

# Waning of Promissory Estoppel

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## THE WANING OF PROMISSORY ESTOPPEL

Promissory estoppel has spawned a host of controversies since its original formulation in Section 90 of the first *Restatement of Contracts* promulgated in 1932. For example, scholars divide over whether the source of promissory estoppel liability is reliance or the promise;<sup>1</sup> whether the typical measure of damages for a valid promissory estoppel claim is (or should be) reliance or expectancy;<sup>2</sup> and whether promissory estoppel evidences the ascent of the tort principle of reliance or merely confirms the predominance of traditional contract principles in contract law today.<sup>3</sup> Regardless of their theoretical positions, however, most scholars presume the widespread judicial application of promissory estoppel theory.<sup>4</sup>

This Note reveals that courts, rather than enthusiastically embracing promissory estoppel theory, in fact severely limit its application. Courts' extreme reluctance to grant recovery under promissory estoppel indicates a continued adherence to traditional contract principles of bargained-for exchange. As yet, promissory estoppel has failed to fulfill scholars' ominous predictions of contract's last gasp.

At the same time, the waning of promissory estoppel does not score a decisive victory for the contract principle of consent over the tort principle of reliance. Reliance continues to exert an even greater influence on judicial application of promissory estoppel. Moreover, because both reliance and consent principles inform promissory estoppel doctrine, its narrowing applicability cannot give a complete,

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<sup>1</sup> See, e.g., Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 914 (1985) (promise); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 364 (1969) (reliance); Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 944 (1937) (reliance); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 162 (1991) (promise).

<sup>2</sup> See, e.g., Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 134-35 (1987) (expectancy); Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 487 (1950) (reliance); Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 32 (1979) (reliance); Farber & Matheson, *supra* note 1, at 909 (expectancy); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 687-88 (1984) (expectancy); Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951) (reliance); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 217 (1990) (expectancy); Yorio & Thel, *supra* note 1, at 130 (expectancy).

<sup>3</sup> See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 771-78 (1979) (reliance principle); GRANT GILMORE, *THE DEATH OF CONTRACT* 72 (1974) (reliance principle); Henderson, *supra* note 1, at 386 (bargain principle of contract); Yorio & Thel, *supra* note 1, at 167 (promise principle of contract).

<sup>4</sup> See, e.g., sources cited *infra* note 32.

accurate picture of the relative roles of reliance and consent principles within modern contract law.

Part I discusses the general academic acceptance of promissory estoppel as a theory of wide application. Next, Part II surveys promissory estoppel cases decided by state courts since 1981 and shows that actual practice contradicts academic thinking. It further examines the strict standards of scrutiny that courts impose on promissory estoppel claims. Part III then discusses the joint roles that reliance and consent play in promissory estoppel theory. In light of the narrowing application of promissory estoppel, Part III also analyzes the reasons for the continued judicial adherence to traditional contract law.

## I

### GENERAL ACADEMIC ACCEPTANCE OF PROMISSORY ESTOPPEL

#### A. Sections 90 & 139 of the *Restatement (Second) of Contracts*

The general theory of obligation based on reliance, which has become known as promissory estoppel,<sup>5</sup> did not take hold until the twentieth century.<sup>6</sup> During the nineteenth and early twentieth centuries, courts did recognize a reliance-based theory of recovery, but only in a few fact-specific situations,<sup>7</sup> such as those involving gratuitous promises to convey land,<sup>8</sup> gratuitous bailments,<sup>9</sup> charitable sub-

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<sup>5</sup> The first use of the term has been attributed to Professor Williston. See Boyer, *supra* note 2, at 459 (citing 1 SAMUEL WILLISTON, CONTRACTS § 139 (1st ed. 1920)). The term "promissory estoppel" is derived from the term "equitable estoppel." In the early case of *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898), the Nebraska Supreme Court invoked the doctrine of equitable estoppel to enforce a grandfather's promise of a monetary gift upon which the granddaughter relied by quitting work. Under equitable estoppel, reliance on a party's representations of fact "estops" that party from establishing contrary facts. In applying this doctrine, the court held that the grandfather was "estopped" from raising the defense of lack of consideration. Equitable estoppel, however, traditionally applies only to a representation of existing fact rather than to a promise of future performance. Thus, the term "promissory estoppel" has been deemed more appropriate in cases involving relied-upon promises. See E. ALLAN FARNSWORTH, CONTRACTS § 2.19, at 92 (1982).

<sup>6</sup> FARNSWORTH, *supra* note 5, § 2.19.

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

<sup>8</sup> Courts enforced promises to convey land where the promisee moved onto the land and made improvements in reliance on the promise. See *Greiner v. Greiner*, 293 P. 759 (Kan. 1930); *Seavey v. Drake*, 62 N.H. 393 (1882); *Roberts-Horsfield v. Gedicks*, 118 A. 275 (N.J. 1922); *Freeman v. Freeman*, 43 N.Y. 34 (1870).

<sup>9</sup> Courts enforced promises in gratuitous bailment cases, where the bailor delivered its goods to the bailee, relied on the bailee's promise to secure insurance for the goods, and suffered loss resulting from the bailee's failure to secure insurance. See *Siegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923).

scriptions,<sup>10</sup> and private donative promises made by family members.<sup>11</sup>

With its appearance in Section 90 of the first *Restatement of Contracts*,<sup>12</sup> the doctrine of promissory estoppel gained formal recognition as a legitimate theory of contractual obligation.<sup>13</sup> Although Section 90 nowhere mentioned the term "promissory estoppel," courts invoking the doctrine often referred to that section to determine the elements of a valid claim.<sup>14</sup>

Section 90 of the first *Restatement* set forth the following core requirements: a promise, reasonably foreseeable reliance, actual inducement of reliance by the promise, and achievement of justice only through enforcement of the promise.<sup>15</sup> These core requirements have remained essentially intact, despite other additions to and modifications of promissory estoppel doctrine.

Because of the brevity of the original Section 90, the extent of promissory estoppel's application was at first uncertain.<sup>16</sup> Courts and scholars initially assumed that the doctrine would apply only in private donative, not commercial, settings.<sup>17</sup> The second *Restatement's* extensive treatment of promissory estoppel, however, signaled the legal community's more wholehearted acceptance of the doctrine. The re-

<sup>10</sup> Charitable subscription cases involve a promise to donate to a charitable organization followed by the charity's reliance on that promise. See *Miller v. Western College*, 52 N.E. 432 (Ill. 1898); *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (N.Y. 1927).

<sup>11</sup> See *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898). Professor Farnsworth notes that gratuitous promises to convey land are often also made by family members. See FARNSWORTH, *supra* note 5, § 2.19, at 91 n.17.

<sup>12</sup> Section 90 of the first *Restatement* provided the following:

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 (FIRST) OF CONTRACTS § 90 (1932) [hereinafter FIRST RESTATEMENT].

<sup>13</sup> General agreement on the persuasive authority of the *Restatement* exists among the legal community. See FARNSWORTH, *supra* note 5, § 1.8, at 25. "A restatement then can have no other authority than as the product of men learned in the subject who have studied and deliberated over it. It needs no other, and what could be higher?" Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 655 (1933).

<sup>14</sup> See FARNSWORTH, *supra* note 5, § 2.19, at 93 ("[Section 90] has been the fountain-head of recovery based on reliance in this country."); Robert A. Brazener, Annotation, *Promissory Estoppel as Basis for Avoidance of Statute of Frauds*, 56 A.L.R.3d 1037, 1046 (1974) ("The source most often cited as setting forth the prerequisites for a promissory estoppel is Restatement, Contracts § 90.").

<sup>15</sup> FIRST RESTATEMENT, *supra* note 12, § 90.

<sup>16</sup> See GILMORE, *supra* note 3, at 64. Unlike most other sections of the first *Restatement*, § 90 had no accompanying Comments and only four supporting illustrative cases. The vague, minimal language of § 90 led Professor Gilmore to declare that "no one had any idea what the damn thing meant." *Id.* at 64-65.

<sup>17</sup> *Id.* at 66.

vision of Section 90<sup>18</sup> and the addition of Section 139,<sup>19</sup> which permits the application of promissory estoppel despite the writing requirement of the Statute of Frauds,<sup>20</sup> vastly expanded the potential scope of promissory liability.

Four major changes in the second *Restatement's* Section 90 are worth noting because they substantially broaden the applicability of promissory estoppel, at least in theory. First, judges may limit the remedy "as justice requires" by awarding reliance rather than expectancy relief.<sup>21</sup> This discretionary power encourages courts to enforce promises for which they would otherwise hesitate to grant expectancy relief. Second, Section 90 no longer requires that reliance be "of a definite and substantial character."<sup>22</sup> Third, extensive comments and illustrations indicate that promissory estoppel applies to commercial as well as private donative contexts.<sup>23</sup> Finally, the new Section 90 expands the scope of liability to encompass not only promisees but also foreseeable third-parties acting in reliance.<sup>24</sup> Taken together, these modifications reflect and, in turn, further promote the academic perception of the proliferation of promissory estoppel.

Similarly, the addition of Section 139 furthered the boundaries of promissory estoppel doctrine by providing for enforcement of relied-upon promises that fail Statute of Frauds requirements. Section 139 appears to be an extension of Comment f to Section 178 of the first *Restatement*. Comment f allowed promissory estoppel to apply despite the Statute of Frauds, but only where the promisor misrepresented the existence of a written agreement or promised to put the agreement in writing.<sup>25</sup> Section 139 includes no such strict limitations.

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<sup>18</sup> Section 90(1) of the second *Restatement* provides the following:

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.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) [hereinafter SECOND RESTATEMENT].

<sup>19</sup> In nearly identical language as in § 90(1), § 139(1) provides that § 90-type promises are enforceable "notwithstanding the Statute of Frauds." SECOND RESTATEMENT, *supra* note 18, § 139(1).

<sup>20</sup> For a summary listing of common types of contracts subject to state Statutes of Frauds, see SECOND RESTATEMENT, *supra* note 18, § 110. For a more detailed discussion, see LAURENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS §§ 67, 68, 76, 77, 80, 82, 88 (2d ed. 1965).

<sup>21</sup> SECOND RESTATEMENT, *supra* note 18, § 90.

