

PROMISSORY ESTOPPEL

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In the development of a mature system of law, it has apparently been inevitable that the question will be faced, what promises shall be enforced?

The common-law legal system, of which the law of almost all of the United States is a part, has been attempting to answer this question in various ways for the better part of a thousand years.

Among the prescriptions adopted by the common law for dealing with the problem of separating the enforceable promise from the unenforceable are the seal, consideration, and selection of particular kinds of promises for enforcement regardless of seal or consideration.

The seal is seen most often these days next to the signature lines of certain legal documents where it assumes the form of the word "Seal" or the letters "L.S." Although much of its former importance has been lost, it represents an attempt to utilize the element of formality in human behavior for the purpose of distinguishing between the seriously intended, well considered, gravely made promise and the promise lightly and inconsiderately given. The same feeling for ritual which makes many persons regard a promise more seriously if they "shake hands on it" at one time accompanied the "sealing" of legal documents. Courts seized on this fact of human behavior to enable them to distinguish between the promise which resulted from mature deliberation and the promise casually thrown off. They enforced the former and refused to enforce the latter--and the presence of a seal was the means by which they were able to distinguish between the two kinds of promises.

The doctrine of consideration represents a sort of tacit decision by the common law judges to recognize, and even emphasize, the importance of business promises in the kind of economy in which we live.

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The making of many kinds of decisions that affect the economic welfare of many persons has been entrusted to businessmen in the world we know. Decisions concerning the uses to which the resources of the community--land, labor, and capital--are to be put are, in large part, made by businessmen. And these decisions often are the results of business bargains and are expressed as business agreements.

The doctrine of consideration has attempted to isolate and define the elements of the business bargain. It has been framed to require that an enforceable promise be given as the end product of a successful attempt to achieve an exchange of things of value. And it has defined what shall be considered of sufficient value: a benefit to the promisor or a detriment to the promisee.

Finally, there is a small list of promises which are enforced without consideration or seal. Sometimes, enforcement of these promises is justified for reasons of "moral consideration" or on similar grounds which will not bear too close examination. Promises to pay debts discharged in bankruptcy or by statutes of limitations belong in this group. The fact seems to be that promises enforced without seal or consideration are enforced for reasons of justice and practical convenience that seldom are clearly expressed by courts.

The Problem of "Gift" Promises

These three approaches to separating the enforceable from the unenforceable promises--the promissory sheep from the promissory goats--are the traditional ones. That they have fulfilled their purpose fairly well can be seen from their persistence in the common law of which they form a vigorous part.

Yet, they do not function perfectly. Their application sometimes leads to denial of enforcement of kinds of promises that justice requires be enforced.

An outstanding example of this kind of promise is the "gift" or "donative" promise. A promise, made to a solicitor of funds for a new church building, that \$5,000 will be given to help defray the costs of construction when the church is completed, illustrates the "gift" promise. Such a promise is not apt to be "sealed," for it may not be written, and, even if written, probably will not be made under circumstances which invite requests for a seal. Often, asking someone who

promises to make a gift to seal his promise may seem to show a lack of gratitude and an almost insulting lack of confidence in the giver's good faith.

Moreover, this kind of promise is not supported by consideration. Consideration, it should be remembered, is a doctrine which emphasizes exchanging. Exchanging is a process of giving something in return for something else. A "gift" promise is one which, by definition, is made without expecting or exacting anything in return, without exchanging. An intention to exchange is required by the doctrine of consideration just as much as benefit to the promisor or detriment to the promisee. There can be no consideration without an intention to exchange. Consequently there can be no consideration for a "gift" promise. One who desires to obtain enforcement of such a promise will receive no aid from the rules of ordinary consideration.

Again, donative promises are not, as such, numbered among the exceptional promises which are enforced without seal or consideration.

Nevertheless, in spite of the reluctance of the common law judges to enforce them, donative promises sometimes demand enforcement. If the managers of the church, in the illustration above, should be led to buy building materials on credit, or borrow money with which to pay construction costs, by the expectation that they would be able to pay from the \$5,000 they were promised on completion of the church, it clearly would be unjust not to enforce the promise, i.e., not to compel the promisor to give the \$5,000 gift he undertook to give. The promisees--the church managers--would have been caused by the promise to act in ways which could be harmful to the church. They would have done things which otherwise they would not have done, because of the promise. They would have, in a word, "relied" on the promise, and reliance has long been a reason for enforcing promises--though not so very long for enforcing donative promises.

