Seductive Oral Deals

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# Abstract

*Legal scholars have devoted considerable attention to contractual realities and mechanisms that exploit consumers’ vulnerabilities. Much of this work has focused on written standard form contracts (“the paper deal”), that typically incorporate onerous, one-sided and sometime unenforceable and illegal terms. However, scant attention has been given to the power of pre-contractual, misleading verbal promises (“the oral deal”). This Article addresses this gap by shedding important light on the seductive nature of oral deals and their legal implications.*

*While focusing on misleading oral promises, the Article addresses instances where the paper deal negates the oral deal or denies its validity. In this context, the Article argues that current approaches to misleading oral deals are undertheorized and underdeveloped. Weaving together insights from behavioral economics, behavioral ethics, social psychology and recent empirical findings, the Article develops a fuller understanding and a more nuanced approach to pre-contractual oral deals.*

*The Article illustrates that current law underestimates, and thus does not properly respond to, the harm of misleading oral deals. First, misleading oral deals are more powerful than assumed. Employing a variety of behavioral insights, we demonstrate the seductive power of misleading oral deals. Second, misleading oral deals are significantly more ubiquitous than one might believe. Drawing on emerging research in behavioral ethics, the Article explains how “good” people find ways to justify mundane unethical behavior, such as lying to customers.*

*Misleading oral promises can harm consumers and scrupulous competitors, erode important societal values, and undermine market efficiency. At the same time, consumers face substantial practical, evidentiary, and doctrinal hurdles should they wish to rely on precontractual oral promises. Against this background, the Article delineates a variety of recommendations that better address the root causes that facilitate misleading oral deals.*

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# Introduction

Legal scholars have devoted considerable attention to contractual realities and mechanisms that take advantage of consumers’ vulnerabilities. Much of this work has focused on written standard form contracts (“the paper deal”), which consumers generally do not read. Scholars have therefore examined paper deals that incorporate onerous, one-sided, and unfair or exploitative terms, and the harm they cause.

Still, the paper deal is only one element in the constellation of consumer contractual relations. Another equally important factor is the seductive power of pre-contractual verbal promises (“the oral deal”), an issue which has not received significant scholarly attention. Indeed, the literature discussing oral deals remains underdeveloped and undertheorized. This Article addresses this deficit by shedding important light on the seductive nature of misleading oral deals and their legal implications.

Consider the following scenarios, which represent only a small sample of a much larger phenomenon. In one, a telecommunication firm orally offers a customer high-speed internet and reliable access to online content. After some time, the customer discovers that the firm is not or cannot deliver on its oral promise to deliver high-speed internet. However, the relevant fine print states that customers may receive “lower than promised speed.” In another instance, an insurance salesperson represents that the policy’s coverage includes hurricane damages. After the house is hit by a hurricane, the insured learns that the fine print actually excludes such events. A car dealer may offer a potential buyer a specific trade-in allowance, or an assumption of liability for mechanical problems. Later, after purchasing the car, the buyer ascertains that the written contract significantly reduces the trade-in allowance, or, rather than assuming liability, actually declares that the car is being sold “as is.” In another common consumer transaction, a lender could promise a borrower a fixed-rate mortgage for a specific timeframe (e.g., a five-year term). However, before the expiration of this timeframe, the lender invokes a contractual term that allows for the loan to be refinanced by the lender at a higher rate. In yet another scenario, a real estate agent might promise a prospective purchaser of a lot that a planned railroad line will serve the property, but the resulting written contract incorporates a disclaimer clause denying any representations of this sort. In the last of the examples, but far from the last of the situations consumers encounter, a homeowner purchases a security alarm system after being assured orally that the system would work even if the phone lines were cut off. The written contract, however, includes a disclaimer exempting the seller from liability in such circumstances.

This Article, while focusing on such misleading oral promises, addresses primarily those instances where the paper deal negates the oral deal or nullifies its legal validity. This line of inquiry is the basis of this Article’s contention that the current scholarly and legal approaches to misleading oral deals are partial and ineffective. Drawing on insights from behavioral economics, behavioral ethics, social psychology and recent empirical findings, the Article presents a comprehensive account elucidating the issue of pre-contractual oral promises.

The Article’s main thesis is based on two complementary concepts. The first is that oral promises that precede the written contract wield significant persuasive power over consumers, one that judges, policymakers, lawyers and legal academics generally underestimate. Adopting an interdisciplinary approach, the Article explains how trust, collaboration, and cognitive biases lead consumers to believe in oral promises despite not seeing and/or understanding them in print.

Further contributing to the persuasive power of oral promises is that the reality of consumer transactions heightens consumers’ trust in oral promises as well as their tendency to ignore the fine print. As the literature demonstrates, consumers do not read form contracts, which are written in such a way that the average consumer cannot read or decipher the terms. In addition, most consumers tend to adopt a formalistic approach to contract law, with many, for example, believing that signing a contract constitutes “a waiver of most rights.” Similarly, most consumers believe that any promise formally consented to is binding, even if the terms are unfair or unenforceable.

The second, complementary approach upon which the Article rests is drawn from the emerging research in behavioral ethics. Here, the literature demonstrates that even normative and “good” people find it easier, and more acceptable, to lie or “cut corners” in oral interactions. In the context of this Article, salespeople thus find various ways to justify and excuse mundane unethical behavior, such as lying to customers.

There are two main types of misleading and deceptive oral deals that this Article examines. In the first of these, sellers may make blatant oral promises that are not supported by the written terms of the contract. As the above examples illustrate, the contract may qualify or conflict with the seller’s oral promises, as in the case where a seller’s oral promise of high-speed internet is qualified by the contract’s fine print.

In the second type of deception found in oral deals, sellers may mislead consumers as to the nature of the written contract and its relation to the oral promises. That is, sellers may tell consumers that the fine print is merely a legal technicality or formality. Salespeople may assure consumers that the paper deal does not, and will not, reflect the real relationship between the contracting parties. Sellers may further ensure consumers that the real deal will be in accordance with the oral deal, rather than the paper deal. Thus, salespeople will convince consumers that the paper deal does not merit much attention or concern, notwithstanding that the paper deal will often include an integration clause denying the legal validity of precontractual promises.

Indeed, when drafting consumer contracts, firms will often employ different types of terms that contravene and invalidate precontractual oral promises. First, drafters may introduce a “no-representation” clause declaring that the firm and its salespeople made no representations other than those detailed in the form contract. Second, drafters will often also include a “no-reliance” clause, which states that the consumer is not relying on any prior representations made by the firm or its agent. Third, firms may, at times, incorporate an "exculpation" clause prohibiting the consumer from bringing any actions based on the firm’s prior representations. In all these cases, the paper deal will clearly state that, contrary to any oral assurances the seller may have made, the paper deal *is* the real deal.[[1]](#footnote-1)

Misleading oral deals can harm consumers, disadvantage honest competitors, erode important societal norms, and undermine market efficiency. In addition, these misleading deals can aggravate distributional disparities and problematic cross-subsidies by enabling firms to discriminate among its customers in the form of yielding to assertive consumers who insist on upholding the oral promises despite integration or negating clauses.  However, average, non-assertive consumers are likely to face substantial practical, evidentiary, and doctrinal hurdles should they seek to rely upon previously exchanged oral promises.

In light of this background, our analysis calls for a fresh approach to precontractual oral promises and presents a strong argument against integration clauses that exclude previous oral exchanges in consumer contracts. Integration and merger clauses can silence consumers and undermine their willingness to express their complaints and assert their rights, thus adding to the already significant obstacles that consumers face when attempting to insist upon their rights.

Beyond our critical stance regarding integration and mergers clauses, our analysis also indicates that firms’ oral promises *ex ante* need to be better scrutinized. Consequently, we contend that contract and consumer law and policy should focus not only on *ex post* treatment measures, but also on *ex ante* preventative ones. In this context, the Article examines placing personal liability on salespeople and marketing executives, imposing a duty on firms to better train and monitor its agents, making use of recordings and mystery shopping, and the like. These proffered approaches may help in crafting and prioritizing enforcement efforts, a key challenge in the consumer law and policy landscape.

The Article is organized as follows: Part I discusses the power of oral promises from a behavioral and societal perspective. It further delineates how oral promises are especially powerful given the “no-reading problem” and information asymmetries between consumers and firms. Next, Part II explains why misleading oral promises are prevalent, drawing on the fields of behavioral ethics and social psychology. Part III then discusses the potential harm of misleading pre-contractual oral promises to consumers, honest competitors, and society at large. In light of this analysis, Part IV highlights the inadequacy of current legal approaches and doctrines. It also provides suggestions and guidelines for possible legal and policy changes, suggesting a variety of tools to better cope with the adverse effects of misleading oral deals.

# The Seductive Power of Oral Promises

This Part explains the power of oral promises on consumers. Section A places oral promises in the context of consumer trust, the science of persuasion, and cognitive biases that influence how consumers understand oral promises. Section B turns to discuss oral promises in light of the realities of consumer contracts. It first describes how *ex ante* factors–such as asymmetric information, the “no-reading” problem, and other manipulative selling tactics–intensify the impact of oral promises on consumers. It continues by clarifying how *ex post* realities–namely the silencing effect of the fine print, litigation hurdles and the unsoundness of consumer recall–further exacerbate the problems posed by pre-contractual misleading oral statements.

## Trust and Persuasion

Humans are fundamentally trusting creatures. People generally trust others and believe what others say, although individuals may differ in the degree to which they do so. Trust has been and continues to be a fundamental and necessary element of all societies, without which social and economic relations cannot exist. Trust is frequently established by the cues or impressions people receive when others speak to them rather than by the content of what is said. In essence, people regularly trust others for non-rational reasons. This non-rational response also applies in the case of promises that salespeople make to consumers during precontractual negotiations. It is here that interpersonal trust is most prominent and, alas, perilous.

Eliciting consumer trust is a key component in consumer markets,[[2]](#footnote-2) and trust and persuasion work in tandem. The seminal work of the renowned psychologist Robert Cialdini on persuasion shows how small tweaks in environment and rhetoric can significantly affect consumers’ information processing and decision-making. Consistent with Cialdini’s observations, marketing and sales literature aimed at salespeople offers abundant tips and insights for eliciting consumer trust and enables salespeople to gain expertise in persuasion and manipulation.[[3]](#footnote-3)

Along with people’s natural tendency to trust, according to the literature, people are not good in at detecting lies.[[4]](#footnote-4) Not only is there little evidence that people are capable of detecting lies, but people’s overconfidence in their ability to detect lies further exacerbates the effect of this underlying deficit.[[5]](#footnote-5) Therefore, while people may believe that they areable to detect lies, the evidence suggests the contrary.

Moreover, in many markets, consumers are one-time actors, one-stoppers, while sellers are repeat players. In the context of oral representations, sellers repeat the same types of conversations again and again, and thus become adept at them and more effect over time. They learn–or know from the outset–how to elicit consumer trust and persuade others. Consumers, however, are likely to be party to only a handful of such interactions and therefore do develop any expertise in sales communication, thus rendering them even less able to detect misleading statements.

Research in the field of marketing devotes extensive attention to how various attributes of salespeople can unconsciously affect consumers. For example, experimental research shows how factors not directly relevant to the sale, such as eye contact and empathy, can increase sales.[[6]](#footnote-6) Other experimental studies have shown the impact of emotional manipulation on consumers’ ability to process information.[[7]](#footnote-7) Other empirical studies have documented how adopting a visible manner of listening can facilitate consumer trust and influence purchasing decisions.[[8]](#footnote-8)

This body of evidence from a number of fields leads to two insights. First, most of these studies document behaviors typical of oral interactions. It would be next to impossible for a salesperson to create empathy, listen actively to customers, or manipulate consumers’ emotions solely by utilizing language cues in written documents. Second, while the documented sales and persuasion techniques do not necessarily involve deception, they can still be manipulative and distract consumers’ attention from the objective or practical aspects and qualities of the goods or services being considered. Given the powerful effect of these interpersonal interactions, the possibility that transactions may be entered into as the result of misleading oral understandings is highly likely in the absence of effective monitoring. These insights serve as the basis for much of the proceeding analysis.

## Beyond Persuasion: Cognitive Biases

The mechanisms that lead to consumer manipulation are diverse. Much of the “success” of oral manipulations can be attributed to the fact that consumers suffer from cognitive biases that make them likely to believe the misleading promises. As detailed in this Section, various biases may motivate consumers to look for and pay attention to those cues and information that reinforce their already existing inclinations and preferences.[[9]](#footnote-9) Furthermore, cognitive biases lead consumers to ignore unpleasant information that could otherwise serve as a warning. It also makes them more likely to interpret information so that it aligns with their pre-existing beliefs.

Several psychological mechanisms and cognitive biases can lead consumers to misprocess, ignore, or misuse information. Consider, for example, motivated reasoning. Motivated reasoning suggests that one’s self-interest and existing beliefs unconsciously shape one’s understanding of reality.[[10]](#footnote-10) Instead of accurately analyzing the evidence or data at hand, people process information in a way that suits their ends or goals as a result of motivated reasoning.

Studies have found that self-interest can affect people’s ability to process visual stimuli.[[11]](#footnote-11) Essentially, people tend to see different things, depending on what better serves their interest. In a classic study from the 1950s, students from two Ivy League colleges were asked to watch a film. The film featured controversial calls that were made during a football game between teams from the students’ respective schools. In this experiment, students were more likely to see the referees’ calls as correct when they favored the team from their school than when they favored their rival’s team.

This experiment indicates that the emotional stake–here, affirming loyalty to one’s institutions–can shape what people see.[[12]](#footnote-12) The existence of this effect might also shed light on marketers’ behavior and communication choices, helping to explain why many marketers, aware of the effect, might not feel uncomfortable about “stretching” the truth and “emphasizing” certain aspects of the transaction, while downplaying others.

This attitude among marketers may apply especially to vague statements, since greater vagueness allows people more room for self-deception and motivated reasoning.[[13]](#footnote-13) By its very nature, speech is far more likely to generate ambiguity for the listener and the speaker. This ambiguity is one of the reasons we believe salespeople might be more likely to deceive consumers orally rather than in writing, a point we will return to below.[[14]](#footnote-14)

Motivated reasoning shares some characteristics with other behavioral phenomena. One is the confirmation bias,[[15]](#footnote-15) which also leads people to look for information that strengthens their existing beliefs.[[16]](#footnote-16) Another is the desirability effect, according to which people may believe that something will happen simply because they want it to happen.[[17]](#footnote-17) In our context, the desirability effect makes consumers more likely to believe in the oral promises and less likely to properly understand the conflicting language of the fine print.

Another related mechanism that makes consumers vulnerable to misleading oral promises is the optimism bias.[[18]](#footnote-18) The literature on the optimism bias illustrates how people often display unrealistic optimism, viewing the future through rose-tinted glasses and systematically underestimating the risks to which they are exposed.[[19]](#footnote-19) For example, most people believe that they are less likely than others to be involved in accidents and suffer from negative experiences, such as bad relationships, job loss, economic difficulties, or health problems.[[20]](#footnote-20)

Generally speaking, optimism is a positive quality,[[21]](#footnote-21) contributing to people’s happiness, health, confidence, personal relationships, and ambition.[[22]](#footnote-22) However, unrealistic optimism can lead people to take excessive risks and ignore warning signs. In our context, the dangers posed by consumers’ optimism can be exacerbated when the risky or negative aspects of a transaction are hidden in fine print and downplayed through oral conversations and misleading statements. These measures reinforce consumers’ trust and optimism and make them more likely to enter into a transaction.

