

3074 ESTOPPEL: LAW NOTE FOR TRIAL JUDGES

The Committee withdrew the instruction Wis JI-Civil 3074, ESTOPPEL, and replaced it with this law note. The withdrawal is based on the Committee's determination that either of the two doctrines of estoppel recognized in Wisconsin can be best applied by the court on the basis of special fact inquiries to the jury without the necessity of specific instructions bearing on all of the elements of estoppel. Instructing on the ultimate issue of estoppel is tantamount to telling the jury what the result of the lawsuit will be. The Committee believes instructions on estoppel should be tailored to the specific facts of each individual case. Whether an estoppel results from established facts is a question for determination by the court.

There may be many situations where only one element is in dispute, such as whether a representation was made or whether a promise was made or whether there was reliance. So long as the instructions are otherwise proper and sufficient, it is immaterial that the plea of estoppel as such is not submitted under the designation of estoppel for consideration by the jury.

EQUITABLE ESTOPPEL - ESTOPPEL IN PAIS

The doctrine of equitable estoppel in pais has long been recognized in Wisconsin. An estoppel arises where a person is prevented from asserting or denying a fact because of prior conduct by which a contrary position has been admitted or implied. Such conduct may consist of action or nonaction and includes representations or silence where there is a duty to speak or respond. To apply, it is necessary that the action or nonaction of one induce another to rely thereon, to his or her detriment. The burden of proof, the middle civil burden, is upon the person asserting the estoppel.

PROMISSORY ESTOPPEL

The doctrine of promissory estoppel was first recognized in Wisconsin in Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1964). It is distinguished from equitable estoppel by the fact that it arises from an express or implied promise rather than out of action or nonaction by the other party. Promissory estoppel arises where there is a promise, express or implied, even though made without valuable exchange, if it was intended to be relied upon and if it was in fact relied upon by the other party. In addition to a promise, express or implied, it is necessary that the promisor should reasonably expect reliance by

another which, in fact, does induce action or forbearance by the other. The burden of proof in cases of promissory estoppel is the same as in equitable estoppel.

Traditionally, the word "estoppel" is used to describe a doctrine upon which a party to a lawsuit may defend and prevent a recovery, but the doctrine of promissory estoppel provides a ground for a cause for action upon which a recovery may be made. Thus, the doctrine of promissory estoppel offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action.

COMMENT

This law note and comment were approved by the Committee in 1985. Case authority was added to the comment in 2006, 2009, 2016, and 2018.

Equitable estoppel or estoppel in pais defined: Bade v. Badger Mut. Ins. Co., 31 Wis.2d 38, 46, 142 N.W.2d 218 (1966); Bratt v. Peterson, 31 Wis.2d 447, 454, 143 N.W.2d 538 (1966); Wendy M. v. Helen E.K., 2010 WI App 90 ¶ 13, 327 Wis.2d 749, 787 N.W.2d 848.

Silence: Dunn v. Pertzsch Const., Inc., 38 Wis.2d 433, 437, 157 N.W.2d 652 (1968). 28 Am.Jur.2d Estoppel and Waiver § 53 (1966); Gabriel v. Gabriel 57 Wis.2d 424, 429, 204 N.W.2d 494 (1973); 28 Am.Jur.2d Estoppel and Waiver §§ 76, 77, 78 (1966).

"Equitable estoppel" and "estoppel in pais" are terms that are interchangeable. 28 Am.Jur.2d Estoppel and Waiver §§ 26, 27, 29 (1966).

Defense of equitable estoppel is not limited to actions brought in equity, and equitable estoppel may apply to preclude assertion of rights and liabilities under a note or contract. Gabriel v. Gabriel, *supra*.

There is a close relationship between the doctrines of equitable estoppel and part performance. See Bunbury v. Krauss, 41 Wis.2d 522, 164 N.W.2d 473 (1969).

In Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis.2d 596, 901 N.W.2d 797, the court of appeals concluded that it was not error to apply equitable estoppel to bar a defense based on the statute of limitations for contracts.

Promissory estoppel defined: Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1984); Janke Const. Co., Inc. v. Balcan Materials Co., 527 F.2d 772 (1976); Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408. Gruen Industries, Inc. v. Biller, 608 F.2d 274 (1979); Landess v. Borden, Inc., 667 F.2d 628 (1981).

Promissory estoppel as grounds for a cause of action (a sword as distinguished from a shield): Hoffman v. Red Owl Stores Inc., *supra* at 696.

Promissory estoppel involves a third requirement: that the remedy can only be invoked where necessary to avoid injustice. This third element involves a policy decision for the court and not for the jury. Hoffman v. Red Owl Stores, Inc., *supra*.

Implied promise: see Silberman v. Roethe, 64 Wis.2d 131, 218 N.W.2d 723 (1973).

Burden of proof: see Eckstein v. Northwestern Mut. Life Ins. Co., 226 Wis. 60, 275 N.W. 916 (1937).

Facts for the jury - estoppel for the court: see Nesbitt v. Erie Coach Co., 416 Penn. 89, 204 Atl.2d 473 (1964); General Elec. Co. v. N.K. Ovalle, Inc., 335 Penn. 439, 6 Atl.2d 835, 838 (1939). See also Skebba v. Kasch, 2006 WI App 232, 297 Wis.2d 401, 724 N.W.2d 408; Kramer v. Alpine Valley Resort, Inc., 108 Wis.2d 417, 321 N.W.2d 293 (1982).

Instructions proper without designating estoppel: see Darst v. Fort Dodge D.M. & S.R.R., 194 Iowa 1145, 191 N.W. 288 (1922); Miller v. Conn, 193 Iowa 458, 186 N.W. 902 (1922). Wisconsin in accord, Foellmi v. Smith, 15 Wis.2d 274, 112 N.W.2d 712 (1961).

Form of verdict for promissory estoppel: see Hoffman v. Red Owl Stores, Inc., *supra*.

For the award by the court of reliance damages or expectation damages: see Skebba, *supra*, and Tynan v. JBVBB, LLC, 2007 WI App 265, 306 Wis.2d 522, 743 N.W.2d 730.