

# ***Equity, or the lack thereof, in Michigan Lender Liability Jurisprudence: Crown Technology and the Lender Liability Amendment to the Michigan Statue of Frauds.***

By Aaron Keyes

## **Introduction**

In 1992, the Michigan legislature passed an amendment to Michigan's statute of frauds barring claims by borrowers against financial institutions based on oral agreements.<sup>1</sup> In 2000, in *Crown Technology v. D & N Bank*<sup>2</sup>, the Michigan Court of Appeals held that one of the traditionally recognized equitable exceptions to the statute of frauds, promissory estoppel, did not apply to the lender liability amendment.<sup>3</sup> This decision has left lenders free to breach oral agreements with borrowers at will.

The Court of Appeals' decision in *Crown Technology* contains a number of flaws, including the Court of Appeals' failure to consider Michigan Supreme Court precedent, the Court of Appeals' failure to consider the purposes underlying the estoppel exceptions to the statute of frauds, and the Court of Appeals' blanket and unequivocal statements regarding the legislative intent behind the lender liability amendment to Michigan's statute of frauds.<sup>4</sup> However, it is likely that despite these flaws, the Crown Court's textualist argument would be affirmed by the current Michigan Supreme

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<sup>1</sup>Mich. Com. Laws § 566.132 (2)(3)(2005).

<sup>2</sup>*Crown Tech. Park v. D&N Bank*, F.S.B., 619 N.W.2d 66 (Mich. Ct. App. 2000).

<sup>3</sup>*Id.* at 71-74.

<sup>4</sup>*Id.* at 72.

Court, if the Supreme Court considered the same issues today. Accordingly, to protect borrowers from unsavory lending practices, the Michigan legislature should amend the statute of frauds to include a notice provision regarding the invalidity of oral agreements, an exemption to the lender liability portion of the statute of frauds for personal, family, and household loans, and a codification of the promissory estoppel exception to the statute of frauds.

### **Statement of the Problem**

The Crown Technology Court's holding that the promissory estoppel exception to the statute of frauds does not apply to the lender liability portion of the Michigan statute of frauds leaves borrowers virtually defenseless in the face of unscrupulous lending practices involving oral agreements. This problem can be better illustrated by considering the case of Ken Burkhart. Mr. Burkhart, who made his living raising and trading sheep in Kansas, had done business with Kinsley Bank for a number of years, during which time the bank granted him loans ranging from \$1,000 to \$20,000.<sup>5</sup> During the course of his regular business, Burkhart became interested in purchasing a large number of lambs from the National Farmers Organization ("NFO").<sup>6</sup> To facilitate this purchase, he contacted the president of Kinsley who agreed to loan Burkhart the money necessary to purchase the animals.<sup>7</sup> Following this oral agreement, a representative of the NFO called the bank and verified that the loan had been approved.<sup>8</sup> Burkhart then proceeded to pay the NFO a down-

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<sup>5</sup>National Farmers Organization, Inc. v. Kinsley Bank, 731 F.2d 1464, 1467 (10th Cir. 1984).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

payment of approximately \$18,000 from a check drawn on Kinsley bank.<sup>9</sup> This check cleared, and shortly thereafter, Burkhart began to take delivery of the lambs.<sup>10</sup> To pay for the first truckload of lambs, Burkhart drew another check for \$75,861 from his account at Kinsley Bank.<sup>11</sup> The bank dishonored Burkhart's check, and in a stunning about face, the bank president who had approved the loan informed Burkhart that the bank would not honor his oral commitment to Burkhart.<sup>12</sup> Burkhart was unable to pay the NFO and suffered considerable financial loss as a result.<sup>13</sup> Burkhart then brought suit against the bank and was able to recover the damages he incurred as a result of the bank's breach of its president's oral agreement to him.<sup>14</sup> This common sense result seems just and equitable. However, under the Michigan Court of Appeals' holding in Crown Technology, were this same set of facts to occur in Michigan today, Mr. Burkhart's claims would have been dismissed on a motion for summary disposition, and he would have no recourse. This type of unjust result, and its possible remedies, are the focus of this paper.

## **Background**

The statute of frauds was enacted by parliament in 1677 to protect against perjured

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<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 1466.

testimony.<sup>15</sup> Originally, the statute of frauds applied only to certain contracts which, “by their very nature were thought to mandate the greater reliability afforded by a signed writing.”<sup>16</sup> The types of contracts most often subject to the statute of frauds include contracts for the transfer of interest in real estate, marriage contracts, an agreement by the executor of a will to pay the deceased’s debts, guaranty agreements, and agreements which by their terms can not be performed within one year of their making.<sup>17</sup> Currently, the statute of frauds has been incorporated into the common law of almost every state.<sup>18</sup> Despite its widespread current usage, a rigid application of the statute can lead to injustice, and accordingly, the courts in Michigan and many other jurisdictions have adopted equitable exceptions to the statute of frauds.<sup>19</sup> In the case of Michigan, these equitable doctrines include a partial performance exception to the statute as it relates to real estate contracts, and equitable and promissory estoppel exceptions to the statute’s other provisions.<sup>20</sup>

During the 1980's, an alleged increase in litigation in which borrowers’ sued lending institutions for these institutions’ supposed breach of oral contracts led the banking industry to lobby

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<sup>15</sup>John L. Culhane, Jr., & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779, 1782 (1990) (“article constitutes the report submitted to the Committee on Consumer Financial Services and to the Committee on Commercial Financial Services by the Task Force on Lender Liability Limitation Amendments to State Statutes of Frauds”).

<sup>16</sup>*Id.* at 1782.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 1783; *Opdyke Investment Co. v. Norris Grain Co.*, 320 N.W.2d 836, 840 (Mich. 1982); *Lovely v. Dierkes*, 347 N.W.2d 752, 753 (1984); *McMath v. Ford Motor Co.*, 259 N.W.2d 140, 142 (1977).

for the addition of statute of frauds lender liability provisions.<sup>21</sup> In response, a majority of the states adopted lender liability amendments to protect lending institutions.<sup>22</sup> In Michigan, an amendment to the statute of frauds was introduced in the state House of Representatives in 1992.<sup>23</sup> This bill, which became Public Act 245 of 1992, was unanimously passed in the state house and senate and immediately signed into law by the governor.<sup>24</sup>

The lender liability amendment to the Michigan statute of frauds took effect on January 1, 2003, and is codified as MCL § 566.132 (2)-(3). It states as follows:

(2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

(a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.

