CONSUMERS, SELLER-ADVISORS, AND THE PSYCHOLOGY OF TRUST

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Abstract: Every day, consumers ask sellers for advice. Because they do not or cannot know better, consumers rely on that advice in making financial decisions of varying significance. Sellers, motivated by strong and often conflicting self-interests, are well-positioned to lead consumers to make decisions that are profitable for sellers and may be harmful to the consumers themselves. Short of imposing fraud liability in extreme situations, the law neither protects the trust consumers place in "seller-advisors," nor alerts them to the incentives motivating the advice that sellers give. This Article makes several contributions to the literature. First, it identifies and defines the seller-advisor. Sellers and advisors are usually regarded separately by the law; therefore, consumers interacting with them are protected by different rules. As a result, a false dichotomy has arisen between (1) a doctrine of caveat emptor, subject to liability for fraud and applying to consumers interacting with sellers, and (2) fiduciary duties protecting consumers interacting with advisors. This Article is the first attempt to study consumer trust in the many common transactions that fall somewhere in the space between. Second, in reporting the results of an original psychology experiment, this Article offers empirical evidence of how consumers' decision making is influenced by the trust they place in seller-advisors. Finally, it explores how consumer trust in seller-advisors arises and how it can be manipulated in an effort to understand how legal policy should respond to both the ubiquity of seller-advisors and the consequences of consumer reliance on, and vulnerability to, their advice.

INTRODUCTION

> *"Trust (n): reliance on the integrity, strength, ability, surety, etc., of a person or thing; confidence."*[1]

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When University of Central Arkansas history professor Kim Little ("Little") noticed an unusual growth below her eye in 2012, she made a routine appointment to see her primary care physician.[2] After examining the skin on her right cheek, the primary care physician assured Little that it was a blemish that would disappear within a few days.[3] In an unrelated appointment with a local dermatologist, however, an alert physician assistant noticed the white bump and, after running additional tests, determined that the growth was a cancerous basal cell carcinoma.[4]

Although basal cell carcinoma is the least dangerous form of skin cancer, the doctors informed Little that the growth should be removed.[5] She was faced with two choices for removing the malignant lesion: (1) the traditional procedure for removing the growth either by incision or by freezing the lesion; or (2) the more innovative and (unbeknownst to Little) vastly more expensive "Mohs technique" procedure, which typically removes less skin tissue when removing the growth.[6] When Little asked her dermatologist for his recommendation, he insisted on using the Mohs technique, which he would perform.[7] When Little expressed doubt that the Mohs technique was necessary, the dermatologist stated that it was the only procedure available because of the proximity of the lesion to Little's eye.[8] The dermatologist assured Little

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[1] *Trust*, DICTIONARY.COM, http://www.dictionary.com/browse/trust [https://perma.cc/9G8L-KZRQ]. Other dictionaries define trust as "assured reliance on the character, ability, strength, or truth of someone or something," or "a charge or duty imposed in faith or confidence or as a condition of some relationship." *E.g.*, *Trust*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/trust [https://perma.cc/2HS4-FZ3C].

[2] Elisabeth Rosenthal, *Patients' Costs Skyrocket; Specialists' Incomes Soar*, N.Y. TIMES (Jan. 18, 2014), https://www.nytimes.com/2014/01/19/health/patients-costs-skyrocket-specialists-incomes-soar.html [https://perma.cc/8Y8H-D4MJ].

[3] *Id.*

[4] *Id.* A basal cell carcinoma ("BCC") is an "uncontrolled growth[] or lesion[] that arise[s] in the skin's basal cells, which line the deepest layer of the epidermis (the outermost layer of the skin)." *Basal Cell Carcinoma (BCC)*, SKIN CANCER FOUND., http://www.skincancer.org/skin-cancer-information/basal-cell-carcinoma [https://perma.cc/K6FV-3ZUU]. BCC is typically caused by overexposure to the sun and can take the form of "open sores, red patches, pink growths, shiny bumps, or scars." *Id.*

[5] Rosenthal, *supra* note 2.

[6] *Id.* The Mayo Clinic defines the Mohs technique (also called Mohs micrographic surgery) as "a precise surgical technique used to treat skin cancer." *Mohs Surgery*, MAYO CLINIC, http://www.mayoclinic.org/tests-procedures/mohs-surgery/basics/definition/prc-20014261 [https://perma.cc/FVC6-2JAE]. During the surgery, "thin layers of cancer-containing skin are progressively removed and examined until only cancer-free tissue remains." *Id.* The Mayo Clinic further clarifies: "The goal of Mohs surgery is to remove as much of the skin cancer as possible, while doing minimal damage to surrounding healthy tissue. Mohs surgery is usually done on an outpatient basis using a local anesthetic." *Id.*

[7] Rosenthal, *supra* note 2.

[8] *Id.* There was apparently a dispute between Little and her dermatologist regarding whether the BCC was located on her eye or cheek. *Id.*

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that the outpatient surgery would be minor, and that she would leave with just "a couple of stitches" when the procedure was complete.[9]

Little reluctantly agreed to the dermatologist's recommendation.[10] A few weeks later, Little traveled thirty miles to Little Rock, Arkansas, where the dermatologist performed the thirty-minute procedure.[11] He declined, however, to sew up the area on her cheek.[12] Instead, he directed her to a plastic surgeon located across the street.[13] When Little protested again, stating that she did not need a plastic surgeon and that she was unconcerned about having a small scar on her cheek, her dermatologist informed her that she had no choice.[14] He assured her, however, that the plastic surgeon's work would be quick and minimally invasive.[15]

When Little crossed the street to the plastic surgeon's office, she was greeted by several nurses who took her clothes and inserted an IV into her arm, as well as an anesthesiologist who was waiting to sedate her for the procedure in the oculoplastic surgery center's operating room.[16] She left the operating room with over two dozen stitches and was sick for several days from the IV fluids used during the unwanted procedure.[17]

When the bill arrived for her relatively minor medical issue, Little was furious.[18] Because the Mohs technique involved three different highly-paid specialists—a dermatologist, an anesthesiologist, and an ophthalmologist trained in plastic surgery—and was performed on the grounds of a large hospital instead of at an outpatient clinic, Little was charged over $26,000 for what was essentially minor surgery.[19] She was charged nearly $2,000 for

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* This appears to be an unusual protocol on the part of the dermatologist. *See The Mohs Procedure*, AM. COLL. MOHS SURGERY, https://www.skincancermohssurgery.org/about-mohs-surgery/the-mohs-procedure [https://perma.cc/4JMK-Z386]. The American College of Mohs Surgery website specifies: "When . . . surgery is complete, [the] Mohs surgeon assesses the wound and discusses [the patient's] options for ideal functional and cosmetic reconstruction. . . . If reconstruction is necessary, *the Mohs surgeon* usually repairs the area the same day as the tumor removal." *Id.* (emphasis added).
[14] Rosenthal, *supra* note 2.
[15] *Id.*
[16] *Id.* This also appears to be a deviation from the typical procedure for Mohs surgery. *See The Mohs Procedure*, *supra* note 13 ("[Patients] receive *local* anesthesia around the area of the tumor, so [patients] are awake during the entire procedure. The use of local anesthesia versus general anesthesia provides numerous benefits, including preventing a lengthy recovery and possible side effects from general anesthesia.") (emphasis added).
[17] Rosenthal, *supra* note 2.
[18] *Id.*
[19] *Id.* BCC is the most common form of skin cancer, but it is also the least serious form (and the form that generally responds best to minimally-invasive treatment) according to physicians. *See BCC*, *supra* note 4 ("BCC almost never spreads (metastasizes) beyond the original tumor site.

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the Mohs technique itself, nearly $15,000 for the plastic surgeon to sew up the wound, $1,000 for the anesthesiologist, and nearly $9,000 for the use of the hospital's facilities.[20]

At the time of her scheduled follow-up examination, Little opted not to return to the dermatologist who performed her procedure.[21] She instead visited a physician at the University of Arkansas Medical Center. The physician suggested that she had been over-treated and that a less extensive, cheaper process would have been equally effective.[22] Little, still furious at what she viewed as a breach of trust by her dermatologist, later told the New York Times, "I have an IV in my arm and a hole in my face that [the dermatologist] refused to stitch. And the anesthesiologist is standing there with his mask on."[23] She further noted that the dermatologist's incision "was no bigger than many cuts that heal on their own, and it definitely could have been repaired by one doctor, but at that point what was I going to do?"[24]

The dermatologist who treated Little is an example of a "seller-advisor." This Article defines seller-advisors as hybrid actors in commercial transactions who (1) give advice to consumers, (2) often have an undisclosed financial incentive to make certain recommendations to the consumer, and (3) fall generally outside the scope of fiduciary duty laws which require a person in a relationship of trust and confidence with another to act solely in that other person's best interest.[25]

Seller-advisors are everywhere. Any time a consumer is interested in a product about which she is not an expert, she may rely on sellers of that product for advice about whether that product is appropriate for her, what model would fit the consumer's needs best, and how to use the product to

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Only in exceedingly rare cases can it spread to other parts of the body and become life-threatening.").

[20] Rosenthal, *supra* note 2.

[21] *Id.*

[22] *Id.* Medicare currently views the Mohs procedure as "potentially misvalued" insofar as the procedure is potentially overused and overpriced. *See id.*; *see also* DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS., GUIDANCE TO REDUCE MOHS SURGERY REIMBURSEMENT ISSUES (2013), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1318.pdf [https://perma.cc/AB64-TF4Q] (providing guidance to reduce reimbursement issues for Mohs Surgery). After extensive negotiations spanning several months, Little reduced the charges for her surgery to almost $3,000. Rosenthal, *supra* note 2. She described this outcome as follows: "It was like, 'Take out your purse, we're robbing you.'" *Id.*

[23] Rosenthal, *supra* note 2.

[24] *Id.*

[25] *See Fiduciary*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a fiduciary as "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship"); Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1293 (2011) [hereinafter Frankel, *Fiduciary Law*] (describing "Components of Fiduciary Relationships").

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the consumer's advantage. Many daily transactions ranging widely in significance and complexity involve an interaction between a consumer and a seller-advisor. Because of the sensitive nature of the transaction with the seller-advisor—and because of the opaque nature of the seller-advisor's independent financial incentive—a problematic mismatch can develop between the expectations of the consumer and the behavior of the seller-advisor: the consumer may mistakenly believe that her expectations of trust and confidence with a seller-advisor are legally protected or even practically justified, and may be unaware that the seller-advisor has no legal duty to act in her best interest.[26] This mismatch has myriad implications for the ways lawmakers think about fiduciary duty law in the commercial context, the role of consumer protection laws with respect to transactions involving seller-advisors, and the ways in which consumers can be taught, irrespective of changes to existing law or policy, to temper their trust in the seller-advisor by employing a healthy dose of skepticism.

To that end, this Article reports the results from an original psychology experiment that we conducted, which examines consumer attitudes toward seller-advisors in a variety of commonplace financial transactions. In the experiment—which we report in two parts—we manipulated the nature of the financial transaction to which consumers were exposed, the stakes of the transaction, the presence or absence of a seller-advisor, and the obviousness of the seller-advisor's financial incentive for making certain recommendations to consumers.[27]

Our experiment revealed several important conclusions that should interest legal policymakers. First, consumers imbue seller-advisors—even seller-advisors who are stereotypically viewed as having an obvious financial self-interest, such as car salespeople—with a significant degree of trust and confidence, regardless of the nature of the financial transaction.[28] Second, although high stakes transactions tend to make consumers more conservative (and less trusting of seller-advisors), we found a much stronger influence from the seller-advisor on consumers' financial decisions.[29] In other words, the mere presence of a seller-advisor caused consumers in our study to more often choose the option that was more financially risky and

[26] *See infra* notes 83–99 and accompanying text.

[27] *See infra notes* 176–184, 227–230 and accompanying text.

[28] *See infra* notes 209–223 and accompanying text; *see also* Brad Tuttle, *Car Shoppers' Decisions Most Influenced by . . . Person Trying to Sell Them Cars?*, TIME (June 5, 2012), http://business.time.com/2012/06/05/car-shoppers-decisions-most-influenced-by-person-trying-to-sell-them-cars/ [https://perma.cc/4L47-2J6N] (describing the results of a survey finding that car buyers are most influenced by the advice of a salesperson, despite the salesperson's "obvious self-interest in how that decision plays out").

[29] *See infra* notes 209–210 and accompanying text.

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which conferred a greater financial benefit on the seller-advisor.[30] Finally, through a series of statistical tests, we attribute this "mere presence" effect of the seller-advisor on consumers' financial choices explicitly to the trust and confidence that consumers conferred onto the seller-advisor.[31]

This Article makes several contributions to the literature. First, it identifies and defines the seller-advisor. Sellers and advisors are usually regarded separately by the law, and consumers interacting with them are protected by different rules.[32] As a result of the false dichotomy between sellers and advisors, neither the doctrine of caveat emptor nor fiduciary duties fully protect consumers interacting with seller-advisors.[33] This Article is the first attempt to study the many common transactions that fall somewhere in the space between. Second, in reporting the results of an original psychology experiment, this Article offers empirical evidence of how consumers' decision making is influenced by the trust they place in seller-advisors. Finally, it explores how consumer trust in seller-advisors arises and how it can be manipulated in an effort to understand how legal policy should respond to both the ubiquity of seller-advisors and the consequences of consumer reliance on, and vulnerability to, their advice.

This Article proceeds in several parts. Part I outlines the manner in which the law incorporates psychological and philosophical theories of trust—for example, through the common law of fiduciary duty and fraud, and through legislative enactments including consumer protection laws—and explains how seller-advisors slip through the cracks of these judicial and legislative protections.[34] Part II outlines the philosophical and psychological research on trust, and explains how consumers may view seller-advisors in light of this research.[35] Parts III and IV test our assertions in an original experiment, which we report in detail.[36] Part V explores the impli-

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[30] *See infra* notes 209–210 and accompanying text.

[31] *See infra* notes 216–218 and accompanying text.

[32] *See infra* notes 100–129 and accompanying text.

[33] *See infra* notes 50–99 and accompanying text; *see also* Michelle Oberman, *Sex, Lies and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 884 (2005) ("The displacement of *caveat emptor* by fairness-based justifications for a duty to disclose is perhaps most readily observed in the law governing confidential relationships—relationships in which the parties, by definition, operate closer than at arm's-length."); Kathleen McNamara Tomcho, *Commercial Real Estate Buyer Beware: Sellers May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1582 (1997) (contrasting relationships in which the doctrine of caveat emptor applies with fiduciary relationships where "the law imposes duties of honesty and full disclosure among . . . parties in accordance with the nature of the relationship and the parties' expectations").

[34] *See infra* notes 38–129 and accompanying text.

[35] *See infra* notes 130–166 and accompanying text.

[36] *See infra* notes 167–245 and accompanying text.

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cations of these findings, their limitations, and future directions for consumer and business law.[37]

I. The Law Promoting Trust

Trust is widely believed to be necessary for most social interactions, including those that take place on various non-social markets.[38] Trust is an important component of non-simultaneous exchanges, for example, and widespread distrust would undermine market participation and may drive even trustworthy market participants out of business.[39] Consumers must make decisions about how and whether to proceed with an exchange quickly, and often have very little information to guide their choices.[40] These exchange transactions that might seem to implicate trust the most must be conducted when the consumer lacks sufficient information to determine whether her exchange partner is trustworthy.[41] It might take years to develop enough information about a particular merchant to feel confident about trusting that seller.[42] Decisions to distrust sellers are also often made quickly, but may not be more accurate.[43]

Policymakers have endeavored to protect consumers and sellers from the risks each face, such that the other will behave opportunistically. Typical buyer-seller relationships are governed by laws prohibiting fraud and con-

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[37] *See infra* notes 246–291 and accompanying text.

[38] *See* INT'L FED'N INFO. PROCESSING, *Trust Management V*, IFIP AICT 358 (Ian Wakeman et al. eds., 2011) (citing Toshio Yamagishi's Keynote Speech, *Trust and Social Intelligence*, at the 2011 IFIP Conference in Copenhagen); J. David Lewis & Andrew Weigert, *Trust as a Social Reality*, 63 SOC. FORCES 967, 969 (1985). Some would argue that social interactions and networks also constitute markets with personal and emotional exchanges of utility driving incentives. *See* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 989 (1995) ("The final legitimation of the union [between economic theory and family law] came in 1992, when Professor Gary S. Becker of the University of Chicago was awarded the Nobel Prize for his work applying microeconomic theory to social problems, including various aspects of family life." (citing GARY S. BECKER, A TREATISE ON THE FAMILY (1991)).

[39] *See* RUSSELL HARDIN, TRUST 20–23 (2006) (illustrating an "exchange model of trust" using game theory); Giangiacomo Bravo & Lucia Tamburino, *The Evolution of Trust in Non-Simultaneous Exchange Situations*, 20 RATIONALITY & SOC'Y 85, 85 (2008) (defining "non-simultaneous exchanges" as those where "a subject bears a cost in order to provide a benefit to a different subject, who subsequently may or may not reciprocate").

[40] *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 10 (2014) ("[M]any people make decisions with scant information and slight deliberation."); Oswald A. Mascarenhas et al., *Buyer-Seller Information Asymmetry: Challenges to Distributive and Corrective Justice*, 28 J. MACROMARKETING 68, 68 (2008) (discussing the relative lack of information available to consumers compared to sellers).

[41] *See* BEN-SHAHAR & SCHNEIDER, *supra* note 40, at 10; HARDIN, *supra* note 39, at 23.

[42] *See* HARDIN, *supra* note 39, at 23 (comparing the difficulty of winning trust with the ease of losing trust).

[43] *Id.*

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sumer protection regulations prohibiting deceptive practices.[44] In some situations, where one party is vulnerable to the other's judgment or advice, the law imposes fiduciary duties that prohibit conflicted interests on the part of the more sophisticated actor.[45] But there are circumstances where a truly unsophisticated buyer or investor must engage in a transaction with and seek advice from a seller with whom they deal at arm's length, and who does not owe them fiduciary duties.[46] In such circumstances, a buyer is seeking advice from the very party whose interests are adverse to their own without seeking advice from any independent third parties. We refer to sellers in these situations as seller-advisors.

