Promissory Estoppel and the Statute of Frauds in California

Since the enactment in seventeenth-century England of the original Statute of Frauds,[1] much judicial energy has been expended developing means to ameliorate the statute's harsh effects. The statute makes certain classes of contracts unenforceable or void if they are not in writing.[2] Courts have eased the statute's writing requirement through the use of doctrines such as part performance, quasi-contract, constructive trust, and most significantly, equitable estoppel.[3] Recently, several courts,[4] following the lead of the Restatement (Second) of Contracts,[5] have used promissory estoppel[6] as an additional means

1. The original English Statute of Frauds, 29 Car. 2, c. 3, was passed in 1677. It was entitled "An Act for Prevention of Frauds and Perjuries." It required a signed writing for several classes of legal transactions. *See generally* 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 380-84 (1927); Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329 (1913); Hening, *The Original Drafts of the Statute of Frauds (29 Car. II, c. 3) and Their Authors*, 61 U. PA. L. REV. 283 (1913).

These writing requirements have been recodified in various provisions of the California codes. CAL. CIV. CODE §§ 1091, 1624 (Deering 1971); CAL. CIV. PROC. CODE § 1971 (Deering 1973); CAL. U. COM. CODE §§ 1206, 2201, 8319, 9203 (Deering 1970).

2. *See* 2 T. STREET, FOUNDATIONS OF LEGAL LIABILITY 169-70 (1970); Note, *The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170 (1967).

The California Civil Code makes the following categories of oral contracts unenforceable: agreements not performable within one year of their making, agreements to answer for the debt of another, agreements made on consideration of marriage, agreements of employment for real estate brokers, agreements to make a will, and agreements of purchasers of land to pay indebtedness secured by a mortgage. CAL. CIV. CODE § 1624 (Deering 1971). Agreements which transfer interests in real property must also be in writing. *Id.* § 1091 and CAL. CIV. PROC. CODE § 1971 (Deering 1973). Finally, several additional writing requirements are found in the California Uniform Commercial Code: agreements for the sale of personal property for more than $5,000, CAL. U. COM. CODE § 1206 (Deering 1970), agreements for the sale of goods for more than $500, *id.* § 2201, agreements for the sale of securities, *id.* § 8319, and agreements creating security interests, *id.* § 9203.

3. Less important exceptions to the statute include the presence of fraud or mistake, the main purpose rule, and the joint obligor rule. A discussion of exceptions other than equitable estoppel is beyond the scope of this Comment. For such a discussion see Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114, 115-16 (1975) [hereinafter cited as *Promissory Estoppel*]. *See also* McIntosh v. Murphy, 52 Hawaii 29, 33 n.3, 469 P.2d 177, 180 n.3 (1970); Note, *The Doctrine of Equitable Estoppel and the Statute of Frauds*, *supra* note 2, at 171 n.7.

4. McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 541 P.2d 323 (1976); Texarkana Constr. Co. v. Alpine Constr. Specialties, Inc., 489 S.W.2d 941 (Tex. Civ. App. 1972).

5. RESTATEMENT (SECOND) OF CONTRACTS § 217A(1) (Tent. Drafts Nos. 1-7, 1973) provides that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or

of avoiding the statute.

Although California courts already use the similar doctrine of equitable estoppel to make enforceable a promise within the statute,[7] they have not considered using promissory estoppel in this context. In *C.R. Fedrick, Inc. v. Borg-Warner Corp.*,[8] however, the Court of Appeals for the Ninth Circuit held that the California Supreme Court would reject this application of promissory estoppel. This Comment will suggest that *Fedrick* was incorrectly decided and that California courts will allow proof of detrimental reliance sufficient to establish promissory estoppel to bar a defendant from invoking the statute to defeat a suit to enforce an oral contract. Since *Fedrick* illustrates the major arguments made against this use of promissory estoppel, the case will be used as the framework for discussing the applicability of this approach in California.

I

BACKGROUND

Modern authorities have suggested several functions served by the requirement of a writing in the Statute of Frauds. First, it serves an evidentiary function by preventing juries from relying on oral evidence which is more easily perjured. Second, it serves a channeling function by encouraging parties to put their agreements in writing. Third, it serves a cautionary function by impressing on the contracting parties the importance of their agreement.[9] The first two functions help implement the statute's avowed purpose of preventing frauds which result from perjured oral testimony.[10] The evidentiary function directly prevents the possibility of perjury. The channeling function reduces the possibility that the opportunity for perjury will arise by discouraging oral agreements.[11]

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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.

It has been suggested that this section was necessary to dispel the impression left by section 90 of the original Restatement that promissory estoppel could only be used as a substitute for consideration. *See Promissory Estoppel, supra* note 3, at 115-18. *But see* note 80 *infra.*

6. *See* note 25 and accompanying text *infra.*

7. *See* text accompanying notes 12-23 *infra.*

8. 552 F.2d 852 (9th Cir. 1977).

9. Comment, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590, 590-93 (1965) [hereinafter cited as *Equitable Estoppel in California*]; *Promissory Estoppel, supra* note 3, at 118 n.42. These functions are provided by any formal requirements in contract law. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-03 (1941).

For a suggestion that the statute has not had a positive channeling effect, see *Equitable Estoppel in California, supra*, at 591 n.10.

10. Willis, *The Statute of Frauds, A Legal Anachronism*, 3 IND. L.J. 427 (1928); *Equitable Estoppel in California, supra* note 9, at 590; *Promissory Estoppel, supra* note 3, at 115.

11. Even Professor Corbin, a critic of the statute, concedes "that the statute renders some

Since the Statute of Frauds prevents proof even of oral contracts already acted upon, its effects often have been criticized as harsh.[12] Among the doctrines developed by the courts to mitigate this harshness[13] is equitable estoppel, an evidentiary tool that prevents a defendant from relying on the statute as a defense. Equitable estoppel allows enforcement of contracts otherwise void under the statute when the promisee has detrimentally relied on the promisor's promise and has suffered unconscionable injury, or when the promisor has been unjustly enriched.[14]

Courts developed equitable estoppel because they believed it would be inconsistent with the purposes of the statute to allow it to be used to perpetrate a fraud. Fraud would result if a promisor in an oral contract induced a promisee detrimentally to change his position and subsequently was allowed to use the statute to avoid his obligations under the contract. Both the statute and equitable estoppel, then, exist to eliminate injustices. Their means of accomplishing this task conflict, however, because equitable estoppel prevents the statute from performing its evidentiary and channeling functions.[15] Judicially developed limitations on equitable estoppel represent a balance between the competing interests of that doctrine and the statute.[16]

California courts have been instrumental in redefining the balance between the Statute of Frauds and equitable estoppel.[17] Before 1950, courts had limited the use of equitable estoppel to situations in which the promisee had relied on a misrepresentation of fact, on a promise to put the oral contract in writing, or on a promise not to rely on the statute.[18] In *Monarco v. Lo Greco*,[19] however, the California Supreme Court held that equitable estoppel could be established by the promisee's detrimental reliance on the promisor's promise to perform the oral

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service by operating *in terrorem* to cause important contracts to be put into writing." 2 A. CORBIN, CONTRACTS § 275 (1950).

12. Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 838 & n.3, 389 P.2d 133, 136 & n.3, 36 Cal. Rptr. 741, 744 & n.3 (1964); 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 396 (1924); Corbin, *The Uniform Commercial Code—Sales; Should it be Enacted?* 59 YALE L.J. 821, 829 (1950); Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951).

13. *See* note 3 and accompanying text *supra*.

14. Monarco v. Lo Greco, 35 Cal. 2d 621, 623, 220 P.2d 737, 739-40 (1950); Wilson v. Bailey, 8 Cal. 2d 416, 422, 65 P.2d 770, 772 (1937); Seymour v. Oelrichs, 156 Cal. 782, 794, 106 P. 88, 94 (1909); Le Blond v. Wolfe, 83 Cal. App. 2d 282, 286, 188 P.2d 278, 281 (2d Dist. 1948); 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 921 (5th ed. 1941).

15. *See* text accompanying notes 184-88 *infra*.

16. *Equitable Estoppel in California, supra* note 9, at 594.

17. *See* text accompanying notes 72-77 *infra*. *See also Equitable Estoppel in California, supra* note 9.

18. Zellner v. Wassman, 184 Cal. 80, 193 P. 84 (1920); RESTATEMENT OF CONTRACTS § 178, Comment f (1932); Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281, 290-94 (1951).

19. 35 Cal. 2d 621, 220 P.2d 737 (1950).

contract, that is, by reliance on the contract itself.[20] The court only required that the detrimental reliance be such that not enforcing the contract would cause unconscionable injury to the promisee.[21] The court added that a promisor could also be estopped from asserting the statute if he had been unjustly enriched by the promisee's performance.[22] These two aspects of the *Monarco* decision significantly broadened the situations in which equitable estoppel applied.[23]

Although equitable estoppel developed to allow proof of an oral contract already formed, promissory estoppel arose as a substitute for the consideration necessary to form a binding contract in the first place. The courts traditionally have enforced as contracts only promises supported by bargained-for consideration—either a performance or a promise of such performance.[24] Promissory estoppel, as set forth in section 90 of the Restatement of Contracts, allows a promise to be enforced without consideration if the promisee has detrimentally changed his position in reliance on the promise and if injustice can be avoided only by its enforcement.[25] Detrimental reliance by a promisee, therefore, is used sometimes to supplant the writing requirement of the Statute of Frauds under equitable estoppel and at other times to supplant the consideration requirement of contract law under promissory estoppel. The first use assumes that a contract was formed before the promisee's reliance. The second use allows the formation of a contract based on such reliance.

Traditionally, promissory estoppel was not used for purposes other

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20. *Id.* at 625-26, 220 P.2d at 740-41.

21. *Id.* at 624, 220 P.2d at 740.

22. *Id.*

23. *Equitable Estoppel in California, supra* note 9; Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951).

24. RESTATEMENT OF CONTRACTS § 75 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 75 (Tent. Drafts Nos. 1-7, 1973); 1 A. CORBIN, CONTRACTS §§ 116-117 (1963); 1 S. WILLISTON, CONTRACTS §§ 99-100 (3d ed. 1957).

25. The leading statement of the doctrine of promissory estoppel is found in RESTATEMENT OF CONTRACTS § 90 (1932):

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

While this section allows detrimental reliance to establish the enforceability of a promise, the Restatement does not call promissory estoppel a form of consideration:

> Since the Restatement generally equated consideration with bargains, Section 90 was placed under a Topic headed "Informal Contracts Without Assent or Consideration." It has been pointed out that the nomenclature of the Restatement does not follow that of the courts. Where courts have considered unbargained for reliance as a sufficient ground for enforcing a promise, they have almost invariably called it "consideration."

L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 159 (3d ed. 1972). For clarity, this Comment will use "consideration" only when referring to a promise supported by a bargained-for exchange.

than providing a substitute for bargained-for consideration.[26] Recently, however, proof of detrimental reliance sufficient to establish promissory estoppel has been used to perform other functions.[27] The similarity of the elements of equitable and promissory estoppel[28] have led some authorities,[29] most notably the American Law Institute through section 217A of the Restatement (Second) of Contracts,[30] to suggest that a new function that promissory estoppel can perform is broadening the bases for avoiding the Statute of Frauds through equitable estoppel. Allowing proof of detrimental reliance sufficient to establish promissory estoppel also to establish equitable estoppel[31] would broaden equitable estoppel in two ways. Reliance on the promise to perform would become sufficient to establish equitable estoppel, and the degree of reliance that must be shown to bar the defendant's use of the statute would decrease. Since it is clear that the California courts have already broadened equitable estoppel in the first of these ways, this Comment will concentrate on the second. This Comment will suggest that California courts have, in fact, already lowered this threshold and thus have redefined the balance between equitable estoppel and the Statute of Frauds.

The Ninth Circuit in *Fedrick* held that the California Supreme

26. *See* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 343-44 (1969); *Promissory Estoppel, supra* note 3, at 116-17.

