

## Beyond Deception: Finding Prudential Boundaries Between Breach of Contract and Deceptive Trade Practices Act Violations in Wisconsin

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### Repository Citation

Donald R. Stroud III, *Beyond Deception: Finding Prudential Boundaries Between Breach of Contract and Deceptive Trade Practices Act Violations in Wisconsin*, 93 Marq. L. Rev. 1157 (2010).

Available at: <http://scholarship.law.marquette.edu/mulr/vol93/iss3/6>

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# BEYOND DECEPTION: FINDING PRUDENTIAL BOUNDARIES BETWEEN BREACH OF CONTRACT AND DECEPTIVE TRADE PRACTICES ACT VIOLATIONS IN WISCONSIN

## I. INTRODUCTION

It has been said that the law of contracts is an abstraction, a residual component destined to disappear among advancing bodies of other law.<sup>1</sup> Professor Grant Gilmore was of such a mind, forecasting that contract, together with tort law, would assimilate into a “generalized theory of civil obligation.”<sup>2</sup> Others have identified the swift progression of regulation, uniform codes, and statutory law as the driving force in obviating the common law of contracts.<sup>3</sup> Wisconsin is currently in the midst of wrestling with this exact issue; that is, the destiny of contracts and contract law. Wisconsin, by adopting a strong economic loss doctrine,<sup>4</sup> has shown particular distaste for the immersion of tort and contract predicted by Gilmore.<sup>5</sup> But the Wisconsin Supreme Court’s economic loss jurisprudence does not similarly foreclose the potential for statutory law to replace the role of contracts. The court has indicated that facts giving rise to a breach of contract claim may also support recovery under the state’s Deceptive Trade Practices Act<sup>6</sup> (the DTPA).<sup>7</sup> Thus,

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1. See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 22–25 (1965); GRANT GILMORE, *THE DEATH OF CONTRACT* 103–10 (Ronald K.L. Collins ed., 2d ed. 1995).

2. GILMORE, *supra* note 1, at 103.

3. FRIEDMAN, *supra* note 1, at 202–10; see generally Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law’s Subsequent Development*, 1994 WIS. L. REV. 1119.

4. The economic loss doctrine “preclude[s] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.” *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 19, 274 Wis. 2d 631, 683 N.W.2d 233 (quoting *Tietsworth v. Harley-Davidson, Inc.* 2004 WI 32, ¶ 23, 270 Wis. 2d 146, 677 N.W.2d 233). Its purpose is to “preserve the distinction between contract and tort by requiring transacting parties to pursue only their contractual remedies when asserting an economic loss claim.” *Ins. Co. of N. Am. v. Cease Elec., Inc.*, 2004 WI 139, ¶ 24, 276 Wis. 2d 361, 688 N.W.2d 462. In other words, the economic loss doctrine prevents parties from asserting tort claims for what amounts to a breach of contract. It is the strengthening of this doctrine in Wisconsin and the attendant prohibition on tort recovery as an alternative to contract that has animated the increased usage of statutory causes of action in contract disputes, which is the main concern of this Comment.

5. See *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 403–04, 573 N.W.2d 842, 846 (1998) (stating that the purpose of the economic loss doctrine is to maintain the distinction between tort and contract law).

6. WIS. STAT. § 100.18(1) (2007–2008).

7. See, e.g., *Below v. Norton*, 2008 WI 77, ¶ 42, 310 Wis. 2d 713, 751 N.W.2d 351.

while the distinction between contract and tort law grows crisper, that between contract and statutory causes of action is becoming significantly blurrier. Indeed, there have been at least twenty-five appellate cases between 2000 and 2010 in which the plaintiff, using the same nucleus of fact, pled a DTPA violation in conjunction with a breach of contract claim.<sup>8</sup>

The recent case *K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.* (*K & S*) demonstrates how this trend, if left unchecked, can go too far.<sup>9</sup> The subject matter in *K & S* was a dispute between two commercial parties over a transaction involving the purchase of manufacturing equipment.<sup>10</sup> The defendant seller had breached its contract—it agreed to sell one piece of machinery to the plaintiff but actually delivered another.<sup>11</sup> However, despite the fact that the purchase was under contract, the plaintiff based its entire action on the DTPA and ultimately prevailed.<sup>12</sup> This raises the question: What becomes of the parties' contract when an action for breach is brought solely under the DTPA? The contract in *K & S* was obviously unnecessary as a condition for imposing liability, and consequently, one could argue that *K & S* provides authority for courts to ignore contracts completely where a DTPA violation is concerned. This, in turn, could afford litigants an opportunity to avoid unfavorable but legitimate contract terms simply by recasting their ordinary contract claims as DTPA violations. In other words, it

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8. *Below*, 2008 WI 77; *Van Lare*, 2004 WI 110; *Tietsworth*, 2004 WI 32, ¶ 2; *Seidling v. Stepan*, No. 2008AP1009, 2009 WL 3273229, ¶ 3 (Wis. Ct. App. Oct. 14, 2009); *Racine County v. Oracular Milwaukee, Inc.*, 2009 WI App 58, ¶ 7, 317 Wis. 2d 790, 767 N.W.2d 280; *WED Dev. LLC v. ABC Ins.*, No. 2008AP977, 2009 WL 691166, ¶ 8 (Wis. Ct. App. Mar. 18, 2009); *Blanchar v. Lake Land Builders, Inc.*, No. 2008AP1282, 2008 WL 5397173, ¶¶ 1, 1 n.3 (Wis. Ct. App. Dec. 30, 2008); *Christensen v. TDS Metrocom LLC*, No. 2008AP554, 2008 WL 5172804 (Wis. Ct. App. Dec. 11, 2008); *Armstrong v. Zima*, No. 2007AP1950, 2008 WL 3389301, ¶ 3 (Wis. Ct. App. Aug. 13, 2008); *Renaissance Learning, Inc. v. Omron Corp.*, No. 2007AP2173, 2008 WL 3389702, ¶ 7 (Wis. Ct. App. Aug. 13, 2008); *Berard v. Schertz*, No. 2007AP2131, 2008 WL 2245868, ¶ 5 (Wis. Ct. App. June 3, 2008); *Aslani v. Country Creek Homes, Inc.*, No. 2007AP503, 2008 WL 220714, ¶¶ 1, 4 (Wis. Ct. App. Jan. 29, 2008); *Nissenbaum v. Daniels*, No. 2006AP1042, 2007 WL 823934, ¶¶ 9, 9 n.1 (Wis. Ct. App. Mar. 20, 2007); *3303-05 Marina Road, LLC v. Zennett Props., LLC*, No. 2005AP2293, 2006 WL 2670963 (Wis. Ct. App. Sept. 19, 2006); *Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 2006 WI App 187, ¶¶ 9, 11, 296 Wis. 2d 273, 722 N.W.2d 633; *Malzewski v. Rapkin*, 2006 WI App 183, ¶¶ 1, 6, 296 Wis. 2d 98, 723 N.W.2d 156; *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶ 10, 294 Wis. 2d 800, 720 N.W.2d 716; *Madcap I, LLC v. McNamee*, 2005 WI App 173, ¶ 4, 284 Wis. 2d 774, 702 N.W.2d 16; *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶¶ 3, 5, 279 Wis. 2d 335, 693 N.W.2d 756; *Ricco v. Riva*, 2003 WI App 182, ¶ 3, 266 Wis. 2d 696, 669 N.W.2d 193; *Selzer v. Brunzell Bros.*, 2002 WI App 232, ¶ 8, 257 Wis. 2d 809, 652 N.W.2d 806; *Kailin v. Armstrong*, 2002 WI App 70, ¶ 1, 252 Wis. 2d 676, 643 N.W.2d 132; *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶ 6, 248 Wis. 2d 172, 635 N.W.2d 640; *Reusch v. Roob*, 2000 WI App 76, ¶ 5, 234 Wis. 2d 270, 610 N.W.2d 168.

9. 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792.

10. *Id.*, ¶ 1.

11. *Id.*, ¶¶ 8–10.

12. *Id.*, ¶¶ 11, 14, 17, 42.

seems as though the *K & S* court sanctioned a loophole through which parties may litigate what is in fact an ordinary contract dispute under the DTPA, and as a result, obtain unwarranted advantages under the statute's relaxed substantive requirements and fee-shifting provisions.

Contract law is a doctrine of mechanical rules subject to variation by the contracting parties. So-called "freedom to contract" permits parties to voluntarily adjust their rights and responsibilities by specifying their own terms to which they can expect to be bound. The law, recognizing the societal value in enforcing contracts, makes it incredibly difficult for a party to escape its promises once the contract is made.<sup>13</sup> However, by allowing recovery for breach of contract under the DTPA, the supreme court has made it significantly easier for parties to "opt out" of their contract's terms just by asserting a DTPA claim. Therefore, the extent to which courts will apply *K & S* and enforce the DTPA over contracts will have a dramatic effect on parties' ability to escape the terms of their agreements *ex post facto*.

The thesis of this Comment is that, for the benefit of our contract-based system of economic exchange, prudential boundaries between ordinary contract disputes and DTPA violations are needed to preserve the difference between the two. The following discussion will cover the DTPA story that is currently unfolding in the state's contract jurisprudence, its implications, and the prudential boundaries that should be considered to check its growth. Part II covers the DTPA basics—its purpose, elements, and specifically its application in *K & S*. Part III explores the potential consequences of the precedent set in *K & S*—particularly its effect on parties' ability to effectively and reliably allocate economic risks. Part IV, assuming that the *K & S* trend will continue, raises two major issues courts should confront when they apply the DTPA in this manner. The first issue is whether a breach of contract, without more, is indeed a true DTPA violation or rather an injury best left to contract law. This Comment argues that a breach of contract, by itself, should remain a matter of contract law. The second issue recognizes that application of the DTPA to breach of contract claims will eventually run afoul of the Uniform Commercial Code (U.C.C.). The U.C.C. permits contracting parties to agree to terms with which the DTPA is at complete odds.<sup>14</sup> The resulting conflict that will confront Wisconsin courts is one between two completely

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13. However, the struggle to find ways to balance private autonomy exercised through freedom of contract with notions of fundamental fairness in commercial transactions is well documented. See Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 647–55 (2009). With mixed success, courts have begun to integrate doctrines—such as promissory estoppel, unconscionability, and good faith—into contract law that eradicate contract formalism to relieve society of private agreements that violate notions of fundamental fairness. *Id.*

14. See *infra* Part IV.B.

opposite standards of contracting required by the two different statutes. Thus, courts must determine whether contract terms entered in compliance with the U.C.C. can survive the DTPA when the two bodies of statutory law conflict. Part IV will attempt to outline some guidelines aimed toward resolving these issues. The DTPA has its purpose, and courts should not unduly hinder the statute from accomplishing that purpose. However, by setting aside valid, freely bargained-for contracts to enforce the DTPA, the supreme court is visiting unjustifiable harm upon contract law without advancing the DTPA's purpose. Contracts still play a fundamental role in law and society by protecting agreements that are the lifeblood of our economic system. The DTPA should not be a tool for scrapping this essential institution.

