The *Borat* Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts

Russell Korobkin*

Two parties reach an oral agreement. The first then presents a standard form contract, which the second signs without reading, or without reading carefully. When the second party later objects that the first did not perform according to the oral representations, the first party points out that the signed document includes different terms or disclaims prior representations and promises. I call this all-too-common occurrence the “Borat Problem,” after litigation presenting this fact pattern that followed the 2006 movie of that name.

The *Borat* Problem exists on the blurry border between contract and tort law. This Article describes the doctrinal indeterminacy and the underlying normative problem of bilateral opportunism that has caused courts to respond to the problem in a variety of inconsistent and unsatisfying ways. It then makes the case that the costs of contracting can be minimized if (1) parties who draft standard form contracts are required to obtain “specific assent” from their counterparts in order to contradict or disclaim prior representations, and (2) nondrafting parties are required to satisfy a heightened evidentiary standard before being permitted to challenge the enforceability of standard form terms on the grounds of fraud or

*Copyright © 2013 Russell Korobkin.

* Professor of Law and Faculty Director of the Negotiation and Conflict Resolution Program, UCLA School of Law. This Article benefited greatly from feedback received at workshops at the Columbia, Cornell, Hebrew University, Northwestern, St. Louis University, UCLA, University of Chicago, University of Washington and Yale Law Schools, and at the Harvard Program on Negotiation. Steve Calandrillo, Bob Hillman, Peter Levine, Doug Lichtman, Dan Markovitz, and Eyal Zamir provided extremely helpful comments and feedback on earlier drafts. George Chapman, Mike LaPlante, Paul McReynolds, Gina Nicholls, Nick Palatucci, Isaac Silverman, and Jonathon Townsend provided critical research assistance.
misrepresentation. This “Borat Solution” is consistent with established common law doctrinal principles.

Introduction....................................................................................................... 53
I. Judicial Treatment of the Borat Problem .............................................. 57
   A. Contract Law vs. Tort Law ............................................................ 57
      1. The Contract Approach: Parol Evidence Rule ............................ 57
      2. The Tort Approach: Fraud ....................................................... 60
      3. Doctrinal Indeterminacy .......................................................... 61
   B. Inconsistent Solutions .................................................................... 63
      1. Follow the Complaint .............................................................. 63
      2. The Back-Door Parol Evidence Rule....................................... 65
      3. Fraud in the Inducement vs. Fraud in the Execution ............... 68
      4. Scienter-Based Classification .................................................. 69
II. The Normative Tension: Bilateral Opportunism ................................... 70
   A. Risks to Drafting Parties ................................................................ 71
      1. Knowingly False Claims.......................................................... 72
      2. Unconscious Opportunism....................................................... 73
      3. Rogue Agents........................................................................... 75
      4. Consequences for Efficiency and Distribution ........................ 76
   B. Risks to Nondrafting Parties .......................................................... 76
      1. Direct Costs of Reading: Complexity and the
         Confirmation Bias.................................................................... 78
      2. Indirect Costs: Undermining Trust ......................................... 80
      3. Costs of “Bait and Switch”: The Status Quo Bias ................... 86
      4. Consequences for Efficiency and Distribution ........................ 88
III. The Borat Solution ................................................................................ 88
   A. Costs of Contracting vs. Costs of Judicial Error ......................... 89
   B. Protecting Nondrafting Parties: The Specific Assent
      Requirement................................................................................... 92
      1. The “Clear Statement” Requirement .................................... 93
      2. The “Realistic Notice” Requirement ..................................... 94
      3. Consistency with Principles of Contract Doctrine ................. 96
         a. Contract Interpretation ...................................................... 96
         b. Defenses to Enforcement ............................................... 97
   C. Protecting Drafting Parties: A Heightened Evidentiary
      Requirement................................................................................... 99
   D. The Borat Solution to the Borat Litigation ................................. 102
   E. Limitations.................................................................................... 104
Conclusion...................................................................................................... 105
INTRODUCTION

In the 2006 movie Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan, English comedian Sacha Baron Cohen plays the role of an outrageously inappropriate Kazakhstani television reporter, Borat Sagdiyev, who journeys across the United States to film a documentary about American culture. In the course of his travels, the title character uses his bizarre persona to elicit offensive statements and behavior from, as well as to humiliate, a number of ordinary Americans who are clearly not in on the joke. The movie was a critical and box office success: Borat received an Academy Award nomination for Best Adapted Screenplay, Baron Cohen won a Golden Globe Award for Best Actor in a Comedy or Drama, and the movie earned nearly one-third of a billion dollars in ticket and DVD sales.

Michael Psenicska, a Maryland driving instructor, was one of Borat’s unwitting stooges. In the movie, Psenicska, hired to give Borat a driving lesson, finds himself trapped in the passenger seat of a car as the volatile faux Kazakhstani careens erratically down local streets while endorsing rape, shouting obscenities at other drivers, and asking Psenicska to be his boyfriend. Clearly discombobulated by this unexpected behavior, an anxious Psenicska alternately ignores, deflects, objects to, or nervously chuckles at Borat’s political incorrectness while trying to prevent an accident.

In Alabama, etiquette coaches served as the chosen foil for Borat’s peculiar brand of social obtuseness. As etiquette expert Kathie Martin attempts to gently teach social graces to the seemingly clueless Borat, Borat makes vulgar sexist and anti-Semitic comments and then shows Martin nude pictures of his supposed son, leaving her visibly uncomfortable and practically speechless. Excerpts from Martin’s coaching session are interspersed with scenes from a dinner party that etiquette instructor Cynthia Streit hosts for Borat with a group of her genteel friends. The boorish Borat shocks the guests with sexist comments, aggressive sexual innuendos and put-downs, and by repeatedly referring to one guest who indicated that he is “retired” as a “retard.” When Borat returns from a trip to the restroom holding a bag of feces, Streit, in a remarkable exhibition of patience and self-control, attempts to explain how a toilet operates. But when a suggestively-dressed African-American female (actually an actress) knocks on the door and Borat introduces her as a

1. Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan (Four by Two Productions 2006).
prostitute, the guests begin to flee and an exasperated Streit tells Borat that neither he nor his friend may stay for dessert.

As Borat continues his travels, he encounters a recreational vehicle populated by a trio of fraternity brothers from the University of South Carolina. In the ensuing alcohol-enhanced conversation, the men profanely disparage women and mourn the fact that slavery is no longer legal.

How did Borat’s producer, Twentieth Century Fox, convince Psenicska, Martin, Streit, the fraternity members, and many others to become the victims of Baron Cohen’s brand of humiliating humor? According to these victims-turned-plaintiffs, the studio enticed them to enter into the transactions by way of a two-part strategy: false representations followed by standard form contracts that included language designed to contradict or disclaim those representations.6

According to Psenicska, Todd Schulman (identified in the Borat credits as an editorial assistant to Baron Cohen) solicited Psenicska to give Borat, whom Schulman identified as a Kazakhstani television reporter, an on-camera driving lesson for a “documentary about the integration of foreign people into the American way of life.” 4 Psenicska agreed. On the date of filming, Schulman and a film crew arrived late with $500 in cash for Psenicska and a document labeled “Standard Consent Agreement,” which they prevailed upon Psenicska to sign. The form, which Psenicska says he did not read, indicates the signatory’s consent to appear in a “documentary-style film” using “entertaining content and formats.” It also includes a lengthy waiver provision according to which the signatory “agrees not to bring at any time in the future, any claims against the Producer,” including claims for “fraud (such as any alleged deception or surprise about the Film or this consent agreement).”7 Finally, it includes a provision stating that “the Participant acknowledges that in entering into [the Agreement], the Participant is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film.”8

Martin claimed that Schulman hired her over the phone to provide “etiquette training to a foreign reporter whose travel experiences were being filmed . . . for Belarus television” for $350.9 At the time of the session,

5. The film spawned ten lawsuits in all, Panda Kroll, Teaching Through a Study of the Borat Litigation, 3 J. WORLD U. F. 127, 144 Ex. A (2010). Only a subset are relevant to this Article.
7. Id. ¶¶ 16–17.
8. Id. ¶ 17.
10. Id. ¶ 5.
Schulman handed Martin a document that he referred to as a “standard filming release form,” which she signed. The form was materially identical to the form Psenicska signed.12

Schulman allegedly told Streit that her dinner party would “be filmed for an educational documentary made for Belarus television.”13 At the time of the dinner party, Schulman provided Streit and her guests with written documents, which included the same terms that appeared in the Psenicska and Martin agreements. He asked each individual for a signature, and they too complied.14

Two of the fraternity members (identified in their lawsuit only as John Does) claimed that unnamed producers recruited them at their fraternity to appear in a film, which the producers assured the men would not be shown in the United States.15 After taking them to a bar and purchasing them alcohol, the producers then asked each of them to sign a “Standard Consent Form” like those procured from the other complainants.16

The Borat plaintiffs alleged that they were induced to participate in the video sessions by the producer’s representation that the footage would be used for a documentary film about American life made for an Eastern European audience. They claimed that they did not consent to playing the straight men and women in a Sacha Baron Cohen comedy routine as part of a studio-produced, major motion picture that would be shown around the world. They contended that the producers’ improper use of their likenesses and performances for a purpose entirely different than what was represented should entitle them to a legal remedy. Twentieth Century Fox responded that the written consent forms, duly signed by each plaintiff, represented the complete agreements between the studio and the various parties, and that the content of any prior communication between the parties was legally irrelevant.

The claims raised by the Borat plaintiffs illustrate a complex doctrinal and normative puzzle that lurks in the muddy interstices between contract and tort law and extends in significance far beyond the particular context of a comedian attempting to trick hapless individuals into being the butt of a grand joke. Should the law privilege the text of a signed, written contract over prior inconsistent oral statements or promises? Or should the law permit nondrafting parties to sustain tort or breach of contract claims by proving the content of such earlier representations? The issue arises frequently, and courts have struggled mightily, and reached inconsistent outcomes, when forced to confront what I call the “Borat Problem.”

12. Id. ¶¶ 39–41.
14. Id. ¶ 11.
16. Id. ¶¶ 13–14.
This Article uses insights from traditional and behavioral strains of law and economics to explain that the Borat Problem is a difficult one because both drafting and nondrafting parties are at risk of opportunistic exploitation by the other. It then provides a framework for resolving the problem—the “Borat Solution”—that minimizes the social costs of strategic exploitation and exploitation avoidance maneuvers, and does so consistent with doctrinal categories familiar to the courts.

Part I describes the present confusion among courts. Courts in different jurisdictions—and even, on occasion, courts in the same jurisdiction—have adopted quite different doctrinal strategies for responding to the Borat Problem.

Part II employs the tools of both traditional and behavioral law and economics to assess the normative tension that the Borat Problem raises and that underlies the judicial ambivalence. A legal rule that protects nondrafting parties from the type of exploitation alleged by the Borat plaintiffs subjects drafters to intentional and unintentional exploitation by nondrafting parties, largely as a consequence of the risk of judicial error in distinguishing true from false claims. It also makes drafters vulnerable to exploitation by their own negotiating agents whose interests are often imperfectly aligned with those of their employers. But a legal rule that protects drafting parties has its own attendant costs: the direct costs of reading and understanding standard form contracts, the deleterious effect that reading in this context can have on trust in contractual relationships, and the psychological costs suffered even by nondrafting parties who identify false representations before signing written documents.

Part III introduces the Borat Solution: a two-pronged approach for addressing the Borat Problem that minimizes social costs, measured as the joint costs of exploitation plus the joint costs of avoiding exploitation. First, to reduce the cost of comprehending terms in signed writings that are inconsistent with prior representations, and thus protect nondrafting parties, courts should require drafters to obtain “specific assent” to written terms that contradict or disclaim prior representations. This specific assent requirement is satisfied by both a “clear statement” of the extent of disclaimer and “realistic notice” of its presence in the writing. Second, to reduce the risk of judicial error, and thus protect drafting parties, courts should require nondrafters to meet a heightened clear and convincing evidence standard before admitting evidence that drafters made prior representations that are inconsistent with signed writings. Not only is this outcome normatively appealing because it promises to maximize contractual efficiency under the circumstances, but it can be promulgated within the boundaries of traditional doctrinal categories, and so falls squarely within the judiciary’s realm of authority.
I. JUDICIAL TREATMENT OF THE BORAT PROBLEM

The Borat Problem arises when one or more of four types of clauses in standard form agreements create inconsistencies between the signed writing and alleged prior representations made by the drafting party: (1) the written document states a representation or promise that substantively contradicts or is inconsistent with the alleged oral statement;\(^\text{17}\) (2) the written document includes a “no-reliance clause” stating that one or both signatories are not relying on any prior representation;\(^\text{18}\) (3) the written document includes a “no-representation clause” stating that one or both parties are making no representations other than what is explicitly contained in that writing;\(^\text{19}\) or (4) the written document includes a “waiver clause” providing that one or both signatories disclaim any right they otherwise might have against a counterparty for fraud, deceit, or misrepresentation.\(^\text{20}\) In the Borat litigation itself, the signed writing at issue includes examples of the first, second, and fourth variety of terms.\(^\text{21}\) This Part describes the problem of doctrinal classification that has led to inconsistent judicial treatment of the Borat Problem.

A. Contract Law vs. Tort Law

The Borat Problem exists on the border between contract and tort law, creating confusion for courts and leading to inconsistent rulings. Simply put, treating the problem as one of contract law points toward one doctrinal solution, while treating the problem as one of tort suggests a contrary solution.

1. The Contract Approach: Parol Evidence Rule

According to the parol evidence rule, the law presumes that if parties assent to a written agreement, the writing supersedes any inconsistent or contradictory terms expressed in prior oral (or even written) exchanges.\(^\text{22}\) The
The parol evidence rule has the virtue of providing predictability concerning how a court will interpret an agreement when there are plausible competing claims, which reduces both the risk of disputes and the cost of dispute resolution. Furthermore, it does so by adopting what is probably the majoritarian24 (and thus efficient)25 interpretive rule; that is, enforcing later-in-time writings when they conflict with prior (often oral) agreements matches the preferences of most contracting parties, judged from an ex ante perspective. This is both because most parties intend for later agreements to supersede earlier ones concerning the same subject matter,26 and because judicial resolution of cases will be more predictable if courts attempt to interpret written words rather than prior discussions.27

Given the parol evidence rule, parties who subjectively understand that a subsequent writing is inconsistent with prior agreements or understandings and are not willing to allow the new writing to govern will then withhold assent. The Borat Problem arises when the nondrafting party asserts that she did not actually assent to the terms in the writing. Under prevailing principles of contract law, however, assent under the law is usually determined by objective indicia, not subjective desire or knowledge. Thus, applying the parol evidence rule requires courts to determine what constitutes an objective manifestation of assent on the part of the nondrafting party.

Typically, courts will not enforce the terms of a written contract against a nondrafting party unless that party would reasonably recognize that she was entering into a contract. An early twentieth-century example of this rule is that

---

23. See generally Arthur L. Corbin, The Parol Evidence Rule, 53 YALE L.J. 603, 606 (1944) (describing this effect of the parol evidence rule as “the ordinary substantive law of contracts”); accord Patton v. Mid-Content, 841 F.2d 742, 745 (7th Cir. 1988) (observing that an integrated signed writing makes any prior agreement unenforceable).


26. See, e.g., Nicholas R. Weiskopf, Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault, 34 EMORY L.J. 93, 94 (1985) (concept underlying the parol evidence rule is negotiators “typically intend” for written, integrative agreements to discharge terms “proposed, discussed, or tentatively assented to in the dickering process”).

