William & Mary Business Law Review

Volume 7 | Issue 1 Article 2

Kill the Monster: Promissory Estoppel as an Independent Cause of Action

Susan Lorde Martin

KILL THE MONSTER: PROMISSORY ESTOPPEL AS AN INDEPENDENT CAUSE OF ACTION

SUSAN LORDE MARTIN*

ABSTRACT

Contract rules may be dissolving into tort-type notions of unfairness and injustice. Traditionally, promissory estoppel was viewed as a substitute for consideration in situations where promisors made promises knowing that promisees would act in reliance on them, the promisees did act on the promises, and the promisors refused to do what they promised to do, to the promisees' detriment. The purpose of promissory estoppel was clearly one of fairness and preventing injustice by enforcing a promise not supported by consideration in very limited circumstances. In recent cases, however, courts have been approving the use of promissory estoppel as an independent cause of action to provide remedies for alleged contracts that otherwise would be unenforceable.

If contract rules are frequently displaced by ad hoc decisions about unfairness, the predictability and reliability of business transactions will diminish to the detriment of all who engage in them. This Article will review the development of the doctrine of promissory estoppel and the variations in its acceptance among the states. It will consider the classification of promissory estoppel as an action at law or in equity and the doctrine's weakening of traditional contract rules, particularly the statute of frauds. This Article concludes that it is not in the interest of businesspeople for their contractual obligations to be governed by the "community's shared sense of fairness" rather than their specific bargained-for exchanges of promises, as governed by classic contract rules. The former provides no reliability or predictability, just confusion and more opportunity for litigation.

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* Cypres Family Distinguished Professor of Legal Studies in Business, Zarb School of Business, Hofstra University. Research for this article was supported by a Zarb School Summer Research Grant.

TABLE OF CONTENTS

INTRODUCTION

A dissenting justice in a Texas Court of Appeals castigated his court's majority for legislating from the bench and creating a monster: "promissory estoppel as a free standing cause of action."[1] He advised killing it now before "it kills many other causes of action."[2] This twenty-first century case brings to mind Grant Gilmore's 1974 book *The Death of Contract*,[3] in which Professor Gilmore argued that contract law may "be swallowed up by tort"[4] because of "the effective dismantling of the formal system of classical contract theory."[5] He noted, for example, that the doctrine of promissory estoppel may be overcoming basic contract principles like the statute of frauds, statutes of limitation, and the parol evidence rule.[6]

A review of cases where courts have considered the doctrine of promissory estoppel suggests that, in fact, contract rules may be dissolving into tort-type notions of unfairness and injustice. Traditionally, promissory estoppel was viewed as a substitute for consideration in situations where promisors made promises knowing that promisees would act in reliance on them, the promisees did act on the promises, and to the promisee's detriment, the promisors

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[1] Frost Crushed Stone Co. v. Odell Geer Constr. Co., 110 S.W.3d 41, 48 (Tex. Ct. App. 2002) (Gray, J., dissenting).

[2] *Id.*

[3] GRANT GILMORE, THE DEATH OF CONTRACT (1974) (Ronald K. L. Collins ed., 1995).

[4] *Id.* at 103.

[5] *Id.* at 72.

[6] *Id.* at 73. In fact, courts have uniformly disallowed the doctrine of promissory estoppel to overcome the parol evidence rule. *See, e.g.*, Newpaper, LLC v. Party City Corp., No. 13-1735 ADM/LIB, 2014 WL 2986653, at *9 (D. Minn. July 1, 2014); Adler v. Elk Glenn, LLC, No. 12-85-ART, 2013 WL 6632057, at *9 (E.D. Ky. Dec. 17, 2013); Hofer v. Liberty Nat'l Bank, No. CIV 11-4129-KES, 2012 WL 5945169, at *6 (D.S.D. Nov. 28, 2012); Prentice v. UDC Advisory Serv., Inc., 648 N.E.2d 146, 153 (Ill. App. Ct. 1995); Mishler v. Hale, 26 N.E.3d 1260, 1270 (Ohio Ct. App. 2014); Big G Corp. v. Henry, 536 A.2d 559, 562 (Vt. 1987). Courts have in few instances allowed promissory estoppel claims to go forward when statutes of limitations have run. *See, e.g.*, Huddleston v. Huddleston, No. CIV-14-597-R, 2014 WL 5317922, at *3 (W.D. Okla. Oct. 16, 2014); GE Mobile Water, Inc. v. Red Desert Reclamation, LLC, 6 F. Supp. 3d 195, 202 (D.N.H. 2014).

refuse to do what they promised to do.[7] The purpose of promissory estoppel was clearly one of fairness and preventing injustice by enforcing a promise not supported by consideration in very limited circumstances.[8] In recent cases, however, courts have been approving the use of promissory estoppel as an independent cause of action to provide remedies for alleged contracts that otherwise would be unenforceable.[9]

If contract rules are frequently displaced by ad hoc decisions about unfairness, the predictability and reliability of business transactions will diminish to the detriment of all who engage in them. Although there is frequent discussion in legislatures and newspapers about tort reform[10]—that is, making it harder for plaintiffs to win negligence and strict liability cases against business defendants—one rarely hears about contract reform. But being able to rely on contracts entered into with the knowledge that traditional contract law rules will apply and not be distorted or eliminated by fact-sensitive tort-type considerations may be a similarly important legal issue for businesses to consider.

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[7] *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898) (calling it "equitable estoppel" but defining promissory estoppel: "Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."); *see also* Kahn v. Cecelia Co., 40 F. Supp. 878, 879 (S.D.N.Y. 1941) (noting that promissory estoppel, a doctrine of "comparatively recent origin," is usually a substitute for consideration with limited application in New York).

[8] *See, e.g.*, Chrysler Corp. v. Chaplake Holdings, Ltd., 822 A.2d 1024, 1031, 1034 (Del. 2003) (noting that "prevention of injustice is the 'fundamental idea' underlying the doctrine of promissory estoppel"); Faimon v. Winona State Univ., 540 N.W.2d 879, 883 (Minn. Ct. App. 1995) (citing RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981)).

[9] *See, e.g.*, Alaska Democratic Party v. Rice, 934 P.2d 1313, 1316–17 (Alaska 1997) (holding that promissory estoppel could overcome a statute of frauds defense in employment cases); Traco, Inc. v. Arrow Glass Co., 814 S.W.2d 186, 189 (Tex. Ct. App. 1991) (holding that promissory estoppel is an independent cause of action in bid construction cases).

[10] *See, e.g.*, Kimberley A. Strassel, Op-Ed., *A Silver Lining in Washington*, WALL ST. J., Jan. 30, 2015, at A11 (noting that New York House Republicans will reintroduce "important tort-reform bill"); Allysia Finley, Op-Ed., *Behind the GOP Statehouse Juggernaut*, WALL ST. J., Dec. 13–14, 2014, at A11 (noting that passing tort reform "will be a hot issue in many states").

This Article will review the development of the doctrine of promissory estoppel[11] and the variations in its acceptance among the states. It will consider the classification of promissory estoppel as an action at law or in equity and the doctrine's weakening of traditional contract rules, particularly the statute of frauds. An examination of cases discussing the doctrine of promissory estoppel indicates the confusion that exists about this topic and the wide range of opinions and conclusions among courts.[12] This Article concludes that it is not in the interest of businesspeople for their contractual obligations to be governed by the "community's shared sense of fairness"[13] rather than their specific bargained-for exchanges of promises as governed by classic contract rules.[14] The former provides no reliability or predictability, just

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[11] A great deal has been written about the doctrine of promissory estoppel. *See, e.g.*, Charles Calleros, *Cause, Consideration, Promissory Estoppel, and Promises Under Deed: What Our Students Should Know about Enforcement of Promises in A Historical and International Context*, 13 CHI.-KENT J. INT'L & COMP. L. 83, 101 (2013); Jennifer Camero, *Zombieland: Seeking Refuge from the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKC L. REV. 1, 18 (2013); Gerald Caplan, *Legal Autopsies: Assessing the Performance of Judges and Lawyers Through the Window of Leading Contract Cases*, 73 ALB. L. REV. 1, 12–17 (2009); Gina M. Chang, Note, *McInerney v. Charter Golf, Inc.: The Court Swings and Misses*, 29 LOY. U. CHI. L.J. 907, 908 (1998); David G. Epstein et al., *Contract Law's Two "P.E.s": Promissory Estoppel and the Parol Evidence Rule*, 62 BAYLOR L. REV. 397, 398 (2010); David J. Gass, *Michigan's UCC Statute of Frauds and Promissory Estoppel*, 74 MICH. B.J. 524, 524 (June 1995); Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 265–66 (1996); Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 669, 669–70 (2010); Nicholas J. Johnson, *The Statutory UCC: Interpretative License and Duty under Article 2*, 61 CATH. U. L. REV. 1073, 1122–24 (2012); Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73, 73 (2011); Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 391–92 (1988).