## II. WISCONSIN'S DECEPTIVE TRADE PRACTICES ACT

### A. Generally

The DTPA is born out of a perception that the high costs to society of investigating, prosecuting, and rectifying economic harm caused by deception or trickery are not adequately addressed by common law contract or tort remedies.<sup>15</sup> Common law actions require proof of such things as an actual injury, fraud, mistake, unconscionability, reliance, or intent.<sup>16</sup> Given the substantive barriers imposed by the common law, a statutory cause of action for deceptive trade practices was needed because, as one commentator noted, "it is more efficient for the law to recognize an obligation in sellers not to deceive their customers and to provide remedies that effectively deter that behavior."<sup>17</sup> Accordingly, state legislatures across the country have adopted statutes, such as the DTPA and others like it, with an aim to relax the substantive requirements on recovering economic losses caused by deceptive and unfair sales practices.<sup>18</sup> A private action to enforce DTPA violations in Wisconsin has been around since 1969.<sup>19</sup> The DTPA's remedy is to compensate injured parties for all pecuniary losses caused by a violation of its

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15. See Jean Braucher, *Deception, Economic Loss, and Mass-Market Consumers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 830 (2006); Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair and Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 530–32 (1980); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 15–17 (2005); Mark R. Hinkston, *Protecting Consumers in the Modern Age: Wisconsin's Deceptive Trade Practices Act*, WIS. LAW., Oct. 2008, at 14, 16.

16. See Schwartz & Silverman, *supra* note 15, at 7 (discussing drawbacks of common law remedies for unfair or deceptive business practices).

17. See Braucher, *supra* note 15, at 831.

18. See *id.* at 830–31; Schwartz & Silverman, *supra* note 15, at 32.

19. James D. Jeffries, *Protection for Consumers Against Unfair and Deceptive Business Practices in Wisconsin*, 57 MARQ. L. REV. 559, 567–68 (1974).

provisions while shifting the expense of litigation—attorney’s fees and costs—to the alleged violator.<sup>20</sup> The result is that actions for losses based on a DTPA violation not only make it easier for aggrieved parties to win, but also more rewarding.<sup>21</sup> For this reason, the DTPA serves as Wisconsin’s primary protection against unfair and deceptive trade practices.<sup>22</sup>

Distilling the Wisconsin statute’s language to its operative terms shows that it creates a broad negative duty:

No person . . . shall . . . place before the public . . . an advertisement, announcement, statement or representation of any kind . . . relating to [the] purchase, sale, hire, use or lease of . . . real estate, merchandise, securities, service or employment . . . which . . . contains any assertion . . . of fact which is untrue, deceptive or misleading.<sup>23</sup>

The DTPA is interpreted to apply generally whether the prohibited statement is made in public or private, so long as no “particular relationship” exists between the parties at issue.<sup>24</sup> The elements of a DTPA violation are (1) the defendant made a representation to “the public”; (2) the representation was untrue, deceptive, or misleading; and (3) the representation caused the plaintiff pecuniary loss.<sup>25</sup> With respect to the first element, a representation to the public includes representations made during face-to-face negotiations to one person in private.<sup>26</sup> The public may include consumers or sophisticated

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20. WIS. STAT. § 100.18(11)(b)(2) (2007–2008).

21. See generally Stuart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575, 599 (1989) (describing the pro-plaintiff, pro-damages aspect of DTPA statutes and their interrelationship with contract law).

22. Most jurisdictions rely on so-called “little FTC Acts” to remedy injuries caused by unfair or deceptive trade practices, which are technically distinct from Wisconsin’s DTPA. Leaffer & Lipson, *supra* note 15, at 530–32; Cullen Goretzke, Comment, *The Resurgence of Caveat Emptor: Puffery Undermines the Pro-Consumer Trend in Wisconsin’s Misrepresentation Doctrine*, 2003 WIS. L. REV. 171, 191. Although Wisconsin has also adopted a little FTC Act, WIS. STAT. § 100.20 (2007–2008), the majority of private actions for unfair or deceptive business practices in Wisconsin are brought under the DTPA, which is worded differently from little FTCs. Hinkston, *supra* note 15, at 15–16; Jeffries, *supra* note 19, at 559–60. Nonetheless, Wisconsin courts’ construction and use of Wisconsin’s DTPA is remarkably the same as other courts’ interpretation of little FTCs, despite differences in the statutes’ texts, and the supreme court has relied on interpretations of the federal FTC Act and as well as little FTC Acts. See Goretzke, *supra*, at 191. Suffice it to say that the DTPA does the heavy lifting in Wisconsin with respect to private actions for deceptive or unfair trade practices.

23. WIS. STAT. § 100.18(1).

24. Hinkston, *supra* note 15, at 17, 63 (discussing what constitutes a “particular relationship”).

25. WIS. STAT. § 100.18(1); K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc., 2007 WI 70, ¶ 19, 301 Wis. 2d 109, 732 N.W.2d 792.

26. Hinkston, *supra* note 15, at 16.

commercial parties.<sup>27</sup> The second element is not interpreted to require intent to defraud or even knowledge that one's representations are untrue or misleading<sup>28</sup>—it merely requires a volitional act.<sup>29</sup> Plus, reasonable reliance is not a prima facie element of causation under the third element.<sup>30</sup> It is sufficient that the alleged representation was a “material inducement” or cause-in-fact.<sup>31</sup> One part misrepresentation,<sup>32</sup> one part promissory estoppel,<sup>33</sup>

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27. *Id.* at 17.

28. *Id.* at 65.

29. *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶ 37, 311 Wis. 2d 492, 753 N.W.2d 448.

30. *Hinkston*, *supra* note 15, at 64–65; *see also K & S Tool & Die Corp.*, 2007 WI 70, ¶ 35.

31. *See K & S Tool & Die Corp.*, 2007 WI 70, ¶ 35; WIS. JURY INSTR. CIVIL 2418.

32. Facts establishing DTPA liability also support a cause of action for misrepresentation. In fact, courts sometimes refer to the DTPA as a statutory misrepresentation action. *Novell v. Migliacco*, 2008 WI 44, ¶ 1, 309 Wis. 2d 132, 749 N.W.2d 544. Wisconsin recognizes three different misrepresentation torts: intentional, negligent, and strict liability misrepresentation. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 25, 288 N.W.2d 95, 99 (1980). The elements shared by all three theories are nearly identical to those needed to establish a DTPA claim. These misrepresentation torts at least require that: “(1) [t]he representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; and (3) the plaintiff must believe such representation to be true and rely thereon to his damage.” *Id.* (quoting *Whipp v. Iverson*, 43 Wis. 2d 166, 169–70, 168 N.W.2d 201, 203–04 (1969)). However, the difference between the DTPA and misrepresentation is that a showing of knowledge, bad faith, or intent to induce or defraud is not an element of misrepresentation. *See Hinkston*, *supra* note 15, at 65; *K & S Tool & Die Corp.*, 2007 WI 70, ¶ 19 n.6. Indeed, it is true that legislatures enacting statutes such as the DTPA intentionally omitted many of the elements needed to establish common law misrepresentation for the purpose of removing these substantive barriers to relief. *See Braucher*, *supra* note 15, at 831; *Hinkston*, *supra* note 15, at 16; *Schwartz & Silverman*, *supra* note 15, at 15. The DTPA has a heightened advantage over misrepresentation claims because the Wisconsin Supreme Court held that, under the economic loss doctrine, contracting parties injured by misrepresentations must resort to contract remedies exclusively because “misrepresentations . . . that ultimately concern the quality of the product sold, are properly remedied through claims for breach of warranty.” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 30, 270 Wis. 2d 146, 677 N.W.2d 253 (quoting *Cooper Power Sys., Inc. v. Union Carbide Chems. & Plastics Co.*, 123 F.3d 675, 682 (7th Cir. 1997)); *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 11, ¶ 42, 283 Wis. 2d 555, 699 N.W.2d 205. However, the same reasoning does not apply to DTPA claims, even though their elements are comparable to those in common law misrepresentation claims. *Kailin v. Armstrong*, 2002 WI App 70, ¶¶ 40, 42, 252 Wis. 2d 676, 643 N.W.2d 132. This is because the supreme court held that the economic loss doctrine does not apply to statutory claims such as the DTPA. *See infra* note 65 and accompanying text. The result is that a good deal of the substance behind promissory liability in tort lives on in the DTPA, which is why it is common for aggrieved parties to assert DTPA claims in the absence of tort remedies otherwise precluded by the economic loss doctrine. *See, e.g., Anderson L. Cao et al., Recent Developments in Business Litigation*, 43 TORT TRIAL & INS. PRAC. L.J. 299, 310 (2008) (stating that “[a] common way to attempt recovery of tort remedies and avoid application of [the economic loss doctrine] is to assert a deceptive trade practices claim”).

33. Both theories exist for purposes of imposing promissory liability out of representations that induce reliance and harm without necessitating proof of intent or deceit. *See K & S Tool & Die Corp.*, 2007 WI 70, ¶ 19 n.6 (clarifying that intent is not an element of a DTPA violation); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 694–95, 133 N.W.2d 267, 272–73 (describing promissory estoppel as a remedy for unfulfilled promises without evidence of fraud or bad faith);

and one part express warranty,<sup>34</sup> the DTPA supplies a distinct, catchall statutory cause of action.<sup>35</sup> And because there is no intent, knowledge, bad faith, or reliance requirement, the DTPA casts a long, strict liability shadow over representations made in the transactional setting.<sup>36</sup>

Observers of DTPA-type statutes have noted how they operate in practice to override the formalism of contract law.<sup>37</sup> The breakdown in contract formalism—due mostly to the relaxed substantive requirements needed to prove a DTPA-type claim—allows courts to ignore contract terms to correct deceptive or misleading behavior.<sup>38</sup> Further, by way of the DTPA’s distinct

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RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 358 (1969) (stating that “the doctrine of promissory estoppel imposes liability without regard to expressed intention”). In other words, one could argue that the DTPA is similar to promissory estoppel in that both are predicated on something that amounts to a representation that a fact exists, which in turn causes another to act upon that representation of fact to her detriment. 3 JOHN NORTON POMEROY, POMEROY’S EQUITY JURISPRUDENCE § 808(b) (5th ed. 1941) (describing the core principles of promissory estoppel as it relates to equitable doctrines). It should be noted too that Wisconsin courts are not strangers to DTPA claims brought in the promissory estoppel context. See generally *N. Am. Mech., Inc. v. Diocese of Madison*, No. 98-3251, 1999 WL 516803 (Wis. Ct. App. July 22, 1999) (plaintiff asserting DTPA claim in conjunction with promissory estoppel); *Bundy v. Univ. of Wis.-Eau Claire*, No. 97-2735, 1998 WL 265042 (Wis. Ct. App. May 27, 1998) (same).

34. Promissory liability under the DTPA also attaches in the breach of warranty context. See, e.g., *Below v. Norton*, 2008 WI 77, ¶¶ 25, 42, 310 Wis. 2d 713, 751 N.W.2d 351 (permitting the plaintiff to proceed on a DTPA action where the seller of residential real estate breached the warranty in the sales contract). The DTPA, like warranty law, triggers accountability for the veracity of an assertion, representation, or statement of fact. “A ‘warranty’ is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It . . . amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.” *Dittman v. Nagel*, 43 Wis. 2d 155, 160, 168 N.W.2d 190, 193 (1969) (quoting 17A C.J.S. *Contracts* § 342 (1963)). Under both warranty law and the DTPA, liability arises where a product fails to conform to a promise or affirmation of fact that induced its purchase; for example, where the product purchased is of quality inferior to that represented by the seller. Consequently, it is not uncommon for a DTPA claim to arise from the same facts creating a cause of action for breach of warranty. See 3 PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., *BRUNER & O’CONNOR ON CONSTRUCTION LAW* § 9:9 (2002); Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011, 1098–99 (1993) (observing that DTPA and similar consumer protection statutes sound like warranty claims—where the nature or quality of the goods is other than that represented by the seller); G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1224 (1988).

