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Contract Law's Two "P.E.'s": Promissory Estoppel and the Parole Evidence Rule

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CONTRACT LAW'S TWO "P.E.'S": PROMISSORY ESTOPPEL AND THE PAROL EVIDENCE RULE

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* Professor, Dedman School of Law, Southern Methodist University, Dallas, Texas [Senior author's note: As the senior author, let me make two ministerial points. First, my name appears first because I am a "Law School Legend," http://www.amazon.com/Law-School-Legends-Contracts-Audio/dp/0314160841, not because I did more work than Melinda or Kelly. Second, while I would like to thank Dean John Attanasio for giving us money for writing this article, I can't. We didn't get any such money. None. Nada. I am not complaining – writing law review articles is a part of a law professor's job. Indeed, there are misguided people who believe that writing law review articles is the most important part of a law professor's job. No one, however, believes that writing a law review article is a part of a law student's job. Nonetheless, Melinda and Kelly spent the summer between their first and second years of law school working on this article for no pay. I just want to be sure that readers of this article – especially readers who are lawyers looking to hire a "baby lawyer" know this about Melinda and Kelly. DGE]

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This article is about "P.E." Not the physical education class that you looked forward to in junior high school, but the two "P.E.'s" you dreaded in your first-year law school contracts class: (1) promissory estoppel and (2) the parol evidence rule.[1] Each is plenty complicated standing alone. This article considers what happens if the two bump into each other. More specifically, this article asks and answers the question: Should the parol evidence rule apply to promissory estoppel cases?

This is not the first law review article to explore the relationship of promissory estoppel and the parol evidence rule. The most-cited such article is an eighty-five page article in the 1983 Vanderbilt Law Review by Professor Michael B. Metzger,[2] currently the Jean Ann and Donald E. Foster Chair in Business Ethics at the Indiana University's Kelley School of Business.[3]

With all due respect,[4] we believe that Professor Metzger improperly framed the question as, "Should promissory estoppel apply to parol evidence cases?" instead of, "Should the parol evidence rule apply to promissory estoppel cases?" [5] There is no such thing as a "parol evidence case." There are, however, promissory estoppel cases.

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[1] As was pointed out by Melinda, Kelly, and the editors of the Baylor Law Review, this is a sentence fragment. Not the only sentence fragment in this article that Melinda, Kelly, and the editors of the Baylor Law Review have spotted. Over their objections, the sentence fragments remain as a form of tribute to Miss Alice Lindemann, Epstein's eleventh grade "Language Arts" teacher who told him that, in the highly unlikely event he ever became a published author, he could then use sentence fragments.

[2] Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983). More recently, the Ohio Northern University Law Review published a short article by Professor Gregory Scott Crespi of the Dedman School of Law, Southern Methodist University, with the long title, "*Clarifying the Boundary Between the Parol Evidence Rule and the Rules Governing Subsequent Oral Modifications.*" 34 OHIO N.U. L. REV. 71 (2008). Like the title, the first sentence of the article indicates that the question addressed in the article is: "What rules govern whether an oral agreement that purports to modify a written contract is legally effective?" *Id.* at 71. There are, however, a few brief statements in the article relevant to the question of whether the parol evidence rule should apply to promissory estoppel cases. *See id.* at 79.

[3] Indiana University, Alliance of Distinguished and Titled Professors, http://www.indiana.edu/~alldrp/members/metzger.html (last visited Mar. 30, 2010).

[4] And, we understand that a lot of respect is due an academic chairholder. *See, e.g.*, John Attanasio, Judge James Noel Dean and Professor of Law and William Hawley Atwell Chair of Constitutional Law, and Bradley J. B. Toben, Dean and M.C. Mattie Caston Chair in Law, Baylor University.

[5] Metzger, *supra* note 2, at 1454.

What is a promissory estoppel case? "Under Texas law, a plaintiff alleging promissory estoppel must establish (1) a promise; (2) foreseeab[le] reliance thereon by the promisor; [and] (3) substantial reliance thereon by the promisee."[6] Assume[7] that, in a promissory estoppel claim, "Simmons contends that HPN orally promised a long-term business relationship on more than one occasion, and that Simmons relied upon those promises when it expanded its facilities in 1995 and 1996 to produce 'low ash' poultry meal."[8] It would seem that the litigable issues would be whether: (1) HPN made such promises; (2) HPN should have foreseen that Simmons would rely on the promises; and (3) Simmons' reliance was substantial.

Now, just like law school, let's play "change the facts."[9] Let's add facts that might raise parol evidence rule concerns.

Professor Arthur Corbin provided one of the more accessible explanations of the parol evidence rule:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.[10]

Professor Corbin uses the term "integration" in listing the facts that trigger the parol evidence rule.[11] Texas courts and the Restatement (Second) of Contracts use similar language and define an integrated agreement as an agreement that is in writing and intended by the parties as the final expression of their agreement.[12] To summarize, the existence of both (1) a

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[6] Pegram v. Honeywell, Inc., 361 F.3d 272, 288 (5th Cir. 2004). *Accord* Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 686 n.25 (Tex. 2002).

[7] This hypothetical is not hypothetical. Instead, we are taking part of the facts from one of our favorite cases, Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc., 270 F.3d 723 (8th Cir. 2001), and part from our favorite law school case book, DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, MAKING AND DOING DEALS (2d ed. 2006).

[8] *Simmons*, 270 F.3d at 727.

[9] *Cf.* Orin S. Kerr, How to Read a Judicial Opinion: A Guide for New Law Students 6 (2005), http://euro.ecom.cmu.edu/program/law/08-732/Courts/howtoreadv2.pdf (explaining how changing the facts can help law students understand the scope and effect of a court's decision).

[10] Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 603 (1944).

[11] *See id.*

[12] *See* Royce Homes, L.P. v. Bates, No. 01-08-00191-CV, 2010 WL 184216, at *9 (Tex. App.—Houston [1st Dist.] Jan. 21, 2010, no pet.); RESTATEMENT (SECOND) OF CONTRACTS

final written agreement and (2) some prior agreement that does not appear in the written contract are necessary to trigger the parol evidence rule.[13]

Accordingly, if, in our "hypo," Simmons "subsequently entered into one-year written contracts with HPN,"[14] then we have our question: Should the parol evidence rule apply in promissory estoppel cases? A judge will confront this question when HPN moves for summary judgment. In the case that inspired our hypothetical (and this article), Judge H. Franklin Waters, an outstanding federal district judge,[15] held that the alleged promises of a long-term relationship were barred by the parol evidence rule.[16] This holding was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit.[17]

Texas lawyers and judges have considered the relationship of promissory estoppel and the parol evidence rule. Not often. Not consistently. Two recent decisions by the courts of appeals are representative.

Gonzalez v. United Brotherhood of Carpenters & Joiners of America Local 551 involved the written contract for a sale of land owned by a union for $550,000 and a 6% realtor's commission.[18] The written contract expressly conditioned sale on approval by union members: "[S]eller's obligation to sell the property is subject to" approval by the union members.[19] Union members did not approve the sale.[20] Gonzalez, the purchaser, nonetheless, sued for specific performance, asserting, inter alia, "breach of contract" and "promissory and equitable estoppel."[21] Gonzalez alleged that, prior to the sale, he had been told by the union representation he was negotiating with that he was authorized by the members to accept an offer of $550,000 and a 6% realtor's commission.[22] In affirming the trial court's decision of summary judgment for the union, the Fourteenth Court

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§ 209(1) (1981).

[13] *See* RESTATEMENT (SECOND) OF CONTRACTS § 213.

[14] Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc., 270 F.3d 723, 727 (8th Cir. 2001).

[15] *See generally* Jimm Larry Hendren, *Tribute to Judge H. Franklin Waters*, 56 ARK. L. REV. 5 (2003).

[16] *Simmons*, 270 F.3d at 727.

[17] *Id.*

[18] 93 S.W.3d 208, 209 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

[19] *Id.* at 209–10.

[20] *Id.* at 210.

[21] *Id.*

[22] *Id.* at 209.

of Appeals in Houston concluded that the alleged statement of the union representative was inadmissible parol evidence and held that "Gonzalez may not, therefore, admit the statement under the guise of equitable or promissory estoppel."[23]

A couple of years earlier, in an opinion not designated for publication, the First Court of Appeals in Houston reached the same ultimate result, using different reasoning. In *Aminian v. Woodward-Clyde Consultants, Inc.*, Aminian signed a written employment agreement that contained an at-will provision: "[M]y employment may be terminated at will at any time, and with or without cause"; he then resigned his job in Houston and started working for the defendant in New Zealand. [24] When Aminian was terminated, he sued for breach of contract, fraud, promissory estoppel, misrepresentation, and bad faith.[25] Aminian asserted that, prior to his signing the agreement, the defendant told him that the at-will provision was only a formality, "trust him."[26] In affirming the trial court's grant of summary judgment for the defendant, the Houston court said, "Appellees moved for summary judgment on appellant's promissory estoppel and negligent misrepresentation claims because they were barred by the statute of frauds, parol evidence rule, and lack of reliance. These claims fail for the reason discussed above, i.e., *lack of justifiable reliance*."[27]

In understanding and assessing these Texas decisions and other cases that raise the question of whether the parol evidence rule applies to promissory estoppel cases, we need to know more about (1) promissory estoppel; (2) the parol evidence rule; and (3) reported decisions from Texas and other states.

