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Metzger and Phillips: Promissory Estoppel and Section 2-201 of the Uniform Commercial C

PROMISSORY ESTOPPEL AND SECTION 2-201 OF THE UNIFORM COMMERCIAL CODE

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I. INTRODUCTION

ALMOST FROM THE TIME OF ITS ENACTMENT in 1677,[1] the Statute of Frauds [2] has been attacked for its tendency to generate at least as much "fraude and perjurie" as it has prevented.[3] And since its enactment, the courts have employed various legal devices in seeking to minimize the Statute's potential for working injustice.[4] Prominent among these judicially-created doctrines are promissory estoppel and its predecessor, equitable estoppel. The use of estoppel principles to circumvent the Statute has been resisted, however, by both courts [5] and commentators [6] contending principally that this practice would effect the Statute's practical abrogation. These tensions are amply apparent in the cases dealing

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1. For an interesting account of the uncertainty surrounding both the authorship and the date of enactment of the Statute, *see* Costigan, *The Date and Authorship of the Statute of Frauds,* 26 HARV. L. REV. 329 (1913). For a discussion of the various drafts of the bill and the insight they give to interpreting the Statute, *see* Hening, *The Original Drafts of the Statute of Frauds (29 Car. II c. 3) and Their Authors,* 61 U. PA. L. REV. 283 (1913).

2. An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. II, c. 3.

3. *See, e.g.,* Child v. Godolphin, 21 Eng. Rep. 181 (1723); Stephen & Pollock, *Section Seventeen of the Statute of Frauds,* 1 L.Q. REV. 1 (1885); Sunderland, *A Statute for Promoting Fraud,* 16 COLUM. L. REV. 273 (1916).

4. *See* Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds,* 44 FORDHAM L. REV. 114, 115-16 (1975). "Among [the exceptions to the strict operation of the Statute] are (1) the doctrine of part performance, (2) the imposition of constructive trusts, (3) quasi-contracts, (4) the presence of fraud or mistake, (5) the main purpose rule, (6) the joint obligor rule and (7) equitable estoppel." *Id.* (footnotes omitted). *See generally* 2 A. CORBIN, CORBIN ON CONTRACTS §§ 335-41, 361 (1950); Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form,* 43 FORDHAM L. REV. 39, 72-75 (1974).

5. *See notes* 76-93, 119, 125-29 and accompanying text *infra.*

6. *See, e.g.,* Lilienthal, *Judicial Repeal of the Statute of Frauds,* 9 HARV. L. REV. 455 (1896).

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with the applicability of estoppel principles to situations involving section 2-201 of the Uniform Commercial Code (U.C.C. or Code), a modernized derivation of the original Statute's provision covering certain sales of goods.[7] This remarkably incoherent body of case law exhibits considerable judicial confusion both as to the nature of estoppel doctrine and its applicability to section 2-201.

The intent of this article is to examine the status of estoppel in section 2-201 cases and to recommend that the use of estoppel in such cases be expanded. Initially, the original Statute's provision regarding the sale of goods,[8] its successor in the Uniform Sales Act,[9] and section 2-201 itself will be described.[10] Next, the article will focus on how estoppel principles came to be applied to section 2-201's precursors,[11] followed by a descriptive treatment of section 2-201 case law dealing with estoppel in the Code context.[12] Finally, the article will conclude with an investigation of the major points of law and policy upon which any ultimate resolution of estoppel's application must rest, and with the assertion that the arguments in opposition to this application are not, on the whole, compelling.[13]

II. THE STATUTE OF FRAUDS

A. *The Original Statute*

At the time of the passage of the Statute of Frauds, the law of contract was in its infancy and little understood.[14] A great danger existed that defendants in contract cases would be legally bound to honor obligations they had never in fact assumed.[15] The law of evidence barred the testimony of any persons having an interest in the outcome of the case, thus excluding any testimony by the parties.[16] In addition, courts had little control over jury verdicts since jurors were free to disregard the evidence presented at trial

7. *See* notes 184-219 and accompanying text *infra.*

8. *See* notes 14-33 and accompanying text *infra.*

9. *See* notes 34-40 and accompanying text *infra.*

10. *See* notes 41-75 and accompanying text *infra.*

11. *See* notes 76-183 and accompanying text *infra.*

12. *See* notes 184-220 and accompanying text *infra.*

13. *See* notes 220-74 and accompanying text *infra.*

14. *See* Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds,* 79 U. PA. L. REV. 440, 441 (1931).

15. *Id.*

16. *See* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 387-89 (1924).

and to base their decision on their own knowledge of the facts.[17] These factors tempted plaintiffs "to procure perjured testimony, and exposed defendants to outrageous liabilities . . . ." [18]

To protect defendants from the possibility of perjury and "to curb the power of juries," [19] the authors of the Statute elected to require written evidence of several classes of contracts and promissory obligations.[20] The provision of the Statute of concern here, section 17, provided:

> And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares and merchandizes, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.[21]

The Statute has been a constant source of controversy and the genesis of an incredible volume of litigation.[22] Numerous commentators have long suggested that modern developments in the

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17. *See id.* at 388. Holdsworth explained that

> the medieval method of controlling the jury by writ of attaint was obsolete, the sixteenth and early seventeenth century method of controlling it by fine or imprisonment had been decided by *Bushell's Case* to be illegal, and the modern device of getting an order for a new trial, when the verdict was clearly against the weight of the evidence, was in its infancy.

Id. (footnotes omitted).

18. Willis, *The Statute of Frauds—A Legal Anachronism,* 3 IND. L.J. 427, 430 (1928).

19. Summers, *supra* note 14, at 458.

20. Most important among the classes were contracts involving an interest in land (except leases not exceeding three years), promises by an executor or administrator to answer for damages out of his personal estate, promises by persons to pay the debts of another, contracts made on consideration of marriage, contracts not capable of execution within one year of their making, and contracts for the sale of goods of a value exceeding ten pounds. Summers, *supra* note 14, at 440-41. For a more extensive summary, *see* 6 W. HOLDSWORTH, *supra* note 16, at 384-87.

21. An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. II, c. 3, § 17.

22. "There is no other statute that has been the source of so much litigation." J. SMITH, THE LAW OF FRAUDS 327 (1907).

law of evidence[23] and contracts,[24] coupled with the increased control over jury verdicts exercised by modern courts,[25] have rendered obsolete the major reasons for its promulgation, and have called for its repeal.[26] The distinctions embodied in section 17 have been a special target for criticism, with questions being raised concerning both the rationale for the section's differentiation between contracts for the sale of goods and other types of contracts,[27] and the justification for requiring written evidence only of those contracts involving goods priced above the prescribed monetary limit.[28]

The most significant criticism of the Statute, however, has been its potential for creating unjust results. Parties, perhaps due to ignorance of the Statute or of its applicability to their agreement,[29] in fact may have entered into an oral agreement whose proof subsequently is barred by their failure to satisfy the Statute's writing requirement.[30] In modern times, defendants probably have used the Statute more often to avoid performing obligations they willingly assumed than to defend against fictitious agreements fabri-

23. *See* Stephen & Pollock, *supra* note 3, at 6 (describing the seventeenth section of the statute as "a relic of times past when the best evidence on such subjects was excluded on a principle now exploded").

24. *See* Willis, *supra* note 18, at 431. Willis observed that "[i]f our modern contract law had existed in the seventeenth century, there probably would have been no fourth and seventeenth sections of the Statute of Frauds at least." *Id.*

25. *See id.* at 430. "[W]ith the control exercised by the courts over juries in modern times the danger that juries will hold people liable on promises they never made is better protected by such court control than by a Statute of Frauds . . . ." *Id.*

26. Justice Stephen recommended that "it should be thrown out of the window—that the 17th section should be repealed, and the cases upon it be consigned to oblivion." Stephen & Pollock, *supra* note 3, at 5.

27. *See id.* at 4-5.

28. One commentator noted:

> When the reason for the Statute of Frauds is considered, there certainly is no good reason . . . for holding that an oral promise to sell a horse for one dollar under the price limit is good, but that an oral promise to sell it for one dollar over is bad; . . . . A man is no more liable in the one case than in the other to be held on a promise he never made.

Willis, *supra* note 18, at 443. Willis observed somewhat humorously that "[w]hether a limit is set because of the belief that people are more liable to lie about large transactions, or because the people who deal in large transactions are more liable to be liars, is also probably not of much importance." *Id.*

29. "In the great mass of cases the contracting party is as unconscious of the existence of the Statute of Frauds as of the pressure of the atmosphere; . . . ." Stephen & Pollock, *supra* note 3, at 3.

30. As one early critic observed: "The great question in all these cases . . . is not, will some one be held liable on a promise he has never made; but . . . will some one, because of the Statute, be able to escape liability on a promise he has made but which he has not put in writing . . . ." Willis, *supra* note 18, at 539.

cated by perjurious plaintiffs.[31] This potential for injustice has led to conclusions that the Statute's writing requirement is not well-suited to combatting fraud[32] and suggestions that other, more efficacious, means are available for dealing with the evidentiary problems associated with oral agreements.[33]

B. *The Uniform Sales Act*

Despite the heavy criticism, the Statute's writing requirement has continued to display a measure of vitality in our legal system. In the sale of goods area, section 4 of the Uniform Sales Act retained the writing requirement for contracts "of the value of five hundred dollars or upwards,"[34] and also adopted the original

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31. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2-8, at 74 (2d ed. 1980). White and Summers observe:

> The possibility that plaintiffs must conjure up forged writings and perjured oral contracts out of whole cloth is unreal. These plaintiffs would be most unlikely to survive cross-examination, motions for directed verdict, and a jury's own scrutiny. But the possibility that defendants might get out of actual contracts simply for lack of a signed writing is not unreal at all.

Id.

32. *See, e.g., id.* "A true 'means to an end' surely should not serve commonly as a means to disserve that end either. Yet, centuries of experience and tons of case law testify that a statute of frauds can be an instrument of perjury and fraud." *Id.* (footnote omitted).

33. *See, e.g.,* Summers, *supra* note 14, at 464 (plaintiff seeking to establish oral contracts should be held to the "beyond a reasonable doubt" standard of proof); Note, *Equitable Estoppel and the Statute of Frauds in California,* 53 CALIF. L. REV. 590, 609 (1965) (defendants should be required to deny the existence of an oral contract as a prerequisite to raising the Statute as a defense). *See also* 2 A. CORBIN, *supra* note 4, § 275, at 13.

34. UNIFORM SALES ACT § 4(1) [hereinafter cited as U.S.A.]. The full text of § 4 reads:

> (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.
>
> (2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.
>
> (3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods,

Statute of Frauds'[35] recognition of part payment or part acceptance as exceptions to the writing requirement.[36] The Sales Act's only major deviation from section 17 of the Statute was its exemption of contracts for specially manufactured goods,[37] a result which had already been achieved by judicial decision in some states.[38] Thus, section 4 of the Sales Act was subject to much the same criticisms as the original Statute. Corbin, in commenting on the proposed Uniform Commercial Code, looked back on the judicial experience with section 17 and its Sales Act counterpart and concluded:

> 1. that belief in the certainty and uniformity in the application of any presently existing statute of frauds is a magnificent illusion; 2. that our existing judicial system is so much superior to that of 1677 that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, 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; [and] 4. that when the courts enforce detailed formal requirements they foster dishonest repudiation without preventing fraud; . . . .[39]

Parliament evidently reached similar conclusions when in 1954 it repealed section 17 and all but two of the remaining sections of the original Statute.[40]

C. *The Uniform Commercial Code*

The authors of the Uniform Commercial Code, however, elected to keep "the sprit of '77 alive in section 2-201 of the Code,"[41] which provides as follows:

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expresses by words or conduct his assent to becoming the owner of those specific goods.

Id. § 4. For a textual treatment of § 4 of the Uniform Sales Act, *see* L. VOLD, HANDBOOK OF THE LAW OF SALES §§ 13-22 (2d ed. 1959).

35. For the pertinent text of the Statute of Frauds, *see* text accompanying note 21 *supra.*

36. *See* U.S.A. § 4(1); note 34 *supra.*

37. *See* U.S.A. § 4(2); note 34 *supra.*

38. *See, e.g.,* Yoe v. Newcomb, 33 Ind. App. 615, 617-18, 71 N.E. 256, 257-58 (1904) (dictum); Goddard v. Binney, 115 Mass. 450, 454-55 (1872).

