Fordham Law Review

Volume 53 | Issue 5 Article 12

1985

The Statute of Frauds as a Bar to an Action in Tort for Fraud

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INTRODUCTION

In 1677 the English Parliament enacted the Act for Prevention of Frauds and Perjuries,[1] commonly known as the Statute of Frauds (Statute),[2] in an effort to prevent fraudulent enforcement of oral promises.[3] The original Statute required certain contracts to be evidenced by a signed writing,[4] on the theory that parol evidence of such transactions

1. 29 Car. 2, ch. 3 (1677). Due in part to England's adoption of the Gregorian calendar in 1751, some confusion developed over the year in which Parliament enacted the Statute of Frauds (Statute). *See* Costigan, *The Date And Authorship Of The Statute Of Frauds*, 26 Harv. L. Rev. 329, 329-34 (1913). It is generally accepted that the date of enactment was April 16, 1677. *See* 6 W. Holdsworth, A History of English Law 380-83 (1927); Costigan, *supra*, at 334; Perillo, *The Statute Of Frauds In The Light Of The Functions And Dysfunctions Of Form*, 43 Fordham L. Rev. 39, 39 n.1 (1974); Willis, *The Statute Of Frauds—A Legal Anachronism*, 3 Ind. L.J. 427, 427 (1928).

2. *See, e.g.*, Burns v. Gould, 172 Conn. 210, 220, 374 A.2d 193, 199 (1977); McIntosh v. Murphy, 52 Hawaii 29, 32, 469 P.2d 177, 179 (1970); Boyd v. Stone, 11 Mass. 342, 345 (1814); C. Browne, Statute of Frauds vii (5th ed. 1895).

3. *See* An Act for Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3 (1677) (preamble); Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768 (1983); McIntosh v. Murphy, 52 Hawaii 29, 33, 469 P.2d 177, 179 (1970); Deevy v. Porter, 11 N.J. 594, 595, 596, 95 A.2d 596, 597 (1953); C. Browne, *supra* note 2, at vii; J. Calamari & J. Perillo, The Law of Contracts § 19-1, at 672 (2d ed. 1977); 2 A. Corbin, Corbin on Contracts § 275, at 2-3 (1950); W. Holdsworth, *supra* note 1, at 380, 384; 3 S. Williston, A Treatise on the Law of Contracts § 448, at 340-41 (3d ed. 1960); Willis, *supra* note 1, at 427. At early common law, oral promises were generally not enforced by the King's courts, but with the advent and expansion of the writ of assumpsit, the enforcement of oral promises became commonplace and could be obtained on the strength of oral testimony alone. *See* J. Calamari & J. Perillo, *supra*, § 19-1, at 672; 2 A. Corbin, *supra*, § 275, at 2; 3 S. Williston, *supra*, § 448, at 340; Perillo, *supra* note 1, at 67. Equally commonplace, however, became the perpetration of fraud by those who were able to suborn perjured testimony in their favor. *See* C. Browne, *supra* note 2, at 4; J. Calamari & J. Perillo, *supra*, § 19-1, at 672; 2 A. Corbin, *supra*, § 275, at 2; 3 S. Williston, *supra*, § 448, at 340; Note, *Statute of Frauds: Section Seventeen in the light of two and a half centuries*, 13 Cornell L.Q. 303, 305 (1928) [hereinafter cited as *Statute of Frauds*]. In response to this situation, Parliament enacted the Statute of Frauds. As stated in its recital, the object of the original Statute was the "prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and [subornation] of perjury." An Act for Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3 (1677); *see* C. Browne, *supra* note 2, at vii.

4. *See* An Act for Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3, §§ 4, 17 (1677); C. Browne, *supra* note 2, at vii, 4; J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 672-73; 2 A. Corbin, *supra* note 3, § 275, at 2-3; 6 W. Holdsworth, *supra* note 1, at 384; Perillo, *supra* note 1, at 41, 68-69; *see also* 3 S. Williston, *supra* note 3, § 448, at 340-41 (referring only to writing); Willis, *supra* note 1, at 427 (same). In addition to the provisions dealing with contracts, the original Statute contained 23 other sections dealing with conveyances, wills, trusts, and execution of judgments. *See* An Act for Prevention of Frauds and Perjuries, 29 Car. 2, ch. 3, §§ 1-3, 5-16, 18-25 (1677); J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 672; 2 A. Corbin, *supra* note 3, § 275, at 2 n.1; 6 W. Holdsworth, *supra* note 1, at 384-87; Willis, *supra* note 1, at 428; *see also* 3 S. Williston, *supra* note 3, § 449, at 347-48 (summarizing selected provisions that require a writing). Today, the Statute of Frauds typically requires the following contracts to be in writing: various

tended to be peculiarly susceptible to perjury and therefore inherently unreliable.[5]

The Statute's capacity to prevent fraud, however, is not achieved without cost. Just as the Statute precludes a dishonest plaintiff from using false testimony to invent oral terms or conditions of a nonexistent agreement,[6] so it precludes a genuinely aggrieved plaintiff from enforcing an oral contract that was in fact made.[7] Far from standing guard against the perpetration of fraud, in the latter situation the Statute actually sanctions fraud by allowing wrongdoers to break their oral promises with impunity.[8] Rarely is the Statute's potential for causing injustice greater

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suretyship agreements, agreements in consideration of marriage, agreements for the sale of land or of interests in land, and contracts not to be performed within one year. *See* J. Calamari & J. Perillo, *supra* note 3, §§ 19-2 to -15, -17 to -25; 2 A. Corbin, *supra* note 3, chs. 15-17, 19, 20; 3 S. Williston, *supra* note 3, chs. 16-17. The Uniform Commercial Code also contains its own Statute of Frauds provisions relating to contracts for the sale of goods. *See* U.C.C. § 2-201 (1977); J. Calamari & J. Perillo, *supra* note 3, § 19-16; 2 A. Corbin, *supra* note 3, § 467; 3 S. Williston, *supra* note 3, § 506A. For a representative sampling of various Statutes currently in effect in the United States that are patterned after the language of the original English Statute, see *infra* notes 44-46.

5. *See* Boyd v. Stone, 11 Mass. 342, 345 (1814) (original Statute of Frauds was enacted because Parliament found it "inconvenient to depend upon the memory or the integrity of witnesses in disputes relating to real estate"); Burns v. McCormick, 233 N.Y. 230, 234, 135 N.E. 273, 274 (1922) (Cardozo, J.) (policy underlying Statute of Frauds reflects "[t]he peril of perjury and error [that] is latent in the spoken promise"); C. Browne, *supra* note 2, at vii (Statute aims to prevent fraud by precluding litigants from proving certain transactions by parol evidence, which "experience had shown to be peculiarly liable to corruption," and which therefore was "at best of an uncertain and deceptive character"); *see also* J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 673 (writing requirement imposed to preclude perjured testimony); 2 A. Corbin, *supra* note 3, § 275, at 3 (same); 6 W. Holdsworth, *supra* note 1, at 384-93 (same); 3 S. Williston, *supra* note 3, § 452, at 357-60 (promises to answer for debt of another peculiarly susceptible to perjury because promisor receives no benefit and nothing but promise is of any evidentiary value); Perillo, *supra* note 1, at 68-69 (writing requirement imposed to preclude perjured testimony); *Statute of Frauds*, *supra* note 3, at 304-05 (same).

6. *See* Cohen v. Pullman Co., 243 F.2d 725, 728-29 (5th Cir. 1957); Deevy v. Porter, 11 N.J. 594, 595-96, 95 A.2d 596, 597 (1953); Friedl v. Benson, 25 Wash. App. 381, 387, 609 P.2d 449, 453 (1980); C. Browne, *supra* note 2, at vii-viii; 2 A. Corbin, *supra* note 3, § 275, at 3; Willis, *supra* note 1, at 427.

7. *See* Presti v. Wilson, 348 F. Supp. 543, 545 (E.D.N.Y. 1972); Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941); Lovely v. Dierkes, 132 Mich. App. 485, 493, 347 N.W.2d 752, 755 (1984) (Peterson, J., dissenting); Burns v. McCormick, 233 N.Y. 230, 235, 135 N.E. 273, 274-75 (1922); J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 673; 2 A. Corbin, *supra* note 3, § 275, at 3.

8. *See* Loeb v. Gendel, 23 Ill. 2d 502, 505, 179 N.E.2d 7, 9 (1961); Lovely v. Dierkes, 132 Mich. App. 485, 493, 347 N.W.2d 752, 755 (1984) (Peterson, J., dissenting); Deevy v. Porter, 11 N.J. 594, 596, 95 A.2d 596, 597 (1953); J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 673; 2 A. Corbin, *supra* note 3, § 275, at 3, 8 & n.9; 3 S. Williston, *supra* note 3, § 448, at 347. Recognizing the Statute's anachronistic nature, Parliament in 1954 deleted all but two provisions of the original Statute of Frauds. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. 2, ch. 34; *see* J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 674; 3 S. Williston, *supra* note 3, § 448, at 340 nn.3-4; Perillo, *supra* note 1, at 39-40. Left standing were the two provisions that relate to contracts for the sale of land and promises to answer for the debt, default or miscarriage of another. *See* J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 674 n.5; 3 S. Williston, *supra* note 3,

than when it is pleaded as a defense to an action in tort for fraud based on an oral promise within the Statute.[9]

An individual who makes a promise without any intention of performing it is liable in tort for the harm caused by another's justifiable reliance thereon.[10] If the Statute's formal requirements were satisfied,[11] he would also be liable in contract for the plaintiff's loss of the bargain.[12] The issue that has divided authorities, however, is whether the Statute must be satisfied in order to maintain the tort action.[13] Alternatively stated, the question is whether the Statute operates as a bar to a tort action predicated on a fraudulent oral promise rendered unenforceable as a contract by the Statute.[14]

The Statute was enacted to protect innocent persons against false claims of oral promises.[15] Yet in providing this protection, it ought not to function as a shield for wrongdoers.[16] A determination that the Statute either applies or does not apply to a fraud action based on an oral

§ 448, at 340 n.4; Perillo, *supra* note 1, at 40. Discussion whether American jurisdictions should also repeal their various Statutes of Frauds is beyond the scope of this Note.

9. *See, e.g.*, Nanos v. Harrison, 97 Conn. 529, 533, 117 A. 803, 805 (1922); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176 (1978). In the context of a fraud claim, the Statute's capacity to cause injustice by immunizing the conduct of a fraudulent promisor exceeds its capacity to prevent injustice by deterring the fraud of a sham promisee. See *infra* Pt. I.B..

10. *See* Kauffman v. Bobo & Wood, 99 Cal. App. 2d 322, 326, 221 P.2d 750, 753 (1950); Sweet v. Kimball, 166 Mass. 332, 335, 44 N.E. 243, 243 (1896); Hunt v. Goodimate Co., 94 N.H. 421, 423, 55 A.2d 75, 77 (1947); Sabo v. Delman, 3 N.Y.2d 155, 160, 143 N.E.2d 906, 908, 164 N.Y.S.2d 714, 716 (1957); Restatement (Second) of Torts § 530 comment c (1976); W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 105, at 725 (5th ed. 1984) [hereinafter cited as Prosser and Keeton]. *But see* Brodsky v. Frank, 342 Ill. 110, 118-19, 173 N.E. 775, 778 (1930) (tort action cannot be based on a promissory representation); Sachs v. Blewett, 206 Ind. 151, 156, 185 N.E. 856, 858 (1933) (same).

