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## Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contact Law

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# FINGERPRINTS OF EQUITABLE ESTOPPEL AND PROMISSORY ESTOPPEL ON THE STATUTE OF FRAUDS IN CONTRACT LAW

STEPHEN J. LEACOCK \*

## ABSTRACT

*This Article evaluates a conundrum and identifies a genuine risk faced by state and federal courts in interpreting and applying the Statute of Frauds to contract law disputes. The Article provides a thorough analytical dissection of the Statute of Frauds as it has been interpreted and applied by the courts in light of the inescapable tension between the Statute's formalities, mandated by the legislature, and the judiciary's profound goal of attaining justice and fairness in deciding each contract law dispute in which the Statute is implicated. The Article discusses in depth how the Statute has been construed by state and federal courts in the unique factual context presented by each individual case argued before these courts. It investigates how judicial application of the Statute to particular facts has invoked creativity and ingenuity on the part of the courts that has led to the formulation of two equitable, ameliorating doctrines consisting of equitable estoppel and more recently, equitable estoppel's evolutionary progeny, promissory estoppel. The Article*

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*discusses the potential dilemma of rigid application of the Statute at the expense of fair and just decisions, faced by the courts in applying the Statute, in light of the uniqueness of the factual context of each case; however, this Article criticizes impulses to apply promissory estoppel too readily because of the risk of eviscerating the Statute entirely. The Article's analytical examination of a plethora of recent state and federal court decisions has concluded that the application of equitable estoppel principles in deciding whether to decline enforcement of a contract, based upon the defense of the Statute of Frauds, is viable and vibrant and is serving the legal community very well, but that there may also be a clear and present danger of over exuberance in unrestrained application of promissory estoppel by state and federal courts to override the application of the Statute and thereby nullify its mandate.*

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## INTRODUCTION

“In contract law, a perennial tension between ... [formalities and reliance], gives rise to interesting issues concerning the enforceability of promises.”<sup>1</sup>

This “perennial tension”<sup>2</sup> between formalities and reliance<sup>3</sup> is inherent in contract law, particularly in the context of contracts to which the Statute of Frauds applies.<sup>4</sup> In this context, reliance is capable of vitiating the written formalities required by the Statute of Frauds to a corrosive degree.<sup>5</sup> Therefore, addressing this tension is inescapable<sup>6</sup> when courts determine the enforceability of certain oral contracts.

Within this frame of reference, equity is *not* a creator.<sup>7</sup> It is a facilitator.<sup>8</sup> It is also a survivor.<sup>9</sup> It can be a financial lifesaver.<sup>10</sup>

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<sup>1</sup> E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 218 (1990).

<sup>2</sup> It is a separation of powers issue because the courts (both federal and state) are not constitutionally empowered to nullify the effect of a valid statute by judicial interpretation (in the federal context, but equally applicable in the state context). *See, e.g., Lichter v. United States*, 334 U.S. 742, 779 (1948) (“[I]t is essential that ... the respective branches of the government keep within the powers assigned to each by the Constitution.”).

<sup>3</sup> *See Farmers Bank and Trust Co. of Georgetown, Ky. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 10 (Ky. 2005) (“[W]here the [S]tatute of [F]rauds is clear and unambiguous ... equitable relief should only be granted under the most limited of circumstances, lest the Court run afoul of judicially amending the statute in violation of separation of powers.”) (citations omitted).

<sup>4</sup> This is derivative of the following fundamental questions in contract law articulated by Professor E. Allan Farnsworth:

Should the mere utterance of a promise, supported by ... consideration, be sufficient to bind the promisor, or should some reliance by the promisee be required? If the law requires some formality, such as a writing, to render a promise enforceable, should that formality be dispensed with if the promisee detrimentally relies upon the promise?  
Farnsworth, *supra* note 1, at 218-19.

<sup>5</sup> *See Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 365 (Utah Ct. App. 1997) (“[P]romissory estoppel should not be allowed to eviscerate the [S]tatute of [F]rauds.”); *see, e.g., Eric Mills Holmes, Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 276 (1996) (“[R]eliance ... has its own autonomous sphere of influence as an evolving equitable principle for enforcing the *right to rely* on certain promises and for designing relief to afford corrective justice between parties.”) (footnote omitted).

<sup>6</sup> This view is not universally supported. *See, e.g. Daniel A. Farber & John H. Matheson, Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903, 904-05 (1985) (“[A] new rule of promissory liability is emerging .... The rule is quite simple: any promise made in furtherance of an economic activity is enforceable.”).

<sup>7</sup> *See, e.g., C.C. Langdell, A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55,

Moreover, equity embroils the courts in interpreting, analyzing and applying the Statute of Frauds,<sup>11</sup> equitable estoppel,<sup>12</sup> and its illustrious progeny,<sup>13</sup> promissory estoppel.<sup>14</sup>

Undeniably, the Statute of Frauds<sup>15</sup> was enacted by the legislature, and equitable estoppel<sup>16</sup> and promissory estoppel<sup>17</sup> were developed by the

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58 (1887-88) (“Equity cannot create personal rights which are unknown to the law ....”).

<sup>8</sup> *Id.* at 59 (“A true equitable right is ... *derivative* and *dependent* .... [I]t is derived from, and dependent upon a legal right.”) (emphasis added).

<sup>9</sup> *See, e.g.,* Holmes, *supra* note 5, at 514 (“Promissory estoppel is neither waning nor dying .... Alive and vital, promissory estoppel has steadfastly evolved over five centuries in the common-law tradition .... [A]ll American jurisdictions adopt and apply a theory of promissory estoppel ....”).

<sup>10</sup> *See id.* at 363 (referring to *Prudential Ins. Co. of Am. v. Clark*, 456 F.2d 932 (5th Cir. 1972) (applying Florida state law, and finding that “[i]n practical effect, promissory estoppel barred the application of the parol evidence rule to avoid injustice just as, in most jurisdictions, it can bar ... [the] [S]tatute of [F]rauds ... as justice requires”).

<sup>11</sup> *See* Jesse W. Lilienthal, 9 HARV. L. REV. 455, 455 (1895-1896) (“The Statute of Frauds is ... a measure to prevent frauds, whether the frauds be intentional ... or accidental, as the result of defective memory.”). *See generally* George N. Stepaniuk, Note, *The Statute of Frauds as a Bar to an Action in Tort for Fraud*, 53 FORDHAM L. REV. 1231 (1985) (arguing that courts should preserve as much of the deterrence value of both the Statute and the fraud action as possible, without abrogating to any significant degree the Statute’s mandate against enforcement of certain oral contracts”).

<sup>12</sup> *See* Sinclair v. Sullivan Chevrolet Co., 202 N.E.2d 516, 518 (Ill. 1964) (“[Equitable estoppel] has sprung from the unwritten law ....”).

<sup>13</sup> *See* Peluso v. Kistner, 970 A.2d 530, 533 (Pa. Commw. Ct. 2009) (“Promissory estoppel is an outgrowth of equitable estoppel ....”); *see also* Coral Way Props., Ltd. v. Roses, 565 So. 2d 372, 374 (Fla. Dist. Ct. App. 1990) (“Promissory estoppel is a qualified form of equitable estoppel.”) (citations omitted); Holmes, *supra* note 5, at 277 (“Commencing with cases in the nineteenth century ... promissory estoppel in its American genesis, [evidencing] an assimilation of two developmental attributes from the equitable principle of estoppel.”).

<sup>14</sup> The solution proposed by Farber & Matheson, that “any promise made in furtherance of an economic activity is enforceable” perhaps goes too far. Farber & Matheson, *supra* note 6, at 905. This solution discards almost a millennium of restrained and incremental development by the common law, constrained by the doctrine of consideration, and substitutes instead the contract principles of the civil law (which are *not* based on the fundamental doctrine of consideration at all). *See, e.g.,* David V. Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, 15 ARIZ. J. INT’L & COMP. L. 695, 695 (“The civil law should not need promissory estoppel.”).

<sup>15</sup> *See, e.g.,* Bolz v. Myers, 651 P.2d 606, 612 (Mont. 1982) (“[T]he [S]tatute of [F]rauds may not itself be an instrument of fraud or used to cloak fraud .... The statute is intended to prevent fraud, not aid it.”) (citations omitted); *see also* Coral Way Props., 565 So. 2d at 374 (“The Statute of Frauds grew out of a purpose to intercept the frequency and success based on nothing more than loose verbal statements or mere innuendos.”) (citations omitted).

courts to prevent fraud<sup>18</sup> and injustice.<sup>19</sup> They should co-exist.<sup>20</sup> They do.<sup>21</sup> Indeed, the development of each one of the three concepts is instructive and the individual development of any one of the three is not necessarily contingent upon the development of any other one of the three.

Essentially, the Statute of Frauds was enacted to obviate<sup>22</sup> the evidentiary problems<sup>23</sup> associated with certain oral contracts.<sup>24</sup> In contrast, equitable estoppel was carefully developed by the courts to attain justice and fairness in deserving cases.<sup>25</sup> In appropriate instances,<sup>26</sup> equitable estoppel provides a remedy for fraud, material misrepresentation, or material omission relating to the writing requirement<sup>27</sup> of the Statute of

<sup>16</sup> See sources cited *supra* note 12.

<sup>17</sup> See sources cited *supra* note 13.

<sup>18</sup> That is, by either the promisee or promisor as the case may be. See, e.g., *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) (“A party claiming fraud must establish six elements by clear and convincing evidence: a) material misrepresentation, b) which is false, c) known to be false or recklessly made, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury .... Intent to deceive is a necessary element of actionable fraud.”) (citations omitted).

<sup>19</sup> See, e.g., *Ozier v. Haines*, 103 N.E.2d 485, 488 (Ill. 1952) (“The doctrine of equitable estoppel and that of the Statute of Frauds have developed side by side in the law, each for the ultimate purpose of preventing fraud and injustice.”).

<sup>20</sup> *Id.* at 488 (“[E]ach doctrine must be given a field of operation and ... neither should be allowed to completely efface the other.”).

<sup>21</sup> See *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 301, 318 n.30 (Mass. 2007), *cert. denied*, 552 U.S. 1099 (2008) (explaining in dicta that “[e]stoppel may prevail against a Statute of Frauds defense where the litigant claiming estoppel proves: (1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2.) An act or omission resulting from the representation, whether actual or by conduct .... (3.) Detriment to such person as a consequence of the act or omission.”) (emphasis added) (citations omitted).

<sup>22</sup> See *Farmers Bank and Trust Co. of Georgetown, Kentucky*, 171 S.W.3d at 10 (“The purpose of the [S]tatute of [F]rauds is to prevent, not facilitate, fraudulent conduct.”) (citation omitted).

<sup>23</sup> See, e.g., *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1351 (Ill. 1997) (“[The Statute of Frauds] functions more as an evidentiary safeguard than as a substantive rule of contract.”).

<sup>24</sup> See *Lilienthal*, *supra* note 11.

<sup>25</sup> See *Holmes*, *supra* note 5, at 278.

<sup>26</sup> See *Farmers Bank and Trust Co. of Georgetown, Kentucky*, 171 S.W.3d at 10 (“Estoppel is a doctrine of equity, and equitable relief may be granted to relieve the harsh effects of the [S]tatute of [F]rauds.”) (emphasis added) (citations omitted).

<sup>27</sup> See *Monarco v. Lo Greco*, 220 P.2d 737, 740-41 (Cal. 1950) (explaining in dicta that “when there have been representations ... indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense ... [i]n those cases ... where ... an unconscionable injury ... would result from refusal to enforce the

Frauds. In order to succeed in proving equitable estoppel, a party must prove that fraud was perpetrated, or that a material misrepresentation was made at the time of the creation of the pertinent oral agreement.<sup>28</sup>

Promissory estoppel is asserted in order to achieve justice in specified circumstances of particular litigants.<sup>29</sup> Success based upon the assertion of promissory estoppel requires proof of reasonable reliance<sup>30</sup> by one party on the promise or promises made by the other. In addition, the relying party must prove that more appropriate remedies are unavailable, and that promissory estoppel is therefore necessary in order to reach a just and fair resolution of the dispute.<sup>31</sup>

The paths of the Statute of Frauds and equitable estoppel cross<sup>32</sup> when an oral contract—otherwise unenforceable under the Statute of Frauds—was entered into as a result of fraud,<sup>33</sup> misrepresentation,<sup>34</sup> concealment,<sup>35</sup> or omission.<sup>36</sup> Success in establishing any one of these requirements entails proof of two specifics: (i) the fraud, misrepresentation,

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contract, the doctrine of estoppel has been applied ....”).

<sup>28</sup> Proving the occurrence of a material omission at the time of the creation of the pertinent oral agreement may also warrant the application of equitable estoppel. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 915 (Danny Veileux et al. eds., 2007) (1938).

<sup>29</sup> See Holmes, *supra* note 5, at 266 (“[P]romissory estoppel is an equitable theory used to avoid injustice and enforce good faith ....”).

<sup>30</sup> See, e.g., *Moga v. Shorewater Advisors, LLC*, No. A08-785, 2009 WL 982237, at \*7 (Minn. Ct. App. Apr. 14, 2009) (“A plaintiff must establish detrimental reliance to prevail on claims for equitable and promissory estoppel.”) (citations omitted).

<sup>31</sup> See Holmes, *supra* note 5, at 297; *infra* Part II.

<sup>32</sup> See *Ozier v. Haines*, 103 N.E.2d 485, 487 (Ill. 1952) (“The proposition that one may be estopped to assert the Statute of Frauds as a defense is not a new one, and has been invoked ... where the facts presented have warranted its application.”).

<sup>33</sup> A contract entered into as a result of fraud includes fraudulent concealment, or fraudulent omission. See *Brocaill v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 110-11 (Tex. App. 2008) (“Fraudulent concealment [is] also known as fraud by nondisclosure or silent fraud .... [I]n order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure .... [T]he touchstone of liability for ... silent fraud is that *some* form of representation has been made and that it was or proved to be false. Although the defendant’s misrepresentation may be made through words or conduct, the plaintiff’s reliance must have been reasonable.”) (citations omitted).

<sup>34</sup> Proof of misrepresentation is listed as the first of six elements necessary for success in establishing equitable estoppel. See *Ozier*, 103 N.E.2d at 487 (“[S]ix elements must appear in order to invoke the doctrine of equitable estoppel: (1) Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts ....”).

<sup>35</sup> *Id.*

<sup>36</sup> See Holmes, *supra* note 5, at 297; *infra* Part III.



concealment, or omission was material; and (ii) it induced the party asserting equitable estoppel to enter into the pertinent oral contract, without the protective weaponry of a legally appropriate writing.<sup>37</sup>

The Statute of Frauds and promissory estoppel intersect in somewhat similar circumstances. They intersect where a party seeks enforcement of an oral contract that is unenforceable<sup>38</sup> because of the provisions of the Statute of Frauds.<sup>39</sup> The party seeking successful enforcement of such a contract must prove that fairness and justice mandate enforcement, in spite of the absence of the statutorily required writing.<sup>40</sup> This requires proof by the party asserting promissory estoppel that there was legally justified reliance on the promise or promises by the party against whom the promissory estoppel is asserted.<sup>41</sup>

This Article discusses the effect and consequences of the “perennial tension”<sup>42</sup> between formalities and reliance, as the courts determine whether to enforce oral agreements litigated under contract law, in light of the Statute of Frauds, equitable estoppel, and promissory estoppel.<sup>43</sup> The entire discussion takes place against the backdrop of the impact of the Restatement (Second) of Contracts<sup>44</sup> as “charismatic legislation.”<sup>45</sup>

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<sup>37</sup> This is to meet the requirements of the Statute of Frauds.

<sup>38</sup> That is, because there is no writing signed by the party against whom enforcement is sought.

<sup>39</sup> That is, contracts that require a writing mandated by the Statute of Frauds in order to be enforceable.

<sup>40</sup> *Kolkman v. Roth*, 656 N.W.2d 148, 156 (2003) (“The doctrine of promissory estoppel does not eviscerate the [S]tatute of [F]rauds, but only applies to circumvent the statute when necessary to prevent an injustice.”).

<sup>41</sup> *See id.*

<sup>42</sup> *See supra* note 2.

<sup>43</sup> This “perennial tension” may be analogized to one of the “mysteries” referred to by Professor Dworkin. *See* RONALD DWORKIN, *LAW’S EMPIRE* 348 (1986) (“These mysteries are spawned by a single domineering assumption: that their solutions must converge on a particular moment in history, the moment at which the statute’s meaning is fixed once and for all, the moment at which the true statute is born. That assumption has a sequel that as time passes and the statute must be applied in changed circumstances, judges are faced with a choice between enforcing the original statute with the meaning it has always had or *amending* it covertly to bring it up to date. That is the dilemma old statutes are often supposed to present: judges must choose, it is said, between the dead but legitimate hand of the past and the distinctly *illicit* charm of progress.”) (emphasis added).

<sup>44</sup> *See generally* RESTATEMENT (SECOND) OF CONTRACTS (1981).

<sup>45</sup> Although the Restatement (Second) of Contracts is the magnificent product of the work of the American Law Institute and is not the enactment of an orthodox legislature, its legal effect has motivated this Author to coin the term “charismatic legislation” to acknowledge its power to evoke the courts’ respect, acceptance and voluntary obedience. Stephen J. Leacock, *Echoes of The Impact of Webb v. McGowin on the Doctrine of Consideration Under Contract Law: Some Reflections on the Decision on the Approach*

Part I introduces the relevant issues as well as the strategy of obtaining exquisite mileage from satisfying the “one year” provision<sup>46</sup> of the Statute of Frauds, in order to escape the application of the statute altogether. Part II explores distinctions, similarities and fundamental differences between equitable estoppel<sup>47</sup> and promissory estoppel.<sup>48</sup> It then discusses whether a different outcome—based upon the application by the courts of one, or the other, of these two doctrines—is warranted. Part III analyzes the cases in order to investigate the legal effectiveness of the two doctrines at work.<sup>49</sup> The conclusion follows.<sup>50</sup>

### I. ORAL CONTRACTS<sup>51</sup>

Oral contracts are different.<sup>52</sup> When they are for personal services, the differences are intensified. This Article brings two types of these contracts into sharp focus. Attention is focused on circumstances where the contracting parties have created a contract: (a) for a specified duration, and (b) for the life of the party who has agreed to render the personal services. These two types need to be compared.<sup>53</sup> The comparison generates dividends. These dividends warrant discussion. Therefore, oral contracts for personal services provide a valuable context within which to examine the principles of the Statute of Frauds, equitable estoppel, and promissory

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*of its 75th Anniversary*, 1 FAULKNER L. REV. 1, 33 (2009) (“This adoption of the ... moral obligation principle typifies the ‘charismatic legislation’ of the Restatement Second in action.”) (citation omitted). In this respect, it is interpreted and applied by the courts in a manner essentially similar to a validly enacted statute.

<sup>46</sup>See 740 ILL. COMP. STAT. ANN. 80/1-1 (West 2011) (“[N]o actions shall be brought ... upon any agreement ... that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”). Other contracts listed in the statute are also subject to its provisions.

<sup>47</sup>See *infra* note 123 and accompanying text.

<sup>48</sup>See *infra* note 133 and accompanying text.

<sup>49</sup>See *infra* note 197 and accompanying text.

<sup>50</sup>See *infra* text accompanying notes 495-507.

<sup>51</sup>See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 163-64 (1963) (“[T]he judicial process ... is a process of search and comparison .... We have to distinguish between the precedents which are static, and those which are dynamic.”) (footnote omitted).

<sup>52</sup>MARVIN MINSKY, *THE SOCIETY OF MIND* 238 (1985) (“The ability to consider differences between differences is important because it lies at the heart of our abilities to solve new problems.”).

<sup>53</sup>Contracts for personal services, including types (a) and (b), will be compared more fully in Part I.B of this Article.

estoppel because of the “one year” provision of the Statute of Frauds. This point of view merits expansion in the discussion. Let us begin with the “one year” provision of the Statute of Frauds.