27. Some of these additional functions are discussed in Henderson, *supra* note 26. The first significant application of the promissory estoppel doctrine in the area of bargained-for contracts was its use to make an offer for a bilateral contract irrevocable when the offeror should reasonably have expected detrimental reliance on the offer by the offeree and the offeree did in fact rely. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); RESTATEMENT (SECOND) OF CONTRACTS § 89B (Tent. Drafts Nos. 1-7, 1973); Henderson, *supra* note 26, at 355-57. Additionally, promissory estoppel has been used to prevent injuries caused by detrimental reliance on preliminary negotiations which do not result in a contract, Hoffman v. Red Owl Stores, Inc., 26 Wisc. 2d 683, 133 N.W.2d 267 (1965); Henderson, *supra* note 26, at 357-65; to establish the enforceability of a promise even though bargained-for consideration is present, Henderson, *supra* note 26, at 368-73, and to enforce modifications in preexisting contracts that are not separately supported by consideration, *id.* at 373-76. Finally, as this Comment will examine, proof of the detrimental reliance sufficient to establish promissory estoppel has been used as a means of avoiding the Statute of Frauds. *See* cases cited in note 4 *supra*; RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Drafts Nos. 1-7, 1973); *Promissory Estoppel, supra* note 3.

28. Both doctrines appear to have their roots in the ancient doctrine of estoppel in pais. Klein v. Farmer, 85 Cal. App. 2d 545, 552-53, 194 P.2d 106, 111 (1st Dist. 1948).

29. McIntosh v. Murphy, 52 Hawaii 29, 469 P.2d 177 (1970); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 541 P.2d 323 (1976); Texarkana Constr. Co. v. Alpine Constr. Specialties, Inc., 489 S.W.2d 941 (Tex. Civ. App. 1972).

30. *See* note 5 *supra*.

31. Because section 217A is cast in language paralleling section 90, some commentators have suggested that section 217A makes promissory estoppel an exception to the statute. *See, e.g.*, Henderson, *supra* note 26; *Promissory Estoppel, supra* note 3. This is misleading. Since promissory estoppel is merely a substitute for consideration, it is conceptually more accurate to say that section 217A means detrimental reliance sufficient to establish promissory estoppel also will establish equitable estoppel. This Comment will use the more accurate formulation to explain section 217A's impact.

Court would find a construction contractor's action in promissory estoppel against a materials subcontractor barred by the sale-of-goods section[32] of the Statute of Frauds. Implicit in this decision is the holding that detrimental reliance sufficient for promissory estoppel will not necessarily establish equitable estoppel. *Fedrick* not only means that the statute may prevent enforcement of an oral promise not supported by consideration even if otherwise enforceable under promissory estoppel; it also means that the statute may render a *bargained-for* contract unenforceable even when the promisee has detrimentally relied to a degree sufficient to establish promissory estoppel.

Fedrick illustrates the three major grounds that other authorities have advanced against the expansion of equitable estoppel to the limits of promissory estoppel: first, that reliance on the promise to perform the contract cannot establish equitable estoppel to assert the Statute of Frauds (the "ancillary promises" argument); second, that equitable estoppel requires a greater degree of detrimental reliance than is required to establish promissory estoppel (the "injury" argument); and third, that the statute will be nullified by any further expansion of equitable estoppel (the "nullification" argument). Examining recent California precedent reveals that none of the arguments relied on by the Ninth Circuit are persuasive. Detrimental reliance on a promise to perform does establish equitable estoppel in California. The similarity of the factual settings in which both estoppel doctrines have been applied strongly suggests that the same degree of detrimental reliance is sufficient to establish both promissory and equitable estoppel in California. Finally, substituting the reliance measure of damages for the expectation measure usually employed in equitable estoppel cases would allay the fear of nullifying the statute. In light of these arguments, the Ninth Circuit's decision in *Fedrick* is an incorrect prediction of the development of California law. This Comment will argue that the California courts have adopted the general philosophy of Restatement (Second) of Contracts section 217A. The California courts have redefined the balance between equitable estoppel and the Statute of Frauds by allowing detrimental reliance sufficient for promissory estoppel to establish equitable estoppel. It will be argued that they should further redefine that balance by limiting damages to reliance losses in all equitable estoppel cases.

32. CAL. U. COM. CODE § 2201 (Deering 1970).

II

THE *FEDRICK* DECISION

A. Facts

The plaintiff in this case, C.R. Fedrick, Inc., was prepared to bid $15,766,693 as the prime contractor on a construction project. Ten minutes before bids were due on the project, Borg-Warner Corp., a subcontractor, submitted a telephone bid to Fedrick to provide pumps required in the prime contract. Borg's bid of $826,550 was more than $450,000 lower than the next lowest bid that Fedrick had received on the pumps. Upon receipt of Borg's bid, Fedrick reduced its bid on the prime contract by $200,000, to $15,566,693.

After being informed by Fedrick that its bid was used, Borg became concerned that its pumps might not meet the contract specifications.[33] Claiming that its original telephone offer was subject to modification, Borg suggested several changes in the pumps that would have raised their total price to $1,114,572. Fedrick refused to pay any additional amount for the pumps. Upon Borg's refusal to honor the telephone bid that Fedrick claimed Borg had made, Fedrick purchased the pumps from another supplier for $1,162,200.[34]

It is clear that Fedrick had a claim for damages based on promissory estoppel under the doctrine of *Drennan v. Star Paving Co.*[35] In response to Fedrick's action,[36] Borg moved for summary judgment, claiming that the Statute of Frauds barred recovery.[37] Fedrick con-

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33. The parties disagreed over the existence of "exceptions" Borg claimed to have included in its offer; because of the result reached by the court, this disagreement was never resolved.

34. 552 F.2d at 854-55.

35. 51 Cal. 2d 409, 333 P.2d 757 (1958). In *Drennan*, a subcontractor's low bid for a paving subcontract was used in determining the amount of the prime contractor's bid, which was subsequently accepted. Claiming a mistake in calculations, the subcontractor refused to perform, and the contractor was forced to pay more to have another subcontractor do the paving. On the theory of promissory estoppel, the California Supreme Court affirmed a judgment awarding the contractor damages for its loss caused by relying on the subcontractor's bid.

California courts had previously applied promissory estoppel in zoning, Edmonds v. County of Los Angeles, 40 Cal. 2d 642, 255 P.2d 772 (1935), labor relations, West v. Hunt Foods, Inc., 101 Cal. App. 2d 597, 225 P.2d 978 (1st Dist. 1951); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1st Dist. 1948), redemptions of pledged articles, Wade v. Markwell & Co., 118 Cal. App. 2d 410, 258 P.2d 497 (2d Dist. 1953).

Numerous later cases have expanded on the *Drennan* holding in the competitive bidding context. *E.g.*, Swinerton & Walberg Co. v. City of Inglewood-Los Angeles County Civic Center Auth., 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (2d Dist. 1974); Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (2d Dist. 1971); H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc., 14 Cal. App. 3d 848, 92 Cal. Rptr. 669 (4th Dist. 1971); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (2d Dist. 1962).

36. This action was originally filed by Fedrick in the California Superior Court for the County of Marin but on Borg's motion was removed to federal district court on the basis of diversity of citizenship. 552 F.2d at 854.

37. CAL. U. COM. CODE § 2201(1) (Deering 1970), which provides:

Except as otherwise provided in this section a contract for the sale of goods for the

tended that Borg was equitably estopped from relying on the statute. The trial court held that *Drennan* and its progeny were distinguishable, since unlike this action they involved bids to provide work as well as materials and, therefore, were not covered by the sale-of-goods section of the Statute of Frauds.[38] Without controlling California authority,[39] the trial court relied heavily on the Arizona decision of *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*[40] The court concluded that an action in promissory estoppel could be barred by the sale-of-goods section of the Statute of Frauds and that Borg was not estopped from asserting the statute. Thus, facts sufficient to prove an action in promissory estoppel under *Drennan* were not necessarily sufficient to prevent application of the Statute of Frauds. The Ninth Circuit on appeal affirmed the trial court, citing certain limitations on the doctrine of equitable estoppel.

B. Arguments

The district court's dependence on *Tiffany* illustrates the argument that equitable estoppel can be established only by reliance on a limited class of promises. Like *Fedrick, Tiffany* involved a contractor's action in promissory estoppel against a materials subcontractor. The Arizona court affirmed a trial court holding that action on the subcontractor's oral bid was barred by the sale-of-goods section of the Statute of Frauds.[41] It held that the statute could be avoided by reliance on a promise only when the promise was to make the necessary memoran-

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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.

This section codifies U.C.C. § 2-201(1).

38. At least one California case, Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (2d Dist. 1962), has applied promissory estoppel to enforce a subcontractor's bid to provide materials alone (chalk and tack boards) without considering the Statute of Frauds. *Accord*, Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1976).

39. In a diversity suit, a federal district court applies the substantive law of the state in which it sits. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). One aspect of the *Erie* doctrine is the requirement that, in the absence of controlling state precedent, the district court must determine what the highest state court would probably decide and apply that rule. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (federal estate tax case discussing determination of state law under the *Erie* doctrine); Bernhardt v. Polygraphic Co., 350 U.S. 198, 205 (1956); Essex Universal Corp. v. Yates, 305 F.2d 572, 582 (2d Cir. 1962) (Friendly, J., concurring); Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945); Pomerantz v. Clark, 101 F. Supp. 341, 345-46 (D. Mass. 1951); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 708-10 (2d ed. 1973).

40. 16 Ariz. App. 415, 493 P.2d 1220 (1972). *See generally* Annot., 56 A.L.R.3d 1037 (1974).

41. ARIZ. REV. STAT. § 44-2308(A) (1967). This section is the Arizona enactment of U.C.C. § 2-201(1).

dum or not to rely on the statute.[42] While Tiffany had alleged sufficient facts to establish promissory estoppel, it had not successfully established equitable estoppel. Its reliance was on the promise to perform, rather than on one of these recognized ancillary promises related to the statute.

The Ninth Circuit affirmed the district court's use of *Tiffany*, applying the rule that great weight will be given to a district judge's determination of the law of the state in which he sits and that such a determination will be overturned on appeal only if it is shown to be clearly wrong.[43] But the appellate court also relied on a line of analysis that suggests that the degree of detrimental reliance required to establish equitable estoppel is greater than that required to establish promissory estoppel. This suggestion is implicit in the court's erroneous conclusion that Fedrick had not detrimentally relied on Borg's bid. The court believed that Fedrick's only injury was the loss of the additional profits it had expected to make because of Borg's lower bid, since Fedrick had still made a profit on the overall construction contract involved in this suit.[44] Under California law, according to the court, the mere loss of these expected profits would not involve any detrimental reliance by the promisee[45] and would not meet the unconscionable injury requirement of equitable estoppel.[46]

Although the Ninth Circuit concluded that Fedrick had not suffered a reliance loss for equitable estoppel purposes, both it and the

42. The Arizona court relied upon the RESTATEMENT OF CONTRACTS § 178, Comment f (1932), which provides:

> Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground in the same way that objection to the non-existence of other facts essential for the establishment of a right or a 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.

The court argued that the inclusion of this comment in the Restatement indicated the limits of section 90's validity as a bar to application of the Statute of Frauds. *Accord*, 21 Turtle Creek Square, Ltd. v. New York State Teacher's Retirement Sys., 432 F.2d 64 (5th Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); Note, *The Doctrine of Equitable Estoppel and the Statute of Frauds*, *supra* note 2, at 178-79.

The drafters of the RESTATEMENT (SECOND) OF CONTRACTS (Tent. Drafts Nos. 1-7, 1973), have changed comment d to section 178 so that it now provides that a promise may be enforceable to the extent required by justice "by virtue of the doctrine of estoppel or by virtue of reliance on a promise notwithstanding the Statute." This is consistent with the wording of section 217A(1) of the second Restatement. *See* note 5 *supra*.

43. 552 F.2d at 856. *See* United States v. Pollard, 524 F.2d 808 (9th Cir. 1975); Owens v. White, 380 F.2d 310 (9th Cir. 1967); Minnesota Mut. Life Ins. Co. v. Lawson, 377 F.2d 525 (9th Cir. 1967); Bellon v. Heinzig, 347 F.2d 4 (9th Cir. 1965).

44. 552 F.2d at 857-58. This Comment will demonstrate that a construction contractor can suffer a reliance loss on part of a contract which proves to be profitable overall. *See* notes 137-41 and accompanying text *infra*.

45. *See* text accompanying notes 83-85 *infra*.

46. *See* text accompanying notes 90-92 *infra*.

district court appear to have assumed that the elements of promissory estoppel—including the requirement of detrimental reliance—would have been met in the absence of the Statute of Frauds.[47] Indeed, *Drennan v. Star Paving Co.*[48] clearly held that a contractor in Fedrick's position suffered a reliance loss.[49] The *Fedrick* court's refusal to find detrimental reliance for equitable estoppel purposes in a situation where detrimental reliance would be found for promissory estoppel purposes must be read as an implicit holding that more detrimental reliance is required for equitable estoppel than for promissory estoppel. What is an "unjust"[50] injury for promissory estoppel, therefore, is not necessarily "unconscionable"[51] for equitable estoppel,[52] according to the *Fedrick* court.

