

BEYOND RELIANCE: PROMISSORY ESTOPPEL, CONTRACT FORMALITIES, AND MISREPRESENTATIONS

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INTRODUCTION

Contracts are normally defined as freely chosen obligations supported by bargained-for consideration. Contract law holds the promisor to his word and gives the other party what was promised. Torts are violations of legally-imposed obligations. Tort law forces the wrongdoer to compensate his victim for his loss.

Liability based on promissory estoppel does not fit neatly into either of these categories. As described in the Restatement (Second) of Contracts section 90, liability is appropriate when the promisor should reasonably expect the promise to induce action or forbearance by the promisee, and the promise does induce such action or forbearance. Liability is then imposed to the extent necessary to avoid injustice.¹

Gilmore viewed promissory estoppel's stress on reliance as an indication that contract and tort are reuniting, thereby ending the

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1. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979), which in pertinent part states:

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.

artificial nineteenth century split of the two into separate bodies of law.² Promissory estoppel, states Gilmore, is the beginning of the end of contract as an independent branch of civil liability.³

A number of commentators have pointed out that the reasons for imposing liability on the basis of promissory estoppel are far from clear.⁴ The "doctrine" itself has little predictive or explanatory power, and judges' discussions of promissory estoppel are often incoherent.⁵ These commentators view promissory estoppel as either an unfathomable conundrum or as a flexible means of achieving fairness, a valuable "doctrine" which, by its very nature, cannot be reduced to a precise formula or series of tests.⁶

Recently, several commentators have attempted to identify the underlying basis for liability in promissory estoppel cases and have reached different conclusions. In a 1983 article, Professors Metzger and Phillips argue that promissory estoppel is becoming an "independent theory of recovery"⁷ and increasingly different from contractual liability.⁸ They suggest that promissory estoppel reflects twentieth century notions of interdependency and the demise of the rugged individualism reflected in late-nineteenth century contract doctrines.⁹ They perceive promissory estoppel as a tort-like remedy designed to compensate a promisee for his reasonable and foreseeable detrimental reliance on a promise.¹⁰ Thus, Metzger and Phillips regard reliance as essential for liability under promissory estoppel and use the black letter of the doctrine to describe tort-based liability.

In a 1985 article, Professors Farber and Matheson argue that promissory estoppel is becoming increasingly contractual in the sense that it is most often used to enforce promises made in furtherance of exchange transactions.¹¹ Farber and Matheson suggest that recovery

2. See G. GILMORE, *THE DEATH OF CONTRACT* 87-90 (1974).

3. *Id.* at 90.

4. See generally Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261 (1980); Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

5. See, e.g., Feinman, *supra* note 4, at 700-08; Goetz & Scott, *supra* note 4, at 1289-91.

6. Henderson, *supra* note 4, at 383-84.

7. Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 509-11 (1983).

8. *Id.* at 508-36.

9. *Id.* at 501-08.

10. *Id.* at 547.

11. Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903 (1985).

is likely when a credible promise is made with apparent authority to further an economic activity beneficial to the promisor.¹² According to these commentators, the absence of real detrimental reliance in some promissory estoppel cases is evidence that reliance is becoming irrelevant in all promissory estoppel cases.¹³

In a 1987 article, Professor Kostritsky suggests that courts use promissory estoppel, rather than traditional bargain analysis, "when persuasive barriers to, or explanations for dispensing with, explicit reciprocal or formalized contracts exist and a plausible benefit to the promisor can be identified."¹⁴ When such barriers exist, the author suggests that courts are more willing to find assent on the basis of plausibly beneficial reliance despite the absence of a formalized bargain.

In this article, we attempt to explain liability in promissory estoppel cases in terms of both traditional contract notions and traditional tort notions. Contract and tort have never been two entirely distinct forms of liability, though we tend to view them as though they were. If contract law enforces voluntarily assumed obligations, then many torts are contractual. For example, medical malpractice is often based on the doctor's breach of his voluntarily assumed duty to treat a patient in a non-negligent manner. If tort law enforces legally imposed (rather than voluntarily assumed) obligations,¹⁵ contract affords a remedy for some tortious misrepresentations. For example, under the objective standard of contract, *A* will be bound by a contract with *B* if *A* led *B* reasonably to think they had a binding agreement, though *A* subjectively had no intent to form a binding contract as yet.¹⁶ Thus, the objective standard of contract affords a remedy for some negligent misrepresentations of the nature (or terms) of an arrangement, though the promisor has not voluntarily assumed any legal obligation. Often, a single fact pattern gives rise to a variety of both tort and contract remedies.¹⁷

In this article, we suggest that promissory estoppel serves two of the functions served by traditional contract and tort remedies available to parties in consensual relationships: the enforcement of some

12. *Id.* at 910-13.

13. *Id.* at 913-14.

14. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987).

15. See W. PROSSER & W. KEETON, THE LAW OF TORTS § 92, at 655 (5th ed. 1984).

16. See *infra* notes 109-10 and accompanying text.

17. See, e.g., W. PROSSER & W. KEETON, *supra* note 15, § 105, at 734-35 (listing eight possible ways to remedy misrepresentations of fact in the context of an exchange transaction).

promises intended as legally binding and the imposition of liability to compensate for harm caused by some misrepresentations. To be sure, promissory estoppel does reflect some change from the more formal nineteenth century law of contracts and established standards for actionable misrepresentation.¹⁸ Under promissory estoppel, some promises intended as legally binding are enforced though some traditional formal requirement, such as the requirement of bargained-for consideration, is lacking.¹⁹ In addition, some promissory misrepresentations are remedied, though no remedy would be available under traditional contract and tort doctrines.²⁰

This article attempts to explain a range of promissory estoppel cases, but it is not normative. Our purpose is simply to describe the kinds of cases in which liability is likely to be imposed on the basis of promissory estoppel and to suggest why courts might consider liability appropriate, either on the basis of contract or tort notions.²¹ We do not discuss the many cases in which promissory estoppel is simply an alternative holding, where the court also imposes liability by applying traditional doctrines in a traditional manner.²² In such cases, there is nothing novel or interesting about liability.

Our focus is on the factual patterns in which liability is likely to be imposed only on the basis of promissory estoppel, rather than on what judges say in explaining liability or on the black letter "requirements" for liability. Most judges impose liability on the basis of promissory estoppel without any useful explanation of why liability is appropriate.²³ The black letter of the doctrine is too circular to have descriptive or predictive power: how can enforcement turn on the reasonableness of reliance when the reasonableness of reliance will

18. See *supra* text accompanying notes 6-10.

19. See *infra* notes 44-68 and accompanying text for a discussion of promises in donative settings. For a discussion of donative promises in commercial settings, see *infra* notes 69-130 and accompanying text.

20. See *infra* notes 216-20 and accompanying text.

21. Since our purpose is only to explain liability when it is imposed on the basis of promissory estoppel, we do not attempt to provide a detailed account of the status of promissory estoppel in various jurisdictions.

22. As Professor Henderson noted in a 1969 article, courts often explore and apply "both bargain consideration and promissory estoppel theories in the same case . . ." Henderson, *supra* note 4, at 357. See, e.g., *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1558-59 (11th Cir. 1984) (relying on the RESTATEMENT (SECOND) OF CONTRACTS § 90 for promissory estoppel issue, Florida law on the damages issue and Massachusetts law on the contract issue); *Glover v. Sager*, 667 P.2d 1198, 1202 (Alaska 1983) (holding plaintiffs made a prima facie case under promissory estoppel and ordinary contract principles).

23. See *infra* notes 204-20 and accompanying text.

necessarily depend on enforceability?²⁴

This approach to understanding the promissory estoppel case law differs from earlier approaches in that it explains liability in terms of both tort and contract.²⁵ Further, we attempt to explain liability in terms more meaningful than the black letter of the doctrine. Farber and Matheson and Kostritsky have tried to explain liability in other terms. But Farber and Matheson regard promissory estoppel as essentially a consideration substitute²⁶ and discuss a very narrow range of promissory estoppel cases.²⁷ Although Professor Kostritsky recognizes that promissory estoppel is more than a consideration substitute, she fails to consider how effectively substitutes (such as reliance) fulfill the normal functions performed by consideration and other formalities.²⁸

In addition, other commentators have focused on detrimental reliance, concluding that it is either essential for, or irrelevant to, promissory estoppel liability.²⁹ We suggest that reliance plays a vari-

24. See Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 274-76 (1986).

25. See Henderson, *supra* note 4, at 376-79. See also Metzger & Phillips, *supra* note 7, at 531-36. These commentators have also pointed out that promissory estoppel is not simply a consideration substitute; it is also used to enforce promises when other traditional criteria for contract liability are not met, such as compliance with the Statute of Frauds or with the requirements that the terms of a bargain be definite and not illusory. See Henderson, *supra* note 4, at 361-65, 371; Metzger & Phillips, *supra* note 7, at 487-91, 494-98. These commentators do not, however, attempt to explain liability in these cases as contractual. Instead, they vaguely describe recovery under promissory estoppel as tort-based, *see supra* notes 7-10 and accompanying text, or as an inherently flexible means of achieving fairness, *see supra* note 6 and accompanying text.

26. See, e.g., Farber & Matheson, *supra* note 11, at 904-05 (describing promissory estoppel as an exception to the consideration requirement). Farber and Matheson are themselves unusually rigorous in their requirements for finding a bargain. *Id.* at 919-21. Thus, they view the use of promissory estoppel as a means of enforcing "invisible handshake" deals, *id.* at 904; though there is nothing "invisible" about the handshake in most of the cases they discuss.

27. Most of the promissory estoppel cases discussed by Farber and Matheson involve express bargains. See Farber & Matheson, *supra* note 11, at 910-914 (discussing, *inter alia*, *Vastoler v. American Can Co.*, 700 F.2d 916 (3d Cir. 1983)); *Oates v. Teamsters Affiliates Pension Plan*, 482 F. Supp. 481 (D.D.C. 1979); *infra* notes 181-97 and accompanying text. Since Farber and Matheson view promissory estoppel as a consideration substitute, they, like the courts in these cases, ignore the key issue when the question is one of enforcing an express bargain: Whether formal defect(s) should bar enforcement.

28. See Kostritsky, *supra* note 14, at 916, 925-26 (discussing *Prudential Ins. Co. v. Clark*, 456 F.2d 932 (5th Cir. 1972) and *Vastoler v. American Can Co.*, 700 F.2d 916 (3d Cir. 1983). Her discussion fails to identify the key question: Whether the benefits of insisting on the missing formality justify nonenforcement.)

29. See, e.g., Metzger & Phillips, *supra* note 7, at 537 (stating that reliance is an essential element of promissory estoppel liability); Farber & Matheson, *supra* note 11, at 904 (stating that reliance is increasingly irrelevant to promissory estoppel liability); Kostritsky, *supra* note 14, at 899-900 n.16 (promissory estoppel enforces promises inducing reliance plausibly

ety of roles in promissory estoppel cases. In some settings, reliance is almost inevitable and rarely an issue. In others, courts do seem to require real detrimental reliance. In still others, courts find reliance when the promisee has acted in a manner consistent with an expectation that the promise will be fulfilled or in the manner bargained-for by the promisor.

Although reliance is not always irrelevant to liability under promissory estoppel, we suggest that reliance should not be the focal point of promissory estoppel discussions. Instead, extending promissory estoppel liability beyond traditional contract and tort limits should depend on how one weighs the costs and benefits of various contract formalities³⁰ and on the standard one considers appropriate for misrepresentation.

In attempting to describe when (and to explain why) courts are likely to impose liability on the basis of promissory estoppel, we do not discuss a closely related issue: the measure of damages in promissory estoppel cases. A courts' use of promissory estoppel to afford relief for misrepresentation, rather than using (or changing) the standards for tort liability for misrepresentation, may result in a different measure of damages than would be available in tort. Similarly, the use of promissory estoppel to afford relief for a promise apparently made with an intent to be legally bound might result in a different measure of damages than would be available were traditional contract doctrines used (or changed) to afford relief.³¹

In section I, we discuss promissory estoppel cases which can be understood as contractual in the broad sense that the promisor apparently intended to be legally bound by the promise, though some formal requirement for an enforceable contract may be missing.³² In section II, we discuss those cases in which liability cannot be understood as entirely contractual. In these cases, courts have used promissory estoppel to afford a remedy for some promissory misrepresentations not remedied by traditional contract and tort doctrines.³³

beneficial to the promisor).

30. For a discussion of the functions of contract formalities, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-06 (1941).

31. For a discussion of the measure of relief in promissory estoppel cases, see Becker, *Promissory Estoppel Damages*, which will appear in volume 16:1 of the HOFSTRA L. REV. (1987).

32. See *infra* notes 118-98 and accompanying text. For a fuller discussion, and a defense, of this standard for contract liability, see Barnett, *supra* note 24, and Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POLICY 211 (1986).

33. See *infra* notes 181-216 and accompanying text.

I. CONTRACT LIABILITY: FORMAL LIMITS AND PROMISSORY ESTOPPEL

There are many formal limits to traditional contract liability; all promises apparently intended as legally binding are not enforced. Under traditional contract principles, a promise is enforced only if it is supported by bargained-for consideration. The Statute of Frauds requires a writing for many contracts to be enforceable.³⁴ If a contract is in writing, the parol evidence rule may bar evidence of promises not included in the writing. Similarly, the bargained-for terms of a contract are often viewed as controlling a transaction regardless of whether one party has given the other a non-bargained-for assurance likely to be regarded as an integral part of the overall transaction. Courts often refuse to enforce bargains if one or more terms of the agreement are indefinite³⁵ or illusory.³⁶

These traditional formal requirements serve useful purposes. They promote certainty and predictability, bar inaccurate or fraudulent oral testimony, and keep out of court disputes involving promises that may not have been intended or understood as legally binding. Formal requirements are, however, two-edged swords; they open, as well as close, the door to fraud and can defeat one party's reasonable understanding of the nature and terms of a promise or bargain. In the discussion that follows, we suggest that courts use promissory estoppel to avoid a variety of traditional formal requirements, but in most cases liability can be understood as contractual in the broad sense that the promisor apparently intended to be legally bound by the promise. Thus, promissory estoppel seems to reflect a judgment that formal requirements too often lead to results at odds with the reasonable intentions and expectations of contracting parties.³⁷

Initially, promissory estoppel was regarded as a basis for liability when one formal requirement was missing: a bargain. Its use was limited to non-bargain promises in donative settings. We begin, therefore, with donative cases. We then discuss the much larger set of cases in which promissory estoppel is used to enforce commercial

34. See, e.g., U.C.C. § 2-201(1) (1978), which provides in relevant part:

Except as otherwise provided in this section a contract for the sale of goods . . . is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought

35. See *infra* notes 160-72 and accompanying text.

36. See *infra* notes 173-80 and accompanying text.

37. See *infra* notes 146-98 and accompanying text.

promises apparently intended as legally binding, though the absence of a bargain or some other formal flaw would bar enforcement on the basis of traditional contract doctrines.

Before discussing cases in which promissory estoppel is used as a substitute for the formality of a bargain (in donative and then commercial settings), we discuss why the requirement of a bargain is a formality, rather than part of the very definition or essence of contract. As common law lawyers have long recognized, consideration is a useful tool for identifying many promises intended as legally binding.³⁸ Non-bargain promises are often made without any intent to assume a legally binding obligation. In addition, enforcement of non-bargain promises is troubling because there may be little evidence (other than possibly perjured or mistaken testimony) that the promise was made or, if made, that it was made with sufficient deliberation.³⁹ These objections go to the form of the non-bargain promise and rest on doubts concerning the wisdom of enforcing promises so informal.⁴⁰

Traditionally, promises made with the formality of a seal were enforced as contracts regardless of consideration because the formality of the sealed instrument, like the formality of a bargain, identified promises that were actually made (as established by credible evidence), and made with due deliberation and an intent to be legally bound.⁴¹ Thus, consideration is a formality much like the formality of the sealed instrument. To the extent they are effective,⁴² both mark as legally enforceable promises that probably should be legally enforced in contract because of the form in which they are made.

As this suggests, whether a promise is bargained-for is often (especially in commercial settings) purely a question of form, a question of how the parties formally structure their arrangement, and unrelated to the substance of the transaction or whether the parties

38. See, e.g., M. GWYER, ANSON'S LAW OF CONTRACT 97 (23rd ed. 1969). Consideration is a uniform and convenient—though imperfect—test for “ascertaining whether the maker and receiver of a promise contemplated the creation of a legal liability.” *Id.*

39. See Fuller, *supra* note 30, at 799.

40. *Id.*

41. *Id.* at 800.

42. The seal is no longer effective because its formal requirements have “degenerated into a L.S. or other scrawl which, in modern practice, is frequently a printed L.S. upon a printed form.” REPORT OF NEW YORK LAW REVISION COMMITTEE at 359-60 (1940). As a result, many states have deprived the seal of all legal effect or have weakened its legal effect. See J. DAWSON, W. HARVEY, & S. HENDERSON, CASES AND COMMENTS ON CONTRACTS 190-91 (5th ed. 1987).

regard the promise as a legally enforceable part of their exchange. A promise gratuitous on its face may be understood by the parties as a legally enforceable part of their exchange. If the parties had paid more attention to legal requirements for enforceability, the promise could easily have been (and would have been) structured as part of the exchange.⁴³

Indeed, the one substantive objection to enforcement of non-bargain promises applies with full force only in donative settings. Some commentators have argued that promises to make gifts are not worth enforcing because they are "sterile transmissions"⁴⁴ and are not important enough "to our social and economic order to justify"⁴⁵ the costs of enforcement.

Thus, consideration is a formal requirement, identifying promises probably made with an intent to be legally bound. The absence of consideration does not, however, necessarily indicate that the promise was intended or understood as legally *unenforceable*. In both donative and commercial contexts, courts have used promissory estoppel to enforce promises made with an apparent intent to be legally bound despite the lack of consideration.

