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# A LICENSE TO DECEIVE: ENFORCING CONTRACTUAL MYTHS DESPITE CONSUMER PSYCHOLOGICAL REALITIES

DEBRA POGRUND STARK AND JESSICA M. CHOPLIN\*

“The policy of the courts is, on the one hand, to suppress fraud and, on the other hand, not to encourage negligence and inattention to one’s own interests. *The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful?*”).<sup>1</sup>

## INTRODUCTION

Companies are well aware that when a consumer purchases a good or service from them, often the consumer has in fact relied on the information provided by the company’s salespersons.<sup>2</sup> Sometimes these statements are in addi-

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\* Debra Pogrund Stark is a professor of law at The John Marshall Law School. She thanks the many students who assisted her in researching the laws among the fifty states and provided her with other research assistance: Dan Concannon, Brian Flores, Caitlin Groh, Greta Hendricks, Scot Levine, Dan Moons, Yuri Ter Sarkisov, Gianna Scatchell, Philip Schroeder, and Alexander Tsinman. She also thanks Dean John Corkery and Associate Dean Ralph Ruebner for their support and Professor Karen Halverson Cross and Professor Julie Spanbauer for their suggestions and insights on aspects of contract law. Jessica M. Choplin, Ph.D., is an assistant professor of psychology at DePaul University. Her primary research area is judgment and decision making. Her work on this article was funded in part by a grant from the National Science Foundation (SES-0621664). She would like to thank Mina Miljkovic, Joseph Figueroa, Emily Kocanda, Emilie Trent, Betsy McCabe, and—most of all—Amber Bloomfield for help running participants and Susan McMahon, Shay-Ann Heiser Singh, and Susan Loess-Perez of the DePaul University Institutional Review Board for help with human subjects protection.

1. Or. Pub. Employees Ret. Bd. v. Simat, Helliesen & Eichner, 83 P.3d 350, 360 (Or. Ct. App. 2004).

2. Indeed, courts have taken judicial notice that companies train their employees on providing information on the products and services that they are selling, knowing that the consumers principally rely on this information, especially if the product or service is complicated. See *Cirillo v. Slomin’s Inc.*, 768 N.Y.S.2d 759, 768 (N.Y. Sup. Ct. 2003) (“The merchant presumably trains and presents its salespersons to consumers for purposes of providing them with information about the company’s product or service. Such

tion to or even inconsistent with what is in the contract.<sup>3</sup> Notwithstanding this reality, it is common that the legal documents for the transaction provide an acknowledgement from the consumer that the company and its sales people have made no representations to the consumers other than what is contained in the contract (a “no representation/disclaimer” clause).<sup>4</sup> The legal documents also may state that the consumer is not relying on any such representations (a “no reli-

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merchants cannot be permitted to escape all responsibility for the information provided simply by including a disclaimer of authority in a form contract. It cannot cloak its agents with authority on the one hand, and then deny it on the other.”); *see also*, *In re First Alliance Mortgage Co.*, 471 F.3d 977, 985 (9th Cir. 2006) (“... loan officers would employ a standardized sales presentation to persuade borrowers to take out loans with high interest rates and hidden high origination fees or “points” and other “junk” fees of which the borrowers were largely unaware ... The track manual did not instruct loan officers to offer a specific lie to borrowers, but the elaborate and detailed sales presentation prescribed by the manual was unquestionably designed to obfuscate points, fees, interest rate, and the true principal amount of the loan ... Loan officers were taught to deflect attention away from things that consumers might normally look at, and the loan sales presentation was conducted in such a way as to lead a consumer to disregard the high annual percentage rate (“APR”) when it was ultimately disclosed on the federally-required Truth in Lending Statement.”).

3. *DirectTV Techs: Policy Makes Lying Part of Job*, WKMG Orlando, May 1, 2006, <http://www.local6.com/problemsolvers/9142100/detail.html> (employees of DirectTV are forced to lie because of a company policy that reduces their paycheck if they sell a receiver that does not connect to the customer’s phone line.); Chris Arnold, *Former Ameriquest Workers Tell of Deception*, NPR, May 14, 2007, <http://www.npr.org/templates/story/story.php?storyId=10165859>; for a short summary of the NPR broadcast, *see* Meghann Marco, *Ameriquest Employees Confess: Lying To Customers, Forging Papers*, THE CONSUMERIST, May 15, 2007, <http://consumerist.com/consumer/subprime/percent20ameriquest-employees-confess-lying-to-customers-forging-papers-260569.php>.

4. *Slack v. James*, 614 S.E.2d 636, 637 (S.C. 2005), *aff’d* 589 S.E.2d 772 (S.C. Ct. App. 2003) (The Sellers real estate contract read:

ENTIRE AGREEMENT: This written instrument expresses the entire agreement, and all promises, covenants and warranties between the Buyer and Seller. It can only be changed by a subsequent written instrument (Addendum) signed by both parties. Both Buyer and Seller acknowledge that they have not received or relied upon any statements or representations by either Broker or their agents which are not expressly stipulated herein.) (emphasis added)

Standard Real Estate Sales Agreement 2008, <http://www.jaresources.com/contractexample.pdf> (last updated 2008):

ance" clause) and will not bring any actions based on any such representations (an "exculpation" clause).<sup>5</sup> Companies add these clauses to their form contracts to prevent consumers from later claiming that they were induced to purchase the product or service based on statements made by the company's salespeople that are inconsistent with or in addition to the terms of the contracts that the consumers signed at the time of the purchase.<sup>6</sup> Legitimate companies use these clauses in their contracts to promote certainty in their contractual obligations and to avoid claims from consumers based on the consumer's faulty memory or fabrication.<sup>7</sup> But unscrupulous companies (or companies with unscrupulous salespeople) can use such clauses, if strictly enforced,<sup>8</sup> as a bar to consumers

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(b) There are no agreements, promises, or understandings between the parties except as specifically set forth in this contract. No alterations or changes shall be made to this contract unless the same is in writing and signed or initialed by the parties hereto and made part in the main body of this contract.

*Sample Auto Sales Agreement*, <http://www.medlawplus.com/legalforms/instruct/sample-autosale2.pdf> (2004):

H. Integration. This Agreement, including the attachments mentioned in the body as incorporated by reference, sets forth the entire agreement between the Parties with regard to the subject matter hereof. All prior agreements, representations and warranties, express or implied, oral or written, with respect to the subject matter hereof, are hereby superseded by this agreement. This is an integrated agreement.

5. Joseph Wylie, *Using No-Reliance Clauses to Prevent Fraud-in-the-Inducement Claims*, 92 ILL. B.J. 536, available at <http://www.isba.org/IBJ/oct04lj/P536.htm> (discussing the legal developments and effect a no reliance clause has on fraudulent inducement claims).

6. See, e.g., *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644-45 (7th Cir. 2002) ("[P]arties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a 'no-reliance' clause into their contract . . . Since reliance is an element of fraud, the clause, if upheld . . . precludes a fraud suit.")

7. See, e.g., *Bauer v. Giannis*, 834 N.E.2d 952, 960 (Ill. App. Ct. 2005) ("there are sound policy reasons for precluding fraud claims based on oral statements outside the written agreement where the agreement includes a non reliance clause . . . [P]lacing primacy on the written word . . . reduces the possibility of faulty memories and fabrication.").

8. The parol evidence is potentially barred in a fraud action based upon the argument that the plaintiff has not "reasonably" or "justifiably" relied upon the false statement when the contract contains these types of clauses or the argument that there is not "legal" causation of harm when the plaintiff

bringing an otherwise valid claim of fraud.<sup>9</sup> Indeed, when the court in *Ginsburg v. Bartlett, as Trustee for Frederick H. Bartlett Realty Company*,<sup>10</sup> first encountered a “no reliance” type clause back in 1931, the court stated:

It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct . . . Public policy and morality are both ignored if such an agreement can be given effect in a court of justice . . . Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing.<sup>11</sup>

Companies that supply goods and services to consumers argue that these clauses should be strictly enforced because the consumer is presumed to have read the contract<sup>12</sup> (including the “no representation/disclaimer,” “no reliance,” and “exculpation” clauses), and if a consumer fails to read the contract that she signed and to object to those clauses, such action is unreasonable and imprudent and must be discouraged by the courts.<sup>13</sup> Consequently, consumers should not be allowed to bring an action for fraud based on any alleged false statement or promise when the consumer signs a form contract containing these types of clauses.<sup>14</sup>

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failed to exercise proper diligence such as reading the contract. See discussion of this law *infra* Part I.

9. See, e.g., *Snyder v. Lovercheck*, 992 P.2d 1079, 1086 (Wyo. 1999) (“A perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it.”); see also *Cirillo*, 768 N.Y.S.2d at 768 (“To reflexively disallow parol evidence on the basis of such disclaimer, is to reward the ingenuity of draftsmen at the expense of sound public policy, and to invite sales agents, armed with impenetrable contracts to lie to their customers. Here the danger of fraudulent claims is outweighed by the danger of unrestrained fraud against the consumer.”).

10. *Ginsburg v. Bartlett*, 262 Ill. App. 14, 11 (Ill. App. Ct. 1931).

11. *Id.*

12. *Belleville Nat'l Bank v. Rose*, 456 N.E.2d 281 (Ill. App. Ct. 1983).

13. See, e.g., *Torres v. State Farm Fire & Cas. Co.*, 438 So. 2d 757, 758-59 (Ala. 1983) (“Because it is the policy of courts not only to discourage fraud but also to discourage negligence and inattention to one’s own interests, the right of reliance comes with a concomitant duty on the party of the plaintiffs to exercise some measure of precaution to safeguard their interests.”).

14. *Id.*

These companies' position enjoys some support under the common law action for fraud. In three-quarters of the states, a common law action for fraud requires that the person who believes he or she has been defrauded either "reasonably" relied or "justifiably" relied on the false statement.<sup>15</sup> This requirement has been interpreted by some courts to bar an action for fraud based on a representation or a promise made by a salesperson if it is inconsistent with the terms of the contract or if the contract contains a "disclaimer" or "no reliance" clause.<sup>16</sup> Some courts have interpreted it to be unreasonable or unjustifiable for a consumer to rely on a parol false statement of fact when the contract, which the consumer could read or did read, contains a no reliance type clause or contains contradictory terms.<sup>17</sup> In addition, some courts have ruled that the parol evidence of the fraud cannot be introduced in a common law action for fraud on the ground that the "causation" element (the requirement that the defendant's false statement caused the plaintiff's harm) should be based on a policy determination by the court of the legal consequences of the alleged false statement rather than simply a "but for" factual type analysis of causation.<sup>18</sup>

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15. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

16. See *infra* Part I.

17. See, e.g., *Tirapelli v. Advanced Equities, Inc.*, 813 N.E.2d 1138, 1144 (Ill. App. Ct. 2004) (Case involved oral representations not made apart of the parties' written agreement; the appellate court held that the non-reliance clause made plaintiff's reliance on oral representations unreasonable as a matter of law. The court stated, "having agreed in writing that they did not rely on any representations found outside the subscription documents, plaintiffs cannot be allowed to argue fraud based on such representations."); *but see*, *Cirillo*, 768 N.Y.S.2d at 768 ("Can the consumer really be said to 'represent' a state of facts (i.e., that no oral representations were made to him), by virtue of his acquiescent signature?").

18. Some courts interpret "causation" to mean more than a simple "but for" causation in fact, and instead incorporate policy in determining the legal consequences of the defendant's statement. See, e.g., *Hartley v. State*, 698 P.2d 77, 83 (Wash. 1985) the court asked ("whether liability should attach as a matter of law given the existence of cause in fact" in addressing how far the consequences of defendant's acts should extend. Court indicated that to prove legal causation the plaintiff must convince the court that "mixed considerations of logic, common sense, justice, policy, and precedent," demands that the defendant be found liable for the consequences of his or her actions.); *Colbert v. Moomba Sports, Inc.*, 176 P.3d 497, 501 (Wash. 2008) (citing *Hartley v. State*, P.2d 77 (Wash. 1985) court on the proposition that legal liability involves a policy determination); *Nuttall v. Dowell*, 639 P.2d 832, 840

Although state consumer fraud statutes have been enacted to make it easier for consumers to bring a private fraud action than a common law action for fraud,<sup>19</sup> and such statutes

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(Wash. Ct. App. 1982) (holding that a party does not establish a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it); *Zekman v. Direct Am. Marketers*, 675 N.E.2d 994 (Ill. App. Ct. 1997) (concept of reliance is “ambiguously present within the parameters of the concept of proximate cause”); *Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 809, 812-13 (Minn. 2004) (car dealer claimed that the existence of a written contract that contradicts the alleged oral misrepresentation means that the car purchaser could not prove a “causal nexus” between the alleged misrepresentations and his injuries *as a matter of law* (based on the argument that there was no justifiable reliance on the alleged misrepresentation when it was contradicted in a contract the car purchaser signed; court rejected this argument and ruled that “a private consumer fraud class action does not necessarily require the justifiable reliance standard of common law fraud. “We conclude that the existence of a written contract that contradicts Walser’s alleged oral misrepresentations does not, as a matter of law, negate any possibility of Weigand and potentially others proving a causal nexus between oral representations and consumer injuries.” However, it appears that the court would have found a lack of causal nexus as a matter of law if justifiable reliance applied to an action under the consumer fraud statute.)

19. *State v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790, (Minn. 1993) (“We believe this elimination of elements indicates that the legislature intended that the burden of proof in a consumer fraud case would be the preponderance of the evidence standard. We will not impute to the legislature the strange goal of making it easier to sue for consumer fraud by eliminating elements required at common law, while at the same time insisting on a higher standard of proof than that generally used in civil cases. For these reasons, we believe the legislature intended the preponderance of the evidence standard.”); see also Debra P. Stark & Jessica M. Choplin, “*Does Fraud Pay: An Empirical Analysis Of Attorney’s Fees Provisions In Consumer Fraud Statutes*” 56 *Cleveland State L. Rev.* 483 (2008) [http://works.bepress.com/debra\\_stark/1/](http://works.bepress.com/debra_stark/1/); see, e.g., *Gruetzke v. Rodgers*, 2001 Wash. App. LEXIS 1879, \*5 (Wash. Ct. App. Aug. 10, 2001) (if statement would tend to deceive a substantial portion of the public [i.e., a “reasonable” consumer], then the plaintiff does not need to show that the defendant intended to deceive the plaintiffs); *Robertson v. Boyd*, 363 S.E.2d 672, 676-78 (N.C. Ct. App. 1988) (although failure to perform an inspection for termite damage would bar a cause of action under common law fraud due to duty to make diligent inquiries when there is notice of a problem, the claim was not barred under the North Carolina consumer fraud statute because contributory negligence is not a defense under the statute); *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 607-08 (N.Y. 1999) (common law fraud action must be proven by clear and convincing evidence while a statutory action requires less so and that the partial disclosure in this case prevents a common law fraud but can still be the basis for a cause of action under the deceptive

rarely explicitly require the showing of any reliance,<sup>20</sup> courts in six of the states (Georgia, Indiana, Maryland, Michigan, Ohio, and Pennsylvania) have interpreted their consumer fraud statutes' causation element to require not only actual reliance, but also "reasonable" or "justifiable" reliance.<sup>21</sup> While this approach to interpreting the consumer fraud statutes is currently followed by only a small minority of the states, the Civil Justice Task Force of the American Legislative Exchange Council, whose website identifies itself as the nation's largest "non-partisan" membership organization of state legislators (but is in fact largely made up of Republican legislators), has unanimously adopted a model consumer protection act for states to follow that would require that the consumer prove that her reliance was "reasonable" in order to recover for fraud.<sup>22</sup>

But what if it is fairly common for consumers not to read all of the terms of the form contracts that they are required to sign in a typical consumer transaction? If unscrupulous companies take advantage of the fact that some consumers do not read all of the terms of the contracts they sign due to cognitive and social psychological impediments, is it still sound policy to bar fraud actions in this circumstance? Even if in some cases the consumer was simply failing to act in a prudent fashion, does the policy of promoting certainty of contract and "discouraging negligence and inattention to one's own interests"<sup>23</sup> trump the policy of discouraging and remedying fraud?<sup>24</sup> Fi-

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business practices act); *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 12-13 (Tenn. Ct. App. 1992) (plaintiff need not show defendant knowingly made a false statement of fact; the Tennessee unfair and deceptive practices act makes negligent misrepresentations actionable).

20. See Reliance and Consumer Protection Acts Table, pp. 713-21.

21. *Id.* In addition, the Wyoming statute requires "reliance" and courts in Wyoming have expansively interpreted this as requiring "reasonable" reliance.

22. Victor Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 70 (2005) (hereafter "Common Sense").

23. Torres, 438 So. 2d at 758-59 ("Because it is the policy of courts not only to discourage fraud but also to discourage negligence and inattention to one's own interests, the right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests.").

24. See, e.g., *Winston Realty Co. v. G.H.G., Inc.*, 320 S.E.2d 286, 290 (N.C. Ct. App. 1984) ("the Legislature did not intend for violations of this Chapter



nally, when the consumer asserts that the salesperson made a false representation, is it so much more likely that the consumer is lying rather than the salesperson? Should a court bar the consumer from being able to bring in evidence of the alleged false statement, even when the contract contains a “no reliance” type clause,<sup>25</sup>

In this Article, we argue that the enforcement of “no reliance” and “exculpation” type clauses as an absolute bar to a fraud claim is only sensible in the context of a contract between two sophisticated parties in a commercial transaction in which the parties are represented by attorneys who have negotiated the terms of the contract.<sup>26</sup> In that context, enforcement of these clauses to bar a claim of fraud could be consistent with the policy of promoting certainty of contract and preventing false allegations of fraud by placing primacy on the last written word of a document that has been scrutinized and negotiated.<sup>27</sup> As the New York Court of Appeals held in the

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[a consumer protection statute] to go unpunished upon a showing of contributory negligence. If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter.”); *see also* Or. Pub. Employees. Ret. Bd. v. Simat, Helliesen & Eichner, 83 P.3d 350, 360 (Or. Ct. App. 2004) (“*The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked.* It has also been frequently declared that as between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him or was guilty of negligence in doing so.”).

25. *See* Cirillo, 768 N.Y.S.2d at 768 (the court rhetorically asked “Is the consumer’s claim, innately any less reliable than the purported disclaimer of reliance?,” and then pointed out that the consumer must sign the contract to get the product or service, and ordinarily, there is no opportunity to negotiate any particular provision).

26. *See, e.g.,* McCartin v. Westlake, 36 Mass. App. Ct. 221, 630 N.E.2d 283 (Mass. App. Ct. 1994).

27. Bauer, 834 N.E.2d at 960 (“[T]here are sound policy reasons for precluding fraud claims based on oral statements outside the written agreement where the agreement includes a non reliance clause . . . [P]lacing primacy on the written word . . . reduces the possibility of faulty memories and fabrication.”) (quoting Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138 (Ill. App. Ct. 2004)). Indeed, one of the roles of an attorney representing a party in a business transaction is to ask her client what promises or representations were made to her to induce the transaction that are not contained in the contract that they are negotiating to make sure that such representations

*Danann* case, in the context of a contract containing a specific no reliance type clause, which expressly stated that there were no representations made regarding operating expenses for the building, “[t]o hold otherwise [i.e., to not enforce this specific type of “no reliance” clause] would be to say it is impossible for two businessmen dealing at arms’ length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.”<sup>28</sup>

However, we contend that the enforcement of such clauses to bar bringing fraud claims in other contexts—in particular, consumer transactions in which the consumer does not negotiate the terms of the contract and is not represented by an attorney—is instead likely to grant a license to deceive to unscrupulous companies.<sup>29</sup> We hypothesize that in this other context, consumers are far less likely to read and understand all of the contract’s terms, including those designed to prevent bringing fraud claims, and that instead, consumers principally rely on what they are told by salespeople. We tested this hypothesis in a laboratory-based fraud simulation study and in a survey of consumers.

Part I of this Article analyzes the conflicting positions courts have taken, and the competing policy considerations they have considered, when ruling whether failure to read a contract should bar a party from being able to raise parol evi-

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or promises are then added to the agreement; *see also* Tirapelli, 813 N.E.3d at 1144 (defendants allegedly made false statements prior to signing of the stock purchase agreement, the court held that the contract’s non-reliance clause in the purchase agreement precluded the plaintiff cause of action for fraud); Debra Pogrud Stark, *Navigating Residential Attorney Approvals: Finding A Better Judicial North Star*, 39 J. MARSHALL L. REV. 171, 178-85 (2006); Paul Brest, *Debate: The Future of Problem-Solving in Legal Education. Skeptical Thoughts. Integrating Problem Solving Into Legal Curriculum Faces Uphill Climb*, 6 NO. 4 DISP. RESOL. MAG. 20 (2000); Stephen Nathanson, *Developing Legal Problem-Solving Skills*, 44 J. LEGAL EDUC. 215 (1994).

28. *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 600 (N.Y. 1959).

29. *See, e.g., Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 10 (Tenn. Ct. App. 1992) (purchaser of truck told by sales person that the truck had never been wrecked but contract stated purchaser taking the truck “as is” and contained a no representation and no reliance type clause that the purchaser said he did not see it; court ruled that the defendant had negligently misrepresented the condition of the truck and indicated that to not permit an action under the state’s unfair or deceptive consumer practices act based upon the “as is” disclaimer clause would create a “license” to engage in unfair or deceptive consumer practices.).

dence in a fraud action (common law or statutory) when the contract contains contradictory terms or a no reliance type clause.<sup>30</sup> We also consider the situation where a consumer has read some, or all, of the contract, including the contradictory terms or non-reliance clause, and still proceeds to sign the contract, and whether parol evidence would be admitted in this circumstance.<sup>31</sup> The article also summarizes the general position adopted in each state regarding the kind of reliance required for a common law cause of action for fraud and under the consumer fraud statutes enacted in each state in a "Reliance Table" appended to the article to identify the states most likely to be in need of reform.

Part II explores possible cognitive and social psychological reasons why consumers sometimes fail to read all, or even any, of the terms of the consumer transaction documents they sign, or fail to understand the terms of their agreement, even when they have read the documents before they sign them. These cognitive explanations include: (i) visual and comprehension challenges based on the manner in which many form contracts are drafted; (ii) analytic deficiencies based upon

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30. See discussion *infra* Part I regarding the requirement of "reasonable" or even "justifiable" reliance in a common law fraud action serving as a bar to bringing a typical fraud claim and the concept of "legal" causation and policy considerations that have also occasionally served as a bar to bringing a fraud action.

31. See, e.g., Ginsburg, 262 Ill. App. 14 at \*5 (buyer of land read the purchase contract and noted that it contained a statement that no representations were made to the buyer that a rail road line would run to the land, even though the seller's sales agent had repeatedly assured the buyer that a rail road line to the land would be soon built. When she asked why this contrary statement was in the contract, the seller's sales agent told her it was an "old form so don't worry about it." After the sales agent then showed her a map depicting where the railroad line would be, she signed the contract without making any changes to it.); see also *Lucas v. OxiGene, Inc.*, 1995 WL 520752, \*2 (S.D.N.Y. 1995) (Employee hired to help a company go public had to renegotiate contract after taking a leave of absence due to substance abuse read the contract which stated that his contract was renewable at the board of directors' discretion [the renewal was necessary for the employee to exercise his stock options]. The employee was concerned about this clause but was told "don't worry that doesn't mean anything." The contract also contained a merger clause and an acknowledgement that neither party made any representations to the other, other than those in the contract. The employee signed the agreement and continued to work on taking the company public. After the company went public, the board elected not to renew his contract and the employee sued for fraud).

schema deficits; (iii) positive confirmation biases; (iv) inability to imagine possible negative outcomes (i.e., the “availability heuristic”); and (v) sunk cost effects. The social psychological explanations discussed include: (i) misplaced trust in the defrauders based on a variety of factors that create a strong motivation to trust, which might be exacerbated when the consumer is of a lower socio-economic status; (ii) social norms not to read contracts in certain contexts; and (iii) a perceived (and often real) inability to negotiate the terms of the contracts. Part II also addresses why a consumer, who has read the contract and discovered an important discrepancy between what the written contract states and what the consumer was told by the salesperson, still proceeds to sign the contract in spite of this discrepancy. While exploring some of these cognitive and social psychological challenges, the article will also note how certain published decisions appear to illustrate them.

Part III presents a laboratory-based study simulating contexts in which people become victims of fraud. To preview our results, we found that very few of our participants (students at the De Paul University) read the contract/consent form that they were asked to sign and that the vast majority (95.6%) signed it, even though it contained terms that were outrageous or which conflicted in important ways from what they were promised by the person seeking their consent. Participants also completed a follow-up survey querying them on their reasons for not reading the consent they signed. The results of the follow up survey are also presented in Part III.

Part IV explores the extent to which the results of the fraud simulation study generalize to real-life consumer contexts by presenting a survey of consumers sampled from the general public as well as first-year law students at the John Marshall Law School during their first week of classes. This survey queried participants on whether they read contracts in a variety of consumer transaction contexts (agreements relating to computer software, “rolling contracts,”<sup>32</sup> car rentals, apartment leases, home purchases and home loans) and their expectations regarding the relationship between verbal represen-

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32. A “rolling contract” is one where the purchaser does not agree to the terms of the sale until after the purchase since the terms of the sale are included in the packaging that they can read only after the purchase.

tations and contractual clauses. Although the percentage who read all of the terms of these agreements varied greatly based upon the context, we again found that a sizeable number of consumers fail to read the contracts that they sign.<sup>33</sup> We also found that participants overwhelmingly expected that a company would stand behind the verbal representations of their salespeople, even if these representations contradicted the written contract.

Finally, based on the data we collected and the cognitive and social psychological challenges that consumers face, particularly consumers of a lower socio-economic status, Part V proposes an approach for courts and legislators to take regarding the "reliance" and "causation" elements of a common law or statutory fraud action, as well as the admissibility of parol evidence in a fraud claim when contracts contain "no reliance" or "exculpation" clauses or when the terms of the contract are inconsistent with the prior verbal representations.<sup>34</sup>

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33. In certain consumer contexts, data we collected reflects that consumers report that they rarely read all of the terms of the contracts that they sign. For example, based on data we collected, only approximately 5 percent of the public we surveyed reported reading the terms of the software agreements they signed on the internet; only 9 percent reported reading all of the terms of the "rolling contracts" they signed; and only 29 percent reported that they read all of the terms of the car rental agreements that they signed, and instead rely on what they have been told about the product or service by the company's salespeople or promotional literature they received prior to the purchase. Even in consumer contexts where the product or service is very important to the consumer (such as the purchase of a home, a loan secured by a home, or a lease of an apartment), our data reflects that a sizable percentage of the consumers (between approximately one-quarter for a mortgage loan and almost one-half for the purchase of a home or the lease of an apartment) reported that they do not read all of the terms of the documents that they sign to enter into these transactions. *See infra* Part IV for a complete reporting of the data collected from the reading contracts questionnaire to the general public and to certain law students.

34. This Article focuses on the use of parol evidence in an action for common law or statutory fraud based upon affirmative, false statements of fact or promises not intended at the time they are made to be kept, in contrast to fraudulent omissions. In a subsequent article the authors will tackle the more difficult issue of fraudulent omissions and whether certain terms of the contract (ones to which, if called to the attention of the consumer, the consumer would likely object, such as waiving certain rights they would have enjoyed had the contract been silent) need to be expressly disclosed and expressly agreed to in order to be enforceable in light of the cognitive and social psychological challenges with which consumers grapple.

## I.

FRAUD CLAIMS BASED UPON PAROL EVIDENCE: LEGAL ISSUES  
AND POLICY CONSIDERATIONS

In a typical consumer fraud scenario, the salesperson makes a false statement of fact to the consumer, regarding the service or product being sold, or makes a promise relating to it, which the salesperson has no intention of keeping, to induce the consumer to purchase the product or service. The consumer would need to provide evidence, sometimes by clear and convincing evidence<sup>35</sup> (often by a preponderance of the evidence standard<sup>36</sup>), of this false statement or promise as one of the key elements for a common law cause of action for fraud<sup>37</sup> or a cause of action in a typical consumer fraud protection type statute.<sup>38</sup> To reduce the chances that such a claim can be successfully raised, companies include in their contracts a “no representation” clause, a “no reliance” clause,” and/or an “exculpation” clause (collectively “disclaimer clauses”).<sup>39</sup> In addition, sometimes the contracts contain specific terms that contradict the statements made by the salespe-

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35. *Hunt Petroleum Corp. v. State*, 901 So. 2d 1 (Ala. 2004); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 28 (Ariz. 2002); *Weinstein v. Weinstein*, 882 A.2d 53 (2005); *Russ v. Brown*, 529 P.2d 765 (Idaho 1974); *Sass v. Andrew*, 832 A.2d 247, 259 (Md. 2003).

36. *Malakul v. Altech Ark., Inc.*, 766 S.W.2d 433, 435-36 (Ark. 1989); *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, (Cal. 1996); *Lamarque v. Barbara Enters.*, 958 So. 2d 708, 711 (La. App. 2007); *Martha's Hands, LLC v. Starrs*, 208 S.W.3d 309, 315-16 (Mo. Ct. App. 2006); *Four R Cattle Co. v. Mullins*, 570 N.W.2d 813, 815 (Neb. 1997).

37. *See Harold Cohn & Co., Inc. v. Harco Int'l, LLC*, 804 A.2d 218, 223-24 (Conn. App. Ct. 2002); *Ramey v. Koons*, 230 F.2d 802, 805 (5th Cir. 1956); *C.B. Mills v. Hawranik*, 1994 U.S. Dist. LEXIS 3839, \*10 (N.D. Ill. Mar. 29, 1994) (the typical elements for common law fraud are (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury.).

38. Each of the fifty states has enacted a consumer fraud protection type statute that typically only requires the showing by a preponderance of the evidence of a false or deceptive statement and causation of harm (although “causation” has been interpreted by the courts in several jurisdictions as incorporating the “reliance” element). *See infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

39. *See, e.g., Vigoritone*, 316 F.3d.

ople, which the consumer has either failed to read or have been “explained away” to them by the salesperson.<sup>40</sup> Courts then must determine whether the parol evidence (i.e., the statements made prior to the consumer signing the contract and purchasing the product or service, which normally cannot be raised in an action to enforce or interpret a written contract) can still be raised in the fraud action. While, in general, a claim of “fraud” is an exception to the well known “parol evidence rule,”<sup>41</sup> courts have sometimes concluded that the presence of these clauses or contradictory terms in the contract cause even a fraud action to fail. This section of the article will detail the differing approaches courts have taken in their legal analysis of these clauses and the conflicting policies and presumptions of consumer behavior that arise in this context.

Before embarking on this legal and policy analysis, it would be helpful to first provide specific examples of the types of consumer claims that are being raised based on a review of reported decisions. Of the numerous consumer fraud cases reviewed, which contained “disclaimer clauses,” the most common involved car purchases and financings, insurance purchases, mortgage loans, and home purchases.

In the car purchase/finance context, one truck purchaser in Tennessee was falsely told that the truck had never been in an accident, but it had been, thereby reducing the value of the truck by 30-50 percent; the seller defended by asserting the “no representations” clause and “as is” clause in the contract.<sup>42</sup> In a car finance case in Minnesota, the salesperson falsely told the consumer that he needed to pay for a servicing agreement to obtain financing, even though the contract clearly stated the contrary.<sup>43</sup> In another Minnesota case, a car purchaser

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40. *See, e.g.*, Ginsburg, 262 Ill. App. Ct.

41. *Pinnacle Peak Developers v. TRW Inv. Corp.*, 631 P.2d 540, 544 (Ariz. Ct. App. 1980); *Pancakes of Haw., Inc. v. Pomare Props. Corp.*, 944 P.2d 97, 107 (Haw. Ct. App. 1997); *1726 Cherry St. P'ship v. Bell Atlantic Prop.*, 653 A.2d 663 (Pa. Super Ct. 1995); *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co.*, 234 S.W.3d 711, 719 n.11 (Tex. App. 2007); *Restatement (Second) of Contracts* § 214(d) (1981).

