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PROMISSORY ESTOPPEL IN WASHINGTON

Promissory estoppel was expressly recognized in Washington in 1940.¹ The doctrine provides relief for a promisee who foreseeably and justifiably relies on a promise even though the parties did not form a contract. The aim of the doctrine is remedial:² to redress harm that has befallen an innocent promisee, not to reward a party for his reliance.³ Promissory estoppel, which protects the promisee's reliance interest,⁴ operates to return the promisee to the position he occupied before the promise was made.

*Hill v. Corbett*⁵ identified the five elements necessary to recovery under a promissory estoppel theory. They are: "(1) [A] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise."⁶

This comment clarifies the considerable confusion that befalls the promissory estoppel doctrine in Washington.⁷ Part I discusses situations

1. *Luther v. National Bank of Commerce*, 2 Wn. 2d 470, 484, 98 P.2d 667, 673 (1940). The doctrine of promissory estoppel was impliedly adopted much earlier. See, e.g., *Coleman v. Larson*, 49 Wash. 321, 325, 95 P. 262, 264 (1908)(holding that "where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the faith of the promise which materially changes his condition," equity makes the promise enforceable).

2. See notes 92–95 and accompanying text *infra*.

3. See Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

4. A promisee has three types of interests that can be protected by providing a remedy for reasonable reliance on a promise. Fuller and Perdue identified the reliance interest, the expectancy interest, and the restitutionary interest in their seminal work, *The Reliance Interest in Contract Damages: I*, 46 YALE L. J. 52, 53–54 (1936).

The objective of a reliance interest recovery is to return the promisee to the position he occupied before the promise was made. The remedy would be a return of all reasonable costs incurred by the promisee in reliance on the promise. An expectancy interest recovery, in contrast, gives the promisee the benefit of the promise by putting him in the position he would have occupied had the promisor performed his promise. Anticipated profits are the normal measure of relief. Finally, a restitutionary interest recovery places both the promisor and the promisee in their pre-promise position by disgorging the benefits of the promisee's performance from the promisor. The measure of recovery would be the value of the benefits conferred on the promisor.

This comment contends that the most appropriate measure of recovery under the promissory estoppel doctrine is the promisee's reliance interest. See notes 107–132 and accompanying text *infra*.

5. 33 Wn. 2d 219, 204 P.2d 845 (1945).

6. *Id.* at 222–23, 204 P.2d at 847.

7. "By 1937, the Washington cases in which a promise was sought to be enforced because of an unbargained-for and detrimental change of position by the promisee in reliance on receiving the promised performance, were in a state of confusion." Shattuck, *Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 24, 70 (1959)(footnote omitted). The years since 1937 have seen further inconsistent application of the doctrine. See, e.g., *Ferrer v. Taft Structurals, Inc.*, 21 Wn.

in which a promisee, though unable to establish a traditional contract,⁸ can invoke promissory estoppel to obtain relief. Part II examines the elements of promissory estoppel identified in *Hill* and illustrates their application in various fact patterns.

I. TRADITIONAL CONTRACT LAW AND PROMISSORY ESTOPPEL

Promissory estoppel recovery does not require the same elements as traditional contract recovery. Formation of a contract ordinarily requires bargaining between the parties. Bargaining demands an objective manifestation of mutual assent and consideration.⁹ A contract may also have to meet the formal requirements of the Statute of Frauds. Mutual assent and consideration, on the other hand, are not elements of promissory estoppel. Even the Statute of Frauds may not be an absolute bar.¹⁰ Thus, the promissory estoppel doctrine supplies a remedy for a promisee when traditional contract law does not.

In an effort to provide litigants with relief under traditional contract doctrine, courts have unnecessarily distorted contract principles.¹¹ Applying the promissory estoppel doctrine in cases where traditional contract law is inapplicable leads to a more logically defensible solution.

App. 832, 587 P.2d 177 (1978)(an accepted bid to perform construction work was construed as an unaccepted offer); *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn. 2d 126, 443 P.2d 544 (1968)(promise to take steam heat for a year was found to be without consideration as the promisor did not in fact require any steam). These cases are discussed more fully at notes 23 and 118.

8. Although promissory estoppel is a contract doctrine, see RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment d (Tent. Draft No. 2, 1965), it should be distinguished from more traditional contract principles. Promissory estoppel contains both contract and tort elements, see, e.g., Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951); Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 909-14 (1937). The key distinction between promissory estoppel and more traditional contract doctrines is the flexibility of promissory estoppel. With promissory estoppel, courts can "make the remedy fit the crime" and provide relief that depends upon the special circumstances and merits of the claim of all parties. 1A A. CORBIN, CONTRACTS § 205, at 236 (1963). The doctrine of promissory estoppel will not be referred to as a contract doctrine in the text of this comment.

9. RESTATEMENT OF CONTRACTS §§ 3, 4 (1932); 1 A. CORBIN, CONTRACTS § 10, at 22 (1963).

10. See notes 24-29 and accompanying text *infra*.

11. Courts have often strained to find consideration for a promise, and thus enforce a contract, when it would appear that no contract was ever intended by the parties. See Shattuck, *Contracts in Washington, 1937-1957*, 34 WASH. L. REV. 24, 73 (1959). An excellent example is found in the cases which transform a gratuitous promise to make a gift to charity into an enforceable contract by construing the charity's reliance on the gift as consideration. See, e.g., *Allegheny College v. National Chatauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173 (1927); *Depauw University v. Ankeny*, 97 Wash. 451, 166 P. 1148 (1917); *Young Men's Christian Ass'n of Wenatchee v. Olds Co.*, 84 Wash. 630, 147 P. 406 (1915).

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A. *Mutual Assent*

To form a contract, two or more parties must agree to something. Mutual assent, or “meeting of the minds,”¹² means that each party either begins performance or agrees¹³ to begin performance.¹⁴ Since promissory estoppel may apply in the absence of an agreement between the parties, mutual assent is not required.¹⁵ Instead, the relevant questions are whether the promisee’s reliance on the promise was foreseeable and whether his reliance was justifiable.

To illustrate the distinction, suppose an uncle promises to give his nephew \$1,000. The nephew buys a new stereo, expecting to be reimbursed. Mutual assent is lacking because the parties reached no agreement to exchange promises or performances. The nephew, therefore, has no contract upon which to sue. If, however, the nephew’s reliance on the promise was foreseeable and was justifiable, he could obtain relief under the promissory estoppel doctrine.

B. *Consideration*

Traditional contract law is based upon consideration. Unless both parties supply consideration, promises in a contract will not be enforced.¹⁶ Promissory estoppel, in contrast, does not require consideration as a condition to recovery.¹⁷ The promisee’s reasonable reliance on the promise substitutes for consideration. Thus, to identify the theory of recovery, reliance on the promise must be carefully distinguished from consideration for the promise.¹⁸

12. *Wetherbee v. Gary*, 62 Wn. 2d 123, 127–28, 381 P.2d 237, 240 (1963). The Washington authority is clear that mutual assent is an essential element of every contract. *See, e.g.*, *Richards v. Kuppinger*, 46 Wn. 2d 62, 66–67, 278 P.2d 395, 398 (1955); *Swanson v. Holmquist*, 13 Wn. App. 939, 942, 539 P.2d 104, 106 (1975).

13. An agreement must be objectively manifested. The unexpressed intentions of the parties are irrelevant. *See Plumbing Shop, Inc. v. Pitts*, 67 Wn. 2d 514, 517, 408 P.2d 382, 384 (1965).

14. “Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.” RESTATEMENT (SECOND) OF CONTRACTS § 20 (Tent. Draft No. 1, 1964).

15. *See Shattuck, Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 941–42 (1937).

16. S. WILLISTON, CONTRACTS § 99, at 367 (1957).

17. “In order for [promissory] estoppel to arise . . . it is not necessary that the one estopped receive some benefit or consideration from the particular transaction; . . . *Central Heat, Inc. v. Daily Olympian*, 74 Wn. 2d 126, 133, 443 P.2d 544, 548 (1968)(quoting *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940)).

18. “[T]he boundary between bargain and reliance is demonstrably tenuous. The thing done by a promisee in reliance on the promise is often a thing which would have been consideration had the promisor requested it.” *Shattuck, Contracts in Washington, 1937–1957*, 34 WASH. L. REV. 24, 73 (1959).

