1981

Detrimental Reliance on a Promise (Promissory Estoppel) in Oklahoma

Martin Frey

Detrimental Reliance On A Promise (Promissory Estoppel) In Oklahoma

By Martin A. Frey And Joann E. Long

The landscape of the law of contracts is rapidly changing due to the pressures of the doctrine of detrimental reliance. Outdated is the notion that contract formation requires offer, acceptance, and consideration. No longer is an offer irrevocable at the whim of the offeror nor are statements made during preliminary negotiations unenforceable. And the mandate of statutes, such as the Statute of Frauds, has been dramatically eroded.

Historically the source of detrimental reliance in the field of contract law is equitable estoppel—a representation of **fact** made by one party and relied on by the other. The representing party was precluded (estopped) from alleging or proving a fact that would contradict the truth of his or her earlier representation if the other party had taken action in reliance on that representation of fact. Equitable estoppel eventually expanded to include estoppel by silence as well as estoppel by conduct.[1] The elements of equitable estoppel in Oklahoma became:

> (1) a false representation or concealment of facts (the representation or concealment may arise from silence of a party under an imperative duty to speak);
> (2) it must have been made with knowledge, actual or constructive, of the real facts;
> (3) the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts;
> (4) it must have been made with the intention that it should be acted upon (the intention that the representation or concealment be acted upon may be inferred from the circumstances); and
> (5) the party to whom it was made must have relied on or acted upon it to his or her prejudice.[2]

Underpinning the doctrine of equitable estoppel is the equitable principle that a party cannot stand by in violation of his or her duty in equity and good conscience to warn another party of the real facts, and permit the other to take some detrimental action before asserting the real facts.[3]

During the late 1800s, cases began to appear recognizing detrimental reliance as a basis for the enforcement of a promise as well as a representation of fact. Prior to that time a promise without consideration was gratuitous and enforceable only if it was executed. This doctrine of detrimental reliance on a promise, called promissory estoppel,[4] was derived from the same equitable principles as was the earlier equitable estoppel.[5] In equitable estoppel, the injured party detrimentally relies on the represented facts while in promissory estoppel the injured party detrimentally relies on the gratuitous promise.[6]

The early cases recognizing reliance as a basis for the enforcement of a promise were classifiable into four categories: (1) family gift promises (one family member relied on a gift promise made by another family member);[7] (2) oral gift promises to convey land (the promisee relied on the promisor's promise by moving onto the land and making improvements);[8] (3) promises coupled with gratuitous bailments (the bailor relied on a promise by the bailee in connection with a gratuitous bailment);[9] and (4) charitable subscriptions (a charitable institution relied on a promised gift or donation).[10] The elements of promissory estoppel in Oklahoma are:

MARTIN A. FREY,
Professor of Law at the University of Tulsa College of Law, teaches Contracts and Commercial Law. He earned a B.S.M.E. from Northwestern University, a J.D. from Washington University, and a LL.M. from George Washington University's National Law Center. He is a member of the Oklahoma, Missouri and Tulsa County Bar Associations and is a law school inspector for the Accreditation Committee of the ABA.

(1) a promise by the promisor;
(2) the promisor intended that the promisee act upon the promise;
(3) the promisee did act upon the promise without protest or warning from the promisor, resulting in a material detriment to the promisee.[11]

By its very name, the concept of promissory estoppel precludes the promisor from asserting that his or her promise is not binding due to lack of consideration. This results in contract formation **with** consideration. Preclusion, an approach followed by the older promissory estoppel cases, explains the historically narrow application of promissory estoppel. Courts began with the assumption that without consideration contract formation could not take place. By barring a party from asserting the lack of consideration, a court could find that consideration was present, a contract formed, and the promise binding.[12]

From the preclusion approach of promissory estoppel, the reliance doctrine was changed dramatically by the Restatement's technique of positively asserting the promisor's liability. The Restatement of Contracts (1932) avoids the phrase "promissory estoppel," using instead a "promise reasonably inducing action or forbearance," which can be shortened to "detrimental reliance."[13] Under the Restatement the promisor's promise is binding upon any substantial act or reliance by the other party.[14]

With this concept of reliance, no bar to assertion of truth by the promisor is necessary. Instead, the promise affirmatively binds the promisor as a promise without consideration. The Restatement (Second) of Contracts makes clear that the promisor's promise is binding but only to the extent that "justice requires." The Restatement (Second) of Contracts §90, entitled "Promise Reasonably Inducing Action or Forbearance," provides:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[15]

But even with the Restatement's dispensing with the fiction of promissory estoppel (and the conceptual importance of the shift from preclusion to a bold enforcement of the promise), courts often apply Restatement §90 and label it promissory estoppel.[16]

The trend of detrimental reliance (promissory estoppel) cases is not to restrict the doctrine to those classes of cases from which the doctrine originated. Rather the doctrine has expanded to include the enforcement of any promise which meets the requirements of the Restatement §90. This article will focus on the trend of the detrimental reliance cases and where Oklahoma decisions stand in relation to this trend.

PROMISES WITHOUT CONSIDERATION (GIFT PROMISES)

When a promise is bargained-for, courts have been reluctant to invoke reliance. The promisee should accept the promisor's offer rather than

merely rely upon it. The doctrine of detrimental reliance will, however, apply to a promise made without consideration, that is a gift promise.[17] Courts no longer limit detrimental reliance to the four types of gift promises where the doctrine had its inception (family gift promises, oral gift promises to convey land, promises coupled with gratuitous bailments, and charitable subscriptions).

