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A MATTER OF TRUST: SHOULD NO-RELIANCE CLAUSES BAR CLAIMS FOR FRAUDULENT INDUCEMENT OF CONTRACT?

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In this Article, Professor Allen Blair examines the enforceability of no-reliance clauses—contractual disclaimers designed to prevent parties from relying on extra-contractual representations to prove fraudulent inducement claims. Many courts are skeptical of such disclaimers and either refuse to enforce them or will enforce them only subject to substantial restrictions. These courts base their decisions on generic moral prohibitions against lying. This Article argues, however, that these courts reach their conclusion too easily. They presume that no-reliance clauses can serve no legitimate contract function and thus never provide value to parties. But, in at least some cases between sophisticated parties, no-reliance clauses can—and do—serve valuable contract functions. With the core assumption made by the majority of courts reluctant to enforce no-reliance clauses dispelled, this Article suggests that at least the generic formulations of a moral prohibition against fraud are insufficient to counterbalance the value gained by autonomous parties choosing what they rationally believe to be in their own best interests.

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I. INTRODUCTION

> The liar, and only the liar, is invariably and universally despised, abandoned, and disowned.[1]

Who or what can you trust when deciding whether or not to enter into a contract? According to the Seventh Circuit Court of Appeals, what contracting parties can trust—what they should trust—is the written language of the contract.[2] After all, the Seventh Circuit reminds us, "[m]emory plays tricks. . . . Prudent people protect themselves against the limitations of memory (and the temptation to shade the truth) by limiting their dealings to those memorialized in writing."[3] Consequently, in the Seventh Circuit's view, contractual disclaimers designed to prevent parties from relying on extra-contractual representations should be enforced.[4] In the face of such disclaimers—what I will refer to as "no-reliance clauses"[5]—neither party

1. 2 Samuel Johnson, *The Adventurer*, *in* THE YALE EDITION OF THE WORKS OF SAMUEL JOHNSON 362 (W. J. Bate, John M. Bullitt & L. F. Powell eds., 1963).

2. *See* Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000).

3. *Id*.

4. *Id*.

5. These sorts of clauses are also commonly referred to as "anti-reliance clauses" or "waivers of reliance clauses." *See, e.g.*, Kronenberg v. Katz, 872 A.2d 568, 593 (Del. Ch. 2004) ("[F]or a contract to bar a fraud in the inducement claim, the contract must contain language that, when read together, can be said to add up to a clear *anti-reliance clause* by which the plaintiff has contractually

should be able to maintain that it was fraudulently induced[6] to enter into the contract.[7] A growing number of courts agree with the Seventh Circuit and

promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract." (emphasis added)). These clauses are also sometimes called "big boy" clauses. *See, e.g.*, Extra Equipamentos e Exportação Ltda. v. Case Corp., 541 F.3d 719, 724 (7th Cir. 2008) ("In the trade, no-reliance clauses are called 'big boy' clauses (as in 'we're big boys and can look after ourselves').").

Such clauses should be distinguished from generic merger or integration clauses because, as discussed in detail in Part III, some courts impose stringent normative requirements on no-reliance clauses, maintaining that they must be set apart from standard merger clauses, must not be, themselves, boilerplate, or must particularly disclaim the alleged misrepresentations. Additionally, no-reliance clauses should be distinguished from clauses that operate to bar or limit claims for fraud based on representations made within the contract. *See generally, e.g.*, Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006). In *Abry*, the contract at issue contained a number of interlocking provisions designed to limit the plaintiff's post-closing recourse against the defendant. *Id.* at 1044–45. The particular provisions at issue, however, stated that, with respect to breaches of (or noncompliance with) any representations or warranties actually inside the Purchase Agreement, the plaintiff could recover only up to $20 million in damages. *Id*. at 1044. While stating in dicta that no-reliance clauses purporting to bar reliance on representations made outside of the contract would be enforceable, *id*. at 1041, the court in *Abry* determined that there were no legitimate justifications for a seller to seek protection for intentional lies that it makes about facts contained in a contract, *id*. at 1036 ("[I]t is difficult to identify an economically-sound rationale for permitting a seller to deny [a remedy] to a buyer when the seller is proven to have induced the contract's formation or closing by lying about a contractually-represented fact."). While I believe that the *Abry* court's distinction is suspect, I limit my analysis in this Article to no-reliance clauses that focus on precontractual representations.

6. This Article will consider only contractual disclaimers of alleged misrepresentations that form the predicates of fraudulent inducement claims. Fraud in the factum, or fraud in the execution, as it is sometimes called, presents a different set of problems. Misrepresentations constituting fraud in the inducement lead "'a party to assent to something he otherwise would not have; [misrepresentations constituting fraud in the factum] induce[] a party to believe the nature of his act is something entirely different than it actually is.'" Connors v. Fawn Mining Corp., 30 F.3d 483, 490 (3d Cir. 1994) (quoting Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 774 (9th Cir. 1986)). Accordingly, "'[f]raud in the [factum] arises when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms. . . . Fraud in the [factum] results in the agreement being void *ab initio*, whereas fraud in the inducement makes the transaction merely voidable.'" *Fawn Mining Corp.*, 30 F.3d at 490 (quoting *Rozay's Transfer*, 791 F.2d at 774) (citation omitted); *see also* Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 109–10 (3d Cir. 2000) (distinguishing between fraud in the inducement and fraud in the execution); Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) ("Where misrepresentation of the character or essential terms of a proposed contract occurs, [i.e., fraud in the factum,] assent to the contract is impossible. In such a case there is no contract at all."); RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a (1991) (same).

7. *See, e.g.*, *Extra Equipamentos e Exportação Ltda.*, 541 F.3d at 724 ("No-reliance clauses serve a legitimate purpose in closing a loophole in contract law (thus resisting, in Judge Kozinski's colorful expression, the metastasizing of contract law into tort law . . .)") (citation omitted); Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644–45 (7th Cir. 2002) (stating, in dicta, that the logic of *Rissman* should apply outside of the securities context, and no-reliance clauses should be allowed to bar fraudulent inducement claims).

enforce, without significant restriction, no-reliance clauses to defeat claims of fraudulent inducement.[8]

Many courts, however, disagree.[9] Following the traditional view that fraud vitiates all that it touches,[10] some courts categorically refuse to enforce no-reliance clauses, leaving contracting parties exposed to intentional fraud claims. For instance, in the California Court of Appeals' view,

> [a] party to a contract who has been guilty of fraud in its inducement cannot absolve himself from the effects of his fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived.[11]

Other courts will sometimes enforce no-reliance clauses, but only with significant restrictions.[12]

The upshot is that courts and commentators addressing the enforceability of no-reliance clauses have a long history of disagreeing.[13] Opposing arguments get framed between two familiar poles: freedom of contract and the moral repugnance of fraud. So framed, the disagreement about the enforceability of no-reliance clauses invokes an ancient divide in our jurisprudence between contract and tort law. Mapping this divide, however,

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8. *See infra* Part II.C.

9. *See infra* Part II.A and B.

10. *See, e.g.*, Wilkinson v. Carpenter, 554 P.2d 512, 516 (Or. 1976) ("[A] contract with an innocent principal [can] be rescinded on the basis of the fraudulent representations of his agent despite a disclaimer clause because the fraud complained of vitiates the entire transaction, including the disclaimer clause." (quotation omitted)); Pearson & Son, Ltd. v. Dublin Corp. [1907] A.C. 351, 362 (H.L) (appeal taken from Ir.) ("[F]raud vitiates every contract and every clause in it.").

11. Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp., 38 Cal. Rptr. 2d 783, 788 n.7 (1995) (favorably quoting 1 WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS §130 410, 368–69 (9th ed. 1987)). *But see* Hinesley v. Oakshade Town Ctr., 37 Cal. Rptr. 3d 364, 372 (2005) (stating that the *Ron Greenspan* rule "does not mean the contract provision is in every case irrelevant" and concluding that a particularized no-reliance clause sufficed as evidence that plaintiff did not rely on defendant's statements).

12. *See infra* Part II.B.

13. *See, e.g.*, Gregory Klass, *Contracting for Cooperation in Recovery*, 117 YALE L.J. 2, 6 (2007) ("There is a longstanding debate within the courts and legal scholarship about whether parties should be able to contract *out* of liability for their fraudulent misrepresentations."). Professor Klass cites two examples of recent scholarship on this issue: Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-Contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 507–13 (1999) (arguing that no-reliance clauses can best be justified as mechanisms for reducing agency costs in contractual negotiations); and Jeffrey M. Lipshaw, *Of Fine Lines, Blunt Instruments, and Half-Truths: Business Acquisition Agreements and the Right To Lie*, 32 DEL. J. CORP. L. 431, 449 (2007) (urging adoption of a rule that allows no-reliance clauses to the extent that extra-contractual representations conflict with a contractual representation or the contract is silent about the subject matter of the extra-contractual representation). Klass, *supra*, at 6 n.5.

has famously been fraught with difficulty.[14] It represents a conflict between sometimes competing primary principles, one of which must take priority in a given instance.[15] On the one hand, the law should encourage people to be diligent in protecting their own interests and respect their choices with regard to such matters; on the other hand, the law should encourage honesty and fair dealing in business transactions.[16] Conflicts between these primary principles have often left a trail of analytical confusion in their wake and given little practical guidance to contracting parties.

This Article aims to help clear such confusion, at least with respect to no-reliance clauses contained in commercial contracts between sophisticated parties.[17] I contend that an analysis of the enforceability of no-reliance

14. In 1953, for instance, Professor William Prosser stated that "the borderland of tort and contract, and the nature and limitations of the tort action arising out of a breach of contract are poorly defined." WILLIAM LLOYD PROSSER, *The Borderland of Tort and Contract*, *in* SELECTED TOPICS ON THE LAW OF TORTS 380, 452 (1953); *see also, e.g.*, Thomas C. Galligan, *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 458–60 (1994) (describing the challenges of drawing boundaries between tort and contract); Richard E. Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163, 164–66 (1983) (tracing the uncertain and often confusing historic distinctions between tort and contract).

15. *See* H.L.A. HART, THE CONCEPT OF LAW 89–91 (1961) (explaining that primary principles are beliefs or moral obligations shared by a relatively homogenous society); *see also* Eric A. Posner, *The Decline of Formality in Contract Law*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 68 (F.H. Buckley ed., 1999) (noting that formalist criticisms of the unconscionability doctrine require "direct application of a moral theory, rather than the application of second-order rules").

16. Paula J. Dalley, *The Law of Deceit, 1790–1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 407. William Powers, Jr. describes the differences between torts and contracts as follows: "The tort paradigm reflects the ideology and rhetoric of reasonableness . . . . The contract paradigm reflects the ideology of freedom and consent and carries the principles of autonomy, individuality, and privacy into commerce via the market." William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1213–14 (1994); *see also* Alloway v. Gen. Marine Indus., L.P., 695 A.2d 264, 268 (N.J. 1997) ("Implicit in the distinction [between contract and tort] is the doctrine that a tort duty of care protects against the risk of accidental harm and a contractual duty preserves the satisfaction of consensual obligations." (citations omitted)); Dalley, *supra*, at 407 n.6 (discussing this historic tension and citing several cases in which courts advocated for honesty and fair dealing and several cases in which courts advocated for prudent business decisions). So framed, the tensions between the paradigms are evident and have been much discussed. *E.g.*, Daniel Markovits, *Making and Keeping Contracts*, 92 VA. L. REV. 1325, 1326–27 (2006) (stating that arguments about these differences "have recently received extensive attention under a variety of headings—including the rise of the welfare state, the tortification of contract law, and the development of a discourse of anticommodification" (footnotes omitted)).

17. In this Article, I focus exclusively on contracts between sophisticated parties with relatively equal bargaining power. No-reliance clauses may well present particular concerns in consumer contracts or contracts involving radically disparate bargaining power. Accordingly, I take no position in this Article on the enforceability of no-reliance clauses in such contracts, opting instead to distinguish, at least roughly, between consumer contracts and commercial contracts. *See, e.g.*, All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 866 (7th Cir. 1999) (recognizing a distinction between "commercial contracting parties" and "consumers, and other individuals not engaged in business" for the purposes of the potential application of the economic loss doctrine to bar claims of fraud); Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104

clauses should begin by examining a core puzzle: why would any rational party[18] in an arms-length contract ever agree to a provision limiting or eliminating her recovery in cases when the other party intentionally lies to her?[19] This puzzle is particularly interesting considering that many commercial contracts contain these clauses.[20]

Courts on both ends of the enforcement spectrum, however, have avoided consideration of this puzzle.[21] Courts reluctant to enforce no-reliance clauses avoid the puzzle by either explicitly or implicitly assuming that no-reliance clauses have no legitimate value for contracting parties. Such clauses are mere licenses to lie.[22] With this assumption in place, courts easily justify their decision not to enforce no-reliance clauses, or to enforce them only subject to

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COLUM. L. REV. 496, 538 (2004) (noting that "distinctions [are] drawn in the case law and in the commentary between different sorts of contracts; it is generally acknowledged that formalism is relatively more important to experienced commercial actors, and substantive interpretation better suited to transactions involving consumers and other amateurs," but also noting that no systematic attempt to draw this distinction exists in domestic contract law); Robert E. Scott, *The Law and Economics of Incomplete Contracts*, 2 ANNU. REV. L. & SOC. SCI. 279, 281 (2006) ("Contracts involving individual consumers raise separate issues that challenge the assumption that their commitments are voluntary, rational and informed."); William J. Woodward, Jr., *"Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC*, 75 WASH. U. L.Q. 243, 244 (1997) ("Nobody doubts any longer that 'consumer contracts' are different from fully negotiated contracts of the classical model. Consumers are seldom represented by lawyers in their contractual dealings, and we tend to think that, as a group, they have a lower level of legal sophistication than those with whom they typically make contracts.").

18. Contracting parties, I assume, are rational in the sense that they only enter into contracts that they believe will make them better off. *See, e.g.*, Scott, *supra* note 17, at 280 (assuming that contracting parties "act rationally, within the constraints of their environment, in the sense that they wish to contract if they believe the arrangement will make them better off and not otherwise"); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 602 (1990) ("If we assume rationality, then it follows that, regardless of the risk attitudes of particular parties, the dominant strategy for contractual risk allocation is to maximize the expected value of the contract for both parties. Only by allocating risks in order to maximize the joint expected benefits from their contractual relationship can the parties hope to maximize their individual utility.").

19. This is precisely the sort of puzzle that occupies Professor Victor Goldberg's energies in his recent book. VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (2006). In his book, Professor Goldberg advances a brand of economic analysis that eschews formal modeling, preferring instead to focus tightly on the transaction. Professor Goldberg suggests that by asking, "Why might reasonable, profit-seeking actors structure their relationship in a particular way?," *id*. at 2, economic analysis can offer insights into not only contract interpretation but also contract rules, both mandatory and default, *see id*.

20. Davis, *supra* note 13, at 485 ("Disclaimers of liability for pre-contractual misrepresentations are common features of all kinds of contracts, ranging from the complex agreements of purchase and sale used in connection with the acquisition of businesses, to contracts for the sale or the lease of consumer goods.").

21. *See infra* Part III.

22. This phrase was first used by Professor Kevin Davis when discussing no-reliance clauses. *See* Davis, *supra* note 13, at 485. Professor Davis, however, advances several compelling arguments favoring the enforcement of no-reliance clauses. *See id.*

significant restrictions, by parroting generic notions that lying and fraud are morally reprehensible. After all, if the parties gain no legitimate value from no-reliance clauses,[23] then freedom of contract with respect to such clauses has no moral or practical weight.[24] It takes only a modest argument against these clauses to justify a refusal to enforce them. But courts that do enforce no-reliance clauses without significant restrictions have, in the main, also failed to address this puzzle, rehearsing instead superficial freedom-of-contract rationales that fail to meet the concerns of courts in the opposing camp.

While I ultimately suggest that no-reliance clauses should be enforced without significant restrictions, my primary goal is not to advocate for one rule or another.[25] Instead, my primary goal is to advance the debate about the enforceability of no-reliance clauses.[26] I argue that courts reluctant to enforce

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23. The term "value" is being used in its most capacious sense. This Article assumes that "[h]uman beings value goods, things, relationships, and states of affairs in diverse ways." Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782 (1994) (citing ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 8–11 (1993)). Thus, it assumes that values are plural and that they cannot be reduced to and compared along a single unitary metric. *See id.* at 784 (arguing that "[d]ifferent kinds of valuation cannot without significant loss be reduced to a single 'superconcept,' like happiness, utility, or pleasure"); *see also* Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PENN. L. REV. 1185, 1185 (1998) (describing advocates of this position as arguing "that people can choose among options, but that the choice depends on qualitative differences between options that cannot be reduced to vectors on a single dimension of evaluation").