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[23] *Id.* at 211. Similar statements can be found in Hughes v. Sams, No. H-07-0671, 2008 WL 4724436, at *2–3 (S.D. Tex. Oct. 24, 2008); Stavert Props., Inc. v. Republic Bank of N. Hills, 696 S.W.2d 278, 282 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); and Joseph v. Mahoney Corp., 367 S.W.2d 213, 215 (Tex. Civ. App.—Austin 1963, writ ref'd n.r.e.).

[24] No. 01-98-01428-CV, 2001 WL 493174, at *1–2 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. denied) (mem. op., not designated for publication).

[25] *Id.* at *2. Promissory estoppel is often invoked in employment disputes, especially employment-at-will relationships. Cortlan H. Maddux, Comment, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197, 198 (1997).

[26] *Aminian*, 2001 WL 493174, at *2.

[27] *Id.* at *6 (emphasis added).

I. PROMISSORY ESTOPPEL

A. History

We[28] know the history of promissory estoppel. Less than a hundred years of history and hundreds of pages of law review articles explore that history.[29] Everyone agrees that the late Professor Samuel Williston of the Harvard Law School "invented" the term "promissory estoppel."[30] The term first appeared in Williston's 1920 treatise on contracts.[31]

Williston's choice of the words "promissory estoppel" in his treatise is understandable, but regrettable. Contract law would be much less confusing if Williston had chosen the phrase, "reliance on a promise contracts" or even just "Sam's contracts" instead of "promissory estoppel." More specifically, it is Williston's choice of the word "estoppel" that has proved to be problematic.

In the law, the word "estoppels" generally connotes a reaction rather than an action. Estoppel is asserted to prevent the other party from raising a claim, rather than to raise a claim.[32] Williston's use of the word "estoppel" in "promissory estoppel" is at least in part responsible for statements such as the following statement from *DeWitt v. Fleming*: "[I]n Illinois promissory estoppel is available only as a defense (*i.e.,* as a shield), not as a cause of action (*i.e.,* as a sword)."[33] Recently, the Illinois Supreme Court

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[28] Not "we" as in "David, Melinda, and Kelly," but a more general "we" as in, "We hold these truths to be . . . ." *Cf. Tongue Twisters*, THE ECONOMIST, Dec.19, 2009, at 137, *available at* http://www.economist.com/world/international/displaystory.cfm?story_id=15108609 (last visited Mar. 30, 2010) ("In Kwaio, spoken in the Solomon Islands, 'we' has two forms: 'me and you' and 'me and someone else (but not you).").

[29] The two most comprehensive articles on the history of promissory estoppel are: Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425 (2007), and Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499 (2004).

[30] *See* Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950) ("The writer has made a careful search to discover the pioneer in the use of the term 'promissory estoppel.' Apparently, the term was first used in I WILLISTON, CONTRACTS § 139 (1st ed. 1920). *See* Note, 13 IOWA L. REV. 332, 333 (1928)."). We also made a careful search.

[31] 1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 139, at 308 (1st ed. 1920).

[32] BLACK'S LAW DICTIONARY 629 (9th ed. 2009).

[33] 828 N.E.2d 756, 758 (Ill. App. Ct. 2005). *See generally* Collin F. Richmond, Case Note, *Promissory Estoppel – Only a Shield, Not a Sword?: Analysis of* Dewitt v. Fleming, 828 N.E.2d 756 (Ill. App. 5th 2005), 31 S. ILL. U. L.J. 735 (2007).

repudiated *DeWitt*, stating, "recognizing promissory estoppel as an affirmative cause of action . . . is consistent with decisions of other courts."[34]

Not "recognizing promissory estoppel as an affirmative cause of action" is also "consistent with . . . decisions of other courts."[35] And, Texas courts have been equivocal as to whether promissory estoppel can be the basis for an affirmative claim. Consider the following language from the seminal Texas Supreme Court decision on promissory estoppel, *Wheeler v. White*:

> As to the argument that no new cause of action may be created by such a promise regardless of its established applicability as a defense, it has been answered that where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them.
>
> The function of the doctrine of promissory estoppel is, under our view, defensive in that it estops a promisor from denying the enforceability of the promise.[36]

In that case, Wheeler alleged that he detrimentally relied on White's promise, contained in a written agreement and supported by consideration, to obtain or furnish a loan to finance construction of a shopping center on Wheeler's land.[37] White's position was that the written contract was

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[34] Newton Tractor Sales, Inc., v. Kubota Tractor Corp., 906 N.E.2d 520, 525 (Ill. 2009). *See also* Alaska Trademark Shellfish, LLC v. State, 172 P.3d 764, 766 n.8 (Alaska 2007) (explaining that promissory estoppel is "offensive, and can be used for affirmative enforcement of a promise" whereas equitable estoppel is defensive).

[35] *E.g.*, Dealers Supply Co. v. Cheil Indus., Inc., 348 F. Supp. 2d 579, 586–87 (M.D.N.C. 2004); Grubb & Ellis Co. v. Potomac Med. Bldg., L.L.C., No. 1:08cv971(GBL), 2009 WL 3175999, at *10 (E.D. Va. Sept. 30, 2009).

[36] 398 S.W.2d 93, 96 (Tex. 1966) (citations omitted).

[37] *Id.* at 95.

unenforceable as it was too indefinite.[38] The lower courts agreed with White.[39] The Texas Supreme Court did not disagree with White's and the lower courts' position on indefiniteness, but it nonetheless reversed, under the theory of promissory estoppel.[40] As the court explains in the language quoted above, it was using promissory estoppel defensively to "estop[] a promisor [White] from denying the enforceability [on the ground of indefiniteness] of the promise [to provide financing]."[41]

Later decisions of the Texas courts of appeals have read *Wheeler* as supporting the proposition that promissory estoppel may be the basis for an affirmative claim.[42] While it can be questioned whether recognizing promissory estoppel as an affirmative cause of action is consistent with the position of the Texas Supreme Court in *Wheeler*, it is consistent with what Williston intended to accomplish with the doctrine of promissory estoppel.[43]

Williston intended that promissory estoppel be the basis for an affirmative claim. Williston suggested the term "promissory estoppel" as a way to distinguish between estoppel based on reliance on a factual

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 96.

[42] *See, e.g.*, Bechtel Corp. v. CITGO Prods. Pipeline Co., 271 S.W.3d 898, 926 (Tex. App.—Austin 2008, no pet.) (citing *Wheeler*) (stating that "promissory estoppel may be the basis for an affirmative claim"); Gold Kist, Inc. v. Carr, 886 S.W.2d 425, 431 (Tex. App.—Eastland 1994, writ denied) (referencing *Wheeler*) (explaining that "[p]romissory estoppel is available as a cause of action to someone who has reasonably relied to his detriment on an otherwise unenforceable promise").

[43] Maddux, *supra* note 25, at 225 ("Both Gold Kist and Henderson based their holdings that promissory estoppel was a cause of action on the Texas Supreme Court's language in Wheeler v. White. Careful examination of the language in Wheeler, however, shows that the court viewed promissory estoppel as defensive in nature. Thus, the Gold Kist and Henderson courts based their determination that promissory estoppel was a cause of action on language that did not clearly support their position. These holdings exemplify the current confusion as to the nature of promissory estoppel and show the current need for the Texas Supreme Court to define how Texas courts should apply the doctrine."). *See also* Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 59 (1996) (referring to "[t]he Texas Supreme Court's defensive application of promissory estoppel" in *Wheeler*); Patterson v. Long Beach Mortgage Co., No. 3:07-CV-1602-O-BH, 2009 WL 4884151, at *6 (N.D. Tex. Dec. 15, 2009) (citing *Wheeler*) ("The doctrine of promissory estoppel is a defensive doctrine that estops a promisor from denying the enforceability of a promise, even where the requisites for a valid contract are absent.").

misrepresentation which has the "defensive" effect of negating denial of the truth of the representation, and reliance upon a gratuitous promise which had the "offensive" effect of creating an enforceable promise.[44] Since most courts at that time took the position that detrimental reliance on a promise did not satisfy the consideration requirement,[45] courts were finding consideration where there likely was none in order to enforce charitable subscriptions.[46] Dissatisfied with this approach, a few courts were enforcing charitable promises on the grounds of estoppel.[47] Williston posited that this approach to charitable subscriptions depended on reliance on a promise as a substitute for consideration.[48]

Williston suggested that: (1) justifiable reliance on a promise, rather than bargained-for promises, might historically be the true basis of informal contracts, and (2) gratuitous promises would satisfy the consideration requirement so long as either the promisor gained a benefit or the promisee suffered a detriment due to reasonable reliance on the promise.[49] Williston acknowledged that recognizing reliance rather than bargained-for consideration as a basis for contract liability would greatly expand liability for promises and admitted that reported cases did not support this shift.[50] Likely because of these widespread implications and his desire to teach what the law is rather than what the law should be,[51] Williston did not

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[44] 1 WILLISTON, *supra* note 31, § 139, at 307–08.

[45] *See id.* § 139, at 308. *See also* E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 598 (1969) (explaining that gratuitous promises cannot be enforced under the doctrine of consideration since nothing is given in exchange).

