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Janine McPeters Murphy

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NOTES

Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases

In *Allen M. Campbell Co., General Contractors v. Virginia Metal Industries, Inc.*,¹ the United States Court of Appeals for the Fourth Circuit addressed two issues that have not been resolved by North Carolina courts. Allen M. Campbell Company sought to invoke the doctrine of promissory estoppel² to recover damages from a subcontractor who refused to satisfy an oral bid. The oral bid had been submitted to Allen M. Campbell Co., a general contractor, which relied on the oral bid in formulating the prime bid.³ Thus, the first issue was whether the doctrine of promissory estoppel was available under North Carolina law to create a cause of action in a construction bidding case.⁴ After the court of appeals found that promissory estoppel was available to the general contractor, the second issue was whether the subcontractor's oral bid was an unenforceable promise because it was not in writing as required by the statute of frauds.⁵

This Note examines the basis for the court of appeals' holding that promissory estoppel was available under North Carolina law and the extent to which the court's decision broadened the scope of the promissory estoppel doctrine beyond its previous application by North Carolina courts. The Note also examines the court's conclusion that a cause of action based upon promissory estoppel can overcome a defense based upon the statute of frauds.

Plaintiff Allen M. Campbell Co. was a successful bidder on a government construction contract.⁶ Defendant Virginia Metal Industries was alleged to have quoted orally a price of \$193,121 to supply all hollow metal doors and frames required by the plans and specifications.⁷ After Campbell was awarded the contract, however, Virginia Metal refused to provide the goods in accordance with its oral bid; Campbell subsequently was forced to purchase the goods from another supplier for \$45,562 more than the price quoted by Virginia Metal.⁸ Plaintiff brought suit based on promissory estoppel seeking recovery of the difference between the price paid and the alleged amount of

1. 708 F.2d 930 (4th Cir. 1983).

2. For a definition and discussion of the doctrine of promissory estoppel see *infra* notes 24-32 and accompanying text.

3. *Campbell*, 708 F.2d at 930-31.

4. North Carolina first applied the doctrine of promissory estoppel in *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982). See *infra* notes 99-108 and accompanying text.

5. *Campbell*, 708 F.2d at 931-32.

6. *Id.* at 931.

7. *Id.* at 930.

8. *Id.* at 931.

Virginia Metal's oral bid.⁹

Under the doctrine of promissory estoppel, a plaintiff may recover upon proof that: the defendant as promisor made a promise to the plaintiff that the defendant reasonably should have expected to induce action or forbearance on the part of the plaintiff, and the promise in fact produced such action or forbearance and resulted in damage to the plaintiff.¹⁰ Campbell argued that Virginia Metal, in submitting its bid, had made a promise that it reasonably should have expected to induce Campbell's action or forbearance.¹¹ Because Campbell had relied on Virginia Metal's oral bid by incorporating that bid into its prime bid, Campbell argued that Virginia Metal was liable for the damages that resulted when Virginia Metal refused to perform in accordance with its bid.¹²

Virginia Metal answered that North Carolina had not recognized promissory estoppel as a basis for a cause of action for damages arising in a transaction involving the sale of goods.¹³ Thus, Virginia Metal argued that it should not be held liable to Campbell on the basis of Campbell's detrimental reliance on the bid. Furthermore, Virginia Metal argued that Campbell had made no promise that it would purchase the metal frames from Virginia Metal, should Campbell's general bid be accepted.¹⁴ Therefore, according to defendant, Campbell had not given consideration and no contract existed between the two parties obliging Campbell to buy, or Virginia Metal to supply, the metal frames at the quoted price.¹⁵ Finally, Virginia Metal contended that even if a promise was made by Virginia Metal, that promise concerned the sale of goods and thus was unenforceable because it was not in writing as required by the statute of frauds provision of the Uniform Commercial Code (UCC).¹⁶

The district court dismissed the case on defendant's motion that plaintiff's complaint failed to state a claim upon which relief could be granted.¹⁷ On appeal, the United States Court of Appeals for the Fourth Circuit concluded that the North Carolina courts would have applied the doctrine of promissory estoppel.¹⁸ The court determined that the necessary elements of promise and

9. *Id.*

10. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). For further discussion of the doctrine of promissory estoppel see *infra* notes 24-32 and accompanying text.

11. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment on the Pleadings at 31, *Campbell*.

12. *Campbell*, 708 F.2d at 931.

13. Defendant's Memorandum in Support of Motion for Judgment on the Pleadings at 13, *Campbell*.

14. *Campbell*, 708 F.2d at 931.

15. *Id.*

16. *Id.* at 932; see U.C.C. § 2-201 (1978) (codified in North Carolina at N.C. GEN. STAT. § 25-2-201 (1965)).

17. *Allen M. Campbell Co., General Contractors v. Virginia Metal Indus., Inc.*, No. 82-16-CIV-4, mem. op. at 92 (E.D.N.C. filed Aug. 26, 1982), as found in Record, *Allen M. Campbell Co., General Contractors v. Virginia Metal Indus., Inc.*, No. 82-1845 (4th Cir. filed Dec. 20, 1982).

18. *Campbell*, 708 F.2d at 931. This holding was based on the recent North Carolina Supreme Court case of *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982). In *Rubish* the court held that defendant could use promissory estoppel as a defense to Wachovia's summary ejectment action by proving plaintiff's express or implied promise to waive

detrimental reliance were present, and thus held that Campbell could assert promissory estoppel in a cause of action against Virginia Metal.¹⁹ The court of appeals also concluded that North Carolina's doctrine of promissory estoppel, in appropriate cases, could withstand a statute of frauds defense and allow a plaintiff to recover in the absence of a writing.²⁰ Although the court acknowledged a split of authority on this second issue, the court based its conclusion on the North Carolina Supreme Court's apparent approval of *Restatement (Second) of Contracts* section 139,²¹ which explicitly allows enforcement of certain promises notwithstanding the writing requirement of the statute of frauds.²² The court of appeals reversed the judgment of the district court and remanded the case for further proceedings.²³

Analysis of the court of appeals' decision in *Campbell* requires an understanding of promissory estoppel and the controversies surrounding its application.²⁴ As now formulated, section 90 of *Restatement (Second) of Contracts* states:

a written notice provision of the lease and defendant's detrimental reliance on that promise. *Id.* at 427, 293 S.E.2d at 756.

19. *Campbell*, 708 F.2d at 932.

20. *Id.* at 934.

