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Is There a “Duty to Read”?*

CHARLES L. KNAPP**

The notion that there is in general contract law a “duty to read” persists in the decisions of American courts. This Article explores the general question of what it may mean to say that there is a “duty to read,” and concludes by suggesting what role (if any) that doctrine should play in our present-day law of contract. The Article begins by examining various ways in which the “duty to read” is commonly articulated, and compares it to other contract law concepts: the “duty to bargain in good faith” and the “duty to mitigate damages.” The Article next considers a variety of ways in which the “duty to read” rule may be countered or overcome, and goes on to note and evaluate policy arguments for the rule. Having thus sketched the legal background, the Article then proceeds to examine a selection of some two dozen recent cases which discuss and in some instances rely on this rule. Finally, after enumerating a number of ways in which the rule should not be applied, the Article concludes by suggesting that the “duty to read” rule would better be denominated as “a presumption of knowing assent,” and asks what role that principle should play in present day contracts jurisprudence.

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INTRODUCTION

It is the policy of the law to protect the unwary and foolish as well as the vigilant from the wiles and artifices of evil-doers[,] and negligence in trusting a representation will not, according to the greater weight of authority, excuse a positive willful fraud The party perpetrating the fraud should not be permitted to say that he should not have been believed or trusted.

—Rowen Petroleum Props., LLC, v. Hollywood Tanning Sys., Inc., No. 08-4764, 2009 WL 1085737, at *5 (D.N.J. Apr. 20, 2009) (quoting Peter W. Kero, Inc. v. Terminal Constr. Corp., 78 A.2d 814, 818 (N.J. 1951)).

How could you believe me when I said I loved you when you know I've been a liar all my life?

—ALAN JAY LERNER, HOW COULD YOU BELIEVE ME WHEN I SAID I LOVED YOU WHEN YOU KNOW I'VE BEEN A LIAR ALL MY LIFE (Rhino Handmade 1951) (appearing in ROYAL WEDDING (MGM 1951)).

The notion that there is in general contract law a “duty to read” (“DTR”) persists in the decisions of American courts. That was certainly true in 1966, when Stewart Macaulay wrote his classic article on that subject.¹ In his piece, Stewart explored, both theoretically and empirically, how the principle of a duty to read might be applied in a particular commercial setting. But it is equally true today, as a rapid run through the last few years of Westlaw reports will quickly demonstrate. In this Article, I explore the question of what it may mean today to say that there is a duty to read, and suggest what role (if any) that doctrine should play in our present-day law of contract.

I. STATEMENTS OF THE RULE

The duty to read principle is commonly expressed in American jurisprudence in two ways: as a “duty,” and as a “presumption.” Although the end result in practice is, in most cases, likely to be substantially the same, the difference in articulation may nevertheless affect how the legal community thinks about this principle. In this Part, I will compare and contrast these two modes of expression.

A. AN IMPLICIT CONTRACTUAL DUTY

The duty to read, although regarded as a part of contract law, is not a “duty” imposed *by* contract, but rather a statement about how parties

1. See generally Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

should behave during the contract-making process. Here are some examples of that statement:

It is beyond cavil that a party accepting an offer has an absolute duty to read and understand the terms of an offer, and failure to do so will not diminish the force and effect of the resulting contract.²

A person signing an agreement has a duty to read it and, absent a showing of fraud, if the person is capable of reading and understanding the contract then he is charged with the knowledge of what the contract says. . . . He cannot avoid the consequences of what he signed by simply saying that he did not know what he signed.³

To consider the implications of such a principle, it is useful to compare the duty to read with two other contractual “duties” that in some ways resemble it: the duty to bargain in good faith and the duty to mitigate damages.

1. The Duty to Bargain in Good Faith

When it comes to regulating the bargaining process, the common law of contract is traditionally loath to interfere. Certain kinds of conduct are understood as being outside the sphere of acceptable bargaining: duress, misrepresentation and wrongful nondisclosure, undue influence, and the like. These proscriptions are not unique to the common law, as many of them are spelled out or particularized in various regulatory statutes. Nor are they unique to the law of contract, since the same kind of conduct is liable to render the actor liable in tort. But collectively, they represent a set of Marquis of Queensbury rules for bargainers; they locate the belt below which hitting is forbidden. Above the belt, however, anything goes, and the job of contract law traditionally is merely to referee the bout.

The duty to bargain in good faith also applies to the bargaining process, but it is quite a different proposition. At least under the common law of contracts, there is no implied duty to bargain in good faith. Such a duty might be imposed by statute, regulating some sphere of economic activity. But otherwise, it arises, if at all, only from the agreement of the parties, either as part of an earlier transaction between them, or from their words and actions in the course of working toward a new contractual agreement. Whether it has been breached in a given case may be particularly hard to determine, since bargainers who see themselves as bound by such a duty may be at some pains to create at least the appearance of having bargained in good faith; the remedy for failure to live up to its demands may also be difficult to assess. But in the small proportion of cases in which it does apply, the duty to bargain in

2. 66 VMD Assocs. v. Melick-Tully & Assocs., No. L-6584-07, 2011 WL 3503160, at *5 (N.J. Super. Ct. App. Div. Aug. 11, 2011).

3. Nunn v. C.C. Midwest, 151 S.W.3d 388, 402 (Mo. Ct. App. 2004).

good faith typically binds both parties equally, to negotiate in a candid, honest, and cooperative manner.

The DTR, on the other hand, is not a creature of the parties’ agreement, past or present, implicitly or explicitly. It is a creature of contract law itself. And although in theory it could apply to both parties, the effect of its application will nearly always be to demand a certain standard of conduct from one who assents to—in most cases, literally “signs on to”—an agreement, the terms of which have been prepared and presented by the other. Conceivably, the DTR could be seen as a manifestation of a more general obligation to bargain in good faith, imposed not on the drafter but on the adhering party, although this is an interpretation that would strike some as marginal, not to say perverse.

2. *The Duty to Mitigate the Damages Flowing from Breach of Contract*

Some first-year law students encountering the general topic of contract remedies may be surprised by the notion that the victim of a breach of contract should have an “obligation” to the breaching party to mitigate, or “minimize,” the injurious effects of the latter’s breach. But they come to understand that this is merely a reflection of the broader principle that contract remedies are designed to compensate one party, not to punish the other, and that—for the sake of both parties, and the system as well—even the completely innocent victim of a truly willful breach is expected to take reasonable measures to limit or reduce her damages.

There are many characteristics that the DTR and the duty to mitigate have in common. Most fundamentally, both are articulated as a “duty,” but in fact (with a few exceptions, some of which are discussed in the notes below), neither doctrine imposes a “duty” in the Hohfeldian sense: neither imposes upon one party an obligation of performance for which a remedy would be available to the other if that duty were not to be performed. Although phrased in terms of “duty,” both principles are really limitations on what might otherwise be rights: Both require a party to be treated *as if she had* behaved in a certain way, *whether* she has actually done so. And both can be seen as expressing a policy preference for the virtue of self-reliance, by providing that even if one party has been (or is likely to be) injured by the actions of another in some way that might otherwise merit relief, such relief will nevertheless be denied to the extent that the injured party might, with prudent actions, have reasonably avoided or minimized the harm resulting from that conduct.

Although significant and substantial, the “duty to mitigate” is not an absolute one.⁴ If a reasonable effort to mitigate is actually made, but unsuccessfully, the injured party will not be penalized for that failure; indeed, the expense incurred in attempting to mitigate, if reasonable (and reasonably foreseeable), will be added to her recoverable damages. Furthermore, the plaintiff does not have to endure “undue risk, burden, or humiliation” in attempting to meet her burden of mitigation.⁵ Those various limitations on the “duty to mitigate” suggest an analogous approach to the duty to read. If the DTR were seen as an obligation to act “reasonably,” but *only* that, then there could well be instances in which a party is seen as having made a reasonable effort to carry out that “duty.” And indeed there are; this will be explored further below.