Reliance has underlain the enforcement of many promises which, the courts have said, were enforced because they were "supported by consideration." In the case, for instance, in which A has done something of value for B because B has promised A that, after A has performed his part of the bargain, B will do something of value in return, the courts will enforce B's promise because A has given "consideration." But this is not a reason for enforcing B's promise which appeals to anyone but a lawyer.

A more persuasive reason for the result is that A was caused to do something by B's promise, something which he wouldn't have done but for B's promise, and it would be unfair to A if B should not be compelled to live up to his promise. A would suffer real harm if B should not be compelled to keep his promise, and all because B's promise caused him to act. A relied, just like the church managers, and it would seem that the result should be similar.

To recapitulate, the justified reliance of a promisee has long been recognized as a persuasive reason for enforcing promises, but, for the most part, only when the promise relied upon was made as the result of an exchange. This has been true because of the emphasis placed by the courts on the importance of the kind of promise typical of business transactions, and despite recognition by the courts of the possibly harmful effects of reliance by a promisee.

Section 90 of the Restatement of Contracts

Although the application of the traditional categories of seal, consideration and "moral consideration" (or other excuses for enforcing promises without seal or consideration) usually excluded recognition of the desirability of enforcing relied-on, donative promises, there grew up a body of cases in which justified reliance on donative promises was regarded as a sufficient reason for giving promisees some relief. However, these cases were not seen as applications of a general rule.

In cases in which promisees made substantial improvements on land which promisors had undertaken to give to them, the courts, for a long time, recognized that the making of improvements was enough to justify enforcement of the promises to give the land. Likewise, in cases in which bailees of goods promised bailors that they would obtain fire insurance on the bailors' property, the courts sometimes held the bailees liable if they and the bailors failed to obtain the insurance and the property burned, even though the bailees expected to get nothing in return for their promises. Again, as indicated previously, courts enforced promises to make gifts to charities when the promisees incurred obligations or otherwise changed their positions in reliance on the promises.¹

¹The promise to make a gift to a charity, although sometimes enforced for reasons of promissory estoppel, appears to be a special case. Courts seem determined to enforce promises of gifts to charities, and will use promissory estoppel as a justification when that is convenient, but will find other reasons when the facts will not support promissory estoppel. See Thomas Clifford Billig, "The Problem of Consideration in Charitable Subscriptions," 12 Cornell L. Q. 467 (1927).

In these and a number of other kinds of similar cases, the claims of promisees who relied on donative promises were upheld, but each of these kinds of cases was regarded as an exception to general rules requiring a seal or consideration. No court and few legal scholars perceived any principle which unified the exceptions.

Not until the publication of the Restatement of Contracts,² a famous legal treatise intended to set forth accepted rules of the law of contracts, was a general principle of justified reliance, flowing from the decisions enforcing donative promises, given recognition. The eminent lawyers and students of law who prepared the Restatement (under the leadership of Professor Samuel Williston--a great teacher of law) set forth explicitly the bases of liability in the gift-promise cases in the famous Section 90 of the Restatement of Contracts.³ Section 90 brought the problem of "gift" promises to the general attention of interested persons for the first time, and prescribed a rule for dealing with it--at least in part.

Section 90 became, soon after the Restatement of Contracts was read by the legal profession, almost a source of law in itself. It purported to announce the rule to be found in the donative promise cases, but these cases had been regarded, prior to Section 90, as constituting discrete groupings, and the rule of Section 90 was not limited to the isolated groups of cases which supported it. It stated a rule of general application, appropriate for the decision of any case which presented facts that came within its terms, whether or not the facts resembled the facts of the cases which underlay Section 90. Judges and lawyers almost immediately overlooked the limited scope of Section 90 and seized upon it as a source of law for any case of justified reliance on a donative promise--perhaps because a rule like that of Section 90 was long overdue.