21. *Id.* The North Carolina Supreme Court had cited RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 139 with approval in *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. at 433, 293 S.E.2d at 759. *Campbell*, 708 F.2d at 934.

22. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 139 states:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . 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.

23. *Campbell*, 708 F.2d at 934.

24. The doctrine of promissory estoppel is of relatively recent origin. For a detailed discussion of the development of the doctrine of promissory estoppel see Boyer, *Promissory Estoppel: Principal from Precedents: pt. 1*, 50 MICH. L. REV. 639 (1952). The term apparently was formulated by Samuel Williston, who was the Reporter for RESTATEMENT (FIRST) OF CONTRACTS. The RESTATEMENT (FIRST) OF CONTRACTS provided:

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.

RESTATEMENT OF CONTRACTS § 90 (1934).

The elements of promissory estoppel often are confused with the older doctrine of equitable estoppel. 3 J. POMEROY, EQUITY JURISPRUDENCE § 805 (5th ed. 1941), lists the following essential elements of equitable estoppel:

1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.
2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.
4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel.

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 promise. The remedy granted for breach may be limited as justice requires.²⁵

Thus, the doctrine of promissory estoppel renders a promise enforceable if reliance is foreseeable and reasonable, and if injustice otherwise cannot be avoided.²⁶

Although acceptance of the doctrine of promissory estoppel has been characterized as "widespread,"²⁷ many applications of the doctrine remain controversial. One area of controversy is the context in which the doctrine of promissory estoppel can be invoked. Some courts have held that promissory estoppel only can be asserted defensively, as when a promisor seeks to assert and enforce a legal right that he previously has promised to forego and the promisee has relied detrimentally upon that promise.²⁸ The majority of courts addressing the issue, however, have upheld the use of promissory estoppel as a means of seeking affirmative relief when a promise has been made that the promisee relied on to his detriment in such a manner as to make it unjust not to enforce the promise.²⁹ *Restatement (Second) of Contracts* section 90 sup-

5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.

6. He must in fact act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

In general, the most significant factor distinguishing equitable estoppel and promissory estoppel is that equitable estoppel requires the party asserting the doctrine to prove that the party to be estopped actually misrepresented a material, present fact. In promissory estoppel, the major distinguishing characteristic is that a promise can pertain to a future fact or action. Annot., 56 A.L.R.3d 1037, 1046 (1974).

The doctrine of promissory estoppel originally was limited to gratuitous promises. Application of the doctrine, however, has been expanded to include the field of bargain transactions. See Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 344 (1969).

25. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 90. For a discussion of the significance of the revisions made in § 90 by the RESTATEMENT (SECOND) OF CONTRACTS see Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

26. Henderson, *supra* note 24, at 346.

27. Knapp, *supra* note 25, at 54.

28. See, e.g., *Farmland Serv. Coop., Inc. v. Klein*, 196 Neb. 538, 544, 244 N.W.2d 86, 90 (1976). The following hypothetical provides an example of the use of promissory estoppel in the defensive context. Landlord informs tenant that oral notification of intent to renew a lease will be accepted, contrary to a term in the lease requiring written notice of intent to renew the lease. Tenant, relying on the promise, provides landlord with oral notice of intent to renew the lease. If the landlord later tries to evict tenant for failure to provide written notice of renewal as required by the lease, tenant can assert the doctrine of promissory estoppel. The landlord will be estopped from asserting a right (written notice) that he previously had promised to forego. See also *Union Mut. Life Ins. Co. v. Mowry*, 96 U.S. 544 (1877); *Southeastern Sales and Serv. Co. v. T.T. Watson, Inc.*, 172 So. 2d 239 (Fla. Dist. Ct. App. 1965); *Exchange Nat'l Bank v. Essley*, 173 Okla. 2, 46 P.2d 462 (1935); *McCurty v. Piedmont Mut. Ins. Co.*, 81 S.C. 152, 62 S.E. 1 (1908); *Elliot v. Whitmore*, 23 Utah 342, 65 P. 70 (1901); Annot., 56 A.L.R.3d 1037, 1047-48 (1974).

29. See Annot., 56 A.L.R. 1037, 1047-49; 28 AM. JUR. 2D, *supra* note 28. For examples of the affirmative use of promissory estoppel to create a cause of action, see *infra* note 30.

ports this majority view.³⁰

The application of promissory estoppel in construction bidding cases also is controversial.³¹ Typically, the problem arises when a subcontractor submits the low bid to a general contractor, which then includes that low bid in the general contractor's prime bid for a project. The general contractor is in no position to "accept" the subcontractor's bid, however, until his own bid is accepted. The subcontractor then attempts to withdraw his bid after the general contractor has relied on the bid but before he has accepted it. If the general contractor is awarded the contract and is unable to find another subcontractor willing to perform the job for the same price as the original subcontractor's bid, he sues, based on promissory estoppel, to recover the difference between the original subcontractor's bid and the price the general contractor must pay to have the job done.³²

Courts confronted with construction bidding cases have adopted two different methods of analysis, with opposite results.³³ Courts rejecting the use of the doctrine of promissory estoppel have based their conclusions on traditional contract principles.³⁴ These courts reason that submission of a bid for a sub-

30. Nothing in the language of § 90 limits its application to defensive situations in which the promisor seeks to assert a legal right that he promised to abandon. Further, comments a and b of § 90 contain illustrations that encompass both defensive and offensive uses of promissory estoppel. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 90 comment a, illustration 1, states:

1. A, knowing that B is going to college, promises B that A will give him \$5,000 on completion of his course. B goes to college, and borrows and spends more than \$5,000 for college expenses. When he has nearly completed his course, A notifies him of an intention to revoke the promise. A's promise is binding and B is entitled to payment on completion of the course without regard to whether his performance was "bargained for" under § 71.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 90 comment b, illustrations 2-4, state:

2. A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed.

3. A sues B in a municipal court for damages for personal injuries caused by B's negligence. After the one year statute of limitations has run, B requests A to discontinue the action and start again in the superior court where the action can be consolidated with other actions against B arising out of the same accident. A does so. B's implied promise that no harm to A will result bars B from asserting the statute of limitations as a defense.

4. A has been employed by B for 40 years. B promises to pay A a pension of \$200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding.