24. For an example of a powerful justification for courts interfering with the choices that contracting parties might make about the design of their contracts when that design does not serve legitimate economic goals, see generally Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

25. The question of whether no-reliance clauses should be enforced can be thought of as a choice about whether prohibitions against fraud should constitute mandatory or default rules. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989). Contracting parties may freely opt out of default rules. *See id.* Unlike default rules, however, mandatory rules may not be varied or waived by contracting parties, even if both would choose to do so. *See id.* Mandatory rules impose standards of procedural or substantive fairness on the parties. These bargaining constraints may be

> justified either by "externalities" or "paternalism" in that lawmakers might make rules mandatory to protect people not in contractual privity (e.g., as in the mandatory prohibition of criminal conspiracies) or to protect people who are parties to the contract itself (e.g., as in the mandatory prohibition against contracting with infants).

Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 901 (1999).

26. I subscribe to the notion that the primary goal of contract law should be to achieve efficiency goals and thereby maximize social welfare gains. While I recognize that there are other goals that contract law might serve, I do not, in this Article, revisit the debate on the propriety of using efficiency analysis. For a discussion of criticisms of the selection of efficiency as the goal to

no-reliance clauses rest their decisions on a faulty premise. Contrary to this premise, both buyers and sellers in arms-length contracts regularly have legitimate and compelling reasons to include no-reliance clauses in their contracts and to want courts to enforce these clauses without restrictions.[27] Once the core assumption made by the majority of courts reluctant to enforce these clauses has been dispelled, I argue that at least the generic formulations of a moral prohibition against fraud are insufficient to counterbalance the value[28] gained by autonomous parties choosing what they rationally believe to be in their own self-interest. Thus, courts should either enforce no-reliance clauses without restrictions or carefully articulate a more robust moral basis for a public policy prohibition against them.

My argument proceeds in three parts. Part II catalogues the current state of the law with respect to no-reliance clauses. This Part identifies three basic categories of approaches that courts take. First, some courts (in Category I) simply refuse to enforce no-reliance clauses. Second, some courts (in Category II) will enforce such clauses only subject to one or more substantial limitations. Finally, a growing number of courts (in Category III) are willing to enforce no-reliance clauses, at least between sophisticated parties. Part II concludes that a significant number of cases fall into Categories I or II. In other words, many courts either prohibit or place significant restrictions on the enforcement of no-reliance clauses.

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be achieved by contract rules, see Richard Craswell, *The Relational Move: Some Questions From Law and Economics*, 3 S. CAL. INTERDISC. L.J. 91, 100 (1993). Instead, this Article is written in the spirit of Professor Cass Sunstein's call to recognize the plurality of values in order to more clearly see what is at stake in the adoption of one legal rule or another. *See* Sunstein, *supra* note 23, at 782. As Professor Sunstein points out,

> to see values as incommensurable, and to say that people are really disputing appropriate kinds (not levels) of valuation, is not by itself to resolve legal disputes. It is necessary to say something about the right kind—to offer a substantive theory—and to investigate the particulars in great detail, in order to make progress in hard cases in law. But an understanding of problems of incommensurability will make it easier to see what is at stake.

Id. This Article endeavors to encourage a more detailed investigation of the particulars of no-reliance clauses so that courts and commentators can more clearly see what is at stake in choices about the enforceability of such clauses.

27. *See infra* Part IV.

28. As I explain in Part III in more detail, I am not attempting to make a commensurabilist claim about the value of no-reliance clauses compared to the value of prohibitions against fraud. Instead, I assume that the values at play are incommensurable, but only in a weak sense. *See, e.g.*, Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 815–17 (1993) (describing the difference between "strong" and "weak" incommensurability). In other words, I contend that even though the values of no-reliance clauses and prohibitions against fraud are not commensurable, when they are in conflict, a rational choice between the two can be—and must be—made.

Part III argues that the general reluctance of most courts to enforce no-reliance clauses rests on one of two highly simplified and often merely implied approaches to the morality of lying, one deontological and the other consequentialist. Part III concludes, however, that with the exception of only a rare, die-hard brand of Kantianism, neither deontological nor consequentialist rationales for opposing lying are categorical. Both deontologists and consequentialists recognize that prohibitions against lying can and often do give way to other moral imperatives or primary principles. Accordingly, even presuming that sound moral arguments exist in favor of requiring sellers to make honest representations, courts, faced with autonomous parties that have voluntarily included no-reliance clauses in their contracts, should compare the value embodied in that contract-design choice with the value protected by moral arguments against lying. Courts have avoided making this comparison, I contend, by presuming that the contract design side of the balance has no weight. As a result of essentially "rigging the game," courts have not only ignored legitimate justifications that might prompt rational buyers and sellers to include no-reliance clauses in their contracts, but also systematically under-articulated the supposed moral basis of their reluctance to enforce such clauses.

Part IV takes seriously the notion, denied by the majority assumption regarding no-reliance clauses, that parties are generally acting in what they believe to be their own best interest.[29] If parties are acting in their own interest, then some consideration of the value that parties who include no-reliance clauses in their contracts must be attaching to them is due. Part V engages in such a consideration. It concludes that there are at least four legitimate and compelling reasons why parties might want no-reliance clauses and at least three reasons why parties would be willing to acquiesce to such clauses.

II. KNOWING LIES: AN OVERVIEW OF THE CURRENT STATE OF THE LAW WITH RESPECT TO NO-RELIANCE CLAUSES

> When my love swears that she is made of truth, I do believe her, though I know she lies.[30]

Commercial transactions rarely, if ever, follow the neat chronology of classic contract law.[31] Instead, such transactions are dynamic. Rather than be

29. In Judge Richard Posner's words, "man is a rational maximizer of his ends in life, his satisfactions—what we shall call his 'self-interest.'" RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 3 (2d ed. 1977).

30. WILLIAM SHAKESPEARE, *Sonnet 138*, *in* SHAKESPEARE'S SONNETS 278 (A.L. Rowse ed., 3d ed. 1984).

punctuated by distinct offers and acceptances, contractual expectations develop over time through the repeated and varied exchanges and negotiations of parties.[32] This is particularly true in complex transactions where numerous agents of buyers and sellers are engaged in multiple discussions of various facets of the deal.

The need for extensive precontractual negotiations stems, in large part, from the fact that parties lack knowledge about one another.[33] Buyers know little about the characteristics and qualities of sellers and their promised performances, including sellers' propensities to act opportunistically.[34] This sort of uncertainty,[35] of course, is pervasive in all contractual negotiations, but

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31. The classical conception of contract law (often referred to as "formalism") strove for scientific precision in the deduction and application of acontextual rules. *See* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 416–17 (2004) (citing CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi, vii (1871)). Variously associated with Samuel Williston, Christopher Langdell, and Joseph Beale, among others, the classical model of contract was "[a]bstract conceptualism or formalism." *Id*. at 416. Melvin Eisenberg has described the classical model of contract as "axiomatic and deductive. It was objective and standardized. It was static. It was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market. It was based on a rational-actor model of psychology." Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000). Lawrence Friedman has described the classical model of contract this way:

> [T]he "pure" law of contract is an area of what we can call abstract relationships. "Pure" contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. . . . Contract law is abstraction—what is left in the law relating to agreements when all particularities of person and subject-matter are removed. . . . The abstraction of classical contract law is not unrealistic; it is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammeled individual autonomy or the completely free market in the name of social policy.

LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 20 (1965).

32. *See, e.g.*, Eisenberg *supra* note 31, at 810 ("Promissory transactions seldom occur in an instant . . . . [C]ontract law, if it is to effectuate the objectives of parties to promissory transactions, must reflect the reality of contracting by adopting dynamic rules that parallel that reality, rather than static rules that deny that reality.").

33. For the sake of simplicity, I will presume from this point forward that representations are being made by a seller to a buyer. A buyer, however, may also make representations to the seller on which the seller might rely. Thus, the roles of the parties could be reversed in any given case without changing the substance of the remainder of this Part of the Article.

34. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 47–49 (1985). Trade will be worthwhile if it will produce a joint welfare surplus for the parties. In other words, trade will be worthwhile if it will be a "win/win situation for both parties (assuming that the promises are rational, voluntary and informed). If the welfare gains that both parties anticipate are greater than the expected costs, including the predicted costs of regret, then both parties will be better off . . . ." Scott, *supra* note 17, at 282–83.

35. From a purely economic perspective, "uncertainty" in contracts may be said to exist when the probability or value of alternative outcomes under the contract cannot be measured. Uncertainty

it becomes exacerbated in complex deals. Parties do not know what the probability of reaching an agreement is, or even how much time and money they should expend to find out.[36] As Professors Hermalin, Katz, and Craswell explain, "[i]n order to conduct exchange, the parties not only must find each other, but they must also determine whether trade is worthwhile."[37]

Parties gain this knowledge during the course of precontractual exchanges and negotiations. They make representations in order to learn more about one another and the quality and likelihood of their respective performances. Such representations might be made at a sales pitch or over dinner after a hard day of negotiating. They might be made orally, or they might be made in writing. Whatever their nature and formality, parties may rely to some degree on these representations in deciding whether to consummate the deal.

The problem is that not every representation made by a party during negotiations should be relied on.[38] Sellers often puff their products or services.[39] And both parties sometimes over-optimistically predict their

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exists, in other words, when "there is no scientific basis on which to form any calculable probability whatever." John M. Keynes, *The General Theory of Employment*, 51 Q.J. ECON. 209, 214 (1937). Uncertainty can then be distinguished from risk, which involves contingent outcomes of known probability. *See id*.

36. During this initial period of uncertainty before a contract is formed, each party must decide when and whether to make investments of various kinds. If a contract is never consummated, precontractual investments may be forever lost. In these circumstances, parties sometimes seek to be compensated for investments that they made in reliance on representations made by their counterparty. Familiar cases like *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965), reflect a liberal approach to the award of such compensation. *Id*. at 274–75; *see also* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 222 (1987) ("In recent decades, courts have shown increasing willingness to impose precontractual liability."); Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 496 (1983) ("[I]t is clear that promissory estoppel has been used to enforce promises too indefinite or incomplete to constitute valid offers."). For an excellent treatment of *Red Owl* and the issue of precontractual reliance, see Robert E. Scott, Hoffman v. Red Owl Stores *and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71 (2007); *see also, e.g.*, Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 495, 504–05 (1996); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 694 (1984); Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 496–99 (1999); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1255–56 (1996); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 686–90 (1969); Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 717–20. The enforceability of no-reliance clauses involves similar but not identical concerns.

37. Richard Craswell, Benjamin E. Hermalin & Avery W. Katz, *Contract Law*, *in* HANDBOOK OF LAW AND ECONOMICS 53, 59 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

38. *See, e.g.*, Steinberg v. Brennan, No. Civ.A. 3:03-CV-0562, 2005 WL 1837961, at *8 (N.D. Tex. July 29, 2005) (recognizing that many statements made during the negotiation of a business transaction are intended to be "merely informational, and . . . not meant by either party to supplant the sophisticated purchaser's own research as the ultimate basis for his purchasing decision").

39. One marketing text defines "puffery" in the following manner:

capacity or willingness to perform. Perhaps more significantly, however, during the imbricating exchanges that characterize complex transactions, parties or any one of their agents working on a deal may make assertions that appear to mean one thing in one context and seem to mean something quite different in a later context.[40] One party may hear one thing at the time an assertion is made but recall hearing another thing at a later date. To complicate matters further, in some complex transactions, a seller's product or service may function differently in the context of a buyer's particular objectives. Thus, sellers may not completely understand their own products or services, at least in the context of the deal presented, and without a high degree of information exchange, they may make inadvertent but material misstatements about the quality or character of their goods or services.

> [P]uffery: advertising copy that indulges in subjective exaggeration in its descriptions of a product or service, such as "an outstanding piece of luggage." Puffery is always a matter of opinion on the part of the advertiser and often will use words such as "the best" or "the greatest" in describing the good qualities of a product or service. Sometimes puffery is extended into an exaggeration that is obviously untrue and becomes an outright parody, such as, "This perfume will bring out the beast in every man!"

JANE IMBER & BETSY-ANN TOFFLER, DICTIONARY OF MARKETING TERMS 458 (2000); *see also, e.g.*, Am. Italian Pasta Co. v. New World Pasta Co., 371 F.3d 387, 391 (8th Cir. 2004) ("Puffery and statements of fact are mutually exclusive. If a statement is a specific, measurable claim or can be reasonably interpreted as being a factual claim, i.e., one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.").

Of course, distinguishing between puffery and factual representations is anything but a science. *See* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1403–04 (2006) ("Because neither courts nor regulators consider empirical evidence about which claims imply facts, their application of a nominally coherent doctrine creates a host of decisions in which relatively similar language receives different levels of protection."); *id*. at 1403 & n.43 (stating that while "authorities assume it is possible to distinguish factual from nonfactual speech by looking at the speech itself[,]" researchers argue "it is not easy to distinguish speech conveying factual claims from speech that does not, and that much of the speech that the FTC refers to as puffery in fact implies facts, which themselves might be false" (emphasis omitted)). In light of this difficulty, Professor Hoffman recommends presumptive, though not strict, liability for false statements in the absence of better knowledge about how puffery affects listeners, as well as evidence of speakers' intent to manipulate consumer responses. *See id*. at 1444.

40. *See, e.g.*, Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 326 (2004) (recognizing that language means different things in different contexts); 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 542 (1960) ("[S]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." (footnote omitted)).

Complex transactions, in short, involve mistakes, exaggerations, and miscommunications.[41]

In the face of potential confusion and strife, parties employ various contractual devices designed to delineate the precise scope and content of their promissory representations. One virtually ubiquitous device is the merger or integration clause,[42] which invokes the parol evidence rule to bar proof of representations made prior to, or contemporaneous with, a completely integrated contract that would contradict or supplement the contract.[43] Merger clauses, however, protect only contracts.[44] Thus, if a buyer alleges that she was fraudulently induced[45] to enter into the contract by

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41. *See, e.g.*, One-O-One Enters., Inc. v. Caruso, 668 F. Supp. 693, 698 (D.D.C. 1987) (describing how, "[a]fter eight months of vigorous negotiations, the parties reached a final agreement that was lengthy, detailed and comprehensive. During these eight months many offers, promises and representations were made and several preliminary agreements were drafted. To avoid a misunderstanding and to make clear that the only understanding between the parties was that expressed in the Agreement, the parties agreed that the Agreement 'supersede[d] any and all previous understandings and agreements.'" (emphasis omitted)).

42. An integration or merger clause is a provision in a contract that recites that the written terms cannot be "varied by prior or oral agreements because all such agreements have been [integrated or] merged into the written document." BLACK'S LAW DICTIONARY 892 (5th ed. 1979). Standard merger clauses look something like the following: "'This writing contains the entire agreement of the parties and there are no promises, understandings, or agreements of any kind pertaining to this contract other than stated herein.'" E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.6a (1990) (footnote omitted).

43. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 215, 216(1) (1981); UCC § 2-202 (2005).

44. *See, e.g.*, Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644 (7th Cir. 2002) ("Doctrine aside, all an integration clause does is limit the evidence available to the parties should a dispute arise over the meaning of the contract. It has nothing to do with whether the contract was induced . . . by fraud.").

45. The Restatement (Second) of Torts recognizes three general categories of misrepresentation: fraudulent, negligent, and innocent. *See* RESTATEMENT (SECOND) OF TORTS §§ 525–49 (fraudulent); 552 (negligent); 552C (innocent) (1977). Fraudulent misrepresentation, sometimes referred to as deceit, requires: (1) a misrepresentation of (2) a material fact (3) that the defendant knew or should have known was false (4) made by the defendant to the plaintiff with the intent to induce plaintiff's reliance. Additionally, (5) the plaintiff must actually and justifiably rely on the misrepresentation (6) to her detriment. *See id.* §§ 525–49.

If a contract was induced by fraud, the promisee may affirm the contract and sue for breach or void the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164. If the promisee voids the contract, she can recover damages in tort for the promisor's intentional misrepresentations. RESTATEMENT (SECOND) OF TORTS § 549. This section provides:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.

a seller's misrepresentations, and the validity of the contract is therefore called into question, the buyer is permitted to adduce evidence of the allegedly fraudulent representations, even if those representations would otherwise be barred by the parol evidence rule.[46]

> One consequence of the [rule that integration clauses do not bar claims sounding in tort] is that parties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a "no-reliance" clause into their contract, stating that neither party has relied on any representations made by the other.[47]

Such clauses may provide that "[n]either party has made any representation with respect to the subject matter of this Agreement to induce its execution

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> (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker, if these damages are proved with reasonable certainty.