The court's view that a promisee's reliance is entitled to greater protection against a lack of consideration than against a lack of a writing[53] is possibly supported by the Restatement (Second) of Contracts. While not necessarily implied by the text itself, a comment to section 217A states that "consideration is more easily displaced than the re-

47. 552 F.2d at 856.

48. 51 Cal. 2d 409, 333 P.2d 757 (1957).

49. *See* note 35 *supra.*

50. Promissory estoppel cases have generally referred to the injury caused by detrimental reliance as "unjust" or as resulting in "injustice." Drennan v. Star Paving Co., 51 Cal. 2d 409, 413, 333 P.2d 757, 759 (1958); Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 110-11, 92 Cal. Rptr. 799, 808 (2d Dist. 1971). The use of the terms "unjust injury" and "injustice" is derived from the wording of section 90 in the Restatement. *See* note 5 *supra. Accord,* RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973).

51. Equitable estoppel cases have generally referred to the injury caused by detrimental reliance as "unconscionable." Monarco v. Lo Greco, 35 Cal. 2d 621, 623, 220 P.2d 737, 739 (1950); McGirr v. Gulf Oil Corp., 41 Cal. App. 3d 246, 253, 115 Cal. Rptr. 902, 905-06 (2d Dist. 1974); Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 617, 49 Cal. Rptr. 1, 6 (1st Dist. 1966).

52. The *Fedrick* court's injury argument differs from the ancillary promises argument derived from the *Tiffany* decision in that it does not stand for the proposition that reliance sufficient for promissory estoppel may *never* establish equitable estoppel. Such reliance may also establish equitable estoppel if it meets the higher reliance requirement of equitable estoppel.

53. Some courts have explained their willingness to show greater deference to the statute's writing requirement than to the consideration requirement by arguing that reliance on an oral contract is inherently unreasonable. In Ozier v. Haines, 411 Ill. 160, 164, 103 N.E.2d 485, 488 (1952), the court stated:

> It is true that harsh results . . . may occur where one has changed his position in reliance on the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law. . . .
>
> . . . When the parties here entered the disputed oral contract, each knew, or is deemed to have known, that they had entered into an unenforcible [sic] agreement. . . . In the absence of fraud or misrepresentation, the party changing his position must be said to have acted solely upon his own judgment and at his own risk . . . .

Accord, Sinclair v. Sullivan, 45 Ill. App. 2d 10, 18-19, 195 N.E.2d 250, 254 (1964) (quoting *Ozier*).

This position assumes that contracting parties have some knowledge of the statute's writing requirements and that the statute has effectively channeled most people's behavior so that they put their agreements into writing. *See* note 9 and accompanying text *supra.*

quirement of writing."[54] By comparing the situations in which California courts have applied the doctrines of promissory and equitable estoppel, however, this Comment will argue that the California courts do not accept this injury limitation on equitable estoppel.[55]

Both the ancillary promises argument, that the statute can be avoided only by reliance on a promise related to the statute, and the injury argument in *Fedrick* result from the court's fear that an expansion of equitable estoppel to include every case of promissory estoppel will result in an abrogation of the Statute of Frauds and thereby a frustration of legislative policy.[56] While the majority opinion only mentioned this fear in passing,[57] it had been expressed by other courts[58] and was advanced in Judge Duniway's concurrence as a separate argument.[59] It has been argued that the statute is left largely whole when equitable estoppel is limited to reliance on ancillary promises related to the statute, as was done in *Tiffany*.[60] Additionally, since "[e]very contract contains the possibility of reliance and a change in position by the person relying"[61] on it, it is feared that expansion of equitable estoppel to require only reliance sufficient for promissory estoppel would remove almost all oral contracts from the statute's protection. Since "there would be little motive to bring suit if the plaintiff had not relied

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

55. Even if the *Fedrick* court's implication of a limitation on equitable estoppel by the degree of reliance is a correct statement of what section 217A intends, California courts may not be ready to put a similar limitation on the doctrine as applied in California.

56. Some authorities have suggested that if courts are going to allow reliance on a promise to establish equitable estoppel, then, at the very least, they also should require greater detriment for equitable estoppel than for promissory estoppel. This argument can also be explained as an attempt to leave some efficacy to the statute by making it difficult to avoid. Henderson, *supra* note 26, at 381.

57. We conclude that the Supreme Court of California in considering this issue would probably adopt the rationale, or a variation thereof, in *Tiffany* rather than render C.C.C. § 2201(1) and (2) a nullity by extending to vendor's oral bids for sale and delivery of specific goods the doctrine of estoppel as applied in *Drennan* and its progeny to subcontractors' *work and materials* oral bids.

552 F.2d at 857 (emphasis in original).

58. Kahn v. Cecelia Co., 40 F. Supp. 878, 880 (S.D.N.Y. 1941); Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 421, 493 P.2d 1220, 1226 (1972); Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492, 495 (Fla. App. 1965), *aff'd*, 190 So. 2d 777 (Fla. 1966); Heyman v. Adeack Realty Co., 102 R.I. 105, 108-09, 228 A.2d 578, 580-81 (1967).

59. District Judge East, sitting by designation, wrote the majority opinion for himself and for Judge Duniway, who also filed a concurring opinion. Judge Wallace dissented.

60. Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 298 (9th Cir. 1954). The court observed that "the Restatement of Contracts, Section 178, Comment f [*supra* note 42], has come up with a very good compromise in the confusion of decisions under the statute of frauds which leaves some vitality to the statute, yet gives a workable rule in making exceptions."

61. Note, *Farmer is Not a Merchant but Promissory Estoppel May Bar the Application of the Statute as a Defense*, 25 U. KAN. L. REV. 318, 325 (1977) [hereinafter cited as *Farmer is Not a Merchant*].

and been harmed through reliance,"[62] it is argued that the statute no longer would have any practical effect.

Judge Duniway suggested in his concurrence that, regardless of the extent of application of equitable estoppel to other statute sections,[63] application of the doctrine had been preempted in the sale-of-goods area.[64] California Commercial Code section 2201 provides explicit circumstances under which the statute can be displaced.[65] Judge Duniway argued that this enumeration precluded any other exceptions to the statute.[66]

Duniway's concurrence ignores the lack of respect that the California courts have paid to any limitations of equitable estoppel implied by enumerated exceptions in section 2201's predecessor.[67] Additionally,

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62. *Id.* at 326.

63. Duniway's position would favor treating the sale of goods section of the statute differently from other sections. California courts have not been willing to apply equitable estoppel differently depending on the section of the statute involved. *See* note 78 and accompanying text *infra*. One obvious difference in the sale-of-goods section is, however, that it was more recently reenacted than other sections of the statute because of its presence in the Uniform Commercial Code. This reenactment took place while some commentators were suggesting that "[a] strong case could be made out for the entire omission of a statute of frauds from the Commercial Code . . . ." Corbin, *The Uniform Commercial Code—Sales; Should it be Enacted?* 59 YALE L.J. 821, 833 (1950). In light of this criticism of the statute, its reenactment could be read as a strong legislative endorsement of at least the sale-of-goods section of the statute.

64. 552 F.2d at 858.

65. CAL. U. COM. CODE § 2201(2)-(3) (Deering 1970) provides:

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

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

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

(c) With respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2606).

The California legislature did not adopt subsection (3)(b) of U.C.C. § 2-201, which provides that the oral contract would be enforceable "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."

66. 552 F.2d at 858. *Accord, Farmer is Not a Merchant, supra* note 61, at 325.

67. Like Commercial Code section 2201(3)(c), the former sale-of-goods section of the statute also provided an exception when goods were paid for or accepted. Unlike the new section which limits enforcement to the extent of payment or acceptance, the old section provided for full enforcement if any of the goods were paid for or accepted. Act of June 19, 1931, 1931 Cal. Stats., ch. 1071, § 13 (repealed 1965) (formerly codified as CAL. CIV. CODE § 1624a); Act of June 19, 1931, 1931 Cal. Stats., ch. 1071, § 2 (repealed 1965) (formerly CAL. CIV. PROC. CODE § 1973a). The California courts never considered this exception to preempt the use of equitable estoppel in enforcing contracts which a strict reading of the statute would have barred. Irving Tier Co. v. Griffin, 244 Cal. App. 2d 852, 53 Cal. Rptr. 469 (1st Dist. 1966); Mosekian v. Davis Canning Co., 229

Commercial Code section 1103 provides that previously existing remedies are available under the code unless explicitly displaced.[68] Duniway's analysis does suggest, however, that if some of the potential applications of the philosophy of section 217A would nullify the statute, then it should be adopted by the courts only if its use can be limited so that it will not frustrate the recently reaffirmed legislative policy of the statute.[69]

C. *Summary*

The *Fedrick* court held that the Statute of Frauds could bar an action in promissory estoppel. This decision clearly rejected the holding of some authorities that proof of detrimental reliance sufficient to establish promissory estoppel also will establish equitable estoppel. If correct, the decision not only limits the number of circumstances where promissory estoppel can be used to enforce oral promises not supported by consideration; it also limits the use of equitable estoppel to enforce contracts that are supported by consideration but that are otherwise unenforceable because of the statute. The *Fedrick* court justified its decision that equitable estoppel was not as broad as promissory estoppel by identifying limitations placed on equitable estoppel by the type of promise relied upon and by the degree of detrimental reliance. Both of these limitations result from the court's fear that expanding equitable estoppel will result in nullification of the statute.

Cal. App. 2d 118, 40 Cal. Rptr. 157 (5th Dist. 1964); Goldstein v. McNeil, 122 Cal. App. 2d 608, 265 P.2d 133 (1st Dist. 1954); *Equitable Estoppel in California, supra* note 9, at 603 n.76. One post-U.C.C. case, Distribu-Dor, Inc. v. Karadanis, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (3d Dist. 1970), which itself was decided under the unique goods provision of section 2201(3)(a), *see* note 65 *supra*, described that provision as "a codification of *one aspect* of the general rule [of equitable estoppel]." 11 Cal. App. 3d at 469, 90 Cal. Rptr. at 234-35 (emphasis added). That court did not appear to consider the estoppel doctrine restricted by this "partial codification."

68. CAL. U. COM. CODE § 1103 (Deering 1970): "Unless displaced by the particular provisions of this code, the principles of law and equity, including . . . estoppel . . . shall supplement its provisions." It has been argued, however, that the specific enumerations in section 2201 should be considered tantamount to an explicit displacement on the ground that use of equitable estoppel to create additional exceptions would nullify the statute:

> The provisions of the statute of frauds are specified in UCC section 2-201, whereas estoppel is merely mentioned in UCC section 1-103 as one of the common law doctrines that shall supplement the Code's provisions "[u]nless displaced by the particular provisions of this act. . . ." The drafters of the UCC must have intended that the statute of frauds displace promissory estoppel, for otherwise UCC section 2-201 is virtually read out of existence. . . . [T]he result flies in the face of the rule of statutory construction that the legislature is presumed to intend that every provision of a statute has meaning. Surely the legislature did not intend UCC section 2-201(1) to be without meaning.

Farmer is Not a Merchant, supra note 61, at 325-26 (footnotes omitted).

69. *See* note 63 *supra*.

III

REPRESENTATIONS GIVING RISE TO EQUITABLE ESTOPPEL IN CALIFORNIA

The first ground suggested by *Fedrick* for rejecting the philosophy of section 217A was that equitable estoppel can only arise from detrimental reliance on ancillary promises related to the Statute of Frauds.[70] This argument was derived from the trial court's use of *Tiffany*,[71] which had applied Arizona law. Arizona law, however, is not consistent with California precedent. California courts do allow equitable estoppel to be established by reliance on a broader range of promises.

The most important California decision is *Monarco v. Lo Greco*.[72] In *Monarco*, the California Supreme Court specifically rejected the limits on equitable estoppel adopted in *Tiffany*.[73] *Monarco* was an action to enforce an oral contract to make a will; such agreements usually are void under the Statute of Frauds.[74] The deceased and his wife had promised his stepson (her son) that they would keep their property in a joint tenancy, so that it would pass to the survivor, who in turn would will it to the stepson, if he would remain at home and help in the family venture. He did so for 20 years, giving up opportunities for education and accumulation of his own property. Before dying, the deceased secretly terminated the joint tenancy and willed his property to his grandson. In an action against the grandson, the trial court declared him constructive trustee of the property for the benefit of the stepson.