To illustrate, suppose A promises to pay for B's trip to Europe. B agrees to take the trip and, in reliance on A's promise, flies to London. Neither B's promise to take the trip nor her flying to London is consideration for A's promise. A was not bargaining for B to take the trip, but only expressing his willingness to pay for the trip if B should decide to go. Neither a promise to accept a gift nor the receiving of a gift is consideration.¹⁹ B's flying to London, however, would be reliance on A's promise, and might be a basis of recovery under promissory estoppel.

The key to the distinction between consideration for the promise and reliance on the promise is bargaining.²⁰ Consideration is not merely a thing, but the process of bargaining itself.²¹ If the promisor actually offers his promise in exchange for the promisee's change of position, then the promisee's act or forbearance is consideration.²² For example, if in the previous hypothetical A was bargaining for a commitment by B to take the trip, then either B's promise to take the trip or her actual performance could be consideration for A's promise, and could create an enforceable contract.²³

C. *Statute of Frauds*

Under some circumstances the Statute of Frauds²⁴ will render an other-

19. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 4-2, at 135 (2d ed. 1977).

20. "Ordinarily the key difference between a promise supported by consideration and a promise supported by promissory estoppel is that in the former case the detriment is bargained for in exchange for the promise; in the latter, there is no bargain." J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 6-1, at 203 (2d ed. 1977).

21. See Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 932 (1958); RESTATEMENT OF CONTRACTS § 75 (1932).

22. See *Huberdeau v. Desmarais*, 79 Wn. 2d 432, 439, 486 P.2d 1074, 1078 (1971); *Williams Fruit Co. v. Hanover Ins. Co.*, 3 Wn. App. 276, 281, 474 P.2d 577, 581 (1970).

23. The Washington Supreme Court had some difficulty with the concept of consideration in *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn. 2d 126, 443 P.2d 544 (1968), a decision purportedly based on promissory estoppel. Defendant, a newspaper company, promised to buy steam heat from plaintiff, after agreeing with the other major customers of the heating plant that they would all take steam heat for one more year and then plaintiff would go out of business. Before the year had begun, but after the contract was entered into, plaintiff's board of directors, of which defendant's business manager was a member, voted to modify plaintiff's billing procedure. The board decided that if a customer should reduce or discontinue the amount of steam normally required, he would be obligated for that normal amount regardless of his actual consumption. Defendant took no heat for the year and refused to pay anything. Recovery for plaintiff was granted by promissory estoppel, rather than by contract, because of the uncertainty of consideration, in that defendant did not actually use any steam. Yet there was consideration for defendant's promise to take heat in plaintiff's promise to provide heat. It should be irrelevant that defendant never actually required heat, because he received the benefit of the right to have heat. The case would have been more correctly analyzed under contract doctrine than under promissory estoppel doctrine.

24. The Washington Statute of Frauds applies to (1) agreements that are not to be performed within one year from their making, (2) special promises to answer for the debt, default, or misdoings

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wise valid contract unenforceable.²⁵ Whether the Statute of Frauds also applies to the promissory estoppel doctrine had been an unanswered question until the recent case of *Klinke v. Famous Recipe Fried Chicken, Inc.*²⁶ In *Klinke*, the Washington Supreme Court limited the application of promissory estoppel to situations where the promisor additionally promises, explicitly or implicitly, to put the original parol promise in writing.

In *Klinke*, defendant orally promised to award plaintiff a franchise if plaintiff would leave his job in Alaska, move to Seattle, and find a location for the fast-food restaurant. After plaintiff did what he was requested to do, defendant decided not to award him the franchise.²⁷ Plaintiff sought damages under both contract and promissory estoppel theories. Although the court of appeals²⁸ affirmed summary judgment against plaintiff's contract claim because of noncompliance with the Statute of Frauds, summary judgment against plaintiff's promissory estoppel claim was vacated. The court held that promissory estoppel is applicable to parol promises notwithstanding the Statute of Frauds.²⁹

The supreme court declined³⁰ to adopt the lower court's rule.³¹ Instead, the court concluded that the promissory estoppel doctrine requires an additional promise, either explicit or implicit, to make a memorandum of

of another, (3) promises made upon consideration of marriage, except mutual promises to marry, (4) special promises made by an executor or administrator to answer damages out of his own estate, and (5) agreements authorizing or employing an agent to sell or purchase real estate for a commission or compensation. WASH. REV. CODE § 19.36.010 (1979).

25. The Statute of Frauds is not an equitable doctrine but "a positive statutory mandate which renders void those undertakings which offend it." *Smith v. Twohy*, 70 Wn. 2d 721, 725, 425 P.2d 12, 15 (1967).

26. 94 Wn. 2d 255, 616 P.2d 644 (1980).

27. The defendant decided not to locate in the State of Washington. *Id.* at 258, 616 P.2d at 646.

28. 24 Wn. App. 202, 600 P.2d 1034 (1979), *rev'd in part, aff'd in part*, 94 Wn. 2d 255, 616 P.2d 644 (1980).

29. The court of appeals expressly adopted §217A of the Restatement of Contracts, which provides 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 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. RESTATEMENT (SECOND) OF CONTRACT § 217A(1) (Tent. Drafts Nos. 1-7, 1973).

Id. at 212, 600 P.2d at 1041.

30. "The unforeseen application of section 217A to areas of law outside the scope of the facts of this case convinces us that it would be unwise to adopt that section now unless necessary to effectuate justice. This is not mandated by this case." *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 262, 616 P.2d 644, 648 (1980).

31. The court of appeals decision to vacate summary judgment for defendant was affirmed by the supreme court because sufficient facts were asserted to show that defendant may have promised to execute a written franchise agreement. 94 Wn. 2d 255, 260, 616 P.2d 644, 647 (1980).

the original promise.³² In other words, in order to recover under promissory estoppel for a parol promise within the Statute of Frauds, a promisor must make two promises. A promisor must first promise to act or forbear and then also promise to make a writing. Absent this second promise, recovery will be denied. The *Klinke* rule is unsatisfactory for two reasons. First, the rule will not protect all promisees who reasonably rely on a promise within the Statute of Frauds.³³ Second, the rule is premised on a legal fiction. It proposes that a promisee changes his position in reliance on the promise of a writing.³⁴ Yet, a promisee does not rely on the promise to make a memorandum, but on the original promise itself.³⁵

II. THE ELEMENTS OF PROMISSORY ESTOPPEL IN WASHINGTON

This part examines the elements of the promissory estoppel doctrine identified in *Hill v. Corbett* and developed through Washington case law.

32. Instead of adopting the more expansive court of appeals rule, the court reaffirmed its holding in *In re Estate of Nelson*, 85 Wn. 2d 602, 537 P.2d 765 (1975), that:

A party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks that promise, is estopped to interpose the statute as a defense to the enforcement of the contract by another who relied on it to his detriment.

Klinke, 94 Wn. 2d at 259, 616 P.2d at 647.

33. For example, suppose that after extensive negotiations by telephone, A, who lives in New York, accepts B's offer to move to Seattle and become B's exclusive sales representative for five years. A quits his job and moves his entire family across the country, incurring considerable expense. B, in the meantime, has decided to give the job to his son and notifies A, upon his arrival, that the deal is off. B denies any contractual liability because the agreement was not in writing. WASH. REV. CODE § 19.36.010(1) (1979) (every agreement which by its terms cannot be performed in one year from its making must be in writing). Despite the contractual defense of the Statute of Frauds, the equities are with A who was induced into relying on the promise. Moreover, A's reliance is not less reasonable because of the absence of a secondary promise to make a writing. Under the *Klinke* rule, however, unless a court is willing to find that B implicitly promised to put the agreement in writing, A will be without relief. See, e.g., *Boone v. Coe*, 153 Ky. 233, 154 S.W. 900 (1913).

34. The court of appeals cited with approval *McIntosh v. Murphy*, 52 Hawaii 29, 469 P.2d 177 (1970), which stated:

It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. . . .

Klinke, 24 Wn. App. at 213, 600 P.2d at 1041.

35. A court liberal in its interpretation of implicit promises could reach the same equitable result that a court would under § 217A. Even so, the *Klinke* rule would be unsatisfactory. A court's inquiry should be directed at the reasonableness of the promisee's reliance, not whether some formalistic requirement has been satisfied.

