

# RELIANCE ON ORAL PROMISES: STATUTE OF FRAUDS AND “PROMISSORY ESTOPPEL”

*David G. Epstein,\* Ryan D. Starbird,\*\* & Joshua C. Vincent\*\*\**

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Reliance on oral promises is the basis not only for law school hypotheticals but also for real world litigation. Consider the following hypothetical based on the 1970 Supreme Court of Hawaii decision in *McIntosh*

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\* Professor of Law, Dedman School of Law, Southern Methodist University, counsel Haynes and Boone. After August 1, I will be teaching at the University of Richmond Law School where I hope to have students as able and hard-working as Ryan and Josh. I am listed as the first author because, as is my custom, I have chosen co-authors whose names begin with letters that come after “E” in the alphabet. Readers, particularly readers looking to hire a new lawyer to start in the fall of 2011, should understand that Ryan’s name and Josh’s name belong right up there with mine as co-authors. They did more and better work on this Article than I did on some books that I have been listed as co-authoring.

\*\* Second year law student, Dedman School of Law, Southern Methodist University.

\*\*\* Second year law student, Dedman School of Law, Southern Methodist University.

*v. Murphy*: Tex moved from Lubbock, Texas to Oklahoma to work for Murphy Motors Chevrolet-Oldsmobile, an Okmulgee car dealership.<sup>1</sup> Tex signed a lease for an apartment in Okmulgee. After two months as assistant sales manager, Murphy Motors fired Tex. Tex sued Murphy Motors alleging breach of an alleged oral agreement that she would be employed for two years.

It is understandable that a jury might not believe Tex—might not believe her claim that Murphy Motors promised two years of employment. And, it is even understandable that a jury might find that even if such a promise was made, Tex should not be able to recover because her reliance on such a promise was not reasonable, not foreseeable.

We can only speculate as to whether a Texas jury would believe Tex or believe her reliance was reasonable. A Texas court would likely grant Murphy Motors's motion to dismiss and base its decision on the contract law concepts of promissory estoppel and statute of frauds.<sup>2</sup> The use of the contract law concepts of statute of frauds and promissory estoppel to prevent juries or other finders of fact from considering claims based on reliance on oral agreements raises questions. And, these questions arise not only in relatively simple transactions such as employment contracts but also in much more complicated business deals, such as the following example inspired by the recent decision in *Olympic Holding Co. v. ACE Ltd.*<sup>3</sup>

NYTR, a New York title reinsurance company, and KON Group, title insurance companies in Kansas, Ohio, and New York, negotiated a five-year joint venture.<sup>4</sup> Their agreement for a five-year joint venture was reduced to writing.<sup>5</sup> NYTR allegedly orally promised that it would sign the writing and KON Group allegedly acted in reliance on that oral promise.<sup>6</sup> NYTR never signed the writing.<sup>7</sup> When KON Group filed a complaint with causes of action for "breach of a joint-venture agreement" and "promissory estoppel," NYTR filed a motion for summary judgment based on the statute of frauds.<sup>8</sup>

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1. See *McIntosh v. Murphy*, 469 P.2d 177, 178 (Haw. 1970); see also *Dargo v. Clear Channel Commc'ns, Inc.*, No. 07-C-5026, 2008 WL 2225812, at \*1 (N.D. Ill. May 28, 2008) (stating similar facts involving a radio station job and a move from Chicago to Minneapolis). In *McIntosh* and other cases, detriment is an element of promissory estoppel. See *McIntosh*, 469 P.2d at 179. Accordingly, we changed the facts from moving to Hawaii to moving to Oklahoma to eliminate any possible issue as to whether there was a detriment. See *id.* at 178.

2. Cf. *Gerstacker v. Blum Consulting Eng'rs, Inc.*, 884 S.W.2d 845, 847-48 (Tex. App.—Dallas 1994, writ denied). In this case, Gerstacker moved from Ohio to Dallas after being promised job security but was terminated after four months. *Id.* at 847. The trial court ruled in summary judgment for Blum Consulting Engineers based on the statute of frauds. *Id.* at 847-48. The appellate court reversed, ruling that a performance contingent contract *could* be performed within a year and was not subject to the statute of frauds. *Id.* at 851.

3. *Olympic Holding Co. v. ACE Ltd.*, 909 N.E.2d 93, 95 (Ohio 2009).

4. See *id.* at 96.

5. See *id.* at 95.

6. See *id.*

7. See *id.*

8. See *id.*

The fact patterns from *McIntosh* and *Olympic Holding* are not outliers. The 2009 edition of Professor Joseph Perillo's hornbook on contracts has a section entitled "Promissory Estoppel" in the chapter on the statute of frauds, which begins: "The first edition of this hornbook published in 1970 predicted a 'major new approach' towards the interrelationship between promissory estoppel and the Statute of Frauds . . . . Since then there has been a widespread application of promissory estoppel to cases in which it would be inequitable to allow the Statute of Frauds to defeat a meritorious claim."<sup>9</sup>

With all due respect to Professor Perillo, we agree that there has been a "widespread application" (and misapplication) of promissory estoppel in cases involving reliance on an oral promise that is within the statute of frauds, but we question whether there has been a "major new approach."<sup>10</sup> In cases like *McIntosh*, *Olympic Holding*, and too many others, courts are using the wrong words to ask and answer the wrong questions.

## I. PROMISSORY ESTOPPEL

### A. Elements of Promissory Estoppel

A statement of the elements of promissory estoppel can be found in the Texas Supreme Court's decision in *English v. Fischer*: "The requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment."<sup>11</sup>

Similar statements can be found in recent appellate court decisions from other states: For example in 2009, the Supreme Court of Illinois defined promissory estoppel with the same elements, while adding that the promise must be unambiguous.<sup>12</sup> And, similar language can be found in both the Restatement (First) of Contracts and the Restatement (Second) of Contracts.<sup>13</sup>

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9. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 693 (6th ed. 2009).

10. Cf. Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 64 (1980) ("remarkably incoherent body of case law"). And a great deal of respect is due to Professor Perillo. See Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 647 n.\* (2002) ("I have been recommending Calamari & Perillo's book on Contracts to my classes for almost thirty years, and I frequently consult with and benefit from that book in connection with my own teaching and writing. I have also learned much from Joe's articles. Both the book and the articles, like Joe himself, have the qualities of exceptionally clear and penetrating intelligence, balance (a virtue that is both underestimated and in short supply), lucidity, and a comprehensive grasp of contract law. Joe Perillo has a rare talent for simultaneously clarifying an area and saying new and very important things. He has illuminated contract law.")

11. *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983).

12. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520, 523 (Ill. 2009) (including a discussion of § 90 of the Restatement and the definition of promissory estoppel in BLACK'S LAW DICTIONARY).

13. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

*B. Origin of the Term Promissory Estoppel*<sup>14</sup>

Professor Samuel Williston, who taught contracts at Harvard Law School from 1890 to 1938, was the first to use the phrase “promissory estoppel.”<sup>15</sup> Williston used the phrase promissory estoppel in a treatise on contracts, published in 1920.<sup>16</sup>

The Williston treatise focused on charitable subscription cases that enforced donative promises because of the promisee’s reliance.<sup>17</sup> Williston distinguished these cases enforcing donative promises because of reliance from cases involving reliance on misrepresentations of fact in which the defendant is estopped from denying the misrepresentation: “In other words, he relies on a promise and not a misstatement of fact; and the term ‘promissory’ estoppel or some equivalent should be used to mark the distinction.”<sup>18</sup>

In this 1920 treatise, Williston advocated more than just new terminology. He argued for a new approach to the enforcement of promises—for the recognition of reliance on a promise as basis for contract liability.<sup>19</sup> Williston acknowledged that recognizing reliance on a promise as an alternative to bargained for consideration would greatly expand the scope of contract liability and acknowledged that then-existing reported cases did not support such an expansion.<sup>20</sup>

*C. Restatement of Contracts’ Concept of Promissory Estoppel*

Williston was not only a law professor and a treatise author but also was a founder of the American Law Institute (ALI) and the Reporter on the ALI’s first project, the Restatement of Contracts.<sup>21</sup> As Reporter, Williston persistently

14. This Article only addresses the origin of the **term** “promissory estoppel.” For an extended discussion of the origin of the **doctrine** of promissory estoppel, see Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 426 (2007) (“history as a legal transplant from English law”); Kevin M. Teeven, *Origins of Promissory Estoppel, Justifiable Reliance and Commercial Uncertainty Before Williston’s Restatement*, 34 U. MEM. L. REV. 499, 500 (1994) (“story begins around the 1860s”).

15. Benjamin F. Boyer, *Promissory Estoppel: The Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950) (“The writer has made a careful search to discover the pioneer in the use of the term ‘promissory estoppel.’”).

16. See 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1920) § 139, at 307 (This treatise is currently in its fourth edition.); RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 8:4 (4th ed. 2008).

17. See generally WILLISTON, *supra* note 16 (focusing on the treatise as a whole).

18. *Id.* § 139, at 308 n.23 (citing *Low v. Bouverie*, 3 Ch. 82, 109 (1891) (“The doctrine of estoppel seems scarcely applicable.”)).

19. *Id.* § 139.

20. See Mark L. Movsesian, *Williston as Conservative-Pragmatist*, 32 S. ILL. U. L.J. 135, 136-37 (2007).

21. See generally SAMUEL WILLISTON, *LIFE AND LAW* 3 (1940); Erwin Griswold, *Samuel Williston, 1861-1963*, 76 HARV. L. REV. 1325 (1963) (discussing Samuel Williston’s legal career).

and effectively advocated that the Restatement recognize reliance as a basis for contract formation.

Chapter 3 of the Restatement (First), which is entitled “Formation of Informal Contracts,” includes “Topic 2. Manifestation of Assent,” “Topic 3. Consideration and Its Sufficiency,” and “Topic 4. Informal Contracts Without Assent or Consideration.”<sup>22</sup> In Topic 3, § 75 defines “consideration”; comment c to Restatement (First) § 75 provides:

The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange; but some informal promises are enforceable without the element of bargain. These fall and are placed in the category of contracts which are binding without assent or consideration.<sup>23</sup>

Section 85 says virtually the same thing as comment c.<sup>24</sup>

More important is what § 90 states. It is § 90 that creates a category of contracts, “which are binding without assent or consideration.”<sup>25</sup> It is § 90 that generations of law students have learned as promissory estoppel and generations of lawyers and judges refer to as promissory estoppel.

