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Toxic Promises

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TOXIC PROMISES

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Abstract: Sellers often make manipulative and dishonest claims about their products and services. Such claims, which are more likely to be present in oral interactions, substantially influence consumers' choices. We term these claims "toxic promises."

This Article argues that the law currently underestimates, and does not properly respond to, the social harms that toxic promises generate. Insights from behavioral ethics suggest that even ordinary, law-abiding sellers can frequently make such manipulative assertions. At the same time, contracting realities might lead consumers to rely heavily on these toxic promises. When consumers discover that they have been manipulated, it is often too late: precontractual oral representations are either dismissed by courts as puffery, qualified by sellers in the unread fine print, or extremely challenging to prove.

Against this background, we call for tighter scrutiny of sellers' oral promises. We propose a spectrum of ex ante measures that regulators can utilize to monitor firms' sales personnel training. We also suggest various means to make firms liable for oral misrepresentations made by their employees. Next, we recommend that courts adopt new analytical frameworks to mitigate toxic oral promises and restrict the enforceability of merger and integration clauses that purport to disclaim them. In making these recommendations, we illustrate how a clever mix of ex ante prevention tools and ex post liability measures may yield a more honest and efficient market environment.

INTRODUCTION

Consumer fraud is a ubiquitous problem.¹ In the United States, tens of millions of consumers are victims of fraud every year.² For example, in 2017,

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around forty million U.S. consumers reported having been defrauded according to a Federal Trade Commission (FTC) report.³ The report estimates that there were almost sixty-two million occurrences of fraud that year.⁴ The median direct loss for consumers resulting from a fraudulent event was one hundred dollars.⁵ In 2020, the FTC estimated that consumer losses from fraud exceeded \$3.3 billion.⁶ This estimation does not include other social costs resulting from consumer fraud, such as forgone opportunities, emotional harm, enforcement and litigation costs, and erosion of societal values.

In many cases, sellers mislead consumers about a material aspect of the transaction.⁷ Often these consumers discover after the fact that the contract they signed or clicked through contradicts what the salesperson promised them before they entered the agreement.⁸

Consider the following cases. In one case, an insurance salesperson promised consumers that the insurance policy they were purchasing covered hurricane damage.⁹ After Hurricane Katrina hit, however, the insureds learned that the contract's fine print in fact excluded such coverage.¹⁰ In two other cases,

¹ See generally KEITH B. ANDERSON, STAFF REP. OF THE BUREAU OF ECON., FED. TRADE COMM'N, MASS-MARKET CONSUMER FRAUD IN THE UNITED STATES: A 2017 UPDATE, at ii (2019), <https://www.ftc.gov/system/files/documents/reports/mass-market-consumer-fraud-united-states-2017-update/p105502massmarketconsumerfraud2017report.pdf> [<https://perma.cc/4CJG-97ED>] (documenting consumer fraud in the United States).

² *Id.* (noting that, in 2017, around “40 million U.S. adult consumers” reported being the victim of at least one fraud and estimating that there was a total of 61.8 million instances of mass-market consumer fraud).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at iv (finding that in twenty-five percent of consumer fraud cases consumers lost no less than \$250).

⁶ FED. TRADE COMM'N, *New Data Shows FTC Received 2.2 Million Fraud Reports from Consumers in 2020*, FTC (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/new-data-shows-ftc-received-2-2-million-fraud-reports-consumers> [<https://perma.cc/CH94-UEE6>].

⁷ See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 503 (2020) (reporting, based on four controlled experiments, that consumers without legal training are more likely than those with legal expertise to capitulate to written contracts after deliberate misrepresentations made by the salesperson during initial oral conversations).

⁸ See *id.* (noting that the fine print in contracts often dissuades consumers from seeking legal recourse because they mistakenly believe all written terms are binding); see also Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 51 (2013) (terming cases in which a standard form contract differs from the oral representations made by the drafting party the “Borat Problem”).

⁹ *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 425 (5th Cir. 2007).

¹⁰ *Id.* at 436 (concluding that because the coverage exclusion clause is “unambiguous and not otherwise voidable under state law, it must stand”); see also *U.S. Fid. & Guar. Co. v. Knight*, 882 So. 2d 85, 92 (Miss. 2004) (“[I]nsurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain, and to ensure that rates have been properly calculated.”).

car dealers offered potential buyers certain incentives, such as a specific trade-in allowance or an assumption of liability for mechanical problems, to encourage them to purchase a car.¹¹ But after purchasing the car, the buyers discovered that the contract significantly reduced the previously-promised trade-in allowance,¹² or that the car had been sold “as is.”¹³

This Article addresses inaccurate, dishonest, misleading, or manipulative promises, which we term “toxic promises.”¹⁴ Particularly, we focus on promises that share the following characteristics: (i) they substantially influence consumers, (ii) they are commonplace and legitimized by cultural and social norms, and (iii) they are largely overlooked by the law.¹⁵

Toxic promises can be very problematic for consumers.¹⁶ Although the law prohibits sellers from deceiving consumers about material aspects of the transaction,¹⁷ in practice, consumers who fall victim to sellers’ “toxic promises” have limited legal recourse.¹⁸ To be sure, a seller generally “cannot promise the moon during the course of selling a product and then seek to escape legal liability by adding terms in forms.”¹⁹ But it is often difficult for courts to determine what the seller’s agents in fact promised consumers prior to entering into the contract.²⁰ Even if consumers can overcome this hurdle, a seller may

¹¹ See *infra* notes 12–13 and accompanying text (providing examples where car salespeople made oral promises to consumers and the later written agreements contravened or excluded these promises).

¹² See *Williams v. Spitzer Autoworld Canton*, L.L.C., 913 N.E.2d 410, 417–18 (Ohio 2009).

¹³ See *Curtis v. Bill Byrd Auto., Inc.*, 579 So. 2d 590, 594 (Ala. 1990). Another typical example involves mortgage agreements. Lenders often promise borrowers fixed-rate mortgages for specific time frames but invoke a contractual term that allows them to apply a higher interest rate before the time frame expires. See, e.g., *Belleville Nat’l Bank v. Rose*, 456 N.E.2d 281, 282–83 (Ill. App. Ct. 1983).

¹⁴ Of course, one should distinguish between the different types of troublesome promises (e.g., misleading, inaccurate, dishonest, unethical, and manipulative). The distinction can be based, for instance, on the degree of intention or malice and the magnitude of the gap between the oral promise and reality.

¹⁵ See *infra* notes 62–159 and accompanying text (discussing how toxic promises influence consumers’ behavior). We therefore use terms such as “toxic,” “misleading,” and “manipulative” interchangeably. Although the terms convey different behaviors, they are all relevant to our analysis.

¹⁶ See *infra* notes 113–241 and accompanying text (discussing the numerous obstacles that consumers face while navigating transactions with salespeople).

¹⁷ See, e.g., Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”).

¹⁸ See *infra* notes 113–241 and accompanying text (discussing the numerous obstacles that consumers face while navigating transactions with salespeople).

¹⁹ DOUGLAS G. BAIRD, *RECONSTRUCTING CONTRACTS* 123 (2013).

²⁰ See, e.g., Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 648 (2009) (discussing the difficulties courts encounter with a salespersons’ oral statements, especially when they conflict with a written contract, because it can be hard to distinguish whether the statements were actually said).

claim that its agents' assertions merely constituted lawful puffery, acceptable exaggerations, or legitimate advertising.²¹

Indeed, the law does not adequately police sellers who tell "half-truths" or make inaccurate assertions.²² Furthermore, the common law doctrine of fraud requires that the defrauded party show that he or she "justifiabl[y]" relied on the seller's fraudulent representation.²³ Courts have often held that a consumer who chooses not to read the contract before accepting it cannot be said to have "justifiably" relied on the seller's oral representations.²⁴

The current state of the law disadvantages consumers and undermines social welfare. Consumers cannot possibly read the overwhelming number of contracts they encounter in routine transactions, nor can they fathom the legal implications of complex contractual provisions.²⁵ The result is that toxic prom-

²¹ See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400 (2006) (noting that puffery has multiple definitions, but legally "it is a defense to a charge of misleading purchasers of goods . . . to a charge that a promisor has made a legally cognizable promise" (emphasis omitted)); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945–46 (3d Cir. 1993) (asserting that defendant's claims about superior engine protection were common marketplace puffery and did not violate the Lanham Act); *Leal v. Holtvogt*, 702 N.E.2d 1246, 1255–56 (Ohio Ct. App. 1998) (concluding that the seller's statements regarding warranties were no more than puffing).

²² See *Castrol*, 987 F.2d at 945 (finding that "[t]he 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific" (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 756–57 (5th ed. 1984))); see also Hoffman, *supra* note 21, at 1400 (clarifying that puffery rebuts the presumption that all misleading speech is per se unlawful).

²³ See RESTATEMENT (SECOND) OF TORTS § 537 cmts. a, b (AM. L. INST. 1977) (stating that common-law fraudulent misrepresentation can only be recovered if the person relies on the misrepresentation and his or her reliance is justifiable).

²⁴ See *Torres v. State Farm Fire & Cas. Co.*, 438 So. 2d 757, 758–59 (Ala. 1983) (stating that courts have not only a duty to discourage fraud but also to discourage consumers from negligence and inattention to one's own interest, and that there is a "concomitant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests"); *Tirapelli v. Advanced Equities, Inc.*, 813 N.E.2d 1138, 1144 (Ill. App. Ct. 2004) (finding that oral statements preceding the written agreement, and in contradiction to the written contract, did not constitute fraud); *Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 874, 882 (7th Cir. 2005) (noting that the Davises "had an opportunity and obvious obligation to read the documents before they signed them"). In most jurisdictions, legislatures enacted consumer fraud statutes that enable consumers to initiate fraud cases without having to prove reasonable reliance on the seller's misrepresentation. See, e.g., Alaska Unfair Trade Practices and Consumer Protection Act, ALASKA STAT. §§ 45.50.471–561 (2021); *Odom v. Fairbanks Mem'l Hosp.*, 999 P.2d 123, 132 (Alaska 2000) (articulating the standard for sustaining a claim under Alaska's Unfair Trade Practices and Consumer Protection Act, and noting that "[a]n act or practice is deceptive or unfair if it has the capacity or tendency to deceive. Actual injury as a result of the deception is not required"). Nevertheless, some courts have interpreted even these statutes as requiring "reasonable" reliance to recover for fraud and refused to void contracts that disclaimed sellers' oral misrepresentations as long as consumers had an opportunity to review the terms before signing. See, e.g., *Stark & Choplin*, *supra* note 20, at 623; *Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 70 (2005).

²⁵ See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 79–93 (2014) (discussing surveys that showed that con-

ises are under-policed and continue to flourish in consumer markets, harming uninformed consumers, honest competitors, and society more generally.

We argue that current approaches to the oversight of sellers' oral promises are partial and ineffective. Drawing on insights from behavioral ethics and social psychology, we present a comprehensive account of the underappreciated impact of sellers' precontractual oral statements on consumers.²⁶ We demonstrate that current approaches to the regulation of toxic promises underestimate the scope of the problem and do not sufficiently deter sellers from misbehaving.²⁷ We propose that instead of trying to encourage consumers to read or shop more diligently, policymakers should focus on eliminating toxic promises, even—and perhaps especially—when the unread contract contradicts or qualifies these promises.²⁸

The Article's central thesis relies on two complementary arguments. First, oral interactions that precede the written contract wield significant persuasive power over consumers.²⁹ This persuasive effect is usually undocumented and hence is one that judges, policymakers, and legal academics generally underestimate.³⁰ Here, we explain how trust, collaboration, and cognitive biases lead consumers to over-rely on what salespeople say when making purchasing decisions.³¹

sumers are typically unable to read the fine print in contracts carefully and arguing that regulations seeking to increase disclosure in contracts are insufficient); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 545 (2014) (arguing for consumer protection to focus on "term substantiation," which would require salespersons to confirm whether their consumers fully understood the terms of their contract (emphasis omitted)); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 680 (describing consumers as typically not reading contracts, and noting that even when consumers do read contracts they might not understand all the terms); Bob Sullivan, *It Pays to Read the Fine Print in Contracts*, AARP (Sept. 9, 2019), <https://www.aarp.org/money/budgeting-saving/info-2019/how-to-read-fine-print.html> [<https://perma.cc/5G7V-Y3QW>] (advising consumers that standardized contracts may disclaim certain assertions made by sellers or reveal that the advertised assertions are too good to be true).

²⁶ See *infra* notes 62–159 and accompanying text.

²⁷ See *infra* notes 242–290 and accompanying text.

²⁸ See *infra* notes 291–375 and accompanying text.

²⁹ See, e.g., John E. Swan, Michael R. Bowers & Lynne D. Richardson, *Customer Trust in the Salesperson: An Integrative Review and Meta-Analysis of the Empirical Literature*, 44 J. BUS. RSCH. 93 (1999) (examining how a consumer's trust in a salesperson can influence the consumer's decision-making). See also *infra* notes 65–84 and accompanying text (documenting the power that oral statements by salespersons to consumers can have).

³⁰ See, e.g., Urschel Farms, Inc. v. Dekalb Swine Breeders, Inc., 858 F. Supp. 831, 841 (N.D. Ind. 1994) (holding that buyers of boars failed to show reasonable reliance on the sellers' misrepresentations); *Sofaer Glob. Hedge Fund v. Brightpoint, Inc.*, No. 09-cv1191, 2011 WL 2413831, at *9 (S.D. Ind. June 10, 2011) (finding that the "[plaintiff's] unduly optimistic behavior was not reasonably prudent and, to the extent [plaintiff] relied on the [defendant's] '99.9% done' statement, such reliance was unreasonable").

³¹ See *infra* notes 62–159 and accompanying text.

Furthermore, we suggest that consumer contracting realities exacerbate the problems arising from consumers' misplaced trust in the promises of sellers and consumers' tendency to ignore the fine print. Most consumers do not read form contracts before signing them.³² In fact, sellers often draft consumer form contracts that the average consumer is unable to read or understand.³³ Consequently, consumers frequently have no choice but to rely on salespeople's oral assertions. Moreover, even if the terms of the written contract are unfair or unenforceable and contradict or qualify the seller's previous oral promises, consumers tend to believe that their contracts are still binding.³⁴ Put differently, although consumers tend to rely on salespeople's oral assertions *ex ante*, they are nevertheless prone to adopting a formalistic approach *ex post*,³⁵ equating contractual acceptance with "a waiver of most rights."³⁶

Our second key argument draws on emerging research in behavioral ethics. This literature demonstrates that even ordinary, law-abiding people, who would otherwise behave ethically, might lie and mislead others when social

³² See, e.g., Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3–5 (2014) (providing empirical evidence that consumers very rarely read online end-user license agreements (EULAs)).

³³ See, e.g., Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 253 (2013) (finding that EULAs are difficult to read); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2259 (2019) (finding sign-in-wrap consumer contracts generally unreadable); Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR*, in CONSUMER LAW AND ECONOMICS 179, 179 (Klaus Mathis & Avishalom Tor eds., 2021) (documenting study results showing that despite implementation of the EU General Data Protection Regulation (GDPR)—which mandates firms, among other things, "to clearly communicate privacy terms to end users"—consumers still readily "encounter privacy policies that are largely unreadable").

³⁴ For a general discussion of the silencing effect of consumer form contract terms and their impact on consumers' perception and behavior, see Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 1 (2017) [hereinafter Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms*] (exploring the unreadable terms of rental contracts); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1031 (2019) [hereinafter Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*] (finding, for example, that tenants are more likely to bear costs that are legally imposed on the landlord); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 148–49 (2017) (detailing the growing research which shows that consumers largely believe their contracts are enforceable even when those contracts are unfair).

³⁵ See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1297–98 (2015) (discussing the formalism, such as a signature or doing paperwork, that lay people see as acceptance of a contract).

³⁶ See, e.g., Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 853 (2012) (arguing that individuals believe that once they sign a contract the legal system holds them to the terms of that contract, even with unenforceable terms).

and situational forces enable them to do so.³⁷ For example, people often find it easier and more acceptable to lie or “cut corners” in oral interactions than in written statements. People are also more likely to behave unethically when they have strong incentives to do so or when facing competitive pressures.³⁸ In the context of this Article, we suggest that salespeople with powerful incentives to increase sales will often find ways to justify and excuse inaccuracies, overestimates, and biased oral representations of the deal.

Legal scholars have devoted considerable attention to consumers’ contractual realities and to mechanisms that exploit consumers’ vulnerabilities. To date, however, most of this work has focused on *written* standard form contracts, which consumers generally do not read.³⁹ Specifically, scholars have examined form contracts that, in response to consumers’ nonreadership, incorporate one-sided, unfair, unenforceable, or exploitative terms.⁴⁰

This Article recognizes that the written form contract—or the “paper deal”—is only one element in the constellation of consumer contractual relations, and that the oral precontractual interaction also has a considerable impact on consumers’ decisions. Unfortunately, however, these precontractual oral promises have not received sufficient scholarly attention. Indeed, the liter-

³⁷ See generally YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR* 125–29, 190–205 (2018) (discussing the influence of situational or social pressures on people).

³⁸ See *infra* notes 160–211 and accompanying text (discussing the situations and factors that contribute to sellers’ toxic promises).

³⁹ See, e.g., Bakos et al., *supra* note 32, at 3–5 (studying whether consumers read software end-user license agreements).

⁴⁰ See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629–30, 632 (1943) (noting the rise in standard-form contracts, which are frequently “contracts of adhesion” because of their large discrepancy in bargaining power); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (Little, Brown and Company 1960) (analogizing signing a form contract to “lay[ing] . . . [one’s] head into the mouth of a lion”); Lewis A. Kornhauser, *Comments & Notes, Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976) (writing that the majority of standardized terms “are candidates for nonenforcement”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176, 1242–43, 1250–55, 1258 (1983) (suggesting that non-negotiated, nonsalient boilerplate terms ought to be considered presumptively unenforceable); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206–08 (2003) (recommending that courts modify the unconscionability doctrine in order to revise inefficient form contract terms that typically hurt buyers); OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 1–32 (2012) (explaining how firms can exploit consumers’ cognitive biases); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 1–33 (2013) (criticizing the current legal treatment of standard form contracts); Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405 (2021) (suggesting ex ante administrative scrutiny of “exploitative” terms in consumer contracts); Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms*, *supra* note 34, at 3, 24–31 (documenting the prevalence of unenforceable terms in residential leases).

ature discussing oral promises remains underdeveloped and undertheorized.⁴¹ This Article addresses this deficit, shedding much-needed light on the prevalence and power of toxic promises and exploring possible normative prescriptions.

We distinguish between three main types of toxic promises. The first of these toxic promises involves a seller's blatant oral statements about the product that the contract's written terms do not support. As the earlier insurance and car examples illustrate, the contract may conflict with or qualify the seller's oral statements.⁴² Other examples include situations where a contract's fine print qualifies a seller's oral promise of high-speed internet,⁴³ or when the seller promises that a security alarm system will work even if the phone lines are cut off but the written contract exempts the seller from liability in such circumstances ("fraud in the inducement").⁴⁴

The second type of toxic promises involves misstatements about the contract's content (which may amount to "fraud in the execution").⁴⁵ One example includes situations when a salesperson promises that the contract contains a

⁴¹ There are, however, notable exceptions: for example, see Korobkin, *supra* note 8, at 51, 55 (discussing the emblematic "Borat Problem"—where participants in actor Sacha Baron Cohen's film, *Borat*, claimed the moviemakers deceived them into filming under false pretenses about its purpose—and courts deal inconsistently with these situations); Furth-Matzkin & Sommers, *supra* note 7, at 503, 518–36 (researching consumer reactions to seller representations that are contradicted by subsequent written contracts); Stark & Choplin, *supra* note 20, at 618–19 (arguing that "no reliance" and "exculpation" clauses should not serve as an absolute bar to fraud claims when written contracts differ from the seller's oral representations).