<sup>22</sup> FIRST RESTATEMENT, *supra* note 12, § 90.

<sup>23</sup> See, e.g., SECOND RESTATEMENT, *supra* note 18, § 90, cmts. b & e.

<sup>24</sup> For a discussion of reliance by third-parties, see SECOND RESTATEMENT, *supra* note 18, § 90, cmt. c.

<sup>25</sup> Comment f provided in pertinent part the following:

A misrepresentation that there has been such satisfaction [of Statute of Frauds requirements] if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it

Theoretically then, Section 139 allows for the defeat of Statute of Frauds requirements even in the absence of a misrepresentation or a commitment to writing.<sup>26</sup> This has led commentators to predict that “[t]he express sanction of the *Second Restatement* . . . may help overcome remaining judicial fears about abrogating the Statute, and thus could hasten a broader recognition of promissory estoppel as a device for circumventing the strictures of the Statute of Frauds.”<sup>27</sup>

## B. Perceptions of Promissory Estoppel’s Proliferation and of Bargain Theory’s Concomitant Decline

Prior to the development of promissory estoppel, the bargain theory of consideration was the unquestioned cornerstone of contract law.<sup>28</sup> Although the doctrine of consideration began as a requirement that there be either a benefit to the promisor or a detriment to the promisee, by the end of the nineteenth century it evolved into a requirement that there be a “bargained-for” exchange.<sup>29</sup> Thus the bargain theory of consideration posits that a promise is enforceable if it is supported by consideration, which is “bargained-for” or, in other words, “sought by the promisor in exchange for his promise and . . . given by the promisee in exchange for that promise.”<sup>30</sup> Furthermore, the bargain theory of consideration requires the parties’ mutual assent to be bound, as manifested by a complete and definite offer and a corresponding acceptance of that offer.<sup>31</sup>

The development of promissory estoppel has since challenged the preeminence of bargain principles of consideration and mutual assent. In fact, courts and commentators have declared that promissory estoppel is no longer a theory of last resort, but rather a primary basis for recovery.<sup>32</sup> Adherents of this view claim that courts apply

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was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective promissory estoppel if the Statute would otherwise operate to defraud.

FIRST RESTATEMENT, *supra* note 12, § 178, cmt. f.

<sup>26</sup> SECOND RESTATEMENT, *supra* note 18, § 139.

<sup>27</sup> Michael B. Metzger & Michael J. Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 491 (1983).

<sup>28</sup> See Feinman, *supra* note 2, at 679; Metzger & Phillips, *supra* note 27, at 477-78.

<sup>29</sup> See FARNSWORTH, *supra* note 5, § 2.2, at 41.

<sup>30</sup> SECOND RESTATEMENT, *supra* note 18, § 71. Note that the second *Restatement* does not make as a requirement of consideration that there be a benefit or detriment. *Id.* §§ 71, 79.

<sup>31</sup> Metzger & Phillips, *supra* note 27, at 476-77.

<sup>32</sup> See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965); *ATIYAH*, *supra* note 3, at 776-78; *Farber & Matheson*, *supra* note 1, at 908; Metzger & Phillips, *supra* note 27, at 508-36. See also *John Price Assocs. v. Warner Elec., Inc.*, 723 F.2d 755, 757 (10th Cir. 1983) (“We need not address the propriety of the trial court’s finding that a contract existed between Price and Warner, since we agree that the doctrine of promissory estoppel barred Warner from withdrawing its bid.”); *Henderson*, *supra* note 1, at 345-46 (“[T]he rules of Section 90 have independent force without regard to, and in spite of, the bargain

promissory estoppel *instead of* bargain theory “even where there has been a bargained-for reliance”<sup>33</sup> or “even when no apparent barrier exists to recovery on a traditional contract theory.”<sup>34</sup>

Scholars point to the well-known case of *Hoffman v. Red Owl Stores, Inc.*<sup>35</sup> to support the view of promissory estoppel as an independent theory of obligation.<sup>36</sup> In *Hoffman*, the Wisconsin Supreme Court awarded promissory estoppel relief upon finding that the plaintiff detrimentally relied upon the defendant’s repeated assurances that it would grant the plaintiff a grocery store franchise.<sup>37</sup> In asserting the independent basis of promissory estoppel, the court declared that “it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action.”<sup>38</sup> Despite the lack of material terms essential to a binding contract, the court held that Section 90 “does not impose the requirement that the promise . . . 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.”<sup>39</sup>

Promissory estoppel’s apparent proliferation and emergence as an independent theory of obligation has led some scholars to sound the death knell for the bargain theory of consideration.<sup>40</sup> Other theorists, however, insist that the widespread application of promissory estoppel merely reaffirms classical contract principles of promise and consent.<sup>41</sup>

Promise-focused theorists view the act of promising as involving an implicit promise to honor the promise.<sup>42</sup> They argue that promise, rather than detrimental reliance, has traditionally formed the core of contractual liability because it reflects the promisor’s consent to be

concept.”); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 52-54 (1981) (positing promissory estoppel as an independent theory of obligation based on the tort principle of reliance rather than on the contract principle of consent).

<sup>33</sup> АТИЯН, *supra* note 3, at 778.

<sup>34</sup> Farber & Matheson, *supra* note 1, at 908.

<sup>35</sup> 133 N.W.2d 267 (Wis. 1965).

<sup>36</sup> See Henderson, *supra* note 1, at 359; Metzger & Phillips, *supra* note 27, at 524-25.

<sup>37</sup> 133 N.W.2d at 274-75.

<sup>38</sup> *Id.* at 275.

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

<sup>40</sup> See, e.g., АТИЯН, *supra* note 3, at 777 (recognizing the “resurgence of reliance-based liability at the expense of consensual liability”); GILMORE, *supra* note 3, at 72 (declaring that the reliance principle has “swallowed up” the bargain principle of contract).

<sup>41</sup> See, e.g., Becker, *supra* note 2, at 133 (asserting that “promissory estoppel . . . liability can be understood as contractual in the broad sense that the promisor intended to be legally bound under an objective standard”); Farber & Matheson, *supra* note 1, at 929 (proposing a promissory estoppel rule that “reinforces the traditional free-will basis of promissory liability”); Yorio & Thel, *supra* note 1, at 115 (proclaiming that “the governing principle of Section 90 in the courts is promise”).

<sup>42</sup> See АТИЯН, *supra* note 3, at 654.

bound.<sup>43</sup> Consent, in turn, is crucial to classical contract theory, for which the source of contractual obligation is the will of the parties, not mere formal requirements such as a written document.<sup>44</sup>

For promise-focused theorists, the basis of promissory estoppel, like that of traditional contract liability, is the promise, not reliance.<sup>45</sup> Thus, the expansion of promissory estoppel reinforces traditional contract principles of promise and consent rather than marking their demise. Theorists offer three supporting reasons for their promise-based view of promissory estoppel. First, they contend that courts have applied promissory estoppel where no detrimental reliance occurred.<sup>46</sup> Second, they note that courts have refused to apply promissory estoppel where detrimental reliance occurred.<sup>47</sup> Finally, they observe that when courts establish promissory estoppel liability, they typically grant expectancy relief instead of limiting the remedy to reliance damages.<sup>48</sup>

Given their observations of judicial disregard of reliance in promissory estoppel cases, promise-focused theorists argue that both liability and remedy under promissory estoppel turn on "the proof and quality of the promisor's commitment."<sup>49</sup> Contrary to popular view, promissory estoppel does not protect promisees' reliance on promises. Instead, it aims to enforce seriously considered promises and hold promisors to their voluntarily-made promises.<sup>50</sup> In doing so, it reaffirms traditional contract principles of promise and consent at the expense of the tort principle of reliance.

Death-of-contract scholars, on the other hand, contend that the acceptance of the reliance principle has significantly undermined the promissory basis of classical contract law. They observe that "few people today appear to have the same respect for the sanctity of bare

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<sup>43</sup> See *id.* at 652-59; Becker, *supra* note 2, at 133; Yorio & Thel, *supra* note 1, at 115.

*But see* H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955) (viewing promises as binding because the promisor receives benefits from making promises and must, therefore, accept the obligations); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 1 (1955) (same); Neil MacCormick, *Voluntary Obligations and Normative Powers*, in THE SYMPOSIUM READ AT THE JOINT SESSION OF THE ARISTOTELIAN SOCIETY AND THE MIND ASSOCIATION AT THE UNIVERSITY OF HULL 59 (1972) (viewing promises as binding because otherwise the promisee may be worse off than had there been no promise at all). These scholars deviate from traditional consensual-based contract theory in that their justifications for enforcing promises ultimately rest on reliance or benefit principles.

<sup>44</sup> Metzger & Phillips, *supra* note 27, at 494.

<sup>45</sup> See sources cited *supra* note 41.

<sup>46</sup> See Yorio & Thel, *supra* note 1, at 112-13.

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 167.

<sup>50</sup> *Id.* at 161-66.



promises, without regard to whether they have been paid for or relied upon, that was commonly expressed a century ago."<sup>51</sup>

Both death-of-contract scholars and promise-focused theorists, however, are wrong in two important respects. First, they misconceive the nature of promissory estoppel by insisting on a dichotomous, black-and-white view of the doctrine. On the one hand, death-of-contract scholars overestimate the reliance principle's role within promissory estoppel doctrine. On the other hand, promise-focused theorists overvalue promissory estoppel's vindication of traditional contract principles of promise and consent. Reducing promissory estoppel to a single unifying principle may be too hasty. A more fruitful approach would be to view promissory estoppel as a complex doctrine incorporating traditional contract principles of promise and consent as well as "fairness" principles such as reliance.<sup>52</sup>

More fundamentally, both death-of-contract scholars and promise-focused theorists (along with the drafters of the *Restatement*) erroneously assume that courts have wholeheartedly embraced promissory estoppel doctrine. Promissory estoppel theory has become so entrenched in contract law that courts and commentators now take it for granted.<sup>53</sup> Scholars, irrespective of their views on the nature of promissory estoppel, have extolled the doctrine as "a principle of wide application"<sup>54</sup> and as "perhaps the most radical and expansive development of this century in the law of promissory liability."<sup>55</sup> Recent cases, however, suggest that promissory estoppel may not be the darling of contract law, as courts and scholars have widely assumed.<sup>56</sup>

## II

### THE NARROW APPLICATION OF PROMISSORY ESTOPPEL: STRICT REQUIREMENTS FOR RECOVERY

The general acceptance of promissory estoppel as a doctrine of widespread applicability has been largely based on the misperception of an abundance of common law precedents providing for promissory

<sup>51</sup> ATIYAH, *supra* note 3, at 655.

