Chicago-Kent Law Review

Volume 77
Issue 1 *Symposium: Theory Informs Business Practice*

Article 6

October 2001

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Recommended Citation

Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 Chi.-Kent L. Rev. 87 (2001).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol77/iss1/6

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THE WRITTEN CONTRACT AS SAFE HARBOR FOR DISHONEST CONDUCT

LAWRENCE M. SOLAN*

INTRODUCTION

The law of contracts gives special status to the written word. The statute of frauds *requires* some contracts to be in writing.[1] The parol evidence rule excludes extrinsic evidence of prior or contemporaneous understandings of an agreement when a document purports to encompass their entire understanding. In theory, these practices are designed to add certainty to business transactions and to inhibit the introduction of unreliable evidence into the litigation system. But in practice, life is not that simple. This Article explores an unintended consequence of the reliance on written contracts: If we eliminate the introduction of precontractual representations and understandings from the dispute resolution process, we create a safe harbor for unethical business practices in the early stages of contract formation. If, in contrast, we weaken the parol evidence rule to permit extrinsic evidence under additional circumstances, we create predictable opportunities for the types of questionable testimony that the parol evidence rule was designed to avoid. This tension is at least in part intractable.

A substantial literature addresses such issues as whether the parol evidence rule should be preserved at all, and if so, how it should be applied in various situations. For example, a recent article by Eric Posner develops economically-motivated criteria for deciding when courts should employ a "hard" parol evidence rule, which is unyieldingly loyal to the language of the contract, and when courts should employ a "soft" version of the rule, which allows more resort

* Professor of Law, Brooklyn Law School. My thanks to Judge Stan Bernstein, Neil Cohen, Ted Janger, Roy Kreitner, Norman Poser, Jennifer Rosato, Peter Tiersma and Jonathan Yovel for helpful discussion, and to Jackie Bieber, Amy Blackman, Mary Ann Buckley and Stacey Winograd for their valuable research. This work was supported by a summer research grant from Brooklyn Law School.

1. *See, e.g.*, CAL. CIV. CODE § 1624 (West 2001); 740 ILL. COMP. STAT. ANN. § 80/0.01-18 (West 1993).

to context.[2] I refer to some of that literature in this Article and basically accept its contribution. The problems discussed here, however, are likely to occur regardless of what version of the rule is applied in any particular circumstance. Therefore, this Article recommends solutions from outside the law of contract to address both precontractual misconduct and false testimony in the courtroom.

To see the problem, let us examine three scenarios. Consider first the standard procedure for registering at a hotel. The clerk looks up your reservation, takes your credit card, and then asks you to sign the bottom of the registration form and to initial the places on the form that state the nightly rate and the checkout date. This procedure can only help to reduce the number of disputes over the terms of a hotel stay. No one can claim that the clerk misspoke in stating a lower rate than the one on the form because that would no longer be credible in light of the guest having initialed the rate. The procedure will probably benefit the hotel more often than the guest, since in the aggregate more tired guests are likely to make mistakes in hearing or reading the rate than are clerks in presenting it.

More significantly, to the extent that there is a base level of dishonesty in our culture, one would expect less of it from hotel clerks who have nothing to gain than from travelers who can reduce the cost of their stay by "negotiating" a new rate at checkout by accusing the hotel of misstating the rate upon registration. Over time, the reliance on clear written statements of the terms of the agreement should reduce the cost of operating hotels by increasing the rate of collection, which, at least in principle, can result in more efficient and competitive markets.

Second, we can change the dynamic by giving the person in the hotel clerk's position an incentive to be dishonest. Examples are easy enough to find. The used car salesman is the classic one, although lemon laws have made this cultural icon example less prominent. In today's world, more salient is the credit card company that sends out misleading advertisements, which contain provisions to the effect that once a credit card is issued, the user is bound by the terms of an agreement that he has never seen, and which may be different from what he could have reasonably surmised from reading the advertisement. While most readers of this Article may throw these advertisements away, someone, no doubt, is taking the bait, or the solicitations

2. *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998).

would have stopped a long time ago. A similar set of incentives obtains with retail sales practices in the technology industry.[3]

In theory, reliance on written agreements reduces dishonesty by reducing the opportunities to commit perjury about one's understanding about precontractual events. No doubt some unscrupulous credit card users would like to get out of arrangements into which they knowingly entered. In practice, such reliance on written contracts also creates a safe harbor for untoward practices that some businesses are all too happy to practice. One side is motivated to behave badly during the period of contract formation, while the other party is motivated to behave badly during the resolution of a dispute.

Third, situations concerning agreements among business entities are often quite different. In these instances, there is likely to be real negotiation and actual familiarity with the contract's terms. Nonetheless, issues such as the applicability of contractual provisions to unforeseen events, whether the contract was actually intended to be the entire agreement between the parties, whether the contract has been modified by conduct even if it originally was intended as the entire agreement, and many others, are bound to occur. This is the classic case in which both sides have an incentive to misbehave during a dispute resolution even if they both acted honorably when the contract was originally being formed. Here, a hard and fast parol evidence rule would almost certainly lead a court to making unjust decisions in a significant number of cases. The legal system often relaxes the rule under these circumstances.

This flexibility is characteristic of, but is certainly not limited to, agreements between firms. With construction contracts, for example, both sides may be happy to have terms such as the price, materials, and scope of the work in writing. The owner is protected against a contractor using less costly materials, or saying that certain work was not included in the price, and the contractor is protected against the owner's "renegotiating" the contract after the work has been done. Nevertheless, disagreements over construction contracts occur frequently, and the contract, at the very least, reduces the potential breadth of a subsequent dispute.

This Article will argue, based on insights from linguistics and psychology, that many of the intuitions underlying standard contract theory are well founded. Privileging the written contract serves a useful function precisely because people do forget what was said, and

3. Both computer sales and credit card sales are discussed *infra* Part III.

because people really do testify dishonestly, or at least consistently with a self-serving reality that they have created in their own minds about events underlying a litigation. Yet, the Article will also explore the unintended consequence of the rule, and suggest both stronger sanctions against dishonest testimony in business disputes, and stronger consumer protection to avoid precontractual heavy-handedness and outright fraud. Firms are the parol evidence rule's principal beneficiaries, since more often than not, they are the ones who draft the contracts, protecting themselves against recurring problems that can lead to litigation. When they must testify, they should be held to a high level of candor.

Part I of this Article is a brief discussion of the parol evidence rule and its motivations. Part II looks more closely at the motivating values—the reduction of perjury, the reduction of reliance on faulty memories, and distrust for juries—in light of recent advances in psychology and linguistics. Part II concludes that there is good reason for maintaining the parol evidence rule, although the distinction between forgetting and lying is not as sharp as the legal system would have it. On the other hand, uncertainties about the meaning of language, also part of the legal system's intuitions about the parol evidence rule, call for a weaker version of the rule in some circumstances. The result is an intractable tension between fostering bad decision making on the one hand (by forcing fact finders to rely on less context than is needed to fully understand the relationship between the parties), and creating an opportunity for inaccurate testimony on the other.

Part III discusses the safe harbor for sharp business practices that results from any version of the rule that permits businesses to promote products and services subject to a subsequent, integrated agreement that the other party did not read or understand when entering into a transaction. The point is illustrated with a discussion of credit card solicitations, shrink-wrap contracts, and disputed promissory notes.

Part IV is a conclusion. I do not recommend doing much to change the parol evidence rule, which really does function to increase reliance on actual agreements and to discourage bogus disputes. However, I do recommend much more aggressive regulation of the two safe harbors that it creates: sharp or dishonest precontractual representations, and false testimony to the extent that testimony is allowed.

I. THE PAROL EVIDENCE RULE AND THE WRITTEN TEXT

One way to avoid dishonest behavior in the resolution of business disputes is to encourage the parties to put their agreement in writing, and to limit the dispute resolution process to what the written agreement says. This, of course, is just what the parol evidence rule does. 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."[4]

The purpose of the rule is to improve the resolution of business disputes by reducing the judicial system's reliance on potentially faulty memories; by reducing the likelihood of perjured testimony; by reducing the amount of testimony altogether; by putting more decision making in the hands of judges, who are more likely than jurors to bring uniformity to the decision making process, and thus predictability to business transactions; and by creating incentives for those engaging in transactions to put their agreements in integrated writings, thus reducing both the costs and the uncertainty of dispute resolution.[5] The New York Court of Appeals presents a fairly typical rationale:

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses[,] infirmity of memory and the fear that the jury will improperly evaluate the extrinsic evidence.[6]

Each of these goals makes good sense, which is probably why the parol evidence rule has remained a principle of law since at least 1604,[7] and probably earlier. As one article has put it, "[t]he rule may

4. Helen Hadjiyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 FORDHAM L. REV. 35, 36 (1985). See U.C.C. §§ 2-202, 2A-202 for some current revisions of the rule.