39. Corbin, *The Uniform Commercial Code–Sales; Should It Be Enacted?,* 59 YALE L.J. 821, 829 (1950).

40. Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3 Eliz. II, c. 34. The writing requirement was retained in the case of contracts for the sale of land and promises to answer for the debt, default or miscarriage of another. *Id.*

41. J. WHITE & R. SUMMERS, *supra* note 31, § 2-1, at 51.

> (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
>
> > (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 (Section 2-606).[42]

The Code's drafters retained the writing requirement "because they saw it as a means to the end of combatting perjured testimony in contract cases."[43] They were not unmindful, however, of the

42. U.C.C. § 2-201.

43. J. WHITE & R. SUMMERS, *supra* note 31, § 2-1, at 51.

historically demonstrated potential for fraud inherent in a writing requirement, and included in section 2-201 several features designed "to make the repudiation of genuine [oral] contracts less likely to be successful while at the same time in no way increasing the probability of successful fraud." [44]

Subsection 2-201(1) follows the pattern established in the Sales Act by requiring a writing for contracts involving the sale of goods "for the price of $500 or more." [45] The retention of a dollar amount as the functional criterion for the Statute's application exposes the Code to the same criticism previously directed at the Sales Act and section 17.[46] In addition, a study conducted by the Yale Law Journal (Yale Study),[47] the only extant empirical study of actual business practice concerning the reduction of oral agreements to written form, indicates that the dollar amount device may not be consonant with commercial reality.[48]

The major change provided by subsection 2-201(1) is its clear relaxation of the writing requirement. The three elements necessary to satisfy subsection 2-201(1) are that the writing "indicate that a contract for sale has been made between the parties," [49] be "signed by the party against whom enforcement is sought or by his authorized agent or broker," [50] and indicate the quantity of goods sold.[51] The Code also indicates that a writing sufficient to satisfy subsection

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44. Corbin, *supra* note 39, at 829.

45. *See* text accompanying note 42 *supra*. Unlike § 4 of the Uniform Sales Act, U.C.C. § 2-201 does not apply to choses in action. The statute of frauds for sales of this type is covered by U.C.C. § 1-206.

46. *See* note 28 *supra*.

47. *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices,* 66 YALE L.J. 1038 (1957).

48. *Id.* at 1057-58. Only 18% of the 65 firms surveyed regularly delayed commencing manufacture of orally ordered goods until receipt of written confirmation of the order because the order was over the $500 limit. *Id.* Sixty-eight per cent indicated their reliance policy was in no way related to the amount of the order and 6% indicated that the larger the amount, the more likely they were to act upon an oral order. *Id.* at 1057.

49. U.C.C. § 2-201, Comment 1 indicates that the writing need only "afford a basis for believing that the offered oral evidence rests on a real transaction."

50. U.C.C. § 1-201(39) defines signed as "any symbol executed or adopted by a party with present intention to authenticate a writing." Thus, the Code "deformalizes" the signature requirement. J. WHITE & R. SUMMERS, *supra* note 31, § 2-4, at 59. *See, e.g.,* Automotive Spares Corp. v. Archer Bearings Co., 382 F. Supp. 513, 515 (N.D. Ill. 1974) (letterhead); A & G Constr. Co. v. Reid Bros. Logging Co., 547 P.2d 1207, 1216 (Alaska 1976) (typed name).

51. The requirement of a quantity term stems from section 2-201(1)'s statement that "the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." U.C.C. § 2-201(1). Even the quantity term need not be accurately stated, but recovery is limited to the amount stated. *See* U.C.C. § 2-201, Comment 1.

2-201(1) need not contain all the material terms of the parties' agreement,[52] as some earlier cases have required.[53] Although neither the original Statute of Frauds[54] nor the Sales Act[55] expressly required the incorporation of every material term of the parties' agreement as a hallmark of a satisfactory writing, courts had engrafted this requirement onto the statutory language, "mak[ing] it possible for a dishonest contractor to admit the making of the contract and yet to repudiate it; indeed, even to go so far as to make proof themselves of the terms of the contract that they had made in order to repudiate the very memorandum that they had signed."[56] This form of injustice is no longer possible under the Code.[57]

Subsection 2-201(2) seeks to prevent another type of fraud made possible by the requirement under the Sales Act[58] and section 17[59] that only the party to be charged need sign the writing. Although it seemed sensible not to require the signature of the moving party who was willing to testify under oath that a contract existed, this provision enabled unscrupulous parties who received confirmatory memoranda from those with whom they dealt to await market developments before deciding whether to perform under an oral contract of sale.[60] For example, if the market price at the time and place set for delivery of the goods exceeded the contract price, the seller could refuse to perform and could raise the Statute as a defense. If the market price dropped below the contract price, however, the seller could enforce the agreement against the buyer because the latter, having signed the confirmatory memorandum, had no defense under the Statute. Subsection 2-201(2) reduces this possibility of fraudulent speculation by denying the protection of the

52. U.C.C. § 2-201, Comment 1 states that the writing need not indicate which party is the buyer and which party is the seller and may omit such terms as price, time and place of payment and delivery, the general quality of the goods, and any particular warranties. White and Summers observe that "the main theory of the writing sufficient under 2-201(1) is not that it conclusively proves the existence of the contract but that it affords the trier of fact something reliable to go on in addition to the mere oral testimony of the plaintiff." J. WHITE & R. SUMMERS, *supra* note 31, § 2-4, at 61.

53. *See* L. VOLD, *supra* note 34, at 127 & n.27.

54. For the text of the original statute, *see* text accompanying note 21 *supra.*

55. For the text of § 4 of the Uniform Sales Act, *see* note 34 *supra.*

56. Corbin, *supra* note 39, at 830-31.

57. On this general point, *see* the discussion of subsection 2-201(3)(b), at notes 68-72 and accompanying text *infra.*

58. For the pertinent text of the Sales Act, *see* subsection (1), at note 34 *supra.*

59. For the text of section 17, *see* text accompanying note 21 *supra.*

60. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 31, § 2-3, at 55; Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ. L. REV. 205, 211 (1978).

Statute to a merchant[61] who receives such a confirmatory memorandum and fails to give "written notice of objection to its contents" within ten days of receipt. Thus, even though subsection 2-201(1) requires that an acceptable writing be "signed by the party against whom enforcement is sought," under subsection 2-201(2), such a writing becomes effective against both parties.[62]

Subsection 2-201(3) incorporates three provisions that facilitate the enforcement of an oral contract in the absence of the writing which would satisfy 2-201(1). Each of these provisions deals with conduct which evidences the existence of a contract and each, in varying degrees, prevents fraudulent use of the Statute.[63] Subsection 2-201(3)(a) follows the Sales Act approach of exempting specially manufactured goods from the writing requirement,[64] but differs from the Sales Act in two significant respects. It is broadened to include recognition of seller reliance not only by specially manufacturing goods but also by making commitments to procure specially manufactured goods from others.[65] The reliance exception is narrowed, however, by requiring a substantial change of position

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61. Subsection 2-201(2) applies to sales only "between merchants." *See* text accompanying note 42 *supra.* Subsection 2-104(1) defines merchant as

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-104(1). The limitation of subsection 2-201(2) thus recognizes the business practice of sending confirming memoranda of oral agreements, while excluding sales of goods between other parties who might not be familiar with the need to object. *See* Edwards, *supra* note 60, at 211.

62. U.C.C. § 2-201, Comment 3 indicates that the only effect of a failure to reply to a confirming memorandum is to eliminate the Statute of Frauds defense. The party seeking to enforce the contract still has the burden of proving that an oral agreement was made prior to sending the written confirmation.

63. White and Summers, in referring to subsections 2-201(3)(a), (b), and (c), observe:

> [E]ach has this in common: it is a kind of special indicator that a contract, albeit oral, was in fact made. Sellers do not produce custom-made goods just to pass the time of day. Parties do not admit contracts lightly in open court, nor do they ordinarily confer gratuitous benefits on others, except perhaps at Christmas.

J. WHITE & R. SUMMERS, *supra* note 31, § 2-5, at 65. For a corresponding view regarding the purpose of the 2-201(1) writing requirement, *see* note 52 *supra.*

64. *See* notes 37-38 and accompanying text *supra.*

65. *See* text accompanying note 42 *supra.* The language of the Uniform Sales Act expressly exempts only contracts where "the goods are to be manufactured *by the seller* especially for the buyer." U.S.A. § 4(2) (emphasis added). The Code exempts contracts where the seller "has made either a substantial beginning of their manufacture or commitments for their procurement." U.C.C. § 2-201(3)(a). *See also* Edwards, *supra* note 60, at 211.

by the seller before receiving notice of repudiation by the buyer.[66] Clearly, subsection 2-201(3)(a) emphasizes protecting sellers' reliance, albeit only in situations where their reliance provides good evidence of the existence of a contract. The Yale Study indicates that few sellers may benefit from this protection, however, since oral orders for specially manufactured goods are less likely to induce reliance than oral orders for stock goods.[67]

Subsection 2-201(3)(b) follows the lead of some earlier cases [68] by denying the Statute's protection to parties who admit in their "pleading, testimony or otherwise in court that a contract for sale was made." [69] This removes what had previously been one of the most galling aspects of the Statute's writing requirement: the ability of a defendant to raise the Statute as a defense while admitting that he had in fact entered into an oral contract with the plaintiff.[70] The language of the subsection apparently still allows a defendant seeking to avoid a contract he actually made to remain silent with

66. U.C.C. § 2-201(3)(a). "Under the Sales Act, once it was established that a contract was for specially manufactured goods, the contract was enforceable even though manufacturing had not started. The Code modified this principle by providing that the oral contract is not enforceable unless the seller has acted in reliance on the oral contract before notice of repudiation is received. Such reliance strengthens the evidence of a contract." Edwards, *supra* note 60, at 211. For cases construing § 2-201(3)(a)'s "substantial beginning before repudiation" requirement, *see, e.g.*, Perlmuter Printing Co. v. Strome, Inc., 436 F. Supp. 409, 414 (N.D. Ohio 1976); LTV Aerospace Corp. v. C.C. Bateman, 492 S.W.2d 703, 706 (Tex. Civ. App. 1973).

67. *Yale Study, supra* note 47, at 1057. The *Yale Study* found that only 15% of the manufacturers surveyed indicated that they were more likely to start production on an oral order for special goods than for stock goods, 43% indicated that the reverse was true, and 29% indicated that they made no distinction in this regard between orders for special or stock goods. *Id.* Of course, one can argue that the harm flowing from denying the enforcement of a contract for special goods is greater than that flowing from a similar denial in the case of stock goods, and that this alone is enough to justify the exception for specially manufactured goods. Also, performance with respect to stock goods is admittedly of less evidentiary value than performance with respect to special goods.

68. *See, e.g.*, Trossbach v. Trossbach, 185 Md. 47, 42 A.2d 905 (1945) (trust in land enforceable if admitted in defendant's testimony); Zlotziver v. Zlotziver, 355 Pa. 299, 49 A.2d 779 (1946) (oral agreement enforceable if admitted in either pleadings or testimony).

69. U.C.C. § 2-201(3)(b). U.C.C. § 2-201, Comment 7 states that after an admission "the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of the truth of the facts so admitted and of nothing more; as against the other party, it is not evidential at all." For a thorough discussion of the current treatment of both voluntary and involuntary admissions under § 2-201(3)(b), *see generally* Note, *The Application of the Oral Admissions Exception to the Uniform Commercial Code's Statute of Frauds*, 32 U. FLA. L. REV. 486 (1980).

70. For example, the oral agreement might be admitted by the defendant to show that the writing did not contain all the material terms of the contract.

impunity concerning its existence.[71] It has been noted, however, that the language of 2-201(3)(b) is broad enough to prevent a defendant from winning the case at the pleading stage by demurring to the complaint and appending a sworn affidavit denying the making of an oral contract, since the subsection contemplates the possibility of an admission not only in a party's pleading but also by "testimony or otherwise in court." [72]

Subsection 2-201(3)(c), like the Sales Act and section 17, continues to recognize part payment or part acceptance as sufficient evidence of the existence of a contract to obviate the need for a writing.[73] Unlike its predecessors, however, 2-201(3)(c) only allows enforcement of the contract to the extent of the quantity received or paid for. This narrowing of the part payment/part acceptance exception protects defendants against fraudulent assertions that the parties contracted for an amount greater than they had in fact agreed to.[74]

Despite section 2-201's attempts to minimize fraudulent abuses of the Statute's writing requirement, defendants in cases not falling within the statutorily enumerated exceptions to the writing requirement may still use that requirement to avoid performing contracts they in fact freely assented to. Such use of the Statute may particularly harm those innocent plaintiffs who have substantially relied upon defendants' promises to perform. However, these plaintiffs may not necessarily be barred from attaining enforcement of their claims if they assert the doctrine of estoppel, a device which sometimes operated to bar the application of the original Statute of Frauds and section 4 of the Sales Act. The existing Code cases on point reflect, however, a great deal of confusion on this issue.[75] Before discussing estoppel under the U.C.C., its application to the Code's predecessors will be examined.

