SMU Law Review

Volume 44 | Issue 2 Article 4

January 1990

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by

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I. INTRODUCTION

PROMISSORY estoppel has been described as "perhaps the most radical and expansive development of this century in the law of promissory liability."[1] From its humble origins as a substitute for consideration in donative promise cases,[2] this reliance-based doctrine has come to enjoy application in a wide variety of contexts.[3] As one commentator colorfully has noted: "Like the camel in the Arab's tent,. . .once reliance. . .nosed into contract law it came to occupy more and more space."[4]

Despite promissory estoppel's continuing expansion, it was long an article of faith that the doctrine could not be used to enforce an indefinite or illusory promise.[5] Over the past twenty-odd years, however, some courts have

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The authors gratefully acknowledge the research assistance provided by Anthony Sullivan in the preparation of this article.

1. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981). *See* Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373, 1373 "[O]ver the past fifty years, the use of promissory estoppel has expanded dramatically."). These statements, however, do not command universal assent. *See* Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303, 304-05 n.11 (1983) (despite the attention reliance-based recovery has received from scholars, "its practical significance seems to be limited"). *Cf.* C. FRIED, CONTRACT AS PROMISE 25 (1981) (promissory estoppel cases are "a belated attempt to plug a gap in the general regime of enforcement of promises, a gap left by the artificial and unfortunate doctrine of consideration"). Nor are all observers enthusiastic about promissory estoppel's continued expansion. *See* Edwards, *Promissory Estoppel and the Avoidance of Injustice*, 12 OKLA. CITY U.L. REV. 223, 252 (1987) (concept of avoiding injustice by protecting reliance "ought to be regarded as having reached the maximum boundaries of its scope" until its desirable limits are thoroughly explored).

2. *See infra* notes 39-59 and accompanying text.

3. Indeed, the authors have argued that it is emerging as a theory of recovery independent of contract. *See* Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472 (1983). *See also infra* notes 95-100 and accompanying text.

4. Feinman, *supra* note 1, at 1374.

5. *See infra* notes 80-87, 105-14 and accompanying text. An illusory promise is basically

employed promissory estoppel to protect reliance on indefinite promises. Although such cases remain controversial and relatively rare, the RESTATEMENT (SECOND) OF CONTRACTS has expressly approved this use of the reliance principle.[6] The RESTATEMENT (SECOND) does not sanction, however, promissory estoppel's use to protect those who rely on illusory promises, and few courts have openly employed the doctrine in such a fashion.[7] Nonetheless, this article contends that many courts have extended protection to promisees whose reliance on illusory promises exposed them to potential injustice.[8] The courts in question have done so under a variety of legal rubrics, including exercises in contract manipulation designed to render illusory promises binding and the application of modern contract doctrines such as good faith and unconscionability.

Thus, the camel has intruded into the tent of contract law more than many had forseen. In determining whether it should be encouraged to stay, or whether this part of the tent should remain off-limits, this Article explores the reasons for protecting those who rely on illusory promises, and the arguments against affording such protection. This Article concludes that such reliance sometimes deserves protection and that there are a number of good arguments for explicitly recognizing promissory estoppel as a major vehicle for protecting such reliance. Not the least of these arguments is the fact that in some situations promissory estoppel is superior to the other legal devices currently employed to protect reliance on illusory promises. As a necessary preface to the discussion of these matters, the Article first examines the historical origins and evolution of the legal protection based on reliance in general, and of promissory estoppel in particular.

II. PROMISSORY ESTOPPEL—THE ORIGINS AND EVOLUTION OF THE DOCTRINE

A. *The Historical and Moral Claims of Reliance*

Commentators and scholars generally agree that the reliance principle played a central role in the precontract action of assumpsit and in early formulations of the doctrine of consideration.[9] For these reasons, the funda-

an expression that imposes no obligation on the promisor even though it is stated in promissory form. *See infra* note 109. For a discussion of the overlap between indefinite and illusory promises, see *infra* note 110.

6. *See infra* notes 159-160 and accompanying text. On the pervasive influence of reliance principles throughout the *Restatement (Second)*, see generally Knapp, *supra* note 1.

7. *See infra* notes 105-148, 162-167 and accompanying text.

8. *See generally infra* notes 168-300 and accompanying text.

9. "There is, of course, no question but that, from the very earliest time—that is the second half of the sixteenth century—when the doctrine of consideration was being formulated in connection with the new action of *assumpsit*, detriment and benefit were seen as alternative forms of consideration." P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 185 (1979) [thereinafter P. ATIYAH] *See also* P. ATIYAH, PROMISES, MORALS, AND LAW 3 (1981) [hereinafter cited as PROMISES, MORALS, AND LAW] (doctrine of consideration as recognized during reign of Elizabeth I satisfied "if the promisee acted to his detriment in reliance on the promise, so that the non-fulfillment of the promise would cause him actual pecuniary loss"); Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679 (1984) (dominance of bargain theory in nineteenth century has obscured the fact that "in the eight-

mental purpose of simple contracts historically was a desire to protect justifiable reliance on a promise.[10] This desire to protect such justifiable reliance was also a significant factor in the formation of fraud and warranty law.[11] These early examples of the reliance principle's influence should not be surprising. The moral and legal obligation to fulfill promises[12] has long been justified not only by their tendency to create reasonable expectations in the mind of the promisee,[13] but also by their tendency to induce reli-

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eenth century promises were often enforced primarily because the promisee had relied on the promise to her detriment or to the promisor's benefit").

10. 1 S. WILLISTON, CONTRACTS section 139, at 502 (2d ed. 1936).

11. "[T]he early beginnings of the law of fraud and warranty clearly rest on the idea of a justifiable reliance. The question always seems to be, did the plaintiff reasonably rely upon what the defendant said, or should the plaintiff have made his own inquiries, his own examination?" P. ATIYAH, *supra* note 9, at 188.

12. "From antiquity the moral obligation to keep a promise [has] been a cardinal tenet of ethical philosophers, publicists, and philosophical jurists." Pound, *Promise or Bargain?* 33 TUL. L. REV. 455, 455 (1959), *quoted in* Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1261 n.1 (1980) [hereinafter Goetz & Scott]. Goetz and Scott likewise observe that "[t]he obligation to keep promises is a commonly acknowledged moral duty." Goetz & Scott, *supra*, at 1261. But they also correctly point out that "intuitionist" theories of contract premised on some inherent moral obligation to fulfill promises are inadequate because they fail to explain "the simple fact that no legal system attempts to enforce all promises." *Id.* at 1263 n.15. *See also* PROMISES, MORALS, AND LAW, *supra* note 9, at 2 (English common law "has never treated the mere fact that a promise has been made as even prima facie a sufficient condition for the creation of a legal obligation"); 1A A. CORBIN, CORBIN ON CONTRACTS section 110, at 490 (1963) (mere fact of promise creates no legal duty; to be enforceable promise must be accompanied by some other factor); Eisenberg, *Principles of Consideration*, 67 CORNELL L. REV. 640, 640 (1982) (promise, as such, not enforceable; first "great question" of contract law therefore what kinds of promises should be enforced).

13. On the importance of promisees' expectations in justifying enforcement of promises, see 1 CORBIN, *supra* note 12, section 1, at 2 (main underlying purpose of contract law to facilitate the "realization of reasonable expectations that have been induced by the making of a promise"). For an attempt at an ethical justification for satisfying such expectations, see C. FRIED, *supra* note 1, at 16 (individuals are morally bound to keep their promises because by making them they have invoked a convention whose function is to give another grounds for expecting the promised performance). However, the need to realize such expectations has also been justified on the basis of individual and social wealth maximization. *See, e.g.*, R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236-37 (1922) (wealth in a commercial age is composed largely of promises; therefore, the social interest in security of transactions requires that we secure to the promisee the expectation which has become a part of his substance); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 123 (1979) (most conventional pieties such as promise-keeping can be derived from the wealth-maximization principle; adherence facilitates transactions, and hence wealth). In addition, it has been argued that enforcing promises and rewarding expectations is essential to the maintenance of social order. *See, e.g.*, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629 (1943) (unless reasonable expectations created by promises receive legal protection, "we will suffer the fate of Montesquieu's Troglodytes, who perished because they did not fulfill their promises"); Knapp, *The Promise of the Future—and Vice Versa: Some Reflections on the Metamorphosis of Contract Law*, 82 MICH. L. REV. 932, 950-51 (1984) (suggesting a focus on the underlying principle "that whenever a promise is made which generates in the promisee a reasonable expectation of performance, its unjustified nonperformance should in theory be an actionable wrong," and arguing that "promise-keeping in general is not merely praiseworthy behavior, but an absolutely necessary glue for holding society together"). In fact, some commentators have gone so far as to urge the protection of expectations that form independent of the terms of a party's promises or, in a few cases, of expectations that are contradicted by the express terms of a party's promises. *See infra* note 358 and accompanying text.

ance.[14] In fact, some scholars have argued that claims based on reliance are more compelling than those sounding merely in disappointed expectations.[15]

Given these impeccable historical credentials, it is at first glance somewhat surprising that the reliance principle was so thoroughly de-emphasized[16] in the classical contract law of the nineteenth century. One prominent authority has attributed this de-emphasis to the imperfect historical and doctrinal understanding of nineteenth century contract scholars.[17] The authors, however, prefer to attribute the submergence of reliance—and also, perhaps, the scholars' deficient perceptions—to the laissez-faire spirit animating classical contract law.[18] Due in part to its resulting "[n]o man is

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14. "[P]romises and contracts invite trust, involve reliance and dependence by others on the word of the promisor." P. ATIYAH, *supra* note 9, at 82. *See also*, PROMISES, MORALS, AND LAW, *supra* note 9, at 9, 36 (discussing the ideas of the French jurist Francois de Connan, who argued that promises only create obligations if they are relied upon or if some exchange of promises has occurred, and later observing that "the fact that promises tend to be relied upon, that they positively invite reliance, is one of the chief grounds for the rule that promises should be kept"); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 810 (1941) (reliance seen as a substantive basis of contract liability due to "a recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled"). Not everyone, however, agrees with these propositions. *See, e.g.*, Goetz & Scott, *supra* note 12, at 1263-64 n.15 for the assertion that: "[I]f moral force is attached to promises merely because people rely upon them, the argument is subject to the claim that such reliance is dependent upon legal enforceability." This argument is one that has plagued promissory estoppel in the past and that has obvious negative implications for the protection of reliance on illusory promises. We address it at *infra* notes 325-48 and accompanying text.

15. "[T]he promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him." Fuller & Perdue, *The Reliance Interest in Contract Damages: Parts I*, 46 YALE L.J. 52, 56 (1936). Fuller and Perdue argued that the restitution interest presents the most compelling claim for judicial protection because it combines both unjust impoverishment of the promisee and unjust gain by the promisor. *Id.* Under this analysis, the promisee's expectation interest is the interest *least* deserving of protection because compensating loss of expectancy rather than protecting change of position involves passing "from the realm of corrective justice to that of distributive justice." *Id. See also* J. MURRAY, MURRAY ON CONTRACTS section 91, at 195 (1974) ("While the expectation interest is the normal interest protected in contracts, it cannot be gainsaid that the reliance interest presents a greater claim to protection."); PROMISES, MORALS, AND LAW, *supra* note 9, at 32 (discussing English philosopher Henry Sidgwick's assertion that while the duty to keep promises was independent of any injury that might be done to the promisee by nonperformance, action in reliance by the promisee aggravates the seriousness of a breach).

16. "The reliance principle of the eighteenth century did not fit within the structure of the classical jurisprudence of the nineteenth century." Feinman, *supra* note 9, at 681.

17. The whole of this problem [the de-emphasis of reliance in classical contract law] seems to have arisen from the failure of nineteenth-century legal scholars and historians to perceive the changes which had occurred in contractual theory during their own century. These historians assumed that contractual theory in the seventeenth and eighteenth century had been based—as it came to be based in the nineteenth century—on the idea of mutually *binding* promises; the promises had to be binding at the time they were exchanged for that was when a contract was thought to be "formed." Consequently, they did not understand how an act of detrimental reliance occurring *after* a promise was given could *ex post facto* invest the promise with a binding contractual character.

P. ATIYAH, *supra* note 9, at 185 (emphasis in original).

18. On the development of classical contract law and its links to economic laissez-faire, see, e.g., L. FRIEDMANN, A HISTORY OF AMERICAN LAW 244 (1973); W. FRIEDMANN, LAW

his brother's keeper" ethos,[19] this body of law tended to limit contractual liability.[20] One way in which it did so was the bargain theory of consideration,[21] which operates to deny promisees recovery for unbargained-for reliance.[22] Finally, although it has been asserted that the decline of reliance during this period was primarily verbal or conceptual,[23] it is also not difficult to identify cases where courts applying the bargain theory have reached seemingly unfair results.[24]

B. *Reliance Resurgent: The Recognition of Promissory Estoppel*

Whatever the reasons for the shift in doctrinal thinking,[25] courts in the early part of this century were less willing than their nineteenth century predecessors to deny protection to those who relied on gratuitous

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IN A CHANGING SOCIETY 119-29 (2d Penguin ed. 1972); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 160-85 (1977); Metzger & Phillips, *Promissory Estoppel and the Evolution of Contract Law*, 18 AM. BUS. L.J. 139, 144-53 (1980).

19. G. GILMORE, THE DEATH OF CONTRACT 95 (paperback ed. 1974).

20. "The theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Since the ideal was not attainable, the compromise solution was to restrict liability within the narrowest possible limits." *Id.* at 14.

21. The best known statement of the bargain idea belongs to Justice Holmes:

> [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.

O.W. HOLMES, THE COMMON LAW 230 (M. Howe ed., paperback ed. 1963). The bargain theory was subsequently enshrined in both contracts *Restatements*. *See* RESTATEMENT OF CONTRACTS section 75 (1932); RESTATEMENT (SECOND) OF CONTRACTS sections 71(1),(2) (1981). On the incompatibility between promissory estoppel and bargain theory, see G. GILMORE, *supra* note 19, at 61 (sections 75 and 90 of the first *Restatement* are "contradictory propositions" that "cannot live comfortably together").

22. The classical contract attitude toward unbargained-for reliance has been summarized as follows: "[I]f A, without the protection of a binding contract, improvidently relies, to his detriment, on B's promises and assurances, that may be unfortunate for A but is no fit matter for legal concern." G. GILMORE, *supra* note 19, at 15.

23. P. ATIYAH, *supra* note 9, at 455. Atiyah supports this argument as follows:

> Courts, judges, and lawyers came to perceive nearly all liabilities as arising from contract, and from the consensualism that they now took to underlie contract. They tended, therefore, to base liability, even where there was an important element of reliance or benefit in the case, not on that element, but on some consensual element. . . .If there was no apparent consensual element in the case, but the Courts still felt moved to impose liability, either as a result of their own sense of justice, or as a result of the weight of tradition and precedent, then they were inclined to find some "implied" contract, consent, promise, or agreement.

Id.

24. *See, e.g.*, Thorne v. Deas, 4 Johns. 84 (N.Y. Sup. Ct. 1809) (denying any recovery to the part-owner of a lost sailing vessel for reliance on the "gratuitous" promise of his co-owner to insure the vessel for its last voyage).

25. The most probable explanations for the changed judicial attitude are socio-historical. *See, e.g.*, Metzger & Phillips, *supra* note 3, at 500-08 (attempting to link the rise of promissory estoppel to the social and economic changes affecting the evolution of twentieth century contract law); Metzger & Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 965-67 (1988) (attempting to link the rise of promissory estoppel to the greater degree of interdependence characterizing modern society).

promises.[26] They responded to the argument that unbargained-for reliance on gratuitous promises is unreasonable by noting that such reliance is a common occurrence.[27] By denying recovery for detriment that was not a *quid pro quo* for the promise,[28] the bargain theory ignored the promisor's role in inducing reliance and unjustifiably allowed promisors to avoid responsibility for consequences that they knew were likely to result from their actions.[29] Given equity's historic role of mitigating the harsh results that would otherwise follow from the strict application of common law rules,[30] it is not surprising that early twentieth century jurists seeking to avoid such injustice often turned to an equitable principle, the doctrine of equitable estoppel.[31]

Equitable estoppel protects those who rely on the representations of others by preventing the representor "from denying or asserting anything to the contrary of that which by the person's own deeds, acts, or representations, has been set forward as the truth."[32] The protection equitable estoppel afforded to relying promisees, however, was significantly limited. Initial for-

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26. "[U]nlike Holmes, many judges. . .were not prepared to look with stony-eyed indifference on the plight of a plaintiff who had, to his detriment, relied on a defendant's assurances without the protection of a formal contract." G. GILMORE, *supra* note 19, at 63-64.

27. *See* Seavey, *Reliance on Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 924-25 (1951). For a further discussion of this point, see *infra* notes 333-338 and accompanying text.

28. *See* G. GILMORE, *supra* note 19, at 64 (new bargain theory prevented turn-of-the-century judges from allowing promisee to recover by precluding them from declaring promisee's detriment "consideration"). *See also supra* note 21 (providing a classic statement of the bargained-for exchange requirement).

29. "[O]ne who makes a promise intending not to keep it misrepresents his intent and, as in other cases of deceitful misrepresentation, it should not be a defense that the defendant succeeded in taking advantage of the plaintiff's credulity." Seavey, *supra* note 27, at 925. *See also* Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 373 (1969).

30. *See* L. FRIEDMAN, *supra* note 18, at 22, for a discussion of the Chancellor's role as the "keeper of the King's conscience."

31. *See* G. GILMORE, *supra* note 19, at 63-64. Since bargain theory prevented a conventional contract recovery in cases where the promisee had relied to his detriment, Gilmore noted, judges desirous of protecting the promisee "had to find a new solution, or, at least, a new terminology." *Id.* at 64. "In such a situation the word that comes instinctively to the mind of any judge is, of course, 'estoppel'. . . ." *Id*

32. Annot., 56 A.L.R.3d 1037, 1041 (1974). The traditional formulation of the doctrine is as follows:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts.
> 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him.
> 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.*
> 4. The conduct must be done with the intention, or at least with the *expectation*, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. . . .
> 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.
> 6. He must in fact act upon it in such a manner as to change his position for the worse. . . .

3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE section 805, at 191-92 (5th ed. 1941) (emphasis in original). Equitable estoppel has also been said to require unconscionable

mulations of the doctrine required that the recipient of the representation prove fraudulent intent on the part of the representor.[33] More importantly, equitable estoppel by its terms applied only to misstatements of facts, not to promises.[34] Thus, promisees whose reliance was induced solely by promises of future performance were unprotected.

Because the fact/promise distinction has long been regarded as artificial,[35] the argument that it is unjust to deny recovery for reliance on promises while protecting those who rely on misstatements of fact is easy to make.[36] In fact this technical distinction did not long survive the twentieth century concern for just results.[37] In such a climate, the emergence of a doctrine to protect reliance on promises—that is, a doctrine of *promissory* estoppel—was inevitable.[38]

Promissory estoppel, however, did not emerge fully developed, or even acknowledged, from its early judicial cocoon. Instead, courts protected those who relied on promises by forcing cases into the bargain mold and pretending that consideration existed,[39] or by purporting to apply equitable estoppel despite the absence of that doctrine's limited traditional elements.[40]

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conduct on the part of the party inducing reliance. *See* L. VOLD, HANDBOOK OF THE LAW OF SALES section 15, at 93 & n.62 (2d ed. 1959).

33. *See* Note, *Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds*, 66 MICH. L. REV. 170, 174 n.21 (1967). By the end of the nineteenth century this hurdle to recovery had been lowered significantly by courts requiring only that the victim of the misstatement prove that it would "work a fraud" on him. *See* Note, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281, 290 (1951).

34. *See, e.g.*, Henderson, *supra* note 29, at 376; Seavey, *supra* note 27, at 914.

35. "[E]very statement of the future includes some statement of present facts" because "statements concerning the future and. . .promises [both] involve representations as to the present state of mind of the speaker." Seavey, *supra* note 27, at 922-23, 914. *See also* Edgington v. Fitzmaurise, 29 Ch. D. 459, 483 (1885) ("the state of a man's mind is as much of a fact as the state of his digestion").

36. For such an argument, see Seavey, *supra* note 27, at 914.

37. On this general tendency in modern contract law, see, e.g., Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 811 (1982) (discussing requirements of "contractual morality," the increasing recognition of which is "one of the hallmarks of the law of our time"); Note, *C & K Engineering Contractors v. Amber Steel Co.: Promissory Estoppel and the Right to Trial by Jury in California*, 31 HASTINGS L.J. 697, 711-12 (1980) (extension of protection to those who rely on promises consistent with other modern contract law changes recognizing fairness as substantive basis of contract liability).

38. Henderson, *supra* note 29, at 376.

39. For a detailed examination of the precedential origins of promissory estoppel, see Boyer, *Promissory Estoppel: Principle From Precedents: Parts I & II*, 50 MICH. L. REV. 639, 873 (1952) [hereinafter Boyer]. Boyer found such precedents in cases involving gratuitous agencies, gratuitous bailments, bonus and pension promises, rent reduction promises, and waivers. *Id.* at 665-74, 873-98. Also, Grant Gilmore identified as forerunners of promissory estoppel a number of cases decided by the New York Court of Appeals during Justice Cardozo's tenure. *See* G. GILMORE, *supra* note 19, at 62. In addition to finding consideration where none existed, the courts in these cases also protected reliance by supplying missing contract terms and implying promises in the absence of express promises. *Id.*

40. *See* Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909), for an excellent example of this phenomenon. In *Seymour*, the court denied an employer-promisor's statute of frauds defense to a ten-year oral employment contract on the basis of the employer's ancillary promise to reduce the contract to written form and the employee's substantial reliance on that promise. *Id.* at 800, 100 P. at 96. (The employee had relied by giving up secure employment and pension rights to accept the promised employment.) The court justified its decision on the basis of

Samuel Williston was the first to coin the term "promissory estoppel" to rationalize such cases,[41] although even he apparently was reluctant to recognize it in the first RESTATEMENT OF CONTRACTS.[42] But the reliance principle ultimately won out when promissory estoppel gained formal recognition in section 90 of the RESTATEMENT OF CONTRACTS.[43]

C. The Elements of Section 90

Section 90 provides that: "[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 the enforcement of the promise."[44] By stating that reliance on a promise can justify enforcement of a contract, section 90 plainly parts company with equitable estoppel and its emphasis on misstatements of fact. Only promises that the promisor should reasonably expect to induce reliance, however, can serve as the basis for liability. The focus here is on the promisor's reasonable expectations at the time the promise was made; given all the circumstances known to him, should he have reasonably expected his promise to induce reliance?[45]

By itself, however, such a promise is insufficient to trigger the operation of section 90. In addition, the promise must actually induce action or forbearance (i.e., reliance) of a definite and substantial character before the risk of enforcement arises. The evident aim of the "definite and substantial reliance" requirement is to prevent recovery for insubstantial forms of reli-

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equitable estoppel. *Id.* Because no misstatement of fact was at issue, however, the case plainly sounds in promissory estoppel. *See* Summers, *The Doctrine of Estoppel applied to the Statute of Frauds*, 79 U. PA. L. REV. 440, 454 (1931).

41. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 459 n.1 (1950) (citing 1 S. WILLISTON, THE LAW OF CONTRACTS section 139, at 308 (1st ed. 1920)).

42. For Arthur Corbin's account of the process that resulted in promissory estoppel's recognition in the first *Restatement*, see G. GILMORE, *supra* note 19, at 60-64. Apparently Corbin overcame the reluctance of Williston and others by citing numerous examples of cases in which courts had imposed liability despite the absence of the bargained-for consideration contemplated by section 75 of the *Restatement*. *Id.* at 63-64.

43. RESTATEMENT OF CONTRACTS section 90 (1932). The drafters of the RESTATEMENT also recognized a limited role for promissory estoppel in circumventing the writing requirement of the Statute of Frauds. *Id.* section 178 comment f (1932). This comment merely sanctioned the outcome in *Seymour v. Oelrichs*, *see supra* note 40, and appropriately designated it as an application of promissory estoppel.

44. RESTATEMENT OF CONTRACTS section 90 (1932).

45. This test is an objective one, and if a court determines that the promisor *should have* foreseen reliance by the promisee, the fact that he did not *actually* foresee reliance is irrelevant. Boyer, *supra* note 41, at 461. It should also be noted that the question whether the promisor should reasonably have foreseen reliance by the promisee overlaps with inquiries into the reasonableness of the promisee's reliance, since the courts are rarely likely to hold that the promisor should reasonably have expected unreasonable reliance. This point is indirectly acknowledged by the RESTATEMENT (SECOND) in a comment to its revised version of section 90, which states that "the reasonableness of the promisee's reliance" is a factor to be considered in resolving promissory estoppel's last element—whether injustice can only be avoided by enforcement of the promisor's promise. RESTATEMENT (SECOND) OF CONTRACTS section 90 comment b (1981).

ance.[46] Implicit in this inquiry into the substantiality of the promisee's reliance, moreover, is a judgment on the justice of the result the promisee seeks.[47] This consideration is explicitly made an element of recovery under the doctrine of promissory estoppel by the last words of the section, which make the promise binding only if injustice can be avoided by its enforcement. Although the main focus of this open-ended requirement appears to be the harm the promisee would suffer in the event of nonenforcement, consideration of the promisor's position is implicitly part of the process of determining the nature of his promise and the substantiality of the reliance it produced.[48]

D. *Some Applications of Promissory Estoppel*

1. *The "Donative Promise" Limitation and Its Demise*

The articulation of the elements of promissory estoppel in section 90 and the imprimatur of the RESTATEMENT did not produce immediate and widespread acceptance of the doctrine. Its subsequent evolution[49] occurred in the face of significant judicial resistance, some of which may have been the product of confusion[50] or institutional conservatism,[51] but much of which doubtless stemmed from genuine reservations concerning the wisdom of extending substantial protection to unbargained-for reliance.[52] Learned Hand plainly exemplified such reservations in his decision in *James Baird Co. v. Gimbel*

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46. On the change in this requirement wrought by the RESTATEMENT (SECOND), see *infra* notes 153-55 and accompanying text. For a discussion of whether reliance is still the primary focus of promissory estoppel, see *infra* notes 365-390 and accompanying text.

47. Boyer, *supra* note 41, at 475. The idea here is that insubstantial reliance by the promisee is unlikely to produce a judicial belief that enforcement is necessary to avoid injustice. Id.

48. The idea here is that any hardship to the promisor that would flow from enforcement can be justified by his role in making a promise which he should have foreseen would induce reliance by the promisee. *Id.* at 461-62, 485. Concern for the unfair impact enforcement can sometimes have on the promisor arguably has been an important factor in slowing the advancement of promissory estoppel. *See infra* notes 78-79 and accompanying text.

49. One very important application of promissory estoppel that is given fairly short shrift here is the use of the doctrine to enforce promises that otherwise would be rendered unenforceable by the statute of frauds. For a detailed treatment of this subject, see Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1422-37 (1983). *See also supra* notes 40, 43 and *infra* notes 151, 169. However, this application of promissory estoppel is peripheral to the concerns of this Article.

50. *See* Henderson, *supra* note 29, at 377 n.192 for a collection of cases in which courts appeared to confuse the elements of equitable and promissory estoppel. *See also* Note, *Estoppel and the Statute of Frauds*, 26 KAN. L. REV. 327, 329-30 (1978) (equitable estoppel and promissory estoppel are "so similar that many courts fail to distinguish adequately between them, and some use the terms interchangeably"). The courts may perhaps be forgiven such confusion when one considers the confusion alleged to have attended the birth of section 90. *See* G. GILMORE, *supra* note 19, at 64-65 ("An attentive study of the four illustrations [to section 90] will lead any analyst to the despairing conclusion, which is of course reinforced by the mysterious text of section 90 itself, that no one had any idea what the damn thing meant.").

51. *See* Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114, 120 n.53 (1975) (judicial failure to properly distinguish between promissory and equitable estoppel due in part to the fact that equitable estoppel is "more established in the law, and courts are loath to establish new exceptions").

52. Under classical contract doctrine, after all, gratuitous promises were among those least deserving of protection. *See* Henderson, *supra* note 29, at 346.

Brothers, Inc.,[53] which held that promissory estoppel was unavailable to protect reliance on offers proposing a bargained-for exchange. Promissory estoppel, in Hand's view, applied only to purely gratuitous or "donative" promises.[54]

Limiting promissory estoppel's role as consideration substitute to donative promise cases was hardly unjustified. After all, the first cases in which the doctrine was stated involved such promises,[55] and the drafting history of section 90 suggests a similar focus.[56] But while Hand's view held sway for the next twenty-five years, numerous factors militated in favor of a broader role for the reliance principle. Whatever the drafter's focus may have been, the language of section 90 neither expressly nor impliedly[57] restricts its application to donative promise cases. More importantly, both reliance and the injustice that can flow from it are as predictable in the bargain context as they are in the case of the gratuitous promise.[58] Add to these considerations the inherently expansionist nature of the reliance principle,[59] and it was only a matter of time before promissory estoppel escaped the strictures of *Baird*.

Promissory estoppel moved beyond the donative promise limitation permanently[60] when the California Supreme Court decided *Drennan v. Star*

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53. 64 F.2d 344 (2d Cir. 1933). *Baird* concerned the now familiar situation in which a general contractor relies on a subcontractor's bid by incorporating the subcontractor's bid into its own bid, and then seeks to prevent the subcontractor from revoking its bid on the ground that allowing revocation would cause the general contractor to incur reliance losses. *Baird* is discussed in detail in Boyer, *supra* note 41, at 491-93.

54. 64 F.2d at 346. *See also* 1 S. WILLISTON, CONTRACTS section 140, at 504 (rev. ed. 1936) (seemingly limiting promissory estoppel to traditionally protected categories like those suggested in *supra* note 39).

55. *See supra* note 39 and accompanying text.

56. "The proceedings leading to the drafting of Section 90. . .evidence concern solely with justifiable detrimental reliance on promises for which no agreed equivalent has been asked or tendered." Henderson, *supra* note 29, at 345.

57. *See* Boyer, *supra* note 41, at 492; Note, *Promissory Estoppel, Equitable Estoppel and the Farmer as Merchant: The 1973 Grain Cases and the U.C.C. Statute of Frauds*, 1977 UTAH L. REV. 59, 82 (to say that reliance can justify enforcement of gratuitous promises is not to proclaim it unable to justify enforcement in other contexts).

58. "Injustice can result where a gratuitous promise is given in connection with a commercial transaction as easily as it can in the instance of a charitable subscription." Boyer, *supra* note 41, at 492-93.

59. Once one accepts that it is sometimes permissible to overlook the absence of a traditional element of contract in order to avoid the injustice that would otherwise flow from uncompensated reliance, one is inevitably moved to ask whether other traditional elements also might be dispensable under certain circumstances. Grant Gilmore thought that bargain theory and the reliance principle were so inherently antithetical that "in the end one must swallow the other up." G. GILMORE, *supra* note 19, at 61. While Gilmore's prediction has not yet come true, increased protection of reliance is an evident trend in modern contract law. *E.g.*, Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 595 (1983) ("Throughout this century the path has been toward increased enforceability of promises, express or implied, that have been followed by some action on the part of the promisee."). One common set of explanations for the solicitude reliance has received root that solicitude in the characteristics of twentieth century society, most notably its increased interdependence. *See, e.g.*, Fuller, *supra* note 14, at 823 ("with an increasing interdependence among the members of society we may expect to see reliance (unbargained-for, or half-bargained-for) become increasingly important as a basis of liability"); and the sources cited in *supra* note 25.

60. For a few pre-*Drennan* cases that apparently ignored *Baird's* gratuitous promise limitation, see Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Northwestern Eng'g Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943).

Paving Co.[61] *in 1958. Like Baird,*[62] *Drennan* involved a general contractor who had relied upon a subcontractor's bid in computing its own bid, and then sought to prevent the sub from revoking its bid when the general contractor's bid was accepted. Holding for the general contractor, Chief Justice Traynor implied a promise on the subcontractor's part not to revoke its bid, and then used promissory estoppel to enforce this gratuitous promise.[63] The result in *Drennan* has since gained wide acceptance.[64]

2. *Damages Questions*

The reliance principle's entry into the bargain context triggered other judicial concerns about the proper scope of promissory estoppel. Prominent among such concerns was the fear that protecting promisees who rely might sometimes work an injustice on promisors.[65] A major reason for this fear was the uncertainty regarding the proper measure of damages in promissory estoppel cases. Although it is generally agreed that promissory estoppel is unavailable in cases where a *quantum meruit* or quasi-contractual recovery of the promisee's restitution interest[66] will suffice to avoid injustice,[67] a promisee's losses in reliance will often exceed any benefit that the promisor derived from that reliance.[68] In such cases, should a promisee receive a full

61. 51 Cal.2d 409, 333 P.2d 757 (1958).

62. *See supra* note 53.

63. 51 Cal. 2d at 409, 333 P.2d at 760. *See* Henderson, *supra* note 29, at 355-56 for a full discussion of *Drennan.*

64. *See, e.g.*, Lyon Metal Prods., Inc. v. Hagerman Constr. Corp., 181 Ind. App. 336, 339-40, 391 N.E.2d 1152, 1154-55 (1979); E.A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (N.J. Super. Ct. App. Div. 1966). The outcome in *Drennan* has also gained the imprimatur of the RESTATEMENT (SECOND). *See* RESTATEMENT (SECOND) OF CONTRACTS section 87(2) & illustration 6 (1981). *See also* the discussion at *infra* notes 150-151 and accompanying text.

65. *See* Boyer, *supra* note 41, at 489; Note, *Promissory Estoppel and the Statute of Frauds in California*, 66 CALIF. L. REV. 1219, 1245 (1978).

66. The restitution interest is the value that the promisor's reliance has conferred upon the promisor. Fuller & Perdue, *supra* note 15, at 53-54. It is awarded to prevent the defaulting promisor from gaining at the promisee's expense. *Id.* at 54. It has been argued that among the three interests—reliance, expectation, and restitution—contract damages principles might protect, the restitution interest presents the strongest claim for relief due to its combination of both unjust impoverishment and unjust gain. *Id.* at 56.

67. This position is attributed to the traditional rule that equitable relief is only available in the absence of an adequate remedy at law, and to the belief that if the parties truly can be returned to the *status quo*, no further enforcement of the promisor's promise is necessary to avoid injustice. On the first point, see Note, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590, 601 (1965). On the latter point, see Boyer, *supra* note 41, at 485.

68. Boyer, *supra* note 41, at 486.

expectation award[69] or damages based on his reliance interest?[70] Even though the rationale for promissory estoppel recovery suggests that reliance damages should be the measure of recovery,[71] the courts generally have granted expectation awards through full enforcement of the promisor's promise.[72]

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69. Expectancy awards attempt to give promisees the value of the expectancy that the promise created by placing them is as good a position as they would have occupied had the promise been performed. Fuller & Perdue, *supra* note 15, at 54. Damage awards based on expectancy have been justified on a number of grounds. Breach of promise, it is said, arouses in the promisee a sense of injury that exists independently of any actions in reliance on the promise. *Id.* at 57. Will theory also furnishes some justification for expectancy awards by making them necessary if the state is to enforce the "private law" created by the parties when they formed their contract. *Id.* at 58. Expectancy awards may also be necessary to recognize that "expectations of future values become for purposes of trade, present values," and to reimburse promisees for elements of reliance that may be difficult to prove. *Id.* at 59, 60. Expectancy awards may also protect reliance by serving as a prophylaxis against reliance losses. Since the expectancy standard is often easier to administer than the reliance standard, it may offer a more effective sanction against breaches of contract and therefore discourage breach. *Id.* at 61. Viewed this way, the purpose of an expectancy award is "not so much to compensate the promisee as to penalize breach of promise by the promisor." *Id.* By protecting reliance in this way, expectancy awards encourage reliance more than would exclusively reliance-based awards because the difficulties of proof associated with the latter might sometimes discourage reliance. *Id.* at 61-62.

70. The reliance interest is defined by the value of the promisee's change of position in anticipation of the promisor's performance. Awards of reliance-based damages seek to return the promisee to the position he occupied before the promisor made his promise. *Id.* at 54. Although the reliance interest is normally conceived as embracing losses of an affirmative nature (e.g., expenditures of money or labor), losses due to foregone opportunities ("gains prevented") are at least conceptually within its purview. *Id.* at 55, 74-75. Losses of this second kind, however, may be particularly difficult to prove, *id.* at 60, and this difficulty may make some courts reluctant to recognize them. *See* Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 630-31 (1983) (in franchise termination context, foregone opportunities problematic because court cannot be sure promisee would actually have availed himself of opportunity or that opportunity would have been profitable, but courts should consider such reliance losses where not too remote or speculative); Hudec, *Restating the "Reliance Interest"*, 67 CORNELL L. REV. 704, 719 (1982) (foregone opportunities more difficult for courts to conceptualize as involving clear diminution of present assets like those associated with out-of-pocket losses, but if promisee can prove opportunity loss and its value with sufficient certainty courts should recognize it).

71. Dean Boyer argued that the tendency of courts to grant expectancy awards in promissory estoppel cases "seems to ignore the very 'injustice' which Section 90 purports to avoid," and that injustice to the promisee "is avoided when he is protected to the extent of his expenditures made in reliance upon the. . .promise." Boyer, *supra* note 41, at 487. *See also* Seavey, *supra* note 27, at 926 (as wrong sought to be avoided in promissory estoppel cases "is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment," it follows that "damages should not exceed the loss caused by the change of position").

72. *See, e.g.*, Feinman, *supra* note 9, at 687-88 (typical damage remedy in most promissory estoppel cases is expectancy award); Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 IOWA L. REV. 47, 49 (1986) ("[A]n enormous discontinuity exists between what contracts scholars for the last twenty years have thought was happening in the courts in connection with the flexible remedy in section 90 and what actually was happening."). Feinman attributes the award of expectancy damages to the shift in the nature of the cases comprising the bulk of promissory estoppel litigation from donative promise situations to business disputes, and to the courts' perception that expectancy awards may better reflect opportunity losses in such cases than would reliance awards. Feinman, *supra* note 9, at 688. Fuller and Perdue noted in their classic article on the reliance interest that most of their arguments in favor of measuring damages by expectancy did not apply to

This stance finds support in the language of section 90,[73] in promissory estoppel's traditional role as a consideration substitute,[74] in the traditional association between expectation awards and contract,[75] and in the analogous association between reliance-based awards and tort.[76] In addition, some cases exist in which reliance-based damages would not fully compensate the promisee.[77] But in the situation where the cost of full performance by the promisor greatly exceeds the promisee's losses in reliance,[78] a court limiting promissory estoppel recovery to the promisee's expectation may deny any recovery if it believes that complete enforcement would be unjust to the promisor.[79]

3. *Indefinite Promises*

For the reasons stated above, reliance-based damage awards may sometimes be preferable in promissory estoppel cases,[80] and some courts have in fact been willing to allow such recoveries.[81] For present purposes, it is significant that many of the cases fashioning reliance-based awards arose from the contract negotiations, that is, the offer and acceptance context. Here, those seeking recovery for their reliance have traditionally faced a number of significant obstacles. First, the traditional rule stated that only genuine *promises* could serve as the basis of a promissory estoppel recovery.[82] Thus, indefinite promises[83] were not proper subjects for the doctrine's applica-

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donative promises. Fuller & Perdue, *supra* note 15, at 64. For their arguments in favor of expectancy awards, see *supra* note 69.

73. Promises that satisfy the section's tests are said to be "binding," and injustice is avoided by "enforcement of the promise." *See supra* text accompanying note 44. Williston told the American Law Institute that expectation damages would be the norm under section 90, saying: "Either the promise is binding or it is not. If it is binding it has to be enforced as made. . . ." 4 PROCEEDINGS, A.L.I., APP. 95-96, 98-99, 101-104 (1926), quoted in Boyer, *supra* note 41, at 487 n.121. *See also* Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 944 n.110 (1937) (observing that the drafters of section 90 apparently assumed that "the usual contracts remedies and rules of damages will apply" while personally arguing in favor of a reliance-based standard).

74. If promissory estoppel is contractual in nature, and merely serves to provide the missing element(s) necessary to the creation of a binding contract, then once the element in question is supplied normal contract enforcement should logically follow. *See, e.g.*, Note, *supra* note 51, at 126.

75. *See, e.g.*, Fuller & Perdue, *supra* note 15, at 89-96; Note, *supra* note 65, at 1245.

76. Fuller & Perdue, *supra* note 15, at 90 n.61. Despite this longstanding association, Fuller and Perdue ultimately concluded that the reliance interest has always been an element of contract damages. *Id.* at 89-96.

77. *See* Note, *supra* note 51, at 128-29. Prominent among such situations are those where reliance is difficult to prove, or involves lost opportunities. *See* Fuller & Perdue, *supra* note 15, at 60. Some situations exist, however, in which there will be little difference between a reliance-based award and an expectation-based award. *Id.* at 73-75. There may also, however, be situations in which the reliance interest exceeds the expectation interest. *See id.* at 75-77.

78. Boyer, *supra* note 41, at 489.

79. *Id.* at 491.

80. *See id.* at 497.

81. *See, e.g.*, the cases discussed in *infra* notes 92, 135 and accompanying text.

82. *See, e.g.*, Henderson, *supra* note 29, at 361.

83. Under traditional contract principles, a promise may be too indefinite for enforcement if it is too vague or too incomplete. *E.g.*, *id.* at 362. Agreements reserving of significant matters for future agreement by the parties ("agreements to agree") were also too indefinite for en-

tion.[84] In such cases, there was no promise capable of judicial enforcement through specific performance or an expectation award.[85] Second, serious doubts may have existed as to the reasonableness of a promisee's reliance on such promises.[86] Finally, the intrusion of the reliance principle into the negotiations context plainly denies a freedom lying at the heart of the traditional rules on offer and acceptance: the freedom from liability on unchosen terms.[87]

Notwithstanding such obstacles, a number of cases use promissory estoppel to protect reliance on indefinite promises arising out of contract negotiations.[88] The best known example of this use of estoppel is *Hoffman v. Red Owl Stores, Inc.*[89] There, Hoffman, the disappointed seeker of a convenience store franchise, sought to recover his reliance losses[90] when lengthy negotiations with Red Owl (the franchisor) collapsed in the face of Red Owl's ever-increasing demands. In its defense, Red Owl argued that the parties had

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forcement under classical principles. 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS section 45 (3d ed. W. Jaeger 1957). The first RESTATEMENT adopted this traditional position on definiteness. *See* RESTATEMENT OF CONTRACTS section 32 (1932). The traditional rule has been said to reflect a policy judgment that contract law should be certain (especially in the formation process), an empirical assumption that bargains are discrete transactions in which the parties will agree on all material terms at the time of contracting, and (in cases where the parties failed to agree) an aversion to the difficulties presented by the courts' supplying a term. Speidel, *Restatement Second, Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 787-88 (1982).

84. For cases requiring a definite promise as a precondition of promissory estoppel liability, see, e.g., Perlin v. Board of Educ., 86 Ill. App. 3d 108, 114, 407 N.E.2d 792, 798 (1980) ("unambiguous" promise); S.M. Wilson & Co. v. Prepakt Concrete Co., 23 Ill. App. 3d 137, 139, 318 N.E.2d 722, 724 (1974) (promise "unambiguous in terms"); Malaker Corp. Stockholder's Protective Comm. v. First New Jersey Nat'l Bank, 163 N.J. Super. 463, 479, 395 A.2d 222, 230 (App. Div. 1978) ("clear and definite" promise).

85. *Cf.* Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM L. REV. 217, 227-28 (1987) (discussing situations where it is appropriate to include lost opportunities in reliance damages; these include cases in which expectation damages are unavailable because the agreement is illusory or is too indefinite to be enforceable since there is no expectancy to be measured in such cases).

86. *See* Henderson, *supra* note 29, at 361-62 ("The idea behind the [promise] requirement is simply that promissory estoppel protects reasonable reliance, and that, in the nature of things, reliance is reasonable only if it is induced by an actual promise."). *See also infra* note 113.

87. *See, e.g.*, Henderson, *supra* note 29, at 357-58 (primary thrust of offer and acceptance rules "to guarantee parties seeking an exchange extensive freedom to express, or to refuse to express, a willingness to be bound," and "to insure that, in most instances, obligation attaches only when it has been deliberately undertaken"). *See also* Edwards, *supra* note 1, at 236 (negotiation stage regarded as "critical to the exercise of freedom of contract" by traditional theory).

