

The Statute of Frauds

By now you know something your non-lawyer friends and family members probably do not: contracts don't generally need to be in writing and courts generally will not refuse to enforce a contract merely because it isn't in a single document—signed, sealed, and delivered. As with so much else in contract law, however, the general rule is not always true. For a set of agreements that conventionally are described as “within” the so-called “statute of frauds,” a contract in writing is important. The failure to reduce a deal to writing isn't always going to make it unenforceable—even if it is “within the statute”—because courts' commitment to this kind of formality is unenthusiastic even when the “statute of frauds” is commanded by a legislature rather than a product of the common law. But it is routine to talk about a “writing requirement” for contracts that are “within the statute.”

Bar examiners will expect you to have memorized which agreements are usually within the statute (but check your local state statutes for variations on these themes)—and there is a well-known mnemonic to keep these classes of contracts in view. The relevant types of contracts spell “MY LEGS:” The M is for contracts in consideration of marriage like premarital agreements; the Y is for contracts that would necessarily take more than a year to perform; the L is for contracts for land; the E is for agreements by executors of wills to take on debts of decedents; the G is for contracts for the sale of goods of \$500 or more; and the S is for suretyship agreements (in which someone acts as a guarantor for another party's debt or obligation). Can you think of what holds these classes of contracts together? Is there one theory of writing here (hinted at by the title of the “statute of frauds”) or perhaps a few?

Even calling the “statute of frauds” a writing “requirement” is a bit misleading. That is because it needs to be pleaded by the party looking for non-enforcement as an affirmative defense. If a party forgets to assert it or admits the oral agreement in open court, a court will deem the requirement waived and the oral contract will be enforced even though it isn't in writing after all. And even when the affirmative defense is asserted, it is unlikely that the court will require the entire contract to be in writing; a memo or note about it, signed by the party against whom enforcement is sought, is usually sufficient.

Have you read *Hamer v. Sidway* yet? There, the contract couldn't have been performed within a year because the nephew was 16 when he promised to behave until he turned 21. When the uncle's executor tried to deny enforcement for the money (and note that if he had promised

to pay the debt, that would have needed to be in writing, too!), why didn't the statute of frauds prevent enforcement? Do you recall?

Courts have found themselves uncomfortable with too aggressively enforcing the statute of frauds. The so-called “part performance exception” works to make enforceable oral contracts within the statute if they have been partially performed. Think of it as good evidence of an admission that the contract exists. The exception finds application routinely in the “land” category. Once a buyer takes possession of land (ostensibly with the seller's notice and permission), the seller cannot invoke the statute of frauds to undo the transaction. *See Hoke v. NeYada*, 387 P.3d 118 (Idaho 2016).

Another way to see courts' ambivalence about being too persnickety about this formal requirement is to focus on the “year” category. Courts will go out of their way to deem a contract performable within a year—even when it is more likely than not that a contract would take longer to complete. The only time a court will trigger the writing requirement is when it is certain that a contract must take over a year, as when a contract calls for a durational term exceeding a year. Courts will even go so far as to assume the possibility of a death to get a contract outside the statute: so, a contract to provision a service for “life” wouldn't come within the statute because the person providing that service could plausibly die within the year and then the contract would have been for less than a year. Consider the following case, which was certified to a Connecticut court from a federal court stuck with trying to figure out the state's law:

C.R. Klewin, Inc. v. Flagship Properties, Inc.

600 A.2d 772 (Supreme Court of Connecticut 1991)

PETERS, Chief Justice:

The sole question before us in this certified appeal is whether the provision of the statute of frauds, General Statutes § 52–550 (a) (5), requiring a writing for an “agreement that is not to be performed within one year from the making thereof,” renders unenforceable an oral contract that fails to specify explicitly the time for performance when performance of that contract within one year of its making is exceedingly unlikely. . . .

The plaintiff, C. R. Klewin, Inc. (Klewin), is a Connecticut based corporation that provides general construction contracting and construction management services. The defendants,

Flagship Properties and DKM Properties (collectively Flagship), are engaged in the business of real estate development. . . .

Flagship became the developer of a major project (ConnTech Project) in Mansfield, near the University of Connecticut's main campus. The master plan for the project included the construction of twenty industrial buildings, a 280 room hotel and convention center, and housing for 592 graduate students and professors. The estimated total cost of the project was \$120 million.

In March, 1986, Flagship representatives held a dinner meeting with Klewin representatives. Flagship was considering whether to engage Klewin to serve as construction manager on the ConnTech Project. During the discussions, Klewin advised that its fee would be 4 percent of the cost of construction plus 4 percent for its overhead and profit. This fee structure was, however, subject to change depending on when different phases of the project were to be constructed. The meeting ended with Flagship's representative shaking hands with Klewin's agent and saying, "You've got the job. We've got a deal." No other specific terms or conditions were conclusively established at trial. The parties publicized the fact that an agreement had been reached and held a press conference, which was videotaped. Additionally, they ceremoniously signed, without filling in any of the blanks, an American Institute of Architects Standard Form of Agreement between Owner and Construction Manager.

Construction began May 4, 1987, on the first phase of the ConnTech Project, called Celeron Square. The parties entered into a written agreement regarding the construction of this one part of the project. Construction was fully completed by the middle of October, 1987. By that time, because Flagship had become dissatisfied with Klewin's work, it began negotiating with other contractors for the job as construction manager on the next stage of the ConnTech Project. In March, 1988, Flagship contracted with another contractor to perform the sitework for Celeron Square II, the next phase of the project.