For example, courts have bound parties promising to pay retirement benefits,[18] to preserve an unobstructed view of the scenic countryside,[19] to pay a gratuitous note given solely to strengthen the bank's assets for bank examination purposes,[20] and to release any further obligation under a lease.[21] A leading text writer has even said, "The kinds of promises which are likely to induce reliance may be applied are as varied as human ingenuity."[22]

Oklahoma's treatment of detrimental reliance in gift promise cases is affected by three statutes. Originally enacted in 1910, Oklahoma Statute title 15, section 107, enforces gift promises based on moral obligation without the necessity of discussing detrimental reliance to circumvent the lack of consideration. Traditionally moral obligation could not be consideration for a promise. Section 107 provides the opposite:

> [A] moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.[23]

With moral obligation as consideration, the promise is enforceable without the detrimental reliance doctrine.

For those gift promise cases where the promise was not based on a moral obligation, Oklahoma Statute title 15, section 114 (also dating back to 1910), comes into play. It provides:

> A written instrument is presumptive evidence of a consideration.[24]

This section is implemented by section 115 which allocates the burden of proof as to consideration:

> The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.[25]

Thus for those written gift promises not based on moral obligation, the burden of proof as to consideration is shifted to the party contending a lack of consideration.

The Oklahoma courts' treatment of detrimental reliance in gift promise cases (gift promises not based on moral obligation) has been extremely cautious, even in the four traditional classes of cases where the doctrine had its beginning. We were hard pressed to find a family gift promise case (where one family member relied on a gift promise made by another family member.)[26] The oral gift promise to convey land (where the promisee relies on the promisor's promise by moving onto the land and making improvements) has been handled under a part performance doctrine rather than under detrimental reliance.[27]

In a promise coupled with gratuitous bailment case (where the bailor relied on the promise by the bailee in connection with a gratuitous bailment), the bailor was granted recovery on the basis of negligence rather than reliance.[28] The early charitable subscription cases in Oklahoma (a charitable institution relying on a promised gift or donation) focus on railroads rather than the usual charitable institutions such as churches, schools, and hospitals. In the typical railroad case, a resident of a town promises to pay the railroad a stated amount if the railroad comes through that town.

Although the courts label these promises as gratuitous and enforce them through promissory estoppel, they clearly are promises made for the consideration of directing the railroad through that particular town.[29] We found no church, school, or hospital case resolved on or even discussing detrimental reliance.

Beyond these four traditional classes of cases, Oklahoma courts treat gift promises in a variety of ways. Generally, opinions show an avoidance of the doctrine whenever possible. The court may find consideration for the promisor's promise despite the absence of express consideration in the offer. *Langdon v. Saga Corp.*[30] is an example of the court's straining to find consideration for what should have been a gratuitous promise. Langdon was employed by Saga's predecessor under an oral contract which provided for periodic compensation but which had no fixed term. When Saga merged with the predecessor company, Langdon continued to work. Saga issued its personnel manual which

"Executory gift promises and pre-offer statements may be enforceable under detrimental reliance. . ."

described benefits calculated to induce employees to increase production and to remain with the company. When Saga terminated Langdon without giving him the benefits described in the manual, Langdon sued for breach of contract. Saga responded that no contract existed. The court came dangerously close to detrimental reliance:

> Where an employee at will forgoes options to refuse future performance in reliance or in partial reliance on articulated personnel policies of the employer, the employer is bound by those policies insofar as they have accrued to an employee for performance rendered while they were in effect and have not been excluded or modified by another valid contractual arrangement.[31]

Rather than use this bold new reasoning, the decision instead rested on a strained finding of consideration:

> We thus conceive personnel policies extending benefits as unilateral offers which are accepted by continued performance.[32]

Thus Saga's promise to pay benefits was not a gift promise but was made for a price—the employee s continued performance.

Once a court makes the determination that a promise was not a gift promise but was made for consideration, a discussion of detrimental reliance is unnecessary. But when the court finds that the promise was in fact a gift promise, the court should then be faced with the question of detrimental reliance.

This precise fact situation faced the court in *National Outdoor Advertising Co. v. Kalkhurst.*[33] Kalkhurst was employed by Western on a month-to-month contract. One day Kalkhurst was notified that he was being retired and that he would receive $200 a month for life. He was paid $200 a month for 6 months, $100 a month for the next 6 months, and nothing thereafter. He then sued for breach of contract. The court found the company's promise to be a gift (a promise without consideration) and therefore an absence of contract formation. The court did not discuss whether the gift promise should be enforceable through detrimental reliance.

Even though Kalkhurst would have had trouble proving the elements for detrimental reliance, had the court discussed detrimental reliance, even though holding it inapplicable to the facts of that case, it would have signaled an acceptance of the doctrine in gift promise cases.[34]

Langdon and *Kalkhurst* show the preference of Oklahoma courts to remain on familiar ground by dealing solely with consideration rather than reliance in gratuitous promise type cases. With a wider recognition of the value of detrimental reliance in such situations, courts could achieve the same results by a less strained method or achieve different results, thus avoiding the injustice which sometimes accompanies a finding of no contract.