27. Cf. Patton, 841 F.2d at 745 (citing Farnsworth on Contracts for the proposition that the parol evidence rule “expresses the parties’ desire” to simplify contract administration and dispute resolution by excluding matters from prior negotiations even if they were agreed upon).
a passenger who checks luggage at a railroad station depository is not bound by
the terms printed on the back of the claim-check ticket if the clerk does not
alert her to the existence of those terms.28 Because the passenger would
reasonably expect that the purpose of the ticket is to demonstrate ownership of
a particular item when she returns rather than communicate terms and
conditions of the transaction, she is not bound by those terms. A late twentieth-
century analog is what has been called a “browse wrap” agreement.29 A
software purchaser is not bound by the terms printed at the bottom of a website
(or by the terms included in a cited link) if she can purchase the software from
the site without realizing that the site contains contractual language because she
could reasonably believe the purpose of the text on the website is to describe
the software’s functionality rather than the terms and conditions of the
transaction.30

As long as the nondrafting party has generalized notice that a set of terms
exists, however, courts usually find what Karl Llewellyn called “blanket assent”31
to those terms, even without evidence that the nondraftor has
specifically assented to their content.32 That is, a party who signs the signature
line of a written contract or clicks an online box that says “I agree to the terms
and conditions” is considered to have assented to the stated terms, even in the
absence of subjective knowledge of the import, or even the existence, of those
terms.

A corollary to the assumption of blanket assent is the oft-stated principle
that contracting parties have a “duty to read” the documents that they sign.
Parties may choose to disregard this duty completely, or to fulfill it with only
modest attention (i.e., negligently), but by doing so they assume the risk that
they will be surprised later by the embodied terms.33 As the U.S. Supreme
Court stated in the nineteenth century, “[a] contractor must stand by the words
of his contract; and if he will not read what he signs, he alone is responsible for
his omission.”34

The objective theory of contract, the principle of blanket assent, and the
duty to read, combine to produce the result that a nondrafting party’s signature

browsewrap as “where website terms and conditions of use are posted on the website typically as a
hyperlink at the bottom of the screen”).
32. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, Standard Form Contracting in the
assent’ dominates contemporary judicial treatment of standard-form provisions.”).
33. See, e.g., Torres v. State Farm Fire & Cas. Co., 483 So. 2d 757, 759 (Ala. 1983) (finding
that where an insurance agent told plaintiffs she would obtain flood insurance but such coverage was
not reflected in their insurance policy, the subsequent “loss was attributable to the plaintiffs’
carelessness and neglect rather than to the misrepresentation” by the agent).
constitutes legal assent to the terms specified in an integrated writing. When these presumptions are combined with the parol evidence rule, the result is that, when a signed writing contradicts or disclaims prior representations, those prior representations lack legal relevance.

2. The Tort Approach: Fraud

Notwithstanding the prior analysis, black letter law does not completely bar nondrafters from challenging the enforceability of signed writings when they are inconsistent with prior representations or promises. 35 Although the default assumption is that a signature provides blanket assent to all the terms within the writing, challenges to enforceability of the entire writing can be sustained by demonstrating that a party’s assent was compromised by duress, mistake, or—most pertinent to the Borat Problem—fraud. 36 I will refer to this as “the fraud rule.” 37

There are efficiency justifications for prohibiting false representations in negotiations, of course, in addition to moral ones. With correct knowledge concerning the subject matter of an agreement and the commitments being made by the counterparty, a negotiator will only enter into an agreement that makes her better off than she otherwise would be. Thus, contracts should satisfy the Pareto efficiency criteria, which provide that at least one party is made better off by the agreement, and no party is made worse off. 38 If false information causes the negotiator to overestimate the value of her counterparty’s commitments, however, it is possible that the misled party will be left worse off as a result of the agreement. 39 This would not only violate the Pareto criteria, but it would also call into question whether the agreement actually increased net social welfare.

Assume, for example, that Michael Psenicska was willing to provide a driving lesson for use in an Eastern European documentary film for $500 or even less, but that he would have demanded a minimum of $20,000 to appear in Borat had he known the true facts about the movie, its star, and its target

35. RESTATEMENT (SECOND) OF CONTRACTS § 214(d).
36. RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c; CORBIN ON CONTRACTS § 28.21.
39. Cf. RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 32 (2d ed. 2009) (referring to reaching an agreement, when a party would have been better off with an impasse, as one of the two “fundamental bargaining mistakes”).
audience. Given this assumption, enforcement of the signed writing left Psenicska worse off as a result of participating in the film shoot than he would have been if he had refused. If his participation was not worth more than $20,000 to Twentieth Century Fox, the transaction also reduced total social welfare.

3. Doctrinal Indeterminacy

The parol evidence rule’s purpose is to choose which set of representations or promises to enforce, while the fraud rule is concerned with false representations. While this difference appears to suggest a reasoned distinction concerning which rule should govern in a specific circumstance, the distinction turns out to be ephemeral where the Borat Problem arises.

A drafting party’s statement concerning the qualities of the consideration it will provide as part of an agreement can almost always be interpreted as a promise to provide goods or services of that quality. When the drafter then provides nonconforming consideration, the aggrieved nondrafter can plausibly allege that the drafter breached her contractual obligation or, alternatively, that she misrepresented the quality of what she would provide. Thus, when a nondrafting party believes that she was promised something other than or additional to what is described in the signed writing, she can allege breach of contract or, alternatively, promissory fraud (a promise made without a present intent to perform). In either case, the choice of doctrinal category is logically indeterminate. If we assume the signed writing describes the contractual consideration, the inconsistent prior statements (if actually made) would be misrepresentations. But this prejudges the question of what constitutes the content of the agreement, which the parol evidence rule is supposedly necessary to determine. If we assume that there is a question concerning the drafting party’s contractual obligations (which the parol evidence rule is needed to help sort out), then both of the competing representations concerning the drafter’s obligations are potential descriptions of the consideration that must be provided, and thus neither can be considered a misrepresentation.

As an example of a dispute over a factual representation, consider the case of Davis v. G.N. Mortgage Corp. Thomas and Cathy Davis alleged that G.N. Mortgage represented that the Davises’ home loan would require a prepayment

40. See Corbin on Contracts § 578 (contending that the parol evidence rule applies to agreements but not to false statements of fact).
41. Cf. Alfred Hill, Breach of Contract as Tort, 74 Colum. L. Rev. 40, 41–42 (1973) (arguing that when a statement of fact inducing a sale turns out to be false, the proper ground for complaint is that there has been a breach of promise).
42. Ian Ayres & Gregory Klass, Insincere Promises: The Law of Misrepresented Intent 4 (2005). Not all jurisdictions recognize promissory fraud as a cause of action but, according to Ayres and Klass, the doctrine is “unequivocally recognized” in at least forty-four states. Id. at 6.
43. 396 F.3d 869 (7th Cir. 2005).
penalty only if the Davises were to repay the balance within two years. By contrast, the written documents that the Davises signed at closing specified a five-year prepayment penalty period. On one view, over the entire course of the interaction, G.N. represented two sets of terms (i.e., one including a two-year penalty period and the other a five-year penalty period). Either set of terms could possibly describe the parties’ contractual obligation, but it is nonsensical to describe either as being “false.” On another view, G.N. misrepresented, whether intentionally or unintentionally, the content of a contract that included a five-year prepayment term. Consequently, the resulting litigation can alternatively be described as a dispute over whether the parties contracted for a short or long prepayment penalty period, or whether the mortgage company misrepresented the prepayment penalty term it was offering to the Davises.

When a plaintiff alleges promissory fraud—such as that the *Borat* producers promised to use the film footage of Psenicska and the other plaintiffs for an Eastern European documentary, all the while intending to produce a documentary-style comedy for an American audience, there is a similar indeterminacy concerning the nature of the dispute. On one hand, the issue can be described as whether the parties contracted for the plaintiffs to appear in an actual documentary or, alternatively, a documentary-style film. If Twentieth Century Fox contracted for the right to use the plaintiffs’ performances in an actual documentary, its alleged representations would not constitute misrepresentations at all, but rather contractual obligations to use the footage only in that type of production. Under this view, Twentieth Century Fox breached the contracts by using the footage in another type of film. On the other hand, if we assume the contract is for the plaintiffs’ performances in a documentary-style film, the producer’s alleged representation that it was making an actual documentary would be false.

It is only in a relatively unusual third type of situation—in which the statement that the drafting party allegedly made is unrelated to the consideration that the drafter will provide as part of the deal—that a claim of misrepresentation is logically distinct from a dispute over the terms of the agreement itself. In *Williams Ford, Inc. v. Hartford Courant Co.*, for example, a group of Connecticut automobile dealers alleged that they were induced to enter into bulk-rate advertising contracts with Hartford’s primary newspaper by the newspaper salespeople’s false statements that the deal in question was the most cost-effective of the newspaper’s various purchasing plans. In this situation, there was no arguable dispute over the parties’ contractual obligations—it was undisputed that they had agreed to a particular (high-cost) advertisement package—so misrepresentation was the only possible

44. *Id.* at 874.
45. *Id.* at 874–75.
46. 657 A.2d 212 (Conn. 1995).
47. *Id.* at 216.
claim. Note, however, that precisely because the allegedly false statement concerned a matter of only tangential relevance to the parties’ contract, the materiality of that misrepresentation (a doctrinal requirement of fraud and misrepresentation claims) is questionable.48

B. Inconsistent Solutions

American courts have responded to the doctrinal conundrum created by the Borat Problem in at least four different, and inconsistent, ways. What these approaches have in common, however, is that courts rarely, if ever, directly consider whether their choice of doctrinal categories promotes contractual efficiency or any other normative value that the law might wish to encourage.

1. Follow the Complaint

The most common approach is to defer to the doctrinal category that plaintiffs invoke in their pleadings, based on the basic principle that plaintiffs are entitled to remedies for whatever claims that they can prove.49 The Eighth Circuit’s decision in *Pinken v. Frank*50 exemplifies this approach.

Frank, an executive of Permaneer Corporation, purchased stock in the corporation from the three principal shareholders, including Pinken, under a stock purchase agreement that called for Frank to pay $6.50 per share in cash and provide promissory notes for an additional $240,000.51 When Pinken tried to collect on the notes, Frank claimed that he was fraudulently induced to enter into the agreement by Pinken’s oral representation that Pinken would enforce the notes only if the share price rose subsequent to the sale and Frank was able to sell his shares at a profit, which had not happened.52 Pinken attempted to invoke the parol evidence rule to prevent Frank’s testimony, but the court (applying Missouri law) sided with Frank on the ground that Frank’s evidence was being “offered to invalidate or defeat, not to vary or reform, the written contract.”53 There is no substantive analysis to support this conclusion, however—only reliance on Frank’s framing of the case.

Frank might have instead chosen to argue that his contract with Pinken made the enforceability of the promissory notes contingent on the appreciation of Frank’s stock, and thus that Pinken had no contractual right to call the notes. Pleading fraud or negligent misrepresentation, however, usually has two

---

48. Restatement (Second) of Torts § 538 (1977).
49. See Applications, Inc. v. Hewlett Packard Co., 501 F. Supp. 129, 134 (S.D.N.Y. 1980) (“[f]raud is a magic word . . . . By casting this complaint in tort, i.e., fraud, plaintiff has avoided the perils of the parol evidence rule . . . .”); see also Vigortone AG Prods. v. PM AG Prods., 316 F.3d 641, 644 (7th Cir. 2002); Pinken v. Frank, 704 F.2d 1019, 1023 (8th Cir. 1983); Downs v. Wallace, 622 So. 2d 337, 340 (Ala. 1993).
50. 704 F.2d 1019 (8th Cir. 1983).
51. Id. at 1021.
52. Id.
53. Id. at 1023.
advantages over contesting the content of the contract: it allows plaintiffs to avail themselves of tort damages (including the possibility of punitive damages), and it provides a way around the usual preference for signed writings under the parol evidence rule. For both reasons, it is unsurprising that plaintiffs in Borat-type cases usually strategically choose to concede that the signed writing constitutes the contract and allege that they were induced by fraud to sign it, rather than arguing that the signed writing does not accurately reflect the terms of the parties’ contract.

If the court credits the plaintiff’s labeling of his or her claim as fraud, the plaintiff still must prove he or she was “justified” or “reasonable” in relying on the false statement. Logically, the reasonableness of the reliance might be undermined by the fact that the allegedly false claim has been disclaimed by the language contained within the signed writing, but this should depend on the particular circumstances of the interaction. In Shah v. Racetrac Petroleum Co., for example, the plaintiffs were interested in purchasing a gas station and convenience store business but were concerned that their investment would be at risk if the lease of the property could be terminated. The plaintiffs allegedly received a series of promises from the defendant and its agents that the lease would not be terminated. The subsequently signed written agreement, however, stated that termination upon 30 days’ notice was permitted, and it included a merger clause (i.e., a provision declaring that the document is the complete agreement) stating that the writing “constitutes the entire understanding between the parties . . . with respect to the facilities covered.” When the defendant sold the property and attempted to exercise the termination provision in the signed writing, the plaintiffs alleged promissory fraud. In response, the defendant argued that the merger clause rendered it per se unreasonable to rely on any prior representations. The court responded that there was no “per se rule,” noted that the plaintiffs alleged six separate misrepresentations, and held that the plaintiffs had “raised a genuine issue of material fact.”

55. Id. §§ 537–545, 547. According to one review of the law of all fifty states, three-quarters require that reliance be justified or reasonable. Debra Pogrand Stark & Jessica M. Choplin, A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities, 5 N.Y.U. J.L. & BUS. 617, 621 (2009). The Second Restatement of Contracts allows a party to void a contract when she is “justified” in relying on a fraudulent or material misrepresentation. RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). Although there is arguably a difference between the “justified” and “reasonable” standards, courts appear to treat them as synonyms in this context. See MARK GERGEN, CONTRACTING OUT OF LIABILITY FOR DECEIT, INADVERTENT MISREPRESENTATION AND NEGLIGENCE MISSTATEMENT IN EXPLORING CONTRACT LAW 237, 249–50 (Jason W. Neyers et al. eds., 2009).
56. 338 F.3d 557 (6th Cir. 2003).
57. Id. at 561, 563–66.
58. Id. at 561–63.
59. Id. at 565.
60. Id. at 568.
2. The Back-Door Parol Evidence Rule

Permitting Borat-type plaintiffs to label their claims as fraud or misrepresentation threatens to swallow the parol evidence rule whole, or at least reduce it to a mere drafting obstacle in many situations. Some courts, including those that ruled on the Borat plaintiffs’ claims, have responded to this concern by purporting to follow the fraud rule while actually applying the parol evidence rule surreptitiously.

Both the federal District Court for the Southern District of New York, which heard the consolidated cases brought by Psenicska, Martin, and Streit, and the Second Circuit, which affirmed on appeal with a Summary Order, found that the fraud rule applied to the plaintiffs’ claims, and thus that the parol evidence rule was inapplicable. This turned out, however, to be a Pyrrhic victory for the plaintiffs. Both courts held that the plaintiffs’ reliance on the alleged oral misrepresentations of the producer was not reasonable, as a matter of law, because the no-reliance clause in the signed writing stipulates that the plaintiffs did not rely on any prior statements about the “nature of the film” or the “identity of any other Participants.”