*A. The “One Year” Provision of the Statute of Frauds*<sup>54</sup>

It is worth emphasizing that under the “one year” provision of the Statute of Frauds, agreements to be performed<sup>55</sup> within a year from the making of the agreement are *not* subject to the statute.<sup>56</sup> An attorney’s initial strategy, therefore, consists of persuading the court that the pertinent agreement can be performed<sup>57</sup> within a year of its making. However, this “universal” and time-honored statutory exception may be under siege.<sup>58</sup> The basis on which this exception rests is apparently the culprit of the siege.

This culprit, consisting of the substantive conceptions underlying the exception, is a function of a specific distinction. This distinction has been developed by the common law to make it work more efficiently in these

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<sup>54</sup>See E. ALLAN FARNSWORTH, *CONTRACTS* 372 (4th ed., Aspen Publishers 2004) (“Although the one-year provision has been repealed in England, it is the law in virtually all of the American states. But of all the provisions of the statute, it is the most difficult to rationalize.”); see also *C.R. Klewin, Inc., v. Flagship Props., Inc.*, 600 A.2d 772, 775 (Conn. 1991) (“[T]he one-year provision ... has caused the greatest puzzlement among commentators.”).

<sup>55</sup>This means *capable* of being performed within a year. See, e.g., *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139, 1143 (Fla. Dist. Ct. App. 2008) (“The general rule is that an oral contract for an indefinite time is not barred by the Statute of Frauds. Only if a contract could not *possibly* be performed within one year would it fall within the statute.”)(emphasis added)(citations omitted).

<sup>56</sup>The following Florida statutory provision is typical: Section 725.01 of Florida Statutes applies to: “[A]ny agreement that is not to be performed within the space of 1 year from the making thereof ... [u]nless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.” FLA. STAT. ANN. §725.01 (West 2010).

<sup>57</sup>See, e.g., *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1351 (Ill. 1997) (“There are ... exceptions to the [S]tatute of [F]rauds’[s] writing requirement which permit the enforcement of certain oral contracts required by the statute to be in writing. One such exception is the judicially created exclusion for contracts of uncertain duration ... [M]any courts have construed the words ‘not to be performed’ to mean ‘not capable of being performed’ within one year.”)(citations omitted).

<sup>58</sup>At least, in the employment/labor law context. See Matthew R. Chapman, Note, *Who Can Afford Common Sense? The Illinois Supreme Court Rejects Time-Honored Exception to Statute of Frauds One Year Rule in McInerney v. Charter Golf, Inc.*, ST. LOUIS U. L.J. 137, 138 (1999) (“While Illinois is the first jurisdiction to outright reject this time-honored exception, *McInerney* may constitute the beginning of a trend to rewrite historical precedent in favor of a common sense approach to the one year rule.”).

contexts. It is the distinction between two types of termination that may not be intuitively clear when first examined. Closer scrutiny is needed.

First of all, there is termination of a contract by a factor, or factors, *other than performance*. Secondly, we have termination of a contract *by performance*. Different legal consequences are set in motion by the occurrence of one or the other of these two different types of termination.

These different legal consequences, based upon the juridical differences between these two types of termination, have been respected for centuries.<sup>59</sup> In this regard, they are an integral part of the substantive jurisprudence of the forty-nine common law jurisdictions in the U.S.<sup>60</sup>

### *B. Distinctions Between Termination Other Than by Performance and Termination by Performance*

The examination of contracts for personal services, mentioned earlier, is particularly helpful. Such contracts are terminated by the death of the party who has agreed to render the personal services. This is settled law.<sup>61</sup> However, termination of the contract does *not* really end the legal inquiry.

#### *1. Termination of a Contract by a Factor, or Factors, Other Than By Performance*

For example, a contract to render personal services, for (a) a specified duration of five years,<sup>62</sup> will certainly be terminated by the death, prior to the lapse of the five years, of the party who has agreed to render the agreed-upon personal services.<sup>63</sup> The death of such a party cuts the

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<sup>59</sup> See, e.g., *Warner v. Tex. & Pac. Ry. Co.*, 164 U.S. 418, 422-23 (1896) (“[A]n oral [contract] which, *according to the intention of the parties*, as shown by the terms of the contract, might be fully *performed* within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.”)(emphasis added).

<sup>60</sup> Many of these jurisdictions have enacted similar provisions. *Id.* at 423 (“The several states of the Union, in re-enacting this provision of the [S]tatute of [F]rauds *in its original words*, must be taken to have adopted the known and settled ... decisions in England.”) (emphasis added)(citations omitted).

<sup>61</sup> See *LaMaster v. Chi. and N.E. Illinois Dist. of Carpenters Apprentice and Trainee Program*, 766 F. Supp. 1497, 1507 (N.D. Ill. 1991) (“[T]he death of the employee would terminate the agreement (as is true in *every* employment contract) ...”) (emphasis added).

<sup>62</sup> These legal principles are similarly applicable to any specified duration that the parties have agreed to that exceeds one year.

<sup>63</sup> However, because the contract was agreed by the parties to be for five years, when

contract short, by ending it prior to the elapse of the five-year specified duration to which the parties agreed. Such death ends the contract prematurely.<sup>64</sup> In spite of the premature death,<sup>65</sup> however, under the terms of the contract a period of time remained unperformed.<sup>66</sup> This is true.<sup>67</sup> Five years cannot elapse within a shorter time than *five years*.<sup>68</sup> However, the common law of contracts does not impose legal liability on the deceased or his or her estate in these circumstances. This is uncontroversial.<sup>69</sup>

It is also conceded that other events that occur *prior* to the elapse of the agreed upon term may terminate such a contract prematurely as well.<sup>70</sup>

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the death occurs *prior* to the lapse of five years, such a termination is by operation of law (that is to say, by the death). Unequivocally, death prior to the lapse of five years is *not* performance of the contract. Such a death is a discharge of the contract by impossibility of full performance and the contract is terminated by the orthodox contract law concept of *frustration* under the common law. *See, e.g.*, *Buccini v. Paterno Constr. Co.*, 170 N.E. 910, 911 (N.Y. 1930) (Cardozo states that “[t]he contract being personal, the effect of [the] death was to terminate the duty of going forward with performance”); *see also* *Joy Mfg. Corp., v. Jones*, 381 S.W.2d 860, 863 (Mo. 1964) (“[T]his contract falls within the general rule; that in this contract, which called for the performance of highly individualized personal services ... [the] death terminated and discharged [the contract].”).

<sup>64</sup> *Buccini*, 170 N.E. at 911.

<sup>65</sup> Of the party who had agreed to render the personal services for five years.

<sup>66</sup> Personal service contracts are contracts for *unique exclusivity* (that is, the services that *only* the deceased could legally render while alive).

<sup>67</sup> However, although personal service contracts are contracts for *unique exclusivity*, the death of the person, who has agreed to render the personal services, is *not* a breach of the contract. On fundamental principles of justice and fairness, the common law of contracts excuses the deceased from liability for his or her premature death, in light of the unique exclusivity phenomenon. So, the estate of the deceased is not assessed any legal liability under the contract for the deceased’s premature demise.

<sup>68</sup> Five years can most certainly *not* elapse within the space of one year. *See* BRIAN GREENE, *THE ELEGANT UNIVERSE* 205 (1999) (“Time, as we know it, is a dimension we can traverse in only one direction with absolute inevitability ...”); *see also* STEPHEN HAWKING, *A BRIEF HISTORY OF TIME* 145 (1988) (“This is the direction in which we feel time passes, the direction in which we remember the past but not the future.”); *Goldstick v. ICM Realty*, 788 F.2d 456, 464 (7th Cir. 1986) (Posner, J.) (“Some promises, for example a promise to work for an employer for five years, really cannot be *performed* within a year.”)(emphasis added).

<sup>69</sup> *See supra* note 67.

<sup>70</sup> This is not a definitive list, however, these events include instances where: (i) a party may materially breach the contract, giving rise to the legal consequences of such conduct, *see, e.g.*, *Liddle v. Petty*, 816 P.2d 1066, 1068 (Mont. 1991) (“If one of the contracting parties materially breaches the contract, the injured party is entitled to suspend his performance.”); (ii) the contract may become illegal subsequent to its formation by the parties, *see, e.g.*, *Watrel v. Pennsylvania. Dep’t. of Educ.*, 488 A.2d 378, 381 n.7 (Pa. Commw. Ct. 1985) (“The doctrine of intervening illegality functions to

However, the agreement of the parties *specifically selecting the particular duration*<sup>71</sup> is the critical factor that makes the Statute of Frauds applicable to such an agreement. Moreover, where the Statute of Frauds applies, a writing,<sup>72</sup> signed by the party to be charged, is required in order to make such agreements legally enforceable.<sup>73</sup>

## 2. Termination of a Contract by Performance

In contrast, a contract (b) to render personal services for the *life* of the party who has agreed to render the personal services is in a class by itself. This is the case because termination of a contract by *performance*<sup>74</sup> is conceptually different<sup>75</sup> from other types of termination.<sup>76</sup> Termination of a contract by *performance* is a function of freedom of contract.<sup>77</sup> Court acknowledgment and enforcement of this conceptual difference respects the preeminence of the parties' intention under the fundamental doctrine of freedom of contract. The courts did not create this phenomenon of potential termination within a year from the making of the agreement. The

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discharge a contractual duty when a promise, lawful when made, becomes unlawful because of subsequent legislation or other governmental action.”) (citations omitted).

<sup>71</sup> It is a fundamental aspect of physics that five years cannot elapse within a year of the making of such an agreement.

<sup>72</sup> See *supra* note 46.

<sup>73</sup> See *supra* note 46.

<sup>74</sup> See, e.g., *Collection and Investigation Bureau of Maryland, Inc., v. Linsley*, 375 A.2d 47, 49 (Md. Ct. Spec. App. 1977) (“The general rule is that a ... contract for personal [services] imposes only a personal liability on the promisor and is fully *performed* ... during his lifetime. When the promise is for ... the life of the promisor, it is not within the ambit of the Statute of Frauds because, life being itself indefinite and uncertain, the promisor may die within the space of one year.”) (emphasis added).

<sup>75</sup> Under the doctrine of freedom of contract.

<sup>76</sup> See, e.g., *Linsley*, 375 A.2d at 51 (“[W]e align ourselves with the view of the majority of our sister States that there is a distinction between termination [of a contract other than by performance] and [termination of a contract by] performance.”) (citations omitted).

<sup>77</sup> See *Hlasnick v. Federated Mut. Ins. Co.*, 539 S.E.2d 274, 276 (N.C. 2000) (“Freedom of contract is a fundamental constitutional right.”) (citations omitted); see also *O’Callaghan v. Walker & Beckwith Realty Co.*, 155 N.E.2d 545, 546 (Ill. 1958) (“Freedom of contract is basic to our law.”).

parties did.<sup>78</sup> The courts simply give legal effect to the unambiguous intention of the parties.<sup>79</sup>

*a. Legal Effect of Death*

In order to provide further clarification, let us compare the legal effect of the death of a party who has agreed to render personal services under: (a) a contract for personal services for a specified duration; and (b) a contract for personal services *for his*<sup>80</sup> *life*. Certainly, under both types (a) and (b), the party who has agreed to render the personal services may die within a year from the making of the contract. The legal effect of such death in both instances would be termination of the contract.<sup>81</sup>

However, the conceptual differences between the termination of a contract under (a)<sup>82</sup> and the one under (b)<sup>83</sup> are fundamental. Both types of contract are certainly and unequivocally ended by the death of the party, who has agreed to the obligation of rendering the personal services.<sup>84</sup> That is accurate. However, it is worth emphasizing that, with regard to a contract for the *life* of the party who has agreed to render the personal services, the death of such a party is a termination by the *performance*<sup>85</sup> to which the parties have agreed. This is not a contrived conception.<sup>86</sup> It is genuine.<sup>87</sup> It is valid. The Statute of Frauds has no application whatsoever to such an agreement *because the agreement can be performed within a year from its making*.<sup>88</sup>

The contrast is this. Where a party has contracted to render personal services for life, his or her death ends the contract by *performance*.<sup>89</sup> The

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<sup>78</sup> See, e.g., *Goldstick v. IMC Realty*, 788 F.2d 456, 461 (7th Cir. 1986) (Posner, J.) (“The parties have the comparative advantage over the court in deciding on what terms a voluntary transaction is value-maximizing; that is a premise of a free-enterprise system.”).

<sup>79</sup> *Id.*

<sup>80</sup> Or her.

<sup>81</sup> *LaMaster v. Chi. and N.E. Illinois Dist. of Carpenters Apprentice and Trainee Program*, 766 F. Supp. 1497, 1507 (N.D. Ill. 1991).

<sup>82</sup> See *supra* notes 62-69.

<sup>83</sup> See *supra* notes 74-76.

<sup>84</sup> See *supra* note 63.

<sup>85</sup> This is irrefutable as a result of the parties’ specific agreement and as a function of freedom of contract. See *supra* note 77.

<sup>86</sup> See *supra* note 79.

<sup>87</sup> See *supra* note 79.

<sup>88</sup> That is, the party obligated to render the services can die within a year of the making of such an agreement. See *supra* notes 77-79.

<sup>89</sup> Death of a party unequivocally ends a contract “for the life of the party” by the explicit terms of the contract.

death does *not* end the contract by frustration of the parties' intentions. Rather, it is a culmination of that intention. Termination by frustration and termination by performance are two profoundly different<sup>90</sup> concepts under contract law.

In *McInerney v. Charter Golf, Inc.*,<sup>91</sup> the Illinois Supreme Court disagreed with these distinctions, referring to them as “hollow and unpersuasive.”<sup>92</sup> However, Justice Nickels's dissent in the case merits careful consideration.<sup>93</sup> It may, in the future, assist the Illinois Supreme Court in realigning<sup>94</sup> its position with the mainstream of common law courts' judicial decisions<sup>95</sup> on these issues. The majority of the court needed to acknowledge and *concede* that “a relationship of long duration” is *also* amply satisfied by a period of time that is less than a year.<sup>96</sup> Nevertheless, the legislature saw fit to enact a period of less than year as an *exception* to the Statute of Frauds.<sup>97</sup> This invalidates the quintessence of the court's decision and makes its decision rationally unpersuasive.<sup>98</sup>

A comparison of the court's conception of a “lifetime” employment contract,<sup>99</sup> on the one hand, and a contract for a duration just short of a

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<sup>90</sup> Freedom of contract merits intellectual honor and respect.

<sup>91</sup> 680 N.E.2d 1347 (Ill. 1997).

<sup>92</sup> *Id.* at 1351.

<sup>93</sup> The dissenting opinion of Justice Nickels is more rationally convincing. *See id.* at 1355 (Nickels, J., dissenting) (“Lacking any reasoned basis for its holding, the majority resorts to nearly tautological wordplay, declaring that because a ‘lifetime’ employment contract is essentially a ‘permanent’ employment contract, it inherently anticipates a relationship of long duration.”) (citations omitted).

<sup>94</sup> *See* THE BLACKWELL COMPANION TO LAW AND SOCIETY 186 (Austin Sarat ed., 2004) (“[C]ourts have an interest in minimizing the disruptive effects of overturning existing rules of behavior. If courts seek to radically change existing rules, then the changes may be more than that to which the members of the community can adapt, resulting in decisions that do not produce rules that will be efficacious.”).

<sup>95</sup> *See supra* notes 76 and 78; *see also* Chapman, *supra* note 58, at 138 (“Illinois is the first jurisdiction to outright reject this time-honored exception . . .”).

<sup>96</sup> A contract for less than a year *also* “[i]nherently . . . anticipates a relationship of long duration.” *Robinson v. BDO Seidman, L.L.P.*, 854 N.E.2d 767, 772 (Ill. App. Ct. 2006). The court failed to fully grasp this actuality. If the court understood this reality, then it would have been intellectually at peace with the rational security of so many other courts that perceive the fundamental distinctions between *termination by performance* and *termination by factor(s) other than performance*.

<sup>97</sup> 740 ILL. COMP. STAT. 80/1 (West 2011).

<sup>98</sup> *See McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1354 (1997) (Nickels, J., dissenting).

<sup>99</sup> *See id.* at 1351-52 (“A ‘lifetime’ employment contract is, in essence, a permanent employment contract. Inherently, it anticipates a relationship of long duration . . .”).



year<sup>100</sup> is helpful. Arguably, both “anticipate[] a relationship of long duration.”<sup>101</sup> Therefore, in enacting the “one year provision” as an exception to the Statute of Frauds, the legislature intended *some* contracts that contemplate a relationship of long duration to be an exception to the application of the Statute of Frauds. The court therefore did not construe the Statute of Frauds to fully realize the underlying policy intended by the legislature.<sup>102</sup> The court’s obligation is to interpret statutes in a manner constrained to give full effect to legislative intent consonant with the court’s separation of powers function.<sup>103</sup> The dissenting opinion of Justice Nickels is closer to Justice Cardozo’s conception<sup>104</sup> than the court’s actual opinion.

### *C. Oral Contracts Subject to the Statute of Frauds*

With respect to oral contracts subject to the Statute of Frauds,<sup>105</sup> this much is substantive: when such contracts are without a legally qualifying writing, any assertion of equitable estoppel to validate their enforcement requires proof of material misrepresentation<sup>106</sup> if the Statute of Frauds is to be given any legally cognizable effect at all.<sup>107</sup> The separation of powers

<sup>100</sup> For example, a contract for eleven months.

<sup>101</sup> *Robinson*, 854 N.E.2d at 772.

<sup>102</sup> The court, of course, thought that it did. See *McInerney*, 680 N.E.2d at 1352 (“To hold otherwise would eviscerate the policy underlying the [S]tatute of [F]rauds and would invite confusion, uncertainty and outright fraud.”).

<sup>103</sup> See CARDOZO, *supra* note 51, at 141 (“The judge ... is not to innovate at pleasure .... He is to draw his inspiration from consecrated principles .... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”).

<sup>104</sup> See *McInerney*, 680 N.E.2d at 1354 (Nickels, J., dissenting).

<sup>105</sup> See, e.g., 740 ILL. COMP. STAT. 80/1, *supra* note 97 (addressing those oral contracts under the category of contracts “not to be performed within the space of one year from the making thereof”).

<sup>106</sup> Or alternatively, material concealment, or material omission. As a recent case articulated, six elements must be satisfied for the doctrine of equitable estoppel to apply. See *Lowe v. Lancaster Cnty. Sch. Dist. 0001*, 766 N.W.2d 408, 415 (Neb. Ct. App. 2009) (“(1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.”).

<sup>107</sup> See *Ozier v. Haines*, 103 N.E.2d 485, 488 (Ill. 1952).

doctrine commands judicial respect for legislative enactments.<sup>108</sup> However, the interpretation<sup>109</sup> of *the legal effect* of statutes is, of course, the bailiwick of the judiciary. The courts are empowered to determine “the point of counterbalance.”<sup>110</sup> On any given set of facts, the duty of the courts is to decide whether the statute or the judicially-crafted<sup>111</sup> equitable estoppel doctrine prevails.<sup>112</sup> As the Illinois Supreme Court explicitly articulated, this is “the point of counterbalance between the two doctrines.”<sup>113</sup> This determines which of the two shall be preeminent<sup>114</sup> in each case. The factual record must be appropriately convincing.<sup>115</sup> If so, in spite of the absence of a legally valid writing, courts may enforce the contract<sup>116</sup> under the umbrella of equitable estoppel.<sup>117</sup> However, material misrepresentation,<sup>118</sup> material omission, or actionable concealment<sup>119</sup> must be proven<sup>120</sup> to the court’s satisfaction.<sup>121</sup>

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<sup>108</sup> See *Lichter v. United States*, 334 U.S. 742, 779 (1948). See also CARDOZO, *supra* note 51, at 14 (“Where does the judge find the law which he embodies in his judgment? ... The rule that fits the case may be supplied by ... statute. If that is so, the judge looks no farther .... [H]is duty is to obey.”).

<sup>109</sup> CARDOZO, *supra* note 51, at 16 (“The judge as the interpreter ... must ... harmonize results with justice ....”).