Another device used by Oklahoma courts when confronted with facts adaptable to detrimental reliance on a promise, is to apply equitable estoppel instead. *McDowell v. Cagle*[35] involved a lessor's assurance that lessee could harvest his alfalfa seed crop after the expiration of the lease in order to realize more profit for both parties. Relying on the lessor's assurance, the lessee had left his crop

unharvested, and the lessor attempted to harvest it himself and retain all the profits.

Rather than treat the case as an oral contract breached by the lessor or a gift promise enforceable under promissory estoppel, the supreme court used the traditional elements of equitable estoppel to preclude the lessor from denying his representation and conduct. In addition to the difference in elements between equitable and promissory estoppel, detrimental reliance on a promise has a much broader scope in application. "The major distinction between equitable and promissory estoppel is that equitable estoppel is available only as a defense, while promissory estoppel can be used as a cause of action for damages."[36]

Even though Oklahoma courts have not ruled on whether promissory estoppel can be a cause of action, confusion between equitable and promissory estoppel could limit the doctrine of detrimental reliance to defensive applications.

THE POWER TO REVOKE AN OFFER PRIOR TO ACCEPTANCE

When an offeror creates the power in the offeree to enter into a contractual relationship (that is, an offer is made), the offeror retains the power to revoke the offer prior to acceptance. If the offer was for a unilateral contract, that is the offeror's promise was made to get the offeree to perform (a promise for a performance), then the offeror could revoke his or her offer at any time prior to full performance. A classical textbook illustration is "The Brooklyn Bridge Hypothetical:"

> Suppose A says to B, "I will give you $100 if you walk across the Brooklyn Bridge" . . . . B starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment A overtakes B and says to him, "I withdraw my offer." Has B then any rights against A? Again, let us suppose that after A has said, "I withdraw my offer," B continues to walk across the Brooklyn Bridge and completes the act of crossing. Under these circumstances, has B any rights against A? . . . .
>
> What A wanted from B, what A asked for, was the act of walking across the bridge. Until that was done, B had not given to A what A had requested. The acceptance of B of A's offer could be nothing but the act of B's part of crossing the bridge. It is elementary that an offeror may withdraw his offer until it has been accepted. It follows logically that A is perfectly within his rights in withdrawing his offer before B has accepted it by walking across the bridge—the act contemplated by the offeror and the offeree as the acceptance of the offer.[37]

The Restatement of Contracts §45 (1932) suggested that the offeree's reliance (beginning performance) should negate the offeror's power to revoke and thus permit the offeree the opportunity to complete performance and accept the offer.[38] The language of the Restatement (Second) of Contracts §45 is even more explicit:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.
>
> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.[39]

The Oklahoma Supreme Court cites with approval the Restatement (First) §45. The case, *Petroleum Research Corp. v. Barnsdall Refining Corp.*, involves a bilateral contract and the discussion of unilateral contract provides the court with an alternative ground for affirming the decision.[40] The Oklahoma courts have yet to cite the Restatement (Second) §45. Since the contract was bilateral, *Petroleum Research* should not have discussed Restatement (First) §45. The fact that the court did discuss reliance upon a promise to enter into a unilateral contract, indicates the court's qualified recognition of the doctrine in this area.

Very few offers are unilateral—a promise inviting a performance as acceptance. Most are bilateral—a promise inviting a promise as acceptance. The Restatements §45 only apply to a unilateral offer and by their language are inapplicable to a bilateral offer. While §90 was designed for the promise without consideration (the gift promise), several cases have extended its application to negate the offeror's power to revoke in a bilateral offer situation. *Drennan v. Star Paving Co.*, a California subcontractor case, was the landmark case.[41]

JOANN E. LONG,
a second year student at the University of Tulsa College of Law, was the Teaching Assistant for the law school's Pre-Admissions Program during the summer of 1980. A University of Oklahoma *summa cum laude* graduate with a B.A. in Political Science, she is a member of Phi Beta Kappa and the Tulsa Law Journal.

Star Paving submitted its bid for the paving subcontract to Drennan, a general contractor, who was preparing its own bid for the school construction contract. Drennan used Star's bid in computing its bid and subsequently Drennan was awarded the general contract. Before Drennan could accept Star's offer for the paving subcontract, Star revoked its offer.

The California Supreme Court used detrimental reliance to negate the subcontractor's power to revoke its offer. First, analogizing to the Restatement (First) §45, the court held that the general contractor's using the sub's bid in preparation of its own bid, an act of detrimental reliance, could create an option promise not to revoke the bilateral offer (promise/promise).

But, in order for the implied promise not to revoke to be binding on the offeror, there must be consideration for this option promise. Again, the court used the general contractor's reliance on the sub's bid with Restatement (First) §90 to bind the promisor—this time by using the more familiar device of detrimental reliance in lieu of consideration. The effect of the *Drennan* reasoning was to create an option contract when an act of reliance on a bilateral offer occurs which meets the requirements of §90.[42]

Not long after the monumental *Drennan* decision, the American Law Institute legitimized the decision by its promulgation of Restatement (Second) §87(2):

> An offer which the offeror should does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.[43]

Nationally courts have adopted the *Drennan* approach to detrimental reliance.[44] Even though Oklahoma has not ruled on this application,[45] the Fifth Circuit Court of Appeals recently ruled favorably in a Texas case, *Montgomery Industries International, Inc. v. Thomas Construction Co.*, a case with facts quite similar to *Drennan*.[46] In this manner the trend continues toward expansion of detrimental reliance on a promise.