The Borat decisions do not reveal whether, in the absence of the no-reliance clause, the courts would have ruled that reliance on the producer’s false statements was not justified because of the conflict between the oral statement that the filmmakers were making a foreign documentary and the written statement that the undertaking’s purpose was to produce an “entertaining . . . documentary-style” film. That is, neither the Southern District of New York nor the Second Circuit revealed how it might have ruled if Twentieth Century Fox had used only the first of the four distinct drafting approaches that lead to the Borat Problem (i.e., substantive inconsistency
between the text of the signed writing and prior representations), and that drafting parties commonly employ in these types of written documents. 66

The New York Court of Appeals has held, however, that reliance on oral statements cannot be reasonable if the oral statement is contradicted by the written document, even in the absence of a no-reliance clause. 67 In Citibank v. Plapinger, that court upheld a grant of summary judgment in favor of Citibank against the officers and directors of a company who had signed personal guarantees for the company’s debts. 68 When Citibank sought to enforce those guarantees, the guarantors claimed they had been induced to provide the guarantees by the bank’s earlier false representation that it would provide the company an additional line of credit, which the bank never provided. 69 The court found that the alleged statement was indeed fraudulent, but it ruled in favor of the bank on the theory that the guarantors’ reliance was unreasonable in light of the statement in the guarantee documents that the guarantors’ obligations were “absolute and unconditional.” 70

Other courts have followed the same line of reasoning. In Barnes v. Burger King Corp., 71 for example, a federal court in the Southern District of Florida granted summary judgment in favor of Burger King where a franchisee alleged he was fraudulently induced to purchase a Los Angeles hamburger franchise. The franchisee argued that he relied on the company’s claim that it had a “good faith policy” of not granting new franchises within two miles of existing franchises, only to watch Burger King approve another franchise five blocks away less than one year later. 72 The court found the franchisee’s reliance unreasonable, as a matter of law, because the supposed “good faith policy” was contradicted by the subsequently signed franchise agreement, which provides that the agreement “does not in any way grant or imply any area, market or territorial rights proprietary to the Franchisee.” 73

Where the Borat Problem exists, a court’s ruling that there can be no reasonable reliance when a subsequent signed writing includes contradictory language renders that court’s antecedent determination that the parol evidence rule does not apply to fraud claims hollowly formalistic. The ultimate resolution of the dispute is the same as if the parol evidence rule had been invoked directly and strictly: as a matter of law, the terms recorded in the signed writing are rendered enforceable and prior inconsistent representations

---

66. See supra text accompanying note 55.
68. Id. at 976–77.
69. Id. at 976.
70. Id. at 976–77.
72. Id. at 1423–24.
73. Id. at 1424, 1428.
are stripped of any legal import. Like the direct application of the parol evidence rule, this back-door application of the parol evidence rule is premised—sometimes explicitly, often implicitly—on the understanding that contracting parties have a duty to read the contents of written agreements to which they give general assent, even when drafted by the other party or presented as a contract of adhesion (that is, presented on a take-it-or-leave-it basis). Thus, for example, the Alabama Supreme Court has explained that summary judgment for the defendant is appropriate when the party claiming fraud is “fully capable of reading and understanding their documents, but nonetheless made a deliberate decision to ignore written contract terms.”

In a few cases, courts have gone so far as to turn the concern for fraud on its head and justified deference to the signed writing as necessary to counter frauds that nondrafting parties attempt to perpetrate. In Danann Realty Corp. v. Harris, the New York Court of Appeals’ leading decision in the field (as well as the primary precedent relied upon by the Second Circuit in the Borat litigation), the court dismissed a commercial real estate purchaser’s complaint that the seller had provided false oral information about the property. As justification, the majority noted that, in light of a provision in the seller-drafted written agreement that “neither party [was] relying upon any statement or representation” made by the other, the buyer’s allegations that it relied on a prior oral statement demonstrated that “it is guilty of deliberately misrepresenting to the seller its true intention.” In other words, it is the party who represents, via a signed writing, that she is not relying on any prior statements of her counterpart and then claims to have done just that who is guilty of fraud, not the party who makes false oral statements and attempts to disclaim them in a subsequent written document.

74. This is occasionally recognized by more candid courts. In one case, Judge Posner called bringing a fraud suit in the context of the Borat Problem “a device for trying to get around the limitations [of] the parol evidence rule” and held that no-reliance clauses “serve a legitimate purpose of closing a loophole in contract law.” Extra Equipamentos e Exportacao, Ltda. v. Case Corp., 541 F.3d 719, 724 (7th Cir. 2008).

75. Foremost Ins. Co. v. Parham, 693 So. 2d 409, 421 (Ala. 1997); see also Andrus v. Ellis, 887 So. 2d 175, 180 (Miss. 2004) (a party “may not complain of an oral misrepresentation the error of which would have been disclosed by reading the contract”). As Professor Mark Gergen has pointed out, this position is at odds with the competing rule that contributory negligence is not a defense to fraud. GERGEN, supra note 55, at 245; see also RESTATEMENT (SECOND) OF TORTS § 545A (1977) (justifiable reliance on fraudulent misrepresentation does not preclude recovery on the basis of contributory negligence).

76. This is sometimes called the “double liar” problem. See Abry Partners V, L.P., v. F&W Acquisition LLC, 891 A.2d 1032, 1058 (Del. Ch. 2006).


78. Id. at 601, 604.
3. **Fraud in the Inducement vs. Fraud in the Execution**

In an attempt to prevent the fraud rule from swallowing the parol evidence rule and vice versa, other courts faced with the *Borat Problem* have attempted to draw a line between claims of “fraud in the inducement,” which are trumped by the parol evidence rule, and claims of “fraud in the execution,” which are permitted notwithstanding the parol evidence rule.79 According to this distinction, nondrafting parties may not challenge the enforcement of a signed writing on the grounds that prior misrepresentations, which are subsequently disclaimed in the writing, induced them to sign. However, they may invoke the fraud rule if the drafter represented that the writing itself contained representations that are different from those it actually included.80 In short, the reasoning is that the parol evidence rule precludes a claim of “she promised me X,” but it does not preclude a claim of “she told me the document promises X.” The legendary legal scholar and treatise author Arthur Corbin favored this distinction, based on the reasoning that a signed writing supersedes the first type of representation (and, thus, that representation cannot be considered fraudulent), but not the second type of representation.81

A pair of Pennsylvania Supreme Court cases illustrates, however, just how thin the distinction between fraud in the inducement and fraud in the execution can be in practice.82 In *Yocca v. Pittsburgh Steelers Sports, Inc.*, football fans who had purchased season ticket seat licenses claimed that the Steelers franchise falsely promised that the licenses would guarantee them seats in a choice location (which they did not ultimately receive). The subsequent signed writing made a much looser representation concerning seat location.83 The court determined that the signed writing, which included a merger clause, constituted “the parties’ entire contract with respect to the sale of [seat licenses],” and thus that the parol evidence rule prevented the admission of any evidence to vary those terms.84

Just three years later, however, in *Toy v. Metropolitan Life Insurance Co.*, the same court confronted an insurance purchaser’s challenge to a signed writing that clearly specified the substantive terms of a permanent life

---

79. Eric Posner calls these “hard” parol evidence rule jurisdictions, as opposed to “soft” parol evidence rule jurisdictions. Posner, supra note 61, at 536.
80. See, e.g., Hamade v. Sunoco, Inc. 721 N.W. 2d 233, 247–49 (Mich. App. 2006) (holding that evidence of an alleged oral promise by franchisor not to permit another franchise to operate close to franchisee inadmissible absent a claim that the franchisor fraudulently convinced franchisee that the promise was actually contained in the writing when it was not); see also Apolito v. Johnson, 414 P.2d 442, 443–44 (Ariz. Ct. App. 1966) (holding that an alleged oral misrepresentation regarding a buyer’s liability was inadmissible under the parol evidence rule where contradicted by the written document).
84. Id. at 438.
insurance policy and included a no-representation clause. The buyer alleged that the seller’s agent falsely led her to believe she was investing in a savings plan. Here the court held the fraud rule applicable and the parol evidence rule inapplicable based on the trial court’s determination that the plaintiff alleged that the defendants had represented that the savings plan features of the financial instrument “would be included in the parties’ agreement.” Thus, the court held that the plaintiff’s claim was one of “fraud in the execution of a contract,” and therefore subject to “a far different analysis than that applied to the fraud claim alleged by the plaintiffs in Yocca.”

The court’s normative basis for distinguishing between the facts of Toy and Yocca is unclear. If a nondrafter has a duty to read a writing before signing to ensure that the drafter did not insert text inconsistent with prior representations or to guard against honest miscommunications between parties, why should the duty to read disappear just because the drafter states, or allegedly states, that the documentation reflects prior representations? Whatever the basis for the distinction (perhaps that it is more reasonable to assume that a counterparty will not directly lie about what is in a document than to assume he or she will not attempt to trick you into signing a document that disclaims prior promises), the value of the distinction is undermined by the apparent ease with which a plaintiff could avoid the fraud in the inducement rule by careful drafting of the complaint. In most cases, a nondrafting party who could honestly claim that the drafter made a prior representation that was inconsistent with the text of the signed writing could also honestly claim that the drafting party represented—implicitly through conduct if not explicitly through words—that the representation on which the nondrafting party relied would be reflected in the signed writing.

4. Scien
ter-Based Classification

A fourth approach courts use to address the Borat Problem is to base the doctrinal categorization of disputes on the scienter of the drafting party. Under this approach, plaintiffs may challenge the terms in a signed writing only if the defendant made prior false representations with the intent to mislead concerning the quality or extent of consideration. Otherwise, following the principle of the parol evidence rule, evidence of prior inconsistent representations is inadmissible. Several courts have relied on this distinction, allowing parties to introduce prior oral evidence to prove “fraud,” which requires intentionality (or recklessness), but not to prove merely “negligent misrepresentation,” which does not require intent to mislead.
The Wyoming Supreme Court’s decision in *Snyder v. Lovercheck*\(^9\) exemplifies this scienter-based distinction. Snyder entered into a contract to purchase Lovercheck’s wheat farm, which according to Snyder, turned out to have a substantial rye infestation over 1800 acres.\(^8\) Snyder alleged that Lovercheck had told him that the infestation was limited to only 100 acres, but the undisputed evidence showed that Snyder subsequently signed a written real estate form contract that included a broad no-reliance term along with a merger clause.\(^9\) Snyder sued, alleging both fraud and negligent misrepresentation.

With a nod to the “age-old proposition that fraud vitiates all contracts,” the court dismissed the “sanctity of the right to contract” in general as well as the Second Circuit’s holding in *Danann Realty* in particular, and found that Snyder was not precluded from bringing a fraud claim.\(^9\) Then, mere paragraphs later, the court defended the “vitality of contract” (and the duty to read) against tort law’s attempted encroachment, and concluded that Snyder’s negligent misrepresentation claim must be dismissed as an impermissible attempt to rewrite the contract.\(^9\)

This distinction can be understood, perhaps, as standing for the proposition that the contents of the signed writing constitutes the contract between the parties, but that public policy considerations preclude enforcement of contract terms that disclaim liability for intentionally caused harm. This raises the question, however, of why the public policy limitation should not also apply to disclaimers of negligently caused harm. The *Snyder* court acknowledged that “there is practically no difference in the harm that can result from either fraud or negligence” but asserted that only fraud is “sufficiently egregious to warrant the intermingling of tort and contract principles.”\(^9\)

**II. THE NORMATIVE TENSION: BILATERAL OPPORTUNISM**

The fact that courts have employed at least four different doctrinal approaches when responding to the *Borat* Problem likely reflects the judiciary’s normative ambivalence towards favoring either the position of drafting or nondrafting parties. Contract law generally attempts to encourage parties to enter into mutually beneficial, and thus social welfare–enhancing, contracts by

---


89. See 992 P.2d 1079 (Wyo. 1999).
90. *Id.* at 1083.
91. *Id.*
92. *Id.* at 1084–86.
93. *Id.* at 1087–89.
94. *Id.* at 1088.
minimizing their joint costs of avoiding opportunistic exploitation by their negotiation counterparts. The judiciary’s failure to converge on a uniform treatment of the Borat Problem can be attributed to the fact that, where the Borat Problem arises, the risk of opportunism is bilateral. A legal rule protective of the interests of drafting parties—what I will call a “pure duty-to-read rule”—subjects nondrafting parties to the possibility of opportunistic exploitation by drafters. Conversely, a rule protective of nondrafting parties—what I will call a “no-exploitation rule”—subjects drafting parties to the risk of nondrafter opportunism. Either polar position that the law might take would undoubtedly cause some combination of three problems that reduce the ability of the parties to contract efficiently, and thus reduce social welfare: (1) the enforcement of agreements that reduce rather than increase one party’s expected utility, (2) the expenditure of transaction costs by one of the parties to reduce the risk of such exploitation, and (3) a decrease in the number of mutually beneficial contracts produced because at least one party wishes to avoid both the risk of exploitation and the cost of self-protection.

The first step toward addressing the Borat Problem, which is the subject of this Part, is to carefully identify the costs of a pure duty-to-read rule and the costs of a no-exploitation rule using a combination of traditional and behavioral economic analyses. Part III then proposes a doctrinal approach designed to minimize the joint costs associated with the bilateral risk of exploitation.

A. Risks to Drafting Parties

A no-exploitation rule would allow nondrafting parties to maintain a cause of action in tort or contract when they can convince the fact finder that the drafting party made prior oral or written representations that are inconsistent with the text of the final, signed writing. By prohibiting knowingly false, misleading, or contradictory statements in negotiations preceding the presentation of a standard form contract, a no-exploitation rule would have no direct social costs. Honesty involves no greater transaction costs than deception, and the former is often significantly easier and cheaper. Such a rule,
of course, would also have the virtue of being consistent with the common moral intuition that deception is wrong and the law should discourage it, or at the very least, not encourage it. Extending the rule to prohibit false statements made unintentionally would create some transaction costs, as drafting parties would have to invest in order to avoid making unknowing statements that are inconsistent with their signed writings. The cost of identifying and avoiding discrepancies between prior representations and signed writings, however, usually would be lower for drafters than for nondrafters.

Providing legal protection to nondrafting parties through a no-exploitation rule, however, would expose drafting parties to the risk of three types of postcontractual exploitation, discussed in greater detail below: (1) knowingly false claims, (2) honestly made but mistaken claims, and (3) promises made by drafters’ negotiation agents whose interests are imperfectly aligned with the drafters’ interests. Drafting parties could respond to this risk by accepting occasional exploitation as a cost of doing business, incurring transaction costs to try to protect themselves against exploitation, choosing not to engage in what could be mutually beneficial transactions, or—most likely—some combination of the above three strategies. Any of these choices would reduce the net value of contracting to drafting parties.

1. Knowingly False Claims

In a legal regime in which nondrafting parties are permitted to challenge the validity of written terms based on testimony concerning prior statements, nondrafting parties who become unhappy with a contract in hindsight might attempt to opportunistically exploit the drafting party by falsely alleging that the drafting party made prior oral representations that were inconsistent with the subsequent written terms. 97 If courts could always identify such claims as false when they in fact are, and do so early in the litigation process, the incentives to bring false claims would be minimized. Defendants would know they would always prevail in litigation, ensuring that plaintiffs bringing such claims would receive negative payoffs. With this knowledge, few plaintiffs would bring such cases, and plaintiffs’ lawyers working on a contingent-fee basis would avoid them.

