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## The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon

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# PACE LAW REVIEW

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## **Symposium:** **The Enduring Legacy of *Wood v.*** ***Lucy, Lady Duff-Gordon***



## Introduction

### The Enduring Legacy of *Wood v. Lucy, Lady Duff-Gordon*

James J. Fishman\*

"The defendant styles herself a creator of fashion. Her favor helps a sale." So begins Benjamin Cardozo's famous decision in *Wood v. Lucy, Lady Duff-Gordon*,<sup>1</sup> one of the most enduring and influential cases in the contracts pantheon.<sup>2</sup> The facts are simple. The plaintiff, Otis Wood,<sup>3</sup> an advertising agent, entered into an agreement with the defendant fashion designer whereby he was to have an exclusive right, subject to her approval, to place her endorsements on the designs of others, to place her own designs on sale or to license to others to market them. They were to divide profits and revenues derived from any contracts Wood might make. Lady Duff-Gordon breached their agreement twice by entering into agreements with Sears to create a portfolio of dresses for the middle class,

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1. 118 N.E. 214, 214 (N.Y. 1917) (internal quotations omitted).

2. The case has been cited 1,219 times (as of December 17, 2007).

3. The focus of the Symposium was on the decision and Lady Lucy's creativeness as a fashion designer, but in Victor Goldberg's sprightly prose: "While Lucy was a famous public figure, Otis [Wood] was not exactly chopped liver." VICTOR GOLDBERG, *Reading Wood v. Lucy, Lady Duff-Gordon with Help from the Kewpie Dolls*, in FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 43, 45 (2006). Wood, one of the seventeen children of Fernando Wood, three times mayor of New York City, at various times was a lithographer, director of a publishing company and a newspaper syndicate. *Id.* at 45, 48-49. *Wood v. Lucy* informs us that "Wood possesses a business organization adapted to the placing of . . . indorsements." *Lucy, Lady Duff-Gordon*, 118 N.E. at 214. His other claim to fame was as the promoter of the Kewpie doll, a fad of the first two decades of the twentieth century. Wood had an exclusive right to promote Kewpies. GOLDBERG, *supra*, at 52-53. The Kewpie contract explicitly contained a "best efforts" clause. *Id.* at 53. Professor Goldberg concludes: "The existence of an explicit 'best efforts' promise in the Kewpie contract makes Cardozo's implication of such a promise in Lucy's contract (entered into only one year later) at least problematic." *Id.* Wood died in 1939.

and by designing the interior of the Chalmers motor car. She kept all of the profits from these transactions.<sup>4</sup>

Wood sued for damages. Lady Lucy demurred on the ground that the agreement lacked mutuality: Wood hadn't promised to do anything. The Supreme Court, Appellate Division, dismissed the complaint for a lack of mutuality.<sup>5</sup> "[T]he defendant gives everything and the plaintiff nothing . . . ."<sup>6</sup> The New York Court of Appeals in a 4-to-3 decision reversed. The promise was "‘instinct with an obligation,’ imperfectly expressed"—Wood's promise was implied. He was to use reasonable efforts to bring profits and revenues into existence.<sup>7</sup> Why has this case remained so significant? In part the decision reflects a period in which contract law was changing.<sup>8</sup> *Wood v. Lucy* became an important catalyst in the implementation of such change, no doubt because the majority decision was written by Cardozo.

To mark the ninetieth anniversary of the decision, Pace University School of Law sponsored a Symposium, *The Enduring Legacy of Wood v. Lucy, Lady Duff-Gordon*, to reconsider the case and to appreciate the accomplishments of Lucy, Lady Duff-Gordon, who as *Lucile*, became one of the twentieth century's most innovative fashion designers. The Symposium brought together leading contracts scholars from as far away as Australia and England as well as experts on *Lucile* from the worlds of fashion, museums and fashion scholarship.

The Symposium examined legal issues raised by the decision through panels that focused upon: implication, interpretation and default terms; the context of the case; implication and best efforts in the employment context; and *Wood v. Lucy* as a teaching vehicle. Another panel discussed *Lucile* as a fashion designer and feminist and accompanied their presentations

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4. The Symposium also featured several original objects relating to Lady Duff-Gordon including the Sears Catalog featuring the dresses designed by her and an advertisement for the Duff-Gordon-designed Chalmers Motor Car.

5. *Wood v. Lucy, Lady-Duff Gordon*, 164 N.Y.S. 576, 577 (App. Div. 1917).

6. *Id.* at 577.

7. *Lucy, Lady Duff-Gordon*, 118 N.E. at 214 (citing *McCall Co. v. Wright*, 117 N.Y.S. 775, 779 (App. Div. 1909)).