THE ENFORCEMENT OF STATEMENTS MADE DURING PRELIMINARY NEGOTIATIONS

An offer can be defined as the offeror's creation of power in the offeree which permits the offeree by his or her voluntary act to create the new relationship called a contract.[47] The components of an offer are the offeror's promise and the consideration for the offeror's promise. To distinguish an offer from preliminary negotiations, the offeror's promise may in turn be defined as an unequivocal assurance that something will or will not be done.[48] Must the promise for promissory estoppel (or detrimental reliance on a promise) be the equivalent of a promise for offer? Several courts have held no. In *Hoffman v. Red Owl Stores, Inc.*,[49] a chain store representative assured a prospective franchise holder that he should sell his bakery, move, buy a small grocery store and then sell it in order to prepare for the forthcoming franchise. Despite the absence of essential terms necessary to form an of-

fer promise, the Wisconsin Supreme Court held that Hoffman could recover on his reliance of the assurances by the Red Owl representative. The language in *Hoffman* is important. It suggests the emergence of a new cause of action; one neither contract nor tort. The label used in *Hoffman* was an "action grounded on promissory estoppel."[50] Since the facts in *Hoffman* are pre-offer and thus pre-contract formation, no cause of action for breach of contract could be maintained without substantial twisting and bending of established doctrine. *Hoffman* is not unique. The Texas Supreme Court in *Wheeler v. White*, a case decided almost simultaneously with *Hoffman*, drew similar conclusions.[51]

Whether this "new cause of action" will be readily accepted by other courts is yet to be seen. The Oklahoma case closest to recognizing an action for pre-offer based on promissory estoppel, was decided ten years before *Hoffman v. Red Owl Stores* and *Wheeler v. White*. In *Buster v. Phillips Petroleum Co.*[52] a number of landowners brought suit to enjoin Phillips, their oil and gas lessee, from disconnecting their gas operated irrigation wells from the company's gas lines. The lessors had drilled the irrigation wells on the assurance by Phillips that Phillips would contract with them for the use of gas if they found water for their pumps.

After the wells were drilled and the pumps connected to the company's gas lines, Phillips and the lessors did not contract and ultimately Phillips notified the lessors that their lines would be disconnected. The Federal District Court for the Western District of Oklahoma granted the lessors' injunction on the basis of promissory estoppel.[53] The Tenth Circuit Court of Appeals affirmed in part and reversed in part.[54] While the Tenth Circuit's opinion is laced with reliance language, the holding is based on an oral contract and not on detrimental reliance in the pre-offer state. Thus whether Oklahoma will extend detrimental reliance to the pre-offer stage is yet to be decided.

THE STATUTE OF FRAUDS

A contract to answer for the duty of another, a contract not to be performed within a year from the date of contract formation, a contract for the sale of an interest in land or for a real estate lease for a period longer than one year, and a contract for the sale of goods $500 or more require a writing to be enforceable.[55] Oral contracts for the sale of real estate have long been enforced through the doctrine of part performance. The acts of part performance required to take the oral contract out of the Statute of Frauds vary widely among states, ranging from a mere showing that the purchase price has been partially tendered, to combinations of complete tender of the purchase price, permanent and valuable improvements made in reliance on the oral contract, and possession of the land exclusive, adverse, and hostile to that of the vendor.[56] Implicit in the doctrine of part performance is the concept of detrimental reliance.

Although an oral contract not to be performed within a year is unenforceable under the Statute of Frauds, the Tenth Circuit Court of Appeals has applied estoppel to circumvent the statute. In *Phillips Petroleum Co. v. Buster*, the court rejected Phillips's Statute of Fraud contention and restrained Phillips from disconnecting the lessors gas operated irrigation well pumps from Phillips's gas lines.[57]

Oklahoma courts have held that an oral agreement to sell real estate is removed from the operation of the Statute of Frauds by possession in good faith along with part payment of the purchase price, or possession in good faith along with valuable and lasting improvements made to the land.[58] The same rule applies to an oral agreement for the lease of land.[59]

Even if the doctrine of part performance is inapplicable, Oklahoma courts have enforced oral agreements concerning real estate if the offeror promises to make a writing as a memorial to the oral contract. *Lacy v. Wozencraft* is illustrative.[60] After the three year written lease had expired, Lacy continued to occupy the premises for one year and during that time the lessor and lessee orally contracted for another three year term and for the contract to be reduced to writing at the convenience of the lessor. The improvements made by the lessee (improvements that suited lessee's particular business) did not entitle the lessee to claim the part performance doctrine due to the lack of permanent value of the improvements. The lessee claimed that the oral lease was enforceable because he had detrimentally relied on the lessor's promise to reduce the oral lease to writing.

> According to defendant's evidence in the instant case, plaintiff [lessor] promised to execute to defendant [lessee] a valid three year lease plaintiff intended that the promise be acted

"The power to revoke an offer prior to acceptance may be negated through detrimental reliance. . ."

upon; the promise was acted upon by defendant without protest or warning from the plaintiff, resulting in material detriment to defendant. These facts bring the case well within the rule stated above.

