THIS IS AN ADDENDUM to FALL 2004 SYLLABUS
(Please see Fall Syllabus for policies, etc.)

During the second semester of this course, we will continue our exploration of contract theory, policy and practice. We will also continue to consider the function and application of unconscionability under common law. In addition, we will look at legislative attempts to prevent and/or cure “unfair” business and contracting practices. Moreover, we will be presenting the Habitat homeowners’ seminar and experiencing contract law in a very human context. We nonetheless begin the semester with a quick look at housing warranty and contracting issues, especially as applied to low-income tenants.

WEEK 1

The following article is a bit of a detour from other readings, but it refocuses our attention on key housing concerns and policies aimed to address those concerns. The following article addresses the implied warranty of habitability as it affects low-income housing, and courts’ application of contract law to residential leases. It questions whether expansive application of the warranty helps or harms low-income tenants. In addition, we will take a look at common leases in Boulder, and consider the provisions contained in those leases. Consider whether these provisions are “unfair,” or justified and proper?

- Please read: Daniel P. Schwallie, The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy, 40 Case W. Res. 525 (1990).
- Please obtain a copy of the sample lease from the box outside my door, and examine the provisions in that lease.
- Please also copy your own lease, redacting any personal information. Examine that lease as well.
As you prepare for class, consider the following:

- What is the implied warranty of habitability, and what purposes does it serve?
- What is Schwallie’s view of the warranty, and whether it serves its intended goals?
- Do you agree or disagree with Schwallie’s views? Why or why not?
- What provisions in the Boulder leases (my example and you own lease) “bother” you? Why? Do you believe that these provisions are enforceable? Why or why not? Should they be enforceable? Why or why not.

**WEEK 2**

Now that we refreshed our focus on affordable housing issues, it is time to also refresh our understanding of alternative theories of contract law. In addition, we reconsider the significance and political contexts of contract theory. To what extent does (and should) the political pendulum drive contract law? Has contract law merged with property and tort concepts such that private law has become one unified vehicle for furthering political agendas? The following articles by Jay Feinman consider some of these issues. They are a bit redundant, but it is useful to also consider how this contract scholar’s views have evolved over the past fourteen years. Please read:


As you prepare for class, consider the following:

- What is your understanding of the six contract theories Feinman considers in his 1990 article? Does Feinman’s account of these theories comport with you understandings from last semester?
- Have your views of these theories changed or evolved since last semester? If so, in what ways?
- What conclusions does Feinman make regarding the political angles of contract theory in his 1990 article? Do you agree? Why or why not?
- What does Feinman mean by the “un-making of law”?
- Compare Feinman’s ideas in his 1990 and 2004 articles. Does it appear that Feinman’s views of contract law have changed over time?

*Reflection/writing assignment*: Recall your choice of a preferred theory last semester (yes, that was when I forced you to choose!). Which of the six theories outlined in today’s readings do you prefer now? Please explain whether your views have changed from the beginning of last semester, and if so, why.
WEEK 3

We now also continue our discussion regarding unconscionability, and its proper function and role in contract law. Indeed, unconscionability creates an interesting lens through which to dissect and debate contract doctrine and policy. Through this lens, we see tensions between efficiency and fairness that run through all of contract law. In addition, we continue to question the meaning, and alleged dominance, of economic theory in modern contract law. With this in mind, please read the following.


Consider the following as you prepare for class:

• What does Bridwell propose with respect to unconscionability analysis? How does his proposed analysis differ or mimic how courts currently apply unconscionability? Do you find his proposal compelling? Why or why not?
• What are the “philosophical dimensions” of unconscionability in Bridwell’s view? What, if any, role should philosophy play in contract law?
• Does Posner answer the question he raises in the title of his article? If so, how does he answer the question? How would you answer the question?
• How does Posner view the varying influences of philosophies, psychology, history, and economics in contract law? Do you agree with his views and assessments of these influences?
• Does Posner believe unconscionability is inefficient? Do you agree?