[12] *See, e.g.*, Aaron R. Petty, *The Reliance Interest in Restitution*, 32 S. ILL. U. L.J. 365, 382–83 (2008) (asserting confusion about doctrine of promissory estoppel and variation among courts in applying it).

[13] Charles Fried, *Aziyah: The Rise and Fall of Freedom of Contract*, 93 HARV. L. REV. 1858, 1858 (1980) (reviewing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979)).

[14] For extensive theoretical discussions of this issue, see CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); Anthony

more opportunity for litigation. It also creates a great deal of confusion for businesses when courts in different states, and even state and federal courts in the same state, take such varied approaches to the promissory estoppel doctrine. Therefore, state legislatures should consider enacting promissory estoppel statutes that provide for the doctrine to act only as a consideration substitute under certain limited circumstances, so as to create an enforceable contract that is subject to traditional contract rules. Injustices propagated by enforcement of contract rules can be alleviated by other existing doctrines such as part performance[15] and unconscionability.[16]

I. THE DOCTRINE OF PROMISSORY ESTOPPEL

In the United States, a traditional requirement of an enforceable contract is consideration that has been bargained for.[17] That is, each party must promise either to act or to refrain from acting to induce the other party to do likewise.[18] Situations in which promissory estoppel was first applied occurred when lack of consideration would have precluded a promise from being enforced.[19] However, the additional circumstances of detrimental reliance on a promise that was made, knowing it would induce action, made the failure to enforce the promise seem unjust.[20] To remedy this situation, courts looked to estoppel.

Townsend Kronman, *A New Champion for the Will* Theory, 91 YALE L.J. 404, 406 (1981) (reviewing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981)).

[15] *See, e.g.*, Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Group plc, 711 N.E.2d 953, 956 (N.Y. 1999) (part performance doctrine based on equitable principles and applied when it would be a fraud to allow a party to an oral contract "to escape performance after permitting the other party to perform in reliance on the agreement").

[16] *See, e.g.*, Murphy v. McNamara, 416 A.2d 170, 176 (Conn. Super. Ct. 1979) (noting that unconscionability doctrine is applied to prevent injustice when bargain involving disadvantaged persons is very one-sided or unreasonable but generally not available to merchants).

[17] Sfreddo v. Sfreddo, 720 S.E.2d 145, 154 (Va. Ct. App. 2012); RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (1981); Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 S.C. L. REV. 203, 205–06 (2008).

[18] RESTATEMENT OF CONTRACTS § 75 cmt. b (1932).

[19] Merex A.G. v. Fairchild Weston Syst., Inc., 29 F.3d 821, 824 (2d Cir. 1994).

[20] *Id.*

Samuel Williston, the chief reporter for the Restatement of Contracts,[21] spoke of "genuine estoppel" as a rule that says "one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations."[22] This shield from a wrongdoer's misrepresentations has come to be known as equitable estoppel and has been applied by courts in the United States for more than 150 years.[23] In this formulation, courts used estoppel to protect an innocent party who had been misled about the facts (not promises or intentions) of a deal and, because of a misrepresentation of facts, could not have protected himself in a contract.[24] Equitable estoppel was not being used as a cause of action, but as a defense by an innocent party when a misrepresenter of facts attempted to enforce a contract.[25]

In his 1920 treatise on contracts, Professor Williston noted that some courts were using the principle of estoppel to enforce an otherwise nonexistent contractual obligation when there was no misrepresentation of fact.[26] Instead, a promisee suffered detriment by relying on a gratuitous promise, not on a misstatement of fact.[27] He gave examples of this use of estoppel in cases involving charitable subscriptions; gratuitous debtors' promises to pay, inducing creditors not to bring an action until the statute of limitations had run; and gratuitous promises to sell land or not to foreclose a mortgage when a promisee made improvements on the property.[28] He offered that in such cases, where the promisee is relying on a promise, not a misstatement of fact, an appropriate term to describe it should be "'promissory' estoppel or something equivalent to mark the distinction."[29] In 1932, Judge Learned

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[21] RESTATEMENT OF CONTRACTS (1932).

[22] SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1920).

[23] *See, e.g.*, Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 (Fla. 2001); Coogler v. Rogers, 7 So. 391, 394 (1889); Camp v. Moseley, 2 Fla. 171, 171 (1848).

[24] Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 457–58 (2007).

[25] Hoye v. Westfield Ins. Co., 487 N.W.2d 838, 842 (Mich. Ct. App. 1992).

[26] WILLISTON, *supra* note 22.

[27] *Id.*

[28] *Id.*

[29] *Id.*

Hand concluded that promissory estoppel was "a recognized species of consideration."[30]

Through recent times, some courts seem to have difficulty characterizing promissory estoppel so that it fits in accepted legal paradigms. In 2006, the United States District Court for the Middle District of Alabama declared that the "full contours of the doctrine of promissory estoppel are ill-defined and still developing as part of Alabama's common law."[31] More than thirty-five years ago, the Massachusetts Supreme Judicial Court declared that it would not use the term "promissory estoppel" because it causes confusion.[32] Through the years, courts interpreting Massachusetts law have cited that sentiment.[33] Nevertheless, Massachusetts courts have enforced promises based on detrimental reliance, characterizing them as contracts "enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration."[34] One Massachusetts court held that "[p]romissory estoppel is not an independent cause of action. It is an alternative method of establishing consideration sufficient to create a contract."[35] A Texas appellate court has said that promissory estoppel does not create a contract where none existed before,[36] while the United States District Court in Maryland, applying Maryland law, has said that promissory estoppel permits recovery where there is no contract.[37]

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[30] Porter v. Comm'r R. 10.2.1(i), 60 F.2d 673, 675 (2d Cir. 1932).

[31] Sykes v. Payton, 441 F. Supp. 2d 1220, 1223 (M.D. Ala. 2006).

[32] Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 179 (Mass. 1978).

[33] *See, e.g.*, Oz Holding LCC v. Elm Court Realty LLC, No. 09 Civ. 7427(PGG), 2010 WL 2730476, at *4 n.2 (S.D.N.Y. July 8, 2010) (applying Massachusetts law and noting that Massachusetts does not use the label "promissory estoppel"); R.I. Hosp. Trust Nat'l Bank v. Varadian, 647 N.E.2d 1174, 1179 (Mass. 1995) (noting that the jurisdiction does not use the expression "promissory estoppel").

[34] Loranger Constr. Corp. v. E. F. Hauserman Co., 384 N.E.2d 176, 179 (Mass. 1978); Pease v. Jernigan, 2014 Mass. App. Div. 169, 171 (2014); Spectrum Sales, Inc. v. Cobham Def. Elec. Sys., No. MICV201303349, 2014 WL 1758109, at *5 (Mass. Super. Ct. Mar. 4, 2014).

[35] Lombardo v. Mauriello, No. 990390F, 2002 WL 31492393, at *3 n.6 (Mass. Super. Ct. Sept. 26, 2002).

[36] Maddox v. Vantage Energy, LLC, 361 S.W.3d 752, 761 (Tex. Ct. App. 2012).

[37] Odyssey Travel Ctr., Inc. v. RO Cruises, Inc., 262 F. Supp. 2d 618, 626 (D. Md. 2003).

Many courts have confronted the issue of using promissory estoppel as a "sword"—that is, as an independent cause of action to enforce an otherwise unenforceable promise, rather than merely as a "shield"—to avoid disadvantaging a promisee who did not give consideration to support a promise but who reasonably relied on the promise to his or her detriment.[38] Courts in some states have held that promissory estoppel is not an independent cause of action at all.[39] The Virginia Supreme Court has held that promissory estoppel is not an independent cause of action in the Commonwealth.[40] The United States District Court in Oregon has held in an employment case that promissory estoppel is only a substitute for consideration and cannot be used as an independent cause of action.[41]

On the other hand, the United States District Court for the Eastern District of Michigan has noted that although Michigan does not recognize an independent cause of action for detrimental reliance, it does recognize promissory estoppel—of which detrimental reliance is an element—as a distinct cause of action.[42] Michigan courts have described promissory estoppel as a tort that is "akin to a contract claim."[43]

In Texas, an appellate court declared that promissory estoppel can act only as a defense in some contexts, but can serve as an independent cause of action in others.[44] The court said it can

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[38] Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981).

