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PROMISSORY ESTOPPEL AND THIRD PARTIES

by

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PERHAPS the most significant development in twentieth century contract law is a phenomenon that Professor Charles Knapp has aptly termed "the proliferation of promissory estoppel."[1] After its first authoritative formulation in section 90 of the original Restatement of Contracts,[2] promissory estoppel's reliance principle eventually spread throughout the law of contract.[3] In recent years, moreover, the doctrine has shown definite signs of leaving its host and becoming an independent theory of recovery or cause of action in its own right.[4] Over roughly the same period, third parties[5] who have relied on the promisor's promise have begun to use promissory estoppel.

This Article concerns this last application of promissory estoppel, its extension to third parties.[6] A background discussion begins with a sketch of

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1. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981). As Knapp notes, promissory estoppel "has become perhaps the most radical and expansive development of this century in the law of promissory liability." *Id.* at 53.

2. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT OF CONTRACTS § 90 (1932).

3. *See, e.g.*, Knapp, *supra* note 1, at 55-79 (discussing promissory estoppel's proliferation throughout the RESTATEMENT (SECOND) OF CONTRACTS (1981)). *See generally infra* notes 8-99 and accompanying text.

4. *See* Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983); *see also infra* notes 44-77 and accompanying text.

5. As used here, the term "third party" simply means any recipient of the promisor's promise other than the promisee.

6. This Article concerns *third-party* reliance and the *third party's* ability to make a promissory estoppel claim against the promisor. The discussion omits situations where the third-party beneficiary of a promise attempts to use the *promisee's* reliance to enforce the promise.

promissory estoppel's twentieth century evolution. The Article then considers the present state of the law regarding reliance-based promissory liability to third parties.[7] The analysis principally concerns this body of law's implications for the claim that promissory estoppel is becoming an independent theory of recovery. The Article concludes by briefly considering the benefits and pitfalls of aggressively using promissory estoppel to protect relying third parties. A major theme of this last section is the need for limits on this potentially quite expansive form of promissory liability.

I. THE ONWARD MARCH OF PROMISSORY ESTOPPEL

A. From the Nineteenth Century to the First Restatement

Although authorities frequently have said that the promisee's reliance was critical to the earlier action of assumpsit,[8] reliance played relatively little role in the classical contract law that emerged during the nineteenth century.[9] The general result was to diminish the scope of contractual liability,[10] primarily through the "bargained-for exchange" requirement of consideration outlined in Holmes's *The Common Law*[11] and later adopted by the first and second Restatements.[12] The Restatement (Second) of Contracts declares, "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise."[13] Detrimental reliance by the promisee may

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See Note, *Should a Beneficiary Be Allowed to Invoke Promisee's Reliance to Enforce Promisor's Gratuitous Promise?*, 6 VAL. U.L. REV. 353 (1972). Apparently, no author has fully treated the subject of third parties' use of promissory estoppel. *See* 1A CORBIN ON CONTRACTS § 200, at 219-20 (1963) (brief discussion generally supporting extension of promissory estoppel to certain third parties); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 465 (1950) (arguing against extension); Knapp, *supra* note 1, at 61; Metzger & Phillips, *supra* note 4, at 543-44; Note, Ravelo v. County of Hawaii, *Promissory Estoppel and the Employment At-Will Doctrine*, 8 U. HAW. L. REV. 163, 174-76, 182-85 (1986) [hereinafter Note, Ravelo]; *The Requirements of Promissory Estoppel as Applied to Third Party Beneficiaries*, 30 U. PITT. L. REV. 174 (1968).

7. This discussion includes an examination of the role reliance has come to play in conventional contract recoveries by third-party beneficiaries. *See infra* notes 106-146 and accompanying text.

8. *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 comment a (1981) ("[i]t is fairly arguable that the enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise"); *see also* Metzger & Phillips, *supra* note 4, at 482 n.57 (citing sources); *cf.* Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679 (1984) (in 18th century, promises often enforced primarily because promisee relied on promise to his detriment or promisor's benefit).

9. "The reliance principle of the eighteenth century did not fit within the structure of the classical jurisprudence of the nineteenth century." Feinman, *supra* note 8, at 681.

10. *Cf.* G. GILMORE, THE DEATH OF CONTRACT 13-16 (paperback ed. 1974) (describing general theory of classical contract law associated with Langdell, Holmes, and Williston, and theory's dedication to limited liability).

11. *See, e.g.*, O. HOLMES, THE COMMON LAW 230-32 (M. Howe ed., paperback ed. 1963).

12. RESTATEMENT OF CONTRACTS § 75 (1932); RESTATEMENT (SECOND) OF CONTRACTS §§ 71(1), (2) (1981); *see* G. GILMORE, *supra* note 10, at 19-21.

13. RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (1981).

qualify as a performance.[14] Unless the promisor made his promise to obtain that performance,[15] however, there is no bargained-for exchange and thus no consideration.[16] As Holmes declared in 1884, "[i]t would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it."[17] From the perspective of classical contract law, therefore, "if A, without the protection of a binding contract, improvidently relies, to his detriment, on B's promises and assurances, that may be unfortunate for A but is no fit matter for legal concern."[18]

Despite the bargained-for exchange requirement, the courts were busy enforcing gratuitous promises in a wide range of discrete contexts during the late nineteenth and early twentieth centuries. The factor of detrimental reliance by the promisee unites these various situations. Examples include: (1) charitable subscriptions, (2) promises to make a gift of land, (3) gratuitous bailments, (4) gratuitous agency relations, (5) promises to pay employees bonuses or pensions, (6) promises to waive conditions on one's contractual liability, and (7) promises to reduce rents.[19] The doctrine of equitable estoppel also protected reliance during this period.[20] An estopped party, who had made representations regarding material facts, could not later deny or modify such representations in court once another party had relied upon the representations.[21] Equitable estoppel's "material fact" requirement would seem to have blocked the doctrine's use as a device for enforcing promises. By the turn of the century, however, some courts began to use equitable

14. *See id.* § 71(3) (performance may consist of act other than promise; forbearance; or creation, modification, or destruction of legal relation).

15. "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. . . . [B]oth elements must be present, or there is no bargain." *Id.* § 71 comment b.

16. For example: "A promises to make a gift of $10 to B. In reliance on the promise B buys a book from C and promises to pay C $10 for it. There is no consideration for A's promise." *Id.* illustration 3. The illustration concludes: "As to the enforcement of such promises, see § 90." *Id.*

17. Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302 (1884).

18. G. GILMORE, *supra* note 10, at 15.

19. *See generally* Boyer, *Promissory Estoppel: Principle from Precedents* (pts. 1-2), 50 MICH. L. REV. 639, 873 (1952).

20. *See, e.g., infra Notes 22, 34 and cases cited there.*

21. More precisely, the following elements comprise the equitable estoppel doctrine: (1) conduct, for example acts, language, or silence, by the estopped party amounting to a representation or a concealment of material facts; (2) knowledge of these facts by the party estopped at the time of such conduct, or at least circumstances from which such knowledge could be necessarily imputed; (3) no knowledge concerning the truth of these facts by the other party; (4) the estopped party's intention or expectation that the other party would act upon the conduct; (5) reliance by the other party on the conduct, so that he acted upon it; and (6) a resulting change in position for the worse by the other party. 3 J. POMEROY, EQUITY JURISPRUDENCE § 805 (5th ed. 1941). Also, there is some authority for the proposition that the other party's reliance must have been reasonable. Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281, 289-90 (1951). Ordinarily, equitable estoppel would "'estop' the maker of a statement of fact by sealing his mouth in court," thus making "the representor powerless to dispute the facts upon which liability is based." Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 376 (1969).

estoppel as a pretext for binding promisors to their promises.[22]

Eventually, the scattered cases protecting unbargained-for promissory reliance came to be united under a general principle of promissory estoppel. Although one author credits Williston's 1920 contracts treatise with the initial use of the term,[23] the Restatement of Contracts first authoritatively formulated promissory estoppel in 1932. Section 75(1) of the Restatement presented a conventional definition of consideration containing the bargained-for exchange requirement.[24] Then, under a general heading entitled "Informal Contracts Without Assent or Consideration," section 90 enunciated the doctrine of promissory estoppel.[25] Entitled "Promise Reasonably Inducing Definite and Substantial Action," the section provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."[26]

Section 90 does not require that the parties bargain for the promisee's action or forbearance, and thus seems to contradict section 75(1). In fact, as Gilmore has observed, sections 75(1) and 90 are "matter and anti-matter."[27] Unlike section 75(1) and its bargain principle, section 90 "frankly recognizes the reliance element in the law of contracts and . . . substitutes reliance for the bargaining element without which simple contracts are not normally enforceable."[28]

B. Subsequent Applications

Section 90 was tolerably clear about the elements of the new doctrine it legitimated. They are: (1) a promise, (2) that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character, (3) that does induce such action or forbearance, and (4) whose enforcement is the only way to avoid injustice.[29] On its face, then, section 90 stated a rule of great generality—one that theoretically could explain most successful contract suits except those involving wholly executory agreements

22. *See, e.g*, Seymour v. Oelrichs, 156 Cal. 782, 795-96, 106 P. 88, 94 (1909); Banning v. Kreiter, 153 Cal. 33, 36, 94 P. 246, 247 (1908); Ricketts v. Scothorn, 57 Neb. 51, 56-57, 77 N.W. 365, 366-67 (1898). Since each of these cases involved reliance on a promise, equitable estoppel theoretically did not apply. *See also infra* note 34.

23. Boyer, *supra* note 6, at 459 (citing 1 S. WILLISTON, CONTRACTS § 139 (1st ed. 1920)).

24. RESTATEMENT OF CONTRACTS § 75(1) (1932) provides that: "consideration for a promise is (a) an act other than a promise, or (b) a forbearance . . . bargained for and given in exchange for the promise."

25. Section 90 does not use the term "promissory estoppel," but Williston regarded the section as a statement of the doctrine he had first identified. 1 S. WILLISTON, CONTRACTS § 140, at 503 (rev. ed 1936).

26. RESTATEMENT OF CONTRACTS § 90 (1932).

27. *See* G. GILMORE, *supra* note 10, at 61. On the drafting history behind these two sections, see *id.* at 62-65.

28. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 925 (1951).

29. RESTATEMENT OF CONTRACTS § 90 (1932).

on which the promisee has not relied.[30]

The First Restatement shed little light on the applicable contexts for this facially sweeping rule.[31] Since section 90 was promulgated, promissory estoppel has principally served as a substitute for consideration. Although for some time this use of promissory estoppel was restricted to certain classes of cases,[32] by now the doctrine is available in virtually all situations where consideration is absent.[33]

Over time,[34] promissory estoppel has also seen increasing use as a device for circumventing the writing requirement imposed by the statute of frauds.[35] In general, this means that a party can be estopped from raising

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30. *E.g.*; Feinman, *supra* note 8, at 685-86 ("If reliance was a coequal rather than a residual basis for recovery, most contract cases could be seen as reliance cases rather than consideration cases."). In the normal breach of contract case, the promisor-defendant will have made a promise, and the promisee-plaintiff will typically have relied by performing. In many situations the promisor could reasonably foresee this performance. One would expect the courts to conclude that injustice can be avoided only by enforcing the promise in most instances of this sort. Where the contract is completely executory, the promisee cannot have relied by performing under the contract. In this case, however, promissory estoppel might still be available if the promisee foreseeably relies in some other fashion not contemplated by the contract.

31. As if to reinforce the uncertainty created by its sweeping text, the original § 90 was accompanied by no comments and only four illustrations. *See* RESTATEMENT OF CONTRACTS § 90 (1932). As Gilmore has noted:

> The extent to which the new § 90 was to be allowed to undercut the underlying principle of § 75 was left entirely unresolved. . . . An attentive study of the four illustrations will lead any analyst to the despairing conclusion, which is of course reinforced by the mysterious text of § 90 itself, that no one had any idea what the damn thing meant.

G. GILMORE, *supra* note 10, at 64-65. RESTATEMENT OF CONTRACTS § 178 comment f (1932) did, however, suggest that promissory estoppel might have limited application in the statute of frauds context. *See infra* note 34.

32. The most notable example is Judge Learned Hand's decision in James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933), which held promissory estoppel inapplicable to promises that "propose bargains," and limited promissory estoppel to "donative" promises. *See also* S. WILLISTON, *supra* note 25, § 140, at 504 (apparently limiting promissory estoppel to discrete situations where reliance had traditionally been protected).

33. *See, e.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 6-7, at 210 (2d ed. 1977) (sketching promissory estoppel's traditional role as consideration substitute); *id.* § 6-8, at 211 (modern trend in promissory estoppel cases to enforce any promise that meets doctrine's requirements).

34. The use of estoppel to evade the statute of frauds traces back at least to the beginning of the twentieth century. Equitable estoppel has long been used to avoid the statute's writing requirement. *See, e.g.*, Metzger & Phillips, *Promissory Estoppel and Section 2-201 of the Uniform Commercial Code*, 26 VILL. L. REV. 63, 75-77 (1980-81). In some turn-of-the-century statute of frauds cases, courts that purported to use equitable estoppel to enforce promises ignored equitable estoppel's "misrepresentation of a material fact" requirement. *See supra* notes 21-22 and accompanying text; Metzger & Phillips, *supra*, at 80-81 (citing cases ignoring requirement in statute of frauds context). The best-known example is Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909), where the court used equitable estoppel to estop the defendants from using the statute of frauds as a defense because they had breached an ancillary promise to reduce an oral contract to a writing. The Restatement later incorporated this "ancillary promise" exception to the statute of frauds. RESTATEMENT OF CONTRACTS § 178 comment f (1932) (promise to make memorandum, if relied upon, may give rise to promissory estoppel if statute would otherwise operate to defraud claimant).

35. *See, e.g.*, Edwards, *The Statute of Frauds of the Uniform Commercial Code and the Doctrine of Estoppel*, 62 MARQ. L. REV. 205 (1978); Metzger & Phillips, *supra* note 34; Note, *Promissory Estoppel and the Statute of Frauds in California*, 66 CAL. L. REV. 1219 (1978);

the statute as a defense if his promise has caused the other party to rely foreseeably and substantially. Here, the states differ considerably in their use of the estoppel doctrine. The most aggressive courts employ promissory estoppel when the claimant has relied on oral promises contained in the contract itself.[36] Others employ promissory estoppel only when the claimant has relied on a so-called "ancillary" promise such as a promise to reduce an oral contract to a writing.[37] Still other courts deny promissory estoppel any effect in the statute of frauds context.[38]

Although the case law on the subject is sparse, one author argues that courts should use promissory estoppel to allow the introduction of promises otherwise blocked by the parol evidence rule.[39] Much better established, however, is the doctrine's effect in the offer and acceptance context. Any offer contains a promise to which section 90 might apply. If this promise is too incomplete or indefinite to create normal contractual liability,[40] can promissory estoppel nonetheless make it binding? Despite numerous statements that the promise must be definite to create liability under promissory estoppel,[41] some courts have used the doctrine to impose contractual liability by enforcing promises that could not qualify as offers.[42] Finally, at least one

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Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114 (1975); Note, *supra* note 21; Annotation, *Comment Note.—Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037 (1974).

36. *E.g.*, Monarco v. Lo Greco, 35 Cal. 2d 621, 624-27, 220 P.2d 737, 740-42 (1950); McIntosh v. Murphy, 52 Haw. 29, 36-37, 469 P.2d 177, 181 (1970). *See generally* Annotation, *supra* note 35, § 6[a].

37. *E.g.*, Tiffany, Inc. v. W.M.K. Transit Mix, Inc., 16 Ariz. App. 415, 420-21, 493 P.2d 1220, 1225-26 (1972); *see also supra* note 34. *See generally* Annotation, *supra* note 35, § 5[a], at 1058 (ancillary promise to reduce agreement to writing enforceable despite statute of frauds). Some courts also require that there be fraud or gross injustice for this "ancillary promise" rule to operate. Annotation, *supra* note 35, §§ 5[b], 5[c]. At least one court enforced an ancillary promise not to raise the statute of frauds as a defense to an oral contract. *E.g.*, Zellner v. Wassman, 184 Cal. 80, 86-87, 193 P. 84, 87 (1920).

38. *E.g.*, Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492, 495 (Fla. Dist. Ct. App. 1965), *aff'd*, 190 So. 2d 777 (Fla. 1966). *See generally* Annotation, *supra* note 35, § 4, at 1052-53 (discussing policy that estoppel should not frustrate purposes of statute of frauds).

39. *See* Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983). The promisee's reliance on the promise may justify introducing otherwise inadmissible parol promises. *Id.* at 1408-22.