After having been replaced as construction manager, Klewin filed suit in the United States District Court for the District of Connecticut. . . . Flagship moved for summary judgment, claiming, *inter alia*, that enforcement of the alleged oral contract was barred by the statute of frauds. The district court granted summary judgment, reasoning that . . . the contract "as a matter of law" could not possibly have been performed within one year. In drawing this [] conclusion, the court focused on the sheer scope of the project and Klewin's own admission that the entire project was intended to be constructed in three to ten years.

Klewin appealed to the United States Court of Appeals for the Second Circuit . . . [which] certified [questions] to this court. . .

The Connecticut statute of frauds has its origins in a 1677 English statute entitled “An Act for the prevention of Fraud and Perjuries.” The statute appears to have been enacted in response to developments in the common law arising out of the advent of the writ of assumpsit, which changed the general rule precluding enforcement of oral promises in the King’s courts. Thereafter, perjury and the subornation of perjury became a widespread and serious problem. Furthermore, because juries at that time decided cases on their own personal knowledge of the facts, rather than on the evidence introduced at trial, a requirement, in specified transactions, of “some memorandum or note . . . in writing, and signed by the party to be charged” placed a limitation on the uncontrolled discretion of the jury. Although the British Parliament repealed most provisions of the statute, including the one-year provision, in 1954, the statute nonetheless remains the law virtually everywhere in the United States.

Modern scholarly commentary has found much to criticize about the continued viability of the statute of frauds. The statute has been found wanting because it serves none of its purported functions very well, and because it permits or compels economically wasteful behavior. It is, however, the one-year provision that is at issue in this case that has caused the greatest puzzlement among commentators. As Professor Farnsworth observes,

of all the provisions of the statute, it is the most difficult to rationalize. If the one-year provision is based on the tendency of memory to fail and of evidence to go stale with the passage of time, it is ill-contrived because the one-year period does not run from the making of the contract to the proof of the making, but from the making of the contract to the completion of performance. If an oral contract that cannot be performed within a year is broken the day after its making, the provision applies though the terms of the contract are fresh in the minds of the parties. But if an oral contract that can be performed within a year is broken and suit is not brought until nearly six years (the usual statute of limitations for contract actions) after the breach, the provision does not apply, even though the terms of the contract are no longer fresh in the minds of the parties.

If the one-year provision is an attempt to separate significant contracts of long duration, for which writings should be required, from less significant contracts

of short duration, for which writings are unnecessary, it is equally ill-contrived because the one-year period does not run from the commencement of performance to the completion of performance, but from the making of the contract to the completion of performance. If an oral contract to work for one day, 13 months from now, is broken, the provision applies, even though the duration of performance is only one day. But if an oral contract to work for a year beginning today is broken, the provision does not apply, even though the duration of performance is a full year.

2 E. FARNSWORTH, CONTRACTS (2d Ed. 1990) § 6.4, pp. 110–11.

Historians have had difficulty accounting for the original inclusion of the one-year provision. Some years after the statute's enactment, one English judge stated that "the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." *Smith v. Westall*, 1 Ld. Raym. 316, 317, 91 Eng. Rep. 1106, 1107 (1697). That explanation is, however, unpersuasive, since, as Farnsworth notes, the language of the statute is ill suited to this purpose. One eminent historian suggested that because such contracts are continuing contracts, it might be very difficult to give evidence of their formation, inasmuch as the rules of evidence of that time prohibited testimony by the parties to an action or any person who had an interest in the litigation. That argument, however, proves too much, since it would apply equally to all oral contracts regardless of the duration of their performance. The most extensive recent study of the history of English contract law offers plausible explanations for all of the other provisions, but acknowledges that this one is "curious." A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 612 (1975). More recently, it has been suggested that the provision "may have been intended to prevent oral perjury in actions of assumpsit against customers who had forgotten the details of their purchases." P. Hamburger, *The Conveyancing Purposes of the Statute of Frauds*, 27 AM. J. LEG. HIST. 354, 376 n.85 (1983).

In any case, the one-year provision no longer seems to serve any purpose very well, and today its only remaining effect is arbitrarily to forestall the adjudication of possibly meritorious claims. For this reason, the courts have for many years looked on the provision with disfavor, and have sought constructions that limited its application.

Our case law in Connecticut, like that in other jurisdictions, has taken a narrow view of the one-year provision of the statute of frauds now codified as § 52–550 (a) (5). In *Russell v. Slade*, 12 Conn. 455, 460 (1838), this court held that "it has been repeatedly adjudged, that unless it

appear *from the agreement itself*, that it is *not* to be performed within a year, the statute does not apply. . . . The statute of frauds plainly means an agreement not to be performed within the space of a year, and *expressly* and *specifically* so agreed. A *contingency* is not within it; nor any case that *depends upon contingency*. It does *not* extend to cases where the thing only *may* be performed within the year.”

A few years later, in *Clark v. Pendleton*, 20 Conn. 495, 508 (1850), the statute was held not to apply to a contract that was to be performed following a voyage that both parties expected to take one and one-half years. “It is not alleged in any form, that it was made with reference to, or that its performance was to depend on the termination of a voyage which would necessarily occupy that time. It is only alleged, that it was expected by the parties, that the defendant would be absent for the period of eighteen months. But this expectation, which was only an opinion or belief of the parties, and the mental result of their private thoughts, *constituted no part of the agreement itself*; nor was it connected with it, so as to explain or give a construction to it, although it naturally would, and probably did, form one of the motives which induced them to make the agreement. . . . [The court then cited several more contemporary examples, reinforcing the same point. —Eds.]