35. See Schwartz & Silverman, *supra* note 15, at 32.

36. In dicta, the Wisconsin Supreme Court has also expressed agreement that the DTPA is a strict liability statute. *K & S Tool & Die Corp.*, 2007 WI 70, ¶ 19 n.6 (stating that intent to induce an obligation is not an element of a DTPA claim); see also *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 23, 274 Wis. 2d 631, 683 N.W.2d 46 (alleging facts that gave rise to common law strict liability misrepresentation and a DTPA violation); *Grube v. Daun*, 173 Wis. 2d 30, 52–63, 496 N.W.2d 106, 113–18 (Ct. App. 1992) (same facts that gave rise to common law strict liability misrepresentation also gave rise to a DTPA violation). The Seventh Circuit has likewise interpreted Wisconsin’s DTPA as such. *Eberts v. Goderstad*, 569 F.3d 757, 763 (7th Cir. 2009) (applying Wisconsin law).

37. See Shell, *supra* note 34, at 1202.

38. *Id.* at 1235.

elements and statutory nature, courts have permitted DTPA plaintiffs to tread on contract ground where tort claims are otherwise barred.<sup>39</sup> Because of these attributes, the DTPA and others like it are susceptible to a construction that enables a replacement theory of obligation—one based on standards of honesty and fairness, and not mechanized common law doctrine.<sup>40</sup> Wisconsin courts agree that the DTPA is distinct from common law claims<sup>41</sup> but also that it applies in breach of contract situations.<sup>42</sup> However, prior to *K & S*, the supreme court had not addressed whether a DTPA claim for breach of contract was grounds to disregard contract terms. In fact, the court of appeals had decided the question negatively, holding that an integration clause is enforceable against DTPA claims.<sup>43</sup> This is why *K & S*, a case in which the supreme court ignored a forum selection clause to impose DTPA liability as a matter of law, is pregnant with important implications for Wisconsin law.

*B. K & S and DTPA Liability for Breach of Contract as a Matter of Law*

In early 2000, John Deere approached a Wisconsin manufacturer, K & S Tool and Die Corporation (K & S), to produce a part for its riding lawnmowers.<sup>44</sup> The process for producing the part was such that K & S had to buy new equipment—a 1,000-ton press.<sup>45</sup> It contacted Perfection Machinery Sales, Inc. (Perfection), an Illinois-based dealer in used heavy equipment, to find the press.<sup>46</sup> Perfection had no such presses in stock but nonetheless agreed to find one for K & S. Perfection sent K & S two machines that it represented in a sales quotation were 1,000-ton presses.<sup>47</sup> K & S had the equipment professionally inspected, and being satisfied with this inspection, ultimately contracted with Perfection to purchase one of the

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39. See *supra* note 32.

40. Shell, *supra* note 34, at 1202, 1222, 1235–36.

41. See *infra* note 65 and accompanying text.

42. In *Van Lare v. Vogt, Inc.*, which was handed down three years prior to *K & S*, the supreme court explained in dicta that a seller's breach of a commercial real estate sales contract created liability under contract law and the DTPA, and that recovery could be had under both. 2004 WI 110, ¶ 23, 274 Wis. 2d 631, 683 N.W.2d 46. Later, in *Below v. Norton*, the court relied on *K & S* to support the proposition that a remedy for breach of contract could be had under contract law or the DTPA. 2008 WI 77, ¶ 42, 310 Wis. 2d 713, 751 N.W.2d 351. Though the economic loss doctrine precluded misrepresentation claims under the same circumstances, the court explained, aggrieved purchasers still have adequate remedies under contract law and the DTPA. *Id.*, ¶ 38.

43. *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶ 30, 294 Wis. 2d 800, 720 N.W.2d 716.

44. *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶ 4, 301 Wis. 2d 109, 732 N.W.2d 792.

45. *Id.*, ¶ 5.

46. *Id.*, ¶ 6.

47. *Id.*, ¶¶ 8–9.

offered machines for \$225,000.<sup>48</sup> K & S later discovered that the press it had purchased was a 1,000-ton press remanufactured to press with only 800 tons of force, instead of the represented 1,000 tons.<sup>49</sup> The purchase agreement contained a forum selection clause that would have placed K & S in an Illinois state court, Perfection's home forum.<sup>50</sup> K & S nonetheless sued Perfection in Wisconsin solely for a violation of the DTPA.<sup>51</sup> After a jury trial, the trial court entered judgment on the jury verdict against Perfection, awarding K & S \$306,000 in damages.<sup>52</sup> On appeal, the supreme court affirmed the judgment and held that no error had occurred in applying the DTPA to impose liability on Perfection for the sale.<sup>53</sup>

As innocuous as the court's conclusion in *K & S* may seem, it hides perhaps a groundbreaking discovery in Wisconsin's contract jurisprudence. Perfection contracted with K & S to provide a 1,000-ton press. One assumes, for the sake of discussion, that the parties' contract was supported by consideration and otherwise enforceable by itself. But for the DTPA, one could assume further that K & S would have been forced to base its claim on the contract and, consequently, litigate in Perfection's home court in Illinois. However, the absence of any substantive discussion in the court's opinion concerning the contract terms, warranties, or its overall effect on K & S's recovery from Perfection shows that the contract was entirely unnecessary as a condition for imposing liability. Instead, the court applied DTPA liability to Perfection's breach as a matter of law. In fact, the only mention of the parties' contract in the court's opinion was in regard to its evidentiary function.<sup>54</sup> Because the DTPA provided an independent basis for Perfection's liability, the parties' contract, and therefore the forum selection clause, had no bearing on K & S's recovery. In other words, it appears as though *K & S* sets precedent for parties to avoid unfavorable contract terms in contract disputes simply by asserting a DTPA claim for what is in essence a breach of contract.<sup>55</sup>

The *K & S* decision can be viewed as only the latest development in a longtime tug of war in Wisconsin law over the distinction between contract

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48. *Id.*

49. *Id.*, ¶ 10.

50. *See K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2006 WI App 148, ¶ 7 n.3, 295 Wis. 2d 298, 720 N.W.2d 507.

51. *K & S Tool & Die Corp.*, 2007 WI 70, ¶ 1, 301 Wis. 2d 109, 732 N.W.2d 792.

52. *Id.*, ¶ 14.

53. *Id.*, ¶ 2.

54. *Id.*, ¶ 40 (explaining that testimony was had on the contract's terms in an attempt to disprove the reliance element).

55. *See Shell, supra* note 34, at 1235.

and other law.<sup>56</sup> The court has explained on many occasions that contract law serves to effectuate exchanges by protecting the benefit of the bargain, and it is therefore distinct from other law.<sup>57</sup> But there are times when a breach of contract case presents itself in such a way that a plaintiff can choose to disguise his contract claim under other law as a matter of strategic advantage. Certainly, whether under statutory or tort law, the strategic advantages in litigating a breach under other law are many. It may be that the statute of limitations on a contract claim has expired while the discovery rule permits a tort claim.<sup>58</sup> Further, it may be that a litigant's choice is motivated by a disparity between the damages available in contract compared to other law.<sup>59</sup> A classic example of this disparity is where the aggrieved purchaser incurs lost profits and other consequential damages, but the contract at issue limits the remedy for breach to repair and replacement.<sup>60</sup> Another instance where it would be beneficial to avoid contract law would be where the contract at issue is void under the statute of frauds. One could avoid such contractual obstacles by attempting to base a breach of contract claim on other theories not similarly impaired, such as negligence or misrepresentation.<sup>61</sup> Another example is that plaintiffs who successfully litigate breach of contract as a DTPA violation may recover attorney's fees and costs whereas the default contract rule is the American rule—parties pay their own way.<sup>62</sup> These and

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56. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 318–21, 592 N.W.2d 201, 206–08 (1999) (describing the historical struggle to find an appropriate boundary between tort and contract law).

57. *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 404–05, 573 N.W.2d 842, 846–47 (1999).

58. See, e.g., *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶ 23, 274 Wis. 2d 631, 683 N.W.2d 46 (describing how a purchaser of commercial real estate sued on a strict liability misrepresentation theory where the statute of limitations had expired on contract and DTPA claims).

59. See *Shell*, *supra* note 34, at 1224–25. The *K & S* case is a good example of this strategy. The contract price of the equipment in *K & S* was \$225,000. *K & S Tool & Die Corp.*, 2007 WI 70, ¶ 8. However, by asserting a DTPA claim instead of breach of contract, *K & S* wound up pocketing \$306,000, not including its attorney's fees. *Id.*, ¶ 14.

60. See, e.g., *Sunnyslope Grading Inc. v. Miller, Bradford & Risberg, Inc.*, 148 Wis. 2d 910, 914, 437 N.W.2d 213, 214 (1989).

61. In *Sunnyslope Grading, Inc.*, a commercial purchaser of excavation equipment bought machines under a manufacturer's limited warranty, which limited remedies for breach of warranty to repair or replacement and disclaimed liability for consequential damages. *Id.* at 913–14, 437 N.W.2d at 214. When the machines broke down, the purchaser attempted to avoid this contractual limitation by asserting a negligence claim. *Id.* at 911–12, 437 N.W.2d at 213. The supreme court held that contract law prohibits a “commercial purchaser of a product” from recovering economic losses from a manufacturer in tort “where the warranty given by the manufacturer specifically precludes recovery for such damages.” *Id.* at 921, 437 N.W.2d at 218.

62. See *Shell*, *supra* note 34, at 1248–49 (explaining that attorney's fees create a lopsided incentive for aggrieved purchasers to litigate breaches under DTPA statutes); see also *Ly v. Norstrom*, 615 N.W.2d 302, 313–14 (Minn. 2000) (observing the unwarranted strategic advantage in recovering for ordinary breach of contract under Minnesota's DTPA due to its fee-shifting

other considerations serve to underscore the strategic advantages of litigating contract disputes under other, non-contract law.

*K & S* is only the latest in a series of clever attempts to end-run unfavorable but otherwise enforceable contract terms by litigating breach of contract claims under other law, and in particular, it is an exemplar of the strategic advantage in using Wisconsin's DTPA to this end. It shows that, in order to avoid a legitimate, enforceable contract term in an action for breach, one need only assert a DTPA claim. That *K & S* could avoid the Illinois courts and still recover all its losses, attorney's fees, and costs in Wisconsin just by recasting its claim for breach as a DTPA violation was no doubt a strong consideration in developing the theory of its case. But there is a history to the *K & S* strategy that extends beyond the case's procedural posture. As mentioned before, parties have been asserting tort claims to recover for breach of contract for years,<sup>63</sup> and the *K & S* strategy is basically the same old chestnut. The difference is that Wisconsin courts have adopted a strong economic loss doctrine to preclude this strategy where torts are concerned.<sup>64</sup> But it is clear that those same jurisprudential constraints are inapplicable to statutory claims such as the DTPA, which means contracts are particularly susceptible to disingenuous claims now more than ever because of the *K & S* decision.<sup>65</sup>

### III. IMPLICATIONS

*K & S* establishes that claims under Wisconsin's DTPA are a robust alternative to contract remedies, and given the pro-plaintiff advantages inherent in the DTPA, it would be fair to conclude that everyday breaches will be litigated under the statute with increasing frequency. What are the implications of this trend? *K & S* arguably sets a precedent for courts to ignore contract terms and impose DTPA liability for breach as a matter of

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provisions).