40. *See, e.g.*, RESTATEMENT OF CONTRACTS § 32 (1932); J. CALAMARI & J. PERILLO, *supra* note 33, § 2-13 (traditional rule that offer must be definite as to its material terms). By now, however, this traditional rule has been loosened considerably. *See e.g.*, U.C.C. §§ 2-204(1) (3); RESTATEMENT (SECOND) OF CONTRACTS § 33 & comments a, b (1981).

41. *E.g.*, Keil v. Glacier Park, Inc., 614 P.2d 502, 506-07 (Mont. 1980) (promise must meet traditional contract standards of definiteness); Perlin v. Board of Educ., 86 Ill. App. 3d 108, 114, 407 N.E.2d 792, 798 (1980) (unambiguous promise); Malaker Corp. v. First N.J. Nat'l Bank, 163 N.J. Super. 463, 479, 395 A.2d 222, 230 (1978) ("clear and definite promise").

42. *See* Wheeler v. White, 398 S.W.2d 93, 95-96 (Tex. 1965) (plaintiff able to recover under promissory estoppel even though agreement lacked material terms); Hunter v. Hayes, 533 P.2d 952, 953 (Colo. App. 1975) (promissory estoppel recovery allowed even though no evidence of meeting of minds on all terms of contract); *see also* Walker v. KFC Corp., 515 F. Supp. 612, 620 (S.D. Cal. 1981) (jury instruction that mere promise, not clear and unambiguous promise, needed for estoppel found satisfactory); Mooney v. Craddock, 35 Colo. App. 20, 24-26, 530 P.2d 1302, 1304-05 (1974) (absence of mutual agreement regarding some essential terms of contract does not prevent liability under promissory estoppel). Promissory estoppel aside, it is also well established that reliance can provide a basis for enforcing an indefinite offer. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1981); Henderson, *supra*

case has seemingly held that promissory estoppel may create liability even in the absence of an acceptance.[43]

C. *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*

Even though their language may occasionally suggest otherwise,[44] this article characterizes the mutual assent cases just discussed as *contract* decisions where promissory estoppel effectively substitutes for a defective offer or a missing acceptance. An increasing number of promissory estoppel cases, however, seem better described as decisions where the doctrine has departed the contract framework and become an independent cause of action. Indeed, promissory estoppel's increasing use *inside* the contract framework leads by degrees to such a result.

Imagine a hypothetical jurisdiction that has aggressively employed promissory estoppel as a substitute for consideration, for the statute of frauds' writing requirement, and as a device for curing indefinite offers and missing acceptances. In such a state, therefore, a party can establish most of the important elements of an enforceable contract through promissory estoppel.[45] Generally speaking, moreover, the promissory estoppel inquiry will be much the same at each point (offer, acceptance, consideration, etc.) in the contract analysis.[46] This being so, consider a situation in which liability

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note 21, at 362; Knapp, *supra* note 1, at 53. Finally, perhaps the best known example of promissory estoppel's use to enforce an indefinite offer, Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965), is better classed as a case where promissory estoppel was used as a basis of recovery distinct from contract. For a discussion of *Hoffman*, see *infra* notes 67-77 and accompanying text.

43. In N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738-40 (D.C. Cir. 1963), the subcontractor Litterio made a bid to the general contractor Glassman to perform the brick and masonry work on a school construction project on which Glassman was soon to make its own bid. Glassman told Litterio that its bid was the lowest received, that Glassman was using the bid to compute its own bid, and that Litterio would get the subcontract for the brick and masonry work if Glassman's bid was accepted. After Glassman received the general contract, it sent Litterio a proposed subcontract containing terms that the parties had not previously discussed and that materially altered Litterio's original offer. Litterio backed out of the deal, Glassman sued, and Glassman won a summary judgment at the district court level. The court of appeals found no bilateral contractual basis for the district court's decision. *Id.* at 740. The court explained that Glassman's proposed subcontract was not an acceptance, but a counteroffer. *Id.* at 738-39. But this contract law holding did "not dispose of the separate question of promissory estoppel." *Id.* at 739. The appeals court, therefore, remanded the case to determine whether Glassman could bind Litterio under promissory estoppel. *Id.* In effect, then, the court held that promissory estoppel liability might exist in the absence of an acceptance.

44. *E.g.*, Hunter v. Hayes, 533 P.2d 952, 953 (Colo. App. 1975) ("circumstances permit the application of the doctrine of promissory estoppel and allow the enforcement of the promise without evidence of a meeting of the minds").

45. The most obvious exceptions to this generalization are contractual capacity and the requirement that a contract have a legal object. For some suggestions as to how each might be accommodated within the § 90 framework, see Metzger & Phillips, *supra* note 4, at 546-47.

46. Admittedly, however, this may sometimes not be the case. RESTATEMENT (SECOND) OF CONTRACTS § 139 comment b (1981), for example, states that "the requirement of consideration is more easily displaced [by estoppel] than the requirement of a writing." For some other possible problems of this sort, see Metzger & Phillips, *supra* note 4, at 509 n.241. Such problems might, however, be remedied by using the toughest of the various promissory estoppel tests at each point where estoppel is applied. For example, if the requirement of considera-

could be based on either conventional contract theory or on section 90 of the first Restatement.[47] Here, a court pursuing a normal contract approach could elect either to base liability on the traditional elements of an enforceable contract, or to satisfy these elements through promissory estoppel.[48] Since the latter inquiry will be much the same at each step in the process, it seems more economical to base liability on a single, across-the-board, application of promissory estoppel. Thus, a court in our hypothetical jurisdiction would be left with two general routes for establishing promissory liability: traditional contract theory and a one-shot application of promissory estoppel. This approach is equivalent to saying that promissory estoppel's increasing use within the conventional contract framework creates strong logical pressure to regard the doctrine as a theory of recovery distinct from contract.[49]

To the authors' knowledge, no court has made the sort of argument just advanced. Increasingly, however, both commentators and courts accept the result to which it apparently leads. Although the subject is rarely discussed at any length, the professional literature for years has suggested promissory estoppel's emergence as an independent cause of action.[50] As for the courts,

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tion is more easily displaced by estoppel than the requirement of a writing, the court could presumably achieve uniformity by employing the more stringent estoppel test used in statute of frauds cases to the consideration element. Presumably, the weaker consideration test would be satisfied whenever the statute of frauds test is satisfied, but not vice versa.

47. *See supra* note 30 and accompanying text.

48. There is, however, some scattered authority for the proposition that courts should not use promissory estoppel where the plaintiff can recover in contract. *See, e.g.*, Guaranty Bank v. Lone Star Life Ins. Co., 568 S.W.2d 431, 434 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (promissory estoppel not applicable where promise part of valid contract); Kramer v. Alpine Resort, Inc., 108 Wis. 2d 417, 422-26, 321 N.W.2d 293, 295-97 (1982) (clearly holding that existence of contract will not bar estoppel claim where contract fails to spell out parties' total business relationship, but suggesting that estoppel claim would fail were contract comprehensive). For reasons that will become apparent below, however, the authors fail to see why the hypothetical jurisdiction would want to adopt such a limitation. The limitation is apparently losing force in any event. Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903, 908 (1985) (courts increasingly rely on estoppel even where no barrier to recovery under conventional contract theory exists).

49. One other possible implication of this argument is that contract law itself should be reconceptualized around the idea of reliance. *See* Metzger & Phillips, *supra* note 4, at 534-36 (criticizing this idea).

50. *E.g.*, J. CALAMARI & J. PERILLO, *supra* note 33, § 6-10, at 213 (entitled in part: "Is Promissory Estoppel a Non-Contractual Cause of Action?"); G. GILMORE, *supra* note 10, at 66, 67 (noting recent cases that suggest that estoppel does not constitute contract liability); Farber & Matheson, *supra* note 48, at 908 ("courts are now comfortable enough with the doctrine to use it as a primary basis of enforcement"); Knapp, *supra* note 1, at 53-54 (suggesting that protection of promise-induced reliance amounts to "the imposition of a distinct kind of liability, with its own theory, and perhaps subject to its own legal rules"). The authors have suggested the possibility on several occasions. Metzger & Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139, 184-93 (1980); Metzger & Phillips, *supra* note 4, at 508-36; Metzger & Phillips, *supra* note 34, at 88-89; Metzger, *supra* note 39, at 1419-21. For an earlier argument along these lines, see Shattuck, *Gratuitous Promises: A New Writ?*, 35 MICH. L. REV. 908 (1937). Two student efforts suggest that promissory estoppel has attained independent theory status in their jurisdictions. *See* Comment, *Promissory Estoppel—The Basis of a Cause of Action Which is Neither Contract, Tort, or* [sic] *Quasi-Contract*, 40 MO. L. REV. 163 (1975); Comment, *Promissory Estoppel in Washington*, 55 WASH. L. REV. 795 (1980).

we have considered promissory estoppel's de facto emergence as an independent theory of recovery at length elsewhere, and cannot repeat the performance here.[51] Instead, we will briefly summarize the most important reasons for our belief that promissory estoppel is becoming a separate cause of action before providing one concrete example.[52]

A theory of recovery or cause of action can be defined as a group of factual elements that will enable a plaintiff to obtain some kind of legal relief if they occur together and are proven.[53] A cause of action is independent of other theories if its elements differ from the elements of those theories. Traditional contract law and Restatement section 90 obviously state different tests of recovery when considered in a vacuum. But this point, while probably necessary to any claim that promissory estoppel is attaining independent theory status, is hardly sufficient, since it begs the question of *how* estoppel is being used by the courts.

At least suggestive in resolving the question of whether section 90 states a separate cause of action are the terms courts sometimes use to describe promissory estoppel. Recent decisions, for example, have called the doctrine an "action,"[54] a "cause of action,"[55] a "theory,"[56] a "basis for recovery" and a "legitimate source of recovery,"[57] an "alternative theory of recovery,"[58] the "basis of an action for damages,"[59] and something under which one can establish a "prima facie case."[60] The cases that use the promissory estoppel to circumvent the statute of frauds by arguing that the statute of frauds provision in question covers only *contracts* and that promissory estoppel recovery is not contractual have greater persuasive value.[61] Still more persuasive

51. *See* Metzger & Phillips, *supra* note 4, at 508-36.

52. The differences between the remedies available in promissory estoppel cases and those available in contract cases might be adduced as an additional reason to argue that promissory estoppel is becoming a separate cause of action. *See infra* note 94. The availability of reliance-based recoveries in contract cases not involving promissory estoppel weakens this argument, however. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 344(b), 349 (1981); J. CALAMARI & J. PERILLO, *supra* note 33, § 14-4, at 522 & § 14-9, at 532-33. For a suggestion that the reliance and expectation interests often coincide, see Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 73-75 (1936).

53. *E.g.*, BLACK'S LAW DICTIONARY 279 (rev. 4th ed. 1968) ("averment of facts sufficient to justify a court in rendering a judgment" and "concurrence of the facts giving rise to [an] enforceable claim").

54. *E.g.*, United States v. Iverson, 609 F. Supp. 927, 929-30 (N.D. Ill. 1985).

55. *E.g., id.* at 930; Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 697, 133 N.W.2d 267, 274 (1965).

56. *E.g.*, Werner v. Xerox Corp., 732 F.2d 580, 582 (7th Cir. 1984) (referring to contract and promissory estoppel as "theories" suitable for recovering damages).

57. Allen v. A.G. Edwards & Sons, 606 F.2d 84, 87 (5th Cir. 1979) (but stating that this is not true in statute of frauds cases).

58. Division of Labor Law Enforcement v. Transpacific Transp. Co., 69 Cal. App. 3d 268, 275, 137 Cal. Rptr. 855, 859 (1977).

59. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wash. 2d 255, 259, 616 P.2d 644, 646 (1980).

60. Glover v. Sager, 667 P.2d 1198, 1202 (Alaska 1983) (also referring to plaintiff's separate contract claim in exactly same language).

61. *E.g.*, Janke Constr. Co. v. Vulcan Materials Co., 386 F. Supp. 687, 697 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976) ("The statute of frauds relates to the enforceability of *contracts*; promissory estoppel relates to *promises* which have no contractual basis and are enforced only when necessary to avoid injustice.") (emphasis in original); *see also* R.S. Bennett

are the decisions in which promissory estoppel was the only theory pleaded or discussed, contract law was not mentioned, and the plaintiff's promissory estoppel claim withstood a demurrer.[62] Also of considerable weight are decisions where the court separately treats the plaintiff's contract and promissory estoppel claims.[63] Lest it be thought that estoppel's separate treatment is only a technicality, some cases of this sort deny recovery under contract law while making recovery actually or potentially available under promissory estoppel.[64]

The decisions effectively making promissory estoppel an independent theory of recovery are not yet overwhelming in number, and they tend to be concentrated in a few states.[65] Their significance lies in their radical break with tradition and in what this portends for the future of promissory liability. The cases in question, however, display little judicial awareness of the step they are taking and its importance.[66] One partial exception to this last generalization, and perhaps the best known promissory estoppel case of the last twenty-five years, is the Wisconsin Supreme Court's decision in *Hoffman v. Red Owl Stores, Inc.*[67] Because *Hoffman* is so familiar, and because it so articulately exemplifies promissory estoppel's emergence as a separate cause of action, detailed consideration of the case follows.

In the *Hoffman* case, Hoffman and his wife relied on Red Owl's various promises to Hoffman that it would give him a grocery store franchise. Hoffman, among other things, sold a bakery and another grocery store, and moved to the location of the planned franchised store. The first two questions considered by the Wisconsin Supreme Court in an opinion affirming the lower court's verdict for the Hoffmans were: (1) "[w]hether this court

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& Co. v. Economy Mech. Indus., 606 F.2d 182, 184-88 (7th Cir. 1979) (stating that statute of frauds no longer provides complete bar to recovery on estoppel theory after rejecting plaintiff's contract claim on statute of frauds grounds); N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 740 n.9 (D.C. Cir. 1963) (holding that no contract was created, remanding case to district court to consider promissory estoppel liability, and declaring statute of frauds issue no longer germane because no contract present). For further discussion of *Litterio*, see *supra* note 43.

62. *See* Insilco Corp. v. First Nat'l Bank, 248 Ga. 322, 283 S.E.2d 262 (1981); Higgins Constr. Co. v. Southern Bell Tel. & Tel. Co., 276 S.C. 663, 666, 281 S.E.2d 469, 470 (1981) ("a cause of action for promissory estoppel is stated").

63. *See, e.g.*, R.S. Bennett & Co. v. Economy Mechanical Indus., 606 F.2d 182, 184-88 (7th Cir. 1979); Glover v. Sager, 667 P.2d 1198, 1202-03 (Alaska 1983); Vigoda v. Denver Urban Renewal Auth., 624 P.2d 895, 897-98 (Colo. App. 1980); *cf.* Schuhl v. United States, 3 Cl. Ct. 207, 210-11 (1983) (promissory estoppel claim cannot be brought against United States under Tucker Act because promissory estoppel not express or implied-in-fact contract theory).

64. *See, e.g.*, R.S. Bennett & Co. v. Economy Mechanical Indus., 606 F.2d 182, 184-88 (7th Cir. 1979); Rawson v. Sears Roebuck & Co., 530 F. Supp. 776, 781 (D. Colo. 1982); *see also* Werner v. Xerox Corp., 732 F.2d 580, 582-84 (7th Cir. 1984) (district court rejected plaintiff's contract claim but granted his promissory estoppel claim, and court of appeals affirmed solely on estoppel grounds).

65. For a fairly complete listing and case description as of the summer of 1982, see Metzger & Phillips, *supra* note 4, at 513-28. *See also Werner*, 732 F.2d at 582-84 (rejecting contract claim but upholding estoppel claim); *Glover*, 667 P.2d at 1202-03 (upholding promissory estoppel claim and contract claim).

66. "That judicial ignorance is one of the great motivating forces of law reform has, of course, long been an open secret." G. GILMORE, *supra* note 10, at 57.

67. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

should recognize causes of action grounded on promissory estoppel"; and (2) whether "the facts in this case make out a cause of action for promissory estoppel."[68] While answering the first question in the affirmative,[69] the court stated: "Not only did the trial court frame [its] special verdict on the theory of [section 90], but no other possible theory has been presented to or discovered by this court which would permit plaintiffs to recover."[70] Turning to the second question posed above, the court first concluded that Red Owl had made various promises to Hoffman, that he had reasonably relied on these promises, and that he had fulfilled the conditions attached to them.[71]

Red Owl's major argument was contractual in nature. Red Owl claimed, and the jury had found,[72] that an "agreement was never reached on essential factors necessary to establish a contract between Hoffman and Red Owl."[73] The court stated:

> This poses the question of whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be the equivalent of an offer that would result in a binding contract between the parties if the promisee were to accept the same.[74]

Answering this question in the negative, the court then declared that section 90 "does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee."[75]

Thus far, the court's opinion might still be characterized, albeit with difficulty, as one where liability really was based on contract and promissory estoppel merely cured a defective offer. But the court soon rejected any such idea by stating that: "We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action."[76] Later, it nailed home the point by declaring that "this is not a

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68. *Id.* at 693, 133 N.W.2d at 272-73. The third question considered by the court, Hoffman's and his wife's damages, assumes some importance later in this Article. *See infra* notes 155-156 and accompanying text.