71. White and Summers suggest that a better course would have been to require that a party invoking the Statute make out at least a prima facie case that a contract does not exist. J. WHITE & R. SUMMERS, *supra* note 31, § 2-5, at 66.

72. *Id.* at 67. White and Summers acknowledge that such an interpretation possibly "cuts the heart right out" of the Code's writing requirement, since plaintiffs who are able to make profitable enough use of cross-examination of the defendant to get their case to the jury may then in reality get a decision based on whether the jury believes that the parties in fact had a contract, and not on the Statute of Frauds issue. *Id.* California did not adopt 2-201(3)(b) due to pleading problems and doubts over whether or not defendants could be compelled thereunder to testify about the existence of a contract. Note, *supra* note 33, at 609-10.

73. For the text of U.C.C. § 2-201(3)(c), *see* text accompanying note 42 *supra*.

74. *See* Corbin, *supra* note 39, at 831; Edwards, *supra* note 60, at 212-13.

75. *See* notes 184-219 and accompanying text *infra*.

III. PROMISSORY ESTOPPEL AND THE STATUTE OF FRAUDS

A. *Equitable Estoppel*

In order to limit the harsh effects which can flow from the unrestricted application of the Statute of Frauds, courts, under the guise of judicial "interpretation" [76] and through the creation of numerous exceptions,[77] have steadily eroded the scope of the Statute's operation.[78] Courts of equity were the first to employ such devices.[79] That equity should intervene to ameliorate the Statute's operation was consistent with equitable tradition, since the "courts of equity have always protected a person from the harsh operations of statutes." [80]

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76. *See* 2 A. CORBIN, *supra* note 4, at 3. Corbin observed:

> Such gain in the prevention of fraud as is attained by the statute is attained at the expense of permitting persons who have in fact made oral promises to break those promises with impunity and to cause disappointment and loss to honest men. It is this fact that has caused the courts to interpret the statute so narrowly as to exclude many promises from its operation on what may seem to be flimsy grounds.

Id. See also Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds,* 66 MICH. L. REV. 170, 171 n.7 (1967).

77. For a list of various exceptions to the Statute, *see* note 4 *supra.*

78. Summers, *supra* note 14, at 442. Summers noted:

> How many unjust suits have been prevented as a result of the statute cannot be estimated, but the reports are filled with cases where just claims have been defeated by its operation. This has resulted in a distorting of the statute, in order to prevent injustice, into the most inconceivable meanings, so that cases might be ruled to fall without its provisions.

Id.

79. The earliest means employed to avoid the operation of the Statute was the equitable doctrine of part performance, recognized since the Statute's enactment.

> [T]he statute's framers were thoroughly familiar with the part-performance problem, and the decisions which shortly after the Statute of Frauds settled the law that part-performance would make the oral contract for the sale of land enforceable in chancery, notwithstanding the statute, are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in the part-performance cases.

Costigan, *supra* note 1, at 344.

80. Summers, *supra* note 14, at 447. Indeed, one prominent historian of the Statute maintained that it was never intended to apply to the courts of equity, a view which, if accurate, indicates that the frequently expressed concerns about the abrogation of the Statute by the application of other equitable doctrines like estoppel may be misplaced. *See* Costigan, *supra* note 1, at 343-45. Costigan reasoned that

> [t]he judges who framed the Statute of Frauds were so anxious to tie the hands of juries and so possessed by the idea that the statute would not apply *ex proprio vigore* to chancery cases that they neglected to be as explicit in the wording of the statute as they should have been.

Id. at 344-45.

In cases involving outright fraud, the courts of chancery enforced oral contracts within the scope of the Statute under the theory that it was the supreme duty of equity to prevent fraud.[81] Of course, situations arose which did not involve fraud, but which occasioned severe hardship for the promisee by denying enforcement of a contract due to its failure to satisfy the Statute. In such cases, the doctrine of equitable estoppel, or estoppel in pais, began to be recognized as a device for defeating the application of the Statute on the ground that "the invocation of the statute would allow the perpetration of a moral fraud." [82] Equitable estoppel operated by preventing a person "from denying or asserting anything to the contrary of that which by the person's own deeds, acts, or representations has been set forward as the truth." [83] Apparently an outgrowth of the equitable maxim that "he who has committed inequity shall not have equity," [84] the use of equitable estoppel to circumvent the Statute was justified under the rationale that "by preventing the inequitable use of the Statute of Frauds, the doctrine of estoppel may be an aid in the ultimate function of the statute in preventing fraud." [85]

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81. *See* Wakeman v. Dodd, 27 N.J. Eq. 564 (1876). The theory in such cases is that "relief is afforded in equity because of the fraud, and not by virtue of the contract." *Id.* at 565 (dictum).

82. Summers, *supra* note 14, at 446. The classic elements of equitable estoppel have been stated as follows:

> 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. . . .
>
> 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; . . . .

3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 805, at 191-92 (5th ed. 1941) (emphasis in original). The equitable estoppel test also has been expressed in terms of whether the promisor's conduct inducing reliance was "unconscionable." *See* L. VOLD, *supra* note 34, at 93 & n.62. For application of this test in section 2-201 estoppel cases, *see* note 201 *infra.*

83. Annot., 56 A.L.R.3d 1027, 1041 (1974).

84. *Id.* at 1040-41.

85. Summers, *supra* note 14, at 447. Summers and others have argued that part performance was nothing more than a limited variant of equitable estop-

As a method of protecting the reliance interests of promisees, however, equitable estoppel was seriously limited by two aspects of its initial formulation. First, early interpretations of the doctrine required that plaintiffs prove actual fraudulent intent on the defendant's part.[86] By the end of the nineteenth century, however, most courts required only that plaintiffs prove a misrepresentation which would "work a fraud" on them if denied.[87] More significantly though, equitable estoppel has traditionally been held to apply only to misrepresentations of present or past facts,[88] and therefore was inapplicable in cases where the promisor's representation amounted solely to a promise of some future performance.[89] Initial applications of the estoppel principle to Statute of Frauds cases, therefore, only applied where the promisor had misrepresented the existence of a fact which would have eliminated the necessity for a writing[90] or had represented that a writing satisfying the Statute's requirements had in fact been executed.[91] This distinction between "facts" and promises was a largely artificial one,[92] and was capable of producing patently unfair results.[93]

pel. Summers concluded that "the part performance doctrine, long since accepted, in the last analysis, merely works as an extension of the principles of equitable estoppel." *Id.* The doctrines clearly overlap and examples abound of courts confusing their application. *See* Note, *Part Performance, Estoppel and the California Statute of Frauds,* 3 STAN. L. REV. 281, 282-83 & nn.11-15 (1951).

86. *See* Note, *supra* note 76, at 174 n.21.

87. *See* Note, *supra* note 85, at 290.

88. *See* Henderson, *Promissory Estoppel and Traditional Contract Doctrine,* 78 YALE L.J. 343, 376 (1969); Seavey, *Reliance Upon Gratuitous Promises or Other Conduct,* 64 HARV. L. REV. 913, 914 (1951).

89. *See, e.g.,* Bank of America v. Pacific Ready-Cut Homes, Inc., 122 Cal. App. 554, 562-63, 10 P.2d 478, 482 (1932); Fiers v. Jacobson, 123 Mont. 242, 251, 211 P.2d 968, 972-73 (1949); *In re* Watson's Estate, 177 Misc. 308, 317, 30 N.Y.S.2d 577, 586-87 (Surr. Ct. 1941).

90. *See* Note, *supra* note 33, at 595.

91. *See* Edwards, *supra* note 60, at 215. The Supreme Court of Pennsylvania has consistently and "categorically rejected the principle of equitable estoppel as a means of enforcing oral contracts falling within the Statute's scope." Note, *supra* note 76, at 180, *citing* Polka v. May, 383 Pa. 80, 84, 118 A.2d 154, 156 (1955) ("the principle of estoppel may not be invoked against the operation of the statute of frauds"). *See* Borrello v. Lauletta, 455 Pa. 350, 352, 317 A.2d 254, 255 (1974); Beers v. Pusey, 389 Pa. 117, 124, 132 A.2d 346, 350 (1957).

92. Seavey pointed out the difficulty of distinguishing between promises about the future and representations of present or past facts when he noted that "every statement of the future includes some statement of present facts." Seavey, *supra* note 88, at 922-23. Seavey also observed that "both statements concerning the future and . . . promises involve representations as to the present state of mind of the speaker . . . ." *Id.* at 914.

93. It is difficult to justify protecting promisees who rely on misrepresentations of fact while denying protection to those who rely on promises, since

B. *The Rise of Promissory Estoppel in the Statute of Frauds Context*

1. *The Doctrine's Early Development*

Twentieth century judges were less willing than their nineteenth century counterparts to tolerate the injustice that resulted from denying protection to parties who had relied upon promises.[94] The traditional view that reliance upon gratuitous promises was unreasonable seemed to deny reality and to ignore the promisor's part in inducing such reliance.[95] In order to protect the promisee's reliance, the estoppel concept was expanded[96] to include reliance on promises by the development of the doctrine of promissory estoppel.[97]

The origins of the promissory estoppel principle lie in several classes of cases in which courts protected plaintiffs who had detrimentally relied on promises.[98] The first open recognition of the

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"harm may result from expectable reliance upon the truth of the one or the performance of the other, if the representations are false." *Id.* at 914.

94. Summers, *supra* note 14, at 448 (footnote omitted). Summers asserted that "the analytical and historical schools of the past century have given way to the philosophical and sociological schools of the present and morality has re-asserted itself in the law." *Id.* *See also* G. GILMORE, THE DEATH OF CONTRACT 63-64 (1974). Gilmore observed:

> [M]any judges . . . were not prepared to look with stony-eyed indifference on the plight of a plaintiff who had, to his detriment, relied on a defendant's assurances without the protection of a formal contract. However, the new doctrine [the bargain test for consideration] precluded the judges of the 1900 crop from saying, as their predecessors would have said a half-century earlier, that the "detriment" itself was "consideration." They had to find a new solution, or, at least, a new terminology. In such a situation the word that comes instinctively to the mind of any judge is, of course, "estoppel" . . . .

Id.

95. Seavey, *supra* note 88, at 924-25. Seavey observed:

> Common experience leads us to believe that it is reasonable to rely on gratuitous promises. . . . [O]ne who makes a promise intending not to keep it misrepresents his intent and, as in other cases of deceitful misrepresentation, it should not be a defense that the defendant succeeded in taking advantage of the plaintiff's credulity.

Id. *See also* Henderson, *supra* note 88, at 373 ("the broad applicability of the estoppel concept in our law derives from the reaction of judges to the effects of misleading conduct").

96. Henderson reasons that, given the extant factors favoring increased protection of reliance interests, it was "inevitable that a rule of promissory estoppel would develop in recognition of the applicability of the estoppel principle to promises." Henderson, *supra* note 88, at 376.

97. The term "promissory estoppel" was apparently first used by Williston. *See* 1 S. WILLISTON, CONTRACTS § 139, at 308 (1st ed. 1921).

98. For an exhaustive treatment of the origins of promissory estoppel, *see* Boyer, *Promissory Estoppel: Principle from Precedents* (pts. I & II), 50 MICH. L. REV. 639, 873 (1952).

doctrine came in charitable subscription cases,[99] in which courts generally would enforce a promise which brought about action in reliance by the promisee.[100] Numerous cases also enforced oral promises to make gifts of land to promisees who subsequently had taken possession and made improvements, despite the absence of bargained-for consideration or a writing sufficient to satisfy the Statute of Frauds.[101] Early application of the promissory estoppel principle also occurred in cases involving gratuitous bailments,[102] gratuitous agency,[103] waivers,[104] rent reductions,[105] and a miscellany of cases including pensions and bonuses.[106]

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99. *See id.* at 644-53.

100. *See, e.g.,* University of S. Cal. v. Bryson, 103 Cal. App. 39, 283 P. 949 (1929) (university began construction of an administration building); Scott v. Triggs, 76 Ind. App. 69, 131 N.E. 415 (1921) (war chest distributed to various charities); First M.E. Church v. Howard's Estate, 133 Misc. 723, 233 N.Y.S. 451 (1929) (church purchased land and had an architect design a parish house).

101. *See, e.g.,* Clansky v. Flusky, 187 Ill. 605, 58 N.E. 594 (1900); Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Evenson v. Aamodt, 153 Minn. 14, 189 N.W. 584 (1922); Royer v. Borough of Ephrata, 171 Pa. 429, 33 A. 361 (1895). Circumvention of the Statute generally was achieved by analogy to the part performance principle, although part performance technically was applicable only to oral contracts to *sell* land. *See* Boyer, *supra* note 98, at 656. *See generally id.* at 653-65.