Restatement (First) of Contracts § 90, in its entirety is set out below:

Chapter 3. FORMATION OF INFORMAL CONTRACTS . . .  
 TOPIC 4. INFORMAL CONTRACTS WITHOUT ASSENT OR  
 CONSIDERATION . . .  
 § 90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL  
 ACTION

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.<sup>26</sup>

The language of Restatement (First) § 90 is noteworthy in three respects. First, Restatement (First) § 90 does not use the term promissory estoppel—does not even use the word “estoppel.”<sup>27</sup> Second, Restatement (First) § 90, unlike Restatement (First) § 75, did not include “comments.”<sup>28</sup> Third, the illustrations to § 90, unlike the examples in the Williston contracts treatise, are not limited to cases of reliance on charitable subscriptions.<sup>29</sup>

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22. RESTATEMENT (FIRST) OF CONTRACTS ch.3, at 22-114 (1932).

23. *Id.* § 75 cmt. c.

24. *See id.* § 85.

25. *Id.* § 90.

26. *Id.*

27. *See id.*

28. *See id.*

29. The Restatement (First) of Contracts § 90, *Illustrations* states the following:

While Williston lived to the age of 102, his “work on earth was done”<sup>30</sup> when work on Restatement (Second) began. Professor Robert Braucher, a contracts professor at the Harvard Law School, was the Reporter until he became Justice Braucher of the Massachusetts Supreme Judicial Court.<sup>31</sup> Thereafter, Professor E. Allan Farnsworth served as Reporter.<sup>32</sup>

According to the Reporter’s Note that follows Restatement (Second) § 90, “The principal change from former § 90 is the recognition of the possibility of partial enforcement. . . . Partly because of that change, the requirement that the action or forbearance have ‘a definite and substantial character’ is deleted.”<sup>33</sup>

Under the Restatement (Second), the possibility of “partial enforcement” is not limited to contracts based on reliance. Consider, for example, illustration 3 to § 352:

Uncertainty as a Limitation on Damages. . . . 3. A and B make a contract under which A is to construct a building of radical new design for B for \$5,000,000. After A has spent \$3,000,000 in reliance, B repudiates the contract and orders A off the site. If the evidence does not permit A’s lost profits to be estimated with reasonable certainty, he can recover the \$3,000,000 that he has spent in reliance.<sup>34</sup>

And, under the Restatement (Second), reliance damages (partial enforcement) is only one of the possible measures of damages for breach of a contract based on reliance. As comment d to Restatement (Second) § 90 states, “A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate.”<sup>35</sup>

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1. A promises B not to foreclose for a specified time, a mortgage which A holds on B’s land. B thereafter makes improvements on the land. A’s promise is binding.
  2. A promises B to pay him an annuity during B’s life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A’s promise is binding.
  3. A promises B that if B will go to college and complete his course he will give him \$5000. B goes to college and has nearly completed his course when A notifies him of an intention to revoke the promise. A’s promise is binding.
  4. A promises B \$5000, knowing that B desires that sum for the purchase of Blackacre. Induced thereby, B secures without any payment an option to buy Blackacre. A then tells B that he withdraws his promise. A’s promise is not binding.

*Id.*

30. VINCE GILL, *Go Rest High on that Mountain, on WHEN LOVE FINDS YOU* (MCA Nashville 1994).

31. Jean Braucher, *E. Allan Farnsworth, and the Restatement Second of Contracts*, 105 COLUM. L. REV. 1420, 1420-21 (2005).

32. See Lance Liebman, *In Memoriam, Allan Farnsworth, ALI Reporter*, 105 COLUM. L. REV. 1429, 1429 (2005).

33. RESTATEMENT (SECOND) OF CONTRACTS § 90 reporter’s note (1981) (internal citations omitted).

34. *Id.* § 352 cmt. 9, illus. 3.

35. *Id.* § 90 cmt. a; see also *id.* § 17(2) (“Whether or not there is a bargain, a contract may be formed . . . under the rules stated in §§ 82-94.”).

Unlike the former § 90, Restatement (Second) § 90 does include comments. Comment a to Restatement (Second) § 90, unlike the section itself, uses the phrase promissory estoppel in the following problematic sentence: “This Section is often referred to in terms of ‘promissory estoppel,’ a phrase suggesting an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.”<sup>36</sup>

To summarize, under the Restatement (Second) of Contracts concept of promissory estoppel:

- Promissory estoppel is a part of contract law.
- And, a contract can be formed as a result of reliance on a promise.
- And, an affirmative recovery can be based on a promisor’s breach of a promise that was relied on.
- And, the liability that results from breach of a promise that was relied on is contract liability, measured by contract damages rules and subject to contract defenses.

*D. Restatement § 90 Not Restatement of the Law of Reported Cases at the Time*

There has been considerable debate as to whether the role of the Restatement project is to restate the law or reform the law.<sup>37</sup> Professor N.E.H. Hull has argued that an important underlying objective of the Restatement project was law reform.<sup>38</sup> Professor Hull based her argument in part on the founding document’s announced reform objectives and in part on the comments of William Draper Lewis, the first director of the ALI.<sup>39</sup>

There can be no debate as to whether Williston’s Restatement (First) § 90 was restating or reforming the law. In his introduction to a law review symposium issue on whether the First Restatement had a reform agenda, Professor Patrick J. Kelley concludes: “Williston was the originator, defender, and promoter of the most progressive innovation or reform in the first Restatement of Contracts—Restatement 90, promissory estoppel. Promissory Estoppel . . . makes hash of the purely formalist notion that breach of contract always requires a showing of *offer, acceptance, and consideration*.”<sup>40</sup> The Restatement (First) of Contracts § 90 was not restating what the law based on

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36. *Id.* § 90 cmt. a. Restatement (Second) like Restatement (First) does not use the term promissory estoppel in the text of § 90 or in any other section. *See id.* § 90.

37. *See* Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461, 461-62 (1936).

38. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 70-74, *reprinted in* AMERICAN LAW INSTITUTE, SEVENTY-FIFTH ANNIVERSARY 1923-1998, 49, 70-75 (1998).

39. Hull, *supra* note 38, at 49, 70-75.

40. Patrick J. Kelley, *Introduction: Did the First Restatement Adopt a Reform Agenda?*, 32 S. ILL. U. L.J. 1, 9 (2007).

reported cases was in 1932.<sup>41</sup> The first Texas Supreme Court decision adopting the Restatement (First) § 90 was *Wheeler v. White* in 1965—more than thirty years after the publication of the Restatement of Contracts. And, Texas was hardly the last state to adopt § 90.<sup>42</sup>

That same year, 1965, Wisconsin also adopted Restatement (First) § 90 in *Hoffman v. Red Owl Stores, Inc.*—a case that most law students read and a lot of law professors criticize.<sup>43</sup> Red Owl promised plaintiffs that it would build a Red Owl store in Chilton, stock it with merchandise, and make it available to plaintiffs to operate as a Red Owl franchise for an investment of \$18,000.<sup>44</sup> In reliance on Red Owl's promises, plaintiffs sold their bakery building and business and their grocery store and business.<sup>45</sup> When Red Owl later demanded a much larger financial commitment, plaintiffs sued.<sup>46</sup> The jury found for the plaintiffs.<sup>47</sup>

In affirming the trial court, the Wisconsin Supreme Court expressly adopted Restatement (First) § 90 and the term promissory estoppel.<sup>48</sup> And, in adopting promissory estoppel, the Wisconsin Supreme Court stated, "It would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract . . . ."<sup>49</sup>

It is important to understand the context of that statement. In addressing defendant Red Owl's contention that "agreement was never reached on essential factors necessary to establish a contract," the Wisconsin Supreme Court simply held that a "promise" can be sufficient for purposes of § 90 even though it is not "so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract."<sup>50</sup>

The *Red Owl* concept of promissory estoppel is consistent with the Restatement (First) concept of promissory estoppel as summarized above. Under the Restatement, reaching an agreement on essential factors is an

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41. *See id.* The Restatement (Second) of Contracts (1981) would not be published by the ALI for another fifty years.

42. *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965); *see also* Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L.J. 263, 464, n.779 (1996). In *Wheeler*, the Texas Supreme Court acknowledged prior Texas decisions as similar in concept to Restatement § 90. *Wheeler*, 398 S.W.2d at 96.

43. *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 274 (1965); *see also* Skebba v. Kasch, 724 N.W.2d 408, 410 (Wis. App. 2006) ("*Hoffman* was the first case in Wisconsin to adopt promissory estoppel."). Most of the criticism of the application of promissory to pre-contractual negotiations in *Hoffman* focuses on whether it was reasonable for the plaintiffs to rely on Red Owl's promise. *See* William C. Whitford & Stewart Macauley, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. (forthcoming 2010). A recent paper, based on conversations with the plaintiffs, suggests that there were additional facts, not mentioned by the court, that support the reasonableness of the plaintiffs' reliance. *Id.*

44. *Hoffman*, 133 N.W.2d at 268.

45. *Id.* at 268-69.

46. *Id.* at 269.

47. *Id.* at 274.

48. *Id.*

49. *Id.* at 275.

50. *Id.* at 274-75.

essential part of a contract based on assent and consideration.<sup>51</sup> Under the Restatement (First), as in *Red Owl*, a contract based on promissory estoppel does not require either consideration or assent.<sup>52</sup> Under the *Red Owl* decision, as under the Restatement (First) of Contracts:

- Promissory estoppel is a part of contract law;
- And, a contract can be formed as a result of reliance on a promise;
- And, an affirmative recovery can be based on a promisor's breach of a promise that was relied on;
- And, the liability that results from breach of a promise that was relied on is contract liability, measured by contract damages concepts.<sup>53</sup>

There have been many other decisions that use the term promissory estoppel in ways that are not consistent with the Restatement (First) concept of promissory estoppel. In 1996, Professor Eric Mills Holmes prepared a review of the status of promissory estoppel case law in each of the fifty states (as well as the District of Columbia and Guam).<sup>54</sup> More recently, Professor Marco Jimenez examined "more than three hundred promissory estoppel cases decided between January 1, 1981, when the Restatement (Second) of Contracts was published, and January 1, 2008."<sup>55</sup> Several other law professors have published the results of their studies of promissory estoppel cases.<sup>56</sup> It is clear from reading these studies and the cases cited therein that many of the states that have adopted the term promissory estoppel use the term in ways inconsistent with the Restatement concepts of promissory estoppel.