(b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

© A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

Financial institution defined.

(3) As used in subsection (2), "financial institution" means a state or national chartered bank, a state or federal chartered savings bank or savings and loan association, a state or federal chartered credit union, a person licensed or registered

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<sup>21</sup>*Id.* at 1779-1780.

<sup>22</sup>Todd C. Pearson, *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, 76 Minn. L. Rev. 295, 296-297 (1991); Daniel R. Fischel, *The Economics of Lender Liability*, 1989 Yale L.J. 131, 131-132.

<sup>23</sup>Journal Of The House Of Representatives Of The State Of Michigan 1992 Regular Session 86<sup>th</sup> Legislature, Volume 2, page 1777; House Legislative Analysis Section, 1992, Bill 5968, page 1.

<sup>24</sup>Journal Of The Senate Of The State Of Michigan 1992 Regular Session, Volume 3, page 2256; Journal Of The House Of Representatives Of The State Of Michigan 1992 Regular Session 86<sup>th</sup> Legislature, Volume 3, pages 2294, 2612.

under the mortgage brokers, lenders, and servicers licensing act, Act No. 173 of the Public Acts of 1987, being sections 445.1651 to 445.1683 of the Michigan Compiled Laws, or Act No. 125 of the Public Acts of 1981, being sections 493.51 to 493.81 of the Michigan Compiled Laws, or an affiliate or subsidiary thereof.<sup>25</sup>

In *Crown Technology*, the Michigan Court of Appeals confronted the issue of whether Michigan's promissory estoppel exception to the statute of frauds applied to the lender liability portion of the statute of frauds.<sup>26</sup> Before discussing the Court of Appeals' holding in *Crown Technology*, a brief overview of Michigan's estoppel exceptions to the statute of frauds is appropriate. Traditionally, promissory estoppel has been used as a defensive legal theory which was invoked to prevent the opposing party from shirking its contractual obligations by, "asserting the absence of a traditional contract requirement...", or by, "asserting a failure of the writing requirement imposed by the statute of frauds."<sup>27</sup> To prove a claim of promissory estoppel, the following elements must be established:

(1) there is a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, (4) in circumstances such that the promise must be enforced if injustice is to be avoided.<sup>28</sup>

Whether or not promissory estoppel should be applied is based on the specific circumstances of a given case, and as an equitable remedy, it is used to correct the injustice which can result from

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<sup>25</sup>Mich. Comp. Laws § 566.132 (2)-(3) (2005).

<sup>26</sup>*Crown Tech. Park v. D&N Bank, F.S.B.*, 619 N.W.2d 66 (Mich. Ct. App. 2000).

<sup>27</sup>Cortlan H. Maddux, *EMPLOYERS BEWARE! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 *Baylor L. Rev.* 197, 198 (1997).

<sup>28</sup>*Martin v. East Lansing School District*, 483 N.W.2d 656, 662 (Mich. Ct. App. 1992); *Dumas v. Auto Club Ins. Ass'n*, 425 N.W.2d 480, 490 (Mich. Ct. App. 1988).

strict adherence to established legal principles and/or doctrines, such as the statute of frauds.<sup>29</sup> In order for the promise at issue to be sufficient to support estoppel, it must be definite and clear.<sup>30</sup> In addition, to assert promissory estoppel as a defense to the statute of frauds, the individual asserting promissory estoppel must have acted to his detriment solely in reliance on the oral agreement at issue.<sup>31</sup> Lastly, “Michigan courts apply the doctrine of promissory estoppel cautiously, and only where the facts are unquestionable and the wrong to be prevented undoubted.”<sup>32</sup>

The equitable estoppel exception to the statute of frauds is intimately linked to the promissory estoppel exception. Equitable estoppel is not a distinct cause of action like promissory estoppel, but instead, a doctrine which may preclude the opposing party from asserting or denying the existence of a given fact.<sup>33</sup> Equitable estoppel can arise where, “(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.”<sup>34</sup> The estoppel exceptions moderate the statute of

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<sup>29</sup>Hebrew Teachers v. Jewish Welfare, 233 N.W.2d 184, 188 (1975).

<sup>30</sup>McMath v. Ford Motor Company, 259 N.W.2d 140, 142 (Mich. Ct. App. 1977).

<sup>31</sup>Wolverine-Pentronix, 205 N.W.2d 504, 506 (Mich. Ct. App. 1973).

<sup>32</sup>Indus. Maxifreight Servs. v. Tenneco Auto. Operating Co., 182 F. Supp. 2d 630, 636 (E.D. Mich. 2002).

<sup>33</sup>Kelly-Stehney & Assocs. v. MacDonald's Indus. Prods., 658 N.W.2d 494, 500 (Mich. Ct. App. 2003).

<sup>34</sup>Lakeside Oakland Dev, L.C. v. H & J Beef Co, 644 N.W.2d 765, 770 (Mich. Ct. App. 2002).

frauds and have helped Michigan Courts avoid injustice for many years. However, in *Crown Technology*, the legitimacy of the equitable exceptions to the Michigan statute of frauds was seriously questioned, and the scope of their application was limited to the pre-amendment statute of frauds.<sup>35</sup>

In *Crown Technology*, the Michigan Court of Appeals applied amended MCL § 566.132 in a way which would have far reaching consequences on lender liability in Michigan.<sup>36</sup> The dispute at issue in *Crown Technology* was between D&N Bank (“D&N”), a lending institution incorporated in Michigan, and *Crown Technology*, a Michigan partnership created in 1985 to construct and operate an office building in Warren, Michigan.<sup>37</sup> In 1987, D&N loaned *Crown Technology* \$720,000 to refinance the Warren office building and secured this loan with a mortgage on the property.<sup>38</sup> The refinancing agreement required that *Crown Technology* make monthly payments until March 19, 1997, at which time all of the unpaid principal and accrued interest on the refinancing loan would become due.<sup>39</sup> In conjunction with the refinancing agreement, the parties executed a promissory note containing a prepayment penalty clause which stated:

The indebtedness evidenced by this note may not be prepaid, in full or in part, prior to March 1, 1997. In the event of acceleration of payment prior to such time, for any reason whatsoever, Maker [*Crown Technology*] shall pay the holder hereof, in addition to the principal balance, accrued interest, penalties and any other amounts due hereunder, additional interest equal to the interest which would have accrued to

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<sup>35</sup>*Crown Tech. Park*, 619 N.W.2d at 70-74.