102. Two early English cases, one of which predates the Statute of Frauds, support the theory of promissory estoppel. *See* Coggs v. Bernard, 92 Eng. Rep. 107 (1703) (gratuitous bailment of casks of brandy to be delivered to a third party); Wheatley v. Low, 79 Eng. Rep. 578 (1623) (gratuitous bailment of 10 pounds to be delivered to a third party). *See generally* Boyer, *supra* note 98, at 665-74.

103. *See, e.g.,* First Nat'l Bank & Trust Co. v. Evans, 11 N.J. Misc. 19, 163 A. 667 (1932) (mortgagee promised to obtain fire insurance adequate to protect mortgagor's interest); Barile v. Wright, 256 N.Y. 1, 175 N.E. 351, 245 N.Y.S. 899 (1931) (mortgagee promised to obtain insurance for benefit of mortgagor); Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921) (insurance agent promised to obtain car insurance). *See generally* Boyer, *supra* note 98, at 873-83.

104. *See, e.g.,* Zarthar v. Saliba, 282 Mass. 558, 185 N.E. 367 (1933) (waiver of provision in construction contract requiring written change orders); Parish Mfg. Corp. v. Martin-Parry Corp., 293 Pa. 422, 143 A. 103 (1928) (waiver by buyer of strict adherence to contract delivery date). Boyer asserted that

> [c]haracteristic of [cases involving waiver] is the fact that in each instance the promisee has, in reliance upon the promise not to insist upon the performance of the condition, neglected or failed to perform it. Enforcement of the promise to "waive" the condition can be justified only on the basis of promissory estoppel.

Boyer, *supra* note 98, at 890 (citations omitted).

105. *See, e.g.,* Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650 (1934) (lessor agreed to reduce rent due to general business depression); Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938) (lessee started new business in reliance on lessor's promise to release him from partnership obligations under lease). In *Fried,* the Pennsylvania Supreme Court expressly applied the doctrine of promissory estoppel. *Id.* at 503, 196 A. at 42-43.

106. *See, e.g.,* Langer v. Superior Steel Corp., 105 Pa. Super. Ct. 579, 161 A. 171 (1932), *rev'd on other grounds,* 318 Pa. 490, 178 A. 490 (1935) (employee

2. The "Ancillary Promise" Limitation: Promissory Estoppel's Early Relation to the Statute of Frauds

Although in many early cases promissory estoppel frequently acted as a substitute for consideration, it soon began to be applied in the Statute of Frauds area. The turn of the century witnessed a number of Statute of Frauds cases[107] decided under the general rubric of estoppel which departed from equitable estoppel's traditional elements.[108] For our purposes, the most significant of these was the California Supreme Court's decision in *Seymour v. Oelrichs*,[109] a case involving a police captain plaintiff who gave up a secure position that included pension rights and the right to be discharged only for cause, to accept a ten-year oral contract to manage property for the defendants.[110] One of the defendants, who was later killed while in Europe, had orally promised the plaintiff to reduce the parties' agreement to written form upon returning from the trip.[111] The Court held that, due to the ancillary promise to reduce the agreement to writing, the surviving defendants were estopped from raising the Statute of Frauds as a defense.[112]

The result in *Seymour*, though ascribed by the court to the doctrine of equitable estoppel,[113] may be more appropriately designated as an application of the principles of promissory estoppel.[114]

relied on employer's promise to pay pension). *See generally* Boyer, *supra* note 98, at 883-88.

107. *See, e.g.*, Kingston v. Walters, 16 N.M. 59, 113 P. 594 (1911) (seller orally agreed to extend future payment date of debt); Perkiomen Brick Co. v. Dyer, 187 Pa. 470, 41 A. 326 (1898) (purchaser orally agreed to subscribe to stock).

108. For a discussion of the elements of equitable estoppel and their application, see notes 82 & 88-93 and accompanying text *supra*.

109. 156 Cal. 782, 106 P. 88 (1909).

110. *Id.* at 792, 106 P. at 93. Since the contract was not to be performed within one year, it was within the Statute of Frauds. *Id.* at 786, 106 P. at 90.

111. *Id.* at 792, 106 P. at 93.

112. *Id.* at 799-800, 106 P. at 96. The court was careful to point out that the plaintiff's part performance of the contract was irrelevant. *Id.* at 794, 106 P. at 93-94.

113. *Id.* at 800, 106 P. at 96.

114. The *Seymour* court recognized that equitable estoppel cases ordinarily distinguish between misrepresentations of fact and promises to do something in the future, but concluded that the defendants' promise to reduce the plaintiff's contract to writing combined with the plaintiff's resignation in full reliance on the promise justified the application of estoppel in order to prevent a manifest fraud. *Id.* at 797-800, 106 P. at 94-96. In commenting on *Seymour*, Summers concluded that "[i]t might have been better had the court called it a promissory estoppel because at the bottom the [misrepresentation of] fact is not there." Summers, *supra* note 14, at 454 (footnote omitted). It should be noted that the California Supreme Court subsequently extended *Seymour* to promises not

The *Seymour* holding was later sanctioned by a comment in the Statute of Frauds section of the *First Restatement of Contracts.*[115] Section 90 of the *Restatement*[116]—the general section concerning promissory estoppel—however, contained nothing, either in its express language or in the comments thereto, suggesting any broader applicability of promissory estoppel in Statute of Frauds cases. Accordingly, some modern courts have continued to restrict the application of promissory estoppel in Statute of Frauds cases to instances involving ancillary promises to reduce oral contracts to written form.[117] Theoretically, the Statute is only being indirectly defeated in such a case, since promissory estoppel is being used to enforce an ancillary promise which is not within the scope of the Statute, and which is not the underlying obligation.[118]

The reluctance of such courts to apply promissory estoppel to cases not involving ancillary promises may stem from their apprehension that broader application of the estoppel doctrine would result in the complete abrogation of the Statute.[119] Any idea that

to rely on the Statute as a defense. *See, e.g.,* Zellner v. Wassman, 184 Cal. 80, 86-87, 193 P. 84, 87 (1920).

115. *See* RESTATEMENT OF CONTRACTS § 178, Comment f (1932). Comment f provides:

> 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 nonexistence of other facts essential for the establishment of a right or a defence may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; *and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.*

Id. (emphasis added).

116. Section 90 provides: "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 (1932).

117. *See, e.g.,* 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement Sys., 432 F.2d 64, 65-66 (5th Cir. 1970) (applying Texas law); Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972). The Ninth Circuit concluded that § 90 was not addressed to the Statute of Frauds but to promissory estoppel as a substitute for consideration, except in the limited circumstance when the promise is to reduce the contract to writing. Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954).

118. The end result, of course, is the enforcement of the underlying oral obligation which did not satisfy the Statute of Frauds requirements. *See* Note, *supra* note 4, at 117; Note, *Promissory Estoppel, Equitable Estoppel and Farmer as a Merchant: The 1973 Grain Cases and the UCC Statute of Frauds,* 1977 UTAH L. REV. 59, 74.

119. *See* Note, *Promissory Estoppel and the Statute of Frauds in California,* 66 CALIF. L. REV. 1219, 1229 (1978).

the Statute affords promisors in such jurisdictions a significant degree of protection seems misplaced, however, since a person seeking to perjuriously establish the existence of an oral agreement otherwise within the scope of the Statute needs only to prevaricate concerning the existence of an ancillary oral promise to reduce the fictitious agreement to writing in order to avoid the Statute's requirements. Fears of the Statute's abrogation have also been a factor in jurisdictions which refuse to recognize promissory estoppel as a means for circumventing the Statute under any circumstances.[120] Accepting promissory estoppel would not result in the Statute's complete abrogation,[121] however, since it would continue to bar the enforcement of wholly executory oral contracts within its scope, as well as oral promises which have not occasioned sufficient reliance by promisees to justify the doctrine's application. Further, even if promissory estoppel did operate to defeat the Statute and to deprive promisors of whatever protection the writing requirement affords, it is doubtful whether this deprivation would amount to a severe loss.[122] In view of the numerous judicially-created exceptions to the Statute's operation,[123] a dishonest plaintiff could frequently "frame" a contract outside the Statute's scope.[124]

In addition to the contention regarding abrogation of the Statute, some courts have expressed the related concern that permitting promissory estoppel to circumvent the Statute would amount to a usurpation of legislative power.[125] This argument ignores several factors discussed previously. Equity has always had the power to ameliorate the harsh operation of statutes,[126] and the

120. *See, e.g.*, Kahn v. Cecelia Co., 40 F. Supp. 878, 880 (S.D.N.Y. 1941); Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492, 495 (Fla. App. 1965), *aff'd*, 190 So. 2d 777 (Fla. 1966). *See also* notes 185-91 and accompanying text *infra*.

121. It has been argued that the Statute's writing requirement is only necessary today if one believes that the judicial fact determination process is ineffective in reliably determining the existence of an oral agreement. *See* notes 23-26 & 31-33 and accompanying text *supra*.

122. *See* Summers, *supra* note 14, at 460. Summers observed that "there is a very serious doubt as to what protection the statute really does afford. Despite the lofty words about its glory that are so often pronounced, its protection, in most cases, is more illusory than real." *Id.* For a discussion of the level of protection afforded by the U.C.C.'s writing requirement, *see* notes 248-56 and accompanying text *infra*.

123. *See* note 4 *supra*.

124. *See* Summers, *supra* note 14, at 460.

125. *See* Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 779 (Fla. 1966). For a discussion of this argument in the Code context, *see* notes 237-38 and accompanying text *infra*.

126. *See* note 80 and accompanying text *supra*.

estoppel principle, which is as old as the Statute,[127] has long been used to circumvent the Statute's operation.[128] In addition, courts have played a major role in shaping the Statute's provisions ever since its enactment,[129] a fact which has prompted one prominent legal historian to observe that "[i]n one sense, the statute of frauds was hardly a statute at all. It was so heavily warped by 'interpretation' that it had become little more than a set of common-law rules, worked out in great detail by the common-law courts." [130] Thus, the suggestion that allowing promissory estoppel to prevent the Statute's operation would be an impermissible usurpation of the legislative function may be based upon a misunderstanding of the longstanding judicial practice of harmonizing the Statute's language and common law equitable doctrines.[131]

3. *Promissory Estoppel and the Statute Today*

Restricting the application of promissory estoppel to those cases involving an ancillary promise to reduce the parties' agreement to written form ignores one fundamental fact: the promisee who relies on a promise to perform suffers just as much from the denial of enforcement as the promisee who relies on a promise to reduce the agreement to writing.[132] In addition, even in ancillary promise cases, the promisee is, in reality, most likely relying upon the promise that the underlying agreement will be performed and not upon the ancillary promise. This fact, however, was not expressly [133]

127. *See* note 79 *supra.*

128. *See* notes 76-106 and accompanying text *supra.*

129. For a discussion of the judicial exceptions to the Statute's operation, *see* notes 76-79 and accompanying text *supra.*

130. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 246-47 (paperback ed. 1973).

131. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 19-48, at 738 (2d ed. 1977).

132. The ancillary promise requirement probably serves to obscure the true basis for preventing the Statute's application to such cases. One court has observed:

> It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. The policy behind enforcing an oral agreement which violated the Statute of Frauds [is] a policy of avoiding unconscionable injury . . . .

McIntosh v. Murphy, 52 Haw. 29, 35, 469 P.2d 177, 180 (1970) (oral employment contract for a period of more than one year).

133. In a few cases in the interim between *Seymour* and *Monarco v. LoGreco,* 35 Cal. 2d 621, 220 P.2d 737 (1950), courts had stretched the ancillary promise requirement in pursuit of just results. *See* Note, *supra* note 85, at 293-94.

recognized by the courts until the California Supreme Court's decision in *Monarco v. Lo Greco*.[134] In *Monarco*, a son, relying on promises by his mother and stepfather to leave him a major portion of their property, remained at home and worked on the family farm for twenty years.[135] Shortly before the stepfather died, however, he changed his will in order to leave his share of the property to a grandson from a previous marriage.[136] The court held that the plaintiff-grandson was estopped from relying upon the statute of frauds despite the fact that the case did not fall within the *Seymour* ancillary promise exception.[137] Concluding that equitable estoppel could properly be based upon a promisee's reliance on the promisor's promise to perform his part of their oral agreement, the court recognized that "[i]n reality it is not the representation that the contract will be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it." [138] Although the *Monarco* Court labeled the version of estoppel it applied as equitable, the decision is plainly based on promissory estoppel principles.[139] The *Monarco* estoppel rule was subsequently applied in other jurisdictions expressly recognizing the general proposition that promissory estoppel can serve to prevent the application of the Statute of Frauds.[140]

The trend toward allowing promissory estoppel to circumvent the Statute has gained considerable impetus from the promulgation of section 217A of the *Restatement (Second) of Contracts*, which provides in part:

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134. 35 Cal. 2d 621, 220 P.2d 737 (1950) (Traynor, J.).