Despite the ways in which they are similar, the two “duty” rules operate in quite different circumstances: the “duty to mitigate” applies in a situation where the “wrong” has already occurred, and the issue is one of remedies. Whether the plaintiff adequately attempts to mitigate after a breach has occurred has no effect on whether the defendant’s conduct was a breach of an enforceable duty. In the case of the duty to read, however, the “failure” to read typically takes place in the making of the contract. If the DTR rule applies, then the only existing contract between the parties is the one expressed in the writing that the non-drafting party signs. Presumably this is a contract that the drafter is willing to perform, but that the signer in some respect does not want to perform. If the DTR rule is applied against the signer, and if she does not perform her duties as provided in the writing, she may well be the one and only party in breach. Note that this further undercuts the notion that this doctrine literally imposes a contractual “duty” to read: In the ordinary case, the signer’s failure to read comes at a time before she has any duties at all to the other party; the “breach” for which she might become liable is her failure to perform as required by the written contract, not her initial failure to read and understand it.

B. A CONCLUSIVE PRESUMPTION

Often, courts, instead of or in addition to phrasing the principle as a “duty to read,” will characterize it as a “conclusive presumption.” “[A] party who signs a written contract is conclusively presumed to know its contents and assent to them.”⁶ This could be seen as a somewhat stronger statement of the principle. It seems, potentially at least, to make its application inescapable—if a person has signed an agreement, then she is

4. See, for example, the statement of that rule in the section 350 of the Restatement (Second) of Contracts (1981), which is phrased in term of “avoidability.”

5. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

6. *Bibbs v. House of Blues New Orleans Rest. Corp.*, No. 10-82, 2011 WL 1838783, at *6 (E.D. La. May 13, 2011).

necessarily going to be treated as though she had read and completely understood the writing she signed, without regard to whether she actually did, and also without regard to other factors in the case.

In law, there is a significant difference between a mere “presumption” and a “conclusive” presumption. The ordinary presumption is merely a device for relieving one party of the burden of pleading and/or proving a (potentially) material fact, a burden which that party would otherwise bear under substantive and procedural rules. The existence (or not) of that fact may be central to a determination of the parties’ rights, and the party having the burden of establishing it may even continue, ultimately, to bear the burden of proof on that issue. But if the fact is initially presumed to exist, then the initial burden of showing its *nonexistence* will be on the other party. But ordinarily there is at least a possibility of doing that, because ordinarily a presumption will be rebuttable: if the other party produces evidence to show that the presumed fact truly did not exist, then the effect of the presumption is dispelled, and the party with the burden is required to produce actual evidence of its own.

The “conclusive” presumption, however, is another matter. It does not merely shift the burden of pleading or proof from one party to the other; it has the effect of treating the fact in issue as having been established beyond contravention. In that sense, the “conclusive presumption” is in effect another name for “legal fiction”—the law’s decision, for reasons of policy, to regard as true a fact which may not be true, and may indeed in a given case be demonstrably false.⁷

II. DEFENSES AGAINST THE RULE

Whether stated as a “duty” or as a “presumption” (conclusive or otherwise), the DTR rule is a strong one. However, in practice the presumption created by signing an agreement is not regarded as truly conclusive, nor is the duty absolute. The rule may still be countered (or avoided) in various ways. Possible defenses against its application include the following.

A. INTERPRETATION

This is actually an avoidance of the DTR, rather than a direct defense against it: even though one party may be generally presumed to have read and understood the writing that she signed, if that writing is ambiguous or otherwise in need of interpretation, the mere act of signing does not signify assent to any and all unfavorable interpretations, merely to the existence of an ambiguous contract. Indeed, where one party was clearly the drafter, this could mean that the other party gets the benefit

7. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (discussing the common law’s traditional conclusive presumption of legitimacy for an in-wedlock child).

of the doubt on disputed issues of interpretation, by application of the familiar maxim of construction *contra proferentem*—against the drafter.

B. LACK OF ASSENT

The party resisting enforcement of a written agreement may claim that she did not actually sign or manifest effective assent to the agreement at issue. This can take a number of forms:

(1) *Forgery*. She did not sign the agreement at all.

(2) *Lack of authority*. The person purporting to sign as her agent did not have authority to do so. This could have the same effect as forgery, and both could present difficult factual questions, but the situation is apt to be very different.

(3) *Duress*. Either actual physical duress, or economic duress. If established, either defense will relieve the signing party of her duty to perform, but the factual issues may be difficult, and particularly in the area of economic duress, problematic for courts.

C. MISTAKE

As a contract law doctrine, mistake comes in two principal varieties, mutual and unilateral. Equally important to the analysis is the nature of the mistaken fact: What are the parties mistaken *about*?

(1) *Mistake as to what the writing says*. If both parties share the same mistaken belief about the contents of the writing—perhaps the traditional “scrivener’s error” has occurred, or a printer has garbled the text—and this is convincingly proven, the court may view this as a “mutual” mistake for which equitable relief should be available, and reform the contract to read the way they both apparently intended it to read. Of course, when this happens, the theory at least is not that one party’s interpretation or expectation prevails over the other; it is rather that at the time of contracting, they both shared the same intent, which was inaccurately reflected in the writing. If, however, the drafting party knows full well what the writing says but the other party does not, can the latter claim this “unilateral” mistake as a defense to enforcement? This may depend on whether the drafting party knows of the other’s mistake and has done anything to conceal the true effect of the writing or to mislead the signer. If so, it could be more usefully be analyzed as fraud, or at least as “wrongful nondisclosure,” the legal equivalent of active fraud, discussed below. In the absence of any wrongful conduct by the drafter, however, the defense is likely to founder on the rock of the DTR.

(2) *Other forms of mutual mistake*. Where the parties are mutually mistaken about some fact extrinsic to the writing, which has a material effect on their exchange, this can sometimes be a basis for relief in the form of rescission and avoidance. Relief may be denied, however, if the

adversely affected party has manifested agreement to a writing that has a provision which the court interprets as waiving such a defense to enforcement.⁸ So the DTR may play a role here.

(3) *Other forms of unilateral mistake.* Here again, a mistake about some extrinsic material fact can sometimes be a basis for avoidance, although the rule here is less lenient to the adversely affected party. Again, contract language might be asserted as a bar to such a claim.

D. FRAUD OR MISREPRESENTATION

Fraud or misrepresentation can be asserted by the signing party in a number of different situations; the following are illustrative but not exhaustive:

(1) *Fraud in the factum, also called essential fraud.*⁹ Most courts appear to regard this as a potentially effective defense. Where one party has misrepresented to the other the nature of the thing she is signing, this may provide a basis for resisting enforcement. If the signing party’s story is credible, it undercuts the rationale for the DTR rule, and it makes the other party appear particularly unsympathetic.¹⁰ If the signer knows that what she signs is intended to have contractual effect, the defense becomes more problematic, and the signer is more likely to be bound to whatever its contents may be, even if those were misrepresented to her. But active misrepresentation about the nature or contents of a writing, if convincingly made in a conducive setting, will in some cases overcome the drafter’s assertion of the DTR.

(2) *Fraud in the inducement.* This is the intentional making of false statements that are intended to, or at least have the effect of, inducing the other party to sign on to an agreement. If the signing party indeed knows that what she is signing is intended to be a contract, then this defense is likely to be unsuccessful.¹¹ Even though the fraudulent party is still (or should be) regarded unsympathetically (assuming one were to believe the signer’s story, that is), courts will routinely declare that a successful claim of fraud depends on, *inter alia*, reasonable reliance by the defrauded party, and that as a matter of law, one cannot *reasonably* rely on oral statements that are directly contradicted by a writing that one is signing (and is therefore “conclusively presumed” to have read).

8. *See, e.g.,* Lenawee Cnty. Bd. of Health v. Messerly, 331 N.W.2d 203, 211 (Mich. 1982) (“as is” clause in sale of real property).

9. RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a (1981).

10. *Cf.* U.C.C. § 3-305(a)(1) (2002) (“fraud in the factum” as a “real defense” to the enforcement of a negotiable instrument).

11. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

(3) *Innocent misrepresentation*.¹² This is a misstatement of fact *not* fraudulently made. It is difficult to imagine an innocent instance of fraud in the factum, so as a practical matter it is going to be an innocently made statement that induces the signing. If there is no guilt attached to the other party, then this is even less likely than “fraud in the inducement” to succeed as a defense for the signing party, if the statement is contradicted by the terms of the writing, or the writing generally excludes any representations, and so on, not contained in the writing itself.

E. OTHER DEFENSIVE DOCTRINES

Besides the defenses enumerated above, there are two doctrines which can be invoked to counter the effect of the DTR rule, by providing relief from enforcement of all or at least some of a written agreement.

(1) *The doctrine of reasonable expectations*. In its strongest form, this doctrine goes beyond merely resolving ambiguity against the drafter, to actually give one party the benefit of her reasonable expectations as to the effect of the contract, even though close reading of that document would contradict that.¹³ In that form, this doctrine can potentially override the literal terms of a written agreement, DTR or not. Its most likely application is in the area of insurance contracts, however, where traditionally contracting parties are not expected to really read and understand the terms of their policies. Even there, it may represent a minority view, at least in its strongest form. (A weaker version of the “reasonable expectations” principle seems to be just another way of stating the maxim of “construing against the drafter.”) Although logically this doctrine might be employed in any case involving a consumer and a standardized form, such cases appear to be rare.

(2) *The doctrine of unconscionability*. At least since the mid-twentieth century, American courts have generally been understood to possess the residual power to refuse to enforce a contract all or some of whose terms are extremely and unfairly one-sided. The Uniform Commercial Code so provides, in Article 2,¹⁴ and the common law (as reflected both in judicial decisions and in the Restatement (Second) of Contracts) agrees.¹⁵ Successful assertions of this principle nearly always involve not only a demonstration that the contract or clause in question is extremely and egregiously unfair to the adhering party (substantive unconscionability) but also usually that there is something in the circumstances that impairs the quality of that party’s consent (procedural

12. The Restatement provides that both a fraudulent and an innocent misrepresentation may be grounds for avoidance, the latter only if also material. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

13. See Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

14. U.C.C. § 2-302.

15. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

unconscionability, or absence of meaningful choice). In the usual case where this doctrine is successfully advanced, the contract (whether or not expressed in a standardized form) was at least memorialized in some form of writing, drafted by one party and adhered to by the other, so in such a case the DTR is necessarily implicated and overcome.

III. OTHER JUSTIFICATIONS FOR THE EXISTENCE OF A “DUTY TO READ”

The above formulations of the DTR rule may seem to be merely conclusory statements of a result, but they can be supported by substantial policy arguments.

A. DEFENDING THE DOCUMENT

The law’s willingness to enforce the terms of a writing even in the teeth of possibly persuasive evidence of active fraud by the other party suggests that the true reason for the DTR rule—whether phrased as a “duty” or a “conclusive presumption”—is the law’s desire to insulate a written contract from later claims that it does not truly represent the complete and final contract of the parties. If the written agreement is assumed to be complete and accurate, then later attempts to undermine its legitimacy deprive the other party of the benefits of that agreement, to which she is legitimately entitled. (Obviously a rule imposing the duty to read must envision some form of writing or at least a “record”; to speak of the duty to read an oral agreement seems pointless.) Viewed this way, the DTR seems to be simply a more sweeping version of the parol evidence rule—or at least, to function as its complement. Together they express a policy judgment that when a person signs onto a more-or-less formal writing (that is, one which that person knows is intended to create or modify a legal relation), then: (1) She ought to be bound by all the terms of that writing, whether she read or understood it; (2) she should have no ability to add to, subtract from, or contradict that writing on the basis of evidence of other agreements or statements, no matter how convincing that evidence might be; and (3) this is an appropriate general policy for the law to effectuate, even at the cost of discouraging or denying redress to persons who may have genuine, good faith claims that they were mistaken or even actively misled, because it is “efficient.”

The efficiency basis of the DTR rule is often very explicit: “[To do otherwise] . . . would absolutely destroy the value of all contracts.”¹⁶ It is grounded at least in part on the obviously true observation that the commercial world today (and indeed for the last century or so) has completely embraced the notion of using standardized forms, not merely as a means of gathering, storing, and transmitting information about

16. *Busching v. Griffin*, 542 So. 2d 860, 865 (Miss. 1989).

contractual agreements, but also as the conventional way of expressing and memorializing such agreements for the purpose of contract formation. Of course, this is particularly the case where one party is a “repeat player,” entering into multiple versions of what is essentially the same transaction with many different contracting parties. However, it goes beyond those incontrovertible propositions to assert that, as a general matter, agreements expressed in writings to which parties have apparently assented should generally be immune from later challenge on the basis that one of the parties did not read, did not understand, or perhaps was even actively misled about the contents or effect of the writing. Although often expressed in cases where standardized forms have been utilized, this position is not limited to standardized forms, but extends to written contracts generally.

Although sometimes a successful application of one or more of the defensive doctrines enumerated above will trump the DTR, a strong DTR rule explicitly contemplates the possibility that genuine instances of mistake and misrepresentation will from time to time occur, but will be tolerated and not corrected. The justification for this attitude of tolerance appears to rest on one or more of the following assumptions, explicit or tacit. First, genuine claims of mistake or fraud are relatively few; most parties who advance such claims in cases like these are (possibly at the instigation of unscrupulous attorneys) attempting to commit a fraud on the court, or to pressure the other party into settling. Second, the public good (or at least the functioning of the commercial marketplace) is better served by a policy that makes it difficult or impossible to later challenge a written contract merely on the basis that it was not read or understood, because the costs of making contracts universally understandable (if not actually understood) at the time of their making would be literally unbearable—if indeed that goal could even be accomplished. Third, a written agreement often contains declarations that the persons signing onto it have read the agreement, do in fact understand it, and are not relying on any promises or representations not expressed in that writing. In such cases, each party is necessarily going to rely on the truth of that statement, and both parties should therefore be estopped later from denying its truth.

B. ESTOPPEL TO CHALLENGE THE WRITING

The last point above leads to another justification sometimes put forth for the DTR rule, the possibility of reliance. Under this approach, the signer of a contractual document should be estopped to later claim that she is not bound by the agreement set forth in that document

if, without being the victim of fraud [the person] fails to read the contract or otherwise learn its contents, [s]he signs the same at his peril and is estopped to deny [her] obligation, will be conclusively presumed

to know the contents of the contract, and must suffer the consequences of [her] own negligence.¹⁷

An argument for estoppel might run something like this: Traditionally, estoppel can arise in law when one party makes a statement (or a promise) on which the other party can reasonably rely, and that party does rely by materially changing her position, so that injustice will result if the first party is thereafter allowed to deny the truth of her earlier statement (or to repudiate her promise). How could an estoppel argument be used to justify enforcing a DTR rule?

When one party signs onto a written agreement, this is a general manifestation by that party of her intention to be bound by the terms of that agreement. This is particularly the case where the writing includes a statement that the signer has read and understood the terms of the contract, contains a merger clause (designed to invoke the parol evidence rule), and/or states that the signer is not relying on any promises or representations not contained in the writing. The writing could also have a disclaimer of the agent's authority to vary the terms as written. Even without any of those terms, the writing might well be protected by the DTR rule if the signer knows (or should have known) that it was intended to have legal effect; however, if it does contain any or (as is often the case) *all* of them, the argument for an estoppel is considerably stronger.

On the strength of that manifestation of agreement, the other party will proceed to prepare for and then perform the obligations imposed on it by that agreement. This is a change of position that the law should recognize. And because such reliance is likely, and likely to begin immediately, and may sometimes take place in ways that are hard to prove, in order to encourage prompt and reasonable reliance, the law should protect the drafter from the time the contract is signed against later challenges by the signer.

Such change(s) of position on the drafter's part can be seen as both reasonable on his part, and reasonably foreseeable to the other party, the signer. Anyone who signs what she knows or should know is intended to have legal consequences should also know that the other party may rely, immediately and substantially, on her manifestation of assent to that agreement.