The supreme court in affirming the decision rejected the grandson's argument that the stepson's action was barred by the Statute of Frauds. It held that the grandson was equitably estopped from asserting the statute. The court concluded that equitable estoppel arose whenever nonenforcement of the contract would allow the promisor to be unjustly enriched or when unconscionable injury would result to the promisee because of a change in position made in reliance on the oral promise.[75] Unconscionable injury could arise from the promisee's reliance upon the promise to perform, not merely from reliance on an ancillary promise about the application of the statute.[76] Equitable

70. Namely, either a promise to make the necessary memorandum or a promise not to rely on the statute. *See* text accompanying notes 41-42 *supra*.

71. Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 493 P.2d 1220 (1972).

72. 35 Cal. 2d 621, 220 P.2d 737 (1950).

73. *Id.* at 625-26, 220 P.2d at 740-41. *See* note 76 *infra*.

74. CAL. CIV. CODE § 1624(6) (Deering 1971).

75. 35 Cal. 2d at 623, 220 P.2d at 739-40.

76. The court stated:

> It is contended, however, that an estoppel to plead the statute of frauds can only arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense. . . . In reality it is not the representation that the contract will

estoppel arose in *Monarco* both because of unjust enrichment and unconscionable injury.[77]

The doctrine of equitable estoppel has been applied to all classes of contracts covered by the Statute of Frauds,[78] and *Monarco* has been specifically applied to contracts for the sale of goods.[79] Clearly, the district court in *Fedrick* erred by relying on *Tiffany's* conclusion that only reliance on ancillary promises about the statute gives rise to equitable estoppel.[80]

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be put in writing or that the statute will not be invoked, but the promise that the contract will be performed that a party relies upon when he changes his position because of it.

Id. at 625-26, 220 P.2d at 740-41.

77. *Id.* at 624, 220 P.2d at 740.

78. Wilson v. Bailey, 8 Cal. 2d 416, 423, 65 P.2d 770, 773 (1937); Seymour v. Oelrichs, 156 Cal. 782, 795, 106 P. 88, 94 (1909); Moore v. Day, 123 Cal. App. 2d 134, 139, 266 P.2d 51, 54 (3d Dist. 1954); LeBlond v. Wolfe, 83 Cal. App. 2d 282, 286, 188 P.2d 278, 281 (2d Dist. 1948).

79. Distribu-Dor, Inc. v. Karadonis, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (3d Dist. 1970); Irving Tier Co. v. Griffin, 224 Cal. App. 2d 852, 53 Cal. Rptr. 469 (1st Dist. 1966); Mosekian v. Davis Canning Co., 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (5th Dist. 1964); Moore v. Day, 123 Cal. App. 2d 134, 266 P.2d 51 (3d Dist. 1954); Goldstein v. McNeil, 122 Cal. App. 2d 608, 265 P.2d 133 (1st Dist. 1954).

80. Without a clear understanding of the manner in which promissory estoppel is functioning in this area, the language of some California cases can mislead the reader into believing that there are additional limitations on the use of reliance on promises to establish equitable estoppel. Recall that, despite authority to the contrary, section 217A does not propose that promissory estoppel itself bar application of the Statute of Frauds. Promissory estoppel is merely the tool for circumventing the requirement of bargained-for consideration. Section 217A bars application of the statute by proof of detrimental reliance of the type and degree which would establish promissory estoppel. *See* note 31 *supra.*

Failure to recognize this distinction might cause one to read certain California cases as implying limitations on the doctrine of section 217A in the context of bargained-for contracts. These cases hold that "it is only where the reliance was unbargained for that there is room for application of the doctrine of promissory estoppel." Healy v. Brewster, 59 Cal. 2d 455, 463, 380 P.2d 817, 822, 30 Cal. Rptr. 129, 134 (1963); *quoted in* Youngman v. Nevada Irrigation Dist., 70 Cal. 2d 240, 250, 449 P.2d 462, 468, 74 Cal. Rptr. 398, 404 (1969). *See also* Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 655, 517 P.2d 1157, 111 Cal. Rptr. 693 (1974); Aronowicz v. Nalley's, Inc., 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (2d Dist. 1972); Hilltop Properties v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1st Dist. 1965). This language could erroneously be read to suggest that section 217A could not be applied when the promisee's reliance is also the performance which was called for under the contract.

Clearly, this language should not be read in the suggested manner, since these cases were only intended to limit the use of promissory estoppel as a substitute for consideration. In that context, the limitation on the use of promissory estoppel is a reasonable position since "if that reliance [the bargained-for performance] was detrimental, it would constitute consideration." Youngman v. Nevada Irrigation Dist., 70 Cal. 2d at 249, 449 P.2d at 468, 74 Cal. Rptr. at 404 (quoting Healy v. Brewster, 59 Cal. 2d at 463, 380 P.2d at 821, 30 Cal. Rptr. at 133 (1963)). These cases are inapplicable to the use of promissory estoppel suggested in this Comment. When the oral promise subject to the statute is a bargained-for contract, promissory estoppel is not being used to form the contract; the bargained-for consideration must be separately established as a prerequisite to enforcement of the promise. It is irrelevant that the same action may constitute both detrimental reliance and the promised performance. Detrimental reliance sufficient for promissory estoppel must serve the dual functions of establishing enforceability of the promise and of estopping use of the statute only when the oral promise is not supported by bargained-for consideration, a situation clearly outside the restrictions suggested by the above cases.

IV

UNCONSCIONABLE AND UNJUST INJURIES: APPLICATIONS OF EQUITABLE AND PROMISSORY ESTOPPEL

Since Fedrick profited overall on the construction contract, the Ninth Circuit concluded that the company had only lost the additional profits that it had expected to make because of Borg's low bid. It is clear from *Drennan*,[81] however, that Fedrick had suffered a loss because of its detrimental reliance on Borg's bid sufficient to establish promissory estoppel.[82] The *Federick* court's refusal to find detrimental reliance for equitable estoppel purposes in this situation is an implicit holding that a greater degree of detrimental reliance is required for equitable estoppel than for promissory estoppel.

The *Fedrick* court correctly held under California law that merely losing the benefits expected from a promisor will not equitably estop the promisor from asserting the Statute of Frauds. But the same limit exists for promissory estoppel. In fact, it is not clear that the injury requirements of promissory estoppel differ at all from those of equitable estoppel. Examining the similarities of the factual situations in which the two doctrines have been applied will suggest that the California courts do not differentiate in the amount of reliance required for the two types of estoppel.

Both equitable and promissory estoppel protect promisees' reliance interests. Reliance is one of the three interests which have been identified in contract actions.[83] A reliance interest is the value of the promisee's actual change in position which was made in anticipation of the promise being performed. To protect this interest, courts award damages designed to put the promisee "in as good a position as he was in before the promise was made."[84] This can be contrasted with the promisee's expectation and restitutionary interests. An expectation interest is the value that a promisee anticipates receiving once a promise has been made. To protect this interest, courts award damages for breach which will "put the plaintiff in as good a position as he would have occupied had the defendant performed his promise."[85] A restitutionary interest is that value that a promisee has bestowed on the promisor as the result of the contract. To protect this interest, courts award damages which "force the defendant to disgorge the value he received from the plaintiff."[86] It should be noted, however, that courts do not

81. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

82. *See* footnote 35 *supra*. *See also* notes 137-41 and accompanying text *infra*.

83. The various interests protected by contract actions were identified in Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373, 53-54 (1936-1937).

84. *Id.* at 54.

85. *Id.*

86. *Id.* at 53-54.

always limit their award of damages to compensation of the interest protected by a given legal doctrine.[87] For example, although equitable estoppel is designed to protect a promisee's reliance interest,[88] courts traditionally have awarded damages based on lost expectation.[89]

The limitation of equitable estoppel to the protection of reliance losses has been affirmed in numerous contexts. A plaintiff's loss of the profits expected from the resale of goods to be received under an oral contract is not unconscionable,[90] but the reliance loss resulting when breach of an oral contract prevents a plaintiff from selling goods in his possession because of spoilage is unconscionable.[91] It is not unconscionable for a court to refuse to enforce an oral employment contract when the employee only gave up an expectation of continuing employment at will, but it is unconscionable when the employee detrimentally relied by abandoning a right to permanent employment.[92]

Reliance also is the key to promissory estoppel. To recover under promissory estoppel, the promisee must establish that: (1) there was a promise; (2) the promisor reasonably should have expected the promise to induce action or forbearance on the part of the promisee; (3) the promise did induce such reliance; and (4) injustice can be avoided only by enforcing the promise.[93] Mere loss of expected profits is not an unjust injury for promissory estoppel purposes. There is no injustice, for instance, when an employee's reliance on an employer's promise of certain remuneration merely causes the employee to give up employment at will,[94] but when the employee loses a substantial right to employment, such as a right under contract, there is an unjust injury.[95]

Although both estoppel doctrines are designed to protect the reliance interest of the promisee, it does not necessarily follow that both have the same injury requirement. Equitable estoppel cases require sufficient detrimental reliance to make nonenforcement of the promise *unconscionable*;[96] promissory estoppel cases require sufficient detrimental reliance to make nonenforcement *unjust*.[97] The *Fedrick* court

87. *Id.* at 66-67.

88. *See* text accompanying notes 90-92 *infra*.

89. *See* text accompanying notes 148-57 *infra*.

90. Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974); Little v. Union Oil Co., 73 Cal. App. 612, 238 P. 1066 (1st Dist. 1925).

91. Mosekian v. Davis Canning Co., 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (5th Dist. 1964).

92. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909).

93. RESTATEMENT OF CONTRACTS § 90 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973); Note, *Promissory Estoppel in California: Subcontractor's Bid Irrevocable as Result of Contractor's Reliance*, 47 CALIF. L. REV. 405, 406 (1959).

94. Bank of Cal. v. Connolly, 36 Cal. App. 3d 350, 111 Cal. Rptr. 468 (4th Dist. 1973).

95. Van Hook v. Southern Cal. Waiters Alliance, 158 Cal. App. 2d 556, 323 P.2d 212 (2d Dist. 1958).

96. *See* cases cited in note 51 *supra*.

97. *See* cases cited in note 50 *supra*.

apparently believed that California courts require more detriment to find an unconscionable injury than they require to find an unjust one. In practice, the California courts have not established static definitions of these injury requirements. Rather, they have applied a case-by-case approach in determining both what constitutes an unconscionable injury for equitable estoppel purposes[98] and what constitutes an unjust injury for promissory estoppel purposes.[99] The similarity of the cases in which California courts have found these injuries suggests that the requirements for the two are in fact the same.

Only two reported California cases have considered both estoppel doctrines. The first was the pre-*Monarco* decision *Sessions v. Southern California Edison Co.*[100] The plaintiff employee in *Sessions* had retired early in reliance on the defendant employer's oral promise that early retirement would not prejudice his rights under the employer's pension plan. The court held that this promise could not be removed from the coverage of the Statute of Frauds by equitable estoppel since the plaintiff's reliance had not been on either a misrepresentation of fact or an ancillary promise related to the requirements of the statute.[101] But the court decided that the statute could be avoided on the basis of promissory estoppel because of the plaintiff's reliance on the promise to perform itself.[102]

The *Sessions* court used promissory estoppel to avoid the ancillary promises limitation on equitable estoppel recognized before *Monarco*. After *Monarco*, the reliance on the promise to perform, which the *Sessions* court found sufficient for promissory estoppel, also would be sufficient for equitable estoppel.[103] Therefore, the *Sessions* holding that the same facts would not establish both estoppels is not good law after *Monarco*.

The *Sessions* court did not consider whether promissory estoppel could be used to expand the degree of reliance considered sufficient for equitable estoppel—the expansion on which this Comment focuses.[104] Although the *Sessions* court held that there was sufficient reliance to avoid the statute for the use it was making of promissory estoppel, its holding says little about whether there was sufficient reliance for equitable estoppel as that doctrine was later formulated in *Monarco* and as

98. Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 828 n.46 (1961); *Equitable Estoppel in California, supra* note 9, at 607-08.

99. *See* Burgess v. California Mut. Bldg. & Loan Ass'n, 210 Cal. 180, 189, 290 P. 1029, 1032 (1930); Aronowicz v. Nalley's, Inc., 30 Cal. App. 3d 27, 45, 106 Cal. Rptr. 424, 435 (2d Dist. 1972).

100. 47 Cal. App. 2d 611, 118 P.2d 935 (2d Dist. 1941).

101. *See id.* at 618-19, 118 P.2d at 939.