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 68.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

such date.<sup>40</sup>

After executing the Crown Technology loan, D & N sold ninety percent of the loan to an insurance company; however, D& N continued to service the loan.<sup>41</sup> In December of 1991, D & N became aware that the Warren property's original tenant had vacated the property, although the tenant continued to pay rent to Crown Technology.<sup>42</sup> This situation concerned D & N, and over the next several years, bank officers communicated regularly with Crown Technology's counsel, Mr. Stefani<sup>43</sup>, to determine what steps Crown Technology was taking to find a new tenant, while closely monitoring and evaluating the status of the loan.<sup>44</sup> In April of 1994, Stefani met with Jamie Muter, a commercial loan officer at D & N, and discussed the possibility of leasing the Warren property to a new tenant who required the addition of a 3,000 square foot parking garage to the property.<sup>45</sup> Subsequent to this meeting, Stefani informed Muter that Crown Technology was interested in obtaining a new loan of \$1.4 million dollars with a ten-year fixed interest rate in order to finance the parking garage addition.<sup>46</sup> D & N responded to Crown Technology's request by offering a loan

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<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>Mr. Stefani's first name is not mentioned by the Court of Appeals in Crown.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

in the requested amount with a five-year fixed interest rate.<sup>47</sup> These terms were not acceptable to Crown Technology, and Stefani, “told Muter that Crown Technology was negotiating with other lenders who had agreed to extend a ten-year fixed rate and asked Muter whether ‘there was going to be any problem with [Crown Technology] paying off this loan early.’”<sup>48</sup> Stefani testified that Muter replied to his request in the following manner:

[‘]I checked and there's no prepayment penalty[,] or . . . words to that effect. He definitely [led] me to believe that he had checked--he didn't say who he checked with or what he checked--but he said . . . [‘]I've already checked and there will be no problem with you paying off the loan or there will be no prepayment penalty.[‘]<sup>49</sup>

After learning that D & N would not change the terms of its loan offer, Stefani proceeded to refinance through another lender, and in June of 1994, Stefani contacted Muter and D & N to arrange an early pay off of the loan in September of 1994.<sup>50</sup> Crown Technology’s prepayment request was rejected, and Stefani was informed by Muter that the loan was closed to prepayment until maturity.<sup>51</sup> After several unsuccessful attempts by Stefani to convince D & N to change its position with regard to prepayment, Crown Technology paid D&N a prepayment penalty of \$ 66,378.67.<sup>52</sup>

Crown Technology then brought suit against D & N and was awarded \$39,827.20 with

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<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 68-69.

<sup>49</sup>*Id.* at 69.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 70.

interest on its claims of promissory estoppel and negligence.<sup>53</sup> D & N appealed the trial court's denial of its motions for summary disposition and judgment notwithstanding the verdict, and this appeal was considered by a three judge panel of the Michigan Court of Appeals.<sup>54</sup> D& N's primary claim on appeal was that the trial court erred in failing to dismiss Crown Technology's claims against it based on the lender liability amendment to MCL § 566.132.<sup>55</sup>

Justice Zahra began his majority opinion by acknowledging that in *Lovely v. Dierkes*<sup>56</sup>, the Court of Appeals held that promissory estoppel could bar the application of the statute of frauds in cases where an application of the statute would lead to an inequitable result.<sup>57</sup> Following this acknowledgment, Justice Zahra criticized the *Lovely* Court's conclusion and cited Judge Peterson's dissent:

As noted by Judge Peterson in his dissenting opinion in *Lovely*, supra at 493, [']we start any discussion of the statute of frauds with the posit that its application may result in substantial injustice. Real and honest contracts will not be enforced because of the statute of frauds; honest [people] will lose the benefits of their bargains because they neglected to reduce them to writing.['] Given this premise, the role of the judiciary is to apply the statute of frauds as written, without second-guessing the wisdom of the Legislature.<sup>58</sup>

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<sup>53</sup>*Id.* at 67.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 71.

<sup>56</sup>*Lovely v. Dierkes*, 347 N.W.2d 752 (Mich. Ct. App. 1984).

<sup>57</sup>*Crown Tech. Park*, 619 N.W.2d at 71.

<sup>58</sup>*Id.* at 71 (Citing *Lovely v. Dierkes*, 347 N.W.2d 752 (Mich. Ct. App. 1984)).

Despite this criticism, the majority declined to explicitly overturn *Lovely*, “[n]otwithstanding our serious concerns, we need not determine whether *Lovely* was wrongly decided, because legislative amendments of the statute of frauds enacted in 1992 clearly provide that a viable claim of promissory estoppel cannot be asserted in the present case.”<sup>59</sup> The majority went on to hold that the MCL § 566.132 (2)’s language was unambiguous, and that if a statute’s language was unambiguous, it should be enforced as written.<sup>60</sup> In addition, the majority noted that, in its opinion, it would be illogical for the legislature to add the lender liability provision to the statute of frauds if at the same time, the legislature intended for the traditional promissory estoppel exception to the statute of frauds to remain in effect.<sup>61</sup> The Court concluded that Crown Technology’s promissory estoppel claim should have been disposed of pursuant to D & N’s motion for summary disposition, while the Court also dismissed Crown Technology’s negligence claim due to its determination that the negligence claim was based upon the failure of D & N to abide by its oral promise to Crown Technology.<sup>62</sup>

The effects of *Crown Technology* reach well beyond the Court of Appeals’ conclusion that the promissory estoppel exception may not be applied to the lender liability portion of the statute of frauds. It seems apparent that the analysis and holding of *Crown Technology* not only prohibit an application of the promissory estoppel exception to the statute of frauds to the lender liability portion

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<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 72 (Citing *Kiesel Intercounty Drain Drainage Dist v. Dep't of Natural Resources*, 575 N.W.2d 791 (Mich. Ct. App. 1998)).

