a cup of coffee or a glass of iced tea. They would sit in the living room. MO and any of us who were there would join them. The conversation would last an hour or more, concerning where it had rained last and when, how range conditions were at the Lazy B and elsewhere in the Southwest, how the cattle looked there and elsewhere, and what the prices had been on any known cattle sales in recent months. There would be talk of mutual friends and acquaintances. But no mention would be made of the purpose of the visitor's trip to the Lazy B. If lunchtime or dinnertime rolled around, MO would invite the visitor to join us for a meal. During the meal, the conversation might extend to President Franklin Roosevelt and some of his programs, which the ranchers particularly disliked, or to the economy generally, or to the price of cattle feed.

Finally, the visitor would say he'd better be getting along. DA would walk out to the car with him, and often the visitor would turn the key and start the motor. Then he might say, "Harry, I think I could use some calves this spring. What would you take for the steers?" "Well, I don't know. What are you paying?" They would talk a bit about the price, and if it sounded all right, they would shake hands. DA would say, "I think I can have them at the shipping pen on May twenty-ninth. Is that all right?" "I think that will be okay. I'll see you the twenty-ninth over at Summit."

It was many years before a written contract of sale became commonplace. And for many years sales would be made without a down payment. Gradually, the practice changed, until not only a written contract but a down payment were required.<sup>4</sup>

The family and the ranch hands at the Lazy B would then spend about two months planning and performing a roundup.<sup>5</sup> They would repair fences, shoe thirty horses, oil saddles, add extra help and proceed to carry out the roundup, which included gathering, sorting and branding a thousand calves, saving a breeding herd and driving the rest from the ranch to a shipping point without upsetting them into shedding weight before delivery.<sup>6</sup> The delivery day was the culmination of six months' work, and it is small wonder that on that day, DA

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3. When she was small and learning to spell, Sandra and Alan's sister Ann gave their father and mother, Harry and Ada Mae Day, the nicknames DA and MO (pronounced "Dee-ay" and "Em-oh"). O'CONNOR & DAY, *supra* note 1, at xi.

4. *Id.* at 166.

5. *Id.* at 165-73 (describing the planning and performance of a roundup, which itself took about 45 straight days of work after the planning process).

6. *Id.* at 166-72.

would feel queasy and couldn't eat much.<sup>7</sup> He was on edge until the last calf was loaded onto railroad cars or trucks and he had a bank draft in hand.<sup>8</sup> The family's economic life depended on relationships of trust and interdependence with buyers as well as with employees. Ranch hands, for example, might spend decades living on The Lazy B, eventually going into semi-retirement and even being buried there.<sup>9</sup>

At a remove of about seven decades, it is hard to know for sure why contracting at The Lazy B was so informal in those days. DA may have been idiosyncratic, or perhaps in the close-knit world of Arizona ranching in the first half of the 20th Century, parties were likely to adjust disputes, with relational sanctions providing sufficient leverage to get them to do so and making detailed contracting unnecessary and thus inefficient.<sup>10</sup> An unhappy party could not only refuse to deal again but also spread negative word of mouth that might poison business as well as personal relationships, so that adjustment of disputes according to fairness norms was highly likely. In such a context, asking for a written contract could have been a sign of trouble to the other party. On the other hand, even in territorial days, some cattle sales did involve a written contract and a down payment.<sup>11</sup> Another possible explanation for informality, not inconsistent with the first, is that the eventuality of a lawsuit was remote, and if it occurred, the courts could be counted on to come up with a reasonable resolution. Although sparse, the early Arizona case law of cattle contracts was creative and sensible.<sup>12</sup> Sandra Day O'Connor's own explanation of her father's contracting practices is that he and his buyers knew each other and had dealt with each other before so "they trusted each other;" furthermore, "he felt that a written contract could also be abused."<sup>13</sup>

That locality matters is a foundational principle of our federalist system. Contract law is state law, and state supreme courts are its stewards.<sup>14</sup> Stewardship

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7. *Id.* at 171–72.

8. *Id.* at 172.

9. *Id.* at 111, 254–55.

10. Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467–68 (concerning academic error of assuming that parties carefully plan contracts or primarily perform them because of the possibility of legal enforcement and describing how relational sanctions can make detailed planning unnecessary).

11. *Pringle v. Hall*, 56 P. 740 (Sup. Ct. Terr. Ariz. 1899) (involving an action to enforce a written agreement to deliver 5,000 head of cattle, in which the purchaser made an advance, or down payment).

12. *See* *McFadden v. Shanley*, 141 P. 732, 733–36 (Ariz. 1914) (citing three different treatises and coming to the conclusion that after a failure to deliver suitable cattle, in a situation where there was no market for cattle at the time and place set for delivery, the buyer could recover the difference between the contract price and the price of a substitute at a market location in the vicinity, plus transportation costs).

13. Remarks of Sandra Day O'Conner at a luncheon at the University of Arizona (Feb. 6, 2008).

14. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 4 (1960) ("It is the appellate court, it is particularly the highest court in any given hierarchy, which is the organ and even more importantly the symbol of reckonable recognition and reward for decent careful craftsmanship in law.").

is an ideal in the American West.<sup>15</sup> A long line of Arizona justices have taken responsibility for the care and tending of Arizona common law. Particularly striking is the fierce, outspoken support of fairness in the Arizona law of contracts, a tradition created and sustained by nonpartisan cooperation of the justices across several generations.<sup>16</sup> In this Article, this grand tradition is dubbed “cowboy contracts,” referring to the iconic ethos of the western cowboy, a person who is honest, trustworthy and straightforward, so that you can rely on his few words.<sup>17</sup> He<sup>18</sup> has no use for city slicker tricks. Although he relies on himself when he has to, he recognizes that his life and livelihood depend on community support.<sup>19</sup>

The Arizona economy was once understood in terms of five Cs—copper, cattle, cotton, citrus, and climate.<sup>20</sup> The state’s economy has moved from mining and agriculture to high tech and service industries, but the fairness tradition lives on and works well for sophisticated and more ordinary contemporary transactions as well.<sup>21</sup> Furthermore, there is no evidence that Arizona’s common law fairness

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15. See Gerald Korngold, *Resolving The Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1528–34 (2007) (concerning the need to take future generations into account as stakeholders when managing land resources and the role of land as a source of opportunity and national wealth in the settlement of the West).

16. The period discussed is mostly the last twenty-five or thirty years, during which time Arizona’s merit selection system, instituted in 1974, reached its full flower and meant the Arizona Supreme Court was composed of very able justices. See *infra* notes 226–37 and accompanying text.

17. See 100 YEARS OF COWBOY STORIES (Ted Stone ed. 1994). There is an opposing idea of the cowboy as simple and a little out of control, which is not the sense in which the term is used here.

18. The cowboy ethos is obviously masculine. The term “cowgirl” does not have the same connotations. On the other hand, women have experienced the ethos; for example, Sandra Day O’Connor seems to have been dramatically shaped by it. See O’CONNOR & DAY, *supra* note 1, at 240–44 (concerning the day in high school when she filled in for one of the crew and took the job of driving a pickup truck alone for two and a half hours to bring lunch to the hands, getting there late because she had to change a flat tire herself, struggling with all her strength to loosen stuck lug nuts with a wrench and finally succeeding: “I had expected a word of praise for changing the tire. But, to the contrary, I realized that only one thing was expected: an on-time lunch. No excuses accepted.”).

19. The ethos, as played out in mid-twentieth century American western movies, also included making use of negative stereotypes or caricatures of American Indians. At its highpoint, the movie form involved elemental tales of good versus evil (and the forces of good were very good—honest, tough, self-reliant, full of gumption); after the Vietnam War, the western movie changed and became darker, more cynical, and critical of the culture as well as more violent. See A. O. Scott, *How The Western Was Won*, N.Y. TIMES MAG., Nov. 11, 2007, at 55 (discussing history of the western movie); Luc Sante, *Reaching For It*, N.Y. TIMES MAG., Nov. 11, 2007, at 23 (discussing simpler western movies of an earlier era and the current resurgence of the form in a darker mode, during the protracted Iraq war, as a form of American self-criticism).

20. Morris K. Udall, *Arizona—Where We Came From, Where We’re Going*, Congressman’s Report, Vol. XXII, No. 1 (Apr. 1984), available at <http://www.library.arizona.edu/exhibits/udall/congrept/98th/8404.html>.

21. See *id.*; WILLIAM P. PATTON & MARSHALL J. VEST, UNIVERSITY OF ARIZONA ELLER COLLEGE OF MANAGEMENT, ECONOMIC & BUSINESS RESEARCH CENTER, HIGH-TECH

tradition has impeded the explosive growth of its economy; more likely it has helped to promote growth by reinforcing trust in contractual relationships.<sup>22</sup>

American legal realist Karl Llewellyn described a certain kind of appellate judging as involving a “Grand Style,” hastening to add that he meant “a way of thought and work, not . . . a way of writing.”<sup>23</sup> The essence of this judicial method is to reconcile precedent with principle and policy, making law more “reckonable,” in the sense of understandable and predictable.<sup>24</sup> An appellate court working in the Grand Style seeks “ever better formulations for guidance” and the “production and improvement of rules which make sense on their face.”<sup>25</sup> Llewellyn contrasted this style with “the Formal Style,” in which “the rules of law are to decide the cases,” so that “sense is no official concern of a formal-style court;” he took the position that the Formal Style is less reckonable, while rules that make sense “have a fair chance to get the same results out of very different judges, and so in truth to hit close to the ancient target of ‘laws and not men.’”<sup>26</sup>

In addition to providing the benefits of greater predictability, Arizona’s grand transactional tradition backs up the substance rather than merely the form of private ordering. It is based on realism, not myths or fictions. The consistent theme in Arizona Supreme Court decisions is that a contractual relationship as a whole creates reasonable expectations, with writings or records<sup>27</sup> only part of the picture, not to be formalistically over-emphasized.<sup>28</sup> Furthermore, the state’s high court has faced up to the need to set limits on private ordering when outweighed by other

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POWERS ARIZONA’S ECONOMY (May 2006), <http://ebr.eller.arizona.edu/benchmarks/Sector/HighTechPower.aspx>; see also *infra* Parts II and III.

22. See Dennis Hoffman, *Jobs, Income, and Growth in Arizona: Individual Versus Aggregate Measures of Economic Performance*, at 3 (March 2005), available at <http://wpcarey.asu.edu/seidman/reports/JobsIndividualvAggregate.pdf> (noting that Arizona is “a job-generating marvel” and “among the nation’s leaders in aggregate growth,” although also noting that human capital issues such as lagging education and skills mean that individual Arizonans do not necessarily feel the benefits of this growth).

23. LLEWELLYN, *supra* note 14, at 36.

24. *Id.* at 4, 17–18. Llewellyn said that “the Grand Style is the best device ever invented by man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice.” *Id.* at 37–38.

25. *Id.* at 38.

26. *Id.*

27. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2006); Uniform Electronic Transactions Act (Official Text 1999) (both making electronic records effective to meet most writing requirements).

28. See *infra* note 62 and accompanying text (concerning the obligation of good faith and fair dealing and finding that it goes beyond “the written words of the contract”) and notes 153–208 and accompanying text (concerning expansive approach to use of extrinsic evidence and the doctrines of reasonable expectations and unconscionability to refuse to enforce unreasonable standard form terms).

important policies<sup>29</sup> or when differences in power and sophistication make contract a means of exploitation.<sup>30</sup>

More recent jurisprudential accounts of appellate judging than Llewellyn's decry a conceptualist,<sup>31</sup> meaning formalist, swing in some states and even accuse some courts of "unmaking law," in the sense of systematically setting out to strip away protections for employees, consumers, and small businesses in relation to big business.<sup>32</sup> The Arizona Supreme Court has successfully resisted any such trend.<sup>33</sup>

The very idea of fairness seems to strike some legal scholars as annoying.<sup>34</sup> That use of this common sense word is controversial may be a sad sign of our times; the word (or its opposite, unfairness) is commonly used in our law, from the Federal Trade Commission Act and state consumer protection statutes to

29. See *infra* notes 144–52 and accompanying text (about covenants restraining trade).

30. See *infra* notes 195–210 and accompanying text (concerning unconscionability).

31. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995). Mooney discusses as an example of conceptualist analysis of formation *Burkett v. Morales*, 626 P.2d 147 (Ariz. Ct. App. 1981) (in which the Court of Appeals found no agreement when the case would have been better described as involving an issue of what were the terms). *Id.* at 1138. More generally, it should be emphasized that the Arizona Court of Appeals does not consistently work in a grand style; for example, most of the Arizona Supreme Court cases discussed in this Article involve reversals of more formalist decisions by the Arizona Court of Appeals. See, e.g., *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 20 (Ariz. 2002) (en banc), discussed *infra* at notes 37–72, (reversing Court of Appeals decision affirming summary judgment for the bank and finding no contract or tort obligation of disclosure of known key financial information relating to a borrower on the part of a construction lender to a permanent lender); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1028, 1044 (Ariz. 1985), discussed *infra* at notes 96–109, 140 (reversing Court of Appeals decision to the extent *inter alia* it affirmed summary judgment against an employee asserting tort of wrongful termination against public policy and breach of an implied-in-fact contract based on an employment manual).

32. JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* 4–5 (2004) (concerning conservative attempt to un-make the common law in the realms of tort, contract and property, particularly by eliminating many rights of customers and employees). *But see* Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 666–79 (2007) (emphasizing a more mixed picture about judicial recognition of the justice claims of economic underdogs).

33. The Arizona Court of Appeals has not been immune to new conceptualism, but the Arizona Supreme Court routinely corrects its formalism as legal error. See *supra* note 31.

34. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1561–62 (1998) (stating "[f]airness' is the vaguest word in the English language" and arguing that much of what that word is used to capture can be put in terms of a broad concept of rationality, particularly in light of evolutionary biology claims that altruistic behavior is adaptive); see also Paul M. Barrett, *Influential Ideas: A Movement Called "Law and Economics" Sways Legal Circles*, WALL ST. J., Aug. 4, 1986, at 1, col. 1 ("Judge Richard A. Posner has little use for words like fairness and justice. 'Terms which have no content,' he calls them.").

the Second Restatement of Contracts and common law decisions.<sup>35</sup> Elsewhere I have written at length about the meaning of the concept in commerce,<sup>36</sup> but here a summary will do: transactional fairness is largely co-extensive with the idea of efficient allocation, although adding a moral spin. Procedural or substantive unfairness in transactions is symptomatic of market failure and weakness, such as prohibitive transaction costs and information asymmetries, sometimes with cognitive biases driving one party. The efficiency of markets depends on approximation of conditions of perfect competition, perfect information and perfect rationality; when reality deviates significantly from these ideal economic assumptions, the results will be inefficient. Finding a lack of fairness is a common sense reaction to market problems. Furthermore, extending somewhat beyond efficient allocation, unfairness is also a name for the results of an abuse of power.

In this 50th anniversary year of the *Arizona Law Review*, and looking forward to the state's centennial in 2012, this Article celebrates the Arizona tradition of transactional fairness. The primary focus is cases involving contract law issues, but sometimes there is an overlap with tort causes of action, which will also be discussed briefly. This Article describes the contours of the Arizona Supreme Court's approach to transactional law, translates the policies reflected in its decisions into economic language, and notes the structural features of the Arizona legal system that allow the tradition to flourish. It ends by discussing the limits of the common law as a means to achieve transactional fairness.

## II.

The Arizona tradition of transactional fairness is alive and well in the 21st Century. A case decided in 2002, *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*,<sup>37</sup> captures well its human and doctrinal dimensions. The Arizona Supreme Court held, *inter alia*, that a construction lender is liable for breach of the implied-in-law contractual obligation of good faith and fair dealing if it fails to disclose to the permanent lender that it knows that the principal of the borrower partnership is in financial distress and has submitted false financial statements to both lenders.<sup>38</sup> The author of the opinion was then-Arizona Chief Justice Charles E. Jones.<sup>39</sup> Prior to his

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35. Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006) (prohibiting "unfair or deceptive acts or practices"); JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (2004) (noting that all 50 states have statutes aimed at preventing consumer deception and abuse in the marketplace, often using the same language as the FTC Act). The Second Restatement of Contracts states in comment a to section 205 on the obligation of good faith and fair dealing that the section requires compliance with "community standards of decency, fairness or reasonableness." See also *infra* note 126 (quotation from an Arizona Supreme Court case invoking the need for fairness).

36. Jean Braucher, *Contract versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349 (1988).

37. 38 P.3d 12 (Ariz. 2002).

38. *Id.* at 17–20, 28–31.

39. *Id.* at 17.

appointment to the court in 1996 by Republican Governor J. Fife Symington III, Jones headed the labor and employment division of Jennings, Strouss & Salmon in Phoenix.<sup>40</sup> At the time of his appointment, he was national chair of the J. Reuben Clark Law Society of Brigham Young University, where he received his college degree in 1959 before going on to Stanford Law School.<sup>41</sup> In practice, he represented banks, hospitals, hotels and utilities, among other business and corporate clients.<sup>42</sup> Jones is a native Westerner, although not a native of the United States; he was born in 1935 in Alberta, Canada.<sup>43</sup>

Joining Chief Justice Jones in the majority opinion were three other Arizona Chief Justices,<sup>44</sup> past and future, Ruth V. McGregor (a former law clerk for Justice O'Connor),<sup>45</sup> Stanley G. Feldman and Thomas A. Zlaket.<sup>46</sup> The Arizona Supreme Court is made up of only five judges, perhaps a feature contributing to the grand tradition of the court; opportunities for factionalism are reduced, and pressure to collaborate is great.<sup>47</sup> The fifth justice, Frederick J. Martone, who seemed not to find the small group atmosphere of the court congenial<sup>48</sup> and who

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40. 2004 Report of the Arizona Judicial Branch, <http://www.supreme.state.az.us/report2004/page02.html> (biographical note concerning Chief Justice Charles E. Jones accompanying the Arizona Supreme Court's 2004 Annual Report).

41. See <http://www.supreme.state.az.us/azsupreme/jones.htm> (page of the Arizona Supreme Court web site devoted to Chief Justice Charles E. Jones).

42. See *id.*

43. See *id.*; see also Michael Kiefer, *Arizona High Court*, ARIZ. REPUBLIC, May 25, 2004, at A2; Correction, "Arizona High Court," May 25, 2004, at A2, ARIZ. REPUBLIC, May 26, 2004 (reporting that Jones was born and raised in Alberta, Canada, and that his father's family had moved to Prescott, Arizona, in the 1870s).

44. *Wells Fargo Bank*, 38 P.3d at 37.

45. Justice McGregor served as Justice O'Connor's law clerk from September 1981 to July 1982. Arizona Supreme Court: Meet the Justices, <http://www.supreme.state.az.us/azsupreme/mcgregor.htm>.

46. The current chief justice is Ruth V. McGregor, who joined the court in 1998 and became chief justice in 2005; Chief Justice Thomas A. Zlaket joined the court in 1992 and served as chief justice from 1997 until a few months before his retirement in 2002; Chief Justice Stanley G. Feldman served on the court from 1982 to 2002 and as chief justice from 1992 to 1997. Welcome to Arizona's Supreme Court Justices, Past and Present!, <http://www.supreme.state.az.us/azsupreme/hxjust.htm> (providing a chronological list of Arizona's 39 justices, with dates of birth and of service on the court and also service as chief justice, where applicable). See *infra* note 223 and accompanying text concerning the considerable role of Justice Feldman in developing the court's contractual fairness tradition.

47. See *infra* notes 226–37 and accompanying text (discussing judicial merit selection, an important institutional underpinning of the Arizona tradition of transactional fairness).

48. A suggestion of tension between Justice Martone and other members on the court can be found in *Demasse v. ITT Corporation*, 984 P.2d 1138 (Ariz. 1999). Justice Martone complained that the court should not have decided a case by a three-to-two vote when in transition. *Id.* at 1160 n.1. The majority opinion chided him for doing so by stating that, "His comments needlessly raise a question of institutional practice, if not integrity." *Id.* at 1151. The majority noted that the case had been argued and decided by five permanent members of the court, even though the final decision was filed after the retirement of Justice James Moeller, consistent with established practice of the court. *Id.* The majority then added this zinger: "In fact, Justice Moeller participated, without objection or comment, in twenty-



has since departed for the U.S. District Court in Arizona,<sup>49</sup> concurred in the result to say that the decision could have been more narrowly drawn.<sup>50</sup> The other justices, however, wanted to make a declaration that various common law legal theories—including breach of contract—should be expansively construed in pursuit of fairness and honesty.

The dispute arose out of a three-party agreement among a construction lender, Wells Fargo Bank (the “Bank”), succeeding to that role by acquiring First Interstate Bank; a permanent lender, made up of a group of various pension funds (the “Funds”), and a real estate partnership that was developing a downtown Phoenix project known as “the Mercado.”<sup>51</sup> Chief Justice Jones’s opinion for the majority noted that the partnership, not a party in the case, was headed by J. Fife Symington III but added nothing about who Symington was, and appropriately so, since his background did not really matter in the case.<sup>52</sup> It is interesting to know, however, that in addition to having appointed Jones to the court,<sup>53</sup> Symington was a notorious or famous figure in Arizona politics, depending on one’s point of view. Symington was forced to resign as governor due to fraud charges, of which he was convicted and for which he was sentenced to 30 months in federal prison, although he never served time.<sup>54</sup>

In the *Wells Fargo Bank* case, the Funds, collectively the permanent lender, alleged that the Bank, the construction lender, had covered up Symington’s financial distress in the months before the permanent loan take-out on the Mercado, thus successfully off-loading the loan from the Bank to the Funds.<sup>55</sup>

two other cases in which the same practice was followed, among them *State v. Green*, a capital case in which Justice Martone wrote the court’s opinion affirming the death penalty and Justice Moeller made the three-justice majority.” *Id.*

49. See Judges of the United States Courts, <http://www.fjc.gov/servlet/tGetInfo?jid=2912> (noting Martone’s appointment to the U.S. District Court of Arizona in 2001 on the nomination of President George W. Bush).

50. Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 37 (Ariz. 2002) (reasoning that the absence of a duty to disclose is not fatal to assertion of intentional tort claims; apparently Justice Martone would not have reached the contract cause of action).

51. *Id.* at 17.

52. See *id.*

53. See *supra* note 40 and accompanying text.

54. The U.S. Court of Appeals for the Ninth Circuit overturned his conviction because a juror in his criminal case was dismissed eight days into deliberations, under circumstances that may have suggested that she could not get along with other jurors in part because of substantive disagreements. *U.S. v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999). See generally National Governor’s Association, Governor’s Information, Arizona Governor J. Fife Symington III, <http://www.nga.org/portal/site/nga/menuitem.29fab9fb4add37305ddcbeeb501010a0/?vgnextoid=48e6ae3effb81010VgnVCM1000001a01010aRCRD&vgnnextchannel=e449a0ca9e3f1010VgnVCM1000001a01010aRCRD> (noting Symington’s 30-month sentence to federal prison and that he was freed pending appeal and also noting that federal prosecutors pursued him on other charges after he won his appeal but that he received a presidential pardon in 2001; he had saved President Bill Clinton’s life by rescuing him from drowning when they were both young men.).

55. *Wells Fargo Bank*, 38 P.3d at 17–20.

