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Contract Law's "Too Good to Be True" Doctrine—Is It?

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CONTRACT LAW’S “TOO GOOD TO BE TRUE” DOCTRINE—IS IT?

William A. Drennan*

“When [the defendant] accepted the plaintiff’s bid, with knowledge of the mistake, [the defendant] sought to take an unconscionable advantage of an inadvertent error. Equity is always prepared to grant relief from such situations.”¹

“If a court should . . . disregard clerical errors, and rearrange words . . . it is hard to see where the line of demarcation could be drawn and the general effect would inevitably be a condition of chaos and uncertainty.”²

ABSTRACT

In a wonderful variety of emotionally charged contract law opinions, including the cases of the boastful cheater, the opportunistic attorney, and the careless concrete contractor,³ courts unfortunately have used the phrase “too good to be true” as a single-step test to decide enforceability. These cases can generate emotional responses ranging from empathy⁴ to schadenfreude⁵ because they involve a mistake with potentially disastrous results for one party (and a windfall for the other side). It is understandable that courts would be drawn to a catchy, down-to-earth phrase to reach a just resolution in these entertaining and memorable cases.

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1. *Rushlight Automatic Sprinkler Co. v. City of Portland*, 219 P.2d 732, 753 (Or. 1950).

2. *United States v. Braunstein*, 75 F. Supp. 137, 139–40 (S.D.N.Y. 1947).

3. *See infra* notes 27–41 and accompanying text (regarding the boastful cheater and the opportunistic attorney); *see infra* notes 62–73 (regarding the careless concrete contractor).

4. *See, e.g., Rushlight Auto. Sprinkler Co.*, 219 P.2d at 753 (involving an inadvertent error by a contractor who promptly admitted the mistake and took remedial action, resulting in no loss or disadvantage to the other side).

5. *See, e.g., Meram v. MacDonald*, No. 06CV1071-L(AJB), 2006 WL 8456253, at *1 (S.D. Cal. Oct. 3, 2006) (involving Rob MacDonald, the multi-millionaire author of the book *Cheat to Win*, attempting to weasel out of a promise he made on the grounds that it was too good to be true).

Nevertheless, this Article argues that using *too good to be true* as a single-step test violates fundamental policies of contract law. Judicial *too-good-to-be-true* pronouncements appear arbitrary and unpredictable, likely undermining public confidence in the enforceability of contracts.⁶ As an alternative, sophisticated, time-tested, multi-factor doctrines are available to achieve just results in these cases.⁷ Accordingly, this Article argues that the phrase “*too good to be true*” should be expunged from the tool kits of decision-makers and advisors involved in contract disputes.

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I. INTRODUCTION

ALTHOUGH the phrase “*too good to be true*” (TGTBT) appears in many contract cases and other authorities,⁸ its appropriateness has not previously been the focus of a thorough article. A

6. See *infra* Section III.A.

7. See *infra* Sections III.A. & III.B.

8. See, e.g., 2 SAMUEL WILLISTON & RICHARD A. LORD, *A Treatise on the Law of Contracts* § 6:58, at 839 n.12 (4th ed. 2007); 27 *id.* § 70:111, at 542 n.8, § 70:118, at 579; 1 *id.* § 94 (1936).

single-step TGTBT test is a tempting,⁹ fact-based¹⁰ device for deciding challenging contract cases, but courts should resist the temptation. Like other conclusory-sounding phrases, such as “I know it when I see it,”¹¹ “it smells fishy,”¹² and “otherwise the results would be absurd,”¹³ the phrase “too good to be true” appeals to a natural desire to reach a just result for the parties involved quickly and easily.¹⁴ Perhaps it also offers a court a low risk of reversal on appeal¹⁵—and a low risk of influencing future judicial decisions—because each case turns on its particular facts.¹⁶

Nevertheless, this Article argues that its use threatens the integrity of the contract law system. Parties need assurance that their bona fide agreements will be enforced¹⁷ rather than invalidated under an unpredictable doctrine applied by third parties who may not understand the situation, the history between the parties, and the custom in the trade.

Contract law has its share of other conclusory-sounding phrases that courts use when deciding cases—and attorneys use when advising clients—such as “it would be unconscionable,”¹⁸ “it was a mistake,”¹⁹ or

9. *See* *Lange v. United States*, 120 F.2d 886, 889 (4th Cir. 1941) (“On the strength of this single factor [that the price was too good to be true] we would be strongly tempted to conclude that there was, in fact and law, no real contract . . .”).

10. Many courts have concluded that whether a proposal was too good to be true is a question of fact. *See, e.g.*, *Portzen Constr. Inc. v. Cal-Co Insulation, Inc.*, No. 13-0758, 2014 WL 2347821, at *5 (Iowa Ct. App. May 29, 2014); *Corriveau v. Wash. Mut. Bank*, No. A09-1771, 2010 WL 1966200, at *2 (Minn. Ct. App. May 18, 2010); *Meram v. MacDonald*, No. 060V1071-L(AJB), 2006 WL 8456253, at *2 (S.D. Cal. Oct. 23, 2006).

11. *United States v. Various Articles of Merch.*, Seizure No. 148, 600 F. Supp. 1383, 1384 (N.D. Ill. 1985) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)) (discussing Justice Stewart’s decision not to attempt a definition of “hard-core pornography,” but stating, “I know it when I see it”).

12. *Nat. Res. Def. Council, Inc. v. BP Prods. N. Am., Inc.*, No. 2:08-CV-204PS, 2009 WL 1854527, at *18 (N.D. Ind. 2009); *see also Alinco Life Ins. Co. v. United States*, 373 F.2d 336, 341 (Ct. Cl. 1967) (discussing tax avoidance schemes that “exude an odor piscatorial”).

13. *Ross v. City of Berkeley*, No. C-85-7321-MHP, 1986 WL 31688, at *2 (N.D. Cal. Feb. 5, 1986).

14. *Rushlight Auto. Sprinkler Co. v. City of Portland*, 219 P.2d 732, 753 (Or. 1950) (“[Relief should be granted] in any case where the offeree should know that the terms of the offer are unintended or misunderstood by the offeror.”).

15. An appellate court generally will only reverse a lower court’s factual determinations if they are contrary to the great weight of the evidence. *See, e.g.*, *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 205 (Minn. Ct. App. 2005).

16. A judicial holding based on the particular facts and circumstances of the case can be distinguished, and will not be binding in a subsequent case, as long as the material facts in the subsequent case are not the same. *See* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW* 4–5 (5th ed. 2003) (“If the facts of the present case do not include a fact that appears to have been necessary (‘material’) to the earlier decision, the court may ‘distinguish’ the precedent and render a different decision.”).

17. *See infra* Section III.A.

18. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981); JOSEPH M. PERILLO, *CONTRACTS* § 9.39, at 352 (7th ed. 2014) (“[T]he unconscionability concept has . . . entered the general law of contracts.”).

19. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 153–54 (AM. L. INST. 1981) (requiring the satisfaction of elements for a contract to be voidable by a mistaken party); PERILLO, *supra* note 18, § 9.27, at 337 (“An increasing number of cases have permitted avoidance where only one party was mistaken.”).

“the parties did not intend to be bound.”²⁰ But on closer examination, these are summations of carefully crafted, sophisticated, multi-factor doctrines which are useful parts of the contract law decision-making tool kit. These doctrines provide meaningful guidance to parties and attorneys when negotiating, structuring, and drafting contracts, and to the courts when evaluating whether agreements are legally enforceable. They generally do not leave contract enforcement to mere caprice.

Part II of this Article, for the first time, organizes the TGTBT contract cases. It creates four categories, and among these, the most disturbing is the class of cases that treat too good to be true as an independent, single-step test. Part III explores the conflicting policies that are not discussed in these cases, but that likely direct the outcomes. The policies for enforcing these deals include promoting the freedom of contract and fulfilling the parties’ expectations. On the other hand, the policies for not enforcing these deals include the equitable concerns involved with excusing honest, inadvertent mistakes plus not allowing the other party to take an unfair advantage. Part IV considers the single-step TGTBT cases²¹ in a new way and asserts that they could have been decided under the unilateral mistake doctrine (or analyzed as jokes or exaggerations). Part IV also suggests a reformulation of the unilateral mistake doctrine into a multi-factor test in which no single factor would be necessary, and a court could balance various facts, circumstances, and policy concerns to reach a just result.

II. ORGANIZING THE TGTBT CASES INTO FOUR CATEGORIES

Courts use the phrase “too good to be true” in contract opinions in at least four different ways and to address two different types of contract problems. The two types of contract problems are (i) whether an offer has been made—a court may say that if the proposal was “too good to be true” it was not an acceptable offer—or (ii) whether an agreement is an enforceable contract—if the agreement was “too good to be true” for one of the parties, then the court may rescind the deal.²²

Of the four ways courts use the phrase “too good to be true,” the first and most disturbing, and the primary focus of this Article, is as a single-

20. See RESTATEMENT (SECOND) OF CONTRACTS § 21 (AM. L. INST. 1981) (“[A] manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”); PERILLO, *supra* note 18, § 2.4, at 28 (“[I]f . . . it appears that the parties do not intend to be bound or do not intend legal consequences, then, under the great majority of the cases, there is no contract.”).

21. See, e.g., *Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 134 (Colo. App. 2009) (discussing the “‘well-settled rule’ that ‘an offeree may not snap up an offer that is on its face manifestly too good to be true.’”); see also *infra* Sections III.A, III.B.

22. 1 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 4.9, at 781 (rev. ed. 1993) (“At times . . . the mistake will prevent the formation of a contract. At other times, the mistake will be grounds for avoidance of the contract.”); see, e.g., *Sumerel*, 232 P.3d at 134–35 (stating alternatively that (i) there was no offer that could be accepted, or (ii) if there was an agreement, it could be rescinded and therefore was unenforceable).

step test to decide whether there was a binding contract under the particular facts and circumstances.²³ Second, courts may fold TGTBT language into their applications of the unilateral mistake doctrine.²⁴ While the TGTBT discussion in these types of cases may appear to bolster the arguments, it is unnecessary. Third, courts may talk about the terms being too good to be true as part of a discussion about whether the parties were joking or under some contract law doctrine other than unilateral mistake.²⁵ Again, in these cases, the TGTBT language is extraneous, likely providing emphasis or mere linguistic flair. Fourth, the phrase may be used to merely summarize the facts or the results of the case, without any link to a legal doctrine—in these situations, the phrase does no harm, but may be confused with the other possible uses.²⁶

A. CATEGORY #1: TGTBT AS A SINGLE-STEP TEST

An example of a court using too good to be true as a single-step test is the case of the boastful cheater.²⁷ Multi-millionaire Rob MacDonald, the author of *Cheat to Win*, joined with Allianz Life Insurance Company to host seminars for financial planners.²⁸ They designed the seminars to encourage the attendees to sell Allianz financial products.²⁹ MacDonald began his presentation telling the audience that one attendee, who placed his or her business card in a basket and stayed until the end, would “walk out of here with a million dollars today.”³⁰ MacDonald repeated the terms at least once more during the presentation.³¹ At the end, MacDonald pulled Frank Meram’s name out of the basket, and after Meram came onstage to receive the prize, MacDonald announced that Meram was entitled to *one dollar per year for one million years*.³² MacDonald prepaid the award for the first one hundred years by giving Meram \$100 in cash.³³ “MacDonald then laughed and thanked everyone for attending.”³⁴ Meram felt humiliated in front of his peers and sued for breach of contract, saying he had accepted MacDonald’s offer by depositing his business card in the basket and staying until the end.³⁵

MacDonald argued that his promise to pay one million dollars was too good to be true and, therefore, could not be the basis for a contract.³⁶ As the case considered a motion for summary judgment, the court needed to

23. See *infra* Section II.A.

24. See *infra* Section II.B.

25. See *infra* Section II.C.

26. See *infra* Section II.D.

27. See *Meram v. MacDonald*, No. 06CV1071-L(AJB), 2006 WL 8456253 (S.D. Cal. Oct. 23, 2006).

28. See *id.* at *1.

29. See *id.* at *6.

30. *Id.* at *2.

