# The Doctrine of Promissory Estoppel in an Arm's Length Commercial Transaction in Tennessee: A Primer

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## I. INTRODUCTION

> For [the United States'] contract law system to work properly, it cannot consist only of law, any more than it could consist only of equity. Equity without law would be tyranny indeed—shapeless, unpredictable, reflecting nothing more than the judge's personal predilections. But in the contract area, as we have seen, law without equity can be tyranny, too: Cold and unforgiving; rewarding wealth and power with still greater wealth and power; repaying trust with betrayal; and finally—tritely but truly—adding insult to injury.[1]

No understatement is made in asserting that promises abound in our daily lives. From personal promises to social promises to business promises, promises affect nearly every aspect of a person's experience in the world. It is only natural that we attach great significance to the fulfillment of promises. There is a magnitude of scholarship examining promises and the moral culpability that attaches when one breaks a promise.[2] However, moral culpability does not necessarily invoke legal culpability.[3] A thought-provoking question is when and

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1. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1334 (1998) [hereinafter Knapp, *Rescuing Reliance*].

2. *See, e.g.*, Ronit Donyets Kedar, *The Unrecognized Dominance of Law in Morality: The Case of Promises*, 24 CANADIAN J.L. & JURIS. 79 (2011) (arguing that morality should not be thought about in legal terms); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1603 (2009) (promoting the thesis that "a 'personal sovereignty' account of individual autonomy—one of the most familiar and intuitive theories of self-imposed moral responsibility—explains how and why, contrary to existing correspondence theories, promissory responsibility corresponds to the objective theory of intent").

3. There is an argument to be made that individuals have no moral duty to obey the law. *See* David Bear, *Establishing a Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics*, 34 FLA. ST. U. L. REV. 491, 493 (2007). Rather, individuals voluntarily decide to obey the law for "prudential reason[s]." *Id.* For example, an individual may simply make a "rational choice of self-interest" to obey the law, which does not invoke any sort of moral duty. *Id.* According to two philosophers, John Locke and Thomas Hobbes, however, such prudential reasons were not sufficient. *Id*. at 492–93. Instead, individuals obey the law out of moral

under what circumstances should promises become legally enforceable.[4] In answering that question, one must reconcile the seemingly irreconcilable legal doctrines of contract law with equitable doctrines that invoke morality and fairness.

The legal doctrines of contract law are notorious for being rigid and formalistic, completely isolating contract law from morality out of fear of economic inefficiency or informal decision-making.[5] Traditional contract law casebooks[6] teach readers that "pure" contract law doctrine does not care about the subject matter or the persons involved.[7] It is an abstraction, a "deliberate relinquishment of the temptation to restrict untrammeled individual autonomy or the completely free market in the name of social policy."[8] Under this approach, there

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reasons because individuals have "an intrinsic philosophical reason to do so." *Id.* at 493.

4. *See* Donald J. Smythe, *The Scope of a Bargain and the Value of a Promise*, 60 S.C. L. REV. 203, 205 (2008) ("The central role that promises play in our lives and the important moral implications of the decisions we make about whether to make, keep, or breach promises raise an inevitable question—when should promises be legally enforceable?").

5. *See* Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 73 (2006) ("The prevailing formalism in contract law promotes a paradigmatic picture of classical contract doctrine that resembles Roman art with 'cold-blooded' lines and rigid structure. Followers of this formalism . . . generally disregard morality . . . in contract law."). Economic efficiency typically requires enforcing a promise if both the promisor and the promisee want the promise to be enforced. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 283 (6th ed. 2012) ("Economic efficiency usually requires enforcing a promise if the promisor and promisee both wanted enforceability when it was made."). By logical reasoning, economic inefficiency would arise when one party does not value enforcement to the extent that the other party values it. Of course, it should be remembered that there are many other schools of thought concerning the nature, function, and limits of contract law. *See* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 11–14 (7th ed. 2012) [hereinafter PROBLEMS IN CONTRACT LAW]; *see also infra* text accompanying note 157. The references to economic efficiency and particular law and economic analyses are not meant to preference one jurisprudential view over another.

6. *See generally* PROBLEMS IN CONTRACT LAW, *supra* note 5.

7. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 20 (1965).

8. *Id.* At this stage in the Note, it is important to understand that there is a strong line of scholarship maintaining the position that contract law is not concerned

is no place for enforcing mere promises in contract law. Since so many promises are connected to familial relationships and friendships, it is tempting to make the oversimplified conclusion that promisors only "balk . . . where circumstances are fishy."[9] There is a fear that legally enforcing promises would annihilate this formal, classic contract theory.[10] The drafting of the *Restatement (First) of Contracts* seemingly eradicated, or perhaps simply ignored, this fear, raising the specter of the equitable doctrine of promissory estoppel. The doctrine of promissory estoppel forced contract law to acknowledge fairness and morality by attaching potential liability to promises.[11] It had a novel, and arguably grandiose, purpose of preventing injustice.

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solely with economic efficiency, but that contract law does concern itself with morality. For one author's opinion, see Schmitz, *supra* note 5, at 76, arguing that the contract law doctrine of unconscionability derives its value from societal concern for fairness. Schmitz explains that unconscionability "flows from an unsquelchable [sic] concern for fairness and equity that lies at the core of contract law." *Id.* at 76–77. For a second author's opinion about morality in contract law, specifically regarding the doctrine of good faith and fair dealing, see Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provision of the Uniform Commercial Code*, 54 VA. L. REV. 195, 198 (1968). Summers argues morality has a unique place in contract law. The doctrine of good faith serves the function of "further[ing] the most fundamental policy objectives of any legal system—justice, and justice according to law." *Id.* Summers continues in this analysis, stating that "[b]y invoking good faith . . . it may be possible for a judge to do justice *and* do it according to law." *Id.*

9. Richard A. Epstein, *Contracts Small and Contracts Large: Contract Law Through the Lens of Laissez-Faire*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 25, 43 (F.H. Buckley ed., 1999).

10. *See* GRANT GILMORE, THE DEATH OF CONTRACT 60–62 (1974) (discussing Gilmore's overreaching thesis that the theory of general contract law, consumed with classical consideration theory, has been killed by the reliance concept's growth). For a thorough explanation and review of Gilmore's book, see Timothy J. Sullivan, *Book Review of* The Death of Contract, 17 WM. & MARY L. REV. 403 (1975) (reviewing GILMORE, *supra*).

11. *See* Drennan v. Star Paving Co., 333 P.2d 767, 760 (Cal. 1958) ("We are of the opinion, therefore, that the defendants in executing the agreement [which was not supported by consideration] made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise." (quoting Nw. Eng'g Co. v. Ellerman, 10 N.W.2d 879, 884 (S.D. 1943))).

After the inception of promissory estoppel, the doctrine was primarily recognized as a substitute for consideration.[12] However, it has become increasingly common for promissory estoppel to be used as an independent cause of action.[13] Additionally, there are different approaches to recognizing promissory estoppel as an exception to the Statute of Frauds.[14] One approach found in *Restatement (Second) of Contracts* section 139 states that promissory estoppel may overcome the Statute of Frauds "only where the promise relied upon is a promise to reduce a contract to writing."[15] Under a second approach, promissory estoppel cannot overcome the Statute of Frauds because doing so would render the statute useless.[16] A third approach takes the position that an oral agreement can satisfy the Statute of Frauds only where the injured party's detrimental reliance is so great that refusing to enforce the oral agreement would give rise to potential fraud.[17]

In Tennessee, the recognition of promissory estoppel is perplexing. There is virtually no disagreement about promissory estoppel's recognition as an independent cause of action.[18] The confusion arises regarding its use as an exception to the Statute of Frauds, which is a rigid, powerful contract law doctrine. There is one line of cases suggesting that promissory estoppel cannot overcome the Statute of

12. A common situation in which promissory estoppel is used as a substitute for consideration is where a promisor made a promise to a promisee, knowing that the promisee would rely on the promise, the promisee did rely on the promise, and the promisor refused to uphold the promise to the promisee's detriment. Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1, 3–4 (2016).

13. For a thorough explanation and analysis of the overview of the differing approaches that states take regarding promissory estoppel's recognition, see Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263 (1996). The article reviews each individual state of the United States, thus allowing the reader to fully understand how individual states recognize promissory estoppel.