Our statute provides that one may be estopped to deny a contract affecting real estate where he has received benefits therefrom, sec. 9668, O.S. 1931, 16 Okl. St. Ann. §11, but the statutes do not purport to define all classes of estoppel. Circumstances like those in the instant case are always considered sufficient to work estoppel.[61]

The promise forming the keystone in *Lacy* was the lessor's promise to reduce the oral contract to writing. In effect the lessor promised to supply the writing necessary to take the contract out of the Statute of Frauds, did not supply the writing, and then wanted to claim that the contract was unenforceable due to the Statute of Frauds. This differs from the situation where the lessor does **not** promise to reduce the oral contract to writing. In those cases, the promise to lease must be the promise upon which the lessee relies.[62]

Under the Uniform Commercial Code an oral contract for the sale of goods for the price of $500 or more must be in writing to be enforceable.[63] As an exception to the writing requirement, the Code provides a limited "partial performance" doctrine "with respect to goods for which payment has been made and accepted or which have been received and accepted."[64] In addition to the exceptions provided in the Code, the issue has often been raised whether detrimental reliance can be used to take the case out of the Statute of Frauds. Courts are split.[65] The Restatement (Second) of Contracts §139 supports the use of reliance as a means of avoiding the Statute of Frauds:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.[66]

The Oklahoma Supreme Court was presented the issue of whether detrimental reliance will take an oral contract for the sale of goods for $500 or more out of the Statute of Frauds in *Darrow v. Spencer.*[67] The court held that the use of the doctrine of promissory estoppel would be inappropriate since under the facts the "promissor" was not sure that the parties had reached an agreement. While *Darrow* cannot be viewed as a hardy endorsement of the doctrine, the court did not reject the use of the doctrine if the appropriate case does arise.

ORAL MODIFICATION OF A WRITTEN CONTRACT

As a general rule, a contract may be modified by either a written or oral contract and whether the modification needs to be in writing is determined on whether the contract as modified comes within the Statute of Frauds. If the contract as modified comes within the Statute of Frauds, it must be in writing to be enforceable. If the contract as modified is not within the Statute of Frauds, even though the original contract was, the oral modification is enforceable.[68]

Oklahoma, by statute, limits the methods by which a written contract can be modified:

> A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.[69]

But Oklahoma courts have applied detrimental reliance to move Oklahoma law closer to the general rule. In *Knittel v. Security State Bank*,[70] the Bank orally promised Knittel that he could delay in making the next payment on his promissory note. When Knittel did delay, the Bank considered the note in default and the payments accelerated. The Bank then proceeded to apply money in Knittel's bank account to his note and then sued for the balance of the note.

Under the statute, the Bank's oral modification of the installment date was only executory and thus unenforceable. The Oklahoma Supreme Court, however, refused to apply the statute. The Bank was estopped from requiring literal compliance with the statute since the Bank promised Knittel that it would not consider the late payment a default and Knittel relied on this promise to his detriment.[71]

CONCLUSION

Detrimental reliance on a promise is reshaping the law of contracts. Executory gift promises and pre-offer statements may be enforceable. The power to revoke an offer prior to acceptance may be negated. Oral contracts may be taken out of the Statute of Frauds and written contracts may be modified orally although a statute indicates otherwise. The landmark cases for detrimental reliance have appeared in the major commercial states and have been followed, albeit slowly, by other states.

In Oklahoma, promissory estoppel, and its forerunner equitable estoppel, have long been recognized. The full implementation of detrimental reliance in Oklahoma, however, has been uneven. Detrimental reliance removes an oral modification of a written contract from the Oklahoma statute which prevents such modifications. Detrimental reliance takes certain cases out of the Statute of Frauds. But the Oklahoma courts have not extended detrimental reliance to either the pre-offer promise or the power to revoke.

In the area of gift promises, application of reliance has been spotty and often the courts circumvent reliance by striving to find consideration for the promise. The doctrine, itself, has never been rejected by the Oklahoma courts. At worst, the court has found the doctrine inapplicable to the set of facts in litigation.

From the appellate opinions, it appears that detrimental reliance has not been raised in cases where it might have been. Even in those cases where it has been raised, a clear, precise, presentation of the many facets of the doctrine has been lacking. With current law school casebooks stressing detrimental reliance, pressure will mount to break from the current tendency to decide cases on established contract law and instead push for the frontiers.

---

1. Estoppels are sometimes said to be of three kinds: (1) by deed; (2) by matter of record; (3) by matter *in pais* (conduct). Estoppel by deed and by matter of record are also called legal estoppels, as distinguished from estoppel by matter *in pais*, known as equitable estoppel. "Black's Law Dictionary" (rev. 4th ed. 1968). Estoppel by matter of record is when any matter adjudicated in a court of record is forever precluded by the party from afterwards contesting the same fact in any subsequent suit with his or her adversary. An example of estoppel by deed is when the party executing a bond is precluded from afterwards denying, in any action brought on that instrument, the facts recited in that bond. B. Shipman, "Handbook of Common-Law Pleading" 356 (3d ed. 1923).

"Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything." 3 J. Pomeroy, "A Treatise on Equity Jurisprudence" 180 (5th ed. 1941). D. Dobbs, "Handbook on the Law of Remedies" 42 (1973), poses the following illustration of equitable estoppel:

> X begins building a garage while N, a neighbor, stands by watching. N makes no objection, but when X completes the job, N says politely, "I think you have built the garage on my land." He then orders a survey and finds that it is indeed so. N then sues X in equity to force removal of the offending structure . . . . [N may be] estopped from asserting the true location of the lot line, because his conduct (including silence here) misled X, and that if N is allowed to assert the truth now, this will combine with his earlier inconsistent conduct to cause harm to X.