[39] Suburban Hosp., Inc. v. Sampson, 807 F. Supp. 31, 33 (D. Md. 1992).

[40] Guardian Pharmacy v. Weber City Healthcare, No. 2:12cv00037, 2013 WL 277771, at *7 (W.D. Va. Jan. 24, 2013); Nasser v. WhitePages, Inc., No. 5:12cv097, 2013 WL 6147677, at *5 (W.D. Va. Nov. 22, 2013); W.J. Schafer Assocs. v. Cordant Inc., 493 S.E.2d 512, 516 (Va. 1997).

[41] Ryman v. Sears, Roebuck & Co., No. 05-CV-1106-BR, 2006 WL 1720534, at *7 (D. Or. June 19, 2006). The Oregon Court of Appeals has stated that "[i]n Oregon, it is well recognized that promissory estoppel is not a 'cause of action' in itself, but is a subset and a theory of recovery in breach of contract actions." Neiss v. Ehlers, 899 P.2d 700, 706 (Or. Ct. App. 1995). *See also* Barnes v. Yahoo, Inc., 570 F.3d 1096, 1106 (9th Cir. 2009) (noting that in Oregon and most other states, promissory estoppel is "a subset of a theory of recovery based on a breach of contract and serves as a substitute for consideration").

[42] 1200 Sixth St., LLC v. United States, 848 F. Supp. 2d 767, 776 (E.D. Mich. 2012).

[43] *Id.* at 777 (quoting Byrne v. Republic Bank, No. 268762, 2007 WL 2560467, at *4 n.2 (Mich. Ct. App. Sept. 6, 2007)).

[44] Lotito v. Knife River Corp., 391 S.W.3d 226, 227 (Tex. Ct. App. 2012).

be used only as "a shield, not a sword," and concluded that in the employment context, promissory estoppel is a defense that prevents a promisor from avoiding a contract that falls under the statute of frauds.[45] The court did not clarify why an action to force an employer to hire an employee because of a promise that was not made in writing as required by contract rules was merely a defense.[46]

In bid construction cases, Texas courts have held that promissory estoppel can be an independent cause of action.[47] In *Frost Crushed Stone Co. v. Odell Geer Construction Co.*,[48] Geer submitted a bid as a subcontractor to supply rock for a highway project.[49] Geer alleged that Frost agreed in a telephone conversation to supply the rock for the project, and after that conversation, Geer contracted with Texas Trucking Company to haul the rock if Geer's bid was successful.[50] After Geer's bid was accepted, Frost sent Geer a written price quote for the rock and Geer signed a contract with Texas Trucking Company to haul the rock.[51] Several months later, Frost informed Geer that it would not be able to supply the rock.[52] Geer sued Frost under a theory of promissory estoppel, inter alia, alleging that Frost promised to supply the rock knowing Geer would rely on the promise and, in fact, Geer did rely on it in signing a hauling contract with Texas Trucking Company.[53] The court held that Geer was seeking "affirmative relief under the equitable doctrine of promissory estoppel based on the premise that it detrimentally relied on Frost's oral bid," and that Geer was entitled to "the amount necessary to restore him to the position in which he would have been had he not relied on [Frost's] promise."[54] This result seems unfair to the subcontractor Frost because Geer could have walked away from their deal at any time up until it began working on the highway project, but Frost did not have the same option.[55]

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[45] *Id.*
[46] *Id.*
[47] *Id.*; Traco, Inc. v. Arrow Glass Co., 814 S.W.2d 186, 189 (Tex. Ct. App. 1991).
[48] 110 S.W.3d 41 (Tex. Ct. App. 2002).
[49] *Id.* at 44.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 45–46.
[54] *Id.* at 46–47.
[55] *Id.* at 44.

Geer could have protected itself from Frost's failure to deliver by signing a written agreement with Frost. Under the *Frost* promissory estoppel decision, Geer gets to have it both ways: Geer can decide not to do business with Frost, but Frost is obligated to do what it promised to do.[56]

Unlike the purported law in Texas regarding promissory estoppel in employment cases, in Vermont, promissory estoppel is an independent cause of action that can be used to modify an at-will employment relationship and provide a remedy for wrongful discharge.[57] In *Foote v. Simmonds Precision Products Company*, Foote alleged that he was discharged because he used the grievance procedure described in the company's employee handbook.[58] The handbook promised employees that if they followed the procedure, they would not be "criticized or penalized in any way."[59] Foote followed the procedure, was fired, and claimed that he relied on this promise of non-retaliation.[60] The Vermont Supreme Court concluded that an employer who makes such a statement in an employee handbook "should expect action or forbearance on the part of the promisee as a result of the statement," and that promissory estoppel could serve as an independent cause of action, modify an at-will employment relationship, and provide a remedy for wrongful termination.[61] The plaintiff in this case also brought actions under express and implied contract theories, but the jury based its verdict only on promissory estoppel, and the Vermont Supreme Court affirmed the decision.[62] It is understandable that a lay jury would find an appeal to justice and fairness attractive, but this case could have been decided based on the contract created by the employee handbook for all employees, including those serving at will. It is unfortunate that the court allowed promissory estoppel to be used in this kind of case, when traditional contract rules could have created the same result.

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[56] *Id.* at 46.

[57] Foote v. Simmonds Precision Prods. Co., 613 A.2d 1277, 1280 (Vt. 1992).

[58] *Id.* at 1278.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 1280–81. *See also* Madden v. Omega Optical, Inc., 683 A.2d 386, 392 (Vt. 1996) (holding that promissory estoppel may modify at-will employment relationship).

[62] *Foote*, 613 A.2d at 1278.

In 2010, a lower court in Vermont described promissory estoppel as a "well established[,] … valid and independent cause of action that may be raised by at-will employees in order to prove wrongful discharge."[63] The law in Iowa is similar.[64] The Iowa Supreme Court, in a case of first impression considering whether promissory estoppel is available in at-will employment cases, quoted cases stating that "'[p]romissory estoppel' is now a recognized species of consideration,"[65] and "in promissory estoppel claims, detrimental reliance on one side will suffice as 'consideration.'"[66] The court concluded that "[p]romissory estoppel is simply another theory by which an employer may be held to his promise," and nothing about at-will employment precludes that.[67] Here, the court attempted to adhere to the traditional use of promissory estoppel as a substitute for consideration, but stretched the meaning of consideration to do so.[68]

The Supreme Court of Delaware has maintained the original notion of promissory estoppel as a "consideration substitute in cases where a contract has not been formed,"[69] and its "fundamental idea" is the "prevention of injustice."[70] In Delaware, promissory estoppel can be pled as an independent cause of action.[71]

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[63] Straw v. Visiting Nurse Ass'n & Hospice, No. 741-10-09 Wrcv., 2010 WL 2259080 (Vt. Sup. Ct. Jan. 2010).

[64] *Compare* Straw, 2010 WL 2259080 (ruling that an at-will employee can raise a promissory estoppel claim), *with* Schoff v. Combined Ins. Co., 604 N.W.2d 43, 47 (Iowa 1999) (ruling that an at-will employee and employer can alter the relationship by an employee handbook and the employer is bound by that agreement).

[65] *Schoff*, 604 N.W.2d at 48 (citing Miller v. Lawlor, 66 N.W.2d 267, 272 (Iowa 1954)).

[66] *Id.* (citing Huhtala v. Travelers Ins. Co., 257 N.W.2d 640, 647 n.16 (Mich. 1977)).

[67] *Id.* at 49. The Nebraska Supreme Court has recognized a cause of action for promissory estoppel in connection with detrimental reliance on a promise of at-will employment, but not necessarily in connection with detrimental reliance on other promises made to an at-will employee. Blinn v. Beatrice Cmty. Hosp. & Health Ctr., 708 N.W.2d 235, 247 (Neb. 2006).

[68] *Schoff*, 604 N.W.2d at 48.

[69] Chrysler Corp. v. Chaplake Holdings, Ltd., 822 A.2d 1024, 1031 (Del. 2003).

[70] *Id.* at 1034.