88. *See, e.g.*, Werner v. Xerox Corp., 732 F.2d 580, 583-84 (7th Cir. 1984); Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981); Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900, 905 (Colo. App. 1982); Mooney v. Craddock, 35 Colo. Ct. App. 20, 25-26, 530 P.2d 1302, 1305 (1974); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965).

89. 26 Wis. 2d 683, 133 N.W.2d 267 (1965). Extended discussions of *Hoffman* can be found in Henderson, *supra* note 29, at 358-60, and Note, *Contracts: Reliance Losses: Promissory Estoppel as a Basis of Recovery for Breach of Agreement to Agree, Hoffman v. Red Owl Stores, Inc.*, 51 CORNELL L.Q. 351 (1966).

90. In reliance on assurances that he would receive a franchise, Hoffman sold his bakery at a loss, acquired a small grocery (which he later sold at a loss at the defendants' urging) to gain experience in the business (an attribute Red Owl allegedly preferred in its franchisees), bought an option on a site for the franchise store, and moved his family closer to the site. 26 Wis. 2d at 687-88, 133 N.W.2d at 269-70.

never reached agreement on the essential terms of the franchise, and therefore that no contract existed.[91] The Wisconsin Supreme Court agreed, but granted Hoffman recovery under promissory estoppel.[92] The language of section 90, the Court noted, does not require that the promise triggering reliance be "so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee."[93] More controversial was the Court's famous observation that it would be a mistake to equate promissory estoppel to a breach-of-contract action.[94]

The latter statement by the *Hoffman* court plainly suggests that promissory estoppel has become a theory of recovery independent of contract.[95] This view is shared by various observers who have described promissory estoppel as a tort theory,[96] a hybrid of tort and contract,[97] a theory of recovery separate and distinct from contract or tort,[98] and an "anti-contract" theory[99] that might trigger a fusion of contract and tort.[100] Others have described *Hoffman* as exemplifying a growing judicial tendency to impose precontractual liability[101] based on promises made to interest the promisee

91. *Id.* at 697, 133 N.W.2d at 274.

92. Hoffman received damages calculated to reimburse his reliance losses, but was denied the lost profits he sought. The Court concluded that "[w]here damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule-of-thumb approaches to the damage problem should be avoided." *Id.* at 701, 133 N.W.2d at 276.

Precedent for such an award in a negotiations case was set some seventeen years before *Hoffman. See* Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948). In *Goodman* the plaintiffs were encouraged by the local Emerson Radio Corporation distributor to apply for an Emerson dealer franchise. They were subsequently told that their application had been accepted, that the franchise would be granted, and that they would receive an initial delivery of 30 to 40 radios. *Id.* at 684. In reliance on these assurances, they hired salesmen, began to solicit orders for radios, and commenced other preparations to do business. When no franchise ultimately was awarded, the plaintiffs filed suit, and the court held that the defendants were "estopped" from denying the existence of a contract due to their statements and the plaintiffs' reliance. *Id.* The court's language is a mixture of both equitable and promissory estoppel terminology, but its emphasis is largely on the defendants' "promise. . .that a franchise would be granted" rather than upon any misstatement of fact on the defendant's part. *Id.* at 685. Whatever the basis of its decision, the court affirmed the trial court's award of reliance damages but reversed its award of lost profits. *Id.*

93. 26 Wis. 2d at 698, 133 N.W.2d at 275.

94. *Id.*

95. For a detailed argument to this effect, see Metzger & Phillips, *supra* note 3, at 508-50.

96. *See, e.g.*, C. FRIED, *supra* note 1, at 24 (*Hoffman* damage award had nothing to do with enforcing a promise, instead being a tort-like punishment of bad bargaining behavior); Barnett & Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 487 & 489-92 (1987) (portraying *Goodman v. Dicker* and *Hoffman* as based on tort notions of misrepresentation); Seavey, *supra* note 27, at 926 (estoppel "basically a tort doctrine" because wrong involved is causing plaintiff "to change position to his detriment" rather than depriving him of promised reward).

97. *See* Shattuck, *supra* note 73, at 942.

98. *See* Beale, *Gratuitous Undertakings*, 5 HARV. L. REV. 222, 225 (1891); Note, *Promissory Estoppel—The Basis of a Cause of Action Which is Neither Contract, Tort or Quasi-Contract*, 40 MO. L. REV. 163 (1975).

99. G. GILMORE, *supra* note 19, at 61. Gilmore also described the bargain theory of consideration and promissory estoppel as "matter and anti-matter." *Id.*

100. *Id.* at 90 (promissory estoppel "may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation)."

101. Farnsworth, *supra* note 85, at 222. Farnsworth notes that even *Drennan v. Star Pav-*

in negotiations,[102] and as an intrusion of the modern contract doctrine of good faith[103] into the negotiations context.[104] Of course, *Hoffman* may be portrayed as allowing promissory estoppel to substitute for the definite expressions of assent traditionally required for contract liability, much as it has come to be accepted as a substitute for consideration. But to do so is to transform the notion of contract into something far from its conventional meaning.

E. Illusory Promises

Commentators predictably have criticized *Hoffman* for undermining freedom of contract[105] and have questioned its actual impact.[106] But as we have seen, cases explicitly[107] using promissory estoppel to protect reliance on indefinite promises are not infrequent.[108] But what about this Article's major concern: using promissory estoppel to enforce promises that are *illusory*[109]

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ing Co., see supra notes 60-64 and accompanying text, represents "a limited inroad into the traditional freedom of negotiation." *Id.* at 222 n.13.

102. *Id.* at 236. Seen this way, liability was imposed on Red Owl "as a result of a promise that the $18,000 cash that he could contribute would suffice to obtain a franchise." *Id.*

103. The requirement of good faith and its use as an alternative device to protect reliance are discussed at *infra* notes 187-255 and accompanying text.

104. *E.g.*, Henderson, *supra* note 29, at 359 (*Hoffman* can be viewed as establishing the beginnings of an "important new legal duty of good faith in the conduct of contract negotiations"); Hillman, *Policing Contract Modifications Under the U.C.C.: Good Faith and the Doctrine of Economic Duress*, 64 IOWA L. REV. 849, 879 (1979) (*Hoffman* an example of use of promissory estoppel to police bad faith withdrawal of offers); Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U.L. REV. 673, 688 (1969) (*Hoffman* can be reasonably interpreted as "furnishing authority for the proposition that one may in some circumstances come under a duty to bargain in good faith"); Note, *supra* note 89, at 355 (*Hoffman* involved "the creation of a new right which looks very much like a cause of action for breach of an implied promise to negotiate in good faith"). However, both the U.C.C. and *Restatement (Second)* good faith provisions concern good faith in the performance and enforcement of contracts, not good faith in contract formation. *See* the discussion at *infra* notes 209-212 and accompanying text.

105. *E.g.*, Edwards, *supra* note 1, at 236 (*Hoffman* restricts freedom to negotiate without liability, a freedom regarded as critical under classical theory); Henderson, *supra* note 29, at 360. As the following quotation indicates, however, *Hoffman* has not been without admirers:

> In deciding *Hoffman*, the Wisconsin Supreme Court justices viewed society as composed of interdependent parties engaging in ongoing transactions giving rise to obligations even before the point of formal offer and acceptance ("cooperative contract"), rather than composed of isolated parties entering into discrete transactions after careful bargaining ("freedom of contract").

Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 855 (1983).

106. Farnsworth, *supra* note 85, at 237 (in the two decades since it was decided *Hoffman*'s influence "has been more marked in the law reviews than in the law reports").

107. One reason why there may not be more such cases is that in many situations where reliance on indefinite promises is protected the court simply does not mention the indefiniteness problem in its decision, or protects reliance by using a legal device other than estoppel. On the former point, see Barnett & Becker, *supra* note 96, at 477 ("As with the use of promissory estoppel to avoid Statutes of Frauds and Parol Evidence Rule problems, promissory estoppel is often used to enforce indefinite promises without any discussion of indefiniteness.") On the latter, see *infra* notes 182-186, 214 and accompanying text.

108. Also, the *Hoffman* result has gained the approval of the RESTATEMENT (SECOND). *See infra* notes 159-160 and accompanying text.

109. An illusory promise is one that in reality imposes no obligation on the promisor. *E.g.*, J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS section 4-17, at 159 (2d ed. 1977) ("an expression cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has committed himself not at all"); A. CORBIN, CORBIN ON CONTRACTS section 145

rather than indefinite?[110] Like indefinite promises, illusory promises have traditionally been considered insufficient to support promissory estoppel liability[111] because they are not true *promises*.[112] As with indefinite promises, moreover, doubts have existed as to the reasonableness of relying on illusory promises[113] and the courts' ability to enforce such promises.[114]

Despite these traditional obstacles, however, promissory estoppel has found application in illusory promise situations. Consider for example the case of *Hunter v. Hayes*,[115] in which the plaintiff Hunter quit her job with a telephone company in reliance on promised employment as a flag girl with a construction company. The defendants reneged on their offer, and Hunter

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(one volume ed. 1952) ("words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all"); E. FARNSWORTH, CONTRACTS section 2.13, at 73 (1982) ("a promise in form but not in substance"). It has generally been held that an illusory promise does not supply consideration for a return promise and that bilateral agreements in which one of the promises is illusory cannot be enforced by either party. *See, e.g.*, J. CALAMARI & J. PERILLO, *supra*, section 4-17, at 160; E. FARNSWORTH, *supra*, section 2.13, at 73.

This result has traditionally been attributed to the doctrine of "mutuality of obligation." *E.g.*, J. CALAMARI & J. PERILLO, *supra*, section 4-17, at 160; E. FARNSWORTH, *supra*, section 2.13, at 73 n.3. For a classic statement of the mutuality requirement, see W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT 93 n.2 (J. Knowlton 2d American ed. 1857) ("When the only consideration to sustain the contract is that arising out of mutual promises, the mutuality must be absolute so that each party must have an action in case of breach or neither is bound"). Illusory promises cannot meet this test because it would be "impossible to show a breach" of such a promise. J. MURRAY, *supra* note 15, section 90, at 192 n.58. The RESTATEMENT (SECOND), however, has almost entirely disavowed the mutuality requirement. *See* RESTATEMENT (SECOND) OF CONTRACTS section 79(c) & comment f (1981).

110. However, in some cases the distinction between illusory promises and indefinite promises may be more imagined than real. A sufficient amount of indefiniteness can operate to render a promise illusory as well. *E.g.*, J. CALAMARI & J. PERILLO, *supra* note 109, section 4-17, at 159-60 (many cases analyzed as indefiniteness cases can also be treated as illusory promise cases, using as an example offer to supply such quantities "as your storekeeper may order from time to time" at specified prices); A. CORBIN, *supra* note 109, section 65 ("I accept your offer" is illusory when made in response to an offer to sell specified goods at certain prices; while a mutual expression of assent is present, the offeree's failure to state a quantity renders assent illusory); 1 S. WILLISTON, *supra* note 83, section 43, at 145-46 ("The difficulty with illusory promises may be two-fold: indefiniteness and insufficiency of consideration."); Pratt, *American Contract Law at the Turn of the Century*, 39 S.C.L. REV. 415, 441 (1988) [hereinafter Pratt] ("The [mutuality of obligation] rule could be satisfied only if there were obligations to be imposed on both sides; if an obligation was not fully described, it was not enforceable."). In other cases, however, the distinction seems meaningful. A complete and certain promise containing an absolute termination clause, for example, presumably would be illusory but not indefinite.

111. *See, e.g.*, Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 458, 287 P.2d 735, 738 (1955); Goodpaster v. Pfizer, Inc., 35 Wash. App. 199, 203, 665 P.2d 414, 416 (1983), both discussed *infra* note 134.

112. *E.g.*, 1A A. CORBIN, *supra* note 12, section 201 (section 90 does not apply to an illusory promise because reliance cannot transform such a promise into a true promise).

113. *E.g.*, A. CORBIN, *supra* note 109, section 16 (giving example of an illusory promise and saying "the words used. . .are not such as may reasonably be relied upon"). In fact, it has been suggested that relying on illusory promises is generally less reasonable than relying on incomplete promises. *See* Henderson, *supra* note 29, at 362 n.96. We consider this issue at *infra* notes 325-348 and accompanying text.

114. *Cf. supra* note 85.

115. 533 P.2d 952 (Colo. App. 1975).

was unable to find employment for two months. The trial court granted her an award based on her lost wages for those two months, and the defendants appealed, arguing among other things, that no evidence existed of a meeting of the minds, and therefore, no contract was present to be breached.[116] The Colorado Court of Appeals agreed, but found the defendants' argument irrelevant because the circumstances warranted the application of the doctrine of promissory estoppel even without evidence of a meeting of the minds or independent consideration.[117] The defendants made Hunter a promise upon which she foreseeably relied to her detriment,[118] and these factors were sufficient to justify liability.[119] Nowhere did the court address the fact that the employment relation promised to Hunter was probably one of employment-at-will.[120] Promises of this kind traditionally have been held to be illusory no matter how definitely worded,[121] due to the ability of either party to terminate the relationship at any time and for any reason, without notice.[122]

The illusory nature of a promise of future employment-at-will was addressed explicitly, and with the same ultimate outcome as *Hunter*, in *Grouse v. Group Health Plan, Inc.*[123] In *Grouse*, the plaintiff, a young pharmacist working in a retail pharmacy, applied for and ultimately was offered a position with the defendant clinic. In reliance on the promised job with Group Health, he gave notice of resignation to his employer, and turned down another offer of employment. After this, Grouse was told that another person had been hired in his stead due to the clinic's inability to secure the favorable written reference required by company policy.[124] Grouse had difficulty finding another job, and the lower court dismissed his subsequent suit against Group Health for failure to state an actionable claim. The Minnesota Supreme Court disagreed, although it acknowledged that "[o]n these facts no contract exists because due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illu-

116. *Id.* at 953.

117. *Id.* Here the court cited *Hoffman* and Mooney v. Craddock, 35 Colo. App. 20, 530 P.2d 1302 (1974).

118. The court found that the defendants "not only offered Hunter a job. . ., but also told her to terminate her position at the telephone company." *Id.*

119. 533 P.2d at 953.

120. The defendant offered evidence concerning its collective bargaining agreement, but the court found that it had "no bearing on the legal issues in this case," and that its only significance was as evidence that Hunter was not promised employment "contrary to the terms of the agreement." *Id.* at 954. This raises the possibility that Hunter might ultimately have gained some job security rights under that agreement had she been allowed to start work.

121. *See, e.g.*, A. CORBIN, *supra* note 109, section 65; E. FARNSWORTH, *supra* note 109, section 2.14, at 77; Barnett & Becker, *supra* note 96, at 478.

122. A classic formulation of this doctrine may be found in Payne v. Western & Atlanta R.R.Co., 81 Tenn. 507, 519-20 (1884): "All may dismiss their employees at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong."

123. 306 N.W.2d 114 (Minn. 1981).

124. Two faculty members at the University of Minnesota declined to give references, and an internship employer and several pharmacies where Grouse had done relief work declined on the ground that they had insufficient experience on which to base an evaluation. Grouse's current employer was not contacted due to a request to that effect on his job application with Group Health. 306 N.W.2d at 116.

sory."[125] This was no obstacle to recovery, however, because promissory estoppel applied[126] and its effect was "to imply a contract in law where none existed in fact."[127] Group Health argued that it would be anomalous to allow an employee who had not even reported to work to recover when the same employee could be discharged with impunity after the first day on the job. The court again disagreed, stating that it believed, under certain circumstances, that section 90 would apply even after employment has begun.[128] The Court said Grouse could assume that he would be given a good faith opportunity to perform his duties once he was on the job.[129] Given the indefinite duration of the employment promised, Grouse's proper remedy was the amount he lost quitting the job he held and in turning down the other offer of employment.[130]

The *Hunter* and *Grouse* courts are not alone in recognizing promissory estoppel's applicability to protect reliance on promises of at-will employment. Other courts have used promissory estoppel to prevent employers from revoking offers of such employment,[131] and to prevent them from dis-

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125. *Id.*

126. The court quoted the text of section 90, and said that the defendant "knew that to accept its offer Grouse would have to resign his employment," and that "[u]nder these circumstances it would be unjust not to hold Group Health to its promise." *Id.*

127. *Id.*

128. *Id.* For a case with a similar result but a somewhat narrower deployment of promissory estoppel, see Bower v. AT & T Technologies, Inc., 852 F.2d 361 (8th Cir. 1988), where the court allowed former employees to recover under promissory estoppel for the employer's breach of an at-will promise to rehire them in new positions. But here, unlike *Grouse*, the court seemingly concluded that promissory estoppel is inapplicable where the promisee has actually been hired and is terminated shortly thereafter. *See id.* at 363 (following Missouri law). In the case before it, though, the plaintiff employees had never been rehired, and the employer therefore breached its promise *to provide them an at-will employment. Id.* As the court explained:

> While, in practical effect, it may be hard to distinguish the case in which an employee is fired a day after beginning work from the situation in which a potential employee is prevented from assuming a promised at-will position, the cases *are* different. In the former case, the employer has completely fulfilled his promise; in the latter, the promise has not been kept *in any respect.*

Id. at 363-64 (emphasis in original).

129. 306 N.W.2d at 116. On good faith as a limit on employers' power to discharge employees with impunity, see *infra* note 247.

130. *Id.* Accordingly, the case was reversed and remanded for a new trial on the damage issue. Note that the court's language suggests the possibility that Grouse could recover for the "lost opportunity" represented by the turned-down job offer. *See supra* notes 70, 77, 85. But while such losses apparently were easily provable in this case, they may be quite difficult to prove, though no less real, in many cases that are otherwise quite similar. Consider for example the graduating student who quits interviewing after accepting a job offer early in the annual recruiting season, only to have the employer renege after the recruiting season is over. *See also* Pettit, *supra* note 59, at 592-93 for a discussion of the difficulties faced by employees who seek to prove reliance on a benefit plan promised by their employers.

131. *See, e.g.*, Ravelo v. County of Hawaii, 66 Hawaii 194, 658 P.2d 883 (1983); Pepsi-Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696 (Ind. App. 1982); Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 (1974). *See also* Bower v. AT & T Technologies, Inc., 852 F.2d 361 (8th Cir. 1988), discussed in *supra* note 128. In *Ravelo*, the plaintiff and his wife both quit their jobs in reliance on the defendant's promise to hire the plaintiff as a county police officer. He was then informed that the defendant was not going to hire him. When he filed suit against the defendant, his suit was dismissed on the ground that he "was at best a probationary employee whose employment was terminable without cause at any time prior to the completion of a period of probationary service." Ravelo, 66 Hawaii at 197-98, 658 P.2d at 886. The

charging current at-will employees.[132] There are, however, cases to the contrary.[133] In fact, two cases which most emphatically reject the application of

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Supreme Court of Hawaii agreed that Ravelo's complaint did not support a claim "premised on breach of a formal contract," but nonetheless found relief appropriate under promissory estoppel. *Id.* at 198, 658 P.2d at 886-87. The court noted the changes to section 90 in the RESTATEMENT (SECOND), and remanded the case in a manner which strongly suggested that a reliance-based award would be appropriate. *Id.* at 200-01 & nn.3-4, 658 P.2d at 887-88 & nn.3-4.

In *Woods*, the court recognized that promissory estoppel applied to protect the plaintiff, who had quit her job in reliance on a promise of employment from Pepsi, which later reneged when it discovered that her boyfriend worked for Coca-Cola. 440 N.E.2d at 699. She ultimately was denied any recovery, however, because there was "not sufficient proof of out-of pocket expenses" such as "moving or job-hunting expenses." *Id.* The outcome in this case was probably influenced by evidence suggesting that the plaintiff might have been able to regain her old job had she chosen to do so, and that she found lesser-paying employment within two weeks and an equivalent job after 26 weeks. *See id.* at 697.

132. *See* Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 104, 483 N.E.2d 150, 155 (1985) (reversing summary judgment against discharged employee and recognizing that promissory estoppel can sometimes operate to prevent discharge of at-will employees); Jones v. East Center for Community Mental Health, Inc., 19 Ohio App. 3d 19, 482 N.E.2d 969 (1984). In *Jones*, the court reversed a summary judgment against a discharged employee who argued that statements in the company personnel manual she received after her hiring removed her employment from the at-will category. The court observed that:

> Where. . .the employment manual does not mention that the employer retains the right to terminate "at will" or where it fails to inform the employees that the manual is of no legal significance, the promises contained therein are quite likely to create expectations of benefit and lead employees to some form of action or forbearance in reliance on those promises. Indeed, why would an employer adopt the policies contained in an employment manual if it did not expect to benefit from them? If an employer is allowed to make unqualified and high-sounding promises of fair treatment and job security in order to obtain loyal and long-standing employees, and then disaffirm such promises and rely on the "at-will" doctrine (conspicuous by its absence in the employee's manual), injustice will frequently result.

19 Ohio App. 3d at 23, 482 N.E.2d at 974. Two points about the *Jones* opinion are of particular interest. First, the court cited Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980), one of several cases holding that statements in an employee manual can become part of the employment contract, and suggested that *Toussaint* was "best analyzed under the principles of promissory estoppel." 19 Ohio App. 3d at 23 n.2, 482 N.E.2d at 974 n.2. Second, although the court remanded the case "for the application of promissory estoppel" and appeared to prejudge the outcome (stating that injustice "can be avoided here only by enforcing the promissory representations" contained in the manual), there is no indication that the plaintiff demonstrated any actual reliance. *Id.* at 24, 482 N.E.2d at 975. As the above quotation suggests, the court appeared to assume the existence of reliance from the fact of the promises' existence.

133. *See, e.g.*, Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961); Mayer v. King Cola Mid-America, Inc., 660 S.W.2d 746 (Mo. App. 1983); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967). *Bixby* held that promissory estoppel was not available to prevent the discharge of employees promised permanent employment, despite evidence that many had relied on the promise by giving up other jobs, moving to the defendant's location, and giving up farm leases. 196 F. Supp. at 891, 904. There, the plaintiffs had been hired to replace strikers at the defendant's plant. Pursuant to an arbitration award after the strike settlement (an award with which the defendant's representative on the arbitration panel disagreed), the strikers were given seniority and the plaintiffs were discharged. *Id.* at 892. Protection of the plaintiffs' reliance could only have come at the price of imposing liability on the defendant, a less-than-willing participant in their discharge. Instead, the court fell back on the wealth of traditional authority to the effect that promises of permanent employment create only an employment at will. *Id.* at 893.