For Oklahoma cases using equitable estoppel, see *Apex Siding & Roofing Co. v. First Fed. Sav. & Loan Ass'n*, 301 P.2d 352 (Okla. 1956) (statements of fact); *Bowen v. Freeark*, 370 P.2d 546 (Okla. 1962) (silence); *Johnson v. State*, 186 Okla. 80, 96 P.24 313 (1939) (conduct); *Heckman v. Davis*, 56 Okla. 483, 155 P. 1170 (1916) (silence).

2. These elements date back to *Bragdon v. McShea*, 26 Okla. 35, 39, 107 P. 916, 918 (1910). *Bragdon* is then cited by *Flesner v. Cooper*, 62 Okla. 263, 267, 162 P. 1112, 1116 (1917), and *Flesner* in turn is cited by *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940),

the estoppel case most often cited in Oklahoma opinions.

3. *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940).

4. The term first appeared in 1 S. Williston, "The Law of Contracts" §139 (1st ed. 1920), although the doctrine was applied in many states under other names. B. Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 U. Pa. L. Rev. 459, 459 (1950).

For a complete discussion of reliance on a promise, see 1A A. Corbin, "Contracts" §§193-209 (1963); Boyer, "Promissory Estoppel: Principle from Precedents" (pts. 1-2), 50 Mich. L. Rev. 639, 873 (1952); Fuller & Perdue, "The Reliance Interest in Contract Damages" (pts. 1-2), 46 Yale L.J. 52, 373 (1963); Henderson, "Promissory Estoppel and Traditional Contract Doctrine," 78 Yale L.J. 343 (1969).

5. *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940).

6. The distinction between whether a fact or a promise is relied upon is not always observed by the courts. Equitable estoppel precedents are used for promissory estoppel cases with little or no discussion of the differences between the two doctrines. *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940); *Johnson v. State*, 186 Okla. 80, 81, 96 P.2d 313, 315 (1939); *Exchange Nat'l Bank v. Essley*, 173 Okla. 2, 4, 46 P.2d 462, 464 (1935).

7. *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

8. *Greiner v. Greiner*, 131 Kan. 760, 293 P. 759 (1930); *Seavey v. Drake*, 62 N.H. 393 (1882); *Freeman v. Freeman*, 43 N.Y. 34 (1870).

9. *Tomko v. Sharp*, 87 N.J.L. 385, 94 A. 793 (1915); *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923). **See generally** Note, "The Extent of a Gratuitous Bailee's Liability in Contract," 23 Colum. L. Rev. 573 (1923).

10. *Miller v. Western College*, 177 Ill. 280, 52 N.E. 432 (1898); *Allegheny College v. National Chatauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927) (dictum); Annot., 151 A.L.R. 1238 (1944). In *Allegheny College*, the leading charitable subscription case, the court found consideration for the promisor's promise to pay $5,000 to the College. Justice Cardozo, in dictum, recognized the doctrine of promissory estoppel in charitable subscription cases.

11. *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940).

12. **See, e.g.,** *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N.W. 74 (1887); *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898); *Cameron v. Townsend*, 286 Pa. 393, 133 A. 632 (1926).

13. The Restatement of Contracts §90 (1932) states:

> 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.

14. For a discussion of substantial act of reliance, see 1A A. Corbin, "Contracts" §200, at 215-17 (1963).

15. Restatement (Second) of Contracts §90 (1980).

> The principal change from the original Restatement is the recognition of the possibility of partial enforcement . . . . Partly because of that change, the requirement that the action or forbearance have "a definite and substantial character" is deleted; and provision is added for reliance by beneficiaries.

Id. at 220 (Tent. Drafts Nos. 1-7 (1973)).

16. **See, e.g.,** *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959); *East Providence Credit Union v. Geremia*, 103 R.I. 597, 239 A.2d 725 (1968).

The phrase "promissory estoppel" is objectionable. 1A A. Corbin, "Contracts" §204 (1963).

17. In *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 449 P.2d 462, 74 Cal. Rptr. 398 (1969), an employee negotiated with the employer's agent for a new union contract. The employer promised to pay annual merit increases for the employee's promise to work. After the employee worked under the contract, the employer refused to grant merit raises claiming that the agent was not authorized to promise such increases. The court refused to apply detrimental reliance to enforce the employer's agent's promise since the employer's promise to pay the merit increases was bargained-for. *Accord*, James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933); *Strahm v. Board of Trustees of the Benevolent & Protective Order of Elks, Tulsa Lodge 946*, 203 Okla. 635, 225 P.2d 159 (1950).

18. *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959).

19. *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954).

20. *Cedar State Bank v. Olson*, 116 Kan. 320, 226 P. 995 (1924). **See generally** 1A A. Corbin, "Contracts" §197 (1963).

21. *Fried v. Fisher*, 328 Pa. 497, 196 A. 39 (1938).

22. *J. Calamari & J. Perillo*, "The Law of Contracts" 180 (1970).

23. Okla. Stat. tit. 15, §107 (1971). For cases applying section 107, **see** *Old Am. Life. Ins. Co. v. Biggers*, 172 F.2d 495 (10th Cir. 1949); *Kaiser v. Fadem*, 280 P.2d 728 (Okla. 1955); *Dobry v. Dobry Flour Mills*, 270 P.2d 317 (Okla. 1954).

