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Promissory Estoppel and Traditional Contract Doctrine

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I. Introduction

Recent decisions[1] invoking Section 90 of the *Restatement of Contracts* demonstrate that the doctrine of promissory estoppel embodied in that section[2] is playing an important role in the fixing of limits of contractual responsibility. Promissory estoppel is, however, today serving functions quite different from those contemplated by the draftsmen of Section 90. The principal application of the doctrine is no longer in

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1. This article is concerned primarily with decisions rendered during the course of the past ten years. For discussions of earlier collections of promissory estoppel cases, see Shattuck, *Gratuitous Promises—A New Writ?* 35 MICH. L. REV. 908 (1937); Boyer, *Promissory Estoppel: Principle From Precedents*, 50 MICH. L. REV. 639, 873 (1952); Annot., 48 A.L.R.2d 1069 (1956); 22 MINN. L. REV. 843 (1939); Note, *The Measure of Damages for Breach of a Contract Created by Action in Reliance*, 48 YALE L.J. 1036 (1939).

2. RESTATEMENT OF CONTRACTS § 90 (1932) provides:

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

The tentative draft of the *Restatement (Second) of Contracts* proposes that Section 90 be altered to read as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

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

Because the doctrine of promissory estoppel and the rules of Section 90 are customarily understood to refer to the same general theory of reliance, they will be used interchangeably in this discussion. The objections to using the phrase "promissory estoppel" to describe the doctrine of enforceability because of action in reliance are noted in 1A A. CORBIN, CONTRACTS § 204 (rev. ed. 1963) [hereinafter cited as CORBIN].

the limited area of gratuitous promises,[3] but in the much broader field of bargain transactions. A number of earlier cases, to be sure, did apply promissory estoppel to gratuitous promises made in a business setting. But both courts and commentators understood that the basis of enforcement was that the promisor had failed to prescribe a return for his promise.[4] Indeed, the basic elements of promissory estoppel doctrine have been fashioned in the context of the explicit assumption that the doctrine properly operates outside the bargain relationship.

The usual setting out of which a Section 90 promise currently emerges, however, is commercial, not benevolent. More important, the promise which calls for application of Section 90 is typically one which contemplates an exchange.[5] Section 90 has thus grown from a device for enforcing certain gratuitous promises into a useful, though little understood, contract tool for recognizing the reliance element in bargain transactions as well.

Expanded application of any legal doctrine naturally raises questions about practical consequences and effective limits. With respect to Section 90, the implications of expansion are to be found in the manner in which theories of reliance upon promises are shaping the evolution and application of other principles to which our system of contract has traditionally been committed, particularly the "bargain principle"[6] of consideration and the "assent principle"[7] of offer-acceptance. The purpose of this discussion is to examine the extent to which familiar rules of contract formation, validation and adjustment have been affected by, and have themselves shaped the course of, expanded use of the promissory estoppel concept of Section 90.

3. The term "gratuitous promise" traditionally refers to a promise which is not conditioned on a specified return—*i.e.*, a promise of a gift. The tendency has been to extend the meaning of the term to include all promises found by the courts to be unsupported by consideration, whether or not the promise in fact asked for a consideration.

4. That a gift promise is essential to the theory of promissory estoppel is conclusively established by the earlier literature. *See, e.g.*, Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

5. According to common law dogma, a promise which by its terms is conditional upon a return promise or performance is an "offer." RESTATEMENT OF CONTRACTS § 24 (1932). In addition to promises which are operative as offers, Section 90 is being applied to promises which propose an exchange, but which fail to satisfy the requirements of an offer.

6. RESTATEMENT OF CONTRACTS § 75 (1932), states the traditional definition of bargain consideration:

> Consideration for a promise is
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification or destruction of a legal relation, or
> (d) a return promise, bargained for and given in exchange for the promise.

7. *See* RESTATEMENT OF CONTRACTS §§ 20-22 (1932):

> A manifestation of mutual assent by the parties to an informal contract is essential

II. Tensions Between the Reliance Principle and the Bargain Principle

Injury to the person or property of one who justifiably relied on the undertaking of another was apparently the earliest basis upon which informal contracts were enforced in the action of assumpsit.[8] And reliance, whether actual or probable, was an essential ingredient in the evolutionary process through which consideration doctrine developed as the keystone of traditional contract law.[9] But despite the early prominence of the element of reasonable reliance in contract, the requirement of "bargain" or "exchange," apparently an extension of the idea of *quid pro quo* in the action of debt,[10] has emerged as the core of consideration doctrine. The classifications of responsibility which we have come to regard as conventional, and which have been accorded blackletter status in the *Restatement of Contracts*, evidence a preoccupation with the belief that only promises for which some agreed price has been paid are deserving of enforcement. Thus, according to the catechism of consideration, action in reliance upon a promise is sufficient reason for enforcement only when the action is bargained for by the promisor and given in return by the promisee.[11]

The proceedings leading to the drafting of Section 90, on the other hand, evidence concern solely with justifiable detrimental reliance on promises for which no agreed equivalent has been asked or tendered.[12] The sections of the *Restatement* which deal specifically with action in reliance out of an agreed exchange[13] confirm that the rules of Section 90 have independent force without regard to, and in spite of, the bargain

to its formation and the acts by which such assent is manifested must be done with the intent to do those acts; . . . [§ 20]

The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct. [§ 21]

The manifestation of mutual assent almost invariably takes the form of an offer or proposal by one party accepted by the other party or parties. [§ 22]

8. *See generally* Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 53 (1888); Holdsworth, *The Modern History of the Doctrine of Consideration*, 2 BOSTON U.L. REV. 87, 174 (1922).

9. The force of the reliance factor in the half-completed and executory exchanges is discussed in Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-12 (1941).

10. For summaries of the historical basis of the action of debt, as well as assumpsit, see 1 CORBIN § 117; 1 S. WILLISTON, CONTRACTS § 99 (3d ed. 1957) [hereinafter cited as WILLISTON].

11. As to the requirement that the promise induce the conduct of the promisee, and the conduct of the latter induce the making of the promise, see the opinion of Mr. Justice Holmes in Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903).

12. RESTATEMENT OF CONTRACTS, Commentaries § 88 [§ 90], comment *e* at 19 (Tent. Draft No. 2, 1926): ". . . but the cases in question are not cases of bargains; they are gratuitous promises on which justifiable reliance has been placed."

13. RESTATEMENT OF CONTRACTS §§ 45, 75 (1932).

concept. In short, Section 90 states the proposition that, in situations where traditional consideration is lacking, reliance which is foreseeable, reasonable, and serious will require enforcement if injustice cannot otherwise be avoided.

In practice, however, the fate of a promisee who urges the theory of "unbargained-for"[14] reliance does not rest solely upon application of the specific requirements of Section 90. On the contrary, experience demonstrates that his case may really turn on the ability of the court to reconcile the reliance factor implicit in promissory estoppel with a general theory of consideration which is dominated by notions of reciprocity, yet concedes that "some informal promises are enforceable without the element of bargain."[15]

It is indeed a curious development that the attempt to establish, in Section 90, a separate identity for the reliance principle of promissory estoppel should not have achieved greater success. Part of the difficulty lies in the fact that the reliance principle, in many respects, operates against the thrust of conventional teachings. The essential function of consideration is to determine the types of promises which should not be enforced. The promise which does not purport to exact an exchange is singled out by consideration doctrine as the one least worthy of enforcement, because it may well have been given without the care which an exchange relationship encourages and because it is least likely to serve a useful economic function. The disfavor with which the gratuitous promise is viewed by orthodox doctrine naturally militates against open judicial recognition that binding obligations can arise from reliance upon gift promises.[16]

Furthermore, precisely because we have established the bargaining process as the prime indicator of the value of promises, institutional pressures are at work to bring the reliance principle of promissory

14. The phrase is usually attributed to Professor Fuller. *See* L. FULLER & R. BRAUCHER, BASIC CONTRACT LAW 202-03 (1964).

15. RESTATEMENT OF CONTRACTS § 75, comment *c* at 81 (1932).

16. It has been observed that once the element of exchange is removed from a transaction, ". . . the appeal to judicial intervention decreases both in terms of form and substance." Fuller, *supra* note 9, at 819. That hardened common law attitudes toward the gratuitous promise have influenced the handling of the reliance factor is illustrated by the following language from Stonestreet v. Southern Oil Co., 226 N.C. 261, 263, 37 S.E.2d 676, 677 (1946): ". . . when one receives a naked promise and such promise is not kept, he is no worse off than he was before the promise was made. He gave nothing for it, loses nothing by it, and upon its breach he suffers no recoverable damage." *Cf.* Jones v. Vulcan Materials Co., 112 Ga. App. 402, 145 S.E.2d 263, 272 (1965). *See also* Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302 (1884) (Holmes, J.): "It would cut up the doctrine of consideration by the roots if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it."

estoppel within that process. Judges accustomed to defining value in terms of exchange, when faced with problems of non-exchange, might well be expected to remove themselves to familiar ground. Since most promises coming to the courts for enforcement involve an element of exchange, actual or contrived, the bargain theory of consideration disposes of the typical case with ease. The smoothness with which it functions most of the time is no doubt due to the high degree to which it conforms with the pattern of exchange which permeates social and business relations.[17] It is thus not surprising that judges tend to think in bargain terms, and to try to assimilate reliance theory to more familiar principles applicable to the normal bargain situation. Such tendencies are particularly understandable in light of the presence of reliance elements in many bargain situations falling clearly within the ambit of standard principles of consideration. It is easy to forget that while reliance may in some instances be essential to bargain theory,[18] bargain is not essential to reliance theory. Though it typically accompanies bargain transactions,[19] conduct in reliance occurs in a variety of forms and degrees and may well be induced independent of the making of a bargain. The factual element of reliance cuts across bargain lines, and may, in the absence of bargain, serve as a separate basis for imposing contract obligations. But the fact that reliance coincides with bargain in some cases tends to pull it within the classification in all cases.[20]

Thus the importance of bargain in practical affairs, reinforced by the

17. *See generally* Patterson, *An Apology For Consideration*, 58 COLUM. L. REV. 929 (1958).

18. Where, for example, the bargain is for a return performance rather than a promise.

19. "Certainly reliance is one of the main bases for enforcement of the half-completed exchange, and the probability of reliance lends support to the enforcement of the executory exchange." RESTATEMENT (SECOND) OF CONTRACTS § 90, comment *a* at 165 (Tent. Draft No. 2, 1965).

20. Some fairly mechanical factors may also have the effect of concealing the significance of reliance as a distinct basis of liability. For example, the structuring of Section 90 as an exception to orthodox theory may have slowed its acceptance because of the intimation that promissory estoppel is not for general application, but must be reserved for weighty and uncommon circumstances. If a court accords only narrow recognition to Section 90, frequently it will emphasize that promissory estoppel is an exception to well-established doctrine. *See, e.g.*, Southeastern Sales & Service Co. v. T. T. Watson, Inc., 172 So. 2d 239, 240 (Fla. Dist. Ct. App. 1965). That Section 90 is drawn from cases which represent a variety of exceptions to conventional doctrine also tends to make the courts cautious in extending it to cases not within the established exceptions. Further, the requirement that a court first determine the fact of bargain must surely influence the approach made to a given sequence of events. Even if the element of bargain is found not to exist, the weight accorded specific facts in the search for bargain can be expected to carry over to other grounds of enforcement. An orientation to first exhaust the possibilities of bargain might well cushion the impact of events removed in time or space from the moment of the making of the promise, such as subsequent dealings initiated by the promisee with third persons, or the abandonment of such possibilities on the assumption the promise will be honored.

priority accorded it in law, has made it difficult for courts to isolate the reliance problem and to handle it with consistency. The notion that bargain represents a calculated effort by the promisor to satisfy some desire, usually economic, operates to make the conduct of the promisee of secondary importance. Because of the prevailing policy that the element of bargain, standing alone, justifies enforcement, action in reliance is commonly seen as a tool for sorting out motives which bear on the issue of exchange.[21] The fact that the promisee may have incurred expense, or otherwise have relied to his detriment, is subsumed in considerations about whether the promisor, in accordance with the rules of offer and acceptance, has received the particular advantage which prompted his promise. Reliance, under this approach, functions not as a substantive ground for enforcement, but as a vehicle for identification of some other ground for enforcement.[22]

Moreover, the disposition to treat action in reliance as proof of bargain rather than as an independent basis of enforcement most seriously impairs the reliance principle in the very cases in which reliance is likely to be the only available ground for relief. Because the cases which most clearly warrant the application of Section 90 seldom involve reliance which is beneficial to the promisor, a causal relation between putative bargain and factual reliance is likely to be difficult to find.[23] The risk that action in reliance will be found to be not sufficiently serious to justify application of Section 90, or to be merely a condition of a gratuitous promise, is thereby increased.[24] In addition, in the absence of benefit conferred, the enrichment factor is not available to give color to reliance or to support relief along restitutionary lines.

21. Williston's discussion of his celebrated tramp case suggests the role of reliance as an aid to interpretation of arguable bargain promises. *See* 1 WILLISTON § 112. Moreover, if a promisee has clearly been hurt by reasonable action in reliance, to require that a price of the injury must be shown is to confess that the injury itself is not of critical importance.

22. Many of the consideration cases use Section 90 to identify the benefit or detriment branches of consideration theory. *E.g.*, Pike v. Triska, 165 Neb. 104, 84 N.W.2d 311 (1957); Leach v. Treber, 164 Neb. 419, 82 N.W.2d 544 (1957); Jackson v. Kemp, 211 Tenn. 498, 365 S.W.2d 437 (1963). Section 90 has also been used to mark off a doubtful offer. Jaybe Construction Co. v. Beco, Inc., 3 Conn. Cir. 406, 216 A.2d 208 (1965). In Hessler, Inc. v. Farrell, 226 A.2d 708 (Del. Sup. Ct. 1967), the issue of whether the payment of retirement benefits to a former employee constituted an illegal gift of corporate assets was resolved by resort to the reliance principle of promissory estoppel.

23. The difficulties with the bargain concept in connection with expensive reliance prior to acceptance are well-documented. *E.g.*, Prather v. Vasquez, 162 Cal. App. 2d 198 (1958); Friedman v. Tappan Dev. Co., 22 N.J. 523, 126 A.2d 646 (1956); American Handkerchief Corp. v. Frannat Realty Co., 17 N.J. 12, 109 A.2d 793 (1954). *Cf.* Wright v. United States Rubber Co., 280 F. Supp. 616 (D. Ore. 1967); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

24. *See* Overlock v. Central Vt. Pub. Serv. Corp., 126 Vt. 549, 237 A.2d 356 (1967); Fedun v. Mike's Cafe, Inc., 204 Pa. Super. 356, 204 A.2d 776 (1964), *aff'd*, 419 Pa. 607, 213 A.2d 638 (1965).

Not even the preference of the courts for the detriment branch of consideration has diminished the appeal of bargain as the prevailing context of analysis and decision. Rather than freeing the reliance factor of its subordinate status, the effect of broadening the meaning of detriment to include practically any conduct of the promisee has been to encourage a corresponding expansion of the bargain concept.[25] This development was predictable so long as the expansion of the concept of detriment took place within a frame of reference which concentrated attention upon events surrounding the making of the promise, rather than upon the consequences of non-performance. It is now true that conventional theory can be manipulated so as to protect even gratuitous promises. But while the holdings in such cases may be approved, their circuitous reasoning tends to confuse the law of reliance by converting change of position in any form or degree into consideration.[26] The disposition of judges, adverted to above, to talk the language of familiar doctrine adds to the pressure to fit the reliance principle of promissory estoppel into the mold of consideration rules.[27] Thus despite the *Restatement* directive that Section 90 promises are enforceable without

25. The reduction of consideration to detrimental conduct has been recognized as an oversimplification which confuses the principal functions of the doctrine. Patterson, *supra* note 17, at 932-34. The elasticity of current bargain concepts is illustrated in Dyer v. Metallic Bldg. Co., 410 S.W.2d 56 (Tex. Civ. App. 1966). The historical process whereby content was given the idea of "detriment" in contract is noted in C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW—TORT AND CONTRACT 395 (1949). *See generally* F. KESSLER & M. SHARP, CONTRACTS, CASES AND MATERIALS 14-27 (1953).