The same authority operated with similar devastating effect in *Forrer*, where the plaintiff had been induced to quit farming (selling his stock at a loss) and to return to work for his former promissory estoppel to illusory promises derive from the employment context.[134]

In a few instances, courts have recognized the availability of promissory

employer by a promise of permanent employment. In his suit for his discharge without cause less than a year later, the Supreme Court of Wisconsin opined that it "would not hesitate to apply the doctrine of promissory estoppel under these facts if justice required it." 36 Wis. 2d at 392, 153 N.W.2d at 589. But it then found that since the defendant had honored its promise, which amounted in law to nothing more than a promise of at-will employment, justice dictated no further recovery. Being unencumbered with the arcana of a legal education, the plaintiff was doubtless surprised by this conclusion. It is hard to imagine that he would have acted as he did had he understood Sears to say: "Quit farming and incur reliance losses and we'll give you a job; but we reserve the right to fire you at any time, for any reason, and without notice." The outcome in *Mayer* is far easier to understand. There, the plaintiff moved to the defendant's location in pursuit of a promised three-year written employment contract which never materialized. Instead, the relationship deteriorated and the Plaintiff was discharged after a few months. The court refused to allow the plaintiff to use promissory estoppel to overcome the defendant's statute of frauds defense to the alleged three-year oral employment contract, finding none of the doctrine's requirements satisfied. Many terms of the alleged contract had not been agreed to, including the important question of the plaintiff's commission. Therefore, instead of having a "promise," the plaintiff had an "expectation of a promise." 660 S.W.2d at 749. More importantly, there was no "detrimental reliance" or "injustice" as a result of reliance because the plaintiff was unemployed at the time he accepted the position with defendant, had recovered a judgment for his moving expenses at the trial level, and had been compensated at the agreed-upon rate for his work while employed by the defendant. *Id.* The court's conclusion that he was merely an employee-at-will therefore did not operate to deny him recovery for the only reliance losses he alleged.

134. *See* Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955); Goodpaster v. Pfizer, Inc., 35 Wash. App. 199, 665 P.2d 414 (1983). (both involving promises to pay discretionary bonuses). In *Spooner*, the court refused to allow the plaintiff life insurance agents to recover the promised bonuses, despite asserting that the defendant was "perilously near the perpetration of a fraud," and that the plaintiffs "have reason to be dissatisfied" with what they had been paid. 47 Wash. 2d at 459, 287 P.2d at 738. The major obstacle confronting the plaintiffs was clear language in the bulletin containing the bonus plan that rendered any payments entirely discretionary at the defendant's option. The bonus was described as a "voluntary contribution" that "may be withheld, increased, decreased or discontinued. . .with or without notice." *Id.* at 456, 287 P.2d at 737. The court acknowledged promissory estoppel's role in protecting significant employee reliance on gratuitous employer bonus promises, but said that "before this rule can be applied, there must be a real promise to be enforced." *Id.* at 458, 287 P.2d at 738. An additional problem was identifying any losses in reliance suffered by the plaintiffs, who were admittedly denied recovery of the readily-computable expectancy interest created by the bonus plan. Any additional policy sales generated by the promised plan resulted in increased regular commissions to the plaintiffs, and therefore some recovery for their reliance. Of course, some agents may have stayed with Reserve in anticipation of the promised bonuses, but the court stated that "if they were in any instance induced to stay with the company until the termination of the bonus period, it was because they were relying on the corporate conscience" of the defendant, and this statement suggests that no such proof of lost opportunities was in fact offered. *Id.* at 459, 287 P.2d at 738. Reserve, at least initially, apparently thought that it would benefit from the plan. The bulletin announcing the plan said: "Reserve wants *career* men—men who are as much concerned about *next year* as *next month.* To attract such workers, and inspire their best efforts, your Company now puts into effect a schedule of *Bonus Payments.*" *Id.* at 455, 287 P.2d at 736 (emphasis in original). *Goodpaster,* a child of *Spooner*, is far less troubling in its outcome. Goodpaster, an employee who was fired after being placed on nine months' probation for substandard performance, was denied recovery of a bonus that the company sales manual expressly stated was discretionary. The court noted that Pfizer had good cause to discharge him, observing that "the record is replete with facts showing Goodpaster's substandard performance during his last 6 years with Pfizer," and, citing *Spooner*, that "[a]ction in reliance upon a supposed promise creates no obligation on a corporation whose promise is illusory." 35 Wash. App. at 202-03, 665 P.2d at 416. The court could have as easily said that there was no evidence of reliance or of injustice flowing from reliance.

estoppel as a limit on the power of manufacturers to terminate their distributors under agreements so indefinite that they arguably were illusory.[135] Most dealer termination cases, however, have been dealt with under other legal rubrics.[136] Finally, some instances of reliance on illusory promises fairly cry out for promissory estoppel's ministrations, but in these cases the doctrine's use was apparently neither sought by the promisee nor considered by the court. Consider for example the case of *Streich v. General Motors Corporation.*[137]

In *Streich* the plaintiff was a component parts manufacturer who had incurred significant reliance expenditures while preparing to supply General Motors with air magnet valves under a purchase order prepared by G.M.'s attorneys. The agreement included a provision stating that G.M. "will have no liability for payment for material or items delivered to Buyer which are in excess of quantities specified in the delivery schedules."[138] The net effect of this provision was that the seller agreed to sell a valve at a fixed price in whatever quantities the buyer might designate, when and if the buyer issued a purchase order.[139] Thus, General Motors' promise was rendered illusory.[140] Streich found a void behind the facade when G.M. ordered only twelve of an anticipated 1,600 units.[141] The court acknowledged that Streich was misled by the many and detailed provisions[142] of the deceptive[143] purchase orders, which were "artfully prepared,"[144] in fine print,[145] and that Streich had undoubtedly gone to considerable expense preparing to

135. *See* Clausen & Sons, Inc. v. Theo Hamm Brewing Co., 395 F.2d 388, 390 (8th Cir. 1968) (reversing summary judgment against terminated long-term exclusive distributor; substantial alleged reliance may justify promissory estoppel liability); L.S. Good & Co. v. H. Daroff & Sons, Inc., 279 F. Supp. 925, 927 (N.D. W.Va. 1968) (denying manufacturer's motion to dismiss suit by exclusive distributor for damages flowing from manufacturer's sales to plaintiff's competitor; even if no contract existed, defendant could be liable for plaintiff's out-of-pocket reliance expenditures under theory of promissory estoppel); Whorral v. Drewrys Ltd. U.S.A., 214 F. Supp. 269, 270-71 (S.D. Iowa 1963) (due to significant reliance by plaintiff, defendant estopped from denying existence of indefinite oral exclusive beer distributorship agreement and from terminating relationship after only 10 months); Hardin v. Eska Co., 256 Iowa 371, 374-75, 127 N.W.2d 595, 596-97 (1964) (promissory estoppel allows dealer to recover reliance damages from manufacturer who violated indefinite exclusive dealership agreement).

136. *See infra* notes 182-185, 214-242, 281-286 and accompanying text.

137. 5 Ill. App. 2d 485, 126 N.E.2d 389 (1955).

138. *Id.* at 489-90, 126 N.E.2d at 391-92.

139. *Id.* at 494, 126 N.E.2d at 394.

140. *Id.* at 495, 126 N.E.2d at 394. G.M. is, of course, not beyond arguing to the contrary when its interests so dictate. *See* Propane Indus., Inc. v. General Motors Corp., 429 F. Supp. 214 (W.D. Wyo. 1977). There, G.M. sought to enforce a similar "purchase order" against a propane gas supplier after a gas shortage created market prices far in excess of the price specified in the purchase order. It argued unsuccessfully that the purchase order constituted a binding requirements contract or, in the alternative, that the parties' prior dealings created an implied promise on its part to issue releases for the "possible requirement" of 500,000 gallons stated in the purchase order. *Id.* at 218, 221.

141. 5 Ill. App. 2d at 500, 126 N.E.2d at 397.

142. *Id.* at 496, 126 N.E.2d at 395.

143. *Id.* at 500, 126 N.E.2d at 397.

144. *Id.* at 499, 126 N.E.2d at 397.

145. *Id.* at 499-500, 126 N.E.2d at 397.

perform the contract.[146] Nonetheless, the trial court could do nothing but sustain G.M.'s motion to dismiss because[147] courts "are not clothed with the power to make contracts for parties, nor can they, under the guise of interpretation, supply provisions actually lacking or impose obligations not actually assumed."[148]

F. Reliance Revisited: Promissory Estoppel and the Restatement (Second)

Streich was decided in 1955. Must the Streichs of the world face a similar fate today? As a first step toward answering this question, it is necessary to examine the state of the reliance doctrine under the RESTATEMENT (SECOND) OF CONTRACTS.[149] Many of the developments chronicled in the preceding subsections were well entrenched when the RESTATEMENT (SECOND) OF CONTRACTS emerged in 1981, a fact the new RESTATEMENT recognizes in several specific provisions. For example, section 87(2) sanctions the *Drennan* result[150] by using promissory estoppel to prevent the revocation of some offers.[151] In addition, the text of section 90 itself has undergone an evolution that reflects, at least in part, the progress of reliance in the decades following the original RESTATEMENT.[152] A promisee's reliance no longer need be definite and substantial[153] to trigger the operation of the section (a change linked[154] to new language explicitly sanctioning partial enforcement of a promisor's promise by an award of reliance-based damages).[155] Moreover,

146. *Id.* at 496, 126 N.E.2d at 395.
147. *Id.* at 500, 126 N.E.2d at 397.
148. *Id.* at 496, 126 N.E.2d at 395.
149. For an extensive treatment of this subject, see generally Knapp, *supra* note 1.
150. *See supra* notes 60-64 and accompanying text.
151. *See* RESTATEMENT (SECOND) OF CONTRACTS section 87(2) (1981). Also, the RESTATEMENT (SECOND) firmly establishes reliance as a justification for circumventing the writing requirement of the statute of frauds. *Id.* section 139. *See supra* note 49.
152. The revised section now reads 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.

Id. section 90(1). Section 90(2) sanctions the enforcement of charitable subscriptions and marriage settlements under section 90(1) "without proof that the promise induced action or forbearance." *Id.* section 90(2). As its language suggests, the new section 90 also makes foreseeable third-party reliance a possible basis for enforcing promises. For a detailed treatment of this subject, see generally Metzger & Phillips, *supra* note 25.
153. *See supra* notes 44, 46 and accompanying text.
154. *See* RESTATEMENT (SECOND) OF CONTRACTS Reporter's Note (1981); ALI, 42D ANNUAL MEETING, PROCEEDINGS 296-97 (1965). As professor Knapp has observed:

> This deletion responds to the argument of Fuller and Perdue that the section as originally drafted appeared to require the promisee's reliance to have been "definite and substantial" enough to justify *full* enforcement of the expectation created by the promise; the drafters seem to have assumed that retention of that language would undercut the new policy of permitting partial enforcement.

Knapp, *supra* note 1, at 58 (emphasis in original) (footnote omitted).
155. "The remedy granted for breach may be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS section 90 (1981). A comment to section 90 says that available remedies include "full-scale enforcement by normal [contract] remedies," "restitution," or damages "measured by the extent of the promisee's reliance rather than by the terms of the

new guidance concerning the section's injustice requirement is supplied in the comments.[156] Little is said, however, about the type and amount of reliance required for recovery under the new section,[157] or about the possibility that promissory estoppel is becoming an independent theory of recovery.[158]

The new RESTATEMENT does provide some guidance on another subject that concerned us earlier: the possibility that reliance on an indefinite promise may make that promise enforceable. Section 34(3) declares that "[a]ction in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed."[159] Also, Illustration Ten to the new section 90, an obvious take-off on *Hoffman v. Red Owl Stores, Inc.*, suggests that only reliance damages are recoverable in such cases.[160]

The Hoffmans of the world, however, appear to have fared far better

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promise." *Id.* comment d. Full-scale enforcement "is often appropriate," but "the same factors which bear on whether any relief should be granted" are also relevant to determining the nature of the relief to be granted. *Id.* The same comment also cautions that "damages should not put the promisee in a better position than performance of the promise would have put him" unless "there is unjust enrichment of the promisor." *Id.*

156. Satisfaction of the. . .[injustice] requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

RESTATEMENT (SECOND) OF CONTRACTS section 90 comment b (1981). On the deterrent and channeling functions of form, see generally Fuller, *supra* note 14.

157. Comment b does make the "definite and substantial character [of the promisee's reliance] in relation to the remedy sought" a factor for consideration in the court's determination whether injustice can only be avoided by enforcement. RESTATEMENT (SECOND) OF CONTRACTS section 90 comment b (1981). The same comment also contains language suggesting that the amount of reliance required varies by type of case. *Id.* ("reliance need not be of substantial character in charitable subscription cases, but must be in cases of firm offers and guaranties"). It has been argued that contemporary courts often require little or no tangible reliance in promissory estoppel cases. *See* Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 910-14 (1985). For an example of such a case, see the discussion of *Jones v. East Center for Community Mental Health, Inc.* in *supra* note 132.

158. In fact, such signals as exist are contradictory. Comment a says that section 90 "states a basic principle which often renders inquiry unnecessary as to the precise scope of the policy of enforcing bargains," but comment d affirms that a "promise binding under this section is a contract." RESTATEMENT (SECOND) OF CONTRACTS section 90 comments a & d (1981).

159. RESTATEMENT (SECOND) OF CONTRACTS section 34(3) (1981).

160. 10. A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, a franchisor of supermarkets. B states to A that for $18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying "Everything is ready to go. Get your money together and we are set." A sells the bakery taking a capital loss on this sale as well. Still later, B tells A that considerably more than an $18,000 investment will be needed, and the negotiations between the parties collapse. At the point of collapse many details of the proposed agreement between the parties are unresolved. The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and grocery and for his moving and temporary living expenses. *Since the proposed agreement was never made, however, A is not entitled to lost*

under the new RESTATEMENT than have the Streichs because those who rely on illusory promises apparently do not receive the protection afforded those who rely on indefinite promises. Section 90 refers to a promise which the promisor should reasonably expect to trigger reliance by the promisee, and appears under the heading: "Promise Reasonably Inducing Action or Forbearance."[161] A Reporter's Note to one of the comments to section 90 refers the reader to Section Two and its comments for the meaning of the term "promise."[162] Unfortunately that section's definition of promise appears to exclude illusory promises.[163] This appearance is confirmed by a comment to Section Two[164] and is reaffirmed by comments to sections 34 and 77.[165] A few notes of ambiguity, however, are struck by an illustration to section 90 which is plainly patterned after a well-known estoppel case[166] and by a Reporter's note to that section,[167] both of which can be read as suggesting that

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> *profits from the sale of the grocery or to his expectation interest in the proposed franchise from B.*

Id. § 90 illustration 10 (emphasis added).

161. *Id.* § 90.

162. *Id.* § 90 comment a Reporter's Note.

163. "A promise is a manifestation of intention to act or refrain from acting in a specified way, *so made as to justify a promisee in understanding that a commitment has been made.*" *Id.* section 2(1) (emphasis added). Comment b tells us, without helping very much, that "[a] promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct." *Id.* comment b. As Ian Macneil has observed, section 2(1) "seems merely a Gertrude Steinian 'a promise is a promise is a promise.' " I. MACNEIL, THE NEW SOCIAL CONTRACT 6 (1980).

164.
> Words of promise which by their terms make performance entirely optional with the "promisor" whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor. Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation of performance.

Id. section 2 comment e.

165. Comment b to section 34 says that "[i]f one party to an agreement is given unlimited choice, that party may not be a promisor (see Comment *e* to section 2), and the contract may fail for want of consideration." *Id.* section 34 comment b. Comment a to section 77 says that "[w]ords of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise" and do not amount to consideration. *Id.* section 77 comment a.

166. The case is Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948). *See supra* note 92 for a discussion of *Goodman*. The illustration in question reads as follows:

> A applies to B, a distributor of radios manufactured by C, for a "dealer franchise" to sell C's products. *Such franchises are revocable at will.* B erroneously informs A that C has accepted the application and will soon award the franchise, that A can proceed to employ salesmen and solicit orders, and that A will receive an initial delivery of at least 30 radios. A expends $1,150 in preparing to do business, but does not receive the franchise or any radios. *B is liable to A for the $1,150 but not for the lost profit on 30 radios.*

RESTATEMENT (SECOND) OF CONTRACTS section 90 illustration 8 (1981) (emphasis added).

167. The Reporter's Note to comment a, in addition to referring to section 2 for the meaning of the term "promise," also invites readers to compare a number of authorities, starting with *Goodman v. Dicker* and concluding with Henderson, *supra* note 29, at 364. The latter reference is almost certainly to the following passage:

> 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

reliance on illusory promises *can* sometimes be enforced through estoppel.

III. ALTERNATIVE DEVICES FOR PROTECTING RELIANCE ON ILLUSORY PROMISES

From a pro-reliance viewpoint, at least, the facts of *Streich* and several other cases discussed in the preceding section argue for using promissory estoppel to enforce illusory promises. Despite the increasing use of promissory estoppel throughout this century, however, it is generally unavailable in this context. The scattered cases explicitly using the doctrine to enforce illusory promises hardly represent mainstream thinking on this subject. Also, despite a few equivocations, even the RESTATEMENT (SECOND) is generally hostile to this particular application of estoppel.

Even if the stance of the RESTATEMENT (SECOND) were completely negative, however, one would not expect such a prohibition to limit the expansion of the reliance doctrine for very long. The first RESTATEMENT did not curb the inherently expansionist tendencies[168] of the reliance doctrine,[169] and there is no reason to suppose that its successor will limit these tendencies either.[170] Should the next RESTATEMENT (if there is a third RESTATEMENT) expressly sanction the application of promissory estoppel to illusory promises? Since the rationalization of extant case law is still one function of

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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.* (emphasis added).

168. "[B]y its very nature, the principle stated in section 90 defies all attempts to confine it within rigid categories." Knapp, *supra* note 1, at 78. *See also supra* note 59 and accompanying text.

169. On the evolution of promissory estoppel in the period between the two RESTATEMENTS, see *supra* notes 49-64, 88-104, 115-122 and accompanying text. Particularly instructive in this regard is the use of promissory estoppel to circumvent the writing requirement of the statute of frauds. The first RESTATEMENT limited this application of estoppel to "ancillary promise" cases, those in which the promisor had promised to reduce his main promise to written form. *See supra* notes 40, 43; Metzger, *supra* note 49, at 1427 & n.364. But this did not prevent courts from going beyond the ancillary promise limitation, *see* Metzger, *supra* note 49, at 1428-29, and the second RESTATEMENT sanctioned the expansion, *see supra* note 151 and accompanying text. Nor have the courts hewn too closely to the language of section 90 when the imperatives of justice dictated otherwise. As Professor Feinman has observed, many cases in which promissory estoppel has been applied do not fit the elements of section 90: "Often a promise is not explicit, definite, or complete, or the reliance is not substantial, neatly linked to the promise, or clear." Feinman, *supra* note 9, at 689.

170. In this perception we are not alone. Professor Charles Knapp has suggested that the new reliance sections in the RESTATEMENT (SECOND) "do no more than indicate the current high-water mark of reliance theory being applied in contract cases. The tide is still coming in, and we can confidently expect additional applications in the future." Knapp, *supra* note 1, at 77. In the same vein, Knapp also observed that by the time the impact of the RESTATEMENT (SECOND) is felt, section 90 "may well have transformed the face of contract law in ways undreamt of by its drafters—or its revisers." *Id.* at 79.

the RESTATEMENTS,[171] a body of decisions in which courts protect reliance on illusory promises under various legal rubrics could bolster the case for using promissory estoppel to enforce such promises. Much as Arthur Corbin induced the inclusion of section 90 in the original RESTATEMENT by demonstrating the existence of innumerable cases using various rationales to protect reliance on donative promises,[172] a similar body of illusory promise case law could impel promissory estoppel's explicit application to such illusory promises. Such case law does, in fact, exist. The decisions expressly protecting reliance on illusory promises are merely the tip of a much larger iceberg composed of cases in which reliance on illusory promises is protected by a variety of other, less controversial means. This section examines the different devices the courts have used to accomplish this result, and suggests how promissory estoppel might better serve this end.

A. *Manipulation of the Agreement*

Courts in this century have employed a variety of interpretative strategies to render illusory promises binding. These include expansively interpreting seemingly illusory promises to render them real obligations,[173] implying the existence of a promise designed to make the initial promise binding,[174] and holding that performance of an illusory promise removes it from the illusory category.[175] For example, it has long been held that an unfettered right to

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171. On the different thrusts of the two contracts *Restatements*, see generally Speidel, *supra* note 83.

172. *See supra* note 42. Apparently, however, Williston did much of the initial systematizing spadework here. *See supra* note 41 and accompanying text.

173. *See, e.g.*, E. FARNSWORTH, *supra* note 109, section 2.13, at 73 for the observation that "[i]n recent years. . .courts have tended to respond by reading the apparently illusory promise so that it is not illusory." *See also* Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939) (noting that in manipulating form contracts courts can "reject enforcement by one side for want of 'mutuality,' though allowing enforcement by the weaker side because 'consideration' in some other sense is present").

174. *See, e.g.*, E. FARNSWORTH, *supra* note 109, at 75; G. GILMORE, *supra* note 19, at 77. The classic example is Cardozo's decision in Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). There, the plaintiff Wood sued for breach of an agreement giving him the exclusive right to market the defendant's fashion designs. The defendant argued that the agreement was unenforceable because it imposed no duties on Wood, and the appellate division agreed, finding it to be "void for lack of mutuality." 177 A.D. 624, 627, 164 N.Y.S. 576, 578 (1917). The court of appeals reversed, finding an implied promise by Wood to use "reasonable efforts" to market the defendant's designs. 222 N.Y. at 92, 118 N.E. at 215. The result in *Wood* is now enshrined in sales law. *See* U.C.C. section 2-306(2) (1978), which provides: "A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale."