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A. *The Promise*

The first prerequisite to promissory estoppel recovery is the promise.³⁶ A promise is an objective³⁷ manifestation³⁸ of intention to act or to refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.³⁹ The promissory estoppel doctrine does not, however, afford relief for an illusory promise.⁴⁰ A promise is illusory if it is so indefinite that its meaning cannot be clearly determined or if it contains provisions that make performance wholly within the promisor's discretion.⁴¹

1. *The Questionable Requirement of Definiteness*

Promissory estoppel recovery will be denied if a court cannot identify the promised performance with reasonable certainty.⁴² The rationale is that reliance on an indefinite promise cannot be reasonable.⁴³ This rule is subject to criticism, however, because definiteness is unnecessary in the promissory estoppel context. Reliance on an indefinite promise should not be equated with unreasonable reliance and thus automatically foreclose promissory estoppel relief.

For example, suppose A is promised a hamburger franchise by the Jimbo Quickfry Burger Company of Topeka if he will knock down a warehouse on his land and erect a hamburger facility. The parties do not discuss the terms of the franchise agreement, merely Jimbo's assurance

36. *Hill v. Corbett*, 33 Wn. 2d 219, 222, 204 P.2d 845, 847 (1949). A promise is to be distinguished from an apparent jest, *Barnes v. Treece*, 15 Wn. App. 437, 440, 549 P.2d 1152, 1155 (1976); or a statement of intention, *Meissner v. Simpson Timber Co.*, 69 Wn. 2d 949, 957, 421 P.2d 674, 679 (1966); 1 A. CORBIN, *CONTRACTS* § 15, at 32 (1963); or an opinion, *Neth v. General Electric Co.*, 65 Wn. 2d 652, 658, 399 P.2d 314, 318 (1965); or a mere prediction of a future event, *RESTATEMENT (SECOND) OF CONTRACTS* § 2, Comment f (Tent. Draft No. 1, 1964).

37. The promisor's subjective intention is irrelevant. The only matter of significance is whether the reasonable person in the position of the promisee would believe that the promise was in earnest. *See* note 13 *supra*.

38. A promise may be expressed in words, oral or written, or inferred wholly or partly from the conduct of the promisor. *RESTATEMENT (SECOND) OF CONTRACTS* § 5 (Tent. Draft No. 1, 1964).

39. *RESTATEMENT (SECOND) OF CONTRACTS* § 2 (Tent. Draft No. 1, 1964). The present Washington definition of a promise is "an undertaking, however expressed, either that something shall happen, or that something shall not happen in the future." *Plumbing Shop, Inc. v. Pitts*, 67 Wn. 2d 514, 517, 408 P.2d 382, 384 (1965) (quoting *RESTATEMENT OF CONTRACTS* § 2 (1932)). The problem with the First Restatement's definition is the semantic difficulty of the meaning of "undertaking." The Second Restatement avoids this problem by emphasizing the corresponding effect of the promise on the promisee. *See* Reporter's comments to *RESTATEMENT (SECOND) OF CONTRACTS* § 2 (Tent. Draft No. 1, 1964).

40. 1A A. CORBIN, *CONTRACTS* § 201 (1963).

41. *Spooner v. Reserve Life Ins. Co.*, 47 Wn. 2d 454, 458, 287 P.2d 735, 738 (1955).

42. *Id.*

43. *Henderson, Promissory Estoppel and Traditional Contract Doctrine*, 78 *YALE L.J.* 343, 361 (1969).

that the franchise will be lucrative. After A knocks down his building, Jimbo awards the franchise to someone else. A's effort to recover on the contract would be unsuccessful because the contract's terms are non-existent.⁴⁴ On the other hand, promissory estoppel should be an available theory of recovery. Despite the indefiniteness of the promise, A's reliance may well have been reasonable because A was expected to rely on the promise by knocking down his building before details of the agreement were finalized. If a promisor expects the promisee to rely on the promise at an early stage of negotiations, the indefiniteness of the promise itself should not bar promissory estoppel recovery.

Definiteness is a contractual requirement⁴⁵ which is unnecessary in promissory estoppel cases. A contract must be well-defined by the terms of the promise, the acceptance,⁴⁶ or the subsequent performances⁴⁷ so that a court may determine damages.⁴⁸ Contract damages attempt to put the injured party in as good a position as he would have obtained if the contract had been performed. The remedy is defined by the promisee's expectancy interest. In an action based upon promissory estoppel, however, the remedy is measured by the promisee's actual reliance on the promise, and not his expectations. The promisee's reliance interest is ascertainable regardless of the definiteness of the promise.⁴⁹

No Washington case has allowed promissory estoppel recovery for an indefinite promise. A recognition that indefiniteness is not a complete defense to an action based on promissory estoppel would put Washington in line with well-reasoned authority.⁵⁰

44. Although a court will provide some missing terms, it will not write a contract for the parties. 1 A. CORBIN, CONTRACTS § 95, at 398 (1963).

45. Sandeman v. Sayres, 50 Wn. 2d 539, 541, 314 P.2d 428, 429 (1957).

46. Acceptance of the offer can define the terms of the contract. For example, if A says to B, "I promise to sell you as many widgets as you may require, up to 10,000" and B responds, "I promise to buy 5000 widgets," the acceptance of A's offer has created an enforceable contract for 5000 widgets.

47. Platts v. Arney, 46 Wn. 2d 122, 126, 278 P.2d 657, 660 (1955).

48. [B]efore a proposal can ripen into a contract, upon the exercise of the power of acceptance by the one to whom it is made, it must be definite enough so that when it is coupled with the acceptance it can be determined, with at least a reasonable degree of certainty, what the nature and extent of the obligation is which the proposer has assumed. Otherwise, no basis would exist for determining liability.

Johnson v. Star Iron & Steel Co., 9 Wn. App. 202, 206, 511 P.2d 1370, 1373-74 (1973).

49. See Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 364 (1969).

The analysis would be similar to having the terms of an indefinite contract clarified by the subsequent performances of the parties. See, e.g., Christoferson v. Radovich, 23 Wn. 2d 846, 162 P.2d 830 (1945) (the terms of an indefinite contract to construct a house were defined by the promisee's actual construction). Instead of performance by the parties providing the contours of the agreement, in the promissory estoppel situation reliance by the promisee defines the legal relationship between the parties.

50. See, e.g., Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1976);

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2. *Optional Performance*

A promise is also illusory if performance is optional or entirely within the discretion, pleasure, or control of the promisor.⁵¹ A promisor obligated to perform “only if he wants to” has not promised anything.⁵² For example, in *Spooner v. Reserve Life Insurance Co.*,⁵³ the employer company “promised” to pay an incentive bonus for increased sales, but provided that the bonus might be discontinued without notice. Even though plaintiff employees increased their sales in reliance on the company’s statements, the supreme court held that they could not recover the bonus. The court decided that the company’s statements were not promises within the promissory estoppel doctrine,⁵⁴ because the company had expressly reserved its performance to its absolute discretion.

While *Spooner* is correct in theory, a court should be reluctant to conclude that a promisor reserved performance to his total discretion. If there has been an expression to undertake *some* performance, the expression falls within Washington’s definition of a promise. The question then becomes one of definiteness, which should not automatically foreclose promissory estoppel relief.⁵⁵ Thus, if a promisor has agreed to some limitation on his future freedom of action, then the promise is real and should satisfy the promissory estoppel requirement.⁵⁶

B. *Foreseeability*

Foreseeable reliance is the second prerequisite to promissory estoppel recovery.⁵⁷ Foreseeability means that the promisor expects or should reasonably expect⁵⁸ the promisee to change his position in reliance on the promise. The requirement of foreseeability shields a promisor from liabil-

Wheeler v. White, 398 S.W.2d 93 (Tex. Sup. Ct. 1965); J. CALAMARI & J. PERILLO, *CONTRACTS* § 6–10 (1977).

51. RESTATEMENT (SECOND) OF CONTRACTS § 2, Comment e (Tent. Draft No. 1, 1964).

52. An “illusory promise” is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. When a “promise” is illusory, there is no actual requirement upon the “promisor” that anything be done because the “promisor” has an alternative which, if taken, will render the “promisee” nothing.

Interchange Ass’n v. Interchange, Inc., 16 Wn. App. 359, 360, 557 P.2d 357, 358 (1976).

53. 47 Wn. 2d 454, 287 P.2d 735 (1955).

54. *Id.* at 459, 287 P.2d at 738.

55. See notes 42–50 and accompanying text *supra*.

56. The illusory promise problem has been greatly resolved in the last century. “The current approach is to say that if the promisor can be taken to have agreed to any limitation on his future freedom of action, however slight, then his promise is real and not illusory,” G. GILMORE, *THE DEATH OF CONTRACTS* 77 (1974).