*Reflection/writing assignment*: Please explain in one page or less how economics impacts the law governing your seminar topic (ie: each of you should consider the law applicable to your particular topic)?

WEEKS 4 & 5 (Along with the reviewing, editing & finalizing of Habitat seminar materials)

Unconscionability often plays a large role in analyzing enforcement of form contracts. Furthermore, form contracts have been controversial in uneven bargaining contexts, especially consumer cases. Indeed, form contracts are now standard and typical, and we have grown to accept them as a “necessary evil” of sorts. Moreover, the habitat homeowners we will be working with will likely have the most familiarity, and concerns, with form contracts that merchants offer on an essentially “take-it-or-leave-it” basis. These contracts are often referred to as adhesion contracts, but they nonetheless survive unconscionability analysis for a variety of reasons. Is this proper or “fair”? Please read the following:


As you prepare for class, consider the following:
• What does Bates see as the three “hurdles” to legal solutions of the “form contract problem”? Do you agree that form contracts are a problem? What are your thoughts on these hurdles?
• How do form contracts foster creation of “private law”? How does this impact consumers?
• How does UCC Article 2 address form contracts? Is this an adequate solution?
• What criticisms and solutions have commentators proposed for addressing form contracts? Does Bates believe these solutions are adequate? Why or why not?
• What is Rakoff’s proposal for protecting consumers from harsh form contracts?
• How does Rakoff describe the “Traditional” and “Modern” doctrines governing form contracts? How do these doctrines differ?
• How does Rakoff break down the “dimensions” of the form contract problem? How does Rakoff think the law should respond? What are your views?

*Reflection/writing assignment*: Please explain in less than one page your views regarding current common law’s ability to adequately deal with form contracts.

**WEEK 6**


As you prepare for class, consider the following:
• What experiences have you had with standard form contracts (SFCs)?
• How do Hillman and Rachlinski describe the benefits and drawbacks of SFCs?
• Have to had experience with electronic SFCs? Do you read these SFCs before accepting them?
• How would you describe “consent” to electronic SFCs? Should this impact courts’ and/or legislatures’ treatment of these contracts? If so, how?
• Are electronic SFCs a “necessary evil” of the modern marketplace? Why or why not? What are Meyerson’s views regarding SFCs? Do these contracts foster efficiency? Why or why not?
• Describe Meyerson’s proposed approach to enforcing SFCs.

* Reflection/writing assignment*: Please explain in less than one page your proposed approach for enforcing SFCs.
WEEK 7


As you prepare for class, consider the following:
- Does current law adequately address enforcement of electronic SFCs?
- How do electronic and paper SFCs differ?
- Should the law treat electronic SFCs differently than it treats paper SFCs? Why or why not?
- How do courts and legislatures currently approach enforcement of electronic SFCs? How may parties attack enforcement of electronic SFCs under current law?
- What is the approach suggested by the Kunz article? Does this approach adequately address assent issues involved with electronic contracting?
- How does changing law affect custom and usage of trade impacting electronic contracting? Should we simply apply evolving custom and trade usage to enforcement of electronic SFCs?
- Review the copy of an electronic SFC you brought to class. Be prepared to explain why you found any provisions particularly troubling.

*Reflection/writing assignment: Please bring to class a copy of an electronic SFCs you have encountered or found on the Internet. Highlight any provisions you find particularly troubling, and note on the copy why you found the provision(s) troubling.

WEEK 8

We have been considering theoretical, economical, and practical issues affecting common consumer agreements. In this context, we also have paid special attention to the unconscionability doctrine under the UCC and the common law. We have seen, however, that the UCC drafters have struggled with tensions between codification of clear rules and provision of adequate flexibility. The following readings revisit the UCC “project,” and question whether the UCC has served it goals:

As you prepare for class, consider the following:
- How does Hawkland characterize the differences between a code and a statute?
- Have Hawkland’s predictions about the UCC come to fruition? Why or why not?
How does Hillman characterize the views of Scott and Bowers regarding the UCC? Do you find Scott’s or Bower’s views more compelling? Why?