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 73-74.

of the statute, but would also prohibit the other equitable exceptions to the statute of frauds from being applied to the lender liability portion of the statute. Moreover, the Crown Court's decision to bar Crown Technology's negligence claim, based on its relation to the oral agreement at issue, essentially precludes any type of claims against lending institutions which have as part of their basis an allegation of an oral promise that was not honored.<sup>63</sup>

### Analysis

#### **In Crown Technology, the Court of Appeals failed to acknowledge Michigan Supreme Court precedent regarding equitable exceptions to the statute of frauds.**

In Crown Technology, the Court of Appeals acknowledged that pursuant to *Lovely v. Dierkes*, a promissory estoppel exception to the statute of frauds does exist in Michigan.<sup>64</sup> After making this acknowledgment, the Crown Court strongly criticized *Lovely*, before concluding that the *Lovely* Court's holding regarding the promissory estoppel exception was not applicable to the lender liability portions of the statute of frauds.<sup>65</sup> The flaws in this argument will be addressed in more detail later in this analysis; however, prior to that discussion, it is necessary to note that at the time Crown Technology was decided, *Lovely* was not the primary authority on the promissory estoppel exception in Michigan. In fact, there existed a more persuasive authority recognizing this exception which the Court of Appeals in Crown Technology failed to acknowledge, namely, the

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<sup>63</sup>*Estate Props., Inc. v. Ann Arbor Commerce Bank, B. Ross Co.*, 2003 Mich .App. LEXIS 1761 (Mich. Ct. App. 2003)(holding that lender liability portion of statute of frauds precluded negligent action).

<sup>64</sup>*Crown Tech. Park*, 619 N.W.2d at 71.

<sup>65</sup>*Id.* at 72-74.

Michigan Supreme Court's decision in *Opdyke Investment Co. v. Norris Grain Co.*<sup>66</sup> Had the Court of Appeals noted the Michigan Supreme Court's stance on promissory estoppel, perhaps it would have been less willing to summarily dismiss the possibility of the promissory estoppel exception to the statute of frauds applying to all of the statute of frauds, including the 1992 lender liability amendments.

In *Opdyke*, the Michigan Supreme Court considered a dispute stemming from an ill-fated attempt to build a hockey arena next to the Pontiac Silverdome.<sup>67</sup> The plaintiff claimed that the defendants breached a valid and enforceable contract to jointly develop the arena on the plaintiff's property when the defendants instead chose to build what is now known as Joe Louis Arena in downtown Detroit.<sup>68</sup> In support of his argument, the plaintiff asserted that the essential terms of the alleged contract were embodied in a letter of intent.<sup>69</sup> However, the trial court granted summary disposition in favor of the defendants based on its conclusion that the letter was at best an unenforceable, "agreement to agree and an insufficient memorandum to satisfy the statute of frauds," while the court also noted that the letter was never accepted by "delivery back."<sup>70</sup> The plaintiff appealed the dismissal of the breach of contract claim, and the Court of Appeals affirmed the trial court.<sup>71</sup>

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<sup>66</sup>*Opdyke Investment Co. v. Norris Grain Co.*, 320 N.W.2d 836 (Mich. 1982).

<sup>67</sup>*Id.* at 837.

<sup>68</sup>*Id.* at 838.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 837.

<sup>71</sup>*Id.*

The Opdyke Court began its analysis by acknowledging that the equitable doctrines of partial performance, equitable estoppel, and promissory estoppel had developed as exceptions to the statute of frauds in order to “to avoid the arbitrary and unjust results required by an overly mechanistic application of the rule.”<sup>72</sup> After determining that the letter at issue was sufficiently specific to satisfy the statute of frauds, the Supreme Court analyzed the promissory estoppel claim and concluded:

In this case, disputed questions of fact exist as to whether a noncontractual promise was made by the defendants and reasonably relied upon by the plaintiff. Since the statute of frauds only applies to certain "contracts", recovery based on a noncontractual promise falls outside the scope of the statute of frauds. The plaintiff's alternate theory of promissory estoppel is sufficiently pleaded and supported to survive the defendants' motion for accelerated judgment based on the statute of frauds.<sup>73</sup>

In *Kelly-Stehney & Associates, Inc. v. MacDonald's Industrial Products Inc.*,<sup>74</sup> a 2003 decision, the Court of Appeals again was forced to address the validity of an equitable exception to the statute of frauds. However, in this case, a portion of the pre-amendment statute of frauds was at issue; the exception to the statute of frauds being considered was equitable estoppel; and the Court of Appeals recognized the Michigan Supreme Court's acknowledgment of the equitable exceptions to the statute of frauds, as opposed to merely criticizing *Lovely v. Dierkes* as the court had done in *Crown Technology*.<sup>75</sup> Tellingly, in *Kelly-Stehney*, the Court of Appeals grudgingly upheld the

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<sup>72</sup>*Id.* at 840.

<sup>73</sup>*Id.* at 842.

<sup>74</sup>*Kelly-Stehney & Assocs. Inc. v. MacDonald's Indust. Prods.*, 658 N.W.2d 494 (Mich. Ct. App. 2003), *Appeal granted by*, *Kelly-Stehney & Assocs. v. MacDonald's Indus. Prods.*, 664 N.W.2d 222 (Mich. 2003), *Vacated and Remanded by*, *Kelly-Stehney & Assocs. v. Macdonald's Indus. Prods., Inc.*, 2004 Mich. LEXIS 735 (Mich. 2004).

<sup>75</sup>*Id.* at 498-99.

validity of the promissory estoppel exception to the statute of frauds.<sup>76</sup> In reaching this conclusion, the Court of Appeals showed considerable deference to the Michigan Supreme Court's holding in *Opdyke*.<sup>77</sup> Had this same level of deference been applied in *Crown Technology*, the Court of Appeals may have reached a different conclusion regarding the application of the promissory estoppel exception to the lender liability provision of the statute of frauds.

The dispute in *Kelly-Stehney* centered around an oral extension and modification of an employment agreement, and as in *Crown Technology*, Justice Zahra delivered the majority opinion.<sup>78</sup> The modification at issue in *Kelly-Stehney* created a reduced sliding scale of commissions for the plaintiff.<sup>79</sup> MacDonald's Industrial's president, Robert McDonald, claimed that Edward Stehney, one of the plaintiff's main shareholders, orally assented to the agreement, and that without the sliding scale agreement, the original employment agreement between the parties would not have been extended.<sup>80</sup> After MacDonald's Industrial terminated the employment agreement in January of 2000, the plaintiff demanded that it be paid for its services in 1999 and 2000 at the rate set out in the original employment agreement.<sup>81</sup> When the defendant refused, the plaintiff brought suit, arguing that the statute of frauds barred the oral extension/modification from being considered.<sup>82</sup> The trial

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<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* at 496.

<sup>79</sup>*Id.* at 496-97.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 497.