Seller-advisors do not owe fiduciary duties to consumers and, as they are only giving their opinion about what may be best for the buyer, are not likely to run afoul of anti-fraud regulations. Consumers who rely on seller-advisors are vulnerable not only in the moment of the financial transaction, but also in their inability to recover for injury caused by heeding the seller-advisor's advice. We have focused our study on buyers dealing with seller-advisors in an effort to determine how likely buyers are to trust seller-advisors and whether and when that trust leads to taking the seller-advisor's advice.

In this Part of the Article, we consider the legal rules available to buyers and sellers.[47] We focus on protections offered to buyers and consider when those protections are most effective to help unsophisticated buyers dealing with sophisticated sellers. Finally, we show how buyers who rely on seller-advisors are stuck in an awkward place without specific regulatory protection. In such circumstances, contracting parties may have to rely on trust to enter transactions with one another. The next Part considers whether trust is realistically available to facilitate these transactions[48] before we turn to the results of our study to reveal what we have learned about the role of trust in transactions between consumers and seller-advisors.[49]

[44] Honorable Shelden Gardner & Robert Kuehl, *Acquiring an Historical Understanding of Duties to Disclose, Fraud, and Warranties*, 104 COM. L.J. 168, 185 (1999) (describing how consumer protection statutes were enacted to protect against "inequitable and deceptive trade practices" that do not meet the requirements of common-law fraud).

[45] Frankel, *Fiduciary Law*, *supra* note 25, at 1291.

[46] John F. Mariani et al., *Understanding Fiduciary Duty*, FLA. B.J., Mar. 2010, at 20, 25 ("[A]n arm's length business transaction does not create a fiduciary relationship. This is so even when one party has superior bargaining power.").

[47] *See infra* notes 50–129 and accompanying text.

[48] *See infra* notes 130–272 and accompanying text.

[49] *See infra* notes 280–245 and accompanying text.

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A. The Law Forbids Deception

The law protecting consumers from deception often grows from notions of what information buyers and sellers must share with each other in an arm's length transaction. The doctrine of caveat emptor, or "buyer beware," places responsibility with buyers for making specific inquiries of a seller.[50] As long as the seller answers honestly, the buyer has no recourse for harm resulting from a lack of information.[51] Fraud prohibits material misstatements given with an intent to deceive in response to such inquiries from buyers.[52] The seller may have information about the product to be sold that would be valuable to the buyer and would change the buyer's estimation of how much to pay for the purchase, but the seller is entitled to withhold that information.[53] Sellers may drive a hard bargain and profit generously from their informational advantage as long as they do not deceive buyers.[54] Allowing buyers and sellers to take advantage of superior information encourages investment in information and helps products move to whomever values them most.[55]

In order to establish a case for fraud, a plaintiff must demonstrate that four elements are present.[56] First, there must have been a misrepresentation of fact.[57] An opinion or overstated puffery will not support a fraud claim.[58]

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[50] Alex M. Johnson, Jr., *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the Caveat Emptor Doctrine*, 45 SAN DIEGO L. REV. 79, 101–03 (2008) (discussing the meaning and historical context of the doctrine). The caveat emptor doctrine, or "let the buyer beware," is often interpreted incorrectly, with its converse taking hold as the correct meaning. *See id.* at 93 ("[T]he caveat emptor rule, . . . in its purest form, requires that the seller say nothing to the buyer with respect to the condition of the premises sold.").

[51] *Id.* at 93–94 (illustrating a buyer's lack of legal recourse in the absence of "active concealment" or misrepresentation).

[52] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996) (holding that "actionable fraud requires a *material* misrepresentation or omission," which includes "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive").

[53] Johnson, *supra* note 50, at 104 ("[T]he caveat emptor doctrine is or at least began as a rule of silence. If the seller remains silent and takes no steps to warrant the condition or quality of the premises, caveat emptor provides a safe harbor for the seller.").

[54] *Id*. at 103.

[55] *See* Jeffrey L. Harrison, *Rethinking Mistake and Nondisclosure in Contract Law*, 17 GEO. MASON L. REV. 335, 336 (2010) ("[T]he basic idea is that the common law generally permits the party who has invested in developing or gathering information to internalize the gains those efforts make available.").

[56] A typical statement of the elements of a cause of action for fraud is as follows:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

[57] *Id*.

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The misrepresented fact must be material to the plaintiff's decision to agree to the transaction.[59] Ancillary facts that are not a proximate cause of the decision to complete the transaction will not lead to liability for fraud.[60] Second, a plaintiff must show that the defendant acted with scienter, or the intent to deceive.[61] Innocent or negligent misrepresentations do not constitute fraud.[62] This state of mind requirement is particularly difficult for plaintiffs to meet, as mens rea is usually difficult to prove.[63] Third, a plaintiff must have relied on the misstatement in deciding to complete the transaction.[64] The reliance requirement is related to materiality in that both elements concern whether the plaintiff would have agreed to the transaction but for the misstatement.[65] Fourth, a plaintiff must suffer damages on account of the fraudulent statement.[66] There is generally no cause of action for fraud where a plaintiff is tricked into paying fair market value for value received.[67] The result of these limitations on fraud liability is that there are many transactions in which an unsophisticated consumer may be taken advantage of and unable to obtain a remedy by appeal to fraud alone. Fraud liability will not stop or even discourage many practices that can harm consumers and undermine faith in the market.

The limitations of fraud liability led to causes of action for negligent misrepresentation and the promulgation of consumer protection statutes.[68] A party may be liable for negligent misrepresentation in business transactions where one party is more knowledgeable than the other and the more knowledgeable party was careless in a way that harmed the less knowledgeable party.[69] This liability could apply to any salesperson who knows more about

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[58] Gardner & Kuehl, *supra* note 44, at 182 ("The puffery doctrine is a defense asserting that some forward-looking statements are so amorphous as to not affect the price of a security. Accordingly, they are not material under a fraud analysis.").

[59] RESTATEMENT (SECOND) OF TORTS § 525.

[60] *Id.* § 538.

[61] *Id.* §§ 525–526.

[62] PETER A. ALCES, LAW OF FRAUDULENT TRANSACTIONS § 2:13 (2015) ("The plaintiff must show . . . that the defendant was aware of the falsity.").

[63] *See* Gardner & Kuehl, *supra* note 44, at 188.

[64] RESTATEMENT (SECOND) OF TORTS § 537.

[65] *Id.* § 538.

[66] *Id.* § 525.

[67] *Id.* § 549 (explaining that damages for fraud may be based on either the difference between the value and purchase price, or other pecuniary losses suffered).

[68] *See* Johnson, *supra* note 50, at 104 (discussing how "once the seller begins to speak[,] . . . even short of fraud, courts are willing to impose a duty on the seller to be truthful and nonnegligent with respect to those representations").

[69] *See* ALCES, *supra* note 62, § 2:3. The basic elements of a negligent misrepresentation claim as outlined by the Supreme Court of Washington are as follows:

> (1) [T]he defendant supplied information for the guidance of others in their business transactions that was false; (2) the defendant knew or should have known that the in-

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the product they are selling than the consumer, if the consumer relies on the salesperson for guidance (as they often do). It would seem to address much of the ground covered by consumer protection statutes. In today's complex market of goods and services, consumers cannot possibly understand everything they are buying as well as the companies selling them.[70] They often rely on those companies for knowledge and guidance. That reliance exposes companies and their sales associates, or others who communicate with potential customers, to liability for negligent misrepresentation if the consumer is misled at all.[71]

Consumer protection statutes build on the promise and premises of fraud and negligent misrepresentation liability to outlaw deceptive devices and practices, and require full, truthful disclosures in enumerated circumstances.[72] Negligent misrepresentation liability does not reach material omissions, and fraud doctrine only provides for liability where there is a duty to disclose particular information.[73] Neither doctrine remedies or prevents sharp practices where only accurate information is shared with consumers, but it is shared in a piecemeal manner not designed to help the consumer make the best decision. States and the federal government have mandated disclosure in certain circumstances to respond to those shortcomings.[74] Mandatory disclosure has resulted in long boilerplate contracts that are impractical for consumers to read or understand.[75] Over-disclosure may prove more harmful than under-disclosure because in both instances, the consumer remains ignorant—the consumer who has received a tome of information that they do not read, for instance, may assume they are somehow protected by the provision of that information.[76] The false sense of security

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> formation was supplied to guide the plaintiff in his business transactions; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied on the false information; (5) the plaintiff's reliance was reasonable; and (6) the false information proximately caused the plaintiff damages.

Id.; *see also* RESTATEMENT (SECOND) OF TORTS § 552(1) (stating the elements to establish liability for "information negligently supplied for the guidance of others").

[70] *See* Mascarenhas et al., *supra* note 40, at 68 (describing the concept of "information asymmetry" and the fact that "marketers know more about their products and services than prospective buyers do").

[71] Johnson, *supra* note 50, at 104–11 (discussing the doctrine of negligent misrepresentation and the ways in which sellers may be held liable for statements made to consumers).

[72] Gardner & Kuehl, *supra* note 44, at 185.

[73] *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152–54 (1972) (holding that an omission can form the basis of securities fraud, and the requirement of reliance is met when there is a failure to fulfill a duty to disclose).

[74] BEN-SHAHAR & SCHNEIDER, *supra* note 40, at 4–7.

[75] *Id.* at 6–7.

[76] *Id.* at 11–12.

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may keep the consumer from asking more questions or approaching the transaction with self-protective skepticism.[77]

Consumer protection statutes go beyond mandatory disclosure and attempt to directly address deceptive practices more broadly, targeting sales tactics that might mislead consumers even if they are not technically fraudulent.[78] Flexibility around those standards and the ability to intervene to provide remedies for strategically misled consumers makes consumer protection regimes more responsive to consumer injuries.[79] The streamlined administrative process for lodging complaints and determining consumer remedies also makes the consumer protection system more accessible and less expensive than litigation.[80]

Fraud, negligent misrepresentation, and consumer protection laws operate to provide an honest environment in which consumers can transact business with sellers who may be more knowledgeable about the transaction. The effect of the laws is to prevent relatively unsophisticated consumers from being directly deceived or taken advantage of in ways they cannot otherwise prevent or anticipate.[81] These laws cannot, however, completely protect consumers from their own ignorance. Even if sellers are completely honest and faithfully follow disclosure laws, consumers will often find themselves at a disadvantage in any number of transactions, perhaps never more so than when a consumer delegates control over a sensitive personal matter to another. The next Section considers how the law protects these particularly vulnerable consumers.[82]

B. The Law Protects Some Expectations and Vulnerabilities

When a consumer wants to buy a toaster or a car, she is expected to understand what the product is and to know what her preferences are for a product of that kind. A particular seller may not misrepresent the characteristics of

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[77] *Id.*

[78] *See* 15 U.S.C. § 45(a)(1) (2012) (stating that "[u]nfair or *deceptive* acts or practices in or affecting commerce, are hereby declared unlawful") (emphasis added); CAL. CIV. CODE § 1770 (West 2017) (stating that "unfair methods of competition and unfair or deceptive acts or practices" are unlawful, including deceptive representations or designations); CAL. BUS. & PROF. CODE § 1720 (West 2017) (defining "unfair competition").

[79] *See, e.g.*, CAL. CIV. CODE § 1760 (explaining that the title addressing remedies "shall be liberally construed and applied"); Melinda Rose Smolin, *Investment Securities: Beyond the Scope of California's Consumers Legal Remedies Act?*, 25 LOY. L.A. L. REV. 127, 133 (1991) (discussing how "[t]he 'liberal construction' language implies that more causes of action . . . should come within the scope of the Act," and thus provides plentiful avenues for consumer protection)).

[80] *See* Lisa Yurwit, *Restitution in Consumer Protection Actions: Stop the Reliance on Reliance*, 36 U. BALT. L. REV. 393, 413 (2007) (arguing that procedures for handling administrative claims would provide for a more fluid recovery process than prolonged litigation).

[81] *See* Mascarenhas et al., *supra* note 40, at 78.

[82] *See infra* notes 83–99 and accompanying text.

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a particular good. Beyond that obligation, however, the seller is free to profit from the consumer's lack of knowledge about the product or even about the degree to which a particular product meets her needs or desires.[83]

But when a person enlists someone's professional advice or delegates control over her property or some sensitive decision making to a professional, the law imposes fiduciary duties to govern those relationships.[84] Fiduciaries owe duties of loyalty and care.[85] In some circumstances, fiduciaries may owe a duty referred to as "prudence,"[86] while in others, a duty of disclosure is claimed.[87] While many non-fiduciary actors are subject to a duty of care particular to their circumstances, the duties of loyalty and prudence are unique to fiduciary relationships.[88] A fiduciary duty of loyalty requires at least that the fiduciary abstain from acting on interests that conflict with those of the beneficiary.[89] A duty of prudence refers to the "prudent man rule" and applies in trust situations, requiring a trustee to administer the trust and either invest or hold its assets with the same degree of care and skill a prudent person would exercise in the administration of their own affairs.[90]

Fiduciary principles are designed to protect parties who rely on the judgment and discretion of others in controlling property, making sensitive, personal decisions, or agreeing to contracts.[91] Most scholars agree that fiduciary duties exist to force the alignment of the fiduciary's interests with those of the beneficiary, and thereby to allow the kinds of transactions in

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[83] *See* Johnson, *supra* note 50, at 104.

[84] Frankel, *Fiduciary Law*, *supra* note 25, at 1291, 1293.

[85] *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 299 (1999) (discussing the duty of loyalty); Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 903 (2011) (discussing Justice Cardozo's famous judicial expression that fiduciary duties include the duty of loyalty which is "one of selfless behavior").

[86] *See* Leo E. Strine et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 654–55 (2010) (explaining that if a fiduciary is to act on his own as a free-standing fiduciary, he must act in accordance with certain duties, including "prudence").

[87] Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1211 (1995) [hereinafter Frankel, *Fiduciary Duties*].

[88] *See* Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215–16 (explaining the unique nature of and need for fiduciary duties).

[89] *See* Blair & Stout, *supra* note 85, at 299; Frankel, *Fiduciary Duties*, *supra* note 87, at 1210.

[90] RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. LAW. INST. 2007) (construing the "prudent investor rule" to mean that the trustee must act as a reasonable person would if they were in control of the trust, including the use of reasonable skill and care to preserve the property and make the trust productive); *see also* Harvard Coll. v. Amory, 26 Mass. (9 Pick.) 446, 465 (1830) (articulating the "prudent man rule" as requiring that trustees "conduct themselves honestly and discreetly and carefully, according to the existing circumstances, in the discharge of their trusts").

[91] Ribstein, *supra* note 88, at 229 (explaining problems that result when confidential information is entrusted to non-fiduciaries rather than constraining the discretion of confidential information through one who exercises power over another's property (a fiduciary)); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1460 (2002) ("The imposition of fiduciary duties can protect creditors during the transitional period, when they are particularly vulnerable because the managers of the debtor would recognize the inevitability of the control transfer.").

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which fiduciaries are enlisted to be completed.[92] Relatively unsophisticated or vulnerable parties may stay out of given markets altogether, may be kept from robust participation in society or hampered in their accumulation of wealth if they are unable to rely on fiduciaries to navigate areas in which they lack the time and expertise to act for themselves.

Fiduciary law allows courts to review a relationship after a problem has occurred to determine to what extent and in what way a fiduciary acted inappropriately.[93] This somewhat flexible ex post review is necessary because beneficiaries lack the time and expertise to monitor fiduciaries closely and lack the expertise necessary to write detailed contracts about how fiduciaries are to exercise discretion.[94] In order to truly take advantage of the fiduciary's greater sophistication and expertise, the beneficiary must allow the fiduciary to exercise discretion as she sees fit, subject only to the relevant duty of care and the duty of loyalty.[95] Attempts to micromanage a fiduciary would undermine the purpose and benefits of the relationship.[96]

Relationships designed for the provision of advice are often classified as fiduciary to ensure that advice about what is best for a beneficiary is just that—best for the beneficiary.[97] But sellers at arm's length are not fiduciaries and the advice they give consumers may well be based on what is best for the seller.[98] We now consider consumer interactions with these sellers who are also called upon to give advice.[99]

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[92] *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 425 (1993). "Contractarian" scholars argue that fiduciary duties fill gaps in the parties' contract in a manner consistent with an expectation that the fiduciary be bound by fiduciary obligations of loyalty and care. *See id.* ("The duty of loyalty, coupled with restitution of any gain the trustee obtains by favoring his own interest, defines a special relation."). "Anti-contractarian" scholars view fiduciary relationships as being relationships of trust that rise above typical contractual rules and practices. *See* Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 555 n.6 (2001). They agree with contractarians, however, that the purpose of imposing fiduciary duties is to ensure that the fiduciary acts in a manner consistent with the best interests of the beneficiary. Frankel, *Fiduciary Duties*, *supra* note 87, at 1211–12, 1229 ("The 'goodness' expected of fiduciaries consists of refraining from taking what is not theirs, without permission.").

[93] Ribstein, *supra* note 88, at 216.

[94] Frankel, *Fiduciary Law*, *supra* note 25, at 1296.

[95] *Id.* at 1293.

[96] *See id.* ("[I]t is in the interest of society that non-experts use fiduciaries' services and avoid wasteful duplication of these services.").

[97] *See* Smith, *supra* note 91, at 1409 ("In the fiduciary context, the duty of loyalty requires the fiduciary to adjust her behavior on an ongoing basis to avoid self-interested behavior that wrongs the beneficiary.").

[98] *See* Mariani et al., *supra* note 46, at 25.

[99] *See infra* notes 100–129 and accompanying text.

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C. The No-Law's Land of Seller-Advisor Transactions

Seller-advisors are sellers of products who may provide advice to consumers about whether to buy the seller's product or under what terms to do business with the seller.[100] When sellers offer particularly complex products or present their customers with a number of choices that may be beyond most consumers' experiences, consumers will ask for advice. Pure advisors are typically considered fiduciaries because giving advice requires one to consider the best interests of the recipient of the advice.[101] That advice would not be valuable if the advisor allowed her personal interests to interfere or determine the nature of the advice. Pure sellers are emphatically not fiduciaries.[102] They pursue self-interest in trying to convince as many consumers as possible to buy their products at the highest price the market will bear. Seller-advisors are often compensated in ways that reward them for up-selling consumers or convincing consumers to buy more of a product than they may need. Those interests are obvious to consumers in some contexts and completely opaque in others.