<sup>110</sup> See *Ozier*, 103 N.E.2d at 488.

<sup>111</sup> See *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516, 518 (Ill. 1964) (noting that the equitable estoppel doctrine “has sprung from the unwritten law.”).

<sup>112</sup> See *Ozier*, 103 N.E.2d at 488 (“[A] fraudulent intention or purpose is not essential to the doctrine of estoppel, but in cases involving oral contracts the estoppel must be based on misrepresentation or concealment if the Statute of Frauds is to be given effect at all. That is the point of counterbalance between the two doctrines.”).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; see, CARDOZO, *supra* note 51, at 29 (“Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully.”).

<sup>115</sup> See, e.g., *Cross v. Weare Comm'n Co.*, 38 N.E. 1038, 1043 (Ill. 1894) (“Where a person induces another to believe in the existence of a certain state of things, and to act on that belief so as to alter his own previous position [to his detriment], he is concluded from averring against such other person a different state of things as existing at the same time.”).

<sup>116</sup> The court thus enforces the contract despite the *normative* application of the Statute of Frauds. See *Ozier*, 103 N.E.2d at 488 (noting that in cases involving oral contracts, the existence of misrepresentation or fraud can take an agreement “out of the Statute of Frauds” via the estoppel doctrine); see also RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

<sup>117</sup> *And* in the interests of justice and fairness. See RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.”).

<sup>118</sup> See, e.g., *Cross*, 38 N.E. at 1042-43 (addressing the misrepresentation that a

## II. EQUITABLE ESTOPPEL AND PROMISSORY ESTOPPEL COMPARED AND CONTRASTED IN THE CONTEXT OF THE STATUTE OF FRAUDS<sup>122</sup>

### A. Requirements for Proof of Equitable Estoppel<sup>123</sup>

Equitable estoppel has a long history of helping to nullify a number of contract defenses<sup>124</sup> in appropriate circumstances.<sup>125</sup> It will continue to do so. Some courts vary in their articulation of the number of elements necessary to prove equitable estoppel.<sup>126</sup> For example, the court in *Derby*

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signature on a mortgage was not necessary when it *was* legally required).

<sup>119</sup> See 26 RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:21 (4th ed. 2010).

<sup>120</sup> See, e.g., *Nat'l Importing & Trading Co. v. Bear & Co.*, 155 N.E. 343, 348 (Ill. 1927) (“It is a principle reaching to the very roots of justice that no man shall be allowed to take advantage of another’s omission which have been induced by his own request. The [S]tatute of [F]rauds was not designed or intended to afford an opportunity for escape from the fundamental principle that no one shall be permitted to found a claim upon his own iniquity or take advantage of his own wrong.”) (citations omitted).

<sup>121</sup> *Id.*

<sup>122</sup> See Holmes, *supra* note 5, at 268 n.7. (providing references to a plethora of helpful legal literature on these doctrines quite exhaustively and very effectively compiled).

<sup>123</sup> See, e.g., *Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 995 (Ill. App. Ct. 1990) (“The elements of *equitable* estoppel are: (1) words or conduct by the party against whom the estoppel is alleged consisting of misrepresentations or concealment of material facts; (2) the party against whom the estoppel is alleged must have actual or implied knowledge at the time the representations are made that they are untrue; (3) the truth regarding the representations is unknown to the party claiming the benefit of estoppel both at the time they are made and when they are acted on by him; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the party claiming estoppel; (5) the party claiming estoppel does rely and act on the representations and in such a manner, that he would be prejudiced if the party making the representations is allowed to deny the truth thereof.”) (emphasis added) (citations omitted); see also *Maffei v. Roman Catholic Archbishop of Boston*, 867 N.E.2d 300, 318 n.30 (Mass. 2007) (“[Equitable] [e]stoppel may prevail against a Statute of Frauds defense where the litigant claiming estoppel proves: '(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2.) An act or omission resulting from the representation, whether actual or by conduct .... (3.) Detriment to such person as a consequence of the act or omission.’”) (citations omitted).

<sup>124</sup> See Holmes, *supra* note 5, at 277 (“[E]stoppel provided ... a defensive reliance shield to estop contract defenses (e.g., statutes of limitations and frauds, and the parol evidence rule) from being raised.”).

<sup>125</sup> See *id.* at 277-78, n.28.

<sup>126</sup> See, e.g., *Derby Meadows*, 559 N.E.2d at 995, *Maffei*, 867 N.E.2d at 318 n.30; see also *Lowe v. Lancaster County Sch. Dist. 0001*, 766 N.W.2d 408, 415 (Neb. Ct. App. 2009) (“Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and

*Meadows Utility Co. v. Village of Orland Park*<sup>127</sup> identified five elements to be proven.<sup>128</sup> In *Lowe v. Lancaster County School District 0001*,<sup>129</sup> the court listed six elements.<sup>130</sup> In *Maffei v. Roman Catholic Archbishop of Boston*,<sup>131</sup> the court listed three necessary elements.<sup>132</sup> As confirmed by these cases, however, the conceptual substance required for proof remains constant.

*B. Requirements for Proof of Promissory Estoppel*<sup>133</sup>

Promissory estoppel developed from equitable estoppel.<sup>134</sup> Although it is an equitable doctrine and is not a hybrid, it nevertheless creatively adapts contract or tort principles, as needed, when those principles are relevant to accomplishing its goals.<sup>135</sup> Proof of promissory estoppel requires a plaintiff to establish the making of: (1) a promise, (2) proof that

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inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.”) (citations omitted).

<sup>127</sup> See *Derby Meadows*, 559 N.E.2d at 995.

<sup>128</sup> *Id.*

<sup>129</sup> See *Lowe*, 766 N.W.2d at 415.

<sup>130</sup> *Id.*

<sup>131</sup> See *Maffei*, 867 N.E.2d at 318 n.30.

<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., *Derby Meadows*, 559 N.E.2d at 995 (“The elements of promissory estoppel are: ‘(1) a promise, (2) which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (3) which induces such action [or] forbearance, and (4) which must be enforced to avoid injustice.’”) (citations omitted).

<sup>134</sup> See Holmes, *supra* note 5, at 277 (“Commencing with cases in the nineteenth century ... promissory estoppel in its American genesis [evidences] an assimilation of two developmental attributes from the equitable principle of estoppel.”).

<sup>135</sup> See *Matarazzo v. Millers Mut. Group*, 927 A.2d 689, 696 (Pa. Commw. Ct. 2007) (“[P]romissory estoppel contains elements of both negligence and contract .... [T]he key element of promissory estoppel, reliance, is not ‘peculiar to the law of contracts’ .... Reliance is also a ‘feature of numerous rules in the law of negligence, deceit and restitution ....’”) (citations omitted); see also *Goldstick v. ICM Realty*, 788 F.2d 456, 463 (7th Cir. 1986) (“[One] approach treats promissory estoppel as a tort doctrine for purposes of damages, though it is conventionally classified as a contract doctrine .... Some cases do award just the tort measure of damages in promissory estoppel cases, rather than giving the plaintiff the value of the promise, which he would be entitled to in a breach of contract action.”) (citations omitted).

the promisor should have reasonably expected the promise to induce action or forbearance of a definite and substantial character on the part of the promisee, (3) proof that the promise induces such action or forbearance, and (4) proof that the promise must be enforced in order to avoid injustice.<sup>136</sup>

*C. Equitable Estoppel, Promissory Estoppel, and the Statute of Frauds*<sup>137</sup>

A comparison of the requirements for proof of the elements of equitable estoppel and promissory estoppel helps identify similarities and articulable differences. Similarities between equitable estoppel and promissory estoppel are acknowledged.<sup>138</sup> Both doctrines require proof of detrimental reliance.<sup>139</sup> Both doctrines also require proof that enforcement of the pertinent agreement is necessary in order to avoid injustice.<sup>140</sup> These are inherent requirements for success on both claims.<sup>141</sup> This stems from the equitable roots<sup>142</sup> of both doctrines.<sup>143</sup>

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<sup>136</sup> *Derby Meadows*, 559 N.E.2d at 995 (Ill. App. Ct. 1990); cf. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981) (deleting “of a definite and substantial character” from requirement (2) in the text.)

<sup>137</sup> A haunting question has been asked by one court. The question remains unanswered. *See Alaska Airlines v. Stephenson*, 217 F.2d 295, 297 (9th Cir. 1954) (“At the outset, one may well wonder if the courts from the beginning had vigorously enforced the [S]tatute of [F]rauds from its first adoption in England, wouldn’t we have less injustice? If people were brought up in the tradition that certain contracts inescapably had to be in writing, wouldn’t those affected thereby get their contracts into writing and, on the whole, wouldn’t the public be better off?”).

<sup>138</sup> *See Derby Meadows*, 559 N.E.2d at 995 (distinguishing the elements of *equitable estoppel* and *promissory estoppel*).

<sup>139</sup> *See, e.g., Moga v. Shorewater Advisors, L.L.C.*, No. A08-785, 2009 WL 982237, at \*7 (Minn. Ct. App. Apr. 14, 2009) (“A plaintiff must establish detrimental reliance to prevail on claims for equitable and promissory estoppel.”) (citations omitted). With respect to promissory estoppel, not all commentators share this view. *See Farber & Matheson, supra* note 6, at 904 (“We have recently surveyed over two hundred promissory estoppel cases decided in the last ten years. Our conclusion is that reliance is no longer the key to promissory estoppel. Although courts still feel constrained to speak the language of reliance, their holdings can best be understood and harmonized on other grounds.”) (footnotes omitted).

<sup>140</sup> *See, e.g., Derby Meadows*, 559 N.E.2d at 995.

<sup>141</sup> *Id.*

<sup>142</sup> *See Holmes, supra* note 5, at 270.

<sup>143</sup> *See Peluso v. Kistner*, 970 A.2d 530, 533 (Pa. Commw. Ct. 2009) (“Promissory estoppel is an outgrowth of equitable estoppel.”) (citation omitted). *See also Coral Way Props., Ltd. v. Roses*, 565 So. 2d 372, 374 (Fla. Dist. Ct. App. 1990) (“Promissory estoppel is a qualified form of equitable estoppel.”) (citation omitted); *Holmes, supra* note 5, at 277 (“Commencing with cases in the nineteenth century ... promissory estoppel in its American genesis [evidences] an assimilation of two developmental attributes from

Moreover, an examination of the origins<sup>144</sup> of promissory estoppel sheds some light on this inquiry. A significant aspect of the development of promissory estoppel has been its role as a help-mate to basic contract law.<sup>145</sup> Promissory estoppel developed to assist promisees, who negotiated with promisors, in their attempts to enforce the promises of promisors that failed to ripen into valid contracts.<sup>146</sup> Successful court enforcement of such promises is based upon the promisees' reliance on such promises.<sup>147</sup> This context may be perceived as the orthodox context<sup>148</sup> of promissory estoppel.<sup>149</sup>

In this context, a plaintiff does not have to prove lack of integrity or the presence of dishonesty on the part of the promisor<sup>150</sup> in order to achieve success<sup>151</sup> in asserting promissory estoppel. The judicially determined degree of reliance that rises to the appropriate level is

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the equitable principle of estoppel.”).

<sup>144</sup> See Holmes, *supra* note 5, at 277.

<sup>145</sup> *Id.* at 284.

<sup>146</sup> See Peluso, 970 A.2d at 532-33 (“[D]etrimental reliance ... is another name for promissory estoppel .... Promissory estoppel enables a person to enforce a contract-like promise that would be otherwise unenforceable under contract law principles .... For example, the doctrine allows a party to enforce a promise that is not supported by consideration .... [W]here ‘there is no enforceable agreement between the parties because the agreement is not supported by consideration, the doctrine of promissory estoppel is invoked to avoid injustice by making [such a promise] enforceable ....”) (citations omitted).

<sup>147</sup> See *id.* at 533 (“[The] factors [of promissory estoppel] are strictly enforced to guard against the ‘loose application’ of [the doctrine] .... The change in the plaintiff’s position must be *substantial*, and there is ‘no injustice in being deprived of a gratuitous benefit.’”) (citations omitted) (emphasis added). But see Farber & Matheson, *supra* note 6, at 910 (“Our ... most important finding is the diminished role of reliance in determining liability. The essential requirement for liability on a promissory estoppel theory has traditionally been some specific action in justifiable reliance on the promise. This requirement of an identifiable detriment no longer defines the boundary of enforceability.”) (footnote omitted). However, Farber & Matheson strike a note of caution later in their article. See *id.* at 914 (“We do *not* claim that *all the cases* can be reconciled with the conclusion that detrimental reliance is no longer the key to promissory estoppel.”) (emphasis added).

<sup>148</sup> See Peluso, 970 A.2d at 532-33.

<sup>149</sup> See, e.g., Goldstick v. ICM Realty, 788 F.2d 456, 462 (7th Cir. 1986) (“If an unambiguous promise is made in circumstances calculated to induce reliance, and it does so, the promisee if hurt as a result can recover damages.”) (citations omitted).

<sup>150</sup> Proof of valid reliance by the promisee, on the promise made by the promisor, can be ruled by the courts to be enough to support some recovery by the promisee. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); see also *infra* note 152.

<sup>151</sup> See Goldstick, 788 F.2d at 462.

sufficient.<sup>152</sup> So, this much is evident. It must be acknowledged, however, that the requirements needed to successfully prove promissory estoppel have been markedly muted<sup>153</sup> in situations where the courts have permitted successful pleadings of promissory estoppel.<sup>154</sup>

Permitting promissory estoppel to overcome a Statute of Frauds defense is fundamentally different from other, more orthodox applications of promissory estoppel. Valid reasons support this point of view. Where a plaintiff pleads promissory estoppel in an effort to overcome a Statute of Frauds defense, a number of courts<sup>155</sup> treat assertions of promissory estoppel as insufficient to overcome a Statute of Frauds defense.<sup>156</sup> This is because proof of promissory estoppel does *not* require proof of the egregiousness component of misrepresentation, material concealment, or material omission that proof of equitable estoppel mandates.<sup>157</sup>

Nevertheless, some courts<sup>158</sup> have concluded that not only equitable estoppel, but alternatively, promissory estoppel will render an otherwise unenforceable contract actionable in spite of the Statute of Frauds.<sup>159</sup> The primary distinction between the two doctrines has already been discussed.<sup>160</sup>

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<sup>152</sup> See *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (Wis. 1965) ("While ... two of the ... three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy [of promissory estoppel] can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.").

<sup>153</sup> See, e.g., *Brook, Weiner, Sered, Kreger & Weinberger v. Coreq, Inc.*, No. 91 C 7955, 1994 WL 444798, at \*3 (N.D. Ill. Aug. 14, 1994) ("The primary distinction between promissory and equitable estoppel is that equitable estoppel has the additional element of a knowing misrepresentation of a material fact.") (citations omitted).

<sup>154</sup> See *Hoffman*, 133 N.W.2d at 275.

<sup>155</sup> See *infra* note 203 and accompanying text discussing the traditional stream of authority.

<sup>156</sup> See *Fischer v. First Chi. Capital Mkts., Inc.*, 195 F.3d 279, 284 (7th Cir. 1999) ("Under Illinois law, the [S]tatute of [F]rauds is applicable to a promise claimed to be enforceable by virtue of the doctrine of promissory estoppel .... [The Statute of Frauds] precludes recovery under a promissory estoppel theory.") (citations omitted); *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516, 518-19 (Ill. 1964); *Ozier v. Haines*, 103 N.E.2d 485, 488 (Ill. 1952).

<sup>157</sup> See *infra* notes 193-194.

<sup>158</sup> See *infra* Part III.B.4 discussing the reliance stream of authority.

<sup>159</sup> See, e.g., *R.S. Bennett & Co. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182, 188 (7th Cir. 1979) (arguing that the fears that a promissory estoppel exception to the Statute of Frauds would hold the statute nugatory have dissipated in light of other exceptions to the statute such as judicial admission of the existence of the promise by the party raising the defense).

<sup>160</sup> See *supra* notes 152-154.

Additionally, some commentators<sup>161</sup> seem to suggest that any fundamental distinctions between equitable estoppel and promissory estoppel have eroded over time.<sup>162</sup> This may only be partially valid, and caution is advised based on the following observations. While the similarity of *some* of the elements of equitable estoppel and promissory estoppel is acknowledged,<sup>163</sup> the differences between the two doctrines should not be overlooked or ignored. The differences between the two doctrines speak volumes. The significance of the differences explains why a number of courts hesitate to blur the distinction between the two doctrines. This hesitation makes sense.<sup>164</sup>

More particularly, judicial reluctance to allow promissory estoppel to defeat a Statute of Frauds defense is based upon a palpable apprehension. The judicial apprehension is that unrestrained invocation of the promissory estoppel doctrine in this context would inevitably subvert the Statute of Frauds too radically.<sup>165</sup> A number of reasons support this judicial apprehension.

Certainly, promissory estoppel may adapt tort elements, when appropriate, in order to attain fair and just outcomes.<sup>166</sup> However, courts treat these tort elements simply as helpful components in assessing the monetary recovery that is appropriate for the particular case.<sup>167</sup> The tort element in such cases is not the degree of degeneracy, if you like, of the conduct<sup>168</sup> implicated in successfully invoking *equitable* estoppel to overcome a Statute of Frauds defense. The degree of degeneracy implicated in a successful equitable estoppel assertion is high. Compare

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<sup>161</sup> See, e.g., Holmes, *supra* note 5, at 479 (“In its older opinions, the Virginia Supreme Court appears to regard equitable and promissory estoppel as interchangeable.”).

<sup>162</sup> See *supra* notes 5 and 9.

<sup>163</sup> See, e.g., *Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 995 (Ill. App. Ct. 1990) (“[B]oth [equitable estoppel and promissory estoppel] consist of words or conduct by one party which is expected or intended to cause action or forbearance on the part of another party ....”).

<sup>164</sup> See *id.* (“[E]quitable estoppel is based on an intended misrepresentation or concealment of a material fact while promissory estoppel is based on a promise which is a declaration that one will do or refrain from doing something specified.”) (citation omitted).

<sup>165</sup> See, e.g., *Ozier v. Haines*, 103 N.E.2d 485, 487 (Ill. 1952) (“[T]he moral wrong of refusing to be bound by an agreement because it does not comply with the Statute of Frauds, does not of itself authorize the application of the doctrine of estoppel .... To hold otherwise would be to render the statute entirely nugatory.”).

<sup>166</sup> See, e.g., *Goldstick v. ICM Realty*, 788 F.2d 456, 463 (7th Cir. 1986).

<sup>167</sup> *Id.*

<sup>168</sup> On the part of the party against whom the equitable estoppel is alleged.



and contrast this high level of degeneracy with the conduct needed to be proven in factual instances where orthodox promissory estoppel<sup>169</sup> has succeeded in the courts. When this is done, important factors emerge.

Clearly, equitable estoppel contemplates some level of reprehensible conduct by the party against whom the equitable estoppel is alleged. The conduct required to be proven to ensure success against such a party is egregious conduct.<sup>170</sup> Proof of a unilateral decision by the promisee to rely on a promise that the promisor made is simply not enough to establish fraudulent misrepresentation.<sup>171</sup> The degree of difference between the two doctrines arguably supports and justifies different outcomes in applying them to the facts of each particular case.

This degree of egregiousness must be present in order to satisfy the requirements of equitable estoppel and thereby bar a Statute of Frauds defense.<sup>172</sup> Equitable estoppel is therefore much closer to the tort of misrepresentation.<sup>173</sup> Successful proof of equitable estoppel requires plaintiffs to prove that the defendant misrepresented<sup>174</sup> a material fact to such plaintiffs. Of course, such plaintiffs must also prove that the party making the misrepresentation intended that plaintiffs would rely on the pertinent misrepresentations.<sup>175</sup> Proof by plaintiffs of actual reliance on the misrepresentation is also required.<sup>176</sup>

This first requirement for success in proving equitable estoppel is proof of intentional material misrepresentation.<sup>177</sup> The pertinent

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<sup>169</sup> In contexts unrelated to overcoming a Statute of Frauds defense, such as asserting promissory estoppel in order to recover reimbursement for reasonable costs incurred as a result of justifiable reliance on a promisor's promise or promises. *See, e.g., Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 276-77 (Wis. 1965) (allowing a promisee to recover reasonable expenditures incurred in reasonably relying on a promisor's promises, made in legally actionable circumstances).