[46] Some courts held that the promises of other subscribers served as consideration. 1 WILLISTON, *supra* note 31, § 116, at 251–52 (citing, among other cases, Allen v. Duffy, 4 N.W. 427 (Mich. 1880) (allowing the mutual promise of multiple subscribers to serve as consideration for a charitable subscription)). Other courts held that an implied promise by the beneficiary to apply the contributions properly served as consideration. *Id.* § 116, at 252 (referring, in part, to Irwin v. Lombard Univ., 46 N.E. 63 (Ohio 1897) (finding consideration where the donee university continued the "educational enterprise" donors had sought to promote with their contributions)). However, neither view reflects a reasonable interpretation of the facts.

[47] *Id.* § 116, at 253 (citing, for example, Simpson Coll. v. Tattle, 33 N.W. 74, 74, 76 (Iowa 1887) (discussing estopping a donor from claiming lack of consideration to avoid payment of a promised donation)).

[48] *Id.* § 116, at 252–53. It is worth noting that Williston's Section 139 is entitled, "Estoppel as a substitute for consideration." *Id.* § 139, at 307.

[49] *Id.* § 139, at 313.

[50] *Id.*

[51] M. Arbuckle & K. Flanagan note: Professor Epstein showed no such restraint in our 1L

explore this line of thought in his materials for law students.[52]

B. Restatement of Contracts

Williston did, however, vigorously pursue this line of thought with the American Law Institute in his work as Reporter for the Restatement of Contracts.[53] But not without opposition.

Professor Arthur Corbin of the Yale Law School, viewed as Williston's "rival," initially espoused a different view of reliance on a promise as a basis for contract liability.[54] Corbin argued that the doctrine of consideration was flexible enough to include reliance not bargained for.[55] In other words, he felt that justifiable reliance on a gratuitous promise could satisfy the consideration requirement.[56] Corbin wrote:

> Indeed, there are many cases justifying the statement that consideration may consist of acts of reliance upon a promise even though they were not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be desired.[57]

If Corbin's position regarding reliance as consideration had prevailed, then law professors (and the occasional law students) would not be writing articles about promissory estoppels, and lawyers in Texas and other states

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Contracts class, challenging us to learn, not memorize, the law and engaging us in frequent Socratic examination of whether the Restatement (Second) of Contracts represents current law or what the law should be. This article represents a further examination.

[52] Williston's anthology reflected his preference to teach students what the courts had done rather than what they might do. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1457 (1987).

[53] Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts,* 70 B.U. L. REV. 511, 531 (1990).

[54] *See* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 362 n.67 (1995). *But cf.* SAMUEL WILLISTON, LIFE AND LAW 312 (1940) ("My greatest indebtedness was to Arthur Corbin. His mastery of contracts law was only equaled by his generosity in contributing his best efforts to a work [the Restatement of Contracts] that would for the most part pass under another's name."). *See generally* Klau, *supra* note 53.

[55] *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 193, at 278 (1 vol. ed. 1952).

[56] *Id.*

[57] WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACTS 124 n.1 (Arthur L. Corbin ed., 3d Am. ed. 1919).

would not be pleading separate causes of action based on (1) contracts and (2) promissory estoppel.[58] The doctrine of promissory estoppel would be superfluous today. Instead, Corbin and the rest of us had to settle for the more conservative recognition of reliance in Section 90 of the Restatement as a possible substitute for consideration rather than consideration itself.[59]

Restatement Section 90 provides, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[60]

Even though Williston coined the term "promissory estoppel" and used it in his treatise on contracts, Restatement Section 90 does not use the term "promissory estoppel."[61] And, even though Restatement Section 90 at most restated existing law as to charitable subscriptions and gratuitous bailments, courts have used Section 90 more generally and have generally used the term "promissory estoppel."[62]

C. Reliance Damages

The landmark Yale Law Journal article on damages for breach of contract by Professor Lon Fuller and law student William Perdue, Jr.,[63] has played a large part in defining the type of damages associated with

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[58] Recall that in *Gonzalez* and *Aminian*, the plaintiffs asserted a claim based on contract and a claim based on promissory estoppel. Gonzalez v. United Bhd. of Carpenters & Joiners, 93 S.W.3d 208, 210 (Tex. App.—Houston [14th Dist.] 2002, no pet.); Aminian v. Woodward-Clyde Consultants, Inc., No. 01-98-01428-CV, 2001 WL 493174, at *2 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. denied).

[59] *See* CORBIN, *supra* note 55, § 193, at 278–79; Ngugi, *supra* note 29, at 442 ("Needless to say, it was the Willistonian solution that prevailed."). For a discussion as to whether it was Corbin or Williston that "had to settle," see GRANT GILMORE, THE DEATH OF CONTRACT 62–72 (1974). *But cf.* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 247–48 (2005). Does this footnote remind you of the Harvard-Yale football game? Kind of limited interest.

[60] RESTATEMENT (FIRST) OF CONTRACTS § 90, at 110 (1932).

[61] *See generally id.*

[62] Williston's study of cases for the Restatement was limited to charitable subscription and gratuitous bailment cases. AM. L. INST., COMMENTARIES ON CONTRACTS: RESTATEMENT NO. 2, at 19–20 (1926).

[63] *See generally* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

promissory estoppel.[64] Fuller and Perdue first proposed that there were three different types of contract damages: (1) expectation damages; (2) reliance damages; and (3) restitution damages.[65] They claimed that reliance damages were the most appropriate remedy for Section 90 cases.[66]

Fuller and Perdue explained that the reasons favoring expectation damages did not apply in these cases because the promise of such promises rarely gave up other opportunities and the enforcement of such promises did not encourage economic utility as commercial transactions did.[67] Furthermore, since promissory estoppel cases usually involve a definite sum of money, they contended that administration of reliance damages would be most straightforward for courts.[68]

Fuller and Perdue's reasons for so limiting Section 90 damages are premised on Williston's initial view of the limited role of Section 90.[69] Their reasoning seems right-on in enforcing charitable subscriptions and gratuitous bailments. Neither Section 90 nor the Fuller and Perdue reliance damages approach to promissory estoppel has, however, been so limited. For example, in *Zenor v. El Paso Healthcare System, Ltd.*, a case involving an employment contract and not a charitable subscription or gratuitous bailment, the Fifth Circuit, applying Texas law, held that the plaintiff had failed to prove recoverable damages in his promissory estoppel claim since none of his damages were reliance damages:[70]

> Zenor has produced no sufficient evidence that he suffered any damages legally available under a promissory estoppel theory of recovery. Under Texas law, only reliance damages are recoverable for a promissory estoppel claim. The jury awarded Zenor damages for mental anguish, past

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[64] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d, at 244 (1981) (sanctioning reliance damages for promissory estoppel cases as endorsed by Fuller and Perdue); Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 305–06 (1992) (explaining that Section 90 became known for protecting reliance rather than endorsing promises due to Fuller and Perdue's article); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 119 (1991) (attributing the rejection by many commentators of Williston's approach to Section 90 damages to publication of Fuller and Perdue's article on damages).

[65] Fuller & Perdue, *supra* note 63, at 54.

[66] *See id.* at 64–65.

[67] *Id.*

[68] *Id.* at 66.

[69] *See id.* at 64.

[70] 176 F.3d 847, 865–66 (5th Cir. 1999).

> lost earnings and/or benefits, and future lost earnings and/or benefits. These awards represent compensatory and expectancy interests; none can be categorized as reliance damages.[71]

Professor Warren Seavey of the Harvard Law School offered an equally unpersuasive reason for limiting promissory estoppel damages to reliance damages. He argues that the essence of a promissory estoppel claim is "not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change his position to his detriment."[72] Professor Seavey's argument is based on the premise that the focus of promissory estoppel is the reliance and not the promise.[73] While Seavey's premise is debatable, it is certainly not Williston's premise.[74]

During the 1926 proceedings of the American Law Institute, an unidentified lawyer posed a hypothetical for Williston.[75] Uncle promises to give Nephew $1,000.[76] In reliance on that promise, Nephew buys a car for $500.[77] If Uncle is not just a promise maker but also a promise breaker, and Nephew sues, what does the Nephew recover, $1,000 or $500?[78] Williston responded that Uncle would be liable for $1,000, the amount of his

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[71] *Id.* While we can and do question whether Texas courts are right on the law in limiting recovery to reliance damages, there is no question that the Fifth Circuit is right on the Texas law. *E.g.*, Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965); Bechtel Corp. v. CITGO Prods. Pipeline Co., 271 S.W.3d 898, 926 (Tex. App.—Austin 2008, no pet.). *But see* Jackson v. Morse, 871 A.2d 47, 51–52 (N.H. 2007) (explaining that expectation damages is the presumed remedy for promissory estoppel unless "awarding so much would be inequitable"). The New Hampshire Supreme Court references the contractual nature of the Restatement (Second) of Contracts and its emphasis on "full-scale enforcement by normal remedies" for most promissory estoppel claims. *Id.* at 52 (citing Restatement (Second) of Contracts § 90 cmt. d). Almost sixty years after Fuller and Perdue's article on reliance damages, another article in the Yale Law Journal challenged the notion of reliance damages in promissory estoppel cases. *See generally* Yorio & Thel, *supra* note 64. Fordham University Professors Steve Thel and Edward Yorio argue that courts usually award expectation damages enforcing the promise rather than reliance damages protecting the reliance. *Id.* at 113–14.