<sup>52</sup> For an account of modern contract theory that sees a balanced employment of each of these principles, see Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 115 (1988).

<sup>53</sup> See, e.g., ATIYAH, *supra* note 3, at 771 ("The past hundred years have witnessed a resurgence of reliance-based liabilities . . ."); Henderson, *supra* note 1, at 343 ("Recent decisions . . . demonstrate that the doctrine of promissory estoppel . . . is playing an important role in the fixing of limits of contractual responsibility."); Yorio & Thel, *supra* note 1, at 167 ("Section 90 has greatly expanded the scope of civil liability in twentieth-century American law.").

<sup>54</sup> Feinman, *supra* note 2, at 678.

<sup>55</sup> Knapp, *supra* note 32, at 53.

<sup>56</sup> See *infra* Part II, arguing that case law does not support the view that promissory estoppel has gained wide judicial acceptance.

estoppel relief. Even the few observers noting restrictions on the application of promissory estoppel have viewed such judicial reluctance as the rare exception rather than the norm.<sup>57</sup> Although many studies have cited numerous cases giving effect to promissory estoppel doctrine,<sup>58</sup> most of these cited cases were decided before 1981<sup>59</sup> and thus do not accurately reflect more recent applications of promissory estoppel. Given the 1981 publication date of the second *Restatement*, it is important to see how courts since 1981 have applied the revised Section 90. Additionally, many of the cases relied on by scholars are federal court cases, which are not authoritative sources of state law on promissory estoppel.<sup>60</sup> Furthermore, a number of the cited cases hold merely that the promisee has stated a sufficient cause of action or presented sufficient evidence to defeat summary judgment.<sup>61</sup> Although such cases give some indication of judicial acceptance of promissory estoppel, they are not determinative in the absence of a final grant of relief.

Despite the widespread perception of promissory estoppel's proliferation, recent empirical evidence points to the contrary. A broad survey of all reported state court cases decided between 1981 and 1992 reveals only twenty-eight successful promissory estoppel cases in which courts granted relief.<sup>62</sup> In fact, a more detailed survey

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<sup>57</sup> See, e.g., Lawrence Kalevitch, *Contract Law*, 14 NOVA L. REV. 663 (1990); Lu Ann Brown, Note, *Contracts—Is Promissory Estoppel Forever Estopped in North Carolina?*, 10 CAMPBELL L. REV. 293 (1988).

<sup>58</sup> See, e.g., Becker, *supra* note 2; Farber & Matheson, *supra* note 1; Feinman, *supra* note 2; Yorio & Thel, *supra* note 1. At least one cited court decision, which established promissory estoppel liability, has been reversed and remanded for a new trial. See *Farm Crop Energy, Inc. v. Old Nat'l Bank*, 685 P.2d 1097 (Wash. Ct. App. 1984), *rev'd*, 750 P.2d 231 (Wash. 1988), *cited in* Becker, *supra* note 2, at 131 n.1.

<sup>59</sup> E.g., *In re Estate of Bucci*, 488 P.2d 216 (Colo. Ct. App. 1971), *cited in* Becker, *supra* note 2, at 134 n.20.

<sup>60</sup> E.g., *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981), *cited in* Feinman, *supra* note 2, at 688 n.53.

<sup>61</sup> See, e.g., *Glover v. Sager*, 667 P.2d 1198 (Alaska 1983) (holding that there was sufficient evidence to defeat summary judgment), *cited in* Farber & Matheson, *supra* note 1, at 908 n.19.

<sup>62</sup> This survey is based on a LEXIS search of all reported state trial and appellate court cases granting promissory estoppel relief between 1981 and 1992. See *Crook v. Mortenson-Neal*, 727 P.2d 297 (Alaska 1986); *Ralston Purina Co. v. McCollum*, 611 S.W.2d 201 (Ark. Ct. App. 1981); *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872 (Ct. App. 1988); *McClatchy Newspapers v. Superior Court*, 209 Cal. Rptr. 598 (Ct. App. 1984); *Kiely v. St. Germain*, 670 P.2d 764 (Colo. 1983); *Snow Basin, Ltd. v. Boettcher & Co.*, 805 P.2d 1151 (Colo. Ct. App. 1990), *cert. denied* (1991); *Baxter's Asphalt & Concrete, Inc. v. Liberty County*, 406 So. 2d 461 (Fla. Dist. Ct. App. 1981), *rev'd on other grounds*, 421 So. 2d 505 (Fla. 1982); *Cullen Distrib., Inc. v. Petty*, 517 N.E.2d 733 (Ill. App. Ct. 1987); *First Nat'l Bank v. Logan Mfg. Co.*, 577 N.E.2d 949 (Ind. 1991); *Telephone Assocs. v. St. Louis County Bd.*, 364 N.W.2d 378 (Minn. 1985); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); *Dallum v. Farmers Union Cent. Exch., Inc.*, 462 N.W.2d 608 (Minn. Ct. App. 1990); *Whipple v. Independent Sch. Dist. No. 621*, 424 N.W.2d 559 (Minn. Ct. App. 1988); *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245 (N.Y. 1983); *Zimmerman v. Zimmer-*

of New York and California court cases decided during the same period indicates a judicial tendency to reject the vast majority of promissory estoppel claims while validating such claims in only rare circumstances.<sup>63</sup>

Since 1981, the New York courts have addressed the issue of promissory estoppel in only thirty-four reported cases,<sup>64</sup> while the California courts have done so in just thirteen reported cases.<sup>65</sup> This low rate of occurrence suggests that promissory estoppel may not be as significant a legal issue as many courts and scholars have assumed.

Of the thirty-four New York cases, the courts rejected twenty-nine promissory estoppel claims,<sup>66</sup> upheld three claims as presenting a tria-

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man, 447 N.Y.S.2d 675 (App. Div. 1982); *Newkirk v. Precision Automotive, Inc.*, No. 12498, 1992 Ohio App. LEXIS 967 (Ct. App. Mar. 3, 1992); *Wallace v. Gray Drug, Inc.*, No. 57031, 1990 Ohio App. LEXIS 3670 (Ct. App. Aug. 23, 1990); *Worrell v. Multipress Corp.*, Nos. 86AP-909 and 86AP-1010, 1988 Ohio App. LEXIS 188 (Ct. App. Jan. 21, 1988), *aff'd in part, rev'd in part*, 543 N.E.2d 1277 (Ohio 1989); *Mers v. Dispatch Printing Co.*, 529 N.E.2d 958 (Ohio Ct. App. 1988); *Smith v. Minnis*, No. CA84-07-080, 1985 WL 121500 (Ohio Ct. App. July 31, 1985); *Oak Tree Ctr., Inc. v. Kroger Co.*, No. 43420, 1981 WL 4568 (Ohio Ct. App. Oct. 22, 1981); *Arasi v. Neema Medical Servs., Inc.*, 595 A.2d 1205 (Pa. Super. Ct. 1991); *Minor v. Sully Buttes Sch. Dist.* No. 58-2, 345 N.W.2d 48 (S.D. 1984); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696 (Tex. Ct. App. 1988); *Stacy v. Merchants Bank*, 482 A.2d 61 (Vt. 1984); *Seattle First Nat'l Bank v. Siebol*, 824 P.2d 1252 (Wash. Ct. App. 1992); *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 721 P.2d 18 (Wash. Ct. App. 1986); *Family Medical Bldg., Inc. v. State of Washington Dep't of Social & Health Servs.*, 684 P.2d 77 (Wash. Ct. App. 1984).

<sup>63</sup> This survey is based on Professor Robert A. Hillman's recent collection of California and New York trial and appellate court cases decided between 1981 and 1992. Professor Hillman conducted a LEXIS search of all cases where the California and New York state courts expressly addressed the issue of promissory estoppel in their opinions. The cases were categorized according to the resolution of the estoppel issue. There were three possible outcomes: rejection of promissory estoppel as inapplicable to the case; recognition of its applicability to the case, pending further resolution of the facts; and application of estoppel theory to establish liability and allow recovery. See ROBERT A. HILLMAN, THEORIES OF CONTRACT: THE RICHNESS AND VITALITY OF MODERN CONTRACT LAW (Draft).

<sup>64</sup> See cases cited *infra* notes 66-68.

<sup>65</sup> See cases cited *infra* notes 69-71.

<sup>66</sup> See *Cohen v. Brown, Harris, Stevens, Inc.*, 475 N.E.2d 116 (N.Y. 1984); *Bon Temps Agency, Ltd. v. Towers Org., Inc.*, 590 N.Y.S.2d 97 (App. Div. 1992), *cert. denied*, 619 N.E.2d 658 (N.Y. 1993); *Wurmfeld Assocs., P.C. v. Harlem Interfaith Counseling Servs., Inc.*, 578 N.Y.S.2d 200 (App. Div. 1992); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 571 N.Y.S.2d 237 (App. Div. 1991); *Messina v. Biderman*, 571 N.Y.S.2d 499 (App. Div. 1991); *Clinton v. Int'l Business Machs. Corp.*, 570 N.Y.S.2d 405 (App. Div. 1991); *Advanced Refractory Technologies, Inc. v. Power Auth. of New York*, 568 N.Y.S.2d 986 (App. Div. 1991); *Gold v. Vitucci*, 563 N.Y.S.2d 443 (App. Div. 1990); *Nicit v. Nicit*, 555 N.Y.S.2d 474 (App. Div. 1990); *Lerman v. Medical Assocs.*, 554 N.Y.S.2d 272 (App. Div. 1990); *Modell & Co. v. City of N.Y.*, 552 N.Y.S.2d 632 (App. Div. 1990); *Cane v. Farmelo*, 543 N.Y.S.2d 775 (App. Div. 1989); *Aeromar C. Por A. v. Port Auth.*, 536 N.Y.S.2d 173 (App. Div. 1988); *Carvel Corp. v. Nicolini*, 535 N.Y.S.2d 379 (App. Div. 1988); *Bernard v. Langan Porsche Audi, Inc.*, 532 N.Y.S.2d 599 (App. Div. 1988); *Dalton v. Union Bank of Switz.*, 520 N.Y.S.2d 764 (App. Div. 1987); *Country-Wide Leasing Corp. v. Subaru of America, Inc.*, 520 N.Y.S.2d 24 (App. Div. 1987); *Tutak v. Tutak*, 507 N.Y.S.2d 232 (App. Div. 1986); *Chemical Bank v. City of Jamestown*, 504 N.Y.S.2d 908 (App. Div. 1986); *Klein v. Jamor Purveyors, Inc.*, 489 N.Y.S.2d 556 (App. Div. 1985); *Cunnison v. Richardson Greenshields Sec., Inc.*, 485 N.Y.S.2d 272 (App.

ble issue (i.e., stating a sufficient cause of action or presenting sufficient evidence to defeat summary judgment),<sup>67</sup> and established liability (or at least allowed the issue to go to the jury) in only two cases.<sup>68</sup> Of the thirteen California cases, the courts rejected promissory estoppel claims in ten of those cases,<sup>69</sup> upheld one claim as presenting a triable issue,<sup>70</sup> and established liability (or at least allowed the issue to go to the jury) in only two cases.<sup>71</sup> The infrequency with which state courts, particularly New York and California, actually grant promissory estoppel relief belies the judicial lip service given to the viability of promissory estoppel as a theory of recovery.