In reality, judges and juries would have difficulty distinguishing true allegations from false ones, and they would err on some occasions. To the extent that juries might be unduly sympathetic toward nondrafting parties, who

97. See Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000) (no-reliance clauses “ensure[] that both the transaction and any subsequent litigation proceed on the basis of the parties’ writings, which are less subject to the vagaries of memory and the risks of fabrication”); see also 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, 1065 (1966) (“[W]hen a court announces a sweeping duty to read . . . one senses that the court is concerned with the likelihood of perjury and difficulties of adjudicating facts.”).
are more likely to be economic underdogs in disputes, such errors could occur more often than would be dictated by random chance. The consequence is that potential plaintiffs would have an incentive to make false claims in some cases. Even if juries could evaluate the veracity of such allegations with perfect accuracy, judges usually would not be able to identify false claims based on pleadings or even party affidavits. Thus, even assuming drafting parties would ultimately prevail in litigation based on false factual allegations, they would incur the substantial litigation costs of taking a lawsuit all the way to trial in order to do so.

The transaction costs of litigation and the risk of an adverse verdict would induce many drafting parties to pay to settle lawsuits based on false allegations, or to renegotiate terms of contracts to avoid litigation. This fact, in turn, gives nondrafting parties who are not deterred by reputational or legal risks (i.e., perjury) an incentive to fraudulently allege that the drafting party made earlier oral statements or promises that are inconsistent with the subsequent set of written terms. The high likelihood of settlement would also reduce the incentive of contingent-fee lawyers to vigorously screen out false claims, even assuming that they would not knowingly suborn perjury.

In the face of these incentives, drafting parties who choose to contract would bear some combination of the costs of losing, settling, and/or defending against nonmeritorious claims. They could avoid these costs by declining to contract, of course, but forgoing potentially Pareto efficient transactions is also costly. However they proceed, a no-exploitation rule would reduce the net value of contracting to honest drafting parties compared to a pure duty-to-read rule, which would render evidence concerning prior representations that are inconsistent with signed writings legally irrelevant.

2. Unconscious Opportunism

Even in a world of scrupulously honest nondrafting parties, costs associated with false claims of precontractual representations would still exist. Research demonstrates that memory retrieval is not like rewinding and playing

---

98. Charles McCormick, The Parol Evidence Rule as a Procedural Device for Controlling the Jury, 41 YALE L.J. 365, 366 (1932) (“The average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing.”); cf. Corbin, supra note 23, at 608 (describing the fear of jury sympathy for the underdog as one reason for the parol evidence rule).

99. See Posner, supra note 61, at 562 (observing that the prospect of judicial error is what encourages opportunism that the parol evidence rule is designed to prevent).

100. See Glenn D. West & W. Benton Lewis Jr., Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be the “Entire” Deal?, 64 BUS. LAW. 999, 1034 (fraud and negligent misrepresentation claims are “hard to dismiss on a threshold, pre-discovery motion [and] difficult to disprove without expensive, lengthy litigation”).

a videotape. It is, instead, a constructive process that draws in part on the expectations, biases, and worldviews of the individual attempting to remember. As a consequence, memories, even if intensely believed, are often imprecise and sometimes entirely inconsistent with the events that actually occurred. Parties can be mistaken in their recollections of what exactly was or was not said over the course of a negotiation.

The risk of false claims concerning contradictory oral statements or promises is exacerbated by the problem of self-serving bias—that is, “the common human tendency to interpret the world to make it square more comfortably with one’s own interests and beliefs.” A seminal study conducted in the 1950s illustrates this concept. Experimenters showed students at Dartmouth and Princeton the recording of a particularly contentious football game between the two schools, and asked the students to identify the fouls committed by each team. Students’ perceptions of which team committed the most infractions differed markedly based on their allegiances: Princeton students were more likely to identify violations by Dartmouth than by Princeton, and vice versa. One consequence of the self-serving bias is that faulty memories are likely to be systematically skewed rather than randomly distributed. That is, nondrafting parties who misrecall the exact nature of the bargaining interaction that preceded written documentation are differentially likely to recollect those statements as being to their advantage.

Evidence of the self-serving bias suggests not only that nondrafting parties are likely to disproportionately interpret hazy recollections to their benefit, but also that they will believe that they are more likely to prevail in litigation than the facts warrant. A wealth of research demonstrates that people are overconfident when predicting the likelihood of desirable outcomes. Research also demonstrates that individuals strongly believe that unbiased outsiders (like judges and jurors) are more likely to view the world as they

103. See, e.g., Craig E.L. Stark et al., Imaging the Reconstruction of True and False Memories Using Sensory Reactivation and the Misinformation Paradigms, 17 LEARNING & MEMORY 485, 485 (2010).
106. Id. at 130–32.
107. See, e.g., Rissman v. Rissman, 213 F.3d 381, 384 (7th Cir. 2000) (“Acting in the best of faith, people may ‘remember’ things that never occurred but now serve their interests.”).
108. One literature review calls this “one of the most robust findings in the psychology of prediction.” David A. Armor & Shelley E. Taylor, When Predictions Fail: The Dilemma of Unrealistic Optimism, in Heuristics and Biases: The Psychology of Intuitive Judgment 334, 334 (Thomas Gilovich et al. eds., 2002).
Studies of students playing the role of lawyers predicting the outcomes of hypothetical lawsuits and of actual lawyers predicting the resolutions of real cases have both found that, on average, subjects make self-serving and unjustifiably optimistic predictions of litigation outcomes.

The prediction that follows is this: if the law permits nondrafters to introduce evidence of inconsistent prior representations made by drafters, even nondrafters with good intentions would file some factually unjustified lawsuits. As is true for knowingly false claims, the legal rule would decrease the net value of contracting to drafters. In contrast, a legal prohibition on the introduction of prior statements that are inconsistent with a signed writing would protect drafting parties against imprecise or confused memories, increasing the net benefits of contracting.

3. Rogue Agents

In addition to the costs associated with false claims that result from the twin realities of judicial error and self-serving bias, a no-exploitation rule would also subject drafting parties to the risk of exploitation by their own negotiating agents.

Business entities, as principal parties, are often represented in negotiations by agents whose interests are not in complete alignment with their principals’ interests. For instance, an agent in the field who is compensated on a commission basis might stand to profit personally from convincing a counterparty to enter into an agreement, even if the terms of the agreement harm his or her principal or prove to be unenforceable at a distant date. When incentives diverge, agents might be tempted to make representations or promises in the course of negotiations that suggest a proposed deal is more desirable to the nondrafting party than is indicated in the written terms, which are likely to be prepared by the entity’s lawyers and more closely controlled by the entity’s top officers. Using Davis v. G.N. Mortgage Corp. as an example, a mortgage broker seeking to secure a commission might be tempted to tell a customer that the prepayment penalty period is shorter than the written

---

109. In a particularly telling example of this, one study found that 87 percent of magistrate judges believed that they are reversed on appeal less often than at least half of their colleagues. Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 814 (2001).


111. Jane Goodman-Delahunty et al., Insightful of Wishful: Lawyers’ Ability to Predict Case Outcomes, 16 PSYCHOL. PUBLIC POL. & LAW 133, 134 (2010).

112. See Blair, supra note 101, at 436.

113. See generally Macaulay, supra note 97, at 1059 (observing that businesses use standard forms to control agents).

114. 396 F.3d 869 (7th Cir. 2005).
document specifies. As long as the agent’s statements are within his or her apparent realm of authority, they are legally attributable to the principal.\footnote{Restatement (Second) of Agency §§ 257–259A (1958).}

The problem extends beyond the faithless agent to the merely negligent one. Agents who do not intentionally attempt to present the counterparty with a set of more favorable provisions than are embodied in the written terms might nonetheless do just this as a result of being insufficiently aware of the standard form contract’s content or insufficiently careful in their communications.

A no-exploitation rule would require drafting entities, in some combination, to (1) bear the risk of exploitation (intentional or unintentional) by rogue agents, (2) expend more resources to train and monitor their agents, or (3) choose not to contract in order to avoid these costs. As is true concerning the risks of false claims, the consequence of drafters having to select some combination of these options increases their cost of contracting, thus reducing the net value of contracting.

4. Consequences for Efficiency and Distribution

As described above, a no-exploitation rule would expose drafting parties to the risks of knowingly false claims, unconscious opportunism, and rogue agents. Drafters could respond to these risks by bearing them (and suffering occasional losses), incurring transaction costs to mitigate them, or declining to enter into contracts to avoid them altogether. No matter which combination of these three strategies drafters choose to use, the legal rule would act as an implicit tax on contracting, reducing the gains in trade that can be created.

Importantly, these costs would reduce the benefits available from contracting for both drafters as well as nondrafters; legal rules that burden contracting impose costs on the parties on both sides of transactions. Depending on the slopes of the supply and demand curves applicable to particular transactions, drafting parties would transfer at least some of the social costs created by the risk of their exploitation to nondrafting parties in the form of higher prices or lower quality goods and services. And to the extent that higher contracting costs exceed the social value that contracts would otherwise create, potentially profitable deals would go unconsummated, to the detriment of both drafters and nondrafters.

This implicit tax on contracting that a no-exploitation rule would create can be substantially reduced, if not eliminated entirely, by a rule prohibiting the introduction of evidence of prior statements that are inconsistent with a signed writing—that is, by enforcement of a pure duty-to-read rule.

B. Risks to Nondrafting Parties

Although a pure duty-to-read rule would greatly reduce the risk of exploitation of drafting parties and the attendant social costs, it would increase
the risk of opportunistic drafting parties exploiting nondrafters by inducing the latter to enter agreements based on oral promises and factual representations and then disclaiming the statements in the signed writing. This is, of course, exactly what the *Borat* plaintiffs alleged that Twentieth Century Fox did in order to obtain their on-camera performances.

As is true for drafters, nondrafters could respond to the risks of exploitation created by an unfavorable legal rule by adopting one, or a combination, of three strategies: (1) accepting the risk of occasional exploitation as a cost of doing business, (2) expending resources to reduce or eliminate the risk, or (3) declining to engage in transactions that have the potential to increase social welfare. Having to employ any of these strategies would reduce the expected value of contracting for nondrafters.

Whereas drafting parties operating under a no-exploitation rule must be prepared to invest heavily in litigation in order to minimize exploitation (and even then, the risk of exploitation remains due to the potential for judicial error), nondrafters operating under a pure no-duty-to-read rule appear to have a cheaper self-protective option: they need only read the written document before signing it. Consistent with this observation, descriptions of the duty-to-read rule sometimes characterize the failure to read as an act of negligence, implying that the costs of reading are relatively low, at least compared to its benefits. Sometimes, courts make explicit the assumption that reading is an inexpensive self-help measure. The Wisconsin Supreme Court, for example, scolded a plaintiff raising the *Borat* Problem for “asking the court to protect him against the wrong of another merely because he failed to take the few moments of time that would have enabled him to protect himself.”

The remainder of this Section contends that the intuition that “reading” is cheap is wrong, at least in the context of the *Borat* Problem. That is, at least when the drafting party has already described salient elements of a proposed deal, reading is not a low-cost way to avoid the risk of opportunist exploitation of nondrafting parties. This realization, in turn, suggests that a pure duty-to-read rule would not necessarily be the most efficient solution to the *Borat* Problem.

---

116. *See, e.g.*, Godfrey, Bassett & Kuykendall Architects Ltd. v. Huntington Lumber & Supply Co., 584 So. 2d 1254, 1259 (Miss. 1991) (“[P]arties to an arms length [sic] transaction are charged with a duty to read what they sign; failure to do so constitutes negligence.”); Bostwick v. Duncan, Johnston & Co., 60 Ga. 383, 387 (1878) (refusing to “relieve [the defendant] from [his] gross negligence in making [his] contracts” when he failed to read and instead relied on the assurances of an agent); *WILLISTON ON CONTRACTS* 70:113 (4th ed. 2011) (calling harms suffered from failing to read the consequences of the nonreader’s “own negligence”).

1. Direct Costs of Reading: Complexity and the Confirmation Bias

It is no secret that extremely few nondrafting parties read contracts, especially those that are prepared on a standard form and/or presented on a take-it-or-leave-it basis. Recent empirical research by Florencia Marotta-Wurgler and colleagues documents just how uncommon reading actually is. In a study of more than 45,000 households, the researchers found that only 0.05 to 0.22 percent of online shoppers for computer software even accessed the license agreement terms, and that most of those who actually accessed the terms viewed them for too short a time period to have read very much. The researchers further found that reducing the number of “clicks” necessary for a consumer to access the contract terms only increased the number of views on the order of one customer per thousand, and that the very few customers who did access the standard form terms were no less likely to make a purchase if the terms were favorable to the seller than if they were favorable to the buyer.

The evidence of nonreading, notwithstanding the obvious risk of exploitation, strongly suggests that the cost of reading contract terms is far from de minimis. The duty-to-read rule came to prominence in a different era, when most written agreements were shorter than they typically are today and standard form contracts were rare. In the more complex and standardized environment of twenty-first century commerce, the time and effort required to read and understand standard form contracts can be substantial, even for sophisticated and educated parties. Further, since standard form contracts are usually drafted by lawyers, the language is often inaccessible to laypeople. When this is the case, the task of “reading” the standard form contract actually requires paying a lawyer to review it, a process that is costly even if the contract itself is not long. Even more troubling is the fact that the cost of reading contract terms depends in part on the behavior of the drafting party. When drafters want to discourage reading, they can increase the costs of doing so by increasing the length and opacity of their standard forms.


121. Id.

122. See, e.g., CORBIN ON CONTRACTS § 29.12 (2010) (noting that the duty-to-read rule is rooted in “bargaining practices of the past, when the self-reliance ethic was strong and standardized agreements were rare”).

123. See, e.g., Hillman & Rachlinski, supra note 32, at 446.
When a drafting party makes prior representations about the nature of a transaction, as is the case when the *Borat* Problem arises, the common heuristic known as “confirmation bias” can make it difficult for even sophisticated laypeople to identify and understand the significance of contradictions or disclaimers. The confirmation bias creates a tendency for people to search for information in a way that confirms rather than contradicts their prior beliefs about the world.124 Perhaps more importantly, when people have in mind only a single hypothesis about some fact in the world, they tend to interpret ambiguous information as supportive of, rather than inconsistent with, that hypothesis, and pay more attention to supportive as opposed to counterindicative information.125 Thus, although it often seems obvious in hindsight that the terms embodied in a signed, written document are inconsistent with a drafting party’s prior representations, the inconsistency may be difficult for the nondrafting party to recognize at the time of signing, even when they read the written document.126 Again, the level of difficulty is not independent of the behavior of the drafting party. The challenge of the confirmation bias is likely to be magnified when the drafting party wishes to mislead the nondrafting party and attempts to leave the smallest possible distance between its oral representations and the later-provided written terms.

The facts of the *Borat* case itself illustrate this problem. Twentieth Century Fox agents allegedly told the plaintiffs that the studio was making a documentary film for an Eastern European audience. The written disclaimer then specified that it would use the footage for a “documentary-style film.”127 The district court had the luxury of interpreting the written language entirely divorced from the surrounding events. It also benefitted from knowing what type of movie the studio actually produced. From this perspective, the written language seemed like a truthful description of the feature film.128 *Borat* was not a documentary, of course, but it was presented in the style of a documentary. Thus, the court held that “the term ‘documentary-style film’ is not ambiguous,”129 and chastised the plaintiffs for their “unwilling[ness] to

---

124. *See generally Margit E. Oswald & Stefan Grosjean, Confirmation Bias, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 79 (Rudiger F. Pohl ed., 2004); Martin Jones & Robert Sugden, Positive Confirmation Bias in the Acquisition of Information, 50 THEORY & DECISION 59 (2001) (demonstrating operation of the confirmation bias when subjects have to pay for information).*

125. *See Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 REV. OF GENERAL PSYCHOL. 175, 177–78 (1998).*

126. *See, e.g., O’Neil v. Int’l Harvester Co., 575 P.2d 862, 864 (Colo. 1978) (plaintiff interpreted an “as is” clause in a contract to mean “as the defendant had verbally represented” the truck for sale to be, rather than as it actually was).*

127. *Borat Release, supra note 9, ¶ 1.*


129. *Id. at *5.*
recognize that the operative word in the phrase ‘documentary-style film’ is ‘style’ and not ‘documentary.’”