24. Okla. Stat. tit. 15, §114 (1971).

25. Okla. Stat. tit. 15, §115 (1971). For cases applying sections 114 and 115, **see** *Stillwater Industrial Foundation, Inc. v. State* **ex rel.** *Bd. of Regents of Okla. A.&M. Colleges*, 541 P.2d 173 (Okla. 1975); *Earth Prods. Co. v. Oklahoma City*, 441 P.2d 399 (Okla. 1968).

26. *Cordrey v. Cordrey*, 579 P.2d 209 (Okla. Ct. App. 1978) (no discussion of reliance).

27. *Reid v. Reid*, 115 Okla. 58, 241 P. 797 (1925).

28. *Kay County Free Fair Ass'n v. Martin*, 190 Okla. 225, 122 P.2d 393 (1942). In *Kay* the court granted recovery for a valuable tablecloth, left by the plaintiff for exhibition, on the basis of negligence concerning the gratuitous bailment. Since no promise had been given concerning the bailed object, promissory estoppel was inapplicable to the resolution of the case.

29. *Ward v. Missouri, K.&O. Ry.*, 59 Okla. 31, 157 P. 775 (1916); *Cobb v. Wm. Kenefick Co.*, 23 Okla. 440, 100 P. 545 (1909); *Guthrie & W. Ry. v. Rhodes*, 19 Okla. 21, 91 P. 1119 (1907).

The inducement of building a street was also found subject to promissory estoppel as a gratuitous promise. *Nelson v. Longmire*, 169 Okla. 80, 36 P.2d 12 (1934). Whether the construction is of a railroad or a street, the building should have been the consideration for the

promise to pay, thus creating an offer for a unilateral contract which can be accepted by performance—building. **See** *Courtney v. First Nat'l Bank*, 569 P.2d 458 (Okla. 1977) (incomplete inter vivos gift to charitable foundation).

30. 569 P.2d 524 (Okla. Ct. App. 1976).

31. *Id.* at 527.

32. *Id.* at 528; *accord, Dangott v. ASG Industries, Inc.*, 558 P.2d 379 (Okla. 1976) (severance pay).

33. 418 P.2d 661 (Okla. 1966).

34. Although the subject matter—retirement benefits—is the same in *Kalkhurst* as that in *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959), a case enforcing the promise to pay, the reliance in *Feinberg* was substantially different than that in *Kalkhurst*. Feinberg had a choice of when or whether to retire; Kalkhurst had no choice. (Care must be taken in comparing *Feinberg* with *Kalkhurst* since *Feinberg* predated the Restatement (Second) of Contracts §90 and has the element of "substantial act of reliance," an element deleted in the Restatement (Second).)

Exchange Nat'l Bank v. Essley, 173 Okla. 2, 46 P.2d 462 (1935) (no promise upon which to base estoppel).

In *Johnson v. State*, 186 Okla. 80, 96 P.2d 313 (1939), a bastardy action, the defendant's 3 year statute of limitations defense was precluded (estopped) by his promise to support. While his promise was a gift promise, the action was not for breach of contract and the case lends no support to the use of reliance for the enforcement of gift promises as contracts. For another statute of limitations case, see *Empire Gas & Fuel Co. v. Lindersmith*, 131 Okla. 183, 268 P. 218 (1928) (negligence action).

35. 205 Okla. 554, 240 P.2d 783 (1951) (lessor sued to enjoin lessee from interfering with the harvest by lessor). **See also,** *Fipps v. Stidham*, 174 Okla. 473, 50 P.2d 680 (1935).

36. *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 493 P.2d 1220, 1224 (1972).

37. Wormser, "The True Conception of Unilateral Contracts," 26 Yale L.J. 136-37 (1916).

38. Restatement of Contracts §45 (1932) entitled, "Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender," states:

> If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

39. Restatement (Second) of Contracts §45 (1980).

40. 188 Okla. 62, 105 P.2d 1047 (1940).

41. 51 Cal. 2d 409, 333 P.2d 757 (1958).

42. *Drennan* has received extensive discussion. **See, e.g.,** "Promissory Estoppel in California: Subcontractor's Bid Irrevocable as Result of Contractor's Reliance," 47 Calif. L. Rev. 405 (1959); "Subcontractor's Offer for Bilateral Contract Held Irrevocable Because of Contractor's Foreseeable Reliance," 59 Colum. L. Rev. 355 (1959); "Contracts: Promissory Estoppel Applied to a Commercial Transaction in California," 10 Hastings L.J. 435 (1959); "Contractors: Promissory Estoppel," 43 Marq. L. Rev. 384 (1960); "Promissory Estoppel—Reliance on Mistaken Bid of Subcontractor," 26 Mo. L. Rev. 356 (1961); "Application of the Doctrine of Promissory Estoppel to Commercial Transactions," 32 S. Calif. L. Rev. 413 (1959); "Extension of the Doctrine of Promissory Estoppel into Bargained-for Transactions," 20 Sw. L.J. 656 (1966); "The 'Firm Offer' Problem in Construction Bids and the Need for Promissory Estoppel," 10 Wm. & Mary L. Rev. 212 (1968).

43. Restatement (Second) of Contracts §87(2) (1980) (numbered 89B (2) during the tentative draft stage).

44. *Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W. 2d 818 (1964); *C&K Eng'r v. Amber Steel Co.*, 23 Cal. 3d 1, 587 P. 2d 1136, 151 Cal. Rptr. 323 (1978); *Harry Harris, Inc. v. Quality Constr.*, 593 S.W. 2d 872 (Ky. 1979); *E.A. Coronis v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966); *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943); *Ferrer v. Taft Structurals, Inc.*, 587 P.2d 177 (Wash. Ct. App. 1978).

