

LEGAL TOLERANCE TOWARD THE BUSINESS LIE AND THE PUFFERY DEFENSE: THE QUESTIONABLE ASSUMPTIONS OF CONTRACT LAW

M. Neil Browne,* Kathleen M. S. Hale** & Maureen Cosgrove***

[T]he gun that won the [W]est¹

Better Ingredients. Better Pizza²

[B]est tires in the world³

America's Favorite Pasta⁴

I. INTRODUCTION

Catchy. Memorable. Clever. These words might come to mind if one were asked to describe the above slogans. The words fraudulent, deceptive, or misleading probably do not come to mind. But those are just the words competitors used when challenging these slogans as false and misleading advertisements.

In response to allegations of false advertising, companies often do not stand by the truth of their claims. In other words, they do not try to prove that their tires are the best tires in the world or that their brand of pasta is America's favorite brand. Instead, they essentially concede that the statements are not true, or at least are not verifiable, and then argue for immunity from liability nonetheless because the statements constitute "mere puffing."⁵ For centuries, courts have refused to impose liability for statements that, although possibly false, are so exaggerated or vague that,

* Distinguished Teaching Professor of Economics, Bowling Green State University

** Partner, Weisbrod, Matteis & Copley PLLC, Washington, D.C.

*** Dickie, McCamey & Chilcote, P.C.

1. *New Colt Holding Corp. v. RJG Holdings of Fla., Inc.*, 312 F. Supp. 2d 195, 235 (D. Conn. 2004).

2. *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 491 (5th Cir. 2000).

3. *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 670 (6th Cir. 2005).

4. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 389 (8th Cir. 2004).

5. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:38 (4th ed. 1997) (explaining that "vague advertising claims that one's product is 'better' than that of competitors' can be dismissed as mere puffing that is not actionable as false advertising").

allegedly, no reasonable consumer would take them literally.⁶ Such statements are called puffery or puffing. In other words, courts have concluded that no reasonable consumer would believe that Papa John's Pizza had better ingredients and better pizza than all other competitors just because the company's slogan says as much.

In effect, puffing is tolerated because the legal rules for telling the truth are different in commercial relations than in the ordinary commonsense meaning of a statement that one knows is not justified by the facts of the situation. A memorable scene from the film *Sunshine Cleaning* illustrates this point. A father, portrayed by Alan Arkin, paints a sign on the van advertising his daughter's new business; the sign says "In business since 1963."⁷ The daughter demurs, "It's a lie."⁸ The father says "No, it's a business lie. That's different from a life lie."⁹ The daughter laughs in response.¹⁰ This toleration of the business lie is analogous to the court's general tolerance for puffing.

The argument here is that puffery is an ambiguous legal doctrine that draws its sustenance from outdated assumptions about what is fair to expect from typical consumers in a modern market exchange. Section II traces the origin and evolution of puffing to establish the need to align legal principles to the historical setting in which they are being applied. Section III establishes the lack of clarity in the legal standards for identifying puffing. Section IV examines the varied treatments by courts to statements alleged to be puffery. The final section places legal treatment of puffing into a more general context in which questionable assumptions underlying contract law provide the structural background responsible for the law of puffery.

II. ORIGIN AND EVOLUTION OF THE DOCTRINE OF PUFFING

To understand how litigants successfully invoke the puffery defense and how courts analyze disputes over alleged puffing, it is necessary to examine the origins of the defense. The term "puffing" was first used to

6. See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400 (2006) (explaining that defendants argue their speech "which would otherwise be unlawful because it is alleged to have misled consumption, could not have done so . . . and should be immune from liability"). See generally *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1029 (9th Cir. 1985) (court relied on the following consumer testimony in affirming a jury verdict that a statement was mere puffing: "When I see those types of claims in advertising, they just kind of go in one ear and out the other. I still evaluate the product on other bases.").

7. Overturefilms, *Sunshine Cleaning—A Business Lie*, YOUTUBE (Feb. 17, 2009), <http://www.youtube.com/watch?v=8PgpDyZ9msw>.

8. *Id.*

9. *Id.*

10. *Id.*

describe the practice of illegally bidding up prices at an auction.¹¹ The person who was paid secretly by the seller to bid up the prices was called a puffer.¹² As early as the sixteenth century, the concept of puffing was invoked as a defense to fraud and misrepresentation allegations.¹³ Courts found that claims of fraud or misrepresentation could not be based on opinions, statements of value, or immeasurable assertions.¹⁴ For example, an English court provided no redress to a buyer who relied on the seller's assertion about the value of the purchased property, reasoning that it was the "plaintiff's folly to give credit to such an assertion."¹⁵

The court's chastising of the buyer for being so naïve as to believe the seller's claims aptly illustrates the assumption about consumer behavior on which the early concept of puffery was based. Courts assumed that buyers had an opportunity for inspection before purchase. Although this assumption may seem far-fetched in the era of Amazon, it likely was legitimate in a time of simple transactions that generally occurred in face-to-face meetings.¹⁶ As an English court in 1534 noted in regard to the sale of a horse: "If he be tame and have been rydden upon, then caveat emptor,"¹⁷ which of course means: let the buyer beware. Courts felt comfortable letting buyers mind their own fates because they assumed buyers were interacting with sellers and the goods and would not be fooled by the seller's talking points.¹⁸ With an opportunity for inspection, consumers did not have to accept a seller's assertions as truth.¹⁹ Whether an inspection took place was a verifiable, factual inquiry undertaken by the court.

Early American jurisprudence recognized puffery as a legitimate defense, but courts generally rejected the need to determine whether a buyer had the opportunity to inspect the goods. In 1853, the Supreme Judicial

11. See Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 TRADEMARK REPORTER 585, 617 (2004).

12. *Id.*

13. *Id.* at 616.

14. See Richard J. Leighton, *Making Puffery Determinations in Lanham Act False Advertising Cases: Surveys, Dictionaries, Judicial Edicts and Materiality Tests*, 95 TRADEMARK REP. 615, 616 (2005); Cullen Goretzke, *The Resurgence of Caveat Emptor: Puffery Undermines the Pro-Consumer Trend in Wisconsin's Misrepresentation Doctrine*, 2003 WIS. L. REV. 171, 177 (2003).

15. *Harvey v. Young*, (1602) 80 Eng. Rep. 15, 15 (K.B.).

16. See Leighton, *supra* note 14, at 617; Goretzke, *supra* note 14, at 181.

17. IVAN L. PRESTON, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING* 29 (rev. ed. 1996) (quoting ANTHONY FITZHERBERT, *BOKE OF HUSBANDRIE* § 118 (1534)).

18. *Kimball v. Bangs*, 11 N.E. 113, 114 (Mass. 1887) (holding that consumers should not believe a seller because they "will naturally overstate the value and qualities of the articles which they have to sell").

19. See Leighton, *supra* note 14, at 617; Goretzke, *supra* note 14, at 177 (contending that "[t]he buyer's ability and, in fact, his responsibility to inspect the veracity of the seller's statements developed into the primary justification for the puffery defense"). See, e.g., *Baily v. Merrell*, (1616) 81 Eng. Rep. 81 (K.B.).