### A. Cases Providing Relief Under Promissory Estoppel

The few state court cases that have provided promissory estoppel relief can be categorized as follows: those where an alternative breach of contract ground actually or theoretically exists; those involving a failure of substantive contract requirements of consideration, offer, and acceptance; and those involving a failure of formal contract requirements of writing imposed by the Statute of Frauds.

#### 1. *Existence of Alternative Ground of Breach of Contract*

Courts are likely to allow recovery under promissory estoppel where they also actually found or could have found a breach of con-

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Div. 1985); *Ski-View, Inc. v. State*, 492 N.Y.S.2d 866 (Ct. Cl. 1985); *D & N Boeing, Inc. v. Kirsch Beverages, Inc.*, 471 N.Y.S.2d 299 (App. Div.), *aff'd*, 472 N.E.2d 992 (N.Y. 1984); *Long Island Pen Corp. v. Shatsky Metal Stamping Co.*, 463 N.Y.S.2d 39 (App. Div. 1983); *Silver v. Mohasco Corp.*, 462 N.Y.S.2d 917 (App. Div. 1983), *aff'd*, 465 N.E.2d 361 (N.Y. 1984); *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447 (App. Div. 1982); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 452 N.Y.S.2d 590 (App. Div.), *aff'd*, 444 N.E.2d 35 (1982); *Ginsberg v. Fairfield-Noble Corp.*, 440 N.Y.S.2d 222 (App. Div. 1981); *Edward Joy Co. v. Noise Control Prods., Inc.*, 443 N.Y.S.2d 361 (Sup. Ct. 1981).

<sup>67</sup> See *Urban Holding Corp. v. Haberman*, 556 N.Y.S.2d 337 (N.Y. App. Div. 1990); *Allen v. Board of Educ.*, 563 N.Y.S.2d 422 (N.Y. App. Div. 1990); *Buddman Distribs., Inc. v. Labatt Importers, Inc.*, 458 N.Y.S.2d 395 (N.Y. App. Div. 1982).

<sup>68</sup> See *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245 (N.Y. 1983); *Zimmerman v. Zimmerman*, 447 N.Y.S.2d 675 (N.Y. App. Div. 1982).

<sup>69</sup> See *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.*, 720 P.2d 935 (Cal. 1986), *cert. denied*, 479 U.S. 1079 (1987); *Racine & Laramie, Ltd. v. California Dep't of Parks & Recreation*, 14 Cal. Rptr. 2d 335 (Ct. App. 1992); *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d 101 (Ct. App. 1992); *Peterson Dev. Co. v. Torrey Pines Bank*, 284 Cal. Rptr. 367 (Ct. App. 1991); *Smith v. City of S.F.*, 275 Cal. Rptr. 17 (Ct. App. 1990); *Kurokawa v. Blum*, 245 Cal. Rptr. 463 (Ct. App. 1988); *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 231 Cal. Rptr. 820 (Ct. App. 1986); *Hoover Community Hotel Dev. Corp. v. Thomson*, 213 Cal. Rptr. 750 (Ct. App. 1985); *Munoz v. Kaiser Steel Corp.*, 203 Cal. Rptr. 345 (Ct. App. 1984); *Downer v. Bramet*, 199 Cal. Rptr. 830 (Ct. App. 1984).

<sup>70</sup> See *Sheppard v. Morgan Keegan & Co.*, 266 Cal. Rptr. 784 (Ct. App. 1990).

<sup>71</sup> See *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872 (Ct. App. 1988); *McClatchy Newspapers v. Superior Court*, 209 Cal. Rptr. 598 (Ct. App. 1984), *vacated on other grounds*, 751 P.2d 1329 (Cal. 1988).

tract. For example, in *Mers v. Dispatch Printing Co.*,<sup>72</sup> the plaintiff-employee, a traveling salesperson, was suspended without pay as a result of his arrest on serious criminal charges. The defendant-employer promised to reinstate him with back pay if the charges were favorably resolved. Consequently, the employee continued to work during his suspension period and did not look for another job. Although the condition of reinstatement was met when the charges were eventually dropped following a hung jury trial, the employer denied reinstatement and dismissed the employee. The Ohio Court of Appeals ruled in favor of the employee on both promissory estoppel and breach of contract grounds.

The *Mers* court first concluded that the parties' employment contract did not result in an at-will employment, but rather included an implied-in-fact agreement that the employee could not be discharged without just cause. In light of the employer's promise of reinstatement and the employee's giving of consideration by continuing to work, the court found a lack of just cause dismissal and thus a breach of contract.

The court's discussion of the alternative ground of promissory estoppel proceeded in much the same way. The only difference was the use of reliance language: the employer's promise of reinstatement modified an otherwise at-will employment contract and was made enforceable by the employee's reliance in continuing to work and not looking for another job.

Even where courts fail to address, or outright reject, the alternative ground of breach of contract, they nonetheless employ in their promissory estoppel analysis the traditional contract method of implying a contract term as a matter of law. For example, *Grouse v. Group Health Plan, Inc.*<sup>73</sup> involved a prospective employee's claim for detrimental reliance on a job offer of a pharmacist position. Group Health Plan refused to honor its commitment to hire Grouse because it did not receive any favorable character references on him. By that time, however, Grouse had already accepted the offer, declined another offer, and quit his former job. The Minnesota Supreme Court asserted that no contract existed because the agreement was terminable at will. Nonetheless, it held the employer liable by implying a good faith duty to allow the employee the opportunity to commence work. Although the court found this duty enforceable by the employee's detrimental reliance, it could just as easily have done so on the traditional contract ground that the employee accepted the offer and gave consideration by promising to work. Thus, despite the court's professed refusal to

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<sup>72</sup> 529 N.E.2d 958 (Ohio Ct. App. 1988).

<sup>73</sup> 306 N.W.2d 114 (Minn. Ct. App. 1981).

apply breach of contract theory, its method of analysis lent itself to a breach of contract interpretation.

## 2. *Failure of Substantive Contract Requirements*

In construction bidding cases invoking promissory estoppel, a plaintiff typically seeks to enforce a bid despite the absence of a final acceptance. The Alaska Supreme Court took this approach in *Crook v. Mortenson-Neal*,<sup>74</sup> which involved a general contractor's suit against a subcontractor who revoked its bid to provide glass, windows, and doors. After Mortenson-Neal Joint Venture (M-N), the general contractor, requested that NGC Investment and Development, Inc. (NGC), the subcontractor, begin work immediately on the shop drawings, NGC informed M-N that it first needed either a notice to proceed or a contract. M-N accordingly sent a notice to proceed, stating M-N's intent to employ NGC as subcontractor. NGC then agreed to begin work while the parties negotiated a final written contract. The parties subsequently drew up a final written contract, which was signed by NGC, but not by M-N. After M-N expressed strong concerns over NGC's delays in producing acceptable shop drawings and warned NGC of the consequences of further delay, NGC unilaterally repudiated the contract by letter.

Despite the lack of final acceptance by M-N, the Alaska Supreme Court applied promissory estoppel doctrine and held that "the parties had a contract with terms covering the details of their agreement left open."<sup>75</sup> The application of promissory estoppel effectively converted NGC's bid into an option contract, whereby the subcontractor's bid was binding for a reasonable period of time.<sup>76</sup> In reformulating Section 90's requirements, the court held that "a *substantial* change of position" must have occurred.<sup>77</sup> Mere reliance will not suffice—reliance must be *substantial*. The court seemed persuaded that M-N's reliance was substantial when it concluded that "M-N relied not only on the original bid, but on four months of repeated assurances of performance and lack of objections by NGC."<sup>78</sup> Had M-N merely relied on NGC's bid by including the bid in its general contract bid, its reliance would not have been substantial because the only resulting injury would have been the loss of expectations; it would have had to pay the higher price of the next lowest bidder regardless of its reliance. However, since NGC waited four months to repudiate, the causal connection between M-N's reliance and injury is much more definite and

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<sup>74</sup> 727 P.2d 297 (Alaska 1986).

<sup>75</sup> *Id.* at 303.

<sup>76</sup> *Id.* at 304.

<sup>77</sup> *Id.* at 301 (emphasis added).

<sup>78</sup> *Id.* at 304.

substantial. But for M-N's reliance on NGC's continued assurances, M-N would have promptly solicited the next lowest bidder and thus, would not have incurred the costs associated with NGC's work delays.<sup>79</sup>

The court further found that the additional terms included in the unexecuted written contract were not "material alterations" to NGC's bid proposal. Rather, they "covered issues which can be implied from industry custom or left open for further negotiations" and therefore did not impose "duties on NGC materially different from those NGC should have known would apply."<sup>80</sup> Thus, the *Crook* court held NGC's bid enforceable only upon finding substantial reliance and an intent to reduce the parties' agreement to writing.

