

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

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During the early history of the common law in England, the only promises that courts enforced were formal contracts such as those under seal.<sup>1</sup> It was not until the fourteenth century and the development of the action of assumpsit that informal contracts, which could be oral, became generally enforceable at common law.<sup>2</sup>

Once oral promises became enforceable in England, not only did legal enforcement become common place but so did fraudulent practices.<sup>3</sup> In 1677, the English Parliament set out to curb these

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1. E. Farnsworth, *Farnsworth on Contracts* Section 6.1, at 370 (1990); 1 S. Williston, *Williston on Sales* Section 14-1, at 120 (4th ed. 1973); 2 A. Corbin, *Corbin on Contracts* Section 275, at 2 (1964).

2. 3 W. Hawland *U.C.C. Series* Section 2-201:01, at 6 (1986); J. Calamari & J. Perillo, *The Law of Contracts* Section 19-1, at 672 (2d ed. 1977); 1 S. Williston, *Williston on Sales* Section 14-1, at 120 (4th ed. 1973); 2 A. Corbin, *Corbin on Contracts* Section 275, at 2 (1964).

3. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 *MARQ.L.REV.* 205, 206 (1978); J. Calamari & J. Perillo, *The Law of Contracts* Section 19-1, at 672 (2d ed. 1977). This was due in part to two practices of the common law courts during this period of time. The first practice was the exclusion of any testimony by the parties to the action. This was the result of a rule of evidence which barred the testimony of any person having an interest in the outcome of the case. The consequence of this was a custom where individual parties paid witnesses to swear to oaths and vouch for the existence or non-existence of the contract. As a result, the possibility for perjury was substantial for an action based on assumpsit where legal enforcement of the oral promise was obtained on the strength of the witness's testimony at trial. The second practice was permitting the jury to reach a verdict based solely upon their personal knowledge of the facts regardless of the evidence before them. This also was disastrous because it allowed the jury to enjoy uncontrolled discretion in their decision making processes. See, 3 Bender's *U.C.C. Service*, R. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* Section 2.01, at 2-2 (1993); E. Farnsworth, *Farnsworth on Contracts* Section 6.1, at 370 (1990); 1 S. Williston, *Williston*

practices by enacting the Statute of Frauds.<sup>4</sup> The Parliament designed the Statute to prevent the enforcement of unfounded claims by requiring a formal written statement or other adequate evidence to prove the existence of several classes of promissory obligations.<sup>5</sup> The Statute contained twenty-five provisions with sections 4<sup>6</sup> and 17<sup>7</sup> dealing with contracts.<sup>8</sup>

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on *Sales* Section 14-1, at 120-121 & 1-4, at 4 (4th ed. 1973); 2 A. Corbin, *Corbin on Contracts* Section 275, at 2 (1964); 6 W. Holdsworth, *A History of English Law*, 388-390 (2d ed. 1937); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV 440, 441 (1931).

4. 29 Car. II, c.3, 8 Stat at Large 405 (1677). The Statute was entitled "An Act for the Prevention of Frauds and Perjuries." 29 Car. II, c.3, 8 Stat at Large 405 (1677). See also, 2 A. Corbin, *Corbin on Contracts* Section 275, at 3 (1964); 6 W. Holdsworth, *A History of English Law*, 380 (2d ed. 1937); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV 440, 440 (1931).

5. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 65 (Nov. 1980); 1 S. Williston, *Williston on Sales* Section 1-4, at 4 (4th ed. 1973). Its purpose was to prevent "many fraudulent practices which are commonly endeavored to be upheld by perjury and subordination of perjury," and to "promote deliberation, seriousness, certainty, and show that the act [of contracting] was a genuine act of volition." 29 Car. II, c. 3, 8 Stat at Large 405 (1677). See, Case Comment, *Contracts—The Availability of Promissory Estoppel to Defeat the Statute of Frauds*, 14 MEM.ST.U.L.REV. 89, 90 (1983); 1 S. Williston, *Williston on Sales* Section 14-1, at 122 (4th ed. 1973); 3 S. Williston, *A Treatise on the Law of Contracts* Section 448, at 340 (3d ed. 1960); 6 W. Holdsworth, *A History of English Law*, 380 (2d ed. 1937).

6. Section 4 provided:

And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought [(1)] where by to charge any executor or administrator upon any special promise, to answer for damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (3) or to charge any person upon any agreement made upon the consideration of marriage; (4) or upon any contract [f]or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized.

26 Car. II, c.3, 8 Stat at Large 405 (1677).

7. Section 17 provided:

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

29 Car. II, c.3, 8 Stat at Large 405 (1677).

8. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 207 (1978).

The Statute of Frauds is not part of the English common law adopted in the United States.<sup>9</sup> However, legislatures throughout most of this country have enacted laws modeled after Sections 4 and 17 with only minor modifications.<sup>10</sup> Hence, there is some common statutory law among the fifty states which has become the basis for a mass of jurisprudence.<sup>11</sup>

In 1906, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Sales Act (U.S.A.).<sup>12</sup> In the states that adopted the U.S.A.,<sup>13</sup> Section 4<sup>14</sup> replaced legislation modeled after Section 17 of the English Statute of Frauds.<sup>15</sup> In 1932, the American Law Institute formally set out the terms of Section 17 and Section 4 of the English Statute of Frauds in Section 178<sup>16</sup> of the

9. E. Farnsworth, *Farnsworth on Contracts* Section 6.1, at 371 (1990); 2 A. Corbin, *Corbin on Contracts* Section 278, at 18 (1964).

10. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 207-208 (1978); 2 A. Corbin, *Corbin on Contracts* Section 278, at 18 (1964); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.PA.L.REV. 440, 441 (1931).

11. 2 A. Corbin, *Corbin on Contracts* Section 278, at 18 (1964).

12. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 208 (1978); 1 S. Williston, *Williston on Sales* Section 1-5, at 6 (4th ed. 1973); R. Nordstrom, *Handbook of the Law of Sales* Section 3, at 4 (1970).

13. Between 1907 and 1941, thirty-six states and the District of Columbia adopted the U.S.A. See, R. Nordstrom, *Handbook of the Law of Sales* Section 3, at 4 (1970).

14. Uniform Sales Act Section 4 (1906) provided:

Statute of Frauds.

(1) A contract to sell or a sale of any goods or chooses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or chooses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the sellers business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

See Generally, L. Vold, *Handbook on the Law of Sales* Section 13-22 (2d ed. 1959).

15. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 208 (1978). The only major deviation between Section 4 and Section 17 was the addition of an exception for specially manufactured goods; a result which had already been achieved by judicial decision in some states. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 68 (Nov. 1980).

16. Restatement (First) of Contracts Section 178 (1932) provided:

First Restatement of Contracts.<sup>17</sup> Section 178 classified those types of contracts which, by law or judicial decision, were governed by the Statute of Frauds in the United States.<sup>18</sup>

Commentators have argued that the English Parliament never intended the Statute of Frauds to apply to equity and that the equi-

Classes of Contracts Within the Statute of Frauds.

(1) the following classes of informal contracts are by statute unenforceable unless there is a written memorandum thereof signed by the party against whom enforcement of the contract is sought, or by some person thereunto authorized by him:

Class I. Contracts by an executor or administrator to be answerable from his own estate for a duty of the decedent's estate;

Class II. Contracts with an obligee to answer to him for the debt, default, or miscarriage of his obligor;

Class III. Contracts in which the consideration is marriage or a promise to marry, except contracts consisting of mutual promises by two persons to marry each other;

Class IV. Contracts for the sale of an interest in land;

Class V. Bilateral contracts, so long as they are not fully performed by either party, which are not capable of performance within a year from the time of their formation;

Class VI. Contracts for the sale of goods or chooses in action of a value above an amount variously fixed by the statutes of the several states, unless the buyer accepts and actually receives what is sold or part thereof, or gives something in earnest or in partial or entire payment of the price.