The problem with the court’s interpretation is that a person who had been told by an agent of the producer that the project was an actual documentary and had no reason to believe otherwise would be inclined to interpret the text as consistent with that expectation. Thus, the natural result in the *Borat* situation would be for a reader to place greater attention on the word “documentary” than on the word “style.” It does not seem like a stretch to hypothesize that the studio’s lawyers hoped for this exact result when they drafted the language.

This does not mean, of course, that it would have been impossible for a very careful reader (or a lawyer with a working hypothesis that the drafting party was seeking to exploit his or her client) to recognize the subtle distinction between the terms “documentary” and “documentary-style film” and to suspect that trickery might be afoot. It is possible, even likely, that would-be stooges other than the *Borat* plaintiffs did just this and decided not to sign the form and play their assigned roles in front of the cameras. But to unearth the deception would have required the *Borat* plaintiffs to make a conscious and determined effort to overcome heuristics on which the human mind typically relies. This level of alertness would increase the costs to nondrafting parties of avoiding exploitation. And the higher the costs of protective measures, the less likely that nondrafters would be to take them, increasing the incentive for drafting parties to attempt to engage in exploitation.

2. *Indirect Costs: Undermining Trust*

Many boilerplate terms that appear in standard form contracts deal with unlikely contingencies or are otherwise tangential to the primary purpose of the agreement. Cognitive limitations on human beings’ abilities to process information often cause individuals making contracting decisions to narrow their focus to a relatively small number of “salient” decision attributes and ignore the content of remaining “nonsalient” attributes, including terms nestled deep within standard form contracts.

Neither the costs of thoroughly reading and understanding standard form contracts, nor the lack of salience of many terms commonly included in boilerplate, however, satisfactorily explains why nondrafters often appear unwilling even to skim standard form contracts to make sure that they do not contradict or disclaim the drafting party’s prior representations concerning central or salient terms—such as, for example, the nature of the film in which

---

130. *Id.*
the Borat plaintiffs would be appearing. A more promising explanation for many nondrafting parties’ almost resolute determination to not even briefly peruse written agreements prior to signing is the consequence that reading can have on the bonds of trust between parties. In this context, “trust” is defined as a willingness to rely on the good faith behavior of another when doing so places oneself at risk of exploitation.

A behavioral research experiment known as the “Trust Game”133 provides some potential insights. In the basic, acontextual version of the game, one player (the “Trustor”) is provided with a fixed amount of money (the “endowment”) and has the choice of keeping it all or transferring some or all of it to the second player (the “Trustee”). If the Trustor keeps the entire endowment, the game ends. If she transfers some or all of the endowment to the Trustee, the experimenter multiplies the amount transferred by some factor (often by three). The Trustee then has the choice of keeping the multiplied amount or returning some or all of it to the Trustor. At this point, the game ends.134

If the Trustor demonstrates trust by transferring part or all of the endowment to the Trustee (thus risking that the Trustee will return nothing) and the Trustee proves to be trustworthy by returning at least as much as the Trustor risked, both players can end up better off than if there had been no trust. Notwithstanding this happy possibility, standard game theory predicts that the players will fail to create this value.135 The Trustee will maximize her income by keeping any portion of the endowment she receives from the Trustor, because she has nothing to gain by making a return transfer. Anticipating this result, a rational Trustor will not transfer any of the initial endowment to the Trustee.136

In stark contrast to game theoretic predictions, laboratory experiments demonstrate that a large percentage of Trustors do exhibit trust, and a large percentage of Trustees reward that trust by returning to the Trustor more than the amount that she transferred. This is true even when subjects play the game with a particular counterpart only once, making revenge impossible,137 and

133. The experiment is also sometimes called the “investment game.” See e.g., Joyce Berg et al., Trust, Reciprocity, and Social History, 10 GAMES & ECON. BEHAV. 122 (1995).
134. See, e.g., Ernst Fehr & Simon Gachter, Fairness & Retaliation: The Economics of Reciprocity, 14 J. ECON. PERSP. 159, 162 (2000); Berg et al., supra note 133, at 123.
135. Berg et al., supra note 133, at 123.
136. Id.
137. See, e.g., Michael Bacharach et al., The Self-Fulfilling Property of Trust: An Experimental Study, 63 THEORY & DECISION 349, 353–54 (concluding from a review of the experimental literature that more than half of Trustors demonstrate trust in one-shot games); Catherine C. Eckel & Rick K. Wilson, Is Trust a Risky Decision?, 55 J. ECON. BEHAV. & ORG. 447, 451 (“Previous results from variations on this game indicate that a large fraction of subjects trust by sending some positive amount, and trust is just reciprocated on average.”). Results reported in one oft-cited, double-blind study are typical: thirty out of thirty-two Trustors transferred part or all of the endowment, and sixteen out of twenty-eight Trustees who received at least one dollar returned the
even when the stakes are very high relative to the subjects’ incomes. The propensity to trust increases substantially when players are permitted to exchange verbal communications with one another. Presumably this is because Trustees use communication to send signals that they are trustworthy. In addition, and importantly, exhibiting trust seems to have a positive causal effect on the trustworthiness of Trustees, a relationship sometimes called “trust responsiveness.” That is, the more trust exhibited by the Trustor, the more that Trustees reward that trust, even though doing so is contrary to their self-interest.

Other laboratory experiments, modeled on principal-agent relationships, have generated similar findings. In one type of game, “Agents” can choose between investments that benefit either the “Principal,” whom they represent, or themselves. Principals can allow their Agents complete freedom of action concerning the investment choice or, at a cost, they can choose to “monitor” the Agent’s behavior, which limits the extent to which the Agent can exploit them by selecting investments that disproportionately benefit the Agent. Studies have found that Agent subjects are more likely to make investment choices that benefit the Principal—at real cost to themselves—when the Principal subject has placed his or her payoff at risk by choosing not to monitor the Agent’s behavior.

When a Trustor keeps the initial endowment rather than transferring, or when a Principal engages in costly monitoring, she signals that she does not trust her counterpart to refrain from exploitation and instead engage in cooperative behavior. In contrast, when a Trustor transfers part or all of her money, with Trustors who trusted ending the game with slightly more than their initial endowment, on average. Berg et al., supra note 133, at 131.

138. See Fehr & Gachter, supra note 134, at 162 (experimental income equal to ten weeks’ salary).
139. Cf. Daniel Balliet, Communication and Cooperation in Social Dilemmas: A Meta-Analytic Review, 54 J. CONFLICT RES. 39, 46–47 (2010) (finding a substantial positive correlation between the ability to communicate and cooperation in a range of social dilemma games (of which the trust game is one variety) and that face-to-face communication has a greater effect than written communication).
140. Cf. Eckel & Wilson, supra note 137, at 461 (finding trusting behavior is positively correlated with the return Trustors expect to receive from Trustees).
142. See Bacharach et al., supra note 137, at 380–81.
144. Id. at 1617. These findings are consistent with the assertions of relational contract theorists that formal contracts can undermine profitable relationships. See, e.g., David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 373, 426–30 (1990); Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55, 64 (1963).
endowment, or a Principal allows her Agent free rein, this signals a high degree of trust, which can create a “virtuous circle.”\textsuperscript{145} of behavior.

The mechanism by which trust affects the extent of cooperative, other-regarding behavior is not entirely clear: it could be that the reciprocity norm encourages similarly sized transfers,\textsuperscript{146} or that recipients of trust desire to live up to the high expectations (and the implicit compliment) bestowed upon them.\textsuperscript{147} Whatever the precise mechanism, the widespread willingness of actors to extend trust in these situations suggests an implicit (and perceptive) calculation that signaling distrust can be more costly than risking exploitation.\textsuperscript{148} One group of researchers has called this negative consequence of engaging in self-protection “the hidden cost of control.”\textsuperscript{149}

When a drafting party makes oral representations to a nondrafter and then presents a standard form contract for signature, the nondrafter is arguably placed in an analogous position to that of a Trustor or Principal. By signing the form without reading it, the nondrafter signals her trust that the drafter will not exploit her. In contrast, by reading the document carefully, the nondrafter signals something less than complete trust in her counterpart.\textsuperscript{150} Asking for an extended amount of time to consider the document or seek legal counsel likely increases the negative effect of the signal.

When contracting with relative strangers, the extent to which parties signal trust or distrust might have a particularly strong impact on the future behavior of the parties. Most people, it turns out, use social cues as a focal point around which to coordinate behavior, exhibiting prosocial behavior when the context seems clearly to call for it and selfish, individualistic behavior when the social context indicates that it would be appropriate.\textsuperscript{151} Arm’s-length


\textsuperscript{146} See Berg, \textit{supra} note 133, at 132. Cf Fehr & Gachter, \textit{supra} note 133, at 169 (summarizing experimental games in which “workers” expend more effort for “employers” who offer higher pay than is necessary to attract them to the job).

\textsuperscript{147} Pelligr, \textit{supra} note 141, at 655, 657; Falk & Kosfeld, \textit{supra} note 143, at 1623 (finding a positive correlation between an Agent’s perception of the Principal’s expectations and the Agent’s actual performance).

\textsuperscript{148} Florian Herold, \textit{Contractual Incompleteness as a Signal of Trust}, 68 \textit{GAMES \\& ECON. BEHAV.} 180, 187 (2010); cf Bacharach et al., \textit{supra} note 137, at 370 (explaining that Trustors who are students of game theory may choose to display trust based on the assumption that Trustees are likely not students of game theory).

\textsuperscript{149} Falk & Kosfeld, \textit{supra} note 143, at 1612.

\textsuperscript{150} Although modern social science literature on trust was not available at the time, Professor Macaulay intuitively recognized forty-five years ago the relationship between reading standard forms and discouraging trust, observing that “part of decent social and business conduct is trust,” and that “in many negotiation situations all of the pressures push for friendly gestures rather than a suspicious line-by-line analysis of the writing.” Macaulay, \textit{supra} note 97, at 1061.

\textsuperscript{151} \textsc{Lynn Stout, Cultivating Conscience: How Good Laws Make Good People} 106–10 (2011).
contracting is arguably an ambiguous context: a contractual partner is alternately someone with whom you work to create social value and someone with whom you compete to appropriate that value. Thus, signals of trust or distrust that parties convey in this context might serve as social cues that have a larger-than-usual impact on their counterpart’s mental determination of whether the situation calls for prosocial or selfish behavior.

Unlike the situations in the Trust Game and the Principal-Agent Game, in the case of the Borat Problem, a nondrafter’s trust signal at the time of signing cannot affect the drafter’s decision of whether or not to exploit the nondrafter during the preagreement negotiation process. The drafter’s decision concerning whether or not to exploit is made, of course, before the standard form is presented for the nondrafter’s signature. But few agreements involve one-time, spot transactions, in which there is no room for opportunistic behavior after contract formation. Most agreements require one or both parties to expend postcontractual effort, and many require joint efforts, in order to satisfy the goals of the agreement. In these circumstances, bonds of trust are likely to increase the chances that parties will engage in cooperative behavior that both maximizes the value of the deal and builds a basis for profitable cooperation in the future.

Although contractual completeness reduces uncertainty and the risk of misunderstandings, some empirical research has found that it can also lead to lower levels of trust between contracting parties. As one group of researchers concludes, a contracting party’s suggestions that more detail or clauses be added to a contract can convey that the party is more concerned about its own

152. Id. at 190–91 (identifying contracting as a context with ambiguous cues concerning whether prosocial or selfish behavior is appropriate).

153. The tension between the benefits of behaving cooperatively and benefits of behaving competitively in contracting situations is referred to by negotiation theorists as “the negotiator’s dilemma.” See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR, 29–45 (1986).

154. See generally G. Richard Shell, Opportunism and Trust in the Negotiation of Commercial Contracts, 44 VAND. L. REV. 221, 226 (1991) (identifying trust as the key to successful commercial dealings); Kenneth Arrow, Gifts and Exchanges, 1 PHILOSOPHY & PUBLIC AFF. 343, 357 (1972) (“Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time.”).

155. See Cross, supra note 95, at 1501–02 (describing this virtue of contracting).

156. See Deepak Malhotra & Fabrice Lumineau, Trust and Collaboration in the Aftermath of Conflict: The Effects of Contract Structure, 54 ACAD. MGMT. J. 981, 983 (2011) (finding that contracts with more “control provisions” that specify legal constraints on the relationship correlate with lower levels of “goodwill-based trust” between real contracting parties involved in disputes); Eileen Y. Chou et al., The Relational Costs of Complete Contracts, 24 ANNUAL INT’L ASSOC. CONFLICT MGMT. CONFERENCE 15 (2011) (finding lower levels of trust in an experimental context when a contracting partner proposed more, rather than less, specific contract terms). It is likely that the effect of trust on contractual completeness is highly dependent on context. Other studies have concluded that contractual completeness can enhance trust. See, e.g., Laura Poppo & Todd Zenger, Substitutes or Complements: Exploring the Relationship Between Formal Contracts and Relational Governance, 23 STRAT. MGMT. J. 707 (2002).
risks than about the relationship, and such behavior can “crowd out rapport and undermine trust.”157 This, in turn, can lead to lower levels of cooperative behavior in subsequent interactions. One experiment found that when a contracting partner proposed a more, rather than less, specific set of contract terms, the counterparty chose less cooperative strategies, on average, in a game the subjects subsequently played with each other in which cooperation could increase joint rewards but risked exploitation.158 Similarly, the decision to read the text of a standard form contract after the drafter has explained the deal’s salient terms risks undermining the trust between the parties by privileging legal over relational constraints on behavior, thus threatening the potential for future cooperation. Such a reduction in the expected long-term social welfare of the contractual relationship makes the indirect costs of reading potentially very high.

In addition, unlike the direct costs of reading, the indirect costs associated with distrust are not inversely related to the value of the deal or the brevity of the signed writing. From a transaction cost perspective, although it might be reasonable for a nondrafting party to choose not to read (or not to hire a lawyer to review) a long standard form agreement concerning the purchase of a trinket, a careful examination of the written document seems more justified when the purchase is substantial or the drafter provides a short term sheet. (Recall that the standard consent form proffered to the Borat plaintiffs was only one page long.)159 The signal of distrust that a nondrafting party sends by reading the form to verify the veracity of prior oral representations, however, results in higher costs as the potential value of the deal or relationship increases, because the distrust places a potentially more valuable opportunity at risk.

The literature on economic development suggests that there is a positive correlation between a society’s level of generalized social trust (belief that other citizens will act honestly and nonexploitatively)160 and economic growth,161 as trust reduces both the risks of being exploited and the costs of

157. Chou et al., infra note 156, at 4; see also Malhotra & Lumineau, infra note 156, at 983; Malhotra & Murnighan, The Effects of Contracts on Interpersonal Trust, 47 ADMIN. SCI. Q. 534, 547 (2002); cf. S.B. Sitkin & A.L. Roth, Explaining the Limited Effectiveness of Legalistic “Remedies” for Trust/Distrust, 4 ORG. SCI. 367, 376 (1993) (“[L]egalistic remedies can erode the interpersonal foundations of a relationship . . . because they replace reliance on an individual’s good will with objective, formal requirements.”).

