

Reflections on *Riverisland*: Reconsideration of the Fraud Exception to the Parol Evidence Rule

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The California Supreme Court recently and unanimously overruled a longstanding precedent regarding the fraud exception to the Parol Evidence Rule in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association. Prior to Riverisland, the Parol Evidence Rule did not allow evidence of promissory fraud. Now, evidence of promissory fraud at variance with the terms of the writing is admissible. Riverisland discourages fraudulent practices and creates a clear rule that is consistent with the language of California's Parol Evidence Rule. It also recognizes the reality that many people do not read or understand the contracts that they sign and the psychological biases that play a role in perception and decisionmaking. The new precedent, however, exposes drafting parties to both intentionally and unintentionally fabricated claims from non-drafting parties. Drafting parties are also at risk of unpredictable outcomes from juries who might be swayed by testimony of alleged fraudulent promises. Because the new standard favors non-drafting parties, the cost of contracting has shifted from non-drafting parties to drafting parties.

This Note suggests that, to balance the costs of contracting between drafting and non-drafting parties, meaningful assent to the specific terms at issue should be required for a party to be able to exclude evidence of alleged promissory fraud. Meaningful assent could be accomplished by having a one-page summary and disclaimer as to the key terms of the contract. If this summary/disclaimer page succeeds in being short, simple, and specific, then California courts should find mutual assent as to a contract's terms and specific disclaimers, and preclude evidence of promissory fraud that is at variance with those terms.

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INTRODUCTION

On January 14, 2013, the California Supreme Court overruled a longstanding precedent regarding promissory fraud. In the 1935 case, *Bank of America National Trust & Savings Association v. Pendergrass*, the California Supreme Court declared inadmissible evidence of promissory fraud—a promise made without the intent to perform—made prior to and inconsistent with the subsequent written agreement.¹ The court’s unanimous decision in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* overturned *Pendergrass* and

1. 48 P.2d 659, 662 (Cal. 1935).

declared that evidence of promissory fraud that is at variance with the terms of the writing is admissible.²

Prior to *Riverisland*, *Pendergrass* was highly criticized and difficult to apply. Two of the main criticisms were that the *Pendergrass* decision was inconsistent with the Parol Evidence Rule,³ codified at section 1856 of the California Code of Civil Procedure, and its holding was not based on the precedent of the time.⁴ In addition, the Restatement of Contracts, most treatises, and a majority of other jurisdictions recognized that evidence of fraud will be allowed despite the Parol Evidence Rule.⁵ Another criticism was that *Pendergrass* provided drafting parties a loophole to make misrepresentations and then disclaim them later in writing.⁶ Thus, scholars were concerned that *Pendergrass* encouraged, or at least tolerated, fraudulent practices.

Riverisland alleviates many of these concerns. First, the decision recognizes the realities of everyday life: many people do not read or understand the contracts that they sign. Second, *Riverisland* creates a clear rule consistent with the language of section 1856. The rule is also consistent with the intent of section 1856: to give recourse against a drafting party's fraudulent misrepresentations and, thus, discourage fraud. Third, application of *Riverisland* will acknowledge the psychological tendencies that play a role in an individual's perception and decisionmaking. People are generally optimistic when entering into agreements, tending to look for evidence that supports their preexisting beliefs about potential dealings while ignoring contradictory information. When a drafting party presents a contract to the non-drafting party, the non-drafting party feels pressure to sign. Taking the time to read it line-by-line, let alone asking to take the time to have a lawyer review it, feels

2. 291 P.3d 316, 325 (Cal. 2013).

3. See *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 36 (Cal. Ct. App. 1971); Justin Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877, 887 (1961); see also *Pac. State Bank v. Greene*, 1 Cal. Rptr. 3d. 739, 750–51 (Cal. Ct. App. 2003).

4. Sweet, *supra* note 3, at 885.

5. RESTATEMENT (SECOND) OF CONTRACTS, § 214 (2012); RESTATEMENT (SECOND) OF TORTS, § 530 (2012); 6 PETER LINZER, CORBIN ON CONTRACTS § 25.20[A] (Joseph M. Perillo ed., rev. ed. 2010); 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.4 (3d ed. 2004); 2 RICHARD A. LORD, WILLISTON ON CONTRACTS § 33:17 (4th ed. 2012). See, e.g., *Touche Ross, Ltd. v. Filipek*, 778 P.2d 721 (Haw. Ct. App. 1989); *Pinnacle Peak Developers v. TRW Inv. Corp.*, 631 P.2d 540 (Ariz. Ct. App. 1980); *Globe Steel Abrasive Co. v. Nat'l Metal Abrasive Co.*, 101 F.2d 489, 491 (6th Cir. 1939) (finding that the plaintiff had been "induced to conclude an agreement by fraudulent concealment of existing facts and by promises, implied if not expressed, made with no present intention of performing. In the allegations of inducement we find no challenge to the terms of the contract impermissible under the parol evidence rule").

6. See Alicia W. Macklin, Note, *The Fraud Exception to the Parol Evidence Rule: Necessary Protection for Fraud Victims or Loophole for Clever Parties?*, 82 S. CAL. L. REV. 809, 810 (2009).

uncomfortable for the non-drafting party because it shows distrust of the drafting party.

The *Riverisland* standard favors non-drafting parties by shifting the cost of contracting from non-drafting parties to the drafting parties. Allowing parol evidence of alleged fraudulent promises presents a number of problems for litigants. First, honestly made but erroneous claims from non-drafting parties regarding prior statements from drafting parties now have a greater chance of making it past the pleading stage. A non-drafter might bring a claim truly believing that the drafter committed fraud when she actually misremembers what occurred. Second, *Riverisland* encourages intentionally fabricated claims. A party who is unhappy with her agreement might attempt to void her contract by alleging that the drafting party made fraudulent misrepresentations prior to signing the final writing. Third, *Riverisland* could lead to unpredictable outcomes from triers of fact who might be biased by evidence of alleged fraudulent promises. Jurors come to trial with different backgrounds and beliefs that impact their perceptions of subjective evidence offered by the parties and, ultimately, their verdicts.

To balance the costs of contracting between the parties, meaningful assent to the specific terms at issue should be required for a party to be able to exclude evidence of prior fraudulent misrepresentations. Meaningful assent could be accomplished by having a one-page summary and disclaimer of the key terms of the contract. Similar to New York decisional law, under which drafting parties can obtain meaningful assent in the form of a signature next to specific disclaimers of prior representations, drafting parties could specifically disclaim prior representations regarding particular terms on this summary/disclaimer page.

Part I of this Note examines the Parol Evidence Rule and its fraud exception. Part II discusses *Pendergrass* and the reactions to and criticisms of it. Part III summarizes the recent California Supreme Court *Riverisland* decision. Part IV analyzes the implications of its holding compared to *Pendergrass*'s holding and discusses the practical realities and behavioral psychological implications of each. Finally, Part V discusses a possible solution to some of the problems that *Riverisland* presents.

I. THE PAROL EVIDENCE RULE AND THE FRAUD EXCEPTION

The Parol Evidence Rule (the "PER") is codified at section 1856 of the California Code of Civil Procedure.⁷ The PER "prohibits the

7. CAL. CIV. PROC. CODE § 1856 (West 2013) ("(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.

introduction of any extrinsic evidence (oral or written) to vary or add to the terms of an integrated written instrument (a contract, deed, or will).⁸ Once the parties put their terms into a written contract, the writing becomes the agreement and the final written terms of the contract supersede any prior oral or written negotiations.⁹ As long as the non-drafting party has the general knowledge that a set of terms exists within the contract, a court will likely find that party to have consented to the agreement.¹⁰ Courts will usually find that a non-drafting party has given such “blanket assent,”¹¹ even if there is no evidence that the party specifically assented to each individual term.¹² Thus, the court will likely find that a party that signs a written contract has agreed to the terms in the contract, even if she does not know the specifics of those terms.¹³

The PER bars evidence of prior writings and prior or contemporaneous oral agreements.¹⁴ Under the PER, therefore, later-in-time writings supersede any conflicting prior agreements, oral or written.¹⁵ The PER is designed to protect the parties’ final understandings, intents, and agreements that have been expressly recorded in a contract.¹⁶

(b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance. (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement. (e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue. (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue. (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud. (h) As used in this section, the term agreement includes deeds and wills, as well as contracts between parties.”). The corresponding section in the California Civil Code is section 1625: “The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.” CAL. CIV. CODE § 1625 (West 2013).

8. 2 B.E. WITKIN, CAL. EVID. DOCUMENTARY EVIDENCE § 60, at 199 (5th ed. 2012).

9. *Casa Herrera, Inc. v. Beydoun*, 83 P.3d 497, 502 (Cal. 2004).

10. Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 59 (2013).

11. *Id.*; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 (1960).

12. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 461 (2002) (“Despite criticism, Llewellyn’s notion of ‘blanket assent’ dominates contemporary judicial treatment of standard-form provisions. ‘Blanket assent’ is best understood to mean that, although consumers do not read standard terms, so long as their formal presentation and substance are reasonable, consumers comprehend the existence of the terms and agree to be bound to them.”).

13. Korobkin, *supra* note 10, at 59.

14. *Casa Herrera*, 83 P.3d at 502–03.

15. *Id.*

16. *Banco Do Brasil, S.A. v. Latian, Inc.*, 285 Cal. Rptr. 870, 893 (Cal. Ct. App. 1991).

Consciously or subconsciously, parties generally intend for their later agreements to supersede earlier discussed terms in their negotiations.¹⁷ Thus, the PER makes sure that this final agreement is not subject to change unless both parties agree to a modification.¹⁸

One policy consideration underlying the PER is based on the assumption that “written evidence is more accurate than human memory.”¹⁹ Because the court will be interpreting written words instead of alleged past discussion, this also provides predictability in how a court will interpret a contract when there is disagreement between the parties. In addition, without such a rule, courts and scholars fear that evidence of intentional or unintentional fabrications by interested parties might mislead jurors.²⁰ The PER is designed to protect against such concerns.