In light of this unbroken line of authority, the legislature’s decision repeatedly to reenact the provision in language virtually identical to that of the 1677 statute suggests legislative approval of the restrictive interpretation that this court has given to the one-year provision. . . .

Bearing this history in mind, we turn to the questions certified to us by the federal court. [The] issue can be framed as follows: in the exclusion from the statute of frauds of all contracts except those “whose performance cannot possibly be completed within a year,” what meaning should be attributed to the word “possibly”? One construction of “possibly” would encompass only contracts whose completion within a year would be inconsistent with the express terms of the contract. An alternate construction would include as well contracts such as the one involved in this case, in which, while no time period is expressly specified, it is (as the district court found) realistically impossible for performance to be completed within a year. We now hold that the former and not the latter is the correct interpretation. “It is the law of this state, as it is elsewhere, that a contract is not within this clause of the statute unless *its terms are so drawn* that it cannot by any possibility be performed fully within one year.” *Burkle v. Superflow Mfg. Co.*

Flagship contends, to the contrary, that the possibility to which this court referred in *Burke* must be a reasonable possibility rather than a theoretical possibility. It is true that in *Burke* this court rejected the argument that “since all the members of a partnership [that was a party to the contract] may possibly die within a year, the contract is not within the statute.” We noted that “[n]o case has come to our attention where the rule that the possibility of death within a year removes a contract from the statute has been extended to apply to the possibility of the death of more than one individual.” *Id.* In *Burke*, however, we merely refused to extend further yet another of the rules by which the effect of the provision has been limited. *Burke* did not purport to change the well-established rule of narrow construction of the underlying one-year provision.

Most other jurisdictions follow a similar rule requiring an express contractual provision specifying that performance will extend for more than one year. Only “[a] few jurisdictions, contrary to the great weight of authority . . . hold that the intention of the parties may put their oral agreement within the operation of the Statute.” 3 S. WILLISTON, CONTRACTS (3d Ed. W. Jaeger 1960) § 495, pp. 584–85. In “the leading case on this section of the Statute,” the Supreme Court of the United States undertook an extensive survey of the case law up to that time and concluded that “[i]t . . . appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, *as shown by the terms of the contract*, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year. The several States of the Union, in reenacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England.” *Warner v. Texas & Pacific R. Co.*, 164 U.S. 418, 422–23 (1896). . . .

Notes and Questions

1. Were you surprised to learn that a contract of such magnitude was not reduced to writing? Do you think it was strategic of Flagship? If you were Flagship’s lawyers, what would your ethical obligations be in terms of contract formation and contract litigation, since Flagship did, after all, have evidence of the deal videotaped? Should a videotape count as a “writing” in today’s day and age?

2. What did you make of the court's argument (which was similar to the Supreme Court argument it quotes from Warner, a case from 1896) that the legislature chose to enact a very limited one-year rule for the purposes of the statute of frauds because the state "reenacted" the statute with limiting judicial constructions? How much of this opinion read like statutory interpretation of the legislature's intent?
3. The Convention on the International Sale of Goods—like the jurisdiction which first passed the statute of frauds in Parliament in 1677—has disbanded with any writing requirements. *See* Article 11 ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."). So why does the United States stick with it, all while undermining it through the common law? Do you think we should get rid of it? For the year provision only or for all contracts? Or, rather, should all contracts be in writing?
4. As you might imagine, "the law" had to figure out whether electronic signatures would count for the purposes of the statute of frauds. Congress did not just leave this for common law development; instead it passed the Electronic Signatures in Global and National Commerce Act—known as E-Sign. Section 7 of that law declares that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form" and that if "a law requires a record to be in writing, an electronic record satisfies the law." Although in 1999 the Uniform Law Commission (which also wrote the UCC) promulgated the Uniform Electronic Transaction Act (UETA) to accomplish the same basic purpose—and many states adopted it—Congress still passed e-Sign as a backstop if a state failed to pass UETA. Why did it get involved this way but never passed something similar to the UCC as a "backstop"?

The UCC did not do away with the statute of frauds. It codified a version of it (sticking with the \$500 number even to this day!) in § 2-201:

U.C.C. § 2-201. Formal Requirements; Statute of Frauds.

- (1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has

- been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
- (2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
 - (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable
 - (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or
 - (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or
 - (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

Keep this section in mind as you read the following case:

ConAgra, Inc. v. Nierenberg

7 P.3d 369 (Supreme Court of Montana 2000)

NELSON, Justice:

This matter concerns whether an enforceable oral contract bound the respective parties to the purchase and sale of 12,500 bushels of wheat in the spring of 1996. It is undisputed that the

Nierenbergs, who operate a wheat farm near Shelby, Montana, were never bound by a written contract bearing one of their signatures. ConAgra, which operates a grain elevator in Shelby and regularly buys and sells grain, brought suit claiming that the oral agreement between the two parties entitled it to recover \$14,125 in expectation damages after the Nierenbergs failed to sell their wheat as promised.

A critical factor in this dispute is the fact that during that spring the price of wheat was steadily rising on a daily basis by as much as 20 cents per bushel.

