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Michael J. Polelle

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AN ILLINOIS CHOICE: FOSSIL LAW OR AN ACTION FOR PROMISSORY FRAUD?

Michael J. Poelle*

Fossil law, while it has historical interest, must not be allowed to outlive its utility. If synchronizing the law with the state of society is result-oriented, then the courts need to be result-oriented and should not hesitate to depart from a rule whose origin is obscure and whose meaning has been forgotten. This is evolution rather than devolution.¹

It is axiomatic that a fraud action² may be based on misstatements of past or present material facts when the other elements of the tort, such as scienter, intent to induce, justifiable reliance, actual damage, and causation are present.³ Pure speculation or prognostication typically is held insufficient to satisfy the misrepresentation-of-fact requirement⁴ because both forewarn a plaintiff that reliance on the statement's veracity must be guarded;

* Professor of Law, John Marshall Law School. A.B., Loyola University, Chicago; J.D., Harvard Law School; LL.M., John Marshall Law School. The author is indebted to Phyllis Haskin, J.D., John Marshall Law School, for her research assistance.

1. Redarowicz v. Ohlendorf, 95 Ill. App. 3d 444, 445, 420 N.E.2d 209, 216 (4th Dist. 1981), *aff'd in part and rev'd in part*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

2. The tort of fraudulent misrepresentation has five essential elements: (1) a false representation or willful omission of a material fact; (2) knowledge of falsity; (3) an intention to induce reliance; (4) action taken in reliance on the representation; and (5) consequent and proximate injury. For cases involving the tort of fraudulent misrepresentation, see, e.g., Howard v. Riggs Nat'l Bank, 432 A.2d 701, 706 (App. D.C. 1981); Vance v. Indian Hammock Hunt & Riding Club, Ltd., 403 So. 2d 1367, 1371 (Fla. App. 1981); Sharp v. Idaho Inv. Corp., 95 Idaho 113, 123, 504 P.2d 386, 394 (1972); Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975).

3. See, e.g., George William Hoffman & Co. v. Capital Serv. Co., 101 Ill. App. 3d 487, 495, 428 N.E.2d 600, 606 (1st Dist. 1981) (absence of evidence sufficient to support allegations of fraud required reversal of judgment); Mother Earth, Ltd. v. Strawberry Camel, Ltd., 72 Ill. App. 3d 37, 45, 390 N.E.2d 393, 401 (1st Dist. 1979) (directed verdict for defendant erroneous because evidence supported prima facie case of fraud).

4. See, e.g., Ziskin v. Thrall Car Mfg. Co., 106 Ill. App. 3d 482, 435 N.E.2d 1227 (1st Dist. 1982) (stockholder not liable for mistaken belief that merger would result in increased profitability); People v. Kinion, 104 Ill. App. 3d 30, 432 N.E.2d 363 (3rd Dist. 1982) (attorney's statements regarding representation of accused without charging the accused a fee did not estop him from later accepting court-ordered and state-paid compensation for his services); Metropolitan Bank & Trust Co. v. Oliver, 4 Ill. App. 3d 975, 283 N.E.2d 62 (1st Dist. 1972) (mortgage creditor who failed to perfect his lien after being told that debt would be paid off when property was sold, had no cause of action for fraudulent misrepresentation); 3700 S. Kedzie Bldg. Corp. v. Chicago Steel Foundry Co., 20 Ill. App. 2d 483, 156 N.E.2d 618 (1st Dist. 1959) (property buyer who was told that his taxes would remain the same had no cause of action for fraudulent misrepresentation); see also James and Gray, *Misrepresentation—Part II*, 37 MD. L. REV. 488, 502 (1978) ("A distinction should be made between predictions of external events not within the speaker's control and statements about what he himself will do in the future, i.e., promises and statements of his own intention."). For a recognition of this distinction in Illinois law, see Kuciel v. LaSalle Nat'l Bank, 106 Ill. App. 3d 333, 435 N.E.2d 1217 (1st Dist. 1982).

even where the element of scienter exists, the statement objectively negates any justifiable reliance. Similarly, mere opinion typically is nonactionable in fraud because the very nature of a vague, indefinite, or puffing opinion, with its manifest lack of certitude, should forestall plaintiff's reliance.⁵

As early as the nineteenth century, English courts recognized that every statement, no matter how futuristic or opinionated, irreducibly contains the kernel of a factual assertion. The courts specifically recognized that a promisor represents as fact at the time of the promise, the present intent to do something in the future to fulfill the promise. Thus, the English judiciary determined that the assertion of a promise which one does not intend to fulfill is a sufficient factual misrepresentation on which to base an action of fraud.⁶

In the seminal case of *Edginton v. Fitzmaurice*,⁷ Lord Bowen considered the case of an investor who bought debentures in a company in reliance on certain representations of the company's directors. The directors represented in the prospectus that any money raised by the sale of the debentures would be used to expand the facilities of the business and to buy new equipment.⁸ The directors, however, did not intend to expend the capital in such a manner when they drafted and published the prospectus.⁹ Instead, they planned to use the proceeds from the sale of the debentures to pay off other debts.¹⁰ Holding the directors liable to the investor for fraud, Lord Bowen articulated the common law principle that established the law of promissory fraud. This common law principle was derived from the same insight as that used contemporaneously in psychiatry by Sigmund Freud:

The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of facts.¹¹

The purpose of this article is twofold. First, the article will trace and critically evaluate the Illinois judiciary's historical refutation of the *Edginton*

5. See, e.g., *Parker v. Arthur Murray, Inc.*, 10 Ill. App. 3d 1000, 295 N.E.2d 487 (1st Dist. 1973) (mere expression of opinion will not support an action for fraud; in order to constitute actionable fraud, misrepresentations must pertain to present or preexisting facts); *Peterson Indus., Inc. v. Lake View Trust & Savings Bank*, 584 F.2d 166 (7th Cir. 1978) (mere expression of opinion or a statement which relates to future or contingent events or probabilities, does not constitute an actionable misrepresentation in Illinois).

6. *Anderson v. Pacific Fire and Marine Ins. Co.*, [1872] 7 L.R.-C.P. 65, 69.

7. [1885] 29 Ch. D. 459.

8. *Id.* at 460-61.

9. *Id.* at 461-62.

10. *Id.* at 462.

11. *Id.* at 483. Prior to the *Edginton* case, the rule appears to have been otherwise. See W. KERR, A TREATISE ON THE LAW OF FRAUD AND MISTAKE 88 (1872) ("As distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it afford a ground for relief in equity.").

doctrine. Illinois remains in the minority of jurisdictions by refusing to recognize that misrepresentation of an intent to perform a promise or other future act states a cause of action or defense based on promissory fraud.¹² Second, the article will explore various Illinois decisions which, in the interests of justice and fairness, recognize an exception that allows actions or defenses based on promissory fraud. As will be illustrated, the discretionary application of this exception to claims which would typically be dismissed as nonactionable has produced an outdated and ineffective pattern of judicial resolution. The article concludes that the time has arrived for the Illinois judiciary to discard its fossil law by recognizing actions based on promissory fraud.

THE FRAMEWORK OF COMMON LAW DEVELOPMENT

Lord Bowen's recognition that a person's state of mind is as much a fact as the physical facts of the external world¹³ established a dominant position in American common law that continues to this day. In the 1930s, treatise writers conceded that an unperformed promise did not necessarily indicate that fraud existed;¹⁴ there still was a general prohibition against recovery for purely predictive statements.¹⁵ According to one commentator, Thomas Cooley, the principle of nonrecovery for purely futuristic statements did not apply when a promise was the device used to accomplish the fraud. Cooley maintained, "Many courts have held that a statement of a present intention to perform an act, made as an inducement for a contract, is a statement of fact, and that if there was no such intention at the time the statement was made, there was actionable fraud."¹⁶ Not all unfulfilled promises, however, form the basis of a fraud action at common law. Some promises,

12. See *infra* notes 26-29 and accompanying text. An action for promissory fraud simply allows a plaintiff to state a claim. In order for a plaintiff to recover, he must prove the elements of fraud as well as the defendant's deceitful state of mind.

13. 29 Ch. D. at 483.

14. See *infra* notes 16-21 and accompanying text.

15. 2 T. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS THAT ARISE INDEPENDENTLY OF CONTRACTS § 354, at 577 (1932).

16. *Id.* at 579. Cooley also noted that "[s]ome courts hold that a promise to do something in the future made as a consideration for a present conveyance, does not constitute fraud even though at the time it was made the promisor had no intention to keep it, unless such promise was coupled with a false representation of an existing fact. Nevertheless, a promise is sometimes the very device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end. Such is the case . . . of the purchase of goods with an intention not to pay for them." *Id.* at 578-79. For Cooley, the promise made with no existing intention of performance is the device for which a fraud action will lie. Contrast this with the mystifying scheme or device exception of Illinois law which theoretically requires something more than a promise made with no existing intent of performance. See *infra* notes 96-168 and accompanying text; see also, e.g., *Zaborowski v. Hoffman Rosner Corp.*, 43 Ill. App. 3d 21, 356 N.E.2d 653 (2d Dist. 1976) ("It is not enough . . . that the party make a false promise not intending to keep it; the total facts must show a scheme or device to defraud."); *Sullivan v. Sullivan*, 79 Ill. App. 2d 194, 223 N.E.2d 461 (4th Dist. 1967) ("a promise of future conduct, even assuming an intention not to perform it, is not the false representation of . . . material fact essential to relief from fraud").

for instance, are not fulfilled because the promisor intends to perform but is subsequently unable or incapable of fulfilling his promise.¹⁷ Acknowledging the widely accepted principle that a fraud action would not lie for the bare unfulfillment of a promise¹⁸ or for the failure of future events to occur as predicted,¹⁹ several commentators have recognized that a promise, prophecy, or prediction represents the minimal facts which would be necessary to impose liability for promissory fraud.²⁰ For instance, one treatise writer observed:

A common situation which calls for the application of this principle is a promise or statement of future conduct by one, who at the time, intends not to fulfill the promise. The promise itself is regarded as a representation of a present intention to perform. Hence, such a promise, made by one not intending to perform operates as a misrepresentation—a misrepresentation of the speaker's state of mind, at the time, and is actionable as a misrepresentation of "fact."²¹

In reaffirming the vitality of actions for promissory fraud, one commentator in 1953 recognized that the law of fraud was no longer bound up with the law of contracts:

Most courts have since adopted Bowen's view, though some courts have been bothered when an action involves a promise not enforceable in a contract action because of either failure to comply with the statute of frauds or expiration before the suit was started of the statutory period in which the contract action must be brought. These worries are ill-founded, for neither the statute of frauds nor the contract provisions of the statute of limitations were designed to protect a deceiver from tort liability.²²

As this commentator noted, *Edginton* and its progeny in American jurisprudence clearly established the tort of promissory fraud as distinct from a contract action even though these actions appear to be factually similar. Thus, acceptance of the *Edginton* principle carries with it the recognition

17. 2 T. COOLEY, *supra* note 15, § 354, at 579.

18. F. BOHLEN & F. HARPER, *CASES ON THE LAW OF TORTS* § 220 (4th ed. 1937).

19. *Id.*

20. *Id.*

21. *Id.* at 452. Another commentator declared:

Certainly, if a defendant promises to do something and fails to carry out his promise the plaintiff must ordinarily look to the law of contract for his remedy. If, however, the defendant at the time of his statement lacks either the will or the power to carry out the promise, there is a misrepresentation capable of giving rise to proceedings for deceit; the diner who orders and consumes his meal without intending to pay for it is liable in deceit.

H. STREET, *THE LAW OF TORTS* 382 (6th ed. 1946); *see also* F. POLLOCK, *LAW OF TORTS* 212 (15th ed. 1951) ("a man's intention or purpose at a given time is in itself a matter of fact, and capable (though the proof be seldom easy) of being found as a fact").