Will injustice result if the drafter's reliance is not protected by enforcement of the writing? Proponents would claim that both fairness and efficiency are best served when marketplace reliance is protected by a strong DTR rule, and that these two policy goals represent the kind of justice that contract law should strive to achieve.

17. *Brubaker v. Barrett*, 801 F. Supp. 2d 743, 751 (E.D. Tenn. 2011) (citing *Giles v. Allstate Ins. Co.*, 871 S.W.2d 154, 156 (Tenn. Ct. App. 1993)).

As thus stated, the estoppel justification seems to depend on a tacit assumption that the drafting party can necessarily rely in good faith on the signer's expression of apparent assent. This will not always be the case, however:

Where the signer's assertion is simply that she failed to read or understand the terms of the document she was signing, but she admits knowing it was intended to have contractual effect, the drafter's reliance argument seems strongest, assuming the absence of any misconduct on the part of the drafter. (Whether the law might still allow the signer a reasonable time to become aware of her mistake and attempt to rescind could remain an open question.) The doctrines of reasonable expectations and unconscionability should remain available to the signing party in any event, if the facts of the case justify their application, but as a general matter the signer could appropriately be estopped from repudiating her expression of agreement.

Where the signer failed to read or understand the terms of the writing she signed because she thought it was something *other than* a contractual document, the case for protecting the drafter's reliance on her signing may be a weaker one. The argument in favor of estoppel in this case might depend on whether it was reasonable for the signer to have that (mistaken) belief, and whether the drafter knew or reasonably should have known of her mistake. If the answers to *both* questions are yes, then the drafter's claim of reliance on the signer's apparent assent may be regarded as being in bad faith. And further, if the signer's mistake occurred because the drafter lied about the nature of the writing ("essential fraud"), then obviously the drafter cannot in good faith have relied on her expression of assent.

Where the signer admits she knew she was signing a contractual document, but alleges that she was lied to, not about the nature or contents of the writing, but about other, extrinsic matters, to induce her to assent, the drafter's conduct is merely fraud "in the inducement," not "in the factum." It does not go to the fundamental issue of consent to be bound. Still, if the signer's story is true, the drafter again cannot in good faith rely on such fraudulently induced assent.

Thus, the estoppel case for the DTR rule is not necessarily a persuasive one; its strength depends on the good faith of the drafter, which in many cases is controverted by the allegations of the signer. To say that the signer should be estopped from showing the truth of her allegations because of the drafter's good faith reliance on her apparent assent is obviously circular reasoning where the fact of the drafter's good faith is called into question. If that proof is precluded by some asserted duty to read, this cannot be justified on an estoppel basis. It must depend on some other underlying policy claim.

Contract law (or perhaps, here, “commercial law”) is less worried about individual injustice than about overall market efficiency. The needs of the marketplace demand that written contracts—even those of “adhesion”—be generally enforceable, regardless of whether they were read or understood by the adhering party at the time of her signing.

In many cases, the court disbelieves the plaintiff’s claim, and wants to relieve the drafter of the burden of litigating that issue on the merits, even if that litigation would eventually be resolved in the drafter’s favor.

Even if the plaintiff’s claim is credible, the law—or at least, the judge—often finds her to be unworthy of protection. For years, the law has tolerated untruthful sales talk, deeming it to be mere “puffing,” which a reasonable buyer should be able to discount and ignore. That tolerance may have declined somewhat,¹⁸ but the principle remains that contracting parties will often be held to a “reasonable” level of self-protection.¹⁹

C. SIGNING AS CONSENT TO BE BOUND

There is another type of argument that might be advanced in favor of a vigorous DTR rule: Even though both parties to an agreement may know that one of them has not read all or perhaps any of the document, nevertheless, by signing it, that party is manifesting her intention to be legally bound to the contents of the writing, whatever they may be. From Llewellyn²⁰ to Barnett,²¹ commentators have suggested the possibility that one party in signing a writing with contents unknown to her may nevertheless be manifesting her *consent to be bound* to whatever may in fact be the contents of that writing, provided those do not exceed the bounds of what might be legitimately expected in light of what the signer *does* know. That consent is thus not without limits, but those limits are found in the context, they are not inherent in the act of manifesting apparent consent.

18. See RESTATEMENT (SECOND) OF CONTRACTS §§ 168, 169 (1981).

19. A corollary of the estoppel/reliance argument is the possibility that the rights of third parties will be adversely affected if signers are permitted to withdraw from their contract or assert claims at variance from the writing. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 166(b) (1981) (stating reformation may be denied if rights of innocent third parties as good faith purchasers would be adversely affected). This is the issue that is addressed by the negotiable instrument rules of U.C.C. Article 3, protecting the holder in due course of a negotiable instrument against many “personal” defenses. U.C.C. § 3-305. The same issue can also arise with the assignment of an ordinary contract. In many cases, the assignee of a written contract would be able to claim with justification that it has changed its position in actual and reasonable reliance on the apparent consent of the signer to the terms of that contract, so that it (the assignee) should not be subject to any claim that the signer may later make to be relieved of, or modify, her obligation. This should not necessarily end the matter, however, since the assignee might have a claim back against the assignor if the assigned rights should prove to be unenforceable.

20. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

21. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 635 (2002).

This expanded notion of consent obviously has potential application to the paradigmatic duty to read case, where a complete and detailed writing exists at the time of signing, is presented by one party to the other, and signed by her. However, it could also be applied in the following situations:

(1) To justify holding one party to the terms of a writing which she knows is intended by the other party to be a contract, and to whose terms she can be seen as having consented, even if she does not literally “sign” that document at any point. This could thus encompass the so-called “rolling contract,” “terms-to-be-added-later” or “terms-in-the-box” contract. These are typically cases in which the signer knew (or arguably should have known) of the writing’s existence; (probably) had access to it before signing; and if not, had (at least in theory) an opportunity thereafter to review the writing and withdraw, an opportunity which she failed to take.

(2) To justify holding one party to the terms of a writing that she did see (or at least could have seen) on a computer screen, at or before her manifestation of consent to those terms by clicking “Submit,” “I agree,” or something similar. Such “clickwrap” contracts are becoming steadily more commonplace, and their efficacy is less and less open to challenge.²²

(3) To justify holding one party to the terms of whatever modified or additional terms that the other party might in the future propose, because the terms of the original agreement expressly gave it that power, particularly if either the original agreement or the new modification provided some mechanism for the adhering party to escape from the relationship if she did find those new or revised terms to be acceptable. This expanded notion of “consent to be bound” goes considerably beyond the traditional DTR, which focuses on the ability of the signing party to see and review the terms of the proposed agreement *at or before* the time of her expression of assent. When the original contract gives the drafting party the power to later unilaterally add to or modify the agreement, the adhering party’s “agreement” might well be characterized not as assent to any particular term or collection of terms, but to the existence of a *relationship*, in which one party voluntarily subjects herself to the power of the other party to set whatever terms it pleases for that relationship, limited only by whatever overarching supervision the law might choose to maintain. Because the power imbalance in this relationship is so extreme, it seems appropriate to characterize the adhering party’s action as one not of “assent,” but of “submission.” To speak of this arrangement

22. See, e.g., *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007).

in terms of traditional DTR principles strains that principle to the breaking point.²³

IV. APPLICATIONS OF THE DUTY TO READ

Even if confined to the last few years, an online search for “duty to read” decisions will yield dozens if not hundreds of cases. Here is a selection of recent cases that discuss the DTR grouped by subject matter.

A. INSURANCE

It is not surprising that the DTR principle figures prominently in disputes involving insurance coverage. In nearly every litigated dispute of this type, the loss of which the insured plaintiff is complaining has already occurred and there is no way for her to mitigate by purchasing better coverage, from the defendant insurer or anybody else. The only way for the plaintiff to be compensated for her loss is thus to show either that the insurer itself should be liable on the policy, or that an insurance agent acting for the plaintiff should be liable to her for failing to procure the disputed coverage. Except for the possibility of the plaintiff’s bringing a bad faith claim against the company, or in extreme cases a disciplinary action against the plaintiff’s attorney, neither side has much to lose by digging in its heels. And if the insurer or agent is relying on language in the policy that supports its claim of noncoverage, the plaintiff will have to confront the general principle of DTR.