42. *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. Ct. App. 1992).

43. *Weigand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807 (Minn. 2004) (class action case where many car purchasers similarly purchased a servicing

asked about the accuracy of the mileage of the car based on the odometer and was told that the odometer reflected the correct mileage on the car; however, the contract stated that the mileage was unknown and not a factor in the purchaser's decision to purchase.<sup>44</sup> A similar "odometer" type fraud case occurred in Georgia where the salesperson falsely stated that the odometer was correct and falsely promised to take care of any problems that arise with the car; but the contract contained a statement that the odometer could be wrong, the buyer was taking the car "as is," and that no agreement between the salesmen and customer would be binding.<sup>45</sup> In an Illinois case, the salesperson made a misrepresentation regarding the extent of the warranty on the car, falsely stated that the car was a demo and not pre-owned, and that the salesperson would get the lowest interest rate possible for the buyer's finance of the car purchase; however, the contract contained contradictory terms.<sup>46</sup> In a slight twist to the basic scenario, a car purchaser in Illinois told the car dealer that she could only afford to pay \$350 per month; the dealer said he would find her financing at that amount per month but that she needed to sign the documents immediately so she could drive the car off the lot without getting into trouble with the law; when the purchaser was reluctant, she was falsely assured that the agreement was not binding.<sup>47</sup>

Although this Article does not focus on this scenario, it is worth noting that sometimes the contract itself does not contain contradictory terms or a disclaimer type clause, but it is asserted that the consumer should have exercised diligence in some other fashion (besides reading the contract) to ascertain the truth of the representation, and failure to exercise such diligence is a bar to a successful common law fraud action. In

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agreement believing that it was required when there was no requirement for such.)

44. *Twardy v. L. B. Sales, Inc.*, 2000 Minn. App. LEXIS 636 (Minn. Ct. App. June 27, 2000).

45. *Attaway v. Tom's Auto Sales, Inc.*, 242 S.E.2d 740 (Ga. Ct. App. 1978).

46. *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355 (Ill. App. Ct. 1992).

47. *Bates v. William Chevrolet/Geo, Inc.*, 785 N.E.2d 53 (Ill. App. Ct. 2003).



*Miller v. William Chevrolet/Geo Inc.*,<sup>48</sup> the court stated in dicta that the car purchaser, who was falsely led to believe the car was only test driven, would not have a cause of action under common law fraud due to failure to exercise diligence in ascertaining the accuracy of the representation. The court noted that the certificate of title showed the prior owner was a rental car place and implied that the consumer should have checked into that. However, the court ruled that the car purchaser could potentially have a cause of action under the Illinois consumer fraud protection statute, since the statute did not provide for this duty of diligence as a precondition to a fraud action.

The cases in the other common contexts (purchasing insurance, obtaining a mortgage loan, or purchasing a house) have similar fact patterns of false or misleading statements of fact, which are contradicted in the contract either specifically or more generally through a disclaimer clause. For example, in one case, a homeowner was told that she would be getting “full coverage” for her home, but her written policy only covered damage due to fire and wind.<sup>49</sup> Many of the insurance fraud cases involve a “vanishing premium” policy about which the salesperson tells the consumer that after a certain number of years, the policyholder will no longer need to make premium payments, but where the insurance documents contain a partial disclosure that indicates that this “vanishing premium” feature will only take place if the yields on investments of the prior premiums are sufficient.<sup>50</sup> In the home purchase context, buyers are sometimes induced to sign the purchase contract when the broker or seller makes a false representation to the buyer regarding aspects of the property or the deal. For example, in one reported case, the seller told the buyer that a parcel of land was suitable for a seasonal home, even though the seller had previously been turned down by the zoning board for this use; the seller attempted to defend the fraud suit based upon the fact that the contract contained a “no representations” clause regarding land use laws or regulations.<sup>51</sup>

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48. *Miller v. William Chevrolet/Geo, Inc.*, 762 N.E.2d 1 (Ill. App. Ct. 2001).

49. *Alfa Mut. Fire Ins. Co. v. Thomas*, 738 So. 2d 815, 818 (Ala. 1999).

50. *See, e.g., Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 601-02 (N.Y. 1999).

51. *Van Der Stok v. Van Voorhees*, 866 A.2d 972 (N.H. 2005)

In a typical mortgage fraud case, the borrower is verbally promised one set of loan terms (for example they could be promised a 30 year loan at a 5 percent interest rate) but receives legal documentation that reflect different loan terms (the initial rate starts at 5 percent but then can adjust upwards by several percentage points after a certain period of time). For example, in one of the reported mortgage fraud cases, the borrower was told that the loan would be at a fixed rate for a five-year term, but the actual note was a “demand” note (a note due upon the lender’s demand at any time) which the lender called prior to the five-year promised term, insisting on refinancing at a higher interest rate.<sup>52</sup>

With so many home loans currently in default,<sup>53</sup> an increasing form of fraud is what has been called “mortgage rescue fraud.” In one form of mortgage rescue fraud, a person facing foreclosure is targeted by a “white knight” (person acting as if helping the borrower) and led to believe that the borrower will be getting a loan from the white knight to pay off the existing mortgage loan in foreclosure. However, the legal documents instead reflect an actual sale transaction.<sup>54</sup> For example, in one reported decision, the borrower was led to believe the transaction was for a new loan to pay off the prior loan in default and was told by the “white knight” that the deed the borrower was required to sign, which conveyed absolute title, would not be recorded unless the borrower de-

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52. *Belleville Nat’l Bank v. Rose*, 119 Ill. App. 3d 56, 456 N.E.2d 281 (Ill. App. Ct. 5th Dist. 1983).

53. In California, the number of loans in default and foreclosures are the highest they have been since one company began taking records twenty years ago. James Temple, *Most Foreclosures in at Least 20 Years*, SAN FRANCISCO CHRONICLE, July 23, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/23/MNE511T63B.DTL>. The number of households facing the foreclosure process more than doubled in the second quarter of 2008 compared to 2007. J.W. Elphinstone, *U.S. Foreclosure Filings More Than Double in 2Q*, ASSOCIATED PRESS, July 25, 2008, available at <http://ap.google.com/article/ALeqM5iX9fLT0pmlsstkmiryfTbwDovc0QD9251UGG3>

54. Les Christie, *Foreclosure Fallout: Rescue Scams*, CNNMONEY.COM, Sept. 7, 2007, [http://money.cnn.com/2007/08/22/real\\_estate/foreclosure\\_rescue\\_scams/index.htm](http://money.cnn.com/2007/08/22/real_estate/foreclosure_rescue_scams/index.htm); Donna Leinwald, *Foreclosure Rescue Scams Multiply*, USA Today, Aug. 4, 2008, available at [http://www.usatoday.com/news/nation/2008-08-04-foreclosure-scams\\_N.htm](http://www.usatoday.com/news/nation/2008-08-04-foreclosure-scams_N.htm) (articles reporting on different foreclosure rescue scams, including fraudulent transfer of title).

faulted in making payments to the “white knight.”<sup>55</sup> In a variation on this scenario, the “white knight” gives the homeowner the impression that the “white knight” is paying off the loan in foreclosure as part of a new loan, but the legal documents provide instead for a sale of the property to the “white knight,” with a lease-back to the homeowner and right to repurchase at a price reflecting a return of the payment made by the “white knight,” including a return on that payment.<sup>56</sup> However, unlike a loan documented as a loan, if there is a default in the monthly payment (now characterized in the legal documents as “rent”), the prior homeowner (who is now characterized in the legal documents as only a “tenant”) can theoretically be quickly evicted and arguably loses the rights of redemption that would otherwise exist under the mortgage foreclosure laws. For example, the typical eviction of a tenant in Illinois can take place in a matter of weeks under the Illinois Forcible Entry and Detainer Act<sup>57</sup> but must take at least seven months

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55. *Cooper v. GGGR Invs., LLC*, 334 B.R. 179, 183-84 (E.D. Va. 2005); *see also, Johnson v. Home Savers Consulting Corp.*, 2007 W.L. 925518 (E.D. N.Y. Mar. 23, 2007) (signed documents referred to home owner as “owner/seller” when home owner expressed concerns the home owner was reassured it was a refinancing, not a sale) and *Nowosleska v. Steele*, 946 A.2d 1097, 1099 (N.J. Super. Ct. App. Div. 2008) (homeowner facing foreclosure believed to receive a new loan but was actually an absolute sale).

56. *See, e.g., Jones v. REES-MAX, LLC*, 514 F. Supp. 2d 1139, 1146 (D. Minn. 2007)

57. Civil Procedure, 735 Ill. Comp. Stat. Ann. 5/9-207 (West, Westlaw through P.A. 96-3 of the 2009 Reg. Sess.) stating:

Notice to terminate tenancy for less than a year. In all cases of tenancy from week to week, where the tenant holds over without special agreement, the landlord may terminate the tenancy by 7 days' notice, in writing, and may maintain an action for forcible entry and detainer or ejectment. In all cases of tenancy for any term less than one year, other than tenancy from week to week, where the tenant holds over without special agreement, the landlord may terminate the tenancy by 30 days' notice, in writing, and may maintain an action for forcible entry and detainer or ejectment.

Civil Procedure, 735 Ill. Comp. Stat. Ann. 5/9-209 (West, Westlaw through P.A. 96-3 of the 2009 Reg. Sess.) stating:

Action for possession. A landlord or his or her agent may, any time after rent is due, demand payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than 5 days after service thereof, the lease will be terminated. If the tenant does not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease

for a judicial foreclosure under the Illinois Mortgage Foreclosure Act.<sup>58</sup>

If the transaction is construed as an equitable mortgage (even though on paper structured as an outright sale), the homeowner will also potentially benefit from rights of rescission under federal laws like the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA").<sup>59</sup>

When confronting a case where the contract contains specific terms that contradict the alleged fraudulent statement or a disclaimer type clause, some courts admit the parol statements,<sup>60</sup> but some courts instead bar plaintiffs from bringing in the parol evidence of the fraud, which has led to granting summary judgments to defendants under the fraud claims.<sup>61</sup>

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ended, and sue for the possession under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand. A claim for rent may be joined in the complaint, and a judgment obtained for the amount of rent found due, in any action or proceeding brought, in an action of forcible entry and detainer for the possession of the leased premises, under this Section.

58. Civil Procedure, 735 Ill. Comp. Stat. Ann. 5/15-1603(b)(1) (West, Westlaw through P.A. 96-3 of the 2009 Reg. Sess.) ("(1) In the foreclosure of a mortgage of real estate which is residential real estate at the time the foreclosure is commenced, the redemption period shall end on the later of (i) the date 7 months from the date the mortgagor or, if more than one, all the mortgagors (A) have been served with summons or by publication or (B) have otherwise submitted to the jurisdiction of the court, or (ii) the date 3 months from the date of entry of a judgment of foreclosure.").

59. Consumer Credit Protection, 15 USCA § 1601 (West, Westlaw through P.L. 111-7 of 2009); Consumer Credit Protection, 15 USCA § 1602 (West, Westlaw through P.L. 111-7 of 2009).

60. *See, e.g.,* Smith v. Scott Lewis Chevrolet, Inc., 843 S.W.2d 9 (Tenn. Ct. App. 1992); Wiegand, 683 N.W.2d; Attaway, 242 S.E.2d at 742 (court would bar claim under common law fraud but would allow claim under consumer fraud statute).

61. Bank of Am. Nat'l Trust & Sav. Assn. v. Lamb Fin. Co., 3 Cal. Rptr. 877, 880 (Cal. Dist. Ct. App. 1960) (The Court said, "if, to induce one to enter into an agreement, a party makes an independent promise without intention of performing it, this separate false promise constitutes fraud which may be proven to nullify the main agreement; but if the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible."); *see also* Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425 (Pa. 2004) (held that a prior sale brochure by the defendant stating the location the ticket at the defendant's stadium would

When reviewing this split of authority and approach, particular attention will be paid to the courts' articulated reasoning and policy concerns, which explain the different outcomes in these cases and which sometimes reflect different conceptions of how ordinary consumers or merchants do behave or should behave.

Courts that have barred the alleged fraudulent statements from being raised have articulated several different grounds for doing so. The most frequent reason articulated is that one of the elements of common law fraud is "reasonable" reliance, and if the contract contains disclaimer clauses or more specific contradictory terms, then it is not "reasonable" for the party alleging fraud to have relied upon the alleged parol false statements since they should have read the contract terms and thereby discovered the falsity of the prior statement. For example, the Supreme Court of Alabama, in *Foremost Insurance Company v. Parham*,<sup>62</sup> stated that

a return to the 'reasonable reliance' standard will once again provide a mechanism . . . whereby the trial court can enter a judgment as a matter of law in a fraud case where the undisputed evidence indicates that the party or parties claiming fraud in a particular transaction were fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms.<sup>63</sup>

The court stated that even if the insurance company employee had misrepresented that there would be no premium charge for the first year of coverage as alleged, the insured would not have a viable cause of action for common law fraud

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be, even if it was incorrect, is not grounds for the plaintiff's cause of action for fraud, because the season ticket sale agreement's integration clause made reliance on any term in the brochure unreasonable); *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355 (Ill. App. Ct. 1992) (fraudulent statements made by car salesman are grounds for action by a buyer); *Tucker v. Boulevard at Piper Glen LLC*, 564 S.E.2d 248 (N.C. Ct. App. 2002) (prior incorrect over-valued claims by a seller/residential home builder to the buyer of the expected future home value is not grounds for a consumer fraud claim); *Central Mass. TV v. Amplicon, Inc.*, 930 F. Supp. 16, 24 n.3 (D. Mass. 1996); *Galmish v. Cicchini*, 734 N.E.2d 782, 790 (Ohio 2000).

62. *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).

63. *Id.* at 421

under the "reasonable" reliance requirement because of the duty to exercise "some measure of precaution to safeguard their interests," and "[i]f the purchaser blindly trusts, where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived."<sup>64</sup>

Georgia courts have also ruled that failure to read the contract will nullify a common law fraud action due to the duty to investigate if the plaintiff claiming fraud has not been prevented from reading the contract.<sup>65</sup> There is a duty to read and understand the contract and to verify the contract terms and representations, which bars persons from relying on what they are told without independently verifying.<sup>66</sup> The Supreme Court of Georgia further extended the "reasonable" reliance requirement grounded in a common law fraud action to a statutory claim of fraud even though the statute only expressly required that the plaintiff "relied upon" the false statement.<sup>67</sup> The court noted that a claimant will not be entitled to recover from a false statement if the claimant "had an equal and ample opportunity to ascertain the truth but failed to exercise proper diligence to do so."<sup>68</sup> Although the Georgia Supreme Court raised two exceptions to the duty to exercise diligence (i.e., to read the contract) in an action for fraud, based on representations as to what is in the contract, the two exceptions are very narrow. The plaintiff must show there was a "confidential relationship" between the parties or that the party alleged to have made a false statement used "artifice or fraud" which "prevents the party signing from reading the instrument."<sup>69</sup> Apparently, making a false statement to a consumer to induce the consumer to sign the contract alone is inadequate in Georgia and certain other states,<sup>70</sup> and some additional or different form of

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64. *Id.* at 433, (quoting *Torres v. State Farm Fire & Casualty Co.*, 438 So. 2d 757, 758-59 (Ala. 1983)).

65. *Credithrift of Am., Inc. v. Whitley*, 380 S.E.2d 489 (Ga. Ct. App. 1989).

66. *Castellana v. Conyers Toyota, Inc.*, 407 S.E.2d 64, 64-68 (Ga. Ct. App. 1991).

67. *Tiismann v. Linda Martin Homes Corp.*, 637 S.E.2d 14 (Ga. 2006).

68. *Id.* at 16-17, quoting *Zeeman v. Black*, 273 S.E.2d 910, 916 (Ga. Ct. App. 1980).

69. *Id.* at 18.

70. *Cole v. Cates*, 149 S.E.2d 165 (Ga. Ct. App. 1966) (Plaintiff was 84 years old, suffering from numerous illnesses, and could only read while wearing his glasses and using a magnifying glass. The trusted mortgage broker

fraud is required that "prevents" the party from reading the contract.

What sort of "artifice" or "fraud" did the Georgia court, and other jurisdictions which have adopted this rule, have in mind that could be characterized as "preventing" a party from reading the contract she signed? There is little case law discussion of what this "artifice" would be that prevents a person from reading the contract. In Georgia, the "artifice" exception to the general rule is narrow indeed. In one Georgia case, a home owner was 85 years old, blind in one eye, with limited vision in his other eye, could read only with the aid of a magnifying glass, and had health problems, which allegedly greatly reduced his mental ability.<sup>71</sup> When the elderly homeowner sought his glasses, the broker (whom the homeowner had known for many years) reassured him this was not necessary since the document he was asking him to sign was only a listing agreement to sell the house, not a contract to sell.<sup>72</sup> The court ruled that there was no artifice that would justify the homeowner's reliance on the broker's false statement, and therefore, no action for fraud.<sup>73</sup> On the other hand, the Alabama Supreme Court, with two justices dissenting, ruled that when a car salesman literally covered up the papers with a file folder so the purchaser could not see what she was signing (the salesman told the purchaser that the papers related to the car she traded in but were in fact an agreement to mandatory arbitration of any claims), the court would not reverse the trial

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the plaintiff knew came to his house and represented to him that he was signed a listing agreement that would allow him to take bids on the house. The plaintiff signed without his glasses or magnifying glass with him after being assured it was not a contract for sale. The document signed by the plaintiff was for the sale of his home but his claim for fraudulent inducement failed because he was able to rely on the brokers oral assurances.); *see, e.g.,* *Liberty Nat'l Life Ins. Co. v. Ingram*, 887 So. 2d 222 (Ala. 2004) (Plaintiff with equivalent of 7th grade education could not recover for fraudulent inducement despite defendant's misrepresentations of insurance policy's provisions because he was able and given opportunity to read the contract.); *Reddick v. Union Elec. Light & Power Co.*, 243 S.W. 382 (Mo. Ct. App. 1922); *White Sewing Mach. Co. v. McCarty Furniture Co.*, 160 P. 495 (Okla. 1916); *Draeger v. Kent County Sav. Ass'n.*, 219 N.W. 637 (Mich. 1928) (In Michigan, relying on false representations may be considered negligence on the part of those who rely, barring fraud claims in such cases.).

71. *Cates*, 149 S.E.2d at 166-67.

72. *Id.* at 167.

73. *Id.* at 168.

court's finding of reasonable reliance on the misrepresentation.<sup>74</sup> The majority stated that a consumer cannot prevail on a fraud claim if she made a conscious decision not to read the arbitration agreement but nonetheless signed it without verifying the nature of its contents. However, the court did not find this to have occurred in the instant case.<sup>75</sup> The dissenting justices did not think that the consumer had reasonably relied on the alleged misrepresentation,<sup>76</sup> pointing to the fact that she was a college graduate who made a conscious decision not to read the document presented to her and had a different interpretation of the significance of the folder covering the agreement: "The fact that she says the arbitration agreement was covered by a file folder so that she could not see what she was signing makes it even more unreasonable to think that Ivey [the plaintiff] relied on Radney William's [the defendant's salesperson] representations."<sup>77</sup> The Iowa Supreme Court ruled that while "As a general rule one should never sign an instrument without reading it . . . if by trick or fraud, another [contract] is substituted in its place . . ." the consumer can claim that the contract contains something different from what he supposed it did.<sup>78</sup>

Although an Illinois court ruled that it is "unreasonable" to rely on an oral representation if the written contract contradicts it and that such unreasonable reliance would bar an action for fraud under the common law,<sup>79</sup> there is also some case law in Illinois that seems to permit a party alleging intentional misrepresentation to introduce the parol evidence, even when the party failed to exercise diligence to ascertain the truth. For

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74. *W.D. Williams, Inc. v. Ivey*, 777 So. 2d 94, 99 (Ala. 2000).

75. *Id.* at 98.

76. *Id.* at 99.

77. *Id.* (Hooper, C.J., dissenting).

78. *Christensen v. Harris*, 180 N.W. 325, 329 (Iowa 1920).

79. *Duran*, 594 N.E. 2d at 1362. The circuit court held that plaintiff's reliance on the dealer's alleged oral misrepresentations concerning the Jetta and the extended warranty was unreasonable in light of plaintiff's signature on certain documents that expressly contradicted the alleged misrepresentations. The court of appeals reversed but only because it ruled that the circuit court was in error on the timing of the reliance. According to the court of appeals, the plaintiff relied when she signed a sales form that bound her to purchase and which did not contain contradictory terms, not when she later signed the sales contract, which did contain the contradictory terms.



example, in *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*,<sup>80</sup> the Illinois Court of Appeals ruled that failure by the plaintiff to verify the truth of a statement (relating to the net income from a business) is not a bar to a fraud action where the defendant was told that the books relating to the business were not available for the plaintiff's review. The court based its ruling on the fact that this statement lulled the plaintiff and blocked the plaintiff's ability to do an investigation of the alleged parol false statement regarding the net income from the business.<sup>81</sup> Although the court did not speak of "artifice" preventing the plaintiff from discovering the truth, this case seems to provide an example. In addition, the court ruled that even if the plaintiff had been negligent in not investigating and verifying the parol statement, when the cause of action is for an intentional tort (such as intentional fraud), this tort action cannot be defeated by an assertion of negligence by the plaintiff whether the action is at law or in equity.<sup>82</sup>

In addition, Illinois courts have interpreted the Illinois consumer fraud statute to not require "reasonable" reliance or diligence in ascertaining the accuracy of misstatements.<sup>83</sup> Consequently, a claim based on a false representation which is contradicted by the written contract is still potentially actionable under the Illinois consumer fraud statute.<sup>84</sup> According to our review of the 50 states, courts in most states have similarly in-

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80. *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 390 N.E.2d 393 (Ill. App. Ct. 1979).

81. *Id.* at 405.

82. *Id.* at 405-06; *see also*, *AMPAT/Midwest, Inc. v. Ill. Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1990) (court ruled that there was no defense of contributory negligence to an intentional tort, including fraud, so the fact that purchaser of screws failed to inspect the screws was no defense to claim that supplier of screws deliberately lied about the condition of the screws); *New York v. Corwen*, 565 N.Y.S.2d 457, 457 (N.Y. App. Div. 1990), abrogated by *New York v. Keene Corp.*, 756 N.Y.S.2d 536 (2003) (court noted that "[c]ontributory negligence clearly has not been regarded as a defense to intentional torts . . . and that appears to remain the rule" today); *but see* *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 Civ. 5298(LMM), 1999 WL 710778 2 (S.D.N.Y. Sept. 8, 1999) (court stated "[t]here is no logical reason why, where an intentional tort on the part of a defendant is shown to be only a partial cause of a plaintiff's loss, the plaintiff should nevertheless also recover a further part of its loss shown to have been caused by its own negligence.")

83. *Salisbury v. Chapman Realty*, 465 N.E.2d 127, (Ill. App. Ct. 1984).

84. *Id.*

interpreted their consumer fraud protection statutes to only require actual reliance rather than “reasonable” reliance.<sup>85</sup> The North Carolina Court of Appeals similarly ruled in *Winston Realty Company, Inc. v. G.H.G., Inc.*<sup>86</sup> that its state Legislature did not intend for violations of the state’s consumer fraud protection statute to go unpunished on a showing of negligence by the plaintiff.<sup>87</sup> “If unfair trade practitioners could escape liability upon showing that their victims were careless, gullible, or otherwise inattentive to their own interests, the Act would soon be a dead letter.”

Instead of requiring that the reliance be “reasonable” for a successful common law fraud action, some courts require that the reliance be “justifiable.” Sometimes this leads to parol evidence being admitted that would not be admitted under a “reasonable” reliance standard.<sup>88</sup> In its most lax format, a court might rule that under the “justifiable” reliance standard the plaintiff can rely on the fraudulent misrepresentation without investigating the truth or falsity of the representation—that it is only if the plaintiff knows the representation is false or its falsity is obvious to him that there is no justifiable reliance.<sup>89</sup> In general, under the “justifiable” reliance standard, courts are supposed to focus on the specific plaintiff’s background and understanding to determine if the plaintiff was “justified” in relying on the misrepresentation, in contrast to holding the plaintiff to an abstract “reasonably prudent person” standard.<sup>90</sup> Under the “justifiable” reliance standard articulated by the Supreme Court of Alabama in the *Hickox*

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85. *Id.* (only seven states’ consumer fraud statutes have been interpreted to require “reasonable” or “justifiable” reliance: Georgia, Indiana, Maryland, Michigan, Ohio, Pennsylvania, and Wyoming; the rest of the states’ statutes have been interpreted to require no reliance or merely actual reliance.).

86. *Winston Realty Co. v. G.H.G., Inc.*, 320 S.E.2d 286, 290 (N.C. Ct. App. 1984).

87. *Id.* at 290.

88. *See* Alfa Mut. Fire Ins. Co., 738 So. 2d 815, 819-20 (Ala. 1999) (failure of the insured to read the policy does not preclude a finding of justifiable reliance on the agent’s fraudulent representation as a matter of law.).

89. *St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of N.Y.*, 818 A.2d 995, 1003 (Me. 2002).

90. *Hickox v. Stover*, 551 So. 2d 259, 263 (Ala. 1989), overruled by *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997).

case,<sup>91</sup> plaintiffs must have “closed their eyes to a patent and obvious lie” to be barred from bringing in evidence of the alleged fraudulent statement. This is contrasted with the “reasonable” reliance standard that the dissent wished to apply under which the court focuses on whether a “reasonably prudent person” would have been put on notice of the need to inquire further and whether the plaintiff had exercised “ordinary care” to discover the true facts.<sup>92</sup> In terms of failing to read a contract, which would have informed the plaintiff of the true facts, the dissent clearly states that this situation would not satisfy the “reasonable” reliance standard. “This Court has held that reliance on an earlier misrepresentation is unreasonable as a matter of law where the contract received by the plaintiff would have informed him of the alleged misrepresentation.”<sup>93</sup>

Although the “justifiable” reliance standard on its face seems to be easier to satisfy than the “reasonable” reliance standard, sometimes courts apply the justifiable standard in such a way that it more resembles the “reasonable” standard.<sup>94</sup> For example, the Supreme Court of Pennsylvania ruled in *Yocca v. The Pittsburgh Steelers Sports, Inc.*<sup>95</sup> that the plaintiffs in that case could not be said to have justifiably relied on any representations made by the defendants before the parties entered into the agreement because the agreement contained an integration clause stating that the terms of the agreement superseded all of the parties’ prior representations and agreements and contained a disclaimer of reliance on any such representations.<sup>96</sup> The court noted that as a matter of “logic” a plaintiff cannot be said to have relied on representations specifically excluded by the integration clause.<sup>97</sup> Some other state courts have similarly applied the justifiable reliance standard

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91. *See id.* (although the court in *Hickox* ruled to replace the “reasonable” reliance standard with the “justifiable” reliance standard, several years later, in [Foremost, 693 So. 2d 409, 421 (Ala. 1997)] the court decided to return to the “reasonable” reliance standard.).

92. *Id.* at 267-68 (Kennedy, J., dissenting in part, concurring in part).

93. *Id.* at 268 (citations omitted).

94. *See Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425 (Pa. 2004); *Weber v. DeKalb Corp.*, 637 N.E.2d 694 (Ill. App. Ct. 1994).

95. 854 A.2d 425, 439 (Pa. 2004).

96. *Id.*

97. *Id.* (citing *Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 654 (W.D. Pa. 1999)).

in a fashion similar to the reasonable reliance standard by barring parol evidence of fraud when the contract contains specific contradictory terms or a disclaimer type clause. The Illinois Court of Appeals ruled that “justifiable” reliance for fraudulent inducement under the common law requires that the plaintiff check facts that the plaintiff can learn with the exercise of ordinary prudence.<sup>98</sup>

The New York Court of Appeals in *Danann Realty Corp. v. Harris*<sup>99</sup> adopted a middle ground approach to applying the justifiable reliance standard to disclaimer type clauses. The court first noted that a general merger clause (i.e., one that says the contract is the entire agreement between the parties and that there are no representations that govern other than what is in the contract) is not effective to bar parol evidence of fraud from being introduced.<sup>100</sup> The court then ruled that if the contract contains a specific no reliance type clause (such as a term in the contract that there are no representations relating to operating expenses and the buyer is not relying on any such representations), this is a different situation, and such a specific disclaimer destroys allegations that someone signed the agreement in reliance on contrary oral representations.<sup>101</sup> However, the court then added that the buyer in the case did not allege that its officers had failed to read or to understand the contract and consequently ruled, “where a person has read and understood the disclaimer of representation clause, he is bound by it.”<sup>102</sup> Thus, it appears that if the buyer in this case had been an unsophisticated consumer who did not read or understand the disclaimer clause, then the court *might* not have barred the parol evidence. The issue is far from clear because the court emphasized that the issue of “justifiable” reliance needs to be examined on a case-by-case basis,

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98. Weber, 637 N.E.2d at 698.

99. 157 N.E.2d at 597 (N.Y. 1959).

100. *Id.*

101. *Id.* at 599. But note that in later cases applying New York law, the court clarified that the specificity requirement is relaxed if the agreement is between sophisticated business people, and the result of negotiations between them, and if the facts are not peculiarly within the knowledge of the party invoking the disclaimer. *See, e.g., Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 576, app. A (2d Cir. 2005).

102. *Danann Realty Corp.*, 157 N.E.2d at 599.

since each case has its own special facts.<sup>103</sup> The court also noted that under the justifiable reliance standard a plaintiff has a duty to “exercise ordinary intelligence” to ascertain the truth of the representation when it relates to a matter not peculiarly within the knowledge of the other party. So, potentially, failure to read and understand the contract might or might not lead to a court allowing in the alleged parol evidence of fraud. As clarified in later New York decisions, certainly if the reason for failure to read the contract and disclaimer clause is because it was surreptitiously inserted, then there could still be justifiable reliance on the alleged parol false statement.<sup>104</sup>

While some courts apply the justifiable reliance standard in a fashion that resembles the tougher “reasonable” reliance standard, some courts apply the reasonable reliance standard in a more nuanced fashion that you would expect from the “justifiable” reliance standard. Many courts, in determining whether there is “reasonable” reliance, will focus on all of the circumstances of the case, including not only the presence of the disclaimer type clause or other contradictory terms but other factors such as the mental capacity, educational background, and sophistication of the party alleging the fraud, whether that party had an opportunity to read the agreement, whether the party was tricked into signing something she did not intend to sign, and the bargaining power of the party.<sup>105</sup> Thus, for example, when the party alleging the fraud was a real estate broker whom the court characterized as a sophisticated party, the court found the broker’s reliance was not reasonable,<sup>106</sup> but when the party alleging the fraud was a first time home buyer, the court ruled that the home buyer’s reliance under all of the circumstances was reasonable.<sup>107</sup>

In addition to barring claims based on a lack of reasonable or justifiable reliance, some courts have interpreted the presence of disclaimer type clauses or other terms in a contract, which contradict the alleged parol false statement as de-

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103. *Id.* at 600.

104. *See, e.g.,* Aetna Cas. & Sur. Co., 404 F.3d at 577 app. A; Generale Bank, N.Y., Branch v. Wassel, 779 F. Supp. 310, 318 (S.D.N.Y. 1991).

105. *See* Belleville Nat’l Bank v. Rose, 456 N.E.2d 281, 285 (Ill. App. Ct. 1983); Gilmore v. M & B Realty Co., 895 So. 2d 200, 210 (Ala. 2004).