<sup>170</sup> *Ozier*, 103 N.E.2d at 488 (“In the absence of fraud or misrepresentation, the party changing his position must be said to have acted *solely upon his own judgment and at his own risk*, and he is not entitled to an application of the [equitable] estoppel doctrine.”) (emphasis added).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *See, e.g., Goldstick v. ICM Realty*, 788 F.2d 456, 463 (7th Cir. 1986) (“[E]quitable estoppel (which requires proof of misrepresentation), is [a] tort doctrine.”).

<sup>174</sup> Proof of the motivation, intention, and objectives, of the person against whom the equitable estoppel is alleged, is critically relevant in an equitable estoppel assertion. *Cf. In re Schneider*, 553 A.2d 206, 214 (D.C. Ct. App. 1989) (Newman, J., dissenting) (“I do not think, however, that ‘the ultimate intent or motives’ of an actor can be analytically truncated from the alleged deceitful or dishonest act.”).

<sup>175</sup> *See Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 995 (Ill. App. Ct. 1990).

<sup>176</sup> *Id.*

<sup>177</sup> This could also include material concealment or material omission.

misrepresentation that must be proven is a genre of fraudulent<sup>178</sup> misrepresentation rather than a lesser form of misrepresentation.<sup>179</sup>

Fraudulent misrepresentation requires a plaintiff to:

plead and prove ... (1) a false statement of material fact, (2) knowledge or belief of the falsity [of the statement] by the party making it, (3) [an] intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statement[], and (5) [actionable] damage to the other party resulting from such reliance.<sup>180</sup>

With regard to stating a claim based upon promissory estoppel, the pertinent elements that must be established are fewer<sup>181</sup> than those needed for stating a claim based upon equitable estoppel.<sup>182</sup> Promissory estoppel does not require either a showing of a material misrepresentation or actionable concealment.<sup>183</sup> Equitable estoppel does.<sup>184</sup> Promissory estoppel requires a weaker standard to be met.<sup>185</sup> It requires proof of detrimental reliance induced by the adverse party's promise.<sup>186</sup> This lower

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<sup>178</sup> See *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) (“A party claiming fraud must establish six elements by clear and convincing evidence: a) material representation, b) which is false, c) known to be false or recklessly made, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury. Intent to deceive is a necessary element of actionable fraud.”) (citation omitted).

<sup>179</sup> That is, types of misrepresentation such as negligent or inadvertent (“innocent”) misrepresentation.

<sup>180</sup> *Bd. of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580, 591 (Ill. 1989).

<sup>181</sup> No proof of misrepresentation is necessary. See *Fischer v. First Chi. Capital Mkts., Inc.*, 195 F.3d 279, 283 (7th Cir. 1999) (“To state a claim for promissory estoppel in Illinois, [claimant] must allege: (1) an unambiguous promise; (2) reasonable and justifiable reliance by the party to whom the promise was made; (3) the reliance was expected and foreseeable by the promisor; and (4) the promisee relied upon the promise to her detriment.”).

<sup>182</sup> See *Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 995 (Ill. App. Ct. 1990).

<sup>183</sup> *Fraudulent* concealment is the worst type. See *Brocaill v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 110-11 (Tex. App. 2008) (“Fraudulent concealment [is] also known as fraud by nondisclosure or ‘silent fraud’ .... [I]n order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure. ‘[T]he touchstone of liability for ... ‘silent fraud’ is that *some* form of representation has been made and that it was or proved to be false.’ Although the misrepresentation may be made through words or conduct, the plaintiff’s reliance must have been reasonable.”) (citations omitted).

<sup>184</sup> *Ozier v. Haines*, 103 N.E.2d 485, 487 (Ill. 1952).

<sup>185</sup> See *Derby Meadows*, 559 N.E.2d at 995.

<sup>186</sup> *Id.*

threshold makes it substantially easier to succeed on a promissory estoppel claim. Therefore, unavoidably, a greater number of contracts traditionally barred by the Statute of Frauds would become enforceable.

Moreover, in some jurisdictions,<sup>187</sup> promissory estoppel may be used “as a sword.”<sup>188</sup> This application differs fundamentally from equitable estoppel<sup>189</sup> and intensifies the differences between these two doctrines. So, the dangers from expanded use of promissory estoppel exceed any dangers that equitable estoppel can substantively threaten.<sup>190</sup> Equitable estoppel is a “shield,” not a sword.<sup>191</sup>

It must be emphasized that proof of equitable estoppel clearly rests upon requirements that are much more stringent<sup>192</sup> than the requirements for proof of promissory estoppel.<sup>193</sup> By way of contrast, promissory estoppel is significantly less stringent and therefore contemplates a more restricted sphere of application. Proof of misconduct<sup>194</sup> by the promisor is

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<sup>187</sup> Including Illinois. *See* *Newton Tractor Sales v. Kubota Tractor Corp.*, 906 N.E.2d 520, 529 (Ill. 2009) (“[P]romissory estoppel is an *affirmative cause of action* in Illinois[.]”) (emphasis added) *abrogating* *DeWitt v. Fleming*, 828 N.E.2d 756, 758 (Ill. App. Ct. 2005) and *ESM Dev. Corp. v. Dawson*, 795 N.E.2d 397 (Ill. App. Ct. 2003). So, in Illinois, promissory estoppel can be used “as a sword.” *See* *Newton Tractor Sales*, 906 N.E.2d at 526 (Ill. 2009).

<sup>188</sup> *See* *Peluso v. Kistner*, 930 A.2d 530, 533 (Pa. Commw. Ct. 2009) (“[P]romissory estoppel can sustain an action brought to remedy the injustice that results from a promise not kept .... [P]romissory estoppel may serve as an independent cause of action. Pennsylvania has long recognized promissory estoppel as a vehicle by which a promise may be enforced in order to remedy an injustice.”) (emphasis added) (citations omitted). *See also* *Holmes*, *supra* note 5, at 506 (“Wyoming has a long, venerable history of applying the equitable principle of promissory estoppel both as a shield to estop the operation of the Statute of Frauds and as a sword to provide an affirmative claim for relief.”) (emphasis added).

<sup>189</sup> *See* *Peluso*, 930 A.2d at 533 (“[E]quitable estoppel ... is wholly a defensive doctrine.”).

<sup>190</sup> *See id.* at 533 n.4 (“[E]quitable estoppel ‘does not create a cause of action ....’”) (citations omitted).

<sup>191</sup> *See id.* at 533.

<sup>192</sup> *See, e.g.,* *Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 995 (Ill. App. Ct. 1990) (listing the elements of *equitable* estoppel). There is a necessary requirement of proof of “conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert ....”; *Lowe v. Lancaster County. Sch. Dist. 0001*, 766 N.W.2d 408, 415 (Neb. Ct. App. 2009) (identifying six elements that must be proven to ensure successful invocation of the doctrine of equitable estoppel).

<sup>193</sup> *See, e.g.,* *Derby Meadows*, 559 N.E.2d at 995 (quoting *Phillips v. Briton*, 516 N.E.2d 692 (Ill. App. Ct. 1987) (listing the elements of promissory estoppel)).

<sup>194</sup> For example, misrepresentation or intentional concealment. *See supra* notes 178 and 181.

not a necessary component for proof of promissory estoppel.<sup>195</sup> Proof of misconduct is, however, one of the *commanding heights* of proof necessary for establishing equitable estoppel.<sup>196</sup>

So, whereas some of the underlying elements of the two doctrines are substantively similar, the differences are fundamental and justify different outcomes in the courts. Proving equitable estoppel is no “walk in the park.” It is difficult. Therefore, emphasizing the *differences* between the two doctrines is crucial, and it is difficult to overstate the differences in the two doctrines.

### III. THE DOCTRINES AT WORK<sup>197</sup>

In exploring the doctrines at work, two streams of authority seem detectable. They may be identified as the “traditional stream”<sup>198</sup> and the “reliance stream.”<sup>199</sup> Under the traditional stream of authority, equitable estoppel is legally capable of barring a Statute of Frauds defense, but promissory estoppel is, on principle, not potent enough to justify such a bar.<sup>200</sup> In contrast, under the “reliance stream” of authority, *both* equitable *and* promissory estoppel are capable of barring a Statute of Frauds defense.<sup>201</sup>

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<sup>195</sup> See *supra* notes 178 and 181.

<sup>196</sup> See *id.* at 995.

<sup>197</sup> See *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 10 (Ky. 2005) (“[W]here the [S]tatute of [F]rauds is clear and unambiguous ... equitable relief should only be granted under the most limited of circumstances, lest the [c]ourt run afoul of judicially amending the statute in violation of separation of powers.”).

<sup>198</sup> The “traditional stream” is the Author’s categorization and may not conform to the view held by other commentators.

<sup>199</sup> The “reliance stream” is the Author’s categorization and may not conform to the view held by other commentators. See, e.g., FARNSWORTH, *supra* note 54, at 407 (“Justice Traynor’s care in detailing the limits of the holding [in *Monarco v. Lo Greco*, 220 P.2d 737 (Cal. 1950)] was to turn *Monarco* from a harbinger of change into a *bastion of tradition*.”) (emphasis added).

<sup>200</sup> See *infra* notes 203, 216 and accompanying text.

<sup>201</sup> See *infra* notes 437-438 and accompanying text.

*A. The Traditional and Reliance Streams of Authority Compared and Contrasted*

*1. Ozier v. Haines and the Traditional Stream of Authority*

*Ozier v. Haines*<sup>202</sup> is quite typical of the traditional stream of authority in action. In *Ozier*, the Illinois Supreme Court ruled that a claim of promissory estoppel did not defeat a Statute of Frauds defense in a contract dispute relating to a sale of corn.<sup>203</sup> The plaintiff also argued that equitable estoppel allegedly justified the assertion of an alleged trade custom.<sup>204</sup>

The court did acknowledge the legal power of valid trade customs and usages when successfully proven.<sup>205</sup> However, the plaintiff's argument in support of a controlling trade custom was not successful.<sup>206</sup>

In *Ozier*, in response to the plaintiff's charge that the defendant breached an oral contract for the sale of corn,<sup>207</sup> defendant asserted that the contract was unenforceable.<sup>208</sup> Essentially, plaintiff's equitable estoppel assertion was based upon plaintiff's claim of reliance<sup>209</sup> upon defendant's oral agreement to sell the corn. Plaintiff presented no evidence

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<sup>202</sup> 103 N.E.2d 485 (Ill. 1952).

<sup>203</sup> *Id.* at 489; *see also* W.R. Grace & Co. v. Geodata Servs., Inc., 547 So. 2d 919, 924 (Fla. 1989) ("The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counter action to the legislatively created Statute of Frauds. *This we decline to do.*") (emphasis added); Coral Way Props., Ltd. v. Roses, 565 So. 2d 372, 374 (Fla. Dist. Ct. App. 1990) (ruling that as a matter of established law promissory estoppel could not be invoked to prevent plaintiff from asserting a Statute of Frauds defense, pursuant to Florida Statute chapter 725.01, which requires a written agreement).

<sup>204</sup> The asserted trade custom barrier to the Statute of Frauds defense was not successful.

<sup>205</sup> *Ozier*, 103 N.E.2d at 489 ("The courts will take judicial notice of general customs and usages provided the same are legal and otherwise possess the requisites necessary to their recognition and application by the court.").

<sup>206</sup> *See id.* ("Plaintiffs point to the many businesses in which similar customs prevail and state that if the practices are to be changed, this court should expressly so declare .... This court has no authority to give license to a custom or usage which is outside the methods established by rule of law. We can only say that those who pursue other methods operate at their risk, and if the enforcement of the law creates a peril to our business structure, the remedy lies with the legislature, not with the courts.").

<sup>207</sup> *Id.* at 486.

<sup>208</sup> *See id.* at 487 (on the footing that the contract violated the Statute of Frauds, because it involved a sale of goods exceeding 500 dollars and had not been reduced to writing as required by Illinois statute).

<sup>209</sup> Plaintiff resold the corn to a third party, allegedly in the presence of the defendant and with the defendant's actual knowledge of the sale. *Id.* at 486-87.

either of fraud in the form of any material misrepresentations or any concealment of material acts by the defendant.<sup>210</sup> So, based upon the facts, the requirements of equitable estoppel were not proven.<sup>211</sup>

The Illinois Supreme Court held that enforcement of the contract was barred by the Statute of Frauds,<sup>212</sup> concluding that plaintiff's claim did not rise to the level of equitable estoppel.<sup>213</sup> The facts and proof in successful cases must rise to the required level of efficacy.<sup>214</sup> If and when they do, the Illinois Supreme Court acknowledged that the doctrine of equitable estoppel operated to avoid proven inequities.<sup>215</sup> The court ruled that valid examples of proof of such inequities would include proof that enforcement of the contract in issue would permit a party to utilize the Statute of Frauds to perpetrate an injustice, or commit an actionable fraud.<sup>216</sup> The court also acknowledged that allowing a party to take unlawful advantage of her or his own wrong would itself be inequitable.<sup>217</sup>

The court declared that equitable estoppel applied only where proper proof of misrepresentation or fraud by the party invoking the statute was presented.<sup>218</sup> Therefore, the Illinois Supreme Court decided that plaintiff's assertion of his allegedly material change in position in reliance on defendant's oral promise was insufficient.<sup>219</sup> This proven change in position did not justify successful assertion of equitable estoppel in the absence of proof of a material misrepresentation.<sup>220</sup>

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<sup>210</sup> On the facts, no material omissions were proven. *Id.* at 487 (“[T]he moral wrong of refusing to be bound by an agreement because it does not comply with the Statute of Frauds, does not of itself authorize the application of the doctrine of estoppel, for the breach of a promise which the law does not regard as binding is *not a fraud.*”) (emphasis added).

<sup>211</sup> *Id.* at 487-89.

<sup>212</sup> *Id.* at 488-89.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 488.

<sup>215</sup> *Id.* at 487.

<sup>216</sup> *Id.* at 487; *see also* *Loeb v. Gendel*, 179 N.E.2d 7, 9 (Ill. 1961) (“[T]he plaintiff’s failure to have the agreement put in writing was induced by defendant’s intentionally misleading advice and promises .... If, contrary to his representations, he can now interpose the Statute of Frauds and thereby render the agreement void and unenforceable, the effect will be the accomplishment of a virtual fraud. This we cannot condone.”).

<sup>217</sup> *Ozier*, 103 N.E.2d at 487.

<sup>218</sup> *Id.* at 487-88.

<sup>219</sup> *Id.* at 488.

<sup>220</sup> *Id.* at 488; *accord* *Libby-Broadway Drive-In, Inc. v. McDonald's Sys. Inc.*, 391 N.E.2d 1, 4 (Ill. App. Ct. 1979).

Plaintiff also argued that requiring proof of misrepresentation, or fraud, was archaic.<sup>221</sup> Plaintiff argued that the court should rule that it was only necessary to prove: (i) an act, or (ii) statement, upon which another had relied, and (iii) had materially changed his position to his detriment, (iv) as a result of such reliance.<sup>222</sup> In essence, acceptance of this viewpoint would, in plaintiff's opinion, prevent any resulting loss from falling upon the *more* innocent party.<sup>223</sup>

Of course, accepting this argument would also have eliminated any genuinely substantive distinctions between promissory estoppel and equitable estoppel. This acceptance would have equated promissory estoppel with equitable estoppel more or less fully and completely. The Illinois Supreme Court, however, rejected this argument.<sup>224</sup> This rejection was a refusal to equate the elaborately circumscribed doctrine of equitable estoppel<sup>225</sup> with the doctrine of promissory estoppel.<sup>226</sup> The Illinois Supreme Court therefore refused to adopt promissory estoppel as an exception to the Statute of Frauds.<sup>227</sup> In the court's opinion, plaintiff's proposition would fundamentally undermine the Statute of Frauds. It would render it "useless and unmeaning."<sup>228</sup> After all, everyone is presumed to know the law.<sup>229</sup> Therefore, at the time of the alleged oral

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<sup>221</sup> *Ozier*, 103 N.E.2d at 488.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 487 ("[S]ix elements must appear in order to invoke the doctrine of equitable estoppel: '(1) Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts; (2) the party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue; (3) the truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made, and at the time they were acted on by him; (4) the party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel or the public generally; (5) the representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel; and (6) the party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party is permitted to deny the truth thereof.'").

<sup>226</sup> A doctrine consisting of less stringent requirements. *See* *Derby Meadows Util. Co. v. Vill. of Orland Park*, 559 N.E.2d 986, 994-95 (Ill. App. Ct. 1990) (listing the elements of promissory estoppel).

<sup>227</sup> *Ozier*, 103 N.E.2d at 487-88.

<sup>228</sup> *Id.* at 488.

<sup>229</sup> *See* *Blumenthal v. United States*, 88 F.2d 522, 530 (8th Cir. 1937) ("It is elementary that everyone is presumed to know the law of the land, whether that be the common law or the statutory law ...."). This legal presumption applies in both civil and criminal law. *See* *Skeen v. Craig*, 86 P. 487, 491 (Utah 1906).

contract, *both* parties clearly knew, or should have known, that the contract was not enforceable.<sup>230</sup>

Neither party misled the other. We must acknowledge that preparing a legally sufficient writing was neither onerous nor irksome.<sup>231</sup> This failure to execute a writing amounted to conduct that was lacking in diligence. The Illinois Supreme Court reasoned that an evaluation of all pertinent facts indicated that neither side was in a position to exploit or otherwise take any unfair advantage of the other.<sup>232</sup> Neither of the two parties possessed material information that the other did not have.<sup>233</sup> This proved to be critical with regard to issues of material concealment or material omission on the part of the defendant.<sup>234</sup> In this respect, subsequent *unilateral* conduct of this nature by plaintiff did not justify legal nullification of the Statute of Frauds defense relied on by the defendant. Here, *mea culpa* was present. It was the plaintiff's own selective decision to rely on the defendant's promise that motivated plaintiff's action in reliance thereon.

Convincing proof was not presented that defendant in some way *induced* plaintiff to take action, either by making a material misrepresentation to plaintiff or otherwise defrauding plaintiff in some unlawful manner.<sup>235</sup> Plaintiff's change in position, in the Illinois Supreme Court's view, was voluntary.<sup>236</sup> It was solely a function of plaintiff's *own* error of judgment and assumption of the risk that the defendant would honor the oral agreement.<sup>237</sup> Therefore, plaintiff had not successfully proved equitable estoppel.<sup>238</sup>

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<sup>230</sup> *Ozier*, 103 N.E.2d at 488 (“The present case is a patent example, for although the parties were in each other’s presence and in a business office, no attempt was made to reduce their agreement to the *simplest* writing.”) (emphasis added).

<sup>231</sup> See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522-23 (Va. 1954) (a signed informal notation on the back of a restaurant invoice was sufficient to satisfy the Statute of Frauds).

<sup>232</sup> *Ozier*, 103 N.E.2d at 488.