In addition, the sunk cost effect, which “is manifested in a greater tendency to continue an endeavor once an investment in money, effort, or time has been made”[[23]](#footnote-23) also explains why consumers pay heed to oral promises yet disregard the conflicting fine print. The main explanation for this behavior is that people often seek to preserve a perception of consistency and efficiency.[[24]](#footnote-24) Overcoming the sunk cost effect is a rather challenging task, which most people cannot undertake successfully on their own.[[25]](#footnote-25)

By their very nature, precontractual oral promises precede the paper deal. The efforts to become familiar with the transaction’s details, including the precontractual conversations, are sunk costs. Thus, a natural tendency would be to ignore potentially adverse terms.[[26]](#footnote-26) Once a consumer has spent substantial time and effort engaging with a salesperson and deciding to conclude the transaction, the consumer will prefer to capitalize on these efforts regardless of the fine print.

In essence, inspecting the contract is usually possible only after orally engaging with the seller. At this relatively late stage, the sunk cost effect will make it much less probable that consumers will inspect the fine print. Fraudulent salespeople can exploit this effect by intentionally postponing the presentation of contractual terms to a late stage, once the consumer has already incurred significant sunk costs.[[27]](#footnote-27)

Finally, information overload is another phenomenon that can lead consumers to rely on oral promises and ignore the fine print. Simply put, when consumers are confronted with a lot of information, they are likely to experience information overload.[[28]](#footnote-28) The human brain is limited in its ability to absorb and analyze information. Indeed, people’s capacity to process information is compromised when they are overwhelmed by a deluge of information.

Hence, consumers typically focus on a few salient aspects of the transaction at stake while neglecting many others.[[29]](#footnote-29) In the context of oral representations about a transaction, the agent’s representations are likely to be more vivid, dynamic and memorable than the complex fine print.[[30]](#footnote-30) Thus, the consumer is likely to regard the oral promises as salient and important, while, at the same time, tends to ignore the convoluted fine print.[[31]](#footnote-31)

## Oral Promises and Consumer Contracting Realities

This Section explains how consumer contracting realities increase the significance and the perils of oral promises. First, it addresses *ex ante* contracting realities that govern the early stages of the negotiation. Next, it addresses the *ex post* stage after a dispute or a problem has arisen.

At the *ex ante* stage, it is assumed that consumers make their purchasing decisions based on different types of information. These may include information about the product, its alternatives, the market, and the firm. From an economic perspective, the contractual substance is one informational factor to be considered. Indeed, contract law assumes that the contracting parties consciously agree upon a set of terms that reflect their understandings and advance their interests.

However, this assumption is largely inapplicable to transactions entered into through consumer form contracts. Consumers rarely read such contracts,[[32]](#footnote-32) which sellers pre-draft and are unwilling to negotiate. As a result, consumers do not become familiar with the content of their contracts. Moreover, even if consumers wanted to read their contracts, empirical evidence suggests that doing so would be next to impossible for most laypeople. As noted, consumer contracts are generally drafted in a way that is unreadable for the average consumer.[[33]](#footnote-33)

The fact that consumers are generally unaware of the substance of their contracts creates a potential market failure due to information asymmetry.[[34]](#footnote-34) Sellers, who draft form contracts and execute them repeatedly, do know what these contracts say. Consumers, lacking the experience of sellers, are not aware of this information. This information asymmetry, in turn, may lead consumers to make ill-advised decisions that to not maximize their personal utility.[[35]](#footnote-35)

Numerous studies have examined the legal challenges posed by the problem of consumer contracts not being read.[[36]](#footnote-36) For our purposes, it is sufficient to acknowledge that consumers do not learn about the contractual elements of their transactions by reading the contract. As a result, other informational sources, such as oral interactions, become even more significant.[[37]](#footnote-37)

Therefore, consumers must often rely heavily on oral promises, using them as a shortcut, or as a substitute for reading detailed and complex contracts. Consumers’ reliance on these oral promises is highly significant, especially given the fact that that most consumers are largely unaware of their rights and often misperceive the law.

Alarmingly, salespeople can further use oral promises to dispel the fears of consumers who *do* realize that the paper deal contains onerous terms.[[38]](#footnote-38) To convince the consumer to proceed with a deal despite problematic terms, salespeople sometimes provide reassurances and deceptive clarifications, explaining away the problematic terms.[[39]](#footnote-39) Such explanations can be effective in allaying consumers’ suspicion even when the proffered explanations are meangingless.[[40]](#footnote-40) Consequently, even those consumers who do read the contract, understand the risks involved, and take them into account, may still be harmed by misleading oral deals.[[41]](#footnote-41)

The discussion above elucidates how *ex ante* consumer contracting realities heighten the power of misleading oral promises. But *ex post* contracting realities exacerbate the problem even more, leaving consumers even more vulnerable.

The chilling effect of fine print provides a good example of the problem of *ex post* effects. As noted, experimental and empirical data suggest that laypeople are contract formalists,[[42]](#footnote-42) with consumers tending to believe that they are legally and morally bound by the fine print in contracts. People’s intuition is to believe in the validity of the fine print,[[43]](#footnote-43) even if the fine print incorporates illegal, unconscionable, or otherwise unfair terms.[[44]](#footnote-44) Thus, a form contract term that negates an oral promise or otherwise conflicts with a pre-contractual representation is likely to have a substantial impact on a consumer’s perspective about their rights.

Consider one study that investigated people’s intuition regarding consent to the fine print.[[45]](#footnote-45) This study found that people generally understand that consent to the fine print is often compromised, and is less meaningful than consent to negotiated contracts.[[46]](#footnote-46) In light of this understanding, it could be assumed that consumers’ consent to the paper deal should be treated with caution when the written contract contravenes the oral deal. Yet, the study found that peoples’ “ambivalence seems to dissipate entirely when questions about consent come up in the context of contract enforcement.”[[47]](#footnote-47) Thus, as another study illustrated, in the case of enforcement of standardized unfavorable terms, people believe that the consent to the fine print is genuine and legitimate, both morally and legally.[[48]](#footnote-48) Consistent with this finding, it has been shown that form contract terms reduce consumers’ willingness to complain, exit the contract, or otherwise challenge sellers.[[49]](#footnote-49)

Another study explored the incorporation of unenforceable and misleading terms in residential rental contracts.[[50]](#footnote-50) The study found that landlords regularly misinform tenants through their contracts, often failing to comply with mandatory disclosures. At times, their contracts included terms that “ﬂatly contravene the law.”[[51]](#footnote-51) Consistent with earlier literature, the study argued that “when a problem or a dispute with the landlord arises, tenants are likely to perceive the terms in their lease agreements as enforceable and binding, and consequently forgo valid legal rights and claims.”[[52]](#footnote-52)

A follow-up study confirmed that unenforceable terms indeed shape tenants’ perceptions.[[53]](#footnote-53) In particular, unenforceable terms made tenants “eight times more likely to bear costs that the law imposed on the landlord than were tenants with contracts containing enforceable terms.”[[54]](#footnote-54) Importantly, the study also found that unenforceable terms undermine tenant’s motivation to search for legal information online.[[55]](#footnote-55) It further suggested that unenforceable terms hinder the non-drafting party’s “ability to accurately process legal information obtained through online searches.”[[56]](#footnote-56)

Of particular relevance to our inquiry is another related study that investigated laypeople’s beliefs about contracts that, as in our context, contradicted false representations.[[57]](#footnote-57) The findings of this study revealed that respondents believed that paper deals–which in this study were signed by consumers without reading them–were valid and enforceable as written despite prior pre-contractual material deceptions.[[58]](#footnote-58) Once again, the findings suggest that fine print “discourages consumers from wanting to take legal action, initiate complaints, or damage the deceptive firm’s reputation by telling others what happened.”[[59]](#footnote-59) Disturbingly, the study also found that informing consumers about consumer protection laws “does not completely counteract the psychological effect of the fine print.”[[60]](#footnote-60)

Thus, there is mounting evidence that suggests that consumers are likely to feel bound by the written contractual terms. This is true even when the terms contradict previous misleading oral promises. While there are valid reasons for assuming the evidentiary superiority of written documents over oral statements, this assumption may entail a significant cost.[[61]](#footnote-61) As Solan observes:

The consequences of this shift in focus from verbal legal events to written ones cannot be overstated. Reliance on the written word is a two-edged sword. On the one hand, it reduces the likelihood of dispute about what the agreement (or statute) really says. On the other, it empowers the party with the pen. When only one party to the transaction controls the document, the possibility arises that the drafter will take advantage of this leverage unfairly. Thus, in addition to intended consequences, there are likely to be some unintended ones.[[62]](#footnote-62)

In addition, other obstacles may also induce consumers to adhere to contractual terms that negate preceding oral promises. First, consumers in such situations are not likely to complain. According to the Federal Trade Commission (FTC), less than 10% of defrauded consumers make a formal complaint.[[63]](#footnote-63) Even if consumers overcome the fine print chilling effect, they are still unlikely to insist upon their rights for a variety of other reasons. Some consumers may fear legally challenging a firm due to unequal bargaining power.[[64]](#footnote-64) Others may prefer avoiding conflicts and confrontations due to the emotional toll involved.[[65]](#footnote-65) Yet others may find litigation costs to be too high a burden.[[66]](#footnote-66) Related to this latter consideration is that many consumer transactions involve a relatively small amount of money or low value items. In such cases, initiating a legal dispute is not cost-effective,[[67]](#footnote-67) and consumers’ willingness to invest resources in complaining or otherwise pursuing legal actions is further reduced.[[68]](#footnote-68) Additionally, some consumers may avoid legal action due to low levels of trust in the legal system.[[69]](#footnote-69) Moreover, the fine print itself may limit the legal options consumers may use, as in the cases of the forms of class action waivers and mandatory arbitration clauses.[[70]](#footnote-70) Given all these considerations, consumers are ultimately likely to feel that there is no choice but to comply with the questionable paper deal that contradicts the oral deal.

# Are all Salespeople Liars?

Part I explained the power of misleading pre-contractual oral statements consumer advocacy perspective. It first delineated the social and behavioral forces that make such promises significant for consumers. Next, it discussed the ways consumer contracting realities, both *ex ante* and *ex post*, make consumers vulnerable to such promises.

This Part shifts the focus from consumers’ vulnerabilities and biases to salespeople’s perspective and psychology. Employing insights derived from behavioral ethics and social psychology, this Part seeks to explain why making misleading oral promises is prevalent, easy, and, at times, an acceptable norm among marketers..

## Contextualizing Oral Deals: Consumer Fraud

Consumer fraud is a persistent, ubiquitous and detrimental problem in the United States.[[71]](#footnote-71) A recent FTC survey found that some 16% of respondents, “representing 40.0 million U.S. adult consumers,” reported having been defrauded.[[72]](#footnote-72) The survey estimated that there were almost 62 million fraud incidents during 2017.[[73]](#footnote-73) The average direct loss for consumers was one hundred dollars,[[74]](#footnote-74) which translates to a total economic loss of the astounding figure of approximately six billion dollars. This estimation does not include other types of loss, such as time, attention, personal data, opportunity costs, emotional frustration, enforcement and litigation costs, and erosion of societal values.

Lying to consumers is a form of fraud, and various factors may lead salespeople to lie to consumers or mislead them. With regard to misleading oral deals, one key reason may be lack of knowledge. One mundane example is Solan’s own experience when experimentally attempting to purchase a printer. He reports:

Many stores have inexperienced sales help with little knowledge of computers. As an experiment, I recently went to such a store and asked questions about printers. The information I received from one salesman was at odds with the information I received from another. I was quite sure that both of them made up much of what they said in any event.[[75]](#footnote-75)

Sales representatives may also lie out of insecurity, stretching the truth in order to please the consumer by telling the consumer what they think the consumer would like to hear. Yet another reason for lying to customers is plainly the motivation to sell the product and secure the sale. This last reason is the focus of our attention here.

## A Behavioral Ethics Perspective

The people who engage in unethical behavior are not limited to just a few miscreants. Recent studies demonstrate that ordinary unethicality is pervasive.[[76]](#footnote-76) In fact, in some contexts, systematic violations of law or ethical standards have become the norm rather than the exception.[[77]](#footnote-77) Some outstanding examples include stealing office supplies from work,[[78]](#footnote-78) making exaggerated statements in market transactions,[[79]](#footnote-79) misreporting tax benefits,[[80]](#footnote-80) or double-parking in a way that blocks other cars.[[81]](#footnote-81)

Because of its pervasiveness, routine unethicality is highly harmful in the aggregate. Its accumulative harms, and the fact that it is committed by otherwise good people, often overshadow the more “serious” forms of unethicality that could rise to the level of crime.[[82]](#footnote-82) Furthermore, widespread unethical behavior has devastating effects on interpersonal relations and social trust,[[83]](#footnote-83) and could lead to more extreme forms of anti-social behavior.[[84]](#footnote-84)

Here, we focus on salespeople who make misleading oral promises to consumers. Our key argument here is that these salespeople find ways to excuse, justify, or ignore that their sales pitches could be considered legal misrepresentations. In essence, it can be argued that “good people” are willing to behave unethically as long as they can maintain a positive self-image as moral individuals.[[85]](#footnote-85) One of the key ways to accomplish that is to use motivated reasoning and self-deception.[[86]](#footnote-86) When “good people” are able to interpret what they do as legitimate business practices, more people are likely engage in unethical behavior.

What, then is “ordinary unethicality?” Ordinary unethicality describes the types of unethical behaviors in which people engage in during the course of their normal, daily routines.[[87]](#footnote-87) The very routineness of these infractions suggests that individuals consistently engage in supposedly minor ethical and legal violations[[88]](#footnote-88) while excusing their own unethicality.

The literature details a number of potential mechanisms that explain why otherwise normative people behave in an unethical way.[[89]](#footnote-89) Some of the unconscious mechanisms that people employ make it hard for them to understand the wrongdoing involved in their own behavior, especially when the behavior could be interpreted in more than one way.[[90]](#footnote-90) In other cases, the decision to behave unethically could be based on more conscious, deliberate mechanisms.[[91]](#footnote-91) Such mechanisms allow people to justify their own unethically by using arguments such as “it would not really harm anyone,” “this is how people expect me to behave,” and “this is the only way to survive in this business.”[[92]](#footnote-92)

The power of both these unconscious and deliberate processes is heightened in the context of oral misrepresentations to consumers. First, oral interactions are by their nature intuitive and not planned, and salespeople frequently engage freely with consumers and respond to their questions. This involves using intuitive rather than planned reasoning, which, in turn, is likely to enhance dishonesty.[[93]](#footnote-93)

Second, verbal interaction is likely to increase ambiguity. Ambiguity is likely to make it harder for people to fully realize the misleading nature of their words, especially where the spoken words have more than one interpretation.[[94]](#footnote-94)

In addition, oral promises are often made in a grey area where salespeople themselves are unsure if what they say is acceptable or legally binding, which can also encourage dishonesty.[[95]](#footnote-95) This grey area of uncertainty may give salespeople greater moral wiggle room to speak freely yet inaccurately by enabling them to tell themselves that oral promises are “merely a pre-contractual, informal, sales talk stage.”

In addition, research suggests that in competitive settings people are more likely to behave unethically.[[96]](#footnote-96) The salesperson’s incentive to “close the deal” might increase the likelihood that this incentive and pressure will mitigate any ethical constraints they might have. The competitive context might also cause salespeople to believe that their peers are probably utilizing any possible trick to boost their sales. This may lead all salespeople to engage in a “race to the bottom,”[[97]](#footnote-97) excusing their dishonest behavior as being part of the game.