26. Unless the requirement of bargain is dispensed with, the notion that any person suffering serious detrimental reliance has satisfied the elements of consideration is not likely to receive consistent administration in the courts. *E.g.*, *compare* Hessler, Inc. v. Farrell, — Del. —, 226 A.2d 708 (1967), *with* Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964).

27. It should be noted that the appeal of reliance often pulls in a direction opposite from that of bargain. Any bargained-for change of position, however slight or inexpensive, is consideration, regardless of the factual impact of the case. On the other hand, an unperformed promise which presents a compelling case for relief because of prejudicial reliance cannot be enforced on consideration grounds unless the reliance constitutes an equivalent given in exchange. Whether or not a court will use Section 90 as the ground for relief in the latter case depends in part upon its understanding of the range of choice provided by consideration theory. One escape route, charted by the dilution of detriment, is to find in the reliance part performance of an offer of a unilateral contract. *E.g.*, Lehrer v. McCloskey Homes, Inc., 245 F.2d 11 (3d Cir. 1957); Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966); *In re* Field's Estate, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Sur. Ct. 1958). *See* Navin, *Some Comments on Unilateral Contracts and Restatement* 90, 46 MARQ. L. REV. 162 (1962). If the reliance cannot fairly be said to amount to part performance, but constitutes preparations leading to performance, it may supply a basis for constructing a bilateral contract on the theory of an implied return promise. Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086 (1902). *See generally* 1 CORBIN §§ 51, 52, 144. A line of authority interpreting a promise of a gift to support a bilateral contract is dealt with in Dunaway v. First Presbyterian Church, — Ariz. —, 442 P.2d 93 (1968). Either of these conventional theories may produce a satisfactory result. But the shortcomings of this kind of analysis are obvious if the central problem in the case is reasonable reliance and the court is persuaded that the reliance, by itself, justifies enforcement.

consideration, the theme of consideration is in fact the point of departure for nearly every judicial discussion of promissory estoppel. Consequently, it is fashionable to portray the doctrine of promissory estoppel as some kind of stand-in for consideration.[28] If promissory estoppel cannot be extricated from the language and label of consideration, the elements of Section 90 are likely to function as little more than an extension of the criteria of the latter.

III. The Functions of Section 90 in the Bargaining Process

While the pressures discussed above have tended to assimilate Section 90 into the consideration-centered framework of traditional contract law, blurring the outlines of reliance theory in the process, the domestication of the section has at the same time had the effect of expanding the sphere of application accorded the theory of promissory estoppel by the courts. Before discussing the details of this expansion, however, it is worth considering briefly some of its general background and implications.

A. *General Background*

It must first be remembered that the tradition which produced Section 90 necessitated the extraction of a broad generalization from an assortment of cases which are not reducible to a systematic pattern.[29] The oral promise of land, followed by entry and improvements, brings into play a wide range of considerations, including the enrichment factor, the history of equity, the Statute of Frauds, and property concepts relating to the status of title.[30] Policy considerations of a different kind are responsible for the varied theories which have been used to

28. The tradition of giving the term "consideration" broad enough coverage to include the cases of action in reliance in the absence of bargain is noted in 1A CORBIN §§ 193, 195. An interesting aspect of the modern promissory estoppel decisions is that there is frequently less reason to take issue with the actual results than with the arguments by which the court arrives at them. This may suggest that a kind of rough, ethical notion of the reliance principle is widely accepted, though the mechanics of theory have not been worked out.

29. The restaters were aware that they were framing "a broader rule than has often been laid down." The "binding thread of principle" they extracted from the various categories of cases was "the justifiable reliance of the promisee." RESTATEMENT OF CONTRACTS, Commentaries § 88 [§ 90], 14, 19-20 (Tent. Draft No. 2, 1926). The standard situations out of which the doctrine of promissory estoppel evolved—charitable subscriptions, parol promises to give land, and a miscellaneous group of gratuitous promises involving bailments, agencies, and waiver of existing rights—are analyzed in BOYER, *supra* note 4; SHATTUCK, *supra* note 1; 22 MINN. L. REV. 843 (1938); 48 YALE L.J. 1036 (1939).

30. Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Seavey v. Drake, 62 N.H. 393 (1882). *Cf.* Page, *Consideration: Genuine and Synthetic*, 1947 WIS. L. REV. 483, 503-04 (1947).

protect charitable subscriptions,[31] and help explain why the ablest of judges might strain conventional theory in order to enforce gift promises to charities.[32] Tort analogies focusing upon consequential losses have apparently influenced the treatment of the gratuitous bailee.[33] At the same time, the degree to which the estoppel idea is reinforced by voluntary dealings or relationships of blood or family undoubtedly accounts for the historical protection of a host of promises reliance upon which gives rise to varying degrees of injustice.

Much current difficulty in working with the older cases stems from inconsistencies and tensions within the groupings themselves. Not only does the weight of a particular factor vary with the type of case, but the standard situations in which the courts have commonly granted relief for reliance losses involve a number of factors which have no special relevance outside a particular grouping of cases.[34] In addition, these categories no longer represent the bulk of case activity under Section 90.[35] Because they are principally concerned with the degree of reliance necessary to make a gratuitous promise binding, they are frequently inappropriate in the area of commercial transactions. Section 90 largely overcomes these limitations by language which ignores factual patterns and emphasizes the injustice of denying relief in any situation where serious and foreseeable reliance is demonstrated. Nevertheless, the

31. *See* 1A CORBIN § 198, for a discussion of the reasons commonly given for enforcing charitable subscriptions. Because of the favored status of the charitable institution, the courts traditionally reflect the attitude that "we are not confined to the same orthodox concepts which once were applicable to every situation arising within a common law jurisdiction." Danby v. Osteopathic Hosp. Ass'n, 34 Del. Ch. 427, 104 A.2d 903, 907 (1954).

32. I. & I. Holding Corp. v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532 (1938); Allegheny College v. National Chautaugua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927). *Cf.* Dunaway v. First Presbyterian Church, — Ariz. —, 442 P.2d 93 (1968).

33. *E.g.*, Siegal v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923). *Contra*, Comfort v. McCorkle, 149 Misc. 826, 268 N.Y.S. 192 (Sup. Ct. 1933). *See generally* Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 790-92 (1941); Seavey, *Reliance Upon Gratuitous Promises Or Other Conduct*, 64 HARV. L. REV. 913 (1951).

34. In addition, it has long been recognized that the extent of actionable reliance fluctuates in the various categories. For example, the probability of reliance often suffices in the cases of marriage settlement and charitable subscription, as well as in some of the waiver cases. On the other hand, such matters as gratuitous options usually require a showing of substantial reliance. *See, e.g.*, Wilson v. Spry, 145 Ark. 21, 223 S.W. 564 (1920); Bard v. Kent, 19 Cal. 2d 449, 122 P.2d 8 (1942); Corbett v. Cronkhite, 239 Ill. 9, 87 N.E. 874 (1909); Kucera v. Kavan, 165 Neb. 131, 84 N.W.2d 207 (1957); Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 A. 571 (1932), *rev'd on other grounds*, 318 Pa. 490, 178 A. 490 (1935).

35. Apart from the waiver category, only a few decisions falling within the well-known promissory estoppel groupings have appeared in the reports during the last ten years. *See, e.g.*, Hebrew Univ. Ass'n v. Nye, 26 Conn. Supp. 342, 223 A.2d 397 (Sup. Ct. 1966) (gift promise to charitable institution); Canterbury Stores, Inc. v. Canterbury At Arlington, 43 N.J. 256, 203 A.2d 713 (1964) (gratuitous license); East Providence Credit Union v. Geremia, — R.I. —, 239 A.2d 725 (1968) (promise to procure insurance). *Cf.* Prevas v. Gottlieb, 229 Md. 188, 182 A.2d 489 (1962); Rouse v. Roy L. Houck Son's Corp., — Ore. —, 439 P.2d 856 (1968); Hagan v. Turner, 38 Pa. D. & C.2d 568 (1963).

formulation of a doctrine sufficiently broad to cover the entire landscape of promises involves obvious risks. The broader the scope of the doctrine, the less orderly the process of application is bound to be.[36]

It has been noted above that on practically every occasion on which the courts have dealt explicitly with Section 90 in recent years, the promise in question has been made either in contemplation of a commercial return or in the course of commercial negotiations.[37] Expanded notions of bargain, perhaps prompted by the problems of the mixed gift, provide only a limited explanation for the scarcity of gift promises arising under Section 90. It may be that the promise of a gift is no longer of much practical significance. But if bargain theory has altered the commonly understood role of promissory estoppel, the question arises whether the incentives for enforcement of the purely gratuitous promise are not on the wane.[38] And if the gratuitous promise is no longer relevant to the theory of Section 90, policy considerations developed in relation to the conventional idea of promissory estoppel will have to be carefully examined before Section 90 is made a vehicle for relieving injustices occasioned by business bargains.

The most obvious consequence of the application of Section 90 in areas other than that of the gratuitous promise is that the distinguishing characteristics of conventional theories are obscured. It is standard practice in a good many jurisdictions to plead the theory of consideration simultaneously with that of promissory estoppel, urging the same allegations and evidence in support of both theories. Occasionally, it is true, the facts of a given case lend themselves to analysis under either approach.[39] But although the use of alernative theories by a litigant is

36. The mere breadth of statement of Section 90 gives the impression that the objective is to declare a legal effect without regard to specific meanings. Consequently, the development of criteria for determining whether a promise ought to be enforced is likely to be heavily shaped by familiar doctrine.

37. The author has uncovered more than 100 decisions during the period in question in which promissory estoppel was considered as the ground of decision in a clear bargain transaction. In more than one-third of those cases, the theory of Section 90 was used as the sole or alternative basis for enforcement.

38. There is some evidence in the cases that we have in fact come full circle, and that a finding that a promise is a mere gratuity operates to *preclude* enforcement under Section 90. *E.g.*, Fedun v. Mike's Cafe, Inc., 204 Pa. Super. 356, 204 A.2d 776 (1964), *aff'd*, 419 Pa. 607, 213 A.2d 638 (1965); Darmopray v. Bayeas, 14 Pa. D. & C.2d 182 (C.P. Montgomery County 1957). *Cf.*, Kaufman v. Mellon Nat'l Bank & Trust Co., 366 F.2d 326, 333 (3d Cir. 1966); Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964). This attitude is apparently an outgrowth of earlier admonitions against the "loose" application of promissory estoppel for fear that "any promise, regardless of the complete absence of consideration, would be enforceable." This language, apparently traceable to Stelmack v. Glen Alden Coal Co., 339 Pa. 410, 14 A.2d 127, 129 (1940), has enjoyed wide circulation in the cases.

39. Some courts have frankly acknowledged that they are able to read the record as

entirely consistent with good practice, a large number of courts are invoking both promissory estoppel and consideration doctrine in their opinions without any recognition of differences in theory.[40] It can be argued that obscuring the distinct criteria of the bargain and reliance principles provides the courts with increased flexibility and ensures wider enforcement of deserving promises. But judicial intertwining of the two theories can cut the other way as well, preventing plaintiffs from circumventing certain obstacles peculiar to one or the other theory.[41] For example, a plaintiff in a recent Wisconsin case[42] attempted to proceed on the basis of promissory estoppel because of a fatal defect in his case with respect to consideration theory. His lack of success appears to have been partly due to the court's insistence that consideration rules be taken into account.[43]

The breadth of statement of Section 90 has facilitated movement of reliance theory into the realm of bargain. Because of the flexibility which results from the generalized phrasing of the doctrine, many courts have apparently concluded that cases can be decided more easily by the use of promissory estoppel than by consideration rules.[44] Thus, promissory estoppel is currently an effective device for defeating a motion to dismiss.[45] It is even more effective as a defense against a motion for summary judgment.[46] The preference for promissory estop-

warranting the application of either Section 90 or consideration doctrine. *E.g.*, East Providence Credit Union v. Geremia, — R.I. —, 239 A.2d 725 (1968).

40. *See, e.g.*, Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966); City of Los Angeles v. Anchor Cas. Co., 204 Cal. App. 2d 175, 22 Cal Rptr. 278 (1962); Nichols v. Acers Co., 415 S.W.2d 683 (Tex. Civ. App. 1967); Dyer v. Metallic Bldg. Co., 410 S.W.2d 56 (Tex. Civ App. 1966).

41. Problems of proof and damages under the consideration label might well lead to emphasis of Section 90. *See, e.g.*, Central Heat, Inc. v. Daily Olympian, Inc., — Wash. —, 443 P.2d 544 (1968). On the other hand, known difficulties in extending Section 90 to certain types of cases may cause a litigant to turn to another theory. *See* pp. 384-86 & notes 224-31 *infra*.

42. Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967). *See also* Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961); Comment, *Contracts—Permanent Employment—Applicability of Doctrine of Promissory Estoppel*, 47 IOWA L. REV. 725 (1962). *Cf.* p. 364 & note 109 *infra*.

43. 153 N.W.2d at 590-91.

44. *E.g.*, Glitsos v. Kadish, 4 Ariz. App. 134, 418 P.2d 129 (1966); Haveg Corp. v. Guyer, — Del. —, 226 A.2d 231 (1967); Anthony v. Hilo Elec. Light Co., — Hawaii —, 442 P.2d 64 (1968). In Schafer v. Fraser, 206 Ore. 446, 290 P.2d 190 (1955), the appellate court relied solely on Section 90 to affirm a judgment which the trial court had based on a theory of bargain consideration.

45. *Cf. e.g.*, Lehrer v. McCloskey Homes, Inc., 245 F.2d 11 (3d Cir. 1957); L. S. Good & Co. v. H. Daroff & Sons, Inc., 279 F. Supp. 925 (N.D. W. Va. 1968); Hilltop Properties v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965). *Contra*, Wright v. U.S. Rubber Co., 280 F. Supp. 616 (D. Ore. 1967); Petty v. Gindy Mfg. Corp., 12 Utah 2d 32, 404 P.2d 30 (1965).