⁴² See *supra* notes 9–13 and accompanying text (providing examples of oral representations by sellers contradicting final written agreements between the parties in auto and insurance policy purchases).

⁴³ *Cf.* *People v. Charter Commc'ns, Inc.*, No. 450318/2017, 2018 WL 919991, at *10 (N.Y. Sup. Ct. Feb. 16, 2018) (denying the internet service provider's motion to dismiss because the New York Office of Attorney General laid out a cognizable claim alleging that the service provider defrauded New York consumers by promising high-speed internet services that they could not or would not ultimately deliver).

⁴⁴ See, e.g., *Cirillo v. Slomin's Inc.*, 768 N.Y.S.2d 759, 766, 768 (Sup. Ct. June 15, 2003) (finding that the disclaimers of reliance clauses contained in the written contract did not protect the seller from contradictory oral statements made by the salesperson to the buyer).

⁴⁵ See *Hetchkop v. Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 31–32 (2d Cir. 1997) ("Fraud in the execution occurs where there is a 'misrepresentation as to the character or essential terms of a proposed contract,' and a party signs without knowing or having a 'reasonable opportunity to know of its character or essential terms.'" (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a (AM. L. INST. 1981)) (citation omitted)). Although the parol evidence rule precludes claims of "fraud in the inducement," it allows for claims of "fraud in the execution." See Eric A. Posner, Essay, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 535–37 (1998) (discussing the "hard" parol evidence rule and "soft" parol evidence rule). This distinction prohibits nondrafting parties from "challeng[ing] the enforcement of a signed writing on the grounds that prior misrepresentations, which are subsequently disclaimed in the writing, induced them to sign." Korobkin, *supra* note 8, at 68. Nondrafters, however, "may invoke the fraud rule if the drafter represented that the writing itself contained representations that are different from those it actually included." *Id.*

warranty for a product even though the contract expressly denies any such warranty.⁴⁶ Another example is when the salesperson promises that the insurance policy will cover certain events that are, in fact, excluded from coverage under the written agreement.⁴⁷

The third type of toxic promises involves diminishing the role of the written contract in the course of oral interactions. That is, the seller may tell consumers that the fine print is merely a technicality or a legal formality.⁴⁸ For example, salespeople may assure consumers that the form contract does not, and will not, reflect the actual relationship between the parties. Sellers may also reassure consumers that the “real deal” will accord with the oral promises rather than with the form contract. Furthermore, salespeople may convince consumers that the form contract does not merit much attention or concern even when the contract contains clauses that deny the legal validity of precontractual promises.⁴⁹ In effect, such clauses typically state that, contrary to any oral assurances or statements the seller may have made, the written agreement governs the entirety of the relationship between the parties. Thus, such clauses declare unequivocally that the form contract is the “real deal.”⁵⁰

⁴⁶ See, e.g., *Carpetland U.S.A. v. Payne*, 536 N.E.2d 306, 307–09 (Ind. Ct. App. 1989) (holding that the disclaimer for an express warranty did not bar the buyer from recovery when the seller had made oral representations that there was a one-year warranty).

⁴⁷ Cf. *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 425, 438–42 (5th Cir. 2007) (noting that the plaintiff stated he relied on the agent’s oral representations that his house was covered by flood insurance, when the written contract expressly denied coverage for floods).

⁴⁸ Cf. *In re First Commodity Corp. of Bos. Customer Accts. Litig.*, 119 F.R.D. 301, 301 (D. Mass. 1987) (finding that the salesperson downplayed the importance of warnings in securities prospectus while suggesting they can be ignored); *Dynamic Energy Sols., LLC v. Pinney*, 387 F. Supp. 3d 176, 190–91 (N.D.N.Y. 2019) (finding that plaintiff’s agent misrepresented to defendant that the document he signed was nonbinding).

⁴⁹ For example, firms may use a “no representation” clause declaring that the firm and its salespeople have made no representations other than those detailed in the form contract. Second, drafters may include a “no reliance” clause, stating that consumers may not rely on any prior representations made by the firm or its agents. Third, sellers may use a “‘integration’ or ‘merger’ clause,” stipulating that the written agreement supersedes any prior communications between the parties. Such clauses will typically state that any such communications cannot be relied upon to supplement or modify the agreement. See, e.g., *Stark & Choplin*, *supra* note 20, at 618–19; Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 489–90 (1999); Joseph Wylie, *Using No-Reliance Clauses to Prevent Fraud-in-the-Inducement Claims*, 92 ILL. BAR J. 536, 536–39 (2004); Elizabeth Cumming, Note, *Balancing the Buyer’s Right to Recover for Precontractual Misstatements and the Seller’s Ability to Disclaim Express Warranties*, 76 MINN. L. REV. 1189, 1202 n.55 (1992).

⁵⁰ Another type of toxic promise that warrants attention occurs when the salesperson makes a deceptive statement about the product or its attributes while the contract remains silent about the issue. For example, a salesperson may tell a consumer that the diet pills on offer are effective when they are not. Similarly, salespeople may unjustly disparage competitors. Although much of the analysis below is relevant to these types of fraud, they are beyond the scope of this Article.

We argue that all three types of toxic promises warrant considerable attention. Toxic promises harm consumers, disadvantage honest competitors, erode important societal norms, and jeopardize market efficiency.⁵¹ Moreover, these promises can aggravate distributional disparities.⁵² This Article therefore suggests that policymakers and courts address the psychological forces that encourage sellers to lie to consumers and those that lead consumers to rely on these lies.

Our analysis calls for a novel approach to precontractual oral interactions regardless of whether the interactions occur face-to-face, on the phone, or online.⁵³ In particular, it calls policymakers to better scrutinize salespeople's oral statements.⁵⁴ The Article also emphasizes that consumer protection efforts should focus not only on ex post sanctions, but also on ex ante preventative measures.⁵⁵ Under this framework, we suggest requiring firms to better train and monitor their agents, adjusting corporate social responsibility standards to

⁵¹ See *infra* notes 212–241 and accompanying text.

⁵² In particular, sellers may yield to assertive or sophisticated consumers who insist on upholding the oral statements despite integration or merger clauses. Conversely, less assertive or sophisticated consumers are likely to face substantial hurdles should they seek to rely upon previously exchanged oral interactions. See *infra* notes 160–211 and accompanying text; see also R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 674–75 (1996) (discussing ex post discrimination in consumer transactions); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 314–15 (2012) (explaining how less vocal consumers or those who are perceived to be less worthy based on gender or race may find it harder to receive redress); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 77–78 (2019) (discussing firms' strategies of being selectively lenient at the ex post stage toward some groups of consumers); Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 938, 965 (2020) (discussing the potential role of assertive and pedantic consumers in disciplining sellers and advancing efficient markets); Meirav Furth-Matzkin, *The Distributive Impacts of Nudnik-Based Activism*, 74 VAND. L. REV. EN BANC 469, 472 (2021), <https://vanderbiltlawreview.org/law-review/wp-content/uploads/sites/278/2021/09/The-Distributive-Impacts-of-Nudnik-based-Activism-1.pdf> [<https://perma.cc/6HY7-ZM8Y>] (describing the power that “nudniks” have in changing the market or the actions of sellers); Meirav Furth-Matzkin, *Retail Race Discrimination* 24 (Feb. 14, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034828 [<https://perma.cc/U2ZE-W8GS>] (finding that sellers are significantly more likely to accept non-receipted returns despite a formal receipt requirement when consumers complain).

⁵³ Oral interactions can presently occur online, via live chat and the like. See, e.g., Lele Kang, Xiang Wang, Chuan-Hoo Tan & J. Leon Zhao, *Understanding the Antecedents and Consequences of Live Chat Use in Electronic Markets*, 25 J. ORGANIZATIONAL COMPUTING & ELEC. COM. 117, 117–18 (2015) (reviewing and discussing new technology that allows online oral interactions between sellers and consumers).

⁵⁴ Accordingly, precontractual *written* statements are beyond the scope of this Article. For one study that finds unrealistically positive and imbalanced written representations of service attributes, see Li Du & Shmuel I. Becher, *Genetic and Genomic Consultation: Are We Ready for Direct-to-Consumer Telegenetics?*, FRONTIERS GENETICS, Dec. 2018, at 1–2 (discussing forthcoming telegenetic practices).

⁵⁵ See *infra* notes 242–381 and accompanying text.

include a commitment by firms to uproot toxic promises, and using recordings and mystery shoppers to overcome the evidentiary hurdles that toxic promises inevitably impose. These proffered approaches may help prioritize enforcement efforts, which is a key challenge in the consumer law and policy landscape. Moreover, these recommended reforms are vital given the disproportionate impact of toxic promises on older, lower-income, less-educated, and minority consumers, who are considerably more vulnerable to manipulative practices.⁵⁶

Beyond the call for stronger *ex ante* monitoring and policing of toxic promises, this Article urges regulators to limit the validity of clauses that negate the enforceability of previous oral exchanges in consumer contracts. Integration and merger clauses can discourage consumers from taking legal action or even voicing their complaints after relying on a seller's oral representations.⁵⁷

This Article proceeds as follows: Part I elucidates the power of toxic promises,⁵⁸ especially given the information asymmetries between consumers and sellers. Employing insights from behavioral ethics and social psychology, Part II explains why toxic promises are both prevalent and challenging to eliminate.⁵⁹ Part III discusses the potential harms of toxic promises to consumers, markets, and social welfare.⁶⁰ Based on this analysis, Part IV highlights the inadequacy of current legal approaches and doctrines in uprooting toxic promises.⁶¹ It then recommends legal and policy changes.

I. THE IMPACT OF TOXIC PROMISES

This Part explains the psychological power of toxic promises on consumers. Section A places toxic promises in the context of consumer trust, the science of persuasion, and cognitive biases that influence how consumers under-

⁵⁶ See ANDERSON, *supra* note 1, at v–viii (discussing the demographics of people most likely to be victims of fraud, including the elderly, the less educated, the non-English-speaking); Furth-Matzkin & Sommers, *supra* note 7, at 560 (finding that female and nonwhite consumers are more likely to fall prey to fine print fraud); see also *Protecting Seniors from Fraud: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. 29 (2000) (statement of Rolando Berrelez, Assistant Regional Director, Midwest Region, Federal Trade Commission) (noting that a large number of fraud victims are elderly); FED. TRADE COMM'N, COMBATTING FRAUD IN AFRICAN AMERICAN & LATINO COMMUNITIES: THE FTC'S COMPREHENSIVE STRATEGIC PLAN 1–2, 2 n.6 (2016), <https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf> [<https://perma.cc/4FWU-C7BL>] (discussing the various work the FTC has done to help protect minority communities from fraud).

⁵⁷ See *supra* note 34 and accompanying text (discussing the silencing effect of contractual terms on consumers).

⁵⁸ See *infra* notes 62–159 and accompanying text.

⁵⁹ See *infra* notes 160–211 and accompanying text.

⁶⁰ See *infra* notes 212–241 and accompanying text.

⁶¹ See *infra* notes 242–381 and accompanying text.

stand and rely on oral interactions.⁶² Section B turns to discuss oral statements in view of the realities of consumer contracting.⁶³ It first describes how ex ante factors—such as asymmetric information, the “no-reading” problem, consumers’ limited attention, and manipulative selling tactics—intensify the impact of toxic promises on consumers. Finally, Section C clarifies how ex post realities—namely the silencing (“chilling”) effect of the fine print, litigation hurdles, and the inadequacy of consumer recall—further exacerbate the problems posed by precontractual toxic promises.⁶⁴

A. Trust and Persuasion

Although individuals may differ in the degree to which they trust one another,⁶⁵ humans are fundamentally trusting creatures.⁶⁶ Even though people may assume that the content of a conversation greatly affects their tendency to trust those who speak to them, it is the cues or impressions people receive from others during these conversations that frequently establish trust.⁶⁷ People regularly trust others when they perceive them as honest and moral.⁶⁸

Promises that salespeople make to consumers during precontractual negotiations can trigger trust.⁶⁹ It is here that interpersonal trust is most prominent

⁶² See *infra* notes 65–84 and accompanying text.

⁶³ See *infra* notes 85–112 and accompanying text.

⁶⁴ See *infra* notes 113–159 and accompanying text.

⁶⁵ See, e.g., William O. Bearden, Richard G. Netemeyer & Jesse E. Teel, *Measurement of Consumer Susceptibility to Interpersonal Influence*, 15 J. CONSUMER RSCH. 473, 473 (1989) (studying interpersonal influence on consumers); Emily A. Goad & Fernando Jaramillo, *The Good, the Bad and the Effective: A Meta-Analytic Examination of Selling Orientation and Customer Orientation on Sales Performance*, 34 J. PERS. SELLING & SALES MGMT. 285, 285 (2014) (examining selling orientations and customer orientations and how they impact sales performance).

⁶⁶ See, e.g., Karen S. Cook & Robin M. Cooper, *Experimental Studies of Cooperation, Trust, and Social Exchange*, in TRUST AND RECIPROCITY: INTERDISCIPLINARY LESSONS FROM EXPERIMENTAL RESEARCH 209 (Elinor Ostrom & James Walker eds., 2003); Tom R. Tyler, *Why Do People Rely on Others? Social Identity and the Social Aspects of Trust*, in TRUST IN SOCIETY 285, 291 (Karen S. Cook ed., 2001).

⁶⁷ Tyler, *supra* note 66, at 291. Consumers can also be affected by nonverbal cues. See, e.g., Shmuel I. Becher & Yuval Feldman, *Manipulating, Fast and Slow: The Law of Non-verbal Market Manipulations*, 38 CARDOZO L. REV. 459, 459–60 (2016) (discussing how nonverbal cues can influence consumers).

⁶⁸ See, e.g., Paul M. Herr, Frank R. Kardes & John Kim, *Effects of Word-of-Mouth and Product-Attribute Information on Persuasion: An Accessibility-Diagnosticity Perspective*, 17 J. CONSUMER RSCH. 454, 454 (1991) (discussing how word-of-mouth communications about products were persuasive).

⁶⁹ John E. Swan & Johannah Jones Nolan, *Gaining Customer Trust: A Conceptual Guide for the Salesperson*, 5 J. PERS. SELLING & SALES MGMT. 39, 39 (1985) (stating that “trust should be an important element in . . . sales [because] . . . that trust facilitates an exchange relationship”); Klaus Wertenbroch & Bernd Skiera, *Measuring Consumers’ Willingness to Pay at the Point of Purchase*, 39 J. MKTG. RSCH. 228, 239 (2002). This is true for promises made both offline and online, as websites can also gain consumer trust. See, e.g., Ming-Hsien Yang, Natalyn Chandrees, Binshan Lin & Hung-Yi Chao, *The Effect of Perceived Ethical Performance of Shopping Websites on Consumer Trust*, J.

and, alas, perilous.⁷⁰ Consumers may be especially likely to trust these assertions when they regard the salesperson as competent and experienced.⁷¹ Consumers may even believe that the seller's representations will override any conflicting contractual provisions. In particular, consumers may assume that salespeople are authorized to deviate from the contract to please consumers,⁷² that firms closely monitor their agents, or that salespeople are exposed to legal liability if they lie to consumers.⁷³

From the business's perspective, eliciting consumer trust is critical in marketing and sales because trust and persuasion often work in tandem.⁷⁴ The seminal work of social psychologist Robert Cialdini on persuasion shows how minor tweaks in environment and rhetoric can significantly affect consumers' information processing and decision-making.⁷⁵ Consistent with Cialdini's observations, marketing and sales literature offers practical advice on eliciting consumer trust.⁷⁶

COMPUT. INFO. SYS., Fall 2009, at 15, 15–16; Paolo Guenzi & Laurent Georges, *Interpersonal Trust in Commercial Relationships*, 44 EUR. J. MARKETING 114, 115 (2010).

⁷⁰ See, e.g., Bearden et al., *supra* note 65, at 473–75; Goad & Jaramillo, *supra* note 65, at 288–29.

⁷¹ See, e.g., Arch G. Woodside & J. William Davenport, Jr., *The Effect of Salesman Similarity and Expertise on Consumer Purchasing Behavior*, 11 J. MKTG. RSCH. 198, 198 (1974) (explaining that perceived competency and trust of the seller can create credibility in the eyes of the consumer).

⁷² See, e.g., Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858, 889 (2006) (arguing that deviation by the salesperson from the standard form contract should be considered a form of fraud and a valid ground for invalidating the written contract).

⁷³ See, e.g., Michael Simkovic & Meirav Furth-Matzkin, *Proportional Contracts*, 107 IOWA L. REV. 229, 232–33 (2021) (arguing that consumer attention is scarce and uninformed, and therefore consumers have an incorrect understanding of sellers).

⁷⁴ See, e.g., Ronald E. Milliman & Douglas L. Fugate, *Using Trust-Transference as a Persuasion Technique: An Empirical Field Investigation*, 8 J. PERS. SELLING & SALES MGMT. 1, 2 (1988) (finding that trust is important to the success of salespeople, and when trust is established salespeople are perceived as being more honest); David de Meza, Bernd Irlenbusch & Diane Reyniers, *Disclosure, Trust and Persuasion in Insurance Markets*, at Abstract (Inst. for the Study of Lab., IZA Discussion Paper No. 5060, 2010), <https://docs.iza.org/dp5060.pdf> [<https://perma.cc/U3QZ-GZ2E>] (noting that “[t]rusting buyers are more suggestible”).

⁷⁵ See generally ROBERT B. CIALDINI, *INFLUENCE: HOW AND WHY PEOPLE AGREE TO THINGS* 1–34 (1984).

⁷⁶ See, e.g., Swan & Nolan, *supra* note 69, at 39–40 (discussing the marketing and sales techniques that have developed based on trust-related research); see also Kenny Basso, Cristiane Pizzutti dos Santos & Manuela Albornoz Gonçalves, *The Impact of Flattery: The Role of Negative Remarks*, 21 J. RETAILING & CONSUMER SERVS. 185, 185–86, 188–90 (2014) (measuring the effect that trustworthiness has in the seller and consumer relationship); Rosemary P. Ramsey & Ravipreet S. Sohi, *Listening to Your Customers: The Impact of Perceived Salesperson Listening Behavior on Relationship Outcomes*, 25 J. ACAD. MKTG. SCI. 127, 129–30 (1997) (highlighting the importance of trust between the seller and buyer).

To be sure, salespeople are often trained professionals and are naturally incentivized to gain expertise in persuasion and manipulation.⁷⁷

Along with the natural tendency to trust, people are also not good at detecting lies.⁷⁸ Although many people believe that they are able to detect lies, the evidence suggests the contrary.⁷⁹ People's ungrounded confidence in their ability to detect lies further exacerbates the effects of sellers' toxic promises.