69. *See id.* at 694-96, 133 N.W.2d at 273-74.

70. *Id.* at 694, 133 N.W.2d at 273. The court then stated that of the other remedies considered, fraud and deceit seemed to be the most comparable, but found them inapplicable. *Id.* A contract recovery was impossible because Red Owl's various "offers" were too indefinite. *See infra* notes 72-73 and accompanying text.

71. *Id.* at 696-97, 133 N.W.2d at 274. There is no obvious reason why a promise giving rise to promissory estoppel liability cannot be conditional, or why the plaintiff's ability to recover under that theory may not depend on his fulfillment of the promisor's conditions. *See* Local 1330, United Steel Workers of Am. v. United States Steel Corp., 492 F. Supp. 1, 6-8 (N.D. Ohio 1980) (plaintiff did not satisfy the promisor's conditions), *aff'd in part and vacated in part*, 631 F.2d 1264, 1277-79 (6th Cir. 1980).

72. *Hoffman*, 26 Wis. 2d at 692, 133 N.W.2d at 272.

73. *Id.* at 697, 133 N.W.2d at 274.

74. *Id.*, 133 N.W.2d at 274-75.

75. *Id.* at 698, 133 N.W.2d at 275. Next, the court stated the elements of § 90 recovery to emphasize the point. *Id.*

76. *Id.*

breach of contract action."[77]

D. *Promissory Estoppel in the Second Restatement*

For the most part, the developments discussed above were fairly well advanced by the time the Restatement (Second) of Contracts appeared in 1981. The new Restatement put its imprimatur on several of them.[78] Three of the Second Restatement's provisions involve specific instances where promissory estoppel can serve as a substitute for consideration. Section 87(2) uses the doctrine to make certain offers irrevocable.[79] Section 88 makes promissory estoppel one basis for enforcing promises to act as a surety.[80] Section 89 uses promissory estoppel to enforce a promise modifying a duty under an executory contract,[81] thus circumventing the traditional rule that a promise to perform a preexisting contractual obligation is not consideration.[82] As for the statute of frauds, section 139 of the new Restatement creates an elaborate factor-based mechanism for using promissory estoppel to avoid its writing requirement.[83] The Second Restatement also makes reliance a basis for

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77. *Id.* at 701, 133 N.W.2d at 276 (using the statement to argue that lost profits were not recoverable).

78. For a comprehensive examination of promissory estoppel under the Restatement (Second) of Contracts, see Knapp, *supra* note 1.

79. "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice." RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981).

80. A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if . . . (c) the promisor should reasonably expect the promise to induce action or forbearance of a substantial character on the part of the promisee or a third person, and the promise does induce such action or forbearance.

Id. § 88(c).

81. "A promise modifying a duty under a contract not fully performed on either side is binding . . . (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise." *Id.* § 89(c); *see also infra* note 83 (quoting the related RESTATEMENT (SECOND) OF CONTRACTS § 150 (1981)).

82. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 89 comment b (1981). *See id.* § 73 & comment c; J. CALAMARI & J. PERILLO, *supra* note 33, § 4-8 (general discussion of preexisting obligation as consideration).

83. (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, particulary 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.

RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981). The Second Restatement also states:

enforcing an indefinite agreement.[84]

The Second Restatement, however, has little to say about the use of promissory estoppel as an independent theory of recovery. One comment to the new section 90 declares that the section "states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains,"[85] but another states that "[a] promise binding under this section is a contract."[86] The text of section 90 itself continues the generality of its predecessor. Its main provision, section 90(1), states that:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce 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.[87]

Section 90(2) makes charitable subscriptions and marriage settlements enforceable under section 90(1) "without proof that the promise induced action or forbearance."[88]

The most important changes made by the new section 90 are its deletion of the requirement that the reliance be "definite and substantial,"[89] and the possibility of partial enforcement created by its statement that the remedy may be limited as justice requires.[90] The drafters of the Second Restatement saw these two changes as linked.[91] Under the previous version of section 90, the drafters apparently envisioned that full enforcement of the expectation created by the promise would be the standard remedy and that definite and substantial reliance was needed to justify this. Under the new section 90, however, less in the way of reliance seems necessary because the court can limit the remedy as justice requires.[92] Section 90's comments have relatively little to say about the nature and degree of reliance now required for recov-

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> Where the parties to an enforceable contract subsequently agree that all or part of a duty need not be performed or of [sic] a condition need not occur, the Statute of Frauds does not prevent enforcement of the subsequent agreement if reinstatement of the original terms would be unjust in view of a material change of position in reliance on the subsequent agreement.

Id. § 150.

84. "Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed." *Id.* § 34(3).

85. *Id.* § 90 comment a.

86. *Id.* comment d. Comment a to § 139 appears to identify § 90 as a provision making promissory estoppel a consideration substitute. *Id.* § 139 comment a.

87. *Id.* § 90(1).

88. *Id.* § 90(2).

89. *See supra* text following note 25.

90. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981).

91. *See id.* § 90 Reporter's Note (1981); *see also* ALI, 42D ANNUAL MEETING, PROCEEDINGS 296-97 (1965) [hereinafter ALI PROCEEDINGS].

92. This deletion responds to the argument of Fuller and Perdue that the section as originally drafted appeared to require the promisee's reliance to have been "definite and substantial" enough to justify *full* enforcement of the expectation created by the promise; the drafters seem to have assumed that retention of that language would undercut the new policy of permitting partial enforcement.

Knapp, *supra* note 1, at 58 (footnote omitted) (emphasis in original) (stating drafters' apparent view before later raising some questions about it).

ery.[93] Comment d, however, does list the many kinds of remedies currently possible under section 90.[94]

Section 90's comments also flesh out the amorphous "if injustice can be avoided only by enforcement of the promise" language of section 90(1).[95] Comment b states that satisfaction of this requirement may depend on the reasonableness of the promisee's reliance;[96] its definite and substantial character in relation to the remedy sought; the formality with which the promise was made; the extent to which the evidentiary, cautionary, deterrent, and channeling functions of form are met;[97] and the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.[98] Finally, the new section 90 and its comments[99] expressly make foreseeable *third-party* reliance a basis for enforcing promises, and thus raise the possibility that third parties may be able to recover under promissory estoppel. We now turn to this possibility.

II. RELIANCE AND THIRD PARTIES

During its twentieth century march through (and beyond) contract law, promissory estoppel has operated almost exclusively in the promisor-promisee context. Throughout the doctrine's many triumphs, the defendant communicated a promise to the plaintiff, who was the promisee of that promise.

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93. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b (1981) makes the "definite and substantial character [of the reliance] in relation to the remedy sought" one factor a court should consider in determining whether injustice can be avoided only by enforcement of the promise. *Id.; see infra* text accompanying note 97. Comment b also states that: "The force of particular factors varies in different types of cases: thus reliance need not be of substantial character in charitable subscription cases, but must in cases of firm offers and guaranties." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b (1981) (citing §§ 87, 88, & 90(2)). For an argument that some courts now require little or no tangible reliance in promissory estoppel cases, see Farber & Matheson, *supra* note 48, at 910-14.

94. The remedies include "full-scale enforcement by normal [contract] remedies"; and restitution, damages, or specific relief "measured by the extent of the promisee's reliance rather than by the terms of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981). The comment also states that damages usually "should not put the promisee in a better position than performance of the promise would have put him," and that in gift promise cases it is rarely proper to award consequential damages that place a greater burden on the promisor than performance of the promise would have imposed. *Id.* Several authors have recently considered promissory estoppel damages. *See, e.g.*, Feinman, *supra* note 8, at 686-88; Knapp, *supra* note 1, at 55-58; Metzger & Phillips, *supra* note 4, at 498-500. *See also* Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559 (1970) (earlier and more detailed discussion of damages). Commentators have suggested that courts now tend to award full expectation damages rather than reliance damages. *See* Farber & Matheson, *supra* note 48, at 909.

95. Restatement (SECOND) OF CONTRACTS § 90(1) (1981).

96. The distinction between the reasonableness of the promisee's reliance and its foreseeability to the promisor is often quite tenuous. *See infra* notes 282-284 and accompanying text.

97. *See* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

98. The comment also adds that "[t]he force of particular factors varies in different types of cases." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b (1981).

99. *Id.* comment c; *see infra* text following note 162. Sections 88(c) and 139 likewise refer to third-party reliance. *See supra* notes 80, 83. Also, comment d to § 89 states that a promise modifying an executory contract "may become binding in whole or in part by reason of action or forbearance by the promisee or third persons in reliance on it." RESTATEMENT (SECOND) OF CONTRACTS § 89 comment d (1981).

But as section 90 of the Second Restatement suggests, and as our subsequent discussion reveals, promissory estoppel has found application as well in claims by relying third parties. For reasons that should become evident, this development is of considerable intrinsic importance. This development also bears upon the accuracy of the claim that promissory estoppel is becoming an independent theory of recovery.

The cases extending promissory estoppel liability to third parties have many of the indicia of independent theory status discussed above.[100] In some of these decisions, that is, suggestive terms like "theory" and "cause of action" are used to describe the estoppel claim.[101] In a few, separate contract and estoppel claims proceed side-by-side.[102] And in many, promissory estoppel is the only apparent basis of recovery.[103] At first glance, however, these cases arguably fail a test of independent theory status that posed no problems when considered earlier: the requirement that a truly "independent" cause of action have different elements of recovery than its competitors.[104] Reliance has become a factor to be considered in conventional contract claims by third-party beneficiaries.[105] This raises the possibility that the tests for third-party promissory estoppel recovery and third-party beneficiary recovery are basically congruent. Alternatively, the practical results may still be much the same under each theory. If the former surmise is accurate, promissory estoppel's overall claim to independent theory status is diminished somewhat. In the latter case, the independence of the action is rendered less significant.

Thus, this section has two general aims. The first is to examine the cases dealing with promissory estoppel liability to third parties. The second is to determine these cases' effect on the argument that promissory estoppel is becoming an independent theory of recovery. Since the second question depends on a comparison between promissory estoppel and third-party beneficiary law, the section begins by examining the use of reliance in third-party beneficiary claims. After considering promissory estoppel in the third-party context, the section assesses the independent theory argument by comparing these two bodies of law and the results obtainable under each. The section concludes with a discussion of the relationship between contract law and promissory estoppel in third-party situations.

A. Reliance in the Third-Party Beneficiary Context

In the typical third-party beneficiary case, the third party sues for breach of a promise made by the promisor as part of a contract with the promisee.[106] Commentators often say that the general test for third-party recov-

100. *See supra* text accompanying notes 53-77.
101. *See supra* text accompanying notes 54-60.
102. *See supra* text accompanying notes 63-64.
103. *See supra* text accompanying notes 62, 64.
104. *See supra* text accompanying notes 53-54.
105. *See infra* text accompanying notes 106-146.
106. Some of these situations can be conceptualized as promissory estoppel cases. In the typical third-party beneficiary case, the promisee furnishes some consideration to the prom-

ery under a contract[107] is the contracting parties' intention that the third party benefit substantially from the promised performance.[108] Sometimes, however, the promisee's intention seems to have been determinative.[109] Traditionally, moreover, the third party recovers only when the third party qualifies as a donee beneficiary or a creditor beneficiary.[110] The third party is a donee beneficiary when the promisee intends that the promisor's promise be a gift to the third party, and a creditor beneficiary when performance of the promise will satisfy some debt, obligation, or duty the promisee owes to the third party.[111] Third-party beneficiaries who are unable to qualify as donee or creditor beneficiaries are incidental beneficiaries, and cannot recover on the contract.[112]

The Restatement (Second) of Contracts departs from the traditional scheme somewhat, at least with respect to terminology.[113] Section 304 of the Restatement (Second) declares that "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."[114] Section 302(1) of the new Restatement provides the following definition of the term "intended beneficiary":

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promisee intends to give the

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isor, in exchange for the promisor's promise to render some performance to a third party. L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 241 (2d ed. 1965). Where the third party relies on the promisor's promise, the case could be conceptualized as a promissory estoppel action. Here, § 90 tests would control the third party's recovery, and the court would apply these tests relative to the third party rather than the promisee. At present, however, our concern is with the role reliance plays in the third-party beneficiary context.

107. The promisor and promisee must be parties to a contract. *See, e.g.*, Beaumont v. American Can Co., 797 F.2d 79, 83 (2d Cir. 1986) (third party's recovery denied because no contract between promisor and promisee); Lee v. Paragon Group Contractors, Inc., 78 N.C. App. 334, 337-38, 337 S.E.2d 132, 134-35 (1985) (same); RESTATEMENT (SECOND) OF CONTRACTS § 304 comment b (1981) ("the requirements for formation of a contract must of course be met").

108. *E.g.*, L. SIMPSON, *supra* note 106, at 246; Prince, *Perfecting the Third Party Beneficiary Standing Rule under Section 302 of the Restatement (Second) of Contracts*, 25 B.C.L. REV. 919, 923 (1984).

109. *Compare* L. SIMPSON, *supra* note 106, at 246-47 (arguing that promisor's intent generally irrelevant and promisee's intent determinative) *with* Prince, *supra* note 108, at 931 (stating that some jurisdictions require only proof of promisee's intent, some require intent of both promisor and promisee, and a few require that promisor have reason to know that promisee intended to contract for third-party rights).

110. *E.g.*, E. FARNSWORTH, CONTRACTS 715 (1982); L. SIMPSON, *supra* note 106, at 241, 242.

111. *E.g.*, RESTATEMENT OF CONTRACTS §§ 133(1)(a), (b) (1932); E. FARNSWORTH, *supra* note 110, at 715; L. SIMPSON, *supra* note 106, at 242-44.

112. *E.g.*, E. FARNSWORTH, *supra* note 110, at 715; L. SIMPSON, *supra* note 106, at 245.

113. E. FARNSWORTH, *supra* note 110, at 716.

114. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

beneficiary the benefit of the promised performance.[115]

Contract beneficiaries who do not qualify as intended beneficiaries are termed "incidental beneficiaries,"[116] and acquire no rights in the contract.[117]

For present purposes, we need not consider the details of section 302's application or the exact degree to which it reflects existing law. Instead, it is sufficient to note that the rules just quoted almost certainly do not mark a radical break with the past.[118] One commentator, for example, regards subsections (a) and (b) of section 302(1) as similar to the traditional categories of creditor and donee beneficiary.[119] Comment d to section 302, however, departs from prior law[120] by introducing the reliance element lacking in the section's text.[121] In relevant part, comment d to section 302 provides:

> *Other Intended Beneficiaries.* Either a promise to pay the promisee's debt to a beneficiary or a gift promise involves a manifestation of intention by the promisee and promisor sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable. Other cases may be quite similar in this respect. Examples are a promise to perform a supposed or asserted duty of the promisee, a promise to discharge a lien on the promisee's property, or a promise to satisfy the duty of a third person. In such cases, if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.[122]

At first blush, comment d might be regarded as yet another Restatement (Second) application of promissory estoppel to an area formerly governed by traditional contract principles. Read literally, however, the comment differs from section 90 by not requiring *actual* reliance by the third party.[123] In

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115. *Id.* § 302(1).

116. *Id.* § 302(2).

117. *Id.* § 315.

118. *See, e.g.*, Prince, *supra* note 108, at 925 n.31 (quoting various judicial views on the impact of § 302, many of which regard § 302 as consistent with prior law); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 VA. L. REV. 1166, 1169-70 (1968) (newness of Restatement's intent test questionable, since courts have long used intent in third-party beneficiary cases).

119. E. FARNSWORTH, *supra* note 110, at 717. On the differences and similarities between these subsections and the traditional categories, see *id.* at 717-24.

120. Prince, *supra* note 108, at 987 (comment d "a significant . . . departure from the popular construction of the original Restatement").

121. Another reliance-based Restatement (Second) provision, § 311(3), states that the power of the promisor and promisee to discharge or modify the agreement terminates when the beneficiary materially changes position in justifiable reliance on the promise before receiving notice of the discharge or modification. RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1981). Here, however, the beneficiary is *already* an intended beneficiary. *Id.* § 311(1) & comment g. Thus, § 311(3) does not apply here.