102. *Id.* at 619-20, 118 P.2d at 939-40.

103. *See* part III *supra*.

104. *See* text accompanying note 31 *supra*.

it is currently applied. *Sessions* is therefore not helpful in determining if the same degree of detrimental reliance will establish both estoppels.

In *Associated Creditors' Agency v. Haley Land Co.*,[105] the other California case considering both estoppel doctrines, the court believed that both estoppels were required to reach its decision. In that case, the Haley Land Company owned a golf course. Haley's president orally agreed to lease a restaurant and club on the course to a partnership, Mart, and to transfer to it Haley's liquor license. In reliance, Mart sold its existing restaurant and began to operate the restaurant and club at the golf course. Despite repeated promises by Haley's president, neither the written lease nor the license were forthcoming. Mart abandoned its business at the course after Haley sold its interest to a third party who refused to honor Mart's claims.

The litigation began as an action by a creditor of the golf course against Haley, Haley's assignee, and Mart. Mart cross-complained against Haley and the assignee for damages caused by breach of the Haley-Mart agreement. Haley appealed from a judgment for Mart, arguing that the agreement with Mart was without consideration and that it was barred by the Statute of Frauds. The court of appeal rejected both claims. It decided that Mart's sale of its original restaurant in reliance upon Haley's representations was sufficiently detrimental to establish promissory estoppel. Although not considering any relationship between the two types of estoppel, the court also held that there was sufficient detrimental reliance to establish an unconscionable injury for equitable estoppel purposes, thus removing the Statute of Frauds bar.[106] This decision demonstrates that there are at least some cases in which the injury requirements of the two doctrines overlap. Further examination of the situations in which either of the doctrines has been applied will show that this overlap is total.

Employment Contracts. Both doctrines have been applied to employment contracts. In *Seymour v. Oelrichs*,[107] an equitable estoppel case, the plaintiff had been a police captain with a right to a pension and a right not to be dismissed except for cause. He left that position, losing these rights, and entered into a 10-year contract to manage property belonging to a Mr. Fair and others. Mr. Fair had promised to put the employment agreement into writing when he returned from Europe,[108] but he was killed while traveling. Seymour brought this action

105. 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1st Dist. 1966).

106. *Id.* at 616-17, 49 Cal. Rptr. at 5-6.

107. 156 Cal. 782, 106 P. 88 (1909). Although *Seymour* predates *Monarco, Seymour* has been held to be consistent with the *Monarco* reasoning. *See* note 108 *infra*.

108. In *Seymour*, the court found an estoppel because the plaintiff had relied on this promise to reduce the agreement to writing. The case also stands for the proposition that reliance on the contract itself will establish estoppel, however, because *Monarco*, citing *Seymour*, stated that the

for damages after being fired by Fair's co-owners. Although the Statute of Frauds required that the employment contract be in writing,[109] the California Supreme Court held that the co-owners could be estopped from asserting the statute. Because he had abandoned valuable employment, Seymour would be unconscionably injured if the statute gave the co-owners a defense.[110]

That the same type of reliance will establish promissory estoppel is seen in *Van Hook v. Southern California Waiters Alliance*.[111] A local restauranteur offered Van Hook, an official of the waiters' union, a 10-year contract as a waiter in his restaurant. Van Hook refused the offer only after the local union passed a resolution guaranteeing him a pension. This pension guarantee was designed to induce him to remain with the union. Upon his retirement, however, the union refused to pay the pension. The court of appeal affirmed the trial court judgment for Van Hook on his promissory estoppel cause of action. The court concluded that forgoing valuable and guaranteed employment is a substantial and unjust injury.[112] *Seymour* and *Van Hook* suggest that the injury requirement in employment contracts is the same for both promissory and equitable estoppel, even though one is called "substantial and unjust" and the other "unconscionable."

Contracts for the Sale of Goods. Mosekian v. Davis Canning Co.[113] exemplifies the occasions in which equitable estoppel has barred use of the sale-of-goods section of the Statute of Frauds.[114] In *Mosekian*, the defendant's agent orally agreed to purchase the plaintiff's peach crop upon ripening at whatever price the canmery association established for the industry—a total price that clearly would exceed the $500 statutory minimum. The defendant refused to accept the peaches when they ripened. Since the plaintiff had not sought another buyer, his crop became overripe and could only be sold at a considerable loss. Affirming the trial court, the court of appeal held that defendant was

promise that had initiated Seymour's reliance was Fair's promise to perform. Monarco v. Lo Greco, 35 Cal. 2d at 625-26, 220 P.2d at 740-41.

109. Contracts not to be performed within one year of their making must be in writing. CAL. CIV. CODE § 1624 (Deering 1971).

110. The trial court judgment for Seymour was reversed and remanded for a determination of whether the co-owners could be charged with Fair's agreement on an agency basis. 156 Cal. at 790-91, 106 P. at 92.

111. 158 Cal. App. 2d 556, 323 P.2d 212 (2d Dist. 1958).

112. *See* Frebank Co. v. White, 152 Cal. App. 2d 522, 313 P.2d 633 (2d Dist. 1957); West v. Hunt Foods, Inc., 101 Cal. App. 2d 597, 225 P.2d 978 (1st Dist. 1951); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1st Dist. 1948).

113. 229 Cal. App. 2d 118, 40 Cal. Rptr. 157 (5th Dist. 1964).

114. *Mosekian* dealt with the pre-U.C.C. sale of goods provisions of the statute, Act of June 19, 1931, 1931 Cal. Stats., ch. 1070, § 13 (repealed 1965) (formerly codified as CAL. CIV. CODE § 1624a). For a similar result under CAL. U. COM. CODE § 2201 (Deering 1970), see Distribu-Dor, Inc. v. Karadanis, 11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (3d Dist. 1970).

estopped from asserting the statute because the plaintiff would suffer an unconscionable injury if he were required to bear the loss in value of his crop caused by not seeking another buyer.[115]

Likewise, promissory estoppel was established in *Aronowicz v. Nally's, Inc.*[116] where the defendant promised that it would distribute meats processed and packaged by the plaintiffs. In reliance, the plaintiffs quit their jobs, obtained financing, leased a building, and began production. When the defendants later refused to distribute the products, the plaintiffs' fledgling operation failed. It was unclear whether any consideration had passed from the plaintiffs for the defendant's promise, but the court held that, even if there were not an enforceable bargained-for contract, the plaintiffs could recover under promissory estoppel. Since the plaintiffs' actions had been taken with the defendant's knowledge, allowing the defendant to disclaim liability for the plaintiffs' loss "would be a blemish on the face of justice."[117] As in *Mosekian*, the buyer's breach caused the seller to be unable to resell his products. This loss of a market outlet gave rise to estoppel because it caused the seller to lose more than the transaction's expected profits.[118]

Lease of Realty. In *McGirr v. Gulf Oil Co.*[119] equitable estoppel was applied to avoid the lease-of-realty section of the Statute of

115. The spoilage in *Mosekian* is significant. If the plaintiff's goods had not been perishable, defendant's breach would have merely caused him to lose his expected profits from the sale, since most nonperishable goods can be resold to other buyers. Perishables are on a theoretical plane with specially manufactured goods, *i.e.*, there is no alternative buyer for the goods if not bought by this purchaser. (Contracts for the sale of specially manufactured goods are excepted from the writing requirements of the statute. CAL. U. COM. CODE § 2201(3)(a) (Deering 1970).) The plaintiff in *Mosekian* clearly had suffered a reliance loss because of the spoilage.

See also Goldstein v. McNeil, 122 Cal. App. 2d 608, 265 P.2d 113 (1st Dist. 1954). In *Goldstein*, the plaintiff had orally agreed to sell used cars to the defendant and to ship them from Shreveport, Louisiana, to San Francisco. The plaintiff paid $210 for caravan permits, and the defendant paid the other caravan expenses. When the cars reached California, the defendant refused to accept them, and plaintiff was forced to sell them at a loss because of an adverse change in market conditions. Although the court did not find the $210 expenditure to be substantial reliance, it did conclude that an unconscionable injury resulted. "[B]ecause of [plaintiff's] performance of the contract he missed the very high market existing around the time of the contract and was caught in a sharp slump." 122 Cal. App. 2d at 612, 265 P.2d at 115. It could be argued that the plaintiff's inability to resell at as high a price was merely a loss of his expected profits and therefore should not have established equitable estoppel. *See Equitable Estoppel in California, supra* note 9, at 605-06. Because of his reliance, however, the plaintiff was unable to protect himself against this shift in the market. Had he not refrained from selling the cars, he would have had the opportunity to sell as the market began to decline. Since the plaintiff's reliance prejudiced his ability to resell under the same terms as before, his injury is similar to that in the spoilage and specially manufactured goods cases. *Accord*, Moore v. Day, 123 Cal. App. 2d 134, 266 P.2d 51 (3d Dist. 1954).

116. 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (2d Dist. 1972).

117. *Id.* at 45, 106 Cal. Rptr. at 436.

118. *See* note 115 *supra.*

119. 41 Cal. App. 3d 246, 115 Cal. Rptr. 902 (2d Dist. 1974).

Frauds.[120] McGirr, a gasoline station manager, was told by a Gulf agent that he could lease a specified high-volume station for ten years if he would first lease an unprofitable Gulf station for a short time. McGirr terminated his existing lease with Enco, leased the unprofitable station for a minimum 90-day term, paid a $750 deposit, and bought a $3,000 inventory from Gulf in reliance on Gulf's promise. Later, Gulf refused to execute a written lease on the high-volume station. Although the trial court judgment for Gulf was affirmed on other grounds,[121] the court of appeal held that Gulf could be estopped from relying on the statute. The deposit and inventory expenses incurred by McGirr in moving to the unprofitable station caused a substantial change in his position, and the resulting loss was deemed unconscionable.[122]

An action in promissory estoppel was established in *Ortize v. Smith*[123] on facts similar to those in *McGirr*. Ortize planned to move his photography business from its old location, partially into his residence and partially into premises that Smith promised to lease him. After Ortize incurred considerable expense in moving equipment to his residence, Smith, who had known of the planned move, refused to lease the promised premises. Ortize then was forced to move back to his original location. The court held that it would be unjust for Ortize to bear the expenses of moving from his old studio and back and allowed his recovery in a promissory estoppel action against Smith. Ortize's moving expenses were not unlike those found to be an unconscionable injury for equitable estoppel purposes in *McGirr*.

These cases confirm the indication in *Associated Creditors' Agency*

120. CAL. CIV. CODE § 1624(4) (Deering 1971).

121. The judgment for Gulf was based on the equal dignities rule, *id.* § 2309, which requires that an authority to enter into a contract required by law to be in writing must itself be in writing. Since Gulf's agent did not have written authorization to enter into a lease for a term greater than one year, the lease, whether oral or written, could not be enforced against Gulf. The equal dignities rule is a derivative of the Statute of Frauds. Sunset-Sternau Food Co. v. Bonzi, 60 Cal. 2d 834, 837-39, 389 P.2d 133, 136-37, 36 Cal. Rptr. 741, 744-45 (1964). The *McGirr* court held, however, that facts sufficient to prevent the statute from being used as a defense did not also estop the defendant's use of the equal dignities rule. Estoppel of that rule was said to require some conduct by the principal. 41 Cal. App. 3d at 258, 115 Cal. Rptr. at 909. Since the representations relied upon by McGirr were all made by Gulf's agent, it could not be estopped from relying on the equal dignities rule.

122. The court did not find an unconscionable injury in McGirr's abandonment of his Enco lease. 41 Cal. App. 3d at 254, 115 Cal. Rptr. at 906. This conclusion seems correct since the Enco lease could have been terminated by either party upon 24 hours notice. Thus, McGirr did not abandon an actual right to continue in business under the Enco lease; he abandoned only his expectation that he could do so.

123. 181 Cal. App. 2d 363, 5 Cal. Rptr. 134 (3d Dist. 1960). For non-California cases applying promissory estoppel in facts even more analagous to *McGirr*, see Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Chrysler Corp. v. Quinby, 51 Del. 264, 144 A.2d 123 (1958); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 663, 133 N.W.2d 267 (1965).

v. Haley Land Co.[124] that the injury requirements of the two estoppel doctrines are similar. Additionally, research has not revealed any pair of similar cases in which courts have held the facts to be sufficient for one type of estoppel but not for the other. Courts have consistently limited the application of both doctrines to injuries of the promisee's reliance interest.[125] Apart from the pre-*Monarco* decision in *Sessions v. Southern California Edison Co.*,[126] no California court has held that the same facts could not support both estoppels. The cases, therefore, suggest that the California courts do accept the general philosophy of Restatement (Second) of Contracts section 217A, that detrimental reliance sufficient for promissory estoppel also establishes equitable estoppel. In other words, California courts reject the *Fedrick* court's view that the injury requirements of the two estoppels are different. To the extent that comment b to section 217A supports the *Fedrick* injury limitation on equitable estoppel,[127] California courts do not appear to follow the Restatement formulation.