46. *E.g.*, Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968). The striking thing about many of the cases in which promissory estoppel is applied on a summary judgment motion is that the case principally involves a conventional contract

pel, which extends to dispositions on the merits as well,[47] may result from the belief that a less detailed factual inquiry is required than would be the case with consideration rules.[48] The broad language of Section 90 also enables courts to avoid struggling with the more unintelligible aspects of consideration doctrine, such as the so-called requirement of "mutuality of obligation."[49]

More important, the use of Section 90 avoids the necessity of unduly stretching the concept of bargain in certain cases. Because of the reluctance of the common law to inquire into the adequacy of consideration, it has been possible to manipulate the test of bargain so as to extend protection to transactions in which the element of exchange is not easily observed.[50] The opinions in such cases, however, disclose some discomfort in the handling of conventional theory. The line between bargain and gift is often vague, and an examination of the motives of the parties may be less than conclusive.[51] Then, too, a court may feel some reluctance to lend support to a contrived exchange which is designed only to effect a gift.[52] Further, the inclination to reduce bargain to a "request"[53] has confused the law in that it tends to make the conditional gift look like an exchange. In light of these conceptual and definitional problems, the appeal of Section 90 and its neat criteria of promissory estoppel is understandable.

allegedly supported by bargain consideration, and the motion is argued on that theory. Whorral v. Drewrys Ltd., 214 F. Supp. 269 (S.D. Iowa 1963); Gill v. U.S. Rubber Co., 195 F. Supp. 837 (N.D. Ind. 1961); Hessler, Inc. v. Farrell, — Del. —, 226 A.2d 708 (1967); Day v. Mtge. Insurance Corp., 91 Idaho 605, 428 P.2d 524 (1967); Bredemann v. Vaughan Mfg. Co., 40 Ill. App. 2d 232, 188 N.E.2d 746 (1963). Because the elements of a Section 90 claim are essentially factual, a summary judgment motion is an inappropriate occasion to rule on them. N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739-40 (D.C. Cir. 1963); E. A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 78-79, 216 A.2d 246, 252-53 (1966).

47. *E.g.*, Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966).

48. In Veasey v. Layton, 42 Del. Ch. 155, 206 A.2d 505, 506 (1964), the court conceded it had "not gone too much into the . . . case" because an uncontested promise had occasioned reliance within the theory of promissory estoppel.

49. In Dunnan & Jeffrey, Inc. v. Gross Telecasting, Inc., 7 Mich. App. 113, 51 N.W.2d 194, 197 (1967), the court expressed a preference for promissory estoppel over "such classic theories of contract law as failure of consideration and mutuality of obligation." *Cf.* Gill v. United States Rubber Co., 195 F. Supp. 837 (N.D. Ind. 1961); Hardin v. Eska Co., 256 Iowa 371, 127 N.W.2d 595 (1964).

50. *E.g.*, Devecmon v. Shaw, 69 Md. 199, 14 A. 464 (1888).

51. As a practical matter, the requirement of "mutual inducement" between promise and consideration has always tended to lead to an exploration of subjective factors clustered around the idea of "motive." The notion that motive is an essential test of consideration, though rejected by the RESTATEMENT OF CONTRACTS § 84(a) (1932), still has life left in it today.

52. *E.g.*, Schnell v. Nell, 17 Ind. 29 (1861); Fischer v. Union Trust Co., 138 Mich. 612 (1904).

53. The real problem with interpreting a request by the promisor in terms of consideration is that it simply cannot be said that every request imports a promise.

Perhaps the most interesting aspect of the recent Section 90 decisions, however, is that significant expansion into the bargain area has occurred in spite of well-established precedent to the contrary. In the years immediately following the drafting of Section 90 it was customary for the courts to exhibit reluctance to extend promissory estoppel to commercial transactions. A major source of this reluctance was the classic case of *James Baird Co. v. Gimbel Bros., Inc.*,[54] in which Learned Hand held that promissory estoppel was inapplicable to a bargain promise which occasioned reliance not constituting performance of the consideration sought by the promisor. An offer which bargains for a promise, he reasoned, is not binding until the specific return asked for is made. If a promise contains conditions about acceptance or performance, they are entitled to full effect.[55] Hence reliance not in the form of the specified equivalent cannot affect the freedom which offer-acceptance doctrine guarantees to the promisor.[56] It follows that the conditional character of an offer which proposes an exchange precludes the application of Section 90 because, of necessity, reliance which fails to satisfy the conditions is unreasonable. Thus, as Judge Hand felt compelled to conclude, promissory estoppel is restricted to "donative" promises.[57] The element of exchange which marks off the bargain promise also serves to identify the boundaries beyond which promissory estoppel is not permitted.

The effect of *Baird* was to bar the application of Section 90 to an offer for a bilateral contract. The restriction, in actual practice, has never been completely accepted.[58] But it was not until the 1958 decision in *Drennan v. Star Paving Co.*[59] that a theoretical bridge to the bilateral contract was constructed. On facts almost identical to those in *Baird*, the *Drennan* court, primarily on the basis of an analogy to the unilateral contract provisions of Section 45 of the *Restatement*, held that a general contractor's reliance on a paving subcontractor's bid had the

54. 64 F.2d 344 (2d Cir. 1933). Defendant subcontractor, claiming a mistake in computation, revoked his offer to supply materials after the general contractor had relied by incorporating the offer in the bid for the prime contract.

55. *See* RESTATEMENT OF CONTRACTS §§ 52, 91 (1932).

56. But an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend it would be to hold the offeror regardless of the stipulated condition of his offer.
64 F.2d at 346. *See generally* 1 CORBIN §§ 62, 63.

57. 64 F.2d at 346.

58. *E.g.*, Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Northwestern Eng'r Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943).

59. 51 Cal. 2d 409, 333 P.2d 757 (1958).

effect of making the bid irrevocable.[60] The technique was first to find in the offer an implied subsidiary promise not to revoke, based upon the promisee's reasonable and foreseeable change of position in reliance upon the offer.[61] Once the subsidiary promise, which was unsupported by consideration and therefore gratuitous, had been implied, the reference to Section 90 in the comment to Section 45[62] was the vehicle for invoking promissory estoppel as the ground for enforcement.[63]

Justice Traynor's opinion for the court in *Drennan* is a landmark because it opens up for exploration ground not previously considered available to Section 90. In challenging the rationale of the *Baird* decision, it also represents one of the few serious efforts to provide a theoretical basis for the application of promissory estoppel in the context of business transactions. It should be noted, however, that the theory articulated in *Drennan* is far from a license to enlarge the scope of Section 90 without limit. The effect of the case is only to make certain offers irrevocable until the offeree has had a reasonable opportunity to accept,[64] which may explain why *Drennan* has not been widely invoked outside its factual setting.

Aside from the interest created by *Drennan,* there appears to be no widespread concern with the disparity between the orthodox theory of promissory estoppel and current applications of Section 90. Nor is there agreement as to the continuing vitality of the *Baird* rationale. Many of

60. Plaintiff, a general contractor, had solicited bids from various subcontractors for the paving work to be done on a construction project on which plaintiff was preparing to bid for the prime contract. Defendant submitted the lowest bid for the paving and plaintiff, according to the custom in the trade, used defendant's bid in computing his own bid. The plaintiff's bid, which listed defendant as a sub, was accepted the same day it was submitted. The following day defendant revoked his bid on the ground that a mistake in computation had been made. Plaintiff sued to recover the increased cost of having the paving work done by another sub. The California Supreme Court affirmed a judgment for the difference between defendant's bid and the actual cost of the paving work.

61. "Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis . . . for implying a subsidiary promise not to revoke an offer for a bilateral contract." 51 Cal. 2d at 414, 333 P.2d at 760.

62. In discussing the theory of an implied promise not to revoke, *Restatement* § 45 says that "merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (*see* § 90)." RESTATEMENT OF CONTRACTS § 45, comment *b* at 54 (1932).

63. Since the general could reasonably be expected to rely upon the sub's bid, the court reasoned that "reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding." 51 Cal. 2d at 414, 333 P.2d at 760.

64. The effect of *Drennan* is simply to keep the power of acceptance alive for a reasonable time after the general contract is awarded. If the general contractor delays acceptance, or reopens negotiations, the protection made available by Section 90 is lost. 51 Cal. 2d at 415, 333 P.2d at 760. *See* R. J. Daum Constr. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952). *Cf.* Northern Commercial Co. v. United Automotive, 101 F. Supp. 169 (D. Alas. 1951).

the courts that face the issue squarely still assert that Section 90 is applicable only to unconditional, or non-bargain, promises.[65] Yet the number of instances in which a court explores and applies both bargain consideration and promissory estoppel theories in the same case casts doubt on such assertions. It may well be that our motions of what qualifies as reasonable reliance on even a highly conditional offer are circumscribing freedoms which orthodox rules have previously assured to the promisor. If reliance upon a bargain promise seems to justify some form of relief, the tendency in the cases is to concentrate upon the particular elements of Section 90 rather than upon the proper function of that section in the context of general contract theory.[66] The practical result is that promisors are required to assume greater responsibility for expensive action occasioned by their promises, regardless of the conditions under which the promises were made.

With these general problems in mind, we turn to a closer examination of the various ways in which promissory estoppel is being used today.

B. *Preliminary Negotiations and Defective Promises*

The offer-acceptance rules which dominate contract formation reflect the importance we attach to bargains arrived at through the interplay of private interests. The general objective of these assorted rules is to guarantee parties seeking an exchange extensive freedom to express, or to refuse to express, a willingness to be bound. Thus, a proposal does not ordinarily subject the proposer to liability unless a variety of safeguards are satisfied.[67] Numerous rules permit a change of mind in the course of bargaining.[68] Doubtful responses operate to keep negotiations alive.[69] The occurrence of such fortuitous events as death, supervening impossibility or frustration, insanity, and delay wipe clean the slate.[70] The difficulties resulting from communication across great distances are taken into account in determining whether a party shall be

65. *E.g.*, Wright v. United States Rubber Co., 280 F. Supp. 616, 620 (D. Ore. 1967). In Aubrey v. Workman, 384 S.W.2d 389, 394 (Tex. Civ. App. 1964), the court, in dictum, says that the theory of promissory estoppel will not be applied in a case of a bargained-for exchange even though the elements of promissory estoppel are satisfied.

66. What this means essentially is that the traditional distinction between bargained-for and unbargained-for reliance is being abandoned.

67. RESTATEMENT OF CONTRACTS §§ 24-33 (1932) describes the elements of an operative offer.

68. Rules about the effect of rejection or revocation of offers are contained in RESTATEMENT OF CONTRACTS §§ 35-45 (1932).

69. *See generally* RESTATEMENT OF CONTRACTS §§ 59-63 (1932).

70. RESTATEMENT OF CONTRACTS § 35 (1932). In some instances relief for mistake is made available. *Id.* § 71.

held to have agreed to a contract.[71] In short, the rules which regulate the bargaining process seek to insure that, in most instances, obligation attaches only when it has been deliberately undertaken.

Because the doctrine of promissory estoppel imposes liability without regard to expressed intention, its use in pre-agreement negotiations is bound to alter the traditional scheme of offer and acceptance. This is particularly so where, after lengthy and expensive negotiations, no agreement is in fact reached. In just such a case the Supreme Court of Wisconsin, solely on the ground of promissory estoppel, approved an assessment of damages against a party whose unfulfilled "promises and assurances," made in the course of bargaining, had left the other party with extensive reliance losses. *Hoffman v. Red Owl Stores, Inc.*[72] evolved from a proposal by defendant to establish plaintiff in one of its stores as a franchise operator, provided plaintiff would invest a specified amount of capital and perform certain other conditions. The parties discussed the matter in various stages for more than two years, with defendant at each stage assuring plaintiff that he would get his franchise upon performance of the stated conditions, some of which were added as matters progressed.[73] The termination of negotiations apparently resulted from defendant's insistence that plaintiff supply an amount of capital nearly twice the sum originally requested. By that time, as a result of defendant's urging, plaintiff had sold his bakery business and building, sold a small grocery operation which had been purchased in order to gain experience, made a payment on the site for the proposed franchise, incurred moving expenses and arranged for a house rental.[74] The Wisconsin court, reasoning that promissory estoppel contemplates an award of such damages "as are necessary to prevent injustice," awarded plaintiff the amount of the actual expenses and losses he had incurred.[75]

The *Hoffman* decision is highly significant in several respects. First, it must be recognized that the responsibilities imposed by the decision

71. RESTATEMENT OF CONTRACTS §§ 64-69 (1932).

72. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

73. The court expressly found that the evidence would not support a finding that defendant's promises were made in "bad faith with any present intent that they would not be fulfilled . . . ." *Id.* at 695, 133 N.W.2d at 273.

74. The general thrust of the evidence in the case is that Red Owl's agents induced plaintiff to undertake a course of conduct which would financially and professionally enable him to move into the operation of the grocery franchise.

75. 26 Wis. 2d at 701, 133 N.W.2d at 275-77. Plaintiff was awarded damages of $2000 for the loss incurred on the sale of the bakery, $1000 as the cost of the land option, and $265 moving and home rental expenses. The court refused to award lost profits in connection with the sale of the interim grocery business, limiting plaintiff's recovery to the actual loss sustained measured by the difference between the sales price and the fair market value.

upon a contract negotiator who induces prejudicial reliance, and then withdraws, are somewhat unusual. If the case is thought of as involving a promise to consummate a deal, it sounds a retreat from the common law view that breach of an agreement to agree is not actionable.[76] In addition, *Hoffman* may be viewed as establishing the beginnings of an "important new legal duty of good faith in the conduct of contract negotiations."[77] But for our purposes, the significance of the case lies in the manner in which it rationalizes its application of Section 90. The parties in *Hoffman* dealt with each other with the intent of effecting a business exchange without reaching agreement on a contract. In fact, the failure to reach agreement upon essential terms prevented defendant's promises from achieving even the level of an operative offer.[78] Nevertheless, the absence of the elements of a traditional contract was deemed immaterial in an action grounded on promissory estoppel.[79] In the judgement of the court, enforcement of a promise under Section 90 is not based on breach of contract, nor is it "the equivalent of a breach of contract action."[80]

By freeing the promise which triggers application of the section from the context of offer-acceptance rules, *Hoffman* does away with the bridge commonly used to link promissory estoppel with orthodox consideration doctrine. The key to the court's opinion is its apparent belief that the conventional use of promissory estoppel as a "substitute for consideration" in connection with gratuitous promises is now obsolete and that Section 90 should serve as a distinct basis of liability without regard to theories of bargain, contract, or consideration. The criteria which justify and limit the application of promissory estoppel are to be determined exclusively by what Section 90 says about the effects of nonperformance of promises.[81] The factual context out of which a given case evolves, whether bargain or gratuity, is presumably

76. See cases and discussion in 51 CORNELL L.Q. 351, 353-55 (1966).

77. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 223-25 (1968).

78. Because agreement was never reached on the terms of construction and occupancy of the building, the question was raised as to "whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction . . . so as to be the equivalent of an offer that would result in a binding contract . . . if the promisee were to accept . . . ." 26 Wis. 2d at 697, 133 N.W.2d at 274-75.

79. The *Hoffman* court emphasized that Section 90 imposes no requirement that a promise giving rise to the doctrine of promissory estoppel be "so comprehensive in scope as to meet the requirements of an offer . . . ." *Id.* at 698, 133 N.W.2d at 275.

80. *Id.* at 698, 133 N.W.2d at 275. See p. 378 & notes 194-95 *infra*.

81. Assuming the factual tests of foreseeable, reasonable, and serious reliance are satisfied, *Hoffman* contemplates that the final decision to invoke Section 90 in order to avoid injustice is reserved to the court in the form of a "policy decision" which "necessarily embraces an element of discretion." 26 Wis. 2d at 698, 133 N.W.2d at 275.

beside the point. If the tests of Section 90 are satisfied, *Hoffman* arguably makes promissory estoppel applicable throughout the negotiating process.