106. Belleville Nat’l Bank, 456 N.E.2d at 285.

107. Gilmore, 895 So.2d at 200

stroying the “causation” element of common law fraud. For example, in the *Tiisman* case, the Georgia Supreme Court ruled that when a person alleging fraud regarding the terms of the contract fails to read the contract, the “cause” of the injury is not the false statement made by the defendant but “the consumer’s lack of proper diligence.”<sup>108</sup> Some other courts have similarly refused to focus on whether the plaintiff, in fact, relied on what she was falsely told as the basis to satisfy the causation requirement (i.e., but for the false statement made by the defendant to the plaintiff, the plaintiff would not have signed the contract and purchased the good or service),<sup>109</sup> but instead, whether “as a matter of law” she should be recognized by a court as having been caused to rely for purposes of imposing liability on the defendant for the defendant’s conduct.<sup>110</sup> For example, the Supreme Court of Washington distinguished between causation as a matter of law and causation in fact, and explained that policy and other considerations determine “how far the consequences of the defendant’s acts should extend . . . . To prove legal causation, the plaintiff must convince the court that logic, common sense, justice, policy, or precedent demands that the defendant be found liable for the consequences of his or her actions.”<sup>111</sup> In another Washington Court of Appeals decision, *Nuttall v. Dowell*,<sup>112</sup> the court ruled that the causation element for fraud was not met because although the broker had misrepresented the location of the western boundary of the property, because the buyer took the broker’s suggestion to check further and contacted a prior owner (who did not provide contrary information), the court

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108. *Tiisman*, 281 Ga. 137 at 141, 637 S.E.2d at 18.

109. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS, 750, (5th ed. 1984); see *Nuttall*, 31 Wn. App. 98, 639 P.2d 832 (Defendant negligently misrepresented a tract of land as 10 acres when it was actually 9 acres. Court ruled the plaintiff did not rely on defendant’s misrepresentations because he made an independent investigation of the property’s dimensions when he contacted the previous owner. Thus, reliance was broken by the plaintiff’s independent inquiry into the matter.).

110. See, e.g., *Hartley v. State*, 103 Wash. 2d 768, 779 (Wash. 1985); *DeVito v. Smithkline Beecham Corp.*, 2004 U.S. Dist. LEXIS 27374 (N.D.N.Y. 2004) (the plaintiff/consumers fraud action failed against the defendant/manufacture of the drug Paxil, because of the plaintiff’s lack of showing legal causation/proximate cause).

111. *Hartley*, 698 P.2d at 83.

112. 31 Wn. App. 98, 639 P.2d 832 (Wash. App. 1982).

ruled that the buyer did not rely on what the broker had falsely represented.<sup>113</sup> This ruling creates a “catch 22” for consumers: if one fails to check the accuracy of the a salesperson’s representation, he or she may be deemed to have relied unreasonably or unjustifiably, but if one tries to check the accuracy of the false statement, then a court might rule that he or she did not, in fact, rely on the statement, and therefore, the statement was not the “cause” of the consumer’s damages.<sup>114</sup>

In *Wiegand v. Walser Automotive Groups, Inc.*,<sup>115</sup> the Minnesota Supreme Court also focused on policy considerations in analyzing whether the “causation” element of common law fraud was satisfied when the contact terms specifically contradicted what the car dealer had told the car purchaser. In *Wiegand*, the dealer had allegedly falsely told the car purchaser that in order to obtain financing to purchase the car, the purchaser would also have to pay for a servicing agreement and credit insurance.<sup>116</sup> The car dealer brought a motion to dismiss the fraud claim arguing that any reliance on oral representations is unjustifiable as a matter of law when a written contract signed by the consumer contradicts the content of the oral representation.<sup>117</sup> The District Court granted the defendant’s motion, and the Court of Appeals ruled that causation could not be proven as a matter of law because each of the oral misrepresentations alleged were contradicted by direct, clear, and unambiguous contractual language.<sup>118</sup> But the Minnesota Supreme Court reversed, at least in terms of a cause of action under its consumer fraud protection statute (as contrasted with a common law fraud action) based upon policy considerations:

The policy and purpose underlying the Consumer Fraud Act, however, suggest that Walser’s assertion that Wiegand and potentially others cannot prove a causal nexus as a matter of law is wrong . . . because

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113. *Id.*

114. It appears that the broker in the Nuttall case did not intentionally misrepresent the location of the boundary line of the property but may have negligently misrepresented it. Unfortunately, the buyer’s attorneys did not raise a claim of negligent misrepresentation. *See id.* at 839.

115. 683 N.W. 2d 807 (Minn. 2004).

116. *Id.* at 809.

117. *Id.* at 810.

118. *Id.*

the Consumer Fraud Act reflects the legislature's intent 'to make it easier to sue for consumer fraud than it had been to sue for fraud at common law' . . . Furthermore, one of the central purposes of the Consumer Fraud Act is to address the unequal bargaining power that is often found in consumer transactions.<sup>119</sup>

Sometimes courts articulate grounds, which appear to be both technical and circular in reasoning, in order to award summary judgment to the defendant when the contract contains disclaimer type clauses. For example, the Court of Appeals of North Carolina ruled that the presence of a no reliance clause in the contract prevents a plaintiff from bringing into evidence the false oral statements alleged and, therefore, the plaintiff cannot show actual reliance.<sup>120</sup> The court noted that the plaintiff must, under the consumer fraud protection statute, show "actual reliance" on the alleged misrepresentation in order to establish that the alleged misrepresentation "proximately caused" the injury complained of by the plaintiff.<sup>121</sup> But the court then noted that since the agreement contained a no reliance clause the plaintiff "cannot produce evidence to support the essential element of actual reliance."<sup>122</sup>

In trying to make sense of the different approaches courts employ in deciding to bar parol evidence of fraud when a contract contains disclaimer type language or other more specific contradictory terms, the key unifying factor may be the courts' sense of how an ordinary consumer does act or should act. Thus, it is useful to review the policy arguments that courts have articulated when ruling to bar the admission of the parol evidence in the fraud claim. An often quoted phrase that courts have used when ruling to bar the admission of the parol evidence in the fraud claim came from the Alabama Supreme Court in *Torres v. State Farm*,<sup>123</sup> "Because it is the policy of

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119. *Id.* at 812 (the court ruled that reliance is required for a private consumer fraud class action under the fraud statute, however, the court also ruled that the "justifiable" reliance standard of the common law action for fraud was not).

120. *Tucker v. The Blvd. at Piper Glen, L.L.C.*, 150 N.C. App. 150, 564 S.E.2d 248 (N.C. Ct. App. 2002).

121. *Id.* at 251.

122. *Id.*

123. 438 So. 2d 757, 758-59 (Ala. 1983)



courts not only to discourage fraud but also to *discourage negligence and inattention to one's own interests*, the right of reliance comes with a concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests." (emphasis added) This statement reflects a policy goal of creating a rule of law that will encourage consumers and others to carefully read all of the terms of the contracts that they sign. In other words, this rationale underscores the courts' sense of how a consumer *should* act.

Courts have also identified the potential problem of faulty memories or fabrications by plaintiffs, which can arise if the court were to admit evidence of the alleged parol false statement when it is contradicted by the contract terms specifically or through a disclaimer type clause. "[T]here are sound policy reasons for precluding fraud claims based on oral statements outside the written agreement where the agreement includes a nonreliance clause . . . [P]lacing primacy on the written word is a primary function of securities law and reduces the possibility of faulty memories and fabrication."<sup>124</sup> Why, however, is the court not equally concerned about the possibility that the salesperson is the one who is lying rather than the consumer? When courts focus on the possibility of false claims by consumers and do not equally emphasize the possibility that it is the salesperson who is lying, this may reflect a perception by the court that the vast majority of consumers do in fact carefully read all of the terms of the contracts they sign, so that when they see the disclaimer type clauses or other more specific contradictory terms, they do not object to them because they have not in fact been told anything contradictory by the salesperson. Thus, when a court emphasizes the problem of fabrication by consumers as more likely to occur than fabrication by the salespersons, this may reflect the court's perception that the vast majority of consumers *do* in fact read through all of the terms of the contracts that they sign.

The case which perhaps most dramatically articulated the policy reasons for requiring consumers to take "reasonable" steps to verify the accuracy of the statements made to them by salespeople (which would include reading the purchase contract) was the concurring opinion by Justice See of the Alabama Supreme Court in the seminal decision *Foremost Insur-*

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124. Bauer, 834 N.E.2d at 962.

ance Company, *Grand Rapids, Michigan v. Parham*.<sup>125</sup> In his concurring opinion, Justice See argued that permitting consumers to bring claims of fraud would have a devastating impact on society if the consumer had not first acted “reasonably” herself in ascertaining the truth of the salesperson’s representation. In defending the Alabama Supreme Court’s decision to return to the “reasonable” reliance standard by overturning its ruling seventeen years earlier in the *Hickox* case (which applied a “justifiable” reliance standard), Justice See began his special concurring opinion by stating: “History demonstrates that severing liberties from responsibilities invites social and legal disorder.”<sup>126</sup> Justice See decried the “justifiable” reliance standard because under it a consumer did not have to read the contract or otherwise take reasonably prudent steps to ascertain the truth as the consumer did under the “reasonable” reliance standard.<sup>127</sup>

According to Justice See, the justifiable reliance standard discouraged consumers from reading their contracts by “insulating the buyer from its consequences and by providing an incentive for the buyer to recast his own carelessness as the seller’s fraud.”<sup>128</sup> Without citing to any statistics in support, Justice See ominously concluded that if courts were to abandon the “reasonable” reliance element that requires consumers to read and be bound by the terms of the contracts they sign in order to be able to raise a fraud claim:

Unbound by the terms of their contracts, unimpeded by any prospect of summary judgment, and lured by the promise of gain, plaintiffs have choked the courts with a flood of fraud litigation . . . The law should not promote the disorder of profligate litigation or encourage people to enter into contracts for the purpose of acquiring a fraud claim.<sup>129</sup>

Several courts, such as the Supreme Court of New York in *Cirillo v. Slomin’s, Inc.*,<sup>130</sup> have addressed and rejected the policy arguments that have been made in favor of barring the pa-

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125. 693 So. 2d 409 (Ala. 1997).

126. *Id.* at 437-38.

127. *Id.* at 438.

128. *Id.*

129. *Id.* at 439.

130. 768 N.Y.S. 2d 759 (2003).

rol evidence of the fraud.<sup>131</sup> In *Cirillo*, the court ruled that the plaintiff (a homeowner who purchased a security alarm system) could bring in evidence of an alleged false parol statement (that the alarm system would work even if the phone lines were cut off), although the purchase contract contained a general and even a specific disclaimer that could apply to this statement. The contract for the alarm system stated: "The salesman has no authority to change any terms or make representations other than contained in this Agreement, and the buyer represents that none have been made to or relied upon by the Buyer."<sup>132</sup> The court at first distinguished the *Danann* case where the disclaimer clause was more specific. However, the court noted there was in fact another disclaimer clause in the *Cirillo* case that was more specific and related to the very issue that the purchaser claimed he had been reassured about by the salesperson regarding whether the alarm system could ever be compromised.<sup>133</sup> The court then noted that another difference between this case and the *Danann* case (where the court barred admission of the parol evidence of the fraud) is that in *Danann* both parties were sophisticated business people and the information that was allegedly falsely provided in that case was readily available to the other party.<sup>134</sup>

An important part of the court's reasoning in *Cirillo* is based upon the court's expressed perception of the dynamics of the interaction between the typical consumer and merchant in contrast to the dynamics when two sophisticated parties are entering into an agreement. The court noted that in a consumer sales transaction, the seller tenders a boilerplate contract to the consumer on a non-negotiable basis, and then it cited approvingly to the dissent in *Danann* on the point that consumers, even when they do read contracts, rely in fact on what they have previously been told to the contrary by the salesperson:

In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been

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131. See also, *Snyder*, 992 P. 2d at 1086; *Hickox*, 551 So.2d at 262.

132. *Cirillo*, 768 N.Y.S. 2d at 766.

133. *Id.* at 766-67.

134. *Id.* at 767.

made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept . . . and act upon agreements containing . . . exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse to grant relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.<sup>135</sup>

The court in *Cirillo* stated that the argument of the dissent in *Danann* is more compelling in the context of a consumer transaction than in the business context. The court noted that consumers often rely on what salespeople tell them about the products or goods they are buying, especially regarding technical matters which are “incapable of independent verification” by the consumer. Thus, the *Cirillo* court reasoned, a clause in the contract that denies an agent’s authority to speak should not in this context bar a fraud claim based upon what the agent allegedly stated.<sup>136</sup>

Upon whom or what else is the consumer supposed to rely? The merchant presumably trains and presents its salespersons to consumers for purposes of providing them with information about the company’s product or service. Such merchant cannot be permitted to escape all responsibility for the information provided simply by including a disclaimer of authority in a form contract. It cannot cloak its agents with authority on the one hand, and then deny it on the other.<sup>137</sup>

The court in *Cirillo* also addressed the policy point that some courts and merchants have made of the possibility that consumers can fabricate that a false statement was made to them and that the presence of no reliance type clauses makes

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135. *Id.* at 767-768, quoting *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 324 (Fuld, J., dissenting) (quoting *Bates v. Southgate*, 308 Mass. 170 (Mass. 1941)).

136. *Id.*

137. *Id.*

the possibility that there has been a fabrication by the consumer more likely. The court in *Cirillo* argues that these disclaimer type clauses create a contractual myth that courts should not reflexively enforce because to do so would encourage unbridled fraud by the merchants:

This case provokes the following questions: Is the consumer's claim, innately, any less reliable than the purported disclaimer of reliance? The consumer must sign the contract if he wants to obtain the product or service, and ordinarily must adopt it wholesale, without opportunity to negotiate as to particular provisions. Can the consumer really be said to "represent" a state of facts (i.e., that no oral representations were made to him) by virtue of his acquiescent signature? What if such state of facts is rendered untrue by the acts of the merchant's sales agent? . . . To reflexively disallow parol evidence on the basis of such disclaimer, is to reward the ingenuity of draftsmen at the expense of sound public policy, and to invite sales agents, armed with impenetrable contracts, to lie to their customers. Here, the danger of fraudulent claims is outweighed by the danger of unrestrained fraud against the consumer.<sup>138</sup>

In response to the point that consumers should not be able to negligently decide not to carefully read the contracts they sign and bring a claim of fraud in such circumstance, the Maryland Supreme Court stated:

There is nothing in law or in reason which requires one to deal as though dealing with a liar or a scoundrel, or that denies the protection of the law to the trustful who have been victimized by fraud . . . It was never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed. The modern and more sensible rule is . . . where it was held not to be negligence or folly for a buyer to rely on what had been told him.<sup>139</sup>

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138. *Id.*

139. *Schmidt v. Millhauser*, 130 A.2d 572, 576 (Md. 1957) (seller misrepresented in a brochure the condition of the roof; calling it new when it was eight years old).

The Wyoming Supreme Court embraced a balancing approach between the competing interests of “justice and freedom of contract.”<sup>140</sup> The court noted the goal of certainty in contractual relations that some courts emphasize to bar the admission of parol evidence of fraud when there is a disclaimer type clause in the contract:

The Massachusetts cases emphasize the desirability of certainty in contractual relations of those who have made a definite agreement, and if they say that they contract without regard to prior representations and that prior utterances have not been an inducement to their consent, any *occasional* damage to the individual caused by antecedent fraud is thought to be outweighed by the advantage of certainty and freedom from attacks, which would in the *majority* of cases be unfounded when such provisions were in the agreement.” (emphasis added)

But the Wyoming Supreme Court then noted that Massachusetts had changed its position on this legal issue citing to a later Massachusetts case in which the court ruled that if the court enforced a “no reliance” type clause to bar the admission of parol evidence of fraud they would

. . . ignore the *frequent* instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the customary course of business. To refuse relief would result in opening the door to a *multitude of frauds* and in thwarting the general policy of the law. (emphasis added)<sup>141</sup>

An important change between the first and the second Massachusetts cases relates to the different assumption by each court as to the frequency with which consumers might rely on

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140. Snyder, 992 P.2d at 1085-86 (quoting Baylies v. Vanden Boom, 278 P. 551, 554 (1929) (quoting Arnold v. Nat'l Aniline & Chemical Co., 20 F.2d 364 (2nd Cir. 1927)).

141. *Id.* at 1086 (quoting Bates v. Southgate, 308 Mass. at 31).

what they were falsely told before they signed the contracts. The latter Massachusetts case assumes that consumers might frequently rely on what they have been told and reflects an understanding of some of the psychological barriers to authentic contractual assent discussed in Part II relating to issues of trust. Thus, after reviewing this evolution in judicial thinking in Massachusetts, the Wyoming Supreme Court stated, "competing considerations outweighed any interest in certainty. A perpetrator of fraud cannot close the lips of his innocent victim by getting him blindly to agree in advance not to complain against it,"<sup>142</sup> and ruled that a contractual disclaimer type clause would not preclude a party from asserting a claim of fraud based on parol evidence.<sup>143</sup>

One of the dissenting judges in the *Foremost* case (Justice Butts) also emphasized some of the psychological barriers to authentic contractual assent that we discuss in Part II relating to the complexity of many contracts consumers sign (in this case an insurance policy) and the resulting trust consumers place on the salesperson to understand what they are agreeing to:

I believe that the majority of this Court simply ignores the *commonsense reality* that consumers who want to buy insurance, an automobile, or a first home must first sign complex documents that have been crafted to favor the party across the table from them. The people who write these documents develop exceptions and exclusions that limit the benefit a consumer will receive from the transaction, and then hide these limitations behind the specialized language of corporate attorneys. It is no surprise that even educated consumers find it difficult to fully understand what they must sign and be bound by; this is precisely why they often rely so heavily upon representations that are made to them as to the meaning of certain terms and provisions, particularly when they are made in a friendly voice and with an assuring smile."<sup>144</sup>

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142. *Id.*

143. *Id.*

144. *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 440 (Ala. 1997)

The dissent also noted that even a college graduate might look to the party with superior knowledge of the complicated insurance documents to find out what they mean and to “expect an honest answer.”<sup>145</sup> Both the dissenting opinion in *Foremost*, and the majority of the court in the *Hickox* decision that *Foremost* reversed, emphasized the policy goal of forcing companies who sell products and services to consumers to be honest and careful when communicating information to the consumers about the products and services they are providing.<sup>146</sup> The dissenting opinion in *Foremost* notes that the majority disagreed with that goal due to the burden on businesses that it would impose and concludes, at times facetiously, with its assessment of the legacy of this shift in Alabama law:

The crushing burden of truthfulness that the justifiable reliance standard imposed on the party with superior knowledge of the truth has been lifted and the so-called ‘balance’ is restored; those with greater knowledge and bargaining power are free to lie about the complicated documents that they draft for their profit, and the consumers who are least able to understand the documents are free to catch them-if they can.<sup>147</sup>

## II.

### COGNITIVE AND SOCIAL PSYCHOLOGICAL EXPLANATIONS FOR THE FAILURE OF CONSUMERS TO READ AND UNDERSTAND CONTRACTS

Although, as detailed in Part I, courts generally expect consumers to read and understand the contracts they sign and sometimes penalize the “negligent” person for failing to do so, in reality, as supported in our “reading contracts survey” in Part IV, a large percentage of consumers do not carefully read the contracts they sign.<sup>148</sup> In this section, we discuss some of

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145. *Id.* at 442.

146. *Id.*; *Hickox v. Stover*, 551 So.2d 259, 262 (Ala. 1989).

147. *Foremost*, 693 So. 2d at 442.

148. See Section IV of the article for study results on consumers failing to read the contracts they sign or acquiescing to contradictory terms.



the cognitive and social psychological explanations for why people fail to read or understand the contracts they sign.<sup>149</sup>

One reason why consumers might not read contracts is that the contract forms are often user-unfriendly. Font sizes are often very small,<sup>150</sup> and the clauses within sentences can be very long,<sup>151</sup> which can make it physically difficult and taxing

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149. The list of factors we present here is likely to be far from exhaustive. We present preliminary evidence for some of these factors below, but future research will need to investigate the relative contributions of these and other psychological factors in making consumers vulnerable to particular types of fraud.

150. Freddie Mac now distributes all its forms in digital format for loan originators to adjust font size, page size, margins, and number of pages themselves. See Modifications to the Uniform Residential Loan Application (Form 65) and Statement of Assets and Liabilities (Form 65A) (Aug. 2, 2005), available at <http://www.freddie.mac.com/sell/guide/bulletins/pdf/080205indltr.pdf>.

151. See Freddie Mac Initial Interest<sup>SM</sup> Adjustable Rate Note, [http://www.freddie.mac.com/uniform/doc/5537-MultistateARMNote\(5-04rev7-05\).doc](http://www.freddie.mac.com/uniform/doc/5537-MultistateARMNote(5-04rev7-05).doc):

(B) AFTER MY INITIAL INTEREST RATE CHANGES UNDER THE TERMS STATED IN SECTION 4 ABOVE, UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT DESCRIBED IN SECTION 11(A) ABOVE SHALL THEN CEASE TO BE IN EFFECT, AND UNIFORM COVENANT 18 OF THE SECURITY INSTRUMENT SHALL INSTEAD BE DESCRIBED AS FOLLOWS:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender. To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan as-

for consumers to read. These user-unfriendly features increase fatigue,<sup>152</sup> particularly among the elderly,<sup>153</sup> stroke survivors,<sup>154</sup> and anyone who is even moderately visually impaired. In addition, the long length of what the consumer is expected to read can cause consumers to decide to at most skim, rather than carefully read, the documents they sign.<sup>155</sup> For example, in *Castellana v. Conyers Toyota*,<sup>156</sup> the court noted that it took the consumer two hours and forty-five minutes to read the car purchase and finance documents.<sup>157</sup> The court in *In re T.V.*

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sumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

152. See GEORGE E. LEGGE, *PSYCHOPHYSICS OF READING IN NORMAL AND LOW VISION* (2007); Jorge Frascara, *Typography and the visual design of warnings*, in *HANDBOOK OF WARNINGS* 385, 385-403 (Michael S. Wolgater ed., 2006); Wallace H. Wulfeck et al., *Document and display design*, 4 *ADVANCES IN READING/LANGUAGE RESEARCH* 183 (2006).

153. See Smither, J.A. & Braun, C.C., *Readability of prescription drug labels by older and younger adults*, 1 *J. CLINICAL PSYCHOL. IN MED. SETTINGS* 149 (1994); Pawaskar, M.D. & Sansgiry, S.S., *Over-the-counter medication labels: Problems and needs of the elderly population*, 54 *J. AM. GERIATRICS SOC'Y* 1955 (2006).

154. See Fames, S., McKenna, K., Worral, L., Read, S., Roth, E., *The suitability of written education materials for stroke survivors and their careers*, 10 *TOPICS IN STROKE REHABILITATION* 70 (2003).

155. For example, to obtain a mortgage loan from one mortgage lender sampled, the FNMAE Home Loan documents, required to be signed, totaled 97 pages (or 105 including the amortization chart) and included 53 places requiring signatures and 18 pages for initialing. Information from Scot Levine, a former mortgage broker and research assistant to Debra Stark, in e-mail to Stark dated Dec. 2008.

156. 407 S.E.2d 64, 64 (Ga. App. 1991).

157. Interestingly, even after taking so much time to read the contract, the consumer still relied on the salesperson's statement that the consumer's credit was approved even though the contract stated that approval had not yet occurred. See *Id.* at 165, 68 ("In her deposition appellant testified that she read every document she signed, and that she understood or believed she

*Dukes*<sup>158</sup> noted the problem of consumers being “presented with an incomprehensible number of additional forms to sign at closing” in a home loan transaction.<sup>159</sup> Another barrier to consumers reading and understanding the contracts that they sign is the language used in the contract. Contracts, by necessity, must be precise. However, to make contracts precise, lawyers who draft contracts typically use language (colloquially called “legalese”) that can sometimes be quite different from ordinary English. The use of legalese within contracts often creates difficulties for consumers when they try to understand what contractual provisions obligate them to do, allow them to do, or forbid them from doing.<sup>160</sup>

Law students spend years studying matters like the difference between “benefit of the bargain” or “expectation damages” (which can be a significant amount of money) versus mere “restitution damages” (which are more likely to be nominal), the difference between “conveys and bargains” language in a deed (which creates a deed without any warranties to the grantee) versus “conveys and warrants” (which creates a deed with warranties), and similar technical distinctions. But lay people do not have such opportunities. For example, in *O’Neil v. International Harvester Company*,<sup>161</sup> the consumer was told by the salesperson that the tractor and trailer would be able to do the hauling work that the consumer described, and thus, when the consumer read the “as is” clause in the contract for the sale of the tractor and trailer (meaning that there were no representations or warranties regarding the tractor and trailer),

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understood what they said prior to signing them. She estimated that reading and signing these documents took about 2 hours and 45 minutes. She agreed when questioned that in the documents she signed there were no statements that her credit application had been approved and that she knew when she signed them that Toyota Motor Credit Corporation, not CTI, would be financing the loan”).

158. 24 B.R. 404 (Bkrtcy. Mich., 1982).

159. *In re T.V. Dukes*, 24 B.R. 404, 412 (Bankr. E.D. Mich. 1982). The consumer was not told of the loan fee equivalent to one-third of the loan amount until just about to sign the documents at the closing. “The expectation that the borrower is to decide whether or not to proceed with the loan transaction based upon disclosure of the broker’s fee at the time of closing is both unfair and deceptive.” *Id.*

160. See *supra* note 151 for a sample of the “legalese” used in closing documents.

161. 575 P.2d 862 (Colo. Ct. App. 1978).

the consumer misunderstood that clause to mean “that the tractor and trailer would be in the condition represented by the defendants’ salesman.”<sup>162</sup>

Even if consumers were able to dissect the legalese in which contracts are written, the process of doing so would be exceedingly difficult, especially since relevant passages are often buried in other language. For example, contracts often contain a “definitions” section that good lawyers know is very important to read, but consumers might not know this. Sometimes important provisions relating to what is being bargained for are imbedded in these definitions. In *Benjamin v. Thompson*,<sup>163</sup> the insured failed to see that in the definitions section of a lengthy health insurance policy, under the term “deductible,” the policy stated that the \$1,000 deductible was not for the year, as the consumer expected, but instead, for each occurrence. By burying this important term in the “definitions” section, consumers are less likely to notice it when skimming a lengthy insurance policy.<sup>164</sup> In another example, a consumer signed a “reservation form” and made a “good faith deposit,” thinking it was an option contract for a specific lot at a specific price based on the terms of the form that the consumer read. However, buried later in the contract was a clause that stated that either party could terminate the contract at any time. When the consumer attempted to exercise the option, the developer pointed to this termination language in the contract as the basis to try to sell to the consumer a smaller lot for a greater price.<sup>165</sup>

Unlike would be defrauders,<sup>166</sup> consumers do not know what is important and what is not. Indeed, they will often not even know what information they should be looking for or whether they need to be looking for information in the first

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162. *Id.* at 864.

163. *Benjamin v. Thompson*, 2005 WL 2285015 (S.D. Ala., 2005).

164. *Id.* (schedule of benefits indicated a \$1,000 deductible, but buried in the definitions section is the clarification that “deductible” takes place for each occurrence).

165. *Ginsburg v. Frederick H. Bartlett as Trustee*, 262 Ill App. 14 (1931).

166. The fact that would-be defrauders know more than consumers leads to situations of asymmetric information and power (asymmetric relating to mortgage lending). Katherine C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (May 2002).

place. It is only after training that a lawyer is able to read a contract with the requisite knowledge of rules of law, rules of construction, and familiarity with what is considered customary terms, to be able to critically review the terms of the contract and determine whether it is consonant with the consumer's goals and needs, as well as oral representations made to the consumer prior to signing the contract.<sup>167</sup> For example, some consumer products, due to regulations, are so complicated, that consumers might end up paying for a product that is structured in such a way that they could never derive a benefit from the purchase. This occurred in *Glazewski v. Allstate Insurance Company*,<sup>168</sup> in which the consumer purchased "under insured" car insurance coverage in an amount under which, based on Illinois law, the insured could never recover in the event of an accident.<sup>169</sup>

Sometimes the laws designed to protect consumers, by mandating the disclosure of certain information that consumers need to assess the value of the consumer product, fail in their purpose because the form of these disclosures are too difficult for many to understand. The federal disclosure laws in the context of home loans are a good example of this.<sup>170</sup> In one published case, a borrower agreed to pay \$1,200 over three years in order to borrow \$200 (resulting in a 110 percent interest rate) because the loan was set up as a modification to an existing loan, rather than a new loan, accruing interest at a 36 percent interest rate, which the borrower believed he would receive according to a solicitation letter from the lender.<sup>171</sup> In that case, Judge Posner pointed to the inadequacy of the TILA

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167. See Stark, *supra* note 27; Brest *supra* note 27; Nathanson *supra* note 27; Ian Weinstein, *Lawyering In The State of Nature: Instinct And Automaticity In Problem Solving*, 23 VT. L. REV. 1 (1998).

168. *Glazewski v. Allstate Ins. Co.*, 466 N.E.2d 1151 (Ill. App. Ct. 1984).

169. *Id.* at 1154.

170. See generally Matthew A. Edwards, *Empirical and Behavioral Critiques Of Mandatory Disclosure: Socio-Economics And The Quest For Truth In Lending*, 14 CORNELL J. L. & PUB. POL'Y 199 (2005); Jeff Sovern, *Toward A Theory Of Warranties In Sales Of New Homes: Housing The Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13 (1993); Elizabeth C. Yen, *The FRB and HUD Truth in Lending Reform Proposals*, 53 CONSUMER FIN. L.Q. REP.100 (1999); Lauren E. Willis, *Decision Making and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707 (2006).

171. *Emery v. American Gen. Fin. Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995).

mandated disclosures to protect borrowers and stated “[n]ot all persons are capable of being careful readers.”

To understand a contract, or even to know that they should look for certain pieces of information, consumers need some background knowledge. In particular, they need to know how contracts of this type—be they mortgage contracts, rental agreements, life or health insurance policies, etc.—are typically structured, the types of information and agreements that are typically codified in these contracts, and the alternative forms that these agreements can take. Cognitive psychologists call mental data structures that code information of this type “schemas,” and consumers need to have specific schemas to understand a mortgage contract, a rental agreement, a life or health insurance policy, and so forth. When consumers read contracts without this knowledge, they will not necessarily be able to identify when something is unusual or amiss.

Contract schemas of this type are analogous to the databases that universities use to keep track of information about their students and that businesses use to keep track of their customers. These databases have slots for particular pieces of information. A university database, for example, will have slots to store a student’s first name, last name, social security number, grade point average, birthday, and so forth. These slots only take particular types of information. The slot for a student’s birthday, for example, will store the month during which the student was born, and only one of the twelve months of the year can be placed in that slot. Analogously, consumers who are familiar with rental agreements will have mental data structures that we might call “rental agreement schemas.” These schemas will have a slot to code for the name of the landlord or landlady and another slot to code for the name of the tenant. There will also be slots to code for the amount of the security deposit, the amount of the rent, slots for the services that the landlord or landlady provides, slots for the obligations of the tenant, slots for restrictions on how the space can be used, slots for termination provisions, remedies for breaches, etc. These slots take particular types of information. The slots designated to code the obligations of the tenant, for example, might code obligations to maintain the lawn, to keep the premises safe, and rules that the tenant is required to follow. The slot for remedies for breaches might list consequential damages, liquidated damages, or exemplar or puni-

tive damages, etc. In addition to these slots and information that might be coded in these slots, there are also “rules of construction” (i.e., rules that apply for the terms of the deal when the contract is silent, but which can be varied by the terms of the contract such as the right of a tenant to assign their leasehold interest) and “rules of law” (which are rules that cannot be modified by the terms of the agreement, such as the implied warranty of habitability which cannot be waived in many jurisdictions).

Consumers are typically aware of some of the information that can be coded in these rental agreement schemas. In particular, most consumers are aware that the rental agreement will list the names of the landlord or landlady and the tenant, the amount of the security deposit and the rent, as well as a description of the services that the landlord or landlady will provide. But many are unaware of all of the possible obligations of the tenant, restrictions on how the space can be used, and possible termination provisions. Moreover, very few consumers are aware of rules of construction and rules of law that apply to the tenancy, which allocate rights, obligations, and risks of loss with these consequences not necessarily spelled out in the contract. Without this knowledge consumers will not be aware that they ought to look for this information, which might in turn decrease motivation to read. Essentially, tenants and consumers might not appreciate the risks in signing a contract, because they cannot think of possible negative outcomes.