122. *Id.* § 302 comment d. The remainder of the comment goes as follows:

> Where there is doubt whether such reliance would be reasonable, considerations of procedural convenience and other factors not strictly dependent on the manifested intention of the parties may affect the question whether under Subsection (1) recognition of a right in the beneficiary is appropriate. In some cases an overriding policy, which may be embodied in a statute, requires recognition of such a right without regard to the intention of the parties.

Id.

123. *Id.* Instead, comment d speaks of a promise *"sufficient . . . to make* reliance by the beneficiary both reasonable and probable," and renders the third party an intended beneficiary

each of comment d's six illustrations, moreover, the third party was an intended beneficiary even though no actual reliance was specifically stated.[124]

What, then, are the aim and impact of comment d? In all likelihood, comment d introduces reasonable and probable reliance only as means of measuring the contracting parties' intent to benefit the third party. The typical test for intent involves an objective standard under which the contract terms and the surrounding circumstances are assessed from the standpoint of the reasonable person.[125] Much the same standpoint underlies comment d's required determination that the promise make third-party reliance reasonable.[126] Where the contract language and the surrounding circumstances reasonably indicate an intention to benefit the third party, for instance, the third party may often reasonably rely. Also, "arguing that reliance is justifiable would be difficult when the terms and circumstances fail to give some basis for concluding that recognition of third-party rights is consistent with the goals of the contracting parties."[127] For these reasons, one author argues that comment d's reliance language basically duplicates the intent test traditionally employed in third-party beneficiary cases.[128]

Although there are a few apparent dissenters,[129] most of the courts specifically considering the matter allow a third party's reliance to play *some* role in determining that party's rights under the contract.[130] A few of these cases appear to follow the authors' reading of comment d by using the promise's ability to provoke reasonable third-party reliance as a gauge of the parties'

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only when he "*would be* reasonable in relying on the promise as manifesting an intention to confer a right on him." *Id.* (emphasis added). Less easy to classify, however, is *id.* § 304 comment e (in cases of doubt, whether intention to benefit third party to be attributed to promisee "may be influenced by the likelihood that recognition of the right will . . . protect the beneficiary in his reasonable reliance on the promise").

124. *See id.* § 302 illustrations 10-15.

125. *See* J. CALAMARI & J. PERILLO, *supra* note 33, at 611.

126. Hereafter, we focus on the operative sentence of comment d: "If the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary." RESTATEMENT (SECOND) OF CONTRACTS § 302 comment d (1981). Thus, from now on, the Article ignores the comment's earlier reference to "probable" reliance.

127. Prince, *supra* note 108, at 988.

128. *Id.* at 987, 988.

129. *E.g.*, White v. Alaska Ins. Guar. Ass'n, 592 P.2d 367, 369 (Alaska 1979) (third party "cannot make himself a creditor beneficiary merely by acting in reliance upon a contract"); Garcia v. Truck Ins. Exch., 36 Cal. 3d 426, 437 n.5, 682 P.2d 1100, 1105 n.5, 204 Cal. Rptr. 435, 440 n.5 (1984) (one determined not to be third-party beneficiary cannot acquire rights in contract by acting in reliance on it).

130. *See, e.g.*, Beverly v. Macy, 702 F.2d 931, 941-42 (11th Cir. 1983); Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 954 (9th Cir. 1977); Taylor Woodrow Blitman Constr. Corp. v. Southfield Gardens Co., 534 F. Supp. 340, 343-44 (D. Mass. 1982); Weninegar v. S.S. Steele & Co., 477 So. 2d 949, 955-56 (Ala. 1985); Harris v. Board of Water & Sewer Comm'rs, 294 Ala. 606, 611, 320 So. 2d 624, 628 (1975); Rae v. Air-Speed, Inc., 386 Mass. 187, 195 n.3, 435 N.E.2d 628, 633 n.3 (1982); Gilmore v. Century Bank & Trust Co., 20 Mass. App. Ct. 49, 477 N.E.2d 1069, 1074 (1985); Lipshie v. Tracy Inv. Co., 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977); Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44, 45-46, 485 N.E.2d 208, 212-13, 495 N.Y.S.2d 1, 4-6 (1985); Pennsylvania Liquor Control Bd. v. Rapistan, Inc., 472 Pa. 36, 45-46, 371 A.2d 178, 182-83 (1976); *cf.* Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1, 5 (1st Cir. 1977) (one element of test for third-party beneficiary status whether third party's expectations of benefit reasonable).

intent.[131] Perhaps the clearest example is the Pennsylvania Supreme Court's decision in *Pennsylvania Liquor Control Board v. Rapistan Inc.*,[132] which involved a contract whereby Rapistan was to construct and install a conveyor system in the Liquor Control Board's (PLCB's) Philadelphia warehouse. Later, after relying on Rapistan's conveyor system specifications in computing its bid, a third party named Holt contracted with the PLCB to operate the warehouse. The system failed to perform as promised, and Holt incurred additional expenses as a result. In concluding that Holt was not an intended beneficiary of the PLCB-Rapistan contract, the court cited comment d, reading it as requiring "evidence, sufficient to permit reasonable reliance, that the promisee and promisor intended to confer a right on the third party."[133] Here, though, there was no indication that either party intended this result. At most, Rapistan was merely aware that some third party would operate its conveyor system, and the contract made no mention of any third-party beneficiary.[134] Moreover, "[n]owhere in the contract or the complaint is it shown or alleged that the PLCB intended to use Rapistan's promise to build the conveyor system to discharge a contractual duty to a third party."[135] For these reasons, "Holt could not reasonably assume that the parties intended to confer on it a right to Rapistan's performance."[136] Nowhere in this portion of its opinion did the court consider Holt's *actual* reliance.

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131. In addition to the *Rapistan* case discussed below, two other decisions serve as possible examples. In Rae v. Air Speed, Inc., 386 Mass. 187, 435 N.E.2d 628 (1982), a woman's husband died in the crash of his employer's plane. She successfully sued as beneficiary of a contract whereby an insurance agent had promised the employer to procure workers' compensation insurance covering the employer's employees. *Id.* at 195, 435 N.E.2d at 633. As an apparent alternative basis of recovery, the court noted that the employer had a statutory duty to obtain workers' compensation insurance for its employees, and that comment d specifically mentions promises "to perform a supposed or asserted duty of the promisee . . . ." *Id.* at 195 n.3, 435 N.E.2d at 633 n.3 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302 comment d (1981)); *see supra* text accompanying note 122. The court also quoted comment d's statement that the third party is an intended beneficiary if the third party would be reasonable in relying on the promise as manifesting an intent to confer a right. *Id.* at 195 n.3, 435 N.E.2d at 633 n.3.

In Harris v. Board of Water & Sewer Comm'rs, 294 Ala. 606, 320 So. 2d 624 (1975), the third-party plaintiff (Harris) sued a public corporation that had contracted with the city of Mobile to maintain an adequate supply of water to the city's fire hydrants. The plaintiff's motel and restaurant were totally destroyed by fire because nearby fire hydrants did not contain water. In reversing a lower court decision denying recovery, the Alabama Supreme Court declared: "[H]ow can it be said that Harris is not the very party for whose benefit the contract was made? . . . [I]n the end, the most direct benefit [of the contract] inures to the people of the City, like Harris, who rely on these city-provided services for the protection of their property." *Id.* at 611, 320 So. 2d at 628. This result, however, may be atypical. *See* E. FARNSWORTH, *supra* note 110, at 726-27 (discussing third-party beneficiary liability under contracts with government bodies and problems this presents).

132. 472 Pa. 36, 371 A.2d 178 (1976).

133. *Id.* at 46, 371 A.2d at 182. The court also cited comment d for the proposition that "a third party is an intended beneficiary only if he can reasonably rely on the contract as manifesting an intent to confer a right on him." *Id.* at 45, 371 A.2d at 182.

134. *Id.* at 46, 371 A.2d at 183. The court did not, however, impose an absolute requirement that the contract expressly state the intent to benefit a third party. *Id.* at 44-45, 371 A.2d at 182.

135. *Id.* at 46, 371 A.2d at 183.

136. *Id.*

In *Rapistan*, therefore, the court's "reasonable reliance" inquiry differed little from the customary intent-of-the-parties analysis.[137] Other cases, however, use reasonable reliance somewhat differently. Comment d to section 302 effectively states that the third party *must* be declared an intended beneficiary if he would be reasonable in relying on the promise as manifesting an intention to confer a right on him.[138] Nevertheless, some courts merely consider the reasonableness of the third party's reliance *one factor* in determining intended beneficiary status.[139] In such cases the court considers the normal "intent" tests for intended beneficiary status along with the justifiability of reliance.[140] For example, *Beverly v. Macy*[141] involved a suit by a third party whose flood insurance had lapsed after the insurer failed to send premium due and termination notices as required by its contract with the company servicing the insured's property. Reversing a district court judgment for the defendant insurer, the court of appeals concluded that the plaintiff had reasonably relied on the defendant's past dispatch of premium notices in assuming that this practice would continue.[142] The court explained that "[w]hile this reliance, by itself, would not allow a court to read into the contract terms that do not exist, . . . [the plaintiff's] conduct when combined with the express obligations incorporated into that contract strongly suggests that she was a direct beneficiary rather than an incidental one."[143]

As the preceding quotation makes apparent, *Beverly v. Macy* also departed from a literal reading of comment d by considering actual reliance. Other courts have done the same.[144] Since a promise on which the third party would be reasonable in relying is also likely to induce actual reliance, and since such reliance apparently occurred in the cases in question, the courts' consideration of actual reliance is understandable and perhaps inevitable.[145] In some cases, however, the nature and degree of the third party's actual reliance seem to have been at least as significant as its reasonableness.[146]

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137. *See supra* notes 106-112 and accompanying text.

138. *See supra* text accompanying note 122.

139. *E.g.*, Beverly v. Macy, 702 F.2d 931, 941 (11th Cir. 1983) (actual and reasonable reliance "a significant factor"); Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44, 485 N.E.2d 208, 212, 495 N.Y.S.2d 1, 4-5 (1985) (reasonableness and probability of third party's reliance among the circumstances warranting consideration); *cf.* Commercial Ins. Co. v. Pacific-Peru Corp., 558 F.2d 948, 954 (9th Cir. 1977) (comment d "further refines" identification of third-party beneficiary); Weninegar v. S.S. Steele & Co., 477 So. 2d 949, 955 (Ala. 1985) (discussing and relying upon *Beverly v. Macy*); Gilmore v. Century Bank & Trust Co., 20 Mass. App. Ct. 49, 477 N.E.2d 1069, 1074 (1985) (third parties' actual reliance "fortified their trustee's right to sue").

140. *See, e.g.*, *Gilmore*, 477 N.E.2d at 1074-75; *Fourth Ocean*, 66 N.Y.2d at 44-46, 485 N.E.2d at 211-13, 495 N.Y.S.2d at 4-6.

141. 702 F.2d 931 (11th Cir. 1983).

142. *See id.* at 941.

143. *Id.* at 941-42 (citation omitted).

144. *See, e.g.*, Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 954 (9th Cir. 1977); *Gilmore*, 477 N.E.2d at 1074; *Fourth Ocean*, 66 N.Y.2d at 46, 485 N.E.2d at 213, 495 N.Y.S.2d at 6.

145. In addition, one reading of RESTATEMENT (SECOND) OF CONTRACTS § 304 comment e might justify the courts' consideration of actual reliance. *See supra* note 123.

146. In *Gilmore* the court found that the claimants' actual reliance "fortified their trustee's

B. Promissory Estoppel and Third Parties

From the perspective of a relying third party seeking recovery for that reliance, the cases just discussed are half-measures at best. Under a literal reading of comment d to section 302, a third party need not show actual reliance, thus somewhat easing the evidentiary burden. This benefit is trivial, however, because the party in question will in fact have relied. Moreover, the most likely reason for this surface advantage is that the drafters aimed comment d less at protecting third-party reliance than at using the reasonableness of such reliance to ascertain the intent of the contracting parties.[147] As a result, comment d, read literally, probably does not diverge much from existing third-party beneficiary law.[148] If the *Rapistan* case provides guidance, the intent measured by the reasonableness of the third party's reliance is a specific intention to benefit a third party.[149] To be sure, some courts do not follow comment d slavishly.[150] But while these courts consider the third party's actual reliance along with the reasonableness of that reliance, these factors do not control the outcome, but only constitute items the court considers along with traditional intent tests.[151] Finally, for comment d to serve as a basis of promissory liability, the promisor and the promisee must have a contract.[152]

1. The Early Cases

From a pro-reliance standpoint, the promissory estoppel cases involving claims by third parties are generally more encouraging than third-party beneficiary cases. The original version of Restatement section 90 failed to extend promissory estoppel liability to third parties.[153] This omission, however, did not prevent the courts from occasionally allowing such recoveries.[154] In *Hoffman v. Red Owl Stores, Inc.*[155] one contested item of dam-

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right to sue" under RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(a) (1981). 477 N.E.2d at 1074. After quoting comment d, the court concluded that because the claimants "in fact relied, and with reason" by giving up various legal rights, their trustee was also entitled to recover under § 302(1)(b). *Id.* at 1074; *see supra* text accompanying note 115 (substance of § 302(1)); *see also* Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 44-46, 485 N.E.2d 208, 213, 495 N.Y.S.2d 1, 6 (1985) (factors in third party's failure to recover include absence of evidence that reliance was reasonable and probable, plus absence of evidence that plaintiff in fact relied).

147. *See supra* text accompanying notes 120-128.

148. *See supra* note 128 and accompanying text.

149. *See supra* text accompanying notes 133-134. Comment d states that the third party is an intended beneficiary if he "would be reasonable in relying on the promise as manifesting an intention *to confer a right on him.*" RESTATEMENT (SECOND) OF CONTRACTS § 302 comment d (1981) (emphasis added).

150. *See supra* text accompanying notes 138-146.

151. *See supra* text accompanying notes 143-146.

152. *See supra* note 107.

153. *See supra* text accompanying note 26.

154. A much-cited early example occurring before promulgation of the First Restatement is the California Supreme Court's decision in Burgess v. California Mut. Bldg. & Loan Ass'n, 210 Cal. 180, 290 P. 1029 (1930). In that case, the defendant lender made a written promise that, in exchange for $6000, it would release certain land from a deed of trust securing a loan the defendant had made to the promisee. At the time, the defendant knew that the promisee needed this written promise to further a transaction with a third party. After telling the third

ages was a $2000 loss resulting from the Hoffmans' sale of a bakery at Red Owl's instigation to raise capital for the promised venture. Since Hoffman's wife was half owner of the bakery, and since Red Owl had not dealt with Mrs. Hoffman, Red Owl claimed that it was not liable for her share of the loss. The Wisconsin Supreme Court, however, allowed Mrs. Hoffman to recover.

> Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. . . . Here not only did defendants foresee that it would be necessary for Mrs. Hoffman to sell her joint interest in the bakery building, but defendants actually requested that this be done.[156]

Also, *Lear v. Bishop*[157] the Nevada Supreme Court awarded a third party specific performance under section 90 after that party had foreseeably and reasonably relied on the defendant's promise to participate in the purchase of some land.[158] While doing so, though, the court limited the class of third parties who could recover under section 90. "Although the doctrine [of] promissory estoppel expressed in Section 90 . . . is limited to cases in which the action in reliance is on the part of the promisee, . . . an intended third party beneficiary . . . should similarly be protected if its reliance was likewise foreseeable."[159] The court thus combined elements of third-party beneficiary theory with promissory estoppel.

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party that the property could be released from the first deed of trust for $6000, the promisee obtained a loan from the third party. The third party took a second deed of trust on the property to secure the loan, and received the defendant's release letter at the closing. Later, the promisee went bankrupt, the defendant attached the property to satisfy the debt, the third party tendered $6000 to the defendant demanding reconveyance of the property, and the defendant refused the tender. The court found for the third party, because "the effect of the transaction was to supply a substitute for a consideration for this promise and to bring into operation the well-known doctrine of estoppel." *Id.* at 188, 290 P. at 1032. Before so concluding, the court noted the defendant's knowledge of the general reason for the release, and the third party's reliance on the promise. *See id.* at 186-87, 290 P. at 1031-32.

155. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). For additional discussion of *Hoffman*, see *supra* notes 67-77 and accompanying text.

156. *Id.* at 699, 133 N.W.2d at 275.

157. 86 Nev. 709, 476 P.2d 18 (1970).