(2) Statutes in most States provide that a promise to perform a duty which is then or later become barred by a Statute of Limitations is not binding within the rule of Section 86 unless it is in writing signed by the promisor, or by some person thereunto authorized by him, except when the promise is inferred from facts stated in Clause (b) of Subsection (2) of that Section.

(3) The word "Statute" as used in this Chapter means in the absence of limiting words, a Statute of Frauds containing provisions substantially identical in meaning with the statements in Subsection (1).

17. 2 A. Corbin, *Corbin on Contracts* Section 278, at 18 (1964); Restatement (First) of Contracts Section 178 cmt. a (1932).

18. 1 S. Williston, *Williston on Sales* Section 14-4, at 207 (4th ed. 1973). In 1979, the American Law Institute published the Second Restatement of Contracts. In the Second Restatement, Section 178 was modified and renumbered as Section 110. Restatement (Second) of Contracts Section 110 (1979) provides:

Classes of Contracts Covered.

(1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:

(a) a contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);

(b) a contract to answer for the duty of another (the suretyship provision);

(c) a contract made upon consideration of marriage (the marriage provision);

(d) a contract for the sale of an interest in land (the land contract provision);

(e) a contract that is not to be performed with one year from the making thereof (the one year provision).

table courts of England, called the Courts of Chancery, accepted it merely because it wished to follow the law.<sup>19</sup> However, there is authority in the United States which says that the Statute of Frauds is no less binding on a court of equity than on a court of law.<sup>20</sup> In any event, whatever the scope of the Statute's applicability, it is clear that the equitable courts from a very early period treated the Statute of Frauds differently than the common law courts.<sup>21</sup>

The use of estoppel to enforce an alleged oral contract within the Statute of Frauds began in cases involving part performance.<sup>22</sup> The

(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code:

(a) a contract for the sale of goods for a price of \$500 or more (Uniform Commercial Code Section 2-201);

(b) a contract for the sale of securities (Uniform Commercial Code Section 8-319);

(c) a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond \$ 5,000 in amount or value of remedy (Uniform Commercial Code Section 1-206).

(3) In addition the Uniform Commercial Code requires a writing signed by the debtor for an agreement which creates or provides for a security interest in personal property or fixtures not in the possession of the secured party.

(4) Statutes in most states provide that no acknowledgement or promise is sufficient evidence to take a case out of the operation of a statute of limitations unless made in some writing signed by the party to be charged, but that the statute does not alter the effect of any payment of principle or interest.

(5) In many states other classes of contracts are subject to a requirement of a writing.

19. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 458 (1931). The reasoning behind this argument follows from the purpose of the Statute of Frauds which was to limit the uncontrolled discretion of the jury and to minimize the abuses possible under the trial system; neither of these shortcomings were relevant in the equitable courts. See, 2 A. Corbin, *Corbin on Contracts* Section 281, 26-28 (1964); 6 W. Holdsworth, *A History of English Law*, 393 (2d ed. 1937).

20. 37 C.J.S. *Frauds, Statute of Section* 247; 2 A. Corbin, *Corbin on Contracts* Section 281, at 27-28 (1964); 3 S. Williston, *A Treatise on the Law of Contracts* section (3d ed. 1960); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV 440, 443 (1931).

21. 1 S. Williston, *Williston on Sales* Section 14-2, at 124 (4th ed. 1973); 6 W. Holdsworth, *A History of English Law*, 393 (2d ed. 1937); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 443 (1931). The equitable courts restricted the provisions of the Statute of Frauds, modified them, and grafted exceptions that continue to be recognized even today. See, 2 A. Corbin, *Corbin on Contracts* Section 281, at 29 (1964); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 459 (1931).

22. These cases involved the sale of land where there was some part performance adequate to show that an oral contract had been made between the parties. To prove part performance sufficient to take a case out of the Statute of Frauds, a party relying thereon had to show a clear, definite, and unequivocal act strictly referable to the contract of such character that it was impossible or impracticable to place the parties back in the status quo. Courts have justified this exception on the theory that the character of the

doctrine of part performance is very similar to the doctrine of estoppel.<sup>23</sup> Because of this similarity, it was not long before the reasoning behind the part performance exception spread to the use of estoppel to prevent the unconscionable or unjust use of the Statute of Frauds defense.<sup>24</sup> At first, the courts of equity used estoppel only if a party could prove all the elements of legal fraud.<sup>25</sup> Cases soon developed, however, which did not involve legal fraud but the perpetration of a moral fraud.<sup>26</sup> To prevent the injury that resulted, the courts of equity extended their application of the doctrine of estoppel by

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conduct involved in part performance satisfactorily fulfills the evidentiary function of the Statute of Frauds. See, 3 W. Hawklund *U.C.C. Series* Section 2-201:08, at 36 (1986); Note, *Statute of Frauds- The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH.L.REV. 170, 171-172 (1967); 37 C.J.S. *Frauds, Statute of Section* 250.

23. Some authorities have said that part performance is based on estoppel and operates on the theory of estoppel. See, Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REVIEW 114, 118 (1975); Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH.L.REV. 170, 181 (1967); 3 S. Williston, *A Treatise on the Law of Contracts* Section 553A, at 791-792 (3d ed. 1960); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 447 (1931); 73 Am Jur. 2d, *Statute of Frauds* Section 566, at 204.

24. 3 W. Hawklund *U.C.C. Series* Section 2-201:08, at 36 (1986).

25. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L. REV. 63, 77 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 214 (1978). To prove legal fraud, a party was required to show the intent to deceive perpetrated through the ignorance or gullibility of the victim. The courts justified the use of estoppel in this manner by saying that the grounds for granting the remedy were not based upon the agreement but upon fraud for which the courts of equity had always given relief. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 76 (Nov. 1980); Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REVIEW 114, 118 (1975); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 444 and 446 (1931).

26. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 76 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 215 (1978). This occurred when the Statute of Frauds was invoked against a promisee who was misled as to certain facts by the conduct of the promisor and in reliance changed his position so far to his detriment that he suffered severe hardship. See, Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.P.A.L.REV. 440, 445-446 (1931).



applying the elements of equitable estoppel<sup>27</sup> to the Statute of Frauds.<sup>28</sup>

Initially, application of equitable estoppel to Statute of Frauds cases occurred only where the promisor had misrepresented the existence of a fact which would eliminate the necessity for a writing or had represented that a writing satisfying the Statute's requirements had been executed.<sup>29</sup> More recently, the courts expanded the

27. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 76 (Nov. 1980). The doctrine of equitable estoppel was invoked on the grounds that the courts of equity should grant relief against the harsh operation of statutes and should not permit the Statute of Frauds to aid in the perpetration of fraud or be used as an instrument to protect fraud since it was enacted for the purpose of preventing it. Another statute where equity has employed estoppel under this justification is the statute of limitations. See, Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 215 (1978); 3 S. Williston, *A Treatise on the Law of Contracts* Section 553A, at 796 (3d ed. 1960); Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U.PA.L.REV. 440, 447 (1931); 73 Am. Jur. 2d, Statute of Frauds Section 561, at 198-199.

Basically, the doctrine of estoppel was applied to prevent a person "from denying or asserting anything contrary to that which by the person's own deeds, acts, or representations, has been set forward as the truth." 28 Am. Jur. 2d *Estoppel and Waiver* Section 1 (1966). The doctrine works to absolutely preclude certain matters by the estopped party including the ability to plead or prove a particular fact or an unequivocal legal right or effective defense. See, 73 Am. Jur. 2d *Statute of Frauds* Section 564, at 201; 3 S. Williston, *A Treatise on the Law of Contracts* Section 553A, at 805 (3d ed. 1960); Annot. 56 A.L.R.3d 1037, 1047 (1974).

The basic elements to establish equitable estoppel are set out by J. Pomeroy in his treatise on equity:

1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.
2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
3. The truth concerning these facts must be unknown to the other party claiming benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him.
4. The conduct must be done with the intention, or least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.
5. The conduct must be relied upon by the other party, and, in such manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he had done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

3 J. Pomeroy, *A Treatise on Equity Jurisprudence* Section (5th ed. 1941).

28. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 76 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 215 (1978).

29. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 215 (1978). This is consistent with the application of the doctrine of equitable estoppel which has been held to apply only where the

application of equitable estoppel to include reliance on promises of future conduct.<sup>30</sup> Use of the doctrine of estoppel in this manner has generally been referred to as promissory estoppel.<sup>31</sup>

In 1909, the California Supreme Court, in *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88 (1909), was one of the first courts to apply promissory estoppel to the Statute of Frauds.<sup>32</sup> In *Seymour*, the promisor made an ancillary promise to execute a writing in the future which would satisfy the Statute of Frauds.<sup>33</sup> When the First Restatement of Contracts published its Statute of Frauds provision in Section 178, the First Restatement indicated its support for the

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representation by the person to be estopped was made as to a present or past fact. See, Case Comment, *Contracts—The Availability of Promissory to Defeat the Statute of Frauds*, 14 MEM.ST.U.L.REV. 89, 93 (1983); 28 Am.Jur.2d *Estoppel and Waiver* Section 46 (1966).

30. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 215-216 (1978).

31. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 215-216 (1978).

Promissory estoppel is a common law rule derived from the general principle of equitable estoppel. The doctrine is like equitable estoppel in that it is applied to defeat recovery by someone asserting legal rights. However, promissory estoppel has also been permitted by courts and legal authorities as a way to bring a right of action in contract to obtain affirmative relief. One example of this is illustrated when promissory estoppel is used as a substitute for consideration such as is suggested in Section 90 of the *Restatement of Contracts*. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 78 n. 97 (Nov. 1980); Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW.U.L.REV. 906, 924 (1978); Annot. 56 A.L.R.3d 1037, 1040 and 1042 (1974); Am. Jur. 2d *Estoppel and Waiver* Section 49, at 659 (1966); 3 J. Pomeroy, *A Treatise on Equity Jurisprudence* Section 808b, at 212 (5th ed. 1941)

See generally, Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969); Boyer, *Promissory Estoppel: Requirements and Limitation of the Doctrine*, 98 U.PA.L.REV. 459 (1950).

32. The result in *Seymour*, thought ascribed to the doctrine of equitable estoppel, is more appropriately designated as an application of the principles of promissory estoppel. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 80 (Nov. 1980); McNeill, *Agreements to Reduce to Writing Contracts within the Statute of Frauds*, 15 VA.L.REV. 553, 558 (1929).

33. *Seymour*, 156 Cal. at 799-800, 106 P. at 106 (1909).



application of estoppel under such circumstances in comment f<sup>34</sup> of that section.<sup>35</sup>

In 1950, the California Supreme Court, *Monaco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737 (1950), applied the principles of estoppel to the circumstances in question even though the promisor had not misrepresented a fact or promised that a writing would later be executed which satisfied the requirements of the Statute of Frauds.<sup>36</sup> In this case, the court decided that the representation that should estop a promisor from raising the Statute of Frauds defense was a promissory statement that the contract would be performed.<sup>37</sup> This, the court concluded, was the promise "that a party relies upon when he changes his position."<sup>38</sup>

34. Restatement of Contracts Section 178 cmt. f (1932) provided:

Though there has been no satisfaction of the statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishments of a right or defense may be precluded. A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the statute would otherwise operate to defraud.

35. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 81 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 216 (1978). Origins of comment f of the First Restatement of Contracts Section 178 can be traced back further than *Seymour* to the case of *Leak v. Morrice*, 22 Eng.Rep. 883 (ch. 1682). This was an English case which involved an oral contract to assign a lease with the further promise to put the main contract in writing. See, Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REVIEW 114, 117 (1975).

The language of comment f stated the law in terms utilized by the First Restatement. It made the distinction between misrepresentations of past or present facts and promises relating to future intentions which the Restatement labeled promissory estoppel. Comment f, however, did not define the term promissory estoppel; rather, the exclusive definition of the term in the First Restatement is found in Section 90. This section is generally regarded as the formal source for the elements of promissory estoppel. See, Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REVIEW 114, 117 (1975); Annot. 56 A.L.R.3d 1037, 1046, 1050 (1974).

36. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 216 (1978). In *Monaco*, the court labeled the version of estoppel it applied as equitable but the decision is clearly based on principles of promissory estoppel. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 84 (Nov. 1980).

37. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 216 (1978).

38. *Monaco*, 35 Cal.2d at —, 220 P.2d at 741 (1950). The court, in *Monaco*, recognized that a promisee who relies on a promise to perform suffers as much as a promisee who relies on an ancillary promise to later reduce the agreement to writing. The court further noted that in reality, even in cases which involve an ancillary promise, the promisee is most likely relying upon the promise that the underlying agreement will be performed and not upon the ancillary promise. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 83 (Nov. 1980).

Subsequently, other courts applied the rule expressed in *Monaco* to a variety of factual situations and expressly recognized the doctrine it used as promissory estoppel.<sup>39</sup> At the same time, some other courts relied upon the doctrine of promissory estoppel stated in Section 90<sup>40</sup> of the First Restatement of Contracts as a basis for estopping a party from raising the Statute of Frauds defense.<sup>41</sup> As a practical matter, the doctrine under Section 90 and the doctrine used in *Monaco* are indistinguishable.<sup>42</sup> Cases applying promissory estoppel under either theory extended the application of this doctrine further than courts had in the past.<sup>43</sup>

In 1973, responding to the judicial trend concerning promissory estoppel and the Statute of Frauds, the American Law Institute (Institute) drafted Section 217A<sup>44</sup> found in the tentative draft of the

39. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 84 (Nov. 1980) (citing, *McIntosh v. Murphy*, 52 Haw. 29, 36-37, 469 P.2d 177, 181 (1970)). These situations even included facts involving the sale of goods under the U.S.A. See, Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 217 (1978) (citing, *Union Packing Co. v. Caribou Land & Cattle Co.*, 191 F.2d 814 (9th Cir. 1951); *Mosekian v. Davis Canning Co.*, 229 Cal.App.2d 118, 40 Cal.Rptr. 157 (1964); *Goldstein v. McNeil*, 122 Cal.App.2d 608, 265 P.2d 113 (1954).

40. Restatement (First) of Contracts Section 90 (1979) provided:

Promise Reasonably Inducing Definite and Substantial Action.

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 their promise.

41. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 217 (1978); J. Calamari & J. Perillo, *The Law of Contracts* Section 19-1, at 672 (2d ed. 1977). Courts did this even though Section 90 was traditionally used as a substitute for consideration and neither the content of the section nor its history indicated it could be applied to the Statute of Frauds. The doctrine has also been applied as a method of curing deficiencies in offer and acceptance such as to failed contract negotiations and indefinite agreements. At least one commentator has noted the increased application of promissory estoppel to other areas of contract law besides its use as a substitute for consideration and sees this as marking the emergence of promissory estoppel as an independent theory of recovery. See, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 88-89 (Nov. 1980).

42. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 217 (1978).

43. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 217-218 (1978).

44. Restatement (Second) of Contracts Section 217A (Tent. Drafts Nos. 1-7, 1973) provided:

Enforcement by Virtue of Action in Reliance.

(1) A promise which 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 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.

Second Restatement of Contracts.<sup>45</sup> This provision supported the decisions and reasoning of the cases mentioned above and made promissory estoppel explicitly applicable to the Statute of Frauds.<sup>46</sup> In the final draft of the Second Restatement, the Institute modified Section 217A somewhat and renumbered it as Section 139.<sup>47</sup> The impact of both Section 217A and Section 139 is illustrated in a number of cases decided after the Institute drafted each section.<sup>48</sup>

In 1942, preparation for the Uniform Commercial Code (Code) began and by 1968 all fifty states except Louisiana had adopted it with some minor variation.<sup>49</sup> Article II of the Code governs the sale

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

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

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

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

(d) the reasonableness of the action or forbearance and the misleading character of the promise.

45. Important to note is that in the tentative and final drafts of the Second Restatement of Contracts, the section specifically governing the Statute of Frauds was redrafted. Among the changes implemented was the elimination of comment f contained within the Statute of Frauds section of the First Restatement.