[71] *Id.* at 1032. In Connecticut, promissory estoppel can also be pled as an independent cause of action. Grey v. Greenwich Hills Ass'n, No. FSTCV13-6019725S, 2014 WL 1568402, at *4 (Conn. Super. Ct. Mar. 20, 2014). The Supreme Court of Colorado has explained that promissory estoppel is an

Similarly, courts in Kentucky have recognized promissory estoppel as an independent cause of action.[72] The theory of the action is that "detrimental reliance becomes a substitute for consideration" in a variety of situations, including the employment context, when "injustice can be avoided only by giving effect to the [gratuitous] promise."[73] The problem, as evidenced in the Texas *Frost* case, is that often the party pleading promissory estoppel should have protected him or herself by entering into an enforceable contract.[74] The party pleading promissory estoppel gets to have a distinct advantage: if a contract would not have been in that party's favor, then there is no contract; but if a contract would benefit that party, then promissory estoppel creates contractual obligations.

II. PROMISSORY ESTOPPEL: A CLAIM AT LAW OR IN EQUITY?

Another area of confusion involves whether courts should categorize a claim of promissory estoppel as sounding at law or in equity. As early as the fourteenth century, the English Chancery granted relief to a plaintiff who suffered detriment in response to a defendant's failure to perform his reciprocal promise.[75] At

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independent cause of action. Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, LLC, 176 P.3d 737, 741 (Colo. 2007). The Supreme Court of Arkansas has held that there is an independent cause of action for promissory estoppel or detrimental reliance. Van Dyke v. Glover, 934 S.W.2d 204, 209 (Ark. 1996). The Arizona Court of Appeals has held that promissory estoppel can be used as a cause of action for damages. Tiffany Inc. v. W. M. K. Transit Mix, Inc., 493 P.2d 1220, 1224 (Ariz. Ct. App. 1972).

[72] Jackson v. JB Hunt Transp., Inc., 384 S.W.3d 177, 184 (Ky. Ct. App. 2012). Indiana also recognizes promissory estoppel as an independent cause of action. Biddle v. BAA Indianapolis, LLC, 830 N.E.2d 76, 87 (Ind. Ct. App. 2005). Illinois recognizes promissory estoppel as an independent cause of action. Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E.2d 520, 521 (Ill. 2009) (overruling DeWitt v. Fleming, 828 N.E.2d 756, 760 (Ill. Ct. App. 2005) and Lawrence H. Flynn, Inc. v. Philip Morris USA, Inc., No. 05 C 318, 2006-1 Trade Cases ¶ 75, 141, Trade Reg. Rep. (CCH), 2006 WL 6469806 (N.D. Ill. Jan. 19, 2006)). Georgia recognizes promissory estoppel as an independent cause of action. Houston v. Houston, 600 S.E.2d 395, 396 (Ga. Ct. App. 2004).

[73] McCarthy v. Louisville Cartage Co., 796 S.W.2d 10, 12 (Ky. Ct. App. 1990).

[74] *See* CORBIN ON CONTRACTS § 8.1 (Joseph M. Perillo ed., 2015) [hereinafter CORBIN ON CONTRACTS].

[75] J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14–15 (1888).

that time, the breach of a promise was viewed as a tort and relief was given in equity for the loss of the thing given in reliance on the promise.[76] Gradually, by the seventeenth century, English courts came to view actions for breaches of promises as contract actions, and they assessed damages for the failure to receive the benefit of the promisor's promise—the promisee's expectation interest.[77] In recent years in the United States, the question of promissory estoppel sounding in law or equity has been addressed by numerous courts in order to decide whether a plaintiff is entitled to a jury or what remedy is appropriate.

The Supreme Court of Minnesota concluded that, in Minnesota, promissory estoppel derived from the English Chancery's equitable cause of action based on "good-faith reliance;" however, according to the court, not all promissory estoppel claims are necessarily equitable.[78] The court said it must "focus on the elements of [the plaintiff's] cause of action," and in the case at hand where the plaintiff's cause of action was "based on equitable good-faith reliance," the court concluded that her cause of action was "equitable in nature," and that she was not entitled to a jury trial.[79]

The United States Court of Appeals for the Eighth Circuit heard a case in which a lessor alleged it bought a building in reliance on the defendant's oral promise to lease 25,000 feet of the building for twenty-five years, and the defendant never followed through on the promise.[80] The lessor demanded a jury in its suit to enforce the promise, and the defendant moved to strike the jury trial demand.[81] The court applied Minnesota law, which required contracts for a lease of more than one year to be in writing; thus, the lessor had a statute of frauds problem that it tried to overcome using promissory estoppel.[82] The Eighth Circuit had to decide whether the lessor had a Seventh Amendment right to a jury trial.[83] The court reasoned that promissory estoppel could

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[76] *Id.* at 15.

[77] *Id.*

[78] Olson v. Synergistic Tech. Bus. Sys., Inc., 628 N.W.2d 142, 152 (Minn. 2001).

[79] *Id.* at 152–53.

[80] Incompass IT, Inc. v. XO Commc'ns Serv., Inc., 719 F.3d 891, 894 (8th Cir. 2013).

[81] *Id.* at 895.

[82] *Id.*

[83] *Id.* at 897.

be either a legal claim or an equitable claim depending on the context.[84] Because the lessor was using promissory estoppel to avoid the statute of frauds, the court held that the claim was equitable.[85] More importantly, according to the court, the lessor was seeking reliance damages as a remedy; that is, a remedy that would put it in the position it would have been in had the contract not been made, and reliance damages are equitable.[86] The court discounted the lessor's apparent claim for expectation damages in the form of rental income it would have received from the defendant, had the defendant kept its promise to lease space.[87] Based on the foregoing analysis, the court held that the lessor was not entitled to a jury trial because of the "undeniably equitable nature of the promissory estoppel claim as a whole."[88]

The United States District Court in Nevada, applying Nevada law, held that a promissory estoppel claim exists to provide a remedy in equity when there is no contract due to a lack of consideration;[89] however, if promissory estoppel is being used as a substitute for consideration, it would make sense to consider the result a contract with a legal remedy for breach.

On the other hand, a court in Pennsylvania that had to decide whether a plaintiff making a promissory estoppel claim was entitled to a jury[90] decided in the affirmative,[91] although this reasoning only exemplifies the confusion that occurs when courts attempt to classify promissory estoppel as a cause of action that sounds at law or in equity.[92] The Pennsylvania Court of Common Pleas first discussed the Pennsylvania Supreme Court's recognition of the equitable basis of promissory estoppel, characterizing it as "not so much one of contract."[93] Then, the court

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[84] *Id.* at 896.

[85] *Id.* at 897.

[86] *Id.* at 898.

[87] *Id.*

[88] *Id.* at 899.

[89] Duarte v. Wells Fargo Bank, No. 3:13-cv-00371-RCJ-VPC, 2014 WL 585802, at *4 (D. Nev. Feb. 14, 2014) (entitlement to a jury was not an issue in this case).

[90] Osborne-Davis Transp. Co. v. Mothers Work Inc., No. 02512, 2008 WL 2175580, at *54 (Pa. Com. Pl. Feb. 20, 2008).

[91] *Id.* at *59.

[92] *Id.* at *57–*58.

[93] *Id.* at *57.

cited the Supreme Court's (1) affirming a jury verdict in a promissory estoppel case; (2) holding that for statute of limitation purposes, promissory estoppel is a breach of contract claim; and (3) stating that promissory estoppel permits an equitable remedy to a contract dispute and sounds in contract law.[94] The court concluded that the plaintiff was entitled to a jury because the claim was for monetary damages only.[95] Five years later, the United States District Court for the Eastern District of Pennsylvania, applying Pennsylvania law, opined that promissory estoppel "stops short of creating a contract governed by law,"[96] but then held that it "implies a contract in law where no contract exists in fact."[97]

It is no wonder that the Missouri Supreme Court noted that "promissory estoppel is not a favorite of the law."[98] In a 2007 case, the court listed the usual elements of a promissory estoppel claim: the promisor makes a promise expecting the promisee to act in reliance on it and the promisee relies on it to his or her detriment.[99] But the court focused on the Restatement's additional element: a resulting "injustice that only enforcement of the promise could cure."[100] The court concluded that the plaintiffs had an available remedy in law through a negligence action, and therefore an equitable remedy for promissory estoppel was not appropriate.[101] Several years earlier, a Missouri appellate court opined that "the doctrine of promissory estoppel is to be used with caution, sparingly and only in extreme cases to avoid unjust results."[102]

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[94] *Id.* at *57–*58.

[95] *Id.* at *60. The Supreme Court of Pennsylvania has held that, because "promissory estoppel makes otherwise unenforceable agreements binding, the doctrine sounds in contract law." Crouse v. Cyclops Indus., 745 A.2d 606, 610 (Pa. 2000).