Along with numerous tort claims, the Funds alleged breach of contract by the Bank, specifically breach of the implied covenant of good faith and fair dealing.<sup>56</sup> The trial court granted the Bank summary judgment on all claims, finding that it had no tort or contract obligation to the Funds to disclose information about Symington's financial condition, and the Court of Appeals affirmed.<sup>57</sup> The alleged details of the transactional context (backed up by various internal Bank memos) were that the Bank had another loan outstanding to Symington on another real estate deal and granted three extensions on it, contrary to ordinary banking practice, to cover up Symington's financial distress so that the Funds would go through with the take-out of the Mercado construction loan.<sup>58</sup> The Bank also allegedly knew that Symington had submitted false financial statements to it and to the Funds, but in addition to not telling the Funds, it failed to report these false representations to federal banking officials, in violation of federal banking regulations.<sup>59</sup>

The Bank's position on the bad faith claim was that it had no contractual obligation to disclose Symington's financial status to the pension funds.<sup>60</sup> Although the Arizona Court of Appeals accepted this argument,<sup>61</sup> the Arizona Supreme Court would have none of it, treating it as city slicker evasion of the Bank's obvious responsibility to act fairly and honestly toward a fellow contract party:

Because the terms of the Triparty Agreement do not require the Bank to volunteer information to the Funds, the Bank argues that it cannot be liable for bad faith because it did not breach any provisions of the Triparty Agreement. The Bank relies too heavily on the literal text. The duty of good faith extends beyond the written words of the contract.<sup>62</sup>

The court believed there were genuine issues of material fact that should go to a jury.<sup>63</sup> One of these questions was:

[D]id the Bank, by its action or inaction, deprive the Funds of a primary benefit of the agreement (*see* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a. ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."))?<sup>64</sup>

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56. *Id.* at 20.

57. *Id.* (noting also that the Arizona Court of Appeals upheld the summary judgment).

58. *Id.* at 18–20.

59. *Id.* at 19–20.

60. *Id.* at 29.

61. *Id.* at 20; 992 P.2d 19 (Ariz. Ct. App. 2000).

62. *Id.* at 29.

63. *Id.* at 31.

64. *Id.*

Reliance on the Restatement<sup>65</sup> is standard practice of the Arizona Supreme Court, which has declared that in the absence of some other binding authority, it will follow the Restatements.<sup>66</sup> This approach aligns the court with the progressive moderation, realism and pragmatism of the Restatement (Second) of Contracts<sup>67</sup> and also commends the vast learning of this project as guidance to Arizona practitioners and lower courts. The Restatement's design is to provide concepts and factors to consider; it self-consciously depends on Grand Style judging to achieve justice.<sup>68</sup> The *Wells Fargo Bank* case is also consistent with the Arizona Supreme Court's emphasis on reasonable expectations created by a contract as a whole, shown in the court's questions about the Funds' "justified expectations" and reasonable assumptions.<sup>69</sup>

The question of justifiable, reasonable expectations in *Wells Fargo Bank* can be translated into language of allocation of risk. The contract allocated the credit risk to the Bank for the construction period and to the Funds thereafter. According to the Funds' allegations, the risk materialized during the construction period and the Bank not only knew that but participated in covering it up by extending the term of another loan to Symington, contrary to banking practice, and by not reporting his misrepresentations of financial condition as required by banking regulations.<sup>70</sup> From this big-picture perspective, the case is not a hard one; even Justice Martone agreed that the Bank's alleged behavior was actionable, albeit as an intentional tort.<sup>71</sup> The justices were left cold by the argument that the Bank had no explicit obligation in the written contract to volunteer information. The decision rested on an implied-in-law obligation of a party to a contract to act in good faith and consistently with fair dealing and to take the consequences of the risk it had agreed to assume. Furthermore, from the planning perspective, the case provides clear counsel to contract parties: forthcoming honesty is not optional, even if a written contract fails to spell that out in so many words.<sup>72</sup>

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65. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a. (1981).

66. *Bank of Am. v. J. & S. Auto Repairs*, 694 P.2d 246, 248 (Ariz. 1985).

67. Jean Braucher, *E. Allan Farnsworth and the Restatement (Second) of Contracts*, 105 COLUM. L. REV. 1420, 1424 (2005).

68. *Id.* at 1420, 1425 (quoting Farnsworth's explanation that the Restatement phrase "as justice requires" is "restatemense" for a need for judicial discretion).

69. *Wells Fargo Bank*, 38 P.3d at 31.

70. *Id.* at 17-20.

71. *Id.* at 37.

72. The Second Restatement of Contracts section 205 draws on an influential article concerning the concept of good faith. See RESTATEMENT (SECOND) OF CONTRACTS § 205 Reporter's Note (1981) (citing Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968)). See also Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 812-13, 816, 820 (1982) (discussing the implementation of the concept in the Second Restatement as an "excluder" of conduct involving bad faith, including "evasion of the spirit of the bargain, lack of diligence and slacking off, abuse of a power to specify terms, conjuring up a dispute to force a settlement or modification, willfully failing to mitigate damages, and so on" and also noting that, as explained in comment d to section 205 of the Restatement, bad faith may consist of inaction and fair dealing may require more than honesty). The Arizona Supreme Court relied not

Another sound rationale for the court's approach is that it is more expensive to do business when parties are free to withhold obviously relevant, casually acquired information from each other.<sup>73</sup> Allowing concealment burdens both parties with the expense of investigating information that one party already knows. Transparency is generally efficient both before and after formation of a contractual relationship. It is not conducive to good business relationships to expect parties to question each other constantly about whether they are covering up important information. As one federal district court put it:

Although theoretically parties could include contractual provisions discussing the allocation of responsibility when one party intentionally lies or misleads the other, it would not be conducive to amicable commercial relations to require parties to include such clauses in contracts. Expressing such a basic lack of trust in the other party would be likely to sour a deal from the start.<sup>74</sup>

### III.

The Arizona Supreme Court's approach to transactional fairness can be further illustrated by focusing on three other settings in which the court made significant contributions in recent decades: agreements between cohabitants, employment, and non-negotiated standard forms. One finds repeated invocation of

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only on the Restatement, but also on the analysis that satisfying reasonable expectations is an important part of good faith performance. *Wells Fargo Bank*, 38 P.3d at 30 (discussing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980)).

73. An exception is when there is a need to protect investments in information, such as when an oil and gas company has investigated subsurface geological conditions and does not have to disclose the information to a seller of land. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 13–16, 20–21 (1978) (discussing differences between information acquired casually as opposed to by investment and using example of oil company investment in information).

74. *Stoughton Trailers, Inc. v. Henkel Corp.*, 965 F. Supp. 1227, 1236 (W.D. Wis. 1997). *Wells Fargo Bank* shows that the Arizona Supreme Court does not apply an “economic loss rule” to bar intentional fraud claims brought in a contractual context; the court found several intentional fraud causes of action tenable on the same facts giving rise to a breach of contract action. 38 P.3d at 28, 31–32, 36. For a fuller discussion of this issue, see Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 836–47 (2006) [hereinafter *Deception*] (concerning errors of law and policy that have led some courts to find an “economic loss rule” applicable to intentional misrepresentation causes of action). The U.S. District Court in Arizona has held that the economic loss rule has no application to the tort of fraud under Arizona law. *KD & KD Enters., LLC v. Touch Automation, LLC*, No. CV-06-2083-PHX-FJM, 2006 WL 3808257, at \*1–3 (D. Ariz. Dec. 27, 2006); see also *Moshir v. PatchLink Corp.*, No. CV-06-1052-PHX-FJM, 2007 WL 505344, at \*1–6 (D. Ariz. Feb. 12, 2007) (both opinions were written by Judge Martone, formerly Justice Martone, see *supra* note 49). The advantage of having both contract and tort theories available is to provide a broad net to catch various types of unfairness and deception, using alternative elements of the various theories, and also to have an array of remedies, including punitive damages where appropriate on a tort theory. See Braucher, *Deception*, *supra*, at 845–46 (noting availability of punitive damages on a tort theory as a way to pay for access to redress).

the importance of basic fairness and justice in the opinions of the state's high court in these realms.

#### *A. Agreements Between Non-marital Cohabitants*

Many state courts have wrestled with enforcement of agreements between unmarried cohabitants in so-called "meretricious relationships," meaning that the parties have a sexual as well as a domestic relationship.<sup>75</sup> The Arizona Supreme Court has taken a clear position that, "Whether the parties 'became lovers' before or after entering into an agreement is not the relevant inquiry."<sup>76</sup> Rather, as the court said in *Cook v. Cook*, the inquiry is whether cohabitants made an agreement supported by "a proper consideration"; an agreement to pool income and acquire assets jointly qualifies to meet that requirement.<sup>77</sup> Thus, an agreement is enforceable even if not independent of the cohabitation relationship, as long as a bargain can be found that is not for performance of "sexual or cohabitant services."<sup>78</sup>

In reaching this conclusion, the Arizona court rejected the argument that enforcement of agreements between cohabitants is contrary to the public policy of Arizona because:

The rule of non-enforcement . . . favors the strongest, the most unscrupulous, the one better prepared to take advantage or the more cunning of the cohabitants. We do not believe this rule to be equitable or good public policy. We think the better rule is simply that valid agreements made by the parties will be enforced according to the intent of the parties.<sup>79</sup>

The court thus emphasized that refusing enforcement of agreements between domestic partners would not be a neutral approach but rather would favor the cunning over the trusting and, furthermore, would not be equitable, in the sense of fair. It also rejected the idea that it is not the court's job to provide justice to cohabitants because they are unmarried.<sup>80</sup>

In another case decided two years later, *Carroll v. Lee*, the court extended its reasoning to situations where only one of the cohabitants contributed income to acquisition of joint assets, holding that homemaker services, including cooking, cleaning, doing laundry and working in the yard, could be consideration to support an agreement of cohabitants to share certain assets accumulated during the relationship and titled in both names.<sup>81</sup>

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75. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

76. *Cook v. Cook*, 691 P.2d 664, 668 (Ariz. 1984).

77. *Id.* at 668-69.

78. *Id.* at 669.

79. *Id.* at 670.

80. Compare *Hewitt*, 394 N.E.2d at 1204 (finding enforcement of a contract between unmarried cohabitants against the public policy favoring marriage reflected in the Illinois Marriage and Dissolution Act).

81. 712 P.2d 923, 925-27 (Ariz. 1986).

A key aspect of these two cases is the court's recognition that domestic partners are often unlikely to articulate and memorialize their agreements and that the best evidence may be their conduct. In *Cook*, the court emphasized the need to examine the parties' "entire course of conduct" to determine whether there was a contract and on what terms.<sup>82</sup> A pattern of opening and using joint accounts and putting property jointly in both names is strong evidence, so that a swearing contest need not be the basis for finding agreement to share assets. The court explained in *Cook*:

Here, there is ample evidence to support a finding that Rose and Donald agreed to pool their resources and share equally in certain accumulations; their course of conduct may be seen as consistently demonstrating the existence of such an agreement. Thus, the trial court would not need to find an agreement by relying on the testimony of one party to the exclusion of the other, as some courts have done.<sup>83</sup>

In *Carroll*, the court quoted relevant testimony of both Judith Lee and Paul Carroll. Paul testified that at the time the two of them took title to certain property, he intended that she would be a co-owner although he had since changed his mind.<sup>84</sup> Judith testified that as to her contribution of household services to the arrangement, "We didn't really discuss it."<sup>85</sup> With this disarming honesty on both sides, the court found that the evidence that the parties had a joint checking account and took some property in both their names was a valid basis for the trial court to find an agreement to jointly own that property.<sup>86</sup> The court also noted that Judith did not assert rights to certain property titled only in Paul's name or claim that he had promised to support her for life.<sup>87</sup>

The court did not expect domestic partners to act like business partners, who are more likely to articulate their financial arrangements. It also recognized that expectations between non-marital domestic partners may be different from those between spouses. Furthermore, spouses' rights are different because in Arizona there is a strong legal presumption that all property acquired during marriage is community property.<sup>88</sup> Unmarried domestic partners who keep separate bank accounts and who do not pool income to acquire property jointly most likely will not be deemed to have contracts to share assets. Overall, the court crafted an approach sensitive to relational norms and to producing a fair division of property of domestic partners. Although the issue has not yet been addressed explicitly in Arizona,<sup>89</sup> there is no reason to believe that gay or lesbian cohabitants

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82. *Cook*, 691 P.2d at 667.

83. *Id.*

84. *Carroll*, 712 P.2d at 928.

85. *Id.*

86. *Id.* at 925, 928.

87. *Id.* at 927, 929.

88. *Id.* at 929.

89. See *Black v. Hewsom*, No. C20060393, 2007 WL 1582275 (Ariz. Super. Ct. Mar. 19, 2007) (on authority of *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984); *Carroll*, 712 P.2d 923 (finding that two women with "a personal relationship" had made an agreement by conduct to share equally in property they acquired together); see also *Crooke v. Gilden*, 414

would be treated differently; where their conduct evidences implied contracts to pool income and accumulate assets or some other type of financial bargain, one would expect the Arizona Supreme Court to enforce their agreements, express or implied-in-fact. By the same token, they should be able to maintain separate property and have such an arrangement respected.