8. See Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988).

with power point pictures of her work.<sup>9</sup> This introduction to *Pace Law Review's* Symposium Issue discusses Lady Lucy's career and offers a précis of the papers herein.

### I. Portrait of a Lady: The Enduring Legacy of *Lucile*

One can speculate that Cardozo's opening line is a clever play on words, or signaling that Lucy is in for a rough time, or that Cardozo thought Lady Lucy or her profession was frivolous,<sup>10</sup> or that she was a nasty person.<sup>11</sup> Professor Deborah Zalesne observes the opening words are "not a neutral statement about her job, but a deeper implicit statement about her character."<sup>12</sup> Contracts casebooks have treated her as a humorous figure. There is a picture from *Good Housekeeping* in Dawson, Harvey and Henderson of a demure Lucy sitting on a piano stool with the inscription from the magazine: "Lady Duff-Gordon—Of the English nobility who employs psychology in designing clothes for women."<sup>13</sup>

#### *Fashion Innovator*

In fact, Lady Lucy Duff-Gordon was a creative fashion designer, a ground-breaking entrepreneur and arbiter of style, who transformed herself from a dressmaker for a few acquaint-

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9. Speakers for this panel and their topics were: Professor Lourdes Font, Fashion Institute of Technology, *Teaching Lucile: Rethinking the Canon of Fashion History*; Rebecca Matheson, Costume Institute, Metropolitan Museum of Art, *Creator of Fashion's: Lady Duff-Gordon: In Her Own Words*; Lewis Orchard, fashion designer, *Lady Duff-Gordon: An Edwardian Designer in a Modern Context*; and Molly Sorkin, Museum of the Fashion Institute of Technology, *After the Verdict: Lady Duff-Gordon and the Fate of Lucile, Ltd.* The Symposium also presented a virtual tour of a 2005 exhibit organized by the Museum of the Fashion Institute of Technology, "Designing the It Girl: *Lucile* and Her Style."

10. Jeffrey L. Harrison, *Teaching Contracts from a Socioeconomic Perspective*, 44 ST. LOUIS U. L.J. 1233, 1240 (2000).

11. Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 637 (1962).

12. Deborah Zalesne, *Integrating Academic Skills into First year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning*, 28 PACE L. REV. 290 (2008).

13. JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON, *CONTRACTS: CASES AND COMMENT* 300 (8th ed. 2003). The book contains additional information on Lady Lucy and her husband, Sir Cosmo Duff-Gordon. *Id.* at 301-02. *Mea Culpa*: Until the author learned of Lady Lucy's preeminence in fashion history, he too treated her as a joke.

ances into an international couturière secure in fashion history. Her beginnings certainly did not presage such a future. Lucy Sutherland was born in Canada in 1864 in modest circumstances. She had a younger sister, Elinor, who became the well-known novelist and celebrity Elinor Glyn.<sup>14</sup> Lucy was first married to James Wallace by whom she had a daughter Esme.<sup>15</sup> In 1890 Wallace ran off with a dancer. Because of financial need, Lucy began making clothes for friends. Her first designs were for tea gowns,<sup>16</sup> and through Elinor's contacts, costumes for the theater. She became *Lucile*, the head of a noted fashion house based in London with branches in Paris, Chicago and New York.

An advocate of fashion's self-expression, *Lucile* encouraged her clients to develop a personal style. Lucy transformed clients into stars or *It* girls. This phrase, which roughly translates into celebrity or star power, was coined by her sister. Lucy's clients: socialites, fashion models and stars of the stage and screen had *It*, an indefinable combination of magnetism, charisma, compelling personal style, confidence, charm and sex appeal.<sup>17</sup> *Lucile* was a pioneer in bringing fashion and grace back to women's dress after the Victorian era. "I brought in the brassière in opposition to the hideous corset of the times . . . and

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14. For a biography of Lucy and her sister, see MEREDITH ETHERINGTON-SMITH & JEREMY PILCHER, *THE "IT" GIRLS* (1986).

15. Wallace, described as a wine merchant, was twenty years Lucy's senior with a "fondness for drink and for pretty women." *Id.* at 25. Esme married Giffard Hardinge Goulburn, 2nd Earl of Halsbury, who died a prisoner of war in France in 1943. They had two children: John, known as Tony, and Flavia. Index to Royal Genealogical Data, <http://www3.dcs.hull.ac.uk/cgi-bin/gedlkup/n=royal?royal54442> (last visited Feb. 25, 2008).