Following a non-jury trial on September 25, 1998, the District Court entered judgment for the Nierenbergs, on December 10, 1998. The court, in its Findings of Fact and Conclusions of Law, determined that ConAgra had failed to sufficiently establish that an enforceable oral agreement existed between the parties, and thus the Nierenbergs prevailed on their statute of frauds defense.

The origins of this dispute can be traced to a phone call placed by Dennis Nierenberg (hereinafter Dennis), on April 9, 1996, which was a Tuesday. On that day, Dennis, acting for himself and his father, Ralph Nierenberg, discussed the sale of the Nierenbergs' number-one, dark northern spring wheat with Marcus Raba (Raba), who at the time managed ConAgra's Shelby, Montana, grain elevator.

According to ConAgra's version of the conversation, the parties agreed that 12,500 bushels of wheat would be sold by the Nierenbergs and purchased by ConAgra for \$5.01 a bushel. At that time, Raba filled out a customary order sheet memorializing the terms discussed during the phone call. ConAgra contends that such an oral agreement by phone is routine, as a matter of its own course of dealing with the Nierenbergs and other area farmers, as well as within the trade of grain purchase and sales by other area grain elevators.

Dennis, on the other hand, maintains that he was doing nothing more than checking the market price that day, and that it was understood that unless he signed a contract no enforceable agreement was reached. He alleges that he has never consummated a grain sale with ConAgra without first signing a written contract. It is undisputed that he requested that a written contract be prepared for his signature, and that Raba followed this instruction. In dispute is whether Dennis requested that the contract be mailed to his residence (which he contends), or whether he stated that he would stop by the elevator at some later time and sign the contract (which ConAgra contends).

Following the phone call, Raba instructed Eve Jacobson (Jacobson), another ConAgra employee, to prepare what ConAgra characterizes as a written “confirmation” contract based on the order sheet. ConAgra asserts that “Marcus signed it and held it for Dennis to come in and sign.” According to ConAgra, when Dennis failed to show up at the elevator and sign the contract within the next few days, Raba “sent the original contract he signed to Dennis’s Shelby address on April 17,” which was the following Wednesday.

It is undisputed that Dennis received the confirmation contract on April 19, 1996, a Friday, and that this contract expressly provided the terms discussed on April 9, 1996: 12,500 bushels of wheat at \$5.01 per bushel. . . . [T]he confirmation form provided no printed signature line for the seller, Dennis. Instead, a handwritten line was drawn in above the printed signature line, where Raba had signed. Raba would explain at trial that whether a farmer actually signs and returns such a confirmation contract is a formality that has no bearing on the formation of such an agreement; rather, the farmer’s receipt confirms the existing oral agreement. He asserted that such oral contracts account for more than 90 percent of ConAgra’s grain purchases.

After receiving the confirmation contract that day, a Friday, Dennis stopped by the elevator, and discussed lowering the quantity to 10,000 bushels. Dennis maintains that this request resulted from his concern, as well as his father’s, that he did not have 12,500 bushels of wheat, which had been stored on their farm since the 1995 harvest. Raba, in turn, explained to Dennis that, essentially, it was too late, that the grain in the Nierenbergs’ bins already belonged to ConAgra, that it is common for ConAgra to turn around and sell the grain to another buyer immediately after making such an oral agreement, and that Dennis would be financially liable for any shortages under the contract, which required that the 12,500 bushels be delivered by May 31, 1996. The District Court would find that ConAgra had in fact resold the grain shortly after April 9, 1996.

Dennis did not assert, at this time, that a contract had not been formed between the parties. The confirmation contract provided that it “will be enforceable in accordance with the exact terms unless you promptly notify us in writing with any objections.” Apparently, he and Raba instead discussed the possibility of filling the 12,500-bushel requirement out of the Nierenbergs’ 1996 harvest. The parties did not reach an agreement on this. Dennis indicated that he would measure the grain in the Nierenbergs’ bins—which he apparently had not done that spring—and also indicated that he would seek a legal clarification concerning the contract confirmation he had received that day. He would later testify that he was unable to reach the

grain bins that day due to muddy road conditions. He apparently had no similar difficulty in reaching an attorney.

Dennis returned later that day, after 4 p.m., and discussed selling 600 bushels in his daughter's name with Jacobson (Raba had already left for the day). The per-bushel price at that time was \$5.60. Dennis instructed Jacobson to mail the contract to his residence. Dennis would later explain that this transaction—which he did not honor, either, and would be found liable for subject to his stipulation at a partial summary judgment hearing—was for the sole purpose of testing how long it would take ConAgra to mail him the contract. The confirmation arrived at his residence a few days later, apparently on the following Monday, according to deposition and trial testimony.

The Nierenbergs ultimately sold the 12,500 bushels to another grain elevator, Harvest States, for \$5.85 per bushel the following Tuesday, April 23, 1996. Believing that he had no obligation to sell wheat to ConAgra—based on the advice of counsel—Dennis did not notify Raba or any other ConAgra agent of his sale to Harvest States. Raba called him some time later, apparently in early or mid-May. Again, Dennis did not indicate that he did not believe he was obligated to perform under an oral agreement. Instead, Dennis “put him off” by telling Raba that he would deliver the wheat “one of these days.”