14. *Id.* at 277–79.

15. 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE: CONTRACT LAW AND PRACTICE 143 (2d ed. 2016).

16. *Id.*

17. *Id.*

18. *See* discussion *infra* Section III.A.

Frauds,[19] while there is another line of cases suggesting the exact opposite proposition that the doctrine can overcome the Statute of Frauds.[20] This confusion impedes one of the purposes of contract law, which is to streamline business transactions.[21] If contract law rules are displaced by doctrines of fairness, the predictability and reliability of contracts will detrimentally diminish. A balance must be achieved between such predictability and reliability and fairness. In one view, the doctrine of promissory estoppel in Tennessee should be clarified to create no confusion for parties. When promissory estoppel stands on its own, as it rightfully should, analytical rigor is gained. Tennessee should not recognize the doctrine of promissory estoppel as an exception to the Statute of Frauds in commercial transactions, thus subsequently not allowing promissory estoppel to overcome the powerful doctrines of contract law.

By examining the history of promissory estoppel as used in commercial transactions[22] in Tennessee, this Note will first argue that the doctrine of promissory estoppel should only be used as an affirmative cause of action, as opposed to being used as both an affirmative claim and an exception to the Statute of Frauds. The reasoning for this argument depends on a fundamental understanding of, and respect for, contract law. Contract law is inherently powerful and rigid, while promissory estoppel, an equitable doctrine, is equally as powerful but more fluid. This Note will take the position that the two should not be conflated, meaning that promissory estoppel should not be used as a defense to the Statute of Frauds. Second, this Note will articulate a position that courts are seemingly hesitant to allow an equitable doctrine to potentially override the field of contract law, thus

19. *See* discussion *infra* Section III.B.1.

20. *See* discussion *infra* Section III.B.2.

21. For a brief overview of competing arguments, see *supra* text accompanying notes 5 and 8.

22. *See* Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 907 (1985) ("Despite its tentative origins and its initial restriction to donative promises, promissory estoppel is regularly applied to the gamut of commercial contexts."). For an assessment and analysis of sophisticated parties in contract law, see Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493 (2010).

creating uncertainty and confusion as to how promissory estoppel should be recognized in commercial transactions.

## II. HISTORICAL DEVELOPMENT OF PROMISSORY ESTOPPEL

To understand promissory estoppel, we must refresh our recollection of the doctrine against which promissory estoppel arguably sits in opposition to. That doctrine, the doctrine of consideration, is arguably one of the most dominant doctrines of American contract law.[23] Common law roots of consideration can be traced back to the fifteenth century.[24] However, the nineteenth and twentieth centuries ushered into existence a new era of contract law.[25] The concept of contract law was based upon the two main principals of freedom of contracting and the sanctity of contract.[26] Notably, in 1932, the American Law Institute[27] (hereinafter referred to as "ALI") published the *Restatement (First) of Contracts*[28] (hereinafter referred to as the

23. *See* ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 15–42 (2007) (discussing the doctrine of consideration's rise to being "one of the most distinctive features of the common law"); *see also* EPSTEIN, *supra* note 9, at 43 ("The doctrine of consideration occupies a large, if somewhat undeserved, place in the history of Anglo-American contract law.").

24. KREITNER, *supra* note 23, at 15.

25. *Id.* at 16.

26. CLIVE M. SCHMITTHOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE 9 (2d ed. 1981) ("In the eighteenth and nineteenth centuries the concept of contract was founded on two principles: freedom of contracting, which assumed the equal bargaining power of the parties, and the sanctity of contract (*pacta sunt servanda*).").

27. ALI was organized primarily to create restatements of law, which ideally would reduce any uncertainty and discrepancies in American common law. Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 667 (2016).

28. *Restatements* are not regarded as binding law, but they do have the force of persuasive secondary authority. PROBLEMS IN CONTRACT LAW, *supra* note 5, at 9. Courts frequently cite, quote, and approve the *Restatements*' rules, wherein the rules become law. *Id.* ALI appointed Professor Samuel Williston of Harvard Law School as the Chief Reporter for the *Restatement*. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, RULES OF CONTRACT LAW 131 (2015). Professor Arthur Corbin of Yale Law School was appointed as a special advisor for the Remedies portion of the *Restatement*. *Id.* While ALI produced the *Restatement* in hopes of streamlining the rules of contract law, rather than creating new rules, critics argue

"*Restatement*"). Professor Samuel Williston of Harvard Law School served as the Chief Reporter for drafting the *Restatement*, and Professor Arthur Corbin of Yale Law School was appointed as Special Advisor.[29] The *Restatement* gave rise to a "systematized contract structure"[30] consisting of three requirements for the formation of a contract—a promisor and promisee, a "manifestation of assent, and sufficient consideration."[31] But the two most celebrated sections in the *Restatement*, section 75 and section 90, created "schizophrenic"[32] doctrines that led to drastic changes in American contract law.

The requirement of consideration was a long-standing convention of both English and American contract law.[33] In section 75 of the *Restatement*,[34] the drafters took a new approach to consideration by formalizing the bargain theory of consideration[35] and effectively ex-

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that it was a failed attempt at simplifying the inherently complex domain of contract law. *Id.* Regardless of any criticism that the drafters may have received, the *Restatement* proved to be widely influential and has been relied on by courts in over 12,000 cases. Gregory E. Maggs, *Ipse Dixit: The* Restatement (Second) of Contracts *and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 515 (1998). For one critique of the *Restatement*, see Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643 (1933).

29. Interestingly, it has been said that Williston and Corbin "held antithetical points of view on almost every conceivable point of law." GILMORE, *supra* note 10, at 60. Furthermore, such differing opinions may be the reason for the "schizophrenic quality" of the *Restatement*. *Id.*

30. Knapp, *Rescuing Reliance*, *supra* note 1, at 1194.

31. Charles L. Knapp, *Reliance in the Revised* Restatement*: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 52 (1981) [hereinafter Knapp, *Reliance in the Revised* Restatement].

32. GILMORE, *supra* note 10, at 60.

33. Knapp, *Rescuing Reliance*, *supra* note 1, at 1194.

34. *See* RESTATEMENT (FIRST) OF CONTRACTS § 75 (AM. LAW INST. 1932):

> (1) Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise. (2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

35. Knapp, *Rescuing Reliance*, *supra* note 1, at 1195.

cluding reliance.[36] The bargain theory stands for the proposition that for a promise to be enforceable, it must be supported by consideration, defined as "'an act,' 'forbearance,' or 'return promise bargained for and given in exchange for the promise.'"[37] Notably, comment c to section 75 states that unbargained-for reliance is not sufficient consideration.[38] The bargain theory's dominance rids society of the eighteenth-century principles of reliance-based recovery.

Williston fully supported section 75 of the *Restatement*.[39] But Corbin insisted that the bargain theory of consideration simply did not reflect the then-current authorities.[40] There was a multitude of cases following the invocation of the bargain theory of consideration that involved substantial, unbargained-for promises upon which parties were detrimentally relying.[41] Corbin argued that just because the proposed *Restatement* narrowed the definition of consideration, the

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36. *See* Kevin M. Teeven, *A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance*, 72 TENN. L. REV. 1111, 1135–36 (2005) ("When Williston and his fellow restaters developed their definition of consideration for the *Restatement*, they excluded reliance and based their definition solely upon the bargain principle.").

37. Marco J. Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the* Restatement (Second) of Contracts*,* 57 UCLA L. REV. 669, 673 (2010); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 75 (AM. LAW INST. 1932).

38. *See* RESTATEMENT (FIRST) OF CONTRACTS § 75 cmt. c (AM. LAW INST. 1932):

> Furthermore, although a price has been agreed upon and paid for a promise, the promise is not binding unless the law deems the price sufficient. The following Sections state when an agreed price or consideration for a promise is sufficient to make the promise binding and when such a price or consideration is insufficient. The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange; but some informal promises are enforceable without the element of bargain. These fall and are placed in the category of contracts which are binding without assent or consideration (see §§ 85–94).

*Id.*

39. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 776 (1979).