The potential sweep of Section 90 presaged by the *Hoffman* litigation does raise certain problems. In the first place, the use of the doctrine in pre-agreement bargaining is inconsistent with a line of authority—based on two well-established principles—holding that preliminary negotiations will not support a promissory estoppel.[82] The first of these principles maintains that pre-agreement discussions and negotiations can at most constitute an agreement to agree, which is not generally enforceable.[83] The other goes to the essence of the general estoppel concept. Conventional theory says that a contract may not be created by estoppel; rather, estoppel may operate only to deny the existence of an otherwise binding contract.[84] It may serve defensively, as a shield, but not as a sword.[85] The latter difficulties are probably not formidable in light of the major inroads into traditional estoppel theory already made by the development of promissory estoppel in the option and construction bidding cases.[86] Nevertheless, where the estoppel idea has on previous occasions been used affirmatively in the bargaining process, the decisive promise was usually fully effective as an offer.[87] With respect to the allocation of the risks of reliance inherent in business negotiations, it would appear that the practical differences between a clearly expressed offer and a promise which contemplates the settling of other matters ought to be taken into account. The original judgment that Section 90 was not to apply to bargains was undoubtedly influenced by doubts about the reasonableness, in bargain situations, of reliance that takes unbargained-for forms. Those same doubts are relevant to the negotiation stages of bargain.

It may be expected, however, that courts will not allow Section 90

82. *See, e.g.*, Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 211-12 (9th Cir. 1957); C. H. Leavell & Co. v. Grafe & Associates, Inc., 90 Idaho 502, 414 P.2d 873, 878-79 (1966).

83. National Dollar Stores v. Wagnon, 97 Cal. App. 2d 915, 219 P.2d 49 (1950). *But cf.* Morris v. Ballard, 16 F.2d 175 (D.C. Cir. 1926).

84. Western Contracting Corp. v. Sooner Constr. Co., 256 F. Supp. 163, 168 (W.D. Okla. 1966).

85. *See* pp. 376-77 & notes 182-87 *infra*.

86. The notion that an estoppel can arise because of reliance on a promise as to the future is, of course, inconsistent with the conventional limitation of estoppel to reliance upon a factual misrepresentation. *See generally* 30 TEXAS L. REV. 903 (1952).

87. The construction bidding cases which employ Section 90 in the tradition of *Drennan v. Star Paving Co.* involve clearly expressed offers. *Cf.* Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal. App. 2d 226, 296 P.2d 368 (1956). The same is true with respect to the option cases.

free rein in bargain negotiation contexts. If promissory estoppel is to provide a standard of fairness by which the conduct of negotiations may be judged, it is likely that the courts will examine the reasonableness of alleged reliance with some care. Deliberate risk-taking prior to agreement will clearly be treated differently from a change of position in response to a promise.[88] The taking of steps designed primarily to enhance the chances of reaching agreement, moreover, even if requested by the other party, involves the risk that benefits derived will render loss difficult to demonstrate in court.[89] Promisees seeking to invoke Section 90 on the basis of pre-agreement action in reliance are particularly vulnerable to the claim that ordinary care was not exercised.[90] Where protracted business negotiations involve a number of parties, as was the case in *Corbit v. J.I. Case Co.*,[91] or a complex transaction, as in *Dovenmuehle, Inc. v. K-Way Associates*,[92] the problems of proof of the elements of promissory estoppel are similar to those commonly associated with conspiracy litigation—the significance of action in reliance may simply be lost in a host of evidentiary disputes. Considerations like these, together with the broad scope of judicial review made available by the generalized tests of Section 90, may well minimize the hazards of hasty applications of the reliance doctrine in bargain contexts.

Section 90 is also being used as a basis for enforcement of promises which under traditional theory would be held indefinite and hence unenforceable. It has long been customary for the courts and commentators to recite that only a *genuine* promise will support an action grounded on promissory estoppel.[93] The idea behind the requirement is simply that promissory estoppel protects reasonable reliance, and that, in the nature of things, reliance is reasonable only if it is induced

88. As to the financial gambles that typically accompany a business deal, and the safeguards afforded by Section 90, see Wright v. United States Rubber Co., 280 F. Supp. 616, 619-20 (D. Ore. 1967).

89. In Slater v. Geo. B. Clarke & Sons, Inc., 186 F. Supp. 814 (D. Del. 1960), action in reliance which improved plaintiff's bargaining position had the effect of preventing him from showing any real damage occasioned by the inducement.

90. Actual or constructive notice that the finality of negotiations depends upon some formal act, such as the execution of a writing or home office approval, may well defeat reliance claims.

91. 70 Wash. 2d 522, 424 P.2d 290 (1967).

92. 388 F.2d 940 (7th Cir. 1968).

93. *See* 1A CORBIN §§ 200, 201, for a discussion of the requirement of a "real" or "actual" promise. Numerous claims based on Section 90 have been denied on the ground that the existence of a promise was not proved. *E.g.*, Dulien Steel Products, Inc. v. Bankers Trust Co., 298 F.2d 836 (2d Cir. 1962); Barker-Lubin Co. v. Wanous, 26 Ill. App. 2d 151, 167 N.E.2d 797 (1960); Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 117 N.W.2d 213 (1962); Hilton v. Alexander & Baldwin, Inc., 66 Wash. 2d 30, 400 P.2d 772 (1965); Ahnapee & Western Ry. v. Challoner, 34 Wis. 2d 134, 148 N.W.2d 616 (1967).

by an actual promise. With the movement of Section 90 into the area of bargains, the promise foundation of the reliance doctrine is subject to additional stress in connection with promises that are "indefinite" because vague or incomplete, or ones that are "illusory" because, in reality, they promise nothing.

Reliance upon indefinite promises has long been recognized as a legitimate basis for the filling of gaps in contract law, as in the implication of agreement or the fashioning of remedies.[94] If an indefinite promise is given in an exchange, and the promisee renders full or partial performance, a contract results.[95] But the effect of detrimental reliance not consisting of the performance sought by an indefinite promise is less clear.[96] The conditional nature of a bargain promise, coupled with the factor of indefiniteness, would seem to have a limiting effect on Section 90 when action in reliance is not in the form of actual performance of an indefinite agreement.[97]

Generally, however, the trend is toward wider use of Section 90 to enforce bargains which are otherwise unenforceable for indefiniteness under conventional rules. In the Texas case of *Wheeler v. White*,[98] a written agreement purported to obligate defendant to obtain or furnish plaintiff with construction financing for a shopping center. In reliance upon defendant's assurances that the financing would be provided, plaintiff proceeded to demolish existing buildings and generally prepare the site for the new venture.[99] Upon learning that the loan would not be made, plaintiff sued to recover damages for breach of the written contract. Because the writing failed to particularize the terms upon which the loan was to be repaid, the intermediate appellate court affirmed the trial court's finding that the contract was too indefinite to

94. *See generally* 1 CORBIN §§ 29, 95, 101, 102, 143.

95. RESTATEMENT OF CONTRACTS § 33 (1932). *Cf.* Morris v. Ballard, 16 F.2d 175 (D.C. Cir. 1926).

96. One source of confusion is the distinction often made between indefinite and illusory promises. In the case of the latter, prestigious authority holds unequivocally that promissory estoppel has no application regardless of induced reliance. Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955). *Cf.* Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205 (1933); Jones v. Vulcan Materials Co., 145 S.E.2d 268 (Ga. App. 1965). *See generally* 1A CORBIN § 201. The absence of similarly sweeping doctrine with respect to indefinite promises is probably a result of the view that, while any reliance upon a wholly illusory promise is likely to be unreasonable, reliance upon a promise which is merely incomplete may be quite reasonable.

97. While reliance in this context may not cure substantive defects, it may make a contractual remedy appropriate. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(3) (Tent. Draft No. 1, 1964).

98. 398 S.W.2d 93 (Tex. Sup. Ct. 1965).

99. The demolished buildings allegedly had a market value of $58,500 and a rental value of $400 monthly. *Id.* at 95.

enforce.[100] The Texas Supreme Court agreed that indefiniteness precluded recovery on a conventional breach of contract theory, but reversed and remanded on the ground that the complaint stated a cause of action on the theory of promissory estoppel.[101] The decision was explicitly premised on the proposition that detrimental reliance occasioned by "an otherwise unenforceable promise" may present a "substantial and compelling claim for relief" under Section 90.[102]

A group of cases involving franchised dealer contracts provide further evidence of the impact of Section 90 upon traditionally unenforceable bargains. The broad powers typically reserved to one or both parties to the franchise arrangement generally do not meet the criteria of established consideration doctrine.[103] If the agreement imposes no real obligation on a party, or is expressly terminable at will, a court may well find the agreement illusory and therefore void for lack of mutuality of obligation.[104] A decision adopting this rationale could be expected to deny recovery of a dealer's reliance losses as well.[105] Nevertheless, over the years some limited protection of reliance losses has been recognized on the basis of the tort notion that a dealer ought to be entitled to enjoy the fruits of a franchise or distributorship at least for a period of time which permits him to recoup his investment.[106] And there is little doubt that Section 90 significantly reinforces the various reasons for reimbursement of a dealer's reliance losses.[107]

100. 385 S.W.2d 619 (Tex. Civ. App. 1964).

101. The court stated that lost profits are not recoverable under the theory of promissory estoppel; rather, "the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained." 398 S.W.2d at 97.

102. *Id.* at 96.

103. The cases are collected in Annot., 19 A.L.R.3d 196 (1968).

104. *E.g.*, Velie Motor Car Co. v. Kopmeier Car Co., 194 F. 324 (7th Cir. 1912). *Cf.* Hunt Foods v. Phillips, 248 F.2d 23 (9th Cir. 1957); Utility Appliance Corp. v. Kuhns, 393 Pa. 414, 143 A.2d 35 (1958).

105. *E.g.*, Buggs v. Ford Motor Co., 113 F.2d 618 (7th Cir. 1940); Ford Motor Co. v. Kirkmyer Motor Co., 65 F.2d 1001 (10th Cir. 1933). *Cf.* Bushwick-Decatur Motors v. Ford Motor Co., 116 F.2d 675 (2d Cir. 1940).

106. For discussion and cases see Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 479-83 (1967). As to the period of time for recoupment of a dealer's investment, see Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 395 F.2d 388 (8th Cir. 1968), which leaves open the possibility that 13 years might not be unreasonable.

A well-known case usually associated with promissory estoppel, Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), may represent nothing more than a sophisticated application of this earlier line of cases. Though the court does not mention Section 90, perhaps because of some fairly obvious difficulties with the specific requirements of that section, the case is significant because reliance is the ground for recovery of expenses incurred in preparation to operate under a franchise which was never granted.

107. *See* L. S. Good & Co. v. H. Daroff & Sons, Inc., 279 F. Supp. 925 (N.D. W. Va. 1968); Hardin v. Eska Co., 256 Iowa 371, 127 N.W.2d 595 (1964). If reliance is sufficiently prejudicial, a court may be more disposed to avoid mutuality problems by going directly to promissory estoppel. *E.g.*, Whorral v. Drewrys Ltd., 214 F. Supp. 269 (S.D. Iowa 1963).

So long as a dealer restricts his lawsuit to expenses actually incurred, Section 90 will apparently allow recovery without opening the Pandora's box of problems relating to the general unenforceability of dealership agreements. And even if lost profits are sought as well, Section 90 may still be of assistance, by way of the doctrine that an exclusive dealership agreement supported by consideration "additional" to the personal services of the dealer, even though expressly terminable at will, is enforceable for a reasonable time and may be terminated without cause only upon notice.[108] The practical effect of this doctrine is that cancellation without notice gives rise to a damage claim which may include the profit margin on sales the dealer might have made during the time the agreement would have been effective after receipt of notice. The significance of promissory estoppel in this connection is that it may be treated as satisfying the requirement of "additional consideration," thereby extending limited protection to the expectation interest.[109]

When a court finds that a bargain promise is indefinite or illusory, or that it lacks mutuality, it is really saying that the theory of consideration, as applied to the particular facts, has not been satisfied. If the court then proceeds on the theory of promissory estoppel, the necessary implication is that the bargain requirement is not as essential in exchange transactions as orthodox doctrine would have us believe. Rather, detrimental reliance emerges as the decisive factor; the promise itself is no longer as significant as the harm it precipitates. The cases of unenforceable bargains—whether for lack of agreement, indefiniteness of language or lack of mutuality of obligation—clearly demonstrate that when reliance is justifiable and serious, the promise requirement of Section 90 is not difficult to satisfy. Indeed, there is considerable evidence that strict requirements of promissory language are not being applied in Section 90 cases today. Section 90 promises are more frequently implied from conduct than was previously true,[110] and patterns of conduct which resembles factual representations rather than promises often suffice.[111]

108. The cases are collected in Annot., 19 A.L.R.3d 196 (1968).

109. *See* C.C. Hauff Hardware, Inc. v. Long Mfg. Co., 257 Iowa 107, 136 N.W.2d 276, 278 (1965); Hardin v. Eska Co., 256 Iowa 371, 127 N.W.2d 595 (1964). *Cf.* Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961). Specific enforcement of the franchise agreement on the ground of reliance does not appear to have much case support. *Compare* Whorral v. Drewrys Ltd., 214 F. Supp. 269 (S.D. Iowa 1963), *with* Meredith v. John Deere Plow Co., 261 F.2d 121 (8th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959).

110. *E.g.*, Travelers Indem. Co. v. Holman, 330 F.2d 142, 151 (5th Cir. 1964); Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 211-12 (9th Cir. 1957); Weiner v. Romley, 94 Ariz. 40, 45, 381 P.2d 581, 584 (1963).

111. *See* Hilltop Properties v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965);

These uses of Section 90 in the bargain context have the obvious effect of limiting powers traditionally exercised by offerors. The danger in this development is that the insistence of traditional theory upon clear promises, upon close attention to the reasonableness of conduct in reliance, and upon external indicia of intent to be bound,[112] fulfill a valid purpose and should not be hastily discarded in the effort to protect every relying promisee. That consideration rules perform a vital function in providing evidence that "something happened" should not be overlooked.[113] Whether or not the limitations inherent in Section 90 will keep the reliance principle within bounds in the bargain context will ultimately depend upon the degree to which courts recognize the dangers of imposing liability too readily in the formative stages of the bargaining process.

C. *The Reinforcement of Offers Through Reliance*

While the general problems relating to the revocability of offers, particularly those presented in the construction bidding cases, have been the subject of much study and discussion,[114] the application of Section 90 to offers raises a number of questions which have not yet been answered.

It should be recalled that contract doctrine generally classifies offers under the same consideration rules as promises. Thus, unless an offer is supported by consideration, the offeror retains the power to revoke until the moment of acceptance.[115] If the offer is expressly or impliedly "firm,"[116] the potential injustice of the operation of the revocation rule

Greene v. Wilson, 208 Cal. App. 2d 852, 25 Cal. Rptr. 630 (1962); Hessler, Inc. v. Farrell, — Del. —, 226 A.2d 708 (1967); Edwards v. Smith, 322 S.W.2d 770 (Mo. Sup. Ct. 1959). *See* Patterson, *An Apology For Consideration*, 58 COLUM. L. REV. 929, 948-49 (1958).

112. The evidentiary, cautionary, deterrent, and channeling functions of formalities are perhaps less easy to identify where the agreement-making process fails to produce reliable assurances that deliberate risk-taking occurred. The fact of reliance during bargaining, or subsequent to an inconclusive termination of negotiations, may raise an elementary question of fairness. *See generally* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-12 (1941).

113. *See* Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 933 (1958). On the basis of cases to date, the test of foreseeability would seem to have the greatest limiting effect on Section 90 in the area of pre-agreement negotiations and promises found defective under consideration doctrine.

114. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); Sharp, *Promise, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286 (1952); Note, *Once Around the Flag Pole: Construction Bidding and Contracts at Formation*, 39 N.Y.U.L. REV. 816 (1964); Note, *Another Look at Construction Bidding and Contracts At Formation*, 53 VA. L. REV. 1720 (1967); Note, 59 COLUM. L. REV. 355 (1959); Note, 18 MAINE L. REV. 297 (1966); Note, 39 TEMPLE L.Q. 489 (1966).