5. *See* Justin Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036, 1049–51 (1968); Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1386–87 (1983).

6. W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990).

7. The parol evidence rule is often traced back to *The Countess of Rutland's Case*, 77 Eng. Rep. 89 (K.B. 1604).

> [E]very contract or agreement ought to be dissolved by matter of as high a nature as

have survived the disappearance from our law of other vestiges of formalism because a written contract furnishes more reliable evidence of the terms of an agreement than does the parties' oral testimony, which may be the product of faulty memory, wishful thinking, or outright prevarication."[8] The rule has the added advantage of putting certainty into commercial dispute resolution by reducing the role of the jury.[9]

The conceptual move that launched the rule seems quite natural today: The written agreement is not merely a memorandum that summarizes understandings between people. Rather, the document constitutes the agreement itself.[10] Peter Tiersma points out that this reconceptualization was part of a larger movement from oral to written law, which included not only the Statute of Frauds,[11] enacted in 1677, but also an earlier shift in the interpretation of statutes, which occurred as the result of the invention of the printing press and the growth of literacy.[12] 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. This is where theory and practice diverge.

> the first deed.... Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.

77 Eng. Rep. at 90. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899 n.73 (1985) ("Chief Justice Popham's observations in The Countess of Rutland's Case became proverbial, and others generalized them to include written documents of a noncontractual nature." (citations omitted)).

8. Metzger, *supra* note 5, at 1386.

9. *Id.*

10. *See, e.g.*, KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN LAW OF CONTRACT 88–89 (1990).

11. For discussion of the application of the statute of frauds in contemporary business disputes, see Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996).

12. For discussion of the broader history, see PETER M. TIERSMA, LEGAL LANGUAGE 36–40 (1999). For discussion of statutes as autonomous texts, see Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy and Statutory Interpretation*, 72 TUL. L. REV. (forthcoming December 2001).

As for the parol evidence rule itself, one scholar after another begins discussion with a statement of frustration about the incoherence of its application.[13] Wigmore's statement is typical: "[T]he so-called parol evidence rule is attended with confusion and obscurity which make it the most discouraging subject in the whole field of evidence."[14] In this Article, I will neither attack the rule, as has been a tradition,[15] nor attempt to fine-tune it in order to bring theory and practice in closer harmony.[16] Instead, my goal is to examine some practices in both the business world and the courtroom that result from a legal system that places so much weight on the written text. I will do so in light of some of what we have discovered in recent years about language and psychology, and in light of the rule's stated justifications.

II. JUSTIFICATIONS FOR THE PAROL EVIDENCE RULE: A PSYCHOLINGUISTIC CRITIQUE

This Part of the Article will examine the goals of the rule in light of some advances in the study of language and the study of social psychology, to see how well-suited the rule is for its intended purposes.

Some of the findings are not remarkable. For example, traditional scholars' intuitions about the frailty of human memory were basically correct. People are terrible at recalling exactly what was said, but are somewhat better at recalling the gist of what was said.[17] However, they recall gist as filtered through mental models that may distort the truth about what actually happened. As for perjury, much of the concern has been about protecting the firm against consumers and others who are willing to prevaricate. I accept this concern as legitimate. In addition, however, recent work in social psychology has focused on how incentive systems within the modern firm often

13. *See, e.g.*, James B. Thayer, *The "Parol Evidence" Rule*, 6 HARV. L. REV. 325 (1893) ("Few things in our law are darker than this, or fuller of subtle difficulties."); Sweet, *supra* note 5, at 1036, 1037; 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 582, at 455 (2d ed. 1960) ("It would have been far better had no such rule ever been stated.").

14. 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 4 (1981).

15. For example, the Law Commission has recommended that the rule be abandoned entirely in the United Kingdom. For discussion, see J. BEATSON, ANSON'S LAW OF CONTRACT 131 (27th ed. 1998).

16. *See* Posner, *supra* note 2.

17. *See* Jacqueline Strunk Sachs, *Recognition Memory for Syntactic and Semantic Aspects of Connected Discourse*, *in* 2 PERCEPTION & PSYCHOPHYSICS 437 (1967).

strengthen temptations to act dishonestly when the stakes are raised.[18] The data come from stories of corporate wrongdoing outside the courtroom, but we will see that the worst features of these incentive systems are typically at play when businesses enter the world of litigation.

On the other hand, there is a problem with an absolute bar on parol evidence that the law already recognizes. The human language faculty is in some ways fragile, so that contractual language that seemed clear when it was written can sometimes later be susceptible to inappropriate and unforeseen interpretations.[19] Thus, it might be necessary to examine context in order to interpret sensibly language that seemed clear at first glance. This is the position that Corbin took more forcefully in response to Williston.[20] It is the position taken by many courts, including courts in Illinois.[21] It is the position of Judge Posner,[22] and it is the position worked out recently by Eric Posner,[23] who has argued for relaxing the parol evidence rule most when the risk of error is greatest.

These two sets of observations about cognitive capacity involve tradeoffs. To the extent that the parol evidence rule adds certainty to legal interpretation, reducing its strength compromises certainty. To the extent that the rule eliminates incentives for perjury and negates the effect of poor memory on the litigation system, reducing its strength compromises these advantages as well. But the situation is even worse, as Claire Hill has pointed out.[24] Hill discusses contractual

18. *See, e.g.*, CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS (David M. Messick & Ann E. Tenbrunsel eds., 1996); SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS (John M. Darley et al. eds., 2001).

19. Sometimes, courts discuss this issue by drawing a distinction between "patent" and "latent" ambiguity. As the Fifth Circuit has recently stated: "A patent ambiguity is evident on the face of the contract. A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter." Constitution State Ins. Co. v. Iso-Tex Inc., 61 F.3d 405, 408 (5th Cir. 1995).

20. *Compare* 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 631, at 948–51 (3d ed. 1961), *with* 3 CORBIN, *supra* note 13, § 573, at 357. For discussion of this history, see Hadjiyannakis, *supra* note 4, at 45–55.

21. *See, e.g.*, Ahsan v. Eagle, Inc., 678 N.E.2d 1238, 1241 (Ill. App. Ct. 1997); Meyer v. Marilyn Miglin, Inc., 652 N.E.2d 1233, 1238 (Ill. App. Ct. 1995).

22. *See* Fed. Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614, 620 (7th Cir. 1989). Judge Posner uses the terms "intrinsic ambiguity" and "extrinsic ambiguity" to capture the notion of context-dependence. *Id.*

23. Posner, *supra* note 2.

24. Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 CHI.-KENT L. REV. 29 (2001).

language in the framework of relational contract theory.[25] In some contracts, especially complex contracts between large firms, the people performing the contract are not fully familiar with the contractual language.[26] The contract is a combination of boilerplate and negotiated terms that lawyers drafted with particular contingencies in mind that may be remote from anything that is at stake in a particular dispute. Here, where there is most likely to be a need for parol evidence because of the complexity of the situation, parol evidence has the least to offer, especially regarding the proffered testimony of those whose job it is to perform the contract. All of this leaves us with some good doctrine, with some intractable problems, and with some problems whose solution must lie outside the realm of evidentiary rules.

A. Forgetting and Lying

A frequent justification for the parol evidence rule, as stated earlier, is the desire to improve the resolution of business disputes by creating a process that is relatively free from unreliable types of evidence, from the whims of jurors,[27] and from dishonesty. I deal with memory and lying here.

1. Forgetting and Reconstructing Reality[28]

Basically, we remember two seconds of verbatim speech.[29] What happens with the information after the actual words cannot be recalled is still a matter of active research and debate among psychologists of language. But the fact that the actual words remain with us only briefly is uncontroversial.

25. *Id.* For recent discussion of relational contract theory, see Symposium, *Relational Contract Theory: Unanswered Questions: A Symposium in Honor of Ian R. MacNeil*, 94 NW. U. L. REV. 737 (2000); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737; Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

26. Hill, *supra* note 24, at 34–42.

27. Although juror reliability has been a theme for hundreds of years, the matter has not been studied empirically, to the best of my knowledge. We have no idea, for example, how often juries are likely to side with the weaker party when that party's position is not legally meritorious. Recent research indicates that in the context of tort suits, such concerns are not in keeping with the facts, which indicate juries decide cases consistent with expectations of the business community most of the time. *See* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000).

28. This discussion is from LAWRENCE M. SOLAN & PETER M. TIERSMA, LANGUAGE ON TRIAL (unpublished book manuscript, on file with author).