135. *Id.* at 622, 220 P.2d at 739.

136. *Id.* at 623, 220 P.2d at 739.

137. *Id.* at 624-27, 220 P.2d at 740-42. The *Monarco* court characterized earlier cases which had refused to recognize estoppel as doing so either because a restitutionary remedy would adequately compensate the promisee or because no unconscionable injury would result from nonenforcement of the agreement. *Id.* at 623-24, 220 P.2d at 740.

138. *Id.* at 626, 220 P.2d at 741. After analyzing prior decisions, the court concluded that whenever unjust enrichment or unconscionable injury would have resulted from the Statute's application, "the doctrine of estoppel has been applied whether or not plaintiff relied upon representations going to the requirements of the statute itself." *Id.*

139. *See* notes 94-97 and accompanying text *supra*. *But see* Note, *supra* note 119, at 1221-22, where *Monarco* is described as allowing proof of detrimental reliance sufficient to establish promissory estoppel as a basis for equitable estoppel. *Id.* This view is the result of that author's belief that promissory estoppel can serve only as a consideration substitute. *Id.* at 1222.

140. *See, e.g.*, McIntosh v. Murphy, 52 Haw. 29, 36-37, 469 P.2d 177, 181 (1970); Alpark Distrib., Inc. v. Poole, 95 Nev. 605, 607-08, 600 P.2d 229, 230-31 (1979).

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.[141]

In addition to expressly authorizing the application of promissory estoppel to Statute of Frauds cases, section 217A contains evidentiary[142] and remedial[143] provisions that are likely to enhance the probability that promissory estoppel will gain wider recognition and to increase the likelihood that future applications of the doctrine will proceed in a more orderly, rational fashion.

Subection 217A(2)(c) directs courts to consider the degree to which the promisee's reliance or other evidence introduced at trial corroborates the existence of the alleged oral promise,[144] thus increasing the likelihood that the evidentiary purposes ordinarily served by the Statute's writing requirement will be satisfied. The result may be a wider acceptance of promissory estoppel as a device for circumventing the Statute, since it is likely that some courts have refused to recognize the doctrine's application because they were, in fact, unconvinced that the alleged oral agreement between the parties ever existed.[145]

Section 217A also addresses the issue of the proper measure of damages in promissory estoppel cases, a question which has generated

141. RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Drafts Nos. 1-7, 1973). Under subsection (1), enforcement of the promise is not mandatory and subsection (2) reads:

> (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.

Id. § 217A(2).

142. *See* notes 144-45 and accompanying text *infra.*

143. *See* notes 164-67 and accompanying text *infra.*

144. For the text of § 217A(2)(c), see note 141 *supra.*

145. *See* Note, *supra* note 118, at 82-83.

a great deal of confusion and controversy ever since the doctrine was first formally recognized. As a general rule, promissory estoppel has not been applied to cases in which injustice could be avoided by a quasi-contractual or quantum meruit recovery of the promisee's restitution interest.[146] This rule is based upon the traditional principle that equitable relief is only granted when legal remedies are inadequate,[147] and upon the idea that enforcement of the promise is unnecessary if justice can be served by returning the promisee to the status quo.[148] A quantum meruit recovery is not always adequate, however, because the promisee's loss of expenditures in reliance will often significantly exceed the value to the promisor of the promisee's reliance.[149] In such cases, promissory estoppel properly finds application.

Despite the fact that, in theory,[150] promissory estoppel protects the promisee's reliance interest,[151] the majority of courts granting relief based on the doctrine have awarded damages aimed at protecting the promisee's expectation interest [152] by fully enforcing the promisor's promise.[153] This treatment is the result of the concept that promissory estoppel cases are essentially contractual in nature [154] and of the traditional view that reliance-based damages were appropriate only in tort actions [155] since contract damages are restricted

146. *See* Fuller & Perdue, *Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 53-54 (1936). A promisee's restitution interest is equal to the value that the promisee, acting in reliance upon the promisor's promise, has bestowed upon the promisor. *Id.* *See also* Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 485-86 (1950).

147. Note, *supra* note 33, at 601.

148. Boyer, *supra* note 146, at 485.

149. *Id.*

150. *See* Note, *supra* note 119, at 1235.

151. A promisee's reliance interest is measured by the value of the promisee's actual change of position in reliance on the promisor's promise. The objective of awarding such a recovery is to place the promisee in as good a position as he occupied before the making of the promise. *See* Fuller & Perdue, *supra* note 146, at 54.

152. Expectation awards seek to place promisees in the same position as if the agreement had been performed. *Id.*

153. *See* Note, *supra* note 4, at 123 and cases cited at n.76 therein.

154. If promissory estoppel is merely utilized in order to substitute a missing element required by law for a binding contract, then full contractual damages are theoretically appropriate. *Id.* at 126, 124 n.77. For a contrasting analysis, *see* the discussion of promissory estoppel as an independent theory of recovery at notes 168-83 and accompanying text *infra*.

155. *See* Fuller & Perdue, *supra* note 146, at 90 n.61. Fuller and Perdue concluded, however, that despite the traditional view, contract damages have always contained an element of reliance. *Id.* at 89-96.

to restitutionary or expectation awards.[156] Also, in some cases an award of reliance damages may not adequately compensate a promisee.[157] In such cases it has been argued that a full contract damage award "satisfies . . . expectations which have been aroused justifiably." [158]

In other cases, however, fully enforcing a promise works an injustice on the promisor which would overshadow the loss to the promisee that would flow from non-enforcement because the value of the promisor's promise far exceeds the promisee's reliance losses.[159] The traditional view of promissory estoppel damages forces courts in such cases to choose between injustices. Faced with this unpalatable choice, some courts departed from the traditional view and awarded reliance-based damages,[160] while others refused to recognize promissory estoppel's applicability.[161] Numerous commentators have suggested that awarding promisees damages based on their reliance is, in many cases, the preferable approach.[162] It has also been suggested that limiting promissory estoppel recoveries to the amount of the promisee's reliance can operate to minimize the abrogation of the Statute of Frauds that otherwise flows from its avoidance through the application of promissory estoppel.[163]

By recognizing that the "remedy granted for breach is to be limited as justice requires," [164] section 217A(1) expressly sanctions

156. *See, e.g., id.* at 89-90; Note, *supra* note 119, at 1245.

157. This might be true, for instance, where there are extensive lost profits resulting from the promisor's failure to perform. *See* Note, *supra* note 4, at 129.

158. Boyer, *supra* note 98, at 663-64 (referring to specific performance of promises to convey land).

159. *See* Boyer, *supra* note 146, at 488-89 (referring to cases involving promises to secure insurance).

160. *See, e.g.,* Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 696, 133 N.W.2d 267, 274 (1965).

161. *See, e.g.,* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933); Comfort v. McCorkle, 149 Misc. 826, 828-32, 268 N.Y.S. 192, 194-98 (1933).

162. *See, e.g.,* Boyer, *supra* note 146, at 497. Boyer suggested that "[i]n many cases, partial enforcement will prevent injustice to the promisee without the injustice to the promisor that is often patent when complete enforcement is granted." *Id.*

163. *See* Note, *supra* note 119, at 1242. According to this view, limiting promisees to reliance-based recoveries avoids injustice to them without the complete circumvention of the Statute that results from a full expectation award. Promisees who fail to have their agreements reduced to written form are, therefore, penalized by the denial of a full contract recovery. Thus, the Statute would continue to encourage knowledgeable promisees to comply with the writing requirement. *Id.*

164. RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tent. Drafts Nos. 1-7, 1973).

the option of partially enforcing the promise under promissory estoppel theory and provides the flexibility needed to confront the remedial dilemmas discussed above.[165] For instance, while a comment to section 217A expressly recognizes the possibility of a reliance-based recovery,[166] the same comment also seems to indicate that full enforcement of the promisor's promise may be the preferred remedy in most Statute of Frauds cases.[167] In thus providing for a necessary degree of discretion on the question of damages, section 217A has removed a major obstacle from the path toward broader recognition of promissory estoppel as a device for barring the operation of the Statute.

C. *The Emergence of Promissory Estoppel as an Independent Theory of Recovery and its Implications for the Statute of Frauds*

Promissory estoppel's increasing application in the Statute of Frauds context has been paralleled in other areas of contract law. Traditionally, the doctrine has served only as a "consideration substitute," [168] but recent cases have applied promissory estoppel to failed contract negotiations [169] and indefinite agreements.[170] Ap-

165. Subsection 217A(2) lists five circumstances which are significant in determining whether or not the promise should be enforced. For the text of 217A(2), *see* note 141 *supra*.

166. RESTATEMENT (SECOND) OF CONTRACTS § 217A, Comment d (Tent. Drafts Nos. 1-7, 1973). Comment d provides in pertinent part: "In some cases it may be appropriate to measure relief by the extent of the promisee's reliance rather than by the terms of the promise." *Id.*

167. *Id.* Comment d states that "when specific enforcement is available under the rule stated in § 197, an ordinary action for damages is commonly less satisfactory, and justice then does not require enforcement in such an action." *Id.* This apparent preference for the contractual remedy is probably due to the fact that most cases occurring under Section 217A will plainly involve the existence of a contract, unlike some of the more controversial cases to which § 90 has recently been applied.

168. *See* notes 94-97 & 117 and accompanying text *supra*.

169. *See* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). In *Hoffman,* the defendant, through various agents, orally agreed to build and stock a store in consideration of the plaintiff's $18,000 investment. *Id.* at 686, 133 N.W.2d at 269. In reliance thereon, the plaintiff sold his bakery business, purchased the site for the new store, and made various incidental expenditures. *Id.* The deal later fell through prior to any written franchise agreement. *Id.* at 691, 133 N.W.2d at 271. The *Hoffman* court granted relief by applying promissory estoppel, despite the fact that the negotiations between the parties were not comprehensive enough to satisfy traditional requirements for a contractual offer. *Id.* at 698, 133 N.W.2d at 275. For a full discussion of *Hoffman, see* Henderson, *supra* note 88, at 358-60; 51 CORNELL L.Q. 351 (1966).

170. Wheeler v. White, 398 S.W.2d 93 (Tex. 1965). In *Wheeler,* a contract to secure a loan was held unenforceable because it failed to contain certain

parently abandoning the classical contract requirement that liability be founded upon definite expressions of mutual assent,[171] these decisions utilize promissory estoppel as a method of curing deficiencies in the offer and acceptance.[172] If this trend continues, reliance-based estoppel tests could replace the traditional contract standards for determining liability.[173] This development could lead to "contractual" liability being determined by a single promissory estoppel test, since there would be little practical difference between applying promissory estoppel independently to each element of a contract and applying it to the contract as a whole.[174] In line with this reasoning, and reflecting the views of commentators who have suggested that the reliance principle may be a basis of recovery separate from the contract,[175] some courts have recently treated promissory estoppel as a discrete theory of recovery and have discussed liability under reliance doctrine without any admixture of contract principles.[176] The continuation of this trend may eventually lead

essential elements regarding repayment and interest. *Id.* at 95. Despite the lack of a contract, the court applied promissory estoppel and allowed recovery for reliance damages. *Id.* at 97.

171. *See* J. CALAMARI & J. PERILLO, *supra* note 131, § 2-1, at 22.

172. For a suggestion that promissory estoppel might also come to displace the contract statute of limitations and the parol evidence rule, *see* G. GILMORE, *supra* note 94, at 66.

173. Allowing promissory estoppel to substitute for the offer, the consideration, and the writing required by the Statute of Frauds obviously has already diminished the force of traditional contract rules.

174. This would not be the case, of course, if the estoppel tests differed depending on the contractual element being displaced.

175. *See* Seavey, *supra* note 88, at 926. Seavey stated:

> Estoppel is basically a tort doctrine and the rationale of the section [§ 90] is that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise. The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment.