A. Promises in Donative Settings

There are two well-established sets of cases in which courts use promissory estoppel to impose liability for promises in donative settings: formal promises to charities and promises to loved ones followed by certain forms of reliance.

1. Formal promises to charities.— In most American jurisdictions, formal charitable subscriptions are legally enforceable either on the basis of the consideration theory or on the basis of promissory estoppel (or both).⁴⁶ Although either reliance or consideration is typ-

43. See *infra* notes 98-101 and accompanying text.

44. Fuller, *supra* note 30, at 815 (quoting BUFNOIR, PROPRIETE ET CONTRACT 487 (2d ed. 1924)). See Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979) (arguing against enforcement of formal donative promises to family members in absence of reliance because enforcement would require the development of rules governing ingratitude and gross improvidence). *But see* Posner, *Gratuitous Promises in Economics & Law*, 6 J. LEGAL STUD. 411, 411-12 (1977) (arguing that donative promises are not "sterile," but wealth maximizing transactions).

45. See Fuller, *supra* note 30, at 799 n.3 (citing Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121 (1914); Willis, *Rationale of the Law of Contracts*, 11 IND. L.J. 227, 230 (1936); *Davis v. Morgan*, 117 Ga. 504, 507, 43 S.E. 732, 733 (1903)).

46. See, e.g., *Danby v. Osteopathic Hosp. Ass'n*, 34 Del. Ch. 427, 104 A.2d 903 (1954) (enforcing only on basis of promissory estoppel); *Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 51 Mich. App. 662, 215 N.W.2d 750 (1974) (enforcing only on basis of promissory

ically "required," courts find reliance (or consideration) when the charity has acted in a manner consistent with the terms of the promise. Thus, the fact that the charity continued normal operations is likely to be considered reliance on (or consideration for) a promise to contribute for the usual purposes of the charity.⁴⁷ The fact that the charity constructed a building is likely to be regarded as reliance on (or consideration for) a promise to contribute a small amount of money to the building fund.⁴⁸ Finding reliance in such actions is often fictional because the charity would have continued to operate or would have constructed the building regardless of the subscription at issue. In addition, if charitable subscriptions were not legally enforceable, such reliance would necessarily be unreasonable.⁴⁹ Iowa and the Restatement (Second) of Contracts have dispensed entirely with the requirement of reliance.⁵⁰ Consideration is often equally fictional, since there is no reason to consider the promise part of a bargain rather than a conditional gift.⁵¹

estoppel); *In re Estate of Field*, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Sur. Ct. 1958) (applying Illinois law; enforcing only on consideration grounds); *In re Estate of Lord*, 175 Misc. 921, 25 N.Y.S.2d 747 (Sur. Ct. 1941) (enforcing charitable subscription on basis of promissory estoppel or consideration).

A few courts have refused to enforce such promises in the absence of real reliance. *See, e.g., Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748 (8th Cir. 1966) (applying Minnesota law; alternatively sustaining jury verdict of fraud by the donee); *Mount Sinai Hosp. Inc. v. Jordan*, 290 So. 2d 484 (Fla. 1974); *Maryland Nat'l Bank v. United Jewish Appeal Fed'n, Inc.*, 286 Md. 274, 407 A.2d 1130 (1979).

47. *See, e.g., In re Drain's Estate*, 311 Ill. App. 481, 36 N.E.2d 608 (1941) (enforcing pledge of \$2,000 out of a total of \$70,000,000 pledged; consideration found in charity's reliance by continuing mission activities); *In re Stack's Estate*, 164 Minn. 57, 204 N.W. 546 (1925) (enforcing pledge of \$5,000 to scholarship fund out of a total of 30 new scholarship funds and \$1,000,000 in general endowment pledges; consideration found in other subscribers' reliance and in college's expenditures in constructing buildings in reliance on all new subscriptions).

48. *See In re Estate of Field*, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Sur. Ct. 1958) (enforcing a pledge to donate \$50,000 to hospital "Development Program" for new building supported by consideration once charity relied by continued construction of structures with a cost of \$7,500,000 building).

49. In planning for the future based on outstanding informal pledges, a reasonable charity will discount the total subscription amount to account for uncollectables. If charitable subscriptions were legally unenforceable, charities would take nonenforceability into account prior to relying on subscriptions.

50. *See Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609 (Iowa 1974); RESTATEMENT (SECOND) OF CONTRACTS § 90(2), at 242 (1979) ("A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.").

51. Some promises to charities are doubtless bargains. For example, a promise to donate money in exchange for a building being named after oneself may be entirely a bargain rather than a gift. In most cases in which charitable subscriptions are enforced, however, there is no

Enforcement is understandable on contract grounds even though there may have been no real reliance and the promise may have been wholly or partly gratuitous, provided that the wording, signing, and delivery of the formal document indicates that the signor intended to assume a legal obligation.⁵² In addition, courts regard the enforcement of promises to charities as sound public policy.⁵³ Given these views, the case for enforcement is strong even in the absence of any real detrimental reliance by the promisee.⁵⁴

2. Reliance, invited or observed by promisor.— In cases involving promises to loved ones in donative settings, promissory estoppel is also used as a basis for enforcement.⁵⁵ In *Estate of Bucci v. Bucci*,⁵⁶ for example, a grandfather had lived with his granddaughter in her apartment for fifteen years. He wanted to buy a house for her, and they agreed on a house with a separate apartment for \$17,000.⁵⁷ She was to live in the house itself, and he and his wife would live in the apartment. The grandfather executed an “assignment” of \$17,000 to the granddaughter to be paid when certain real estate he owned was sold. She then withdrew \$2,000 from her savings account for an op-

basis for concluding that a promise for a particular charitable purpose (e.g., building a building) is part of a bargain rather than a conditional gift. A conditional gift can only be used for the purposes designated. See *Dunaway v. First Presbyterian Church*, 103 Ariz. 349, 442 P.2d 93 (1968). Because liability cannot be explained simply by reference to the traditional doctrine of consideration, we include these cases in the discussion in text, though generally we do not discuss cases in which promissory estoppel is used as an alternative holding and the same result is reached by traditional analysis, as noted *supra* note 22 and accompanying text.

52. Compare *Pappas v. Bever*, 219 N.W.2d 720 (Iowa 1974) (holding pledge card drafted by charity not legally enforceable because words used, “I/we intend to subscribe” only indicate an intent to do something in the future) with *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609 (Iowa 1974) (holding letter from donor making unqualified promise to contribute enforceable). See Eisenberg, *supra* note 44, at 8 (discussing the close case for enforceability of un-relied upon donative promises).

53. See, e.g., *Trustees of the Methodist Episcopal Church v. Garvey*, 53 Ill. 401 (1870) (enforcing a promise on the basis of fictional consideration); *In re Estate of Lipsky*, 45 Misc. 2d 320, 256 N.Y.S.2d 429 (Sur. Ct. 1965) (enforcing promise on the basis of either promissory estoppel or fictional consideration).

54. Some courts have even enforced oral promises to charities. See *In re Estate of Lipsky*, 45 Misc. 2d 320, 256 N.Y.S.2d 429 (Sur. Ct. 1965) (enforcing oral promise made during United Jewish Appeal fund drive, according to undisputed facts); *In re Estate of Field*, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Sur. Ct. 1958) (applying Illinois law; enforcing oral promise proven by testimony of residuary legatee; promise would be paid out of residuary legatee's share of estate).

55. When the promise is to give land, the equitable doctrine of part performance continues to be used to enforce the promise. See, e.g., *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954) (using both promissory estoppel and equitable doctrine of part performance to enforce promise to give an interest in land).

56. 488 P.2d 216 (Colo. App. 1971).

57. *Id.* at 217.

tion on the house.⁵⁸ Shortly thereafter, the grandfather died. The court enforced the promise on the basis of promissory estoppel, holding that in light of her reliance "the manifest intention of the decedent cannot be frustrated by his heirs on their claim that their father's obligation was without consideration."⁵⁹

The court's use of promissory estoppel to enforce the promise can be understood as based on the desire to afford a remedy given the granddaughter's reliance on a promise apparently made with an intention to be legally bound. Although the promise may have been wholly or partly gratuitous,⁶⁰ the court considered the grandfather's execution of a formal "assignment" an attempt to use a legally binding channel for the promise.⁶¹ Even had the promise been made more informally, the grandfather would not (in all likelihood) have invited and observed his granddaughter's reliance without any word of caution unless the promise was intended to be reliable. A court could reasonably conclude that, if it was intended to be reliable, enforcement would likely be more consistent with the promisor's intentions than nonenforcement,⁶² especially since the grandfather died without retracting the promise.⁶³

The granddaughter's reliance also increases the costs of underenforcement.⁶⁴ The promise might have been gratuitous.⁶⁵ If so, in the absence of reliance she would only be disappointed by not receiv-

58. *Id.* at 217-18. The option had initially been purchased for \$1,000, which the granddaughter paid with money given her by her grandfather. The \$2,000 was paid to extend the option period. *Id.*

59. *Id.* at 219. The court also used equitable estoppel to estop the defendant from asserting the lack of consideration. *Id.* With the exception of a few unusual equitable estoppel cases which contributed to the development of promissory estoppel, *see, e.g.,* *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898), equitable estoppel was traditionally limited to misstatements of fact or promises to relinquish legal rights. *See, e.g.,* M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 554, 558 (4th ed. 1886).

60. *Estate of Bucci*, 488 P.2d at 216.

61. *Id.* at 217, 219.

62. In absence of formality, and in a donative setting, it is often likely that the promisor never consciously thought about legal enforceability. It may, nevertheless, be possible to conclude that enforcement is likely to be more consistent with the promisor's intentions than nonenforcement.

63. *See Estate of Bucci*, 488 P.2d at 218. In many of the cases in which a donative promise to a loved one is enforced after reliance, the dispute arises after the donor's death. *See also In re Jamison's Estate*, 202 S.W.2d 879 (Mo. 1947) (enforcing decedent's promise to pay all debts incurred as a result of giving his sister credit).

64. Even without reliance, an argument for a remedy can still be made. *See Posner, supra* note 44, at 411-12. In the absence of reliance, however, enforcement is unusual. *See, e.g.,* *Henry v. Weinman*, 157 Cal. App. 2d 360, 321 P.2d 117 (1958).

65. *See supra* note 60-63 and accompanying text.

ing a promised gift. Once she relied, however, nonenforcement would mean that she would be worse off because of the promise, though it was made to benefit her.⁶⁶

In these cases, invited or observed reliance provides both some evidence that the promisor may have intended to make a reliable promise (so that enforcement is likely to be consistent with his intentions) and a reason to afford a remedy though the promise was gratuitous.⁶⁷ The number of cases involving enforcement of promises to loved ones in donative settings has never been large, but promissory estoppel continues to be useful for enforcing such promises once there has been reliance.⁶⁸ Today, courts use promissory estoppel most often in commercial settings.

B. *Not-Expressly-Bargained-For Promises in Commercial Settings*

In this section, we discuss five sets of commercial cases imposing liability on the basis of promissory estoppel:⁶⁹ implicit bargains, firm offers, contract modifications, assurances likely to be regarded as part of an overall transaction, and pensions promised at or near retirement. In these cases, enforcement is at least doubtful under traditional doctrines because the promise is not clearly supported by bargained-for consideration.

1. Implicitly bargained-for reliance.— Today, the largest single set of the cases in which liability is imposed solely on the basis of promissory estoppel involve implicit bargains. In *United Electric Corp. v. All Service Electric, Inc.*,⁷⁰ for example, a general contractor hired a subcontractor to furnish the labor and materials for the

66. *Estate of Bucci*, 488 P.2d at 219.

67. Because this paper is not normative, we make no claim that these factors (or those identified elsewhere as explaining liability) do or do not justify a legal remedy. A normative justification would require a normative theory of contract and of tort. See, e.g., Barnett, *supra* note 32, at 291-319 (presenting a normative theory of contract); Barnett, *supra* note 24, at 291 (further developing a consent theory).

68. See, e.g., *Greene v. Wilson*, 208 Cal. App. 2d 852, 25 Cal. Rptr. 630 (1962); *Larabee v. Booth*, 463 N.E.2d 487 (Ind. Ct. App. 1984); *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954) (using equitable doctrine of part performance as a basis of enforcement); *In re Jamison's Estate*, 202 S.W.2d 879 (Mo. 1947); *Zimmerman v. Zimmerman*, 86 A.D.2d 525, 447 N.Y.S.2d 675 (1982).

69. As indicated in the introduction, we do not discuss the many cases in which liability is imposed on the basis of both promissory estoppel and traditional doctrines, since our purpose is to identify how promissory estoppel has extended liability beyond traditional contract and tort limits.

70. 256 N.W.2d 92 (Minn. 1977).

electrical work on a project.⁷¹ The subcontractor had a poor credit rating. The materialman, United, insisted that the general contractor's checks to the subcontractor for material be made out to the subcontractor and United so that United would not have to rely on the subcontractor's creditworthiness. United delivered a signed copy of the contract to the subcontractor only after the general contractor promised, in a writing delivered to United, that checks for the electrical materials would be jointly payable to the subcontractor and United. Although seven joint checks were issued, four were issued only to the subcontractor. As a result, United was not paid for some \$8,000 worth of material. United sued the general contractor for this amount, and the promise was enforced on the basis of promissory estoppel: United had relied on the general contractor's promise to issue joint checks, and the general contractor was therefore liable.⁷²

One would think there was a bargain even in the most technical sense: the general contractor promised to issue joint checks for electrical equipment in exchange for United agreeing to supply electrical parts to a shaky subcontractor. The court concluded, however, that there was no bargain because United never made any promises to the general contractor; if United had refused to supply materials, the general contractor would have had no cause of action against United. The joint-check agreement could not therefore "rise to the level of express contract."⁷³ But even if United was not obligated to the general contractor, one could find a unilateral contract on these facts. The general contractor promised to issue joint checks in exchange for United actually supplying parts to the subcontractor or promising (the subcontractor) to supply parts to the subcontractor. In its letter to United, the general contractor did not, however, expressly link its promise and United's reliance.⁷⁴ Regardless of whether there was technically a bargain, United and the general contractor certainly had a "deal" which both considered an advantageous exchange transaction at the time the general contractor delivered its letter to United. In such cases, promissory estoppel affords courts a basis for enforcing the deal without having to find that the expressly "gratuitious" promise was implicitly bargained-for.⁷⁵ Liabil-

71. *Id.* at 93.

72. *Id.* at 95-96.

73. *Id.* at 95.

74. *Id.* at 94-95.

75. *Id.* at 95-96. As examples of the many similar cases, see *Gill v. United States Rubber Co.*, 195 F. Supp. 837 (N.D. Ind. 1961) (remanding to consider enforcing employer's

ity is, however, understandable as contractual because of the implicit bargain. In *United Electric*, for example, the promise was made to induce United to supply electrical equipment for the general contractor's project. In exchange, the general contractor promised that when it paid the subcontractor for electrical equipment supplied by United and installed by the subcontractor, it (the general contractor) would issue a joint check payable to United and the subcontractor.

When promissory estoppel is used to enforce an implicit bargain, courts tend to find reliance sufficient to support liability on the basis of promissory estoppel provided that the promisee has acted in a manner consistent with the terms of the implicit bargain.⁷⁶ In the absence of such reliance, liability would be inappropriate; reliance is a condition of the promise. In *United Electric*, for example, the general contractor's promise to issue joint checks for electrical supplies was clearly conditioned on United supplying the equipment to the subcontractor. In addition, once United relied, there was a need for a remedy, both to protect United and to prevent unjust enrichment of the general contractor, which would otherwise enjoy the benefits of United's reliance without paying the promised price.

2. Firm offers.— The common law begins with the assumption that an offer is freely revocable, prior to acceptance, unless sup-

alleged promise to employ plaintiff for life after plaintiff relied by settling claim for work-related injuries); *Mazer v. Jackson Ins. Agency*, 340 So. 2d 770 (Ala. 1976) (enforcing developer's promise to maintain buffer zone between development and residences; promise induced plaintiffs to drop opposition to annexation by their city); *Peoples Nat'l Bank v. Linebarger Constr. Co.*, 219 Ark. 11, 240 S.W.2d 12 (1951) (enforcing general contractor's promise made to induce a bank to provide short-term funding to subcontractor's payroll); *Homestead Supplies, Inc. v. Executive Life Ins. Co.*, 81 Cal. App. 3d 978, 147 Cal. Rptr. 22 (1978) (enforcing insurance company's promise to charge the amount originally promised by its agent for renewal premiums, rather than the amount on the face of the policy; promise made to induce insured to maintain insurance coverage); *Swinerton v. Walberg Co. v. City of Inglewood*, 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (1974) (enforcing promise to accept lowest responsible bid); *Peterson Tractor Co. v. Orlando's Snack-Mobile Corp.*, 270 Cal. App. 2d 787, 76 Cal. Rptr. 221 (1969) (enforcing promise made to third party to induce plaintiff's reliance); *Day v. Mortgage Ins. Corp.*, 91 Idaho 605, 428 P.2d 524 (1967) (reversing summary judgment, mortgagee's promise to pay funds directly to contractor not supported by consideration, but promissory estoppel applies); *Fretz Constr. Co. v. Southern Nat'l Bank*, 626 S.W.2d 478 (Tex. 1982) (holding promissory estoppel applicable when promise made to protect general contractor's interest); *Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wash. 2d 126, 443 P.2d 544 (1968) (enforcing promise to pay plaintiff for steam heat regardless of usage by defendant, but statute of limitations barred recovery for most of claim). *See also* *Northwestern Eng'g Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943) (permitting promissory estoppel to enforce subcontractor's bid because there was no consideration for express written conditional bilateral contract binding both sub and general contractor).

76. *See supra* note 75.

ported by consideration.⁷⁷ An offeror might, however, want to extend an offer that is irrevocable for a period of time in order to increase the chances that the offer will be accepted. If the offer is perceived as irrevocable or "firm," the offeree may be more likely to rely on it in formulating plans and arranging other transactions, thereby increasing the chances that the offer will ultimately be accepted.