Seller-advisors enjoy the most power when they sell complex products that consumers need help understanding, when products are expensive, or when the product otherwise presents significant decision-making importance.[103] On a small scale, a waiter in a restaurant is a seller-advisor, but a much more powerful seller-advisor is a surgeon or a mortgage broker. Consumers need advice to navigate more complex markets, and the more money or welfare on the line, the more afraid they will be of making the wrong choice. While we found that consumers do not always defer to advice under such circumstances, they are more cautious and less comfortable making decisions they do not understand.[104] In the face of this vulnerability, individual seller-advisors may be able to have the most influence.

More complex products are not only difficult to understand, but the markets in which they are offered are sufficiently complex that consumers will not always understand the incentives the seller-advisor has that may motivate the advice they give. Many mortgage borrowers likely have no idea how the mortgage lender representative or broker is paid. Patients may not know how doctors are paid or even what alternatives a doctor may consider and discard along the way to giving advice. While consumers might

[100] *See supra* note 25 and accompanying text.

[101] *See* Frankel, *Fiduciary Law*, *supra* note 25; Smith, *supra* note 91.

[102] *See* Mariani et al., *supra* note 46, at 25.

[103] *See* Mascarenhas et al., *supra* note 40, at 72–73 ("Modern economies include many activities like selling cars, houses, and electronic goods, where product quality and product attributes are complex and sellers know far more about what they sell than buyers know about what they buy.").

[104] *See infra* notes 207–208 and accompanying text.

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understand that car salespeople work on commission, they do not necessarily understand the other ways a dealership makes money or what components of the price allow the dealership to extract gains from the sale of the car.

The complexity and opacity of a seller-advisor's role in a sales transaction can harm consumers. It can convince a consumer to make a substantial purchase that causes him to suffer significant financial or other harm. It can lead a consumer to act against his best interests, locking him into a decision with long-term consequences he does not fully understand or appreciate. Even at the beginning of the process, a lack of understanding of the seller-advisor's incentives can prevent a consumer from asking the questions required to understand the purchase or transaction, leaving him irretrievably under-informed about the decision at hand. In situations where a consumer has to make a quick decision, such as when choosing the terms of a mortgage loan, the consumer may defer to a seller-advisor whose interests sharply conflict with his own because he does not have time to do otherwise. A seller-advisor would not have to lie at all in order to lead a consumer to make a decision against his own interests, so fraud liability would not protect such a consumer.[105]

Likewise, fiduciary liability would not be available to remedy the injury suffered by a consumer led astray in most seller-advisor relationships.[106] Most sellers, whose interests are in having the consumer pay as much as possible for as many goods or services as possible, definitionally cannot be fiduciaries.[107] A party that is primarily a seller of goods or services and who operates through sales agents—whose job is to sell as many products for as much money as possible—will not be considered a fiduciary and will not be bound by fiduciary duties.[108] Such sellers will not have to consider the interests of the consumer at all and can give advice that runs directly counter to the consumer's best interests as long as they do not commit fraud.

Fiduciary duties do not bind fiduciaries to capture perfectly the best interests of a beneficiary. Even fiduciaries can be imperfect seller-advisors in some circumstances.[109] Fiduciaries have to be paid for their services and so in those negotiations act as sellers of their services.[110] Most fiduciaries, however, are not primarily engaged in selling. They negotiate a price for the fiduciary relationship and then go about doing their work on the consumer's

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[105] *See supra* notes 50–82 and accompanying text.

[106] *See supra* notes 83–99 and accompanying text.

[107] *See* Mariani et al., *supra* note 46, at 25.

[108] *Id.*

[109] *See* Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955, 971–72 (1995).

[110] Frankel, *Fiduciary Law*, *supra* note 25, at 1294 (explaining that fiduciaries are entitled to compensation for their services and if an entrustor does not have funds to compensate the fiduciary, they may deem part of the assets to the fiduciary as payment).

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behalf. Further, and perhaps most importantly, fiduciaries are always protected by something like a business judgment rule.[111] That is, as long as a fiduciary's advice is given in good faith and not the result of an undisclosed conflict of interest, the advice does not have to be the best course of action for the beneficiary—it does not have to be "right."[112] A variety of influences may push the fiduciary to give advice contrary to the interests of the beneficiary, but still not result in liability for breach of the duty of loyalty because there were no direct conflicts of interest or the advice was given in good faith and within the standard of care.[113]

An example of a fiduciary relationship that could be influenced by unexpected interests is the doctor/patient relationship. Doctors are fiduciaries of patients and are expected to avoid or disclose any financial interests they have that would conflict with the patient's interests in care.[114] However, doctors are not required to know everything about the conditions they treat and they are not expected to know of or have access to all experimental or new treatments, even those that relate to conditions they treat regularly.[115] A doctor's standard of care simply does not require them to be all-knowing.[116] Doctors are therefore allowed and expected to skew their advice in favor of their experience. A surgeon would not violate her fiduciary duties to her patient if she recommended surgery—even if another treatment would be as or more effective—as long as surgery would not be inappropriate for the patient's condition.[117]

[111] Douglas M. Branson, *The Rule That Isn't a Rule—The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 632 (2002) ("[T]he business judgment rule acts as a presumption in favor of corporate managers' actions. . . . provid[ing] a safe harbor that makes both directors and their actions unassailable if certain prerequisites have been met.").

[112] *See* Dickerson, *supra* note 109, at 959 (providing an example demonstrating that if a transaction does not involve a conflict of interest, the transaction will be considered to have been executed "in good faith").

[113] *Id.*

[114] *See* Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 455 (2000) (discussing the history of the doctor-patient relationship and the notion of fiduciary relationships eventually applying to that relationship). "In the course of this expansion, the fiduciary model was applied to the doctor-patient relationship, and doctors and commentators, and later judges, came to refer to doctors as fiduciaries." *Id.*

[115] Gerald J. Smoller, *Standard of Care: "Reasonable Man" Doctrine*, 44 CHI.-KENT L. REV. 107, 107 (1967) (explaining that though doctors have knowledge superior to an ordinary person and must act in a manner that is reasonably "consistent with this higher knowledge," they need not be all-knowing).

[116] *Id.* A doctor's standard of care requires a doctor to "possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified doctors in the locality in which he practices or in similar localities in similar cases and circumstances." *Id.* (quoting ILL. PATTERN JURY INSTRUCTIONS-CIVIL § 105.02 (1961), now located at § 105.01).

[117] *See* Oberman, *supra* note 114, at 459 (explaining how, despite the terminology of fiduciary duty being applied to physicians, the law generally does not enforce a physician's fiduciary duty).

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Such a surgeon would have an obvious financial interest in recommending surgery that may conflict with the patient's interest in a minimally invasive treatment.[118] A patient may not be sensitive to the doctor's interest or may assume that the surgeon is giving equal weight to all available treatment methods when making a final recommendation. Nothing in the law protects the patient from his lack of understanding of the doctor's incentives or from the doctor's lack of knowledge of alternative treatments.[119] A patient's choices are simply to rely on this seller-advisor's recommendation, conduct research, or find another advisor who may make a different recommendation.

An example of a non-fiduciary in a sensitive seller-advisor position is a stockbroker.[120] Brokers, as opposed to investment advisors who do owe fiduciary duties, must only be paid for making trades and any advice they give is considered incidental to making the trade.[121] As such, brokers may not charge for advice.[122] Instead of a fiduciary obligation, brokers have simply been held to a "suitability" standard that requires them to recommend only securities to their clients that are appropriate given the particular client's wishes and financial circumstances.[123]

In a sense, brokers are the car salesmen of the securities world. They place orders for traders and may give information about securities, but it is generally known that they are working on commission.[124] It is well known

[118] *See id.* at 461 ("Malpractice law has yet to hold physicians liable for actions motivated by financial conflicts of interest.").

[119] *Id.*

[120] *See* Lynn Bai, *Broker-Dealers, Institutional Investors, and Fiduciary Duty: Much Ado About Nothing?*, 5 WM. & MARY BUS. L. REV. 55, 57–58 (2014) ("Broker-dealers generally do not owe a fiduciary duty to their clients under federal law, but some courts have imposed a fiduciary duty under limited circumstances when there is a special trust relationship or when a broker-dealer exercises control over trading activities of the client."); Thomas Lee Hazen, *Stock Broker Fiduciary Duties and the Impact of the Dodd-Frank Act*, 15 N.C. BANKING INST. 47, 52 (2011) ("[U]nder the Exchange Act, broker-dealers are not subject to an explicit fiduciary standard . . . ."). *But see* Dodd-Frank Wall Street Reform and Consumer Protection Act § 913(g)(1), Pub. L. No. 111–203, 124 Stat. 1828 (2010) (codified as amended at 15 U.S.C. § 78o(k)(1) (2012)) (granting authority to the Securities Exchange Commission to establish a fiduciary duty for brokers and dealers).

[121] *See* Hazen, *supra* note 120, at 53 ("Moreover, because the representative was not giving general investment advice, the absence of special compensation for the advice rendered the advice incidental to his activities as a broker-dealer.").

[122] *Id.*

[123] *See* FINRA R. 2111 (2014), http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=15663&element_id=9859&highlight=2111#r15663 [https://perma.cc/F38B-HFBZ] (requiring that a broker-dealer or associated person "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer," and identifying "three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability"); Hazen, *supra* note 120, at 52.

[124] *See* Harlan Landes, *Brokers Are Salespeople, Not Financial Advisors*, FORBES (July 11, 2012, 5:31 PM), https://www.forbes.com/sites/moneybuilder/2012/07/11/brokers-are-salespeople-not-financial-advisers/#4e2397133dc0 [https://perma.cc/6KCW-LXPA] ("Stockbrokers facing the

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by many traders that a broker's job is not to devise a long-term investment plan tailored to a particular client's needs, but rather to simply place orders for, and perhaps recommend, suitable securities.[125] Securities are not as familiar of a product as cars, however, and retail traders often have a less sophisticated understanding of a broker's incentives and compensation structure; a misunderstanding about a broker's intentions is more likely to impose a greater risk of loss.[126] Retail investors often cannot tell the difference between an investment advisor who does owe fiduciary duties and a stockbroker who does not.[127] The U.S. Securities and Exchange Commission ("SEC") has considered imposing fiduciary duties on stockbrokers, but has not enacted regulations to do so yet.[128]

The law does not help consumers very much in their interactions with seller-advisors. Consumers do not necessarily understand the seller-advisor's interests, and the law does not require that seller-advisors explain their financial incentives to consumers. We wonder why consumers are turning to seller-advisors so often and how much they rely on the advice of seller-advisors. Without legal protection, what are consumers relying on to fill in the gaps in their knowledge in navigating these transactions? Is it trust? Trust or some sort of confidence may partly explain consumers' decisions to enter into these transactions and whether and when consumers defer to seller-advisors' recommendations. The next Part of the Article considers the social science research on trust to put in perspective our study addressing these questions about consumer behavior.[129]

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general investing public working for JP Morgan Chase, might have business cards with a title of 'financial advisor,' but just like the people you meet when you walk into a car dealership, they are salespeople."); Jim Norman, *Americans Rate Healthcare Providers High on Honesty, Ethics*, GALLUP NEWS (Dec. 19, 2016), http://news.gallup.com/poll/200057/americans-rate-healthcare-providers-high-honesty-ethics.aspx [https://perma.cc/Z3ZP-NHQG] (showing that stockbrokers and car salespeople received low scores in public perception of their trustworthiness).

[125] Craig A. Cunningham, *Mind the Gap: A Legal and Economic Analysis of Stockbroker Overtime Eligibility Under the Fair Labor Standards Act*, 2009 U. ILL. L. REV. 1243, 1249 n.37 ("However, it should be noted this statement operates under the misleading assumption that the stockbroker is *successful*; it ignores the fact that an underperforming stockbroker whose pay is chiefly derived from commissions will take home a meager wage compared to his successful counterparts. There is nothing implicit in the stockbroker's occupation that guarantees *success*."). A "stockbroker—though involved in an intricately complex and sophisticated industry—is, at his core, nothing more than a salesman." *Id.* at 1266.

[126] *See* Landes, *supra* note 124.

[127] *See* Bai, *supra* note 120, at 57–58 (comparing the duties of investment advisors and broker-dealers).

[128] Press Release, U.S. Sec. & Exch. Comm'n, SEC Releases Staff Study Recommending a Uniform Fiduciary Standard of Conduct for Broker-Dealers and Investment Advisors (Jan. 22, 2011), https://www.sec.gov/news/press/2011/2011-20.htm [https://perma.cc/L773-4NKC].

[129] *See infra* notes 130–166 and accompanying text.

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II. THE PSYCHOLOGY OF TRUST

The act of trusting is comprised of a variety of beliefs, emotions, and actions. Trusting is, essentially, a belief in the trustworthiness of another.[130] It is a willingness to be vulnerable to the behavior of another and a belief that the other will behave as agreed or expected, that she will keep her promises, be honest, and comport herself in accordance with social norms of good will and civility.[131] Those beliefs, coupled with an emotional willingness to be vulnerable and assume the risk that the other person will turn out to be untrustworthy—even when that risk is recommended in light of rational calculation—may lead to trusting behavior.[132] Trusting behavior turns those beliefs and predispositions into action: leaving one's fate in the hands of another, deferring to another's decision-making or efforts in place of one's own, cooperating at a cost, and trusting that the other party will also cooperate.[133] There may be a disconnect between the degree of trust a potential trustor claims and his or her choice about whether to engage in trusting behavior.[134]

Trust is "socialized."[135] Not only is it considered socially acceptable to give others the benefit of the doubt, to "trust" that they will behave competently, honestly, and with regard for our well-being, but there are also tangible benefits to trusting.[136] People who are trusted are more likely to be

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[130] HARDIN, *supra* note 39, at 1.

[131] David Dunning & Detlef Fetchenhauer, *Understanding the Psychology of Trust*, *in* SOCIAL MOTIVATION 147, 148 (David Dunning ed., 2011); *see* HARDIN, *supra* note 39, at 17 ("To say we trust you means we believe you have the right intentions toward us and that you are competent to do what we trust you to do.").

[132] Dunning & Fetchenhauer, *supra* note 131, at 148.

[133] Roger C. Mayer et al., *An Integrative Model of Organizational Trust*, 20 ACAD. MGMT. REV. 709, 724–26 (1995) (turning from a description of the elements of trust to an analysis of when a combination of those elements leads a person to engage in "risk taking" while in a relationship).

[134] KATHERINE HAWLEY, TRUST: A VERY SHORT INTRODUCTION 11 (2012); Mayer et al., *supra* note 133, at 724–26.

[135] *See* Dunning & Fetchenhauer, *supra* note 131, at 149–50; David Dunning et al., *Trust as a Social and Emotional Act: Noneconomic Considerations in Trust Behavior*, 33 J. ECON. PSYCHOL. 686, 687 (2012); Ribstein, *supra* note 92, at 553–54 ("Trusting people cooperate because it is in their nature or because they have been socialized to do it, not because some costly structure has been set up to ensure reliability.").

[136] Dunning et al., *supra* note 135, at 690–91 (pointing out that trusting is the socially acceptable choice according to prevailing norms and that participants in experiments are more likely to act as though they trust strangers in contexts in which there is a real, rather than hypothetical, social interaction); Ribstein, *supra* note 92, at 564 (explaining that in society, "people operate under an honor system where they make themselves vulnerable to others and are trustworthy without strictly calculating costs and benefits"); *cf.* David Dunning et al., *Trust at Zero Acquaintance: More a Matter of Respect Than Expectation of Reward*, 107 J. PERSONALITY & SOC. PSYCHOL. 122, 136 (2014) (clarifying that trust is not a social norm so much as a personal, moral norm).

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trustworthy, and trusting behavior acts as a "social lubricant" allowing beneficial interactions to occur.[137]

A. The Elements of Trust

The literature has coalesced around a few common elements of trust. They can be summarized as ability, benevolence, and integrity.[138] Ability captures elements such as competence, expertise, and judgment.[139] Benevolence refers to a trustee's intrinsic motivation to act for the benefit of a trustor.[140] Integrity refers to a trustee's reliability, openness, honesty, and sense of honor.[141] Integrity is often defined as a person's adherence to a personal code and, in the context of trust, the adherence to a personal code that a trustor finds appropriate.[142] A trustor must believe in the existence of all of these elements in a trustee before engaging in trusting behavior.[143] Deferring to the judgment of someone who is benevolent but incompetent can lead to dangerous outcomes, just as would trusting someone who adheres to a well-defined personal code, but wants to harm the trustor.

Although many interactions in which trust would be useful are formed quickly and last only briefly, some elements of trust take time to establish. Ability is the easiest element to establish quickly.[144] A seller might be able to give credible signs of expertise rather quickly by demonstrating a length of experience or seniority or by accruing and publicizing impressive credentials. In a competitive market, a seller of services may be able to signal a high de-

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[137] HAWLEY, *supra* note 134, at 11 ("If we are genuinely unsure whether someone can be relied upon, we may decide to take our chances and trust her. Such trust can encourage trustworthiness when people react positively to being trusted, and this in turn can justify the original decision to trust."); *see* Ribstein, *supra* note 92, at 553 n.1 (citing FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 151 (1995)).

[138] Roy J. Lewicki & Edward V. Tomlinson, *Trust and Trust Building*, BEYOND INTRACTABILITY KNOWLEDGE BASE PROJECT (Dec. 2003), http://www.beyondintractability.org/essay/trust-building [https://perma.cc/BK9S-W6K2] ("[T]he more we observe [ability, benevolence, and integrity] in another person, our level of trust in that person is likely to grow."); *see also* Mayer et al., *supra* note 133, at 717–19 (discussing how ability, benevolence, and integrity each contribute a unique perceptual perspective that provides for "a solid and parsimonious foundation for the empirical study of trust").

[139] Mayer et al., *supra* note 133, at 717–18 ("Ability is that group of skills, competencies, and characteristics that enable a party to have influence within some specific domain. The domain of the ability is specific because the trustee may be highly competent in some technical area, affording that person trust on tasks related to that area.").