Most legal discussion of the enforcement of donative promises has centered around this famous section of the Restatement, and, in this paper, it will be treated as a point of departure for a great deal of what follows.

² American Law Institute, Restatement of the Law of Contracts (1933).

³ *Ibid.*, p. 77.

Section 90 reads:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."⁴

The Meaning of Section 90

The paragraph just quoted was phrased after careful examination of each of its terms, and understanding of its meaning requires something like a reversal of the processes of its original elaboration.

The rule of Section 90 may be analyzed into three main parts:

- (1) The kind of promise required by the rule, stated as: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee..."
- (2) The effect which the promise must have upon the promisee, set forth in the following words: "...which does induce such action or forbearance..."
- (3) A limitation on the scope of the rule, in the following terms: "...if injustice can be avoided only by enforcement of the promise."

⁴ The principle requiring that a promise be enforced on behalf of a promisee who has suffered detriment because of his reliance on the promise, is sometimes referred to as that of "promissory estoppel." It is exemplified in, but not limited to, Section 90 of the Restatement.

Promissory estoppel should be distinguished from "estoppel" (without the qualifying term), or "estoppel in pais," or "equitable estoppel." Promissory estoppel is employed as a basis of promissory liability. The other terms refer to a rule which forbids one who has led another to act in reasonable reliance on the former's representations of fact to deny the truth of his representations in litigation between the two.

The Promise

To fulfill the rule of Section 90, the promise must be one "which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character." The four components of this element which require discussion are:

1. reasonable expectation,
2. inducement,
3. action or forbearance, and
4. definite and substantial character.

They will be treated in the foregoing order.

For the promisor to "reasonably expect" something is for the promisor to foresee it. What is expected is what is foreseen. But the rule speaks not of what the promisor does reasonably expect (or foresee), but of what he should reasonably expect (or foresee).

What, then, should the promisor reasonably foresee? To answer this question, one need not know what, in an actual case, the promisor did foresee, but one must know what the law requires, under particular circumstances, that the promisor should foresee. The promisor may be stupid or careless or ignorant and fail to foresee what he should foresee. His lack of foresight will not prevent the application of the rule to him, for the rule imposes a legal standard which a promisor must observe at his peril.

For example, an uncle who never has completed a grammar-school education may promise his nephew, upon the latter's graduation from grammar school, that he will support the nephew if he goes to college. If his promise leads the nephew to take a college-preparatory course in high school and to emerge from high school partly untrained to earn his living, the uncle probably will be required to keep his promise. The fact that the uncle may truthfully claim that he did not foresee that his promise might lead his nephew to devote the period of his high-school training to "impractical" courses will not relieve him of legal liability. The question is not, what did the uncle foresee? It is, what should he have foreseen?

The foregoing example not only illustrates that a legal standard is involved, but applies the standard. What, then, is the standard applied? In other words, the problem is:

What and how much does "should reasonably expect" require that the promisor foresee? The answer seems to be: he must foresee that a particular kind of action or forbearance by the promisee will result from his promise if, under all of the facts and circumstances surrounding the making of the promise, this would be a natural and reasonable consequence of the promise.

In the example, it probably is not too much to say that the uncle should have anticipated, even if he himself had no idea of the preliminaries necessary to a college education and even under the bare circumstances stated, that the nephew would take a college-preparatory course and would forego whatever vocational training such a course would prevent.

However, the provision that the promise must be one which the promisor "should reasonably expect" to have certain effects not only enlarges the promisor's liability on some occasions, but, on other occasions, limits it. The action or forbearance of the promisee which follows from the promise will not satisfy the rule if it is just any action or forbearance at all. It must be such action or forbearance as the promisor should reasonably foresee. Some remote, irrational or improbable behavior of the promisee will not be enough.

For instance, if the nephew should, because of his uncle's promise to send him through college, relax his efforts to maintain a high scholastic standing because of the feeling of security which his uncle's promise had given him, this probably would not satisfy the rule. Such an improbable and irrational result would not be one which the uncle should have foreseen.

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The discussion now can turn to analysis of the meaning of "induce" and "action or forbearance." These terms are found together in Section 90, and are most easily understood in close connection with each other.