40. *Id.*

41. Knapp, *Rescuing Reliance*, *supra* note 1, at 1254.

courts would not cease to find other sufficient reasons, "such as reliance, for enforcing a promise."[42] He pointed out that courts were enforcing contracts solely to avoid disappointment of the promisees' reasonable expectations and that refusal to enforce would not satisfy the public.[43] Williston, and other American scholars, fervently argued that those decisions were simply wrong.[44] Corbin's response was that the consideration doctrine was an invention of the courts, and if the courts treated unbargained-for promises as consideration, then the courts were not wrong.[45] This treatment of unbargained-for promises by the courts is merely an illustration of the origins and nature of promissory estoppel as a creature of pure judicial fiat.

It was through this slight divergence of ideas, and the realization that the bargain theory of section 75 did not apply to cases of that type, that the drafters birthed the revolutionary idea of promissory estoppel, explained in a mere sentence, constituting section 90.[46] This seemingly contradictory and entirely radical theory of contractual obligation, entitled "Promise Reasonably Inducing Definite and Substantial Action," was based on the principle of reliance rather than the bargain theory.[47] Section 90 requires a promise that actually induces "action or forbearance of a definite and substantial character" that the promisor should reasonably expect, and it must appear that "injustice can be avoided only by enforcement of the promise."[48] There were no supporting comments to this radical section, but the drafters did pre-

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42. Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 305 (2002).

43. *Id.*

44. ATIYAH, *supra* note 39, at 776.

45. *Id.*

46. *See* RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST. 1932):

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

*Id.*

47. *Compare id.* § 90 (allowing unbargained-for reliance to be sufficient consideration), *with id.* § 75 cmt. c (explaining that unbargained-for reliance is not sufficient consideration).

48. *Id.*§ 90.

sent four illustrations to demonstrate three situations in which promises would be enforceable and one situation in which promises would not be enforceable.[49] Looking at the ALI Commentaries, the impression appears that section 90 was not intended to be as radical as it appeared, at first glance, in the *Restatement*. Williston himself wrote that section 90 does not state a "'sweeping rule'"[50] but rather "'states a broader general rule than has often been laid down.'"[51] Williston discouraged a liberal application of section 90.[52] Because "the star of promissory estoppel continued to ascend"[53] in the wake of the *Restatement*, promissory estoppel was no longer being used exclusively in non-commercial settings; instead, it was being used in commercial settings as well.[54] In such commercial settings, it became increasing-

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49. These four illustrations, as contained in the ALI Commentaries, are:

> A promises B not to foreclose for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding.
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> A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding.
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> A promises B that if B will go to college and complete his course he will give him $5000. B goes to college and has nearly completed his course when A notifies him of an intention to revoke the promise. A's promise is binding.
>
> A promises B $5000, knowing that B desires that sum for the purchase of Blackacre. Induced thereby, B secures without any payment an option to buy Blackacre. A then tells B that he withdraws his promise. A's promise is not binding.

*Id.* § 90 illus. 1–4.

50. *See* Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's* Restatement, 34 U. MEM. L. REV. 499, 532 (2004) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST., Proposed Final Draft No. 1, 1928)).

51. *Id.*

52. *Id.*

53. Knapp, *Rescuing Reliance*, *supra* note 1, at 1198.

54. *Id.*

ly important to compensate parties who reasonably relied on commercial promises that were never performed.[55]

It is clear that sections 75 and 90 are very different and seemingly irreconcilable. As Grant Gilmore poignantly wrote, "[t]he one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up."[56] However, after the inception of *Restatement* section 90, the drafters of the *Restatement (Second) of Contracts* (hereinafter referred to as "*Restatement (Second)*") attempted to "steer a middle course."[57] They kept section 90 with virtually no changes to the original language, adding only a proposition about remedies.[58] The revised section 90 did include more illustrations of its application.[59] Entitled "Promise Reasonably Inducing Action or Forbearance," the revised section 90 states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.[60]

Section 90 of the *Restatement (Second)* implicitly endorsed a popular view that reliance, being the basis for promissory estoppel, was "a basis for the imposition of obligation in the absence of conventional consideration."[61] Facilitating and protecting such reliance was a main goal of contract law.[62]

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55. *Id.*
56. GILMORE, *supra* note 10, at 61.
57. Knapp, *Reliance in the Revised* Restatement, *supra* note 31, at 54.
58. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).
59. *Id.*; *see* Knapp, *Reliance in the Revised* Restatement*, supra* note 31, at 55.
60. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1981).
61. Knapp, *Rescuing Reliance*, *supra* note 1, at 1199.
62. *Id.*

In addition to adding new language to section 90, the drafters also included entirely new sections in the *Restatement (Second)* relating to section 90's doctrine of promissory estoppel. One notable new section was section 139, entitled "Enforcement by Virtue of Action in Reliance."[63] This section related to reliance on a contract within the Statute of Frauds.[64] Traditionally, the Statute of Frauds provided that for certain contracts to be enforceable, they must be reduced to writing and signed by the party to be charged.[65] Under section 139, however, the Statute of Frauds had the potential of being overridden by certain promises, some of which may not be supported by consideration. Essentially, section 139 was meant to overcome an otherwise "applicable and dispositive Statute of Frauds."[66] Today, the national position on promissory estoppel is that it routinely continues to grow and evolve in increasingly complex ways.

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63. RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. LAW INST. 1981):

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
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> (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
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> > (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
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> > (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
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> > (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
> >
> > (d) the reasonableness of the action or forbearance;
> >
> > (e) the extent to which the action or forbearance was foreseeable by the promisor.

*Id.*

64. Knapp, *Reliance in the Revised* Restatement, *supra* note 31, at 67.

65. *Id.*

66. *Id.* at 70.

## III. HISTORICAL DEVELOPMENT OF PROMISSORY ESTOPPEL IN TENNESSEE

Unlike other states, Tennessee was relatively slow in recognizing the doctrine of promissory estoppel.[67] Prior to the 1960s, Tennessee's common law did not recognize the doctrine.[68] In fact, there are cases yet to be overruled holding that Tennessee does not recognize promissory estoppel.[69] The Tennessee Supreme Court formally recognized promissory estoppel in the 1963 seminal case of *Jackson v. Kemp*, opining that "[s]ome such rule is necessary in our society and it does not seem to us that the cases over the years are inconsistent with such a rule."[70] The Tennessee Supreme Court favorably quoted *Restatement* section 90,[71] and the Court recognized the doctrine being used both defensively to terminate the running of the statute of limitations and offensively, as a substitute for consideration, to enforce an insurance adjuster's promise to pay the plaintiff's medical bills under certain conditions. [72] Post-1963, there were a steady number of cases in Tennessee that relied on promissory estoppel. However clear the precedent may have appeared, the Tennessee Supreme Court ostensibly contradicted itself in *Alden v. Presley* by not acknowledging that Tennessee recognizes promissory estoppel.[73] While both the trial court and the court of appeals awarded the plaintiff a judgment on the theory of promissory estoppel, the Tennessee Supreme Court found "it unnecessary to address the question of whether or not Tennessee

67. To compare Tennessee's adoption of promissory estoppel to other states, see Holmes, *supra* note 13.

68. *See* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 8.12 (Joseph M. Perillo ed., 2018).

69. FELDMAN, *supra* note 15, at 484 (listing the following cases, yet to be overruled, as standing for the proposition that Tennessee does not recognize promissory estoppel: Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964); City of Chattanooga v. Louisville & Nashville R.R. Co., 298 F. Supp. 1 (E.D. Tenn. 1969)).

70. Jackson v. Kemp, 365 S.W.2d 437, 440 (Tenn. 1963) (involving an individual, who was hit by an automobile, seeking payment from his insurer for his hospital and doctor bills).

71. *Id.*; *see* RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST. 1932).

72. *Jackson*, 365 S.W.2d at 439–41.

73. *See* Alden v. Presley, 637 S.W.2d 862, 864 (Tenn. 1982).

recognizes the doctrine of promissory estoppel" because the plaintiff did not successfully prove the elements of promissory estoppel.[74] The Court, however, continued to approvingly quote the definition of promissory estoppel as found in the *Restatement (Second)* section 90.[75] With that convoluted non-recognizing recognition, the doctrine of promissory estoppel in Tennessee was "something of an enigma."[76] It was not until 1991 that the Tennessee Supreme Court "finally and unequivocally" recognized promissory estoppel.[77]

Tennessee law, notwithstanding the fact that no dispute exists as to whether Tennessee recognizes the existence of promissory estoppel, remains unclear regarding how promissory estoppel can be used. While there is no confusion in Tennessee as to promissory estoppel's use as an independent cause of action and as a substitute for consideration, there are considerable discrepancies surrounding its use as an exception to the Statute of Frauds.[78] One line of cases suggests that promissory estoppel is not an exception to the doctrine, while another line of cases suggests that the doctrine can pierce the defense of the Statute of Frauds.