31. See *id.*

32. See *id.* at *1.

33. See *id.*

34. *Id.*

35. See *id.* at *5.

36. See *id.* at *3.

decide only that it was not an “unescapable conclusion”³⁷ that MacDonald did not mean what he said.³⁸ Although denying MacDonald’s request for summary judgment, the court concluded that a defense could exist if the offer was too good to be true (or a joke), thus treating too good to be true as a separate legal test.³⁹ The court also stated, “Whether a person could reasonably conclude that a contract would result if he or she accepted . . . is a question to be determined by the trier of fact.”⁴⁰ In some situations, the job of applying a vague test is given to the judge, rather than the jury, to provide “considerable restraint” resulting in “reasonable application.”⁴¹ Thus, this court treated too good to be true as an independent, single-step test that could absolve MacDonald, and it left the job of applying that test to the jury.

In *Speckel v. Perkins*, a case of an opportunistic attorney, the court chose a narrow approach to the unilateral mistake doctrine and wholeheartedly endorsed an independent, single-step TGTBT test.⁴² Speckel was injured in a car accident, and his opportunistic attorney sought to recover the full policy limit of \$50,000 from the other driver’s insurance company.⁴³ The other side’s attorney dictated a letter stating that Speckel’s case was *not* worth the policy limit of \$50,000, invited further negotiations, and intended to offer \$15,000 to settle the claim.⁴⁴ The attorney’s assistant, however, typed “\$50,000” as the settlement amount in the letter instead of “\$15,000,” and the attorney failed to review the settlement letter before it was sent.⁴⁵ Upon receipt, Speckel and his opportunistic attorney promptly mailed an acceptance and sued when the defendant did not pay \$50,000.⁴⁶

The Minnesota Court of Appeals adopted an extremely narrow view of unilateral mistake⁴⁷ and concluded that the mistake excuse was unavaila-

37. *Id.*

38. On the other hand, the court acknowledged the following facts supporting Meram’s argument that the proposal was believable (or at least not too good to be true): (i) MacDonald was a multi-millionaire (so MacDonald was capable of paying a million dollars); (ii) Allianz was a billion dollar company; and (iii) MacDonald discussed the terms twice during the presentation. *Id.* at *2.

39. *See id.*

40. *Id.*

41. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 574 (discussing that the unconscionability doctrine is treated as a question of law for the judge to decide); *see also* Bohne v. Comput. Assocs. Intercom, Inc., 514 F.3d 141, 144 (1st Cir. 2008) (“Allowing a jury to pass on the lawfulness of contractual terms could raise serious problems in assuring the stability and predictability of contractual arrangements.”); Residential Mktg. Grp., Inc. v. Granite Inv. Grp., 933, 548 (7th Cir. 1991) (Posner, J.) (discussing generally that a “[d]esire for certainty and predictability . . . combined with some distrust of juries, has resulted in” judges making determinations).

42. *Speckel v. Perkins*, 364 N.W.2d 890, 891 (Minn. Ct. App. 1985).

43. *See id.*

44. *See id.*

45. *See id.* at 891–92.

46. *See id.* at 892.

47. There were at least four different tests for contract rescission based on unilateral mistake under Minnesota law. *See* Dixon v. Progressive Preferred Ins. Co., No. A12-2183, 2013 WL 2928121, at *2–4 (Minn. Ct. App. June 17, 2013).

ble.⁴⁸ The court then quoted a treatise for the existence of an independent TGTBT test.⁴⁹ In analyzing the facts and summarizing the inconsistencies within the settlement letter and between the settlement letter and the prior negotiations, the court concluded the agreement was too good to be true and could not be enforced.⁵⁰

Sometimes a court will cast the single-step TGTBT test as a “duty to inquire” test.⁵¹ Despite the thin veil, this is the same decision-making tool. For example, in *Discover Bank v. Blake*, which could be called the case of the six-cents-for-a-dollar deal, the court concluded the deal was unenforceable because the nonmistaken party failed to inquire if there was a mistake before accepting.⁵² Discover Bank obtained a judgment against Marline Blake for over \$10,000.⁵³ Initially, Discover Bank offered discounts of five percent, four percent, and three percent depending on how quickly she repaid.⁵⁴ In a subsequent letter, Discover Bank offered to settle for (i) \$9,360 or (ii) three monthly payments of \$206.61—a total of merely \$619.83.⁵⁵ Promptly upon receipt, Marline Blake notified Discover Bank that she accepted their offer to settle for \$619.83 total, and she enclosed a check in the amount of \$206.61 for the first installment payment.⁵⁶ A week later, Discover Bank returned the \$206.61 check with a letter stating the \$619.83 proposal was a mistake.⁵⁷

Eventually, Discover Bank sued to rescind the alleged agreement based on the doctrine of unilateral mistake,⁵⁸ but the court instead focused on whether the offer to settle for six-cents-on-the-dollar was too good to be true, in which case the customer would have had a duty to inquire before accepting.⁵⁹ The court emphasized the following facts: (i) the discounts offered by Discover Bank just two weeks earlier were not nearly as generous (only five percent, four percent, or three percent); (ii) Discover Bank’s subsequent letter was intrinsically nonsensical as it offered a seven percent discount if she paid immediately in a lump sum, but the letter offered a ninety-four percent discount if she made three monthly payments; and (iii) Discover had just obtained the judgment

48. See *Speckel*, 364 N.W.2d at 893.

49. *Id.* (citing 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 94 (3d ed. 1957)).

50. *See id.*

51. *See, e.g., id.* (mentioning a “duty to inquire” twice); *Nelson v. Helgeson Dev. Co.*, No. C8-90-2452, 1991 WL 59812, at *2 (Minn. Ct. App. 1991) (“If Nelson knew . . . that Hollis was acting on a mistaken belief . . . he had a duty to inquire and to set the record straight.”); *Wender Presses, Inc. v. United States*, 343 F.2d 961, 962 (Ct. Cl. 1965) (“[T]here was nevertheless enough to have reasonably cast upon defendant’s officials the duty to make inquiry.”).

52. *Discover Bank v. Blake*, No. 27-CV-16-1265, 2017 WL 3469525, at *3 (Minn. Ct. App. 2017).

53. *See id.* at *1.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.* Discover Bank also argued that no contract was formed. *Id.*

59. *See id.* at *2.

against Blake three months earlier and therefore had not been trying to collect for very long.⁶⁰ The court concluded there had been no cheap settlement because the offer was too good to be true and Marline Blake did not inquire.⁶¹

As the single-step TGTBT test is a question of fact, decisions can go the other way—in which case the agreement was *not* too good to be true, and the court will enforce it. In what may be described as the case of the careless concrete contractor, a prime contractor requested bids from sub-contractors for the concrete work on a parking lot and road project for the City of Wahpeton, North Dakota.⁶² Craig Shuck, a concrete contractor (doing business as Beaver Masonry), submitted a sub-bid for \$537,281, which was the low bid by 24%.⁶³ After the prime contractor (Riley Brothers Construction) won the prime contract, Riley Brothers and Craig Shuck finalized their agreement in connection with a subsequent meeting.⁶⁴ After the meeting, that same evening, Craig Shuck realized his bid was at least \$100,000 too low, and he would not be able to perform.⁶⁵ Nevertheless, he waited almost two weeks to notify Riley Brothers Construction that there was a problem.⁶⁶

The trial court decided that the careless concrete contractor's sub-bid was *not* too good to be true and was an offer that Riley Brothers Construction could accept to create a binding contract.⁶⁷ On appeal, the court affirmed the validity of the single-step TGTBT test⁶⁸ and concluded that the trial court's factual determinations were supported by reasonable evidence.⁶⁹ The court noted (i) the prime contractor "testified that in his experience, bids for the same work can vary between 25% and 30%, and

60. The district court entered a default judgment against Blake in February of 2016, and Discover sent the second letter on May 9. *See id.* at *1.

61. Although her husband telephoned Discover Bank and was told the \$619.83 proposal was a mistake and should be ignored, the court did not have sufficient facts to determine whether her husband was acting as her agent. *See id.*

62. Riley Bros. Constr., Inc. v. Shuck, 704 N.W.2d 197, 199 (Minn. Ct. App. 2005).

63. *See id.* at 200. The next lowest bid was \$771,000. *See id.*

64. The meeting included several parties involved in the parking lot and road project, and the careless concrete contractor admitted that he understood that the meeting finalized the arrangements. *See id.*

65. The careless concrete contractor underbid by more than \$100,000 because he assumed he could use eight inch slabs of concrete. Instead, the job specifications called for concrete slabs that were three feet thick. *See id.* at 201. The careless concrete contractor produced the faulty bid, in part, because he had merely reviewed "summary specifications and 'bidder's proposal' for the concrete work." *Id.* at 200. He did not receive the project blueprints until the meeting when the relationships were finalized. *See id.* at 200–01.

66. The meeting was on May 22. *See id.* at 200. That evening, Shuck identified errors of over \$100,000. *See id.* at 201. Although Shuck talked to a representative of the prime contractor two days later, he did not inform the representative that there was a problem. *See id.* He did not inform anyone with the prime contractor about the problem—or that he would not perform—until June 5. *See id.*

67. *See id.* at 201 ("The [district] court also found that [the careless concrete contractor's] bid was *not* so disproportionately low as to alert [the prime contractor] that there might be an error in the bid." (emphasis added)).

68. *See id.* at 204.

69. *See id.* at 205.

that he had seen variations as high as 40%”;⁷⁰ (ii) possible reasons for variations could include the “contractor’s availability and overhead, the skill and knowledge of the contractor’s [work] crew, whether the contractor had special machinery, and whether the contractor could obtain favorable prices on material”;⁷¹ (iii) the contractor (Craig Shuck) had more than fifteen years of experience in the industry;⁷² and (iv) the bid was over \$500,000.⁷³

A case of a miscommunicating school district is another instance where the Minnesota appellate courts acknowledged a one-step TGTBT test but denied relief on the facts.⁷⁴ The school district hired Mercedes Sheldon as a high school teacher for the 2009 school year on a probationary contract.⁷⁵ The school district’s procedures for evaluating probationary teachers included three classroom observations; following the observations, the school district would provide a summary report including a recommendation of contract renewal or termination.⁷⁶ Due to a miscommunication between the school’s assistant principal and the district’s human resources department, the human resources department placed the renewal of Sheldon’s contract on the school board’s agenda, without considering the results of the three classroom observations. The school board authorized a one-year renewal contract for 2010, the school board chair and clerk both signed the renewal contract, and the next day, Sheldon signed the contract.⁷⁷ Two weeks later, after the classroom observations, the school district realized its mistake and issued the summary report concluding that Sheldon should be terminated as a teacher.⁷⁸ The school district refused to honor the signed renewal contract.⁷⁹

When Sheldon sued, the school district argued that rescission was proper under the doctrine of unilateral mistake, or alternatively, that the signed agreement was too good to be true, and Sheldon had a duty to inquire before she signed the contract.⁸⁰ After rejecting the unilateral mistake argument, the court concluded the school district’s offer to renew was believable, and Sheldon had no duty to inquire.⁸¹ The court emphasized the following facts: (i) there was nothing unusual or inconsistent

70. *Id.* at 204.

71. *Id.*

72. *See id.* Accordingly, the prime contractor would not expect the subcontractor to make a mistake.

73. *See id.* The high price indicated that this was a substantial project, and the prime contractor could thus expect greater accuracy on a bid.

74. *Sheldon v. Indep. Sch. Dist. No. 284*, No. A10-1186, 2011 WL 1236167, at *1 (Minn. Ct. App. Apr. 5, 2011).

75. *Id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* at *2.