22. C. MORRIS, *TORTS* § 3, at 271 (1953); *see also* F. HARPER & F. JAMES, *THE LAW OF TORTS* § 7.10, at 571 (1956) (a promise made by one not intending to perform operates as a misrepresentation of the promisor's state of mind and is actionable as misrepresentation of fact); J. SALMOND, *THE LAW OF TORTS* § 141, at 389 (17th ed. 1977) ("So also an action of tort will lie for a false representation of intention.").

that an action in promissory fraud does not necessarily preclude an action in contract based on the same facts.

Prosser's most recent treatise on the law of torts²³ articulates the basic common law approach of allowing recovery for an action based on promissory fraud. Generally, a prediction solely as to future events is only an opinion on which another party has no cause to rely.²⁴ Yet, representations of intention, whether of the speaker or of a third party, are generally regarded as statements of fact because the assertion of a specific intention necessarily implies the existence of a present will to execute the intention—even if the execution is to occur in the future.²⁵ Summarizing the current legal landscape, Prosser states that “[a]ll but a few courts regard a misstatement of a present intention as a misrepresentation of a material fact; and a promise made without the intent to perform it is held to be a sufficient basis of an action of deceit, or for restitution or other equitable relief.”²⁶ The Restatement (Second) of Torts also recognizes promissory fraud as a valid concept of modern common law:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.²⁷

Presently, forty states and the District of Columbia have remained faithful to the common law by allowing recovery for promissory fraud against a promisor who never had an intention of honoring his promise.²⁸ Illinois,

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 109, at 720 (4th ed. 1971).

24. *Id.* at 728.

25. *Id.*

26. *Id.* at 729. Illinois and Indiana reject the doctrine that a misrepresentation of a present intention is a misrepresentation of a material fact or that a promise made without an intent to perform can be the basis of an action for fraud. See *infra* note 29. Prosser fails to note, however, that Illinois does have an exception to the rule against such recovery for fraud where the promise is a scheme or device to accomplish the fraud. See *infra* notes 96-168 and accompanying text.

27. RESTATEMENT (SECOND) OF TORTS § 525 (1977). One who fraudulently misrepresents to another that he or a third person intends to do or refrain from doing a particular thing is subject to liability under the conditions stated in § 525. *Id.* at § 530. Also, the “recipient of a fraudulent misrepresentation of intention is justified in relying upon it if the existence of the intention is material and the recipient has reason to believe that it will be carried out.” *Id.* at § 544.

28. The following states allow a promissory fraud action against a promisor who fraudulently misrepresents material facts as to future events: *Robinson v. Allstate Ins. Co.*, 399 So. 2d 288 (Ala. 1981); *Correa v. Pecos Valley Dev. Corp.*, 126 Ariz. 601, 617 P.2d 767 (1980); *Anthony v. First Nat'l Bank*, 244 Ark. 1015, 431 S.W.2d 267 (1968); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980); *Stalos v. Booras*, 34 Colo. App. 252, 528 P.2d 254 (1974); *Smith v. Frank*, 165 Conn. 200, 332 A.2d 76 (1973); *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309 (Del. Super. Ct. 1973); *Howard v. Riggs Nat'l Bank*, 432 A.2d 701 (D.C. 1981); *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367 (Fla. Dist. Ct. App. 1981); *Sharp v. Idaho Inv. Corp.*, 95 Idaho 113, 504 P.2d 386

together with six sister states, rejects as a matter of law the notion that a promisor can be sued in fraud for misrepresenting an intention to perform a promise in the future.²⁹ It is necessary to trace the rise and current status of Illinois' minority position on promissory fraud to accurately evaluate its strength and worth.

NINETEENTH CENTURY ILLINOIS PRECEDENT

The first major Illinois Supreme Court case to address the issue of promissory fraud did not formulate a general ban against it. In *Miller v. Howell*,³⁰ the court considered whether an unfulfilled promise by the proprietor of a town to build a storehouse and a bridge by a certain date amounted to a fraud that would relieve the defendant of his obligation on

(1972); *Grefe v. Ross*, 231 N.W.2d 863 (Iowa 1975); *Young v. Hecht*, 3 Kan. App. 2d 510, 597 P.2d 683 (1979); *Kentucky Rd. Oiling Co. v. Sharp*, 257 Ky. 378, 78 S.W.2d 38 (1935); *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646 (Me. 1979); *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 378 A.2d 1 (1977); *Bernstein v. Levitz*, 218 Minn. 576, 16 N.W.2d 744 (1944); *Bauer v. Adams*, 550 S.W.2d 850 (Mo. App. 1977); *Svennungsen v. Svennungsen*, 165 Mont. 161, 527 P.2d 640 (1974); *Smith v. Wrene*, 199 Neb. 753, 261 N.W.2d 620 (1978); *Bart-sas Realty, Inc. v. Nash*, 81 Nev. 325, 402 P.2d 650 (1965); *Munson v. Raudonis*, 118 N.H. 474, 387 A.2d 1174 (1978); *Lipsit v. Leonard*, 64 N.J. 276, 315 A.2d 25 (1974); *Werner v. City of Albuquerque*, 55 N.M. 189, 229 P.2d 688 (1951); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 57 N.Y.2d 1038, 444 N.E.2d 35, 457 N.Y.S.2d 785 (1982); *Ferguson v. Ferguson*, 55 N.C. App. 341, 285 S.E.2d 288 (1982); *Lanz v. Naddy*, 82 N.W.2d 809 (N.D. 1957); *Tibbs v. National Homes Const. Corp.*, 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977); *Citation Co. Realtors, Inc. v. Lyon*, 610 P.2d 788 (Okla. 1980); *Butte Motor Co. v. Strand*, 225 Or. 317, 358 P.2d 279 (1960); *Brentwater Homes, Inc. v. Weibley*, 471 Pa. 17, 369 A.2d 1172 (1977); *Robinson v. Standard Stores, Inc.*, 52 R.I. 271, 160 A. 471 (1932); *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978); *Reitz v. Ampro Royalty Trust*, 75 S.D. 167, 61 N.W.2d 201 (1953); *Cravens v. Skinner*, 626 S.W.2d 173 (Tex. Civ. App. 1981); *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798 (Utah 1980); *Union Bank v. Jones*, 138 Vt. 115, 411 A.2d 1338 (1980); *Lloyd v. Smith*, 150 Va. 132, 142 S.E. 363 (1928); *Markov v. ABC Transfer & Storage Co.*, 76 Wash. 2d 388, 457 P.2d 535 (1969); *State v. Moore*, 273 S.E.2d 821 (W. Va. 1980); *Mahonna v. Chaimson*, 214 Wis. 396, 253 N.W. 391 (1934); *Johnson v. Soulis*, 542 P.2d 867 (Wyo. 1975).

29. The following states, in addition to Illinois, do not allow a promisee to bring an action in promissory fraud against a promisor who has fraudulently misrepresented an intention to perform a promise in the future: *Cosby v. A.M. Smyte Mfg. Co.*, 158 Ga. App. 587, 281 S.E.2d 332 (1981) (fraud cannot be predicated on promissory statements for future acts); *Aloha Petroglyph, Inc. v. Alexander & Baldwin, Inc.*, 619 P.2d 518 (Hawaii Ct. App. 1980) (statements of future conduct cannot be fraud); *Tutwiler v. Snodgrass*, 428 N.E.2d 1291 (Ind. Ct. App. 1981) (fraud cannot be based on matter of subjective future intent or probability); *Higgins v. Lawrence*, 107 Mich. App. 178, 309 N.W.2d 194 (1981) (future promises are contractual and do not constitute fraud); *House v. Holloway*, 258 So. 2d 251 (Miss. 1972) (an action for fraud is not allowed for promissory future acts); *Fowler v. Happy Goodman Family*, 575 S.W.2d 496 (Tenn. 1978) (promises of future conduct are not actionable as fraud). *But cf.* Note, *Promissory Fraud in Tennessee: A Wrong Without a Remedy*, 10 MEM. ST. U.L. REV. 308, 341 (1980) (Tennessee courts should recognize that promissory statements accompanied by the intent not to perform are statements of present, existing fact and should be viewed as fraud in order to prevent gross injustice). The Alaskan judiciary has not yet decided the issue.

30. 2 Ill. 499 (1838).

a promissory note.³¹ After rejecting a contract defense based on failure of consideration,³² the *Howell* court also rejected the defense of promissory fraud by stating, "Nor did the evidence offered, amount to a fraud, because the defendant did not also offer to prove, that when the proprietors made the declarations of their intention to build in the town, they did it deceitfully."³³ Thus, rather than reject an action based on promissory fraud, this case of first impression faithfully reflects the standard common law principle of promissory fraud;³⁴ the defendant's failure to prove an intent to deceive when the proprietor made his promise to build was the only reason his action for fraud was rejected.³⁵

Twelve years before the landmark English decision of *Edginton v. Fitzmaurice*,³⁶ the Illinois Supreme Court held in *Gage v. Lewis*³⁷ that a defense of promissory fraud, used to counter a plaintiff's suit in contract, was an improper defense as a matter of law.³⁸ In *Gage*, a surety defended an action on his bond by claiming that the plaintiff had falsely represented that if the defendant became a surety for the plaintiff's partner, the plaintiff would retire from the partnership and not compete with the new firm.³⁹ The surety claimed that he was not bound on the bond because the plaintiff violated his promise by setting up a rival business.⁴⁰ Ignoring the decision in *Howell*,⁴¹ the *Gage* court affirmed the judgment against the surety and referred to the promissory fraud defense:

It cannot be said that these representations and promises were false when made, for, until the proper time arrived, and plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract.⁴²

The *Gage* court's justification for denying the promissory fraud defense is a peculiar one. The court stressed the possibility that at the time of the

31. *Id.* at 500 (the action of assumpsit commenced on a promissory note assigned to the plaintiff after it became due).

32. *Id.*

33. *Id.*

34. *See supra* notes 14-28 and accompanying text.

35. 2 Ill. at 500. If the Illinois Supreme Court had refused to even consider promissory fraud as a cause of action, it would have been unnecessary to prove the proprietor's deceitful state of mind. *Id.*

36. [1885] 29 Ch. D. 459; *see supra* notes 7-11 and accompanying text.

37. 68 Ill. 604 (1873).

38. *Id.* at 615.

39. *Id.* at 611.

40. *Id.*

41. The court never cited its decision in *Miller v. Howell*, 2 Ill. 498 (1838), which is the first Illinois Supreme Court case to involve a claim of promissory fraud. *Howell* is discussed *supra* notes 32-35 and accompanying text.

42. 68 Ill. at 615.

fraudulent promise, the deceiving promisor might forsake the error of his ways and instead fulfill his promise.⁴³ Yet, speculation that a defrauder might later decide to honor his fraudulent promise overlooks the obvious reality that a plaintiff would not be in a court of law raising the issue of promissory fraud unless the defrauder actually had failed to recant. The defendant in *Gage* pleaded that the plaintiff made a false promise that never was fulfilled.⁴⁴ To conclude, as the Illinois Supreme Court did, that an action should not lie because the plaintiff could have fulfilled his fraudulent promise, was unjustified because, in fact, the plaintiff did not act in accordance with his representations. The court failed to recognize that reasonable people do not bargain with a promisor who has no intention of honoring a promise on the gossamer speculation that the promisor might change his mind. Common sense suggests that promisees choose to bargain with promisors who intend to perform their promises. Thus, the decision in *Gage* emphasizes that historically Illinois courts have not had a sound foundation or a well-reasoned legal principle on which to deny promissory fraud actions.