### *A. Tennessee's Recognition of Promissory Estoppel as an Independent Cause of Action*

Promissory estoppel[79] can be thought of as a sword when it is used offensively. Tennessee courts have consistently recognized

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74. *Id.*

75. *Id.*

76. *See* Holmes, *supra* note 13, at 459.

77. FELDMAN, *supra* note 15, at 485; *see also* Bill Brown Constr. Co. v. Glens Falls Ins., 818 S.W.2d 1, 12 (Tenn. 1991) (citing Travelers Indem. Co. v. Holman, 330 F.2d 142, 151 (5th Cir. 1964) ("It is here that promissory estoppel fills the gap.").

78. The Statute of Frauds is a dominant doctrine of contract law. It was enacted to "obviate the evidentiary problems associated with certain oral contracts." Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73, 78 (2011).

79. At this point in the Note, it is important to understand the terminology that Tennessee courts frequently use when referring to promissory estoppel. While promissory estoppel is the correct term, courts frequently refer to the doctrine as "detrimental reliance" because the plaintiff must show that his reliance on the prom-

promissory estoppel as an independent cause of action.[80] In *Shedd v. Gaylord Entertainment Co.*, the Tennessee Court of Appeals conceded that Tennessee does allow a cause of action for promissory estoppel, even though it applies only to "exceptional cases."[81] Such exceptional cases include situations in which "enforce[ment of] the [S]tatute of [F]rauds would make it an instrument of hardship and oppression, verging on actual fraud."[82] Most recently, the Tennessee Court of Appeals acknowledged Tennessee's recognition of the claim

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ise resulted in detriment to himself. *See* Bank of Gleason v. Weakley Farmers Co-op., No. W1999-02161-COA-R3-CV, 2000 Tenn. App. LEXIS 303, at *7–8 (Tenn. Ct. App. Apr. 27, 2000); EnGenuis Entm't v. Herenton, 971 S.W.2d 12, 20 (Tenn. Ct. App. 1997); Foster & Creighton Co. v. Wilson Contracting Co., 579 S.W.2d 422, 427 (Tenn. Ct. App. 1978).

Additionally, promissory estoppel is frequently conflated with "equitable estoppel," which is a distinct equitable doctrine. Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 699 (Tenn. Ct. App. 2003) ("Our cases sometimes refer to promissory estoppel as equitable estoppel . . . ."). Tennessee courts, however, are not alone in conflating promissory estoppel and equitable estoppel. *See* Holmes, *supra* note 13, at 393–94. Michigan courts similarly commingle equitable and promissory estoppel, most notably in *Maxwell v. Bay City Bridge Co.*, 2 N.W. 639, 646–47 (Mich. 1879) ("The doctrine of [equitable] estoppel rests upon a party having, directly or indirectly, made assertions, promises or assurances upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved, or the promises or assurances to be withdrawn."). It is a mischaracterization to conflate promissory estoppel and equitable estoppel.

80. Whether these independent claims of promissory estoppel are upheld and why Tennessee courts are hesitant to recognize promissory estoppel as an affirmative claim are fascinating issues beyond the scope of this Note. While my research has not revealed any scholarship on this precise topic, there are articles discussing whether promissory estoppel is a utilized doctrine. *Compare* Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002) (arguing that promissory estoppel is still a vital theory in contract law), *with* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (arguing the unsuccessfulness of promissory estoppel in courts). For a more nuanced discussion of the inherent hesitancy of courts to recognize promissory estoppel in a litigation setting, see Annabelle P. Harris, *The Promissory Estoppel Nexus from an Alternative Dispute Resolution Perspective and a Litigation Perspective* (forthcoming).

81. *Shedd*, 118 S.W.3d at 700 (quoting Baliles v. Cities Serv., 578 S.W.2d 621, 624 (Tenn. 1979)).

82. *Id.*

in *Stratienko v. Brock*, stating that "[a] claim of promissory estoppel is not dependent upon the existence of an express contract between the parties."[83] To succeed on an independent cause of action of promissory estoppel, the following elements must be established: "(1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment."[84] While this line of cases clearly establishes that promissory estoppel can be used as an independent cause of action, there is another line of cases that holds otherwise.

### *B. Tennessee's Recognition of Promissory Estoppel as a Defense to the Statute of Frauds*

Used defensively, promissory estoppel can be thought of as a shield to contractual liability. Promissory estoppel and the Statute of Frauds cross when a party seeks enforcement of an oral contract that is otherwise unenforceable due to the Statute of Frauds' requirement that the agreement must be reduced to writing.[85] The party who is seeking enforcement of the oral contract must prove that enforcement is the just and fair outcome, even though the requirements of a valid contract are not fulfilled.[86]

In Tennessee, there is considerable confusion regarding the use of promissory estoppel as a defense to the Statute of Frauds. The

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83. Stratienko v. Brock, No. E2016-01467-COA-R3-CV, 2017 Tenn. App. LEXIS 475, at *15 (Tenn. Ct. App. July 13, 2017).

84. Chavez v. Broadway Elec. Serv. Corp., 245 S.W.3d 398, 404–05 (Tenn. Ct. App. 2007) (citing Rice v. NN, Inc. Ball & Roller Div., 210 S.W.3d 536, 544 (Tenn. Ct. App. 2006); Calabro v. Calabro, 15 S.W.3d 873, 879 (Tenn. Ct. App. 1999); Amacher v. Brown-Forman Corp., 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991); Wilson v. Price, 195 S.W.3d 661, 670 (Tenn. Ct. App. 2005)).

85. *See* Leacock, *supra* note 78, at 80 ("The Statute of Frauds and promissory estoppel . . . intersect where a party seeks enforcement of an oral contract that is unenforceable because of the provisions of the Statute of Frauds. The party seeking successful enforcement of such a contract must prove that fairness and justice mandate enforcement, in spite of the absence of the statutorily required writing. This requires proof by the party asserting promissory estoppel that there was legally justified reliance on the promise or promises by the party against whom the promissory estoppel is asserted.").

86. *Id.*

Tennessee Court of Appeals most recently summarized this uncertainty in *Jones v. BAC Home Loan Servicing*, noting that there is one line of Tennessee cases holding promissory estoppel is not an exception to the Statute of Frauds and another line holding promissory estoppel is a viable defense to an otherwise unenforceable oral promise.[87] The *Jones* court, in opining that Tennessee is unclear on its position, relied upon *Carbon Processing and Reclamation, LLC. v. Valero Marketing and Supply Co*.[88] In *Carbon Processing*, the United States District Court for the Western District of Tennessee filed a certification order with the Tennessee Supreme Court requesting clarity as to whether the doctrine of promissory estoppel could be used as a defense to the Statute of Frauds.[89] The Tennessee Supreme Court ultimately denied the certification, reasoning that the matter presented was moot.[90] The court in *Jones* did not discuss promissory estoppel beyond merely pointing out the confusion, as it found that the dismissal of the promissory estoppel claim was appropriate on other grounds.[91] It did not have to decide whether the trial court erred in relying on the Statute of Frauds as a basis to dismiss the asserted promissory estoppel claim.[92]

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87. Jones v. BAC Home Loans Servicing, LP, No. W2016-00717-COA-R3-CV, 2017 Tenn. App. LEXIS 464, at *31–32 (Tenn. Ct. App. July 12, 2017) ("[W]e note that a lack of clarity exists under Tennessee case law as to whether promissory estoppel could survive a Statute of Frauds defense."); *see also* Carbon Processing & Reclamation, LLC v. Valero Mktg. & Supply Co., 823 F. Supp. 2d. 786, 819 (W.D. Tenn. 2011) ("Generally speaking, the application of the doctrine of promissory estoppel in cases where the [S]tatute of [F]rauds is a defense is unsettled under Tennessee law.").

88. *Jones*, 2017 Tenn. App. LEXIS 464, at *31–32.