158. Chou et al., supra note 156, at 19–20 (study 3).


monitoring one’s contracting partners. The usual lesson derived from this relationship is that a dependable rule of law is necessary for economic efficiency: few will trust the promises of strangers, for example, in the absence of a legal system that enforces contracts. When parties can count on enforcement of their contracts, this reduces the risk of exploitation by potential nonperformers, and makes trusting behavior safer. Similarly, if a no-exploitation rule protects nondrafting parties from opportunistic drafters who are tempted to say one thing and write down another, it becomes less risky for nondrafters to extend, and thus build, trust by declining the opportunity to carefully compare the signed writing to prior representations. This, in turn, should help to increase social trust and thus the efficiency of contractual relationships.

3. Costs of “Bait and Switch”: The Status Quo Bias

A different reason why nondrafting parties often cannot avoid actual exploitation at low cost merely by “reading” standard forms is that false representations can increase the psychological costs of later declining to sign the written document.

Research in behavioral decision making has demonstrated that individuals usually display a preference for the status quo, all other things being equal, as opposed to alternative states of the world. Known as the “status quo bias” or the “endowment effect,” this behavioral phenomenon stems from “loss aversion”—people usually experience more pain upon losing something than they experience pleasure upon gaining something of equivalent value. Findings from numerous laboratory and real-world experiments support the existence of the status-quo bias and loss aversion. people demand more

---

162. See Zak & Knack, supra note 161, at 305.
164. Cf. Cross, supra note 95, at 1466 (“By giving legal assurances of remedies for breaches of trust, the law makes parties more likely to be both trusting . . . and trustworthy . . . .”).
169. For a survey of the literature and an application to a range of legal issues, see Korobkin, supra note 165.
money when selling a small consumer item that someone gave to them than they would pay to buy that same item with money that someone gave them; drivers are unlikely to choose no-fault insurance if fault-based insurance is the default option, but they are also unlikely to choose fault-based insurance if no-fault insurance is the default option; most employees fail to opt in to their employer’s 401(k) plan, but most employees do not opt out if enrollment is automatic; when negotiating a contract, parties demand higher compensation in return for changing an existing desirable term to a less desirable one than they are willing to pay to change an existing term to a more desirable one.

By making representations that are favorable to the nondrafting party early in negotiations and then contradicting or disclaiming them in the final written document, drafting parties can use the status quo bias to increase the likelihood that nondrafting parties will agree to the written terms, even if drafters know or suspect that the original representations are being disclaimed. The *Borat* litigation provides a useful illustration.

When Twentieth Century Fox originally contacted the *Borat* plaintiffs, the plaintiffs had no expectation of either the income or the nonfinancial utility that they could obtain by sharing their respective expertise on camera. There is little doubt that, at this time, they viewed the producer’s proposition as a potential “gain” vis-à-vis the status quo. By the time that the studio’s agents presented them with the standard form contract to sign—long after reaching an oral agreement concerning the terms of the encounter, scheduling the film shoot, and planning for it—it is probable that the plaintiffs viewed the opportunity as part of their endowments. Although it was possible for the plaintiffs to refuse to sign the written agreement and simply walk away, doing so would have meant accepting a loss in relation to their presumed reference positions, making it psychologically more costly to decline to participate at this point than it would have been at the time of first contact.

Just as the principle of loss aversion causes most people to place a higher value on protecting their endowment from a loss than adding to it with a gain, it causes people to assume risks to avoid losses that they would not be willing to accept for the possibility of obtaining an equivalent gain. This empirical finding suggests that even if the *Borat* plaintiffs had realized that the inconsistencies and disclaimers in the written release suggested that Borat and

---

his project might not be precisely as they had been represented previously, they would be more likely to accept this risk of severe disappointment at the time of filming (when the alternative was to accept the certain “loss” associated with forfeiting their opportunity to appear in the documentary) than had they been asked to sign the same document at the time of the original negotiations (before internalizing the Borat opportunity as part of their endowment).

4. Consequences for Efficiency and Distribution

The preceding analysis can be understood as demonstrating that while “reading” makes it possible for nondrafting parties to avoid exploitation, the direct and indirect costs of reading standard form contracts—especially in the face of prior representations concerning the salient elements of the proposed deal—can be substantial. Operating under a pure duty-to-read rule, some nondrafters would painstakingly read and understand the standard forms (or retain an attorney to do so), in order to protect against exploitation. But bearing this cost would often substantially reduce the value of contracting. Reasonable nondrafters would more often decline to read standard form contracts at all—a result consistent with widespread anecdotal observation and some rigorous scholarship175—thus risking exploitation that would also reduce their net value of contracting. And, in some cases, in light of the risks of exploitation and the costs of self-protection, nondrafters would simply decline to consider potentially profitable deals, resulting in a deadweight loss. All of these alternatives reduce the social value of contracting.

As is true of the costs that would be suffered by drafting parties operating under a no-exploitation rule, the costs borne by nondrafting parties under a pure duty-to-read rule would ultimately be shared by their contracting counterparts, to the detriment of all concerned. The lost social value would otherwise have been divided between both sides as part of the negotiation process.

III.

THE BORAT SOLUTION

In the context of the Borat Problem, a pure duty-to-read rule would encourage the exploitation of nondrafting parties and a no-exploitation rule would render drafting parties vulnerable. Enforcing either rule threatens to reduce the expected social value of contracting, to the ultimate detriment of parties on both sides of the contract.

From an economic perspective, the optimal way to address the Borat Problem is to structure the law itself such that it minimizes the joint costs of opportunistic exploitation and the costs of self-protective steps taken by both parties. Nondrafting parties should be permitted to introduce evidence of prior inconsistent representations when the risk that judges and jurors will err in

175. See supra Part II.B.1.
determining whether such representations were actually made is low relative to the cost that nondrafting parties would need to expend to avoid relying on the misrepresentations. Drafting parties, in turn, should be able to exclude such evidence in favor of the final written terms when it would be difficult for them to protect themselves against exploitation relative to the risk that the judicial process would erroneously find false representations when none had actually been made. I call the proposed legal regime that strikes this balance, described in this Part, the “Borat Solution.”

A. Costs of Contracting vs. Costs of Judicial Error

Most attempts by courts and scholars to wrestle with the Borat Problem are flawed because they privilege the risks of exploitation on one side of the relationship while downplaying or ignoring the countervailing risks.

Two Seventh Circuit cases, authored by Judges Richard Posner and Frank Easterbrook, provide examples of analyses that seem to be concerned only with the risks to drafting parties. In Carr v. CIGNA Securities, Inc., the plaintiff alleged that he relied on the representation of the defendant’s agent that an investment was safe and did not read the form disclosures that warned the investment was risky. In dismissing the plaintiff’s claim, Judge Posner reasoned that the written document must govern or “sellers would have no protection against plausible liars and gullible jurors.” In Rissman v. Rissman, the plaintiff challenged an agreement to sell his stock in a family-owned company to his brother because one of the brother’s prior representations proved to be false. Enforcing the written agreement, which included a no representation clause disclaiming the existence of any external statements or inducements, Judge Easterbrook pointed out that writings are “less subject to the vagaries of memory and the risks of fabrication.” The observations of both highly respected judges are correct, but they ignore half of the Borat Problem.

Analyses that favor nondrafting parties, in contrast, tend to treat the risks faced by nondrafters as significant but ignore the very real risks faced by drafters. Professors Deborah Stark and Jessica Choplin, for example, oppose the enforcement of no-reliance clauses against claims that the agreement was induced by false oral representations on the grounds that such a rule “grant[s] a license to deceive to unscrupulous companies.”

176. 95 F.3d 544, 545 (7th Cir. 1996).
177. Id. at 547. This is notwithstanding Judge Posner’s recognition in other contexts that the cost of avoiding exploitation can be high: “Not all persons are capable of being careful readers.” Emery v. Am. Gen. Fin., Inc., 71 F.3d 1343, 1347 (7th Cir. 1995).
178. 213 F.3d 381, 382 (7th Cir. 2000).
179. Id. at 384.
Prentice argues that, in the specific context of securities transactions, waivers of liability for fraud and no-reliance clauses should be unenforceable because they encourage false oral representations.\(^{182}\)

When attempts are made to address both sides of the opportunism coin simultaneously, the most commonly proposed solution is to strictly differentiate between agreements among “sophisticated” parties (perhaps only when represented by counsel) and those involving a nondrafter who is a consumer or other “unsophisticated” party.\(^{183}\) In the former class of cases, the terms of the signed writing would be enforced scrupulously against any claims of prior inconsistent or misleading statements. In the latter class of cases, nondrafting parties would be permitted to recover damages by using parol evidence to prove to a jury that the drafting party made inconsistent prior statements or promises.

The Delaware courts have attempted to implement this sophisticated-unsophisticated distinction. In a detailed and wide-ranging opinion, Chancellor Strine invoked the “American tradition of freedom of contract, . . . especially strong in [Delaware], which prides itself on having commercial laws that are efficient,” to defend a line of cases that enforced no-reliance and no-representation clauses against fraud claims when the contracts were “between sophisticated parties with equal bargaining strength.”\(^{184}\) Strine distinguished apparently conflicting precedent that refused to permit “[a] perpetrator of fraud . . . to close the lips of his innocent victim by getting him blindly to agree in advance not to complain about it”\(^{185}\) as “invol[ving] the protection of a relatively unsophisticated party or a party lacking bargaining clout who signs a contract with a boilerplate merger clause.”\(^{186}\)

Arguably, New York courts have attempted to draw the same line. In Cirillo v. Slomin’s Inc., the New York Court of Appeals refused to enforce a no-representation clause appearing in the signed writing to block an alarm system customer’s claim that the defendant’s salesman had made false statements about the system’s capabilities.\(^{187}\) In doing so, it distinguished Danann Realty by observing that that case involved “sophisticated business


\(^{183}\) See, e.g., Stark & Choplin, supra note 55, at 624 (arguing against enforcement of written no-reliance and waiver clauses except when terms are negotiated by attorneys representing “sophisticated” parties in “commercial transactions”); West & Lewis, supra note 100, at 1033–34 (“Contracts made between sophisticated parties, represented by counsel . . . are fundamentally different from the adhesion contracts made by consumers who buy cars, rent jet skis, or sign consents allowing their children to participate in rafting excursions.”).


\(^{185}\) Id. at 1061 (quoting Webster v. Palm Beach Ocean Realty Co., 139 A. 457, 460 (Del. Ch. 1927)).

\(^{186}\) Id.

people."188 (Notably, neither the Southern District of New York nor the Second Circuit discussed this potential distinction, which would have cut in favor of the plaintiffs, when issuing unpublished opinions and orders in favor of the defendant in the *Borat* case).

This sophisticated-unsophisticated, dichotomous approach is attractive because it takes seriously both the efficiency benefits of allowing informed parties to structure their transactions as they see fit and the dubious nature of the assent to written terms provided by nondrafting parties in many cases. The distinction also captures the reasonable intuition that the direct and indirect costs associated with reading written agreements are lower for sophisticated than unsophisticated parties. Unlike the unsophisticated, sophisticated parties can usually engage legal counsel able to interpret contract terms accurately and quickly, and they can better avoid indirect relational harm by blaming seemingly distrustful behavior on their lawyers or on business custom.

Such a strict division is problematic, however, because the categories it creates are at least quasi-immutable. That is, the approach assigns sophisticated parties to one legal regime and unsophisticated parties to another while leaving them no way, or at least no good way, of contracting for something different.

Even sophisticated parties can be surprised by written terms that are inconsistent with prior representations, especially when agreements include substantial boilerplate and broad disclaimers. Consequently, they will sometimes find it in their interest to be able to rely on legal protection from hard-to-anticipate surprises. In a sophisticated-unsophisticated regime, sophisticated parties probably could obtain such protection only by negotiating to add a term to a written agreement specifying, more or less, that "notwithstanding any other language in the contract, Party A maintains the right to sue for any prior false or inconsistent representations made by Party B." The indirect cost to the establishment of trust of proposing such a provision would likely be quite high. Not only does it imply that the nondrafter does not trust the drafter, but also might lead the drafter to view the nondrafter as excessively litigious, and therefore not trustworthy.

The sophisticated-unsophisticated categorization scheme is even more problematic for the unsophisticated negotiator. Unsophisticated nondrafting parties (often consumers) would find it in their interest, in some circumstances, to be able to consent to disclaimers of prior representations. For example, drafting parties will often be able to minimize the costs of preventing rogue agents from overpromising making false promises in order to close deals by requiring nondrafters to rely only on the signed writing, essentially deputizing nondrafters to monitor the drafters’ agents. Savings resulting from this cooperation will then be shared with nondrafters through implicit adjustments to price of other contract attributes. But in a sophisticated-unsophisticated

188. *Id.* at 767.
regime, the unsophisticated party would appear to have no mechanism available to legally consent to such an arrangement.

In the remainder of this Part, I contend that the legal system can better respond to the challenge of minimizing the costs of bilateral opportunism present in the Borat Problem with a more nuanced and flexible approach than the sophisticated-unsophisticated dichotomy allows. I also demonstrate that courts can implement the Borat Solution consistent with established, common law principles of contract law.

B. Protecting Nondrafting Parties: The Specific Assent Requirement

The Borat Solution assumes that contracting parties, whether sophisticated or unsophisticated, businesses or consumers, should have the ability to agree to a contract in which representations or promises made in the final written document override some or all prior statements, as long as both parties determine that such a contract serves their interests. From this perspective, the problem with a pure duty-to-read rule is not the resulting allocation of risk but that, as a practical matter, nondrafting parties often do not actually determine that it is in their best interest to accede to terms included in the signed writing. This concern can be addressed by requiring a more exacting demonstration of assent to standard form contract terms that contradict or disclaim prior representations than is evidenced merely by a signature at the end of a preprinted document.

It is no doubt impractical to impose a heightened demonstration of assent to all terms found in standard form contracts. Most terms buried in fine print are relevant only to unlikely contingencies and are of little interest to nondrafting parties, making it rational for them to avoid spending the time reading and understanding them. 189 Many terms are also adhesive, in which case understanding them would provide no practical benefit to the many nondrafters who stand to gain so much consumer surplus from the agreement that they would rather agree to the contract than walk away from the transaction no matter how undesirable the terms in the fine print. It would be inefficient to force nondrafting parties to bear the transaction costs of reading and understanding boilerplate when those costs would exceed any expected benefits to them of becoming informed. 190 In addition, any rule that attempted to force the rationally ignorant to bear such costs would result in a significant deadweight loss because many nondrafting parties would choose to walk away from transactions that are potentially personally and socially beneficial rather than tangle with the boilerplate. For these reasons, although a case can be made

189. See, e.g., Ben-Shahar & Shapiro, supra note 118, at 18.

190. Cf. Slawson, supra note 118, at 552 (“Under what conceivable calculus of social value . . . would it be worthwhile to raise the price of a ten-cent consumer product enough to cover the cost of individually negotiating the warranty of each one sold . . . ?”).
for replacing boilerplate with law-provided, gap-filling terms, there is at least a plausible argument for giving effect to standard form terms that are not otherwise addressed by the parties based on the principle of blanket assent.