16. A long outer garment, usually sheer and made of chiffon, "[t]he tea-gown originated from the peignoir . . . . [I]t had developed into a filmy garment, still with overtones of the boudoir, but respectable enough to be worn in public without corsets . . . . [I]t was the personification of the informal side of the Edwardian social scene . . . ." ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 40. "The tea gown occupied the place between dress and undress, between a negligee and an evening dress, between a woman's private life and the public sphere of fashionable society." REBECCA JUMPER MATHESON & MOLLY FRANCES SORKIN, *DESIGNING THE IT GIRL: LUCILE AND HER STYLE* 10 (The Museum at FIT, New York, 2005). This publication was the exhibition catalog for the Museum of the Fashion Institute of Technology's 2005 exhibit of Lucile's work.

17. See MATHESON & SORKIN, *supra* note 16, at 3.

draped skirts, which opened to reveal slender legs," she wrote in her autobiography.<sup>18</sup>

The unique *Lucile* style, simultaneously romantic, exotic and modern—incorporated a blending of color, texture and embellishment. Her layered sheer fabrics over a foundation of skin toned silk, broke down the visual barrier between the lady and her clothes. She picked a life style, offering women the correct ensemble for every occasion from sipping tea in one's boudoir to piloting an airplane! *Lucile's* importance in the history of fashion is her bridging the nineteenth and twentieth centuries, high society and the demi-monde, the artistry of the designer and the personality of the client. She set the stage for the modern era in fashion.<sup>19</sup>

Her first major show in 1904 "Gowns of Emotion" made explicit the link between feeling and fashion. She looked back to the idealized past, naming dinner dresses in honor of Nell Gwynne, mistress of Charles the Second, and Marie Antoinette. Lucy was one of the first designers to market fragrances with fashion, selling blended perfumes at her salons. Beginning in January 1916 she wrote a monthly column in *Harper's Bazaar* entitled "The Best Word in Fashion."

Lucy's breaches of her agreement with Wood demonstrate an ability to foresee future fashion industry developments. Her design of the interior of the Chalmers motorcar augured Ralph Lauren and Eddy Bauer seventy years later, though presumably the contemporary designers did not bathe the interiors of their designer SUVs in pink. The Sears venture lasted but one year and was unsuccessful, but Lucy's business plan of a lower-priced ready-to-wear line was ahead of its time. It presaged the business model for couturiers who lose money on their annual runway shows of new designs but use the publicity to aid their fashion collections for the middle classes.<sup>20</sup> Lucy also had foresight in realizing the value of publicity as a catalyst for fashion, and was regularly quoted in the press, often saying whatever

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18. LADY DUFF GORDON, DISCRETIONS AND INDISCRETIONS 66 (1932) [hereinafter DISCRETIONS AND INDISCRETIONS]. She added: "If I never did anything else in my life I showed the world that a woman's leg can be a thing of beauty, instead of a 'limb' . . . ." *Id.*

19. MATTHESON & SORKIN, *supra* note 16, at 6-7.

20. *Id.* at 12.

came into her head.<sup>21</sup> This quotability was to come back to haunt her.<sup>22</sup>

Lucy was the first designer to stage theatrical fashion shows starring models whose persona were her creation. *Lucile* was the first designer to use models on a runway. She recruited ordinary girls, gave each a stage name and transformed them into goddess-like stars, assuming each had that *it* quality. Her models were taught to walk down the runway with a signature slithering *Lucile* walk.<sup>23</sup> Lucy coined the word *chic* to express stylishness and elegance of women's dress.<sup>24</sup> She was the first to understand the opportunities for publicity offered by the confluence of fashion, fame and entertainment.

Lucy eliminated the tight fitting *maillot* that was worn by models to cover their skin, which had the effect of sublimating their personalities to the dress.<sup>25</sup> Lucy gave her models names such as "Hebe," "Gamela" and "Dinarzade."<sup>26</sup> Her most famous model, the six-foot Delores, was discovered by Flo Ziegfeld while modeling in Lucy's New York branch and became a Ziegfeld Follies Star.<sup>27</sup> Delores wore *Lucile's* costumes on stage. Lucy also gave her models invaluable off-runway advice: "If you want marry be as good as gold. If you don't, be expensive."<sup>28</sup>

*Lucile* was one of the first fashion designers to expand internationally and the first to create accessories for her designs, such as shoes, bags, etc. She embraced the cinema and theater very early. *Lucile* dressed actresses and performers in London, Paris and on Broadway, as well as film stars of the silent era such as Mary Pickford and Lillian Gish without losing her high

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21. ETHERINGTON-SMITH & PILCHER, *supra* note 14 at 76-77.

22. When asked in the course of defending a lawsuit by a dancer against her if she had purchased any Liberty bonds sold during World War One, Lucy responded: "Why should I buy any? This country means nothing to me. I have had nothing but trouble over here. It is an awful country." *Lady Duff Gordon in Court*, N.Y. TIMES, Apr. 13, 1919 at 22.