In addition, a common law principle provides that parties have a “duty to read” contracts that they sign.²¹ As the celebrated contracts scholar and treatise author Arthur Corbin stated, a “party who signs an instrument manifests assent to it and may not later complain about not reading or not understanding the instrument.”²² Without a duty to read and the existence of the PER, parties could simply avoid liability by claiming not to have read or understood their contracts.²³ This would lead to written contracts that have virtually no meaning.

In determining the admissibility of extrinsic evidence, courts generally undertake a multi-step process.²⁴ First, the court must determine whether the PER applies. To make this determination, the court considers whether there was a final writing and whether the parties intended that writing to be an integration²⁵—“a complete and final expression of the parties’ agreement.”²⁶ The PER only applies to an agreement that is integrated.²⁷ If the writing is a final integration, the PER bars any evidence of collateral agreements.²⁸ An integration might also be “partial” where the parties intend the writing to be final but do not intend it to include all

17. Nicholas R. Weiskopf, *Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault*, 34 EMORY L.J. 93, 94 (1985) (“[P]articipants in negotiations typically intend, consciously or subliminally, to have a resulting written agreement, an ‘integration,’ evidence terms finally agreed to in discharge of those proposed, discussed, or tentatively assented to in the dickering process.”).

18. *See Casa Herrera*, 83 P.3d at 503.

19. *Masterson v. Sine*, 436 P.2d 561, 564 (Cal. 1968).

20. *See, e.g., id.*; Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 608 (1944).

21. *See* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS §§ 28.38, 29.8, 29.12 (rev. ed. 2012).

22. *Id.* § 28.38.

23. *See id.* § 29.8.

24. WITKIN, *supra* note 8, § 60, at 200.

25. *Id.*

26. *Banco Do Brasil, S.A. v. Latian, Inc.*, 285 Cal. Rptr. 870, 886 (Cal. Ct. App. 1991).

27. *Shivers v. Liberty Bldg.-Loan Ass’n*, 106 P.2d 4, 6 (Cal. 1940).

28. *Banco Do Brasil*, 285 Cal. Rptr. at 886.

the details of their agreement.²⁹ If the writing is partially integrated, then the PER applies only to the integrated part of the agreement.³⁰

Second, the court must determine whether the evidence is consistent or inconsistent with the writing.³¹ If the extrinsic evidence constitutes a consistent collateral agreement or is being used to interpret the terms of the agreement, then the evidence is admissible.³² If the extrinsic evidence is used to vary the terms of the final writing, then the evidence is barred.³³

Third, the court looks at whether the extrinsic inconsistent evidence falls under one of the exceptions to the PER.³⁴ Extrinsic evidence is admissible when there is a mistake in the writing, when the validity of the contract is in dispute, to interpret the terms of the writing, or to establish illegality or fraud.³⁵ This Note focuses on the fraud exception, which includes actual or constructive fraud—intentional or reckless false representations that induce a party’s reliance and cause economic damages.³⁶ Under section 1572 of the California Civil Code, “actual fraud” consists of a false representation committed by a party to the contract with the intent to deceive the other party about the agreement or induce her to enter into it.³⁷ Section 1572 lists a variety of fraudulent acts including “[t]he suggestion, as a *fact*, of that which is not true, by one who does not believe it to be true; . . . A *promise* made without any intention of performing it; or, . . . *Any other act* fitted to deceive.”³⁸ Under section 1573 of the California Civil Code, “constructive fraud” includes any breach of duty, *without* fraudulent intent, that misleads a person to the other’s advantage.³⁹

When a party alleges fraud or illegality, California decisional law permits evidence of pre-contractual misrepresentations that vary or contradict the written agreement.⁴⁰ Evidence of fraud is admissible even if the contract contains a merger clause stating that the written document

29. *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 135 Cal. Rptr. 2d 505, 512 (Cal. Ct. App. 2003).

30. *Id.*

31. WITKIN, *supra* note 8, § 60, at 200.

32. *Id.*

33. *Id.*

34. *Id.*; CAL. CIV. PROC. CODE § 1856(e)–(g) (West 2012).

35. *Id.* § 1856(g).

36. CAL. CIV. CODE § 1572 (West 2012) (defining “actual fraud”); *id.* § 1573 (defining “constructive fraud”).

37. *Id.* § 1572.

38. *Id.* (emphasis added); *see id.* § 1710 (“A deceit . . . is either: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, (4) A promise, made without any intention of performing it.”).

39. *Id.* § 1573 (emphasis added).

40. *Nagrama v. MailCoups, Inc.*, 469 F.3d 1257, 1291 (9th Cir. 2006).

embodies the entire agreement⁴¹ and any right to introduce prior oral representations is waived.⁴²

The fraud exception can be justified in three ways. First, if fraud is present, there cannot be mutual assent between the parties.⁴³ Extrinsic evidence of fraud does not vary the terms of the contract, but rather shows that no legally binding contract was made in the first place.⁴⁴ Thus, because there was never a contract to begin with, the PER does not apply.⁴⁵ Second, as a practical matter, if a contract were voidable due to fraud, the fraud would likely not appear in the actual written document.⁴⁶ Thus, the exception allows extrinsic evidence to prove fraud, even if fraud cannot be found on the face of the contract. Third, parol evidence of fraud is allowed because, otherwise, parties would be able to engage in fraud or illegality without fear of repercussion.⁴⁷ Parties may not use the PER as a shield to commit fraudulent acts and escape liability.⁴⁸ Despite these policy considerations and the language in section 1856, which specifically and broadly permits evidence of fraud, the California Supreme Court in *Pendergrass* limited the fraud exception.⁴⁹

II. *PENDERGRASS*: EVIDENCE OF PROMISSORY FRAUD INCONSISTENT WITH A SUBSEQUENT WRITING IS INADMISSIBLE UNDER THE PAROL EVIDENCE RULE

[T]o admit evidence of extrinsic agreements would be to open the door to all evils that the parol evidence rule was designed to prevent.

—Judge P. Tyler⁵⁰

In 1935, *Pendergrass* limited the fraud exception to the PER and held that evidence of promissory fraud that was inconsistent with the written agreement was not allowed.⁵¹ In 1928, the defendant borrowers, T.S. Pendergrass and his son, purchased a ranch subject to a \$20,000 trust deed from plaintiff Bank of America.⁵² In January 1932, the Pendergrasses fell behind on their payments.⁵³ They negotiated with the

41. *Fleury v. Ramacciotti*, 67 P.2d 339, 340 (Cal. 1937).

42. *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*, 38 Cal. Rptr. 2d 783, 789 (Cal. Ct. App. 1995); *Ferguson v. Koch*, 268 P. 342, 345 (Cal. 1928).

43. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 392 (6th ed. 2007).

44. *Wiberg v. Barnum*, 278 P. 871, 872 (Cal. Ct. App. 1929).

45. KNAPP, CRYSTAL & PRINCE, *supra* note 43, at 392.

46. *Id.*

47. *See Macklin*, *supra* note 6, at 810.

48. *Halagan v. Ohanesian*, 64 Cal. Rptr. 792, 796 (Cal. Ct. App. 1967).

49. *Bank of Am. Nat'l Trust & Sav. Assoc. v. Pendergrass*, 48 P.2d 659, 662 (Cal. 1935).

50. *Lindemann v. Coryell*, 212 P. 47, 49 (Cal. 1922).

51. *Pendergrass*, 48 P.2d at 662.

52. *Id.* at 660, 662.

53. *Id.* at 661.

bank for a new demand note for \$4750, secured by chattel and crop mortgages and payable on demand.⁵⁴ Soon after these documents were executed, the bank demanded payment.⁵⁵ When the Pendergrasses did not pay, the bank seized all of the property covered by the mortgages and sued to enforce the note.⁵⁶

The Pendergrasses raised two defenses in their answer: (1) the bank could only enforce the note by judicial foreclosure because the note was secured by a chattel mortgage, and (2) the note was obtained by fraud.⁵⁷ The Pendergrasses alleged that the bank had promised that they would not interfere with their farming for the rest of the year and that the defendants would not have to make any payments on their debt until the 1932 crop was ready for harvest because the proceeds from the crop would constitute payment.⁵⁸ The Pendergrasses asserted that the bank made these promises fraudulently to obtain the new note and additional collateral and never intended to follow through with them.⁵⁹

The trial judge directed the judgment for the bank.⁶⁰ The district court of appeal reversed because the Pendergrasses' opening statement fixed a pleading error regarding the note only being enforceable by judicial foreclosure.⁶¹ Although unnecessary because the judgment was already reversed, the court then addressed the Pendergrasses' second claim of promissory fraud, finding that it could be used as a defense.⁶²

The Supreme Court of California reversed the intermediate appellate court decision regarding promissory fraud.⁶³ The court considered whether the promise by the bank not to collect payments until the Pendergrasses sold their 1932 crop would be admissible evidence.⁶⁴ The court also analyzed whether such a fraudulent promise was subject to the PER.⁶⁵ In its analysis, the court relied on the Virginia case, *Towner v. Lucas' Executor*, which stated: "It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of a bond, promised not to enforce

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 659–60.

58. *Id.* at 660.

59. *Id.* at 660–61.

60. *Bank of Am. Nat'l Trust & Sav. Assoc. v. Pendergrass*, 35 P.2d 346, 346 (Cal. Ct. App. 1934).

61. *Id.* at 349.

62. *Id.*

63. *Pendergrass*, 48 P.2d at 662.

64. *Id.* at 661.