<sup>82</sup>*Id.*

court concluded that the statute of frauds did not bar the oral agreement from being considered and granted the defendant's motion for summary disposition based on equitable estoppel.<sup>83</sup>

Writing for the majority, Justice Zahra reluctantly acknowledged that the Michigan Supreme Court recognized the equitable estoppel exception to the statute of frauds.<sup>84</sup> However, Justice Zahra went on to severely criticize the estoppel exception, again citing Justice Peterson's previously mentioned dissent in *Lovely v. Dierkes*, his own opinion in *Crown Technology*, and Justice Scalia's treatise on statutory interpretation for the proposition that any modifications of the statute of frauds should come from the legislative process, not the judiciary.<sup>85</sup> Justice Zahra also questioned the validity of the "absurd results" canon of statutory construction, which he argued was the basis for the Michigan Supreme Court's adoption of the equitable and promissory estoppel exceptions.<sup>86</sup> Despite these criticisms, the Court of Appeals analyzed the defendant's claim that the equitable estoppel exception applied to the oral agreement at issue, and affirmed the trial court's grant of summary disposition for the defendant based on this exception.<sup>87</sup>

Following the Court of Appeals decision, Kelley-Stehney appealed to the Michigan Supreme

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<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 498-99.

<sup>85</sup>*Id.* at 499 (Citing *Lovely v Dierkes*, 132 Mich. App. 485, 493; 347 N.W.2d 752 (Mich. Ct. App. 1984); *Crown Technology Park v. D&N Bank*, 242 Mich. App. 538, 548; 619 N.W.2d 66 (Mich. Ct. App. 2000); *and*, Scalia, *A Matter of Interpretation: Federal Courts and the Law* 14-29 (New Jersey: Princeton University Press 1997).

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 500-504.

Court which agreed to consider the case.<sup>88</sup> Originally, the only issue which was to be considered on appeal was the validity of the equitable estoppel exception to the statute of frauds.<sup>89</sup> The scope of the appeal was widened when the Supreme Court allowed other issues to be introduced; surprisingly, instead of addressing the ongoing validity of the equitable estoppel exception, the Michigan Supreme Court chose to vacate and remand the case for a determination of issues raised subsequent to the initial appeal, issues which were not significantly related to the equitable estoppel exception.<sup>90</sup>

Justice Weaver dissented from this order and strongly criticized the majority's refusal to address the equitable estoppel issue, arguing that the Supreme Court's failure to address the issue of equitable exceptions to the statute of frauds wasted judicial resources and created instability in the law.<sup>91</sup> On remand, the trial court considered the issues raised by the Supreme Court and again held that the defendant was entitled to summary disposition.<sup>92</sup> The trial court's decision was affirmed by the Court of Appeals.<sup>93</sup>

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<sup>88</sup>Kelly-Stehney & Assocs. v. MacDonald's Indus. Prods., 677 N.W.2d 838, 839 (Mich. 2004).

<sup>89</sup>*Id.*

<sup>90</sup> *Id.* at 838-41 (the issues to be considered on remand were (1) whether there was a writing sufficient to satisfy the statute of frauds; (2) whether Quality Products & Concepts Co. v. Nagel Precision, Inc., 666 N.W.2d 251 (Mich. 2003), was pertinent; and (3) whether the language of MCL § 566.136 affected the disposition of the case).

<sup>91</sup>*Id.* at 838-39.

<sup>92</sup> Kelly-Stehney & Assocs. v. Macdonald's Indus. Prods., 2005 Mich. App. LEXIS 264, 2-3(Mich. Ct. App. 2005).

<sup>93</sup>*Id.*

Justice Weaver's dissent from the Michigan Supreme Court's order to vacate and remand in Kelley-Stehney makes it apparent that the estoppel exceptions to the statute of frauds are still alive and well in Michigan, at least as they relate to the pre-amendment portions of the statute of frauds.<sup>94</sup> Although the Court of Appeals acknowledged the Michigan Supreme Court's historic stance on the estoppel exceptions in Kelly-Stehney, the Court of Appeals did not do so in Crown Technology. Apparently, the Crown Court believed that it was not bound by Opdyke, as Opdyke was decided prior to the lender liability amendment to the statute of frauds. However, it should be noted that in Justice Weaver's dissent to the majority order in Kelly-Stehney, no mention was made of an equitable exception to the "pre-amendment" statute of frauds or the "original" statute of frauds; instead, Justice Weaver referred to the equitable exception to the "statute of frauds," which currently includes the lender liability amendment.

By failing to acknowledge Michigan Supreme Court precedent, the Crown Court minimized the role of equitable exceptions to the statute of frauds in Michigan jurisprudence, and reached its conclusion without carefully considering the reasons for the Supreme Court's adoption of said exceptions. Had the majority in Crown more carefully considered the motives underlying the equitable exceptions to the statute of frauds, they would have had to acknowledge that the injustices these exceptions seek to avert may stem just as easily from the post-amendment portions of the statute of frauds as from the pre-amendment portions. At this time, a consideration of the motives underlying the estoppel exceptions to the statute of frauds is appropriate.

**The purpose of the equitable exceptions to the Michigan statute of frauds is to prevent an**

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<sup>94</sup>Kelly-Stehney & Assocs. v. MacDonald's Indus. Prods., 677 N.W.2d 838, 839 (Mich. 2004).

## **unjust and mechanistic application of the statute of frauds in Michigan.**

The statute of frauds has long been a source of contention and scholarly debate, and while the statute is unquestionably entrenched in current U.S. jurisprudence, this has not stopped critics from questioning its wisdom. Professor Corbin has noted that, "even as narrowly interpreted and applied, the statute perpetuates more injustice than it prevents; and its entire repeal has been advocated."<sup>95</sup> The statute of frauds is most readily criticized for the rigid and inequitable results which can easily flow from its strict application. To counteract this problem, the previously mentioned equitable exceptions to the original statute of frauds arose. To wit, in *Opdyke*, the Michigan Supreme Court opined that, "estoppel and promissory estoppel have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the rule."<sup>96</sup> More recently, in *Lakeside Oakland Dev., L.C. v. H & J Beef Co.*,<sup>97</sup> the Court of Appeals noted that, "[t]he statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice."<sup>98</sup> In a more succinct expression of the reasons for the estoppel exception, Eric Mills Holmes states that, "the source of 'estoppel' is the 'good faith' and 'conscience' to promote equity and corrective justice in an individual case."<sup>99</sup> In recognition of the importance of the promissory estoppel exception to the

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<sup>95</sup>2d Corbin on Contracts § 275.