After independently learning of the Nierenbergs' sale to Harvest States, ConAgra, in a May 24, 1996 letter, advised the Nierenbergs that it would assert its contractual rights, and demand payment of the difference between the contract price (\$5.01 per bushel), and the current market price (\$6.14 per bushel) it had incurred in purchasing other grain to fulfill its sale obligations pursuant to its purchase of the Nierenbergs' wheat. Thus, ConAgra pursued this matter in order to recoup the \$1.13 per-bushel price on 12,500 bushels for a total of \$14,125.

In their Answer, the Nierenbergs denied that the parties entered into a contract, and asserted, as an affirmative defense, the signed-writing requirement under the statute of frauds, pursuant to the Uniform Commercial Code governing sales under [§ 2-201]. Thus, any alleged oral contract between the parties was unenforceable, because the sale of goods price [was \$500 or more], and it is undisputed that Dennis never signed a contract.

In a March 19, 1998 order granting partial summary judgment, the court determined that Dennis Nierenberg was a “merchant” as a matter of law. The court based its determination

on the fact that Dennis had been selling grain crops since 1986 and was familiar with the prices of grain through periodic visits to local grain elevators. . . .

This determination was relevant to ConAgra's claim that an exception to the Uniform Commercial Code's statute of frauds governing sales exists for a "merchant" who provides written confirmation to another "merchant" within a "reasonable time," and thus exempts the sales transaction from the signed-writing requirement. ConAgra contends that Dennis's receipt of the confirmation contract on April 19, 1996—ten days after the phone discussion—was within a reasonable time, and pursuant to the statutory exception Dennis never objected to the confirmation within 10 days.

Following the trial on September 25, 1998, the District Court concluded that Dennis Nierenberg never "admitted" in his pleadings or testimony that a contract for the sale and purchase of his grain was made with ConAgra. This conclusion pertains to another statutory exception to the signed-writing requirement under the statute of frauds asserted by ConAgra. The court concluded that such a judicial admission must be unambiguous, and Dennis's testimony did not include an unambiguous admission to all the necessary elements of a contract under the circumstances.

Next, the court concluded that, although both parties were merchants, the confirmation received within 10 days by Dennis on April 19, 1996, was not within a reasonable time. This conclusion was reached in light of the "upwardly changing price at the time" of the phone conversation between ConAgra and Dennis. "Considering the fluctuation in price occurring at the time Dennis Nierenberg and Plaintiff had their telephone conversation, and considering that Plaintiff simply had to forward to Dennis Nierenberg a copy of the already prepared memorandum to satisfy [§ 2-201(2)]," the court concluded that ConAgra did not give Dennis Nierenberg written confirmation within a reasonable time. . . . ConAgra appealed. . . .

This case presents a request for a straightforward, legal determination as to the respective rights of the parties as buyers and sellers of grain in Montana under a number of issues. . . .

First, we disagree with the Nierenbergs that the dispositive issue in this case is "whether or not the parties made an oral agreement." Rather, more precisely, the dispositive issue is whether the parties formed an *enforceable* oral agreement. [§ 2-201(1)] provides as follows:

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

(Emphasis added). The Nierenbergs asserted a statute of frauds affirmative defense pursuant to the foregoing. . . .

The U.C.C. statute of frauds, however, provides alternatives, or exceptions, to the signed writing requirement of [§ 2-201(1)] which effectively prevent a party from asserting the affirmative defense. Under [§ 2-201(3)(b)], for example, if a party admits that an oral contract for sale was made by way of his pleadings, testimony, or “otherwise in court,” then he can no longer assert a statute of frauds defense. Alternatively, under [§ 2-201(2)] if both parties are “merchants,” one party may send written confirmation of an oral contract to the other which, if received within a “reasonable time,” provides that the receiving party has 10 days to object in writing. Should the receiving party subsequently fail to object as required, he too can no longer assert a statute of frauds defense. *See* § 2-201, Official Comment 3 (stating that “failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1)”).

In light of the fact that much of the foregoing turns on the question of formation, it is imperative to our discussion that we recognize that the U.C.C. rules governing sales agreements are far more permissive in this respect than the general common law rules governing contract formation. . . . The only term that a sales contract must include, generally, is quantity. *See* § 2-201, Official Comment 1 (stating that the “only term which must appear in writing is the quantity term”). . . .

As the foregoing indicates, the parties obviously reached accord on the quantity of the grain, namely 12,500 bushels, as well as the price at \$5.01 per bushel, sufficient for a U.C.C. sales contract to be formed. . . .

Did the District Court err by concluding that the Nierenbergs did not receive written confirmation of the sale and purchase of their grain within a reasonable time?

In relying on a 1976 Utah court decision, the District Court concluded that a written confirmation sent by ConAgra following the April 9, 1996 telephone discussion at issue was not received by Dennis Nierenberg within a “reasonable time,” and therefore could not bar the Nierenbergs’ statute of frauds defense. The court determined that receipt of the confirmation in this instance within 10 days was unreasonable.

The court’s conclusion under this issue was premised on the court’s earlier determination that Dennis Nierenberg was a “merchant” as defined under [§ 2-104]. Although farmers are not merchants as a matter of law in Montana, whether Dennis is a merchant was not cross-appealed by the Nierenbergs, and is therefore not at issue.