23. MATTHESON & SORKIN, *supra* note 16, at 15.

24. *Lady Duff-Gordon, Style Expert, Dies*, N.Y. TIMES, Apr. 22, 1935, at 17.

25. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 66-67.

26. MATHESON & SORKIN, *supra* note 16, at 15.

27. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 79.

28. *Id.* at 81. Unlike today's waifs, none of Lucy's models weighed less than eleven stone, or 154 pounds. *Id.* No fasting or watercress sandwiches for lunch for these women.



society clientele. She created designs for more than seventy stage productions as well as for over twenty silent films. She designed costumes for the Ziegfield Follies from 1915 to 1919.<sup>29</sup>

Perhaps Lucy's greatest innovation, a benefit to men as much as women, was to create alluring, sexy underwear instead of the heavy cotton garments of the time. "I was so sorry for the poor husbands, who had to see their wives looking so unattractive at night after taking off the romantic dresses I had created."<sup>30</sup> These garments were sold in the "rose room" of her salons, a pink boudoir, which evoked the feminine and sensual.<sup>31</sup>

### *The Titanic*

In 1912 Lucy was in Paris establishing a new branch when business called her to New York. As befitted her station in life, she, her husband Sir Cosmo Duff-Gordon and her secretary, Miss Francatelli, sailed on the most modern and luxurious ocean liner afloat—the *Titanic*! After the ship hit the iceberg, they went up on deck. Lucy said she refused to go into a lifeboat without Cosmo. Though the rule was women and children first, the ship officers ordered them into a lifeboat.<sup>32</sup> The craft had a capacity of forty, but it rowed away from struggling survivors in the water and the sinking ship with but twelve, including five crew members.<sup>33</sup> The survivors were rescued by the liner *Carpathia* and taken to New York.<sup>34</sup> Never one to avoid a headline, Lucy had a ghostwritten story under her byline about the tragedy, which appeared in *The New York Daily News*.<sup>35</sup>

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29. MATTHESON & SORKIN, *supra* note 16, at 17.

30. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 41.

31. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 56-57; MATTHESON & SORKIN, *supra* note 16, at 11.

32. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 152. See *Duff-Gordon Paid Only for Rescue: Fashion, Crowding the Titanic Court Applauds Rebuke of an Attorney's Questions. Wife an Emphatic Witness And Tells an Interesting Story About a Signed New York Interview Which She Never Wrote*, N.Y. TIMES, May 21, 1912, at 4 [hereinafter *Duff-Gordon Paid Only for Rescue*]. The *Titanic* disaster takes up three chapters in her autobiography. See ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 151-60.

33. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 154.

34. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 181.

35. *Duff-Gordon Paid Only for Rescue*, *supra* note 32, at 4.

When the lifeboat's crew returned to London, they showed the press checks of £5 (\$25) given to them by Sir Cosmo, while they were in the boat. It was alleged that the gratuities were to row away from the sinking ship, rather than to return to pluck out people from the water.<sup>36</sup> Lady Lucy maintained that Sir Cosmo had merely given the crew a tip after one of the men commented that the passengers in the lifeboat had the resources to replace their possessions, but the crew had lost everything.<sup>37</sup>

Both Duff-Gordons testified at the Board of Trade's wreck inquiry as it was indelicately called. Lucy's testimony was widely reported and influenced the commissioners.<sup>38</sup> The commissioners' final report exonerated Sir Cosmo from the bribery charge, but alleged behavior unbecoming a gentleman.<sup>39</sup> Though they were exonerated by the inquiry, the Duff-Gordons remained guilty in the minds of the public and their friends. Neither Lucy nor Sir Cosmo ever recovered from the whispers and aspersions of cowardice.<sup>40</sup>

### *Financial Problems*

Lucy's creative vision as a fashion innovator was not accompanied by business acumen. One of the problems was the

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36. See *Says Duff Gordons Prevented Rescues*, N.Y. TIMES, May 10, 1912, at 6.

37. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 158-59. See also WALTER LORD, *A NIGHT TO REMEMBER* 148 (1955) (supporting Lady Lucy's version of events). See also *Boat Not Kept Away*, *Duff Gordon Says*, N.Y. TIMES, May 18, 1912, at 4.

38. The headlines give the flavor of Lucy's testimony and the influence even then of star power: *Duff-Gordon Paid Only for Rescue*, *supra* note 31, at 4; *Woman's Appeal A Triumph. Subtle but Telling Appearance of Lady Duff-Gordon Pictured*, N.Y. TIMES, May 21, 1912, at 4 ("Her voice is tuned to the siren's note, her little face is pale and plaintive and her whole being is braced to the edge of victory over her accusers . . . It was a triumph of millinery.")