To induce is to cause. The idea of causation may become a subtle and difficult one in the hands of philosophers, but, in its context in Section 90, it has the rough-and-ready meaning given to it in ordinary conversation. It has not occasioned much difficulty to courts or legal scholars, and needs no special comment.

"Action" is also to be understood in its usual sense.

"Forbearance" is a deliberate foregoing of the exercise of some legal right or privilege. The word is one often used in defining consideration in the law of contracts, and it apparently is used in Section 90 in its well-understood sense in the law of consideration. Refraining from smoking, or from suing in court, or from selling something one owns, or from obtaining insurance, all may be examples of forbearance.

When a promisee has been induced to act or forbear, it may be said that he has "relied." "Reliance" is the term which was used to convey this set of ideas in the earlier part of this discussion.

Finally, the kind of promise demanded by Section 90 of the Restatement of Contracts is one which causes reliance of a "definite and substantial" kind.

"Substantial" is the easier term to understand. It defines the degree of financial or economic importance which the promisee's reliance must attain. Reliance is substantial if its effect on the promisee's financial fortune is great enough to justify a court's acting to rectify the wrong done to the promisee.

Not every small loss which is caused by reliance on a promise is important enough to the community to merit formal action by the law-enforcing machinery of society. One who, having been promised a gift of land, took a short automobile trip to view the land he had been promised, would not, by this action alone, have relied "substantially" on the promise.

"Definite" action or forbearance by the promisee, when read together with the requirement of foreseeability in Section 90, limits promises within the rule to those which, the promisor should reasonably have foreseen, might cause the promisee to act or forbear in the way he did act or forbear. This is not to say that the promise must be one which the promisor can reasonably expect to have one and only one effect on the promisee. An act or a forbearance is definite enough if it is such as the promisor should expect to follow from his promise as one likely possibility among an indefinite number of others.⁵

⁵The discussion of the meaning of "definite" in Section 90 is based on the explanations of Professor Samuel Williston, to be found in 4 A. L. I., Proceedings, App., (1926) pp. 90-93.

An example may clarify the point: If an uncle, out of the clear sky, should promise to make his nephew a gift of \$1,000 on his birthday, and if the nephew, in the expectation of receiving the gift, should launch forth into high life, the uncle's promise probably would not be enforced. This possible action of the promisee would not be sufficiently definite. Perhaps the nephew could be expected to invest the money or use it for his support or for some other purpose. There could be no foretelling--that is the trouble.

But if an uncle, after hearing his nephew express a desire to him to own an automobile, should say, "I will give you \$1,000 to buy a car," then, if the nephew should immediately purchase an automobile for \$1,000, the uncle's promise would be enforced. The nephew's act would be of a kind which would be a "definitely" foreseeable consequence of the promise.

The Required Effect of the Promise

As has been shown, a carefully defined kind of promise must be made if Section 90 is to apply. But this is not all. The promise must actually cause one of the kinds of reliance by the promisee which the promisor should have foreseen. Not only must the promise be one which the promisor should expect to induce action of a definite and substantial kind, but it actually must cause the promisee to engage in the kind of behavior which should have been anticipated.

Reliance must occur or there is no reason for enforcing the promise. There are many justifications for enforcing promises, but if a promise to make a gift does not cause the promisee to suffer some disadvantage, probably only those people who believe in the sanctity of all promises will advocate its enforcement. Unless the promise should, to some significant extent, affect the promisee's fortunes, it would be hard to see what the promisor could be said to be responsible for.

Reliance by the promisee is the justification for enforcement of the promise, and the part of the rule under discussion demands evidence that it has occurred.

The Limits of Section 90⁶

A donative promise and reliance by the promisee, it has been explained, are the basis of a moral claim by the promisee to some relief. However, Section 90 of the Restatement is not broad enough to provide a foundation for such relief in all cases.

The words, "if injustice can be avoided only by enforcement of the promise," limit Section 90 to some group of cases smaller than that which includes all cases of justified reliance. This fact has been somewhat misunderstood by both courts and legal scholars.

Sometimes puzzled judges have emphasized the portion of the quoted clause which refers to avoidance of "injustice." They have regarded it as a roving commission to determine whether, in accordance with their personal views of right and wrong, they should give any relief to plaintiffs injured by justifiable reliance. Skepticism about and perhaps even some conservative hostility to the forthright announcement of the claims of reliance in Section 90 have found expression through this interpretation of the limitation under discussion.