[96] I.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674, 690 (E.D. Pa. 2013).

[97] *Id.* at 702.

[98] Clevenger v. Oliver Ins. Agency, Inc., 237 S.W.3d 588, 590 (Mo. 2007).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 591.

[102] Midwest Energy v. Orion Food Sys., Inc. 14 S.W.3d 154, 165 (Mo. Ct. App. 2000); *see also* Meinhold v. Huang, 687 S.W.2d 596, 599 (Mo. Ct. App. 1985) (noting that the "doctrine of promissory estoppel has been resorted to in Missouri in extreme cases and only to avoid unjust results" and giving as examples cases in which former employees sued to recover lifetime pensions promised to them if they retired).

Courts have also grappled with appropriate remedies in promissory estoppel cases when the right to a jury was not an issue. The Alabama Supreme Court has held that courts should award reliance damages in promissory estoppel cases, limited by the amount that would be recoverable in an action for breach of contract, because promissory estoppel plaintiffs should not be in better positions than if they had been able to recover for breach of contract.[103] The court was reluctant to award specific performance in promissory estoppel actions because specific performance, although an equitable remedy, satisfies the expectation interest, and the plaintiff would be receiving the benefit of the bargain instead of damages resulting from reliance on a broken promise.[104]

If the law made it clear that promissory estoppel was a substitute for consideration in the limited circumstance when a promisee relies to their detriment on promises that a promisor knows will induce action by the promisee, the result would be an enforceable contract which would permit the non-breaching party to collect damages based on their expectation interests and have their case decided by a jury. Much of the confusion would be eliminated.

III. THE COMMON LAW EXPANSION OF PROMISSORY ESTOPPEL

Section 90 of the Restatement of Contracts (1932) states that "[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."[105]

The comments on the Restatement (Second) of Contracts (1981) note that Section 90 "is often referred to in terms of 'promissory estoppel.'"[106] Section 90 says:

> 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 such action or forbearance is binding if injustice can be avoided only by enforcement of the

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[103] Wyatt v. BellSouth, Inc., 757 So.2d 403, 408 (Ala. 2000).

[104] *Id.*

[105] RESTATEMENT OF CONTRACTS § 90 (1932) (emphasis added).

[106] RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1981).

> promise. The remedy granted for breach may be limited as justice requires.[107]

The six words in the original Restatement that were deleted from the Second are a good indication of the direction courts had taken in the fifty years between them, and continue to take to this day.[108] By 1981, *any* action taken by a promisee (not necessarily a definite and substantial action) in response to a promise the promisor should have known would induce action creates an enforceable contract, if non-enforcement would seem unfair.[109] Instead of an easily applied rule about consideration, courts substituted an ad hoc factual decision about injustice.[110]

In 1966, an appellate court in New Jersey, noting that no court in New Jersey had applied the doctrine of promissory estoppel, quoted a New Jersey Supreme Court Justice:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.[111]

Although it would make no sense to argue that the law should never change, but should adhere to rules no longer useful in modern society, substituting vague notions of fairness for easily understood rules for transactions between businesspeople does not advance the law. Once you go down the path of eliminating the consideration requirement on the grounds of justice, it is not difficult to eliminate the statute of frauds as well in order to mete out justice.[112] For example, the Restatement (Second) of Contracts in section 139 provides that:

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[107] *Id.* § 90.

[108] *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932), *with* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[109] *Id.*

[110] *Id.*

[111] E. A. Coronis Assocs. v. M. Gordon Constr. Co., 216 A.2d 246, 251 (N.J. Super. Ct. App. Div. 1966) (citing Jacobs, J. in Schipper v. Levitt & Sons, 207 A.2d 314, 325 (N.J. 1965)).

[112] Arguments are made supporting the elimination of the doctrine of consideration and the statute of frauds, but that discussion is beyond the scope of this paper, which assumes that both remain basic tenets of U.S.

> [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.[113]

IV. WEAKENING THE STATUTE OF FRAUDS

In 1997, the Supreme Court of Alaska, in a case of first impression, noted that the purpose of the statute of frauds is to prevent fraud, not to be "an escape route for persons seeking to avoid obligations."[114] The court quoted Arthur Corbin, the realist chief reporter of the Restatement (Second) of Contracts, asserting in 1950 that "many courts are now prepared to use promissory estoppel to overcome the requirements of the statute of frauds," and joined the approach of those courts in employment disputes.[115] The plaintiff in the case was an experienced executive in the Democratic Party who sued on an alleged oral contract for a two-year executive director's job that failed to materialize.[116] She was not an

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contract law. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (stating that a "contract of sale need not be concluded in or evidenced by writing"); Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, c.34, § 1 (Eng.) (eliminating consideration requirement for most contracts in United Kingdom); Barry Hough & Ann Spowart-Taylor, *The Doctrine of Consideration: Dead or Alive in English Employment Contracts?*, 17 J. CONT. L. 193 (2001) (noting that in English employment law, "the classical doctrine of consideration is falling into desuetude and no longer convincingly explains the distinction between non-enforceable from enforceable obligations"); Joseph M. Perillo*, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 42 (1974) (acknowledging critics who argue that statute of frauds should be eliminated); *Significant Changes in the Proposed Revision of Article 2 on Sales*, SB29 ALI-ABA 143 (1996) (noting proposal to UCC § 2–201 to eliminate statute of frauds for contracts for goods).

[113] RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

[114] Alaska Democratic Party v. Rice, 934 P.2d 1313, 1316 (Alaska 1997) (citing Eavenson v. Lewis Means, Inc., 105 N.M. 161, 730 P.2d 464, 465 (1986), *overruled on other grounds by* Strata Prod. Co. v. Mercury Expl. Co., 121 N.M. 622, 916 P.2d 822 (1996)).

[115] *Id. But see* Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73, 117 (2011) (asserting that "[c]ourts have generally not allowed a promissory estoppel claim to defeat a Statute of Frauds defense in the employment context").

[116] *Alaska Democratic Party*, 934 P.2d at 1315.

inexperienced novice worker or an unsophisticated consumer.[117] Any first-year business law student knows that a contract that cannot be performed within one year must be in writing to be enforceable.[118] If that rule is applied only when there is a fraud, then it becomes reduced to the amassing of evidence to indicate that there was indeed an oral contract; that is, no rule at all, even if the evidence required is characterized as "clear and convincing."[119]

In 2012, the Supreme Court of Alaska extended its promissory estoppel exception to the statute of frauds in holding that the exception could apply in a land sale case.[120] In that case, both parties were business owners,[121] not unsophisticated consumers, who should have known to protect themselves by putting their agreement in writing. Furthermore, the court gratuitously allowed the possible application of promissory estoppel when the same result could have been achieved by the application of the part performance exception to the statute of frauds.[122] The latter is a much more limited exception.

In 2007, the United States District Court in Kansas cited the Kansas Supreme Court for the proposition that promissory estoppel can overcome the statute of frauds if the application of the statute of frauds would "work a fraud or a gross injustice upon the promisee."[123] In fact, both parties in that case were experienced companies: one, a supplier of computer hardware for point-of-sale systems; the other, a seller of food service technology solutions to schools throughout the country.[124] Therefore, it is hard to understand why these companies could not protect themselves in written contracts absent any misrepresentations of fact.

In 2001, the Supreme Court of South Dakota asserted that the statute of frauds will not be used to work an injustice, and

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[117] *See* CORBIN ON CONTRACTS, *supra* note 74, § 19.1

[118] *See id.* § 19.1.

[119] *Alaska Democratic Party*, 934 P.2d at 1317. More than 40 years ago, Professor Perillo asserted that "a requirement of clear and convincing evidence [should] be substituted for the writing requirement" to do justice without "technical and artificial rules." Perillo, *supra* note 112, at 82.

[120] Kiernan v. Creech, 268 P.3d 312, 314, 316 (Alaska 2012).

[121] *Id.* at 314.

[122] *Id.* at 317–18.

[123] School-Link Tech., Inc. v. Applied Res., Inc., 471 F. Supp. 2d 1101, 1114 (D. Kan. 2007) (citing Decatur Co-op. Ass'n v. Urban, 547 P.2d 323, 329 (Kan. 1976)).