When an offer is in writing delivered to the donee and expressly states that it is firm, several doctrines other than promissory estoppel provide a means of enforcement. For example, under the UCC, a written offer is irrevocable if it expressly states that it is firm.⁷⁸ In all jurisdictions, a firm offer will be enforced by the common law if some consideration was actually given for it,⁷⁹ and in many jurisdictions, a recital of nominal consideration will support an expressly firm offer.⁸⁰

Notwithstanding the protection afforded to some *expressly* firm offers by these doctrines, others will not be enforced. Nor can these other doctrines be used to enforce *implicitly* firm offers. Promissory estoppel has been used as a basis for enforcement in both of these situations.

Due to the variety of other doctrines available to enforce expressly firm offers, promissory estoppel is only rarely used to enforce such offers.⁸¹ In these cases, liability can easily be understood as contractual: by delivering to the offeree a written offer, which states that it is irrevocable for some time, the offeror has indicated an intention to be bound by the offer. The offeree has almost inevitably relied on the offer, increasing the need for a remedy.

Promissory estoppel is often used to enforce implicitly firm of-

77. See cases cited *supra* note 75.

78. U.C.C. § 2-205 (1978) (such offers are irrevocable for a maximum period of three months).

79. See, e.g., *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill. App. 3d 907, 476 N.E.2d 788 (1985); *Hermes v. William F. Meyer Co.*, 65 Ill. App. 3d 745, 382 N.E.2d 841 (1978); *Northwestern Bell Tel. Co. v. Cowger*, 303 N.W.2d 791 (N.D. 1981); *R. J. Taggart, Inc. v. Douglas County*, 31 Or. App. 1137, 572 P.2d 1050 (1977).

80. See *Smith v. Wheeler*, 233 Ga. 166, 210 S.E.2d 702 (1974); *Rottkamp v. Eger*, 74 Misc. 2d 858, 346 N.Y.S.2d 120 (1973). But see *Lewis v. Fletcher*, 101 Idaho 530, 617 P.2d 834 (1980); *Hermes v. William F. Meyer Co.*, 65 Ill. App. 3d 745, 382 N.E.2d 841 (1978).

81. For examples of promissory estoppel used to enforce expressly firm offers, see *Elgin Nat'l Indus. v. Howard Indus.*, 264 So. 2d 440 (Fla. Dist. Ct. App. 1972) (estopping vendor from withdrawing offer where purchaser made expenditures in reliance upon vendor's assurances that it would remain open for a specified time); *Bixler v. First Nat'l Bank*, 49 Or. App. 195, 619 P.2d 895 (1980) (enforcing oral, but expressly firm, offer). But see *Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977) (refusing to enforce expressly firm written option after reliance).

fers in one particular factual setting: subcontractors' bids to general contractors for use by the general contractor in preparing its bid on a prime contract. Provided that the general contractor has relied on the subcontractor's bid and is subsequently awarded the prime contract, courts routinely use promissory estoppel to impose liability.⁸² Liability in these cases can also be understood as contractual. When a subcontractor submits a bid to a general contractor for use by the general contractor in preparing its bid on a prime contract, the offer might be understood as, and intended to be, firm. The subcontractor expects and desires a very particular kind of reliance: use of its bid by the general contractor in preparing the prime bid. This reliance is more substantial than typical reliance on other offers. If the subcontractor can withdraw its bid after reliance, the general contractor has not simply lost the benefit of the sub's price or the opportunity to search for alternative offers; the general contractor may be bound to perform a contract with another, at a price it would not have offered but for the subcontractor's bid. The subcontractor benefits by inducing this reliance. If the general contractor does rely (which it is more likely to do if the bid is regarded as firm), the subcontractor's chances of getting the subcontract (in the event the general contractor gets the prime contract) increase substantially.

This desired and unusually substantial reliance is relevant to the enforcement question in two ways: it suggests that the subcontractor may have intended the general contractor to regard his bid as firm and it increases the cost of underenforcement if a legal system refuses to enforce such offers when subcontractors and general contractors regard the bids as binding. Although subcontractors' bids are often oral and include no express indication that they are firm, empirical evidence suggests that subcontractors and general contractors

82. See, e.g., *Preload Technology, Inc. v. A.B. & J. Constr. Co.*, 696 F.2d 1080 (5th Cir. 1983) (applying Texas law in holding subcontractor liable to general contractor under promissory estoppel theory where subcontractor, knowing his bid would be relied upon in general contractor's bid on city project, refused to perform under the bid); *Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co.*, 688 P.2d 576 (Alaska 1984) (holding that courts should use promissory estoppel to enforce reasonably-relied upon subcontractor's bids in order to further the industry's need that such bids be binding for a reasonable time); *Gerson Elec. Constr. Co. v. Honeywell, Inc.*, 117 Ill. App. 3d 309, 453 N.E.2d 726 (1983) (allowing recovery by contractor of lost profits under promissory estoppel where subcontractor refused to perform and contractor had to withdraw its low bid on a prime contract). Cf. *Young v. Johnston*, 475 So. 2d 1309 (Fla. Dist. Ct. App. 1985) (holding defendant builder liable after would-be home owner relied on bid; no contract, however, because homeowner remained free to back out though builder may have led home owner to think that homeowner had a firm offer).

do regard these bids as firm once the general contractor has relied.⁸³ Courts typically enforce such bids as firm when there is evidence of trade custom and usage supporting such an inference.⁸⁴

Reliance by the general contractor (in preparing its bid on the prime contract) is probably essential if the general contractor is to recover.⁸⁵ A reliance requirement is, however, consistent with contract liability in this context. It is likely that the subcontractor's bid was only conditionally firm. Empirical evidence indicates that subcontractors regard bids as firm when relied on in preparing a bid on a prime contract, but there is no reason to think that a subcontractor would be willing to stand by its bid in the absence of reliance. Moreover, there is little need for a remedy when there has been no reliance. Thus, reliance by the general contractor both increases the need for a remedy, and is probably a condition of the bid being firm.

3. Contract modifications.— Promissory estoppel is sometimes used by courts as a basis for enforcing some contract modifications. Under the traditional pre-existing duty rule,⁸⁶ contract modifications are not enforceable unless supported by bargained-for consideration. The policy for this rule is the need to guard against opportunistic behavior by a party to a contract. Contract remedies are often inadequate, and a party to a contract is likely to rely on the contract and, therefore, be in a vulnerable position should the other party threaten breach. The other party may act opportunistically by threatening breach in order to extract a premium from the vulnerable party.⁸⁷

83. See Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); Note, *Another Look at Construction Bidding and Contract Formation*, 53 VA. L. REV. 1720 (1967). In the Virginia study, all the subcontractors indicated that they felt bound to "perform the work at the original price bid" if they discovered an error in the bid after the general had used it. *Id.* at 1734. Eighty-five percent of the subcontractors indicated that they would feel bound regardless of whether the bid stated that it would not be withdrawn.

84. See, e.g., *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 116, 190 N.W.2d 71, 73 (1971) (enforcing subcontractor's offer as firm where it is common in the local industry for subcontractors and contractors to negotiate on the telephone); *E.A. Coronis Ass'n v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 79, 216 A.2d 246, 253 (App. Div. 1966) (requiring showing that subcontractor should have expected his bid to be relied upon given his knowledge of custom and usage in the trade).

85. In the litigated cases, the general contractor has invariably relied; reliance therefore tends not to be an issue.

86. The pre-existing duty rule is not applicable to sales of goods. Under the UCC, no consideration is needed to modify a contract, although a waiver of an executory condition of a contract is ineffective prior to reliance. U.C.C. § 2-209(1), (5) (1978).

87. See Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 522-25 (1981). See Posner, *supra* note 44, at 422 (using word "extortion" to refer to such behavior).

The vulnerable party may agree to pay more than originally promised simply because his reliance on the contract has made performance by the other party critically important.⁸⁸

On the other hand, on-going adjustments and modifications are the rule, rather than the exception in contract relationships of any duration. Often, modifications—even if unsupported by consideration—are seen by the promisor (as well as the promisee) as desirable for some reason other than the pressure caused by the threat of breach. Not surprisingly, a number of exceptions to the pre-existing duty rule have developed as courts attempt to enforce some modifications while refusing to enforce others.⁸⁹

Waiver is one of these exceptions. A waiver of a future contractual right or obligation is binding once there has been reliance. A waiver cannot substantially change the value of the transaction to the promisor (the “waiving” party); an owner cannot waive a builder’s obligation to build a house. One can, however, waive a right that does not substantially impair the value of the contract.⁹⁰ An owner can waive a requirement that a house be completed by July 1.

Some courts have used promissory estoppel to enforce contract modifications as either an alternative holding to waiver or as the only basis for enforcement in waiver-like circumstances. For example, in *Brewer v. Universal Credit Co.*,⁹¹ the plaintiff had purchased a car on credit, and the conditional sales contract had been assigned to the defendant Credit Company. When the plaintiff was in default on two payments, the Credit Company demanded possession but then agreed that the car would be stored for thirty days at the plaintiff’s expense and during that period the plaintiff would be able to pay the overdue installments and recover his car. The plaintiff tendered the

88. Opportunistic behavior by one party is not always correlated with the other party’s vulnerability. For example, a party may threaten breach because performance has become so costly that it would rather pay damages than continue. A threat to breach would not, in such circumstances, be opportunistic, but the other party might nevertheless agree only because of its vulnerability.

89. See 1A A. CORBIN, CORBIN ON CONTRACTS §§ 186-88, at 158-71 (1963); E. FARNSWORTH, CONTRACTS §§ 4.21-4.24, at 273-89 (1982); RESTATEMENT (SECOND) OF CONTRACTS, §§ 89, at 275 (1979). For discussions of the difficulty (or impossibility) of distinguishing between mutually beneficial modifications (at the time of the modification) and modifications whose enforcement will encourage opportunistic behavior, see Aivazian, Trebilcock, & Penny, *The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability*, 22 OSGOODE HALL L. J. 173 (1984); Robison, *Enforcing Extorted Contract Modifications*, 68 IOWA L. REV. 699 (1983).

90. See 3A A. CORBIN, CORBIN ON CONTRACTS § 753, at 486 (1960).

91. 191 Miss. 183, 190-91, 192 So. 902, 904 (1940).

money due within the thirty days, but the Credit Company had sold the car.⁹²

Although the modification was not supported by consideration,⁹³ the court's use of promissory estoppel to enforce the modification is understandable in contract terms. The Credit Company made a promise which purported to modify its legal rights under an existing contract with the knowledge that it would be relied on by the plaintiff. Since the modification did not substantially change the value of the contract to the Credit Company, the policies behind the pre-existing duty rule do not argue strongly against enforcement.⁹⁴ Moreover, as is usually true in waiver-like cases, the plaintiff was not acting opportunistically in extracting the modification, nor was the Credit Company particularly vulnerable. Finally, the traditional judicial hostility towards forfeiture argues for enforcement in *Brewer* and in many of the waiver-like modification cases.⁹⁵

Since reliance on the modification almost inevitably occurs, reliance tends not to be an important issue in these cases. As *Brewer* illustrates, however, courts use promissory estoppel to impose liability in such cases once there has been some reliance;⁹⁶ but reliance need not be very costly or detrimental.⁹⁷

4. Assurances likely to be regarded as part of overall transac-

92. *Id.* at 186-87, 192 So. 2d at 902.

93. Under the pre-existing duty rule, the plaintiff's tender of the overdue money could not be consideration since the plaintiff had a duty to pay that amount under the original contract. The promise to pay the storage costs for 30 days could be consideration, but not if, as is likely, the original contract imposed liability on the plaintiff for all costs sustained by the Credit Company in repossessing and selling after default.

94. *Brewer*, 191 Miss. at 190, 192 So. 2d at 904.

95. *See Id.* at 190, 192 So. 2d at 904 (referring to forfeiture problem in holding promise enforceable despite lack of consideration).

96. *See also Veasy v. Layton*, 42 Del. Ch. 155, 206 A.2d 505 (1964)(holding reasonable reliance present but not expressly stating what constituted actual reliance); *Perry Publications, Inc. v. Bankers Life and Casualty Co.*, 246 So. 2d 604 (Fla. Dist. Ct. App. 1971)(finding failure to use all advertising credit to be reliance under promissory estoppel); *Bank Computer Network Corp. v. Continental Ill. Bank & Trust Co.*, 110 Ill. App. 3d 492, 442 N.E.2d 586 (1982)(finding negotiations with other financial institutions to be reliance).

Sometimes courts use both promissory estoppel and traditional waiver analysis. *See, e.g., Edwards v. Smith*, 322 S.W.2d 770 (Mo. 1959); *Dairyland County Mut. Ins. Co. v. Estate of Basnight*, 557 S.W.2d 597 (Tex. Ct. App. 1977).

Some courts state that a waiver of a future substantive condition is binding only if supported by consideration or an estoppel (i.e., the waiver has been relied upon). For these courts, promissory estoppel seems to be a form of waiver. *See Wachovia Bank & Trust Co. v. Rubish*, 306 N.C. 417, 293 S.E.2d 749 (1982).

97. In *Brewer*, for example, there was no evidence that the plaintiff spent much time looking for funds, or that, had he immediately repaid the money (after the Credit Co. refused to accept it), he would have sustained much of a loss. 191 Miss. at 183, 192 So. 2d at 902.

tion.— Often, courts use promissory estoppel as a basis for enforcing assurances given by one contracting party and likely to be regarded as part of the overall transaction (and therefore legally binding) by the other contracting party. Typically, the question is whether an insurer is bound by a post-contract misrepresentation of the terms of the policy.⁹⁸ In *Travelers Indemnity Co. v. Holman*,⁹⁹ for example, the plaintiff policy holder asked his agent if certain activities on his land were covered by his policy or whether additional coverage was required. It was by no means clear from the policy whether the activities were covered.¹⁰⁰ The agent wrote the defendant's underwriters requesting clarification. The underwriters replied that no additional policy was needed because the current policy covered the activities. Unfortunately, it did not, and the defendant refused to honor the plaintiff's subsequent claim arising from the activities. The court used promissory estoppel to hold the insurance company bound by the terms represented to the insured.¹⁰¹

In *Holman*, there was no consideration for any modification of the insurance contract. Indeed, at the time of the "clarification," neither insurer nor insured thought that the contract was being modified. Both thought that the insurer was only attempting to describe its existing obligation.

The court's imposition of liability can, nevertheless, be under-

98. In a number of similar cases, the insurer issues a policy at odds with the policy requested by the insured, without warning the insured (in English) about the difference in coverage. In these cases, the question is whether the parol evidence rule bars evidence showing that the written policy does not reflect the actual agreement of the parties. *See, e.g.*, *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 435-36 n.7 (1953); *Travelers Indem. Co. v. B.N. Holman*, 330 F.2d 142 (5th Cir. 1964). *See also* *Homestead Supplies, Inc. v. Executive Life Ins. Co.*, 81 Cal. App. 3d 978, 147 Cal. Rptr. 22 (1978) (using promissory estoppel to enforce insurance company's promise to charge less than the amount on the face of the policy).

99. 330 F.2d 142 (5th Cir. 1964). *See also* *Tomerlin v. Canadian Indem. Co.*, 61 Cal. 2d 638, 394 P.2d 571, 39 Cal. Rptr. 731 (1964) (holding insurer bound by its attorney's representation to insured, during suit against insured, that his case was covered by policy); *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 254 N.W. 221 (1934) (enforcing decision that insurer's mistake in computing policy expiration date precluded insurer from denying liability under policy); *Green v. Helmcamp Ins. Agency*, 499 S.W.2d 730 (Tex. Civ. App. 1973) (precluding insurance agency from denying coverage, since it had told motorist that his liability coverage would be in effect through a certain date).

For two similar cases in which employers, in response to a question from an employee, unintentionally misrepresented the terms of a pension plan, see *Sanders v. United Distributions*, 405 So. 2d 536 (La. Ct. App. 1981) (applying law of Louisiana); *Abelson v. Genesco*, 58 A.D.2d 774, 396 N.Y.S.2d 394 (1977). Both courts used promissory estoppel to enforce the pension plan as represented to the employees.

100. 330 F.2d at 146.

101. 330 F.2d at 151-52.

stood as contractual. The insured thought that the insurer was describing the terms of the contract, and the insurer doubtless appreciated this fact. As is often the case with insurance policies,¹⁰² the provisions on coverage in the *Holman* policy were "obscure" and "contradictory."¹⁰³ Even attorneys often cannot understand insurance policies.¹⁰⁴ When such a contract has been drafted by one of the parties, it is likely to be the understanding of the non-drafting party, as well as the expectation of the drafting party, that the latter's descriptions of what has been purchased will be authoritative. Thus, the court used promissory estoppel to enforce an implicit term in the original contract: that the insured can regard the insurer's descriptions of the policy as authoritative.

A somewhat similar analysis explains other cases in which courts use promissory estoppel to enforce a post-contract assurance, such as *East Providence Credit Union v. Geremia*.¹⁰⁵ In this case, the plaintiff Credit Union loaned money to Mr. and Mrs. Geremia with their car as security. Under the loan agreement, the Geremias were responsible for insuring the car, but if they failed to do so, the Credit Union had the right to insure the car.¹⁰⁶ Two years later, Mr. Geremia became ill and the Geremia's were unable to pay the insurance premium. The Credit Union sent a notice to the Geremia's stating that if they did not pay the overdue premium within ten days the credit union would. Mrs. Geremia called the Credit Union and indicated that the Geremias were unable to pay both the loan installment and the insurance premium and would rely on the Credit Union paying the latter. Both the Credit Union and the Geremias understood that the premium amount would be added to the out-

102. See, e.g., *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 432 (1953)(Frankfurter, J., compares interpreting insurance policy to deciphering "obscure palimpsest texts").

103. *Holman*, 330 F.2d at 147.