Legal scholars (who, in general, have been favorably disposed toward Section 90) have struggled with the very problem which the limitation was intended to settle and apparently have overlooked its significance.

If anybody is capable of indicating the purpose of the troublesome clause, that person is Professor Samuel Williston. It was he who, more than any other man, formulated, phrased and successfully defended Section 90. It is from his explanations of the meaning and effect of the words "if injustice can be avoided only by enforcement of the promise," that what follows will be taken.

⁶The troublesome matter of the meaning of the portion of Section 90 discussed under this heading forms the subject of a running exchange between Professor Williston and other members of the A.L.I., set forth in 4 A.L.I., Proceedings, App., (1926) pp. 90-104. The ideas expressed in this paper are drawn from Professor Williston's exegesis.

To Professor Williston, enforcement of a promise seems to have been equivalent to awarding to a promisee, as nearly as possible under the circumstances, that which he was promised. Two kinds of remedies for breach of contract seem to achieve this result. The first is a judgment for damages in an amount sufficient not only to reimburse the promisee for opportunities foregone or trouble, expense or obligation incurred as a result of the promise made to him but also to compensate him for the benefits (profits) of which he was deprived by the promisor's failure to perform. The other kind of remedy is that of specific performance, which compels the promisor to do for the promisee, as nearly as circumstances will allow, exactly what he undertook to do.

A third remedy sometimes granted to persons injured by breaches of contracts is that of restitution, which may be regarded as restoration to an injured party of the reasonable value of a performance rendered by him. Professor Williston argued that this remedy, if it should be the only one available to a promisee whose case came within Section 90, was not appropriate.

He contended that the remedy of restitution was a quasi-contractual remedy,⁷ and that any rule which would require a promisee to be satisfied with this remedy would have no proper place in a treatise on the law of contracts. Apparently, a contract was, to him, a promise which would be enforced (1) by a judgment compensating the promisee not only for the value of his performance but also for the value of the benefits he was promised but did not receive, or (2) by a decree of specific performance.

To ensure that the rule of Section 90 would be limited to cases in which the promisee could show his right to a judgment for damages of the kind mentioned or to a decree of specific performance (and thus to confine that rule to cases which Professor Williston conceived to fall within the law of contracts), the words "if injustice can be avoided only by enforcement of the promise" were included.

⁷ A quasi-contractual remedy is one administered under the rules of the law of quasi-contracts. This branch of law is characterized, although not defined, as follows: (1) it imposes obligations on persons regardless of assent or agreement to their assumption; hence, the obligations enforced are not contractual; (2) these obligations are usually imposed on persons who have come into possession of things of value to which, in the eyes of the law, they have no right (by which they have been unjustly enriched); (3) it usually requires these persons to surrender the benefits to which they are not entitled, i.e., to make "restitution." Cf. Williston, Contracts (Rev. ed. 1936) f3, pp. 6-10.

The quoted clause would prevent the use of the rule to justify the result in a case in which a nephew, whose uncle had promised him \$1,000 to buy a car and who bought one for the full price of \$500, was awarded a judgment for only \$500. This would not be a case exemplifying "enforcement of the promise."

The purpose, then, of the provision under discussion was to restrict the operation of Section 90 to cases in which the promise should be enforced in the sense indicated. It is not to define the kind of promise which was required by Section 90 or the circumstances under which enforcement should be granted. The emphasis was on the remedy of "enforcement of the promise," not on the kind of promises to be enforced or the reasons for enforcing them.

The reference to avoidance of injustice in this provision apparently was made for the purpose of conferring some discretion on the courts which would be called upon to determine when the strong remedy of "enforcement of the promise" should be administered on an injured party's behalf. There neither were nor are any clear-cut rules for deciding whether the lesser remedy of restitution or the more serious remedies of specific performance or a judgment including an allowance for promised benefits would be appropriate. It was necessary, therefore, to allow courts to follow their feelings for the justice of a case in deciding whether the effects of reliance would be harmful enough to justify the stronger remedies. In these considerations seems to lie the origin of the words, "if injustice can be avoided."