Court of Massachusetts observed that a plaintiff cannot base a misrepresentation claim on “statements made by sellers, concerning the value of the thing sold” because it “[has] been understood, the world over, that such statements are to be distrusted.”²⁰ The court noted that in “other cases” courts have found a statement inactionable because “by ordinary vigilance and attention, [the buyer could] have ascertained that the statement on which he acted was false,” but the court did not require proof of an inspection before dismissing the buyer’s claim.²¹

Justice Oliver Wendell Holmes somewhat famously confirmed this approach to puffery when he held that “the mere fact that the property is at a distance, and is not seen by the buyer does not change the rule that sellers’ statements are not to be believed.”²² By doing away with the inspection requirement, American courts implicitly acknowledged changing business transactions and molded the puffery defense to survive these changes.

Puffery gained a further foothold in American jurisprudence during the Strict Law era when courts leaned heavily on a caveat-emptor approach to commercial questions.²³ The puffery defense continued to hinge on assumptions about consumers being informed and savvy. Courts in the early 1900s observed that buyers and sellers had “equal means of knowing” about products²⁴ and that buyers rightly distrusted slogans and advertisements.²⁵ Judge Learned Hand expressed a rather dismal view of the veracity of statements made during commercial transactions, yet also showed confidence in consumers’ ability to assess these statements when he stated:

There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it.²⁶

III. THE LACK OF CLARITY IN THE BOUNDARIES OF PUFFERY

Although the complexity of market exchanges has changed dramatically since Holmes made his remark, the puffery defense continues

20. *Brown v. Castles*, 65 Mass. 348, 350 (1853).

21. *Id.*

22. *Deming v. Darling*, 1620 N.E. 107, 108 (Mass. 1889). Holmes also declared that “the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion.” *Id.*

23. *Goretzke*, *supra* note 14, at 180-81.

24. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 857 (2d Cir. 1918).

25. *See Goretzke*, *supra* note 14, at 181; *see also Union Car Advertising Co. v. Collier*, 189 N.E. 463, 468 (N.Y. 1934) (“Exaggeration, puffing, boasting appear to be the very breath of salesmanship. We never expect detraction, always overemphasis.”).

26. *Vulcan Metals*, 248 F. at 856 (2d Cir. 1918).

to thrive in modern law. No standard legal definition of puffery has evolved, however.²⁷ The U.S. Court of Appeals for the Fifth Circuit adheres to one of the detailed definitions, finding puffery as either “an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying” or “a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”²⁸ The Third Circuit more succinctly provides that puffery is advertising “that is not deceptive, for no one would rely on its exaggerated claims.”²⁹ The Federal Trade Commission (FTC) defines puffery as “those [claims] that ordinary consumers do not take seriously.”³⁰ Scholar W. Page Keeton offers a more colorful definition, stating that puffing is “a seller’s privilege to lie his head off, so long as he says nothing specific.”³¹

Although most definitions focus on statements that exaggerate or boast about a product in a positive light,³² puffery also takes shape as a negative assessment of a competitor’s product. For instance, in an advertisement for a razor, Norelco claimed that any razor providing a closer shave than its product “Could Be Too Close for Comfort.”³³ Gillette, Norelco’s direct competitor, challenged the statement as misleading, but the court found Norelco simply was puffing about the possibility of another product not performing well.³⁴

Although definitions of puffery vary in precision,³⁵ courts appear to agree that immeasurable, non-factual statements will almost always qualify

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27. See Leighton, *supra* note 14, at 618 (describing puffery as an “I-know-it-when-I-see-it” phenomenon); cf. Stefan J. Padfield, *Is Puffery Material to Investors? Maybe We Should Ask Them*, 10 U. PA. J. BUS. & EMP. L. 339, 351-52 (2008) (listing various definitions offered by courts).
 28. *Pizza Hut, Inc. v. Papa John’s Int’l, Inc.*, 227 F.3d, 489 497 (5th Cir. 2000) (drawing from McCARTHY, *supra* note 5, at § 27.38 and W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 757 (5th ed. 1984)).
 29. *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 922 (3d Cir. 1990); see also *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106 (10th Cir. 2009) (also defining puffery as a term “used to characterize those vague generalities that no reasonable person would rely on as assertions of particular facts”); *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (defining puffery as a statement so exaggerated it precludes reliance).
 30. *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).
 31. KEETON, *supra* note 28, at 757.
 32. See *Cook*, 911 F.2d at 246 (stating that most courts have described puffing “as involving outrageous generalized statements . . . that are so exaggerated as to preclude reliance by consumers”).
 33. *Gillette Co. v. Norelco Consumer Prods., Inc.*, 946 F. Supp. 115, 119 (D. Mass. 1996).
 34. *Id.* The court relied heavily on the inclusion of the word “could”, finding this word indicating an uncomfortable shave was only a possibility, given that the conditional “could” indicates only a possibility.
 35. Cf. *Hoffman*, *supra* note 6, at 1396-97. The lack of a standard definition for puffery is due in part to the fact that the defense is employed in a variety of legal contexts, including false advertising, securities fraud, and Uniform Commercial Code warranty cases.

as puffery.³⁶ The Eighth Circuit explained that, “if [a] statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.”³⁷ Similarly, the Ninth Circuit has observed that “[t]he common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions.”³⁸

For example, a court found the claim that a disposable diaper “fit more naturally” than other diapers inactionable because the statement was incapable of verification.³⁹ The court reasoned that people cannot agree on what factors make a diaper comfortable, and the measurement of any possible factors is based on subjective consumer perception.⁴⁰ In another matter, an advertisement that certain lamps were “far brighter than any lamp ever before offered for home movies” was deemed to be puffery, but when the advertiser quantified the alleged superiority of the product by stating “35,000 candle power and 10-hour life,” the court found a potential claim for false or misleading advertising.⁴¹

Thus the common denominator in statements that constitute puffing is the lack of verifiable content. This often puts companies in the awkward position of arguing that their slogans and descriptions of products essentially are untruthful. The case of *Clorox Co. v. Proctor & Gamble*⁴² illustrates well the precarious position in which a company wishing to claim immunity from suit because of puffery is placed. Clorox challenged two statements made by Proctor & Gamble (P&G) in regard to a laundry detergent that contained a non-chlorine whitening agent: “Whiter is not possible,” and “Compare with your detergent . . . Whiter is not possible.”⁴³ P&G initially asserted a puffery defense but ultimately admitted the latter statement was not puffery because the company had studies comparing its product with other detergents and, indeed, its products produced whiter

36. The corollary also is true: a measurable, factual statement almost invariably will not be puffery. See e.g., *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007). In this case, DIRECTV advertised that one could not “get the best picture out of some big fancy big screen TV without DIRECTV. It’s broadcast in 1080i.” *Id.* at 154. The court concluded that the advertisement’s implication was that “it is impossible to obtain ‘the best picture’—i.e. a ‘1080i’ resolution picture—from any source other than DIRECTV” and that statement was “flatly untrue.” *Id.*

37. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004).

38. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246 (9th Cir. 1990).