Id.

46. *See, e.g.*, Betz Labs., Inc. v. Hines, 647 F.2d 402, 408 (3d Cir. 1981) ("[E]vidence of fraud in the inducement is outside the parol evidence rule and, consequently, admissible."); Aplications Inc. v. Hewlett-Packard Co., 501 F. Supp. 129, 134–35 (S.D.N.Y. 1980) (citing several cases to this effect); Withers v. Mobile Gas Serv. Corp., 567 So. 2d 253, 255 (Ala. 1990) ("It is true that fraud can be an exception to the parol evidence rule." (citations omitted)); Formento v. Encanto Bus. Park, 744 P.2d 22, 26 (Ariz. Ct. App. 1987) (stating as a "well-settled" rule that "a party 'can not free himself from fraud by incorporating [an integration clause] in a contract'" (quoting Lusk Corp. v. Burgess, 332 P.2d 493, 495 (Ariz. 1958))); Keller v. A.O. Smith Harvestore Prods., Inc., 819 P.2d 69, 73 (Colo. 1991) (en banc) (finding that the parol evidence rule is a rule of substantive contract law and does not apply to tort actions); Filmlife, Inc. v. Mal "Z" Ena, Inc., 598 A.2d 1234, 1235–36 (N.J. Super. Ct. App. Div. 1991) ("Introduction of extrinsic evidence to prove fraud in the inducement, however, is a well recognized exception to the parol evidence rule."); Wilburn v. Stewart, 794 P.2d 1197, 1199 (N.M. 1990) ("[P]arol evidence is admissible to show any misrepresentations that induced the parties to contract."); Gilliland v. Elmwood Props., 391 S.E.2d 577, 580–81 (S.C. 1990) ("The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of substantive contract law."); MacFarlane v. Manly, 264 S.E.2d 838, 840 (S.C. 1980) ("The 'as is' clause of the contract does not constitute an absolute defense to an action for fraud and deceit."); Allen-Parker Co. v. Lollis, 185 S.E.2d 739, 742 (S.C. 1971) (stating that if the contract was formed "with a fraudulent intent of the party claiming under it, then parol evidence is competent to prove the facts which constitute the fraud"); Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990) ("The general rule is that parol evidence is not admissible to contradict, alter, or vary the terms of a written instrument, except upon grounds of estoppel, fraud, accident or mistake." (citations omitted)). *But see, e.g.*, One-O-One Enters., Inc. v. Caruso, 848 F.2d 1283, 1287 (D.C. Cir. 1988) ("Were we to permit plaintiffs' use of the defendants' prior representations . . . to defeat the clear words and purpose of the Final Agreement's integration clause, 'contracts would not be worth the paper on which they are written.'" (quoting Tonn v. Philco Corp., 241 A.2d 442, 445 (D.C. Cir. 1968))).

47. Vigortone AG Prods., Inc. v. PM AG Prods., Inc., 316 F.3d 641, 644 (7th Cir. 2002).

except as specifically set forth herein,"[48] or they may provide that "'none of [the parties] is relying upon any statement or representation of any agent of the parties being released hereby. Each of [the parties] is relying on his or her own judgment.'"[49] Whatever their particular form, no-reliance clauses have the same goal: limit or eliminate tort liability for potential misstatements made during precontractual negotiations.[50] As Judge Posner puts it:

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48. Becker v. Allcom, Inc., No. C04-0958L, 2005 WL 1654524, at *4 (W.D. Wash. July 12, 2005); *see also, e.g.*, Danann Realty Corp. v. Harris, 157 N.E.2d 597, 598 (N.Y. 1959) ("The Seller has not made and does not make any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made . . . ." (emphasis and quotation omitted)). In this form, such clauses are sometimes referred to as no-representation clauses. *See, e.g.*, Karen B. Satterleee & Kerry L. Bundy, *"You Made Me Do It": Reliance in Franchise Fraud Cases,* 26 FRANCHISE L.J. 191, 193 (2007) (referring to a clause stating that no representations other than or inconsistent with the matters set forth in the contract were made as a "no representation" clause).

49. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) (quoting from contract); *see also, e.g.*, Rissman v. Rissman, 213 F.3d 381, 383 (7th Cir. 2000) ("The parties further declare that they have not relied upon any representation of any party hereby released [Defendant] or of their attorneys . . . , agents, or other representatives concerning the nature or extent of their respective injuries or damages. . . . [T]his Agreement is executed by [Plaintiff] freely and voluntarily, and without reliance upon any statement or representation by Purchaser, the Company, any of the Affiliates or [Defendant] or any of their attorneys or agents except as set forth herein." (quoting from contract)). In this formulation, it is easier to understand why such clauses are frequently referred to as "no-reliance clauses."

50. This Article does not address the potential application of the economic loss doctrine to bar fraudulent inducement claims. Essentially, the economic loss doctrine is a judicially created rule that bars recovery in tort for strictly economic losses arising from a contractual relationship. *See, e.g.*, Werwinski v. Ford Motor Co., 286 F.3d 661, 670–81 (3d Cir. 2002) (interpreting Pennsylvania law); Palmetto Linen Serv., Inc. v. U.N.X., Inc., 205 F.3d 126, 128–30 (4th Cir. 2000) (interpreting South Carolina law); Cyberco Holdings, Inc. v. Am. Express Travel Related Servs. Corp., No. 01 Civ. 2426(DC), 2002 WL 31324028, at *2–4 (S.D.N.Y. Oct. 16, 2002) (interpreting Michigan law); Orlando v. Novurania of Am., Inc., 162 F. Supp. 2d 220, 225–26 (S.D.N.Y. 2001) (interpreting New York law); Eye Care Int'l, Inc. v. Underhill, 92 F. Supp. 2d 1310, 1314–15 (M.D. Fla. 2000) (interpreting Florida law); Grynberg v. Questar Pipeline Co., 70 P.3d 1, 10–11 (Utah 2003) (interpreting Wyoming law).

Because of the sheer volume of litigation involving not only allegations of intentional fraud but also negligent and innocent misrepresentations, personal injuries, and property injuries arising from contractual relationships, the economic loss doctrine has a great deal of practical significance, making it a continuing topic of interest to lawyers, businesses, and judges. *See, e.g.*, Paul J. Schwiep, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (1995) ("[I]t is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss doctrine."). Despite this interest, however, the doctrine remains notoriously amorphous. *See, e.g.*, Eddward P. Ballinger, Jr. & Samuel A. Thumma, *The History, Evolution and Implications of Arizona's Economic Loss Rule*, 34 ARIZ. ST. L.J. 491, 491 (2002) ("The intersection between contract and tort law has confounded courts and counsel for decades."); R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1789 (2000) ("The economic loss rule is one of the most confusing doctrines in tort law."). Notwithstanding the doctrine's importance, however, this Article avoids any detailed examination of the doctrine because most courts find that "fraud is an intentional tort, and as such, the intentional

> [A] suit for fraud can be a device for trying to get around the limitations that the parol evidence rule and contract integration clauses place on efforts to vary a written contract on the basis of oral statements made in the negotiation phase. . . . No-reliance clauses serve a legitimate purpose in closing a loophole in contract law (thus resisting, in Judge Kozinski's colorful expression, the metastasizing of contract law into tort law).[51]

Courts faced with no-reliance clauses, however, have not responded uniformly.[52] In fact, a survey of cases reveals that the decisions fall into three basic categories.[53] First, a number of courts (in Category I) simply refuse to enforce such clauses. Second, others (in Category II) may enforce the clauses, but only subject to significant restrictions. For instance, some courts will enforce no-reliance clauses only if the seller can establish that the clauses were specifically negotiated—in other words, that the clauses are not boilerplate.[54] Similarly, some courts will enforce only no-reliance clauses that are formalistically distinct from general merger clauses. Other courts may enforce such clauses only if the seller can establish that they address with particularity the very type of factual representation on which the buyer claims to be relying.[55] Still other courts will allow the no-reliance clause to be considered by the trier of fact only as evidence of the reasonableness of the buyer's reliance in the particular circumstances of the case.[56] Finally, a growing number of courts (in Category III) seem to be enforcing no-reliance clauses to bar claims of fraudulent inducement as a matter of law.[57]

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misrepresentation is actionable as a tort, notwithstanding that the contract losses are solely economic." Ralph C. Anzivino, *The Fraud in the Inducement Exception to the Economic Loss Doctrine*, 90 MARQ. L. REV. 921, 922 (2007).

51. Extra Equipamentos e Exportação, Ltda. v. Case Corp., 541 F.3d 719, 724 (7th Cir. 2008) (citation omitted).

52. *E.g.*, Steven M. Haas, *Contracting Around Fraud Under Delaware Law*, 10 DEL. L. REV. 49, 51 (2008) ("Other jurisdictions have split on the treatment of extra-contractual disclaimers.").

53. *See infra* Part II.A–C.

54. *See, e.g.*, Danann Realty Corp. v. Harris, 157 N.E.2d 597, 598–99 (N.Y. 1959).

55. *See, e.g.*, Mfrs. Hanover Trust Co. v. Yanakas, 7 F.3d 310, 316–18 (2d Cir. 1993) ("[W]here specificity has been lacking, dismissal of [a] fraud claim has been ruled inappropriate[, and] . . . [w]here [a] fraud claim has been dismissed, the disclaimer has been sufficiently specific to match the alleged fraud.").

56. *See, e.g.*, Nutrasep, LLC v. TOPC Tex. LLC, No. A-05-CA-523 LY, 2006 WL 3063432, at *8 (W.D. Tex. Oct. 27, 2006) (noting that the specificity of a no-reliance clause's language may shed light on a jury's consideration of the defendant's claims of reliance).

57. *See* cases discussed *infra* Part II.C.

A. Category I: Courts Categorically Refusing to Enforce No-Reliance Clauses

Traditionally, courts refused to enforce no-reliance clauses.[58] As the New York Court of Appeals explained at the turn of the twentieth century in *Bridger v. Goldsmith*:

> [T]here is no authority that we are required to follow in support of the proposition that a party who has perpetrated a fraud upon his neighbor may nevertheless contract with him, in the very instrument by means of which it was perpetrated, for immunity against its consequences, close his mouth from complaining of it, and bind him never to seek redress. Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such case as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing.[59]

An early Minnesota Supreme Court case, *Ganley Bros. v. Butler Bros. Building Co.*,[60] serves as a prime example of this jurisprudential approach to no-reliance clauses. In *Ganley*, a defendant general contractor engaged the services of the plaintiff subcontractor for the construction of roads.[61] The plaintiff alleged that it was induced into the contracts by the defendant's fraud.[62] The defendant countered by pointing to a no-reliance provision in the contract that, even by the most exacting standards, would seem to disclaim responsibility for precontractual misrepresentations by the defendant:

> The contractor has examined the said contracts of December 7, 1922, and the specifications and plans forming a part

58. "Should a person escape liability for his own fraudulent statements by inserting in a contract a clause to the effect that the other party shall not rely upon them? Most courts throughout this country and in England have replied to this question in the negative." Richard T. Rosen, Comment, *Disclaimer of Liability for Fraud in Written Agreements*, 24 ALB. L. REV. 148, 148 (1960) (footnote omitted); *see also* Recent Decision, *Contracts—Stipulation Against Effect of Fraud*, 25 COLUM. L. REV. 231, 231 (1925) ("[N]o agreement of the parties can preclude the defense of fraud.").

59. 38 N.E. 458, 459 (N.Y. 1894).

60. 212 N.W. 602 (Minn. 1927).

61. *Id.* at 602.

62. *Id.*

> thereof, and is familiar with the location of said work and the conditions under which the same must be performed, and knows all the requirements, and is not relying upon any statement made by the company in respect thereto. The contractor further represents that it is familiar with the kind and character of the work to be done, as called for by said plans, specifications, and contract, and that it is experienced in road building.[63]

In the defendant's view, this disclaimer should have been enforced because "a party should have the legal right to let his work to a certain person because the other will therein agree that he relies and acts only upon his own knowledge and not upon the representations of his adversary."[64] Although the court agreed, in theory, with this freedom-of-contract notion—a contracting party, the court conceded, "should have this right"[65]—it could come up with no legitimate reason why the right would ever need to be invoked.[66] Without a legitimate justification for the no-reliance clause, the court concluded that "[t]he law should not, and does not, permit a covenant of immunity to be drawn that will protect a person against his own fraud. . . . Fraud destroys all consent."[67]

In the same year that the Minnesota Supreme Court decided *Ganley*, the Second Circuit Court of Appeals issued a decision invoking a strikingly similar line of reasoning in *Arnold v. National Aniline & Chemical Co.*[68] Although the court in *Arnold* ultimately concluded that the clause at issue did not "purport to exclude causes of action for fraud"[69] and thus could not suffice to disclaim fraud in the inducement, it discussed the enforceability of no-reliance clauses at some length.[70] This discussion reveals a fervent skepticism of such clauses, even though it also suggests, as did the discussion in *Ganley*, that a few courts, at the time, were exploring the possibility of enforcing these clauses in the name of freedom of contract.[71] Notwithstanding the general

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63. *Id*.

64. *Id*. at 603.

65. *Id*.

66. *See id*. The court did note that it might "be desirable in dealing with unscrupulous persons to have [a no-reliance] clause as a shield against wrongful charges of fraud." *Id.* But in the court's view, "if there is no fraud that fact will be established on the trial," and "every party should have his day in court." *Id*.

67. *Id*.

68. 20 F.2d 364 (2d Cir. 1927).

69. *Id*. at 369.

70. *Id*. at 368–69.

71. *Id*. at 369 (citing several Massachusetts cases for the proposition that "where one declares in his contract that every representation to which he will undertake to hold the opposite party is

strength of freedom-of-contract principles, however, according to the Second Circuit, the decisions refusing to enforce no-reliance clauses were superior because they were "based upon a greater consideration for the individual who may suffer wrong through deliberate fraud."[72]

The traditional and categorical approach to the enforceability of no-reliance clauses embodied in cases like *Bridger*, *Ganley*, and *Arnold* still captures the attention of some modern courts. For instance, according to the California Court of Appeals,

> [a] party to a contract who has been guilty of fraud in its inducement cannot absolve himself [or herself] from the effects of his [or her] fraud by any stipulation in the contract, either that no representations have been made, or that any right which might be grounded upon them is waived.[73]

Similarly, the Tennessee Supreme Court has declared that "Tennessee law 'gives no effect to disclaimers in the presence of fraud,'"[74] and the Utah Supreme Court has held that "'[t]he law does not permit a covenant of immunity which will protect a person against his own fraud on the ground of public policy.'"[75]

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embodied in the agreement, no fraud which does not enter into the execution [as opposed to inducement] of the contract can avail either as a defense or as ground for an independent action").

72. *Id*.

73. Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp., 38 Cal. Rptr. 2d 783, 788 n.7 (1995) (citations omitted); *see also, e.g.*, Simmons v. Ratterree Land Co., 17 P.2d 727, 728 (Cal. 1932) ("A seller cannot escape liability for his own fraud or false representations by the insertion of provisions such as are embodied in the contract of sale herein.").

74. First Nat. Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 928 (Tenn. 1991) (quoting Agristor Leasing v. A.O. Smith Harvestore Prods. Inc., 869 F.2d 264, 268 (6th Cir. 1989)); *see also In re* Sikes, 184 B.R. 742, 746 (Bankr. M.D. Tenn. 1995) ("Tennessee . . . does not permit disclaimers of liability or exculpatory clauses to excuse a party from fraud."); Robinson v. Tate, 236 S.W.2d 445, 450 (Tenn. Ct. App. 1950) ("We think citation of authority is unnecessary for the statement that one may not contract against liability for fraud.").

75. Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993) (quoting Lamb v. Bangart, 525 P.2d 602, 608 (Utah 1974)). Other states follow suit. *See, e.g.*, Nw. Bank and Trust Co. v. First Ill. Nat'l Bank, 354 F.3d 721, 726 (8th Cir. 2003) ("Under Iowa law, contractual disclaimers are ineffective to bar a plaintiff from asserting a claim for fraudulent inducement." (citing Hall v. Crow, 34 N.W.2d 195, 199 (Iowa 1948) ("[W]here there is evidence of fraudulent misrepresentations in the inception of a contract such misrepresentations can be the basis for either an action to rescind or for damages, despite the limiting provisions of a contract."))); Turkish v. Kasenetz, 27 F.3d 23, 27–28 (2d Cir. 1994) ("We could not uphold any provision intended to insulate parties from their own fraud. It is well settled that parties cannot use contractual limitation of liability clauses to shield themselves from liability for their own fraudulent conduct."); RepublicBank Dallas, N.A. v. First Wis. Nat'l Bank of Milwaukee, 636 F. Supp. 1470, 1473 (E.D. Wis. 1986) ("There is ample Wisconsin caselaw in which [courts have held] disclaimers of liability ineffective against claims of fraudulent misrepresentation." (citing Malas v. Lounsbury, 214 N.W. 332, 333

Even the Restatement (Second) of Contracts declares that "[a] term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy."[76] So, as Illustration 1 says, if "A and B sign a written agreement containing a term precluding B from asserting any misrepresentations made by A[,] [t]he term is unenforceable on grounds of public policy with respect to both fraudulent and

(Wis. 1927) ("An express agreement made in a contract that it shall be incontestable for fraud is void as against public policy.""))); Oak Indus., Inc. v. Foxboro Co., 596 F. Supp. 601, 607 (S.D. Cal. 1984) (recognizing that under California law the general rule is that, notwithstanding no-representation clauses, extrinsic evidence of fraud may be used to prove fraud in the inducement); Sperau v. Ford Motor Co., 674 So. 2d 24, 35–36 (Ala. 1995), *vacated and remanded*, 517 U.S. 1217 (1996), *aff'd subject to remittitur of punitive damages* 708 So. 2d 111, 124 (1997) (allowing plaintiffs to prove that defendants had misrepresented the profitability of a franchise notwithstanding a written contractual provision that no representations had been made regarding profitability, because "'[t]o refuse relief [on grounds of the disclaimer] would result in a multitude of frauds and in thwarting the general policy of the law'" (citation omitted)); Reece v. Finch, 562 So. 2d 195, 200 (Ala. 1990) (holding that "releases as to future intentional [torts are] prohibited"); Burton v. Linotype Co., 556 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 1989) ("'Fraud is an intentional tort and thus not subject to the cathartic effect of the exculpatory clauses found in contracts.'" (quoting L. Luria & Son, Inc. v. Honeywell, Inc., 460 So. 2d 521, 523 (Fla. Dist. Ct. App. 1984))); Robinson v. Perpetual Servs. Corp., 412 N.W.2d 562, 567 (Iowa 1987) (reaffirming the principle laid down in *Hall*); Miles Excavating, Inc. v. Rutledge Backhoe & Septic Tank Servs., Inc., 927 P.2d 517, 518 (Kan. Ct. App. 1996) ("We hold that parol evidence is admissible to show fraud in the inducement of a contract even where the contract contains a provision stating the parties have not relied on any representations other than those contained in the writing."); Bryant v. Troutman, 287 S.W.2d 918, 920–21 (Ky. 1956) ("One cannot contract against his fraud."); McEvoy Travel Bureau, Inc. v. Norton Co., 563 N.E.2d 188, 194 (Mass. 1990) ("We continue to believe that parties to contracts, whether experienced in business or not, should deal with each other honestly, and that a party should not be permitted to engage in fraud to induce the contract."); Bates v. Southgate, 31 N.E.2d 551, 555 (Mass. 1941) (noting in a fraud case involving a contract providing that defendant made no representations that "[a]ttempts under the form of contract to secure total or partial immunity from liability for fraud are all under the ban of the law" (citation and quotation omitted)); Gibb v. Citicorp Mortgage., Inc., 518 N.W.2d 910, 919 (Neb. 1994) ("Citicorp cannot escape liability for the fraudulent conduct of its agent on the sole basis that it included a disclaimer clause in the purchase agreement."); Niehaus v. Haven Park West, Inc., 440 N.E.2d 584, 586 (Ohio Ct. App. 1981) ("'Fraud which enters into the actual making of a contract cannot be excluded from the reach of the law by any formal phrase inserted in the contract itself.'" (citation omitted)); Carty v. McMenamin, 216 P. 228, 230–31 (Or. 1923) (noting in a case involving a contractual provision stating that defendants made no representation about the subject of the fraud that "[i]f a party is guilty of fraud in making a contract, he cannot exculpate himself from the consequences of his own wrong by a provision in writing that his fraudulent oral representations shall not be used as evidence against him in a case in which fraud and deceit is the gist of the cause"); Dieterich v. Rice, 197 P. 1, 3 (Wash. 1921) (stating that a contractual provision wherein plaintiff represented that he had not relied on any sayings or inducements by defendant was worth no more than a piece of waste paper in a fraud case); Baylies v. Vanden Boom, 278 P. 551, 553–54, 557 (Wyo. 1929) (giving no efficacy to a contractual provision stating that plaintiff relied on no statements by defendant not contained in the writing).

76. RESTATEMENT (SECOND) OF CONTRACTS § 196 (1981). Comment a goes on to specifically contemplate the use of no-reliance clauses that effectively "prevent[] reliance by the recipient on a misrepresentation (see § 167) or that make[] reliance unjustified (see § 172)." *Id*. cmt. a.

non-fraudulent misrepresentations."[77] Despite the crisp clarity of the illustration example, however, on its face the Restatement's use of the qualifier "unreasonably" seems to raise at least the possibility that a no-reliance clause could be enforced in some limited—not unreasonable—circumstances.[78] As the next section discusses, some courts agree and may enforce no-reliance clauses, but only subject to significant restrictions.

B. Category II: Courts Enforcing No-Reliance Clauses, but Only Subject to Significant Limitations

Although, as the Second Circuit noted in *Arnold v. National Aniline and Chemical Co.*, some courts before the middle of the twentieth century occasionally enforced or considered enforcing no-reliance clauses,[79] it was not until the New York Court of Appeals decided *Danann Realty Corp. v. Harris*[80] in 1959 that no-reliance clause jurisprudence began to change in a demonstrable fashion.[81] In *Danann*, the plaintiff claimed that the defendants had induced him to buy the lease of a building by making false oral representations about the operating expenses of the building and its overall profitability.[82] The written agreement between the parties, however, contained a no-reliance clause stating that the defendants had not made any representations "as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises."[83] The agreement went on to provide that "neither party [was] relying upon any statement or representation, not embodied in this contract, made by the other."[84] Although the majority noted that a general and vague merger clause would not bar parol evidence to support a fraud claim,[85] it found that the contract's specific disclaimer of reliance on the very types of representations

77. *Id*. cmt. a, illus. 1.

78. Some courts citing section 196 seem to find that all purported disclaimers of intentional fraud are per se "unreasonable." *See, e.g.*, Merzin v. Provident Fin. Group, Inc., 311 F. Supp. 2d 674, 685 (S.D. Ohio 2004) ("[I]t seems inequitable to permit a party to eliminate liability for an alleged fraudulent misrepresentation by drafting such a term."); Blankenheim v. E. F. Hutton & Co., 266 Cal. Rptr. 593, 599 n.7 (Cal. Ct. App. 1990) ("The Restatement 2d of Contracts and the modern trend are in accord: there can be no exemption from liability for any misrepresentation." (emphasis omitted)). Presumably, in the view of these courts, section 196 allows only reasonable no-reliance-type clauses to exempt parties from the consequences of unintentional misrepresentations.

79. 20 F.2d 364, 369 (2d. Cir. 1927).

80. 157 N.E.2d 597 (N.Y. 1959).

81. *See id.* at 602 (Fuld, J., dissenting) (asserting that, prior to the majority's decision, "it matter[ed] not" whether the no-reliance clause was general, specific, or even precise to the fraudulent allegations because they were not enforceable).

82. *Id*. at 598.

83. *Id*. (emphasis omitted).

84. *Id*. (emphasis omitted).

85. *Id*.

that constituted the alleged fraud prevented the plaintiff from claiming that it had justifiably relied on any fraudulent pre-contractual misrepresentations.[86]

Following *Danann*, other courts applying New York law have allowed enforcement of no-reliance clauses only if the defendant can show that the clauses were specifically negotiated (nonboilerplate) and particularly set out the precise representations at issue.[87] For instance, in *Manufacturers Hanover Trust Co. v. Yanakas*,[88] the Second Circuit held that a no-reliance clause was not enforceable because the clause did "not, in words or substance, contain disclaimers of the representations that formed the basis of [the plaintiff's] claim of fraudulent inducement."[89] Many of the courts following *Danann*, however, have "ratcheted up" the degree of proof required to establish that a provision is not boilerplate and have tightened the required degree of specificity needed to disclaim representations.[90]

Similarly, some courts outside of New York, following the basic precepts of *Danann*, have imposed even more stringent limitations on the enforceability of no-reliance clauses. Two recent cases applying Texas law, *Warehouse Associates Corp. Centre II, Inc. v. Celotex Corp.*[91] and *Nutrasep, LLC v. TOPC Texas LLC*,[92] demonstrate just how stringent these requirements can be.

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86. *Id*. at 600.

87. *See, e.g.*, Aetna Cas. & Sur. Co. v. Aniero Concrete Co., 404 F.3d 566, 575 (2d Cir. 2005) ("The venerable principles established in *Danann* remain the law of New York State."); Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 735 (2d. Cir. 1984) ("The *Danann* rule operates where the substance of the disclaimer provisions tracks the substance of the alleged misrepresentations.").

88. 7 F.3d 310, 316–18 (2d Cir. 1993) (reinstating a fraud claim and holding that no-reliance clauses can only be upheld if they are specifically negotiated, nonboilerplate, provisions that address, with particularity, the representations at issue).

89. *Id*. at 318.

90. *See, e.g.*, Zaro Bake Shop, Inc. v. David, 574 N.Y.S.2d 803, 804 (App. Div. 1991) (finding that "although the guarantee provided that the [defendants] were 'absolutely and unconditionally' liable on the note, such language, in and of itself, was . . . insufficient to preclude the [defendants] from introducing proof of fraud in the inducement"); DiFilippo v. Hidden Ponds Assocs., 537 N.Y.S.2d 222, 224 (App. Div. 1989) (stating that a contract provision was not a bar to fraud-in-inducement claim where it "d[id] not specifically disclaim reliance on any oral representation concerning the particular matter as to which plaintiff now claims he was defrauded"); GTE Automatic Electric Inc. v. Martin's Inc., 512 N.Y.S.2d 107, 108 (App. Div. 1987) (finding that a recitation that underlying notes are absolute and unconditional does not bar proof of fraud in inducement of the guarantee since there was "not . . . a specific disclaimer, as in . . . *Danann Realty* and, therefore, the principle of [that case] does not apply"); Goodridge v. Fernandez, 505 N.Y.S.2d 144, 147 (App. Div. 1986) (finding that the defendant was not barred from asserting fraud-in-inducement defense because, "in sharp contrast to the guarantee in [another case], [the defendant's guarantee] contains no specific disclaimer of defenses available to the guarantor with [respect] to the guaranty").

91. 192 S.W.3d 225 (Tex. Ct. App. 2006).

92. No. A-05-CA-523 LY, 2006 WL 3063432 (W.D. Tex. Oct. 27, 2006).

Celotex arose out of a dispute over the sale of property. The defendant seller had "operated an asphalt shingle manufacturing plant on the Property for a number of years" prior to entering into the contract to sell it to the plaintiff.[93] While negotiating the sale, the defendant provided the plaintiff with a partial environmental report indicating that asbestos had been used in the buildings on the property but omitting information about asbestos contamination in the soil and the use of asbestos in the shingle manufacturing process.[94] The defendant then discovered asbestos in the soil but did not disclose this finding to the plaintiff, who conducted an independent environmental assessment of the soil.[95] After the inspection period and closing, the plaintiff discovered significant asbestos contamination in the soil and brought suit against the defendant, alleging fraud and misrepresentation.[96]

The sale contract included an extensive "waiver-of-reliance" provision providing, for example, that:

> Purchaser acknowledges and agrees that seller has not made, does not make and specifically disclaims any representations, warranties, promises, covenants, agreements or guaranties of any kind or character whatsoever, whether express or implied, oral or written, past, present or future, of, as to, concerning or with respect to (A) the nature, quality or condition of the property, including without limitation, the water, soil and geology, (B) the income to be derived from the property, (C) the suitability of the property for any and all activities and uses which Purchaser may conduct thereon[.][97]

Considering that this disclaimer seemed to address precisely the very sort of matter allegedly creating the fraud, the defendant argued that the plaintiff's fraud claims should be barred by it.[98]

After reviewing prior Texas precedent,[99] the court in *Celotex* determined that a carefully negotiated no-reliance clause was not necessarily enforceable: "an arm's length transaction between parties represented by counsel is not

93. *Celotex*, 192 S.W.3d at 227.

94. *Id*.

95. *Id*. at 228.

96. *Id*. at 228–29.

97. *Id*. at 235.

98. *Id*. at 234–35.

99. Primarily, the court focused on a close analysis of *Schlumberger Technology Corp. v. Swanson*, a decision that was self-consciously fact-specific. 959 S.W.2d 171, 181 (Tex. 1997) ("We conclude only that on this record, the disclaimer of reliance conclusively negates as a matter of law the element of reliance on representations . . . needed to support the [plaintiff's] claim of fraudulent inducement.").

enough to enforce a waiver-of-reliance clause."[100] Additionally, the court determined that the specificity in the no-reliance clause was insufficient, even if coupled with the fact that the clause was carefully negotiated, to make the clause enforceable.[101] Instead, in the court's estimation, an additional circumstance must be proven before a no-reliance clause will be enforced to bar fraudulent inducement claims: the fraud must induce a party to sign a release or settlement agreement intended to definitively resolve a long-running dispute between the parties.[102]

The court in *Nutrasep* followed essentially the same analysis as the court in *Celotex* and reached a very similar result. The dispute in *Nutrasep* involved a Technology Licensing Agreement and a Manufacturing and Supply Agreement.[103] Nutrasep, LLC (NTS) purported to have developed a system for improving the quality of soybean oil, which it licensed to TOPC.[104] TOPC was an agricultural cooperative that produced soybean oil.[105] NTS sued TOPC for breach of the Technology License Agreement and the Manufacturing and Supply Agreement, based on TOPC's failure to make the required payments.[106] TOPC argued, in response, that NTS had misrepresented the uniqueness of NTS's technology and the amount of investment that TOPC would be required to make.[107] In a motion for summary judgment, NTS asserted that these fraud counterclaims should fail as a matter of law because of a no-reliance clause, providing in pertinent part that:

> [TOPC], by execution hereof, acknowledges, covenants and agrees that it has not been induced in any way by NTS or its employees to enter into this Agreement, and further warrants and represents that (i) it has conducted sufficient due diligence with respect to all items and issues pertaining to this Article 3 and all other matters pertaining to this Agreement; and (ii) [TOPC] has adequate knowledge and expertise, or has utilized knowledgeable and expert consultants, to adequately conduct the due diligence, and agrees to accept all risks inherent herein. . . . This Agreement constitutes the entire and only agreement between the parties for Licensed Subject

100. 192 S.W.3d at 233.

101. *Id*. at 234.

102. *Id*.

103. Nutrasep, LLC v. TOPC Tex. LLC, No. A-05-CA-523 LY, 2006 WL 3063432, at *1 (W.D. Tex. Oct. 27, 2006).

104. *Id*.

105. *Id*.

106. *Id*.

107. *Id*. at *2.

> Matter and all other prior negotiations, representations, agreements, and understandings are superseded hereby. No agreements altering or supplementing the terms hereof may be made except by a written document signed by both parties.[108]

Following the *Celotex* court's lead, the court in *Nutrasep* concluded that these no-reliance provisions were not necessarily dispositive of the fraud claim.[109] First, NTS and TOPC "entered into the Agreements in order to create a business relationship, not end an existing one [and resolve a dispute between the parties]."[110] Second, TOPC was not represented by counsel, and the provisions were "standard boiler-plate provisions that do not clearly and unequivocally disclaim reliance on the specific representations that form the basis for [TOPC's] fraud claims."[111] Accordingly, the court denied NTS's motion for summary judgment on TOPC's fraud claims.[112] The court did note, however, that "given the language of the various clauses, a jury may well find [TOPC's] professions of reliance on [NTS's] statements lacking in credibility."[113]

Cases like *Celotex* and *Nutrasep*, in short, demonstrate an approach that has emerged since *Danann* in which some courts enforce no-reliance clauses, but only somewhat grudgingly and subject to strict limitations.[114] As the next

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108. *Id*. at *6.

109. *Id*. at *8.

110. *Id*.

111. *Id*.

112. *Id*.