In *City Blueprint & Supply Co. v. Boggio*,²⁴ the insured business sued its insurer and insurance agent in the aftermath of Hurricane Katrina for failure to provide flood coverage. Neither of the two owners of the insured business nor their agent ever read their policy, which had been in force for many years and contained a flood damage exclusion. Plaintiffs claimed they had believed, and had been assured by their agent, that they had “full coverage.” The trial court’s denial of recovery was affirmed; neither the company nor the agent had been shown ever to have promised flood coverage, and plaintiffs had never specifically requested it. Regardless of whether the agent ever said they were “fully covered,” the plaintiffs could not have reasonably believed that they would have flood coverage because their policy contained “a straightforward, uncomplicated, exclusion against damage caused by flood,” which “[a] simple review of the policy” would have disclosed.²⁵ “An insured is responsible for reading his policy and is presumed to know its terms.”²⁶ Other courts have come

23. See generally David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010).

24. 2008-1093, p. 2 (La. App. 4 Cir. 12/17/08); 3 So. 3d 62, 64.

25. *Id.* p.8, 3 So. 3d at 67.

26. *Id.*

to a different conclusion. For example, in *C's Discount Pharmacy v. Pacific Insurance Co.*,²⁷ a long-standing relationship and a seven-month delay before delivery of the policy enabled the insured to avoid summary judgment for the insurer.

Some cases state, as a general rule, that the insured cannot rely on possible fraud by agents of the company or of the insured to overcome lack of stated coverage in the policy:

Fraud cannot be “perpetrated upon one who has full knowledge to the contrary of a representation.” An insured party is presumed to have read the terms of his insurance policy. Therefore, if the insurer has made a statement which clearly conflicts with the terms of the policy, an insured cannot argue that he reasonably relied upon it²⁸

Similarly, in *Guideone Mutual Insurance Co. v. Rock*,²⁹ the insurer sued for a declaration that the policy was void and that the insureds’ fire losses (their house and its contents, plus two automobiles) were not covered by their homeowner and auto insurance policies. (The insurer also claimed that the insureds were guilty of fraud and that the fire was not accidental.) The insureds’ fraud claim was held to be precluded by the DTR: “A signatory to an insurance contract has no right to rely on misrepresentations by the agent that are contrary to the terms of the contract.”³⁰

However, some jurisdictions have a weaker version of the rule in insurance cases, which permits a plaintiff to show, and the jury to find, that the defendant insurer was in fact guilty of fraud, and that the insured was not unreasonable in failing to read the policy and discover the falsity of the agent’s representation. For example, “under ‘Pennsylvania insurance law, there is no general duty to read the policy; rather, the insured may be justified in relying on oral representations made to him at the time he applied for the policy.’”³¹

In states with this more lenient rule, the insured may show that the company or its agents made misrepresentations about the policy and thus, will not necessarily be deemed negligent for failure to discover the discrepancy between statements made and the terms of the policy. The question will be for the jury.³²

27. 09-217, p. 3-6 (La. App. 5 Cir. 1/26/10); 31 So. 3d 1103, 1104-06.

28. *Burger v. Allstate Ins. Co.*, 667 F. Supp. 2d 738, 746 (E.D. Mich. 2009) (citations omitted) (quoting *Montgomery Ward & Co. v. Williams*, 47 N.W.2d 607, 611 (Mich. 1951)).

29. No. 1:06-CV-218, 2009 WL 2195047, at *1 (N.D. Miss. July 22, 2009).

30. *Id.* at *3.

31. *Scarpato v. Allstate Ins. Co.*, No. 05-05520, 2007 WL 172341, at *4 (E.D. Pa.) (quoting *Special Jet Servs., Inc. v. Federal Ins. Co.*, 643 F.2d 977, 982 (3d Cir. 1981)).

32. See generally *Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Cal., Inc.*, 98 Cal. Rptr. 3d 910 (Ct. App. 2009); *Nolan v. Consec Health Ins. Co.*, 7th Dist. Jefferson No. 07 JE 30, 2008-Ohio-3332, 2008 WL 2609659 (June 30, 2008).

Other possible means of circumventing the DTR rule in insurance cases include ambiguity in the fine print of the policy,³³ and the insurer's failure to make the terms of the policy reasonably available.³⁴

B. PRE-INJURY RELEASES

This category of cases presents a situation where the plaintiff was injured prior to filing her claim and may have no alternative means of obtaining compensation. Such suits are generally tort claims against the proprietor of the premises where the plaintiff was injured (although it could also be for breach of contract), and the defense will argue that the plaintiff signed a release form before the injury, thus releasing it from liability. Two recent Pennsylvania cases fall into this category. One involves the plaintiff's participation in a paintball game, where he lost the sight of one eye because the goggles the proprietor furnished were defective.³⁵ In the other, the plaintiff was injured when he helped friends remove a transmission from a car in the defendant's auto junkyard without adequate tools because he had been assured that defendant's employees would perform the necessary work.³⁶ Both plaintiffs were Spanish-speaking and could read little or nothing of the written releases they were presented with, but both signed anyway. The traditional DTR rule makes no exception for signers who cannot read the language of the writing they are signing, and in both cases, the release was held binding. Martinez, the paintball player, was permitted to proceed on a product liability or strict liability basis because the language of the release was strictly construed in his favor, to apply only to ordinary negligence. The defendant junkyard proprietor in *Arce v. U-Pull-It Auto Parts, Inc.* was held entitled to summary judgment, however, both because of the release that plaintiff had signed and because he had failed to show actionable negligence.³⁷ A similar case to *Martinez v. Skirmish* is *Oelze v. Score Sports Venture, LLC*,³⁸ where plaintiff was injured while playing tennis in defendant's club; she was held precluded by her signed release from pursuing a claim of ordinary negligence, but not one for gross negligence.

C. REAL PROPERTY

This is an area where one might expect relatively strict adherence to the duty to read principle, in light of the need for land titles to not be easily overturned by evidence outside the written record. Two decisions

33. *Blumenthal v. N.Y. Life Ins. Co.*, No. Civ-08-456-F, 2009 WL 498961, at *8 (W.D. Okla. Feb. 26, 2009).

34. *Citizens Prop. Ins. Corp. v. Eur. Woodcraft & Mica Design, Inc.* 49 So. 3d 774, 778 (Fla. Dist. Ct. App. 2010).

35. *Martinez v. Skirmish, U.S.A., Inc.*, No. 07-5003, 2009 WL 1676144 (E.D. Pa. June 15, 2009).

36. *Arce v. U-Pull-It Auto Parts, Inc.*, No. 06-5593, 2008 WL 375159 (E.D. Pa. Feb. 11, 2008).

37. *Id.* at *14.