39. *Proctor & Gamble Co. v. Kimberly-Clark Corp.*, 569 F. Supp. 2d 796, 805 (E.D. Wis. 2008).

40. *Id.*

41. *Smith–Victor Corp. v. Sylvania Elec. Prod., Inc.*, 242 F.Supp. 302, 308-09 (N.D. Ill. 1965).

42. *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 29 (1st Cir. 2000).

43. *Id.*

clothes.⁴⁴ This admission illustrates the often strange paradox puffery cases present. Companies are successful in asserting the puffery defense when their boasts cannot be proven, and thus, the truth is irrelevant. When their boasts are truthful, the companies must concede the statement is not puffery and therefore open themselves to protracted litigation debating the merits of their evidence.⁴⁵

IV. LITIGATING FALSE AND MISLEADING PRODUCT CLAIMS

Litigation over allegations of false or misleading statements can become particularly protracted in cases alleging false or misleading advertising under the Lanham Act⁴⁶ or material falsehoods related to securities.⁴⁷

Section 43(a) of the Lanham Act permits claims for a “false or misleading description of fact or false or misleading representation of fact” made “in connection with any goods or services.”⁴⁸ This provision of the Lanham Act promotes the dissemination of accurate information about consumer products and services.⁴⁹ Plaintiffs, who are generally competitors

44. *See id.* The court stated that the latter statement, which specifically invites verification, was “specific and measurable, not the kind of vague or subjective statement that characterizes puffery.” *Id.* at 38.

45. *See, e.g.,* Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997) (holding the claim that turfgrass seed requires “50% less mowing” was not puffery and relying on the company’s claim that it conducted tests on its research farm).

46. 15 U.S.C. § 1125 (2012).

47. The puffery defense also can be asserted in response to an action initiated by the Federal Trade Commission (FTC), which has authority to regulate “unfair or deceptive acts or practices.” 15 U.S.C. §. 45 (2012). The FTC requires advertising to be truthful and non-deceptive. *See* F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1096 (9th Cir. 1994). Advertisers must substantiate any factual statements in their ads with a “reasonable basis.” *See id.* (explaining that the FTC or court “must first determine what level of substantiation the advertiser is required to have for his advertising claims”). The amount and form of evidence required to substantiate a claim varies depending on the nature of the product and the type of claim. For example, statements concerning health and safety must be backed by “competent and reliable scientific studies.” *See* Nat. Comm’n on Egg Nutrition v. F.T.C., 570 F.2d 157, 161 (7th Cir. 1977).

48. 15 U.S.C. § 1125(a)(1). The statute more fully provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.; *see also* Leighton, *supra* note 14, at 618. The words “of fact” were added to § 43(a) of the Lanham Act in 1988 to avoid a constitutional challenge over whether the section regulated opinions, ideas, and political speech.

49. *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U.L. REV. 807, 875 (1999).

claiming damage from the allegedly false or misleading statements,⁵⁰ may assert either that a statement is literally false or implicitly false, such as where the representation is misleading, even if literally true or ambiguous.⁵¹ In challenging the falsity of a statement, the defendant may raise the puffery defense.⁵² Defendants typically must show that the statement is non-factual or incapable of being falsified to prevail on such a defense.⁵³ The rationale for relying on the distinction between statements of fact and unverifiable claims is that the consumer is unlikely to be deceived by an unverifiable claim. Whether a statement is capable of being verified is a question of law in false advertising cases.⁵⁴

Courts' assessment of the factual nature of statements has created inconsistent application of the puffery doctrine.⁵⁵ Courts have found seemingly factual statements to be puffery, including a claim that a videogame system was "The Most Advanced Home Gaming System in the Universe"⁵⁶ and a claim that a particular model gun was "the gun that won the west."⁵⁷ In the latter case, the competitor challenging the statement asserted that its model gun literally did win the West and presented evidence in support of this assertion.⁵⁸ Nonetheless, the court rejected the evidence, stating that "[w]hile any claim may have some basis in fact, the claim of exclusive responsibility [for winning the West] is inevitably an exaggeration."⁵⁹

50. The Ninth Circuit requires the plaintiff to be a direct competitor of the advertiser. *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005). In the Second Circuit, plaintiffs who are not direct competitors can bring a cause of action, but they must make a more substantial showing of injury and causation. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169-70 (2d Cir. 2007). The Third, Fifth, and Eleventh Circuits apply a five-factor test used in anti-trust litigation under which even a direct competitor can be denied standing. *See Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1167 (11th Cir. 2007).

51. *See Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310-11 (1st Cir. 2002); *see also Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000) (stating that the elements of a false advertising claim under the Lanham Act are proving 1) the advertisement is a false or misleading statement of fact; 2) the misrepresentation is material, in the sense that it is likely to influence the purchasing decision; 3) the misrepresentation actually deceives or has a tendency to deceive the target audience; 4) the defendant placed the false statement in interstate commerce; and 5) the plaintiff was or is likely to be injured by a loss of sales or loss of goodwill).

52. *See Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 34-35 (1st Cir. 2000). Courts typically will not characterize as false "[c]ommerical claims that are implicit, attenuated, or merely suggestive" and that "rely upon the viewer or consumer to integrate [the message's] components and draw the apparent conclusion." *Id.*

53. *See id.* at 38.

54. Hoffman, *supra* note 6, at 1402-03.

55. *See id.*, at 1404 ("Almost every scholarly discussion of false-advertising puffery cases bemoans the doctrine's incoherent aspects.")

56. *Atari Corp. v. 3DO Co.*, 1994 WL 723601, at * 1 (N.D. Cal. May 16, 1994).

57. *New Colt Holding Corp. v. RJG Holdings of Fla., Inc.*, 312 F. Supp. 2d 195, 235 (D. Conn. 2004).

58. *Id.*

59. *Id.*

The Eighth Circuit's opinion in *American Italian Pasta Co. v. New World Pasta Co.*⁶⁰ further illustrates the difficulty of determining whether statements used in advertising are verifiable. New World Pasta Company challenged the use of the phrase "America's Favorite Pasta" to describe the Mueller's brand, which was distributed by American Italian Pasta Company.⁶¹ To advance its claim, New World Pasta Company produced consumer surveys showing subjects interpreted the slogan "America's Favorite Pasta" to mean either that Mueller's is a national brand or the nation's number one selling pasta, neither of which was true.⁶² American Italian Pasta Company argued that its slogan was "non-actionable puffery."⁶³ For New World Pasta Company's false advertising claim to go forward in the face of the asserted puffery defense, the court had to find that "America's Favorite Pasta" was a "specific and measurable claim, capable of being proved false or of being reasonably interpreted as a statement of objective fact."⁶⁴

The court rejected the survey evidence as a means of determining whether the slogan was verifiable, fearing that such reliance would result in "unintended liability for a wholly unanticipated claim."⁶⁵ The court was unwilling to allow consumers' responses to a survey dictate the outcome of the claim, fearing it would lead to "unpredictability [and] could chill commercial speech."⁶⁶ Instead, the court relied on the dictionary definition of "favorite" as meaning "markedly popular especially over an extended period of time."⁶⁷ The court then reasoned that, "By combining the term 'favorite' with 'America's,'" American Italian Pasta Company simply was asserting that Mueller's "has been well liked or admired over time by America."⁶⁸ This assertion, the court held, was neither specific nor measurable.⁶⁹ Conceding that the survey evidence suggested the slogan could be interpreted differently, the court stated that "the Lanham Act protects against misleading and false statements of fact, not misunderstood statements."⁷⁰ The opinion in *American Pasta* suggests that plaintiffs, even

60. 371 F.3d 387 (8th Cir. 2004).

