

*Just Published*

# Insincere Promises

*The Law of Misrepresented Intent*

by Ian Ayres and Gregory Klass

*A Complete Guide to the Law of Promissory Fraud*

**How can a promise be a lie?**

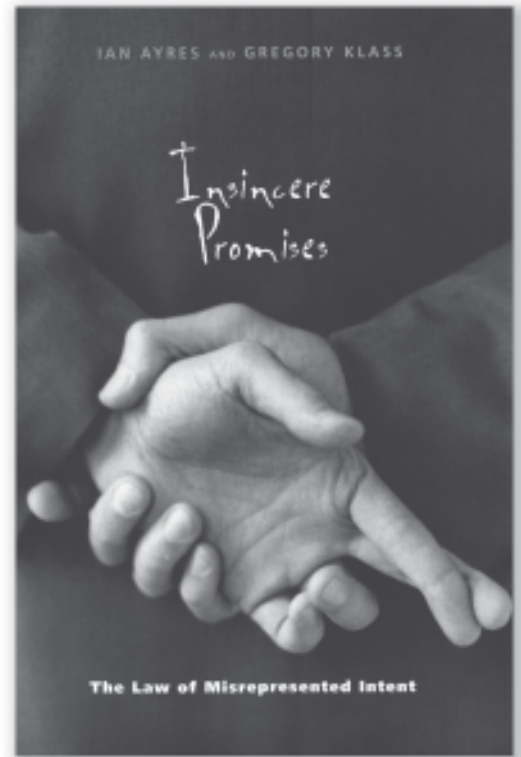
**Answer: when the promisor never intended to perform the promise.**

Promissory fraud is one of the few ways to win punitive damages for breach of contract. In some cases, it can also defeat contract defenses like the Statute of Frauds, the parole evidence rule, or even lack of consideration. But while, in many jurisdictions, promissory fraud is litigated more than mistake and impossibility combined, it is almost never taught in law schools.

This book provides the first comprehensive discussion of both civil and criminal promissory fraud liability. In addition to developing a theoretical account of the doctrine, the book provides litigators with practical advice on how to bring and defend promissory fraud claims, and how to avoid them in the first place.

Here are just a few of its take-home lessons:

1. The Restatement of Torts says that every promise implicitly represents an intention to perform. But courts should acknowledge that not all promises include that representation, and they should allow promisors to disclaim it. Thus a business traveler who pays a non-refundable deposit to stay at the Holiday Inn can go ahead and immediately try for a reservation at the Ritz. Similarly, sophisticated parties drafting complex contracts should consider disclaiming representations of intent to perform, thereby minimizing promissory fraud liability.
2. Even promisors who don't represent an intention to perform still must not intend not to perform. It would be promissory fraud (even with a non-refundable deposit) to book a reservation at the Holiday Inn that you know you are not going to use. And a party who disclaims a representation of an intent to perform may still be liable for promissory fraud if, when it entered into the contract, it affirmatively intended to breach.
3. Promissory fraud liability may not be appropriate when the promisor didn't realize what she was promising. Any defendant who is mistaken about the scope of her promise – and testifies that she never intended to do X because she thought she had promised to do Y – currently runs the risk of being held liable for promissory fraud. Courts and litigators need to pay more attention to scienter.
4. Promissory fraud is usually inappropriate when a promisor breaches because of changed circumstances. But in some contexts, a defendant promisor makes implicit representation of an intent not to breach even if a better offer comes along. Thus a landlord who rents to you and then immediately solicits tenants at a higher price is asking for trouble.



*please see reverse*

The book includes extended discussions of evidentiary issues in promissory fraud cases, a chapter devoted to criminal liability, as well as discussions of how the doctrine might be applied outside of the offer-and-acceptance box – such as in claims of vaporware, precontractual liability and post-contractual assurances. These discussions are based largely on the analysis of actual cases, some familiar and some new, all of which add to the book’s practical value. **This is a treatise for the thinking litigator.**

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**Advance praise for *Insincere Promises: The Law of Misrepresented Intent*:**

“*Insincere Promises* advances an important and convincing theory of promissory fraud; it also rewards readers with an illuminating overview of contract law and theory. **Written with precision, sophistication, and humor, the volume will appeal to experts and students alike.**”

—Eric Posner, *University of Chicago Law School*

“*Insincere Promises* is a **must-read for law teachers, law students, and anyone else interested in the law of contracts or torts.** The authors traverse the forbidding and tangled landscape of the law of deceit, manipulation, mistake, and accident, demonstrating how the oft-overlooked topic of promissory fraud implicates central issues in the law of contract, tort, and crime.

It is clearly written, intelligently presented, and highly original.”

—Katherine Stone, *UCLA*

“Fraud and misrepresentation have always been neglected by scholars. This book puts them back on center stage where they belong.”

—Richard Craswell, *Stanford University*

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