104. See Littler, *Legal Writing in Law Practice*, 31 CAL. ST. B. J. 28, 31 (1956): Recently my broker handed me a multiple coverage public liability insurance policy. I noticed that on the outside it said 'Read your policy.' So I did. In fact, I read it ten times. I still could not understand the first sentence, which is about 186 words long.

So I called up a friend of mine who is counsel for the company [and] asked him what it meant. He did not know either. I doubt whether anyone knows what it means. My broker says I am fully protected. I have to take his word for it.

Id. at 31.

105. 103 R.I. 597, 239 A.2d 725 (1968). See also *Northwestern Bank of Commerce v. Employers' Life Ins. Co.*, 281 N.W.2d 164 (Minn. 1979)(enforcing insurer's promise to insured's assignee to notify assignee of any premium default; either implicit bargain or assurance likely to be regarded as part of overall exchange transaction by assignee).

106. 103 R.I. at 598, 239 A.2d at 726.

standing loan balance and that interest would be charged on it.¹⁰⁷ The Credit Union failed to pay the premium and the uninsured car was destroyed. The court used promissory estoppel to enforce the "promise."¹⁰⁸

As in *Holman*, it is unlikely that the credit union (or its agents) intended to assume an additional legal obligation when the Geremias were assured that the credit union would pay the insurance premium. The credit union, after all, received nothing for any such commitment. Indeed, it is doubtful that the credit union even promised the plaintiffs anything; it only threatened to do what it had a right to do under the loan agreement.

Liability can, nevertheless, be understood as essentially contractual under the objective standard of contract.¹⁰⁹ Under the objective standard, *A* is bound by *B*'s understanding of whether there is a contract or of its terms if a reasonable party in *B*'s position would share *B*'s understanding, and *A* knows (or should know) of *B*'s understanding.¹¹⁰

The Credit Union knew (or should have known) that the Geremias were likely to regard the "threat" as a reliable part of the contractual relationship. The Geremias, not having taken first-year contracts nor having read Holmes's definition of consideration, would not have hesitated about relying on the Credit Union's commitment on the ground that it was gratuitous, and therefore legally unenforceable. The overall transaction was not gratuitous. Moreover, the Credit Union was going to charge interest on the premium amount. This was not technically bargained-for consideration,¹¹¹ but it is un-

107. *Id.* at 600, 239 A.2d at 727.

108. *Id.* at 603, 239 A.2d at 728.

109. For a discussion of the consistency of an objective standard with the notion that contract enforces voluntarily assumed obligations, see Barnett, *supra* note 24, at 300-09.

110. See *Embry v. McKittrick Dry Goods Co.*, 127 Mo. App. 383, 105 S.W. 777 (1907); *Lucy v. Zehmer*, 196 Va. 493, 84 S.E.2d 516 (1954); RESTATEMENT (SECOND) OF CONTRACTS §§ 20-21, 201 (1979).

The objective standard of contract applies only if there is bargained-for consideration. Thus, the objective standard would not afford relief for *B*, who reasonably thought that there was consideration, as *A* knew or should have known he would, unless there actually was consideration as a matter of law. The analysis suggested below, in text, extends the objective standard to include whether a promise is part of a bargain.

111. The credit union planned on paying the premium to protect its security interest, not to expand its loan portfolio. Further, the credit union had the right under the loan agreement to pay the premium and to demand immediate repayment from the Geremias. The interest, therefore, was not the consideration for extending money to cover the premium without demanding immediate repayment. The court, however, viewed the interest as consideration, and enforced the Credit Union's promise as bargained-for, as well as on the basis of promissory

likely that the Geremias reflected on the implications of this fine point. At least when notified of the Geremias' reliance, the Credit Union should have realized that the Geremias were likely to consider the assurance a reliable commitment in the context of an exchange transaction. The Credit Union could have easily and clearly indicated that the "threat" was only that and not reliable.¹¹² In the absence of such a caveat, the court's imposition of liability is understandable as contractual under an objective standard.

In addition, both *Holman* and *Geremia* involve transactions with consumers. The costs of formal limits on contract liability are higher (and the benefits lower) for consumers than for merchants who engage repeatedly in the same transactions. Consumers are less likely to be aware of formal limits on liability than are merchants.¹¹³ As a result, formal limits may surprise and disappoint consumers' reasonable expectations; consumers are less likely than merchants to learn to take advantage of, or to depend upon, formal limits.¹¹⁴ The outcomes in both *Geremia* and *Holman* may be based, at least in part, on the unusually high costs associated with formal limits on merchants' liability in transactions with consumers.

When promissory estoppel is used to enforce assurances reasonably regarded as part of a contract, courts do require some reliance but are not extremely demanding. In *Holman*, it is likely that the insured actually relied on the insurer's representations to his detriment, since he would otherwise have obtained expanded coverage. In other insurance cases, however, real reliance on the insurer's description of terms of coverage is often doubtful. For example, when the insurer misstates the termination date on a life insurance policy, there may be no reason to think that the insured would have ob-

estoppel. *Geremia*, 103 R.I. at 602, 239 A.2d at 728.

112. For example, in its original notice to the Geremias, the Credit Union could have stated: "It is currently our intention to pay your premium if you do not do so in 10 days. You remain, however, solely responsible for paying the premium and should not rely on our doing so." *Id.* at 598-99, 239 A.2d at 726.

Or, when notified that the Geremias were relying, the Credit Union could have warned them to check with the insurance company to make sure the Credit Union had actually paid the premium prior to reliance, as the Credit Union's procedures were not always reliable and this commitment was not part of the Credit Union's contractual obligations to the Geremias. *Id.*

113. Consumers are less likely to consult a lawyer about the nature and terms of an arrangement. In addition, a consumer is not in the business of repeatedly engaging in the same transaction. As a result, a consumer is less likely (than a merchant) to learn where the formal lines limiting liability are drawn.

114. Because a merchant repeatedly engages in the same transaction, he is likely to learn where the formal limits on liability lie, and how to use them to his own advantage.

tained extended coverage had the insurer reported the termination date accurately.¹¹⁵ In *Geremia*, the Geremias might have acted differently if the Credit Union had not indicated its intent to pay the premium; but they might have been unable to find funds to pay the premium and might have driven the car without insurance. Consistent with the explanation suggested here, courts tend to find sufficient reliance when actions of the promisee are consistent with an understanding that the assurance is part of the contract.

5. Pensions at or near retirement.— A number of courts have used promissory estoppel to enforce employers' promises of pensions to employees at or near retirement.¹¹⁶ Traditional bargain analysis could be used to explain enforcement in these cases, but some courts are reluctant to find bargains in the context of employment, perhaps because the ancient doctrine of mutuality of obligation has unusual vitality in this setting. We discuss these cases separately because they share a common factual pattern and illustrate that courts' use of promissory estoppel can often be understood on the basis of several of the previously suggested explanations.¹¹⁷

In *Hessler, Inc. v. Farrell*,¹¹⁸ Farrell had been hired by the defendant's father, Hessler, Sr. During his life, Hessler, Sr. had "repeatedly assured Farrell that he would receive some kind of retirement benefits."¹¹⁹ Hessler, Jr. took over the business after his

115. Compare *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 254 N.W. 221 (1934) (estopping insurer from denying liability for miscalculated insurance termination date when insured died one month prior to miscalculated date) with *Ginsberg v. Eastern Life Ins. Co.*, 118 N.J. Eq. 223, 178 A. 378 (1935) (holding insurer not estopped to assert misstatement because insured had not shown reliance).

116. See *supra* notes 86-97.

117. See *Universal Computer Sys., Inc. v. Medical Servs. Ass'n*, 628 F.2d 820 (3d Cir. 1980) (applying Pennsylvania law). There, the court used promissory estoppel to award expectation damages to a disappointed bidder on a computer lease contract. Plaintiff would have received the contract had plaintiff's bid been timely. Plaintiff's bid would have been timely but for plaintiff's reliance on defendant's agent's (unfulfilled) promise to personally pick up bid at airport. Liability can be understood in terms of defendant's agent's waiver-type modification of an implicit bargain: bids prepared according to specified requirements and submitted within deadline would receive good faith consideration. The court specifically found that defendant's agent had apparent authority to bind defendant by his promise.*Id.* at 823-24.

118. 226 A.2d 708 (Del. 1967).

119. *Id.* at 710. See also *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (holding plaintiff's retirement in reliance upon defendant's assurance to pay pension created an enforceable agreement under doctrine of promissory estoppel); *Abelson v. Genesco, Inc.*, 58 A.D.2d 774, 396 N.Y.S.2d 394 (1977) (holding plaintiff reasonably relied upon defendant's representation of retirement benefits). In some pension cases, courts enforce promises on the basis of both consideration analysis and promissory estoppel. See *Wickstrom v. Vern E. Alden Co.*, 99 Ill. App. 2d 254, 240 N.E.2d 401 (1968); *Bredemann v. Vaughan Mfg. Co.*, 40

father's death. Some time later, Hessler, Jr. asked Farrell when he intended to retire completely.¹²⁰ Farrell reminded Hessler, Jr. of the promises he had received regarding a pension. They agreed that Hessler, Jr. would pay Farrell \$12,000 a year for five years provided that Hessler's counsel approved.¹²¹ After the approval of counsel, a disagreement arose and Hessler, Jr. refused to abide by the terms of the promised pension. The court used promissory estoppel to enforce the promise.¹²²

Farrell sued alleging breach of contract. In affirming the denial of summary judgment for the defendant, however, the court used promissory estoppel without explaining why traditional bargain analysis was not used.¹²³ Perhaps the court was concerned that Farrell's retirement could not be consideration for the promised pension because Farrell was a terminable-at-will employee.¹²⁴ A similar objection could, however, be made to liability on the basis of promissory estoppel. Hessler, Jr. apparently wanted to end Farrell's employment, and could have fired Farrell without any pension had he refused to retire. Why should retirement be considered reliance? The court accepted retirement as reliance with little scrutiny, however, and courts enforcing these promises tend to find reliance easily.

Regardless of reliance, enforcement can be understood as contractual. The promise was a promise to modify the terms of an existing employment contract.¹²⁵ Thus, Farrell would in all likelihood regard it as binding and as part of a contract. In addition, as is

Ill. App. 2d 232, 188 N.W.2d 746 (1963). *See also* Kulins v. Malco, A Micro Dot Co., 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1984) (enforcing severance pay plan on consideration theory and promissory estoppel).

In some pension cases, promissory estoppel is used to avoid a problem with a formal requirement other than consideration, such as the parol evidence rule. *See infra* notes 152-59 and accompanying text.

In other pension cases, promissory estoppel is used to hold an employer to the terms of the pension that were innocently misrepresented to an employee. *See supra* note 99.

120. Due to health problems, Farrell was working part time at a reduced salary.

121. 226 A.2d at 710.

122. *Id.* at 711.

123. *Id.*

124. Hessler, Sr.'s original promises were too vague to be legally enforceable, though continued employment would have been consideration for these promises.

125. In the litigated cases, there is no evidence of opportunistic behavior by the employee or of employer vulnerability. *See supra* notes 87-99 and accompanying text. If these cases are typical, the policies behind pre-existing duty rule's limits on contract modification would not cut against enforcing the modification in pension cases. Technically, the rule would not apply since employment is terminable at will. Thus, a pension promised prior to continued employment would be supported by consideration. *See supra* note 89.

often true in cases involving promised pensions, the promise makes explicit and specific an implicit or vague understanding that the employer will give employees some sort of pension after years of faithful service. It is not, therefore, gratuitous though the consideration may have been rendered while the promise was too vague to be legally enforceable.

Often, as is likely in *Hessler*, there may be an implicit bargain. The pension is promised in order to induce an employee to retire voluntarily. Although the employee may be terminable at will, it is in the employer's interest to induce voluntary retirement rather than fire an employee who has worked faithfully for many years without any pension. Such an action would often have undesirable effects on other employees.¹²⁶ When the employer promises a pension prior to retirement rather than in exchange for retirement, continued employment would be consideration for the pension. Pension plans are a form of deferred compensation, and employers are not free to lower wages of terminable-at-will employees for periods already worked.¹²⁷ Courts sometimes have difficulty finding consideration in continued employment or voluntary retirement, however, and therefore use promissory estoppel to enforce the promised pension.¹²⁸ In addition, courts may regard legally enforceable pensions favorably on public policy grounds.¹²⁹ Notwithstanding this, courts have refused to enforce pension rights (and similar promises) when the employer has clearly indicated that the promises are not legal obligations, but rather subject to change at any time.¹³⁰

126. See, e.g., *Wickstron v. Vern E. Alden Co.*, 99 Ill. App. 2d 254, 240 N.E.2d 401 (1968) (holding that although retiring partner could have been forced out by other partners, there was consideration for his voluntary retirement; using promissory estoppel and consideration theory to enforce pension).

127. See *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1352 (8th Cir. 1980) (applying Minn. law); *Kulins v. Malco A Micro Dot Co.*, 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1984).

128. See, e.g., *Feinberg v. Pfeiffer*, 322 S.W.2d 163, 167 (Mo. Ct. App. 1959) (holding there is no consideration when employee given choice of voluntary retirement or continued employment).

129. Although courts enforcing pension rights do not expressly allude to such views, such views would be understandable in light of the many legal rules favoring legally enforceable pension rights. See, e.g., I.R.C. §§ 401(a), 501(a) (1986) (providing tax exempt status for certain legally enforceable pension funds); *Inland Steel Co.*, 77 N.L.R.B. 1, 21 L.R.R.M. 1310 (1948) (holding that pension and retirement plans are part of subject matter of mandatory bargaining for union contracts).

130. See, e.g., *Hughes v. Encyclopedia Britannica, Inc.*, 1 Ill. App. 2d 514, 117 N.E.2d 880 (1954); *Kari v. General Motors*, 79 Mich. App. 93, 261 N.W.2d 222 (1977), *rev'd on other grounds*, 402 Mich. 926, 282 N.W.2d 925 (1978); *Spooner v. Reserve Life Ins. Co.*, 47

C. Other Formal Bars to Enforcement

Although promissory estoppel tends to be regarded as an alternative to the formal requirement of a bargain, courts often use it as a basis for enforcement when other formal defects bar enforcement. In these cases, some reliance is essential. In the absence of reliance, the policy behind the formal bar argues against enforcement, and there is no great need for a remedy. Reliance need not, however, always be clearly detrimental. For a court willing to use promissory estoppel to circumvent one or more formal barriers to liability for breach of a bargain, bargained-for reliance is usually sufficient.

1. The Statute of Frauds.— Equitable estoppel has long been used to bar a plea of the Statute of Frauds when the statutory bar arises because of the plaintiff's reliance on a misrepresentation of fact such as a false statement that the defendant had signed the required writing. With the development of promissory estoppel, some jurisdictions have estopped the defendant from pleading the Statute when the defendant encouraged the plaintiff to rely by promising that a writing would be executed.¹³¹ Some jurisdictions have gone further, and allow promissory estoppel to be used when the plaintiff has relied on a promise under the Statute, though the defendant did not promise to execute a writing.¹³² In the absence of a collateral promise to execute the required writing, many, probably most, jurisdictions overtly apply promissory estoppel only in extreme cases when, according to the courts, nonenforcement would be close to fraud.¹³³

In those jurisdictions most willing to use promissory¹³⁴ estoppel overtly¹³⁵ to bar the defendant's plea of the Statute of Frauds, courts

Wash. 2d 454, 287 P.2d 735 (Wash. 1955) (holding bonus plan, which stated that employer was not contractually bound, unenforceable).

131. See *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 616 P.2d 644 (1980).

132. See *Metzger & Phillips*, *supra* note 7, at 488-491.

133. See, e.g., *Buddman Distribs., Inc. v. Labatt Importers, Inc.*, 91 A.D.2d 838; 458 N.Y.S.2d 395 (1982); *Libby Broadway Drive-in v. McDonald's Sys., Inc.*, 72 Ill. App. 3d 806, 391 N.E.2d 1 (1979).

134. Courts in these jurisdictions sometimes refer to such estoppel as equitable (rather than promissory). Promissory estoppel is, however, a more accurate term since equitable estoppel has traditionally been limited to misstatements of fact, with one limited exception not relevant here (promises to abandon legal claims). See *supra* notes 58, 128 and accompanying text. In order to avoid confusion, we use promissory estoppel to refer to estoppel on the basis of a promise (other than a promise to abandon a legal right), though the courts themselves may have described the estoppel as equitable.

135. Promissory estoppel is often used to enforce an oral promise covered by the Statute

tend to find an estoppel when there is substantial evidence (including reliance) that the promise was made, and the plaintiff has detrimentally relied on the promise. For example, in *Jamestown Terminal Elevator, Inc. v. Hieb*,¹³⁶ the court used promissory estoppel as the basis for enforcing a farmer's oral promise to sell the plaintiff 10,000 bushels of durum wheat at \$2.65.¹³⁷ As the Supreme Court of North Dakota indicated on appeal, there was "substantial evidence to support the jury's finding that Hieb [the farmer] agreed to sell a specified amount of grain to Terminal."¹³⁸ Terminal's manager and assistant manager testified that the agreement was made during telephone calls to Hieb on July 3, 1973. The transaction was routinely recorded in Terminal's business records. Documents indicated that Terminal immediately resold the same amount of durum wheat at the same price.¹³⁹ A third party, a retired farmer, testified that in early July Hieb had told him that he had recently sold 10,000 bushels of durum wheat to Terminal at \$2.65 a bushel.¹⁴⁰ The price of wheat rose substantially, reaching \$6.75 per bushel by September 4. Hieb refused to deliver and denied the parol agreement.

The Statute of Frauds serves valuable purposes. It bars contract claims based simply on parol testimony when it is likely that the contract, if made as alleged, would have been reduced to a writing. It encourages parties to document the terms of important agreements in signed contracts. The Statute simplifies the task of courts and restrains juries by keeping allegations of certain types of oral contracts out of court. By excluding claims based simply on parol testimony which may be false, the Statute prevents fraud. Like any formal requirement, however, the Statute of Frauds may produce inequitable results. In *Hieb*, if the alleged oral agreement was made,

of Frauds without any discussion of the Statute. See *infra* notes 145-46 and accompanying text.