175. *See, e.g.*, Redd v. Woodford County Swine Breeders, Inc., 54 Ill. App. 3d 562, 566, 370 N.E.2d 152, 155 (1977); Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance, 49 Ill. App. 3d 213, 220, 365 N.E.2d 1285, 1290 (1977); J. MURRAY, *supra* note 15, section 90, at 193 (once performance has been completed, "a unilateral contract [is] formed with one right in the plaintiff who had already performed and one correlative duty in the defendant who had received the benefit of performance"). Note that here we are dealing with reliance by the author of the illusory promise, which is then used to overcome the promisee's defense that no consideration has been given for the promisee's return promise. This is the reverse of the situation that is our focus: the case in which the recipient of the illusory promise relies upon it to his detriment.

cancel by the promisor renders his promise illusory.[176] Yet any limitation on the power of cancellation will remove the promise from the illusory category.[177] Where such a limitation is missing, courts have often strained to find one,[178] or have found some other means to justify enforcement where enforcement is necessary to avoid injustice.[179]

Where no explicit limit on the promisor's power to terminate is manifest, courts have restricted that power by implying a promise to give reasonable notice before cancellation.[180] The desire to protect reliance has also led

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176. *See, e.g.*, Allington Towers North, Inc. v. Rubin, 400 So. 2d 86, 88 (Fla. App. 1981) (addendum to sales agreement giving buyer "absolute and unfettered right to cancel" at any time before closing rendered buyer's obligation illusory); E. FARNSWORTH, *supra* note 109, section 2.14. *See also* RESTATEMENT (SECOND) OF CONTRACTS section 77 comment a (1981) (purported promise making performance entirely optional with promisor is not a promise and is not consideration for a return promise).

177. *See, e.g.*, Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 37 (8th Cir. 1975) (limitations on unilateral right to cancel prevent promise from being illusory); Stern & Co. v. International Harvester Co., 148 Conn. 527, 531, 172 A.2d 614, 616 (1961) (power of both parties to cancel upon giving written notice does not render promises illusory); David Roth's Sons, Inc. v. Wright & Taylor, Inc., 343 S.W.2d 389, 391 (Ky. Ct. App. 1961) (limitations on lessor's unilateral right to cancel lease furnish adequate consideration for lessee's promise to lease); RESTATEMENT (SECOND) OF CONTRACTS section 77 illustration 5 (1981) (principal's reservation of right to terminate agency relationship on 30 days' notice does not render obligation illusory); A. CORBIN, *supra* note 109, section 164 (power to cancel by notice given for some stated period does not render obligation illusory); E. FARNSWORTH, *supra* note 109, section 2.14 (same); G. GILMORE, *supra* note 19, at 77 (problem of illusory promise laid to rest by saying that if promisor has agreed to any limitation on his future freedom of action, however slight, promise is real, not illusory). The brevity of the notice period is not an issue due to the traditional rule that courts will not inquire into the adequacy of consideration. E. FARNSWORTH, *supra* note 109, section 2.14.

178. *See infra* notes 180, 188 and accompanying text.

179. *See, e.g.*, Kowal v. Day, 20 Cal. App. 3d 720, 98 Cal. Rptr. 118 (1971); Tilbert v. Eagle Lock Co., 116 Conn. 357, 165 A. 205 (1933). In *Kowal*, the court enforced an option against the seller despite the buyer's unilateral right to cancel. There was evidence of significant buyer reliance, but as it was unbargained-for, it could not amount to consideration. 20 Cal. App. 3d at 725-26, 98 Cal. Rptr. at 121. The court found sufficient consideration, however, in the fact that the buyer had allowed the seller the use of an automobile during the option period. *Id.* at 727, 98 Cal. Rptr. at 122.

In *Tilbert*, an employee's widow was allowed to recover a death benefit despite the employer's attempt to cancel the program to cut costs. The death benefit plan expressly reserved the right to cancel on notice and provided that the plan "constitutes no contract" and "confers no legal rights." 116 Conn. at 360, 165 A. at 207. The plaintiff's decedent died in the early hours of the morning when notice of cancellation was given to employees. The court found consideration for the plan in the benefits Eagle had received from its employees (Eagle's statement to employees on inauguration of the plan outlined the benefits it hoped to receive), and in the fact that plaintiff's decedent had remained with Eagle for seven years after receiving the certificate. *Id.* at 361-62, 165 A. at 207-08. The court concluded by finding that the employer had the right to cancel the plan, but found the attempt to cancel ineffective in this particular case. *Id.* 363-64, 165 A. at 208. *Tilbert*, and Psutka v. Michigan Alkali Co., 274 Mich. 318, 264 N.W. 385 (1936), a somewhat similar decision, have been characterized as cases where employer death benefit programs "which were unenforceable as contracts by their express terms were treated as contracts in order to avoid the otherwise harsh result of depriving an employee's beneficiary of accrued death benefits." Hughes v. Encyclopedia Britannica Inc., 1 Ill. App. 2d 514, 519, 117 N.E.2d 880, 882 (1954).

180. This requirement has found its way into modern sales law. The U.C.C. now provides that: "Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable." U.C.C. section 2-309(3) (1978). The explanatory comment to the section provides:

some courts to limit the times when the power to terminate an agreement can be exercised.[181] This tendency is especially apparent in the so-called "Missouri rule" line of cases,[182] which limit the traditional rule that contracts of indefinite duration are terminable at any time by holding that franchise agreements which involve a large investment by the dealer and which exist indefinitely cannot be terminated until after a reasonable period of time has elapsed.[183] This entitles the dealer to a 'fair opportunity' to recoup his expenditures.[184] The Missouri rule plainly seeks to protect dealer

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> Subsection (3) recognizes that the application of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.

Id. comment 8. The RESTATEMENT (SECOND) directs readers to this section after noting that "an agreement dispensing with notification may be unconscionable and invalid." RESTATEMENT (SECOND) OF CONTRACTS section 77 comment d (1981). Two prominent commentators have observed of section 2-309(3) that "by imposing a reasonable notice requirement, consideration, along traditional lines of thinking, is supplied." J. CALAMARI & J. PERILLO, *supra* note 109, section 4-17, at 163.

Well before the U.C.C. was promulgated, courts imposed such limitations by interpretation, at times in the face of express contract language attempting to reserve the right to terminate at any time without notice. *See, e.g.*, Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945). In *Sylvan Crest*, the Second Circuit reversed a judgment for the government based on a cancellation clause giving it the right to cancel its order "at any time." *Id.* at 643. While doing so, the court said that in construing the agreement a "presumption should be indulged that both parties were acting in good faith." *Id.* This meant that the government's "acceptance" should be interpreted "as a reasonable business man would have understood it": namely, that the government would accept and pay for rock unless it gave the plaintiff notice of cancellation within a reasonable time. *Id.* at 644. Of *Sylvan Crest* it has been observed that while the decision "accords with business convenience and effectuates the agreement of the parties," it is difficult to say that "plaintiff bargained for notice of termination in exchange for his promise to supply trap rock." J. CALAMARI & J. PERILLO, *supra* note 109, section 4-17, at 162. Instead, in *Sylvan Crest* and in "similar cases, the presence of such a bargain is quite doubtful and the finding of consideration on such a premise seems to be a fiction designed to effectuate the parties' agreement." *Id.*

181. Modern sales law distinguishes "termination" from "cancellation." Termination occurs "when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach." U.C.C. section 2-106(3) (1978). Cancellation occurs "when either party puts an end to the contract for breach by the other." *Id.* section 2-106(4). Many of the authorities cited herein, however, have not made this distinction and we have used the terms interchangeably. In every case, however, we are referring to "termination" of an agreement in the modern sense of the term.

182. *See, e.g.*, Cambee's Furniture v. Doughboy Recreational, Inc., 825 F.2d 167, 173 (8th Cir. 1987); Berryfast, Inc. v. Zeinfeld, 714 F.2d 826, 829 (8th Cir. 1983); Lockewill, Inc. v. United States Shoe Corp., 547 F.2d 1024, 1029-30 (8th Cir. 1976); Allied Equip. Co. v. Weber Engineered Prods., 237 F.2d 879 (4th Cir. 1956); Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955); Beebe v. Columbia Axle Co., 233 Mo. App. 212, 218, 117 S.W.2d 624, 629 (1938).

183. Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 479-80.

184. Dealers relying on agreements of indefinite duration "may expend large sums purchasing franchise equipment and otherwise preparing for performance." Hillman, *supra* note 70, at 630. Some expenditures of this kind may not be salvageable upon termination because they are tailored to the franchise in question. Examples of such expenditures include monies spent on spare parts inventories with no resale value, signs containing the franchisor's logo, and "single purpose" facilities and equipment. Gellhorn, *supra* note 183, at 467 & n.5,

reliance interests,[185] and its kinship to promissory estoppel is obvious.[186] The protection the rule gives relying dealers is limited, however. The franchisor may avoid its operation by inserting provisions disclaiming any liability for dealer reliance losses in the dealership agreement, or by incorporating short, specific minimum duration periods into the agreement.[187]

For reasons stated above, placing specific minimum time limits on franchises or specifying a brief required notice of cancellation technically supplies consideration and removes the franchisor's promise from the illusory category. But to the franchisee terminated under such provisions, these are likely to be distinctions without a difference. The loss experienced by reliance will be the same as in cases where the franchisor terminates without using either approach, and the underlying realities of the franchisor-franchisee relationship that permitted the inclusion of such language will also remain the same. Some courts have recognized this and have employed modern contract doctrines of good faith and unconscionability to protect dealers who rely on such de facto illusory promises. As the following sections demonstrate, these doctrines now constitute major alternative avenues for compensating reliance on both true and de facto illusory promises.

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473 & n.27, 519. Terminated dealers can also experience losses by foregoing other business opportunities in reliance on the continued existence of their dealership. Hillman, *supra* note 70, at 630. While such losses are obviously somewhat speculative because courts cannot be sure that the franchisee actually would have availed herself of the foregone opportunity or that it would have been profitable, Professor Hillman argues that they should be considered in contract cessation cases when they are not too remote or speculative. *Id.* at 631. He also argues that courts should consider the franchisee's anticipated profits, since franchisee reliance expenditures "are an investment for a future return; if that return is denied, the relying party is harmed by not having invested elsewhere." *Id.* at 632.

185. Professor Henderson has observed that "there is little doubt that Section 90 significantly reinforces the various reasons for reimbursement of a dealer's reliance losses" in such cases. Henderson, *supra* note 29, at 363. He also asserted that "[s]o 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 enforceability of dealership agreements." *Id.* at 364.

186. Gellhorn, *supra* note 183, at 482. *See also* Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 137-38 n.9 (5th Cir. 1979) ("reasonable duration envisioned by the [Missouri] doctrine is quite short and the minimum duration may be eliminated contractually").

187. *See, e.g.*, A. CORBIN, *supra* note 109, section 149 (promissory words not nullified by fact that promise conditional on event within promisor's power "if at the same time he *impliedly* promises to make [a] reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred") (emphasis added); Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387-88 (1980) ("implication of good faith" now renders enforceable many agreements otherwise unenforceable due to definiteness or mutuality requirements). *See also* Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 670 (1963) (function of good faith to allow judges to imply terms in the parties' agreement)[hereinafter *Good Faith*]. On the implication of good faith as furnishing consideration, see RESTATEMENT (SECOND) OF CONTRACTS section 77 illustration 10 (1981) (party's reservation of right to accelerate payment of debt "at will" limited by U.C.C. section 1-208 requirement of good faith, and therefore his "surrender of the unconditional right to demand immediate payment is consideration").

B. Good Faith

1. In General and in Contract Negotiations

One of the methods by which courts have fleshed out otherwise illusory promises in order to render them enforceable has been to imply a promise or duty on the part of the promisor to act in good faith.[188] Thus, good faith has been used to limit the promisor's power to terminate an agreement,[189] to qualify a clause conditioning the promisor's duty to perform on his personal satisfaction with the promisee's performance,[190] to require a buyer whose purchase obligation is contingent on obtaining satisfactory financing to make good faith efforts to obtain such financing,[191] to restrict a party's power to set a price for performance,[192] and to limit the quantity that can be delivered or demanded in output and requirements contracts.[193] Indeed, both the RESTATEMENT (SECOND)[194] and the Uniform Commercial Code[195] now recognize a general duty of good faith in the performance and enforcement of contracts.

The increased importance of good faith has been attributed to the reduced specificity in contract terms resulting from modern contracting practices.[196] The concept of good faith has also been linked to various modern principles of "contractual morality"[197] and characterized as a safety valve for judges to fill gaps and manipulate rights and duties otherwise available under rules of

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188. *See* RESTATEMENT (SECOND) OF CONTRACTS section 34 comment b (1981) ("discretionary power granted by a commercial contract must be exercised in food faith"); *id.* section 205 comment e ("abuse of power. . .to terminate the contract" cited as violation of good faith obligation). At times, this limitation has been implied despite clear contract language to the contrary. *See* Richard Bruce & Co. v. J. Simpson & Co., 40 Misc. 2d 501, 504, 243 N.Y.S.2d 503, 506 (1963) (party's contract right to terminate at "absolute discretion" interpreted as "a discretion based upon fair dealing and good faith").

189. "[C]ourts have interpreted the language of satisfaction provisions so as to impose a requirement of fair dealing on the promisor and thus avoid leaving too much to the promisor's discretion." Farnsworth, *supra* note 85, at 246. For some extraordinary examples, see *id.* at 246 n.11.

190. *See* Mezzanote v. Freeland, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973).

191. *See* U.C.C. section 2-305(2) (1978) ("A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.").

192. *See id.* section 2-306(1) ("A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith. . . .").

193. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS section 205 (1981).

194. "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. section 1-203 (1978).

195. *See* Pratt, *supra* note 110, at 417-18 for the assertion that such new contracting practices forced courts to modify classical contract doctrines to embrace the greater uncertainty typical of modern agreements. This, Pratt argues, led to the evolution of the concept of good faith and to "an altered image of contract, one in which the relationship between the parties was closer to a fiducial one than to that of unrelated individuals in a free market." *Id.* at 419.

196. Summers, *supra* note 37, at 811 (good faith is "of a piece with explicit requirements of 'contractual morality' such as the unconscionability doctrine and various equitable principles"). Professor Summers also argued that the good faith principle "symbolizes a commitment to the most fundamental objectives a legal system can have—justice, and justice according to law." *Id.*

197. *Id.* at 812.

law or specific contract language.[198] Good faith is employed to reward the trust,[199] satisfy the reasonable expectations of contracting parties,[200] and to enforce the spirit of deals.[201]

Despite its widespread application, however, the parameters of the good faith obligation have eluded successful definition. The U.C.C. attempts to define the concept,[202] an approach eschewed by the RESTATEMENT SECOND.[203] Professor Summers argues that the drafters of the RESTATEMENT SECOND took the proper course, because the general requirement of good faith is "not appropriately formulable in terms of some general positive meaning. . .; rather, it function[s] as an excluder to rule out a wide range of heterogeneous forms of bad faith."[204] Others, however, have found cause for concern in the amorphous nature of the good faith duty, which is seen as an invitation to arbitrary judicial decision making[205] that could cause uncer-

198.
> Because contracting parties do not contract with those they do not trust to some extent, a dependent party will have reason to rely on the good faith of a discretion-exercising party. Such reliance plausibly is based on the simple belief that the party with discretion in performance will keep the contract. . . .

Burton, *supra* note 187, at 392.

199. *Good Faith*, *supra* note 187, at 669 (good faith obligation characterized as "resulting in an implied term. . .requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations").

200. Summers, *supra* note 37, at 827.

201. The general Code definition of good faith is "honesty in fact in the conduct or transaction concerned." U.C.C. section 1-201(19) (1978). A higher standard is imposed on merchants. *Id.* section 2-103(1)(b) ("honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

202. RESTATEMENT (SECOND) OF CONTRACTS section 205 comment a (1981) states that:
> The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

203. Summers, *supra* note 37, at 819.

204. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 620 (expansive interpretation of good faith "subjects bargains to inconsistent and uncertain enforcement"); Hillman, *supra* note 104, at 876 (good faith principle "has been criticized for unleashing a wave of judicial moralism, produced by the unbridled power that the concept confers on the courts"). Professor Hillman goes on to suggest that the reason good faith "takes on so many different meanings in different contexts [is] because at base it is nothing more than a requirement of fairness—a definition so broad as to be virtually meaningless." *Id.* at 877. Instead of relying on good faith, he argues that lawmakers should craft specific rules "when the type of conduct that *is* unfair—in bad faith—in a given area is apparent" in order to avoid "the potential of good faith to permit inconsistent and arbitrary decisions." *Id.* at 878.

205. "Existence of a broad principle, judicially applied and not capable of disclaimer by bargaining, introduces an element of uncertainty that is likely to increase risks and raise costs at the contract formation stage." Gillette, *supra* note 204, at 651.

tainty,[206] impose unbargained-for obligations,[207] and increase costs.[208] For these reasons, promissory estoppel seems superior to good faith as a device for protecting reliance on illusory promises. Although the "injustice" requirement of section 90 is far from a model of precision,[209] its other elements combine to render the section arguably more definable, and therefore less susceptible to abuse, than the good faith requirement.

Another advantage of promissory estoppel over the good faith obligation springs from the contexts in which the good faith obligation normally applies. However much they may lack in precision, one thing about the U.C.C and RESTATEMENT (SECOND) formulations of good faith is quite clear: they impose a duty of good faith in the performance and enforcement of the contract, not in its formation or negotiation stages.[210] A comment to the good faith section of the RESTATEMENT (SECOND) suggests a role for promissory estoppel and unconscionability in such cases.[211] This suggestion is consistent with the claims that *Hoffman* represents an intrusion of the good faith principle into the negotiations context,[212] and that reliance-based damage

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206. *Id.* at 620 (expansive interpretation of good faith "extends the responsibilities of commercial actors beyond bargained-for risk allocations").

207. *Id.* at 632 (if good faith is "used to police the substantive fairness of a transaction or to convert commercial actors into [their] brothers' keepers," the costs of interpretation, administration, and remedy may "multiply to an unacceptable level"). *But see* Burton, *supra* note 187, at 393 (good faith performance doctrine enhances economic efficiency by reducing contracting costs such as negotiating and drafting contracts, and gathering information about trustworthiness of contract partners).

208. However, the comments to the revised version of section 90 offer some assistance here. *See supra* note 156 and accompanying text.

209. *See supra* notes 193-194. *See also Good Faith, supra* note 187, at 239 (reluctance of courts to find a general obligation "that would preclude a party from breaking off negotiations" supported by Code and RESTATEMENT (SECOND) formulations of general duty of good faith which, "at least by negative implication," do not extend to negotiations); Gilette, *supra* note 204, at 627 n.47 (obligation to negotiate in good faith "is conspicuously absent" from U.C.C. section 1-203).

210. This Section, like Uniform Commercial Code section 1-203, does not deal with good faith in the formation of a contract. Bad faith in negotiation, although not within the scope of this Section, may be subject to sanctions. Particular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress. See, for example, sections *90* and 208 [unconscionability section].

RESTATEMENT (SECOND) OF CONTRACTS section 205 comment c (1981) (emphasis added).

211. *See supra* notes 103-104 and accompanying text. *See also* Kessler & Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 408 (1964) [hereinafter Kessler & Fine], which discusses the German doctrine of *culpa in contrahendo* (fault in negotiating), and observes that "[n]otions of *culpa in contrahendo* and good faith have clearly given rise to many concepts applicable during the negotiation stage, such as the notions of promissory estoppel and implied in fact collateral contract, which have been employed in order to protect reasonable reliance on a promise." This nexus between good faith and reliance was observed long ago by Professor Fuller when he noted that in some section 90 cases "we are not 'upholding transactions' but healing losses causes through broken faith." Fuller, *supra* note 14, at 811. Professor Summers has observed that promissory estoppel, good faith, and implied promises all can play a similar role in mitigating the otherwise harsh effects that may flow from the mechanical application of more specific principles. Summers, *"Good Faith" In General Contract Law and the Sales Provisions of the Uniform Commercial Code*. 54 VA. L. REV. 195, 198 (1968).

212. *See* Kessler & Fine, *supra* note 211, at 402 (Jhering, originator of *culpa in contrahendo*, suggested that party who has relied on validity of contract to his injury should re-

awards are uniquely appropriate in negotiations cases.[213] Thus, promissory estoppel may be the doctrine of choice in situations where negotiations have yielded an illusory promise that provokes precontractual reliance, where the promise cannot readily be rendered substantial by traditional methods,[214] and where the general duty of good faith is inapplicable because its alleged breach occurred during those negotiations.

2. *Good Faith and Contract Terminations*

Where an ongoing contractual relationship exists, good faith principles have been employed to limit a party's power to terminate existing contracts of indefinite duration,[215] and even to prevent the nonrenewal of a definite-term dealership agreement.[216] All of the cases in question involved a dealer whose tenure was sufficiently long to assure recovery of the start-up expenses protected by the Missouri rule.[217] Interestingly enough, two of these cases exhibit additional elements of reliance beyond those normally encountered in dealer termination cases,[218] and the third displays judicial awareness of the reliance losses that even long-term dealers may experience upon termination.[219] This consideration of reliance in the good faith context is hardly surprising. The reliance losses a dealer faces upon his termination should

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cover reliance damages, not value of promised performance). *See also supra* notes 160, 166 and accompanying text.

213. *See supra* notes 173-175, 180 and accompanying text.

214. *See, e.g.*, Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc., 69 N.J. 123, 130, 351 A.2d 349, 352 (1976); Reisman & Sons v. Snyder's Potato Chips, 32 Somerset Legal J. 3, 10 (C.P. Somerset Cty. 1975).

215. *See* Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978).

216. *See supra* notes 182-81 and accompanying text.

217. *See supra* note 214. In *Reisman*, the plaintiff pretzel distributor had given up other sources of supply in response to recent assurances by the defendant manufacturer that it would supply all of plaintiff's requirements. 32 Somerset Legal J. at 5. In addition to good faith, the court also justified its decision by referring to promissory estoppel and U.C.C. sections 2-309(2) and (3). *Id.* at 10-12.

In *Bak-A-Lum*, the defendant manufacturer's representatives had concealed their intention to terminate the plaintiff's exclusive dealership, allowing the plaintiff to commit to a significant expansion of its warehouse facilities and inducing it to place a major order on the eve of the termination announcement. 69 N.J. at 128, 351 A.2d at 351.