29. For discussion, see ALAN BADDELEY, HUMAN MEMORY: THEORY AND PRACTICE (1990).

In one early study, Jacqueline Sachs[30] read various passages to subjects. One of the sentences in each passage was the target sentence. After the passage was completed, the experimenter presented subjects with another sentence—the test sentence. The test sentences were either the same as the target sentence, different from the target sentence only in form but not in substance, different in substance, or different in whether the sentence was in the active or passive voice. For example, for the target sentence, "*He sent a letter about it to Galileo, the great Italian scientist*," the test sentences were:

1. He sent a letter about it to Galileo, the great Italian scientist. (Same)
2. He sent Galileo, the great Italian scientist, a letter about it. (Form)
3. Galileo, the great Italian scientist, sent him a letter about it. (Substance)
4. A letter about it was sent to Galileo, the great Italian scientist. (Passive)[31]

Subjects were asked to say whether the test sentence was one that they had heard in the passage, and how certain they were about it. When asked to answer immediately after hearing the target sentence (i.e., when the target sentence was the last one in the passage), subjects were correct between 85 and 95 percent of the time, depending on the condition. When asked after hearing an additional sixty syllables of the passage, they continued to perform well (about 80 percent correct) on only the test sentence whose meaning had changed (sentence three in the example given above). When 180 syllables of passage intervened between the target sentence and the test sentence, subjects still were correct more than 70 percent of the time in recognizing that the semantically altered test sentence was one that they had not heard, but performed only slightly better than chance on the others.[32] This shows that we do pretty well recalling the gist of what we hear, but cannot reliably recognize the exact words even a few moments later.

But while we are better at recalling the gist of what was said, we are not really great at that either. For example, Amina Memon and A. Daniel Yarmey examined how different interview techniques affect recall.[33] Subjects listened to seven minutes of a monologue

30. Sachs, *supra* note 17.
31. *Id.* at 439.
32. *Id.* at 441.
33. Amina Memon & A. Daniel Yarmey, *Earwitness Recall and Identification: Comparison*

recorded on tape. Two days later, they returned to answer questions about what was said, and to try to identify the voice they had heard. Subjects only remembered an average number of details ranging from 13.10 to 16.20, depending on the interview technique that solicited their responses.[34] They also erroneously recalled an average of about 1.25 details that were never said. The authors concluded: "Witnesses had a difficult time recalling details about the 7-minute monologue, even though the retention interval was only two days."[35]

To make matters worse, in recalling events listeners are very suggestible. This was the point of an important study by Elizabeth F. Loftus and John C. Palmer.[36] People were shown a film of a car accident and then asked questions about it. Depending on how the questions were asked, subjects remembered what they had seen differently when asked to retell the story a few weeks later.[37]

Imagine, then, what happens when a corporate executive is interviewed by lawyers about the circumstances surrounding the execution of a contract that is now in litigation. Assume that the executive is basically an honest person, but has only sketchy memory of the events. The lawyers brief their client on how the case seems to be coming together and ask—quite in earnest—whether the executive recalls facts relating to the negotiation that can be helpful. Much of the time, I submit, that executive's memory will be appropriately jogged, and he will testify at the deposition to the events the lawyers want to hear as though they had just happened yesterday. This is not because he is a liar. It is because he has reconstructed the story in such a way as to integrate helpful scenarios into the parts of the story that he actually remembers. I recall such experiences from my own practice as a litigator, and I have interviewed corporate lawyers in connection with this project whose recollections also accord with this view.

Note how much more difficult the situation gets when we are dealing with parties who, along the lines of Hill's discussion, never knew much about the language of the contract.[38] Once in a while,

of the Cognitive Interview and the Structured Interview, 88 PERCEPTUAL AND MOTOR SKILLS 797 (1999).

34. *Id.* at 802.

35. *Id.*

36. Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974).

37. *Id.*

38. *See* Hill, *supra* note 24.

someone admits as much in a litigation.[39] But if the witness does not, then most of the testimony will be a matter of reconstructing reality. This means that there will indeed be a great deal of inaccuracy in testimony, even when people mean no harm.[40] This is a function of human nature and the litigation system generally, not a function of the parol evidence rule. But to the extent that the rule disallows testimony in some circumstances and allows it in others, it will channel the situations in which these problems arise.

2. Lying

I do not have any idea how often litigants lie on the stand. But I know they do. I have seen it. In my thirteen years as a litigator of commercial disputes, I saw my clients lie, and I saw opposing parties lie.[41] The extent to which people behaved dishonestly in commercial litigation was one of the most surprising and depressing observations in my years of legal practice.

While written contracts serve to facilitate the smooth resolution of disputes, additional considerations about honesty should be confronted when it comes to business litigation. Social psychologists have, over the past decade, identified incentive systems within the corporate structure that appear to encourage sharp practices and dishonesty. Recently, various anthologies of studies about corporate ethics have been published.[42] Serious acts of wrongdoing committed by business executives are seen not as the isolated acts of bad people, but rather as the predictable consequences of pressures and incentives in today's corporate culture. Among the most interesting of this work is that of John Darley.[43]

Darley argues that a number of factors in the routine of corporate life contribute to employees succumbing to the temptation to act corruptly. Among them are: diffusion of information; diffusion and fragmentation of responsibility; sunk costs; the opacity of ethical

39. "Miglin also testified that he was 'not concerned too much about the language' in the purchase order, even though it did not expressly state that no payment would be due if a suitable version of the photograph was not created. He thought that the parties understood one another." Meyer v. Marilyn Miglin, Inc., 652 N.E.2d 1233, 1237 (Ill. App. Ct. 1995).

40. *See, e.g.*, Loftus & Palmer, *supra* note 36, at 585.

41. Like most lawyers, I generally believed that the opposing parties and their witnesses were lying more.

42. *See* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 18; SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS, *supra* note 18.

43. *See* John M. Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 18, at 13.

implications of decisions; and the fact that the individual facing concrete decision options in the organization, once ethical issues are visible, must function within a hierarchical structure on which that individual depends for his livelihood.

For example, some companies socialize their employees to "come to the perception of their customers as fools to whom no moral obligations are owed."[44] When this happens in the securities industry, for example, it can lead to a mentality in which customers are seen to deserve their plight of being sold bad investments. Darley uses a scandal at Salomon Brothers to illustrate this point.[45] Other incentives include fearing the consequences of backing away from a set course of action, and fear of reprisal. Once a company has committed substantial resources for a project, sometimes even betting its future survival, the incentives to tailor one's narrative to conform to the party line become enormous. This mindset offers a partial explanation for the LTV scandal, in which the B.F. Goodrich Corporation knowingly sold defective brake systems to an aircraft manufacturer and committed itself to the viability of a technology that was unable to perform the function for which it was designed.[46] In addition, the individual employee's sense of self-interest and job survival can lead him to do wrong not only by following an order, but may even induce him to do wrong in advance of such an order. Such an order may be an attempt to avoid putting his superior on the spot in ordering the wrongdoing or, alternatively, out of a fear of being perceived as lacking initiative. Throughout, the employee pays attention to what happens to others in similar situations.[47]

Robert Cialdani suggests other factors on the employee's mind. These include: reciprocation, commitment/consistency, social validation, friendship, respect for authority, and scarcity.[48] George Lowenstein adds immediacy effects and a lack of self-awareness to the list of factors that make corrupt business practice more likely.[49]

44. *Id.* at 37.

45. *Id.*

46. *Id.* at 28–36.

47. *See* John M. Darley, *The Dynamics of Authority Influence in Organizations and the Unintended Action Consequences*, *in* SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS, *supra* note 18, at 37.

48. Robert B. Cialdani, *Social Influence and the Triple Tumor Structure of Organizational Dishonesty*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 18, at 44.

49. George Lowenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-offs Between Self and Other*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, *supra* note 18, at 214; *see also* John M. Conley & William M. O'Barr, *Crime and*

How do these components of everyday social psychology make their way into the litigation system? Consider this hypothetical situation. A television network signs an agreement with a sports league to televise the league's games for a three-year period. By the end of the first year, it is clear that the agreement was a bad one. No one is watching the games. The person at the network who made the deal is in hot water. He and his superiors want to sue the league to get the network out of the contract so that it will not have to broadcast games in future years. It is difficult to imagine a situation with more incentive for the executive to tell a story of negotiations consistent with what the network wants him to say.

Much of the literature dealing with issues of dishonesty and the parol evidence rule concerns external incentives.[50] Lisa Bernstein's distinction between what she calls "relationship-preserving norms" ("RPNs") and "end-game norms" ("EGNs") provides insight into this dynamic.[51] Bernstein observes:

> There is empirical evidence from a variety of contracting contexts that suggests that merchants behave in ways that reflect an implicit understanding of the distinction between end-game and relationship-preserving norms and that they do not necessarily want the RPNs they follow during the cooperative phase of their relationship to be used to resolve disputes when their relationship is at an end-game stage.[52]

Bernstein was writing about the Uniform Commercial Code's reliance on custom and usage in resolving disputes. But there are other relationship-preserving norms that become less significant when a relationship is shot. Honesty is one. Parties who are extremely angry at each other and no longer have a stake in acting honorably for the sake of maintaining the other party's trust are more likely to succumb to temptations to lie or cheat than are parties who remain concerned about their relationship with the other party. Of course, businesses still care about their reputations in the community, and may well care about their relationships with opposing litigants when the relationship involves many contracts for various goods and services. Nonetheless, litigation is certainly an end-game circumstance, and honesty a relationship-preserving value.

Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 5 (1997).

50. *See, e.g.*, Posner, *supra* note 2.

51. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

52. *Id.* at 1798.

Social science research shows that in end-game situations, people are less cooperative and more competitive when they are acting as part of a group than when they are acting on their own behalf. In a series of studies, psychologists Chester Insko, John Schopler, and their colleagues have used a prisoners' dilemma game to develop this finding. "In the prisoners' dilemma, two reciprocally-situated parties might be able to gain from mutual cooperation, but each is afraid to cooperate because there is a high penalty attached to cooperating if the other party does not."[53] Subjects in Insko and Schopler's study were asked to play a matrix game, in which the total scores tend to go up in the long run if the two sides play cooperatively, and tend to go down if they play competitively.[54] Participants playing on behalf of groups routinely exhibited fewer cooperative responses, significantly more competitive responses, and lower scores than did people playing as individuals.[55] The authors attribute this to an increase in fear and greed in the context of intergroup dynamics. People believe that groups are more competitive and less trustworthy than are individuals, and therefore are less willing to risk cooperating for fear that they will be undermined.[56] At the same time, membership in a group reinforces "support for competitive greed directed toward outgroups, and that such learned beliefs are sufficient to produce the behavior even in the absence of active social support."[57]

In a subsequent study,[58] some of the subjects were told that the game that they were about to play would be their only game, and others were told that they would be interacting with their opponent at the game six to eight times. In reality, all participants only played once.[59] Again, some subjects played as individuals, others as members of a group. The results showed a significant reduction in the number of competitive responses in the group condition for those subjects

53. Wendy J. Gordon, *Assertive Modesty: An Economics of Intangibles*, 94 COLUM. L. REV. 2579, 2585 n.31 (1994). The prisoners' dilemma is closely associated with the tragedy of the commons. *See, e.g.*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 620 (1998).

54. *See* ANDREW M. COLMAN, GAME THEORY AND ITS APPLICATIONS IN THE SOCIAL AND BIOLOGICAL SCIENCES 115–18 (2d ed. 1995). (My thanks to Chester Insko for bringing this work to my attention.)

55. Chester A. Insko et al., *Individual-Group Discontinuity as a Function of Fear and Greed*, 58 J. PERSONALITY & SOC. PSYCHOL. 68 (1990).

56. *Id.* at 78.

57. *Id.*

58. Chester A. Insko et al., *Interindividual-Intragroup Discontinuity Reduction Through the Anticipation of Future Interaction*, 80 J. PERSONALITY & SOC. PSYCHOL. 95 (2001).

59. *Id.* at 100.

who expected multiple encounters with their opponent. The authors attribute this difference to an increase in trust that results from the anticipation of working with the opponent in repeated situations. They hypothesized that "with additional trials, participants might recognize that mutual trust could produce mutual benefit and also that anticipated conduct could, in itself, produce assumed mutual trust."[60]

The authors of the study hypothesize that the fear component of competitiveness comes primarily from outside the group.[61] Yet in the litigation context, internal relations within the firm no doubt play an important role.[62] Not only is there less reason to act honorably toward the opposing party at a time of war, but, as discussed earlier, corporate officers are likely to be concerned about their positions within their own firms in deciding how to act in the context of a litigation over one of their contracts. This is the case even when the firm itself is concerned not only about the litigation, but also about being able to maintain a continuing relationship with the opposing party. The litigation may be seen in part as a relationship-preserving event for the firm, but for the officer whose judgment led to the dispute, it is much more an endgame situation.[63] What this means is that whatever opportunities are left for testimony after applying the parol evidence rule are likely to provoke some level of dishonesty, both by consumers against the firm, and by the firm itself.

B. Parol Evidence and the Frailty of the Language Faculty

Much of the debate about the parol evidence rule over the decades has been about its scope. Among the debated issues are: the need for extrinsic evidence when a judge determines that the contract was ambiguous; the need for extrinsic evidence when a court finds that the contract was not intended to be the entire agreement between the parties; the kind of proof of integration upon which a court should rely; and whether a court should look provisionally at

60. *Id.* at 109. The authors also found that the extent to which the participants were abstract thinkers produced more cooperative behavior in response to anticipated future interaction.

61. Insko et al., *supra* note 55.

62. For application of the prisoner's dilemma to the conduct of litigants, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994) (discussing external sources of noncooperative conduct).

63. Darley writes about fragmentation of responsibility as a source of corporate corruption. *See* Darley, *supra* note 43, at 17–21.

evidence to see whether what appeared at first glance to be a clear agreement is not really clear upon further reflection. As noted in the introduction, this is often discussed in the literature as the battle between Williston's formalism and Corbin's contextualism.[64]

The stakes in this debate are high. The worse our linguistic capacity, the more need there is for context, and the more opportunity there is for forgetting, reconstructing and lying. The better the language faculty, the less the need to take these problems into account. While scholars have written about the parol evidence rule's differential applicability in different circumstances,[65] the literature contains no analysis of the kinds of language problems that arise in parol evidence rule cases. What kinds of ambiguities do litigants claim occur in legal documents?

I have surveyed recent cases from Illinois and California[66] in which parol evidence was admitted during the past decade to see what went wrong linguistically that caused the court to conclude that ambiguities existed. The findings are interesting.

Many of the problems are about the goodness of fit between particular words in the contracts and the events that occurred in the world. For example, one Illinois case addressed the question of whether lead paint should count as a "contaminant" for purposes of construing a general liability insurance policy.[67] The court held that the word in the policy was susceptible to a range of interpretations, and therefore permitted extrinsic evidence to decide the matter. Another asked whether a transfer between spouses should count as a "sale" that triggers the obligation to pay a real estate broker.[68] Such problems are conceptual, and occur simply as a result of being human. We use words with their ordinary or prototypical meanings in mind, and often have to decide in everyday life whether a situation that strays from the prototype, but is not very remote from the prototype conceptually, should be included within the concept. As

64. In an extremely interesting article, Ross and Tranen adapt the arguments made in favor of contextualizing the parol evidence rule in this way to the debate over textualism in statutory interpretation. *See* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998).

65. *See* Robert Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1 (1972); Michael A. Lawrence, Comment, *The Parol Evidence Rule in Wisconsin:* Status in the Law of Contract, *Revisited*, 1991 WIS. L. REV. 1071; *see also* Posner, *supra* note 2.

66. In California, the parol evidence rule is statutory. CAL. CIV. PROC. CODE § 1856 (West 1983).

67. Ins. Co. of Ill. v. Stringfield, 685 N.E.2d 980 (Ill. App. Ct. 1997).

68. Foxfield Realty, Inc. v. Kubala, 678 N.E.2d 1060 (Ill. App. Ct. 1997).

Steven Winter demonstrates,[69] such problems will always occur in legal debate, and we can only resolve them by reference to context.

Other cases involve contradictory terms. The contract appeared to say both X and not X, and the court needed to resort to extrinsic evidence to resolve the dispute, using such information as how the parties actually conducted themselves in performing the contract. For example, one Illinois case discussed a note which clearly was designated as a "demand note," but which incorporated by reference another document that set forth specific conditions constituting a default.[70] Another involved a contract containing apparently inconsistent statements about the treatment of confidential information upon contract termination.[71] A third allowed parol evidence when the contract first imposed a duty on a general contractor to be solely responsible for coordinating all the work on a project, but later exculpated the general contractor from liability resulting from the acts of subcontractors.[72] A California court allowed parol evidence when a contract for an option to purchase real estate contained one provision removing what appeared to be the remaining contingencies, and another referring to a later date.[73]

Many disputes involve allegedly omitted terms.[74] Something has happened and the contract seems to say nothing about it. Is that because the contract intentionally gave the plaintiff no rights with respect to the event, or is it because the contracting parties simply assumed the outcome? Fights over contract termination clauses provide a rich source of examples. A contract permits termination on, say, six months' notice. Then, the party who does not want the contract terminated brings an action claiming that the parties had agreed that there would be no termination absent good cause. Should that party be permitted to introduce evidence to that effect? Courts go both ways on the issue, but are typically fairly generous in allowing the evidence when the contract is silent on the issue of cause,[75] and do

69. *See* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

70. N.W.I. Int'l, Inc. v. Edgewood Bank, 684 N.E.2d 401 (Ill. App. Ct. 1997).

71. Quality Lighting, Inc. v. Benjamin, 592 N.E.2d 377 (Ill. App. Ct. 1992).

72. A.W. Wendell & Sons, Inc. v. Qazi, 626 N.E.2d 280, 292 (Ill. App. Ct. 1993).

73. WYDA Assocs. v. Merner, 50 Cal. Rptr. 2d 323, 327 (Cal. Ct. App. 1996).

74. *See* Hadjiyannakis, *supra* note 4.