89. *Carbon Processing*, 823 F. Supp. 2d. at 824; *see also* Tenn. Sup. Ct. R. 23 § 1.

90. Carbon Processing & Reclamation v. Valero Mktg. & Supply Co., No. 09-2127-STA, 2012 U.S. Dist. LEXIS 147114, at *3–4 (W.D. Tenn. Oct. 12, 2012) (explaining that the Tennessee Supreme Court did not decide whether Valero was entitled to summary judgment on CPR's claim of promissory estoppel because Tennessee courts had not yet resolved the issues presented regarding promissory estoppel as an exception to the Statute of Frauds, and consequently declined to reach the presented certified questions).

91. *Jones*, 2017 Tenn. App. LEXIS 464, at *32–33 ("Exploring whether, and under what circumstances, promissory estoppel could operate as an exception to the Statute of Frauds must await another day."). *Id.* at *33.

92. *Id.* at *32–33.

The very logic of the Tennessee Supreme Court itself supports the need for clarity regarding promissory estoppel's use.

### 1. Tennessee Does Not Recognize Promissory Estoppel as a Defense to the Statute of Frauds

In *Steelman v. Ford Motor Credit Co.*,[93] the Tennessee Court of Appeals explicitly explained that in the past, Tennessee courts avoided application of the Statute of Frauds by applying the doctrines of partial performance or equitable estoppel.[94] The court went on to explain that the Tennessee Supreme Court "refused to apply the doctrine of promissory estoppel as an exception to the [S]tatute of [F]rauds in *Southern Industrial Banking Corp. v. Delta Properties, Inc*."[95] Following this seemingly straightforward proclamation of

93. Steelman v. Ford Motor Credit Co., 911 S.W.2d 720 (Tenn. Ct. App. 1995). To fully comprehend the basis and the significance of this court's holding, it is useful to have a brief overview of the facts of the case. Appellant, Jerry Steelman, filed suit against Appellee, Ford Motor Credit Company, alleging breach of contract and promissory estoppel. *Id.* at 721. Jim Hamby owned three automobile dealerships, each of which operated under a wholesale financing and security agreement with Ford. *Id.* The three dealerships experienced financial difficulties, and Ford eventually suspended the credit lines. *Id.* Soon after, Steelman began negotiations with Hamby to purchase an interest in one of the three dealerships, the Hamby Ford Dealership. *Id.* Steelman paid $90,000 to Ford, and Hamby Ford conveyed 50% of its stock to Steelman. *Id.* at 721–22. The controversy between Steelman and Ford arose because of differing accounts of the terms of floor-plan financing with Ford. *Id.* at 722. There were no writings about Ford's statements to Steelman regarding the floor-plan financing upon which to rely, prompting Ford to assert a Statute of Frauds defense to the present action. *Id.* at 722–23. Ford claimed that where the Statute of Frauds is used as a defense, the doctrine of promissory estoppel can only be applied to avoid fraud. *Id.* at 723. In response, Steelman argued that proof of actual fraud is not necessary to recover under promissory estoppel. *Id.* The trial court held that Steelman did not satisfy his burden of proof on the issue of fraud. *Id.*

94. *Id.* at 723; *see also* Blasingame v. Am. Materials, Inc., 654 S.W.2d 659, 663 (Tenn. 1983) (holding that the equitable doctrine of partial performance can be invoked to overcome the Statute of Frauds); Baliles v. Cities Serv. Co., 578 S.W.2d 621, 624 (Tenn. 1979) (holding that the equitable doctrine of equitable estoppel can be invoked to overcome the Statute of Frauds).

95. *Steelman*, 911 S.W.2d at 723; *see* S. Indus. Banking Corp. v. Delta Props., Inc., 542 S.W.2d 815, 817–18 (Tenn. 1976) (refusing to apply promissory estoppel as an exception to the Statute of Frauds).

Tennessee's stance on promissory estoppel, numerous other courts followed the holding of *Steelman*.[96] The Tennessee Court of Appeals stated, in *Nationsbank v. Millington Home Investors*, that "[the court is] not aware of any decisional law [in Tennessee] which addresses the precise issue" and that "to the contrary, the thrust of the cases is that promissory estoppel is not recognized as an exception to the Statute of Frauds."[97] Additionally, the court acknowledged Tennessee's recognition of equitable estoppel as an exception to the Statute of Frauds.[98] Staying in line with the holding in *Steelman*, the Tennessee Court of Appeals in *Seramur v. Life Care Centers of America, Inc.* reiterated the holding that promissory estoppel is not a recognized exception to the Statute of Frauds.[99] The *Seramur* court, as the court did in *Nationsbank*, distinguished promissory estoppel from equitable estoppel, which can serve as an exception to the Statute of Frauds in Tennessee.[100] The court eloquently explained, "promissory estoppel is a sword, based on the failure to deliver on a promise, while equitable estoppel is a shield a plaintiff can raise against the defense of the [S]tatute of [F]rauds when the defendant has knowingly misrepresented a fact."[101]

### 2. Tennessee Does Recognize Promissory Estoppel as a Defense to the Statute of Frauds

Despite those additional cases, the United States District Court for the Western District of Tennessee noted that the Tennessee Supreme Court in *Southern Industrial Banking* never actually addressed the issue of whether promissory estoppel is recognized as a defense to

96. *See, e.g.*, Bank of Gleason v. Weakley Farmers Coop., Inc., No. W1999-02161-COA-R3-CV, 2000 Tenn. App. LEXIS 303, at *6 (Tenn. Ct. App. Apr. 27, 2000); EnGenius Entm't v. Herenton, 971 S.W.2d 12, 20–21 (Tenn. Ct. App. 1997).

97. Nationsbank v. Millington Homes Inv'rs, No. 02A01-9805-CH-00134, 1999 Tenn. App. LEXIS 107, at *10 (Tenn. Ct. App. Feb. 19, 1999).

98. *Id.*

99. Seramur v. Life Care Ctrs. of Am., Inc., No. E2008-01364-COA-R3-CV, 2009 Tenn. App. LEXIS 126, at *13 (Tenn. Ct. App. Apr. 2, 2009).

100. *Id.* at *13–14.

101. *Id.* at *14.

the Statute of Frauds.[102] In fact, all the Tennessee Supreme Court said was that "[t]he reasoning and authorities relied upon by plaintiff . . . to establish promissory estoppel and take this case out of the [S]tatute of [F]rauds are inapposite."[103] The court did not cite any specific cases or rules of law to support its holding. One can make an argument that the court did not actually intend to make such a drastic holding in such an inconspicuous manner, thus leaving the line of cases citing to that decision as being unpersuasive.[104]

The cases standing for the proposition that promissory estoppel does not serve as an exception to the Statute of Frauds are contradicted by another line of Tennessee cases standing for the opposite proposition—that promissory estoppel is an exception to the Statute of Frauds.[105] One case from the Tennessee Court of Appeals is *Johnson v. Allison* in which the court held "[s]ince the application of promissory estoppel in contract cases creates an exception to the Statute of Frauds, it should not be applied too liberally lest the exception swallow the rule."[106] Yet, in the same case, it is worth noting that the court appears to conflate promissory estoppel with equitable estoppel.[107] Therefore, it is unclear whether the court was actually disagreeing with the holding in *Steelman*. Another case that contradicts the *Steelman* holding is *EnGenius Entertainment, Inc. v. Herenton*.[108] In that case, the Tennessee Court of Appeals held that the Statute of

102. *See* Carbon Processing & Reclamation, LLC. v. Valero Mktg. & Supply Co., 823 F. Supp. 2d. 786, 820 (W.D. Tenn. 2011) ("However, this Court finds that the Tennessee Supreme Court in *Southern Industrial Banking* did not actually address the issue of whether promissory estoppel is an exception to the [S]tatute of [F]rauds.").

103. S. Indus. Banking Corp. v. Delta Props., Inc., 542 S.W.2d 815, 819 (Tenn. 1976).

104. *See Carbon Processing*, 823 F. Supp. 2d. at 820.

105. *See id.*

106. Johnson v. Allison, No. M2003-00428-COA-R3-CV, 2004 Tenn. App. LEXIS 648, at *23 (Tenn. Ct. App. Oct. 7, 2004).

107. *Id.* at *19–23 (discussing the elements of equitable estoppel and the buyer's desire to rely on the defense of equitable estoppel to avoid the operation of the Statute of Frauds but then later referring to promissory estoppel).