65. *Id.* ("Is such a promise the subject of parol proof for the purpose of establishing fraud as a defense to the action or by way of cancelling the note, assuming, of course, that it can be properly coupled with proof that it was made without any intention of performing it?").

it.”⁶⁶ The court in *Towner* argued that allowing such oral evidence would nullify the PER, which was created, in part, to prevent non-drafting parties from subsequently fabricating claims that the drafting party made fraudulent prior misrepresentations.⁶⁷

The court also cited *Lindemann v. Coryell*.⁶⁸ In *Lindemann*, the court held that parol evidence of fraud could not be used when a person “has it in his power to guard in advance against any and all consequences of a subsequent change of conduct by the person with whom he is dealing.”⁶⁹ The *Lindemann* court stated that admitting such evidence would negate the purpose of the PER.⁷⁰

The California Supreme Court concluded that parol evidence offered to show fraud “must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.”⁷¹ If the alleged oral promise is inconsistent with the writing—even if the promise was made with fraudulent intent—the evidence is inadmissible.⁷² When the party has it in her power to read the contract, thereby guarding against any fraudulent misrepresentations, she has the burden to do so.⁷³ Allowing evidence of any prior or contemporaneous promises that conflict with the writing would negate the PER.⁷⁴ Thus, although the court reversed on the judicial foreclosure issue, it found that the evidence of promissory fraud inconsistent with the writing should not be allowed.⁷⁵

A. DISTINCTIONS AND LIMITATIONS: *PENDERGRASS* EXPLAINED

Courts and scholars have interpreted *Pendergrass* in a variety of ways, finding numerous distinctions between the types of fraud and limitations on what evidence is admissible. There are distinctions between “promises” and “facts,” “fraud in the execution” and “fraud in the inducement,” and “consistent” and “inconsistent” terms. *Pendergrass* is a promissory fraud case (with inconsistent terms) or a fraud in the inducement case. These distinctions are important to note because the *Riverisland* court could have easily found the case to be one of fraud in the execution and, therefore, did not need to overrule *Pendergrass*.

66. 54 Va. (13 Gratt.) 705, 716 (Va. 1857).

67. *Id.*

68. *Pendergrass*, 48 P.2d at 662 (citing *Lindemann v. Coryell*, 212 P. 47, 48 (Cal. 1922)).

69. *Id.* at 48–49.

70. *Id.* at 49.

71. *Pendergrass*, 48 P.2d at 661.

72. *Id.* at 662.

73. *Lindemann*, 212 P. at 48–49.

74. *Towner v. Lucas' Ex'r*, 54 Va. (13 Gratt.) 705, 716 (Va. 1857).

75. *Pendergrass*, 48 P.2d at 661.

Promissory fraud is a promise that is made without the intent to perform.⁷⁶ Under *Pendergrass*, evidence of promissory fraud is *not* admissible when it varies or contradicts the terms of the written promise.⁷⁷ The PER will not allow evidence of “D promised me X” when the contract states that X will not be given.⁷⁸ Evidence of promissory fraud *is* admissible, however, if it is consistent with or independent of the written promise.⁷⁹ For example, in *Simmons v. California Institute of Technology*, a written agreement stated the form of payment but did not specify the money’s required use.⁸⁰ The alleged fraudulent promise was that the money was to be used exclusively for a specific type of research.⁸¹ Thus, the written agreement dealt with the *form* of payment and the promise dealt with the *use* of the money, which were two “wholly different matters.”⁸² The court held that these representations were not at variance with the writing but were *independent* of it and, therefore, admissible.⁸³

Misrepresentations of fact regarding a present existing fact or the physical content of the written agreement are always admissible.⁸⁴ Misrepresentations of fact regarding a present existing fact would be classic, actual fraud. This could include misrepresentations of fact during negotiations.⁸⁵ For example, a real estate broker representing that land could be divided into two separate properties, when zoning laws actually prohibited splitting the land, would be a misrepresentation of a present existing fact.⁸⁶

Misrepresentation of fact regarding the physical content of the written agreement occurs when a party knows the type of document that she signed but the drafter said that the writing contained terms different from those actually included.⁸⁷ For example, misrepresentation occurs when the non-drafter knows that she is signing a loan agreement but the

76. CAL. CIV. CODE § 1572 (West 2012).

77. *Pendergrass*, 48 P.2d at 662; Macklin, *supra* note 6, at 816.

78. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1073 (Cal. 1996); *see Korobkin, supra* note 10, at 68.

79. *Pendergrass*, 48 P.2d at 661; Macklin, *supra* note 6, at 816.

80. 209 P.2d 581, 587 (Cal. 1949).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See, e.g., Cont'l Airlines, Inc. v. McDonnell Douglas Corp.*, 264 Cal. Rptr. 779, 798 (Cal. Ct. App. 1989). The defendant in this case made various promises within its brochures while also making factual representations. *Id.* For example, the defendant promised that “[u]nder crash loading conditions, the main landing gear *is designed* to break away from the wing structure *without rupturing fuel lines or the integral wing fuel tank*,” and that “[t]he [wing] support structure *is designed* to a higher strength than the gear *to prevent fuel tank rupture* due to an accidental landing gear overload.” *Id.* The court held that these were factual misrepresentations and, thus, admissible to show fraud. *Id.* at 799.

86. *See Manderville v. PCG & S Group, Inc.*, 55 Cal. Rptr. 3d 59, 61 (Cal. Ct. App. 2007).

87. *Korobkin, supra* note 10, at 68.

terms in the document are materially different than what the drafting loan officer had represented.⁸⁸

In addition, courts have distinguished between fraud in the execution and fraud in the inducement. Fraud in the execution relates to the establishment or inception of the agreement where a party is “deceived as to the nature of his act”—either the party did not intend to enter into a contract or does not know the nature and character of what she was signing.⁸⁹ For example, the drafter asks the non-drafter to sign what the drafter says is a receipt for items delivered, but is actually a contract for the sale of more items.⁹⁰ The PER allows, and *Pendergrass* did not prohibit, evidence of “D said that the contract promises X” when the contract promises Y instead.⁹¹ In such a case, because there is no mutual assent, there is no legal contract.⁹² Thus, the contract is *void* and subject to rescission by the party that was deceived.⁹³

With fraud in the inducement, on the other hand, the party knows the nature and character of what he is signing “but his consent is *induced* by fraud.”⁹⁴ For example, making a fraudulent statement that the roof on a house had been repaired to get homebuyers to sign a contract would constitute fraud in the inducement. In such cases, the parties mutually assented and formed a contract, but it might be *voidable* by rescission because of the fraud.⁹⁵ However, under *Pendergrass*, the PER does not allow evidence of “D promised me X” if X was not included in the contract.⁹⁶

Finally, there is a distinction between “consistent” and “inconsistent” terms. In *Coast Bank v. Holmes*, the bank sued the borrower to recover the money owed on its promissory note.⁹⁷ The borrower alleged that the bank had orally promised (1) not to enforce the note, but to cancel it if the parcel of land was foreclosed upon, (2) to only demand payment on the note if the parcel was sold for enough money to enable the borrower to pay off the note, and (3) to protect the borrower’s security interest.⁹⁸ The court ultimately held that the first two promises were inconsistent terms

88. *See Pac. State Bank v. Greene*, 1 Cal. Rptr. 739, 742–43 (Cal. Ct. App. 2003).

89. *Ford v. Shearson Lehman Am. Express, Inc.*, 225 Cal. Rptr. 895, 904 (Cal. Ct. App. 1986).

90. KNAPP, CRYSTAL & PRINCE, *supra* note 43, at 392.

91. Korobkin, *supra* note 10, at 68.

92. *Speck v. Wylie*, 36 P.2d 618, 619 (Cal. 1934).

93. *Edwards v. Centex Real Estate Corp.*, 61 Cal. Rptr. 2d 518, 535 (Cal. Ct. App. 1997) (finding that evidence of fraud “is admissible in an action for rescission because it does not go to contradict the terms of the parties’ integrated agreement, but to show instead that the purported instrument has no legal effect”).

94. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1073 (Cal. 1996).

95. *Id.*

96. *Bank of Am. Nat’l Trust & Sav. Ass’n v. Pendergrass*, 48 P.2d 659, 662 (Cal. 1935).

97. *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 32 (Cal. Ct. App. 1971).

98. *Id.* at 34–35.

and that the third promise was consistent with the terms of the note,⁹⁹ but the court was very critical of the “consistent-inconsistent” distinction.¹⁰⁰ The court noted that it is contradictory to have a rule that states that promissory fraud can invalidate an agreement but then exclude evidence of such fraud when the promise is at variance with the written terms of the agreement.¹⁰¹ Given the numerous distinctions between the types of fraud and limitations on admissible evidence, courts have interpreted and applied *Pendergrass* in a variety of ways.

B. MIXED REVIEWS: REACTIONS TO *PENDERGRASS*

Subsequent applications of *Pendergrass* have varied. Some courts have followed the decision,¹⁰² some have stretched the meaning of what is “consistent” within a writing,¹⁰³ and some have simply ignored it.¹⁰⁴

Courts that have followed *Pendergrass* found that there are rational policy reasons for limiting the fraud exception.¹⁰⁵ For example, in *Price v. Wells Fargo Bank*, the First District Court of Appeal noted that too broad of a fraud exception would undermine the policy considerations of the PER.¹⁰⁶ An overbroad exception would possibly “allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes.”¹⁰⁷ The court also noted, however, that favoring the policy concerns of the PER compromised tort principles.¹⁰⁸ The court concluded that the *Pendergrass* court made a rational policy decision that should

99. *Id.* at 36 (“There was substantial evidence to support the court’s findings that the latter promise, the prime bargained for assurance which induced Holmes to execute the note, was falsely made. That the Bank had no intention of performing that promise when it made it may be inferred from the failure to perform and from the dubious authority of a bank to make such a promise.”).

100. *Id.* at 35–36.

101. *See id.* at 36; *see also* Sweet, *supra* note 3, at 885.

102. *See, e.g.*, *Duncan v. McCaffrey Group, Inc.*, 133 Cal. Rptr. 3d 280 (Cal. Ct. App. 2011); *West v. Henderson*, 278 Cal. Rptr. 570 (Cal. Ct. App. 1991); *Banco Do Brasil, S.A. v. Latian, Inc.*, 285 Cal. Rptr. 870 (Cal. Ct. App. 1991); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Lamb Fin. Co., Inc.*, 3 Cal. Rptr. 877 (Cal. Ct. App. 1960); *Abbot v. Stevens*, 284 P.2d 159 (Cal. Ct. App. 1955); *Newmark v. H & H Prod. Mfg. Co.*, 274 P.2d 702 (Cal. Ct. App. 1954).

103. *See, e.g.*, *Morris v. Harbor Boat Bldg. Co.*, 247 P.2d 589 (Cal. Ct. App. 1952); *Simmons v. Cal. Inst. of Tech.*, 209 P.2d 681 (Cal. 1949).