11. The Statute of Frauds typically requires a writing, signed by the party to be charged with the contract or his authorized agent, that states with reasonable certainty the identity of both contracting parties, the subject matter of the contract, and the essential terms and conditions of the contract. *See* J. Calamari & J. Perillo, *supra* note 3, §§ 19-29, 19-31; 2 A. Corbin, *supra* note 3, §§ 498-500; 4 S. Williston, *supra* note 3, §§ 567A-569. The authorities are divided, however, on the question whether the writing must also state the consideration for the promises constituting the contract. *See* 2 A. Corbin, *supra* note 3, § 501; 4 S. Williston, *supra* note 3, §§ 570-572.

12. *See* Sachs v. Blewett, 206 Ind. 151, 155, 185 N.E. 856, 858 (1933); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 438-39, 280 N.W. 814, 819 (1938); Restatement (Second) of Torts § 530 comment c (1976).

13. General Corp. v. General Motors Corp., 184 F. Supp. 231, 234 (D. Minn. 1960); *see* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 976-78, 203 Cal. Rptr. 345, 351-53 (1984); Mildfelt v. Lair, 221 Kan. 557, 566, 561 P.2d 805, 813 (1977).

14. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 976, 203 Cal. Rptr. 345, 351-52 (1984); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176 (1978); Collins v. McCombs, 511 S.W.2d 745, 746 (Tex. Civ. App. 1974).

15. See *supra* note 6 and accompanying text.

16. *See* Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768 (1983); Loeb v. Gendel, 23 Ill. 2d 502, 505, 179 N.E.2d 7, 9 (1961); Imperator Realty Co. v. Tull, 228 N.Y. 447, 457, 127 N.E. 263, 266 (1920) (Cardozo, J., concurring).

promise within the Statute necessarily represents a weighing of risks.[17] The result is to promote one policy at the direct expense of the other.[18] The split in authority on this issue thus reflects a disagreement as to which type of fraud—that of the promisor or the promisee—poses the greater threat to the Statute's overall policy of preventing fraud in business dealings.[19]

Initially, the Statute was held to constitute an absolute bar to an action at law involving an oral promise within its ambit.[20] More recently, however, many courts and commentators, recognizing the potential for injustice inherent in that position, have adopted a more liberal view of the Statute's operation.[21] Consequently, the majority of courts today holds unequivocally that the Statute in no way affects the validity of an action sounding in tort.[22] Although this approach seeks to vindicate the Stat-

17. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 978, 203 Cal. Rptr. 345, 353 (1984); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Boyd v. Stone, 11 Mass. 342, 349 (1814); American, Inc. v. Bishop, 29 Wash. 2d 95, 98, 185 P.2d 722, 723 (1947).

18. *See* Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Dung v. Parker, 52 N.Y. 494, 498-99 (1873); American, Inc. v. Bishop, 29 Wash. 2d 95, 98, 185 P.2d 722, 723 (1947). See text accompanying notes 63-73.

19. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 977-78, 203 Cal. Rptr. 345, 353 (1984). *Compare* Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941) (fraud plaintiff must bear hardship because to permit claim "would be to nullify and destroy [the Statute's] wholesome effect and the protection it affords against fraud") *with* Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176-77 (1978) (applying Statute to bar fraud action would contravene policy of Statute by fostering injustice). See *infra* Pt. I.B..

20. *See* Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Sachs v. Blewett, 206 Ind. 151, 159, 185 N.E. 856, 859 (1933); Kiser v. Richardson, 91 Kan. 812, 814, 139 P. 373, 374 (1914); Sumner v. Fuqua, 182 Ky. 266, 267, 206 S.W. 459, 459 (1918); Dawe v. Morris, 149 Mass. 188, 193, 21 N.E. 313, 314 (1889); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 439, 280 N.W. 814, 819 (1938); Lewis v. Williams, 186 Miss. 701, 715, 191 So. 479, 482 (1939); State *ex rel.* Fletcher v. Blair, 352 Mo. 476, 483, 178 S.W.2d 322, 325 (1944); McIntyre v. Dawes, 71 Mont. 367, 375-76, 229 P. 846, 849 (1924); Dung v. Parker, 52 N.Y. 494, 497 (1873); Ossage v. Foley, 20 Ohio App. 16, 18, 153 N.E. 117, 118 (1923); Barry v. Wixon, 22 R.I. 16, 16, 46 A. 42, 42 (1900) (per curiam); American, Inc. v. Bishop, 29 Wash. 2d 95, 97-98, 185 P.2d 722, 723 (1947); *see also* Cohen v. Pullman Co., 243 F.2d 725, 727-29 (5th Cir. 1957) (interpreting Georgia law). *But see* Zuckerman v. Cochran, 229 Ala. 484, 486, 158 So. 324, 326 (1934); Nanos v. Harrison, 97 Conn. 529, 533-35, 117 A. 803, 805 (1922); Schleifer v. Worcester N. Sav. Inst., 306 Mass. 226, 229, 27 N.E.2d 992, 994-95 (1940); Burgdorfer v. Thielemann, 153 Or. 354, 361-62, 55 P.2d 1122, 1127 (1936); Sibley v. Southland Life Ins. Co., 36 S.W.2d 145, 146 (Tex. 1931); *see also* Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 680-81, 684 (E.D.S.C. 1940) (interpreting South Carolina law).

21. See *infra* note 22.

22. *See, e.g.*, Campbell v. Regal Typewriter Co., 341 So. 2d 120, 125 (Ala. 1976); Dobison v. Bank of Hawaii, 60 Hawaii 225, 226, 587 P.2d 1234, 1235 (1978) (per curiam); Schulz v. Coleman, 473 S.W.2d 716, 719 (Mo. 1971); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176-77 (1978); Louis Schlesinger Co. v. Wilson, 22 N.J. 576, 584-85, 127 A.2d 13, 18 (1956); Paul J. Cowley & Assocs. v. Comtax, Inc., 100 A.D.2d 744, 744, 473 N.Y.S.2d 625, 626 (1984); Kent v. Humphries, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981); Restatement (Second) of Torts § 530 comment c (1976); *see also* Walker v. U-Haul Co., 734 F.2d 1068, 1078 (5th Cir. 1984) (applying Mississippi law).

ute's policy of preventing fraud,[23] it ignores the concomitant policy against the enforcement of certain oral contracts[24]—a policy that might be undermined if a claimant is permitted to maintain the action in tort.[25] Both extreme positions on the issue forfeit one prong of the Statute's antifraud policy in favor of the other.

Accordingly, a few states reject both of these approaches and look instead to the measure of damages sought in the fraud action to determine whether the Statute of Frauds should apply.[26] Under this analysis, a claim for out of pocket damages would indicate that the claim truly sounds in tort,[27] thereby permitting use of parol evidence.[28] Conversely, a claim for benefit of the bargain damages, a typical contractual remedy,[29] would be dismissed as an attempt at indirect enforcement of an

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Some older authorities adhering to this view remain good law. *See, e.g.*, Nanos v. Harrison, 97 Conn. 529, 533-35, 117 A. 803, 805 (1922); Schleifer v. Worcester N. Sav. Inst., 306 Mass. 226, 229, 27 N.E.2d 992, 994-95 (1940); Burgdorfer v. Thielemann, 153 Or. 354, 361-63, 55 P.2d 1122, 1127 (1936). A substantial minority of jurisdictions still adheres to the view that the Statute of Frauds bars an action for fraud based on an oral promise within its ambit. *See, e.g.*, Lininger v. Sonenblick, 23 Ariz. App. 266, 269, 532 P.2d 538, 541 (1975); Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 978, 203 Cal. Rptr. 345, 353 (1984); Ostman v. Lawn, 305 So. 2d 871, 872-73 (Fla. Dist. Ct. App. 1974); American Standard, Inc. v. Jesse, 150 Ga. App. 663, 665-66, 258 S.E.2d 240, 244 (1979); Mildfelt v. Lair, 221 Kan. 557, 568, 561 P.2d 805, 814-15 (1977); *see also* Glenway Indus. v. Wheelbrator-Frye, Inc., 686 F.2d 415, 418 (6th Cir. 1982) (per curiam) (interpreting Pennsylvania law).

23. *See* Dobison v. Bank of Hawaii, 60 Hawaii 225, 226, 587 P.2d 1234, 1235 (1978) (per curiam); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176-77 (1978).

24. *See* Cohen v. Pullman Co., 243 F.2d 725, 728-29 (5th Cir. 1957); Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Sachs v. Blewett, 206 Ind. 151, 159, 185 N.E. 856, 859 (1933); Dawe v. Morris, 149 Mass. 188, 193, 21 N.E. 313, 314 (1889); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 438-39, 280 N.W. 814, 819 (1938); Dung v. Parker, 52 N.Y. 494, 498-500 (1873); Burgdorfer v. Thielemann, 153 Or. 354, 378, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part); Wade v. State Nat'l Bank, 379 S.W.2d 717, 720 (Tex. Civ. App. 1964).

25. See *supra* notes 5, 6 and accompanying text.

26. *See, e.g.*, Welch v. Lawson, 32 Miss. 170, 177-78 (1856); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974); Papanikolas v. Sampson, 73 Utah 404, 413, 274 P. 856, 859-60 (1929).

27. *See* Welch v. Lawson, 32 Miss. 170, 178 (1856); Hastings v. Houston Shell & Concrete Co., 596 S.W.2d 142, 144 (Tex. Civ. App. 1979); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974); Papanikolas v. Sampson, 73 Utah 404, 413, 274 P. 856, 859-60 (1929); *see, e.g.*, *Welch*, 32 Miss. at 177 (because plaintiff sought to recover only out of pocket expenses, action sounded in tort and was therefore permitted); *Hastings*, 596 S.W.2d at 144 (same).

28. *See* Cobbledick-Kibbe Glass Co. v. Pugh, 161 Cal. App. 2d 123, 126, 326 P.2d 197, 199 (1958); Sabo v. Delman, 3 N.Y.2d 155, 161, 143 N.E.2d 906, 908-09, 164 N.Y.S.2d 714, 717 (1957); Bareham & McFarland, Inc. v. Kane, 228 A.D. 396, 401, 240 N.Y.S. 123, 130 (1930); 3 A. Corbin, *supra* note 3, § 580, at 431; 9 J. Wigmore, Evidence § 2439, at 128 (J. Chadbourn rev. ed. 1981); Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 Calif. L. Rev. 877, 877 (1961).