In *People ex rel. Ellis v. Healy*,⁴⁵ the Illinois Supreme Court considered, for the first time, a cause of action for damages based on promissory fraud.⁴⁶ The plaintiff alleged that he sold \$1,000 worth of goods to the defendant on credit, after relying on the defendant's false representation that he would repay the debt. Since the defendant was insolvent at the time of his purchase, the plaintiff alleged that, at the time of the purchase, the defendant had no intention of ever repaying the plaintiff.⁴⁷ The court, however, noted that within two months, the defendant had reduced the debt to \$375 and that although he was still insolvent, the defendant had assets that would cover at least 75% of his outstanding indebtedness.⁴⁸ Based on these facts, the Illinois Supreme Court dismissed the promissory fraud claim.⁴⁹ Citing *Gage*, the *Healy* court concluded that there was no cause of action for promissory fraud where the promisor never intended to perform.⁵⁰

Throughout the nineteenth century, the Illinois Supreme Court steadfastly dismissed promissory fraud claims as a matter of law. In *Kitson v. People*,⁵¹ a defendant buyer allegedly misrepresented that at the end of the credit period, he intended to pay for the goods when in fact he was insolvent at

43. *Id.*

44. *Id.* at 609.

45. 128 Ill. 9, 20 N.E. 692 (1889).

46. *Id.*

47. *Id.* at 14-15, 20 N.E. at 693.

48. *Id.* at 17, 20 N.E. at 695.

49. *Id.* ("It is not alleged that the defendant never intended to pay for them, and the pleadings and exhibits before us negative such an intention.")

50. *Id.* at 16, 20 N.E. at 694 (citing *Gage v. Lewis*, 68 Ill. 604 (1873)); see also *Murphy v. Murphy*, 189 Ill. 360, 59 N.E. 796 (1901) (promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a representation as can be the basis for an action in promissory fraud).

51. 132 Ill. 327, 23 N.E. 1024 (1890).

the time of the promise and had no intention of paying for them.⁵² The *Kitson* court observed, "For aught that appears, the defendant may be ready and willing to pay at the time when it was agreed he should pay."⁵³ The court concluded that even if the debt was past due, the plaintiff's recourse would only be on the contractual promise to pay and not in tort for damages caused by the fraudulent promise.⁵⁴ In refusing to permit an action for damages, the court stated that before a purchaser could be liable for fraud, the purchaser "must have been guilty of making false representations of fact, or practicing some artifice or deception."⁵⁵ The court refused to admit that a misrepresentation of intent is a misrepresentation of fact:

It has never been held, so far as we are advised, that it will constitute actionable fraud for a purchaser to buy when he is insolvent, knowing that to be his condition, and failing to disclose that fact to the vendor, or that he purchases without any reasonable expectation that he can ever pay therefore. A contrary rule has been announced in many cases.⁵⁶

In stating that a purchaser who buys on credit while insolvent is never liable for promissory fraud,⁵⁷ the *Kitson* court ignored the crucial element of promissory fraud: the defendant's deceitful state of mind. Deceit has traditionally required that a plaintiff prove scienter, that is, that the defendant knowingly or recklessly uttered a false statement.⁵⁸ There is a distinct difference between an insolvent buyer who plans never to pay at the time of purchase, even if he should later become solvent, and one who intends to pay but who, at worst, is unduly sanguine or careless in estimating his ability to repay when the debt falls due. Until quite recently, courts in Illinois refused to award recovery for merely negligent fraud, whether it was promissory fraud or any other kind of fraud.⁵⁹ It is not surprising, therefore, that the *Kitson* court refused to hold an insolvent buyer liable for intentional damages in fraud. Nevertheless, it is not inconsistent with the decisions that disallow recovery for negligent fraud to hold that a buyer who not only knows he is insolvent, but who also never intends to pay, is liable for his deceit when the date of payment has passed.⁶⁰ By failing to differentiate between cases in which the due date merely had passed⁶¹ and cases in which scienter actually existed,⁶² the *Kitson* court unnecessarily prohibited any claim or defense based on promissory fraud.

52. *Id.* at 330-31, 23 N.E. at 1025.

53. *Id.* at 338, 23 N.E. at 1025.

54. *Id.* at 337, 23 N.E. at 1025. The court acknowledged that a rescission action would lie where there was a "preconceived design" on the part of the purchaser not to pay. *Id.*

55. *Id.*

56. *Id.* at 337-38, 23 N.E. at 1025.

57. *Id.*

58. *See supra* note 3.

59. *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (first case in Illinois which allowed recovery for negligent fraud).

60. *Kitson v. People*, 132 Ill. 327, 337, 23 N.E. 1024, 1025 (1890).

61. *Id.* at 337, 23 N.E. at 1025.

62. *Id.*

By the end of the nineteenth century, the Illinois judiciary had firmly adopted the rule that the misrepresentation of an intention to perform an existing promise could not be treated as a misrepresentation of an existing fact.⁶³ Even when considering a replevin action based on fraud, an Illinois appellate court acknowledged that "[a] promise to perform an act though accompanied at the time with an intention not to perform it, is not such a representation as can be made the ground of an action at law."⁶⁴ A few years later, the Illinois Supreme Court extended the rule of nonrecovery to a chancery action initiated to annul a deed of conveyance based on fraud,⁶⁵ while yet another court refused to allow promissory fraud as a defense to a contract action.⁶⁶ Courts imposed these specific restrictions in addition to the general rule that a plaintiff could not base any fraud action on a fraudulent promise, even when the defendant never intended to perform.⁶⁷

THE TWENTIETH CENTURY: AN ERROR PERPETUATED

Well into the twentieth century, Illinois courts continued to disallow actions based on promissory fraud. In *Miller v. Sutliff*,⁶⁸ the Illinois Supreme Court provided a new rationale for the general rule that an action for promissory fraud could not lie even when the promisor indisputably had no intention of fulfilling the promise at the time the promise was made.⁶⁹ In *Sutliff*, three defendants represented to the plaintiff, Miller, that they were owners of iron mills near Youngstown, Ohio, and that they would transfer one of the mills to Miller's land and the remaining mills to the community in which Miller lived.⁷⁰ The consideration for this promise was that Miller and his neighbors would convey to the defendants an undivided one-half interest in any coal or other minerals located under the transferred land.⁷¹ The defendants further promised that they would employ many men in the community and would build a railroad for the transportation needs of the community.⁷² Lured by promises that the defendants would build the railroad

63. See *supra* notes 37-56 and accompanying text.

64. *Murray v. R.P. Smith & Sons*, 42 Ill. App. 548, 554 (1891).

65. *Haenni v. Bleisch*, 146 Ill. 262, 267, 34 N.E. 153, 154 (1893) ("If, therefore, a court of equity can be resorted to, on the facts here alleged, to annul a deed of conveyance to real estate, then, in every case in which there is a breach of the vendee's contract to pay for the land conveyed, the vendor can avoid the deed.").

66. *Commercial Mut. Accident Co. v. Bates*, 176 Ill. 194 (1898); see also *Gage v. Lewis*, 68 Ill. 604 (1873), which is discussed *supra* notes 37-44 and accompanying text.

67. *Phelan v. Kuhn*, 51 Ill. App. 644, 647 (1893) (although when appellee made the agreement, he may have fraudulently intended to break it, the only remedy for his actual breach is upon the agreement); see also *Potter v. Potter*, 65 Ill. App. 74 (1896); *Day v. Fort Scott Inv. and Improvement Co.*, 53 Ill. App. 165 (1894), *aff'd*, 153 Ill. 293, 38 N.E. 567 (1894); *Peake v. Walton*, 52 Ill. App. 90 (1893).

68. 241 Ill. 521, 89 N.E. 651 (1909).

69. *Id.* at 525, 89 N.E. at 652.

70. *Id.*

71. *Id.* at 524, 89 N.E. at 651.

72. *Id.* at 525, 89 N.E. at 652.

before the onset of winter and would provide a steamboat on the Ohio River to transport the mill machinery, Miller conveyed to the defendants the requested interest in his mineral rights.⁷³ Miller petitioned the court to set aside the deed on the ground that the defendants refused to honor their promises.⁷⁴ Affirming the trial court's dismissal of Miller's action, the Illinois Supreme Court reasoned:

If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of contract does not amount to a fraud, and neither knowledge of inability to perform, nor an intention to do so, would make the transaction fraudulent.⁷⁵

The problem with this cryptic justification of the rule is that it erroneously and unjustifiably insinuates that contract law would be destroyed or seriously impaired if a fraud action were allowed as an alternative theory to a breach of contract theory.⁷⁶ As long as the fraud is not promissory fraud, an Illinois plaintiff may sue contemporaneously for breach of contract and fraud.⁷⁷ No Illinois court has suggested that the fraud theory might somehow diminish the stability of contracts. It was unsound, therefore, for the *Sutliff* court to hold that promissory fraud actions would undermine the viability of contract actions.

The *Sutliff* court suggested that every breach of contract might lead to an alternate action in damages for promissory fraud.⁷⁸ This suggestion is legally erroneous because the court failed to recognize that promissory fraud involves an element which is entirely independent of the elements necessary to establish breach of contract—namely, the promisor's deceptive intent. The necessity of proving deceptive intent therefore ensures that most actions based on breach of contract will not serve as the basis for additional damage

73. *Id.*

74. *Id.* at 523-24, 89 N.E. at 651 (trial court granted defendants' demurrer to the complaint even though the demurrer necessarily admitted the truth of the allegations due to a want of equity).

75. *Id.* at 526-27, 89 N.E. at 652.

76. W. PROSSER, *supra* note 23, §§ 96, 129; see also, e.g., *Hotze v. Schlanser*, 410 Ill. 265, 102 N.E.2d 131 (1951) (in a contract action, plaintiff's claim that his signature was obtained by fraud was an affirmative defense required to be proved like any other fact); *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 72 Ill. App. 3d 37, 390 N.E.2d 393 (1st Dist. 1979) (terms of a written contract executed in conjunction with fraud are irrelevant to a cause of action grounded in tort); *Bliss v. Rhodes*, 66 Ill. App. 3d 895, 384 N.E.2d 512 (2d Dist. 1978) (in the absence of fraud, inadequacy of consideration, exorbitance of price or improvidence in contract will not constitute a defense for failure to perform); *Shanahan v. Schindler*, 63 Ill. App. 3d 82, 379 N.E.2d 1307 (1st Dist. 1978) (party who fraudulently induces another to enter into a contract cannot eliminate the defense of fraud by executing a substitute contract without disclosing the original fraud). For cases in which the court allowed the alternative action, see generally *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (4th Dist. 1982); *Baker, Bourgeois & Assoc. v. Taylor*, 84 Ill. App. 3d 909, 410 N.E.2d 55 (1st Dist. 1980).

77. See, e.g., *infra* note 86.

78. *Miller v. Sutliff*, 241 Ill. 521, 528, 89 N.E. 651, 653 (1909).

recovery for fraud. The court also failed to consider that contracts may be unperformed for various reasons that are very different from an intentional fraudulent misrepresentation of future facts and events. For example, impossibility or inability to perform a contract are problems that may beset a promisor who acts with the utmost good faith.⁷⁹ Furthermore, a promisor who intended to perform at the time of entering into the promise, but who later reneges, clearly is in a different category from a promisor who never intended to carry out a promise from its very inception. In the former instance, scienter and the other elements of deceit have not occurred simultaneously; in the latter instance, the elements all conjoin contemporaneously to establish the tort of fraudulent misrepresentation.⁸⁰

The chimerical supposition that an action for promissory fraud would debilitate contract law has not been articulated in any one of the overwhelming majority of states that recognize actions for promissory fraud.⁸¹ A plaintiff bringing a promissory fraud action has the difficult burden of proving that the promisor had a fraudulent state of mind at the time of entering into the transaction and never intended to fulfill the promise. Only objective evidence, such as admissions against interest or contradictory promises, would be useful to prove a culpable state of mind, because the adversary is unlikely to confess as to her deceitful frame of mind at the time of her promise. Making it even more difficult for a plaintiff to prove an intent to deceive, Illinois law requires that fraud must be pleaded specifically and particularly, without merely conclusory allegations contained in the complaint.⁸² Illinois law also requires that a plaintiff seeking recovery for fraud must prove the elements of fraud, which include establishing the promisor's culpable state of mind with clear and convincing evidence—a higher standard than the usual preponderance standard of civil cases.⁸³ Moreover, since one may freely plead alternate and inconsistent counts in Illinois,⁸⁴ it is an antiquated requirement that one must choose between a contract

79. See, e.g., *Joseph v. Lake Michigan Mortgage Co.*, 106 Ill. App. 3d 988, 436 N.E.2d 663 (1st Dist. 1982) (party may not avoid a contract entered into in good faith if subsequently, that party is unable to perform because of a mistaken opinion of its legal effect).