63. See, e.g., *A. E. Inv. Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479, 483, 214 N.W.2d 764, 766 (1974) (allowing tort recovery for a negligently performed service contract).

64. See John L. Laubmeier, *Demystifying Wisconsin's Economic Loss Doctrine*, 2005 WIS. L. REV. 225, 233–34 (explaining how the strategy of asserting a tort claim for breach of contract would avert the parties' contract terms and the U.C.C., and how the economic loss doctrine is designed to preclude that result).

65. The reason being that courts have articulated a statutory claim exception to the economic loss doctrine. In *Kailin v. Armstrong*, purchasers of commercial real estate (the Kailins) sued their seller (Armstrong) for breach of contract, misrepresentation, and DTPA violations. 2002 WI App 70, ¶ 1, 252 Wis. 2d 676, 643 N.W.2d 132. The defendant asserted the economic loss doctrine as an affirmative defense to the misrepresentation and DTPA claims. *Id.*, ¶ 12. The court of appeals disagreed, holding that the DTPA created a distinct cause of action immune from the economic loss doctrine. *Id.*, ¶ 43. The supreme court subsequently adopted the reasoning in *Kailin*, exempting statutory claims in general from the economic loss doctrine. *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶¶ 35–37, 308 Wis. 2d 103, 746 N.W.2d 762.

law. Although the term ignored in *K & S* was a forum selection clause, it could follow from this approach that courts may also set aside terms that allocate economic risk—such as warranty disclaimers, limited warranties, indemnification clauses, or remedy modifications—to give effect to the DTPA remedy. This approach would basically allocate all the risk of loss to one party—the seller.

A fundamental principle of Wisconsin law is that only contracting parties bear the economic risks of contracting.<sup>66</sup> Where personal injury or property damage is concerned, society has developed a way to bear the brunt of these hazards through liability insurance.<sup>67</sup> However, a lack of adequate liability insurance for purely economic losses caused by breach of contract makes breach a difficult injury to insure against through the normal channels.<sup>68</sup> Contracting parties must therefore ascertain their own economic risks and allocate those risks among each other accordingly—they must become self-insured.<sup>69</sup> For this reason, warranties and other contractual risk-allocating devices play a critical role in controlling parties' exposure to economic loss. They function as insurance policies built into the contract terms.

A warranty is a particular type of promise whereby the warrantor promises to answer for damages when a certain set of facts is found not to exist—it is, in effect, an insurance policy.<sup>70</sup> Professor Corbin equated the creation of a warranty with a promise to indemnify against loss in case the facts turn out not to be as represented.<sup>71</sup> Judge Learned Hand likewise characterized a warranty as a “promise to indemnify.”<sup>72</sup> Wisconsin also recognizes that the

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66. *CLL Associates Ltd. P'ship v. Arrowhead Pac. Corp.*, 174 Wis. 2d 604, 611, 497 N.W.2d 115, 118 (1993).

67. JOHN G. FLEMING, *THE LAW OF TORTS* 7–10 (7th ed. 1987).

68. *CLL Associates*, 174 Wis. 2d at 611–12, 497 N.W.2d at 118; Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 954–55 (1966) (discussing the insurability of economic losses compared to personal injury); see generally Ellen S. Pryor, *The Economic Loss Rule and Liability Insurance*, 48 ARIZ. L. REV. 905 (2006) (discussing the opportunities or a lack thereof in obtaining commercial liability insurance for economic losses). However, the Wisconsin Supreme Court has found that “contractually-assumed liability” exclusions in commercial general liability policies do not per se exclude coverage for all breaches, which partially alleviates these problems. See *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 8, 268 Wis. 2d 16, 673 N.W.2d 65.

69. See *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 327–33, 592 N.W.2d 201, 210–12 (1999); *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 407–10, 573 N.W.2d 842, 847–849 (1998); *CLL Associates*, 174 Wis. 2d at 611–12, 497 N.W.2d at 118.

70. See *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 14 (1st Cir. 1999); RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. d (1981); 17A C.J.S. *Contracts* § 342 (1999).

71. 1 ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 1.14 (rev. ed. 1993). But see KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 210 (1930). Professor Llewellyn, the principal draftsman of the U.C.C., detested warranties and, ironically, apparently desired to ignore the concept of warranty altogether.

72. *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946); see Glenn D. West &

effect of a warranty is to indemnify a purchaser as to the warranty's subject matter.<sup>73</sup> Accepting the comparison as accurate, the promise to indemnify and its scope is a critical contract term.<sup>74</sup> Depending on the parties and the nature of the transaction, warranties can range from very sophisticated to simple and straightforward arrangements.<sup>75</sup> On one hand, an individual selling a used boat on Craigslist.com might require the sale to be "as is"—no warranties—and the buyer may agree in exchange for a lower price. On the other hand, a sophisticated businessperson acquiring a going concern may require enhanced coverage—perhaps an extended warranty with an escrow agreement—and the seller may require a higher purchase price or a "basket" in return to account for its increased risk.<sup>76</sup> In any event, courts presume that parties factor risk allocation into their agreements and that the contract price accurately reflects the amount of built-in warranty coverage.<sup>77</sup> But because *K & S* likely gives courts the authority to strip away contract terms in applying the DTPA, parties' ability to effectively allocate risk by contract will diminish significantly.<sup>78</sup>

Without the freedom to effectively allocate risk by contract, such as with warranties, the costs of transacting business become incredibly unpredictable and expensive. One can find a drastic example of this problem in a Fifth Circuit case applying Texas's DTPA to a commercial contract dispute.<sup>79</sup> In

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W. Benton Lewis, Jr., *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the "Entire" Deal?*, 64 BUS. LAW. 999, 1020 (2009).

73. *Dittman v. Nagel*, 43 Wis. 2d 155, 160, 168 N.W.2d 190, 193 (1969) (quoting 17A C.J.S. *Contracts* § 342 (1963)).

74. The exception to this rule is products liability theory—where breach of warranty results in personal injury or property damage. See *State Farm Mut. Auto. Ins. Co.*, 225 Wis. 2d at 316, 592 N.W.2d at 205.

75. See West & Lewis, *supra* note 72, at 1020–21.

76. *Id.*

77. See *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 408, 573 N.W.2d 842, 848 (1998) (quoting *Stoughton Trailers, Inc. v. Henkel Corp.*, 965 F. Supp. 1227, 1230 (W.D. Wis. 1997)) (presuming commercial parties bargain for contractual promises, specifically warranties); *State Farm Mut. Auto. Ins. Co.*, 225 Wis. 2d at 327–28, 592 N.W.2d at 210 (applying the same presumption to consumer transactions). There are, however, strong opposing views on this presumption. Professor Slawson argued that "[t]he contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance" and that the complexity of modern life and law have made form contracts the preferred method of contracting. W. David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 HARV. L. REV. 529, 529–31 (1971). Specifically, with respect to the presumption that parties allocate risk, it has been argued that this presumption is false and that incomplete contracting is the norm. See Subha Narasimhan, *Of Expectations, Incomplete Contracting, and the Bargain Principle*, 74 CAL. L. REV. 1123, 1129–30 (1986).

78. See Note, *supra* note 68, at 965–66 (explaining that holding manufacturers liable for economic losses outside of contract would essentially force them to fully insure their products).

79. *Int'l Nickel Co. v. Trammel Crow Distrib. Corp.*, 803 F.2d 150, 151–52 (5th Cir. 1986).

*International Nickel Co. v. Trammel Crow Distribution Corp.*, the plaintiff contracted with a warehouse to store 71,000 pounds of nickel.<sup>80</sup> The warehouse failed to deliver the nickel back to the plaintiff on time, which led to damages and a lawsuit.<sup>81</sup> The plaintiff's contract with the warehouse contained a liability limitation that essentially limited the defendant's liability to \$11,491, a provision that the trial court ultimately enforced.<sup>82</sup> However, on appeal, the court found that by asserting a DTPA claim under the Texas statute, the plaintiff was able to override the contractual liability limitation to recover the full value of its nickel—\$216,000—plus attorney's fees.<sup>83</sup> That is nearly eighteen times more liability than the defendant warehouse had agreed to assume in the contract.

There are several problems that could conceivably result from a regime such as this where courts may ignore contract terms in evaluating a DTPA claim. One problem is the potential for moral hazard. Moral hazard is the "tendency of an insured to relax his efforts to prevent the occurrence of the risk that he has insured against because he has shifted the risk to an [insurer]."<sup>84</sup> Moral hazard creates inefficiency and waste because the incentive for an insured buyer to take care in making contract decisions is decreased and the seller's costs of providing warranty coverage increase with the attendant rise in claims.<sup>85</sup> If it were understood that under the DTPA a seller is always liable for the quality of her performance notwithstanding the contract, what incentive would purchasers have in investigating a product's quality themselves or, alternatively, purchasing a warranty? It would seem that the seller would always bear the risk of loss and, consequently, purchasers would have little motivation to avoid "poor purchasing" by protecting themselves before and after contracting for a product or service.<sup>86</sup> The potential for moral hazard is further increased by the fact that the opportunity costs for buyers to litigate contract claims under the DTPA, as opposed to contract law, are relatively low due to the availability of attorney's fees and costs.<sup>87</sup>

Another problem is how contracting parties—particularly sellers—should go about absorbing the increased risk of liability for breach under the DTPA. It

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80. *Id.* at 151–52.

81. *Id.* at 152.

82. *Id.*

83. *Id.* at 155.

84. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 109 (6th ed. 2003)

85. See Thomas J. Holdych & Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What You Pay for and Paying for What You Get*, 45 DEPAUL L. REV. 781, 798 (1996).

86. William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 339 (1974).

87. See Holdych & Mann, *supra* note 85, at 798–99.

would appear that, under Wisconsin law, DTPA liability for pure breach of contract cannot be allocated by contract *or* insured under a commercial general liability (CGL) policy. Again, *K & S* sets the stage for courts to strip apart contract terms and impose DTPA liability as a matter of law without respect to the parties' contractual allocations of risk. Further, the Wisconsin Supreme Court in *Stuart v. Weisflog's Showroom Gallery, Inc. II (Stuart II)* interpreted the term "occurrence," defined as an "accident" in CGL policies, to exclude statutory violations that require proof of volitional acts.<sup>88</sup> With reference to the DTPA, the court explained in dicta that the DTPA is such a statute and therefore outside normal CGL coverage.<sup>89</sup> The Seventh Circuit, applying *Stuart II*, has also precluded CGL coverage for DTPA violations.<sup>90</sup> Thus, without the traditional means to protect themselves—contract or liability insurance—sellers are exposed to significantly higher risks posed by the DTPA.