80. *See id.*

81. *See id.* The court adopted a narrow approach to the mistake doctrine, stating that “unilateral mistake . . . is not a basis for rescission unless there is ambiguity, fraud, misrepresentation, or where the contract may be rescinded without prejudice to the other party.” *Id.* (quoting *Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. Ct. App. 1985)).

about the form or language of the written contract—it was all standard;⁸² (ii) the written contract was properly signed by school district officials; and (iii) the school district’s handbook for probationary teachers failed to explicitly state that “renewal decisions concerning probationary teachers are only made after the completion of the summative report.”⁸³

Also, *Wender Presses, Inc. v. United States* involved a one-line bid booboo that inspired a peculiar legal analysis.⁸⁴ The U.S. government wished to sell various items of used equipment and prepared a list on which two items, number thirty-three and number thirty-four, were used lathes.⁸⁵ Wender Presses erred—they confused the numbers and mistakenly bid \$7,751 for item number thirty-four (instead of item number thirty-three).⁸⁶ The U.S. government accepted Wender Presses’ bid on item number thirty-four.⁸⁷ When Wender Presses discovered its mistake, it requested rescission on grounds of mistake.⁸⁸

Although the parties had an agreement supported by consideration, the court refused to analyze whether that agreement should be rescinded under the unilateral mistake doctrine.⁸⁹ Instead, the U.S. Court of Federal Claims focused on whether the bid failed to be an offer on the grounds that the government’s contracting officer should have known it was too good to be true,⁹⁰ in which case the court said the contracting officer would have had a “duty to make inquiry.”⁹¹

Having chosen this method of analysis, the Court of Claims stated, “The task of ascertaining what [a government] official in charge of accepting bids ‘should’ have known or suspected is, of course, not always an easy one.”⁹² Among the facts the court considered were: (i) the contracting officer had not estimated a fair price for the used lathe in advance;⁹³ (ii) the contracting officer had no “knowledge of previous purchases of the same or [a] similar article”;⁹⁴ (iii) the range of bids (Wender Presses bid \$7,751 and the only other bids were \$3,441, \$2,429.99, \$1,511, and \$288);⁹⁵ and (iv) the difficulty of valuing used machinery.⁹⁶ The court refused to grant relief for Wender Presses and instead enforced the deal, emphasizing that “[t]here was . . . a wide range

82. *See id.* at *3.

83. *Id.* The handbook merely stated that a probationary teacher would receive a “written summative report at the conclusion of all annual observations.” *Id.*

84. *Wender Presses, Inc. v. United States*, 343 F.2d 961, 961 (Ct. Cl. 1965).

85. *See id.* at 963.

86. *See id.*

87. *See id.*

88. *See id.* at 962.

89. *See id.* at 963.

90. *See id.* The Court of Claims acknowledged this shift when it stated “no agreement based on such an offer can then be enforced by the acceptor.” *Id.*

91. *Id.* at 962.

92. *Id.* at 963.

93. *See id.*

94. *Id.*

95. *See id.*

96. *See id.* at 964.

on a percentage basis between [all five of the] bids [and] the difference between [Wender’s] bid and the second highest [was] less than the differences between some of the other bids” on a percentage basis.⁹⁷ As the court concluded the deal was *not* too good, the government had no duty to inquire before accepting.⁹⁸

Thus, even when a court acknowledges a single-step TGTBT test, it will not always be a winning argument for the mistaken party. Nevertheless, its continued use will signal that courts have a great deal of discretion in these cases, making outcomes unpredictable. This can make cases more difficult to settle, prolong acrimony, and encourage protracted litigation.

B. CATEGORY #2: MIXING TGTBT WITH THE UNILATERAL MISTAKE DOCTRINE

In several cases, a court has described a single-step TGTBT test, but then applied a multi-step, unilateral mistake test. Courts may consider some combination of the following elements in granting rescission for a unilateral mistake: (i) whether the mistake related to a basic assumption upon which the contract was made; (ii) whether the mistake was material; (iii) whether the mistaken party bore the risk of the mistake; (iv) whether enforcing the contract (with the mistake) would be unconscionable or oppressive; (v) whether the other party knew, or had reason to know about the mistake before accepting; (vi) whether the other party caused (or induced) the mistake;⁹⁹ (vii) whether rescission would impose a “substantial hardship on the [nonmistaken party], other than loss of bargain”;¹⁰⁰ (viii) whether it was a clerical, computational, or other inadvertent error;¹⁰¹ (ix) whether it was a mistake of law;¹⁰² (x) the degree of the mistaken party’s negligence;¹⁰³ and (xi) the presence of ambiguity, fraud, or misrepresentation.¹⁰⁴ One leading commentator has a similar list of thir-

97. *Id.*

98. *See id.*

99. These first six factors are included among the *Restatement* provisions on unilateral mistake. RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981). The RESTATEMENT arguably creates three separate avenues for granting relief for a unilateral mistake. In addition to meeting other requirements, relief is available if (i) “enforcement of the contract would be unconscionable, or (ii) the other party had reason to know of the mistake, or (iii) [the other party’s] fault caused the mistake.” *Id.* Whether the mistaken party bore the risk of the mistake can depend on the language of the agreement, and whether “he is aware, at the time the contract is made, that he has only limited knowledge . . . but treats [that] limited knowledge as sufficient.” *Id.* § 154.

100. PERILLO, *supra* note 18, § 9.27, at 337.

101. *See id.* § 9.27, at 337–38 (contrasting these types of mistakes with those caused by an error in judgment).

102. *See id.* § 9.28, at 339 (contrasting a mistake of law with a mistake of fact, but observing that “[t]oday, the rule denying relief for [a] mistake of law has little vitality. It has been eroded by so many qualifications and exceptions”).

103. *See id.* § 9.27, at 338 (“[C]ourts have floundered with ‘culpable’ verses ordinary negligence, ‘bad faith’ verses ‘good faith’ negligence and other such *nonsense*.” (emphasis added)).

104. *See, e.g.*, *Christianson v. Jansen*, No. A11-1833, 2012 WL 2368914, at *2 (Minn. Ct. App. June 25, 2012).

teen elements.¹⁰⁵

The case of the unshrunk material mishap is an example of a court indicating that too good to be true is a valid, single-step test, but then applying a unilateral mistake test instead. As part of World War II logistical efforts, the Philadelphia Quartermaster requested informal bids from at least eight firms for a contract to supply 12,000 two-piece military uniforms.¹⁰⁶ In calculating a bid, the superintendent for Hyde Park Clothes disregarded the language in the request for bids that the government would supply *unshrunk* material (which the successful bidder would need to shrink).¹⁰⁷ As a result, Hyde Park eventually required over \$12,000 worth of extra material to make the uniforms.¹⁰⁸

Hyde Park asserted that the U.S. government should bear the extra cost as the government should “not be permitted to snap up an offer that [was] too good to be true.”¹⁰⁹ Although acknowledging the argument and not explicitly rejecting it, the Court of Federal Claims instead emphasized Hyde Park’s negligence, specifically that (i) the invitation for bids clearly stated, in capitalized and underlined wording, that the contractor would receive *unshrunk* material; (ii) Hyde Park’s superintendent, who had thirty-years experience, disregarded that language;¹¹⁰ and (iii) this transaction involved “almost a quarter of a million dollars.”¹¹¹ Also, the court observed that Hyde Park failed to promptly notify the U.S. government of its mistake.¹¹² In its conclusion, the court made no mention of the TGTBT test and instead wrote, “[I]n this case, neither the [requirements] of mutual mistake . . . nor . . . unilateral mistake by which the other party should not be allowed to profit, are present.”¹¹³

In *Fisher v. Stolaruk Corp.*, Fisher sued Stolaruk Corporation under the Fair Labor Standards Act (the FLSA) for services rendered.¹¹⁴ The company’s attorney prepared an offer of judgment to settle for \$5,000 “with costs then accrued.”¹¹⁵ The company’s attorney mistakenly believed this language would include attorney’s fees, but precedent established that it did not.¹¹⁶ If the \$5,000 amount did not include attorney’s fees, “the offer . . . was more than twenty-five percent greater than what plaintiff

105. See MURRAY, *supra* note 22, § 28.27, at 112.

106. See Hyde Park Clothes, Inc. v. United States, 84 F. Supp. 589, 589 (Ct. Cl. 1949).

107. See *id.* at 590.

108. See *id.*

109. *Id.* (quoting 1 WILLISTON, *supra* note 49, § 94).

110. See *id.*

111. *Id.* at 591. The total contract price agreed upon by the parties was \$216,000. *Id.* at 589.

112. See *id.* at 589–90 (reporting that after the contract was awarded on August 11, Hyde Park ordered extra material on October 30, did not notify the government that it expected the government to pay this extra cost until November 7, and failed to state there had been a mistake); *id.* at 591 (distinguishing a case in which the party withdrew its bid promptly once it discovered the mistake).

113. *Id.* at 592.

114. See *Fisher v. Stolaruk Corp.*, 110 F.R.D. 74, 75 (E.D. Mich. 1986).

115. *Id.*

116. See *id.* (citing *Marek v. Chesney*, 473 U.S. 1, 105 (1985)).

could recover at trial”¹¹⁷ under the FLSA. The employee’s attorney attempted to accept the offer of \$5,000, and soon thereafter, the employee’s attorney “petition[ed] the court separately for attorney’s fees under the Act.”¹¹⁸

The company asked the court to rescind the settlement agreement.¹¹⁹ The court cited the Williston treatise for the proposition that “an offeree will not be permitted to snap up an offer that is too good to be true.”¹²⁰ However, the court promptly turned to the unilateral mistake doctrine and listed a four-part test, including the need to have exercised reasonable care and the ability to “place the [nonmistaken] party in a position of status quo ante.”¹²¹ The court concluded the company was entitled to rescission.¹²² Although the court observed the attorney’s mistake “demonstrated some amount of legal negligence,”¹²³ the attorney promptly notified the other side of the mistake, and there would be no prejudice to the other side.¹²⁴

A crop-conveyance confusion case also encouraged a single-step TGTBT test, but the court decided the case on unilateral mistake.¹²⁵ In *Christianson v. Jansen*, the seller’s attorney drafted the agreement for a sale of farmland.¹²⁶ The seller did not intend to sell the crops growing on the farmland, but the contract said nothing about the crops.¹²⁷ The seller’s attorney was unaware of the Minnesota rule that if a sales agreement is silent, ownership of the crops follows ownership of the land.¹²⁸ The trial court granted the buyer’s motion for summary judgment to receive the crops (or damages), and the seller appealed.¹²⁹

The appellate court proclaimed that no binding agreement can be based on an offer that was too good to be true, but it failed to discuss the facts needed to determine how good the offer was, such as the contract sales price, the fair market value of the land, the fair market value of the crops, prior negotiations between the parties, or other similar information.¹³⁰ Instead, the court asserted that rescission is not available for a

117. *Id.* at 76.

118. *Id.* at 75.

119. *See id.* at 76.

120. *Id.* (citing 13 SAMUEL WILLISTON, A TREATISE ON THE LAWS OF CONTRACTS § 1573, at 490 n.15 (3d ed. 1970)).

121. *Id.* at 76. The court’s application of the four-part unilateral mistake test could be said to express at least part of the rationale of the too-good-to-be-true test, as the court emphasized that the plaintiff was on notice that a mistake had been made. *Id.*

122. *See id.*

123. *Id.*

124. *Id.*

125. *See Christianson v. Jansen*, No. A11-1833, 2012 WL 2368914, at *1 (Minn. Ct. App. June 25, 2012).

126. *See id.*

127. *See id.*

128. *See id.* (“Absent a contractual provision to the contrary, ‘title to growing crops passes with title to the land.’”).