### 1. *Simply a Defensive Doctrine*

Because of Williston's unfortunate choice of the term promissory estoppel to distinguish his theory of contract law recovery based on reliance on a promise from equitable estoppel, courts persist in treating promissory estoppel as a form of estoppel that is no different from equitable estoppel—simply a defensive doctrine.<sup>57</sup> As the Oklahoma Supreme Court stated in 1928 in

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51. See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981). The Restatement, § 33, requires certainty. *Id.*

52. Recall that Restatement § 90 is in a part of the Restatement entitled, "Informal Contracts Without Assent or Consideration." *Id.* § 90.

53. See *Hoffman*, 133 N.W.2d at 274-75.

54. Holmes, *supra* note 42, at 297-514.

55. Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 669 (2010).

56. See, e.g., Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 597-619 (1998); Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841, 855-80 (2007).

57. See 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 204 (1963) ("[T]he phrase is objectionable. The word estoppel is so widely and loosely used as almost to defy definition . . . . The American Law Institute was well advised in not adopting the phrase.").

*Haubert v. Navajo Refining Co.*, “Estoppel is a rule of equity, and it was never intended to work a positive gain to a party.”<sup>58</sup>

In light of Williston’s choice of words and the historical understanding of the word “estoppel,” it is not surprising to find statements in reported cases such as, “North Carolina courts apply the doctrine of promissory estoppel when it is raised defensively as a shield against a claim by one who, in bringing suit, is reneging on a promise not to do . . . North Carolina courts have expressly rejected use of promissory estoppel as an affirmative claim.”<sup>59</sup>

There is no similar definitive statement by the Texas Supreme Court on whether promissory estoppel is an affirmative cause of action. There are two intermediate appellate court decisions in Texas involving promissory estoppel in which the courts state, “estoppel is a shield, not a sword.”<sup>60</sup> Read literally and historically, the statement from the Texas courts of appeals is correct. Estoppel is defensive in nature and is used as an affirmative defense—not the basis for an affirmative claim. It prevents a party from making an argument or denying an argument because of her bad conduct. The word estoppel connotes a reaction, rather than an action.

There is language from the seminal Texas Supreme Court decision on promissory estoppel, *Wheeler v. White*, which treats promissory estoppel as simply a defensive doctrine.<sup>61</sup> In that case, Wheeler alleged that he detrimentally relied on White’s promise, in a written agreement supported by consideration, to obtain or furnish a loan to finance construction of a shopping center on Wheeler’s land.<sup>62</sup> White’s position was that the written contract was unenforceable as it was too indefinite.<sup>63</sup> The lower courts agreed with White.<sup>64</sup> The Texas Supreme Court did not disagree with White’s and the lower courts’ position on indefiniteness, but it nonetheless reversed, under the theory of promissory estoppel:

As to the argument that no new cause of action may be created by such a promise regardless of its established applicability as a defense, it has been answered that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot

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58. *Haubert v. Navajo Ref. Co.*, 264 P. 151, 153 (Okla. 1928).

59. *DCNC N.C. I, L.L.C. v. Wachovia Bank, N.A.*, Nos. 09-3775, 09-3776, 2009 WL 3209728, at \*7 (E.D. Pa. 2009).

60. *Sonnichsen v. Baylor Univ.*, 47 S.W.3d 122, 125 (Tex. App.—Waco 2001, pet. granted), *rev’d*, 221 S.W.3d 632 (Tex. 2001); *Collins v. Allied Pharmacy Mgmt.*, 871 S.W.2d 929, 936 (Tex. App.—Houston 1994, no pet.).

61. *See Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965) (“The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops a promisor from denying the enforceability of the promise.”).

62. *See id.* at 94.

63. *See id.* at 94-95.

64. *See id.* at 95.

afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them . . . . The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops a promisor from denying the enforceability of the promise.<sup>65</sup>

There are later cases that have read *White* as supporting the proposition that promissory estoppel may be the basis for an affirmative claim.<sup>66</sup> And, such a reading is consistent with the result, if not the language, in *White*.

The facts and result in *White* are markedly similar to the facts and result in the Wisconsin case, *Hoffman v. Red Owl Stores, Inc.*<sup>67</sup> In both *Hoffman* and *Wheeler*, the plaintiff had relied on a promise that the court concluded was too indefinite to be a contract under traditional offer and acceptance. In both *Hoffman* and *Wheeler*, the plaintiff invoked, and the state supreme court adopted, Restatement (First) § 90; in both cases the plaintiff recovered under promissory estoppel.

While it can be questioned whether recognizing promissory estoppel as an affirmative cause of action is consistent with the language of the Texas Supreme Court in *Wheeler v. White*, it is unquestionably consistent with the position of most states' courts.<sup>68</sup> As the Illinois Supreme Court stated in 2009, "[R]ecognizing promissory estoppel as an affirmative cause of action in Illinois is . . . consistent with decisions of other courts."<sup>69</sup>

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65. *Id.* at 96.

66. See *Booher v. Zeig Enters., Inc.*, No. 10-08-00238-CV, 2009 WL 1958493, at \*1 (Tex. App.—Waco 2009); *Bechtel Corp. v. CITGO Prods. Pipeline Co.*, 271 S.W.3d 898, 926 (Tex. App.—Austin 2008) (“[P]romissory estoppel may be the basis for an affirmative claim . . . .”); *Gold Kist, Inc. v. Carr*, 886 S.W.2d 425, 431 (Tex. App.—Eastland 1994, pet. denied) (“Promissory estoppel is available as a cause of action to someone who has reasonably relied to his detriment on an otherwise unenforceable promise.”). See also Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 59 (1996) (referring to *Wheeler* as “[t]he Texas Supreme Court’s defensive application of promissory estoppel”). *Contra* *Patterson v. Long Beach Mortgage Co.*, No. 3:07-CV-1602-0-BH, 2009 WL 4884151 (N.D. Tex. 2009) (“The doctrine of promissory estoppel is a defensive doctrine that estops a promisor from denying the enforceability of a promise, even where the requisites for a valid contract are absent.”); *Brogan, Ltd v. Brogan*, No. 07-05-0290-CV, 2007 WL 2962996, at \*11 (Tex. App.—Amarillo 2007) (“While recognizing there is authority to the contrary, . . . this Court has held, and holds in this case, that promissory estoppel is defensive only, and cannot constitute a basis for affirmative relief.”); Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197, 225 (1997) (“Both *Gold Kist* and *Henderson* based their holdings that promissory estoppel was a cause of action on the Texas Supreme Court’s language in *Wheeler v. White*. Careful examination of the language in *Wheeler*, however, shows that the court viewed promissory estoppel as defensive in nature. Thus, the *Gold Kist* and *Henderson* courts based their determination that promissory estoppel was a cause of action on language that did not clearly support their position. These holdings exemplify the current confusion as to the nature of promissory estoppel and show the current need for the Texas Supreme Court to define how Texas courts should apply the doctrine.”).

67. See *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 268-70 (Wis. 1965).

68. *Frost Crushed Stone, Inc. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 48-51 (Tex. Civ. App.—Waco 2002, no pet.) (asking and answering this question most forcefully in the dissenting opinion).

69. *Newton Tractor Sales, Inc., v. Kubota Tractor Corp.*, 906 N.E.2d 520, 525 (Ill. 2009); see also *Alaska Trademark Shellfish, L.L.C. v. State*, 172 P.3d 764, 766 n.8 (Alaska 2007) (Promissory estoppel is

## 2. Not a Real Contract

Some courts have questioned whether a promise binding by reason of promissory estoppel is a contract and whether contract law principles should apply to promissory estoppel. Consider, for example, this statement by the South Carolina Supreme Court: “A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous . . . .”<sup>70</sup>

Similarly, some law professors have questioned whether promissory estoppel is a contract law concept. The most influential of these professors,<sup>71</sup> Yale Law Professor Grant Gilmore, in his 1974 book, *The Death of Contract*, suggested that contract law in general is “being reabsorbed into the mainstream of ‘tort,’” and he used Restatement (First) § 90 as his primary example.<sup>72</sup>

A number of other law professors have also linked promissory estoppel with tort law, not contract law.<sup>73</sup> Probably more law professors than judges, however, have linked promissory estoppel with tort.<sup>74</sup> Consider, for example, the 2009 statement United States District Judge Barbara Lynn, in *Eagle Metal Products, L.L.C. v. Kermark Enterprises*:

The promissory estoppel claim is of a different order from the tort claims. Promissory estoppel is a quasi-contract theory which seeks to hold a party responsible for promises that induced justifiable reliance on another. This cause of action applies when a contract does not exist, but equity compels enforcement of the promise.<sup>75</sup>

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“offensive, and can be used for affirmative enforcement of a promise, whereas [equitable estoppel] is defensive . . . .”).

70. *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 326 S.E.2d 395, 406 (S.C. 1985).

71. At least, most influential with other law professors. *See, e.g.*, Ronald K.L. Collins, *Gilmore’s Grant (or the Life & Afterlife of Grant Gilmore & His Death)*, 90 NW. U. L. REV. 7 (1995); Dennis J. Hutchinson, *Remembering Grant Gilmore*, 6 GREEN BAG 2d 67 (2002).

72. GRANT GILMORE, *THE DEATH OF CONTRACT* 87 (1974).

73. *See, e.g.*, Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 177 (Peter Benson ed., 2001) (“Promissory estoppel is not a species of contractual liability. . . . Reliance-based liability, including promissory estoppel, is best understood as a species of tort, not contractual, liability.”); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1254 (1996) (“The doctrine of promissory estoppel is commonly explained as promoting the same purposes as the tort of misrepresentation: punishing or deterring those who mislead others to their detriment and compensating those who are misled.”).

74. Professor Marco Jimenez of the Stetson University Law School examined more than 300 promissory estoppel cases decided between January 1, 1981 and January 1, 2008, and concluded “for better or worse, many judges are conceptualizing promissory estoppel actions as fully contractual causes of action.” Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 722 (2010).