75. *See e.g.*, Varni Bros. v. Wine World, Inc., 41 Cal. Rptr. 2d 740 (Cal. Ct. App. 1995); Hayter Trucking, Inc. v. Shell Western E & P, Inc., 22 Cal. Rptr. 2d 229 (Cal. Ct. App. 1993); Esbensen v. Userware Int'l, Inc., 14 Cal. Rptr. 2d 93 (Cal. Ct. App. 1992).

not allow parol evidence when the contract specifically permits termination even without good cause.[76]

Contract theorists have proposed that courts fill in missing contractual terms by establishing default rules that will apply in contract interpretation if the parties do not specify their agreement to other terms.[77] In fact, the "omitted term" cases provide the greatest opportunity for inaccurate testimony at trial. It is easy to imagine a party reconstructing in his own mind the negotiation of a contract to suit the party's position in litigation. The philosopher H. Paul Grice suggested that people routinely draw inferences from conversation to resolve ambiguities and to fill gaps in ways that result in cooperative conversation.[78] A witness might construct a narrative that self-servingly includes the implicature that will help his party's cause. That is especially true when the actual facts were not well remembered in the first place.[79]

In contrast, it is difficult to find cases in which syntax is much of an issue. The closest I came in my review of cases from these two states during the 1990s were cases involving ambiguity of reference. One Illinois case involved a contract with the following clause:

> Work performed by [subcontractor] shall be in strict accordance with all applicable plans, general conditions, specifications, and addenda thereto, and [subcontractor] is bound by all provisions of these documents and also all other documents to which [contractor] is bound, and to the same extent.[80]

The question was whether an insurance policy counted as one of the documents. Similarly, a case from California depended upon the meaning of "Star Trek."[81] When Gene Roddenberry, the creator of

76. Heller v. Pillsbury Madison & Sutro, 58 Cal. Rptr. 2d 336 (Cal. Ct. App. 1996); Haggard v. Kimberly Quality Care, Inc., 46 Cal. Rptr. 2d 16 (Cal. Ct. App. 1995); Mktg. West, Inc. v. Sanyo Fisher (USA) Corp., 7 Cal. Rptr. 2d 859 (Cal. Ct. App. 1992).

77. This literature is voluminous. For an important early work, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). For an interesting recent article that deals with cognitive biases in contract formation that can lead to gaps in contractual language, see Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998). For a critical assessment of some of the foundations of the theory governing contractual gaps, see Roy Kreitner, UNFINISHED STORIES—THE NARRATIVES OF INCOMPLETE CONTRACTS (2001) (unpublished manuscript, on file with The Chicago-Kent Law Review and Brooklyn Law School).

78. H. Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975).

79. See *supra* text accompanying notes 27–39 for discussion of how failed memory and wishful thinking combine to produce inaccurate recollections of past events.

80. Pepper Constr. Co. v. Transcon. Ins. Co., 673 N.E.2d 1128 (Ill. App. Ct. 1996).

81. Roddenberry v. Roddenberry, 51 Cal. Rptr. 2d 907 (Cal. Ct. App. 1996).

Star Trek, died, his first wife sued the estate to enforce the terms of their divorce agreement. The agreement had given her "one-half interest in all future profit participation income from 'Star Trek' to which [she] and/or [Gene Roddenberry] are entitled."[82] The question in that case was whether "Star Trek" included only the original television series, which was the only one that existed at the time of the divorce, or whether it also included subsequent series for which Mr. Roddenberry was entitled to compensation. The court admitted parol evidence to help decide the issue.[83]

Our linguistic capacities, then, are limited in some ways, but are robust in others. The linguistic literature strongly suggests that a great deal of meaning is fixed fairly well through the application of syntactic rules and constraints that we apply automatically and unselfconsciously with enormous rapidity. Analysis of the kinds of disputes that recur in both contract law and statutory interpretation bear this perspective out. For example, an analysis of cases decided under the federal bribery statute shows cases disputing the applicability of almost every word in the statute in one case or another, but very few cases dealing with linguistic ambiguity resulting from ambiguous syntactic structure.[84] Much the same seems to be true when it comes to disputes over the meanings of contracts, a similarity that should not be surprising.[85] What this means is that we should expect written contracts to go a long way toward recording the understanding between parties, but that there will necessarily be a residual amount of uncertainty, and there will even be a residual amount of uncertainty over whether there is uncertainty.

III. THE SAFE HARBOR FOR UNSAVORY PRECONTRACTUAL PRACTICES

This Part of the Article will examine three situations in which the system provides incentives for sharp practices prior to execution of a contract. The examples are credit card operations, shrink-wrap contents and promissory notes.

82. *Id.* at 910.

83. *Id.* at 916.

84. Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great: Words and Rules in Legal Interpretation*, 26 LAW & SOC. INQUIRY 243, 245–48 (2001).

85. For discussion of the relationship between issues in contractual and statutory interpretation, see Ross & Tranen, *supra* note 64.

A. Consumer Credit Agreements

My household receives about ten credit card applications per week. The current fad is to advertise a low, "introductory" interest rate, typically for three or four months, and typically from zero to 3 percent. Often, these interest rates are circled in red, or otherwise highlighted. All you have to do is sign the application, which indicates your agreement to abide by the terms of the credit agreement, some of the terms of which are located on the back of the application in small print. The front of the form—the part that contains the introductory interest rate—rarely says what the rate will rise to after the introductory period has expired.[86] It does not make clear whether the low rate applies either to credit transfers and new loans, or just to transfers. Nowhere is there an analysis of what finance charges you will actually pay if you make only the minimum payments. That is, nowhere do they tell you, either in the application or in subsequent bills, how long each loan is calculated to be.

Much of what is on the back is complex, very difficult to read, and relatively uninformative. Some applications do not even say what the actual interest rate will be, because the interest rates float with an index, usually the prime rate. Regulations require that in these instances the current rate be disclosed,[87] but it is often hard to find that rate, since it is discussed outside the table containing the basic information.

To illustrate, I recently received two letters indicating that I have been pre-approved to receive a platinum credit card. One circular[88] begins with the words, "You're Pre-Approved! The G.E. Select Platinum MasterCard. . . . A reflection of the quality, innovation and spirit of G.E." These words are in italics and boldface. The text of the letter again tells me that I have been "Pre-Approved for the exceptional GE Select Platinum MasterCard—the card endorsed by GE." It then explains various benefits associated with the card, including a 1.9 percent introductory APR. One would have to look closely to notice that the text contains footnotes. The actual notes are in small print on the back of the document, just before various disclosures, which are also in small print. Note 1 says: "In some

86. Those with lower subsequent rates are more likely to disclose the later rate in large print.

87. 12 C.F.R. § 226.5 (2001).

88. G.E. SELECT PLATINUM MASTERCARD CIRCULAR (on file with author and the Chicago-Kent Law Review) [hereinafter G.E. MASTERCARD CIRCULAR].

instances, we may not be able to open an account for you. Please see the 'Notice Regarding Pre-Approved Offer' for details." The second note discloses, "the APR for cash advances is a variable rate, currently 19.99%." The introductory rate apparently applies to balance transfers and purchases only—not to cash advances. Moreover, the lower credit rate, which stays in effect for about seven months, only applies if the applicant transfers a credit balance as part of the application. This requirement, however, is also disclosed on the front of the application in readable print. The third note says: "In certain instances, you may receive a Standard card with a credit line of up to $5,000."

What can one make of these disclosures? Apparently, I've been pre-approved for a platinum credit card, but the bank reserves the right to give me a different card or no card at all if I do not meet certain criteria based on its review of my "credit history, income and the information that [I] provide."[89] The notice explains: "You were selected for this offer because, based on your credit record maintained by credit bureaus you meet the criteria we established for the offer."[90] In other words, "pre-approved" means targeted for this advertisement, but subject to a review of my credit-worthiness. I doubt that anyone receiving this notice would understand the word "pre-approved" that way based on everyday experience.

The second "pre-approved" application is the more bizarre of the two. The disclosures on the back are similar. The introductory rate on the front is zero percent with no disclosure of what the fixed rate will be. What is strange is the text, which reads in part:

> You have been pre-approved for this Capital One Platinum MasterCard with exclusive Platinum-level benefits, a credit line up to $5,000 and a **0% introductory APR on all purchases** until December 2001. After that, you will have a fixed purchase rate of 14.9%. No security deposit is required and the application is absolutely free. If you are not approved for a Platinum MasterCard, you will automatically be considered for a Gold MasterCard. (See reverse for additional information). [91]

What it means to have been "pre-approved" for a credit card for which you may not be approved is an unexplained mystery.

89. *Notice Regarding Pre-Approved Offer*, G.E. MASTERCARD CIRCULAR, *supra* note 88 (on file with author and the Chicago-Kent Law Review).

90. *Id.*

91. CAPITAL ONE PLATINUM MASTERCARD CIRCULAR (on file with author and The Chicago-Kent Law Review) (boldface type in original) [hereinafter CAPITAL ONE MASTERCARD CIRCULAR].