<sup>96</sup>*Opdyke Inv. Co.*, 320 N.W.2d at 840.

<sup>97</sup>*Lakeside Oakland Dev., L.C. v. H & J Beef Co.*, 644 N.W.2d 765 (Mich. Ct. App. 2002).

<sup>98</sup>*Id.* at 770 (Citing *Farah v. Nickola*, 90 N.W.2d 464 (1958)).

<sup>99</sup>Eric Mills Holmes, *Article: Restatement of Promissory Estoppel*, 32 *Willamette L. Rev.* 263, 277-279 (1996).

original statute of frauds, the American Law Institute codified the exception in the Second Restatement of Contracts, published in 1981.<sup>100</sup>

Now that the principles underlying the promissory estoppel exception to the statute of frauds have been examined, it is appropriate to consider whether these same principles would support an extension of estoppel exceptions to the lender liability portions of the Michigan statute of frauds. The key to this consideration is the question of whether or not the lender liability portion of the statute of frauds is any less likely than the original statute of frauds to produce unjust results when applied in a strict or mechanistic fashion. The answer to this question is clear: as illustrated by the hypothetical results of the Burkhardt dispute under Michigan law, noted in the Statement of the Problem section of this paper, the lender liability portion of the statute of frauds can just as easily produce unjust results as the original provisions of the statute of frauds. Accordingly, the arguments which support the estoppel exceptions to the original statute of frauds apply equally to the lender liability portion of the statute of frauds.

In fact, the lender liability portion of Michigan's statute of frauds may create even more opportunities for injustice than the original provisions, because unlike lender liability amendments in other states<sup>101</sup>, Michigan's amendment affects all loans, including personal, household, and family loans. By failing to exempt these type of loans from its statute, Michigan places largely unsophisticated borrowers at the mercy of lenders, and if strictly construed, renders these borrowers

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<sup>100</sup>Restatement (Second) of Contracts § 139 (1981).

<sup>101</sup>See Cal. Civ. Code § 1624 (a)(7) (2005).

virtually no recourse should they suffer harm as a result of an oral agreement with a lender. As previously established, the Court of Appeals considered none of these issues in *Crown Technology*, and instead employed a textualist legal argument supported by a flawed view of the legislative history surrounding the statute.

**The Crown Court’s legislative analysis is one sided and flawed.**

In *Crown Technology*, the Court of Appeals stated that, “it would make absolutely no sense to conclude that the Legislature enacted a new section of the statute of frauds specifically addressing oral agreements by financial institutions but, nevertheless, the Legislature still intended to allow promissory estoppel to exist as a cause of action for those same oral agreements.”<sup>102</sup> A thoughtful consideration of the lender liability amendment’s legislative history casts doubt upon the Court of Appeals’ assertions regarding legislative attitudes towards the estoppel exceptions.

The legislative analysis which was distributed to lawmakers considering House Bill 5968 makes it apparent that the principle motivation behind the bill was to prevent frivolous litigation against lending institutions. The analysis cites a two million dollar settlement, and the threat of law suits stemming from aggressive advertising campaigns in which commercial lending institutions proclaimed the availability of credit.<sup>103</sup> In reference to the type of lawsuits the bill would seek to prevent, the analysis noted, “these cases typically are brought by a business that has experienced a large downturn and is making a last ditch effort to generate income....”<sup>104</sup>

Although the legislative analysis strongly indicates that by adopting the lender liability

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<sup>102</sup>*Crown Tech. Park*, 619 N.W.2d at 72.

<sup>103</sup>House Legislative Analysis Section, 1992, Bill 5968, page 1.

<sup>104</sup>*Id.*

portion of the statute of frauds, the Michigan legislature intended to protect the banking industry from frivolous lawsuits; it would be a mistake to equate the desire to protect lending institutions from frivolous litigation with the intent to leave borrowers totally unprotected from misleading and unethical behavior by lenders. The estoppel exceptions are extraordinary remedies only to be applied in cases where they are necessary to prevent manifest injustice, and therefore, they have little effect on the overall amount of litigation against lending institutions. Accordingly, the Crown Court's conclusion regarding legislative intent is by no means undisputable. Outside of blanket conclusions regarding legislative intent, the Crown Court's primary justification for its decision stems from its textualist analysis of the lender liability amendment.

**Despite the significant flaws in the Crown Court's analysis, were the Michigan Supreme Court to consider the issues raised in Crown today, they would likely affirm the Court of Appeals.**

In Crown Technology, the Court of Appeals was highly critical of the promissory estoppel exception to the statute of frauds; however, the Crown Court reached its conclusion regarding the exception's inapplicability to the lender liability portion of the statute of frauds based on its reading of the text of the lender liability provision. Specifically, the Crown Court stated that the lender liability provision of the statute of frauds bars "an action," and that:

By not specifying what sort of [ 'action[ ' MCL 566.132(2); MSA 26.922(2) prohibits (sic) we read this as an unqualified and broad ban. We also note that the subsections of MCL 566.132(2); MSA 26.922(2) use generic and encompassing terms to describe the types of promises or commitments that the statute of frauds now protects absolutely. This is consistent with interpreting MCL 566.132(2); MSA 26.922(2) to preclude all actions for the enumerated promises and commitments, including actions for promissory estoppel.<sup>105</sup>

It must be conceded that if a strictly textualist approach to statutory analysis is applied the

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<sup>105</sup>Crown Tech. Park, 619 N.W.2d at 72.

Court of Appeals' conclusion regarding the lender liability portion of the statute of frauds, said conclusion would be correct. Nevertheless, it should be noted that in *Opdyke*, the Michigan Supreme Court failed to apply this same type of strict textualist approach to its analysis of the pre-amendment statute of frauds. The language of the pre-amendment statute is nearly as plain and unambiguous as that of the lender liability amendment, and accordingly, had the *Opdyke* Court applied a strict plain meaning approach to the statute of frauds, it would not have recognized the validity of the equitable exceptions. Even so, *Opdyke* was decided in 1982, and the Michigan Supreme Court's judicial ideology and methods of statutory construction have changed significantly since then. In order to determine the ultimate validity of the Court of Appeals' decision in *Crown*, it is necessary to examine the current Michigan Supreme Court's views on statutory construction.