113. *Id*. Courts in other jurisdictions have similarly concluded that no-reliance clauses may only be considered as evidence relevant to determining whether the allegedly defrauded party reasonably relied on the representation at issue. *See, e.g.*, Kaufman v. Guest Capital, LLC, 386 F. Supp. 2d 256, 268 (2005) ("[T]he Court deems it imprudent to examine the non-reliance clauses in an abstract fashion without delving further into the undisputed facts regarding [the alleged fraud].").

114. *See, e.g.*, Dunbar Med. Sys., Inc. v. Gammex Inc., 216 F.3d 441, 450–51 (5th Cir. 2000) (applying Texas law to hold that a "sold as is" clause coupled with a clause providing that no other oral representations had been made did not prevent plaintiff from proving defendant's fraud); Deluxe Media Servs., LLC v. Direct Disc Network, Inc., No. 06 C 1666, 2007 WL 707544, at *8 (N.D. Ill. Mar. 2, 2007) (effectively endorsing the specificity requirement of *Yanakas*); Becker v. Allcom, Inc., No. C04-0958L, 2005 WL 1654524, at *4 (W.D. Wash. July 12, 2005) ("[T]he fact that an agreement includes a non-reliance provision is relevant but not dispositive of whether reliance on outside representations was reasonable."); DynCorp v. GTE Corp., 215 F. Supp. 2d 308, 319 (S.D.N.Y. 2002) ("Dyncorp's particularized disclaimers [that extra-contractual representation that were made were not being relied upon] make it impossible for it to prove one of the elements of a claim of fraud: that it reasonably relied on the representations that it alleges were made to induce it to enter into the Purchase Agreement."); *In re* Hovis, 325 B.R. 158, 167 (Bankr. D.S.C. 2005) (finding that fraud and negligent misrepresentation claims did not fail as a matter of law in the face of a non-reliance clause, but noting that such clauses could raise a doubt about whether reasonable reliance existed); Slack v. James, 614 S.E.2d 636, 640–41 (S.C. 2005) (finding that a clause providing that

section observes, only a few courts have pressed beyond the strictures of post-*Danann* reasoning to find that no-reliance clauses may be enforced without restrictions.

C. Category III: Courts Enforcing No-Reliance Clauses Without Significant Limitations

A few courts freely give effect to no-reliance clauses[115] or strongly suggest that they will do so.[116] At the avant-garde are the Delaware courts (or courts applying Delaware law). Although the Delaware Supreme Court technically remains wary of no-reliance clauses,[117] the clear trend in Delaware is evidenced by the *Abry* court's bold assertion about the clarity of Delaware's no-reliance clause jurisprudence:

> We have honored clauses in which contracted parties have disclaimed reliance on extra-contractual representations, which prohibits the promising party from reneging on its promise by premising a fraudulent inducement claim on

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both parties "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" was merely a general merger clause and insufficient to preclude a fraud-in-the-inducement claim (emphasis omitted)); Stewart v. Estate of Steiner, 93 P.3d 919, 927 (Wash. Ct. App. 2004) (allowing a no-reliance clause to stand but only considering it as a factor that could be weighed by a trier of fact in determining whether the plaintiff's reliance was reasonable under the circumstances).

115. Of course, such clauses are always subject to the same restrictions and limitations as any other contract provisions.

116. *See, e.g.*, MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 214 (3d Cir. 2005) (rejecting New York's particularity rule and upholding a no-reliance clause); Garcia v. Santa Maria Resort, Inc., 528 F. Supp. 2d 1283, 1295 (S.D. Fla. 2007) (holding that, as a matter of law, a plaintiff could not maintain a fraud claim against the defendant in the face of an express no-reliance clause); Eclipse Med., Inc. v. Am. Hydro-Surgical Instruments, Inc., 262 F. Supp. 2d 1334, 1342 (S.D. Fla. 1999) ("[R]eliance on fraudulent representations is unreasonable as a matter of law where the alleged misrepresentations contradict the express terms of the ensuing written agreement."); H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 142 n.18 (Del. Ch. 2003) (stating in dicta that "[t]he Court of Chancery has consistently held that sophisticated parties to negotiated commercial contracts may not reasonably rely on information that they contractually agreed did not form a part of the basis for their decision to contract" (citation omitted)).

117. *See* Norton v. Poplos, 443 A.2d 1, 6 (Del. 1982). In *Norton*, the plaintiff buyer sought to rescind a real estate transaction by alleging that the seller had negligently misrepresented the land's zoning. *Id*. The purchase agreement contained a no-reliance clause stating that "Purchasers and Sellers agree that they have read and fully understand this contract & furthermore they acknowledge that they do not rely on any written or oral representations not expressly written in this contract." *Id*. at 3. In response to the seller's effort to defeat the buyer's claims using this clause, the Delaware Supreme Court declared that such a clause "does not preclude a claim based upon fraudulent misrepresentations." *Id*. at 6.

> statements of fact it had previously said were neither made to it nor had an effect on it.[118]

A recent case by the Third Circuit applying Delaware law, *MBIA Insurance Corp. v. Royal Indemnity Co.*,[119] illustrates this trend. In *MBIA*, the court upheld the enforceability of a no-reliance clause despite the fact that the contract (or more precisely a series of insurance contracts) had been obtained as a result of a "spectacular fraud."[120] Because "[t]he Delaware Supreme Court ha[d] not addressed the standards for effective waiver of a defense based on fraud in the inducement," the Third Circuit had to predict how the Delaware Supreme Court would rule on this issue.[121] Although previous Delaware precedent appeared to indicate that Delaware courts would follow the New York approach and require that enforceable no-reliance clauses appear outside of mere boilerplate provisions,[122] the Third Circuit effectively eviscerated this requirement. In weighing the degree of comprehensiveness and detail in no-reliance clauses in the insurance policies at issue, the court concluded that "[t]he lack of specificity in [the issuer's] waivers does not make them any less clear."[123] The court went on to say that:

> [g]iven the potential for misrepresentation from each side of the agreement, the safer route is to leave parties that can protect themselves to their own devices, enforcing the agreement they actually fashion. This rule will make for less prolix disclaimers and reduce the likelihood that an intended allocation of the risk of fraud will be frustrated by an unintentional omission from a long and tedious list of representations. . . . When sophisticated parties include a broad but unambiguous anti-reliance clause in their agreement, the Delaware Supreme Court will likely indulge

118. Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1057 (Del. Ch. 2006) (stating in dicta that "a party cannot promise, in a clear integration clause of a negotiated agreement, that it will not rely on promises and representations outside of the agreement and then shirk its own bargain in favor of a 'but we did rely on those other representations' fraudulent inducement claim").

119. 426 F.3d 204.

120. *Id*. at 208.

121. *Id*. at 214.

122. *See In re* Med. Wind Down Holdings III, Inc., 332 B.R. 98, 104 (Bankr. D. Del. 2005) ("'[B]ecause Delaware's public policy is intolerant of fraud, the intent to preclude reliance on extra-contractual statements must emerge clearly and unambiguously from the contract.'" (quoting Kronenberg v. Katz, 872 A.2d 568, 593 (Del. Ch. 2004))); *Norton*, 443 A.2d at 7 ("We see no reason why a court of equity should enforce a standard 'boiler plate' provision that would permit one who makes a material misrepresentation to retain the benefit resulting from that misrepresentation at the expense of an innocent party.").

123. *MBIA Ins. Corp.*, 426 F.3d at 218.

> the assumption that they said what they meant and meant what they said.[124]

Cases like *MBIA*, however, are unusual. Most of the decisions surveyed either refuse to enforce no-reliance clauses or will enforce such clauses only subject to a number of limitations or restrictions. As the next Part argues, courts skeptical of no-reliance clauses seem to rest their judgments on moral prohibitions against lying. Giving at best cursory attention to generic notions of freedom of contract, these courts presume that parties have gained no legitimate value from no-reliance clauses.

III. "DESIGNS AND ARTIFICES OF THE CRAFTY": THE GENERIC MORAL THEORIES RELIED ON BY COURTS RELUCTANT TO ENFORCE NO-RELIANCE CLAUSES

An action for fraud, it has been said, serves to protect "the weak and the ignorant against the designs and artifices of the crafty."[125] In the context of precontractual negotiations, fraud may consist of an intentional misrepresentation about the character or quality of performance, dissimulation about the likelihood of performance, or both. Misrepresentations of the first kind lead promisees to enter into contracts that they otherwise might avoid by convincing them that the promised performance will be more valuable than it actually is. Misrepresentations of the second kind, in contrast, lead promisees to enter into contracts that they might otherwise avoid by convincing them that the promisor has a greater intent or ability to perform than he actually does. This second kind of misrepresentation hinges on the recognition that "the state of a man's mind is as much a fact as the state of his digestion."[126] In other words, "[b]y saying something about the promisor's present intent [to perform], the act of promising creates the opportunity to lie."[127]

Because fraud is a "'protean legal concept, assuming many shapes and forms,'"[128] courts tend to be particularly solicitous of alleged victims of

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124. *Id*.

125. Medbury v. Watson, 47 Mass. (6 Met.) 246, 259 (1843).

126. Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (Ch. App. 1885).

127. IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT 4 (2005); *see also* RESTATEMENT (SECOND) OF TORTS § 525 cmt. c (1977) ("A representation of the state of mind of the maker or of a third person is a misrepresentation if the state of mind in question is otherwise than as represented. Thus, a statement that a particular person, whether the maker of the statement or a third person, is of a particular opinion or has a particular intention is a misrepresentation if the person in question does not hold the opinion or have the intention asserted.").

128. Florenzano v. Olson, 387 N.W.2d 168, 172 (Minn. 1986) (quoting Jacobs v. Farmland Mut. Ins. Co., 377 N.W.2d 441, 444 n.1 (Minn. 1985)); *see also, e.g.*, Stonemets v. Head, 154 S.W. 108, 114 (Mo. 1913) ("Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean

fraudulent representations. As the previous section demonstrates, in the context of no-reliance clauses, this solicitude means that a significant number of courts remain wary of enforcing no-reliance clauses. Some (Category I courts) simply will not do so under any circumstances. Others (Category II courts) may enforce the clauses, but only subject to significant restrictions. Both categories of courts, I contend, rely, often only implicitly, on one of two generic moral theories to justify their conclusion that no-reliance clauses should not be enforced or should be enforced only with significant limitations. Specifically, courts either rely on deontological conceptions of the value of autonomy and the harm to autonomy caused by lying[129] or consequentialist conceptions of the harm caused to the fabric of society as a whole by lying in contract negotiations.[130]

The following two sections trace, in broad strokes, both arguments. The goals of these sections are twofold. First, I want to describe, sympathetically, the powerful, if only generic, concerns regarding fraud that seem to underlie courts' reluctance to enforce no-reliance clauses. After all, "[l]egal rules must be constructed and justified in ways that take into account the fact that law embodies a system of rules and practices that moral agents inhabit, enforce, and are subject to alongside other aspects of their lives, especially their moral

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form at will, were courts to cramp themselves by defining it with a hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition.").

129. Lying may be defined more narrowly than fraud, which in some jurisdictions includes more than intentional misrepresentations. Indeed, a number of courts have devised various formulations that have "stretched" the concept of scienter, allowing recovery for misstatements made with something less than an intent to deceive. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 740–42 (5th ed. 1984); *see also, e.g.*, Leon Green, *Deceit*, 16 VA. L. REV. 749, 752–57 (1930) (discussing various court formulas for meeting scienter requirements in fraud actions). For example, some courts have imputed knowledge to the defendant, thereby concluding that the defendant "knew" of the falsity of her statement. KEETON ET AL., *supra*, § 107, at 740–42. Other courts have allowed recovery for misstatements made "recklessly." *See, e.g.*, McLean v. Alexander, 599 F.2d 1190, 1197 (3d Cir. 1979); Flamme v. Wolf Ins. Agency, 476 N.W.2d 802, 809 (Neb. 1991) (Shanahan, J., concurring). Finally, most courts find that fraud may include omissions as well as express representations. *See, e.g.*, Laidlaw v. Organ, 15 U.S. 178, 184–85 (1817) ("Suppression of material circumstances within the knowledge of the vendee, and not accessible to the vendor, is equivalent to fraud, and vitiates the contract.").

While there may be moral gradations between the various forms of deception that count as "fraud," it seems beyond cavil that the most morally reprehensible form of deception is the outright lie. Accordingly, moral prohibitions against fraud are at their strongest when the fraud involves a lie. For the purposes of this Article, then, I will limit myself to an examination of this strongest moral case against fraud.

130. The basic framework tracks a distinction made by Alasdair MacIntyre between "two rival moral traditions with respect to truth-telling and lying, one for which a lie is primarily an offense against trust and one for which it is primarily an offense against truth." Alasdair MacIntyre, *Truthfulness, Lies, and Moral Philosophers: What Can We Learn from Mill and Kant?*, *in* 16 THE TANNER LECTURES ON HUMAN VALUES 307, 336 (Grethe B. Peterson ed., 1995).

agency."[131] It will not do to advance an argument in favor of the enforcement of no-reliance clauses without accounting for the moral intuition that such clauses violate fundamental precepts of morality and fairness. Second, I want to demonstrate that neither deontological nor consequentialist conceptions of the wrongfulness of lying, with the exception of a rare brand of Kantianism, constitute categorical norms. Instead, moral prohibitions against lying are, in the main, prophylactic in nature. Accordingly, as I argue in the third section of this Part, even presuming that one or both conceptions have moral purchase, other first-order principles, like freedom of contract, can and should take priority in particular situations.

Importantly, I do not make any strong claims in this section about whether freedom of contract should trump moral prohibitions against lying in the context of no-reliance clauses. My goal is more modest. I simply mean to establish that a comparison of first-order moral principles is needed. To date, courts have not engaged in this comparison, relying instead on a faulty presumption that no-reliance clauses have no morally legitimate value to contracting parties.

A. Deontological Rationales

A lie is the statement, verbal or nonverbal, of a proposition that the speaker believes to be false, but that the speaker intends the listener to take as a proposition the speaker believes to be true.[132] So defined, lying is widely condemned as wrong, and as a general matter, it is proscribed by the law, but opinions differ as to why.[133] One of the most pervasive explanations for the wrongfulness of lying derives from Immanuel Kant.

Kant had no patience for lies. He stated that "the greatest violation of man's duty to himself regarded merely as a moral being (the humanity in his own person) is the contrary of truthfulness, lying. . . . [B]y a lie a man throws away and, as it were, annihilates his dignity as a man."[134] He continued:

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131. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 712 (2007).

132. *See, e.g.*, Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157, 159 (2002) ("Lying, as we shall see, involves asserting what one believes is literally false.").

133. For an excellent discussion of the various legal responses to deception, see generally Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PENN. L. REV. 1529 (1998). *See also* Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1035 (2006) ("The public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong.").

134. IMMANUEL KANT, THE METAPHYSICS OF MORALS 225 (Mary Gregor trans., 1991) (1797) (emphasis omitted). Augustine similarly regarded lies as wrong in principle. *See* Saint Augustine, *Lying*, *in* 16 THE FATHERS OF THE CHURCH 45, 109 (Roy J. Deferrari ed., Sister Mary Sarah Muldowney et al. trans., 1952) ("Whoever thinks, moreover, that there is any kind of lie which is not

> A [human being] who does not himself believe what he tells another . . . has even less worth than if he were a mere thing; for a thing because it is something real and given, has the property of being serviceable so that another can put it to some use. But communication of one's thoughts to someone through words that yet (intentionally) contain the contrary of what the speaker thinks on the subject is an end that is directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts, and is thus a renunciation by the speaker of his personality, and such a speaker is a mere deceptive appearance of a [human being], not a [human being] him [or her] self.[135]

Indeed, so strong were his views on lying that he believed even lies that were told with good intention were categorically wrong.[136]

Neo-Kantians tend to agree that lying is an affront to autonomy. Lies interfere with the victim's rational deliberation and rob the victim of her prospects for making at least some sensible choices about a course of action or belief.[137] As Charles Fried has put it, lying is a breach of trust:

> Lying is wrong because when I lie I set up a relation which is essentially exploitative. . . . Lying violates respect and is wrong, as is any breach of trust. Every lie is a broken promise [which] . . . is made and broken at the same moment. Every lie necessarily implies—as does every assertion—an assurance, a warranty of its truth.[138]

Barbara Herman, along similar lines, has claimed that lying forces the victim to become an instrument of the deceiver's purposes:

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a sin deceives himself sadly."). Lies were, for Kant, no more justifiable by virtue of their consequences than would be other evil actions, such as murder or theft. *See* KANT, *supra*, at 226.

135. KANT, *supra* note 134, at 225–26.

136. *Id*.; *see also* IMMANUEL KANT, ON EDUCATION 104 (Annette Churton trans., Dover Publ'ns, Inc. 2003) (1899) ("[T]here is no single instance in which a lie can be justified."); Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, *in* ETHICS 280 (Peter Singer ed., 1994).