158. The third party (C-B Ranch) was the seller of land under a contract with the Nevada Department of Fish and Game (Fish and Game). The defendant (Lear) promised Fish and Game that it would participate in the sale as a co-purchaser. *See id.* at 710-12, 476 P.2d at 19-21 (detailing the complicated context within which this promise occurred). C-B Ranch foreseeably and reasonably relied on Lear's promise by selling a portion of its land to Fish and Game, thus severing its land holdings. *Id.* at 712, 714, 476 P.2d at 20, 22. Lear then refused to sign a subsequent agreement under which C-B Ranch was to convey the remainder of its property to Lear. Apparently, Lear's promise was not binding on a regular contract theory, although the court did not discuss the point. The court did discuss Lear's claim that the statute of frauds blocked recovery, but seemingly directed the discussion toward the contract for sale of the land, not Lear's separate promise to participate in the deal. *See id.* at 713, 476 P.2d at 21.

159. *Id.* at 714, 476 P.2d at 22.

2. Comment c to Section 90

By the early 1970s, the cases considering promissory estoppel liability to third parties had the benefit of a tentative draft of the new section 90, which brings third-party reliance within the section's protection.[160] The draft on which these courts relied does not differ from the present section 90(1).[161] Proposed comment d further provided:

> *Reliance by third persons.* If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise. Enforcement of the promise in such cases rests on the same basis and depends on the same factors as in cases of reliance by the promisee. Justifiable reliance by third persons who are not beneficiaries is less likely, but may sometimes reinforce the claim of the promisee or beneficiary.[162]

This comment appears without change in the final text of the Restatement (Second), redesignated as comment c.[163]

Comment c's meaning is anything but obvious. At first blush, it suggests that new section 90, like the Nevada Supreme Court in *Lear*, limits recovery to third parties who can qualify as intended beneficiaries under the Restatement (Second)'s third-party beneficiary provisions.[164] The comment identifies the relying third party as a "beneficiary."[165] The "for the benefit of another" language in its first sentence suggests that this beneficiary is an intended beneficiary.[166] Comment c's last sentence strongly implies that relying third parties who are not such beneficiaries cannot recover on their own behalf.[167] Moreover, both commentators and the ALI's Proceedings on section 90 support this reading of comment c.[168]

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160. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

161. *Compare id. with* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1965) (identical text).

162. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (Tent. Draft No. 2, 1965).

163. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1981).

164. On these provisions, see *supra* notes 113-124 and accompanying text.

165. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1981).

166. *Id.*

167. *Id.*

168. Note, Ravelo, *supra* note 7, at 174-76, 183; *cf.* 1A CORBIN ON CONTRACTS § 200, at 219 (1963) (expressing similar view about scope of third-party recovery under promissory estoppel). The American Law Institute proceedings provide in part:

> MR. TALBOT RAIN (Texas). Mr. Chaiman—Mr. Reporter, on the top of page 169 in Comment d you talk about reliance by third persons, and in the second line you make reference to the situation where a promise is made to one party for the benefit of another. My question is, is that use of the words "for the benefit of another" unnecessarily limiting?
>
> Back in section 89C you speak of a promise which is likely to induce action or forbearance by a third person. It may not be for his benefit.
>
> I have in mind a case where, for example, a bank is asked to lend money to a college. They promise a gift for a building; and Comment (d), if that promise is not made for the benefit of the thing, but is a promise which the contributor knows is likely to induce action on the part of the lender—and you do not intend, I think, by the use of that word in the second line on page 169 that the promise must be for the benefit of the college—he may rely and act even though it is not for his benefit.
>
> PROFESSOR BRAUCHER: I agree with you entirely, Mr. Rain. I thought we

If comment c is limited to intended beneficiaries, however, it becomes redundant, since the Restatement (Second) already guarantees that such beneficiaries can enforce the promisor's promise.[169] In response, it might be argued that comment c merely reiterates the new reliance-oriented tests for intended beneficiary status contained in comment d to section 302.[170] As suggested above, however, comment d uses the reasonableness of the third party's reliance to gauge the contracting parties' intent to benefit the third party.[171] Comment c, in contrast, contemplates that section 90's tests will control the third party's recovery.[172]

Another nonredundant reading of comment c could say that it uses the *third party's* reliance to cure defects in the *agreement between the promisor and the promisee*.[173] In the absence of a contract between the promisor and promisee, third parties who otherwise would qualify as intended beneficiaries cannot enforce the promisor's promise under third-party beneficiary law.[174] If, however, reliance by such parties satisfies the tests of section 90,[175] that

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had said in the first sentence that if the promise is made to one party for the benefit of another there will be reliance. In that kind of case the beneficiary stands on the same kind of footing as the promisee. Then I go on to say, "Justifiable reliance by third persons who are not beneficiaries is less likely, but may sometimes reinforce the claim of the promisee or beneficiary."

Your case seems to me an example of where the bank is not a beneficiary or an intended beneficiary of the promise to give money to the college, and yet the fact that there is reliance may reinforce the college's claim. I think it's the last sentence that was designed to deal with that.

MR. RAIN: That may be so. I had in mind the opportunity of enforcing directly by the bank.

PROFESSOR BRAUCHER: Well, I think as to that the problem of reliance or consideration is probably less significant than the question whether the bank was an intended beneficiary of the promise; but I would be very skeptical whether the bank was really a third party beneficiary to enforce a promise to make a gift to the college, but—[at this point, another question intervened].

ALI PROCEEDINGS, *supra* note 91, at 300-01.

The hypothetical discussed by Professor Braucher and Mr. Rain could have been clearer, but it seems to involve a contributor's (promisor's) promise to give money to a college (the promisee), a promise on which a third-party bank somehow relied by making a loan. In any event, Braucher's remarks strongly suggest his intent that comment d (now comment c) only protect intended beneficiaries. Earlier, indeed, he had stated that the new § 90's inclusion of third parties was "to provide for reliance by beneficiaries as well as reliance by promises [sic]," and that this change "is entirely consistent with the chapter on third party beneficiaries in the original Restatement." *Id.* at 297. The Restatement (Second)'s definition of the term "beneficiary," however, hardly supports the view that § 90 only protects intended beneficiaries. *See infra* text accompanying notes 180-184.

169. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

170. *See supra* text accompanying note 115 (substance of § 302); *see also supra* note 122 (substance of comment d to § 302).

171. *See supra* notes 125-128 and accompanying text.

172. "Enforcement of the promise in such cases rests on the same basis and depends on the same factors as in cases of reliance by the promisee." RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1981).

173. This is the position the authors adopted in a previous article. Metzger & Phillips, *supra* note 4, at 543 ("only third party beneficiaries of a contract made enforceable by estoppel are to be protected"). For reasons that will become apparent shortly, we now doubt that this interpretation was correct. Although we still cannot dismiss it completely.

174. *See supra* note 107 (contract between promisor and promisee needed for third-party beneficiary recovery).

175. *See supra* text accompanying note 87 (text of § 90).

reliance would, in effect, create the necessary contract between the promisor and promisee and thus allow the intended beneficiary to recover.[176] Thus read, comment c is little more than a supplement to the Restatement (Second)'s third-party beneficiary rules. While some evidence supports this reading of comment c,[177] the authors know of no authoritative source that articulately enunciates it.[178]

In any event, the claim that comment c to section 90 protects only intended beneficiaries is subject to a more significant objection. The comment simply uses the term "beneficiary" to describe the relying third party, and fails to include the word "intended."[179] This omission is important because section 2 of the Second Restatement defines a beneficiary as a person other than the promisee who will benefit from performance of a promise.[180] Comment g to that section elaborates by stating: "A beneficiary may or may not have a legal right to performance; like 'promisee,' the term is neutral with respect to rights and duties."[181] If this definition is incorporated within comment c, the comment seemingly includes *all* beneficiaries of the promise, whether intended or incidental.[182] At least one court has adopted this reading of comment c. While reaffirming *Hoffman*'s[183] extension of promissory

176. *See* Metzger & Phillips, *supra* note 4, at 543.

177. The college hypothetical discussed by Professor Braucher and Mr. Rain suggests this reading of comment c, since it appears that no consideration supports the contributor's gift promise. *See supra* note 168. Illustration 6 to § 90 further supports this reading of comment c:

> A executes and delivers a promissory note to B, a bank, to give B a false appearance of assets, deceive the banking authorities, and enable the bank to continue to operate. After several years B fails and is taken over by C, a representative of B's creditors. A's note is enforceable by C.

RESTATEMENT (SECOND) OF CONTRACTS § 90 illustration 6 (1981). Here, no consideration supported *A*'s note, yet *C* could recover. *C* might, however, qualify as an intended beneficiary under Restatement (Second) § 302(1) or comment d to that section. A case supplies further evidence for this reading of comment c. *See* Lee v. Paragon Group Contractors, Inc., 78 N.C. App. 435, 337 S.E.2d 132 (1985) (discussed *infra* note 198). The court, however, denied the third party's claim, arguably rejecting this reading of comment c in the bargain. *Id.*

178. This reading is also inconsistent with the general argument that promissory estoppel is becoming an independent theory of recovery, since there is little reason to think that such a theory would incorporate traditional contract tests of liability. *See* Metzger & Phillips, *supra* note 4, at 543-44.

179. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1981).

180. Where performance will benefit a person other than the promisee, that person is a beneficiary." RESTATEMENT (SECOND) OF CONTRACTS § 2(4) (1981).

181. *Id.* comment g. Comment a to § 302 basically repeats this point. *Id.* § 302 comment a. Also, comment a adds that: "[e]ither promisee or beneficiary may but need not be connected with the transaction in other ways: neither promisee nor beneficiary is necessarily the person to whom performance is to be rendered, the person who will receive economic benefit, or the person who furnished the consideration." *Id.*

182. Professor Knapp so reads comment c. *See* Knapp, *supra* note 1, at 61. Professor Knapp explains that "the text [of section 90] refers not only to third parties who are the intended beneficiaries of a promised performance, but also to others who may foreseeably rely on a promised performance in making expenditures or taking other action of their own." *Id.* (citing comment c to § 90). Since comment c does limit third-party recovery to *beneficiaries*, however, this formulation may be a bit too broad. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 comment c (1981).

183. *See supra* notes 155-156 and accompanying text.

estoppel liability to third parties in 1974, the Wisconsin Supreme Court declared:

> We can see no reason to limit recovery to those persons who would be considered third party beneficiaries under contract law if this is what the proposed comment suggests. If the plaintiff can prove the essential facts he should not be precluded from recovery as a third party reasonably relying on promises made to others.[184]

3. *The Later Cases*

The other two major 1970s cases discussing promissory estoppel liability to third parties reached contrasting conclusions, but their differences are largely attributable to their divergent facts.[185] In *Aronowicz v. Nalley's, Inc.*[186] a food distributor, Nalley's, promised a newly formed firm, Major, that it would distribute meat products prepared by Major. Major's incorporators, Duncan and Aronowicz, took innumerable actions in reliance on the promise. For example, the incorporators quit their previous jobs, purchased meat products, set up a factory, committed their own assets to the project, and obtained investments from others.[187] After Nalley's backed out of the deal at the last minute, Duncan and Aronowicz sued Nalley's "under promissory estoppel theories."[188] After quoting the proposed section 90 and its comment to support the extension of liability to third parties,[189] the court found Nalley's liable.[190]

Like *Aronowicz, C.R. Fedrick, Inc. v. Sterling-Salem Corp.*[191] involved

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184. Silberman v. Roethe, 64 Wis. 2d 131, 148, 218 N.W.2d 723, 731-32 (1974). In *Silberman*, though, the third-party plaintiff did not recover. Defendant Nasco, Inc. promised to purchase a firm named Milway, Inc. and to strengthen it financially. Silberman, the third-party plaintiff, relied on this promise by reducing the amount of a debt owed him by Milway. The court denied recovery, finding that questions about the detrimental nature of Silberman's reliance, the informality of the promise, and the fact that all parties to the transaction were businessmen failed to satisfy § 90's injustice element. *See id.* at 143-47, 218 N.W.2d at 729-31. The court also concluded that the promise was the type of promise that the promisor should reasonably have expected to induce definite and substantial action or forbearance. *Id.* at 154, 218 N.W.2d at 734.

185. *See infra* notes 186-197 and accompanying text; *see also* Oates v. Teamsters Affiliates Pension Plan, 482 F. Supp. 481, 488 n.34 (D.D.C. 1979) (use of estoppel by third party not precluded, but issue irrelevant).

186. 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (1973).

187. *Id.* at 36-37, 45, 106 Cal. Rptr. at 428-29, 435-36.

188. *Id.* at 33, 106 Cal. Rptr. at 427. Major sued under both contract and estoppel theories. While the court apparently found ample grounds for concluding that Major could recover in contract, it refused to characterize the lower court's verdict for Major as contractual. *See id.* at 44, 106 Cal. Rptr. at 434.

189. *Id.* at 44-45, 106 Cal. Rptr. at 435.

190. [D]efendant knew that Aronowicz and Duncan were leaving their previous employment, investing and pledging their fortunes and securing the investments of others in substantial amounts . . . . Defendant watched these efforts by plaintiffs, encouraged them, approved of the results, and went so far as to commence to secure orders for the products to be manufactured by Major . . . . It would be a blemish on the face of justice to allow defendant to now disclaim any responsibility.

Id. at 45, 106 Cal. Rptr. at 435-36.

191. 507 F.2d 319 (9th Cir. 1974).

California law, but the cases have little else in common. In *Aronowicz* the corporate promisee Major was virtually identical with its third-party incorporators Duncan and Aronowicz, and defendant Nalley's dealt with Duncan and Aronowicz, who acted on behalf of their newly founded corporation.[192] In *Fedrick*, on the other hand, the defendant gave price quotations on sewage pump equipment to a supplier that it believed to be the ultimate purchaser. The supplier then submitted a higher price quotation on the same equipment to Fedrick, a contractor, identifying the defendant as the source of the equipment. Fedrick used this quotation to compute its bid to a California Improvement District for the construction of sewage pump stations. The Improvement District accepted the bid, but the defendant never received Fedrick's purchase order for the equipment and never accepted it. Nonetheless, Fedrick and the defendant continued to discuss the suitability of defendant's equipment for Fedrick's project until they finally reached an impasse. Fedrick then had to obtain the equipment at a higher price. Fedrick claimed that section 90 estopped the defendant from denying a contractual relationship between the two parties.[193]

The three-judge panel denied Fedrick's claim because: (1) the defendant thought that it was dealing with the supplier "as *its* customer" and thus had no "[r]easonable expectation that a *particular* third party" would rely upon its promise, and (2) the price the defendant quoted and the price the supplier quoted to Fedrick were different.[194] The precise scope of the court's holding, however, is unclear.[195] A two-judge concurrence concluded that California courts would allow the third party to recover "only when a promisor knows that a third party may reasonably rely on his offer, and only when the third party so relies."[196] Thus, the concurring judges would "require that the promisor intend his offer to reach the third party without undergoing change en route," and that it "be the offer of the promisor and not some

192. The letter in which Nalley's promised to become Major's distributor was delivered to Duncan. *Aronowicz*, 30 Cal. App. 3d at 35, 106 Cal. Rptr. at 428. Lengthy discussions between Nalley's and the two third parties and a detailed proposal from Duncan to Nalley's preceded this letter. *Id.* at 34, 106 Cal. Rptr. at 427.

193. *Fedrick*, 507 F.2d at 321. Fedrick sought "damages . . . founded on the delay in and additional cost of" completing the project. *Id.*

194. *Id.* at 322 (emphasis in original).

195. The court stated that the revised version of § 90 should have *no* application to "price quotations by manufacturers to general contractors." *Id.* at 322. The facts supporting the ruling stated in the text, however, obviously have a narrower sweep. The opinion also discussed the wider implications of a contrary decision. For example, the court worried that manufacturers who issue price lists to dealers might be liable if the dealer transmits the quotation to a third party without the manufacturer's knowledge, and that this might occur even if the dealer changes the terms of the quotation. *Id.* The court said further: "It would seem that Section 90 (Revised) should, if at all, only be applicable to third persons in complete privity with the terms of the promise made by the promisor and whose conduct of reliance is in answer to the *terms of the promise*." *Id.* at 322 n.9 (emphasis in original). Since privity of contract is a term usually employed with reference to *parties*, the meaning of "privity with the terms of the promise" is unclear. Perhaps this portion of the opinion merely explains that liability should not exist where the intermediary has changed the promisor's terms. For a suggestion that the *Fedrick* decision is easily explained under § 90's tests, see *infra* note 265.