29. *See* J. Calamari & J. Perillo, *supra* note 3, § 14-4; 5 A. Corbin, *supra* note 3, § 992; D. Dobbs, Handbook on the Law of Remedies § 12.1, at 786 (1973); 11 S. Williston, *supra* note 3, § 1338, at 198. See *infra* note 106 and accompanying text.

oral contract.[30]

This remedial approach is the most feasible solution in states that measure fraud damages according to the out of pocket rule,[31] but it is useless in states that follow the benefit of the bargain rule[32] or permit recovery of contract-type damages, such as lost profits, as consequential fraud damages.[33] In those states, it would be impossible to ascertain the gravamen of the claim by looking at the requested relief.[34] Moreover, if a tort has been committed, it makes little sense to nonsuit the victim merely because he has pleaded an improper measure of damages.[35]

Any rule resolving this dispute must necessarily sacrifice some of the deterrence against fraud provided by either the Statute[36] or the common law fraud action.[37] This Note argues that courts should preserve as much of the deterrence value of both the Statute and the fraud action as

30. *See* Welch v. Lawson, 32 Miss. 170, 178 (1856); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974); Papanikolas v. Sampson, 73 Utah 404, 413, 274 P. 856, 859-60 (1929); *see, e.g.*, Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 45-46 (Tex. Civ. App. 1980) (dismissing tort claim as attempt at indirect enforcement of oral contract because plaintiff sought to recover amount he would have earned had oral contract been performed); *Collins*, 511 S.W.2d at 747 (same); Easton v. Wycoff, 4 Utah 2d 386, 390-91, 295 P.2d 332, 335 (1956) (dismissing fraud claim as indirect contract action because claimant's loss resulted from loss of bargain and not from any expense incurred in reliance on misrepresentations as to title of property); *Papanikolas*, 73 Utah at 413, 274 P. at 859-60 (dismissing fraud claim as indirect contract action because amount of damages sought under fraud claim identical to amount sought under contract claim). Texas has very recently added the requirement that plaintiff prove an additional misrepresentation—one that is collateral to the oral promise—in order to maintain the fraud action. *See* Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 680-81 (Tex. App. 1984); *see also Keriotis*, 607 S.W.2d at 46 (fraud claim dismissed because plaintiff sought benefit of the bargain damages and failed to allege a collateral agreement).

31. See *infra* notes 105-10 and accompanying text.

32. See *infra* notes 111-13 and accompanying text.

33. See *infra* note 113 and accompanying text.

34. Because the standard measure of damages for breach of contract is the benefit of the bargain rule, see *supra* note 29, the amount of damages sought in a fraud action in a benefit of the bargain state would be identical to the amount sought in an action to enforce the contract. *See* General Corp. v. General Motors Corp., 184 F. Supp. 231, 235 (D. Minn. 1960).

35. A complaint cannot be dismissed simply because the plaintiff prays for relief to which he is not entitled. Lipsit v. Leonard, 64 N.J. 276, 286, 315 A.2d 25, 30 (1974); Rosenwald v. Goldfein, 3 A.D.2d 206, 209-10, 159 N.Y.S.2d 333, 337 (1957); Thompson v. Hunstead, 53 Wash. 2d. 87, 91, 330 P.2d 1007, 1009 (1958). The proper course of action is to allow the plaintiff an opportunity to prove his claim and, if he is successful, to limit his recovery to the proper amount. *Lipsit*, 64 N.J. at 286, 315 A.2d at 30; *Rosenwald*, 3 A.D.2d at 209-10, 159 N.Y.S.2d at 337; *see Thompson*, 53 Wash. 2d at 91-92, 330 P.2d at 1009-10.

36. *See, e.g.*, Cohen v. Pullman Co., 243 F.2d 725, 728-29 (5th Cir. 1957) (denying fraud action because Statute's deterrence value would be imperiled); Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 978, 203 Cal. Rptr. 345, 353 (1984) (same); Dung v. Parker, 52 N.Y. 494, 498-99 (1873) (same). See *supra* note 6 and accompanying text.

37. *See, e.g.*, Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176-77 (1978) (sustaining common law fraud action notwithstanding Statute of Frauds); Kent v. Humphries, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981) (same); Sibley v. Southland Life Ins. Co., 36 S.W.2d 145, 146 (Tex. 1931) (same); *cf.* Southern States Dev. Co. v. Robinson, 494 S.W.2d 777, 781 (Tenn. App. 1972) (because "man will discover some way to use the

possible, without abrogating to any significant degree the Statute's mandate against enforcement of certain oral contracts. Part I of this Note examines the competing policies embodied in the Statute and concludes that the Statute should not operate to bar tort actions predicated on oral promises. Part II proposes the following compromise rule: When a fraud action is based solely on an oral promise within the Statute of Frauds, the plaintiff may recover only his out of pocket losses incurred in reliance thereon, regardless of the usual measure of fraud damages. When the plaintiff can prove a collateral misrepresentation, however, he can recover the usual amount of damages the jurisdiction allows for fraud. Although this rule presents two risks—undercompensating a true victim of fraud, and compensating a sham plaintiff, with the commensurate harm to a defendant fully within his rights in not performing an oral promise—this Note concludes that these risks are preferable to the greater risks of promoting fraud inherent in the other approaches.

I. SHOULD THE STATUTE OF FRAUDS OPERATE AS A BAR TO A FRAUD ACTION?

A. *The Language of the Statutes of Frauds*

There are several different versions of the Statute of Frauds[38] and, although the underlying policies are identical,[39] the effect of noncompliance with the Statute's writing requirement is neither uniformly stated[40] nor uniformly interpreted.[41] Consequently, the terms of the different Statutes do not clearly delimit the scope of the Statute's operation. For this reason, semantic analysis is not helpful in determining whether the Statute applies to a fraud action based on an oral promise within its ambit.[42] Nevertheless, many courts ostensibly resolve the issue by interpret-

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very law established to prevent frauds to protect one," common law fraud action is necessary supplement to Statute of Frauds).

38. See *infra* notes 44-46 and accompanying text.

39. *See, e.g.*, Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768 (1983); Burns v. Gould, 172 Conn. 210, 217, 374 A.2d 193, 199 (1977); Burgdorfer v. Thielemann, 153 Or. 354, 377-78, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part).

40. *See* C. Browne, *supra* note 2, § 115, at 137-38; J. Calamari & J. Perillo, *supra* note 3, §19-35, at 723; 2 A. Corbin, *supra* note 3, § 279, at 19-20; 3 S. Williston, *supra* note 3, §§ 525-526A, at 695-708. See *infra* notes 44-46 and accompanying text.

41. *See* J. Calamari & J. Perillo, *supra* note 3, § 19-35, at 724; 2 A. Corbin, *supra* note 3, § 279; 3 S. Williston, *supra* note 3, § 527; Note, *Statute of Frauds: Evaluation of underlying theories*, 14 Cornell L.Q. 102, 103 (1928) [hereinafter cited as *Underlying Theories*]. See *infra* notes 47-60 and accompanying text.

42. Authorities warn against relying extensively on the language of the applicable Statute of Frauds provision in ambiguous situations. *See* C. Browne, *supra* note 2, § 115, at 137-38 (because policy underlying these provisions is identical, "[courts] should not be justified in laying too much stress" upon semantic distinctions); 2 A. Corbin, *supra* note 3, § 279, at 20 ("It may be that in a few instances, the operation of the statute . . . turns upon the special form of words adopted; but it is clear that the use of such words as 'void' and 'rule of evidence' in stating the effect of the statute . . . is almost always erroneous."); *Underlying Theories*, *supra* note 41, at 103 ("[t]he problem cannot be solved on

ing the language of the relevant Statute.[43]

The semantic debate focuses primarily on the words "void"[44] and "invalid,"[45] and on the phrase "no action shall be brought."[46] Courts that construe the Statute both as a substantive rule of law and as a statement of public policy[47] interpret these terms to mean that an oral promise is a nullity for all purposes and may not be used to support any cause of action, whether in contract or tort.[48] Because the plaintiff in a promissory fraud action is compelled to make the void promise a part of his

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the basis of subtle distinctions in wording; there is no uniformity in the judicial interpretation of critical phrases" such as "void," "invalid," or "no action"). See *infra* notes 44-62 and accompanying text.

43. *See, e.g.*, Ostman v. Lawn, 305 So. 2d 871, 872 (Fla. Dist. Ct. App. 1974) (per curiam); Dung v. Parker, 52 N.Y. 494, 500 (1873); Burgdorfer v. Thielemann, 153 Or. 354, 361, 55 P.2d 1122, 1125 (1936).

44. *E.g.*, Ala. Code § 8-9-2 (1984); Colo. Rev. Stat. §§ 38-10-108, 38-10-112 (1982); Mich. Comp. Laws Ann. § 566.132 (West Supp. 1984); N.Y. Gen. Oblig. Law §§ 5-701, 5-703 (McKinney 1978 & Supp. 1984); Or. Rev. Stat. § 41.580 (1981); Utah Code Ann. §§ 25-5-3, 25-5-4 (1984); Wash. Rev. Code Ann. § 19.36.010 (1978).

45. *E.g.*, Cal. Civ. Code § 1624 (West 1973 & Supp. 1985); Mont. Code Ann. § 28-2-903 (1983).

46. *E.g.*, Ariz. Rev. Stat. Ann. § 44-101 (1967); Fla. Stat. Ann. § 725.01 (West Supp. 1984); Hawaii Rev. Stat. § 656-1 (1976 & Supp. 1983); Ill. Ann. Stat. ch. 59, §§ 1, 2 (Smith-Hurd 1972 & Supp. 1984); Ind. Code Ann. § 32-2-1-1 (Burns 1973); Kan. Stat. Ann. § 33-106 (1981); Ky. Rev. Stat. § 371.010 (1972 & Supp. 1984); Md. Real Prop. Code Ann. § 5-104 (1981); Mass. Ann. Laws ch. 259, § 1 (Michie/Law. Co-op. 1980); Miss. Code Ann. § 15-3-1 (1972); Mo. Ann. Stat. § 432.010 (Vernon 1952); N.J. Stat. Ann. § 25: 1-5 (West 1940); Ohio Rev. Code Ann. § 1335.05 (Page 1979); Pa. Stat. Ann. tit. 33, § 3 (Purdon 1967); R.I. Gen. Laws § 9-1-4 (1969); S.C. Code Ann. § 32-3-10 (Law. Co-op. 1976); Tenn. Code Ann. § 29-2-101 (1980); Va. Code § 11-2 (1978). Other statutes phrase this proscription as "no action shall be maintained." *See, e.g.*, Conn. Gen. Stat. Ann. § 52-550 (West Supp. 1984); Minn. Stat. Ann. § 513.01 (West 1947); N.H. Rev. Stat. Ann. §§ 506:1-506:2 (1983). North Carolina's Statute of Frauds provisions contain both "void," N.C. Gen. Stat. § 22-2 (1965), and "no action shall be brought," *id.* § 22-1, langauge.