137. According to Samuel Cook, freedom and coercion are generally "antithetical relations or realities" such that "freedom entails the absence of coercion, and coercion involves the absence of freedom." Samuel DuBois Cook, *Coercion and Social Change*, *in* NOMOS XIV: COERCION 107, 126 (J. Roland Pennock & John W. Chapman eds., 1972).

138. CHARLES FRIED, RIGHT AND WRONG 67 (1978).

> Using deceit to control access to facts, one moves someone to deliberate on grounds she believes (falsely) she has assessed on their merits. When deceit is effective, it causes the victim to have the beliefs necessary for her to adopt ends and choose actions that serve the deceiver's purposes. The victim's will becomes an instrument of the deceiver's purposes—under the deceiver's indirect causal control.[139]

Under both Fried's and Herman's accounts, the moral problem with lying is that it effectively allows the liar to control the victim's will.[140] Such control is incompatible with the view that the victim is a "possible source of reasons all the way down."[141]

Of course, one might disagree with this concern, at least as framed. After all, controlling another's will is not, per se, objectionable. Many contract rules, not to mention many other laws, deal with controlling the will of another.[142] Similarly, even rational persuasion aims, in some sense, to control the will of another.[143] Thus, the moral reprehensibility of lies must turn on the

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139. BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 228 (1993). David Strauss has advanced a similar argument with respect to restrictions on free speech. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991). Strauss advances what he calls the "persuasion principle," which essentially provides that "harmful consequences resulting from the persuasive effects of speech may not be any part of the justification for restricting speech." *Id*. at 335. Strauss excludes lies from the protection of the persuasion principle, however, because the liar effectively subjects her listener to a form of "mental slavery." *Id*. at 354.

140. *See, e.g.*, 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS 378 (2d ed. 1986) ("The type of interest protected by the law of deceit is the interest in formulating business judgments without being misled by others—in short, in not being cheated. Generally, the law of deceit is limited to misrepresentations that mislead another into an unwise judgment in some business enterprise resulting in financial loss." (footnote omitted)). In this sense, lying resembles other forms of coercion, including duress. *See, e.g.*, Rick Bigwood, *Coercion in Contract: The Theoretical Constructs of Duress*, 46 U. TORONTO L.J. 201, 208 (1996) ("What a party really complains about when she alleges duress is not that she is altogether deprived of her will but, as with fraud, that her will has been subjected to a motive for 'intentional' action from which she ought to have been free.").

141. HERMAN, *supra* note 139, at 230; *see also* Douglas N. Husak, *Paternalism and Autonomy*, 10 PHILO. & PUB. AFF. 27, 28 (1980) ("Deontological theories often employ the notion of moral autonomy to stress the dignity and inviolability of the person. What is valuable about persons, according to this tradition, is their ability to follow laws that are self-imposed, formulated by exercises of their capacity to deliberate and reason.").

142. *See* Bigwood, *supra* note 140, at 201 ("Certainly in the negotiations leading up to a contract, some degree of persuasion and pressure is both likely and expected, especially in arm's-length commercial context.").

143. *See, e.g.*, Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1114 (2006) ("One can argue that other forms of persuasion resting on, say, charisma or personal charm, or even the overbearing persistence of a used car salesman, also might treat the listener instrumentally.").

manner in which the control gets exercised, not merely the fact of control. In this vein, Christine Korsgaard argues that lying is wrong because it treats victims in ways to which they cannot assent:

> People cannot assent to a way of acting when they are given no chance to do so. The most obvious instance of this is when coercion is used. But it is also true of deception: the victim of the false promise cannot assent to it because he doesn't know it is what he is being offered.[144]

Thus, at least in Korsgaard's view, assent, or the lack thereof, may be deemed the critical feature from a deontological perspective in determining the morality of a lie. And, mirroring Kant, Korsgaard contends that assent is logically impossible in the case of lies.[145]

Many of the courts reluctant to enforce no-reliance clauses seem to at least implicitly agree with this perspective. For instance, in the classic *Ganley* case discussed previously, the Minnesota Supreme Court rested much of the weight of its decision not to enforce a clear no-reliance clause on the premise that "[f]raud destroys all consent."[146] In the *Ganley* court's view, fraud is corrosive, eroding whatever voluntary choice there might have been to support the contract, including the no-reliance clause, in the first place.[147] Similarly, in *Arnold*, the Second Circuit determined that cases refusing to enforce no-reliance clauses were correct because they were "based upon a greater consideration for the individual who may suffer wrong through deliberate fraud" than decisions enforcing such clauses.[148] This argument favoring the nonenforcement of no-reliance clauses turns on a decidedly deontological perception of the morality of fraud.

Most modern moral philosophers, even of a deontological bent, however, do not share Kant's and Korsgaard's view that lying is a categorical wrong. In fact, much of the modern literature on lying aims at uncovering the circumstances in which a person may be justified in lying.[149] Lying may

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144. CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 138 (1996).

145. *See id*. at 138–39 (arguing that even if the victim knows about the lie, she "cannot really assent to the transaction . . . propose[d]").

146. Ganley Bros. v. Butler Bros. Bldg. Co., 212 N.W. 602, 603 (Minn. 1927).

147. *See id.*

148. Arnold v. Nat'l Aniline & Chem. Co., 20 F.2d 364, 369 (2d Cir. 1927).

149. *See generally, e.g.*, SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978); Robert N. Van Wyk, *When is Lying Morally Permissible? Casuistical Reflections on the Game Analogy, Self-Defense, Social Contract Ethics, and Ideals*, 24 J. VALUE INQUIRY 155 (1990); *see also, e.g.*, BOK, *supra*, at 108–10 (arguing that intentional deception may be morally acceptable in certain circumstances, such as to protect a murderer's intended, innocent victim); Jonathan E.

compromise autonomy because it undercuts a victim's capacity to assent, but it hardly follows that it always does so. Instead, as the law seems to recognize in a variety of other contexts, it is possible to assent to a lie and thereby obviate any moral concerns regarding it.[150]

Recognizing that assent to a lie is possible seems to comport with common assumptions about lies that are permissible, both outside and inside of legal contexts. For instance, few would argue that lying in order to protect the secrecy of a surprise birthday party constitutes a moral offense. Focusing on assent, a neo-Kantian could justify this common reality by noting that the person celebrating the birthday retrospectively assents to the lie. Similarly, few would argue that lying during the course of a poker game constitutes a moral offense.

> Not only is misleading behavior in this context permissible and consistent with the general prohibition on deception, but we do not much worry that our behavior in poker games will corrode the relevant aspects of our moral character—our resolve not to lie and to take truth-telling and candor seriously.[151]

This is so, a neo-Kantian might argue, because the participants in the game have tacitly assented to the lies.

Even if one does not agree that these particular examples justify lying—or even if one believes that establishing assent, even in these contexts, requires more exacting proof—the point of this section is a simple one: all but the most die-hard Kantians agree that lying is, at least sometimes, justifiable. Thus, prohibitions against lying are not categorical, and when such prohibitions conflict with other moral goods, the other moral goods may, occasionally, prevail. This seems particularly true in circumstances where a person may be said to have assented to the lie or the possibility of a lie.

B. Consequentialist Rationales

People depend on others to tell the truth. Cooperation requires mutual honesty (at least most of the time). The duty to tell the truth (or engage in "fair play") has gotten its most influential recent articulation by John Rawls.

Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 440–41 (1997) (disagreeing with Korsgaard's argument by showing situations in which one might assent to being told a lie).

150. Some neo-Kantians would also urge that other justifications for lying may exist, particularly in circumstances where the lie can prevent serious injury or death.

151. Shiffrin, *supra* note 131, at 743.

> Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating.[152]

Though Rawls himself was a self-professed neo-Kantian, this description of mutual trust and cooperation has a consequentialist feel.[153]

Indeed, consequentialists, like deontologists, tend to view lying as morally reprehensible. Lies degrade the background of trust necessary for mutually beneficial interaction.[154] John Stuart Mill, for example, argued that lies undermine mutual trust, "the insufficiency of which does more than any one thing that can be named to keep back civilisation, virtue, everything on which human happiness on the largest scale depends."[155] And although consequentialists recognize that prohibitions against lying are not categorical,[156] they often argue for very strong presumptions against lying,

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152. John Rawls, *Legal Obligation and the Duty of Fair Play*, *in* LAW AND PHILOSOPHY: A SYMPOSIUM 3, 9–10 (Sidney Hook ed., 1964).

153. There are, of course, many varied forms of consequentialism. *See generally*, *e.g.*, L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS (1996) (describing and discussing various forms of consequentialist thought). For my limited purposes, however, Kent Greenawalt's simple definition of a generic consequentialism suffices: "A practice has value from a consequentialist point of view if it contributes to some desirable state of affairs. . . . The force of a consequentialist reason is dependent on the factual connection between a practice and the supposed results of the practice." Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 128 (1989).

154. *See*, *e.g.*, Michael Perelman, *The Neglected Economics of Trust: The Bentham Paradox and Its Implications*, 57 AM. J. ECON. & SOC. 381, 381–87 (1998) (arguing that "[t]rust is a central component of the way people relate to society," and that it prevents people from rationally pursuing self-maximizing strategies that would undermine society).

155. John Stuart Mill, *Utilitarianism*, *in* 43 GREAT BOOKS OF THE WESTERN WORLD 445, 455 (Robert Maynard Hutchins ed., 1952); *see also* JEREMY BENTHAM, THE THEORY OF LEGISLATION 260 (C.K. Ogden ed., Richard Hildreth trans., 1950) ("[F]alsehood . . . brings on at last the dissolution of human society.").

156. By definition, consequentialists are willing to weigh the consequences of one value or choice against another in order to ascertain the best course of action.

viewing individuals as ill-equipped to judge the consequences of their deceptions.[157]

In the context of contractual disclaimers of reliance on misrepresentations, it is worth focusing on a particularly strong economic rationale that might be wielded to justify the decisions of courts that are reluctant to enforce such disclaimers.[158] Contracts, in the economic view, allow promisors to make credible promises and representations[159] so that they can convince promisees to enter into mutually beneficial transactions. A rational promisee will be convinced only if she believes that the benefits of accepting a promise or representation exceed the costs of relying on it. The benefits of a promise or representation, in turn, hinge in substantial part on the likelihood that the promisor will actually perform or that the representation is accurate. Phrased slightly differently, any anticipated benefit that a promisee might gain from a promised performance or representation must be discounted by the possibility that the promisor will not perform or that the representation is false.[160]

Of course, even when a promisor has a sincere desire to perform, circumstances can arise that make performance impossible, impracticable, or inefficient. Similarly, even the most earnest promisors may be wrong about the representations that they make. Thus, a promisee can never know for certain that a promise will be fulfilled or that a representation is true.[161] But the doctrine of fraudulent inducement operates to dissuade promisors from at

157. *See, e.g.*, BENTHAM, *supra* note 155, at 260 (warning that the slightest lie is "a first transgression which facilitates a second, and familiarizes the odious idea of a falsehood").

158. This discussion is based, in substantial part, on Chapter 5 of Ian Ayres and Gregory Klass's book, *Insincere Promises: The Law of Misrepresented Intent*. *See* AYRES & KLASS, *supra* note 127, at 83–112.

159. Promises, of course, may be credible in the absence of legal enforcement. *See, e.g.*, H. Lorne Carmichael, *Self-Enforcing Contracts, Shirking, and Life Cycle Incentives*, 3 J. ECON. PERSP. 65, 67 (1989) ("Self-enforcing contracts are collections of promises that, while they might not be legally binding, are nonetheless credible. Everyone can be confident that the promises will be kept."); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1646 (2003) ("[W]e know that contracts often are performed even in the absence of any legal sanctions for breach."). Various self-enforcement mechanisms may, in a given situation, suffice to render a promise or representation sufficiently credible to convince a promisee to enter into a transaction with a promisor. These self-enforcement mechanisms include reputational sanctions, loss of repeat business with the promisor, and norms of reciprocity. *See* Scott, *supra*, at 1646–47.

160. In other words, the promisee must engage in an expected value exercise. Expected value is the probability of the event occurring multiplied by the value of the event occurring. *See, e.g.*, HENRY N. BUTLER, ECONOMIC ANALYSIS FOR LAWYERS 566–67 (1998) (explaining basic economic principles underlying expected value analysis).

161. There may be, in fact, good reasons to think that even promisors acting in good faith and with no active intent to dissemble might over-solicit sunk costs from the promisee in order to reduce uncertainty. This over-solicitation subjects the promisee to the same hazard of opportunistic exploitation as does an intentional lie about the likelihood or quality of performance. *See, e.g.*, Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 629 (1993).

least intentionally misrepresenting the likelihood of their performance or the truthfulness of their assertions. The doctrine, therefore, serves to help promisees more accurately estimate the likelihood of a promised performance or the truthfulness of a represented fact. It thus helps the promisee avoid the expensive precaution costs that she might otherwise incur in an effort to avoid fraudulent transactions.[162] Additionally, regular enforcement of the doctrine by courts serves to bolster the credibility of promises and representations made by promisors. Promisors and promisees can, accordingly, bargain more efficiently over prices, and promisees can make decisions about optimal investments and precautions against nonperformance or inaccuracies.

Viewed in this light, the doctrine of fraudulent inducement plays a critical role in effective and efficient contract design.[163] But this role is far from immutable. The critical concern should be giving promisees the ability to estimate the likelihood of a promised performance or the truthfulness of a represented fact. "[T]here are many situations in which a promisee can find it in his interest to rely even though the promisor does not intend to perform" or the promisor does not guarantee the veracity of his factual representation.[164] Promisees may find it in their interest to rely on promises, even if the promisor may not perform or may not be telling the truth about a fact, so long as the benefits of such reliance outweigh the costs. So long as promisees are put on notice through a no-reliance clause that the likelihood of performance or of the veracity of a represented fact is low, there is no good reason to second guess the promisee's estimation of her participation constraint.[165]

As with the generic deontological justifications for prohibiting lying, then, consequentialist, and particularly economic, rationales for prohibiting lying in contractual dealings may give way, in appropriate circumstances, to countervailing moral goods. Consequentialist objections to lying are not categorical.

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162. *See* Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 630–31 (1992).

163. Rules against fraud can also be said to avoid investment inefficiencies. As Paul Mahoney explains:

> Because a lie can produce a wealth transfer to defendants that would have been impossible in an honest market transaction, defendants will have an incentive to devote a positive amount of resources to lying. Such investments are a source of net social cost because any positive allocative outcomes they produce could be achieved through an honest market transaction.

Id. at 631.

164. AYRES & KLASS, *supra* note 127, at 93.

165. To be clear, I am assuming that the parties to a contract containing a no-reliance clause are sophisticated and that no other bargaining improprieties are present.

C. The Bottom Line

Dean William L. Prosser once criticized an excessively compartmentalized approach to legal analysis that suggests that "east is east and west is west, and never the twain shall meet," because in reality "there are, of course, no such distinctly segregated compartments in the law."[166] He went on to argue that "[t]he first question which arises in this curious dichotomy [between contract and tort law] is, when is a breach of contract also a tort? It is obvious that [there cannot be a tort in every breach of contract case] . . . or there would be no distinction left at all."[167]

> Contract liability is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed. . . . [Tort law] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required.[168]

In those tricky cases where the primary purposes of each area of the law overlap or conflict, as is the case with no-reliance clauses, the "single guiding principle," in Dean Prosser's view, is that tort "liability must be [levied against only that] conduct which is socially unreasonable."[169]

In the context of no-reliance clauses, the conduct that could potentially be subject to liability is fraud. As the generic deontological and consequentialist arguments rehearsed in the previous sections suggest, fraud constitutes, as a general matter, "socially unreasonable" conduct. Importantly, however, fraud is not categorically unreasonable. In other words, there are other social goods that can, in proper circumstances, offset the need to impose liability for fraud.

In the context of this Article, then, the question becomes whether enforcement of no-reliance clauses generates social goods weighty enough to offset the need to impose liability for fraud. By asking this question, I am not suggesting that the value of moral prohibitions against fraud is commensurable with the value of contractual freedom. "In the commensurabilist model, other things being equal, if we can compare two options in terms of which is more just, or which produces more utility, then

166. Prosser, *supra* note 14, at 380.

167. *Id*. at 387.