## The Nuts and Bolts of B2C Oral Promises

It is precisely the mundane nature of business to consumer (B2C) transactions that makes these “ordinary” unethical acts harmful. Since misleading oral promises are perceived to be less severe, ordinarily normative people find it much easier to justify such promises. Defrauding consumers can thus easily become a norm, even an epidemic. In short, the perception of misleading oral promises as minor infractions, if even that, can change the accepted standards of ethical, social and professional norms of commercial transactions.[[98]](#footnote-98)

The literature on compliance and enforcement illustrates that ordinary unethicality is often situation-driven.[[99]](#footnote-99) In some situations, an overwhelming percentage of individuals will behave unethically.[[100]](#footnote-100) Behavioral experiments have also identified situations in which the majority of people were found to lie consistently.[[101]](#footnote-101)

In one situation, salespeople will often not reap the full economic benefit of their wrongdoing. Instead, the salesperson will often receive merely a fee or a commission, while the firm retains some of benefit as well. Receiving only part of the benefit blurs the ethical lines and makes people more likely to behave dishonestly.[[102]](#footnote-102)

Another situational factor that may increase unethicality is teamwork, where different salespeople are responsible for different aspects of the transaction. For example, one person will often make the oral marketing pitch followed by another sales representative who oversees the formal aspects, including the written contract. Generally, marketers and sellers are responsible for the oral interaction with the consumer, while lawyers are responsible for drafting the contracts. Teams and groups are more likely to engage in unethical behavior, as each individual is able to reduce his or her personal responsibility by drawing legitimacy from the group and referring to others.[[103]](#footnote-103)

Another factor affecting ethicality in these situations is that, unlike written contracts, oral promises lack an effective mechanism of accountability. Lack of accountability, in turn, increases the likelihood of unethical behavior.[[104]](#footnote-104)

Given all these factors, it is easy to see why misleading statements are frequently made and relied upon in oral interactions between salespeople and consumers. Pre-contractual oral exchanges are mundane actions, and many people cut corners orally.[[105]](#footnote-105) In fact, sellers may mislead or deceive in oral communication without a clear intention to deceive, justifying their behavior as being “part of the game” and a way to make a living. They may view such interaction as an integral part of their job, or even as a (perhaps implicit and subtle) requirement or expectation emanating from their employers.[[106]](#footnote-106)

Furthermore, to excuse or justify their behavior, sellers may also shift the blame to consumers, arguing that consumers have ample alternative sources of information.[[107]](#footnote-107) Some may believe the old maxim of “buyer beware.”[[108]](#footnote-108) Salespeople may also believe that consumers *want* to be manipulated, and that they derive satisfaction or hope by believing the marketing stories they are told.[[109]](#footnote-109)

Disturbingly, when the typical customer’s profile is different than the typical salesperson’s, sellers may be more likely to justify unethical misrepresentations, as they feel even greater distance from the consumer’s group. Sellers are naturally more likely to favor those social groups with which they associate and to discriminate against others. This is also known as in-group or the homophily bias,[[110]](#footnote-110) which can be rather easily formed.[[111]](#footnote-111) This bias may also be a factor in salespeople’s willingness to excuse misrepresentations to consumers from whom they feel socially distant.

In addition, as already noted, oral speech is more likely to be vague.[[112]](#footnote-112) When using vague speech, the speaker is able to avoid feeling that he or she is engaging in intentionally misleading behavior. Indeed, ordinary unethicality increases in ambiguous situations. As explained above, in such circumstances, people can easily deceive themselves about the moral meaning of their own behavior.[[113]](#footnote-113)

In fact, the very nature of sales talk may tend to fall under the somewhat ambiguous legal doctrine of puffery, whereby the law protects the kind of nonfactual speech which the average consumer perceives to be unrealistic, humoristic or exaggerated.[[114]](#footnote-114) But, as Hoffman notes, many consumers actually perceive puffery statements as serious, and are hence influenced by them.[[115]](#footnote-115) This may further blur the line between legitimate sales talk and contractual promises.

Another factor is the emotional stimulation for both parties that characterizes many sales talk and oral, face-to-face negotiations. This emotional stimulation further limits people’s capacity to self-monitor,[[116]](#footnote-116) once again making unethical behavior by salespeople easier to overlook. At the same time, consumer arousal may distract consumers from some types of information and make them less likely to explore aspects of the transaction vigilantly and thoroughly.[[117]](#footnote-117)

For all the reasons discussed above, misleading oral deals can easily become the norm. At the same time, both buyers and sellers may not even be aware of this new and essentially unethical norm. While people may become accepting of this reality, it nevertheless results in significant harms, which will be identified and discussed in the next Part.

# The Various Harms of Misleading Oral Deals

Salespeople are skillful and experienced communicators. As already discussed, they are motivated to make misleading promises and find ways to excuse and justify them. At the same time, consumers want to trust sellers. Various cognitive biases lead consumers to believe sellers and trust their statements. Unfortunately, consumer contracting realities–such as the no-reading problem, the chilling effect of the fine print, and hurdles reducing consumers’ likelihood of seeking justice–intensify consumers’ vulnerabilities toward misleading oral deals. Misleading oral promises are thus bound to be prevalent and effective.

This Part identifies the various social costs of misleading oral deals, which deals can harm consumers, undermine important societal values, disadvantage honest competitors, and harm the salespeople themselves.

**Harm to consumers**. First and foremost, misleading oral promises provide incorrect information, which can lead consumers to make erroneous decisions. The maxim that market transactions advance the parties’ utility relies on the assumption that the market provides relevant and accurate information.[[118]](#footnote-118) When this is not the case, inefficient transactions are more likely to take place.[[119]](#footnote-119)

Of course, misleading and deceiving promises also harm consumers’ autonomy and dignity. Borrowing from Kant,[[120]](#footnote-120) when salespeople lie to consumers in order to sell to them, they often treat consumers merely as a means (to conclude a sale), rather than as an end in themselves.

It is generally accepted that lying is morally bad and disrespectful,[[121]](#footnote-122) and contravenes accepted social norms.[[122]](#footnote-123) Revealingly, surveys indicate that the public largely expects “that a sales person's verbal representations would be consistent with the terms of the sales Agreement.”[[123]](#footnote-124) Surveys also clarify that people expect firms to “stand behind the verbal representations of their salespeople, even if these representations contradicted the written contract.”[[124]](#footnote-125)

Certainly, there are many kinds of consumers, and some consumers are more naïve and trusting than others.[[125]](#footnote-126) Thus, consumers differ in their inclination to believe misleading oral deals. It is cause for concern that marginalized consumers are more likely to be defrauded than are the wealthy and well-educated.[[126]](#footnote-127)

Those from high socio-economic groups have more to lose, and are therefore more likely to be distrusting and fearful of being deceived.[[127]](#footnote-128) At the same time, those from lower socio-economic groups will distrust others if they perceive inequality.[[128]](#footnote-129) Thus, if sales agents appear to treat members of lower socio-economic groups with respect, the resulting illusion of equality will make these consumers less likely to take precautionary steps against deception.[[129]](#footnote-130) Consequently, vulnerable, poor and marginalized consumers are likely to suffer a disproportionate impact from misleading oral deals.

The distributional effects of misleading oral deals become even more disturbing given firms’ profit-incentive to discriminate among consumers. That is, firms may choose to strategically use misleading oral promises as means to exploit weak consumers. Indeed, pre-contractual misleading promises can facilitate both *ex ante* and *ex post* discrimination.

*Ex ante*, firms can use big data and personal information to micro-target consumers.[[130]](#footnote-131) They can identify naïve or vulnerable consumers, who are more likely to be trusting, and make them extravagant promises. At the same time, firms will be more careful when dealing with sophisticated or wealthy consumers.

*Ex post*, assertive consumers might insist more on enforcing oral promises. Customers from higher socio-economic groups are more likely to confront the firm, complain about its unfair practices, threaten the firm’s reputation, or initiate legal action.[[131]](#footnote-132) Realizing the threat, firms are likely to yield to assertive consumers and honor their verbal promises.[[132]](#footnote-133) Weak consumers, in contrast, are much less able to assert their rights and confront the misleading agent or business. As noted above, they are typically less informed, less educated, and have fewer resources and less capacity to manage conflicts with firms.

**Undermining societal values**. Beyond harming consumers and market efficiency, misleading oral deals also undermine important societal values. Misleading oral promises legitimize and trivialize dishonesty. As a result, they erode consumer trust in the marketplace and reduce levels of trust more generally. This harms society at large.

It should be recalled that trust facilitates relationships, enhances mental and physical wellbeing, supports flourishing societies, and advances efficient markets.[[133]](#footnote-134) Trust is a fundamental necessity for facilitating economic activity, reducing the need to take precautions and be vigilant.[[134]](#footnote-135) On a public health level, trusting people are also happier, more tolerant and more optimistic.[[135]](#footnote-136) Misleading oral promises that reduce trust can thereby result in negative externalities that extend beyond the contracting parties.

**Disadvantaging honest competitors**. Moreover, the practice of misleading oral deals can harm scrupulous sellers who choose not to engage in making oral misrepresentations to their customers, thereby putting honest sellers at a disadvantage. If honest sellers who do not want to engage in making misleading promises need to compete with unscrupulous ones who use oral deals to manipulate consumers, the result is unfair competition.

In competitive markets, sellers compete over salient attributes, offsetting the price of this competition by reducing the importance of other attributes.[[136]](#footnote-137) Therefore, if consumers cannot effectively detect lies, honest sellers in competitive markets might be forced to adopt the practice of making misleading oral promises in order to remain competitive. Sellers who do not participate in this race to the ethical bottom to mislead consumers might compromise their earnings and eventually be pushed out of the market.[[137]](#footnote-138)

**Damaging salespeople**. Finally, the practice of justifying misleading oral deals can have a negative impact on salespeople themselves, who become accustomed to lying and behaving unethically. Research suggests a slippery slope process, whereby engaging in smaller acts of deception may pave the way to more frequent and severe types of misbehavior.[[138]](#footnote-139) Furthermore, research on social norms suggests that when a certain unethical behavior appears to be more pervasive, people view it as more legitimate.[[139]](#footnote-140) This is consistent with the bandwagon effect, which suggests that the increasing popularity of a norm or trend makes it more likely that others will adopt it.[[140]](#footnote-141) This creates a vicious circle, where more and more people who would not otherwise adopt said behavior join in accepting or engaging in the unethical norm.

Currently, oral pre-contractual promises are generally not considered an integral part of the contract. This reduces the likelihood of salespeople receiving any normative feedback as to what is (un)acceptable in their oral interactions with customers.[[141]](#footnote-142) This, in turn, deprives sellers of the opportunity to update or improve their operating principles and gives salespeople even more power over consumers. Power can corrupt,[[142]](#footnote-143) and lead to additional unethical behavior.

# Law And Policy Recommendations

Nothing in this analysis should be misinterpreted to suggest that the law actually permits pre-contractual misleading and deceptive promises. Legally, sellers cannot promise anything imaginable to consumers during negotiations while avoiding liability by incorporating one-sided contract terms. Should sellers attempt to do so, buyers “can prevail without having to assert any rights under the contract.”[[143]](#footnote-144) But as we argue below, current consumer protections against these misleading practices are partial and insufficient.

Section A of this Part provides a review of the current law and policy landscape of misleading oral deals. The remainder of this Part offers a set of policy recommendations aimed at improving the legal scrutiny of misleading oral deals. Section B focuses on *ex ante* measures, tailored for application at the pre-contractual stage. These proposals are intended to prevent misleading oral promises from occurring in the first place. Section C details *ex post* recommendations, designed to better respond to misleading oral deals that do transpire.

## The Current Landscape of Misleading Oral Deals

Perhaps the most relevant legal regulation of misleading oral deals relates to the parol evidence rule, codified by Section 2-202 of the Uniform Commercial Code (U.C.C.),[[144]](#footnote-145) and the common law doctrine of fraud. However, the judicial implementation of the codified parol evidence rule has been unclear and varies significantly among jurisdictions.[[145]](#footnote-147) Essentially, according to the parol evidence rule, a finding that a writing is integrated limits the introduction of applicable evidence to determine the content of the contract.[[146]](#footnote-148) Slightly restated, extrinsic evidence, such as oral promises, may be limited if the court finds that a written contract is integrated.[[147]](#footnote-149)

Fraud, which at times take the form of misrepresentations, is an exception to this rule.[[148]](#footnote-150) As noted in § 164 of the Restatement (Second) of Contracts, where “assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”[[149]](#footnote-151)

As Professor Posner explains:

The parol evidence rule deals with a common contractual situation: where initial negotiations, in which preliminary oral or written promises are exchanged, conclude with a writing that appears to embody the entire agreement. The question is whether the court's interpretation of the contract should rely at all on evidence related to the earlier negotiations, known as ‘extrinsic evidence,’ or should rely entirely on the writing.

…

Most courts would subscribe to something close to the following statement of the parol evidence rule: A court will refuse to use evidence of the parties' prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous, or (3) the product of fraud, mistake, or a similar bargaining defect.[[150]](#footnote-152)

Courts seem to differentiate among different types of transactions and parties when applying the parole evidence rule.[[151]](#footnote-153) Generally speaking, most courts are more likely to apply the rule strictly to contracts between sophisticated parties.[[152]](#footnote-154) This strict application, to use Posner’s terminology, is the “hard” parol evidence rule.[[153]](#footnote-155) Nonetheless, there are other courts that apply more lenient versions of the rule where parties lack sophistication.[[154]](#footnote-156) These are also known as “soft” parole evidence rules.[[155]](#footnote-157) Since consumers are considered unsophisticated parties, courts tend to apply soft rules to consumer form contracts.[[156]](#footnote-158)

Insisting upon integration clauses where both parties are sophisticated makes sense. Sophisticated parties are likely to negotiate the terms of their contracts, genuinely agree to their contents, be represented by lawyers, and prefer certainty over judicial discretion.[[157]](#footnote-159) However, where consumer contracts are involved, many have argued that relaxing the rule is also sensible.[[158]](#footnote-160) Consumers do not bargain over the contractual terms, do not necessarily read or understand them, and are rarely represented by lawyers.[[159]](#footnote-161) Instead, consumers generally believe salespeople and rely on the word of sales agents.[[160]](#footnote-162)

That said, allowing consumers to present extrinsic evidence in the form of misleading oral deals does not cure the problem. As has been shown, it would be counterproductive to place the onus of initiating litigation on individual consumers. This crucial point should be borne in mind when crafting effective legal responses to misleading oral deals, some of which we will discuss in the following Sections.

Relaxing the parol evidence rule is not the only protective measure the law offers to consumers who are lured into transactions by misleading oral deals. When the transaction involves a sale of goods and the misleading promises pertain to warranties, the buyer may sue for damages for breach of warranty.[[161]](#footnote-163) Section 2-316 of the U.C.C. further addresses the relationship between an oral warranty and the seller’s standard form contract, which purports to undermine the oral warranty. According to this section, contractual terms that bar oral modifications should be “in writing and conspicuous.”[[162]](#footnote-164)

The rationale behind requiring conspicuous writing is fairly clear. With this requirement, the law seeks to enhance the likelihood that important information is clearly disclosed and, hopefully, effectively communicated. In essence, it attempts to empower the consumer to make an informed decision and protects the consumer from unexpected disclaimers.[[163]](#footnote-165)

Nonetheless, such a disclosure requirement may not have the intended effect. Recall that the mere use of fine print makes consumers more likely to comply with the written terms of a contract.[[164]](#footnote-166) Faced with such standardized terms, consumers are prone to blame themselves for not fully reading the terms and analyzing their exact meaning.[[165]](#footnote-167) As has been shown, this holds true even when the weaker party was defrauded before entering into the contract.[[166]](#footnote-168)

One might theoretically argue that consumers can avoid misleading oral deals by carefully reading the fine print *ex ante*. According to this line of reasoning, by insisting on the duty to read the agreement, the law can incentivize consumers to become aware of the terms and conditions that govern their transactions.[[167]](#footnote-169) Consumers who choose not to read their contracts, the argument goes, should bear the risks and pay the price of their decision.[[168]](#footnote-170)

We find this reasoning unpersuasive. Imposing a duty to read on consumers will not solve the problem. As clearly shown above, above, consumers do not read form contract terms, notwithstanding their duty to do so. Consumers cannot understand form contracts and should not be expected to rationally evaluate their contents. Moreover, sellers are likely to distract consumers’ attention from the fine print. For example, salespeople can reassure consumers concerns by using “a friendly voice” and “an assuring smile,”[[169]](#footnote-171) while explaining away problematic terms. A complex, unread standard term should not shelter agents who opportunistically exploit misleading oral deals.[[170]](#footnote-172)

Striving to eliminate or mitigate the problems of deceptive, fraudulent and misleading oral deals by using written means to warn consumers is bound to fail. Consumers, as discussed above, are generally likely to trust sellers, exhibit unrealistic optimism, and commit to the contract regardless of its harsh terms. Consumers, who are usually one-shotters, often have no alternative but to rely on salespeople and agents.[[171]](#footnote-173) As the Federal Reserve Board observed in the context of mortgage transactions:

Consumers generally lack expertise in complex mortgage transactions because they engage in such mortgage transactions infrequently. Their reliance on loan originators is reasonable in light of originators’ greater experience and professional training in the area, the belief that originators are working on their behalf, and the apparent ineffectiveness of disclosures [about originators’ compensation structure] to dispel that belief.[[172]](#footnote-174)

The proposed Draft Restatement of Consumer Contracts follows this logic and generally adopts a narrow (“soft”) parol evidence rule.[[173]](#footnote-175) According to the proposed Restatement, contract terms that contravene precontractual representations are presumably deceptive and voidable.[[174]](#footnote-176) The Draft Restatement acknowledges that consumers do not systematically inspect the fine print.[[175]](#footnote-177) Thus, the drafters seek to urge firms to ensure that the paper deal does not deviate from the oral deal.[[176]](#footnote-178) Yet again, this is merely a first step. There is still a need to better monitor misleading oral deals and mitigate the problematic chilling effect of unfair and unenforceable terms.