75. *Eagle Metal Prods., L.L.C. v. Keymark Enters., L.L.C.*, 651 F. Supp. 2d 577, 592 (N.D. Tex. 2009); *see CWTM Corp. v. AM Gen., L.L.C.*, No. Civ. A. H-04-2857, 2005 WL 1923605, at \*4 (S.D. Tex. 2005) (holding “extra-contractual theories of recovery, not descriptions of actionable tortious conduct”); *see also Barnes v. Yahoo, Inc.*, 570 F.3d 1096, 1106-07 (9th Cir. 2009) (holding “its promissory character distinguishes it from tort”); *Allied Van Lines, Inc. v. Edwards Movers, Inc.*, No. 08 C 3186, 2009 WL 1579520, at \*3 (N.D. Ill. June 3, 2009) (discussing “[p]romissory estoppel, which is not a species of tort but,

If promissory estoppel is tort as Professor Gilmore wrote or even “quasi-contract,” as Judge Lynn recently wrote, then it is arguable that contract law concepts do not apply to causes of action based on promissory estoppel.<sup>76</sup> There are reported cases on both sides of the questions whether promissory estoppel is “contract enough” that (1) contract expectation damages apply,<sup>77</sup> (2) the contract’s statute of limitations applies,<sup>78</sup> or (3) a statute that provides for attorney’s fees for a claim on an “oral or written contract” applies.<sup>79</sup>

Cases are also on both sides of the question of whether the statute of frauds applies to a cause of action based on promissory estoppel, although it is not always clear from the language of the opinion which side the court is taking, or even that there are two “sides” to take.<sup>80</sup> For example, in *Midwest Energy, Inc. v. Orion Food Systems, Inc.*, the defendant had provided a written, but unsigned five-year franchise agreement that the plaintiff relied on.<sup>81</sup> There

rather, is grounded in the principles of contract”); *Louis & Karen Metro Family, L.L.C. v. Lawrenceburg Conservancy*, No. 4:06-cv-177-WGH-DFH, 2009 WL 1196938, at \*9 (S.D. Ind. May 1, 2009) (“This doctrine [promissory estoppel] sounds in contract, is not a tort . . .”).

76. *Eagle Metal Prods.*, 651 F. Supp. 2d at 592.

Thus, it may be, defenses based on the statute of frauds or the contracts statute of limitation or the parol evidence rule—all of these being looked on as contract-based defenses—are no longer available if the underlying theory of liability—section 90 or an analogue—is not contract theory at all.

GILMORE, *supra* note 72, at 66.

77. *Compare Zenor v. El Paso Healthcare Sys., Ltd.*, 176 F.3d 847, 865-66 (5th Cir. 1999) (“Under Texas law, only reliance damages are recoverable for a promissory estoppel claim.”), *with Jackson v. Morse*, 871 A.2d 47, 51-52 (N.H. 2007) (explaining that expectation damages are the presumed remedy for promissory estoppel unless “awarding so much would be inequitable”). *See generally* Steve Thel & Edward Yorio, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 113-14 (1991) (courts usually award expectation damages in promissory estoppel cases).

78. *Compare Huhtala v. Travelers Ins. Co.*, 257 N.W.2d 640 (Mich. 1977) (stating that a promissory estoppel claim is governed by the six-year contracts statute of limitations and not the three-year torts statute of limitations), *with Ambulatory Infusion Therapy Specialist, Inc. v. N. Am. Adm’rs, Inc.*, 262 S.W.3d 107, 116 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (“The statute of limitations for a breach-of-contract cause of action is four years. . . . Likewise, the statute of limitations for promissory estoppel is four years.”); *MBank Abilene N.A. v. LeMaire*, No. CI4-86-00834-CV, 1989 WL 30995, at \*17 (Tex. App.—Houston [14th Dist.] Apr. 6, 1989, no writ) (“MBank also asks that we apply the two year statute of limitations because promissory estoppel is like fraud, which is a tort. . . . In our view the promissory estoppel element of this case derives from the action on the contract. As such, promissory estoppel cannot be separated from its foundation, which is breach of contract.”).

79. *Compare Preload Tech., Inc. v. AB & J Constr. Co.*, 696 F.2d 1080, 1093-95 (5th Cir. 1983) (applying Texas law and relying on language in *Williston* and in comment d to Restatement (Second) § 90 to conclude that promissory estoppel claims should be treated as contract claims for purpose of Texas attorney’s fee statute), *with Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 637 (Tex. App.—Houston [14th Dist.] 2004, pet. ref’d) (“[S]ection 38.001(8) cannot include a promissory estoppel claim. Were we to hold otherwise, we would have to (1) ignore a long line of cases holding that a recovery under promissory estoppel means no valid contract existed and (2) add a cause of action that the statute’s plain language does not include. We intend to do neither of these.”).

80. *Compare In re Brandeis Lofts, L.L.C., Bankr.* No. BK 07-80482-TLS, 2009 WL 2501113, at \*6 (Bankr. D. Neb. July 21, 2009) (“[T]he statute of frauds does not bar a claim of promissory estoppel in a situation where a contract never arose.”), *with Collins v. Ace Mortgage Funding, L.L.C.*, No. 08-cv-01709-REB-KLM, 2009 WL 1796067, at \*8 (D. Colo. July 23, 2009) (“statute of frauds has been found to bar promissory estoppel claims”).

81. *Midwest Energy, Inc. v. Orion Food Sys., Inc.*, 14 S.W.3d 154, 156 (Mo. Ct. App. 2000).

were three separate counts in the plaintiff's complaint: (1) breach of contract, (2) "promissory estoppel . . . in accordance with the provisions of Section 90 of the *Restatement (2d) of Contracts*," and (3) fraud and deceit.<sup>82</sup> Without even acknowledging that there was an issue of whether the statute of frauds applied to the promissory estoppel count or indicating that there were two sides to that issue, the Missouri Court of Appeals held that the defendant was entitled to summary judgment on the breach of contract count because of the statute of frauds, but not on the promissory estoppel count.<sup>83</sup>

Courts in Texas have been more direct, albeit not more correct, on the question of whether the statute of frauds is a defense to an action based on Restatement § 90.<sup>84</sup> For example, in *Mediastar Corp. v. Schmidt*, the court stated: "The statute of frauds, however, is not a defense to an action for affirmative relief under the doctrine of promissory estoppel."<sup>85</sup>

The law reflected by cases such as *Midwest Energy* and *Mediastar* was not the law espoused by the Restatement.<sup>86</sup> While the Restatement was not restating then existing case law, cases today increasingly reflect the Restatement's concepts of promissory estoppel.<sup>87</sup>

#### *E. Restatement § 90 Becoming the Law*

Recently, the Ninth Circuit addressed the questions of (1) whether a promise found enforceable because of reliance is a "contract" and, if so, (2) whether ordinary contract principles apply to such contracts.<sup>88</sup> The court stated, "In most states . . . '[a] promise binding under [§ 90 of the Restatement] is a contract' . . . . Thus, aside from consideration, ordinary contract principles usually apply."<sup>89</sup>

There can be no question that the Restatement treats promises binding through reliance as contracts. Consider, for example, the following language from Comment e to § 17 of the Restatement (Second) of Contracts: "In this Restatement, however, 'consideration' is used only to refer to the element of exchange, and **contracts** not involving that element are described as promises binding without consideration. There is no requirement of agreement for such **contracts**. They are the subject of §§ 84-92."<sup>90</sup> Similarly, comment d to Restatement (Second) § 90 states in pertinent part: "A promise binding under

82. *Id.* at 157.

83. *Id.* at 157-58, 161.

84. In his outstanding treatise for Texas practitioners, Professor William Dorsaneo summarizes the Texas case law: "The statute of frauds is not a defense to an action for affirmative relief under the doctrine of promissory estoppel based on the premise that the plaintiff detrimentally relied on the defendant's oral promise." 14 WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE § 210A.06[6] (2007).

85. *Mediastar Corp. v. Schmidt*, 267 S.W.3d 150, 163 (Tex. App.—San Antonio 2008, pet. denied).

86. See *infra* notes 101-02 and accompanying text.

87. See *infra* Part II.E.

88. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1106-09 (9th Cir. 2009).

89. *Id.* at 1106.

90. RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. e (1982) (emphasis added).

this section is a **contract** . . . .”<sup>91</sup> As Professor Williston stated during the American Law Institute’s discussion about what became promissory estoppel: “I should say that anything was truly contractual where a promisor makes a promise and that promise is enforced.”<sup>92</sup>

Neither the Restatement (Second) nor the comments thereto directly address whether the statute of frauds applies to contracts based on reliance. Nonetheless, the conclusion that the statute of frauds should apply to contracts based on reliance is supported by (1) the general approach of the Restatement to treat contracts without consideration the same as contracts based on consideration, (2) illustration 2 to Restatement (Second) § 112, (3) Comment a to Restatement (Second) § 139, and (4) most important, the policy and purpose of the statute of frauds.<sup>93</sup> The next part of the Article explores the policy and purpose of the statute of frauds.

## II. STATUTE OF FRAUDS

### A. Basics

The four most basic questions about the statute of frauds are (1) what is a statute of frauds, (2) what are the reasons for the statute of frauds, (3) what kind of agreements are covered by the statute of frauds, and (4) what does the statute of frauds require.<sup>94</sup> First, what is a statute of frauds? The first statute of frauds

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91. *Id.* § 90 cmt. d (emphasis added).

92. *Discussion of the Tentative Draft of Contract, Restatement No. 2*, American Law Institute Proceedings App. 61 (1926).

93. *See* RESTATEMENT (SECOND) OF CONTRACTS § 112, cmt. b, illus. 2.

S promises C orally to guarantee the performance of any duty that D may incur to C within the ensuing year. **Relying on this promise**, C enters into contracts with D, by which D undertakes within the year to sell materials for a house and to act as supervising architect during its construction. D, without excuse, fails to perform his contract. S’s promise is within the Statute of Frauds.

*Id.* (emphasis added). S’s promise is not only “within the Statute of Frauds,” but also within § 90. *Id.* Section 139 “is complementary to § 90, which dispenses with the requirement of consideration if the same conditions are met, but **it also applies** to promises supported by consideration.” *Id.* §139 cmt. a (emphasis added). Recall that § 139 is a part of the Restatement (Second) chapter on the statute of frauds and provides that reliance can make a promise enforceable “notwithstanding the Statute of Frauds.” *Id.* By stating that § 139 applies both to contracts based on § 90 and contracts based on consideration, comment to § 139 is implying, if not stating, that the statute of frauds applies to contracts based on § 90.