Moreover, in many markets, consumers are one-time actors, whereas sellers are repeat players. In the context of oral representations, sellers engage in the same types of conversations again and again, becoming adept and effective in eliciting consumer trust. Consumers, on the other hand, are likely to participate in only a handful of such interactions. They are therefore unlikely to develop expertise in sales communication or in detecting misleading statements.

Marketing research 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.⁸⁰ Other studies have shown the impact of emotional manipulation on consumers' ability to process information.⁸¹ For example, studies have found that convincing consumers that the seller is listening to them facilitates trust and influences purchasing decisions.⁸²

This body of evidence leads to two insights. First, these studies suggest that it is easier for salespeople to elicit empathy and manipulate consumers' emotions during oral interactions rather than solely utilizing language cues in written documents.⁸³ Second, while the documented sales and persuasion tech-

⁷⁷ See, e.g., DOUGLAS RUSHKOFF, *COERCION: WHY WE LISTEN TO WHAT "THEY" SAY* 14–15 (1999) (detailing how sellers use marketing, advertising, retail atmospherics, and other techniques to manipulate consumers and inhibit rational decision-making).

⁷⁸ See, e.g., Bella M. DePaulo, *Spotting Lies: Can Humans Learn to Do Better?*, 3 CURRENT DIRECTIONS PSYCH. SCI. 83, 83 (1994) (noting that people are not good at detecting lies).

⁷⁹ For recent evidence that people overestimate their ability to detect lies, see Marta Serra-Garcia & Uri Gneezy, *Mistakes, Overconfidence, and the Effect of Sharing on Detecting Lies*, 111 AM. ECON. REV. 3160, 3160 (2021).

⁸⁰ 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, 46 (1994) (discussing effects that can contribute to sellers' success).

⁸¹ See, e.g., Barry J. Babin, James S. Boles & William R. Darden, *Salesperson Stereotypes, Consumer Emotions, and Their Impact on Information Processing*, 23 J. ACAD. MKTG. SCI. 94, 94–95 (1995).

⁸² See, e.g., Ramsey & Sohi, *supra* note 76, at 132–33 (finding that “[a] customer’s perception of listening behavior [of the salesperson] is positively related to trust in the salesperson”); Ko de Ruyter & Martin G.M. Wetzels, *The Impact of Perceived Listening Behavior in Voice-to-Voice Service Encounters*, 2 J. SERV. RSCH. 276, 281 (2000) (finding that “customer perceptions of agent listening behavior are instrumental in maintaining relationships”).

⁸³ See *supra* notes 65–82 and accompanying text (documenting studies regarding salespersons’ oral statements and their effects on consumers).

niques do not necessarily involve deception, they can still be manipulative and distract consumers' attention away from their objectives or the practical aspects and qualities of the goods or services they consider.⁸⁴ Given the powerful effect of these interpersonal interactions, the possibility that consumers may enter into transactions due to misleading oral promises is highly likely in the absence of effective monitoring. These insights serve as the basis for much of the proceeding analysis.

B. Beyond Persuasion: Cognitive Biases

As previously noted, consumers frequently trust salespeople's assertions and rely on them when making their decisions.⁸⁵ Indeed, consumers may trust sellers' assertions even when it is not entirely rational for them to do so given a host of cognitive biases and behavioral tendencies.⁸⁶

The mechanisms that lead to consumer manipulation are diverse. Various cognitive biases can explain much of the "success" of toxic oral promises. As detailed in this Section, cognitive biases may motivate consumers to look for, and pay attention to, those cues and information that reinforce their preexisting inclinations and preferences.⁸⁷ Furthermore, cognitive biases can lead consumers to ignore unpleasant information that could otherwise serve as a warning.⁸⁸ Similarly, and as we explain next, consumers are more likely to interpret information in ways that align with their preexisting beliefs.

Several psychological mechanisms and cognitive biases can lead consumers to misprocess, ignore, or misuse information. Consider, for example, motivated reasoning. Evidence suggests that one's self-interest and existing beliefs unconsciously shape one's understanding of reality.⁸⁹ Thus, rather than accu-

⁸⁴ See *supra* notes 65–82 and accompanying text.

⁸⁵ See Cook & Cooper, *supra* note 66, at 209 (finding that humans, in general, are fundamentally trusting); Woodside & Davenport, *supra* note 71, at 198 (noting that consumers are more trustworthy of salespeople who appear competent and knowledgeable).

⁸⁶ See RUSHKOFF, *supra* note 77, at 14–15 (documenting how salespersons use manipulation in their techniques to inhibit rational thinking by consumers); DePaulo, *supra* notes 78, at 83 (finding that people overestimate their ability to spot lies).

⁸⁷ See, e.g., David Dunning, *Self-Image Motives and Consumer Behavior: How Sacrosanct Self-Beliefs Sway Preferences in the Marketplace*, 17 J. CONSUMER PSYCH. 237, 237–41 (2007) (discussing how decision-making is influenced by belief harmonization).

⁸⁸ See RUSHKOFF, *supra* note 77, at 14–15 (describing how coercion by sellers can interfere with consumers' decision-making).

⁸⁹ See, e.g., Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 480, 484 (1990) (noting that "[t]here is considerable evidence that people are more likely to arrive at conclusions that they want to arrive at, but their ability to do so is constrained by their ability to construct seemingly reasonable justifications for these conclusions").

rately analyzing the evidence or data at hand, consumers may process information in ways that promote their perceived goals.⁹⁰

Self-interest can even affect how people process visual stimuli.⁹¹ Essentially, people tend to see different things depending on what better serves their interests.⁹² In a classic study from the 1950s, students from two colleges watched a film of a controversial football game between teams from the two schools. Despite watching the same film, students from both schools rated the rival school's team as playing less fairly and with less sportsmanship.⁹³

This experiment indicates that the emotional stakes—for example, affirming loyalty to one's institution—can shape what people see.⁹⁴ The existence of this effect might also shed light on sellers' marketing and communication choices. For example, it helps explain why many salespeople might be comfortable telling half-truths and emphasizing favorable aspects of the transaction while downplaying other, less favorable aspects.

Such an attitude among salespeople may be particularly applicable to their desire to generate vague statements, because greater vagueness allows people more room for self-deception and motivated reasoning.⁹⁵ When using vague speech, speakers may avoid feeling that they are engaging in intentionally misleading behavior. Notably, ordinary unethicality increases in ambiguous situations. By its very nature, speech is far more likely than writing to gen-

⁹⁰ *Id.*

⁹¹ See Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCH. 612, 612–15 (2006) (exploring how “[p]eople’s motivational states . . . influence their processing of visual stimuli”); Emily Balcetis & David Dunning, *Cognitive Dissonance and the Perception of Natural Environments*, 18 PSYCH. SCI. 917, 917 (2007) (noting that the findings from two “studies suggest that the impact of motivational states extends from social judgment down into perceptual processes” (emphasis omitted)); Jonathan R. Zadra & Gerald L. Clore, *Emotion and Perception: The Role of Affective Information*, 2 WIRES COGNITIVE SCI. 676, 676–79 (2011) (finding that emotions continuously affect how we perceive what we see).

⁹² See, e.g., Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCH. REV. 781, 781 (2004) (studying the “asymmetries between self-perception and social perception [that] arise from the simple fact that other people’s actions, judgments, and priorities sometimes differ from one’s own”); Dan M. Kahan et al., *“They Saw a Protest”: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 851 (2012) (finding that culturally motivated cognition influences how people interpret political demonstrations).

⁹³ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129, 131 (1954).

⁹⁴ For an accessible review and explanation, see Chris Mooney, *What Is Motivated Reasoning? How Does It Work? Dan Kahan Answers*, DISCOVER (May 5, 2011), <https://www.discovermagazine.com/the-sciences/what-is-motivated-reasoning-how-does-it-work-dan-kahan-answers> [<https://perma.cc/AK6S-BQ6Z>].

⁹⁵ See, e.g., Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 988–89 (2009) (finding that legal ambiguity enhances motivated reasoning and self-deception).

erate ambiguity for the listener and the speaker. This ambiguity is one reason we believe salespeople might be more likely to deceive consumers orally rather than in writing, a point we will return to below.⁹⁶

Motivated reasoning processes underlie some other related behavioral mechanisms. One is the confirmation bias,⁹⁷ which leads people to spend more cognitive resources looking for information that strengthens their preexisting beliefs.⁹⁸ Another is wishful thinking, according to which people may believe that something will happen just because they want it to happen.⁹⁹ In our context, the desirability effect makes consumers more likely to believe the oral statements and less likely to understand the conflicting language of the fine print.

Another related mechanism that makes consumers vulnerable to toxic promises is the optimism bias.¹⁰⁰ The literature on optimism bias illustrates how people often display unrealistic optimism, viewing the future through rose-tinted glasses and systematically underestimating risks.¹⁰¹ 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.¹⁰²

By and large, optimism is a positive quality,¹⁰³ contributing to people's happiness, health, confidence, personal relationships, and ambition.¹⁰⁴ Unreal-

⁹⁶ See *infra* notes 192–211 and accompanying text.

⁹⁷ See ARTHUR S. REBER, *THE PENGUIN DICTIONARY OF PSYCHOLOGY* 151 (2d ed. 1995) (defining confirmation bias when individuals interpret new evidence or information as confirming one's preexisting beliefs).

⁹⁸ See, e.g., SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 233 (1993) (noting that individuals usually look for information that supports their beliefs); 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”).

⁹⁹ See Maya Bar-Hillel & David Budescu, *The Elusive Wishful Thinking Effect*, 1 *THINKING & REASONING* 71 (1995).

¹⁰⁰ See, e.g., Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 *J. PERSONALITY & SOC. PSYCH.* 806, 806 (1980) (finding that people tend to believe that they are invulnerable, and therefore only expect others to be the victims of misfortune); Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 *ACTA PSYCHOLOGICA* 143, 147 (1981) (finding that people's optimism about their own abilities compared to others could lead them to increase their risk-taking).

¹⁰¹ See, e.g., Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 *SCIENCE* 1232, 1232 (1989) (finding that people are unaware of their optimism bias when it concerns their own risks); 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, 439 (1993) (same); Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 *J. SOC. & CLINICAL PSYCH.* 1, 1 (1996) (same).

¹⁰² Weinstein & Klein, *supra* note 101, at 1.

¹⁰³ See, e.g., Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 *PSYCH. BULL.* 193, 195–97 (1988) (finding that optimism can have positive implications for people).

istic optimism, however, can also lead people to take excessive risks and ignore warning signs. In our context, the dangers posed by consumers' unrealistic optimism can be exacerbated when the risky or harmful nature of a transaction is hidden in the fine print and downplayed through oral conversations and misleading statements.

Next, consider the sunk costs effect. In essence, the sunk cost effect "is manifested in a greater tendency to continue an endeavor once an investment in money, effort, or time has been made."¹⁰⁵ Overcoming the sunk costs fallacy is a rather challenging task, which many people cannot undertake successfully.¹⁰⁶

By their very nature, precontractual oral interactions precede the formal contract. Consumers' efforts to become familiar with the transaction's details, including their precontractual conversations with sellers' representatives, are sunk costs. Thus, a natural tendency would be to ignore contract terms that seem to conflict or qualify the seller's assertions.¹⁰⁷ Once consumers have spent substantial time and effort engaging with the salesperson and deciding to conclude the transaction, most consumers would prefer to capitalize on these efforts regardless of any conflicting fine print.

Inspecting the contract is usually possible only after speaking with the seller. The sunk cost effect likely makes it much less probable that consumers will inspect the fine print at this relatively late stage. Fraudulent salespeople can exploit this fact by intentionally postponing the presentation of contractual terms to a later stage once the consumer has already incurred high sunk costs.¹⁰⁸

Finally, cognitive overload can lead consumers to rely on oral statements and ignore the fine print. Because the cognitive ability to absorb and analyze information is limited, consumers are likely to experience cognitive overload when confronting a myriad of information.¹⁰⁹ Consequently, consumers typically focus on a few salient aspects of the transaction at stake while neglecting many

¹⁰⁴ See, e.g., Gustavo E. de Mello & Deborah J. MacInnis, *Why and How Consumers Hope: Motivated Reasoning and the Marketplace*, in *INSIDE CONSUMPTION* 45–46 (S. Ratneshwar & David Glen Mick eds., 2005) (noting the benefits that can occur as the result of optimism).

¹⁰⁵ Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 124, 124 (1985).

¹⁰⁶ See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *CORNELL L. REV.* 486, 500 (2002) (noting that people let sunk costs influence their decision-making).

¹⁰⁷ See Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 *LA. L. REV.* 117, 129 (2007) (arguing that the "sunk cost effect plays an important role in consumers' decisions not to read [contracts]").

¹⁰⁸ *Id.* at 131; see also Simkovic & Furth-Matzkin, *supra* note 73, at 260 (observing that sellers delay providing a contract until late in the sales process to increase the chance of a sale).

¹⁰⁹ Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision Making*, 10 *J. CONSUMER RSCH.* 436, 440 (1984).

others.¹¹⁰ In the context of consumer transactions, an agent's oral representations about the transaction are likely to be more straightforward, vivid, and memorable than the typically lengthy and complex fine print.¹¹¹ Thus, consumers are likely to put more weight on the more salient information conveyed through their oral interactions with sellers, while ignoring the convoluted fine print.¹¹²

C. Toxic Promises and Consumer Contracting Realities

This Section explains how consumer contracting realities increase the significance and the perils of toxic oral promises. First, it addresses *ex ante* contracting realities that govern the early stages of the negotiation.¹¹³ Next, it addresses the *ex post* stage, after a dispute or a problem has arisen.¹¹⁴

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 contract is one informational factor that the parties may consider.¹¹⁵ Indeed, contract law assumes that the contracting parties consciously agree upon a set of terms that reflect their understandings and advance their interests.¹¹⁶

¹¹⁰ See generally Korobkin, *supra* note 40, at 1206 (highlighting the price and principal, operational features of a product as the most pertinent aspects of a contract in the eyes of the average consumer); Becher, *supra* note 107, at 166–77 (discussing information overload and consumer contracts).

¹¹¹ See, e.g., Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1676 (2006) (discussing “the tendency of consumers to focus on . . . ‘vivid’ information” rather than legalese); cf. Hoffman, *supra* note 21, at 1396 (“We are constantly exposed to speech . . . encouraging us to buy goods . . . and transact for services. This speech is often intentionally misleading, is usually vivid and memorable, and induces many of us to rely on it.”).

¹¹² Cf. Ram N. Aditya, *The Psychology of Deception in Marketing: A Conceptual Framework for Research and Practice*, 18 PSYCH. & MKTG. 735, 747–48 (2001) (explaining how “the state of arousal brought about by visual and verbal appeals [can] . . . make some product features salient and others inconspicuous”).

¹¹³ See *infra* notes 115–127 and accompany text.

¹¹⁴ See *infra* notes 128–159 and accompany text.

¹¹⁵ See, e.g., Korobkin, *supra* note 40, at 1206 (“Terms that govern the contractual relationship between buyers and sellers are attributes of the product in question, just as are the product’s price and its physical and functional characteristics.”).

¹¹⁶ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (AM. L. INST. 1981) (stating that when interpreting a contract, “the primary search is for a common meaning of the parties”); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1138 (2019) (“Regardless of one’s normative theory of contract, the central focus of justification is on the enforcement of common terms that parties agree to when they form contracts. Without the presence of an actual agreement freely reached, the state is not easily justified in enforcing a contract . . .”).

This assumption, however, is largely inapplicable to transactions entered into through consumer form contracts.¹¹⁷ Consumers rarely read such contracts, which sellers pre-draft and are generally unwilling to negotiate.¹¹⁸ As a result, consumers often are unfamiliar with the content of their contracts.¹¹⁹ 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 earlier, consumer contracts are unreadable for the average consumer.¹²⁰

The fact that consumers are generally unaware of the contents of their agreements creates a potential market failure due to information asymmetry.¹²¹ Sellers, who draft form contracts and execute them repeatedly, 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 do not maximize their utility.

Numerous studies examine the legal challenges posed by the problem of consumers not reading consumer contracts.¹²² For our purposes, it is sufficient to acknowledge that consumers do not learn about the contractual elements of their transactions by reading the contract. Nor are they likely to seek expert advice or consult a lawyer for most types of consumer transactions. As a result, other informational sources, such as oral interactions with sellers, become even

¹¹⁷ See, e.g., 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, 205–06 (2010) (providing indicative evidence that most consumers generally do not read contracts *ex ante*); Simkovic & Furth-Matzkin, *supra* note 73, at 237 (stating that consumers rarely read contracts).

¹¹⁸ See, e.g., Bakos et al., *supra* note 32, at 3–5 (tracking the browsing history of users and finding that they fail to access the terms and conditions).

¹¹⁹ 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 anecdote, see Planet Money, *SUMMER SCHOOL 8: Risk & Disaster*, NPR, at 11:00 (Aug. 26, 2020), <https://www.npr.org/2020/08/26/906243873/summer-school-8-risk-disaster> [<https://perma.cc/B95W-GZGH>] (opining that over five years, only three out of thousands of consumers read the insurance fine print).

¹²⁰ See *supra* note 33 and accompanying text (explaining that the average consumer cannot read legal contracts, or sufficiently understand clauses).

¹²¹ 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, 724–25 (2008).

¹²² See, e.g., Clayton P. Gillette, *Pre-approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 975 (2005) (discussing the inherent problem that consumers do not read standard-form contracts); Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1243 (2006) (same); 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, 231–39 (2007) (same); Shmuel I. Becher, *A “Fair Contracts” Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 748–49 (2009) (same); RADIN, *supra* note 40, at 8–22 (same); Ayres & Schwartz, *supra* note 25, at 545 (same).

more meaningful. Consumers must often rely heavily on sellers' statements, using them as a shortcut, or a substitute, for reading detailed and complex contracts.¹²³ Consumers' reliance on these oral interactions is highly significant. This is especially so since most consumers are largely unaware of their rights and often misperceive the law.¹²⁴

Alarming, salespeople can further use oral interactions to dispel consumers' fears once consumers realize that the form contract contains onerous terms.¹²⁵ For example, to convince the consumer to proceed with a deal despite its problematic terms, salespeople sometimes provide reassurances and deceptive clarifications, explaining away the problematic terms.¹²⁶ Such explanations can be effective in allaying consumers' suspicions even when the explanations offered are meaningless.¹²⁷ Consequently, even those consumers who read the contract, understand the risks involved, and take them into account, may still be harmed by toxic promises.

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

The chilling effect of fine print provides an excellent example of the problem of *ex post* effects. As noted, experimental and empirical data suggest that laypeople are contract formalists.¹²⁸ Consumers generally consider the fine

¹²³ Other substitutes may be information flows and reputation mechanisms. For the idea that information flows can discipline sellers and inform consumers see, for example, Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMMS. & TECH. L. REV. 303, 305–06 (2008); Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1239–41 (2019). For the idea that reputation can discipline sellers see, for example, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829 (2006); Becher & Zarsky, *supra* note 52, at 77–78.

¹²⁴ See, e.g., Oren Bar-Gill & Kevin E. Davis, *(Mis)perceptions of Law in Consumer Markets*, 19 AM. L. & ECON. REV. 245, 245–86 (2017) (discussing the misperceptions and lack of understanding that consumers hold pertaining to the law and their legal rights); Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1058–59 (noting that sophisticated sellers take advantage of buyers' misconceptions regarding the law); see also Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 15–17 (2015).