115. RESTATEMENT OF CONTRACTS §§ 24, 47 (1932).

116. The term generally refers to an offer which contains reliable assurances against revocation. *See* Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 793 (1941).

is obvious. One avenue of escape is made available by consideration doctrine in the part performance rule of Section 45 of the *Restatement*.[117] The principle of that section, however, does not provide a foundation sufficiently broad to include many cases of justifiable reliance arising today.[118] It is expressly limited to offers for unilateral contracts and precludes revocation prior to acceptance only where the action in reliance constitutes a part of the actual performance made the price of the offer.[119] If justifiable reliance in the form of *preparations* to perform is to have the effect of preventing revocation, the most readily available theory is that of promissory estoppel.[120] Yet, aside from the construction bidding cases, there is little evidence that nonperformance reliance upon unaccepted offers prompts explicit use of Section 90 as a ground of irrevocability.[121] And even in those cases in which the section is applied, the mode of application is vulnerable to objections of inconsistency, invalid analogy, and circuitous reasoning.

The outcome of current construction bidding litigation usually depends upon the extent to which a particular court accepts the *Drennan* route[122] around the obstacles of *Baird*.[123] In view of the

117. *E.g.*, Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106 (1917).

118. Even a casual examination of the reports should make it clear that Section 45 is invoked in contract litigation much less often than is Section 90. This may suggest that a greater number of reliance claims arise from the bilateral than the unilateral setting. It may also suggest that Section 90 is operating as a substitute for Section 45. *See* Murray, *Contracts: A New Design For the Agreement Process*, 53 CORNELL L. REV. 785, 805 (1968).

119. RESTATEMENT OF CONTRACTS § 45, comment *a* at 53 (1932): "What is tendered must be part of the actual performance requested in order to preclude revocation under this Section."

120. *E.g.*, Anthony v. Hilo Elec. Light Co., — Hawaii —, 442 P.2d 64 (1968); Dunnan & Jeffrey, Inc. v. Gross Telecasting, Inc., 7 Mich. App. 113, 151 N.W.2d 194 (1967); Spitzli v. Guth, 112 Misc. 630, 183 N.Y.S. 743 (Sup. Ct. Oneida Co. 1920); Bretz v. Union Central Life Ins. Co., 134 Ohio St. 171, 16 N.E.2d 272 (1938). It should be noted that while some offers of a bilateral contract unquestionably call for a return promise, others can fairly be said to contemplate some forms of reliance prior to the making of a return promise. In the latter situation, part performance prior to acceptance may create a contract. RESTATEMENT OF CONTRACTS § 63 (1932).

121. For example, it might be expected that Section 90 could comfortably be used to prevent revocation in the real estate brokerage cases. But the cases seldom use the theory of promissory estoppel for this purpose. It may be that there is a general understanding that offerors, before acceptance, have no reason to expect substantial reliance that is not part performance, and therefore the issue is not frequently raised.

122. 51 Cal. 2d 409, 333 P.2d 757 (1958). *See* pp. 355-57 & notes 59-66 *supra*.

123. 64 F.2d 344 (2d Cir. 1933). *See* p. 355 & notes 54-57 *supra*. Though *Baird* and *Drennan* produce widely divergent results, it is interesting that they both purport to observe traditional offer-acceptance rules. In *Baird* it is the offer which authorizes revocation until acceptance, thereby precluding the application of promissory estoppel. On the other hand, the offer in *Drennan* provides assurance against revocation and makes the general's reliance reasonable. At the same time, even *Drennan* concedes the common law effect of a deviant response to an offer. Thus, again in contrast to other factual settings, the continuation of negotiations past the point of the general's use of the sub's bid operates to remove the conditions which justify the use of promissory estoppel. *See, e.g.*, Heddon v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962); Brooks v.

frequent applications of Section 90 to bargains, it is surprising that *Baird* has retained as much vitality as it has. Aside from the technicalities of theory, the blunt thrust of the case is that Section 90 has no relevance to a promise which offers a bargain. A number of courts have, in effect, adopted this philosophy,[124] depriving themselves of a flexible tool for conforming law to common commercial expectations and practices.[125] The liberalizing effect of Justice Traynor's opinion in *Drennan* is therefore a valuable contribution to legal doctrine. However, because the opinion may well be relied upon to justify continued expansion of Section 90, the difficulties with the *Drennan* application of promissory estoppel to offers ought to be kept in mind.

It will be recalled that *Drennan*, by reference to Section 45 of the *Restatement*, found in the sub's offer an implied promise against revocation which, although gratuitous, was binding under Section 90.[126] The first problem with the case is the inconsistency between Justice Traynor's recognition that Section 90 is restricted to gratuitous promises[127] and his ultimate application of the section to a bargain. In addition, the analogies drawn from Section 45 in *Drennan* are not entirely free of difficulty. The subsidiary promises which may be implied from Section 45 offers are in fact themselves conditional upon tender of part of the performance specified in the offer.[128] It would seem that the subsidiary promise to which Section 90 was applied must also have been conditional upon some exchange.[129] So long as reliance is the justification for implying the subsidiary promise, as well as the basis for giving the promise the effect of traditional consideration, there is a risk that the courts will emphasize the latter aspect of the transaction and thereby lose sight of the practical reasons for protecting pre-acceptance reliance.

Oberlander, 49 Ill. App. 2d 312, 199 N.E.2d 613 (1964). Since the *Drennan* rationale agrees with *Baird* on the point that mere use of the sub's bid does not bind the sub on the theory of an acceptance, N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 738 (D.C. Cir. 1963); Norcross v. Winters, 209 Cal. App. 2d 207, 25 Cal. Rptr. 821 (1962), it should be fairly obvious that, in the offer context, traditional contract doctrine controls Section 90 far more than is generally true in the promise context.

124. *E.g.*, Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966).

125. *See generally* Sharp, *supra* note 114.

126. *See* p. 356 & notes 61-63 *supra*.

127. "The very purpose of Section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange'." 51 Cal. 2d at 414, 333 P.2d at 760 (1958).

128. RESTATEMENT OF CONTRACTS § 45, comment *b* at 54 (1932):

> The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer . . . .

129. The response of the *Drennan* court was that the reference to Section 90 in the comment to Section 45 "makes clear that consideration for such a promise is not always necessary." 51 Cal. 2d at 414, 333 P.2d at 760.

There are obvious advantages in frank recognition that foreseeable and substantial reliance upon unaccepted offers, standing alone, is a sufficient reason for binding offerors. The tentative draft of the second *Restatment of Contracts* takes this position in a new section dealing with reliance prior to acceptance.[130] Its approach makes clear that the reliance principle is applicable to bargains, whether unilateral or bilateral in form. Presumably this would permit the use of promissory estoppel theory to prevent revocation of an offer of a unilateral contract—a question presently unsettled because of the exclusion of preparations to perform from the scope of Section 45[131]—thereby helping to clarify two problems which currently obscure the decisional role of Section 90.

D. *The Bargain and Its Aftermath*

Our examination of the role of promissory estoppel now shifts from the earlier stages of the agreement-making process to the point of contract formation and immediately beyond. Attention will be concentrated on the functions performed by Section 90 in the actual striking of the bargain. What is happening in the cases at this point bears heavily upon the interaction of the reliance factor and traditional notions of bargain.

Time and again, in decisions involving clearly commercial agreements, Section 90 is used by the courts as the sole or alternative ground for enforcement. The cases do not fall into any consistent factual pattern. They involve a variety of business activities, ranging from financing the construction of buildings[132] to production of goods[133] and organization and operation of enterprises.[134] A large number of

130. Section 89B(2) (Tent. Draft No. 2, 1965) provides:
An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.
Section 89B(1) provides for irrevocable written offers which meet certain requirements, as does Section 2-205 of the Uniform Commercial Code. *Cf.* Curtiss Candy Co. v. Silberman, 45 F.2d 451, 453 (6th Cir. 1930).

131. Because of the often vague line separating performance from preparations to perform, the respective areas of operation of Sections 45 and 90 have been difficult to distinguish. *See, e.g.*, Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965). Some courts have indicated that preparations to perform will provide a basis for enforcement of a unilateral contract on the rationale of Section 90. *E.g.*, Lazarus v. American Motors Corp., 21 Wis. 2d 76, 123 N.W.2d 548 (1963).

132. *E.g.*, Lehrer v. McCloskey Homes, Inc., 245 F.2d 11 (3d Cir. 1957); Day v. Mortgage Ins. Corp., 91 Idaho 605, 428 P.2d 524 (1967).

133. *E.g.*, Haveg Corp. v. Guyer, — Del. —, 226 A.2d 231 (1967).

134. *E.g.*, Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49

cases also arise from arrangements relating to the employment relation.[135] Since a bargained-for exchange is normally apparent from the face of the transaction, the question arises why the courts believe it necessary, or even desirable, to by-pass bargain principles in favor of promissory estoppel.

The beginnings of an explanation lie in the conventional unilateral contract, where action in reliance serves the dual function of manifesting assent and supplying a justification for enforcement in the form of consideration. The distinguishing characteristic of reliance in this context is that it was deliberately made the price of the promise. In order for the theory of promissory estoppel to find application in such cases, a court must give full effect to the element of reliance and ignore the element of price. This is precisely what is happening in those decisions which see in the acceptance of an offer of a unilateral contract the justification for application of promissory estoppel.[136] A standard contract theory is also frequently recognized in such cases, with the confusion between acceptance and prejudicial reliance compounded by sweeping opinions which conceal the necessity of reinterpreting the transaction in order to accommodate both theories.[137] And the mistake of treating bargained-for reliance as a justification for invoking promissory estoppel carries over to the bilateral contract cases as well. It is not at all unusual to find in the reports cases tried principally on theory of an alleged exchange of promises, but decided solely or partially on the theory of Section 90.[138] A narrow view of

Cal. Rptr. 1 (1966); Central Heat, Inc. v. The Daily Olympian, Inc., — Wash. 2d —, 443 P.2d 544 (1968).

135. *E.g.*, Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964); Gill v. United States Rubber Co., 195 F. Supp. 837 (N.D. Ind. 1961); Thomson v. International Alliance, Stage Employees, 232 Cal. App. 2d 446, 42 Cal. Rptr. 785 (1965); Van Hook v. Waiters Alliance Local 17, 158 Cal. App. 2d 556, 323 P.2d 212 (1958); Hessler v. Farrell, — Del. —, 226 A.2d 708 (1967); Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777 (Fla. 1966); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250 (1964); Bredemann v. Vaughan Mfg. Co., 40 Ill. App. 2d 232, 188 N.E.2d 746 (1963); Dewein v. Dewein's Estate, 30 Ill. App. 2d 446, 174 N.E.2d 875 (1961); Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959); Hilton v. Alexander & Baldwin, Inc., 66 Wash. 2d 30, 400 P.2d 772 (1965); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967).

136. The striking thing is not that an acceptance is mistaken for prejudicial reliance within the meaning of Section 90, but that the disposition to equate the two ideas persists to the degree it does. *See, e.g.*, Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966). In Feiler v. Midway Sales, Inc., 363 Mich. 105, 110, 108 N.W.2d 884, 887 (1961), the court grounds application of Section 90 on the "performance of the conditions" specified in the promise.

137. *E.g.*, City of Los Angeles v. Anchor Cas. Co., 204 Cal. App. 2d 175, 22 Cal. Rptr. 278 (1962). *Cf.* Hilltop Properties, Inc. v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965).

138. *E.g.*, Gill v. United States Rubber Co., 195 F. Supp. 837 (N.D. Ind. 1961); Haveg

consideration doctrine may account for some of these decisions,[139] but again and again the rendering of performance by a party to a bilateral contract leads courts to believe that the reliance test of Section 90 has been satisfied.[140]

Since the element of reliance is indispensable to both promissory estoppel and the unilateral contract, difficulties in preserving the separate identities of the theories are to some extent understandable. But why performance of a bilateral contract should look like the detrimental reliance contemplated by Section 90 is less clear. Perhaps a partial explanation is that the cases in question often resemble half-completed exchanges, with the reliance factor reinforced by economic values conferred by full performance on one side of the bargain.[141] In such situations broad classifications will effectively dispose of a case with no serious threat of disagreement. Another factor contributing to careless use of Section 90 results from the factual context of the cases involved. A noteworthy aspect of the bargain cases which employ promissory estoppel is that the bargain itself is subject to dispute, usually because it is oral.[142] Lawyers in preparing such cases, and judges in deciding them, are understandably inclined to give weight to facts which are supportable by objective proof. Demonstrated change in business conduct is thus likely to assume an importance which makes technicalities about inducement appear insignificant.[143] If a court is otherwise receptive to the broad principle of promissory estoppel, the tests of reliance can be manipulated to support the doctrine. If the court takes a dim view of Section 90, strict tests of reliance can be used to deny its application.[144]

What this means is that reliance which is substantial and appears to flow naturally from the transaction has the practical effect of inducing courts to substitute the promissory estoppel idea for conventional

Corp. v. Guyer, — Del. —, 226 A.2d 231 (1967); Quijada v. Southern Pipe & Casing Co., 78 Nev. 271, 371 P.2d 661 (1962).

139. *E.g.*, Day v. Mortgage Ins. Corp., 91 Idaho 605, 428 P.2d 524 (1967).

140. *E.g.*, Hessler, Inc. v. Farrell, — Del. —, 226 A.2d 708 (1967); Aldrich v. Forbes, 237 Ore. 559, 385 P.2d 618 (1963).

141. Action in reliance, in this context, will usually be beneficial to the promisor. With rare exceptions, reliance which takes unbargained-for forms is not involved.

142. The extent to which Section 90 is relevant to the problems caused by the lack of a writing is illustrated in Haveg Corp. v. Guyer, — Del. —, 226 A.2d 231 (1967). It has been held that promissory estoppel cannot operate in the face of the parol evidence rule. Joseph v. Mahoney Corp., 367 S.W.2d 213 (Tex. Civ. App. 1963).

143. This would seem to support the notion that the reliance principle of Section 90 is becoming increasingly recognized as an independent standard of elementary fairness. Aldrich v. Forbes, 237 Ore. 559, 385 P.2d 618 (1963).

144. *See* Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964).

bargain concepts. If promissory estoppel reasonably supports a court's statement that consideration is present, a detailed analysis of bargain is unnecessary.[145] These observations are subject to some qualification in the cases involving the employment relation, particularly with respect to alleged agreements for retirement benefits. Here benevolent motives intervene to color the transaction, creating doubts about the exchange element.[146] In consequence, the theory of promissory estoppel may be examined more closely in the context of standard consideration rules,[147] and a stronger showing of the elements of Section 90 tends to be required.[148] A finding that consideration tests are not satisfied may influence the result of the promissory estoppel approach to the case.[149]

An interesting and relatively unexplored area of the bargain field has to do with collateral promises made either contemporaneously with, or subsequent to, a concluded bargain. If the bargain is oral, one party may promise, also orally, to reduce it to a writing.[150] Or, if the promise is subsequent to the conclusion of the bargain, it may constitute further assurance that the agreed performance will be rendered.[151] Such a promise may also contain assurances about the meaning and scope of the original agreement.[152] Obviously promises of this nature collide with parol evidence and pre-existing duty rules, as well as the Statute of Frauds.[153] Nevertheless, such promises may in fact induce detrimental reliance. When they do, the question arises whether Section 90 imposes obligation independent of the completed bargain. The availability of Section 90 is particularly important in the event the bargain is ultimately found to be unenforceable.

145. This was essentially the attitude of the court in Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 610, 49 Cal. Rptr. 1 (1966). *Cf.* Williams Constr. Co. v. Standard-Pacific Corp., 61 Cal. Rptr. 912, 918-19 (Ct. App. 1967).