### 3. *Failure of Formal Contract Requirements of Writing under the Statute of Frauds*

Courts typically look for unconscionable circumstances before they will apply promissory estoppel to defeat Statute of Frauds requirements.<sup>81</sup> This heightened scrutiny apparently accounts for the small number of promissory estoppel claims that succeed despite the Statute of Frauds defense.<sup>82</sup> These cases suggest that there are few situations which courts would deem unconscionable enough to trigger promissory estoppel liability.

On the rare occasion that a promisee's act of reliance would unjustly enrich the promisor, courts may opt to grant relief under promissory estoppel.<sup>83</sup> Judicial concern with preventing unjust enrichment may explain why courts typically provide relief only in commercial bar-

<sup>79</sup> Indeed, the court recognized such a causal connection: "A subcontractor cannot string along the general until the time for performance nears and then suddenly limit its promised performance. Such conduct forces the general to accept a substitute performance or face delays in finding a substitute subcontractor." *Id.* at 303.

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

<sup>81</sup> See *infra* Part III.B.4.

<sup>82</sup> This survey has uncovered only six successful claims involving the Statute of Frauds defense. See *Ralston Purina Co. v. McCollum*, 611 S.W.2d 201 (Ark. Ct. App. 1981); *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872 (Ct. App. 1988); *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245 (N.Y. 1983); *Worrell v. Multipress, Inc.*, 534 N.E.2d 84 (Ohio Ct. App. 1988); *Smith v. Minnis*, No. CA84-07-080, 1985 WL 17382 (Ohio Ct. App. July 31, 1985); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696 (Tex. Ct. App. 1988).

<sup>83</sup> In *Allied Grape Growers v. Bronco Wine Co.*, the court stated that unconscionable injury may "occur[ ] in cases of unjust enrichment." 249 Cal. Rptr. at 878. Furthermore, in *Farash v. Sykes Datatronics, Inc.*, the court held that "a promisee who partially performs . . . at a promisor's request should be allowed to recover [damages]." 452 N.E.2d at 1248. There, the lessee-promisor breached an oral lease. The lessor-promisee made building improvements in reliance on the lease, but the promisee never occupied the building. Although the promisee did not directly benefit from the lessor's performance, the court suggested that the promisee indirectly benefited " '[i]f what the [promisor] has done is part of the agreed exchange.' " *Id.* (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 15-4, 574 (2d ed. 1977)).

gain situations. In private donative settings, generous benefactors typically do not expect to profit at the expense of their promisees.<sup>84</sup> In the commercial context, however, courts can be reasonably assured that the promisor intended to benefit from the promisee's reliance, where the parties have made a bargained-for exchange, but merely failed to reduce their agreement to writing. Hence, in the absence of a written contract required by the Statute of Frauds, the court in *Allied Grape Growers v. Bronco Wine Co.*<sup>85</sup> required a finding of "all the elements of a contract" before the promisee could recover promissory estoppel damages. The court's insistence on finding the presence of a bargained-for exchange before it could enforce the terms of the agreement indicates the court's concern with ensuring that neither party is unjustly enriched.

The unjust enrichment concern may also explain why courts consider definite and substantial reliance as a factor in determining unconscionable circumstances.<sup>86</sup> In bargain arrangements, the promisee often relies by performing at the promisor's request and for the promisor's benefit. Hence, the greater the reliance, the more the promisor is enriched, and the more unjust the enrichment becomes.

In addition to considering unjust enrichment as an unconscionable circumstance, courts may also focus on whether the promisor agreed to memorialize the terms of the oral contract.<sup>87</sup> The policy behind the Statute of Frauds' requirement may not be as compelling where the promisor agreed to commit the oral contract to writing or misrepresented the existence of a written agreement. Accordingly, courts are more willing to apply promissory estoppel in these cases.<sup>88</sup>

## B. Cases Rejecting Promissory Estoppel Liability

### 1. No "Clear and Definite" Promise

Courts often invalidate promissory estoppel claims for lack of a clear and definite promise.<sup>89</sup> Although courts may further find no

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<sup>84</sup> In all six successful claims involving the Statute of Frauds defense, the courts found that the parties had made oral contracts. None of the cases involved gratuitous promises. See cases cited *supra* note 82.

<sup>85</sup> 249 Cal. Rptr. 872, 879 (Ct. App. 1988).

<sup>86</sup> See *Ralston Purina Co. v. McCollum*, 611 S.W.2d 201, 203 (Ark. Ct. App. 1981); *Worrell v. Multipress, Inc.*, 534 N.E.2d 84 (Ohio Ct. App. 1988); *Smith v. Minnis*, No. CA84-07-080, 1985 WL 17382 (Ohio Ct. App. July 31, 1985).

<sup>87</sup> In *Adams v. Petrade Int'l, Inc.*, the court asserted that the application of promissory estoppel against the Statute of Frauds is "limited to those cases in which the [promisee] relied on an oral promise to furnish a written contract." 754 S.W.2d 696, 707 (Tex. Ct. App. 1988).

<sup>88</sup> See *Ralston*, 611 S.W.2d at 201; *Smith*, No. CA84-07-080; *Adams*, 754 S.W.2d at 696.

<sup>89</sup> See *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d 101, 129-31 (Ct. App. 1992); *Racine & Laramie, Ltd. v. California Dep't of Parks & Recreation*, 14 Cal. Rptr. 2d 335 (Ct. App. 1992); *Peterson Dev. Co. v. Torrey Pines Bank*, 284 Cal. Rptr. 367 (Ct. App.



reasonable or reasonably foreseeable reliance, they typically only do so where the promisor has not made a clear promise.<sup>90</sup> Frequently, promises that courts dismiss are deemed either nonexistent or irrelevant. In these cases, the courts need not even consider the additional question of whether the promise was sufficiently clear and definite. Instead, the courts determine that the promisor made no promise at all,<sup>91</sup> that other prior representations by the promisor contradicted or negated the alleged promise,<sup>92</sup> or that the actual promise conditioned performance on the occurrence of events that never came to pass.<sup>93</sup>

In several cases, however, courts have held that even though the promisor made the alleged promise, the promise was not sufficiently clear or definite to be enforced.<sup>94</sup> One rhetorical strategy in such

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1991); *Wurmfeld Assocs., P.C. v. Harlem Interfaith Counseling Servs., Inc.*, 578 N.Y.S.2d 200 (App. Div. 1992); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 571 N.Y.S.2d 237 (App. Div. 1991); *Messina v. Biderman*, 571 N.Y.S.2d 499 (App. Div. 1991); *Nicit v. Nicit*, 555 N.Y.S.2d 474 (App. Div. 1990); *Lerman v. Medical Assocs. of Woodhull, P.C.*, 554 N.Y.S.2d 272 (App. Div. 1990); *Chemical Bank v. City of Jamestown*, 504 N.Y.S.2d 908 (App. Div. 1986); *Ski-View, Inc. v. State*, 492 N.Y.S.2d 866 (Ct. Cl. 1985); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 452 N.Y.S.2d 590 (App. Div. 1982); *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447 (App. Div. 1982).

<sup>90</sup> See *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 571 N.Y.S.2d 237 (App. Div. 1991); *Nicit v. Nicit*, 555 N.Y.S.2d 474 (App. Div. 1990).

<sup>91</sup> See *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d at 129-31 (defendant-university never represented that hospital blood supply was safe, where plaintiff contracted AIDS virus from blood transfusion); *Racine & Laramie, Ltd. v. California Dep't of Parks & Recreation*, 14 Cal. Rptr. 2d at 338 (government agency never promised to negotiate for contract modification); *Wurmfeld Assocs., P. C. v. Harlem Interfaith Counseling Servs., Inc.*, 578 N.Y.S.2d at 201 (state defendants were not parties to the contract with plaintiff, nor did they promise to assume any contractual liability); *Lerman v. Medical Assocs. of Woodhull, P.C.*, 554 N.Y.S.2d at 272 (employment contract specified neither duration nor dismissal for cause); *Dalton v. Union Bank of Switz.*, 520 N.Y.S.2d 764, 765-66 (App. Div. 1987) (employer offered only at-will, not one-year or for-cause, employment); *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d at 449 (defendant-lessors did not orally promise to give eighteen-months' notice before terminating business lease).

Although the court in *Wurmfeld* also found no reliance because plaintiffs began rendering services before their relationship with defendants, this conclusion is a weak basis for its holding. Plaintiffs' continued performance after their relationship with defendants may still have constituted reliance. 578 N.Y.S.2d at 201. In *Racine*, the plaintiff did not sue under promissory estoppel. The court, however, made it a point to reject its application anyway. 14 Cal. Rptr.2d at 340.

<sup>92</sup> See *Wurmfeld*, 578 N.Y.S.2d at 201 (state defendants expressly disavowed contractual liability); *Sanyo Elec., Inc. v. Pinros & Gar Corp.*, 571 N.Y.S.2d at 238 (promisor's written representations contradicted terms of alleged oral distributorship agreement); *Ski-View, Inc. v. State*, 492 N.Y.S.2d at 869 (state defendant's representations expressly negated promise to issue permit).

<sup>93</sup> See *Nicit v. Nicit*, 555 N.Y.S.2d at 475-76 (defendant-wife's offer to sell share of property contemplated matrimonial relief, which did not occur); *Chemical Bank v. City of Jamestown*, 504 N.Y.S.2d at 909 (defendant's promise to loan money depended upon applicant's meeting loan requirements).

<sup>94</sup> See *Messina v. Biderman*, 571 N.Y.S.2d 499 (App. Div. 1991); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 452 N.Y.S.2d 590 (App. Div. 1982).

cases is to characterize the promise as a promise to negotiate rather than as a promise to perform.

For example, in *Messina v. Biderman*,<sup>95</sup> the promisees had exclusive rights to negotiate with the city to purchase business property. They alleged that the city subsequently made a written memorial entitling them to submit their property development plan to the city's board of estimate. The city, however, failed to close the deal. Despite the promisee's pre-existing right to negotiate with the city, the court held that the written memorial constituted only an agreement to negotiate because it lacked additional material terms.