### ***B. The Employment Relationship***

The Arizona legislature has supplemented the common law of employment with a statute known as the Employment Protection Act (the “EPA”), enacted in 1996.<sup>90</sup> More than ten years later, the extent to which this statute limits the earlier case law is still an open question. There are good arguments, however, that most of the earlier common law is not modified by the EPA.

The first chapter of the EPA’s story involves a pair of cases in which the Arizona Supreme Court made clear that although employment is presumed to be at-will absent agreement otherwise, an agreement can be found in a handbook or in the totality of the circumstances of how an employer and employee behave.<sup>91</sup> In *Leikvold v. Valley View Community Hospital*, the court held that even in employment for an indefinite term, a personnel manual can set terms of an employment contract and limit an employer’s ability to discharge employees.<sup>92</sup> Whether a particular manual becomes a contract, for example by promising to discharge only for good cause, is a question of fact, with the relevant evidence including the manual itself and the oral representations concerning it.<sup>93</sup> In cases where a manual “can be reasonably construed in more than one manner,” extrinsic evidence may be used to ascertain its meaning.<sup>94</sup>

The court also stressed that a personnel manual need not create job security:

Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Such actions, either not issuing a personnel manual or issuing one with clear language of limitation, instill no reasonable expectations of job security and do not give employees

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S.E.2d 645 (Ga. 1992) (written agreement did not refer to lesbian couple’s relationship, enforcing their agreement). This case is discussed in Martha M. Ertman, *Contractual Purgatory for Sexual-Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1139–40 1155, 1166 (1996). Compare *Jones v. Daly*, 122 Cal. App. 3d 500 (1981) (not enforcing agreement where written contract referred to homosexual couple as “lovers”).

90. ARIZ. REV. STAT. ANN. § 23-1501 (1995) (added as § 23-2501 by Laws 1996, Ch. 140, § 3 and renumbered as § 23-1501; amended by Laws 2001, ch. 334, § 27).

91. See *infra* notes 92–98 and accompanying text.

92. 688 P.2d 170, 172 (Ariz. 1984).

93. *Id.* at 174.

94. *Id.* Presumably extrinsic evidence can also be used where the writing is not an integration at all or where an alleged term is outside the scope of a partial integration. See RESTATEMENT (SECOND) OF CONTRACTS §§ 209–210, 212–214, 216 (1981).

any reason to rely on representations in the manual. However, if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.<sup>95</sup>

In *Wagenseller v. Scottsdale Memorial Hospital*, the court quoted this language from *Leikvold* to stress its continuing authority<sup>96</sup> and also stated that the at-will character of employment for an indefinite term is a rebuttable presumption, and statements or conduct of the parties can be the basis of an implied-in-fact contract term, with a personnel manual as one example.<sup>97</sup> The intent to create an employment relationship that is not at-will is “to be discerned from the totality of the parties’ statements and actions. . . .”<sup>98</sup> Indeed, this was the same theory, implied-in-fact contract, recognized in the cohabitation cases discussed above.<sup>99</sup> In addition, the court in *Wagenseller* noted that proving reliance is not necessary in an action on an implied-in-fact contract.<sup>100</sup> The discussion of reliance is a reminder, however, that where offer, acceptance and consideration cannot all be shown, an action for reliance on a promise, under section 90 of the Restatement (Second) of Contracts, is an alternative theory under Arizona law.<sup>101</sup>

*Wagenseller* also recognized another contract theory as applicable in the employment context—an action based on the covenant of good faith and fair dealing implied in every contract.<sup>102</sup> The court stopped short of either recognizing a tort theory for breach of this obligation or treating the obligation as giving rise to a right to be terminated only for good cause; it said “a claim for prospective employment . . . must fail” if based on the obligation of good faith and fair dealing.<sup>103</sup> Rather, a contract action for breach of this obligation permits an employee to recover for a benefit earned by the employee, where the employer seeks to avoid paying by discharging the employee.<sup>104</sup>

The court thus took the position that it would not reverse the presumption of at-will status for employees; it treated this as a policy question for the

95. *Leikvold*, 688 P.2d at 174.

96. 710 P.2d 1025, 1037–38 (Ariz. 1985).

97. *Id.* at 1036.

98. *Id.* at 1038.

99. *See supra* notes 75–87 and accompanying text.

100. *Wagenseller*, 710 P.2d at 1037–38.

101. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The reliance on a promise theory, set forth also in section 90 of the original Restatement of Contracts, has been used in Arizona to avoid the bar of the statute of frauds as well. *See Waugh v. Lennard*, 211 P.2d 806, 814 (Ariz. 1949).

102. *Wagenseller*, 710 P.2d at 1038–41. Although *Wagenseller* does not cite the Second Restatement of Contracts, *Wells Fargo Bank*, cites both *Wagenseller* and section 205 of the Second Restatement as authority for the principle that there is an implied obligation of good faith and fair dealing in every contract, indicating the same theory was under discussion in both cases. *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 28, 30–31 (Ariz. 2002).

103. *Wagenseller*, 710 P.2d at 1040.

104. *Id.*



legislature.<sup>105</sup> An advantage of reversing the presumption would be to require employers to tell employees that they are at-will and can be fired for no cause; currently, many employees are under a misimpression that there must be good cause for termination.<sup>106</sup> On the other hand, with a reversal of the presumption, small, unsophisticated employers without access to legal advice would be the ones most likely to end up inadvertently providing job security. Although the legislature may not be willing to reverse the at-will presumption, its ability to carve out small employers, in the way Arizona's Civil Rights Act does, is in theory a good reason to leave the question to statutory resolution.<sup>107</sup>

Another significant holding of *Wagenseller* was to recognize a tort of termination against public policy even in at-will employment.<sup>108</sup> The court defined this tort theory expansively, providing that the public policy can be found in a constitution, statute or common law judicial decision and that the connection between the public policy and the reason for discharge can be somewhat loose.<sup>109</sup>

The Arizona legislature responded to these two cases with a very convoluted and unclear statute, the Arizona EPA.<sup>110</sup> The statute begins by stating that the employment relationship is contractual, which seems to codify the cause of action based on breach of the obligation of good faith and fair dealing implied in every contract, recognized in *Wagenseller*.<sup>111</sup> As has been noted, this theory does not give a right to damages for loss of prospective employment but is a basis to recover benefits earned before termination.<sup>112</sup>

The statute also recognizes a cause of action based on a manual "or any similar document" setting forth a specified duration for the employment relationship or "otherwise expressly restricting the right of either party to terminate

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105. *Id.*

106. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110, 134 (Table 1) (1997) (concerning workers' misimpressions about their legal rights; 89% incorrectly believed that it was unlawful for an employer to discharge an employee out of personal dislike, and 82% incorrectly believed that it was unlawful for an employer to discharge an employee to hire another at a lower wage, absent discriminatory motive in either case).

107. ARIZ. REV. STAT. ANN. § 41-1461(4) (2004) (defining employer under the Arizona Civil Rights Act as one with at least fifteen employees). *See infra* notes 128-30 and accompanying text for the possibility of use of a reliance on a promise to prompt disclosure of lack of job security.

108. *Wagenseller*, 710 P.2d at 1033.

109. *Id.* at 1033-34. *Wagenseller* alleged she was discharged for refusing to participate in a skit requiring her to "moon" the audience. *Id.* at 1029, 1035. The court found the relevant public policy in Arizona's criminal statute making indecent exposure to another adult a misdemeanor; the court said a tort action could lie for termination against public policy even though the criminal statute might not technically have been violated, either because "moonning" did not involve exposure of the particular body parts listed in the statute or because the audience would not have been offended (recklessness about offending or alarming another being an element of the crime). *Id.* at 1035.

110. *See supra* note 90 (citing the Arizona EPA).

111. ARIZ. REV. STAT. ANN. § 23-1501(1) (1995).

112. *See supra* notes 102-04 and accompanying text.

the employment relationship," provided that the document "expresses the intent that it is a contract of employment."<sup>113</sup> Restrictions on an employer's right to terminate and an intent to have a contract might be expressed by setting policies to be followed, without qualifying language stating that they are non-contractual. Given its *Leikvold* and *Wagenseller* decisions, it seems highly plausible that the Arizona Supreme Court would so hold.<sup>114</sup>

*Wagenseller* recognizes the idea of an implied-in-fact contract promising job security, based on "a policy statement, in a manual or otherwise,"<sup>115</sup> including "statements or conduct," meaning that no writing is necessary where conduct and oral statements provide a basis for finding a contract.<sup>116</sup> Thus, the EPA, by requiring a document, in essence sets forth a new statute of frauds requirement for a contract to provide job security.<sup>117</sup> This aspect of the EPA raises the question whether the Arizona Supreme Court likely would recognize an exception to the new statute of frauds based on reliance on oral statements, a theory embraced by the Restatement (Second) of Contracts, section 139.<sup>118</sup>

The EPA explicitly rejects one case law exception to its statute of frauds: "Partial performance of employment shall not be deemed sufficient to eliminate the requirements set forth in this paragraph."<sup>119</sup> Part performance is a doctrine in equity giving rise to specific performance notwithstanding a failure to comply with an applicable statute of frauds; the Arizona Supreme Court has said that this doctrine does not apply in an action where only money damages are sought.<sup>120</sup>

The EPA is silent about case law exceptions to its statute of frauds where the action is for a damage remedy. In a case decided before the Restatement (Second) was published, the court indicated that reliance on a promise, where justified, can remove the objection of noncompliance with a statute of frauds in an

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113. ARIZ. REV. STAT. ANN. § 23-1501(2).

114. Also, if a manual's words could be interpreted in more than one way, the Arizona Supreme Court likely would permit extrinsic evidence to help determine whether the parties intended to limit termination and create a contract. See *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 170, 174 (Ariz. 1984).

115. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1037-38 (Ariz. 1985).

116. *Id.* at 1036.

117. ARIZ. REV. STAT. ANN. § 23-1501(2).

118. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

119. ARIZ. REV. STAT. ANN. § 23-1501(2).

120. *Trollope v. Koerner*, 470 P.2d 91, 98 (Ariz. 1970). The EPA's elimination of the equitable doctrine of part performance as a basis for enforcement without a writing could be seen as codification of general doctrine about the specific performance remedy. Courts have discretion to refuse specific performance where the burden of supervision would be great, and they do not order specific performance of personal services; ordering an employer to retain an employee could involve enforced association and thus might entail supervision burdens courts are loath to accept. RESTATEMENT (SECOND) OF CONTRACTS §§ 366-67. The concern about enforced association may be overdrawn because ordering reinstatement, which happens under collective bargaining agreements, may only change the leverage of its beneficiary to exact a higher sum in settlement, rather than in fact resulting in enforced association.

action for damages.<sup>121</sup> The Arizona Supreme Court has not yet had occasion to apply section 139 of the Restatement (Second), but that provision seems only to back up the court's earlier analysis based on reliance on a promise.<sup>122</sup> Indeed, an Arizona Court of Appeals decision in 2005 flagged the Restatement (Second)'s explicit recognition of reliance as a basis for money damages notwithstanding noncompliance with a statute of frauds; the intermediate court raised a question about the continuing validity of one of its earlier decisions limiting the theory of reliance on a promise as an exception to a statute of frauds.<sup>123</sup> Given the Arizona Supreme Court's consistent embrace of the Restatement (Second) of Contracts, the Court of Appeals is clearly right to suggest that Arizona will likely follow section 139. Furthermore, the EPA—excluding only the equitable doctrine of part performance as an exception to eliminate its requirements—does nothing to displace use of reliance on an oral promise as a basis to recover damages for loss of employment.

The economic rationale for enforcing promises of job security includes that these promises help employers to secure "an orderly, cooperative and loyal work force."<sup>124</sup> The Arizona Supreme Court has taken the position that employers cannot make such promises, reap their benefits, and then claim that the employment was at-will. In *Demasse v. ITT Corporation*, a 1999 case requiring employers to give something in order to take away such benefits (to meet the doctrinal requirement of consideration),<sup>125</sup> the court stated its rationale in terms of fairness and honesty, quoting a New Jersey decision:

All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have

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121. *Trollope*, 470 P.2d at 99 (holding that a landlord was not justified in relying on an oral promise to make a lease but suggesting that a tenant with less power might be treated differently when asserting promissory estoppel against a landlord as a basis for enforcement of a lease notwithstanding absence of a writing).