The foregoing discussion, in sum, indicates that Section 90 of the Restatement of Contracts creates a rule for the protection of promisees who have relied on unbargained-for promises. The protection extended by the rule is limited in two ways: first, by requiring that that reliance be such as the promisor could and should have foreseen, i.e., that the promise be such as the promisor should have expected to cause the promisee to rely in a certain way; second, by requiring that the promisee's reliance be sufficiently serious, i.e. that it be "definite and substantial" and of great enough consequence so that "injustice can be avoided only by enforcement of the promise."

Some Developments and Problems of Promissory Estoppel

The rule of promissory estoppel set forth in Section 90 was placed before judges and lawyers about thirty years ago. It provoked much interest and discussion, favorable and unfavorable, and, as was to be expected, its acceptance was not immediate.

A few courts welcomed the new rule with open arms. Some others seemed to view it with great suspicion, but few, if any, of these rejected it completely. Rather, they found reasons, more or less plausible, for refusing to apply it until they should have had a longer time in which to evaluate it. In many of the states, years passed before the courts were requested, in appropriate cases, to grant the kind of relief called for by Section 90.

As a consequence, the development of the law of promissory estoppel in the forty-nine jurisdictions of the United States has been both different and uneven. In some places, this area of the law has been explored fully and gladly. In others it has been entered infrequently and reluctantly, with the result that the decisions are few and their reasoning often poor.

Under these circumstances, the logic and interpretations of Section 90 discussed above may or may not have been accepted. Only after exploring the case law of a jurisdiction can one make any confident or even speculative assertions about its views of promissory estoppel.

No student should, therefore, expect to be able to apply his insights into promissory estoppel with anything like the assurance with which he can apply his knowledge of consideration or offer and acceptance. Promissory estoppel is a doctrine which is too new to permit easy generalizations about its status or usefulness in any particular place.

Yet, despite the novelty of this prescription for dealing with certain kinds of reliance, problems have emerged and developments have occurred. The remainder of this discussion will be devoted to explanation of a few of these.

The Proper Remedy for Reliance

One of the matters which has interested students of promissory estoppel is that of the appropriate remedy to cure the effects of disappointed reliance. The kind of promise and the type of reliance which, according to Section 90, should lead to a promissory estoppel have caused relatively little controversy. Much discussion has been given, however, to the question of the circumstances under which "enforcement of the promise," by the methods regarded as appropriate by Professor Williston, is truly just. A subsidiary inquiry has been, how accurately does Section 90 of the Restatement reflect the decisions of the cases on which it purports to rely when it requires that "enforcement of the promise" be the invariant result of the kind of reliance it describes?

The last question is the less important of the two. By this time, it probably is of not much more than historical interest. Section 90 has won so much acceptance as the most authoritative statement of the rule it expresses that it almost has become a source of law independent of the cases which underlie it. Moreover, Professor Williston, in limiting it to those cases in which enforcement of the promise was the chosen remedy, probably was more concerned to state a rule suitable for inclusion in a treatise on enforceable promises (as previously explained) than to include within his rule all cases in which justifiable reliance led to a result favorable to a promisee. He may have chosen to disregard, as falling within the scope of another rule, cases of reliance in which any result was reached other than enforcement of the promise.

The first question asked above--that about the justice of "enforcement of the promise" as the sole remedy in cases of promissory estoppel--is, however, as important today as it ever was. What is the best, the most just, remedy is a question always open to discussion.

It seems that the impression created by Section 90 in the minds of many of its readers, that it said the last word on remedies for promissory estoppel, was factually incorrect. Many cases have been found in the law reports in which the kind of reliance described in Section 90 was compensated in ways other than by "enforcing the promise" relied on.

A frequently-adopted method of doing justice between a promisor and a justifiably relying promisee has been to order the promisor to put the promisee in a position as good as that he would have been in if no promise had been made to him. The effect of this method is to compensate the promisee for, and to the extent of, his reliance, usually by a judgment for what is called reliance damages.