31. For a detailed analysis of the issues involved in construction bidding cases, see Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U. L. REV. 816 (1964) [hereinafter cited as Note, *Flag Pole*]; Comment, *Construction Bidding Problem: Is There a Solution Fair to Both the General Contractor and Subcontractor?*, 19 ST. LOUIS U.L.J. 552 (1975) [hereinafter cited as Comment, *Construction Bidding*]; Comment, *Bid Shopping and Peddling in the Subcontractor Construction Industry*, 18 UCLA L. REV. 389 (1970) [hereinafter cited as Comment, *Bid Shopping*]; Note, *The Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship*, 37 U. CIN. L. REV. 798 (1968) [hereinafter cited as Note, *Offer and Acceptance*]; Note, *The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel*, 10 WM. & MARY L. REV. 212 (1968) [hereinafter cited as Note, *The Firm Offer*].

32. See Comment, *Construction Bidding*, *supra* note 31, at 553-54.

33. *Id.* at 552, 553.

34. See *id.* at 552. Using traditional contract analysis the court will examine the facts to determine if the essential elements of a bargain transaction, including a valid acceptance, mutual

contract is an offer that can be withdrawn at any time before it is accepted. Therefore, a subcontractor is free to withdraw his bid at any time prior to acceptance by the general contractor and is not liable for any damages to the general contractor resulting from revocation of the bid.³⁵

The leading case adopting this line of reasoning is *James C. Baird Co. v. Gimbel Brothers*,³⁶ decided by the United States Court of Appeals for the Second Circuit. In *Baird* Judge Learned Hand concluded that the general contractor's use of the subcontractor's bid in his prime bid did not constitute acceptance of the offer so as to form a contract.³⁷ The court also rejected the use of promissory estoppel in the context of a bargaining transaction.³⁸

More recently courts have accepted and applied the doctrine of promissory estoppel in construction bidding cases.³⁹ These courts have applied the doctrine of promissory estoppel to hold the subcontractor liable to the general contractor if the subcontractor refuses to perform according to his bid and the general contractor suffers damages as a result.

The leading case in this line is *Drennan v. Star Paving Co.*,⁴⁰ a 1958 California Supreme Court decision. The facts of *Drennan* were similar to those in *Campbell*: a general contractor sought to recover damages from a subcontractor who had refused to perform according to a bid submitted to the general contractor.⁴¹ In *Drennan* Justice Traynor agreed with Judge Hand's opinion in *Baird* that use of a bid by the general contractor is not sufficient acceptance of the offer to create a contract.⁴² Unlike Judge Hand, however, Justice Traynor concluded that "[r]easonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis . . . for implying a subsidiary promise not to revoke an offer for a bilateral contract."⁴³ He concluded that "absence of consideration is not fatal to the enforcement of such a promise"⁴⁴

assent, and consideration, are present. If any of these elements are missing, no contract has been formed. In contrast, enforcement of a promise through promissory estoppel is based on reliance, not on the elements of bargain or exchange.

35. *James C. Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *Mitchell v. Siqueros*, 99 Idaho 396, 399-401, 582 P.2d 1074, 1077-79 (1978); *K.L. House Constr. Co. v. Watson*, 84 N.M. 783, 508 P.2d 592 (1973); *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 732-34, 418 P.2d 187, 189-90 (1966).

36. 64 F.2d 344 (2d Cir. 1933).

37. *Id.* at 346; see I A. CORBIN, CORBIN ON CONTRACTS § 51 (1st ed. 1963); S. WILLISTON, WILLISTON ON CONTRACTS § 139 (3d ed. 1957). For criticism of *Baird* see Note, *Flag Pole*, *supra* note 31, at 821.

38. *Baird*, 64 F.2d at 346.

39. Two early cases recognizing the use of promissory estoppel in the context of construction bidding are *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 660-61 (7th Cir. 1941) (recognizing the availability of promissory estoppel, but refusing to apply the doctrine because "the promisee has failed to show irreparable detriment"), and *Northwestern Eng'g Co. v. Ellerman*, 69 S.D. 397, 406-08, 10 N.W.2d 879, 883-84 (1943) (awarding damages to the general contractor after step-by-step application of the RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 90).

40. 51 Cal. 2d 409, 333 P.2d 757 (1958).

41. *Id.* at 411-13, 333 P.2d at 758-59.

42. *Id.* at 413, 333 P.2d at 759.

43. *Id.* at 414, 333 P.2d at 760.

44. *Id.*

because "[r]easonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding."⁴⁵

Subsequent cases have clarified the elements necessary to support a cause of action based on promissory estoppel in construction bidding cases.⁴⁶ Four requirements generally are cited. First, the subcontractor promisor must have made an affirmative promise to do something.⁴⁷ Second, the general contractor promisee must demonstrate that his reliance was reasonably foreseeable.⁴⁸ Third, the reliance must be justifiable.⁴⁹ Last, substantial detriment must result from the reliance if the promise is not enforced.⁵⁰ Section 87(2) of the *Restatement (Second) of Contracts*, in essence a codification of the *Drennan* holding, provides additional support for the application of promissory estoppel in construction bidding cases.⁵¹

A few jurisdictions continue to follow traditional contract analysis in construction bidding cases, and allow a subcontractor to revoke his bid at any time before the general contractor accepts it.⁵² The majority of jurisdictions, however, have followed *Drennan* and its progeny and have applied promissory estoppel to bind a subcontractor to perform in accordance with his bid, once the general contractor has relied on that bid by incorporating it into his prime bid.⁵³ In these jurisdictions, a subcontractor's offer is rendered irrevocable for a reasonable period after the general contractor has detrimentally relied on that bid.⁵⁴

45. *Id.* (citing RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 90).

46. *See* N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736 (D.C. Cir. 1963); Constructors Supply Co. v. Bostrom Sheet Metal Works, 291 Minn. 113, 190 N.W.2d 71 (1971).

47. N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739 (D.C. Cir. 1963).

48. *Id.*

49. *Id.*

50. *Id.*

51. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 87(2) states: "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."

Furthermore, the *Drennan* fact situation is used as one of six illustrations of the section. Comment e, illustration 6 to RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 87(2), reads as follows:

A submits a written offer for paving work to be used by B as a partial basis for B's bid as general contractor on a large building. As A knows, B is required to name his subcontractors in his general bid. B uses A's offer and B's bid is accepted. A's offer is irrevocable until B has had a reasonable opportunity to notify A of the award and B's acceptance of A's offer.

52. *See supra* note 35.