108. *See generally* EnGenius Entm't, Inc. v. Herenton, 971 S.W.2d 12 (Tenn. Ct. App. 1997).

Frauds is not a bar to an independent claim of promissory estoppel.[109] In other words, promissory estoppel can be used as an exception to the Statute of Frauds. The court explained, "[a]lthough the [S]tatute of [F]rauds may prevent the Defendants from seeking enforcement of an alleged oral agreement under these equitable doctrines, the [S]tatute [of Frauds] does not preclude EnGenius from recovering damages for unjust enrichment or detrimental reliance."[110] Lastly, in *Launius v. Wells Fargo Bank*, the Eastern District of Tennessee recognized that while the Tennessee Court of Appeals had previously held that promissory estoppel is not an exception to the Statute of Frauds, promissory estoppel is still an independent cause of action even where an oral promise may otherwise be unenforceable under the Statute of Frauds.[111] These cases promote the stance that a Statute of Frauds defense, raised by the defendant against an independent claim for promissory estoppel, will not preclude that claim of promissory estoppel.[112] Essentially, promissory estoppel can overcome the Statute of Frauds, meaning that promissory estoppel is in fact an exception to the Statute of Frauds.[113]

### *C. Predictions for the Future of Promissory Estoppel in Tennessee*

The use of promissory estoppel as a defense to the Statute of Frauds desperately needs clarity, as the Tennessee Supreme Court it-

109. *Id.* at 20–21.

110. *Id.* It is important to note that the Tennessee Court of Appeals refers to promissory estoppel as detrimental reliance in this case.

111. Launius v. Wells Fargo Bank, N.A., No. 3:09-CV-501, 2010 U.S. Dist. LEXIS 89234, at *18 (E.D. Tenn. Aug. 27, 2010) ("While promissory estoppel is not an exception to the Statute of Frauds, it does provide an independent cause of action.").

112. *See* Carbon Processing & Reclamation, LLC. v. Valero Mktg. & Supply Co., 823 F. Supp. 2d 786, 821 (W.D. Tenn. 2011) ("The Court finds that these cases are representative of those holding that a [S]tatute of [F]rauds defense will not preclude a claim for promissory estoppel.").

113. An additional way of understanding the connection between promissory estoppel and the Statute of Frauds is by thinking about a defendant raising the defense of Statute of Frauds and a plaintiff asserting promissory estoppel as a counter-defense to the defendant's defense.

self implies.[114] The next plausible step is for Tennessee courts to formally recognize promissory estoppel as a defense to the Statute of Frauds, which may work to diminish the clarity that courts so frequently strive to obtain. This reasoning comes about because Tennessee courts recognize other new remedies to prevent fraud.[115] After reviewing Tennessee decisional law on promissory estoppel and fraud, it is not clear whether the courts are drawing from tort-based fraud, contract-based fraud, or hybrid-fraud theories, elements, and factors.

To add to the confusion surrounding the tension between promissory estoppel and fraud, Tennessee courts use terms such as "equitable estoppel" to describe these muddled theories of obligation or defense. For example, Tennessee has applied the doctrine of equitable estoppel as an exception to the Statute of Frauds.[116] To establish equitable estoppel in Tennessee, "the party asserting [equitable] estoppel must prove that the party to be estopped (1) engaged in a false representation or concealment of material facts, (2) with knowledge, [either] actual or constructive, of the real facts, and (3) with the intent or . . . the expectation that its representation or concealment would be

114. There is another area of confusion surrounding promissory estoppel in Tennessee. Even if Tennessee courts recognized promissory estoppel as a defense to the Statute of Frauds, the extent to which promissory estoppel can apply to promises that are unenforceable under the Statute of Frauds is unclear and undefined. *See Carbon Processing*, 823 F. Supp. 2d at 821 ("Even if the Court assumed that a cause of action for promissory estoppel is available where a defendant raises the [S]tatute of [F]rauds as a defense, the Tennessee Supreme Court has not defined the limits for applying promissory estoppel to promises that are unenforceable under the [S]tatute of [F]rauds."). Tennessee courts have consistently held that promissory estoppel should not be applied "too liberally." *Id.* at 820. However, the meaning of "too liberally" has never been defined. *Id.* The "quantum of proof . . . required to recover under a theory of promissory estoppel where the [S]tatute of [F]rauds bars enforcement of the promise" is not clear. *Id.* at 823.

115. FELDMAN, *supra* note 15, at 146.

116. *Id. See generally* Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1425–38 (1983) (discussing the history of part performance and equitable estoppel being used as an exception to the Statute of Frauds, as well as the complex relationship between promissory estoppel and the Statute of Frauds).

[relied upon] by the other party."[117] Additionally, the party asserting equitable estoppel must prove that "he relied on the false representation or concealment," detrimentally changed his position, and lacked both the "knowledge and the means of acquiring knowledge of the truth as to the facts."[118] Notably, equitable estoppel is not used as a sword the way that promissory estoppel can be used.[119] Rather, equitable estoppel is used only as a shield, meaning that equitable estoppel is only used as a defense.[120] In cases involving oral contracts, courts permitted, and still permit, equitable estoppel as a defense to the Statute of Frauds when denying such contracts' enforceability due to a failure to comply with the Statute of Frauds' requirements would inflict serious hardship on the promisee.[121] To do otherwise would "allow the perpetration of a moral fraud."[122]

According to many scholars' reasoning, courts are willing to allow equitable estoppel to overcome the Statute of Frauds because equitable estoppel's requirements are markedly stringent.[123] The requirements of equitable estoppel are meant to avoid proven inequities, so any proof of such inequities would include proof that enforcement of the alleged contract at issue would allow a party to use the Statute of Frauds to commit an injustice or actionable fraud.[124] It is reasonable, therefore, for courts to allow equitable estoppel to defeat the Statute of Frauds. Courts mistakenly reason that because equitable estoppel can overcome the Statute of Frauds requirements, promissory estoppel can also overcome the doctrine.[125] Because promissory estoppel similarly requires detrimental reliance, allowing the party as-

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117. Doe v. Catholic Bishop for the Diocese of Mem., 306 S.W.3d 712, 721 (Tenn. Ct. App. 2008).

118. *Id.*

119. *See* Leacock, *supra* note 78, at 98.

120. *Id.*

121. *See* Metzger, *supra* note 116, at 1425–26.

122. *Id.* at 1426 (citing Lionel Morgan Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 446 (1931)).

123. *See, e.g.*, Leacock, *supra* note 78, at 100–01.

124. *Id.*

125. For a brief statement on Tennessee court's interchangeable use of promissory estoppel and equitable estoppel, see *supra* note 79.

serting promissory estoppel to be barred by the Statute of Frauds would allow, at the least, injustice or, at the most, fraud.

While, in the name of avoiding the perpetration of fraud, it would be a reasonably incremental step for Tennessee courts to formally recognize promissory estoppel as a means of overcoming a Statute of Frauds defense, to do so would weaken an imperative and powerful doctrine of contract law.[126] Formally recognizing promissory estoppel in that capacity is a reasonable future action by Tennessee courts because there is a current lack of appreciation for the distinct differences between promissory estoppel and equitable estoppel.[127] To avoid this undesirable result, the differences between the two doctrines must be understood.

Equitable estoppel requires a certain level of disgraceful and reprehensible conduct on the part of the promisor.[128] Mere reasonable reliance, even if detrimental, is not sufficient to prove equitable estoppel.[129] Contrastingly, promissory estoppel does not require any showing of egregiousness.[130] All that is needed is evidence of reasonable, detrimental reliance on the promisor's promise.[131] Promissory estoppel does not require any proof of misrepresentation, material

126. There are states that do not recognize promissory estoppel as a defense to the Statute of Frauds, which is the approach Tennessee courts should follow. Two such states are Nevada and New Hampshire. Martin, *supra* note 12, at 21. In *Duarte v. Wells Fargo Bank*, the court explained that the Statute of Frauds applies only to contracts, and that "promissory estoppel is a claim that necessarily only exists where no enforceable contract has been formed, because there has been no formal consideration." Duarte v. Wells Fargo Bank, N.A., No. 3:13-cv-00371-RCJ-VPC, 2014 WL 585802, at *4 (D. Nev. Feb. 14, 2014) (internal citations omitted). The United States District Court in New Hampshire held that New Hampshire does not allow the Statute of Frauds to bar a promissory estoppel claim because "[p]romissory estoppel . . . is not premised upon the existence of a contract, but rather upon [an] alternative theory that, even if there was no contract, the plaintiff was induced to rely on the defendant's non-contractual promises." GE Mobile Water, Inc. v. Red Desert Reclamation, LLC, 6 F. Supp. 3d 195, 202 (D.N.H. 2014).