136. 246 N.W.2d 736 (N.D. 1976). For examples of promissory estoppel used in similar cases, see *Oxley v. Ralston Purina Co.*, 349 F.2d 328 (6th Cir. 1965) (applying Michigan law); *Triology Variety Stores, Ltd. v. City Pro. Corp.*, 523 F. Supp. 691 (S.D.N.Y. 1981); *Le Blond v. Wolfe*, 87 Cal. App. 2d 282, 188 P.2d 278 (1948); *Kaye v. Melzer*, 87 Cal. App. 2d 299, 197 P.2d 50 (1948). In some jurisdictions, courts use a special standard when promissory estoppel is used to avoid the suretyship provision of the Statute of Frauds, but the promise to pay the debt of another was made to benefit the promisor himself. See, e.g., *Texarkana Constr. Co. v. Alpine Constr. Specialties, Inc.*, 489 S.W.2d 941 (Tex. Civ. App. 1973) (enforcing prime contractor's promise to pay subcontractor of subcontractor, when promise made to induce the sub-subcontractor to continue construction).

137. *Hieb*, 246 N.W.2d at 742.

138. *Id.* at 739.

139. *Id.*

140. *Id.*

the result of a strict application of the Statute of Frauds would be to deny any recovery for Terminal. But had the price of grain dropped, it is most unlikely that Hieb would have denied the contract, and Terminal might well have been bound.¹⁴¹ In effect, Hieb would be able to bind Terminal by the \$2.65 per bushel price while remaining free to sell at a higher price should the market rise.

As indicated above, jurisdictions vary considerably with respect to when a promisor is estopped to plead the Statute of Frauds as a defense to a parol agreement.¹⁴² This is not surprising, since the decision is a policy one, and will turn, *inter alia*, on how judges weigh the Statute's costs and benefits.¹⁴³ We do not attempt to identify where the line should be drawn, but simply observe that some courts use promissory estoppel as a means of enforcing promises when the costs of underenforcement are increased (because of reliance) and substantial evidence exists (often in the form of reliance) that the parol promise was actually made.¹⁴⁴ In *Hieb*, the immediate resale at the same price is evidence that the contract was made. Other evidence supports this conclusion. All considered there is substantial evidence that the parol agreement was made. In addition, Terminal's reliance in reselling at the July 3 price raises the costs of underenforcement. A court dissatisfied with the inequitable effects of a strict application of the Statute of Frauds might well consider enforcement appropriate.

The number of cases in which promissory estoppel is effectively used (either by plaintiffs or by courts) to avoid the Statute of Frauds is probably much larger than the number of cases in which promissory estoppel is overtly used for that effect. Even in jurisdictions in which promissory estoppel is rarely, if ever, overtly used to bar this defense, promissory estoppel is often used to enforce oral promises

141. Terminal's business records might have satisfied the Statute. *See* U.C.C. § 2-201(1) (1978).

142. *See supra* notes 131-36 and accompanying text.

143. The decision may also turn on the wording of the applicable state statute and the judges' views of the roles of courts and legislatures. *Compare* *Tannenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777 (Fla. 1966) (holding that promissory estoppel will not avoid the Florida Statute of Frauds and noting that the Florida legislature has not incorporated that doctrine into the Statute despite many opportunities for doing so) *and* *Keller v. Penvid*, 262 So. 2d 243 (Fla. 1972) (holding that promissory estoppel is not a basis for avoiding the Statute of Frauds in the context of an oral employment contract) *with* *New Empire Corp. v. Davidson*, 102 Wis. 2d 721, 308 N.W.2d 420 (Wis. Ct. App. 1981) (holding that oral two-year lease might be enforceable under Statute of Frauds with explicit exceptions for some relied-on promises).

144. *See supra* note 96.

covered by the Statute. Often, the Statute of Frauds is not even mentioned if the plaintiff sues only on the basis of promissory estoppel.¹⁴⁵ For example, subcontractors' oral bids to general contractors have been routinely enforced on the basis of promissory estoppel after the general contractors' reliance. In such cases, reliance does increase the costs of underenforcement, and often there is substantial evidence (including reliance) that the promise was made. In the vast majority of the cases, the Statute of Frauds is not mentioned.¹⁴⁶ In several recent cases, subcontractors have argued that the Statute of Frauds bars enforcement of their bids. Several courts have rejected the argument,¹⁴⁷ two on the basis of Illinois law, though as a general rule in Illinois a promissory estoppel claim is vulnerable to the Statute except in extreme cases when, as the courts put it, allowing the defense would be close to condoning fraud.¹⁴⁸ It is possible that had subcontractors raised this defense more consistently in earlier cases¹⁴⁹—before liability for oral bids after general contractor's reliance became so well established—these courts would have been more willing to allow the Statute of Frauds defense.¹⁵⁰ Promissory estop-

145. For examples of cases in which the Statute of Frauds is not discussed when liability is imposed on the basis of promissory estoppel, though it is likely that the promise being enforced is under the Statute, see *supra* note 136. In addition, see *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *Signal Hill Aviation Co. v. Stroppe*, 96 Cal. App. 3d 607 158 Cal. Rptr 178, (1979). See also *infra* notes 183-92 and accompanying text.

146. See *Saliba-Kringlen Corp. v. Allen Eng'g Co.*, 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971); *S.M. Wilson & Co. v. Prepakt Concrete Co.*, 23 Ill. App. 3d 137, 318 N.E.2d 722 (1974); *Constructors Supply Co. v. Bostrum Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971).

147. See *Allen M. Campbell Co. v. Virginia Metal Indus.*, 708 F.2d 930 (4th Cir. 1983) (applying North Carolina law); *R.S. Bennett & Co., v. Economy Mechanical Indus., Inc.*, 606 F.2d 182 (7th Cir. 1979) (applying Illinois law); *Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*, 36 Ill. App. 3d 1044, 344 N.E.2d 275 (1976); *Quantum Constr. Co. v. Metro Mechanical, Inc.*, No. C-850207 (Ohio Ct. App. Apr. 2, 1986).

148. See *Libby Broadway Drive-in Inc. v. McDonald's Sys., Inc.*, 72 Ill. App. 3d 806, 391 N.E.2d 1 (1979).

149. Prior to the late 1970's, we have found only two cases in which the subcontractor raised and appealed the Statute of Frauds issue. *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736, 740 n.9 (D.C. Cir. 1963)(applying D.C. law); *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 493 P.2d 1220 (1972). In *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687, 697 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. 1976) (applying Wisconsin law), the subcontractor raised the issue in the trial court. But the trial court held that the Statute of Frauds was inapplicable in promissory estoppel cases, and the subcontractor did not argue the issue on appeal. 527 F.2d at 772.

150. When subcontractors raised the Statute of Frauds defense in the late 1970's, a number of courts ruled in their favor, holding that the Statute remained an available defense despite the general contractor's reliance. See *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977) (applying California law); *McDabco, Inc. v. Chet Adams Co.*, 548 F. Supp. 456 (D.S.C. 1982)(applying South Carolina law); *C.G. Campbell & Son, Inc. v. Com-*

pel's expansion of liability beyond traditional formal limits may, at least in part, be the result of inadvertence and happenstance, rather than conscious judicial decision.¹⁵¹

2. The Parol Evidence Rule.— The purposes of the Parol Evidence Rule are quite similar to those of the Statute of Frauds. The rule excludes evidence of prior or contemporaneous promises or assurances when the court considers it likely that, had such assurances been intended to survive after the contract was embodied in a writing, the writing would have included them.¹⁵² The rule encourages parties who reduce some terms of their agreement to writing to include all terms in the writing. The Parol Evidence Rule simplifies litigation (and restrains juries) by barring some parol claims. Like the Statute of Frauds, the Parol Evidence Rule combats overenforcement by barring recovery based on perjured testimony about the terms of an agreement. The Parol Evidence Rule can, however, also yield underenforcement by barring relevant evidence of terms which were understood as part of the agreement, though not included in the writing.

Despite the many similarities between the Statute of Frauds and the Parol Evidence Rule, courts have overtly used promissory estoppel less often to avoid the Parol Evidence Rule than to avoid the Statute of Frauds.¹⁵³ Unlike the Statute of Frauds, the Parol Evidence Rule has many exceptions, and can usually be manipulated by a court determined to admit evidence.¹⁵⁴ There is, therefore, less need to use promissory estoppel to avoid this formal bar to contract liability.¹⁵⁵ In one of the few decisions in which a court has overtly

deq Corp., 586 S.W.2d 40 (Ky. Ct. App. 1979); *Anderson Constr. Co., v. Lyon Metal Prod.*, 370 So. 2d 935 (Miss. 1979); *Edward Joy Co. v. Noise Control Prods., Inc.*, 111 Misc. 2d 64, 443 N.Y.S.2d 361 (Sup. Ct. 1981).

151. For an example of a case in which the subcontractor raised the Statute of Frauds defense for the first time on appeal (when it was too late), see *Swansea Concrete Prods., Inc. v. Distler*, 126 Ill. App. 3d 927, 467 N.E.2d 388 (1984).

152. See U.C.C. § 2-202 (1978); see generally E. FARNSWORTH, *CONTRACTS* § 7.3, at 451-52 (1982).

153. Compare *Berverdor, Inc. v. Salyer Farms*, 97 Cal. App. 2d 459, 218 P.2d 138 (1950) (holding promissory estoppel not a basis for avoiding parol evidence rule) with *Kaye v. Melzer*, 87 Cal. App. 2d 299, 197 P.2d 50 (1948) (enforcing promise on the basis of promissory estoppel despite Statute of Frauds issue). See also *Metzer & Phillips*, *supra* note 7, at 493-94.

154. See McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 *YALE L.J.* 365 (1932); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 *CORNELL L. REV.* 1036 (1968).

155. For examples of cases in which the parol evidence rule seems to have been liberally applied (thus admitting evidence of parol assurance) in order to protect the plaintiff's reliance,

used promissory estoppel to bar a defense based on the Parol Evidence Rule, the exceptions to the rule could not easily be invoked. Yet, there was compelling evidence that an agent of the drafting party had assured the non-drafting party that the "parol" promise (which was in a writing signed by the drafting party's agent) would govern their relationship even after the formal contract was signed.¹⁵⁶

While there are only a few cases in which courts have overtly used promissory estoppel to avoid the Parol Evidence Rule,¹⁵⁷ plaintiffs or courts may have used promissory estoppel in other cases to avoid Parol Evidence Rule problems. By using promissory estoppel, some plaintiffs seem to avoid any mention of arguments based on the Parol Evidence Rule¹⁵⁸ despite the fact that most courts which have considered the issue have held that promissory estoppel is vulnerable to defenses based on the rule.¹⁵⁹

3. Indefinite Agreements.— Another traditional formal prerequisite for contractual liability is that all terms of the bargain must be worked out. Traditionally, even if there was an apparent intention to be legally bound and even if the plaintiff was asking only for reliance damages, a contract would be enforced only if all terms of the agreement were specified. Under both the Uniform Commercial Code

see *Hohenstein v. S.M.H. Trading Corp.*, 382 F.2d 530 (5th Cir. 1967); *Walker v. KFC*, 515 F. Supp. 612 (S.D. Cal. 1981), *modified*, 728 F.2d 1215 (9th Cir. 1984) (applying California law); *Graddon v. Knight*, 138 Cal. App. 2d 577, 292 P.2d 632 (1956); *Bussard v. College of Saint Thomas, Inc.*, 294 Minn. 215, 200 N.W.2d 155 (1972); *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis. 2d 417, 321 N.W.2d 293 (1982).

156. *Ehret Co. v. Eaton, Yale & Towne, Inc.*, 523 F.2d 280 (7th Cir. 1975) *cert. denied*, 425 U.S. 943 (1976) (applying Illinois law; enforcing manufacturer's written "parol" promise to agent, assuring agent that he would receive more in commissions on termination than the amount specified in the formal contract manufacturer wanted agent to sign).

157. *Id.* See also *Prudential Ins. Co. v. Clark*, 456 F.2d 932 (5th Cir. 1972) (applying Florida law; using promissory estoppel in similar circumstances); *Industro Motive Corp. v. Morris Agency, Inc.*, 76 Mich. App. 390, 256 N.W.2d 607 (1977) (using "estoppel" to enforce policy as represented to insured rather than as written in policy despite parol evidence rule problem).

158. For examples of liability imposed on the basis of promissory estoppel without any discussion of a probable parol evidence rule problem, see *Trilogy Variety Stores, Ltd. v. City Prods. Corp.*, 523 F. Supp. 691 (S.D.N.Y. 1981) (applying New York law; enforcing franchisor's parol promise made prior to written franchise agreement); *Oates v. Teamster Affiliates Pension Plan*, 482 F. Supp. 481 (D.D.C. 1979) (using promissory estoppel to enforce promised pension rights, though promise was parol and prior to written plan); *Van Hook v. Southern Cal. Waiters Alliance*, 158 Cal. App. 2d 556, 323 P.2d 212 (1958) (using promissory estoppel to enforce a written promise gratuitous on its face, but actually bargained-for).

159. See *Belvidere Distilling Co. v. Reconstr. Fin. Corp.*, 211 F.2d 893 (7th Cir. 1954); *Johnson v. Curran*, 633 P.2d 994 (Alaska 1981); *Berverdor, Inc. v. Salyer Farms*, 97 Cal. App. 2d 459, 218 P.2d 138 (1950).

(UCC)¹⁶⁰ and more modern case law in some jurisdictions,¹⁶¹ it is sufficient that the terms have been worked out with sufficient certainty to support a conclusion that the parties intended to be bound provided that the indefiniteness is not relevant to the remedy requested by the plaintiff.

In some jurisdictions, promissory estoppel has been used as the remedy for breach of indefinite agreements without overruling precedents holding that as a matter of contract law such agreements are wholly unenforceable. For example, in *Wheeler v. White*,¹⁶² the Texas Supreme Court used promissory estoppel to award reliance damages to a plaintiff who had relied on a formal, written agreement.¹⁶³ The agreement was wholly unenforceable under Texas precedents (as construed by the court) because, inter alia, it did not precisely specify how the yearly interest rate was to be compounded.¹⁶⁴ Because the plaintiff was only seeking reliance damages, however, any ambiguities in the written agreement were irrelevant to the requested measure of relief. The formal written agreement was sufficiently specific to indicate that the parties thought that they had a binding contract. Once the plaintiff had relied substantially on the contract, there was as much need for a remedy as for any other breach of an executory contract. In such cases, promissory estoppel is used simply to give a contractual remedy without holding that a contract so indefinite is enforceable as a contract.¹⁶⁵

160. See U.C.C. § 2-204(3) (1978) (providing "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

161. See, e.g., *Howard v. Beavers*, 128 Colo. 541, 264 P.2d 858 (1953) (awarding reliance damages, though contract for exchange of land too indefinite to be specifically enforced); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1979).

162. 385 S.W.2d 619 (Tex. Civ. App. 1964), *rev'd*, 398 S.W.2d 93 (Tex. 1965).

163. *Id.* at 97.

164. *Id.* at 95.

165. See also *Goldstick v. ICM Realty*, 788 F.2d 456 (7th Cir. 1986) (refusing to enforce as contract because "hopelessly vague;" court willing to enforce "minimum value" of promise on promissory estoppel theory); *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352 (8th Cir. 1974) (applying Missouri law; promissory estoppel used to enforce subcontractor's bid; parties had express oral conditional bilateral contract; promissory estoppel apparently used to avoid subcontractor's arguments that no clear words of commitment had ever been spoken and that all terms of the transaction had not been worked out); *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963) (remanding on promissory estoppel in subcontractor's bid case; offer by general to subcontractor contained terms other than those specified at time of bid); *Mooney v. Craddock*, 35 Colo. App. 2d, 530 P.2d 1302 (1974) (holding formal written contract not enforceable in Colorado because, inter alia, precise square footage of some areas of new building not specified; enforced with reliance damages on promissory estoppel theory).

Some courts have used promissory estoppel to enforce contracts for an indefinite term when one party has made a substantial investment in reliance on the contract. For example, some courts have held that a franchise for an indefinite term can be terminated only after a reasonable time and have construed a reasonable time as the time necessary to give the franchisee an opportunity to recoup her investment.¹⁶⁶ This same result has, however, been obtained by other courts through contract construction and interpretation, and does not represent any expansion of liability through the use of promissory estoppel.¹⁶⁷ Liability can be understood as contractual in the sense that it is likely to be the reasonable expectation of the franchisee operating under an indefinite-term franchise that she will be given at least an opportunity to recoup her investment.¹⁶⁸

As with the use of promissory estoppel to avoid Statutes of Frauds and Parol Evidence Rule problems,¹⁶⁹ promissory estoppel is often used to enforce indefinite promises without any discussion of indefiniteness. For example, in some of the cases enforcing subcontractors' bids to general contractors after the general contractor's reliance, the subcontractor backs out because she miscalculated the price, but many details of the transaction were still unspecified. Had negotiations faltered over the payment or performance schedule, it is likely that the court would have concluded that there was no agreement definite enough to be enforceable. When the general contractor sues, however, on the basis of promissory estoppel for the difference between the promised price and the price charged by the substitute subcontractor, courts routinely award this amount without any dis-

166. See, e.g., *Whorral v. Drewrys Ltd. USA*, 214 F. Supp. 269 (S.D. Iowa 1963) (applying Iowa law; oral franchise for an indefinite period "provided that the contract was not to be terminated by the defendant unless the plaintiffs did something wrong"). See also *Associated Tabulating Servs. v. Olympic Life Ins. Co.*, 414 F.2d 1306 (5th Cir. 1969) (applying Texas law; stating that defendant knew the plaintiff began providing services at a rate which amortized start-up expenses over five years, though the parties had not yet signed a formal contract or expressly agreed to any specific term); *L.S. Good & Co. v. H. Daroff & Sons*, 279 F. Supp. 925 (N.D. W.Va. 1968) (applying West Virginia or Pennsylvania law; holding that if a sales contract existed it was for an indefinite term).