146. Though the theory of Section 90 is readily available in connection with promised benefits for services, concern with the traditional bargain idea may result in Section 90's being overlooked entirely. *See* National Outdoor Advertising Co. v. Kalkhurst, 418 P.2d 661 (Okla. 1966).

147. *See* Bredemann v. Vaughan Mfg. Co., 40 Ill. App. 2d 232, 188 N.E.2d 746 (1963). Even though Section 90 is made the ground for relief, the court may make a special effort to caution that the holding is not to be understood as an abandonment of the consideration concept. Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959).

148. *See* Pitts v. McGraw-Edison Co., 329 F.2d 412 (6th Cir. 1964); Dewein v. Dewein's Estate, 30 Ill. App. 2d 446, 174 N.E.2d 875 (1961).

149. *Compare* Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967), *with* Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961).

150. Hessler, Inc. v. Farrell, — Del. —, 226 A.2d 708 (1967).

151. Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966); Dunnan & Jeffrey, Inc. v. Gross Telecasting, Inc., 7 Mich. App. 113, 151 N.W.2d 194 (1967); Corbit v. J.I. Case Co., 70 Wash. 2d 522, 424 P.2d 290 (1967).

152. Travelers Indem. Co. v. Holman, 330 F.2d 142 (5th Cir. 1964).

153. *See* pp. 381-82 & notes 210-17 *infra*.

Existing authorities suggest that expansion of promissory estoppel in this area is both possible and likely. *Wheeler v. White*[154] makes clear that the unenforceability of a bargain does not preclude application of promissory estoppel. A significant factor in that decision was that assurances of performance made subsequent to the bargain were the principal cause of reliance losses.[155] In holding that the complaint stated a cause of action under Section 90, the court in *Wheeler* emphasized the role of "promises designedly made to influence conduct" without clearly separating the purported contract from the later promises of performance.[156] It would further appear that analogies drawn from the theory of implied subsidiary promises under Section 45 of the *Restatement* and the *Drennan* case[157] could be of service here. Surely an oral promise which is clearly proved is entitled to parity with one understood to be necessarily implied. Nevertheless, although several recent decisions have tied results based on promissory estoppel to collateral promises respecting performance,[158] courts do not yet generally appreciate the potential of Section 90 in this setting.[159]

When the collateral promise is to reduce to writing an otherwise completed bargain, the doctrine of promissory estoppel has enjoyed only limited success as a method of hurdling the obstacle of the Statute of Frauds. Courts have been particularly resistant to the doctrine in cases involving oral employment contracts.[160] An outstanding example is the case of *Tanenbaum v. Biscayne Osteopathic Hospital, Inc.*,[161] in which the Florida Supreme Court, apparently because of its extremely restrictive view of Section 90, refused to so much as recognize plaintiff's attempt to avoid the statute by distinguishing a promise to employ from a promise to reduce the employment bargain to written form.[162] The cases thus stands directly opposed to the *Restatement* position that substantial reliance upon a promise to deliver a writing precludes the

154. 398 S.W.2d 93 (Tex. 1966). *See also* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

155. *Cf.* Dovenmuehle, Inc. v. K-Way Associates, 388 F.2d 940, 947 (7th Cir. 1968) (separate opinion of Schnackenberg, J.).

156. 398 S.W.2d at 96 (Tex. 1965).

157. 51 Cal. 2d 409, 333 P.2d 757 (1958).

158. *See* cases cited note 151 *supra*.

159. *See, e.g.*, Lefforge v. Rogers, 419 P.2d 625 (Wyo. 1966), where both court and counsel apparently missed the fairly obvious applicability of Section 90 to an oral promise made at the point of contract formation.

160. For cases and discussion see Comment, *Promissory Estoppel and Oral Employment Contracts*, 24 WASH. & LEE L. REV. 347 (1967).

161. 190 So. 2d 777 (Fla. 1966).

162. The only discussion of the point appears in the opinion of the dissenting judge. *Id.* at 780-82. *See* note 217 *infra*.

raising of the statute if the effect is to create a promissory estoppel.[163] The Restatement view necessarily recognizes that a promise to reduce a contract to writing is directly relevant to the issue of the reasonableness and foreseeability of reliance, a view more courts will have to take if Section 90 is to become an effective device for dealing with such promises.[164]

E. *Readjustment in On-going Transactions*

Perhaps the most conventional application of promissory estoppel occurs when a relationship, usually contractual, has already been established and the rendering of performance has begun. One of the parties then promises to vary or forfeit a non-essential term or condition of the contract, or to surrender a defense which may arise in the future.[165] The promise is typically unsupported by consideration, and the reliance which it induces is not actionable under strict contract theory because of the rule that performance of legal duties already owed the promisor is not consideration.[166] But if the promise relates to the future and induces a material change of position, the intention of "waiver" or "abandonment" expressed in the promise combines with the general estoppel idea to give rise to promissory estoppel.[167]

In examining the operation of Section 90 in the setting of on-going transactions, it is useful to recall that the broad applicability of the estoppel concept in our law derives from the reaction of judges to the effects of misleading conduct. To the extent that promises produce similar effects, they tend to be treated by means of the broad and flexible estoppel technique, whether or not the specific tests of promissory estoppel are satisfied.[168] And because the cases now under consideration comfortably fit the factual pattern of traditional equitable estoppel, or estoppel in pais, it is not surprising that the requirements of liability spelled out in Section 90 are often less rigorously applied

163. RESTATEMENT OF CONTRACTS § 178, comment *f* at 234-35 (1932).

164. Some courts will undoubtedly believe that the hazards of enforcement of such promises are too great to justify the use of Section 90. *See* Dooley v. Lachut, — R.I. —, 234 A.2d 366 (1967); Heyman v. Adeack Realty Co., — R.I. —, 228 A.2d 578 (1967).

165. *See, e.g.*, Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938).

166. RESTATEMENT OF CONTRACTS § 76 (1932).

167. As used here, the concept of "waiver" is not confined to the usual definition of a "voluntary relinquishment of a known right." Rather, the reliance which the waiver induces operates to merge the latter idea with that of estoppel. *See* RESTATEMENT (SECOND) OF CONTRACTS § 88, comment *b* at 113 (Tent. Draft No. 2, 1965).

168. *See* Albanese v. N.V. Nederl. Amerik Stoomv. Maats, 279 F. Supp. 635 (S.D.N.Y. 1967); Hetchler v. American Life Ins. Co., 266 Mich. 608, 254 N.W. 221 (1934); Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898). *Contra*, Prescott v. Jones, 69 N.H. 305, 41 A. 352 (1898).

in the waiver cases than in other contexts. Opinions can be found in which the concepts of equitable estoppel, promissory estoppel, and waiver are treated as indistinguishable.[169]

In light of the fact that a formal relationship exists, the risk of serious reliance upon a promise designed specifically to adjust that relationship is high. Consequently, it might be expected that the waiver cases would push toward expansion of Section 90 beyond situations of proved reliance to those involving a substantial likelihood of reliance. The draft proposal of Section 90 in the second *Restatement* contemplates that the reliance element may, in certain instances, be satisfied by a showing of a probability of reliance.[170] Nevertheless, the decisions have not, as yet, explored such prospects in explicit terms. In some of the decisions applying Section 90 the courts appear to have believed that a close examination of the reliance factor was unnecessary.[171] At the same time, however, other characteristics of the waiver cases suggest that the courts are simply not prepared to be adventurous in their use of Section 90 in this area. The cases are marked by substantial concern about whether actual reliance did in fact occur,[172] whether it was induced by the promise in question[173] and whether real injury resulted.[174] This kind of administration of the reliance principle suggests that adjustments in on-going contracts are subject to review under

169. *E.g.*, Veasey v. Layton, 42 Del. Ch. 155, 206 A.2d 505 (1964); Shell Oil Co. v. Kelinson, — Iowa —, 158 N.W.2d 724 (1968). *Cf.* Shinabarger v. United Aircraft Corp., 381 F.2d 808 (2d Cir. 1967).

This disposition, coupled with the importance of the waiver cases to the general development of promissory estoppel, may explain why a number of courts have limited their acceptance of Section 90 to the waiver category. *See* Southeastern Sales & Service Co. v. T. T. Watson, Inc., 172 So. 2d 239 (Fla. Dist. App. 1965). (As to the impact of the estoppel tradition on the issue of Section 90 damages, see p. 378 & notes 198-99 *infra*.) With respect to the promise requirement in the waiver cases, there exists some evidence of fulfillment by a course of conduct verging on misrepresentation of existing fact. *See* cases cited note 111 *supra*. Indeed, there are instances where the exclusive urging of Section 90 may have the effect of confusing the promise, with the result that traditional theories are overlooked. While agreeing that the promise was made, the court in Fedun v. Mike's Cafe, Inc., 204 Pa. Super. 356, 204 A.2d 776 (1964), *aff'd*, 419 Pa. 607, 213 A.2d 638 (1965), devoted its full attention to the issue of whether the promise satisfied the tests of Section 90 and failed to consider whether an offer of a unilateral contract had in fact been accepted. A similar disposition occurred in Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964).

170. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90, comments *b* & *c* at 166-68 (Tent. Draft No. 2, 1965). *See generally* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810-12 (1941).

171. The procedural setting of a case is of course significant on this point. If the case is not up for disposition on the merits, there may be less reason to be precise in the handling of various theories.

172. *E.g.*, Nichols v. Acers Co., 415 S.W.2d 683 (Tex. Civ. App. 1967) (dictum).

173. *E.g.*, Kaufman v. Mellon Nat'l Bank & Trust Co., 366 F.2d 326 (3d Cir. 1966); Glitsos v. Kadish, 4 Ariz. App. 134, 418 P.2d 129 (1966).

174. *E.g.*, Weiner v. Romley, 94 Ariz. 40, 381 P.2d 581 (1963).

standards little if any different from those generally applied in the Section 90 cases.[175]

When it comes to extreme adjustments, such as alleged agreements to rescind existing obligations, the difficulties in applying Section 90 appear to increase. To begin with, further bargaining after performance has begun is uniquely subject to abuse because of institutional advantages enjoyed by promisors over dependent promisees. If such abuses do occur, courts are more likely to turn to remedial doctrines of fairness than to bother with the requirements of Section 90.[176] It cannot realistically be contended that promises extracted by pressures such as those so well-documented in the duress cases should be enforced simply because they meet the Section 90 requirements.

In addition, the courts have not forgotten that a rescission is itself a contract subject to conventional consideration requirements.[177] Three recent decisions on point,[178] moreover, demonstrate again that when the need for consideration is considered filled by promissory estoppel, the outlines of both theories become blurred and indistinct. All three case arose out of negotiations looking to a total release of liability. In each the emphasis on promissory estoppel obscures the outlines of a potential bargain theory, while the application of Section 90 in a traditional consideration context appears to result in a rigid but ill-defined application of the criteria of promissory estoppel. The discussion of both the reliance and promise factors in *Aubrey v. Workman* is so saturated with bargain concepts that it is difficult to identify any meaningful role for Section 90.[179] Perhaps the most interesting aspect of these particular waiver cases is that promissory estoppel generally failed as a ground for rescission.[180] The explanation may simply be

175. RESTATEMENT (SECOND) OF CONTRACTS § 89D(c) (Tent. Draft No. 2, 1965) states a general rule with respect to the effect of reliance upon adjustments in on-going transactions: "A promise modifying a duty under a contract not fully performed on either side is binding . . . (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise." The section is an adaptation of the UNIFORM COMMERCIAL CODE § 2-209.

176. The relation of promissory estoppel and the doctrines of duress and mistake is considered in Sharp, *Promise, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286, 292-96 (1952); Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783, 785-88 (1941). *Cf.* Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

177. *See* RESTATEMENT OF CONTRACTS § 406 (1932).

178. Mohr v. Shultz, 86 Idaho 531, 388 P.2d 1002 (1964); Fedun v. Mike's Cafe, Inc., 204 Pa. Super. 356, 204 A.2d 776 (1964), *aff'd*, 419 Pa. 607, 213 A.2d 638 (1965); Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964).

179. *See* 384 S.W.2d at 393-95.

180. *Cf.* Prevas v. Gottlieb, 229 Md. 188, 182 A.2d 489 (1962). In the rescission cases there exists a real possibility that promissory estoppel will serve as a vehicle for carrying consideration rules over to the problems of discharge of contracts, an area where the relevance of consideration doctrine has long been in doubt.

that a party who seeks to keep a contract alive, even though in a modified form, is in a better position to secure relief than one who asks for a full release from the burdens of performance.[181]

IV. The Impact of the Estoppel Principle

In addition to resisting pressures exerted by bargain concepts, Section 90 must also be extricated from the influence of traditional estoppel doctrine if it is to establish an identify of its own. The limiting effects of the estoppel principle stem from an historical distinction which has little real meaning today. The common definition of estoppel in pais, or equitable estoppel,[182] is based upon the assumption that a promise as to the future is normally distinguishable from a factual representation about the past or present. But because many of the estoppel cases can be interpreted to involve an express or implied promise rather than a representation of fact,[183] the narrow definition of equitable estoppel has never adequately covered all the cases to which the estoppel principle might fairly be applied. It was therefore inevitable that a rule of promissory estoppel would develop in recognition of the applicability of the estoppel principle to promises. The basic difficulty with this innovation is that the underlying theory of estoppel is not mechanically suited for application to promises. To "estop" the maker of a statement of fact by sealing his mouth in court has the effect of establishing a factual basis for an action, which, standing alone, will support recovery.[184] The consequences of misleading conduct supply the injury, and the estoppel theory renders the representor powerless to dispute the facts upon which liability is based.

The situation becomes more complex when estoppel is applied to a promise. In the first place, enforcement goes beyond a represented status quo.[185] As to theory, the mechanics of promissory estoppel pro-

181. If such considerations are entitled to weight, it is clear that the modern requirements of Section 90 can be shaped to effect the desired result.

182. The species of estoppel which equity puts upon a person who has made a false representation or a concealment of material facts, with knowledge of the facts, to a party ignorant of the truth of the matter, with the intention that the other party should act upon it, and with the result that such party is actually induced to act upon it to his damage.
BLACK'S LAW DICTIONARY 632 (4th ed. 1951). A good discussion of the rules of equitable estoppel appears in Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965).

183. *E.g.*, Hetchler v. American Life Ins. Co., 266 Mich. 608, 254 N.W. 221 (1934).

184. *See* American Nat'l Bank v. A.G. Somerville, Inc., 191 Cal. 364, 216 P. 376 (1923); Colonial Theatrical Enterprises v. Sage, 255 Mich. 160, 237 N.W. 529 (1931).

185. If the action seeks to enforce an affirmative undertaking by the promisor, simply sealing the promisor's mouth because of the promisee's reliance does not fulfill the undertaking. *See generally* Comment, *The Measure of Damages for Breach of a Contract Cre-*

duce liability by the technique of "estoppel to deny consideration."[186] In effect a promise which is unenforceable under consideration rules is enforced by creating the impression that a form of consideration exists.[187]

The significant point is that while the reliance principle of Section 90 is widely understood as independent of the common definition of estoppel, the technicalities which derive from the common definition continue to influence the application of promissory estoppel.[188] Decision after decision disposes of Section 90 in the language of equitable estoppel, as if there were no real difference between the theories.[189] Estoppel precedents are used to give content to the specific elements of Section 90, as well as to dispose of broad issues of promissory estoppel.[190] The old fact-promise distinction may be employed to preclude liability under either equitable or promissory estoppel.[191] Concepts long associated with equitable estoppel, such as deceit and fraud, are easily incorporated as substantive elements of promissory estoppel, with the result that the reliance element of Section 90 is scrutinized under such labels as "irreparable detriment," "unjust enrichment," or "constructive fraud."[192] The essentially defensive tradition of equitable

ated By Action in Reliance, 48 YALE L.J. 1036, 1044-45 (1939); Note, 30 TEXAS L. REV. 903 (1952). *Cf.* Griswold v. Haven, 25 N.Y. 595 (1862).