57. *Hill v. Corbett*, 33 Wn. 2d 219, 222, 204 P.2d 845, 847 (1949).

58. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 461 (1950).

ity for injury sustained by the promisee's unexpected changes of position.⁵⁹ Unforeseeable reliance will not be protected.

The standard of foreseeability in Washington is a troublesome one.⁶⁰ For example, in *Hill v. Corbett*,⁶¹ a landlord gratuitously promised his tenant an option to extend a lease on a garage for five years. In reliance on that promise, the tenant sublet the garage to a third party for the term of his lease and the extension. Before the tenant was able to accept the landlord's option, however, the landlord sold the garage and told the tenant that the option was cancelled. The court denied the application of promissory estoppel because the tenant did not establish that the landlord should have reasonably expected the tenant to rely on the promised option. The court came to this conclusion even though the landlord knew of the tenant's plan to sublease the garage, and had his own attorney draft the option agreement.⁶² It is hard to imagine what more would have been necessary to establish foreseeability. Although the promisee's transaction with the specific third party was not foreseeable, a transaction with some third party was foreseeable.

The *Hill* court confused the question of foreseeability with the issue of justifiable reliance. Although it was foreseeable that the tenant would rely, his reliance may not have been justified.⁶³ The tenant wanted the benefits of an option contract without giving consideration for it.⁶⁴ He wanted the power to rent the garage, but no obligation to lease it if he was unable to find a sublessee. The promisee may have been guilty of overreaching.⁶⁵

59. The requirement of foreseeability was established in *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). See generally, Fuller & Perdue, *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 84-88 (1936).

60. Two cases have specifically denied the application of promissory estoppel because of unforeseen changes of position. *Corbit v. J. I. Case Co.*, 70 Wn. 2d 522, 539, 424 P.2d 290, 301 (1967); *Hill v. Corbett*, 33 Wn. 2d 219, 204 P.2d 845 (1949). *J. I. Case* involved a promisee who relied on a conditional promise before the condition was satisfied. Instead of denying the application of the doctrine because of an unforeseeable change of position, the case would have been better analyzed as an unjustified change of position, see notes 99-100 and accompanying text *infra*.

61. 33 Wn. 2d 219, 204 P.2d 845 (1941).

62. *Id.* at 223, 204 P.2d at 847-48.

63. A promisee is ordinarily not justified in relying on an offer. If he wishes to rely on the promise all he need do is accept it. See J. CALAMARI & J. PERILLO, *CONTRACTS* § 6-9, at 212 (2d ed. 1977).

64. The *Hill* court did indicate that the promisee could have protected himself from harm by accepting the offered option immediately. *Hill v. Corbett*, 33 Wn. 2d 219, 223, 204 P.2d 845, 848 (1949).

65. With the acceptance of the promissory estoppel doctrine in the bargain context, the holding in *Hill v. Corbett* may be subject to attack. Modern contract doctrine recognizes that there are times when reliance on an offer without immediate acceptance may be justified and foreseeable. The Restatement provides: "[a]n 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

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The concept of foreseeable reliance should be distinguished from that of justifiable reliance.⁶⁶ The test for foreseeability is—based upon all the circumstances the promisor knew or should have known at the time of the making of the promise, *might it be expected* that the promisee would rely? The test for justifiable reliance, on the other hand is—based upon all the circumstances objectively known to the promisee, was he reasonable in relying on the promise?

Foreseeability sets the perimeter of reliance. All foreseeable reliance by a promisee may be compensable. Whether a promisee will in fact recover depends on whether his foreseeable reliance was also justifiable. If, however, a promisee's reliance exceeded the foreseeability barrier, he cannot recover for the excess reliance. For example, assume A promises to pay for B's new car. B purchases a \$95,000 Rolls Royce. Unless A had reason to know that B intended to buy such an expensive car, B's reliance would have exceeded the foreseeability barrier. B's potential recovery could be no more than the cost of a car that A might have reasonably foreseen B would buy.

C. Reliance

Reliance on the promise is the third prerequisite to promissory estoppel recovery.⁶⁷ Reliance must be both substantial and induced by the promise in order to satisfy this requirement.

1. Reliance on the Promise

The promisee must rely on the promise.⁶⁸ Although the promise need not be the only factor that induces the promisee to rely, the promise must play a major role in inducing the reliance.⁶⁹ A change of position before

injustice." RESTATEMENT (SECOND) OF CONTRACTS § 89B(2) (Tent. Draft No. 2, 1965); cf. WASH. REV. CODE § 62A.2-205 (1979)(an offer made by a merchant to buy or sell goods, in a signed separate writing, which gives assurances that it will be held open is not revocable for lack of consideration); Ferrer v. Taft Structurals, Inc., 21 Wn. App. 832, 587 P.2d 177 (1978) (a general contractor can rely on a bid submitted by a subcontractor in the estimation of his overall bid).

66. Granted, it would be difficult to find an instance where a promisee's reliance was reasonably foreseeable and yet not reasonably justified. In fact, some formulations of the promissory estoppel doctrine specify only the requirement of foreseeable reliance. See Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 460 (1950). Yet as the Washington formulation has both a requirement of foreseeable and of justifiable reliance, it must mean something. The term "justified" necessarily implies a qualitative decision, directing the court's attention to the social acceptability of the promisee's reliance when balanced against the position of the promisor.

67. Hill v. Corbett, 33 Wn. 2d 219, 222, 204 P.2d 845, 847 (1949).

68. State v. Northwest Magnesite Co., 28 Wn. 2d 1, 29, 182 P.2d 643, 658 (1947).

69. In order for a promisee to rely, the promise must be communicated to the promisee. Hilton v.

the promise was made⁷⁰ or coincidental with the making of the promise cannot have been induced by the promise, and therefore, does not meet this test.⁷¹

In *Neth v. General Electric Co.*,⁷² the Washington Supreme Court in dictum indicated that not only must the promise cause the reliance, but the reliance must also have been requested, expressly or impliedly, by the promisor. In *Neth*, defendant, in an effort to stop union organization of its secretarial department, printed pamphlets arguing that the employees already enjoyed all union benefits. After plaintiff, a clerical worker, was discharged, she demanded the union right to have the discharge reviewed by a neutral arbitrator. The court stated that even if defendant's expressions were an actionable promise,⁷³ promissory estoppel relief would still be denied because she had not adequately relied on her employer's representations:

It should be noted that, in order for [plaintiff] to have relied on these so-called "promises" or "representations," her act in reliance thereon would have to be more than a mere continuation in her employment with the employer. . . . [T]he act must be the one sought or requested by the employer.⁷⁴

The court's analysis of the promissory estoppel doctrine's reliance requirement was flawed. Reliance, for estoppel purposes, is the result of the promise, not the inducement for the promise.⁷⁵ To argue otherwise is to confuse promises supported by consideration with promises supported by promissory estoppel. This confusion defeats one of the purposes of promissory estoppel, which is to provide relief even when consideration is lacking.⁷⁶

2. *Substantial Change of Position*

Not only must the promisee rely on the promise, but the action or forbearance must amount to a substantial change of position.⁷⁷ There is

Alexander & Baldwin, Inc., 66 Wn. 2d 30, 31, 400 P.2d 772, 774 (1965).

70. For example, if A says to B, "I promise to reimburse you for that new car you bought," and B does nothing else but expect performance, then B has not relied on the promise.

71. See *Northern State Construction Co. v. Robbins*, 76 Wn. 2d 357, 457 P.2d 187 (1969) (a promisee does not rely on a promise if the change of position is only what he is contractually obligated to do) discussed at notes 86-91 and accompanying text *infra*.

72. 65 Wn. 2d 652, 399 P.2d 314 (1965).

73. The court found the defendant's representations to be expressions of opinion, and not real promises. *Id.* at 658, 399 P.2d at 318.

74. *Id.* at 659, 399 P.2d at 319.

75. 1A A. CORBIN, CONTRACTS § 196, at 199 (1963).

76. See notes 18-23 and accompanying text *supra*.

77. *State v. Northwest Magnesite Co.*, 28 Wn. 2d 1, 29, 182 P.2d 643, 658 (1947); 1A A.