122. *Id.* (relying on RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932)). Section 139 of the Second Restatement of Contracts deals specifically with reliance on a promise as a basis to enforce notwithstanding lack of a writing to meet an applicable statute of frauds.

123. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 114 P.3d 835, 842 & n.1 (Ariz. Ct. App. 2005) (raising the question whether its analysis in *Tiffany v. W.M.K. Transit Mix, Inc.*, 493 P.2d 1220, 1225–26 (Ariz. Ct. App. 1972), refusing to recognize an exception to the statute of frauds based on reliance on a promise absent a promise not to raise the statute of frauds, is still good law in light of adoption of section 139 of the Second Restatement of Contracts).

124. *Leikvold v. Valley View Cmty. Hosp.*, 688 P.2d 201, 205 (Ariz. Ct. App. 1983) (quoting *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)).

125. 984 P.2d 1138, 1148 (Ariz. 1999) (reasoning that an employer seeking to reduce rights of employees must provide something in return to meet the consideration requirement). It should be noted that in the law of contracts, there are exceptions—not applicable in *Demasse*—to the requirement of consideration to make a modification enforceable. *See* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (setting forth exceptions to consideration requirement for a modification to be binding, such as change of circumstances, where a statute so provides, or where justice requires enforcement in view of material change of position).

been made and then to allow the employer to renege on those promises. What is sought here is basic honesty . . . .<sup>126</sup>

Here we see the court's trademark concern with fairness and honesty. Nothing in the EPA seems to undermine the holding in *Demasse*, a case decided after its enactment but involving an employment contract formed before its effective date.<sup>127</sup> Employers who do not wish to provide job security, following the advice of *Leikvold*, *Wagenseller*, and *Demasse*, are likely to state as much explicitly in any manual or handbook of personnel policies. Given the longstanding precedent in Arizona that employers should explicitly disclaim any intention to promise job security when they set forth employment policies, the *Demasse* holding is unlikely to affect many employers in the future.

Rather than not providing a manual at all, Arizona employers are probably best advised to have a manual with a prominent, easy-to-understand disclaimer of job security; this will provide evidence to counter arguments that oral promises or conduct created express or implied job security. Because the EPA only excludes an exception to its writing requirement based on part performance, and not based on reliance where damages are sought, there is a live possibility of enforcement of promises made orally and by conduct if reasonably relied upon by employees. A good reason for the Arizona Supreme Court to adopt section 139 of the Restatement (Second) is that this is a highly discretionary theory that includes in the analysis of whether justice demands enforcement an examination of the extent to which the reliance was foreseeable by the promisor.<sup>128</sup> Courts using this theory have discretion not to enforce promises made orally or by conduct, for example because an unsophisticated employer did not have reason to know it was inducing reliance.<sup>129</sup> By recognizing the reliance-based theory, the court could provide incentives for sophisticated employers to correct misimpressions of many employees that they have rights not to be fired except for good cause.<sup>130</sup> This type of false impression often comes from how employers behave—that they usually do base terminations on good cause, after warnings, opportunities to improve, and inquiry. If the employer is acting in this fashion but not willing to promise to provide private due process or substantive cause before termination, it is only fair that employees be so informed.

Furthermore, given the analysis of *Demasse*, employers should get meaningful assent and provide something in return (such as a raise or new benefits) if they want to be sure that they have eliminated promises of job security previously given. Part of meaningful assent is that employees have to be free to

126. *Demasse*, 984 P.2d at 1150 (quoting *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1271 (N.J. 1985)).

127. *Id.* at 1141 (case focused on 1989 changes in an employee manual); *supra* note 90 (EPA was enacted in 1996).

128. RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(b) & (e).

129. Compare text accompanying notes 106–07, making the point that a reversal of the presumption of at-will employment in general might primarily ensnare small employers without the legal knowledge to contract out of it. A discretionary, reliance-based theory of recovery, in contrast, could be tailored to avoid unfairness to small employers.

130. See Kim, *supra* note 106, at 155–56. Absent knowledge of a lack of rights, even employees with bargaining power will not know to ask for contractual job security.

say no to loss of previously promised job security, as *Demasse* indicates.<sup>131</sup> Under *Demasse*, employees should be briefed on their options and offered consideration; if they reject offered additional compensation or benefits, they can retain previously promised rights to job security, if they so choose.<sup>132</sup>

The EPA also has provisions dealing with tort theories in the employment context.<sup>133</sup> It endorses tort claims based on statutory policies “for wrongful termination in violation of the public policy set forth in the statute,” in situations where “the statute does not provide a remedy to an employee for the violation of the statute.”<sup>134</sup> In *Cronin v. Sheldon*, a 1999 decision dealing with the impact of the EPA on tort theories in the employment context, the Arizona Supreme Court stated that the legislature did not disturb a tort theory of termination against public policy, such as that recognized in *Wagenseller* (involving the public policy in a criminal indecent exposure statute), even where the statute that was the source of the public policy provided no civil remedy to an employee.<sup>135</sup>

*Cronin* is a shining example of the Arizona Supreme Court’s independence from politics. As in *Wells Fargo Bank*, Justice Jones wrote for the court, which this time was unanimous (with Justice Martone joining the same four chief justices, past, current or future, Feldman, Zlaket and McGregor, in addition to Jones, who had joined in the majority opinion in *Wells Fargo Bank*).<sup>136</sup> The *Cronin* court held that the legislature in the EPA had limited actions based on the Arizona Civil Rights Act (“ACRA”) to the remedies set forth in the ACRA, because that act had no antecedents in common law protecting against discrimination on the basis of race, age, or sex; however, the court also stated that the preamble of the EPA had no effect when it attempted to limit the ability of the Arizona Supreme Court to develop the common law.<sup>137</sup> Indeed, if the preamble had a limiting effect, the court said it would be unconstitutional because the anti-abrogation clause of the Arizona Constitution protects tort causes of action that either existed at common law or evolved from rights recognized at common law.<sup>138</sup> Thus, the court said, employees can continue to bring actions against their employers based on such torts as intentional infliction of emotional distress, negligent infliction of emotional distress, interference with contractual relations, or defamation.<sup>139</sup>

The EPA embraces the tort of wrongful termination based on a statutory policy where the statute does not provide an employee a remedy and also limits purely statutory causes of action to the remedies in the statutes; unclear is whether the tort of wrongful termination can be based on a constitutional or common law

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131. *Demasse*, 984 P.2d at 1145, 1149 (noting absurdity of requiring employees to quit to say no to a new policy taking away job security).

132. *Id.* at 1146 (requiring notice of the effect of a changed policy and affirmative assent and also noting lack of reorientation in a case involving revision of a handbook).

133. ARIZ. REV. STAT. ANN. § 23-1501(3) (1995).

134. *Id.* § 23-1501(3)(b).

135. 991 P.2d 231, 236 (Ariz. 1999).

136. *Id.* at 233, 242.

137. *Id.* at 238–39.

138. *Id.*

139. *Id.* at 241.

policy, as indicated in *Wagenseller*.<sup>140</sup> *Cronin* suggests that the legislature may lack constitutional power to restrict the court's role in developing the common law along these lines. The court there forcefully rejected the EPA preamble stating that courts cannot "develop, modify, or expand" common law causes of action,<sup>141</sup> explaining, "Courts do make law. . . . The common law is and has been a product of the courts for hundreds of years."<sup>142</sup> It added:

The judicial power is not dependent on the legislative branch. The judicial mandate, intended to secure equal and substantial justice under the rule of law, is delegated to the judiciary by the constitution, not the legislature. The preamble [of the EPA] would limit the mandate by restricting the judicial power—a constitutional power sometimes neglected in the unpredictable maelstrom of partisan politics.<sup>143</sup>

We see in *Cronin* an independent judiciary self-consciously protecting its role to develop the common law against legislative assault.

An additional aspect of Arizona employment law bears mention—a refusal to enforce unreasonable restraints of trade.<sup>144</sup> In *Olliver/Pilcher Insurance, Inc. v. Daniels*, the Arizona Supreme Court was not fooled by a provision that purported to permit competition by a former employee, but at a heavy cost.<sup>145</sup> The clause in question would have required an insurance salesperson to pay 67 percent of any commission on insurance business switched from his old employer to his new employer statewide for three years after he left the job, even if the employee had no role in handling the account at either employer.<sup>146</sup> The court labeled the provision a penalty<sup>147</sup> and was unpersuaded that such an onerous provision should be enforced, despite acknowledging some difficulty for an employer in proving a former employee's role in getting customers for a new employer.<sup>148</sup> A second Arizona Supreme Court opinion, *Valley Medical Specialists v. Farber*, sets out a balancing test for unreasonable restraints, taken from the Restatement (Second) of Contracts section 188.<sup>149</sup> Restraints are not enforceable when they are greater than necessary to protect an employer's legitimate interest or when they are outweighed by the employee's and the public's interest.<sup>150</sup>

The court in *Farber* also addressed the question of the appropriate remedy for overbroad restraints. It recognized the need to discourage employers from creating "ominous covenants" with "*in terrorem* effect" on employees who

140. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1034 (Ariz. 1985).

141. *Cronin*, 991 P.2d at 237.

142. *Id.*

143. *Id.* at 238.

144. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1283–85 (Ariz. 1999); *Olliver/Pilcher Ins., Inc. v. Daniels*, 715 P.2d 1218, 1220–21 (Ariz. 1986).

145. 715 P.2d at 1219–21.

146. *Id.* at 1219–1220.

147. *Id.* at 1220.

148. *Id.*

149. 982 P.2d at 1283 (citing RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981)).

150. *Id.*

lack access to legal advice about enforceability.<sup>151</sup> Feeling bound by precedent suggesting that overbroad restrictions can be severed from reasonable ones, the court said that it would “tolerate” elimination of grammatically severable provisions but would not rewrite restraints to make them reasonable, so as to encourage employers to draft restraints narrowly.<sup>152</sup> The court’s analysis recognizes that individuals often do not have lawyers. Its approach provides some incentive for employers not to write restrictions that could scare employees either into staying with a current employer despite better opportunities or into refraining from permissible competition after leaving.

### C. Standard Form Contracts

In its approach to standard forms, the Arizona Supreme Court wholeheartedly rejects formalism; it is routinely skeptical of legal fictions and rejects the ideas of a “duty to read” or “plain meaning.”<sup>153</sup> Overall, the court favors the real deal over the paper deal<sup>154</sup> and sets substantive limits on contract terms to protect against over-reaching by a stronger or more sophisticated party.<sup>155</sup>

Arizona has long taken the position that interpretation of an agreement should be undertaken in light of all circumstances.<sup>156</sup> Furthermore, a trial court should not attempt to find “plain meaning” of an integrated writing without first considering extrinsic evidence to see whether it supports an asserted meaning to which the language of the writing is “reasonably susceptible.”<sup>157</sup> The court’s approach is consistent with sophisticated contemporary interpretative theory—that meaning depends upon understanding authors’ intentions in context and cannot be derived from texts alone.<sup>158</sup>

When it comes to non-negotiated standard forms, the court is even more skeptical of searching for the meaning of the writing without considering the full context, including not just context as it bears on the meaning of the writing but also the possibility that the writing does not necessarily represent the reasonable expectations of the parties. Arizona has embraced the “reasonable expectations” doctrine concerning terms in non-negotiated standard form contracts as a basis for

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151. *Id.* at 1286.

152. *Id.*

153. *See* *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394 & n.6 (Ariz. 1984) (concerning multiple fictions and “the land of make-believe” involved in pretending that an insured had agreed to an arcane exclusion from coverage); *id.* at 399–400 & n.9 (concerning skepticism about the idea of a “duty to read” as applied to boilerplate limitations in an insurance policy or other standard form).

154. *See generally* Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 71–73 (2003).

155. *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58–59 (Ariz. 1995).