<sup>233</sup> *Id.* (“[E]ach knew, or is deemed to have known, that they had entered into an unenforceable agreement. Both had all knowledge in reference to the transaction and neither side had information that the other did not have.”).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 488 (“In the absence of fraud or misrepresentation, the party changing his position must be said to have acted solely *upon his own judgment and at his own risk* ....”) (emphasis added).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*



## 2. *Other Interesting Cases*

An examination of a number of cases may identify future courses that traditional courts, such as the Illinois courts, may chart. Certainly, there is no tenable opposition to the legal power of equitable estoppel to defeat a Statute of Frauds defense. These principles remain unchanged. Equitable estoppel is capable of barring a Statute of Frauds defense where there is proof of either: (i) material misrepresentation or (ii) concealment of material facts by the defendant.<sup>239</sup> Equity will not permit a statute to be used as a cloak for fraud.<sup>240</sup> It would indeed be the epitome of irony if the Statute of Frauds was itself permitted by the courts to be used to perpetrate fraud. Arguably, the courts are equally vigilant with respect to the risks attendant upon the invocation of promissory estoppel.<sup>241</sup>

Opposition to permitting promissory estoppel to defeat a Statute of Frauds defense exists. This is because promissory estoppel stands on a somewhat different footing from equitable estoppel. Promissory estoppel is not as substantively potent as equitable estoppel. Promissory estoppel is based on reliance by one party upon the promises of another.<sup>242</sup> It is not based upon any proof of active misleading by the party against whom it is asserted. So, it does not require proof of any fraud, concealment of material facts,<sup>243</sup> or misconduct on the part of the party against whom a claim is made.<sup>244</sup>

Traditionally, Illinois courts have held that nothing less than a material misrepresentation, material concealment, material omission, or fraud would defeat an otherwise successful invocation of a Statute of Frauds defense.<sup>245</sup> Clearly, a promissory estoppel claim does not satisfy these criteria, for “[t]he breach of a promise which the law does not regard as binding is not fraud.”<sup>246</sup> Therefore, in cases where the Statute of Frauds

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<sup>239</sup> Or material omission by the defendant. *See id.* at 487 (“The proposition that one may be estopped to assert the Statute of Frauds as a defense is not a new one, and has been invoked by this court *where the facts presented have warranted* its application.”) (emphasis added).

<sup>240</sup> *See, e.g.,* Bolz v. Myers, 651 P.2d 606, 612 (Mont. 1982) (“[T]he [S]tatute of [F]rauds may not itself be an instrument of fraud or used to cloak fraud . . . . The statute is intended to prevent fraud, not aid it.”) (citations omitted).

<sup>241</sup> *See* Stangl v. Ernst Home Ctr., Inc., 948 P.2d 356, 365 (Utah App. 1997) (“Just as the [S]tatute of [F]rauds should not be used to perpetrate fraud, so, too, promissory estoppel should not be allowed to eviscerate the [S]tatute of [F]rauds.”).

<sup>242</sup> *Id.* at 364.

<sup>243</sup> Or proof of any material omissions.

<sup>244</sup> *Id.* at 362; *see also* Genin, Trudeau & Co. v. Integra Dev. Int’l, 845 F.Supp. 611, 616-17 (N.D. Ill. 1994).

<sup>245</sup> *See* Ozier v. Haines, 103 N.E.2d 485, 488 (Ill. 1952).

<sup>246</sup> *Id.*

applies, this limits success in earning court enforcement of oral contracts<sup>247</sup> to cases where equitable estoppel is proved. Irrefutably, a decision by a promisee to rely on a particular promise is a personal value judgment by each promisee who does so rely. It does not implicate clear-cut dishonesty on the part of the promisor.

In a different context, in *Sinclair v. Sullivan*<sup>248</sup> the Illinois Supreme Court disallowed an assertion of equitable estoppel to defeat a Statute of Frauds defense in the context of an employment contract. In *Sinclair*, plaintiff asserted a breach of an oral employment contract against defendant.<sup>249</sup> The defendant interposed the Statute of Frauds as a defense, alleging that the contract could *not* be fully discharged by performance within one year.<sup>250</sup> Plaintiff claimed that defendant was estopped from asserting the Statute of Frauds defense because of a prior misrepresentation.<sup>251</sup> The Illinois Supreme Court held that enforcement of the contract was barred by the Statute of Frauds.<sup>252</sup>

The court acknowledged that a valid claim, based on equitable estoppel, will defeat a Statute of Frauds defense<sup>253</sup> in appropriate circumstances. Plaintiffs must properly prove words or conduct by

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<sup>247</sup> Success would be limited without a qualifying writing as required by the Statute of Frauds.

<sup>248</sup> *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516 (Ill. 1964). The validity and legal precedential power of *Sinclair* remains intact in spite of the fact that the Northern District Court of Illinois declined to follow *Sinclair* in deciding *Genin, Trudeau & Co. v. Integra Dev. Int'l*, 845 F.Supp. 611 (N.D. Ill.1994). *See Genin*, 845 F.Supp. at 616 (referring to *Sinclair* as “[t]he aging landmark case in Illinois ...”). With respect to the issues relating to these legal principles decided in *Genin* and discussed in this Article, the federal courts must defer to state supreme courts. State law issues, which the U.S. Constitution does not supersede, are reserved to the states under the Tenth Amendment to the Constitution. *See, e.g.*, *Newton Tractor Sales v. Kubota Tractor Corp.*, 906 N.E.2d 520, 525 (Ill. 2009) (“[T]he Seventh’s Circuit’s application of Illinois law does not bind [the Supreme Court of Illinois.]”). Nor would federal district courts’ applications of Illinois law bind the Supreme Court of Illinois. *See infra* footnotes 340, 355 and the surrounding analytical discussion and evaluation of the interplay of the conflict between these two cases.

<sup>249</sup> *Sinclair*, 202 N.E.2d at 517.

<sup>250</sup> *Id.* at 518.

<sup>251</sup> *Id.* Presumably, an alleged promise by the defendant to put the agreement in writing. However, the court found no such misrepresentation. Instead, the court was apparently inclined to find as a fact that the defendant’s delay with regard to putting the agreement in writing “was caused by the failure to agree on a satisfactory bonus arrangement.” *Id.* at 518.

<sup>252</sup> *Id.* at 519.

<sup>253</sup> *Id.* at 518.

defendants that constitute a material misrepresentation or concealment of a material fact.<sup>254</sup>

The pertinent words or conduct must relate to an *existing* or *past* event. *Future* promises<sup>255</sup> are ordinarily insufficient. Certainly, it may be argued that one's intention is an *inner* fact.<sup>256</sup> The future nature of such a statement of intention, however, can make it too unstable to support these legal consequences.<sup>257</sup> In *Sinclair*, there was no persuasive proof of *present* material misrepresentation or concealment of any material facts.<sup>258</sup> To the contrary, merely oral promises of *future* performances were presented<sup>259</sup> and Illinois contract law did not recognize such an oral promise as binding.<sup>260</sup> Therefore, the Illinois Supreme Court held that the contract was unenforceable, in light of the Statute of Frauds.<sup>261</sup>

A couple of decades later, in *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*,<sup>262</sup> the Illinois Supreme Court considered similar issues. In *Ceres*, the defendant refused to vacate plaintiff's property, asserting equitable estoppel<sup>263</sup> and reliance on an alleged oral lease agreement. Allegedly, this oral lease permitted him to remain in occupation of the property for fifteen years.<sup>264</sup> When plaintiff asserted a Statute of Frauds defense, defendant claimed that plaintiff was equitably estopped from asserting the Statute of Frauds as a bar to the agreement.<sup>265</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> As an inner fact, one's intention is therefore as viable as any other fact.

<sup>257</sup> Human beings change their minds. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933) ("It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep *all* one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.") (emphasis in the original).

<sup>258</sup> *Sinclair*, 202 N.E.2d at 519.

<sup>259</sup> *Id.* ("When the instant contract was entered into, there appears to have been no concealment or misrepresentation of fact but *mere oral promises concerning future performances* which the law did not regard as binding.") (emphasis added); see *W.R. Grace & Co. v. Geodata Servs., Inc.*, 547 So. 2d 919, 924 (Fla. 1989) ("Ordinarily, a truthful statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built.") (citation omitted).

<sup>260</sup> *Sinclair*, 202 N.E.2d at 519.

<sup>261</sup> *Id.*

<sup>262</sup> *Ceres v. Illinois Scrap, Inc.*, 500 N.E.2d 1, 7-8 (Ill. 1986).

<sup>263</sup> *Id.* at 3.

<sup>264</sup> *Id.* at 2.

<sup>265</sup> *Id.* at 1.

The court determined that on the facts and in the circumstances of this case, the defendant's arguments were unsuccessful.<sup>266</sup> The court ruled that the defendant alone was responsible for its actions.<sup>267</sup> The court reasoned that plaintiff's conduct was insufficient to satisfy the requirements necessary for successful proof of equitable estoppel by the defendant.<sup>268</sup> The court, however, seemed to articulate a more meticulously defined standard for proof of equitable estoppel.<sup>269</sup>

In dicta, the court seems to have made a *partial* retreat from the standards set in *Ozier*<sup>270</sup> and *Sinclair*<sup>271</sup> for successful proof of equitable estoppel. However, the Illinois Supreme Court did *not* overrule these two landmark cases. The court seems to have partially diluted the strict scienter-like requirements articulated in the two prior cases.<sup>272</sup> The Illinois Supreme Court stated that with respect to an equitable estoppel assertion, the alleged misrepresentations need not be "fraudulent in the strict legal sense or done with an intent to mislead or deceive."<sup>273</sup> The court asserted, "[r]ather, the test is 'whether in all circumstances of the case conscience and the duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct.'"<sup>274</sup> Absent such conduct,

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<sup>266</sup> *Id.* at 7 ("[Plaintiff's] actions cannot be said to amount to misrepresentations of plaintiff's position or concealment of any material facts.").

<sup>267</sup> *Id.* ("[D]efendant's actions were taken at its own risk.").

<sup>268</sup> *Id.* at 7 ("[T]here was no basis for the trial court's implicit determination that plaintiff engaged in conduct amounting to fraud or misrepresentation.") (citations omitted).

<sup>269</sup> *Id.*

<sup>270</sup> *Ozier v. Haines*, 103 N.E.2d 485, 488 (Ill. 1952).

<sup>271</sup> *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d at 518.

<sup>272</sup> *See Ceres*, 500 N.E.2d at 7; *Sinclair*, 202 N.E.2d at 518-19; *Ozier*, 103 N.E.2d at 488.

<sup>273</sup> *Ceres*, 500 N.E.2d at 7 (citations omitted).

<sup>274</sup> *Id.* (citations omitted). This seems to be a weakening of the earlier tests. Arguably, the conduct would still need to cross the threshold of recklessness on the part of the party against whom the equitable estoppel is asserted. It would need to be proven that the party against whom the equitable estoppel was asserted had acted with reckless disregard as to whether or not the relying party was misled; or acted on insufficient information under the influence of the words or conduct of the other party against whom the equitable estoppel was asserted. As the Author has argued, in a different context, recklessness can legally amount to the scienter of fraud. *See* Stephen J. Leacock, *Recklessness as Scienter in Corporate Securities Trading: An Analysis and Evaluation of United States Investor Protection Policy Reforms and Their Implications for the Commonwealth Caribbean*, 4 J. TRANSNAT'L L. & POL'Y 1 (1995); *see also* *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005) ("A party claiming fraud must establish six elements by clear and convincing evidence: a) material misrepresentation, b) which is false, c) known to be false or

“the party changing [her] position must be said to have acted solely upon [her] own judgment and at her own risk.”<sup>275</sup>

The court, however, has retained the requirement of proof of misrepresentation, or other similar conduct, that activate the relying party’s conduct.<sup>276</sup> Therefore, words and conduct that simply prove the making of the agreement would still seem to be insufficient to satisfy the requirements for successful proof of equitable estoppel.<sup>277</sup> Something more would seem to be necessary.

The significance of *Ceres* is the following: courts *could*, on appropriate facts in a future case, interpret this standard as a sufficient justification for adopting the less stringent requirements of the doctrine of promissory estoppel. This would certainly be a lower standard than the current strict mandate of equitable estoppel.<sup>278</sup> This apparent extension could potentially open the door for the doctrine of promissory estoppel to defeat a Statute of Frauds defense in appropriate future circumstances. The likelihood of this, however, remains uncertain. So, the question of whether the Illinois Supreme Court would *ever* permit a promissory estoppel claim to defeat a Statute of Frauds defense remains unanswered.

In a more recent Illinois case, an appellant argued that the doctrine of promissory estoppel could not be used to defeat a Statute of Frauds defense.<sup>279</sup> The appellate court declined the opportunity to examine this issue and therefore declined to make a ruling on the appellant’s argument.<sup>280</sup> The appellate court reversed the lower court on different grounds.<sup>281</sup> The basis for the appellate court’s decision was that promissory estoppel could not be used as a cause of action.<sup>282</sup> The appellate court stated “that promissory estoppel ‘is not a proper vehicle for

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*recklessly* made, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury .... Intent to deceive is a necessary element of actionable fraud.”) (emphasis added) (citations omitted).

<sup>275</sup> *Ceres*, 500 N.E.2d at 7.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *See Sinclair*, 202 N.E.2d at 518.

<sup>279</sup> *DeWitt v. Fleming*, 828 N.E.2d 756, 757 (Ill. App. Ct. 2005). In deciding the case, the appellate court applied legal principles that have since been abrogated by the Illinois Supreme Court in *Newton Tractor Sales v. Kubota Tractor Corp.*, 906 N.E.2d 520, 525 (Ill. 2009), which recognized that promissory estoppels can be a cause of action. As a result of this erroneous conclusion, the Statute of Frauds issue was never reached. *See generally Dewitt*, 828 N.E.2d 756.

<sup>280</sup> *Dewitt*, 828 N.E.2d at 758 (“[W]e do not reach the [appellant’s] statute-of-frauds argument.”).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* This legal conclusion has now been abrogated; *see also supra* note 279.

direct relief [and] cannot properly be pled as a cause of action.”<sup>283</sup> The court stated that it “is meant to be utilized as a defensive mechanism, not as a means of attack.”<sup>284</sup>

*3. Notable U.S. Court of Appeals Authority Applying State Law and Interpreting the UCC Statute of Frauds*

In *Goldstick v. IMC Realty*,<sup>285</sup> the United States Court of Appeals for the Seventh Circuit reversed a grant of summary judgment by the United States District Court for the Northern District of Illinois.<sup>286</sup> One of the bases for reversal was the court’s conclusion that a full-blown trial was necessary in order to resolve matters of material fact implicated by a critical argument made by the defendant-appellee.<sup>287</sup> This argument was that the Statute of Frauds barred plaintiff-appellant’s claim for promissory estoppel.<sup>288</sup>

In dicta, the *Goldstick* court seemed inclined to think that the Illinois Supreme Court would indeed hold the Statute of Frauds applicable to bar successful assertion of promissory estoppel,<sup>289</sup> but the court acknowledged that such a holding would be in conflict with its earlier position in *R.S. Bennett & Co., Inc. v. Economy Mechanical Industries, Inc.*<sup>290</sup> The Seventh Circuit, however, quite admirably and courageously conceded that its decision in *R.S. Bennett* may very well have been incorrect in interpreting Illinois law<sup>291</sup> to allow promissory estoppel to bar a Statute of Frauds defense.<sup>292</sup>

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<sup>283</sup> *Dewitt*, 828 N.E.2d at 758.

<sup>284</sup> *Id.* An erroneous conclusion if nullification of its use as a cause of action is intended; *see also supra* note 279.

<sup>285</sup> *Goldstick v. IMC Realty*, 788 F.2d 456, 458 (7th Cir. 1989) (“[T]he governing substantive law is that of Illinois.”).

<sup>286</sup> *Id.* at 456.

<sup>287</sup> *Id.* at 464, 466, 468.

<sup>288</sup> *Id.* at 464 (Defendant-appellee argued that the promise which the plaintiff-appellant sought to enforce could not be completed within one year, and that an appropriate writing was legally necessary in order to satisfy the requirements of the Statute of Frauds).

<sup>289</sup> *Id.* at 466 (“If forced to guess what the Illinois Supreme Court would do in a case like this we would guess (a word used deliberately) that it would hold the [S]tatute of [F]rauds applicable to promissory estoppel (since [sic] to do otherwise would require the court to overrule two of its decisions), and thus would disapprove [*R.S. Bennett & Co. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182, 187 (7th Cir. 1979)].”).

<sup>290</sup> *Bennett*, 606 F.2d at 187.

<sup>291</sup> *Goldstick*, 788 F.2d at 466 (“We have found only two recent cases in which [the Illinois Supreme Court] dealt with the [S]tatute of [F]rauds ... [and] they do not provide

In articulating this interpretation, the Seventh Circuit acknowledged that it had “relied heavily”<sup>293</sup> on the decision of the Illinois Appellate Court in *Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*<sup>294</sup> The Seventh Circuit conceded that its interpretation of Illinois law, based on *Jenkins*, was the result of a failure to cite an Illinois Appellate Court decision<sup>295</sup> that was subsequent to *Jenkins*. This later appellate decision held that the Statute of Frauds is indeed a defense to promissory estoppel.<sup>296</sup> So, under Illinois law, promissory estoppel could not successfully bar a Statute of Frauds defense. The Seventh Circuit also acknowledged that an even later Illinois Appellate Court decision<sup>297</sup> seemed to support the view that under Illinois law, promissory estoppel does not bar a Statute of Frauds defense.<sup>298</sup>

In addition to the precedential support for the conclusion that promissory estoppel does not bar the defense of the Statute of Frauds, there are quite good substantive reasons for this concession by the Seventh Circuit. In *R.S. Bennett*, the Seventh Circuit concluded that Illinois law does not automatically preclude recovery on a promissory estoppel theory when a defendant asserts a Statute of Frauds defense.<sup>299</sup> In *R.S. Bennett*, in response to an alleged breach of an oral contract, the defendant asserted first, that the contract was barred by the Statute of Frauds, and second, that plaintiff’s promissory estoppel claim was insufficient to defeat his Statute of Frauds defense.<sup>300</sup>

The United States Court of Appeals for the Seventh Circuit, in *R.S. Bennett*, reasoned that circumstances had changed since the Illinois

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strong evidence that the [Illinois Supreme Court] has been swept up in the “constant erosion” that has eaten away the statute in other jurisdictions[,] ... and thus [the Illinois Supreme Court] would disapprove *Bennett* .... [F]rom what we have said it should be clear that we regard [our decision in *Bennett*] as open to reexamination.” (citations omitted).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 465.

<sup>294</sup> 344 N.E.2d 275 (Ill. App. Ct. 1976).

<sup>295</sup> *Goldstick*, 788 F.2d at 465 (discussing *Libby-Broadway Drive-In, Inc., v. McDonald’s Systems, Inc.*, 391 N.E.2d 1 (Ill. App. Ct. 1979)).

<sup>296</sup> *Libby-Broadway Drive-In, Inc.*, 391 N.E.2d at 4.

<sup>297</sup> *Goldstick*, 788 F.2d at 465 (discussing *Hux v. Woodcock*, 474 N.E.2d 958, 961 (Ill. App. Ct. 1985)).

<sup>298</sup> *Hux*, 788 F.2d at 961.

<sup>299</sup> *R.S. Bennett & Co. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182, 187 (7th Cir. 1979) (coming to a conclusion that may no longer be substantively correct as the United States Court of Appeals for Seventh Circuit now concedes).

<sup>300</sup> *Bennett*, 606 F.2d at 188 (citing *Ozier v. Haines*, 103 N.E.2d 485, 487-88 (Ill. 1952) and *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516, 518-19 (Ill. 1964)).

Supreme Court's decisions in *Ozier* and *Sinclair*.<sup>301</sup> The court therefore seemed persuaded that, under Illinois law, the courts should no longer be irreversibly opposed to the power of the doctrine of promissory estoppel to defeat a Statute of Frauds defense.<sup>302</sup> The court reasoned that the fear expressed by the Illinois Supreme Court in *Ozier*<sup>303</sup> was more attenuated with modern commercial life.<sup>304</sup> The court seemed inclined to think that the precedential power of *Ozier* was weakened as an inevitable byproduct of the enactment, by the Illinois legislature, of the Uniform Commercial Code (UCC).<sup>305</sup>

More specifically, in Article 2, the Illinois UCC Statute of Frauds provision<sup>306</sup> “for[bade] the use of the [S]tatute of [F]rauds as a defense if the existence of an oral contract [was] admitted.”<sup>307</sup> Consequently, the legislature had statutorily eliminated the defense of the Statute of Frauds in the circumstances specified in Article 2 of the UCC.<sup>308</sup> The legislature enacted that an admission, as defined by the UCC, was the statutory equivalent of the writing required by the Statute of Frauds.<sup>309</sup> Therefore, in any case where admission of an oral contract, under the UCC provisions was established, the viable use of the Statute of Frauds to bar the enforcement of such oral agreement was eliminated by the Illinois legislature.<sup>310</sup> This reasoning necessitates an examination of the legislature's rationale in enacting the Statute of Frauds initially and requires a clear understanding of the legislature's objective in enacting changes in Article 2 relating to the Statute of Frauds.