¹²⁵ See Jessica M. Choplin, Debra Pogrud Stark & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 LAW & PSYCH. REV. 61, 61–62 (2011) (explaining why consumers might be especially vulnerable to deception).

¹²⁶ *Id.* at 66.

¹²⁷ *Id.* at 69.

¹²⁸ See generally Wilkinson-Ryan & Hoffman, *supra* note 35, at 1270 (finding that consumer thinking regarding contract formation is formalistic).

print legally and morally binding.¹²⁹ People's intuition is to believe in the validity of the fine print even if it contains illegal, unconscionable, or otherwise unfair terms.¹³⁰ Thus, a form contract term that negates an oral statement or otherwise conflicts with a precontractual representation is likely to impact consumers' perceptions of their rights.

Consider, for example, Professor Wilkinson-Ryan's study of people's perceptions regarding consent to the fine print.¹³¹ 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.¹³² Given this understanding, one could hypothesize that a consumer's consent to the terms of the form contract should be treated cautiously when the written contract contravenes the seller's oral promises. Nevertheless, the study found that people's "ambivalence seems to dissipate entirely when questions about consent come up in the context of contract enforcement."¹³³ Thus, as another study illustrated, in the case of enforcement of standardized unfavorable terms, people believe that their consent to the fine print is genuine and legitimate, both morally and legally.¹³⁴ Consistent with this finding, research illustrates that form contract terms reduce consumers' willingness to complain, terminate the contract, or otherwise confront sellers.¹³⁵

Another study explored the incorporation of unenforceable and misleading terms in residential rental contracts.¹³⁶ The study found that landlords regularly misinform tenants about their legal rights and remedies under their contracts and often fail to comply with mandatory disclosures. At times, tenants' contracts included terms that clearly violate the law.¹³⁷ Congruent with earlier literature, the study argued that because tenants regard the provisions in their lease agreements as legally enforceable, they frequently "forgo valid legal rights and claims" when faced with a landlord/tenant dispute.¹³⁸

¹²⁹ Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747–48 (2014).

¹³⁰ See, e.g., Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1059–60 (finding that tenants are deterred by the terms of their leases once a dispute arises even if those terms are unenforceable).

¹³¹ See generally Wilkinson-Ryan, *supra* note 129.

¹³² *Id.* at 1747.

¹³³ *Id.* at 1748.

¹³⁴ Wilkinson-Ryan, *supra* note 34, at 144, 146 (exploring the perceived "moral obligations" of individuals in contractual relationships).

¹³⁵ *Id.* at 121.

¹³⁶ Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms*, *supra* note 34, at 3.

¹³⁷ *Id.* (finding that many residential contracts "flatly contravene the law").

¹³⁸ *Id.* at 1.

A follow-up study confirmed that these unenforceable contractual terms indeed shape tenants' perceptions of their legal rights.¹³⁹ Tenants with contracts containing legally unenforceable terms were eight times more likely to suffer the costs that the law inflicted on landlords than tenants with enforceable agreements.¹⁴⁰ Notably, the study also found that unenforceable terms undermine the tenant's motivation to search for legal information online,¹⁴¹ and that unenforceable terms hinder the nondrafting party's ability to interpret and understand legal information accessed online.¹⁴²

Of particular relevance to our inquiry is another related study that investigated laypeople's beliefs about contracts that contradicted false representations.¹⁴³ This study found that respondents believed that form contracts—which in this study were signed by consumers without reading them—were valid and enforceable as written despite prior precontractual material misrepresentations made by sellers' agents.¹⁴⁴ Once again, the findings suggest that the fine print “discourages consumers from wanting to take legal action, initiate complaints, or damage the deceptive firm's reputation by telling others what happened.”¹⁴⁵ The study also found that informing consumers about consumer protection laws did not fully ameliorate the psychological impact that the fine print imposes on buyers.¹⁴⁶

Thus, mounting evidence suggests that consumers are likely to feel bound by the written contractual terms, even when the terms contradict a seller's previous misleading oral statements.¹⁴⁷ Although there are valid reasons for presuming the evidentiary superiority of written documents over oral statements,¹⁴⁸ this assumption may entail a significant cost. As professor Lawrence Solan observes:

¹³⁹ Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1032.

¹⁴⁰ *Id.* at 1035.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1067.

¹⁴³ Furth-Matzkin & Sommers, *supra* note 7, at 508, 520–21 (showing that many lay consumers are “contract formalists,” or rather they believe courts will enforce the letter of the contract without regard for extenuating circumstances, like fraudulent sales practices).

¹⁴⁴ *Id.* at 521 (noting that many consumers sign form contracts under “clear and material deception”).

¹⁴⁵ *Id.* at 503.

¹⁴⁶ *Id.* 508–09.

¹⁴⁷ *See supra* notes 143–146 and accompanying text (describing how consumers view contracts and their terms).

¹⁴⁸ *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 (2009) (explaining that “written evidence is more accurate than human memory,” that it helps “to avoid fraud and unintentional invention after an agreement has been reached,” and that “there is a desire not to mislead the finder of fact with emotional evidence”).

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.¹⁴⁹

Other obstacles may also induce consumers to adhere to contractual terms that negate preceding oral interactions. First, consumers in such situations are not likely to complain because they may blame themselves for failing to read the fine print.¹⁵⁰ According to the FTC, less than ten percent of defrauded consumers make a formal complaint.¹⁵¹

Even if consumers overcome the fine print's chilling effect, they are still unlikely to insist upon their rights for various other reasons. Some consumers may be concerned about legally challenging a firm due to unequal bargaining power.¹⁵² Others may prefer to avoid conflicts and confrontations due to the emotional toll involved¹⁵³ or may simply find litigation costs to be too high a burden.¹⁵⁴

¹⁴⁹ Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 92 (2001).

¹⁵⁰ See, e.g., Furth-Matzkin & Sommers, *supra* note 7, at 510 (suggesting that consumers “may become demoralized by contractual language and . . . blame *themselves* for failing to read” and providing evidence that “consumers are disinclined to renegotiate with sellers, and . . . express little appetite for complaining”).

¹⁵¹ KEITH B. ANDERSON, FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY 80 tbl.5-1, 80–81 (2004), <https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf> [<https://perma.cc/H23N-Q2UP>]; see also Keith B. Anderson, *To Whom Do Victims of Mass-Market Consumer Fraud Complain?* 3 (May 24, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3852323 [<https://perma.cc/6WCA-Z6FH>] (observing, based on FTC surveys from 2005, 2011, and 2017, that less than 3% of defrauded consumers complain to a government entity).

¹⁵² Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95–97 (1974).

¹⁵³ See, e.g., William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 631–36 (1980) (examining how disputes come about).

¹⁵⁴ For a general discussion of 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) (discussing the rising costs of litigation); Edward L. Rubin, *Essay, Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 288 (2003) (noting that significant litigation costs remain a barrier); see also RONALD L. BURDGE, UNITED STATES CONSUMER LAW: ATTORNEY FEE SURVEY REPORT 2017–2018, at 26 (2020) (finding that “the average hourly rate for the typical Consumer Law attorney in the United States is \$345”).

Furthermore, many consumer transactions involve a relatively small sum of money or low-value items. In such cases, initiating a legal dispute is not cost-beneficial.¹⁵⁵ This further reduces consumers' willingness to invest resources in complaining or otherwise pursuing legal action.¹⁵⁶ Additionally, some consumers may be especially reluctant to pursue legal action due to low levels of trust in the legal system.¹⁵⁷ Finally, the fine print itself may limit the legal options consumers may use, as is the case in the context of class action waivers and mandatory arbitration clauses.¹⁵⁸

Given these considerations, many consumers are likely to feel that they have no choice but to comply with the questionable form contract that contradicts the seller's oral promise. Firms, as a result, may have strong financial incentives to implement schemes that encourage salespeople to behave unethically. Simply put, sellers may realize that because only a few customers will take action, toxic oral promises are economically valuable. In fact, empirical evidence, including firms' training materials, indicates that companies encourage their salespeople to exaggerate the benefits of their products or mislead consumers to increase sales.¹⁵⁹

¹⁵⁵ Cf. Amy J. Schimtz, *Enforcing Consumer and Capital Markets Law in the United States*, in ENFORCING CONSUMER AND CAPITAL MARKETS LAW: THE DIESEL EMISSIONS SCANDAL 339–40 (Beate Gsell & Thomas M.J. Möllers eds., 2020) (explaining that class actions are especially relevant to “small dollar claims, where the cost to individually litigate is disproportionate to the eventual judgment”).

¹⁵⁶ For a discussion about the underenforcement of consumer harm see, for example, Iain D.C. Ramsay, *Consumer Redress Mechanisms for Poor-Quality and Defective Products*, 31 U. TORONTO L.J. 117, 117–19 (1981); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 151–53 (1999).

¹⁵⁷ For a discussion about the public (dis)trust in the legal system, see, for example, BENJAMIN H. BARTON, AMERICAN (DIS)TRUST OF THE JUDICIARY (2019), https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf [<https://perma.cc/JHR9-DLYS>]; JAMES M. LYONS, TRUMP AND THE ATTACK ON THE RULE OF LAW (2019), https://iaals.du.edu/sites/default/files/documents/publications/lyons_trump_and_the_attack_on_the_rule_of_law.pdf [<https://perma.cc/UD6D-SYVF>]; CHASE T. ROGERS & STACY GUILLON, GIVING UP ON IMPARTIALITY: THE THREAT OF PUBLIC CAPITULATION TO CONTEMPORARY ATTACKS ON THE RULE OF LAW (2019), https://iaals.du.edu/sites/default/files/documents/publications/rogers-guillon_giving_up_on_impartiality.pdf [<https://perma.cc/FUC4-Y8XG>].

¹⁵⁸ See, e.g., Frank A. Luchak, *Consumer Contracts and Class Actions*, N.J. LAW. MAG., Apr. 2011, at 6, 6; Kristina Moore, Comment, *The Future of Class-Action Waivers in Consumer Contract Arbitration Agreements After DIRECTV, Inc. v. Imburgia*, 67 CASE W. RESV. L. REV. 611, 613 (2016); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/54DA-H97R>]; Carrie Menkel-Meadow, *What Is an Appropriate Measure of Litigation? Quantification, Qualification and Differentiation of Dispute Resolution*, 11 ONATI SOCIO-LEGAL SERIES 320 (2020) (Spain).

¹⁵⁹ See, e.g., KEITH B. ANDERSON, FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES, 2011: THE THIRD FTC SURVEY 4–16 (2013), https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-2011-third-ftc-survey/130419fraudsurvey_0.pdf [<https://perma.cc/54DA-H97R>].

II. DO ALL SALESPEOPLE LIE?

Part I explained the power of toxic oral promises.¹⁶⁰ 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.

Part II shifts the focus from consumers' vulnerabilities and biases to salespeople's perspectives and psychology. First, Section A contextualizes toxic promises and how salespeople come to make them.¹⁶¹ Employing insights derived from behavioral ethics and social psychology, Section B explains why making toxic promises is a prevalent, tempting, easy, and, at times, an acceptable norm among sellers.¹⁶² Lastly, Section C discusses the basics of how sellers' toxic promises come to be.¹⁶³

A. Contextualizing Toxic Promises

Various factors may lead salespeople to mislead consumers about material aspects of the transaction. One reason may be a lack of knowledge. Take Professor Solan's experience when attempting to purchase a printer, for example:

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.¹⁶⁴

Sales representatives may also misstate facts out of insecurity, stretching the truth to please the consumer by telling the consumer what they think the consumer would like to hear.

Primarily though, salespeople may lie to consumers to sell the product and secure the sale. This type of toxic oral promise is the focus of our attention.

cc/M4JE-JR68] (documenting the most common forms of fraud and how they are commonly committed).

¹⁶⁰ See *supra* notes 62–159 and accompanying text (describing how toxic promises influence consumers).

¹⁶¹ See *infra* note 164 and accompanying text.

¹⁶² See *infra* notes 165–191 and accompanying text.

¹⁶³ See *infra* notes 192–211 and accompanying text.

¹⁶⁴ Solan, *supra* note 149, at 112.

B. A Behavioral Ethics Perspective

Salespeople who engage in unethical behavior, such as lying and deception, are not alone. Recent studies demonstrate that ordinary unethicity is pervasive. Even those who value morality often behave unethically when presented with an opportunity to gain from cheating.¹⁶⁵ In fact, in some contexts, dishonesty and cheating have become the norm.¹⁶⁶ Some outstanding examples include stealing office supplies from work,¹⁶⁷ engaging in misleading audits,¹⁶⁸ misreporting tax benefits,¹⁶⁹ or double-parking in a way that blocks other cars.¹⁷⁰

Because of its pervasiveness, ordinary unethicity is very harmful in the aggregate. These accumulative harms, and the fact that otherwise good people are behaving badly, often overshadow the more severe forms of unethicity that could rise to the level of crime.¹⁷¹ Furthermore, widespread unethical behavior has devastating effects on interpersonal relations and trust.¹⁷² It could further lead to more extreme forms of anti-social behavior.¹⁷³

Here, we focus on salespeople who make toxic promises to consumers. Our key argument is that salespeople often find ways to excuse, justify, or ignore the fact that their sales pitches include false representations. “Good people” may behave unethically if they find ways to maintain a positive self-image as moral individuals.¹⁷⁴ One of the central ways to accomplish this is to use moti-

¹⁶⁵ As explained below, we use the term “ordinary unethicity” to refer to situations where normative, law-abiding people behave in mundane yet unethical ways and find ways to justify their (un)ethical choices. See FELDMAN, *supra* note 37, at 127, 190–205. See generally Francesca Gino, *Understanding Ordinary Unethical Behavior: Why People Who Value Morality Act Immorally*, 3 CURRENT OP. BEHAV. SCIS. 107, 107 (2015).

¹⁶⁶ See also DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY* 24–26 (2012).

¹⁶⁷ Celia Moore et al., *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 PERS. PSYCH. 1, 3 (2012); RICHARD C. HOLLINGER & JOHN P. CLARK, *THEFT BY EMPLOYEES* 1, 1 (1983).

¹⁶⁸ See Max H. Bazerman, George Loewenstein & Don A. Moore, *Why Good Accountants Do Bad Audits*, HARV. BUS. REV., Nov. 2002, at 96, 96, <https://hbr.org/2002/11/why-good-accountants-do-bad-audits> [<https://perma.cc/6PM8-WKUF>].

¹⁶⁹ See Scott Rick & George Loewenstein, *Commentaries and Rejoinder to “The Dishonesty of Honest People,”* 45 J. MKTG. RSCH. 645, 645 (2008) (discussing acts of dishonesty, such as cheating on one’s taxes, and suggesting that they occur when people want to avoid a loss).

¹⁷⁰ For a relevant anecdote, see David Gonzalez, *Don’t Box Me In, Double-Parker*, N.Y. TIMES (Sept. 12, 2008), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9D0DE4D8123FF931A2575AC0A96E9C8B63.html> [<https://perma.cc/5T6G-7TNF>].

¹⁷¹ FELDMAN, *supra* note 37, at 190–205; Rick & Loewenstein, *supra* note 169, at 647.

¹⁷² Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RSCH. ORGANIZATIONAL BEHAV. 1, 2–3 (2003).

¹⁷³ See David T. Welsh, Lisa D. Ordóñez, Deirdre G. Snyder & Michael S. Christian, *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. APPLIED PSYCH. 114, 116 (2015).

¹⁷⁴ See, e.g., Anna C. Merritt, Daniel A. Effron & Benoît Monin, *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 4 SOC. & PERSONALITY PSYCH. COMPASS 344, 344–45 (2010) (ex-

vated reasoning and self-deception.¹⁷⁵ When “good people” can construe their actions as a legitimate business practice, more people, who perceive themselves to be moral, are likely to engage in unethical behavior. Indeed, evidence suggests that ordinary people consistently engage in supposedly minor ethical and legal violations while finding ways to excuse their unethical behavior.¹⁷⁶

The literature details several explanations for why ordinary people behave unethically.¹⁷⁷ Some people behave unethically because unconscious psychological mechanisms make it difficult for them to understand the wrongfulness of their own behavior.¹⁷⁸ In other cases, the decision to behave unethically could be a byproduct of tempting situations, and therefore honesty requires more deliberations.¹⁷⁹ In particular, people can consciously justify their unethicality by convincing themselves that their behavior would not really harm anyone, that people expect them to behave this way under the circumstances, or that such behavior is the only way to survive in their business.¹⁸⁰

The power of these conscious and unconscious mechanisms becomes especially harmful in the context of toxic oral promises to consumers. Oral interactions often include intuitive and spontaneous conversations. When salespeo-

plaining that people justify their bad behavior based on their previous good behavior); FELDMAN, *supra* note 37, at 190–205 (discussing how good people can become corrupted by legitimizing their unethical behavior through various social incentives).

¹⁷⁵ See *supra* notes 89–99 and accompanying text (describing motivation techniques for salespeople).

¹⁷⁶ Ovul Sezer, Francesca Gino & Max H. Bazerman, *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OP. PSYCHOLOGY 77, 77–78 (2015); Kim B. Serota & Timothy R. Levine, *A Few Prolific Liars: Variation in the Prevalence of Lying*, 34 J. LANGUAGE & SOC. PSYCH. 138, 141–42 (2015).

¹⁷⁷ See Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 94 (2012) (finding that in making unethical decisions people weigh their moral decisions from the past); see also Lisa L. Shu, Francesca Gino & Max H. Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY & SOC. PSYCH. BULL. 330, 330 (2011) (finding that “people justified their dishonest deeds through moral disengagement and exhibited motivated forgetting of information that might otherwise limit their dishonesty”).

¹⁷⁸ See FELDMAN, *supra* note 37, at 128 (introducing research that shows individuals often commit indeliberate misconduct).

¹⁷⁹ See Yoella Bereby-Meyer & Shaul Shalvi, *Deliberate Honesty*, 6 CURRENT OP. PSYCHOLOGY 195, 195–98 (2015) (arguing that “when lying serves self-interest, that is, when lying is tempting and lies are easy to craft, honesty may require deliberation”); Nils C. Köbis et al., *Intuitive Honesty Versus Dishonesty: Meta-Analytic Evidence*, 14 PERSPS. PSYCH. SCI. 778, 779, 792–95 (2019) (finding that individuals are more prone to lie when they are tired, under pressure, doing many things at once, or experiencing other pressure).

¹⁸⁰ For a taxonomy of the justifications people use to rationalize unethical behavior, see Albert Bandura, Claudio Barbaranelli, Gian Vittorio Caprara & Concetta Pastorelli, *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71 J. PERSONALITY & SOC. PSYCH. 364, 364–65 (1996); Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, in THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 149, 152 (Mario Mikulincer & Phillip R. Shaver eds., 2012).

ple engage freely with consumers and respond to their questions, they typically use their intuitive, rather than deliberate, reasoning.¹⁸¹ Such intuitive reasoning may enhance dishonesty in situations where cheating is tempting, i.e., when it is easier or more rewarding to lie than to tell the truth.¹⁸² Serving one's interests is an automatic tendency and refraining from doing so requires a high degree of self-control.¹⁸³ Moreover, verbal interaction is likely to increase ambiguity. Ambiguity makes it easier for people to overlook the misleading nature of their words, especially when the spoken words have more than one possible interpretation.¹⁸⁴

In addition, oral interactions often occur in a grey area, where salespeople are unsure whether their statements are morally acceptable or legally binding. This grey area of legal and moral uncertainty provides salespeople with greater moral flexibility to speak freely yet inaccurately. It allows salespeople to convince themselves that their oral statements are merely precontractual, informal, sales pitches. Salespeople may accordingly persuade themselves that their toxic promises are no more than puffery or legitimate marketing techniques.¹⁸⁵

Sellers can mislead consumers either by making a false statement or by knowingly failing to correct consumers' stated (or implicit) misperceptions. Nevertheless, salespeople could perceive deception through omission, or failure to disclose the whole truth, as more morally permissible than actively lying.¹⁸⁶ Salespeople may believe that failing to disclose something is not as

¹⁸¹ Cf. Shaul Shalvi, Ori Eldar & Yoella Bereby-Meyer, *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCH. SCI. 1264, 1268 (2012) (finding a notable distinction between "intuitive and deliberative modes of thought" when evaluating a person's proclivity to lie).