The lack of adequate liability insurance for economic losses and the inability to allocate risk by contract, it would seem, leaves sellers with limited options: (1) do nothing and suffer forced withdrawal from the marketplace; (2) close shop and make a voluntary withdrawal from the marketplace; (3) continue to sell albeit without marketing operations; or (4) increase prices to reflect the increased risk. The first option would occur in instances where sellers neglect to change their normal business practices—e.g., marketing and selling products—and succumb to overwhelming liability for breach under the DTPA, eventually causing the seller to be run out of business. The second would occur where, after assessing the costs and benefits of DTPA liability for breach, sellers choose to stop operating in Wisconsin. The third option would require a conscious decision by sellers to continue to sell their products but without the benefit of communicating about their product's quality, fitness, or specifications, and thereby avoid liability for representations made with "an intent to sell" under the DTPA. Given the undesirability and improbability of options one through three, it seems obvious that sellers will be forced to increase the purchase price of their goods or services to absorb the increased risks of contracting in Wisconsin. In essence, such an increase would reflect an "insurance premium," which would in theory allow the seller to pool its own resources to cover the anticipated rise in losses created by DTPA liability.<sup>91</sup>

The argument for imposing DTPA liability as a matter of law irrespective of contract is that it permits courts to strip away contract terms behind which

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88. 2008 WI 86, ¶¶ 30–36, 45, 311 Wis. 2d 492, 753 N.W.2d 448.

89. *Id.*, ¶¶ 35, 37.

90. *Eberts v. Goderstad*, 569 F.3d 757, 763 (7th Cir. 2009).

91. *See Note, supra* note 68, at 952–53.

unscrupulous dealers hide dishonesty and deceit.<sup>92</sup> Where dishonesty and deceit exist, this course of action is obviously justified. However, extending this approach beyond deceptive or unfair circumstances to ordinary breach situations only deters efficient, prudent, and otherwise desirable contracting practices. Remedying ordinary breach of contract with DTPA remedies is bad policy for this reason. DTPA liability for breach reverses the rule that parties must bear their own risk; it creates a perverse incentive for parties not to be diligent or careful in their economic relations. In sum, ignoring contract terms, though justified in some instances, has little to no utility where ordinary breach of contract is concerned and, arguably, the practice does not at all further the DTPA's purpose. When courts strip away contract terms where a DTPA claim is asserted, it is patently unfair to the institution of contracts upon which our economy is built and to those who use them in a lawful, prudent way.

#### IV. PRUDENTIAL BOUNDARIES: THE "MERE BREACH" RULE AND DTPA VERSUS THE U.C.C.

In light of the implications described above, Wisconsin courts that decide to follow plaintiffs down the DTPA path should first consider two major issues. First, courts must affirmatively decide if there is a genuine difference between garden-variety breach of contract claims and DTPA violations as a matter of law. Depending on one's point of view, resolution of this question could be viewed as an unwarranted hindrance to realizing the DTPA's full potential<sup>93</sup> or, conversely, as a justifiable defense of the institution of contracts and legitimate profit-seeking activity.<sup>94</sup> Either way, resolution will significantly help clarify the law governing commercial exchanges, which is in and of itself an important goal. Courts discerning the difference between breach and a DTPA violation have categorized their findings under the heading of a "mere breach" rule. The three approaches to the mere breach rule are discussed below. Second, conflict between the DTPA and the U.C.C. is an inevitable consequence of applying the DTPA to contract disputes. Again, depending on one's point of view, resolution of this issue could be construed as a hindrance or help, but resolution is absolutely necessary before proceeding further down the DTPA path.

##### A. The "Mere Breach" Rule

The United States Supreme Court has explained that "the basis for a contract action is the parties' agreement; to succeed under consumer protection law, one must show not necessarily an agreement, but in all cases,

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92. Shell, *supra* note 34, at 1235–36.

93. *Id.* at 1236 (decrying the mere breach rule as unduly restricting the DTPA's potential).

94. See Schwartz & Silverman, *supra* note 15, at 49, 66 (supporting efforts to limit the DTPA's scope).

an unfair or deceptive practice.”<sup>95</sup> This statement best captures the majority approach to the conflict between contracts and DTPA-type statutes, which is the mere breach rule. The mere breach rule simply holds that a mere breach of contract, without more, cannot constitute a violation of DTPA-type statutes as a matter of law.<sup>96</sup> Indeed, there is a fundamental difference between broken contractual promises and deception or misrepresentation.<sup>97</sup> Deceptive acts, the reasoning goes, require something more than the mere fact that the defendant promised to do something and then failed to do it because “that type of ‘misrepresentation’ occurs every time a defendant breaches a contract.”<sup>98</sup> To characterize mere breaches, even intentional ones, as deceptive acts would mean DTPA-type statutes apply to virtually all contract disputes, supplying aggrieved parties with an additional, redundant remedy.<sup>99</sup> Given the implications of this result, courts have found that legislatures did not intend DTPA-type statutes to be construed so broadly.<sup>100</sup>

Although there seems to be consensus among other jurisdictions on the mere breach rule, the concept remains largely unaddressed in Wisconsin law.<sup>101</sup> To be sure, Wisconsin courts have attached to the DTPA a distinction between it and the common law such that the DTPA is not just an add-on to existing common law remedies.<sup>102</sup> It has followed from this interpretation that

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95. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995).

96. *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 844 (Ill. 2005); *Ashford Dev., Inc. v. USLife Real Estate Servs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983). The same can be said for mere breach of warranty, *see Searles v. Fleetwood Homes of Pa., Inc.*, 2005 ME 94, ¶ 34, 878 A.2d 509, but for simplicity’s sake, the mere breach rule for contracts and warranties is subsumed into one discussion here.

97. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 148 (Colo. 2003). A promise can be a misrepresentation if, at the time it is made, the promisor had no intention of performing it—that is an intentional tort. *Id.* (citation omitted). However, a promise bargained for in exchange for a return promise or performance is simply a contract. *Id.* Therefore, absent the requisite intent, the mere failure to perform a bargained-for promise is a contractual injury. *Id.*; 1 SAMUEL WILLISTON, *THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT* § 12 (2d ed. 1924).

98. *Zankle v. Queen Anne Landscaping, Inc.*, 724 N.E.2d 988, 993 (Ill. App. Ct. 2000).

99. *Avery*, 835 N.E.2d at 844 (citation omitted).

100. *See, e.g., id.*

101. The lone exception being an unpublished case wherein the court of appeals affirmed summary judgment entered against the plaintiff who had brought contract and DTPA claims. *Christensen v. TDS Metrocom LLC*, No. 08-AP-554, 2008 WL 5172804, ¶ 14 (Wis. Ct. App. Dec. 11, 2008). In *Christensen*, the plaintiff argued that the failure to perform a contractual obligation as represented is a per se misrepresentation under the DTPA. *See id.*, ¶ 15. The court rejected that argument and held that failure to perform as represented is not, by itself, enough to establish a DTPA violation. *See id.*, ¶¶ 18–19. The statute, the court explained, took aim at false advertising and attendant misrepresentations, not breach of contract, and accepting the plaintiffs’ argument would unreasonably blur a line between the two bodies of law. *Id.*, ¶ 17.

102. *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶ 30, 294 Wis. 2d 800, 720 N.W.2d 716; *see Kailin v. Armstrong*, 2002 WI App 70, ¶ 40, 252 Wis. 2d 676, 643 N.W.2d 132.

there is an inherent difference between the DTPA and common law remedies that, so far, has only served as a basis to enlarge the DTPA's application.<sup>103</sup> But there are two sides to every coin, and in this case, the flip side must be the mere breach rule. Indeed, if it is true in Wisconsin that a DTPA action is not cumulative of common law remedies and therefore inherently distinct from common law claims, then it should have no application where a pure common law dispute is at issue, such as in a breach of contract case.

By expressly adopting the mere breach rule, Wisconsin courts would effectively preserve the distinction between contract law and the DTPA, and in the process decisively avoid unnecessary entanglements between benign contract disputes and truly deceptive acts. But where does the distinction lie? What criteria should courts use to discern it? While most jurisdictions agree on the mere breach rule's goal—enforcing a prudential boundary between true contract disputes and true DTPA claims—there exists a variety of methods for reaching that objective. Three primary tests have emerged: the public interest standard, the “rascality” standard, and the misfeasance standard.

#### 1. The Public Interest Standard<sup>104</sup>

The public interest standard is the most exculpatory of all tests promulgated under the mere breach rule.<sup>105</sup> Although it is claimed to be the minority approach, a growing number of jurisdictions have adopted it, including Colorado,<sup>106</sup> Georgia,<sup>107</sup> Illinois,<sup>108</sup> Minnesota,<sup>109</sup> Nebraska,<sup>110</sup> New York,<sup>111</sup> South Carolina,<sup>112</sup> and Washington.<sup>113</sup> The rule of the public

103. See *Below v. Norton*, 2008 WI 77, ¶¶ 6, 37, 310 Wis. 2d 713, 751 N.W.2d 351.

104. This standard is also referred to as the “public injury” or “public benefit” standard.

105. See Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Law*, 33 WM. MITCHELL L. REV. 163, 207–10, 215–20 (2006) (explaining how restrictive the public interest is on DTPA recovery for breach of contract); Jonathan A. Mark, *Dispensing with the Public Interest Requirement in Private Causes of Action Under the Washington Consumer Protection Act*, 29 SEATTLE U. L. REV. 205, 234 (2005); Shell, *supra* note 34, at 1235.

106. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003).

107. *Zeeman v. Black*, 273 S.E.2d 910, 913–14 (Ga. Ct. App. 1980).

108. *Lake County Grading Co. of Libertyville v. Advance Mech. Contractors, Inc.*, 654 N.E.2d 1109, 1116 (Ill. App. Ct. 1995). Although an amendment to the Illinois statute expressly removed the public interest element in 1990, Illinois courts have basically continued to apply this standard through the “consumer nexus” requirement. *Id.*

109. *Ly v. Nystrom*, 615 N.W.2d 302, 313–14 (Minn. 2000).

110. *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136, 141–42 (Neb. 2000).

111. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 744 (N.Y. 1995).

112. *Daisy Outdoor Adver. Co. v. Abbott*, 473 S.E.2d 47, 50–51 (S.C. 1996).

113. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 536–37 (Wash. 1986).

interest standard essentially holds that “if a wrong is private in nature, and does not affect the public, a claim is not actionable” under consumer protection or deceptive trade practice statutes.<sup>114</sup> In other words, plaintiffs must show that the complained-of act or conduct has a broader impact on the consuming public at-large, which means that private contract disputes unique to the parties generally do not fall within the scope of the DTPA.<sup>115</sup>

The public interest standard is one implied by the courts based on the language and purpose of DTPA-type statutes.<sup>116</sup> It derives from the view that the DTPA and its cognates are intended to protect the general public. This makes sense from an historical standpoint because most of these statutes, including Wisconsin’s, began as public interest statutes; that is, they were enforceable only by state agencies.<sup>117</sup> Later amendments to these statutes created “private attorney general” provisions designed to allow private actions to enforce DTPA violations.<sup>118</sup> In light of the private attorney general purpose of these private action provisions, courts have interpreted them to apply only where the private action seeks to vindicate the public interest, as an actual attorney general might, and not merely private rights.<sup>119</sup> Therefore, the scope of private attorney general provisions in deceptive trade practice statutes is no broader than that afforded the actual attorney general, who is limited in all cases to vindicating the public interest.<sup>120</sup> But, as a practical matter, the purpose of the public interest requirement is to carve ordinary contract disputes out of the category of wrongs prohibited by the DTPA and its cognates.<sup>121</sup>

Jurisdictions that have adopted the public interest standard employ different tests for identifying acts or conduct that affect the public interest. New York has stuck with an ad hoc approach to determining when an ordinary contract claim affects the public interest.<sup>122</sup> Illinois plaintiffs must

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114. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003).