47. The Statute of Frauds is substantive in that it determines in large degree the legal effect and value of agreements that do not comply with its requirements. *See* 2 A. Corbin, *supra* note 3, § 294, at 73. Under this approach to the Statute's operation, "[t]he writing is a necessary constituent of any legal obligation; without it there is nothing." *Underlying Theories*, *supra* note 41, at 105; *see* Franklin Sugar Ref. Co. v. William D. Mullen Co., 7 F.2d 470, 471-72 (D. Del. 1925), *rev'd on other grounds*, 12 F.2d 885 (3d Cir. 1926); Jamerson v. Logan, 228 N.C. 540, 544, 46 S.E.2d 561, 564 (1948); *see, e.g.*, Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941); Ostman v. Lawn, 305 So. 2d 871, 872 (Fla. Dist. Ct. App. 1974); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); McIntyre v. Dawes, 71 Mont. 367, 375-76, 229 P. 846, 849 (1924); Dung v. Parker, 52 N.Y. 494, 500 (1873); Burgdorfer v. Thielemann, 153 Or. 354, 377-78, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part); Gogel v. Blazofsky, 187 Pa. Super. 32, 36-37, 142 A.2d 313, 315 (1958); Wade v. State Nat'l Bank, 379 S.W.2d 717, 719-20 (Tex. Civ. App. 1964); American, Inc. v. Bishop, 29 Wash. 2d 95, 96-97, 185 P.2d 722, 722-23 (1947).

48. *See, e.g.*, Kroger v. Baur, 46 Cal. App. 2d 801, 803-04, 117 P.2d 50, 52 (1941) ("invalid" means oral contract invalid for all purposes); Ostman v. Lawn, 305 So. 2d 871, 872 (Fla. Dist. Ct. App. 1974) ("no action" means no claim may be brought that requires proof of oral promise); American, Inc. v. Bishop, 29 Wash. 2d 95, 98, 185 P.2d 722, 722-23 (1947) ("void" means oral promise cannot be basis for recovery in either contract or tort).

case, he must subject his tort claim to the Statute.[49] Under this literal interpretation, the Statute precludes any action either directly or indirectly related to the oral promise.[50]

When the Statute is construed as a rule of evidence,[51] however, it does not operate as an absolute bar to a claim based on an oral promise.[52] Courts adhering to this theory interpret the words "void" and "no action" to mean that the oral promise is merely unenforceable.[53] According to this interpretation, the Statute bars an action to enforce the contract but permits a promissory fraud action,[54] on the theory that the Statute does not preclude testimony of an oral promise offered solely for the limited evidentiary purpose of establishing an element of a tort action.[55]

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49. *See* McIntyre v. Dawes, 71 Mont. 367, 375, 229 P. 846, 849 (1924); Dung v. Parker, 52 N.Y. 494, 500 (1873).

50. *See, e.g.*, Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Burgdorfer v. Thielemann, 153 Or. 354, 377-78, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part); Wade v. State Nat'l Bank, 379 S.W.2d 717, 720 (Tex. Civ. App. 1964).

51. According to the evidentiary theory, the Statute simply requires that certain contracts be evidenced by a signed writing; it does not condemn as nonexistent any contract not so evidenced. *See, e.g.*, Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 681-82 (E.D.S.C. 1940); Moore v. Culpepper, 397 So. 2d 108, 110 (Ala. 1981); Wood v. Lett, 195 Ala. 601, 603, 71 So. 177, 179 (1916); Troj v. Chesebro, 30 Conn. Supp. 30, 32, 296 A.2d 685, 686 (Super. Ct. 1972); Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 313 (Iowa 1971); Daugherty v. Kessler, 264 Md. 281, 285, 286 A.2d 95, 97 (1972); Corder v. O'Neill, 176 Mo. 401, 436-37, 75 S.W. 764, 774 (1903); Crane v. Powell, 139 N.Y. 379, 384, 34 N.E. 911, 912 (1893); Golden v. Golden, 273 Or. 506, 509, 541 P.2d 1397, 1399 (1975); Burgdorfer v. Thielemann, 153 Or. 354, 361, 55 P.2d 1122, 1125 (1936); *Underlying Theories*, *supra* note 41, at 105.

Courts that adhere to this theory tend to limit the Statute's application when a party seeks to prove an oral contract for purposes other than its enforcement. *See Daugherty*, 264 Md. at 285, 286 A.2d at 97. For example, in a quasi-contractual suit, the oral contract can be proved to show that performance was not rendered as a gift. *See* Downey v. Guilfoile, 96 Conn. 384, 386, 114 A. 73, 74 (1921). The oral contract is also admissible and fully operative in collateral actions against a third party. *See* Kaufhold v. Taylor, 360 Pa. 372, 375-76, 61 A.2d 813, 814 (1948). For further examples of situations in which courts allow proof of an oral contract within the Statute, see 2 A. Corbin, *supra* note 3, § 288, at 49-53, and cases cited therein.

52. *See, e.g.*, Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 681-82 (E.D.S.C. 1940); Corder v. O'Neill, 176 Mo. 401, 436-37, 75 S.W. 764, 774 (1903); Burgdorfer v. Thielemann, 153 Or. 354, 361, 55 P.2d 1122, 1125 (1936).

53. *See, e.g.*, Moore v. Culpepper, 397 So. 2d 108, 109 (Ala. 1981) (interpreting "void" to mean unenforceable); Troj v. Chesebro, 30 Conn. Supp. 30, 31, 296 A.2d 685, 686 (Super. Ct. 1972) (interpreting "no action" to mean no action for direct enforcement of oral contract); Golden v. Golden, 273 Or. 506, 509-11, 541 P.2d 1397, 1399 (1975) (interpreting "void" to mean unenforceable).

54. *See, e.g.*, Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 681 (E.D.S.C. 1940); Corder v. O'Neill, 176 Mo. 401, 437, 75 S.W. 764, 774 (1903); J. Calamari & J. Perillo, *supra* note 3, § 19-35, at 724; 2 A. Corbin, *supra* note 3, § 288, at 49.

55. *See, e.g.*, Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 681-82 (E.D.S.C. 1940); Nanos v. Harrison, 97 Conn. 529, 533, 117 A. 803, 805 (1922); Corder v. O'Neill, 176 Mo. 401, 436-37, 75 S.W. 764, 774 (1903); Burgdorfer v. Thielemann, 153 Or. 354, 361, 55 P.2d 1122, 1125 (1936).

A third group of courts views the Statute as a remedial rule.[56] Under this theory, the Statute bars enforcement of oral promises unless certain conditions are satisfied[57] but, significantly, treats the oral promise as valid for most other purposes.[58] Consequently, it would be permissible to introduce parol evidence of one element of a possibly valid contract—the promise to perform—for the limited purpose of proving the tort element that the promise was made with a fraudulent intent,[59] because proof of this fact would not entitle the plaintiff to any contractual enforcement remedy.[60]

The plain language of the various Statutes of Frauds is susceptible to contrary interpretations,[61] none of them conclusive or particularly helpful in resolving the conflict.[62] Indeed, courts that attempt to rely on the language often get entangled in a semantic thicket, and the results are often unnecessarily inconsistent, if not illogical. Consequently, an analysis of the policy concerns underlying the Statute is dispositive in determining whether and under what circumstances an action for fraud may be based on an oral promise within the Statute.

B. *The Policy Debate*

Although the Statute of Frauds was specifically enacted to deter fraudulent claims of oral promises,[63] its overriding purpose is to prevent fraud in any form.[64] The Statute's antifraud policy thus embraces two dissonant components: the express legislative prohibition against enforcement

56. Under the remedial theory, the Statute operates solely as a limitation upon a court's discretion to grant a contractual enforcement remedy: Specific performance or breach damages cannot be granted unless certain conditions are met. *See, e.g.*, Grossman v. Levy's, Inc., 81 So. 2d 752, 753 (Fla. 1955); Kludt v. Connett, 350 Mo. 793, 804-05, 168 S.W.2d 1068, 1073 (1943); Murphy v. Nolte & Co., 226 Va. 76, 81, 307 S.E.2d 242, 245 (1983); 2 A. Corbin, *supra* note 3, § 279, at 20, § 294, at 72-73; *Underlying Theories*, *supra* note 41, at 105.

57. See *supra* note 11.

58. *See, e.g.*, Rice v. Insurance & Bonds, Inc., 366 So. 2d 85, 87 (Fla. Dist. Ct. App.) (proof of oral contract permitted to prove ownership of accounts for purpose of establishing element of conversion claim), *cert. dismissed*, 372 So. 2d 469 (Fla. 1979); Murphy v. Nolte & Co., 226 Va. 76, 82-83, 307 S.E.2d 242, 245 (1983) (proof of oral contract term permitted despite existence of contradictory term in written memorandum used to satisfy the Statute). Whether a court adheres to the evidentiary theory or to the remedial theory, the result is the same as long as enforcement of the oral contract is not sought. See *supra* note 51.

59. *See* Schenley Distillers Corp. v. Renken, 34 F. Supp. 678, 681 (E.D.S.C. 1940); Corder v. O'Neill, 176 Mo. 401, 436-37, 75 S.W. 764, 774 (1903); Burgdorfer v. Thielemann, 153 Or. 354, 361, 55 P.2d 1122, 1125 (1936).

60. Although proof of the false oral promise is essential to a successful fraud action, it alone does not entitle the plaintiff to receive either damages or a decree of specific performance for its breach. See *infra* notes 101-08 and accompanying text.

61. See *supra* note 41 and accompanying text.

62. See *supra* note 42 and accompanying text.

63. See *supra* notes 3, 6 and accompanying text.

64. *See* Dobison v. Bank of Hawaii, 60 Hawaii 225, 226, 587 P.2d 1234, 1235 (1978) (per curiam); Bennett v. Horton, 592 S.W.2d 460, 463 (Ky. 1979); Friedl v. Benson, 25 Wash. App. 381, 387, 609 P.2d 449, 453 (1980).

of certain oral contracts[65] and the implied judicial caveat against invocation of the Statute to shield fraudulent conduct.[66] Authorities that view the Statute as an absolute bar to promissory fraud claims emphasize the former component and reason that to permit such claims would in effect nullify the Statute.[67] Although the Statute's continued existence might evidence legislative intent to apply it in any action related to an oral promise within its ambit,[68] courts sensitive to the Statute's potential for sanctioning fraud have developed many devices in contract actions for "taking the case outside" the Statute.[69] Accordingly, courts frequently exercise their discretion when application of the Statute might result in the very fraud it was enacted to prevent.[70] The possibility of such a paradoxical result increases dramatically in the context of a fraud action.

A fraud action based on an oral promise within the Statute necessitates a balancing of valid but conflicting policy concerns.[71] Although those who construe the Statute to bar the fraud action present formidable arguments in support of their position,[72] this balancing militates in favor of permitting the action.[73]

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65. See *supra* note 4 and accompanying text.

66. See *supra* note 16, *infra* note 76 and accompanying text.

67. *See, e.g.*, Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 439-40, 280 N.W. 814, 819 (1938); Burgdorfer v. Thielemann, 153 Or. 354, 378, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part).