¹⁸² See, e.g., *id.* at 1266–68; Ine Van der Cruyssen, Jonathan D'hondt, Ewout Meijer & Bruno Verschuere, *Does Honesty Require Time? Two Preregistered Direct Replications of Experiment 2 of Shalvi, Eldar, and Bereby-Meyer (2012)*, 31 PSYCH. SCI. 460, 461 (2020).

¹⁸³ See, e.g., Don A. Moore & George Lowenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RSCH. 189, 191–93 (2004) ("[W]hen mental capacity is constrained because people are under cognitive load, it is harder for them to engage in reflection and correction of automatic judgments." (citation omitted)); Shalvi et al., *supra* note 181, at 1265 (discovering that "when cognitive resources are depleted" exercising self-control becomes more difficult and the probability of lying or cheating increases).

¹⁸⁴ See Jennifer M. Rodd, Sylvia Vitello, Anna M. Woollams & Patti Adank, *Localising Semantic and Syntactic Processing in Spoken and Written Language Comprehension: An Activation Likelihood Estimation Meta-Analysis*, 141 BRAIN & LANGUAGE 89, 92 (2015) (defining ambiguities, for purpose of the study, "as stimuli for which multiple different semantic/syntactic representations were (temporarily) consistent with all or part of the linguistic input, but where it was possible for the listener/reader to resolve [the] ambiguity and produce a coherent, meaningful representation").

¹⁸⁵ See Hoffman, *supra* note 21, at 1402–03 (articulating how puffery operates in the context of false-advertising law).

¹⁸⁶ This distinction could be attributed to omission bias—defined as "the preference for harm caused by omissions over equal or lesser harm caused by acts." Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION

morally wrong as lying, even if the effect of that omission on consumers' choices and outcomes is the same.¹⁸⁷

Furthermore, research suggests that in competitive environments, people are more likely to behave unethically.¹⁸⁸ A salesperson's desire to "close the deal" might overcome ethical constraints he or she might have. Salespeople may also believe that their peers utilize any possible trick to boost their sales, especially when facing competitive pressures to do so.¹⁸⁹ Indeed, people generally believe that they are more honest and moral than others.¹⁹⁰ Such a belief may lead all salespeople to engage in a "race to the bottom," excusing their dishonest behavior as part of the game.¹⁹¹

C. The Nuts and Bolts of Toxic Promises

The mundane nature of business-to-consumer transactions enables sellers to see toxic promises as "ordinary" rather than unethical behavior. Because misleading oral promises may be perceived as less severe than lying to consumers in writing, salespeople may find it easier to justify such promises. Defrauding consumers can thus quickly become a norm, even an epidemic. The perception of toxic oral promises as minor infractions, if even that, can change the accepted norms of commercial transactions.¹⁹²

PROCESSES 74, 74, 77 (2004); Mark Spranca, Elisa Minsk & Jonathan Baron, *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCH. 76, 76–77 (1991).

¹⁸⁷ Spranca et al., *supra* note 186, at 86.

¹⁸⁸ See Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 PROC. NAT'L ACAD. SCI. 1754, 1754–59 (2016) (showing that competition enhances dishonesty); Robert Cooter, Michal Feldman & Yuval Feldman, *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium*, 4 REV. L. & ECON. 889, 892 (2008) (showing that exaggeration in the unethicality of others might exacerbate bad behavior).

¹⁸⁹ See, e.g., Schurr & Ritov, *supra* note 188, at 1754–59 (finding that competition enhances dishonesty); Thomas Tyson, *Does Believing That Everyone Else Is Less Ethical Have an Impact on Work Behavior?*, 11 J. BUS. ETHICS 707, 709–10 (1992) (discussing the idea that individuals perceive themselves as acting more ethical than their professional peers, and that this thinking validates their immoral actions); Cooter et al., *supra* note 188, at 899–900 (analyzing the social costs versus incentives to break various social norms depending on how commonly people violate them).

¹⁹⁰ See, e.g., Constantine Sedikides & Aiden P. Gregg, *Self-Enhancement: Food for Thought*, 3 PERSPS. PSYCH. SCI. 102, 109 (2008); Cindi May, *Most People Consider Themselves to Be Morally Superior*, SCI. AM. (Jan. 31, 2017), <https://www.scientificamerican.com/article/most-people-consider-themselves-to-be-morally-superior/> [<https://perma.cc/9T54-DS7A>]. This self-perception of moral superiority could be seen as one illustration of the "better-than-average" effect—people's tendency to rank themselves as better than others on desirable traits in ways that are statistically impossible. See, e.g., Mark D. Alicke & Olesya Govorun, *The Better-Than-Average Effect*, in THE SELF IN SOCIAL JUDGMENT 85, 88–91 (Mark D. Alicke, David A. Dunning & Joachim I. Krueger eds., 2005).

¹⁹¹ Cf. Daniel Schwarcz, *Differential Compensation and the "Race to the Bottom" in Consumer Insurance Markets*, 15 CONN. INS. L.J. 723, 744–46 (2009).

¹⁹² Welsh et al., *supra* note 173, at 449.

The literature on compliance and enforcement illustrates that various situational forces may shape people's decisions to behave unethically.¹⁹³ For example, people are more likely to act dishonestly when they do not expect to be the only ones benefiting from their wrongdoing.¹⁹⁴ Thus, when salespeople recognize that they will not reap the full benefit of their wrongdoing because the firm will retain most of the surplus, they may be more inclined to behave dishonestly.

Another situational factor that influences a salesperson's actions concerns the division of labor between salespeople and other employees. Generally, salespeople are responsible for the oral interactions with consumers, whereas lawyers draft the firm's contracts, customer service representatives address consumer complaints, and internal dispute officers resolve disputes between businesses and consumers. Furthermore, because it is common for employees to work in teams, they are more likely to behave unethically as each employee feels less responsibility for the harm the team's unethical conduct caused.¹⁹⁵ Oral interactions also affect ethicality in these situations because, unlike written contracts, these interactions lack an effective accountability mechanism. Lack of accountability, in turn, increases the prospect of unethical behavior.¹⁹⁶

Given these factors, it is easy to see why toxic promises are frequent and potent in interactions between salespeople and consumers. Precontractual oral exchanges are mundane, and many people cut corners when communicating orally.¹⁹⁷ Sellers may mislead or deceive consumers, justifying their actions as a way to make a living. They may even view toxic promises as part of their job

¹⁹³ ARIELY, *supra* note 166, at 24–27; Yuval Feldman & Yotam Kaplan, *Big Data and Bounded Ethicality*, 29 CORNELL J.L. & PUB. POL'Y 39, 48 (2019). In some situations, an overwhelming percentage of individuals will behave unethically. Behavioral experiments have even identified situations in which most people lie consistently. *See, e.g.*, Philipp Gerlach, *The Games Economists Play: Why Economics Students Behave More Selfishly Than Other Students*, PLOS ONE, Sept. 5, 2017, at 1; Yuval Feldman, Adi Libson & Gideon Parchomovsky, *Corporate Law for Good People*, 115 NW. U. L. REV. 1125, 1130 (2021).

¹⁹⁴ *See, e.g.*, Scott S. Wiltermuth, *Cheating More When the Spoils Are Split*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 157, 157–58 (2011) (finding that when others benefit from cheating, people are more likely to cheat); Francesca Gino, Shahar Ayal & Dan Ariely, *Self-Serving Altruism? The Lure of Unethical Actions That Benefit Others*, 93 J. ECON. BEHAV. & ORG. 285, 285–86 (2013) (same).

¹⁹⁵ *See* Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 PROC. NAT'L ACAD. SCI. 10651, 10651 (2015) (noting evidence suggesting “that collaboration might have a liberating effect, freeing people to behave unethically”).

¹⁹⁶ Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 INT'L J. ORG. THEORY & BEHAV. 405, 407–09 (2003).

¹⁹⁷ Archishman Chakraborty & Rick Harbaugh, *Persuasive Puffery*, 33 MKTG. SCI. 382, 384 (2014); Pedro M. Gardete, *Cheap-Talk Advertising and Misrepresentation in Vertically Differentiated Markets*, 32 MKTG. SCI. 609, 622, 624 (2013).

or believe that their employers expect (or even require) them to behave this way.¹⁹⁸

To excuse or justify their behavior, salespeople may also shift the blame onto consumers, rationalizing that consumers have ample sources of accurate information.¹⁹⁹ Some may endorse the old maxim of “buyer beware.”²⁰⁰ Salespeople may also convince themselves that consumers *want* to be manipulated or that consumers derive hope from relying on the salesperson’s promises.²⁰¹ For instance, a salesperson may convince herself that consumers want to believe that consuming organic food will improve their health or that an expensive eye-cream will make them look younger—even if this is not the case.²⁰²

In fact, sales talk may fall under the legal doctrine of puffery.²⁰³ The law shields the kind of nonfactual speech that the reasonable consumer perceives as unrealistic, humoristic, or exaggerated.²⁰⁴ Although courts may consider salespeople’s toxic promises as mere puffery, many consumers perceive them as accurate and take them into account when making their purchasing decisions.²⁰⁵ Put differently, the puffery doctrine may further blur the line between nonbinding sales talk and legally enforceable contractual promises.²⁰⁶

Finally, salespeople might underplay the influence that their nonverbal communication has on consumers during in-person sales’ discussions. This makes it easier for salespeople to engage in self-deception and persuade themselves that their behavior is not morally dubious. For example, it might be easier for sellers to trivialize the implications of nodding authoritatively when making inaccurate statements. At the same time, nonverbal cues from salespeople (e.g., authoritative nods or facial gestures) or nonverbal marketing techniques (e.g., pleasant scents of chocolate in a bookstore or attractive sales-

¹⁹⁸ Cf. Solan, *supra* note 149, at 93–94; Stark & Choplin, *supra* note 20, at 706.

¹⁹⁹ Typically, consumers can use online platforms or reviews, the firm’s contracts and policies, or the reputation of the firm to assess their reliability.

²⁰⁰ For a review of the caveat emptor (“buyer beware”) doctrine see, for example, Steven C. Tyszka, *Remnants of the Doctrine of Caveat Emptor May Remain Despite Enactment of Michigan’s Seller Disclosure Act*, 41 WAYNE L. REV. 1497, 1499–1502 (1995).

²⁰¹ See SETH GODIN, ALL MARKETERS ARE LIARS: THE POWER OF TELLING AUTHENTIC STORIES IN A LOW-TRUST WORLD 24–32 (2005); Theodore Levitt, *The Morality (?) of Advertising*, HARV. BUS. REV., July-Aug. 1980, at 84, 85.

²⁰² Levitt, *supra* note 201, at 85.

²⁰³ See, e.g., Hoffman, *supra* note 21, at 1400 (discussing puffery as a defense to claims of misrepresentation and fraud).

²⁰⁴ See Hoffman, *supra* note 21, at 1403; Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 118 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000) (per curiam); All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 868 (7th Cir. 1999).

²⁰⁵ Hoffman, *supra* note 21, at 1427–28.

²⁰⁶ See *id.* at 1400 (noting how puffery can create uncertainty regarding sellers’ statements to consumers).

people in clothes outlets) might appease or distract consumers and make them less likely to inspect the product or service vigilantly.²⁰⁷

Disturbingly, when the customer's profile is different from the salesperson's, salespeople may be more willing to justify using toxic promises as they may be better able to distance themselves from the particular consumer.²⁰⁸ Salespeople are likely to favor social groups with which they associate due to "in-group bias" and "homophily,"²⁰⁹ which people form quickly.²¹⁰ Homophily may also help salespeople justify toxic promises that they make to consumers from whom they feel socially distant.

For the reasons discussed above, toxic oral promises can quickly become the norm in business-to-consumer interactions.²¹¹ While consumers may accept this reality, it nevertheless results in significant harms to consumers and society as a whole. The following Part identifies these multiple harms.

III. THE VARIOUS HARMS OF TOXIC PROMISES

Salespeople are skillful and experienced communicators. As discussed above, they are motivated to make toxic promises and often find ways to excuse and justify them.²¹² Simultaneously, consumers want to trust sellers. As Part I revealed, cognitive biases enhances consumers' trust in sellers' statements. Consumer contracting realities further intensify consumers' vulnerabilities toward toxic promises.²¹³

Toxic promises are thus bound to proliferate and affect consumer choice. This Part identifies the multiple harms and various social costs of toxic promises. It explores how such promises can harm consumers, undermine important social values, disadvantage honest competitors, and harm the salespeople themselves.

²⁰⁷ Aditya, *supra* note 112, at 748; Becher & Feldman, *supra* note 67, at 459–60.

²⁰⁸ Cf. Sergio Currarini & Friederike Mengel, *Identity, Homophily and In-Group Bias*, 90 EUR. ECON. REV. 40, 42 (2016).

²⁰⁹ *See id.* (defining homophily as "the tendency of people to interact with similar others," and in-group bias as "the tendency to treat others more favorably if they are perceived to belong to the same group). Homophily and in group bias are intimately linked concepts, with one's effects directly influencing the other in many instances, such as the formation of "homogenous contracts" and "discriminat[ory] . . . economic transactions." *Id.* at 41.

²¹⁰ *See, e.g.,* Dale T. Miller, Julie S. Downs & Deborah A. Prentice, *Minimal Conditions for the Creation of a Unit Relationship: The Social Bond Between Birthdaymates*, 28 EUR. J. SOC. PSYCH. 475, 479 (1998) (finding that sharing a fictitious birthday was sufficient to create an in-group bias among participants).

²¹¹ *See supra* notes 160–211 and accompanying text (documenting how toxic promises become prevalent).

²¹² *See supra* notes 160–211 and accompanying text.

²¹³ *See supra* notes 62–159 and accompanying text.

Harm to consumers. First and foremost, toxic promises might lead consumers to make erroneous decisions. In this context, the assumption that market transactions advance both parties' well-being might not hold.²¹⁴ Toxic promises confuse consumers and do not provide them with the relevant information necessary to make an informed decision.

Misleading and deceptive promises also harm consumers' autonomy and dignity. Borrowing from Kant, when salespeople lie to consumers to sell to them, they often treat consumers merely as a means (to conclude a sale) rather than as an end in themselves.²¹⁵ Along these lines, people generally agree that lying is disrespectful and morally wrong, and that it contravenes accepted social norms.²¹⁶ Thus, the public largely expects written agreements to be congruous with the salesperson's prior oral statements.²¹⁷ Surveys also show that people expect firms to "stand behind the verbal representations of their salespeople, even if these representations contradicted the written contract."²¹⁸

Moreover, consumers are diverse and some consumers are more naïve and trusting than others.²¹⁹ Thus, consumers differ in their inclination to rely on salespeople's toxic promises.²²⁰ Alarming, disadvantaged consumers are more likely to be defrauded than those who are wealthy and well-educated.²²¹ Wealthier, better-educated consumers are typically more knowledgeable about their legal rights and remedies, and therefore, are less vulnerable to toxic

²¹⁴ See, e.g., Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L.J. 437, 446 (1991); Bebchuk & Posner, *supra* note 123, at 827 ("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 . . ."); 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) (stipulating that under the duty to read "more bargains will approach the economists' ideal where both leave the bargaining table in a better position than when the negotiations began").

²¹⁵ On the Kantian probation on treating people as means, see *Treating Persons as Means*, STAN. ENCYCLOPEDIA PHIL. (2019), <https://plato.stanford.edu/entries/persons-means/> [<https://perma.cc/343J-H4M5>].

²¹⁶ See, e.g., Joseph Kupfer, *The Moral Presumption Against Lying*, 36 REV. METAPHYSICS 103, 103–14, 114 (1982) (stating that the "disrespect . . . is not merely for the deceived but for mankind in general since the lie trades upon a communal practice and human interdependence").

²¹⁷ Stark & Choplin, *supra* note 20, at 619, 697 (reporting that ninety percent of consumers surveyed had an expectation "that a salesperson's verbal representation would be consistent with the terms in the sales agreement").

²¹⁸ *Id.* at 628.

²¹⁹ See *supra* note 65 and accompanying text (discussing how people can develop different levels of trust toward others).

²²⁰ See Bearden et al., *supra* note 65, at 477 (reviewing the factors that can influence individuals varying levels of trust for salespeople's oral statements).

²²¹ See generally Peter Alexander Lichtenberg et al., *Psychological and Functional Vulnerability Predicts Fraud Cases in Older Adults: Results of a Longitudinal Study*, 39 CLINICAL GERONTOLOGIST 48, 51–55 (2016) (documenting the large number of frauds targeted toward elderly people).

promises and deception.²²² Conversely, those from lower socio-economic groups are typically less informed and may be more inclined to rely on the salespeople's assertions.²²³

The distributional effects of toxic promises become even more disturbing given the firms' profit incentives to discriminate among consumers. Ex ante, firms can use big data and personal information to micro-target consumers.²²⁴ For example, they can identify naïve or vulnerable consumers who are more likely to trust extravagant promises. At the same time, firms will be more careful when dealing with sophisticated or wealthy consumers who normally feel more entitled and are more knowledgeable about their rights.²²⁵

Ex post, assertive consumers might insist on enforcing salespeople's toxic promises.²²⁶ Customers from higher socio-economic backgrounds are more likely to confront a deceptive firm. These consumers will more often complain about the firm's unfair practices, threaten the firm's reputation, or initiate legal action. Firms, realizing the threat, are likely to yield to assertive consumers and honor their verbal promises.²²⁷ In contrast, poorer consumers are considerably less likely to assert their rights and confront the misleading agent or business. As noted above, poor consumers 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, toxic oral promises also undermine fundamental societal values. Frequent misleading oral interactions legitimize and trivialize dishonesty.²²⁸ As a result, they erode consumer trust in the marketplace and reduce levels of trust more generally. Trust erosion, in turn, harms society at large.²²⁹

²²² Stark & Choplin, *supra* note 20, at 670 (citing Kessely Hong & Iris Bohnet, *Status and Distrust: The Relevance of Inequality and Betrayal Aversion*, 28 J. ECON. PSYCH. 197 (2007)).

²²³ *Id.*

²²⁴ There is ample literature on a firm's ability to cleverly target consumers based on their demographics, emotional state, and use patterns. See, e.g., Bin Yu & Munindar P. Singh, *A Social Mechanism of Reputation Management in Electronic Communities*, in COOPERATIVE INFORMATION AGENTS IV: THE FUTURE OF INFORMATION AGENTS IN CYBERSPACE 154, 154 (Matthias Klusch & Larry Kerschberg eds., 2000); Sam Machkovech, *Report: Facebook Helped Advertisers Target Teens Who Feel "Worthless,"* ARSTECHNICA, <https://arstechnica.com/information-technology/2017/05/facebook-helped-advertisers-target-teens-who-feel-worthless/> [https://perma.cc/5EJT-UJDC] (May 1, 2017); Mark Bartholomew, *The Law of Advertising Outrage*, 19 ADVERT. & SOC'Y Q., no. 3, 2018, article no. 23; Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 972–74.