Beyond common law doctrines, state law may also protect consumers from misleading oral deals. Unfair and Deceptive Acts or Practices Statutes (“UDAP laws”) have been enacted in all states in the United States.[[177]](#footnote-179) These laws, while differing in scope, strength and application,[[178]](#footnote-180) play a key role in protecting consumers from deceptive and unfair business practices.[[179]](#footnote-181) However, inasmuch as they largely rely on private enforcement by individual consumers, such laws are unlikely to yield the anticipated protection. We return to this crucial point below.

\* \* \*

The protections that the law currently affords against misleading oral deals are partial only. Such protections fall short in two important ways. First, the current state of the law appears to assume that misleading oral promises are the exception, not the norm, presuming that the transaction at stake is valid unless the consumer can prove to the contrary. Thus, the law underestimates both the likelihood that sellers will mislead consumers orally and the frequency of misleading oral deals. However, insights from behavioral science reveal that people are rather likely to behave dishonestly quite often. Given the often stressful selling environment in which salespeople operate, there is little doubt that many of them engage in misleading or deceptive oral interactions. This highlights the need for forceful *preventative* measures, which is the focus of Section B.

Second, current protections fall short in their expectations from consumers, both *ex ante* and *ex post*. *Ex ante*, the law overestimates consumers’ ability to avoid relying on misleading oral deals. First, contrary to what many observers may think, consumers’ ability to detect lies is rather limited.[[180]](#footnote-182) In addition, various social and behavioral forces compromise consumers’ capacity to identify misleading promises and ignore them when making decisions. These factors further emphasize the need for a nuanced and comprehensive consumer protection approach to misleading oral deals.

*Ex post*, the law overestimates the degree to which consumers will be likely to challenge effectively misleading statements once made. As explained, many consumers are unaware of their rights and are not informed about contract and consumer law doctrines. Consumers are also not good at identifying harms. Even if these challenges were mitigated in some way, consumers still face significant barriers limiting their ability to assert their rights or seek justice. Consumers may fear legal confrontation with stronger parties, distrust the legal system, seek to maintain their relationship with the firm, or lack resources or motivation to insist upon their rights. These attitudes of consumers indicate that there is a need to encourage consumers to stand up for and assert their rights, and a need for better public enforcement of consumer rights.

Moreover, the mere existence of contract terms, including unfair and unenforceable ones, can silence consumers. As emphasized throughout this Article, empirical finings “raise questions about the effectiveness of legal interventions and consumer protection regimes that put the onus on victims of fraud to challenge the enforceability of their standard form contracts.”[[181]](#footnote-183) Bearing this in mind, we now proceed to discuss legal and policy recommendations.

## Mitigation and Preventative Measures

There is a spectrum of *ex ante* measuresthat can assist in mitigating the problem of misleading oral promises. At the heart of these measures is the understanding that precontractual misleading oral deals are more prevalent and harmful then is commonly assumed. Consequently, more attention should be given to preventative means. Accordingly, this Section presents some *ex ante*, preemptive measures that policymakers, legislatures and courts can consider in the battle against seductive oral deals.

As a starting point, we suggest regarding firms as perhaps the most effective cost-avoider. Firms can minimize agents’ misrepresentation by monitoring them *ex ante*, limiting their interaction with negotiating parties, and penalizing agents who misrepresent products or services.[[182]](#footnote-184) This may be especially important when firms employ agents whose interests might not be fully aligned with that of the firms.[[183]](#footnote-185) For example a salesperson who is compensated on a commission basis might be overly eager to convince the consumer to enter into a transaction, which could lead to the use of misleading oral deals.[[184]](#footnote-186)

Accordingly, we suggest imposing a general duty on firms to properly train their agents and supervise their behavior.[[185]](#footnote-187) A prime example of *ex ante* scrutinizing is that of recording agents’ pre-contractual exchanges.[[186]](#footnote-188) Many firms are already using automatic recordings of sales conversations for monitoring, training and quality purposes.[[187]](#footnote-189) Firms are also frequently using video surveillance at stores.[[188]](#footnote-190) As technology advances, and recorded information is easier to store and save, the relative costs of these measures fall and their prevalence increases.[[189]](#footnote-191)

Policymakers can take advantage of these developments and require firms to use recordings as a check on agents’ behavior with regard to oral deals. A further step in this direction could entail requiring these recordings to be available for inspection by external parties, such as individual consumers, consumer watchdogs and enforcement agencies. Yet a more forceful measure would be to generally require firms, or at least some of them,[[190]](#footnote-192) to record and make available pre-contractual interactions with consumers. Determining the exact scope of such a duty requires a close analysis of the costs involved.

By better training its agents, firms can attempt to limit the extent of pre-contractual communications in order to minimize the risk of offering misleading oral deals. Such training can include tutorials, workshops or presentations by lawyers, pro-consumer representatives and high-ranking management personnel within the firm. Firms could also be required to report on their training efforts on a regular basis. Alternatively, they could be required to detail these efforts in case of disputes or regulatory checks. The relevant court or regulatory agency can then take into account these efforts, or lack of therefore, when deciding the dispute, case or issue before them.

The same logic may apply to automating precontractual exchanges, which is another way to minimize the risks of agents’ misrepresentations. While machine bias is a genuine and legitimate concern, robots will not lie unless programed to do so. For example, firms can be incentivized to use potentially pre-approved platforms that are programed to provide information to consumers rather than to manipulate them.[[191]](#footnote-193) As mentioned with regard to recordings, the design of these platforms can be a factor that enforcement agencies and courts can take into consideration when determining future disputes. Here too, the costs of employing such measures and their possible unintended consequences should be carefully evaluated.[[192]](#footnote-194)

To further incentivize salespeople to be careful in their representations, the law can impose personal responsibility on them. Holding agents liable for misrepresentations will incentivize them to be more careful and accurate when making oral promises. The higher the risks and stakes, the more cautious a salesperson would be. Furthermore, the mere fact that an individual knows that his or her behavior will be reviewed *ex post* encourages more thoughtful behavior *ex ante*.[[193]](#footnote-195)

While intuitively appealing, placing the responsibility on salespeople is not really a panacea. From the salespeople’s perspective, salespeople might be pressured by firms to deceive and mislead consumers.[[194]](#footnote-196) From the consumers’ perspective, consumers may not remember exactly with whom they spoke, rendering personal liability impossible and irrelevant. Even if the wrongdoer *is* identified, initiating legal procedures against the firm rather than its agent makes more economic sense, as firms typically have far more resources (deeper pockets) than do individual agents.

Moreover, motivated firms might attempt to circumvent such a measure by providing agents with insurance against claims, in which case the imposition of liability on agents could actually harm consumers in at least two ways. First, firms would be likely to pass some of these additional insurance costs onto consumers, charging consumers an additional premium. Second, an “insurance to mislead” might yield fertile ground for even more aggressive misleading selling statements. Thus, if personal liability is imposed on sales agents, careful consideration should be given to the possibility and the prevention of firms’ shielding agents via insurance. Lastly, even if firms do not insure agents, it has already been noted that agents are often motivated and pressed by the firm to sell aggressively, making it unfair to place the full responsibility on the agents.

The next proposed measure is the imposition of personal liability on marketing executives. While not a complete solution, this option does have some important potential advantages. Marketing executives normally have most of the responsibility for the firm’s marketing strategy. They rank relatively high in a firm’s hierarchy. They participate in crafting incentive schemes for salespeople, some of which could encourage a toxic corporate culture with respect to people’s ethicality.[[195]](#footnote-197)

Marketing executives are more powerful, more knowledgeable and better able to appreciate the problematic nature of misleading oral promises. They also have more to lose, in terms of wealth and reputation, than do ordinary salespeople. Placing much of the responsibility on executives also frees consumers from the need to recall the specific agent with whom they interacted. Aligning marketing executives’ legal responsibility with their status and authority within the firm may thus prove beneficial.

Policymakers may also wish to revise enforcement priorities, allocating more resources to the problem of misleading oral promises. Accordingly, another measure that consumer organizations and enforcement agencies may consider is mystery shopping.[[196]](#footnote-198) Like telephone recordings, mystery shopping has been used by firms mainly to evaluate the service in their stores. However, we propose that a more deliberate and systematic employment of mystery shoppers can facilitate law enforcement by federal and state agencies.

Section 5 of the Federal Trade Commission Act authorizes the FTC to take appropriate action against unfair or deceptive acts or practices.[[197]](#footnote-199) In this context, the FTC has wide investigative powers and enforcement authority.[[198]](#footnote-200) In fact, the FTC interprets its legal authority to conduct investigations as including undercover investigations. Thus, on occasion, FTC investigators pose as consumers to directly experience real-life sales.[[199]](#footnote-201) The FTC also has used undercover investigators to investigate whether media industry players were complying with their self-regulatory systems.[[200]](#footnote-202) However, due to legal and ethical issues, the FTC employs this practice only infrequently.

Regulatory and enforcement agencies should use this method to scrutinize misleading oral deals more regularly and systematically. By employing mystery shoppers, consumer organizations and enforcement agencies can get a real-world, neutral impression of how salespeople present products and services. Unlike harmed consumers, mystery shoppers can be more objective in reporting their experiences. They can also be better prepared and briefed as to how to record their exchanges with the firm’s agents or representatives. This will ensure that enforcement efforts do not rely on faulty, biased and imperfect human memory. We also suggest that undercover investigations ideally should not rely solely on the employees of enforcement and consumer agencies. Keeping in mind that salespeople may treat different consumers differently,[[201]](#footnote-203) attention should be given to the demographics of mystery shoppers.

To supplement these efforts and proposals, policymakers and consumer organizations can also embark on consumer informational campaigns. Experimental evidence suggests that informing consumers about the law can influence their perceptions.[[202]](#footnote-204) Along these lines, consumer educational campaigns may seek to better inform consumers about the practice of misleading oral promises and the risk of trust exploitation. Using a variety of smart tools, educational campaigns may endeavor to make related complaints and legal cases more salient to consumers. A not exhaustive list of such tools includes the use of human narratives and stories (rather than legalese), humoristic clips, comics, social media, celebrities, and influencers.

Additional educational initiatives may include literacy efforts in schools and local community centers, as well as programs that target or serve marginalized communities. Educating consumers will make them less likely to fall prey to such practices, which in turn weakens agents’ motivation to be manipulative. Though not an ultimate remedy in isolation, raising consumers’ awareness about their rights may prove to play an important role in the efforts to protect them from oral misrepresentations.

Finally, we are skeptical about the effectiveness and appropriateness of traditional disclosure requirements.[[203]](#footnote-205) Consider, for example, the Federal Trade Commission Used Motor Vehicle Trade Regulation Rule.[[204]](#footnote-206) The Rule was a response to car dealers’ notorious false representations, “particularly about the extent of the seller's liability for post-sale problems.”[[205]](#footnote-207) Attempting to mitigate this practice, the Rule requires car dealers to conspicuously and clearly warn the customer by stating “IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing.”[[206]](#footnote-208)

This disclosure is most decidedly drafted in clear and plain language. Nonetheless, we suspect that salespeople can find ways to undermine its effectiveness.[[207]](#footnote-209) Salespeople may allay consumers’ concerns by telling them that they should not worry, assuring them that the fine print is merely a formality, explaining that the terms would not govern the parties’ relationship, or even stating in a meaningless way that the disclosure is an FTC requirement.[[208]](#footnote-210) Ultimately, formalistic approaches such as mandated disclosures may prove counterproductive by providing salespeople with a shield against complaints and a de facto authorization to deceive.

## Judicial Tools and other ex post Measures

Efforts to minimize misleading oral deals *ex ante* are important. Yet they are unlikely to eliminate the practice. Despite genuine mitigating efforts, some agents may still employ, at times unintentionally, misleading oral deals. This Section details some *ex* *post* measures that can be adopted to deal with misleading precontractual oral deals that are not successfully addressed by the preventative policy and regulatory measures specified above.

First and foremost, the law should not rely on consumers to discipline sellers via legal action. Private enforcement is not likely to yield the desired equilibrium between consumers and sellers. As explained, consumers are not good at detecting oral lies. Even when they do detect a lie, consumers are unlikely to complain or otherwise initiate legal procedures against firms. As repeatedly emphasized, this is especially true when the paper deal contains terms that may silence consumers. This, in turn, suggests that public enforcement mechanisms should be seriously considered. Accordingly, public agencies and consumer organizations should be allowed to litigate cases on behalf of aggrieved, misled consumers.[[209]](#footnote-211)

Furthermore, we join others who have called for the revision and crafting of the law of merger clauses and the parol evidence rule so as to better protect consumers. In this respect, we agree that “… the abolition of the parol evidence rule [in the context of consumer contracts] would benefit consumers because the rule allows merchants to mislead consumers by making oral representations that are inconsistent with the writings.”[[210]](#footnote-212) As Burnham observes, the parol evidence rule “indirectly favors the party with stronger bargaining power,” since “usually if there is a difference between the two parties in economic status, the one who relies upon the writing is likely to be among the ‘haves,’ and the one who seeks escape through the oral word will probably be ranged among the ‘have nots,’….”[[211]](#footnote-213)

Unfortunately, however, some courts hold that consumers should read the fine print and be held to it.[[212]](#footnote-214) These courts show a willingness to enforce the contractual language that bars parol evidence and excludes precontractual representation.[[213]](#footnote-215) Our analysis raises serious doubts about this approach.

Courts can also apply other judicial tools in deciding cases of misleading oral deals. One tool entails imposing and enforcing a duty of good faith and fair dealing. In this context, some courts have recognized a duty to negotiate in good faith.[[214]](#footnote-216) Misleading precontractual oral promises that are negated by fine print which consumers do not read may fall into the category of “bad faith.”[[215]](#footnote-217) Indeed, “[b]ad faith is lack of ‘honesty in fact,’ and … a party who makes an intentional material misrepresentation during negotiations probably exhibits bad faith.”[[216]](#footnote-218)

Courts may also scrutinize terms that deny the validity of oral promises employing the doctrine of unconscionability.[[217]](#footnote-219) Generally speaking, the unconscionability doctrine is the primary tool in striking down unfair contract terms.[[218]](#footnote-220) In essence, the doctrine has a procedural and a substantive component,[[219]](#footnote-221) with a sliding scale relationship.[[220]](#footnote-222) Courts are willing to relax the evidence required to sustain the procedural unfairness if the term is severely oppressive and vice versa.[[221]](#footnote-223) Typical cases of misleading oral deals might satisfy both the procedural and the substantive unfairness components of the doctrine.