68. *See* Kroger v. Baur, 46 Cal. App. 2d 801, 803-04, 117 P.2d 50, 52 (1941); Boone v. Coe, 153 Ky. 233, 239, 154 S.W. 900, 903 (1913); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 439-40, 280 N.W. 814, 819 (1938); Deevy v. Porter, 11 N.J. 594, 595, 95 A.2d 596, 597 (1953); Meyer v. Texas Nat'l Bank of Commerce, 424 S.W.2d 417, 426 (Tex. 1968); 3 S. Williston, *supra* note 3, § 448, at 345.

69. *See* Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768 (1983); Weale v. Massachussetts Gen. Hous. Corp., 117 N.H. 428, 431-32, 374 A.2d 925, 928 (1977); Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co., 69 N.M. 281, 286, 365 P.2d 925, 929 (1961). Among the devices are promissory estoppel, *see Kiely*, — Colo. at —, 670 P.2d at 768, part performance, *see Weale*, 117 N.H. at 431-32, 374 A.2d at 928, and equitable estoppel, *see* Ozier v. Haines, 411 Ill. 160, 163, 103 N.E.2d 485, 487 (1952).

70. *See* Davis v. Patrick, 141 U.S. 479, 487-88 (1891); McIntosh v. Murphy, 52 Hawaii 29, 35-37, 469 P.2d 177, 180 (1970); Stevens v. Good Samaritan Hosp. & Medical Center, 264 Or. 200, 202-03, 504 P.2d 749, 750 (1972); Miller v. McCamish, 78 Wash. 2d 821, 824-25, 479 P.2d 919, 921 (1971); *see also* Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 838, 389 P.2d 133, 136, 36 Cal. Rptr. 741, 744 (1964) ("If the extent of [the Statute of Frauds'] coverage is unclear, however, we know of no policy reasons which compel a resolution of the ambiguity in favor of its wide application.") (footnote omitted); 2 A. Corbin, *supra* note 3, § 279, at 19 ("Like the United States Constitution, the statute of frauds is the product not only of those who drafted and enacted it, but also of those who have interpreted and applied it."). See *supra* note 69 and accompanying text.

71. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 978, 203 Cal. Rptr. 345, 353 (1984) (concluding that "more mischief would be done than benefit would be gained" by allowing fraud claim based on oral promise within Statute of Frauds); *cf.* Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768-70 (1983) (balancing policies underlying doctrine of promissory estoppel and statute of frauds "to prevent use of the statute to effect inequitable results"). See *supra* notes 15-19, *infra* notes 74-104 and accompanying text.

72. See *infra* notes 77, 89-90, 97 and accompanying text.

73. See *infra* notes 74-100 and accompanying text.

Courts will best serve the Statute's antifraud policy by admitting parol evidence of a misrepresentation despite the unenforceability of the underlying contract. If the Statute is not to be used as a vehicle for fraud, it must not be peremptorily invoked to bar an action in tort for fraud. Such a broad application of the Statute would subvert its purpose by immunizing the fraudulent conduct it was enacted to prevent.[74] Moreover, courts should not allow a fraudfeasor to escape liability for his tortious conduct merely because he chose an oral promise as the means for perpetrating the fraud.[75] If a fraud action could never be based on an oral promise within the Statute, corrupt entrepreneurs would be encouraged to structure their schemes around oral "agreements" within the Statute, thus clearly frustrating the Statute's antifraud policy.[76]

Nevertheless, opponents of the fraud claim argue that permitting the action will allow any unscrupulous person to circumvent the Statute simply by labeling his claim a tort.[77] That concern, albeit valid,[78] is exaggerated. Merely labeling the claim a tort does not establish a valid cause of action for fraud.[79] The rigorously applied requirements of a fraud

74. *See* Nanos v. Harrison, 97 Conn. 529, 532-35, 117 A. 803, 805 (1922); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176-77 (1978); Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 408, 151 N.E.2d 833, 836, 176 N.Y.S.2d 259, 263 (1958).

75. *See* Sibley v. Southland Life Ins. Co., 36 S.W.2d 145, 146 (Tex. 1931) ("Responsibility for the tort committed is not affected by the fact that the false promise was made orally.").

76. *See* Nanos v. Harrison, 97 Conn. 529, 533, 117 A. 803, 805 (1922) ("If the action will not lie because this contract of lease was parol, the statute of frauds, which was intended to prevent fraud, will serve as an aid in helping to perpetrate a fraud."); Munson v. Raudonis, 118 N.H. 474, 478, 387 A.2d 1174, 1176 (1978) ("Barring an action in deceit because of the Statute of Frauds, however, would not further the policy of the statute. Quite the contrary, it would foster an injustice."). See *supra* note 16 and accompanying text.

77. *See* Glenway Indus. v. Wheelabrator-Frye, Inc., 686 F.2d 415, 418 (6th Cir. 1982) (interpreting Pennsylvania law); Cohen v. Pullman Co., 243 F.2d 725, 728-29 (5th Cir. 1957) (interpreting Georgia law); Kroger v. Baur, 46 Cal. App. 2d 801, 803-04, 117 P.2d 50, 52 (1941); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Sachs v. Blewett, 206 Ind. 151, 158, 185 N.E. 856, 859 (1933); Dawe v. Morris, 149 Mass. 188, 190-91, 21 N.E. 313, 314 (1889); Boyd v. Stone, 11 Mass. 342, 348 (1814); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 440, 280 N.W. 814, 819 (1938); Club Chain of Manhattan Ltd. v. Christopher & Seventh Gourmet, Ltd., 74 A.D.2d 277, 285, 427 N.Y.S.2d 627, 632 (1980); Burgdorfer v. Thielemann 153 Or. 354, 377-78, 55 P.2d 1122, 1131 (1936) (Rossman, J., concurring in part, dissenting in part); Wade v. State Nat'l Bank, 379 S.W.2d 717, 720 (Tex. Civ. App. 1964); Easton v. Wycoff, 4 Utah 2d 386, 391, 295 P.2d 332, 336 (1956); 1 F. Harper & F. James, The Law of Torts § 7.10, at 573 (1956). One court even went so far as to state that allowing the fraud claim would effectively repeal the Statute of Frauds, and that "in so acting the courts . . . would be guilty of an unconstitutional invasion of legislative powers." *Cassidy*, 285 Mich. at 439, 280 N.W. at 819. Professors Harper and James regard the promissory fraud action as an attempt to circumvent the Statute of Frauds through a "northwest passage." 1 F. Harper & F. James, *supra*, § 7.10, at 573.

78. See *infra* notes 101-04 and accompanying text.

79. *See, e.g.*, Lininger v. Sonenblick, 23 Ariz. App. 266, 267-68, 532 P.2d 538, 539-40 (1975); Dobison v. Bank of Hawaii, 60 Hawaii 225, 226 n.1, 587 P.2d 1234, 1235 n.1 (1978) (per curiam); Mountain Fir Lumber Co. v. Employee Benefits Ins. Co., 64 Or.

claim[80] provide substantial protection against facile circumvention of the Statute and its objectives.[81] For example, reliance on an oral promise may be unreasonable in a given case;[82] in that event, the court can hold that the "justifiable reliance" element of the fraud claim has not been established.[83] Dismissing the claim on this narrow ground is preferable to a broad rule barring all such claims without regard to their individual merit.[84] In addition, the plaintiff in a promissory fraud action assumes a heavy burden to prove that the defendant had no intention of performing the promise at the time he made it.[85] Because fraudulent intent may not be inferred from nonperformance alone,[86] this burden affords substantial protection against spurious claims.[87]

App. 312, —, 667 P.2d 567, 572, *rev'd on other grounds*, 296 Or. 639, 679 P.2d 296 (1983); *see also* Biggs v. Marsh, — Ind. App. —, —, 446 N.E.2d 977, 982 (1983) (evidence to establish elements of fraud differs substantially from evidence necessary to sustain breach of contract claim).

80. The essential elements of an action for fraudulent misrepresentation are: a representation by defendant of some material existing fact; falsity of such representation; defendant's knowledge of its falsity (scienter); plaintiff's justifiable reliance on such representation; and injury incurred by plaintiff as a result of such justifiable reliance. *See, e.g.*, Lininger v. Sonenblick, 23 Ariz. App. 266, 267, 532 P.2d 538, 539 (1975); Louis Schlesinger Co. v. Wilson, 22 N.J. 576, 585-86, 127 A.2d 13, 18 (1956); Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 406-07, 151 N.E.2d 833, 834-35, 176 N.Y.S.2d 259, 262-63 (1958); Prosser and Keeton, *supra* note 10, § 105, at 728.

81. *See* Louis Schlesinger Co. v. Wilson, 22 N.J. 576, 586, 127 A.2d 13, 18 (1956) (Statute of Frauds not bar to tort action for deceit, but "[t]he burden of proof is not a light one to sustain"); Keeton, *Fraud—Statements Of Intention*, 15 Tex. L. Rev. 185, 201 (1936) (burden of proof on fraud plaintiff to show more than mere broken promise provides safeguard against "too many trumped up contracts"); *see, e.g.*, Trollope v. Koerner, 106 Ariz. 10, 19, 470 P.2d 91, 100 (1970) (fraud claim dismissed due to lack of fraudulent intent and failure to plead with required particularity); Des Brisay v. Foss, 264 Mass. 102, 110-12, 162 N.E. 4, 7 (1928) (Statute said to be no bar to fraud claim, but plaintiff failed to prove injurious reliance).

82. *See, e.g.*, Trollope v. Koerner, 106 Ariz. 10, 18, 470 P.2d 91, 100 (1970); Des Brisay v. Foss, 264 Mass. 102, 112, 162 N.E. 4, 7 (1928); Beck v. New York News, Inc., 92 A.D.2d 823, 825, 460 N.Y.S.2d 326, 328, *aff'd*, 61 N.Y.2d 620, 459 N.E.2d 1287, 471 N.Y.S.2d 850 (1983).

83. See *supra* note 82.

84. For a discussion of the commercial necessities of allowing tort actions based on oral promises, see *infra* notes 88-94 and accompanying text.

85. *See* Louis Schlesinger Co. v. Wilson, 22 N.J 576, 585-86, 127 A.2d 13, 18 (1956); Keeton, *supra* note 81, at 202. See *supra* note 10 and accompanying text.