[72] Warren A. Seavey, *Reliance on Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

[73] *Id.*

[74] *See generally* Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996).

[75] *See Proceedings at Fourth Annual Meeting*, 4 A.L.I. PROC. 98–99 (1926).

[76] *Id.* at 98.

[77] *Id.* at 99.

[78] *Id.*

promise.[79] Frederic Coudert, of the famous Coudert Brothers law firm,[80] challenged Williston's answer:

> MR. COUDERT: Allow me to trespass once more, Mr. Reporter, by asking this question. Please let me see if I understand it rightly. Would you say, Mr. Reporter, in your case of Johnny and the uncle, the uncle promising the $1000 and Johnny buying the car—say, he goes out and buys the car for $500—that uncle would be liable for $1000 or would he be liable for $500?
>
> MR. WILLISTON: If Johnny had done what he was expected to do, or is acting within the limits of his uncle's expectation, I think the uncle would be liable for $1000; but not otherwise.
>
> MR. COUDERT: In other words, substantial justice would require that uncle should be penalized in the sum of $500.
>
> MR. WILLISTON: Why do you say "penalized"?
>
> . . . .
>
> MR. COUDERT: Because substantial justice there would require, it seems to me, that Johnny get his money for his car, but should he get his car and $500 more? I don't see.[81]
>
> . . . .
>
> MR. WILLISTON: Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made.[82]

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[79] *Id.*

[80] *See generally* ASIL Presidents: Frederic René Coudert, http://www.asil.org/presidents/CoudertF.html (last visited Mar. 4, 2010); VIRGINIA KAYS VEENSWIJK, COUDERT BROTHERS: A LEGACY IN LAW: THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM (1994).

[81] *Proceedings at Fourth Annual Meeting, supra* note 75, at 99.

[82] *Id.* at 103.

D. Restatement (Second) of Contracts

The Restatement (Second) takes a middle ground on whether enforcement of a promise that induces reliance requires an award of expectation damages as Williston argued or reliance damages as Texas courts insist.[83] Section 90 now contains the additional sentence: "The remedy granted for breach *may* be limited as justice requires."[84]

Unlike the Restatement, the Restatement (Second) Section 90 also contains comments, and Comment d is especially instructive. For example, Comment d states that "the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometime be limited to . . . damages . . . measured by the extent of the promisee's reliance rather than the terms of the promise."[85]

More important, that same Comment earlier states, "A promise binding under this section *is a contract*, and full-scale enforcement by normal remedies is often appropriate."[86] That Comment is important because commentators and courts question whether a promise binding by reason of promissory estoppel is a contract and whether contract law principles should apply to promissory estoppel.

E. Contract Law or Tort Law

Remember that the phrase "promissory estoppel" was first used by a contracts scholar in his contracts treatise, in a section entitled, "Estoppel as a substitute for consideration."[87] Moreover, that contracts scholar, Williston, as the Reporter for the Restatement of Contracts, was instrumental in making reliance on a promise a part of the Restatement of Contracts. There can be no question that Williston regarded a promise binding by reason of reliance to be a contract and subject to contract law principles. Consider his statement during the American Law Institute Proceedings leading up to the Restatement:

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[83] *See* Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 55–58 (1981).

[84] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (emphasis added).

[85] *Id.* § 90 cmt. d, at 244.

[86] *Id.* (emphasis added).

[87] 1 WILLISTON, *supra* note 31, § 139, at 307. It is equally clear that Corbin also viewed promissory estoppel as a part of contract law. *See* CORBIN, *supra* note 55, Ch. 8 (entitled, "Reliance on a Promise as Ground for Enforcement").

> I should say anything was truly contractual where a promisor makes a promise and that promise is enforced . . . of contract in the first part of the section [of the Restatement] is a binding promise. If any law in any state says that a promise is binding under certain circumstances, then that promise is a contract.[88]

And, as noted above, Comment d to Restatement (Second) takes the same position: "A promise binding under this section is a contract . . . ."[89] Also consider the language and structure of Restatement (Second) Section 17:

> (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
>
> (2) Whether or not there is a bargain *a contract may be formed* under special rules applicable to formal contracts or under the rules stated in §§ 82–94.[90]

Note that Section 17 is the first section in a chapter entitled, "Formation of Contracts – Mutual Assent."[91]

Notwithstanding this unequivocal history, for at least sixty years, law professors have been equivocal about whether the basis for liability in promissory estoppel is contract or tort.[92] The most influential of these professors,[93] Yale Law Professor Grant Gilmore in his 1974 book, *The Death of Contract*, suggested that contract law in general is "being reabsorbed into the mainstream of tort" and used Restatement Section 90 as his primary example.[94]

In his revision of a volume of *Corbin on Contracts*, Professor Eric Mills Holmes concluded that the majority of American jurisdictions have

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[88] *Proceedings at Fourth Annual Meeting*, *supra* note 75, at 94–95 (quoting Samuel Williston).

[89] RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d.

[90] *Id.* § 17 (emphasis added).

[91] *Id.*

[92] *See generally, e.g.*, Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28 (1949).

[93] At least, most influential with other law professors.

[94] GILMORE, *supra* note 59, at 87–90.

accepted promissory estoppel as an independent right from contract.[95] He explained that the doctrine is in its tort stage when courts focus on "the promisee's right to rely and the promisor's duty to prevent foreseeable reliance" rather than the enforceability of the promise.[96] Holmes noted that these courts' tendencies to award reliance damages for the harm suffered rather than expectation damages for the unfulfilled promise resembled the tort approach to righting wrongs.[97]

A number of other law professors have also linked promissory estoppel with tort law, not contract law.[98] However, probably more law professors than judges have linked promissory estoppel with tort.[99] Consider, for example, the recent statements of the Ninth Circuit in *Barnes v. Yahoo!, Inc.*, explaining that "'[p]romissory estoppel' is not a 'cause of action' in itself [in most states]; rather it is a subset of a theory of recovery based on a breach of contract."[100] Later in that same opinion, the court explains, "Though promissory estoppel lurks on the sometimes blurry boundary between contract and tort, its *promissory* character distinguishes it from tort."[101]

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[95] 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.11, at 53–54 (Joseph M. Perillo ed., West Publishing Co. 1996) (1950). *See also* Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 70 (1996).

[96] 3 HOLMES, CORBIN ON CONTRACTS, *supra* note 95, § 8.11, at 53.

[97] *See id.* § 8.11, at 54.

[98] *See, e.g.*, Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 118, 177 (Peter Benson ed. 2001) ("Promissory estoppel is not a species of contractual liability . . . Reliance-based liability, including promissory estoppel, is best understood as a species of tort, not contractual, liability."); Avery Katz, *When Should An Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1254 (1996) ("The doctrine of promissory estoppel is commonly explained as promoting the same purposes as the tort of misrepresentation: punishing or deterring those who mislead others to their detriment and compensating those who are misled.").

[99] Professor Marco Jimenez of Stetson University Law School examined more than 300 promissory estoppel cases decided between January 1, 1981, and January 1, 2008, and concluded "for better or worse, many judges are conceptualizing promissory estoppel actions as fully contractual causes of action." Marco Jimenez, *The Many Faces of Promissory Estoppel: An Empirical Analysis Under the Restatement (Second) of Contracts*, 57 UCLA L. REV. 3 (forthcoming 2010).

[100] 570 F.3d 1096, 1106 (9th Cir. 2009).

[101] *Id.* at 1107 n.14. *See also* Allied Van Lines, Inc. v. Edwards Movers, Inc., No. 08 C 3186, 2009 WL 1579520, at *3 (N.D. Ill. June 3, 2009) (discussing "[p]romissory estoppel, which is not a species of tort but, rather, is grounded in the principles of contract"); Louis & Karen Metro Family, L.L.C. v. Lawrenceburg Conservancy, No. 4:06-cv-177-WGH-DFH, 2009 WL 1196938,

If promissory estoppel were a form of tort and not a form of contract, then it would be arguable that contract concepts such as the parol evidence rule would not apply to causes of action invoking promissory estoppel.[102] Only arguable. Reported cases are divided as to whether the parol evidence rule is limited to contract claims or applies to any claim arising from a contractual relationship.[103]

Perhaps, promissory estoppel is neither a form of tort nor a form of contract. In *Eagle Metal Products, L.L.C. v. Keymark Enterprises, L.L.C.*, Judge Barbara Lynn recently wrote:

> The promissory estoppel claim is of a different order from the tort claims. Promissory estoppel is a quasi-contract theory which seeks to hold a party responsible for promises that induced justifiable reliance on another. This cause of action applies when a contract does not exist, but equity compels enforcement of the promise.[104]

And if, as Judge Lynn writes, promissory estoppel is neither a form of tort nor a form of contract, then is it still arguable that contract concepts such as the parol evidence rule would not apply to causes of action invoking promissory estoppel.[105] There are reported cases on both sides of the question whether promissory estoppel is "contract enough" that (1) the

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at *9 (S.D. Ind. May 1, 2009) ("This doctrine [promissory estoppel] sounds in contract, is not a tort . . . .").

[102] *See* Extra Equipamentos e Exportação Ltda. v. Case Corp., 541 F.3d 719, 723 (7th Cir. 2008).