80. See *supra* note 2.

81. For a listing of states which allow actions for promissory fraud, see *supra* note 28.

82. ILL. REV. STAT. ch. 110, § 43(4) (1979). See also *Goldberg v. Goldberg*, 103 Ill. App. 3d 584, 588, 431 N.E.2d 1060, 1063 (1st Dist. 1982) (to allege a cause of action for fraud, pleadings must contain specific allegations thereof); *Wiersma v. Workman Plumbing, Heating & Cooling, Inc.*, 87 Ill. App. 3d 535, 538, 409 N.E.2d 159, 162 (3rd Dist. 1980) ("To properly allege a cause of action for fraud, the pleadings must contain specific allegations of facts from which fraud is the necessary or probable inference."); *Younger v. Revelle*, 78 Ill. App. 3d 1, 4, 397 N.E.2d 221, 223 (5th Dist. 1979) (fraud must be pleaded with such specificity, particularity and certainty as to apprise the opposing party of the allegations); *Browning v. Heritage Ins. Co.*, 33 Ill. App. 3d 943, 948, 338 N.E.2d 912, 917 (2d Dist. 1975) (fraud must be shown by specific allegations of facts from which fraud is the necessary or probable inference).

83. See *supra* note 2; see also *Younger v. Revelle*, 78 Ill. App. 3d 1, 5, 397 N.E.2d 221, 224 (5th Dist. 1979) ("Presupposing that the complaint stated a cause of action, the evidence at trial failed to establish the existence of fraud by clear and convincing proof.").

84. ILL. REV. STAT. ch. 110, § 43(2) (1979).

action and an alternate promissory fraud action.⁸⁵ A plaintiff should be free to plead a breach of contract action and a promissory fraud action in the alternative because the elements of the two wrongs are not identical.⁸⁶

The *Sutliff* court, however, conceded that there were Illinois cases in which conveyances had been set aside in equity when a party transferred home and hearth to another person, often a family member, under the promise that the transferees would take care of the transferor for the remainder of the transferor's life.⁸⁷ The court distinguished those cases, stating that the prohibition against promissory fraud in cases involving ordinary business transactions for gain did not apply.⁸⁸ It is mystifying, however, why deceit is more tolerable in the business world than in cases of fraud among family members. Nevertheless, the *Sutliff* court acknowledged that James Miller might obtain relief in equity but could not obtain relief at law because a law court could not adequately measure the damages incurred by the defendants' refusal to move the iron mills, to build a railroad, or to employ many men in the community.⁸⁹ The paradox of this acknowledgment is that James Miller never asked for damages but simply asked the court to set aside his deed and remove the cloud on his title.⁹⁰

This inconsistent approach to promissory fraud is the weakest of reeds

85. See *Miller v. Sutliff*, 241 Ill. 521, 526-27, 89 N.E. 651, 652 (1909) (court determined that contract law would be seriously impaired or destroyed if fraud action were allowed as an alternative theory to a breach of contract). *But see Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334, 371 N.E.2d 634, 641 (1977).

86. In fact, Illinois courts allow alternate causes of action in a complaint based respectively on a contract theory and a tort theory based on fraud. The Illinois Supreme Court in *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977), specifically held that an action of fraud as well as an action for a breach of contract was an appropriate theory of recovery. In *Steinberg*, a medical school applicant alleged that the defendant medical school breached its agreement to evaluate his application according to the academic criteria stated in the school catalogue. The plaintiff argued that the medical school rejected his application because of unstated criteria that involved the financial ability of the applicant to donate large sums of money to the school. *Id.* The trial court dismissed both the contract theory and the fraud theory. *Id.* at 332, 371 N.E.2d at 640. The appellate court reversed the dismissal of the contract theory but affirmed the dismissal of the promissory fraud theory. *Id.* In reversing the lower courts, the Illinois Supreme Court stated:

Here an action for fraud is consistent with the recognition of a contract action. The law creates obligations "on the ground that they are dictated by reason and justice." . . . So here the facts of this situation mandate that equity imply an obligation by the defendant. We note this since the circumstances before us justify a contract action, as well as a fraud action, or, in the event no contract can be proven, an action on an implied-in-law obligation of the defendant.

Id. at 334, 371 N.E.2d at 641.

Because *Steinberg* emphasizes that Illinois law allows the conjunction of a contract cause of action and a fraud cause of action in the same lawsuit, the Illinois Supreme Court in *Steinberg* implicitly determined that a promissory fraud theory is compatible with a breach of contract action. *Id.*

87. *Miller v. Sutliff*, 241 Ill. 521, 528, 89 N.E. 651, 653 (1909).

88. *Id.* at 528, 89 N.E. at 652.

89. *Id.*

90. *Id.* at 528, 89 N.E. at 653.

on which to continue the ban. The *Sutliff* court suggested that James Miller might obtain relief for promissory fraud in equity.⁹¹ Now that equity and law have merged in Illinois as a result of the Judicial Reform Act,⁹² the *Sutliff* case is obsolete as precedent for the ban on promissory fraud because the court denied recovery based on the then existent schism between equity and law.⁹³ With the merger of law and equity, the rule that allows for recovery in equity must logically allow for recovery in law as well; there are no longer two sets of legal principles for two distinct courts.⁹⁴ Nevertheless, the ban on promissory fraud has continued after the *Sutliff* case without deviation.⁹⁵

THE SCHEME OR DEVICE EXCEPTION

In 1922, the Illinois Supreme Court tentatively created an exception to the general rule prohibiting recovery for promissory fraud. In *Luttrell v. Wyatt*,⁹⁶ the defendant cajoled the plaintiff into lending money to the defendant's brother. The defendant represented that he would personally guarantee the loan and that his brother owned real estate which could be used as security.⁹⁷ After being threatened with a grand jury indictment, the defendant agreed to reimburse the plaintiff for the defaulted loan.⁹⁸ Before repaying the loan, however, the defendant warned that the plaintiff's wife and son were after the money, and the defendant expressed his concern that the plaintiff alone should receive the payment.⁹⁹ Believing the defendant, the plaintiff isolated himself from his wife, his son, and his lawyer.¹⁰⁰ The defendant then promised that as soon as the plaintiff's son dropped the contract action against him, he would repay the money.¹⁰¹ The plaintiff alleged that

91. *Id.*

92. "With the adoption in 1964 of the new Judicial Article to the Illinois Constitution in 1870, the distinction between courts of law and courts of equity was formally eliminated and this was carried over into the Judicial Article of the Illinois Constitution of 1970." ILL. ANN. STAT. ch. 110, § 2-601, at 4 (Smith-Hurd 1983) (historical and practice notes). For a case which has eliminated the distinction between courts of law and courts of equity, see *Balcor Income Properties, Ltd. v. Arlen Realty, Inc.*, 95 Ill. App. 3d 700, 420 N.E.2d 612 (1st Dist. 1981) (the merger of law and equity has eliminated the distinction on which this rule was based, and thus there is no compelling reason to follow this obsolescent adage).

93. 241 Ill. at 528, 89 N.E. at 653.

94. See *supra* note 92 and accompanying text.

95. For courts that continued to deny actions premised on promissory fraud, see, e.g., *Keithley v. Mutual Life Ins. Co.*, 271 Ill. 584, 111 N.E. 503 (1916); *Grubb v. Milan*, 249 Ill. 456, 94 N.E. 927 (1911); *Ingersoll v. Brown & Co.*, 205 Ill. App. 537 (1st Dist. 1917); *Meixner v. Western Live Stock Ins. Co.*, 203 Ill. App. 523 (2d Dist. 1916); *Ensign v. Lehmann*, 192 Ill. App. 578 (1st Dist. 1915); *Buyer's Index Pub. Co. v. American Shoe Polish Co.*, 169 Ill. App. 618 (1st Dist. 1912); *Koehler v. Glaum*, 169 Ill. App. 537 (1st Dist. 1912).

96. 305 Ill. 274 (1922).

97. *Id.* at 276.

98. *Id.* at 276-77.

99. *Id.* at 277.

100. *Id.*

101. *Id.* at 278 (plaintiff's son and trustee of the mortgage sued the defendant to recover the mortgage balance).

the defendant falsely promised payment only to beguile the plaintiff into releasing the defendant from the debt.¹⁰² The Illinois Supreme Court set aside an injunction that the defendant had obtained to prevent the plaintiff from suing the defendant.¹⁰³ Noting that the ban on promissory fraud actions did not apply because the promise was accompanied by a "number of false representations" made by the defendant,¹⁰⁴ the Illinois Supreme Court determined that an action could be based on the defendant's fraudulent promise to pay the plaintiff. The court held that a "representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party and then acted upon by him, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity."¹⁰⁵ To ensure the plaintiff's recovery for the defendant's deceit, the court reasoned that even if no promissory fraud action lay, the plaintiff still had an action for breach of contract.¹⁰⁶

Until 1948, the hope of a well-entrenched exception to the general ban on promissory fraud collapsed beneath the weight of cases disallowing recovery.¹⁰⁷ Then, in *Roda v. Berko*,¹⁰⁸ the Illinois Supreme Court firmly developed the exception beyond the tentative gropings in *Luttrell*. In *Roda*, the plaintiff sued in equity to cancel a warranty deed issued in reliance on defendant's fraudulent promise that the deeded land would be used for a factory of prefabricated houses.¹⁰⁹ Instead of developing the land as promised, and thereby enhancing the value of the surrounding property, the

102. *Id.* at 279.

103. *Id.* (injunction, which was obtained to enjoin the prosecution in assumpsit, allowed the notes to be cancelled and relieved the defendant from liability).

104. *Id.* at 282.

105. *Id.* at 283 (citing 2 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (4th ed. 1811)).

106. *Id.*

107. See *Brodsky v. Frank*, 342 Ill. 110, 173 N.E. 775 (1930) (plaintiff denied recovery for an action based on promissory fraud); *Bielby v. Bielby*, 333 Ill. 478, 165 N.E. 231 (1929) (promissory fraud was insufficient to vitiate a marriage); *May v. Chas. O. Larson Co.*, 304 Ill. App. 137, 26 N.E.2d 139 (1st Dist. 1940) (defendant could not use failure to achieve an increase in profits as a defense to the enforcement of the notes; the defense of misrepresentation must be based on past or present facts and not on the promise to do an act in the future); *Thomson v. Miner*, 303 Ill. App. 335, 25 N.E.2d 137 (3rd Dist. 1940) (recovery for fraud denied when it was based on a failure to comply with a future promise); *Wright v. Peabody Coal Co.*, 290 Ill. App. 110, 8 N.E.2d 68 (3d Dist. 1937) (court dismissed the fraud action because it was based on a failure to comply with a future promise and a fraud action generally requires a willful misrepresentation of past or present facts); *Johnson v. Johnson*, 257 Ill. App. 587 (1st Dist. 1930) (promissory fraud was not sufficient to annul marriage where wife married for the sole purpose of obtaining the name of a married woman, with no intent to live with her husband or consummate the marriage); *Chilvers v. Huenemoerder*, 250 Ill. App. 499 (2d Dist. 1928) (plaintiff denied contract rescission based on fraud because he failed to set forth facts on which to base the action); *Steven v. Combination Found. Co.*, 231 Ill. App. 360 (3d Dist. 1923) (recovery for promissory fraud denied because plaintiff failed to state all the elements of fraud). *But see Seimer v. James Dickinson Farm Mortgage Co.*, 299 F. 651 (E.D. Ill. 1924) (court applied Texas law which allowed recovery for real estate fraud consisting of a false promise to do a future act).