V

EXPECTATION AND RELIANCE DAMAGES: THE CONTINUED EFFICACY OF THE STATUTE OF FRAUDS UNDER PROMISSORY ESTOPPEL

Courts that have maintained the ancillary promises and injury limitations on equitable estoppel have done so because they feared that dropping them would so significantly reduce the number of cases in which the statute applied that it would be nullified.[128] This Comment has already demonstrated that the California courts have explicitly rejected the ancillary promises limitation[129] and probably have rejected the injury limitation.[130] The California courts seem to allow detrimental reliance sufficient for promissory estoppel to establish equitable estoppel. This conclusion implies that the California courts have not been influenced by the fear of nullifying the statute which troubled the *Fedrick* court.[131]

If, however, the California courts currently do recognize the injury limitation—meaning that the existing injury threshold actually must be lowered to broaden equitable estoppel—the feared erosion of the stat-

124. 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1st Dist. 1966). *See* text accompanying notes 105-06 *supra.*

125. *See* text accompanying notes 83-95 *supra.*

126. 47 Cal. App. 2d 611, 118 P.2d 935 (2d Dist. 1941). *See* text accompanying notes 100-04 *supra.*

127. *See* text accompanying notes 53-55 *supra.*

128. *See* text accompanying notes 56-62 *supra.*

129. *See* part III *supra.*

130. *See* part IV *supra.*

131. *See* text accompanying notes 56-69 *supra.*

ute still can be avoided. This could be accomplished by changing the measure of damages used in the new cases of equitable estoppel created by allowing detrimental reliance sufficient for promissory estoppel to establish equitable estoppel. The fear of nullification appears to result from the measure of damages traditionally used in equitable estoppel cases. Normally, expectation is the measure used to compensate for loss under a bargained-for contract.[132] The statute bars the promisee's recovery for this lost expectancy.[133] Expectation damages have been allowed, however, when a promisee establishes equitable estoppel.[134] Thus, equitable estoppel thwarts the statute when it allows expectation damages to be recovered.

Although the statute prevents recovery of expectation damages, "[t]he effect of the Statute . . . is not to obliterate the oral contract, but merely to lessen its legal consequences."[135] Courts have not considered it to bar restitutionary recovery by a promisee.[136] Since the promisee still loses his expectation interest, restitutionary recovery does not nullify the statute's effect. It will be argued that reliance damages also can be awarded without nullifying the statute. This approach will allow a redefinition of the balance between equitable estoppel and the Statute of Frauds in a way that increases the number of cases in which injustice is avoided without significantly curtailing the protection of the statute.

The argument that awarding reliance damages in equitable estoppel cases nullifies the statute less than awarding expectation damages obviously applies even if the California courts recognize that the injury requirements of the two estoppels are the same. Thus, it will be argued that the reliance measure of damages should be adopted generally for equitable estoppel cases.

A. Measures of Damages

The value of the promisee's reliance on the promise need not be equivalent to the value that the promisee expected to receive if the promise were performed. By way of illustration of the various measures of damages, consider the following hypothetical based on the facts of *Fedrick*.[137] The plaintiff intended to bid $15,800,000 on the project,

132. *See generally* 5 A. CORBIN, CONTRACTS § 992 (1964); 11 S. WILLISTON, CONTRACTS § 1338 (3d ed. 1968); Fuller & Perdue, *supra* note 83, at 57.

133. Fuller & Perdue, *supra* note 83, at 387-88; *Promissory Estoppel, supra* note 3, at 123.

134. *See* text accompanying notes 148-57 *infra*.

135. Fuller & Perdue, *supra* note 83, at 386. *Accord*, 3 S. WILLISTON, CONTRACTS § 531 (3d ed. 1960).

136. Fuller v. Reed, 38 Cal. 99, 110 (1869); Goble v. Dotson, 203 Cal. App. 2d 272, 280, 21 Cal. Rptr. 769, 774 (1st Dist. 1962); Doke v. Brockhurst, 150 Cal. App. 2d 514, 516-17, 310 P.2d 43, 45-46 (1st Dist. 1957); RESTATEMENT OF CONTRACTS § 355 (1932); 3 S. WILLISTON, CONTRACTS § 534 (3d ed. 1960).

137. For the facts in *Fedrick*, see text accompanying notes 33–34 *supra*.

based partially on the second-lowest bid of $1,275,000 for the pumps. Upon Borg's bid of $825,000, which was $450,000 less than the next lowest, Fedrick reduced its own bid by $200,000 to $15,600,000. The $250,000 difference between the amount by which Borg's bid was lower and the amount by which Fedrick reduced its bid represents the additional profits Fedrick expected to receive because of Borg's lower bid.

The reliance measure of damages would return to Fedrick the amount of out-of-pocket expenditures it incurred because of Borg's breach.[138] Assume that when Borg breached, Fedrick still was able to get the second-lowest bidder to provide the pumps for $1,275,000. In this case reliance damages would be $200,000, the additional amount Fedrick would have received had Borg not bid and breached. If after Borg's breach it had cost Fedrick more, *e.g.*, $1,300,000, to get another party to provide pumps, Fedrick would have lost not only the $200,000 because of its reduced bid, but also the additional $25,000 that it would not have had to pay if reliance on Borg's bid had not caused it to lose the opportunity to purchase them for $1,275,000. Thus, the reliance loss would be $225,000. Fedrick actually was able to get a third party to sell him the pumps for about $1,162,000, $113,000 less than the previous second-lowest bid. This reduced Fedrick's out-of-pocket loss to $87,000.[139]

This analysis indicates that the *Fedrick* court erred when it concluded that Fedrick had only suffered a loss of expected profits.[140] Fedrick's reliance loss is not erased by its profit on the overall construction contract. Borg's breach not only caused Fedrick to lose the profits it expected from Borg's low bid, but it also caused Fedrick to lose part of the normal margin of profits that it would have earned on such a contract. Without this normal return, Fedrick might never have bid on

138. Fuller & Perdue, *supra* note 83, at 54.

139. The reliance loss actually suffered by Fedrick was approximately $85,650 ($200,000 reliance reduced by $114,350, the amount by which the price actually paid for the replacement pumps ($1,162,200) was less than the previous second lowest bid (approximately $1,276,550)). Fedrick sued for $95,903. 552 F.2d at 855. Although the opinion makes no mention of the calculation of damages, it can be argued that the additional $10,253 claimed by Fedrick represents interest on $85,650 between the time of the breach and the time of the lawsuit. Therefore, it appears that Fedrick was only seeking compensation for his reliance loss in this lawsuit. *See also* note 146 *infra*, suggesting that the damages sought by Fedrick clearly were not based on the expectation measure.

140. Judge Wallace's dissent showed that the majority had misapplied the principles of reliance and expectation injuries. In the cases relied on by the majority to establish that Fedrick had only lost expected profits, Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974) and Little v. Union Oil Co., 73 Cal. App. 612, 238 P. 1066 (1st Dist. 1925), the promisees had not been bound to deliver the goods that they did not receive because of the promisor's breach. In *Fedrick*, however, the plaintiff was still bound to perform its contract with the government. Therefore, Borg's breach forced Fedrick to incur additional out-of-pocket expense—the additional purchase price of the pumps. Wallace believed that Fedrick's profit on the overall contract was irrelevant since its dealings with Borg had caused it to lose more than its expected profits on the pumps subcontract. 552 F.2d at 859.

the contract. Thus, Fedrick's reliance on Borg's bid and Borg's breach put Fedrick into a contract on terms that it might not have voluntarily accepted. The damage formula outlined above awards Fedrick the difference between its normal return on this contract and the return it actually received.[141]

The expectation measure of damages[142] would put Fedrick in as good a position as if Borg had performed.[143] Under the U.C.C. damage formula, when a seller breaches his contract for the sale of goods, expectation damages are computed as the difference between the cost of goods purchased to cover the breach and the contract price.[144] The amount of Fedrick's prime bid and the amount of the next lowest bid on the pumps in this case would be irrelevant.[145] If Fedrick could still get the pumps for $1,275,000, it would be awarded expectation damages of $450,000. If it paid $1,300,000, then damages would equal $475,000; and if it paid $1,162,000, damages would be $337,000.[146] In each case, putting Fedrick in the same place it would have been if Borg had performed results in damages equal to Fedrick's reliance plus the additional $250,000 in profits expected because of Borg's lower bid. Thus, refusing to give Fedrick the expectation measure of damages always means loss of the $250,000 additional profits expected because of Borg's bid.[147]

I. The Measure of Damages for Cases Involving Equitable Estoppel

Both equitable and promissory estoppel were developed to protect a promisee against reliance losses.[148] Courts, however, do not always award damages on the basis of the interest protected.[149] Once the elements of estoppel are established, the contract is fully enforced, *i.e.*,

141. In contrast, under the expectation measure of damages, Fedrick would be awarded the difference in the return it *expected* because of Borg's low bid and the return it actually received.

142. Expectation would be the correct measure of damages if this were a bargained-for contract, *e.g.*, if Fedrick had paid Borg $100 for its bid.

143. Fuller & Perdue, *supra* note 83, at 54.

144. CAL. U. COM. CODE § 2712 (Deering 1970).

145. The next lowest bid might be relevant in determining if the contractor was reasonable in his attempt to cover.

146. This last example is suggestive of the actual facts in *Fedrick* where the contract price was $826,550 and the cost of cover goods was $1,162,200. Expectation damages in *Fedrick* would be $335,650. It is clear that Fedrick's claim of $95,903 in damages, 552 F.2d at 855, was not based on the expectation measure. For the suggestion that the claim was based on the reliance measure, *see* note 139 *supra*.

147. Actually, Fedrick does not lose the entire $250,000 if it is able to buy the pump from a third party for an amount less than $1,075,000. When the price equals $1,075,000, Fedrick's detrimental reliance is zero, since the amount by which it reduced its bid is exactly set off by the amount it saved because of Borg's nonperformance. For amounts less than $1,075,000, its loss of expected profits is also reduced by this saving. However, unless the price from the third party is reduced to $825,000 (Borg's original bid) or below, Fedrick still loses part of its expected profits.

148. *See* text accompanying notes 83-95 *supra*.

149. Fuller & Perdue, *supra* note 83, at 66-77.

expectation damages are awarded.[150] Use of this measure resulted from an early view that contract law could only award expectation damages (for losses under actual contracts) or restitution damages (for losses under quasi-contracts).[151] Reliance damages were seen as something reserved for the law of torts.[152] Since the basis of recovery in an equitable estoppel case was a loss arising out of a contractual transaction, courts felt compelled to award expectation damages. Equitable estoppel was seen completely to strip a promisor of a Statute of Frauds defense against an otherwise valid contract.[153]

Courts therefore were unable to mitigate the damage measure once equitable estoppel was established. They instead sought to limit the circumstances under which equitable estoppel arose. Estoppel cannot be established unless the remedy of quantum meruit is insufficient.[154] Quantum meruit allows recovery by an individual who has performed services for another but who for some reason cannot collect for those services under a contract.[155] In theory, it is a restitutionary measure, designed to disgorge the defendant's unjust enrichment resulting from the plaintiff's services.[156] Damages are traditionally measured, however, not by the value of the services to the defendant, a restitutionary measure, but by the market value the plaintiff could have demanded for the services, a measure of what plaintiff gave up in reliance on the contract.[157] Thus, the quantum meruit limit on equitable estoppel is a way to restrict its application only to cases of otherwise uncompensable reliance losses.

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150. Monarco v. Lo Greco, 35 Cal. 2d 621, 626, 220 P.2d 737, 741 (1950); Seymour v. Oelrichs, 156 Cal. 782, 800-03, 106 P. 88, 96-98 (1909); Mosekian v. Davis Canning Co., 229 Cal. App. 2d 118, 120, 40 Cal. Rptr. 157, 158 (5th Dist. 1964).

151. Fuller & Perdue, *supra* note 83, at 89-96.

152. *Id.* at 90 n.61.

153. *Promissory Estoppel, supra* note 3, at 126.