168. KEETON ET AL., *supra* note 129, § 1, at 5–6.

169. *Id*. at 6.

we should pick the option that offers more of the property."[170] But to say that two values cannot precisely be measured and ranked against each other along a single metric is not to say "that the two options cannot be compared at all, or ranked as better or worse than the other."[171] "When it is impossible to deliberate rationally among options by judging which option has more of some desired property, but it is still possible to deliberate rationally, the objects of deliberation are incommensurably valuable."[172]

It is beyond the scope of this Article to engage in that deliberation.[173] Instead, this Article merely argues that, to date, most courts have failed to meaningfully engage in such deliberation, simply assuming that no-reliance clauses can have no legitimate value, and serve only to countenance fraud. As the next Part demonstrates, however, the assumption that courts have been making is wrong. There are compelling and legitimate reasons why parties might benefit from no-reliance clauses.

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170. Strudler, *supra* note 133, at 1531–32. Henry Richardson explains the commensurability thesis this way:

> Two values (or goods) are deliberatively commensurable with respect to a given choice if and only if there is some single norm (or good) such that the considerations put forward by those two values (or goods) for and against choosing each of the available options may be adequately arrayed prior to the choice (for purposes of deliberation) simply in terms of the greater or lesser satisfaction of that norm (or instantiation of that good).

HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 104 (1994).

171. Stephen Gardbaum, *Law, Incommensurability, and Expression*, 146 U. PA. L. REV. 1687, 1687 (1998) (distinguishing between incomparability and incommensurability). For an overview of incommensurability, see Ruth Chang, *Introduction*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 1–3 (Ruth Chang ed., 1997).

172. Strudler, *supra* note 133, at 1533.

173. As Alasdair MacIntyre has suggested, there may be good reasons to doubt how successful such a deliberation can ultimately prove with respect to all fundamental questions:

> [T]he great Enlightenment theorists had themselves disagreed both morally and philosophically. Their heirs have, through brilliant and sophisticated feats of argumentation, made it evident that if these disagreements are not interminable, they are such at least that after two hundred years no prospect of termination is in sight. Succeeding generations of Kantians, utilitarians, natural rights' theorists, and contractarians show no signs of genuine convergence.

2 ALASDAIR MACINTYRE, *Some Enlightenment Projects Reconsidered*, *in* ETHICS AND POLITICS: SELECTED ESSAYS 172, 181–82 (2006). Nevertheless, as MacIntyre has also suggested, in solving particular problems, we can learn a great deal from utilitarian and Kantian approaches to moral philosophy. *See* 2 ALASDAIR MACINTYRE, *Truthfulness and Lies: What Can We Learn from Kant?*, *in* ETHICS AND POLITICS: SELECTED ESSAYS 122, 122–42 (2006) (investigating Kantian responses to a variety of moral questions); 2 ALASDAIR MACINTYRE, *Truthfulness and Lies: What Can We Learn from Kant?*, *in* ETHICS AND POLITICS: SELECTED ESSAYS 101, 101–21 (2006) (investigating utilitarian responses to a variety of moral questions).

IV. "UNRAVELING CERTAIN HUMAN LOTS": LEGITIMATE REASONS WHY CONTRACTING PARTIES MIGHT USE NO-RELIANCE CLAUSES AND WANT THEM ENFORCED

> I at least have so much to do in unraveling certain human lots, and seeing how they were woven and interwoven, that all the light I can command must be concentrated on this particular web, and not dispersed over that tempting range of relevancies called the universe.[174]

A significant number of commercial parties include no-reliance clauses in their contracts.[175] Despite this reality, many courts remain skeptical of such clauses. These courts reductively view no-reliance clauses as nothing more than licenses to lie.[176] As Part III argued, these courts then use generic moral prohibitions against lying to conclude that no-reliance clauses should not be enforced or should be enforced only subject to substantial limitations. This Part contends that courts skeptical of no-reliance clauses mistakenly fail to consider several plausible and legitimate reasons why parties might want to include no-reliance clauses in their contracts and have such clauses enforced.

The animating intuition behind the arguments advanced in this Part is that parties are, in general, the best judges of their self-interest and that they enter into contracts because they expect mutual gains from trade.[177] If this intuition accurately describes at least some commercial dealings, then a more thoroughgoing exploration of why commercial parties often include no-reliance clauses in their contracts is needed.

One possible explanation for the presence of no-reliance clauses in commercial contracts might be that, with respect to such clauses, parties systematically suffer from one or more cognitive biases that impair their ability to make rational judgments. A number of biases could vie for contention here. For instance, people might be overly optimistic or confident, particularly when they are investing in contractual preparations.[178] This overconfidence could cause them to underestimate the extent to which they

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174. GEORGE ELIOT, MIDDLEMARCH 141 (Rosemary Ashton ed., Penguin Books 2003) (1871).

175. *See supra* note 20 and accompanying text.

176. *See supra* Part II.B–C.

177. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003) ("[C]ontract law should facilitate the efforts of contracting parties to maximize the joint gains (the 'contractual surplus') from transactions.").

178. *See, e.g.*, Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, *in* BEHAVIORAL LAW & ECONOMICS 144, 149 (Cass R. Sunstein ed., 2000) ("One of the most robust findings in the literature of individual decision making is that of the systematic tendency of many people to overrate their own abilities, contributions, and talents.").

are likely to be defrauded.[179] Alternatively (or in addition), people may be poor at calculating the probabilities of future events, especially risks. This calculating deficiency may cause people to systematically underestimate the risk that they will be defrauded.[180] Individuals might also suffer from what is often referred to as a "personal positivity bias," which leads people to generally perceive others in a positive light. If a person is honest, she may view others as honest, even if such a view is naïve. Coupled with the concept of cognitive dissonance,[181] individuals may be especially reluctant to reach the conclusion that they have made a mistake in deciding to trust someone.[182] Finally, people may simply be very bad at detecting fraud, though they think they have the ability to do so,[183] and they might be particularly susceptible to oral communications, even when they have the intention to rely only on written communications.[184] Given the sophistication of the parties involved, however, and considering their diversity, as well as the diversity of transaction types in which no-reliance clauses are used, it is difficult to imagine any pattern of cognitive bias that could account for all of the uses of no-reliance clauses.[185]

In contrast, several rational reasons exist for parties to enter into no-reliance clauses. First, a seller might want to include a no-reliance clause because, ex ante, it believes that there is a high risk that the buyer will try to hold the seller up by asserting, ex post, that the seller made fraudulent assertions. A no-reliance clause operates as a barrier to such a holdup problem. Sellers may be acutely concerned about the risk of a holdup in complex deals for at least two reasons: (1) in such deals, numerous different interactions between different buyer and seller agents on multiple facets of the deal may take place, potentially making the costs of verifying to a court that no fraud actually occurred particularly high; and (2) in such deals, the assertions being made may themselves be complex, thus increasing the risks that a court will erroneously conclude that an assertion was fraudulent when, in fact, it was merely negligent, inadvertent, or not factually incorrect at all.

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179. *See, e.g.*, Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 362–63 (2003).

180. *See id.* at 363–64.

181. *See, e.g.*, LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (describing cognitive dissonance as the tendency to suppress information inconsistent with positions taken in order to preserve psychological consistency).

182. *See* Prentice, *supra* note 179, at 365.

183. *See id.* at 366–67.

184. *See id.* at 369–71.

185. Significantly, there is little research to suggest that firms suffer from cognitive biases. To the contrary, it is likely that firms tend to correct for cognitive biases due to market pressures, even if individuals in the firm suffer from them. *See* Schwartz & Scott, *supra* note 177, at 550–54.

Second, a seller might want to include a no-reliance clause in situations where its agents are heavily involved in making pre-contractual and contractual representations, it is expensive for the seller to monitor its agents' conduct, and the buyer might be in a better position to monitor or observe the agents or protect itself against the agents' actions at a lower cost. Third, buyers or sellers might want to include a no-reliance clause in order to enhance precontractual information exchange, particularly in complex transactions where the functionality of a product or service may hinge, in part, on how that product or service interacts with the buyer's particular business. Inclusion of a no-reliance clause may, in such circumstances, facilitate a freer exchange of information by reducing the threat of postcontractual allegations of fraud. Finally, buyers might want to include a no-reliance clause in order to protect their legitimate investments in private (as opposed to public) information about valuation.

Buyers (or sellers) might well be willing to acquiesce to a no-reliance clause for at least three somewhat overlapping reasons. First, the alternative might be to pay a higher contract price. One party may well believe that it can protect itself against the other party's potentially fraudulent assertions at a lower cost. A second, and closely related, reason why a party might accept a no-reliance clause is that it may believe that the risks of fraud are low. This may be especially true in circumstances where the party either already has, or can inexpensively obtain, sufficient information to gauge the truthfulness of the other party's assertions. Finally, a party might accept a no-reliance clause because it believes that nonlegal sanctions, such as reputational sanctions or the threat of ceasing further dealings, which might otherwise be crowded out or diminished by legal sanctions, are sufficient deterrents to the other party's fraud.

A. Affirmative Reasons Why Parties Might Want to Include No-Reliance Clauses and Have Them Enforced

1. Holdup by a Buyer Alleging Fraud

A seller may legitimately fear that sales representations it made to the buyer could be turned against it after the contract exists. Complex deals, as previously noted, often require that sellers and their agents make numerous different representations at different times to different constellations of the buyers' agents. The volume of representations made in complex deals, coupled with the diversity of players involved, increases the likelihood of

misunderstandings and confusion.[186] As deals get more and more complicated, buyers have increasing opportunities to allege fraudulent inducement. This sort of allegation threatens to impose significant costs on a seller and thus gives a buyer leverage that it can use after contract formation to renegotiate the terms of the deal in its favor.[187]

The most obvious costs are those related to the development of a factual and legal defense. Deception can be difficult to detect, even after the fact.[188] Unless the seller had in place extensive and costly monitoring allowing it not only to observe all of the representations made by its agents during precontractual negotiations[189] but also to translate those observations into verifiable evidence for a future court, the seller will face expensive challenges in reconstructing the events surrounding alleged incidents of fraud.[190] But such a reconstruction is vital. Fraud cases are fact-intensive. Indeed, other than having to clear relatively minor pleading hurdles,[191] a plaintiff alleging fraud stands a very good chance of surviving any pretrial efforts that a

186. The possibility of confusion may be particularly acute in complex transactions, as Part IV.A.3 suggests, because sellers may not know everything about their products or services, at least in the context of the buyer's proposed use or need for those products or services.

187. Holdup problems, like this one, occupy the attentions of many contract and organizational theorists. *See, e.g.*, CASE STUDIES IN CONTRACTING AND ORGANIZATION 7 (Scott E. Masten ed., 1996); Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 685–87, 693–702 (2007).

188. *See, e.g.*, Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 67–77 (1973) (discussing cases in which providers of repair service falsely diagnose a need for the service and considering how difficult it can be, ex post, to discover this fraud).

189. *See, e.g.*, John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 966–67 (1984) (describing how parties may undertake inefficient precautions); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 289 (1986) (same).

As discussed in Part IV.A.2, there may be circumstances in which it is less costly for buyers to monitor sellers' agents. In the absence of a no-reliance clause, however, a buyer might not be sufficiently motivated to invest in such monitoring, banking instead on its ability to hold the seller liable for fraud if the seller's agent acts inappropriately.

190. For a discussion of the distinctions between observable and verifiable information in the contractual setting, see Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279–80 (1992).

191. Fraud, in most jurisdictions, must be pleaded with "particularity." *See, e.g.*, FED. R. CIV. P. 9(b). The requirement of pleading the circumstances of an alleged fraud with particularity, however, "does not render the general principles of simplicity set forth in Rule 8 entirely inapplicable to pleadings alleging fraud; rather, as a significant number of federal courts from throughout the country have said over the years, . . . the two rules must be read in conjunction with each other." 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298 (3d ed. 2004 & Supp. 2008). In Judge Easterbrook's now-famous words, Rule 9(b) requires the plaintiff to plead at most the "first paragraph of any newspaper story." DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990). Thus the particularity requirement does not pose a substantial hurdle, in most cases, to fraud claims.

defendant might make to cut short the litigation. Even if a seller is absolutely convinced (and correct) that it did not commit fraud, mustering sufficient evidence to defeat a motivated buyer's claims can be very costly.

Moreover, even when a seller is prepared to raise its defense, the dispute resolution process itself imposes significant costs on the seller. This is particularly true with respect to fraud claims because, as just noted, such claims stand a good chance of surviving until the end of a trial on the merits. Sellers faced with fraud claims, then, are likely to be forced to incur legal fees through a trial and then face the unpredictability of the legal system. Specifically, sellers run the risk that courts will not be able to distinguish accurately between representations that were fraudulent and representations that were merely inaccurate or puffery.[192] In the context of fraud claims, the costs associated with an erroneous judgment may be compounded by the threat of punitive damages.[193]

In short, in our system, a trial often constitutes a failure.

> Although we celebrate [the trial] as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. . . . Much of our civil procedure is justified by the desire to promote settlement and avoid trial. More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial . . . .[194]

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192. Litigation necessarily includes the risk that a court will err in its judgment. This risk is frequently referred to as an error cost.

> Error costs are the social costs associated with erroneous legal judgments and are a function of several variables. Erroneous judgments include decisions for undeserving defendants (Type I errors) and decisions for undeserving plaintiffs (Type II errors). The expected cost of each individual error is the product of the probability of the error (q_1 or q_2) and the magnitude of the error (EC_1 or EC_2). Total error costs additionally depend on the fraction of defendants who are truly liable (k) and the total quantity of litigation (Q). In the loss function expressed above, total Type I error costs are kQq_1EC_1 and total Type II error costs are $(1\text{-}k)Qq_2EC_2$. The probability of error (q_1 or q_2), will depend on several variables: the standard of proof used by the court, the allocation of burdens, and the court's level of confidence in the accuracy of its decision.

Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1, 5 (1997) (footnotes omitted).

193. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 1381 (2000) (noting the possibility of punitive damages when intentional misrepresentation is "sufficiently malicious or oppressive").

194. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (footnote omitted).

The fear of a potential fraud claim can cast a long shadow over completed transactions, generating instability. Judge Posner concisely summarized these concerns when considering a party's attempt to attach a tort claim for fraud to its breach of contract claim:

> There is a risk of turning every breach of contract suit into a fraud suit, of circumventing the limitation that the doctrine of consideration is supposed however ineptly to place on making all promises legally enforceable, and of thwarting the rule that denies the award of punitive damages for breach of contract.[195]

In light of the costs associated with defending against a buyer's fraud claim, it is not surprising that a seller might worry that a buyer will hold it up in an effort to renegotiate the contract. To account for this possibility, sellers might either increase the price of the deal for the buyer, to offset this risk, or offer to include a no-reliance clause that either eliminates or reduces the seller's potential liability for fraud.

2. Agency Monitoring Costs

A seller might want to include a no-reliance clause in its contract with a buyer because it is concerned about the discretion given to its agents and the possibility than an agent will make either an intentional misrepresentation to a buyer or a representation that could be mistaken for an intentional misrepresentation. Agents, after all, may have their own independent strategies to pursue during the course of their work for the seller, and these strategies may not line up with the seller's goals.[196] In the face of concern about its agents' representations, a seller can, of course, take precautions such as monitoring the agent in order to catch and correct any misrepresentations before they are communicated to, or at least relied on by, the buyer.[197] It may

195. Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1354 (7th Cir. 1995); *see also* Charles Miller, Comment, *Contortions Over Contorts: A Distinct Damages Requirement?*, 28 TEX. TECH L. REV. 1257, 1263 (1997) (citing Laurence P. Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284, 284 (1959)) (noting that potentially at stake in fraudulent inducement cases "are punitive damages, which are generally unavailable for a breach of contract, but which may be available in cases where the conduct in question constitutes both a breach of contract and a tort").

196. *See, e.g.*, Robert E. Benfield, Comment, *Curing American Managerial Myopia: Can the German System of Corporate Governance Help?*, 17 LOY. L.A. INT'L & COMP. L.J. 615, 617 (1995) (noting that "[c]orporate managers necessarily pursue short-term growth strategies in order to appease their shareholder[] and thereby significantly increase the cost of funding long-term research and development").

197. *See, e.g.*, Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1057–58 (1993) (noting that without a

be difficult, however, for the seller to monitor all of its representations, especially on a regular basis. And, even if such monitoring can be done, "[i]t is quite possible for an agent to make a fraudulent misrepresentation even though the enterprise has taken all reasonable precautions to prevent him from doing so."[198] In any event, such monitoring will be costly, and in at least some circumstances, it may well be that the buyer can protect itself against misrepresentations made by the seller's agent at a lower cost.[199] After all, the buyer "is in an excellent position to be aware of all the representations that have been made by the agent and whether they are material."[200]

But a buyer may not be motivated, in the absence of a no-reliance clause, to expend its resources in monitoring the seller's agent's representations.[201] If a seller's agent makes a misrepresentation, the buyer can sue the seller for fraud.[202] Thus, without a no-reliance clause, the seller could bear an inefficiently large cost—the cost of monitoring its agents—that could otherwise be shared between the parties. While the seller can certainly charge more for its product in order to offset these costs, in many states a no-reliance clause limiting or eliminating fraud liability for the seller might more efficiently fit the actual needs of the parties.