108. 401 Ill. 335, 81 N.E.2d 912 (1948).

109. *Id.* at 338, 81 N.E.2d at 914.

defendant turned the deeded land into a junkyard which the plaintiff alleged was a nuisance to his remaining land.¹¹⁰ The defendant vigorously argued the general rule that a promise to perform an act, although accompanied by an intention not to perform the act, is not such a false representation of facts as to constitute actionable fraud.¹¹¹ In reversing the dismissal of the plaintiff's action, the Illinois Supreme Court asserted, "It is true . . . that this is the general rule, but this general rule is subject to qualification and does not apply to the case we are here considering."¹¹² The court cautioned that although "language used in some of the cases, standing alone, would seem to support defendant,"¹¹³ the general rule was limited by the "facts and circumstances of the particular case."¹¹⁴ The court first made the dubious distinction that in none of the key cases espousing the general rule had there been a showing of "deliberate fraud by which a party had been induced to act to his damage."¹¹⁵ The court then made another distinction, finding that in none of the key cases supporting the general rule was the existence of fraud "shown by anything other than the broken promise."¹¹⁶ Whatever the validity of the reasoning, the *Roda* court declared:

It is also the rule that a promise to perform an act, though accompanied at the time with an intention not to perform it, is not such a false representation as will constitute fraud sufficient to predicate thereon a cause of action. However, in cases where the false promise or representation of intention or of future conduct is the *scheme or device* to accomplish the fraud and thereby cheat and defraud another of his property, equity will right the wrong by restoring the parties to the positions they occupied before the fraud was committed.¹¹⁷

Although the *Roda* court's pronouncement of the scheme or device exception appears to be based on a sound legal principle, the reasoning of the decision is self-destructing because the only scheme or device in the case was the one fraudulent promise.¹¹⁸ Unlike the *Luttrell* case, the *Roda* decision did not involve persistent fraud that had been perpetrated on the plaintiff in various ways other than promissory fraud. The general rule that one

110. *Id.* at 339, 81 N.E.2d at 914.

111. *Id.* at 341-43, 81 N.E.2d at 915-16.

112. *Id.* at 341, 81 N.E.2d at 915.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* If there are fraudulent misrepresentations of past or present material facts other than the promissory ones, as was true in *Luttrell*, it is not necessary to rely on the promissory fraud. It is meaningless to allow recovery for promissory fraud in a case where one would recover because of non-promissory fraud involving misrepresentation of past or present physical facts other than a defendant's state of mind.

117. *Id.* at 340, 81 N.E.2d at 915 (emphasis added) (citing *Luttrell v. Wyatt*, 305 Ill. 274, 137 N.E. 95 (1922); *Abbott v. Loving*, 303 Ill. 154, 135 N.E. 442 (1922)).

118. *Id.* at 338, 81 N.E.2d at 914 (defendant represented that real estate purchased from plaintiff would be used to build a factory for the making of prefabricated homes when in fact it was used as a junk yard).

cannot recover for a mere promissory fraud is an illusion if a single promissory misrepresentation is enough to constitute a scheme or device.¹¹⁹ The court in *Roda* simply has replaced, sub silentio, a general rule of liability for promissory fraud for a general rule of nonliability. The *Roda* court makes no attempt to reconcile the general rule with the scheme or device exception. Such a reconciliation, however, is impossible, because the exception is a purely discretionary development.

At first glance, the impact of *Roda* appears to have far-reaching effects for Illinois plaintiffs desiring to bring promissory fraud actions. The *Roda* decision, however, has had no such far-reaching effects primarily because the court applied the exception without any underlying rationale. To preserve the integrity and viability of the general rule against liability for promissory fraud, the *Roda* court should have confined its holding to equity actions. Such a limitation would have been consistent with several Illinois cases prior to *Roda* which held that the general rule of nonliability for promissory fraud, though applicable to actions at law based on fraud, did not apply to equity actions.¹²⁰ If this was the Illinois Supreme Court's intent, then after *Roda*, the general rule of nonliability for promissory fraud still reigned supreme in actions at law, while in chancery actions, judges and lawyers would have to contend with the general rule and its puzzling scheme or device exception.¹²¹ Any attempt to confine the exception to equity cases after 1964, however, was nullified by the merger of equity and law.¹²²

Nevertheless, by the 1950s and 1960s, the scheme or device exception was used with regularity by the Illinois courts. As illustrated by the case of *Willis v. Atkins*,¹²³ Illinois courts were particularly prone to rely on the exception in cases in which the defendant used various machinations to fraudulently mislead a hapless plaintiff over a period of time. In *Willis*, the defendant promised to divorce his wife and marry the plaintiff if she would provide him with money for his funeral business.¹²⁴ The plaintiff gave the defendant land and cash in reliance on his promise of marriage.¹²⁵ The court carefully noted that the defendant frequently visited the plaintiff's home, ate meals with her, handled her affairs, acted intimately with her, and portrayed images of a "rosy future" for both of them while he was secretly scheming

119. *Id.* at 340, 31 N.E.2d at 915.

120. *Dauids v. Davids*, 333 Ill. 327, 164 N.E. 662 (1929) (constructive trust was established in favor of the children when son persuaded his mother to deed the land to him instead of preparing a will so that he could distribute the shares to the children as she requested); *De Costa v. Bischer*, 287 Ill. 598 (1919) (court rescinded contract and cancelled deed when grantor voluntarily conveyed all his property in consideration of support and maintenance, but grantee refused to perform); *Frazier v. Miller*, 16 Ill. 48 (1854) (court allowed rescission of contract when a complete remedy could not be attained at law).

121. See *infra* notes 123-68 and accompanying text.

122. See *supra* note 92.

123. 412 Ill. 245, 106 N.E.2d 370 (1952).

124. *Id.* at 249, 106 N.E.2d at 371.

125. *Id.* at 249-51, 106 N.E.2d at 372-73.

to obtain what he could of the plaintiff's property without marrying her.¹²⁶ Obviously disturbed by the defendant's alleged knavery, the Illinois Supreme Court concluded that the gulled woman should reap the return of her land and cash.¹²⁷ Reminded of the ban on promissory fraud actions, the Illinois Supreme Court rejoined:

We are aware of these decisions and of the general rule but believe it has no application to a situation such as that presented here, where the fraud was perpetrated and the confidence gained not by mere promises but by a course of conduct covering a period of almost twelve years in which [defendant] by pretending great interest in the [plaintiff's] welfare and devotion to her affairs, secured not only her property but a large measure of his support.¹²⁸

As evinced by this passage, the Illinois Supreme Court in *Willis* interpreted the scheme or device exception very narrowly by limiting it to a fraud that had been perpetrated for many years by a defendant seeking to obtain a substantial interest in the plaintiff's money. The *Willis* court's interpretation and application of the exception is much more restrictive than the *Roda* court's, although it is arguably the same scheme or device exception. The inconsistent application of this discretionary exception in *Roda* and *Willis* indicates that the Illinois Supreme Court has not yet determined which plaintiffs may state a promissory fraud cause of action based on a scheme or device.

126. *Id.* at 260, 106 N.E.2d at 377.

127. *Id.* at 258, 106 N.E.2d at 378.

128. *Id.* at 259, 106 N.E.2d at 377. Other contemporary decisions, however, continued to prohibit recovery for any promissory fraud. *See, e.g.,* *Hablas v. Armour & Co.*, 270 F.2d 71 (8th Cir. 1959) (when employer induced employee with a pension plan despite his intent to terminate the employee before he was eligible for the pension, it constituted a future promise to do an act; therefore, it was insufficient for recovery under Illinois law); *North Am. Plywood Corp. v. Osh Kosh Trunk and Luggage Co.*, 263 F.2d 543 (7th Cir. 1959) (court dismissed action which alleged that the defendant had no intention of paying for his purchases because it was a promise to do a future act which does not constitute fraud); *Stewart-Warner Corp. v. Remco, Inc.*, 205 F.2d 583 (7th Cir. 1953) (although contract was broad enough to excuse nondelivery of television sets to the exclusive distributor, Illinois law bars fraud actions based on future promises to do an act); *Federal Deposit Ins. Corp. v. Wainer*, 4 Ill. App. 2d 233, 124 N.E.2d 29 (1st Dist. 1955) (demand note to a bank, accompanied by a secret agreement that the note would not be paid by its maker, was a representation of a future intent insufficient to support a defense of fraud). For a recognition that Illinois has consistently remained in the minority, see *Gass v. National Container Corp.*, 171 F. Supp. 441 (S.D. Ill. 1959), *appeal dismissed*, 271 F.2d 231 (7th Cir. 1959), where the court states as follows:

The minority rule is that fraud cannot be predicated upon a mere promise, even though it is accompanied by a present intention not to perform it. The reasoning of the courts following the minority rule is that even under such circumstances the promise is not a misrepresentation of an existing fact, and there is a mere unexecuted intention which does not constitute fraud, and that a mere breach of contract does not amount to a fraud, and that neither knowledge of inability to perform, nor an intention to do so would make the transaction fraudulent.

Reminiscent of *Willis v. Atkins*, 412 Ill. 245, 106 N.E.2d 370 (1952), an Illinois appellate court in *Kriegel v. Miedema*, 20 Ill. App. 2d 235, 155 N.E.2d 815 (1st Dist. 1959), admonished: "Something more than failure to keep the promise must be shown to prove a fraudulent in-

The appellate court in *Sullivan v. Sullivan* shed some additional light on the scheme or device exception.¹²⁹ In *Sullivan*, the defendant, a twenty-one-year-old woman, admitted that soon after her sixty-four-year-old husband transferred real estate to her in joint tenancy, she moved out of the marital domicile to another town.¹³⁰ The plaintiff husband claimed that he gave her the property interest only because she had promised to live with him.¹³¹ Consequently, the husband sued for a divorce because of his wife's subsequent adultery and asked for a rescission of the real estate deed because of her false representations and lack of consideration.¹³² The appellate court affirmed the decree of divorce and the voiding of the conveyance on the ground that the wife's promise, made without an intention of honoring it, was part of a scheme or device to procure the real estate interest.¹³³ The court held that "equity will provide relief in those cases where the promise made without intent to perform, or the false representation, is, in fact, part of the scheme or device to procure the conveyance."¹³⁴ The court considered what the scheme or device was in this case apart from the fraudulent promise itself, and concluded that the wife's conduct prior to the time of the conveyance could be considered as evidence of her bad faith and involvement in a scheme or device to swindle her husband.¹³⁵

tent." *Id.* at 240, 155 N.E.2d at 818. The appellate court was well aware that it would not be easy to prove the fraudulent intent behind the promise:

It is true that the subject of a man's mind is a fact which may be proved as any other fact when certain issues such as belief or reliance upon representations are involved. But a strong and persuasive case must be made before a court will commence an inquiry of this character so long after the actual transactions, with the death of the principals and other circumstances intervening.

Id. at 241, 155 N.E.2d at 818. Despite the *Kriegel* case, Illinois courts during this period still remained confused as to whether a misrepresented state of mind was a fact. *See, e.g.,* *Plavec v. Plavec*, 30 Ill. App. 2d 345, 349, 174 N.E.2d 578, 580 (1st Dist. 1961) ("Authorities cited by plaintiff indicate that some promises, not misrepresentations of existing facts, wrongfully entered into with the intention to deceive and for the purpose of obtaining an advantage, may be the basis of equitable relief from a judgement or decree obtained by fraud.").

129. 79 Ill. App. 2d 194, 223 N.E.2d 461 (4th Dist. 1967).

130. *Id.* at 195, 223 N.E.2d at 462.

131. *Id.* at 197, 223 N.E.2d at 463.

132. *Id.* at 195-96, 223 N.E.2d at 462.