154. Monarco v. Lo Greco, 35 Cal. 2d 621, 625-26, 220 P.2d 737, 740-41 (1950); Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (4th Dist. 1959); Palmer v. Phillips, 123 Cal. App. 2d 291, 266 P.2d 850 (2d Dist. 1954); Chahon v. Schneider, 117 Cal. App. 2d 334, 256 P.2d 54 (1st Dist. 1953); Jirshick v. Farmers & Merchants Nat'l Bank, 107 Cal. App. 2d 405, 237 P.2d 49 (2d Dist. 1951).

155. *See* San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 274-75, 51 P. 335, 336-37 (1897); Lawn v. Camino Heights, Inc., 15 Cal. App. 3d 973, 980-83, 93 Cal. Rptr. 621, 626-27 (3d Dist. 1971); Burgermeister v. Wells Fargo Bank, 191 Cal. App. 2d 624, 627, 13 Cal. Rptr. 123, 125 (1st Dist. 1961); Drvol v. Bant, 183 Cal. App. 2d 351, 356, 7 Cal. Rptr. 1, 5 (2d Dist. 1960); Toney v. Security First Nat'l Bank, 108 Cal. App. 2d 161, 166, 238 P.2d 645, 647 (2d Dist. 1951); Leoni v. Delany, 83 Cal. App. 2d 303, 306-07, 188 P.2d 765, 767 (1st Dist. 1948).

156. RESTATEMENT OF RESTITUTION § 1 (1937); 5 A. CORBIN, CONTRACTS §§ 1107, 1112 (1964).

157. 5 A. CORBIN, CONTRACTS §§ 1107, 1112 (1964); 12 S. WILLISTON, CONTRACTS § 1480 (3d ed. 1970). *See* Drvol v. Bant, 183 Cal. App. 2d 351, 356, 7 Cal. Rptr. 1, 5 (2d Dist. 1960); Toney v. Security First Nat'l Bank, 108 Cal. App. 161, 166, 238 P.2d 645, 647-48 (2d Dist. 1951).

2. *The Measure of Damages for Cases Involving Promissory Estoppel*

Although California courts have consistently applied the expectation measure of damages in equitable estoppel cases, the law of damages for promissory estoppel is more confused. There are three approaches to awarding damages for promissory estoppel: reimbursement of expectation losses, reimbursement of reliance losses only, and a flexible approach allowing the measure of damages most appropriate to the facts, with expectation as the upper limit. A number of California cases have awarded damages based on lost expectation, but it appears that reliance or perhaps the flexible approach is actually the correct measure in California.[158]

When section 90 was introduced by the first Restatement, Samuel Williston, the reporter, felt that full expectation damages should be recovered under promissory estoppel.[159] This was consistent with the view of contract theory at the time, which did not see reliance as an interest compensable under contract law.[160] Further, it was consistent with the general concept of estoppel, which viewed the promisor as estopped from proving that the contract lacked consideration. With the promisor thus barred, the promisee was allowed to prove an agreement on an equal footing with a bargained-for contract and was entitled to full expectation damages. This view of damages taken by the first Restatement, appears to have been applied in early California promissory estoppel cases.[161] Some cases appear to have used this measure even in recent years.[162]

Shortly after the promulgation of the first Restatement, Fuller and Perdue wrote their seminal article on the protection of reliance interests in contracts.[163] They criticized the Restatement view that reliance damages were not compensable under contract theory and convincingly showed that courts had actually protected the reliance interest.

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158. *But see Promissory Estoppel, supra* note 3, at 123, suggesting that "the vast majority of decisions [from all jurisdictions] have opted for protection of *expectancies* under promissory estoppel." It will be seen, however, that many cases that use the expectation measure do so because it is a useful equivalent or surrogate for the reliance measure. *See* text accompanying notes 170-77 *infra.*

159. Either the promise is binding or it is not . . . . I could leave this whole thing to the subject of quasi-contracts so that the promise under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me that you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the status quo.

4 ALI PROCEEDINGS (Appendix) 103-04 (1926). *Accord*, Note, *Promissory Estoppel—Measure of Damages*, 13 VAND. L. REV. 705, 709-12 (1960).

160. *See* text accompanying notes 151-52 *supra.*

161. *See* Comment, *Promissory Estoppel in California*, 5 STAN. L. REV. 783, 794-95 (1953).

162. *See* notes 170-77 and accompanying text *infra.* The use of the expectation measure in these cases can be explained as a surrogate or an equivalent of reliance. *Id.*

163. Fuller & Perdue, *supra* note 83.

Under this analysis, the damages for promissory estoppel could be limited to the extent of the plaintiff's reliance.[164] The second Restatement clearly recognizes the reliance interest in contracts, accepting promissory estoppel as an independent means of compensating loss rather than as an adjunct to traditional consideration theory. The second Restatement does not, however, necessarily establish reliance damages in all promissory estoppel situations. It rather ambiguously states that damages "may be limited as justice requires."[165]

California courts have recognized the possibility of limiting damages to reliance in promissory estoppel cases[166] and have applied this measure. In *Ortize v. Smith*,[167] where the plaintiff moved his photographic equipment in reliance on a promise of a lease, damages were awarded for the out-of-pocket moving expenses rather than the value of the expected lease. In *Van Hook v. Southern California Waiters Alliance*,[168] the plaintiff, who turned down a 10-year contract for a promise of a pension, was awarded an amount which suggests that the court approximated the wages he lost by not accepting the contract[169] rather

164. Seavey, *Reliance Upon Gratutious Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

165. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973). *Accord, id.* § 217A. Some commentators have argued that the language of the Restatement (Second) provides direct support for the contention that damages in promissory estoppel actions could be limited to reliance:

> Restatement, Second, Contracts carries forward Section 90, but makes several changes in its text, which now reads as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." A major reason for adding the last sentence was to make clear that damages in a Section 90 case could be determined by the reliance measure. And "[p]artly because of that change, the requirement that the action or forbearance have a definite and substantial character is deleted . . . ."

L. FULLER & M. EISENBERG, *supra* note 25, at 160. (citing the Reporter's Note). This language of the second Restatement also can be interpreted as supporting the "flexible" approach to damages in promissory estoppel cases advocated by Professor Corbin, the consultant to the Reporter of the second Restatement. *See* text accompanying note 170 *infra*.

166. Swinerton & Walberg Co. v. City of Inglewood-Los Angeles County Civic Center Auth., 40 Cal. App. 3d 98, 105, 114 Cal. Rptr. 834, 838-39 (2d Dist. 1974).

167. 181 Cal. App. 2d 363, 5 Cal. Rptr. 134 (3d Dist. 1960).

168. 158 Cal. App. 2d 556, 323 P.2d 212 (2d Dist. 1958).

169. The plaintiff refused a 10-year employment contract as a waiter for $250 per week plus a percentage of the profits of the restaurant in reliance on the union's promise to pay him a pension for life of 75% of his salary at the time of retirement. The court affirmed the trial court's judgment without discussion of the method by which damages of $109,900 were determined. It appears that this amount measures the plaintiff's out-of-pocket loss caused by the union's breach. That breach, two years after the original promise, caused him to lose the opportunity of steady employment for the remaining eight years under the contract for employment as a waiter. If he had worked those eight years for $250 per week, he would have received $104,000. The extra $5900 awarded could represent the jury's determination of the percent of profits that he would have received in eight years. Unfortunately, the court does not discuss the plaintiff's salary at retirement upon which the pension was to be based, so no estimate of the expectation measure of damages can be made.

than awarding an amount equal to the pension.

Professor Corbin suggested a third view on the measure of damages for promissory estoppel. He argued for a flexible rule, allowing the remedy that would be most appropriate under the particular facts of a case, with the full value of performance as an upper limit.[170] The second Restatement can be read to support this view as well as the view that damages should be limited to reliance. Although it is not clear that Corbin so intended, his "flexible" analysis can be explained as meaning that reliance is the general measure but that the expectation measure may be used as an equivalent or surrogate for reliance damages where expectation is more easily determined. This approach is helpful in rationalizing some of the California cases.

First, in some cases reliance loss simply equals expectation loss. For instance, if, in the series of *Fedrick* hypotheticals,[171] the plaintiff had reduced its prime bid by the entire $450,000 by which Borg underbid the second-lowest bidder, *i.e.*, if Fedrick had expected no additional profits because of Borg's bid, then Fedrick's reliance loss would equal its expectation loss. Several California cases dealing with competitive bidding do not discuss any change made in the contractor's prime bid and simply award damages equal to the additional costs to the contractor of having the subcontractor's bid performed.[172] It appears that the courts in these cases were not presented with evidence of additional profits anticipated by the contractor because of a lower subcontract bid; as far as the courts were concerned, these were cases where the lowering of the subcontractor's bid did not result in any increase in expected profits. Therefore, the use of the cover minus contract price formula of damages[173] resulted in a determination of both expectation and reliance measures of damages.

A second line of cases awards expectation damages when the promisee changes position in a manner not lending itself to monetary valuation. In such a case, the court may presume that the value of the promisee's reliance equaled the value expected from the promisor, since expectation is the greatest extent a reasonable promisee would be willing to change position. This is only a surrogate for the promisee's actual reliance which may have been less than full expectation.

An application of this surrogate measure of reliance is seen in *Tomerlin v. Canadian Indemnity Co.*[174] There, the insurer's attorney

170. 1A A. CORBIN, CONTRACTS § 205 (1963).

171. *See* text accompanying notes 137-47 *supra.*

172. Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 977 (2d Dist. 1971); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (1st Dist. 1962). For a non-California case reaching the same result, see Janke Constr. Co. v. Vulcan Material Co., 527 F.2d 772 (7th Cir. 1976).

173. *See* text accompanying note 144 *supra.*

174. 61 Cal. 2d 638, 394 P.2d 571, 39 Cal. Rptr. 731 (1964).

told the insured that the insurer would cover him fully in a lawsuit against him. The insured relied on this statement and withdrew his personal attorney. After a judgment against the insured, the insurer denied liability under the policy. The insured then sued the insurer, and the California Supreme Court affirmed a judgment against the insurer based on promissory estoppel, holding that the insured had detrimentally relied by giving up his opportunity to defend the suit. Since the use of the reliance measure would have imposed on the insured "the impossible burden of proving . . . the precise extent of the loss caused by withdrawal of his attorney,"[175] the court awarded expectation damages—the amount of the judgment against the insured—as the "only remedy appropriate to the instant case . . . ."[176] Other cases appear to have used this surrogate measure where it was difficult to determine the value of the promisee's reliance.[177]

If the use of expectation damages as either an equivalent or a surrogate for reliance was what Corbin meant by his "flexible" rule, then his views were consistent with those of Fuller and Perdue. Even if this was not what Corbin meant, this analysis shows that many California cases appearing to use the expectation measure of damages actually may be using the reliance measure. It can be argued, therefore, that reliance damages are awarded under promissory estoppel in California. This is in contrast to equitable estoppel cases, which use the expectation measure but also limit equitable estoppel to cases of otherwise uncompensable reliance losses.

B. Damages When Detrimental Reliance Sufficient for Promissory Estoppel Establishes Equitable Estoppel

The *Fedrick* court's concern with the possibility of nullifying the Statute of Frauds seems to arise from the practice of awarding full ex-

175. *Id.* at 650, 394 P.2d at 578, 93 Cal. Rptr. at 738.

176. *Id.*

177. These valuation problems have arisen in cases involving an employee's reliance on an employer's promises designed to induce the employee to refuse other job offers. Frebank Co. v. White, 152 Cal. App. 2d 522, 313 P.2d 633 (2d Dist. 1957); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1st Dist. 1948). In these cases, the California courts have tended not to discuss the appropriate measure of damages and have simply awarded lost expectation. While these cases imply the use of expectation damages in promissory estoppel cases, they can also be explained as further examples of expectation being used as a surrogate for indeterminate reliance. In Van Hook v. Southern Cal. Waiters Alliance, 158 Cal. App. 2d 556, 323 P.2d 212 (2d Dist. 1958), a definite employment offer was refused, giving the court a means to determine the value given up because of the present employer's promise. In a number of cases, however, the employee can merely show that he or she did not seek other employment because of the employer's promises. This leaves the court with no way to determine the actual value of the plaintiff's reliance. The court can only hypothesize that the employee would have changed jobs if an offer had exceeded the value of the pension, bonuses, etc. that the current employer promised. Thus, the court's award of the value of those promises can be seen as use of a surrogate for the employee's actual reliance.

pectation damages when equitable estoppel is established.[178] When expectation damages are awarded in an estoppel action, the statute's writing requirements have no effect. This implication of equitable estoppel apparently caused the *Fedrick* court to oppose any expansion of that doctrine.