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<sup>301</sup> *Bennett*, 606 F.2d at 188.

<sup>302</sup> *Id.* at 187.

<sup>303</sup> *Ozier*, 103 N.E.2d at 487. The Illinois Supreme Court in *Ozier* feared that allowing a successful promissory estoppel assertion to defeat a Statute of Frauds defense “would render the statute entirely nugatory.” *Id.*

<sup>304</sup> *Bennett*, 606 F.2d at 188.

<sup>305</sup> *Id.* (citing *Ozier*, 103 N.E.2d at 487).

<sup>306</sup> 810 ILL. COMP. STAT. ANN. 5/2-201 (West 2009).

<sup>307</sup> *Bennett*, 606 F.2d at 188.

<sup>308</sup> 810 ILL. COMP. STAT. ANN. 5/2-201 cmt. 7 (“Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense.”).

<sup>309</sup> *Id.* at cmt. 2 & 7.

<sup>310</sup> *Bennett*, 606 F.2d at 188.



*B. The UCC and the Primary Rationale for the Statute of Frauds*<sup>311</sup>

The primary rationale for the Statute of Frauds becomes an important issue here. Two questions may be usefully considered. Is the goal of the Statute of Frauds to prevent success in the courts of a fraudulent assertion of a contract against a party where *no contract* in fact existed? Or, is it to prevent the enforcement of a contract that was made orally, simply because an appropriate writing, as required and defined by the Statute of Frauds, has not been created?

The line of reasoning articulated in *R.S. Bennett* by the United States Court of Appeals for the Seventh Circuit seems valid where the primary rationale for the Statute of Frauds is to prevent success in the courts of fraudulent assertions of contracts where no contracts in fact existed. The statutorily defined admission would obviate the existence of any fraud. Therefore, enforcement of contracts subject to the Statute of Frauds would only succeed where either a valid writing<sup>312</sup> was proven, or a valid admission<sup>313</sup> was in evidence. Fraudulent assertions of contracts would not succeed<sup>314</sup> because there would be neither a writing that met the requirements of the Statute of Frauds nor a statutorily defined admission, as required by the UCC.

First of all, where no valid contract is proven, suits to enforce a breach of contract would of necessity fail. Clearly, if the objective is to prevent the success of a fraudulent assertion of a contract against a party, where *no valid contract in fact existed*, then this can be remedied unequivocally by an admission of the contractual obligation by the party against whom the action is brought.<sup>315</sup> This would obviate the need to prove either equitable or promissory estoppel.

However, if the legislature intended the Statute of Frauds to bar the enforcement of genuine oral contracts because no qualifying writing was

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<sup>311</sup> There are at least two tenable rationales. First, enactment of the Statute of Frauds by the legislature prevents success in the courts when there is a fraudulent assertion of a contract against a party when no valid contract in fact existed. Second, the Statute of Frauds represents an enactment by the legislature to be used against the risk-takers, the slothful, and the incompetent where a valid oral contract was created, but no writing, signed by the party to be charged as required by the Statute of Frauds was created.

<sup>312</sup> In other words, if there was a writing that met the requirements of the Statute of Frauds.

<sup>313</sup> In other words, an admission that satisfied the statutory provisions.

<sup>314</sup> For example, if a writing, or writings, presented to the court, in purported satisfaction of the Statute of Frauds were asserted to be fraudulent, the court is amply equipped to resolve such assertions.

<sup>315</sup> “The party to be charged,” in keeping with the rhetoric of the Statute of Frauds itself.

created, then the reasoning articulated in *R.S. Bennett* by the Seventh Circuit seems to be less stable. It would, therefore, be less convincing. Of course, the courts should not ignore the legislative enactment.<sup>316</sup> However, the legislature did not generalize this provision to *all* contracts subject to the Statute of Frauds. The legislature restricted it to contracts for the sale of goods under Article 2 of the UCC.<sup>317</sup>

With respect to contracts other than for the sale of goods, the Statute of Frauds may have been enacted by the legislature to be used against the risk-takers,<sup>318</sup> the slothful,<sup>319</sup> and the commercially incompetent.<sup>320</sup> If so, proof of a valid contract would be insufficient to justify enforcement by the courts, if no valid writing as required by the Statute of Frauds existed.<sup>321</sup> The risk takers would have undertaken the risk that the Statute of Frauds would not be asserted as a defense by the party against whom the contract action would be brought. The slothful and the commercially incompetent also would have undertaken a similar risk. In these instances involving oral contracts without a writing, the probable outcome would be as follows: Where a party opposing enforcement of such contracts asserted the defense of the Statute of Frauds, suits for breach of contract would continue to be unsuccessful. A writing that met the requirements of the Statute of Frauds would be necessary to win such cases.

Admission or proof of a valid oral contract would *also* be insufficient for success in such actions, where no valid writing signed by the party to be charged was created.<sup>322</sup> Furthermore, the doctrine of promissory estoppel would be insufficient to achieve success in such suits. In equity, the doctrine of promissory estoppel exists only to provide the relief necessary to avoid injustice.<sup>323</sup> Arguably, there would be no injustice where a party took action based upon the taking of his or her own unilateral, personal risks, by not insisting on a valid writing. Such a party

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<sup>316</sup> That a party's admission of a contract is a substitute for a writing, as required by the Statute of Frauds, specific to the context of contracts for the sale of goods.

<sup>317</sup> *R.S. Bennett & Co., Inc. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182, 185 (7th Cir. 1979).

<sup>318</sup> Risk-takers include those who knew or ought to have known that a writing was mandated by the Statute of Frauds, but undertook the risk that the other contracting party would not raise the Statute of Frauds as a defense.

<sup>319</sup> The slothful include those who were indifferent as to a Statute of Frauds mandate, or many other pitfalls, for that matter.

<sup>320</sup> Legal advice should have been sought by such parties.

<sup>321</sup> *Bennett*, 606 F.2d at 185 n.2.

<sup>322</sup> *Id.*

<sup>323</sup> *See supra* note 29.

or parties should ensure that the writing mandated by the Statute of Frauds was created and signed by the party to be charged.

Finally, in *Goldstick*, the Seventh Circuit explained the rationale of the Illinois Appellate Court decision in *Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*<sup>324</sup> The *Jenkins & Boller* decision was reached subsequent to the *Ozier*<sup>325</sup> and *Sinclair*<sup>326</sup> decisions of the Illinois Supreme Court. In *Jenkins & Boller*, the Illinois Appellate Court seemed to permit the plaintiff to successfully assert a promissory estoppel claim to bar the defense of the Statute of Frauds.<sup>327</sup> However, as the Seventh Circuit explained, the *rationale* of this decision did not allow such a bar at all.<sup>328</sup>

The Seventh Circuit acknowledged<sup>329</sup> that an Illinois Appellate Court decision,<sup>330</sup> subsequent to *Jenkins & Boller*, explained the decision in *Jenkins & Boller*. The decision in *Libby-Broadway Drive-In, Inc. v. McDonald's System, Inc.* explained that the facts and litigation in *Jenkins & Boller* did not involve a contract that fell within the Statute of Frauds at all.<sup>331</sup> The Seventh Circuit therefore conceded that the court in *Libby-Broadway Drive-In, Inc. v. McDonald's System, Inc.* correctly “described *Jenkins* as a case outside of rather than rejecting the [S]tatute of [F]rauds.”<sup>332</sup>

### 1. Common Law and UCC Approaches Compared

In the opinion of the Seventh Circuit, *R.S. Bennett & Co.*<sup>333</sup> is “open to re-examination,”<sup>334</sup> with respect to any assertion that promissory estoppel bars the defense of Statute of Frauds under Illinois law.<sup>335</sup> Therefore, the post-*R.S. Bennett & Co.* point of view of the Seventh Circuit is as follows. It seems to indicate acceptance of the conclusion that under Illinois law, the doctrine of promissory estoppel does not bar the defense of the Statute

<sup>324</sup> 344 N.E.2d 275 (Ill. App. Ct. 1976).

<sup>325</sup> *Ozier v. Haines*, 103 N.E.2d 485 (Ill. 1952).

<sup>326</sup> *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516 (Ill. 1964).

<sup>327</sup> *Jenkins*, 344 N.E.2d at 278.

<sup>328</sup> See *Goldstick v. IMC Realty*, 788 F.2d 456, 465 (7th Cir. 1989).

<sup>329</sup> *Id.*

<sup>330</sup> *Libby-Broadway Drive-In, Inc. v. McDonald's Sys., Inc.*, 391 N.E.2d 1, 4 (1979).

<sup>331</sup> *Id.* (“The authorit[y] cited by plaintiffs in which the doctrine of promissory estoppel was applied in order to enforce an oral promise [is] distinguishable in that [it did] not involve [a contract] which [fell] within the Statute of Frauds.”) (citations omitted).

<sup>332</sup> *Goldstick*, 788 F.2d at 465.

<sup>333</sup> *R.S. Bennett & Co., Inc. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182, 182 (7th Cir. 1979).

<sup>334</sup> *Goldstick*, 788 F.2d at 466.

<sup>335</sup> *Id.*

of Frauds in a case not governed by Article 2 of the UCC.<sup>336</sup> The Seventh Circuit provided several reasons for this apparent acceptance.

First, it interpreted the Illinois Supreme Court's language in *Ceres* as “intimations” that a Statute of Frauds defense would preclude a successful assertion of promissory estoppel.<sup>337</sup> Because *Ceres* was governed by the common law, the Seventh Circuit apparently interpreted *Ceres* as making a UCC/non-UCC distinction.

Second, this distinction is rational and logical. As the Seventh Circuit conceded,<sup>338</sup> to do otherwise would mean that the Illinois Supreme Court would have to overrule both of its two prior decisions in *Ozier* and *Sinclair*. Finally, the Seventh Circuit stated that it “follow[s] the practice in diversity cases of giving substantial deference to the district judge's interpretation of the law of the state in which the judge sits.”<sup>339</sup>

Additional cases are helpful. The Northern District Court of Illinois in *Genin, Trudeau & Co. v. Integra Development International*<sup>340</sup> ruled that a plaintiff's equitable estoppel claim “sufficiently state[d] allegations that [fell] within the *Ceres* definition of [equitable] estoppel, and the [defendant's] motion to dismiss ... [was] denied.”<sup>341</sup> In *Genin*, the court acknowledged that the *Ceres* decision reaffirmed the misrepresentation requirement for proof of equitable estoppel, but reasoned that the decision showed potential.<sup>342</sup> The potential was that the *Ceres* decision could conceivably permit promissory estoppel to bar the defense of the Statute

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<sup>336</sup> *Id.* (Of course, the court's views in this regard are dicta on this issue, as the case was ultimately decided on other grounds.); *see also* *Snellman v. A.B. Dick Co.*, No. 81 C 3048, 1987 WL 8619, at \*11 (N.D. Ill. Mar. 24, 1987) (holding that the UCC distinction made by the Seventh Circuit is the most logical explanation of present Illinois law); *accord* *Novacor Chems., Inc. v. Aluf Plastics, Inc.*, No. 87 C 9128, 1988 WL 135556 (N.D. Ill. Dec. 8, 1988).

<sup>337</sup> *Goldstick*, 788 F.2d at 465.

<sup>338</sup> *See id.* at 464-65.

<sup>339</sup> *Id.* at 466 (citing *Am. Motorists Ins. Co. v. Trane Co.*, 718 F.2d 842, 845 (7th Cir. 1983); *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413, 416-17 (7th Cir. 1983); *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 354 (7th Cir. 1982)).

<sup>340</sup> *Genin, Trudeau & Co. v. Integra Dev. Int'l*, 845 F. Supp. 611, 616 (N.D. Ill. 1994); *see* *Dumas v. Infinity Broad. Corp.*, No. 03 C 4713, 2003 U.S. Dist. LEXIS 22779 (N.D. Ill. Dec. 18, 2003) (distinguishing the holding in *Genin*). In *Dumas*, the court stated that the *Genin* court “[was] faced with uncertain Illinois law regarding the application of the [S]tatute of [F]rauds to promissory estoppel claims and the liberal standard governing a motion to dismiss when they ruled.” *Id.* at \*9. That court found that the law of Illinois is settled on the matter and that a promissory estoppel claim was subject to the Statute of Frauds. *Id.*

<sup>341</sup> *Genin*, 845 F. Supp. at 619.

<sup>342</sup> *Id.* at 617.

of Frauds on an appropriate factual record.<sup>343</sup> The court analyzed the test articulated in the *Ceres* decision and concluded that the articulation of the test of success or failure in asserting equitable estoppel was pivotal.<sup>344</sup> The *Ceres* decision articulated the test of success or failure as a question of “whether in all circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct.”<sup>345</sup> By virtue of this elucidation, the Illinois Supreme Court had therefore extended the parameters of the doctrine of equitable estoppel.<sup>346</sup>

According to the *Genin* opinion, this parameter extension in the *Ceres* decision ameliorated the more strict requirements for successful proof of misrepresentation stipulated under *Sinclair*.<sup>347</sup> The court also noted that courts in its district had reached differing results on the issue.<sup>348</sup> As a result, the court reasoned that consideration of “all the circumstances of the case” was critical.<sup>349</sup> In addition, the court also analyzed the decision in *Michaels Corp. v. Trans World Metals*.<sup>350</sup> The court in *Michaels* ruled that the allegations in that case fell within the ameliorated definition of equitable estoppel enunciated in *Ceres*.<sup>351</sup>

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<sup>343</sup> *Id.* at 618.

<sup>344</sup> *Id.* at 617.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* The court arguably interpreted the ruling in *Ceres* as not quite allowing a promissory estoppel claim to “trump” the Statute of Frauds, but rather, as a reevaluation of a party’s claim to determine whether or not it conformed to the restated, more flexible definition of fraud articulated in the *Ceres* decision.

<sup>348</sup> *Id.* Describing the Appellate Court’s decision and the relationship between the Statute of Frauds and equitable estoppels, the court states:

[I]n ... a sales case, the Appellate Court read *Ceres* as an outright affirmation of the equitable/promissory estoppel dichotomy. The court distinguished equitable estoppel, which requires misrepresentation, and is an exception to the [S]tatute of [F]rauds, from promissory estoppel which does *not* require misrepresentation and is *not* an exception ... [I]n an attempt to trump the [S]tatute of [F]rauds, a party must invoke the doctrine of equitable estoppel, which differs from promissory estoppel in that the party asserting it must additionally allege words or conduct amounting to misrepresentation or concealment of material facts .... On the other hand is a string of Illinois cases that take the opposite position. (emphasis added) (citations omitted).

<sup>349</sup> *Id.* at 619.

<sup>350</sup> *Michaels Corp. v. Trans World Metals*, No. 87 C 3440, 1987 WL 14010 (N.D. Ill. July 14, 1987).

<sup>351</sup> *Id.* at \*2.

In *Genin*, the court therefore ruled that the facts under scrutiny were similar to the facts in *Michaels*.<sup>352</sup> The court reasoned that these similarities supported a ruling that plaintiff's allegations were sufficient to fall within the *Ceres* definition of equitable estoppel.<sup>353</sup> Consequently, after completing its examination of the leading cases that addressed the issue in its district, the court ruled that the plaintiff had succeeded in stating a claim falling within the *Ceres* definition of equitable estoppel.<sup>354</sup> The court therefore denied the defendant's motion to dismiss plaintiff's claim.<sup>355</sup>

## 2. *The Employment Context Specifically*

Where performance of an employment agreement cannot be completed within one year from the date when it was made, the contract is not enforceable unless there is a writing that meets the requirements of the Statute of Frauds.<sup>356</sup> Courts have generally not allowed a promissory estoppel claim to defeat a Statute of Frauds defense in the employment context.<sup>357</sup> *McInerney v. Charter Golf, Inc.*<sup>358</sup> is a relatively recent Illinois case involving an oral promise of employment. In *McInerney*, the Illinois Supreme Court adhered to the precedents of *Ozier* and *Sinclair* and held that interposing a Statute of Frauds defense precludes success on a promissory estoppel assertion, even though there has been reliance on such a promise.<sup>359</sup> The employment at will doctrine is the engine that provides power to this conclusion. The court acknowledged that the employment at will doctrine is the dominant type of employment

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<sup>352</sup> See *Genin*, 845 F.Supp at 618-19.

<sup>353</sup> *Id.* at 619 ("As in *Michaels*, we believe the allegations here are more than sufficient to fall within the *Ceres* definition of equitable estoppel.").

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* This decision, however, does not and indeed cannot overrule the *Sinclair* decision. See *supra* footnote 248.

<sup>356</sup> See *Evans v. Fluor Distrib. Co.*, 799 F.2d 364, 365 (7th Cir. 1986) (affirming the grant of summary judgment where no writing, signed by the party to be charged, existed and the contract in issue could not possibly be performed in one year when the agreement allegedly promised to employ the sixty-two-year-old plaintiff until he was sixty-five); see also *Cohn v. Checker Motors Corp.*, 599 N.E.2d 1112, 1116 (Ill. App. Ct. 1992). *Contra* *LaMaster v. Chi. and N.E. Illinois Dist. of Carpenters Apprentice and Trainee Program*, 766 F. Supp. 1497 (N.D. Ill. 1991) (holding that an oral employment contract for permanent employment is not necessarily barred by the Statute of Frauds because death could render the contract performed).

<sup>357</sup> *Evans*, 799 F.2d at 367.

<sup>358</sup> *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347 (Ill. 1997).

<sup>359</sup> *Id.* at 1353.

relationship in this country.<sup>360</sup> Promissory estoppel claims would undermine termination at will. In order to succeed on a promissory estoppel assertion, the asserting party must show reliance.<sup>361</sup> In the employment context, this is simply too easy to do. The *Evans v. Fluor*<sup>362</sup> case is helpful in this context.

In *Evans*, the court ruled in favor of the defendant.<sup>363</sup> The plaintiff claimed that the defendant had breached an oral agreement to employ the plaintiff.<sup>364</sup> Allegedly, the defendant/employer promised the plaintiff, who had already been working for defendant for twenty-five years, that he could keep his position until he was sixty-five years old.<sup>365</sup> The court determined that, in Illinois, an assertion of promissory estoppel does not bar a Statute of Frauds defense under these circumstances.<sup>366</sup>

Two main grounds supported this decision. First, precedent supported the court's ruling. The Illinois Supreme Court in *Sinclair* stated that the doctrine of promissory estoppel does not operate as a bar to a Statute of Frauds defense in oral employment agreements.<sup>367</sup> Secondly, the employment at will doctrine is significant in this context. It would be seriously undermined if the courts permitted promissory estoppel to apply to employment agreements in such a way that it would bar a Statute of Frauds defense. Reliance is too easily shown in the employment setting. Too often, an employee must give up one position to take another employment opportunity. This can be too easily described as reliance on an employer's oral promises of employment.<sup>368</sup> Thus, the court ruled that the oral employment agreement at issue was not enforceable.<sup>369</sup> *Evans* remains the pertinent law in this area.<sup>370</sup>

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<sup>360</sup> *Evans*, 799 F.2d at 368 n.3.

<sup>361</sup> *Id.* at 367.

<sup>362</sup> *Id.* at 368 n.3.

<sup>363</sup> *Id.* at 369.

<sup>364</sup> *Id.* at 364.

<sup>365</sup> *Id.* at 365.

<sup>366</sup> *Id.* at 367-68; *see also* *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777, 779 (1966) ("The question that emerges for resolution by us is whether or not we will adopt by judicial action the doctrine of promissory estoppel as a sort of counteraction to the legislatively created Statute of Frauds. *This we decline to do.*") (emphasis added).

<sup>367</sup> *Sinclair v. Sullivan Chevrolet Co.*, 202 N.E.2d 516, 518-19 (Ill. 1964).