218. *See supra* note 215. *Razumic* involved a dealer who had represented the plaintiff oil company for 20 years and whose dealership agreement was silent on the issue of renewal. In denying the plaintiff possession of the station, the court observed that:

> [A] franchisee such as Razumic builds the goodwill of both his own business and Arco. In exchange, an Arco dealer such as Razumic can justifiably expect that his time, effort, and other investments promoting the goodwill of Arco will not be destroyed as a result of Arco's arbitrary decision to terminate their franchise relationship.

480 Pa. at 378, 390 A.2d at 742. The court also noted that "[a] contrary conclusion would allow Arco to reap the benefits of its franchisees' efforts in promoting the goodwill of its name without regard for the franchisees' interests." *Id. See also* Shell Oil Co. v. Marinello, 63 N.J. 402, 409, 307 A.2d 598, 602 (1973) for the observation that "[i]t is the incumbent dealer who has everything to lose since, even if he had another location to go to, the going business and trade he built up would remain with the old station."

219. Gellhorn, *supra* note 181, at 495-96. A similar approach has been adopted in employment-at-will cases by those courts holding that employees cannot be discharged for bad faith reasons, but that good faith and fair dealing do not require that the employer have good cause for the discharge. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 378, 710

reasonably be expected to influence courts' perceptions of the termination's justice and justice, after all, presumably is what good faith is all about.

The extent of the protection afforded terminated dealers by the good faith duty is far from clear, however. For example, it has been suggested that the good faith test applies only to terminations for wrongful motives,[220] and that for this reason a good faith limitation on termination neither protects dealers against franchisor overreaching nor prevents unjust enrichment.[221] For the same reason, good faith may not protect many forms of franchisee reliance. Although many good faith cases have not inquired into the motives of the terminating party, an important constraint has been placed on the good faith idea by those courts holding that good faith cannot override an express termination provision in the agreement. The best known case of this kind is probably *Corenswet, Inc. v. Amana Refrigeration, Inc.*[222]

In *Corenswet*, the Fifth Circuit Court of Appeals vacated a preliminary injunction against Amana's termination of Corenswet, an exclusive distributor of seven years' standing.[223] It did so despite holding the district court's finding that Corenswet's termination was "arbitrary and without cause" was not clearly erroneous.[224] The Fifth Circuit instead based its holding on the agreement's specific provision that either party could terminate the agreement at any time without cause.[225] The court recognized that dealers tend to pay insufficient attention to termination provisions while negotiating a

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P.2d 1025, 1040 (1985); Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551-52 (N.H. 1974).

220. Gellhorn, *supra* note 181, at 504. Professor Gellhorn appropriately observed of such a conception of good faith that:

> Analytically, the terminating party's motives are unrelated to the harshness of the bargain or of [sic] its effect. Motives have no relationship to the parties' relative bargaining power. Nor would the application of the good faith test be affected either by whether the dominant party was misusing its power or by whether termination would have unduly harsh effects on the terminated party.

Id. He subsequently argued that a termination "for the sole purpose of furthering the economic self-interest of the terminating party" would probably not be in bad faith, despite the fact that "such a termination may nevertheless have substantial unfair effects on the terminated party's business." *Id.* at 505.

221. 594 F.2d 129 (5th Cir. 1979). *See also* Blalock Mach. & Equip. Co. v. Iowa Mfg. Co., 576 F. Supp. 774, 777 (N.D. Ga. 1983).

222. Note that this means Corenswet had probably recouped its start-up reliance costs at the time of termination.

223. 594 F.2d at 131. Over the seven year period, Amana's representatives had repeatedly praised Corenswet's performance. *Id.* at 132. The court later concluded that there was ample evidence in the record to support the district court's conclusion that the real reason for Amana's decision to terminate was Amana's president's animosity toward the president of Corenswet's parent company. *Id.* at 133.

224. *Id.* at 132.

225. "As is so often the case with franchise and distributorship relationships, the termination clause in the standard form contract was of little interest or concern to the parties so long as things were going well between them." *Id.* at 132. On this point, see also Gellhorn, *supra* note 181, at 466 (when dealer contracts are drafted parties tend to focus on questions of performance, paying little attention to the problem of termination); Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimer*, 62 CHI.[-]KENT L. REV. 199, 241 (1985) (because many disadvantageous form contract clauses deal with contingencies that may never occur, there is a natural disposition toward discounting their importance and hoping for the best while accepting the standard form terms).

dealership agreement.[226] The Court also recognized Corenswet's significant and successful investment in marketing Amana's products,[227] and the fact that Amana's past conduct may have created a reasonable expectation that Amana would not arbitrarily terminate a distributor.[228] Nonetheless, it concluded that the contract by its terms allowed Amana to do so.[229] Such a contractually reserved right, "however distasteful, may [not] be lost through nonuse, . . . except in cases of conduct of the sort giving rise to promissory estoppel."[230] It is unclear whether the latter reference was to the kinds of extraordinary reliance that can sometimes arise in termination cases,[231] or to oral assurances that an "any reason" termination clause would be exercised only for cause.[232] What *is* crystal clear about the decision is the determination of the Fifth Circuit not to join the courts which have held that good faith can limit a franchisor's power to terminate under an unqualified termination clause.[233] The court criticized the use of good faith as a tool for policing distributorship terminations,[234] and stated that unlike unconscionability, good faith cannot properly be used to override or cancel express contract terms.[235] The proper question in such cases, the court opined, is "whether public policy forbids enforcement of a contract clause permitting unilateral termination without cause,"[236] a question it saw as properly addressed in unconscionability terms.[237] Corenswet had raised, but not pur-

226. Corenswet had invested over $1.5 million developing the market for Amana's products, with the result that annual sales of Amana products had increased from $200,000 in 1969 to $2.5 million in 1976, and the number of retail outlets selling Amana's products had increased from six to seventy-two over the same period. 594 F.2d at 132.

227. *Id.* at 136. There was, in fact, testimony that Corenswet "understood" that the contract would not be terminated arbitrarily. *Id.* at 135-36. Indeed, it is hard to imagine that Corenswet would have made so significant an investment in developing a market for Amana's products had it believed that Amana would interpret the termination clause literally.

228. *Id.* at 136.

229. *Id.*

230. *See supra* note 217 and accompanying text.

231. Note that any proffered evidence of such assurances would probably be confronted at trial with an objection based on the parol evidence rule. On the interaction between promissory estoppel and the parol evidence rule, see generally Metzger, *supra* note 49.

232. *See* 594 F.2d at 136, where the court discusses such cases.

233. *Id.* at 138. Here the court cited Professor Gellhorn's discussion of good faith's supposed emphasis on the terminating party's improper motivation, *see supra* notes 219-220 and accompanying text.

234. 594 F.2d at 138.

235. *Id.* at 138. The court plainly believed that the answer to this question was not invariably affirmative. Instead, it argued, such clauses can permit "parties to end a soured relationship without subsequent litigation." *Id.* Moreover, bilateral clauses such as the one at issue can give the distributor "an easy way to cut the knot should he be presented with an opportunity to secure a better distributorship from another manufacturer." *Id.* at 139. The latter argument, however, ignores the losses even long-term dealers suffer on termination and the benefits that may devolve to manufacturers in the event of termination. *See supra* note 218 and accompanying text.

236. "It is the office of the unconscionability concept, and not of the good faith concept, to strike down 'unfair' contract terms." *Id.* at 139. Public policy, the court continued, abhors "economic overreaching—the use of superior bargaining power to secure grossly unfair advantage," which "is the precise focus of the Code's unconscionability doctrine." *Id.*

237. *Id.*

sued, an unconscionability argument,[238] and in the eyes of the court, Cornswet's proper unconscionability-based remedy for inadequate notice of termination[239] was not the preliminary injunction it had requested.[240]

Corenswet has attracted criticism,[241] and the court can be faulted for giving insufficient weight to Corenswet's probable understanding of the termination clause, and for giving too much weight to literal contractual language that was in all probability the product of unequal bargaining power.[242] *Corenswet* does, however, implicitly raise another problem associated with using good faith as a tool for policing illusory and de facto illusory promises: the remedy to be afforded the victim of bad faith behavior. Denying a franchisor the right to terminate could force the parties to continue a relationship that at least one of them is unwilling to continue.[243] Human nature being what it is, the victorious franchisee may thereafter be confronted with grudging, dilatory performance by the franchisor, or with a franchisor who is determined to amass sufficient evidence to justify termination. Similar

238. The court framed the unconscionability issue as one of inadequate notice due to the language of U.C.C. section 2-309(3). *Id.* For the text of section 2-309(3) see *supra* note 180.

239. *Id.* Here the court referred to Des Moines Blue Ribbon Distribs. v. Drewrys Ltd., 256 Iowa 899, 909-10, 129 N.W.2d 731, 737 (1964), a termination case in which no notice was given and the terminated distributor was allowed to recover damages based on the profits it would have made during a reasonable notice period.

240. Hillman, *supra* note 70, at 648 n.198 (*Corenswet* decision incorrect due to Amana's "unfair tactics, the material harm to Corenswet on termination, and the profitability of the agreement to Amana").

241. On the disparity of bargaining power between franchisors and franchisees, *see* Gellhorn, *supra* note 183, at 468. *See also* the discussion of *Shell Oil Co. v. Marinello, infra* note 242.

Where courts have evidence that the termination clause at issue is the product of genuine bargaining, they are likely to sustain it under all of the theories discussed here. For an excellent example, see Triangle Mining Co. v. Stauffer Chemical Co., 753 F.2d 734 (9th Cir. 1985). There, a mine operator sought to prevent a mineral leaseholder from exercising a clause allowing either party to terminate upon 90 days' notice. The termination clause allowed the plaintiff to recover all of its advance expenditures upon termination, so at least some of the plaintiff's reliance was protected. *Id.* at 737. More important, however, was the fact that the termination provision was the product of extensive negotiation by the parties and had been inserted into the contract at the insistence of plaintiff's predecessor in interest to secure tax benefits for both parties. *Id.* at 741. The court acknowledged that other courts have used the good faith duty to restrict unambiguous termination provisions, but said that this was only true in "special circumstances": cases that "involve a special element *of reliance*. . .[or] where one party has traditionally held *vastly superior bargaining power.*" *Id.* at 740 (citation omitted; emphasis added)). Given the absence of either special reliance or a disparity of bargaining power, the court gave full effect to the contract language. *Id.* at 741.

242. Several courts have recognized this potential problem. *See, e.g.*, Shell Oil Co. v. Marinello, 63 N.J. 402, 411, 307 A.2d 598, 603 (1973) (holding that public policy prohibits franchisor from terminating or failing to renew franchise in absence of showing that dealer has substantially failed to perform his obligations under agreement and recognizing that result of this is that franchise "would have legal existence for an indefinite period"); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 385-86, 390 A.2d 736, 746 (1978) (Pomeroy, J., concurring) (expressing concern that majority decision preventing bad faith refusal to renew dealership agreement "in effect excises the three-year term provision from the contract and reads into the contract a duty on the franchisor-lessor to keep the agreement in force indefinitely, with no provision of any sort for termination"); Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 474, 223 S.E.2d 433, 440 (1976) (court finds 10-day cancellation provision to be unconscionable, but says "we cannot and do not leave the parties with an irrevocable relationship").

243. See *supra* notes 115-134 and accompanying text.

problems may attend employment-at-will cases[244] and cases like *Streich v. General Motors Corporation*.[245] Should employers be forced to hire or indefinitely retain employees they do not want, or should buyers be required to purchase (or pay damages for failing to purchase) some judicially-determined quantity of goods where the agreement contains no quantity specification?[246]

Such problems are not the inevitable or unavoidable consequences of using good faith to police illusory and de facto illusory promises. The remedy for breach of the good faith duty is sufficiently indeterminate to embrace various kinds of cash damages,[247] and some courts have allowed the recovery of such awards without disturbing the termination itself.[248] The point is that reliance-based damages seem ideally suited to many such cases.[249] They

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244. *See supra* notes 138-148 and accompanying text.

245. Because the agreement contained an estimate of the number of valves that G.M. would order, the court in *Streich* presumably could have required G.M. to give Streich the benefit of his bargain by awarding him the profit he would have made on the sale of that number of valves. But it is not difficult to imagine a case with similar facts, but without the stated quantity estimate. If the disappointed plaintiff was to be the sole supplier, then damages presumably could be calculated based on the number of parts the buyer in fact bought from other suppliers. If, however, the buyer entered similar agreements with several would-be suppliers, such a resolution would not be available. In such a case, a court might attempt to arrive at a quantity estimate by a pro rata division of actually occurring demand, but even such a strategy would be unavailing in a case where the buyer had entered such agreements as a hedge against a potential need that never materialized.

246. A comment to the RESTATEMENT (SECOND) merely states that "[t]he appropriate remedy for a breach of the duty of good faith. . .varies with the circumstances." RESTATEMENT (SECOND) OF CONTRACTS, section 205 comment a (1981). Professor Speidel has noted that these "circumstances" are not clearly stated in the new RESTATEMENT and concludes that "the remedy might be less but not more than the expectation interest." Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163, 180 (1983).

247. *See, e.g.*, Bak-A-Lum Corp. v. Alcoa Bldg. Prods., 69 N.J. 123, 131, 351 A.2d 349, 352 (1976) (termination of long-term dealer without adequate notice; damages awarded for lost profits dealer would have earned during reasonable notice period); Reisman & Sons v. Snyder's Potato Chips, 32 Somerset Legal J. 3, 5 (C.P. Somerset Cty. 1975) (termination without notice allowed; issue is proper period for notice and damages resulting from failure to provide adequate notice). A similar approach has been adopted in many employment-at-will cases. *See, e.g.*, McKinney v. Nat'l Dairy Council, 491 F. Supp. 1108, 1122 (D. Mass. 1980) (employee discharged in violation of good faith duty allowed to recover damages; method of calculation unclear); Fortune v. National Cash Register Co., 373 Mass. 96, 105-06, 364 N.E.2d 1251, 1258 (1977) (employee discharged in bad faith to avoid payment of sizeable bonus allowed to recover amount of bonus due); Monge v. Beebe Rubber Co., 114 N.H. 130, 134, 316 A.2d 549, 552 (1974) (employee discharged in bad faith allowed to recover damages based on lost wages); Nees v. Hocks, 272 Or. 210, 220, 536 P.2d 512, 517 (1975) (same).

248. *See* the last quotation from Professor Henderson, *supra* note 185. *See also* the discussion, *supra* note 212 and accompanying text and Hillman, *supra* note 70, at 639 (in contract cessation cases, reliance damages appropriate if parties' position on cessation is unclear).

249. *See* Shattuck, *supra* note 73, at 940-44. *See also* Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965) for the following statement:

> [I]n cases such as we have before us, where there is actually no contract the promissory estoppel theory may be invoked, thereby supplying a remedy which will enable the injured party to be compensated for his foreseeable, definite and substantial reliance. Where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained. Since the promisee in such cases is partially responsible for his failure to bind the promisor to a legally sufficient contract, it is reasonable to conclude that all that is necessary to

may adequately protect the promisee's foreseeable reliance[250] without doing as much violence to the promisor's interests as an expectancy-based award or the forced continuation of an unwanted relationship. Promissory estoppel is much more commonly associated with reliance than is the doctrine of good faith, and its use in the illusory promise context might alleviate the uncertainty some courts feel about the proper treatment of such cases. Such use might also induce some courts to afford relying promisees a measure of protection by providing a middle ground between a complete denial of such protection and the forced continuation of an unwanted relationship.[251] The case for formal recognition of promissory estoppel gains additional momentum if, as has been suggested above,[252] the prospect of promisee reliance losses plays a major role in shaping judicial intuitions about the equities of the case.[253]

This is not to suggest, however, that promissory estoppel is a perfect device for policing illusory and de facto illusory promise cases. Some forms of promisee reliance, though real, may be difficult to prove.[254] In addition, some types of cases may not be amenable to resolution by the reliance principle.[255] Finally, relying promisees are sure to be confronted with the argument that their reliance was unreasonable given the language of the agreement, and therefore they are undeserving of protection. This Article addresses this important objection to promissory estoppel's application to illusory promises in the next section.[256] Before doing so, however, it examines the doctrine of unconscionability, the other major device by which courts have protected reliance based on illusory promises.

> achieve justice is to put the promisee in the position he would have been in had he not acted in reliance upon the promise.

The degree to which a promisee is "responsible" for the illusory or de facto illusory nature of the agreement that results from the conscious choice of a promisor with superior bargaining power is, of course, highly debatable. However, even in such circumstances it is difficult to say that the promisor "consented" to a contract in any meaningful sense of the term.

250. In addition, this course of action might make unnecessary the judicial filling-in of quantity terms in cases like *Streich*. *See supra* note 245 and accompanying text.

251. *See supra* text following note 218.

252. To further pursue this point, envision a contract termination case, a *Streich*-like case, or an employment-at-will case in which the facts plainly indicate that the terminated party will suffer no significant reliance losses upon termination. We believe most courts would allow termination under such circumstances regardless of what legal theory they purport to apply.

253. *See infra* notes 374-375 and accompanying text.

254. *See, e.g.*, Spindle v. Travelers Ins. Cos., 66 Cal. App. 3d 951, 135 Cal. Rptr. 404 (1977). There, the court held that the implied duty of good faith and fair dealing limits the operation of a provision in a medical malpractice policy giving the insurer the right to cancel coverage upon 30 days' notice to the insured. *Id.* at 959, 135 Cal. Rptr. at 408. The plaintiff alleged that the canceled insurance was unavailable at competitive rates from solvent, nonhazardous insurance carriers. *Id.* at 955, 135 Cal. Rptr. at 406. In such a case, the absence of feasible alternative suppliers means there are no obvious reliance losses upon which to premise the application of promissory estoppel. While the application of good faith can serve to prevent policy cancellation, such cases really concern the availability of professional liability insurance, an issue more amenable to legislative resolution than to judicially crafted solutions.

255. *See infra* notes 325-48 and accompanying text.

256. Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931 (1969).

C. *Unconscionability*

1. *In General*

The doctrine of unconscionability, which has been described as "an all-purpose weapon against contract problems,"[257] apparently originated in equity[258] when chancellors refused to grant specific performance to contracts "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[259] Its recent rise to prominence has been linked to the twentieth-century rise of the form contract[260] and the way standardized forms undermined the assumptions underlying classical contract law.[261] As one of the family of doctrines that "restrict unbridled freedom of contract and protect against numerous forms of advantage taking,"[262] its primary function "has been to rescue from hard bargains those who are grossly disadvantaged in their dealings with sharp, or at least more sophisticated, traders."[263]

Earlier in this century, courts grappling with the then unfamiliar problems created by the abuse of form contracts sought to avoid unfair outcomes by "using existing, technical devices such as interpreting ambiguous language against the drafter or striking a contract for lack of mutuality or failure of consideration."[264] This approach distorted contract precedents and aggravated consent problems by encouraging drafters to redraft with even more detailed contract language.[265] These problems motivated the drafters of the Uniform Commercial Code to draft section 2-302[266] and thereby "make it possible for the courts to police explicitly against the contracts or clauses

257. *See, e.g.*, Mallor, *Unconscionability in Contracts Between Merchants*, 40 Sw. L.J. 1065, 1065 & n.3 (1986); Phillips, *supra* note 225, at 212; Note, *Commercial Decency and the Code—The Doctrine of Unconscionability Vindicated*, 9 Wm. & Mary L. Rev. 1143, 1144 (1968).

258. Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750)).

259. *See* Mallor, *supra* note 257, at 1069-70.

260. *Id.* at 1069. On the relation between standardized forms and freedom of contract, see also *infra* notes 352-61 and accompanying text.

261. J. White & R. Summers, Handbook Of The Law Under The Uniform Commercial Code section 4-1, at 147-48 (2d ed. 1980).

262. Mallor, *supra* note 257, at 1066; Note, *supra* note 257, at 1144-45.

263. Mallor, *supra* note 257, at 1069-70.

264. *Id.* at 1070.

265. *Id.* U.C.C. section 2-302(1) reads as follows:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The Restatement (Second) includes a very similar provision. *See* Restatement (Second) Of Contracts section 208 (1981).

266. U.C.C. section 2-302 comment 1 (1978). This comment goes on to observe that:

> In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.

which they find to be unconscionable."[267] The doctrine has grown and been applied in many situations not governed by article 2 of the U.C.C., and has thus "entered the general law of contracts."[268]

But while section 2-302 gives the courts formidable powers to deal with unconscionable contracts or clauses, it provides precious little assistance in identifying the objects of such powers. Nowhere in its extensive definitional sections does the Code define unconscionability. A comment to section 2-302 purports to provide some guidance,[269] but two prominent Code commentators have judged the effort useless.[270] This, the commentators suggest, is in part due to the fact that it is not possible to *define* unconscionability. "It is not *a concept*, but a determination to be made in light of a variety of factors not unifiable into a formula."[271] This imprecision exposes the unconscionability doctrine to the same criticism previously leveled against the good faith principle:[272] that its vagueness invites inconsistent and arbitrary judicial decision making.[273]

Nonetheless, it is possible to delineate some of the factors that are likely to be considered relevant in an unconscionability analysis. Most cases in which courts have found a contract or clause unconscionable have involved ele-

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267. J. CALAMARI & J. PERILLO, *supra* note 109, section 9-39, at 322. *See also id.* at 322-23; E. FARNSWORTH, *supra* note 109, section 4.28, at 308. In general, the factors used by courts to decide such cases resemble those used in cases proceeding under U.C.C. section 2-302.

268. Comment 1 says that the relevant inquiry is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable" at the time the contract was created. U.C.C. section 2-302 comment 1 (1978). The comment goes on to say that "[t]he principle is one of the prevention of oppression and unfair surprise and not of the disturbance of allocation of risks because of superior bargaining power." *Id.* (citation omitted).

269. J. WHITE & R. SUMMERS, *supra* note 261, section 4-3, at 151. They explain this judgment as follows:

> To the extent that the comment [comment 1] gives a message, it is an ambiguous one, for it acknowledges that the court in some circumstances has the power to overturn various clauses in a contract, but it assures us that the purpose is not to disturb the allocation of risks. How a court can refuse to enforce certain contracts which were formerly enforceable and not at the same time disturb the allocation of the risk because of superior bargaining power, is difficult to see.

Id.