Id. See also Beale, *Gratuitous Undertakings,* 5 HARV. L. REV. 222, 225 (1891) (gratuitous undertakings should be classified as a separate area of personal rights distinct from tort and contract); Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799, 811 (1941) (promissory estoppel characterized as "not 'upholding transactions', but healing losses caused through broken faith"). Fuller also observed, with considerable foresight, that "occasionally reliance may appear as a distinct basis of liability, excluding the necessity for any resort to the notion of private autonomy." *Id.*

176. *See* Debron Corp. v. National Home Constr. Corp., 493 F.2d 352 (8th Cir. 1974) (applying Missouri law). In *Debron,* a general contractor and subcontractor orally agreed to terms which were included in the general contractor's bid. *Id.* at 354. After the general was awarded the contract, the sub refused to perform. *Id.* at 355. Before trial, the plaintiff voluntarily dismissed its contract claim, and the court held, nonetheless, that promissory estoppel could serve as a basis for a separate cause of action and that such a suit did not require proof of all of the elements necessary to a contract action. *Id.* at 357-58. *See also* Allen v. A.G. Edwards & Sons, 606 F.2d 84, 87 (5th Cir. 1979)

to what Grant Gilmore has called the "Death of Contract." [177] Even if this does not happen, however, the traditional contract framework will surely be affected by the future evolution of estoppel doctrine, and promissory estoppel itself tends to reflect and embody certain trends in twentieth century contract law.[178]

Recognition of promissory estoppel as an independent theory of recovery has also occurred in cases involving the Statute of Frauds. Recent decisions suggest that promissory estoppel claims are not barred by the Statute because they are not contractually based, and therefore are beyond the Statute's scope.[179] Such cases obviously represent a significant departure from the traditional reasoning which circumvents the Statute by enforcing an otherwise valid contract in order to prevent the injustice that would flow

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(applying Florida law to an oral promise concerning a brokerage contract); Northwestern Bank of Commerce v. Employer's Life Ins. Co. of America, — Minn. —, —, 281 N.W.2d 164, 164-66 (1979) (oral promise to notify assignee bank of premium default on life insurance policy).

177. *See* G. GILMORE, *supra* note 94. Gilmore termed the bargain-based classical contract framework and the reliance-oriented promissory estoppel theory as "Contract and anti-Contract." *Id.* at 61. He further noted:

> The most recent, and quite possibly the most important, development in the promissory estoppel or § 90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision. This line, if it continues to be followed, may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation. . . . By passing through the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory. . . . If we manage to get that far, the absurdity of attempting to preserve the nineteenth century contract-tort dichotomy will have become apparent . . . .

Id. at 90 (footnotes omitted). Assuming that this ever comes to pass, the residual area left to be covered by ordinary contract principles is obviously quite unclear. *See id.* at 72-90. Gilmore has suggested that the "wholly executory exchange where neither party has yet taken any action would seem to be the only situation in which it would be necessary to look to [classical bargain theory]." *Id.* at 72.

178. For a discussion of the tendency toward contract rules of some open-endedness and amenability to discretionary application, *see* R. UNGER, LAW IN MODERN SOCIETY 193-94, 196 (1976). *See also* U.C.C. § 2-204(1) (contract may be formed "in any manner sufficient to show agreement, including conduct"); § 2-204(3) (contract will not fail solely because terms have been left open); § 2-206 (acceptance in any manner reasonable, including beginning performance).

179. *See, e.g.,* Gruen Indus., Inc. v. Biller, 608 F.2d 274, 277-80 (7th Cir. 1979) (applying Wisconsin law) (considering recovery based on promissory estoppel despite dismissal of a contract claim barred by the Statute of Frauds); R.S. Bennett & Co. v. Economy Mechanical Indus., Inc., 606 F.2d 182, 188 (7th Cir. 1979) (applying Illinois law) (permitting assertion of promissory estoppel notwithstanding the Statute's bar to contract recovery); N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738-40 (D.C. Cir. 1963) (noting that the lack of a contractual obligation based on an oral agreement did not dispose of the promissory estoppel question).

from the Statute's operation.[180] Of course, it can be argued that there is little practical difference between allowing promissory estoppel to serve as a substitute for the Statute and using it as an independent theory of recovery, since the tests employed should be the same in either instance. But the trend toward making promissory estoppel an independent theory of recovery could have a definite impact on those courts seeking to avoid the Statute's often harsh and unjust results, but troubled by the apparent abrogation of the Statute and disregard of legislative will that circumvention via estoppel arguably entails.[181] With the availability of promissory estoppel as an independent cause of action, such courts have an obvious, if rather technical, escape device: to verbally proclaim the Statute's continuing vitality when applied to contractual claims, but to treat it as inapplicable to an estoppel-based attempt at recovery.[182] This reasoning could be buttressed by noting that the reliance required for successful invocation of promissory estoppel theory helps to fulfill the evidentiary purposes traditionally associated with the Statute.[183]

IV. PROMISSORY ESTOPPEL AND SECTION 2-201

A. *The Cases*

One operating without the dubious benefit of having perused the extant cases might assume that the application of promissory estoppel to section 2-201 of the Code was proceeding apace with its increasingly broad acceptance elsewhere. Since section 2-201 is fundamentally similar to its predecessors, the same arguments that justified the circumvention of section 17 of the original Statute and section 4 of the Sales Act by equitable and promissory estoppel should apply equally to section 2-201.[184] The cases demonstrate, however, that a substantial amount of judicial confusion exists concerning not only the applicability of promissory estoppel to cases under the Code, but also the distinction between equitable and

180. *See* note 82 and accompanying text *supra.*

181. For discussion of abrogation of the Statute and disregard of legislative will, *see* notes 119-31 and accompanying text *supra.*

182. *Cf.* Gruen Indus., Inc. v. Biller, 608 F.2d 274, 278-79 (7th Cir. 1979) (raising the Statute in the contract context but not in the estoppel context).

183. *See* notes 144-45 and accompanying text *supra. See also* Summers, *supra* note 14, at 459-60 ("it is almost inconceivable that anyone should materially change his position, so as to satisfy all the elements of an estoppel, on the expectation of recouping himself on a 'framed' contract").

184. *See* Edwards, *supra* note 60, at 221; notes 22-40 and accompanying text *supra.*

promissory estoppel. This section of the article presents an overview of the cases in point, followed by a discussion of the major issues they raise.

To begin, the courts differ significantly on whether or not estoppel should be applicable at all in the section 2-201 context. Several courts, employing a variety of arguments, have precluded recourse to estoppel where section 2-201 applies.[185] Perhaps the primary theory of exclusion is the literalistic assertion that section 2-201 does not by its terms allow recourse to any form of estoppel, and that the specifically listed exceptions are a complete statement of the conditions[186] under which the Statute of Frauds can be avoided.[187] Also prominent is the familiar assertion[188] that to allow estoppel to operate in the 2-201 context would effectively negate the Statute.[189] Courts also rely, without much analysis or discussion of policy, upon prior case law holding that no estoppel-type exception to the Statute of Frauds will be recognized.[190] Finally, in situations where prior state authority *supports* the use of estoppel in the Statute of Frauds context, some courts distinguish such precedents as occurring before enactment of the Code or as not involving the sale of goods.[191] Significantly, none of these courts even mentions section 1-103 of the Code, which in relevant part provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to . . . estoppel . . . shall supplement its provisions."[192] Nor do these courts discuss the numerous decisions which explicitly

185. Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978); Cox v. Cox, 292 Ala. 106, 111-12, 289 So. 2d 609, 613 (1974); C.G. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 40-41 (Ky. Ct. App. 1979). *See also* Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 543, 244 N.W.2d 86, 89-90 (1976) (equitable exception where fraud is present but not merely reliance to one's detriment).

186. *See* notes 58-74 and accompanying text *supra*. For the text of § 2-201, *see* text accompanying note 42 *supra*.

187. *See, e.g.*, Cox v. Cox, 292 Ala. 106, 111-12, 289 So. 2d 609, 613 (1974); C.G. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 40-41 (Ky. Ct. App. 1979).

188. *See* notes 119-22 and accompanying text *supra*.

189. *See, e.g.*, Cox v. Cox, 292 Ala. 106, 111-12, 289 So. 2d 609, 613 (1974); Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 542-45, 244 N.W.2d 86, 90 (1976).

190. *See* Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978) (applying Mississippi law); Cox v. Cox, 292 Ala. 106, 111-12, 289 So. 2d 609, 613 (1974).

191. *See* C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856-57 (9th Cir. 1977); C.G. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979).

192. U.C.C. § 1-103.

rely on section 1-103 as a basis for allowing the *potential* use of estoppel in situations governed by section 2-201.[193]

Despite these exceptions, the substantial weight of extant authority supports the proposition that some form of estoppel is applicable to section 2-201 cases. Although a few of the cases involve only the older equitable version of estoppel,[194] the tendency, especially pronounced in recent cases, has been to label the type of estoppel employed as promissory.[195] In addition, some courts have concluded that both promissory and equitable estoppel apply.[196] From a plaintiff's standpoint, promissory estoppel is obviously the preferable doctrine as it does not necessitate the more stringent proof of the misrepresentation of fact required by equitable estoppel.[197]

If one or both forms of estoppel are applicable to the U.C.C. Statute of Frauds, what remains to be examined is the actual impact of estoppel as a practical device for avoiding the Statute. At this writing, estoppel has been employed successfully—either in upholding a lower court judgment or as a basis for remand—in about one-half of the reported cases involving its application in the 2-201 context.[198] This split in the courts' use of estoppel doctrines is

193. *See, e.g.*, Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 341-42 (Iowa 1979); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 177-79, 547 P.2d 323, 329 (1976); Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 326-27, 232 N.W.2d 921, 923 (1975); Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 813 (N.D. 1976); Farmers Elevator Co. v. Lyle, 90 S.D. 86, 91-93, 238 N.W.2d 290, 293-94 (1976).

194. *See, e.g.*, Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 548-50, 369 A.2d 1017, 1029 (1977); Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 326-27, 232 N.W.2d 921, 923 (1975). *See also* Farmers Elevator Co. v. Lyle, 90 S.D. 86, 93-94, 238 N.W.2d 290, 293-94 (1976) (applying equitable estoppel but also noting the possibility of promissory estoppel).

195. *See, e.g.*, Jenkins & Boller Co. v. Schmidt Iron Works, Inc., 36 Ill. App. 3d 1044, 1046-48, 344 N.E.2d 275, 277 (1976); Meylor v. Brown, 281 N.W.2d 632, 634-35 (Iowa 1979); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 176-80, 547 P.2d 323, 329-30 (1976); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 740-41 (N.D. 1976); Darrow v. Spencer, 581 P.2d 1309, 1312 (Okla. 1978).

196. R.S. Bennett & Co. v. Economy Mechanical Indus., Inc., 606 F.2d 182, 186-89 (7th Cir. 1979); Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 419-20, 493 P.2d 1220, 1224-25 (1972); Del Hayes & Sons v. Mitchell, 304 Minn. 275, 281-86, 230 N.W.2d 588, 593-95 (1975); Wilke v. Holdredge Coop. Equity Exch., 200 Neb. 803, 804-06, 265 N.W.2d 672, 674-75 (1978).

197. *See* notes 87-91 and accompanying text *supra*. *See also* J. CALAMARI & J. PERILLO, *supra* note 131, § 11-34, at 445.

198. R.S. Bennett & Co. v. Economy Mechanical Indus., Inc., 606 F.2d 182, 186-89 (7th Cir. 1979); Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207 (8th Cir. 1976); Jenkins & Boller Co. v. Schmidt Iron Works, Inc., 36 Ill. App. 3d 1044, 1046-48, 344 N.E.2d 275, 277 (1976); Meylor v. Brown, 281 N.W.2d 632, 634-35 (Iowa 1979); Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 341-44 (Iowa 1979); Decatur Coop. Ass'n v. Urban, 219 Kan.

further reflected in the manner in which legal standards for each form of estoppel are verbalized. Historically, the various suggested tests for applying equitable estoppel have always been fairly complex and confusing [199] and the relevant section 2-201 cases also differ somewhat in the standards they prescribe.[200] In dealing with the common element of reliance by the promisee, some courts emphasize the promisee's conduct by requiring "unconscionable hardship and loss," [201] while other courts emphasize the promisor's conduct by requiring fraudulent behavior.[202] Most of the equitable estoppel decisions [203] state the traditional "past or present fact" test,[204] although one decision appears not to require this element.[205] Finally, one so-called "equitable estoppel" decision appears to deviate substantially from the traditional format by framing its test in a fashion more akin to promissory estoppel.[206]

In the promissory estoppel cases involving section 2-201, similar confusion exists concerning the standards to be applied. Some courts [207] have relied on a strict construction of section 90 of the

171, 176-80, 547 P.2d 323, 329-30 (1976); Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 548-50, 369 A.2d 1017 (1977); Fairway Mach. Sales Co. v. Continental Motors Corp., 40 Mich. App. 270, 272, 198 N.W.2d 757-58 (1972); Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 740-42 (N.D. 1976); Dangerfield v. Markel, 222 N.W.2d 373, 378-79 (N.D. 1974); Farmers Elevator Co. v. Lyle, 90 S.D. 86, 91-93, 238 N.W.2d 290, 293-94 (1976).