115. *Oswego Laborers’ Local 214 Pension Fund*, 647 N.E.2d at 744.

116. *See, e.g., Hangman Ridge Training Stables, Inc.*, 719 P.2d at 536.

117. *See Hinkston, supra* note 15, at 15.

118. *See, e.g., Haw. Med. Ass’n v. Haw. Med. Servs. Ass’n*, 148 P.3d 1179, 1207–09 (Haw. 2003) (describing the legislative history of Hawaii’s DTPA and amendments providing for private causes of action).

119. David J. Dove, *Washington Consumer Protection Act—Public Interest and the Private Litigant*, 60 WASH. L. REV. 201, 203 (1984); *see also* *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007); *Ly v. Nystrom*, 615 N.W.2d 302, 313–14 (Minn. 2000); *Zeeman v. Black*, 273 S.E.2d 910, 913–15 (Ga. Ct. App. 1980).

120. *Ly*, 615 N.W.2d at 313.

121. MARY DEE PRIDGEN, *CONSUMER PROTECTION AND THE LAW* § 5.6 (2009) (explaining that courts apply a public interest requirement to avoid entangling consumer protection concerns with ordinary contract disputes).

122. *See, e.g., Genesco Entm’t, Inc. v. Koch*, 593 F. Supp. 743, 750–53 (S.D.N.Y. 1984).

show that their claim implicates “consumer protection” concerns.<sup>123</sup> South Carolina’s public interest test is met with a showing that the challenged conduct is capable of repetition; however, its supreme court has rejected any rigid, bright-line rule to determine how to meet that test.<sup>124</sup> Colorado’s test requires courts to consider (1) the number of consumers affected by the challenged practice; (2) the relative sophistication and bargaining power of consumers affected by the challenged practice; and (3) evidence that the challenged practice has previously impacted other consumers or has significant potential to do so in the future.<sup>125</sup>

Washington has produced by far the most comprehensive framework for addressing the public impact requirement. The Washington test sets forth different factors to ascertain public impact, all of which hinge on the type of transaction at issue.<sup>126</sup> If the transaction is a “consumer” transaction, courts consider (1) whether the alleged acts were committed in the course of the defendant’s business; (2) whether the acts are part of a pattern or generalized course of conduct; (3) whether repeated acts were committed prior to the act causing the plaintiff’s harm; (4) whether there is a real or substantial potential for repetition of the defendant’s conduct; and (5) if the challenged act involved a single transaction, whether many consumers would be affected by it.<sup>127</sup> On the other hand, if the transaction at issue is essentially a private contract dispute, courts use a different set of factors to discern a public interest: (1) whether the challenged act was committed in the course of the defendant’s business; (2) whether the defendant advertised to the public in general; (3) whether the defendant actively solicited the plaintiff, indicating solicitation of others; and (4) whether the parties possessed unequal bargaining power.<sup>128</sup> Alternatively, under Washington law, there is a public interest per se if the defendant’s acts violate a statute that contains a declaration of public interest—e.g., a public interest in regulating the insurance business or automobile retail sales.<sup>129</sup>

## 2. The “Rascality” Standard

The intermediate standard for separating ordinary breach of contract from DTPA-type violations is the “rascality” standard. This standard holds that

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123. *Lake County Grading Co. of Libertyville v. Advance Mech. Contractors, Inc.*, 654 N.E.2d 1109, 1116 (Ill. App. Ct. 1998).

124. *Daisy Outdoor Adver. Co. v. Abbott*, 473 S.E.2d 47, 51 (S.C. 1996).

125. *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003).

126. *Hangman Riding Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 537–38 (Wash. 1986).

127. *Id.* at 538.

128. *Id.*

129. *Id.*

conduct actionable under deceptive trade practice statutes must “attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.”<sup>130</sup> Courts interpreting DTPA-type statutes to require rascality are of the mind that legislatures did not intend these acts to supersede the common law of contracts or the U.C.C.<sup>131</sup> Therefore, a showing of egregious conduct in addition to a mere contractual dispute is required to obtain the DTPA remedy.<sup>132</sup> It is not enough that the breach itself was intentional,<sup>133</sup> as in the event of a so-called “efficient breach”,<sup>134</sup> rather, substantial aggravating factors must attend the breach.<sup>135</sup> States including Connecticut,<sup>136</sup> Kentucky,<sup>137</sup> Louisiana,<sup>138</sup> Massachusetts,<sup>139</sup> North Carolina,<sup>140</sup> New Hampshire,<sup>141</sup> and Rhode Island<sup>142</sup> follow the rascality standard.

Courts in jurisdictions following the rascality standard frequently distinguish between legitimate profit-seeking activity and deceptive or unfair practices.<sup>143</sup> The Fifth Circuit nicely captured the distinction between lawful business pursuits and DTPA-type violations:

[Louisiana’s DTPA] does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions. The statute does not forbid a business to do what everyone knows it must do: make money. Businesses in Louisiana are still free to pursue

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130. *Levings v. Forbes & Wallace, Inc.*, 396 N.E.2d 149, 153 (Mass. App. Ct. 1979). The term “rascality” has itself been subject to much criticism but it remains symbolic of the rule that something more malignant than mere breach, such as substantial aggravating circumstances, is required to establish a DTPA violation in jurisdictions following this approach. See Katerina S. Callahan, *Massachusetts General Laws Chapter 93A, Section 11: The Evolution of the “Raised Eyebrow” Standard*, 36 SUFFOLK. U. L. REV. 139, 149–52 (2002).

131. *Levings*, 396 N.E.2d at 153.

132. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (applying North Carolina law).

133. *Branch Banking & Trust Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992).

134. See generally Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982) (discussing the theory of efficient breach—an intentional, opportunistic, but beneficial breach—and its defects).

135. *Dalton v. Camp*, 548 S.E.2d 704, 712 (N.C. 2001).

136. *Greene v. Orsini*, 926 A.2d 708, 710–11 (Conn. Super. Ct. 2007).

137. *Capitol Cadillac Olds, Inc. v. Roberts*, 813 S.W.2d 287, 291 (Ky. 1991).

138. *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) (applying Louisiana law).

139. *Mass. Employers Ins. Exch. v. Propac-Mass, Inc.*, 648 N.E.2d 435, 438 (Mass. 1995).

140. *Branch Banking & Trust Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992).

141. *Barrows v. Boles*, 687 A.2d 979, 986 (N.H. 1996).

142. *E. Motor Inns, Inc. v. Ricci*, 565 A.2d 1265, 1274 (R.I. 1989).

143. See, e.g., *id.* (explaining that “selfish bargaining and business dealings will not be enough to justify a claim for damages” under DTPA statutes); *Barrows*, 687 A.2d at 986 (exculpating the defendant from DTPA liability because its conduct “simply fell within the rough edges of commercial lending”).

profit, even at the expense of competitors, so long as the means used are not egregious.<sup>144</sup>

An implied rascality standard creates much needed daylight between ordinary breach claims and DTPA-type violations, but what exactly constitutes aggravating or egregious conduct eludes precise definition. It is clear that whether a breach of contract is imbued with sufficient rascality should be a question of law. However, most of the tests used by courts to determine rascality or aggravating circumstances are vague and ad hoc. Louisiana's ad hoc approach holds that intentional acts of fraud, misrepresentation, and deception are covered, but negligence is not.<sup>145</sup> The test in Massachusetts is whether the nature, purpose, and effect of the challenged conduct are coercive or extortionate.<sup>146</sup> For example, a party's conduct in disregard of known contractual obligations to secure unwarranted benefits is viewed as sufficiently egregious to allow DTPA relief.<sup>147</sup> Courts in Connecticut disagree over what is sufficiently aggravating to render a breach of contract a DTPA violation.<sup>148</sup> North Carolina's conception of "aggravating circumstances" appears to hinge on whether fraud preceded the contract's formation, whether it occurred in its performance, or whether the defendant acted in bad faith.<sup>149</sup> Kentucky has perhaps the clearest approach. Its supreme court has stated that Kentucky's DTPA "does not apply to simple, incompetent performance of contractual duties unless some element of intentional or grossly negligent conduct is present."<sup>150</sup>

### 3. Misfeasance

The narrowest standard for separating ordinary breach of contract from DTPA violations is the misfeasance standard. This approach holds that a breach of contract caused by misfeasance is actionable under DTPA-type statutes, but not nonfeasance.<sup>151</sup> Misfeasance amounts to improper

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144. *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1422 (5th Cir. 1993) (citation omitted).

145. *See Marshall v. Citicorp Mortgage, Inc.*, 601 So. 2d 669, 670–71 (La. Ct. App. 1992).

146. *Mass. Employers Ins. Exch. v. Propac-Mass, Inc.*, 648 N.E.2d 435, 438 (Mass. 1995).

147. *See, e.g., Wang Labs., Inc. v. Bus. Incentives, Inc.*, 501 N.E.2d 1163, 1166 (Mass. 1986).

148. *See Greene v. Orsini*, 926 A.2d 708, 710–11 (Conn. Super. Ct. 2007) ("There is a split of authority . . . regarding what is necessary to establish a [Connecticut Unfair Trade Practices Act (CUTPA)] claim for breach of contract, the majority of courts holding that a simple breach of contract, even if intentional, does not amount to a violation of CUTPA in the absence of substantial aggravating circumstances.") (internal quotation marks omitted).

149. *See, e.g., Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (applying North Carolina law); *Hardy v. Toler*, 218 S.E.2d 342, 346 (N.C. 1975).

150. *Capitol Cadillac Olds, Inc., v. Roberts*, 813 S.W.2d 287, 291 (Ky. 1991).

151. *See Horowitz v. Fed. Kemper Life Assurance Co.*, 57 F.3d 300, 307 (3d Cir. 1995) (explaining that "[i]n Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action" under the commonwealth's DTPA); 18A SUMM. PA. JUR. 2D *Commercial Law* § 20:25 (explaining that misfeasance, rather than nonfeasance, must be shown to

performance of a contractual obligation. Nonfeasance is the failure to perform a contractual obligation at all. The difference between the two is that “misfeasance is active misconduct working positive injury to others and nonfeasance is passive inaction or failure to take steps to prevent harm.”<sup>152</sup>

The test promulgated under this standard amounts to the same analysis used in these jurisdictions when tort claims are asserted for breach.<sup>153</sup> The mere failure to perform is not a DTPA violation, but rather a breach of contract; but defective or improper performance constitutes an independent wrong (such as negligence or fraud) and is therefore subject to tort or DTPA liability.<sup>154</sup> For example, in a Texas case, a business made an advance purchase of advertising space in a phonebook’s yellow pages.<sup>155</sup> The phonebook company failed to publish the ad and the business sued for breach of contract and a DTPA violation.<sup>156</sup> On appeal to the Texas Supreme Court, the plaintiff argued that the defendant had represented it would perform the contract, and by failing to perform, the defendant had misrepresented that it would perform.<sup>157</sup> The supreme court disagreed, explaining that such reasoning “would convert every breach of contract into a DTPA claim.”<sup>158</sup> Rather, the court explained that the phonebook company’s representations pertained only to its contractual duty, and a mere failure to fulfill that duty could sound only in contract.<sup>159</sup>

#### 4. Recommendation

The mere breach rule is not unreasonable or harsh; it simply separates

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establish a violation of the commonwealth’s DTPA); Margaret Cox, *A Light in the Darkness: Discerning the Border Between Tort and Contract Claims in Texas Law*, 40 S. TEX. L. REV. 1023, 1031–34 (1999) (explaining how failure to perform contractual obligation is not actionable under the Texas DTPA whereas defective performance is actionable); DAVID R. DOW & CRAIG SMYSER, *CONTRACT LAW* § 6.4 (2005) (West, Tex. Practice Series No. 49, 2005) (explaining that nonfeasance is not actionable under Texas DTPA).