167. *Clausen & Sons v. Theo. Hamm Brewing Co.*, 395 F.2d 388 (8th Cir. 1968); *J.C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484 (N.D. Cal. 1954); *Leibel v. Raynor Mfg. Co.*, 571 S.W.2d 640 (Ky. Ct. App. 1978); *Aronowicz v. Nalley's Inc.*, 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (1972).

168. See Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1144-46 (1981) (making a similar point in terms of optimal allocation of risk given possibility of opportunistic termination by franchisor).

169. See *supra* notes 131-159 and accompanying text.

cussion of the indefiniteness of other terms.¹⁷⁰ As the earlier discussion of these cases suggested, however, it is likely that both the subcontractor and the general contractor understood the price offered by the subcontractor as binding once relied on.¹⁷¹ In addition, as in *Wheeler v. White*,¹⁷² the indefinite terms are irrelevant to the requested remedy.

4. Illusory promises.— Promissory estoppel has also been used to enforce promises which traditional contract doctrine would refuse to enforce because they are illusory. For example, some courts have used promissory estoppel to enforce a promise of future employment in one particular factual setting though the employee, once employed, could be terminated at will. Under traditional contract doctrines, such promises would be wholly unenforceable because they are illusory.¹⁷³

In these cases, the plaintiff is given an offer to begin working for the defendant in the very near future. Only after receiving what appears to be a firm offer, does the applicant resign from her current job. The employer then changes its mind about hiring the plaintiff, and notifies her, prior to the date on which she was to begin work, that she does not have a job. These courts award the plaintiff compensation for her reliance loss, i.e., the loss sustained as a result of losing her original job.¹⁷⁴

In each case, the promise of employment was illusory in the sense that had the plaintiff started to work for the defendant, she could have been fired at any time for any reason or for no reason. It does not follow, however, that the promise of employment is illusory with respect to pre-employment termination. The plaintiff's loss is caused by the employer's failure to adequately evaluate whether to

170. See, e.g., *Constructors Supply Co. v. Bostrom Sheet Metal Works*, 291 Minn. 113, 190 N.W.2d 71 (1971); *Saliba-Kringlen Corp. v. Allen Eng'g Co.*, 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971).

Occasionally, subcontractors do raise "indefiniteness" problems, but courts tend to reject this defense when the general contractor's claim is based on promissory estoppel rather than contract. See *supra* note 165.

171. See *supra* note 165 and accompanying text.

172. 385 S.W.2d at 619. Typically, the general contractor seeks the difference between the price bid by the defendant subcontractor and the cost of substitute performance. Any uncertainty about payment or performance schedules would be irrelevant to this damage award.

173. See E. FARNSWORTH, *CONTRACTS* § 2.14, at 77 (1982).

174. See *Hunter v. Hayes*, 533 P.2d 952 (Colo. Ct. App. 1975); *Ravelo v. County of Hawaii*, 66 Haw. 194, 658 P.2d 883 (1983); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981).

employ the plaintiff prior to giving her a job offer. The employer is in the best position to avoid this loss by not giving an offer prior to making a final decision about employing the plaintiff. Enforcement is therefore understandable on the basis of contract since, in the absence of any explicit allocation of this risk between the parties, it should be allocated in the manner most parties would prefer, and most parties would prefer to place the risk of loss on the party in the best position to avoid it.¹⁷⁵ Moreover, most parties would expect at least reliance loss to be compensated should the employer change its mind.

True, once employment began, the employee would have been terminable at will. And the applicant may have understood the risks associated with accepting such employment. But it does not follow that the applicant would be willing to risk having no job at all on the scheduled starting date. Indeed, the facts of these cases argue strongly against any such conclusion. As each employer doubtlessly realized, the applicant resigned from her prior job only after receiving what appeared to be a firm offer. These applicants did not resign on the basis of promising interviews. Further, employers offer terminable-at-will employment because of the costs associated with post-employment limits on termination. Pre-employment limits are not nearly so costly. Employers prefer terminable-at-will arrangements "to enhanc[e] assurances of performance" and to afford flexibility in the event the employer's requirements change in the future.¹⁷⁶ Any post-employment limits on termination would severely limit the employers' ability to fire for cause or in light of changed circumstances because of the difficulty of articulating these standards and the difficulty of proving that the standards have been met.

Prior to the employee's starting date, however, satisfactory performance is not an issue. The employer can exercise total discretion in evaluating the plaintiff's potential and make its final decision prior to offering the plaintiff a job. Similarly, the employer can decide whether it needs the plaintiff as an employee in the very near future prior to offering what will appear to be a firm offer. Although there may be some uncertainties about employment needs over the next two or three weeks, the costs of resolving those uncertainties prior to making what will appear to be a firm offer are relatively low, and

175. See, e.g., A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 25 (1983); R. POSNER, ECONOMIC ANALYSIS OF LAW 82-83 (3d ed. 1986).

176. Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1134 (1981).

may be lower than the loss the plaintiff will sustain if she quits her current job and then discovers that her new employer has changed its mind.¹⁷⁷

The use of promissory estoppel to afford relief for losses sustained in reliance on a promise of future employment, a promise breached by the employer prior to the starting date of employment, can therefore be understood as contractual. Regardless of whether employment would have been terminable at will, it is reasonable to assume that when the parties have not explicitly allocated the risk of there being no job at all, the plaintiff has not assumed this risk. In these cases, as in the cases in which indefinite promises are enforced with reliance damages under either promissory estoppel or modern contract doctrines,¹⁷⁸ reliance damages can be calculated with ease, though other remedies could not be.¹⁷⁹

In the context of illusory promises, as with indefinite promises, courts use promissory estoppel as a way to enforce promises in some circumstances, though the promise would be too illusory or too indefinite to enforce as a contract in other circumstances.¹⁸⁰ In these cases, promissory estoppel may be more consistent with the understanding and expectations of the contracting parties than the dichotomous approach of traditional contract law, under which a contract is either completely enforceable or unenforceable with respect to the future. Contracting parties may understand their arrangement to be binding in the future under some circumstances, but not others, or

177. Even if the costs of resolving the uncertainty were greater than the plaintiff's pre-employment potential loss (in light of the probability of employer not needing the plaintiff by the scheduled starting date), the employer should not be able to shift this risk to the plaintiff without warning the plaintiff. See *supra* notes 174-75 and accompanying text.

178. See *supra* notes 161-69 and accompanying texts.

179. It might seem odd to award full reliance damages when the contract might have been a losing one. However, in analogous situations reliance damages are routinely awarded. For example, when expectation damages are speculative, full reliance damages are routinely awarded unless the breaching party can show that the contract would have been a losing one. In most cases the breaching party is not likely to be able to show that the contract would have been a losing one for the very reason that only reliance damages are available: expectation damages are speculative. Similarly, reliance damages are awarded by modern courts for contracts too indefinite to award expectation damages, see *supra* notes 161-68 and accompanying text. For a more complete discussion of damages in promissory estoppel cases, see Becker, *Promissory Estoppel Damages*, to be published in Vol. 16:1 HOFSTRA L. REV. (1987).

180. For an example of a court using promissory estoppel to enforce an illusory promise with reliance damages outside the employment context, see *Vigoda v. Denver Urban Renewal Auth.*, 646 P.2d 900 (Colo. 1982) (holding that where an express written agreement provided that the parties were bound to negotiate for 90 days, developer was able to collect for expenditures made in reliance on the promise of continuing negotiations).

binding only to the extent of the reliance interest.

5. Expressly bargained for reliance.— In some cases, courts limit the use of promissory estoppel to the imposition of liability when the defendant has expressly bargained-for the plaintiff's reliance. In these cases, it is likely that there is some formal problem with enforcement under traditional doctrines, but often the defect is unspecified.¹⁸¹ When reliance is expressly bargained for, a court willing to use promissory estoppel to enforce the promise despite the formal defect is likely to find reliance if the plaintiff has acted in the bargained-for manner, even if that course of conduct was in the plaintiff's best interest independent of the promise.

In *Vastoler v. American Can Co.*,¹⁸² Vastoler was first employed by American Can in 1937 and retired from American Can in 1978. During this period, there were several breaks in his employment at American Can; the last break ended in 1958. In 1963, the company wanted to promote Vastoler to a salaried supervisory position. Vastoler was reluctant to accept the promotion but said that he would if he were given full credit for all fringe-benefit purposes, including pension rights, for all service prior to 1958.¹⁸³ Under existing company plans and policies, his service prior to 1958 did not count. The company agreed. Although the promise was oral, an internal memorandum from the plant manager, who negotiated the promotion, supported Vastoler's claim.¹⁸⁴

Vastoler was given full credit for past service for all purposes, such as vacation time, from 1963 until his retirement in 1978. Only then was he told that he would not be given full credit for purposes of calculating his pension. Vastoler sued to enforce the pension as promised on two counts.¹⁸⁵ The first was that he was entitled to full credit under the express terms of the pension plan, but this claim was denied since the express terms of the plan would give him credit

181. As indicated in the preceding discussion, promissory estoppel is often used to enforce a promise without any discussion of apparent formal defects, such as the fact that the promise is oral and falls within the provisions of the Statute of Frauds, or is barred by the Parol Evidence Rule. See *supra* notes 131-159 and accompanying text.

182. 700 F.2d 916 (3d Cir. 1983) (applying New Jersey law).

183. *Id.* at 917, 920.

184. In the memo, the plant manager explained that at the time of the promotion, seniority was miscalculated with the result that "we committed ourselves to him as having sixteen (16) years of accredited service." *Id.* at 917. The manager also explained, in asking that Vastoler be given full credit for past service, that "it was necessary that we [the company] sell him [Vastoler] on all the benefits because from a financial standpoint of view, initially, he [Vastoler] was not benefitting by this promotion . . ." *Id.* at 917.

185. *Id.* at 918.

only for post-1958 employment. The other claim was based on promissory estoppel.

The district court granted summary judgment for American Can because Vastoler had not relied to his detriment.¹⁸⁶ The District Court found that Vastoler had been better off financially as a result of the promotion even without credit for the disputed years of service.¹⁸⁷ The Court of Appeals reversed and remanded, holding that a jury might reasonably find that Vastoler had detrimentally relied because of the pressures and stress of being a supervisor, and because Vastoler accepted the promotion "in exchange for full recognition of his past service"¹⁸⁸

As some commentators have noted, this approach is atypical in light of promissory estoppel's reliance requirement.¹⁸⁹ It is entirely understandable, however, in terms of traditional contract notions. When reliance is expressly bargained-for, contract law has traditionally enforced the promise regardless of whether reliance was, in hindsight, the plaintiff's most lucrative course of action independent of the promise. The only reason to hesitate before enforcing a promise when expressly bargained-for reliance has occurred is the possible presence of a formal bar.

Although no formal bar is identified in *Vastoler*, it seems likely that the plaintiff used promissory estoppel, rather than suing on the basis of the 1963 contract, because of some concern about a formal bar. There might have been a Statute of Frauds problem, since the agreement itself was oral, and insofar as it related to pension rights, might have been within the one-year provision of the Statute.¹⁹⁰ Perhaps the plaintiff's lawyer worried that the 1963 promise would be regarded as illusory or indefinite because the pension plan for salaried employees was subject to change.¹⁹¹ Perhaps there was a Parol

186. *Id.*

187. *Id.*

188. *Id.* at 920.

189. See Farber & Matheson, *supra* note 11, at 909-11.

190. The internal memo written by the plant manager might not have satisfied the Statute of Frauds.

191. One need not regard the promise as illusory even if the plan was subject to change by the employer. One could interpret the promise made to Vastoler as binding the employer to give him whatever he was entitled to (if anything) under the pension plan generally in effect for salaried employees at the time of his retirement, with full credit for all Vastoler's years of past service. This would be a substantial limit on the employer's freedom of action. The employer could limit Vastoler's pension rights only by limiting the pension rights of all salaried employees or perhaps, depending on the terms of the plan, by firing him and thus incurring a substantial detriment by losing his services. See, e.g., *Petroleum Refractionating Corp. v. Ken-*

Evidence Rule problem, because the pension plan in effect in 1978 was adopted after 1963 and contained a merger clause. Perhaps the pension plan provided that it could be modified only by certain individuals following certain procedures, and the 1963 promise did not conform to these requirements.¹⁹²

Whatever the formal flaw, the court's enforcement of an express bargain is understandable in terms of contract. There was considerable evidence that the promise was made as alleged by the plaintiff, including both the plant manager's memo and the fact that from 1963 to 1978 the plaintiff was given full credit for past service for all fringe benefit purposes such as vacation time. There are two reasons for overlooking the formal flaw in this case and avoiding under-enforcement: first, to protect the plaintiff who may have suffered a loss through reliance; and second, to prevent unjust enrichment by the defendant, who will otherwise be able to enjoy what he bargained for without paying the agreed-upon price. As *Vastoler* illustrates, the case for enforcing a manifestation of assent is often as strong when the plaintiff relies in the way the defendant bargained for as when the plaintiff relies in a way detrimental to the plaintiff.¹⁹³ Consistent with this explanation of liability, courts willing to

drick Oil Co., 65 F.2d 997 (10th Cir. 1933) (holding seller's freedom of action was sufficiently limited by an obligation either to sell a certain grade of oil or to discontinue making that grade).

192. As this suggests, promissory estoppel may be used to avoid formal bars to liability other than those discussed in the text. Since courts often impose liability only on the basis of promissory estoppel without explaining why liability would not lie in contract, it is not possible to identify all the ways in which promissory estoppel might extend liability beyond traditional limits. For example, some courts have used promissory estoppel to bind governmental entities to express or implied bargains. In these cases, promissory estoppel may be used to avoid sovereign immunity or the lack of any apparent-authority doctrine for governmental officials and agents (or for any of the reasons discussed in the text throughout this article). *See, e.g.*, *McClatchy Newspapers v. Superior Court*, 163 Cal. App. 3d 214, 209 Cal. Rptr. 598 (1985) (estopping grand jury from publishing a witness' testimony where the witness testified on reliance on grand jury's promise that the testimony would remain confidential); *Harbach v. El Pueblo De Los Angeles State Historical Monument Comm'n*, 14 Cal. App. 3d 828, 92 Cal. Rptr. 757 (1971) (using both promissory estoppel and commissioner's duty to enforce unrepealed resolutions and precluding commission from rescinding resolutions); *Hilltop Properties, Inc. v. State*, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965) (invoking promissory estoppel against governmental body where landowner relied upon promise that his land would be purchased for highway); *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945) (estopping city from issuing general obligation bonds where city officials represented at election time that such bonds would not be issued).

193. Indeed, to allow the defendant in 1978 to give the plaintiff credit for fewer years of service for retirement purposes than he was promised in 1963 would be to condone something very close to fraud. American Can had apparently known about the problem, i.e., the difference between *Vastoler's* understanding of his seniority and his actual seniority, since shortly

enforce (formally flawed) bargains when the plaintiff has relied in the bargained-for manner, tend to be satisfied with bargained-for reliance regardless of whether reliance might have been in the plaintiff's best interest independent of the promise.¹⁹⁴ Some courts might, depending on how they value the formal requirements of contract, decline to enforce such a promise because of the formal defect(s).¹⁹⁵ For a court willing to enforce such a promise, however, once there is sufficient evidence that the bargain was actually struck, liability can be understood as contractual.

The use of promissory estoppel to afford relief for an express bargain, without any discussion or even mention of why promissory estoppel is used rather than more traditional doctrines, is nevertheless troubling. This approach, common in promissory estoppel cases, as has been noted repeatedly, obscures the only real issue in the case: Whether the formal flaw, whatever it is, should bar enforcement.¹⁹⁶ Regardless of how this issue is decided, it should surely be discussed. Courts, however, usually confine themselves to the issues presented by the parties. When facing promissory estoppel claims, defendants' lawyers often seem to ignore defenses based on traditional formal limits to contractual liability. Depending on the facts of the case, and the court's attitude toward the formality at issue, the defense might not prevail, but defenses based on formal requirements have not been so unsuccessful in promissory estoppel cases as to explain entirely defendants' failure to raise them.¹⁹⁷

after the 1963 promotion. At the urging of the plant manager, the company had given Vastoler full credit for past service for all purposes from 1963 to 1978, leading him to believe that he would also be given full credit for his pension rights when he retired in 1978. After accepting services rendered with the knowledge that Vastoler thought that his services were given in exchange for full credit for past service for pension purposes as well, American Can should not be able to unilaterally cut compensation for services already rendered. To allow American Can to do so, would be equivalent to allowing it to reduce wages for weeks already worked. A wage promised to a terminable-at-will employee might not be enforceable with respect to the future, but it is enforceable with respect to the past. *See supra* notes 111-13 and accompanying text.

194. *Vastoler*, 700 F.2d at 916; *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980) (applying Minnesota law); *Oates v. Teamsters Affiliates Pension Plan*, 482 F. Supp. 481 (D.D.C. 1979) (applying Michigan or District of Columbia law); *Van Hook v. Southern Cal. Waiters Alliance*, 158 Cal. App. 2d 556, 323 P.2d 212 (1958).

195. *See Advocat v. Nexus Indus. Inc.*, 497 F. Supp. 328 (D. Del. 1980) (applying Delaware law; holding that Statute of Frauds bars a promissory estoppel claim for breach of an oral promise to provide a pension).

196. *See supra* notes 145-51 and accompanying text. *See generally* Henderson, *supra* note 4, at 355-57.