61. *Id.* at 389.

62. *Id.* at 390.

63. *Id.*

64. *Id.* at 391 (quoting *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999); *see also* *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 496 (factual claim is a statement that "1) admits of being adjudged true or false in a way that 2) admits of empirical verification." (quoting *Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 679 (5th Cir. 1986))).

65. *Am. Italian*, 371 F.3d at 393-94.

66. *Id.*

67. *Id.* at 391.

68. *Id.* The court observed that its conclusion "might be different if American claimed Mueller's pasta was the favorite pasta of a specific person or an identifiable group." *Id.*

69. *Id.*

70. *Id.* at 393-94.

when armed with consumer survey evidence showing consumers are reading exaggerated statements as actual fact, face an uphill battle in convincing courts that competitor's slogans are in fact verifiable claims subject to suit.

The opinion also demonstrates the fine parsing of words courts often engage in when deciding disputes involving alleged puffery. Other cases bolster the point that seemingly minor differences in the use of words may affect how an advertisement is characterized. For example in *Transgo, Inc. v. Ajac Transmission Parts Corp.*, the Ninth Circuit affirmed a jury verdict that the description of a product as "the FIRST name in Shift Kits" was "merely puffery" even though the product was not the first one on the market.⁷¹ The court did not question whether the claim was verifiable, but instead assumed that "FIRST" referred to the quality of the product, rather than entry into the marketplace.⁷² In contrast, the Seventh Circuit, in ruling on a challenge to the slogan "1st Choice of Doctors," stated that, "In English, 'first' is ordinal. . . . A runner who crosses the finish line ahead of all others is 'first.'"⁷³ One might think that such attempts at canonical statements of meaning would perplex the courts in that they are definitive and definitively in conflict.

Further illustrating that the context of the ad matters, a federal court found the statement "most weatherable" was actionable because it was included in a brochure featuring independent testing results of vinyl siding.⁷⁴ The court explained that, although the phrase, "standing alone, would likely be mere puffery . . . the Court must consider the entire context of the ad, not each sentence or word in isolation."⁷⁵ In the *Clorox* case, the court was torn over whether the slogan: "Whiter is not possible" was puffery.⁷⁶ The court observed that, "Standing alone, that statement might well constitute an unspecified boast, and hence puffing."⁷⁷ But in the context of the ad, consumers were invited to compare the detergent with other products, and in doing so, P&G rendered its slogan "a specific measurable claim."⁷⁸

Just as false advertising claims cannot be based on statements that ordinary consumers would not believe, so too, in the federal securities

71. 768 F.2d 1001, 1029 (9th Cir. 1985).

72. *See id.* at 1029.

73. *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 883-84 (7th Cir. 2000). The makers of another brand of infant formula, Enfamil, argued that Similac's slogan was misleading because it implied that a majority of physicians preferred it; a fact that was not supported by survey evidence. *Id.* The court rejected the claim, however, holding that a product need not have the majority to be considered first. *Id.*

74. *Outdoor Techs., Inc. v. Vinyl Visions*, 2006 WL 2849782, at *4 (S.D. Ohio Sept. 29, 2006).

75. *Id.*

76. *Clorox Co. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 39 (1st Cir. 2000).

77. *Id.*

78. *Id.*

context, do courts consider whether a reasonable investor would rely on the challenged statements.⁷⁹ Private plaintiffs or the Securities and Exchange Commission (SEC) can bring a fraud action for statements companies make to shareholders that omit or misrepresent “material” facts.⁸⁰ A fact is “material” if there is “a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”⁸¹ The question of materiality is one of both fact and law in which courts aim to determine “the significance of the reasonable investor would place on the withheld or misrepresented information.”⁸² Companies may raise puffery as a defense by arguing the statement was merely a “vague statement[] of corporate optimism” that a reasonable investor would ignore.⁸³ For example, the Second Circuit dismissed an IBM executive’s claim that “we’re not—despite your anxiety—concerned about being able to cover the dividend for quite a foreseeable time” as being “plainly an expression of optimism that is too indefinite to be actionable.”⁸⁴

A review of recent cases involving securities fraud suggests that “defendants have been increasingly successfully in obtaining dismissals based on puffery arguments.”⁸⁵ The defense is most successful when the statement being challenged is one about the future,⁸⁶ such as claims that corporate earnings are “in line with analysts’ current projections” and there is “an expected annual growth rate of 10% to 30% over the next several years.”⁸⁷ Until 1979, the SEC did not even permit companies to issue forward-looking statements.⁸⁸ When the SEC did away with this prohibition, future-oriented statements became fodder for misrepresentation

79. PRESTON, *supra* note 17, at 61.

80. Hoffman, *supra* note 6, at 1405 (noting that the standard for these claims is “a substantial likelihood that the statement omitted or misrepresented the material fact”).

81. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 439 (1976).

82. Basic, Inc. v. Levinson, 485 U.S. 224, 240 (1988). Where the puffery defense is not involved, judges rarely decide whether a fact is material on summary judgment, preferring to send the question to the jury. Edward A. Fallone, *Section 10(b) and the Vagaries of Federal Common Law: The Merits of Codifying the Private Cause of Act Under a Structuralist Approach*, 1997 U. ILL. L. REV. 71, 100 (stating that “the materiality standard is exceedingly fact-specific and therefore peculiarly appropriate for applications by the trier of fact”); Terry Fleming, *Telling the Truth Slant—Defending Insider Trading Claims Against Legal and Financial Professions*, 28 WM. MITCHELL L. REV. 1421, 1430 (2002) (observing that “[m]otions for judgment on the pleadings and summary judgment are rarely granted”).

83. See Jennifer O’Hare, *The Resurrection of the Dodo: The Unfortunate Re-Emergence of the Puffery Defense in Private Securities Fraud Actions*, 59 OHIO ST. L.J. 1697, 1697 (1998).

84. *In re Int’l Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 108 (2d Cir. 1998).

85. Hoffman, *supra* note 6, at 1406.

86. *Id.* (observing that “courts view optimism about the present with considerably more skepticism than optimism about the future”).