196. *Fedrick*, 507 F.2d at 323 (Merrill, J., concurring).

intervening elaboration or modification on which the third party relies."[197]

Third-party promissory estoppel claims since the Second Restatement's issuance in 1981 have also produced mixed results. In *Bolden v. General Accident, Fire, & Life Assurance Corp.*[198] an Illinois intermediate appellate court rejected the doctrine's extension to third parties.[199] In that case, the plaintiffs, who had suffered injury in an automobile accident, sued to enforce promises allegedly made in a settlement agreement between two insurers. Their first complaint stated a third-party beneficiary theory, but their second amended complaint "sound[ed] in promissory estoppel."[200] In deciding plaintiffs' appeal of the defendant's successful motion to dismiss, the court considered only the promissory estoppel claim contained in the amended complaint.[201] Since the complaint failed to allege that the defendant insurer ever made a promise to the plaintiffs, they had to sue as third parties. After noting that "no cases in Illinois . . . have allowed anyone other than the promisee to proceed on a promissory estoppel theory,"[202] the court considered whether it should adopt section 90's embrace of third parties. To this end, the court discussed some of the cases extending liability to such parties, but finally declined the plaintiffs' invitation to join those decisions.[203] "In view of the substantial nature of the detriment apparent in [those] decisions," the court stated, "the instant case would not provide the best vehicle for effectuating a change in Illinois law, even if desirable, for several reasons."[204] These reasons were the court's uncertainty about the existence of the alleged settlement agreement and its conclusion that the plaintiffs' reli-

197. *Id.*

198. 119 Ill. App. 3d 263, 456 N.E.2d 306 (1983); *see also* Marine Transp. Lines v. International Org. of Masters, Mates, & Pilots, 636 F. Supp. 384, 391 (S.D.N.Y. 1986) (statement "*to a third party*" apparently one reason for rejecting a promissory estoppel claim) (emphasis in original)); Lee v. Paragon Group Contractors, Inc., 78 N.C. App. 334, 337 S.E.2d 132 (1985).

In *Lee* the third-party plaintiff was a lender that had agreed to make advances to a construction subcontractor. The lender conditioned these advances on the general contractor's agreement to make its future payments to the subcontractor payable to the lender as well. The general contractor therefore promised the subcontractor that it would make future checks payable to both the subcontractor and the lender. The general contractor subsequently breached this promise by making some of the checks payable to other parties. The court first rejected the plaintiff lender's third-party beneficiary claim, since the subcontractor's return promise was merely a promise to perform a preexisting contractual obligation and therefore did not supply consideration for the general contractor's promise. *Id.* at 338, 337 S.E.2d at 135. The court further considered whether the third party's reliance could serve "[a]s a substitute for the want of consideration." *Id.* After discussing the new version of § 90 and its history, the court declined to grant the third party's claim because it found no North Carolina cases permitting § 90 recovery by a third party. *See id.* at 338-41, 337 S.E.2d at 136. *Lee* provides an example of a third-party beneficiary case where the third party attempted to use its own reliance as a substitute for the absence of consideration in the agreement between the promisor and the promisee. *See supra* notes 173-178 and accompanying text.

199. 119 Ill. App. 3d at 269, 456 N.E.2d at 311.

200. *Id.* at 265, 456 N.E.2d at 308. The court referred to the promissory estoppel claim as "an action," "a cause of action," and "a theory" and also called the third-party beneficiary claim an "alternative theory." *Id.*

201. *Id.* at 265, 456 N.E.2d at 308.

202. *Id.* at 266, 456 N.E.2d at 309.

203. *Id.*

204. *Id.* at 267-68, 456 N.E.2d at 309.

ance was insubstantial.[205]

In *Ravelo v. County of Hawaii*,[206] however, the Hawaii Supreme Court adopted the new section 90 and its inclusion of third parties.[207] In that case, the Hawaii County Police Department informed Ravelo by letter that the county had accepted his application for employment as a police officer. Ravelo and his wife relied on this promise by quitting their jobs and removing their children from a private school. The county then rescinded the offer under state regulations declaring that probationary employees like Ravelo could be terminated without cause at any time. The lower court therefore dismissed the Ravelos' complaint. On appeal, the Hawaii Supreme Court stated that it could not "fault the circuit court's perception that the averments in the complaint could not sustain an action premised on a breach of a formal contract."[208] The court, however, considered whether the plaintiffs could recover under "alternative theories of relief," and concluded that promissory estoppel filled the bill.[209] After quoting and discussing the 1932 and 1981 versions of section 90, the court declared that "the revised section provides a sounder legal foundation for the application of promissory estoppel, and we deem it advisable that the current § 90 be followed hereafter."[210] "Hence," the court concluded, "we expect that relief here, if appropriate, will extend to Mrs. Ravelo as well as Mr. Ravelo."[211]

C. Implications for the Independent Theory Argument

As we stated earlier, this section has two general aims. The first is simply to examine the promissory estoppel cases involving third-party claimants. Here, although the decisions explicitly discussing the point are relatively few and are concentrated in a few states, the weight of such authority clearly supports estoppel's extension to third parties in appropriate cases.[212] This section also considers how these decisions affect the argument that promissory estoppel is becoming an independent theory of recovery. As the preceding discussion suggests, some of these cases display the outward indicia of independent theory status identified earlier in the Article.[213] Some of the cases, that is, base the plaintiff's claim solely on estoppel without mentioning contract law;[214] some segment the plaintiff's contract and estoppel

205. *See id.* at 268-69, 456 N.E.2d at 309-11.

206. 66 Haw. 194, 658 P.2d 883 (1983); *see also* Russell v. Bank of Kirkwood Plaza, 386 N.W.2d 892, 896-97 (N.D. 1986) (rejecting third-party's promissory estoppel claim because reliance neither substantial nor justifiable, but expressing no objection to third-party estoppel claims in general).

207. 66 Haw. at 201, 658 P.2d at 887-88.

208. *Id.* at 198, 658 P.2d at 886.

209. *Id.* at 199, 658 P.2d at 886-87.

210. *Id.* at 201, 658 P.2d at 887-88.

211. *Id.*, 658 P.2d at 888.

212. *See supra* notes 155-211 and accompanying text.

213. *See supra* notes 53-64 and accompanying text (stating these indicia).

214. *See, e.g., Ravelo*, 66 Haw. at 198-201, 658 P.2d at 887-88; Bolden v. General Accident, Fire & Life Assurance Corp., 119 Ill. App. 3d 263, 265-69, 456 N.E.2d 306, 308-11 (1983) (contract claim in first complaint not considered).

claims;[215] and some use terms like "theory" to describe the estoppel claim.[216] These cases also support the independent theory argument in two other ways. Each involves a comparison between the third-party promissory estoppel cases and the third-party beneficiary discussion that opened this section.[217]

A genuinely "independent" theory of recovery should employ tests of liability different from its competitors.[218] Here, this means that the standards for determining promissory estoppel liability to third parties should differ from the tests used for determining liability under third-party beneficiary theory. Obviously, section 90's elements differ from the intent standards traditionally employed in third-party beneficiary cases.[219] Moreover, although the evidence is mixed, comment c to section 90 arguably does not require that the relying third party also qualify as an intended beneficiary.[220] Nor does comment c reiterate the new reliance-oriented third party beneficiary tests set by comment d to Restatement (Second) section 302.[221] Section 90 requires actual reliance on the third party's part, while comment d does not, if read literally.[222] Even though some of the cases applying comment d mention actual reliance, they generally make it one factor to be weighed along with traditional intent standards.[223] Under section 90, on the other hand, actual reliance constitutes a distinct element in the plaintiff's case.[224] All of these factors show the difference between third-party beneficiary theory and promissory estoppel theory.

The most important difference between third-party beneficiary recovery and promissory estoppel recovery, however, is that the former requires a contract between promisor and promisee while the latter does not.[225] Third parties mounting a promissory estoppel claim therefore need only establish the elements of estoppel in order to recover. In *Hoffman*, for example, the court's opinion demonstrated that no contract existed between Red Owl and Hoffman, but this absence did not prevent Hoffman's wife from recovering.[226] Also, the absence of third-party beneficiary claims in some of the

215. *E.g.*, Russell v. Bank of Kirkwood Plaza, 386 N.W.2d 892, 895-97 (N.D. 1986); *cf.* Aronowicz v. Nalley's Inc., 30 Cal. App. 3d 27, 33, 106 Cal. Rptr. 424, 427 (1973) (one plaintiff sues under contract and estoppel; two others sue under estoppel only); Bolden v. General Accident, Fire & Life Assur. Corp., 119 Ill. App. 3d 263, 265, 456 N.E.2d 306, 307-08 (1983) (first complaint sounded in contract, second in estoppel).

216. *See e.g., supra* notes 188, 202 and accompanying text. The Hawaii Supreme Court's language in *Ravelo* is especially revealing in this respect. *See supra* text accompanying notes 208-209.

217. *See supra* text accompanying notes 106-146.

218. *See supra* text following note 53.

219. *Compare supra* text accompanying note 29 (classic test for § 90) *with supra* text accompanying notes 108-112 (classic tests for third-party beneficiary).

220. *See supra* notes 165-184 and accompanying text.

221. *See supra* text accompanying notes 169-178.

222. *See supra* text accompanying notes 86-94; notes 122-124 and accompanying text.

223. *See supra* notes 139-146 and accompanying text.

224. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("and which does induce such action or forbearance").

225. *See supra* note 107 and accompanying text.

226. *See supra* notes 70, 73, 155-56 and accompanying text. Also, in C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319 (9th Cir. 1974), the court permitted a promissory estoppel

other estoppel decisions strongly suggests that no contract was present in those cases either.[227] Indeed, the authors do not read any of the third-party estoppel cases discussed above as specifically requiring the plaintiff to prove a contract between the promisor and the promisee.[228] These cases arguably can be conceptualized as third-party beneficiary decisions because they use the third party's foreseeable reliance to substitute for missing contract elements, thus creating a contract between promisor and promisee.[229] With one possible exception, however, the opinions do not explicitly *say* anything of the sort.[230] Also, it is difficult to see how a common-law doctrine like estoppel could ever "cure" the statutorily and administratively created termination power that blocked a normal contract recovery in *Ravelo*.[231]

Even conceding promissory estoppel's independent theory status, one might still dismiss the development as a technicality. That is, readers inclined to agree with the two preceding paragraphs might respond with a weary "so what?" In reality, though, promissory estoppel's use as an independent theory of recovery increases the likelihood that promisors will be liable to third parties.[232] For example, courts following a literal reading of comment d to Restatement (Second) section 302 use the promise's ability to provoke reasonable reliance as an index of the parties' intention to confer a right on the third person.[233] Nonetheless, in *Pennsylvania Liquor Control Board v. Rapistan*,[234] where the court denied liability under such an ap-

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claim to proceed even though apparently no contract nor agency relationship existed between the defendant promisor and the promisee-supplier. *See* 507 F.2d at 321 (supplier never advised promisor that it had accepted promisor's price quotation, and trial court's finding of agency relation not supported by the evidence); *see also supra* text accompanying notes 193-197 (discussion of *Fedrick*).

227. *E.g.*, C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319 (9th Cir. 1974); Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983); Silberman v. Roethe, 64 Wis. 2d 131, 218 N.W.2d 723 (1974).

228. The court in Bolden v. General Accident, Fire, & Life Assurance Corp., 119 Ill. App. 3d 263, 268, 456 N.E.2d 306, 309 (1985), did, however, make the absence of an agreement between promisor and promisee one factor in its decision not to adopt the new version of § 90. Even here, though, the court's statement of the elements of a successful estoppel case did not include a contract between promisor and promisee. *Id.* at 266, 456 N.E.2d at 308. Furthermore, in *Ravelo v. County of Hawaii* the court discussed the estoppel claim mounted by Ravelo and his wife without mentioning the terminable-at-will employment contract between Ravelo and the county. *See Ravelo*, 66 Haw. at 199-201, 658 P.2d at 887-88.

229. *See supra* notes 173-178 and accompanying text (suggesting this interpretation of comment c to § 90).

230. In Lee v. Paragon Group Contractors, Inc., 78 N.C. App. 334, 338-41, 337 S.E.2d 132, 135-36 (1985), the court did consider an argument that the third party's reliance should substitute for the consideration missing from the agreement between promisor and promisee. The court, however, rejected that argument and with it the third-party beneficiary claim. *See supra* note 198.

231. *See* Ravelo v. County of Hawaii, 66 Haw. 194, 197-98 & n.2, 658 P.2d 883, 886 & n.2 (1983).

232. As we have noted, however, one technical difference between estoppel and third-party beneficiary theory—comment d's failure to include actual reliance—seems to make life easier for the plaintiff under third-party beneficiary law. In the cases of concern to us, though, the third party will have relied. Moreover, a promise capable of provoking reasonable reliance under comment d to § 302 should often generate reliance in fact.

233. *See supra* notes 130, 131 and accompanying text.

234. 472 Pa. 36, 371 A.2d 178 (1976).

proach, the third party could possibly have recovered under promissory estoppel.[235] More importantly, some of the promissory estoppel cases discussed earlier allowed the third-party plaintiff to recover even where traditional third-party beneficiary law probably would not have permitted such recoveries.[236] As just demonstrated, third parties can and have recovered under promissory estoppel in the absence of a contract between promisor and promisee.[237] If third-party beneficiary liability was possible in these cases, why did the plaintiffs eschew this obvious avenue of relief and pursue an unconventional claim such as promissory estoppel?

D. The Relation Between Promissory Estoppel and Third-Party Beneficiary Theory

The preceding discussion has left us with two general bases for promissory liability to third parties: a normal contractual third-party beneficiary claim, supplemented by the reliance criteria of comment d to section 302; and promissory estoppel. Where estoppel has attained independent theory status, the plaintiff should presumably be able to pursue both claims simultaneously. A few courts have followed this approach.[238] Thus, the third-party plaintiff should be able to recover under both theories where the plaintiff (1) qualifies as a donee or creditor beneficiary under traditional rules or as an intended beneficiary under the Restatement (Second); and (2) meets the various tests for promissory estoppel liability.[239] Where the plaintiff is merely an incidental beneficiary, but satisfies the promissory estoppel requirements,

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235. *See supra* notes 132-136 and accompanying text (discussing *Rapistan*). There, Rapistan obviously promised the PLCB that it would construct a conveyor system meeting certain specifications, and Holt allegedly relied to its detriment on those specifications when computing its bid to the PLCB. *See Rapistan*, 472 Pa. at 40-41, 371 A.2d at 180. At first blush, a potential warehouse operator might foreseeably rely in this way. The plaintiff alleged that Rapistan actually was aware that a third party would operate its equipment, and that Rapistan might have reasonably foreseen that this party would be a relying bidder. *Id.* at 46, 371 A.2d at 183.

The court concluded that it was not reasonable for Holt to rely on Rapistan's promise. *Id.* at 46, 371 A.2d at 183. The court's reasonableness analysis was, however, merely a surrogate for a conventional "intent of the parties" inquiry. Under the court's literal reading of comment d there was little to indicate the parties' specific intention *to benefit a third party*. *See supra* notes 133-136 and accompanying text. No obvious reason supports such a test under promissory estoppel. Moreover, under § 90 a court considers reasonableness of reliance merely a factor for determining whether it is unjust not to enforce the promise, and not a specific element of recovery. *See supra* note 96 and accompanying text. The court's reasonableness analysis, in sum, seems closely tied to the third-party beneficiary context in which the case proceeded.

236. *See supra* notes 155-211 and accompanying text.

237. *See supra* notes 226-228 and accompanying text.

238. *See e.g.*, Russell v. Bank of Kirkwood Plaza, 386 N.W.2d 892 (N.D. 1986) (denying each claim); *cf.* Aronowicz v. Nalley's, Inc., 30 Cal. App. 3d 27, 41-42, 106 Cal. Rptr. 424, 432-33 (1973) (considering claim that contract recovery precludes estoppel recovery by promisee, but apparently rejecting this argument on facts of case).

239. Some authority, however, supports the proposition that the plaintiff should not be able to employ estoppel where a normal contract recovery is possible. *See supra* note 48. The courts have apparently begun to abandon this rule, which seems inconsistent with true independent theory status for promissory estoppel. Even where this rule does apply, it would not prevent the plaintiff from recovering, but would only affect the legal standards governing his damages. Due to the extremely open-ended character of estoppel remedy standards, *see*

only the latter basis supports recovery.[240] Intended beneficiaries who have not foreseeably relied should receive only a contract recovery.[241] Third parties who satisfy neither the tests for third-party beneficiary recovery nor the requirements for liability under promissory estoppel should not obtain relief under either theory.