86. Restatement (Second) of Torts § 530 comment d (1976); Prosser and Keeton, *supra* note 10, § 109, at 764; Keeton, *supra* note 81, at 202. The successful promissory fraud plaintiff must show, in addition to nonperformance of the promise, circumstances that imply an intent not to perform, such as: evidence of insolvency or some other reason for defendant to know from the outset that he cannot perform, Prosser and Keeton, *supra* note 10, § 109, at 764-65; repudiation of the promise very soon after it is made with no intervening change of position by either party, such as entering into a better deal or suffering an unforeseeable supervening inability to perform, *id.* at 765; failure to make any attempt at performance or preparation therefor, *id.*; or continued assurances of performance after it is clear defendant will not or cannot perform, as where the subject premises have already been leased or sold to another, *id.*

87. *See* Keeton, *supra* note 81, at 202. Professor Keeton asserts that objective circumstances that tend to show an intention not to perform a promise also tend to show

The significant role of oral representations in commercial practice also militates in favor of permitting the fraud action. If the law is not to discourage the business community from capitalizing on the advantages of oral communication,[88] it must provide some relief from the risk of being defrauded by someone taking refuge in the Statute of Frauds. Opponents of the fraud action, however, argue that businesspersons are presumed to know the law[89] and that they therefore, as a matter of law, have no right to rely on a promise that the law declared to be unenforceable or void when made.[90] This reasoning ignores the realities of commerce.[91]

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that there was no contract at all. *See id.* at 202. Accordingly, there is less likelihood of "enforcing" an oral contract invented by a dishonest claimant. *Id.* This heavy burden of proof, however, does not guarantee that a spurious claim will never succeed. *See id.* Therefore, in order to minimize gains that a plaintiff might derive from bringing a spurious claim, this Note proposes that the plaintiff's recovery should be limited in most cases to his out of pocket losses. See *infra* notes 101-18 and accompanying text.

88. *See* Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co., 69 N.M. 281, 287, 365 P.2d 925, 929 (1961) ("swift pace of modern business life" made it unrealistic to require board of directors to issue formal written resolution authorizing president to modify contract within Statute); Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 Yale L.J. 821, 829 (1950) ("the requirement of a signed writing has been at odds with the established habits of men, a habit of reliance upon the spoken word in increasing millions of cases"); *Statute of Frauds*, *supra* note 3, at 306 (asserting that changing business conditions and commercial practices cause business persons to make contracts on basis of convenience and not on basis of Statute). *But see* Perillo, *supra* note 1, at 70 (although acknowledging argument that Statute is inconvenient and may slow pace of business, nevertheless doubts that such effects are significant).

89. *See, e.g.*, Owens v. Foundation for Ocean Research, 107 Cal. App. 3d 179, 184, 165 Cal. Rptr. 571, 573 (1980); Kroger v. Baur, 46 Cal. App. 2d 801, 804, 117 P.2d 50, 52 (1941); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 437, 280 N.W. 814, 819 (1938); Dung v. Parker, 52 N.Y. 494, 498 (1873). *But see Statute of Frauds*, *supra* note 3, at 307 (arguing that modern businesspersons cannot be presumed to know all formal statutory requirements that apply to all their numerous daily contracts).

90. *See* Owens v. Foundation for Ocean Research, 107 Cal. App. 3d 179, 184, 165 Cal. Rptr. 571, 573 (1980); Kroger v. Baur, 46 Cal. App. 2d 801, 804, 117 P.2d 50, 52 (1941); Sachs v. Blewett, 206 Ind. 151, 158, 185 N.E. 856, 859 (1933); Boyd v. Stone, 11 Mass. 342, 349 (1814); Byers v. Zuspan, 241 Mo. App. 1103, 1117, 264 S.W.2d 944, 949 (1954); Dung v. Parker, 52 N.Y. 494, 500 (1873); *see also* Trollope v. Koerner, 106 Ariz. 10, 18, 470 P.2d 91, 99 (1970) (finding reliance on oral promise within Statute justifiable "would frustrate the basic policy and effect of the . . . Statute").

In states in which legislatures have already prescribed the manner in which transactions should be consummated, courts arguably have no authority to license a practice that contravenes that prescription. *See, e.g.*, Ozier v. Haines, 411 Ill. 160, 166-67, 103 N.E.2d 485, 489 (1952); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 438-40, 280 N.W. 814, 819 (1938); Dung v. Parker, 52 N.Y. 494, 498-99 (1873). Consequently, proponents of this view assert that merchants who pursue business methods other than those prescribed by law operate at their own risk; they therefore conclude that if the enforcement of the law creates a peril to the nation's business structure, the remedy lies with the legislature, not the judiciary. *See Ozier*, 411 Ill. at 166-67, 103 N.E.2d at 489; *Cassidy*, 285 Mich. at 439, 280 N.W. at 819. However, "[t]he mind of man is infinite in its contrivances. No matter what laws are written for the purpose of preventing fraud, in time, man will discover some way to use the very law established to prevent frauds to protect one." Southern States Dev. Co. v. Robinson, 494 S.W.2d 777, 781 (Tenn. Ct. App. 1972). As Justice Cardozo admonished the legal profession many years ago, "[i]f we were to state the law today as well as human minds can state it, new problems, arising almost overnight, would encumber the ground again. . . . The law . . . must be ready for the

Oral agreements otherwise unenforceable under the Statute are entered into, relied upon, and performed every day.[92] Indeed, many long-term business relationships mature to the point where lucrative transactions are routinely carried out on the faith of nothing more than an oral promise and a handshake.[93] It is therefore empirically incorrect to state that it is per se unreasonable to rely on certain oral promises. If reliance is indeed factually unreasonable, a court should dismiss the fraud action on the ground that the plaintiff has not proved the element of justifiable reliance.[94] Moreover, a policy that declares any reliance on certain oral promises to be absolutely irremediable could have a detrimental effect on the efficient functioning of the marketplace.

Invoking the Statute of Frauds to dismiss an otherwise meritorious fraud claim not only creates a semantic anomaly,[95] it also unjustifiably amplifies the Statute's already potent capacity for causing injustice.[96]

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morrow." B. Cardozo, The Growth of the Law 19-20 (1924). Therefore, when necessary to further the purpose of both the common law and the Statute to prevent fraud in business dealings, courts should allow the common law fraud action to be predicated on a promise the legislature has declared to be "void." *See id.* at 67 ("Hardly is the ink dry upon [a statute] before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bids us blur and blot and qualify and even, it may be, erase.").

91. See *supra* note 88. The tension between the Statute and the customs of trade has long been recognized. *See* Leake, The Principles of Legislation Involved in the Statute of Frauds, As It Affects the Law of Contracts, read before the Juridical Society (July 7, 1856), in Papers Read Before the Juridical Society: 1855-1859, at 271, 291 (London 1858). See *supra* note 88. Professor Leake observed:

> If it comes to pass that men may act, almost habitually, in a manner which will bring on them the penalties of the law, or at least deprive them of its protection, and yet without any imputation of moral blame on the score of dishonesty or even of negligence, it surely affords a strong argument to shew, that in such case the law is in fault, and has attempted to guide the conduct of men in a wrong direction: and such seems to be the case with the Statute of Frauds.

Leake, *supra*, at 291; *see also* Prosser and Keeton, *supra* note 10, § 108, at 751-52 (new standard of business ethics, demanding that statements of fact be honestly made, has led to shift away from law's presumption that only a fool expects common honesty). See *infra* notes 92-94 and accompanying text.

92. *See* Ozier v. Haines, 411 Ill. 160, 165-66, 103 N.E.2d 485, 488-89 (1952); Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co., 338 N.W.2d 64, 70 (N.D. 1983); J. Calamari & J. Perillo, *supra* note 3, § 19-1, at 673. See *supra* note 88 and accompanying text.

93. *See, e.g.*, Ozier v. Haines, 411 Ill. 160, 165-66, 103 N.E.2d 485, 488-89 (1952) (custom in grain business to buy and sell grain by oral agreement); *see also* Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer Co., 338 N.W.2d 64, 70 (N.D. 1983) (ten years of prior oral dealing justified plaintiff's reliance on oral promise of defendant, whose word was " 'better than most men's checks' ").

94. See *supra* notes 80-84 and accompanying text.

95. It is inconceivable that either Parliament or any of the state legislatures intended a statute expressly enacted to prevent fraud to operate as the sole barrier to compensation of a bona fide fraud victim or, conversely, to constitute a fraudfeasor's last refuge from liability for his conduct. See *supra* notes 3, 6 and accompanying text.

96. That the Statute of Frauds may unjustly deny recovery for the nonperformance of an oral promise that was in fact made is the accepted price for deterring false claims of oral promises. See *supra* notes 7-9 and accompanying text. To permit the Statute to deny

Theoretically, the fraud plaintiff may, in order to avoid unjust application of the Statute, estop the defendant from asserting it as a defense.[97] Some courts require the claimant to show either unconscionable injury to himself or unjust enrichment to the defendant.[98] Others amorphously require the claimant to show that application of the Statute would itself operate a fraud upon him.[99] But because the elements of an estoppel are

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relief in a case in which actual fraud has been legally established is to raise the price of deterring sham allegations of oral promises to a level the legislature could not have contemplated. See *supra* notes 63-87 and accompanying text.

97. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 978, 203 Cal. Rptr. 345, 353 (1984). While acknowledging the potential for injustice inherent in sustaining the Statute of Frauds as a defense to a fraud action, the *Munoz* court asserted that the avoidance of injustice is the function of an estoppel. *See id.* at 978, 203 Cal. Rptr. at 353. A successful estoppel claim, however, results in enforcement of the contract in derogation of the Statute's policy. *See* Ozier v. Haines, 411 Ill. 160, 163-65, 103 N.E.2d 485, 487-88 (1952); Good Samaritan Hosp. & Medical Center, 264 Or. 200, 207-09, 504 P.2d 749, 752-53 (1972) (McAllister, J., dissenting); Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 260-61, 616 P.2d 644, 647 (1980).

An estoppel to assert the Statute can take one of three forms: promissory estoppel, equitable estoppel, or part performance. *See* Note, *Promissory Estoppel As A Means Of Defeating The Statute Of Frauds*, 44 Fordham L. Rev. 114, 120 (1975). The requirements for the three forms of estoppel frequently overlap and are sometimes contradictory. For example, the requirements for an equitable estoppel, predicated in theory on a representation of fact made by the party seeking to assert the Statute, range from the identical elements required to establish a cause of action for fraud, *see* Ozier v. Haines, 411 Ill. 160, 163-64, 103 N.E.2d 485, 487 (1952), to the following comparatively minimal requirements: an admission, statement, or act inconsistent with the claim afterwards asserted; action by the other party on the faith of such admission, statement, or act; and injury to the other party resulting from permitting the first party to contradict or repudiate such admission, statement, or act, *see* Farm Crop Energy, Inc. v. Old Nat'l Bank, 38 Wash. App. 50, —, 685 P.2d 1097, 1100 (1984) (quoting Wilson v. Westinghouse Elec. Corp., 85 Wash. 2d 78, 81, 530 P.2d 298, 300 (1975)). Alternatively, some courts require that any acts in reliance on the action or representation asserted as the basis of the estoppel must also be unequivocally referable to the alleged oral contract. *See* Margate Indus. v. Samincorp, Inc., 582 F. Supp. 611, 618 (S.D.N.Y. 1984). This requirement is the dispositive criterion for enforcing the oral contract pursuant to the equitable doctrine of part performance. *See* Clark v. Portland Trust Bank, 221 Or. 339, 355, 351 P.2d 51, 59 (1960) (quoting 49 Am. Jur. *Statute of Frauds* § 428, at 734-35 (1943)). The elements of a promissory estoppel to assert the Statute, predicated on a party's detrimental reliance on a promise, are set forth in the Restatement (Second) of Contracts § 139, at 354 (1979). Some courts, however, modify these elements to require the promissory estoppel claimant to show substantial injury tantamount to fraud, *see* Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34, 36 (2d Cir. 1977) (per curiam) (applying New York law), while others expressly hold that fraudulent conduct is not relevant to a promissory estoppel claim, *see* Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 767 (1983). Still others require both unconscionable injury and part performance unequivocally referable to the alleged oral agreement. *See* Long Island Pen Corp. v. Shatsky Metal Stamping Co., 94 A.D.2d 788, 789, 463 N.Y.S.2d 39, 40 (1983).