Sometimes consumers do know that they ought to look for particular pieces of information. However, even if they have questions about how a contractual agreement is structured, they will typically ask the salesperson and the salesperson will answer their question either honestly or dishonestly. Once consumers have heard an answer, even if they are skeptical of what they have been told, they tend to attempt to allay their concerns by trying to find out whether what they were told was true. That is, they will generally not try to find out whether what they are told was false, even though testing would often be a more productive test strategy. Testing whether a statement is true is called a confirmatory test strategy, while testing whether a statement is false is called a disconfirmatory test strategy. Consumers use confirmatory test strategies by default. Disconfirmatory test strategies are diffi-

cult for consumers, even if they know that they ought to use them.

The most famous example of this type of confirmatory test strategy in cognitive psychology was reported by Wason (1960).<sup>172</sup> Wason gave his research participants a series of 3 numbers—the number 2, the number 4, and the number 6—and told them that this series followed a rule. The participants' task was to generate additional series of 3 numbers, and he would tell them whether or not their new series followed the rule. The true rule was: any ascending series of numbers. However, few participants thought of this broad rule, and instead, either assumed that the rule required the numbers to ascend by 2 or assumed that the rule required the numbers to ascend by equal increments. Consequently, they tested this assumption by generating additional series that followed the rule they had in mind (doing so followed a confirmatory test strategy). They rarely generated series that did not follow the rule. That is, they rarely generated series that ascended by 1, 3, 7, or 53, ascended by uneven increments, or descended (to do so would be to follow a disconfirmatory test strategy). Finally, when participants thought that they knew the rule, Wason had them guess what the rule was. Because they had used a confirmatory test strategy, only six out of twenty-nine participants produced the correct rule on their first attempt. If instead they had used a disconfirmatory test strategy and generated series of numbers that ascended by 1, 3, or 7, ascended by uneven increments, and series that descended, they would have soon realized that the rule did not require the numbers to ascend by 2 or by equal increments. But few participants tested these hypotheses. Since Wason's seminal work, many studies have confirmed—and no studies have disconfirmed—Wason's observation that people use confirmatory test strategies to verify the veracity of almost every claim they hear.<sup>173</sup> People almost never use disconfirmatory test strategies as long as the claim does not contradict other entrenched beliefs.

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172. Wason, P. C., *On the failure to eliminate hypotheses in a conceptual task*, Q.J. EXPERIMENTAL PSYCHOL. 129 (1960).

173. Joshua Klayman & Young-Won Ha, *Confirmation, disconfirmation, and information in hypothesis testing*, 94 PSYCHOL. REV. 211 (1987); M. Snyder & B. Campbell, *Testing hypotheses about other people: The role of the hypothesis*, 6 PERSONALITY AND SOC. PSYCHOL. BULLETIN 421 (1980).



By analogy, consumers might use a confirmatory test strategy when they are asked to sign contracts. They might only look for information that confirms what they have been told and fail to look for information that disconfirms what they have been told. A borrower might fall prey to a predatory adjustable rate loan, for example, because the mortgage broker tells them that the interest rate will be at a given relatively low rate. Even if they are skeptical of the mortgage broker's verbal representation, they will try to allay their concerns by looking for evidence in the contract that the interest rate will indeed be at the given low rate. They do not (and often cannot) think of the alternative that the given low rate is only an introductory rate and that it will change later. The first author of this paper witnessed a law student go through such a cognitive process in her real estate transactions class. In her lecture, the author had casually mentioned that the prevailing prime rate was at least 5 percent. At the end of the lecture, a student approached her and claimed that she was about to receive a loan at 4 percent. The mortgage broker had told her the rate was 4 percent, and she had read the mortgage contract—probably skimmed—and saw the interest rate was 4 percent. She did not notice that the contract was for an adjustable rate mortgage. This event happened while adjustable rate loans were receiving negative press in the popular media. The public had become aware that adjustable rate loans exist and that they have negative consequences. This law student, nevertheless, almost unwittingly fell for the scheme, because she read the mortgage contract looking for evidence that confirmed, rather than disconfirmed, what the mortgage broker had told her.

Another example of a confirmatory test strategy on the part of the signatory on a contract happened in *O'Neil v. International Harvester Co.*<sup>174</sup> In that case, as previously discussed, the plaintiff purchased a truck from the defendant to carry lumber up a mountain. The defendant had made the verbal representation that the truck had been overhauled and would be able to carry lumber up the mountain. The contract, however, contained boilerplate that stated that the purchase of the truck was "as is" and contained a "merger clause" (that the written agreement embodies the entire agreement between the parties). The plaintiff acknowledged reading the contract,

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174. *O'Neil v. International Harvester Co.*, 575 P.2d 862 (1978)

but claimed that he had interpreted the “as is” language to mean “as the defendant had verbally represented” the truck. If the plaintiff had been in a different state of mind, perhaps he would have interpreted that clause in the contract correctly. As it was, however, he was looking for information that was consistent with what he had been told and interpreted the clause in the contract in light of that search.

However, the explanations provided by sales people need not always invoke such confirmatory test strategies to be successful. Indeed, sometimes any explanation—even senseless explanations—will alleviate people’s concerns. This effect was demonstrated in an experiment by Langer, Blank, and Chanowitz (1978) in which the experimenter asked to cut in line to make photocopies.<sup>175</sup> The experimenter either provided no reason for the request (i.e., “May I use the Xerox machine?”), provided a senseless explanation (i.e., “May I use the Xerox machine, because I have to make copies?”), or provided a plausible explanation (i.e., “May I use the Xerox machine, because I’m in a rush?”). Langer, Blank, and Chanowitz found that the senseless explanation was just as effective as the plausible explanation when the request did not involve a great deal of effort and that the plausible explanation was very effective even when the request involved a significant amount of effort. Analogously, if upon reading a contract, consumers have concerns about contractual provisions, sales people may be able to alleviate these concerns by providing either senseless or more plausible explanations. For example, in *Ginsburg v. Frederick H. Bartlett as Trustee*,<sup>176</sup> the broker lied to a prospective lot purchaser who wanted to build a home that a railroad line would be coming to the site. The lot purchaser read the contract, which contained a disclaimer clause that no representations were made as to the existing or future plans for a railroad line to the site. This disclaimer clause raised concerns, so the lot purchaser asked the broker about it and the broker told her that the contract was an “old form so don’t worry about it.” The broker then showed her a map indicating that the railroad line would be located nearby. The lot purchaser then re-

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175. E. Langer, A. Blank & B. Chanowitz, *The mindlessness of ostensibly thoughtful action: The role of “placebic” information in interpersonal interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 635 (1978).

176. *Ginsburg v. Frederick H. Bartlett as Trustee*, 262 Ill App. 14 (1931).

lied on the broker's word without pursuing independent verification, signed the contract, and closed on the lot. She did not discover until well after the closing that the broker had lied to her about a future railroad line. Here, the impact of the lie was substantial so the consumer repeatedly sought assurances from the broker, which the broker provided including a false map to make the lie seem more plausible.

Not only are consumers vulnerable to confirmation biases and senseless explanations, but consumers will also often have difficulty imagining problems that might arise. That is, scenarios under which things can go wrong never enter their minds. This is a problem, because extensive psychological research on people's judgments of the likelihood of events has found that people judge likelihood by the ease with which instances or associations come to mind (the "availability heuristic").<sup>177</sup> People might sign contracts that are not in their best interests, because they cannot think of scenarios under which things could go wrong, and they assume that things will work out. Law students spend much of law school and beyond learning the ability to foresee negative consequences and contingent negative consequences; lay people do not.<sup>178</sup> If someone were to bring such scenarios to their attention, perhaps they would have protected themselves better.

Even if some consumers manage to foresee the possibility of potential negative consequences, they will often be overly optimistic in assessing the probability of those negative consequences once they have invested even a small amount of time, effort, or other resources pursuing a goal. Spending the time and effort listening to a sales presentation, going through a long application process, or paying an application fee might

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177. The phenomenon wherein people judge likelihood by the ease with which instances or associations come to mind is called the availability heuristic. A. Tversky & D. Kahneman, *Availability: A heuristic for judging frequency and probability*, 5 COG. PSYCHOL. 207 (1980). In one well-known demonstration of the availability heuristic, Tversky and Kahneman asked their participants whether five consonants (K, L, N, R, and V) appear more frequently in the first or the third position of English words. All five consonants appear more frequently in the third position. However, their participants thought that these consonants appear more frequently in the first position, because it is so much easier to recall English words with these consonants in the first position.

178. See Stark, *supra* note 27; Brest *supra* note 27; Nathanson *supra* note 28; Weinstein *supra* note 167.

be sufficient to cause people to become overly optimistic. This effect—called the “sunk cost effect”—is a psychological phenomenon in which once people have committed resources toward a goal, they often irrationally escalate their commitment, even when there are reasons to suspect that this course of action might lead to problems. The effect seems to stem from a desire not to be wasteful and to justify choices. Once an amount of time, effort, or resources has been spent, walking away can appear wasteful, leaving consumers with no justification for the time, effort, and resources they have already spent. The result can often be disastrous.

In one demonstration of the sunk cost effect, Arkes and Blumer<sup>179</sup> asked their participants to imagine that they were the president of an airline company and had invested \$10,000,000 of the company's money into a research project. The purpose of the research project was to build an airplane that would not be detected by conventional radar. As the project was nearing completion, they discovered that another firm had already begun marketing an airplane with the same capabilities but was better, faster, and more economical than the airplane that their company was developing. Arkes and Blumer then asked their participants whether they should invest the remaining portion of the company's research budget to complete the project. The overwhelming majority of these participants decided to invest the remaining portion of the budget in an attempt to recoup the \$10,000,000 sunk cost. Control participants received a similar story, but no money had yet been invested in the research project. Very few control participants were willing to invest research funds on the project. Participants who imagined that they had invested \$10,000,000 were also more optimistic about the eventual success of the project than were control participants. The borrower in *In re Sheppard*,<sup>180</sup> may have been affected by the sunk cost effect when he decided to go ahead and close on a loan, even though he discovered just before closing that the terms would be different from what had been previously represented to him.

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179. Hal R. Arkes & Catherine Blumer, *The psychology of sunk cost*, ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESS 124 (1985).

180. 299 B.R. 753 (Bankr. E.D. Pa. 2003).

Consumers are also vulnerable to fraud because they are subject to strong motivations to trust would-be defrauders. Traditional psychological models of the trust development process pointed out that trust involves risk. To decrease the risks associated with trust, these models recommended that those who initiate trust should take small incremental steps towards trust. One should trust a little, wait to see whether the trust is reciprocated, and then trust more only if the original trust is reciprocated.<sup>181</sup> This traditional model of trust development fits well with the view that consumers should not simply rely on would-be defrauders' verbal representations, but rather, should be vigilant (i.e., reasonably rely by engaging in due diligence, such as reading the terms of the contract they sign or otherwise taking steps to verify the truth of what they have been told). Contrary to the traditional view, however, recent research has found that—instead of gradually developing trust—people, perhaps irrationally, trust immediately without reservation, and, surprisingly, are usually better off in doing so.<sup>182</sup>

Researchers have tested these two alternative views of the trust development process using trust games in which one player is given an amount of money and then decides how much to trust a second player by sending a portion of that money to the second player.<sup>183</sup> The amount that the first player sends is then tripled and given to the second player. If the second player is trustworthy she or he will then send money back and reciprocate the trust that the first player placed in them. If not, then the second player will retain the money. The results of these trust games show that second players tend to be more trustworthy and return more of the money when the first player initially trusted them wholeheartedly.<sup>184</sup> If there is any hesitation on the part of the first player, the second player will also hesitate to trust. This dynamic may play out in consumer fraud situations such that potential victims of

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181. J.K. Rempel, J.G. Holmes & M.P. Zanna, *Trust in close relationships*, J. PERSONALITY & SOC. PSYCHOL. 95 (1985).

182. J.M. Weber, D. Malhotra & J.K. Murnighan., *Normal acts of irrational trust: Motivated attributions and the trust development process*, RES. IN ORGANIZATIONAL BEHAV. 75 (2005).

183. M.M. Pillutla, D. Malhotra & J.K. Murnighan, *Attributions of trust and the calculus of reciprocity*, J. EXPERIMENTAL SOC. PSYCHOL. 448 (2003).

184. *Id.*

fraud, especially those who have to apply for a loan or otherwise be trusted in return may feel that they cannot show any hesitation in trusting the would-be defrauder. It may have also played a role in *Lucas v. OxiGene, Inc.*,<sup>185</sup> wherein an employee helped a company go public, and in the initial contract, the compensation was based on salary and a stock option, but after the employee had an alcoholic relapse the company renegotiated the contract. The new contract said that the option was at the board of director's discretion. The employee read the contract and raised concerns about the board of director's discretionary language, but the employee was told not to worry and that the language did not mean anything. This employee was in a vulnerable situation, wanted the company to trust him that he would not have another relapse, and could not afford to distrust the company that he hoped would place trust in him. Showing any hesitation or reservation might have made him even more vulnerable to being distrusted.<sup>186</sup> In addition, since the employee had already spent so much time and effort in the position prior to the layoff, the employee may have been affected by the sunk cost effect, as well.

There are several reasons why trusting immediately without reservations puts a person in an advantageous position. The first reason involves attributions. Research has found that people who trust are thought to be happier, assumed to have had a happier childhood, and assumed to be more ethical.<sup>187</sup> Other research suggests that these assumptions might, in fact, turn out to be accurate.<sup>188</sup> People who trust immediately without reservation may, in fact, be more trustworthy. Another reason why trusting immediately without reservations puts a person in an advantageous position, is that in many social situations there is a norm of reciprocity.<sup>189</sup> People give what they get. If they are trusted, it will be incumbent upon them to trust

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185. *Lucas v. OxiGene, Inc.*, 1995 WL 520752 (S.D.N.Y. 1995).

186. *Id.*

187. Julian B. Rotter, *Interpersonal Trust, Trustworthiness and Gullibility*, 35 AM. PSYCHOL. 1, 3 (1980) (citing experimental result of D.J. Hochreich, *Trust and Interpersonal Attraction* (1977) (unpublished)).

188. See *id.*; T.L. Wright & A. Kirmani, *Interpersonal trust, trust-worthiness and shoplifting in high school*, 41 PSYCHOL. REPORTS 1165 (1977).

189. See R.B. Cialdini, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION*, ch. 2 (2007).

in return.<sup>190</sup> If they are not trusted, then there is no such obligation.<sup>191</sup> If consumers only take small incremental steps toward trust, as recommended by traditional models of trust development and those advocating for reasonable reliance requirements, consumers might find that their small steps are never reciprocated.

People with low socio-economic status, ethnic minorities, young people, and women might be more vulnerable to be defrauded than higher status people because while status does not affect how much people trust, status does affect people's motivation to distrust. Research suggests that high status people distrust, because they fear being deceived.<sup>192</sup> Gullibility on their part might compromise their high status. Thus, high status individuals are motivated to take steps to avoid acting in a gullible fashion and to avoid being deceived. By contrast, low status people distrust when they fear an unequal outcome.<sup>193</sup> These findings suggest that low-status people might be particularly vulnerable to the illusion of equality. Once the would-be defrauder treats them respectfully, or even with just the appearance of respect, the low-status person's fears might be prematurely allayed, and unlike the high status individuals, they would be less likely to take steps to avoid being deceived.

Furthermore, people with low socio-economic status often have fewer options in choosing mortgage loans, car loans, rental agreements, and purchasing life or health insurance

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190. Pillutla et al., *supra* note 183.

191. *Id.*

192. Hong and Bohnet (2007) tested this hypothesis using a trust game in which participants were presented with several options: a certain option and a risky option. In the certain option, they would receive \$10 for sure. In the risky option, they would be paired with an unknown decision maker who had already chosen between an equitable distribution in which each party would receive \$15 and an inequitable distribution in which the unknown decision maker selfishly took \$22 and apportioned only \$8 to them. The participants' task was to identify how high the probability of being paired with a trustworthy person who had chosen the equitable distribution would have to be for participants to choose the risky option over the safe option. High status people required a higher probability for being paired with a trustworthy decision maker than did low status people compared to a functionally equivalent game that did not involve trust. K. Hong & I. Bohnet, *Status and distrust: The relevance of inequality and betrayal aversion*, 28 J. ECON. PSYCHOL. 197 (2007).

193. *Id.*

than do people with high socio-economic status. They are, therefore, more likely than people with high socio-economic status to be dependent upon would-be defrauders. Recent research suggests that people ameliorate the fears associated with dependency by trusting those on whom they depend.<sup>194</sup> This strategy might be rational. As described above research on the trust development process has found that when one party is hesitant to trust, other parties are even more hesitant than they otherwise would be to trust that party. Therefore, people with low socio-economic status who show hesitancy to trust others will often make themselves even more vulnerable. Requiring "reasonable" reliance, which has been interpreted to mandate that consumers distrust what they are told and check for accuracy, puts low status consumers in the difficult position of being expected to act in ways that would leave them vulnerable to being distrusted when they are already dependent. This vulnerability is made particularly problematic for those who lack education and are, therefore, also acutely vulnerable to the comprehension difficulties discussed above.

Even if consumers do not completely trust would-be defrauders, it will often be uncomfortable for consumers to double-check their verbal statements. Performing due diligence, such as reading the contract that was just summarized, is in essence like calling the person a liar. People have difficulty taking liars to task, even if they are caught telling the lie and their lie is known.<sup>195</sup> We speculate that to do so, when there is no real evidence that the person has lied, is particularly difficult for consumers and another motivation to trust.<sup>196</sup>

Another major reason why people might not read the contracts that they sign is that many consumer contracts are

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194. See Weber, Malhotra & Murnighan for a theoretical account of the development of trust in situations that involve dependency, *supra* note 182, at 75-101.

195. P. Keith-Spiegel, B.G. Tabachnick, B.E. Whitley & J. Washburn, *Why professors ignore cheating: Opinions of a national sample of psychology instructors*, 8 ETHICS & BEHAVIOR 215 (1998).

196. There is evidence that people feel uncomfortable questioning (i.e., double-checking by reading the contract) what people tell them about contractual provisions from the follow-up survey of our fraud simulation study (see *infra* Tbl.2 Trust of Deceiver, pp. 606-88).



contracts of adhesion.<sup>197</sup> The consumers' choice is to accept the offered agreement or go elsewhere. When consumers download software from the Internet, for example, absolutely nothing can be negotiated. Likewise, when consumers rent a car, there is very little that can be negotiated. They can opt in or out of the various options that car rental companies provide, but nothing is negotiable outside of that framework. Consumers may fail to see the utility of reading contracts, if they—perhaps correctly—assume that nothing can be negotiated anyway. This may especially be the case if they are dependent upon the product or service. For example, a consumer might have no choice but to download a piece of software from the Internet if they need that software for their employment, and there are no available alternatives, or they are not aware of alternatives. If a consumer needs to rent a car to get to her final destination, she may have no choice, but to sign the car rental agreement. If consumers have no choice but to enter

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197. See, e.g., James P. Nehf, *European Fair Trading Law: The Unfair Commercial Practices Directive*, 35 INT'L J. LEGAL INFO. 305 (2007) (book review) (author noted "Most consumer transactions result in contracts of adhesion where all but the most basic terms are neither read by the consumer nor negotiable" after discussing the widely criticized "consent model" of contracts as not reflecting what happens in a typical merchant-consumer transaction); *American Food Management, Inc. v. Henson*, 105 Ill. App. 3d 141, 145, 434 N.E.2d 59, 62-63 (5th D. 1982) (citing *Corbin on Contracts* § 559A-559I (Kaufman Supp. 1980)): "Adhesion contracts" include all form contracts' submitted by one party on the basis of this or nothing. Ehrenzweig [Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Col. L. Rev. 1073 (1953)] defines them as agreements in which one party's participation consists in his mere 'adherence,' unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise." He includes the following classes: Insurance Policies; Commercial Loan Contracts; Transportation Contracts; Employment Contracts. *Corbin on Contracts* § 1446. Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead, courts engage in a process of judicial review. Those terms which cannot be proven to be unfair are enforced, unless the rest of the contract is so one-sided that justice would be better served by discarding the contract entirely, in which case it can be entirely unenforceable by the sticking party. "Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not" (citing *Am. Food Mgt, Inc. v. Henson*, 434 N.E.2d 59, 63 (Ill. App. 1982) citing Professor Corbin on adhesion contracts.).

into agreements, and the provisions of those agreements either are not negotiable or are believed not to be negotiable, then there may in fact be very little utility in reading contracts.

Even in those cases when contractual provisions are negotiable, negotiations are often very difficult. Because negotiations are difficult, many people fear the negotiation process. Both men and women fear this process, but women—even more than men—are especially prone to fear it,<sup>198</sup> since being assertive of one's own needs and asking for concessions is contrary to female gender norms.<sup>199</sup> According to hopefully antiquated norms, women are not supposed to be looking out for their own needs. Rather, they are supposed to be looking out for the needs of others. The needs of their families, their children, their husbands, are supposed to come first. Although these norms are antiquated, people still often react negatively to women who are assertive of their own needs.<sup>200</sup> After a lifetime of such reactions, many women have learned not to be assertive.<sup>201</sup> They then might not read contracts, because they do not feel as if they can negotiate its terms anyway or that they would be punished if they did try to negotiate its terms. They may also be less likely to speak up, if they do read contracts, and they see provisions that are disadvantageous to their interests.

Finally, there are often social norms not to read contracts.<sup>202</sup> Because of these social norms, consumers often re-

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198. L. Babcock, M. Gelfand, D. Small & H. Stayn, *Gender differences in the propensity to initiate negotiations*, SOC. PSYCHOL. & ECON., 239-262 (in D. De Cremer, M. Zeelenberg & J.K. Murnighan eds., 2006).

199. LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

200. H.R. Bowles, L. Babcock & L. Lai, *Social incentives for gender differences in the propensity to initiate negotiations: Sometimes it does hurt to ask*, 103 ORG. BEHAVIOR & HUMAN DECISION PROCESSES, 84 (2007).

201. D.A. Small, M. Gelfand, L. Babcock & H. Gettman, *Who goes to the bargaining table? The influence of gender and framing on the initiation of negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 600 (2007).

202. Evidence that there are social norms not to read contracts can be seen from the fact that it takes more time to read documents than the time that is scheduled to do so; *Castellana v. Conyers Toyota, Inc.* 407 S.E.2d 64 (Ga. App., 1991). We made this social norm clear to the participants in the Fraud Simulation described in Part III by having participants stand when they were asked to sign the consent form and by turning the page to the third page where they were asked to sign.

ceive social signals that they are expected not to read and that reading is socially inappropriate. A huge literature in social psychology has documented the ways in which expectations shape behavior causing people to conform to expectations.<sup>203</sup> In contexts where contracts are supposed to be signed, the expectation that a person should not read is signaled in many ways. A meeting to sign contracts might be scheduled to last an hour, where the mortgage broker chats with the borrower for thirty minutes or more on other matters and then towards the end of the meeting presents the borrower with a pile of mortgage documents to sign that run approximately one hundred pages.<sup>204</sup> Or there might be a long line at a car rental office so that reading the lease would be rude to other customers, making them wait, and delaying their—and their children's—vacation plans. The expectation not to read can also be signaled when would-be defrauders explain clauses while pointing to the appropriate sections of the contract but flip the page before there is time to read those sections and hold the document open turned directly to the signature page for them to sign.<sup>205</sup> If a consumer insists upon reading the contract, the signal that they are acting inappropriately might be signaled

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203. M. Snyder, *When belief creates reality*, 18 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 247 (1984); M. Snyder & W.B. Swann, *Behavioral confirmation in social interaction: From social perception to social reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148 (1978); S.C. Jones & D. Panitch, *The self-fulfilling prophecy and interpersonal attraction*, J. EXPERIMENTAL SOC. PSYCHOL. 356 (1971); D.M. Kuhlman & D. Wimberley, *Expectations of choice behavior held by cooperators, competitors, and individualists across four classes of experimental game*, J. PERSONALITY & SOC. PSYCHOL. 81 (1976); R. ROSENTHAL, ON THE SOCIAL PSYCHOLOGY OF THE SELF-FULFILLING PROPHECY: FURTHER EVIDENCE FOR PYGMALION EFFECTS AND THEIR MEDIATING MECHANISMS (1974).

204. See *supra* note 157.

205. Another technique some mortgage brokers were trained to use was to purposely induce the borrower to notice and raise one issue on a page that could be very well explained by the mortgage broker in order to cause the borrower to not notice other issues on that page that were problematic. ("Although I never did this, we were taught to raise objections [in the mind of the borrower, but on an innocuous point] in order to divert the consumer's attention from the prepayment disclosures"); see also Fran Silverman, *Cracking Down on Unethical Lawyers*, N.Y. Times, Feb. 27, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9E06E6DE173DF934A15751C0A9639C8B63> (lawyers implicated in closing fraud). Greg Farrell, *Las Vegas Called "Mortgage Fraud Ground Zero,"* USA Today, June 3, 2008, [http://www.usatoday.com/money/economy/housing/2008-06-02-mortgage-fraud-las-vegas\\_N.htm](http://www.usatoday.com/money/economy/housing/2008-06-02-mortgage-fraud-las-vegas_N.htm) (professionals can not resist fraud).

by sighs, blank looks around the room that signal boredom, and fidgeting.<sup>206</sup> After sitting through several such settings, consumers will learn that they are expected not to read contracts<sup>207</sup>.

Those who argue in favor of reasonable reliance requirements often state that one of their goals is to change these social norms. In our view, such a change is unlikely, unless all of the other cognitive and social psychological barriers we have discussed also change, including changes to the legal system so that precise legal language that lay people have difficulty understanding would no longer be necessary; the education of lay people to be aware of relevant rules of law, rules of construction, and of the risks that can arise in the contemplated transaction (or their representation by attorneys in consumer transactions); changes to the social system so that reading contracts would not be perceived as signs of mistrust; and indeed, changes to the human cognitive system itself so that people would not have confirmation biases or fall prey to sunk cost effects. To say that we are skeptical that such wide-ranging changes are possible would be an understatement. Furthermore, it is not even clear to us that such a change in social norms would even be desirable. Contracts need precision that only legal language can provide, and the time and economic costs of reading all contracts in their entirety would be enor-

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206. Title companies usually allot only a one-hour period for a home loan closing (and as little as one-half hour during the boom period of home loans), yet it would take at least several hours to the better part of a day to read the approximately 100 pages of loan documents. The title company's profitability is based in part on completing the loan closing as quickly as possible, so title company agents would at most provide general comments on the voluminous documents and did not encourage the borrowers to read through them. Mr. Levine also noted that when the title agent does the closing, the agent has a high incentive to see that the loan closes (i.e., that the consumer not read and see something problematic and then choose to rescind), since the title company is only paid the insurance premium if the loan closes. Both of these issues may explain the opposition expressed by title companies to the recent Housing and Urban Development ("HUD") proposed regulation requiring the closing agent to read a lengthy closing script to borrowers to try to better assure that they truly understand the terms of their loan agreement. Real Estate Settlement Procedures Act ("RESPA"): Rule To Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68,204-01 (Nov. 17, 2008) (to be codified at 24 C.F.R. pt. 3500).

207. B.F. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1965).

mous, as would the economic cost of trying to train laypeople to know what a lawyer would know.<sup>208</sup> Another consideration is the social costs on our culture of requiring people to be skeptical of each other.

To summarize, in this Part II, we identified numerous cognitive and social psychological reasons why consumers fail to read or thoroughly understand the contracts they sign. Some of these reasons relate to user-unfriendly features of contracts and the fact that many consumers lack the contractual schemas or knowledge structures needed to comprehend contracts, leading to systematic misinterpretation of contractual provisions and often inaccurate, default assumptions of how contractual provisions are likely to be structured. Because consumers typically read contracts after listening to salespeople's accurate or inaccurate descriptions of contractual provisions, there will sometimes be positive confirmation biases in how consumers interpret contracts and consumers will often accept senseless explanations. We also described how consumers often cannot foresee ill effects that a contract might create; they, therefore, might have no misgivings about signing a contract. Alternatively, because they cannot imagine what potential ill effects might be, they might assume that any such ill effects are not likely to be worth the time and effort that would be required to overcome the cognitive and social psychological difficulties that they face. Even if they manage to foresee the possibility of a few potential negative consequences, be-

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208. In applying a cost-benefit analysis to the idea of addressing the fraud issue by having consumers be represented by attorneys in various consumer transactions, one would imagine that the costs would far outweigh the benefits for the typical consumer transaction, but it may be beneficial for larger consumer transactions, such as a purchase of a home or a home loan. See Debra Pogrud Stark, *Unmasking The Predatory Loan In Sheep's Clothing: A Legislative Proposal*, 21 HARV. BLACKLETTER L.J. 129, 130-31 (2005); Stark, *supra* note 127; Janet Kennedy Dawson, *The Role Of Laypersons In The Closing of Residential Real Estate Transactions: North Carolina's New Approach*, 7 N.C. Banking Inst. 277 (2003) (economic comparison of different approaches); Joyce Palomar, *The War Between Attorneys And Lay Conveyances—Empirical Evidence Says "Cease Fire,"* 31 CONN. L. REV. 423 (1999) (using an attorney in real estate closings); Melissa K. Walker, *Comment: Sharing Their Piece Of The Real Estate Pie: An Analysis Of The Necessity Of Lawyers At Residential Real Estate Closings In The Context Of The Adoption Of Recent Opinions Of The North Carolina State Bar*, 26 CAMPBELL L. REV. 59 (2004) (North Carolina joins states not requiring attorney's physical presence at real estate closings).

cause of sunk cost effects, once they have invested even a small amount of time and effort pursuing an agreement, they will often be overly optimistic in assessing the probability of those negative consequences. By the time consumers have reached the stage when they are ready to sign a contract, they have also typically developed a level of possibly misplaced trust in the would-be defrauders due to various factors, which create a strong motivation to trust. Furthermore, many contractual provisions are not negotiable, so consumers may fail to see the utility of reading. Indeed, a rational cost-benefit analysis might recommend against reading extremely long and complicated contracts in those cases when there appears to be no alternative but to enter into the agreement and suffer whatever negative consequences might come. Finally, there is often a social norm not to read contracts and this social expectation creates a situation wherein consumers receive social signals that they ought not to read.

Although each of these effects and explanations (together we refer to them as the "Psychological Barriers to Authentic Contractual Assent") provides a plausible explanation for why people fail to read or understand the contracts they sign, in Part III, we test the relative strength of each of them in a fraud simulation study and follow-up questionnaire where people self-reported on why they failed to read a document that they signed.

### III.

#### FRAUD SIMULATION STUDY AND FOLLOW-UP SURVEY

##### A. *Method of Fraud Simulation Study and Follow-up Survey*

##### 1. *Participants*

The participants were ninety-one undergraduate students enrolled in an introductory psychology course. They participated to fulfill a course requirement wherein students learn how psychological research is conducted by becoming subjects of psychological research. Students have a variety of options to fulfill this course requirement, including options wherein they do not participate in research studies, so they were in no way obligated to participate in this particular study.

## 2. *Materials and Procedure*

Students participated in this study as one study within a series of studies conducted in a single session. After completing the prior studies, participants were led to an adjacent room. Both the participant and the researcher remained standing. The researcher told participants that we needed them to sign a form (the bogus consent form) consenting to being a participant in the next study which would take approximately five minutes. The researcher inaccurately described the contents of this consent form, indicated that it contained a lot of boilerplate, stated that the study in which they were about to participate would take only approximately five additional minutes, that all of these studies that they were participating in should have only taken approximately one hour to complete, and that they would receive one hour's credit. The researcher then asked whether there were any questions. Few participants took advantage of this opportunity to ask questions. If participants asked, "what else is in the consent form?" or "what is in the boilerplate?" the researcher was instructed to answer, "the consent form covers things like the importance of consent and how the data will be used after the study is completed. It also says that you can choose to participate or not to participate in this study, and you can change your mind later and leave the study if you want, and there will be no negative consequences."