133. *Id.* at 199, 223 N.E.2d at 464.

134. *Id.*

135. *Id.* at 200, 223 N.E.2d at 464. In the same year, however, an Illinois appellate court in an almost identical equitable action for rescission involving the sale of stock, invoked the general rule against promissory fraud without distinguishing the *Sullivan* case. *Illinois Rockford Corp. v. Kulp*, 88 Ill. App. 2d 458, 232 N.E.2d 190 (1st Dist. 1967), *rev'd on other grounds*, 41 Ill. 2d 215, 242 N.E.2d 228 (1968). By what standard is the act of a 21-year-old woman in breaking a promise to live with a 64-year-old man more of a scheme or device than swindling another out of stock? The apparent arbitrariness of the general rule and its exception is illustrated by *Carroll v. First Nat'l Bank*, 413 F.2d 353 (7th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), where the court, allowing a claim for promissory fraud in an action to recover from a stock swindle, declared that the "general rule in Illinois denies recovery for fraud based on a false representation of intention or future conduct, but there is a well-recognized exception, where, as here, the false promise or representation of future conduct is claimed to be the scheme used to accomplish the fraud." *Id.* at 358.

The *Sullivan* court properly concluded that a fraudulent state of mind marked by bad faith does not arise on the spur of the moment. Since all deceit can be characterized as bad faith that precedes the actual promise and continues up to the time of the fraudulent promise, one who entertains an intent not to perform a promise and adheres to that secret intent is engaged in a continuous course of bad faith. The *Sullivan* court explained that if scheme or device is coterminous with bad faith, then every time one knowingly intends not to perform a promise there is a redundant characterization of a scheme or device.¹³⁶ The Seventh Circuit succinctly characterized the meaningless surplusage of the Illinois scheme or device exception by stating that the "law has been long established that a scheme to defraud may consist of suggestions and promises as to the future, when not made in good faith but with deceptive intent."¹³⁷ If every deceitful promise equals bad faith and if bad faith equals a scheme or device, there is no logical way to avoid the conclusion that every deceitful promise is a scheme or device. The ineluctable result is that the exception has engulfed the general rule, although the Illinois courts have yet to acknowledge this reality. The general rule of nonliability for promissory fraud has been engulfed by the logic of the scheme or device exception when the deceit implicit in the promise is sufficient to constitute a scheme or device.

By the 1970s it became clear that the Illinois courts knew how to use the exception to gut the general rule of nonliability.¹³⁸ For instance, in *Roth v. Roth*¹³⁹ the plaintiff, an ex-wife, petitioned the trial court to compel her ex-husband to pay her support as directed by the divorce decree.¹⁴⁰ The defendant counterpetitioned to modify the decree on the ground that the appropriate support level had been determined based on the ex-wife's statement that she had no plans to remarry, despite her actual intent to remarry as soon as possible.¹⁴¹ In fact, the ex-wife remarried exactly thirty-one days after the divorce decree.¹⁴² The Illinois Supreme Court held that "[t]he [counter]petition was filed within two years after the entering of the decree and it is clear that it made allegations of fact which, if true, would entitle [defendant] to the relief sought."¹⁴³ The court thereupon granted the defen-

136. 79 Ill. App. 2d at 199, 223 N.E.2d at 464.

137. *United States v. Herr*, 338 F.2d 607 (7th Cir. 1964).

138. In *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977), the court easily avoided the rule prohibiting recovery in damages for promissory fraud by noting: "We concede the general rule denies recovery for fraud based on a false representation of intention or future conduct, but there is a recognized exception where the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud." *Id.* at 334, 371 N.E.2d at 641.

139. 45 Ill. 2d 19, 256 N.E.2d 838 (1970).

140. 45 Ill. 2d at 20-21, 256 N.E.2d at 839.

141. *Id.* at 21, 256 N.E.2d at 839.

142. *Id.* The trial court denied the plaintiff's motion to strike the counterpetition. The Illinois Appellate Court reversed the trial court and the Illinois Supreme Court in turn reversed the appellate court and affirmed the trial court.

143. 45 Ill. 2d at 23, 256 N.E.2d at 840; *see also* *Deahl v. Deahl*, 13 Ill. App. 3d 150,

dant's request to modify the decree without any obligatory mention of the scheme or device exception.

Although Illinois courts have been reluctant to fully incorporate the exception into a general rule of liability, they have applied the exception regularly, although without any consistent or unified judicial rationale. The judicial uncertainty, however, that has characterized the scheme or device exception is reflected in *Louis v. Louis*.¹⁴⁴ In that case, a woman was granted an annulment on the ground that her husband had represented his desire to consummate the marriage and have children when, in actuality, he did not have such an intention.¹⁴⁵ The court held that the "statement of a matter in the future, if affirmed as a fact, may amount to a fraudulent misrepresentation, but it must amount to an assertion of a fact and not an agreement to do something in the future."¹⁴⁶ Appellate court decisions, like the *Louis* decision, often have either ignored or rejected the scheme or device exception and have cited the general rule against recovery for promissory fraud as a sufficient reason to dismiss legal claims based on a fraudulent promise.¹⁴⁷ In effect, some courts have incorporated the excep-

300 N.E.2d 497 (1st Dist. 1973) (in a divorce proceeding, a wife's failure to disclose her immediate intention to remarry constituted fraud because it was a material fact pertinent to the determination of alimony).

144. 124 Ill. App. 2d 325, 260 N.E.2d 469 (1st Dist. 1970).

145. *Id.* at 326-27, 260 N.E.2d 470-71.

146. *Id.* at 329-30, 260 N.E.2d at 472; *see also* *Duhl v. Nash Realty, Inc.*, 102 Ill. App. 3d 483, 490-91, 429 N.E.2d 1267, 1274 (1st Dist. 1982) (Consumer Fraud and Deceptive Business Practice Act is broader than common law, allowing recovery for any deception or false promise with no showing of intent to deceive, misrepresentation or statement of fact or false promise); *Hereen v. Smith*, 276 Ill. App. 438, 442 (1934) (no fraud in sale of real estate when statements did not amount to assertions of fact); *Owens v. Union Bank*, 260 Ill. App. 595, 601 (1931) (defendant was guilty of fraudulent representation in sale of real estate because statements of future matters were assertions of fact).

147. *See, e.g.*, *People v. Gordon*, 45 Ill. App. 3d 282, 359 N.E.2d 794 (1st Dist. 1977) (without referring to scheme or device exception, court analogized theft to a fraud action since both are limited to past or present misrepresentations); *McAfee V. Rockford Coca-Cola Bottling Co.*, 40 Ill. App. 3d 521, 352 N.E.2d 50 (2d Dist. 1976) (court dismissed promissory fraud action stating the general rule that "an action for fraud or deceit will not lie for misrepresentation as to a future event," but the court ignored the scheme or device exception); *Alikonis v. Alikonis*, 36 Ill. App. 3d 159, 343 N.E.2d 161 (4th Dist. 1976) (court denied modification of divorce settlement based on promissory fraud stating the general rule but ignoring the scheme or device exception); *Polivka v. Worth Dairy, Inc.*, 26 Ill. App. 3d 961, 328 N.E.2d 350 (1st Dist. 1975) (court denied recovery for promissory fraud without considering the scheme or device exception); *Friendship Medical Center, Ltd. v. Space Rentals*, 62 F.R.D. 106 (N.D. Ill. 1974) (dismissed action for promissory fraud without considering the scheme or device exception); *Tonchen v. All-Steel Equip., Inc.*, 13 Ill. App. 3d 454, 300 N.E.2d 616 (2d Dist. 1973) (court dismissed action for promissory fraud without considering the scheme or device exception); *Hurley v. Frontier Ford Motors, Inc.*, 12 Ill. App. 3d 905, 299 N.E.2d 387 (2d Dist. 1973) (court denied recovery for promissory fraud stating that "the exception [to the rule] that if one who makes the future promise has no present intention to perform, an action for fraud will lie . . . has been rejected in Illinois"); *Dennis v. Dennis*, 132 Ill. App. 2d 952, 271 N.E.2d 55 (3d Dist. 1971) (court dismissed promissory fraud action without considering scheme or device exception). One federal case appears to have confused the scheme or device

tion into the general rule to allow recovery in a promissory fraud action, while still maintaining the fiction of two distinct legal principles.¹⁴⁸

Some Illinois courts adhere to the exception as the basis for recovery only if the total facts reveal a scheme or device. These courts do not allow recovery merely because a party made a false promise with no intention of keeping it.¹⁴⁹ This reluctance to allow recovery characterizes Illinois courts' continual dissatisfaction with the scheme or device exception. Some courts have narrowed its application to the extent that it has become a virtually impossible standard to satisfy.¹⁵⁰ In yet another example of a court's uncertainty as to how to apply the scheme or device exception, the court in *Ochoa v. Maloney*¹⁵¹ held that no promissory fraud action at law existed, without any mention of the scheme or device exception.¹⁵² In *Ochoa*, the plaintiffs alleged that for a fee, defendant lawyers agreed to represent them in their criminal appeal although they never actually intended to do so.¹⁵³ Determining that the plaintiffs had no basis for recovery, the *Ochoa* court declared:

Thus, they have alleged that defendants falsely promised to do something in the future, which is not the basis for an action in fraud even though accompanied by an intention not to perform. The mere fact that they also alleged in the proposed pleading that they "believed in and justifiably relied upon these representations" does not, in our opinion, alter the future character of the promise.¹⁵⁴

Thus, even a promise which the declarant arguably never intended to honor,

exception by suggesting that the exception to the normal rule against recovery in Illinois for future or contingent events was the promissory fraud exception. See *Peterson Indus., Inc. v. Lake View Trust & Sav. Bank*, 584 F.2d 166, 169 (7th Cir. 1978) ("One such exception arises when the statement is a 'false promise or representation of future conduct.'").

148. See *Metropolitan Sanitary District v. Pontarelli & Sons, Inc.*, 7 Ill. App. 3d 829, 841, 288 N.E.2d 905, 913 (1st Dist. 1972) (court noted that plaintiff admitted in its brief that even though there was no cause of action for promissory fraud in Illinois, courts should allow such an action as do other jurisdictions; appellate court responded that it was not its function to initiate that change); *Metropolitan Bank & Trust Co. v. Oliver*, 4 Ill. App. 3d 975, 978, 283 N.E.2d 62, 64 (1st Dist. 1972) (scheme or device exception was equated with a "carefully constructed plan of deceit").

149. *Baker, Bourgeois & Assoc. v. Taylor*, 84 Ill. App. 3d 909, 914, 410 N.E.2d 55, 59 (1st Dist. 1980) (plaintiff did not plead the existence of total facts to show a fraud scheme); *Shanahan v. Schindler*, 63 Ill. App. 3d 82, 94, 379 N.E.2d 1307, 1316 (1st Dist. 1978) (total facts did not reveal a scheme or device on which to base an action in fraud, even though defendant's testimony revealed that the plaintiff made a promise without an intention of honoring it); *Zaborowski v. Hoffman Rosner Corp.*, 43 Ill. App. 3d 21, 25, 356 N.E.2d 653, 656 (2d Dist. 1976) (in dismissing promissory fraud action, the court stated that "[i]t is not enough, however, that the party make a false promise not intending to keep it; the total facts must show a scheme or device to defraud").

150. See, e.g., *infra* notes 151-55 and accompanying text.

151. 69 Ill. App. 3d 689, 387 N.E.2d 852 (1st Dist. 1979).

152. *Id.* at 695-96, 387 N.E.2d at 855-56.