Misleading oral deals often exploit social norms, including the norm of accepting a form contract without scrutinizing it.[[222]](#footnote-224) They further exploit, at times cynically, consumer trust.[[223]](#footnote-225) It is important to recall that trust is an important dimension in our human interactions. Naturally, therefore, acts that provoke distrust are likely to trigger negative responses which people prefer to avoid. Accordingly, buyers will tend to believe sellers’ oral promises and refrain from reading the fine print. Such behavior maintains trust, conformity, and cooperation.[[224]](#footnote-226) Cunning sellers can take advantage of this natural human trait, signaling to consumers trust and false intimacy or affection.[[225]](#footnote-227) Consequently, consumers will not have a proper opportunity to consider the negating, and substantially unfair, fine print. Clearly, this makes the imposition of the duty to read imprudent.

Another judicial path that courts can take is expressed in Section 211 of the Restatement (Second) of Contracts. This Section reads that ‘‘Where the other party has reason to believe that the party manifesting…assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.’’175 On the face of it, there is no reason to believe that consumers would simply assent to fine print terms that contravene the promises agents previously made.

Following this logic, one can plausibly argue that firms that turn a blind eye toward (let alone encourage) misleading oral deals are engaging in fraud.[[226]](#footnote-228) When deciding misleading oral deals, state laws and courts can lower the bar for consumer fraud claims.[[227]](#footnote-229) For example, they can waive the requirement to prove seller’s intention or knowledge. Alternatively, they can shift the burden of proof and presume seller’s knowledge, placing the burden on the firm to prove to the contrary. Likewise, courts can lower the required standard for satisfying causation and consumer reliance,[[228]](#footnote-230) while realizing that often even conspicuous disclosures cannot effectively inform consumers.[[229]](#footnote-231)

Ultimately, firms seek to maximize their profits. Thus, it is important to be cognizant not only of the relevant legal doctrines, but also of firms’ financial implications and incentives.[[230]](#footnote-232) To ensure proper deterrence and improve firms’ compliance, misleading firms, their marketing executives, and their salespeople, could be subject to civil fines when employing misleading oral deals.[[231]](#footnote-233) Imposing monetary penalties is not an unfamiliar concept in consumer law cases.[[232]](#footnote-234)

Beyond judicial or administrative control over misleading oral promises, consumer educational campaigns can prove beneficial in this context as well. At least in laboratory settings, informed consumers were more morally and legally critical of misleading practices.[[233]](#footnote-235) Along these lines, informed participants expressed greater willingness to use legal and meta-legal means to insist upon their rights.[[234]](#footnote-236)

Of course, there is no guarantee that this potential attitude shift will translate into real-world legal action. This is particularly the case given the small dollar claims involved in many consumer transactions.[[235]](#footnote-237) The current legal landscape that is supportive of class action waivers and mandatory arbitration clauses in consumer contracts exacerbates this challenge. We therefore echo the call to provide stronger economic incentives to lawyers who represent consumers in such cases.[[236]](#footnote-238) The Consumer Protection Act in Montana may serve as an example.[[237]](#footnote-239) Under this Act, successful plaintiffs “may recover minimum damages, treble damages, and attorneys’ fees, provisions clearly intended to have a deterrent effect on those who engage in deceptive practices.”[[238]](#footnote-240)

Similarly, educational campaigns should urge consumers to complain and air their grievances. To begin with, consumers should be encouraged to complain to consumer organizations and law enforcement agencies. These complaints may further help in identifying wrongdoers, prioritizing enforcement resources and efforts, and better tailoring educational and policy efforts. As part of these educational efforts, consumers can also be encouraged to share their complaints using online platforms, including those that rank or grade firms. Many of these platforms, including Amazon, eBay, Yelp and TripAdvisor, to name a few, have clear reputational impacts on firms. Complaints may help firms channel their improvement efforts, as well as deter firms from behaving unethically to begin with.

Interestingly, empirical data suggests that public disclosure of consumer complaints can serve as an effective consumer protection measure. A recent study examined this point by referring to the U.S. Consumer Financial Protection Bureau (CFPB) complaint database.[[239]](#footnote-241) Specifically, the study investigated the effectiveness of publicly disclosing the CFPB’s complaints in protecting mortgage borrowers.[[240]](#footnote-242) The study found that banks that received more complaints experienced a greater reduction in mortgage applications.[[241]](#footnote-243) Moreover, the effect was found to be stronger “in areas with more sophisticated consumers and higher credit competition, and for banks receiving more severe complaints.”[[242]](#footnote-244) The authors therefore concluded that disclosing the data regarding consumer complaints may “enhance product market discipline and consumer financial protection.”[[243]](#footnote-245) We believe this can be true in our context too.

\* \* \* \* \*

Before concluding, we wish to address an important caveat. One might argue that our suggestions do not account for the risk of post-contractual exploitation by aggrieved consumers. According to this line of reasoning, our suggestions expose firms to *ex post* opportunistic claims. Realizing courts’ inclination to protect the non-drafting party, consumers might make false claims about oral promises.[[244]](#footnote-246) Furthermore, people’s memory is fallible, and often shaped by worldviews, biases and aspirations.[[245]](#footnote-247) People’s recollections are imprecise and prone to mistakes.[[246]](#footnote-248) Thus, consumers might make mistaken yet honest claims about what was said during the negotiation process.[[247]](#footnote-249) Our suggestions to better protect consumers, this arguments goes, neglects to consider the risks that such protections might inflict on firms.

This is an important observation, and our response is fivefold. First, we strongly prefer *ex ante* measures tailored to *prevent* misleading oral deals and educate consumers, rather than *ex post* measures that facilitate consumers’ litigation efforts. Second, consumers are not likely to be very familiar with legal doctrines and thus may not be too motivated to litigate to begin with. Third, consumers encounter many limitations to seeking justice, and it is not realistic to expect that they will flood the courts with fabricated cases. Fourth, we have already seen how the fine print may chill consumers and weaken their motivation to insist upon their rights. Fifth, there is no reason to believe that consumers’ opportunism and faulty memory pose a greater risk than firms’ incentives to exploit consumers or salespeople’s enthusiasm to close deals. If anything, it seems to the contrary. In the end, our suggestions should be measured against the current state of the world, not against a perfect, utopian reality.

# Conclusion

Consumers face an ever-increasing number of complex products and services. It is inevitable that they ask salespeople and agents questions about the products, services and the transactions they consider. It is not foolish for consumers to generally trust the answers they get. In fact, trusting agents is quite natural and even desirable. Similarly, it is also not negligent for a consumer to not read the fine print, not understand it, or discount its risks.

While navigating their way through a complicated and demanding world, consumers may fall into traps.[[248]](#footnote-250) Some of these traps are cleverly designed by firms and salespeople, who exploit consumers’ trust and psychological vulnerabilities. This Article argues that such traps often take the form of misleading oral deals, which sellers find subtle ways to excuse. The Article thus proposed a more realistic and flexible approach to scrutinizing misleading oral deals. Such an approach, we believe, can help shift the focus from excessive formality that relies on fine print toward a much needed humanistic approach that acknowledges nuanced realities and human fallibility.

1. A third main type of misleading oral promises may be unrelated to the contract, but to the product. For example, a salesperson may tell a consumer that the diet pills on offer are effective when they are not. The contract in this type of promises, does not negate the promise itself, nor does it negate oral promises and representations in general. While much of the analysis below is relevant to this kind of cases too, it is t beyond the scope of this Article. [↑](#footnote-ref-1)
2. This is true, of course, for both offline and online consumer markets, and many studies show how websites can gain consumer trust. *See, e.g.,* Ming-Hsien Yang et al., *The Effect of Perceived Ethical Performance of Shopping Websites on Consumer Trust*, 50 J. Computer Info. Sys. 15 (2009). Interestingly, much of the research on interpersonal trust was related to a comparison to the ability of people to trust in online markets. *See* David Gefen & Detmar W. Straub, *Consumer Trust in B2C E-Commerce and the Importance of Social Presence: Experiments in E-Products and E-Services,* 32 Omega 407 (2004); Paolo Guenzi & Georges Laurent, *Interpersonal Trust in Commercial Relationships*, 44 Eur. J. Mkt. 114 (2010). [↑](#footnote-ref-2)
3. *See, e.g.,* Douglas Rushkoff, Coercion: Why We Listen to What "they" Say(1999) (detailing how sellers use marketing, advertising, retail atmospherics and other techniques to manipulate consumers and inhibit rational decision-making). [↑](#footnote-ref-3)
4. *See, e.g.,* Bella M. DePaulo, *Spotting Lies: Can Humans Learn to Do Better?*, 3 Current Directions Psychol. Sci. 83 (1994). [↑](#footnote-ref-4)
5. For a recent account see Marta Serra-Garcia & Uri Gneezy, *Mistakes and Overconfidence in Detecting Lies* (working paper). [↑](#footnote-ref-5)
6. *See, e.g.,* Bruce K. Pilling & Sevo Eroglu, *An Empirical Examination of the Impact of Salesperson Empathy and Professionalism and Merchandise Salability on Retail Buyers' Evaluations*, 14 J. Pers. Selling & Sales Mgmt. 45 (1994). [↑](#footnote-ref-6)
7. *See, e.g.,* Barry J. Babin et al., *Salesperson Stereotypes, Consumer Emotions, and their Impact on Information Processing*, 23.2 J. Acad. Mktg. Sci. 94 (1995). [↑](#footnote-ref-7)
8. *See, e.g.,* Ramsey Rosemary P. & Ravipreet S. Sohi, *Listening to Your Customers: The Impact of Perceived Salesperson Listening Behavior on Relationship Outcomes*, 25 J. Acad. Mktg. Sci. 127 (1997); Ko de Ruyter & Martin G. M. Wetzels, *The Impact of Perceived Listening Behavior in Voice to Voice Service Encounters*, 2.3 J. Serv. Rsch. 276, 281 (2000). [↑](#footnote-ref-8)
9. *See, e.g.,* David Dunning, *Self‐Image Motives and Consumer Behavior: How Sacrosanct Self‐Beliefs Sway Preferences in the Marketplace*, 17.4 J. Cons. Psych. 237 (2007) (arguing that consumers are likely to change their views in a way which would change their purchasing behavior). [↑](#footnote-ref-9)
10. *See, e.g.,* Ziva Kunda, *The Case for Motivated Reasoning,* 108 Psyc. Bull. 480 (1990). [↑](#footnote-ref-10)
11. *See* Emily Balcetis & David Dunning, *What You Want to See: Motivational Influences on Visual Perception*, 91 J. Pers. & Soc. Psych.612 (2006);Emily Balcetis & David Dunning, *Cognitive Dissonance and the Perception of Natural Environments*, 18 Psych. Sci. 917 (2007); Jonathan R. Zadra & Gerald L. Clore. *Emotion and Perception: The Role of Affective Information*, 2.6 InterdicplinaryRev. Cognitive Sci. 676 (2011). [↑](#footnote-ref-11)
12. For an accessible review and explanation see Chris Mooney, *What is Motivated Reasoning? How Does It Work? Dan Kahan Answers,* Discover (May 6, 2011). [↑](#footnote-ref-12)
13. For a discussion of how people use ambiguity to self-deceive themselves see Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 Econ. Theo. 67 (2007). *See also* Francesca Gino et al., *Motivated Bayesians: Feeling Moral While acting egoistically*, 30 J. econ. Percp. 189 (2016). For an experimental illustration of how legal ambiguity enhances the process of motivated reasoning and self-deception see Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal,* 84 N.Y.U. L. Rev*.* 980 (2009). [↑](#footnote-ref-13)
14. *Infra* Section II.C. [↑](#footnote-ref-14)
15. *See* Arthur S. Reber, The Penguin Dictionary of Psychology 151 (2d ed. 1995). [↑](#footnote-ref-15)
16. *See, e.g.*, Scott Plous*,* The Psychology of Judgment and Decision-making233 (1993); Stephanie M. Stern, *Outpsyched: The Battle of Expertise in Psychology-Informed Law*, 57 Jurimetrics J. 45, 53 (2016) (explaining that “we process information in ways that support our goals, including the goal of maintaining preexisting beliefs . . . . ”). [↑](#footnote-ref-16)
17. *See generally* Zlatan Krizan & Paul D. Windschitl, *The Influence of Outcome Desirability on Optimism,* 133 Psycol. Bull. 95 (2007). [↑](#footnote-ref-17)
18. *See, e.g.,* Neil D. Weinstein, *Unrealistic Optimism about Future Life Events*, 39 J. Personality & Soc. Psychol. 806 (1980); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 Acta Psychologica 143 (1981). [↑](#footnote-ref-18)
19. *See, e.g.*, Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 Science 1232 (1989); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993); Neil D. Weinstein & William M. Klein*, Unrealistic Optimism: Present and Future,* 15 J. Soc. & Clinical Psychol. 1 (1996). [↑](#footnote-ref-19)
20. *Id*. [↑](#footnote-ref-20)
21. *See, e.g.*, Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 Psycholo. Bull. 193 (1988). [↑](#footnote-ref-21)
22. *See, e.g.*, Oren Bar-Gill, Seduction by Contract (2012); Gustavo E. de Mello & Deborah J. MacInnis, *Why and How Consumers Hope: Motivated Reasoning and the Marketplace* 61–62, Inside Consumption (2005); Becher et al., *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, in Legal Applications of Marketing Theories (forthcoming 2021). [↑](#footnote-ref-22)
23. Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost,* 35 Org. Behav. & Hum. Decision Process 124 (1985). [↑](#footnote-ref-23)
24. Arkes & Blumer, *id.* at 132. [↑](#footnote-ref-24)
25. *See, e.g.*, Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*,1999 Utah L. Rev. 205, 214 (1999); Mark Seidenfeld, *Symposium: Getting Beyond Cynicism: New Theories of the Regulatory State Cognitive Loading, Social Conformity, and Judicial Review of Agency Rulemaking*,87 Cornell L. Rev. 486, 500, 517 (2002). [↑](#footnote-ref-25)
26. *See, e.g.,* Becher, *supra* note 1, at 129 (“Since the efforts to become familiar with the transaction’s details are sunk, a natural tendency, according to the framework proposed by behavioral law and economics, is to ignore potentially adverse terms that the [fine print] may contain.”). [↑](#footnote-ref-26)
27. *Id.* at 131 (noting that “sellers can manipulate the contracting process… by intentionally postponing the discussion about contractual terms, or by presenting the [form contracts] at the latest possible stage.”). [↑](#footnote-ref-27)
28. Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision-making*, 10 J. Cons. Res. 436 (1984). [↑](#footnote-ref-28)
29. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003); Becher, *supra* note 1, at 166-77 (discussing information overload in general and consumer contract in particular). [↑](#footnote-ref-29)
30. *Cf.* David A. Hoffman, *The Best Puffery Article Ever,* 91 Iowa L. Rev. 1395, 1396 (2006) (“We are constantly exposed to speech… encouraging us to buy goods, invest in stocks, and transact for services. This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it.”). [↑](#footnote-ref-30)
31. *Cf.* Ram N Aditya, *The Psychology of Deception in Marketing: A Conceptual Framework for Research and Practice*, 18 Psychol. & Marketing  735, 748 (2001) (explaining how the state of arousal brought about by visual and verbal appeals [can] make some product features salient and others inconspicuous.” [↑](#footnote-ref-31)
32. *See supra* note 1. *See also* Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 Depaul Bus. & Com. L.J. 199, 206 (2010) (providing empirical data that most consumers are unlikely to read mundane consumer contracts ex ante); Richard A. Epstein, *Contract, Not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in Consumer Protection In The Age Of The ‘Information Economy,’ 227 (Jane K. Winn ed., 2006) (“[I]t seems clear that most consumers—of whom I am proudly one—never bother to read these terms anyhow: we know what they say on the issue of firm liability, and adopt a strategy of ‘rational ignorance’ to economize on the use of our time.”). For a recent accessible anecdote seeRobert Smith & Jacob Goldstein, *Summer School 8: Risk & Disaster,* Planet Money ″11:00 (26 Aug., 2020) (an insurance agent opines that in the course of five years only three people, out of thousands of customers, read the insurance fine print (or part of it) and raised issues to be discussed). [↑](#footnote-ref-32)
33. *See supra* note 11. [↑](#footnote-ref-33)
34. *See, e.g.*, Shmuel I. Becher, *Asymmetric Information in Consumer Contracts:* *The Challenge That Is Yet to Be Met*, 45 Am. Bus. L. J. 723 (2008). [↑](#footnote-ref-34)
35. For further explaining how firms design the environment so to make it harder on consumers to read and understand form contracts see Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs,* 47 William & Mary L. Rev. 1635 (2006). [↑](#footnote-ref-35)
36. *See, e.g.*, Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 Stan. L. Rev. 545 (2014). *See also* Clayton P. Gillette, Pre-Approved Contracts for Internet Commerce, 42 Hous. L. Rev. 975 (2005); Todd D. Rakoff, *The Law and Sociology of Boilerplate*,104 Mich. L. Rev. 1235, 1243 (2006); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 Wash. L. Rev. 227 (2007); Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. Mich. J. L. Reform 747 (2009); David A. Hoffman, *Relational Contracts of Adhesion*,85 U. Chi. L. Rev. 1395 (2018). [↑](#footnote-ref-36)
37. Other types of substitutes may be information flows and reputation mechanism. For discussing the idea that information flows and reputation can discipline sellers and inform consumers *see, e.g.,* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 Mich. Telecomm. & Tech. L. Rev. 303 (2008) (suggesting that online information flows from generated by experienced consumers ex post can inform other consumers and may lead to reputational constrains that deter sellers from misbehaving); Yonathan Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets,* 54 Wake Forest L. Rev. 1239 (2019) (detailing the limits and the problems with relying on reputational constraints as means to achieve fair and efficient equilibrium). [↑](#footnote-ref-37)
38. *See* Jessica M. Choplin et al., *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implication*, L. & Psychol. Rev. 35 (2011) (detailing psychological explanations for why consumers might be vulnerable to deception). [↑](#footnote-ref-38)
39. *Id.* at p. 66 (“Another type of fraud occurs when consumers are lied to but realize before signing the contract that the contract contains contradictory terms. At this point, the salesperson further deceives the consumer by explaining away the problematic term to reassure him. Nonetheless, some consumers still sign the agreement after being told a deceptive explanation for the problematic contractual term.” (footnotes omitted)). [↑](#footnote-ref-39)
40. *Id.* at 69 (“consumers might still follow communication rituals and be satisfied that there is an explanation as long as the salesperson provides the syntax of an explanation, even if the literal meaning of the salesperson’s words have in fact provided no explanation at all.”). [↑](#footnote-ref-40)
41. *Id.* at 98 (“even when a consumer does read the problematic term in the contract, such reading will not necessarily cause the consumer to object to it.”); *id.* at 101, 105. [↑](#footnote-ref-41)
42. *See generally* Wilkinson-Ryan & Hoffman, *supra* note 12. [↑](#footnote-ref-42)
43. Wilkinson-Ryan, *supra* note 66, at 1747-48 (“Even in the face of evidence of procedural defects or wrongdoing by the drafter, participants’ instincts were to hold the consumer to the boilerplate terms.”). [↑](#footnote-ref-43)
44. *See, e.g.,* Furth-Matzkin, *supra* note 23(finding that tenants are likely to be deterred by the terms of their lease agreements once a dispute arises even if those terms are unenforceable); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print,* 99 Iowa L. Rev. 1745 (2014); Wilkinson-Ryan, *supra* note 23; Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud,* 72 Stan. L. Rev. 503 (2020). [↑](#footnote-ref-44)
45. Wilkinson-Ryan, *supra* note 66. [↑](#footnote-ref-45)
46. *Id.* at 1747 (explaining that “[m]ost people see consent to boilerplate as less meaningful than consent to negotiated terms…”). [↑](#footnote-ref-46)
47. *Id.* at 1748. [↑](#footnote-ref-47)
48. Wilkinson-Ryan, *supra* note 14. [↑](#footnote-ref-48)
49. *Id.* at 121 (“In the context of consumer contracting, though, the terms may deter complaints, exit, or even legal challenges, precisely because they appear morally and legally legitimate in a way that non-contractual policies do not.”). [↑](#footnote-ref-49)
50. Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms*, *supra* note 14. [↑](#footnote-ref-50)
51. *Id.* at 3. [↑](#footnote-ref-51)
52. *Id.* at 1. [↑](#footnote-ref-52)
53. Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms, supra* note 14. [↑](#footnote-ref-53)
54. *Id.* at 1035. [↑](#footnote-ref-54)
55. *Id*. [↑](#footnote-ref-55)
56. *Id*. at 1067. [↑](#footnote-ref-56)
57. Furth-Matzkin & Sommers, *supra* note 66. [↑](#footnote-ref-57)
58. *Id.* at 521 (reporting that respondents “saw the contract’s written terms as legally binding even though the agreement was signed as a result of clear and material deception, and they predicted that a court of law would refuse to void the contract in such cases.”). [↑](#footnote-ref-58)
59. *Id.* at 503. [↑](#footnote-ref-59)
60. *Id.*  [↑](#footnote-ref-60)
61. *See, e.g.,* Alicia W. Macklin, *The Fraud Exception to the Parol Evidence Rule: Necessary Protection for Fraud Victims or Loophole for Clever Parties*, 82 S. Cal. L. Rev. 809, 810 (2008) (explaining that “written evidence is more accurate than human memory”, it helps “to avoid fraud and unintentional invention after an agreement has been reached”, that “there is a desire not to mislead the finder of fact with emotional evidence”, and the written agreements enhances predictability). [↑](#footnote-ref-61)
62. Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77