<sup>368</sup> *Evans*, 799 F.2d at 368 n.3; *see also* *Goldstick v. ICM Realty*, 788 F.2d 456, 465 (7th Cir. 1986).

<sup>369</sup> *Evans*, 799 F.2d at 369.

<sup>370</sup> *Taylor v. Canteen Corp.*, 789 F. Supp. 279, 285 (C.D. Ill. 1992) (holding that *Evans* is good law and would not permit a promissory estoppel claim to defeat a Statute of Frauds defense); *Koch v. Ill. Power Co.*, 529 N.E.2d 281, 286 (Ill. App. Ct. 1988) (holding that *Evans* is still good law, and thus an employment contract which cannot be performed within one year must meet the writing requirements of the Statute of Frauds).

### 3. UCC/Non-UCC Comparisons

The Illinois Supreme Court's current ruling on whether a promissory estoppel assertion, in the context of the sale of goods, can defeat a successful Statute of Frauds defense in the pre-UCC context comes from both *Ozier* and *Ceres*. *Ozier* maintained that promissory estoppel alone is insufficient, and that proof of material misrepresentation, concealment, or omission is required to defeat a Statute of Frauds defense.<sup>371</sup> Some courts interpret *Ceres* as making a UCC/non-UCC distinction, and thus its holding was intended to apply only to non-UCC cases, leaving its application to UCC cases open for discussion.<sup>372</sup> In *Evans v. Fluor*, the Seventh Circuit Court of Appeals stated “there is arguably some question with respect to whether the Illinois Supreme Court would allow a party to raise the Statute of Frauds as a defense in an action premised upon promissory estoppel, especially in cases arising under the [UCC].”<sup>373</sup> Therefore, with regard to cases to which the UCC applies, Illinois law is arguably unclear.

Many decisions hold strictly to the precedent set by *Ozier* without considering section 2-201 of the Uniform Commercial Code.<sup>374</sup> The Illinois Appellate Court in *Cohn v. Checker Motors Corp.*<sup>375</sup> acknowledged that it was bound by the decision in *Ozier*.<sup>376</sup> In *Cohn*, the court explained that, to defeat a Statute of Frauds defense in a case governed by the UCC, the plaintiff must invoke the doctrine of equitable estoppel.<sup>377</sup> The court reiterated that a promissory estoppel claim will not suffice.<sup>378</sup> The Seventh Circuit has also reaffirmed that *Ozier* remains the authority that promissory estoppel is insufficient to bar a Statute of Frauds defense in UCC cases,<sup>379</sup> despite its contrary decision in *R.S. Bennett*.<sup>380</sup>

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<sup>371</sup> *Ozier v. Haines*, 103 N.E.2d 485, 487-88 (Ill. 1952).

<sup>372</sup> *Evans*, 799 F.2d at 367.

<sup>373</sup> *Id.* at 368.

<sup>374</sup> Illinois adopted the Uniform Commercial Code in July of 1962. See *Cohn v. Checker Motors Corp.*, 599 N.E.2d 1112, 1115 (Ill. App. Ct. 1992). *Ozier* was decided in 1952 before the UCC was enacted in Illinois. See *Ozier*, 103 N.E.2d at 485.

<sup>375</sup> *Cohn*, 599 N.E.2d 1112.

<sup>376</sup> *Id.* at 1117.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at 1117-18; see also *Fischer v. Mann*, 514 N.E.2d 566, 571 (Ill. App. Ct. 1987).

<sup>379</sup> See, e.g., *Novacor Chems. v. Aluf Plastics, Inc.*, No. 87 C 9128, 1988 WL 135556, at \*4 (N.D. Ill. Dec. 8, 1988).

<sup>380</sup> *R.S. Bennett & Co. v. Econ. Mech. Indus.*, 606 F.2d 182, 187-88 (7th Cir. 1979).



Although *R.S. Bennett*,<sup>381</sup> a UCC case, conflicts to some degree with the decision in *Ozier*, that decision has been significantly undermined by other decisions.<sup>382</sup> The Seventh Circuit, in *Goldstick*, expressed doubt as to whether *R.S. Bennett* is an accurate statement of Illinois law.<sup>383</sup> Also, the Illinois Appellate Court stated that “decisions by the Federal courts, other than the United States Supreme Court, as to the law of Illinois are not binding” on the Illinois courts.<sup>384</sup> Consequently, courts have reaffirmed the precedential authority of *Ozier*.

However, some courts do not perceive Illinois law to be clear-cut in the context of the UCC. The UCC contains statutory exceptions to the Statute of Frauds. It states in section 2-201(3)(c): “A contract that does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable ... with respect to goods for which payment has been made and accepted or which have been received and accepted.”<sup>385</sup>

Controversy inevitably arises when a plaintiff asserts promissory estoppel to bar the defense of the UCC’s Statute of Frauds provisions. Success for the plaintiff would preclude the defendant from successfully raising the defense of the Statute of Frauds where partial performance was proven. Such partial performance could consist of the delivery of some, but not all, of the quantity allegedly agreed upon in the oral contract.<sup>386</sup> Proof of partial performance would be used to satisfy the reliance element of promissory estoppel.

In circumstances where the general Illinois Statute of Frauds applied, the doctrine of partial performance could possibly be invoked.<sup>387</sup> The doctrine of partial performance makes a contract, otherwise unenforceable under the Statute of Frauds, enforceable.<sup>388</sup> However, the facts of cases where this doctrine has been successfully invoked tend to be unusually viable and convincing in justifying each court decision. On those facts, where the plaintiff performed substantially, the existence of a contract can

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<sup>381</sup> *Id.*

<sup>382</sup> *See, e.g.,* *Abart Elec. Supply, Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1403-04 (7th Cir. 1991); *Monetti v. Anchor Hocking Corp.*, 931 F.2d 1178, 1181, 1186 (7th Cir. 1991); *Evans v. Fluor Distrib. Co.*, 799 F.2d 364, 368 (7th Cir. 1986); *Goldstick v. ICM Realty*, 788 F.2d 456, 464-66 (7th Cir. 1986).

<sup>383</sup> *Goldstick*, 788 F.2d at 464.

<sup>384</sup> *See Cohn v. Checker Motors Corp.*, 599 N.E.2d 1112, 1117 (Ill. App. Ct. 1992).

<sup>385</sup> U.C.C. § 2-201 (2003).

<sup>386</sup> *Monetti*, 931 F.2d at 1186. *R.S. Bennett & Co.* did not involve the partial delivery of goods, but rather the plaintiff’s detrimentally changed position in reliance on the oral contract for goods. Delivery or part performance was not established. *R.S. Bennett & Co. v. Econ. Mech. Indus., Inc.*, 606 F.2d 182 (7th Cir. 1979).

<sup>387</sup> *Monetti*, 931 F.2d at 1185.

<sup>388</sup> *Id.* at 1181, 1183-85.

be clearly and unequivocally inferred.<sup>389</sup> Moreover, the equities in favor of the relying party have tended to be overwhelming.<sup>390</sup> The partial-performance exception is often explained “as necessary to protect the reliance of the performing party.”<sup>391</sup> It is, in essence, an “enhanced” reliance doctrine.

Of course, the doctrine of restitution is also relevant in the overall context of attaining justice in equity. So, in the event that the performing party “can be made whole by restitution, the oral contract will not be enforced.”<sup>392</sup> Thus, the issue is whether Illinois adheres to a conception of UCC/non-UCC exceptions.

In *Meyer v. Logue*,<sup>393</sup> the Appellate Court of Illinois reached a decision that is consistent with a UCC exception.<sup>394</sup> *Meyer v. Logue* involved the sale of securities.<sup>395</sup> The court enforced the contract for those items received and paid for.<sup>396</sup> In the context of the UCC, the receipt and acceptance of goods is seen as an “unambiguous overt admission” by both parties that a contract ... exists.”<sup>397</sup> However, performance only validates the executed portion.<sup>398</sup> This fits within the statutory exception of the UCC. However, it does not determine whether performance, even substantial performance, which falls short of full performance, would lead to enforcement of the entire contract, thereby precluding success based upon a Statute of Frauds defense.

*Monetti v. Anchor Hocking Corp.* is interesting. *Monetti* involved an alleged breach of an oral interrelated contract.<sup>399</sup> The contract was for the sale of (i) goods, (ii) distribution rights, and (iii) assets associated with the distribution rights.<sup>400</sup> The plaintiff transferred its inventory, records, physical assets, and trade secrets before the defendant breached the alleged contract.<sup>401</sup> The Seventh Circuit held that the doctrine of partial

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<sup>389</sup> *Id.* at 1183-84.

<sup>390</sup> *See, e.g.,* Seeley v. Cochrane, 590 So. 2d 38, 39-40 (1991). *aff'g the authority of* Cottages, Miami Beach, Inc. v. Wegman, 57 So. 2d 439, 441 (1952).

<sup>391</sup> *Monetti*, 931 F.2d at 1184.

<sup>392</sup> *Id.*

<sup>393</sup> *Meyer v. Logue*, 427 N.E.2d 1253 (Ill. App. Ct. 1981).

<sup>394</sup> *Id.* at 1257-58.

<sup>395</sup> *Id.* at 1253.

<sup>396</sup> *Id.* at 1256-57.

<sup>397</sup> *Id.* at 1257.

<sup>398</sup> *Id.*

<sup>399</sup> *Monetti*, 931 F.2d at 1179.

<sup>400</sup> *Id.* at 1179.

<sup>401</sup> *Id.* at 1180.

performance took the contract out of the Statute of Frauds.<sup>402</sup> The court distinguished this specific partial performance from other instances governed by the UCC.<sup>403</sup> The court reasoned that the partial performance in issue in the instant case was more than just the partial delivery of a total quantum of goods consisting of part of a larger order.<sup>404</sup> The court ruled that the partial performance in this case was part of a sequence of the turning over of an entire business.<sup>405</sup> In this respect, this was substantial evidence of an oral contract.<sup>406</sup> It differed from a contract for simply selling goods, as the UCC's Statute of Frauds contemplated.<sup>407</sup> Noting that partial performance, under the UCC Statute of Frauds, would not allow enforcement beyond the quantity that was delivered, the court stated that the Illinois general Statute of Frauds works differently when applicable to "mixed" contracts.<sup>408</sup>

Prior cases dealing with the convergence of the UCC and the common law have entailed a particular approach. Decisions relating to a "mixed" contract require court analysis to determine the predominant purpose of the contract.<sup>409</sup> In *Monetti v. Anchor Hocking Corp.*, the contract would certainly fall within the parameters of the UCC, but the court did not think that the facts amounted to a seamless application of the UCC to this contract.<sup>410</sup> The court contemplated two alternate ways to interpret the UCC Statute of Frauds.

First, section 2-201(1) could be viewed as not involving *every* transaction that is otherwise within the scope of the UCC.<sup>411</sup> The Statute of Frauds section of Article 2 applies to "contract[s] for the *sale* of goods," while Article 2 of the UCC generally applies to "transactions in goods."<sup>412</sup> In other words, all *transactions* in goods are not necessarily *sales* of goods. Inevitably, a number of transactions involve goods, but the Statute of Frauds only applies to *sales* of goods.<sup>413</sup> The contract in issue could be more accurately categorized as a "transaction in goods" because of its

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<sup>402</sup> *Id.* at 1185.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 1184.

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 1184-85.

<sup>409</sup> *Id.* at 1184.

<sup>410</sup> *Id.* at 1184-85.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 1185 (emphasis added).

<sup>413</sup> *Id.* at 1184.

"mixed" nature.<sup>414</sup> Thus, the UCC Article 2 Statute of Frauds need not be applied. Instead, the general Illinois Statute of Frauds could be applied.<sup>415</sup>

Secondly, the court suggested applying the UCC Article 2 Statute of Frauds flexibly in light of special circumstances that do not "fit" appropriately into the statute's usual framework.<sup>416</sup> For example, enforcing the contract completely when part performance involved the partial payment for all the goods.<sup>417</sup> Thus, the goal of the UCC Article 2 Statute of Frauds, preventing the seller from unilaterally altering the quantity ordered by the buyer, still would be met. These observations by the court are dicta because the case was ultimately decided on other grounds.<sup>418</sup>

However, the court does pose the question whether the plaintiff could alternately have asserted a promissory estoppel claim using the partial performance to establish reliance.<sup>419</sup> Because the court's decision rested on alternative grounds, the decision, of necessity, leaves this question unanswered.<sup>420</sup>

Nonetheless, a promissory estoppel argument would not have fundamentally differed from a part performance argument, which the court seemed to support. In *Zayre Corp. v. S.M. & R., Inc.*,<sup>421</sup> the Seventh Circuit seemed to question whether there is a legally discernable difference between the full performance doctrine and promissory estoppel.<sup>422</sup> The court seemed persuaded that full performance could be argued as the reliance element of promissory estoppel.<sup>423</sup> The facts would probably need to be as irrefutable as those in *Monarco v. Lo Greco*<sup>424</sup> and *Cottages, Miami Beach, Inc. v. Wegman*.<sup>425</sup>

Arguably, Illinois law would probably preclude a promissory estoppel claim from barring a Statute of Frauds defense in a case governed by the UCC. Recent cases show that the courts have not unequivocally

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<sup>414</sup> *Id.* at 1184-85.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 1185 (citing *Meyer v. Logue*, 427 N.E.2d 1253, 1256-58 (Ill. App. Ct. 1981)).

<sup>417</sup> *Id.* at 1185 (citing *Sedmak v. Charlie's Chevrolet, Inc.*, 622 S.W.2d 694, 698-99 (Mo. Ct. App. 1981)).

<sup>418</sup> *Id.* at 1185 (finding that the Statute of Frauds was indeed satisfied by a memo prepared before the oral agreement was made because the memo was sufficient to indicate that there really was an agreement).

<sup>419</sup> *Id.* at 1186.

<sup>420</sup> *Id.*

<sup>421</sup> 882 F.2d 1145 (7th Cir. 1989).

<sup>422</sup> *Id.* at 1156 n.4.

<sup>423</sup> *Id.* at 1156.

<sup>424</sup> 220 P.2d 737 (Cal. 1950); *see infra* note 440 and accompanying text.

<sup>425</sup> 57 So.2d 439 (Fla. 1951); *see infra* note 448 and accompanying text.

contradicted the precedent set by the Illinois Supreme Court in *Ozier*. The Seventh Circuit in *Monetti*, in dicta, seemed persuaded that the doctrine of promissory estoppel *could* bar a Statute of Frauds defense.<sup>426</sup> This interpretation is based on the Court's analysis of the doctrine of part performance in the context of the facts of that case.<sup>427</sup> Thus, until the Illinois Supreme Court overturns *Ozier*, that decision precludes promissory estoppel from barring the Statute of Frauds as a defense.

#### 4. *The Reliance Stream of Authority*

In contrast to courts that have adhered to the traditional approach, such as those in Illinois, “[a] ‘constant erosion’ ... has eaten away the statute [of frauds] in other jurisdictions.”<sup>428</sup> Moreover, “[t]his process of erosion promises to continue in the future.”<sup>429</sup> Essentially, this erosion is a consequence of the doctrine of reliance.<sup>430</sup> It may be referred to as the reliance stream.<sup>431</sup>

The reliance stream of authority is court-created.<sup>432</sup> The stream has been fundamentally impacted by the “charismatic legislation” of the Second Restatement of Contracts.<sup>433</sup> The late Professor Farnsworth referred to *Monarco v. Lo Greco*<sup>434</sup> as “[t]he seminal case”<sup>435</sup> in its creation.<sup>436</sup> This stream of authority permits both equitable<sup>437</sup> *and*

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<sup>426</sup> *Monetti v. Anchor Hocking Corp.*, 931 F.2d 1178, 1186 (7th Cir. 1991).

<sup>427</sup> *Id.*

<sup>428</sup> *Goldstick v. IMC Realty*, 788 F.2d 456, 466 (7th Cir. 1986).

<sup>429</sup> FARNSWORTH, *supra* note 54, at 357.

<sup>430</sup> *See, e.g., Alaska Airlines v. Stephenson*, 217 F.2d 295, 297 (9th Cir. 1954) (“At the outset, one well may wonder if the courts from the beginning had vigorously enforced the [S]tatute of [F]rauds from its first adoption in England, wouldn’t we have less injustice? If people were brought up in the tradition that certain contracts inescapably had to be in writing, wouldn’t those affected thereby get their contracts into writing and, on the whole, wouldn’t the public be better off?”).

<sup>431</sup> *See id.* (“For generations, in hard cases, the courts have been making exceptions to ‘do justice,’ granting relief here, calling a halt there. The result is that one with difficulty can predict the result in a given state ....”).

<sup>432</sup> *See* FARNSWORTH, *supra* note 54, at 406 (“The recognition of reliance has come ... through case law and ... the Restatement Second [of Contracts].”).

<sup>433</sup> *See infra* Part III.A.

<sup>434</sup> 220 P.2d 737 (Cal. 1950).

<sup>435</sup> *See* FARNSWORTH, *supra* note 54, at 406.

<sup>436</sup> MALCOLM GLADWELL, *THE TIPPING POINT* 262 (2002) (“A book ... is a living and breathing document that grows richer with each new reading.”). The same is true of a case.

<sup>437</sup> The reliance stream of authority interprets and applies equitable estoppel in a manner quite similar to its interpretation and application under the traditional stream of authority. *See, e.g., Monarco v. Lo Greco*, 220 P.2d 737, 740 (Cal. 1950) (“[A]n

promissory<sup>438</sup> estoppel to bar the defense of the Statute of Frauds on qualifying facts. Because both streams of authority respect the efficacy of equitable estoppel to bar a Statute of Frauds defense, when warranted, further discussion will be devoted to promissory estoppel.

In *Monarco*, the Supreme Court of California ruled that promissory estoppel barred the defense of the Statute of Frauds on the facts presented. The facts of *Monarco* are unique.<sup>439</sup> Few cases will be so deserving<sup>440</sup> of court-ordered barring of the Statute of Frauds defense.<sup>441</sup> First, the reliance extended over twenty years of devoted full-time employment services to the pertinent property by the relying party.<sup>442</sup> Secondly, the promisor repeated assurances that the promises would be honored essentially throughout the period of the relying party's employment<sup>443</sup> and reliance.<sup>444</sup>

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[equitable] estoppel to plead the [S]tatute of [F]rauds can ... arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense.”).

<sup>438</sup> See, e.g., *id.* at 742 (“[Promisee] in reliance on the contract contributed his services for over twenty years to make the family venture a success, and [promisor] accepted the benefits thereof. Plaintiff is thus estopped because of these facts ....”).

<sup>439</sup> The plaintiff's grandfather (promisor) had made promises to the promisee, cross-complainant's son (by a previous marriage), which induced the promisee to devote over twenty years working full-time to develop family property owned jointly by promisor and promisee's mother (cross-complainant, who was the promisor's wife). *Monarco*, 220 P.2d at 739. On his death, and in violation of his promises to promisee, promisor left the pertinent property by will to the plaintiff. *Id.*

<sup>440</sup> The unique facts served as the launch-pad. The court would most certainly have been aware “that logic launched from introspection alone lacks thrust, can travel only so far, and usually heads in the wrong direction.” See EDWARD O. WILSON, *CONSILIENCE* 105 (1998).

<sup>441</sup> The Supreme Court of California, en banc, ruled that *both* (i) unconscionable injury to the cross-complainant. *and* (ii) unjust enrichment to the plaintiff would be the result, if the court permitted successful use of the Statute of Frauds to prevent enforcement of the promisor's oral contract and promises. *Monarco*, 220 P.2d at 739-40. The court therefore permitted promissory estoppel to be used to bar the defense of the Statute of Frauds. The court reached the right decision and eliminated what might have otherwise been almost certain poverty for the promisee. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 247 (1998) (“There can be no single blueprint for eliminating poverty .... There are far too many economic, political, and social factors today that directly affect this poverty problem.”).

<sup>442</sup> *Monarco*, 220 P.2d at 740.

<sup>443</sup> *Id.* at 739.