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no precise measure of substantiality, a fluid concept dependent upon the individual circumstances.⁷⁸

There is, however, Washington case authority for the proposition that forbearance from action by the promisee cannot be substantial reliance.⁷⁹ Logic does not support a distinction between action and forbearance from action.⁸⁰ In either situation the promisee has sustained foreseeable injury because of the promisor's promise. Yet the court in *Hazlett v. First Federal Savings & Loan Association*⁸¹ denied relief to a promisee who refrained from obtaining fire insurance on his property in reliance on the promisor's promise to procure the insurance. The court concluded, "Surely, forbearance was not intended to include the mere passive failure of the promisee to procure elsewhere, or by other means, the service or the thing promised."⁸²

This action/forbearance distinction may have been overruled *sub silentio* in *Weitman v. Grange Insurance Association*.⁸³ In *Weitman*, defendant promised to notify the plaintiff if plaintiff's insurance policy on his feed mill lapsed or was to be terminated. In reliance on the promise, plaintiff forbore obtaining insurance available elsewhere. The court affirmed promissory estoppel recovery without discussing the problems of forbearance or any of the *Hazlett* exceptions.⁸⁴ Thus, the Washington

CORBIN, CONTRACTS § 200, at 215 (1963).

78. Of course, in every case the question will arise, what is substantial. It cannot be answered by a formula. It is a matter of fact, to be determined by court and jury, under appellate supervision as in other cases. Not only is it a matter of fact; it has no absolute standard of measurement. Beyond doubt, it is relative to the other circumstances and especially to the content of the promise and the cost to the promisor of his promised performance.

1A A. CORBIN, CONTRACTS § 200, at 215-16 (1963).

79. See *Hudson v. Ellsworth*, 56 Wash. 243, 105 P. 463 (1909); *Hazlett v. First Fed. Sav. & Loan Ass'n*, 14 Wn. 2d 124, 127 P.2d 273 (1942).

80. Commenting on the distinction in Washington between action and forbearance, Professor Shattuck wrote:

That the draftsmen of section 90 had any such distinction in mind seems most unlikely. The creation of categories of non-action, only some of which are sufficient reliance, is a process hard indeed to justify on any logical basis. This is a holding which may be vulnerable to attack in future litigation.

Shattuck, *Contracts in Washington, 1937-1957*, 34 WASH. L. REV. 24, 71 (1959). See Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 479-82 (1950).

81. 14 Wn. 2d 124, 127 P.2d 273 (1942).

82. *Id.* at 131, 127 P.2d at 277.

83. 59 Wn. 2d 748, 370 P.2d 587 (1962).

84. In dictum, the *Hazlett* court recognized an exception to the rule that forbearance is insufficient reliance if the promisor had begun performance or if the promisor was an insurance agent or a factor or a broker. 14 Wn. 2d at 130, 127 P.2d at 276 (citing *Hudson v. Ellsworth*, 56 Wash. 243, 247, 105 P. 463, 465 (1909)). The promisor in *Weitman*, being an insurance agent, fit within the second exception. However, because the *Weitman* court ignored the forbearance issue, two Washington court of appeals decisions and one Ninth Circuit opinion have assumed that the distinction be-

court has impliedly recognized that substantial forbearance can be substantial reliance.⁸⁵

The Washington Supreme Court has held that doing what one is already legally bound to do is not substantial reliance.⁸⁶ In *Northern State Construction Co. v. Robbins*,⁸⁷ a corporation entered into a contract with plaintiff construction company to build a concession stand at the Seattle World's Fair. Three days after the contract was signed, defendants, backers of the corporation, signed a guarantee, personally promising to pay plaintiff if the corporation was unable to meet its obligations. The guarantee was not supported by consideration. After plaintiff had completed his performance, the corporation became insolvent. Regarding plaintiff's reliance on the guarantee, the court found that "[a]ll that plaintiff did was continue with the construction which it was bound to do by the terms of the contract."⁸⁸ The court concluded that the plaintiff did not, therefore, substantially rely on the promised guarantee.⁸⁹

If, however, plaintiff had incurred additional damages as a result of his reliance, then the legal duty of performance would not preclude establishing that plaintiff substantially relied on the promise. What is necessary is a detrimental change of position over and above the contractual obligation.⁹⁰ For example, if in reliance upon defendant's guarantee of payment, plaintiff lost his right to a materialman's lien, this reliance interest

tween action and forbearance has been eliminated. See *Broxson v. Chicago, M. St. P. & Pac. R.R. Co.*, 446 F.2d 628 (9th Cir. 1971) (forbearance from repairing an elevator); *Estes v. Hammerstad, Inc.*, 8 Wn. App. 22, 24-25 n.1, 503 P.2d 1149, 1151 n.1 (1972) (forbearance from obtaining insurance); *Hellbaum v. Burwell and Morford*, 1 Wn. App. 694, 701 n.3, 463 P.2d 225, 229 n.3 (1969).

85. On the issue of gratuitous promises to procure insurance, see generally RESTATMENT (SECOND) OF CONTRACTS § 90, Comment f (Tent. Draft No. 2, 1965).

86. *Northern State Const. Co. v. Robbins*, 76 Wn. 2d 357, 457 P.2d 187 (1969). But see *Luther v. Nat'l Bank of Commerce*, 2 Wn. 2d 470, 98 P.2d 667 (1940) (promise by a wife to care for her husband, although a legal duty, was nevertheless recognized as substantial reliance for his promise to convey his estate upon death to her); *Douglas County Memorial Hosp. Ass'n v. Newby*, 45 Wn. 2d 784, 278 P.2d 330 (1954), discussed at note 89 *infra*.

87. 76 Wn. 2d 357, 457 P.2d 187 (1969).

88. *Id.* at 362, 457 P.2d at 190.

89. *Id.* *Northern State Construction* is contrary to the earlier Washington decision of *Douglas County Memorial Hosp. Ass'n v. Newby*, 45 Wn. 2d 784, 278 P.2d 330 (1954). In *Newby*, defendant, owing the hospital several hundred dollars, promised to pay the debt at a rate of twenty dollars a month. Plaintiff agreed to accept the twenty dollars a month, although the full amount was then owing. When plaintiff sought to disregard the agreement and compel Newby to pay the full amount owing, the court allowed defendant to assert promissory estoppel, despite the fact that defendant owed a legal duty to pay. As *Newby* has not been cited as authority since the decision was rendered, it is believed the case is limited to its facts.

90. The principle is similar to that found in the doctrine of consideration. A promise to do something that one is already contractually obligated to do is not sufficient consideration to support a new promise, *Johnson v. Tanner*, 59 Wn. 2d 606, 609, 369 P.2d 307, 309 (1961), yet there is consideration for the promising or doing of something additional to what was required in the initial contract, *Gannon v. Emtman*, 66 Wn. 2d 755, 760, 405 P.2d 254, 257 (1965). Just as additional promises or

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should be protected by promissory estoppel. Thus, if a promisee reasonably relied on a promise in such a way that he has incurred injury he would not have sustained if the promise had not been made, then promissory estoppel would provide a theory of recovery.⁹¹

D. Justifiable Reliance

Justifiable reliance is the fourth prerequisite to promissory estoppel recovery.⁹² Like foreseeability, justifiable reliance is measured by an objective standard. The test is whether a reasonable promisee, in the same or similar circumstances, would have relied on the promise.

1. The Issue of Justifiable Reliance

Justifiable reliance is nothing less than a policy choice.⁹³ When should the law provide a remedy for reliance without a contract? The choice is between protecting the relying promisee, to whom it appeared that the

performances are sufficient consideration to support a contract, so too should additional reliance be sufficient to support an action under the promissory estoppel doctrine.

91. Promissory estoppel will not protect a promisee who does no more than perform his original obligation. The doctrine will only protect a promisee who *modifies* his performance because of the promise and is injured because of his reliance. Relief will be granted only to the extent of reliance.

For example, suppose A and B enter into a contract whereby A promises to repair B's roof for \$1,000. After completing about half of the job, A discovers the work will cost him significantly more than he had originally estimated. He negotiates with B who then promises an additional \$250. In reliance on the promise A purchases an additional \$250 worth of supplies which he would not have purchased if B had not made the promise. Despite the holding in *Rosellini v. Banchero*, 83 Wn. 2d 268, 517 P.2d 955 (1974), that new consideration is necessary to provide a modification to an executory contract, A should be able to assert promissory estoppel and recover the additional \$250. See RESTATEMENT (SECOND) OF CONTRACTS § 89D(c) (Tent. Draft No. 2, 1965). Note that the *Rosellini* decision is contrary to RESTATEMENT (SECOND) OF CONTRACTS § 89D(a) (Tent. Draft No. 2, 1965) and the U.C.C. § 2-209 (1972 version)(sales contracts).