199. *See, e.g.,* note 77 *supra.*

200. *Compare* Farmers Elevator Co. v. Lyle, 90 S.D. 86, 92, 238 N.W.2d 290, 293 (1976) (requiring promisee's reliance to result in "unconscionable hardship and loss") *with* Del Hayes & Sons v. Mitchell, 304 Minn. 275, 284-86, 230 N.W.2d 588, 595 (1975) (requiring promisor's conduct to be "akin to fraud"). *See also* notes 201-06 and accompanying text *infra.*

201. Farmers Elevator Co. v. Lyle, 90 S.D. 86, 92, 238 N.W.2d 290, 293 (1976), *quoting* Federal Land Bank v. Matson, 68 S.D. 538, 541, 5 N.W.2d 314, 315 (1942).

202. Sacred Heart Farmers Coop. Elevator v. Johnson, 305 Minn. 324, 326-27, 232 N.W.2d 921, 923 (1975); Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 813 (N.D. 1976).

203. *See, e.g.,* Del Hayes & Sons v. Mitchell, 304 Minn. 275, 284-86, 230 N.W.2d 588, 594-95 (1975); Farmers Coop. Ass'n v. Cole, 239 N.W.2d 808, 813 (N.D. 1976).

204. *See* notes 88-93 and accompanying text *supra.*

205. Farmers Elevator Co. v. Lyle, 90 S.D. 86, 91-92, 238 N.W.2d 290, 293 (1976).

206. Dangerfield v. Markel, 222 N.W.2d 373, 378 (N.D. 1974). The North Dakota Supreme Court stated in *Dangerfield* that the doctrine of equitable estoppel may be applied when: 1) one party relies on another's representation and changes his position or otherwise suffers an unjust or unconscionable injury or loss; or 2) where one party has accepted performance or benefits to the detriment of another. *Id.* at 378.

207. *See, e.g.,* Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972); Del Hayes & Sons v. Mitchell, 304 Minn. 275, 282 n.6, 230 N.W.2d 588, 593 n.6 (1975).

First Restatement of Contracts;[208] others have varied the test in minor, but significant, ways;[209] and still others have adopted elements more appropriate to equitable estoppel.[210] One court,[211] on the other hand, has moved in the opposite direction by expressly adopting section 217A of the *Second Restatement.*[212]

In addition to the considerations concerning the standards for applying either equitable or promissory estoppel, some of the 2-201 cases impose additional general requirements. The most significant of these decisions are those confining the application of estoppel to instances where there has been either an ancillary promise to reduce the oral agreement to writing or a representation that there has been compliance with the Statute.[213] Both requirements were originally established in section 178 of the *First Restatement.*[214] Also, many courts state that, before estoppel can be invoked, the oral contract must be proven to some degree of certainty by competent evidence.[215] On the other hand, one court has contradicted this assertion by declaring that *promissory* estoppel cannot apply where an actual contract exists.[216] A few decisions state that, for estoppel to operate, the conduct of the promisor must

208. For the text of § 90, *see* note 116 *supra.*

209. *See, e.g.,* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 178-79, 547 P.2d 323, 329 (1976) (requiring that the promisor *intend and* reasonably expect that the promise will be relied upon, and that the promisee act reasonably in relying); Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 545, 244 N.W.2d 86, 90 (1976) (limiting § 90 to unilateral informal contracts where consideration is lacking).

210. *See* Jamestown Terminal Elevator, Inc. v. Hieb, 246 N.W.2d 736, 740-42 (N.D. 1976); Darrow v. Spencer, 581 P.2d 1309, 1312 (Okla. 1978).

211. *See* Meylor v. Brown, 281 N.W.2d 632, 635 (Iowa 1979). *See also* Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342-43 (Iowa 1979).

212. For the text of section 217A, *see* note 141 and accompanying text *supra.*

213. C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856-57 (9th Cir. 1977) (applying California law); Rockland Indus., Inc. v. Frank Kasmir Assoc., 470 F. Supp. 1176, 1179-80 (N.D. Tex. 1979) (applying Texas law); Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc., 463 F. Supp. 543, 552-54 (N.D. Miss. 1978) (applying Mississippi law and relying on *C.R. Fedrick* since applicable Mississippi and California codes are identical); Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972); Del Hayes & Sons v. Mitchell, 304 Minn. 275, 281-86, 230 N.W.2d 588, 593-94 (1975).

214. *See* RESTATEMENT OF CONTRACTS § 178, Comment f. For the text of § 178, Comment f, *see* note 115 *supra.*

215. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342 (Iowa 1979); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 178-79, 547 P.2d 323, 329-30 (1976); Dangerfield v. Markel, 222 N.W.2d 373, 378 (N.D. 1974); Farmers Elevator Co. v. Lyle, 90 S.D. 86, 92, 238 N.W.2d 290, 293 (1976); H. Molsen & Co. v. Hicks, 550 S.W.2d 354, 356 (Tex. Ct. App. 1977).

216. Del Hayes & Sons v. Mitchell, 304 Minn. 275, 283, 230 N.W.2d 588, 593 (1975).

amount to more than a mere refusal to perform.[217] Standing in contrast to the conflicting authority as to when estoppel may be employed as a "substitute" for compliance with Statute of Frauds requirements are two cases based on Illinois law in which estoppel was apparently used as an independent theory of recovery.[218]

A vast degree of doctrinal disarray is obviously revealed in the cases dealing with the use of estoppel to avoid section 2-201.[219] These decisions run the gamut from an outright refusal to recognize any form of estoppel, at one extreme, to using promissory estoppel as an independent theory of recovery to which the Statute does not apply, at the other. This situation clearly cries out for definitive resolution and, in an attempt to meet this need, we now turn to our arguments for making promissory estoppel available to defeat the U.C.C. Statute of Frauds.[220]

B. *Should Promissory Estoppel Apply to Cases Under U.C.C. Section 2-201?*

One of the most common arguments against applying promissory estoppel to cases arising under section 2-201 is that the express enumeration of various methods [221] for satisfying the Statute without the writing required by subsection 2-201(1) [222] impliedly precludes

217. *See, e.g.,* Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 178-79, 547 P.2d 323, 330 (1976); Farmland Serv. Coop., Inc. v. Klein, 196 Neb. 538, 543, 244 N.W.2d 86, 90 (1976). The position taken by these courts appears to be equivalent to the "fraud or unconscionable conduct" requirement discussed in note 82 and accompanying text *supra.*

218. R.S. Bennett & Co. v. Economy Mechanical Indus. Inc., 606 F.2d 182, 186-89 (7th Cir. 1979); Jenkins & Boller Co. v. Schimdt Iron Works, Inc., 36 Ill. App. 3d 1044, 1047-48, 344 N.E.2d 275, 278 (1976). *Cf.* Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 210 (8th Cir. 1976) (trial court improvidently granted summary judgment for defendant since evidence failed to conclusively establish that the oral contract would have been enforceable despite the Statute). Concerning the significance of this trend, *see* notes 168-83 and accompanying text *supra.*

219. For an attempt to organize some of these cases by *Restatement* § 217A(2) criteria, *see* Note, *supra* note 118, at 82-83.

220. In the next subsection, we will not devote great attention to the form of estoppel, promissory or equitable, that we regard as preferable. Also, we will not attempt to specify the appropriate tests for each form of estoppel, though we tend to favor the *Restatement* § 217A framework. Finally, we will not discuss the implications of the nascent emergence of promissory estoppel as an independent theory of recovery, since this development is as yet too conjectural and limited in its practical impact. *See* notes 168-83 and accompanying text *supra.* What we *will* do in the next subsection is to focus on the validity of the traditional arguments for denying estoppel's applicability as a means of avoiding the Statute of Frauds.

221. *See* U.C.C. § 2-201(2), (3). For the text of these subsections, *see* text accompanying note 42 *supra.*

222. For the text of subsection 2-201(1), *see* text accompanying note 42 *supra.*

the Statute from being avoided in some other manner.[223] This argument is premised upon the familiar maxim of statutory construction, *expressio unius, est exclusio alterius*.[224] The *expressio unius* idea has been attacked,[225] however, and the fact that both section 17 of the original Statute[226] and section 4 of the Sales Act[227] also contained expressly enumerated exceptions to their operation did not prevent numerous courts from barring their operation by the estoppel device. Indeed, the fact that numerous courts recognized either equitable or promissory estoppel as methods of circumventing the Statute prior to the Code and, therefore, were likely to rule in similar fashion concerning section 2-201, militates against the notion that the authors of the section had any intent to forestall a continuance of this judicial practice. Rather than manifesting a clear negative intent in either the section or its comments, they chose to remain silent on the issue.[228] This argument is reinforced by section 1-103,[229] which authorizes the utilization of estoppel in Code cases.

In fact, the authors believe that section 1-103 standing alone is sufficient to dispose of the issue at hand. Not only does it allow

223. *See* Edwards, *supra* note 60, at 218. The author stated:

> It cannot be gainsaid: the Statute sets forth specific methods of compliance. Estoppel, in any form, has the effect of creating a method which is not recognized by the legislature. Indeed, the usual rule of statutory construction would suggest that since specific methods for satisfying the Statute are expressly provided for, other methods are therefore intended to be excluded.

Id. *See also* C.R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 858 (9th Cir. 1977) (Duniway, J., concurring); Cox v. Cox, 292 Ala. 106, 111, 289 So. 2d 609, 613 (1974); C.G. Campbell & Son v. Comdeq Corp., 586 S.W.2d 40, 41 (Ky. Ct. App. 1979).

224. Enumeration of specific items impliedly excludes all others. *See* United States v. Robinson, 359 F. Supp. 52, 58-59 (S.D. Fla. 1973) (interpreting statute relating to applications for authorization of wiretaps).

225. *See* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-74 (1930). Radin argued:

> The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word *men*. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.

Id. (emphasis in original). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973).

226. *See* text accompanying note 21 *supra*.

227. *See* note 34 *supra*.

228. *See* Edwards, *supra* note 60, at 221.

229. For the text of section 1-103, *see* text accompanying note 192 *supra*.

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courts that are so inclined to apply estoppel principles to section 2-201 cases, but it also arguably allows incorporation of the other judicially-created exceptions to the Statute's operation.[230] Nor is section 1-103 solely retrospective in operation.[231] Thus, legal developments subsequent to the Code's creation and enactment, like section 217A of the *Second Restatement*,[232] may be properly incorporated into Code decisions under the aegis of section 1-103.[233] Additional statutory support for the application of estoppel principles to cases involving section 2-201 may be found in section 1-203 of the Code,[234] which imposes an obligation of good faith in the performance and enforcement of every contract and duty under the Code.[235] It has been said that, in conjunction, sections 1-103 and 1-203 "authorize the use of estoppel concepts against a party who unjustifiably misleads another party, however innocently. These provisions may also be used to combat the defendant who otherwise acts in bad faith or fraudulently in setting up the statute as a defense." [236] Additionally, the language of section 1-103 would appear to negate the concern traditionally expressed by courts reluctant to allow promissory estoppel to circumvent the Statute—that to do so would amount to a usurpation of the legislative prerogative.[237] As previously observed, this argument was probably misconceived even when applied to the Code's predecessors,[238] and, in the face of the section's clear statement that the Code can be

230. White and Summers observed:

> At the time of the Code's general reception, courts had carved out other exceptions to the writing requirements of pre-Code statutes of frauds. According to some courts, a party cannot invoke the statute actually to perpetrate a fraud, nor can a party invoke the statute if the elements of an equitable estoppel could be shown against him. *These exceptions survive enactment of the Code.*

J. WHITE & R. SUMMERS, *supra* note 31, § 2-3, at 56 (emphasis added) (footnotes omitted). *See also* note 255 *infra.*

231. "What the section [1-103] invites is not limited to law which exists as of the date of particular enactments of the Code." Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA. L. REV. 195, 197 n.9 (1968).

232. For the text of § 217A, *see* note 141 and accompanying text *supra.*

233. The Code itself provides no guidelines for the supplementation of its provisions by the incorporation of equitable principles. For one commentator's suggestions, *see* Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code,* 72 NW. U.L. REV. 906, 945-46 (1978).

234. U.C.C. § 1-203 provides: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

235. *Id.*

236. J. WHITE & R. SUMMERS, *supra* note 31, § 2-6, at 70 (footnote omitted).

237. *See* Note, *supra* note 76, at 182; notes 125-31 and accompanying text *supra.*

238. *See* notes 126-30 and accompanying text *supra.*

supplemented with general equitable principles, it loses whatever vestiges of authority it had previously retained.