104. *See, e.g.*, *Chastain v. Belmont*, 271 P.2d 498 (Cal. 1954); *Willson v. Niagara Duplicator Co.*, 198 P.2d 362 (Cal. Ct. App. 1948).

105. *See, e.g.*, *Price v. Wells Fargo Bank*, 261 Cal. Rptr. 735, 746 (Cal. Ct. App. 1989) (“Moreover, despite scholarly criticisms, the decision is based on an entirely defensible decision favoring the policy considerations underlying the parol evidence over those supporting a fraud cause of action.”); *Banco Do Brasil*, 285 Cal. Rptr. at 892 (“Over fifty years ago, our Supreme Court made a very defensible policy choice which favored the considerations underlying the parol evidence rule over those supporting a fraud cause of action.”).

106. *Price*, 261 Cal. Rptr. at 746.

107. *Id.*

108. *Id.*

only be reconsidered by the California Supreme Court.¹⁰⁹ In *Banco Do Brasil, S.A. v. Latian, Inc.*, the Second District Court of Appeal agreed with the reasoning in *Price* and even stated that *Pendergrass* made the “better” policy choice of the two alternatives, favoring the PER over favoring tort principles.¹¹⁰

Some secondary sources have also agreed with *Pendergrass*'s interpretation of the PER. For example, John Wigmore, a legal scholar and expert in evidence, stated that a party's intent *not* to perform a promise should not be considered “fraudulent” as it relates to the PER.¹¹¹ Although critical of *Pendergrass*, a recent law review note by Alicia Macklin of the University of Southern California Gould School of Law favors the limiting of the PER's fraud exception.¹¹² In her note, Macklin even advocates for a stricter promissory fraud rule.¹¹³ She argues that there should be varying degrees of the fraud exception for certain contracts and parties—e.g., more sophisticated parties versus less sophisticated parties.¹¹⁴

However, *Pendergrass* has also received much criticism. The main criticism is that the decision is inconsistent with California Code of Civil Procedure section 1856,¹¹⁵ which broadly permits extrinsic evidence that establishes illegality or fraud.¹¹⁶ The statute does not contemplate any limitations or distinctions. Thus, it is inconsistent to have a rule that states that promissory fraud can invalidate an agreement but then not allow evidence of such fraud just because the promise varies from the written terms of the contract.¹¹⁷

Two years after *Pendergrass*, the California Supreme Court completely ignored *Pendergrass* when it decided *Fleury v. Ramacciotti*.¹¹⁸

109. *Id.*

110. *Banco Do Brasil*, 285 Cal. Rptr. at 892.

111. *Bank of Am. Trust & Sav. Ass'n v. Pendergrass*, 48 P.2d 659, 662 (Cal. 1935). *But see* Sweet, *supra* note 3, at 884 (arguing that the *Pendergrass* court might have been erroneously relying on Wigmore because “Wigmore quoted the case to discredit a former Pennsylvania rule that it was fraud to insist on a writing when there had been an earlier oral agreement to the contrary, a rule that is almost universally rejected. He did not cite it to support his view that only evidence of factual fraud is exempted from the parol evidence rule, although there was dicta to that effect in the case”).

112. Macklin, *supra* note 6, at 837.

113. *Id.* (“Instead of admitting evidence of alleged promissory fraud that is consistent with or independent of the written agreement, courts should either follow the more strict PER standard for complete integrations—barring evidence that varies from or adds to the written agreement—or follow a ‘substantial variance’ test. While critics of the already narrow *Pendergrass* rule assert that the focus needs to be on the ‘right to relief from fraud,’ fraud *is* a lesser concern for sophisticated parties, who are in a position to protect themselves in a contract negotiation.”).

114. *Id.*

115. *See* *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 36 (Cal. Ct. App. 1971); Sweet, *supra* note 3, at 887; *see also* *Pac. State Bank v. Greene*, 1 Cal. Rptr. 3d. 739, 750–51 (Cal. Ct. App. 2003).

116. CAL. CIV. PROC. CODE § 1856 (West 2013).

117. *Coast Bank*, 97 Cal. Rptr. at 35–36.

118. 67 P.2d 339 (Cal. 1937).

In *Fleury*, the defendant defaulted on a note and the plaintiff let the statute of limitations run on his potential action against the defendant.¹¹⁹ The defendant then signed a renewal note.¹²⁰ When the defendant again defaulted, the plaintiff entered a deficiency judgment against the defendant.¹²¹ The defendant alleged that he told the plaintiff—and the plaintiff agreed—that the defendant would only sign a renewal note and waive the statute of limitations if no deficiency judgment would be entered against him.¹²² The defendant alleged that he did not read the contract but signed relying on the plaintiff’s representations that it included provisions that prevented a deficiency judgment against him.¹²³ The court stated that “fraud may always be shown to defeat the effect of an agreement.”¹²⁴ Thus, the court held that the PER did not bar evidence of fraudulent misrepresentations regarding the content of the contract, when those misrepresentations induced the party to sign the contract.¹²⁵ Therefore, the court reached the complete opposite result of *Pendergrass*.

Notably, in 1977, the California Law Revision Commission did not take *Pendergrass* into account when it modified the PER statute.¹²⁶ The Commission suggested that the Legislature review three cases in making its decision about modifications to the rule;¹²⁷ *Pendergrass* was not included, and the Commission cited *Coast Bank*, which is very critical of *Pendergrass*, in its discussion of the PER.¹²⁸ The Legislature adopted the Commission’s proposed revision and did not change the language of the PER as it relates to the admissibility of extrinsic evidence of fraud.¹²⁹

In addition, most scholars in their treatises recognize that the PER broadly allows evidence of fraud without a *Pendergrass*-like restriction. Corbin, along with E. Allen Farnsworth and Samuel Williston, who were also contracts scholars and treatise authors, did not put restrictions on the admissibility of evidence of fraud.¹³⁰ The Restatement (Second) of Contracts section 214 and the Restatement (Second) of Torts section 530

119. *Id.* at 339.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 340

125. *Id.*

126. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 291 P.3d 316, 321 (Cal. 2013).

127. *Id.*; see *Delta Dynamics, Inc. v. Arioto*, 446 P.2d 785 (Cal. 1968); *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968); *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968).

128. *Recommendation Relating to Parol Evidence Rule*, in CALIFORNIA LAW REVISION COMMISSION ANNUAL REPORT 147, 148 (1977).

129. *Id.* at 152; see 1978 Cal. Stat. ch. 150, § 1.

130. LINZER, *supra* note 5, § 25.20[A]; FARNSWORTH, *supra* note 5, § 7.4; LORD, *supra* note 5, § 33:17.

also do not put any limitations on the fraud exception.¹³¹ Finally, a majority of other jurisdictions also allow parol evidence of fraud.¹³²

III. *RIVERISLAND*: EVIDENCE OF PROMISSORY FRAUD IS ALWAYS ADMISSIBLE

We respect the principle of stare decisis, but reconsideration of a poorly reasoned opinion is nevertheless appropriate.

—Justice Corrigan¹³³

On January 14, 2013, the California Supreme Court overruled *Pendergrass in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*.¹³⁴ The PER now permits evidence of promissory fraud that is at variance with the terms of the writing.

In *Riverisland*, plaintiffs Lance and Pamela Workman failed to make a required payment on their loan to defendant Fresno-Madera Production Credit Association (the “Credit Association”).¹³⁵ In March 2007, the Workmans restructured their debt in an agreement with the Credit Association.¹³⁶ The written agreement stated that the loan would be extended three months with eight of the Workmans’ properties as collateral.¹³⁷ The Workmans alleged, however, that when they met with the Credit Association’s vice president before the agreement was signed, he told them that the Credit Association would extend their loan by two years for the additional collateral of two of the Workmans’ properties.¹³⁸ The Workmans claimed that when they signed the contract the vice president again assured them of these terms.¹³⁹ The Workmans stated that they did not read the contract but signed the places where the vice president had tabbed for signature.¹⁴⁰ The Workmans initialed the pages with the legal descriptions of each of the eight properties.¹⁴¹ The Workmans failed to make the requisite payments and, in March 2008, the

131. RESTATEMENT (SECOND) OF CONTRACTS, § 214 (2012); RESTATEMENT (SECOND) OF TORTS, § 530 (2012).

132. See, e.g., *Touche Ross, Ltd. v. Filipek*, 778 P.2d 721 (Haw. Ct. App. 1989); *Pinnacle Peak Developers v. TRW Inv. Corp.*, 631 P.2d 540 (Ariz. Ct. App. 1980); *Globe Steel Abrasive Co. v. Nat’l Metal Abrasive Co.*, 101 F.2d 489, 491 (6th Cir. 1939) (finding that the plaintiff had been “induced to conclude an agreement by fraudulent concealment of existing facts and by promises, implied if not expressed, made with no present intention of performing. In the allegations of inducement we find no challenge to the terms of the contract impermissible under the parol evidence rule”).

133. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 291 P.3d 316, 322 (Cal. 2013).

134. *Id.* at 325.

135. *Id.* at 317.

136. *Id.*

137. *Id.* at 318.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 317.

Credit Association recorded a notice of default.¹⁴² The Workmans eventually repaid the loan, “but they had to sell their properties at severely reduced prices.”¹⁴³ After being repaid, the Credit Association dismissed its foreclosure proceedings.¹⁴⁴

The Workmans then sued the Credit Association, seeking damages for negligent misrepresentation and fraud.¹⁴⁵ In response to these allegations, the Credit Association argued that the PER barred any evidence of terms that contradicted the written agreement.¹⁴⁶ The Workmans argued that these misrepresentations fell under the fraud exception to the PER.¹⁴⁷

The trial court granted summary judgment for the Credit Association.¹⁴⁸ Relying on *Pendergrass*, the trial court held that the fraud exception did not include parol evidence that was inconsistent with the written agreement.¹⁴⁹

The court of appeal reversed, holding that *Pendergrass* was limited to promissory fraud cases.¹⁵⁰ The appellate court reasoned that the alleged false statements by the vice president were “factual misrepresentations” about the contents of the contract and were thus beyond the scope of *Pendergrass*.¹⁵¹ The California Supreme Court then granted the Credit Association’s petition for review.¹⁵² In the Workmans’ brief, they argued that the appellate court’s holding was correct: theirs was a case of fraud in the execution and *Pendergrass* did not apply.¹⁵³ Alternatively, the Workmans argued that, if the court wanted to reconsider *Pendergrass*, there were good reasons to overrule it.¹⁵⁴

The California Supreme Court began its analysis by looking at the PER, finding that the language of section 1856 is “broad” and “unqualified.”¹⁵⁵ The court then discussed the reactions to and criticisms of the ruling in *Pendergrass*.¹⁵⁶ In reconsidering *Pendergrass*, the court

142. *Id.* at 318.