If participants had no questions, the researcher turned the consent form to page 3 (described below), said, "please sign here and then we can begin," and handed the bogus consent form to the participant. This form was placed on a hard-backed surface so that participants could easily sign it.

The bogus consent form was three pages long. The first two pages contained the body of the form typed out single-spaced in Times New Roman 11-point font. It started innocently by describing the purpose of the experiments in which they were participating. In addition to describing the purposes of the previous studies in which they had participated, the first paragraph of this bogus consent form informed participants that we were studying the psychological reasons why people sometimes become victims of fraud. It explicitly laid out the fact that we were asking them to sign this contract so that we could study this question. The text clarified that they did not

need to sign to participate and that we were only asking them to sign to see whether they read contracts and consent forms.

The second paragraph was a long-winded explanation of informed consent, but buried three-quarters of the way through this paragraph, was a sentence suggesting that participants should not sign this consent form as its terms were clearly not in their best interests. The third and fourth paragraphs described unproblematic aspects of studies typically conducted at the university. Buried within the fifth paragraph, however, were clauses that were certain to be unacceptable if read by participants. In particular, these clauses committed participants to administering electric shocks to fellow participants, if instructed to do so, even if that participant screamed, cried, and asked for medical assistance. It also required participants to do push-ups if the experimenter instructed them to do so. Contrary to human-subject protection guidelines, the form required participants to remain in the laboratory until and unless the experimenter allowed them to leave.

The sixth paragraph also contained clauses that would be problematic to participants if they had read it. In particular, these clauses required students who signed the form to participate in any future studies that Dr. Choplin (the second author of this Article) would conduct at DePaul University with or without credit in their undergraduate courses and with or without any compensation for their time. This paragraph also contradicted verbal assurances by explicitly stating that there was no guarantee that they would receive credit of any kind in any of their courses for the time that they had already spent participating in research.

Although the problematic clauses were embedded within the first two pages, the consent form was opened to page 3 when it was handed to participants. Minimal text was placed on the third page, but this text was self-serving to the party needing to obtain "informed" consent. It had a bolded heading across it saying, "Statement of Consent." There were three sentences that read: "I have read the above information. I have all my questions answered. I consent to be in this study." Finally, there was a line on which they were to sign.

The researcher noted whether participants did not even look at the bogus consent form, looked so briefly that they



could not have read it, skimmed enough to get a vague idea about some provisions, read parts but skimmed the rest, or read the bogus consent form in its entirety. The researcher also timed how long participants looked at the bogus consent form.

After participants had either signed or not signed the consent form and returned it to the researcher, the researcher debriefed them. Participants were told that the goal of this study was to understand why people fail to read the contracts that they sign even though this failure often leaves them vulnerable to fraud. Participants were informed that the contract they had been given was bogus and that we asked them to sign it to investigate whether and when people read contracts. The researcher demonstrated that signing this form was not in the participants' interests by pointing to the problematic provisions, but reassured participants that they should not worry as the problematic provisions would not be enforced. The researcher then tore the consent form in half.

The DePaul University Institutional Review Board which monitors all research done on human participants at DePaul University, with the goal of protecting research participants from abuse, required us to finish this study by asking participants for permission to use their data. This requirement turned out to be fortuitous as it allowed us to investigate whether people might learn to read contracts after being deceived once or whether they would persevere and continue to fail to read contracts. Participants were verbally assured that their data could help us identify factors that make people vulnerable to fraud, but that we need their permission to use their results in our study and that we also wanted them to complete a survey. Participants were also informed that if they granted permission, we would keep their results and there would be no identifying information attached to their data so no one could identify their data as theirs. If they did not grant permission, their records would be discarded.

Participants were then asked to read the actual consent form and sign it. The researcher noted whether participants did not even look at this actual consent form, looked so briefly that they could not have read it, skimmed enough to get a vague idea about some provisions, read parts but skimmed the rest, or read the actual consent form in its entirety. The re-

searcher also timed how long participants looked at the actual consent form.

After participants signed the actual consent form, the researcher gave participants a survey to fill out. This survey queried participants who signed the bogus consent form about the reasons why they failed to read it by asking them to rate their agreement with sentences of the form, "I didn't read the bogus consent form, because . . . ," on a 5-point rating scale where 1 represented "do not agree at all" and 5 represented "agree completely." The complete list of sentences used in this survey is presented in Table 2.

### B. *Results of Fraud Simulation Study*

The results are presented in Table 1. Contrary to the assumptions underlying some court decisions discussed in Part I which maintained that no "reasonable" party should sign contracts without first reading their provisions, eighty-seven out of ninety-one participants, 95.6 percent, signed the bogus consent form, which included some terms one might find in a contract, such as the amount of course credit the participant would receive for her participation in the study. Only four participants read enough of the bogus consent form to detect the fraud. Of those who signed the bogus consent form, 86.2 percent did not even look at the consent form and another 10.3 percent looked so briefly that they could not have read it. Very few read any provisions or even skimmed enough to get a vague idea of those provisions. The average time that these participants spent looking at the bogus consent form was 2.0 seconds. By contrast, of the four participants who detected the fraud and refused to sign the bogus consent form, two read the bogus consent form in its entirety and the other two read some of the provisions and skimmed the rest. The average time that these four participants spent looking at the bogus consent form was 3 minutes and 12.5 seconds, which was statistically greater than the time spent by the other eighty-seven participants ( $t[89]=15.28, p<.01$ ).

Table 1 provides the results of the fraud simulation study in which 95.6 percent of participants signed the bogus consent form after failing to read it. Many also failed to read the actual consent form. In addition, many participants failed to read the actual consent form even after becoming simulated victims of

fraud. Of the eighty-seven participants who signed the bogus consent form, 17.2 percent did not even look at the actual consent form, another 18.4 percent looked so briefly that they could not have read it, and 21.8 percent only skimmed enough to get a vague idea of some of the provisions. The remaining 42.5 percent apparently learned that they ought to spend more time reading: 20.7 percent read some provisions in full and skimmed the rest, while 21.8 percent read the actual consent form in its entirety. These eighty-seven participants spent an average of 16.0 seconds looking at the actual consent form which was statistically greater than the average of 2.0 seconds spent looking at the bogus consent form ( $t[86]=5.71$ ,  $p<.01$ ). By contrast, the four participants who read enough of the bogus consent form to detect the fraud also read at least some of the provisions of the actual consent form and skimmed the rest or read the actual consent form in its entirety. These four participants spent an average of 51.5 seconds looking at the actual consent form which was statistically greater than the average of 16.0 seconds that the other eighty-seven participants spent looking at the actual consent form ( $t[89]=3.15$ ,  $p<.01$ ).

TABLE 1.  
FRAUD SIMULATION STUDY

<b>General Tallies</b> (total number of participants = 91)	Participants who signed bogus consent form	Participants who did not sign bogus consent form
Number of Participants	87	4
Percentage of participants	95.6%	4.4%

<b>Bogus Consent Form</b>	Participants who signed bogus consent form	Participants who did not sign bogus consent form
Percentage of participants who did not even look at consent form	86.2%	0%
Percentage who looked so briefly that they could not have read consent form	10.3%	0%
Percentage who skimmed form enough to get a vague idea about some provisions	2.3%	0%
Percentage who read parts of form but skimmed the rest	1.1%	50%
Percentage who read form in its entirety	0%	50%
Average time spent looking at bogus consent form	2.0 seconds	192.5 seconds (3 minutes 12.5 seconds)

<b>Actual Consent Form</b>	Participants who signed bogus consent form	Participants who did not sign bogus consent form
Percentage who did not even look at consent form	17.2%	0%
Percentage who looked so briefly that they could not have read consent form	18.4%	0%
Percentage who skimmed form enough to get a vague idea about some provisions	21.8%	0%
Percentage who read parts of form but skimmed the rest	20.7%	75%
Percentage who read form in its entirety	21.8%	25%
Average time spent looking at bogus consent form	16.0 seconds	51.5 seconds

### C. *Results of Survey Following the Fraud Simulation Study*

The results of the survey following the fraud simulation study are presented in Table 2. A word of caution in interpreting these results is appropriate. People's abilities to introspect and know their own motivational states are notoriously imprecise. As a result, their answers to this survey should be interpreted only as their own, likely imprecise, beliefs about why they unwisely signed the consent form. Their answers should not in any way be construed as completely accurate statements about their motivational states. For example, the first question under social norms in Table 2 asked participants whether they agreed with the statement that they would have read the bogus consent form, if the researcher had suggested that they read it before signing it. Participants rated themselves in relatively high agreement with this statement giving it a rating of 3.7 on the scale where 1 represented "do not agree at all" and 5 represented "agree completely." Anecdotal evidence from other researchers at the university suggests that participants are likely inaccurate in this assessment. Researchers often suggest that participants read these consent forms, yet replicating the results we are presenting here participants rarely read them. If participants are inaccurate in their assessment of this statement, they might very likely be inaccurate in their assessment of the other statements as well. With this qualification in mind, we present these results not as completely accurate statements about participants' motivations, but as participants' beliefs about their motivations.

Of all of the issues addressed in the survey, participants rated themselves in highest agreement with the statement that they did not read the bogus consent form, because they trusted what the researcher had told them was in the form. They gave this statement a 4.7, very close to 5 representing complete agreement. Likewise, the statement with which they rated themselves in second highest agreement addressed their trust in DePaul University as an institution and in federal regulations designed to protect them. In particular, this statement asserted that they did not read the bogus consent form, because they presumed that there could not have been anything problematic in the form because all experiments at DePaul must conform to federal standards and be approved by the Institutional Review Board. Participants gave this statement a rat-

ing of 4.1. In participants' own narrative about the situation then, the most important issue is trust. They did not read the consent form, because they trusted the researcher, the university, and federal institutions. If this narrative is accurate, it would suggest that the best way to induce people to read consent forms and contracts more generally would be to undermine their trust in those with whom they interact and undermine their trust in institutions. Doing so, however, may have costly and undesirable side effects which outweigh the benefits.

Participants also rated themselves in relatively high agreement with statements declaring that they did not read the bogus consent form because it was long (average rating of 3.1), it was boring (average rating of 3.3), they were lazy (average rating of 3.9), and they wanted to get on with their day as soon as possible (average rating of 3.8). Participants did not believe that difficulties in comprehending the consent form, their inability to negotiate, or the desire to preserve their reputations as good and trustworthy participants discouraged them from reading the consent form (average ratings in the 2's). As discussed above, participants did believe that verbal instructions create social norms. In particular, they thought that they would have read the consent form, if the researcher had suggested that they read it. They did not believe or were unaware of other factors that might create social norms such as being rushed (average rating of 2.9) or standing up (average rating of 2.7). Participants did believe that their default assumptions had a moderate effect on their decisions not to read the consent form. Participants presumed that this consent form would read the same as other consent forms that they claimed to have read (average rating of 3.1), and they did not think it would contain anything important for them to know (average rating of 3.3).

TABLE 2.

## RESULTS OF FRAUD SIMULATION FOLLOW-UP SURVEY

Key: Participants rated their agreement with each sentence on a 5-point rating scale where 1 represented "do not agree at all" and 5 represented "agree completely"

	Sentence	Rated Agreement
<b>User-Unfriendly Features</b>	I didn't read the bogus consent form because it was written in a small font size (I would have read the bogus consent form if it had been written in a large font size).	2.0
	I didn't read the bogus consent form because it was written in long paragraphs (I would have read the bogus consent form if it had been written in shorter paragraphs).	2.4
	I didn't read the bogus consent form because the bogus consent form was so long (I would have read the bogus consent form if it were shorter).	3.1
<b>Time and Effort Constraints</b>	I didn't read the bogus consent form because I wanted to leave the laboratory and get on with my day as soon as possible.	3.8
	I didn't read the bogus consent form because it was boring.	3.3
	I didn't read the bogus consent form because I was lazy.	3.9
<b>Contract Comprehension</b>	I didn't read the bogus consent form because I didn't feel as if I would understand it anyway (I would have read the bogus consent form if I would have been able to understand it).	2.1
	I didn't read the bogus consent form because it was written in legalese (I would have read the bogus consent form if it had been written in plain English).	2.0
	I didn't read the bogus consent form because I wouldn't have known what was important anyway (I would have read the bogus consent form if I had known what was important).	2.6

	I didn't read the bogus consent form because I didn't even know what I should have been looking for (I would have read the bogus consent form if I knew what I should have been looking for	2.8
<b>Default Assumptions of Contractual Content</b>	I didn't read the bogus consent form because I have read other consent forms, and I presumed they all read the same.	3.1
	I didn't read the bogus consent form because I didn't think it contained anything important for me to know or agree to.	3.3
<b>Trust of Deceiver</b>	I didn't read the bogus consent form because I trusted what the researcher told me was in the form.	4.7
	I didn't read the bogus consent form because reading the bogus consent form would have been like telling the research that I did not trust her or him.	3.2
	I didn't read the bogus consent form because reading the bogus consent form would have been like I was double-checking what the researcher had told me was in the form.	3.8
	I didn't read the bogus consent form because I presumed that there was nothing problematic in the form because all experiments at DePaul must confirm with federal standards and be approved by the IRB.	4.1
<b>Persevering Trustworthy Reputation</b>	I didn't read the bogus consent form because I feared that if I had read the bogus consent form then the researcher might have thought that I was untrustworthy or that I was a poor participant.	2.3
	I didn't read the bogus consent form because I would have been embarrassed to read it.	2.1
	I didn't want to question the researcher because I was dependent upon her or him for class research participation credit.	2.9



<b>Negotiation</b>	I didn't read the bogus consent form because I didn't feel as if I could negotiate anything different anyway.	2.7
<b>Social Norms</b>	I didn't read the bogus consent form because the researcher asked me to sign it after explaining it to me and did not suggest that I read it first (I would have read the bogus consent form if the researcher had suggested that I read it before signing it).	3.7
	I didn't read the bogus consent form because I felt rushed (I would have read the bogus consent form if I had not been rushed).	2.9
	I didn't read the bogus consent form because I was standing up (I would have read the bogus consent form if I had been sitting down).	2.7

#### IV.

##### SURVEY REGARDING CONTRACTS AND EXPECTATIONS

##### A. *Method of Survey Regarding Contracts and Expectations*

##### 1. *Participants*

The participants were one hundred and six people approached by the researcher in public locations in the Chicago metropolitan area (the public sample) and one hundred and one first-year law students enrolled in classes at the John Marshall Law School in Chicago, Illinois. The survey of law students was conducted during class time in the first week of classes. Participation was voluntary on the part of both groups. The public sample was 59.4 percent female and 40.6 percent male; 60.4 percent self-identified their ethnicity as White, 16.0 percent identified as Hispanic, 9.4 percent self-identified as African American, 6.6 percent self-identified as Asian/Pacific Islander, no participants self-identified as Native American, and two participants did not identify their ethnicity. The average age was 24.5 years old. Among the public sample, 34.0 percent reported being college graduates, 47.2 percent reported having some college, 8.5 percent reported only having a high school diploma, 6.6 percent reported having a master's de-

gree, only one participant reported not having a high school diploma, only one participant reported having a Ph.D. or equivalent, and two participants did not identify their level of education. Approximately one-third, 28.3 percent, of the public sample participants self-reported their household incomes as less than \$30,000 per year, 19.8 percent self-identified their household incomes as \$30,000 to \$50,000 per year, 24.5 percent self-reported their household incomes as \$50,000 to \$100,000 per year, 20.8 percent self-reported their household incomes as \$100,000 to \$200,000 per year, 2.8 percent self-reported their household incomes as more than \$200,000, and four participants did not identify their household income. We did not collect demographic data on the first-year law students.

## 2. *Methods and Procedure*

We asked each of the two hundred and seven participants to complete a ten-question survey designed to investigate the extent to which they self-report reading contracts and their expectations regarding verbal representations, the written provisions of a contract, and discrepancies between the two. The first six questions asked them whether they read contracts in a variety of situations including car rental agreements (Question 1), the terms enclosed in a package when a good is delivered (Question 2),<sup>209</sup> the terms of software use when software is downloaded from the internet (Question 3), the lease agreement when they have rented apartments (Question 4), the terms of the loan documents when they have mortgaged or refinanced the mortgage on their homes (Question 5), and the purchase agreement when they have purchased a house or condominium (Question 6). For each of these six questions, participants either indicated that “yes,” they did read contracts in this situation, “no,” they did not, or “n/a,” the question was not applicable because they had never been in a situation where they would have been expected to read these contracts. If participants indicated that “yes,” they read the contracts in these situations, they were asked to indicate whether or not

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209. See Robert A. Hillman, *Symposium: A Tribute To Professor Joseph M. Perillo: Rolling Contracts*, 71 *FORDHAM L. REV.* 743 (2002-2003) (Question 2 was modeled after the survey that Robert Hillman gave to his students that he reported on).

they read all of the terms of the contracts. We asked Question 2 (i.e., the question that asked participants whether they read the terms enclosed in a package of a good that is delivered to them before using the goods), in part, because we wanted to investigate whether we would replicate the results in a survey of law students undertaken by Robert Hillman discussed in "Symposium: A Tribute To Professor Joseph M. Perillo: Rolling Contracts,"<sup>210</sup> finding that only about 25 percent of law students report reading these terms. We were concerned that this estimate of the proportion of people reading these terms might be an over estimate. In particular, we were concerned that the proportion of people reading these terms might be lower among the general population than among law students. In addition, we were concerned that this question might be inherently vague in that the word "terms" could refer to either the legal terms or the owner's manual which instructs consumers how to use the good. If participants interpreted the word "terms" to indicate the owner's manual, even fewer people would be reading the legal terms. To disambiguate these two possible interpretations, the last question of the survey (Question 10) asked participants whether they interpreted the word "terms" as the legal terms, the owner's manual, or both.

Questions 7 through 9 asked participants about their expectations regarding verbal representations, the written provisions of a contract, and possible discrepancies between the two. They were asked to answer these questions based on their own experiences and views and not what they thought the law required. Question 7 asked them whether in their view a company should stand behind a verbal representation (such as the length of the warranty for the product) made to them by the company's sales person. Question 8 asked them whether they would expect that a sales person's verbal representation about a product would be consistent with the terms in the sales agreement. Question 9 asked them whether a company should honor the verbal representations made by a sales person when the consumer has not read the terms of the sales agreement and the verbal representations are inconsistent with the sales agreement.

Finally, we asked the public sample, but not the first-year law students, to report demographic information. We asked

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210. *Id.*

them to report their gender (male or female), ethnicity (White, African American, Asian/Pacific Islander, Native American, Hispanic, or other), age, annual household income (less than \$30,000; \$30,001 to \$50,000; \$50,001 to \$100,000; \$100,001 to \$200,000; more than \$200,000), and level of education (did not graduate high school, high school graduate, some college, college graduate, master's degree, Ph.D. degree or equivalent).

### B. Results

Question 1 asked participants whether they read the terms of car rental agreements before signing the terms and renting a car. A sizable minority of our public sample (37.7 percent, the median age was 22) and the first-year law students (19.8 percent) reported that this question was not applicable to them presumably because they had never rented a car. Of the 62.3 percent of the public sample and the 80.2 percent of law students who had rented cars, only 55.7 percent of the public sample and 56.8 percent of the law students reported reading the terms of the rental agreement. This statistic leaves 44.3 percent of the public sample and 43.2 percent of law students who had rented cars admitting that they did not read any of the terms. Furthermore, not all of those who reported reading terms reported reading all of the terms. In fact, 48.6 percent of the public sample and 78.6 percent of the law students who reported reading the terms admitted that they did not read all of the terms, leaving only 28.7 percent of the public sample and 12.2 percent of law students who reported reading all of the terms.

We were surprised by how low these reading rates were since car rental agreements are typically not excessively long (typically only a few pages long). However, the social setting in which people rent cars, wherein people wait in long lines, sales people are rushing to process rentals, and people are waiting, might discourage people from reading these rental agreements. The social atmosphere is hurried and the salesperson and the people waiting behind them in line might be sending people social cues that reading the entire contract, thus making others wait to receive service, is not socially appropriate.<sup>211</sup>

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211. This hypothesis could be tested in several ways. It could be tested in an observational study investigating whether consumers in line at a car

In addition, it is common for the salesperson to summarize what certain portions of the rental agreement provides, directing the customer to initial certain sections and then sign in full at the end of the form. This sort of direction might be a further inducement for consumers to not read most of the contract form.<sup>212</sup> In addition, we expected that law students—being somewhat legally minded—would be more likely to read than the public sample when, it turns out, law students were less likely. There are, of course, many other factors that could explain the low reading rates that were discussed in Part II and reported upon in Part III, such as misplaced trust, default assumptions, and time/efforts considerations.

Although rushed social settings and social cues not to read likely discourage people from reading these contracts, these factors cannot be the only factor that causes people to fail to read contracts, as evidenced by the results of Questions 2 and 3. Question 2 asked participants whether they read the terms enclosed in the package when a good is delivered to them before they use the good. Only two people in our public sample and none of the law students claimed that this question was not applicable to them. However, of the remaining participants, 71.3 percent of the law students admitted that they did not read any terms. Of the 28.7 percent of law students who did read some terms, only 19.2 percent reported that they read all of the terms. That is, only 5.5 percent of law students (19.2 percent of 28.7 percent) reported reading all of the terms. We were concerned, however, that this 5.5 percent figure might overestimate the proportion of law students who read these terms, because the question was ambiguous in that the word “terms” could be interpreted as either the legal terms or as the owner’s manual or both. We investigated how law

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rental company spend less time reading the car rental contract when there are people in line behind them than when there are not. It could also be tested in an experiment wherein confederates would get in line at a car rental company behind random consumers to test whether these consumers would spend less time reading the car rental contract when there was a confederate in line behind them than when there was not.

212. This hypothesis could be tested in an experiment in which the salesperson at a car rental company either summarizes the terms of the contract or simply hands the contract to the consumer and asks them to read it. We suspect that consumers would spend more time reading the contract when it is not summarized for them.

students interpreted this word by asking them whether they thought it referred to the legal terms or the owner's manual or both in Question 10. Of the 5.5 percent of law students who reported reading all of the terms, 20 percent interpreted the word "terms" to refer only to the owner's manual so only 4.4 percent of law students (a group we might expect to be more legally savvy than the general population) reported that they read all of these legal terms. We were concerned that the proportion of people reading these terms might even be lower in the general population. However, fewer participants from the public sample than from the law student sample admitted that they did not read any terms (62.1 percent rather than 71.3 percent). Of the 37.9 percent of the public sample who claimed to read some terms, only 30.0 percent reported that they read all of the terms. That is, only 11.4 percent of the public sample (30.0 percent of 37.9 percent) reported reading all of the terms; and of this, 11.4 percent, 18.2 percent interpreted the word "terms" to refer only to the owner's manual, leaving 9.3 percent of the public sample who reported that they read all of the legal terms. While this proportion was larger than the proportion of law students who claimed to read all of the legal terms, it is still exceptionally low.

The situation is no better when it comes to reading the terms of use for software downloaded from the internet (Question 3). None of our participants claimed that this question was not applicable to them. Nevertheless, only 29.7 percent of law students reported reading these terms of use, and only 17.9 percent of those reported that they read all of the terms, leaving only 5.3 percent (17.9 percent of 29.7 percent) reporting to have read all of the terms. Likewise, only 23.8 percent of the public sample reported reading these terms of use and only 19.2 percent of those reported that they read all of the terms, leaving only 4.6 percent of the public sample (19.2 percent of 23.8 percent) who reported reading all of the terms. Both the terms enclosed in a package when a good is delivered and the terms of use for software downloaded from the internet are typically read in the privacy of one's own home where the social setting is not typically overly rushed and there are few, if any, social cues that one should not spend the time to read. Nevertheless, both of our samples admitted that they failed to read contracts in these settings.

Participants from both our sample of law students and our sample of the public reported that they were more likely to read contracts when there was more at stake as in the case of apartment rental lease agreements (Question 4), mortgages (Question 5), and real estate purchase agreements (Question 6). Even in these cases where there is a lot at stake, however, not everyone reported reading contracts. The highest rates of reading were found when we asked law students whether they read the terms of the lease agreement when they rent an apartment (Question 4). Of the 89.1 percent of law students who had rented an apartment, 98.9 percent reported that they read the lease agreement and of these 81.2 percent reported that they read all of the terms. So, of the law students who had rented an apartment, 80.9 percent reported reading the entire lease agreement (this number may be inflated because shortly before the law students participated in the survey, the students' class covered the topic of the importance of carefully reading lease agreements). This proportion was lower among the public sample. Of the 90.5 percent of the public sample who had rented an apartment, 93.8 percent reported that they read the lease agreement, and of these, 61.1 percent reported that they read all of the terms. So of the public sample who had rented an apartment, 57.3 percent reported reading the entire lease agreement.

More is at stake when people purchase a home than when they rent an apartment. Surprisingly, however, the proportion of our law student sample who reported reading the purchase agreement when they purchased a home was smaller than the proportion of our law student sample who reported reading lease agreements when they rented apartments. Of the 32.7 percent of law students who had purchased a home, 12.1 percent admitted that they did not read the purchase agreement (Question 6), leaving only 87.9 percent who reported reading it. And of these 87.9 percent who reported reading it, only 66.7 percent reported reading all of the terms of the purchase agreement, leaving only 58.6 percent of the law students who had purchased a home reporting that they need all of the terms of the purchase agreement. This proportion is similar to the proportion of the public sample who reported reading the entire purchase agreement. Of the 33.0 percent of the public sample who had purchased a home, 22.9 percent admitted that they did not read the purchase agreement, leaving 77.1

percent who reported reading it. And of these 77.1 percent, 74.1 percent reported reading all of the terms, leaving only 57.1 percent of the public sample who had purchased a home reporting that they read all of the terms of the purchase agreement. This proportion of the public sample that reported that they read the purchase agreement when they purchased a home was similar to the proportion of the public sample that reported reading the rental agreement when they rented an apartment.

The situation is even worse for law students who had a mortgage or refinanced the mortgage on their home (Question 5). Of the 33.7 percent of law students who had such a mortgage, 17.6 percent admitted that they did not read the terms on any of the loan documents. Of the 82.4 percent who reported reading the loan documents, 57.7 percent admitted that they did not read all of the terms. So of the law students who had a mortgage on their home, only 47.5 percent reported reading all of the terms of the loan documents. Surprisingly, perhaps, a larger proportion of the public sample reported reading the terms of their loan documents than the law student sample. Of the 31.1 percent of the public sample who had such a mortgage, only 6.1 percent admitted that they did not read the terms on any of the loan documents. Of the 93.9 percent who reported reading the loan documents, only 77.4 percent admitted that they did not read all of the terms, leaving 72.7 percent of the public sample who had a mortgage on their home reporting that they read all of the terms of their loan documents. This self-reported level of the public reading all of the terms of all of their loan documents is highly unlikely to be accurate. We clocked a research assistant and asked him to read through all of the terms of all the FNMAE ("Fannie Mae") loan documents for a typical home loan, and it took him over three hours to do so (and he was a former mortgage broker more familiar with these documents than a person in the general public would be). Perhaps the self-reporting by the public of reading mortgage loan documents was affected by the heightened public attention on predatory loans. It is also possible that the mortgage brokers have given the public the impression that they have read through all of the terms of the loan documents through (i) their summary of those terms for the consumers, (ii) calling the attention of the borrower to



look at some of the terms of these documents, and (iii) and the signing of various pages among the loan documentation.

Even though there is more at stake with a contract to purchase a house compared with a lease of an apartment, it is possible that consumers are more likely to read the lease because there is typically no attorney representing them in connection with entering into a lease, but in some parts of the United States, including Illinois where our study took place, it is more common for home purchasers to be represented by an attorney,<sup>213</sup> and the consumer may feel that in this circumstance they do not need to read the purchase contract.<sup>214</sup> Although consumers are rarely represented by an attorney in refinancing a home loan, it is common for mortgage brokers to act in a fashion that is calculated to cause the consumer to trust the broker and not read the loan documents.<sup>215</sup>

We also investigated whether participants of lower socio-economic status reported that they were less likely to read consumer contracts than participants of higher socio-economic status. To investigate the relationship between education and propensity to read contracts, we coded level of education by coding participants who did not graduate high school as 1's, high school graduates as 2's, participants with some college as 3's, college graduates as 4's, participants with master's degrees as 5's, and participants with Ph.D. degrees or equivalent as 6's. For each participant, we counted the number of types of contracts participants reported reading (car rental contracts, contracts for delivered goods, contracts for downloaded software, apartment rental contracts, mortgage contracts, and house or condominium purchase contracts) and only counted them as reading each type of contract, if they reported reading the entire contract. There was a significant positive correlation between level of education and the number of contracts participants reported reading,  $r=0.468$ ;  $F(1,102)=28.54, p<.01$ , such that persons with higher levels of education were more likely to read the contract. To investigate the relationship between

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213. Debra Poggrund Stark, *Navigating Residential Attorney Approvals: Finding A Better Judicial North Star*, 39 J. Marshall L. Rev. 171 (2006).

214. This hypothesis could be tested by investigating whether consumers are more likely to read purchase contracts if they have an attorney than if they do not.

215. See Stark, *Unmasking the Predatory Loan in Sheep's Clothing: A Legislative Proposal*, *supra* note 208, at 129 n.1 (conversation with mortgage broker).

income and propensity to read contracts, we coded income level by coding participants whose annual household income was less than \$30,000 as 1's; annual incomes between \$30,001 and \$50,000 as 2's; annual incomes between \$50,001 and \$100,000 as 3's; annual incomes between \$100,001 and \$200,000 as 4's; and annual incomes that were more than \$200,000 as 5's. Again for each participant, we counted the number of types of contracts participants reported reading. Like the correlation between education and the number of contracts participants reported reading, there was also a significant positive correlation between income level and the number of contracts participants reported reading,  $r=0.258$ ;  $F(1,100)=7.11, p<.01$  such that persons with higher levels of income were more likely to fully read the contract.<sup>216</sup> Gender had no effect on propensity to read contracts,  $t(104)=0.15, p>.05$ . Whites were not more likely to read contracts than ethnic minorities,  $t(104)=1.41, p>.05$ .

The results of this survey clearly indicated that our participants—both the public sample and the law students—expected companies to stand behind the verbal representations of their sales staff (despite the stereotype of the dishonest sales person). 99 percent of our law students and 97.2 percent of our public sample said that they believe that a company should stand behind the verbal representations of the company's sales staff (Question 7). Similarly, 90.1 percent of our law students and 90.6 percent of our public sample said that they expect that a salesperson's verbal representation would be consistent with the terms in the sales agreement (Question 8). Even when the verbal representations made by sales staff are inconsistent with the sales agreement, 73.3 percent of law students and 80.2 percent of the public sample believed that the company should honor the verbal representations when the consumer has not read the terms of the sales agreement (Question 9).

Although some of the reasons why consumers fail to read contracts are illegitimate (e.g., participants in the follow-up survey of the fraud simulation study gave the statements that

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216. Lower income participants were more likely to report reading parts of contracts such that the correlation between income and reading contracts was not significant, if we count reading any part of the contract as reading the contract,  $r=0.079$ ;  $F(1,100)=0.63, p>.05$ .

they were lazy<sup>217</sup> and wanted to get on with their day<sup>218</sup> relatively high ratings), many of the reasons why consumers fail to read contracts they sign are legitimate. Most of these reasons are outside of their reasonable control. They have no control over the user-unfriendly features of contracts such as the length of contracts or the language in which contracts are written. Indeed, a rational cost-benefit analysis will often recommend against reading extremely long and complicated contracts, because the probability of being defrauded is fortunately often low enough so as to make the time and effort that would be required to read and understand the contract unwarranted. Furthermore, unless we are going to require all consumers to attend law school, consumers cannot be held responsible for the fact that they lack the contractual schemas and knowledge structures needed to comprehend contracts.<sup>219</sup> Nor can they be held responsible for the systematic misinterpretations of contractual provisions and inaccurate, default assumptions of how contractual provisions are likely to be structured that this lack of knowledge produces.<sup>220</sup> Likewise, unless all consumers are going to be afforded the training that lawyers receive to foresee possible ill effects of contractual provisions, we cannot hold consumers responsible for the fact that they cannot foresee all of the possible ill effects that a contract might create. Consumers also should not be held responsible for positive confirmation biases, their natural tendency to accept even senseless explanations that salespeople provide, or sunk cost effects, as psychologists have demonstrated that these phenomena are basic, unalterable

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217. Participants gave the statement that they were lazy an average rating of 3.9 where 5 represented complete agreement.