270. *Id.* (emphasis in original). This has not, of course, prevented some courts from trying to define the term. *E.g.*, Stanley A. Klopp, Inc. v. John Deere Co., 510 F. Supp. 807, 810 (E.D. Pa. 1981), *aff'd*, 676 F.2d 688 (3d Cir. 1982) (unconscionability is "the rubric under which the judiciary may refuse to enforce unfair or oppressive contracts in the absence of fraud or illegality"); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (unconscionability means "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party").

271. *See supra* notes 204-7 and accompanying text.

272. For the most thorough and sustained attack of this kind on record, see generally Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

273. *See, e.g.*, Mallor, *supra* note 257, at 1073; Phillips, *supra* note 225, at 218. Some authorities have suggested, however, that certain types of contract terms are sufficiently egregious to be decreed unconscionable even absent any procedural irregularities. *See, e.g.*, Mallor, *supra* note 257, at 1073 & n.74; Phillips, *supra* note 225, at 219.

ments of both[274] procedural and substantive unconscionability.[275] Given the disparity of roles of bargaining power in unconscionability cases, claims by consumers unsurprisingly tend to enjoy far greater success than claims by merchants.[276] In some situations, however, small businesses dealing with larger entities have successfully employed the unconscionability doctrine as well.[277]

Thus, although courts occasionally fail to distinguish between them,[278] some formal differences between the good faith principle and unconscionability are apparent. Unconscionability plainly applies to the contract formation process,[279] while the good faith duty theoretically applies only to the

274. These terms were coined by Professor Leff, and have been employed in most subsequent commentary. Procedural unconscionability refers to defects in the bargaining process (also called "bargaining naughtiness" by Leff). Leff, *supra* note 272, at 487. Substantive unconscionability refers to "evils in the resulting contract." *Id.* On the interaction between the two, Professor Mallor observes:

> Procedural and substantive unconscionability usually go hand in hand. The concept of unfair surprise implies the coexistence of procedural and substantive unfairness. A contract might present a term in fine print, for example, and not be unfairly surprising. If the parties expected the term in that type of contract, the term would not be surprising, and, if the term were necessary to protect the drafting party's legitimate interests, it would not be unfair. Oppression also connotes substantive as well as procedural unfairness. Disparity of bargaining power becomes oppressive only when one of the parties obtains an unfair term through its bargaining advantage.

Mallor, *supra* note 257, at 1073. *See also* Jordan, *Unconscionability at the Gas Station*, 62 MINN. L. REV. 813, 815 n.11 (1978) for the following observation:

> [T]he emerging consensus seems to be that unconscionability is not directed at bargaining per se: terms written on the head of a pin about which no bargaining is possible will be enforceable if they are reasonable and in line with ordinary expectations. Unless the terms produce hardship, the bargaining process need not be scrutinized.

275. *See, e.g.*, J. WHITE & R. SUMMERS, *supra* note 261, section 4-2, at 149; Mallor, *supra* note 257, at 1066.

276. *See, e.g.*, Gianni Sport Ltd. v. Gantos, Inc., 151 Mich. App. 598, 391 N.W.2d 760 (1986); Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1973); Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 223 S.E.2d 433 (1976). *See also* the cases cited in Mallor, *supra* note 257, at 1066 n.11. White and Summers state that "when a businessman is poorly educated, 'over a barrel,' or is the victim of fine print, a court may invalidate a clause that otherwise would stand up between ordinary businessmen." J. WHITE & R. SUMMERS, *supra* note 261, section 4-9, at 172.

277. *See* Hillman, *supra* note 104, at 857 n.45 (courts generally have not tried to distinguish good faith and unconscionability). *See also* Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1198 n.3 (1988) for the following observation:

> [C]ourts use a set of terms, such as "good faith," "bad faith," "fiduciary duty," and "unconscionability" in business cases as a means to demand of businesspersons a higher level of trustworthiness, fairness, and honesty in the conduct of business affairs than is the case when traditional common law contract and tort doctrines are the rule of decision in commercial cases.

Professor Shell also sees a similar role for promissory estoppel, arguing that "[c]ourts seem to approve of promissory estoppel in part because the doctrine advances moral and ethical ideals of market behavior." *Id.* at 1206.

278. "Unconscionability. . .is a limitation on freedom of contract that allows the courts to police the bargaining relationship and to override the manifested intention of the parties in the interests of justice." Burton, *supra* note 187, at 371-72 n.14.

279. *See supra* notes 209-10 and accompanying text.

performance and execution of the contract.[280] Also, while the good faith duty plainly can be used to protect against injustice arising from unequal bargaining power, it is far more likely to be applied to transactions between equals than is the unconscionability doctrine.[281]

2. *Unconscionability and Promissory Estoppel in Illusory Promise Cases*

Is unconscionability, as some commentators have argued,[282] the ideal device for policing dealer termination cases? Certainly it has been used effectively by some terminated dealers[283] and has also been applied with telling

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280. Unlike the unconscionability doctrine, however, weakness and strength in this [good faith] context do not refer to the substantive fairness of the bargain or to the relative bargaining power of the parties. Good faith performance cases typically involve arm's-length transactions, often between sophisticated business persons. The relative strength of the party exercising discretion typically arises from an agreement of the parties to confer control of a contract term on that party. The dependent party then is left to the good faith of the party in control.

Burton, *supra* note 187, at 383-84. It should be noted, however, that virtually all of the case types with which this article is concerned are situations in which the illusory or de facto illusory nature of the agreement is the product of disparate bargaining power.

281. *See* Hillman, *supra* note 70, at 648; Gellhorn, *supra* note 183, at 508.

282. *See, e.g.*, Shell Oil Co. v. Marinello, 63 N.J. 402, 410, 307 A.2d 598, 603 (1973) (10-day termination clause contrary to public policy); Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 474, 223 S.E.2d 433, 440 (1976) (10-day termination clause in gasoline dealer lease is "unconscionable on its face"). The *Marinello* court held that Shell could not terminate or fail to renew Marinello's franchise without proof that he had "failed to substantially perform his obligations" under the agreement. 63 N.J. at 410-11, 307 A.2d at 603. The court stressed the importance of dealer efforts to the success of the franchise, noting that "the personality and efforts of the operator and the good will and clientele generated thereby are of major importance." *Id.* at 407, 307 A.2d at 601. This good will would be captured by the franchisor upon termination. *See* the quotations from *Marinello* in *supra* note 218. Therefore, a dealer, "particularly if he has been operating the station for a period of years and built up its business and clientele. . .cannot afford to risk confrontation with the oil company," a fact which allowed Shell to "dictate its own terms." *Id.* at 408, 307 A.2d at 601. Thus, the provisions at issue were "the result of Shell's disproportionate bargaining position and. . .grossly unfair." *Id.* at 409, 307 A.2d at 602.

In *Donahue*, the court similarly held a ten-day termination provision to be unconscionable on its face, but said that "we do not find it necessary to base our holding upon a disparity in bargaining power between Ashland and Donahue." 159 W. Va. at 474, 223 S.E.2d at 440. Instead, the court observed that the contract was governed by the Code, under which "[t]here is imposed upon both parties to a business transaction an obligation of good faith in its performance or enforcement." *Id.* "[W]ithin that framework," the court continued, "defenses may be made and proof may be offered in a manner sufficient to protect the commercial rights of all parties whether they be economically strong or weak." *Id.*

283. *See* Gianni Sport Ltd. v. Gantos, Inc., 151 Mich. App. 598, 391 N.W.2d 760 (1986). There, Gianni, a small clothing manufacturer, had entered an agreement to supply women's fall fashions to Gantos, a large retailer. The agreement included a clause giving Gantos the right to "terminate by notice to Seller all or any part of this Purchase Order with respect to Goods that have not actually been shipped by the Seller." *Id.* at 600, 391 N.W.2d at 761. The clothes were to be delivered in early October. In late September, after Gianni had manufactured, but not yet shipped, most or all of the order, Gantos terminated. *Id.* Gianni subsequently agreed to a 50% reduction in price if Gantos would accept the goods. The trial court held that the price reduction agreement was invalid because the cancellation clause which necessitated it was unconscionable. *Id.* The Michigan Court of Appeals agreed, noting the disparity of bargaining power between the parties and pointing out the significant reliance losses Gianni faced if the agreement were upheld:

> The [trial] court questioned whether a clause entitling one party to cancel at any time even allowed for a contract to exist. The court pointed out that plaintiff

effect to termination provisions in contracts for the sale of goods.[284] But unconscionability's essentially defensive thrust[285] means that the doctrine is not commonly associated with an award of damages.[286] For this reason, using unconscionability to police contracts with illusory promises raises the same problems discussed earlier in the good faith context. Employing the doctrine to block an unfair termination may force the parties to continue an unwanted relationship in dealer termination cases,[287] or compel the courts to supply a missing quantity term in cases like *Streich v. General Motors Corp.*[288]

Some commentators have also expressed concern that unconscionability is too "contract term oriented,"[289] and therefore vulnerable to "superconscionability" strategies[290] that seek to block unconscionability claims by the use

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> made the goods in question especially for defendant pursuant to this order. Noting the fast-changing character of the women's fashion industry, *the court distinguished this case from situations where cancellation means the seller merely replaces the goods back on the shelf to await another order.* Here, a last-minute cancellation places the seller in the untenable position of absorbing the loss or negotiation with the buyer to accept the goods at a reduced price.

Id. at 602, 391 N.W.2d at 762 (emphasis added). The emphasis on reliance here is obvious, the clear implication of the emphasized language being that termination would have been allowed had it come before Gianni made a substantial beginning in preparing the order, or had the ordered goods been readily resalable to other customers. That the provision was the product of disparate bargaining power was confirmed when the defendant's buyer testified at trial that such clauses were standard practice in the garment industry because "the buyer in our industry is in the driver's seat." *Id.*

284. *See* J. WHITE & R. SUMMERS, *supra* note 261, section 4-1, at 148.

285. "[I]t appears that the doctrine is in the nature of an affirmative defense and is not usually intended as a basis for damage recovery." *Id.* section 4-3, at 150. Of course, in some cases refusing to enforce the contract or striking a provision of the contract results in a damage award. *See, e.g.*, the discussion of the *Gianni* case in *supra* note 283.

286. *See supra* note 242 and surrounding text. The *Donahue* court recognized this problem when it stated that "[h]aving determined that the ten-day termination provision is unconscionable, we cannot and do not leave the parties with an irrevocable relationship." 159 W. Va. at 474, 223 S.E.2d at 440. The *Marinello* court, in contrast, seemed unconcerned that the effect of its decision was that the dealer's franchise "would have legal existence for an indefinite period." 63 N.J. 411, 307 A.2d at 603. This aspect of *Marinello* led one critic to complain that "[i]f the effect of an unconscionability decision is to lock the parties into a lifelong relationship quite contrary to original expectations, then a strong argument can be made that in attempting to prevent oppression and unfair surprise, the law has itself become oppressive." Jordan, *supra* note 274, at 841. Professor Gellhorn recognized this problem when he observed that even if a termination provision is held unenforceable, the court should allow termination on reasonable terms. Gellhorn, *supra* note 181, at 515. He also argued that fairness may dictate allowing termination, but modifying the termination clause to enable the dealer to "reduce his losses on termination by phasing out his business." *Id.* at 518-19. This, he argued, would alleviate the harsh effects of termination on dealers while freeing manufacturers from an unwanted continued relationship. *Id.* at 519.

287. *See supra* notes 244-45 and accompanying text.

288. *See* Hewitt, *Good Faith or Unconscionability—Franchisee Remedies for Termination,* 29 BUS. LAW. 227, 231 (1973).

289. For a discussion of such strategies, see J. WHITE & R. SUMMERS, *supra* note 261, section 4-7, at 164-66; Mallor, *supra* note 257, at 1078-79, 1087.

290. *See, e.g.*, Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 396 (6th Cir. 1982). There, the Sixth Circuit affirmed a trial court decision enforcing a unilateral termination clause in a contract between a manufacturer of slow-cookers and the supplier of the internal cooking shell used in the cookers. The agreement consisted of 22 purchase orders, the last eight of which were canceled by the defendant. The court noted that the parties were both experienced professionals, that the plaintiff had been on notice of the provision from the outset, and that the

of highly detailed, specific, and conspicuous contract language designed to prevent oppression and unfair surprise. Where contract language is the product of real bargaining, decisions upholding the language are plainly proper.[291] But where such language merely notifies the victim of "the sad state of his rights. . .at the outset,"[292] it should only be given effect if the result is not unconscionable. Despite this, parties who are considered merchants[293] may be particularly vulnerable to a superconscionability strategy because of the tendency by some courts to impose what amounts to a presumption against unconscionability in contracts between merchants.[294] Courts also may be reluctant to use the unconscionability doctrine for anyone who can be cast as an experienced business person.[295]

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plaintiff knew that demand for the defendant's product was volatile. *Id.* at 396. The eight canceled orders were interrelated and reflected this volatility. *Id.* Quite important for our purposes is the court's observation that the agreement contained a provision obligating the defendant to pay the reasonable costs of reaching a settlement in the event of termination. This, the court said, "means expenses incurred under the contracts in question," which the defendant had apparently already paid. *Id.* at 397. No further recovery for lost profits was allowed because the plaintiff was bound by the express damage term in the agreement. *Id.* Thus, under the facts of the case and the terms of the agreement the plaintiff here had in all probability recovered any reliance losses upon termination.

291. J. WHITE & R. SUMMERS, *supra* note 261, section 4-7, at 165.

292. Under the Code, a "merchant" is:

> a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge skill peculiar to the practices or goods involved the transaction or to whom such knowledge or skill be attributed by his employment of an agent or or other intermediary who by his occupation himself out as having such knowledge or U.C.C. section 2-104(1) (1978).

293. Mallor, *supra* note 257, at 1067.

294. *See, e.g.*, Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 408 N.E.2d 1370 (1980); Smith v. Price's Creameries, Inc., 98 N.M. 541, 650 P.2d 825 (1982). In *Zapatha* the terminated franchisee, a high school graduate with one year of college and some managerial experience, had knowledge of the termination provision because the defendant's representative read the contract to him and advised him to show it to his attorney. He was also advised, however, that the terms of the contract were not negotiable. Given Zapatha's business experience, the fact that the clause was not in fine print and had been pointed out to him by Dairy Mart's representative, and the fact that he had the opportunity to have the agreement reviewed by counsel, the Massachusetts Supreme Court concluded that no unfair surprise existed and upheld the termination. 381 Mass. at 293-94, 408 N.E.2d 1376-77. Significant for our purposes is the court's conclusion that the effect of the clause was not oppressive because Dairy Mart was obligated to buy back Zapatha's equipment and unsold inventory upon termination, thus compensating him for his reliance losses. *Id.* at 295, 408 N.E.2d at 1377.

The decision in *Smith*, however, demonstrates that the prospect of serious reliance losses will not necessarily shield an allegedly sophisticated party confronted with a plainly worded termination provision. There, the plaintiffs faced the loss of their investment of almost $99,000 when the defendant terminated their franchise less than seven months after its creation. The plaintiffs argued that during negotiations leading up to their agreement the defendant's representative had claimed that the distributorship would continue indefinitely if they adequately performed their duties. The court, however, upheld the termination due to the presence in the agreement of a clause giving either party the right to terminate upon 30 days' written notice "for any reason." The court emphasized Mr. Smith's background and education (three and one-half years of college, and work experience as a policeman, an insurance salesman, and a finance company employee), the plaintiffs' knowledge that the clause was in the contract, their opportunity to consult an attorney, and their failure to attempt to negotiate any of the provisions of the agreement. 98 N.M. at 544-45, 650 P.2d at 828-29.

295. On the other hand, as we have observed elsewhere, promissory estoppel's "injustice" requirement is sufficiently broad to embrace the kinds of factors typically considered by courts in unconscionability cases. Metzger & Phillips, *supra* note 3, at 546.

Promissory estoppel, however, is not necessarily the only way to prevent the problems just recounted. After all, the unconscionability concept is sufficiently broad to enable a determined court to do justice to relying promisees without unduly penalizing promisors in most cases.[296] In addition, promisees using promissory estoppel to recover for terminations based on clearly worded contract clauses will be confronted with the argument that their reliance is unreasonable,[297] an argument that will gain credence if the promisee is putatively sophisticated.[298] It seems plain, however, that the prospect that one party will suffer serious reliance losses often plays a major role in judicial determinations that a contract or clause is unconscionable.[299] Likewise, in many cases where unconscionability arguments have failed, serious reliance losses were not at issue.[300] Further, one may reasonably assume that some courts which have left a party with a substantial reliance loss by failing to heed unconscionability arguments[301] have done so, at least in part, because they viewed reliance-based awards as unavailable in unconscionability claims and were reluctant to force a party into an unwanted relationship of indeterminate duration. To the extent that these observations are accurate, the administration of justice is likely better served by a formal recognition of the importance of reliance in such cases.

IV. WHY NOT PROMISSORY ESTOPPEL?

A. *The Case for the Application of Promissory Estoppel's Application to Illusory Promises*

The discussion in the preceding section justifies our contention that a party's reliance on illusory promises has long been protected under a variety

296. *See infra* notes 325-348 and accompanying text.

297. *See, e.g.*, Berryman v. Kmoch, 221 Kan. 304, 309, 559 P.2d 790, 794 (1977) (expertise of realtor promisee a factor in denial of recovery on option promise unsupported by consideration).

298. *See* Hillman, *supra* note 70, at 648 (extent of franchisee's reliance losses and expected gains are elements of unconscionability determination because they indicate whether termination clause destroyed essence of franchisee's deal, although reliance element requires investigation of the parties' positions at time of contract breakdown, a determination that courts do not generally recognize as a function of unconscionability). *See also* Gellhorn, *supra* note 181, at 517-18 (suggesting that proper unconscionability test in termination cases should consider "whether the harm which will or is likely to result to the terminated party from enforcing the termination provision is proportional to the harm which will or is likely to result to the terminating party if the provision is not enforced"). For case examples, see the discussions of *Marinello* and *Gianni Sport*, *supra* notes 282, 283.

299. *See* Gellhorn, *supra* note 183, at 517 (one reason why unconscionability has not been more liberally applied to termination cases is that losses to terminated party have not seemed severe, especially when compared to potential losses to manufacturer if termination provision not enforced). *See also* the discussions of *Cardinal Stone* and *Zapatha*, *supra* notes 290, 294, respectively.

300. *See, e.g.*, the discussion of *Smith v. Price's Creameries, Inc.*, *supra* note 294.

301. *See supra* notes 39-43 and accompanying text. *See also* G. GILMORE, *supra* note 19, at 56 (noting the tendency for many cases protecting reliance to be "underground" cases); Barnett & Becker, *supra* note 96, at 472-73 (arguing that the number of cases in which promissory estoppel is effectively used to circumvent the statute of frauds is far higher than the number in which it is overtly so used; in many such cases oral promises within the statute are enforced and the statute is never mentioned).

of legal doctrines. This finding is hardly surprising, given the moral and historical claims of the reliance interest, its long history of covert protection,[302] the courts' tendency to justify their decisions in the most traditional way possible,[303] and their propensity to manipulate traditional contract rules to achieve just results.[304] But "[c]overt tools are never reliable tools."[305] Their use often hinders the development of law,[306] and impairs the administration of justice by causing confusion and unpredictability.[307]

The preceding section provided ample support for these generalizations in the illusory promise context. As tools for protecting reliance on illusory promises through manipulation of the agreement, good faith and unconscionability suffer serious flaws. The protection afforded promisee reliance by the Missouri rule, for instance, is easily defeated by including a disclaimer of reliance losses or a minimum duration period in the agreement.[308] The good faith doctrine is generally inapplicable to reliance occurring during contract negotiations.[309] In addition, some courts say that relief for bad faith termination is possible only when the terminating party acted with wrongful motives,[310] a requirement which leaves some forms of promisee reliance uncompensated. Cases like *Corenswet Inc. v. Amana Refridgerator, Inc.*,[311] further restrict the use of good faith to protect reliance by holding that the doctrine is unavailable where a contract cancellation occurs pursuant to an absolute termination clause.[312] Because recovery of damages is problematic under both good faith and unconscionability, neither doctrine is an ideal vehicle for awarding a terminated party the value of her reliance where the equities of the case make this the most sensible result.[313] Finally, both doc-

302. Pettit, *supra* note 59, at 592 (explaining why judges prefer unilateral contract analysis to promissory estoppel, even though estoppel offers some advantages).

303. *See, e.g.*, Gellhorn, *supra* note 183, at 493 (noting the tendency of courts to use and misuse rules of contract construction to aid abused party in franchise cases); Hillman, *supra* note 104, at 853 (discussing ways courts have manipulated preexisting duty rule to produce fair results); Llewellyn, *supra* note 173, at 702 (discussing semi-covert techniques for manipulating form contracts to avoid injustice); Metzger, *supra* note 49, at 1401-03 (discussing judicial manipulation of parol evidence rule).

304. Llewellyn, *supra* note 173, at 703.

305. Hillman, *supra* note 104, at 853. Llewellyn said of covert judicial tools that "since they do not face the issue, they fail to accumulate either experience or authority in the needed direction." Llewellyn, *supra* note 173, at 703.

306.
> [S]ince they [covert tools] purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction, they seriously embarrass later efforts at true construction, later efforts to get at the true meaning of those wholly legitimate contracts and clauses which call for their meaning to be got at instead of avoided. The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy.

Llewellyn, *supra* note 173, at 703.

307. *See supra* note 186 and accompanying text.

308. *See supra* notes 209-13 and accompanying text.

309. *See supra* notes 219-20 and accompanying text.

310. 594 F.2d 129 (5th Cir. 1979).

311. *See supra* notes 221-41 and accompanying text.

312. *See supra* notes 242-49, 284-87 and accompanying text.

313. However, this is not to say that the doctrine is perfectly adapted to protecting reliance on illusory promises, or that good faith and unconscionability have no role to play in this area. *See, e.g., supra* notes 246-55, 295-99 and accompanying text.

trines are amorphous in the extreme, and for that reason should not be preferred when a superior alternative is available.