197. For cases which have held that promissory estoppel will not bar application of the Statute of Frauds or the parol evidence rule as a limit on liability, see *C.G. Campbell & Son, Inc. v. Comdeg Corp.*, 586 S.W.2d 40 (Ky. Ct. App. 1979) (precluding use of promissory

As noted in the introduction, courts often use promissory estoppel to impose liability as an alternative holding and reach the same result under traditional contract doctrines. We have not discussed such cases because they can tell us nothing new about the circumstances under which courts are willing to impose liability for breach of a promise. In those cases in which liability is based exclusively on promissory estoppel, liability can almost always be understood as contractual in the sense that the promisor apparently intended to make a binding commitment under an objective standard. Normal enforcement would, however, likely run afoul of one or more of the many formal requirements for an enforceable contract.

The liability imposed in other promissory estoppel cases cannot be explained as contractual, even in the very broad sense in which we have used the term. We now turn to consider what factors might explain why a court would use promissory estoppel to impose liability when it is unlikely that the parties regarded an assurance as legally binding.

II. Misrepresentation

Traditional contract and tort doctrines afford remedies for some misrepresentations. Traditional contract doctrine provides a remedy for misrepresentations in the form of promises or facts, but a contract remedy is available only if the assurance is part of a bargained-for exchange and there is no formal bar to enforcement. When liability lies in contract, it is usually strict, and imposed regardless of whether the misrepresentation was innocent, negligent, or fraudulent.¹⁹⁸ Indeed, liability will lie for breach of a promise even if there is no misrepresentation at all.¹⁹⁹

Tort law provides a remedy for some negligent or reckless misrepresentations of fact. In almost all jurisdictions, liability will lie in tort if the speaker made a misrepresentation of fact negligently or with reckless disregard for the truth in order to induce desired reli-

estoppel where party relied on an oral bid within the Statute of Frauds); *Lige Dickson Co. v. Union Oil Co.*, 96 Wash. 2d 291, 635 P.2d 103 (1981) (applying Washington law, holding an oral promise falling within the Statute of Frauds not enforceable); *cf. Bervador, Inc. v. Salyir Farms*, 97 Cal. App. 2d 459, 218 P.2d 138 (1950) (excluding application made contemporaneously with a written lease by operation of the parol evidence rule).

198. See Barnett, *supra* note 24, at 306.

199. A false statement of fact, no matter how innocent, is a misrepresentation. But a promise, which is subsequently not fulfilled, may not have been a misrepresentation of anything at the time it was made. At that time, the promisor may have had every intention of fulfilling the promise.

ance provided that the plaintiff reasonably relied in the desired manner.²⁰⁰

In almost all American jurisdictions, tort law also provides a remedy for some promissory misrepresentations made to induce reasonable reliance desired by the speaker.²⁰¹

For liability to lie in tort, however, a promissory misrepresentation must be a lie when made. If at the time the promise is made to induce desired reliance, the promisor has no intention of performing, liability will be established. Liability will not lie in tort, however, if the promisor made the promise to induce desired reliance and hoped that the promise would be fulfilled.²⁰² Thus, tort affords no general remedy for breach of a promise made to induce desired reliance even when the promisor knows that the promisee will consider the promise

200. See, e.g., W. PROSSER & W. KEETON, *supra* note 15, §§ 105-09, at 725-64. Jurisdictions vary in whether they label this tort as negligent misrepresentation or as fraud or as deceit. *Id.* § 105, at 734-35. In the majority of jurisdictions, liability is strict for a misrepresentation of fact made to induce desired reliance. See *id.* § 107, at 746. There are, however, some limits on liability for factual misrepresentation not mentioned herein. For example, vague sales talk is only "puffing," and cannot be the basis for actionable misrepresentation of fact. *Id.* § 109, at 756-57.

In some jurisdictions, courts say that actual dishonesty or moral fault is required, not just negligence. These courts, however, usually find such dishonesty if the misrepresenter based her statement on unreliable information, and a reasonable person would have realized that she was acting carelessly. There appears to be, therefore, little practical difference between the jurisdictions requiring only negligence and those requiring dishonesty or moral fault. See *id.* § 109, at 745-46.

201. See 37 Am. Jur. 2d *Fraud and Deceit* § 64, at 97-100 (1968). In a very few American jurisdictions, promissory fraud is not actionable even though the promise was a lie when made. See *id.* § 72, at 111-13 (citing cases from Colorado, Illinois, Indiana, Missouri, and Vermont).

202. See, e.g., W. PROSSER & W. KEETON, *supra* note 15, § 109 at 762-64. There are a few tort cases in which courts have imposed liability for breach of a promise, though the promise was not a lie when made. These cases, however, involved physical injury and suffering. See, e.g., *Marsalis v. LaSalle*, 94 So. 2d 120 (La. Ct. App. 1957) (imposing liability for breach of promise causing plaintiff to undergo painful series of rabies shots); *Johnson v. Souza*, 71 N.J. Super. 240, 176 A.2d 797 (1961) (allowing plaintiff to go to jury in action seeking compensation for injuries sustained after defendant failed to salt icy sidewalk as promised).

In addition, some courts have imposed tort liability for breach of a promise when physical injury or suffering is foreseeably caused by reliance on a promise, made in good faith, by one party to an existing contract. See, e.g., *Mixon v. Dobbs Houses Inc.*, 149 Ga. App. 481, 254 S.E.2d 864 (1979) (holding employer liable for wife's suffering after breaking promise to employee husband to pass along message that she was in labor); *Abresh v. Northwestern Bell Tel. Co.*, 246 Minn. 408, 75 N.W.2d 206 (1956) (imposing liability in tort for negligently failing to pass along emergency messages after promising to do so, although phone company not contractually obligated).

Even these most "liberal" tort cases, imposing liability in tort for negligent promising, cannot explain liability in the promissory estoppel cases, see *infra* notes 203-14 and accompanying text, since the promissory estoppel cases do not involve physical injury and suffering.

more reliable than it actually is.

A few courts have used promissory estoppel to impose liability when traditional contract or tort doctrines would also afford a remedy for the misrepresentation.²⁰³ In *Goodman v. Dicker*,²⁰⁴ estoppel²⁰⁵ was used to impose liability though liability could probably have been imposed under the then-existing tort standard and possibly in contract on the basis of agency principles.²⁰⁶ In *Goodman*, the local distributors of a franchisor were held liable for the plaintiffs' reliance loss on an assurance that the franchisor had decided to award plaintiffs a franchise.²⁰⁷

The plaintiffs had written the franchisor in New York (Emerson Radio & Phonograph Corporation) and asked about a franchise. The defendants (Emerson Radio of Washington) responded, explaining to the plaintiffs that the franchisor had written suggesting that the defendants contact the plaintiffs.²⁰⁸ After some discussions, the defendants gave the plaintiffs a franchise application. The application required the defendants' (the local distributor's) approval. The plaintiffs submitted the application to the defendants. The defendants signed the application, noting their approval, and submitted it to the franchisor.²⁰⁹ The plaintiffs' reliance on the defendants' assurance (that the franchisor had decided to award the franchise) was therefore "reasonable;" the defendants appeared to be in a position to know about the franchisor's decision. The defendants offered the assurance to induce the plaintiffs to hire salesmen and to begin selling Emerson radios prior to the receipt of a formal franchise certificate.

203. In some cases, courts impose liability both on the basis of promissory estoppel and on the basis of misrepresentation or fraud. *See, e.g.*, *Walker v. KFC Corp.*, 515 F. Supp. 612 (S.D. Cal. 1981) (applying California law).

204. 169 F.2d 684 (D.C. Cir. 1948) (applying D.C. law).

205. The court used "estoppel" rather than "promissory estoppel" to describe the basis of liability. *Id.* at 685.

206. *See also Chrysler v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958). There, the court used promissory estoppel to afford a remedy for breach of a promise to give the plaintiff a franchise. Because the promise was both a legally enforceable bargain and a lie when made, liability could have been imposed on the basis of traditional contract or tort doctrines. Indeed, it is not clear whether the court based its holding only on promissory estoppel, or on traditional contract notions as well. The remedy afforded, however, suggests that the basis of liability may have been (intentional) tort since the measure of damages seems to include a punitive element. *See Becker, Promissory Estoppel Damages*, to be published in Vol. 16:1 HOFSTRA L. REV. (1987).

207. 169 F.2d at 685.

208. Joint Appendix at 5-6; *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948).

209. Joint Appendix at 7, 9-10.

Contrary to the defendants' assurance, the franchisor had not decided to award the plaintiffs a franchise. When the decision was made, it was negative. The plaintiffs sued the defendants for losses sustained in reliance on their assurance.

Liability might have been imposed in contract if the defendants gave the plaintiffs the impression that they (the defendants) were speaking as authorized agents of the franchisor when they assured the plaintiffs that the franchisor had made an affirmative decision.²¹⁰ If so, the defendants would be liable for breach of their implied warranty of agency.²¹¹ Neither the trial court nor the appellate court, however, explicitly made such findings of fact.

It seems more likely that the decision is based on tort notions;²¹² the imposition of liability is consistent with the then-existing tort standard. This mistaken assurance can be regarded as a false state-

210. See RESTATEMENT (SECOND) OF AGENCY § 329 comment g, illustration 8 (1957). The defendants would then be liable to the plaintiff "for the harm caused to him by the fact that the agent was unauthorized, but also for the amount by which he would have benefited had the authority existed." *Id.* § 329 comment j, at 85.

211. Alternatively, the defendants may have been agents with apparent authority to bind their principal (the franchisor). This seems less likely, however, since apparent authority requires that the principal act in such a way as to give third parties the impression that the "agent" has authority to bind the principal. See RESTATEMENT (SECOND) OF AGENCY § 8, comments a & b (1957). It is questionable whether asking the local distributors to respond to the plaintiffs' request for franchise information and requiring that the application be submitted to, and approved by, the local distributors, would make the defendants agents with apparent authority given the clear language in the application indicating that the franchisor would make the final decision: "Based on the above, consideration will be given to the issuance of the Franchise Certificate upon the approval of the Emerson Radio distributor in the territory." Joint Appendix at 10. The defendants may nevertheless have led the plaintiffs to believe that the defendants were authorized agents, though the franchisor does not seem to have done so. In any event, the doctrine of apparent authority cannot explain the result in this case, since it would justify holding the principal (the franchisor) but not the agent (the defendants) to the contract. See RESTATEMENT (SECOND) OF AGENCY § 328 (1957).

212. Not only did both courts fail to make the findings of fact necessary for contract liability, it is likely that the appellate court intended to base its decision on tort doctrines. Although the case is widely cited as a promissory estoppel case, the court itself did not use the words "promissory estoppel." The court mentions "estoppel," but cites equitable estoppel cases. The factual misrepresentation strand of traditional equitable estoppel is closely related to the modern tort of reckless or negligent factual misrepresentation, See *infra* notes 216-222. For a similar case imposing liability in tort for factual and legal misrepresentation, and using the term estoppel to describe the basis of liability, see *Cellucci v. Sun Oil Co.*, 320 N.E.2d 919 (Mass. App. Ct. 1974) (treating agent's description of internal procedures, which included assurance that home office approval was a bureaucratic formality, as misstatements of fact). Thus, it is likely that the *Goodman* court based liability on tortious misrepresentation of fact, rather than on promissory estoppel. True, the court refers to defendants' "promise" and "assurances that a franchise would be granted," *Goodman*, 169 F.2d at 685, but it also notes that the defendants "represented that the application had been accepted." *Id.* at 684.

ment of fact: that the franchisor had made an affirmative decision when it had not.²¹³ Tort would afford a remedy for this misstatement of fact since the defendants made the misrepresentation negligently or recklessly: the defendants had no basis for thinking that the franchisor had made any decision.²¹⁴ In addition, the assurance was made to induce the plaintiffs to rely in a way desired by the defendants.²¹⁵

In a few cases, promissory estoppel has been used to afford a remedy for misrepresentation beyond those available under traditional contract and tort doctrines. In these cases, it seems likely that the defendant made a promise in order to induce the plaintiff to rely in a desirable way, knowing that the plaintiff would regard the promise as more reliable than it actually was. The best known of these cases is *Hoffman v. Red Owl Stores*.²¹⁶ The Hoffmans owned

213. In the letter informing the plaintiffs that a franchise would not be awarded, the defendants virtually admitted the misrepresentation:

During the numerous times that we have spoken about your franchise, your application was being held up for approval at the factory. I led you to believe that it had been accepted although I was trying to convey to you the fact that the application had been sent in to the factory, and usually, they accept same without hesitation.

Joint Appendix at 17-18, *Goodman* (No. 9786).

214. A false statement of another person's present intention with respect to his future actions is a misrepresentation of fact and is therefore actionable "provided the other elements of fraud are present." 37 AM. JUR. 2D, *Fraud and Deceit*, § 67, at 102 (1968).

215. Negligent or reckless misrepresentation of fact was actionable in tort in the District of Columbia at the time *Goodman* was decided. See, e.g., *Rosenberg v. Howle*, 56 A.2d 709 (D.C. 1948). For a recent decision imposing tort liability for factual misrepresentation in a case much like *Goodman*, see *Celluci v. Sun Oil Co.*, 320 N.E.2d 919 (Mass. App. Ct. 1974). See also *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981) (applying Wisconsin law). According to the factual findings of the lower court in *Walters*, "[p]laintiffs told defendant that they would not proceed with the project and spend One Hundred Thousand Dollars (\$100,000.00) unless they were assured of being a Marathon dealer. Defendant then told plaintiffs they were a Marathon dealer," though certain formalities remained to be completed. *Walters v. Marathon Oil Co.*, No. IP 79-625-C, slip op. at 3 (S.D. Ind. Feb. 20, 1980). Thus, as in *Goodman*, the defendant in *Marathon* misled plaintiff's about their status as franchise applicants. This misrepresentation can be regarded as one of fact: that the Marathon organization had decided to award a franchise to the plaintiffs when no final internal decision had actually been made. Therefore, liability could have been imposed under the contemporary tort standard for factual misrepresentation. Liability might also have been imposed in contract on the ground that the Marathon agents had the apparent authority to bind Marathon to a contract prior to Marathon officials signing the formal contract. The trial court found that the agents involved had the apparent authority "to seek out business for the defendant's benefit," and that these agents "acted within the course and scope of such authority in dealing with the plaintiffs." *Id.* Furthermore, all key terms of the franchise agreement had been worked out (e.g., terminable by either party with thirty days written notice at the end of each twelve month period).

216. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

and operated a bakery in Wautoma, Wisconsin, but were interested in a franchise for a Red Owl grocery store. The defendant's agents repeatedly assured Mr. Hoffman that Red Owl would give the plaintiffs a franchise in Chilton for a total cash outlay of \$18,000. Although the terms of the franchise were never worked out, Red Owl agents encouraged Mr. Hoffman to rely on their assurances in many specific and potentially costly ways desired by Red Owl.²¹⁷ Apparently, the agents had made the representation that \$18,000 would be enough without consulting Red Owl's credit manager regarding Hoffman's financial standing and the financing of the store.²¹⁸ When the credit manager was consulted, the cash needed by Hoffman increased dramatically, and the deal fell through.

Liability would lie in contract, even under an objective standard, only for Hoffman's reliance on what Hoffman reasonably thought was an enforceable contract. Much of Hoffman's reliance occurred, however, at a very early point in negotiations prior to the parties agreeing on such basic terms as the town the store would be in. When negotiations finally broke down, long after most of Hoffman's reliance, the parties had yet to agree on the specifications for the new store or many of the terms of the lease. It is unlikely, even at that late date, that Hoffman reasonably thought that he and Red Owl had a legally binding franchise agreement.

Similarly, liability cannot be explained by the then-existing tort standard for promissory misrepresentation. At the time the Red Owl agents assured Hoffman that \$18,000 cash would be enough, the agents hoped that it would be enough. As the court noted, a tort action for misrepresentation "cannot be predicated on unfulfilled promises unless the promisor possessed the present intent not to perform."²¹⁹ Although the court imposed liability on the basis of promissory estoppel, it did not explain why liability was appropriate in the absence of either a contract or a tort.²²⁰

If, however, a court considers liability appropriate when a promisor makes a promise in order to induce desired and detrimental reliance with the knowledge (or under circumstances such that he should know) that the promisee will consider the promise more relia-

217. *Id.* at 689, 133 N.W.2d at 269.

218. *Id.*

219. *Id.* at 692, 133 N.W.2d at 273; *See supra* note 214.

220. The court only noted that the plaintiffs had relied on the defendant's promise, and that whether liability was appropriate involved a discretionary policy decision by the court as to whether a remedy was needed to prevent injustice.

ble than it actually is, liability is understandable. Red Owl's agents apparently assured Hoffman that \$18,000 cash would be enough without talking to the Red Owl employee who would ultimately decide how much cash would be required. The agents were (or should have been) more familiar than Hoffman with the allocation of authority within the Red Owl organization. They knew (or should have known) that the assurance would appear to Hoffman to be more reliable than it actually was.

Hoffman is the first of a small but continuing line of cases in which courts have used promissory estoppel to afford a remedy for negligent promissory misrepresentation, i.e., to afford relief when a promise is made to induce a promisee to rely in a desired way in circumstances such that the promisor knows (or should know) that the promise will appear to be more reliable than it is. In each of these cases, the plaintiff relied detrimentally on the defendant's promises.²²¹ Consistent with this explanation of liability—that it is based on misrepresentation of the reliability of the promise—courts have generally denied relief for losses sustained during preliminary negotiations no matter how reasonable the reliance.²²²

221. For a case quite similar to *Hoffman*, see *Werner v. Xerox Corp.*, 732 F.2d 580 (7th Cir. 1984) (applying Wisconsin law). Wolf, a Xerox agent, encouraged Werner to set up production of "off-load rollers" by assuring Werner that Xerox would buy them. When Wolf's supervisor visited the facility, he immediately told Werner that the facility would never make parts for Xerox. It seems likely that Wolf knew, or should have known, that his assurances would appear more reliable to Werner than they actually were. Liability might therefore be based on negligent promissory misrepresentation. Liability would not lie in contract because too few terms of the exchange were worked out for Werner to have reasonably thought that there was a binding contract. Xerox also produced these parts (on equipment built by Werner) and nothing had apparently been said about price, quantity, or duration of any supply contract.