98. *See, e.g.*, Monarco v. Lo Greco, 35 Cal. 2d 621, 623-24, 220 P.2d 737, 739-40 (1950); Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 974, 203 Cal. Rptr. 345, 350 (1984); *see also* Lovely v. Dierkes, 132 Mich. App. 485, 493, 347 N.W.2d 752, 755 (1984) (Peterson, J., dissenting) (estoppel to assert Statute turns on either unjust enrichment to party asserting Statute or unconscionable injury to party seeking to enforce contract).

99. *See, e.g.*, Loeb v. Gendel, 23 Ill. 2d 502, 505, 179 N.E.2d 7, 9 (1961); Kent v. Bell, 374 Mich. 646, 654, 132 N.W.2d 601, 605 (1965); Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co., 109 N.M. 281, 289, 365 P.2d 925, 930 (1961).

at best inconsistently applied,[100] an estoppel to assert the Statute does not provide effective protection against the Statute's use as an instrument of fraud. Indeed, it is difficult to understand why a judge would prefer to apply a vague and elusive notion such as estoppel rather than simply require the plaintiff to establish the comparatively clear and objective elements of a fraud claim.

The two components of the Statute's antifraud policy—nonenforcement of oral contracts in order to deter fraud by a bogus promisee and proscription of the Statute's employment to shield fraud by a promisor—are difficult, if not impossible, to reconcile satisfactorily in the context of a fraud action based on an oral promise within the Statute. No matter which position a court ultimately adopts, the Statute's policies are compromised to some degree. Nevertheless, if the Statute is to remain a credible deterrent against fraud, it cannot constitute an absolute bar to a common law fraud action.

II. THE APPROPRIATE RECOVERY

A. *Regardless of the Usual Measure of Damages, Recovery Should Generally Be Limited to Out of Pocket Losses*

Although the victim of a fraudulent oral promise within the Statute must be allowed to recover in tort, the consequent opportunity for fraud by a purported promisee cannot be ignored. Accordingly, the amount of recovery must be computed in a manner consistent with the Statute's mandate against enforcement of certain oral contracts.

The Statute bars enforcement of certain oral promises because such claims have traditionally been permeated with fraud.[101] The fact that evidence of an oral promise is offered for the purpose of showing that it was made with a fraudulent intent does not somehow make it more credible than when it is offered to show that it was subsequently dishonored.[102] Accordingly, permitting a fraud action based on an oral promise within the Statute potentially allows both honest and dishonest plaintiffs to circumvent the Statute's formal requirements and indirectly enforce an unenforceable contract.[103] Thus, allowing such claims entails the risk

100. *See, e.g.*, Kiely v. St. Germain, — Colo. —, —, 670 P.2d 764, 768 (1983) (observing that "[a]lthough the doctrine of promissory estoppel is based in part upon the premise that statute of frauds provisions need not defeat meritorious claims for enforcement of oral promises, the results are far from uniform"); McIntosh v. Murphy, 52 Hawaii 29, 38-39, 469 P.2d 177, 182 (1970) (Abe, J., dissenting) (complaining about unbridled judicial discretion inherent in using estoppel to avoid injustice when plaintiff merely changed position); *see also* Lovely v. Dierkes, 132 Mich. App. 485, 491, 347 N.W.2d 752, 754 (1984) (Peterson, J., dissenting) (objecting to discretionary invocation of estoppel to enforce oral contract because "[i]t adds nothing to justice or jurisprudence to allow ill-defined claims to be submitted under ill-defined rules").

101. See *supra* notes 3-5 and accompanying text.

102. See *supra* notes 47-50 and accompanying text.

103. *See* Kroger v. Baur, 46 Cal. App. 2d 801, 803, 117 P.2d 50, 52 (1941) ("If the law can be thus nullified by the transparent device of predicating a tort action upon the inva-

of encouraging the type of fraud that initially led legislatures to deny relief for the breach of such promises.[104]

Limiting a successful fraud plaintiff to a strict out of pocket recovery, however, alleviates the risk of indirect enforcement of the contract. The out of pocket rule is consistent with the basic goal of tort law in that it puts the plaintiff in the same position in which he was before the fraud was committed.[105] On the other hand, the standard measure of damages for breach of contract is benefit of the bargain losses, which, in order to compensate the expectancy interest, puts the plaintiff in the position in which he would have been had the promise been performed.[106] Accordingly, because an out of pocket recovery is practically and theoretically different from that obtained by enforcement of the contract,[107] permitting the fraud action does not defeat the policy underlying the Statute of Frauds.[108]

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lid oral promise . . . then the section might just as well be stricken from the statute."); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 439, 280 N.W. 814, 819 (1938) (warning that "by this indirect method the statute of frauds would be nullified"); Wade v. State Nat'l Bank, 379 S.W.2d 717, 720 (Tex. Civ. App. 1964) ("To hold [the Statute inapplicable to the fraud claim] would be to create an anomaly, and allow one to do indirectly what he could not by law do directly.").

104. *See* Cohen v. Pullman Co., 243 F.2d 725, 728-29 (5th Cir. 1957); Kroger v. Baur, 46 Cal. App. 2d 801, 803-04, 117 P.2d 50, 52 (1941); Dung v. Parker, 52 N.Y. 494, 499 (1873).

105. *See, e.g.*, Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1103-04 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); Seaboard Terminal & Refrigeration Co. v. Droste, 80 F.2d 95, 96 (2d Cir. 1935); General Corp. v. General Motors Corp., 184 F. Supp. 231, 235 (D. Minn. 1960); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974); D. Dobbs, *supra* note 29, § 9.2, at 595; Prosser and Keeton, *supra* note 10, § 110, at 767-68.

106. *See* Hahn v. Atlantic Richfield Co., 625 F.2d 1095, 1104 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981); General Corp. v. General Motors Corp., 184 F. Supp. 231, 235 (D. Minn. 1960); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974); D. Dobbs, *supra* note 29, § 12.1, at 786. See *supra* note 29.

107. *See* D. Dobbs, *supra* note 29, § 9.2, at 595-98.

108. *See* General Corp. v. General Motors Corp., 184 F. Supp. 231, 235 (D. Minn. 1960); Welch v. Lawson, 32 Miss. 170, 177-78 (1856); Papanikolas v. Sampson, 73 Utah 404, 411-13, 274 P. 856, 859-60 (1929).

The law of restitution provides an instructive analogy in support of permitting an out of pocket recovery in fraud. As a general rule, the Statute does not bar a restitutionary recovery of the value of benefits conferred upon the repudiating party. *See* J. Calamari & J. Perillo, *supra* note 3, § 19-40, at 729; 2 A. Corbin, *supra* note 3, § 321, at 155; D. Dobbs, *supra* note 29, § 13.2, at 948; 3 S. Williston, *supra* note 3, § 534, at 812; Jeanblanc, *Restitution Under The Statute Of Frauds: What Constitutes A Legal Benefit*, 26 Ind. L.J. 1, 39 (1950); Perillo, *Restitution In A Contractual Context*, 73 Colum. L. Rev. 1208, 1215-16 (1973). Just as in the case of an out of pocket recovery in tort, allowing a restitutionary recovery despite the unenforceability of the underlying contract is not offensive to the Statute, because such a recovery differs in theory and in result from enforcement of the contract. *See* 2 A. Corbin, *supra* note 3, § 321, at 157; D. Dobbs, *supra* note 29, § 13.2, at 948-49; Jeanblanc, *supra*, at 2-4. The contract is admitted into evidence for a limited purpose: to show that the party conferring the benefit was not a volunteer. D. Dobbs, *supra* note 29, § 13.2, at 948-49; *see* Perillo, *supra*, at 1216. Moreover, because the Statute allows avoidance of the expectancy interest, the injured party is not entitled to recover the benefit of the bargain; he may recover only the value of benefits

Moreover, under the out of pocket rule, there is little incentive to bring a spurious fraud claim as a means of avoiding the Statute: Even if successful, the disingenuous plaintiff realizes no profit.[109] Thus, an out of pocket recovery in tort is consistent with the Statute's policy of deterring fraudulent claims.[110]

Because permitting the fraud claim in jurisdictions that allow a benefit

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transferred to the repudiating party. *See* 2 A. Corbin, *supra* note 3, § 321, at 157; D. Dobbs, *supra* note 29, § 13.2, at 949; Jeanblanc, *supra*, at 4. Thus, a restitutionary recovery represents a compromise between the common law's policy against unjust enrichment and the Statute's mandate against enforcement of certain oral contracts. *See* 2 A. Corbin, *supra* note 3, § 321, at 157; D. Dobbs, *supra* note 29, § 13.1, at 946, § 13.2, at 948; Jeanblanc, *supra*, at 2-4. Analogously, the rule proposed herein represents a compromise between the policy against the Statute's operation as a shield for fraudulent conduct, see *supra* notes 74-76 and accompanying text, and the policy of nonenforcement of certain oral contracts, see *supra* note 4 and accompanying text. Because recovery of out of pocket losses compensates only the reliance interest, the proposed rule still allows avoidance of the expectancy interest, as required by the Statute, except when fraud is so clearly established that such avoidance is no longer justified. See *infra* notes 119-22 and accompanying text.

Although courts have traditionally allowed a restitutionary recovery only to the extent of the value of benefits conferred upon the repudiating party, this concept of benefit is so flexible as to be misleading, if not altogether meaningless. *See* J. Calamari & J. Perillo, *supra* note 3, § 19-44, at 731; D. Dobbs, *supra* note 29, § 13.2, at 955-57. For example, in Farash v. Sykes Datatronics, Inc., 59 N.Y.2d 500, 452 N.E.2d 1245, 465 N.Y.S.2d 917 (1983), the New York Court of Appeals allowed recovery for expenditures made by plaintiff in reliance on defendant's oral promise to lease a building from plaintiff, who was to complete its renovation and make modifications prior to defendant's taking possession. *See id.* at 502-03, 452 N.E.2d at 1246, 465 N.Y.S.2d at 918. Contrary to the traditional rule, the court held that the defendant need not benefit from plaintiff's efforts in order for the latter to obtain restitution; the plaintiff may recover for those efforts that were to his own detriment. *See id.* More significantly, the court also held the Statute of Frauds inapplicable to plaintiff's claim and rejected the dissent's position, *see id.* at 503-04, 452 N.E.2d at 1247, 465 N.Y.S.2d at 919, which would have barred plaintiff's claim on the authority of Dung v. Parker, 52 N.Y. 494 (1873), *see Farash*, 59 N.Y.2d at 508, 452 N.E.2d at 1249, 465 N.Y.S.2d at 921, one of the leading cases holding that the Statute bars recovery in tort for a misrepresentation related to an oral agreement within the Statute, *see* Nanos v. Harrison, 97 Conn. 529, 535, 117 A. 803, 805 (1922). The court reasoned that whether the theory of recovery is called "acting in reliance" or "restitution," a promisee who incurs expense at a promisor's request should be allowed to recover, notwithstanding the unenforceability of the underlying agreement. *Farash*, 59 N.Y.2d at 506, 452 N.E.2d at 1248, 465 N.Y.S.2d at 920.