94. There is a fifth “basic question” about the “statute of frauds”: Should it be capitalized? While the Restatement capitalizes the Statute of Frauds, Bryan Garner does not. *See* BLACK’S LAW DICTIONARY 1450 (8th ed. 2004). Reported cases in Texas do both, sometimes on the same page. *See* Bank of Tex. v. Gaubert, 286 S.W.3d 546, 553 (Tex. App.—Dallas 2009, pet. dismissed w.o.j.). In this Article, we capitalize “Statute of Frauds” only when referring to the Restatement (or beginning a sentence). After all, Bryan Garner is a “lexicographer” and the other members of the American Law Institute are only judges, lawyers, and professors. *See generally* Paul Kix, *Dallas’ Bryan Garner is the Leading Lexicographer of Our Time*, D MAGAZINE, Nov. 2007, [http://www.dmagazine.com/Home/2007/10/12/Dallas\\_Bryan\\_Garner\\_is\\_the\\_Leading\\_Lexicographer\\_of\\_our\\_Time.aspx?p=1](http://www.dmagazine.com/Home/2007/10/12/Dallas_Bryan_Garner_is_the_Leading_Lexicographer_of_our_Time.aspx?p=1).

was enacted in England in 1677.<sup>95</sup> It required that certain kinds of agreements must be in writing to be legally enforceable. It remained the law in England until 1954 when most of its provisions were repealed so that it applies only to land contracts and guarantees.<sup>96</sup> According to Professor John Krahmer of Texas Tech University School of Law, England abolished the statute of frauds “for being superfluous and irrelevant.”<sup>97</sup> While the statute of frauds has been virtually eliminated from the law of contracts in England, it remains an important (albeit long unpopular) part of the law of contracts in the United States.<sup>98</sup> All states have statutes of fraud providing that certain kinds of agreements are not legally enforceable unless set out in a signed writing.

In adopting the Uniform Commercial Code, Texas and other states were enacting statutes of fraud after England had abolished it. Professor Dr. Ernst Rabel, then the leading comparative sales law scholar, was especially critical of the United States’ adopting more statutes of fraud by enacting the Uniform Commercial Code:

Compulsory writing for the enforceability of transactions is a thoroughly antiquated legislative trick, which has so often misfired that the old law has been called the Statute for Frauds and the ‘refuge of a welcher.’ . . . Not even the small farmers of Poland and Italy have been considered to need this guard. . . . Do we rate American businessmen as less intelligent [and] more naïve?<sup>99</sup>

Nonetheless, Texas and forty-eight states enacted the Uniform Commercial Code’s statute of frauds.<sup>100</sup> And, Texas did not stop with the Uniform Commercial Code. In 1989, the Texas Legislature enacted a specific statute of frauds for loan agreements involving loans exceeding \$50,000.<sup>101</sup>

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95. See An Act for Prevention of Fraud and Perjuries, 1677, 29 Car. 2, c.3 (Eng.). For the history of the statute of frauds, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 379-84 (1927); George P. Castigan, Jr., *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 329-30 (1913).

96. See Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34.

97. John Krahmer & Henry Gabriel, *Article 1 and Article 2A: Changes in the Uniform Commercial Code Regarding General Provisions of Sales and Leases*, 2 DEPAUL BUS. & COM. L.J. 691, 702 (2004).

98. See Francis M. Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273, 273 (1916) (questioning the need for statute of frauds, as the title suggests); Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 427 (1928) (same). *But cf.* Leland v. Creyon, 1821 WL 835, at \*4 (S.C. Const. App. 1821) (“No statute has been so much, and, in my opinion so justly eulogized for its wisdom as the statute of Frauds.”); Jesse Lilienthal, *Judicial Repeal of the Statute of Frauds*, 9 HARV. L. REV. 455 (1896) (“through all the years that it has been upon the statute-book it has undoubtedly proved to be a great instrument of justice”).

99. Ernst Rabel, *The Sales Law in the Proposed Commercial Code*, 17 U. CHI. L. REV. 427, 433 (1950); see Bernhard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 SYRACUSE J. INT’L L. & COM. 3, 11 (1992) (“mastermind behind the draft uniform international sales law”); Stefan Grundmann, *The Fault Principle as the Chameleon of Contract Law: A Market Function Approach*, 107 MICH. L. REV. 1583, 1583-84 (2009).

100. For a brief history of Texas’s adoption of the Uniform Commercial Code, see George E. Henderson, *A New Chapter of 2 for Texas: Well Suited or Ill-Fitting*, 41 TEX. TECH L. REV. 235, 241-42 (2009).

101. TEX. BUS. & COM. CODE ANN. § 26.02 (Vernon 2006).

Second, what are the reasons for a statute of frauds? The title of the first statute of frauds sets out the purpose of a statute of frauds: “Prevention of Frauds or Perjuries.”<sup>102</sup> Almost two hundred fifty years later, Justice Cardozo attributed the same purpose to the statute of frauds when he was “just” Judge Cardozo. In *Burns v. McCormick*, Cardozo said that passage of the statute of frauds was necessary because of the “peril of perjury . . . latent in the spoken promise.”<sup>103</sup> About that same time, the Texas Supreme Court stated the statute of frauds “was made for the purpose of preventing frauds and perjuries.”<sup>104</sup> More recently, the note preceding § 110 of the Restatement (Second) of Contracts provides a more complete explanation of the purpose of the statute of frauds: “In general the primary purpose of the Statute of Frauds is assumed to be evidentiary, to provide reliable evidence of the existence and terms of the contract, and the classes of contracts covered seem for the most part to have been selected because of importance or complexity.”<sup>105</sup>

Third, what kinds of agreements are covered by the statute of frauds? Again, statutes of fraud vary from state to state.<sup>106</sup> Section 110 of the Restatement (Second) of Contracts sets out the kinds of agreements generally covered by a state’s statute of frauds.<sup>107</sup>

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102. See An Act for Prevention of Fraud and Perjuries, 1677, 29 Car. 2, c.3 (Eng.).

103. *Burns v. McCormick*, 233 N.Y. 230, 234, 135 N.E. 273 (1922).

104. *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1116 (Tex. 1921).

105. RESTATEMENT (SECOND) OF CONTRACTS, ch. 5, statutory note (1981).

106. TEX. BUS. & COM. CODE ANN. § 26.01(b) (Vernon 2006). In Texas, the primary statute of frauds applies to:

- (1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;
- (2) a promise by one person to answer for the debt, default, or miscarriage of another person;
- (3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;
- (4) a contract for the sale of real estate;
- (5) a lease of real estate for a term longer than one year;
- (6) an agreement which is not to be performed within one year from the date of making the agreement;
- (7) a promise or agreement to pay a commission for the sale or purchase of:
  - (A) an oil or gas mining lease;
  - (B) an oil or gas royalty;
  - (C) minerals; or
  - (D) a mineral interest; and
- (8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

*Id.*

107. RESTATEMENT (SECOND) OF CONTRACTS § 110.

- (1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:
  - (a) a contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);
  - (b) a contract to answer for the duty of another (the suretyship provision);
  - (c) a contract made upon consideration of marriage (the marriage provision);
  - (d) a contract for the sale of an interest in land (the land contract provision);

Fourth, what does the statute of frauds require? The statute of frauds requires a writing. As the Texas Supreme Court stated most recently in *Nagle v. Nagle*, “The Statute of Frauds is the Legislature’s directive that courts enforce promises covered by the statute only if such promises are in writing.”<sup>108</sup>

For the statement from *Nagle* to be wholly accurate it is necessary to disregard the statute of frauds in Article 2 of the Uniform Commercial Code. Under § 2-201(c), part performance can be a substitute for a writing when there is an oral agreement to sell goods for \$500 or more.<sup>109</sup> The Uniform Sales Act contained a comparable provision, and before that, the English Statute of 1677, § 17 did as well.<sup>110</sup>

### B. Part Performance Exception

While there is no “legislative directive” that part performance can be a substitute for a writing when there is an oral agreement to sell an interest in real estate, courts in Texas, like courts in other states, have created such an exception.<sup>111</sup> To illustrate, consider illustration 3 to Restatement (Second) § 129:

A and B make an oral agreement for the sale of Blackacre by A to B. With A’s consent B takes possession of the land, pays part of the price, builds a dwelling house on the land and occupies it. Two years later, as a result of a dispute over the amount still to be paid, A repudiates the agreement. B may obtain a decree of specific performance.<sup>112</sup>

This exception is generally referred to as the “part performance doctrine.” The term part performance doctrine, like the term promissory estoppel, is at best misleading. Consider the following variation of illustration three. Playing our favorite first year law school game “change the facts,” omit B’s payment of part of the price from illustration three above.<sup>113</sup> B’s taking possession of the

(e) a contract that is not to be performed within one year from the making thereof (the one-year provision).

(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code:

(a) a contract for the sale of goods for the price of \$500 or more (Uniform Commercial Code § 2-201) . . . .

*Id.*

108. *Nagle v. Nagle*, 633 S.W.2d 796, 799 (Tex. 1982).

109. U.C.C. § 2-201(c) (1981).

110. UNIFORM SALES ACT § 4 (1906); An Act for Prevention of Fraud and Perjuries, 1677, 29 Car. 2, c.3 (Eng.). See generally 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 6.9 (2d ed. 1998) (giving a general overview of contracts).

111. A few states have enacted statutes providing that the statute of frauds is subject to the equitable powers of the court in cases of part performance. See, e.g., MINN. STAT. § 513.06 (1990).

112. RESTATEMENT (SECOND) OF CONTRACTS § 129.

113. Cf. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1683 (1996) (explaining law professor’s Socratic teaching methods and the effects on law students).

land is not a part of the performance of her contract with S, and B's building a house is not part of the performance of her contract with S. Nonetheless, the buyer's taking possession of the land and making substantial improvements is enough to satisfy the part performance doctrine.<sup>114</sup>

The part performance doctrine was first created by courts of equity, shortly after Parliament enacted the statute of frauds.<sup>115</sup> The original rationale for the exception was the "equities" of the parties: "The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be enabled to practise [sic] a fraud upon the other . . . ."<sup>116</sup> Today, the rationale for the part performance exception seems to be evidentiary—the part performance serves the same evidentiary function as a writing.<sup>117</sup> As stated in *Welch v. Coca-Cola Enterprises*, "In order to remove an oral contract from the statute of frauds, the part performance must be unequivocally referable to the alleged oral agreement and corroborative of the fact that such an agreement was made."<sup>118</sup> In other words, the part performance must itself constitute persuasive evidence of the existence and terms of the oral contract.<sup>119</sup> Better yet, in Cardozo's words: "[T]he acts of part performance are not solely and unequivocally referable to a contract for the sale of land. Because that is so, they do not become sufficient . . . ."<sup>120</sup>

Notwithstanding this change in rationale and the merger of law and equity, courts have continued to treat the part performance exception as an equitable doctrine so that damages are not available.<sup>121</sup> The remedy in part performance doctrine cases has been limited to the remedy in illustration three—specific performance.

And, courts have tended to limit the part performance doctrine to oral agreements for the sale of an interest in real estate.<sup>122</sup> Arguments that an oral agreement that is not capable of being performed within a year of the date of the contract should be enforceable because of part performance have been

114. 2 FARNSWORTH, *supra* note 110, at § 69.

115. See *Butcher v. Stapley*, 23 Eng. Rep. 524 (1865); see H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 350 (4th ed. 2002).