Debron Corp. v. National Homes Constr. Corp., 493 F.2d 352 (8th Cir. 1974), another reluctant subcontractor case, appears to rely on *Drennan* but in fact distorts the doctrine of detrimental reliance. Before trial, Debron voluntarily dismissed its count for breach of contract and submitted its proof solely on the theory of promissory estoppel. *Drennan* is a breach of contract action with reliance merely providing the implied option contract so Drennan could accept Star's offer even though Star attempted to revoke. In *Debron*, the subcontractor made the offer and the prime contractor accepted it before the subcontractor attempted to revoke. The facts present a breach of contract action without regard to detrimental reliance. Unfortunately, the decision was based on promissory estoppel.

45. The closest that Oklahoma has come to detrimental reliance to imply an option contract was in *Western Contracting Corp. v. Sooner Constr. Co.*, 256 F. Supp. 163 (W.D. Okla. 1966). The exact question was never raised because Western and Sooner went through a series of rejection counteroffers rather than for Sooner attempting to accept Western's offer after Western attempts to revoke.

46. 620 F.2d 91 (5th Cir. 1980). The court in *Montgomery Industries* quotes the Restatement (First) §90 but does not mention either the Restatement (Second) §90 or §87(2) (formerly 89B(2)), although both were in tentative draft form dating back to 1965.

47. Corbin, "Offer and Acceptance, and Some of the Resulting Legal Relations," 26 Yale L.J. 169, 181-82 (1917). The Restatement (Second) of Contracts §24 (1980) defines offer as:

> the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

48. The Restatement (Second) of Contracts §2(1) (1980) defines a promise as:

> a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

49. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). For a discussion of *Hoffman*, see "Contracts—Expanded Application of Promissory Estoppel in Restatement of Contracts Section 90," 65 Mich. L. Rev. 351 (1966).

50. *Id.* at_____, 133 N.W.2d at 275.

51. 398 S.W.2d 93 (Tex. 1965).

52. 133 F. Supp. 594 (W.D. Okla. 1955).

53. *Id.* at 601-02. The court's opinion is vague on the exact ground for the holding.

54. *Phillips Petroleum Co. v. Buster*, 241 F.2d 178 (10th Cir.), *cert. denied*, 355 U.S. 816 (1957).

55. Okla. Stat. tit. 15, §136, 12A, §2-201(1) (1971).

56. 2 A. Corbin, "Contracts" §§433-34 (1950).

57. 241 F.2d 178, 184 (10th Cir. 1957). The court did not give blanket approval to estopping the assertion the Statute of Frauds. The court emphasized that "[t]hese were not actions for the enforcement of the oral agreements. They were actions to restrain wrongful discontinuance of the furnishing of gas pursuant to the terms of the agreements." This appears to be a distinction without a difference.

58. *Lacy v. Wozencraft*, 188 Okla. 19, 105 P.2d 781 (1940); *Reid v. Reid*, 115 Okla. 58, 241 P. 797 (1925); *Johnston v. Baldock*, 83 Okla. 285, 201 P. 654 (1921); *Boese v. Childress*, 83 Okla. 60, 200 P. 997 (1921).

59. *Lacy v. Wozencraft*, 188 Okla. 19, 105 P.2d 781 (1940).

60. *Id.*

61. *Id.* at 20, 105 P.2d at 783.

62. *Funk v. Anderson-Rooney Operating Co.*, 423 P.2d 465 (Okla. 1966); *Cauthron v. Goodwin*, 287 P.2d 893 (Okla. 1955).

63. U.C.C. §2-201(1), enacted as Okla. Stat. tit. 12A, §2-201(1) (1971). The writing requirement can be satisfied by a subsection (1) writing or a subsection (2) writing—the written confirmation between merchants.

64. U.C.C. §2-201(3) (c). The Code provides two additional exceptions: §2-201(3) (a) (specially manufactured goods) and §2-201(3) (b) (admissions in court).

65. **Compare** *Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339 (Iowa 1979), **and** *Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065 (10th Cir. 1980), **with** *Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.*, 463 F. Supp. 543 (N.D. Miss. 1978).

66. Restatement (Second) of Contracts §139 (1980).

67. 581 P.2d 1309 (Okla. 1978). In *Fox v. Overton*, 534 P.2d 679 (Okla. 1975), the sellers contended that the buyer had breached an oral contract to buy corporate stock. This contract was required to be in writing to be enforceable. Okla. Stat. tit. 12A, §8-319 (1971). Since the sellers did not plead estoppel at trial, estoppel could not be raised on appeal.

68. This discussion assumes that the pre-existing duty problem has been resolved so the modification is a contract or the modification is enforceable without being a contract. **See** Restatement (Second) of Contracts §§222, 223 (Tent. Draft No. 4, 1968); U.C.C. §2-209(3).

69. Okla. Stat. Ann. tit. 15, §237 (1971).

70. 593 P.2d 92 (Okla. 1979).

71. *Accord, Bowen v. Freeark*, 370 P.2d 546 (Okla. 1962); *Walker Valley Oil & Gas Co. v. Parks & Palmer*, 128 Okla. 286, 262 P. 672 (1928). In *Walker Valley*, the actions by the drilling Company's agent cause the other party's performance to become impossible. The drilling company, when attempting to enforce a payment provision by the other party, was estopped from asserting that the modification be in writing.