A second frequently expressed judicial concern about allowing promissory estoppel to bar the Statute's operation is that doing so results in the practical abrogation of the Statute.[239] This position focuses primarily on the evidentiary function of the writing required by the Statute. The assertion is that if reliance is allowed to justify circumventing the Statute's operation, promisors lose the protection afforded them by the writing requirement.[240] This argument gives insufficient credence to the previously noted evidentiary value of reliance,[241] and to the ability of modern courts to detect and combat perjury.[242] It also overlooks the fact that the Code itself expressly recognizes the evidentiary value of reliance in subsection 2-201(3)(a) regarding contracts for specially manufactured goods,[243] in subsection 2-201(3)(c) regarding part payment or part acceptance,[244] and in subsection 2-209(4),[245] which allows an oral modification of a sales contract that fails to satisfy the Statute to "operate as a waiver."[246] Admittedly, the more generalized reliance con-

239. *See* notes 119-24 and accompanying text *supra.*

240. *See* Edwards, *supra* note 60, at 220.

241. *See* notes 144-45 & 183 and accompanying text *supra.*

242. *See* notes 25 & 31-33 and accompanying text *supra.*

243. *See* notes 64-67 and accompanying text *supra.*

244. *See* notes 73-74 and accompanying text *supra.*

245. U.C.C. § 2-209 states:

> (1) An agreement modifying a contract within this Article needs no consideration to be binding.
>
> (2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
>
> (3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
>
> (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.
>
> (5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Id.

246. Subsection 2-209(5) allows a party who has made a waiver to retract it by "reasonable notification" of the other party "unless the retraction would be unjust in view of a material change of position in reliance on the waiver." U.C.C. § 2-209(5). *See also* J. WHITE & R. SUMMERS, *supra* note 31, § 1-5, at 45-46. On the relationship between promissory estoppel and waiver, *see* note 104 *supra.*

templated by promissory estoppel may be less convincing evidence of the existence of a contract than the particularized reliance contemplated by subsections 2-201(3)(a) and (3)(c). As previously discussed,[247] however, section 217A(2) of the *Second Restatement* now explicitly directs courts to consider the evidentiary value of the alleged reliance in promissory estoppel cases, a factor that should afford increased protection to promisors.

Another question that bears directly on the legitimacy of concerns about the harm flowing from the abrogation of the Statute involves the true level of protection afforded promisors by the writing requirement. If the writing required by the Statute provides promisors with scant protection against fraud, as previously contended,[248] fears of its circumvention by estoppel may be largely unwarranted. The purpose of the writing required by section 2-201(1) is not to prove the existence of a contract, but rather to provide the trier of fact with evidence of the contract's existence in addition to the oral testimony of the plaintiff.[249] Thus, a complying memorandum, by itself, is not conclusive evidence of either the existence or the terms of an oral contract, and a plaintiff must still convince the fact-finder of each.[250] The fact that memoranda in sales contracts are often far from complete statements of the terms of the agreements they purport to represent [251] creates the possibility that a plaintiff could successfully lie to the trier of fact about the terms of the parties' agreement.[252] Conversely, the existence of a writing sufficient to satisfy the Statute does not necessarily indicate that the parties ever, in fact, had an oral agreement. The writing may have been signed for the sake of convenience in advance of an agreement that never materialized,[253] or the writing may be a forgery, particularly in cases where the parties have had a continuing relationship.[254] Furthermore, in some states a plaintiff may be allowed, by reference to pre-Code judicial doctrine, to prove orally the existence of a complying memorandum which was allegedly lost

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247. *See* notes 144-45 and accompanying text *supra.*

248. *See* notes 119-24 and accompanying text *supra.*

249. *See* J. WHITE & R. SUMMERS, *supra* note 31, § 2-4, at 61; note 52 *supra.*

250. J. WHITE & R. SUMMERS, *supra* note 31, § 2-3, at 57.

251. *Id.* For a further discussion of the writing required by section 2-201 (1), *see* notes 49-57 and accompanying text *supra.*

252. J. WHITE & R. SUMMERS, *supra* note 31, § 2-8, at 72-73.

253. In this situation, the perjurious plaintiff may, aided by the writing, succeed in convincing the trier of fact that agreement was in fact reached. *See id.*

254. *Id.* § 2-8, at 73.

or destroyed.[255] The foregoing factors have led at least one prominent commentator on the Code to conclude that the writing requirement is "so far from any kind of guarantee aganist successful perjury that it is inappropriate even to call it a means to fraud prevention at all." [256]

However, even if the writing requirement is, in reality, a poor device for fulfilling an evidentiary function, it has been observed that the Statute, like any legal formality, can also fulfill channeling and cautionary functions.[257] The channeling function of the Statute is to encourage knowledgeable parties to reduce their agreements to written form and thus to provide a basis for distinguishing enforceable from non-enforceable contracts.[258] The cautionary function of the Statute stems from the idea that the act of reducing an oral agreement to written form will impress upon the parties the seriousness of their actions, thus deterring ill-considered promises.[259] Obviously, the reliance upon which promissory estoppel is based cannot perform these two functions. It should be noted, however, that all of the express exceptions to the writing requirement of section 2-201 concern themselves solely with behavior that can serve to perform the evidentiary function of the writing.[260] This indicates either that the authors of the Code were not overly concerned with the channeling or cautionary functions of the writing requirement, or that they at least felt that these functions should be superseded when reliable evidence of the existence of an agreement was

255. White & Summers noted:

> According to one pre-Code judicial doctrine, a party need not produce a complying memo if he can prove that the writing once existed but was somehow lost, misplaced, or destroyed. Section 2-201 does not expressly sanction this doctrine, but pre-Code statutes did not either. Doubtless it remains good law even under 2-201 in some states.

Id. § 2-4, at 58 (footnote omitted). *See also* note 122 and accompanying text *supra.*

256. J. WHITE & R. SUMMERS, *supra* note 31, § 2-8, at 73 (Professors White and Summers disagree on this point).

257. *See* Note, *supra* note 76, at 182. *See also* J. CALAMARI & J. PERILLO, *supra* note 131, at 673.

258. *See* Note, *supra* note 76, at 170-71. *See also* 2 A. CORBIN, *supra* note 4, § 275 ("the statute renders some service by operating *in terrorem* to cause important contracts to be put into writing"); Fuller, *supra* note 175, at 801 (a formality like the writing requirement can provide a simple, external test for the enforceability of agreements).

259. *See, e.g.,* Fuller, *supra* note 175, at 800; Note, *supra* note 76, at 170.

260. *See* Edwards, *supra* note 60, at 218. The author observed that "the underlying purpose of each of the methods is to provide reliable evidence of the existence of an agreement." *Id.* For a discussion of the various statutory exceptions to the writing requirement, *see* notes 49-62 and accompanying text *supra.*

available. Both these functions also assume that the parties are aware of the writing requirement, an assumption that will often be at odds with reality.[261]

In addition to ignorance of the Statute's operation, many other reasons exist why parties may not reduce their agreements to written form, including reliance on an ancillary promise to reduce the agreement to writing or to refrain from raising the Statute as a defense and the mistaken belief that the writing requirement has been satisfied.[262] When agreements within the Statute's scope are reduced to writing, the existing evidence indicates that the Statute itself plays a small role in the parties' decision to do so.[263] The Yale Study found that few firms governed their decision to reduce agreements to writing on the basis of the dollar amount involved.[264] Instead, firms tended to seek the reduction of their contracts to written form simply because it was sound business policy to have written records.[265] More importantly when considering the need for protecting reliance on promises within the scope of the Statute, the Yale Study discovered a strong tendency on the part of manufacturers who had demanded written confirmation to commence production *before* receipt, especially when dealing with customers with whom they had had prior dealings.[266]

The Yale Study also raised interesting questions concerning who is most likely to be protected by the writing requirement. It indicated that large manufacturers are more likely than small manufacturers to demand and receive written evidence of oral agreements from their customers.[267] This situation was attributed to the difference in the nature of large and small-scale business operations[268]

261. *See* note 29 *supra.*

262. *See* Note, *supra* note 33, at 597.

263. *Id.* at 593. The parties may, for example, decide to reduce their agreement to writing to avoid subsequent problems of interpretation or to prevent each other from denying the existence of the agreement. *Id.* at 593 n.16.

264. *See* notes 47-48 and accompanying text *supra.*

265. *Yale Study, supra* note 47, at 1064.

266. *Id.* at 1055. The Study did indicate that manufacturers were likely to await receipt of confirmations from customers with poor credit ratings. *Id.* If buyers expressed an urgent need for the goods, however, manufacturers were likely to commence production at once without awaiting confirmation. *Id.*

267. *Id.* at 1047.

268. *Id.* at 1051. The Study observed:

> The discovery that oral promises are more prevalent in the transactions of small manufacturers than in the dealings of large ones is not surprising. . . . [T]he reduction to writing of all commitments — both of the manufacturer and of the parties with whom he deals — is an important factor in the efficient operation of the modern large-scale

and to the lesser bargaining power of the small firm.[269] It is also reasonable to assume that the proprietors of small businesses are less likely than their larger counterparts to have actual knowledge of the Statute's requirements. Thus, the evidence indicates that the Statute is most likely to operate against those who are least likely to know of its requirements, are least able to obtain compliance with those requirements if they know of them, and are also less likely to be able to absorb the losses flowing from their reliance if the Statute is enforced against them.

In the light of the foregoing discussion, it seems reasonable to conclude that, in reality, the writing requirement of the Statute plays an unimportant role as either a channeling or a cautionary device, and does not conform to the realities of prevailing business practice, a measure which should be a touchstone for any rule of commercial law.[270] Commercial realities in fact indicate that reliance upon oral promises is a common business practice[271] deserving the legal protection which could be afforded by the doctrine of promissory estoppel. Courts that wish to retain whatever level of "in terrorem" effect[272] the Statute exerts can do so and still avoid the injustice to relying promisees that would follow from the Statute's strict enforcement by limiting non-complying promisees to the recovery of reliance damages as authorized by section 217A of the *Second Restatement*.[273]

> business organization. A small manufacturer, handling a more limited volume of business on a more personal basis, is likely to find strict adherence to business formalities both more foreign to the nature of his business relationships and less necessary in the interest of efficiency.

Id. (footnote omitted).

269. *Id.* at 1051-55. The Study reasoned that "the relatively infrequent demand of the small businessman for written follow-ups may also be an incident of his comparatively weak bargaining position, which may preclude him from freely demanding written documents from his promisors even though he would desire such documents for his own legal security." *Id.* at 1054-55 (footnote omitted).

270. Justice Stephen long ago observed in this regard that "[l]aws ought to be adjusted to the habits of society, and not to aim at remoulding them." Stephen & Pollock, *supra* note 3, at 6. The Code itself implicitly recognizes this objective by stating:

> (2) Underlying purposes and policies of this Act are
>
> . . . .
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

U.C.C. § 1-102(2)(b).

271. *See* note 267 and accompanying text *supra*.

272. *See* note 258 *supra*.

273. *See* notes 164-67 and accompanying text *supra*.

V. CONCLUSION

The authors tend to cast their lot with those commentators who have concluded that the Statute of Frauds is an anachronistic device that no longer effectively serves its intended purposes. The drafters of the Code made several real improvements in the Statute designed to prevent its fraudulent use. The probability that it will be used to perpetrate fraud, however, still outweighs any utility it may possess as a method for fraud prevention. The extant evidence of prevailing business practices and the cases themselves indicate that many promisees act in reliance on oral promises within the Statute's scope.

This reliance should be protected by the application of promissory estoppel, the latest in a series of legal doctrines utilized by the courts to mitigate the potentially harsh effects of the Statute. The already strong trend [274] to recognize promissory estoppel as a device for circumventing the Statute has gained increased momentum from the promulgation of section 217A of the *Second Restatement of Contracts,* which further refines and rationalizes several aspects of the reliance doctrine's application in the Statute of Frauds context. In addition, estoppel principles have long been applied to the Code's predecessors and the Code expressly authorizes the supplementation of its provisions with general equitable principles. No compelling principles of law or policy exist to preclude the courts from avoiding unjust applications of section 2-201 by the application of promissory estoppel principles.

274. A majority of the courts that have considered the question have concluded that estoppel in some form can be used to bar the operation of section 2-201 of the Code. Moreover, a few cases doing so permit estoppel to be used as an independent basis of recovery to which the Statute is conceptually irrelevant. The reasons advanced by the minority that have refused so to apply promissory estoppel, upon examination, remain unconvincing.