218. Participants gave the statement that they wanted to get on with their day as soon as possible an average rating of 3.8.

219. Although participants in the fraud simulation study did not believe that difficulties in comprehending the consent form discouraged them from reading the consent form (in the follow-up survey the contract comprehension questions received average ratings in the 2's), participants may have been reticent to answer these questions honestly, and these factors are likely to play a greater role in other contexts.

220. Participants in the fraud simulation study acknowledged that default assumptions played a role in their decisions not to read the consent form. In particular, they acknowledged their assumption that this consent form would read the same as other consent forms that they claimed to have read (average rating of 3.1).

facts about how human cognition and decision making processes operate.<sup>221</sup> Participants in the fraud simulation study primarily attributed their decision not to read the consent form to the trust they placed in the researcher, in the university, and in other regulatory bodies, but consumers should not be held responsible for their misplaced trust especially when trust is so important for the functioning of society. Nor can consumers be held responsible for the fact that there is often a social norm not to read contracts.

### C. *Results of the Reading Contracts Survey*

The proportion of consumers who reported they did not read all of the contractual terms is in black and the proportion who reported they did read all of the contractual terms is in white.

## V.

### PROPOSAL IN LIGHT OF COGNITIVE AND SOCIAL PSYCHOLOGICAL BARRIERS TO AUTHENTIC CONTRACTUAL CONSENT IN THE CONSUMER CONTEXT

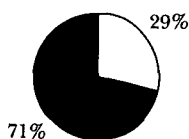
This Article focused on the question of the effect that “no representation/no reliance” type disclaimer clauses in contracts has on a consumer action for fraud under either the common law or a statutory based fraud/deception action. The Article also considered more specific disclaimers that are inconsistent with what a salesperson told a consumer about the product, the service, or the terms of purchase, such as the length of the warranty period. Courts should not treat these disclaimer clauses as a bar to consumers bringing a fraud action under either a common law or a statutory based action in light of the cognitive and social psychological barriers to authentic contractual consent described in this article, as well as the reported high level of consumer expectation that companies will stand behind representations of their salespeople, even if inconsistent with what is contained in the contract.

In the context of a common law action for fraud (which can apply to either consumer or business transactions), if a

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221. See ROBERT B. CIALDINI *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (revised ed. 2008) (1984).

1. Car rental contracts



2. Packaged good terms



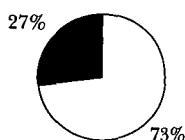
3. Terms on downloading software



4. Apartment rental agreement



5. Mortgage contract



6. Home purchase agreement



7. Average



jurisdiction requires that reliance be “reasonable” or “justifiable,”<sup>222</sup> courts should look to the following factors to determine what weight to place on the disclaimer clause: (i) whether the party alleging fraud contracted on a matter that was part of the party’s business (i.e., a matter with which the

222. 41 states require the reliance be reasonable or justifiable for a common law fraud action. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

plaintiff was very familiar); (ii) whether that party was represented by counsel; (iii) whether the party read the contract; and (iv) whether any of the terms of the contract were, in fact, negotiated. If a person is represented by counsel who reviews the terms of the contract and negotiates those terms, it is the attorney's role (and arguable duty under the obligation to competently represent a client<sup>223</sup>) to show the client the disclaimer clause, to ask whether the client was told anything by the other party that induced the client to enter into the transaction, and then to add any such representations to the written contract. This should lead to a modification of the disclaimer clause, removal of the disclaimer clause, or authentic consent to the disclaimer clause. When persons or entities sign contracts relating to their businesses, after reading and negotiating the terms of a contract with their counsel, (including the presence of the disclaimer clause, especially one that relates to a specific parol representation alleged), it makes sense for the disclaimer clause to bar a claim based on the alleged false parol representation to the contrary.

Conversely, a disclaimer clause in a contract between a merchant and a consumer should not create a bar to a consumer bringing a fraud claim due to the evidence presented in this article that a large percentage of consumers who are unrepresented by counsel fail to carefully read all, or sometimes even any, of the terms of the contracts they sign in a variety of consumer transaction contexts, and equally important, evidence that this failure to read and comprehend is based largely upon matters beyond the reasonable control of the consumer.<sup>224</sup> The consumer would still be required to prove, by a preponderance of the evidence, that a false statement of fact was indeed made, and the party alleging fraud should testify with particularity the alleged oral representation relied on, together with the contextual facts, in sufficient detail for a court to gage their inherent credibility.<sup>225</sup> But the merchant

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223. See Stark, *supra* note 27.

224. See discussion *supra* Part IV (results of the reading contracts survey); discussion *supra* Part III (potential cognitive and social psychological reasons for failing to read contracts); discussion *supra* Part III (follow up survey to the fraud simulation study).

225. See Cirillo, 768 NYS at 768-69 (court stated that if those steps are done, a court should permit a plaintiff to go forward with proof of the fraud notwithstanding existence of a specific disclaimer in the contract form).

will not be able to bar the consumer from trying to prove the false statement based on the disclaimer clause in the contract. Courts need to interpret the “reasonable” or “justifiable” reliance element that is applied in many states’ common law causes of action for fraud to take into account the cognitive and social psychological barriers described in this article to consumers reading and understanding the terms of the contracts they sign. In light of the large percentage of consumers who self-reported not reading all of the terms of the consumer contracts they sign, and the legitimate reasons why consumers do not read all of the terms of these contracts, courts should not find the consumer’s reliance on the false statements of the salesperson to be “unreasonable” or “unjustifiable” When the consumer fails to read the contract. In the rarer situation in which a consumer does see a term in a contract that is contradictory to what the salesperson has told her, this also should not bar a common law fraud claim, since the consumer may still trust what she is told by the salesperson, and salespeople can often explain away any terms that are not in the consumer’s interests.<sup>226</sup> Indeed, sometimes semantically senseless explanations will do the trick.<sup>227</sup>

A consumer might also bring a cause of action under her state’s consumer fraud/deceptive practices type statute, because typically, these statutes make it easier to bring an action than under common law fraud and may permit recovery of attorney’s fees by the consumer if she prevails on her claim,

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226. See, e.g., Ginsburg, 262 Ill. App. (broker lied to prospective home purchaser that railroad line would be coming to the site; home purchaser read the contract which contained a disclaimer clause that no representations were made as to the existing or future plans for a railroad line to the site; home purchaser asked the broker about it and he told her this was an “old form so don’t worry about it” and then showed her a map indicating that the railroad line would be located nearby; home purchaser relied upon what she was told); Devine v. Notter, 753 N.W.2d 557, (Wis. App. 2008) (rev. denied, 2008 WI 122 (2008)) (borrower noticed in the loan documents that repayment would take place at a different time from when he was told; when he asked the lender’s agent about it he was told it did not mean anything and so the borrower went ahead and signed the document trusting what he was told).

227. See E. Langer, A. Blank & B. Chanowitz, *The Mindlessness of Ostensibly Thoughtful Action: The Role of “Placebic” Information in Interpersonal Interaction*, 36 J. OF PERSONALITY AND SOC. PSYCHOL. 635 (1978).

making it economically feasible to bring these claims.<sup>228</sup> For example, under the common law action for fraud (which could apply to any transaction whether by sophisticated business people or between a merchant and a consumer), usually the plaintiff must show that the defendant knew that the statement was false, and as discussed, must show that the reliance by the plaintiff was reasonable or justifiable. But legislatures desired to make it easier for consumers who have entered into a transaction with a merchant to be able to recover when they have been lied to or deceived. Consequently, most of these statutes do not require that the consumer prove that the seller knew the false statement was false.<sup>229</sup> In forty-six states, the statutes do not even expressly require the consumer to prove “reliance” at all, but, instead, most required a showing that the false statement “caused” harm.<sup>230</sup> Although proving causation of harm is similar to proving reliance—especially when a consumer is bringing an individual claim—when a class action fraud claim is brought, it is helpful that the statutes read this way since it reduces the burden in each individual case by not having to show how each particular plaintiff relied on a specific false statement or deceptive practice.<sup>231</sup> The crux of these class action claims is that the company engaged in a pattern of deceptive dealing which caused numerous consumers to suffer losses.<sup>232</sup> The presence of a disclaimer type clause in those cases should have no impact since the two statutorily required elements—(1) a “false” or “deceptive” statement or conduct and (2) “causation of harm”—are still present, notwithstanding the disclaimer clause in the contract.

But a merchant could argue that there was no “legal” causation due to the presence of the disclaimer clause (i.e., that the legal cause of the harm to the consumer was in failing to

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228. See Stark & Choplin, *Does Fraud Pay* *supra* note 19.

229. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

230. *Id.* All but twelve states’ statutes require a showing of harm.

231. See *In re First Alliance Mortgage Co.*, 471 F.3d at 991 (“Class treatment has been permitted in fraud cases where, as in this case, a standardized sales pitch is employed . . . [t]he gravamen of the alleged fraud is not limited to the specific misrepresentations made to bond purchasers . . . The exact wording of the oral misrepresentations, therefore, is not the predominant issue. It is the underlying scheme which demands attention. Each plaintiff is similarly situated with respect to it, and it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again.”).

232. *Id.*



read the contract).<sup>233</sup> In addition, the merchant could argue that since “causation” is so tied to “reliance” that the “causation” element in the statute embraces the “reliance” element from the common law.<sup>234</sup> Indeed, eleven states’ courts have interpreted the express statutory causation element in this manner and in seven of these states extended this interpretation to require “reasonable” or “justifiable” reliance. Schwartz and Silverman, in their article “Common-Sense Construction of Consumer Protection Acts”<sup>235</sup> made this very argument and urged that courts interpret the consumer fraud statutes in this fashion.<sup>236</sup> The American Legislative Exchange Council, a group of state legislators identified as bi-partisan, but comprised mainly of Republican members,<sup>237</sup> has drafted a model consumer fraud statute that specifically requires not only that the consumer prove reliance on the false statement, but also that this reliance be proven to be “reasonable.”<sup>238</sup> Currently, no state consumer fraud type statutes expressly require that the consumer prove reasonable reliance.<sup>239</sup>

This article argues that policy considerations based on the goal of protecting consumers from deceptive trade practices and the psychological realities described in this article militate against interpreting the consumer fraud type statutes to impliedly require reasonable reliance or to modify the statutes to expressly require reasonable reliance. The legislatures in the seven states where their courts have taken this approach should amend their statutes to clarify that there is no requirement to show “reasonable” reliance at all and no requirement in a class action lawsuit for an individualized showing of reliance. Schwartz and Silverman make a good case for clarifying that in an individual case actual reliance should be a required element, but provide no support for requiring reasonable reli-

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233. See discussion *supra* Part II (legal causation versus a “but for” type causation) and *supra* note 18.

234. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

235. Schwartz & Silverman *supra* note 22.

236. *Id.* at 52-53.

237. See the list of ALEC Public Sector State Chairs on the ALEC website as of Nov. 2, 2006 reflecting that fifty-six were Republicans, four were Democrats, and one was non-partisan.

238. Schwartz & Silverman, *supra* note 22 at 67.

239. See *infra*, Reliance and Consumer Protection Acts Table, pp. 713-21.

ance as a necessary element, especially in a statute designed to protect consumers from false and deceptive practices.<sup>240</sup>

The fact that so many consumers self report that they do not read all of the terms of the contracts they sign and the existence of significant cognitive and social psychological barriers to authentic contractual assent by consumers raises important questions that reach beyond the scope of this paper. Specifically, when a merchant's contract contains terms to which consumers would normally not agree if they knew of its existence, understood its consequences, and had the power to negotiate for the term to be modified or removed, should courts still enforce such a term when the merchant has not lied to or deceived the consumer regarding this term (i.e., the merchant was silent on the matter)? The European Union has addressed this issue in the E.U. Directive on Unfair Contract Terms, and the Restatement Second of Contracts in Section 211(3) has also tried to address this thorny question, which raises, on the one hand, the need to acknowledge and address the failure of authentic contractual consent, and on the other hand, the goal of providing for certainty of contract and pre-

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240. The only support that Schwartz and Silverman provide for requiring a showing of "reasonable" reliance in the context of a consumer fraud type statute action were (i) a letter from the Federal Trade Commission to Representative Dingell, noting a shift of the FTC position under their enforcement of the Federal anti-fraud statute from the "credulous/ignorant consumer" standard to the "reasonable" consumer standard and (ii) the *Dura Pharms, Inc. v. Broudo* case, which involved a securities fraud matter, where the court noted in dicta that for common law fraud one of the elements was "justifiable" reliance. 544 U.S. 336 (2005). However, the FTC position letter related to whether certain advertisements would be considered deceptive or not and advocated focusing on whether the "average listener" would be deceived based on how they would interpret the advertisement, in contrast to how the most credulous/ignorant consumer would interpret the advertisement. *Id.* This is much different than imposing a general "reasonable" or "justifiable" reliance standard that requires consumers to perform certain due diligence (such as reading all of the terms of the contracts they sign) when in fact the "average" consumer does not in fact do so. *Id.* As for the *Dura Pharms* case, while the Court noted that a common law fraud action requires "justifiable" reliance, the Court noted that under Section 10(b) of the Securities Fraud Act, reliance, not "justifiable" reliance is required. Indeed, the Court in *Affiliated Ute Citizens v. United States* had earlier interpreted Section 10(b) in the context of an omission of a material fact to not require proof of reliance with positive evidence, and instead, just a showing that material facts were not revealed. 406 U.S. 128 (1972).

dictability of contractual rights and obligations. This is the topic of a future article by the authors.

### CONCLUSION

Unscrupulous businesses sometimes train their salespersons to engage in fraud or in misleading and deceptive trade practices to induce consumers to purchase their products or services. This has occurred in various consumer contexts,<sup>241</sup> including settings where the fraud or deceptive practices lead to substantial losses such as in the purchase of health and property insurance, the purchase and/or finance of a car, and most notably, the purchase and/or finance of a home.<sup>242</sup> For example, it has been estimated that predatory home loans ending in foreclosure cost homeowners as much as \$164 billion between 1998 and the third quarter of 2006.<sup>243</sup> In *In re First Alliance Mortgage Company*, the United States Court of Appeals for the 9th Circuit described quite well the deceptive practices in which some mortgage lenders engage:<sup>244</sup>

. . . loan officers would employ a standardized sales presentation to persuade borrowers to take out loans with high interest rates and hidden high origination fees or “points” and other “junk” fees, of which the borrowers were largely unaware . . . The track manual did not instruct loan officers to offer a specific lie to borrowers, but the elaborate and detailed sales presentation prescribed by the manual was unquestionably designed to obfuscate points, fees, interest rate, and the true principal amount of the loan . . . Loan officers were taught to deflect attention away from things that consumers might normally look at, and the loan sales presentation was conducted in such a way as to lead a consumer to disregard the high an-

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241. See Keith B. Anderson, *Consumer Fraud in the United States*, FTC Survey, FTC Staff Rep. 920040, at 28 available at <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf> (in 2004, an estimated 25 million Americans became the victims of ten types of consumer fraud studied by the Federal Trade Commission (“FTC”) according to data collected by the FTC.).

242. See discussion *supra* Part I.

243. Center for Responsible Lending, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* (2006), available at <http://www.responsiblelending.org/pdfs/CRL-foreclosure-rprt-1-8.pdf>.

244. 471 F. 3d at 985.

nual percentage rate ("APR") when it was ultimately disclosed on the federally-required Truth in Lending Statement.<sup>245</sup>

In an attempt to avoid liability for fraud or deception, these same businesses can include "disclaimer clauses" in their form contracts that state that the company's salespersons have not made any representations to the consumer other than what is in the contract, the consumer is not relying upon any such representations, and the consumer agrees not to bring a claim based upon any such representations. In a common law action for fraud (which can arise in both a consumer transaction and in a sophisticated commercial transaction), courts in approximately three-quarters of the jurisdictions require that the plaintiff's reliance on the alleged false statement of the defendant be "reasonable" or "justifiable."<sup>246</sup> Some courts have ruled that a plaintiff is barred from bringing a common law action for fraud when she has signed a contract containing a disclaimer clause because she should have read the contract (including the clause) and if she had been told something by the salesperson that differed from in the content of the contract, then she should not have purchased the product or service.<sup>247</sup> The consumer is considered "foolish" and "negligent" for failing to read the contract and for relying on the false statements or deceptive conduct of the salesperson,<sup>248</sup> or she is assumed to have read the contract and to have fabricated the alleged parol false statement or deceptive conduct. In either scenario, she is barred from raising a fraud claim.<sup>249</sup>

The problem with this logic is that, as detailed in our reading contracts survey and fraud simulation study, often-times consumers do not in fact read any or all of the terms of

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245. *Id.* (in addition to the deceptive techniques recommended, it is also very possible that the loan officers also lied about the loan terms or provided incomplete information tantamount to a lie, such as stating that the interest rate was a certain rate without explaining that the rate would rise in the near future.).

246. See discussion *supra* Part I.

247. *Id.*

248. See *supra*, note 18 (some courts have also barred a fraud claim on the basis that the legal causation of the plaintiff's harm was not the false statement of the defendant but the plaintiff's failure to take steps to determine the accuracy of the statement such as reading the contract.).

249. Foremost Ins. Co., 693 So. 2d.

the contracts that they sign. Can a consumer really be labeled “negligent” (i.e., failing to meet the standard of care for a similar person in a similar situation) for failing to read all of the terms of a contract when on average 61 percent of consumers reported that they do not do so in the six categories we surveyed? As explained in the psychological literature review in Part II and reflected in our follow up survey to the fraud simulation study in Part III, the primary reasons why consumers rely on what the salesperson tells them and fail to carefully read all of terms of the contracts they sign is grounded on basic unalterable facts about how human cognition and decision making processes operate and for legitimate social psychological reasons. Among the cognitive reasons why consumers fail to read all of the terms of the contracts they sign are: (i) visual and comprehension challenges based upon the manner in which many form contracts are drafted; (ii) analytic deficiencies based upon schema deficits; (iii) positive confirmation biases; (iv) inability to imagine possible negative outcomes (i.e., the availability heuristic); (v) default assumptions; and (vi) sunk cost effects. Among the social psychological reasons why consumers fail to read the contracts they sign are: (i) misplaced trust in the defrauders due to a variety of factors that create a strong motivation to trust, which we theorized is exacerbated when the consumer is of a lower socio-economic status;<sup>250</sup> (ii) social norms not to read contracts in certain contexts and a concomitant social value to trust (90 percent of the consumers we surveyed expected that a sales person’s verbal representations would be consistent with the terms of the sales agreement); and (iii) a perceived (and often real) inability to negotiate the terms of the contracts.<sup>251</sup>

Consequently, when courts enforce disclaimer clauses as a bar to a consumer bringing a common law action for fraud, courts are enforcing a contractual myth and granting a license

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250. Consumers surveyed with lower socio-economic status reported they were more likely to not have read all of the terms of the contracts they sign than did people of higher status.

251. Although in the fraud simulation study follow up survey, failure to be able to negotiate the terms of the contract was not rated highly as a reason for failing to read, this could be low due to the context of the contract: a consent to participating in a study for course credit, where there are not many terms to potentially negotiate and where regulatory protections are high.

to deceive. Justice Holmes' famous observation "the life of the law is not logic but experience" applies with particular force to the situation where a consumer is in fact fraudulently influenced to sign a contract containing a disclaimer clause. Yet, remarkably, in six states (Georgia, Indiana, Maryland, Michigan, Ohio, and Pennsylvania), courts have interpreted their consumer fraud and deceptive practices statutes' "causation" requirement to require "reasonable" or "justifiable" reliance (with the potential of this leading to a license to deceive) even though the express language of these statutes not only fails to require this but also fails to require "reliance" at all.<sup>252</sup> In addition, the Civil Justice Task Force of the American Legislative Exchange Council, a group largely composed of conservative legislators, has proposed a model law that would require all state consumer fraud and deceptive practices acts to expressly require "reasonable" reliance similar to the common law action for fraud. This position, if embraced by state legislatures, could make it impossible for consumers to bring fraud actions, including against the mortgage brokers and lenders who engaged in deceptive sales practices when marketing their loans which caused so many homeowners to enter into overpriced and unaffordable loans, by allowing the parties alleged to have engaged in this fraud to raise the disclaimer clause or other contradictory term in the written loan documents as a bar to the fraud/deceptive practices action.<sup>253</sup>

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252. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

253. The FNMAE form loan documents, drafted decades ago, contain an integration clause indicating that the loan documents are the entire agreement between the parties, but do not contain a specific "non-reliance" type clause. Still, a court might find that a borrower did not reasonably rely on a false statement of a material term of the loan documents when the borrower could have read the loan documents to have discovered the falsity of the mortgage broker's statement. In addition, most sub-prime loans were considered "non-conforming" loans, and even if on a FNMAE form, the form could be modified to include a "no reliance" type clause (as an example, prepayment provisions terms for non-conforming sub-prime loans varied from the terms in the FNMAE form for conforming loans). In addition to home loans, another important consumer transaction is the purchase of a home. According to Evelyn Kelly, an attorney who represents condominium developers in the Chicago area, no reliance type clauses were commonly utilized in the standard form condominium purchase agreements that developers used. This clause became prevalent because construction lenders insisted on its presence in the standard form contracts before they would fund on a construction loan to make it more likely that these deals would close. If the

To prevent the use of contractual myths to create a license to deceive, state legislatures in the six states noted<sup>254</sup> (as well as Wyoming, where the statute expressly requires “reliance” but has been interpreted to also require “reasonable reliance”) should clarify that it is not a requirement under the consumer fraud statutes that the consumer “reasonably” or “justifiably” rely on the false or deceptive trade practice in order for the consumer to recover for her resulting losses. Courts in these seven jurisdictions should cease interpreting the consumer fraud statutes in a fashion that is inconsistent with the central purpose behind these statutes, to provide consumers with more protection against fraud and deceptive practices than available under the common law. Additionally, in a common law cause of action for fraud, courts should not interpret the “reasonable” or “justifiable” reliance element or the “causation” element to bar a consumer from bringing a fraud claim when a contract contains a disclaimer clause or other contradictory term. In light of our psychological literature review and the results of our reading contracts survey, fraud simulation study, and follow-up survey to the fraud simulation study, it would only make sense to consider enforcing a disclaimer clause as a bar to a common law fraud claim when: (i) the party raising the claim is a sophisticated party involved in a deal related to that party’s business; (ii) the party is represented by counsel; (iii) the party (or the party’s attorney) read the terms of the contract the party signed; and (iv) the party (or the party’s attorney) negotiated the terms of the contract. In addition, the case for enforcing the disclaimer clause as a bar to bringing a fraud claim would be even stronger when the disclaimer clause specifically addressed the matter alleged to have been stated to the contrary prior to entering into the contract rather than a more general disclaimer clause.<sup>255</sup> When all of these circumstances are present, then the goal of certainty in contractual obligations can be pursued without fear that such goal is creating a license to deceive.

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buyer raised a claim prior to closing based upon what a salesperson told the consumer, the seller could point to the “no reliance” clause to argue that the buyer was not entitled to rely upon what they were told when it contradicted what was in the written contract. Telephone interview with Evelyn Kelly, Real Estate Attorney, in Chicago Ill. (Feb. 4, 2009).

254. See *infra* Reliance and Consumer Protection Acts Table, pp. 713-21.

255. Danann, 157 N.E.2d 59.

Sometimes consumers do read all or a portion of the contract and spot an instance where the salesperson has told them something inconsistent with what is in the contract and yet the salesperson still convinces the consumer to sign the contract by using confirmatory test strategies.<sup>256</sup> Even when the salesperson offers a fairly senseless explanation, such as “that doesn’t mean anything” or “don’t worry about that it is an older contract form” a consumer may in fact be influenced to rely on this explanation.<sup>257</sup> As previously discussed, there is an analogous phenomena demonstrated in an experiment by Langer, Blank, and Chanowitz (1978), and thus, such reliance need not be characterized as “unreasonable” and a bar to a fraud action. Even if a consumer could be considered negligent in relying on an implausible false statement of a salesperson, which is inconsistent with what the consumer read in the contract, we return to the question whether it is better policy to punish a consumer for her negligence or punish a business for engaging in lies or deceptive trade practices.

Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has obvious dangers. But judicial experience exemplifies that the former is the less objectionable and hampers less the administration of pure justice. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked . . . as between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say in defense of the charge of fraud, that the innocent ought not to have trusted him or was guilty of negligence in doing so.<sup>258</sup>

A high percentage of the consumers we surveyed (73 percent of the surveyed law students and 80 percent of the public sample) appear to have drawn the same conclusion when they reported that they believed that a company should honor the verbal representations of their salespeople, even if these repre-

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256. Ginsburg, 262 Ill. App. 14.

257. Lucas, 1995 WL 520752.

258. Or. Pub. Employees’ Ret. Bd. v. Simat et al., 83 P.3d 350, 360 (Or. Ct. App. 2004) (quoting *Johnson v. Cofer*, 281 P.2d 981 (Or. 1955)).



sentations were contradicted in the written contract. Courts and legislatures need to take into account the psychological barriers to authentic contractual consent to these disclaimer clauses and cease enforcement of this contractual myth of no reliance on the representations of salespersons, since to do otherwise creates a license to deceive and is inconsistent with the expectations of the vast majority of consumers.

APPENDIX 1  
TABLE 3.  
RELIANCE AND CONSUMER PROTECTION ACTS – 50 STATES

STATE (category 1)	STATUTE (Year Enacted) (category 2) <sup>1</sup>	ELEMENT(S) NOT REQUIRED (category 3) <sup>2</sup>	ADDITIONAL ELEMENTS REQUIRED (category 4) <sup>3</sup>	TYPE OF RELIANCE REQUIRED: STATUTORY Language (category 5) <sup>4</sup>	CASE LAW INDICATES RE: CATEGORY 3, 4, AND 5 (category 6)	COMMON LAW FRAUD: CASE LAW REQUIREMENT OF RELIANCE (category 7)
ALABAMA	Deceptive Trade Practices Act (1981)	All required <sup>5</sup>	Substantial evidence <sup>6</sup>  Written demand requirement <sup>7</sup>	Actual reliance <sup>8</sup>	Substantial evidence standard defined <sup>9</sup>  No case found addressing reliance	Reasonable reliance <sup>10</sup>
ALASKA	Unfair Trade Practices and Consumer Protection Act (1970)	Actual damages not required <sup>11</sup>  Actual deception not required <sup>12</sup>	Intent for some violations <sup>13</sup>	Reliance not required <sup>14</sup>	Reliance not required <sup>15</sup>  Actual injury or intent to deceive not required <sup>16</sup>	Justifiable reliance <sup>17</sup>
ARIZONA	Consumer Fraud Act (1967)	Actual damages not required <sup>18</sup>	No additional elements <sup>19</sup>	Reliance not required <sup>20</sup>	Actual reliance <sup>21</sup>  Intent only to do the act <sup>22</sup>	Reasonable reliance <sup>23</sup>

ARKANSAS	Deceptive Trade Practices Act (1971)	All required <sup>24</sup>	Intent required <sup>25</sup>	Reliance not required <sup>26</sup>	Actual damages, and proximate cause <sup>27</sup> No case found addressing reliance	Reliance <sup>28</sup>
CALIFORNIA	Consumer Legal Remedies Act <sup>29</sup> (1970)	All required <sup>30</sup>	Intentional violation required <sup>31</sup>	Reliance not required <sup>32</sup>	Reliance not required <sup>33</sup>	Justifiable reliance <sup>34</sup>
COLORADO	Colorado Consumer Protection Act (1963)	All required <sup>35</sup>	Knowingly make a false representation for many violations but not all <sup>36</sup>	Reliance not required <sup>37</sup>	Reliance not "required" but may factor into causation <sup>38</sup> Public impact required <sup>39</sup>	Justifiable reliance <sup>40</sup>
CONNECTICUT	Unfair Trade Practices Act (1973)	All required <sup>41</sup>	No additional elements <sup>42</sup>	Reliance not required <sup>43</sup>	Reliance not required <sup>44</sup>	"Reliance" but undefined <sup>45</sup>
DELAWARE	Consumer Fraud Act (1965)	Actual damages not required <sup>46</sup>	No additional elements <sup>47</sup>	Reliance not required <sup>48</sup>	Reliance not required <sup>49</sup> No intent required <sup>50</sup>	Justifiable reliance <sup>51</sup>
FLORIDA	Florida Deceptive and Unfair Trade Practices Act (1973)	All required <sup>52</sup>	No additional elements <sup>53</sup>	Reliance not required <sup>54</sup>	Reliance not required <sup>55</sup>	Justifiable reliance <sup>56</sup>

GEORGIA	Fair Business Practices Act <sup>57</sup> (1973)	All required <sup>58</sup>	No additional elements <sup>59</sup>	Reliance not required <sup>60</sup>	Justifiable reliance <sup>61</sup> Scienter / intent to deceive not required <sup>62</sup>	Justifiable reliance <sup>63</sup>
HAWAII	Uniform Deceptive Trade Practice Act (1969)	All required <sup>64</sup>	No additional elements <sup>65</sup>	Reliance is not required <sup>66</sup>	Reliance not required <sup>67</sup> Actual deception is not required <sup>68</sup> Actual damages are required <sup>69</sup>	Actual reliance <sup>70</sup>
IDAHO	Idaho Consumer Protection Act (1971)	All required <sup>71</sup>	No additional elements <sup>72</sup>	Reliance not required <sup>73</sup>	No case on reliance found	Justifiable reliance <sup>74</sup>
ILLINOIS	Consumer Fraud and Deceptive Business Practices Act <sup>75</sup> (1961)	All required <sup>76</sup>	No additional elements <sup>77</sup>	Reliance not required <sup>78</sup>	Reliance required under proximate cause element <sup>79</sup> Proximate causation <sup>80</sup>	Justifiable reliance <sup>81</sup>
INDIANA	Deceptive Consumer Sales Act (1971)	Harm or causation not required <sup>82</sup>	No additional elements <sup>83</sup>	Reliance not required <sup>84</sup>	Justifiable reliance is needed <sup>85</sup> Offer to cure <sup>86</sup>	Justifiable reliance <sup>87</sup>

IOWA	Consumer Fraud Act (unavailable for an individual)	Damages not required <sup>88</sup>	Intent others rely <sup>89</sup>	Reliance not required <sup>90</sup>	There is no cause of action for a consumer plaintiff. The gov't as plaintiff need not show reliance. <sup>91</sup>	Justifiable reliance <sup>92</sup>
KANSAS	Consumer Protection Act (1973)	All required <sup>93</sup>	No additional elements <sup>94</sup>	Reliance not required <sup>95</sup>	Reliance not required <sup>96</sup>	Justifiable reliance <sup>97</sup>
KENTUCKY	Consumer Protection Act (1972)	Harm or causation not required <sup>98</sup>	No additional elements <sup>99</sup>	Reliance not required <sup>100</sup>	No case found	Reasonable reliance <sup>101</sup>
LOUISIANA	Unfair Trade Practices and Consumer Protection Law (1972)	All required <sup>102</sup>	No additional elements <sup>103</sup>	Reliance not required <sup>104</sup>	No case found	Justifiable reliance <sup>105</sup>
MAINE	Unfair Trade Practices Act (1969)	All required <sup>106</sup>	No additional elements <sup>107</sup>	Reliance not required <sup>108</sup>	Detrimental reliance <sup>109</sup>	Detrimental reliance <sup>110</sup> (being influenced to make a consumer choice)
MARYLAND	Consumer Protection Act (1957)	Harm unnecessary <sup>111</sup>	No additional elements <sup>112</sup>	Reliance not required <sup>113</sup>	Reasonable reliance <sup>114</sup>	Justifiable reliance <sup>115</sup>