38. 927 N.E.2d 137 (Ill. Ct. App. 2010).

illustrate the traditional position of strict application of the rule despite potentially mitigating factors. In *Guzman v. Inter National Bank*,³⁹ the purchaser of a house and land made a number of claims based on the seller's failure to disclose an existing mechanic's lien on the property, which eventually caused her to default on her mortgage loan, after which the mortgage lender purchased the property at the foreclosure sale. Plaintiff could not read or speak English, had no legal counsel or prior experience with institutional lenders, and asserted that she relied on an employee of the seller for counsel.⁴⁰ The court held that because no fiduciary duty existed, the bank had no duty to disclose, and plaintiff's claims must fail.⁴¹ In *Ballard v. Commercial Bank of DeKalb*,⁴² the defendant bank was permitted to proceed with foreclosure despite the debtor's claim of fraud in connection with the execution of a deed of trust. To the extent that there was fraud, however, it appeared to have been committed by the debtor's grandson, rather than the lender bank, in order to obtain his grandfather's guarantee on the grandson's outstanding debts, which he secured by the deeded property. The defendant debtor was elderly, but apparently competent and experienced in business; the case is notable for the quotation attributed to him: "[W]ho reads all the fine print and all junk? [sic] Nobody. I never did."⁴³

Another case illustrates one of the possible counters to the DTR rule: a claim for reformation based on mutual mistake. In *Chandler v. Charleston Volunteer Fire Department*,⁴⁴ the lessors claimed that their lease agreement with the local volunteer fire department did not give the lessee the right to renew its lease for another twenty-year term, the renewal option being expressly vested by the words of the lease in the "Lessor." The court granted reformation of the lease so as to provide that the right to renew was instead with the "Lessee," pointing out that since the rental was only a dollar a year, it made little sense to give the option to renew to the landlord. The provision was clearly a "scrivener's error," the result of mutual mistake, and reformation was appropriate, even more so because the fire department had already spent over \$70,000 in improving the property.⁴⁵

Another possible way to overcome an assertion of the DTR principle is the doctrine of unconscionability. *Mattingly v. Palmer Ridge Homes LLC*⁴⁶ involved a home warranty scheme that has generated litigation in several

39. No. 13-07-08-CV, 2008 WL 739828, at *1-2 (Tex. Ct. App.).

40. *Id.* at *3.

41. *Id.* at *4.

42. 2007-CA-01406-SCT (¶¶ 1-8), 991 So. 2d 1201, 1202-04 (Miss. 2008).

43. *Id.* ¶ 27, 991 So. 2d at 1207.

44. No. W2011-00322-COA-R3-CV, 2011 WL 4026844, at *1-2 (Tenn. Ct. App. Sept. 13, 2011).

45. *Id.* at *4, *6.

46. 238 P.3d 505 (Wash. Ct. App. 2010).

states in recent years.⁴⁷ Plaintiff home buyers sued the builder of their assertedly defective newly built home, as well as the company that purported to have contracted to provide a home warranty in lieu of the builder’s warranties under the construction contract.⁴⁸ Plaintiffs’ failure to read the terms of the booklet describing and limiting the warranty was not fatal to their claims, despite the fact that they signed a document which said that they had read it and that they agreed to be bound by it, where they did not actually receive a copy until several months later. The court found procedural unconscionability (as had other courts in similar cases involving the same program),⁴⁹ and permitted some of plaintiffs’ claims to proceed.⁵⁰

Finally, in *Rowen Petroleum Properties, LLC, v. Hollywood Tanning Systems, Inc.*,⁵¹ the plaintiff landlord asserted that after he had orally agreed to permit the defendant commercial tenant to assign its lease to an entity which had been shown to have adequate financial resources, the defendant substituted for plaintiff’s signature a document granting approval for assignment to a different entity, a “shell” with no financial resources.⁵² Plaintiff signed under the belief that no change had been made from the earlier version. The defendants argued that because plaintiff was a “savvy businessman” he should have read the document he signed, and therefore could not assert fraud.⁵³ The court felt otherwise, stating:

It is the policy of the law to protect the unwary and foolish as well as the vigilant from the wiles and artifices of evil-doers[,] and negligence in trusting a representation will not, according to the greater weight of authority, excuse a positive willful fraud The party perpetrating the fraud should not be permitted to say that he should not have been believed or trusted.⁵⁴

Thus, the court held that even a negligent failure to read is not necessarily a bar to the assertion of active fraud.⁵⁵

D. SALE OF GOODS

Two cases of this type illustrate contrasting approaches and results. In *Fitzsimmons v. Fleet Truck Sales, Inc.*,⁵⁶ the plaintiff purchased a used truck from defendant to use in his trucking business.⁵⁷ The contract called

47. See, e.g., *Burch v. State ex rel. Washoe County*, 49 P.3d 647 (Nev. 2002).

48. *Mattingly*, 238 P.3d at 507.

49. *Id.*

50. *Id.* at 513.

51. No. 08-4764, 2009 WL 1085737 (D.N.J. Apr. 20, 2009).

52. *Id.* at *1.

53. *Id.* at *3.

54. *Id.* at *5 (quoting *Peter W. Kero, Inc. v. Terminal Constr. Corp.*, 78 A.2d 814, 818 (N.J. 1951)).

55. *Id.*

56. No. HHDCV085024281S, 2010 WL 5030117 (Conn. Super. Ct. Nov. 10, 2010).

57. *Id.* at *1.

for a 2005 vehicle of a designated make and type, but the vehicle actually delivered was a 2006 model.⁵⁸ Instead of making the vehicle slightly more valuable (although it might have done that, too), the error made it unsaleable, unregistrable, and uninsurable once the mistake was discovered.⁵⁹ The defendant seller at first claimed the plaintiff was responsible for the mistake, but eventually admitted responsibility, and supplied the vehicle originally contracted for.⁶⁰ Plaintiff sued for a variety of damages, including lost revenue as a result of the first truck being inoperable, and various payments made on that vehicle (maintenance, storage costs, and taxes) while it was out of service.⁶¹ The “Purchase Order” used by the seller was a two-page form, only one page of which the plaintiff had apparently received (the facts were disputed).⁶² The first page of that document had a reference to “Terms and Conditions” listed on page two; among the terms on the latter page was a disclaimer of liability for consequential damages.⁶³ Although the plaintiff did not see the second page at the time, the reference to its contents was enough for the court to find that the disclaimer bound the plaintiff.⁶⁴ As a result some (though not all) of his claimed damages were disallowed as being consequential.⁶⁵

In contrast, the buyer in *Woodruff v. Bretz, Inc.*⁶⁶ was a consumer buying a used motor home from defendant dealer for a price of \$135,000. The purchase took place in Montana in March; when the weather warmed up, the home began to smell.⁶⁷ It was found to be heavily contaminated (all the carpet as well as some of the walls) with pet urine. Plaintiff hired a restoration service to make the home livable, at a cost of over \$17,000; the service informed her that the defendant had contacted them in January with questions about how to clean carpeting contaminated with animal urine.⁶⁸ The issue for decision at this stage of plaintiff’s suit for damages was only whether an arbitration clause in the contract bound the plaintiff.⁶⁹ A divided (four-to-two) Montana Supreme Court held that the clause was not part of the parties’ contract.⁷⁰ Mostly, the warring opinions were devoted to the question of whether the sale contract was or was not a

58. *Id.*

59. *Id.* at *6, *8.

60. *Id.* at *1.

61. *Id.*

62. *Id.* at *2.

63. *Id.*

64. *Id.* at *4.

65. *Id.*

66. 2009 MT 329, 353 Mont. 6, 218 P.3d 486 (Mont. 2009).

67. *Id.* ¶ 2, 218 P.3d at 488.

68. *Id.*

69. *Id.* ¶ 5, 218 P.3d at 489.

70. *Id.* ¶ 19, 218 P.3d at 492.

contract of adhesion. Finding the agreement to be a standard form take-it-or-leave-it consumer contract, the majority held that the clause was indeed a contract of adhesion, and that the arbitration clause was not within the reasonable expectations of the buyer.⁷¹ The dissent disputed all of those conclusions, contending that the plaintiff had failed to establish her inability to negotiate better terms with the seller, and took the majority to task for sweeping aside “a basic tenet of contract law,” the duty to read.⁷² However “incorrigible” and “egregious” the defendant’s actions may have been, the dissent maintained, the issue was simply whether the plaintiff should be bound to arbitrate her claims.⁷³ The dissent may well be right that the majority in *Woodruff* allowed its feelings about the merits of the plaintiff’s case to control its decision on this procedural issue; here is the majority’s penultimate paragraph:

In conclusion, the record reflects that Bretz contacted a restoration and janitorial service in January 2006 with questions of how best to clean carpeting contaminated with animal urine. Two months later, Bretz sold Woodruff a motor home that was heavily contaminated with animal urine such that parts of the motor home were non-salvageable. Woodruff then had to spend some \$17,000 to refurbish the motor home before she could use it. We are not even remotely persuaded that an ordinary consumer in Woodruff’s position and with her relative level of sophistication regarding arbitration clauses would reasonably expect that she is giving up her valuable right to present such facts to a jury and seek reasonable damages in the courts of this state. Indeed, Woodruff would not have agreed to forgo her right to bring this action had Bretz’s salesperson told her before she signed the purchase contract: “By the way, the motor home you are purchasing may be heavily contaminated with animal urine, and when the weather warms up it will smell so bad that you will not be able to use it. But if you spend \$15,000 to \$20,000, you can probably fix it up.” Rather, Woodruff most likely would have moved on to another dealer. Consumers do not reasonably expect to be treated as Woodruff was here. More to the point, they do not reasonably expect to give up their right to go to court when they are treated as Woodruff was here.⁷⁴

So the dissent in *Woodruff* probably has a point. On the other hand, if unconscionability is just another word for something that the court simply cannot stomach,⁷⁵ a coach-full of cat urine is probably near the top of any judge’s list.