Reliance damages usually do not compensate the promisee for all that he was promised and reasonably could have expected to receive from the promisor. Only a remedy which compels the promisor to do what he promised or to give the promisee the equivalent in money of what he was promised will always achieve this result. A decree of specific performance or a judgment for money damages in an amount large enough to equal the value of the promised performance not only will include an allowance for the harms suffered by the promisee through reliance but also will give him all he could reasonably have expected--the "expectation element."

The difference between the reliance and expectation measures can be seen in the case, stated above, of the nephew who, upon receiving his uncle's promise to give him \$1,000 with which to buy a car, bought an automobile for \$500. The promise caused the nephew to rely to the extent of \$500, and this is the amount he should be awarded as reliance damages. The amount he was promised and could reasonably have expected to receive was \$1,000. A judgment which included the expectation element would award the nephew \$1,000. A judgment for \$1,000 would constitute such "enforcement of the promise" as Section 90 commands.

Much room exists for differences of opinion about the justice of the contrary results which could be reached in the nephew's action against his uncle and in many similar cases. Such differences can be closely examined only through an analysis of the purposes which underlie the remedial policies of the law of contracts, a project which exceeds the scope of this discussion.

However, reflection should show that the existence of reasonable disagreements about this matter indicates that Section 90 may not be broad enough to provide a rule for all cases of promissory estoppel. Arguments which will support an award of expectation damages to a promisee who received his promise as the result of a business exchange may not apply equally well to a promisee of a donative promise. The demands of justice may sometimes be better satisfied by awarding the donative promisee only enough to reimburse him for his reliance.

Promissory Estoppel in Business Situations

Although promissory estoppel had its origin largely in cases in which the promisor typically was a close relative or friend of the promisee, desirous of making the promisee a gift out of motives of generosity, the applications of the doctrine have changed somewhat in recent years.

Since the promulgation of Section 90, increasingly frequent attempts have been made to persuade courts to uphold unbargained-for promises made in business situations on grounds of promissory estoppel. There even have been efforts, some of which were successful, to induce courts to enforce bargained-for business promises on the same grounds.

Men engaged in doing business with each other may, and frequently do, make promises to one another without expecting or receiving anything in exchange--promises of "business favors." These promises may be more or less closely related to the subject-matter of an exchange, past, present or future, but they will not be part of the exchange. For instance, a real estate broker, in order to facilitate the making of a deal on which he is working, may promise the buyer that he will arrange to have fire insurance placed on the property. If the broker makes the promise without indicating a desire to exact any valuable return for it, merely in order to gain the buyer's good will, he will be doing a "business favor."

Promises of business favors can come as fully within the terms and logic of promissory estoppel as social or family gifts. They are unbargained-for promises, and, if they comply in content and consequences with the requirements of Section 90, they probably should be enforced by an appropriate remedy. They appear to present no special problems.

However, extension of promissory estoppel to bargained-for promises is a much more serious step.

A considerable amount of dissatisfaction has been expressed by legal scholars with the workings of the doctrine of consideration. Consideration does not discriminate precisely enough between promises which should be enforced and those which should be denied enforcement. Usually, in the troublesome cases, it denies enforcement to promises which should be enforced, rather than the opposite.

For example, suppose that one businessman sells some goods to another businessman at a price of \$10,000; the goods are delivered to and accepted by the buyer without complaint or objection, but the buyer encounters financial difficulties before he pays the price. He may then approach the seller with a forthright account of his woes, and the seller, in order to help a good customer through bad times and in the hope of continued patronage, may, after bargaining with the buyer, agree to take \$8,000 in full payment of the buyer's debt of \$10,000.

The seller's promise to take a lesser amount of money in full payment of his liquidated, undisputed claim will not be enforced under usual notions of consideration. The payment of the smaller sum of money by the buyer would constitute neither a legal detriment to him as promisee nor a legal benefit to the promisor-seller; it is merely partial performance of an existing legal obligation.

Yet the arrangement between buyer and seller probably is a desirable business adjustment. Its effects are healthy. The buyer's business gets a new lease on life; the seller gets paid without any difficulty in collecting, retains a customer who might fail financially, and increases his customer's good will toward him. There is no hint of dishonesty or unfairness.