46. Case Comment, *Contracts—The Availability of Promissory Estoppel to Defeat the Statute of Frauds*, 14 MEM.ST.U.L.REV. 89, 93 (1983).

47. Restatement (Second) of Contracts Section 139 (1979) provides: Enforcement by Virtue of Action in Reliance.

(1) A promise which 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 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.

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

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

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

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

(d) the reasonableness of the action or forbearance;

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

48. E. Farnsworth, *Farnsworth on Contracts* Section 6.12, at 438-440 (1990).

49. The first official text of the Code was drafted in 1949 and after considerable revision and redrafting subsequent official texts appeared in 1952, 1958, and 1962. In the states that adopted the Code, it is the law by virtue of local enactment. Through Section 10-102 the Code specifically repeals prior Acts dealing with certain commercial law issues and through Section 10-103 it generally repeals all legislation inconsistent with the Code. See, J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code*

of goods and Section 2-201<sup>50</sup> is the Statute of Frauds provision for that article. By virtue of its enactment, Section 2-201 specifically repeals Section 4 of the U.S.A. and supersedes the Statute of Frauds provisions of the Restatement of Contracts for the sale of goods.<sup>51</sup> Consequently, cases decided under these prior laws before the effective date of Section 2-201 are not considered controlling.<sup>52</sup>

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Section 1, at 1 and 4 (2d ed. 1980); Edwards, *The Statute of Frauds and the Uniform Commercial Code*, 62 MARQ.L.REV. 205, 205 (1978); 1 S. Williston, *Williston on Sales* Section 1-5, at 8-14 (4th ed. 1973); R. Nordstrom, *Handbook of the Law of Sales* Section 2, at 3 (1970).

50. Uniform Commercial Code Section 2-201 (1972) provides:

Formal Requirements; Statute of Frauds.

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

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

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

(a) if the goods are to be specifically manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

51. 2 R. Anderson, *Anderson on the Uniform Commercial Code* Section 2-201:6, at 15 (3d ed. 1992); 1 S. Williston, *Williston on Sales* Section 14-4, at 206 (4th ed. 1973). Section 2-201 is similar to prior Statute of Fraud provisions in a number of ways. However, there are a number of changes in Section 2-201 which distinguish it from prior law. See, 3 Bender's U.C.C. Service, K. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* Section 2.05, at 2-139 and 2-140 (1993); Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 73 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 210-212 (1978); J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* Section 2-5, at 65 (2d ed. 1980).

52. 2 R. Anderson, *Anderson on the Uniform Commercial Code* Section 2-201:6, at 15 (3d ed. 1992). However, the influence of these cases can still be seen in how courts construe Section 2-201.

The doctrine of estoppel has no counter part in the Code.<sup>53</sup> Section 2-201 does not mention it nor does another Code section specifically apply it to Section 2-201.<sup>54</sup> However, Section 1-103<sup>55</sup> does allow principles of estoppel to “supplement” provisions of the Code “UNLESS DISPLACED BY THE PARTICULAR PROVISIONS OF [THE] ACT.” (Emphasis supplied).<sup>56</sup> This framework and language has created some ambiguity in the Code as to the applicability of estoppel to Section 2-201. Because of this, courts of different jurisdictions are not in agreement as to whether estoppel should be applied to the Statute of Frauds as it is set out in Section 2-201.<sup>57</sup> In addition, because Section 1-103 generally refers to the doctrine of estoppel without being more specific, the particular form of estoppel that may be applied to Section 2-201 is also the subject of judicial debate.<sup>58</sup>

It appears from the existing cases that courts generally allow equitable estoppel to apply to Section 2-201.<sup>59</sup> There are some courts

53. Case Comment, *Contracts—The Availability of Promissory Estoppel to Defeat the Statute of Frauds*, 14 MEM.ST.U.L.REV. 89, 93 (1983).

54. 3 Benders U.C.C. Service, R. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* Section 2.04[6], at 2-131 (1993); 2 R. Anderson, *Anderson on the Uniform Commercial Code* Section 2-201:233, at 126 (3d ed. 1992).

55. Uniform Commercial Code Section 1-103 (1972) provides:

Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to the capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

56. The origins of Section 1-103 can be found in Uniform Sales Act Section 73 (1906) which provided:

Rule for Cases Not provided for by this Act.

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and sales of goods.

57. 2 R. Anderson, *Anderson on the Uniform Commercial Code* Section 2-201:233, at 125-126 (3d ed. 1992); Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 99 (Nov. 1980); Annot. 29 A.L.R.4th 1006, 1011

58. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ.L.REV. 205, 222 (1978).

59. ARIZONA: *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz.App. 415, 493 P.2d 1220, 10 UCCRS 393 (1972). ARKANSAS: *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201, 31 UCCRS 440 (1981); CALIFORNIA: *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal.App.3d 432, 249 Cal.Rptr. 872, 6 UCCRS2d 1059 (1988) (*rejecting*, *C.R. Frederick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852, 21 UCCRS 26 (9th Cir. 1977)); *Distribu-Dor, Inc. v. Karadanis*, 11 Cal.App.3d 463, 90 Cal.Rptr. 231, 8 UCCRS 36 (1970); ILLINOIS: *National Enterprises, Inc. v. Enersyst, Inc.*, 749 F.Supp. 1506, 13 UCCRS2d 1116 (N.D.Ill. 1990); *R.S. Bennett & Co., Inc. v. Economy Mechanical Industries, Inc.*, 606 F.2d 182, 27 UCCRS 345 (7th Cir. 1979); IOWA: *Meylor v. Brown*, 281

that have rejected its applicability;<sup>60</sup> however, in most cases, the court does not reject the doctrine outright but holds that the facts of the case do not warrant its application.<sup>61</sup> Whether the doctrine of equitable estoppel applies to the facts of a case also may vary from court to court because different jurisdictions often have different standards for proving equitable estoppel.<sup>62</sup>

The majority view on the issue of whether promissory estoppel may apply to the defense contained in Section 2-201 favors allowing its application.<sup>63</sup> However, there is a strong minority position

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N.W.2d 632, 26 UCCRS 1060 (1979); KANSAS: *Decatur Coop Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323, 18 UCCRS 1160 (1976); MARYLAND: *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017, 21 UCCRS 721 (1977); MICHIGAN: *Fairway Machinery Sales Co. v. Continental Motors Corp.*, 40 Mich.App. 270, 198 N.W.2d 757, 10 UCCRS 1405 (1972); MINNESOTA: *Stary Const. Co., Inc. v. Murphy Oil USA, Inc.*, 785 F.Supp. 1356, 17 UCCRS2d 353 (D.Minn. 1992); *Don Shreve Lincoln-Mercury, Inc. v. American Honda Motor Co., Inc.*, 1981 WL 138025, 32 UCCRS 1091 (D.Minn. 1981); *W.H. Barber Co. v. McNamara-Vivant Contracting Co., Inc.*, 293 N.W.2d 351, 27 UCCRS 899 (1979); *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588, 17 UCCRS 16 (1975); *Sacred Heart Farmers Coop Elevator v. Johnson*, 305 Minn. 324, 232 N.W.2d 921, 17 UCCRS 901 (1975); MONTANA: *Northwest Potato Sales, Inc. v. Beck*, 208 Mont. 310, 678 P.2d 1138, 37 UCCRS 1468 (1984); NEW YORK: *Liss Bros., Inc. v. Resnick*, 1990 WL 212962 (S.D.N.Y. 1990); *National Microsales Corp. v. Chase Manhattan Bank, N.A.*, 1989 WL 125884 (S.D.N.Y. 1989); *Hoffman v. Boone*, 708 F.Supp. 78, 9 UCCRS2d 474 (S.D.N.Y. 1989); *Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787, 2 UCCRS2d 826 (2d Cir. 1986); NORTH DAKOTA: *Farmers Coop. Ass'n of Church Ferry v. Cole*, 239 N.W.2d 808, 18 UCCRS 1151 (1976); *Dangerfield v. Markel*, 222 N.W.2d 373, 15 UCCRS 765 (1974); OKLAHOMA: *Dixon v. Roberts*, 853 P.2d 235, 21 UCCRS2d 513 (1993); OREGON: *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982); SOUTH CAROLINA: *Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 320 S.E.2d 720, 39 UCCRS 1199 (1984); SOUTH DAKOTA: *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 238 N.W.2d 290, 18 UCCRS 1143 (1976); TENNESSEE: *Massey v. Hardcastle*, 753 S.W.2d 127, 7 UCCRS2d 661 (1988); TEXAS: *Rockland Industries, Inc. v. Frank Kashmir Associates*, 470 F.Supp. 1176, 26 UCCRS 852 (N.D.Tex. 1979); *H. Molsen & Co., Inc. v. Hicks*, 550 S.W.2d 354, 22 UCCRS 294 (1977).