39. The very gross charge against Sir Cosmo Duff-Gordon that he bribed the boatmen to row away from drowning people is unfounded. I do not believe the men in the boat were deterred from making an attempt to rescue others by any act of Sir Cosmo Duff-Gordon. At the same time, I think if he had encouraged the men to return to where the Titanic had foundered they probably would have made an effort to do so and could have saved some lives.

*Finds Speeds Cause of Titanic's Loss*, N.Y. TIMES, July 31, 1912, at 9; Board of Trade Report, THE LONDON TIMES, July 31, 1912, at 7G.

40. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 159-60; DISCRETIONS & INDISCRETIONS, *supra* note 18 at 181.

common merchant complaint that the richer or more famous the client, the slower they pay. Her business knowledge was demonstrated in the hearings in 1924 before the Recorder in Bankruptcy when she was asked: "Can you give me some particulars of your shareholdings?" She replied: "It is all Greek to me. I don't know what a share is."<sup>41</sup> Lucy was an artist not a manager and extravagant to a fault.<sup>42</sup> She spent and lost enormous sums of money.<sup>43</sup> In 1907, she estimated that she was making nearly £40,000 per year,<sup>44</sup> the equivalent of \$3.9 million in 2006 dollars.

In the mid-1890s Lucy nearly went bankrupt, and decided to recapitalize the business.<sup>45</sup> There were two investors, an accountant and Sir Cosmo Duff-Gordon, who became her second husband in 1900, and a restraining influence on Lucy's extravagance until they separated in 1915.<sup>46</sup> Cosmo remained a business partner for several years thereafter.

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41. *Lady Duff Gordon, Style Expert, Dies*, *supra* note 24, at 17.

42. Money never represented money to me, it only stood for the things I wanted to buy. It was something turned over quickly and easily, made to be spent as it came in. In the years when I was earning thousands of pounds I was as ignorant of the actual mechanism of my business as a child. I never knew what my capital was, and I have never known my bank balance in those days, except that it was a very considerable one. I never bothered to save anything, and left others to speculate for me, and so eventually I lost most of the money which years of work had brought me.

DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 132-33.

43. Lucy, when residing alone in the United States, would rent a house for the summer and completely redecorate it before she would move in, using *Lucile's* capital. *ETHERINGTON-SMITH & PILCHER*, *supra* note 14, at 196. She also supported several young men—a full time chauffeur and a sailor—who looked after her motorboat on Long Island Sound. *Id.*

44. *ETHERINGTON-SMITH & PILCHER*, *supra* note 14, at 125. *See also* DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 133.

45. *ETHERINGTON-SMITH & PILCHER*, *supra* note 14, at 59-60.

46. *Id.* Sir Cosmo had a startling resemblance to Kaiser Wilhelm II of Germany, but lacked the withered arm of the Kaiser and his imperial majesty had more than the one eye of the baronet. Sir Cosmo was a classically trained singer and a member of the British Olympic fencing team. He was dominated by his mother, a conservative religious woman who, for some reason, did not approve of her son's relationship with a divorced woman who designed risqué underwear for a living. *Id.* *See also* DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 60. Lucy was on vacation in Monte Carlo and was about to become engaged to another, when Sir Cosmo telegraphed that momma had died and if she were to marry anyone it would be him. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 60. Sir Cosmo was a sportsman, who preferred spending time at Maryculter, the family home in Aberdeenshire, Scotland. *ETHERINGTON-SMITH & PILCHER*, *supra* note 14,

One of Lucy's problems was that she did not recognize taxation. In 1911, the managers of her New York branch were accused of falsifying firm invoices to avoid full payment of full duty on the garments imported from the London house and subject to a civil suit for recovery of \$50,000.<sup>47</sup> She paid a fine of \$10,000.<sup>48</sup>

Lucy moved to America and spent the First World War there, while Cosmo oversaw the business in London. He kept her on an allowance of \$200 per week (\$4,161 in 2006 dollars).<sup>49</sup> In return Lucy was contractually bound to design dresses for *Lucile*. Lucy's efforts to evade Cosmo's financial confines led to the contracts with Wood, Sears and the Chalmers Motor Car Co.<sup>50</sup> Lucy engaged Wood as a way to evade her exclusive contract with *Lucile*. By working as "Lady Duff-Gordon" and making endorsements in addition to designs, in addition to her labors as *Lucile*, she could earn more than the \$200 per week.<sup>51</sup> Thus, Lucy did to Sir Cosmo and *Lucile* what she later tried to do to Wood.