92. *Hill v. Corbett*, 33 Wn. 2d 219, 222-23, 204 P.2d 845, 847-48 (1949). Only two Washington decisions have directly addressed the issue of justifiable reliance, but neither case provides much insight into its specific requirements. In *Hilton v. Alexander & Baldwin, Inc.*, 66 Wn. 2d 30, 400 P.2d 772 (1965), the court held that in order for a promisee to justifiably rely on a promise, the promise must have been communicated to him. *Id.* at 31, 400 P.2d at 774. Yet, the requirement of communication is inherent in the element of reliance, and is separate from the issue of justifiable reliance. See notes 68-71 and accompanying text *supra*. In *Weitman v. Grange Ins. Ass'n*, 59 Wn. 2d 748, 370 P.2d 587 (1962), a rule was announced that reliance upon the promise of another to provide information was justifiable only if the promisee was not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring the information. *Id.* at 752, 370 P.2d at 589. The court's rule, however, does not apply to the promissory estoppel doctrine where reliance on promises rather than facts is the gravamen. In fact, the rule in *Weitman* was taken from the equitable estoppel case of *Geoghegan v. Dever*, 30 Wn. 2d 877, 194 P.2d 397 (1948), and should be limited to the equitable estoppel situations.

93. Note the emphasis on justice and fairness in the application of the promissory estoppel doctrine. "[Promissory estoppel] is an attempt by the courts to keep remedies abreast of increased moral

promisor intended to perform, or protecting the promisor, who has not contractually obligated himself. For example, suppose A promises to pay for B's trip to Europe. In reliance on the promise B takes the trip. A's promise to make a gift is not a contract. After considering, however, such factors as the sincerity of the promise, the setting in which it was made, A's knowledge of B's willingness to take the trip, and the relationship between the parties, then B's reliance may have been reasonable. If so, the loss should fall on the promisor who reneged, not on the innocent promisee.

The equities of the case will often determine whether reliance was justifiable. Faced with the choice between a relatively innocent promisee and a manipulative promisor, a natural sense of justice dictates protecting the innocent promisee even though no contract was formed.⁹⁴ This equity-minded analysis is inherent in promissory estoppel. The purpose of the doctrine is to remedy injustice.⁹⁵ Thus, unless the equities of the case favor the promisee, a court is unlikely to conclude that the promisee justifiably relied.

2. *Justifiable Reliance as a Limitation on Recovery*

The requirement that the promisee prove that his reliance was justifiable is the promisor's greatest protection from liability. The promisor can, therefore, reduce or avoid responsibility for injuries to the promisee by revoking or conditioning the promise.⁹⁶

consciousness of honesty and fair representations in all business dealings." *Peoples Nat'l Bank of Little Rock v. Linebarger Constr. Co.*, 219 Ark. 11, 17, 240 S.W.2d 12, 16 (1951). "We conclude that *injustice would result* here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment." *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267, 275 (1965)(emphasis added). "It seems to us that it would be a *gross injustice* to deny respondent [relief] . . . merely because by operation of the law the services which she rendered subsequent to marriage are held to be without consideration." *Luther v. Nat'l Bank of Commerce*, 2 Wn. 2d 470, 484, 98 P.2d 667, 673 (1940)(emphasis added).

The doctrine itself can be applied only to prevent injustice. *See* RESTATEMENT OF CONTRACTS § 90 (1932).

94. "[I]t must be realized that the emphasis which the Restatement places on the avoidance of injustice calls for the use of ethical standards in applying the doctrine of promissory estoppel." Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 484 (1950).

95. *See* text accompanying notes 101-33 *infra*.

96. A third limitation on justifiable reliance suggested by one commentator is in the area of reliance by third parties. Professor Boyer writes: "Promises are not made to the whole world, they are directed to specific individuals. . . . To hold a promisor because third parties have or may have changed position in reliance on his promise runs counter to the general trend of promissory obligations." Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 465 (1950). This position has been criticized. *See* 30 U. PITT. L. REV. 174 (1968). The present Restatement takes the position that enforcement of promises made for the benefit of third parties rests on the same basis as in cases of reliance by the promisee. RESTATEMENT (SECOND) OF

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If the promisee knows the promisor no longer intends to perform, he is not justified in beginning or continuing to rely on the earlier promise.⁹⁷ For example, A promises to pay for B's college education. The next day, before B has changed his position, A revokes the promise. If B later incurs expenses for tuition or books, then he cannot recover from A. B's reliance after A revokes his promise is not justified.

The effectiveness of the revocation is problematic once the promisee has begun to rely on the promise. Assume that after A promises to pay for B's college education, B enrolls in a four year institution. The issue is whether B may continue to attend college all four years and recover his total expenses, or whether he may recover only for the expenses he has already incurred. Recovery for B should be limited to those expenses incurred prior to revocation of the promise by A. Once A revokes the promise, B is put on notice that any reliance beyond that point is unjustified. A duty to mitigate harm, analogous to the contractual duty to mitigate losses upon breach of a contract, should apply.⁹⁸ To allow the promisee to recover for reliance after revocation of the promise would be to allow recovery of avoidable damages.

Another means for the promisor to protect himself from liability is through the use of conditions.⁹⁹ The promisor is the master of his promise and may impose any condition precedent to his obligation to perform. For example, suppose A says to B, "I promise to give you \$100 if I get a raise next month." Performance of the promise becomes due only if A gets the raise, the condition being satisfied.¹⁰⁰

CONTRACTS § 90, Comment d (Tent. Draft No. 2, 1965). There is no Washington case authority on the issue.

97. See Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 466-70 (1950).

98. There is a duty incumbent upon anyone who has suffered wrong at the hands of another to make a reasonable effort to mitigate damages. *Westland Const. Co. v. Chris Begg, Inc.*, 35 Wn. 2d 824, 837, 215 P.2d 683, 691 (1950).

99. See *Corbit v. J. I. Case Co.*, 70 Wn. 2d 522, 539, 424 P.2d 290, 301 (1967) which adopted the rule that "[i]f a promise within [the doctrine of promissory estoppel] is in terms conditional or performable at a future time the promisor is bound thereby, but performance becomes due only upon the happening of the condition or upon the arrival of the specified time." (quoting RESTATEMENT OF CONTRACTS § 91 (1932)).

100. In *Winslow v. Mell*, 48 Wn. 2d 581, 295 P.2d 319 (1956), the Washington court found a conditional promise to be illusory. Defendant promised the logging rights to a certain piece of property to plaintiff if defendant ever acquired the property. Since defendant was under no duty to purchase the property, the promise was held illusory. Such a conclusion, however, was inappropriate. Defendant, although not obligated to purchase the land, was presently obligated to the plaintiff if he should ever acquire the land. He had promised away his right to assign the logging rights to someone else. See RESTATEMENT (SECOND) OF CONTRACTS § 2, Comment e (Tent. Draft No. 1, 1964).

E. Prevention of Injustice

A showing that injustice can be avoided only by full or partial performance of the promise is the final prerequisite to promissory estoppel recovery.¹⁰¹ The question of the amount of recovery should not be confused with the right to recover. That is, enforcement of the promise need not entail granting specific performance or providing damages based on the promisee's expectations.¹⁰² Rather, after deciding that the promisee should recover, the inquiry is what in the particular case would be just relief.¹⁰³

In an attempt to find the most appropriate measure of recovery under the promissory estoppel doctrine, courts should distinguish a gratuitous promise¹⁰⁴ from a promise made in the context of bargaining.¹⁰⁵ Relief for reliance on a gratuitous promise should be a return of reliance expenditures limited by the promisee's expectancy interest. In the bargain context, although reliance recovery will ordinarily be the most suitable measure of damages, expectancy relief is sometimes appropriate.¹⁰⁶

101. Hill v. Corbett, 33 Wn. 2d 219, 223, 204 P.2d 845, 847 (1949).

102. 1A A. CORBIN, CONTRACTS § 205, at 236 (1963).

103. Few Washington promissory estoppel decisions have ever reached the issue of the appropriate measure of relief under promissory estoppel theory. Those that have provided relief have split between reliance and expectancy recovery. See *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn. 2d 126, 443 P.2d 544 (1968) (expectancy recovery, but not a true promissory estoppel decision, see note 23 *supra*); *Luther v. Nat'l Bank of Commerce*, 2 Wn. 2d 470, 98 P.2d 667 (1940) (expectancy recovery, but as a contract was actually formed, *Luther* is questionable authority on promissory estoppel); *Estes v. Hammerstad, Inc.*, 8 Wn. App. 22, 503 P.2d 1141 (1972) (reliance recovery); *Hellbaum v. Burwell and Morford*, 1 Wn. App. 694, 463 P.2d 225 (1969) (reliance relief). See also *Heaton v. Imus*, 93 Wn. 2d 249, 608 P.2d 631 (1980) (providing expectancy relief for reliance without a contract under a heretofore unknown theory of *quasi contract quantum meruit*).