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reward/punish mechanism, agents may shirk responsibilities). There are a variety of other precautions that sellers can, and likely will, take, such as training agents, providing agents with incentives, expressly limiting the authority of agents, and randomly sampling the work of agents. *See* Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 276 (1998) (discussing some monitoring and control mechanisms, including that principals may reward agents to encourage them to act in the principals' best interests). For the purposes of this argument, however, I presume that most of these precautions would be taken by a seller regardless of the particular structure of the seller's agreement with a buyer. This presumption rests on the intuition that, in an agency relationship, the principal decides whether to invest before the agent has acted. Thus, the principal necessarily faces a moral-hazard problem because the agent has the choice of either cooperating and investing or appropriating the principal's investment. *See, e.g.*, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1657–77 (1996) (discussing an agent's choice). Principals are thus likely to take precautions to ensure that their agents act appropriately.

198. Davis, *supra* note 13, at 509.

199. "In many situations, . . . it will be impossible for an enterprise to monitor all of the pre-contractual representations being made by its agents at a reasonable cost. . . . In these types of situations it might be useful to recruit the enterprise's trading partner to assist in the process of monitoring the agent." *Id*. at 511–12.

200. *Id*. at 512.

201. *Id*.

202. This, of course, may be an exaggeration. In many instances, it may still be in the buyer's interests to monitor the seller's agent because the costs associated with proving—verifying—any misrepresentations to a court are greater than the costs of monitoring.

3. Information Streamlining

A seller might also want to include a no-reliance clause in her contract with a buyer in order to enhance incentives for information exchange. In complex transactions, the standard binary adage that sellers know everything about their products or services and buyers know everything about their needs or desires may not hold true. Instead, a seller may be offering a complex good or service that has unique characteristics or features in the context of a buyer's particular objectives. In such circumstances, the accuracy of a seller's assertions about its goods or services may hinge, in significant part, on a high degree of information exchange between the parties. In order to make truthful representations about its product or service, a seller might need detailed information from a buyer about its business, but in order to understand what information about its business is relevant, a buyer might need detailed information about a seller's product or service. Moreover, and perhaps more importantly, sellers may not be able to accurately discern what aspects of their products or services are most relevant to buyers' needs—are material, in the parlance of fraud[203]—without a high degree of information exchange.

Although parties generally have incentives to share information during contractual negotiations, in order to ensure that beneficial trade is possible,[204] in the context of particularly complex goods or services, these natural incentives may not be strong enough to ensure free exchange. In the absence of a no-reliance clause insulating it from future threats of fraud, a seller may be reticent to engage in the necessary exchange—or may engage in this exchange only after charging a higher contract price—for fear that its incomplete and potentially inaccurate assertions may later be used against it. On the other side, in the absence of a no-reliance clause, a buyer may not be induced to gather and share necessary information about its needs or desires, preferring instead to foist all of the risks and costs associated with such an investigation onto the seller. In these cases, and in the absence of an enforceable no-reliance clause, deals either may not get made or may get made only at suboptimal prices.

No-reliance clauses, in this context, can effectively give the seller a little more freedom to share information and give the buyer a little more incentive to gather information. Importantly, this rationale for the existence of no-reliance clauses extends the intuition behind arguments that favor limiting the liability of parties for promissory estoppel based on precontractual

203. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 538 (1977) (stating that "[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material" and then describing the materiality requirement).

204. *See* Johnston, *supra* note 36, at 390.

representations.[205] Professor Jason Johnston, for instance, has argued that in some instances there will be no need for legal liability to attach to precontractual negotiations (and that legal liability would, in fact, be counterproductive) because the parties themselves will have a private incentive to engage in "'cheap talk.'"[206] "[W]hen the parties have at least some interests in common, even cheap talk—talk that involves no direct cost—may be credible and informative."[207] In these circumstances, the parties will have private incentives to engage truthfully and accurately in cheap talk about the probabilities and characteristics of performance because of the "parties' mutual interest in minimizing wasteful expense in investigating and negotiating when there is in fact no possibility of mutually beneficial trade."[208] When, however, "a speaker is held legally liable for damages if trade does not occur after the speaker makes a promissory (or more generally) optimistic statement in courtship, that message is, as an economic matter, no longer cheap talk."[209] While Professor Johnston does not argue that all promissory estoppel liability should be eliminated, he suggests that at least in some circumstances, cheap talk may be more efficient than the legally mandated alternatives.[210] No-reliance clauses allow parties to talk "cheaply" without fear of legal sanction for fraud.

4. Protecting Investments in Private Information

Buyers (or potentially sellers) might want to include no-reliance clauses, which in this context would insulate them from liability for misstatements made in buyers' warranties, in order to protect their investment in private information. For example, a real estate developer might want to buy a parcel of property P^2 because it already owns an adjacent parcel P^1 and knows that P^1 will be turned into a strip mall (with a Barnes & Noble and a variety of other high-traffic stores). The developer wants P^2 because she believes that she can turn it into a gas station and make a great deal of money. In the course of negotiations, the current owner of P^2 might inquire about whether the developer knows anything about what is being done with P^1. The developer could, of course, say nothing. But she then runs the risk of having the current owner of P^2 suspect that she is hiding something and hold out for more money. Alternatively, the developer could tell the current owner of P^2 about the strip mall plans, thus virtually guaranteeing a holdup. Finally, the

205. *See generally, e.g.*, *id*.
206. *Id*. at 389 (footnote omitted).
207. *Id*. at 390.
208. *Id*.
209. *Id*.
210. *Id*.

developer could lie. If she does so, however, she might well face a potential fraud claim.

No-reliance clauses, in this context, serve to foster productive investment in information-gathering by allowing buyers to protect that investment. Twenty years ago, Professor Kronman advanced the argument that contract law can tolerate nondisclosure by one who is protecting such an investment.[211] Although he went on to dismiss the possibility that affirmative misrepresentations could also be allowed,[212] others have been more bold.[213] Professor Levmore, for instance, has argued that because "nondisclosure on the part of the buyer [is conceptually permissible] in order to maintain a socially beneficial incentive structure," it does not make sense to allow sellers to undermine this structure by merely asking, "'Do you have any information about properties or developments in this area of the world such that if I shared your knowledge, I would be likely to raise my sale price by ten percent or more?'"[214] In such circumstances, society's interests may well be served by allowing the buyer to give a dishonest answer, since that is the only way of protecting its informational investment.

A relevant and similar right to lie is now commonly defended in the jurisprudence of corporations. In some circumstances, it may make sense to allow executives, acting on behalf of a corporation contemplating a major transaction, such as the acquisition of another corporation, to lie about their intentions, when such lies protect the interests of their shareholders by limiting speculation that might increase the price of stock in the corporation to be acquired. Defenders of this right to lie argue that shareholders sometimes should be permitted to vote to give executives the express right to lie to them.[215]

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211. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15–18 (1978). Professor Kronman used a similar scenario, based on a real dispute, to illustrate his arguments. In the dispute, a large company, Texas Gulf Sulphur, spent time and money conducting aerial surveys of land in Ontario, Canada, and concluded that there was a likelihood of valuable mineral deposits under farmland owned by the estate of Murray Hendrie. Based on this information, Texas Gulf Sulphur purchased an option for effectively $18,000 on mineral and surface rights in the Hendrie property. It turned out that mineral deposits under the Hendrie tract were worth approximately $1 billion. In Professor Kronman's view, if the Hendrie property sellers were entitled to learn the Texas Gulf's private valuation information, the sellers would gain an unwarranted windfall. *Id*.

212. *Id*. at 19 n.49.

213. *See, e.g.*, Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 138–42 (1982) (arguing that the law should tolerate affirmative misrepresentation in some circumstances).

214. *Id*. at 138, 139.

215. *See* Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1069 (1990) (suggesting that it is legally acceptable under a "fiduciary duty analysis" for a corporation publicly and falsely to deny

On the other hand, allowing buyers to have a free pass to lie to sellers without any warning whatsoever may be too extreme. No-reliance clauses strike a balance, allowing buyers to protect their informational investments while also putting sellers on notice that they should discount buyers' representations when calculating their participation constraint.

B. Reasons Why Parties Might Acquiesce to the Inclusion of a No-Reliance Clause

1. Lower Costs of Self-Protection

A buyer may agree to the inclusion of a no-reliance clause because, in exchange, it can demand a lower price for the goods or services from the seller. The savings may well be greater than what the buyer believes it will spend in taking precautions to guard against seller fraud. This straightforward cost-benefit rationale fits comfortably with the next two rationales that may entice a buyer to accept a no-reliance clause.

2. Low Risk of Seller Fraud

Buyers may agree to the inclusion of a no-reliance clause because they view the risk of seller fraud to be very low. Buyers may view the risk as low because, in the particular circumstances of the transaction, they have access to sufficient information to determine, at a low cost, the veracity of seller's representations. Alternatively, the buyer may not care about the veracity of the seller's representations because the buyer may be relying exclusively on its own evaluation of the seller's goods or services, without regard to the seller's representations. Finally, the buyer may trust the seller because of repeated interactions with the seller.

3. Equivalency or Superiority of Extra-Legal Sanctions

Finally, a buyer may agree to a no-reliance clause because it concludes that extra-legal sanctions available to deter seller fraud are sufficient, or perhaps even superior to, legal sanctions.[216] Extra-legal or informal enforcement mechanisms may include reputational sanctions, opportunities

involvement in merger negotiations when "a rational shareholder group would have endorsed [this] strategy"); *see also* Ian Ayres, *Back to* Basics*: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 997 (1991) (arguing that there is a default "fiduciary duty to tell the truth" that corporations can avoid by contracting "to waive this warranty").

216. *See, e.g.*, Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON 757, 780–89 (1993) (finding that the market value of the common stock of corporations that were either alleged to have committed fraud or were convicted of fraud fell significantly following announcement of the allegations or conviction and that very little of the fall in value could be attributed to expected legal penalties).

for repeat business interactions, and norms of reciprocal fairness.[217] Essentially, all of these mechanisms provide credibility to contractual commitments and representations without the need for third-party (court) enforcement.[218]

In general, contracting parties want to earn and maintain a good reputation with potential contracting partners and the general business community.[219] A good reputation helps generate future business opportunities with high-caliber contracting partners, and it enhances one's self-esteem.[220] The threat of having a good reputation sullied can often operate to prevent one contracting party from opportunistically exploiting the other. Similarly, the prospects of future dealings with a contracting partner often operate to curb opportunistic behavior.[221] But even in circumstances where reputational sanctions or concerns about future business dealings are not powerful enough to prevent nefarious behavior, there are strong reasons to believe that norms[222] of

217. *See, e.g.*, Scott, *supra* note 159, at 1644–45.

218. Numerous commentators have analyzed the merits and risks of self-enforcing contracts. *See generally, e.g.*, Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005 (1987); L.G. Telser, *A Theory of Self-enforcing Agreements*, 53 J. BUS. 27 (1980); Oliver E. Williamson, *Assessing Contract*, 1 J.L. ECON. & ORG. 177 (1985).

219. *See, e.g.*, Avner Greif, *Informal Contract Enforcement: Lessons from Medieval Trade*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 287, 287–95 (Peter Newman ed., 1998) (describing how cultural and social standing impact self-enforcement); Schwartz & Scott, *supra* note 177, at 557.

220. Though powerful, reputational sanctions may have distinct limits. The threat of reputation sanctions works best to deter opportunistic conduct when other potential trading partners and the business community can easily learn why a deal broke down. Reputational sanctions, then, tend to work most effectively in small communities where information travels swiftly. *See, e.g.*, Greif, *supra* note 219, at 287–95.

221. *See, e.g.*, Scott, *supra* note 159, at 1646 ("[W]here parties contemplate repeated interactions, neither party will breach an agreement if the expected gains from breaching are less than the expected returns from future transactions that breach would sacrifice."). Like reputational sanctions, however, the threat of losing future dealings has limits, particularly when parties believe that a relationship is about to end. *See id.* ("[T]he anticipation of the last transaction may cause the entire cooperative pattern to unravel.").

222. Different definitions of the term "norms" abound in legal scholarship. *See, e.g.*, Cooter, *supra* note 197, at 1656–57 (defining norms as imposing obligations); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255 (1999) (defining norms as "all rules and regularities concerning human conduct, other than legal rules and organizational rules"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both"); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699–1701 (1996) (defining norms as rules distinguishing desirable and undesirable behaviors while giving a third party the authority to punish those engaging in behaviors that are undesirable); Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 364 n.24

reciprocal fairness can ensure fair dealings.[223] Experimental evidence indicates that a preference for reciprocity—the willingness to reward cooperation and to punish selfishness—can motivate cooperation even in arms-length interactions between complete strangers.[224]

All of these informal enforcements of norms against fraud may have several advantages over formal legal enforcement.[225] First, informal enforcement avoids the direct institutional costs of legal enforcement. Perhaps most significantly, informal enforcement can kick in even if the parties can only observe—but could not, at a reasonable cost, verify to a court—violations of the norms against fraud. Moreover, informal enforcement has other advantages, especially in the context of fraud. At least in some contexts, informal processes may result in more sensitive fact-finding. Those who know the parties may have insights about their intentions and understandings, both critically relevant to determinations of whether particular conduct is fraudulent, negligent, or merely mistaken, that would elude a court.[226]

In light of the potential advantages of informal enforcement, rational contracting parties will compare the relative costs and benefits of using

(2003) (defining norms as "behavioral regularities that arise when humans are interacting with each other"); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (using a rough definition of norms as "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done").

223. "Recent work in experimental economics suggests . . . that the domain of self-enforcing contracts may be considerably larger than has been conventionally understood. A robust result of these experiments is that a significant fraction of individuals behave as if reciprocity were an important motivation (even in isolated interactions with strangers) . . . ." Scott, *supra* note 159, at 1644.

224. *See generally* Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 817 (1999); David K. Levine, *Modeling Altruism and Spitefulness in Experiments*, 1 REV. ECON. DYNAMICS 593 (1998); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993).

225. Some have argued that the introduction of legal constraints may be counterproductive, by "undermining incentives to develop private cooperative arrangements and by creating incentives for entrepreneurs to invest in rent seeking." Bruce L. Benson, *Economic Freedom and the Evolution of Law*, 18 CATO J. 209, 229 (1998); *see also, e.g.*, Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1140 (1997) (arguing that "private ordering generates substantive legal principles that are superior to those that the state produces"). Indeed, Larry Ribstein contends that trust is essential to efficient transactions and that the introduction of legally compulsory contracts may, at least sometimes, be counterproductive. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 570 (2001). By providing for the legal enforcement of contracts, the law, he maintains, may "crowd out" the trust that enhances efficient transactions or even promote distrust. *See id*. at 576–85.

226. Thomas A. Smith, *Equality, Evolution and Partnership Law*, 3 J. BIOECONOMICS 99, 110–14 (2001) (discussing the literature and suggesting its application to partnership law).

nonlegal, as opposed to legal, sanctions when determining whether or not to disclaim legal liability for fraud through a no-reliance clause.[227]

V. CONCLUSION

Lies are often wrong. Lies may compromise the autonomy of their victims, and they may treat their victims unfairly. Moreover, lies may result in allocational inefficiencies, causing a victim to buy something that she does not really want, and lies may erode the fabric of trust essential to cooperative behavior. Based on these generic moralisms, a majority of courts faced with no-reliance clauses, which effectively give one or both parties the freedom to lie, either refuse to enforce them altogether or enforce them only subject to significant limitations.

I have argued, however, that these courts have reached their conclusion too easily. They presume that no-reliance clauses can serve no legitimate contract function and thus have no legitimate value. But, at least in some cases where sophisticated parties contract with one another, no-reliance clauses can—and do—serve valuable contracting functions. With the core assumption made by a majority of courts reluctant to enforce no-reliance clauses dispelled, I suggest that at least the generic formulations of a moral prohibition against fraud are insufficient to counterbalance the value gained by autonomous parties choosing what they rationally believe to be in their best self-interest. Thus, courts should either enforce no-reliance clauses without significant restrictions or carefully articulate a more robust moral basis for a public policy prohibition against such clauses.

227. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 379–83 (1990).