Credit card issuers can circulate such applications because they know that ultimately it is the written agreement that will govern, and the written agreement will have no such silly contradictions. The parol evidence rule comes into this picture once the borrower has agreed to abide by the credit agreement by signing the application or by using the credit card.[92] Once this happens, the misleading aspects of the application are made largely irrelevant as a matter of law. I do not argue, however, that we should do away with the parol evidence rule for consumer transactions. In fact, the banks are bound by the interest rates in their credit agreements, just as are the consumers.[93] My point is more limited: Heavy reliance on the written contract creates a safe harbor for this kind of sharp or dishonest business practice, and if we don't like that we should regulate the undesired consequences of the rule's application.

B. Shrink Wrap Contracts

To take another example, also involving consumers, consider Judge Easterbrook's controversial opinion in *Hill v. Gateway 2000, Inc.*[94] He describes the facts as follows:

> A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days. Are these terms effective as the parties' contract, or is the contract term-free because the order-taker did not read any terms over the phone and elicit the customer's assent?[95]

92. The first sample discussed here contains, again in small print, the following:

> You understand that the use of an account or any card issued in connection with this offer will constitute your acceptance of and will be subject to the terms and conditions of the First USA Cardmember Agreement that will be sent with the card. You agree to be responsible for all charges incurred according to the Cardmember Agreement. **You understand that the terms of your account are subject to change as provided in the Cardmember Agreement.**

G.E. MASTERCARD CIRCULAR, *supra* note 88 (boldface type in original).

The second application has the words, "I have read the IMPORTANT DISCLOSURES and Miscellaneous Information on the back of the letter and agree to be bound as specified therein." One of these disclosures on the back says, "I will receive the Capital One Customer Agreement and am bound by its terms and all future revisions." CAPITAL ONE MASTERCARD CIRCULAR, *supra* note 91.

93. There are numerous lawsuits against credit card issuers for violating the terms disclosed in the applications, usually brought under the Truth in Lending Act. *See, e.g.*, Demando v. Morris, 206 F.3d 1300 (9th Cir. 2000).

94. 105 F.3d 1147 (7th Cir. 1997).

95. *Id.* at 1148.

The question in *Hill* was whether an arbitration clause contained in the contract contained in the box was binding. The court held that it was, relying heavily on an earlier opinion by Judge Easterbrook, *ProCD, Inc. v. Zeidenberg*,[96] in which it was held that the terms in a software box bind the software user once he has begun using the software if he had the opportunity to reject the terms by returning the box.

While the parol evidence rule was not at issue in *Hill*, the rule is certainly lurking in the background. If the terms contained in the box include an integration clause, then whatever happened that led to the customer deciding to buy the computer in the first place will not be admissible in a subsequent dispute. This may even preclude evidence of fraud, although fraud is supposed to be an exception to the parol evidence rule. Some courts have held that "promissory fraud" is not an exception to the parol evidence rule[97] on the theory that "to do otherwise would tempt litigants, courts, and juries to transform every broken promise into a false promise."[98] While this position has been criticized sharply in the literature[99] and rejected by some courts,[100] it is not difficult to find cases in which courts apply this principle.[101]

Furthermore, most courts hold that the parol evidence rule trumps promissory estoppel, which means that there is a precontractual safe harbor for making promises that will not be kept.[102] This has been recognized as a problem in the scholarly literature. Professor Knapp writes about this situation as a "double reliance

96. 86 F.3d 1447, 1452 (7th Cir. 1996).

97. *See, e.g.*, Bank of Am. Nat'l Trust and Sav. Ass'n v. Pendergrass, 48 P.2d 659 (Cal. 1935).

98. 2 E. ALLAN FARNSWORTH, CONTRACTS § 7.4, at 217 (2d ed. 1990).

99. *See* Justin Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CAL. L. REV. 877 (1961) (suggesting that the court should overturn *Pendergrass* and allow all evidence of promissory fraud).

100. *See e.g.*, Dellcar & Co. v. Hicks 685 F. Supp. 679, 682 (N.D. Ill. 1988); Parker v. Columbia Bank, 604 A.2d 521, 529 (Md. App. 1992). 2 FARNSWORTH, *supra* note 98, states that "[m]ost courts treat promissory fraud like other types of fraud" for purposes of the parol evidence rule. A review of recent case law, however, suggests that courts are more divided on this issue. *Id.* at 217.

101. *See, e.g.*, Globe Metallurgical Inc., v. Hewlett-Packard Co., 953 F. Supp. 876 (S.D. Ohio 1996); Cong. Fin. Corp. v. John Morrell & Co., 790 F. Supp. 459 (S.D.N.Y. 1992); Alling v. Universal Mfg. Corp., 7 Cal. Rptr. 2d 718 (Cal. Ct. App. 1992).

102. *See, e.g.*, Davis v. Univ. of Montevallo, 638 So. 2d 754, 758 (Ala. 1994) ("Courts have been reluctant to permit the enforcement by the application of the doctrine of promissory estoppel of promises made contemporaneously with a completed contract, evidence of which promises comes within the prohibition of the parol evidence rule."); Prentice v. UDC Advisory Servs., Inc., 648 N.E.2d 146 (Ill. App. Ct. 1995); Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43, 52 n.3 (Iowa 1999).

problem," which may arise "when an agent with apparent authority to act generally with respect to a transaction makes promises or representations that conflict with the writing."[103] Because of the many exceptions to the parol evidence rule, it is not possible to conduct a reliable survey of all cases in which the two doctrines interact. As Professor Holmes points out, there exist cases in which courts either do not mention the parol evidence rule at all, or hold it inapplicable because the parol evidence itself indicates that the parties did not agree that the written agreement embodied the entire understanding of the parties.[104] Nonetheless, the weight of authority is heavily on the side of the parol evidence rule when the two doctrines clash directly.[105]

Judge Easterbrook's approach to contractual interpretation is currently under serious debate. Courts have come out on both sides of the issue,[106] and a growing literature, mostly critical, has been exploring the consequences of the decision.[107] In fact, one law review recently published an entire symposium on *Hill v. Gateway 2000*.[108] One point made by several scholars is that Easterbrook's opinion gives judicial approval to certain norms governing the conduct of business, especially over the telephone.[109] Professor Ghosh observes:

> The choice of norms also illustrates an attempt to decentralize norm creation. Future rules governing these transactions will be determined by contract terms that can be dictated by Gateway or

103. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1327 (1998). For additional discussion of the relationship between the parol evidence rule and promissory estoppel, see Metzger, *supra* note 5; *see also* Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 60–62 (1996).

104. *See* Holmes, *supra* note 103, at 61 (discussing Prudential Ins. Co. of Am. v. Clark, 456 F.2d 932 (5th Cir. 1972)).

105. *See* Knapp, *supra* note 103, at 1310–13.

106. *Compare* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (App. Div. 1998), *with* Novell, Inc. v. Network Trade Ctr. Inc., 25 F. Supp. 2d 1218 (D. Utah 1997).

107. *See, e.g.*, Mark E. Budnitz, *Consumers Surfing for Sales in Cyberspace: What Constitutes Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741 (2000); Walter A. Effross, *The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code*, 34 SAN DIEGO L. REV. 1263 (1997); Bernstein, *supra* note 51; Robert J. Morrill, Comment, *Contract Formation and the Shrink Wrap License: A Case Comment on* ProCD, Inc. v. Zeidenberg, 32 NEW ENG. L. REV. 513 (1998).

108. *See* Symposium, *Common Sense and Contracts Symposium*, 16 TOURO L. REV. 1037 (2000).

109. *See* Thomas Joo, *Common Sense and Contract Law: Fear of a Normative Planet?*, 16 TOURO L. REV. 1037 (2000); Shubha Ghosh, *Where's the Sense in* Hill v. Gateway 2000*?: Reflections on the Visible Hand of Norm Creation*, 16 TOURO L. REV. 1125 (2000); Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205 (2000).

> other sellers. Courts should defer to what companies define to be the practice regarding consumer transactions.[110]

Interestingly, part of Judge Easterbrook's rationale in the opinion was that Hill should have known that there would be additional terms because Gateway's advertisements refer to warranties without specifying their terms.[111] But Hill was claiming that the advertising was false and misleading—the components that came in the box did not match those specified in Gateway's advertisements.[112] Easterbrook, then, seems to be approving of business norms in which a great deal of the burden falls on the consumer. It is the buyer's obligation to draw inferences from advertisements about the terms of the transaction, but the seller will not necessarily be held responsible for misstatements in those same advertisements.

Whether or not one agrees with Judge Easterbrook's resolution of the particular cases he decided, the seller's conduct will not always be easy to paint in innocent terms. Consider the experience of deciding what computer to buy. 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.