MASSACHUSETTS	Regulation of Business for Consumer Protection Act (1967)	All required <sup>116</sup>	Written demand for relief prior to filing action <sup>117</sup>	Reliance not required <sup>118</sup>	Reliance not required <sup>119</sup> Proximate cause required <sup>120</sup>	Reasonable reliance <sup>121</sup>
MICHIGAN	Consumer Protection Act (1977)	Harm / damages not mentioned <sup>122</sup>	Causing a probability of confusion <sup>123</sup>	Reliance not required <sup>124</sup>	Reasonable Reliance <sup>125</sup>	Acted in reliance <sup>126</sup>
MINNESOTA	Prevention of Consumer Fraud Act (1963)	Damages not required <sup>127</sup>	Intent that others rely <sup>128</sup>	Reliance not required <sup>129</sup>	Reliance not required <sup>130</sup>	Justifiable reliance <sup>131</sup>
MISSISSIPPI	Regulation of Business for Consumer Protection Act (1974)	All required <sup>132</sup>	Personal, family, or household purpose <sup>133</sup>	Reliance not required <sup>134</sup>	No case found	Justifiable reliance <sup>135</sup>
MISSOURI	Merchandising Practices Act (1967)	Harm / damages not mentioned <sup>136</sup>	No additional elements <sup>137</sup>	Reliance not required <sup>138</sup>	Reliance not required <sup>139</sup>	Reasonable reliance <sup>140</sup>
MONTANA	Consumer Protection Act (1973)	All required <sup>141</sup>	No additional elements <sup>142</sup>	Reliance not required <sup>143</sup>	No case found	Justifiable reliance <sup>144</sup>
NEBRASKA	Consumer Protection Act (1974)	All required <sup>145</sup>	No additional elements <sup>146</sup>	Reliance not required <sup>147</sup>	No case found	Justifiable reliance <sup>148</sup>
NEVADA	Deceptive Trade Practices Act (1973)	All required <sup>149</sup>	No additional elements <sup>150</sup>	Reliance not required <sup>151</sup>	No case found	Justifiable reliance <sup>152</sup>

NEW HAMPSHIRE	Regulation of Business Practices for Consumer Protection Act (1970)	All required <sup>153</sup>	No additional elements <sup>154</sup>	Reliance not required— “whether or not any person has in fact been misled” <sup>155</sup>	Reliance not required <sup>156</sup>	Reasonable reliance <sup>157</sup>
NEW JERSEY	Trademarks and Unfair Trade Practices Act (1960)	All required <sup>158</sup>	No additional elements <sup>159</sup>	Reliance not required— “whether or not any person has in fact been misled” <sup>160</sup>	Reliance not required <sup>161</sup>	Reasonable reliance <sup>162</sup>
NEW MEXICO	Unfair Trade Practices Act (1953)	All required <sup>163</sup>	No additional elements <sup>164</sup>	Reliance not required <sup>165</sup>	Reliance not required <sup>166</sup>	Detrimental reliance (but interpreted as justifiable) <sup>167</sup>
NEW YORK	Consumer Protection from Deceptive Acts and Practices (1970)	Damages not required <sup>168</sup>	No additional elements <sup>169</sup>	Reliance not required <sup>170</sup>	Reliance not required <sup>171</sup>	Justifiable reliance <sup>172</sup>
NORTH CAROLINA	Consumer Protection Act (1969)	All required <sup>173</sup>	No additional elements <sup>174</sup>	Reliance not required <sup>175</sup>	Reliance not required <sup>176</sup>	Reasonable reliance <sup>177</sup>
NORTH DAKOTA	Unlawful Sales or Advertising Practices (1965)	All required <sup>178</sup>	No additional elements <sup>179</sup>	Reliance not required <sup>180</sup>	No case found	“Reliance” <sup>181</sup> required for both fraud and deceit

OHIO	Consumer Sales Practices Act (1972)	All required <sup>182</sup>	Must commit an "unconscionable act" <sup>183</sup>  Knowledge important factor <sup>184</sup>	Reliance not required <sup>185</sup>	Justifiable reliance <sup>186</sup>	Justifiable reliance <sup>187</sup>
OKLAHOMA	Consumer Protection Act (1972)	Causation is not required <sup>188</sup>	No additional elements <sup>189</sup>	Reliance not required <sup>190</sup>	Reliance not required <sup>191</sup>	Detrimental reliance <sup>192</sup>
OREGON	Unlawful Trade Practices Act (1977)	All required <sup>193</sup>	"Willful" act <sup>194</sup>	Reliance not required <sup>195</sup>	Reliance requirement depends upon the defendant's act <sup>196</sup>	Oregon Sup. Ct. uses justifiable reliance but lower courts use reasonable reliance <sup>197</sup>
PENNSYLVANIA	Unfair Trade Practices and Consumer Protection Law (1968)	All required <sup>198</sup>	Non-Commercial transactions <sup>199</sup>	Reliance not required <sup>200</sup>	Justifiable reliance <sup>201</sup>	Justifiable reliance <sup>202</sup>
RHODE ISLAND	Unfair Trade Practice and Consumer Protection Act (1968)	All required <sup>203</sup>	Non-Commercial transactions <sup>204</sup>	Reliance not required <sup>205</sup>	No case found	Justifiable reliance <sup>206</sup>
SOUTH CAROLINA	Unfair Trade Practices Act (1962)	All required <sup>207</sup>	No additional elements <sup>208</sup>	Reliance not required <sup>209</sup>	Reliance not required <sup>210</sup> "Affects public interest" <sup>211</sup>	Justifiable reliance <sup>212</sup>



SOUTH DAKOTA	Deceptive Trade Practices and Consumer Protection Act (1971)	All required <sup>213</sup>	Knowingly and intentionally <sup>214</sup>	Reliance not required <sup>215</sup>	Reliance not required <sup>216</sup>	"Reliance" but undefined <sup>217</sup>
TENNESSEE	Consumer Protection Act (1977)	All required <sup>218</sup>	No additional elements <sup>219</sup>	Reliance not required <sup>220</sup>	Reliance not required <sup>221</sup>	Reasonable reliance <sup>222</sup>
TEXAS	Deceptive Trade Practice Act (1973)	All required <sup>223</sup>	Mental anguish or economic loss <sup>224</sup>	Reliance by the consumer to the consumer's detriment <sup>225</sup>	Reliance not required <sup>226</sup>	Actual & Justifiable Reliance <sup>227</sup>
UTAH	Consumer Sales Practices Act (1973)	All required <sup>228</sup>	Knowingly or intentionally <sup>229</sup> required for listed violations but knowledge just a factor for "unconscionable" acts <sup>230</sup>	Not specified <sup>231</sup>	No case found <sup>232</sup>	Reasonable reliance <sup>233</sup>
VERMONT	Consumer Fraud Act (1967)	All required <sup>234</sup>	No additional elements <sup>235</sup>	Reliance required only if no damages result from violation <sup>236</sup>	Reasonable interpretation of misrepresentation is required <sup>237</sup>	Detrimental reliance <sup>238</sup>
VIRGINIA	Consumer Protection Act (1977)	All required <sup>239</sup>	No additional elements <sup>240</sup>	Reliance not required <sup>241</sup>	Reliance is required <sup>242</sup>	Actual reliance <sup>243</sup>

WASHINGTON	Consumer Protection Act (1961)	All required <sup>244</sup>	No additional elements <sup>245</sup>	Reliance not required <sup>246</sup>	Reliance not required <sup>247</sup> Reliance helps show causation but not always required as part of causation <sup>248</sup> Public interest and requirement and proximate cause <sup>249</sup>	Justifiable reliance <sup>250</sup>
WEST VIRGINIA	Consumer Credit and Protection Act (1974)	All required <sup>251</sup>	Notice to "cure" <sup>252</sup>	Reliance not required <sup>253</sup>	Reliance not required <sup>254</sup>	Justifiable reliance <sup>255</sup>
WISCONSIN	Consumer Act (1971)	All required <sup>256</sup>	No additional elements <sup>257</sup>	Reliance not required <sup>258</sup>	Reliance is a defense to causation (whether defendant caused plaintiff pecuniary loss) <sup>259</sup>	Justifiable reliance <sup>260</sup>
WYOMING	Consumer Protection Act (1973)	All required <sup>261</sup>	No additional elements <sup>262</sup>	Reliance on uncured unlawful practice <sup>263</sup>	Reasonable reliance <sup>264</sup>	Reasonable reliance <sup>265</sup>

## ENDNOTES

1. For this Article we focused on false statements and not on fraudulent omissions. We researched the key "anti-fraud" type statutes in each state (these state statutes were primarily based on either the Federal Trade Commission's Anti-Fraud Act or the Uniform Deceptive Trade Practices Act) and limited our research to violations under the state statutes that most resembled making a false statement. We did not cover the many other separate state statutes that touch on fraud in a specific context and addressed only the elements for a private cause of action for damages rather than injunctive relief.

2. In the vast majority of states, the consumer fraud statute requires the following elements for a plaintiff to have a cause of action for fraud: (1) a false statement of fact (deceptive or misleading statement); (2) which causes harm/damage to the plaintiff. This category lists when any of these elements are not required.

3. Some states require additional elements (e.g., seller knowledge of a false statement, buyer reliance on the false statement). Category 4 lists any such added elements.

4. This category lists the type of reliance that the statute expressly requires such as actual reliance, reasonable reliance, or justifiable reliance. Not all state statutes require reliance, and some statutes refer to "reliance" but do not add an adjective such as "reasonable" or "justifiable."

5. ALA. CODE § 8-19-5, 10 (LexisNexis 2002).

6. Evidence and Witnesses, ALA.CODE § 12-21-12 (2005) (abolishing the scintilla evidence rule).

7. ALA. CODE § 8-19-10(e) (LexisNexis 2002).

8. *Id.* The statute's demand requirement states, "[a]t least 15 days prior to the filing of any action under this section, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be communicated to any prospective respondent by placing in the United States mail or otherwise." *Id.* Because the statute only states, "relied upon," the most probable standard is actual reliance. Subsection (e) provides exceptions to the demand requirement for prospective respondents who do not maintain a place of business in the state or do not keep assets within the state. *Sheehan v. Bowden*, 572 So.2d 1211, 1213 (Ala. 1990). The burden is on the plaintiff to demonstrate that these exceptions apply. *Id.*

9. Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *Thomas v. Principal Fin. Group*, 566 So.2d 735, 738 (Ala. 1990) (quoting *West v. Founders Life Assurance Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989)).

10. *Foremost Ins. Co. v. Parham*, 693 So.2d 421 (Ala. 1997). *Foremost* overruled the "justifiable reliance" standard in *Hickox*. *Id.* The court held that reasonable reliance, rather than justifiable reliance, is an element of fraud, explaining, "[t]he reasonable reliance standard is . . . a more practicable standard that will allow the fact-finder greater flexibility in determining the issue of reliance based on all of the circumstances surrounding a transaction, including the mental capacity, educational background, relative sophis-

tication, and bargaining power of the parties.” *Id.* However, there was a scathing dissent:

The legislature of this state should recognize fraud as the criminal act and civil wrong that it is, and treat it accordingly. In Alabama there is no real criminal penalty for consumer fraud, and the \$2,000 civil fine in the Deceptive Trade Practices Act is not even a slap on the wrist. The legislature should enact meaningful criminal fraud statutes that impose strong punishments and should increase the civil penalty to an amount that will sting when a sting is needed . . . *For too long, the other branches of government have failed to lead the attack on consumer fraud, although they alone have the power to fight it at its source . . .* If those with the power to do so would arm the State of Alabama with reasonable criminal and civil consumer protection laws and then courageously enforce them, it would finally serve notice that persons who wish to defraud Alabama citizens will do so at their peril.

*Id.* at 440-41 (Butts, J., dissenting) (*emphasis* in original). Further, the dissenting justice noted that a majority of states adopt the “justifiable reliance” standard, contrary to the Alabama Supreme Court’s decision. *Id.* at 441, n.14.

11. There is no requirement of damages in the act except, under one provision, if the conduct at issue does not mislead or deceive. *See* ALASKA STAT. § 45.50.471 (b) (11) (2008) (“engaging in any other conduct creating a likelihood of confusion or of misunderstanding and which misleads, deceives or damages a buyer or a competitor in connection with the sale or advertisement of goods or services”).

12. *Id.* § 45.50.471 (b) (12).

13. *Id.*

14. *Id.* § 45.50.531 (private and class actions); *id.* § 45.50.535(a) (injunctions). For the purposes of this paper, injunctive relief and other types of equitable relief (such as declaratory judgment) will be omitted.

15. *Odom v. Fairbanks Mem’l. Hosp.*, 999 P.2d 123, 131-32 (Alaska 2000).

16. An act or practice is “deceptive or unfair” if it has the capacity or tendency to deceive; actual injury as a result of the deception is not required and intent to deceive need not be proved, but, rather, all that is required is a showing that the acts and practices were capable of being interpreted in a misleading way. *State v. O’Neill Investigations, Inc.*, 609 P.2d 520, 534-35 (Alaska 1980).

17. *Barber v. Nat’l Bank*, 815 P.2d 857, 862 (Alaska 1991) (“The elements of a cause of action for knowing misrepresentation or deceit include: a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damages.”).

18. ARIZ. REV. STAT. ANN. § 44-1522 (2008).

19. However, when the complained of acts involve “concealment, suppression or omission of a material fact.” *See id.* § 44-1522 requires a showing “that others [relied] upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise.” For the purposes of this paper, “concealment, suppression, or omission” type claims have been omitted.

20. *Id.*

21. *Correa v. Pecos Valley Dev. Corp.*, 617 P.2d 767, 771 (Ariz. Ct. App. 1980) ("injury occurs when consumer relies, though reliance need not be reasonable"); *but see*, *Babbitt v. Green Acres Trust*, 618 P.2d 1086, 1094 (Ariz. Ct. App. 1980), citing *Peery v. Hansen*, 585 P.2d 574 (Ariz. Ct. App. 1978) (Howard, J., concurring) (holding that reliance is not an element for a private party under the Act); *see also* *Parks v. Macro-Dynamics, Inc.*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) ("For [a] *false advertisement* to cause the injury, the hearer must actually rely on the advertisement; unlike common law fraud, this reliance need not be reasonable.") (*emphasis added*).

22. *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 626 P.2d 1115, 1118 (Ariz. Ct. App. 1981) ("[T]he only showing of intent required by Ariz. Rev. Stat. Ann. § 44-1522 is an intent to do the act involved. It is not necessary to show a specific intent to deceive."); *see also* endnote xvii.

23. The nine elements of common law fraud in Arizona are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Nielson v. Flashberg*, 419 P.2d 514 (Ariz. 1966). Although there is no modifier for reliance under *Parks v. Macro-Dynamics, Inc.* adds that the reliance for common law fraud must be actual, reasonable reliance. 591 P.2d 1005 (Ariz. App. Ct. 1979).

24. ARK. CODE ANN. § 4-88-113(f) (2009).

25. Some violations require intent. *Id.* § 4-88-107(a)(1) ("Knowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model"); *id.* § 4-88-107(a)(3) ("Advertising the goods or services with the intent not to sell them as advertised"); *id.* § 4-88-107(a)(5) ("The employment of bait-and-switch advertising consisting of an attractive but insincere offer to sell a product or service which the seller in truth does not intend or desire to sell, evidenced by"); *id.* § 4-88-107(a)(6) ("Knowingly failing to identify flood, water, fire, or accidentally damaged goods as to such damages"); *id.* § 4-88-107(a)(8) ("Knowingly taking advantage of a consumer who is reasonably unable to protect his or her interest because of [physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement, or a similar factor]"); *id.* § 4-88-108(2) ("The concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission.").

26. ARK. CODE ANN. § 4-88-101 *et seq.*

27. Although no case addresses all the elements of an Arkansas consumer fraud claim, the ARKANSAS MODEL JURY INSTRUCTION (2008) states as follows:

AMI 2902 Issues—Claim for Damages Based on Deception, Fraud, or False Pretense and Concealment, Suppression, or Omission of Material Facts in Sale Transaction

\_\_\_\_\_ claims damages from \_\_\_\_\_ and has the burden of providing each of three [four] essential propositions:

First, that he/she has sustained damages;

Second, that \_\_\_\_\_ (used a deception, fraud, or false pretense)(or)(concealed, suppressed, or omitted a material fact) in connection with the sale or advertisement of goods, services, or a charitable solicitation; (and)

[Third[, that \_\_\_\_\_ intended that others rely upon the concealment, suppression, or omission; and]

[Fourth], that \_\_\_\_\_'s conduct was a proximate cause of \_\_\_\_\_'s damages.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for \_\_\_\_\_; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for \_\_\_\_\_.]

28. The elements of misrepresentation are: (1) a false representation of a material fact; (2) knowledge or belief on the part of the person making the representation that the representation is false; (3) an intent to induce the other party to act or refrain from acting in reliance on the misrepresentation; (4) justifiable reliance by the other party; (5) resulting damages. *O'Mara v. Dykema*, 942 S.W.2d 854 (Ark. 1997). A representation is fraudulent when the person making it either knows it to be false or, not knowing, asserts it to be true. *Id.* at 317.

29. For brevity and clarity, the Unfair Practices Act (CAL. BUS. & PROF. CODE § 17045 (West 2008)) (dealing with secret commissions) has been omitted and so has the Unfair Competition Law (CAL. BUS. & PROF. CODE § 17200) (dealing with injunctive relief).

30. Deceptive Practices, CAL.CIV.CODE § 1770 (West 2008).

31. No award of damages if violation not intentional. *Id.* § 1784.

32. *Id.*

33. *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668-69 (Cal. 1983).

34. *See Robinson Helicopter Co., Inc. v. Dana Corp.*, 102 P.3d 268, 274 (Cal. 2004) ("The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.").

35. COLO. REV. STAT. ANN. § 6-1-105(1)(e) (2008).

36. *Compare id.* § 6-1-105(1)(e) ("Knowingly makes a false representation as to . . . goods, food, service, or property . . .") with *id.* § 6-1-105(1)(l) ("Makes false or misleading statements concerning the price of goods, services, or property . . .").

37. *Id.* § 6-1-101 *et. seq.*

38. *Crowe v. Tull*, 126 P.3d 196, 201 (Colo. 2006) ("To prove a private claim for relief under the CCPA, a plaintiff must show: (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury."). Although reliance is not an express element of a consumer fraud claim, the court noted the plain-

tiff's reliance on the defendant's false advertisements as part of causation of his injury. *Id.* at 210. Causation is for the trier-of-fact to determine. *Id.*; but see *Pauley v. Bank One Colo. Corp.*, 205 B.R. 272, 276 (D. Colo. 1997) (holding in the bankruptcy court that "the alleged violations of COLO. REV. STAT. § 6-1-105 are defective in that there was no element of reliance by the Pauleys upon the alleged misdeeds of the Defendants").

39. Tull, 126 P.3d at 200 (requiring that the conduct "significantly impact the public as actual or potential consumers").

40. *Black v. First Federal Sav. & Loan Ass'n, F.A.*, 830 P.2d 1103, 1113 (Colo. Ct. App. 1992) ("The elements necessary for proving fraud are: 1) a false representation or concealment of a material existing fact; 2) with knowledge that the representation was false or that the fact which was concealed in equity and good conscience should have been disclosed; 3) ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or of the existence of the fact concealed; and 4) justifiable reliance; 5) resulting in damages.") citing *Morrison v. Goodspeed*, 68 P.2d 458.

41. *Fair Trade Act, CONN. GEN. STAT. ANN. §42-110(b)* (2008) (Prohibiting broadly "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.").

42. *Id.* § 42-110(g)-(a).

43. *Id.*

44. *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 176 (D. Conn. 2000) (explaining that "[u]nlike a claim of fraud, CUTPA (Connecticut Unfair Trade Practices Act) does not require reliance on alleged misrepresentation or a claim that misrepresentation became part of the basis of the bargain."); *Robichaud v. Hewlett Packard Co.*, 847 A.2d 316, 322 (Conn. Super. Ct. 2003) (saying that "[a]n Unfair Trade Practices Act plaintiff need not prove reliance or that representation became part of the basis of the bargain.").

45. *Nazami v. Patrons Mut. Ins. Co.*, 910 A.2d 209, 214 (2006) ("In order to plead a cause of action for fraud, a plaintiff must allege that: (1) a false representation was made by the defendant as a statement of fact; (2) the statement was untrue and known to be so by the defendant; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment.").

46. *DEL. CODE ANN. TIT. 6 § 2513(a)* (2008); see also 6 DEL. C. § 2532.

47. *Id.* § 2513 *et seq.*

48. *Id.* § 2513(a).

49. *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Ayers v. Quillen*, 2004 WL 1965866 (Del. Super. Ct. 2004) (holding that a consumer need not show actual reliance on a false statement as long as the person making the statement intended others to rely on it).

50. See *In Re Brandywine Volkswagen, Ltd.*, 306 A.2d 24 (Del. Super 1973) (intent is required only to prove concealment, suppression, or omission).

51. *Browne v. Robb*, 583 A.2d 949, 955 (1990) ("The general elements of common law fraud under Delaware law are: (1) defendant's false representation, usually of fact, (2) made either with knowledge or belief or with ruthless indifference to its falsity, (3) with an intent to induce the plaintiff to act

or refrain from acting, (4) the plaintiff's action or inaction resulted from a reasonable reliance on the representation, and (5) reliance damaged the defendant."); *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 510 (1932) (discussing reasonable or justifiable reliance as required to be demonstrated by a plaintiff in a common law fraud action).

52. FLA. STAT. ANN. § 501.211 (2008).

53. *Id.*

54. *Id.* §§ 501.201 - 501.213.

55. *Lance v. Wade*, 457 So. 2d 1008 (1984) (holding that a consumer claim for damages under Florida's Deceptive and Unfair Trade Practices Act, §§ 501.201 - 501.213 has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages).

56. *Id.* (The elements for actionable fraud are (1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party.). In summary, there must be an intentional material misrepresentation upon which the other party relies to his detriment. *Id.* Appellate court cases such as *Albertson v. Richardson-Merrell, Inc.*, 441 So. 2d 1146 (Fla. Dist. Ct. App. 1983) and *Nantell v. Lim-Wick Constr. Co.*, 228 So. 2d 634 (Fla. Dist. Ct. App. 1969) have added that the reliance must be "justifiable" reliance.

57. The Uniform Deceptive Trade Practices Act, in contrast with the Fair Business Practices Act, authorizes only equitable relief. GA. CODE ANN. § 10-1-370 et seq. (2008); *Akron Pest Control v. Radar Exterminating Co., Inc.*, 455 S.E.2d 601 (Ga. App. Ct. 1995).

58. Selling and Other Trade Practices, GA. CODE ANN., § 10-1-393 (2008).

59. *Id.*

60. *Id.*

61. *Tiismann v. Linda Martin Homes Corp.*, 637 S.E.2d 14, 16 (Ga. 2006) (explaining that a "claimant who alleges the FBPA was violated as the result of a misrepresentation must demonstrate that he was injured as the result of the RELIANCE upon the alleged misrepresentation.") (emphasis added); *Zeeman v. Black*, 273 S.E. 910, 916 (Ga. App. Ct. 1980) ("Since the Act contemplates notice of the deception relied upon as the prerequisite to a suit for recovery of damages resulting from that deception, we construe Code Ann. § 106-1210 as incorporating the "reliance" element of the common law tort of misrepresentation into the causation element of an individual claim under the FBPA.").

62. *Campbell v. Beak*, 568 S.E.2d 802 (Ga. Ct. App. 2002) (noting that scienter and intent to deceive are common law elements excluded from the Act); see also *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 262 S.E.2d 820, 823 (Ga. Ct. App. 1979) (holding that an "intentional violation" of Fair Business Practices Act is a volitional act constituting an unfair or a deceptive act or practice conjoined with culpable knowledge of the nature, but not necessarily the illegality of the act).

63. *Tiismann*, 637 S.E.2d at 18.

64. Monopolies; Restraint of Trade, HAW. REV. STAT. ANN. § 480-13 (2008).

65. *Id.*



66. *Id.*

67. No mention is made of reliance as an element of a consumer fraud case. *Compare* *Ai v. Frank Huff Agency, Ltd.*, 607 P.2d 1304 (Haw. Ct. App. 1980) (holding that the four essential elements are: (1) a violation of chapter 480; (2) injury to plaintiff's business or property resulting from such violation; (3) proof of the amount of damages; and (4) a showing that the action is in the public interest or that the defendant is a merchant.) *with* *Davis v. Wholesale Motors*, 949 P.2d 1026, 1038 (Haw. Ct. App. 1997) (holding that the "elements necessary to recover on an unfair or deceptive trade acts or practices claim under are: (1) a violation of 480-2 [the act]; (2) injury to the consumer caused by such a violation; and (3) proof of the amount of damages.") (emphasis added). Note that the fourth element as required by *Ai* was abrogated by the legislature. *See* 1987 HAWAII SESS. LAWS, ACT 274 § 2. Also, note that a business can no longer be a consumer: "No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." "Consumer" is now defined as: "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in an investment." HAW. REV. STAT. §481A (2008).

68. *Eastern Star v. Union Bldg. Materials Corp.*, 712 P.2d 1148, 1154 (Haw. Ct. App. 1985) ("actual deception need not be shown; the capacity to deceive is sufficient.").

69. *Beerman v. Toro Mfg. Corp.*, 615 P.2d 749 (Haw. Ct. App. 1980).

70. *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 701 (Haw. 2003) (The elements of fraud are listed as "(1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) actual reliance by the plaintiff.") (emphasis added).

71. Consumer Protection Act, IDAHO CODE ANN. § 48-603 (2008).

72. *Id.*

73. *Id.*

74. *Mannos v. Moss*, 143 Idaho 155 P.3d 1166, 1170 (2007) ("To successfully bring an action for fraud, a plaintiff must establish the existence of the following elements: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.").

75. For brevity and clarity, The Uniform Deceptive Trade Practices Act 815 ILL. COMP. STAT. ANN. § 510/2 (2009) has been omitted. Under that act, the only remedy is injunction relief.

76. Illinois Consumer Fraud and Deceptive Business Practices Act 815 ILL. COMP. STAT. ANN. § 505/10(a) (2009).

77. *Id.*

78. *Id.* § 505/2.

79. *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584 (1996); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 218 (Ill. 2004) (in dicta, the *Shannon*

court said that “[a]lthough proof of actual deception of a plaintiff is required, this is not to say that the deception must always be direct between the defendant and the plaintiff to satisfy the requirement of proximate cause under the Act.”); *see also* Zekman v. Direct Am. Marketers, 675 N.E.2d 994 (Ill. App. Ct. 1997), *rev’d on other grounds*, 695 N.E.2d 853 (Ill. 1998) (holding that plaintiff must prove reliance in order to establish proximate causation).

80. *Barbara’s Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 924 (Ill. App. Ct. 2007) (holding that the “as a result of” equates to proximate causation). Further, with respect to a class action, Illinois plaintiffs must establish actual deception through actual reliance. *Id.*

81. *Weber v. DeKalb Corp.*, 637 N.E.2d 694, 697-98 (Ill. App. Ct. 1994) (“In a common law fraud cause of action, a plaintiff must establish that (1) defendant made a false statement of a material fact; (2) defendant knew or believed the statement to be false; (3) defendant intended that plaintiff rely on the statement; (4) plaintiff acted in justifiable reliance on the statement; and (5) plaintiff suffered damages resulting from his reliance. The determination of whether plaintiff’s reliance was justifiable necessitates an examination of all the facts which plaintiff knew, as well as those facts the plaintiff could have learned through the exercise of ordinary prudence.”).

82. *Deceptive Consumer Sales*, IND. CODE ANN. § 24-5-0.5-3(a)(1)-(a)(19) (2008) (listing acts constituting deceptive practices).

83. *Id.*

84. *Id.* However, a supplier’s reliance of a manufacturer’s representations is a defense; *see also id.* § 24-5-0.5-3(d).

85. *McKinney v. State*, 693 N.E.2d 65, 71 (Ind. 1998) (“In actions under Deceptive Consumer Sales Act that are grounded in fraud, pleading specificity requirement applicable to fraud claims must be met.”).

86. *See id.* (IND. CODE ANN. §24-5-0.5-2; IND. CODE ANN. § 24-5-0.5-4). There are offers to cure required by a consumer and offers to cure sent by a supplier that relieve suppliers of attorney’s fees if the amount of the award is less than the offer. An “incurable deceptive act” means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. IND. CODE ANN. § IC 24-5-0.5-2 (8). It does not require an offer to cure by a consumer.

87. *Jim Barna Log Sys. Midwest, Inc. v. General Cas. Ins. Co.*, 791 N.E.2d 816, 830 (Ind. Ct. App. 2003) (“The five elements of fraud are: (1) a false statement of past or existing material fact, (2) made with knowledge it was false or made recklessly without knowledge of its truth or falsity, (3) made for the purpose of inducing the other party to act upon it, (4) and upon which the other party did justifiably rely and act, (5) proximately resulting in injury to the other party.”).

88. *Theft, Fraud, and Related Offenses*, IOWA CODE ANN. § 714.16 (2008).

89. *Id.*

90. *Id.*

91. *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 621 (Iowa 1989).

92. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001) (listing elements necessary to establish common-law fraud claim: “(1) defen-

dant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation, (7) the representation was a proximate cause of plaintiff's damages, and (8) the amount of damages").

93. Unfair Trade and Consumer Protection, KAN. STAT. ANN. § 50-626 (2008).

94. *Id.*

95. *Id.*

96. *Frank v. Weber*, 777 P.2d 277 (Kan. 1989) ("The distinction between the deceptive acts or practices under the Kansas Consumer Protection Act ("KCPA"), KAN. STAT. ANN. § 50-623 et seq., and the common-law claim of fraud is that fraud requires the plaintiff to reasonably rely upon the defendant's misrepresentations while the KCPA does not.").

97. *Id.*

98. Unfair Trade and Consumer Protection, KY. REV. STAT. ANN. § 367.170 (2008) (holding that "(1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. (2) For the purposes of this section, unfair shall be construed to mean unconscionable.").

99. *See id.* § 367.220.

100. *Id.*

101. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006) (holding that a "party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: (a) material representation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury"); *Bassett v. NCAA*, 428 F. Supp. 2d 675, 682 (E.D. Ky. 2006) (holding that reliance upon a misrepresentation must be reasonable).

102. Unfair Trade Practices and Consumer Protection Law, LA. REV. STAT. ANN. § 51:1409 (2008).

103. *See id.* § 51:1409.

104. *See id.* § 51:1405.

105. *Sun Drilling Prods. Corp. v. Rayborn*, 798 So. 2d 1141, 1152-53 (La. Ct. App. 2001) ("Two elements are necessary to prove fraud: (1) an intent to defraud and (2) actual or potential loss or damage. [citation omitted]. Federal courts applying Louisiana law indicate that reliance is an element of a claim for fraud. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 624 (5th Cir.1993). Moreover, for fraud or deceit to have caused plaintiff's damage, he must at least be able to say that had he known the truth, he would not have acted as he did to his detriment. Whether this element is labeled reliance, inducement, or causation, it is an element of a plaintiff's case for fraud. [citation omitted].").

106. Uniform Deceptive Trade Practices Act, ME. REV. STAT. ANN. tit. 10 § 1212 (West 2008).

107. *Id.*

108. *Id.*

109. *State v. Tibbetts*, 2007 Me. Super. LEXIS 1 (Me. Super. Ct. Jan. 2, 2007) (holding that “reliance is an element under both UTPA and unjust enrichment”).

110. *GxG Mgmt., LLC v. Young Bros. & Co.*, 457 F.Supp.2d 47 (D. Me. 2006) (holding that “reliance is an element under both UTPA and unjust enrichment.”). Under Maine law, detrimental reliance means being influenced in regard to making any consumer choice. *Id.* at 51.

111. MD. CODE ANN. COM. LAW, § 13-302 (2008).

112. *Id.*

113. *Id.* §§ 13-301 - 13-302.