[140] *Id.* at 718–19 ("Benevolence is the extent to which a trustee is believed to want to do good to *the trustor*, aside from an egocentric profit motive.").

[141] *Id.* at 719–20 ("The relationship between integrity and trust involves the trustor's perception that the trustee adheres to a set of principles that the trustor finds acceptable.").

[142] *Id.* at 719.

[143] *Id.* at 721.

[144] *Id.* at 717–18.

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gree of competence by commanding top dollar for her services. Other habits such as punctuality, organization, responsiveness, and reliability can quickly signal competence and attentiveness. Personal integrity can be idiosyncratic, so it may be difficult for consumers to see until they develop a long working relationship with a seller or advisor.[145] In professions with codes of ethics or professional responsibility, remaining a member of good standing in the apposite professional licensing organization can indicate an adherence to a code of conduct and so may give a hint to a degree of integrity. But, such rules cannot be sufficiently detailed to give consumers much assurance that a professional is personally or intrinsically bound to an honorable code of conduct that would ensure that the relationship is a productive one for the consumer.[146] Moreover, many of the seller-advisors we are concerned with are not bound by professional codes of ethics. Such codes usually apply to professionals who owe fiduciary duties to their clients anyway and function to provide guidance to professionals and their clients about obligations owed by fiduciaries.[147]

Among the three elements of trust, a belief in the benevolence of a trustee takes the most time to develop.[148] Benevolence is a belief that the particular trustee is personally motivated to pursue the best interests of the trustor.[149] A potential trustee may be able to establish a reputation for benevolence generally and may be able to provide some assurance in its manner of conducting business that it is willing to put the interests of others ahead of its own. For example, a seller-advisor may be able to make an admission against interest or share its own interests in a transaction in a way that allows the trustor to take that information into account.[150]

Openness is a sign of benevolence.[151] Benevolence can take time to establish because it requires that the parties understand and internalize each

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[145] *Id.* at 719–20.

[146] *See* HAWLEY, *supra* note 134, at 57–60 (describing how certain categories of people are believed to be trustworthy); Rakesh Khurana & Nitin Nohria, *It's Time to Make Management a True Profession*, HARV. BUS. REV., Oct. 2008, at 70, 72 ("Through [professional] codes, professional institutions forge an implicit social contract with other members of society: Trust us to control and exercise jurisdiction over this important occupational category.").

[147] *See, e.g.*, AMA CODE OF MEDICAL ETHICS 1–2 (AM. MED. ASS'N 2016) (describing how doctors are also fiduciaries and guided by the American Medical Association Code of Ethics). *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016) (describing how lawyers owe fiduciary duties to their clients and are subject to Rules of Professional Responsibility in each state).

[148] *See* Mayer et al., *supra* note 133, at 718–19.

[149] *Id.*

[150] *See infra* notes 231–245 and accompanying text.

[151] Mayer et al., *supra* note 133, at 718–19 (explaining that openness measured through questions about the trustee's openness with others, as well as the trustor, is related to benevolence and integrity).

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other's interests.[152] Only then can the trustee truly pursue the trustor's interests, and only then can the trustor know the trustee is doing so out of concern for the trustor.[153] Benevolence may be the hardest element to establish, but social norms support giving potential trustees the benefit of the doubt that they are working to advance the goals of those who trust them, or are at least not undermining those goals.[154] In practice, in low stakes situations, that benefit of the doubt may support the necessary degree of faith in benevolence to complete the transaction or for a trustor to take a trustee's advice.[155] In higher stakes situations or when more important, significant decisions are involved, benevolence may be the element of trust that is lacking, and its absence may prevent the consumer from "trusting" or relying on the advice of the seller-advisor.[156]

B. Trust and the Seller-Advisor

Some seller-advisors and consumers have repeated interactions and can build relationships that include a strong sense of benevolence.[157] Many consumers, however, must seek and decide to follow a seller-advisor's advice much more quickly and without time to investigate the seller-advisor beyond learning a little bit about their reputation and, perhaps, credentials. In such situations, trust may be transferred from a recommender of the seller-advisor to the seller-advisor. For instance, a homebuyer may have a long-standing, trusting relationship with her real estate agent and then rely on the real estate agent to identify a trustworthy mortgage lender with whom the real estate agent has a long-standing trusting relationship.

We are most interested in what happens when a consumer must make a quick, important decision about a transaction which the consumer does not

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[152] Lewicki & Tomlinson, *supra* note 138 (describing identification-based relationships as those where the parties develop a thorough understanding of each other's goals and motivations after a number of interactions so that they are able to truly act in each other's stead). Such relationships have a high degree of benevolence that finds its foundation in the strong personal relationship between the parties. *Id.*

[153] *Id*.

[154] *See* Dunning & Fetchenhauer, *supra* note 131, at 123; Mayer et al., *supra* note 133, at 718–19.

[155] *See* HAWLEY, *supra* note 134, at 1–2 (describing the many low stakes instances of trust that occur in daily life); Dunning & Fetchenhauer, *supra* note 131, at 149 (providing common examples of trust in low stakes situations).

[156] *See* Tiffany Barnett White, *Consumer Trust and Advice Acceptance: The Moderating Roles of Benevolence, Expertise, and Negative Emotions*, 15 J. CONSUMER PSYCHOL. 141, 143 (2005) (arguing that "emotionally difficult" decisions are high stakes decisions for which a trustor requires emotional support). When making emotionally difficult decisions, trustors are likely to favor benevolence over expertise and rely more heavily on the advice of trustees they know well. *Id.*

[157] Mayer et al., *supra* note 133, at 718 ("Benevolence suggests that the trustee has some specific attachment to the trustor.").

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understand fully, and so must make a quick decision about whether to trust the advice received from the seller-advisor. Can the consumer trust without deferring to the advice of the seller-advisor? What is the consumer trusting, and how and why is that trust limited? If the consumer follows the seller-advisor's advice, is that necessarily evidence of trust, or a simple willingness to roll the dice on an inconsequential choice?

Human decision making is complex and a variety of factors influence the choices individuals make. Biases and preferences can overwhelm careful research and solid, well-intentioned advice.[158] Most people do operate on a baseline assumption that other people are not out to get them and that the people they interact with are basically well-intentioned.[159] We are not all vigilantly searching for con artists in daily consumer interactions. The belief in the basic goodness of others may lead us to take advice in sales situations when we do not have enough information to know what our best option is. Deferring to a seller-advisor is faster and may well lead to the best outcome. Most consumers are happy to bet on the basic goodness of the sellers they encounter and to self-insure against the risk that their trust is misplaced.[160]

Under-trusting can be a problem that may harm consumers, preventing them from gaining the information they need to make the best decisions they can in important transactions.[161] Sometimes an entire industry can be considered suspect and will cease to inspire a basic belief in its benevolence.[162] Used car salesmen often join snake oil salesmen as the paradigmatic examples of distrusted sales professionals.[163] Since the financial crisis nine years ago, mortgage lenders may have joined their ranks.[164] As mortgage lenders are in a position to advise relatively unsophisticated consumers about major financial transactions, the loss of trust in those relationships can be costly for consumers. Still, trusting too much may prove even more costly.

Whether the choice to defer to the advice of a seller-advisor is a sign of trust or something else is significant when considering how to best use the law to protect consumer expectations and vulnerabilities. We, as a society, typically expect buyers to fend for themselves when they know their in-

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[158] Thomas D. Gilovich & Dale W. Griffin, *Judgment and Decision Making*, *in* 1 HANDBOOK OF SOCIAL PSYCHOLOGY 542, 546–57 (Susan T. Fiske et al., 5th ed. 2010).

[159] *See* Dunning & Fetchenhauer, *supra* note 131, at 149.

[160] *Id.*

[161] *Id.* at 149–50.

[162] *See* Norman, *supra* note 124 (listing professions which the general public views as more and less trustworthy).

[163] *Id.*

[164] *See infra* notes 216, 269–275 and accompanying text; *see also* Ron Lieber, *When to Use a Mortgage Broker*, N.Y. TIMES (Apr. 3, 2009), http://www.nytimes.com/2009/04/04/your-money/mortgages/04money.html [https://perma.cc/H2B5-4HGD] (discussing how the 2008 financial crisis tarnished mortgage brokers' collective image).

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terests are at odds with those of a seller, and the law offers more protection in the form of fiduciary duties and consumer protection statutes when a buyer is vulnerable to a seller's judgment or skill.[165] If consumers are trusting, or perhaps over-trusting, to their detriment in certain situations, that is important for policy-makers to know and something courts should keep in mind when identifying which relationships warrant fiduciary status. Understanding the extent to which trust plays a role in more important decisions and the extent to which consumers rely on seller-advisors in various situations will also help illustrate how the law should best support consumers in those interactions so that their trust will not be used against them. We now turn to our study in which we tried to discover whether and how much consumers trust seller-advisors in various scenarios.[166]

III. EXPERIMENTAL STUDY: PART ONE

In this Part, we report the results of our original experiment examining the relationship between consumers and seller-advisors. Our experiment is designed to test several questions. First, does the presence of seller-advisors—who provide recommendations to consumers without owing any fiduciary duty to put the consumer's financial interest above their own—exert influence over consumers' financial decisions? Second, to the extent that seller-advisors do exert influence on consumers' financial decisions, is this because (contrary to current fiduciary duty laws) consumers have placed trust and confidence in the seller-advisor?

We report the results of this study in two parts, consistent with these experimental research questions. In Part One of this study, participants read a vignette in which they imagined themselves completing a commonplace financial transaction. In Part One, we manipulated three variables.[167] First, we presented participants, at random, with one of five different financial scenarios: selecting an entrée at a fancy restaurant, selecting a personal training package at the local gym, purchasing a brand-new car, purchasing a new home, or making a medical decision. Second, we manipulated the stakes of the transaction, such that the impact of the financial transaction was consequential or relatively inconsequential.[168] Finally, we manipulated whether participants were exposed to a seller-advisor during the transaction or navigated the transaction alone.[169] We then examined the financial decision that

[165] *See supra* notes 38–99 and accompanying text.
[166] *See infra* notes 173–245 and accompanying text.
[167] *See infra* notes 176–184 and accompanying text.
[168] *See infra* notes 176–178 and accompanying text.
[169] *See infra* note 180 and accompanying text.

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we asked our participants to make, and (if they had been exposed to a seller-advisor) we examined their level of trust in the seller-advisor.[170]

If, as we suspect, consumers routinely rely on the advice of seller-advisors (or, put another way, act as if they are in a fiduciary relationship with the seller-advisor and expect that the seller-advisor is attentive to consumers' best interests), we hypothesize several results from Part One of this study. First, we expect that consumers, as a general matter, will trust seller-advisors across all of our financial scenarios, although the individualized nature of these relationships might lead people to trust certain types of seller-advisors more than they do others.

Second, we expect that the stakes of the transaction will influence consumers' willingness to trust, but we make no prediction regarding the directionality of the effect. For example, we imagine that high stakes conditions might increase consumers' sense of unease, and may therefore make them more conservative (and less trusting of seller-advisors).[171] We could also imagine that high stakes transactions might increase consumers' willingness to trust a seller-advisor, particularly with respect to financial transactions that are less familiar to consumers.[172]

Finally, and most importantly, we expect that the mere presence of a seller-advisor will influence consumers' financial decisions in a particularly malevolent manner. We expect that the seller-advisor's mere recommendation (vis-à-vis a financial product that secretly benefits the seller-advisor) will cause participants to choose that financial product. We further expect that participants' deference to the seller-advisor's financial recommendation is the result of the trust with which consumers imbue the seller-advisor. We now turn to the methodology and results of Part One of this study.

A. Participants

We recruited 844 participants for this study through the Amazon Mechanical Turk online participant recruitment service.[173] Once recruited, participants were directed to an online survey hosted on the Qualtrics survey

[170] *See infra* notes 183–184 and accompanying text.

[171] *See supra* notes 155–156 and accompanying text.

[172] *See supra* notes 155–156 and accompanying text.

[173] *See, e.g.*, Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012) (summarizing the advantages and disadvantages of using Mechanical Turk, or MTurk, as an inexpensive platform for collecting high quality data from a representative sample of the population); Michael Buhrmester et al., *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSP. ON PSYCHOL. SCI. 3, 3, 5 (2011) (describing how Mturk functions); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RES. METHODS 1, 2–4 (2012) (discussing the "unique benefits of using Mechanical Turk as a platform for running online experiments").

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platform.[174] We paid each participant two dollars to complete the study, which was advertised as a psychology experiment designed to collect data about laypeople's impressions of different financial transactions.[175] All participants completed the survey within twenty minutes.

Our participant sample was a representative cross section of the internet-using population in the United States. Females constituted 51.3% of the sample, and the average age of participants was 38.69 years old (with a standard deviation of 12.92 years). Participants identifying as Caucasian composed 77.5% of the sample, followed by those who identified as African-American (8%), Asian-American (7.5%), Hispanic (5.1%), and "other" (1.9%). Approximately 52% of the sample had obtained at least a Bachelor's degree from a four-year college or university, and the median household income of the sample was between $40,000 and $49,999. Nearly 44% of the sample had experience with the financial scenario that they encountered in this study. A complete breakdown of this study's sample characteristics appears on page 28 in Table 1.

B. Procedure and Measures

After obtaining informed consent to participate in the study, participants were told to imagine themselves engaging in one of several common business transactions. At the end of each scenario, participants were required to choose between two different financial options (a cheaper option or a more expensive option). To determine how seller-advisors potentially influence consumers in terms of the choices that they make—and whether any such influence stems from an increase in trust between the consumer and the seller-advisor—we manipulated several variables in this experiment.

First, we manipulated the nature of the financial transaction to which our participants were exposed. There are many financial transactions in which most consumers will rely on seller-advisors, persons who may or may not owe those consumers fiduciary duties of care and loyalty. It would be impossible to devise an experiment that involves all such scenarios, and

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[174] *Research Core*™, QUALTRICS, https://www.qualtrics.com/research-core/ [https://perma.cc/GAW7-5PV6].

[175] The relevant text reads as follows:

> In this [task] you will be asked to participate in a psychology research study. The purpose of the study is to collect your impressions of a summary of a common business transaction. This [task] consists of a series of questionnaires. You will have 45 minutes to complete this [task], but nearly everyone completes it in approximately 15–20 minutes. You MUST be in a quiet room for the duration of this study, and you must be 18 or older to participate.

Justin Sevier & Kelli Alces Williams, Psychology Study Description (2017) (unpublished study instructions) (on file with authors).

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so we chose five scenarios that represent financial transactions that (1) everyday consumers are likely to be familiar with and (2) represent a cross-section of transactions in terms of subject matter, importance, and scope. Participants read about a scenario in which they were either deciding what to eat at a fancy restaurant, choosing a personal training package at the gym, purchasing their first new car, purchasing their first house, or deciding between different medical treatment options at the doctor's office. Each participant read only one of these scenarios, which the Qualtrics software chose for each participant randomly.

Second, because of its relevance to the social psychology of trust, we manipulated the stakes involved in each of these five transactions.[176] Half of the participants who were assigned to each financial transaction read either a "high stakes" version or a "low stakes" version of the transaction. Each of the high stakes and low stakes variations are discussed below.

[176] *See supra* notes 155–156 and accompanying text.

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Table 1. Participant Demographics[177]

	%	*N*
Age (Median: 35.00)		
<30	30.4	255
30–39	30.3	254
40–49	16.9	142
50–59	13.9	117
60–81	08.5	71
Gender		
Male	48.5	408
Female	51.5	433
Race		
Caucasian	77.5	652
African American	08.0	67
Hispanic	05.1	43
Asian	07.5	63
Other	01.9	16
Education		
High School	15.5	130
Some College	32.5	273
College	39.0	54.5
Master's	10.3	87
Ph.D. or Professional	02.7	23
Political Affiliation		
Very Conservative	05.4	45
Conservative	19.9	165
Moderate	26.3	218
Liberal	34.5	286
Very Liberal	14.0	116
Income		
Less than $30,000	28.8	242
$30,000–$49,999	26.9	226
$50,000–$69,999	18.9	159
$70,000 or greater	25.3	213

Participants assigned to the restaurant scenario had to choose between two entrees for themselves and their dinner companion. In both versions of this transaction, the participant was at a fancy restaurant and had to choose between two opaque-sounding entrees: either (1) "roasted swordfish with sage crispy sweetbread, braised lettuce burrata, Yukon gold potato tempura, and olive jus," (the less expensive option) or (2) "roasted quail breast with

[177] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9].

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stewed peppers 'Basquaise,' Iberico ham, Yukon gold potato, and braising greens" (the more expensive option).[178]

In all versions of the restaurant scenario, the participant's dinner companion insisted that the participant order for the table, because the participant had eaten at the restaurant in the past. In the low stakes version of the transaction, participants were told that they were at the restaurant to celebrate their ten-year wedding anniversary with their partner. In the high stakes version, participants learned that they were at the restaurant on a first date with someone whom they had admired for some time and wanted to impress.

In the personal training scenario, participants were told that they were examining training programs in connection with a New Year's resolution to improve their health. After learning about the gym and the personal trainer, participants decided between two different packages. The study described the first package as medium intensity aerobic interval training ("MIAIT") which involved a series of aerobic exercises performed at seventy-five percent of the participants' maximum heartrate mixed with lower-intensity exercise for a total of one hour. This package also included "periodic 'hydrostatic weighing'" which the study described as "a modern procedure for determining a person's body fat composition." In contrast, the study described the second option as high intensity anaerobic interval training ("HIAIT") which involved shorter periods of more intense exercises using roughly eighty-five percent of the participant's heart rate. This more expensive package included fat monitoring via dual energy x-ray absorptiometry, or a "DEXA scan."[179]

In the low stakes condition, participants were told that they were generally in good health, but could use more cardiovascular training. In the high stakes condition, however, participants were told that they recently went to the doctor for a physical exam which revealed a genetic predisposition for several weight-related illnesses, including diabetes. Participants in the high stakes condition were told that the doctor recommended that they lose weight as soon as possible to reduce their likelihood of a serious health issue.