104. Most early discussions of the measure of relief under promissory estoppel theory concerned only gratuitous promises. See, e.g., Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937); Comment, *The Measure of Damages for Breach of a Contract Created by Action in Reliance*, 48 YALE L.J. 1036 (1939). As such, they are of questionable authority for use in arriving at a measure of relief for reliance on a promise made in the bargain context. See Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559 (1970) [hereinafter cited as *Into The Breach*].

105. Promissory estoppel was originally available only for reliance on gratuitous promises. See Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 909 (1937); Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639, 643 (1952). If the parties were contemplating a contract in the bargain context, the promisee was regarded as having assumed the risk of his reliance if no contract was ultimately formed. See, e.g., *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). The last twenty years have seen the application of promissory estoppel to the bargain context. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 344 (1969).

106. The measure of recovery in the promissory estoppel context is the choice between providing the promisee with his reliance interest or his expectancy interest. Limiting recovery to the restitutionary interest will ordinarily not protect the promisee. For example, suppose A promises to hire B for three years as foreman of his shipping dock. B spends \$500 in plane fare and other reasonable ex-

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1. *Reliance on Gratuitous Promises*

If the parties are not contemplating the creation of a contract, then a promisee who relies on a gratuitous promise is not entitled to expectancy relief.¹⁰⁷ Recovery should be reliance expenditures limited by the promisee's expectancy interest.¹⁰⁸ Ordinarily, relief would be a return of the expenses incurred in reliance on the promise.¹⁰⁹ Once the reliance expenditures exceed the expectancy interest, however, the promisee would be limited to the lesser expectancy recovery.¹¹⁰

To illustrate the application of reliance limited by expectancy damages, suppose an uncle promises his nephew \$1,000. The nephew, unbeknownst to the uncle, decides to go into business. Reserving the promised \$1,000 for rent, he invests his savings in a weasel ranch. At the end of the month when the landlord demands payment, the nephew asks his uncle for the money. The uncle, however, has decided not to make the gift. The nephew is forced to liquidate the weasel ranch to pay his debts and loses \$2,000.

The nephew has suffered \$2,000 in losses, but should be entitled to recover only \$1,000. His expectancy interest (\$1,000) would limit his

penses, and reports to the shipping dock on Monday morning. A, however, has decided not to give the job to B and tells him there is no contract as agreements that cannot be performed within one year violate the Statute of Frauds. See note 24 *supra*. Assuming that the Statute of Frauds is no bar to the assertion of promissory estoppel, see notes 24–29 and accompanying text *supra*, appropriate relief is either providing a reliance recovery (the \$500 spent in reasonable reliance on the promise) or an expectancy recovery (which will be determined at trial, whatever lost profits the promisee would have had had the promisor performed). As this hypothetical illustrates, however, a restitutionary recovery would be inappropriate. As recovery is based upon disgorging unjust enrichment from the promisor, the promisor in this, and most other promissory estoppel situations, has received little or no benefit from the promisee's actions in reliance. There is nothing to disgorge.

107. A promisee who relies on a promise to make a gift has no right to expectancy recovery because a promisee has no right to a gift. See Shattuck, *supra* note 7, at 943–44. The focus of the doctrine should be upon the prevention of harm, not giving a promisee a windfall, as would be the result with an expectancy recovery. Providing reliance recovery for a promisee who relies on a gratuitous promise will place the promisee in as good a position as she was before she relied on the promise. See note 4 *supra*.

108. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951) (note, however, the emphasis on tort principles); Shattuck, *supra* note 7, at 942–43.

109. There are times, however, when a court will not concern itself with the actual reliance of the promisee, but will presume for social policy reasons that the promisee relied up to his expectancy interest. Two examples of this policy decision are charitable subscriptions and marriage settlements. See RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (Tent. Draft Nos. 1–7, 1973); see also note 11 *supra*.

110. Reliance recovery seeks to return the promisee to the position he occupied before his reliance on the promise. See note 4 *supra*. Note, however, that a promisee who attains benefits from his reliance is not returned to his pre-promise position. For example, if A promises to pay for B's car and B spends \$500 in reliance on the promise to buy a car, a \$500 recovery will not place B in his pre-promise position because he still retains the car. Appropriate reliance recovery would be \$500 less what B could recover for selling the car.

reliance interest (\$2,000) recovery, for he had reason to expect only the promised \$1,000.¹¹¹ A promisee who relies beyond his expectancy interest has assumed the risk of additional loss.¹¹²

2. *Reliance in the Bargain Context*

The argument for expectancy recovery is much stronger in the bargain context.¹¹³ The bargaining parties contemplate the formation of a contract from which they expect to profit. Notwithstanding the parties' expectancies, reliance recovery is still the appropriate measure of relief in most commercial situations.¹¹⁴

When parties bargain for performances, they may fail to form a contract for one of three reasons. Either consideration¹¹⁵ or mutual assent¹¹⁶ may be missing, or the contract may violate the Statute of Frauds.¹¹⁷ These three impediments to contract formation have been translated into three situations inviting the application of promissory estoppel in the bargain context. Each pattern should be separately analyzed.

111. Another illustration of reliance limited by expectancy is in a promise to convey land. In *Raymond v. Hatrick*, 104 Wash. 619, 177 P. 640 (1919), defendant promised to convey a piece of property to plaintiff. In reliance on the promise, plaintiff erected a "substantial residence" on the property. When defendant later refused to convey the deed, plaintiff was awarded specific performance. Yet in another promise to convey land case, *Mitchell v. Pirire*, 38 Wash. 691, 80 P. 774 (1905), a family who moved from Massachusetts to Washington in reliance on the promise was denied all relief.

A more satisfactory result would be obtained using reliance limited by expectancy rather than an all or nothing approach. If the promisee's reliance expenditures were less than the value of the land, he should be limited to reliance relief. With a return of his reliance expenditures, a promisee is no worse off than when the promise was made. If, however, the reliance on the promise exceeds the value of the land, then specific performance or a like sum in damages would be in order.

112. Recognizing that sometimes it may be difficult to actually measure the reliance interest of the promisee, Professor Eisenberg sets forth a rule for measuring nonfinancial reliances. "Broadly speaking, expectation should be employed as a surrogate for measuring the costs of reliance only if those costs appear significant, difficult to quantify, and closely related to the full extent of the promise. An important index for determining whether this test has been met is whether the promisee was induced to make a substantial change in his life that is not easily reversible." Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 29 (1980).

113. See, *Into the Breach*, *supra* note 104, at 565-80. Two reasons have been identified for the enforcement of expectancies. They are: (1) expectancy recovery most closely resembles the actual commercial harm that has befallen the promisee, and (2) providing expectancy recovery facilitates reliance on business agreements. Fuller & Perdue, *supra* note 4, at 62.

114. Reliance recovery is not antithetical to expectancy-like relief. Included within the reliance interest is not only the promisee's out-of-pocket expenses but the gains prevented by reliance on the promise. Fuller & Perdue, *supra* note 4, at 55. Had the promisee not been induced into relying on the promise, he might have entered into another contract from which he would have received profits. Such recovery is ordinarily, however, too speculative for a court to provide.

115. See notes 12-16 and accompanying text *supra*.

116. See notes 17-23 and accompanying text *supra*.

117. See notes 24-29 and accompanying text *supra*.

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The first situation is when a promisee relies on a promise that is not supported by consideration. These are known as the firm offer cases.¹¹⁸ For example, assume a subcontractor submits an offer¹¹⁹ to do a paving project for \$1,000. The general contractor relies on the subcontractor's offer and incorporates it into his bid. After the general contractor has been awarded the contract and is obligated to perform, but before he has accepted the subcontractor's offer, the subcontractor revokes his offer. The general contractor then accepts the next lowest offer, \$1,500. The general contractor may sue the subcontractor on a promissory estoppel theory.