53. *See, e.g.,* Montgomery Indus. Int'l v. Thomas Constr. Co., 620 F.2d 91 (5th Cir. 1980); Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1976); Debron Corp. v. National Homes Constr. Corp., 493 F.2d 352 (8th Cir. 1974); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Saliba-Kringlen Corp. v. Allen Eng'g Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (1962); Jaybe Constr. Co. v. Beco, Inc., 3 Conn. Cir. Ct. 406, 216 A.2d 208 (1965); Nielson v. National Heat & Power Co., 32 Ill. App. 3d 941, 337 N.E.2d 387 (1975); Lyon Metal Prods. v. Hagerman Constr. Corp., 181 Ind. App. 336, 391 N.E.2d 1152 (1979); Constructors Supply Co. v. Bostrom Sheet Metal Works, 291 Minn. 113, 190 N.W.2d 71 (1971); E.A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966); Wargo Builders, Inc. v. Douglas L. Cox Plumbing & Heating, Inc., 26 Ohio App. 2d 1, 268 N.E.2d 597 (1971).

54. *Drennan*, 51 Cal. 2d at 413-14, 333 P.2d at 759-60.

Critics contend that the availability of a cause of action based on promissory estoppel in a construction bidding case creates the potential for injustice between a general contractor and a subcontractor.⁵⁵ Although the subcontractor is obligated to perform if the general contractor incorporates his bid into the prime bid, the general contractor is not obligated to award the job to the subcontractor who submitted the bid.⁵⁶ Thus, the general contractor might attempt to delay acceptance of the subcontractor's bid after receiving the prime contract in hopes of getting a better price through postaward negotiations with various subcontractors.⁵⁷ To prevent the general contractor from delaying acceptance of the subcontractor's bid to seek a better price, however, it is only necessary that the general contractor be required to accept the subcontractor's bid within a reasonable period after being awarded the prime bid.⁵⁸

Although promissory estoppel creates the potential for abuse by the general contractor, the case law indicates that courts are aware of the potential abuses⁵⁹ and scrutinize the facts of each case. Courts have refused to apply the doctrine of promissory estoppel in cases in which the equities lie with the subcontractor.⁶⁰ Some courts have refused to apply promissory estoppel when the subcontractor's bid was so "glaringly low" as to put the general contractor on notice that a mistake had been made.⁶¹ In such cases courts view the general contractor's reliance on the bid as unreasonable.⁶²

In summary, although some courts have rejected the use of promissory estoppel to render a subcontractor's bid irrevocable for a period of time under any circumstances,⁶³ the majority accept the doctrine as embodied in *Restatement (Second) of Contracts* sections 87(2) and 90. Thus, a subcontractor's bid is rendered irrevocable if the general contractor has detrimentally relied on the

55. See, e.g., Comment, *Construction Bidding*, *supra* note 31, at 563-66; Comment, *Bid Shopping*, *supra* note 31; Note, *Offer and Acceptance*, *supra* note 31.

56. Note, *Offer and Acceptance*, *supra* note 31, at 812-13.

57. Various types of unethical trade practices used by general contractors to obtain lower subcontract prices are defined and discussed in Comment, *Construction Bidding*, *supra* note 31, at 564-65.

58. See *Drennan*, 51 Cal. App. 2d at 415, 333 P.2d at 760 (1958) (A general contractor is "not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.").

59. In *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963), the court reversed a summary judgment in favor of the general contractor when, after having received the prime contract award, the general contractor sent the subcontractor a proposed subcontract containing terms previously not discussed by the parties. The court ruled that when the proposed subcontract adds conditions, it becomes a counteroffer and is not effective as an acceptance. *Id.* at 738; see also *R.J. Daum Constr. Co. v. Child*, 122 Utah 194, 247 P.2d 817 (1952) (proposed subcontract containing additional specifications constitutes a counteroffer, not an acceptance).

60. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941); *Edward Joy Co. v. Noise Control Prods., Inc.*, 111 Misc. 2d 64, 443 N.Y.S.2d 361 (1981); *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000 (1964).

61. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654, 660 (7th Cir. 1941).

62. See also *supra* note 35 and accompanying text (courts that have refused to apply a promissory estoppel test).

63. See *supra* notes 35-37 and accompanying text.

bid and injustice otherwise cannot be avoided.⁶⁴ The courts, however, have tended to apply the doctrine flexibly, considering the facts and equities in each case before allowing promissory estoppel to render the subcontractor's bid irrevocable.⁶⁵

Another controversial and unsettled issue is whether promissory estoppel can be used to avoid the writing requirement of the statute of frauds. Although *Restatement (First) of Contracts* made no reference to the effect of promissory estoppel on the statute of frauds,⁶⁶ the *Restatement (Second) of Contracts* explicitly allows promissory estoppel to overcome the requirements of the statute of frauds if certain requirements are satisfied.⁶⁷

64. See generally Note, *The Firm Offer*, *supra* note 31, at 220-23 (discussing recent developments in use of promissory estoppel to avoid injustice in construction bidding process).

65. For a discussion of the growth of the use of promissory estoppel as a means of defeating the Statute of Frauds, see Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114 (1975). For an earlier discussion advocating the use of estoppel to overcome the statute of frauds, see Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

66. Since the RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, made no reference to the effect of promissory estoppel on the statute of frauds, a promise made binding by RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 90, arguably still must meet the statute of frauds writing requirement before it can be enforced. See Note, *supra* note 65, at 116. RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 178, however, contained language that permitted a limited application of estoppel to overcome the statute of frauds. Comment f to § 178 stated:

Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a defence [sic] may be precluded. . . . [A] promise to make a memorandum, if . . . relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 178 comment f. Citing comment f, courts often have refused to allow promissory estoppel to overcome the statute of frauds when the promisee did not rely on an ancillary promise by the promisor to put their agreement in writing. See *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852, 856-57 (9th Cir. 1977); *Alaska Airlines v. Stephenson*, 217 F.2d 295, 298 (9th Cir. 1954); *Rockland Indus. v. Frank Kasmir Assocs.*, 470 F. Supp. 1176, 1180 (N.D. Tex. 1979); *Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.*, 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972); *H. Molsen & Co. v. Hicks*, 550 S.W.2d 354, 356 (Tex. Civ. App. 1977); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 259-60, 616 P.2d 644, 647 (1980) (en banc). For criticism of the leading case applying RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 178, in a construction bidding case, see Comment, *Prime Contractor's Reliance on Supplier's Bid Does Not Estop Supplier from Raising Statute of Frauds Defense under Uniform Commercial Code Section 2-201*, 9 RUT.-CAM. L. REV. 387 (1978) (discussing *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977)).

67. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, contains significant changes in sections dealing with estoppel and the statute of frauds. Section 178, comment f of RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, was dropped in RESTATEMENT (SECOND) OF CONTRACTS. Section 178 of RESTATEMENT (FIRST) OF CONTRACTS was renumbered as § 110 in RESTATEMENT (SECOND) OF CONTRACTS, and a new comment d was added. Comment d acknowledges that "circumstances may be such that justice requires enforcement of the promise. To the extent that justice so requires, the promise is then enforced by virtue of the doctrine of estoppel or by virtue of reliance on a promise notwithstanding the Statute." RESTATEMENT (SECOND) OF CONTRACTS, § 110 comment d.

The second and more significant change from RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, to the RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, is the addition of § 139, which expressly sanctions the use of promissory estoppel to overcome the statute of frauds. Section 139 states:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce the action or forbearance is

This issue becomes more complicated, however, when an agreement pertains to the sale of goods and therefore is subject to the provisions of the UCC.⁶⁸ Section 2-201, the statute of frauds provision of the UCC⁶⁹ requires

enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 139. See Knapp, *supra* note 25, at 67-71, for a discussion of the significance of the revisions made in the RESTATEMENT (SECOND) OF CONTRACTS. Comment b of § 139 states:

Like § 90 this Section states a flexible principle, but the requirement of consideration is more easily displaced than the requirement of a writing. The reliance must be foreseeable by the promisor, and enforcement must be necessary to avoid injustice. Subsection (2) lists some of the relevant factors in applying the latter requirement.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 139 comment b. Some courts considering the issue of whether promissory estoppel can be used to avoid the statute of frauds have adopted the position of the RESTATEMENT (SECOND) OF CONTRACTS. See *McIntosh v. Murphy*, 52 Hawaii 29, 35-57, 469 P.2d 177, 181 (1970); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 342-43 (Iowa 1979) (en banc); *Walker v. Ireton*, 221 Kan. 314, 321-22, 559 P.2d 340, 345-46 (1977); *Remilong v. Crolla*, 576 P.2d 461, 465 (Wyo. 1978). But see *McDabo, Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 460-61 (D.S.C. 1982) (promissory estoppel claim not recognized on grounds that judicially created exception to statute of frauds would nullify it); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash. 2d 291, 299-300, 635 P.2d 103, 107 (1981) (en banc) (adoption of promissory estoppel would erode UCC and result in increased litigation and confusion). The North Carolina Supreme Court recently addressed the issue and cited § 139 with approval in *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 433, 293 S.E.2d 749, 759 (1982). Many jurisdictions, however, have not considered the issue. Other jurisdictions, in the past having adopted the position of the RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, have not addressed the issue since the adoption of the RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10. See *supra* note 66 and accompanying text. As a result, many jurisdictions still follow the rule of RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, and limit the use of promissory estoppel to situations in which an ancillary promise was made to fulfill the writing requirement of the Statute of Frauds.

68. The two relevant sections of the Uniform Commercial Code are § 2-201 (the statute of frauds) and § 1-103 (the availability of equitable principles to supplement specific Code provisions). U.C.C. § 2-201 (1976) states:

Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

that a contract for the sale of goods involving \$500 or more be in writing.⁷⁰ In addition, section 2-201 enumerates three specific exceptions to the writing requirement of the statute of frauds for situations in which various actions of the parties provide evidence of the transaction.⁷¹

The statute of frauds provision of the UCC, like its predecessors under the Uniform Sales Act⁷² and the original statute of frauds pertaining to the sale of goods,⁷³ was enacted to prevent the enforcement of fraudulent contracts to which the parties may not have assented.⁷⁴ Also like its predecessors, the UCC statute of frauds provision is subject to the criticism that it can be used to perpetrate fraud.⁷⁵ When clear evidence of an agreement exists, but the evidence fails to conform to the requirements of the statute or its exceptions, one party can use the statute of frauds to avoid performance. Application of the statute in such a case results in injury to the party who detrimentally relied on the agreement.⁷⁶

Historically, courts have recognized that strict enforcement of the statute of frauds may assist the perpetration of fraud.⁷⁷ As a result, courts have turned to the doctrine of estoppel as one means of mitigating the harsh results of strict enforcement of the statute of frauds.⁷⁸ Case law is divided, however, as to whether the doctrine of promissory estoppel can be used to overcome the general statute of frauds.⁷⁹ The controversy continues as courts have at-

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- (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
 - (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
 - (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-206).

U.C.C. § 1-103 (1976) states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

69. U.C.C. § 2-201 (1976).

70. *Id.* § 2-201(1).

71. *Id.* § 2-201(3). For the text of this section see *supra* note 68.

72. Uniform Sales Act § 4 (1906).

73. 29 Car. 2, c.3, § 17 (1677).

74. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ. L. REV. 205, 207-09, 213-14 (1978).

75. See, e.g., J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-8 (2d ed. 1980); Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 66-67 (1980).

76. Metzger & Phillips, *supra* note 75, at 66-67.

77. Edwards, *supra* note 74, at 214-16; see also Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916) (arguing that the statute of frauds may promote fraud by encouraging parties to deny the existence of obligations rather than meet them).

78. Edwards, *supra* note 74, at 214; Metzger & Phillips, *supra* note 75, at 63. For North Carolina cases supporting the use of equitable estoppel to overcome the statute of frauds, see *infra* note 121.

79. The original statute of frauds contained twenty-five sections, two of which applied to

tempted to determine if estoppel can overcome a statute of frauds defense under section 2-201 of the UCC.

With respect to this issue, section 1-103 of the UCC provides that "unless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to . . . estoppel . . . shall supplement its provisions."⁸⁰ Section 1-103 does not indicate, however, how to determine whether the equitable principles have been displaced by particular provisions of the Code. Section 2-201 also does not state specifically whether estoppel is displaced by its specific provisions. Thus, neither section 1-103 nor section 2-201 provides any guidance as to whether estoppel doctrine can be used to overcome the requirements of the statute of frauds.⁸¹

Courts faced with the issue of whether section 1-103's estoppel principle may operate as an exception to the statute of frauds generally have taken one of two positions. The minority position is that estoppel cannot create an exception to the requirements of the statute of frauds.⁸² Courts adopting this position hold that the only exceptions to the UCC statute of frauds are those specifically enumerated in section 2-201.⁸³ These courts reason that if the legislature had intended the list of exceptions in section 2-201 merely to be suggestive and not exclusive, the section would have been worded accordingly.⁸⁴ The statute of frauds reflects a legislative policy encouraging parties to put their agreements in writing,⁸⁵ therefore, allowing a party to circumvent the statute of frauds' writing requirement through the use of estoppel is contrary

contracts. 29 Car. 2, c.3, § 4, 17 (1677). Section 4 applied to contracts other than for the sale of goods. Such contracts include: contracts of an executor or administrator to pay damages out of his own estate, contracts to pay the debts of another, contracts made in consideration of marriage, contracts for the sale of lands, and contracts not to be performed within one year. *Id.* § 4. Section 17 referred specifically to contracts for the sale of goods, and was incorporated into later statutes of frauds in the United States. Edwards, *supra* note 74, at 207-08.