143. Reply Brief on the Merits at 5, *Riverisland*, 291 P.3d 316 (No. S190581), 2011 WL 5075465, at *5.

144. *Riverisland*, 291 P.3d at 318.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. Reply Brief on the Merits at 7, *Riverisland*, 291 P.3d 316 (No. S190581), 2011 WL 5075465, at *6–7.

154. *Id.*

155. *Riverisland*, 291 P.3d at 319.

156. *Id.* at 320–22; see *supra* Part II.B.

considered whether its limitation on the fraud exception was necessary to serve the goals of the PER.¹⁵⁷

First, the court looked at the law at the time that *Pendergrass* was decided.¹⁵⁸ The court cited six California Supreme Court cases prior to *Pendergrass* that held that PER, without qualification, allowed evidence of fraud.¹⁵⁹ The court also looked to the 1898 case *Langley v. Rodriguez*¹⁶⁰ and found that the broad fraud exception applied in promissory fraud cases as well.¹⁶¹ The court noted that it confirmed this view of promissory fraud in *Fleury v. Ramacciotti*.¹⁶² Thus, the court found that *Pendergrass* was out of touch with California law.¹⁶³

Second, the court looked at the authority that the *Pendergrass* court cited in its opinion.¹⁶⁴ The court found that the authorities relied upon did not support its decision.¹⁶⁵ The court noted that *Towner*, the Virginia case quoted in the opinion, was not a promissory fraud case, and the California cases cited also did not consider the PER's fraud exception.¹⁶⁶ The court stated that "*Pendergrass* was an aberration," and held that its limitation on the fraud exception to the PER was not justified.¹⁶⁷ Thus, *Pendergrass* was out of touch with California law, not based on relevant precedent, and inconsistent with the terms of section 1856.¹⁶⁸

Finally, the court noted that the intent element of promissory fraud required a showing from the plaintiffs that their reliance on the defendant's misrepresentation was reasonable.¹⁶⁹ The court declined to address this issue, as neither the trial court nor the appellate court addressed it.¹⁷⁰ The court affirmed the judgment of the appellate court, holding that the PER does not bar evidence of fraudulent promises at variance with the terms of the written agreement.¹⁷¹

IV. REFLECTIONS ON *RIVERISLAND*

[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.

157. *Riverisland*, 291 P.3d at 322–23.

158. *Id.* at 323.

159. *Id.*

160. 55 P. 406 (Cal. 1898).

161. *Id.*; see generally 55 P. 406 (Cal. 1898).

162. *Id.*; see generally *Fleury v. Ramacciotti*, 67 P.2d 339 (Cal. 1937).

163. *Riverisland*, 291 P.3d at 324.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 325.

170. *Id.*

171. *Id.*

—Justice Tyler¹⁷²

Was *Pendergrass* truly an “aberration”—so out of step with the law that the California Supreme Court was waiting for an opportunity to overturn its ruling? Possibly. The court could have easily found *Riverisland* to be a case of fraud in the execution without disturbing *Pendergrass*. However, overturning long-standing precedent is quite rare, especially in a unanimous decision. This clear consensus might also seem somewhat surprising considering the current makeup of the California Supreme Court: six of the seven current Supreme Court Justices were appointed by Republican Governors (Tani Cantil-Sakauye, Joyce Kennard, Marvin Baxter, Kathryn Werdegar, Ming Chin, and Carol Corrigan), and one was appointed by a Democrat (Goodwin Liu). Generally held notions suggest that Republicans are “pro-business” and Democrats are looking out more for “the little guy.” Thus, the makeup of the current California Supreme Court would be expected to be “pro-business,” however, the decision was more “pro-little-guy.” Perhaps, then, *Riverisland* was a logical decision based on a mechanical application of the statutes, case law, and scholarly analysis.

There might be unstated reasons for the court’s decision. Justin Sweet of University of California Berkeley School of Law stated that perhaps the court’s holding in *Pendergrass* was due to “the court’s fear, engendered by the depression, that a contrary holding would enable borrowers to evade their obligations.”¹⁷³ A possible unstated reason for the *Riverisland* decision could be based on the blame placed on banks for the subprime mortgage crisis of 2008.¹⁷⁴ Many banks gave loans to debtors that the banks knew could not afford them and then foreclosed when the borrowers could not make the required payments. In *Riverisland*, the bank modified the Workmans’ loan while allegedly fraudulently misrepresenting the agreement, only to initiate foreclosure proceedings on them a few months later. The *Riverisland* court might have recognized, and not wanted to sanction, such fraudulent dealings. Whatever the ultimate reason, *Riverisland* brings with it both problems and positive effects.

A. PROBLEMS WITH ALLOWING PROMISSORY FRAUD THAT CONTRADICTS THE WRITTEN AGREEMENT

A verbal contract isn’t worth the paper it’s written on.

172. *Ferguson v. Koch*, 268 P. 342, 345 (Cal. 1928).

173. Sweet, *supra* note 3, at 893.

174. See generally FIN. CRISIS INQUIRY COMM’N, THE FINAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011); Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 25, 2011, at A1.

—Samuel Goldwyn¹⁷⁵

Riverisland's ruling, which allows parol evidence of fraudulent statements that directly contradict the writing, appeals to our sense of morals. A drafter that lies about the contents of a written agreement and induces a non-drafter to sign it should not be able to escape liability. *Riverisland* appears to be fair because this type of deceit is wrong, and the law should discourage such practices.¹⁷⁶

On the other hand, *Riverisland* arguably favors non-drafting parties by allowing them to introduce evidence that has not been memorialized in a written agreement. Allowing parol evidence of such statements presents a number of problems. Three main problems are: (1) unintentional—honestly made but erroneous—false claims from non-drafters, (2) intentionally fabricated claims, and (3) unpredictable outcomes from triers of fact.

I. Permits Unintentionally False Claims

People only see what they are prepared to see.

—Ralph Waldo Emerson¹⁷⁷

Claims might arise from genuine misunderstandings between the parties or honestly made but false allegations. For example, a non-drafting party might bring a claim of promissory fraud, honestly thinking that the drafting party misrepresented the terms of the contract, when, in reality, the drafting party did no such thing. The mind is not flawless and might remember events incorrectly.

People see things the way that they want—and the way that their brains are trained—to see them. A “schema” is a mental shortcut based on a quick analysis of past similarities to previous information.¹⁷⁸ “Memory shaping” is the idea that a schema shapes how information is stored and also influences how it is retrieved from memory.¹⁷⁹ A person’s

175. This quotation is attributed to Samuel Goldwyn, however, it is a misreporting of his actual quotation: “His verbal contract is worth more than the paper it’s written on.” PAUL F. BOLLER, JR. & JOHN GEORGE, *THEY NEVER SAID IT* 42 (1989).

176. See Korobkin, *supra* note 10, at 72.

177. RALPH WALDO EMERSON, *EMERSON IN HIS JOURNALS* 514 (1982).

178. Humans receive a lot of new information every day, and because of this, the brain creates mental short cuts in attempt to remember it all. These short cuts help us categorize new experiences so that our brain does not have to create a new “mental file folder” for every piece of new information. Our minds scan the new experience for similarities to past events and knowledge. Then, the new events get placed in an already created mental folder that correlates with the new data. These categories that our brains create are called scripts and schemas—mental short-cuts based on a quick analysis of similarities to previous information. This process is mostly unconscious and happens quickly. A script is based on a person’s previous experiences and is the order in which they think things occur. SUNWOLF, *PRACTICAL JURY DYNAMICS* 124–25 (2004).

179. *Id.* at 130–31.

mind is schema-consistent and does not easily remember details from a different perspective.¹⁸⁰ Perseverance and strengthening of schemas occur as well-developed schemas resist change and become more powerful over time.¹⁸¹ People also tend to forget inconsistencies, over-interpret consistencies, and favor memories that are consistent with their schemas.¹⁸²

A non-drafting party might remember certain statements as being in her favor because she has bolstered them to be consistent with her schema.¹⁸³ Thus, even a non-drafting party with honest intentions can make mistakes. After *Riverisland*, and given the effects of memory shaping, permitting parol evidence of alleged misrepresentations might increase the number of lawsuits that are not factually justified, and such litigation can take years. For example, the *Riverisland* action began in 2008, the California Supreme Court gave its decision five years later in 2013, and the case is still active on remand.

2. *Encourages Intentionally Fabricated Claims*

Pendergrass implemented a duty-to-read rule, which barred extrinsic statements from evidence, even if they might have been made with fraudulent intent. Stewart Macaulay of University of Wisconsin Law School notes that, when a court has a duty-to-read rule, “one senses that the court is concerned with the likelihood of perjury and the difficulties of adjudicating facts” because “[i]t is easy to make up a story about one’s assumptions that are contradicted by a written contract.”¹⁸⁴ For example, the Seventh Circuit, in both *Rissman v. Rissman* and *Carr v. CIGNA Securities, Inc.*, acknowledged the concern regarding intentionally fabricated claims.¹⁸⁵ In *Rissman*, Judge Frank Easterbrook stated that a non-reliance clause “ensures that both the transaction and any subsequent litigation proceed on the basis of the parties’ writings, which are less subject to the vagaries of memory and the risks of fabrication.”¹⁸⁶ In *Carr*, Judge Richard Posner stated that the written agreement controls over

180. *See id.* at 131.

181. *Id.*

182. Thomas K. Srull & Robert S. Wyer, Jr., *Category Accessibility and Social Perception: Some Implications for the Study of Person Memory and Interpersonal Judgments*, 38 J. PERSONALITY & SOC. PSYCHOL. 841, 854–55 (1980). This is also known as the “self-serving bias.” Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 570 (2003).