Participants assigned to the new car scenario were told that they were walking into a car dealership to purchase their first new automobile. Partic-

[178] *Menu*, DANIEL N.Y.C., https://www.danielnyc.com/menu [https://perma.cc/X97R-G5TW]. Both entrée options were taken from the online menu of the New York City restaurant, Daniel. *Id.* All participants were told that they (and their dinner companion) had the financial means to pay for both entrees, and that they had no foodborne allergies or other dietary restrictions. They were also told to imagine that they, and their dinner companion, do not have an aversion to either dish.

[179] *See generally* Gordon Fisher et al., *High Intensity Interval- vs Moderate Intensity- Training for Improving Cardiometabolic Health in Overweight or Obese Males: A Randomized Controlled Trial*, 10 PLOS ONE (2015) (providing information on HIAIT and MIAIT); DEXAFIT, https://www.dexafit.com [https://perma.cc/N3MW-5EAU] (explaining the DEXA procedure and its underlying science).

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ipants were further told that they had already decided to purchase the same brand of car that they had enjoyed driving in the past, but they needed to choose between the base model or the more expensive luxury edition model. The base model was known to perform well, and came with several standard features, including air conditioning, automatic emergency brakes, head-up displays, and keyless entry. The luxury model, in addition to having all of the features that composed the base model, included heated seats, a backup camera, automatic high beams, Bluetooth capability, lane-keeping assistance software, and elements that improve gas mileage and reduce carbon and nitrogen emissions.

In the low stakes condition, participants were told that their personal finances were in excellent shape and that they had recently been promoted at work before their trip to the dealership. In the high stakes condition, however, participants learned that (1) their current car is no longer serviceable after ten years of driving, (2) the purchase of a new car is critical to their work and family-related obligations, and (3) in light of recent news stories, there was some risk that the car manufacturer was misrepresenting the nitrogen and carbon emitted from its car, which could make the car undrivable and would require a cumbersome process to trade in the car for one that conforms to U.S. emissions standards.

Participants assigned to the house purchase scenario were told that the bank had pre-approved them for a loan to purchase a house that was up to four times their annual income. The participants were told that they negotiated down the price for their dream house, which ultimately was at the upper end of the acceptable range vis-à-vis the bank. All participants discovered, to their dismay, that the closing costs were significantly higher than expected and that they would be required to pay an additional amount each month for mortgage insurance. In light of this information, participants had to decide whether to cancel the transaction (and forfeit their binder deposit) or continue with the financial transaction.

In the low stakes condition, participants were told that their current lease was flexible and could be extended until they found a financially suitable house to purchase. They were also told that several refinancing options would be available if they later had difficulty paying their mortgage. In the high stakes condition, however, participants were told that the lease for their current house was expiring at the end of the month (with no possibility of renewal) and that there would be few, if any, refinancing options in the event that they could not pay the mortgage.

Participants assigned to the medical scenario learned that they had been diagnosed with a cancerous lesion on a non-vital organ. The doctor informed the participants that the lesion may spread to other parts of the body and lead to substantial complications. They were also told that it was possible, and

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perhaps likely, that the lesion would not spread at all, and would therefore have no impact on their quality of life. Participants then had to choose whether to have surgery to remove the lesion or to wait one year and see if the lesion spreads (and if not, to continue that process each year).

In the low stakes condition, participants learned that the doctor would be able to target the cells at the lesion in a minimally invasive outpatient procedure for a mildly significant cost, most of which would be paid by the participant's insurance company. Participants also learned that there would be some uncomfortable side effects to the procedure, but that those side effects would dissipate within a few weeks. In contrast, in the high stakes condition, the doctor informed participants that it is impossible to target the cells at the lesion site, so the doctor prefers to remove the organ entirely. The procedure would be expensive (and only some of the costs would be defrayed through insurance), and the loss of the organ would require lifelong use of medication and months of recovery.

Finally, we manipulated whether a seller-advisor was present or absent in these scenarios to examine the effect, if any, of the seller-advisor on participants' choices vis-à-vis the financial transaction. The scenarios that did not contain a seller-advisor therefore served as control conditions and provided the base rates for participants' financial decisions in the absence of receiving advice regarding the two options available to them. When the seller-advisor was present, the experiment proceeded as follows:

Table 2. Seller-Advisor Conditions in Part One[180]

Scenario	Relevant Text and Explanation
Restaurant	The seller-advisor took the form of the server, who told the participant that, in light of the "special occasion" for the participant and the participant's dinner companion, the quail option is better, because "[t]he difference [in taste] between [the two options] is well worth the difference in price."
Personal Training	The seller-advisor took the form of the personal trainer, who recommended the HIAIT program, noting that the participant will "see results more quickly with anaerobic training," and that "the difference in results is well worth the difference in price."

[180] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9]. Table 2 clarifies that the seller-advisor took the form of a server at a fancy restaurant, a personal trainer at a local gym, a salesperson at a used car dealership, a mortgage agent, or a surgeon depending on the scenario to which we randomly assigned our participants.

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Car Purchase	The seller-advisor took the form of the car salesman, who recommended the luxury edition model because "the car manufacturer . . . has not had any problems with the EPA, and the difference in mileage (in the LE model) makes up for the difference in price within five years."
House Purchase	The mortgage agent served as the seller-advisor and recommended that the participant proceed with the transaction. The agent told the participant, "You'll be fine . . . our data indicates that these are typical loan terms for someone in your financial position, and it's clear that you love the house."
Medical	The surgeon served as the seller-advisor and recommended that the participant have the surgery: "I have had patients in the past who have had to make this decision . . . and I think having me perform the surgery is the best option."

Notably, the seller-advisor always steered the participant toward the more expensive option, and the more expensive option always benefited the seller-advisor: the restaurant server would receive a higher tip on a more expensive bill, the personal trainer and car salesman would receive a higher commission on the more expensive product, the mortgage agent would receive a commission on the house if the participant did not cancel the transaction, and the doctor would be paid the cost of the surgery that he performed if the participant decided not to "wait and see."

Moreover, most of the seller-advisors—notably the server, the trainer, the car salesman, and the mortgage agent—owe no legally recognized fiduciary duty to act in the best interest of the participant, and therefore owe no duty to disclose their potentially hidden financial interest.[181] Additionally, although doctors generally owe certain fiduciary duties to their patients, those duties do not necessarily require doctors to disclose all financial interests that they might have in a course of action that they recommend to patients.[182]

In sum, we manipulated three variables in this experiment: the type of transaction to which participants were exposed (restaurant, personal training, car purchase, house purchase, or medical decision), the stakes involved in that transaction (either high or low), and the presence or absence of a seller-advisor, who always, to his benefit, recommended the more expensive option.

[181] *See supra* notes 83–99 and accompanying text.
[182] *See supra* notes 114–119 and accompanying text.

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After our participants read the scenario to which they were randomly assigned, we asked them several questions about the financial transaction. On seven-point Likert scales, we asked participants to rate the significance of the decision they made, along with the complexity of the scenario (from "insignificant"/"not complex" to "highly significant"/"highly complex").[183] We also asked participants, on the same seven-point scale, to rate their preference for the less-expensive option and for the more-expensive option (from "very little" to "very much"). Finally, we asked participants to choose between the less-expensive and more-expensive options.

We also asked participants four questions to determine their level of trust in the seller-advisor (if a seller-advisor was present in the scenario that they read). In accordance with the elements of trust that we identified in our review of the literature, we asked participants to rate the seller-advisor's knowledge of the options presented compared to the participants' own knowledge ("ability"), the seller-advisor's general competency (also "ability"), the level of respect that participants afforded the seller-advisor ("integrity"), and how much they trusted the seller-advisor's recommendation ("benevolence").[184]

Finally, we asked participants several demographic questions. We asked participants to record their age, gender, race/ethnicity, highest level of education completed, household annual income, and political orientation. We also asked participants if they had a personal experience with the subject matter that they had read about. Afterward, we thanked the participants, debriefed them with respect to the study hypotheses, and concluded the experiment.

C. Results and Discussion

This section proceeds in three parts. First, it reports the results of the preliminary analyses of the study with respect to our independent and dependent variables.[185] Second, it reports the main results of this study: whether the type of financial transaction to which the participants were exposed, the stakes of that transaction, and whether the presence of a seller-advisor during the transaction independently affected participants' financial

[183] *See* ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 145 (2d ed. 2016) (describing a Likert Scale as a psychometric scale that is routinely used in questionnaires and analyzed as an ordinal variable frequently ranging from one to seven); Saul McLeod, *Likert Scale*, SIMPLY PSYCHOL. (2008), http://www.simplypsychology.org/likert-scale.html [https://perma.cc/4HH8-QT8U] (noting that the Likert Scale is the most widely used measure of attitudes in survey research and that they "allow for degrees of opinion," permitting the researcher to collect quantitative data); *see also* James Carifio & Rocco J. Perla, *Ten Common Misunderstandings, Misconceptions, Persistent Myths and Urban Legends About Likert Scales and Likert Response Formats and Their Antidote*s, 3 J. SOC. SCI. 106, 113 (2007) (refuting common misconceptions of Likert Scales).

[184] *See supra* notes 138–156 and accompanying text.

[185] *See infra* notes 188–201 and accompanying text.

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choices.[186] Third, to the extent that the mere presence of a seller-advisor influenced participants' financial choices, we performed a mediation analysis to determine whether, and to what extent, participants' financial choices can be attributed to their level of trust in the seller-advisor.[187]

1. Preliminary Matters

Our preliminary analyses focused on three questions. First, we claim to have manipulated the stakes of the financial transaction to which participants were exposed. In this section, we perform a "manipulation check," in which we demonstrate empirically that our participants did, in fact, perceive the high stakes and low stakes scenarios as differentially important.[188]

Second, in addition to having participants choose between two competing financial options, and asking participants to rate their preference for those options on two seven-point scales, we asked participants four questions to determine their level of trust in the seller-advisor (if they were randomly assigned to an experimental condition in which a seller-advisor was present). In this part of the study we show, statistically, that those four questions all measured the same latent psychological trait (trust), and that these questions measured trust reliably. We now turn to these analyses.

To determine whether participants perceived the high stakes and low stakes conditions as differentially important across all five scenarios in this experiment, we examined the effect of our "stakes" variable on our "importance" variable through a one-way analysis of variance ("ANOVA").[189] The analysis revealed that participants did in fact perceive the high stakes conditions as meaningfully more important than the low stakes conditions across all financial scenarios.[190] The manipulation was therefore successful.

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[186] *See infra* notes 202–210 and accompanying text.

[187] *See infra* notes 212–223 and accompanying text.

[188] *See generally* Daniel M. Oppenheimer et al., *Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867 (2009) (explaining the concept of a "manipulation check").

[189] As Justin Sevier explained when discussing the use of analysis of variance in another original study:

> An analysis of variance ("ANOVA") provides a statistical test of whether the means of several groups are equal. ANOVA results are represented by an F-statistic, and the sizes of the effects are represented by η^2_p. Means are denoted by the letter "M" and standard deviations are denoted by the letters "SD." Differences are denoted as "statistically significant" in this Article if the statistical tests indicate that the likelihood that the difference observed would occur by chance is 5% or less (as indicated by the p-value as $p < 0.05$). A difference is "marginally significant" if the likelihood of seeing such a difference by chance is greater than 5% but less than 10%.

Justin Sevier, *Vicarious Windfalls*, 102 IOWA L. REV. 651, 677 n.102 (2017) (citation omitted).

[190] $M_{low} = 5.38$ ($SD = 1.58$), $M_{high} = 5.64$ ($SD = 1.37$); $F(1, 840) = 6.22$, $p = .013$, $\eta^2_p = .01$.

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The analysis was more complex to determine whether our four questions, intended to measure the participants' trusts in their seller-advisor, in fact measured trust and did so reliably. To make this determination, we performed two different tests. First, we performed a principal components exploratory factor analysis, with an oblique rotation, on participants' responses to the four questions regarding the seller-advisor to which they were exposed.[191] The analysis confirmed that the four questions that purportedly measured participants' trust in their seller-advisor also measured the same underlying latent trait—trust—and together explained 75.7% of the variance in our participants' responses.[192] In other words, the factor analysis suggested that a significant amount of the variation in how our participants' answered these four questions is accounted for by just one psychological trait. And based on the substance of those questions in light of the psychology literature, we believe that the underlying trait is trust.[193]

Consistent with prevailing practices in experimental psychology, we therefore averaged our participants' responses to these four questions together to form our "trust" index measure. A subsequent analysis revealed that our trust index measure was highly reliable, with a Cronbach's alpha value of 0.89.[194] The results of the exploratory factor analysis appear below.

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[191] *See generally* Harold Hotelling, *Analysis of a Complex of Statistical Variables into Principal Components*, 24 J. EDUC. PSYCHOL. 498 (1933) (explaining the tenets of a principal component analysis and the meaning of an oblique factor rotation).

[192] *See id.* (explaining that the factors in a principal component analysis are meaningful if their statistical "eigenvalues" are greater than one). The eigenvalue associated with the four trust questions was 3.03.

[193] *See supra* notes 130–166 and accompanying text.

[194] *See generally* Lee J. Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16 PSYCHOMETRIKA 297 (1951) (describing the concept of the coefficient alpha and corresponding tests). The reliability of a psychometric scale is measured by a Cronbach's alpha statistic ranging from zero (lowest reliability) to one (highest reliability). J. Martin Bland & Douglas G. Altman, *Cronbach's Alpha*, 314 BRIT. MED. J. 572, 572 (1997). Stated differently, a Cronbach's alpha value "is a measure of internal consistency, that is, how closely related a set of items are as a group" or how well a test measures what it purports to measure. *What Does Cronbach's Alpha Mean?*, UCLA INST. DIGITAL RES. & EDUC., https://stats.idre.ucla.edu/spss/faq/what-does-cronbachs-alpha-mean/ [https://perma.cc/PDD9-TJDQ].

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Table 3. Total Variance Explained[195]

Initial Eigenvalues				Extraction Loadings		
Component	Total	Variance	Cum. %	Total	Variance	Cum. %
1	**3.03**	**75.70**	**75.70**	**3.03**	**75.70**	**75.70**
2	0.57	14.14	89.84			
3	0.25	6.13	95.97			
4	0.16	4.03	100.00			

Individual Items	Trust Index
How would you rate the [advisor's] knowledge of [the subject matter]?	0.79
How competent do you believe the [advisor] is?	0.90
To what degree did you respect the [advisor's] advice?	0.92
How much did you trust the [advisor's] recommendation?	0.86

Finally, we examined whether specific factors—including the perceived complexity of the financial transaction and the perceived significance of the transaction—affected people's willingness to trust their seller-advisors. If these factors independently predict our participants' trust levels—and if the level of perceived complexity and perceived significance differs in each of our scenarios—we must control for these factors in our behavioral model of the relationship between people's trust in their seller-advisors and the financial choices that they make.[196] We turn to this analysis below.[197]

To determine whether the type of financial transaction to which our participants were exposed affected (1) their perceptions of the importance of the transaction and (2) their perceptions of the complexity of the transaction, we performed a multivariate analysis of variance ("MANOVA") on both of these dependent variables, with "transaction type" as the independent variable.[198] The analysis revealed a statistically significant difference

[195] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9]. Table 3 shows that just one latent trait (of five possible latent traits) was statistically meaningful and accounted for three-quarters of the variance in participants' responses to our four items. Those four items loaded onto a reliable "trust" scale, with loadings ranging from 0.79 to 0.92.

[196] These control variables are termed "covariates," and an analysis that includes these covariates would be termed an analysis of co-variance ("ANCOVA") which is a close cousin of the ANOVA linear model. *See generally* Andrew C. Porter & Stephen W. Raudenbush, *Analysis of Covariance: Its Model and Use in Psychological Research*, 34 J. COUNSELING PSYCHOL. 383 (1987) (describing covariance analysis).

[197] *See infra* notes 198–201 and accompanying text.

[198] *See generally* Russell T. Warne, *A Primer on Multivariate Analysis of Variance (MANOVA) for Behavioral Scientists*, 19 PRAC. ASSESSMENT, RES. & EVALUATION 1 (Nov. 2014), http://pareonline.net/pdf/v19n17.pdf [https://perma.cc/9G7V-J2KA] (describing the multivariate analy-

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with respect to the importance of our five transactions.[199] Specifically, participants found the new car scenario, the new house scenario, and the surgery scenario more significant than the restaurant scenario and the personal training scenario.[200] We found a similar, statistically significant pattern of results with respect to participants' perceptions of the complexity of the transactions.[201] We therefore added to the model as control variables the perceived importance and perceived complexity of the financial transactions to which participants were exposed in our experiment.

2. Main Analysis

This section proceeds in two parts. First, we examined the type of financial transaction, the stakes of the transaction, and the presence or absence of a seller-advisor on consumers' financial decision making.[202] Second, in the experimental conditions, where a seller-advisor was present, we examined (1) whether the role of the financial transaction and stakes of the transaction affected consumers' trust in the seller-advisor and (2) the extent to which consumers' trust in the seller-advisor explained their financial choices.[203]

First, we evaluated our experimental hypotheses regarding consumers' financial decisions. Controlling for several variables, we predicted the following. First, we predicted that certain financial transactions would cause participants to choose the expensive option more often than in other financial transactions. Second, although we were unsure of the direction of the difference, we expected that the stakes of the transaction would cause participants to differentially choose the more expensive option (although it is perhaps more likely that they would become more conservative in high stakes situations). Third, and most importantly, we predicted that (1) the mere presence of a seller-advisor, who recommends that participants choose the more expensive option which also benefits the seller-advisor, would cause participants to more often choose the more expensive option; and (2)

sis of variance ("MANOVA") technique). MANOVA is a special type of analysis of variance where multiple dependent variables—which are at least moderately correlated—are analyzed in tandem to reduce the likelihood of false positives ("type I error"). *Id.*

[199] $F(4, 832) = 108.75, p < .001, \eta^2_p = .34$.

[200] The means for the perceived importance of each financial scenario were as follows: $M_{restaurant} = 4.17$ ($SD = 0.09$), $M_{trainer} = 4.90$ ($SD = 0.09$), $M_{car} = 5.71$ ($SD = 0.09$), $M_{house} = 6.54$ ($SD = 0.09$), $M_{surgery} = 6.21$ ($SD = 0.09$).