Before the matter is dismissed, it should be noticed that, even if the buyer should change his position in reliance on the seller's promise, he probably would obtain no relief. The seller's promise was bargained for, and promissory estoppel, which sometimes affords relief for justified reliance, would not apply. The seller's promise is not a donative promise.

If, however, the doctrine of promissory estoppel should be extended to bargained-for undertakings, the buyer would be protected and a desirable end would be achieved.

This analysis would seem to make out a strong argument for upholding bargained-for, relied-on promises by the application of promissory estoppel notions. If consideration is too restrictive, if it denies enforcement to too many promises, promissory estoppel will relax and supplement it.

Unfortunately the matter is not quite so simple.

Here again an example may be useful. Consider the case in which a buyer with large financial resources and a large law firm on retainer buys goods from a financially weak seller at a price of \$10,000. The buyer may refuse to pay for the goods, and, when demand is made on him, indicate that if the seller does not accept a lower price he will turn his battery of high-powered lawyers loose on the matter, utilize every possible legal subterfuge and delay, and pay only when compelled to do so. After "bargaining" between buyer and seller, the seller may agree to accept \$8,000 in full satisfaction of the buyer's debt of \$10,000.

The seller's promise, for the reasons stated in connection with the preceding example, would not be enforced. There would be no consideration to support it.

But here the result might be applauded. The seller's promise is completely unhealthy. None of the reasons which justified the enforcement of the seller's promise in the earlier example obtain here. Besides, in this example the seller was compelled to give his promise by an undesirable kind of business

coercion. The buyer's immoral threat to employ unfairly and improperly the processes of litigation, not any beneficial business adjustment, induced the seller's promise.

Yet, this buyer might rely just as much on the promise he extorted from the seller as the other buyer might rely on the healthier promise. And if a decision should have been made to apply promissory estoppel notions to bargained-for promises, nothing in the doctrine of promissory estoppel would preclude the unworthy buyer's successfully invoking it. The doctrine itself does not prevent this result.

Consideration appears to be too restrictively indiscriminating, but promissory estoppel may be too loosely indiscriminating. As the examples show, consideration sometimes does justice by denying enforcement of an undesirable promise, but only at the cost of unjustly denying enforcement of a desirable promise. Promissory estoppel sometimes does justice by enforcing a desirable promise, but only at the cost of unjustly enforcing an undesirable promise.

Clearly, promissory estoppel is no easy cure for all of the ills of consideration. There can be no assurance that the extension of promissory estoppel to bargained-for promises will automatically lead to enforcement of only those promises which should be enforced and of no others. Promissory estoppel is not a panacea.

This is not to be understood, however, as an assertion that promissory estoppel cannot profitably be made to apply to certain kinds of bargained-for promises. All that has appeared is the need for careful, well-reasoned use of the doctrine. Most of the necessary cautious exploration remains to be done. Only time will afford an opportunity adequately to determine the proper limits of the doctrine.

The Future of Promissory Estoppel

The foregoing discussion has portrayed a rule the possibilities of which are largely unknown. The rule has arrived too recently on the legal scene to permit any confident predictions.

When limited to donative promises, it seems to be filling a long-felt need. Perhaps in its present form it is somewhat crude. A noted scholar has so implied.⁸

⁸
Lon L. Fuller, "Consideration and Form," 41 Col L. Rev. 799, 819 (1941).

Its greatest promise and most interesting possibilities lie in the area of bargained-for promises. The courts have applied it to such promises with caution, so no confident forecast can be made of its practical success. Scholars have only begun to develop the implications of the problems which would follow from attempts to bring within its scope promises arising out of exchanges. This part of its history is yet to be written.

Despite its novelty and uncertain future, promissory estoppel merits respectful attention. It is the fruit of an earnest effort to incorporate in a formula the result of moral developments in human affairs. One who studies it not only will enlarge his knowledge of the law of contracts but also must learn something of what men desire in their lives.⁹

⁹The following discussions of promissory estoppel and the bases of contractual liability will enable the interested student to extend his knowledge of matters mentioned in this discussion:

Boyer, "Promissory Estoppel: Requirements and Limitations of the Doctrine," 98 U. Pa. L. Rev. 459 (1950).

Shattuck, "Gratuitous Promises--A new Writ?" 35 Mich. L. Rev. 908 (1937).