In 1906 these statutes were replaced by § 4 of the Uniform Sales Act, which applied to sales of goods worth \$500 or more. *Id.* at 208. Section 4 of the Uniform Sales Act was replaced by U.C.C. § 2-201 (1976), which also applied to contracts for the sale of goods worth \$500 or more. *Id.* at 208.

North Carolina's general statute of frauds, which does not apply to sales of goods, is contained in N.C. Gen. Stat. §§ 22-1 to 22-4 (1965). It covers several types of contracts included in the original statute of frauds. *See, e.g., id.* § 22-1 (contracts to pay for the debts of another); *id.* § 22-2 (contracts for the sale of land); *id.* § 22-4 (contracts to pay a debt discharged by a bankruptcy decree). The UCC statute of frauds, applying to sales of goods for \$500 or more, is codified at N.C. GEN. STAT. § 25-2-201 (1965).

80. *See supra* note 68 for the complete text of U.C.C. § 1-103 (1978).

81. *See* Edwards, *supra* note 74, at 219-24.

82. *See, e.g., Cox v. Cox*, 292 Ala. 106, 289 So. 2d 609 (1974); *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40 (Ky. Ct. App. 1979). The following hypothetical illustrates the results of the minority rule. A seller orally agrees to the sale of certain goods to a buyer who relies on the promise by reselling the goods. If the seller later refuses to perform according to the oral agreement, the statute of frauds bars enforcement of that agreement and the court will not allow the buyer to use the doctrine of promissory estoppel to escape the writing requirement of the statute of frauds.

83. *See, e.g., McDabco Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 461 (D.S.C. 1982); *Cox v. Cox*, 292 Ala. 106, 111, 289 So. 2d 609, 613 (1974); *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); *Farmland Serv. Coop., Inc. v. Klein*, 196 Neb. 538, 544, 244 N.W.2d 86, 90 (1976).

84. *See C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 41 (Ky. Ct. App. 1979).

85. *See McDabco, Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 461 (D.S.C. 1982). *See gener-*

to the intent of the legislature.⁸⁶

Courts adopting this position acknowledge that strict enforcement of the statute of frauds can result in injustice when clear evidence of an oral agreement exists and one party has detrimentally relied on that agreement. These courts argue that the injured party willingly assumed a risk in relying on an oral promise.⁸⁷ Furthermore, these courts argue that the few unjust results are outweighed by the benefits of strict application of the statute of frauds.⁸⁸

The second position, adopted by a majority of courts, is that the estoppel principles of section 1-103 can operate as an exception to the statute of frauds provision of 2-201.⁸⁹ Under this view, section 2-201 is not interpreted to have displaced equitable principles simply because the section does not make any reference to their availability.⁹⁰ Courts take the position that because section 2-201 does not prohibit specifically the use of equitable principles, the general provisions of section 1-103, including estoppel, are available as exceptions.⁹¹ The exceptions explicitly enumerated in 2-201 therefore were not intended to be exclusive. This view is consistent with the primary function of the statute of frauds—to require independent evidence of a bona fide transaction. Because reliance on an oral contract provides such independent evidence, dispensing with the writing requirement in promissory estoppel cases does not undercut the statute's purpose.⁹² Furthermore, although the purpose of the UCC was to bring uniformity and predictability to commercial law, the drafters did not intend for the UCC to create a rigid system that perpetuates injustice and inequitable results through strict application of the statute of frauds.⁹³

Although a majority of courts have held that equitable provisions embodied in section 1-103 may override the writing requirement of the statute of

ally J. WHITE & R. SUMMERS, *supra* note 75, § 2-8 (discussing various rationales for the statute of frauds).

86. *McDabco, Inc. v. Chet Adams Co.*, 548 F. Supp. 456, 461 (D.S.C. 1982); *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 41 (Ky. Ct. App. 1979); *Anderson Constr. Co. v. Lyon Metal Prods., Inc.*, 370 So. 2d 935, 937 (Miss. 1979) (quoting *Thomas v. Prewitt*, 355 So. 2d 657, 661 (Miss. 1978)); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash. 2d 291, 299-300, 635 P.2d 103, 107 (1981).

87. *See, e.g., Farmers Coop. Elevator Ass'n v. Cole*, 239 N.W.2d 808, 812 (N.D. 1976) (quoting *Ozier v. Haines*, 411 Ill. 160, 164-65, 103 N.E.2d 485, 488 (1952)).

88. *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 345 (Iowa 1979) (Reynoldson, C.J., dissenting).

89. *See Ralston Purina Co. v. McCollum*, 611 S.W.2d 201 (Ark. Ct. App. 1971); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339 (Iowa 1979); *Sacred Heart Farmers Coop. Elevator v. Johnson*, 305 Minn. 324, 232 N.W.2d 921 (1975); *Del Haynes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588 (1975); *Farmers Coop. Elevator Ass'n v. Cole*, 239 N.W.2d 808 (N.D. 1976); *Potter v. Hatter Farms, Inc.*, 56 Or. App. 254, 641 P.2d 628 (1982); *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 238 N.W.2d 290 (1976).

90. *Potter v. Hatter Farms, Inc.*, 56 Or. App. 254, 641 P.2d 628, 632 (1982).

91. *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 343 (Iowa 1979).

92. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 Nw. U.L. REV. 906, 941-42 (1978).