127. See *supra* note 79, for a statement about Tennessee courts conflating equitable estoppel with promissory estoppel.

128. *See* Leacock, *supra* note 78, at 96.

129. *Id.* at 97–98.

130. *Id.* at 94.

131. *Id.* at 97.

concealment, or material omission.[132] One can imply that because promissory estoppel does not have as stringent requirements as equitable estoppel, it should not be recognized as a defense to the Statute of Frauds. To do so would "inevitably subvert the Statute of Frauds too radically."[133] Because recognizing promissory estoppel as an exception to the Statute of Frauds would weaken this imperative and powerful feature of contract law, Tennessee courts must not only clearly explain how they recognize promissory estoppel in regards to being an exception to the Statute of Frauds but also decide to not recognize promissory estoppel in that manner.

## IV. WHY PROMISSORY ESTOPPEL SHOULD NOT BE A RECOGNIZED EXCEPTION TO THE STATUTE OF FRAUDS IN COMMERCIAL TRANSACTIONS

Grant Gilmore was concerned that promissory estoppel, being used as a substitute for consideration, would rid the world of classical contract law.[134] Contract law, and the rule of law in general, does not contain a trace of morality[135] even though it "affects the individual more personally than any other branch of the law."[136] Promissory estoppel, on the other hand, is completely consumed with morality—its very purpose is to promote justice.[137] The doctrine "did not just arise, like the mists of creation; it was born out of conscience and embodied

132. *Id.*

133. *Id.* at 95.

134. GILMORE, *supra* note 10, at 60–61.

135. *See* MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 205 (2004) ("Precisely because an undertaking is a genuine promise only if in its substance and circumstances it satisfies a threshold test of prima-facie moral commendability, the practice of promising and of promise-keeping is crucially different from the rule of law . . . . That practice is inherently moral in its bearings, whereas the rule of law is not.").

136. P.L. BRADBURY, LAW RELATING TO BUSINESS 43 (1971).

137. *See* Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1452 (2008) (explaining that the inclusion of promissory estoppel promoted avoidance of injustice and furthered an anti-formalist approach to contract law).

in the law to right wrongs."[138] While it is morally regrettable to break a promise, and while it is valid for there to be equitable remedies,[139] contract law should not concern itself with broken promises. To do otherwise would simply conflate contract law with equitable doctrines. Inherently, that fusion is flawed and dangerous. It is crucial that contract law and equitable doctrines are kept separate to preserve the sanctity[140] and power of contracts. Allowing an equitable doctrine to triumph over contract law weakens the force of a contract; it displaces the very essence of American contracts.[141] It is that very forcefulness and inherent power that drives the contract system in America. The rigid rules that make contract law so powerful provide sufficient predictability, allowing for and encouraging planned contractual exchanges.[142] Without rules, ensuring that agreements and

138. Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 64 (1996) (citation omitted).

139. *See id.* ("[P]romissory estoppel puts estoppel's equitable basis of remedial relief on more accurate affirmative grounds as an offensive theory providing affirmative remedies.").

140. Interestingly, in the Medieval period in England, the obligations of religion and promises were one in the same. DAVID HUGHES PARRY, THE SANCTITY OF CONTRACTS IN ENGLISH LAW 6 (1959). Breach of contract, or breach of promise, was closely associated with a breach of faith. *Id.* at 8. Failure to fulfill one's promises was viewed as "a mark of sinful or unethical aberration." *Id.* In the nineteenth century, with the development of a common law, the focus shifted away from sinfulness and more towards the extension of one's freedom through contract. *Id.* at 18. With this new emphasis relating contracts to one's freedom, it is unsurprising that contracts developed a "juristic blessedness," ultimately contributing to the sanctity and importance of contracts. *Id.* While contracts in the modern world do not necessarily have a religious aspect of sanctity to them, contracts do have this indescribable, untouchable quality about them. It is this "untouchability" and mystique that is unique only to contract law. These characteristics are exactly what promissory estoppel threatens to destroy, if recognized as an exception to contract doctrines.

141. *See* FRIEDMAN, *supra* note 7, at 19–20 (theorizing that when notions of equity are promoted to protect unsophisticated parties, contract rules are displaced).

142. *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 844 (1983) ("The principal advantage of rules is that they provide sufficient predictability to permit and encourage the planning and execution of contractual exchange.").

promises are actually adhered to would be an onerous task for both courts and parties alike.[143]

One way in which contract law is conflated with equitable doctrines is by recognizing promissory estoppel as an exception to the Statute of Frauds.[144] In that scenario, an equitable doctrine, promissory estoppel, is essentially rendering a fundamental doctrine of contract law, the Statute of Frauds, worthless. Without the requirement of an enforceable agreement being reduced to writing, opportunities for fraud abound.[145] Furthermore, allowing promissory estoppel to overcome the Statute of Frauds creates a type of unpredictability and inconsistency that is quite costly in commercial transactions.[146] There is a widely recognized argument that "contract law supports 'the network of private, unregulated transactions which form[s] the basis of the economic system.'"[147] Contract law allows parties to plan in advance and provides parties with security of enforcement of the contract so long as all relevant rules have been adhered to.[148] As previ-

143. Making promises invokes trust in future actions, not just trust in "present sincerity." CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 11 (1981). But enforcing a promise, and committing one another to fulfilling promises, is difficult to do when no legal liability is attached. *Id.* It is difficult to "commit ourselves to a course of conduct that absent our commitment is morally neutral." *Id.*

144. See PROBLEMS IN CONTRACT LAW, *supra* note 5, at 325–27, for an overview of the Statute of Frauds.

145. *See id.* (explaining that requiring a writing has the effect of eliminating, or at least minimizing, the likelihood of fraud occurring in the contractual transaction).

146. A counter-argument is that failure to recognize promissory estoppel as an exception to the Statute of Frauds creates potential injustice. The parties to an oral agreement fall within the scope of the Statute of Frauds, and failure to reduce the agreement to writing may deem that agreement unenforceable. Accordingly, scholars argue that promissory estoppel would be a way of circumventing the harsh statute. *See* Jennifer Camero, *Zombieland: Seeking Refuge from the Statute of Frauds in Contracts for the Sale of Services or Goods*, 82 UMKC L. REV. 1, 11–12 (2013). However, recognizing promissory estoppel as an exception to the Statute of Frauds creates uncertainty in commercial transactions. It takes away from the definiteness and formality of contract formation.

147. Feinman, *supra* note 142, at 848 (quoting LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 184 (1965)).

148. *Id.*

ously argued, the Statute of Frauds is an essential doctrine of contract law.[149] Furthermore, allowing promissory estoppel to overcome the Statute of Frauds has the potential to lead to reckless behavior of sophisticated contracting parties. Sophisticated business parties should not rely on agreements that were not reduced to some type of writing.[150] It is careless for such a party to be so naïve as to believe that the other party would not try to further its own interests at the party's expense. A party should not cry for help in the name of promissory estoppel, and in the name of avoiding the Statute of Frauds, just because that party did not adhere to the traditional rules of contract law.

Proponents of allowing promissory estoppel to overcome the harsh requirements of the Statute of Frauds steadfastly hold that the Statute of Frauds "'promotes more fraud than it prevents.'"[151] That is, the Statute of Frauds prevents an honest man from speaking the truth about an alleged agreement that was not written down. In doing so, it "'enable[s] a man to break a promise with impunity, because he did not write it down with sufficient formality.'"[152]

Allowing promissory estoppel to overcome the Statute of Frauds is not the logical answer, even though many scholars find merit in that position. Promissory estoppel as an independent cause of action can correct any unjust results that may arise out of contract law's Statute of Frauds requirements. While this Note is in no way promoting careless commercial transactions in which no part of the agreement is written down, it would be blatantly wrong to not acknowledge that, today, many parties do conduct business via telephone conversations.[153] Even though traditional requirements of contract law, such as the Statute of Frauds, are not adhered to in those situations, such commitments are still meant to promote economic activity and obtain

149. *See supra* Part IV. For a counter-argument that the Statute of Frauds is no longer relevant and quite unnecessary in the modern world, see generally Camero, *supra* note 146.