[201] $F(4, 832) = 59.11, p < .001, \eta^2_p = .22$. The means for the perceived complexity of each scenario were as follows: $M_{restaurant} = 3.42$ ($SD = 0.12$), $M_{trainer} = 4.11$ ($SD = 0.12$), $M_{car} = 4.23$ ($SD = 0.11$), $M_{house} = 5.42$ ($SD = 0.11$), $M_{surgery} = 5.45$ ($SD = 0.12$). Our importance and complexity dependent measures were moderately correlated: $r(835) = .55, p < .001$.

[202] *See infra* notes 204–210 and accompanying text.

[203] *See infra* notes 204–223 and accompanying text.

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this effect would be stronger than the hypothesized conservative effect produced in relation to the stakes of the financial transaction.

To test these hypotheses empirically, we conducted a logistic regression analysis[204] including the following model specifications: (1) the type of transaction, stakes of the transaction, and presence or absence of a seller-advisor as the independent (predictor) variables; (2) the perceived importance and complexity of the transaction as covariates (to serve as controls); and (3) the participants' financial choice—either the cheaper or more expensive option—as the dependent (response) variable.

The results confirmed our hypotheses. First, we found a significant and strong effect on participants' willingness to choose the more expensive financial option based on the type of transaction they engaged in.[205] Specifically, participants were more willing than not to choose the more expensive entrée at the restaurant and the luxury edition vehicle, regardless of the presence or absence of a seller-advisor. Participants were more evenly split between the cheaper and expensive options in the personal training, house purchase, and surgery scenarios. A graph illustrating participants' choices in each financial scenario appears below.

Chart 1[206]

[204] A logistic regression is a regression analysis that examines whether several variables independently predict a binary, dichotomous outcome, such as a guilty or not guilty verdict. *See* LAWLESS ET AL., *supra* note 183, at 298–303 (discussing logistic regressions). Statistical significance in a logistic regression model is determined by a "Wald" statistic and its corresponding p-value. Viv Bewick et al., *Statistics Review 14: Logistic Regression*, 9 CRITICAL CARE 112, 114 (2005). The logistic regression model also produces an "exponential(B)" statistic, which is an odds ratio. Exponential(B) values above one represent heightened odds (for example, an exponential(B) value of two represents a doubling of the odds), whereas values below one represent decreased odds.

[205] $Wald = 39.21, p < .001$.

[206] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9]. Chart 1 shows that 76% of participants in the car condition chose the expensive option, as did 63.6% of participants in the restaurant condition, 48.5% of participants in the house condition, 47.9% of participants in the trainer condition, and 45.2% of participants in the surgery condition.

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Second, we found a statistically significant—but weaker—effect on participants' likelihood of choosing the more expensive option based on the stakes of the transaction. Specifically, participants were less likely to choose the expensive option—that is, exhibited greater conservatism—when the stakes of the transaction were higher than when they were lower.[207] Across all financial scenarios, this conservatism effect reduced the likelihood of participants choosing the more expensive option by roughly twenty-two percent.[208]

Finally, and most importantly, we found a statistically significant effect on participants' likelihood of choosing the seller-advisor-preferred, more expensive option, whenever a seller-advisor was present.[209] Specifically, the mere presence of the seller-advisor increased the likelihood that participants would choose the option that the seller-advisor recommended by roughly forty-three percent, and this effect was stronger than the conservative effect exhibited with the degree of the stakes of the transaction.[210]

Notably the effect of the seller-advisor's presence caused an increase in participants' likelihood of choosing the more expensive option in each financial scenario, although the effect was not uniform. The seller-advisor had a relatively small effect on participants' choices in the house and car purchase scenarios. The seller-advisor's impact was stronger, however, in the restaurant, surgery, and personal training scenarios. Indeed, the mere presence of the seller-advisor caused a shift in overall preference in the personal training scenario, away from a preference for the cheaper option and toward a preference for the more expensive, seller-advisor-preferred option.

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[207] $B = -0.25$, $SE = 0.15$, $Wald = 2.84$, $p = .092$ (marginal), *exponential(B)* = 0.78 (odds ratio).

[208] For example, in the surgery scenario, 57.8% of participants in the low stakes condition elected to have the more expensive option (surgery). That percentage fell to 32.9% of participants in the high stakes condition.

[209] $B = 0.36$, $SE = 0.15$, $Wald = 5.50$, $p = .019$, *exponential(B)* = 1.43 (odds ratio).

[210] For example, in the personal training scenario, participants chose the more expensive training package just 33.9% of the time when they were not exposed to a seller-advisor. In contrast, 55% of participants exposed to a seller-advisor chose the seller-advisor's preferred, more expensive, option. Participants chose the more expensive, seller-advisor-preferred option by 10.4 points in the restaurant condition, 21.1 points in the trainer condition, 2.2 points in the car condition, 0.3 points in the house condition, and 7 points in the surgery condition.

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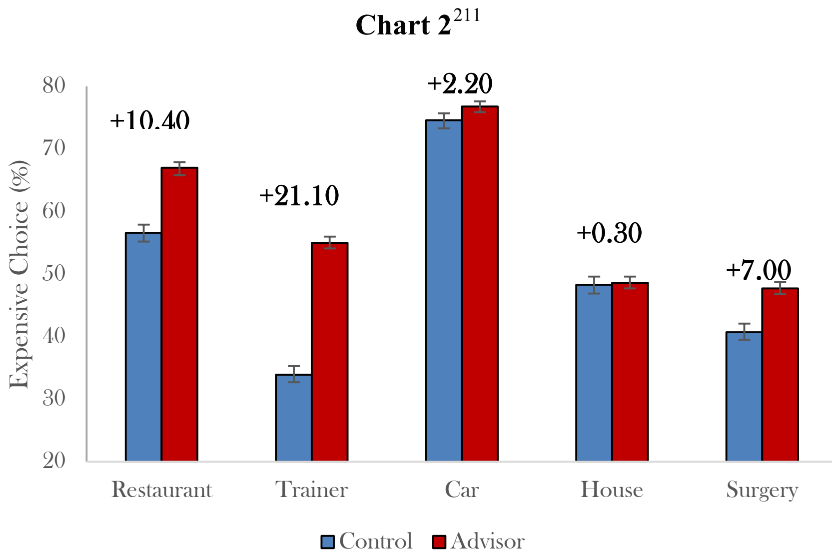
Chart 2[211]



We next evaluated the role of perceived trust with respect to participants' financial choices. To do so, we examined only participants who had been exposed to a seller-advisor. Among these participants, we had several hypotheses. First, we expected that people would generally trust their seller-advisors, perhaps on the mistaken assumption that the seller-advisors were looking out for the interests of the participants. Second, although we had no specific predictions, we expected that people would not trust the seller-advisors equally across all five financial scenarios. Third, we expected that high stakes financial transactions would make our participants more conservative, and therefore less likely to trust their seller-advisor, compared to low stakes financial transactions. Finally, and most importantly, we expected that participants' financial choices would be strongly and significantly associated with their score on the trust index that we created in this experiment.

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[211] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9]. Chart 2 illustrates the percentage of consumers who chose the expensive option in each financial scenario. The left-side bar in each scenario represents the percentage of consumers who chose the expensive option when they were not exposed to a seller-advisor. The right-side bar in each scenario represents the percentage of consumers who chose the expensive option across all of the experimental conditions in this study (that is, the conditions in which a seller-advisor was present). Thus, the right-side bars indicate the percentage of participants who followed the seller-advisor's recommendation. Above each scenario, we have included the seller-advisor effect, which is an increase in the percentage of consumers who chose the more expensive, seller-advisor-recommended option.

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To test these hypotheses, we first compared the mean trust ratings for participants in our sample with the midpoint of the trust scale. Next, we conducted a main effects analysis of co-variance ("ANCOVA") in which we included (1) the type of transaction and stakes of the transaction as the independent variables, (2) the perceived importance and complexity of the transaction as covariates, and (3) the scores on the trust index as the dependent variable. We then examined the bivariate correlation between the participants' choices and their trust in their seller-advisor.[212]

The results supported our hypotheses. The mean rating on our trust index was 5.23 out of 7. A one-sample t-test revealed that this rating was statistically different from the lowest point of the scale (1)[213] and was statistically different from the mid-point of the scale (4) as well.[214] This indicates, consistent with past literature on the psychology of trust, that participants generally trusted their seller-advisor in the financial transaction to which they were exposed.[215]

Additionally, as with participants' financial choices, we found a strong and significant effect on participants' trust in their seller-advisor based on the type of transaction, such that the car salesman and the mortgage agent were deemed less trustworthy than the agents in the other financial scenarios.[216] We also found a weaker, but statistically significant, effect on participants' trust in their seller-advisor based on the stakes of the transaction, such that participants viewed the seller-advisor in the high stakes condition as less trustworthy than the seller-advisor in the low stakes condition.[217]

Finally, and most importantly, an examination of the bivariate correlation between participants' trust scores and their ultimate financial decision revealed a moderately strong and statistically significant relationship between participants' trust in the seller-advisor, across all scenarios, and their likelihood of choosing the seller-advisor's preferred option.[218]

In four of the five scenarios, the correlation between participants' trust in the seller-advisor and their willingness to choose the seller-advisor's pre-

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[212] Bivariate correlations range from negative one (a perfect negative relationship) to positive one (a perfect positive relationship). *See* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 425–29 (14th ed. 2016). A bivariate correlation of zero indicates no relationship. *Id.*

[213] $M = 5.23$, SD = 1.24. $t(556) = 80.37$, $p < .001$, *Cohen's* $d = 3.41$. A one-sample t-test is a parametric technique that "determines whether the sample mean is statistically different from a known or hypothesized population mean." *SPSS Tutorials: One-Sample t-Test*, KENT ST. U. LIBRARIES, https://libguides.library.kent.edu/SPSS/OneSampletTest [https://perma.cc/6SLX-LSP6].

[214] $M = 5.23$, SD = 1.24. $t(556) = 23.38$, $p < .001$, *Cohen's* $d = 0.99$.

[215] *See supra* notes 130–166 and accompanying text.

[216] $F(4, 548) = 47.41$, $p < .001$, $\eta^2_p = .26$. The means for the level of trust vis-à-vis the seller-advisor in each scenario are as follows: $M_{restaurant} = 5.95$ ($SE = 0.11$), $M_{trainer} = 5.52$ ($SE = 0.11$), $M_{car} = 4.72$ ($SE = 0.10$), $M_{house} = 4.18$ ($SE = 0.11$), $M_{surgery} = 5.80$ ($SE = 0.11$).

[217] $M_{low} = 5.33$ ($SE = 0.07$), $M_{high} = 5.14$ ($SE = 0.07$), $F(1, 548) = 4.36$, $p = .037$, $\eta^2_p = .01$.

[218] *Pearson's* $r(550) = .29$, $p < .001$.

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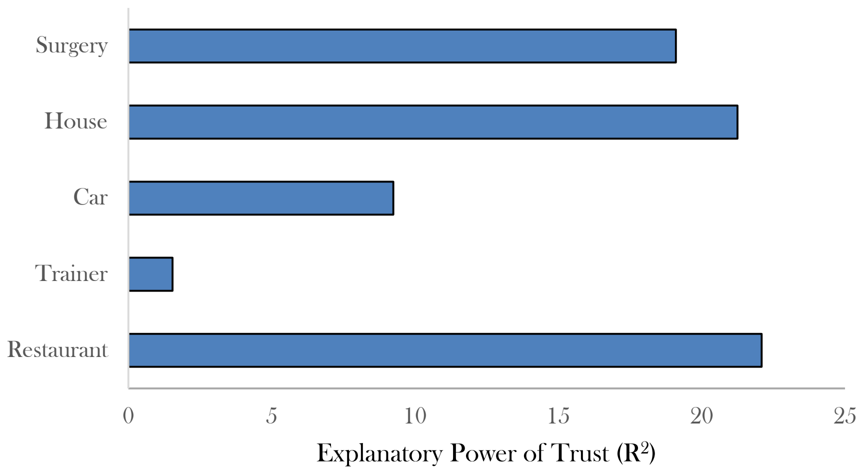
ferred option was moderate to strong.[219] Extrapolating from these bivariate correlations, we also determined the percentage of the variance in people's financial choices that were explained through their trust in their seller-advisor. Participants' level of trust in their seller-advisor explained twenty percent of their financial decision in the restaurant, house purchase, and surgery scenarios. Trust levels accounted for ten percent of the variance in the car purchase scenario.[220]

Chart 3[221]



In sum, the results from Part One of our study provide substantial support for our hypotheses regarding the role of seller-advisors and the role of trust in consumers' decisions across a spectrum of commonplace financial scenarios. Consumers' willingness to choose a more expensive financial option versus a cheaper option vary widely across differing financial sce-

[219] In the restaurant scenario, the bivariate correlation was 0.47 ($p < .001$); in the car purchase scenario, it was 0.3 ($p = .001$); in the new house scenario, it was 0.46 ($p < .001$); in the surgery scenario, it was 0.44 ($p < .001$). The trainer scenario was the only scenario in which the correlation was unreliable ($p = .195$), and the bivariate correlation between perceived trust scores and consumer choice was 0.12.

[220] Specifically, and as Chart 3 illustrates, the r^2 values for each experimental condition are as follows: 0.22 for the restaurant condition, 0.21 for the house condition, 0.19 for the surgery condition, 0.09 for the car condition, and 0.01 for the trainer condition. The figures in the graph represent r^2 values. The r^2 statistic represents the amount of the variance in the dependent variable that is entirely attributable to the independent variable. r^2 values range from zero (no explanatory power) to one (perfect explanatory power).

[221] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9].

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narios. They become predictably more conservative, however, when the stakes of the financial transaction are high.

More importantly, the mere presence of a seller-advisor increases the likelihood that participants will choose the financial option recommended to them by the seller-advisor, even when the seller-advisor's recommendation is motivated by a financial interest that is independent from the interests of the consumer. Subsequent analyses revealed that this seller-advisor effect is not simply a matter of coldly deferring to the expertise of the seller-advisor; a substantial amount of the variance in consumers' financial choices in our study is attributable—independently and explicitly—to the trust they felt towards their seller-advisor. These findings are host to an array of potential policy implications for the relationships between seller-advisors and consumers in the marketplace, which we discuss at the conclusion of this Article.[222]

Part One of this study leaves several questions unanswered. For example, what might be the effect, if any, of the disclosure of a seller-advisor's financial interest in the option that the seller-advisor recommends to a consumer? Moreover, does the source of that disclosure—either through the seller-advisor or a third party—affect consumers' levels of trust in the seller-advisor and, ultimately, the financial choices that they make? Part Two of our study examines these questions.[223]

IV. Experimental Study: Part Two

Two questions formed the basis of Part Two of our study. Recall that the mere presence of a seller-advisor in Part One increased the likelihood that consumers would choose the seller-advisor's preferred financial product.[224] Also recall that the seller-advisor preferred that financial product because the product allowed the seller-advisor to earn an economic benefit, compared to the disfavored option.[225] It is an open question (1) whether consumers would trust the seller-advisor if the seller-advisor disclosed his or her financial interest at the time of the transaction; and (2) whether the disclosure would affect the consumers' financial decisions. On the one hand, we can imagine that consumers will realize that the seller-advisor's recommendation stems from the seller-advisor's independent financial interest, and the consumer will be less inclined to follow the seller-advisor's advice. On the other hand, we can imagine that the seller-advisor's disclosure may make consumers more likely to trust the seller-advisor's advice and follow their recommendation, on account of the seller-advisor's candor.

[222] *See infra* notes 248–291 and accompanying text.
[223] *See infra* notes 224–245 and accompanying text.
[224] *See supra* notes 209–210 and accompanying text.
[225] *See supra* notes 180–182 and accompanying text.

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Second, it is unclear whether the disclosure of the seller-advisor's financial interest in the transaction must come from the seller-advisor or if it only matters that the consumer receives the information, regardless of its source. To the extent that the seller-advisor fails to disclose his or her financial interest, consumers might view that as a violation of the relationship of trust and confidence that they believe they hold with the seller-advisor. A third-party's disclosure of that financial interest might, therefore, cause consumers to switch their financial preferences accordingly. If this is so, we expect that decreased levels of trust in the seller-advisor would be responsible for consumers' changed financial preferences. Our methods for testing these hypotheses and the results from Part Two of this study appear below.

A. Participants

Part Two of this study is composed of data collected from a subset of the participants from Part One. Participants were, therefore, also recruited through Amazon Mechanical Turk, and completed the study through the online Qualtrics survey platform.[226]

The subset of participants whose data is reported in Part Two totaled 558 people. Females composed 49.1% of the subset, and the average age of participants was 38.88 years old (with a standard deviation of 12.91 years). Caucasian participants composed 77.8% of the subset, followed by African-American (8.5%), Asian-American (7.2%), Hispanic (4.7%), and "other" (1.8%). Approximately 52.6% of the sample had obtained at least a college degree, and the median household income was between $40,000 and $49,999. Forty-four percent of the sample had experience with the financial scenario that they encountered in this study.

B. Procedure and Measures

Because the data we analyze in Part Two is a subset of the data from Part One of this study, the procedures and measures were largely the same.[227] The participants in Part Two were randomly assigned to the "seller-advisor present" conditions of the original experiment. We created two additional sub-variables for participants assigned to the seller-advisor conditions, which we discuss below.

First, we manipulated the transparency of the seller-advisor's independent financial interest in his or her recommendation to the consumer. In the opaque conditions—to which half of the participants in the seller-advisor condition were assigned randomly—consumers received no information re-

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[226] *See supra* note 173–175 and accompanying text.
[227] *See supra* notes 176–184 and accompanying text.

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garding the seller-advisor's potential conflict of interest. In the transparent conditions, however, the seller-advisor disclosed the conflict when giving his or her recommendation. For example, in the restaurant scenario, the server clarified that he or she would recommend the more expensive quail dish anyway, "even if [he or she] would not receive a higher tip because of the increased price of the meal." [228] Participants then followed the procedure outlined for Part One.[229] Participants chose between the two financial options, rated their preferences for them, and recorded their trust in the seller-advisor.