Similarly, in *Tribune Printing Co. v. 263 Ninth Avenue Realty, Inc.*,<sup>96</sup> the court concluded that a landlord's alleged oral promise to renew a business lease was not a promise to perform but a promise to negotiate for more definite terms. The court then rejected promissory estoppel as inapplicable to the case.<sup>97</sup> Thus, in the absence of additional material terms, courts may refuse to enforce a commitment to sell or lease property by labeling it a mere promise to negotiate.

Although Section 90 requires merely a promise, courts tend to reject promissory estoppel claims for ambiguity or indefiniteness.<sup>98</sup> Courts may require that promises include such additional material terms as courts deem appropriate. Moreover, courts reluctant to invoke promissory estoppel may intentionally explain away a promise to perform by labeling it as a mere agreement to negotiate.<sup>99</sup> The distinction between a promise to perform and an agreement to negotiate, particularly in the commercial context, is often so unclear that it would not be difficult to classify a given promise as one or the other.<sup>100</sup> Given that promissory estoppel has its roots in equity, courts could legitimately supply the missing material terms they deem necessary to make a promise sufficiently clear and definite. Yet, judicial refusal to do so indicates a narrowing of promissory estoppel doctrine.

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<sup>95</sup> 571 N.Y.S.2d 499 (App. Div. 1991).

<sup>96</sup> 452 N.Y.S.2d 590 (App. Div. 1982).

<sup>97</sup> *Id.* at 593. Although the court did not specify the grounds for rejecting promissory estoppel, its opinion suggests two possible grounds. In addition to the lack of a definite promise, plaintiff's reliance was not "unequivocally referable" to the alleged promise to defeat Statute of Frauds requirements. *Id.*

<sup>98</sup> See *supra* notes 94-97 and accompanying text.

<sup>99</sup> See *supra* notes 95-97 and accompanying text.

<sup>100</sup> See Farber & Matheson, *supra* note 1, at 915 ("[C]ourts have long had trouble distinguishing binding commitments from other communications such as opinions, predictions, or negotiations.") (emphasis added).

## 2. No "Definite and Substantial" Reliance

Rather than finding no clear promise, courts may instead determine that no detrimental reliance occurred.<sup>101</sup> Detrimental reliance comprises two elements: reliance and injury. A promissory estoppel claim may fail because the promisee did not rely on the promise at all. Alternatively, it may fail because no injury resulted from reliance. Although some of the claims that courts have rejected for lack of detrimental reliance are weak cases for meeting Section 90's reliance requirement,<sup>102</sup> others are not so easy to dismiss.

In *Smith v. City of San Francisco*,<sup>103</sup> the city of San Francisco promised to give fair consideration to the promisees' land development applications. In fact, it encouraged the promisees by suggesting various uses for the land. Despite the court's assertion that the promisees stated no facts demonstrating reliance, the facts clearly indicate that the promisees relied on the city's promise by undertaking the expense of preparing and submitting their development plans.<sup>104</sup>

In *Ripple's of Clearview, Inc. v. Le Havre Associates*,<sup>105</sup> the plaintiff-lessee alleged it had maintained and improved the premises in reliance on defendant-lessor's promise to give eighteen months' notice before terminating the business lease. Although the court found no clear promise, it also rejected the promissory estoppel claim for lack of reliance.<sup>106</sup> The court reasoned that the plaintiff's ongoing catering business required it to continue to maintain and improve the premises, with or without a promise of eighteen months notice of lease termination. Thus, the plaintiff's expenditures were not "unequivocally referable" to the alleged oral promise.<sup>107</sup> The court could have found, however, that the plaintiff continued to maintain and improve the premises in the belief that it would have at least eighteen months to enjoy the property improvements.

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<sup>101</sup> See *Smith v. City of S.F.*, 275 Cal. Rptr. 17 (Ct. App. 1990); *Kurokawa v. Blum*, 245 Cal. Rptr. 463 (Ct. App. 1988); *Hoover Community Hotel Dev. Corp. v. Thomson*, 213 Cal. Rptr. 750 (Ct. App. 1985); *Downer v. Bramet*, 199 Cal. Rptr. 830 (Ct. App. 1984); *Clinton v. International Business Machs. Corp.*, 570 N.Y.S.2d 405 (App. Div. 1991); *Silver v. Mohasco Corp.*, 462 N.Y.S.2d 917 (App. Div. 1983); *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447 (App. Div. 1982).

<sup>102</sup> See *Kurokawa*, 245 Cal. Rptr. at 471 (where former domestic partner never requested forbearance of legal rights, plaintiff neither alleged nor showed such forbearance or any other act of reliance on partner's alleged promise of financial support); *Hoover Community Hotel*, 213 Cal. Rptr. at 758 (where plaintiff failed to accept defendant-church's offer to sell property, no detrimental reliance occurred); *Downer*, 199 Cal. Rptr. at 833-34 (where employer's intended transfer of property interest was a gift, not a promised retirement benefit, employee could not have detrimentally relied by remaining with employer).

<sup>103</sup> 275 Cal. Rptr. 17 (Ct. App. 1990).

<sup>104</sup> *Id.* at 19-20, 23.

<sup>105</sup> 452 N.Y.S.2d 447 (App. Div. 1982).

<sup>106</sup> *Id.* at 449.

<sup>107</sup> *Id.*

Section 90 does not expressly require that injury result from the promisee's reliance. Nonetheless, courts and scholars often regard resultant injury as an essential element "because without injury there would be no injustice in not enforcing the promise."<sup>108</sup> For example, *Clinton v. International Business Machines Corp.*<sup>109</sup> rejected a promissory estoppel claim because the promisees' injury did not result from reliance on the promise. In that case, the promisor requested that the promisees not oppose a proposed law that would prohibit the promisees from parking at their business site. In return, the promisor agreed to help the promisees find another parking site for their business. The town passed the law, repealed it, and then ordered the promisees not to park at their business site anymore. Despite the promisees' performance in accordance with the promisor's request, the court refused to enforce the promise because the town, and not the promisor, was responsible for the promisees' displacement.<sup>110</sup>

Despite evidence that a promisee's reliance resulted in injury, courts may still hold that the injury is not definite or significant enough to warrant recovery. In *Silver v. Mohasco Corp.*,<sup>111</sup> the defendant allegedly promised not to inform the plaintiff's prospective employers that it had terminated plaintiff's employment. Notwithstanding the possible injury resulting from the plaintiff's reliance on the promise, the court held that the plaintiff failed to allege any "substantial and concrete" injury.<sup>112</sup>

Courts' rejection of claims for lack of detrimental reliance, despite evidence of some reliance, suggests a higher standard of scrutiny.<sup>113</sup> Contrary to the spirit and letter of Section 90, mere detrimental reliance does not seem sufficient to trigger liability. Reliance must be "definite and substantial" before a court will allow recovery.

The cases rejecting promissory estoppel claims on reliance grounds suggest that the promisee must establish definite and substantial reliance by showing that the promise *dispositively* induced her to *specifically* act (or forbear). The promisee may not simply allege general reliance on the promise.<sup>114</sup> Moreover, it is not sufficient that

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<sup>108</sup> JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 6-1, at 273 (3d ed. 1987).

<sup>109</sup> 570 N.Y.S.2d 405 (App. Div. 1991).

<sup>110</sup> *Id.* at 406-07.

<sup>111</sup> 462 N.Y.S.2d 917 (App. Div. 1983), *aff'd.*, 476 N.Y.S.2d 822 (1984).

<sup>112</sup> *Id.* at 920.

<sup>113</sup> *Cf.* *Yorio & Thel*, *supra* note 1, at 157-59 (arguing that courts apply promissory estoppel even where promisees only acted in contemplation of promise or in a manner consistent with reliance on promise).

<sup>114</sup> *See* *Smith v. City of S.F.*, 275 Cal. Rptr. 17, 23 (Ct. App. 1990) ("[O]ther than their conclusory allegation that they reasonably and justifiably relied on the City's promises, appellants allege no facts demonstrating such reliance.").

she specifically acted in contemplation of the promise or in a manner consistent with reliance on the promise.<sup>115</sup> For that matter, it is not sufficient that the promise was one among several factors leading to her detrimental act. Rather, she must show a "but for" causality. It must be clear that but for the promise, she would not have so acted.

Thus, as we saw in *Smith v. City of San Francisco*,<sup>116</sup> despite the promisees' reliance in preparing and submitting land development plans to the city, the court seemed to believe that they would have acted the same way even without the city's promise. The promisees would have still needed to apply with the city to develop their land. The estoppel claim therefore failed to show definite reliance.<sup>117</sup>

The requirement of definite reliance causes difficulty for promisees who acted specifically in reliance on the promise but who cannot easily prove that they would have acted differently had it not been for the promise. To vindicate their promissory estoppel claims, these promisees must subject themselves to post-hoc judicial conjectures as to what they would or would not have done in the absence of the promise.

### 3. Governmental Agencies Acting Within Statutory Authority

Absent unusual circumstances, promissory estoppel cannot be used against government agencies or municipalities that act within their statutory authority, even if such action is in breach of a prior promise.<sup>118</sup> Courts may justify this rule, expressly or implicitly, on three different grounds. First, courts may find it unreasonable to rely on a promise that is not clear and definite. For example, in *Modell & Co. v. City of New York*,<sup>119</sup> the plaintiff alleged reliance on a city official's written representation to renew a business lease. The court, however, held that since the written representation did not fully comply with statutory requirements, it could not constitute a clear and definite promise by the government. The plaintiff's reliance therefore could not have been reasonable.<sup>120</sup>

Second, courts may also determine that justice does not require enforcement of a governmental promise where enforcement would compromise "a strong rule of policy, adopted for the [public] bene-

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<sup>115</sup> Cf. *Yorio & Thel*, *supra* note 1, at 154 ("[O]nly rarely do courts seem to require proof that the promisee would have acted differently had the promise not been made.").

<sup>116</sup> 275 Cal. Rptr. at 23.

<sup>117</sup> *Id.*

<sup>118</sup> See *San Marcos Water Dist. v. San Marcos Unified Sch. Dist.*, 720 P.2d 935, 943 (Cal. 1986), *cert. denied* 479 U.S. 1087 (1987); *Advanced Refractory Technologies, Inc. v. Power Auth.*, 568 N.Y.S.2d 986 (App. Div.), *appeal denied*, 578 N.E.2d 440 (N.Y. 1991); *Modell & Co. v. City of N.Y.*, 552 N.Y.S.2d 632 (App. Div. 1990).