153. *Id.* at 695, 387 N.E.2d at 856. The plaintiffs also alleged that the lawyers promised, but never intended, to file a brief as well. *Id.*

154. *Id.* at 695-96, 387 N.E.2d at 856.

made in the context of a fiduciary relationship, was insufficient to state a cause of action under the scheme or device exception.¹⁵⁵

Contrary to the *Ochoa* court,¹⁵⁶ the Illinois appellate court in *Pearson v. Alexander*¹⁵⁷ recently incorporated the exception into the general rule in order to allow a plaintiff to base an action on promissory fraud. In *Pearson*, the defendant agreed to install a set of truck scales on the plaintiff's farm by a certain date. The work, however, was not actually completed until many months later.¹⁵⁸ The case was tried on claims of both breach of contract and fraud because the defendant "knew, or should have reasonably known that said representation was false and that he would be unable to complete the installation" by that date.¹⁵⁹ The trial court awarded compensatory damages on both the breach of contract and the fraud counts and also awarded punitive damages on the fraud count.¹⁶⁰ Due to evidentiary problems, the appellate court reversed and remanded for a new trial solely

155. Unlike state courts in Illinois, federal courts applying Illinois law have been more willing to find that a scheme or device derived from a false promise states an action in fraud. For instance, in *Wilhoite v. Fastenware*, 354 F. Supp. 856 (N.D. Ill. 1973), an ex-employee sued his former employer for fraud based on his employer's promise that he would be paid 10% of net sales, when in fact the employer had no intention of paying this rate of compensation. *Id.* at 858. In allowing the case to go to trial under the scheme or device exception, the district court stated: "Certainly this standard places a substantial burden of proof upon plaintiff, but mere problems of proof should not preclude him from attempting to sustain that burden, however great." *Id.* Thus, while the scheme or device exception has only inconsistent discretionary application in the state courts, the federal courts have allowed a plaintiff the opportunity to recover under the scheme or device exception if the plaintiff could prove that the defendant lacked the intention of keeping a promise when made.

Moreover, the United States Court of Appeals for the Seventh Circuit has refused to follow the Illinois courts' refusal to allow an action for promissory fraud. For example, the Seventh Circuit allowed recovery in deceit against an employer who falsely promised that an inventor would be treated fairly if the inventor would transfer his patents to the employer. In so holding, the Seventh Circuit declared:

Nor can it be successfully maintained that fraud may not under any circumstances be based upon the nonperformance of promises. If such promises are made to induce the fraud, if they induce one to change his status to his damage, he may seek the relief of one defrauded. It is only essential that the evidence disclose that they were fraudulent in their inception, were made in bad faith, with the intention to deceive and were the inducing cause of the detrimental change in his condition made by the complaining party in reliance thereon.

Seimer v. James Dickinson Farm Mortgage Co., 299 F. 651, 657 (E.D. Ill. 1924), *aff'd*, 12 F.2d 772 (7th Cir. 1926), *cert. denied*, 273 U.S. 700 (1926).

156. The *Ochoa* court held that reliance on a misrepresentation of a future act did not alter the future characteristic of the promise. 69 Ill. App. 3d 689, 695-96, 387 N.E.2d 852, 856 (1st Dist. 1979). The *Pearson* court, however, extended the exception to cases in which the purpose of the misrepresentation was to induce action by the plaintiff. 86 Ill. App. 3d at 112, 408 N.E.2d at 787. By extending the exception to include promises to do an act in the future, the court narrowed the gap between Illinois and the majority of jurisdictions.

157. 86 Ill. App. 3d 1105, 408 N.E.2d 782 (4th Dist. 1980).

158. *Id.* at 1106-07, 408 N.E.2d at 783.

159. *Id.* at 1107, 408 N.E.2d at 783.

160. *Id.* at 1106, 408 N.E.2d at 783.

on the issue of compensatory damages.¹⁶¹ Most importantly, the appellate court affirmed the punitive damages award on the fraud count because the court recognized that false promises alone are enough to constitute actionable fraud.¹⁶² The court determined that the plaintiff could sue contemporaneously for both fraud and breach of contract, when both causes of action arise out of the same factual circumstances, without waiving any possible theory of recovery.¹⁶³ The court indicated that only when a party seeks contract rescission may there be a possibility of waiver under the Illinois cases.¹⁶⁴ Significantly, the court trenchantly abolished the scheme or device exception by stating:

Distinguishing between the general rule in Illinois that a promise of future conduct made without intention to perform is not misrepresentation and the exception to the rule which makes such a promise a misrepresentation if it is the scheme to accomplish a fraud, is not easy. As fraud occurs when a misrepresentation is made with intent to induce a victim to rely thereon and a victim is deceived and relies thereon to his detriment, such misrepresentations are ordinarily the schemes by which the victim is defrauded regardless of whether the misrepresentation is as to the declarant's future intent or otherwise. Thus it would seem that the exception tends to engulf and devour much of the general rule and lessen any disparity between the Illinois rule and the majority rule as explained by Prosser.¹⁶⁵

Nevertheless, even as recently as 1982, Illinois courts refused to accept the majority rule of allowing recovery for promissory fraud. In *Bank of Lincolnwood v. Comdisco, Inc.*,¹⁶⁶ the appellate court applied the Illinois rule which disallows recovery for promissory fraud. In *Comdisco*, a bank sued a borrower for breach of contract, restitution, and promissory fraud because the borrower planned and schemed to benefit from the drop in interest rates by renouncing the plaintiff's loan agreement after being unable to modify the agreement.¹⁶⁷ Although affirming the plaintiff's restitutory recovery for breach of contract, the *Comdisco* court refused to allow recovery for the promissory fraud under the scheme or device exception because the plaintiff bank did not allege sufficient facts from which a scheme could be deduced.¹⁶⁸ With these varying interpretations by the appellate courts on the viability of an action based on promissory fraud, it is clear that only the Illinois Supreme Court can effectively abolish the shell of a rule that still purports to bar recovery for promissory fraud.

161. *Id.*

162. *Id.* at 1112, 408 N.E.2d at 787.

163. *Id.*; see also *Ledingham v. Blue Cross Plan for Hosp. Care*, 29 Ill. App. 3d 339, 330 N.E.2d 540 (5th Dist. 1975) (where both tort and contract causes of action arise out of same fact situation, plaintiff is free to proceed with theory of his choice, and presence of cause of action in contract does not preclude action based on tort), *rev'd on other grounds*, 64 Ill. 2d 338, 356 N.E.2d 75 (1976).

164. *Pearson v. Alexander*, 86 Ill. App. 3d at 1112, 408 N.E.2d at 787.

165. *Id.*

166. 111 Ill. App. 3d 822, 444 N.E.2d 657 (1st Dist. 1982).

167. *Id.* at 824, 444 N.E.2d at 659.

168. *Id.* at 829, 444 N.E.2d at 662.

A TIME FOR CHANGE

The judicial rationale for prohibiting promissory fraud actions in Illinois rests on two interlocking arguments. The first is the implicit fear that promissory fraud will undermine the law of contracts. The second is the unarticulated suspicion that courts will be flooded with litigation in fraud when no breach of contract action would lie. Both arguments, however, cannot withstand rigorous scrutiny.

The argument that a promissory fraud action will erode the law of contracts contradicts the Illinois Code of Civil Procedure, which in several sections expressly authorizes the pleading of alternate and even inconsistent legal theories.¹⁶⁹ It is not inconsistent to assert that one has been damaged by fraud as well as by breach of contract because both actions may well supplement each other.¹⁷⁰ And, even though the Illinois Supreme Court in *Steinberg v. Chicago Medical School* made it clear that promissory fraud can exist when no contract action exists,¹⁷¹ Illinois courts have only tentatively accepted this principle. This reluctance is outdated and inappropriate because there are different statutes of limitation, different rules of damages, and different substantive elements as to the two legal theories. In addition, it is unlikely that an action based on a fraudulent promise will devitalize contract law because Illinois law already provides recovery under the modern doctrine of promissory estoppel even in cases in which there is no classical formation of a contract.¹⁷² It is inconsistent and irrational that state policy allows recovery for promissory estoppel on the very same promise for which it will not allow recovery in promissory fraud as a matter of law. The promise that justifies reliance is the heart of the recovery whether one uses the tort theory of promissory fraud or the nontort theory of promissory estoppel.¹⁷³ The same promise is involved in either case, yet, Illinois courts refuse to extend recovery to promissory fraud actions.

169. See *supra* notes 82, 84 & 85.

170. Illinois allows tort and contract causes of action to be tried in a single case when they arise out of the same fact situation. See *supra* note 163. This essentially overrules *Miller v. Sutliff*, 241 Ill. 521, 89 N.E. 651 (1909), where the court suggested that allowing an action for fraud could destroy or seriously impair contract law. See *supra* notes 68-75 and accompanying text.

171. See *supra* note 86.

172. See, e.g., *Prueter v. Bork*, 105 Ill. App. 3d 1003, 435 N.E.2d 109 (1st Dist. 1982) (the court did not consider allegations of breach of contract or promissory estoppel after it determined that defendant breached his fiduciary duty); *Ill. Valley Asphalt, Inc. v. J.F. Edwards Constr. Co.*, 90 Ill. App. 3d 768, 413 N.E.2d 209 (3d Dist. 1980) (court allowed recovery on theory of promissory estoppel, a doctrine under which plaintiff may recover without the presence of a contract); *Perlin v. Board of Educ.*, 86 Ill. App. 3d 108, 407 N.E.2d 792 (1st Dist. 1980) (court concluded that plaintiff had a valid claim for promissory estoppel, which is "an unambiguous promise upon which the party making it can reasonably expect the other to rely, followed by the second party's reliance resulting in his own injury").

173. Illinois courts, however, still recognize a legal distinction between the two theories. See, e.g., *Bank Computer Network Corp. v. Continental Ill. Nat'l Bank and Trust Co.*, 110 Ill. App. 3d 492, 442 N.E.2d 586 (1st Dist. 1982) (where a bank promised to forego collection

Illinois courts also consistently have held that a bare promise is sufficient consideration for a contract even when the performance is a future event.¹⁷⁴ It is reprehensible, therefore, for Illinois courts to hold that it is unacceptable to allow recovery for promissory fraud, the performance of which is a future event, in a case in which the breach of the same bare promise would be sufficient to sustain a contract action. Moreover, significant case precedent in Illinois allows relief in equity to those who parted with their home or property in exchange for the duplicitous promise of lifelong support by an artful deceiver or that of an ex-spouse.¹⁷⁵ A fraud action is not any more ruinous to the law of contracts than is cancellation or rescission of a deed in equity. Either the promissory fraud justifies reliance in both situations or it justifies reliance in neither. Finally, Illinois courts find no inconsistency in awarding a contract measure of damages in fraud cases.¹⁷⁶ Yet,

until negotiations ceased, court held that breach of the promise states a cause of action for promissory estoppel but not for promissory fraud). *But cf.* *Sinclair v. Sullivan Chevrolet Co.*, 31 Ill. 2d 507, 202 N.E.2d 516 (1964) (employment promise was not a fact for purposes of equitable estoppel and the oral contract was barred by the statute of frauds).

174. Courts have adhered to the rule that there is no failure of consideration where the consideration is the promise to do an act in the future and the act is not performed. *See, e.g.*, *Gage v. Lewis*, 8 Ill. 604 (1873); *Wilson v. Continental Body Corp.*, 93 Ill. App. 3d 966, 418 N.E.2d 56 (1981); *Bogdan v. Ausema*, 33 Ill. App. 2d 294, 179 N.E.2d 401 (1962); *Vella v. Pour*, 329 Ill. App. 355, 68 N.E.2d 631 (1946); *Conour v. Zimmerly*, 290 Ill. App. 546, 9 N.E.2d 61 (1937); *Smysor v. Glasscock*, 256 Ill. App. 29 (1930); *Woodlawn Sec. Fin. Corp. v. Doyle*, 252 Ill. App. 68 (1929).