As has been seen, California courts explicitly reject the ancillary promises limitation on equitable estoppel[179] and probably reject the injury limitation.[180] These conclusions suggest that the California courts do not have the same fears of nullifying the statute that were expressed by the *Fedrick* majority. They also suggest that, in the context of bargained-for contracts, the California courts are willing to apply the expectation measure of damages when equitable estoppel is established. Of course, California courts will limit damages to reliance when equitable estoppel is established in the context of an unbargained-for promise, that is, when promissory estoppel is also being used as a substitute for consideration. There is no reason to give more protection to reliance on unbargained-for promises within the statute than is given to reliance on such promises outside it.

If California courts reject this Comment's conclusion that *Fedrick*'s injury argument is incorrect, then the nullification argument, which lies at the root of both the ancillary promises and the injury arguments,[181] becomes relevant. In that event, changing the measure of damages applied when equitable estoppel is established by reliance sufficient for promissory estoppel obviates the nullification argument. Analysis of this limited rethinking of damages also suggests that the reliance measure of damages should be adopted generally in equitable estoppel cases.

1. Damage Analysis if the Fedrick *Court's Injury Analysis is Accepted*

If the California courts would now hold that more detrimental reliance is required for equitable estoppel than for promissory estoppel, then a later change to the position advocated by this Comment—allowing reliance sufficient for promissory estoppel to establish equitable estoppel—would create new situations in which equitable estoppel could be applied. To the extent that expectation damages were awarded, establishing equitable estoppel in such situations would nullify the Statute of Frauds in situations where it is not currently nulli-

178. *See* text accompanying notes 132-34 *supra.*

179. *See* section III *supra.*

180. *See* section IV *supra.*

181. Courts have feared the expansion of equitable estoppel that would result from abandoning the ancillary promises or injury limitation because they fear such expansion would nullify the statute. *See* text accompanying notes 56-62 *supra.*

fied.[182]

Section 217A of the second Restatement suggests, however, that in these new cases of equitable estoppel, the promisee's damages could be limited to reliance in the contexts of both bargained-for and unbargained-for promises.[183] This suggestion implies that there would be two separate measures of damages when equitable estoppel is established in the context of bargained-for contracts. Expectation damages would be awarded when equitable estoppel is established by the degree of reliance traditionally sufficient for equitable estoppel, and reliance damages would be awarded when equitable estoppel is established by the degree of reliance sufficient for promissory estoppel but not also traditionally sufficient for equitable estoppel. Although such a result would detract from the aesthetic symmetry of equitable estoppel, it would also defuse much of the hostility expressed toward the proposed expansion of equitable estoppel by allowing the expansion without constricting the scope of the Statute of Frauds.

Both the Statute of Frauds and equitable estoppel are designed to prevent injustices. Specifically, the statute is designed to prevent fraudulent testimony.[184] The statute serves principally to exclude proof of oral contracts in certain situations where perjured testimony is considered especially likely to occur (the statute's evidentiary function).[185] Additionally, by refusing to enforce certain oral agreements, the statute attempts to prevent even the possibility of perjury by forcing parties to put those agreements in writing (the statute's channeling function).[186] Equitable estoppel was developed to prevent injustices resulting from use of the statute to injure a promisee who had detrimentally relied on a representation made by a promisor.[187] There is a tension between these two devices for avoiding injustice, and the limitations on equitable estoppel "represent a compromise between complete abrogation of the Statute and strict enforcement of its terms."[188] The purpose of the statute and equitable estoppel conflict because full enforcement of a contract under equitable estoppel prevents the statute from working

182. As noted earlier, the award of expectation damages when equitable estoppel is established in the context of bargained-for contracts means that the statute has no effect and is nullified. *See* text accompanying notes 132-34 *supra*.

183. Paralleling the language of Restatement (Second) section 90, section 217A states that "[t]he remedy granted for breach is to be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 217(A)(1) (Tent. Drafts Nos. 1-7, 1973). As noted earlier, this language can be read to support either the Fuller and Perdue position of always awarding only reliance damages, *see* text accompanying notes 163-65 *supra*, or the Corbin position of a flexible measure of damages, *see* text accompanying note 170 *supra*.

184. *See* text accompanying note 10 *supra*.

185. *See* text accompanying note 9 *supra*.

186. *Id.*

187. *See* text accompanying notes 12-14 *supra*.

188. *Equitable Estoppel in California, supra* note 9, at 594.

through either its evidentiary or channeling functions. If equitable estoppel could protect reliance without impeding these functions of the statute, this conflict could be largely avoided.

If the California courts were now to recognize a distinction between the degree of reliance required for the two estoppels and were later to expand equitable estoppel to allow its proof by detrimental reliance sufficient for promissory estoppel, the balance between estoppel and the statute *could* be altered in such a way that this expansion would not significantly restrict application of the statute. The proposed alteration is the use of the reliance measure of damages. First, reliance damages are by definition sufficient to protect a promisee's reliance interest;[189] therefore, estoppel's goal of preventing injustice is met. Second, as seen by the *Fedrick* hypotheticals, the promisee still will lose the difference between actual reliance and expectation because of the failure to fulfill the writing requirements of the statute.[190] Thus, the promisee still is prevented from proving the existence of any rights under an oral contract to an extent greater than this reliance. The evidentiary function of the statute is nullified only to the extent of the promisee's reliance and would still be served by excluding oral proof of lost expectancy. Fear of losing the difference between detrimental reliance and expectation should continue to encourage parties to reduce their contracts to writing. Establishing equitable estoppel when reliance damages are used therefore does not prevent the operation of the statute's evidentiary and channeling functions.

Although it will later be argued that these same considerations should support the limitation of recovery to reliance in those cases where the equitable estoppel doctrine already applies, such an extensive redefinition of the balance between estoppel and the statute is not required. In those cases of bargained-for contracts where equitable estoppel currently would be found, California courts have been willing to accept nullification of the statute.[191] Thus, if equitable estoppel does not now cover cases of detrimental reliance sufficient for promissory estoppel, then making such an expansion and coupling it with the use of reliance damages in these new situations would increase the number of cases in which equitable estoppel avoids unconscionable injury without unduly restricting the scope of the Statute of Frauds. The statute would only be nullified in cases in which expectation equals reliance[192] or when expectation is used as a surrogate for reliance.[193] The limited

189. *See* note 84 *supra*. California courts have protected a promisee's reliance interest by awarding reliance damages only in promissory estoppel actions. *See* text accompanying notes 163-77 *supra*.

190. *See* text accompanying notes 137-47 *supra*.

191. *See* text accompanying notes 150-53 *supra*.

192. *See* text accompanying notes 171-73 *supra*.

193. *See* text accompanying notes 174-77 *supra*.

nullification of the statute in these cases may be justified by the need to prevent injustice. This approach is supported by recent decisions that have adopted promissory estoppel as a basis for equitable estoppel.[194]

The *Fedrick* court needlessly feared that dropping the injury limitation on equitable estoppel would nullify the Statute of Frauds. First, reliance and not expectation was the correct measure of damages for Fedrick's claim, since this was a classic case of promissory estoppel in the context of a promise not supported by bargained-for consideration.[195] Additionally, it appears that Fedrick was only seeking compensation for reliance damages.[196] Since the award of reliance does not unnecessarily interfere with the functioning of the statute, there should be no fear of nullification. Second, even if *Fedrick* had involved a bargained-for contract (*e.g.*, if Fedrick has paid Borg ten dollars as consideration for its bid), the court could have adopted the section 217A approach and limited damages to reliance since detrimental reliance sufficient for promissory estoppel was being used to establish equitable estoppel. Again, the functioning of the statute would not have been curtailed.

2. Damage Analysis in California: A Proposal

This Comment's conclusion that neither the ancillary promises nor injury limitation on equitable estoppel is applied in California implies that the California courts are willing to limit significantly the scope of the Statute of Frauds in the context of bargained-for promises. The discussion in the last section suggests, however, that this abrogation of the statute is unnecessary. By using the reliance measure of damages in all equitable estoppel cases, the estoppel goal of preventing unconscionable injury could be achieved without unduly hindering the operation of the statute in either its evidentiary or channeling functions. This general overhaul of the damages measure would allow the statute to operate in situations where it is currently nullified by equitable estoppel.[197]

The rationale of Judge Duniway's concurrence in *Fedrick* argues strongly for the adoption of the reliance measure of damages by the California courts. He pointed out that nullifying the statute frustrates legislative policy.[198] That appears to usurp legislative function in light of the California legislature's recent reaffirmation of the statute's poli-

194. McIntosh v. Murphy, 52 Hawaii 29, 36-37, 469 P.2d 177, 181 (1970); Decatur Coop. Ass'n v. Urban, 219 Kan. 171, 178-80, 547 P.2d 323, 329-30 (1976); Texarkana Const. Co. v. Alpine Const. Specialties, Inc., 489 S.W.2d 941, 943-44 (Tex. Civ. App. 1972).

195. *See* text accompanying notes 158-77 *supra*.

196. *See* note 139 *supra*.

197. Equitable estoppel currently nullifies the statute in the context of bargained-for exchanges because courts award expectation damages. *See* text accompanying notes 132-34 *supra*.

198. *See* text accompanying notes 63-69 *supra*.

cies by passing the U.C.C.'s Statute of Frauds provisions.[199] Using reliance damages in all cases of equitable estoppel will expand the impact of the statute in avoiding frauds resulting from perjured oral testimony,[200] while still preventing the injustices sometimes caused by the statute.

CONCLUSION

Prodded by the Restatement (Second) of Contracts, promissory estoppel has become the latest doctrine used for avoiding the Statute of Frauds. This use of the doctrine would allow proof of detrimental reliance sufficient to establish promissory estoppel also to establish equitable estoppel, a traditional tool for avoiding the statute. In *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, the Court of Appeals for the Ninth Circuit rejected this use of promissory estoppel in California. The court's opinion illustrates the major grounds which have been advanced for rejecting this doctrine: that reliance on promises to perform the contract cannot establish equitable estoppel to assert the Statute of Frauds; that equitable estoppel requires a greater degree of detrimental reliance than is required to establish promissory estoppel; and that allowing proof of promissory estoppel to establish equitable estoppel would nullify the Statute of Frauds and thereby thwart legislative policy.

An examination of relevant California precedent reveals that no argument relied on by the Ninth Circuit is persuasive. *Monarco* and other earlier California decisions have established that, in some circumstances, detrimental reliance on promises to perform a contract could establish equitable estoppel.

Additionally, the factual situations in which both estoppel doctrines have been applied reveal a coincidence of the interests protected. These cases suggest that the California courts adhere to the general philosophy of Restatement (Second) of Contracts section 217A, allowing detrimental reliance sufficient for promissory estoppel also to establish equitable estoppel. Contrary to *Fedrick*, the same degree of detrimental reliance establishes both promissory and equitable estoppel in California.

Finally, both the ancillary promises and injury limitations that some courts have placed on equitable estoppel result from a fear that broadening equitable estoppel would nullify the legislative policy embodied in the Statute of Frauds. The California courts' willinguess to reject both of these limitations suggests that they have not had the same

199. With the adoption of the U.C.C., the California legislature explicitly reenacted the statute for sales of personal property for more than $5000, CAL. U. COM. CODE § 1206 (Deering 1970), for sales of goods for more than $500, *id.* § 2201, for sales of securities, *id.* § 8319, and for creation of security interests, *id.* § 9203.

200. This was the statute's primary purpose. *See* text accompanying note 10 *supra.*

fears. There is merit to these fears, however, because the traditional use of expectation damages in equitable estoppel cases prevents the statute from operating in either its evidentiary or channeling function. The use of reliance damages would allow the statute to operate in both these ways. Failure to meet the writing requirements of the statute would prevent a promisee from recovering the amount by which expected benefit exceeded detrimental reliance. This limitation on recovery would reduce the danger of recovery through perjured testimony. The statute's evidentiary function would be nullified only to the extent of the reliance and would still be served by excluding oral proof of lost expectation. Additionally, the possibility of losing the difference between detrimental reliance and expectation would continue to give parties an incentive to put their agreements in writing. Thus, the California courts should adopt the reliance measure of damages in all cases of equitable estoppel. The use of reliance damages would allow the courts to prevent the injustices caused by the statute without usurping legislative policy. The result would be a new balance between the conflicting means by which the Statute of Frauds and estoppel attempt to avoid injustice.

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