    Chi.-Kent L. Rev. 87, 92 (2001). [↑](#footnote-ref-62)
63. Keith B. Anderson, FTC, Consumer Fraud in The United States: An FTC Survey 80-81, 80 tbl.5-1 (2004), <https://perma.cc/H23N-Q2UP>. [↑](#footnote-ref-63)
64. See the classic article Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. Rev. 95 (1974). [↑](#footnote-ref-64)
65. See the seminal article Felstiner et al., *supra* note 24. [↑](#footnote-ref-65)
66. For generally discussing the high costs of litigation see, for example, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 74 (1983) (commenting that litigation costs may become a barrier to some litigants); Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 Ark. L. Rev. 261, 288 (2003) ("The converse problem with relying upon trial by argument is that many social policies are under-enforced.... Litigation ranges from being rather expensive, to extremely expensive, to ferociously expensive to make-yourhair-stand-up-on-end-knock-your-teeth-out-one-by-one expensive.”). [↑](#footnote-ref-66)
67. *Cf.* Amy J. Schimtz, *Enforcing Consumer and Capital Markets Law in the United States,* in Enforcing Consumer And Capital Market Law – The Diesel Emissions Scandal 339-40 (2020) (explaining that class actions are especially relevant to “small dollar claims, where the cost to individually litigate is disproportionate to the eventual judgment.”). [↑](#footnote-ref-67)
68. This has been a traditional concern in many consumer markets. For discussing the underenforcement of consumer harm see, e.g., Iain D.C Ramsay, *Consumer Redress Mechanisms for Poor-Quality and Defective Products*, 31 U. Toronto L.J. 117 (1981); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 Tex. Int’l L. J. 135 (1999). [↑](#footnote-ref-68)
69. For discussing the public (dis)trust in the judiciary and the legal system see, e.g., Benjamin H. Barton, *American (Dis)Trust of the Judiciary* (IAALS, Sep. 2019); James M. Lyons, *Trump and the Attack on the Rule of Law* (IAALS, Sep. 2019); Hon. Chase Rogers and Stacy Guillon, *Giving Up on Impartiality: The Threat of Public Capitulation to Contemporary Attacks on the Rule of Law* (IAALS, Sep. 2019). [↑](#footnote-ref-69)
70. *See, e.g.,* Frank A. Luchak, *Consumer Contracts and Class Actions,* New Jersey Lawyer 6 (April 2016) (“[Service] providers customarily rely upon consumer agreements that include arbitration provisions that expressly waive the parties’ right to bring class actions”); Kristina Moore, *The Future of Class-Action Waivers in Consumer Contract Arbitration Agreements after DIRECTV, Inc. v. Imburgia*, 67 Case W. Res. L. Rev. 611 (2016); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice,* N.Y. Times (Oct. 31, 2015), available at https:// www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”). For recent critiques of this phenomenon see, e.g., Carrie Menkel-Meadow, *What is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution*, Oñati Socio-Legal Series, forthcoming 2020 (criticizing the practice of restricting access to justice by mandatory arbitration and class action limitations); Albert H. Choi & Kathryn E. Spier, *The Economics of Class Action Waiver*, available at <https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3665283&dgcid=ejournal_htmlemail_consumer:law:ejournal_abstractlink> (analyzing firms’ incentive to employ class action waivers and finding that in many settings such a practice may compromise product safety, undermine competition, and harm social welfare); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, Fl. L. Rev. Forthcoming (2020) (“The arbitration revolution is far-reaching…. Assuming you own a smartphone, have a bank account, and use a credit card, the revolution applies to you and anyone you know.”). For another study that suggests a profound lack of understanding of the arbitration agreements see Jeff Sovern et al., *'Whimsy* *Little Contract' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1 (2015). [↑](#footnote-ref-70)
71. *See generally* Keith B. Anderson, Fed. Trade Comm’n, Mass-Market Consumer Fraud in The United States: A 2017 Update (2017), available at <https://www.ftc.gov/reports/mass-market-consumer-fraud-united-states-2017-update>. [↑](#footnote-ref-71)
72. *Id.* at ii. [↑](#footnote-ref-72)
73. *Id*. [↑](#footnote-ref-73)
74. *Id*. at iv. [↑](#footnote-ref-74)
75. Solan, *supra* note 84, at 112. [↑](#footnote-ref-75)
76. As explained below, we use the term “ordinary unethicality” to refer to situations where normative people behave in mundane yet unethical ways and still feel comfortable with their (un)ethical choices. [↑](#footnote-ref-76)
77. Dan Ariely & Simon Jones, The (Honest) Truth About Dishonesty (2012). [↑](#footnote-ref-77)
78. Cella Moore et al, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavio*r, 65 Pers. Psychol. 1 (2012); Richard C. Hollinger & Jason L. Davis, *Theft by Employees,* inThe Encyclopedia of Crime & Punishment 1 (1983)‏. [↑](#footnote-ref-78)
79. See Bazerman, Max H., George Loewenstein, and Don A. Moore. "*Why good accountants do bad audits."* 80(11) Harvard business review  (2002): 96-103. [↑](#footnote-ref-79)
80. *See* Scott Rick et al., *Commentaries and Rejoinder to The Dishonesty of Honest People*, 645 J. Mkt. Res. (2008).‏ [↑](#footnote-ref-80)
81. For a relevant anecdote see David Gonzalez, *Don’t Box Me In, Double-Parker,* N.Y. Times (Sep. 10, 2008) (discussing the “everybody does it” excuse with respect to illegal double-parking in New York). [↑](#footnote-ref-81)
82. Rick et al., *supra* note 102.‏ [↑](#footnote-ref-82)
83. Blake E Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 Res. Org. Behav. 1 (2003).‏ [↑](#footnote-ref-83)
84. See Welsh, Brandon C., Anthony A. Braga, and Gerben JN Bruinsma. "Reimagining broken windows: From theory to policy." *Journal of Research in Crime and Delinquency* 52, no. 4 (2015): 447-463. [↑](#footnote-ref-84)
85. *See, e.g.,* Anna C. Merrittet al., *Moral Self‐Licensing: When Being Good Frees Us to Be Bad,* 4.5 Soc. & Pers. Psycol. Compass 344 (2010); Mazar et al., *supra* note 107. [↑](#footnote-ref-85)
86. *See supra* text accompanying notes 38-41. [↑](#footnote-ref-86)
87. Feldman Yuval, The Law of Good People: Challenging States' Ability to Regulate Human Behavior 152 (2018). [↑](#footnote-ref-87)
88. Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 Current Opinion Psyc. 107 (2015)‏; Kim B. Serota & Timothy R. Levine, *A few Prolific Liars: Variation in the Prevalence of Lying*, 34 J. Lang. & Soc. Psychol. 138 (2015). [↑](#footnote-ref-88)
89. *See* Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty,* 8 Ann. Rev. L.& Soc. Sci. 85 (2012). *See also* Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 Pers. & Soc. Psych. Bull.330 (2011). [↑](#footnote-ref-89)
90. *See* Dana et al., *supra* note 46. [↑](#footnote-ref-90)
91. *See* Yoella Bereby-Meyer & Shaul Shalvi, *Deliberate Honesty*, 6 Current Opi. Psyc*.* 195 (2015);Nils C. Köbis et al., *Intuitive Honesty Versus Dishonesty: Meta-Analytic Evidence*, 14 Persp. Psyc. Sci. 778 (2019). [↑](#footnote-ref-91)
92. For a full taxonomy of the justifications people use to justify unethical behavior see Albert Bandura et al., *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71J. Pers. & Soc. Psyc. 364 (1996). *See also* Ayal Shahar& Francesca Gino, *Honest Rationales for Dishonest Behavior*, InThe social psychology of morality: Exploring the causes of good and evil 149 (2011) (listing the rationales people use to justify unethical behavior). [↑](#footnote-ref-92)
93. Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 Psyc. Sci*.* 1264 (2012). [↑](#footnote-ref-93)
94. Jennifer M. Rodd et al., *Localising Semantic and Syntactic Processing in Spoken and Written Language Comprehension: An Activation Likelihood Estimation Meta-Analysis*, 141 Brain & Lang.  89 (2015). [↑](#footnote-ref-94)
95. For a discussion of the effect of ambiguity see Dana, *supra* note 46. [↑](#footnote-ref-95)
96. *See* Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 Proc. Nat'l. Acad. Sci. 1754 (2016). [↑](#footnote-ref-96)
97. Daniel Schwartz, *Differential Compensation and the Race to the Bottom in Consumer Insurance Markets*, 15 Conn. Ins L. J. 723 (2008) (discussing various marketing tricks used by those who attempt to sell cheap insurance policies to clients). [↑](#footnote-ref-97)
98. Welsh et al., *supra* note 106. [↑](#footnote-ref-98)
99. Dana et al., *supra* note46; Yuval Feldman & Yotam Kaplan, *Big Data & Bounded Ethicality*, available on SSRN (2018).‏ [↑](#footnote-ref-99)
100. Ariely & Jones, *supra* note 99. [↑](#footnote-ref-100)
101. Philipp Gerlach, *The Games Economists Play: Why Economics Students Behave More Selfishly Than Other Students*, 12 Plus One (2017).‏ *See* *also* Yuval Feldman et al., *Corporate Law for Good People* 115 Nw. U. L. Rev. 3, 17-18 (2020); Yuval Feldman & Yotam Kaplan, *Bounded Ethicality & Big Data* 29.39 Cornel J. L. & Pub. Pol's. 39, 48 (2019). [↑](#footnote-ref-101)
102. *See* Scott S. Wiltermuth, *Cheating More When the Spoils are Split,* 115Org. Behav. & Hum. Decision Proc. 157 (2011). [↑](#footnote-ref-102)
103. *See* Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 Proc. Nat'l. Acad. Sci. 10651 (2015). [↑](#footnote-ref-103)
104. Melvin J Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 Int'l. J. Org. Theo. & Behav. 405 (2003). [↑](#footnote-ref-104)
105. Archishman Chakraborty & Rick Harbaugh, *Persuasive Puffery,* 33 Mktg. Sci.382 (2014);Pedro M. Gardete, *Cheap-Talk Advertising & Misrepresentation in Vertically Differentiated Markets*, 32 Mktg. Sci. 609 (2013). [↑](#footnote-ref-105)
106. *Cf.* Solan, *supra* note 84, at 93-94 (noting that “recent work in social psychology has focused on how incentive systems within the modern firm often strengthen temptations to act dishonestly when the stakes are raised.”); Stark & Choplin, *supra* note 17, at 706 (“Unscrupulous businesses sometimes train their salespersons to engage in fraud or in misleading and deceptive trade practices to induce consumers to purchase their products or services...”). [↑](#footnote-ref-106)
107. Typically, consumers can use online platforms, reviews and blogs to explore the items and services they consider purchasing, the firm’s contracts and policies, or the firms they are interacting with. [↑](#footnote-ref-107)
108. *See, e.g.,* Steven C. Tyszka, *Remnants of the Doctrine of Caveat Emptor May Remain Despite Enactment of Michigan's Seller Disclosure Act*, 41 Wayne L. Rev. 41 1497 (1994); Cullen Goretzke, *The Resurgence of Caveat Emptor: Puffery Undermines The Pro-Consumer Trend in Wisconsin's Misrepresentation Doctrine*, Wis. L. Rev. 171 (2003). [↑](#footnote-ref-108)
109. For instance, consumers might want to believe that organic food supports their health, that non-GMOs are good for the environment, or that an expensive eye cream will make them look younger, or that hair loss pills are effective – even if this is not objectively true. *See* Seth Godin, All Marketers Are Liars: The Power of Telling Authentic Stories in a Low-Trust World (2005). *See also* Theodore Levitt, *The Morality (?) of Advertising,* Harv. Bus. Rev., July/Aug. 1970, at 85 (paraphrasing Charles Revson: “In the factory, we make cosmetics; in the store we sell hope.”). [↑](#footnote-ref-109)
110. *See, e.g.,* Sergio Currarini & Friederike Mengel, *Identity, Homophily and In-Group Bias*, 90 Eur. Econ. Rev. 40 (2016). [↑](#footnote-ref-110)
111. *See, e.g.,* Dale T. Miller et al., *Minimal Conditions for the Creation of a Unit Relationship: The Social Bond Between Birthdaymates*, 28 Eur. J. Soc. Psyc. 475 (1998) (reporting on a study where sharing a fictitious birthday was sufficient to create an ingroup bias among participants). [↑](#footnote-ref-111)
112. *Supra* note 46 and accompanying text. [↑](#footnote-ref-112)
113. Dana et al., *supra* note 46. [↑](#footnote-ref-113)
114. *See* FTC, Policy Statement On Deception 4 (Oct. 14, 1983), <https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf>. *See also* Hoffman, *supra* note54; Leonard v. Pepsico, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), aff'd 210 F.3d 88 (2d Cir. 2000); All-Tech Telecom, Inc. v. Amway Corp. 174 F.3d 862, 868 (7th Cir. 1999). [↑](#footnote-ref-114)
115. Hoffman, *supra* note 54, at 1427-28 (“Rather than ignoring or disbelieving puffery speech, consumers believe it and use it to make their purchase decisions.”). [↑](#footnote-ref-115)
116. See Riggio, Ronald E., and Howard S. Friedman. "The interrelationships of self-monitoring factors, personality traits, and nonverbal social skills." *Journal of Nonverbal Behavior* 7, no. 1 (1982): 33-45. [↑](#footnote-ref-116)
117. Aditya, *supra* note 64. [↑](#footnote-ref-117)
118. *See, e.g.,* Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 Can. Bus. L.J. 437, 446 (1991). [↑](#footnote-ref-118)
119. *Cf.* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 827 (2006) (The usual assumption in economic analysis of law is that in a competitive market without informational asymmetries, the terms of contracts between sellers and buyers will be optimal…’’). [↑](#footnote-ref-119)
120. On the Kantian probation on treating people as means see *Treating Persons as Means,* Stan. Encyclopedia Phil. (2019), available at <https://plato.stanford.edu/entries/persons-means/>. [↑](#footnote-ref-120)
121. *See, e.g.,* Joseph Kupfer, *The Moral Presumption Against Lying*, 36 Rev. Metaphysics 103 (1982). [↑](#footnote-ref-122)
122. *Id.*  [↑](#footnote-ref-123)
123. Stark & Choplin, *supra* note 17, at 619 (reporting that 90 percent of consumers surveyed had this expectation). [↑](#footnote-ref-124)
124. *Id.* at 628. [↑](#footnote-ref-125)
125. *See supra* note 27. [↑](#footnote-ref-126)
126. *See generally* Peter Alexander Lichtenberg et al., *Psychological and Functional Vulnerability Predicts Fraud Cases in Older Adults: Results of a Longitudinal Study*, 39 Clin. Gerontol. 48 (2016). [↑](#footnote-ref-127)