129. *See id.*

130. *Id.* at *2.

unilateral mistake of law¹³¹ and that the “unilateral mistake [doctrine] does not warrant rescission of a contract absent ambiguity, fraud[,] or misrepresentation,”¹³² or inequitable conduct.¹³³ Although the contract was silent about the ownership of the crops, the court stated that the contract was not ambiguous because the law was clear.¹³⁴

C. CATEGORY #3: MIXING TGTBT WITH OTHER LEGAL TESTS

In several cases, courts have acknowledged too good to be true as a valid, single-step test but used a different legal theory to decide the dispute. In the spray foam disaster case, a general contractor requested a sub-bid from Cal-Co Insulation on a building renovation project including separate prices for (i) rigid-board insulation and (ii) spray foam insulation.¹³⁵ Cal-Co quoted \$30,320 if the building owner wanted spray foam insulation.¹³⁶ Cal-Co subsequently realized that the material costs alone would be about *seven to eight times higher than their entire bid*.¹³⁷ When Cal-Co refused to supply the spray foam insulation, the general contractor hired another firm and sued Cal-Co for \$303,000.¹³⁸

Cal-Co argued that their bid was too good to be true and that the general contractor had a duty to inquire before accepting.¹³⁹ In response, the general contractor argued that they did not know and had no reason to know, that the bid was a mistake.¹⁴⁰ Regarding the TGTBT test, the court said, “Both parties have legitimate arguments to support their position and the issue is a close call.”¹⁴¹ Facts considered in the TGTBT analysis included that Cal-Co’s bid was ten times lower than all other insulation bids, although the other insulation bidders only estimated rigid-based insulation; none of them estimated a price for spray foam insulation.¹⁴²

Curiously, the court then focused on several facts indicating that Cal-Co’s representative was grossly negligent, which would seem to have nothing to do with how *good* the estimate was under a TGTBT test.¹⁴³ Specifically, the court stated, “Ross Pierce had been in the busi-

131. *See id.*

132. *Id.*

133. *See id.* On this point, the court stated, “[H]ow [the buyer] could have acted inequitably by harvesting that crop [was] neither clear nor explained.” *Id.* at *3.

134. *See id.* (explaining that if the agreement is otherwise silent, the crops transfer with the land). Finally, the court applied the rule of construction that even if the contract was ambiguous (as argued by the seller), “[a]mbiguous contractual provisions are construed against the drafting party.” *Id.*

135. *See Portzen Constr., Inc. v. Cal-Co Insulation, Inc.*, No. 13-0758, 2014 WL 2347821, at *1–2 (Iowa Ct. App. May 29, 2014).

136. *See id.* at *1.

137. *See id.* The estimate of the material cost was between \$206,700 and \$243,750. *Id.*

138. *See id.* at *2.

139. *See id.* at *5.

140. *See id.* Indeed, the trial court “made factual findings [that] Portzen did not know or should not have known Cal-Co’s bid was too good to be true.” *Id.*

141. *Id.*

142. *See id.*

143. *See id.*

ness . . . for years. He had been applying spray foam insulation [for five years] He had attended a four-day course specifically pertaining to spray foam insulation. He ha[d] access to his sales rep, and he ha[d] dealt with the same rep for five years.”¹⁴⁴ Only after this apparent finding of culpable negligence did the court conclude that the bid was *not* too good to be true¹⁴⁵ and that Cal-Co was liable for over \$300,000.¹⁴⁶

Another case asking whether a proposal was too good to be true but then moving on to apply a different contract law principle to decide the controversy was *Sumerel v. Goodyear Tire & Rubber Co.*¹⁴⁷ Bob and Sally Sumerel and others sued Goodyear for selling defective products and won a jury verdict of approximately \$1.3 million plus 36% of certain costs and expenses (and 48% of other costs and expenses).¹⁴⁸ The attorneys had difficulty agreeing on the precise amount of damages, leading to a series of emails and other communications.¹⁴⁹ At one point, a co-counsel for Goodyear sent the plaintiffs’ attorney an email overstating the amount Goodyear owed by \$550,000 with the following message: “Here are our charts . . . that Goodyear believes are appropriate. . . . Please review these, then let’s discuss.”¹⁵⁰

The plaintiffs’ attorney immediately spotted a miscalculation in the charts—Goodyear’s co-counsel had failed to assess only 36% (or 48%) of the costs and expenses.¹⁵¹ Instead, Goodyear’s co-counsel had added *all* of the costs and expenses to the amount Goodyear owed.¹⁵² The plaintiffs’ attorney did *not* discuss these figures as requested by Goodyear’s co-counsel.¹⁵³ Instead, plaintiffs’ attorney left a voice message and promptly followed with a fax accepting the bloated amount.¹⁵⁴ Goodyear refused to pay the extra \$550,000, and the plaintiffs sued.¹⁵⁵ The trial court held for the plaintiffs, and Goodyear appealed.¹⁵⁶

On appeal, the court observed, “In our view, the present case is a prototype for a purported offer that was ‘on its face manifestly too good to be true.’”¹⁵⁷ The court described the mathematical calculations as “simple” and “inconsistent,” which raised a “duty . . . to inquire before attempting to accept the purported ‘offer.’”¹⁵⁸ In regards to the duty to inquire, as discussed above, the plaintiffs’ attorney did not ask Goodyear’s co-counsel about the apparent error and instead immediately at-

144. *Id.*

145. *See id.*

146. *See id.* at *6–7.

147. 232 P.3d 128, 134–35 (Colo. App. 2009).

148. Goodyear manufactured a defective part for a heating system. *See id.* at 130.

149. *See id.*

150. *Id.* at 131.

151. *See id.*

152. *See id.*

153. *See id.*

154. *See id.* at 132.

155. *See id.*

156. *Id.*

157. *Id.* at 134.

158. *Id.* at 134–35.

tempted to accept. Thus, if the court truly believed that a TGTBT test (and the duty to inquire) were sufficient devices for deciding a case, no further legal analysis would have been necessary.

Instead, the court discussed a different legal rule—that the mistaken communication could not have been an offer because it did not invite acceptance.¹⁵⁹ Rather than inviting acceptance, the communication contained “qualifying language,”¹⁶⁰ specifically saying, “Please review these, then let’s discuss.”¹⁶¹ As a result, it was not an offer—it was just a part of preliminary negotiations, so the plaintiffs and their attorneys never had power of acceptance.¹⁶² Accordingly, the appellate court reversed the trial court and directed a satisfaction of judgment order favoring Good-year, thereby rescinding the transaction.¹⁶³

Similarly, in *Lange v. United States*, the court initially indicated that the dispute might be decided on the grounds the proposal was too good to be true, but the court then expanded its analysis.¹⁶⁴ Lange Brothers hired a subcontractor, C.M. Wilkinson, to construct a laundry chute in a laundry building for the U.S. Naval Academy in Annapolis, Maryland.¹⁶⁵ C.M. Wilkinson initially offered to build the chute for \$347 but did not receive the specifications until after signing the contract, approximately four months later.¹⁶⁶ Initially, C.M. Wilkinson assumed it could use steel sheets typically costing five cents a pound, but the specifications called for stainless steel sheets costing forty-six cents a pound.¹⁶⁷

Without the mistake, C.M. Wilkinson would have bid \$1,271, and C.M. Wilkinson eventually offered to eliminate all profit and overhead and build the chute for \$1,071.¹⁶⁸ The parties signed a second contract for \$1,106, but subsequently, Lange Brothers refused to pay more than \$325, attempting to hold C.M. Wilkinson bound by the first agreement.¹⁶⁹ Lange Brothers asserted that the second contract (for \$1,106) was unenforceable due to a lack of consideration.¹⁷⁰

159. *See id.* at 135.

160. *Id.* at 134.

161. *Id.* at 132.

162. In the alternative, the court considered the multi-part test for unilateral mistake under *Restatement (Second) of Contracts* §§ 153 and 154 which includes (i) whether the mistake related to a basic assumption on which the contract was made; (ii) whether the mistake would have a material effect on the agreed-upon exchange; (iii) whether the mistaken party bore the risk of the mistake; (iv) whether enforcing the contract would be unconscionable or oppressive; and (v) whether rescission would pose a substantial hardship on the other party. *Id.* at 136.

163. *See id.* at 138.

164. *Lange v. United States*, 120 F.2d 886, 886 (4th Cir. 1941).

165. *See id.*

166. C.M. Wilkinson made a written offer to construct the chute for \$347 on November 11, 1938. *See id.* C. M. Wilkinson received the specifications after they signed a contract on March 1, 1939. *See id.* at 887.

167. *See id.*

168. *See id.*

169. *See id.* at 888–89.

170. Lange Brothers pointed out that C.M. Wilkinson did not agree to provide any additional services—the only significant changes between the first and second contracts were the change in price and an extension of time. *See id.* at 889.

In regards to the enforceability of the first contract, the court said it was tempted to simply find that the bid for \$347 was too good to be true, and therefore, it was not an offer capable of being accepted.¹⁷¹ The court then briefly discussed some factors considered in a typical unilateral mistake analysis—the subcontractor’s degree of fault and whether the other party would be prejudiced—but the court complained that “the instant record is silent on this point.”¹⁷² As a result, the court could not draw inferences that otherwise would be “quite obvious.”¹⁷³

Ultimately, the court applied the legal concept of “unforeseen and substantial difficulties” to conclude that the first contract was unenforceable.¹⁷⁴ As a result, the second contract was supported by consideration, and C.M. Wilkinson was entitled to payment under the second contract.¹⁷⁵ Thus, rather than use the single-step TGTBT test, the court used a “liberal application to the exception of unforeseen difficulties.”¹⁷⁶

Likewise, in perhaps the most widely studied, post-Millennial contract case using “too good to be true,” Judge Kimba Wood of the U.S. District Court for the Southern District of New York employed it as one of five factors to conclude that a communication was a joke instead of an offer.¹⁷⁷ In *Leonard v. Pepsico, Inc.*, a “darling of casebook writers,”¹⁷⁸ Pepsi conducted a promotional campaign awarding so-called “Pepsi Points” for purchasing Pepsi soft drinks.¹⁷⁹ A customer could redeem the Pepsi Points for merchandise bearing the Pepsi logo (or colors), as listed in a catalogue.¹⁸⁰ Consumers also could purchase Pepsi Points for ten cents per point.¹⁸¹

One of Pepsi’s television commercials stated that a consumer could purchase a Harrier Jet with seven million Pepsi Points, although the Harrier Jet was not included in the catalogue.¹⁸² Leonard and his acquaintances joined together and sent Pepsi slightly more than \$700,000 cash for seven million Pepsi Points, and they directed that Pepsi send Leonard a Harrier Jet.¹⁸³ The cost of a Harrier Jet at the time was \$23 million.¹⁸⁴ Pepsi refused to deliver, and Leonard sued.¹⁸⁵ Pepsi raised several suc-

171. *See id.*

172. *Id.*

173. *Id.*

174. *Id.* at 890.

175. *See id.* at 889–90.

176. *Id.*

177. *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 129 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000).

178. Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526, 536 n.39 (2003) (listing eight law school casebooks using *Leonard v. Pepsico, Inc.* as a principal case).

179. *See Leonard*, 88 F. Supp. 2d at 118.

180. *See id.* at 119.

181. *See id.*

182. *See id.*

183. They sent a check for \$700,008.50, along with fifteen original Pepsi Points coupons. *Id.*

184. *See id.* at 129.