60. ALABAMA: *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609, 14 UCCRS 330 (1974); NEBRASKA: *Golden Plains Feedlot, Inc. v. Great Western Sugar Company*, 588 F.Supp. 985, 39 UCCRS 785 (D.S.D. 1984); *Wilke v. Holdredge Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672, 23 UCCRS 1130 (1978); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86, 19 UCCRS 1063 (1976); *Schott Grain Co. v. Rasmussen*, 197 Neb. 267, 248 N.W.2d 42 (1976).

61. 2 R. Anderson, *Anderson on the Uniform Commercial Code Section 2-201:235* (3d ed. 1992).

62. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 93-94 (Nov. 1980).

63. ARKANSAS: *Dickson v. Delhi Seed Co.*, 26 Ark.App. 83, 760 S.W.2d 382, 8 UCCRS2d 925 (1988); *Ralston Purina Co. v. McCollum*, 271 Ark. 840, 611 S.W.2d 201, 31 UCCRS 440 (1981); CALIFORNIA: *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal.App.3d 432, 249 Cal.Rptr. 872, 6 UCCRS2d 1059 (1988) (*rejecting*, *C.R. Frederick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852, 21 UCCRS 26 (9th Cir. 1977)); *Distribu-Dor, Inc. v. Karadanis*, 11 Cal.App.3d 463, 90 Cal.Rptr. 231, 8 UCCRS 36 (1970); ILLINOIS: *Michaels Corp. v. Trans World Metals, Inc.*, 1989 WL 134606 (N.D.Ill. 1989); *R.S. Bennett & Co., Inc. v. Economy Mechanical Industries, Inc.*, 606 F.2d 182, 27 UCCRS 345 (7th Cir. 1979); *Jenkins & Boller Co., Inc. v. Schmidt Iron Works, Inc.*, 36 Ill.App.3d 1044, 344



against this.<sup>64</sup> In addition, there is an intermediate position that

N.E.2d 275, 19 UCCRS 425 (1976); *But see, Cohn v. Checker Motors Corp.*, 233 Ill.App.3d 839, 599 N.E.2d 1112, 175 Ill.Dec. 98 (1992); *Novacor Chemicals, Inc. v. Aluf Plastics, Inc.*, 1988 WL 135556 (N.D.Ill 1988); IOWA: *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979); *Meylor v. Brown*, 281 N.W.2d 632, 26 UCCRS 1060 (1979); KANSAS: *Howard Wyman Co. v. Provimi Veal Corp.*, 1991 WL 257090 (D.Kan. 1991); *Tel-Treads, a Div. of Teleci, Inc. v. Montgomery Ward & Co., Inc.*, 772 F.2d 908 (6th Cir. 1985); *Quaney v. Tobyne*, 236 Kan. 201, 689 P.2d 844, 40 UCCRS 37 (1984); *Decatur Coop. Ass'n. v. Urban*, 219 Kan. 171, 547 P.2d 323, 18 UCCRS 1160 (1976); MARYLAND: *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017, 21 UCCRS 721 (1977); MASSACHUSETTS: *Hurwitz v. Prime Communications Inc.*, 1994 WL 561834, 23 UCCRS2d 1213 (Mass.Super. 1994); *Highland News Company, Inc. v. Hearst Corporation*, 1986 WL 1385 (1986); *Loranger Const. Co. v. E.F. Hauserman Co.*, 6 Mass.App.Ct. 152, 374 N.E.2d 306 (1978); MICHIGAN: *Opydke Inv. Co. v. Norris Grain Co.*, 413 Mich. 354, 320 N.W.2d 836 (1982); *Fairway Machinery Sales Co. v. Continental Motors Corp.*, 40 Mich.App. 270, 198 N.W.2d 757, 10 UCCRS 1405 (1972); MISSOURI: *Robert Johnson Grain Co. v. Chemical Interchange Co.*, 541 F.2d 207, 20 UCCRS 40 (8th Cir. 1976); MONTANA: *Trad Industries, Ltd. v. Brogan*, 246 Mont. 439, 805 P.2d 54, 14 UCCRS 718 (1991); *Northwest Potato Sales, Inc. v. Beck*, 208 Mont. 310, 678 P.2d 1138, 37 UCCRS 1468 (1984); NEW YORK: *National Microsales Corp. v. Chase Manhattan Bank, N.A.*, 1989 WL 125884 (S.D.N.Y. 1989); *Hoffman v. Boone*, 708 F.Supp. 78, 9 UCCRS2d 474 (S.D.N.Y. 1989); *Bernard v. Langan Porche Audi, Inc.*, 143 A.D.2d 495, 532 N.Y.S.2d 599 (1988); *Country-Wide Leasing Corp. v. Subaru of America, Inc.*, 133 A.D.2d 735, 520 N.Y.S.2d 24, 4 UCCRS2d 1362 (1987); *Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787, 2 UCCRS2d 826 (2d Cir. 1986); *Edward Joy Co. v. Noise Control Products, Inc.*, 111 Misc.2d 64, 443 N.Y.S.2d 361 (1981); *Swerdloff v. Mobil Oil Corp.*, 74 A.D.2d 258, 427 N.Y.S.2d 266 (1980); NORTH CAROLINA: *Allen M. Campbell Co., General Contractors, Inc. v. Virginia Metal Industries, Inc.*, 708 F.2d 930, 36 UCCRS 384 (4th Cir. 1983); NORTH DAKOTA: *Minnesota Farm Bureau Marketing Corp. v. North Dakota Agr. Marketing Ass'n*, 563 F.2d 906 (8th Cir. 1977); *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736, 20 UCCRS 617 (1976); *Dangerfield v. Markel*, 222 N.W.2d 373, 15 UCCRS 765 (1974); OHIO: *Evets Elec., Inc. v. Ohio Edison Co.*, 1991 WL 274243 (1991); *Columbus Trade Exchange, Inc. v. AMCA Intern. Corp.*, 763 F.Supp. 946, 15 UCCRS2d 51 (S.D. Ohio 1991); OKLAHOMA: *Darrow v. Spencer*, 581 P.2d 1309, 24 UCCRS 819 (1978); OREGON: *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982); SOUTH DAKOTA: *Farmers Elevator Co. of Elk Point v. Lyle*, 90 S.D. 86, 238 N.W.2d 290, 18 UCCRS 1143 (1976); WISCONSIN: *Janke Const. Co., Inc. v. Vulcan Materials Co.*, 386 F.Supp. 687, 16 UCCRS 937 (W.D.Wis. 1974); WYOMING: *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