150. *See* Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and* The Restatement (Third) of Contracts, 73 IOWA L. REV. 659, 692 (1988).

151. Raj Bhala, *A Pragmatic Strategy for the Scope of Sales Law, the Statute of Frauds, and the Global Currency Bazaar*, 72 DENV. U. L. REV. 1, 36 (1994) (citation omitted).

152. *Id.* (citation omitted).

153. *Id.* at 39 (citation omitted).

economic benefits. In other words, "[p]romisors expect various benefits to flow from their promise-making."[154] As this Note repeatedly argues, contract law is simply not concerned with justice and fairness.[155] It may be unfair to disallow an honest man from enforcing an agreement that does not fall within the Statute of Frauds requirement, but such unfairness can be corrected by filing a promissory estoppel cause of action. Promissory estoppel, on its own, has the power of "furthering economic interests . . . [by] enforc[ing] without regard to any of the traditional formalities of contract law."[156]

In commercial transactions, both sides are more likely to maximize their economic interests if there is a certain amount of trust between the parties.[157] Such interdependent trust, the very foundation of modern economic relationships,[158] is a common characteristic of the economic market. Trusting one another prevents a party from being risk averse.[159] Being risk averse means that, because the party bears the weight and costs of its own risks, the party is more likely to take

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154. Farber & Matheson, *supra* note 22, at 929.

155. *But see supra* text accompanying notes 5 and 8 (discussing competing theories of contract law).

156. G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1207 (1988).

157. The levels of trust between parties is merely one approach to viewing contract law through an economic efficiency lens. *See* PROBLEMS IN CONTRACT LAW, *supra* note 5, at 14. One scholar, Professor Ian Macneil, adopts this approach by arguing that a majority of modern contracts arise in settings in which the parties have previously formed, long-term commercial or personal relationships. *Id.* According to his analysis, contract law should embrace legal doctrines to preserve such long-term relationships. *Id.* Two other notable approaches of economic efficiency of contract law do not necessarily take trust into account. Those approaches are the Chicago School and the Austrian School. For an in-depth discussion about those two competing schools of thought and the interconnection with morality, see Bear, *supra* note 3.

158. *See* John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37, 46–47 (2008) ("Indeed, the ability to trust strangers is what distinguishes primitive, tribal-based economies from modern, free-market economies. . . . The ability to move beyond transactions limited to people who are personally known to one another to transactions with people with no prior relationship is a necessary condition of modern economic life.").

159. *See* Farber & Matheson, *supra* note 22, at 928.

the less precarious alternative in hopes of avoiding a potential economic loss.[160] As a result, the party may be disinclined to partake in risky transactions even though the expected return may be great.[161] One party, or multiple parties, significantly breaking trust arguably leads to negative externalities that impede commercial transactions because other parties become less inclined to trust others.[162] This phenomenon occurs because of information asymmetry in which one party has more information about his own trustworthiness than the other party.[163] Accordingly, promissory estoppel, when used as an independent cause of action, works to promote high levels of trustworthiness. Since detrimental reliance[164] on a promise is the crux of promissory estoppel, a party can have certainty that equitable relief will be afforded if the other party breaks his promise. Such certainty ensures high levels of trust not necessarily in the other party but trust in the legal system's monitoring of injustice.[165]

For good reason, contract law has stringent requirements for forming an enforceable contract. There is a hesitancy to enforce promises that are blatantly casual.[166] Casual promises that do not fit the requirements dictated by contract law are arguably more likely to arise in commercial situations in which parties are "operating with unequal status or knowledge, already involved in some sort of joint

160. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

161. *See* Farber & Matheson, *supra* note 22, at 928.

162. *See id.*

163. *Id.*

164. While the word "trust" is not an element of promissory estoppel or used in any explanation of section 90, "the role of trust is an undeniable part of the doctrine." Chung, *supra* note 158, at 56. The role of trust in the doctrine of promissory estoppel is obvious because the "[r]eliance doctrine is a means of affirming the existence of trust." *Id.* at 57 (quoting Jay M. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1386 (1984)).

165. *Id.* at 38–39 ("Trust in the enforceability of a promise . . . is about the trust that the promisee has in the legal system to enforce a promise. A promisee may choose to rely on a promise even if she does not trust the promisor because she has trust that the legal system will provide a remedy for a broken promise.").

166. *See* FRIED, supra note 143, at 38 ("The law hesitates to enforce casual promises where promisor or promisee or both would be surprised to find the heavy machinery of the law imposed on what seemed an informal encounter.").

endeavor, or situated in a confidential relationship."[167] However, promises are more likely to adhere to the contract law requirements, including satisfying the elements of the Statute of Frauds, when they operate "with an equality of bargaining power, with an equal and sufficient amount of expertise, and at arm's length."[168] Requiring parties to adhere to the traditional rules of contract law, including abiding by the Statute of Frauds, increases the likelihood that parties gave serious thought to entering into the contract.[169] It encourages parties to put terms in writing and provides for a more thorough contemplation of substantially relying on the other party to fulfill his promise. There is a cautionary function to the Statute of Frauds, ensuring that parties do not rashly enter into a contract they may later regret.[170] Furthermore, knowing that the agreement must be written down and knowing that the traditional bargain theory applies, rather than an indefinable sense of fairness, allows for greater predictability. Parties do not have to fear that "the assertion [of] 'it isn't fair' can overcome traditional contract rules."[171]

Promissory estoppel-based arguments can very clearly stand on their own without any support of contract law and without resorting to undermining contract law to effectuate equity and fairness goals. There is a place for the justice that promissory estoppel concerns itself with. That place, however, is not contract law. Rather, promissory estoppel-based arguments should be reined in. As this Note has explained, courts will attain more conceptual clarity and accomplish greater amounts of analytical rigor if promissory estoppel is not recognized as an exception to the Statute of Frauds in Tennessee.

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167. Knapp, *Rescuing Reliance*, *supra* note 1, at 1212 (citing Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987)).

168. *Id.*

169. *See* FRIED, *supra* note 143, at 38.

170. *See* Camero, *supra* note 146, at 13 ("The Statute of Frauds allegedly performs a cautionary function by protecting individuals from hastily entering into a contract they may later regret. The thought is that the act of writing down and signing an oral agreement forces the parties to appreciate the legal obligations to which they are agreeing.").

171. Martin, *supra* note 12, at 31.

## V. CONCLUSION

Contract law "affects the individual more personally than any other branch of the law."[172] However, the doctrines in place, no matter how rigid they may appear, are in place for a reason—to promote predictability and stability. Contract law never has, and never should, concern itself with morality. When morality becomes a factor in enforcing contract doctrines, all notions of predictability are killed.[173] The law is already "untidy."[174] Allowing fairness and morality to be intertwined with classical contract law doctrines would simply add to the mess. In a desperate attempt to preserve the sanctity of contract, equitable doctrines should not be allowed to overcome traditional contract law doctrines. There is simply no need to cloak promissory estoppel, a separate and distinct equitable doctrine, under the guise of contract law. Specifically, in Tennessee, promissory estoppel should not be recognized as an exception to the Statute of Frauds, a classical and powerful contract law doctrine.

While promissory estoppel has a lofty goal of preventing injustice, that goal can be fully achieved when promissory estoppel is used as an independent cause of action, completely distinct from contract law. In Tennessee, there is no dispute regarding promissory estoppel's use as a sword. There is no need for contract law to be placed in a compromising position by courts recognizing promissory estoppel as a defense to the Statute of Frauds because an affirmative claim of promissory estoppel ensures justice will be obtained when the Statute of Frauds bars an honest commercial agreement from being enforced. When used as a sword, promissory estoppel can benefit commercial transactions without undermining contract law to effectuate its goal.

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172. BRADBURY, *supra* note 136, at 43.

173. This personification is borrowed from Grant Gilmore, who prophesized that contracts would become dead after the introduction of promissory estoppel. *See* GILMORE, *supra* note 10.

174. Farber & Matheson, *supra* note 22, at 946.