185. *Id.* at 120.

cessful defenses, including that the purported sale of goods would violate the Statute of Frauds under the Uniform Commercial Code¹⁸⁶ because the price was \$500 or more and Pepsi never signed a writing to sell a Harrier Jet.¹⁸⁷ The court also followed the general rule that an advertisement is not an offer.¹⁸⁸

In addition, Judge Wood's opinion included a lengthy discussion that the commercial was a joke, not an offer to enter into a binding contract.¹⁸⁹ In an attempt to explain why the commercial was funny,¹⁹⁰ the opinion described five features. The first four reasons were: (i) the commercial, like many others, indicated that by using the product "one will become attractive, stylish, desirable, and admired by all;"¹⁹¹ (ii) it is highly improbable that the teenage boy in the ad would be capable of safely flying a Harrier Jet;¹⁹² (iii) the events in the commercial are the stuff of fantasy, including the teenager's school having a suitable landing pad for a Harrier Jet;¹⁹³ and (iv) a Harrier Jet is designed for attacking and destroying surface and air targets, a very different mission than transporting a teenager to his local high school.¹⁹⁴

Fifth and finally, Judge Wood discussed the great disparity between the price advertised in the commercial (seven million Pepsi Points that could be purchased for \$700,000), and the cost of a Harrier Jet (\$23 million).¹⁹⁵ The court commented that a price of \$700,000 would be "a deal too good to be true,"¹⁹⁶ and this helped explain why the commercial was funny. In conclusion, Judge Wood listed three reasons for the holding and did not treat the single-step TGTBT test as a separate basis for the result.¹⁹⁷

D. CATEGORY #4: JUST USING TGTBT TO DESCRIBE OR SUMMARIZE

Sometimes courts use the phrase "too good to be true" merely to describe the facts or summarize the essence of the dispute. For example, in a please-pay-me-for-nothing case, Knox Energy, LLC, a natural gas pro-

186. *See id.* at 131 (citing U.C.C. § 2-201(1) (AM. L. INST. & UNIF. L. COMM'N 1977)).

187. *See id.* at 131 ("There is simply no writing between the parties that evidences any transaction.").

188. *See id.* at 132 ("[T]he commercial was merely an advertisement, not a unilateral offer.").

189. The basic legal principal is that if the speaker did not intend to be bound and a reasonable person would conclude from outward manifestations that the speaker did not intend to be bound, there was no offer, and the other party could not accept. *See PERILLO, supra* note 18, § 2.4, at 28.

190. *Leonard*, 88 F. Supp. 2d at 129 ("Explaining why a joke is funny is a daunting task . . .").

191. *Id.* at 128.

192. *See id.* at 128–29.

193. *See id.* at 129.

194. *See id.*

195. *See id.*

196. *Id.*

197. *See id.* at 132.

ducer, contracted with Gasco Drilling for two years.¹⁹⁸ Part of the deal was a “stand-by” clause that Knox Energy would pay Gasco \$10,800 a day per drilling rig when Gasco was on site, but Knox Energy was not directing Gasco to drill.¹⁹⁹ About a year after the two-year contract terminated, someone at Knox Energy inexplicably emailed a one-year extension form to Gasco, which Gasco’s CEO signed and returned.²⁰⁰ For the next year, there were no communications between the parties, and Gasco performed no drilling for Knox Energy.²⁰¹ At the end of the year, Gasco sued Knox Energy for over \$7 million, arguing they should be paid under the standby clause.²⁰²

The trial court’s instruction to the jury in the second trial (the judge granted judgment as a matter of law for the defendant at the close of the plaintiff’s case-in-chief in the first trial, but the court of appeals reversed and remanded) stated in part, “A party cannot snap-up an offer that is too good to be true.”²⁰³ But the very next sentence in the jury instruction focused on the doctrine of unilateral mistake.²⁰⁴ In concluding that this jury instruction accurately summarized Virginia law, the trial court stated that the “too good to be true” language was merely intended as a “colloquial phrase” which “accurately reflects [a] basic premise.”²⁰⁵ The court stated, “Viewed alongside the next sentence, the meaning of the language was clear—the law does not permit Gasco to take advantage of a mistake of which it knew or should have known.”²⁰⁶

Similarly, in a “gem of a case,”²⁰⁷ which could be called the Carat Confusion Caper, the court used the phrase “too good to be true” merely to describe the situation.²⁰⁸ Thomas DePrince, a former antique and jewelry dealer,²⁰⁹ on a Starboard cruise from Miami, visited the cruise ship’s jewelry store and asked the sales manager about a large, loose, twenty-carat diamond listed in a catalogue.²¹⁰ The sales manager “had never dealt with a diamond of such magnitude, [and] sent an email inquiry to Starboard’s corporate office in Miami.”²¹¹ Starboard’s corporate office contacted the

198. See *Knox Energy, LLC v. Gasco Drilling Inc.*, 258 F. Supp. 3d 709, 713 (W.D. Va. 2017) (citing *Knox Energy, LLC v. Gasco Drilling Inc.*, 637 F. App’x 735, 736–37 (4th Cir. 2016)).

199. *Id.* Knox Energy was only obligated to pay the standby rate for 328 days each year. *Id.* This was also called a “take-or-pay” provision. *Id.* Gasco guaranteed it would make two oil rigs available for Knox Energy whenever it requested work. *Id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *Id.* at 737.

204. The next sentence in the jury instruction was: “If either party knew or should have known that the other had made a *mistake* with respect to the alleged agreement, then there was no meeting of the minds, and no contract.” *Id.* (emphasis added).

205. *Id.* at 738.

206. *Id.*

207. *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586, 589 (Fla. Dist. Ct. App. 2015), *vacated*, 271 So. 3d 11 (Fla. Dist. Ct. App. 2018) (en banc).

208. *Id.* at 588.

209. *Id.* at 592.

210. *See id.* at 589.

211. *Id.*

diamond supplier, who emailed the following information: “EMERALD CUT 20.64 carats D VVS2 GIA VG Price \$235,000.”²¹² The diamond supplier intended the price to be \$235,000 *per carat*, or a total of approximately \$4,850,400.²¹³ The sales manager on the cruise ship misunderstood and sold the diamond to DePrince for \$235,000 plus \$25 for shipping.²¹⁴ Before shipping the diamond, Starboard discovered its mistake, refunded all of DePrince’s money, telephoned DePrince to explain the situation, offered him discounts for future cruises, and repudiated the contract.²¹⁵

When DePrince sued, Starboard defended on grounds of unilateral mistake, and the court initially applied a four-part test for unilateral mistake.²¹⁶ The court described \$235,000 as a “too good to be true price,”²¹⁷ and noted that when DePrince mentioned the \$235,000 price quote to a certified gemologist and a person holding the highest available degree in gemology,²¹⁸ they both advised him that the “sale price was too good to be true.”²¹⁹ Nevertheless, the court did not treat too good to be true as a separate legal test; instead, it applied the unilateral mistake doctrine.²²⁰ In a subsequent appeal, the court modified the test for unilateral mistake and held for Starboard.²²¹

III. ADDRESSING HIDDEN POLICIES WITH THE UNILATERAL MISTAKE DOCTRINE

A. IDENTIFYING THE HIDDEN POLICIES

The cases using a single-step TGTBT test tend to emphasize the facts and provide scant policy analysis.²²² Other contract law authorities, however, enunciate multiple policy issues likely at play in these cases.

On the one hand, enforcing a promise regardless of the equivalency of the bargain is consistent with fundamental, objective contract law principles, such as the primacy of the parties’ intent, the sanctity of written contracts, and the freedom of contract.²²³ Courts and commentators have

212. *Id.*

213. *See id.* at 590.

214. *See id.* at 589–90.

215. *See id.* at 590.

216. *See id.* at 591–94 (confirming the same outcome under a two-part test some courts applied in prior Florida cases and a three-part test from the new state jury instructions).

217. *Id.* at 588.

218. DePrince’s life partner was a certified gemologist and DePrince’s sister held the highest available degree in geology. *Id.* at 589.

219. *Id.*

220. *See id.* at 591.

221. *DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11, 21 (Fla. Dist. Ct. App. 2018) (en banc).

222. Occasionally, these cases provide a brief policy discussion about contract formation, such as stressing that the focus must be on the outward manifestations of the parties rather than their subjective, mental beliefs. *See, e.g.*, *Christianson v. Jansen*, No. A11-1833, 2012 WL 2368914, at *1 (Minn. Ct. App. June 25, 2012).

223. Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1414 (2009) (“[T]he law should effectuate the objectives of parties to promissory transactions.”).

stressed the importance of these principles.²²⁴ From an economic view, if people doubt that the courts will enforce contracts, they may be less likely to make contracts, thereby reducing economic cooperation and slowing overall economic growth.²²⁵ Furthermore, fulfilling promises—whether oral or written—and telling the truth are valuable social norms.²²⁶

Also, enforcing a promise regardless of how lopsided the deal supports another objective, bedrock principle of contract law. Many of the TGTBT cases involve a mistake in price—often, one party promised to provide goods or services for an extremely cheap price.²²⁷ All attorneys likely remember the ancient maxim from their first-year contracts class²²⁸ that a court will not judge the adequacy of consideration.²²⁹ Theoretically, as part of the freedom of contract, individuals and entities should be able to make good or bad bargains without government interference—even if those deals are too good to be true.

224. See, e.g., *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987) (“Freedom of contract is an important cornerstone of national labor policy”); *Moss v. Fed. Power Comm'n*, 502 F.2d 461, 468 (D.C. Cir. 1974) (discussing “sanctity of contract”); *In re Caldwell Port Elevator, Inc.*, 23 B.R. 154, 156 (Bankr. W.D. La. 1982) (“[F]reedom of contract is an important principle . . . nurtured by courts.”); see also PERILLO, *supra* note 18, § 1.3, at 5 (“[T]he parties’ power to contract as they please for lawful purposes remains a basic principle of our legal system.”).

225. See PERILLO, *supra* note 18, § 1.4, at 8–9 (discussing the “economic efficiency” of enforcing contracts).

226. See Eisenberg, *supra* note 223, at 1430 (“The efficiency of [the contract law] system rests on” three legs, one of which is “the moral norm of promise keeping”); see also *United States v. Urutyay*, 564 F.3d 679, 682 (4th Cir. 2009) (quoting a party who asserted that “a man’s word is his bond”); *Ehlert v. Comm’r.*, 50 T.C.M. (CCH) 1048 (1985) (mentioning “the old handshake concept that a man is as good as his word”).

227. See, e.g., *Wender Presses, Inc. v. United States*, 343 F.2d 961 (Ct. Cl. 1965); *Riley Bros. Constr. Inc. v. Shuck*, 704 N.W.2d 197 (Minn. Ct. App. 2005); *Hyde Park Clothes, Inc. v. United States*, 84 F. Supp. 589 (Ct. Cl. 1949); PERILLO, *supra* note 18, § 9.27, at 335 (observing that the most frequent fact pattern involves a construction contractor making a computational error or misconstruing specifications).

228. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 101 (“[C]onsideration traditionally has been one of the prominent ingredients of a course in basic American contract law.”).

229. RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. L. INST. 1981) (“If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged”); PERILLO, *supra* note 18, § 4.4, at 162. In contrast, under old Roman law, a sale of real estate could be set aside if one party was paying twice what the property was worth. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 649. English common law and U.S. contract law have rejected this double (or half) price rule; however, there is an exception for nominal or token consideration. RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b, illus. 5 (AM. L. INST. 1981). *But see* PERILLO, *supra* note 18, § 4.6, at 166 (criticizing the *Restatement* approach, arguing that the “recital of the token [consideration] manifests a bargained-for-exchange”). And there is also an exception for benefits or detriments that were not bargained for. See *Pennsy Supply, Inc. v. American Ash Recycling Corp. of Penn.*, 895 A.2d 595, 600–01 (Pa. Super. Ct. 2006) (discussing Professor Williston’s famous “benevolent man” hypothetical and quoting Oliver Wendell Holmes, Jr. that “the promise must induce the detriment and the detriment must induce the promise”). Determining when consideration is nominal or token is not a precise science—a transaction might be characterized as an enforceable part-sale and part-gift transaction. As an example, a leading commentator provides that if *A* sells his car, worth \$5,000, to his friend *B* for \$1,000, the agreement should be enforced “even though *A*’s primary motive in entering into the transactions is friendship.” PERILLO, *supra* note 18, § 4.7, at 167.