[§ 2-201(2)] states:

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

The foregoing “merchant” exception to [§ 2-201(1)]’s writing requirement is one born from the coupling of custom and efficiency in the market place. Wheat, for example, must pass through numerous sales transactions on its journey from field to bakery, a process that simply does not permit the time-consuming enterprise of carefully drafted and executed written agreements stating all material terms. In theory, it is essential to the wheat farmer merchant, as well as to the merchant-buyer, that prices can be contractually fixed orally, by phone, given the constraints of both time and physical proximity. Subsection (2) assumes, therefore, that no written contract is necessary between two seasoned merchants because they prefer to transact business via a telephonic handshake. The “merchant exception” simply facilitates this desirable method of conducting business by encouraging the sending of writings to confirm oral contracts. Accordingly . . . the determination of what constitutes a “reasonable time” under any given specific set of facts “depends on the nature, purpose and circumstances of such action.” This determination is a question of fact that must be resolved in the light of the circumstances surrounding the particular transaction.

As a preliminary matter, we observe that the District Court found and concluded that had Dennis accepted the confirmation “document,” he would have been bound to its terms, indicating that the confirmation contract was enforceable once signed. The court concluded, therefore, that if the confirmation was received within a reasonable time, “the writing necessary to comply with [§ 2-201(1)] is present.” Further, the court, in issuing partial summary judgment in favor of ConAgra, concluded that Dennis generally sold grain “pursuant to an initial oral agreement, memorializing such agreement in a written contract signed when he received payment for the grain sold.”

We conclude that, in view of the substantial evidence as a whole . . . the court correctly reached its determinations in this regard. We also observe that, under U.C.C. § 2–201, Official Comment 3, “failure to answer a written confirmation of a contract within ten days of receipt is tantamount to a writing under subsection (2) and is sufficient against both parties under subsection (1).” Here, it is undisputed that Dennis never objected in writing to the written confirmation he received within 10 days. Further, Dennis has not once objected to any of the terms found within the signed confirmation contract. Quantity, price, time of delivery, date of formation all accord with Dennis’s recollection of his discussion with Raba. . . .

Without the protection of the statute of frauds, the Nierenbergs, pursuant to the District Court’s findings and conclusions, are contractually bound. Thus, we conclude that the confirmation contract, if received within a reasonable time, is sufficient to indicate that a contract for sale was made. . . .

Due to the case-by-case analysis required under this issue, we cannot establish a bright line rule for what is a reasonable time as between a merchant-farmer and merchant-buyer of grain. Nevertheless, we hold that it makes little sense to shorten what is “reasonable” under these circumstances to a term shorter than that offered the recipient, which is precisely what the District Court achieved in determining that 10 days was unreasonable. . . .

In light of this holding, we observe that the current system employed by ConAgra to buy grain by phone, and then recover expectancy damages should a grain farmer fail to honor an oral contract, encourages rather discourages a breach in circumstances not all that different than those described by the parties herein. And such a breach is not necessarily a *bad* thing; to the contrary, courts as well as scholars have for more than two decades heralded such an “efficient breach” as an essential free-market tool that maximizes net economic gain.

This Court has often stated that each party to a contract has a justified expectation that the other will act in a reasonable manner and not outside of “accepted commercial practices” in not only its performance of a contract but in its “efficient breach” as well.

Under the foregoing rationale, and slightly altering the facts here for the purpose of illustration, Dennis Nierenberg would have been justified, and in fact should be commended, if in fact he chose to dishonor a contract with ConAgra, where grain prices were moving steadily upward. In other words, if he had breached his \$5.01 contract when the market reached \$5.60 on the day he received the confirmation, April 19, 1996—which would have fixed ConAgra’s expectancy damages at fifty-nine cents per bushel—and then proceeded with his sale to Harvest States at \$5.85 per bushel on April 23, 1996, he would have increased his net-per-bushel sale price by fifteen cents, or by \$1,875.

Accordingly, Dennis could have simply paid ConAgra its cover costs and then realized his gain. ConAgra would have been compensated for its contract damages, and no legal recourse would have been necessary by either party. Such conduct should be expected of a party that has legally attained the status of “merchant,” an issue that is—needless to say—not before this Court as this time. Contrary to the District Court’s underlying reasoning, . . . “playing the market” is precisely what both parties in this instance do—and are *supposed* to do—so long as they play within the rules.

Unfortunately, Dennis Nierenberg chose to simply not honor his contractual obligation without notifying ConAgra of his true intentions. His mistake, therefore, was to not give ConAgra prompt notice of his breach so that his obligation for expectancy damages would be fixed; i.e., he acted outside of “accepted commercial practices.” It is apparent that Dennis established his dubious position on the advice of legal counsel—meaning, had he received advice to the contrary, he may have indeed chosen a much different course of action. The testimonial record shows that after receiving this advice—at the latest, on the same day he sold the grain to Harvest States—he gave his obligation to ConAgra not a second thought, and that he was in fact deceptive about his sale to Harvest States when Raba called some time in May to determine when the grain would be delivered. Such a breach cannot, and should not, be excused or encouraged under any theory, due to the nature of the market place in which the Nierenbergs have chosen to make their living.

In this instance, the “Confirmation of Grain Purchase Contract,” which the District Court determined would have contractually bound the Nierenbergs had Dennis accepted it, expressly

provided that “unless you promptly notify us in writing with any objections” the confirmation would become enforceable. Thus, as a “merchant,” Dennis simply failed to follow the ordinary course of business practices employed by the market in which he sold grain. . . .