93. *Potter v. Hatter Farms, Inc.* 56 Or. App. 254, 641 P.2d 628, 633 (1982); *see also Corbin, The Uniform Commercial Code—Sales, Should It be Enacted?*, 59 YALE L.J. 821, 829 (1950) (“The purpose of the statute of frauds is to prevent the enforcement of alleged promises that never were made; it is not, and never has been, to justify contractors in repudiating promises that were in fact made.”).

frauds, much controversy exists about what type of estoppel may be invoked. This conflict arises because section 1-103 does not define specifically what type of estoppel is included in its provisions.⁹⁴ Thus, some jurisdictions allow equitable estoppel but not promissory estoppel⁹⁵ to overcome the statute of frauds.⁹⁶ The issue is muddled further by judicial confusion about the essential elements of promissory estoppel.⁹⁷ As a result, the holdings in cases addressing the issue are inconsistent and fail to set forth dependable guidelines.⁹⁸

As the foregoing discussion demonstrates, the application of promissory estoppel in construction bidding cases is plagued by conflicting precedent and case law. In *Campbell* the court of appeals attempted to resolve these controversial issues as it believed the North Carolina Supreme Court would. Because there was little guidance in North Carolina case law, the court found its task complicated further.

The first issue raised in *Campbell* was whether promissory estoppel is available under North Carolina law to render the subcontractor's bid irrevocable. This issue had not been addressed by the North Carolina courts. Until the recent case of *Wachovia Bank and Trust Company, N.A. v. Rubish*,⁹⁹ the North Carolina Supreme Court never had accepted expressly promissory estoppel and had mentioned the doctrine in dicta only twice. The two references in dicta indicated neither acceptance nor rejection of the doctrine.¹⁰⁰

The *Rubish* court for the first time expressly accepted promissory estop-

94. See *supra* note 68 for the full text of U.C.C. § 1-103 (1976).

95. See *supra* note 24 and accompanying text for definitions of promissory and equitable estoppel.

96. *Farmers Coop. Elevator Ass'n of Churchs Ferry v. Cole*, 239 N.W.2d 808 (N.D. 1976) (plaintiff failed to establish promissory estoppel; courts may be reluctant to find estoppel when another doctrine suffices); *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 94, 238 N.W.2d 240, 294 (1976) (only equitable estoppel may overcome the statute of frauds).

97. An example of judicial confusion over the distinction between equitable and promissory estoppel is seen in a line of South Dakota cases in which the court applies several different and incorrect definitions to the terms "promissory estoppel" and "equitable estoppel." See *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 91-92, 238 N.W.2d 290, 294 (1976); *Kelly v. Gram*, 73 S.D. 11, 24-25, 38 N.W.2d 460, 466-67 (1949); *Federal Land Bank of Omaha v. Matson*, 68 S.D. 538, 541-42, 5 N.W.2d 314, 315 (1942); see also *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974) (the court cited RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 90, while purporting to define equitable estoppel in a manner indistinguishable from promissory estoppel).

98. For example, in construction bidding cases involving both "goods" and "services" and decided without reference to the UCC, California case law allows promissory estoppel to overcome the statute of frauds. See *Saliba-Kringlen Corp. v. Allen Eng'g Co.*, 15 Cal. App. 3d 95, 106, 92 Cal. Rptr. 799, 808 (1971).

99. 306 N.C. 417, 293 S.E.2d 749 (1982).

100. In *Clement v. Clement*, 230 N.C. 636, 55 S.E.2d 459 (1949), the promisor had promised to forego interest on a loan contrary to the agreement made at the time of the loan. Later the promisor sued for the interest according to the original agreement. The court acknowledged the existence of the doctrine of promissory estoppel based on RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 24, § 90. The court, however, found the doctrine of estoppel inapplicable because the promisee had not suffered substantial detriment as a result of reliance on the promise. Therefore, the court concluded that a waiver of a legal right that is to be or may be asserted in the future, when the waiver cannot operate as an estoppel, requires consideration as much as any agreement by any other name. In *Tatum v. Brown*, 29 N.C. App. 504, 224 S.E.2d 698 (1976), plaintiff brought suit for lost salary alleging that in reliance on defendant's promise of employment she resigned her job and subsequently defendant revoked the job offer. The court stated without discussion that the doctrine of promissory estoppel did not apply in this action for breach of employment contract.

pel.¹⁰¹ In *Rubish*, plaintiff, as trustee, sought to evict defendant, a tenant, for defendant's failure to give written notice of renewal as required by his lease.¹⁰² The jury found that plaintiff had waived the requirement of written notice and ruled in defendant's favor.¹⁰³

On appeal the North Carolina Supreme Court was presented with two issues: whether there was sufficient evidence to support defendant's assertion of waiver and estoppel; and whether the jury had been instructed properly on these issues.¹⁰⁴ The court found that the jury had been instructed improperly on the issues and that the evidence did not support the finding that plaintiff had waived the notice requirement.¹⁰⁵ The court did find evidence, however, from which the jury could have found, based on the promissory estoppel theory, that plaintiff was estopped from demanding written notice.¹⁰⁶ The *Rubish* court held that to assert a defense based on promissory estoppel defendant had to prove that plaintiff had expressly or impliedly promised to waive the written notice provision and that defendant had detrimentally relied on the promise.¹⁰⁷ The supreme court reversed and remanded the case for a new trial to determine whether plaintiff was estopped from demanding written notice based on promissory estoppel theory.¹⁰⁸

Relying on *Rubish*, the United States Court of Appeals for the Fourth Circuit held in *Campbell* that North Carolina law recognizes the doctrine of promissory estoppel.¹⁰⁹ The court quoted extensively from *Rubish*, but did not analyze the holding except to note the distinction between equitable estoppel and promissory estoppel.¹¹⁰ The court of appeals did not set forth its own list of the necessary elements of promissory estoppel, but cited those in *Rubish*.¹¹¹ Apparently, the necessary elements were an express or implied promise and detrimental reliance on that promise.

The court of appeals did not recognize that the application of promissory estoppel in *Campbell* differed from the application of the doctrine in *Rubish*. In *Rubish* promissory estoppel was applied defensively.¹¹² Defendant was allowed to assert a defense of promissory estoppel based on plaintiff's alleged waiver of the right to require written notice under the terms of the lease.¹¹³ Thus, the doctrine of promissory estoppel was asserted to prevent the promisor from asserting a legal right he had promised explicitly or implicitly to forego.

101. *Rubish*, 306 N.C. at 429, 293 S.E.2d at 757.

102. *Id.* at 418, 293 S.E.2d at 751.

103. *Id.* at 423, 293 S.E.2d at 754.

104. *Id.* at 424, 293 S.E.2d at 754.

105. *Id.*

106. *Id.* at 429, 293 S.E.2d at 757.

107. *Id.* at 427, 293 S.E.2d at 756.