127. Stark & Choplin, *supra* note 133, at 670 (citing Kessely Hong & Irish Bohnet, *Status and Distrust: The Relevance of Inequality and Betrayal Aversion*, 28 J. Econ. Psychol. 197 (2007)). [↑](#footnote-ref-128)
128. *Id.*  [↑](#footnote-ref-129)
129. *Id.*  [↑](#footnote-ref-130)
130. There is ample literature on firms’ ability to cleverly target consumers based on their personal data, demographics, emotional state and use patterns. *See, e.g.,* Sam Machkovech*, Report: Facebook Helped Advertisers Target Teens who Feel “Worthless” [Updated],* Arstechnica (Jan. 5, 2017); Mark Bartholomew, *The Law of Advertising Outrage*, 19 Advert. & Soc’y Q. (2018) (discussing datafication of emotions and citing media studies scholars); Shaun B. Spencer, *The Problem of Manipulation*, 2020 U. Ill. L. Rev. 959 (discussing online manipulation in the digital era and linking such manipulations to data protection measures). [↑](#footnote-ref-131)
131. *Cf.* Yiwei Dou & Yongoh Roh, *Public Disclosure and Consumer Financial Protection*, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647491> (finding “a greater reduction in mortgage applications to banks that receive more mortgage complaints in local markets….” and that “[t]he effect is stronger in areas with more sophisticated consumers and higher credit competition, and for banks receiving more severe complaints.”). [↑](#footnote-ref-132)
132. *See* sources cited *supra* note 22 [↑](#footnote-ref-133)
133. *Id*. [↑](#footnote-ref-134)
134. *See, e.g.* Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 Comput. Hum. Behav. 1020, 1025 (2015) (“[T]rust continues to reduce perceived risk overtime . . . . The end result is that buyers trust to the point that their intention to engage in transactions is decisively enhanced, and perceived risk begins to encourage purchase behavior rather than discouraging buyers from engaging in transactions.”); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. Econ. 1251, 1252 (1997) (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions.”); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 Econ. J. 295, 296 (2001) (“Because trust reduces the cost of transactions ([that is,] less time is spent investigating one’s broker), high trust societies produce more output than low trust societies.”). [↑](#footnote-ref-135)
135. Marek Kohn, Trust: Self-Interest and The Common Good 123 (2008). [↑](#footnote-ref-136)
136. *See generally,* Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & Econ. 461, 485 (1974) (arguing that firms are likely to compete over price at the expense of nonprice terms); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 Mich. L. Rev. 215, 287 (1990). [↑](#footnote-ref-137)
137. *Compare* Korobkin, *supra* note 53 (explaining generally how competitive markets may result in a race to bottom among firms to exploit information asymmetries); Arunesh Mathur et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3.CSCW Proc. ACM Hum.-Comp. Interaction (2019) (observing that “dark patterns [that manipulate consumers] are more likely to appear on popular websites”). [↑](#footnote-ref-138)
138. David T. Welsh et al., *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. Applied Psych*.* 114 (2015). [↑](#footnote-ref-139)
139. Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 Psych. Sci. 393 (2009). [↑](#footnote-ref-140)
140. *See, e.g.* Eric Abrahamson & Lori Rosenkopf, *Institutional and Competitive Bandwagons: Using Mathematical Modeling as a Tool to Explore Innovation Diffusion*, 18 Acad. Mgmt. Rev. 487 (1993).  [↑](#footnote-ref-141)
141. Madan M. Pillutla & Xiao-Ping Chen, *Social Norms and Cooperation in Social Dilemmas: The Effects of Context and Feedback*, 78 Org. Behave. & Hum. Decision Processes 81 (1999). [↑](#footnote-ref-142)
142. *See generally* Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 Am. Psychol. 621 (1993); Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 Psychol. Rev. 265 (2003). [↑](#footnote-ref-143)
143. Douglas G. Baird, Reconstructing Contracts 123 (2013). [↑](#footnote-ref-144)
144. U.C.C. § 2-202. [↑](#footnote-ref-145)
145. *See, e.g.,* Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 Theo. Inq. L. 457, 463 (2019) (noting that “[i]t is widely recognized that different U.S. jurisdictions employ different parol evidence rules” and that “[i]t is no easy thing to summarize the parol evidence rules found in the common law of contracts.”); Solan, *supra* note 84, at 93 (“As for the parol evidence rule itself, one scholar after another begins discussion with a statement of frustration about the incoherence of its application.”); Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, Cal. L. Rev. 51, 55-56 (2013) (“The issue arises frequently, and courts have struggled mightily, and reached inconsistent outcomes…. Courts in different jurisdictions—and even, on occasion, courts in the same jurisdiction—have adopted quite different doctrinal strategies”); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. Penn. L. Rev. 533, 540 (1998) (“In virtually every jurisdiction, one finds irreconcilable cases, frequent changes in doctrine, confusion, and cries of despair.”). [↑](#footnote-ref-147)
146. *See also* Solan, *supra* note 84, at 91 (“A typical statement of the rule is: ‘[I]f the parties assent to a writing as the final and complete expression of the terms of their agreement, evidence of prior or contemporaneous agreements may not be admitted to contradict, vary, or add to the terms of the writing'”, citing Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, 36 (1985)). [↑](#footnote-ref-148)
147. *See, e.g.,* Cumming, *supra* note 16, at 1196 (1992) (“The parol evidence rule is a rule of substantive contract law that prevents a factfinder from considering extrinsic evidence that would create or alter obligations under the contract.”). [↑](#footnote-ref-149)
148. *See, e.g.,* Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Precontractual Misrepresentations,* 33 Val. U. L. Rev. 485, 490 (1998) (“However, most courts make an exception to the parol evidence rule to permit evidence of fraud to be used by a party suing on a misrepresentation.”); Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 Mont. L. Rev. 93 (1994) (exploring the parol evidence rule and discussing the fraud exception); Richard F. Broude, *The Consumer and the Parol Evidence Rule: Section 2-202 of the Uniform Commercial Code*, 1970 Duke L. J. 881, 899 (“Although the term ‘misrepresentation’ is not generally found in lists of exceptions to the parol evidence of material misrepresentation has been admitted occasionally to contradict a written contract.”). *see also* Cumming, *supra* note 16, at 1207 (“A misrepresentation action, however, undermines the evidentiary function of contract by allowing the plaintiff to introduce extrinsic evidence of prior oral representations that contract law has deemed unreliable.”); Korobkin, *supra* note 151, at 60; Macklin, *supra* note 83, at 810 (“The bright-line PER does, however, contain exceptions, including the fraud exception…. typically arises in cases in which one party makes misrepresentations to another to induce that party to sign an agreement”). [↑](#footnote-ref-150)
149. 1 Restatement (Second) Of Contracts § 164 (Am. Law Inst. 1979). [↑](#footnote-ref-151)
150. Posner, *supra* note 151, at 533-534. [↑](#footnote-ref-152)
151. Klass, *supra* note 151, at 472. [↑](#footnote-ref-153)
152. *Id.*  [↑](#footnote-ref-154)
153. Posner, *supra* note 151, at 534 (“Under what I will call the ‘hard-PER [parole evidence rule],’ the court generally excludes extrinsic evidence and relies entirely on the writing.”). [↑](#footnote-ref-155)
154. *See, e.g.* Furth-Matzkin & Sommers, *supra* note 49, at 513-14 (observing that “courts often find that contractual exculpatory clauses, or other types of clauses disclaiming or qualifying a seller’s prior representations, generally do not bar consumers from bringing fraud claims…”). [↑](#footnote-ref-156)
155. Posner, *supra* note 151, at 534 (“Under the ‘soft-PER,’ the court gives weight both to the writing and to the extrinsic evidence.”). [↑](#footnote-ref-157)
156. Klass, *supra* note 151, at 472; Posner, *supra* note 151, at 556 (“Some courts are more willing to apply soft-PER to printed form contracts that do not permit amendment than to other kinds of contracts.”); *id.* at 564 (“indeed, courts in hard-PER jurisdictions sometimes depart from the rule when a consumer is involved.”); Davis, *supra* note 154, at 524 (“… courts should be reluctant to enforce disclaimers against consumers in transactions involving goods or services with a fairly low value….”); Stark and Choplin, *supra* note 17, at 624 (“….the enforcement of [strict parol evidence rule and the like] is only sensible in the context of a contract between two sophisticated parties…. represented by attorneys who have negotiated the terms of the contract.”). [↑](#footnote-ref-158)
157. Many commentators agree with such an approach. *See, e.g.,* Klass, *supra* note 151*;* Solan, *supra* note 151, at 89 (noting that “situations concerning agreements among business entities are often quite different. In these instances, there is likely to be real negotiation and actual familiarity with the contract's terms.”). [↑](#footnote-ref-159)
158. *See, e.g.,* Posner, *supra* note 151, at 554 (explaining that “ordinary consumer contracts are good candidates for soft-PER” so to allow consumers, but not businesses, to introduce extrinsic evidence). [↑](#footnote-ref-160)
159. *See also* Davis, *supra* note 154; Klass, *supra* note 151. [↑](#footnote-ref-161)
160. *See, e.g.,* Stark and Choplin, *supra* note 17, at 625 (noting that “consumers principally rely on what they are told by salespeople.”). [↑](#footnote-ref-162)
161. U.C.C. § 2-714. [↑](#footnote-ref-163)
162. U.C.C. § 2-216 (2) (“…to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous….”). [↑](#footnote-ref-164)
163. U.C.C. § 2-316, Comment 1 (Section 2-316 “seeks to protect a buyer from unexpected language of disclaimer by denying effect to such language with language of express warranty and permitting the warranties only by conspicuous language or other circumstances the buyer from surprise.”). [↑](#footnote-ref-165)
164. Wilkinson-Ryan, *supra* note 14. [↑](#footnote-ref-166)
165. *Id.*  [↑](#footnote-ref-167)
166. Furth-Matzkin & Sommers, *supra* note 66, at 516. [↑](#footnote-ref-168)
167. *Cf.* Stewart Macaulay, *Private Legislation and the Duty to Read–Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 Vand. L. Rev. 1051, 1058 (1966) (“If one knows he will be legally bound to what he signs, he will take care to protect himself…”). [↑](#footnote-ref-169)
168. *See, e.g.,* Stark & Choplin, *supra* note 17, at 620 (“Companies that supply goods and services to consumers argue that… the consumer is presumed to have read the contract … and if a consumer fails to read the contract that she signed and to object to those clauses, such action is unreasonable and imprudent and must be discouraged by the courts.”). [↑](#footnote-ref-170)
169. *Cf.* Foremost Ins. Co. v. Parham, 693 So. 2d 409, 440 (Ala. 1997) (“It is no surprise that even educated consumers… often rely so heavily upon representations that are made to them… particularly when they are made in a friendly voice and with an assuring smile.”). [↑](#footnote-ref-171)
170. *See, e.g.,* Cirillo v. Slomin’s Inc., 768 N.Y.S.2d (Sup. Ct. 2003) (stating that a strict parole evidence rule can “invite sale agents, armed with impenetrable contracts, to lie to their customers.”). *See also* Klass, *supra* note 151, at 483 (“In fact, it is difficult to see why a predictably unread standard term in a consumer contract should ever prevent the enforcement of other affirmations or promises that the consumer is likely to see and understand.”); Posner, *supra* note 151, at 564 (arguing that when a paper deal opportunistically contradicts misleading oral deals “[s]oft-PER is necessary….”). [↑](#footnote-ref-172)
171. *Cf.* Davis, *supra* note 154, at 524 (“it may be inappropriate to enforce disclaimers of liability for pre-contractual misrepresentations against people who systematically invest an undue amount of trust in their trading partners.”). [↑](#footnote-ref-173)
172. Federal Register, Vol. 75, No. 185, p. 58509, 58515 (Sept. 24, 2010). [↑](#footnote-ref-174)
173. *See* Restatement of Consumer Contracts § 1 cmt. 10, at 12 (Am. Law Inst., Tentative Draft 2019). [↑](#footnote-ref-175)
174. *Id*. § 6 reporters’ notes. [↑](#footnote-ref-176)
175. *Id*. § 6 cmt. 8(c). [↑](#footnote-ref-177)
176. *Id*. § 6 reporters’ notes. [↑](#footnote-ref-178)
177. *See, e.g.,* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*. 81 Antitrust L. J. 911, 911 (2016) (“State consumer protection statutes, otherwise known as Unfair and Deceptive Acts or Practices (UDAP) laws, have been on the books of all states for some 40-plus years.”). [↑](#footnote-ref-179)
178. *See, e.g.,* Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms, supra* note 14, at 1059 (noting that “[s]ome UDAP laws contain a general prohibition on deception, some prohibit misstatements of fact, and some address both misstatements of fact and law.”). [↑](#footnote-ref-180)
179. National Consumer Law Center, *Unfair & Deceptive Acts and Practices,* available at <https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html> (“In billions of transactions annually, UDAP statutes provide the main protection to consumers against predators and unscrupulous businesses.”). [↑](#footnote-ref-181)
180. *See supra* note 36. *See also* Choplin et al., *supra* note 60, at 70 (explaining that “consumers frequently have difficulty detecting and acknowledging lies.”). [↑](#footnote-ref-182)