Accordingly, the conclusion by the District Court that the agreement between the Nierenbergs and ConAgra cannot be enforced is reversed and this matter is remanded for further proceedings consistent with this opinion.

Notes and Questions

1. What is the status of the Official Comments to the UCC? How relevant are they to the court?
2. What if a contract is within the UCC but at issue is the “year” provision of the statute of frauds? Does § 2–201 exclude the application of any other statute of frauds category in case within the UCC? What is the alternative?
3. Is the embrace of the efficient breach idea in this decision sensible? Might it lead to a less solidaristic marketplace the more courts embrace it? Might it implicate the ability of moral agents to make ethically good decisions? *See generally* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).
4. Which party seemed like it had more power in this transaction? Should that matter?
5. Did you catch the way § 2–201 codifies a “part performance” exception?
6. Should a thumbs-up emoji count as a signature for the purposes of the UCC? When? For a case in Canada that had to consider how to treat that emoji, see *South West Terminal Ltd. v. Achter Land & Cattle Ltd.*, 2023 SKKB 116 (King’s Bench for Saskatchewan 2023 06 08), *available at* <https://www.canlii.org/en/sk/skbb/doc/2023/2023skkb116/2023skkb116.html>.
7. Are you convinced that the Nierenbergs knew that this was how ConAgra did business? Are you convinced the delay in getting the confirmation to the Nierenbergs was within a reasonable time? What is really the rule to derive from these factual issues on which the case seems to turn? Should an appellate court be able to revisit a trial court on these seemingly factual issues?

Can the principle of promissory estoppel enforce oral promises which are unenforceable under the statutes of frauds? For example, if the *Klein* court had found the oral contract within the statute of frauds, would it be appropriate to award the plaintiff a remedy for having relied on what it took in good faith to be enforceable? The Restatement and some courts support this position.

Restatement (Second) of Contracts § 139: Enforcement by Virtue of Action in Reliance

- (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.
- (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
 - a. the availability and adequacy of other remedies, particularly cancellation and restitution;
 - b. the definite and substantial character of the action or forbearance in relation to the remedy sought;
 - c. the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
 - d. the reasonableness of the action or forbearance;
 - e. the extent to which the action or forbearance was foreseeable by the promisor.

Many courts, however, reject this broad rule. As you read the next case, consider the reasons behind their hesitance.

Stearns v. Emery-Waterhouse Co.

596 A.2d 72 (Maine Supreme Judicial Court 1991)

ROBERTS, Justice.

Emery–Waterhouse Co. appeals from a judgment of the Superior Court (Cumberland County, Lipez, J.) awarding damages to Timothy B. Stearns for breach of an oral contract to employ Stearns for a definite term greater than one year. The court held Emery–Waterhouse estopped to assert its defense under the statute of frauds, 33 M.R.S.A. § 51(5)(1988), by the extent of Stearns’s detrimental reliance on the oral contract. Because Stearns did not produce clear and convincing evidence of fraud on the part of his employer, we hold that enforcement of the oral contract was barred by the statute of frauds. Accordingly, we vacate the judgment.

Emery–Waterhouse is a Portland hardware wholesaler that also franchises “Trustworthy” hardware stores throughout the Northeast and owns several such stores. In December, 1984 the Employer’s president, Charles Hildreth, met with Timothy Stearns in Massachusetts to discuss hiring him to run the Employer’s retail stores. Stearns was managing a Sears–Roebuck & Company store in Massachusetts, had done retail marketing for Sears for twenty seven years, and was then fifty years old. He was earning approximately \$99,000 per year, owned his home in Massachusetts, and also owned property in Maine. Stearns had some dissatisfactions with Sears but was concerned about retaining his Sears job security and was aware that his age would make it hard to find another marketing job. After the initial meeting Stearns came to Maine, inspected some stores, and met with Hildreth in Portland. The substance of this second meeting was disputed, but the jury found that Hildreth gave Stearns an oral contract of employment to age fifty five at a guaranteed salary of \$85,000 per year. This contract was never reduced to writing.

Stearns resigned from Sears, moved to Maine, and became Emery–Waterhouse’s director of retail sales. His employer retained Stearns in this position at \$85,000 for nearly two years. In December, 1986 Hildreth advised Stearns that he was being removed, but Stearns was given a different job as the national accounts manager the next day. Stearns remained in this new position at an annual salary of \$68,000 for six months. Hildreth then succeeded in his efforts to acquire a national marketing firm, eliminated Stearns’s position as a result, and terminated his employment before he reached age fifty-five. Stearns eventually filed a complaint in the Superior Court for breach of contract. The court denied summary judgment based on the possibility that the employer might be estopped to assert its defense under the statute of frauds

by Stearns's detrimental reliance. At trial the court held that such an estoppel applied. The jury established the oral contract and breach by special findings and the court assigned damages in equity pursuant to Restatement (Second) of Contracts § 139. Following the denial of its post trial motions Emery–Waterhouse brought this appeal.