We subjected participants who were randomly assigned to the opaque conditions, however, to one more experimental manipulation. After the participants received a recommendation from the seller-advisor, who did not disclose their financial interest, and rated their preferences for each financial option, participants read text which revealed the seller-advisor's incentive, but from someone other than the seller-advisor. For example, in the restaurant scenario, participants were told to imagine that, a few days later, they were casually discussing the dinner and their entrée choice with a friend who remarked, "[t]hat's a tough choice. I guess the server has an incentive to recommend the expensive dish, since the resulting tip would be higher."

All participants in the opaque conditions were then asked, "in light of this conversation," which financial option they would choose, their preference for each option, and their level of trust in the seller-advisor. All participants were then debriefed regarding the experimental hypotheses and the study was concluded. A chart of the experimental language in the transparent and opaque conditions appears below.

[228] Table 4 provides the text of each transparent and opaque condition scenario. *See infra* note 230 and accompanying text.

[229] *See supra* notes 176–184 and accompanying text.

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Table 4. Incentive Disclosure Conditions in Part Two[230]

Scenario	Transparent	Opaque (Third-Party Reveal)
Restaurant	"I've had both dishes," the server says. "The difference between them is worth the difference in price. I'd recommend it even if I would not receive a higher tip because of the increased price of the meal."	Your friend remarks, "That's a tough choice. I guess the server has an incentive to recommend the more expensive dish, since the resulting tip would be higher."
Trainer	"I've been through both programs," the trainer says. "The difference in results is well worth the difference in price. I'd recommend it for you even if it were the cheaper option and I'd get paid less."	Your friend remarks, "That's a tough choice. I guess the trainer has an incentive to recommend the more expensive package, because the difference in price gets paid directly to the trainer."
Car	"I've driven both cars," says the salesperson . . . . "The difference in mileage makes up for the difference in price within five years. I'd recommend the LE to you even if I weren't receiving a higher commission from the sale."	Your friend remarks, "That's a tough choice. I guess the salesperson has an incentive to recommend the luxury model, since the price difference would result in a higher commission."
House	"It's clear you love the house," says the mortgage agent . . . . "I would make the same recommendation to you even if I weren't receiving a commission when you complete the purchase."	Your friend remarks, "That's a tough choice. I guess the mortgage agent has an incentive to recommend that you purchase the house, since the agent gets paid on commission."
Surgery	"I think having me perform the surgery is the best option," says the doctor. "I would make this recommendation to you even if someone else performed the surgery, and I did not get paid for it."	Your friend remarks, "That's a tough choice. I guess the doctor has an incentive to recommend the surgery, since the doctor would perform it and get paid for it."

[230] This Table is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9]. The relevant information that participants learned, as shown in Table 4, is as follows: (1) the restaurant server receives a higher tip if the more expensive entrée is selected, (2) the personal trainer receives greater compensation if the more expensive training package is selected, (3) the car salesperson receives a higher commission if the more expensive car is selected, (4) the mortgage agent receives a commission only if the house purchase is completed, and (5) the surgeon has an incentive to recommend the surgery because he or she would perform it and receive payment for it. The seller-advisor revealed the incentive to the participant in the "transparent" condition; a friend of the participant revealed the incentive in the "opaque" condition.

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C. Results and Discussion

We report the results of three different tests in Part Two of the study. First, we examined whether any differences exist with respect to the financial decisions of the participants in the transparency condition and those in the opaque condition, before they learned of the seller-advisor's financial interest. Second, examining only participants in the opaque condition, we examined whether any meaningful differences exist between consumers' financial decisions before they learned of the seller-advisor's financial incentive and after a third party revealed it to them. Finally, to the extent that meaningful differences exist between the financial decisions of the participants in the opaque conditions before and after they learned of the seller-advisor's conflict of interest, we examined whether consumers' level of trust in the seller-advisor attributes to the shift in financial preference.

We first examined, controlling for the perceived importance and complexity of the transaction, whether the transparency of the seller-advisor's conflict of interest affected participants' financial choices or their trust in the seller-advisor. Somewhat surprisingly, we found no meaningful differences in consumer choices[231] or in their trust in the seller-advisor.[232] This may suggest that mere disclosure by the seller-advisor will not, by itself, lead consumers to trust the seller-advisor more and choose the seller-advisor's preferred financial product more often. Conversely, it may also mean that consumers do not "punish" self-interested seller-advisors, either by trusting them less or failing to follow their recommendations, because they are not aware of the seller-advisor's potential conflict.

As a result of this ambiguity in our results, we next examined how consumers behave when a third party reveals the seller-advisor's conflict of interest. The post-choice disclosure of the seller-advisor's financial incentive by a third party caused a ten percent net movement in consumer choices toward the cheaper financial option, which was *not* recommended by the seller-advisor.[233] This effect was trending toward significance in our sample of consumers.[234]

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[231] $B = 0.04$, $SE = 0.18$, $Wald = 0.04$, $p = .834$, $exponential(B) = 1.04$ (odds ratio). Compared to participants in the transparent condition, participants in the opaque condition were 4% more likely to choose the advisor's preferred financial option. This (small) observed effect, however, was statistically unreliable.

[232] $M_{opaque} = 5.26$ ($SE = 0.08$), $M_{transparent} = 5.20$ ($SE = 0.07$); $F(1, 552) = 0.28$, $p = .600$, $\eta^2_p = 0$.

[233] Unlike our previous statistical tests, which examined how different participants responded to our experimental manipulations (referred to as a "between-subjects" design), this portion of our study examines changes over time in the responses given by the same participants, which is referred to as a "within-subjects" design.

[234] $\chi^2(1) = 2.31$, $p = .12$. In this chi-square "goodness of fit" test, we tested the proportion of participants' post-disclosure choices against the proportion of pre-disclosure financial choices to determine whether the post-disclosure proportions meaningfully differed from participants' pre-

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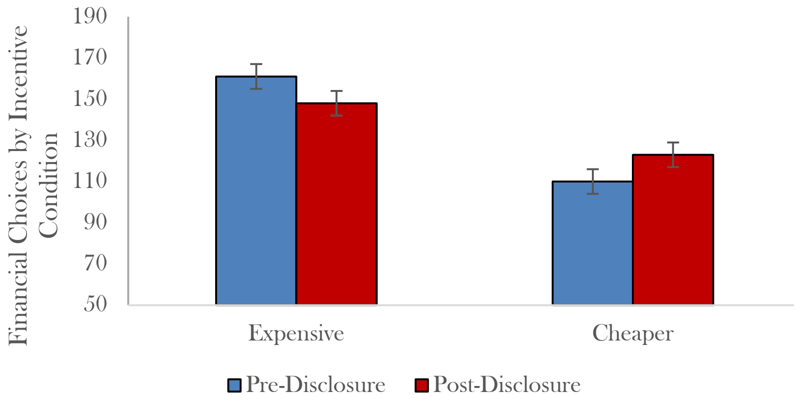
Chart 4[235]



We also tested whether any differences emerged regarding consumers' willingness to trust the seller-advisor again. A repeated measures analysis of variance, comparing participants' willingness to trust the seller-advisor again in the future before the incentive was revealed with their willingness to do so after a third party disclosed the incentive, revealed a significant drop in consumers' trust in the seller-advisor after the third-party disclosure of the incentive compared to beforehand. Specifically, participants appeared to trust the seller-advisor highly when the seller-advisor's conflict of interest remained opaque, but those trust levels regressed toward the midpoint of the scale after the third-party disclosure of the conflict.[236] The graph below illustrates the participants' willingness to trust the seller-advisor both before and after the third-party disclosure of the seller-advisor's financial interest in each of the five scenarios.

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disclosure choices. *See* LAWLESS ET AL., *supra* note 183, at 210–15. Although consumers' shift in preferences did not reach statistical significance as it is conventionally defined ($p < .05$), it came close to reaching marginal significance, as it is defined in the statistical literature ($p < .10$). If the null hypothesis were true (that there was no change in consumers' financial decisions as a result of the third party's disclosure of the seller-advisor's incentive), we would see the results that we found in our study just twelve times out of every one hundred studies. This suggests, unsurprisingly, that the newly disclosed information affected our participants' financial choices partially but not entirely. As we demonstrate later in this Article, however, the newly disclosed information *did* negatively affect our participants' stated preferences for the financial option favored by the seller-advisor. *See infra* note 243 and accompanying text.

[235] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9].

[236] $M_{opaque} = 4.91$ ($SE = 0.10$), $M_{transparent} = 4.54$ ($SE = 0.10$); $F(1, 267) = 36.54$, $p < .001$, $\eta^2_p = .12$.

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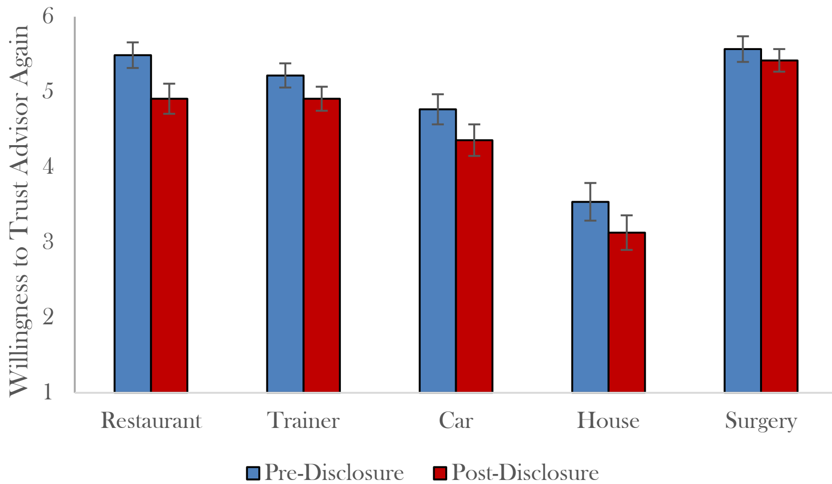
Chart 5[237]



Although we found, in parallel, that a third-party's disclosure of a seller-advisor's financial conflict of interest resulted in (1) a preference shift among some of the consumers in our study vis-à-vis their financial choices; and (2) lowered feelings of trust toward the seller-advisor as a result of that third-party disclosure, we have not determined whether consumers' willingness to trust the seller-advisor is attributable to the shift in consumer preferences. To test this proposition empirically, we employed a psychological mediation analysis, which is a series of regression models designed to test the psychological "pathway" through which an independent variable exerts its influence on a dependent variable.[238]

In our mediation analysis, we hypothesize that the third-party's disclosure of the seller-advisor's conflict of interest is associated with lowered feelings of trust on the part of consumers toward the seller-advisor. These lowered feelings of trust, in turn, are associated with lowered preferences for the seller-advisor's recommended financial option. These lowered pref-

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[237] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9].

[238] Mediation analysis determines "when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator." Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RES. METHODS 879, 879 (2008) (quoting the Abstract). We performed this mediation using a linear regression analysis. This analysis reports unstandardized coefficients ("B") and standard errors ("SE"). Mediation analysis determines whether the coefficients are statistically significant via a "student's t" statistic. A linear regression examines the independent effects of independent variables on a continuous dependent variable. *See* LAWLESS ET AL., *supra* note 183, at 257–88.

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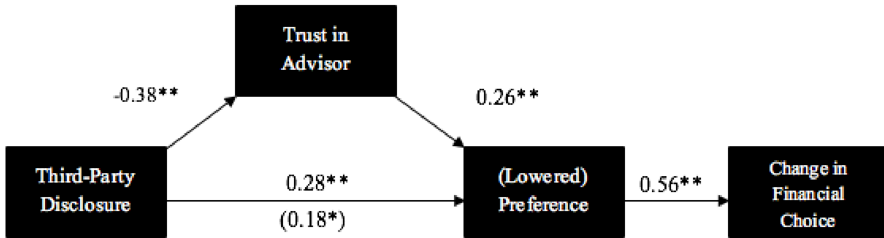
erences then manifest themselves in the financial choices that our participants made, in which a subset of our participants, upon reflection, chose the financial option that was not recommended by the seller-advisor.[239]

Chart 6[240]



The mediation analysis supports our hypothesis that lowered levels of trust toward the seller-advisor were the mediating factor in our study. The mediation first demonstrated a statistically significant difference between consumers' preferences for the seller-advisor-preferred, more expensive, financial option before they learned of the seller-advisor's conflict of interest and their preferences for that option after they learned of it.[241] Specifically, participants preferred the more expensive option significantly less after learning of the seller-advisor's conflict of interest. Next, the analysis demonstrated that consumers' willingness to trust the seller-advisor in the future differed depending on whether they had been made aware of the seller-advisor's conflict.[242] Consumers were significantly more willing to trust the seller-advisor again before a third party revealed the seller-advisor's conflict than they were afterward.

Importantly, we found that, when we included the change in participants' trust ratings, vis-à-vis the seller-advisor, into the model in which we examined the change in participants' preferences for the more expensive financial option, we found that (1) a change in trust levels was a statistically significant predictor of the change in consumer preferences; and (2) the ef-

[239] We performed a special type of mediation analysis called a "repeated measures" or "within subjects" mediation, which applies the typical mediation analysis to responses made by the same experimental participants over time during the study. Amanda K. Montoya & Andrew F. Hayes, *Two-Condition Within-Participant Statistical Mediation Analysis: A Path-Analytic Framework*, 22 PSYCHOL. METHODS 6, 6–7 (2017) (explaining the procedure and placing it in the context of the traditional mediation analysis).

[240] This Chart is permanently available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-3/sevier-williams-graphics.pdf [https://perma.cc/P667-7XA9].

[241] $B = 0.28$, $SE = 0.08$, $t(263) = 3.74$, $p < .001$, CI [0.13, 0.43].

[242] $B = -0.38$, $SE = 0.06$, $t(263) = 6.07$, $p < .001$, CI [0.26, 0.50].

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fect of the change in preferences was reduced by 0.1 (from 0.28 to 0.18).[243] This is a reduction of the effect by 35.7%. We can conclude, therefore, that lowered feelings of trust toward the seller-advisor after a third party's disclosure of the seller-advisor's conflict of interest accounted for nearly 36% of the change in consumer preferences.[244] Moreover, consumers' preferences for the expensive financial option were strongly, significantly, and positively associated with their financial choices, such that higher preferences for the more expensive option were associated with actually choosing the more expensive option, and vice versa.[245] These strong preferences likely explain a significant remainder of the participants' decision making.

V. IMPLICATIONS, OBJECTIONS, AND CONCLUSIONS

In this Part of the Article, we offer thoughts about the normative implications of our study and acknowledge the limitations of our approach and conclusions.[246] We address potential objections to our methodology and discuss avenues for future research.[247] Finally, we offer the concluding thoughts about our study results and analysis.

A. Research and Policy Implications

In this Article, we identify some of the contours and limitations of consumers' trust in seller-advisors. We found that consumers may enter an interaction with a seller-advisor giving the seller-advisor the benefit of the doubt, assuming or "trusting" that the seller-advisor is knowledgeable and well-intentioned.[248] As the stakes and significance of the transaction at issue increased, consumers were less likely to defer to the seller-advisor's advice to choose a more expensive option.[249] *High stakes* transactions led to more conservative decisions. Consumers who received advice, however, were more likely to choose the more expensive/riskier option than those who received no advice.[250] The fact that consumers were willing to change their

[243] Total effect of the difference in trust levels on the difference in participants' preferences for the expensive option: $B = 0.26$, $SE = 0.07$, $t(261) = 3.84$, $p < .001$, CI [0.13, 0.40]. Effect of the difference in participants' preferences (while controlling for their difference in trust levels): $B = 0.18$, $SE = 0.07$, $t(261) = 2.48$, $p = .014$, CI [0.04, 0.33].

[244] Indirect effect of differences in trust levels on differences in participants' financial preferences: $B = 0.10$, $SE = 0.04$, CI [0.03, 0.18].

[245] $B = 0.56$, $SE = 0.09$, $Wald = 35.63$, $p < .001$, $exponential(B) = 1.76$. A one-unit increase in participants' trust scores was therefore associated with a 75% increase in the odds that they would choose the advisor's preferred financial option (and vice versa).

[246] *See infra* notes 248–291 and accompanying text.

[247] *See infra* notes 282–291 and accompanying text.

[248] *See supra* notes 213–215 and accompanying text.

[249] *See supra* note 217 and accompanying text.

[250] *See supra* notes 209–217 and accompanying text.

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decisions and move away from the more expensive choice when the seller-advisor's incentives were initially concealed and then later revealed by a third party indicates a potential loss of trust in those situations, putting the consumer on guard and, therefore, less likely to defer to the seller-advisor's judgment.[251]

Social science literature tells us that society's goal should not be to encourage trust, but rather to encourage *trustworthiness*.[252] The focus then should be on what seller-advisors can do to signal trustworthiness and to create a structure around their interactions with consumers that earnestly, and in good faith, works to take into account and honor consumers' preferences in giving advice. By taking actions that signal trustworthiness, a seller-advisor may actually become trustworthy. Of course, all kinds of signals can be faked, and seller-advisors could lull consumers into inappropriately trusting them without too much effort. The law may play a role in verifying signals of trustworthiness and perhaps in punishing false signals. The law may also effectively incentivize reliable signals. It must take care, though, not to mandate signals that could prove false. Requiring everyone to "look" trustworthy, when not everyone is, would be a great detriment to consumer trust and well-being. Consumers need help identifying competent, benevolent seller-advisors who have integrity.

The law may be able to assist by signaling trustworthy seller-advisors, but must be very careful not to overburden communications between consumers and seller-advisors or to legitimize false signals sent by untrustworthy seller-advisors. The law's role in promoting safe, trusting relationships between consumers and seller-advisors is to help consumers separate the good from the bad. As many scholars in the past have noted, the law's ability to influence trust may be limited.[253] It is most important that the law not impede the ability of consumers and seller-advisors to form trusting relationships or create so much noise that reliable signals are lost. Perhaps the law would do best to assist market mechanisms that work and to avoid impeding the effective communication the market has already devised. A system that fosters communication and is still able to punish false signals may be able to strike the optimal balance.