[124] *Id.* at 1106.

affirmed a lower court's ruling that promissory estoppel removed an agreement from the statute of frauds.[125] It was clear in this case that the trial court found the plaintiff asserting promissory estoppel to be a much more sympathetic witness than the defendant.[126] But the South Dakota court had a history of allowing promissory estoppel to overcome a statute of frauds defense.[127]

In *Duarte v. Wells Fargo Bank*,[128] the court held that under Nevada law, the statute of frauds cannot be a defense to a promissory estoppel claim because the statute of frauds applies to contracts, and promissory estoppel exists only when there is no contract.[129] Similarly, the United States District Court in New Hampshire held that under New Hampshire law, the statute of frauds is not a bar to a promissory estoppel claim because the statute of frauds applies to contracts and a promissory estoppel claim is based on the absence of a contract.[130] An Arkansas Court of Appeals has held that promissory estoppel can defeat a statute of frauds defense.[131]

The Supreme Court of Wyoming has also held that promissory estoppel can be used to enforce an oral promise that falls within the statute of frauds.[132] The court recognized promissory estoppel as both a defense and a cause of action.[133] The court downplayed the importance of the statute of frauds by asserting that, unlike the difficulty seventeenth century English courts had in detecting perjury, modern courts are capable of discovering perjury.[134] The court did not consider the value of the statute of

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[125] Jacobson v. Gulbransen, 623 N.W.2d 84, 90–91 (S.D. 2001).

[126] *Id.* at 88.

[127] *See, e.g.*, Farmers Elevator Co. v. Lyle, 238 N.W.2d 290, 293 (S.D. 1976).

[128] Duarte v. Wells Fargo Bank, N.A., No. 3:13-cv-00371-RCJ-VPC, 2014 WL 585802, at *3 (D. Nev. Feb. 14, 2014).

[129] *Id.*

[130] *See, e.g.*, GE Mobile Water, Inc. v. Red Desert Reclamation, LLC, 6 F. Supp. 3d 195, 202 (D.N.H. 2014); Embree v. Bank of N.Y. Mellon, No. 12-cv-462-JL, 2013 WL 6384776, at *5 (D.N.H. Dec. 6, 2013).

[131] Country Corner Food & Drug, Inc. v. Reiss, 737 S.W.2d 672, 674 (Ark. 1987).

[132] B & W Glass, Inc. v. Weather Shield Mfg., Inc., 829 P.2d 809, 809 (Wyo. 1992).

[133] *Id.* at 813.

[134] *Id.* at 819.

frauds in promoting certainty, clarity, and seriousness of purpose, in addition to discouraging perjury.[135]

A California court of appeal asserted in 1988 that no California case had directly allowed the doctrine of promissory estoppel to act as an exception to the statute of frauds provision in the California Uniform Commercial Code.[136] However, since that time, there have been cases in which courts have interpreted California law as allowing claims of promissory estoppel to overcome statute of frauds requirements to avoid injustice when detrimental reliance has caused unconscionable injury.[137] Unconscionable injury may sound like a high bar, and it is a high bar in some states,[138] but the California court of appeal defined it merely as the injury resulting from "denying enforcement of a contract after one party is induced by another party to seriously change position relying upon the oral agreement."[139] This merely sounds like the usual injury that would result from a breach of contract.[140]

An outstanding example of a court's using a mistaken notion of justice to ignore the statute of frauds in favor of supporting an allegation of promissory estoppel occurred in Hawaii in 2013.[141] The United States District Court in Hawaii cited a Hawaii Supreme Court opinion that quoted section 139 of the Restatement (Second) of Contracts for the proposition that the statute of frauds is not an automatic bar to the enforcement of an oral contract for the

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[135] *Current Legislation*, 29 COLUM. L. REV. 206, 207 (1929) (giving reason for requiring writing for contract enforceability, in addition to avoiding perjury, encouraging thoughtfulness).

[136] Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 442 (Cal. Ct. App. 1988).

[137] *See, e.g.*, Siam Numhong Prods. Co. v. Eastimpex, 866 F. Supp. 445, 448 (N.D. Cal. 1994) (alleged UCC contract involving wild bamboo shoots); Peterson v. Bank of Am., N.A., No. 09cv2570-WQH-CAB, 2010 WL 1881070, at *6 (alleged agreement for loan payoff); Rijhwani v. Wells Fargo Home Mortg., Inc., No. C 13-05881 LB, 2014 WL 890016, at *12 (alleged agreement for loan modification).

[138] *See* Robins v. Zwirner, 713 F. Supp. 2d 367, 377 (S.D.N.Y. 2010) (citing Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 827 (2d Cir. 1994)) (the New York definition of unconscionable injury for the purpose of allowing promissory estoppel to overcome a statute of frauds writing requirement).

[139] *Allied Grape Growers*, 203 Cal. App. 3d at 444.

[140] *Id.*

[141] Au v. Republic State Mortg. Co., No. CIV. 11-00251 JMS, 2013 WL 1339738, at *5 (D. Haw. Mar. 29, 2013).

purchase of land.[142] The district court noted that the plaintiff asserting promissory estoppel had practiced law for forty-two years, understood real estate contracts, "knew what he was doing," and admitted "that he was 'absolutely ... familiar with the statute of frauds.'"[143] Nevertheless, based on the plaintiff's allegation that the defendant orally agreed to change the terms of a note and mortgage, the court denied the defendant's summary judgment motion to dismiss the promissory estoppel count.[144] This case indicates the fragility of a statute of frauds, resulting in the creation of great uncertainty in undertaking contractual obligations. It suggests that the law will protect those who do not protect themselves in spite of sophisticated knowledge about business and the law.[145]

The New York Court of Appeals has held that the doctrine of promissory estoppel does not preclude using the statute of frauds as an affirmative defense to the enforcement of an oral lease.[146] In New York, promissory estoppel can theoretically overcome the statute of frauds, but it is more difficult than in other states because the promisee must demonstrate not merely a gross injustice but also unconscionable injury.[147] The United States Court of Appeals for the Second Circuit "has defined an 'unconscionable injury' as 'beyond that which flows naturally ... from the nonperformance of the unenforceable agreement,'" and "a greater injury than one that is ... predictable and ... the consequences of the [promisee's] own choice[ ]."[148] This is a much higher standard than the one that has been applied in California.[149]

The Superior Court in Connecticut, relying in part on New York's allowing promissory estoppel to overcome the statute of

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[142] *Id.* at *4 (citing McIntosh v. Murphy, 469 P.2d 177, 179, 181 (Haw. 1970)).

[143] *Id.* at *5.

[144] *Id.* at *7.

[145] *Id.*

[146] Cohen v. Brown, Harris, Stevens, Inc., 64 N.Y.2d 728, 747 (1984).

[147] Robins v. Zwirner, 713 F. Supp. 2d 367, 376–77 (S.D.N.Y. 2010). *But see* Arthur B. Schwartz, *The Second Circuit "Estopped": There Is No Promissory Estoppel in New York*, 19 CARDOZO L. REV. 1201, 1233 (1997) (arguing that, as of 1997, the New York Court of Appeals had never recognized the doctrine of promissory estoppel).

[148] 713 F. Supp. 2d at 377 (quoting Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 827 (2d Cir. 1994)).

[149] *Id.*

frauds when there is evidence of unconscionable injury, allowed the plaintiff's promissory estoppel claim to go forward, and concluded that "[p]arties will still have an incentive to reduce agreements to writing because enforcing a written contract on a theory of breach of contract will likely be much easier than enforcing an oral promise on a theory of promissory estoppel."[150] The plaintiff in this case was a full-service energy company that had been in business for more than twenty-five years, had a fleet of over fifty vehicles, more than sixty employees, and licenses to operate in twelve states.[151] The plaintiff claimed that the defendant had ordered heating oil on the phone and the defendant procured the heating oil the same day, but the defendant had never signed an agreement and then refused to pay.[152] This experienced business plaintiff could have protected itself by requiring a signed writing before starting to act.[153] The Connecticut court's action encourages sloppy business practice and unnecessary litigation. If some fraud were involved or the defendant's actions were unconscionable, there would be other means of dealing with those problems without allowing promissory estoppel to overtake other accepted contract doctrines.

Not every court has seen the wisdom of allowing the doctrine of promissory estoppel to overcome the statute of frauds. The United States District Court in Maine opined that if section 139 of the Restatement (Second) of Contracts (allowing the avoidance of injustice to overcome the statute of frauds) were to be applied to Maine's statute of frauds or probate statute, both would be rendered unenforceable.[154] The court offered that "it could always be said that injustice will result if the promise upon which a promisee has relied is not fulfilled."[155] The Maine Supreme Judicial Court had declined to allow promissory estoppel to overcome

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[150] E. River Energy, Inc. v. Gaylord Hosp., Inc., No. NNHCV095029078S, 2011 WL 3198251, at *9 (Conn. Super. Ct. June 15, 2011) (citing *Allied Grape Growers v. Bronco Wine Co*., 203 Cal. App. 3d 432, 432 (Ct. App. 1988)).