<sup>444</sup> If the facts establishing reliance were weaker, the court may well have decided this case differently. See LEONARD MLODINOW, *THE DRUNKARD'S WALK, HOW RANDOMNESS RULES OUR LIVES* 209 (2008) (“On an emotional level many people resist the idea that random influences are important even if, on an intellectual level, they understand that they are.”).

The facts of *Cottages, Miami Beach, Inc. v. Wegman*,<sup>445</sup> are somewhat similar to the facts in *Monarco*.<sup>446</sup> Nevertheless, the decision does not seem to have had an impact similar to the *Monarco* decision, and Florida seems firmly entrenched in the traditional stream.<sup>447</sup> In *Wegman*, in response to a letter<sup>448</sup> from her father, the daughter accepted an offer from him.<sup>449</sup> She relinquished her home in New York City and moved with her child to Miami Beach, Florida.<sup>450</sup> Her father allowed her to take possession of some real property, which she operated for about three years prior to his death.<sup>451</sup> In the offer, the father had indeed bargained for her to leave her home in New York City and move to Miami Beach, Florida.<sup>452</sup> In his letter, the father asked her to relocate in this manner in order to help him in the operation of a business relating to real estate that he was currently acquiring.<sup>453</sup> The father included, as an inducement, a promise of a half interest in the pertinent real property that he was purchasing.<sup>454</sup> Unfortunately, the father died without transferring the promised interest.<sup>455</sup> The daughter therefore sued the executrix<sup>456</sup> of his estate for specific performance of the alleged agreement. The trial court ruled in favor of the daughter and the Florida Supreme Court affirmed the decision.<sup>457</sup>

In ruling in favor of the daughter, the court reasoned that the daughter's possession of the property, combined with her reliance and performance of what was bargained for, satisfied the equitable part performance doctrine.<sup>458</sup> This was sufficient to bar any successful

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<sup>445</sup> 57 So.2d 439 (Fla. 1951).

<sup>446</sup> *Id.* It does not appear that *Monarco* was cited in *Wegman*.

<sup>447</sup> *See supra* note 203.

<sup>448</sup> *Cottages, Miami Beach, Inc. v. Wegman*, 57 So. 2d 439, 440-41 (1952) ("The letter that was written to the appellee by her father is not such a written memorandum as can be said to meet the requirements of the Statute of Frauds. Consequently, the agreement must be treated as an oral agreement to convey land.").

<sup>449</sup> *Id.* at 440.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 442.

<sup>452</sup> *Id.* at 440.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 441.

<sup>456</sup> *Id.* at 442 ("[A]ppellee's testimony concerning an altercation and of an inharmonious relation, between her and her stepmother was sufficient showing to excuse the suggested laches or the invocation against her of equitable estoppel.").

<sup>457</sup> *Id.* at 441 ("[T]he evidence discloses such part performance as will take the oral agreement out of the [S]tatute of [F]rauds .... [T]he rendition of services together with possession of the property to which the contract relates is a sufficient part performance to take the contract out of the statute [of frauds].") (citations omitted).

<sup>458</sup> *Id.* at 441-42.

assertion of a Statute of Frauds defense.<sup>459</sup> However, the Florida courts adhere to the traditional stream of authority.<sup>460</sup> So, *Wegman* may be perceived as permitting promissory estoppel to bar a Statute of Frauds defense where the facts overwhelmingly justify such an outcome. This would be an example of a reliance *plus* set of facts.

Other courts have followed the lead of the California Supreme Court's decision in *Monarco. Alaska Airlines v. Stephenson*<sup>461</sup> is such a case. In *Alaska Airlines*, based upon an oral agreement, plaintiff employee brought action against his new employer, who asserted the defense of the Statute of Frauds.<sup>462</sup> Plaintiff argued that promissory estoppel barred the asserted defense.<sup>463</sup> Plaintiff's promissory estoppel arguments were based on his alleged reliance on his new employer's promises.<sup>464</sup> That reliance consisted of: (i) moving his family from California to Alaska, (ii) giving up his position with his prior employer in order to take up employment with the promisor, and (iii) commencing work with the promisor on the promised terms.<sup>465</sup> The United States Court of Appeals for the Ninth Circuit affirmed the court below and ruled in favor of the plaintiff-appellee.<sup>466</sup> The court reasoned that, on these facts, promissory estoppel barred the defense of the Statute of Frauds.<sup>467</sup>

In *Stangl v. Ernst Home Center, Inc.*,<sup>468</sup> the Court of Appeals of Utah indicated that appropriate representations can create circumstances in which promissory estoppel bars the defense of the Statute of Frauds.<sup>469</sup>

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<sup>459</sup>*Id.* at 442 (“[T]he evidence in this case convinces us that had the Chancellor refused equitable relief such action would have been tantamount to countenancing an injustice amounting to a fraud upon appellee.”).

<sup>460</sup> *See supra* note 204.

<sup>461</sup> *Alaska Airlines v. Stephenson*, 217 F.2d 295 (9th Cir. 1954).

<sup>462</sup> *Id.* at 296.

<sup>463</sup> *Id.* at 297.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* (including promises to work for a certain monthly salary, which would later be followed, in six weeks to six months, by mutual negotiations with a view to finalizing a long-range agreement in writing).

<sup>466</sup> *Id.* at 298 (“The circumstance of [plaintiff’s] relinquishing his rights with [his prior employer] and the promise [of the defendant] to make a written contract on the future condition, we think, meets the test of the Restatement.”).

<sup>467</sup> *Id.* (“[I]t occurs to us that the Restatement of Contracts ... has come up with a very good compromise in the confusion of decisions under the [S]tatute of [F]rauds which leaves some vitality to the statute, yet gives a workable rule in making exceptions.”).

<sup>468</sup> *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356 (Utah Ct. App. 1997).

<sup>469</sup> *Id.* at 365-66 (“Promissory estoppel bars a defendant from asserting the [S]tatute of [F]rauds as a defense only where the party has clearly and unequivocally represented that it would not use it as a defense.”).



The representations could justify a court determination that there has been a waiver of the defense by the party making them.<sup>470</sup> A waiver of the Statute of Frauds defense would certainly be a bar to its use as a defense by the party that waived it.<sup>471</sup> The facts of such a case, or cases, would need to be exceptional.<sup>472</sup>

*5. Legal Impact of the Second Restatement of Contracts, the  
“Charismatic Legislation”*

The late Professor Farnsworth indicated that section 139 was added to the Restatement Second of Contracts in response to this developing line of cases.<sup>473</sup> An examination of the influence of section 139, on both the traditional and reliance streams of authority should therefore be valuable.

*a. The Legal Impact of the Second Restatement of Contracts  
Section 139 on the Traditional Stream of Authority.*

The impact of section 139 on the traditional stream may be investigated by examining a number of decisions applying Illinois law.<sup>474</sup> In *Goldstick v. IMC Realty*,<sup>475</sup> some dicta of the United States Court of Appeals for the Seventh Circuit reflect a view that the Second Restatement of Contracts seems to demonstrate some movement away from overly strict enforcement of the Statute of Frauds.<sup>476</sup> The court formed these views based upon its analysis of section 139(1)<sup>477</sup> and (2)<sup>478</sup> of the Second

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<sup>470</sup> *Id.* at 366 (“Accordingly, because Ernst did not represent that it would not assert the [S]tatute of [F]rauds as a defense, it is not estopped from doing so.”).

<sup>471</sup> *Id.* at 361 (“A defendant is estopped from asserting the [S]tatute of [F]rauds as a defense ... when he or she has expressly and unambiguously waived the right to do so.”).

<sup>472</sup> *See id.* at 362 (“[P]romissory estoppel will bar the defense of the [S]tatute of [F]rauds ... when ‘[t]he acts and conduct of the promisor ... so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party.’”) (citation omitted).

<sup>473</sup> *See* FARNSWORTH, *supra* note 54, at 407.

<sup>474</sup> Nebraska and Wisconsin laws seem similar to Illinois law. *See* *Farmland Serv. Coop v. Klein*, 244 N.W.2d 86 (Neb. 1976); *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974).

<sup>475</sup> *Goldstick v. IMC Realty*, 788 F.2d 456, 458 (7th Cir. 1986) (“[T]he governing substantive law is that of Illinois ....”).

<sup>476</sup> *Id.* at 465-66 (“[T]he movement away from the [S]tatute of [F]rauds ... is reflected for example in section 139(1) of the Second Restatement, which provides that an oral promise can be the basis of a promissory estoppel ‘notwithstanding the [S]tatute of [F]rauds if injustice can be avoided only by enforcement of the promise.’”).

<sup>477</sup> *Id.*

<sup>478</sup> *Id.* at 466 (“Subsection (2) gives substance to the concept of avoiding injustice by specifying the considerations relevant to whether the promise should be enforced despite

Restatement of Contracts. The court reasoned that subsection (2) of section 139 allows for specific deliberation by courts in determining whether a promise should be enforced despite the Statute of Frauds.<sup>479</sup> The dicta indicated that the court's analysis of two recent past decisions of the Illinois Supreme Court<sup>480</sup> did not demonstrate that the Statute of Frauds is being eroded in Illinois.<sup>481</sup>

The court concluded that the combined effect of these two subsections of section 139 of the Second Restatement of Contracts has been "to create a more flexible standard which nonetheless preserves some judicial power ...."<sup>482</sup> The court seemed persuaded that, in spite of these developments in the Second Restatement, the Illinois Supreme Court would retain its opinion that promissory estoppel does not bar a Statute of Frauds defense.<sup>483</sup>

This point of view is entitled to support based upon the Illinois Supreme Court's decision in *Ozier v. Haines*.<sup>484</sup> *Ozier* was decided prior to the formulation of the Second Restatement, which was not published until 1981.<sup>485</sup> At the time of the *Ozier* decision, the Illinois Supreme Court would have formulated its reasoning in light of the First Restatement. Thus, it may be argued that the Illinois Supreme Court decided that promissory estoppel is insufficient to bar a Statute of Frauds defense, in light of the language of section 90 of the First Restatement of Contracts.<sup>486</sup> Arguably, the court decided that even if "the promisor should reasonably

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the [S]tatute of [F]rauds, considerations such as whether 'the making and terms are otherwise established by clear and convincing evidence.'" (citation omitted).

<sup>479</sup> *Id.*

<sup>480</sup> See *Sierens v. Clausen*, 328 N.E.2d 559 (Ill. 1975); *Lee v. Cent. Bank & Trust Co. of Rockford*, 308 N.E.2d 605 (Ill. 1974).

<sup>481</sup> See *Goldstick*, 788 F.2d 456, 466 ("We have found only two recent cases in which [the Illinois Supreme Court] dealt with the [S]tatute of [F]rauds, and though in both the defense was rejected, they do not provide strong evidence that the court has been swept up in the 'constant erosion' that has eaten away the statute in other jurisdictions.") (citations omitted).

<sup>482</sup> *Id.* (identifying that power as "[the] power to keep out of the hands of a jury a case based solely on evidence of an oral promise and of reasonable reliance thereon").

<sup>483</sup> *Id.* ("If forced to guess what the Illinois Supreme Court would do ... we would guess ... that it would hold the [S]tatute of [F]rauds applicable to promissory estoppel ....").

<sup>484</sup> See *Ozier v. Haines*, 103 N.E.2d 485, 489 (Ill. 1952).

<sup>485</sup> See FARNSWORTH, *supra* note 54, at 28.

<sup>486</sup> RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932) ("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.").

expect [his promise] 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," nevertheless, promissory estoppel is insufficient to bar a Statute of Frauds defense.<sup>487</sup>

Logically and rationally, therefore, if a greater degree of reliance was insufficient to bar a Statute of Frauds defense,<sup>488</sup> then, a fortiori, a lesser degree of reliance<sup>489</sup> will also be insufficient to bar such a defense as well. The creation, by section 139, of a more flexible standard for courts to apply promissory estoppel is incapable, without more, of enhancing the doctrine to the level necessary to overpower the decision in *Ozier*.<sup>490</sup> This does not necessarily mean that the Illinois Supreme Court is absolutely closed-minded to a ruling that promissory estoppel can ever be a bar to a Statute of Frauds defense. Such a ruling would undoubtedly need to be based upon overwhelmingly deserving facts yet to unfold in the future.

*b. The Legal Impact of the Second Restatement of Contracts Section 139 on the Reliance Stream of Authority.*

Some courts seem persuaded to permit promissory estoppel to defeat a Statute of Frauds defense in circumstances that extend beyond the unique facts of *Monarco v. Lo Greco*.<sup>491</sup> However, it does not seem clear-cut that a majority of the forty-nine common law jurisdictions adhere to such a standard. In a more circumspect approach, one commentator asserted that, in most jurisdictions, promissory estoppel *may* be successfully asserted to bar a Statute of Frauds defense.<sup>492</sup> Some decisions seem to be based upon an analysis of section 139(1) and (2) of the Second Restatement of Contracts.<sup>493</sup> They seem to be based upon reliance without more.<sup>494</sup> So, reliance alone can apparently be sufficient in the reliance stream courts to enable a promissory estoppel assertion to bar a Statute of Frauds defense.

<sup>487</sup> See *id.*; see also *Ozier*, 103 N.E.2d at 489.

<sup>488</sup> See *Ozier*, 103 N.E.2d at 488.

<sup>489</sup> See RESTATEMENT (FIRST) OF CONTRACTS § 139(1)-(2) (1981).

<sup>490</sup> See *Ozier*, 103 N.E.2d at 488.

<sup>491</sup> See *supra* note 439-440.

<sup>492</sup> See Holmes, *supra* note 5, at 363 (“[P]romissory estoppel ... in most jurisdictions ... can bar ... the [S]tatute[] of [F]rauds ... as justice requires.”) (emphasis added).

<sup>493</sup> See, e.g., *Warder & Lee v. Britten*, 274 N.W.2d 339, 342-43 (Iowa 1979) (decided based upon the tentative draft of section 139).

<sup>494</sup> See FARNSWORTH, *supra* note 54, at 408 (“[The court] enforced the farmers’ oral promises, even though there was no claim that they had been unjustly enriched and no promise to execute a memorandum. The recognition of reliance as a means of avoiding the defense of the [S]tatute of [F]rauds had come a long way since Christie Lo Greco made his claim.”).

## CONCLUSION

“Somewhere between worship of the past and exaltation of the present the path of safety will be found.” – Benjamin N. Cardozo – <sup>495</sup>

The Statute of Frauds has been part of the common law for more than three centuries.<sup>496</sup> Court decisions can be incentives<sup>497</sup> or disincentives<sup>498</sup> for compliance with its provisions. Under the traditional stream of authority, typified by Illinois law, a promissory estoppel claim will not ordinarily bar a Statute of Frauds defense.<sup>499</sup> For the traditional stream courts, the conclusion that promissory estoppel cannot be used ubiquitously as a vehicle to attain success in cases where oral promises alone are proven makes sense. The rationale for excluding the doctrine of promissory estoppel is the same in both UCC and non-UCC cases. It is to empower the legal force of the Statute of Frauds. Cases in Illinois and the traditional stream courts that seem to contradict this premise can be reconciled as either incorrect interpretations of the pertinent state law or cases consisting of promissory estoppel *plus*. The *plus* consists of some additional element such as full or partial performance or a judicial admission by the party to be charged.

Under the traditional stream of authority, the watchword has been reluctance. In order to overcome this reluctance in the traditional stream courts, something more than reliance must be proven.<sup>500</sup> The reluctance is

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<sup>495</sup> BENJAMIN N. CARDOZO, *supra* note 51, at 160.

<sup>496</sup> See FARNSWORTH, *supra* note 54, at 358 (“[T]he classes of contracts that come within the statute have not been appreciably revised in more than three centuries . . .”).

<sup>497</sup> See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* 13 (2005) (“*Incentives are the cornerstone of modern life. And understanding them, or often, ferreting them out, is the key to solving just about any riddle . . .*”) (emphasis in original). Effective enforcement, by the courts, of the statute *is* an incentive for compliance. See *Stangl v. Ernst Home Ctr., Inc.*, 948 P.2d 356, 365 (Utah App. Ct. 1997) (“A party concerned about assertion of the [S]tatute of [F]rauds could easily protect itself by *demanding written commitments before acting in reliance* on the negotiations.”) (emphasis added). A party unconcerned about assertion of the Statute of Frauds, because of *less than vigorous enforcement by the courts*, has very little incentive to comply with the statute, or insist on compliance by others.

<sup>498</sup> For example, court decisions permitting the unwarranted invocation of equitable and/or promissory estoppel to defeat the defense of the Statute of Frauds.

<sup>499</sup> See *Ozier v. Haines*, 103 N.E.2d 485, 488 (Ill. 1952).

<sup>500</sup> See *supra* notes 458-460 and accompanying text. The *plus* may consist of part performance combined with the relying party being in possession of real property for which title has been sought by the relying party pursuant to a specific performance suit in equity.

motivated by the fear that unrestrained use of promissory estoppel to bar the defense of the Statute of Frauds will undermine the statute. Such unrestrained use would subvert the goal of the statute: the prevention of fraud. Permitting the success of promissory estoppel claims *on their own merits*, without the legally intensifying force of additional factors, as previously mentioned, would too significantly undermine the statute and its goal. For, parties entering contracts know, or *should* know, that the Statute of Frauds exists.<sup>501</sup>

In Illinois and other traditional stream courts, the law at this point is seemingly settled.<sup>502</sup> Even the Seventh Circuit Court of Appeals, whose decision in *R.S. Bennett* bore the risk of introducing some amorphousness into the doctrine,<sup>503</sup> has reconciled itself to the awareness that Illinois law would not ordinarily permit a promissory estoppel claim to supersede a Statute of Frauds defense.<sup>504</sup> Of course, the decision in *Ceres*, which to some degree has apparently diluted the “fraud” aspect of equitable estoppel,<sup>505</sup> is thought to open the door for a promissory estoppel claim. Yet, if some particular post-*Ceres* case, premised on equitable estoppel, met the ameliorated articulation of equitable estoppel in *Ceres*, that eventuality would not change the fundamental notion that it is *equitable* estoppel that suffices to bar the defense of the Statute of Frauds.

The reliance stream of authority has parted company with the reluctance of the traditional stream. The courts that unhesitatingly apply the reliance stream seem confident of their power to be effective. They do not share the intensity of the traditional stream’s fear of undermining the Statute of Frauds or its goal. These reliance stream courts seem confident of managing these potential pitfalls with judicial dexterity.

Thus, we are back to the future. For the traditional stream, where legally necessary under the Statute of Frauds, contracting parties must insist on a writing that passes legal muster as evidence of the contract, in order to empower the enforceability of the pertinent contract. In the view of the traditional stream courts, litigating parties who claim that injustice results from circumscribing the legal power of the doctrine of promissory estoppel in the traditional manner have no impregnable grounds for complaint. After all, the Statute of Frauds exists to protect *all* contracting

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<sup>501</sup> See *supra* note 229 (certain contracts must be in writing to be enforceable).

<sup>502</sup> See *supra* notes 472 and 474.

<sup>503</sup> See *supra* note 159.

<sup>504</sup> See *Fischer v. First Chi. Capital Mkts., Inc.*, 195 F.3d 279, 284 (7th Cir. 1999) (“Under Illinois law, the [S]tatute of [F]rauds is applicable to a promise claimed to be enforceable by virtue of the doctrine of promissory estoppel .... The fact that [plaintiff] cannot perform the promised services within one year precludes recovery under a promissory estoppel theory.”) (citations omitted).

<sup>505</sup> A fundamental doctrine that *can* indeed bar a Statute of Frauds defense.

parties equally.<sup>506</sup> Nevertheless, some commentators apparently perceive the reliance stream courts fueled by the charismatic legislation as being “on the march.”<sup>507</sup> They may be.

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<sup>506</sup> It should serve as some measure of comfort to be aware of that. *See* BENJAMIN N. CARDOZO, *supra* note 51, at 23 (“The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in ... the courts of justice.”).

<sup>507</sup> *See, e.g.*, Farber & Matheson, *supra* note 6.