108. *Id.* at 431, 293 S.E.2d at 758. Although the *Rubish* court relied on case law to support its holding, the court also cited the RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 90. *Rubish*, 306 N.C. at 433, 293 S.E.2d at 759.

109. *Campbell*, 708 F.2d at 931.

110. *Id.* at 932.

111. *Id.* (citing *Rubish*, 306 N.C. at 427, 293 S.E.2d at 755-56).

112. See *supra* note 28 and accompanying text.

113. *Rubish*, 306 N.C. at 431, 293 S.E.2d at 758.

In *Campbell*, however, promissory estoppel was invoked to make an offer irrevocable based on the action of the offeree in justifiable and detrimental reliance on the offer.¹¹⁴ Therefore, in *Campbell* the doctrine of promissory estoppel was used affirmatively to create a cause of action.

The distinction between the two applications of the doctrine is significant. North Carolina precedent and dicta support the application of promissory estoppel only in the defensive context.¹¹⁵ By allowing promissory estoppel to affirmatively create a cause of action the court of appeals sanctioned a use of the doctrine that is not supported by North Carolina precedent. The *Restatement (Second) of Contracts* and the majority of cases from other jurisdictions, however, have approved the use of promissory estoppel to create a cause of action.¹¹⁶ Thus, although arguably not supported by North Carolina law, the holding of the court of appeals is in accord with legal authority in the majority of jurisdictions that have ruled on the issue.

Having found the doctrine of promissory estoppel available under North Carolina law, the court of appeals turned to the second issue. This issue was raised by Virginia Metal's assertion that, even if the court found that a promise was made, the promise was not enforceable since it was not in writing as required by the statute of frauds.¹¹⁷ Because Virginia Metal's bid involved the sale of goods, the statute of frauds provision of the UCC, section 2-201, controlled. Although North Carolina courts have allowed equitable estoppel to overcome the general statute of frauds,¹¹⁸ whether estoppel of any kind is available to overcome the statute of frauds provision of the UCC has not been addressed by the North Carolina Supreme Court.

In *Campbell* the court of appeals acknowledged that a split of authority exists in decisions from other states.¹¹⁹ The court cited various cases that allowed the estoppel provision of section 1-103 of the UCC to overcome the statute of frauds provision of the UCC.¹²⁰ The court also cited cases that refused to allow promissory estoppel to overcome the statute of frauds in cases of obvious subcontractor bidding error—a strict interpretation of the exceptions to the statute of frauds of the UCC or a refusal to accept *Restatement (Second) of Contracts* section 139.¹²¹ The opinion in *Campbell*, however, merely acknowledged these holdings without examining their merits or their underlying reasoning. Instead, the court of appeals based its decision to allow promissory estoppel to overcome Virginia Metal's statute of frauds defense on the North Carolina Supreme Court's apparent approval of *Restatement (Second) of Con-*

114. *Campbell*, 708 F.2d at 932.

115. *See supra* notes 28, 112 and accompanying text.

116. *See supra* notes 29-30 and accompanying text.

117. *Campbell*, 708 F.2d at 932. *See supra* notes 82-88 and accompanying text.

118. "[I]n proper cases, an estoppel predicated upon grounds of silence or fraud may override the statute of frauds." *Callahan v. Arenson*, 239 N.C. 619, 626, 80 S.E.2d 619, 625 (1954); *see also McKinley v. Hinnant*, 242 N.C. 245, 87 S.E.2d 568 (1955); *Dunn v. Dunn*, 24 N.C. App. 713, 212 S.E.2d 40, *cert. denied*, 287 N.C. 258, 214 S.E.2d 430 (1975).

119. *Campbell*, 708 F.2d at 932-33.

120. *Id.*

121. *Id.*

tracts section 139, which allows promissory estoppel to defeat the writing requirement of the Statute of Frauds.¹²² The North Carolina Supreme Court had approved the use of promissory estoppel to overcome the general statute of frauds in the context of evidence relating to waiver of a notice provision of a lease,¹²³ adopting the approach of the *Restatement (Second) of Contracts* in this narrow context.¹²⁴ Thus, the court of appeals broadened the application of promissory estoppel to overcome the statute of frauds requirement to cases governed by the UCC. Allowing promissory estoppel to overcome the statute of frauds provision of the UCC is controversial, but consistent with the view of the majority of courts and legal authorities.¹²⁵ The courts of other states, once allowing promissory estoppel to overcome the general statute of frauds, often have found no reason not to extend that holding beyond the general statute of frauds.¹²⁶ Therefore, the holding in *Campbell* arguably is in accord with the view that the North Carolina courts would adopt if faced with this issue.

The doctrine of promissory estoppel is of relatively recent origin. As a result, the definition and extent of application of the doctrine have been controversial and unsettled. This Note has examined the application of the doctrine of promissory estoppel in two specific situations: construction bidding cases and cases in which the doctrine is used to overcome the statute of frauds provision of the UCC. The court of appeals in *Campbell* held that promissory estoppel was available to render a subcontractor's bid irrevocable based on the general contractor's detrimental reliance on the subcontractor's bid. The court held further that promissory estoppel was available to overcome the statute of frauds provision of the UCC. Although the holdings are consistent with the view of most legal authorities and the majority of other jurisdictions, the court's decision expanded the use of the doctrine in North Carolina. The holdings in *Campbell*, however, represent a logical extension of the doctrine of promissory estoppel in North Carolina law. Permitting the use of promissory estoppel in construction bidding cases provides the courts with a useful doctrine for achieving equitable results in these often troublesome cases.

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122. See *supra* note 67 and accompanying text. In *Rubish*, 306 N.C. at 433, 293 S.E.2d at 759, the statute of frauds had been invoked to exclude testimony that allegedly demonstrated the oral modification of a lease. The North Carolina Supreme Court found that the evidence arguably indicated an implied promise to forego the notice requirement and that such a promise was enforceable only if it induced detrimental reliance by the defendant notwithstanding the writing requirement of the Statute of Frauds. The North Carolina Supreme Court concluded that RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 10, § 139 was consistent with North Carolina cases that recognized exceptions to the Statute of Frauds.

123. *Rubish*, 306 N.C. at 433, 293 S.E.2d at 759; see *supra* note 122.

124. *Rubish*, 306 N.C. at 433, 293 S.E.2d at 759; see RESTATEMENT (SECOND) OF CONTRACTS §§ 90, 139 (1981).

125. See *supra* notes 89-93 and accompanying text.

126. *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 342 (Iowa 1979). One widely cited and highly controversial case, *C. R. Fedrick Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977), is *contra*.