The appeal presents a question of first impression in Maine: whether an employee may avoid the statute of frauds based solely upon his detrimental reliance on an employer's oral promise of continued employment.¹ Other jurisdictions have divided on this question. Some have permitted avoidance based on theories of promissory estoppel, *McIntosh v. Murphy*, 52 Haw. 29, 112, 469 P.2d 177, 181 (1970), equitable estoppel, *Pursell v. Wolverine–Pentronix, Inc.*, 44 Mich. App. 416, 205 N.W.2d 504, 506 (1973), or part performance, *Stevens v. Good Samaritan Hosp. and Medical Center*, 264 Or. 200, 504 P.2d 749, 752 (1972). Others have rejected such an avoidance as contrary to the policy of the statute, *Tanenbaum v. Biscayne Osteopathic Hosp.*, 173 So.2d 492, 495 (Fla. 1965), or as unsupported by sufficient evidence to verify the oral promise, *Hudson v. Venture Industries, Inc.*, 243 Ga. 116, 252 S.E.2d 606, 608 (1979). Stearns contends that our case law permits him to avoid the statute of frauds under the promissory estoppel theory of section 139 of the Restatement (Second) of Contracts. We disagree.

In *Chapman v. Bomann*, 381 A.2d 1123 (Me. 1978), we adopted promissory estoppel as a substitute for consideration, Restatement (Second) of Contracts § 90, but did not decide whether it would permit a direct avoidance of the statute of frauds. *Id.* § 139. Chapman involved an oral promise to make a writing satisfying the statute of frauds that was ancillary to a contract for the sale of land. We considered whether this ancillary promise could be enforced under the equitable principle that the statute of frauds may not itself become an instrument of fraud. Focusing on the conduct of the defendant, we concluded that an actual, subjective intention to deceive can estop the operation of the statute. In addition, an oral, ancillary promise may be enforced if the circumstances show objectively that “a fraud, or a substantial injustice tantamount to a fraud” would result from strict application of the statute. *Chapman*, 381 A.2d at 1123. Thus, although we invoked the rubric of promissory estoppel, our decision in *Chapman* actually applied an equitable estoppel and extended it only to an ancillary promise to make a writing. *See* 381 A.2d at 1130 n. 6.

¹ It is undisputed that the oral contract with Stearns, if any, was for a period longer than one year and therefore was within the statute of frauds.

We affirm that equitable estoppel, based upon a promisor's fraudulent conduct, can avoid application of the statute of frauds and that this principle applies to a fraudulent promise of employment. But we decline Stearn's invitation to accept *promissory* estoppel as permitting avoidance of the statute in employment contracts that require longer than one year to perform. Although section 139 of the Restatement may promote justice in other situations, in the employment context it contravenes the policy of the Statute to prevent fraud. It is too easy for a disgruntled former employee to allege reliance on a promise, but difficult factually to distinguish such reliance from the ordinary preparations that attend any new employment. Thus, such pre-employment actions of reliance do not properly serve the evidentiary function of the writing required by the statute. An employee who establishes an employer's fraudulent conduct by clear and convincing evidence may recover damages for deceit, *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 189 (Me.1990), or may avoid the statute of frauds and recover under an oral contract. The policy of the statute commands, however, that the focus remain upon the employer's conduct rather than upon the employee's reliance.

For similar reasons we reject the part performance doctrine as an avenue for avoidance of the statute of frauds in the employment context. We have recognized in other circumstances that a promisor's acceptance of partial performance may estop a defense under the statute on the ground of equitable fraud. *Northeast Inv. Co. v. Leisure Living Communities, Inc.*, 351 A.2d 845, 855 (Me. 1976); *McGuire v. Murray*, 107 Me. 108, 115, 77 A. 692 (1910). Under this doctrine, too, our focus has been upon the conduct of the promisor. Moreover, an employee's preparations to begin a new assignment generally convey no direct benefit to an employer so it is particularly inappropriate to remove from an employer the protections of the statute. An employee can recover for services actually performed in quantum meruit. But to enforce a multi-year employment contract an employee must produce a writing that satisfies the statute of frauds or must prove fraud on the part of the employer.

Stearns has neither alleged nor proved fraud on the part of Emery–Waterhouse. Stearns does not dispute that he was adequately compensated for the time that he actually worked. We conclude that his action for breach of contract is barred by the statute of frauds. Our holding renders it unnecessary to address the employer's other contentions on appeal.

The entry is:

Judgment vacated.

Notes and Questions

1. Make sure you understand the court's rationale for rejecting Restatement (Second) of Contracts § 139 and its emphasis on the evidentiary function of the statute of frauds in the context of employment relationships. Do you agree with that reasoning? Do similar concerns arise in other contexts (for example, in *Klevin* or *Con-Agra*)? Does the partial performance rule (which the *Stearns* court also rejects) raise similar concerns?
2. The other common justification for the statute of frauds is cautionary, meaning that it warns the promisors of the significant obligation they are about to undertake. Does Restatement (Second) of Contracts § 139 address that concern?
3. How should a court who adopts the Restatement's position distinguish between those cases where injustice can be avoided only by enforcement of the promises and those cases where it might be unjust to enforce the promise? Does *Stearns* raise potential injustice from finding the promise enforceable?
4. As you saw in *Stearns*, the applicability of promissory estoppel to enforce oral contracts within the statute of frauds is controversial. However, as the *Stearns* court also noted, the promisee in those cases might have other causes of action, for example, under tort law or unjust enrichment. Similarly, Restatement (Second) of Contracts § 375 makes clear that unless a statute precludes recovery of restitution when a contract is unenforceable because of the statute of frauds, a plaintiff may always seek that remedy. See *Accord Montanaro Brothers Builders, Inc. v. Snow*, 460 A.2d 1297 (Ct. 1983) (emphasizing that restitution is "independent" of contract).