87. Raab v. Gen. Physics Corp., 4 F.3d 286, 289-90 (4th Cir. 1993).

88. See Bruce A. Hiler, *The SEC and the Courts’ Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 MD. L. REV. 1114, 1115 (1987).

claims.⁸⁹ In the case of the statements just noted, the Fourth Circuit held that they were immaterial puffery, in part because “[n]o reasonable investor would rely on these statements.”⁹⁰ Such projections were distinguished from “guarantees” that may be material to investors’ decisions.⁹¹ Courts see a potential danger in imposing liability for future-looking statements because they “will almost always prove to be wrong in hindsight.”⁹²

When judges find a statement to be immaterial based on puffery, they appear to be assuming that “reasonable investors do not invest capital based on optimism but, instead, invest based on facts.”⁹³ Yet, as with the false advertising cases, courts sometimes decline to hold companies accountable for statements lacking a factual basis. For instance, the Fifth Circuit held that the statement that a contract would “establish[] the company as a major participant in the Argentine water market” was immaterial puffery, even though the defendant lacked the financial capacity to become a major participant.⁹⁴ The court reasoned that the defendant “was under no duty to cast its business in a pejorative, rather than a positive light.”⁹⁵ Thus even though the statement appeared to be grounded in facts and hardly was an exaggerated, outlandish claim, the court dismissed it as puffery.⁹⁶

Despite the increasing success of the puffery defense over the past few decades, a recent securities case against the discredited mortgage giant Countrywide, suggests that courts may become more hostile to the defense. Investors in Countrywide brought a suit under federal securities law seeking damages for false and misleading statements about the company’s essential operations.⁹⁷ One of the statements challenged was the generic description of Countrywide’s operations as “high quality.”⁹⁸

The court acknowledged that a statement such as this is generally not actionable because it is “vague and subjective puffery.”⁹⁹ But the court found the investors “adequately allege[d] that Countrywide’s practices so departed from its public statements that even ‘high quality’ became materially false or misleading; and that to apply the puffery rule to such allegations would deny that ‘high quality’ has any meaning.”¹⁰⁰ This ruling

89. *Id.* at 1158-72

90. *Raab*, 4 F.3d at 290.

91. *Id.*

92. *Id.*

93. Hoffman, *supra* note 6, at 1407.

94. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 860 (5th Cir. 2003).

95. *Id.* at 869.

96. *Id.*

97. *In re Countrywide Financial Securities Litigation*, 588 F. Supp. 2d 1132, 1144 (C.D. Cal. 2008).

98. *Id.*

99. *Id.*; *see also, e.g., Nikkal Indus., Ltd. v. Salton, Inc.*, 735 F. Supp. 1227, 1234 n.3 (S.D.N.Y.1990) (holding that general claims that the product was “better” were mere puffery and not actionable as false advertising).

100. *In re Countrywide*, 588 F. Supp. 2d at 1144.

is rather remarkable given that, from the earliest days of the puffery defense, generic descriptions such as “high quality” were protected.¹⁰¹ But the court appeared to be acknowledging that the statement was a verifiable claim and that the facts did not validate the assertion.

In addition, the *Countrywide* case suggests that, in making investment decisions, investors can reasonably rely on descriptions of a business as offering “high quality” service or products, rather than solely on hard facts and numbers.¹⁰² This suggestion aligns with behavioral research, which strongly indicates consumers rely on statements that courts would characterize as innocent puffing.¹⁰³ For example, in one study, subjects did not distinguish between the statement that a car gets “27 miles per gallon on regular gas” and the more general boast that a car has “truly excellent gas mileage.”¹⁰⁴ When asked whether Minute Rice’s claim to make “[p]erfect rice every time” was true, 73% of participants said it was true either completely or partially.¹⁰⁵ Consumers also tend to believe factual claims, such as the “brand children’s doctors recommend the most”¹⁰⁶ at the same rate as more vague claims, such as “fast and gentle relief.”¹⁰⁷ Despite research results to the contrary, however, when applying the puffery defense, courts envision the savvy, rational consumer who can see through any sales pitch and use the advances of the modern world to test claims and compare products. The law’s response to these deceptive slogans and advertisements is to assume consumers are too smart to be misled.

Some speculate that the proliferation of websites allowing consumer reviews of products and services “will likely change the importance of advertising in computer-age society.”¹⁰⁸ There may be a growing perception that “[m]ost consumers today are highly media savvy and know how to deconstruct advertisements.”¹⁰⁹ Courts already have recognized that

101. See Hoffman, *supra* note 6, at 1413 n.101.

102. *In re Countrywide*, 588 F. Supp. 2d at 1144.

103. See Perry Haan & Cal Berkey, *A Study of Believability of the Forms of Puffery*, 8 J. MARKETING COMM’NS 243, 253 (2002) (concluding that numerous studies prove “puffery is believed by large numbers of consumers”). See generally, Goretzke, *supra* note 14, at 204 (“Modern research on puffery has shown that consumers routinely understand and rely on facts implied by puffery claims.”).

104. See PRESTON, *supra* note 17, at 80-83.

105. *Id.* at 82.

106. See, e.g., *Avon Products, Inc. v. S.C. Johnson & Son, Inc.*, 1994 WL 267836, at *7 (S.D.N.Y. 1994) (claim that an insecticide is “100 times better” is so exaggerated that no consumer would rely on it).

107. Hoffman, *supra* note 6, at 1437 (citing Herbert J. Rothfeld & Kim B. Rotzoll, *Puffery vs. Fact Claims—Really Different?*, 4 J. CURRENT ISSUES RES. & ADVER. 85, 91 (1981)).

108. See Sarah Samuelson, *True or False: The Expanding “False by Necessary Implication” Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve This Problem*, 30 CARDOZO L. REV. 317, 341 (2008).

109. *Id.*; see also Jeffrey P. Singdahlsen, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 339, 376

“[t]he relative expertise of the speaker and the listener can be a critical factor” in assessing a puffing defense.¹¹⁰ If perceptions of consumers shift toward a belief that they are more sophisticated in today’s market than ever before, courts may well be even more resistant to actions based on false claims.

V. ASSUMPTIONS OF CONTRACT LAW AS A BASIS FOR EXCESSIVE TOLERANCE OF THE PUFFERY DEFENSE

In the broadest sense, contract law exists to facilitate an efficient, fair transaction¹¹¹ between two parties.¹¹² As this section examines the truth value of these assumptions, the pertinent question for purposes of our argument should be, “Does the puffery defense strengthen these objectives of contract law?”

Although the relevant parties in any given contract may range from a firm to a spouse to a consumer, the consumer-firm relationship is most germane to our discussion of puffery and the business lie.

Three principal types of contracts are used to establish the terms of a transaction between a firm and a consumer: negotiated contracts, standard-form contracts, and implicit contracts. The use of form contracts has increased dramatically over the past several decades, while jointly negotiated contractual agreements are becoming passé.¹¹³ Negotiated

(1991) (alleging that “consumers appear to recognize that a great deal of what they are told is overstated and discount the claims accordingly”).

110. See *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1106 (10th Cir. 2009).

111. See Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472 (1980). Kronman noted:

Among contract scholars, there is nearly universal agreement that the law of contracts, the tangled mass of legal rules that regulate the process of private exchange, has three legitimate functions: first, to specify which agreements are legally binding and which are not; second, to define the rights and duties created by enforceable but otherwise ambiguous agreements; and finally, to indicate the consequences of an unexcused breach.

Id.

112. However, a deep canyon of discrepancy exists between descriptive and prescriptive theories of contract law. What the law is diverges from what the law ought to be. According to Schwartz and Scott, the normative theory of contract law suggests that, “contract law should facilitate the efforts of contracting parties to maximize the joint gains (the ‘contractual surplus’) from transactions.” Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003).

113. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003). Korobkin pointed out that:

More than thirty years ago, W. David Slawson estimated that 99 percent of all contracts did not resemble the Platonic ideal of a list of jointly negotiated terms but were instead presented by one party to the other on a pre-printed form. If anything, the dominance of form contracts over negotiated contracts has increased in the intervening decades.

Id.

contracts are becoming obsolete¹¹⁴ as firms find it less costly and more time-effective to produce one standard-form contract covering all necessary specifications of the transaction. Implicit contracts, or “invisible handshakes,”¹¹⁵ as Arthur Okun once termed them, are essentially “tacit agreements that are not written down.”¹¹⁶

Very little evidence is available to mark the existence of implicit contractual agreements because of the difficulty inherent in collecting data about implicitly established specifications.¹¹⁷ In most instances of modern trade, consumers are not provided with an explicit contract to read, agree to, and sign. So what happens when the quality, price, and specifications of a product are not expressly enumerated on a printed piece of paper? Buyers are forced to rely on oral agreements and implicit contracts that are murky and establish dubious terms of trade. For the purpose of this Article, we center our attention on the standard-form contract and the implicit contract. Those contracts are the venue in which false product claims do major damage to commercial fairness.

Several assumptions are relevant and necessary for discussions about contract law and the transparency¹¹⁸ of the agreement to which a firm and a consumer arrive.¹¹⁹ Contract law assumes that signing agents are rational¹²⁰

114. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 433 (2002). Hillman and Rachlinski suggest that the e-commerce environment dictates the contract type most commonly used. In general, the authors argue that:

Even as the electronic environment provides consumers with new tools to protect themselves from businesses, it also creates novel opportunities for businesses to take advantage of consumers. Furthermore, whether consumers realize any benefit from these new tools is questionable. Businesses still know more than consumers, and consumers still completely fail to read and understand standard terms. Consequently, e-businesses, like traditional businesses, have incentives and abilities to induce consumers to accept standard terms that are not in the consumers’ best interest.

Id.

115. Andrew T. Young & Daniel Levy, *Explicit Evidence on an Implicit Contract 2*, (Emory Univ. Sch. of L., L. & Econ. Research Paper Series, Paper No. 4-05, 2006), available at <http://ssrn.com/abstract=739984>.

116. ALAN S. BLINDER, ET AL., ASKING ABOUT PRICES 152 (1988).

117. See *supra* note 101 and accompanying text. The authors of this paper use the Coca-Cola Company as a case study to find evidence to determine the presence of an implicit contractual agreement between the company and its consumers.

118. There are advantages and disadvantages to transparency. For instance, consider the recent controversial topic of the United States military’s use of interrogation techniques. If a person values national security, he may argue that it is not in our country’s nor our military’s best interest to publicly disclose interrogation methods and practices (thus allowing potential terrorists to prepare with techniques to overcome harsh interrogation). On the other hand, as a democratic country, should we allow our government to keep us blinded to those methods? How do we determine whether our government is behaving in our interest if we don’t even know what practices it is engaging in?

119. Transparency is not altogether positive, particularly from the seller’s perspective. On the surface, it seems that the seller would want to preserve information from the consumer. However, the classic economic story of Akerlof’s “Lemons Problem” illustrates that it may not be in the seller’s interest to keep information from the consumer. In fact, a market failure can arise when a seller is

and that information is perfectly disseminated between parties. These assumptions play key roles in legitimizing the terms of trade between two parties. But, why do we fail to assess the seemingly unquestionable nature of these assumptions in common American institutions? The assumptions are so deeply ingrained in tradition and daily thought that we must explore the historical roots of the rational agent and the power disparity between consumer and seller before taking steps to amend modern contract law.

The rational agent and equal information assumptions inherent in consumer contract law are rooted in the fertile grounds of England's Industrial Revolution.¹²¹ Before 1200, the Common Law of England regulated legal responsibility under strict liability.¹²² When harm was caused, the injurer paid for it, regardless of whether harm was intended. The King's Treasury, as well as the victim of the injury, was compensated for the ill fortune.¹²³ As time passed, the injurer was not always forced to pay the King's Treasury—particularly if harm was caused accidentally.¹²⁴ However, the injurer continued to be obligated to compensate the injured

not transparent about the quality of the good he wishes to sell. Consider the market for used cars. The owner of the used cars can conceal the quality of the cars, while the buyer is unable to assess the quality of the cars. In keeping with Akerlof's language, let's use the word "lemon" to represent a poor quality car and "peach" to represent a high quality vehicle. The buyer essentially pays a price that reflects the probability that the car will be a peach. If the car is a lemon, the seller will sell the lemon at the buyer's price—a price that is higher than the value of the lemon but lower than the value of a peach. On the other hand, if the car is a peach, the owner may not sell the car because the buyer will inevitably offer a price that is lower than the value of the high quality car (because, as we know, the buyer has already set a price, given he knows the probability the car will be a peach). Few good cars will be sold in the market, few people will want to risk the chance of purchasing a lemon, there will be few sales in the market, and the market will function poorly. Thus, we observe how a lack of transparency can be detrimental to a properly performing market. *See generally* George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970); *see also* FREDERIC S. MISHKIN, *THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS* 175 (7th ed. 2006).

120. *See* Korobkin, *supra* note 113, at 1218. Korobkin claimed that:

The economic theory of form contracts, as described above, assumes a type of "rational" behavior on the part of buyers, often referred to as "expected utility theory," according to which buyers are expected to use the marketplace to maximize their expected utility as they define it. This behavioral assumption seems unobjectionable at its simplest level: namely, that different individuals have different goals, but all will attempt to satisfy their goals as cheaply as possible. Lurking beneath the surface of the utility-maximization assumption, however, are stringent assumptions about the human decisionmaking processes that are difficult to defend.

Id. Korobkin continues to discuss assumptions such as non-selectivity and compensatory analysis of the desired product. *Id.* at 1220-25. If a decisionmaker were to use these skills in selecting a product, he would be engaging in a process that requires calculated weighing of the advantages and disadvantages of that product compared to a multitude of other similar products. *Id.* at 1220-21.

121. *See* LAUREN KROHN, *CONSUMER PROTECTION AND THE LAW: A DICTIONARY* 1 (1995).

122. *See id.* at 4.

123. *Id.*

124. *Id.*

party. At the same time of the advent of tort law, private negotiations began to spew over into the realm of the court system.¹²⁵

Prior to the Industrial Revolution, most people produced what they needed on a subsistence basis.¹²⁶ Thus, few consumers existed. Moreover, the limited participation in commerce was done on a local level.¹²⁷ Any buyers or sellers at the time had strong incentive to uphold an honest trade for accountability and religious reasons.¹²⁸

As a result of the invention of the steam engine and more efficient modes of transportation during the Industrial Revolution, products were more frequently purchased from distant locations. Buyers could not inspect the products they intended to purchase.¹²⁹ Consumers became isolated from the seller—or the corporation, of which the United States would begin to see an influx in the 1800s.¹³⁰ Consequently, a seller no longer needed or maintained a “kinship” with the buyers of his product. Quality and honesty have always been important lubricants to commercial behavior, but distance creates a diminishing focus on those product attributes that the consumer can impose.