183. *See Rissman v. Rissman*, 213 F.3d 381, 384 (7th Cir. 2000) (“Memory plays tricks. Acting in the best of faith, people may ‘remember’ things that never occurred but now serve their interests. Or they may remember events with a change of emphasis or nuance that makes a substantial difference to meaning.”); *see also SUNWOLF*, *supra* note 178, at 131.

184. Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1065 (1966).

185. *Rissman*, 213 F.3d at 384; *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 547 (7th Cir. 1996).

186. *Rissman*, 213 F.3d at 384.

alleged inconsistent prior representations because, otherwise, “sellers would have no protection against plausible liars and gullible jurors.”¹⁸⁷ A party that later becomes dissatisfied with the agreement might attempt to void her contract by alleging that the drafting party made prior misrepresentations. Under *Riverisland*, such evidence of alleged prior statements is now allowed.¹⁸⁸

Riverisland changes *Pendergrass*'s more general rule—barring evidence of promissory fraud that is made prior to and is inconsistent with the written agreement—to a more case-by-case analysis in which such evidence is admissible. Moving “from relatively general rules to case-by-case standards” increases the involvement of triers of fact.¹⁸⁹ If judges and juries were always able to identify fabricated claims, this would not be a problem because claimants would have less incentive to bring such claims.¹⁹⁰ “Defendants would know they would always prevail in litigation, ensuring that plaintiffs bringing such claims would receive negative payoffs. With this knowledge, few plaintiffs would bring such cases, and plaintiffs’ lawyers working on a contingent-fee basis would avoid them.”¹⁹¹

Because the trier of fact will not always be able to tell the real claims from the fabricated ones, there will be error. Corbin stated that the PER might have been based in part as a way to control the jury.¹⁹² Corbin contended that some courts prohibited evidence that contradicted the writing because such evidence was likely intentionally or unintentionally false, and there was a fear that the jury would consider it credible out of sympathy for “the little guy.”¹⁹³ Charles McCormick of University of Texas School of Law agreed and noted that the “average jury will, other things being equal, lean strongly in favor of the side which is threatened with possible injustice and certain hardship by the enforcement of the writing.”¹⁹⁴ Juries might be overly sympathetic to non-drafting parties that they think were taken advantage of by the drafting parties.¹⁹⁵ Thus, some plaintiffs will have an incentive to make up claims—now admissible under *Riverisland*—knowing that a sympathetic jury will likely believe them.

Jurors might also be more sympathetic to the underdog given current events and recent history. A lot of blame has been placed on

187. *Carr*, 95 F.3d at 547.

188. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 291 P.3d 316, 325 (2013).

189. Macaulay, *supra* note 184, at 1066.

190. Korobkin, *supra* note 10, at 72.

191. *Id.*

192. Corbin, *supra* note 20, at 608.

193. *Id.*

194. Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 *YALE L.J.* 365, 366 (1931).

195. *Id.*

banks for the subprime mortgage crisis.¹⁹⁶ Although jurors generally vary on whether they are pro-little-guy or pro-business, jurors might presently be more sympathetic to the little-guy debtor given the country's recent recession. Whether or not the Credit Association made the alleged misrepresentations in the Workmans' case, jurors in other cases might be inclined to believe that the non-drafting parties were taken advantage of by the drafting parties because they do not want to sanction potentially fraudulent dealings.

Furthermore, even if the truthful drafting party prevails, there is still the high cost of litigation.¹⁹⁷ Many parties will want to avoid litigation, as it involves considerable time, money, and risk of an adverse judgment. This gives leverage to the plaintiffs—including those who have intentionally fabricated claims—to get the defendants to renegotiate the terms of the agreement, rescind the contract, or settle.¹⁹⁸ If the parties do end up in court, however, they will face uncertain outcomes from juries.

3. *Risks Unpredictable Outcomes From Juries*

There is no such thing as an impartial jury because there are no impartial people.

—Jon Stewart¹⁹⁹

Perception is ubiquitous as it relates to humans and, more specifically, as it relates to jurors. Under a *Pendergrass*-like rule, a judge would likely dismiss a claim or grant summary judgment against a party that claimed prior fraudulent misrepresentations inconsistent with the writing. In the case of the Workmans, the trial court granted summary judgment for the Credit Association, holding that the fraud exception did not include parol evidence that was inconsistent with the written agreement.²⁰⁰ After *Riverisland*, decisions about alleged factual misrepresentations will be left to juries. Instead of relying on the written word of a contract, evidence will now be “he said, she said” arguments for the jury to decide who they deem believable.

In the courtroom, lawyers act as message senders and jurors act as evidence receivers. There are numerous receiver-centered variables that a juror holds when interpreting evidence presented at trial.²⁰¹ Jurors

196. See generally *supra* note 174.

197. Korobkin, *supra* note 10, at 72.

198. See Allen Blair, *A Matter of Trust: Should No-Reliance Clauses Bar Claims for Fraudulent Inducement of Contract?*, 92 MARQ. L. REV. 423, 468–69 (2009) (explaining that a holdup by a party alleging fraud is a reason for the other party to want to have no-reliance clauses included and enforced in its contracts).

199. JUDY BROWN, JOKE EXPRESS: INSTANT DELIVERY OF 1,424 FUNNY BITS FROM THE BEST COMEDIANS 136 (2007).

200. *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 291 P.3d 316, 318 (2013).

201. SUNWOLF, *supra* note 178, at 119.

perceive other people (witnesses, plaintiffs, defendants, and lawyers), objects, and things through mental filters and “psychosocial-noises.”²⁰² These noises are the variables through which the receiver views the message. Some of these noises include: prior experiences, beliefs, gender, memory, physical attractiveness, race, and snap judgments.²⁰³ These noises make up the “social perceptual lenses” through which each juror will look at the trial and are the cause of many perceptual errors.²⁰⁴ All of the evidence presented is filtered through the juror’s “socialized gender, cultural values (including organizational, community, religious, or ethnic cultures), and attribution-making processes (personal theories about what causes a thing to happen).”²⁰⁵ Basically, what a juror hears gets filtered and thus distorted through these noises, leaving a different message than the lawyer actually sent.

After *Riverisland*, judges must permit parol evidence of alleged fraudulent misrepresentations that directly contradicts the writing. Now, instead of relying on the written word of the contract, courts will rely on jurors—whose mental filters and psychosocial-noises could distort their views of the evidence, not to mention their views of the plaintiffs, defendants, lawyers, and witnesses. Academics have conducted a substantial amount of research about the effects of these psychosocial noises in the legal system. Physical attractiveness and race, two of the most visible and obviously available traits of individuals, are examples of psychosocial-noises that play a role in the courtroom.²⁰⁶ The effects of physical attractiveness and race reside mostly on a subconscious level. Most people would say that physical attractiveness is a superficial quality and that it does not bias them in any way.²⁰⁷ Similarly, most people do not consider themselves, or would not admit to being, racist. However, it seems that people grossly underestimate the influence that physical attractiveness and race have on them.²⁰⁸

Physical attractiveness greatly affects “person perception”—how individuals think about other people and how they judge others’ internal

202. *Id.* at 119–21.

203. *See id.* at 119.

204. *Id.* at 122.

205. *Id.* (emphasis omitted).

206. This research relies heavily on mock juries, as performing experimental research in actual trials could have detrimental consequences to obtaining justice. This research, however, has its limitation because much of it does not include the deliberation stage in the study.

207. GORDON L. PATZER, *THE POWER AND PARADOX OF PHYSICAL ATTRACTIVENESS* 44 (2006).

208. A major reason for this is because they are socialized biases originating from childhood. *See generally* T.G. Power, K.A. Hildebrandt & H.E. Fitzgerald, *Adults’ Responses to Infants Varying in Facial Expression and Perceived Attractiveness*, 5 *INFANT BEHAV. & DEV.* 33 (1982). A major reason for this is because they are socialized biases. *Id.*

and external qualities.²⁰⁹ The “Physical Attractiveness Phenomena” is the notion that, in general, physically attractive people receive more positive responses than their less attractive counterparts.²¹⁰ These subconscious biases translate to the courtroom in both civil and criminal cases. In mock civil trials, jurors gave physically attractive plaintiffs more favorable judgments, including rewarding higher monetary damages,²¹¹ and, in criminal settings, jurors gave more lenient sentences to physically attractive defendants.²¹² Another study suggests that, if physical attractiveness was used in any way to commit the crime or fraudulent act, being good-looking might be detrimental to the defendant.²¹³

In addition, many studies have considered the role of race in the courtroom. Most people have implicit, unconscious preferences for their own race.²¹⁴ In his book, *Blink*, Malcolm Gladwell asserts that we have our conscious attitudes—what we choose to believe and how we choose to act—and our unconscious attitudes—our immediate, automatic associations that we make without thinking.²¹⁵ These unconscious attitudes are largely based on past experiences, relationships with others, and the media.²¹⁶ In the legal context, a juror is more likely to find a defendant civilly liable when the defendant is of a different race than the juror.²¹⁷ A juror is also likely to be more lenient on a defendant of her same race.²¹⁸

Physical attractiveness and race are just two examples of psychosocial-noises that jurors bring to the courtroom that impact their judgments and, ultimately, their verdicts. Each juror is unique, and all jurors come to a trial with different backgrounds, beliefs, and expectations. *Riverisland* is significant because jurors, with all of their biases, will now decide the credibility of alleged fraudulent misrepresentations. Judges will no longer be able to exclude evidence of alleged prior misrepresentations that is inconsistent with the writing. *Riverisland* moves us away from

209. See generally R. Tagiuri, *Person Perception*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY (G. Lindzey & E. Aronson eds, 1954).

210. PATZER, *supra* note 207, at 20–21.

211. *Id.* at 275.

212. *Id.*

213. Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL., 410, 410–13 (1975). In the study, the defendant’s physical attractiveness was high, low, or unknown, and the crime was either burglary or swindle. *Id.* Defendants of high physical attractiveness were given more lenient punishments for burglary than their unattractive counterparts. *Id.* at 413. The reverse was true for swindle—the less physically attractive defendants were given lesser punishments than the attractive defendants. *Id.*

214. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 77–88 (2005).