On the other hand, refusing to enforce a promise that is too good to be true can fulfill multiple subjective, equitable policy goals and promote beneficial social norms that run through several contract law doctrines. Although contract law often is called a strict liability system,²³⁰ numerous equitable doctrines are available to rescind unfair agreements. The doctrine of unconscionability encourages fairness by refusing to enforce transactions in which a party with superior bargaining power imposed unreasonable terms.²³¹ The doctrines of economic duress and undue influence also promote fairness in the bargaining process.²³² In addition, parties cannot profit from fraud, misrepresentation, or concealment for equitable and moral reasons.²³³

B. BALANCING THE HIDDEN POLICIES

Balancing these conflicting policies can be challenging, but courts routinely perform that task in unilateral mistake cases. “Nowhere in the law of contracts do objective elements supporting the certainty and stability of transactions and subjective elements supporting fairness . . . clash as frequently” as in mistake cases.²³⁴ As described earlier, courts may apply several elements from a lengthy list when deciding whether to rescind a mistaken promise.²³⁵ Many of the elements reflect important policy concerns at play in TGTBT cases.

For instance, when applying the unilateral mistake doctrine, whether a court considers the mistaken party’s degree of negligence or carelessness reflects a policy choice.²³⁶ On the one hand, if the court believes that freedom of contract is paramount, then the court will view contract law as a strict liability system and the degree of fault will be irrelevant—the mistaken party will have to fulfill his or her promise.²³⁷

230. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (AM. L. INST. 1981) (“Contract liability is strict liability. It is an accepted maxim that . . . contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault . . .”). Courts and commentators have noted this principle. See, e.g., *United States v. Bolton*, 496 F. Supp. 3d 146, 156 (D.D.C. 2020); Eisenberg, *supra* note 223, at 1413.

231. See U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 1977) (“The principle is one of prevention of oppression and unfair surprise.”); PERILLO, *supra* note 18, § 9.40, at 355 (discussing “[s]uperior bargaining power”).

232. See PERILLO, *supra* note 18, § 9.6, at 294 (“[C]ases now hold that a threat to breach a contract constitutes duress if the threatened breach would, if carried out, result in irreparable injury because of the absence of . . . other reasonable alternative[s].”); see *id.* §§ 9.10–11, at 299–303 (regarding undue influence).

233. See *id.* §§ 9.13, 9.20, 9.22 at 304–06, 315–22.

234. *Id.* § 9.25, at 328 (introducing a section titled “Errors, Mistakes, Misunderstandings”); see also MURRAY, *supra* note 22, § 28.27, at 108.

235. See *supra* notes 99–105 and accompanying text (listing eleven possible elements that could be included in a unilateral mistake test).

236. See PERILLO, *supra* note 18, § 9.27, at 336.

237. RESTATEMENT (SECOND) OF CONTRACTS ch. 11, intro. note (AM. L. INST. 1981); *Paradine v. Jane* [1647] 82 Eng. Rep. 897 (K.B.). In *Paradine v. Jane*, Paradine agreed to rent certain real estate from Jane for a term of years, but Paradine could not use it for almost three years because Prince Rupert and his army subsequently entered and occupied the land during the English Civil War. *Id.*

On the other hand, a court may view fairness as an important policy and will relieve the mistaken party if the degree of negligence was slight or otherwise excusable.²³⁸ Advocates of this view may emphasize that some types of errors are an inescapable part of the human condition.²³⁹ “[B]lunders that result from transient errors in the actor’s mental machinery” may take the form of mathematical errors, number transposition, clerical mistakes, or “misunderstandings of specifications, formula, or plans.”²⁴⁰ Although a party may customarily carry out tasks competently, “every once in a while, [things go] awry.”²⁴¹ In addition, even when the “mistaken party is at fault, . . . [morally, the offeree is] more strongly at fault if he tried to take advantage” of the mistake.²⁴²

One commentator analogizes these contractual mistake cases to lost property situations and observes that, under the law, even if the property owner was at fault for failure to exercise due care (in losing the property), the finder of the property must return it to the true owner.²⁴³ Although this rule may defeat the expectations of the finder, the rationale apparently is that those expectations were unjustified; the finder should not be able to profit from the true owner’s mistake.²⁴⁴

Evaluating the degree of a party’s negligence and balancing these policy goals can lead to some linguistic acrobatics when applying the unilateral mistake doctrine. Courts may state that ordinary carelessness or negligence will not preclude relief,²⁴⁵ and that a mistaken party worthy of relief may be characterized as acting in good faith and engaging in fair dealing.²⁴⁶ In contrast, mistaken parties not entitled to relief may be said to have violated a legal duty or committed culpable negligence.²⁴⁷

Another policy-driven element of the unilateral mistake doctrine that courts often consider is whether the other party knew, or had reason to know, that the other side made a mistake.²⁴⁸ The appeal of a fairness

238. See, e.g., *Speckel v. Perkins*, 364 N.W.2d 890, 892–93 (Minn. Ct. App. 1985) (finding a poorly written and confusing letter to be valid grounds for rescission).

239. See Eisenberg, *supra* note 223, at 1425.

240. *Id.* (referring to “mechanical errors” and lapses in concentration).

241. *Id.*

242. *Id.*

243. *Id.* at 1427.

244. *Id.* at 1425.

245. *BMW Fin. Servs. NA, LLC v. DeLoach*, No. G05021, 2017 WL 1832250, at *4 (Cal. Ct. App. May 8, 2017).

246. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 739.

247. See, e.g., *Anderson, Clayton & Co. v. Farmers Nat’l Bank of Cordell*, 624 F.2d 105, 109 (10th Cir. 1980) (explaining that “culpable negligence . . . preclude[s] a party from claiming mistake”); *President & Council of Mount St. Mary’s Coll. v. Aetna Cas. & Sur. Co.*, 233 F. Supp. 787, 798 (D. Md. 1964) (requiring that the mistaken party not have violated a “positive legal duty” or committed “culpable negligence” to be entitled to rescission for unilateral mistake). A leading commentator has described such characterizations as “nonsense.” PERILLO, *supra* note 18, § 9.27, at 336.

248. See *supra* note 99 and accompanying text. Presumably, if a proposal is too good to be true, a reasonable person would know it, so the nonmistaken party would have *reason to know* the proposal was a mistake. Leading commentators say these are true unilateral mistake situations, see KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 737, presumably because one side knows the truth that the other side is mistaken.

argument can change depending on whether the nonmistaken party (i) knew about the mistake, (ii) should have known about the mistake, or (iii) neither knew nor should have known about the mistake.²⁴⁹

In terms of the policy analysis, if the other party actually knew that the proposal was a mistake, the equities seem to weigh heavily in favor of rescinding the agreement.²⁵⁰ While the mistaken party likely was at fault for failing to exercise due care, the offeree is “more strongly at fault if he tried to take advantage.”²⁵¹ Likewise, if the nonmistaken party *had reason to know* the proposal was a mistake, fairness may dictate that the mistaken party be released from his or her promise, and the nonmistaken party should not profit from the mistake.²⁵² “[A]ministrability considerations strongly favor relief” to the mistaken party, because it will generally be “too difficult” to prove the other party actually knew.²⁵³ Some cases indicate that the nonmistaken party had reason to know if the mistake was palpable.²⁵⁴

The remaining question regarding this element is whether fairness dictates that the mistaken party obtain relief even if the nonmistaken party did not know and had no reason to know the proposal was a mistake. As a policy matter, the nonmistaken parties in these cases were justified in relying on the proposal and arguably should recover damages for any costs or expenses from their justified reliance.²⁵⁵ But in these situations, it may be unfair to enforce the promise as a contract and allow the nonmistaken party to profit, particularly when that will impose a substantial burden on the mistaken party.²⁵⁶ This leads to other frequently employed unilateral mistake elements, such as whether the mistake must be material and related to a basic assumption of the agreement, and whether the nonmistaken party must be returned to the status quo (as if the mistake

249. See *supra* note 99 and accompanying text.

250. See Eisenberg, *supra* note 223, at 1425–26.

251. *Id.* at 1425 (stating that, “as a matter of morality,” the nonmistaken party “would be viewed as improperly taking advantage of” the mistaken party); Michael I. Myerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1290 (1993) (claiming that “the party who knows of an error is the ‘better mistake preventer’”).

252. See Eisenberg, *supra* note 223, at 1426.

253. *Id.*; see also MURRAY, *supra* note 22, § 28.41, at 259 (“[O]ften, . . . it will be possible to show no more than that the party had reason to know.”).

254. See *Wil-Fred’s, Inc. v. Metro. Sanitary Dist.*, 372 N.E.2d 946, 951 (Ill. App. Ct. 1978) (finding that the mistake was “grave” when the contractor’s bid was seventeen percent lower than the next lowest bid). *But see Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons’ Co.*, 264 F.2d 435, 437–38 (8th Cir. 1959) (concluding the general contractor had *no* reason to know the subcontractor had made a mistake even though the bid was thirty percent lower than the next lowest bid), *discussed in* MURRAY, *supra* note 22, § 28.41, at 259; *Handle Constr. Co. v. Norcon, Inc.*, 264 P.3d 367, 374 (Alaska 2011) (concluding that the mistake was not palpable even though the bid was thirty-five percent lower than the next lowest bid).

255. Eisenberg, *supra* note 223, at 1427. Although, as discussed elsewhere, the unilateral mistake doctrine generally is a multi-element test, so other facts would be relevant, such as materiality. See *supra* notes 99–105 (listing eleven possible elements).

256. See Eisenberg, *supra* note 223, at 1427 (citing *Glover v. Metro. Life Ins. Co.*, 664 F.2d 1101, 1105 (8th Cir. 1981)).

had not been made).²⁵⁷

A few courts applying the unilateral mistake doctrine have also required the nonmistaken party to have somehow caused or induced the other party’s mistake.²⁵⁸ As a matter of policy, the fairness argument that the nonmistaken party should not profit is even stronger in these situations. However, a memorable Florida case flatly rejected this requirement and granted the mistaken party relief even when there was no evidence that the nonmistaken party caused or induced the mistake.²⁵⁹

IV. ABANDONING TGTBT AND REVAMPING THE UNILATERAL MISTAKE DOCTRINE

As discussed below, the unilateral mistake doctrine could likely be clarified in many jurisdictions.²⁶⁰ Nevertheless, as asserted in Part II, a state has likely already balanced the policy concerns at play in TGTBT cases when the state formulated its unilateral mistake doctrine. Thus, in cases involving a mistake, the analysis can be conducted with the unilateral mistake doctrine. Even in cases involving a joke, exaggeration, or other figures of speech, rather than a mistake, the single-step TGTBT test likely can be avoided.

A. THE SINGLE-STEP TGTBT TEST IS UNNECESSARY IN MISTAKE CASES

Each of the cases discussed above that use a single-step TGTBT test and involve a mistake could have been decided under the unilateral mistake doctrine. The court in *Speckel v. Perkins*, the case of the opportunistic attorney, focused on contract formation, but it also stated, “A unilateral mistake . . . is . . . a basis for rescission [if] there is ambiguity, fraud, misrepresentation, or where the contract may be rescinded without prejudice to the other party.”²⁶¹ However, the court failed to apply this unilateral mistake test in *Speckel*, even though the settlement letter was ambiguous,²⁶² and there was no indication of prejudice to the other party.²⁶³ The Minnesota Court of Appeals confirmed the availability of this approach under Minnesota law in *Dixon v. Progressive Insurance*

257. See *supra* notes 99–105 and accompanying text (listing other unilateral mistake elements).

258. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 738 (referring to a “few courts”).

259. See, e.g., *DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11 (Fla. Dist. Ct. App. 2018) (en banc).

260. See *infra* notes 301–309 and accompanying text.

261. *Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. Ct. App. 1985).