In the late 1700s, legal thought increasingly moved in the direction of a marketplace where individuals could and should establish their own terms of trade through contracts. Capitalism prompted visions of individual responsibility and a laissez-faire approach to trade and market transactions.¹³¹

The classical school of economic thought, which blossomed in the late 18th century, assumes that market participants are self-interested, rational, calculating agents. In *The Wealth of Nations*,¹³² Adam Smith asserts that optimal utility is reached when humans are left to freely participate in market transactions. An individual will seek to maximize her utility by participating in trade that generates the most private benefit. Assuming the individual is rational and the individual will have access to perfect information, she will be capable of reaching terms of trade most advantageous to herself. Thus, each individual is personally responsible for the outcome of the trade—for better or for worse. According to Smith and his contemporaries, “Any failure to exercise his or her rights is the fault of

125. *Id.* at 5.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 2.

130. *Id.* at 3.

131. Martin J. Doris, *The Continued Resonance and Challenge of the “Ius Commune” in Modern European Contract Law*, 34 INT’L J. LEGAL INFO. 391, 400-01 (2006).

132. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (Edwin Cannan ed., 1991) (1776).

either her reasoning or her will,¹³³ and not that of the market.”¹³⁴ Adam Smith, Thomas Paine,¹³⁵ Voltaire,¹³⁶ and other humanists of the 18th and 19th centuries helped to popularize these ideas which later became the standards for western market thought.

These basic assumptions about the skills and responsibility of consumers form the foundation of thought in transnational contract law as well.¹³⁷ Individual responsibility and rationality are necessary components of a properly functioning free-market system that embraces laissez-faireism. However, where is the evidence that these assumptions are reasonable in a complex commercial environment that would require an appreciation for the wonders of modern engineering and food chemistry to be able to sort through common product claims?

The rules governing contract law in the 1800s seemed more than appealing to a group of hard-working individuals who valued individual responsibility and held romantic ideas about the capacities of the average person. Negligence on the part of the consumer was clearly a just standard for a society that touted the benefits of individual responsibility and proclaimed the beautiful conclusion when two intelligent, rational actors were left to negotiate the terms of a trade.

The “rational agent” assumption has historically played a part in the formulation of two key arenas of American life—the market and the court. A free-market system assumes that a reified, rational agent exists while the

133. This idea is also known as meritocracy. Michael Young coined the term “meritocracy” in his book *The Rise of the Meritocracy*. Generally, meritocracy is the idea that if one has talent and tries hard, he or she gets what she deserves. Meritocracy ignores social factors such as wealth or formal education as playing a role in desserts. As an interesting language note, in English we say *earn* money. In French, however, they do not earn money; they *win* money (*Ils gagnent d'argent*). This suggests that meritocracy is perhaps an idea arising from social construction, rather than human nature. See generally MICHAEL YOUNG, *THE RISE OF MERITOCRACY* (1958).

134. See M. Neil Browne, Carrie Williamson & Garrett Coyle, *The Shared Assumptions of the Jury System and the Market System*, 50 ST. LOUIS U. L.J. 425, 431-39 (2006).

135. See generally THOMAS PAINE, *RIGHTS OF MAN* (Oxford Univ. Press 1998) (1791) (arguing that the natural state of man entitles men to equal rights such as autonomy, liberty, property, security, and the pursuit of property).

136. JERRY Z. MULLER, *THE MIND AND THE MARKET: CAPITALISM IN WESTERN THOUGHT* 22-23 (2002). The author stated:

Voltaire’s great talent was as a popularizer of ideas developed by others rather than as an original or systematic thinker. . . . Voltaire’s defense of the market in the *Letters* and later in his *Philosophical Dictionary* was political rather than economic. Market activity was valued not because it made society wealthier, but because the pursuit of economic self-interest was less dangerous than the pursuit of other goals, above all religious zealotry.

Id.

137. See M. Neil Browne & Jennifer Coon, *The Impact of Market Ideology on Transnational Contract Law*, 30 LOY. L.A. INT’L & COMP. L. REV. 91, 110-11 (2008).

adversary system trusts in the rational juror.¹³⁸ Have we, as a society, placed too much faith in the human-as-rational-agent motif that has remained a founding principle of so many facets of American life? It certainly seems as if the branch of contract law that claims to protect consumers has posited a consumer who might or should be, rather than focusing on the empirical behavior of actual consumers.

The rational consumer is the sanitizing agent of market theory, transforming the greed of firms into a force working on behalf of consumers. The economic principle of consumer sovereignty¹³⁹ offers a glimpse into the problems that may arise when we use the term “consumer” as an umbrella term to represent the general public. Ludwig von Mises conceived the concept of consumer sovereignty, which means that, in a free market, the consumers ultimately dictate what is to be produced.¹⁴⁰ While capitalists and entrepreneurs might steer the economy, they take orders from the consumers by responding to demand for certain goods and lack of demand for others.¹⁴¹ The producers of goods, who aim to stay in business, must satisfy the preferences of consumers.¹⁴² This narrative has both humanistic and ethical appeal because it promises to avoid the dangers of collective action.

However, Mises, like many economists, fails to recognize that (1) all consumers are not equal in their capabilities to protect their interests, and (2) consumers and firms do not enter the bargain as equals. Furthermore, the consumer rationality assumption¹⁴³ that exists to bolster the

138. See generally Browne, Williamson & Coyle, *supra* note 134, at 426 (“For example, when we rely on jury decisions as an arbiter in the adversary system, we reflexively make specific assumptions about the skills of certain cohorts of citizens to listen, integrate, and evaluate evidence.”)

139. GERALD F. CAVANAGH, *AMERICAN BUSINESS VALUES* 213 (2d ed., 1984). Cavanagh makes a comparison between the American political system and the economic system to explain the myth of consumer sovereignty. He wrote:

The American political system is democratic; the economic system is aristocratic. Politically, every person has but one vote, but because some people earn more than fifty times the average annual income, they possess fifty times the economic “voting power” of others. They may spend their personal income on expensive clothes, second and third homes, lavish vacations, or even political influence, while others, who work just as hard or harder, find it difficult to pay the rent and grocery bills. While we say that wealth is the reward for hard work, we also know that good fortune—especially in the way of birth and resulting opportunities—is even more important.

Id. Cavanagh further comments on the economic concept of consumer sovereignty as being a convenient classical economic value because it distributes responsibility. “Who is responsible for the many problems that we have drifted into in the past generation—use of scarce resources, the quality of the air over Los Angeles or Denver, toxic waste disposal? Consumer sovereignty implies undirected, promiscuous economic growth.” *Id.* at 213.

140. Israel M. Kirzner & Gordon Tullock, *Mises and His Understanding of the Capitalist System*, 19 *CATO J.* 215, 218 (1999).