<sup>119</sup> 552 N.Y.S.2d 632 (App. Div. 1990).

<sup>120</sup> *Id.*

fit."<sup>121</sup> For example, in *San Marcos Water District v. San Marcos Unified School District*,<sup>122</sup> the school district promised to pay special assessment fees to the water district. The court held that the school district was exempt from such fees. Requiring payment by the school district would only undermine the legislative goal of maintaining balanced public funding and of minimizing administrative costs.<sup>123</sup> *San Marcos* thus illustrates that it may be against public policy to enforce a governmental promise that would impede the government's proper functions.

A third ground for denying promissory estoppel relief against the government is that detrimental reliance is often difficult to prove in such cases. In *Advanced Refractory Technology v. Power Authority*,<sup>124</sup> the court refused to invoke promissory estoppel to prevent the state power authority from raising its utility rates. Absent the alleged promise, a regulated individual is still subject to governmental authority. It would be difficult to show that the promisee incurred lost opportunity costs or that she would have been in a better position had the government not made the promise.

#### 4. No "Unconscionable Circumstances" to Defeat Statute of Frauds Requirements

Although the Statute of Frauds generally requires written and signed documentation for certain contracts, Section 139 allows enforcement of such promises even if they fail Statute of Frauds requirements.<sup>125</sup> Courts, however, have not been so heedless of those requirements.<sup>126</sup> They frequently reject promissory estoppel claims upon finding that no "unconscionable circumstances" exist to warrant defeating Statute of Frauds requirements.<sup>127</sup> The circumstances to

<sup>121</sup> *San Marcos Water Dist.*, 720 P.2d at 943 (citing *City of Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970)).

<sup>122</sup> *Id.* at 935.

<sup>123</sup> *Id.* at 943.

<sup>124</sup> 568 N.Y.S.2d 986 (App. Div. 1991).

<sup>125</sup> SECOND RESTATEMENT, *supra* note 18, § 139.

<sup>126</sup> *See, e.g.*, *Gold v. Vitucci*, 563 N.Y.S.2d 443 (App. Div. 1990); *Cane v. Farmelo*, 543 N.Y.S.2d 775 (App. Div. 1989).

<sup>127</sup> *See Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 231 Cal. Rptr. 820 (Ct. App. 1986); *Munoz v. Kaiser Steel Corp.*, 203 Cal. Rptr. 345 (Ct. App. 1984); *Bon Temps Agency, Ltd. v. Towers Org., Inc.*, 590 N.Y.S.2d 97 (App. Div. 1992); *Aeromar C. Por A. v. Port Auth.*, 536 N.Y.S.2d 173 (App. Div. 1988); *Carvel Corp. v. Nicolini*, 535 N.Y.S.2d 379 (App. Div. 1988); *Bernard v. Langan Porsche Audi, Inc.*, 532 N.Y.S.2d 599 (App. Div. 1988); *Country-Wide Leasing Corp. v. Subaru of America*, 520 N.Y.S.2d 24 (App. Div. 1987); *Tutak v. Tutak*, 507 N.Y.S.2d 232 (App. Div. 1986); *Cunnison v. Richardson Green-shields Sec., Inc.*, 485 N.Y.S.2d 272 (App. Div. 1985); *Klein v. Jamor Purveyors, Inc.*, 489 N.Y.S.2d 556 (App. Div. 1985); *D & N Boeing, Inc. v. Kirsch Beverages, Inc.*, 471 N.Y.S.2d 299 (App. Div.), *aff'd*, 472 N.E.2d 992 (N.Y. 1984); *Long Island Pen Corp. v. Shatsky Metal Stamping Co.*, 463 N.Y.S.2d 39 (App. Div. 1983); *Ginsberg v. Fairfield-Noble Corp.*, 440 N.Y.S.2d 222 (App. Div. 1981).

consider may include the nature and extent of the injury, the character of reliance, the definiteness of the promise, and the reprehensiveness of the promisor's conduct.

Courts often decline to apply promissory estoppel as an alternative remedy for plaintiffs whose oral employment contracts fail the Statute of Frauds.<sup>128</sup> Employees who rely upon promises of employment may suffer harm by changing or failing to change jobs or residence. Courts, however, do not regard such injury as unconscionable. In *Munoz v. Kaiser Steel Corp.*,<sup>129</sup> the plaintiff permanently relocated in reliance on the defendant's assurances of at least three years of employment. The court, however, held that the employee suffered no unconscionable injury since he incurred negligible relocation costs and had no other job or job offers prior to his employment.<sup>130</sup>

In contrast, the employee in *Cunnison v. Richardson Greenshields Securities, Inc.*<sup>131</sup> alleged that she did in fact forego other job opportunities in reliance on a five-year oral employment contract. The court held that such circumstances were not "sufficiently egregious" to estop the employer from raising a Statute of Frauds defense. Further, the court declared that "a change of job or residence, by itself, is insufficient to trigger invocation of the promissory estoppel doctrine."<sup>132</sup> Similarly, in *Ginsberg v. Fairfield-Noble Corp.*,<sup>133</sup> the employee left his former job to work for the defendant, who terminated employment after only two months. In rejecting the promissory estoppel claim, the court asserted, "The choice to forego current employment because of rosy promises 'does not put the stigma of unconscionability upon the defendants' right to assert the Statute of Frauds.'"<sup>134</sup>

Courts' reluctance to invoke promissory estoppel theory to defeat Statute of Frauds requirements extends not only to oral employment contracts, but also to oral property leases.<sup>135</sup> In *Tribune Printing Co. v. 263 Ninth Avenue Realty, Inc.*,<sup>136</sup> the plaintiff-lessee alleged that it helped the defendant-lessor purchase the leased property by providing a written statement that supported the lessor's application for fi-

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<sup>128</sup> See *Munoz v. Kaiser Steel Corp.*, 203 Cal. Rptr. 345 (Ct. App. 1984); *Cunnison v. Richardson Greenshields Sec., Inc.*, 485 N.Y.S.2d 272 (App. Div. 1985); *Ginsberg v. Fairfield-Noble Corp.*, 440 N.Y.S.2d 222 (App. Div. 1981).

<sup>129</sup> 203 Cal. Rptr. 345 (Ct. App. 1984).

<sup>130</sup> *Id.* at 349.

<sup>131</sup> 485 N.Y.S.2d 272 (App. Div. 1985).

<sup>132</sup> *Id.* at 275. In addition to finding no "egregious" injury, the court also asserted that the employee's reliance was not "unequivocally referable" to the alleged promise of employment for five years. *Id.* at 276-77.

<sup>133</sup> 440 N.Y.S.2d 222 (App. Div. 1981).

<sup>134</sup> *Id.* at 225 (quoting *Swerdloff v. Mobil Oil Corp.*, 427 N.Y.S.2d 266 (App. Div. 1980)).

<sup>135</sup> See *Cohen v. Brown*, 475 N.E.2d 116 (N.Y. 1984); *Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 452 N.Y.S.2d 590 (App. Div. 1982).

<sup>136</sup> 452 N.Y.S.2d 590 (App. Div. 1982).

nancing. In return, the lessor promised to renew the lessee's business lease. The court concluded that there were no "unusual circumstances" to justify invoking promissory estoppel. It asserted that the lessee's reliance in the form of the written statement was not "unequivocally referable" to the alleged oral promise.<sup>137</sup> The court also noted that oral property lease agreements are not definite enough to merit reasonable reliance.<sup>138</sup>

Rather than focusing on the extent of the injury, the nature of the reliance, or the definiteness of the promise, courts may instead decide that the promisor's conduct was not so unconscionable as to warrant promissory estoppel liability in contravention of Statute of Frauds requirements. Hence, in *Edward Joy Co. v. Noise Control Products, Inc.*,<sup>139</sup> where a contractor detrimentally relied upon an erroneous price quote by a subcontractor, the court rejected the promissory estoppel claim because the subcontractor's mathematical mistake was neither fraudulent nor unconscionable.

### III

#### IMPLICATIONS FOR MODERN CONTRACT THEORY

##### A. The Joint Roles of Consent and Reliance in Promissory Estoppel

The strict standards of scrutiny that courts impose on promissory estoppel claims reveal that both consent and reliance are crucial to promissory estoppel theory. The requirements of a clear promise and substantial reliance lend support for the arguments of both promise-focused theorists and death-of-contract scholars regarding the respective roles of consent and reliance principles. Neither requirement, however, dispositively validates absolutist claims that one principle dominates promissory estoppel theory at the expense of the other.

##### 1. *The Role of Consent*

The surveyed cases demonstrate the crucial role that consent plays in promissory estoppel adjudication. The requirement of a clear and definite promise suggests that there is some truth in the claim of promise-focused theorists that consensual, promise-based liability dominates modern contract law, including promissory estoppel theory. The tort principle of reliance does not seem to account for the requirement of a promise, let alone a clear promise. As Professors Yorio and Thel argue, "[i]f the basis of recovery were harm caused by the defendant's conduct, it should not matter whether the conduct

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<sup>137</sup> *Id.* at 593; see also *supra* note 132 and accompanying text.

<sup>138</sup> 452 N.Y.S.2d at 593.

<sup>139</sup> 443 N.Y.S.2d 361 (Sup. Ct. 1981).



constituted a promise.<sup>140</sup> Courts' insistence on a clear and definite promise indicates a judicial impulse to enforce only seriously considered commitments.<sup>141</sup> In the absence of consideration and given the frequent difficulty of distinguishing a binding promise to perform from a mere agreement to negotiate,<sup>142</sup> the requirement of a clear and definite promise assures greater accuracy in determining the promisor's intent.

The need to determine precisely the promisor's intent and give binding effect to that intent suggests that courts continue to value the inherent moral force of a voluntarily given promise. The clear and definite promise requirement supports the promise-focused theorists' proposition that "[e]nforcement of a promise appears to be desired for its own sake."<sup>143</sup> Thus, the "impulse to hold [people] to their promises,"<sup>144</sup> as opposed to the sole desire to protect promisees from harm, remains a major influence on judges.