In two cases, the measure of damages suggests that the courts used promissory estoppel to impose tort liability. In both cases, some lower measure of damages could have been imposed on the basis of contract principles, but punitive damages were appropriate because the defendants intentionally and deliberately led the plaintiffs to think that a promise was more reliable than the defendants intended it to be. See *Greenstein v. Flatley*, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985); *Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958).

In *Greenstein*, the court indicated that it was using promissory estoppel to remedy misrepresentation, see *supra* note 204, and imposed punitive damages because the misrepresentation was intentional. See *supra* note 200. Although the promissory misrepresentation was made intentionally to mislead the plaintiffs, it might not have been a lie when made under Massachusetts case law. See *McCusker v. Geiger*, 195 Mass. 46, 80 N.E. 648 (1907) (requiring the additional element of an "affirmative" intent not to perform for a promise to be a lie when made).

222. See, e.g., *Gruen Indus. Inc. v. Biller*, 608 F.2d 274 (7th Cir. 1979); *Wright v. U.S. Rubber Co.*, 280 F. Supp 616 (D. Or. 1967) (applying Oregon law); *Bender v. The Design Store*, 404 A.2d 194 (D.C. 1979). In these cases, reliance is often reasonable in the sense that

The courts using promissory estoppel to impose liability for negligent promissory misrepresentation could reach the same result under tort, by changing the standard for promissory misrepresentation from lie-when-made to negligent or reckless. For over a hundred years, however, common law courts have repeatedly held that tort liability for promissory misrepresentation requires that the promise be a lie when made.²²³ The tort standard has become fairly rigid, and promissory estoppel is a relatively new, and certainly more flexible basis for liability. Plaintiffs' and courts' use of promissory estoppel rather than tort to remedy misrepresentation (even if actionable also in tort)²²⁴ might have significant consequences, giving the plaintiff some important advantage.²²⁵ Two possible differences are the

a reasonable person would rely. For a discussion of the circularity of reasonable reliance as a basis for enforcement, see Barnett, *supra* note 24, at 274.

223. See, e.g., *Sawyer v. Prickett*, 86 U.S. (19 Wall.) 146 (1875); *Farwell v. Colonial Trust Co.*, 147 F. 480 (8th Cir. 1906); *Henry v. Continental Bldg. & Loan Ass'n*, 156 Cal. 667, 105 P. 960 (1909); *McElrath v. Electric Inv. Co.*, 114 Minn. 358, 131 N.W. 380 (1911); *Davis v. Reynolds*, 107 Me. 61, 77 A. 409 (1910), all cited for the current standard for promissory misrepresentation in W. PROSSER & W. KEETON, *supra* note 14, § 109, at 762 n.80.

224. Six cases are cited or discussed in this section as cases in which courts may have used promissory estoppel (or estoppel) to impose liability on the basis of tort principles. See *supra* notes 204-06, 216, 221. In three of these cases, a tort remedy could have been afforded on the basis of the then-current standard for actionable misrepresentation in tort. See *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981) (applying Wisconsin law; negligent or reckless factual misrepresentation); *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948) (using estoppel to impose liability for negligent or reckless factual misrepresentation); *Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958) (where the promise was a lie when made).

Three cases imposed liability for misrepresentation which might not have been actionable in tort under the applicable tort standard. See *Werner v. Xerox Corp.*, 732 F.2d 580 (7th Cir. 1984) (applying Wisconsin law; promise not a lie when made); *Greenstein v. Flatley*, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985) (intentional promissory misrepresentation which might not have been a lie when made under the Massachusetts standard); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (promise not a lie when made).

In two of the six cases, the basis of liability might (but might not) have been contract: *Walters v. Marathon Oil Comp.*, 642 F.2d 1098 (7th Cir. 1981) (applying Wisconsin law); *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948). See Becker, *Promissory Estoppel Damages*, to be published in vol. 16:1 HOFSTRA L. REV. (1987).

In four, liability seems to lie in tort (not contract) either because negotiations broke down too early for a reasonable person to think that there was a contract, *Werner v. Xerox Corp.*, 732 F.2d 580 (7th Cir. 1984) (applying Wisconsin law); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), or because the court overtly or implicitly imposed punitive damages for intentional misrepresentation, *Greenstein v. Flatley*, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985) (overt); *Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958) (implicit).

225. In addition to the differences discussed herein, contract and tort have different approaches to one agency issue: When is a principal liable for an agent's representation in the context of a bargain transaction? In contract, the standard is apparent authority. See RESTATEMENT (SECOND) OF AGENCY § 8, comment a, b (1957). In tort, there is a different

applicable statute of limitations and the measure of damages.²²⁶

In none of the cases cited or discussed above was promissory estoppel used to extend the limitations period.²²⁷ Usually, the question is whether (if promissory estoppel is used) the statute of limitations for oral contracts will apply or (if misrepresentation is used) the statute of limitations for fraud or deceit will apply. In most (thirty-one) American jurisdictions, the statute of limitations for fraud or deceit is as long as the statute of limitations for breach of an oral contract.²²⁸ In two states, the limitations period is actually

(somewhat lower) standard for principal liability for misrepresentation by an agent. *See id.* § 258. The existing promissory estoppel case law does not, however, suggest that promissory estoppel is being used in contract-type cases to avoid the contract standard for principal liability since the results in promissory estoppel cases are usually consistent with contract agency principles. *See Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958) (applying traditional apparent authority principles in promissory estoppel case); *supra* note 197; Farber & Matheson, *supra* note 11, at 916-19.

In the one promissory estoppel case in which the tort standard for principal liability seems to have been used, liability was based on tort: intentional, though not necessarily lies-when-made, promissory misrepresentations. *See Greenstein v. Flatley*, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985).

226. In addition, in California, there is no right to jury trial in promissory estoppel cases. *See C&K Eng'g v. Amber Steel Co.*, 23 Cal. 3d 1, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978) (stressing the equitable nature of promissory estoppel). This would not, however, seem to give plaintiffs any advantage in using promissory estoppel rather than tort. As mentioned in the introduction, the measure of damages is the subject of another article.

227. In the six cases cited *supra* note 224, promissory estoppel might have been used to impose liability for misrepresentation. In five of these cases, there is no difference between the promissory estoppel limitations period and the tort period. *Compare Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981) (applying Wisconsin law); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 83, 133 N.W.2d 267 (1965) (applying Wisconsin law) and *Werner v. Xerox Corp.*, 732 F.2d 580 (7th Cir. 1984) (applying Wisconsin law) with Wis. STAT. ANN. §§ 893.43, 893.93 (West 1983) (contract limit same as fraud limit); *compare Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948) (applying D.C. law) with D.C. CODE ANN. § 12-301 (1981) (contract limit same as fraud limit); *compare Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958) (applying Delaware law) with DEL. CODE ANN. tit. 10 § 8106 (1974).

In one, *Greenstein v. Flatley*, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985) (applying Massachusetts law), the fraud statute (three years) was shorter than the oral contract standard (six years), *see* MASS. ANN. LAWS ch. 260 § 2-2A (Law. Co-op. 1959), but the action was almost certainly brought within the shorter period. *See Greenstein*, 19 Mass. App. Ct. at 352, 474 N.E.2d at 1131 n. 3, 1132 (trial court rendered judgment about three and one-half years after cause of action accrued).

228. ARIZ. REV. STAT. ANN. § 12-543 (West 1956); CONN. GEN. STAT. ANN. § 52-577, -581 (West 1958); DEL. CODE ANN. tit. 10, § 8106 (1974); D.C. CODE ANN. § 12-301 (1981); FLA. STAT. ANN. § 95.11 (West 1982); GA. CODE ANN. § 9-3-25 (1982); HAW. REV. STAT. § 657-1 (1985); ILL. ANN. STAT. ch. 110, ¶ 13-205 (Smith-Hurd 1984); IND. CODE ANN. § 34-1-2-1 (West 1983); IOWA CODE ANN. § 614.1 (West 1946 & Supp. 1987); KY. REV. STAT. ANN. § 413.120 (Michie/Bobbs-Merrill 1970); ME. REV. STAT. ANN. tit. 14, § 752 (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984); MICH. COMP. LAWS ANN. §§ 600.5807, -5813 (West 1987); MINN. STAT. ANN. § 541.05 (West 1947 & Supp. 1987); MISS. CODE ANN. § 15-

longer for fraud than for breach of an oral contract.²²⁹ Thus, in thirty-three of the fifty-one American jurisdictions, the use of promissory estoppel, rather than misrepresentation, is not likely to give the plaintiff any advantage with respect to the applicable limitations period.²³⁰

In eighteen jurisdictions, the plaintiff is better off with the statute of limitations for oral contracts than the limitation period for fraud or deceit.²³¹ Judges in these jurisdictions might want to consider whether the tort statute of limitations should apply when the basis of liability in promissory estoppel is actually misrepresentation rather than contract.²³²

1-29, -49 (1972 & Supp. 1986); MO. ANN. STAT. § 27-2-202, -203 (Vernon 1949); NEB. REV. STAT. §§ 25-206, -207 (1943); N.H. REV. STAT. ANN. § 508:4 (1983 & Supp. 1986); N.J. STAT. ANN. §§ ZA:14-1, 12A:2-725 (West 1952,1962); N.M. STAT. ANN. § 37-1-4 (1978); N.Y. CIV. PRAC. L. & R. § 213 (McKinney 1972 & Supp.1987); N.C. GEN. STAT. § 1-52 (1983); N.D. CENT. CODE § 28-01-16 (1974 & Supp.1987); R.I. GEN. LAWS § 9-1-13 (1985); S.C. CODE ANN. §§ 15-3-530, 15-51-10 (Law Co-op. 1976 & Supp. 1986); S.D. CODIFIED LAWS ANN. § 15-2-13 (1984); TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958); VT. STAT. ANN. tit. 12 § 511 (1973); WASH. REV. CODE ANN. §4.16.080 (1962); WIS. STAT. ANN. §§ 893.43, .93 (West 1983).

229. ARK. STAT. ANN. §§ 37.206, 37.213 (1962); CAL. CIV. PROC. CODE §§ 338-39 (West 1987). In some instances, the limitations period for fraud may be longer than the period for breach of contract because the fraud period begins to run only when the plaintiff learns, or should have learned, of the fraud. *See, e.g.,* *Brick v. Cohn-Hall-Marx*, 276 N.Y. 259, 11 N.E.2d 902 (1937)(holding six-year fraud period longer than six-year contract period because the latter begins to run earlier). In that case, the court held that action for alleged fraud, which was also breach of contract, was barred by the shorter contract statute of limitations. When both contract and fraud actions lie, the plaintiff is not always free to choose the longer limitations period. *Id.* at 264, 11 N.E.2d at 904. *See infra* note 208. .

230. The issue discussed in the text is whether, when there is no contract, the contract statute of limitations (applied in promissory estoppel cases) offers the plaintiff an advantage over the tort statute. When there is both a contract and misrepresentation, plaintiffs are not always free to pick the longer limitations period, though jurisdictions vary with respect to which limitations period (contract or fraud) applies. *See* 51 AM. JUR. 2D *Limitation of Actions* §§ 61, 62 at 640 (1970).

231. ALA. CODE § 6-2-34, -38 (1975 & Supp. 1985); ALASKA STAT § 09.10.070 (1962); COLO. REV. STAT. §§ 13-80-108, -110 (1973 & Supp. 1986); IDAHO CODE §§ 5-217 to 218 (1949); KAN. STAT. ANN. §§ 60-512 to 513 (1983); LA. CIV. CODE ANN. art. 3492, 3494, 3497 (West Supp. 1987) (in Louisiana most contract actions have a longer limit than fraud, but some have the same limit as fraud); MASS. GEN. LAWS ANN. ch. 260 §§ 2-2A (West 1959); MONT. CODE ANN. §§ 27-2-202 to -203 (1985); NEV. REV. STAT. ANN. § 11.190 (Michie 1986); OHIO REV. CODE ANN. §§ 2305.07, .09 (Anderson 1981); OKLA. STAT. ANN. tit. 12 § 95 (West Supp. 1987); OR. REV. STAT. §§ 12.080, .110 (1985); 42 PA. CONS. STAT. ANN. §§ 5524-5525 (Purdon 1981 & Supp. 1987); TENN. CODE ANN. §§ 28-3-1105, 109 (1980); UTAH CODE ANN. §§ 78-12-25 to -26 (1987); VA. CODE § 8.01-246 (1984); W. VA. CODE §§ 55-2-6, -13 (1981); WYO. STAT. § 1-3-105 (1977).

232. In addition, in some jurisdictions parol evidence rule arguments are effective in avoiding liability for fraud. *See, e.g.,* *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320, 157 N.E.2d 597, 599, 184 N.Y.S.2d 599, 601 (1959) (holding that a specific disclaimer in a writ-

The use of promissory estoppel to remedy misrepresentation may nevertheless be problematical in all jurisdictions. Courts taking this approach impose liability by ritualistically invoking the black letter of promissory estoppel without ever addressing the only issue in the case: Whether liability should lie for this form of misrepresentation.²³³ Had the court in *Hoffman v. Red Owl*, for example, addressed the question of whether liability should be imposed for negligent promissory misrepresentation, given the facts of the case, it might have come to a different conclusion and certainly a more understandable one.²³⁴

CONCLUSION

In this article, we have suggested that promissory estoppel is neither an unfathomable conundrum nor a radical break with tradi-

ten contract "destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations"); *Spires v. Relco, Inc.*, 165 Ga. App. 4, 7, 299 S.E.2d 58, 61 (1983) (holding that disclaimer and merger clause gave plaintiff notice that "the written agreement was the entire agreement," and therefore plaintiff could not sue for a fraudulent misrepresentation not incorporated into the written agreement). In these jurisdictions, courts might be inclined to hold that such arguments can also be made in promissory estoppel actions, whether contract-based or tort-based. Only a very few courts have, however, explicitly allowed promissory estoppel to be used to avoid the parol evidence rule. *See supra* notes 156-59 and accompanying text. Similarly, some jurisdictions might follow the old (minority) rule that the Statute of Frauds bars claims of misrepresentation or fraud as well as for breach of contract. *See W. PROSSER & W. KEETON, supra* note 15, § 109, at 764 n.7; RESTATEMENT (SECOND) OF TORTS § 530, at 138 (1979). Courts in such jurisdictions might want to hold that the Statute of Frauds is a defense in all promissory estoppel suits (whether contract-based, *supra* notes 131-150 and accompanying text, or tort-based). Recent decisions, however, have tended to reject the old minority rule, and it seems likely that no court today would so hold. *See, e.g., Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 702 P.2d 212, 216 Cal. Rptr. 130 (1985) (holding that the Statute of Frauds cannot be asserted in a fraud action); *Hendrix v. Scarborough*, 131 Ga. App. 342, 206 S.E.2d 42 (1974) (rejecting Statute of Frauds defense in a tort suit); *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958) (holding that whether agreement is enforceable in contract is irrelevant in a suit for fraudulent misrepresentation).

233. *But see Greenstein v. Flatley*, 19 Mass. App. 351, 474 N.E.2d 1130 (1985) (discussed *supra* notes 221, 224). *Greenstein* is one of the rare promissory estoppel cases in which the court rather clearly identified the basis of liability. In that case, the court imposed liability on the basis of tort notions because the defendants adopted a course of action designed to lead the plaintiff to think that a deal had been made, though the principal (one of the defendants) ultimately accepted a subsequent offer. The court stated that "[i]t is not even necessary that the conduct complained of fit into a precise tort or contract niche," *Id.* at 354, 474 N.E.2d at 1133, and then rested its decision on promissory estoppel. *Id.* at 354, 474 N.E.2d at 1133-34.

234. One can only guess at the actual reason the court imposed liability in the reported decision. The court could have based liability on the fact that Red Owl's agents knew (or should have known) that Hoffman would regard the \$18,000 commitment as more reliable than it was, because the Red Owl agents knew (or should have known) more than Hoffman about the internal organization of Red Owl. *See supra* notes 217-220 and accompanying text.

tional doctrines. Promissory estoppel, like traditional contract and tort doctrines, affords courts a basis for enforcing some promises intended as legally binding and for remedying some misrepresentations.

In most cases in which liability is imposed only on the basis of promissory estoppel, liability can be understood as contractual in the broad sense that the promisor apparently intended to assume a legal obligation under an objective standard. Many formal requirements bar the enforcement of such promises under traditional contract doctrines, and promissory estoppel affords plaintiffs and courts a way around these formal bars to contractual liability. One cannot, however, assess the full extent to which promissory estoppel is used (by plaintiffs or courts) to avoid traditional formal limits on contractual liability because often formal limits on liability are ignored in promissory estoppel cases.

In addition, courts have sometimes used promissory estoppel as a remedy for promissory or factual misrepresentation. In some of these cases, the courts could have imposed liability on the basis of conventional tort or (possibly) contract doctrines. In a few cases, however, courts have used promissory estoppel to impose liability for promissory misrepresentation though traditional contract and tort remedies would afford no relief because the promise was not a lie when made and was not part of a contract.

We have tried to describe and explain the outcomes in promissory estoppel cases rather than to criticize them. We have, however, criticized the analysis in these cases. Rather than invoking the meaningless black letter of promissory estoppel to explain liability, judges could state simply and precisely why it is that liability is being imposed. We have suggested some reasons liability might be imposed in various cases. But until judges explain their real reasons, one can only guess.

Because commentators and courts have focused on reliance, the real issues in promissory estoppel cases have not been faced: Whether traditional formal requirements for contract liability are worth their cost and whether the tort standard for promissory misrepresentation should be modified. Were the issues properly focused, it would be obvious that reliance cannot be the touchstone of promissory estoppel liability. Although reliance often increases cost of underenforcement, a formal limit on liability is of little value if it holds only in the absence of reliance. Similarly, although there is no need for a remedy for misrepresentation in the absence of reliance, reli-

ance alone cannot determine the standard of liability for misrepresentation.