²²⁵ Cf. Schmitz, *supra* note 52; Becher & Zarsky, *supra* note 52; Arbel & Shapira, *supra* note 52; Furth-Matzkin, *supra* note 52, at 38–40 (discussing the intersection between customer assertiveness and factors like race, gender, and socioeconomic status).

²²⁶ Cf. Schmitz, *supra* note 52.

²²⁷ See *supra* note 52 and accompanying text (noting that consumers who speak up against manipulative or deceptive sellers are more likely to receive favorable outcomes).

²²⁸ See, e.g., RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 31 (2002).

²²⁹ *Id.*

Recall that trust facilitates relationships, enhances people's wellbeing, and promotes market efficiency.²³⁰ Trust is a fundamental necessity for facilitating economic activity as it reduces the need to take precautions and be vigilant. Trusting people are also happier, more tolerant, and more optimistic.²³¹ Misleading oral interactions that reduce trust can thereby result in negative outcomes that extend beyond the contracting parties.

Disadvantaging honest competitors. Businesses whose agents make toxic promises can harm scrupulous sellers who refrain from such practices. If scrupulous sellers need to compete with sellers who engage in misleading sales tactics, these honest sellers might be pushed out of the market or driven to adopt deceptive techniques to survive competition.²³²

In competitive markets, sellers compete over the salient attributes of a product, offsetting the price of this competition by reducing the quality of other attributes.²³³ Therefore, if consumers cannot effectively detect lies, market pressures might force trustworthy sellers in competitive markets to make toxic promises to remain competitive. Sellers who do not participate in this race to the ethical bottom might compromise their earnings and eventually the market may push them out.²³⁴

Harming salespeople. Finally, ethical, law-abiding salespeople who are driven to making toxic promises to consumers might be harmed in the process. Research suggests a "slippery slope" process whereby engaging in more minor acts of deception might pave the way to more frequent and severe types of misbehavior.²³⁵ Similarly, salespeople who make "small lies" to consumers may become accustomed to lying and behaving unethically.

Research on social norms suggests that when a particular unethical behavior appears to be more pervasive, people view it as more legitimate.²³⁶ This

²³⁰ See, e.g., 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 (ie less time is spent investigating one's broker), high trust societies produce more output than low trust societies.").

²³¹ MAREK KOHN, TRUST: SELF-INTEREST AND THE COMMON GOOD 123 (2008).

²³² See, e.g., BAR-GILL, *supra* note 40, at 1–3.

²³³ See 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) (same); BAR-GILL, *supra* note 40, at 1–3 (same).

²³⁴ Cf. Korobkin, *supra* note 40, at 1243 (acknowledging adverse effects sellers may experience by "breaking with the competition" through more honest, benevolent sales practices).

²³⁵ See Welsh et al., *supra* note 173.

²³⁶ Francesca Gino, Shahar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCH. SCI. 393, 394 (2009) (discussing how one unethical decision can promote an atmosphere for unethical decision-making).

phenomenon is consistent with the bandwagon effect, suggesting that the increasing popularity of a norm or trend makes it more likely that others will adopt it.²³⁷ If salespeople make toxic promises to customers, more and more of their peers might be driven to adopt similar deceptive practices.²³⁸

Currently, oral precontractual promises are not generally considered an integral part of the contract. This separation reduces the likelihood of salespeople receiving any normative feedback about what is (un)acceptable in their oral interactions with customers.²³⁹ Lack of feedback, in turn, deprives sellers of the opportunity to update or improve their operating principles and may give salespeople even more power over consumers. Power can corrupt and lead to other unethical behaviors.²⁴⁰

Finally, although the law does not adequately deter salespeople from making toxic promises to consumers, salespeople may still be legally liable for fraud.²⁴¹ This ubiquitous practice thus exposes salespeople to legal sanctions—potentially without them being aware of the risks.

IV. LAW AND POLICY RECOMMENDATIONS

Of course, the law does not explicitly permit sellers to make toxic promises to consumers.²⁴² Undoubtedly, sellers cannot expect to promise anything imaginable during the negotiations while also avoiding liability by incorporating one-sided contract terms. Should sellers attempt to do so, buyers could succeed in invalidating the contract without having to raise certain rights granted by the contract.²⁴³

²³⁷ 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, 488–89 (1993) (noting that bandwagon pressures can increase the number of adopters).

²³⁸ See *id.* at 491.

²³⁹ See Madan M. Pillutla & Xiao-Ping Chen, *Social Norms and Cooperation in Social Dilemmas: The Effects of Context and Feedback*, 78 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 81, 86–87 (1999).

²⁴⁰ See Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCH. 621, 621 (1993) (theorizing that power encourages stereotyping, and vice versa); Dacher Keltner, Deborah H. Gruenfeld & Cameron Anderson, *Power, Approach, and Inhibition*, 110 PSYCH. REV. 265, 265–67 (2003) (examining how power influences behavior).

²⁴¹ See, e.g., Alaska Unfair Trade Practices and Consumer Protection Act, ALASKA STAT. §§ 45.50.471–561 (2021) (regulating seller conduct to protect consumers from fraud). See generally NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf> [<https://perma.cc/W398-RUBC>] (documenting the states' consumer protection laws).

²⁴² For an analysis from a law and marketing perspective, see Karl A. Boedecker, Fred W. Morgan & Jeffrey J. Stoltman, *Legal Dimensions of Salespersons' Statements: A Review and Managerial Suggestions*, 55 J. MARKETING 70, 70 (1991).

²⁴³ BAIRD, *supra* note 19, at 123.

To be sure, the law regulates speech and does not tolerate deceptive lies and deceptive promises.²⁴⁴ Current consumer protections against toxic promises, however, are partial and insufficient. Most conspicuously, the law does not effectively attend to the risk that salespeople will “stretch the truth” and use “mundane” or “little” lies to entice consumers.

Section A of this Part reviews the current law and policy landscape of toxic promises. The remainder of this Part offers policy recommendations to improve the legal scrutiny of toxic promises. Section B focuses on ex ante measures, tailored for the precontractual stage. These proposals seek to prevent sellers from making toxic promises in the first place. Section C details ex post recommendations designed to respond better to toxic promises that transpire.

A. The Current Landscape of Toxic Promises

Perhaps the most relevant legal regulations of toxic oral promises relate to the parol evidence rule²⁴⁵ and fraudulent misrepresentations.²⁴⁶ Judicial implementation of the parol evidence rule, however, has so far been inconsistent and unpredictable.²⁴⁷ Furthermore, case law surrounding the parol evidence rule varies significantly across jurisdictions.²⁴⁸

Under the parol evidence rule, a finding that a writing is integrated limits the introduction of extrinsic evidence, such as oral statements made prior to the written contract, to vary or contradict the terms of the contract.²⁴⁹ Thus, extrinsic evidence, such as oral interactions, may be barred if the court finds that a written contract is entirely integrated and unambiguous.²⁵⁰

²⁴⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. L. INST. 1981) (codifying misrepresentation).

²⁴⁵ U.C.C. § 2-202 (AM. L. INST. & UNIF. L. COMM’N 2017) (codifying the parol evidence rule).

²⁴⁶ RESTATEMENT (SECOND) OF CONTRACTS § 164.

²⁴⁷ See, e.g., Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES LAW 457, 463 (2019) (introducing how different jurisdictions have applied the parol evidence rule); Solan, *supra* note 149, at 93 (noting that much of the scholarship on the parol rule has found it to be riddled with confusion and obscurity in its application); Posner, *supra* note 45, at 534 (finding that the “[parol evidence] rule is susceptible to hard and soft interpretations in several ways, each of which turns on the use of extrinsic evidence to determine whether any of the exceptions apply”).

²⁴⁸ Posner, *supra* note 45, at 540.

²⁴⁹ See Solan, *supra* note 149, 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.’” (alteration in original) (quoting Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 36 (1985))).

²⁵⁰ See, e.g., Cumming, *supra* note 49, at 1196 (“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.”). Parol evidence may, however, be introduced to interpret an ambigu-

Fraud, which at times takes the form of misrepresentation, is an exception to this rule.²⁵¹ Section 164 of the Restatement (Second) of Contracts notes that 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.”²⁵² As Professor Eric 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.²⁵³

Courts seem to differentiate among different types of transactions and parties when applying the parol evidence rule.²⁵⁴ Generally speaking, courts are more likely to apply strictly the rule when both parties to the contract are sophisticated.²⁵⁵ Nonetheless, courts have applied “softer” versions of the rule when at least one of the parties lacked sophistication.²⁵⁶ Because most consumers are

ous contract term. *See, e.g.*, *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643–49 (Cal. 1968) (allowing in extrinsic evidence to help interpret an ambiguous contract term).

²⁵¹ *See* *Cumming*, *supra* note 49, 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.”); *Macklin*, *supra* note 148, at 810 (“The bright-line PER does, however, contain exceptions, including the fraud exception,” which “typically arises in cases in which one party makes misrepresentations to another to induce that party to sign an agreement.” (footnote omitted)); Scott J. Burnham, *The Parol Evidence Rule: Don’t Be Afraid of the Dark*, 55 MONT. L. REV. 93, 133–41 (1994) (discussing how courts have interpreted the fraud exception to the parol rule).

²⁵² RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (AM. L. INST. 1981).

²⁵³ Posner, *supra* note 45, at 533–34.

²⁵⁴ *Klass*, *supra* note 247, at 472.

²⁵⁵ *Id.*

²⁵⁶ *See* *Stark & Choplin*, *supra* note 20, at 624, 636 (noting circumstances where courts concluded that one of the parties was unsophisticated and therefore relaxed the “reasonable reliance” requirement (quoting *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 421 (Ala. 1977))).

considered unsophisticated parties, courts tend to apply soft rules to consumer form contracts.²⁵⁷

When both contracting parties are sophisticated, insisting upon integration clauses 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.²⁵⁸ Where consumer contracts are involved, however, many have argued in favor of relaxing the rule.²⁵⁹ Consumers do not bargain over the contractual terms, do not often read (let alone understand) them, and are rarely represented by lawyers.²⁶⁰ Instead, consumers generally believe what salespeople tell them and rely on the salesperson's word.²⁶¹

Nevertheless, allowing consumers to present extrinsic evidence in the case of toxic oral promises would not remedy the problem. In fact, it would be counterproductive to place the onus of initiating litigation on consumers. This crucial point should be kept in mind when crafting effective legal responses to toxic oral promises, some of which we will discuss in the following Sections.

Relaxing the parol evidence rule is not the only protective measure that the law can offer to consumers who are lured into transactions by toxic promises. When the transaction involves a sale of goods and the seller's toxic promises pertain to warranties, the buyer may sue for damages for breach of warranty.²⁶² 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.²⁶³ According to this section, contractual terms that bar oral modifications should be "in writing and conspicuous."²⁶⁴ In addition, the Magnusson-Moss Warranty Act requires that sellers who provide a warran-

²⁵⁷ Klass, *supra* note 247, at 472; Posner, *supra* note 45, at 556; Stark & Choplin, *supra* note 20, at 624.

²⁵⁸ See, e.g., Solan, *supra* note 149, at 89 (noting that "agreements among business entities" tend to foster "real negotiation and actual familiarity with the contract's terms").

²⁵⁹ See, e.g., Posner, *supra* note 45, at 554 (explaining that "ordinary consumer contracts are good candidates for soft-PER" so as to allow consumers, but not businesses, to introduce extrinsic evidence).

²⁶⁰ See, e.g., Klass, *supra* note 247, at 479 (noting that consumer contracts are drafted by the seller, offered to consumers on a "take-it-or-leave-it basis," and that consumers regularly consent to terms they do not understand).

²⁶¹ See Stark & Choplin, *supra* note 20, at 625 (noting that "consumers principally rely on what they are told by salespeople").

²⁶² U.C.C. § 2-714 (AM. L. INST. & UNIF. L. COMM'N 2017).

²⁶³ *Id.* § 2-316.

²⁶⁴ *Id.* § 2-316(2) & cmt. 4 ("[T]o 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 . . .").

ty to consumers disclose—fully, conspicuously, and in plain language—the terms and conditions of the warranty according to the FTC rules.²⁶⁵

The rationale behind requiring conspicuous writing is straightforward. With this requirement, the law seeks to enhance the likelihood that important information is clearly disclosed and effectively communicated.²⁶⁶ It attempts to empower consumers to make informed decisions and to protect consumers from unexpected warranty disclaimers.²⁶⁷

Nonetheless, such disclosure requirements may not produce the intended effects. Recall that the mere use of fine print makes consumers more likely to comply with the written terms of a contract.²⁶⁸ Consumers who face lengthy, standardized terms are prone to blaming themselves for not thoroughly reading the terms and analyzing their exact meaning.²⁶⁹ As detailed above, this holds true even when the consumer was defrauded before entering into the contract.²⁷⁰

One might theoretically argue that consumers can avoid the influence of toxic promises by carefully reading the fine print *ex ante*. According to this line of reasoning, by insisting on the duty to read contracts, the law can incentivize consumers to become aware of the terms that govern their transactions.²⁷¹ Consumers who choose not to read their contracts, the argument goes, should bear the risk of their decision.²⁷²

We find this reasoning unpersuasive. Imposing a duty to read on consumers will not solve the problem.²⁷³ As shown above, consumers do not read form contract terms, notwithstanding their duty to do so. Consumers cannot understand form contracts and rationally evaluate their contents. Moreover, sellers

²⁶⁵ Magnusson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312. The FTC has enacted rules concerning the disclosure of product warranties. *See* 16 C.F.R. § 700 (2021) (discussing the various disclosures a firm must make regarding product warranties).

²⁶⁶ *See* U.C.C. § 2-316 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 2017) (stating that terms should be conspicuous so that a party to the contract can readily and easily understand the term).

²⁶⁷ *Id.*

²⁶⁸ Wilkinson-Ryan, *supra* note 34, at 136; Furth-Matzkin & Sommers, *supra* note 7, at 509.

²⁶⁹ Furth-Matzkin & Sommers, *supra* note 7, at 528 (clarifying that victims of consumer fraud often remain silent, in legal and nonlegal forums, because they “feel resigned to the unfair outcome instead of feeling outraged”).

²⁷⁰ *Id.* at 516.

²⁷¹ *Cf.* Macaulay, *supra* note 214, at 1058 (“If one knows he will be legally bound to what he signs, he will take care to protect himself . . .”).

²⁷² *See, e.g.*, Stark & Choplin, *supra* note 20, at 620 (“Companies . . . argue that . . . 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.”).

²⁷³ *See* Ayres & Schwartz, *supra* note 25, at 550–52 (calling into question the premises underlying the “duty to read”); Stark & Choplin, *supra* note 20, at 648 (finding that most consumers do not read contracts before signing them); Benoliel & Becher, *supra* note 33, at 2263 (arguing that the duty to read is not a fair and efficient rule in the context of consumer form contracts).

are likely to distract consumers' attention from the fine print. For example, salespeople can soothe consumers' concerns by using "a friendly voice" and "an assuring smile"²⁷⁴ while explaining away problematic terms.²⁷⁵ A complex, unread standard form contract should not shelter agents who opportunistically make toxic oral promises.²⁷⁶

Mitigating the problems of toxic oral promises by using written means to warn consumers is bound to fail.²⁷⁷ Consumers are generally likely to trust sellers, exhibit unrealistic optimism, and commit to the contract without reading it, regardless of its harsh terms.²⁷⁸ Furthermore, consumers are often one-shotters and might consequently have no alternative option but to rely on salespeople's assertions.²⁷⁹ 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.²⁸⁰

The proposed Draft Restatement of Consumer Contracts follows this logic and generally adopts a narrower parole evidence rule.²⁸¹ According to the proposed Restatement, contract terms that contravene a seller's precontractual represen-

²⁷⁴ 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.")

²⁷⁵ *Choplin et al.*, *supra* note 125, at 61–62 (finding that consumers often acquiesce to problematic terms as a result of sellers' oral assurances and explanations).

²⁷⁶ See also *Klass*, *supra* note 247, 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."); *Cirillo v. Slomin's Inc.*, 768 N.Y.S.2d 759, 766–69 (Sup. Ct. 2003) (stating that a strict parole evidence rule can "invite sales agents, armed with impenetrable contracts, to lie to their customers").

²⁷⁷ See generally *BEN-SHAHAR & SCHNEIDER*, *supra* note 25, at 79–93 (providing similar skepticism about disclosure).

²⁷⁸ See *supra* notes 69–78 and accompanying text (discussing the trust that consumers have for salespeople and their oral statements).

²⁷⁹ Cf. *Davis*, *supra* note 49, at 524 (finding that "it may be inappropriate to enforce disclaimers of liability for precontractual misrepresentations against people who systematically invest an undue amount of trust in their trading partners").

²⁸⁰ *Truth in Lending*, 75 Fed. Reg. 58,509, 58,515 (Sept. 24, 2010) (codified at 12 C.F.R. pt. 226).

²⁸¹ See *RESTATEMENT OF CONSUMER CONTRACTS* § 1 cmt. 10, at 12, § 6 cmt. 8(c), at 104–05 (AM. L. INST., Tentative Draft 2019) (discussing the interplay between the parole evidence rule and deception in consumer contracts).

tations are presumably deceptive and voidable.²⁸² The Draft Restatement acknowledges that consumers do not systematically inspect the fine print.²⁸³ Thus, the drafters urge firms to ensure that the form contract does not deviate from their oral promises to consumers.²⁸⁴

Beyond common law doctrines, state law may also protect consumers from toxic oral promises. For example, legislatures in all fifty states enacted Unfair and Deceptive Acts or Practices laws (“UDAP laws”).²⁸⁵ Even though these laws differ in scope, strength, and application,²⁸⁶ they play a central role in protecting consumers from deceptive business practices.²⁸⁷

Although the above protections for consumers from deceptive practices are important in deterring sellers from engaging in deception, regulators and courts should monitor and sanction more closely sellers who make toxic oral promises. We explain this crucial point below.

* * * *

To recap, the current protections that the law provides against toxic oral promises are partial in scope. These protections fall short in two critical ways. First, they appear to assume that misleading oral interactions are the exception, not the norm. This misconception is likely related to the underreporting of such unethical behaviors to regulatory agencies due to consumers’ belief that their complaints would likely be ignored.²⁸⁸ Regulators are consequently likely to underestimate the frequency of toxic oral promises. Insights from behavioral sciences reveal, however, that salespeople are relatively likely to behave dishonestly when interacting with consumers. The stressful and competitive environments in which salespeople frequently operate encourage them to make toxic oral promises. This pressing reality underscores the need for forceful *preventative* measures.²⁸⁹

²⁸² *Id.* § 6 reporters’ notes, at 105.

²⁸³ *Id.* § 6 cmt. 8(c), at 104.

²⁸⁴ *Id.* § 6 reporters’ notes, at 105.

²⁸⁵ 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 (2017) (“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.”).

²⁸⁶ See, e.g., Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1059–60 (noting that state UDAP laws differ in their scope and application).