[103] *Compare* Snyder v. Lovercheck, 992 P.2d 1079, 1088 (Wyo. 1999) (holding that the parol evidence rule applies in negligent-misrepresentation cases because in those cases "a tort cause of action is being infused into a contractual relationship") *with Extra Equipamentos*, 541 F.3d at 723 ("[E]vidence of what was said in the negotiations that led up to the signing of the release would not be admissible—in a suit for breach of contract. That is a critical qualification. The parol evidence rule is a rule of contract law, and a contract integration clause is a privately negotiated supplement to the rule, and most courts, including, we have assumed (though the matter is not free from doubt), Illinois, hold that neither the rule nor the clause prevents a disappointed party to the contract from basing a tort suit on proof that in the course of the negotiations the other party made fraudulent representations.").

[104] 651 F. Supp. 2d 577, 592 (N.D. Tex. 2009).

[105] "Thus, it may be, defenses based on the Statute of Frauds, or the contracts statute of limitations, or the parol evidence rule – all of these being looked at as contract-based defenses – are no longer available if the underlying theory of liability – section 90 or an analogue – is not contract theory at all." GILMORE, *supra* note 59, at 66.

Statute of Frauds applies;[106] (2) the contracts' statute of limitations applies;[107] or (3) a statute providing for attorney's fees for a claim on an "oral or written contract" applies.[108]

F. Not an Agreement

Obviously, the Restatement (Second) of Contracts regards "promissory estoppel" as a form of contract, but not as a form of agreement.[109]

Chapter 3 of the Restatement (Second), entitled "Formation of Contracts – Mutual Assent", begins with Section 17, which provides:

> § 17. Requirement of a Bargain
>
> (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
>
> (2) Whether or not there is a bargain a contract may be

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[106] *Compare In re* Brandeis Lofts, L.L.C., No. BK07-80482-TLS, 2009 WL 2501113, at *6 (Bankr. D. Neb. July 21, 2009) ("[T]he statute of frauds does not bar a claim of promissory estoppel in a situation where a contract never arose.") *with* Collins v. Ace Mortgage Funding, L.L.C., No. 08-cv-01709-REB-KLM, 2009 WL 1796067, at *8 (D. Colo. June 23, 2009) ("[T]he statute of frauds has been found to bar promissory estoppel claims . . . .").

[107] *Compare* Huhtala v. Travelers Ins. Co., 257 N.W.2d 640, 644 (Mich. 1977) (stating that a promissory estoppel claim is governed by the six-year contracts statute of limitations and not the three-year torts statute of limitations) *with* Ambulatory Infusion Therapy Specialist, Inc. v. N. Am. Adm'rs, Inc., 262 S.W.3d 107, 119 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("The statute of limitations for a breach-of-contract cause of action is four years. Likewise, the statute of limitations for promissory estoppel is four years." (citation omitted)); MBank Abilene N.A. v. LeMaire, No. CI4-86-00834-CV, 1989 WL 30995, at *14 (Tex. App.—Houston [14th Dist.] Apr. 6, 1989, no writ) ("MBank also asks that we apply the two year statute of limitations because promissory estoppel is like fraud, which is a tort. In our view the promissory estoppel element of this case derives from the action on the contract. As such, promissory estoppel cannot be separated from its foundation, which is breach of contract." (citation omitted)).

[108] *Compare* Preload Tech., Inc. v. AB & J Constr. Co., 696 F.2d 1080, 1093–95 (5th Cir. 1983) (applying Texas law) (relying on language in Williston's treatise on contracts and Comment d to Restatement (Second) Section 90 to conclude that promissory estoppel claims should be treated as contract claims for purpose of the Texas attorney's fee statute) *with* Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P., 154 S.W.3d 634, 637 (Tex. App—Houston [14th Dist.] 2004, pet. abated) ("[S]ection 38.001(8) cannot include a promissory estoppel claim. Were we to hold otherwise, we would have to (1) ignore a long line of cases holding that a recovery under promissory estoppel means no valid contract existed and (2) add a cause of action that the statute's plain language does not include. We intend to do neither of these.").

[109] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

> formed under special rules applicable to formal contracts or under the rules stated in §§ 82–94.[110]

Comment b then explains that "the two essential elements of a bargain" are "agreement and exchange."[111] Accordingly, under Restatement (Second) Section 17(2), a "contract may be formed" under Restatement (Second) Section 90, even though there has been no "bargain," *i.e.*, no "agreement."[112]

Further support for the conclusion that promissory estoppel is not a form of agreement is provided by the illustrations to Restatement (Second) Section 90.[113] For example, "A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed."[114] While there is reliance by B, there is no "bargain" between A and B – no "agreement."[115]

II. PAROL EVIDENCE RULE

Now that we have considered promissory estoppel, let's focus on the parol evidence rule. We will see that just as the words "promissory estoppel" are not always helpful in understanding what promissory estoppel is and is not, the words "parol evidence rule" are not always helpful in understanding what the parol evidence rule is and is not. The "parol evidence rule" is not limited to "parol," is not evidence law, and is not a single rule.

A. History

We know much more about the history of the parol evidence rule than we do about the history of promissory estoppel, but there is a lot more history to know. The classic evidence treatises of James B. Thayer and

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[110] *Id.*

[111] *Id.* § 17 cmt. b.

[112] *Id.* § 17(2).

[113] *See id.* § 90 cmt. b, illus. 2.

[114] *Id.*

[115] *Cf.* Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1, 22 (2009) ("A more fundamental problem with a reliance theory is that the normative connection between reliance and contract is often debatable. Reliance may exist in cases where the defendant never entered into a voluntary obligation."). [We are using the ambiguous introductory signal "Cf." because we are never sure that we fully understand articles that use words like "normative."]

John Henry Wigmore provide the most complete (and completely contradictory) explanation of the Roman law origins of the rule.[116]

Contracts scholars tend to trace the parol evidence rule's origins back to *The Countess of Rutland's Case*.[117] While *Countess of Rutland* does state that "[i]f other agreement or limitation of uses be made by writing, or by other matter as high or higher, then the last agreement shall stand; for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed," the case hinges on (1) facts that are possibly limiting and (2) a possibly troublesome rationale.[118]

The case concerns a transfer of land.[119] More accurately, it concerns multiple transfers of the same piece of land by the same person.[120] Edward Earl of Rutland, an apparently well-regarded lawyer, created a problematic set of documents—willing his property, Eykering, by one document to his wife, the Countess, and by a second document to "heirs males of the body of Thomas Earl of Rutland," his father.[121] By these contradictory documents Edward's nephew, Roger, stood to take Eykering, because he had been granted the property the day after the Countess.[122] Thus, essentially what is involved are serial testamentary gifts, and in such situations, the later will is always determinative of the testator's intent.[123]

The Countess wanted to use the oral testimony of trustees to the documents to prove that Edward really meant to give the property to her at his death.[124] In holding that the Countess was barred from using such evidence, the court stated, "[i]f other agreement or limitation of uses be made by writing, or by other matter as high or higher, then the last

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[116] *Compare generally* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 393 (1898) *with* 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2426, at 3411 (1905).

[117] 77 Eng. Rep. 89 (K.B. 1604). *See, e.g.*, Juanda Lowder Daniel, *K.I.S.S. The Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 SYRACUSE L. REV. 227, 233 (2007); Lawrence M. Solan, *The Written Contract as a Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 91 n.7 (2001).

[118] *Countess of Rutland*, 77 Eng. Rep. at 90.

[119] *See id.* at 89.

[120] *See id.*

[121] *Id.*

[122] *Id.*

[123] For an excellent discussion of this case, see Professor Bill Long's self-published history of the case at The Parol Evidence Rule, Early History I, *The Countess of Rutland's Case (1604)* (Dec. 21, 2005), http://www.drbilllong.com/Sales/PERH.html (last visited Mar. 6, 2010).

[124] *See Countess of Rutland*, 77 Eng. Rep. at 89–90.

agreement shall stand; for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed."[125] This language effectively linked *Countess of Rutland* to the parol evidence rule.

It is of some relevance that the case involved a transfer of land, a type of contract traditionally within the province of the Statute of Frauds. One reason provided by Coke's report that parol evidence should not be admitted was that "it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted."[126] This statement can be viewed in two ways. On the one hand, this line of reasoning can be seen as extending the parol evidence rule beyond land transfers and into commerce. However, it makes more sense, since the case regards a land transfer, that the statement was meant to emphasize the notion of certainty of title. It seems more likely from the context of the facts that the court was concerned that third parties – people who were not a party to the contract – might be misled if the writing was not considered paramount. This is not the concern of the parol evidence rule today.

Additional criticism can be found in Thayer's evidence treatise, where the *Countess of Rutland* is further dismissed:

> [T]he Countess of Rutland's case . . . merely applied a rule as to the declaration of the uses of fines; namely the doctrine briefly stated in *Jones v. Morley*, that if the fine be levied pursuant to a covenant declaring the uses, one cannot set up an intervening oral declaration of uses, or deny the uses declared in the covenant; unless, indeed, there be an intervening declaration by "other matter (than the covenant), as high or higher."[127]

Thayer goes further, using the language of the case that "it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted"[128] to make the point that the case also fails to make the necessary discrimination that it is the use of extrinsic evidence, and not the proving of it, that is made

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[125] *Id.* at 90.

[126] *Id.*

[127] THAYER, *supra* note 116, at 401.