64. ALABAMA: *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974); KENTUCKY: *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 27 UCCRS 11 (1979); MINNESOTA: *Starry Const. Co., Inc. v. Murphy Oil USA, Inc.*, 785 F.Supp. 1356, 17 UCCRS2d 353 (D.Minn 1992); *Del Hayes & Sons, Inc. v. Mitchell*, 304 Minn. 275, 230 N.W.2d 588, 17 UCCRS 16 (1975); MISSISSIPPI: *T.K. Stanley, Inc. v. Scott Paper Co.*, 793 F.Supp. 707, 18 UCCRS2d 673 (S.D.Miss 1992); *Futch v. James River-Norwalk, Inc.*, 722 F.Supp. 1395, 10 UCCRS2d 684 (S.D. Miss. 1989); *Anderson Const. Co., Inc. v. Lyon Metal Products, Inc.*, 370 So.2d 935 (1980); *FMC Finance Corp. v. Reed*, 592 F.2d 238 (5th Cir. 1979); *Ivey's Plumbing & Elec. Co., Inc. v. Petrochem Maintenance, Inc.*, 463 F.Supp. 543, 26 UCCRS 621 (N.D. Miss. 1978); NEBRASKA: *Golden Plains Feedlot, Inc. v. Great Western Sugar Co.*, 588 F.Supp. 985, 39 UCCRS 785 (1984); *Wilke v. Holdredge Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672, 23 UCCRS 1130 (1978); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86, 19 UCCRS 1063 (1976); *Schott Grain Co. v. Rasmussen*, 197 Neb. 267, 248 N.W.2d 42 (1976); PENNSYLVANIA: *Atlantic Paper Box Co. v. Whitman's Chocolates*, 1994 WL 53754 (E.D.Pa 1994); *International Products & Technologies, Inc. v. IOMEGA Corp.*, 1989 WL 138866, 10 UCCRS2d 694

confines the application of promissory estoppel to cases where the promise relied upon is an ancillary promise to later reduce the oral agreement to writing or a representation that there has been compliance with the requirements of the Statute of Frauds.<sup>65</sup> As in the case of equitable estoppel, the courts complicate this issue further by applying different standards for satisfying the doctrine of promissory estoppel.<sup>66</sup>

The legal trend, reflected in the cases, is to apply both equitable estoppel and promissory estoppel to Section 2-201. The Second Restatement of Contracts appears to follow this trend, which is reflected in their drafting of Section 139. The reasons for this result are grounded in the strengths and weaknesses of the various policies which support the respective sides of this issue.

The courts which apply estoppel to Section 2-201 contend that the purpose of the Statute of Frauds is to prevent the enforcement of alleged promises<sup>67</sup> and prevent fraud and injustice.<sup>68</sup> They state that its purpose was never to justify repudiating promises which were in fact made.<sup>69</sup> Therefore, a court should not allow the Statute of Frauds to be used as a shield to protect fraud or enable one to take advantage of his own wrong.<sup>70</sup> This would result if the court prevented estoppel from applying to the Statute of Frauds because it would allow a promisor to induce a promisee to rely to his detriment and then allow the promisor to completely escape liability.<sup>71</sup>

The courts which do not apply the doctrine of estoppel to Section 2-201 state that allowing estoppel to apply to that section would enable a court to grant a remedy for a mere refusal to perform an oral agreement. This is because almost every oral promise contains

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(E.D.Pa. 1989); SOUTH CAROLINA: *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); WASHINGTON: *Lige Dickson Co. v. Union Oil Co. of California*, 96 Wash.2d 291, 635 P.2d 103, 32 UCCRS 705 (1981), 671 F.2d 503, 32 UCCRS 1096 (9th Cir. 1981).

65. ARIZONA: *Tiffany Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz.App. 415, 493 P.2d 1220, 10 UCCRS 393 (1972); TEXAS: *Adams v. Petrade Intern, Inc.*, 754 S.W.2d 696, 7 UCCRS2d 369 (1988); *Rockland Industries, Inc. v. Frank Kashmir Associates*, 470 F.Supp. 1176, 26 UCCRS 852 (N.D.Tex. 1979); *H. Molsen & Co., Inc. v. Hicks*, 550 S.W.2d 354, 22 UCCRS 294 (1977).

66. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 94-95 (Nov. 1980).

67. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

68. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979); *Decatur Coop Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323, 18 UCCRS 1160 (1976).

69. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

70. *Decatur Coop Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323, 18 UCCRS 1160 (1976).

71. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992); *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982); *Edward Joy Co. v. Noise Control Products, Inc.*, 111 Misc.2d 64, 443 N.Y.S.2d 361 (1981).

the estoppel elements of reliance and injustice.<sup>72</sup> According to these courts, a mere refusal to perform an alleged oral agreement does not amount to fraud sufficient to justify estopping a party from raising the Statute of Frauds defense.<sup>73</sup> In addition, allowing the application of the doctrine of estoppel to Section 2-201 would bring a massive infusion of litigation and would create confusion,<sup>74</sup> encourage oral contracts,<sup>75</sup> and require courts to engage in the delicate balancing maneuvers required by the elements of estoppel.<sup>76</sup> This would strip Section 2-201 of its purpose and would frustrate the intent of the legislature by rendering the Statute meaningless and nugatory.<sup>77</sup>

The policy reasons of the courts which apply estoppel to Section 2-201 are sound while the reasons used by the opposing courts against its application are assailable. First, the fear of the opposing courts that applying estoppel to Section 2-201 will allow enforcement of a mere refusal to perform an oral agreement is unjustified. Cases fill reporters where courts do not enforce an oral agreement after a party asserts the doctrine of estoppel. This is because the elements of estoppel are not easily proven.<sup>78</sup> Second, applying estoppel to Section 2-201 will not render the Statute meaningless or nugatory. The primary purpose of the Statute of Frauds is the evidentiary function of providing evidence of a real transaction.<sup>79</sup> The

72. *Sacred Heart Farmers Coop Elevator v. Johnson*, 305 Minn. 324, 232 N.W.2d 921, 17 UCCRS 901 (1975).

73. *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86, 19 UCCRS 1063 (1976).

74. *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash.2d 291, 635 P.2d 103, 671 F.2d 503, 32 UCCRS 705 (1981); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting).

75. *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting).

76. *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting).

77. *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); *Farmers Coop Elevator Ass'n. of Church Ferry v. Cole*, 239 N.W.2d 808 (1976); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86, 19 UCCRS 1063 (1976); *Sacred Heart Farmers Coop Elevator v. Johnson*, 305 Minn. 324, 232 N.W.2d 921, 17 UCCRS 901 (1975); *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974). Other remedies besides estoppel are available to the defrauded party such as restitution and unjust enrichment. These remedies are allowed because they are not based upon proof of a contract. The Statute of Frauds is a defense against remedies which require contract enforcement as a precursor to relief. The Statute of Frauds fails to become an issue in claims which do not seek enforcement of the contract. See, *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting).

78. For example, promissory estoppel requires 'reasonable' reliance and 'unjust' enrichment. See, Restatement (Second) of Contracts Section 90 (1979).

79. The requirements of the Statute of Frauds has been justified as serving numerous important functions. Foremost of these is providing reliable evidence of the existence and terms of the contract between the parties. This is sometimes referred to as the evidentiary function. Through this function, the Statute lessens the danger that courts or

writing requirement and all of the expressed exceptions to Section 2-201 concern themselves with behavior that performs this function.<sup>80</sup> Estoppel also involves behavior that provides independent evidence of a real transaction. This is due to the element of reliance necessary to satisfy the doctrine of estoppel.<sup>81</sup> Section 2-201 recognizes that reliance can perform this evidentiary function in Section 2-201(3)(a), the specifically manufactured goods exception, and in Section 2-201(3)(c), regarding part payment and part acceptance.<sup>82</sup> It is also recognized by Article II in Section 2-209(4), which allows conduct that fails to satisfy the Statute to operate as a waiver.<sup>83</sup> Lastly, application of estoppel will not create a massive infusion of litigation, confusion, or encourage oral contracts. Several courts have applied estoppel to other types of Statutes of Frauds and have not encountered such a result.

In opposition to the strength of the policy reasons for applying estoppel to Section 2-201 is the particular language of the Statute. An analysis of the specific words used in Section 2-201 indicates that estoppel should not be applied to this section.

The courts which do not apply the doctrine of estoppel to Section 2-201 recognize that Section 1-103 allows estoppel to "supplement" provisions of the Code.<sup>84</sup> However, they point out that Section 1-

juries will be misled by perjured testimony as to the existence of the contract. See, E. Farnsworth, *Farnsworth on Contracts* Section 6.1, at 372 (1990); Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 101 (Nov. 1980); Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 207 (1978); J. Calamari & J. Perillo, *The Law of Contracts* Section 19-1, at 674 (2d ed. 1977); Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH.L.REV. 170, 170-171 (1967).

80. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 218 (1978).

81. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 99 (Nov. 1980); Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW.U.L.REV. 906, 941-942 (1978).

82. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 99 (Nov. 1980).

83. Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL.L.REV. 63, 99 (Nov. 1980). Uniform Commercial Code Section 2-209(5) (1972) allows a party who has made a waiver to retract it by "reasonable notification" of the other party "unless retraction would be unjust in view of a material change of position in reliance on the waiver."

84. A study of the Code and related materials reveals that the doctrine of estoppel can only be applied to Section 2-201 through Section 1-103. This is because the Code is not a supplement to the common law but is a general law that preempts all pre-existing legal principles in the commercial field. 2 W. Hawkland *U.C.C. Series* Section 1-103:01, at 55 (1986); Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW.U.L.REV. 906, 936 (1978); see also, 3 Bender's *U.C.C. Service*, K. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* Section 1.01, at 1-2 (1993). This includes the doctrine of estoppel. The existence and content of Section 1-103, which provides the only exception, is cogent evidence of this.

103<sup>85</sup> does not allow application of the doctrine of estoppel if it is "DISPLACED BY THE PARTICULAR PROVISIONS OF [THE] ACT." (Emphasis supplied.) The courts argue, in the case of Section 2-201, that the language of that particular provision displaces the doctrine of estoppel. Section 2-201(1) reads "[E]XCEPT AS OTHERWISE PROVIDED FOR IN THIS SECTION a contract for the sale of goods for . . . \$500 or more . . . is not enforceable . . . unless there is some writing." (Emphasis supplied).<sup>86</sup> According to this language, Section 2-201 requires a sufficient writing for contracts involving the sale of goods "EXCEPT AS OTHERWISE PROVIDED FOR IN THIS SECTION." (Emphasis provided).<sup>87</sup> Section 2-201 does provide in other parts of the section four expressly enumerated exceptions which otherwise allow a contract to satisfy the Statute of Frauds,<sup>88</sup> however, it does not otherwise provide anywhere in the section an express or particular exception for any form of estoppel.<sup>89</sup> This indicates that applying

85. Uniform Commercial Code Section 1-103 (1972) provides:

Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to the capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

86. Uniform Commercial Code Section 2-201(a) (1972).

87. *Futch v. James River-Norwalk, Inc.*, 722 F.Supp. 1395, 10 UCCRS2d 684 (S.D. Miss. 1989); *International Products & Technologies, Inc. v. IOMEGA Corp.*, 1989 WL 138866, 10 UCCRS2d 694 (ED PA 1989); *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash.2d 291, 635 P.2d 103, 671 F.2d 503, 32 UCCRS 705 (1981); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86, 19 UCCRS 1063 (1976).

88. Section 2-201 provides four alternate methods for satisfying the Statute of Frauds. The first method is the 'merchant exception' found in Uniform Commercial Code Section 2-201(2) (1972). Under this subsection, merchants may not assert the Statute of Frauds as a defense if they do not affirmatively object to a contract within ten days after receiving written confirmation of the underlying oral agreement. The second method is the 'specially manufactured goods' alternative found in Uniform Commercial Code Section 2-201(3)(a) (1972). Under this subsection, an oral contract for specifically manufactured goods is enforceable if the seller has either substantially begun their manufacture or made commitments for their procurement before receiving a notice of repudiation. The third method is the 'admissions alternative' found in Uniform Commercial Code Section 2-201(3)(b) (1972). Under this subsection, a contract is enforceable if the contracting party admits in his pleadings, testimony, or otherwise in court that the contract was made. The fourth method is the 'part performance' alternative found in Uniform Commercial Code Section 2-201(3)(c) (1972). Under this subsection, that part of a contract for which payment has been made and accepted or for which goods have been received and accepted is enforceable.

89. *International Products & Technologies, Inc. v. IOMEGA Corp.*, 1898 WL 138866, 10 UCCRS2d 694 (ED PA 1989); *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 27 UCCRS 11 (1979); *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974). The language of Section 2-201 expresses a legislative decision that the exceptions "otherwise provided for in this section" were as far as the legislature was willing to go to alleviate any harshness caused by the Statute. It evidences a legislative intent to displace the principles



estoppel to Section 2-201 is inconsistent with the particular structure and wording of that section.<sup>90</sup>

Courts which have applied the doctrine of estoppel to Section 2-201 have countered the above arguments by asserting that, while Section 1-103 specifically mentions estoppel,<sup>91</sup> Section 2-201 does not mention Section 1-103 or estoppel and nothing in the language of Section 2-201 purports to displace either.<sup>92</sup> Because there is no language in Section 2-201 that constitutes displacement<sup>93</sup> and

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of law and equity which might supplement the particular provisions of Section 2-201 through Section 1-103. See, *Futch v. James River-Norwalk, Inc.*, 722 F.Supp. 1395, 10 UCCRS2d 684 (S.D. Miss. 1989); *International Products & Technologies, Inc. v. IOMEGA Corp.*, 1989 WL 138866, 10 UCCRS2d 694 (ED PA 1989); *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash.2d 291, 635 P.2d 103, 671 F.2d 503, 32 UCCRS 705 (1981); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting).

90. These courts also point out that it is the concern of the legislature to adopt the commercial practices of the state and if they had wanted to include an exception for the doctrine of estoppel they would have incorporated such language. Because the legislature clearly and unambiguously did not, the courts should not enlarge upon the Statute. Because the courts are without the legislative power to engraft any additional exceptions, an attempt to do so would violate the doctrine of separation of powers. See, *McDabo, Inc. v. Chet Adams Co.*, 548 F.Supp. 456, 34 UCCRS 1101 (D.S.C. 1982); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash.2d 291, 635 P.2d 103, 671 F.2d 503, 32 UCCRS 705 (1981); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979) (Reynoldson, C.J., dissenting); *C.G. Campbell & Son, Inc. v. Comdeq Corp.*, 586 S.W.2d 40, 27 UCCRS 11 (1979); *Anderson Const. Co. v. Lyon Metal Products, Inc.*, 370 So.2d 935 (1979); *Cox v. Cox*, 292 Ala. 106, 289 So.2d 609 (1974).

91. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

92. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS 1 (1992); *Northwest Potato Sales, Inc. v. Beck*, 208 Mont. 310, 678 P.2d 1138, 37 UCCRS 1468 (1984); *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979). Some of these courts argue that the displacement required by Section 1-103 must be explicit. They find this requirement in Uniform Commercial Code Section 1-103 cmt. 1 (1972) which provides:

Purposes of Changes:

While this section indicates the continued applicability to commercial bodies of law except insofar as they are explicitly displaced by this Act, the principle has been stated in more detail and the phrase enlarged to make it clear that the 'validating', as well as the 'invalidating' clauses referred to in the prior uniform statutory provisions, are included here. 'Validating' as used here in conjunction with 'invalidating' is not intended as a narrow word confined to original validation, but extends to cover any factor which at any time or in any manner renders or helps to render valid any right or transaction.

93. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992); *Northwest Potato Sales, Inc. v. Beck*, 208 Mont. 310, 678 P.2d 1138, 37 UCCRS 1468 (1984); *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982); *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 25 UCCRS 963 (1979).



because silence cannot be construed as displacement<sup>94</sup> the legislature must have intended for estoppel to be applied to Section 2-201 through Section 1-103. This rationale, they point out, is consistent with general principles of statutory construction,<sup>95</sup> with principles outlined in the Code for interpreting its provisions,<sup>96</sup> and with the opinions of Code commentators.<sup>97</sup>

Regarding this issue, the arguments for applying estoppel to Section 2-201 are weaker than those for preventing its application. First, the contention that Section 2-201 does not displace the doctrine of estoppel because the Statute does not mention either estoppel or Section 1-103 is flawed because it extends the requirements of Section 1-103 too far. Section 1-103 does not require a particular provision of the Code to mention a principle of equity in order to prevent its application. It only requires the particular provision to displace it. Second, asserting that a provision of the Code must mention either Section 1-103 or estoppel by name renders the language of Section 1-103 superfluous because there is currently no other section in the Code that mentions either. Third, resort to prin-

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94. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992); *Potter v. Hatter Farms, Inc.*, 56 Or.App. 254, 641 P.2d 628, 33 UCCRS 819 (1982).

95. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992). These general principles of statutory construction include: (1) that provisions which relate to the same subject matter should be harmonized and (2) that every section should be read in the context of every other section to ascertain meaning. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

96. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992). These principles are outlined in Uniform Commercial Code Section 1-102 (1972). Under this section, the Code should be liberally construed and applied to promote its underlying purposes such as: to clarify and simplify, to modernize the law governing commercial transactions, to permit continued expansion of commercial practices through custom, usage, and agreement, to make the commercial law more uniform, and to make the law of commercial transactions reasonable, liberal, and non-technical. See generally, J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* Section 1, at 1 (2d ed. 1980).

97. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992). For example, Professor Robert S. Summers outlines a model for considering whether the equitable principles contained in Section 1-103 are displaced by particular provisions of the Code in his article entitled, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW.U.L.REV. 906 (1978). Prof. Summers suggests that these principles are not displaced unless it is shown that: the general equitable principle is explicitly displaced by name in the plain language of the text or comments to the provision; the specific objectives of the Section would be served only by displacement; the underlying general objectives of the Code would be best furthered by displacement; or the history of the section or the Code would plainly indicate displacement. In his article, Prof. Summers disagrees with those courts which have held that the Code's Statute of Frauds provision for the sale of goods displaces the equitable principles contained in Section 1-103. See, Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW.U.L.REV. 906, 938, 941-942 (1978). In a recent case, a court held that Section 2-201 did not displace the doctrine of promissory estoppel by applying the criteria in Prof. Summer's framework. *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 18 UCCRS2d 1 (1992).

ciples of statutory construction and interpretation and opinions of outside authorities to surmise what the legislature intended in promulgating Section 2-201 is misplaced because it presupposes that the language of that section is ambiguous. If the wording of Section 2-201 was vague then speculating as to what the legislature intended and resorting to outside sources would be appropriate.<sup>98</sup> However, a close reading of Section 2-201 indicates that the language is particular and the wording is clear on its face. In such a case, the plain meaning of the section and not the presumed intent of the legislature should be controlling.

Because of the unpredictable and inconsistent application of the law in the area of Section 2-201 and estoppel, a complete and authoritative solution to this problem is critical. In my judgement, this solution must be a legislative one.

First, according to the analysis above, the judicial trend and the policies underlying this problem support the application of estoppel to Section 2-201; however, the language of the relevant Code provisions dictate otherwise. Thus, in order for there to be a solution to this problem, the language of Code must be changed to accurately reflect how it is applied.

Second, a court should be able to look no further than the Code itself for answers to disputes governed by it.<sup>99</sup> This is because the Code is no ordinary statute but a legislative enactment which entirely preempts the field of commercial law.<sup>100</sup> A court should be

98. Of course, one would have to question the necessity to travel down such a route since ambiguity in Section 2-201 as to displacement would necessarily mean that it was not displaced as required by Section 1-103.

99. Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code Methodology"*, 18 B.C. INDUS & COM.L.REV. 655, 657 (1977). Karl Llewellyn, chief reporter for the Uniform Commercial Code has stated:

Every provision should show its reason on its face. Every body or provision should display on their face their organizing principle. The rationale of this is that construction and application are intellectually impossible except with reference to some reason and theory of purpose and organization. Borderline, doubtful, or un contemplated cases are inevitable. Reasonably uniform interpretation by judges of different schooling, learning, and skill is tremendously furthered if the reason which guides application of the same language is the same reason in all cases. A patent reason, moreover, tremendously decreases the leeway open to the skillful advocate for persuasive distortion or misapplication of the language; it requires that any contention, to be successfully persuasive, must make some kind of sense in terms of the reason; it provides a real stimulus toward, though not an assurance of, corrective growth rather than strait-jacketing of the code by way of case law.

J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* Section 4, at 11-12 (2d ed. 1980).

100. 3 Bender's U.C.C. Service, R. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* Section 1.01, at 1-2-1-3 (1993).

able to view the Code as comprehensive and self explanatory<sup>101</sup> and should not have to rely on case law to arrive at a solution.<sup>102</sup>

Third, one of the basic objectives of the Code is uniformity.<sup>103</sup> The Code cannot obtain this objective if courts freely invoke common law or equitable rules in construing its provisions.<sup>104</sup> Such resort makes "possible the utilization of different analogies and brings into play different rules of law and social policies."<sup>105</sup> This has been the result with the application of estoppel to Section 2-201 because it is pervaded by jurisdictional variations.<sup>106</sup>

The sponsors of the Code knew that there inevitably would be changes in commercial practices which would require additions to and changes in its official text.<sup>107</sup> Because of this, they established a Permanent Board (Board) to review state changes in the Code's text and to recommend amendments whenever new commercial practices rendered provisions of the Code obsolete or new provisions desirable, court decisions cast doubt on the intended interpretation of some section, or some provision proved unworkable.<sup>108</sup>

The time has come for the Board to specifically address the issue of Section 2-201 and estoppel. The Board should (1) carefully analyze this issue, (2) decide whether it is wise to allow estoppel to apply to Section 2-201, and then (3) draft or amend pertinent provisions to carry out their decisions. Because of the circumstances surrounding this issue, the Board should complete all three of these steps even if they do not think estoppel should be applied to Section 2-201.

Based upon the above analysis, I believe the Board should follow the current legal trend and allow application of estoppel to Section 2-201. If this is the decision of the Board, then they can draft their solution through one of two methods.

The first method would be to eliminate the "[e]xcept as otherwise provided for in this section" language at the beginning of Section 2-201(1). This would allow estoppel to supplement Section 2-201 through Section 1-103 and leave no doubt that Section 2-201 has not

101. D. King, et al., *Commercial Transactions Under the Uniform Commercial Code*, at 7 (4th ed. 1987); Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code Methodology"*, 18 B.C. INDUS. & COM.L.REV. 655, 657 (1977).

102. D. King, et al., *Commercial Transactions Under the Uniform Commercial Code*, at 7 (4th ed. 1987).

103. Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARO.L.REV. 205, 225 (1978).

104. Hillman, *Construction of the Uniformed Commercial Code: U.C.C. Section 1-103 and "Code Methodology"*, 18 B.C. INDUS. & COM.L.REV. 655, 659 and 684 (1977).

105. Hillman, *Construction of the Uniformed Commercial Code: U.C.C. Section 1-103 and "Code Methodology"*, 18 B.C. INDUS. & COM.L.REV. 655, 659 and 684 (1977).

106. Hillman, *Construction of the Uniform Commercial Code: U.C.C. Section 1-103 and "Code Methodology"*, 18 B.C. INDUS. & COM.L.REV. 655, 655 (1977).

107. R. Nordstrom, *Handbook of the Law of Sales* Section 2, at 3 (1970).

108. R. Nordstrom, *Handbook of the Law of Sales* Section 2, at 3 (1970).

displaced this doctrine. However, this change would only be a partial solution. It would only eliminate the problem in those jurisdictions specifically holding that the language mentioned above has displaced the doctrine of estoppel. It would not eliminate the problem in states where courts elect not to apply estoppel to Section 2-201 based solely on policy considerations prevalent in their jurisdiction.

The second method of drafting a solution to this problem would be to provide for an estoppel exception within Section 2-201. This could be done either by adding exception language in Subsection (c) or by adding a Subsection (d) to the end of the Statute. This would be the most authoritative solution to the problem since it would unambiguously mandate that courts allow the application of estoppel to Section 2-201 cases. In my judgement, this is the best and recommended solution.