The clear and definite promise requirement does not, however, signal the victory of the contract-based consent principle over the tort-based reliance principle. The clear and definite promise requirement may merely serve the function of screening out unreasonable reliance. A reliance view of promissory estoppel does not require the doctrine to protect all forms of reliance. In fact, promise-focused theorists concede that protecting only reasonable reliance is consistent with general reliance theory.<sup>145</sup> Furthermore, death-of-contract scholars argue that by giving a promise, the promisor has invited others to trust, or rely on, his word.<sup>146</sup> Such an express invitation of trust makes reliance on the promise all the more reasonable.

## 2. *The Role of Reliance*

As the foregoing discussion suggests, reliance plays a joint role with consent in promissory estoppel adjudication. The requirement of definite and substantial reliance supports the death-of-contract

<sup>140</sup> Yorio & Thel, *supra* note 1, at 161-62.

<sup>141</sup> *Id.* at 167.

<sup>142</sup> See *supra* notes 94-100 and accompanying text.

<sup>143</sup> Farber & Matheson, *supra* note 1, at 912; see also *De Cicco v. Schweizer*, 117 N.E. 807, 809 (N.Y. 1917) (Cardozo, J.) (The law "strains . . . to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others."); Yorio & Thel, *supra* note 1, at 167 ("Judges respond instead to 'the impulse to hold men to their promises.'").

<sup>144</sup> Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1-2), 46 *YALE L.J.* 52, 70 (1936-37).

<sup>145</sup> See Yorio & Thel, *supra* note 1, at 124 ("If the objective of Section 90 is to protect reliance, then reasonable reliance alone justifies a remedy.")

<sup>146</sup> See АТТІАН, *supra* note 3, at 82. Some contractarians, despite positing the decline of reliance, curiously also assert that promissory estoppel seeks to "foster trust between economic actors." Farber & Matheson, *supra* note 1, at 945.

scholars' view that the reliance principle is essential to promissory estoppel theory. Contrary to the claims of promise-focused theorists,<sup>147</sup> the survey of state court cases since 1981 indicates that detrimental reliance remains crucial to a promissory estoppel claim. This finding, however, represents a Pyrrhic victory for death-of-contract scholars. Because only those few cases with the strongest showings of reliance can pass judicial scrutiny, the reliance principle of promissory estoppel does not have the overwhelming impact on contract law that death-of-contract scholars have ardently declared.

Of course, promise-focused theorists continue to insist that the requirement of "definite and substantial" reliance is consistent with a promise-based theory of liability. Substantial reliance provides evidence that there was in fact a promise.<sup>148</sup> Furthermore, substantial reliance also indicates that reliance was foreseeable. Since the promisor should have reasonably expected to induce reliance, it is likely that she in fact contemplated reliance and, therefore, considered the seriousness of her promise.<sup>149</sup> According to promise-focused theorists, courts thus focus on enforcing this seriously considered promise, rather than on protecting harm resulting from substantial reliance.

This argument, however, is no more plausible than the death-of-contract scholars' view that the reliance requirement protects people's reliance interests. The plausibility of both characterizations suggests that the complex theory of promissory estoppel is not reduceable to a single unifying principle.

## B. Judicial Adherence to Traditional Contract Theory

Contrary to death-of-contract scholars' dire claims, judicial reluctance to extend the reliance principle of promissory estoppel suggests the persistent strength of the traditional contract theory of bargained-for exchange. Two pieces of evidence support this thesis. First, the requirement of a clear and definite promise reflects contract rules regarding the making of a valid offer.<sup>150</sup> Under these rules, the offer must unambiguously state all essential terms so as to indicate a clear intent to be bound.<sup>151</sup> By requiring a clear and definite promise, courts are applying similar contract standards for a valid offer to

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<sup>147</sup> See Yorio & Thel, *supra* note 1, at 155-57. Professors Yorio & Thel's assertion rests primarily on cases cited in § 90 of the second *Restatement*. These cases pre-date 1981, the publication date of the second *Restatement*.

<sup>148</sup> *Id.* at 159.

<sup>149</sup> *Id.* at 162-63.

<sup>150</sup> See SECOND RESTATEMENT, *supra* note 18, §§ 24-33.

<sup>151</sup> See JOEL P. BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS § 316, 324 (2d ed. 1907); Metzger & Phillips, *supra* note 27, at 496.

promissory estoppel claims.<sup>152</sup> Second, the surveyed cases reveal that courts generally decline to invoke promissory estoppel to defeat Statute of Frauds requirements.<sup>153</sup> This indicates courts' insistence upon strict contract formalities.

One explanation for the judicial adherence to contract bargain theory may be that judges are more comfortable with familiar contract rules and principles.<sup>154</sup> Because judges frequently deal with promises in the bargain context, they "tend to think in bargain terms, and to try to assimilate reliance theory to more familiar principles applicable to the normal bargain situation."<sup>155</sup> Moreover, given Section 90's broad sweeping language,<sup>156</sup> judges instinctively resort to familiar contract theory in shaping promise-enforcement criteria because that theory is more established and thus provides a greater degree of certainty.<sup>157</sup> Consequently, in applying promissory estoppel doctrine, judges often refuse to enforce promises that would have also failed the traditional contract requirement of a clear and definite offer.<sup>158</sup> This "judicial intertwining" of promissory estoppel and traditional bargain theory makes it difficult for promisees to avoid requirements of contract bargain theory simply by invoking promissory estoppel doctrine.<sup>159</sup>

Two other factors serve to reinforce courts' dependence on bargain theory. First, since courts typically view promissory estoppel as an exception to traditional contract theory, they try to determine whether a bargain has been made before they invoke promissory estoppel theory.<sup>160</sup> Thus, "[a]n orientation to first exhaust the possibilities of bargain might well cushion the impact of events removed . . . [from] the making of the promise . . ."<sup>161</sup> In other words, by virtue of this process of adjudication, courts allow bargain considerations to seep into determinations of promissory estoppel liability. Second, the availability of alternative bargain-related doctrines, such as part per-

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<sup>152</sup> See *supra* notes 89-97 and accompanying text; see also Kalevitch, *supra* note 57, at 677 (concluding that Florida promissory estoppel law requires a definite promise "which might have been enforced had bargained-for consideration been exchanged for the promise"); Metzger & Phillips, *supra* note 27, at 496 (discussing a line of promissory estoppel cases requiring a promise "so definite as to meet traditional contract standards for an offer").

<sup>153</sup> Since 1981, courts in California and New York alone have refused to apply promissory estoppel to defeat Statute of Frauds requirements in at least 15 cases. See cases cited *supra* notes 126-27. In comparison, the survey of *all* state court cases for the same period of time reveals only six cases establishing promissory estoppel liability despite Statute of Frauds requirements. See *supra* note 82.

<sup>154</sup> Henderson, *supra* note 1, at 347.

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* notes 18, 21-24 and accompanying text.

<sup>157</sup> Henderson, *supra* note 1, at 352 n.36.

<sup>158</sup> See *supra* notes 89-97 and accompanying text.

<sup>159</sup> Henderson, *supra* note 1, at 353.

<sup>160</sup> See, e.g., Hoover Community Hotel Corp. v. Thomson, 213 Cal. Rptr. 750 (Ct. App. 1985); Silver v. Mohasco Corp., 462 N.Y.S.2d 917 (App. Div. 1983).

<sup>161</sup> Henderson, *supra* note 1, at 347 n.20.

formance and implied-in-fact contract, also serves to minimize the significance of promissory estoppel and reaffirm bargain analysis.<sup>162</sup>

Yet another explanation for judicial adherence to traditional bargain theory is that courts place a high value on the functions that contract formalities serve. Courts may believe that consideration theory serves evidentiary, cautionary, and channeling functions much more adequately than promissory estoppel doctrine. Consideration provides evidence of a contract, since the promisee probably would not have given consideration had the promisor not agreed to a contract.<sup>163</sup> Consideration also cautions the promisor as to the seriousness of the promise, since mutuality of obligation supposedly places both parties in a "circumspective frame of mind."<sup>164</sup> Furthermore, consideration distinguishes the enforceable promise by virtue of the exchange process.<sup>165</sup>

Promissory estoppel doctrine, on the other hand, does not seem to serve formal functions as well as consideration theory. Reliance that a fact-finder deems reasonably foreseeable after the fact is certainly not strong evidence of a clear promise. Nor does it provide cautionary or channeling safeguards as effectively as consideration. In fact, Professor Fuller suggests that unbargained-for reliance by itself is insufficient to satisfy functions of formality.<sup>166</sup> He asserts that one must determine whether the promise "emerge[d] out of a context of tacit exchange" and "whether after the promise was made the promisee declared to the promisor his intention of acting on it."<sup>167</sup> This analysis suggests that reliance, in the absence of a "tacit exchange" and notice to the promisor, would not justify enforcement of a promise, at least on formal grounds. Consequently, courts may find traditional bargain theory of consideration more appealing because it more effectively serves goals of formality.

#### CONCLUSION

Although the drafters of the second *Restatement* intended the new Sections 90 and 139 to reflect the burgeoning development of promissory estoppel, state court decisions since the publication of the second *Restatement* indicate a contraction, rather than expansion, of promissory estoppel (assuming that the doctrine ever had such widespread practical appeal to begin with). Though judges and scholars, in theory, may recognize promissory estoppel as a sound doctrine, in prac-

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<sup>162</sup> *Id.* at 349 n.27.

<sup>163</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

<sup>164</sup> *Id.* at 800, 816.

<sup>165</sup> *Id.* at 801, 816.

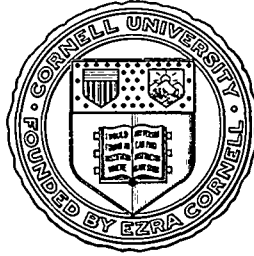
<sup>166</sup> *Id.* at 819.

<sup>167</sup> *Id.*

tice courts show extreme reluctance to deviate from traditional contract principles. Contrary to assertions that promissory estoppel has become a primary, independent theory of obligation, the doctrine has remained an inferior doctrine of last resort. Because promissory estoppel claims typically come to the fore only after promisees have exhausted all other possible claims, courts regard such last-ditch attempts at recovery with extreme suspicion. Despite the claims of death-of-contract scholars, the waning of promissory estoppel provides evidence of the enduring vitality of traditional bargain theory.

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