141. *Id.*

142. *Id.*

143. A free-market system assumes that a reified, rational agent exists while the adversary system trusts in the rational juror. See generally Browne, Williamson & Coyle, *supra* note 134 at 426

effectiveness of the market system, as touted by classical economists, is questionable. Researchers have found that individuals often do not have the strength to exert self-control when making rational decisions.¹⁴⁴ As Russell B. Korobkin argued, consumers are boundedly rational rather than fully rational decision makers.¹⁴⁵ Because the opportunity costs of shopping for information about products differs among buyers¹⁴⁶ and consumers often fail to read or understand the terms in standard form contracts, the theoretical ability of markets to optimize consumer utility is not realized in the absence of remediation in the institutional arrangement of the market by the polity.¹⁴⁷

(“For example, when we rely on jury decisions as an arbiter in the adversary system, we reflexively make specific assumptions about the skills of certain cohorts of citizens to listen, integrate, and evaluate evidence.”); *see also* Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 302 (1989) (“The adversary system is characterized by party control of the investigation and presentation of evidence and argument, and by a passive decision maker who merely listens to both sides and renders a decision based on what she has heard.”); *Id.* at 316-17 (“When each side presents its best case, the decisionmaker has all the information he needs to reach a just result. When presentation of the case is left in the hands of the parties, the information and motive-based rationales both suggest that each side will, indeed, present its best case.”). Sward acknowledged that one of the primary assumptions of the adversary system is equality of power. She stated the following:

The assumption of equality became part of the adversary system some time after it was recognized that magic could not determine victors. If God does not decide who wins, the system must do so; but the system can do so only if the parties are equal—in resources, analytical skill, creativity, advocacy skill, and information. In other words, the adversary system itself is the magic that replaces God’s intervention. Discovery is a subtle admission that the system does not do what it is intended to do. . . . Procedure came to be treated as a science—a methodology that, if done right, would enable a court to arrive at the right answer, whether the dispute was one of fact or one of law.

Id. at 329, 354.

144. SIEGFRIED DEWITTE, SABRINA BRUYNEEL & KELLY GEYSKENS, *SELF-CONTROL PERFORMANCE ENHANCES SELF-CONTROL PERFORMANCE AT SIMILAR TASKS* (2006). The “self-control strength model” suggests that when a person exerts self-control at one point in time, he has much less strength to exert self-control in subsequent activities, like eating and rational decision-making. *Id.* at 24. These researchers argue that the cognitive control theory predicts that exerting self-control may actually improve self-control in subsequent instances. *Id.* The primary source of discrepancy between commonly held beliefs about self-control and the findings of these researchers lay in the *type* of activity for which self-control is demanded. *Id.*

145. *See* Korobkin, *supra* note 113, at 1222 (explaining that the problem a boundedly rational individual faces is one of “balancing the desire to make accurate choices with the mutually exclusive desire to minimize effort”). Furthermore:

While most buyers employ decision strategies that require more effort than the random choice approach, they rarely use strategies as accurate as weighted adding. Like other individuals, they usually solve problems using heuristics, or mental short-cuts, that provide solutions with less than maximum effort, as opposed to algorithms, which require patient and often lengthy calculation.

Id. at 1223. Korobkin enumerates a number of approaches that the average human uses to make a decision—from choosing a minimum aspiration level to utilizing cognitive heuristics—as he argues that an average consumer rarely optimizes his decision-making behavior. *Id.* at 1223-25.

146. *Id.* at 1214.

147. *Id.* at 1217.

As advertising became pervasive in American business activity, consumers were besieged by product information, imagery, and puffing. Firms were not bound by any explicit contractual agreement to follow through with the statements they made in an advertisement. If a buyer was deceived by an advertisement, the buyer was required to prove that the firm or seller knew the advertisements were untrue *and* that the intentions of the false statements were to urge the consumer to purchase the good.¹⁴⁸ One would be hard-pressed to locate any average consumer who could effectively take on such an immense task.

VI. CONCLUSION

Though advances in contract law protected consumers in many regards, corporations often had the upper hand when a consumer suffered a loss or injury. The burden to show that the product was carelessly made or that the product was marketed poorly fell on the consumer.¹⁴⁹ Furthermore, large firms had the financial capacities to deflect claims of faulty production.¹⁵⁰ Additionally, contributory negligence merely added to the burden of injured consumers.¹⁵¹

Increased advertising by firms, coupled with the development of the internet and, subsequently, e-commerce, instigated a radical transformation in the context for transparency once again. Consumers are quick to click and consent to electronic standard form contracts on the web.¹⁵² Though paper contracts and virtual contracts share certain attributes,¹⁵³ the internet setting opens up a Pandora's box of opportunities for businesses to take advantage of unsuspecting consumers.¹⁵⁴ Robert A. Hillman and Jeffrey J. Rachlinski extensively enumerate the implications of market failures in

148. KROHN, *supra* note 121, at 7.

149. *Id.* at 6.

150. *Id.*

151. *Id.*

152. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 468-69 (2002).

153. *Id.* at 432-33. Hillman and Rachlinski list some similarities between the vehicles for each contract:

In both worlds, experienced businesses typically draft the standard form and inexperienced consumers (or sometimes small businesses) generally agree to its provisions. Because businesses can identify the most sensible allocation of contractual risks better than courts, judicial failure to enforce standard terms can harm both consumers and businesses in both environments. Businesses also use their knowledge and experience in both environments to exploit consumers, knowing that consumers reliably, predictably, and completely fail to read the terms employed in standard-form contracts.

Id. Additionally, the language in which each contract is written is often so convoluted and complex such that an average consumer may not fully understand the terms. *See id.* at 433

154. *Id.* at 434.

relation to paper and virtual standard-form contracts. First, “reading and understanding boilerplate terms is difficult and time consuming for consumers.”¹⁵⁵ Second, Hillman and Rachlinski argue that social forces acting upon individuals prevent those individuals from reading standard-form contracts.¹⁵⁶ Finally, the researchers list cognitive factors that prevent consumers from fully understanding the terms of a standard-form contract.¹⁵⁷

Though a consumer might fail to understand a standard-form contract, a consumer may encounter even more trouble when attempting to navigate the terms of an implicit contract. As we have seen, the context for the transparency of the terms of trade has changed over time. Advertising and e-commerce have created an environment in which consumers are left to their own devices (or lack thereof) in determining the terms of a market transaction. Yet, consumers often remain unprotected from the business lie.

Courts would seem to have a responsibility to reflect about the probable attributes of this elusive “consumer” that we hear about in marketing textbooks, the arguments of economists, and business journals. We can maintain a legal doctrine about puffing that is largely prescriptive in the sense that it assumes consumers are or should be the skilled agents of classical liberal thought. Alternatively, we can apply the same understanding of dishonesty to commercial enterprises that we apply in our relationships with families and friends.

155. *Id.* at 446 (noting that, beyond using inflated language, businesses can use formatting techniques and organizational techniques to mask important terms within the contract). Additionally, customers tend to think of standard-form contract terms as, well, standard. *Id.* They give little thought to the terms because “they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.” *Id.* at 447.

156. *Id.* at 448 (discussing time constraints that cause people to rush through the consent process, as well as the desire to appear non-confrontational).

157. *Id.* at 450-451 (stating that individuals rely on cognitive heuristics like “satisficing” and thus tend to underestimate the adverse risks that they agree to).