Under the traditional intent-oriented standards for third-party beneficiary recovery, the scheme just suggested would have a modicum of conceptual neatness. Courts would decide third-party beneficiary claims under the established tests, and promissory estoppel claims would proceed under section 90 or some variant of it.[242] By injecting reliance tests into the third-party beneficiary picture, however, comment d to section 302 muddies the water considerably.[243] The courts will sometimes have to consider reliance in two separate contexts, and will have to employ it differently in each context. In promissory estoppel cases, courts will usually apply the standard section 90 requirements.[244] In third-party beneficiary cases, comment d and the cases applying it suggest two possible approaches: (1) reading the comment literally by ignoring actual reliance and using the reasonableness of third-party reliance as a gauge of the parties' intent to benefit that party; and (2) making reasonable and actual reliance factors along with established intent standards.[245] Since neither approach is consistent with section 90, in some cases the courts may be left to consider three different ways of using reliance in third-party suits. The likely result is a certain amount of judicial confusion. While this confusion may not affect the disposition of too many cases, it still is advisable for courts to ignore comment d and purge third-party beneficiary law of reliance elements.[246] By basing third-party beneficiary recovery solely on traditional intent-related tests and leaving reliance to section 90, this move would achieve a degree of conceptual clarity.

III. PROMISSORY ESTOPPEL AND THIRD PARTIES—AN EVALUATION

By imposing liability under tests and in situations that differ from third-party beneficiary theory, the cases allowing promissory estoppel recovery by third parties support the claim that the doctrine is emerging as an independent cause of action. The cases recognizing third-party recovery, however, are not yet so numerous as to etch the trend in stone. For this reason, this section considers the desirability of allowing third parties to recover when

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supra note 94, and the possibility of reliance-based damages in contract cases, *see supra* note 52, it is unclear how much practical impact such a rule would have in any event.

240. The *Rapistan* case provides a possible example. *See supra* notes 132-136, 234-235 and accompanying text.

241. Examples would include almost all traditional donee-beneficiary and creditor-beneficiary situations where the third party did not rely.

242. *Compare supra* text accompanying notes 107-117 (third-party beneficiary tests) *with supra* text accompanying note 87 (promissory estoppel test).

243. *See supra* text accompanying notes 120-128.

244. *See supra* text accompanying note 87.

245. *See supra* notes 125-146 and accompanying text.

246. *See* Prince, *supra* note 108, at 989, 990 (seemingly arguing that third-party reliance be considered under § 90 and nowhere else).

they foreseeably rely on promises made to another person. In examining this question, the discussion turns first to the justifications for extending promissory estoppel to third parties. The section then considers the problems this extension may eventually create and suggests possible ways to minimize these problems.

A. The Case for Protecting Third-Party Reliance

Any argument for allowing recovery by third parties who rely on promises made to others must rest on the assumption that it is desirable to protect reliance in general. As the reader may have gathered by inference, the authors accept this assumption. Of course, one can dismiss as an arbitrary personal preference the belief that people who foreseeably rely on promises are morally entitled to recompense.[247] Nevertheless, the reliance interest derives support from the way it has found favor over time. As noted earlier, reliance apparently was a significant factor in the action of assumpsit that preceded modern contract law.[248] The previous discussion amply demonstrates that protection of reliance has been a major theme within the twentieth century law of contract.[249] Thus, the reliance interest seems to reflect a fairly permanent moral intuition that supports recovery by relying third parties.[250] Yet it is also an intuition whose influence has waxed and waned depending on the social milieu in which it operates.

The main reason for the nineteenth century de-emphasis of the reliance interest was the economic individualism that pervaded that century's contract law.[251] One aspect of this laissez-faire orientation was the desire to limit contractual liability.[252] Two concrete expressions of this desire were the general tendency to deny recovery where unbargained-for reliance had occurred,[253] and the rule that no contract liability would obtain where the parties had not fully and clearly spelled out the terms of their agreement.[254]

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247. *E.g.*, Feinman, *supra* note 8, at 711 (basic tenet of liberal theory that, because values are arbitrary and subjective, no objective measure for assessing relative importance of different values exists).

248. *See supra* note 8 and accompanying text.

249. *See, e.g., supra* text accompanying notes 19-28.

250. *But see* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1263-64 n.15 (1980). The authors argue that "if moral force is attached to promises merely because people rely on them, the argument is subject to the claim that such reliance is dependent upon legal enforceability." *Id.* But while reliance on legally enforceable promises *may* carry greater moral weight than reliance on unenforceable promises, centuries of evidence indicate that many people will rely to their significant detriment on legally unenforceable promises, for example oral promises within the statute of frauds. We may choose not to protect such reliance for other reasons—for example, because the social cost of doing so exceeds the obtainable benefits, or because we judge countervailing moral claims to be superior. But any implication that a decision not to protect an interest necessarily entails a judgment that it is devoid of any moral claim goes too far.

251. This statement places more weight on widely shared nineteenth century values than on material factors like the structure of the economy. The authors suspect that situations where promises induced foreseeable reliance were fairly common even in the relatively decentralized nineteenth century economy.

252. *See* G. GILMORE, *supra* note 10, at 14-17; *supra* notes 11-18 and accompanying text.

253. *See* G. GILMORE, *supra* note 10, at 18-21; *supra* notes 11-18 and accompanying text.

254. *See, e.g*, J. BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS 126-27, 129 (2d

Another aspect of the prevalent laissez-faire ethos was a "[n]o man is his brother's keeper" spirit[255] that tended not to sympathize with relying promisees.[256] As a result, nineteenth century courts would almost certainly have denied recovery in a case like *Hoffman*.[257] An archetypal court might have declared not only that Hoffman was imprudent in relying on an incomplete offer, but that courts should protect promisors like Red Owl from liability on indefinite obligations that they did not clearly assume.

Certain general features of modern society, on the other hand, help explain the revival of the reliance interest in the twentieth century. These features also indirectly support the claim that this revival is a desirable development. In making the latter statement, the authors do not assert the innate goodness of whatever changing times may bring, or even the futility of resisting such changes.[258] Instead, the analysis merely makes three interconnected points. First, among the many reciprocal relations between law and society, factors such as the structure of economic relations and widely shared social values inevitably influence the legal order. Secondly, disharmony between the legal and the social spheres has practical costs that sometimes justify letting the former follow the latter. Finally, certain perennial moral claims like the reliance interest seem especially worthy of support when social conditions let them flower.

The increased interdependence characterizing modern society is the usual explanation for the greater protection given reliance in the twentieth century.[259] This "interdependence" can be regarded in two overlapping, yet conceptually distinguishable ways. First, it can be seen as a *material condition* giving basically egoistic individuals and groups a practical need to rely on each other, and giving courts a practical incentive to protect such reliance.[260] For example, a complex, specialized economy of the modern sort

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ed. 1907) (offer must state all needed terms and do so in clear fashion); Henderson, *supra* note 21, at 357-58 (traditional offer and acceptance rules give parties freedom to express, or refuse to express, a willingness to be bound and also seek to insure that obligation attaches only when it has been deliberately undertaken). Today, by contrast, indefinite agreements are much more likely to be enforced. *See, e.g.*, U.C.C. §§ 2-204(1), (3) (1977); RESTATEMENT (SECOND) OF CONTRACTS § 33 & comments a, b (1981); *id.* § 34.

255. G. GILMORE, *supra* note 10, at 95.

256. "No matter how much detriment a promisee may have suffered, he has not, thereby, necessarily furnished a consideration. Nor does he have, so far as Holmes takes us, any right to redress or even any claim on our sympathies." *Id.* at 20.

257. *See supra* notes 67-77 and accompanying text.

258. As a likely example of the second view, consider Holmes's well-known statement that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, *whether right or wrong*." O. HOLMES, *supra* note 11, at 36 (emphasis added).

259. *E.g.*, Fuller, *supra* note 97, at 823 ("with an increasing interdependence among the members of society we may expect to see reliance . . . become increasingly important as a basis of liability"). *See generally* Kostritsky, *A New Theory of Assent-Based Liability Emerging under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 908-11 (1987) (sketching these and related explanations without deciding whether they are accurate). For a fuller statement of our views about the social origins of promissory estoppel's rise, see Metzger & Phillips, *supra* note 4, at 500-08.

260. "We are now all cogs in a machine, each dependent on the other." G. GILMORE, *supra* note 10, at 95.

may require a high degree of trust for its proper functioning, and thus may require that economic actors be able to rely on each others' promises.[261] Here, courts protect reliance not because of any feeling of communal solidarity, but because enlightened self-interest demands it.

Interdependence can also be viewed in a second sense: as a widely-shared *moral feeling* of interconnectedness superseding the nineteenth century's economic individualism. In such a climate, parties whose promises cause foreseeable detrimental reliance *are* in some sense "their brother's keeper," and thus are legally responsible for that reliance.[262] It is difficult to determine which of these two overlapping senses of the term interdependence best explains the revival of the reliance interest in the twentieth century, or the relative weight to be assigned to each sense. Also difficult to determine is what might have produced the changed moral outlook constituting our second sense of the term, or the extent to which that outlook has actually changed. One possible explanation is the way the rise of the large corporation has undermined classical contract law and its economic individualism by creating marked disparities in bargaining position.[263] With the field thus cleared, longstanding ethical claims like the reliance principle could once again make themselves felt.

For all these reasons, promise-induced reliance deserves legal protection. Furthermore, no obvious reason exists to limit this protection to direct recipients of the promise. As the cases dealing with third-party reliance demonstrate, such reliance is occasionally every bit as real, foreseeable, and reasonable as reliance by promisees.[264] If the goal is to protect reliance, why deny such parties recovery? Admittedly, a random sample of potential third-party suits is likely to contain proportionately more unjustifiable claims than a similar sample of suits by promisees. Section 90's tests of recovery should, however, usually eliminate such claims.[265] As a group, third-

261. *See* Farber & Matheson, *supra* note 48, at 927-29.

262. *Cf. id.* at 942 (reliance protected to foster a society in which value of trust gets greater recognition and in which people can confidently rely on each other); Kostritsky, *supra* note 259, at 942-43 (discussing altruistic explanation for promissory estoppel cases).

263. For one rendition of this very familiar story, see Metzger & Phillips, *supra* note 4, at 501-04.

264. *See supra* text accompanying notes 154-211.

265. For example, in C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319 (9th Cir. 1974), the defendant made a bid to a middleman who later revised the bid and submitted it to the plaintiff. *See supra* notes 191-197 and accompanying text. The main opinion in the case apparently limited § 90's third-party application "to third persons in complete privity with the terms of the promise made by the promisor and whose conduct of reliance is in answer to the *terms of the promise*." *Id.* at 322 n.9 (emphasis in original). The court explained the reason for this limitation as follows:

> An application of [plaintiff's] proposed interpretation of Section 90 (Revised) would import that no manufacturer could issue a price list to an independent dealer without the fear that some day (unbeknownst to him) the manufacturer might be called upon to answer to a third party for an independent dealer's price quotation to that third party, even though the price list may bear the legend in boldest possible type that "prices are subject to change without notice." So, too, manufacturers may be called upon, in a litigative posture, to answer for contractual terms that may differ vastly from those originally consummated between the manufacturer and the independent dealer.

party promissory estoppel claims should fare less well under section 90's tests of foreseeable, reasonable, promise-induced reliance than claims by promisees.[266] In the process, section 90's tests should do a tolerable job of distinguishing cases implicating the reliance interest from cases where the relevant policies do not justify recovery.

B. The Spectre of Mass Liability

In general, then, the extension of promissory estoppel liability to third parties is a desirable development.[267] But the reliance principle on which this expansion is based, while important, is hardly absolute. Indeed, section 90 recognizes as much by limiting the circumstances in which reliance-based recoveries may occur.[268] In one general class of third-party cases, however, section 90's tests may not restrict liability in a satisfactory manner. Here, maximum protection of the reliance interest through a broad reading of section 90's elements may have unfortunate consequences. The cases in question involve situations where the promise creates potential section 90 liability to a large number of third-party plaintiffs. Such situations pose, for example, problems of heavy dollar liability, the likely need to insure or self-insure against such liability, the cost and availability of insurance, and the feasibility and desirability of passing on these various expenses to customers. These problems, of course, have plagued tort law and product liability law for some time.

To the authors' knowledge, promissory estoppel cases presenting the problem of mass third-party liability have not yet arisen.[269] Yet the doctrine's long history of expansion into new areas makes the problem's emergence quite possible. Obviously, mass liability cases may arise in an unpredictably

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Id. at 322.

On the facts of the case, however, § 90's tests very adequately prevent liability and therefore render such a limitation unnecessary. Courts will probably not regard a promise whose terms are altered by a middleman as one "which the [promisor] should reasonably expect to induce action or forbearance" by a third person. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). Where the terms have been changed, moreover, how can the promisor's promise to the dealer be a promise "which does induce such action or forbearance"? *Id.* In such cases, the promise actually provoking reliance is distinct from the promisor's original promise.

266. Such claims should also fare less well under the predictive variables discussed in Kostritsky, *supra* note 259, at 911-29. Two of Kostritsky's variables affecting promissory estoppel recovery, (1) the parties' enmeshment in broad long-term ties, and (2) the existence of a relationship of trust and confidence between the parties, are especially unlikely in the third-party context. *Id.*

267. Third-party recoveries for reliance induced by the defendant's statements occur in other areas of the law. *See, e.g.*, U.C.C. § 2-318 (1977) (extending seller's liability for express and implied warranties outside privity of contract where, among other things, it was reasonable to expect that the plaintiff would use, consume, or be affected by the goods); RESTATEMENT (SECOND) OF TORTS § 552 (1977) (extending liability for negligent misstatements by professionals and others to certain relying third parties).

268. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also supra* text accompanying notes 78-99.

269. As the rules regarding claims on government contracts indicate, however, the problem has long been evident in the third-party beneficiary context. *See, e.g.*, E. FARNSWORTH, *supra* note 110, at 726-27 (discussing third-party suits against water companies, highway contractors, and utilities in which presence or absence of consequential damages was a factor in denying or allowing recovery).

broad set of situations. Existing third-party beneficiary and promissory estoppel cases, however, provide a few representative possibilities. Suppose, for example, that the promisor is a construction firm promising to complete a large office building for the promisee by a certain date, and that prospective tenants suffer reliance losses when the building is not finished on time.[270] Or consider third-party beneficiaries in government contract situations such as promises to supply water to city fire hydrants[271] or to provide electricity to customers within a city.[272] Third parties harmed by breach of such promises normally will have relied in the sense that they counted on the uninterrupted provision of such services in conducting their activities and might have chosen to locate elsewhere had they had reason to expect the breach. While these are not the sort of discrete, tangible, promise-induced changes in position found in *Hoffman* and similar cases, judges may on occasion sympathize with the plaintiffs.[273] Indeed, some courts have already become very lenient when applying section 90's actual reliance requirement.[274] Finally, if a troubled corporation promises the employees of an unprofitable plant in a one-industry town that the plant will continue to operate, local residents as well as the employees may suffer reliance losses when the corporation breaches the promise.[275] In each of these situations, one can easily flesh out the facts to create a mass of plausible third-party promissory estoppel claims. While other theories of recovery may be assertible in these cases, the authors here assume that promissory estoppel provides a truly independent theory of recovery.

In some of the situations just sketched, the extension of promissory estoppel to third parties may exact severe consequences. For this reason, some might urge that courts abort the extension before real damage occurs.[276] Although the authors do not intend an exhaustive examination of this diffi-

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270. *Cf.* McDonald Constr. Co. v. Murray, 5 Wash. App. 68, 485 P.2d 626 (1971) (no recovery in third-party beneficiary suit by tenants). For additional discussion of *McDonald*, see E. FARNSWORTH, *supra* note 110, at 710.

271. *Cf.* Harris v. Board of Water & Sewer Comm'rs, 294 Ala. 606, 320 So. 2d 624, 628 (1975) (successful third-party beneficiary suit by owner of motel and restaurant destroyed by fire); *supra* note 131 (discussing *Harris*).

272. *Cf.* Strauss v. Belle Realty Co., 98 A.D.2d 424, 469 N.Y.S.2d 948, 951 (1983), *aff'd*, 65 N.Y.2d 399, 482 N.E.2d 34, 38, 492 N.Y.S.2d 555, 559 (1985) (unsuccessful negligence and third-party beneficiary suits by apartment dweller injured in fall after electrical blackout).

273. *See, e.g.*, Harris v. Board of Water & Sewer Comm'rs, 294 Ala. 606, 320 So. 2d 624 (1975) (plaintiff's motel and restaurant destroyed in fire).

274. *See* Farber & Matheson, *supra* note 48, at 910-14; *see also supra* notes 89-94 and accompanying text (discussing the new § 90's deletion of the "definite and substantial" requirement). Although they differed in the use they made of this conclusion, both courts in the cases cited in *supra* notes 271 and 272 assumed that the plaintiff had relied in some way. *See Harris*, 294 Ala. at 611, 320 So. 2d at 628 (fact that plaintiff relied on hydrant service one reason for recovery); *Strauss*, 469 N.Y.S.2d at 950 (even though plaintiff relied on flow of electricity, reliance failed to give him rights greater than those possessed by general public).