116. *Whitney v. Hay*, 181 U.S. 77, 89 (1901); *Hooks v. Bridgewater*, 229 S.W. 1114, 1116 (1921) ("[T]o warrant equity's 'breaking through the statute' to enforce such a parol contract, the case must be such that the nonenforcement of the contract—or the enforcement of the statute—would, itself, plainly amount to a fraud."); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 423 (14th ed. 1918); cf. Jesse W. Lienthal, *Judicial Repeal of the Statute of Frauds*, 9 HARV. L. REV. 455, 463 (1906) ("There should be, it would seem, in addition to part performance, something in the attending circumstances to constitute a case of legal fraud.").

117. See Perillo, *supra* note 9, at 659.

118. *Welch v. Coca-Cola Enters., Inc.*, 36 S.W.3d 532, 539 (Tex. App.—Tyler 2000).

119. See *id.*

120. *Burns v. McCormick*, 135 N.E.2d 273, 274 (1922).

121. See, e.g., *Anderson v. Kohler*, 922 N.E.2d 8, 14 (Ill. Ct. App. 2009).

122. See *Part Performance, Estoppel and the California Statute of Frauds*, 3 STAN. L. REV. 281, 283 (1951) ("The traditional view is that part performance is confined to contracts to convey real property.").

largely unsuccessful.<sup>123</sup> One justification for the limitation has been that the part performance exception is only applicable in equitable actions.<sup>124</sup> Another common justification for the limitation has been that the role of courts is to interpret legislation, not create exceptions to legislation.<sup>125</sup>

We have problems with courts holding that an oral agreement within the statute of frauds' one-year provision is not enforceable even after part performance by the promisee, and we have problems with the justifications for such holdings. Courts consistently hold that full performance of an oral agreement within the statute of frauds one-year provision makes the agreement enforceable so that the promisee can recover damages.<sup>126</sup> The reasons in the preceding paragraph for not recognizing a part performance exception for one-year contracts are equally applicable to this recognized full performance exception. Even more telling, the evidentiary rationale for the part performance doctrine in cases involving oral agreements for the transfer of an interest in real estate is equally applicable to cases involving oral agreements not capable of being performed within a year of the agreement.

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123. See RESTATEMENT (SECOND) OF CONTRACTS § 130, cmt. e (1981); see, e.g., *DuSesol v. United Ref. Co.*, 540 F. Supp. 1260, 1271 (W.D. Pa. 1982) (“When dealing with oral employment contracts, Texas law has . . . held that partial or full performance of the agreement does not render the statute inoperative.”); *Spectrum Benefit Options, Inc. v. Med. Mut. of Ohio*, 880 N.E.2d 926, 938 (Ohio Ct. App. 2007) (“doctrine does not apply to personal-services contracts”). *But cf.* *Welch v. Coca-Cola Enters.*, 36 S.W.3d 532, 539 (Tex. App.—Tyler 2000) (considering the part performance argument in a case involving an alleged five year vending service contract). *Welch* is discussed in James H. Stilwell, *When Actions Speak Louder Than Words: The Case for a Quasi-Estoppel Exception to the Statute of Frauds*, 22 REV. LITIG. 69, 84-87 (2003).

124. See *Stoetzel v. Cont'l Textile Corp.*, 768 F.2d 217, 223 (8th Cir. 1985).

125. See, e.g., *Metro. Alloys Corp. v. Considar Metal Mktg.*, 615 F. Supp. 2d 589, 598 (E.D. Mich. 2009) (Michigan courts have expressed reservations about judicially created exceptions to the statute of frauds); *D'Jock v. Strunk*, No. 02-C-381-C, 2003 WL 23112008, at\*1 (W.D. Wis. 2003) (“[I]f the legislature had intended to include a part performance exception in § 241.02, it would have done so expressly . . .”). *Cf.* H. Miles Foy III, *Legislation and Pedagogy in Contracts 101*, 44 ST. LOUIS U. L.J. 1273, 1284 (2000) (“[W]hy do modern judges think that they are free to ignore the Statute of Frauds in cases such as these? Here we are confronted with what can only be described as a judicially created exception to an otherwise unqualified statutory command. What role must judges play in the interpretation and enforcement of statutory law? The part-performance rule originated at a time when the concept of the separation of powers was far less important than it is today. Whatever role the Lord Chancellor may have played in British government in the eighteenth century, is it appropriate for American judges to play the same role as they interpret and enforce legislation in the twenty-first century? Furthermore, we are dealing here with a question of public order versus private order. The legislature has prescribed certain public standards to govern transactions involving interests in land, but here the parties have seen fit to make an agreement that ignores them. Which order should prevail?”); Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 199 (1891) (concluding that “[j]udicial legislation is a necessary element in the development of the common law”).

126. See *Markarian v. Garoogian*, 771 F. Supp. 939, 943 (N.D. Ill. 1991); see also RESTATEMENT (SECOND) OF CONTRACTS § 130(2).

*C. Oral Promises to Put an Oral Agreement in Writing and Estoppel to Plead the Statute of Frauds*

Two wrongs don't make a right, and two oral agreements do not make a written agreement.<sup>127</sup> Two alleged oral agreements, are just as different from a written agreement as one oral agreement. If there is a concern that a person who alleges the existence of an oral agreement is making a fraudulent allegation, there should be the same concern that a person who alleges two oral agreements is making two fraudulent allegations. Two alleged oral agreements such as (1) an alleged oral employment agreement followed by (2) an alleged oral agreement to put the first agreement in writing, can no more meet the requirements of a statute of frauds than one oral agreement.<sup>128</sup>

Two such agreements can, however, meet the requirements of estoppel. The general principle of estoppel is that one "should not be permitted to make representations or promises on which they know or should know others will rely to their detriment, only to later attempt to escape those commitments scot-free."<sup>129</sup>

Courts have specifically applied that principle to estop a person who allegedly made two oral promises from later asserting a statute of frauds defense. *Seymour v. Oelrichs*, decided by the California Supreme Court in 1909, has been described as a "leading case" for the use of the estoppel doctrine as a "basis for enforcement of an oral contract despite the writing requirement of the statute of frauds."<sup>130</sup>

In that case, John Seymour sued on an alleged oral employment agreement. More specifically, Seymour alleged that (1) he was hired to oversee land and buildings in San Francisco for a period of ten years at a salary of \$300 per month, and (2) he was told the agreement would soon be put in writing.<sup>131</sup> Seymour quit his job as captain of detectives of the San Francisco Police Department and began work.<sup>132</sup> Two years later, nothing had been put in writing and Seymour was fired.<sup>133</sup>

Because the oral agreement was for employment not to be completed within one year, and a subsequent promise to reduce the agreement to writing

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127. But three "lefts" do make a "right." Seymour Papert, *The Connected Family: Bridging the Digital Generation Gap* (Longstreet Press 1996), available at <http://www.papert.org/articles/Twowrongs.html>.

128. See *Consolidation Servs., Inc. v. Keybank Nat'l Ass'n*, 185 F.3d 817, 822-23 (7th Cir. 1999) (rejecting the argument that a second oral promise to put the first oral promise in writing complies with the statute of frauds, Judge Posner stated, "[I]t would be bootstrapping to allow oral proof of such a promise to take it out of the statute of frauds and the better view . . . is that the promise is unenforceable.").

129. *White v. White*, 293 S.W.3d 1, 28 (Mo. Ct. App. 2009) (Ahuja, J., dissenting).

130. See *Seymour v. Oelrichs*, 106 P. 88 (1909); Phillip H. Wile et al., *Estoppel to Avoid the California Statute of Frauds*, 35 MCGEORGE L. REV. 319, 320 (2004).

131. See *Seymour*, 106 P. at 88. Seymour had been making \$250 per month with the Police Department before entering into the agreement with Charles L. Fair, the brother of Oelrichs and Vanderbilt. *Id.* This was a life position and removable only upon a showing of good cause after trial. *Id.*

132. *Id.*

133. *Id.*

had never been fulfilled by either Oelrichs or Vanderbilt, the contract did not satisfy the requirements of the statute of frauds.<sup>134</sup> And, because the subject matter of the contract was the performance of services for more than a year and not a transfer of real estate, the part performance doctrine was not relevant.<sup>135</sup>

Instead, the California Supreme Court based its affirmance of the trial court's judgment for Seymour on "equitable estoppel."<sup>136</sup> In so ruling, the court relied on a statement from a 19th century treatise on the statute of frauds (that is now accessible online as a part of the Google Project) and relied on the fact that there was a second oral promise—an oral promise to put the first oral promise in writing.<sup>137</sup> Indeed, the court repeatedly emphasizes that second promise.<sup>138</sup>

Other courts consider that second promise to be a critical fact in determining whether equitable estoppel prevents a defendant sued on oral promise within the statute of frauds from asserting its statute of frauds defense. According to Professor Farnsworth, "equitable estoppel was not available if there was no misrepresentation and one party had simply relied on a promise by the other party that came within the statute of frauds."<sup>139</sup>

Texas courts have generally required yet another critical fact before finding estoppel to plead the statute of frauds. The leading Texas case on estoppel to plead the statute of frauds, *Moore Burger, Inc. v. Phillips Petroleum Co.*, involved not only an oral promise to sign a written contract but also an unsigned written contract.<sup>140</sup> The United States Court of Appeals for the Fifth Circuit reads Texas law as requiring not only an oral promise to sign a written contract but also proof that a written contract that would satisfy the statute of frauds had been prepared but not signed at or before the time of that promise to sign.<sup>141</sup>

134. *Id.*

135. *Id.* ("The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities. BROWNE ON STATUTE OF FRAUDS, § 448").

136. *Id.*

137. *See id.* at 91-95; CAUSTEN BROWNE, A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS (Little, Brown, & Co. 1895), available at [http://books.google.com/books?id=zVI9AAAAIAAJ&printsec=frontcover&dq=browne+on+statute+of+frauds&source=bl&ots=NmXzyCe37b&sig=\\_5qomE0NATmYcCfETxID0eRTfA&hl=en&ei=AeiSS6eCMo0tgfPkr3UCg&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CAkQ6AEwAA#v=onepage&q=&f=false](http://books.google.com/books?id=zVI9AAAAIAAJ&printsec=frontcover&dq=browne+on+statute+of+frauds&source=bl&ots=NmXzyCe37b&sig=_5qomE0NATmYcCfETxID0eRTfA&hl=en&ei=AeiSS6eCMo0tgfPkr3UCg&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAkQ6AEwAA#v=onepage&q=&f=false).