[151] EAST RIVER ENERGY, *Corporate History*, http://www.eastriverenergy.com/about-us/corporate-history/ [http://perma.cc/S3YR-GAYX].

[152] *East River Energy*, *Inc.*, 2011 WL 3198251, at *1–*2.

[153] *Id.*

[154] Robinson v. Miller, No. 2:11-CV-56-JHR, 2011 WL 2610193, at *5–6 (D. Me. June 30, 2011).

[155] *Id.* at *6.

the statute of frauds in employment contracts that cannot be performed within one year.[156] The Maine court said:

> [a]lthough section 139 of the Restatement may promote justice in other situations, in the employment context it contravenes the policy of the Statute to prevent fraud. It is too easy for a disgruntled former employee to allege reliance on a promise, but difficult factually to distinguish such reliance from the ordinary preparations that attend any new employment.[157]

Notwithstanding the Supreme Judicial Court's absolute statement in the employment context, it did allow a promissory estoppel claim to proceed in a case involving the enforcement of an oral promise to sign a real property contract that would have been unenforceable under the statute of frauds.[158] In 2014, in a promissory estoppel case concerning the Uniform Commercial Code Statute of Frauds, the United States Court of Appeals for the First Circuit concluded that the Maine court was "seek[ing] a middle course between an outright bar on the use of promissory estoppel on one hand and the wholesale use of the doctrine to evade the Statute on the other."[159]

The Florida Supreme Court specifically refused to allow the statute of frauds to be overcome by promissory estoppel.[160] It asserted that the statute of frauds should be strictly construed vis-à-vis the doctrine of promissory estoppel so that parties to a contract can "fully understand or be advised of their rights and obligations."[161] An Arizona appellate court held that promissory estoppel cannot be used to overcome the statute of frauds because holding otherwise would render the statute of frauds of no effect.[162]

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[156] Stearns v. Emery-Waterhouse Co., 596 A.2d 72 (Me. 1991).

[157] *Id.* at 74–75.

[158] Chapman v. Bomann, 381 A.2d 1123, 1129 (Me. 1978).

[159] Packgen v. BP Exploration & Prod., Inc., 754 F.3d 61, 73 (1st Cir. 2014).

[160] Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 779 (Fla. 1966).

[161] Shore Holdings, Inc. v. Seagate Beach Quarters, Inc., 842 So. 2d 1010, 1012–13 (Fla. Dist. Ct. App. 2003) (citing Yates v. Ball, 181 So. 341 (Fla. 1938) and W.R. Grace & Co. v. Geodate Serv., Inc., 547 So. 2d 919, 925 (Fla. 1989)). *See also* Farm Credit of Nw. Fla., ACA v. Easom Peanut Co., 718 S.E.2d 590, 602 (Ga. Ct. App. 2011) (asserting that, under Florida Law, "a party may not circumvent the requirements of the statute of frauds by alleging promissory estoppel").

[162] Tiffany Inc. v. W. M. K. Transit Mix, Inc., 493 P.2d 1220, 1226 (Ariz. Ct. App. 1972).

In Tennessee, promissory estoppel is not an exception to the statute of frauds.[163] Nevertheless, one commentator has argued that, because the Tennessee Supreme Court has recognized exceptions to the statute of frauds when enforcing the statute would perpetrate a fraud, "it would be only an incremental change in Tennessee law" for promissory estoppel to override the statute, as well.[164] To the contrary, the Tennessee Court of Appeals has called the statute of frauds a "venerable rule of law" and has noted that the Tennessee Supreme Court's "more restrictive view, limiting application of promissory estoppel to 'exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud.'"[165] In fact, no state will enforce a statute of frauds to abet fraud,[166] so a defense of fraud or unconscionability or equitable estoppel is always available to enforce an oral promise.[167] It only creates ambiguity and uncertainty to allow a claim of promissory estoppel to overcome a statute of frauds.

Texas courts have decided many promissory estoppel cases.[168] Since the 2009 economic downturn, many of these cases have involved mortgage foreclosures and homeowners alleging promises made by lenders.[169] In *Martin-Janson v. JP Morgan Chase Bank*,[170] for example, the homeowner received a foreclosure notice after missing two consecutive monthly payments.[171] She

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[163] Launius v. Wells Fargo Bank, No. 3:09-CV-501, 2010 WL 3429666, at *6 (E.D. Tenn. Aug. 27, 2010).

[164] Steven W. Feldman, *Avoidance of Requirements-Promissory Estoppel*, 21 TENN. PRAC. CONTRACT L. & PRAC. § 2:33 (2014).

[165] Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 697, 700 (Tenn. Ct. App. 2003).

[166] *See, e.g.*, S. States Dev. Co. v. Robinson, 494 S.W.2d 777, 781–82 (1972) (citing Hackney v. Hackney, 27 Tenn. 452, 8 Hum. 452 (1847)).

[167] *Id.*

[168] *See, e.g.*, Trammel Crow Co. v. Harkinson, 944 S.W.3d 631 (Tex. 1997); English v. Fischer, 660 S.W.2d 521 (Tex. 1983); Nagle v. Nagle, 633 S.W.2d 796 (Tex. 1982).

[169] *See, e.g.*, Martin-Janson v. JP Morgan Chase Bank, N.A., 536 Fed. App'x 394 (5th Cir. 2013); Franco v. U.S. Bank Nat'l Ass'n, No. SA-14-CV-636-XR, 2014 WL 4441224 (W.D. Tex. Sept. 8, 2014); Hayes v. Bank of Am., N.A., No. 4:13-CV-760-A, 2014 WL 308129 (N.D. Tex. Jan. 27, 2014); Moore v. Fed. Nat'l Mortgage Ass'n, No. H-12-1518, 2012 WL 6048999 (S.D. Tex. Dec. 5, 2012).

[170] 536 Fed. App'x 394 (5th Cir. 2013).

[171] *Id.* at 395.

then had many communications with the lender, who allegedly told her that her receipt of a loan modification was imminent.[172] After about two years of the lender's alleged assurances that a modification was forthcoming, the homeowner received a formal notice of acceleration and trustee's sale, and she filed lawsuits challenging the foreclosure on the basis of promissory estoppel as well as other causes of action.[173] Texas has a statute of frauds for loan agreements in excess of fifty thousand dollars, and the United States District Court for the Western District of Texas concluded that the homeowner's claims were barred by the statute of frauds.[174] Texas has an unusual rule for the relationship between the doctrine of promissory estoppel and the statute of frauds. Generally, the doctrine will not overcome the statute; however, the doctrine will prevail if the alleged promise is merely to sign an already existing written agreement that would satisfy the statute.[175] The Court of Appeals for the Fifth Circuit overturned the district court because the homeowner alleged that, based on the lender's repeated assertions that her receipt of a loan modification was imminent, she believed that the loan modification agreement had been prepared but never sent to her.[176] The Fifth Circuit held that the agreement would satisfy the statute of frauds and the homeowner could proceed with her promissory estoppel claim.[177]

In contrast, in another case in which a homeowner facing foreclosure for non-payment brought an action for promissory estoppel based on an alleged oral modification agreement, the United States District Court for the Western District of Texas held that the homeowner's reliance on oral representations made by the lender was unreasonable as a matter of law.[178] The district court cited a Texas appellate court for the proposition that "[a] party to an arm's length transaction must exercise ordinary care and reasonable diligence for the protection of his own interests, and a failure to do so is not excused by mere confidence in the honesty

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[172] *Id.* at 395–96.

[173] *Id.* at 396.

[174] *Id.* at 396–97.

[175] Davidson v. JP Morgan Chase, N.A., No. 4:13-CV-3698, 2014 WL 4924128, at *8 (S.D. Tex. Sept. 29, 2014).

[176] 536 Fed. App'x at 399.