Here again, by giving premium status to written contracts, the legal system creates a safe harbor for less than honorable business practices in advance. That is exactly what we should expect to have happen, given the enormous pressure to show profits and the internal incentive systems within firms.[113]

C. Promissory Notes

Consider the following scenario, which recurs in the case law with some frequency: Two firms are involved in a business relationship, and one owes money to the other for goods or services. The debtor company, in order to avoid more drastic action from the

110. Ghosh, *supra* note 109, at 1141.

111. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997).

112. Joo, *supra* note 109, at 1038.

113. Some of the advantage that companies have over consumers may be a matter of disparate conceptualizations that each side brings to the transaction. A consumer who looks at a purchase as a simple matter, modeled on buying an object at a store, may not consider the legal consequences of failing to pay attention to a set of unfamiliar rules dictated by the seller. *See* Beverly Horsburgh & Andrew Cappel, *Cognition and Common Sense in Contract Law*, 16 TOURO L. REV. 1091 (2000).

creditor company, signs promissory notes for the full amount due as of a date certain, either the date they are signed, or some future date. Perhaps the owner of the debtor firm signs on his own behalf as well as his company's behalf. The date on the note passes, and payment in full has not been made. The creditor company sues. The maker of the note for the debtor company tries to defend on the ground that he only signed the note on the promise that the creditor would not actually try to collect until the debtor had a chance to straighten out its financial problems. This promise, courts often hold, is inconsistent with the notes themselves, and therefore evidence of it is inadmissible under the parol evidence rule.[114]

These are especially difficult cases, since they engage both the reasons for having a parol evidence rule and the risks of having a parol evidence rule. Some creditors will indeed say whatever they must to get the debtor to sign the promissory note, knowing full well that the pre-execution promises will not be enforceable later. On the other hand, some debtors will creatively and sometimes falsely divine representations from creditors to save their businesses. Who should the law protect?

Professor Burnham describes the conflict over whether the parol evidence rule should apply in this sort of routine commercial dispute as follows:

> In one view of the world, things should function tidily. People should think before they act, seek advice when out of their depth, know what they are getting into, read all documents, and write down all their agreements. If they do not, the law will see that they suffer the consequences. . . .
>
> In the other view of the world, people screw up. They grope their way through a complex and demanding world, doing the best they can, which is often not good enough, and they fall into traps. . . . If the particular story is compelling enough, they will be rescued.[115]

If this is what is at stake, then we should expect to see courts deciding these kinds of cases in both directions, and that is just what happens. While many courts apply the parol evidence rule and refuse to inquire into the circumstances surrounding the execution of the

114. *See, e.g.*, WWF Paper Corp. v. Quinlan, No. 00-Civ.-0512, 2001 U.S. Dist. LEXIS 3444 (S.D.N.Y. Mar. 29, 2001); Friends Lumber, Inc. v. Cornell Dev. Corp., 663 N.Y.S.2d 327, 329 (App. Div. 1997).

115. Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93, 141–42 (1994). For discussion, see Knapp, *supra* note 103, at 1314–15.

notes,[116] others react as a New York appellate court did in *DeVito v. Benjamin*:[117]

> Although the parol evidence rule bars evidence offered to contradict the express terms of a document, the rule does not preclude a party from offering evidence demonstrating that what appears to be an obligation was not intended to be an obligation at all.[118]

The court permitted evidence of the circumstances surrounding the execution of the note, reversing the lower court's grant of summary judgment. These are cases in which the law appears to make a formalistic choice, and judges circumvent it when they think that justice so demands.[119]

IV. WHAT SHOULD WE DO?

I have suggested that the following observations hold:

1. People forget what was said;
2. People lie about what was said;
3. People re-create the reality of what was said in self-serving ways so that they no longer believe that they have forgotten; they are not lying, but surely are not saying anything true;
4. Language is not precise enough to state terms clearly and crisply in contracts all of the time, but it is precise enough to state terms clearly and crisply in contracts much of the time;

116. *See* Banco do Brasil, S.A. v. Latian, Inc., 285 Cal. Rptr. 870 (Cal. Ct. App. 1991); Parker v. Cook, 548 S.E.2d 387 (Ga. Ct. App. 2001); Gross v. Fruchter, 646 N.Y.S.2d 53 (App. Div. 1996); Jones v. Sageeyah Dev. Ltd., 833 P.2d 1235 (Okla. 1992); Bourg v. Bristol Boat Co., 705 A.2d 969 (R.I. 1998); *see also* Perfection Metal and Supply Co. v. Indep. Supply of N.O. Inc., 707 So. 2d 86 (La. Ct. App. 1998) (involving a guarantee agreement).

117. 663 N.Y.S.2d 266 (App. Div. 1997).

118. *Id.* at 267 (citations omitted) (relying on RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 11-202 (11th ed. 1998)).

119. *See, e.g.*, Capdeville v. White's Temple of Church of God in Christ, Inc., 755 So. 2d 923 (La. Ct. App. 1999) (holding that parol evidence was properly admitted to correct a mutual mistake of parties); Venners v. Goldberg, 758 A.2d 567 (Md. Ct. Spec. App. 2000) (parol evidence may be admitted to show whether there was a failure of consideration); Roberts v. Maze, 985 P.2d 211 (Or. Ct. App. 1999) (holding that parol evidence to show a contract was a sham is allowed based on the state statute's language which permits such evidence when the validity of the agreement is in dispute); Ebert v. Ebert, 465 S.E.2d 121 (S.C. Ct. App. 1995) (holding that parol evidence is admissible to clarify ambiguity created because a particular matter is not expressly included in the written instrument); Berg v. Hudesman, 801 P.2d 222 (Wash. 1990) (holding that extrinsic evidence is admissible to understand the context under which a written instrument was executed to aid in the interpretation of words).

5. Sometimes we think we have said something clearly, but it can be understood differently, and will be understood differently if we are not given the opportunity to explain ourselves;
6. The pressure on people in businesses to produce is enormous, and the pressure on people who have lost money on deals is also great, so businesses will try to take advantage of a parol evidence rule if there is one, and plaintiffs will try to take advantage of there not being a parol evidence rule if there isn't one;
7. The internal pressures within firms sometimes pit productivity against moral conduct, at least in the short-term.

If all of this is true—and I think it is—then irreconcilable tensions will inevitably occur, which will frustrate the ability of any parol evidence rule to accomplish its goals without incurring a substantial cost. We must, then, find ways of addressing some of these problems more directly. I will suggest a few tentatively. I will not try to defend these suggestions in detail here, in part because I offer them principally as illustrations of the need for approaches outside the system of evidentiary rules.

Part of the theory of the firm, as reflected in positive law,[120] is the notion that firms should have the right to enter into contracts and to sue or be sued for their breach.[121] Within the system, we consider firms to be "legal persons," which permits them to aggregate the wealth of many in carrying out their business, and we advantage firms with rules of evidence, such as the parol rule, designed to promote the smooth flow of commerce.[122] This, I believe, should be the starting point of addressing the problems I have raised.

First, dishonesty in the legal system should not be tolerated—with or without a parol evidence rule. No doubt the rule does a great deal to encourage people to come to agreements in writing, and reduces the opportunity for inaccurate testimony, whatever the motivation. For the most part, the frailty of the language faculty supports the Corbin approach to parol evidence—a soft rule that allows testimony, at least provisionally, to try to convince the court

120. For the history of this idea, see MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977).

121. *See, e.g.*, 8 DEL. CODE ANN. § 122 (2001).

122. *See, e.g.*, Metzger, *supra* note 5, at 1389; Sweet, *supra* note 5, at 1050.

that the language was not intended to convey the message that an unexplained reading might lead one to believe. When, either because the court finds a term ambiguous, or because a court permits a party to try to convince the court of an ambiguity, or for any other reason, there is testimony and the testimony is perjured, there should be some serious consequences.

One possibility is to increase the frequency with which perjury in civil cases is referred for prosecution. For the most part, President Clinton was right during the impeachment dispute—such prosecutions happen, but very rarely in the scheme of things. In the business context, many instances in which people testify inaccurately will not amount to perjury, for reasons stated above. But when perjury is obvious, it should not be tolerated.

A far more aggressive approach, also related to Clinton, is to treat firms the way we treat lawyers and others with special obligations to society. Clinton's suspension from the Arkansas bar[123] was a statement that lawyers are members of society with special privileges and with a special relationship to the courts. If they behave dishonorably, even in a situation that has little to do with their own practice of law, the legal system will express its disapproval.[124]

Firms, and corporations in particular, are also in a special position in society. They are created by statute and permitted to make significant decisions about the distribution of resources. Further, firms are almost always the beneficiaries of the parol evidence rule's application, both in disputes against consumers and in disputes against other firms.[125] The party that benefits from the disallowance

123. The New York Times reported:

> Former President Bill Clinton has paid a $25,000 fine that was part of a sanction in which his Arkansas law license was suspended for five years.
>
> Mr. Clinton paid the fine with a personal check on March 21, said Marie-Bernarde Miller, the lawyer who handled a disbarment lawsuit brought by a committee of the Arkansas Supreme Court. "The case is completed," Ms. Miller said.