The case for enforcement based on the principle of blanket assent is much less convincing, however, when the written terms are inconsistent with prior representations made by the drafting party. This is the feature of the Borat Problem that distinguishes it from the more general issues of notice and assent raised by all standard form contracts. When a term appearing in a signed writing conflicts with or disclaims a prior representation, the resulting difference is highly likely to be material to the allegedly misled party. If the content of a particular representation were not material, at least to many nondrafting parties, why would drafters have gone to the trouble to make the representation? It follows that written terms that are inconsistent with, or completely disclaim, earlier representations or promises are also likely to be material. Unlike boilerplate that concerns arcane issues or remote contingencies, when material terms are at issue, the transaction costs associated with nondrafting parties reading and understanding the terms will usually be justified.

The problem faced by nondrafting parties is that, short of reading and understanding the entire standard form contract, which are both costly and can signal distrust, they will not know which terms justify their attention. The Borat Solution incentivizes drafting parties to call the attention of nondrafting parties to such terms, thus reducing the direct cost of reading and avoiding the indirect cost of signaling distrust. The Borat Solution does so by requiring drafters to obtain the objective manifestation of specific assent on the part of nondrafters to written terms that are inconsistent with or disclaim prior promises or representations. Under the specific assent standard, drafting parties are able to enforce terms in a signed writing even assuming that they are inconsistent with prior oral or written statements, but only if they satisfy two requirements: a “clear statement” requirement and a “realistic notice” requirement.

1. The “Clear Statement” Requirement

To satisfy the clear statement requirement, the text of the written document must clearly indicate that it takes precedence over specific prior representations, or at least a specifically defined category of prior statements. Given the likely salience of statements concerning the terms or nature of a deal

---

191. Such terms could be provided ex ante, in the form of default terms that cannot be superseded unless terms are individually dickered, or ex post, in the form of courts selecting gap fillers that maximize social welfare when disputes arise. See generally Korobkin, supra note 165, at 1247–55.

192. See supra Part II.B.1.

193. See supra Part II.B.2.
that a drafter might make prior to the presentation of a written document for signature, the law cannot fairly presume that a nondrafter assented to disclaimers that are overly broad or vague, or contradictory terms that are difficult to understand.

The clear statement requirement is a rather modest proposal; some courts already impose something like it before they will enforce no-reliance or no-representation clauses against claims of fraudulent inducement. For example, in Danann Realty, the New York Court of Appeals dismissed the plaintiff’s allegation that the defendant had made false oral representations concerning the building’s operating expenses and profitability because the signed writing included a specific disclaimer of any representations “as to the physical condition, rents, leases, expenses, . . . [and] operation[s]” of the building. A general merger clause, the court opined, would not have been sufficient to trump the plaintiff’s claim of prior false statements about the building’s existing income and expenses.195 Other courts, however, do not demand a clear statement as to the exact type of representations that are being disclaimed or superseded, allowing very broad no-representation or no-reliance clauses to trump the implications of any prior representations.196

2. The “Realistic Notice” Requirement

To satisfy the realistic notice requirement, there must be evidence that the nondrafter was presented with information that would place a reasonable party on notice of the written terms that contradict or disclaim prior representations. This requirement takes account of the fact that few contracting parties carefully read and understand the boilerplate in standard form contracts.

A court should consider the realistic notice requirement satisfied if the parties actively negotiated the term in question, rather than the drafter inserting an undiscussed adhesive term.197 The requirement should also be deemed satisfied if the term appears in a type of contract that principal parties customarily retain lawyers to thoroughly and carefully review, whether or not the parties actively negotiate the term. Thus, the realistic notice requirement would be satisfied in the prototypical case involving two or more

196. See, e.g., MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 216, 218 (3d Cir. 2006) (enforcing a “broad” waiver of reliance after specifically finding that “specificity” is not legally required under Delaware law).
197. See Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60 (Tex. 2008) (noting that the fact that the parties actually negotiated the waiver term appearing in the writing favors its enforcement against a fraud claim); Elizabeth Cumming, Note, Balancing the Buyer’s Right to Recover for Precontractual Misstatements and the Seller’s Ability to Disclaim Express Warranties, 76 MINN. L. REV. 1189, 1217 (1992) (arguing for a requirement that the process of a buyer waiving a warranty be deliberate, such that “the buyer has an opportunity to acknowledge consciously those representations that induced him to buy from the seller”).
“sophisticated” parties, in which teams of lawyers carefully parse each word of
the written agreement, but it would not necessarily be satisfied in every
commercial contract, many of which do not typically receive that level of
scrutiny.

But parties should be able to satisfy the realistic notice requirement by
other means as well. There is no compelling reason why nondrafting parties
should be categorically precluded from consenting to such terms—to the
potential detriment of both parties—if they happen to be written on a standard
form, the form is adhesive, and the contract is of a type not typically reviewed
word-for-word by lawyers. 198

Thus, the drafting party should be deemed to have satisfied the realistic
notice requirement by directing the nondrafter’s attention to specific provisions
and encouraging careful study of those provisions. One way for a drafting party
to demonstrate that she fulfilled this obligation might be to obtain a separate
signature from the nondrafting party acknowledging the content of any terms
that conflict with prior representations. Consumer protection statutes
sometimes use separate signature (or initialization) requirements as tools to
ensure that nondrafting parties specifically assent to terms that are particularly
likely to be unanticipated or surprising, while still ultimately allowing for
freedom of contract. 199 Because it is generally reasonable for nondrafting
parties to rely on prior representations made by drafting parties, a term that
rescinds or disclaims such representations will usually be surprising, as well as
material.

Obtaining a separate signature should be understood only as a potential
means of satisfying the realistic notice standard, and not as a bright-line safe
harbor. When a drafter directs the nondrafter’s attention to one or two
paragraphs of boilerplate and obtains a separate signature adjacent to those
passages, it is reasonable to conclude the nondrafter knows or should know
their content. One recent study found that a large majority of student subjects
admit that they will not read standard form contracts of various types in their
entirety, but most of the subjects claimed a willingness to read or skim at least a
portion of such contracts. 200 If a drafting party asks a nondrafter to hastily
initial every paragraph in a long document, however, there is little reason to

198. See Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997) (holding
that several factors—including but not limited to party sophistication and whether the term was
negotiated—should be taken into account when determining whether a disclaimer of reliance is
binding).

199. For example, California law requires liquidated damages provisions in real property
transactions to be separately signed or initialed. CAL. CIV. CODE § 1677 (2012). The failure to obtain

200. Shmuel I. Becher & Esther Unger-Aviram, The Law of Standard Form Contracts:
Misguided Intuitions and Suggestions for Reconstruction, 8 DEPAUL BUS. & COM. L. J. 199, 212–13
(2010) (between 8 and 25 percent of subjects said they would read a car rental, bank account, or
laundry contract thoroughly, while half or more said they would skim or read parts of the contract).
believe a reasonable nondrafter would recognize the presence and understand the consequence of no-reliance, no-representation or waiver clauses contained therein. For the realistic notice principle to serve its purpose, courts need to ensure that drafters cannot satisfy it by requiring ministerial acts that increase the transaction costs of contracting without actually increasing the nondrafter’s understanding of terms that are highly likely to be material to the transaction.

3. Consistency with Principles of Contract Doctrine

The specific assent requirement, and its realistic notice component in particular, might, at first glance, appear to draw a line between cases that should be treated as contract disputes and those that should be handled as tort claims. That is, when drafters obtain the specific assent of nondrafters, the parol evidence rule applies to preclude evidence of prior representations inconsistent with the signed writing, but when drafters do not obtain specific assent, nondrafters may maintain fraud actions. But where the Borat Problem arises, contract principles, in addition to tort principles, support the claims of nondrafting parties in the absence of their specific assent to written terms that contradict or disclaim prior representations. This Section explains how fidelity to doctrine concerning both the interpretation and enforceability of contracts, in addition to the normative goal of maximizing contracting efficiency, supports the judicial imposition of the specific assent requirement.

a. Contract Interpretation

Section 201 of the Restatement (Second) of Contracts provides that when contracting parties attach different meanings to an agreement or term therein, the meaning attached by one party governs if that party had no reason to know that the counterpart attached a different meaning but the counterpart had reason to know of the meaning attached by the first party. To be sure, courts invoke this principle most often when the parties agree that certain contractual language governs their respective rights and responsibilities but disagree over the meaning that should be attributed to that language. The principle is just as applicable, however, when the disagreement concerns which language should govern: earlier salient representations or subsequent boilerplate.

When a drafting party makes an oral representation that it then contradicts or disclaims in a written document, in the absence of specific assent to the disclaimer, the drafter has reason to know that its interpretation of the contract is probably not shared by the nondrafting party, whereas the nondrafting party

would have no reason to be aware of the dissociation. It follows that the nondrafting party’s understanding should govern.

This general principle is reflected in the more specific doctrine of reasonable expectations, which provides that the court’s interpretation of a contract should be consistent with the reasonable expectations of nondrafting parties, even when this interpretation is at odds with the text of the boilerplate.203 Although a staple of insurance contract interpretation, the reasonable expectations doctrine has not been widely adopted in other contexts.204 One reason for its limited application is the difficulty of identifying the circumstances in which a nondrafting party might reasonably expect a different bargain from the one that is recorded in the signed writing. Another reason is the difficulty of determining what the parties might reasonably have understood the terms of a different bargain to be.205

Because many types of insurance contracts are ubiquitous, the reasonable expectations of a purchaser in that context can be evaluated on the basis of commercial standards. That is, absent specific assent to some different set of terms, the purchaser of a general liability insurance policy might reasonably expect that his or her policy will protect against hazards commonly insured by similar policies. At the same time, knowing that insurance customers usually lack actual knowledge as to the content of complicated provisions, insurance sellers are on notice that their buyers understand the policy to protect them against such standard hazards. Similarly, when specific oral representations or promises are made to a nondrafting party outside the insurance context, the content of those statements provides an objective basis for determining what expectations the nondrafting party might reasonably possess that are inconsistent with the subsequent written document (i.e., expectations that were created by the oral representations and not contradicted or retracted with specific notice). The specific assent requirement proposed here does no more than enable courts to enforce those reasonable expectations.

b. Defenses to Enforcement

In most jurisdictions, in order for a term appearing in a signed writing to be deemed unconscionable, and therefore unenforceable, the court must find both an imperfection in the bargaining process, known as “procedural unconscionability,” and an unfairly one-sided term, known as “substantive unconscionability.”206 One indicium of procedural unconscionability207 is that a

---

204. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §211 cmt. c.
nondrafting party was unfairly surprised by the content of a term in a form that it signed.\textsuperscript{207} Courts are most likely to find such “unfair surprise” when it would have been physically arduous for the complaining party to learn the content of a written term—such as when the font size is small,\textsuperscript{209} the disputed term is buried in a long list of terms that the party had limited time to read,\textsuperscript{210} or when the disputed term is written in confusing language or legalese.\textsuperscript{211} Courts have also invoked unfair surprise as a safeguard, however, when nondrafting parties are given insufficient notice that a document contains the type of term in question. For example, one federal district court found unfair surprise, and thus procedural unconscionability, when the letter in which a telephone company’s modified terms appeared began by stating: “[P]lease be assured that your AT&T service or billing will not change . . . ; there’s nothing you need to do.”\textsuperscript{212}

Like the telephone company’s written statement assuring that service will not change, an unqualified and unretracted prior representation or promise implies that its recipient need not fear that a subsequently signed writing will modify prior agreements or representations. The recipient might be wise to read and understand the entire document, when he can do so at a reasonable cost, in order to learn how the contract will resolve issues not previously discussed, but language that contradicts or disclaims prior representations easily fits within the rubric of unfair surprise.

A successful claim of unconscionability, however, also requires a judicial finding of “substantive unconscionability.” This requirement, which courts have uniformly resisted defining with bright-line rules, requires that the term or terms at issue be not merely unfavorable to the complaining party but generate a high degree of opprobrium in the mind of a neutral reader. Courts have described the requirement in various ways; for instance, they have stated that the term must be “overly harsh” or “one-sided,”\textsuperscript{213} “unreasonably favor[able to] one party,”\textsuperscript{214} “shock[ing to] the conscience,”\textsuperscript{215} or “so oppressive that no reasonable person would make them.”\textsuperscript{216}


\textsuperscript{207} The other indicum of procedural unconscionability is that the complaining party had “little real choice” but to assent to an unfavorable term. See, \textit{e.g.}, Williams, 350 F.2d at 449.

\textsuperscript{208} See, \textit{e.g.}, Ting v. AT&T, 182 F. Supp. 2d 902, 929 (N.D. Cal. 2002) (finding evidence of surprise satisfies the procedural unconscionability requirement), \textit{aff’d in part and rev’d in part}, 319 F.3d 1126 (9th Cir. 2003).


\textsuperscript{210} See Kinney v. United Healthcare Servs., Inc., 83 Cal. Rptr. 2d 348, 353 (Ct. App. 1999).

\textsuperscript{211} See, \textit{e.g.}, Blubaugh, 636 F. Supp. at 1574; Bank of Indiana NA v. Holyfield, 476 F. Supp. 104, 109–10 (S.D. Miss. 1979); \textit{Kinney}, 83 Cal. Rptr. 2d at 553.

\textsuperscript{212} Ting, 182 F. Supp. 2d at 913.

\textsuperscript{213} See, \textit{e.g.}, Armendariz v. Found. Health Psychcare, 6 P.3d 669, 690 (Cal. 2000).

\textsuperscript{214} See, \textit{e.g.}, Alexander v. Anthony Int’l, L.P., 341 F.3d 256, 265 (3d Cir. 2003).
Absent context, there often is nothing substantively objectionable about the written terms at issue where the Borat Problem arises. Paying an individual several hundred dollars to appear in a “documentary-style film” is hardly troubling, for example, even if the film is not an actual documentary. Nor would a waiver of legal claims, or even a no-reliance clause necessarily “shock the conscience.” But unconscionability determinations are fact specific, and courts routinely determine whether a term is substantively unconscionable by referencing the specific context in which the case arises. A written term could be found substantively unconscionable when it is materially different from an oral representation, even if the term would not be substantively unconscionable in the absence of the prior representation. For example, even assuming that it would not be substantively unconscionable for Twentieth Century Fox to contract to pay Michael Psenicska $500 to appear in a documentary-style film, it might well be substantively unconscionable to contract to pay him $500 to appear in a documentary-style film after having represented that the film would be a documentary. And even assuming that a no-reliance clause is not substantively unconscionable as a general matter, it might well be in the context in which the studio’s agents intentionally made a false representation in an effort to obtain Psenicska’s assent to the agreement.

Related to unconscionability, the Restatement (Second) of Contracts provides that a lack of actual knowledge of terms within a standard form contract can evidence a lack of assent to the contract and thus defeat its enforcement if the knowing buyer would have refused to sign the contract. This provision demonstrates that established contract law recognizes the possibility that reasonable nondrafting parties might not have actual knowledge of terms appearing in a standard form contract, and that courts may decline to enforce such contracts when they are Pareto inferior to the status quo.

C. Protecting Drafting Parties: A Heightened Evidentiary Requirement

The specific assent requirement provides protection to nondrafting parties from opportunistic exploitation by drafting parties to which they are subject under a pure duty-to-read rule. The cost of this protection, however, is that if drafting parties choose not to take the steps necessary to secure specific assent, the drafters are subject to the risk of opportunistic exploitation by nondrafting parties who might claim falsely, whether fraudulently or unintentionally, that the drafter made prior representations inconsistent with the written document. Because securing specific assent can be costly itself, drafters who choose not do so are not necessarily any more negligent than nondrafters who fail to master the entire content of standard form contracts. To protect this group of

drafting parties, nondrafters should be permitted to challenge the content of a signed writing based on allegations of prior inconsistent or contradictory representations only when such allegations are particularly likely to be true. This can be accomplished by imposing a heightened evidentiary standard of proof before such a claim can proceed to a jury.