215. *Id.*

216. *Id.*

217. DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 191 (2012).

218. *Id.*

relying on the written word of the contract bargained for by both parties to allowing jurors, who likely cannot be impartial, to determine its meaning and what happened. Furthermore, because each juror views the trial differently and pays attention to what she deems important, an “evidence gap” often occurs.²¹⁹ The human mind cannot possibly remember it all and remember it correctly.

B. POSITIVE EFFECTS OF ALLOWING PROMISSORY FRAUD THAT
CONTRADICTS THE WRITTEN AGREEMENT

There seems to be an easy fix for non-drafting parties to avoid being taken advantage of: read the contract. However, the duty-to-read rule came from bargaining practices of a different era “when the self-reliance ethic was strong and standardized agreements were rare.”²²⁰ Times have changed. Russell Korobkin of University of California, Los Angeles School of Law asserts that implementing a “pure duty-to-read rule” would not serve as an effective solution because it increases the direct and indirect costs, and reduces the social value, of contracting.²²¹ He asserts that these costs arise due to the complexity of contracts, confirmation and status quo biases, and the potential to undermine trust.²²² Korobkin states that this rule would require non-drafting parties to painstakingly read contracts to protect themselves against exploiting drafting parties, cause non-drafters to take substantial risks by not reading their contracts, or cause them to avoid contracting all together.²²³ He contends that each option reduces the social value of contracting, as “the costs borne by nondrafting parties under a pure duty-to-read rule would ultimately be shared by their contracting counterparts, to the detriment of all concerned.”²²⁴ *Riverisland* recognizes some of Korobkin’s concerns, as well as others.

I. *Recognizes Reality: No One Reads and Fully Understands
Contracts*

I read part of it all the way through.

—Samuel Goldwyn²²⁵

219. SUNWOLF, *supra* note 178, at 123 (“There’s a real gap between the evidence that was presented at a trial and the evidence a juror perceives was presented at trial.”).

220. PERILLO, *supra* note 21, § 29.12.

221. Korobkin, *supra* note 10, at 88.

222. *Id.* at 78–88.

223. *Id.* at 88.

224. *Id.*

225. See BOLLER & GEORGE, *supra* note 175, at 42 (attributing this quotation to Samuel Goldwyn; however, he might not have actually said it).

The *Riverisland* rule recognizes a reality of everyday life: many people will not fully read a contract before signing it. In his article, which is highly critical of *Pendergrass*, Sweet states that the “argument that a party can protect himself by insisting on written promises shows a remarkable lack of awareness of the facts of everyday commercial life.”²²⁶ One study found that about 1 in 1000 people scrolls through the online boilerplate contract when it is provided prior to accepting an online agreement.²²⁷ The one-in-one-thousand reader spent a median time of twenty-nine seconds “reading” the agreement.²²⁸ The median length of the boilerplate agreements was about 1700 words.²²⁹ In twenty-nine seconds, the average person can read only 150 words or less.²³⁰ Thus, given the complicated legalese in these agreements and the time spent reading them, readership of the contract is basically zero.²³¹ As an anecdotal example, in an experiment by a software developer, PC Pitstop, the company put a clause in its user license agreement that promised \$1000 to anyone who read it.²³² After four months and more than 3000 downloads, someone finally wrote in.²³³

In addition, the problem is not only reading the contract but also understanding it. Contracts are often long, complex, and written in legalese. Understanding the agreement might be time-consuming and difficult for the average person.²³⁴ Fully understanding the contract might require hiring a lawyer, which is, again, time-consuming, not to mention costly.²³⁵

In *Riverisland*, the Workmans’ loan agreement was twenty-six single-spaced pages.²³⁶ That is almost twice as long as this Note and likely much more difficult to understand. In addition, the Workmans were renegotiating their loan agreement. It is possible that they thought that the only terms changing were the ones represented to them by the vice president of the Credit Association and, thus, there was no need to review

226. Sweet, *supra* note 3, at 896.

227. Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contract 3* (N.Y. Univ. Law & Econ. Working Papers, Working Paper No. 195, 2009), available at http://lsr.nellco.org/nyu_lewp/195.

228. *Id.* at 27.

229. *Id.*

230. *Id.* at 26 (explaining that the average reading rate is 250–300 words per minute).

231. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 671 (2011).

232. Larry Magid, *It Pays to Read License Agreements*, PC PITSTOP, <http://pcpitstop.com/spycheck/eula.asp> (last visited Jan. 15, 2014).

233. PC Pitstop sent that person a check for \$1000. *Id.*

234. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446 (2002).

235. Korobkin, *supra* note 10, at 78.

236. Reply Brief on the Merits at 4, *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n*, 291 P.3d 316, 321 (Cal. 2013) (No. S190581), 2011 WL 5075465, at *4.

the document carefully. Although it might have been unreasonable for them not to read such an important contract (or at least the terms regarding the extension and additional collateral that they believed were changing), it is a reality of everyday life that people, like the Workmans, neglect to fully read and comprehend long, complex contracts.

2. *Discourages Fraudulent Practices of Drafting Parties and Recognizes Legislative Intent*

Pendergrass's holding left non-drafting parties vulnerable. Under *Pendergrass*, a drafting party could make false representations and then later disclaim them in the written agreement without consequence. After *Riverisland*, non-drafting parties have more protection, or at least recourse, against this practice. Because of potential liability, drafting parties will be discouraged from making fraudulent statements.

Riverisland is also consistent with the language of section 1856, which broadly permits parol evidence of fraud, because fraud invalidates the agreement. As the court in *Riverisland* stated, "*Pendergrass* failed to account for the fundamental principle that fraud undermines the essential validity of the parties' agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds."²³⁷ Thus, as the Legislature intended, any fraud voids a contract.

3. *Acknowledges Psychological Tendencies*

As previously discussed, people tend to look for evidence that supports their preexisting understandings and fail to notice evidence that does not.²³⁸ "Confirmation bias" is the psychological tendency to bolster current beliefs by seeking out consistent information and ignoring inconsistent information.²³⁹ Furthermore, people also tend to interpret ambiguous information as consistent, rather than inconsistent, with prior beliefs.²⁴⁰ This "selectivity of perception" is unavoidable.²⁴¹

Such selectivity creates a problem when a party reads over a document after being told—by someone that they have no reason to disbelieve—that the terms state one thing when they actually state another. One study examined the confirmation bias in participants

237. *Riverisland*, 291 P.3d at 324.

238. See SUNWOLF, *supra* note 178, at 105.

239. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

240. See *id.*

241. See SUNWOLF, *supra* note 178, at 105.

reviewing home-loan disclosure forms by tracking eye fixations.²⁴² Participants were randomly told their interest rate (e.g., 4%) or monthly payment (e.g., \$2000) for their loan but, were not told that the quoted rate would only apply for a limited amount of time.²⁴³ If a confirmation bias existed, participants would look for information that confirmed their interest rate or monthly payment and not for information that would disconfirm it—i.e., the information that the loan adjusts.²⁴⁴ The results showed that 29% of those participants given the interest rate term and 33% of those given the monthly payment term showed confirmation biases in their eye fixations.²⁴⁵ The percentages indicating confirmation bias increased further to 42% and 48%, respectively, when experimenters tried to engage the participants in conversation while they reviewed the forms.²⁴⁶

In the case of the Workmans in *Riverisland*, they claimed not to have read the contract before signing. However, even if they had, the confirmation bias suggests that they would have tended to read the contract as being consistent with the Credit Association's representations. Their prior beliefs from what the Credit Association had told them might have caused them to overlook any change in the terms. They might have confirmed their preexisting beliefs about the contract and signed anyway. Thus, because a fraudulent promise would have affected the Workmans' reading of the contract, allowing evidence of the promissory fraud would at least help counteract the negative repercussions of having signed it.

In addition, when presented with a contract, people often feel pressured to sign. By taking the time to read the contract carefully or asking to have extended time so that an attorney can review it, the non-drafting party indicates that she does not completely trust the drafting party.²⁴⁷ On the other hand, a non-drafting party signals trust by signing a contract without reading it.²⁴⁸ Korobkin notes that most agreements are not just one-time transactions, but involve post-contractual performance on the part of one or both parties.²⁴⁹ In such circumstances, he notes that

242. Debra Pogrud Stark et al., *Ineffective in Any Form: How Confirmation Bias and Distractions Undermine Improved Home-Loan Disclosures*, 122 YALE L.J. ONLINE 377, 377 (2013), <http://yalelawjournal.org/2013/04/16/stark-choplin&leboeuf.html>.

243. *Id.* at 381.

244. *Id.* at 382.

245. *Id.* at 387. This particular experiment used pre-2010 Department of Housing and Urban Development form 1 ("HUD-1 forms"). In another experiment using 2010 HUD-1 forms, the results showed that four percent of those participants told about the interest rate term and thirty-five percent of those told about the monthly payment term showed confirmation biases in their eye fixations. *Id.*

246. *Id.* at 388.

247. Korobkin, *supra* note 10, at 83.

248. *Id.*

249. *Id.* at 84.

“bonds of trust are likely to increase the chances that parties will engage in cooperative behavior that both maximizes the value of the deal and builds a basis for profitable cooperation in the future.”²⁵⁰

In the Workmans’ case, they also might have felt a similar pressure to sign the agreement without reading it because of their ongoing relationship with the Credit Association. Because the Workmans were renegotiating their preexisting loan, they likely felt that they already understood most of the contract’s terms. Thus, the Workmans reading the entire agreement carefully would have signaled distrust of the Credit Association. The Workmans would also continue to work with the Credit Association, as a loan agreement requires post-contractual performance, and might have wanted to do future business with the Credit Association. Thus, the Workmans had incentives to cooperate and continue fostering a positive relationship.

Another cognitive bias is the “status quo bias,” which is an irrational preference for the current state of affairs.²⁵¹ Any change from a person’s current position is perceived as a loss. As an example, most employees do not opt in to their employer’s 401(k) plan, but most employees do not opt out if their enrollment is automatic.²⁵²

In *Riverisland*, the Workmans had a preexisting loan agreement with the Credit Association as part of their status quo. In working with the Credit Association to restructure their loan agreement, the Credit Association allegedly made misrepresentations about the agreement’s terms. By the time the Workmans signed the loan modification, the contract had become part of their status quo. Not signing would have been perceived as a loss. Thus, if the drafting party makes favorable representations and then disclaims them later in writing, it is more likely that the non-drafting party will sign the contract because getting the deal is already part of her status quo.