Clinton Pays $25,000 Fine in Arkansas Case, N.Y. TIMES, April 8, 2001, § 1, at 30.

124. In the opinion holding Clinton in contempt, Judge Wright wrote:

> [T]he President's contumacious conduct in this case, coming as it did from a member of the bar and the chief law enforcement officer of this Nation, was without justification and undermined the integrity of the judicial system. . . . Sanctions must be imposed, not only to redress the misconduct of the President in this case, but to deter others who . . . might themselves consider emulating the President of the United States by willfully violating discovery orders of this and other courts, thereby engaging in conduct that undermines the integrity of the judicial system.

Jones v. Clinton, 36 F. Supp. 2d 1118, 1131 (E.D. Ark. 1999). One of the sanctions involved reporting Clinton's conduct to the Arkansas Supreme Court's Committee on Professional Conduct for disciplinary action, if they deemed it appropriate. *Id.* at 1132.

125. That is certainly the case for the opinions from Illinois and California reviewed in the context of preparing this article. That does not mean, however, that corporations are the only

of testimony so much of the time should not be willfully engaging in dishonesty when testimony is allowed. Corporate officers should simply not be lying in court either to protect their own status within their companies or to protect corporate profits to keep share prices elevated. Companies whose representatives lie in court might be subject to sanctions similar to those imposed on lawyers.

It would be impractical to suspend charters, especially of big firms. That would affect large numbers of innocent people. But in especially egregious cases, legislatures or courts might consider having corporations held in a type of constructive receivership for a period of time, by which the company is deemed to be operating for the benefit of society at large, with its profits being available to the state. I do not mean by this any actual receivership, which would involve interference in management. Rather, I mean merely that a period be named (perhaps one day, or one week, depending on the inconvenience and expense to which the liar put the judicial system), and that profits for that period be paid to the state as a kind of civil fine resulting from a constructive trust formed by the fact that the company is in constructive receivership.[126]

Without question, this approach has its problems, both practical and philosophical. For one thing, it calls for treating the parties to a litigation asymmetrically. If one party happens to be a business firm, its stakes are higher than are those for an individual. Particularly vigilant litigators may try to take advantage of this asymmetry to create strategic advantages within a lawsuit. That kind of conduct has been an unfortunate part of practice under Rule 11 of the Federal Rules of Civil Procedure. In fact, Rule 11 was amended in 1993 in part as a response to its employment by some lawyers as part of an aggressive litigation strategy.[127]

ones who benefit from written contracts. If, for example, corporations routinely perform the portions of contracts about which consumers are most likely to complain, and then protect themselves in writing from the kinds of complaints that consumers are most likely to make, one would expect to see disproportionately many cases in which the beneficiary of the parol evidence rule is the firm. Even in this instance, the firm has benefited by having the means and knowledge, as a repeat performer, to know what to draft into the contract.

126. The expression "constructive receivership" turns up from time to time in the case law, but the device is not one that is really used in legal settings. *See* Sec. Pac. Mortgage & Real Estate Servs., Inc. v. Republic of the Philippines, 962 F.2d 204 (2nd Cir. 1992); Prince v. First City, Texas/Houston, N.A., 853 S.W.2d 691 (Tex. App. 1993).

127. *See, e.g.*, A. Leon Higgenbotham, Jr. et al., *Bench-Bar Proposal to Revise Civil Procedure Rule 11*, 137 F.R.D. 159 (1991); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998); *Development in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1629–51 (1994).

The best response to this is that these one-way advantages occur all the time in the litigation system. Such an advantage occurs when the conduct of one party but not the other is subject to regulation by an authority that may inflict punishment for dishonest conduct outside of the litigation at hand. The Clinton case is an obvious example, but these situations arise in all kinds of circumstances. For example, a party finds itself in a position to reap a windfall settlement in litigation over a transaction that their opponent used as part of a tax fraud scheme.

My suggestion is far less troubling than such cases. The greater obligation for corporations to act honorably in the litigation process relates directly to the advantages drawn from the parol evidence rule itself. In part, for the sake of a less encumbered system of commerce, contract law has grown to favor written instruments. It is not unreasonable for society to require a heightened level of responsibility within the legal system for the recipients of such largess.

Moreover, the enormous pressures placed on corporate executives to operate successfully creates such strong incentives for dishonest conduct when the stakes are high[128] that we should not expect a reduction in pressures without changing the incentive system within the firm.[129] Possible solutions include restructuring firms internally, or adding external incentives through the litigation system itself. While this particular proposal may seem rather radical, *any* solution will have to deal with the incentives and pressures that corporate executives face. Society should decide, apart from the parol evidence rule, what to do about sharp business practices prior to execution of the contract. The credit card example cries out for regulation.[130] While the Truth in Lending Act already requires some disclosure, it is self-evidently too weak in its current form.[131] The Senate has recently passed S. 420, The Bankruptcy Reform Act of

128. *See* Part II, *supra.*

129. *See* Darley, *supra* note 47.

130. Recently, as reported in the press, the Office of Comptroller of the Currency settled a case it had brought against Providian National Bank for unfair and deceptive trade practices in the marketing of credit cards, alleging violations of the Federal Trade Commission Act. The case settled for $300 million. *See, e.g.*, Edmund Sanders, *Providian Ordered to Pay Cardholders $300-Million Refund*, L.A. TIMES, June 29, 2000, at C1. It is not clear that this type of action will recur, but it is another possible avenue of consumer protection against dishonest precontractual conduct. *See* McNeill Y. Wester, Note, OCC v. Providian National Bank: *Enforcement of the FTC's Unfair and Deceptive Trade Practices Statute by the OCC*, 5 N.C. BANKING INST. 373 (2001).

131. *See* 15 U.S.C. § 1601 (2001). The Act authorizes the Board of Governors of the Federal Reserve System to promulgate disclosure regulations. *See also* 12 C.F.R. § 226.5a (2001) (requiring disclosure of annual percentage rate in credit card applications).

2001, Title XIII of which is intended to amend the Truth in Lending Act to require additional disclosures to credit card holders.[132] Among them are disclosures about the economic consequences of making only minimum payments,[133] and disclosure about interest rates that will be paid once a low introductory rate has expired.[134] The House's version requires similar disclosures.[135]

Detailed precontractual disclosures are already required for mortgages, and rental car agencies, and hotels seem able to bring salient terms to a customer's attention by having them circle and initial the important items. The banking industry, however, has a strong lobby in Washington[136] that has worked hard to block legislation requiring banks to disclose information to consumers that may reduce the likelihood of their borrowing money they cannot easily repay. [137]

132. Bankruptcy Reform Act of 2001, S. 420, 107th Cong. (2001).

133. *Id* § 1301.

134. Section 1303 requires, in part, the following disclosures:

> (ii) if the annual percentage rate of interest that will apply after the end of the temporary rate period will be a fixed rate, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing of the temporary annual percentage rate in the tabular format described in section 122(c)), the time period in which the introductory period will end and the annual percentage rate that will apply after the end of the introductory period; and
>
> (iii) if the annual percentage rate that will apply after the end of the temporary rate period will vary in accordance with an index, state in a clear and conspicuous manner in a prominent location closely proximate to the first listing of the temporary annual percentage rate (other than a listing in the tabular format prescribed by section 122(c)), the time period in which the introductory period will end and the rate that will apply after that, based on an annual percentage rate that was in effect within 60 days before the date of mailing the application or solicitation.

Id. § 1303.

135. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001).

136. The extent of the banking industry's lobbying was reported widely in the press. For example, conservative columnist William F. Buckley, writing a column that criticized more liberal writers for tolerating irresponsible behavior on the part of defaulting credit card users, also wrote:

> The avarice of the credit card industry is unmistakably there. Invitations to sign up are everywhere, the costs of doing so understated. What tends to happen is credit card ballooning, keeping one company at bay while living off the second, in turn kept at bay while living off the third and fourth, and so on.

William F. Buckley, Jr., *Lenders Are Only as Greedy as Borrowers*, HOUSTON CHRON., March 17, 2001, at 34. In the article that Buckley was criticizing, *The New York Times* reported:

> The bill's passage would be evidence of the heightened power of corporate lobbyists in Washington in the aftermath of last year's elections, which left the White House and both houses of Congress in the hands of business-friendly Republicans.

Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividends*, N.Y. TIMES, March 13, 2001, at A1.

137. For discussion of the role of the consumer credit industry in the legislative process, see Edward J. Janger, *The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy*

Ultimately, left behind is a residue of cases in which the contract is not clearly clear, the parties are not clearly lying, and testimony is not clearly disallowed. Many commercial disputes take this form. It is here that I believe we have to live with a system that works fairly well as it is, and with a little tough luck. As human beings, our ability to get to the bottom of things takes us only so far.

Reform, 74 AM. BANKR. L.J. 97, 111 (2000).