Typically, fraud must be pled with particularity, and many jurisdictions require that fraud be proven by clear and convincing evidence (although most states have consumer protection statutes that allow fraud to be proven by only a preponderance of the evidence). 218 For several reasons, however, such rules, which at first appear to protect drafting parties from exploitation, 219 often provide them with insufficient protection from the risks associated with the Borat Problem.

Particularity requirements, such as Rule 9 of the Federal Rules of Civil Procedure, 220 are designed to provide notice to the defendant of the specific conduct that underlies the fraud claim. 221 Such requirements allow a defendant to win dismissal if the plaintiff’s allegations reflect only a vague suspicion of a fraudulent act and do not specify particular acts or circumstances, 222 including the “who, what, when, where, and how” that justify relief. 223 However, as long as a plaintiff identifies a particular statement that, if made, would constitute fraud, the court will deny the defendant’s motion to dismiss the claim, even if the vast weight of the evidence suggests that the statement was not in fact made. 224

The requirement of clear and convincing evidence is more complicated. Typically, courts state that where the law requires clear and convincing evidence of fraud, this standard applies to all of the elements of the fraud claim. In practice, however, courts often invoke the heightened standard of proof to provide summary judgment for the defendant only when the plaintiff cannot

218. See Stark & Choplin, supra note 55, at 629 n.38.
219. See Gergen, supra note 55, at 248 (claiming that these rules “discourage unfounded fraud claims and avoid unjust fraud verdicts”).
220. In contrast to the general pleading standing in federal court that requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), Rule 9 requires that, when “alleging fraud or mistake,” a plaintiff “must state with particularity the circumstances constituting fraud or mistake,” Fed. R. Civ. P. 9(b).
221. See, e.g., United States ex rel. Marlar v. BWXT Y-12, LLC, 525 F.3d 439, 445 (6th Cir. 2008).
222. See, e.g., Kearns v. Ford Motor Co., 567 F.3d 1120, 1126–27 (9th Cir. 2009) (affirming dismissal when the plaintiff failed to specify what the allegedly fraudulent advertisements and sales materials stated); Marlar, 525 F.3d at 446 (affirming dismissal when the plaintiff “fail[ed] to allege concrete facts, rather than inferences based ‘[o]n information and belief’” that the defendant submitted false claims to the government).
223. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).
224. Cf. Ackerman v. Northwestern Mutual Life Ins. Co., 172 F.3d 467, 469–70 (7th Cir. 1999) (observing that both heightened pleading and heightened proof requirements attempt to protect defendants against irresponsible and defamatory claims, but that they “do not move in lockstep with each other”).
sufficiently plead scienter (i.e., the drafter’s intent). When the issue is whether the drafter actually made the (allegedly false) statement, courts often find that the trier of fact could reasonably determine that the issue has been proved by clear and convincing evidence, even when the only evidence is the plaintiff’s contested recollection.

Consider, for example, the Mississippi case of *McMullen v. Geosouthern Energy Corp.*\(^{225}\) Paul and Mary George McMullen, along with others, had previously prevailed in a securities fraud lawsuit against the defendant. In postverdict settlement negotiations, the McMullens agreed to release their claims against the defendant in return for a discounted payment of the verdict amount.\(^{226}\) When the defendant paid a larger settlement payment to another plaintiff, the McMullens alleged promissory fraud on the grounds that the defendant had orally agreed to increase the McMullens’ payment if it paid any other plaintiff a larger pro-rata portion of the verdict amount and that it had failed to do so.\(^{227}\) The defendant denied making the promise in question, which was not recorded in the written settlement agreement. The trial court granted summary judgment for the defendant. The Mississippi Supreme Court reversed, holding that the “clear and convincing standard required of the evidence to sustain a claim of fraud is certainly met in a summary judgment posture when one witness specifically claims a representation was in fact made.”\(^{229}\) This holding is consistent with cases from other jurisdictions, which have similarly concluded that whether fraud allegations satisfy even a heightened evidentiary standard is ordinarily a question of fact for the jury, even when the allegations are supported only by the testimony of a single witness and there are conflicting testimonies.\(^{230}\)

When the heightened evidentiary requirement for fraud claims is enforced this weakly, defendants are insufficiently protected from plaintiff opportunism for two reasons. First, notwithstanding that the judge will instruct the jury that clear and convincing evidence is required, juries may nonetheless determine that the defendant made an alleged statement inconsistent with the final written document, when it was not in fact made. The general assumption that juries can distinguish truthful from untruthful testimony with a high degree of accuracy has long been undermined by social science research.\(^{231}\) If the law permits the

---

225. 556 So. 2d 1033 (Miss. 1990).
226. Id. at 1034.
227. Id. at 1034–35.
228. The defendant’s affidavit “only conceded” that it had told the McMullens that it “had no intention” of paying the other plaintiff in question a greater percentage of the judgment. Id. at 1035.
229. Id. at 1037.
jury to decide that a single plaintiff’s testimony, standing alone, constitutes clear and convincing evidence that the defendant made an alleged statement, there is little doubt that juries will sometimes find that the plaintiff has satisfied this burden even when the statement was, in fact, never made. Second, even if juries use the clear and convincing evidence requirement to screen out false allegations, the law, as applied, does not protect innocent drafting parties from suffering the expense of defending against false allegations all the way to trial.

For both of these reasons, a weak clear-and-convincing evidence standard gives drafting parties insufficient protection against false claims of fraud. This, in turn, enhances the credibility of a nondrafting party’s threat to challenge an agreement for which there is a signed writing, and encourages drafting parties to renegotiate in light of such a threat. Since this will increase the cost of doing business, parties on both sides of the agreement are likely to be rendered worse off ex ante.

To provide balanced protection to drafters as well as nondrafters, courts should enforce a heightened clear and convincing evidence requirement before nondrafting parties may introduce evidence of prior representations that conflict with a signed writing, even in the absence of specific assent to terms disclaiming or contradicting such representations. Specifically, defendants should be entitled to summary judgment unless plaintiffs can proffer evidence that is more substantial than the testimony of one plaintiff when that testimony is disputed by the defendant or the defendant’s agent. Plaintiffs should be able to avoid summary judgment only when they can (1) produce recorded evidence of the alleged misrepresentations, (2) provide third-party testimony that the defendant made representations or promises contradictory to terms embodied in the final written document, or (3) provide evidence that the defendant engaged in a pattern of similar conduct in other transactions.

D. The Borat Solution to the Borat Litigation

The facts of the Borat litigation can be used to illustrate how courts should resolve the Borat Problem more generally. Under the first step of the analysis, as applied to the Borat litigation, a court would have concluded that Twentieth Century Fox only partially satisfied the specific assent requirement. Consequently, the language in the form contract should not have precluded the plaintiffs from maintaining lawsuits based on prior inconsistent representations. Under the second step of the analysis, a court would have found that the Borat plaintiffs satisfied the heightened clear and convincing evidence requirement. As a result, their complaints should have escaped dismissal.

The text in Twentieth Century Fox’s Standard Consent Form stating that the nondrafting party will not bring future claims of “fraud (such as any alleged deception or surprise about the Film or this consent agreement)” provides a

233. Borat Release, supra note 9, ¶ 4 (emphasis added).
clear statement that the studio was not standing behind prior statements about the nature of the film. Similarly, the no-reliance clause arguably provides a clear statement when it specifies that the “Participant is not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film,” although this language would more certainly satisfy the clear statement requirement if it referred “to the identity of the reporter” rather than the “identity of any other Participant or persons.” 234 The statement that the studio was filming a “documentary-style film” using “entertaining content and formats” would not satisfy the clear statement requirement, however, because the language does not explicitly state that this term overrides any prior statements about the nature and intended audience of the film. The fundamental problem is that, in the absence of an acknowledgment of this contrast, it is likely that signatories would interpret this clause as being consistent with, rather than at odds with, the prior oral claims about the nature of the movie.

Regardless of whether Twentieth Century Fox could have met the clear statement requirement, it would have failed to satisfy the realistic notice requirement because it could provide no objective evidence that it directed the plaintiffs’ attention specifically to the terms that contradicted or disclaimed its alleged prior representations about the nature of the film project. Although a court might ultimately determine, based on the testimony of all parties and the circumstances surrounding the agreement, that the most reasonable interpretation of the agreement between the parties is that the plaintiffs agreed to appear in any “documentary-style film” the studio might produce, Twentieth Century Fox should not have been entitled to judgment on the pleadings on the ground that the signed writing rendered any prior false or inconsistent statements by the producers legally irrelevant.

Even though the defendants could not demonstrate specific assent to the written terms at issue, the plaintiffs should only have been permitted to challenge the enforceability of the terms memorialized in the signed writing to the extent that they could present evidence of prior false or inconsistent statements sufficient to satisfy the heightened clear and convincing evidence standard. In this case, although each plaintiff lacked direct evidence beyond his or her own testimony that the producers actually represented that the film project was an Eastern European documentary, each could provide testimony from several unrelated parties alleging that the producers made nearly identical false statements and inconsistent promises to them. It is the consistency across the plaintiffs’ allegations that suggests it is at least likely that the studio actually did exploit the plaintiffs in this case, as opposed to itself being the victim of exploitation by plaintiffs who agreed to appear in a movie for a small fee and came to regret their decisions later (perhaps as a result of learning the

extent of the movie’s profitability). Under the *Borat* Solution, this evidence of a pattern of behavior should have enabled the plaintiffs to proceed past dispositive motions.

**E. Limitations**

Because protecting nondrafting parties necessarily increases the likelihood that they might exploit drafting parties and vice versa, any attempt to balance protections to maximize social welfare ex ante will provide incomplete protection to both sides. The *Borat* Solution advanced here certainly has flaws in this respect.

In order to protect the freedom of contract necessary to enable the parties to increase their joint welfare through contract, the *Borat* Solution permits drafting parties to make representations that they ultimately disclaim in a signed writing as long as they then obtain indicia of specific assent. Obviously, however, actions that satisfy the specific assent requirement will not guarantee that the nondrafting party subjectively comprehends the import of a term in question. For example, indicia of specific assent might not override the confirmation bias. 235 So even if the *Borat* producers had provided realistic notice of clear statements that the standard release disclaimed all prior representations about the nature of movie, the plaintiffs still might have assumed that the studio was filming a documentary. And even if the plaintiffs had determined from the notice that the nature of the film shoot might not be what they had anticipated, if the lapse of time between the scheduling of the shoot and their appearance caused them to view their moments of stardom in front of the camera as part of their endowment, loss aversion might have caused them to proceed with their performances anyway, even if they would have declined the offer had the disclaimers been provided at an earlier time. 236 In other words, even when the *Borat* Solution is correctly applied, dishonesty on the part of drafting parties might still pay off in particular cases, even though the specific assent rule reduces its expected value. And, of course, even when the specific assent rule successfully prevents exploitation, it creates a transaction cost for both drafters and nondrafters, which is effectively a tax on contracting.

On the flip side, the *Borat* Solution’s heightened clear and convincing evidence standard for nondrafting parties will leave nondrafters exposed to some risk of exploitation. Drafters could still exploit nondrafters in many cases if they make their false representations beyond the observation of third parties and avoid creating a record, although the possibility that nondrafters could produce pattern-of-behavior evidence should provide a check on the worst abuses. At the same time, this heightened evidentiary standard will not provide

235. See supra Part II.B.1.
236. See supra Part II.B.3.
a foolproof guarantee against the intentionally fraudulent or unintentionally self-serving recollections of nondrafting parties. For example, in order to demonstrate a pattern of prior representations inconsistent with disclaimers in a signed writing, several similarly situated nondrafting parties might collude in fabricating similar “recollections,” or an overzealous plaintiffs’ attorney might off-handedly inform potential litigants of others’ experiences and hint that corroboration would be necessary for any plaintiff to prevail in court.

These points conceded, the Borat Solution must be compared to plausible alternatives, not theoretical perfection. By taking seriously the risk of exploitation faced by both drafting and nondrafting parties and substantially mitigating the risk to both, the Borat Solution seeks to minimize the sum of costs of bilateral opportunism, bilateral self-protection, and deadweight loss suffered when parties avoid potentially profitable contract opportunities in order to avoid those costs. In this way, the Borat Solution is more desirable for both drafting and nondrafting parties ex ante than other judicial solutions and academic proposals that focus exclusively on the risks faced by only one party or assign different parties to rigid legal categories from which they cannot easily escape.

CONCLUSION

There is no perfect solution to the Borat Problem. Legal rules that protect nondrafting parties from exploitation make it easier for them to exploit drafting parties, and vice versa. But it is possible for courts to provide significant protection to both sides at relatively low cost, and in so doing reduce the social costs of contracting compared to the polar regimes of strictly enforcing signed writings and permitting all parol evidence. The Borat Solution’s requirement that drafters obtain specific assent to agreement terms that contradict or disclaim prior representations (through a clear statement and realistic notice) protects nondrafters by reducing the costs of comprehension. The requirement that nondrafters satisfy a strong clear and convincing evidence requirement protects drafting parties by reducing the risk of judicial error resulting from false claims. The proposed approach also has the distinct benefit of being consistent with basic principles of contract law, thus making implementation by the judiciary feasible without raising questions concerning whether legislative action is required.

I have used the Borat litigation as the primary example of a far more general problem because it starkly illuminates the costs of following either polar legal regime, and thus helps make the case for a more nuanced approach that takes seriously both sides of the coin of bilateral opportunism. The representativeness of the Borat illustration might be questioned, however, on the ground that, unlike more garden-variety transactions in which the Borat Problem arises, the making of a movie of its type requires subterfuge. If the unwitting stars of the movie had known that the so-called journalist “Borat”
was actually comedian Sacha Baron Cohen, the producers could not have obtained the unknowing, confused reactions central to the film’s brand of humor.

While this is true, it is worth noting that, per the Coase Theorem,\textsuperscript{237} it does not follow that this type of movie can only be made under the protection of a pure duty-to-read legal regime. Had the courts employed the Borat Solution proposed in this Article, the plaintiffs would have satisfied the clear and convincing evidentiary standard for proving inconsistent prior statements, and the defendants would have failed to prove specific assent to the contradictions and disclaimers contained in the signed writing. Thus, the contract would have provided Twentieth Century Fox with the right to use the footage of the plaintiffs only in an Eastern European documentary. But the studio then could have approached the plaintiffs after the filming and negotiated for the rights to use their performances in the movie the studio actually intended to make.

Some plaintiffs might have refused any offer within the movie’s budget, forcing the studio to find and film new stooges, but many would likely have agreed to appear in Borat, albeit perhaps at somewhat higher rates of compensation. The movie cost $18 million to produce and ultimately earned more than $323 million in revenue.\textsuperscript{238} Even assuming that Borat’s financial success far exceeded the studio’s prerelease expectations, it seems likely that Twentieth Century Fox would have had substantial room to bargain for use rights from stooges who turned in the most entertaining “performances” in reaction to Baron Cohen’s antics. Almost certainly, the comedic story of the faux Kazakhstani journalist interacting with befuddled Americans as he makes his way across the “U, S, and A” still would have graced the silver screen. And if, by chance, it turned out that no ordinary Americans could be found who were willing to knowingly license their amusing performances for this endeavor at a price the studio was willing to pay, the implication would have been that that movie’s social costs exceeded the value of its expected profits. In that unlikely scenario, an efficiency-based analysis would conclude that the movie should not have been produced.


\textsuperscript{239} \textit{See supra} note 4.