275. *Cf.* Local 1330, United Steelworkers of Am. v. United States Steel Corp., 492 F. Supp. 1, 9 (N.D. Ohio 1980) (denying contract and estoppel claims based on employer's conditional promise to keep plant open if workers made its operations profitable), *aff'd in part and vacated in part*, 631 F.2d 1264-80 (6th Cir. 1980). For an entirely different rationale for enforcing such promises, see Farber & Matheson, *supra* note 48, at 938-42.

276. *Cf.* Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402-05, 482 N.E.2d 34, 36, 492 N.Y.S.2d 555, 557-59 (1985) (court's refusal to extend negligence liability for electrical black-

cult subject, several considerations weigh against so extreme an approach. The first and most obvious is that otherwise deserving third parties may remain uncompensated, even if their losses are severe.[277] Also, promisors may make some of the promises capable of provoking mass third-party liability carelessly or without true commitment. In situations like this, the promisor's relatively culpable behavior argues for the imposition of liability. Finally, in these and other situations, a few well-publicized mass recoveries may deter promisors from making false promises, cause them to refrain from making promises they may not be able to keep, and stimulate them to keep the promises they do make.[278]

Thus, the authors believe, although with some trepidation, that the overall benefits of extending promissory estoppel liability to third parties may exceed the costs to promisors and to society in mass liability cases. This quite tentative conclusion, however, relies on a significant condition. Courts must be able to limit mass liability through methods that do reasonable justice to the competing interests of promisors, third parties, and society generally. The various requirements articulated by section 90 of the Second Restatement arguably provide suitable points of departure for such an effort. What follows is a brief assessment of some of the more obvious possibilities in approximate order of ascending desirability. These brief suggestions are intended to be speculative and exploratory.

1. Reasonable Foreseeability of Reliance

Section 90's requirement that the promise be one "which the promisor should reasonably expect to induce action or forbearance" is basically a test of reasonable foreseeability.[279] Greater stringency in the application of this requirement would no doubt reduce the mass liability burden somewhat, but one wonders how much. Many kinds of reliance likely to be induced by our

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out beyond utility's actual customers based largely on fear of enormous liability to utility and resulting social consequences).

277. Insurance may of course cover some of the losses. *E.g.*, E. FARNSWORTH, *supra* note 110, at 727 (noting availability of fire insurance as factor in denying third-party beneficiary claim by warehouse owner against water company for failure to maintain adequate water pressure). However, because promisors in such cases also can insure and because they are likely to have a greater ability to pass on costs than most promisees, allowing third-party recovery for reliance losses is arguably consistent with the loss-spreading principle inherent in many modern contract rules. On this tendency in modern contract law, see Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303, 335-36 (1983) (contract law seems to embody an insurance principle limiting individual catastrophic losses).

278. *See* Goetz & Scott, *supra* note 250, at 1266 (observing that enforcement of promises shapes nature and amount of promise-making activity). If courts enforce promises of a particular sort, promisors will be far more cautious about making them and far more forthcoming about the circumstances under which they will be unwilling to perform as promised. *Id.* at 1279. Accordingly, promisees and third parties will receive more accurate information to guide them in deciding whether or not to rely on a promise. *Id.* Thus, one general reason for enforcing promises is that parties will adapt their behavior in ways that positively affect social welfare. *Id.* at 1263-64. However, this could also mean that promisors will be deterred from making some socially useful promises. *Id.* at 1265. In the authors' judgment, however, this particular cost is unlikely to be substantial for the types of promises considered here.

279. Boyer, *supra* note 6, at 461-64.

set of illustrative promises are all too foreseeable.[280] The courts, however, could quite effectively reduce the promisor's exposure by requiring that the defendant have foreseen that the *specific plaintiff* would rely on the promise.[281] In this way, they could deny recovery to third parties whom the promisor could not identify at the time of the promise, even though the promisor could have foreseen that many people of this general sort would rely in certain specifiable ways. From the plaintiff's vantage point, however, this requirement is a rather artificial and arbitrary criterion for distinguishing winners from losers.

2. *Reasonableness of Reliance*

A court should consider the "reasonableness of the promisee's reliance" as a factor when applying section 90's "avoiding of injustice" requirement.[282] The reasonableness of the third party's reliance should operate similarly in suits by third parties. In most cases, consideration of this factor will closely resemble consideration of the forseeibility test just discussed. Since an objective test of reasonableness operates in both instances, the party's viewpoint should not significantly affect the determination. In a few mass liability situations, however, the reasonableness requirement may have some independent significance. Where the promisor's situation, reputation, or past behavior makes reliance on the promise unreasonable,[283] some third parties may nonetheless rely, and this reliance may be foreseeable. Thus, when a third party foreseeably, but unwisely, relies on a questionable promise, the unreasonableness of the third party's action or forbearance may provide an appropriate basis for a court to deny recovery.[284]

3. *Disclaimers*

Promisors who desire to avoid widespread promissory estoppel liability to

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280. *See supra* notes 270-276 and accompanying text.

281. *Cf.* Strauss v. Belle Realty Co., 65 N.Y.2d 399, 404-05, 482 N.E.2d 34, 37-38, 492 N.Y.S.2d 555, 558-59 (making a similar argument in a negligence suit). *Cf.* RESTATEMENT (SECOND) OF TORTS §§ 552(1), (2)(a) (1977); PROSSER & KEETON ON TORTS 747 (1984) (liability to third parties for negligent provision of business information generally limited to situations where promisor knows that recipient intends to supply information to particular third parties or to class of such parties). In addition, many of the cases in which third parties have recovered under promissory estoppel have involved plaintiffs whose identities were either known or highly knowable to the promisor. *See, e.g., supra* notes 155-156, 186-192, 206-211 and accompanying text.

282. RESTATEMENT (SECOND) OF CONTRACTS § 90 comment b (1981).

283. For example, suppose that everyone knows that a corporation promising to keep a plant open is in perilous financial condition and the plant in question is a serious drag on its profitability, and that everyone has considerable reason to suspect that the corporation made the promise to influence potential lenders. Or suppose that a construction firm's past performance and general reputation and a brief examination of the construction site belie that firm's promise to finish an office building by a certain date. Also, is it reasonable to rely on a promise that electrical power will be supplied on a continuous basis? Surely, everyone is aware that power failures can and do occur. Should not a reasonable person be expected to take reasonable steps to avoid losses caused by such failures?

284. Another option for the court would be to consider unreasonableness as a basis for reducing the amount of the third party's recovery. *See infra* note 305 and accompanying text.

third parties may attempt to disclaim liability in advance.[285] A promisor might simply include a statement that the promise is not enforceable by third parties and that the promisor will not be liable for third-party reliance.[286] When such a promise nonetheless causes a third party to rely, the promisor has at least two arguments for escaping liability. The first is that since section 90 recovery is *promissory* recovery and the promise explicitly denies third-party recovery, the promisor can never be liable to such a party.[287] This argument raises a basic question about the aims and further evolution of section 90. Is promissory estoppel primarily a device for enforcing *promises*, or is it mainly a vehicle for protecting *reliance*?[288] To the extent that the latter concern outweighs the former, this promise-based argument for using disclaimers to avoid liability loses force. Also, the argument has already been weakened by the many cases that have awarded the plaintiff losses-in-reliance instead of promise-based expectations.[289]

The promisor might next argue that no reasonable third party would rely on a promise containing a disclaimer of the sort described.[290] As a general proposition, this contention has much force. It assumes, however, that the disclaimer is communicated to the third party in such a fashion that a reasonable person can recognize and understand it.[291] Even when this occurs, though, a court may still find grounds for imposing liability if the promisor is in a position to dictate terms and the third party has little choice but to rely.[292] Assuming adequate communication, for example, a third-party

285. This tactic, however, presents some practical problems. If used for business reasons by, for example, builders or financially troubled corporations, a disclaimer may undermine the credibility of the promise and thus defeat the promisor's practical aims in making the promise.

286. Various other ways of stating the promise can also affect the likelihood of promissory estoppel recovery. Examples include reservation of a right to revoke, reservation of a right to change terms, and use of a conditional promise. *See* C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319, 322 (9th Cir. 1977) (reservation of right to change terms); *supra* note 71 (conditional promise). In addition, courts sometimes consider the definiteness of the promise in determining promissory estoppel liability, but aggressive use of promissory estoppel usually minimizes this factor. *See supra* notes 40-42 and accompanying text. Definiteness, however, still has some bearing on the reasonableness of the promisee's or third party's reliance.

287. *Cf.* Metzger & Phillips, *supra* note A, at 532-38 (discussing illusory promises).

288. On the latter view, the promise's existence and attributes assume less importance.

> [T]he promise must be viewed *relationally*: its ability to provoke reliance in a particular context is the focus of concern. Instead of asking "is this behavior a true promise meeting certain contractual tests?" courts might come to inquire "is this promise or other behavior, however characterizable in the abstract, such as to promote foreseeable reliance in the context where it occurred?"

Metzger & Phillips, *supra* note 4, at 539 (emphasis in original). At this point, promissory estoppel might effectively become one part of an expanded law of negligence, with the breach of duty consisting of the defendant's failure to avoid actions that would provoke reasonably foreseeable reliance. *Cf.* G. GILMORE, *supra* note 10, at 89-90 (suggesting that promissory estoppel may be becoming a "contort").

289. *See, e.g.*, Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 699-702, 133 N.W.2d 267, 275-77 (1965).

290. In most cases, the same basic argument might also be couched in terms of unforeseeability of reliance.

291. Thus, for example, courts in third-party promissory estoppel cases eventually may have to consider questions of conspicuousness akin to those now considered in product liability cases. *See, e.g.*, U.C.C. §§ 1-201(10), 2-316(2) (1977).

292. *See* PROSSER & KEETON, *supra* note 281, at 482-83 (express assumption of risk clause

apartment dweller may have little choice but to accept an electrical utility's disclaimer of estoppel liability, while prospective tenants in an office building or residents of a one-industry town may have other options.

4. Causation

Section 90 also requires that the promisor's promise be one "which does induce . . . action or forbearance."[293] This requirement is basically one of causation, but to the authors' knowledge no authoritative statement detailing the degree of required inducement has ever appeared. Whether a mere "but for" relation between promise and reliance will always suffice, or whether the promise must sometimes play a larger role in causing the claimant to rely, is therefore unclear. Given this uncertainty, courts may manipulate this requirement to limit the promisor's exposure if confronted with mass liability situations. Possibilities include a requirement that the promise be a substantial factor in producing reliance, or even a rule that recovery be denied if the promise's causal role falls below some arbitrary percentage.

This approach has the benefit of denying recovery when factors other than the promise helped bring about the third party's action or forbearance.[294] For example, consider a bankrupt local store owner in a formerly one-industry town who argues that he remained in the town and suffered reliance losses because the XYZ Corporation promised local employees that it would keep the plant open and later breached that promise. The store owner might remain a sympathetic figure if family ties were the main reason for his failure to move, but the overriding need to keep liability within manageable bounds might still dictate that he not recover. The causation determinations in this and other cases obviously would be anything but tidy, and a court should probably leave them to the factfinder.

5. Factor-Based Balancing

Section 90 allows recovery only "if injustice can be avoided . . . by enforcement of the promise."[295] An open-ended test of this sort obviously allows courts to consider a wide range of factors, and one of section 90's comments provides a list.[296] Courts, however, need not limit themselves to the listed factors when others seem relevant. Thus section 90's broad "injustice" requirement permits a factor-based approach that identifies, weighs, and balances the various relevant policy considerations. Mass liability and its collateral effects are legitimate inquiries within such an approach.

In the present context, the obvious advantage of this approach is that it permits courts explicitly to consider all the competing values at stake, and make the inevitable tradeoffs in as sensitive and discriminating a fashion as

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no defense in negligence case where party accepting risk suffers obvious disadvantage in bargaining power).

293. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

294. It could also provide a basis for reducing the amount of the third party's recovery. *See infra* note 303 and accompanying text.

295. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

296. *Id.* comment b; *see supra* notes 96-98 and accompanying text.

possible. Its equally obvious disadvantages include the mushy, uncertain, discretionary decisionmaking factor-based balancing will produce and the demands such an analysis will impose on the judiciary.[297] Decisionmaking processes of the former sort, however, are not unknown to twentieth century American law.[298] Furthermore, while the courts' less-than-sterling handling of doctrinal matters has been a pervasive, if subdued, theme within this Article, the concrete results they have reached are usually defensible. Thus, there is at least some reason to hope that a factor-based balancing approach would produce sensible accommodations in mass liability cases, even if the opinions justifying these accommodations are not things of beauty.

6. *Reduced Recoveries*

Section 90's "injustice" requirement, while a necessary element for liability, plays a more limited role in determining damages. The section contemplates partial enforcement of the promise and flexible remedies by stating that "[t]he remedy granted for breach may be limited as justice requires."[299] Thus, either in conjunction with a balancing approach or otherwise, courts confronted with mass liability promissory estoppel situations may consider the option of limiting the plaintiff's damages.[300] The advantage of such an approach, of course, is that it limits the tangible dollar burden on promisors, their insurers, and (ultimately) society, but also gives deserving claimants some recovery.

Although section 90 does not specifically contemplate this approach,[301] the fairest and most justifiable methods of accomplishing this end are probably those that make the promisor's burden roughly proportional to the promise's role in causing the plaintiff's losses. After a percentage-based determination of "inducement" like that suggested above,[302] courts might reduce the plaintiff's damages by making them proportional to the share of inducement contributed by the promise.[303] Alternatively, courts might imi-

297. To implement such an approach properly, the courts must identify the relevant factors of decision, make value judgments about their inherent importance, assess the extent to which the facts implicate each factor, and somehow determine the resultant of all these competing pushes and pulls.

298. Consider for example the sort of decision making required under the open-ended unconscionability doctrine of U.C.C. § 2-302 (1977). *See, e.g.*, E. FARNSWORTH, *supra* note 110, at 310, 314-16.

299. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

300. Some recent tort reform measures pursue the same tactic. *E.g.*, COLO. REV. STAT. § 13-21-102(1)(a) (1987) (punitive damages cannot exceed amount awarded as actual damages); FLA. STAT. ANN. § 768.80 (West Supp. 1988) ($450,000 limit on noneconomic damages).

301. In particular, RESTATEMENT (SECOND) OF CONTRACTS § 90 comment d (1981), the section's partial enforcement comment, does not specifically refer to this possibility.

302. *See supra* text following note 293.

303. *Cf.* Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303-04 (Utah 1981) (reducing plaintiff's recovery in product liability case to that portion of plaintiff's damages equal to percentage of cause contributed by product defect). For example, if the defendant's promise caused 60% of the plaintiff's reliance and other factors caused the remaining 40%, a plaintiff suffering $10,000 in total losses would recover $6,000.

tate existing comparative negligence and comparative fault rules[304] by making recovery proportional to the percentage share of fault represented by the defendant's breach of promise.[305] Finally, courts could adopt a "modified" comparative fault approach under which the plaintiff would recover nothing if the plaintiff's fault exceeds (or is equal to or exceeds) the defendant's fault.[306]

IV. CONCLUSION

"Like the camel in the Arab's tent," Professor Jay Feinman has remarked, "once reliance had nosed into contract law it came to occupy more and more space."[307] By now, however, reliance has left the tent and begun to forage through the camp. One aspect of promissory estoppel's move toward independent theory status is its application in third-party suits whose results cannot be explained on conventional contract grounds. Most of the policies supporting promissory estoppel's expansion within contract law also support this extension of reliance-based liability to third parties. But this particular application of the reliance principle may create economic problems akin to those now plaguing tort law. For that reason, promissory estoppel's extension to third parties may eventually become the most problematic and controversial of the doctrine's applications.

304. *See* PROSSER & KEETON, *supra* note 281, at 468-79.

305. Here, the unreasonableness of the third party's reliance may sometimes be a major factor in reducing that party's recovery. Also, ordinary carelessness or a failure to take simple precautions may have the same effect. For example, in Strauss v. Belle Realty Co., 65 N.Y.2d 399, 482 N.E.2d 34, 35, 492 N.Y.S.2d 555, 596 (1985), the unsuccessful plaintiff fell while descending the darkened stairs to his apartment's basement in search of running water after a city-wide blackout had caused both the lights and his water supply to cease operation. Rather than denying the plaintiff any recovery, courts in similar future cases brought under promissory estoppel might reduce the plaintiff's recovery in proportion to his own fault. For instance, was it reasonable for Mr. Strauss to assume that he could find running water in the apartment's basement? Did he use a flashlight?

306. *See* PROSSER & KEETON, *supra* note 281, at 473-74 (describing this "modified" version of comparative negligence or comparative fault).

307. Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1374.