²⁸⁷ *Unfair & Deceptive Acts & Practices*, NAT’L CONSUMER L. CTR., <https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html> [<https://perma.cc/RJA4-33WF>] (“In billions of transactions annually, UDAP statutes provide the main protection to consumers against predators and unscrupulous businesses.”).

²⁸⁸ See, e.g., Ziggy MacDonald, *Revisiting the Dark Figure: A Microeconomic Analysis of the Under-Reporting of Property Crime and Its Implications*, 41 BRIT. J. CRIMINOLOGY 127, 127–29 (2001) (discussing, generally, the factors predicting underreporting in other contexts).

²⁸⁹ See *infra* notes 291–332 and accompanying text.

Second, current protections fall short in their expectations of consumers, both *ex ante* and *ex post*. *Ex ante*, the law unrealistically expects consumers to read and understand contracts and refrain from relying on toxic promises. But consumers face overwhelming amounts of contracts in their everyday lives and cannot possibly review or understand most of the terms and conditions governing their transactions. Consumers consequently *need* to rely on salespeople's oral assertions. Here, the law overestimates consumers' ability to uncover deception by scrutinizing their contracts before entering them.²⁹⁰ Furthermore, and contrary to what many may think, consumers' ability to detect lies is significantly limited. As we have seen, 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 toxic promises.

Ex post, the law overestimates the degree to which consumers are likely to effectively challenge toxic promises. Many consumers are unaware of their rights and are not informed about contract and consumer law doctrines. Consumers are also not always good at identifying when they have been wronged. Furthermore, even when consumers realize firms' misbehavior, they still face significant barriers limiting their ability to assert their rights. Consumers may fear legal confrontation, distrust the legal system, seek to maintain their relationships with the firm, or lack resources or motivation to enforce their rights. Moreover, the mere existence of contract terms, including unfair and unenforceable ones, can silence consumers and deter them from acting.

Consumers' limited ability to challenge toxic promises highlights the need to complement private action with stronger public enforcement efforts. These should include both *ex ante* preventative tools and *ex post* liability measures. We discuss these tools next.

B. Mitigation and Preventative Measures

There is a spectrum of *ex ante* measures that can assist in mitigating the problem of toxic oral promises. At the heart of these measures is the understanding that toxic promises are more prevalent and harmful than people commonly assume. Consequently, policymakers should give more consideration to preventative approaches.

As a starting point, we suggest viewing firms as the most effective cost-avoiders. Firms can minimize agents' misrepresentations by monitoring their statements, limiting their interactions with consumers, and penalizing agents

²⁹⁰ See BEN-SHAHAR & SCHNEIDER, *supra* note 25, at 79–93 (noting that consumers do not understand the fine print).

who misrepresent products or services.²⁹¹ Such measures may prove especially effective when firms employ agents whose interests are not fully aligned with those of the firm.

For example, if firms compensate salespeople on a commission basis, salespeople might resort to making questionable oral statements to lure consumers into transactions.²⁹² Accordingly, we call for an institutional shift in salespeople's incentive structures. Namely, we propose that firms compensate their salespeople according to behavior-based criteria, rather than based on selling targets or quotas only.²⁹³ Because firms may not have sufficient incentives to make these changes voluntarily,²⁹⁴ we propose imposing a general duty on firms to train their agents properly and adequately supervise their behavior.²⁹⁵

A prime example of ex ante scrutiny involves recording agents' precontractual exchanges. Many firms are already using automatic recordings of sales conversations for monitoring, training, and quality purposes.²⁹⁶ Firms are also frequently using video surveillance at stores.²⁹⁷ As technology advances and recorded information is easier to save and store, the relative costs of these measures decrease and their prevalence increases.²⁹⁸

Policymakers can take advantage of these developments and require firms to use recordings as a check on agents' behavior. A further step in this direction could entail requiring that firms make recordings available for inspection by external parties, such as individual consumers, consumer watchdogs, or enforcement agencies. An even more forceful measure would be to generally re-

²⁹¹ Davis, *supra* note 49, at 511.

²⁹² Cf. Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 YALE L. & POL'Y REV. 289, 292–94 (2007) (evaluating the efficacy of greater disclosures as a remedy for the negative incentives inherent in contingent commissions).

²⁹³ For examples of similar proposals, see Boedecker et al., *supra* note 242, at 77 (proposing that “sales managers should consider supplementing outcome-based incentives with behavior-based ones”); Schwarcz, *supra* note 292, at 292–94.

²⁹⁴ Boedecker et al., *supra* note 242, at 78 (“[E]vidence suggests that legal topics rarely receive formal attention in sales training programs” (citation omitted)).

²⁹⁵ Cf. Klass, *supra* note 247, 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”).

²⁹⁶ See, e.g., *Acquiring Recorded Conversations with a Business*, HG.ORG <https://www.hg.org/legal-articles/acquiring-recorded-conversations-with-a-business-37956> [<https://perma.cc/KA4E-96PX>] (discussing the purposes, rules, and regulations surrounding the recording of business conversations).

²⁹⁷ See, e.g., *How and Why Retail Stores Are Spying on You*, CONSUMER REPS. (Mar. 2013), <https://www.consumerreports.org/cro/2013/03/how-stores-spy-on-you/index.htm> [<https://perma.cc/76N7-82D7>] (noting that monitoring stores' operations could help improve service).

²⁹⁸ See, e.g., Andy Klein, *Hard Drive Cost Per Gigabyte*, BACKBLAZE (July 11, 2017), <https://www.backblaze.com/blog/hard-drive-cost-per-gigabyte/> [<https://perma.cc/VXP5-RVT4>] (documenting the substantial decrease in cost for hard drives).

quire firms, or at least some of them, to record and make available precontractual interactions with consumers.²⁹⁹

Firms can minimize the risks of toxic oral promises by better training their agents. Such training can include tutorials, updates, workshops, or presentations by lawyers, consumer representatives, and high-ranking management personnel within the firm.³⁰⁰ Becoming familiar with the topic and discussing its legal and social aspects will make it more difficult for salespeople to justify unethical behavior. These measures will also communicate to both employees and consumers that the firm takes oral promises seriously and strives to maintain an ethical corporate culture.³⁰¹ More generally, we propose that firms adopt a broader approach toward corporate social responsibility (CSR),³⁰² acknowledging that the company's social responsibility includes a commitment to eradicate unethical behavior and consumer exploitation.

Firms could also be required to submit a periodic report, either to the public or to a designated agency, detailing their training and monitoring efforts to eliminate misrepresentations. Alternatively, they could be required to detail these efforts in cases of disputes or regulatory checks. The relevant court or regulatory agency can then consider these efforts—or lack thereof—when deciding the dispute, case, or issue before it.

The same logic may apply to automating precontractual exchanges, which is another way to minimize the risks of agents' misrepresentations. Although machine bias is a genuine and legitimate concern, robots will not lie unless programmed to do so. For example, firms can be incentivized to use potentially preapproved platforms that are programmed to provide information to consumers rather than manipulate them.³⁰³ As mentioned with regard to record-

²⁹⁹ 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 the size of the firm, the number of its customers and employees, the nature of the product or service, and previous complaints.

³⁰⁰ Cf. Boedecker et al., *supra* note 242, at 76 tbl.2 (proposing the development of a training program that includes “modules on legal guidance” and “updated information . . . about the most recent judicial and statutory developments related to communications with prospects and customers”).

³⁰¹ Cf. *id.* at 77 (opining that “[p]eriodic [legal] updates reinforce the impression that managers are serious about the legal aspects of selling activity, contributing to a responsible market-driven corporate culture”).

³⁰² See generally Lance Moir, *What Do We Mean by Corporate Social Responsibility?*, 1 CORP. GOVERNANCE 16, 16 (2001) (examining the development of corporate social responsibility); Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 78–79, <https://hbr.org/2006/12/strategy-and-society-the-link-between-competitive-advantage-and-corporate-social-responsibility> [<https://perma.cc/W582-3SV6>] (explaining that under corporate social responsibility practices, the public has become much more skilled at keeping corporations “account[able] for the social consequences of their activities”).

³⁰³ See Daniel Schwarcz & Peter Siegelman, *Insurance Agents in the Twenty-First Century: The Problem of Biased Advice*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 36

ings, the design of these platforms can be a factor that enforcement agencies and courts consider when determining future disputes and regulations. Here, too, the costs of employing such measures and their possible unintended consequences should be carefully evaluated.³⁰⁴

To further impel salespeople to be careful in their representations, the law can impose personal liability on salespeople who make toxic promises. Holding agents liable would encourage them to be more careful when making oral statements. The higher the stakes, the more cautious a salesperson would be. Furthermore, the mere fact that a third-party will review their behavior *ex post* could encourage salespeople to be more thoughtful and cautious *ex ante*.³⁰⁵

The most extreme version of such personal liability would take the form of heightened fiduciary duties.³⁰⁶ In the United States, many types of agents, advisors, or intermediaries bear fiduciary duties.³⁰⁷ These include lawyers, guardians, corporate directors, trustees, and majority shareholders, among others.³⁰⁸ For example, investment advisors have a fiduciary duty toward investors³⁰⁹ and employers that sponsor retirement plans have a fiduciary duty toward employees participating in those plans.³¹⁰ Currently, however, most salespeople bear no fiduciary responsibilities toward consumers.

Imposing fiduciary duties on sellers could discourage them from making toxic promises to consumers. Although intuitively appealing, however, placing legal liability or fiduciary duties on salespeople is not a panacea. First, mandating such duties would impose high administrative and compliance costs. Second, firms might still pressure salespeople to manipulate or mislead consumers, and consumers may not remember precisely with whom they spoke. This

(Daniel Schwarcz & Peter Siegelman eds., 2015) (finding that such incentives may include tax benefits, legal immunity, positive publicity, and the like).

³⁰⁴ In addition to raising the cost to businesses, that may respond by rolling these costs onto consumers, policy-makers need to consider the ways such systems may affect the labor market and the benefits that contracting parties derive from social, humane interactions. These concerns relate to automation more generally and are not unique to our suggestions.

³⁰⁵ 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, 72 (Erwann Michel-Kerjan & Paul Slovic eds., 2010) (finding that when an individual knows that his or her behavior will be reviewed *ex post*, they are likely to engage in more thoughtful behavior *ex ante*).

³⁰⁶ Cf. Robert Flannigan, *Fiduciary Duties of Shareholders and Directors*, 2004 J. BUS. L. 277, 281 (explaining when fiduciary duties occur).

³⁰⁷ See, e.g., Sumit Agarwal, Xavier Gabaix, John C. Driscoll & David Laibson, *The Age of Reason: Financial Decisions Over the Life Cycle and Implications for Regulation*, in *BROOKINGS PAPERS ECON. ACTIVITY* 51, 85 (Fall 2009) (noting the many types of advisors that harbor fiduciary duties).

³⁰⁸ *Id.*

³⁰⁹ See Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (regulating the conduct of investment advisors).

³¹⁰ Agarwal et al., *supra* note 307, at 84.

renders personal liability much more difficult, if not impossible, to impose. Moreover, even if the wrongdoer *is* identified, initiating legal procedures against the firm rather than its agents may be more economically sensible. Firms typically have far more resources than individual agents.

In addition, firms might attempt to circumvent such a measure by providing agents with insurance against claims.³¹¹ In this case, the imposition of liability on agents could actually harm consumers in at least two ways. First, firms would likely pass some of the newly-added insurance costs onto consumers, charging consumers an additional premium. Second, possessing this so-called “insurance to mislead” might create fertile ground for agents to make even more deceptive statements.³¹² Thus, if regulators decide to impose fiduciary duties on sales agents, they should give careful consideration to preventing firms from shielding agents through insurance. Finally, even if firms do not insure agents, it has already been noted that firms often instruct agents to sell aggressively,³¹³ making it unfair and less effective to place full responsibility on the agents rather than on the firm.

An effective measure that should be seriously considered is imposing personal liability on marketing executives. Marketing executives typically bear most of the responsibility for the firm’s marketing strategy and rank relatively high in a firm’s hierarchy. They participate in crafting incentive schemes for salespeople—some of which could encourage an unethical corporate culture.³¹⁴

Marketing executives are more powerful and more knowledgeable than salespeople and better appreciate the problematic nature of toxic 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 having to recall the specific agent with whom they interacted. Making marketing executives’ legal responsibility commensurate with their status and authority within the firm may thus prove beneficial.³¹⁵

³¹¹ By providing agents with insurance and employing other modern analytical tools to extract information about consumer behavior, firms can easily evade the consumer protection rules that regulators pass, finding ways to meet the “letter but not the spirit of the rules.” See Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1327 (2015) (discussing product design regulation and noting that when regulators prohibit a certain product feature that similar features appear in their place).

³¹² This concern could be mitigated if insurance companies refuse to insure firms for intentional misstatements and only cover negligent misrepresentations.

³¹³ See ANDERSON, *supra* note 159, at 4–16 (noting how firms encourage their sellers to exaggerate or mislead consumers in order to increase sales).

³¹⁴ See Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, ADMIN. SCIS., June 22, 2018, at 1, 23–24, 30 (studying what leads to toxic corporate cultures and finding that incentive programs can lead to employees breaking the law).

³¹⁵ See generally Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 680, 692–94 (2009) (describing developments within the compli-

Policymakers may also choose to revise enforcement priorities, allocating more resources to the problem of toxic oral interactions. Accordingly, another measure that consumer organizations and enforcement agencies may consider is mystery shopping.³¹⁶ Like telephone recordings, firms have used mystery shopping mainly to evaluate the service in their stores.³¹⁷ Federal and state agencies, however, can advance a more deliberate and systematic use of mystery shoppers for monitoring purposes.

Section Five of the Federal Trade Commission Act authorizes the FTC to take appropriate action against unfair or deceptive acts or practices.³¹⁸ The FTC has broad investigative powers and enforcement authority.³¹⁹ In fact, the FTC has interpreted its authority to include undercover investigations.³²⁰ Thus, on occasion, FTC investigators pose as consumers to experience directly real-life sales scenarios.³²¹ The FTC has also employed undercover investigators to examine compliance within the media industry.³²² But due to legal and ethical issues, the FTC employs this practice only infrequently.

ance profession, and explaining how corporate monitors, such as managers and executives, can play a role in identifying corporate crime enforcement). Similarly, in corporate law, the director oversight liability doctrine imposes monitoring duties on directors to ensure compliance with applicable regulations. *See, e.g.*, Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1857 (2021) (examining the recent shift in the standard for director oversight duties).

³¹⁶ *See Mystery Shopping Scams*, FED. TRADE COMM'N (Mar. 2021), <https://www.consumer.ftc.gov/articles/0053-mystery-shopper-scams> [<https://perma.cc/KXW5-GD9Y>] (explaining that mystery shoppers make purchases and then report back on the experience they had).

³¹⁷ *See id.* (describing “mystery shopping” as merchants hiring “people to go into their business to try their products or services and report on their experiences”).

³¹⁸ Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

³¹⁹ *See id.* § 43 (stating that the FTC may “prosecute any inquiry necessary to its duties in any part of the United States”). The FTC is authorized under the act “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce” *Id.* § 46(a).

³²⁰ FED. TRADE COMM'N, *PRIVACY IMPACT ASSESSMENT: BUREAU OF CONSUMER PROTECTION (BCP) TECH LAB 8* (2019), https://www.ftc.gov/system/files/attachments/privacy-impact-assessments/bureau_of_consumer_protection_tech_lab_privacy_impact_assessment_october_2019.pdf [<https://perma.cc/S77D-T5FC>] (explaining that the FTC often uses the Tech Lab’s capabilities to make undercover purchases in investigations).

³²¹ *FTC Releases Funeral Home Compliance Results, Offers New Business Guidance on Funeral Rule Requirements*, FED. TRADE COMM'N (June 8, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-releases-funeral-home-compliance-results-offers-new-business> [<https://perma.cc/HDZ8-JW3T>] (reporting the findings of undercover investigations of funeral rules as part of our enforcement of the Funeral Rule).

³²² *See FTC Undercover Shopper Survey on Entertainment Ratings Enforcement Finds Compliance Highest Among Video Game Sellers and Movie Theaters*, FED. TRADE COMM'N (Mar. 25, 2013), <https://www.ftc.gov/news-events/press-releases/2013/03/ftc-undercover-shopper-survey-entertainment-ratings-enforcement> [<https://perma.cc/HM74-JU9H>] (detailing the findings of the FTC’s undercover investigation of entertainment retailers’ enforcement of age-based ratings).

Regulatory and enforcement agencies at the federal and state levels should use this method to scrutinize toxic oral promises more regularly and systematically. By employing mystery shoppers, consumer organizations and enforcement agencies can obtain a real-world impression of how salespeople portray products and services.³²³ Unlike aggrieved consumers, mystery shoppers can be more objective in reporting their experiences. They can also be better prepared to record their exchanges with the firm's agents or representatives. Importantly, this will ensure that enforcement efforts do not rely on faulty, biased, and imperfect human memory.³²⁴ Keeping in mind that salespeople may treat different consumers differently,³²⁵ we also suggest that regulatory agencies vary the demographics of mystery shoppers to detect discrimination better.

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.³²⁶ Thus, consumer educational campaigns may better inform consumers about the practice of toxic promises. Furthermore, educational campaigns may endeavor to make consumer complaints and legal cases more salient.³²⁷

Additional educational initiatives may include literacy efforts in schools and local community centers and programs targeting marginalized communities. Educating consumers will make them less likely to fall prey to such practices, which, in turn, could weaken agents' motivations to behave manipulatively. Though not an ultimate solution in isolation, raising consumers' awareness about their rights may prove to play an important role in protecting them from toxic promises.

³²³ *Mystery Shopping Scams*, FED. TRADE COMM'N, *supra* note 316.

³²⁴ There is a wealth of research demonstrating that people's memory for verbal statements is especially poor. See, e.g., Mark L. Howe & Lauren M. Knott, *The Fallibility of Memory in Judicial Processes: Lessons from the Past and Their Modern Consequences*, 23 *MEMORY* 633, 633–35 (2015) (discussing the reliability of witnesses to recollect events accurately). Therefore, in our context, both consumers and salespeople might not remember the exact words used. On the one hand, this can relieve some of the guilt associated with deceit for the salesperson. On the other hand, it may elevate the consumer's frustration, who is likely to remember mostly the positive oral promises, rather than the qualifications or reservations. For an elaboration on the imperfection of human memory, see DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 90 (2012).

³²⁵ See *supra* note 224 and accompanying text (discussing firms' sophisticated tools to target specific types of customers for their business).

³²⁶ Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1031; Furth-Matzkin & Sommers, *supra* note 7, at 539, 541, 543.

³²⁷ A nonexhaustive list of such tools includes the use of human narratives and stories (rather than legalese), humoristic clips, comics, social media, celebrities, and influencers.

Finally, we are skeptical about the effectiveness and appropriateness of traditional disclosure requirements.³²⁸ Consider, for example, the Federal Trade Commission Used Motor Vehicle Trade Regulation Rule.³²⁹ The Rule was a response to car dealers' notorious false representations, in particular regarding the seller's liability for any car issues occurring after the sale.³³⁰ 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."³³¹

This disclosure employs plain language and is relatively straightforward. Nonetheless, we suspect that salespeople find ways to undermine its effectiveness. For example, 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' actual relationship, or even stating in passing that the disclosure is a meaningless FTC requirement.³³² Ultimately, mandated disclosures may prove counterproductive by providing salespeople with a shield against complaints and a de facto license to deceive.