She still needed money and in 1917 met a clothing manufacturer, John Lang Schuloff, who offered to purchase the business and buy Cosmo and other investors out.<sup>52</sup> This caused a family feud and led to Cosmo cutting off Lucy's *Lucile* dividends.<sup>53</sup> Lucy sold her American and French branches and the use of the name, *Lucile*. She was to receive a monthly stipend

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at 86. One of his favorite activities there was to make the younger members of a house party don fencing masks, while he shot at them with wax bullets. This was supposed to stiffen their resolve! *Id.* Lucy became attracted to young men, who became her assistants, particularly one "Bobbie," whose real name was Genia d'Agarioff. *Id.* at 172. From 1915, Lucy and Cosmo lived apart, though maintained contact. *Id.* at 172. He died in 1931 at the age of 68.

47. DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 155.

48. *Id.* at 140-41.

49. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 196.

50. *Id.* at 197.

51. *Id.* at 196-97.

52. *Id.* at 197. Of Mr. Schuloff, Lucy was quoted,

Mr Schuloff appeared on the scene and wanted us to amalgamate. I shall never forget our first meeting, as he seized me by the arm and addressed me as 'girlie' in 1918. Mr. Schuloff put forward a scheme which I foolishly accepted. He was to manage the business and I was to receive £6,000 a year as a dress designer, in addition to a profit-sharing arrangement.

*Lady Duff Gordon Loses*, N.Y. TIMES, Oct. 13, 1922, at 9.

53. ETHERINGTON-SMITH & PILCHER, *supra* note 14, at 197.

and a share of the profits.<sup>54</sup> This transaction was a fatal mistake, for Lucy was edged aside, and in 1922, the American branch failed. Lucy did not realize that when America entered the war in 1917, a new era of austerity set in. The other *Lucile* branches suffered as well. The London firm and Lady Lucy became bankrupt in 1923.<sup>55</sup>

### *Lady Lucy as a Feminist*

One cannot easily imagine the social risk that Lucy took when she decided to become a business woman. It just wasn't done by people of her class.<sup>56</sup> She believed that women should go into the world of work if they desired. She said that in all of the unhappy marriages she knew, the wife was bored and that very few modern women were born housewives. For them a career could be their salvation. Lucy was able to juggle marriage, parenting and work, but seventy-five years ago, she recognized the ambivalence of many women who juggle career and family:

I am not advocating for one moment that the woman who feels an urge towards the business world should neglect her home and give her husband and children the second place in her interests, but I do think that there are many women today sitting discontented and repining in small suburban homes, kept there by the conventional idea that they are in their only rightful place, when there would be a far greater chance of happiness for both themselves and their husbands if they were able to take up a career which would give them a wider outlook on life.<sup>57</sup>

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54. *Id.* at 198.

55. *Id.* at 198, 226. See also *Bankrupt Discharge for Lady Duff-Gordon*, N.Y. TIMES, Apr. 19, 1923, at 23.

56. She wrote:

I shall never forget the wall of prejudice which I had to storm. To begin with I was one of the first women, if not actually the very first of my class, to go into the business world, and I lost caste terribly in doing it at the start of my venture. Old family friends came and solemnly warned me and my mother of the utter impossibility of my going into 'trade' . . . the very word was spoken with bated breath, as though it was only one shade better than going in for crime. I was told that nobody would know me if I 'kept a shop,' it would be bad enough for a man but for a woman it would mean social ruin.

DISCRETIONS AND INDISCRETIONS, *supra* note 18, at 59.

57. *Id.* at 328.

Lady Lucy died of cancer in April 1935 at the age of seventy-one.<sup>58</sup>

## II. Perspectives on the Case by Contracts Scholars

Cases that have a lasting presence in the casebooks and continuing influence on scholars and judges often possess a Rashomon quality: offering many different perspectives to the decision. The papers published in this Symposium Issue reflect this aspect of the case.

### *Keynote Address*

In *Neutral Standardizing of Contracts*, Professor Joseph Perillo, one of the nation's most distinguished contracts scholars, examines issues involving the standardization of contracts. Such contracts are filled with terms that unduly favor the drafting party. While neutral standardized forms developed by organizations are currently employed by business lawyers and businesses for transactions between businesses, Professor Perillo notes consumers have not benefited from this process, and they are notably absent from most of the standard form drafting organizations.

Professor Perillo asks what can be done to assure that a standard form applicable to a consumer transaction is fair. There is little government protection, and consumer protection organizations have not intervened in drafting of form contracts, though they have lobbied for legislative protection. He proposes a partial resolution of the consumer's plight based upon a proposal originated by Judge Benjamin Cardozo.