[128] *Countess of Rutland*, 77 Eng. Rep. at 90.

objectionable by the parol evidence rule.[129] Seen in this way, the case fails to establish the parol evidence rule as substantive contract law.

Even more problematic in *Countess of Rutland* is the other explanation for the decision to disallow the use of oral testimony to verify the agreement made prior to the writing, concerns of that testimony's basis in "slippery memory."[130] While the complicated conveyances in this case were indeed made twenty-four years prior to the litigation, analysis of the uncertainty of testimony is more consistent with evidence law concepts than contract law concepts, other than, perhaps, the contracts concept of the Statute of Frauds, where a writing is paramount in a real estate transaction to prevent enforcing false claims to an interest in land based only an alleged oral agreement.

B. Parol Evidence Rule as Contract Law

Notwithstanding any ambiguity in the statements from *Countess of Rutland*, there is no ambiguity in more modern day statements, omissions, and restatements. The recent statement from the El Paso Court of Appeals in *Adams v. McFadden* – "The parol evidence rule is a rule of substantive contract law, not evidence" – is representative.[131]

Professor E. Allan Farnsworth makes the most persuasive argument as to why the parol evidence rule should be treated as a rule of substantive contract law and not evidence:

> Admittedly, the [parol evidence] rule is exclusionary, making certain kinds of evidence inadmissible. But this does not make it a rule of 'evidence,' for it is not based on the idea that the evidence excluded is 'for one or another reason [an] untrustworthy or undesirable means of evidencing some fact to be proved.' Rules of evidence, such as the hearsay rule, bar some methods of proof to show a fact but permit that fact to be shown in a different way. In contrast, the parol evidence rule bars a showing of

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[129] THAYER, *supra* note 116, at 401.

[130] *See* 2 E. ALAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.2, at 212–13 (2d ed. 1998).

[131] 296 S.W.3d 743, 751 (Tex. App.—El Paso 2009, pet. granted, judgm't vacated w.r.m.). *See also* Academic Imaging, L.L.C. v. Soterion Corp., No. 08-3577, 2009 WL 3805807, at *6 (6th Cir. Nov. 13, 2009); *In re* Marine Energy Sys. Corp., No. 07-1506, 2008 WL 4820128, at *7 n.1 (4th Cir. Nov. 6, 2008).

> the fact itself – the fact that the terms of the agreement are other than those in the writing.[132]

The Federal, Texas, and Uniform Rules of Evidence make no mention of the parol evidence rule. No evidence casebooks or student aids mention the parol evidence rule. Contracts casebooks and student aids devote a significant number of pages to the parol evidence rule. So does the Restatement (Second) of Contracts.

C. Restatement (Second) of Contracts

The Restatement's provisions on parol evidence have not been extensively used by appellate courts in Texas. On January 17, 2010, we[133] did Westlaw searches of the Texas cases database using the search instructions "parol evidence," and then "parol evidence" and "Restatement" and "Contracts" in the same paragraph. From January 2000 through January 17, 2010, 418 Texas appellate court decisions used the term "parol evidence,"[134] but only five of those cases also mentioned the Restatement (Second) of Contracts. In discussing parol evidence issues, Texas courts use the words "exclude" and "evidence" rather than the Restatement's words "discharge" and "prior agreements."[135] While Texas courts in applying the parol evidence rule do not expressly look to the Restatement (Second) of Contracts' provisions and use a different terminology from the Restatement (Second) of Contracts, the positions taken in Texas cases look like the positions take in the Restatement.[136]

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[132] 2 FARNSWORTH, *supra* note 130, § 7.2, at 212. Professor Farnsworth also explains away the *Countess of Rutland's* "slippery memory" rationale. *See id.* at 212–13.

[133] "We" in this instance is the "royal we" – in other words, Epstein.

[134] Out of curiosity, we also did a Westlaw search for Texas cases that use the phrase "parole evidence." Since 2000, forty-four Texas appellate court decisions used the "parole evidence" misspelling. Worse, nine of those opinions used both "parol evidence" and "parole evidence" in the same paragraph. None of the forty-four cases mentioned, much less misspelled, the Restatement of Contracts.

[135] *E.g.*, Rowan Cos. v. Wilmington Trust Co., No. 14-07-00465-CV, 2009 WL 3210936, at *15 (Tex. App.—Houston [14th Dist.] Oct. 8, 2009, pet. filed) ("[T]he parol evidence rule, it excludes 'only evidence of . . . .'"); Noell v. Crow-Billingsley Air Park Ltd. P'ship, 233 S.W.3d 408, 417 (Tex. App.—Dallas 2007, pet. denied) ("The parol evidence rule excludes evidence of . . . .").

[136] *See* 14 WILLIAM V. DORSANEO III ET AL., TEXAS LITIGATION GUIDE § 210A.29[1][a] (2009) [Professor Dorsaneo's books are an incredible resource for law students and lawyers]. *But cf.* David R. Dow, *The Confused State of the Parol Evidence Rule in Texas*, 35 S. TEX. L. REV.

Section 213 of the Restatement (Second) of Contracts, set out below, is subtitled "Parol Evidence Rule":

> § 213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)
>
> (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
>
> (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
>
> (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.[137]

In reading Section 213, you should have noticed:

> (1) The phrase "parol evidence" appears only in the title.[138] The phrase "parol evidence" does not appear in the language of Section 213 or in the language of any other Restatement section.[139]
>
> (2) And, instead of describing which evidence is not admissible, the section describes which "agreements" are "discharged."[140]
>
> (3) Even though the phrase "Parol Evidence Rule" is a part of the title of Section 213, the section has multiple rules.[141] Section 213(1) discharges prior agreements only to the

457, 462 (1994) (criticizing Texas courts' use of the parol evidence rule in contract interpretation cases).

[137] RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

[138] *Id.*

[139] *But see id.* § 213 cmt. a. (This Comment is entitled "Parol evidence rule." This is the only mention of "parol evidence" in the comments).

[140] *Id.* § 213. *See also id.* § 213 cmt. a (explaining that Section 213 "renders inoperative prior written agreements as well as prior oral agreements").

[141] *See id.* § 213 (1981); Scott J. Burnham, *The Parol Evidence Rule: Don't Be Afraid of the Dark*, 55 MONT. L. REV. 93, 99 (1994) ("[T]he rule can be said not to be a rule at all. It is a cluster of concepts, used for a variety of purposes. It also looks unlike a rule because it is so riddled with exceptions, some of which are expressed in the statement of the rule itself.").

> extent that the prior agreements are "inconsistent" with the integrated agreement.[142] Section 213(2) is a different rule; it only applies if the integrated agreement is a "completely integrated agreement," in which case Section 213(2) discharges all prior agreements. [143]

And, if you were to read other Restatement sections, you would find still other rules relating to prior agreements.[144] For example, Section 214 provides in part:

> § 214. Evidence of Prior or Contemporaneous Agreements and Negotiations
>
> Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . .
>
> (d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;
>
> (e) ground for granting or denying rescission, reformation, specific performance, or other remedy.[145]

Under Section 214 and consistent case law and commentary, the "parol evidence rule does not apply when the remedy of rescission or reformation is sought as a result of a misrepresentation."[146] A popular student guide, Emanuel's Contract outline, provides an easy illustration:

> Example: After numerous meetings and discussions, Buyer buys an apartment building from Seller. The contract contains a standard 'merger' clause . . . reciting that the contract constitutes the sole agreement between the parties. Buyer later discovers that Seller has lied about the profitability of the property, and sues to rescind the deal. The parol evidence rule will not prevent Buyer from showing that Seller made fraudulent misrepresentations to

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[142] RESTATEMENT (SECOND) OF CONTRACTS § 213(1). *See id.* § 209 (defines "integrated agreements").

[143] *Id.* § 213(2). *See id.* § 210 (defines "completely integrated agreements").

[144] *See id.* § 214.

[145] *Id.*

[146] Still v. Cunningham, 94 P.3d 1104, 1110 (Alaska 2004). *See also* E. ALLAN FARNSWORTH, CONTRACTS § 7.4, at 429 (4th ed. 2004).

induce him to enter into the contract.[147]

The Emanuel hypothetical, like many law school hypotheticals, is somewhat theoretical and incomplete. As a matter of legal theory, the Buyer's rescission suit should not be unsuccessful because of the parol evidence rule. The parol evidence rule should not prevent the trier of fact from determining whether Seller lied about the profitability of the property prior to the execution of the contract of sale.

The applicability of the parol evidence rule is not, however, the only legal issue raised by the Emanuel hypothetical. And, it is not the determinative issue. The Buyer's rescission suit probably will still be unsuccessful. Buyer's rescission because of misrepresentation requires that the trier of fact find that, notwithstanding the contract language, Buyer did rely on the misrepresentation and that Buyer was justified in relying on the misrepresentation.[148]

Regrettably, some courts describe a ruling that Buyer's reliance on earlier oral promises was not justified due to the language of the written contract as a ruling based on the parol evidence rule. Consider, for example, the following statement by the United States Court of Appeals for the Eighth Circuit in *Crowell v. Campbell Soup Co.*:[149]

> [1] The district court found that the alleged promises were completely contradicted by the terms of the written contract, thereby rendering any reliance by the Growers on those promises unreasonable. [2] Based on Minnesota's parole evidence rules, the district court therefore prohibited the introduction of any evidence of the alleged oral promises and granted summary judgment in favor of Herider on the Growers' claims.
>
> [3] We agree with the district court that any reliance by the Growers on the three alleged oral promises made by Herider was unreasonable as a matter of law because each of the alleged oral promises plainly contradicted the terms

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[147] STEVEN L. EMANUEL, CONTRACTS 181 (8th ed. 2006). While far more people read Emanuel and Gilbert's outlines than the Baylor Law Review, or the SMU Law Review for that matter, this is the first law review article to quote from Emanuel.