262. *Id.* at 891. The letter stated that the policy limit was \$50,000 and that “I cannot agree that this is a limits case.” *Id.* Nevertheless, the letter then offered a \$50,000 settlement. *Id.* In addition, the letter then anticipated further negotiations, even though the original amount demanded by the plaintiff was \$50,000. *Id.*

263. The opposing party, the plaintiff in the lawsuit, could presumably continue settlement negotiations or pursue litigation. *Id.*

Co.²⁶⁴

In the case of the careless concrete contractor,²⁶⁵ the court discussed promissory estoppel and the single-step TGTBT test²⁶⁶ but never expressly addressed the unilateral mistake doctrine. The court concluded that the nonmistaken party did not have reason to know the bid was a mistake, and the agreement based on the bid was enforceable²⁶⁷—in other words, the bid was *not* too good to be true. The court could have reached the same result under at least one formulation of the unilateral mistake doctrine according to the applicable law.²⁶⁸

In the case of the one-line booboo,²⁶⁹ the Court of Claims concluded that, under either the TGTBT test or the unilateral mistake doctrine, no relief was available for the mistaken party.²⁷⁰ In the “six-cents-on-the-dollar debt-forgiveness” case,²⁷¹ the court did not discuss the unilateral mistake doctrine at all. Instead, the court concluded there was no enforceable agreement to forgive the debt for six-cents-on-the-dollar because that proposal was too good to be true,²⁷² but the court could have reached the same result under the jurisdiction’s unilateral mistake doctrine.²⁷³ Finally, in the case of the confused school district,²⁷⁴ the court stated that the result under the TGTBT test and the unilateral mistake

264. *Dixon v. Progressive Ins. Co.*, No. 27-CV-12-9854, 2013 WL 2928121, at *3 (Minn. Ct. App. 2013) (discussing four different formulations of the unilateral mistake doctrine available under Minnesota law, including the test articulated in *Speckel v. Perkins*).

265. *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 201 (Minn. Ct. App. 2005).

266. *Id.* at 204.

267. *Id.*

268. Under Minnesota law, a necessary element for rescission under unilateral mistake is that “rescission would impose no substantial hardship on the one seeking enforcement.” *Dixon*, 2013 WL 2928121, at *3 (quoting *Gethsemane Lutheran Church v. Zacho*, 104 N.W.2d 645, 649 (Minn. 1960)). In the case of the careless concrete contractor, the specifications for the project prohibited the prime contractor (Riley Brothers) from charging any more than the amount listed on its bid, so the prime contractor absorbed the extra cost of \$79,500 charged by the replacement subcontractor. *Riley Bros. Constr., Inc.*, 704 N.W.2d at 201–03. Thus, if the court rescinded the contract, the prime contractor would have suffered a substantial loss, precluding the use of the unilateral mistake doctrine to rescind the contract. *See id.* at 201.

269. *Wender Presses, Inc. v. United States*, 343 F.2d 961, 962 (Ct. Cl. 1965).

270. *See id.* at 962–64. The court found that the U.S. Government neither knew, nor had reason to know that Wender Presses’ \$7,751.51 bid for a used lathe was a mistake, even though the next lowest bid was \$3,441. *Id.* at 962–63.

271. *Discover Bank v. Blake*, No. 27-CV-16-1265, 2017 WL 3469525, at *2 (Minn. Ct. App. Aug. 14, 2017).

272. *Id.* at *3. In addition, the customer failed to fulfill her duty to inquire. *Id.*

273. Under Minnesota law, the mistaken party can be relieved of contractual obligations if “enforcement would impose an oppressive burden on the [mistaken party] and when rescission would impose no substantial hardship on the one seeking enforcement.” *Dixon*, 2013 WL 2928121, at *3 (quoting *Gethsemane Lutheran Church*, 104 N.W.2d at 649). In the six-cents-on-the-dollar debt-forgiveness case, the creditor arguably would suffer a substantial burden if it collected only \$619.83 on a debt of \$10,699.37. *See Discover Bank*, 2017 WL 3469525, at *1. Also, if the court rescinded the \$619.83 proposal, the debtor would be back at status quo ante. *See generally Dixon*, 2017 WL 2928121, at *2 (noting that an element of the unilateral mistake doctrine is whether rescission can return the parties to status quo).

274. *Sheldon v. Indep. Sch. Dist. No. 284*, No. A10-1186, 2011 WL 1236167, at *1 (Minn. Ct. App. Apr. 5, 2011).

doctrine would be the same,²⁷⁵ although the court’s analysis under unilateral mistake appears incomplete.²⁷⁶

B. THE SINGLE-STEP TGTBT TEST IS UNNECESSARY IN JOKE AND EXAGGERATION CASES

If a court was tempted to use the TGTBT test in a joke or exaggeration case,²⁷⁷ it likely could be replaced with a soundly reasoned, multi-part test. The case of the boastful cheater²⁷⁸ was probably not a mistake case because MacDonald never wanted to retract his promise; instead, it was more likely a joke case.²⁷⁹ As discussed earlier,²⁸⁰ Rob MacDonald, the boastful cheater, promised at the beginning of his presentation that one audience member would “walk out of here with a million dollars today.”²⁸¹ At the end of the presentation, when the time came to pay, MacDonald only paid \$100 and promised to pay one dollar per year for approximately one million years.²⁸² In connection with this declaration, MacDonald laughed, so perhaps he believed his \$1 million promise was a funny joke.²⁸³

The court merely rejected MacDonald’s motions to dismiss in part and never reached the merits.²⁸⁴ If it had inquired whether MacDonald’s statement was a joke, the court could have consulted many resources. Scholars have offered an amazing array of definitions and descriptions of humor: one professor listed forty-five cognitive techniques or mechanisms typically used to generate humor;²⁸⁵ one scholarly tome devoted almost eighty pages to listing prior definitions and descriptions of humor

275. *Id.* at *2.

276. The court indicates that relief under the unilateral mistake doctrine is available if there was “ambiguity, fraud, misrepresentation, or where the contract may be rescinded without prejudice to the other party.” *Id.* at *2 (quoting *Speckel v. Perkins*, 364 N.W.2d 890, 893 (Minn. Ct. App. 1985)). The court did not discuss the prejudice to the teacher—perhaps it was too late in the year for the teacher to obtain a job at another school? Rather than explore that point, the court simply stated that “a lack of effective communication among respondents’ agents is not a unilateral mistake.” *Id.* at *2.

277. A few sources discuss contract cases involving jokes or exaggerations. *See, e.g.*, Rowley, *supra* note 178; William A. Drennan, *Joking, Exaggerating or Contracting?*, 88 TENN. L. REV. 565 (2021).

278. *Meram v. MacDonald*, No. 06CV1071-L(AJB), 2006 WL 8456253, at *1 (S.D. Cal. Oct. 23, 2006).

279. Objectively, MacDonald’s statement seems false—he said that an audience member would “leave with a million dollars,” and Meram only left with \$100 and a promise of one dollar a year for approximately one million years. *Id.* at *1. However, it appears that MacDonald said exactly what he intended to say, and subsequently, there was no indication that MacDonald would have changed his statement. *Id.* at *2.

280. *See supra* notes 27–38 and accompanying text.

281. *Meram*, 2006 WL 8456253, at *2.

282. *Id.* at *1.

283. *See id.*

284. MacDonald moved to have Meram’s contract claim dismissed because his promise was too good to be true. *Id.* at *1–2. The court refused to grant that motion (or MacDonald’s motion to have a fraud claim dismissed), but it did grant MacDonald’s motion to dismiss a claim for intentional infliction of emotional distress and a claim under the California Consumer Legal Remedies Act. *Id.* at *4–6.

285. ARTHUR ASA BERGER, *AN ANATOMY OF HUMOR* 18 (1993).

and related terms;²⁸⁶ and philosophers and psychologists have proposed at least six different theories of humor.²⁸⁷

In the case of the boastful cheater, if his promise was a joke, it might have been based on the superiority theory or the incongruity theory.²⁸⁸ Under the superiority theory, “People laugh down at someone else when they realize they are better, or at least better off, than the butt of the joke Both the maker of the joke and the audience simultaneously consider themselves superior to the butt of the joke.”²⁸⁹ Meram would have been the butt of the joke; the boastful cheater presumably believed he was smarter than Meram, and the other audience members perhaps felt that they would not have fallen for MacDonald’s prank. In addition, Meram asserted that he “suffered humiliation.”²⁹⁰

Under the incongruity theory, “something . . . doesn’t fit,”²⁹¹ which challenges the audience—momentarily or for a longer time—until the comedian provides a humorous resolution. An incongruous joke typically consists of a setup and a punch line.²⁹² An example would be: “One day a father was washing the car with his son. The son looked at the father and said, ‘Dad, don’t you think you could just use a sponge?’”²⁹³ In the case of the boastful cheater, perhaps MacDonald’s setup was telling the audience that he would give someone a million dollars just for staying until the end of the presentation (and putting his or her business card in a bowl).²⁹⁴ The audience members may have wondered how MacDonald was going to fulfill this promise at a reasonable cost. The punch line, and the relief of the mental tension created by the setup, occurred when MacDonald said he was only going to pay \$100 today and promised to pay one dollar a year for approximately one million years.²⁹⁵

In addition to mistakes and jokes, there are other situations when a speaker’s words do not match the true intent, and the proposal could be described as “too good to be true.” Many contract law cases classified as joke or jest cases really involve nonhumorous exaggeration.²⁹⁶ As one linguist wrote, hyperbole “is a common feature of everyday language use.”²⁹⁷ As in other contexts, potential buyers, sellers, service providers,

286. See JON E. ROECKELEIN, *THE PSYCHOLOGY OF HUMOR* 9–86 (2002).

287. See STEVEN GIMBEL, *TAKE MY COURSE, PLEASE! THE PHILOSOPHY OF HUMOR* 271–73 (2018).

288. See *id.*

289. *Id.* at 271. The ancient philosopher Plato condemned this type of humor. *Id.* at 167–68.

290. *Meram v. MacDonald*, No. 06CV1071-L(AJB), 2006 WL 8456253, at *5 (S.D. Cal. Oct. 23, 2006).

291. GIMBEL, *supra* note 287, at 273.

292. *Id.* at 237.

293. *Id.* at 240.

294. See *Meram*, 2006 WL 8456253, at *1.

295. *Id.*

296. See Drennan, *supra* note 277, at 3 (“Many of the other contract law controversies customarily lumped in the joke category would be more accurately described as exaggeration cases.”).

297. CLAUDIA CLARIDGE, *HYPERBOLE IN ENGLISH: A CORPUS-BASED STUDY OF EXAGGERATION* 1 (2011) (discussing the work of the Roman rhetorician Quintillian).

and other contracting parties can exaggerate, and sometimes the other party may seek to enforce the promise as a binding contract.²⁹⁸ A five-factor test for evaluating whether promissory language should be treated as nonbinding exaggeration is available.²⁹⁹ One court has indicated that figures of speech may not be enforced, such as if a party said, “I’ll eat my hat” upon the performance of some future task.³⁰⁰ Thus, in these exaggeration cases, courts could turn to a multi-factor test rather than relying on “too good to be true” language.

C. REVAMPING THE UNILATERAL MISTAKE DOCTRINE

When a mistake raises a potential TGTBT issue, this Article generally recommends that the court use the unilateral mistake doctrine. But choosing and applying a satisfactory, definitive test for the unilateral mistake doctrine can be challenging. In 1992, one commentator wrote, “Almost nobody, these days, understands how cases of unilateral mistake ought to be decided—or why.”³⁰¹ Perhaps this confusion contributes to courts occasionally choosing a quick solution with a single-step TGTBT test.

A very straightforward fact pattern and its unsatisfactory resolution help demonstrate the level of confusion. Bryan Wrzesinski, a very knowledgeable twelve-year-old baseball card collector, visited “the Ball-Mart, a newly opened baseball card store in Itasca, Illinois.”³⁰² Wrzesinski asked an inexperienced sales clerk the price of a 1968 Nolan Ryan/Jerry Koosman rookie baseball card.³⁰³ The inexperienced sales clerk interpreted the marked price of “1200/” to mean \$12.00 and accepted that amount in exchange for the card.³⁰⁴ Subsequently, the proprietor of the Ball-Mart told Wrzesinski that the price was \$1,200, which was “a price in line with the market value,” but “Wrzesinski refused to reverse the transaction.”³⁰⁵ The parties went to court to resolve the matter, but the parties announced that the card would be sold at auction and the proceeds given to charity before the court could make a ruling.³⁰⁶

298. See, e.g., *Kolodziej v. Mason*, 774 F.3d 736, 739 (11th Cir. 2014) (explaining that a law student tried to accept a defense lawyer’s televised exaggeration that he’d give a million dollars to anyone who could prove the prosecution’s theory).