Although Farash did not sue in fraud—possibly because he could not prove a lack of intent to perform at the time the promise was made—the court's analysis applies to a promissory fraud action and militates in favor of a rule that the Statute is not a bar to recovery of out of pocket expenses. Because a restitutionary recovery does not require any bad faith on the part of the repudiating party, a fortiori an out of pocket recovery in tort should be permitted.

109. Because an out of pocket recovery merely restores to the plaintiff the amount he lost in reliance on defendant's promise, *see* General Corp. v. General Motors Corp., 184 F. Supp. 231, 235 (D. Minn. 1960); Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974), he is only made whole and therefore gains nothing, *see General Corp.*, 184 F. Supp. at 235; *Collins*, 511 S.W.2d at 747.

110. If a potential fraudfeasor stands to gain nothing from the action, he has little reason to try to establish by perjurious testimony a promise that was never made. The Statute's policy of discouraging spurious claims founded on perjured testimony is therefore advanced. See *supra* notes 3-5 and accompanying text.

of the bargain recovery for fraud could result in indirect enforcement of oral contracts in derogation of legislative policy,[111] a plaintiff in those states who has proven a fraudulent oral promise within the Statute should still be limited to an out of pocket recovery.[112] Similarly, in states that technically follow the out of pocket rule but, under a liberal interpretation of consequential damages, nevertheless permit recovery of contract-type damages, such as lost profits,[113] a successful fraud plaintiff should also be limited to a strict out of pocket recovery.

Imposing a limit on recovery may deny a true fraud victim the full measure of damages his jurisdiction allows;[114] however, granting any recovery risks awarding damages to a person who may have introduced perjured testimony in support of his claim[115] as well as commensurately harming a person fully within his rights in not performing an oral promise.[116] Nevertheless, these risks are preferable to the greater risks of promoting fraud inherent in either granting a full benefit of the bargain recovery[117] or denying any recovery at all.[118] Moreover, when the plaintiff is acting in good faith, limiting his recovery to his reliance damages is not a grave injustice because he will have lost nothing. Therefore, limiting a successful fraud plaintiff to a strict out of pocket recovery most effectively promotes the Statute's policies because it makes whole the meritorious claimant and substantially deters the fraudfeasor.

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111. *See* Munoz v. Kaiser Steel Corp., 156 Cal. App. 3d 965, 977-78, 203 Cal. Rptr. 345, 353 (1984); Canell v. Arcola Hous. Corp., 65 So. 2d 849, 851 (Fla. 1953); Mildfelt v. Lair, 221 Kan. 557, 566-68, 561 P.2d 805, 813-15 (1977); Cassidy v. Kraft-Phenix Cheese Corp., 285 Mich. 426, 439-40, 280 N.W. 814, 819 (1938).

112. See *supra* notes 105-08 and accompanying text.

113. *See, e.g.*, Price v. Mabrey, 231 Ark. 971, 974-76, 333 S.W.2d 724, 727-28 (1960); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 95 A.D.2d 5, 22-24, 465 N.Y.S.2d 606, 618-19 (1983). When explicitly adopted, this approach is referred to as the "flexible rule," because it permits the courts, on a case-by-case basis, to allow whatever recovery they deem just and proper under the circumstances. *See* D. Dobbs, *supra* note 29, § 9.2, at 596-97; *see, e.g.*, Rice v. Price, 340 Mass. 502, 509-10, 164 N.E.2d 891, 895-96 (1960); Zeliff v. Sabatino, 15 N.J. 70, 74-75, 104 A.2d 54, 56 (1954); Selman v. Shirley, 161 Or. 582, 609, 85 P.2d 384, 393-94 (1938). Lost profits should never be recovered under the out of pocket rule, because under that theory of damages a successful plaintiff may not improve his position by virtue of the fraud. See *supra* notes 101-10 and accompanying text.

114. See *supra* notes 111-13 and accompanying text.

115. See *supra* notes 101-04 and accompanying text. Although limiting recovery to out of pocket losses is sufficient to deter the malicious, premeditated fraudfeasor from bringing a bogus fraud claim in his quest for illegal profit, it is nevertheless possible that someone who has negligently expended money in reliance on what he thought was a binding oral agreement may, under this proposal, theoretically be able to use a bogus fraud action to recoup those losses in derogation of the Statute.

116. *See* Presti v. Wilson, 348 F. Supp. 543, 545 (E.D.N.Y. 1972).

117. See *supra* note 111 and accompanying text.

118. See *supra* notes 74-76 and accompanying text.

B. *Full Fraud Recovery Is Permitted If Collateral Misrepresentations Are Proven*

Although limiting the recovery in fraud actions based solely on an oral promise within the Statute ensures that such claims will not result in indirect enforcement of oral contracts, a successful fraud plaintiff should be permitted to recover the full amount of his damages if he can prove additional misrepresentations that are collateral to the oral promise.[119] Proof of a collateral misrepresentation reduces the likelihood that the plaintiff may be the defrauding party because it implies a comprehensive scheme of fraud rather than a single, possibly inadvertent, misstatement.[120] Moreover, the existence of additional misrepresentations renders proof of the oral promise nonessential to the success of the fraud action;[121] the plaintiff need not even plead it as part of his cause of action,[122] thereby eliminating any basis for invoking the Statute.

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119. *Cf.* Weinacht v. Phillips Coal Co., 673 S.W.2d 677, 680-81 (Tex. Civ. App. 1984) (plaintiff's fraud claim barred by Statute because alleged false oral promise did not relate to collateral matter but rather to consideration for the unenforceable contract itself); Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 46 (Tex. Civ. App. 1980) (fraud action barred by Statute because no collateral agreement alleged or proved and no attempt made to establish any fraudulent acts other than oral promise to perform agreement and failure to do so).

120. The Statute of Frauds' underlying premise is that the party alleging the making of an oral promise is more likely than not acting in bad faith. See *supra* notes 3-5 and accompanying text. The proof of other false statements made by the party denying the making of the oral promise tends to vitiate this fictional presumption.

121. The Statute of Frauds precludes proof of certain oral promises by parol evidence. See *supra* notes 3-5 and accompanying text. Accordingly, when there is no need to offer proof of the oral promise, there is nothing for the Statute to preclude.

122. The claimant may predicate his fraud action entirely on the collateral misrepresentation and recover any damages flowing therefrom. This analysis may be what the New York Court of Appeals intended when it held that

> [i]f the proof of a promise or contract, void under the statute of frauds, is essential to maintain the action, there may be no recovery, but, on the other hand, one who fraudulently misrepresents himself as intending to perform an agreement is subject to liability *in tort* whether the agreement is enforcible [sic] or not.

Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 408, 151 N.E.2d 833, 836, 176 N.Y.S.2d 259, 263 (1958) (emphasis in original).

In *Channel Master*, defendant had falsely represented to plaintiff that it had enough aluminum ingot to allow it to sell to plaintiff a specified quantity each month, and that it was its intention to sell to plaintiff the specified quantity for a period of five years. *Id.* at 407, 151 N.E.2d at 834-35, 176 N.Y.S.2d at 262. Although the court never explained what it meant by "proof of a promise or contract" within the Statute being "essential to maintain the action," it may have meant to require as the basis for the fraud claim some misrepresentation other than the promise within the Statute. This interpretation is supported by the fact that the court had a choice of two misrepresentations upon which plaintiff relied to his detriment—one purely promissory and one a collateral misrepresentation of a condition necessary to performance of the underlying contract. The promissory misrepresentation: I promise to supply you with your requirement of aluminum ingot for the next five years. *See id.* at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 263. The collateral misrepresentations: I possess enough aluminum ingot to meet your requirements and I have not contracted to sell to anyone such a quantity that would render it impossible to meet your needs. *See id.* at 407, 151 N.E.2d at 835, 176 N.Y.S.2d at 263.

Thus, in jurisdictions that allow recovery of benefit of the bargain damages or the equivalent in a fraud action, there is no reason to limit the recovery to strict out of pocket losses, because the defendant's fraudulent conduct and the plaintiff's good faith are more clearly evident.[123] No harm is done to the Statute's underlying policies when a genuine fraud victim is compensated to the full extent prescribed by law.[124] Indeed, the possibility of a benefit of the bargain recovery may deter potential fraudfeasors from using the Statute as a shield against liability,[125] thus buttressing the Statute's antifraud policy.

CONCLUSION

A fraud action predicated on an oral promise subject to the Statute of Frauds accentuates the tension between the Statute's laudable objectives and its controversial means of achieving them. Although this tension can never be completely resolved, focusing on the available fraud remedy offers a fair and practical solution that is consistent with the Statute's policies.

Basic principles of justice and modern business practice dictate that the Statute may not constitute an absolute bar to an action in tort for fraud. To hold otherwise would be to invite corrupt individuals to employ the Statute as an instrument of their fraud, thereby subverting the legislature's purpose in enacting the Statute. Moreover, because a strict out of pocket recovery in an action predicated solely on the oral promise does not put the plaintiff in the position in which he would have been had the fraudulent promise been performed, allowing the fraud action will not result in indirect enforcement of oral contracts within the Statute. Furthermore, because a successful fraud plaintiff cannot profit from the action, limiting recovery to direct pecuniary loss deters potential fraudfeasors from enlisting the aid of the Statute. Although by no means a panacea for the inequities inherent in construing the Statute of Frauds

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Consequently, proof of the promissory misrepresentation was not essential in order to maintain the tort action.

Under the approach proposed herein, proof of such collateral misrepresentations would entitle the fraud plaintiff to recover the full extent of damages permitted in his jurisdiction. On the other hand, if the fraud plaintiff proves only the fraudulent nonperformance of an oral promise within the Statute, his recovery would be limited to the direct pecuniary loss he incurred in reliance thereon.

123. See *supra* note 120. Because the Statute's purpose is to prevent fraud, there is no reason to limit the plaintiff's recovery when he is clearly the victim of the fraud—and not the other way around, as the Statute presumes. When this presumption is factually invalid, the Statute should not preclude recovery. See *supra* notes 120-22 and accompanying text.

124. See *supra* notes 1-5, 63-64 and accompanying text.

125. As a matter of logic, if a potential fraudfeasor knows he may be forced to pay in damages what his victim would have earned had the false promise been performed—in other words, lost profits—he is less likely to make a fraudulent promise than if he faces the prospect of paying only the victim's reliance expenditures, which can never include lost profits.

in the context of a fraud action, the proposed compromise approach most effectively vindicates the Statute's fundamental policy of preventing fraud.

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