152. W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 56 (5th ed. 1984).

153. See Cox, *supra* note 151, at 1031–32 (describing the Texas Supreme Court’s application of the tort liability for breach of contract test to a DTPA action); *Gordon v. Pa. Blue Shield*, 548 A.2d 600, 604 (Pa. Super. Ct. 1988) (applying the test for discerning tort liability for breach of contract to a DTPA action).

154. The classic statement of this rule is that:

Ordinarily, a breach of contract is not a tort. . . . However, a contract may furnish the state of things which furnishes the occasion for a tort so that negligent performance of a contract may give rise to an action in tort, if the duty exists independently of the performance of the contract.

57A AM. JUR. 2D *Negligence* § 110 (footnotes omitted).

155. *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13–15 (Tex. 1996).

156. *Id.* at 14.

157. *Id.*

158. *Id.*

159. *Id.*

contract law and DTPA violations into their proper spheres. Indeed, the primary impact of the rule—denying a DTPA remedy for simple breaches—does not impair parties’ ability to litigate genuine contract claims under contract law or, conversely, true DTPA violations under the DTPA. The tricky part is adopting a test for discerning the appropriate occasion to apply the rule.

Wisconsin’s test should ultimately lie somewhere between two policy goals. On one hand, courts must consider protecting the efficacy, integrity, and reliability of contracts, an institution upon which our system of economic exchange depends heavily. Enforcing contracts freely bargained for and entered into in good faith is an end to which the law aspires.<sup>160</sup> Adopting too weak of a mere breach rule would undermine this well-established policy goal and risk sweeping benign disputes over freely bargained-for contracts into the DTPA meat grinder. On the other hand, courts must not overrun the legislative purpose of the DTPA, which is to eliminate the substantive barriers to remedying deceptive trade practices imposed by the common law, such as proof of intent. Thus, prudence counsels against courts reviving rigorous common law burdens, such as proof of intent, by way of an overly strong mere breach rule.

Of the three standards described above, the public interest standard seems to satisfy both of these goals. It reflects the need for a reliable system of contract-based economic exchange because it would mitigate the threat of DTPA interference in every transaction. Indeed, only contracts that truly endanger the Wisconsin public are scrutinized while ordinary or benign disputes remain within the purview of contract law. The public interest standard best matches the language, purpose, and history of Wisconsin’s DTPA as well.<sup>161</sup> As a matter of fact, a federal court in Wisconsin has aligned this state’s DTPA with the statute’s counterparts in jurisdictions following the public interest standard.<sup>162</sup> The statute’s language also indicates a general concern for protection of the public, which is the public interest standard’s focus. Moreover, no iteration of the public interest standard would alter the status quo of Wisconsin precedent applying the DTPA. The public interest standard does not re-create or simulate any common law burden on recovery. Nor would it necessarily exclude single-shot, privately negotiated contracts

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160. *See, e.g., Merten v. Nathan*, 108 Wis. 2d 205, 211, 321 N.W.2d 173, 177 (1982) (explaining that courts’ stated function with respect to contracts is to “protect each party to a contract by ensuring that the promises will be performed . . . [because t]he law protects justifiable expectations and the security of transactions”).

161. *See generally* Jeffries, *supra* note 19 (describing the history and purpose of Wisconsin’s consumer protection laws).

162. *See* *D & B Auto. Equip., Inc. v. Snap-On, Inc.*, No. 03-CV-141, 2006 WL 776749, at \*7 (E.D. Wis. Mar. 27, 2006).

from its coverage, such as the one in *K & S*; provided, however, the plaintiff can show that a one-time deal affected the public interest.<sup>163</sup>

*B. Conflict with the U.C.C.*

Because the DTPA casts such a long shadow over contract law, it has a tendency to intervene into subject matter already regulated by statute. When the DTPA does intervene, courts should determine whether cross-application of the DTPA to other statutes would be appropriate in light of the purposes of the other law. For example, the DTPA applies to the sale of securities, which also happens to be the subject of Wisconsin's Uniform Securities Act (WUSA).<sup>164</sup> However, courts interpret the WUSA as not providing the exclusive remedy for securities-based actions, so it should have no effect on DTPA claims in the context of the sale of securities.<sup>165</sup> The DTPA also intervenes in transactions for the sale of goods, which is an area addressed in detail by Article 2 of the U.C.C. Wisconsin courts have given special protections to the U.C.C. in the past where actions based on other law threaten to undermine its provisions. For instance, the supreme court has found aggrieved purchasers cannot supplement U.C.C. remedies with common law misrepresentation claims.<sup>166</sup> Because the DTPA so closely resembles a common law misrepresentation action, it is important for courts to likewise consider whether the U.C.C. is, like the WUSA, amenable to cross-application of DTPA claims. It becomes clear almost immediately that that is not the case.

1. Identifying the Conflict

There are three specific areas where cross-application of the DTPA to the U.C.C. could be found to contradict specific provisions of the U.C.C.: (1) the parol evidence rule;<sup>167</sup> (2) exclusion or limitation of warranties;<sup>168</sup> and (3) modification or limitation of remedies.<sup>169</sup> The following examples demonstrate that the U.C.C. permits contracting parties to do certain things, such as disclaim warranties or modify remedies, with which the DTPA is at complete odds.

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163. That is, however, not to say that opinions do not differ on whether the public interest standard is a good standard. *See generally* Mark, *supra* note 105, at 234; Cox, *supra* note 151, at 207–10, 215–20 (criticizing the public interest standard as overly restrictive).

164. WIS. STAT. ch. 551 (2007–2008).

165. *Esser Distrib. Co., Inc. v. Steidl*, 149 Wis. 2d 64, 67, 437 N.W.2d 884, 885 (1989) (holding that the legislature did not intend for the WUSA to supersede common law actions for misrepresentation).

166. *See* *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI App 32, ¶ 30, 270 Wis. 2d 146, 677 N.W.2d 233.

167. WIS. STAT. § 402.202 (2007–2008).

168. *Id.* § 402.316.

169. *Id.* § 402.719.

*Example A:*<sup>170</sup> Suppose that a husband and wife (the buyers) set out to purchase from a manufacturer (the seller) treated wood windows for incorporation into the construction of their new home. The advertising material provided by the seller stated that “all exterior wood is deep-treated to permanently protect against rot and decay.” Based on this assurance, the buyers purchased a number of windows from the seller. The purchase agreement communicated to the buyers contained a limited warranty that stated in effect:

Seller’s millwork is warranted for one year after sale to be of high-quality workmanship and materials and to be free from defects. THE EXPRESS WARRANTIES SET FORTH HEREIN ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE.

The agreement also contained an integration clause, which stated: “This Offer contains the *entire agreement* of the Buyer and Seller regarding the transaction. *All prior negotiations and discussions have been merged into this Offer.*” Two years later, the buyers began noticing rot on many of the windows it had purchased from the seller. The rot was apparently caused by defects in the treatment chemicals used by the seller—a condition unknown to the seller at the time.<sup>171</sup> They sued the seller later that year for breach of warranty and a DTPA violation.

The legal conclusion here would be that the statement concerning the “permanent protection” against rot and decay created an express warranty under the U.C.C.<sup>172</sup> The problem is the effect of the limited one-year warranty in the actual contract (which had expired) on the “permanent protection” statement in the advertisement upon which the buyers based their DTPA claim. The U.C.C. permits parties to modify warranties made prior to contracting, as in Example A when the seller’s final offer contained a one-year warranty instead of the permanent protection guarantee stated in its advertising materials.<sup>173</sup> Further, by operation of the contract’s integration clause, the U.C.C.’s parol evidence rule, absent evidence of fraud, should preclude the buyers from introducing evidence of the prior permanent protection guarantee to contradict the limited warranty to which they

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170. The following hypothetical facts are mostly borrowed from *Selzer v. Brunsell Bros.*, 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806.

171. See *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 877–78 (8th Cir. 2000) (case preceding *Selzer* between the Selzers’ seller and its supplier of wood treatment products concerning concealment of defects in the treatment product (PILT) that caused rot).

172. See *Selzer*, 2002 WI App 232, ¶ 14.

173. WIS. STAT. § 402.316.

agreed.<sup>174</sup> The DTPA, by its terms, does not appear to yield to limited warranties or the parol evidence rule.<sup>175</sup> Thus, the issue is whether the seller can rely on the U.C.C. and its parol evidence rule to enforce its limited warranty or, alternatively, whether such protections permitted by the U.C.C. are overrun by the alleged DTPA violation.

*Example B:*<sup>176</sup> An excavation company (the buyer) purchased excavation equipment from a dealer under a warranty from the equipment's manufacturer (the seller). The seller's limited warranty stated in effect:

Seller hereby warrants that the equipment purchased shall be free from defects in material and workmanship for a period of six months or 1,000 hours of use, whichever shall occur first. This warranty shall be limited to the replacement of such parts as shall appear to Seller to have been defective in material or workmanship. Seller shall not be liable for any other cost or damages, whether direct, incidental, or consequential, and this warranty is in lieu of any and all other warranties, express or implied. *The foregoing warranty is in lieu of any and all other warranties, express or implied, including but not limited to warranties of merchantability and fitness for purpose.*

After only four months and 500 hours of use, the equipment broke down. The resulting downtime caused the buyer to lease replacement equipment, incur additional labor costs, and lose profits. The buyer sued the seller for breach of warranty and a DTPA violation because the seller represented the equipment would be free from defects for 1,000 hours of use when in fact it was not.

The U.C.C. provides that parties may limit remedies for breach to repair and replacement and exclude recovery of consequential damages, as the parties did here.<sup>177</sup> The DTPA is not so constrained; rather, parties may recover their pecuniary losses caused by a violation plus attorney's fees and costs. Thus, it would appear that the buyer could claim its general damages and its consequential damages under the DTPA, and not just repair and replacement as agreed to in the contract. So the issue is whether the seller may rely on the U.C.C. to enforce the provision limiting the buyer's remedy or, alternatively, whether such protections are overridden by the DTPA.

The questions raised in Examples A and B demonstrate that cross-

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174. *Id.* § 402.202.

175. This proposition is supported by the *K & S* decision. But, as mentioned earlier, the court of appeals had held prior to *K & S* that the parol evidence rule could apply to bar evidence establishing a DTPA violation. See *Peterson v. Cornerstone Prop. Dev., LLC*, 2006 WI App 132, ¶ 30, 294 Wis. 2d 800, 720 N.W.2d 716.

176. The following hypothetical facts are borrowed mostly from *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 148 Wis. 2d 910, 916–918, 437 N.W.2d 213, 215–21 (1989).