138. *See Seymour*, 106 P. at 93-96.

139. 2 FARNSWORTH, *supra* note 110, at § 6.

140. *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (1973).

141. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 769 (5th Cir. 1988); *see Sonnichsen v. Baylor Univ.*, 47 S.W.3d 122 (Tex. App.—Waco 2001); 14 WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE 210A-60 (2010).

III. STATUTE OF FRAUDS AND PROMISSORY ESTOPPEL AND RESTATEMENT  
SECOND § 139

A. *Statute of Frauds and Promissory Estoppel*

1. *Reliance on a Promise to Execute a Writing and Promissory Estoppel*

The Texas cases finding estoppel to plead the statute of frauds are also different from the California Supreme Court's decision in *Seymour* and from Farnsworth's summary of case law in that Texas cases use the term promissory estoppel rather than equitable estoppel.<sup>142</sup> Texas courts are not alone in making such a use/misuse of the term promissory estoppel. While the Restatement (First) of Contracts did not use the term promissory estoppel in § 90, promissory estoppel does appear in a comment to § 178 on the statute of frauds.<sup>143</sup> Comment f to § 178 states the following: "[A] promise to make a memorandum . . . may give rise to an effective promissory estoppel."<sup>144</sup> In *Alaska Airlines, Inc. v. Stephenson*, the Court of Appeals for the Ninth Circuit upheld a judgment for breach of oral promises that Alaska Airlines (1) would employ Stephenson for two years and (2) would give Stephenson a written contract as soon as it obtained an operating certificate.<sup>145</sup> In so holding, the court referred to Comment f of § 178 and concluded "there was an intention to carry promissory estoppel (or call it what you will) into the statute of frauds if the additional factor of a promise to reduce the contract to writing is present."<sup>146</sup>

2. *Reliance on the Promise within the Statute of Frauds and Promissory Estoppel*

In the *Alaska Airlines* case, the Ninth Circuit relied not only on Restatement § 178 but also on *Monarco v. Lo Greco*.<sup>147</sup> One of the "other" leading contracts casebooks describes *Monarco* as a "leading one, indicating a change of attitude about estoppel[']s] relation to statutes of fraud."<sup>148</sup>

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142. See, e.g., *Birenbaum v. Option Care, Inc.*, 971 S.W.2d 497, 503 (Tex. App.—Dallas 1997); *CRSS Inc. v. Runion*, 992 S.W.2d 1, 6 (Tex. App.—Houston [1st Dist.] 1995). In fairness, *Moore Burger, Inc. v. Phillips Petroleum Co.* acknowledged that Professor Corbin had questioned the use of the term "promissory estoppel." *Moore Burger*, 492 S.W.2d at 937.

143. See RESTATEMENT (FIRST) OF CONTRACTS § 90, 178 (1932).

144. See *id.* § 178.

145. See *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295, 298 (9th Cir. 1954).

146. *Id.*

147. See *id.* at 300 n.4 (citing *Monarco v. Lo Greco*, 220 P.2d 737 (1950); 2 FARNSWORTH, *supra* note 110, at 196 (stating that *Monarco* "was relied on . . . by Court of Appeals for the Ninth Circuit"). While the phrase "relied on" makes for a nice transition from *Alaska Airlines* to *Monarco*, Farnsworth's research assistants probably erred in their choice of verbs. 2 FARNSWORTH, *supra* note 110, at 196. *Alaska Airlines* simply mentions *Monarco* at the end of a footnote. See *Alaska Airlines*, 217 F.2d at 300 n.4.

148. E. ALLAN FARNSWORTH ET AL., *CONTRACTS CASES AND MATERIALS* 305 (7th ed. 2008). "Our" contracts casebook is, of course, DAVID G. EPSTEIN ET AL., *MAKING AND DOING DEALS* (2d ed. 2006).

The facts in *Monarco* are different from the facts in *Seymour* or the facts in *Alaska Airlines*.<sup>149</sup> In *Monarco*, the promisee simply relied on the alleged oral promise to transfer the family farm to him; in other words, in *Monarco*, the reliance was on the very promise that was within the statute of frauds.<sup>150</sup> In *Monarco*, Natalie and Carmela Castiglia owned a farm in joint tenancy and orally promised Christie Lo Greco, their son, that if he stayed home and worked on the farm, rather than set out on his own, he would inherit the farm.<sup>151</sup> In reliance on this promise, Christie remained home and worked on the farm.<sup>152</sup> Natalie breached his oral agreement with Christie and left his interest in the family farm to the plaintiff, his grandson Carmen Monarco, not to Christie.<sup>153</sup> Not surprisingly, litigation ensued.<sup>154</sup>

The court framed the question as whether the plaintiff was estopped from relying upon the statute of frauds to defeat the enforcement of the oral contract with Christie.<sup>155</sup> The plaintiff argued that estoppel only applied in situations in which a party made representations that a writing was either unnecessary, would be executed, or that the statute of frauds would not be relied upon.<sup>156</sup> The court clarified the previous ruling in *Seymour*, noting in that case that such representations had been made but were not a requirement.<sup>157</sup> Specifically, “where either an unconscionable injury or unjust enrichment would result from refusal to enforce the contract, the doctrine of estoppel has been applied whether or not plaintiff relied upon representations going to the requirements of the statute itself.”<sup>158</sup> The court held that the appropriate reliance should be the focus in applying estoppel.<sup>159</sup> The court held that “[i]n reality, it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it.”<sup>160</sup> Thus, Christie LoGreco’s reliance on the Castiglia’s oral promise was sufficient to estop Monarco from pleading the statute of frauds.<sup>161</sup>

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149. See *Monarco*, 220 P.2d at 737; see also *Seymour v. Oelrichs*, 106 P. 88 (Cal. 1909); *Alaska Airlines*, 217 F.2d at 295.

150. See *Monarco*, 220 P.2d at 739.

151. *Id.* at 737.

152. See *id.* at 739.

153. See *id.*

154. See *id.*

155. See *id.* at 740.

156. *Id.*

157. *Id.* at 741.

158. *Id.*

159. *Id.* at 741-42.

160. *Id.* at 741.

161. *Id.* at 742.

Although *Monarco* is often described as a case applying promissory estoppel, Justice Traynor does not use the term promissory estoppel in the *Monarco* opinion—Traynor does repeatedly use the term “estoppel.”<sup>162</sup>

From the facts of *Monarco*, it can be seen as much a case of the purposes of the statute of frauds being satisfied by the defendant’s reliance as it is a case of the plaintiff’s being estopped from asserting the statute of frauds defense by the defendant’s reliance. The *Monarco* decision is not based on any fault or wrong of Natalie but rather on the fraud to Christie: “Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract . . . .”<sup>163</sup>

More important than how we now see *Monarco* is how the Reporter for the Second Restatement of Contracts saw *Monarco*. Professor Farnsworth saw § 139 of the Restatement (Second) as a “response” to *Monarco*.<sup>164</sup>

### B. Statute of Frauds and Restatement (Second) § 139

Restatement (Second) adds § 139 to “Chapter 5. The Statute of Frauds.”<sup>165</sup> It is a new section—there is no Restatement (First) counterpart. Section 139 has the descriptive title “Enforcement by Virtue of Action in Reliance.”<sup>166</sup> Like § 90, § 139 does not use the words promissory estoppel.<sup>167</sup> Not even the comments to § 139 use the term promissory estoppel.<sup>168</sup> Section 139 does use the term “Statute of Frauds” and provides that reliance can make a promise enforceable “notwithstanding the Statute of Frauds.”<sup>169</sup> And, Restatement (Second) § 139 applies to contracts within the statute of frauds based on reliance as well as contracts within the statute of frauds based on consideration.<sup>170</sup>

162. E.g., Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?*, 36 VAND. L. REV. 1383, 1429 (1983) (“doctrine they actually applied is promissory estoppel”); Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 334 (2002) (“use of promissory estoppel”).

163. *Monarco*, 220 P.2d at 739 (citing *Seymour v. Oelrichs*, 106 P. 88 (Cal. 1909)).

164. 2 FARNSWORTH, *supra* note 110, at § 6.12 (“In response to this line of cases . . .”). So does the California Court of Appeals. See *Munoz v. Kaiser Steel Corp.*, 203 Cal. Rptr. 345, 351 (Ct. App. 1984) (“[M]eaning essentially the same thing substantively . . .”).

165. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1982).

166. *Id.*

167. See *id.*; RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

168. RESTATEMENT (SECOND) OF CONTRACTS § 139. Moreover, Restatement (Second) § 110, which replaces Restatement (First) § 178, replaces the reference to promissory estoppel in comment d with the following: “To the extent that justice so requires, the promise is then enforced by virtue of the doctrine of estoppel or by virtue of reliance on a promise, notwithstanding the Statute.” RESTATEMENT (SECOND) OF CONTRACTS § 110 cmt. d.

169. *Id.* § 139.

170. See *id.* § 139, 139 cmt. a (“This section is complementary to § 90, which dispenses with the requirements of consideration . . . but it also applies to promises supported by consideration.”).

Restatement (Second) § 139(1) is identical to Restatement (Second) § 90(1) except for the following: (1) the substitution of the word “enforceable” for the word “binding” and (2) the addition of the phrase “notwithstanding the Statute of Frauds.”<sup>171</sup> Nonetheless, it would be a mistake to think the two provisions are the same—to think that if a promisee’s reliance on a promise satisfies § 90, then it also satisfies § 139.<sup>172</sup>

The two provisions serve two very different purposes. Under § 90, reliance can become a substitute for consideration and make an oral or written promise binding.<sup>173</sup> Under § 139, reliance can become a substitute for a writing, or perhaps the part performance doctrine, and make a binding oral promise legally enforceable.<sup>174</sup> As comment b to Restatement § 139 provides, “Like § 90 this Section states a flexible principle, but the requirement of consideration is more easily displaced than the requirement of a writing.”<sup>175</sup>

That perhaps is the reason that § 139(2), unlike § 90(2), lists factors for courts to consider in determining whether the promisee’s reliance satisfies the statute of frauds. Again, the comments are instructive. Comment b explains: “Each factor relates either to the extent to which reliance furnishes a compelling substantive basis for relief in addition to the expectations created by the promise or to the extent to which the circumstances satisfy the evidentiary purpose of the Statute . . . .”<sup>176</sup> With respect to the latter, § 139(2)(c) provides that courts should look to “the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence.”<sup>177</sup>

No opinion by a Texas appellate court has even considered Restatement (Second) § 139.<sup>178</sup> As Professor Perillo has observed, “The widespread use of [Restatement (Second) 139] . . . is in its infancy.”<sup>179</sup>

*McIntosh v. Murphy*, our inspiration for the Okmulgee hypothetical in the first paragraph of the Article, was one of the first cases to apply § 139.<sup>180</sup> Dick McIntosh, a Los Angeles resident, interviewed for a sales position with George Murphy’s car dealership in Hawaii.<sup>181</sup> Upon receiving the job, McIntosh “moved some of his belongings from the mainland to Hawaii” and “leased an

171. *Id.* § 139; RESTATEMENT (FIRST) OF CONTRACTS § 90.

172. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139; RESTATEMENT (FIRST) OF CONTRACTS § 90. *But cf.* *McIntosh v. Murphy*, 469 P.2d 177 (Haw. 1970) (applying § 139).

173. *See* RESTATEMENT (FIRST) OF CONTRACTS § 90.

174. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139.

175. *Id.* § 139 cmt. b.

176. *Id.*

177. *Id.* § 139(2)(c).

178. The only reported Texas case that even mentions the section is *Haase v. Glazner*, which includes a reference to § 139 at the end of a string citation in a footnote. *Haase v. Glazner*, 62 S.W.3d 795, 795 n.22 (2001).

179. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 694 (6th ed. 2009).

180. *McIntosh v. Murphy*, 469 P.2d 177 (Haw. 1970). More precisely, *McIntosh* applied Restatement (Second) of Contracts § 217A (Supp. Tentative Draft No. 4, 1969). *McIntosh*, 469 P.2d at 181.

181. *Id.* at 178.

apartment in Honolulu.”<sup>182</sup> Two and a half months later, Murphy fired McIntosh.<sup>183</sup> McIntosh then sued, alleging breach of an oral agreement that he would be employed for one year.<sup>184</sup>

At trial the judge refused to allow the defendant to assert a statute of frauds defense for a contract that, by “Murphy’s math,” would be within the statute of frauds because the alleged one year agreement was made on Saturday, and McIntosh was not to start work until Monday.<sup>185</sup> The trial court rejected this argument as making the law “look ridiculous.”<sup>186</sup> Not wanting to “look ridiculous,” the Hawaiian Supreme Court found for McIntosh on other grounds. In affirming, Justice Levinson first held it “appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds.”<sup>187</sup> This opinion then “transitions” to a discussion of the estoppel principles set forth by the courts of California in *Seymour* and *Monarco*.<sup>188</sup> Finally, the court expressly adopts § 217A (now § 139) as a “workable test” that would give the trial court “the necessary latitude to relieve a party of the hardships of the Statute of Frauds.”<sup>189</sup>

The closest the *McIntosh* opinion comes to giving other courts guidance in applying § 139 is the following statement: “Naturally each case turns on its facts. Certainly, there is considerable discretion for a court to implement the true policy behind the Statute of Frauds.”<sup>190</sup> There is nothing in *McIntosh* about the “true policy” behind Restatement (Second) § 139. The closest the opinion comes to addressing what is now Restatement (Second) § 139(2)(c), which provides that courts should look to “the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence” is the following statement: “It is also clear that a contract of some kind did exist.”<sup>191</sup>

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* Not related to fuzzy math, *see generally* PETR HÁJEK, METAMATHEMATICS OF FUZZY LOGIC (Kluwer 1998) (analyzing the logical structures and applications of imprecise propositions).

186. *McIntosh*, 469 P.2d at 178 (“THE COURT: You make the law look ridiculous, because one day is Sunday and the man does not work on Sunday; the other day is Saturday; he is up in Fresno. He can’t work down there. And he is down here Sunday night and shows up for work on Monday. To me that is a contract within a year. I don’t want to make the law look ridiculous . . . because it is one day later, one day too much, and that one day is a Sunday, and a non-working day.”). *Accord* Mario Puzo, writer, *The Godfather* (Paramount Pictures 1972), available at <http://www.imdb.com/title/tt0068646/quotes?qt0361879> (“She threw it all away just to make me look ridiculous. And a man in my position can’t afford to be made to look ridiculous.”).

187. *McIntosh*, 469 P.2d at 180.

188. *Id.* at 180-81.

189. *Id.* at 181.

190. *Id.*

191. RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(c) (1981); *McIntosh*, 469 P.2d at 181.

There was no question that a contract of some kind did exist. The question was whether McIntosh's reliance by moving "some" of his belongings to Hawaii and leasing an apartment satisfied the statute of frauds "corroborates evidence of the making and terms of the promise."<sup>192</sup> It would have been helpful to know how much of his belongings that McIntosh had moved and the term of this apartment lease.

In sum, the *McIntosh* decision, while expressly adopting Restatement (Second) § 139, seems inconsistent with Restatement concepts. Under the Restatement (Second), §§ 90 and 139 are not interchangeable: "[T]he requirement of consideration is more easily displaced than the requirement of a writing."<sup>193</sup> Not so under *McIntosh*.

*Olympic Holding Co. v. ACE Ltd.*, a 2009 decision by a divided Ohio Supreme Court that inspired the title insurance joint venture hypothetical in the introduction, is even more inconsistent with Restatement concepts in four respects.<sup>194</sup> First, unlike the Restatement, the *Olympic Holding* majority treats a claim based on promissory estoppel as an equitable claim, different from a claim for breach of contract.<sup>195</sup> Second, unlike the Restatement, *Olympic Holding* held that the statute of frauds does not apply to claims based on promissory estoppel.<sup>196</sup> Third, unlike the Restatement, *Olympic Holding* limits promissory estoppel recovery to reliance damages.<sup>197</sup> Fourth, *Olympic Holding* holds that a promisor is not estopped to assert the statute of frauds notwithstanding the promisee's reliance on a second promise to execute a written agreement.<sup>198</sup>

This fourth holding is inconsistent not only with the Restatement and cases in Texas, but also with the "majority of jurisdictions."<sup>199</sup> According to the dissent in *Olympic Holding*, "**Although the analyses differ in some respects**, an overwhelming majority of jurisdictions recognize that promissory

192. RESTATEMENT (SECOND) OF CONTRACTS § 139(2)(c); see *Consolidation Servs., Inc. v. Keybank Nat'l Assoc.*, 185 F.3d 817, 822 (7th Cir. 1999) ("In some cases reliance on an oral promise may take a form that, as in some cases of part performance, provides compelling evidence of the existence and terms of a contract, and then, once more, the statute of frauds is relaxed."); *Kolkman v. Roth*, 65 N.W.2d 148, 152-57 (Iowa 2003) (discussing the statute of frauds similarities of part performance and promissory estoppel).

193. RESTATEMENT (SECOND) OF CONTRACTS § 139, cmt. b.

194. See generally *Olympic Holding Co. v. ACE Ltd.*, 909 N.E.2d 93 (Ohio 2009) (concerning a holding group bringing a cause of action for breach of promise to execute a joint venture agreement and other claims against a title reinsurance company).

195. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) ("A promise binding under this section is a contract . . ."); *Olympic Holding*, 909 N.E.2d at 100; *Seaman v. Fannie Mae*, No. 92751, 2009 WL 2462623, at \*3 (Ohio Ct. App., Aug. 13, 2009) ("*Olympic Holding* confirms that a plaintiff may pursue a cause of action for reliance damages under a promissory estoppel theory, even though the statute of frauds bars their [sic] breach of contract claim.>").

196. See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d ("[F]ull-scale enforcement by normal [contract] remedies is often appropriate."); *Olympic Holding*, 909 N.E.2d at 100; *Seaman*, 2009 WL 2462623, at \*3.

197. See *Olympic Holding*, 909 N.E.2d at 100; *Seaman*, 2009 WL 2462623, at \*3; *supra* Part IC.

198. See *Olympic Holding*, 909 N.E.2d at 100.

199. See RESTATEMENT (FIRST) OF CONTRACTS § 178 cmt. f (1932); *supra* note 190 and accompanying text.

estoppel may bar a party from asserting a defense under the statute of frauds **in certain circumstances.**<sup>200</sup>

#### IV. CONCLUSION

The *Olympic Holding*'s dissent citation to cases from twenty-four states supports the statement in Professor Calamari's 2009 contracts text—there is now widespread use of promissory estoppel in cases involving reliance on an oral promise that is within the statute of frauds.<sup>201</sup> Professor Calamari was, however, less than prescient when he predicted a “major new approach” forty years ago. The cases in the last forty years reflect many different approaches—not “A” major new approach. The “analyses differ to some extent” statement from the *Olympic Holding* dissent significantly understates the differing approaches reflected by the case law.

This Article shows that the differences can be traced to different uses and misuses of the term promissory estoppel. We realize that the question of whether the term promissory estoppel should be used to describe § 90 liability based on reliance has long been moot: judges and law professors have been referring § 90 as promissory estoppel for more than seventy-five years.

Restatement (Second) § 139 does not have that same history. The courts in Texas and most states have not yet considered § 139. This Article provides three reasons that courts using Restatement (Second) § 139 should not use the term promissory estoppel:

1. The § 139 question of whether there has been sufficient reliance to serve the same evidentiary function as a writing is different from the § 90 question of whether there has been sufficient reliance to serve the same policy function as consideration.
2. In terms of policy and particulars, § 139 more closely parallels the part performance doctrine than § 90.
3. Under § 139, like the part performance doctrine, reliance can provide a way of satisfying the evidentiary purposes of the statute of frauds without a § 139 is thus different from equitable estoppel cases like *Seymour* (or promissory estoppel cases such as *Moore Burger*) in which reliance estops the promisor from asserting the statute of frauds.

Instead of asking whether “promissory estoppel circumvents the statute of frauds,” courts, depending upon the facts, should ask one of two questions: (1) whether the promisee's reliance provides sufficient evidence of the existence of the terms of a contract so that the statute of frauds has been

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200. *Olympic Holding*, 909 N.E.2d at 104 (emphasis added).

201. *Id.*

satisfied or (2) whether the wrongful conduct of the promisor coupled with the reliance of the promise makes it inequitable for the promisor to assert a statute of frauds defense.<sup>202</sup>

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202. *E.g.*, *Bazzy v. IndyMac Mortg. Servs.*, No. 09-CV-13436, 2010 WL 707371, at \*2 (E.D. Mich., Feb. 23, 2010) (“If the doctrine of promissory estoppel is to be applied to circumvent the statute of frauds . . . .”); *Bank of Texas, N.A. v. Gaubert*, 286 S.W.3d 546, 556 (Tex. App.—Dallas 2009) (“[P]romissory estoppel circumvents the statute of frauds in the limited circumstance when . . . .”).