156. *Smith v. Melson, Inc.*, 659 P.2d 1264, 1266–67 (Ariz. 1983).

157. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1138–41 (Ariz. 1993).

158. *Stanley Fish, There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 635 (2005).

non-enforcement of surprising terms.<sup>159</sup> The doctrine is recognized in section 211 of the Restatement (Second) of Contracts<sup>160</sup> and by courts in several other states.<sup>161</sup> It is based on Karl Llewellyn's analysis that those who adhere to standard forms typically give explicit assent only to a few "dickered" terms, meaning those that are discussed and negotiated, and otherwise the adhering party gives a "blanket assent" to any reasonable form terms in boilerplate, without knowing what they are.<sup>162</sup> A discussion of two of the Arizona Supreme Court's decisions employing the reasonable expectations doctrine will suffice to show how expansive this doctrine is in Arizona.<sup>163</sup>

Although discussing antecedents in Arizona case law, the first Arizona case to rely explicitly on the reasonable expectations doctrine of the Restatement (Second) was *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*<sup>164</sup> This case involved an issue about the limits of coverage under an umbrella insurance policy provided to Darner Motors, an automobile sales, service and leasing business, specifically the policy's coverage of the business and its lessees for liability risk.<sup>165</sup> The court held that Darner Motors could use the reasonable expectations doctrine against enforcement of a boilerplate liability limitation on the grounds that the policy was contrary to the alleged explicit representations of the insurer's agent about the extent of coverage.<sup>166</sup>

Joel Darner, the company owner, admitted never reading the umbrella policy, complaining "it's like reading a book," and also saying that after his conversation with the agent assuring Darner of certain coverage, "I didn't think I needed to."<sup>167</sup> Darner Motors' office manager saw little point in reading the policy because the insurance company's agent "would occasionally appear, remove pages

159. James J. White, *Form Contracts under Revised Article 2*, 75 WASH. U. L. Q. 315, 323–25 (1997) (discussing efforts to put a version of the reasonable expectations doctrine into U.C.C. Article 2 and noting that the appellate courts of Arizona had relied on the doctrine more than any other jurisdiction). The entire Revised Article 2 project failed when pulled from consideration during the 1999 meeting of the National Conference of Commissioners on Uniform State laws. See Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 790–91 (2001). Although cut back to a more modest set of amendments, the Article 2 project has remained controversial and, as of this writing, it has failed to win a single enactment.

160. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

161. *Lauvetz v. Alaska Sales and Serv.*, 828 P.2d 162, 165 (Alaska 1991); *C. & J. Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 172 (Iowa 1975); *Band Bros., Inc. v. Robinson*, 471 N.E.2d 1332, 1336 (Mass. 1984); *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861, 868–69 (Okla. 1996); *Elliott Leases Cars, Inc. v. Quigley*, 373 A.2d 810, 814 (R.I. 1977). *Contra Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 806 (Utah 1992).

162. LLEWELLYN, *supra* note 14, at 370.

163. White, *supra* note 159, at 325–26 (counting seven Arizona Supreme Court cases and total of twenty-five Arizona appellate cases decided using the reasonable expectations doctrine).

164. 682 P.2d 388, 394–97 (Ariz. 1984).

165. *Id.* at 390.

166. *Id.* at 392–95 (the clause was conceded to be "unambiguous" because the policy was not in the record).

167. *Id.* at 391.



from the loose-leaf binder and insert new pages.”<sup>168</sup> The court vacated the decision of the Court of Appeals and reversed the summary judgment by the trial court in order to allow Darner Motors to assert various theories against the insurer, including reformation to align the insurance policy with the parties’ reasonable expectations, particularly those based on the agent’s oral representations to the insured about the extent of coverage.<sup>169</sup>

The *Darner Motors* case describes the reasonable expectations doctrine as “a pragmatic, honest approach” that “will provide greater predictability”<sup>170</sup> because it “removes the temptation to create ambiguity or invent intent in order to reach a result.”<sup>171</sup> The court did not believe that an expansive approach to consideration of parol evidence or a rule of interpretation against the drafter would be enough to avoid the fiction that boilerplate expresses the expectations of the parties, particularly the adhering party.<sup>172</sup> The court in *Darner Motors* adopted not only Llewellyn’s theory but his realist rationale for Grand Style judging, that “covert tools are never reliable tools.”<sup>173</sup> Noting that boilerplate is often disregarded both by customers and salespersons, the court said that the doctrine “does not give effect to boilerplate terms which are contrary to either the expressed agreement or the purpose of the transaction known to the contracting parties.”<sup>174</sup> The court stated that to “interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule.”<sup>175</sup> The court’s purpose was to “acknowledge standardized contracts for what they are—rules written by commercial enterprises,” with the reasonable expectations doctrine setting “just limits on business practice.”<sup>176</sup>

The court quoted a Restatement comment to the effect that the blackletter test of section 211(3) (that the drafter had “reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term”) is met in three types of circumstances: (1) “the term is bizarre or oppressive;” (2) “it eviscerates the non-standard terms explicitly agreed to,” or (3) “it eliminates the dominant purpose of the transaction.”<sup>177</sup>

The *Darner Motors* case is expansive in applying the reasonable expectations doctrine in a business-to-business context, not involving a household consumer. The court also expressed the intention to apply the doctrine beyond the insurance context, including in cases involving rail, airline and bus transportation, rental of cars, trucks and equipment, credit cards, and bills of lading, invoices and other commercial documents, when used on a non-negotiated basis.<sup>178</sup> The court

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168. *Id.*

169. *Id.* at 402, 405.

170. *Id.* at 397.

171. *Id.* at 399.

172. *Id.* at 394–95.

173. K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

174. *Darner*, 682 P.2d at 399.

175. *Id.*

176. *Id.*

177. *Id.* at 396–97 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211(3) cmt. f (1981)).

178. *Id.* at 397 & n.8.

has since applied the doctrine in a non-insurance context in *Broemmer v. Abortion Services of Phoenix*, in which the patient sued for malpractice after suffering a punctured uterus in an abortion.<sup>179</sup> The abortion clinic moved to dismiss based on a standard form “agreement to arbitrate.”<sup>180</sup> The arbitration agreement included a provision that the arbitrators selected would be doctors specializing in obstetrics and gynecology.<sup>181</sup> The plaintiff was 21 years old, unmarried, a high school graduate of low income with no medical benefits; the father insisted that she have an abortion, and her affidavit said she was in a state of confusion and emotional turmoil when she went to the clinic.<sup>182</sup> In five minutes during a visit the day before her abortion, she completed three forms, including the “agreement to arbitrate” (without explanation from clinic staff).<sup>183</sup> She later stated that she was still not sure “what arbitration is.”<sup>184</sup> The court held that, in the absence of explanation to her that she was waiving her right to a jury trial for all possible disputes, including medical malpractice claims, the arbitration provision was contrary to reasonable expectations.<sup>185</sup>

In one way, the *Broemmer* holding is narrower than *Darner Motors*, because it involved an unsophisticated consumer of medical services, rather than a business. On the other hand, *Broemmer* expands the holding in *Darner Motors* not only because the context is other than insurance, but also because there was no contradiction between an oral representation and the standard form. In addition, it would take some stretching of another ground recognized in *Darner*—a term contrary to “the purpose of the transaction,”<sup>186</sup> to fit the situation in *Broemmer*, an effort the court did not undertake. It also did not label the agreement to arbitrate “bizarre or oppressive”<sup>187</sup> or use the deal breaker reading of the test in Restatement (Second) section 211(3), which asks whether the form drafter “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.”<sup>188</sup> The unsophisticated and confused patient in *Broemmer* might well have gone forward even if clinic staff had explained to her that she was giving up her right to a trial by jury in the event of medical malpractice. Rather, the court used broad language from a Restatement comment:

179. 840 P.2d 1013, 1015 (Ariz. 1992).

180. *Id.* at 1015, 1023.

181. *Id.* at 1016.

182. *Id.* at 1014.

183. *Id.* at 1014–15.

184. *Id.* at 1017.

185. *Id.*

186. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 397–99 (Ariz. 1984).

187. Justice Martone, dissenting, ran the case through the three tests of comment f of section 211 of the Second Restatement of Contracts and stated, “An agreement to arbitrate is hardly bizarre or oppressive. . . . Arbitration does not eviscerate any agreed terms. Nor does it eliminate the dominant purpose of the transaction.” *Broemmer*, 840 P.2d at 1020 (Martone, J. dissenting).

188. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981); *see also* White, *supra* note 159, at 321–22 (emphasizing the deal breaker reading of the blackletter, meaning that a party really would not have gone forward with the deal if that party had focused on the clause later in issue).

“Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.”<sup>189</sup>

The court seemed to rely on a combination of substantive and procedural deficiencies. The agreement, if not bizarre and oppressive, was harsh because it involved a “waiver of the fundamental right to a jury trial.”<sup>190</sup> The court also listed procedural elements of the situation that meant the waiver was not knowing—the term was not explained or called to her attention, and in addition the plaintiff “was under a great deal of emotional distress, had only a high school education, was not experienced in commercial matters, and is still not sure ‘what arbitration is.’”<sup>191</sup>

Although criticized as “activist,”<sup>192</sup> the Arizona Supreme Court’s version of the reasonable expectations doctrine can be explained in economic terms. Customers who adhere to standard forms do not have the time to read and understand them; transaction costs would be prohibitive if they tried to do so. Even if a few individual customers did read and understand form terms, they typically could not negotiate better ones because businesses are not set up to deal with this unusual customer behavior.<sup>193</sup> Furthermore, sophisticated businesses may be able to segment readers and non-readers, so that the readers do not provide market policing that benefits other customers.<sup>194</sup> Although customers may pay a small amount more if unexpected clauses are not enforceable, most might prefer to do so rather than, for example, have a less promising forum in which to pursue a claim of serious medical malpractice. Using obscure clauses is a way to hide a cost from view, with a few unlucky customers bearing that cost rather than all sharing in paying a small amount each to avoid it. In essence, policing of standard forms provides a form of insurance to adhering customers, insurance that most would want. It is not possible to give customers meaningful choice in many standard form transactions because it would be prohibitively expensive to communicate effectively the meaning of a large number of complex form terms (such as what arbitration is and its pros and cons). The reasonable expectations doctrine thus

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189. *Broemmer*, 840 P.2d at 1017 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211(3) cmt. f); *see also* Braucher, *supra* note 67, at 1421 & n.8 (concerning Arizona Supreme Court’s reliance on the broad comment rather than a narrow reading of the language of the blackletter).

190. *Broemmer*, 840 P.2d at 1017.

191. *Id.*

192. White, *supra* note 159, at 328. Speaking to a class at the University of Arizona James E. Rogers College of Law in the spring semester of 2007 (which I attended), Justice Sandra Day O’Connor stated that an activist judge is one who gets up in the morning and goes to work.

193. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394 & n.6 (Ariz. 1984) (concerning fictions that an insured gets a lower premium by having a policy exclusion or could get a policy without the exclusion by agreeing to pay a higher premium).

194. Clayton P. Gillette, *Rolling Contracts As an Agency Problem*, 2004 WIS. L. REV. 679, 692–93 (concerning the problem that sellers may be able to distinguish high-end buyers and give them better treatment both at the front end and in the adjustment of disputes, so that readers may not provide market policing that benefits non-readers).

operates as a check on over-aggressive drafting of non-negotiated, standard form contracts. It recognizes market failure caused by transaction costs and resulting information asymmetries and protects customers against unexpected boilerplate.