186. This is the popular description of the job performed by promissory estoppel. The defendant is simply "estopped to deny liability by showing lack of consideration." Glitsos v. Kadish, 4 Ariz. App. 134, 418 P.2d 129, 130 (1966).

187. In conventional language, estoppel to deny consideration provides a "substitute" for consideration. As a practical matter, it is estoppel theory which supplies the legal framework for the imposition of liability. *Cf.* Bray v. Gardner, 268 F. Supp. 328, 332 (E.D. Tenn. 1967): " . . . in the absence of statute, the doctrine of estoppel is available to protect a right; never to create one."

188. The wide use of the popular phrase "promissory estoppel" undoubtedly contributes to the belief that Section 90 is properly classified under an estoppel heading. As a result, attention is diverted from the reliance principle which underlies Section 90.

189. *E.g.*, Veasey v. Layton, 42 Del. Ch. 155, 206 A.2d 505 (1964); Edwards v. Smith, 322 S.W.2d 770 (Mo. 1959).

190. *See* Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30 (1965); Ahnapee & Western Ry. v. Challoner, 34 Wis. 2d 134, 148 N.W.2d 646 (1967).

191. *See* Southeastern Sales & Serv. Co. v. T.T. Watson, Inc., 172 So. 2d 239 (Fla. Ct. App. 1965); Croce v. Whiting Milk Co., —— R.I. ——, 228 A.2d 574 (1967).

192. The Illinois courts, for example, continue to require proof of fraud or intent to deceive before there can be a recovery under Section 90. *See* Dovenmuehle, Inc. v. K-Way Associates, 388 F.2d 940, 947 (7th Cir. 1968). *Cf.* Swift v. Peterson, 240 Iowa 715, 719, 37 N.W.2d 258, 259 (1949) ("actual fraud in the making of the promise must appear"). One of the strongest statements of the elements of promissory estoppel appears in Meredith v. John Deere Plow Co., 261 F.2d 121, 124 (8th Cir. 1958): "Such injustice must be so substantial . . . as to constitute serious prejudice (not mere legal detriment . . .), or to amount in its effect to constructive fraud or unjust enrichment within traditional equitable concepts." *See also* Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); McCrillis v. American Heel Co., 85 N.H. 165, 155 A. 410 (1931). It has been recognized that an action for fraud or deceit is the "most comparable" to a Section 90 action. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267, 273 (1965).

estoppel not only dominates the fashioning of remedial relief under Section 90,[193] but, by necessary implication, brings in question the expansion of promissory estoppel as an affirmative basis of responsibility. The most striking consequence of preoccupation with estoppel concepts is that the courts fail to recognize that application of Section 90 does in fact involve a contract. It should be recalled that the expanded use of promissory estoppel in the forward-looking case of *Hoffman v. Red Owl Stores, Inc.*, was expressly premised upon a finding that Section 90 did not rest upon, nor was equivalent to, a contract.[194] Other courts have similarly dissociated promissory estoppel from contract.[195] If such decisions are merely saying that Section 90 does not depend upon bargain consideration, the distinction is of course accurate. But there is a general failure to recognize that Section 90 is catalogued under the heading of informal contracts without consideration. As a result, attention is diverted from the specific language of the section, which says that a "promise" is "binding" when detrimental reliance creates "injustice" which can be avoided only by "enforcement of the promise."[196]

The consequences of failure to recognize promissory estoppel as a contract doctrine are felt principally in the area of remedies. After scholarly and exhaustive analysis, the issue of whether damages awarded under Section 90 should be limited to protection of the reliance interest, or measured by the full expectation interest, is still unsettled.[197] In practice, even the most progressive expansions of Section 90 often cling to a damage measure derived from the defensive theory of estoppel.[198] There are occasions, to be sure, where the limitations of estoppel theory are circumvented by employing Section 90 to effect a recovery in excess of reliance losses.[199] It is interesting to note, however, that the cases which use Section 90 as the ground for awarding

193. *See* note 198 *infra*.
194. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). *See* p. 359 & notes 78-80 *supra*.
195. *E.g.*, Solway Decorating Co. v. Merando, Inc., 240 A.2d 361, 362-63 (D.C. Ct. App. 1968); L.S. Good & Co. v. H. Daroff & Sons, Inc., 279 F. Supp. 925, 927 (N.D.W. Va. 1968)
196. RESTATEMENT OF CONTRACTS § 90 (1932).
197. The definitive work is Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936, 1937). *See also* Seavy, *Reliance Upon Gratuitous Promises and Other Conduct*, 64 HARV. L. REV. 913 (1951); Shattuck, *Gratuitous Promises—A New Writ?* 35 MICH. L. REV. 908 (1937); Comment, *The Measure of Damages For Breach of a Contract Created by Action in Reliance*, 48 YALE L.J. 1036 (1939); Note, 59 DICK. L. REV. 163 (1955); Note, 65 MICH. L. REV. 351 (1966); Note, 13 VAND. L. REV. 705 (1960).
198. *See, e.g.*, Dovenmuehle, Inc. v. K-Way Associates, 388 F.2d 940 (7th Cir. 1968) (dissent); Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965). Recoveries in the franchise dealer cases are consistent with measuring protection by the reliance interest.
199. *See, e.g.*, Haveg Corp. v. Guyer, —— Del. ——, 226 A.2d 231 (1967).

the promised performance typically involve bargain transactions in which consideration might arguably have been found.[200] This suggests that identification with contract doctrine is indeed essential if promissory estoppel is to be broadly accepted as a vehicle for protecting the expectation interest. To the extant that estoppel intervenes to obscure the contract theory, the reimbursement of reliance losses alone will likely develop as the standard damage measure under Section 90.

A further influence upon Section 90 is to be observed in the tradition of equity which underlies estoppel. The specific concern of Section 90 with "injustice," standing alone, contemplates broad judicial discretion to make use of equitable principles. The risk inherent in such discretion is that equities arising from sources other than Section 90 may operate to modify the requirements of that Section. For example, the historical tests of a remedy in equity do not necessarily determine the availability of promissory estoppel.[201] Nor does Section 90 authorize a conventional "balancing of the equities,"[202] especially in the light of the principal concern of the section for the effects of non-performance upon the promisee.[203] If the particular remedy sought sounds in equity, the elements of promissory estoppel have on occasion drawn meaning from doctrines indigenous to the ethics of equity.[204]

Since promissory estoppel is a peculiarly equitable doctrine de-

200. The courts which invoke Section 90 to support a recovery in the setting of construction industry bidding are, of course, compensating for the loss of expected profits. *See, e.g.*, Solway Decorating Co. v. Merando, Inc., 240 A.2d 361 (D.C. Dist. Ct. App. 1968); Reynolds v. Texarkana Constr. Co., 237 Ark. 583, 374 S.W.2d 818 (1964); Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958). As has been noted, these decisions do involve offers and take the form of conventional bargains. As to full or partial protection of the expectation interest in other settings of exchange, see Glitsos v. Kadish, 4 Ariz. App. 134, 418 P.2d 129 (1966); Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966); City of Los Angeles v. Anchor Cas. Co., 204 Cal. App. 2d 125, 22 Cal. Rptr. 278 (1962); Anthony v. Hilo Elec. Light Co., —— Hawaii ——, 442 P.2d 64 (1968); Quijada v. Southern Pipe & Casing Co., 78 Nev. 271, 371 P.2d 661 (1962); East Providence Credit Union v. Geremia, —— R.I. ——, 239 A.2d 725 (1968); Dyer v. Metallic Bldg. Co., 410 S.W.2d 56 (Tex. Civ. App. 1966); Central Heat, Inc. v. The Daily Olympian, —— Wash. 2d ——, 443 P.2d 544 (1968). The element of bargain is arguably present in some of the employment compensation cases which award expectation damages on the authority of Section 90. *E.g.*, Van Hook v. Waiters Alliance Local 17, 158 Cal. App. 2d 556, 323 P.2d 212 (1958).

201. *See* Dobbs v. Russell, 347 S.W.2d 796 (Tex. Civ. App. 1961) (promissory estoppel is inapplicable where grounds for an action in equity do not exist).

202. Viewing promissory estoppel as a "doctrine of equity," the court in Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 104, 387 P.2d 1000, 1003 (1964), discussed the case entirely in terms of "the equities between the parties."

203. Professor Williston, in discussing Section 90, commented: "I suppose that the fair inference is that it [injustice] does mean injustice to the promisee. . . ." 4 ALI PROCEEDINGS 85 (Appendix 1929). Nevertheless, the foreseeability test of Section 90 operates to safeguard promisors from reliance claims.

204. For example, the requirement of "clean hands" in quiet title action may have determined the disposition of the issue of promissory estoppel in Weiner v. Romley, 94 Ariz. 40, 381 P.2d 581 (1962).

signed to deal with situations which, in total impact, necessarily call into play discretionary powers, it is desirable that the elements of Section 90 remain sufficiently pliable. They should not, however, be subject to unlimited modification in the name of estoppel or equity. If it is remembered that the rules of promissory estoppel create a contract grounded on the effects of reliance, indiscriminate use of estoppel notions will be minimized. The complicating factor is that the element of detrimental reliance is essential to both estoppel and Section 90. If Section 90 is to be unravelled from the estoppel tradition, controlling importance must be given the specific tests of that section in weighing the factors which bear on relief.

V. The Collision of Promissory Estoppel and Legislative Policies

Some estimate of the importance attached by courts to the principles of promissory estoppel can be gathered from cases in which the reliance doctrine is invoked to keep alive agreements which are unenforceable under either statutes of limitation or the Statute of Frauds. With respect to the operation of statutes of limitation, straight estoppel theory has long provided relief in cases involving misleading conduct which encourages the belief that protection of the statute will not be claimed.[205] While it is not unusual for a court to find the elements of promissory estoppel as well in such cases,[206] recent decisions suggest that Section 90 operates only as an adjunct to general estoppel notions in extending time limits on the bringing of actions.[207] Its chief function is apparently to reinforce the considerations of injustice balanced by the court against the purposes of the statute in deciding whether the limitation period shall be extended in a given case.[208]

When it comes to satisfying or avoiding the Statute of Frauds, courts are unquestionably concerned about conflict between legislative policy and the implications of Section 90. Some of the resistance to application of reliance doctrine derives from the great extent to which the courts understand the Statute of Frauds' requirement of a writing as diminishing the relevance of traditional issues of enforceability.[209]

205. *See generally* Dawson, *Estoppel and Statutes of Limitations*, 34 MICH. L. REV. 1 (1955). The cases are collected in 1A CORBIN § 194.

206. *E.g.*, Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806 (1949).

207. *E.g.*, Dobbs v. Russell, 347 S.W.2d 796 (Tex. Civ. App. 1961).

208. *See* Shinabarger v. United Aircraft Corp., 381 F.2d 808 (2d Cir. 1967).

209. A case commonly regarded as supplying a benchmark for promissory estoppel, Seavey v. Drake, 62 N.H. 393 (1882), illustrates the point. The court there enforced a gift promise of a deed on the authority of the equity doctrine of "part performance." The

Even though reliance in theory works an exception to the Statute, the consequences of non-compliance with the writing requirement tend to carry the greatest weight. As a practical matter, the priority of the writing requirement seems to result in more restricted application of Section 90 than would normally be the case in other settings.[210]

With minor exceptions, the recent cases pitting promissory estoppel against the defense of the Statute of Frauds involve bargains, not gratuitous promises. They arise from attempts to create original contract obligations rather than from revisions of existing relationships. Above all, there is seldom any indication that the court is not convinced that the oral contract was in fact made. Given these factors, it is not surprising that the elements of promissory estoppel tend to be applied in the language of the tests of bargain consideration.[211] There is also some tendency in the Statute of Frauds cases to lump promissory with equitable estoppel, with some courts apparently taking the position that only equitable estoppel will preclude the raising of the Statute.[212] Because doctrines based on estoppel or fraud are so often applicable to cases falling within Section 90, it is not unusual to find a court employing multiple theories simultaneously in a single case.[213]

But the most instructive cases from the standpoint of judicial attitudes toward promissory estoppel are those which deny any basis whatsoever for operation of the doctrine in opposition to the Statute of Frauds.[214] Aside from explicit concern with the undermining of legislative policy, these decisions surely reflect some lingering doubts

promise was both oral and without consideration, yet the subject of consideration was only relevant to the court's discussion to the extent that it reinforced the "part performance" ground for circumventing the writing requirement. "The expenditure in money or labor in the improvement of the land induced by the donor's promise to give the land to the party making the expenditure, constitutes, in equity, a consideration for the promise, and the promise will be enforced." *Id.* 394.

210. Since it is established doctrine that the Statute of Frauds is to be "strictly applied," it would seem to follow that the elements of Section 90 will also be "strictly applied," in this context. A good collection of cases on estoppel to plead the Statute of Frauds appears in 37 CALIF. L. REV. 151 (1949).

211. For example, in Aubrey v. Workman, 384 S.W.2d 389, 393-94 (Tex. Civ. App. 1964), the court states that in order for a promise to defeat the defense of the statute, the promisor must "receive some requested benefit . . . ."

212. *E.g.*, Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964). Most courts seem to make no distinction between the efficacy of the two theories. *See* Dooley v. Lachut, —— R.I. ——, 234 A.2d 366 (1967); Heyman v. Adeack Realty Co., —— R.I. ——, 228 A.2d 578 (1967).

213. In at least one instance, the merits of the litigation were disposed of on the ground of promissory estoppel, while the issue of the Statute of Frauds was resolved by a straight estoppel theory. Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966).

214. *E.g.*, Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250 (1964); Prevas v. Gottlieb, 229 Md. 188, 182 A.2d 489 (1962).

about the general legitimacy of the reliance ground of enforcement of promises. Whether or not these courts are persuaded that legislative distrust of oral agreements is expressed so conclusively that no room for exceptions is permitted, the fact remains that dispensing powers have historically been exercised in the face of such statutes because of a promisee's reliance.[215] Judicial reluctance to recognize Section 90 as falling within traditional discretionary powers suggests that for some judges, at least, reliance is somehow less worthy of protection when it is invoked under the theory of promissory estoppel. For example, courts inclined to make an exception to the Statute for detrimental reliance occasioned by deliberate misleading have indicated a different result where the injury from a simple promise to waive the defense of the Statute.[216] The Florida Supreme Court has gone so far as to state that only the legislature may authorize enforcement, under Section 90, where a promise is otherwise within the Statute of Frauds.[217] These attitudes may simply reflect the belief that, absent conduct approaching willful concealment or misrepresentation, reliance upon an oral, unenforceable promise cannot be justified.

In any case, it is important to recognize that the decisions which close the Statute of Frauds field to Section 90 do so in the face of a considerable body of theory which could be used to achieve the opposite result.[218] It appears that the sweep of policies regarding the

215. *See* Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965), for an interesting discussion of the roles of part performance and equitable estoppel in the awarding of reliance damages. Jurisdictions taking a restrictive view of promissory estoppel in the face of the Statute of Frauds, have at the same time recognized the exception to the statute based upon the equity doctrine of part performance. *See, e.g.*, the discussion of authorities in Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 780-82 (Fla. 1966) (dissent).

216. Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 17, 109 N.E.2d 250, 253 (1964); Heyman v. Adeack Realty Co., —— R.I. ——, 228 A.2d 578, 580 (1967). *Cf.* Dooley v. Lachut, —— R.I. ——, ——, 234 A.2d 366, 368 (1967).

217. In Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777, 779 (Fla. 1966), the court, after noting "the legislative prerogative of dealing with matters of this nature," proceeded to say that "[T]hirty-three years have passed since the Restatement . . . was adopted and there have been about fifteen intervening sessions of the legislature at which the contents of Section 90 could have been incorporated into the act, yet we know of no such effort or accomplishment."

218. Doctrines of estoppel and promissory estoppel have long precluded objections to non-compliance with the Statute. *See* RESTATEMENT OF CONTRACTS § 178, comment *f* at 234-35 (1932). The traditional limitation of the part performance doctrine to equitable relief, (RESTATEMENT (SECOND) OF CONTRACTS § 197 (Tent. Draft No. 4, 1968) continues to limit the application of the part performance doctrine to equitable relief in actions involving a transfer of interest in land) particularly specific performance, has been subject to notable exceptions. *See generally* 2 CORBIN § 459. Since reliance is widely recognized as providing a compelling substantive basis for relief, there is no reason why equity notions, developed primarily in the land contract cases, should bar a damage remedy for breach of oral agreements not involving the land contract provision of the statute. For recent

hazards of perjured litigation have the effect of foreclosing inquiry into competing policies. Thus cases which summarily dismiss promissory estoppel seldom indicate concern with the seriousness of the claimed reliance.[219] By the same token, the possibility that proof of actual agreement, and reliance thereon, may satisfy the purposes of the Statute at least in some cases is not considered. It may well be that, in the final analysis, the threat of jury verdicts of heroic proportions, coupled with the fact that the legislature has declared a policy, will have the effect of barring application of Section 90 regardless of injustice in individual cases.

VI. Inherent Limitations of the Reliance Theory

The granting of relief under Section 90 depends ultimately upon a judgment that enforcement is necessary to avoid injustice. Such a requirement serves as a reminder that not all promisees who suffer reliance injuries are entitled to the protections of the section. More important, the notion that justice determines the limits of responsibility means that promissory estoppel is informed by a basic test of fairness. The doctrine thus allows courts wide latitude in redistributing losses resulting from unfilled promises. At the same time, it must be recognized that the very flexibility of Section 90 prevents its reduction to a precise formula or series of tests.[220] In consequence, as the fore-

authority supporting this view, see Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965); Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 49 Cal. Rptr. 1 (1966); Trinity Universal Ins. Co. v. Ponsford Bros., 414 S.W.2d 16, 28-31 (Tex. Civ. App. 1967). RESTATEMENT (SECOND) OF CONTRACTS § 217A (Tent. Draft No. 4, 1968) states a basic principle which recognizes the necessity of an ordinary damage action in situations where reliance gives rise to injustice, notwithstanding the Statute of Frauds. *Cf.* Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931). And as noted earlier, see pp. 376-78 & notes 185-95, the separate theory of the promise to reduce the agreement to writing, as distinguished from a promise of performance, has hardly been explored at all. *See* 24 WASH. & LEE L. REV. 347 (1967), for a discussion of the problems in applying Section 90 to employment contracts within the "one-year" clause of the Statute of Frauds. *See also* Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909).

219. *E.g.*, Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 173 So. 2d 492 (Fla. Dist. App. 1965), *aff'd*, 190 So. 2d 777 (Fla. 1966).

220. Many of the shortcomings of traditional analysis result from a tendency to view Section 90 as establishing a series of known tests which are uniformly applicable throughout the field. It is customary to set out the following prerequisites for a recovery under the section: "(1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying on the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise." Corbit v. J.I. Case Co., 70 Wash. 2d 522, 538-39, 424 P.2d 290, 300-01 (1967).

A wide variety of factors have been identified as potentially relevant to the application of promissory estoppel. Professor Corbin goes so far as to suggest that "the relative eco-

going discussion should have demonstrated, it is difficult if not impossible to abstract and describe any single theory of the operation of the reliance principle of Section 90. Now that the role being played by that section has been examined in some detail at each stage of the contracting process, however, certain general observations and suggestions are in order. Because the language of Section 90 appears to call for the enforcement of the promised performance, rather than an award of reliance losses,[221] it is customary for the courts to dwell upon the requirement that reliance be "of a definite and substantial character." The trouble with this statement is that it seems to get translated into rigid tests which suggest that some specific degree of reliance must be shown in order to recover.[222] If, on the other hand, limited or partial enforcement comes to be recognized as the norm in Section 90 cases,[223] the test of substantial reliance is likely to merge with the test of "injustice." The result will be that the extent of relief will reflect and be tailored to the extent of reliance, encouraging development of a more effective working concept concentrating inquiry upon the foreseeability and seriousness of reliance.

A party who seeks to rest liability on reliance grounds must be prepared to carry a substantial burden of argument and proof. Problems of proof of actual loss, particularly where reliance takes the form of forbearance, have been crucially significant in a number of instances where recovery has been denied under the promissory estoppel label.[224]

nomic needs and capacities of the parties and the needs and interests of the promisor's dependents and creditors should be taken into consideration, particularly in determining the form of remedy and the extent of the recovery." 1A CORBIN § 200. And in determining whether the reliance requirement of Section 90 is satisfied, the following factors have been suggested as significant:

> . . . the reasonableness of the promisee's reliance, . . . its definite and substantial character in relation to the remedy sought, . . . the formality with which the promise is made, . . . the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and . . . the extent to which other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

RESTATEMENT (SECOND) OF CONTRACTS § 90, comment *b* at 16 (Tent. Draft, No. 2, 1965). It is unrealistic to suppose that each of these many factors must command equal weight in every instance.

221. Section 90 merely says a promise is "binding" where "enforcement" is necessary to avoid injustice. It fails to say to what extent the promise is binding or enforceable.

222. *See, e.g.*, Darmopray v. Bayeas, 14 Pa. D. & C.2d 182 (C.P. 1957). As a result, questions are posed as to whether reliance must involve "solely pecuniary loss" or be "substantial in an economic sense." *See* Mohr v. Shultz, 86 Idaho 531, 540, 388 P.2d 1002, 1008 (1964); Aubrey v. Workman, 384 S.W.2d 389, 393 (Tex. Civ. App. 1964).

223. *See* cases cited at note 198 *supra*. Because the Tentative Draft of Section 90 in the *Restatement (Second)* adds a new sentence recognizing the possibility of partial enforcement, the requirement that action in reliance have "a definite and substantial character" is abandoned. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90, Reporter's Note at 173-74 (Tent. Draft No. 2, 1965).

224. *See* Bush v. Bush, 278 Ala. 244, 177 So. 568 (1965); Weiner v. Romley, 94 Ariz.

The handling of the mistake factor in the construction bidding cases is representative of more general attitudes about the responsibilities a promisee is expected to assume concerning the reasonableness of his conduct.[225] If damages are difficult to assess or the consequences of reliance hard to unravel, the chances of success on a theory of promissory estoppel may be impaired.[226] And even if recovery is won in the trial court, the broad scope of judicial review permitted by promissory estoppel increases the possibility of reversal, especially where a large damage recovery is involved.[227]

In addition, the subject matter of the action may significantly influence the outcome of litigation. For example, attempts to expand insurance coverage by resort to Section 90 are likely to founder upon familiar rules pertaining to the limited operation of estoppel doctrine.[228] Courts are also reluctant to use Section 90 to make a promisor an insurer or guarantor.[229] And it will be remembered that promissory estoppel has had little success in cases involving the employment re-

40, 381 P.2d 581 (1963); Thomson v. Stage Employees, 232 Cal. App. 2d 446, 42 Cal. Rptr. 785 (1965); Dewein v. Dewein's Estate, 30 Ill. App. 2d 446, 174 N.E.2d 875 (1961); Paul Estate, 34 Pa. D. & C.2d 765 (1963); Shaw v. George, —— S.D. ——, 141 N.W.2d 405 (1966); Overlock v. Central Vt. Pub. Serv. Corp., —— Vt. ——, 237 A.2d 356 (1967).

225. That a plaintiff must demonstrate the exercise of reasonable care in order to recover under Section 90 is well documented in the cases. For example, recovery is denied where there is a reasonable basis for charging the promisee with notice of a possible mistake by the promisor. *E.g.*, Union Tank Car Co. v. Wheat Bros., 15 Utah 2d 101, 387 P.2d 1000 (1964). Knoweldge of other terms or conditions in the full transaction can be a decisive factor on the issue of reasonableness of reliance. *See* Stanley Furniture Co. v. Texas State Bank, 425 S.W.2d 883 (Tex. Civ. App. 1968). Perhaps the most interesting decisions in this area are the ones which charge the promisee with unreasonableness for failure to bind the promisor to a contract before relying. *E.g.*, Wheeler v. White, 398 S.W.2d 93, 96-97 (Tex. 1965). *Cf.* Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30 (1965).

226. In Slatter v. Geo. B. Clarke & Sons, Inc., 186 F. Supp. 814, 816 (D. Del. 1960), the difficulties of computing damages were expressly tied to the reasonableness of the promisee's conduct.

227. *Compare* Corbit v. J.I. Case Co., 70 Wash. 2d 522, 424 P.2d 290 (1967), *with* Haveg Corp. v. Guyer, —— Del. ——, 226 A.2d 231 (1967). *Cf.* Van Hook v. Waiters Alliance, Local 17, 158 Cal. App. 2d 556, 323 P.2d 212 (1958).

228. Promissory estoppel was the basis for enlarging the scope of the policy in Travelers Indem. Co. v. Holman, 330 F.2d 142 (5th Cir. 1964). *Contra*, Ahnapee & Western Ry. v. Challoner, 34 Wis. 2d 134, 148 N.W.2d 646 (1967). The question was reserved in Artmar, Inc. v. United Fire & Cas. Co., 34 Wis. 2d 181, 185, 148 N.W.2d 641, 643 (1967). By the prevailing view an insurer is not estopped, even though he knew when the policy was issued the extent of the insured's interest, to deny that the insured had a sufficient insurable interest.

229. *E.g.*, Dillown v. Phalen, 106 Ohio App. 106, 153 N.E.2d 687 (1957); Stanley Furniture Co. v. Texas State Bank, 425 S.W.2d 883 (Tex. Civ. App. 1968); Nichols v. Acers Co., 415 S.W.2d 683 (Tex. Civ. App. 1967). Occasionally, however, promises to procure insurance have been fully enforced on the theory of Section 90. Graddon v. Knight, 138 Cal. App. 2d 577, 292 P.2d 632 (1956); East Providence Credit Union v. Geremia, —— R.I. ——, 239 A.2d 725 (1968). *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment *f* at 172-73 (Tent. Draft No. 2, 1965). At the very least, the elements of Section 90 are apt to be closely scrutinized where liability is large in relation to the value of the promised service. *See* Petty v. Gindy Mfg. Corp., 17 Utah 2d 32, 404 P.2d 30 (1965).

lation and franchised dealers—areas marked by longstanding confusion in the theory of consideration. If, on the other hand, action in reliance is taken by a third person who is a beneficiary of the promise, there appears to be support developing for application of the theory of Section 90,[230] although at least one court has been reluctant to accept reliance by the promisee as a basis for reinforcing the claim of a beneficiary who was seriously prejudiced by the reliance.[231]

Possibly the greatest risk in electing to proceed on a theory of promissory estoppel is that the concept of reliance, and hence injustice, will be tested by the criteria of common law consideration. In view of the frequency with which Section 90 is raised today in the context of commercial exchange, it should not be surprising that principles of bargain reliance became confused with the requirements of promissory estoppel.[232] The chief difficulty with this tendency is that if the reliance element of Section 90 is reduced to common law notions of "legal detriment," any real assessment of the merits of the alleged action in reliance is unlikely to occur.[233] One court has even gone so far as to suggest that, for purposes of Section 90, forbearance is not prejudicial unless it consists of "an abandonment or deferment of an enforceable right."[234] This insistence upon the classic terminology of consideration is symptomatic of a general desire to give familiar meaning to the elements of Section 90. But it woodenly directs attention away from considerations of justice and the extent of reliance, and focuses instead upon relatively inflexible and narrow bargain-oriented rules. As has been pointed out above, since the typical commercial case in which Section 90 is invoked will satisfy some of the elements of both theories,

230. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965), extends the protections of Section 90 to claims of third party beneficiaries. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965), expressly includes "a third person" within the operation of the reliance principle. *Cf.* Day v. Mortgage Ins. Corp., 91 Idaho 605, 428 P.2d 524 (1967).

231. Overlock v. Central Vt. Pub. Serv. Corp., 126 Vt. 549, 237 A.2d 356 (1967). A contrary position is taken in RESTATEMENT (SECOND) OF CONTRACTS § 90, comment *d* at 169 (Tent. Draft No. 2, 1965).

232. *E.g.*, City of Los Angeles v. Anchor Cas. Co., 204 Cal. App. 2d 175, 22 Cal. Rptr. 278 (1962); Dyer v. Metallic Bldg. Co., 410 S.W.2d 56 (Tex. Civ. App. 1966).

233. As suggested earlier, the confusion of price or bargain with the principle of injustice underlying Section 90 tends to distort the reliance concept. The fact of actual inducement wanes in significance. *See, e.g.*, Fedun v. Mike's Cafe, Inc., 201 Pa. Super. 356, 204 A.2d 776 (1964), *aff'd*, 419 Pa. 607, 213 A.2d 638 (1965). Bargain notions fix guidelines which operate to limit the areas within which reliance is permissible. *See, e.g.*, the discussion of the reliance factor in Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 385, 391-2, 153 N.W.2d 587, 589 (1967); Neth v. General Electric Co., 65 Wash. 2d 652, 658-60, 399 P.2d 314, 318-19 (1965).

234. Overlock v. Central Vt. Pub. Serv. Corp., 126 Vt. 549, 237 A.2d 356, 359 (1967). *See also* Pitts v. McGraw-Edison Co., 329 F.2d 412, 416 (6th Cir. 1964) (" . . . plaintiff gave up nothing to which he was legally entitled . . . ").

it is not surprising that bargain principles permeate judicial treatment of the reliance factor. Nevertheless, if the principles of fairness and avoidance of injustice underlying Section 90 are to serve their intended function, some effort must be made to distinguish reliance from bargain elements and to allow the former some autonomy of application.

Given the vast factual differences among the Section 90 cases, any attempt to dispose of the problems of promissory reliance by a single formula is hazardous because no formula can be comprehensive enough to resolve every case satisfactorily. But the major impact of promissory estoppel in recent years may be that it has made the whole matter of classification or definition less important in the decision of contract cases. Change is in fact being effected by quiet manipulation of the familiar labels. To this extent, protection of the reliance interest ultimately depends upon the total impact of a given case rather than upon the technicalities of classification.

At this stage the principal difficulty is that the purposes to be served by Section 90 in the setting of bargains have not been sufficiently identified or examined. If the reason for enforcing a bargain promise on a non-bargain theory is to protect reasonable reliance in conduct, the criteria of consideration are not of central importance. However, the policies which underlie orthodox contract rules are quite relevant to the expansion of Section 90 in commercial cases. No persuasive public policy may preclude a recovery where injury is occasioned by a gratuitous promise. But if a reliance claim arises in the bargain context, policy considerations relating to the security of expectations come into play. It is probable that the next stage of development of Section 90 will evidence concern with these broader aspects of the reliance theory.