71. *Id.* ¶ 24, 218 P.3d at 494.

72. *Id.* ¶ 29, 218 P.3d at 495 (Rice, J., dissenting).

73. *Id.* ¶ 26, 218 P.3d at 494.

74. *Id.* ¶ 23.

75. Or, as Professor Leff put it, something that causes one’s gorge to rise. Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 555 (1967).

E. ATTORNEY MISCONDUCT

A few reported cases have involved parties who at the time of their contracting were represented by attorneys, the quality of whose service appears questionable. Plaintiff's reliance on the advice of another person will not necessarily excuse her duty to read, as we have seen, and this is likely to be true even where that person is an attorney engaged for the purpose of advising her with respect to the contract she is about to enter into. In *Stokes v. Lusker*,⁷⁶ the would-be buyer of a co-op apartment unit sued various parties on the seller's side, as well as his own attorney, for the failure of the proposed purchase, a failure that caused plaintiff to forfeit a \$250,000 deposit.⁷⁷ The plaintiff claimed that everybody involved had known that his ability to finance the purchase turned on his ability to sublease the apartment for commercial purposes, but that nobody—including his own attorney—advised him that such a sublease was legally impossible, even though they knew that to be the case.⁷⁸ Applying New York's strong DTR rule, the court dismissed all of the claims against the seller-related parties, even though the plaintiff had alleged fraud and wrongful nondisclosure on their part. Because the plaintiff could have discovered the restrictions on the apartment's use before committing himself to the purchase, the court held, "He cannot blame his own recklessness on the acts of others by crying fraud."⁷⁹ On other hand, the plaintiff's claim against his own attorney was allowed to proceed, despite the argument that the plaintiff had assumed the risk by signing the purchase documents: Assuming the accuracy of the plaintiff's pleadings, the court held, the defendant attorney knew or should have known that the plaintiff was relying on him to read the documents and advise him accordingly.⁸⁰

As to the signer's ability to sue her own attorney for negligence in failing to advise her of the effect of the document she was signing, the *Stokes* court seems clearly right in its decision to allow such a suit to proceed. A similar recent decision on this point is *Meyers v. Sudfeld*,⁸¹ involving claims of legal malpractice stretching over several years. In that case, the court noted that although there might be ways in which a client could be deemed contributorily negligent (such as withholding information from her attorney, or disregarding her attorney's advice), a client cannot be so faulted merely for signing documents without reading them, when she has relied on her attorney's advice and representation in so doing.⁸²

76. No. 08 Civ. 3667 (CM), 2009 WL 612336 (S.D.N.Y. Mar. 4, 2009).

77. *Id.* at *1-2.

78. *Id.* at *4.

79. *Id.* at *6.

80. *Id.* at *11.

81. No. 05-CV-2970, 2007 WL 419182 (E.D. Pa. Feb. 2, 2007).

82. *Id.* at *5-6.

In contrast, in *Marion Partners, LLC, v. Weatherspoon & Voltz, LLP*,⁸³ the court appears to have taken the position that even if an attorney has been charged with the responsibility of advising the plaintiff about a proposed contract, the plaintiff’s signing of that contract means she cannot complain of her attorney’s failure to warn her of any risk that she might have discovered by reading it herself.⁸⁴ If that is really what the court in that case means to say, it seems an indefensible, not to say inexplicable, conclusion.

F. CREDIT CARDS

In two cases, credit card issuers were sued by persons claiming to have been hurt by the defendants’ dissemination of inaccurate information about their credit standing. In *Heiges v. JP Morgan Chase Bank*, the plaintiff was an employee of a corporation that had opened a credit card account with the defendant issuer.⁸⁵ The defendant also issued a card to the plaintiff in his own name.⁸⁶ The plaintiff’s employer was later dissolved, at a time when it owed over \$6000 to the defendant, and the defendant reported the plaintiff as a delinquent debtor to credit agencies, asserting that he was personally liable for his employer’s debt on its account, because of language to that effect in the credit agreement.⁸⁷ The defendant responded to the plaintiff’s suit with a motion to compel arbitration, based on its asserted amendment of the credit agreement by modifications sent with the monthly statements (the original agreement did not contain an arbitration clause, but it did contain provisions for future amendment).⁸⁸ To the plaintiff’s assertions that he never saw a copy of the underlying agreement (which also contained language making personally liable any person in whose name a card was issued), the court responded:

As to any claim of not seeing a copy of the agreement, Heiges does not dispute receiving monthly statements, including the statements that came with amendments to the Agreement. Regardless, these statements included telephone numbers that he could have called to obtain a copy of the Agreement. If he called that number, he could have learned that the language of the Agreement subjected him to personal liability for the charges placed on the card.⁸⁹

The cardholder fared better in *Kortum-Managhan v. Herbergers NBGL*.⁹⁰ Here also, the plaintiff asserted that the defendant card issuer

83. 716 S.E.2d 29 (N.C. Ct. App. 2011).

84. *Id.* at 31.

85. 521 F. Supp. 2d 641, 644 (N.D. Ohio 2007).

86. *Id.*

87. *Id.* at 645.

88. *Id.* at 644-45.

89. *Id.* at 649. As a college classmate of mine used to say, “If your grandmother had wheels, she’d have been a trolley.”

90. 2009 MT 79, 349 Mont. 475, 204 P.3d 693 (Mont. 2009).

had disseminated inaccurate information about her credit standing to credit reporting agencies, and sued on a variety of statutory theories.⁹¹ The defendant responded by moving to compel arbitration on the basis of a clause in the original agreement permitting it to “change any term of this agreement” by notice to the account holder followed by the latter’s continued use of her card.⁹² The court held that the addition of an arbitration clause was not merely a “change” in the agreement, but a new addition, and agreed with the plaintiff’s characterization of the defendant’s attempt to add the provision via an ambiguous and misleading “bill-stuffer” as “sneaky and unfair.”⁹³ The defendant, the court asserted, had buried the notice in “copious piles of junk mail.”⁹⁴ In this case, as in *Woodruff*, the other Montana decision discussed above, there was a vigorous dissent arguing that the plaintiff should have been bound by the arbitration clause.⁹⁵

V. CONCLUSIONS

What kind of conclusions can be drawn from the above analysis? This discussion is written primarily for an audience with some interest in, as well as knowledge of, legal affairs, and its success will depend on the extent to which its observations seem to that audience to be generally well taken. But its subject is the present and future state of one particular facet of contract law, and the potential readers with the most power to affect the future development of that area of law are judges—in particular, judges whose duties at least occasionally include hearing and deciding contract disputes. Based on the observations made above, how might one recommend that they deal with the duty to read as a rule of contract law?

A. DO NOT CALL IT A “DUTY”

This is not only technically incorrect, but it also encourages judges (and others as well) to moralize or be condescending to persons who do not read everything they sign. Nobody does that, and in fact nobody is expected to. In standardized form contracting, it is not only *not* encouraged, it is essentially *discouraged*. Contract recitations that say, “I have read all of this contract” are patently false, and are known to be false—to the party who presents a written contract for signature as well as to the party who signs it. All those words really convey to the signer is this: “Although we know you haven’t read much or any of this contract, and probably wouldn’t understand its importance if you had, we expect to hold you to

91. *Id.* ¶ 8, 204 P.3d at 695.