The Arizona Supreme Court has also recognized an expansive version of unconscionability. In *Maxwell v. Fidelity Financial Services, Inc.*, the court held that a question of substantive unconscionability was presented in a transaction involving a \$6,512 price for a water heater for a modest residence (worth about \$40,000), financed at 19.5 percent interest, for a total of payments over time of about \$17,000 after a refinancing, where the loan was secured not only by the heater but also by a security interest in the debtor's residence.<sup>195</sup> The water heater never functioned properly, and the City of Phoenix eventually condemned it and ordered it disconnected; nonetheless, the customer made payments for six years and then sought a declaratory judgment to be released from further obligation to the assignee of the loan.<sup>196</sup> The court held that summary judgment for the lender was inappropriate and that a hearing should have been held on the commercial setting, purpose and effect of the contract, as provided under Arizona's enactment of the standard version of Uniform Commercial Code ("UCC") section 2-302(2).<sup>197</sup>

Interestingly, Justice Martone, sometimes more cautious about expansive decisions, concurred in the case to contend that a hearing was unnecessary because unconscionability had been made out as a matter of law. He explained:

On the undisputed facts, the commercial setting, purpose and effect . . . are tragically plain. The commercial setting: a "now defunct" entity . . . took advantage of a limited person living on the margin of human existence. The purpose: to extract "\$17,000" from a "hotel maid" who earned "\$400 per month." . . . The effect: to subject a marginal person to the risk of loss of her home, all for a hot water heater that "was never installed properly, [and] never functioned properly."<sup>198</sup>

*Maxwell* treats unconscionability as a check primarily on substantive harshness of terms. Although noting the conventional analysis of unconscionability as involving both procedural and substantive elements, the court reasoned that the dual requirement is "more coincidental than doctrinal," leaving the rule "largely substantive."<sup>199</sup> The court based its analysis in significant part on the text of the UCC's unconscionability provision, section 2-302, noting that "[c]onspicuously absent from the statutory language is any reference to procedural aspects."<sup>200</sup>

195. 907 P.2d 51, 53–54, 59 (Ariz. 1995).

196. *Id.* at 53–54. The assignee of the contract was not a holder in due course by virtue of both federal law and a term of the contract making the assignee liable for defenses good against the original seller. *Id.* at 55. Asserting the defense that the water heater did not work probably would not have been sufficient to address the customer's problem, because even if she recovered the full value of the water heater on a damage claim, she might still have been liable for more on the high-interest loan.

197. *Id.* at 62 (citing ARIZ. REV. STAT. ANN. § 47-2302 (2005)).

198. *Id.* at 63 (Martone, J., concurring) (internal citations omitted).

199. *Id.* at 57–59.

200. *Id.* at 59.

Rather, the text refers to the unconscionability of “the contract or any clause of the contract,” a focus on substance;<sup>201</sup> similar language is used in the blackletter of the Restatement (Second) of Contracts, section 208.<sup>202</sup> The *Maxwell* court also noted the substantive emphasis of the UCC provision, section 2-719(3), making a limitation of consequential damages for injury to the person presumptively unconscionable in cases involving consumer goods.<sup>203</sup> The consumer context might be considered procedural, but otherwise this provision highlights substance.

The *Maxwell* case certainly involved some procedural weaknesses, making all the more striking the court’s decision to focus on substance alone as sufficient to show unconscionability. A door-to-door salesman sold the water heater to a hotel maid and her then-husband, a couple of modest means, and the transaction involved numerous documents, including “a loan contract, a deed of trust, a truth-in-lending disclosure form, and a promissory note and security agreement,” making it unlikely that the couple really understood the deal.<sup>204</sup> On the other hand, they may have known that they were paying a very high price.

The Arizona court’s focus on substance in unconscionability doctrine also comes out in its comparison of that doctrine to the reasonable expectations doctrine. The court has twice noted, both in *Broemmer* and *Maxwell*, that “even if [the contract provisions are] consistent with the reasonable expectations of the party,” unconscionability can make them unenforceable.<sup>205</sup> The reasonable expectations doctrine is a mixture of substance and procedure under Arizona law, while unconscionability can be purely a matter of substance. To use the reasonable expectations doctrine, a party must show that a contract of adhesion was used; furthermore, lack of explanation of surprising terms is important.<sup>206</sup> In *Broemmer*, the court found the arbitration agreement contrary to reasonable expectations, given the lack of explanation of the term and emotional state of the unsophisticated plaintiff, and did not reach the issue of unconscionability.<sup>207</sup> In *Maxwell*, the court focused on substantive unconscionability and found it unnecessary to also draw out the elements of possible procedural unconscionability.<sup>208</sup>

Some might view as a bad policy choice the Arizona court’s analysis that sufficient substantive harshness is enough to make a contract or term

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201. *Id.*

202. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (referring to the possibility of any “contract or term” being unconscionable).

203. *See Maxwell*, 907 P.2d at 59 (discussing U.C.C. § 2-719(3), codified as ARIZ. REV. STAT. § 47-2719(C) (2005)).

204. *Id.* at 53.

205. *Id.* at 57 (quoting *Broemmer v. Abortion Servs. of Phoenix*, 840 P.2d 1013, 1016 (Ariz. 1992)) (alternation in original).

206. *See Broemmer*, 840 P.2d at 1016–17. The reasonable expectations doctrine in Arizona bears some resemblance to the “sliding scale” approach to unconscionability, in which the more harsh the term, the less procedural unfairness is required. *See Freeman v. Wal-Mart Stores, Inc.*, 3 Cal. Rptr. 3d 860, 866–67 (Ct. App. 2003).

207. 840 P.2d at 1016–17.

208. *Maxwell*, 907 P.2d at 59.

unconscionable, even if the customer understood that harshness.<sup>209</sup> However, Justice Martone's summary of the setting, purpose and effect of the *Maxwell* transaction points out an opposing perspective; at some point, an "opportunity" is really exploitation and ought to be labeled as such. Ian Macneil has put this point in psychological terms, noting that a sense of solidarity in market exchange "cannot survive in the face of perceptions that one side constantly gets too good a deal;" when that perception sets in, it converts "the psychology of exchange from that of goods to that of harms."<sup>210</sup> The recognition of this psychology, and its very real material consequences, lies behind a willingness to label some contracts too unfair to merit state enforcement. When private ordering becomes private exploitation, Arizona law is willing to release the exploited party.

Given its insistence on both meaningful disclosure and reasonable substance in form terms, the Arizona Supreme Court seems unlikely to go along with industry efforts, such as those of computer and software sellers, to take away important default rules using terms hidden in delayed forms.<sup>211</sup> In *Demasse*, the court showed a willingness to use formation doctrines, such as assent and consideration, to reject later terms attempting to take away job security,<sup>212</sup> so the Arizona court might not even need to reach policing doctrines such as reasonable expectations or unconscionability to decline to enforce terms not made available in advance (particularly since advance disclosure is so cheap and easy in the age of the internet).<sup>213</sup> The Arizona high court would be unlikely to indulge in "land of make-believe" fictions<sup>214</sup> to find that computer purchasers meaningfully assent to arbitrate (in a forum that charges individuals a fee in excess of the price) when they fail to return the product to avoid terms in the box, not disclosed in advance of delivery.<sup>215</sup> Even with advance availability of terms, the court would likely be

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209. See White, *supra* note 159, at 356 (stating that "consumers are smarter, more cunning, and far less honest than their advocates make them out to be" and also expressing the fear that relief from standard form clauses will put costs "on the backs of the honest majority of the consumer class"). See *supra* notes 192–95 and accompanying text for an answer to this argument.

210. Ian R. Macneil, *THE NEW SOCIAL CONTRACT* 45, 103 (1980).

211. Compare *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1151 (7th Cir. 1997) (defending delayed disclosure in the early days of the Internet, on the grounds that it would be absurd to require computer sellers to read long terms to buyers over the telephone), with American Law Institute, *PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS*, Discussion Draft No. 4 § 2.02(c)(1) (Aug. 28, 2007) (calling for standard forms to be "reasonably accessible electronically prior to initiation of the transfer at issue" in order for the terms to be adopted by customers). The possibility of internet disclosure was not considered in the *Hill* case suggesting that the analysis is now dated.

212. *Demasse v. ITT Corp.*, 984 P.2d 1138, 1148–49 (Ariz. 1999).

213. See *supra* note 211.

214. See *supra* note 153 (quoting *Darner* about make-believe involved in treating surprising, unread insurance policy terms as assented to by the insured); see also *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573–75 (App. Div. 1998) (treating as unconscionable arbitration rules that deny customers access to dispute resolution as a practical matter).

215. See *Hill*, 105 F.3d at 1148–49. For an analysis of delayed terms that avoids the legal errors of *Hill*, see *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1338–41 (D.

willing to employ either the reasonable expectations doctrine, to decline to enforce surprising terms not adequately explained, or unconscionability, in cases involving oppressive terms.<sup>216</sup> One would also expect the Arizona Supreme Court to be resistant to “cubewrap” contracts, left in employees’ cubicles to be signed after they show up for work and used to attempt to take away rights to pursue civil rights claims in court or to compete with the employer after leaving the job.<sup>217</sup>

#### IV.

The Arizona Supreme Court clearly has a grand tradition of expansive use of the common law to insist upon transactional fairness, raising two questions: Why has this tradition flourished, and how much does it matter to how business is actually done in the state?

##### A. *The Cultural and Institutional Factors*

Place plausibly played an important role in the development of Arizona’s contract law. Autonomy versus solidarity is a central tension in making and performing contracts.<sup>218</sup> On the oceanic Arizona range, this tension is literally part of the landscape. The account of contracting at the Lazy B Ranch with which this Article begins evokes the isolation of living in “high desert country—dry, windswept, clear, often cloudless.”<sup>219</sup> The Lazy B’s watering places had names, and Sandra Day O’Connor and her brother Alan Day explained that, “High Lonesome is the most descriptive name on the ranch,” standing “alone as a sentinel over a large, bare prairie that is roughly on the Continental Divide. When you are there, you can feel that High Lonesome is the proper name.”<sup>220</sup>

Those living on the Lazy B could watch a buyer approaching from a long way off; when one came calling, it was a social as well as a business occasion.<sup>221</sup> The longing for human connection is palpable. Both buyer and seller might have disliked New Deal programs, but they also operated on a solidarity principle with each other, with cooperation expected and relational sanctions far more likely than

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Kan. 2000) (relying on U.C.C. sections 2-207 and 2-209 to hold that express assent is necessary for delayed terms to become part of a contract).

216. See *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 53–54, 59–60 (Ariz. 1995); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 397 (Ariz. 1984).

217. Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 657–59 (2007) (arguing that a choice to delay disclosure of an arbitration clause to employees until after they are hired is misleading and undermines assent). The term “cubewrap contracts,” referring to terms left in an employee’s cubicle, is a play on “shrinkwrap” contracts, used for digital products to attempt to treat opening shrinkwrap packaging after purchase as assent to terms not disclosed in advance. *Id.* at 639–40.

218. See Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 575–76 (concerning autonomy, solidarity and hierarchy in contractual relationships).

219. O’CONNOR AND DAY, *supra* note 1, at 6.

220. *Id.* at 8.

221. *Id.* at 166.

use of law.<sup>222</sup> This western interdependence has helped to shape the insistence on fairness in Arizona transactional law.

Another possible explanation is the influence of individuals. A few great justices often seem key to a tradition. Perhaps the best recent example in Arizona is Justice Stanley Feldman, who wrote many of the opinions discussed above.<sup>223</sup> He combined heart and erudition with wisdom to produce “the law of the singing reason,” Llewellyn’s phrase for the essence of Grand Style judging.<sup>224</sup> Llewellyn was not immune to the “great man” theory of judging, naming favorites such as Lord Mansfield and many others, but concluding that a period of Grand Style judging is marked by use of principle and policy, not only by “giants,” but also “by most of the lesser men of the period.”<sup>225</sup> Arizona’s grand tradition of transactional fairness is not the work of one or even of a small number of judges; many judges had to sign on to and write the opinions that created and sustained it.

Arizona’s merit selection process for picking appellate judges (as well as trial court judges in the larger counties)<sup>226</sup> is an important part of the institutional foundation supporting the transactional fairness tradition. Arizona instituted merit selection in 1974, saving the state from the circus of judicial campaigns in the TV era and the unseemliness of campaign fundraising by prospective and sitting judges.<sup>227</sup> Morris Udall started the long campaign in 1959 as chair of a State Bar committee.<sup>228</sup> Sandra Day O’Connor also promoted the idea in the legislature in 1971 while serving as Arizona Senate president but did not succeed in getting it enacted; she later was picked for the Arizona Court of Appeals under the merit system and was elevated directly from that court to the United States Supreme Court.<sup>229</sup>

Arizona ultimately adopted merit selection by ballot initiative in 1974.<sup>230</sup> Under the system, as revised by another ballot initiative in 1992, commissions

222. See *supra* notes 10–11 and accompanying text.

223. See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 389 (Ariz. 1984). For an assessment of Justice Feldman’s judicial career, see John P. Frank, *Tribute, Justice Stanley G. Feldman*, 45 ARIZ. L. REV. 269 (2003) (calling him “a major contributor to the growth of Arizona law” and describing in particular his contributions to development of the law of torts and contracts).