### *Implications Interpretations and Default Terms*

Peter Linzer in "*Implied*," "*Inferred*," and "*Imposed*": *Default Rules and Adhesion Contracts—the Need for Radical Surgery* believes the most important question in interpretation is simply what did the parties intend? Much of the process called "implication" has nothing to do with the parties' intent and little to do with freedom of contract. *Wood v. Lucy* has nothing to do with implication. Rather, the court drew an inference. Aside

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58. *Lady Duff Gordon, Style Expert, Dies*, *supra* note 24, at 17.

from courts mistaking implication for inference, Professor Linzer believes the implication process is further muddled because courts say a contract has an implied term when in fact they are imposing it. Most of these imposed rules of law are default rules that can be dispensed with by the parties if they choose to do so. Unlike inferences, default rules are not part of the interpretation process.

The parties have the choice to accept the default rule or dispense with it. The problem today is the use of contracts of adhesion. For Professor Linzer, adhesion contracts, especially in the age of electronic commerce and click wrap, are the most important—and most dangerous—institution of contemporary contract law, precisely because they undermine “implied terms.” He calls them bullying devices and consent to a bully is no consent at all.

How to deal with the adhesion contract? Professor Linzer would focus on those particularly harsh terms and make them unenforceable per se as opposed to using standards such as reasonableness, unconscionability or indecency. He would ban the procedural trap laid for lay people: mandatory arbitration clauses, choice of forum and choice of law clauses and very short time periods.

In *Wood v. Lucy: the Overlap between Interpretation and Gap-Filling to Achieve Minimum Decencies*, Nicholas Weiskopf notes that despite the precedential respect *Wood* has enjoyed, it is surprising how many New York decisions flatly refuse to treat good faith as any sort of independent duty or to engraft implied terms onto an actual agreement. Under this restrictive approach, good faith precepts shape the performance of actual undertakings, but no more. Professor Weiskopf believes concluding that such implication is improper whenever it would create “new” duties, rather than regulate performance is incorrect, for different types of “gap fillers” serve very different functions.

#### *Wood v. Lucy, Lady Duff-Gordon as a Teaching Vehicle*

In *Exploring (Social) Class in the Classroom: The Case of Lucy, Lady Duff-Gordon* Professor Miriam Cherry examines how the facts of the case could be used to illuminate the issue of social class in contracts cases and the classroom. Social class is

present within the text of the opinion, the background material that accompanies it and the subject matter of the contract itself. Her goal in examining social class and the contracts is twofold: 1) to open more inquiry into the distributional nature of contract law and 2) for students to think about issues of economic stratification more critically. Professor Cherry notes that Judge Cardozo reflects the values of his age by emphasizing the greed and frivolity of Lady Lucy whose "favor helps a sale." The case resonates today. The marketing of social class through the sale of status goods is fundamental to modern fashion advertising.

Celia Taylor's essay *Teaching Ethics in Context: Wood v. Lucy, Lady Duff-Gordon in the First Year Curriculum* concerns a matter of great interest to legal educators: should professional ethics be taught in the first year? Professor Taylor argues in the positive and focuses on how ethical discussions should be conducted. She explains why *Wood v. Lucy* is a good vehicle for teaching professional ethics, and she examines such overarching ethical issues as the underpinnings of judicial action, authorial style and then discusses specific ethical issues raised in the case. Professor Taylor raises a number of questions relating to the ethics of the parties to the case, the attorneys, the judge and the rule of law established. Her paper convincingly demonstrates that *Wood v. Lucy* is an excellent vehicle to engage first-year students in the important role that ethics plays in all decision-making.

In her paper *Integrating Academic Skills into First Year Curricula: Using Wood v. Lucy, Lady Duff-Gordon to Teach the Role of Facts in Legal Reasoning*, Professor Deborah Zalesne discusses the disconnect between doctrinal instruction and learning analytic academic skills. The focus on the law and doctrine by students in case reading often results in overlooking information about how the law works. Professor Zalesne argues that cases such as *Wood v. Lucy* are ideal vehicles for explicit teaching of analytic skills. Her article focuses on the fact sensitive doctrines of good faith and best efforts and makes concrete suggestions for using the case as a vehicle to teach the role of fact identification and fact analysis in legal reasoning.

Professor Zalesne demonstrates how Cardozo convinces readers that the extensive and detailed terms of the contract



suggest the parties intended to conclude an agreement, and the transaction only made sense if Lady Lucy was to get something in return for her grant of an exclusive agency to Wood. She offers several exercises to assist students in fact analysis, which demonstrates how the facts can be used to set the stage for the overall legal theory developed later in the argument.