[177] *Id.*

[178] Montalvo v. Bank of Am. Corp., No. SA-10-CV-360-XR, 2013 WL 870088, at *13 (W.D. Tex. Mar. 7, 2013).

and integrity of the other party."[179] The court noted that the plaintiff was not unsophisticated about financial matters because she was a manager of a large pawn shop and had been trained in Texas lending laws.[180] Moreover, the loan agreement specifically prohibited oral modifications and "under Texas law … reliance on an oral statement is unreasonable as a matter of law if the statement is controverted by the plain language of a binding written contract."[181]

The Supreme Court of the State of Washington has specifically declined to allow promissory estoppel to overcome a valid defense based on the statute of frauds in the Uniform Commercial Code.[182] The court emphasized the importance of uniformity among the states as a prime purpose of the Uniform Commercial Code.[183] It viewed enforcing the statute of frauds as a way to limit litigation and confusion.[184] The Washington Supreme Court also refused to allow the promissory estoppel doctrine to overcome the statute of frauds in a wrongful termination case,[185] a franchise agreement case,[186] and a consulting case.[187] Last year, the United States District Court for the Western District of Washington, applying Washington law, noted on several occasions that the Washington Supreme Court has consistently declined to allow a promissory estoppel claim to avoid the statute of frauds.[188]

V. ENCOURAGING CONFUSION AND LITIGATION

North Carolina probably has the most restrictive law governing promissory estoppel among states that recognize the doctrine.[189]

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[179] *Id.* at *12 (citing DRC Parts & Accessories, LLC v. VM Motori, S.P.A., 112 S.W.3d 854, 858 (Tex. Ct. App. 2003)).

[180] *Id.* at *14.

[181] *Id.*

[182] Lige Dickson Co. v. Union Oil Co., 635 P.2d 103, 107 (Wash. 1981).

[183] *Id.* (citing UCC § 1-102(2)(c)).

[184] *Id.*

[185] Greaves v. Med. Imaging Sys., Inc., 879 P.2d 276, 282–83 (Wash. 1994).

[186] Klinke v. Famous Recipe Fried Chicken, Inc., 616 P.2d 644 (Wash. 1980).

[187] Lectus, Inc. v. Rainier Nat'l Bank, 647 P.2d 1001 (Wash. 1982).

[188] Rutherford v. Chase Bank, N.A., No. 2:13-cv-01175-MJP, 2014 WL 4540066, at *4 (W.D. Wash. Sept. 11, 2014); Nicholson v. Thrifty Payless, Inc., No. C12-1121RSL, 2014 WL 618894, at *2 (W.D. Wash. Sept. 18, 2014).

[189] Home Elec. Co. of Lenoir, Inc. v. Hall & Underdown Heating & Air Conditioning Co., 358 S.E.2d 539, 541 (N.C. Ct. App. 1987).

North Carolina courts have never recognized promissory estoppel as a substitute for consideration.[190] The only circumstance in which North Carolina courts have recognized promissory estoppel is as a defense involving the waiver of a preexisting legal right.[191] For example, in *Wachovia Bank v. Rubish*,[192] a tenant relied on his landlord's promise not to require written notice to renew his lease.[193] The tenant asserted promissory estoppel as a defense when, after the landlord's death, the landlord's executors brought an action for summary ejectment.[194] The court stated that a promissory estoppel theory of the case is possible based on the landlord's waiver of two prior breaches of the condition of written notice, and the defendant's reliance on the promise implied from these waivers that no written notice would be required.[195]

The North Carolina Court of Appeals chastised the United States Court of Appeals for the Fourth Circuit for holding that, under North Carolina law, promissory estoppel could be used affirmatively in a construction bid case to allow the plaintiff to recover the difference between the price of the defendant's oral bid and the price the plaintiff had to pay when the defendant was unable to deliver.[196] The court opined that "[a]llowing a cause of action based on promissory estoppel in construction bidding … creates the potential for injustice."[197] A contractor can use a subcontractor's bid to get a job, but is not obligated to use that subcontractor while, under a promissory estoppel theory, the subcontractor will be bound to act in accordance with his or her bid.[198] Most importantly, contractors can protect themselves by contracting with subcontractors dependent upon a successful bid.[199]

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[190] *Id.*

[191] *Id.* at 541–42.

[192] 293 S.E.2d 749 (N.C. 1982).

[193] *Id.* at 751.

[194] *Id.*

[195] *Id.* at 757.

[196] *Home Elec. Co.*, 358 S.E.2d at 542.

[197] *Id.*

[198] *Id.* at 542. *But see* Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E.2d 520, 527 (Ill. 2009) (asserting the court's conviction that promissory estoppel as an independent cause of action will not negatively affect relationship between subcontractors and general contractors).

[199] *Home Elec. Co.*, 358 S.E.2d at 542.

Differences in opinion about promissory estoppel between state courts and federal courts applying the same state law are not limited to North Carolina.[200] This variation in approach, in addition to the differences among states, is further indication of the difficulty in coming to terms about what promissory estoppel actually means and what it should accomplish. The United States District Court in South Carolina held that promissory estoppel could not be used to avoid the Uniform Commercial Code's statute of frauds, because to hold otherwise would render the statute "a nullity."[201] Two years later, the South Carolina Court of Appeals held that promissory estoppel can overcome the statute of frauds in South Carolina.[202] However, it may be relevant that the defendant asserting the statute of frauds was a New York resident who ordered silver over the phone from a South Carolina company.[203] The company purchased the silver and awaited the defendant's payment.[204] The price of the silver went down by about two-thirds, and the defendant refused to pay.[205] The company sued the defendant, alleging promissory estoppel.[206] This is the kind of surmise that becomes available when courts are deciding cases based on ad hoc notions of justice.

A database counseling on how to litigate wrongful discharge cases advises that a promissory estoppel claim should almost always be advanced as a "backup" to a breach of contract claim.[207] First, a promissory estoppel claim may succeed where a breach of contract would not when an employer makes promises that were not supported by any bargained-for consideration on the part of the employee;[208] and second, a promissory estoppel claim may succeed when an oral promise would not be enforceable because it did not

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[200] *See generally* McDabco v. Chet Adams Co., 548 F. Supp. 456 (D.S.C. 1982).

[201] *McDabco*, 548 F. Supp. at 460–61.

[202] Atl. Wholesale Co. v. Solondz, 320 S.E.2d 720, 723 (S.C. Ct. App. 1984). The court inquired whether "equitable estoppel" could overcome the statute of frauds, but the situation in the case clearly involved promissory estoppel. *Id.*

[203] *Id.* at 722–23.

[204] *Id.* at 723.

[205] *Id.*

[206] *Id.*

[207] Paul H. Tobias, 1 Litigating Wrongful Discharge Claims § 4.38 (June 2015), *available at* WestlawNext Labor & Employment Texts & Treatises.

[208] *Id.*

satisfy the statute of frauds.[209] The advice warns that the drawbacks include that the employee must be able to prove detrimental reliance, and the remedy may be restricted to reliance damages—for example, moving expenses, new housing costs, and suspension of prior income—rather than expectation damages based on an alleged contract.[210] When getting around long-known, traditional contract rules has become the normal way of conducting business, perhaps it is time to admit that tort-like principles are overcoming contract rules, and that it is time for reform.

CONCLUSION

In considering an independent cause of action for promissory estoppel, the choices are: (1) allowing courts to make ad hoc decisions about what is and is not fair in situations in which parties could have entered into enforceable contracts but did not; or (2) expecting experienced business people to protect themselves by adhering to traditional contract rules. The first choice may be suitable in limited circumstances, such as allowing promissory estoppel to act as a substitute for consideration in domestic situations when particularly unsophisticated consumers or homeowners are involved. The second choice is the one that is appropriate in business situations. Businesspeople should be able to rely on predictable rules and professional legal advice, and should not be at the mercy of vague claims of unfairness and injustice. Businesspeople should also be expected to know basic contract rules and when to get expert legal advice.

There will always be businesses that will conduct handshake deals. That does not mean that those deals should be enforced if they do not satisfy statute of frauds requirements. It means that such businesses have to understand the risks they are taking, knowing that sometimes their deal counterparts will not honor such handshake deals. That fact should become part of the assessment of business costs, risks, and insurance needs. When the assertion "it isn't fair" can overcome traditional contract rules, all businesses incur additional litigation risks that are very unpredictable. State legislatures can cure the confusion, unpredictability, and lack of uniformity across courts by enacting statutes

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[209] *Id.*
[210] *Id.*

that define promissory estoppel as only a substitute for consideration, which creates an enforceable contract when a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee does induce such action or forbearance to the detriment of the promisee. If a promisor's behavior is outrageously unfair to an unsophisticated consumer or homeowner, courts can deem the behavior unconscionable and remedy the situation without resorting to the confounding doctrine of promissory estoppel.