224. LLEWELLYN, *supra* note 14, at 183 (concerning “the law of the singing reason” as a rule that “wears both a right situation-reason and a clear scope-criterion on its face” to yield “regularity, reckonability, and justice all together”).

225. *Id.* at 36.

226. Mark I. Harrison, Sara S. Greene, Keith Swisher & Meghan H. Grabel, *On the Validity and Vitality of Arizona’s Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L. J. 239, 243 (2007); see also John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L. J. 837, 845 (1990).

227. Ted A. Schmidt, *Fair Courts Under Fire—A Special Section on Judges and Judicial Independence, Part I: Merit Selection of Judges*, 42 ARIZ. ATT’Y 13, 13–14 (Feb. 2006) (concerning large sums raised and use of television advertising in states with elected judges).

228. *Id.* at 16.

229. *Id.*; Harrison et al., *supra* note 226, at 244.

230. Schmidt, *supra* note 227, at 16 (also noting the role of then State Bar President Stanley Feldman in placing the proposition on the ballot in 1974).



made up of five lawyers selected by the state bar and 10 lay members selected by the governor must recommend a minimum of three candidates from different parties for any vacancy, with the governor required to choose among the recommended candidates (and surprisingly, 26 percent of the time, the governor has picked someone from another political party).<sup>231</sup> Judges selected under this system must also undergo unopposed retention elections, after judicial performance reviews.<sup>232</sup> The Arizona State Bar has consistently supported merit selection.<sup>233</sup> Leaders in the bar view merit selection as the best way to assure that judges are both fair and highly qualified.<sup>234</sup> Opposition has come primarily from “value voter” groups promoting particular positions on hot-button issues such as abortion and rights of accused criminals.<sup>235</sup> The system has lasted for nearly 35 years, a period that roughly corresponds to the period of Grand Style judging described in this Article.

Would Arizona’s transactional fairness tradition have flourished to the same degree under an elected Arizona Supreme Court? The answer is probably no, not because voters would have opposed it or even paid attention to it. Rather, elected judges who need to stand for reelection are more likely to focus on such issues as being tough on criminals.<sup>236</sup> They are less likely to be interested in developing expertise on civil law issues that will not draw much media attention. An elected court would likely have been much less interested in studying and adopting the scholarship of the American Law Institute’s restatements than the merit-selected Arizona Supreme Court has been.<sup>237</sup>

### ***B. The Impact***

The Arizona Supreme Court uses broad versions of common law doctrines to insist on honesty, fairness and justice in transactions, but we should have no illusion that the effect on commerce in Arizona is profound. Contract disputes are often resolved informally because business pressures are usually much more powerful leverage than legal entitlements.<sup>238</sup> This may be why Sandra Day

231. *Id.* at 16–17.

232. *Id.* at 17 (concerning retention elections, which judges rarely lose); Harrison et al., *supra* note 226, at 245–47 (concerning performance review process, instituted in 1992, which includes surveys of jurors, attorneys, litigants, witnesses, and court staff about judicial performance, publication of results, and self-improvement programs for judges).

233. Schmidt, *supra* note 227, at 19 (discussing what concerned members of the bar can do to assure preservation of the merit system).

234. *Id.* at 14, 17–18 (discussing merit system as a way to have “fair and neutral courts” with “well-qualified” judges); see generally Sandra Day O’Connor & Ronnell Anderson Jones, *Reflections on Arizona’s Judicial Selection Process*, 50 *Ariz. L. Rev.* 1, 15 (2008).

235. *Id.* at 14.

236. *See id.*

237. *See supra* note 66 and accompanying text (describing Arizona Supreme Court’s case law statement that it follows the Restatements absent contrary authority).

238. *See* Macaulay, *supra* note 10, at 467 (finding “just wrong” or “greatly overstated” assumptions about contract law such as: “Without contract law and the state’s monopoly of the legitimate use of force, performance of contracts would be highly uncertain.”).

O'Connor's father made handshake deals to sell six months' production of cattle at the Lazy B.<sup>239</sup>

When relational sanctions fail because the amount at stake in a dispute is more than the value of a relationship or of negative impact on reputation, legal sanctions may not work either. Common law doctrines that depend on factual nuances require expensive litigation to put them into effect, a cost that is often prohibitive in relation to possible recovery.<sup>240</sup> Although an Arizona statute provides generally that courts may award attorneys' fees to prevailing parties in contract actions, the discretionary nature of the statute means there is no guarantee of recovering fees even if one wins, and furthermore there is the risk of not only losing, but of having to pay the other party's attorneys.<sup>241</sup> The Arizona Supreme Court has used its discretion under the statute to try to minimize disincentives to vindicate rights,<sup>242</sup> but risk-adverse parties will not be entirely comforted.<sup>243</sup>

The impact of the Arizona Supreme Court's approach to transactional fairness is probably greatest when it comes to sophisticated parties making and performing large deals; these parties do bargain and adjust in the shadow of the law. Thus, a decision such as *Wells Fargo Bank*<sup>244</sup> likely affects parties to large commercial lending transactions, reducing the need to provide explicitly for disclosure of financial information and also reducing the settlement value of arguments that the letter of a written agreement requires less than basic honesty.

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239. See *supra* Part I (describing process of making contracts at the Lazy B).

240. See Macaulay, *supra* note 10, at 469–70 (noting that “contract remedies are limited and reflect a fear of awarding too much” and that: “One must pay for one’s own lawyer, and one must win enough to offset all the costs of the endeavor”); see also *The Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (in opinion written by Judge Richard Posner, noting “the legal remedies for breach of contract are not always adequate”).

241. ARIZ. REV. STAT. ANN. § 12-341.01(A) (2003) (providing that in “any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees”).

242. *Wagenseller v. Scottsdale Mem’l Hosp.*, 710 P.2d 1025, 1049 (Ariz. 1985) (reviewing factors a court should consider when asked to award attorneys’ fees, including “whether the award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney’s fees” and awarding fees to an employee who established valid causes of action available to employees generally to “encourage parties to seek to have their rights interpreted under the proper law”).

243. For example, a “little guy” with a tenable claim but who loses might have to be willing to go all the way to the Arizona Supreme Court to avoid paying the other side’s attorneys’ fees. See *Mullins v. S. Pac. Transp. Co.*, 851 P.2d 839, 842 (Ariz. Ct. App. 1992) (awarding partial attorneys’ fees to an employer and rejecting the employee’s argument, characterized as follows: “His position appears to be that an employee, if the unsuccessful party, should not be required to pay attorney’s fees, while an employer, if unsuccessful, should always pay attorney’s fees.”). Although mocked, this argument is not without merit; sensitivity to the relative resources of the parties is part of avoiding discouraging vindication of rights. See *supra* note 242.

244. See *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 17–20 (Ariz. 2002), discussed *supra* at notes 37–72 and accompanying text.

Another example of a doctrine likely to affect dispute resolution is Arizona's broad approach to use of extrinsic evidence,<sup>245</sup> which has the effect of giving parties less leverage for textualist arguments that can be refuted with evidence concerning the context.

When it comes to non-negotiated contracts involving a business and an individual, the common law decisions of the Arizona Supreme Court are predictably less significant in their impact on business behavior. Maintaining good word-of-mouth reputation drives businesses to do more for many customers and employees than the law requires. However, when the cost of satisfying a contract partner turns out to be great in relation to the benefits to be gained, businesses may take their chances about living up to their legal obligations, such as those to customers and employees, knowing that most individuals will never even go to a lawyer, let alone sue. Litigation is too costly in transactions involving small dollar amounts; it is hard to get a lawyer.<sup>246</sup> Furthermore, with the increasing use of arbitration clauses in all sorts of consumer and other mass-market transactions as well as in employment,<sup>247</sup> lawyers for individuals know that they will have to either use a private forum that has a structural incentive to favor the contract drafter (who picks the forum), or otherwise go through a first round of litigation to challenge the arbitration clause before getting to the merits.<sup>248</sup>

In contrast to fact-sensitive common law doctrines, a statute requiring or prohibiting specific practices by businesses can have more dramatic effect.<sup>249</sup> Many businesses will comply with a clear statutory command, such as a requirement that payments in loan transactions involving cross-collateralization be attributed first to the first item purchased,<sup>250</sup> even though businesses would not adopt that approach in response to the possibility of a challenge based on the reasonable expectations doctrine or unconscionability. In short, legislatures can have more impact because of the ability of statutes to provide clear answers on

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245. See *supra* notes 156–58 and accompanying text (discussing Arizona's permissive parol evidence doctrine).

246. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 124 (1979).

247. Arnow-Richman, *supra* note 217, at 642 (concerning common use of arbitration clauses by sellers and employers).

248. See W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 69–70, 112 (2007) (noting that repeat-player bias is a potent objection to pre-dispute arbitration agreements between parties of unequal power and arguing that more use of class arbitration could legitimize this means of dispute resolution).

249. See William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1022 (concerning advantages of specificity in getting businesses to comply with law).

250. *Id.* The example is the law under an Arizona statute that is a model of specificity. ARIZ. REV. STAT. § 44-6002C(6) (2003). This is a better way than unconscionability to stop abusive cross-collateralization that makes consumers vulnerable to lose all items purchased when they default after making significant repayment. Compare *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445, 448–50 (D.C. Cir. 1965) (addressing the issue with the unconscionability doctrine).

specific questions.<sup>251</sup> Legislatures can also delegate their powers to administrative agencies, empowering them to act more quickly and flexibly to address new forms of unfairness.<sup>252</sup>

Even though appellate judging has modest direct impact, especially beyond the realm of large transactions between sophisticated parties, it is not completely without significance. Judicial decisions operate symbolically and contribute to the societal store of norms, influencing behavior in that way.<sup>253</sup> A cynical view is that ameliorative judicial decision-making in the name of fairness amounts to no more than cosmetics, a diversion from facing the harshness of an economic and social system that produces increasing disparities in wealth and opportunity.<sup>254</sup> On the other hand, a focus on the expressive power of law suggests that indirect effects may be significant, influencing people's attitudes about what is socially acceptable and changing their behavior independent of the sanctions that the law would impose if invoked.<sup>255</sup> From this perspective, it is important that the Arizona Supreme Court has weighed in heavily in favor of forthcoming transparency in commercial lending contexts<sup>256</sup> and against exploiting poor people by selling them worthless merchandise on credit at exorbitant prices while getting them to put their homes at risk of foreclosure along the way.<sup>257</sup> When these types of bad behavior not only happen, but are pronounced acceptable by justices in black robes, a downward spiral in social norms is likely. With its grand tradition of transactional fairness, the Arizona Supreme Court speaks up for doing right.

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251. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 67–68 (Paul Gerwitz ed., 1989) (discussing advantages of using a statute to “move much more directly and efficiently toward its real goal than the pure tradition-bound case method” and also discussing consumer protection as an enormous problem that cannot be dealt with effectively by the case method).

252. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 357 (1969) (discussing need for statutes and administrative enforcement to “change as many nasty forms and practices as possible”).

253. Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1043 (using insights from game theory to explain why people obey expressions of courts about acceptable behavior even when there is no effective legal sanction). For an earlier scholarly account of the expressive power of judicial decisions, see Gordon, *supra* note 218.

254. See David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 27–28 (2000) (concerning illusions that simple correction of market failures can produce meaningful consumer choice for the inner-city poor).

255. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 341–42 (2000) (discussing how court decisions reflecting popular views may affect behavior by expressing disapproval for certain behavior, causing people to change behavior because of the disapproval and not because of the sanctions the law would impose).

256. See *supra* notes 37–72 and accompanying text (discussing Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12 (Ariz. 2002)).

257. See *supra* notes 195–201 and accompanying text (discussing Maxwell v. Fid. Fin. Servs., Inc., 907 P.2d 51 (Ariz. 1995)).