What conclusions does Hillman provide? Is this satisfying?

How should legislation or a uniform code address “unfair” contracts?

To what extent do you agree or disagree with the views students expressed in the survey discussed in the Litowitz book excerpt?

*Reflection/writing assignment*: As you likely noticed, these questions revisit questions we explored in the first semester. Please explain in less than a page the extent to which you believe a code or statute is able to address issues dealing with unconscionability and “unfair” contracts?

**WEEK 9 – PRACTICE SESSION FOR HOMEOWNERS’ SEMINAR ON 3/12**

**WEEK 10 – SPRING BREAK/NO CLASS**

**WEEK 11 – POST-SEMINAR EVALUATION/POST-MORTEM SESSION**

- NO NEW READING ASSIGNMENT
- PAPER DRAFTS DUE
- WE WILL COMPILE, REVIEW, AND DIGEST THE HOMEOWNERS’ EVALUATION RESPONSES IN CLASS
- BE PREPARED TO DISCUSS PROS & CONS OF THE SEMINAR, WHAT WORKED & DID NOT WORK, ETC.
- BE PREPARED TO PRESENT IDEAS REGARDING HOW THE HOMEOWNERS’ SEMINAR SHOULD BE IMPROVED FOR NEXT YEAR

**WEEK 12**

In the readings and through our outreach work, we have confronted tensions between codification and common law. This includes issues regarding the birth and development of consumer protections statutes, and the politics of legislative and code-making processes. It also includes questions regarding courts’ interpretations and applications of these statutes. Please read the following:


As you prepare for class, consider the following:

- Was the UCC code-making process as “apolitical” as it purported to be? To what extent is alleged “conservatism” of the code the product of compromise? Is this conservatism inevitable when crafting a uniform code?
• Which of the readings in the book excerpt did you find most interesting, compelling and/or surprising? Did these readings change your views regarding the UCC?
• How should code drafters revise the uniform lawmaking process to make it more balanced, to the extent you believe there is a lack of balanced representation? Does it need to be more balanced or will the market iron out any imbalances?
• How did the legislative processes leading to enactment of unfair trade practices and consumer protection statutes differ from the code-making process? What ramifications does this have for public attempts to protect consumers from unfair contracts?
• How does judicial interpretation affect complaints regarding imbalances in code-making and legislative reform processes?
• What does “judicial activism” mean? Why is it so controversial, especially in today’s political climate?

• *Reflection/writing assignment*: Considering the readings for today, explain in a short paragraph whether you would prefer clerking for an activist or conservative judge? Why? What’s “wrong” or “right” with judicial activism?

**WEEK 13**

The UCC code-making process failed to produce specific provisions for standard form contracts, and UCC 2-302 simply incorporates vague unconscionability rules of the common law. Consumer protection statutes, therefore, have sought to provide more particularized protections from unfair, or “unconscionable,” contracting or trade practices. Please read:


As you prepare for class, please consider the following:

• Have these statutes served their goals?
• If not, how can or should legislators reform these statutes?
• *Have we merely gone “full circle”—in the sense that we are back to where we started the year—in the unending debate regarding fairness versus efficiency?*

*No reflection paper this week – instead, each student will be assigned a partner with whom he or she will exchange papers. Before Week 14, these students must review each other’s papers and be prepared to critique and discuss these critiques with their paper partners in the following class.*

**WEEK 14 – PAPER EXCHANGES/CRITIQUES (no new reading assignment)**
WEEK 15 – FINAL CLASS!

• PAPERS DUE THIS WEEK ON 4/22

• Please Read the very short (2 ½ pages) hand-out, “Service Learning for Depth in a Fluid World.”

• Write a short reflection paper (not to exceed 1 page) explaining how you would define or describe what it means to “Humanize Contracts,” and the extent to which this course furthered the goals you had set regarding your participation in this course (ie: looking back at why you took this course).

• Be prepared to discuss your reflections on “Humanizing Contracts,” contract doctrine v. theory, etc.

• Be prepared to discuss you reflections on the course and how it should be improved.