175. *Markovits v. Markovits*, 2 Ill. 2d 303, 118 N.E.2d 255 (1954) (grounds for rescission established where conveyance of property was exchanged for a son's promise to aid in the family business when, in fact, son had no intention of performing); *Dauids v. Davids*, 333 Ill. 327, 164 N.E. 662 (1929) (fraud was established where mother conveyed property to son based on son's promise to distribute shares to the children as the mother requested, although the son had no intent of performing); *DeCosta v. Bischer*, 287 Ill. 598 (1919) (conveyance of real estate was set aside for failure of consideration where grantee failed to support grantor); *Stebbins v. Petty*, 209 Ill. 291 (1904) (conveyance of real estate given for consideration of life support, which grantee performed until she died but which her heirs refused to continue, was not grounds for rescission); *Jones v. Neely*, 72 Ill. 449 (1874) (where consideration of support for life was not performed, a rescinded deed justified a presumption of fraudulent intent and abandonment of the contract); *Frazier v. Miller*, 16 Ill. 48 (1854) (plaintiff had a valid claim in equity for rescission of a real estate conveyance where consideration of support for life was not performed); *Deahl v. Deahl*, 13 Ill. App. 3d 150, 300 N.E.2d 497 (1st Dist. 1973) (husband had a cause of action for modification of divorce settlement which was based on wife's intent not to remarry when in fact she intended to remarry immediately after the divorce); *Roth v. Roth*, 45 Ill. 2d 19, 256 N.E.2d 838 (1970) (ex-husband had a valid claim for modification of divorce settlement when it was based on wife's intent not to remarry, and in fact she remarried 31 days after the divorce); *Sullivan v. Sullivan*, 79 Ill. App. 2d 194, 223 N.E.2d 461 (4th Dist. 1967) (where conveyance by husband to wife was made upon promise of wife to return and live with husband and to act as a good wife, and such promise was not kept, conveyance was a nullity). *But cf.* *Johnson v. Johnson*, 257 Ill. App. 587 (1930) (false promise to live with husband and to consummate the marriage was insufficient ground for annulment); *Bielby v. Bielby*, 333 Ill. 478, 165 N.E. 231 (1929) (false promise to live with husband and make a home for him was insufficient to annul the marriage).

176. *See, e.g.*, *Board of Educ. v. Del Vianco & Assoc.* 57 Ill. App. 3d 302, 372 N.E.2d 953 (1st Dist. 1978) (court properly awarded contract damages in action sounding in tort);

once again, there is no evidence that an identical measure of damages both under the tort theory and the contract theory will sap contract law of its separate legal identity.

The related suspicion that the floodgates of litigation will be opened wide if an action for promissory fraud exists also is indefensible. There is no evidence that states which allow actions based on promissory fraud are besieged by an unusual number of promissory fraud actions. One explanation for this lack of evidence is that it is typically far more difficult to prove a promissory fraud action than a breach of contract action.¹⁷⁷ The fear that a plaintiff will blithely ignore a contract theory in favor of a promissory fraud theory overlooks several stark realities. First, Illinois law requires that fraud be pleaded specifically and with particularity.¹⁷⁸ In addition, Illinois courts regularly require that any fraud specifically alleged must be proven by clear and convincing evidence, a burden that surpasses the normal preponderance of the evidence requirement in civil cases.¹⁷⁹ In contrast, contract actions need only be proven by a preponderance of the evidence.¹⁸⁰ A plaintiff in a promissory fraud theory must prove not only the fraud but the scienter—that is, that the defendant knowingly or recklessly told an untruth, or at least that the defendant negligently made a false representation.¹⁸¹

Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp., 29 Ill. App. 3d 339, 330 N.E.2d 540 (5th Dist. 1975) (both compensatory and punitive damages were awarded in case involving claims on an insurance policy where defendants raised the defense that plaintiff's claim was excluded from coverage by clause which states that the policy does not cover preexisting illness or conditions), *rev'd on other grounds*, 64 Ill. 2d 338, 356 N.E.2d 75 (1976).

177. See, e.g., Knightsbridge Realty Partners v. Pace, 101 Ill. App. 3d 49, 427 N.E.2d 815 (1st Dist. 1981) (court avoided rule against promissory fraud and its scheme or device exception by adroitly finding a lack of justifiable reliance by the plaintiff); *accord* Redarowicz v. Ohlendorf, 95 Ill. App. 3d 444, 420 N.E.2d 209 (4th Dist. 1981), *aff'd in part and rev'd in part*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

178. See *supra* note 82 and accompanying text; see also Goldberg v. Goldberg, 103 Ill. App. 3d 584, 431 N.E.2d 1060 (1981) ("To sustain unsupported allegations of a plan or scheme as sufficient, as the Bank contends, would only invite this type of pleading every time multiple parties, who are jointly obligated under a contract, elect not to perform."). Bank of Lincolnwood v. Comdisco, Inc., 111 Ill. App. 3d 822, 829, 444 N.E.2d 657, 662 (1st Dist. 1982).

179. See, e.g., Younger v. Revelle, 78 Ill. App. 3d 1, 397 N.E.2d 221 (5th Dist. 1979) (evidence failed to prove that statements made about restaurant were more than puffing or boosting not amounting to a statement of fact); Costello v. Liberty Mut. Ins. Co., 38 Ill. App. 3d 503, 348 N.E.2d 254 (1st Dist. 1976) (the evidence amply supported defendant's claim that he did not engage in any fraud to induce employee to retire); Illinois Rockford Corp. v. Kulp, 88 Ill. App. 2d 458, 232 N.E.2d 190 (1st Dist. 1967) (damages awarded where plaintiff proved with clear and convincing evidence that defendant made fraudulent misrepresentations to induce plaintiff to sell stock at an inadequate price), *rev'd on other grounds*, 41 Ill. 2d 215, 242 N.E.2d 228 (1968).

180. See, e.g., O'Neil & Santa Claus, Ltd. v. Xtra Value Imports, Inc., 51 Ill. App. 3d 11, 365 N.E.2d 316 (3d Dist. 1977) (plaintiff failed to establish a preponderance of evidence to support the existence of an oral contract); George F. Mueller & Sons v. Northern Ill. Gas Co., 32 Ill. App. 3d 249, 336 N.E.2d 185 (1st Dist. 1975) (determination that plaintiff failed to perform its contractual duties was not against the manifest weight of evidence).

181. See, e.g., Mother Earth, Ltd. v. Strawberry Camel, Ltd., 72 Ill. App. 3d 37, 45, 390 N.E.2d 393, 401 (1st Dist. 1979) (scienter is met by proof that party knew or was unaware

An action for breach of contract, however, does not require proof of a defendant's state of mind at the time of breach. Promissory fraud also requires a showing of fault,¹⁸² while the breach of a contract case is a no-fault action; the issue in a breach of contract action is that performance has not taken place, whether or not the promisor intended to perform.¹⁸³ A plaintiff who opts for the promissory fraud theory must prove, by clear and convincing evidence, that at the very time of the promise, the promisor had no intention of ever performing.¹⁸⁴ Since such an intent cannot be inferred from the mere breach by the promisor,¹⁸⁵ proof of the intent by clear and convincing evidence is not likely to be common. Lastly, the statute of limitations in Illinois is longer for a written contract action than for a fraud action, while the same period of limitations exists for an action based on an oral contract and on fraud.¹⁸⁶ This is another disincentive for plaintiffs who dream of using a promissory fraud theory to obviate a contract cause of action. Thus, it is unlikely that plaintiffs will attempt to manipulate a contract action into a promissory fraud action simply because the plaintiff's lawyer is barred by the contract statute of limitations. Although it is true that punitive damages are recoverable in a fraud action,¹⁸⁷ and doctrines such as the parol evidence rule and the statute of frauds may be avoided with a promissory fraud theory,¹⁸⁸ those advantages, even if obtainable, are offset by the difficulty of proving the legal elements peculiar to a fraud action.

It is illogical and unrealistic to suggest that fraud covers only physical facts and not psychological facts. Although one cannot generally recover in fraud for vague and indefinite present opinions,¹⁸⁹ modern courts allow recovery against one who falsely represents an opinion as a fact or who represents that he holds a particular opinion when in fact he never held such an opinion.¹⁹⁰ A man's state of mind, which is often an element of a crime

of the truthfulness of the representations; in the instant case, defendant knew whether or not he owned the equipment); *Rozny v. Marnul*, 43 Ill. 2d 54, 62-68, 250 N.E.2d 656, 660-63 (1969) (defendant's knowledge that his survey would be relied on by others was sufficient to meet the scienter requirement).

182. See *supra* notes 23-27 and accompanying text.

183. See *supra* note 180.

184. See *supra* note 179.

185. See *supra* notes 78-80 and accompanying text.

186. The limitation period is ten years for written contracts, ILL. REV. STAT. ch. 83, § 17; five years for oral contracts and five years for fraud as a civil action "not otherwise provided for," *id.* § 16. See *Chicago Park Dist. v. Kenroy, Inc.*, 78 Ill. 2d 555, 560, 402 N.E.2d 181, 184 (1980); *accord* *Munsterman v. Illinois Agric. Auditing Ass'n.*, 106 Ill. App. 3d 237, 435 N.E.2d 923 (1982).

187. See *supra* notes 169-172 and accompanying text.

188. The courts are split on the question of whether actions barred by lack of consideration, illegality, statute of frauds, statute of limitations, parol evidence, or disclaimer under contract theory are necessarily barred under a promissory fraud theory. W. PROSSER, *supra* note 23, § 109, at 729-30.

189. See *supra* notes 179 and 181.

190. See *supra* notes 28.

or a tort, is a factual element of proof. To hold that a promise is in no sense a present or past fact leads to arbitrary results.¹⁹¹ The community, moreover, knows that a promise is as much a fact as is any other representation, and that, realistically, men of good sense and intelligence are likely to rely on a promise which is reasonably within the promisor's control. To allow a deceiver to escape liability merely because his statement is characterized as a promise rather than as a misrepresentation is unconscionable. Many Illinois cases imply an even more untenable position by distinguishing between a promise of something to be done in the future, which is not actionable, and a misrepresentation of a nonpromissory matter which is to occur in the future, which is actionable in fraud.¹⁹²

The continuation of the ambiguities in Illinois law that result from the general rule of nonrecovery for promissory fraud, coupled with an exception when the promise is the scheme or device of the fraud, allows a trial court to do virtually what it pleases without any reasoned guidance. This unbridled discretion, in the guise of a legal rule accompanied by an ambiguous exception, arises because the exception logically destroys the major premise of nonrecovery and, thus, allows the trial court to cite either the rule or its exception with equal rationale. It would be useless to limit the exception to situations in which there is other fraud in addition to the promissory fraud. The proper alternative for Illinois courts is to recognize an action for promissory fraud whenever the demanding elements of a typical fraud action are met.¹⁹³ The most direct way to deal with this fossil law is to bury it. To salvage vestiges of an invalidated legal principle such as this will further exacerbate the lack of an intelligible principle in promissory fraud cases. The rule against recovery for promissory fraud must be changed and Illinois must follow the trend of its sister states¹⁹⁴ by allowing promissory fraud both as a cause of action and as a defense.

191. See, e.g., *Reimer v. Leshtz*, 90 Ill. App. 3d 980, 444 N.E.2d 114 (1st Dist. 1980). The plaintiffs in *Reimer* had a cause of action against the defendant because defendant seller represented that her home did not and would not leak. According to the court, "it is apparent from the complaint that plaintiffs at the time of inspection were not seeking an express assurance that the home would not leak in the future although they might have desired such an assurance." *Id.* at 983, 414 N.E.2d at 116.

192. See *supra* note 137 and accompanying text.

193. See, e.g., *Broberg v. Mann*, 66 Ill. App. 2d 134, 213 N.E.2d 89 (2d Dist. 1965) (court held that to state a cause of action in common law fraud, the party must allege that: (1) the statement made was of material fact as opposed to opinion; (2) that it was untrue; (3) that the party making the statement knew or believed it to be untrue; (4) that the opposing party believed and relied on it and had a right to do so; (5) that the statement was made for the purpose of inducing the other party to act; and (6) that the other party's reliance thereon led to his injury); see also *supra* note 2.

194. See *supra* note 28.