181. Furth-Matzkin & Sommers, *supra* note 66, at 511. [↑](#footnote-ref-183)
182. Davis, *supra* note 154, at 511. [↑](#footnote-ref-184)
183. Korobkin, *supra* note 151, at 75. [↑](#footnote-ref-185)
184. *Id*. [↑](#footnote-ref-186)
185. *Cf.* Klass, *supra* note 151, at 483 (noting that one can “expect much better results if businesses undertake the costs of training and monitoring to ensure that employee communications accord with standard terms, rather than relying on consumers to read standard terms and recognize when not to rely on an employee’s promises or representations.”). [↑](#footnote-ref-187)
186. Another ex ante monitoring tool is mystery shopping. We return to this idea in more detail below. [↑](#footnote-ref-188)
187. *See, e.g., Acquiring Recorded Conversations with a Business, https://www.hg.org/legal-articles/acquiring-recorded-conversations-with-a-business-37956* [↑](#footnote-ref-189)
188. *See, e.g., How and Why Retail Stores Are Spying on You,* Consumer Reports (Mar. 2013), available at <https://www.consumerreports.org/cro/2013/03/how-stores-spy-on-you/index.htm>; *Retail Surveillance Strategies: 5 Emerging Trends You Need to Know*, Supreme Security System, available at <https://supremealarm.com/retail-surveillance-strategies-5-emerging-trends-need-know/>. [↑](#footnote-ref-190)
189. *See, e.g.,* Andy Klein, *Hard Drive Cost Per Gigabyte*, Backblaze (July 11, 2017); Lucas Mearian, *CW@50: Data Storage Goes From $1M to 2 Cents per Gigabyte,* Computerworld (Mar. 23, 2017); Mitch Tulloch, *Business Data Storage Is Getting Cheaper — Or Is It?,* TechGenix (Jan. 8, 2019). [↑](#footnote-ref-191)
190. The criteria for imposing such a duty should be left for future discussion. At this stage suffice it to say that such criteria may include, for instance, the size of the firm, the number of its customers, the number of its employees, the nature of the product or service at stake, previous complaints, and the like. [↑](#footnote-ref-192)
191. Such incentives may include tax benefits, legal immunity, positive publicity and the like. [↑](#footnote-ref-193)
192. Aside of raising the costs to businesses, which may respond by rolling these costs onto consumer, policymakers need to consider the ways such systems may impact the labor market and the pleasure and wellbeing benefits that contracting parties derive from social, humane interactions. These are general and significant concerns that relate to automation more generally and are not unique to our suggestions. [↑](#footnote-ref-194)
193. Paul R. Kleindorfer, *What if You Know You Will Have to Explain Your Choices to Others Afterwards? Legitimation in Decision-making*, in The Irrational Economist: Making Decisions in a Dangerous World 72 (2010). [↑](#footnote-ref-195)
194. *See supra* note 116. [↑](#footnote-ref-196)
195. *See, e.g.,* Benjamin Van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 Admin. Sci. 23 (2018). [↑](#footnote-ref-197)
196. In essence, mystery shoppers make purchases and then report back on the experience they had. *See, e.g.,* FTC, *Mystery Shopper Scam,* available at <https://www.consumer.ftc.gov/articles/0053-mystery-shopper-scams>. [↑](#footnote-ref-198)
197. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012). [↑](#footnote-ref-199)
198. Likewise, UDAP Laws may facilitate administrative ex ante enforcement by state actors. [↑](#footnote-ref-200)
199. FTC Bureau of Consumer Protection, *Privacy Impact Assessment* (Oct. 2019) (explaining that the FTC often uses the Lab’s capabilities to make undercover purchases in investigations); *FTC Releases Funeral Home Compliance Results, Offers New Business Guidance on Funeral Rule Requirements* (June 8, 2020) available at <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-releases-funeral-home-compliance-results-offers-new-business> (reporting the finding of undercover investigations of funeral rules as part of our enforcement of the Funeral Rule); [↑](#footnote-ref-201)
200. *FTC Undercover Shopper Survey on Entertainment Ratings Enforcement Finds Compliance Highest Among Video Game Sellers and Movie Theaters*, available at <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-undercover-shopper-survey-entertainment-ratings-enforcement> (Mar. 25, 2013) (reporting the use of mystery shoppers to examine whether movie theaters and retailers of video games, music, and movies were complying with self-regulation prohibiting the sale of products with violent content to children). [↑](#footnote-ref-202)
201. *See supra* note 120 and accompanying text. [↑](#footnote-ref-203)
202. Furth-Matzkin & Sommers, *supra* note 66, at 543 (“Our findings suggest that if we educate consumers about consumer protection statutes that allow for contract rescission on the basis of fraud, consumers may adjust their perceptions.”). [↑](#footnote-ref-204)
203. *Cf.* Choplin et al, *supra* note 60, at 95 (explaining how salespeople were able to convince borrowers to take unaffordable loans in spite of disclosure requirements). [↑](#footnote-ref-205)
204. 16 C.F.R. § 455 (1993). [↑](#footnote-ref-206)
205. Burnham, *supra* note 133, at 126. Burnham further explains that [w]hen the customer complained about a problem after the sale, the seller would point to language in the agreement, which first stated that there are no warranties (often the words "AS IS" were used…) and second stated a strong merger clause, indicating that the writing represented the entire understanding of the parties.”; *id*. [↑](#footnote-ref-207)
206. 16 C.F.R. § 455 (1993). [↑](#footnote-ref-208)
207. For instance, sellers may display the sticker in a way that makes it harder to observe; ensure the sticker is seen at a late negotiation stage, thus exploiting consumers’ sunk costs and self-commitment; use small font or colors that make the text illegible, etc. Interestingly, the FTC rule strives to minimize firms’ ability to do so by explicitly stating that “[t]he Buyers Guide shall be displayed prominently and conspicuously in any location on a vehicle and in such a fashion that both sides are readily readable” and that “The capitalization, punctuation and wording of all items, headings, and text on the form must be exactly as required by this Rule. The entire form must be printed in 100% black ink on a white stock no smaller than 11 inches high by 7 1/4 inches wide in the type styles, sizes and format indicated.”; § 455.2 (a). Such detailed rules might be hard to tailor, enact and enforce in the numerous consumer markets in which they are required. [↑](#footnote-ref-209)
208. *See* Choplin et al., *supra* note 60, at 94. [↑](#footnote-ref-210)
209. For making this suggestion in a different context *see* Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 14, at 1066 (“… public agencies could be authorized to file claims against noncompliant landlords on behalf of tenants.”). [↑](#footnote-ref-211)
210. Posner, *supra* note 151, at 568. [↑](#footnote-ref-212)
211. Burnham, *supra* note 133, at 106, citing Mccormick, Handbook of The Law of Evidence (1st ed. 1954), at 428. [↑](#footnote-ref-213)
212. *See, e.g.,* Stark & Choplin, *supra* note 17, at 621 (“Some courts have interpreted it to be unreasonable or unjustifiable for a consumer to rely on a parol false statement of fact when the contract, which the consumer could read or did read, contains a no reliance type clause or contains contradictory terms.”). [↑](#footnote-ref-214)
213. *Id.*at 630 (“While, in general, a claim of ‘fraud’ is an exception to the well known ‘parol evidence rule,’ courts have sometimes concluded that the presence of these clauses or contradictory terms in the contract cause even a fraud action to fail.”). *See also* Foremost Ins. Co. v. Parham, 693 So. 2d 409, 433 (Ala. 1997) (an insurer who believes an alleged misrepresentation that promised no premium charge for the first year of coverage while the contract indicated to the contrary cannot argue he was defrauded since he did not exercise sufficient precautions to protect his interest); Peerless Wall and Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 531 (W.D. Pa. 2000) (limiting the fraud exception to fraud in the execution, while excluding fraud in inducement, which is the more relevant type of misleading oral deal); MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 213, 218 (3d Cir. 2005) (anticipating that Delaware courts may enforce anti-reliance clauses in order “to bar a subsequent fraud claim”); Tirapelli v. Advanced Equities, Inc., 813 N.E.2d 1138, 1144 (Ill. App. Ct. 2004) (plaintiffs cannot argue fraud based on representation after signing a written contract that stated they did not rely on any representation). [↑](#footnote-ref-215)
214. *See, e.g.,* RREF BB Acquisitions, LLC v. MAS Properties, LLC, 2015 NCBC 58*.*  [↑](#footnote-ref-216)
215. Likewise, not honoring oral promises and hiding behind fine print might be understood as bad faith performance. For detailing the duty to perform in good faith see U.C.C.§§ 1–203, 2–305(2), 2–306(1), 2–311(1), 2–615(a) (Am. Law Inst. & Unif. Law Comm’n 2012). [↑](#footnote-ref-217)
216. Burnham, *supra* note 133, at 120. [↑](#footnote-ref-218)
217. U.C.C. § 2-302 (2001). [↑](#footnote-ref-219)
218. *See, e.g.,* W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 Mich. St. L. Rev. 853, 858–62. [↑](#footnote-ref-220)
219. While procedural unconscionability addresses unfairness in the bargaining *process*, substantive unconscionability is concerned with unfairness in the contractual *outcome*. *See, e.g.,* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741, 752–53 (1982). [↑](#footnote-ref-221)
220. *See, e.g.,* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism-The Sliding Scale Approach to Unconscionability*, 44 Loy. U. Chi. L. J. 44 1 (2012). [↑](#footnote-ref-222)
221. *See, e.g*., Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000). [↑](#footnote-ref-223)
222. *See, e.g.,* Choplin et al., *supra* note 60, at 98 (“Some consumers… feel pressure to conform with the social norm to sign contracts presented to them, and trust in the salesperson based upon the concept of reciprocity of trust and respect.”). [↑](#footnote-ref-224)
223. *See, e.g.* Hillman & Rachlinski, *supra* note 1, at 448 (“Consumers will feel uncomfortable suddenly indicating distrust to the reassuring agent by studying terms covering unlikely events.”); Korobkin, *supra* note 151, at 83 (“By signing the form without reading it, the nondrafter signals her trust that the drafter will not exploit her. In contrast, by reading the document carefully, the nondrafter signals something less than complete trust in her counterpart.”). [↑](#footnote-ref-225)
224. Becher, *supra* note 5, at 157 (“Buyers, therefore, are expected not to read [Standard Form Contracts] in order to refrain from generating antagonism as well as to maintain their own self-perception of trust, conformity, and cooperation.”). [↑](#footnote-ref-226)
225. *See generally* Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness,* U. Ill. L. Rev. (forthcoming, 2021). [↑](#footnote-ref-227)
226. The FTC applies a similar reasoning in somewhat similar contexts, such as false advertising. *See, e.g.,* Maureen K. Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis*, 83 Geo. Wash. L. Rev. 1999, 2005 (2015). [↑](#footnote-ref-228)
227. *See, e.g.,* Choplin et al., *supra* note 60, at 99. [↑](#footnote-ref-229)
228. *Id.* at 100. [↑](#footnote-ref-230)
229. *Cf. id.*at 98. [↑](#footnote-ref-231)
230. For making this point with respect to unfair contract terms see Wilkinson-Ryan, *supra* note 14, at 172 (“Interventions that target unfair terms may be most effective if they make clear that firms that get it wrong—firms that include terms that a court deems unenforceable—will suffer real costs.”). [↑](#footnote-ref-232)
231. For a similar suggestion in a different context see Wilkinson-Ryan, *supra* note 14, at 171 (suggesting that “[o]ne route is to subject firms to civil fines when they include unenforceable terms in their contracts.”). [↑](#footnote-ref-233)
232. *Id.* at 171-72(discussing the example of anti-disparagement clauses in California, which can attract a penalty of up to $10,000). [↑](#footnote-ref-234)
233. Furth-Matzkin & Sommers, *supra* note 66, at 543. [↑](#footnote-ref-235)
234. *Id.* [↑](#footnote-ref-236)
235. *See supra* note 89. [↑](#footnote-ref-237)
236. Furth-Matzkin & Sommers, *supra* note 66, at 544 (discussing, among other things, statutory damages and fee-shifting provisions). [↑](#footnote-ref-238)
237. Mont. Code Ann. § 30-14-133 (1993). [↑](#footnote-ref-239)
238. Burnham, *supra* note 154, at 118. [↑](#footnote-ref-240)
239. Yiwei Dou & Yongoh Roh, *Public Disclosure and Consumer Financial Protection,* working paper (2020). [↑](#footnote-ref-241)
240. *Id.*  [↑](#footnote-ref-242)
241. *Id*. [↑](#footnote-ref-243)
242. *Id.* [↑](#footnote-ref-244)
243. *Id.* [↑](#footnote-ref-245)
244. Korobkin, *supra* note 143, at 72-73 (discussing “knowingly false claims”); Solan, *supra* note 84, at 89-90 (“Privileging the written contract serves a useful function precisely because…. people really do testify dishonestly…”). [↑](#footnote-ref-246)
245. Korobkin, *supra* note 143, at 73-75 (discussing “unconscious opportunism”); Solan, *supra* note 84, at 90 (opining that people’s testimony can be inaccurate yet consistent “…with a self-serving reality that they have created in their own minds about events underlying a litigation.”). [↑](#footnote-ref-247)
246. *See generally* Daniel Gilbert, Stumbling on Happiness (2005). [↑](#footnote-ref-248)
247. Korobkin, *supra* note 143, at 75 (explaining that due to imperfect memories “even nondrafters with good intentions would file some factually unjustified lawsuits.”); Solan, *supra* note 84, at 89-90. [↑](#footnote-ref-249)
248. Burnham, *supra* note 133, at 142. [↑](#footnote-ref-250)