[148] *See* RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) ("upon which the recipient is justified in relying").

[149] 264 F.3d 756 (8th Cir. 2001).

of the written contract.[150]

The Growers had asserted "fraud, misrepresentation and rescission claims" based on statements made before the written contract.[151] Reading statement [3] in conjunction with statement [1], we understand that the Growers' reliance on oral statements contradicted by a later writing was unreasonable as a matter of law. That is understandable and reasonable.

What is not understandable is statement [2] which is not only unnecessary to the holding but also both a misspelling and a misapplication of the "parol evidence rule." In rescission actions, evidence of pre-contract misrepresentations is admissible to show an "invalidating cause."[152] Statement [2] is inconsistent with Restatement (Second) Section 214 and with the law in Texas and elsewhere.

As the Texas Supreme Court ruled in *Dallas Farm Machinery v. Reaves*:

> Writ of error was granted in this case on two of thirty points of error contained in petitioner's application. The two points pose the question of whether parol evidence is admissible, in the face of a 'merger' clause in a written contract, to establish that the contract was induced by fraud. We hold it is.[153]

In *Reaves*, the buyer sought rescission of a written contract for the sale of a crawler tractor and loader, alleging that the seller orally misrepresented the work capabilities of the tractor and loader and that he relied on the misrepresentations in entering into the contract.[154] The Texas Supreme Court found support for its ruling that the parol evidence rule does not apply to actions for misrepresentation based on rescission in a decision by the Massachusetts Supreme Court[155] and in McCormick and Ray's treatise.[156]

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[150] *Id.* at 762 (footnotes omitted).

[151] *Id.*

[152] *See* RESTATEMENT (SECOND) OF CONTRACTS § 214 cmt. c.

[153] 307 S.W.2d 233, 233 (Tex. 1957).

[154] *Id.* at 234.

[155] Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941) (holding that the parol evidence rule "does not stand in the way of recession for fraud").

[156] 2 CHARLES T. MCCORMICK & ROY R. RAY, TEXAS LAW OF EVIDENCE, CRIMINAL AND CIVIL § 1644 (2d ed. 1956) ("[I]t is only when the oral expressions are relied on as warranties, that is, as parts of the contract, as being obligations intentionally assumed, that the Parol Evidence

D. Purpose of the Parol Evidence Rule

Professor Marvin Chirelstein provides a helpful explanation of the purpose of the parol evidence rule:

> The purpose of the rule is apparent. Since the completion and execution of a written contract is typically the concluding point in the bargaining process, one's ordinary expectation is that the document itself will contain all the conscious and important elements of the deal. . . . The parol evidence rule assumes that the formal writing reflects the parties' minds at a point of maximum resolution and, hence, that duties and restrictions that do not appear in the written document, even though apparently accepted an earlier stage, were not intended by the parties to survive.[157]

Professor Michael B. Metzger sees a different purpose. Throughout his article on the parol evidence rule and promissory estoppel, he connects the parol evidence rule with the Statute of Frauds. The following statement is representative: "The parol evidence rule and the Statute of Frauds, as mentioned earlier, are strikingly similar. The same underlying policies support both doctrines: prevention of perjury by excluding presumptively untrustworthy oral testimony and the desire to give judges increased control over the jury."[158]

Generally, reported cases apply the parol evidence rule without expressly addressing the purpose of the parol evidence rule. Nonetheless, there is some case support for Professor Metzger's position. An intermediate appellate court in Tennessee stated in *Lyons v. Farmers*

Rule applies. If they are relied on as misrepresentations and the theory of recovery or defense is fraud, then the Parol Evidence Rule is clearly without application. On the latter proposition there has been some apparent wavering in Texas cases where the writing contained a disclaimer of warranties, or 'merger clause.' Yet even here the sounder authority seems to admit extrinsic agreements for the purpose of avoiding the instrument for fraud.").

[157] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 98 (5th ed. 2006). *See also* CISG Advisory Council Opinion No. 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause, and the CISG*, 17 PACE INT'L L. REV. 61, 72 (2005) ("Though the Parol Evidence Rule does not apply to contracts governed by the CISG, similar policy considerations are incorporated into the CISG itself. The principal purpose of the Parol Evidence Rule is to respect the importance the parties may have accorded to their writing. Under the Convention as well, a writing constitutes an important fact of a transaction – it must be assumed to fulfill a function, otherwise it would not have been employed.").

[158] Metzger, *supra* note 2, at 1454.

Insurance Exchange, "[O]ne of the reasons for the parol evidence rule is to prevent fraud in presenting oral defenses to written agreements . . . Thus, the parol evidence rule is a 'quasi-statute of frauds' . . . ."[159]

The only modern Texas appellate court decision that expressly attributes a purpose to the parol evidence rule, *Pan American Bank of Brownsville v. Nowland*, describes the purpose of the parol evidence rule as follows: "The conceptual essence of the parol evidence rule is to prevent fraud, therefore, exceptions to the rule are equally well recognized when enforcement of the rule would be inequitable or result in fraud."[160] A law review note discussing *Nowland* and related Texas cases concludes: "Thus the policy considerations encompassed by the parol evidence rule are similar to those of the statute of frauds."[161]

And, as we suggested earlier, *The Countess of Rutland's Case*, the 1604 "case that is considered to have established the parol evidence rule,"[162] relied in part on a rationale that is consonant with the Statute of Frauds: "[I]t would be inconvenient, that matters in writing made by advice and on consideration, and which finally impart the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."[163]

While there is this case support for viewing the parol evidence rule in statute of frauds terms, such a view is, at best, an incomplete view. Unlike the Statute of Frauds, the parol evidence rule is not limited to oral agreements. The parol evidence rule reaches prior written agreements as well as prior or contemporaneous oral agreements,[164] but it does not reach oral (or written) agreements that are after, not prior to, the written agreement.[165] And in misrepresentation cases such as *Campbell Soup*, the

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[159] 26 S.W.3d 888, 893 (Tenn. Ct. App. 2000).

[160] 650 S.W.2d 879, 885 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

[161] Raren S. Guerra, Note, *DTPA Precludes Use of Merger Doctrine and Parol Evidence Rule in Breach of Warranty Suit:* Alvarado v. Bolton, 41 BAYLOR L. REV. 373, 384–85 (1989).

[162] Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 AM. U. J. GENDER SOC. POL'Y & L. 251, 259 (2006).

[163] *Countess of Rutland*, 77 Eng. Rep. 89, 90 (K.B. 1604).

[164] Ingersoll Cutting Tool Co. v. Iowa Midland Supply, Inc., No. 06 C 00845, 2010 WL 181585, at *3 (N.D. Ill. Jan. 14, 2010). *See also* Quicksilver Res., Inc. v. CMS Mktg. Servs. & Trading Co., No. 2-03-251-CV, 2005 WL 182951, at *5 (Tex. App.—Fort Worth Jan. 27, 2005, pet. denied) (using the phrase "oral or written parol evidence"). *But cf.* BLACK'S LAW DICTIONARY 1227 (9th ed. 2009) ("parol" means "oral or unwritten").

[165] JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 108 (6th ed. 2009) ("The [parol evidence] rule does not apply to subsequent agreements."). However, in F.D.I.C. v. Perry

question is whether the reliance on the oral statement is reasonable, not whether the oral statement is a fraud.[166] As Professor E. Allan Farnsworth concluded, "Now the conceit that the parol evidence rule is rooted in the relative unreliability of testimony based on 'slippery memory' in contrast with the 'certain truth' afforded by a writing has fallen from favor."[167]

Professor Chirelstein's view of the purpose of the parol evidence rule seems more consistent with the parol evidence rule's historic origins and contract law context. And, the purpose and historic origins of the parol evidence rule along with the Restatement (Second) of Contracts provisions and Texas case law on the parol evidence rule, like the purpose and historic origins of promissory estoppel, are instructive in answering the question of whether the parol evidence rule applies to the promissory estoppel cases.

III. PROMISSORY ESTOPPEL AND PAROL EVIDENCE

There are basically two different fact patterns that might raise the question of whether the parol evidence rule applies to promissory estoppel cases:

> (1) Oral or written promise, then reliance on this oral or written promise before the integrated agreement (i.e., final written contract), then integrated agreement.
>
> (2) Oral or written promise, then integrated agreement, then reliance on the pre-integrated oral or written promise in entering into the integrated agreement, or reliance after the integrated agreement.