92. *Id.* ¶ 22, 218 P.3d at 698.

93. *Id.* ¶ 31, 218 P.3d at 700.

94. *Id.* ¶ 42, 218 P.3d at 701.

95. *Id.* ¶ 40 (Rice, J., dissenting).

it.” Like a merger clause, it is essentially a message not to the other party, but to a future court.

If twenty-first century judges want to make better sense of this area of law, they could start by understanding and admitting that:

- *Nobody* reads everything she signs;
- *Nobody is able* to read everything she signs; and
- *Nobody wants* her to read everything she signs.

What drafters *do* want is to be able to treat her as if she *had* read everything. They do not care if in fact she has not—and, indeed, in many cases would prefer that she did not.

So do not call it a “duty.” This just adds insult to injury.

B. DO NOT CALL IT A “CONCLUSIVE PRESUMPTION”

As we have seen, a conclusive presumption is essentially a legal fiction. If there is anything that is a fiction here, it is the notion that anyone does—or even could—read everything they sign. Whatever the merits of such a device might be in other legal contexts, in this area it is clearly an inaccurate description of how people actually behave, as well as an inaccurate statement of how the DTR rule is applied in practice. There are countless court decisions that accept as a fact the proposition that a contracting party has *not* read what she signed, and go on to give that party some relief based on that fact. On the other hand, calling it a *rebuttable* presumption seems not so problematic. When one person has done an act (which is usually signing, but it might be something else—clicking a “Submit” button, perhaps) that on the face of it seems to express unqualified assent to a bargain proposed by another, it could be useful, at least as a point of departure, for the law to say that this creates a rebuttable presumption of “knowing assent.” (“PKA,” for short.) This is admittedly still a misdescription of reality, but it does have the virtue of putting the burden on the signer to overcome the fact of her apparent assent, while at the same time making clear that it is permissible and potentially possible for her to do so.

C. DO NOT REPLICATE THE PAROL EVIDENCE RULE

Whether the American legal system really needs the parol evidence rule (“PER”) is certainly open to question. Other functioning legal systems appear to manage quite well without one. And ours is so full of exceptions and anomalies that except possibly for teachers of contract law (whose students can be challenged, to put it mildly, by this body of doctrine) it is hard to see why we tolerate it. In some situations, of course, it does have a certain logic: parties who have carefully negotiated (probably through their attorneys) an elaborate written contract to which they then express assent should expect to find it difficult or impossible later to claim that they did not intend to have their contractual relationship

governed by the terms of that writing. The PER does achieve this result, although in a complicated and arcane way.

In any event, regardless of whether we need the PER that we have, we certainly do not need *another* one. A modernized PKA rule should be based not on a patently false assumption that of course the parties have all read and understood the written contract, but on the candid admission that in many cases it is necessary and appropriate as a matter of policy to hold a person to a contract to which she has manifested a form of assent without having understood or even read its terms.

D. DO NOT ALLOW THE PRESUMPTION OF KNOWING ASSENT TO BE A SHIELD FOR WRONGDOING

If the “presumption of knowing assent” is not a conclusive one, then it can necessarily be rebutted. If one party (call her P, for convenience) asserts that she was the victim of a fraud practiced upon her by the other (D), those allegations are *issues of fact*. P’s ability to have her story heard by a trier of fact should not be trumped by any “presumption” that it is necessarily false unless a judge finds that, as a matter of law, no reasonable person could believe her story. The test at this point should not be whether in the view of the judge P behaved imprudently or “unreasonably,” but simply whether her story is potentially credible. This should be the case whether the fraud complained of is fraud in the factum, fraud in the inducement, or fraud in the form of active concealment or wrongful nondisclosure, because the crux here is *misconduct by D*. Carelessness or imprudence on P’s part may be “venial faults,” to use Cardozo’s phrase,⁹⁶ but they are *only* that. Active wrongdoing is something more. The PER has traditionally had an exception for fraud,⁹⁷ although in some jurisdictions it has been cabined and to some extent neutralized.⁹⁸ Whatever one might say about that version of the PER, the same should not be true of the PKA. If P’s allegations of fraud are believed, then in applying the substantive law of fraud the court may need to consider whether P in fact relied on D’s fraudulent representations, and whether, if she did, such reliance was “reasonable.” But those issues should not turn on whether P signed a document provided by D containing self-serving declarations intended to head P off at the courthouse door.

E. DO NOT LET THE PRESUMPTION OF KNOWING ASSENT PRECLUDE RELIEF FOR MISTAKE

Courts have been willing to let parties show the existence of a “mutual mistake” of the “scrivener’s error” type, even though doing so

96. *Jacob & Youngs v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

97. RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (1981).

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

denies the validity of an apparently agreed-to writing. In such a case, the writing is “reformed” to become, in legal contemplation, the writing the parties actually intended. Other types of mutual mistake may result in avoidance, not reformation, but the PKA should not necessarily preclude their establishment as a basis for relief. Where one party claims “unilateral mistake,” the availability of relief should depend again—as in the case of relief for fraud, above—on the substantive rules governing such relief, not on any presumption that the signer of a contract knowingly assented to things of which in fact she was ignorant or mistaken.

F. DO NOT LET THE PRESUMPTION OF KNOWING ASSENT PRECLUDE THE APPLICATION OF OTHER PROTECTIVE DOCTRINES

The doctrines of “reasonable expectations” and “unconscionability” are legal devices fashioned to protect parties who in some way are vulnerable to overreaching from the injurious consequences of their vulnerability. Both doctrines contemplate the possibility that in order to achieve justice, a court may have to go beyond the literal wording of a contract in order to enforce the agreement that one party reasonably believed she was making, or to relieve a party from the effects of a contract she should not be held to. Whether the vulnerable party did in fact read and understand the agreement to which she apparently assented can be germane to those issues, perhaps in some cases even determinative, but the application of those other doctrines should not in principle be precluded by the application of a PKA rule.

G. DO NOT LET THE PRESUMPTION OF KNOWING ASSENT PRECLUDE SCRUTINY OF ADHESION CONTRACTS

To a large extent, this point has been dealt with in the preceding discussion. To the extent that a contract of adhesion runs afoul of the principle of unconscionability or reasonable expectations, that has been already addressed. Courts and commentators are generally vocally insistent that a contract cannot be overturned or avoided merely because it is a contract of adhesion. If a contract is indeed one of “adhesion,” that should in the view of many provide a basis for finding it to be “procedurally unconscionable,” but that conclusion typically only opens the door to an examination of the contract for possible “substantive unconscionability” as well. Even if one imposes a rule of “strict scrutiny” or even “presumptive nonenforcement” for contracts of adhesion, that does not make them per se unenforceable.⁹⁹ In any event, a PKA rule should not deter a court’s finding that a given agreement is in fact a contract of adhesion, whatever may be the legal results of that conclusion.

99. See generally Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 *LOY. L.A. L. REV.* 95 (2006).

H. WHAT REMAINS?

Sherlock Holmes famously declared, “When you have eliminated the impossible, whatever remains, however improbable, must be the truth.”¹⁰⁰ When one has eliminated the various defenses to contract enforcement that are not—or at least *should* not be—necessarily barred by the application of a presumption of knowing assent, then what remains? When will that principle be decisive in protecting a written agreement from attack of one kind or another?

Assuming the continued existence of the PER, a PKA as envisioned above seems to have very little work of its own to do. Assuming we trust judges here as elsewhere to perform responsibly and fairly the task of deciding when “reasonable people” would have to find the facts in one and only one way, and assuming farther that we are willing to trust juries to behave responsibly when assigned a fact-finding task of their own, all that a PKA would accomplish is to state authoritatively a probably noncontroversial proposition:

One who knowingly and voluntarily assents to a contract whose terms are contained in a given writing should be held legally responsible for her actions by being held to those terms, in the absence of fraud, mistake, or other excusing cause.

100. ARTHUR CONAN DOYLE, *THE SIGN OF THE FOUR* 41 (Oxford University Press 1993) (1890).