Recovery for reliance on an offer should be limited to the promisee's reliance expenditures. An offeror ordinarily has the power to revoke his offer until acceptance, without incurring liability.¹²⁰ Reasonable reliance on an offer is an exception to this rule.¹²¹ Reliance recovery prevents the promisee from being harmed for his reliance, yet does not unduly penalize the promisor. The promisee in the illustration above should be limited to a \$500 recovery, his reliance interest.¹²²

The second application of promissory estoppel in a bargaining context occurs when a contract is not formed because of the parties' lack of mutual assent. These are the indefinite promise cases.¹²³ As in the firm offer

118. See *Into the Breach*, *supra* note 104, at 582, RESTATEMENT (SECOND) OF CONTRACTS § 89 (Tent. Draft No. 2, 1965); See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); cf. *Ferrer v. Taft Structurals, Inc.*, 21 Wn. App. 832, 587 P.2d 177 (1978). In *Ferrer*, subcontractor submitted a bid which the general contractor incorporated into his overall estimate. Unlike other firm offer cases, however, the general contractor awarded the project to the subcontractor before the subcontractor withdrew his bid, thus accepting his offer. Although the court of appeals accepted the principle of reliance on an offer, the conclusion was simply not called for. This was a contract and not a promissory estoppel case.

119. A bid is no more than an offer to contract. *Clover Park School Dist. No. 400 v. Consolidated Dairy Products Co.*, 15 Wn. App. 429, 433, 550 P.2d 47, 49 (1976).

120. 1 S. WILLISTON, CONTRACTS § 55, at 176 (3d ed. 1957); 1 A. CORBIN, CONTRACTS § 38, at 157 (1963).

121. Relief for reliance on an offer is an extension of the promisor's liability. Although a promisee ordinarily is not justified in relying on an offer, *see* note 63 *supra*, there are times when such reliance is reasonable. See *Ferrer v. Taft Structurals, Inc.*, 21 Wn. App. 832, 835, 587 P.2d 177, 178 (1978). The remedy granted in these situations, however, must take into account that this is an extension of liability. Benefit from this extension runs only to the promisee. A promisee is not liable to a promisor for reliance on an offer. *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wn. 2d 363, 301 P.2d 759 (1956) (mere use of subcontractor's bid did not constitute an acceptance of the offer); *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Engineering Corp.*, 305 F.2d 659 (9th Cir. 1962), *cert. denied*, 371 U.S. 935 (1962) (under Washington law use of a subcontractor's bid is not an acceptance). It is difficult to justify the additional liability of expectancy recovery to an already overburdened promisor.

122. The promisee incurred an additional \$500 expense in reliance on the promise. *But see, Into the Breach*, *supra* note 104, at 570, where it is argued that similar recovery is expectancy relief.

123. See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W. 2d 267 (1965); *Wheeler v. White*, 398 S.W.2d 93 (Tex. Sup. Ct. 1965). A surprising number of the indefinite promise cases arise in the franchise context. Therefore, special attention should be given to the registration

cases, the appropriate measure of damages is the promisee's reliance expenditures. There are two reasons why this measure of damages is proper. First, expectancy recovery would be exceedingly speculative. Expectancy recovery attempts to give the promisee the benefit of the promised performance. The very problem in the indefinite promise situation is that this benefit is uncertain.¹²⁴ Second, as a court has already determined that the agreement is too indefinite to be enforced, it would be incongruous to find that bare reliance on the promise could create, without more, a right to expectancy relief.

The third application of the doctrine occurs when the promisee relies on a contract that violates the Statute of Frauds.¹²⁵ In these cases, expectancy recovery may logically be granted.¹²⁶ Unlike the other two situations, providing expectancy relief does not contravene the purpose of the restriction on contract formation.¹²⁷ "The purpose of the Statute of Frauds is the prevention of frauds arising from the uncertainty inherent in oral, contractual undertakings."¹²⁸ However, "[w]here no uncertainty exists in the oral agreement, the reason for the statute's application similarly disappears."¹²⁹ The proof sufficient to establish promissory estoppel may serve as an evidentiary substitute for the writing requirement of the statute, allowing the promisee to recover on the contract. As in the doctrine of part performance,¹³⁰ if a promisee can prove clearly and unequivocally

requirements of the Washington Franchise Investment Protection Act, WASH. REV. CODE §§ 19.100-.010-.940 (1979). The Act required franchisors to file information concerning the terms of the franchise. Failure to comply may give a promisee an action for damages.

124. "If, unless uncontestably proven, such profits are thought too 'speculative' to constitute an element of recovery in normal contract actions, the same limiting rule could be expected to operate with no less force where reliance forms the basis for enforcement." *Into the Breach*, *supra* note 104, at 586-8.

125. See, e.g., *Klinke v. Famous Recipe Fried Chicken, Inc.* 94 Wn. 2d 255, 616 P.2d 644 (1980); *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295 (9th Cir. 1954).

126. The vast majority of decisions that have addressed the issue of the measure of recovery under promissory estoppel theory for reliance on a contract that violates the Statute of Frauds have granted expectancy relief. See, e.g., *Lucas v. Whittaker Corp.*, 470 F.2d 326 (10th Cir. 1972); *Alaska Airlines, Inc. v. Stephenson*, 217 F.2d 295 (9th Cir. 1954). See Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORD. L. REV. 114, 123 (1975).

127. In both the firm offer and indefinite promise cases, an essential element to contract formation is missing. Without consideration or mutual assent, a contract has not been formed. In the Statute of Frauds cases, however, the statute serves only as a defense to an otherwise valid contract. Thus, once the defense is removed, recovery should be had on the contract, and not on the separate theory of promissory estoppel.

128. *Miller v. McCamish*, 78 Wn. 2d 821, 829, 479 P.2d 919, 924 (1971).

129. *Id.*

130. Part performance is an equitable doctrine having as its purpose the prevention of fraud that would occur if a promisor were allowed to escape performance of his contract after the promisee has changed his position in performance of his agreement. See *Richardson v. Taylor Land and Livestock Co.*, 25 Wn. 2d 518, 527, 171 P.2d 703, 709 (1946). The purpose of the doctrine is almost identical to that of promissory estoppel. In fact, a court *could*, through a broad reading of the word "perform-

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vocally the contract's terms and character, and if his reliance unmistakably points to the existence of the agreement, and if the promisor promises explicitly or implicitly to put the promise in writing,¹³¹ then expectancy recovery should be granted.¹³² If, however, the promisee is unable to meet the necessary proof requirements in order to recover his expectancies, but can nonetheless establish the other elements of the promissory estoppel doctrine, then reliance recovery would be appropriate.¹³³

CONCLUSION

Promissory estoppel provides a promisee with an alternative theory of recovery if a contract action would fail for want of mutual assent or consideration, or if the contract violates the Statute of Frauds. Since these are not infrequent occurrences, a promisee who foreseeably and justifiably relied on a promisee should always assert promissory estoppel as an alternative theory of recovery when the existence of a contract is at issue.

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ance," provide the same protection to a promisee under the part performance doctrine. Unfortunately, courts have a tendency to read performance restrictively. *See, e.g.,* *Wagers v. Associated Mortgage Investors*, 19 Wn. App. 758, 577 P.2d 622 (1978); *Sunset Pac. Oil Co. v. Clark*, 171 Wash. 165, 17 P.2d 879 (1933), and there is authority for the proposition that the doctrine applies only to contracts involving real estate. *Id.* The promissory estoppel requirement of reliance is much broader than "performance" and could logically incorporate the part performance cases. Nonetheless, a court determined to invalidate an agreement because of the Statute of Frauds could reach the same result under promissory estoppel theory by a restrictive interpretation of the requirement of substantiality. *See* notes 77–91 and accompanying text *supra*.

131. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 259, 616 P.2d 644, 647 (1980). *See* notes 24–35 and accompanying text *supra*.

132. The requirements for the doctrine of part performance were set out in *Miller v. McCamish*, 78 Wn. 2d 821, 829, 479 P. 2d 919, 923–24 (1971) (quoting *Grandquist v. McKean*, 29 Wn. 2d 440, 445, 187 P.2d 623, 626 (1947)). These requirements are equally applicable to establishing what is necessary for a promisee to recover expectancy recovery under promissory estoppel theory for a contract that violates the Statute of Frauds. If a promisee is able to establish these elements, no uncertainty will exist, and where no uncertainty exists in the oral agreement, the reason for the statute's application disappears. *Miller* at 829, 479 P.2d at 923–24.

133. Recovery would still require, however, the promisee to show that the promisor promised to make a memorandum of the original promise. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn. 2d 255, 616 P.2d 644 (1980).