Finally, the “overconfidence effect” is a bias whereby a person’s subjective confidence in her decisions is higher than her objective accuracy.²⁵³ The overconfidence effect might also increase the force of “escalating commitment.”²⁵⁴ “Escalation of commitment,” or the “sunk cost fallacy,” occurs when people rationalize their increased investment in a course of action based on their total prior investment, ignoring

250. *Id.*

251. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003).

252. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1150 (2001).

253. Gerry Pallier et al., *The Role of Individual Differences in the Accuracy of Confidence Judgments*, 129 J. GEN. PSYCHOL. 257, 258 (2002).

254. See Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 41–42 (1976).

evidence that the cost now outweighs the anticipated benefit.²⁵⁵ When threatened with foreclosure of one's home, it is likely that a party would be willing to do most anything to keep that from happening. It is also likely that evidence of the risk or cost of saving one's home might actually outweigh the anticipated benefit.

In the case of *Riverisland*, the Workmans might have rationalized renegotiating their loan with additional collateral, thinking that it was necessary to save their home and that they would find a way to make the payments. Whether the Credit Association told them that their new agreement included two or eight properties as collateral, the overconfidence effect suggests that they might have agreed to it either way. However, if the Credit Association really did make favorable representations and then disclaim them later in writing, the overconfident Workmans might have overlooked the significance of the change, ignoring the evidence that the cost now outweighed the anticipated benefit.

V. BALANCING THE INTERESTS OF DRAFTING AND NON-DRAFTING PARTIES

Pendergrass favored drafting parties. *Riverisland* now tips the scale in favor of non-drafting parties. Drafters can either bear these risks and costs (paying for occasional losses), try to mitigate them (sustaining transaction costs in the process), or avoid them (not entering into contracts).²⁵⁶ Any of these three options, however, creates an "implicit tax on contracting."²⁵⁷ Basically, the drafting party's cost of contracting has gone up while its value of contracting has gone down. It is difficult to find a solution that does not compromise one party over the other. On the one hand, it is important to encourage people to read and understand their contracts. On the other hand, courts should not tolerate fraudulent practices.

Some scholars have argued for use of a "sophisticated-unsophisticated" distinction because it takes into account the bargaining power and experience of the respective parties.²⁵⁸ Sophisticated parties would be bound by the terms of the written agreement and prohibited from bringing in parol evidence.²⁵⁹ Unsophisticated parties, on the other hand, would be permitted to bring in parol evidence to show that a

255. *Id.*

256. Korobkin, *supra* note 10, at 76.

257. *Id.*

258. See, e.g., *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059–60 (Del. Ch. 2006); Macklin, *supra* note 6, at 833–36; Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 624 (2009).

259. Korobkin, *supra* note 10, at 91.

drafting party made prior inconsistent promises.²⁶⁰ As Korobkin points out, however, the problem with a sophisticated-unsophisticated distinction is that it creates one rule for sophisticated parties and another for unsophisticated parties, and no practical way to contract for something else.²⁶¹ He notes that even sophisticated parties can be taken advantage of by a contract being inconsistent with prior misrepresentations, and it sometimes works in an unsophisticated party's favor to be able to consent to certain disclaimers of terms.²⁶²

New York decisional law provides a step in the right direction toward a workable compromise by requiring meaningful assent in the form of a signature next to specific disclaimers of prior representations. In *Danann Realty Corp. v. Harris*, the plaintiff alleged that the defendant made oral misrepresentations about the operating expenses and profitability of the purchased building.²⁶³ The contract contained a specific disclaimer, which stated that: (1) the seller had not made "any representations as to the physical condition, rents, leases, expenses, operation or any other matter or thing affecting or related to the aforesaid premises," (2) the purchaser "expressly acknowledges that no such representations have been made," and (3) the purchaser "acknowledges that it has inspected the premises and agrees to take the premises 'as is.'"²⁶⁴ The court noted that a general merger clause would not bar evidence of fraud, but this specific disclaimer destroyed the plaintiff's allegations that he relied on contrary oral representations.²⁶⁵ The court stated that the plaintiff had "in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded."²⁶⁶ The court said that if the language used in this case was not specific enough to avoid claims of fraudulent representations, "then no language [could] accomplish that purpose."²⁶⁷

Building on New York's requirement of specific disclaimer, California courts should consider recognizing meaningful assent to the terms of an agreement if the drafting party provides a one-page summary of the key terms in the document and specific disclaimers of any prior representations. Preferably, this summary page would be the first page of the contract, be written in plain English, and require a signature. This page would be beneficial to both non-drafting and drafting parties: it

260. *Id.*

261. *Id.* at 91.

262. *Id.*

263. *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 598 (N.Y. 1959).

264. *Id.* (emphasis omitted).

265. *Id.* at 599.

266. *Id.*

267. *Id.* at 600.

would help non-drafting parties understand the major terms of their contracts, and drafting parties could show that the non-drafter knew that any prior representations regarding specific terms were being disclaimed. This summary/disclaimer page should be short, simple, and specific.

First, the summary/disclaimer page should be short. Most people are not willing to read entire standard form contracts that are long and full of terms that deal with unlikely contingencies. One study asked students in Bachelors and Masters degree programs whether they would read various types of contracts.²⁶⁸ One of the scenarios tested was that of opening up a bank account.²⁶⁹ Researchers found that ninety-two percent of the respondents indicated that they would not read the entire contract, while forty-seven percent said that they would read parts of it or skim it prior to signing.²⁷⁰ This indicates that people are willing to spend *some* time to try and understand their contracts but are less willing to read them in their entirety. However, if a drafting party just asks the non-drafter to quickly initial or sign paragraphs that have been tabbed in a long document, the non-drafter might still feel pressure to just sign without fully reading those paragraphs.²⁷¹ Therefore, instead of just calling a person's attention to specific areas of the document, drafting parties could have a one-page summary of the crucial terms and disclaimers.

Second, the summary/disclaimer page should be simple. Mandated disclosures or disclaimers regarding the terms of a contract often fail because they are too complex and difficult to understand.²⁷² The summary/disclaimer page should be written in plain English so that the non-drafting party can understand the main terms of the contract. One study showed that borrowers better understood a simplified Truth in Lending Act mortgage form compared to the mandated one.²⁷³ On average, participants given the mandated disclosure form only answered sixty-one percent of the questions about the loan terms correctly, whereas those given the simplified prototype form answered eighty-percent correctly.²⁷⁴ Simple information facilitates understanding.

268. Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 209 (2010).

269. *Id.* at 210.

270. *Id.* at 213.

271. See Korobkin, *supra* note 10, at 95–96.

272. See Ben-Shahar & Schneider, *supra* note 231, at 743 (suggesting that mandated disclosures often fail because “length, complexity, and difficulty are the enemies of successful mandates. This suggests that brief, simple, easy disclosures are at least preferable”).

273. James M. Lacko & Janis K. Pappalardo, *The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers*, 100 AM. ECON. REV. PAPERS & PROC. 516, 518–19 (2010).

274. *Id.*

Third, the summary/disclaimer page should be specific. Specificity provides notice to the non-drafting party of the particular important terms and disclaimers and protection to the drafting party against admission of evidence of alleged prior misrepresentations inconsistent with the writing. If the disclaimers are specific, like in *Danann*, then the drafting party should be able to exclude evidence of alleged prior misrepresentations. As stated in *Danann*, “[t]o hold otherwise would be to say that it is impossible for two businessmen dealing at arm’s length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact.”²⁷⁵

The summary/disclaimer page would foster transparency. Placing the critical information on one page would make it extremely easy for a non-drafter to understand the critical terms and disclaimers of the contract. At the same time, it would help protect drafters by prohibiting potentially biasing evidence of alleged prior misrepresentations by a non-drafter. The summary/disclaimer page solution recognizes the reality that people do not read long, complex contracts and holds parties accountable for the agreements into which they freely enter. If a drafting party includes such a page, California courts should find mutual assent as to a contract’s terms and specific disclaimers and preclude evidence of promissory fraud that is at variance with those terms.

CONCLUSION

The California Supreme Court’s unanimous decision in *Riverisland* overturned *Pendergrass* and, now, evidence of promissory fraud that is at variance with the terms of the writing is admissible. The decision creates a clear rule consistent with the language of section 1856. Its application is beneficial given the fact that many people do not read or understand the contracts that they sign and psychological biases play a role in perception and decisionmaking. The precedent set by *Riverisland*, however, exposes drafting parties to intentionally and unintentionally fabricated claims from non-drafting parties. Drafting parties are also at risk of unpredictable outcomes from juries who might be swayed by testimony of alleged fraudulent promises.

Riverisland’s standard favors non-drafting parties and shifts the cost of contracting from non-drafting parties to drafting parties. To protect against promissory fraud claims, drafting parties could obtain meaningful assent by having the non-drafting party sign the one page of the contract that contains both a summary of its key terms and specific disclaimers of any prior representations regarding those terms. At the same time, this

275. *Danann Realty Corp. v. Harris*, 157 N.E.2d 597, 600 (N.Y. 1959).

summary/disclaimer page would aid non-drafting parties in understanding the major terms of their contracts.

So what about the Workmans? Had there been such a one-page summary/disclaimer, would they have read it and uncovered the alleged fraudulent misrepresentations? Given the studies discussed *supra* that suggest that most people are willing to take the time to skim an entire contract before signing it, it seems likely that they would have taken the time to read that one page. Had they done so, they most likely would have discovered any inconsistencies. Perhaps the Credit Association might also have been discouraged from even making any misrepresentations, had it planned on including such a summary/disclaimer page. On the other hand, what if the Credit Association did not make any misrepresentations and it was the Workmans who made an intentional or unintentional false claim? Then, the Credit Association would have been able to use the summary/disclaimer page to preclude any representations specifically disclaimed by the Workmans. In either scenario, the parties would have avoided costly litigation.