299. “This list is not exclusive, and neither a single factor, nor a tallying of factors, would be determinative.” Drennan, *supra* note 277, at 593. The five factors are: (i) the speaker was trying to express an emotion—which could be anything from empathy and camaraderie, all the way to frustration and rage—rather than convey accurate information; (ii) the proposal includes inappropriate amounts, or unnecessary, impractical, or impossible terms; (iii) the course of dealing and other history between the parties suggests exaggeration; (iv) the speaker uses round numbers; and (v) the speaker may (or may not) have repeated the promissory language. See *id.* at 594–600.

300. *Kolodziej*, 774 F.3d at 744.

301. Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASH. U. L.Q. 57, 57 (1992).

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

It seems that the card shop proprietor had the stronger case—he would suffer material loss without rescission, Wrzesinski could be returned to status quo ante with twelve dollars, and Wrzesinski clearly knew, or had reason to know, about the mistake.³⁰⁷ Indeed the case is strikingly similar to *DePrince v. Starboard Cruise Services, Inc.* (decided twenty-four years later) in which an expert also tried to take advantage of an inexperienced salesperson unable to understand the language of the trade.³⁰⁸ In *DePrince*, the court applied Florida’s unilateral mistake doctrine and concluded the expert could *not* take advantage of the mistake.³⁰⁹

Even the experts in the field cannot agree on a precise list of the necessary elements to satisfy the unilateral mistake doctrine.³¹⁰ A leading commentator writes, “Today avoidance is generally allowed . . . if two conditions concur: 1) enforcement of the contract against the mistaken party would be oppressive . . . and 2) avoidance would impose no substantial hardship on the [nonmistaken party], other than loss of bargain.”³¹¹ But the same commentator then discusses that the outcome of a case could turn on a number of factors, such as: whether the mistake was substantial; whether the mistake was a miscalculation or clerical error, as opposed to an error in judgment; whether the mistake was of law or fact; and whether “the mistaken party had easy access to the information about which he or she was mistaken.”³¹²

In contrast, the *Restatement (Second) of Contracts* provides that three elements must be satisfied,³¹³ along with one of three additional elements.³¹⁴ This effectively suggests three different avenues for relief because of unilateral mistake.

Even within a jurisdiction, there can be great uncertainty about the test for unilateral mistake: “To suppose that there has been uniformity of statement and action by the courts of any jurisdiction [regarding mis-

307. See *supra* notes 99–105 and accompanying text (listing possible elements for a unilateral mistake excuse).

308. *DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11, 13 (Fla. Dist. Ct. App. 2018) (en banc).

309. *Id.* But see *Sheldon v. Indep. Sch. Dist. No. 284*, No. A10-1186, 2011 WL 1236167, at *2 (Minn. Ct. App. Apr. 5, 2011) (“A lack of effective communication among [the mistaken party’s] agents is not a unilateral mistake.”).

310. See, e.g., *DePrince*, 271 So. 3d at 20–21 (citing *State Bd. of Control v. Clutter Constr. Corp.*, 139 So. 2d 153, 156 (Fla. Dist. Ct. App. 1962) (discussing the different standards in four different Florida districts); *Fla. Ins. Guar. Ass’n v. Love*, 732 So. 2d 456, 457 (Fla. Dist. Ct. App. 1999); *Garvin v. Tidwell*, 126 So. 3d 1224, 1228 (Fla. Dist. Ct. App. 2012); *Flynt v. Progressive Consumers Ins. Co.*, 980 So. 2d 1217, 1219 (Fla. Dist. Ct. App. 2008)).

311. PERILLO, *supra* note 18, at 335; see also MURRAY, *supra* note 22, § 28.39, at 224 (using the same language, but omitting the phrase “other than loss of bargain”).

312. PERILLO, *supra* note 18, at 336–37.

313. Under the *Restatement*, the elements that must always be met are (i) the mistake involved a basic assumption of the contract; (ii) the mistake must have a material effect on the exchange; and (iii) the mistaken party did not bear the risk of loss. RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981).

314. The mistaken party must prove either (i) enforcement of the contract would be unconscionable; or (ii) the other party had reason to know about the mistake; or (iii) the nonmistaken party’s “fault caused the mistake.” *Id.*

takes] would be to make a serious mistake.”³¹⁵ For example, in 2013, a Minnesota court stated that Minnesota cases “are not consistent” and discussed at least four other tests.³¹⁶ Also, in 2015, a Florida court found support for three different unilateral mistake tests in the Florida precedents.³¹⁷ The court referred to a two-prong test, a three-prong test, and a four-prong test.³¹⁸ The court eventually settled on the four-prong test.³¹⁹ But three years later, the same court eliminated one of the elements³²⁰ and emphasized that when reviewing precedents, “a court’s holding can only go so far as its facts”³²¹

A leading commentator warns against “dogmatic generalization” on what courts have done or will do regarding mistakes.³²² He asserts, “It is without question that in any treatise or Restatement many such serious mistakes are made.”³²³ Accordingly, he concludes, “We can only . . . appeal[] to courts and lawyers to realize that these generalizations must be tentative . . . as new cases arise to test their capacity to satisfy our changing notions of justice and human welfare.”³²⁴

One thing all the approaches have in common is that the mistaken party must satisfy *every* element of the relevant test.³²⁵ This inflexibility can lead to disturbing and unpredictable results. For example, in *DePrince v. Starboard Cruise Services, Inc.*,³²⁶ the Florida court held that Starboard Cruise Services was *not* entitled to summary judgment under the unilateral mistake doctrine, in part, because there was no evidence that the nonmistaken party induced the mistake.³²⁷ However, three years later, the court eliminated the inducement requirement from the Florida test and held for Starboard Cruise Services.³²⁸

Although a thorough analysis of the unilateral mistake doctrine is beyond the scope of this Article, one possible response would be to switch to a multi-factor test in which no one factor is determinative. This would allow courts to balance all the relevant circumstances. Also, this might

315. MURRAY, *supra* note 22, § 4.9, at 780.

316. *Dixon v. Progressive Preferred Ins.*, No. A12-2183, 2013 WL 2928121, at *2–3 (Minn. Ct. App. 2013).

317. *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 2d 586, 591 (Fla. Dist. Ct. App. 2015).

318. *Id.* at 591–94.

319. *Id.* at 594 (“[T]his court currently adheres to the four-prong test.”).

320. *DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11, 20 (Fla. Dist. Ct. App. 2018) (en banc).

321. *Id.* at 18.

322. MURRAY, *supra* note 22, § 4.9, at 780.

323. *Id.*

324. *Id.*

325. The *Restatement* requires satisfaction of three elements but then requires satisfaction of only one element more from a list of three additional elements. *See supra* notes 313–314 and accompanying text.

326. 163 So.3d 586 (Fla. Dist. Ct. App. 2015).

327. *Id.* at 592; *see also DePrince v. Starboard Cruise Servs., Inc.*, 271 So. 3d 11, 14 (en banc) (“The court concluded there was a genuine issue of material fact on the inducement prong.”).

328. *Id.* at 20 (concluding that “inducement is not an element.”).

allow courts to rely more heavily on decisions from other jurisdictions (because the approaches may become more uniform). This might more closely match what courts actually do in these situations. In both the en banc *DePrince*³²⁹ case and the *Dixon*³³⁰ case, it appears that the courts shaped the unilateral mistake test to achieve the desired result in the particular case. Commentators have noted concerns “that the practice of distorting . . . doctrinal rules to police for unfairness . . . produce[s] confusion and unpredictability” and “‘covert tools are never reliable tools.’”³³¹ A more consistent approach might lead to more predictable outcomes.

V. CONCLUSION

Everybody makes mistakes.³³² Deciding the contractual consequences of a mistake can be complicated, challenging work.³³³ It is understandable that a twelve-year-old would take the extreme position that a deal is always a deal regardless of the hardship on the mistaken party and the windfall to the nonmistaken party.³³⁴ Such a position might lead parties to take uneconomical measures striving for perfection.³³⁵ And at the other extreme, some might say that any bargain involving a mistake fails to represent the parties’ true intent and should be unenforceable. Widespread acceptance of that extreme view could erode—if not destroy—confidence that courts will enforce contracts.³³⁶

A more mature approach recognizes that, depending on the circumstances, valid arguments can be made on both sides.³³⁷ Sometimes a party should be able to profit from another’s mistake, as when one party has diligently researched the details, while the other party has been careless,

329. See generally *id.*

330. See generally *Dixon v. Progressive Preferred Ins.*, No. A12-2183, 2013 WL 2928121 (Minn. Ct. App. 2013).

331. KNAPP, CRYSTAL & PRINCE, *supra* note 16, at 649–50 (quoting Karl Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 703 (1939)). As an example of saying one thing and meaning another, a leading commentator states, after reviewing unilateral mistake cases, “‘Reason to know’ [in these cases, really] means that the mistake, though unilateral, makes enforcement unjust.” MURRAY, *supra* note 22, § 28.41, at 260.

332. MURRAY, *supra* note 22, § 28.39, at 224; *id.* § 4.9, at 779 (“To err is indeed human.”); Eisenberg, *supra* note 223, at 1425 (“[E]very once in a while, [things go] awry.”).

333. MURRAY, *supra* note 22, § 4.9, at 613 (“The subject of mistake is one of the most difficult in the law.”), quoted in *Milligan v. Grinnell Mut. Reins. Co.*, No. 12-CV-947-WDS, 2013 WL 6631783, at *5 (S.D. Ill. Dec. 16, 2013).

334. See *supra* notes 302–306 and accompanying text (regarding the baseball card case involving the twelve-year-old boy).

335. See *Market Street Assocs. L.P. v. Frey*, 941 F.2d 588, 594 (7th Cir. 1991) (discussing “costly defensive expenditures”).

336. PERILLO, *supra* note 18, § 9.27, at 335–36; see also MURRAY, *supra* note 22, § 4.9, at 779 (“It would be a very damaging mistake to suppose that we know just what to do and say as to every mistake, or that we can lay down safe and easy rules and generalizations based upon judicial experience.”).

337. PERILLO, *supra* note 18, § 9.25, at 328 (“Nowhere in the law of contracts do objective elements supporting the certainty and stability of transactions and subjective elements supporting fairness . . . clash as frequently as here.”).

reckless, or made a poor judgment.³³⁸ On the other hand, Judge Posner has compared some who take advantage of another party’s mistake with thieves.³³⁹ “Both judicial and extra-judicial experience shows that at times we are . . . held responsible[] for our mistakes, while at other times we are forgiven.”³⁴⁰

Courts may be tempted to take the easy way out and decide mistake cases with a single-step TGTBT test. But courts should resist that temptation; it suggests that contract enforcement turns on mere caprice and that confidence in the system would be misplaced. This Article organizes the TGTBT cases and demonstrates that those cases could have been decided through carefully structured multi-part tests that consider the conflicting policy objectives. It also recommends a more flexible—and hopefully more reasonable and predictable—method for applying the unilateral mistake doctrine.

338. See *Laidlaw v. Organ*, 15 U.S. (2 Wheat) 178, 183–84 (1817) (regarding a tobacco buyer taking advantage of his knowledge that the Treaty of Ghent had been signed ending the War of 1812 with Great Britain).

339. *Market Street Assocs.*, 941 F.2d at 594 (“[Taking] deliberate advantage of an oversight by your contract partner . . . is sharp dealing. Like theft, it has no social product . . .” (citing Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 393 (1980))).

340. MURRAY, *supra* note 22, § 4.9, at 779.