114. *Hoffman v. Stamper*, 843 A.2d 153 (Md. Ct. Spec. App. 2004).

115. *Everett v. Baltimore Gas & Electric Co.*, 513 A.2d 882 (Md. 1986) (noting that a claim of fraud requires: (1) that a false representation was made by a party; (2) that its falsity was known to that party or that the misrepresentation was made with such reckless indifference to truth as to impute knowledge to the party; (3) that the misrepresentation was made for the purpose of defrauding some other person; (4) that the person not only relied on the misrepresentation but had a right to rely upon it with full belief in its truth, and that the person would not have done the thing from which the damage resulted if the misrepresentation had not been made; and (5) that the person suffered damage directly resulting from the misrepresentation). A right to rely, or justifiable reliance, requires that purchaser does not have special knowledge or experience and that the defect is not obvious. *Gross v. Sussex, Inc.*, 630 A.2d 1156 (Md. 1993).

116. Regulation of Business Practices for Consumers Protection, MASS. GEN. LAWS ANN. 93A § 2 (2008); *see also id.* § 9.

117. *Id.* § 9(3).

118. *Id.* § 2.

119. *Hershenow v. Enter. Rent-A-Car Co. of Boston*, 840 N.E.2d 526 (Mass. 2006) (holding that causation is not the same as reliance and reliance is not an essential element of a consumer protection claim); *but see* Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236 (D. Mass. 1999) (holding that reasonable reliance is required).

120. *Hershenow*, 840 N.E.2d at 534 fn 20.

121. *Id.*

122. MICH. COMP. LAWS SERV. § 445.903 (LexisNexis 2008).

123. *Id.*

124. *Id.*

125. *Darryl J. Chimko et al. v. Douglass H. Shermeta et al.*, Mich. App. LEXIS 2366 (Mich. App. Ct. 2006); *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) (holding that in class actions it suffices if a reasonable person would have relied on the representations).

126. *City of Novi v. Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 152 (Mich. 2005) (the elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury.).

127. Consumer Protection; Products and Sales, MINN. STAT. ANN. § 325F.69 (2008).

128. *Id.*

129. *Id.*

130. Wiegand, 683 N.W.2d at 811 (Minn. 2004) (noting that the Consumer Fraud Act's substantive misrepresentation in sales section eliminates the requirement of proving "traditional common law reliance."); Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 38 (Minn. 2001) (explaining that "[t]o impose a requirement of proof of individual reliance in the guise of causation would reinstate the strict common law reliance standard that we have concluded the legislature meant to lower for these statutory actions.").

131. Azbill v. Grande, 2005 Minn. App. LEXIS 596, \*17 (Minn. Ct. App. 2005) ("In order to establish fraud, a complainant must plead with specificity that (1) there was a false representation regarding a past or present fact, (2) the fact was material and susceptible of knowledge, (3) the representer knew it was false or asserted it as his or her own knowledge without knowing whether it was true or false, (4) the representer intended to induce the claimant to act or justify the claimant in acting, (5) the claimant was induced to act or justified in acting in reliance on the representation, (6) the claimant suffered damages, and (7) the representation was the proximate cause of the damages.").

132. Regulation of Business for Consumer Protection, MISS. CODE ANN. § 75-24-15(1) (2008).

133. *Id.*

134. *Id.*

135. Hobbs Auto., Inc. v. Dorsey, 914 So. 2d 148, 152-53 (Miss. 2005) ("This Court has enumerated the elements of fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury"); *see also*, In re Estate of Law v. Law, 869 So. 2d 1027, 1030 (Miss. 2004) (explaining that "[n]ot every spoken untruth is actionable as fraud. It is only if that untruth by design and effect induced the hearer to change his position in justifiable reliance on the information.").

136. Merchandising Practices, MO. ANN. STAT. § 407.020 (2008).

137. *Id.*

138. *Id.*

139. State ex rel. Webster v. Areaco Inv. Co. 756 S.W.2d 633, 635 (Mo. Ct. App. 1988) ("We also do not find that proof of reliance by customers is a necessary element of such cases.").

140. Trimble v. Pracna, 167 S.W.3d 706, 712 n.5 (Mo. 2005) (citing Heberer v. Shell Oil Co., 744 S.W.2d 441, 443 (Mo. Banc 1988) ("The nine essential elements of fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's conse-

quent and proximately caused injury.”). The reliance must also be proven to be reasonable. *Id.*

141. Assumed Business Names, Trademarks, and Related Rights, MONT. CODE ANN. § 30-13-133 (1) (2008).

142. *Id.*

143. *Id.*

144. *Franks v. Kindsfather* 108 P.3d 487, 490 (Mont. 2005) (“To establish a prima facie case of actual fraud, the party asserting the claim must establish the following nine elements: (1) a representation; (2) the falsity of that representation; (3) the materiality of the representation; (4) the speaker’s knowledge of the representation’s falsity or ignorance of its truth; (5) the speaker’s intent that the representation should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer’s ignorance of the representation’s falsity; (7) the hearer’s reliance upon the truth of the representation; (8) the hearer’s right to rely upon the representation; and (9) the hearer’s consequent and proximate injury or damages caused by their reliance on the representation.”); *see also* *Cechovic v. Hardin & Assocs.*, 902 P.2d 520, 525-26 (Mont. 1995) (holding that independent investigation by buyers did not preclude justifiable reliance on a real estate agent’s negligent misrepresentation regarding boundary).

145. Monopolies and Unlawful Combinations, NEB. REV. ST., § 59-1609 (2008).

146. *Id.*

147. *Id.*

148. *Knoell v. Huff*, 395 N.W.2d 749, 757 (Neb. 1986) (“The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a *justifiable reliance on the representation*, and (5) injury or damage resulting from such reliance.”) (emphasis added); *but see* *State v. Dawson*, 480 N.W.2d 700 (Neb. 1992) (setting forth a reasonable reliance standard for fraud based upon a misrepresentation of fact); *Sec. Inv. Co. v. State*, 437 N.W.2d 439, 448 (Neb. 1989) (setting forth a reasonable reliance standard for fraud based upon concealment).

149. Deceptive Trade Practices, NEV. REV. STAT. ANN. § 598.091(13) (2008) (defining one type of deceptive trade practice as making “false or misleading statements of fact concerning the price of goods or services for sale or lease, or the reasons for, existence of, or amounts of price reductions.”). Other violations, such as the catch-all violation, require knowledge: “Knowingly makes any other false representation in a transaction.” *Id.* at 15.

150. *Id.*

151. *Id.*

152. *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975), citing PROSSER, LAW OF TORTS 685 (4th ed. 1971) (“A false representation made by the defendant, knowledge or belief on the part of the defendant that the representation is false, or that he has not a sufficient basis of information to make it, an intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation, justifiable reliance upon the representation on the part of the plaintiff in taking action or refraining from it, and damage to the plaintiff, resulting from such reliance, are the elements of intentional misrepresentation.”).

153. *Frauds, ETC., in Sales or Advertisements of Merchandise*, N.J. STAT. ANN. § 56:8-19 (2008).

154. *Id.*

155. *Id.*

156. *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (N.J. 1997) (holding that reliance is not required in suits under the Consumer Fraud Act because liability results from “misrepresentations whether ‘any person has in fact been misled, deceived or damaged thereby’”) (quoting N.J. STAT. ANN. § 56:8-2).

157. *Jewish Ctr. of Sussex County v. Whale*, 432 A.2d 521, 524 (N.J. 1981) (holding that the five elements of common-law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.).

158. *Frauds, ETC., in Sales or Advertisements of Merchandise*, N.J. STAT. ANN. § 56:8-19 (2008).

159. *Id.*

160. *Id.*

161. *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366 (N.J. 1997) (holding that reliance is not required in suits under the Consumer Fraud Act because liability results from “misrepresentations whether ‘any person has in fact been misled, deceived or damaged thereby’”) (quoting N.J. STAT. ANN. § 56:8-2).

162. *Jewish Ctr. of Sussex County v. Whale*, 432 A.2d 521, 524 (N.J. 1981) (holding that the five elements of common-law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.).

163. *Id.* (“monetary damage, loss of profits or intent to deceive or take unfair of any person is not required.”).

164. *Id.*

165. *Trade Practices and Regulations*, N.M. STAT. ANN. § 57-12-10(B) (2008).

166. *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550 (N.M. Ct. App. 2003) (“Policyholder was not required to allege detrimental reliance in order to state valid claim that life insurer’s failure to disclose total cost of paying annual premiums in installments violated Unfair Practices Act (“UPA”) and the Unfair Insurance Practices Act (“UIPA”); UPA and UIPA required causation, but not reliance.”).

167. *Cain v. Champion Window Co. of Albuquerque, LLC*, 164 P.3d 90, 97 (N.M. App. Ct. 2007).

168. *General Business Law*, N.Y. GEN. BUS. LAW § 350-e (3) (McKinney 2004) (stating that a person can “recover his actual damages or fifty dollars, whichever is greater, or both such actions.”).

169. *Id.*

170. *Id.*

171. *Stutman v. Chemical Bank*, 731 N.E.2d 608 (N.Y. 2000) (holding that reliance on the misrepresentation is not an element of the claim under sec-

tion 349). However, in an advertising claim under Section 350, actual reliance is required. Section 350 prohibits false advertising. N.Y. GEN. BUS. LAW § 350 (McKinney 2004).

172. *Lama Holding Co. v. Smith Barney Inc.*, 668 N.E.2d 1370 (1996) (“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.”).

173. Monopolies, Trusts and Consumer Protection, N.C. GEN. STAT. ANN. § 75-16 (2008).

174. *See id.* (treble damages are mandatory in North Carolina to a prevailing consumer); *see also* *Canady v. Crestar Mortg. Corp.*, 109 F.3d 969 (4th Cir. N.C. 1997).

175. *Id.*

176. *Cullen v. Valley Forge Life Ins. Co.*, 589 S.E.2d 423, 431 (holding that reliance is not a factor in a consumer fraud case).

177. *Cofield v. Griffin*, 78 S.E.2d 131, 133 (N.C. 1953) (holding that reasonable reliance is an essential element of fraud); *see also* *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559 (N.C. 1988)

While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive (4) which does in fact deceive, (5) resulting in damage to the injured party.

178. Unlawful Sales or Advertising Practices, N.D. CENT. CODE § 51-15-08 (2008).

179. *Id.*

180. *Id.*

181. North Dakota statutes define actual fraud as: Actual fraud within the meaning of this title consists in any of the following acts committed by a party to the contract, or with the party's connivance, with intent to deceive another party thereto or to induce the other party to enter into the contract:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true;
3. The suppression of that which is true by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or
5. Any other act fitted to deceive. *Id.* § 9-03-08.

North Dakota statute defines deceit as:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;



3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
4. A promise made without any intention of performing.

*Id.* § 9-10-03. A key element in proving fraud or deceit is reliance upon false or misleading representations by the complaining party. *Id.* § 9-03-08; § 9-10-02; *See* Dvorak v. American Family Mut. Ins. Co., 508 N.W.2d 329 (N.D. App. Ct. 1993) (the only significant distinction between the torts of fraud and deceit is whether the wrongdoer happens to be a party to contract, in that fraud applies to misrepresentations between parties to contract but deceit applies when there is no contract between parties).

182. Consumer Protection, OHIO REV. CODE ANN. § 345.09 (2008).

183. OHIO REV. CODE ANN. § 1345.03(A)(1)-(6); *see also id.* § 1345.031 (prohibiting unconscionable acts or practices with respect to residential real estate mortgages); § 1345.09(2) (limiting actions involving loan officer, mortgage brokers, and non-bank mortgage lenders and consumers to individual actions; limiting rescission actions to those prohibited by the Truth in Lending Act and its applicable limitations period for rescission).

184. OHIO REV. CODE ANN. § 1345.03(B) (2008).

185. *Id.*

186. Estate of Cattano v. High Touch Homes, Inc., 2002 WL 1290411 at \*8 (Ohio Ct. App. 2002). However, Ohio courts have recognized that class action treatment is appropriate in cases where the claims arise from standardized forms or routine procedures, notwithstanding the need to prove reliance. Baughman v. State Farm Mut. Auto. Ins. Co., 727 N.E.2d 1265, 1275 (Ohio 2000) (citing Hamilton v. Ohio Sav. Bank, 694 N.E.2d 442, 456); Hamilton v. Ohio Sav. Bank, 694 N.E.2d 442, 456 (Ohio 1998) (explaining further than in such cases, proof of reliance may be sufficiently established by inference or presumption).

187. State ex rel. Illuminating Co. v. Cuyahoga County Court, 776 N.E.2d 92, 97-98 (Ohio 2002) (common law fraud requires proof of the following elements: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance).

188. Consumer Protection Act, OKLA. STAT. ANN. tit. 15, § 761.1(A) (2008). Although the act states that a violator is liable for a consumer's actual damages sustained, there is no causation language or "as a result of" language. *Id.*

189. *Id.*

190. *Id.*

191. Patterson v. Beall, 19 P.3d 839, 846 (Okla. 2000) ("The four elements of a consumer's private action under the Oklahoma Consumer Protection Act (OCPA) are: (1) that the defendant engaged in an unlawful practice; (2) that the challenged practice occurred in the course of defendant's business; (3) that the plaintiff, as a consumer, suffered an injury in fact; and (4) that the challenged practice caused the plaintiff's injury.").

192. *Roberts Ranch Co. v. Exxon Corp.*, 43 F. Supp. 2d 1252, 1259 (W.D. Okla. 1997) (defining detrimental reliance as “misleading another to his prejudice”) (quoting OKLA. STAT. ANN. TIT. 15, § 59 (1991)); *Rogers v. Meiser*, 68 P.3d 967, 977 (Okla. 2003) (explaining that “[t]he elements of common law fraud are: (1) a false material misrepresentation, (2) made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, (3) with the intention that it be acted upon, and (4) which is relied on by the other party to his/her own detriment. Fraud is never presumed and it must be proved by clear and convincing evidence.”).

193. *Trade Practices and Antitrust Regulation*, OR. REV. STAT. ANN. § 646.638 (2008).

194. *Id.* (as a result of willful use or employment by another person of a method, act or practice declared unlawful).

195. *Id.*

196. Whether reliance is an element of an action under the Oregon Unlawful Trade Practices Act “necessarily depends on the particular unlawful practice alleged.” *Sanders v. Francis*, 561 P.2d 1003 (Or. 1977); *Tri-West Const. Co. v. Hernandez*, 607 P.2d 1375, 1382 (Or. App. Ct. 1979) (holding that reliance is not required where a creditor-contractor misrepresented to the debtors-purchasers that he had no right to rescind a contract contrary to both federal law (15 U.S.C. 1635) and state law (ORS 83.710 *et seq.*)). “Similarly, proof that a party justifiably relied on a representation is not necessary when the representation involves a matter about which the party making it is legally required to inform the other.” *Id.*

197. *Compare* *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595, 604 (Or. 1987) (“The elements of a tort action in deceit are as follows: (1) a false representation made by the defendant. In the ordinary case, this representation must be one of fact; (2) knowledge or belief on the part of the defendant that the representation is false—or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. This element often is given the technical name of “scienter”; (3) an intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation; (4) justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it; (5) damage to the plaintiff, resulting from such reliance”); *In re Brown*, 956 P.2d 188, 196 (Or. 1998) (“Fraud” and “deceit,” as those terms are used in DR 1-1-102(A)(3), are intended in their tortious sense), *with* *In re Hockett*, 734 P.2d 877 (Or. 1987) (“Generally, that means showing that (1) the accused had falsely represented a material fact; (2) the accused knew that the representation was false; (3) the misrepresentation was made with the intent to induce the recipient to act or refrain from acting; (4) the recipient justifiably relied on the misrepresentation; and (5) the recipient was damaged by that reliance.”); *see also* *Westerberg v. Mader*, 48 P.3d 192, 195 (Or. Ct. App. 2002) (“The focus is on whether the plaintiff’s reasonable reliance on the defendant’s false representation caused harm to the plaintiff.”); *Or. Pub. Employees Ret. Bd. v. Simat, Helliesen & Eichner*, 83 P.3d 350, 361-62 (Or. Ct. App. 2004).

To prevail on a fraud claim, a plaintiff’s reliance in fact must be reasonable, but such reasonableness is measured in the totality of the parties’ circumstances and conduct. For example, if there is a

naive and unsophisticated plaintiff on one side of the equation and an unscrupulous defendant who made active misrepresentations of fact on the other, a court might well conclude that, although a more sophisticated party would not have taken at face value the false representations of the defendant, that particular plaintiff was justified in doing so. In contrast, if a party is a large and sophisticated organization that has at its disposal a small army of attorneys, accountants, and hired experts to evaluate a business deal, that party probably has or can obtain equal means of information and is equally qualified to judge the merits of a business proposition, thus making reliance on misstatements by another party unjustified.

198. Unfair Trade Practices and Consumer Protection Law, 73 PA. STAT. ANN. § 201.9.2 (A) (2008).

199. *Id.*

200. *Id.*

201. *Feeney v. Disston Manor Pers. Care Home, Inc.*, 849 A.2d 590, 597 (Pa. Super. Ct. 2004) (“To prove fraud under Deceptive Trade Practices and Consumer Protection Law (“UTPCPL”), a plaintiff must demonstrate by clear and convincing evidence: (1) a representation, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance.”); *see also* *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa.2001) (saying that the “statute clearly requires, in a private action, that a plaintiff suffer an ascertainable loss as a result of the defendant’s prohibited action. That means . . . a plaintiff must allege reliance . . .”) (emphasis in original); *see id.* at 446 (“Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation.”); *but see* *Basile v. H & R Block, Inc.*, 729 A.2d 574, 584 (Pa. Super. Ct. 1999) (explaining that “Plaintiffs’ agent was bound to conform to the duty of a fiduciary, reliance by the class plaintiffs is implicit and is established by operation of law as to all matters within the scope of the agency.”), *rev’d in part*, 761 A.2d 1115 (Pa. 2000). In dicta, the Basile court decided that “detrimental” reliance must be shown for all violations of the UTPCPL, notwithstanding this unique exception. *Id.* at 584.

202. *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994) (holding that the tort of fraud contains the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance).

203. Deceptive Trade Practices, R.I. GEN. LAWS § 6-13.1-5.2 (a) (2008).

204. *Id.* (requires a consumer to purchase goods or services “primarily for personal, family, or household purposes”); *see also* *Scully Signal Co. v. Joyal*, 881 F. Supp. 727 (D.R.I. 1995) (in Rhode Island, there is no private cause of action for a business or other entity).

205. Deceptive Trade Practices, R.I. GEN. LAWS § 6-13.1-5.2 (a) (2008).

206. *Zaino v. Zaino*, 818 A.2d 630, 638 (R.I. 2003) (to establish a prima facie case of common law fraud in Rhode Island “the plaintiff must prove that the defendant “made a false representation intending thereby to induce plaintiff to rely thereon,” and that the plaintiff justifiably relied thereon to his or her damage.”).

207. Unfair Trade Practices, S.C. CODE ANN. § 39-5-140 (a) (2008).

208. *Id.*

209. *Id.* § 39-5-140 (d).

210. *Wright v. Craft*, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006) (“To recover in an action under the Unfair Trade Practices Act (“UTPA”), the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts.”). *See id.* (no mention is made of the element of reliance.).

211. *Id.*

212. *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 519 P.2d 491, 495 (Okla. 1974) (court upheld a justifiable reliance standard and reasoned that “[T]he gist of fraudulent misrepresentation is the production of a false impression and damage sustained as the natural and probable consequence of the acts charged.”) (citations omitted). The elements of actionable fraud are: (1) That defendant made a material representation; (2) that it was false; (3) that he made it when he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. All these facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them would be fatal to a recovery.”); *see also Ramsey v. Fowler*, 308 P.2d 654 (Okla. 1957); *Steiger v. Commerce Acceptance of Oklahoma City, Inc.*, 455 P.2d 81 (Okla. 1969).

213. Deceptive Trade Practices and Consumer Protection, S.D. CODIFIED LAWS § 37-24-6(1) (2008) (“Knowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been mislead, deceived, or damaged thereby. . .”); *id.* § 37-24-49 (“recovery of actual damages suffered as a result of such act or practice.”) (*emphasis added*).

214. *Id.* § 37-24-6. Also note that in South Dakota, a violation of a consumer fraud act is a Class 2 misdemeanor. *Id.* Continued violations may result in felony charges. *Id.*

215. *Id.*

216. *See Brookings Mun. Utils., Inc. v. Amoco Chem. Co.*, 103 F. Supp. 2d 1169, 1178 n.12 (D.S.D. 2000):

South Dakota’s statutes on Deceptive Trade Practices and Consumer Protection which provide cause of action for damages to any person who claims to have been adversely affected by any act or practice declared to be deceptive, for recovery of actual damages suffered as result of the act or practice, it is a deceptive act or practice to knowingly and intentionally act, use or employ any deceptive

act or practice, fraud, false pretense, false promises or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled, deceived or damaged thereby.

217. *Paint Brush Corp. v. Neu*, 599 N.W.2d 384, 391 (S.D. 1999) ("That a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he [or she] did in fact rely on it and was induced thereby to act to his [or her] injury or damage.").

218. Consumer Protection, TENN. CODE ANN. § 47-18-109 (a) (1) (2009).

219. *Id.* § 47-18-109(a)(3).

220. *Id.* § 47-18-109.

221. *Harvey v. Ford Motor Credit Co.*, 1999 WL 486894 at \*1-2 (Tenn. Ct. App. 1999).

222. *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. App. Ct. 1992) ("Actions for fraud contain four elements: (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the representation. The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform.").

223. Deceptive Trade Practices, TEX. BUS. & COM. CODE ANN. § 17.50 (2008)

224. *Id.* § 17.50 (b)(1).

225. *Id.* § 17.50 (a)(1)(B).

226. *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994); *Cianfichi v. White House Motor Hotel*, 921 S.W.2d 441, 443 (Tex. App. 1996) (although the Texas Supreme Court has not added the reliance requirement, Texas appellate courts have required that reliance may be factor in deciding whether defendant's conduct was "producing cause" of damages to plaintiff); *Crawford & Co. v. Garcia*, 817 S.W.2d 98, 101 (Tex. App. 1991).

227. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) ("To prevail on a fraud claim, Pacific must prove that: (1) Ernst & Young made a material representation that was false; (2) it knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) it intended to induce the plaintiff to act upon the representation; and (4) Pacific actually and justifiably relied upon the representation and thereby suffered injury.").

228. Utah Consumer Sales Practices Act, UTAH CODE ANN. § 13-11-4 (2008); *id.* § 13-11-5; 13-11-19 (1)-(b); § 13-11-4 is similar to § 3 of the Uniform Consumer Sales Practices Act, *see* UNIF. CONSUMER SALES PRACTICES ACT § 3, 7A PT. 1 U.L.A. 75 (2002).

229. UTAH CODE ANN. § 13-11-4(a)-(w) ("a supplier commits a deceptive act or practice if the supplier knowingly or intentionally [commits any act listed in subpart a through w]"); *see* UTAH CODE ANN. § 13-11-3(6) (definitions) ("Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.").

230. *Id.* § 13-11-5(1)-(3) (noting that an “unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction”; “unconscionability . . . is a question of law for the court . . . the court shall consider circumstances which the supplier knew or had reason to know”).

231. *Id.* § 13-11-19.

232. The closest case to touch on the issue, but does not directly do so, is *Andreason v. Felsted*, 137 P.3d 1, 14 (holding that a consumer that establishes damages axiomatically establishes the statutory requirement of “loss”). “Reliance” is mentioned in the Westlaw headnotes.

233. *Armed Forces Ins. Exch. v. Harrison*, 70 P.3d 35 (Utah 2003) (the elements that a party must allege to bring a claim sounding in fraud are: (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party’s injury and damage.).

234. *Consumer Fraud*, VT. STAT. ANN. TIT. 9 § 2461(B) (2008).

235. *Id.*

236. *Id.* Under the statute’s language a consumer may sue for equitable or monetary relief, based on reliance on a false statement prohibited by the Act (with or without any damages resulting), or based on damages resulting from conduct prohibited by the Act (with or without any reliance upon a false statement).

237. *Jordan v. Nissan North America, Inc.*, 853 A.2d 40, 43 (Vt. 2004) (“a complainant must establish with proof of three elements: (1) the representation or omission at issue was likely to mislead consumers; (2) the consumer’s interpretation of the representation was reasonable under the circumstances; and (3) the misleading representation was material in that it affected the consumer’s purchasing decision. *Id.*; *Carter v. Gugliuzzi*, 716 A.2d 17, 23 (1998). Under the Act’s objective standard, a consumer establishes the first element if she proves that the representation or omission had the tendency or capacity to deceive a reasonable consumer. *Id.*; *Bisson v. Ward*, 628 A.2d 1256, 1261 (1993). Messages susceptible to multiple reasonable interpretations may violate the Act if just one of those interpretations is false. *Carter*, 168 Vt. at 57, 716 A.2d at 24. Notably, no intent to deceive or mislead need be proven because § 2453(a) requires only proof of an intent to publish. *Id.* at 56, 716 A.2d at 23”).

238. *Fuller v. Banknorth Mortg. Co.* 788 A.2d 14, 16 (Vt. 2001) (“Vermont case law establishes that, in order to state a claim for fraud based on fraudulent concealment, a plaintiff must demonstrate: (1) concealment of facts, (2) affecting the essence of the transaction, (3) not open to the defrauded party’s knowledge, (4) by one with knowledge and a duty to disclose, (5) with the intent to mislead, and (6) detrimental reliance by the defrauded party.”).

239. *Virginia Consumer Protection Act*, VA. CODE ANN. §59.1-200 ET SEQ. (2008).

240. *Id.*

241. *Id.*

242. *Cooper v. GGGR Invs., LLC*, 334 B.R. 179, 189 (E.D. Va. 2005) (explaining that to “successfully pursue private cause of action under the Virginia Consumer Protection Act (“VCPA”), claimant show that he relied on alleged misrepresentations that are claimed to constitute the prohibited practice, and, thus, that his loss was caused by the prohibited practice.”). This opinion is from a Bankruptcy Court and therefore is not binding on trial courts. No other appellate court case can be found on whether or not reliance is an element under the VCPA.

243. *State Farm Mut. Auto. Ins. Co. v. Remley*, 618 S.E.2d 316, 321 (Va. 2005) (the court has previously held that “[a] litigant who prosecutes a cause of action for actual fraud must prove by clear and convincing evidence: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.”).

244. *Unfair Business Practices—Consumer Protection*, WASH. REV. CODE ANN. § 19.86.090 (2008).

245. WASH. REV. CODE ANN. §§ 19.86.020, 030, 090 (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful”); *see also* Betsy Hollingsworth & Tina Kondo, *Methods of Practice—Consumer Transactions, Consumer Protection*, 1A Wash. Prac. Series § 46.71 (2008) (according to the literal language of the statutes, “proximate cause” is required for per se violations, meaning proximate cause is only required for the list of violations the legislature has deemed unfair).

246. *Id.*

247. *Svendsen v. Stock*, 23 P.3d 455, 459 (Wash. 2001) (holding that “[t]o establish a claim under the Washington Consumer Protection Act, five elements must be established: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation.”); *see also* *State v. Ralph Williams’ North West Chrysler Plymouth, Inc.*, 553 P.2d 423, 436-37 (Wash. 1976) (merely requiring conduct have the capacity or tendency to deceive); *see Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wash. App. 90, 605 P.2d 1275, 1277 (Wa. App. Ct. 1979) (holding that a claimant alleging unfair and deceptive acts or practices in conduct of any trade or commerce “need not prove reliance or deceptive misrepresentation but only that actions have a tendency or capacity to deceive a substantial portion of public”).

248. *Compare Robinson v. Avis Rent A Car System, Inc.* 22 P.3d 818, 823 (Wa. App. Ct. 2002) (holding that plaintiff establishes causation under the CPA if he or she shows the trier of fact that he or she relied upon a misrepresentation of fact), with *Schnall v. AT&T Wireless Servs., Inc.*, 161 P.3d 395, 401 (Wash. App. Ct. 2007) (holding that “[i]ndividual reliance is not the exclusive means of proving causation in class action Consumer Protection Act (“CPA”) claims; it is sufficient to prove that a practice has the capacity to deceive a substantial portion of the public”).

249. On its face, the Washington Consumer Protection Act demands no more than that litigant sustain injury as result of unfair or deceptive acts or practices in conduct of any trade or commerce, but the Washington Supreme Court has established both a public interest requirement as prerequi-

site to bringing private action and a “proximate cause” requirement. See *Guijosa v. Wal-Mart Stores, Inc.*, 32 P.3d 250 (Wash. 2001) (citing to a prior Supreme Court case that adhered to the trial court’s requirement of “proximate” cause). In part, this may be because jury instructions have said so. *Id.*

250. *State v. Hardesty*, 915 P.2d 1080 (Wash. 1996); *Stiley v. Block*, 925 P.2d 194, 204 (Wash. 1996) (“The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon it; and (9) damages suffered by the plaintiff.”).

251. General Consumer Protection, W. VA. CODE ANN. § 46A-6-106 (A) (2008).

252. *Id.* § 46A-6-106 (B).

253. *Id.* § 46A-6-102(7)(M) prohibits the “act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby” (*emphasis added*).

254. *McGraw v. Imperial Mktg.*, 472 S.E.2d 792 (W. Va. 1996) (holding that reliance is not needed to use the attorney general’s powers); *see also* *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52, 75 (W.Va. 2003) (“We conclude that for a consumer to make out a *prima facie* case to recover damages for ‘any ascertainable loss’ under W. VA. CODE § 46A-6-106, the consumer is not required to allege a specific amount of actual damages.”).

255. *Kidd v. Mull*, 595 S.E.2d 308, 313 (W.Va. 2004) (“The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.”).

256. Marketing; Trade Practices, WIS. STAT. ANN. § 100.18 (West 2008) (fraudulent misrepresentations); *id.* § 100.263 (recovery).

257. *Id.*

258. *Id.*

259. *Novell v. Migliaccio*, 749 N.W.2d 544, 553 (2008) (“The [defendants] maintain that even if reasonable reliance is not an element of a § 100.18 claim, the reasonableness of a person’s actions in relying on representations is a defense and may be considered by a jury in determining cause. We agree. As set forth above, there are three elements in a Wis. Stat. Ann. § 100.18 cause of action: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was ‘untrue, deceptive or misleading,’ and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff . . . Reliance is an aspect of the third element, whether a representation caused the plaintiff’s pecuniary loss.”) (internal citations omitted).

260. *Mackenzie v. Miller Brewing Co.*, 716, 623 N.W.2d 739, 745 (Wis. 2001) (holding that “[t]he elements of a fraud claim are: (1) false representation; (2) intent to defraud; (3) reliance upon the false representation; and



(4) damages.”); *Ritchie v. Clappier*, 326 N.W.2d 131, 134 (Wisc. Ct. App. 1982) (holding that “[t]he elements of fraud are a false representation made with intent to defraud and reliance by the injured party on the misrepresentation. The reliance must be “justifiable.” Negligent reliance is not justifiable”).

261. Consumer Protection, WYO. STAT. ANN. § 40-12-108 (A) (2008).

262. *Id.* § 40-12-108.

263. *Id.* § 40-12-108 (A).

264. *Big-O Tires, Inc. v. Santini*, 838 P.2d 1169, 1177 (Wyo. 1992) (“To establish a case of fraudulent misrepresentation in a consumer sales transaction, the consumer must establish that the seller knowingly made a false representation of a material fact with the intent of inducing her to purchase the product, and that she was induced to make the purchase, to her detriment, by her reasonable reliance upon the seller’s statements”).

265. *Britton v. Bill Anselmi Pontiac-Buick-GMC, Inc.*, 786 P.2d 855 (Wyo. 1990) (holding that a defendant must knowingly make a false representation of a material fact with the intent of inducing them to purchase, and that plaintiff was induced to purchase, to their detriment, by reasonable reliance upon defendant’s statements).