There appear to be several benefits to consumers' decision making when seller-advisors disclose their personal incentives voluntarily at the outset of the conversation. Understanding how seller-advisors are compensated and what their motivations are for the advice they give helps consumers better understand the transactions or products they are considering and

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[251] *See* HARDIN, *supra* note 39, at 23.

[252] *Id*. at 1.

[253] *See, e.g.*, Ribstein, *supra* note 92, at 554 ("This article concludes that trust does not provide a distinct justification for mandatory legal rules . . . .").

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allows them to make more informed decisions. Such disclosures would also serve as admissions against interest. That sort of openness is key to building a belief in the benevolence of, and thereby trust in, the seller-advisor.[254] Disclosure of conflicts of interest and compensation structures is a key element of the fiduciary duty of loyalty.[255] Fiduciaries may not harbor financial interests without disclosing them to their beneficiaries and receiving their approval.[256] Requiring the disclosure of a seller-advisor's interest in the transaction would honor the hybrid nature of the seller-advisor's role. Mere disclosure would not be as onerous as the duties imposed on fiduciaries because a seller-advisor would not have to seek the consumer's consent for the compensation scheme or financial interest. Simple disclosure would allow a consumer to understand more completely how the transaction works and to put the seller-advisor's recommendations in the proper context.

Legally mandated disclosure is fraught. Book-length disclosures for simple transactions effectively bury important, easy to understand terms, and are therefore frequently ignored.[257] Legally required disclosures are more likely to be rushed over and treated as an onerous obligation, rather than as a simple, important part of explaining a transaction to a consumer.[258] Further, disclosures made to fulfill legal obligations may not help to build trust because they do not serve as an indication of voluntary openness. Admissions against interest do not build trust if they are only given under pain of legal liability.[259] The law may not be able to force conditions amenable to trust by mandating disclosure. Furthermore, the law may undermine its very purpose if it goes too far down that path.

There may be a way to use various carrots to induce seller-advisors to be more trustworthy, or to try to develop and encourage trustworthiness in their employees. If the law were to more openly acknowledge that seller-advisors have special attributes that put them in a different category than other sellers and fiduciary duty-bound advisors, there may be a way to develop a jurisprudence around their interactions with consumers. When a consumer is aggrieved by their relationship with a seller-advisor—for instance, if a consumer received and acted upon completely inappropriate advice and was harmed—a seller-advisor may be given the benefit of the doubt if he clearly and simply explained his interest in the transaction to the consumer. Clear and effective warnings to consumers about the potential

[254] *See supra* notes 148–156 and accompanying text.
[255] *See supra* note 85 and accompanying text.
[256] *See* Frankel, *Fiduciary Duties*, *supra* note 87, at 1229.
[257] BEN-SHAHAR & SCHNEIDER, *supra* note 40, at 8–9.
[258] *Id*.
[259] *See* Ribstein, *supra* note 92, at 577 ("Regulation thereby may increase the friction and attendant transaction costs that trust is supposed to reduce.").

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dangers of following the seller-advisor's recommendation, or of not doing more independent research, may warrant more lenient treatment of seller-advisors whose advice harms consumers.[260] Finding indications of benevolence and good faith may absolve the seller-advisor of responsibility for a decision that is revealed to be ill-advised only in hindsight. The law should seek ways to encourage and incentivize benevolence and commitments to actions that signal good faith without micromanaging the communications between seller-advisors and consumers.

Ability can be signaled and disclosed more easily than benevolence.[261] Posting credentials or publicizing the credentials required to obtain a seller-advisor position would be an obvious step for companies interested in signaling the superior expertise and competence of their seller-advisors. Developing a long, successful track record in an industry or geographical region can also serve that purpose. Seeking and highlighting favorable consumer testimonials and reviews can also signal successful experience to potential consumers. Professional associations can set standards for expertise and competence and require the disclosure of certain credentials. They can also require disclaimers by seller-advisors that express the limits of their knowledge and ability and point consumers to other helpful resources that may offer them guidance. Admissions against interest can, again, be useful to signal trustworthiness with regard to competence or ability.[262] If a seller-advisor says clearly, "I can help you with x, but I can't help with y because I don't have any experience with y. Y may be better for you, but you would have to talk with someone else about that," that admission may communicate knowledge of the topic more generally by showing an awareness of y and also a comfort with what the seller-advisor knows as well as what the seller-advisor does not know. The doctor in our scenarios did not admit a lack of knowledge about other procedures or treatments and did not emphasize that his experience was limited to one kind of treatment. Our results showed that patients were willing to give doctors the benefit of the doubt at the outset, but were more hesitant to follow the doctors' advice as the stakes of the scenario increased.[263] Someone who is comfortable admitting what they do not know may seem less likely to make mistakes by overselling the advice they give based on what they do know. Understanding the limits of one's own knowledge and expertise is an important element of truly demonstrating expertise. And, of course, admitting limitations is a form

[260] Potential causes of action could include negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, malpractice, or violation of any number of consumer protection regulations.

[261] *See supra* note 144 and accompanying text.

[262] *See supra* notes 144–147, 150 and accompanying text.

[263] *See supra* notes 216–218 and accompanying text.

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of openness that is likely to also increase consumers' faith in the seller-advisor's benevolence.[264]

The law may be able to mandate disclaimers in some instances, requiring that seller-advisors honestly present the limits of their credentials and expertise. The typical problems with mandatory disclosure regimes would arise if those disclosure requirements go too far.[265] Standards of care and licensing requirements are the usual legal responses to problems of competence. All are strategies that can be effective and help communication and signaling if used judiciously. Lawmakers must be cautious when thinking about expanding licensing requirements to new industries. Licensing regimes can be expensive barriers to entry for new providers and can be difficult to implement, monitor, and comply with. Some minimal standards can be helpful in specialized fields, but requiring that every potential seller-advisor pass a test and pay fees would not be the answer to consumer vulnerability to the advice of seller-advisors.

Professional codes of conduct or even codes of conduct internal to individual companies could help to define standards for integrity. If employees are able to internalize those codes, then the firm may be able to develop a reputation for having honorable employees bound to observe a code of conduct that the firm can easily define. One example of this would be Progressive Insurance advertising that the company will tell you if another insurer would offer someone in your situation better premiums.[266] The company is advertising a commitment to honesty and benevolence by providing information to its customers that allows them to make the decision that is in their interests, even if those interests conflict with the interests of Progressive. Another way to communicate integrity would be to treat employees with compassion. If a firm treats its employees well, even when it is more expensive to do so, consumers may assume that the company is more likely to apply the same standard of care to them. [267] Integrity refers to a personal commitment to an honorable code of conduct.[268] Such a personality trait may be difficult for companies to inspire or guarantee, but not impossible to cultivate through codes of conduct, norms, clearly stated priorities and values, and careful hiring and supervision. A culture of integrity could carry over to seller-advisor employees and could strongly influence the ways in

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[264] *See supra* note 256 and accompanying text.

[265] BEN-SHAHAR & SCHNEIDER, *supra* note 40, at 8–9.

[266] *See History*, PROGRESSIVE INSURANCE, https://www.progressive.com/progressive-insurance/history/ [https://perma.cc/AVF9-YR7M] (providing a description of this practice).

[267] *See* Laura Lorenzetti, *Starbucks to Provide Free College Tuition for Baristas*, FORTUNE (June 16, 2014), http://fortune.com/2014/06/16/starbucks-to-provide-free-college-tuition-for-baristas/ [https://perma.cc/TXT7-J3EB].

[268] *See supra* note 141 and accompanying text.

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which those seller-advisors interact with consumers. For individuals, reputation is the best way to establish and signal integrity.

The law could, theoretically, be tremendously helpful when an entire industry suffers a crisis and appears to lack integrity. Then, strict legal standards and consumer protections can coax consumers back to the industry to help encourage the interactions that will allow the industry participants to rebuild trust. Over time, the law may relax those regulatory standards (though it almost never does) to avoid overburdening an industry that has overcome a particularly corrupt episode.

We find a contrary example to the idea that regulatory laws can prompt renewed trust in an industry in the aftermath of the recent financial crisis. In our study, we found that people were still, surprisingly to us, distrusting of mortgage lenders nearly ten years after the financial crisis caused by a collapse of the housing market.[269] Our research subjects seemed hesitant to defer to the advice of a mortgage lender and were very conservative in their decision-making about how much money to borrow for a mortgage and under what circumstances.[270] Many of the strict standards that the Dodd Frank Act imposed after the crisis were aimed at requiring more conservative mortgage lending.[271] The regulations addressed what kinds of loans could be made under what circumstances.[272] Perhaps tellingly, the regulations neither imposed stricter codes of conduct on mortgage lenders or brokers, both originators of the crisis, nor changed the nature of the relationship between mortgage originators and consumers, other than adding items to what are already voluminous mandatory disclosures.[273] The regulations simply kicked subprime borrowers out of the market.[274] The knowledge that a borrower is much less likely to be given a loan, a loan that they have very little hope of repaying, should be comforting knowledge and a useful assurance to be provided by regulation. Our research subjects, however, were hesitant to take the risks encouraged by our mortgage lender and were reluctant to

[269] *See supra* notes 164, 216 and accompanying text.

[270] *See supra* note 216 and accompanying text.

[271] *See* Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV 617, 635–52 (2016); Adam J. Levitin et al., *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk Capital to the Securitization Market?*, 29 YALE J. ON REG. 155, 169–71 (2012). *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1828 (2010) (codified as amended at 15 U.S.C. § 78o(k)(1) (2012)).

[272] *See* Johnston, *supra* note 271, at 635–52.

[273] *Id.* at 694. *But see* Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. REV. 639, 682–86 (2017) (suggesting, in discussing the Dodd-Frank Act, that "improving transparency can be an effective regulatory tool in reducing systemic risk, especially considering that the financial crisis was uniquely characterized by information asymmetries").

[274] Johnston, *supra* note 271, at 651–52.

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be pulled into a lower probability of being able to repay their loans.[275] Not all regulatory interference can restore or encourage trust, even in industries whose reputations have been decimated.

Indeed, some argue that people will behave more honorably and act with more integrity in the absence of legal interventions.[276] Extrinsic motivations such as legal penalties may result in more guarded, selfish interactions.[277] The law can interfere with trust by putting people on guard, making them worry that others will take advantage of them or try to expose them to legal penalties. Think of how your interaction with someone would change if, in the middle of a dispute, they asked you to put things in writing or told you they were recording the conversation or they threatened to retain a lawyer. Interpersonal trust, particularly as it concerns integrity and benevolence, relies largely on notions of intrinsic motivation and a belief that others are treating you better than the minimum legal standard requires.[278] Indeed, if someone is doing only what the law requires, we are not at all convinced that they are worthy of our trust; we only know that we cannot punish them.

Companies may do best to stay ahead of the legal requirements. Doing more than the law requires and developing a reputation for treating consumers and employees better than the legal standard mandates is the way to build trust.[279] This is not to say that the law does not have a role to play in facilitating trusting relationships among strangers in the marketplace. Rather, the law must be dispatched thoughtfully with a deep awareness of its goals and limitations. Perhaps the most useful function the law can serve in encouraging trust is an expressive one—one that helps trustees signal their trustworthiness in ways trustors can see and understand. To that end, legal rules and standards for behavior should be clear and obvious to trustors and easy for trustees to follow.

Ultimately, we found that trust in a seller-advisor explains some of a consumer's decision making, but not all, or even most, of it.[280] Consumers still keep their own counsel to some extent and harbor and honor personal

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[275] *See supra* note 106 and accompanying text.

[276] *See* Philippe Aghion et al., *Regulation and Distrust*, 125 Q.J. ECON. 1015, 1015–16 (2010) (describing the vicious cycle in which people are distrustful, so they demand more regulation and then become less trustworthy and feel that their distrust is justified); Roland Bénabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489, 492 (2003) (explaining that showing confidence or trust in an agent increases the agent's intrinsic motivation to perform a task). *See generally* Edward M. Iacobucci, Market Conditions, Reputation and Contract Design (Jan. 2014) (unpublished manuscript) (on file with author) (arguing that informal means of enforcing contractual obligations often are preferable and more effective than formal mechanisms).

[277] Bénabou & Tirole, *supra* note 276, at 490 (defining extrinsic motivation as "contingent rewards" and intrinsic motivation as "the individual's desire to perform the task for its own sake").

[278] Ribstein, *supra* note 92, at 581.

[279] Lorenzetti, *supra* note 267.

[280] *See supra* notes 212–223 and accompanying text.

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preferences that seller-advisors cannot fully know or understand. The more trustworthy seller-advisors are and the better they are at signaling their trustworthiness, the more likely they will be able to help consumers enter mutually beneficial transactions on appropriate terms. Trustworthy seller-advisors can be a valuable resource to uninformed, unsophisticated consumers.[281] The law may be able to help trustworthy seller-advisors send the right signals and to help consumers correctly interpret those signals.

B. Objections and Future Directions

The study reported in this Article is the first to empirically explore the relationship between consumers and seller-advisors, whom the law allows to provide advice to consumers without owing a fiduciary duty. This study challenges the traditional view of law and policymakers in this area—that consumers who deal with seller-advisors subscribe to a theory of caveat emptor, such that protections from opportunistic seller-advisors are unnecessary.[282] Our findings suggest that consumers are influenced by the recommendations of seller-advisors across a wide, representative set of commonplace financial transactions, with stakes large and small.[283] Moreover, our results suggest that the influence that seller-advisors exert over consumers may stem from a mistaken belief on the part of consumers that these types of advisors are looking out for their financial well-being.

The use of controlled laboratory experiments to inform policy is a burgeoning but relatively new development in the law.[284] Although experimental data has informed policy debates on a range of criminal law and evidentiary issues—such as eyewitness testimony, the hearsay rule, and the interrogation of suspects—it has so far played less of a role in informing policy in the realm of business law.[285] It is, of course, important not to overstate the implications of any single empirical study, including experimental ones.[286] But it is also important to situate any empirical study within the literature on which the study was based, so that lawmakers can draw appropriate, measured conclusions from the study's findings.

[281] *See supra* notes 38–46 and accompanying text.

[282] *See supra* notes 50–82 and accompanying text.

[283] *See supra* notes 202–223 and accompanying text.

[284] *See* LAWLESS ET AL., *supra* note 183, at 79–104.

[285] *See generally* 2 ADVANCES IN PSYCHOLOGY AND LAW (Brian H. Bornstein & Monica K. Miller eds., 2016) (discussing topics such as plea dealings and jurors' reactions to certain kinds of evidence, and related policy implications).

[286] *See* Samir D. Parikh & Zhaochen He, *Failing Cities and the Red Queen Phenomenon*, 58 B.C. L. REV. 599, 631 (2017) (noting that statistical significance in empirical studies does not necessarily imply policy significance).

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With that caveat in mind, controlled experiments hold many advantages to non-experimental, empirical studies. Laboratory experiments have the advantage of high internal validity because of the greater control that experimenters can exhibit with respect to the variables under investigation.[287] This is because in a laboratory experiment, every aspect of the study is kept uniform except the aspects of the study that the experimenter manipulates. This allows researchers to make even stronger causal conclusions—that a certain manipulation in fact caused the outcome—than researchers who engage in non-experimental work and use statistical controls instead.[288]

Empirical validity, however, is often a tradeoff between competing interests. Empirical methods have heightened internal validity but are often weaker with respect to external, or ecological, validity.[289] Simply stated, it is always an open question whether the behavior that is exhibited in the relatively artificial confines of the laboratory experiment, where the variable of interest is isolated, will also be exhibited in the noisy world outside the laboratory.[290]

It is, of course, important to take this critique seriously, and carefully evaluate experimental research with an eye toward external validity when evaluating legal policy. There are, however, at least two responses to consider. As an initial matter, many laboratory experiments are replicable in the "real world," particularly studies that examine people's attitudes toward legal rules or scenarios.[291] Second, as long as the experiment is placed in the scientific context in which the experiment was conducted, such as against the literature that led to the experiment in this first place, empirical data—even imperfect data—will often be preferable to making policy determinations, particularly those that make assumptions about consumer behavior, in the absence of any such data. This may seem an obvious statement, but one to which rule-makers and policymakers should give careful attention.

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[287] *See* Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, JUDICATURE, Jan.–Feb. 2003, at 184, 184–85 (discussing the benefits of laboratory-based mock jury empirical studies as opposed to in situ jury research).

[288] Sevier, *supra* note 189, at 705–06.

[289] Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 483 n.108 (2003).

[290] *Id.*; *see also* LAWLESS ET AL., *supra* note 183, at 79–104 (discussing the strengths, weaknesses, and tradeoffs among controlled laboratory experiments, field experiments, quasi-experiments, and natural experiments).

[291] *See* Mark Kelman et al., *Context-Dependence in Legal Decision Making*, *in* BEHAVIORAL LAW AND ECONOMICS 61, 73 (Cass R. Sunstein ed., 2000).

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CONCLUSION

Consumers often seek advice from those selling products. They give seller-advisors the benefit of the doubt that the advice seller-advisors provide, at least to some extent, will be designed to promote the best interests of the consumer. Our study presents evidence of that baseline trust and shows that varying degrees of trust in seller-advisors can explain consumer choices. Our study found that seller-advisors are able to effectively encourage consumers to make more expensive choices and that there is some degree of backlash when consumers are informed of a seller-advisor's incentives after they have made their choice. That backlash seems to indicate a kind of resentment that an adverse incentive was intentionally concealed from the consumer.

The law largely ignores the trust consumers place in seller-advisors when seeking their advice. Fraud liability provides a remedy for lies, but fiduciary duties do not apply to sellers who only incidentally give advice. Still, consumers may trust a seller-advisor's advice as much as they would trust the advice of a fiduciary advisor. Lawmakers should not be too quick to design legal remedies to fill that gap. They should not expand fiduciary obligations to any instance of a person asking advice of another. Rather, we should consider the trust that underlies consumer advice-seeking and endeavor to find ways to help trustworthy seller-advisors signal their trustworthiness. Similarly, we should aim to expose the untrustworthy, making the variations between the different kinds of advisors more apparent to consumers who may need help making purchasing decisions. Too much regulation in matters of trust can be just as harmful as too little. The law cannot "make" anyone trustworthy; it can only help interested parties signal the trustworthiness that they have already developed.

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