### *The Case in Context*

Professor Andrew Tettenborn in *What It's Worth to Do Your Best* notes that it is one thing to establish a duty to use best efforts in determining a breach, but quite a different and more difficult task to quantify damages for breach of such an obligation. There are several difficulties in the quantification of damages as a matter of proof in contrast to the principle of best efforts. These include the indeterminacy of the obligation and its proof, and possible alternative measures of damages. Professor Tettenborn examines how a best efforts plaintiff goes about satisfying a jury of her would-be gains. He concludes that although a best efforts clause in a contract may provide initial solace to plaintiffs, its potential for large damages awards is limited.

Professor Larry A. DiMatteo's article, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, focuses on Cardozo's contextual mode of interpretation and asserts that the best part of the decision in *Wood* and other Cardozo contract decisions was his expert use of contextual evidence. Professor DiMatteo challenges the notion of the originality of the opinion and demonstrates that by the late nineteenth and early twentieth centuries the implied duty of good faith had already arrived in contract law. He concludes that the true innovation in the case was the offering of a contextual means of interpretation.

In *A Picture of the New York Court of Appeals at the Time of Wood v. Lucy, Lady Duff-Gordon*, Professor Meredith Miller places the opinion in the context of the court's history and explores how structural and jurisdictional changes to the court might have had an impact on how the case was decided. She also raises a conundrum, given the court's immense backlog of cases; it is uncertain why *Wood* was decided in under six months, when the average case took approximately two years from the date of filing to reach oral argument.

According to Megan Richardson and David Tan, Lady Lucy occupied the fringes of the modernist movement defined by a group of radical artists who rebelled against conventional ideas about art as reflecting middle class values and ideas. She self-consciously created her identity, portraying herself through her designs, writings and endorsements and, like other celebrity fashion designers, became a “personality.”

Richardson and Tan characterize the Sears contract as the exploitation of a personality right and trace the evolution of the rule of *Wood* in England. Their essay, *Wood v. Duff-Gordon and the Modernist Cult of Personality* examines the evolution of the role of personality and reputation, and the law’s willingness to accommodate it through legal developments that prohibited the passing off of someone’s personality, *i.e.*, a design by *Lucile*, through selling of fakes or knockoffs.

In *Cardozo’s Opinion in Lady Lucy’s Case: “Formative Unconscionability,” Impracticability and Judicial Abuse*, Professor Monroe Freedman believes Cardozo’s opinion in *Wood* should be more criticized than celebrated. He suggests that Cardozo used the concept of unconscionability not to invalidate a contract or clause, but to create a contract that would not otherwise have existed. Professor Freedman coins the term “formative unconscionability.” Cardozo justified holding against Lady Lucy on the ground that a finding that Wood’s promises were illusory, therefore, finding no contract between them would have unfairly put Lady Lucy at Wood’s mercy and would have made her the victim of unfair surprise. Anomalously, Wood won his contractual action by successfully arguing the unconscionable nature of his own promise. According to Professor Freedman, Cardozo’s decision unwisely created serious practical difficulties for a lawyer representing a client in Lady Lucy’s position. He uses the example of what if Wood failed to produce any endorsements, would a lawyer recommend suing him?

### *Implication and Best Efforts in the Employment Context*

Robert Bird traces the influence of *Wood* on employment law and points out that the “instinct with obligation phase” was first used eight years previously in a New York Appellate Division case dealing with an employment contract. Professor Bird examines three challenges to the orderly development of the

good faith doctrine in employment law: the meaning of good faith, the lack of mutuality in the good faith context in that it is uncertain to what extent employees have any good faith obligations and the limited understanding of the costs of adopting good faith duties in the employment context. He discusses some empirical studies of the costs of the covenants of good faith and fair dealing.

In *Fulfilling Lucy's Legacy: Recognizing Implicit Good Faith Obligations Within Explicit Job Duties* Professor Emily Gold Waldman observes that the same New York Court of Appeals that found an implied good faith and fair dealing in *Wood* has been unwilling to recognize analogous covenants in the context of employment at will. She criticizes the court's conclusion that the implied covenant of good faith and fair dealing must yield to the presumption of employment at will. Professor Waldman argues that an at-will employee should be able to recover for breach of an implied covenant of good faith and fair dealing, if she can demonstrate termination simply for performing the very job duties that were required of her and that it does not unduly encroach upon the presumption of employment at will. Professor Waldman compares the evidentiary frameworks that courts have embraced for proving causation in employment discrimination claims.

The scholars contributing to this Symposium demonstrate the multi-layered complexity, mystery and ambiguity of Cardozo's decision. These factors have made *Wood v. Lucy, Lady Duff-Gordon* timeless.