As any law student who has taken a class in Constitutional law is well aware, there is currently an ongoing debate in the world of statutory interpretation between judges and scholars favoring a strict textualist approach to statutory construction and those who apply a more purpose-oriented approach. The current Michigan Supreme Court's stance on this issue is crucial to understanding whether or not the Court of Appeals' decision in *Crown Technology* is in synch with the broader trends regarding statutory interpretation in Michigan. One of the rules of statutory construction at the heart of the textualist versus purposivist debate is the "absurd results doctrine," pursuant to which, "[d]eparture from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question."<sup>106</sup> The absurd results rule of statutory construction provides courts with the flexibility to recognize and apply equitable remedies to prevent gross

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<sup>106</sup>*Salas v. Clements*, 247 N.W.2d 889, 891 (1976).

injustice even when the plain language of a statute might not warrant such an exception. However, despite the Michigan Supreme Court's earlier acceptance of the absurd results doctrine, the Court of Appeals in *Crown* correctly noted that this doctrine has fallen out of favor with the Michigan Supreme Court, which is currently dominated by textualists.<sup>107</sup> Based on the textualist methods of statutory interpretation currently espoused by the Michigan Supreme Court<sup>108</sup>, it is likely that were the current Michigan Supreme Court to consider the issues which the Court of Appeals addressed in *Crown*, the Michigan Supreme Court would reach a similar conclusion. Accordingly, if the rights of borrowers are to be protected in Michigan, they must be protected by the legislature through amendments to the Michigan statute of frauds.

**The Michigan statute of frauds should be amended through the addition of a notice provision regarding the validity of oral agreements, an exemption from the lender liability portion for personal, household, and family loans, and a codification of the promissory estoppel exception to the statute of frauds.**

Given the Michigan Supreme Court's stance on statutory interpretation, defending the rights of borrowers, especially unsophisticated borrowers, is an issue that must be addressed by the Michigan legislature. Different states have employed a number of different approaches to protecting borrowers in their own lender liability amendments to their respective statutes of frauds. Many of these approaches, if adopted by the Michigan legislature, would serve to better protect Michigan residents from unsavory banking practices, while not undermining the purpose of Michigan's lender liability amendment. The three of these approaches recommended by this paper will be addressed

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<sup>107</sup>Kelly-Stehney & Assocs., 658 N.W.2d at 499 (Citing *People v. McIntire*, 599 N.W.2d 102 (1999) ).

<sup>108</sup>*People v. McIntire*, 599 N.W.2d 102 (Mich. 1999)(Michigan Supreme Court discusses its views on statutory interpretation).

in turn.

One simple way in which some states have chosen to protect borrowers from the injustice which may result from lender liability amendments to a given state's statute of frauds is through strict notice requirements.<sup>109</sup> By putting borrowers on notice that oral agreements will not be honored by the courts, notice requirements educate borrowers and help borrowers protect themselves against unsavory practices by members of the banking industry. Kansas, Oregon, and Texas have established these types of notice requirements, and was Michigan to follow their lead, it would surely help to protect at least some borrowers from unsavory practices by commercial lending institutions.<sup>110</sup>

Kansas' notice provision states as follows:

All credit agreements shall contain a clear, conspicuous and printed notice to the debtor that states that the written credit agreement is a final expression of the credit agreement between the creditor and debtor and such written credit agreement may not be contradicted by evidence of any prior oral credit agreement or of a contemporaneous oral credit agreement between the creditor and debtor.<sup>111</sup>

Although Kansas' approach to notice is probably better than no notice requirement at all, it contains flaws which make adopting a similar approach in Michigan undesirable. The Kansas notice provision only specifically alerts borrowers to the invalidity of "prior" or "contemporaneous" notice provisions, and fails to warn borrowers of the invalidity of "future" oral modifications. The lack of warning regarding "future" oral agreements could lead some borrowers to the erroneous conclusion

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<sup>109</sup>*Id.* at 1789.

<sup>110</sup>*Id.*

<sup>111</sup>Kansas. Stat. Ann. § 16-118 (b)(2005).

that future oral modifications are not excluded by the statute of frauds. In addition, Kansas' statute does not include a boilerplate and /or recommended notice clause. To prevent confusion among lending institutions and litigation regarding the validity of different notice clauses, the inclusion of a boiler plate and/or recommended notice provision in the Michigan statute would be appropriate.

Oregon's notice provision solves the two major problems associated with the Kansas statute by avoiding language which could confuse borrowers as to whether future oral agreements with a lending institution would be valid, and by including a suggested notice clause. The statute in its applicable parts states that a lending institution:

shall, not later than the time the loan or extension of credit is initially made, include within the loan or credit document, or within a separate document which identifies the loan or extension of credit, a statement which is underlined or in at least 10-point bold type and which is substantially to the following effect:

[‘]Under Oregon law, most agreements, promises and commitments made by us concerning loans and other credit extensions which are not for personal, family or household purposes or secured solely by the borrower's residence must be in writing, express consideration and be signed by us to be enforceable.[‘]<sup>112</sup>

It should be noted that Oregon's statute of frauds not only includes a notice provision, but it also limits the types of loans covered, exempting loans for personal, household, or family purposes. The purpose and effectiveness of such provisions will be discussed subsequently. At this point, it is sufficient to note that Oregon's notice provision would serve as a useful example to the Michigan legislature, and an amendment to the Michigan statute of frauds modeled after the Oregon notice provision would help to protect borrowers, while in no way leading to an increase in litigation against lending institutions, unless of course, a given lending institution failed to follow the simple

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<sup>112</sup>Or. Rev. Stat. § 41.580 (3)(a).

notice requirement.

While Oregon's statute presents a useful model, the Texas legislature has produced a boilerplate notice clause which is slightly more clear cut, and accordingly, more effective than Oregon's notice clause. The Texas boilerplate provision simply states, "This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties."<sup>113</sup> The language of the Texas statute clearly indicates that "future" oral agreements are invalid, and the boilerplate language in the Texas statute is more straightforward than the language in the Oregon boilerplate provision. The people of Michigan would be well served by the incorporation of a boilerplate notice clause modeled after Texas' clause in any notice provision amendment.

In addition to containing straightforward suggested notice language, the Texas statute of frauds also includes an additional notice requirement to help protect borrowers: "All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such a manner and in places in the institutions so as to fully inform borrowers of the provisions of this section...."<sup>114</sup> This additional notice requirement is useful in that it gives borrowers who might not read through contracts carefully another opportunity to become aware of the effect that a given lender liability amendment may have on their oral agreements. One further notice requirement, which has not yet been codified, but which might prove extremely

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<sup>113</sup>Tex. Bus. & Com. Code § 26.02 (e) (2005).