In both fact patterns, the critical issue should be the reasonableness of the

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Bros., 854 F. Supp. 1248 (E.D. Tex. 1994), the United States District Court for the Eastern District of Texas held that the bank breached an oral contract regarding loan renewal. *Id.* at 1256, 1265. In so holding, the court found the parol evidence rule did not preclude evidence of the oral agreement for loan renewal because it took place after, rather than prior to, the written loan agreement. *Id.* at 1278. On appeal, without acknowledging or disputing the oral agreement took place after the written loan agreement, the Fifth Circuit stated "based on certain oral promises, Perry Brothers contends that Nationsbank may be held liable for its refusal to renew Perry Brothers's loan agreement. We agree, however, with Nationsbank that the parol evidence rule prevents Perry Brothers from contradicting the clear written terms of the loan agreement, which left the renewal decision to Nationsbank's discretion." Nationsbank v. Perry Bros. Inc., No. 94-40630, 1995 WL 581536, at *2 (5th Cir. Aug. 24, 1995).

[166] *See* Crowell v. Campbell Soup Co., 264 F.3d 756, 762 (8th Cir. 2001).

[167] 2 FARNSWORTH, *supra* note 130, at 213.

reliance, not whether the parol evidence rule "discharges" or makes inadmissible evidence of the oral promise.

A. Reliance, then Integrated Agreement

Prudential Insurance Co. v. Clark is an example of the first fact pattern category: oral promise, then reliance on the promise before the integrated agreement, then the integrated agreement.[168] Steve Clark, a Marine, dropped his World Life policy that had a war risk exclusion clause and signed a written application for a Prudential policy in reliance on a representation by Brumell, a Prudential agent, that the Prudential policy would not have a war risk exclusion.[169] Clark's written application made no mention of the agent's representation as to non-war risk exclusion, and the Prudential policy, issued after Clark was already in Vietnam, contained a war risk exclusion.[170] The Fifth Circuit looked to promissory estoppel to enforce agent Brumell's promise that the Prudential policy would include war-risk coverage:

> The doctrine of Section 90 is known as promissory estoppel. . . . It requires affirmative action indicative of a desire to be contractually bound. In the case at bar, that affirmative action manifested itself when the agent, Brumell, promised to obtain a policy without the exclusion clauses and thereby induced Steve to drop his other policy in reliance upon that promise.
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> . . . .
>
> . . . [A]pplication of promissory estoppel in no way trammels upon the parol evidence rule. Involved here is a separate enforceable promise and not a variance or modification of the terms of the policy.[171]

Justice Sweeney of the Ohio Supreme Court provided a clearer

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[168] 456 F.2d 932, 936 (5th Cir. 1972) (applying Florida law, which had not previously applied promissory estoppel).

[169] *Id.* at 934.

[170] *Id.*

[171] *Id.* at 936–37. *See also* Gregory Scott Crespi, *Clarifying the Boundary Between the Parol Evidence Rule and the Rules Governing Subsequent Oral Modifications*, 34 OHIO N.U. L. REV. 71, 79 (2008) ("agreement would be formed by the initial act of reliance, making the later acceptance redundant and of no legal consequence").

explanation as to why the parol evidence rule has no application to a promissory estoppel action based on reliance that preceded the integrated agreement:

> [A] claim based on promissory estoppel does not contravene the parol evidence rule.
>
> . . . Under such a theory, the plaintiff asserts an independent claim for damages based on detrimental reliance. Courts confronting such a claim focus on "a promissory commitment centering on the promisee's right to rely, and the promisor's duty to prevent (or not cause) harmful reliance which was reasonably foreseeable by the promisor. The right to rely arises from promissory statements, assurances, and representations that show sufficient commitment to induce reasonable reliance in another." Whether the reliance is objectively reasonable and foreseeable is a jury question. Thus, the integration clause in the agreement holds no significance for the promissory estoppel claim. Instead, what is involved is a separate enforceable promise and not a variation or modification of the agreement. Therefore, the subsequent execution of an integration clause does not preclude a claim based on detrimental reliance that occurred before the execution of that clause.[172]

While Justice Sweeney's statement is clear, the procedural context in which the statement was made is apparently confusing. In *Rucker*, the Ohio Supreme Court dismissed the appeal as "improvidently accepted."[173] The above quotation is from Justice Sweeney's opinion dissenting from the court's decision to dismiss.[174] Accordingly, we viewed these words as just the words of Justice Sweeney. A recent Ohio court of appeals decisions has a different view. In *Millersport Hardware, Ltd. v. Weaver Hardware Co.*, the court preceded its use of the language we quoted above with the statement: "The court's reasoning is instructive."[175]

Whether Justice Sweeney's or the Ohio Supreme Court's, the reasoning

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[172] Rucker v. Everen Sec., Inc., 811 N.E.2d 1141, 1142–43 (Ohio 2004) (citations omitted).

[173] *Id.* at 1141.

[174] *Id.* at 1142–43.

[175] No. 08-CA-86, 2009 WL 4761560, at *5 (Ohio Ct. App. Dec. 9, 2009).

from *Rucker* would have been "instructive" to the Eighth Circuit panel that decided *Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc.*, the case that inspired the hypothetical at the beginning of this article.[176] Let's use the court's statement of facts relating to Simmons' promissory estoppel claim:

> Simmons contends that HPN orally promised a long-term business relationship on more than one occasion, and that Simmons relied upon those promises when it expanded its facilities in 1995 and 1996 to produce "low ash" poultry meal. The district court held that the alleged oral promises of a long-term relationship were barred by the parol evidence rule, UCC § 2-202, because Simmons had *subsequently* entered into written one-year contracts.[177]

The Eighth Circuit then affirmed the grant of summary judgment for HPN on the ground of the parol evidence rule.[178]

Wrong reasoning, if not wrong result. If, prior to the integrated agreement, all of the elements necessary for Simmons' recovery for promissory estoppel were established, why should a later writing prevent Simmons' recovery of reliance damages on its promissory estoppel claim? Remember, recovery for promissory estoppel, like the tort remedy of misrepresentation and the contract remedy of rescission, is based on reliance, not on an agreement.[179]

Just as in tort misrepresentation cases and contract rescission cases, getting past summary judgment motions and prevailing at trial in promissory estoppel cases based on a promise made prior to an integration should turn on the reasonableness of the reliance, not on the parol evidence rule. And, if, as in the *Simmons* case, the reliance came before the written agreement, the possibility exists that a fact finder concludes that the reliance was reasonable.

B. No Reliance Prior to the Integrated Agreement

If, on the other hand, the facts are that there was no reliance on the promise prior to the integrated agreement other than entering into the integrated agreement, then a promissory estoppel claim is likely to be

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[176] 270 F.3d 723 (8th Cir. 2001).

[177] *Id.* at 727 (emphasis added).

[178] *Id.*

[179] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

dismissed or resolved by summary judgment. Even Patty Hewes would have a hard time convincing a finder of fact that the plaintiff employee reasonably relied on an oral promise of a long term employment when he entered into an employment contract that provided for termination on thirty days notice.[180]

These are essentially the facts that the Seventh Circuit faced (without Patty Hewes) in *Mack v. Earle Jorgensen Co.*[181] In affirming a directed verdict for the defendant, the court stated: "[T]he alleged oral agreement or promise was followed by a written contract, the terms of which are in direct conflict with the alleged oral agreement or promise. In such a situation, we seriously doubt whether the promisee could successfully argue that his reliance on the promise was justifiable, justifiable reliance being 'a necessary element of promissory estoppel.'"[182] As stated by Justice Fairchild in his concurring opinion in *Beers v. Atlas Assurance Co.*: "[S]uch denial should be based on the fact that the party did not rely upon the oral statement, or, if he did, that he was entirely unwarranted in doing so, and not on an invocation of the parol evidence rule."[183]

In promissory estoppel cases such as *Simmons* or *Beers* that involve an alleged oral promise, denial of the plaintiff's promissory estoppel claim perhaps can also be denied on the basis of the Statute of Frauds. The Statute of Frauds is different from the parol evidence rule, and whether the Statute of Frauds applies to promissory estoppel claims is a different article.[184]

IV. CONCLUSION

While there is no harm in B-School professors such as Professor Metzger or law school types like us wrestling with the question whether the parol evidence rule should apply in promissory estoppel cases (or even the question whether promissory estoppel should apply in parol evidence

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[180] Patty Hewes – Damages, http://damagestvshow.wetpaint.com/page/Patty+Hewes (last visited Mar. 14, 2010).

[181] 467 F.2d 1177, 1178–79 (7th Cir. 1972).

[182] *Id.* at 1179.

[183] 253 N.W. 584, 595 (Wis. 1934). Again, in a court of appeals decision with similar facts, there was a similar statement. Aminian v. Woodward-Clyde Consultants, Inc., No. 01-98-01428-CV, 2001 WL 493174, at *6 (Tex. App.—Houston [1st Dist.] May 10, 2001, pet. denied) (not designated for publication) (applying California law).

[184] Until we write that article, you might look to Maddux, *supra* note 28, at 209–11.

cases), judges and practicing lawyers should not be wrestling with this question. A promissory estoppel case based on a promise made prior to an integrated agreement should turn on the reasonableness of the alleged reliance, not on the applicability of the parol evidence rule. To borrow from Justice Holmes[185] — sort of — bad law makes hard cases.[186]

[185] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("hard cases make bad law").

[186] As the senior author, I wrote the first draft of this Conclusion. I naively thought that I was the first to come up with this spin on Holmes' famous statement. As Melinda, Kelly, and Baylor Law Review editors pointed out, the same phrase was used in the Columbia Law Review in 1951, Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838, 847 (1951), and in numerous other law review articles that do not mention Professor Cahn.