C. Judicial Tools and Other Ex Post Measures

Although efforts to minimize toxic promises ex ante are important, they are unlikely to completely eliminate the practice. Despite genuine mitigating efforts, some agents may still employ, at times unintentionally, misleading oral promises. This Section proposes ex post measures that can further mitigate toxic promises.

³²⁸ Cf. Choplin et al., *supra* note 125, at 95 (explaining how salespeople were able to convince borrowers to take unaffordable loans notwithstanding disclosure requirements).

³²⁹ 16 C.F.R. § 455 (2021).

³³⁰ Burnham, *supra* note 251, at 126 (noting that car dealers were known for the false statements made regarding "the extent of the seller's liability for post-sale problems").

³³¹ § 455 fig.1. The FTC rules were revised in 2016. See *FTC Approves Final Changes to Used Car Rule*, FED. TRADE COMM'N (Nov. 10, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-approves-final-changes-used-car-rule> [<https://perma.cc/7XXL-7GX4>] (summarizing the changes to the rules).

³³² See Choplin et al., *supra* note 125, at 94 (documenting oral statements made by salespeople that induced consumers to sign fraudulent contracts). In addition, 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; or use small font or colors that make the text illegible. 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" and that "[t]he capitalization, punctuation and wording of all items, headings, and text on the form must be exactly as required by this Rule." § 455.2(a)(2)(1)–(2). Such detailed rules, however, might be difficult to tailor, enact, and enforce in the numerous consumer markets in which they are required.

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 previously noted, the average consumer is not good at detecting lies. Even when consumers detect lies, they are unlikely to complain or initiate legal procedures against the deceptive seller, especially if the contract contains terms that produce an *in terrorem* effect.³³³ This concern suggests that policymakers should seriously consider public enforcement mechanisms. Accordingly, public agencies and consumer organizations should be allowed to litigate cases on behalf of aggrieved, misled consumers.³³⁴

Furthermore, we join others who have called for the revision and crafting of the law of merger clauses and the parol evidence rule to protect consumers better.³³⁵ In this respect, we agree that “the parol evidence rule . . . allows merchants to mislead consumers by making oral representations that are inconsistent with the writings.”³³⁶ As Burnham observes, the parol evidence rule provides the party with greater bargaining power the ability to make statements that the weaker party will later seek to escape.³³⁷

Unfortunately, some courts continue to hold that consumers should read the fine print and be bound by the written text.³³⁸ These courts show a willingness to enforce the contractual language that bars parol evidence and excludes precontractual representation.³³⁹ Our analysis raises severe doubts about this approach. We propose that courts adopt a significantly narrower interpretation of the “duty to read” in the context of consumer contracts.

³³³ See *supra* note 34 and accompanying text (discussing the unlikelihood of consumers initiating legal procedures against sellers).

³³⁴ Cf. Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1066 (“The FTC is authorized to enforce the requirements of consumer protection laws by both administrative and judicial means.”).

³³⁵ See Posner, *supra* note 45, at 540 (introducing the various applications of the parol evidence rule in different courts).

³³⁶ *Id.* at 568.

³³⁷ Burnham, *supra* note 251, at 106 (citing CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 210, at 428 (1st ed. 1954)).

³³⁸ See, e.g., Stark & Choplin, *supra* note 20, 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.”).

³³⁹ *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.” (footnote omitted)); see also *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 433 (Ala. 1997) (holding that a consumer who relies on a precontractual representation that contradicts the final written contract cannot argue he was defrauded because he did not exercise sufficient precautions to protect his interest).

We also call on policymakers to restrict the use of “merger,” “integration,” or “no-reliance” clauses in standardized consumer contracts, at least when the consumer does not have legal representation. Companies know that consumers will typically rely on their salespeople’s oral representations. They include merger, no-reliance, or integration provisions to discourage consumers from taking legal action once consumers realize they have been defrauded.³⁴⁰ In view of the documented chilling effect of such clauses on consumers, legislatures should prohibit their inclusion in consumer form contracts. Alternatively, courts could rule that such clauses, when included in consumer contracts, are against public policy and thus void (unless a lawyer represented the consumer).³⁴¹

Courts can also apply other doctrines, such as the duty of good faith and fair dealing, in deciding cases involving toxic promises.³⁴² Along these lines, some courts have recognized a duty to negotiate in good faith.³⁴³ Misleading precontractual oral statements that the unread fine print negates may fall under the category of “bad faith.”³⁴⁴

Courts may also scrutinize terms that deny the validity of oral statements using the unconscionability doctrine.³⁴⁵ The unconscionability doctrine is one

³⁴⁰ See Stark & Choplin, *supra* note 20, at 618–19 (explaining the use of no-representation and no-reliance clauses in contracts and how they bar consumer claims of fraud); Davis, *supra* note 49, at 489–90 (noting that merger clauses signal that the entire agreement is integrated in the written contract).

³⁴¹ For a similar suggestion, see Choplin et al., *supra* note 125, at 100 (suggesting that “courts should not enforce this type of exculpatory provision, since rather than reflecting reality, [their] enforcement instead creates a license for unscrupulous companies to deceive consumers”).

³⁴² See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. L. INST. 1981) (defining the duty of good faith to involve “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party”).

³⁴³ See, e.g., RREF BB Acquisitions, LLC v. MAS Properties, L.L.C., No. 13-CVS-193, 2015 WL 3646992, at *17–21 (N.C. Super. Ct. June 9, 2015) (finding that there can be a duty to negotiate in good faith), *on reconsideration*, 2015 WL 7910510 (N.C. Super. Ct. Dec. 3, 2015) (granting plaintiff’s motion for reconsideration on the motion for summary judgment).

³⁴⁴ Likewise, not honoring oral promises and hiding behind fine print might be understood as bad faith performance. See U.C.C. §§ 1-203, 2-305(2), 2-306(1), 2-311(1), 2-615(a) (AM. L. INST. & UNIF. L. COMM’N 2017) (detailing the duty to perform in good faith). Even if, however, courts were to impose a duty to negotiate in good faith and interpret it to include oral representations that are subsequently qualified in the fine print, consumers would still face the hurdle of proving that the sellers’ agents misled them. Oral statements are more difficult to prove because they are typically not accompanied by written documentation. This could be addressed either by stronger monitoring efforts (e.g., recordings and mystery shopping) or by shifting the burden of proof to firms.

³⁴⁵ § 2-302; see Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 781 (2016) (defining the unconscionability doctrine as a way to invalidate contracts that “shock the conscience” with how unfair they are to one party (citation omitted)).

of the primary tools used in striking down unfair contract terms.³⁴⁶ The doctrine has a procedural and a substantive prong, and there is a sliding scale relationship between the two prongs.³⁴⁷ This means that courts are willing to relax the evidence required to sustain procedural unfairness if the term is severely oppressive and vice versa.³⁴⁸ Typical cases of toxic oral promises likely satisfy both the procedural and the substantive unfairness prongs of the doctrine.

Sellers who make toxic oral promises often exploit consumers' tendency to accept a form contract without scrutinizing it.³⁴⁹ They may further exploit, at times cynically, consumers' trust.³⁵⁰ Cunning sellers can signal to consumers' trust and false intimacy or affection, further dissuading consumers from reading the fine print.³⁵¹ This can exacerbate consumers' tendency to believe sellers' oral statements and refrain from reading the fine print.

Section 211 of the Restatement (Second) of Contracts depicts another judicial path that courts may take.³⁵² This section reads that “[w]here 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.”³⁵³ Accordingly, there is no apparent reason to believe that

³⁴⁶ See W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 858–60 (explaining that unconscionability is one of the primary defenses employed against unfair contracting).

³⁴⁷ See Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752–53 (1982) (explaining that procedural unconscionability addresses unfairness in the bargaining process and that substantive unconscionability is concerned with unfairness in the contractual outcome).

³⁴⁸ See, e.g., Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 12–13 (2012) (“[U]nder the sliding scale approach, the two prongs are viewed in tandem, permitting the court to make a finding of unconscionability if the overall weight of the facts and circumstances favors intervention.”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (explaining the sliding scale view of unconscionability doctrine as not requiring both prongs of unconscionability to have the same degree of unfairness).

³⁴⁹ See, e.g., Choplin et al., *supra* note 125, 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.”).

³⁵⁰ See, e.g., Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 448 (2002) (“Consumers will feel uncomfortable suddenly indicating distrust to the reassuring agent by studying terms covering unlikely events.”); Korobkin, *supra* note 8, 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.”).

³⁵¹ See Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 U. ILL. L. REV. 1547, 1548–49 (highlighting the abilities of sellers to use trust and intimacy to dissuade consumers from rational decision-making).

³⁵² See RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981).

³⁵³ *Id.* § 211(3).

consumers would simply assent to fine print terms that violate the promises agents had previously made to them.

Following this logic, one can plausibly argue that firms that turn a blind eye toward—let alone encourage—toxic oral promises engage in fraud.³⁵⁴ State laws and courts can lower the bar for consumer fraud claims in these situations.³⁵⁵ For example, they can waive the requirement to prove the seller's intention or knowledge.³⁵⁶ Alternatively, they can shift the burden of proof and presume the seller's knowledge, placing the burden on the firm to prove the contrary.³⁵⁷ Likewise, courts can lower the standard for satisfying causation and consumer reliance,³⁵⁸ while acknowledging that even conspicuous disclosures often do not effectively inform consumers.³⁵⁹

Ultimately, firms seek to maximize their profits. Thus, it is imperative to be cognizant of both the relevant legal doctrines and firms' financial incentives.³⁶⁰ To ensure proper deterrence and improve firms' compliance, misleading firms, their marketing executives, and their salespeople should be exposed to punitive civil fines for making toxic promises.³⁶¹ Imposing penalties is not an unfamiliar concept in consumer law cases.³⁶²

Beyond judicial or administrative control over misleading oral interactions, consumer educational campaigns can prove beneficial in this context as well.³⁶³ At least in laboratory settings, informed consumers were more morally

³⁵⁴ See 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) (finding that the FTC applies similar reasoning in somewhat similar contexts, such as false advertising).

³⁵⁵ See, e.g., Choplin et al., *supra* note 125, at 99 (documenting states that have reformed consumer protection laws to no longer require consumers to prove that sellers knowingly made false statements or that the consumer relied on these statements).

³⁵⁶ See, e.g., *Odom v. Fairbanks Mem'l Hosp.*, 999 P.2d 123, 132 (Alaska 2000) (articulating the standard for sustaining a claim under the Alaska Unfair Trade Practices and Consumer Protection Act, noting that "[a]n act or practice is deceptive or unfair if it has the capacity or tendency to deceive. Actual injury as a result of the deception is not required All that is required is a showing that the acts and practices were capable of being interpreted in a misleading way" (omission in original) (quoting *State v. O'Neil Investigations, Inc.*, 609 P.2d 520, 534–35 (Alaska 1980))).

³⁵⁷ Such an approach may be specifically warranted where firms construct payment schemes—such as rewarding agents for closing deals (e.g., in the form of commissions)—that encourage salespeople to mislead consumers orally.

³⁵⁸ Choplin et al., *supra* note 125, at 100.

³⁵⁹ *Cf. id.* at 98. ("[E]ven when a consumer does read the problematic term in the contract, such reading will not necessarily cause the consumer to object to it.").

³⁶⁰ See Wilkinson-Ryan, *supra* note 34, 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.").

³⁶¹ See *id.* at 171 (suggesting that "[o]ne route is to subject firms to civil fines when they include unenforceable terms in their contracts").

³⁶² *Id.* at 171–72 (discussing the example of anti-disparagement clauses in California, which can attract a penalty of up to \$10,000).

³⁶³ See, e.g., Furth-Matzkin & Sommers, *supra* note 7, at 543.

and legally critical of misleading practices.³⁶⁴ Along these lines, informed participants expressed greater willingness to use legal and meta-legal means to assert their rights.³⁶⁵

Of course, there is no guarantee that this attitude shift will translate into real-world legal action, particularly given the small-dollar claims involved in typical consumer transactions. The current legal landscape, which supports class action waivers and mandatory arbitration clauses in consumer contracts, aggravates this challenge. We therefore echo the call to provide more substantial economic incentives to lawyers who represent consumers in such cases.³⁶⁶ The Consumer Protection Act in Montana may serve as an example.³⁶⁷ Under Montana's Act, successful plaintiffs may recover various types of damages and fees.³⁶⁸

Similarly, educational campaigns should urge consumers to complain and air their grievances. Specifically, campaigns should encourage consumers to complain to consumer organizations and law enforcement agencies. These complaints may further help identify wrongdoers, prioritize enforcement resources and efforts, and tailor educational and policy efforts. As part of these educational efforts, policymakers and enforcement agencies should also encourage consumers to share their complaints using online platforms, including those that rank or grade firms. Many of these platforms, including Amazon, eBay, Google, Facebook, Yelp, and TripAdvisor, to name a few, have clear reputational impacts on firms. Consumer complaints may help firms channel their improvement efforts and deter agents from behaving unethically.³⁶⁹ To encourage consumers to complain, agencies like the FTC should make their complaining processes as easy and accessible as possible.³⁷⁰

³⁶⁴ *Id.* at 543.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 544 (discussing “statutory damages,” “fee-shifting provisions,” and “class action fee awards” as potential solutions to discourage sellers’ fraudulent practices).

³⁶⁷ MONT. CODE ANN. § 30-14-133 (2021).

³⁶⁸ *Id.*; see Burnham, *supra* note 251, at 118 (describing the then-current version of the Montana Consumer Protection Act, which allowed successful plaintiffs to “recover minimum damages, treble damages, and attorneys’ fees,” and noting that these “provisions [are] clearly intended to have a deterrent effect on those who engage in deceptive practices”).

³⁶⁹ See, e.g., Arbel & Shapira, *supra* note 52, at 931 (finding that “nudniks,” or those that constantly complain, provide an important check on seller’s activities (footnote omitted)).

³⁷⁰ The FTC is already taking steps in this direction. For example, it has recently launched a new website to facilitate consumer complaints. *Report to Help Fight Fraud*, FED TRADE COMM’N, <https://reportfraud.ftc.gov> [<https://perma.cc/6ZQF-39RS>]. One new feature of the website is that consumers who submit a report will receive advice from the FTC based on their report, including recommendations on next steps. See *FTC Launches New Website to Report Consumer Fraud*, SUBPRIME AUTO FIN. NEWS (Oct. 8, 2020), <https://www.autoremarketing.com/subprime/ftc-launches-new-website-report-consumer-fraud> [<https://perma.cc/T2Q9-RN7C>] (discussing the features of the FTC’s new reporting website).

Interestingly, empirical data suggests that public disclosure of consumer complaints can serve as an effective consumer protection measure. A recent study examined this issue by referring consumers to the U.S. Consumer Financial Protection Bureau (CFPB) complaint database.³⁷¹ More specifically, the study investigated whether publicly disclosing the CFPB's complaints data can inform mortgage borrowers.³⁷² The study found that banks receiving more complaints experienced a "greater reduction in mortgage applications" following the CFPB's disclosure of this information.³⁷³ Moreover, the research found the effect to be stronger in areas with higher concentrations of sophisticated consumers and larger credit competition, as well as for banks that received harsher complaints.³⁷⁴ The researchers concluded that disclosing the consumer complaints data could increase protections for consumers.³⁷⁵ We believe that 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. Recognizing the courts' inclination to protect nondrafting parties, the argument goes, consumers might make false claims about their oral interactions with sellers.³⁷⁶ Furthermore, memory is fallible and is often shaped by worldviews, biases, and aspirations.³⁷⁷ People's recollections are imprecise and prone to mistakes (especial-

³⁷¹ Yiwei Dou & Yongoh Roh, Public Disclosure and Consumer Financial Protection 1–4 (July 9, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647491 [<https://perma.cc/X3F9-N4Z4>] (studying and analyzing the Consumer Financial Protection Bureau's complaint process and its effectiveness).

³⁷² *Id.* at 30.

³⁷³ *Id.* at 14, 32.

³⁷⁴ *Id.* at 7, 27.

³⁷⁵ *Id.* at 32.

³⁷⁶ Korobkin, *supra* note 8, at 72–73 (explaining the problematic temptation for nondrafting parties to allege false statements in court about their oral conversations with salespeople prior to signing a contract, with the intent of securing favorable litigation outcomes); Solan, *supra* note 149, at 89–90 ("Privileging the written contract serves a useful function precisely because . . . people really do testify dishonestly . . .").

³⁷⁷ Korobkin, *supra* note 8, at 73–75 (noting that "[e]ven in a world of scrupulously honest nondrafting parties" other factors, such as faulty memory and implicit bias, impact the reliability of a nondrafter's testimony); Solan, *supra* note 149, 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"). For a discussion of how people are more likely to forget facts and rules that threaten their moral self-view, see, for example, Lisa L. Shu & Francesca Gino, *Sweeping Dishonesty Under the Rug: How Unethical Actions Lead to Forgetting of Moral Rules*, 102 J. PERSONALITY & SOC. PSYCH. 1164, 1164 (2012).

ly self-serving ones).³⁷⁸ Thus, consumers might make erroneous yet honest claims about what sellers said during the negotiation process.³⁷⁹ Our suggestion to better protect consumers, this argument opines, neglects to consider the potential harm that such protections might inflict on firms.

Our response to this important concern is fivefold. First, we strongly prefer *ex ante* measures tailored to *prevent* toxic promises and educate consumers over *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 in the first place.³⁸⁰ Third, consumers encounter many limitations in 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 consumer action and weaken consumers' motivation to assert 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' naiveté or salespeople's enthusiasm to close deals. If anything, the evidence seems to suggest the contrary.³⁸¹ 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 transactions they consider. Equally, it is sensible for consumers to trust the answers they receive. In fact, trusting agents' statements is a natural and even desirable human response. Similarly, consumers are not acting negligently if they refrain from reading the fine print, fail to understand it, or discount its risks.

While navigating their way through ever-growing, complex, and demanding markets, consumers may fall into traps. Unfortunately, some of these traps are employed by firms and salespeople who exploit consumers' trust and psychological vulnerabilities. This Article argues that such traps often take the form of toxic promises, which sellers find ways to justify *ex post* or are not fully aware of *ex ante*.

³⁷⁸ See generally DANIEL GILBERT, *STUMBLING ON HAPPINESS* (2006).

³⁷⁹ Korobkin, *supra* note 8, at 75; Solan, *supra* note 149, at 89–90.

³⁸⁰ See, e.g., Bar-Gill & Davis, *supra* note 124, at 248 (finding that consumers' beliefs about how the law protects them is systematically wrong); Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms*, *supra* note 34, at 1058–59 (discussing consumers' hesitancy to bring suits against sellers because of their misunderstanding about the legal enforceability of certain contract terms).

³⁸¹ Cf. Boedecker et al., *supra* note 242, at 70 (discussing the temptation from salespeople to deceive consumers to achieve higher sales goals, despite efforts by firms to curb these practices in the interest of establishing credibility).

The Article proposes a more realistic and flexible legal approach to scrutinizing toxic promises. This approach, we believe, helps shift the focus on toxic promises. Blaming consumers for trusting sellers and for failing to read unreadable fine print is both unfair and counterproductive. Instead, the law should better account for nuanced contracting realities and human fallibility.