<sup>114</sup>Tex. Bus. & Com. Code § 26.02 (g) (2005).

advantageous in empowering and informing borrowers, would be a requirement that borrowers must sign and date a form containing the notice clause prior to the financial transaction at issue becoming enforceable by the lender. This would further promote awareness among borrowers and is an option that should be considered.

Adopting a notice provision to the lender liability portion of the Michigan statute of frauds is the very least that the legislature can do to protect borrowers. A provision modeled after that in Texas, with an additional borrower signature requirement, would help to create informed borrowers, who are more cognizant of their rights, or lack thereof. Providing boilerplate language for financial institutions to adopt would prevent litigation challenging the validity of a given lending institution's notice clause, and outside of this type of challenge, a notice requirement would in no way promote additional litigation against lending institutions, unless, as previously mentioned, a lending institution failed to comply with the notice requirements. Although a notice provision standing alone is not enough to provide borrowers with adequate protection, it is surely better than nothing, and would be a simple first step to protecting borrowers from the injustice which can easily result from a strict application of the lender liability portion of the Michigan statute of frauds.

As previously mentioned, Oregon is only one of a number of states which have drafted their lender liability amendments to protect unsophisticated borrowers from being taken advantage of by unsavory lenders. Perhaps the greatest difficulty posed by the Michigan lender liability amendment is its sweeping nature, which affords sophisticated lenders the opportunity to take advantage of everyday people who do not understand the complexities of banking practices and the rigid application of lender liability law in Michigan. Notice requirements are a first step towards educating and protecting borrowers; however, a more direct and effective step would be to exclude

certain types of transactions from Michigan's lender liability amendment.

Oregon's statute has already been cited and examined, but a consideration of California's approach sheds additional light on this issue. Like Oregon, California specifically exempts financial transactions for personal, household, or family purposes from the lender liability portion of its statute of frauds:

A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars (\$ 100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.<sup>115</sup>

If Michigan were to adopt an amendment to its statute of frauds modeled after the exemptions contained in California's and Oregon's statutes, unsophisticated borrowers would be afforded even greater protection. It is hard to imagine that a majority of Michigan legislators intend for Michigan's current lender liability provision to put ordinary people at the mercy of unsavory practices by sophisticated lenders. Moreover, any potential litigation stemming from disputes involving these types of loans would typically involve far less money than disputes stemming from commercial loans, making an exemption for personal, household, and family loans less dangerous to lending institutions' financial well being.

Like Californian and Oregon, Michigan should adopt a notice provision and an exemption provision to exclude personal, family, and/or household loans from the lender liability amendment

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<sup>115</sup>Cal. Civ. Code § 1624 (a)(7) (2005).

to the statute of frauds. However, although these measures would protect the most vulnerable borrowers, they would not protect commercial borrowers in the unique cases where the application of an equitable exception to the statute of frauds would be appropriate. To address these unique and isolated situations, the possibility of codifying statutory exceptions to the statute of frauds must be considered.

To truly protect Michigan borrowers, a codification of the promissory estoppel exception to the statute of frauds similar to that contained in Section 139 of the Second Restatement of Contracts should be considered.<sup>116</sup> Like the Second Restatement of Contracts, Georgia has codified the promissory estoppel doctrine, although not explicitly as an exception to the statute of frauds:

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.<sup>117</sup>

The Georgia codification of promissory estoppel would serve as a useful model for an amendment to the Michigan statute of frauds, although a few changes would be desirable. First, the statute would have to explicitly state that it served as an exception to the statute of frauds. For example, the phrase, “The statute of frauds will not prevent the enforcement of ...” could be inserted at the beginning of the first sentence of the Georgia statute. Second, the last sentence in the Georgia statute should be changed so that the remedy to be granted “would be limited as justice requires,” as opposed to the language in the statute which states that the remedy “may” be limited as justice requires. This change would help to narrow the focus of the statute and assure lending institutions

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<sup>116</sup>Restatement (Second) of Contracts § 139 (1981).

<sup>117</sup>Ga. Code Ann. § 13-3-44 (2004).

and their backers that the promissory estoppel exception would provide a narrow remedy geared specifically towards making a wronged borrower whole, not punishing the financial institution at issue.

The key to this proposed amendment is that it would be narrow in its scope, especially if a notice provision amendment was also passed. As one can imagine, if the type of notice provision suggested in this paper were adopted, it would be extremely rare for a borrower to be considered to have “reasonably” relied upon a lender’s oral promises. Accordingly, the promissory estoppel amendment would only apply in truly egregious cases, and frivolous litigation would be kept to a minimum. However, for the scope of the promissory estoppel amendment to be limited in a such a way, the suggested notice provision should first be adopted, or at very least, adopted at the same time as the proposed promissory estoppel amendment.

### **Conclusion**

A codification of the promissory estoppel exception is by far the most radical of the statutory solutions suggested in this paper, and it would likely be the most controversial. Such an amendment would allow for an increase in litigation against lending institutions, and it is likely that some state legislators, who would support the less radical suggested amendments, might balk at what they viewed as an invitation to litigation. For this reason, there would be a danger in presenting all three amendments in one bill, as the more radical suggestion regarding a codification of the promissory estoppel exception could lead to the rejection of the other less dramatic, but equally important, amendments.

A better approach would be to divide the amendments into separate bills. The notice

provisions suggested in this paper would be the least controversial of the amendments, would provide borrowers with significant protection, and should be proposed first. After passing the notice provision, the exemption provision should be considered, and although it would significantly narrow the scope of the Michigan lender liability portion of the statute of frauds, it would do so to protect unsophisticated borrowers from unsavory lenders. Despite the banking industry's strong lobby, it is reasonable to assume that Michigan legislators would respond favorably to this attempt to protect their everyday constituents. Finally, the proposed promissory estoppel amendment should be brought before the legislature for consideration. By adopting the three proposed amendments, the Michigan legislature would help to protect borrowers, while still honoring the lender liability amendment to the statute of frauds. By balancing the interests of borrowers and lenders in this way, the legislature will be fashioning a system designed to promote equity and justice, whether that means protecting borrowers from unscrupulous lenders or protecting upright lenders from frivolous litigation.