177. WIS. STAT. § 402.719.

application of the DTPA to contracts for the sale of goods could render unenforceable those contract terms made enforceable by the U.C.C. In other words, the conflict here is that the U.C.C. permits contracting parties to do certain things, such as disclaim warranties or modify remedies, with which the DTPA is at complete odds. This is a very close issue. When it arises, and it surely will, how should Wisconsin courts proceed? Where cross-application of torts to the U.C.C. is concerned, the Wisconsin Supreme Court has responded unequivocally that tort recovery shall not buttress U.C.C. provisions.<sup>178</sup> But whether the same extends to cross-application of the DTPA to the U.C.C. is totally unaddressed in Wisconsin and mostly unexamined in other jurisdictions. However, based on the language and context of the U.C.C., one could indeed argue that contract terms executed in compliance with Article 2 of the U.C.C. survive cross-application of the DTPA.

## 2. Interpreting Key Statutes

When a court confronts an inconsistency between statutes, it is the rule that a court should reconcile the conflict without nullifying one or the other in a manner that will effect legislative intent.<sup>179</sup> The legislative intent behind the U.C.C. is to “simplify, clarify, and modernize the law governing commercial transactions.”<sup>180</sup> Specifically, Article 2 of the U.C.C. applies to transactions in goods.<sup>181</sup> Wisconsin courts interpreting Article 2 have found that it provides a “comprehensive system” for compensating purchasers of goods for economic losses.<sup>182</sup> The legislative intent of the DTPA is “to protect the residents of Wisconsin from any untrue, deceptive or misleading representations” made to promote the sale of products, services, real estate, securities, or employment.<sup>183</sup> These broad descriptions of legislative intent are not particularly informative because, as described here and elsewhere in this Comment, it is already clear that both bodies of law can apply to the same subject matter. The principle of statutory construction where two statutes covering the same subject matter conflict is that the more specific statute should control.<sup>184</sup> The fact that the subject matter of Article 2 is limited to the

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178. See, e.g., *Sunnyslope Grading, Inc.*, 148 Wis. 2d at 916, 437 N.W.2d at 215.

179. *Colby v. Columbia County*, 202 Wis. 2d 342, 349, 550 N.W.2d 124, 127 (1996).

180. Wis. STAT. § 401.102(2)(a) (2007–2008).

181. *Id.* § 402.102.

182. *Ins. Co. of N. Am. v. Cease Elec., Inc.*, 2004 WI 139, ¶ 28, 276 Wis. 2d 361, 688 N.W.2d 462 (quoting *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 342, 592 N.W.2d 201, 216 (1999)).

183. *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶ 21, 301 Wis. 2d 109, 732 N.W.2d 792 (quoting *State v. Automatic Merchs. of Am., Inc.*, 64 Wis. 2d 659, 663, 221 N.W.2d 683, 686 (1974)).

184. *In re Doe Petition*, 2008 WI 67, ¶ 41, 310 Wis. 2d 342, 750 N.W.2d 873; *Lornson v. Siddiqui*, 2007 WI 92, ¶ 65, 302 Wis. 2d 519, 735 N.W.2d 55; *State v. Anthony D.B.*, 2000 WI 94,

sale of goods specifically and the DTPA is concerned with a much broader category of items is somewhat helpful in this respect.

But that the U.C.C. is more specific in scope does not fully resolve the core issue. One could argue that the U.C.C. and the DTPA are equally specific regarding the enforcement of contract terms and remedies, the difference being the way in which they go about doing it. The DTPA specifically provides that “any assertion, representation or statement of fact” is actionable if it is untrue, deceptive, or misleading, and that pecuniary losses caused by such representations “shall” be recovered.<sup>185</sup> The U.C.C. likewise makes such representations enforceable, but subject to disclaimer or modification and the parol evidence rule. Further, the U.C.C. remedy is not absolute as with the DTPA; parties may vary the terms to modify or limit their remedies.

The impasse can be resolved by interpreting these laws in relation to surrounding, closely related statutes.<sup>186</sup> In doing so, it is clear that cross-application of the DTPA may not override contract terms compliant with specific U.C.C. provisions. Any doubt that the legislature intended to protect the U.C.C. from other, inconsistent law is removed by section 401.103 of the U.C.C., which states:

Unless displaced by the particular provisions of chs. 401 to 411 the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement [the U.C.C.’s] provisions.<sup>187</sup>

Wisconsin courts have interpreted this provision to mean that although other law may “supplement” provisions of the U.C.C., other law cannot supplant it.<sup>188</sup> Claims that exist side by side with the U.C.C. are precluded to the extent they conflict with a Code provision.<sup>189</sup> The DTPA, by its construction and application, falls into the category of side-by-side claims restricted by this section. The official 2009 comment to the U.C.C. commends this approach when other statutes conflict with the U.C.C.<sup>190</sup> The comment

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¶ 11, 237 Wis. 2d 1, 614 N.W.2d 435.

185. WIS. STAT. §§ 100.18(1), (11)(b)2 (2007–2008) (emphasis added).

186. See *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

187. WIS. STAT. § 401.103.

188. *Weber, Leicht, Gohr & Assocs. v. Liberty Bank*, 2000 WI App 249, ¶ 12, 239 Wis. 2d 461, 620 N.W.2d 472.

189. *United Catholic Parish Schs. of Beaver Dam Ass’n v. Card Servs. Ctr.*, 2001 WI App 229, ¶ 20, 248 Wis. 2d 463, 636 N.W.2d 606.

190. The official comment to the U.C.C. is not automatically law, but it is persuasive authority.

recognizes that state law is becoming more statutory and that legislatures are codifying common law and equity principles with increasing frequency.<sup>191</sup> Nonetheless, the comment states that “when the other law relating to a matter within the scope of the Uniform Commercial Code is a statute, the principles of [section 1-103(3)(b)] remain relevant to the court’s analysis of the relationship between that statute and the Uniform Commercial Code.”<sup>192</sup>

Other provisions support the conclusion that cross-application of the DTPA should not contravene U.C.C.-sanctioned contract terms. Specifically, section 402.104 of the U.C.C. serves as protection against implicit repeal of its provisions by subsequent legislation. Wisconsin adopted the U.C.C. in 1963.<sup>193</sup> The legislature amended the DTPA to create a private cause of action in 1970.<sup>194</sup> Because a private right of action under the DTPA was created after the U.C.C., the DTPA’s cross-application to contracts cannot overrule U.C.C. protections by operation of the doctrine of implicit repeal.<sup>195</sup> Moreover, unlike the U.C.C., the DTPA is completely silent as to any preemptive or repellent effect it has on other statutory law. In short, judging from the language, structure, and purpose of these statutes, it seems quite clear that contract terms permitted under the U.C.C. survive application of the DTPA.

### 3. Summary

One of the greatest benefits of the U.C.C. is the reliability and predictability engendered by its uniformity.<sup>196</sup> No doubt, many businesses and probably whole industries have internalized U.C.C. contracting rules to the extent they serve as a gold standard. The significant invalidating effect the DTPA may have on contract terms permitted by the U.C.C. should therefore ring at least a few alarm bells. For example, a seller of goods who, in full compliance with the U.C.C., disclaims warranties as a routine business practice will want to know: Are my disclaimers enforceable given the DTPA? A manufacturer of goods who, in full compliance with the U.C.C., limits its liability to repair and replacement as a routine business practice will also want to know: Are my contractual remedy limitations enforceable given the DTPA? Likewise, buyers will also want to know whether the safety net provided by

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Textron Fin. Corp. v. Firstar Bank Wis., 217 Wis. 2d 582, 589, 579 N.W.2d 48, 51 (Ct. App. 1998).

191. U.C.C. § 1-103 cmt. 3 (2009).

192. *Id.*

193. Act of July 1, 1963, ch. 158, § 1, 1963 Wis. Sess. Laws 155.

194. Act of Feb. 12, 1970, ch. 425, secs. 1–2, § 100.18(7), 1969 Wis. Sess. Laws 1389 (renumbering section 100.18(7) and creating section 100.18(11)(b)–(e)).

195. Other jurisdictions have added to their DTPA statutes specific “tie-ins” for breach of warranty, which are widely interpreted to abrogate the U.C.C. sections at issue here. See Clifford, *supra* note 34, at 1099.

196. See Charles W. Mooney, Jr., *Introduction to the Uniform Commercial Code Annual Survey: Some Observations of the Past, Present, and Future of the U.C.C.*, 41 BUS. LAW. 1343, 1353 (1986).

the DTPA remains in place even after entering a contract covered by the U.C.C. These questions are incredibly pressing because, without resolution, contracting parties will be left to wonder whether compliance with the U.C.C. is sufficient to render a term enforceable or whether U.C.C. compliance is futile given the threat of DTPA liability. Considering the strong evidence that the legislature intended for U.C.C.-protected terms to survive DTPA claims, Wisconsin courts should agree that compliance with the U.C.C. trumps any contrary provision under the DTPA.

#### V. CONCLUSION

Unfortunately, it is true that contracts often serve as an excuse for courts to ignore socially accepted behavioral norms of honesty and integrity.<sup>197</sup> It is also true that the goal of enforcing bargain contracts sometimes comes at the expense of fundamental fairness.<sup>198</sup> The DTPA, in many respects, serves to correct these inequities.<sup>199</sup> Indeed, there is a utopian promise behind the DTPA, *pacta sunt servanda*,<sup>200</sup> that no one shall make an assertion, representation, or statement of fact that is untrue or misleading with the intent to sell a product or service. A world without the risk of cheats and frauds is very much an ideal one, and a penumbral duty emanating from the DTPA to “be as good as your word” would help glean these unscrupulous individuals from the ranks of the honest; it could drive the defectors out by imposing impossibly high costs for being sharp.

However, the vast majority of contracts protect legitimate, honest agreements freely bargained for in good faith. Further, the institution of contracts allows our society to grow and prosper by providing an efficient and reliable means to accumulate, distribute, and invest resources. Our system of exchange erodes a tiny bit with every case that ignores an enforceable contract. And although it is possible to characterize good contracting practices—and by implication free enterprise and profit-making activity—as against public policy, that is not the aim of Wisconsin’s DTPA and its cognates. So it is troubling that the supreme court has begun to construe the DTPA in such a way that allows courts to set aside valid agreements with ease. Indeed, without breaking a sweat, the *K & S* court completely ignored the parties’ contract and imposed DTPA liability as a matter of law. To be sure, the DTPA serves a very important purpose, and is very adept at doing so; however, clever litigants are using its relaxed substantive requirements to litigate benign contract disputes, and in doing so, obtain unwarranted strategic advantages. The DTPA was not

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197. Shell, *supra* note 34, at 1244–45.

198. Edwards, *supra* note 13, at 656, 660–61.

199. Shell, *supra* note 34, at 1235.

200. “All promises must be kept.”

intended to be abused in this way. Even those who support use of DTPA statutes as a contract remedy recommend certain restraints to prevent such abuses.<sup>201</sup> Thus, it would be very beneficial for Wisconsin courts to check this precedent before it grows too strong by adopting prudential limitations such as the mere breach rule and enforcement of the U.C.C. over DTPA claims.

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201. Shell, *supra* note 34, at 1248–49.

\* J.D. 2010, Marquette University Law School. I would like to thank the Lord for His many blessings—health, happiness, family, friends, and especially my darling wife Allison, to whom I am profoundly indebted for her endless love, grace, and support. I also want to thank the 2008–09 and 2009–10 *Marquette Law Review* Editorial Boards, and the Marquette University Law School for providing this opportunity. Thank you as well to Attorneys John J. Laubmeier and Norman D. Farnam for patience, insight, and much-needed guidance in general.