Promissory estoppel is such an alternative.[314] Although the doctrine's elements are hardly models of definiteness,[315] the doctrine certainly exceeds good faith and unconscionability in this respect. Because promissory estoppel allows a reliance-based damage recovery in appropriate cases,[316] it provides courts an alternative to forcing an unjustly terminated party into an unpromising relationship, or (in cases like *Streich*) fashioning a quantity term out of whole cloth.[317] As *Hoffman v. Red Owl Stores, Inc.*[318] makes clear, promissory estoppel protects promisees who foreseeably rely to their detriment during contract negotiations. Because it focuses on detrimental reliance that is forseeable, the doctrine renders the motive of the promisor a secondary consideration in deciding whether to award relief.[319] In appropriate situations, promissory estoppel could enable deserving promisees to recover for reliance on promises containing either an absolute or a qualified termination clause, and even for promises that disclaim liability for reliance losses. In such cases, the usual elements of promissory estoppel recovery, especially the foreseeable reliance and injustice tests, should usually be determinative.[320] Finally, to its open-endedness, the latter test should enable courts to accommodate the various miscellaneous factors[321] that become relevant in illusory promise cases.

As Justice Holmes once observed, "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves. . . ."[322] Here, the end in question is the protection of foreseeable reliance on illusory promises, an end inarticulately and haphazardly advanced by the doctrines discussed in the preceding section. For these reasons, promissory estoppel is a much more straightforward

314. On the elements of promissory estoppel, see generally *supra* notes 44-48, 149-158 and accompanying text (discussing the doctrine's formulations under the first and second *Restatements*). Of these elements, only the broad "injustice" requirement is especially amorphous, and even here the RESTATEMENT (SECOND) provides some guidance. *See supra* note 156 and accompanying text.

315. *See, e.g., supra* notes 80-81, 85, 92, 130, 160, 166 and accompanying text.

316. On these defects of good faith and unconscionability, see *supra* notes 242-250, 286-287 and accompanying text.

317. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

318. Where it is relevant, presumably, this factor could be considered under promissory estoppel's broad "injustice" requirement.

319. Of course, the reasonableness of the promisee's reliance is likely to be a surrogate for its foreseeability in many situations of this kind.

320. The most conclusive of these is likely to be the presence or absence of genuine bargaining over the clause in question. In the absence of such bargaining, other important factors would include the extent of the promisee's knowledge of the existence and import of the clause at issue, the availability to the promisee of feasible alternative causes of action, indications that the promisor benefited from the promisee's reliance, and the extent and nature of the promisee's losses in reliance on the agreement.

321. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

322. *See supra* notes 111-112 and accompanying text. *See also supra* notes 82-84 and accompanying text (making the same argument in the indefinite promise context) and *supra* notes 159-167 and accompanying text (discussing the RESTATEMENT (SECOND)'s treatment of these questions).

and effective vehicle for realizing this goal. As noted earlier,[323] the main technical bar to utilizing promissory estoppel in enforcing illusory promises is the easily-dispensable formalism[324] that such statements by promisors are not genuine promises capable of supporting promissory estoppel recovery. Two other objections to promissory estoppel's deployment in the illusory promise context, the unreasonableness of relying on such promises and the denial of freedom of contract their enforcement entails,[325] at least are relevant substantive objections to the doctrine's expansion. For this reason, this Article concludes by examining each in turn.

B. The Reasonableness of Relying on Illusory Promises

Reliance on illusory promises, some argue, is unreasonable and therefore undeserving of protection. There are two main thrusts to this contention. The first and more general of the two is that the reasonableness of relying on a promise depends heavily on that promise's legal enforceability.[326] The second and more specific contention is that there is something particularly unreasonable about relying on an illusory promise.[327] Both lines of argument

323. *See* Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant Theory about Law and Its Use*, 66 CORNELL L. REV. 861, 868 n.4 (1981) (contrasting formalistic and nonformalistic views of law by, *inter alia*, noting how "logic" of existing concepts controls the interpretation, application, and extension of law in the former, and goals and "policy" control these processes in the latter). Under formalism so regarded, the "logic" of a promise would seem to dictate that illusory promises are not true promises and should not be enforced, since by their terms they bind the promisor to nothing. To a nonformalist, on the other hand, the relevant "policy"—in this case, protecting reliance—controls the question of enforceability. As should be obvious from the discussion thus far, we are generally unsympathetic to formalism as just defined. The reason is our agreement with Professor Summers that "[a] general theory of law that does not address issues of value is. . .fundamentally incomplete." *Id.* at 875. But this does not preclude the possibility that legal formalism may promote certain values—most notably, definiteness and predictability in legal rules and the benefits to private planning flowing therefrom—and that these may override or modify other policies in particular contexts.

324. *See supra* notes 86-87, 113 and accompanying text. Another relevant consideration is the difficulty courts would face in fashioning damage awards if illusory promises were enforceable. *See supra* notes 85, 114 and accompanying text. To the extent that promissory estoppel recoveries in illusory promise cases involve reliance losses, however, this objection seems moot, for such losses do not depend for their computation on the terms of the promise.

325. [W]hether a person has "reasonably" relied on a promise depends on what most people would (or ought to) do. We cannot make this assessment independent of the legal rule in effect in the relevant community, because what many people would do in reliance on a promise is crucially affected by their perception of whether or not the promise is enforceable. A reliance theory, therefore, ultimately does no more than pose the crucial question that it is supposed to answer: is this a promise that should be enforced?

Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986). *See also* Barnett & Becker, *supra* note 96, at 446-47 (black letter rules of promissory estoppel "too circular to have descriptive or predictive power: how can enforcement turn on the reasonableness of reliance when the reasonableness of reliance will necessarily depend on enforceability?"); the quotation from Professors Goetz and Scott in *supra* note 14.

326. *See* Henderson, *supra* note 29, at 362 n.96 (greater judicial resistance encountered by those seeking to recover for reliance on illusory promises as opposed to indefinite promises "is probably the 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").

327. In rejecting these arguments, we are not asserting that the reasonableness of the prom-

are unpersuasive for a number of reasons.

In the present context the argument derived from the legal unenforceability of illusory promises seems circular. If the use of promissory estoppel to enforce such promises depends on whether it is reasonable to rely on them, and if this reasonableness depends on whether the law enforces them, the fact of their general nonenforcement inevitably precludes using estoppel for this purpose.[328] If this argument had held sway throughout this century, promissory estoppel may not have gained recognition in the first place,[329] and its various subsequent applications almost certainly would not have occurred.[330] Much the same objection applies to the argument that there is something especially unreasonable about relying on illusory promises. For example, promissory estoppel has been used to protect reliance in the face of inconsistent contract provisions,[331] and to protect reliance on implied promises not part of the parties' agreement.[332] Is reliance on such promises any more reasonable than reliance on illusory promises?

To say that something has been done, of course, is not to say that it *should* have been done, and the success an idea enjoys is not an infallible test of its quality. But the argument that the reasonableness of promissory reliance is contingent on the promise's enforceability suffers from an additional flaw; the argument rests on the assumption that parties know the law and shape their behavior accordingly.[333] A wealth of historical experience suggests

isee's reliance is never a relevant inquiry in promissory estoppel cases. Indeed, the RESTATEMENT (SECOND) expressly makes it a relevant inquiry. *See supra* note 156. Instead, our remarks are directed toward the general argument that promissory estoppel should have no application to illusory promises because reliance on such promises is inherently unreasonable.

328. Of course, as we have argued at length, such promises often *are* enforced through one legal device or another. To whatever extent their enforceability would be apparent to a reasonable promisee, the argument we are discussing is further undermined.

329. We say "may not" because the doctrine originated by generalization from a number of discrete situations in which reliance was protected. *See supra* notes 35-43 and accompanying text. In many of these situations, though, the courts were twisting established doctrines to protect reliance. For this reason, it is unclear whether the promisee could reasonably have depended on the promise's enforceability in each individual context.

330. At the time promissory estoppel was held inapplicable to promises made in the bargain context, for example, promises contemplating such a bargain were legally unenforceable until a contract had been created. *See supra* note 53 and accompanying text. *See also* Feinman, *supra* note 9, at 685 (it was argued that "reliance on a promise in the bargain context could never be reasonable—and therefore never be actionable—unless the promisee had actually concluded the bargain with the promisor"). Yet promissory estoppel eventually came to serve as a "consideration substitute" in such situations. *See supra* notes 57-64 and accompanying text.

331. *See, e.g.*, Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); Prudential Ins. Co. v. Clark, 456 F.2d 932 (5th Cir. 1972); Walker v. KFC Corp., 515 F. Supp. 612 (S.D. Cal. 1981). *See also* the cases cited in Fuller, *supra* note 14, at 811 n.16.

332. *See, e.g.*, the discussion of *Drennan v. Star Paving Co.* at *supra* notes 60-64 and accompanying text. Professor Macneil has said of *Drennan* that it "can be read as holding that reliance on something (industry patterns or common decency?) created the promise rather than the other way around." Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 897 (1978). He argues that under an emerging "relational" view of contract law parties' restitution, expectation, and reliance interests "[n]o longer are. . .bottomed primarily on defined promises, nor are efforts necessary to squeeze them within promissory contexts." *Id.* at 898.

333. *See, e.g.*, Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984) (classical contract assumed everyone knows, or can fairly be taken to know, the law); Feinman, *supra* note 105, at 844-45 (classical system of formal contract rules based on

that this assumption is inaccurate in many cases.[334] Surely one of the reasons reliance on otherwise unenforceable promises is protected is because people *do* rely on such promises.[335] What promisees rely upon is not the legal enforceability of the promise, but rather the prospect that the promise will be performed.[336] Such reliance is often the intended product of the promise[337] and is plainly foreseeable because it is a prerequisite to the promisee's enjoyment of the fruits of the promise.[338]

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behavioral assumption that people are highly responsive to incentive or threat of contract rules).

334. "Contemporary and historical research suggests that people generally don't know or don't care much about the rules of contract law and generally carry out their affairs with little regard for them." Feinman, *supra* note 105, at 844-45. *See also* Eisenberg, *supra* note 333, at 1109 for the observation that "[i]n the real world. . .the empirical evidence—consisting of the common experience of those trained in the law—strongly suggests that private actors, taken as a class, have little or no significant knowledge of contract law." A superb historical example is afforded by the statute of frauds, about which it was said over a century ago that "[i]n the great mass of cases the contracting party is as unconscious of the existence of the Statute of Frauds as of the pressure of the atmosphere." Stephen & Pollock, *Section Seventeen of the Statute of Frauds*, 1 L.Q. REV. 1, 3 (1885). Thus, these early critics of the Statute were moved to argue that "[l]aws ought to be adjusted to the habits of society, and not to aim at remoulding them." *Id.* at 6.

335. "Experience has proved that promises [sic] all too frequently rely to their injury on gratuitous promises. It is useless to argue that they should not rely where there is no consideration for the promise. The uncontrovertible fact is that they do rely." Shattuck, *supra* note 73, at 943.

336. "When a man enters into a contract he does not think of himself as bargaining for a law suit. He relies upon the other party's undertaking in fact rather than upon the legal obligation, if any, which that undertaking imposes." J. MURRAY, *supra* note 15, section 90, at 194-95. *See also* PROMISES, MORALS, AND LAW, *supra* note 9, at 38, for the argument that the promisee:

> [D]oes not rely on the fact that a promise creates a binding obligation; he relies on the speaker's intention to do what he has promised to do. If a promisor intends, or thinks it probable that the promisee will so rely, and if he in fact does so, he will suffer harm unless the promise is performed. The promisor will thus have caused harm to the promisee, will have made his position worse, as a result of, first making, and then breaking, the promise. Even if the promise was not known to be binding, for example, in a society which does not recognize binding promises, people will sometimes rely upon statements of intention (or various other kinds of statements), and through such reliance, they will suffer loss.

Atiyah does not find this explanation totally satisfactory, however, because it takes no account of the promisee's voluntary role in relying. *Id.* at 64-66 (emphasis in original). What is missing, he says, is "something which tells us whether the second person [promisee] was *justified* in acting in the way he did." *Id.* at 66. That extra element, he argues, "is compliance with some socially accepted values which determine when expectations and/or reliance are sufficiently justifiable to be given some measure of protection." *Id.* at 68.

337. *See, e.g., id.* at 144 ("promises are given to induce people to act upon them"); Posner, *Gratuitous Promises in Economics and Law* in A. KRONMAN & R. POSNER, THE ECONOMICS OF CONTRACT LAW 46, 46 (1979) (only economic reason promisor of gratuitous promise makes promise instead of merely conferring benefit is "to induce performance of some sort by the promisee; if reciprocal performance is not desired, there seems no reason to make a promise"). Certainly, some of the illusory promise cases previously discussed suggest that the promisor expected to benefit from promisee reliance. *See* the discussions of the *Jones*, *Spooner*, and *Tilbert* cases *supra* notes 132, 134, and 179 respectively. *See also* Boyer, *supra* note 39, at 884 (discussing cases in which promissory estoppel was used to enforce employer promises of bonuses and pensions, noting the "benefits to an employer who is thus able to reduce his labor turnover," and suggesting that this benefit gives courts added incentives to try to enforce such promises).

338. This is plainly so of the case types we have been discussing. The new employer knows

One may argue, however, that mere facts should not control what is essentially a normative inquiry.[339] Thus, it might be asserted that even though many promisees rely on legally unenforceable promises, such promisees still do not deserve protection because they failed to adequately inform themselves. The rugged individualism apparently underlying such a view,[340] of course, is clearly not the dominant theme of twentieth century contract law.[341] And it is subject to an even more pertinent objection—that those parties who *do* know the rules and act accordingly are likely to be sophisticated, economically powerful individuals or entities, and that such actors may employ the rules to take advantage of the weak, dependent, or ill-informed.[342] This observation is particularly apposite to illusory and de facto illusory promise cases, many of which result from the intentional exercise of

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that the currently employed employee promised a new job will have to quit his old job in order to assume his new duties. *See supra* notes 118, 126 and accompanying text. General Motors knew that Streich would have to undertake expensive preparations if he was to be able to supply it with air magnet valves. *See supra* notes 137-148 and accompanying text. *See also* I. MACNEIL, CASES & MATERIALS ON CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS 70 (1971), for a discussion of the auto industry's common use of "blanket orders" such as the one at issue in *Streich*. There, the following recorded interview between Professor Stewart Macaulay and a Ford supplier is reproduced:

> When you deal with Ford, you get a release which tells you to ship so many items in January and gives an estimate on February and March. Ford is committed to take or pay for the February estimate even if it cancels. However, it is not bound to take the parts estimated for March if it cancels in February. One fabricates March parts at his own risk, *but Ford tries to encourage its suppliers to take this risk so there will be an inventory to handle sudden increased orders.*

Id. (emphasis added). Finally, the franchisor who signs a franchisee to an illusory or de facto illusory franchise agreement plainly knows that the dealer must make the investment necessary to sell the franchisor's product line and desires the dealer to make that investment.

339. *Cf.* the concluding remarks by Atiyah in *supra* note 336.

340. Chancellor Kent, for example, once asserted that the common law "does not go to the romantic length of giving indemnity against the consequences of indolence and folly." J. KENT, COMMENTARIES ON AMERICAN LAW 380 (1st ed. 1827), quoted in E. FARNSWORTH, *supra* note 109, section 4.14, at 247.

341. To take just one of many possible examples, today little remains of the traditional rule that justifiable reliance is necessary for recovery in a fraud or misrepresentation case. *See, e.g.*, J. CALAMARI & J. PERILLO, *supra* note 109, section 9-15, at 280-81.

342.
> [A] special problem exists to the extent that [contract] rules *are* known and used. Knowledge and use of contract law by commercial actors typically reflects disparities of economic position. Large enterprises and frequent participants in the marketplace have greater legal sophistication and can use it to the detriment of those less well situated. . . .

Feinman, *supra* note 105, at 845 (emphasis in original). *See also* Barnett & Becker, *supra* note 96, at 466, for the observation that:

> The costs of formal limits on contract liability are higher (and the benefits lower) for consumers than for merchants who engage repeatedly in the same transactions. Consumers are less likely to be aware of formal limitations on liability than are merchants. As a result, formal limits may surprise and disappoint consumers' reasonable expectations; consumers are less likely than merchants to learn to take advantage of, or to depend upon, formal limits.

The problem is not confined to consumers, however. *See The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 Yale L.J. 1038 (1957). This empirical study looked at actual business practice concerning the reduction of oral agreements to written form. It found that large manufacturers were more likely than small manufacturers to demand and receive from customers written evidence of oral agreements. *Id.* at 1047. This difference in practice was attributed to the difference between large-scale and small-scale business operations and to the lesser bargaining power of the small firm. *Id.* at greater sophistication or superior bargaining power.[343] As our preceding remarks suggest, such knowledgeable promisors may derive an advantage from the promisee's failure to read or understand a complex form agreement containing an illusory promise, or his failure to comprehend its legal impact. Even where this is not the case, promisees may rely because they are economically dependent on the promisor's business.[344] In either situation, basing the unenforceability of illusory promises on the alleged unreasonableness of the promisee's reliance is hard to reconcile with twentieth century contract law's general tendency to protect weaker contracting parties.[345] Admittedly, in some cases reliance on an illusory or de facto illusory promise may result from a party's conscious and voluntary decision to assume the known risks of the agreement because the potential benefits appear to justify those risks.[346] Where this is so, a court has no more business disturbing the agreed-upon allocation of risk under promissory estoppel than it would under unconscionability or good faith. But realities of contracting in the modern world guarantee that many agreements will not be the products of consent in the classical sense of the term.[347] The doctrines of unconscionability and good faith,[348] among others, bear ample witness to this fact.

C. *Promissory Estoppel and Freedom of Contract*

Portions of the preceding discussion suggest another objection to promissory estoppel's application in illusory and de facto illusory promise cases: that imposing liability on promisors in such situations violates freedom of contract. But this is not the only possible freedom-of-contract-related argument against using the doctrine to enforce illusory promises. For some recent commentators, liability based on promissory estoppel is not really based on reliance, but rather can and should be viewed as a product of the parties' assent. Because this assertion may undermine the extension of promissory estoppel to illusory promises, this Article considers it after discussing the first, more conventional, freedom-of-contract-based assertion.

1051 & 1054-55. For some further generalizations on these familiar subjects, see *infra* notes 352-61 and accompanying text.

343. As we have observed elsewhere, "[p]arties with superior bargaining power have been known to retain the option of non-performance by creating long and complex 'agreements' rendered illusory by a single clause, while effectively binding weaker parties through their ignorance of the clause's effect and their need of the stronger party's business." Metzger & Phillips, *supra* note 3, at 538.

344. *Streich* and *Gianni Sport* are obvious examples. *See supra* notes 137-48, 283 and accompanying text. *See also* Macneil, *supra* note 332, at 869 n.44 ("blanket orders" used in auto industry not technically enforceable against manufacturer in absence of specific order; enforcement mechanism based largely "on the desire of the supplier to continue doing business with the manufacturer").

345. On this tendency, see *infra* notes 352-61 and accompanying text. In situations of the second sort, moreover, the promisee's reliance is arguably quite reasonable, at least in a business sense. Certainly it is at least as reasonable as Hoffman's reliance on Red Owl's promise of a franchise.

346. The *Cardinal Stone* case discussed in *supra* note 290 is an example of such a case.

347. *See infra* notes 352-361 and accompanying text.

348. *See supra* notes 187-200, 256-67 and accompanying text (discussing the origins of good faith and unconscionability).

1. *Promissory Estoppel as Violating Freedom of Contract*

Using promissory estoppel to enforce illusory and de facto illusory promises obviously violates freedom of contract.[349] In cases where the illusory promise is intended, the liability imposed is liability to which the promisor has not freely consented. Moreover, liability is imposed when the promisor clearly intended to avoid or limit it. Even so, it is unclear why freedom of contract should outweigh the competing claim of the reliance principle. In any event, the remarks in preceding sections suggest another reason for rejecting this objection. One choosing to stand on freedom of contract today is standing on an idea whose moral force has been eroded by many of the social and legal developments of this century.

The notion that a contract is, and should only be, a product of the parties' free wills was undermined quite early by the objective theory of contract[350] and by the contract interpretation process.[351] The most devastating assault on the citadel of freedom to contract, however, came with the advent of form contracting. Standardized contracts were often prepared by businesses with greater bargaining power[352] and sophistication[353] than those with whom they dealt. These advantages were employed to defeat the expectations of

349. *See* Henderson, *supra* note 29, at 365 (application of promissory estoppel to indefinite and illusory promises "limits powers traditionally exercised by offerors," raising danger that traditional insistence on "clear promises, upon close attention to the reasonableness of conduct in reliance, and upon external indicia of intent to be bound" will be discarded "to protect every relying promisee"). *Cf.* Kniffin, *Innovation or Aberration: Recovery for Reliance on a Contract Offer, as Permitted by the New Restatement (Second) of Contracts*, 62 U. DET. L. REV. 23, 38-39 (criticizing section 87(2) of the new *Restatement*, which makes an offer irrevocable if it provokes reliance, as violating "the freedom to contract or not to contract").

350. That the objective theory of contract is divorced from the actual subjective intent of the parties is evident from Learned Hand's classic statement of its effect:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of that sort.

Hotchkiss v. National City Bank, 200 F. 287, 295 (S.D.N.Y. 1911). This gap between subjective and objective intent has led one observer to note that "[r]equiring the promisor's subjective will to yield always, or almost always, to the promisee's reliance on the promisor's objective manifestation of assent undermines the claim that contractual obligation is grounded in the individual's will and bolsters the view that contractual obligations may be imposed rightfully on unwilling parties." Barnett, *supra* note 325, at 274. *See also* PROMISES, MORALS, AND LAW, *supra* note 9, at 15 (where Atiyah expresses surprise "that English common lawyers, even in the nineteenth century adopted an extreme form of objectivism in the law, while, at the same time, they were developing the classical model of contract with its emphasis on free choice and consent"); Macneil, *supra* note 332, at 883-84 (noting how far the objective manifestations of assent the courts actually enforce may stray from the parties' subjective intentions).

351. "Just as the process of interpreting a statute is really a process of subsidiary legislation, so is the interpretation of a contract really a method of supplementing the original agreement by such provisions as are necessary to determine the point at issue." Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 584 (1933), quoted in Hillman, *supra* note 70, at 618 n.10.

352. For a classic account, see generally Kessler, *supra* note 13, especially *id.* at 632, 640.

353. *See, e.g.*, Phillips, *supra* note 225, at 241.

parties[354] who did not understand, or even read, the contract[355] and who may not have been able to bargain for better terms.[356] Can such parties meaningfully be said to have consented to the terms of the agreements they signed,[357] or did new modes of contracting call for new notions of consent?[358] Courts grappling with these questions first resorted to interpretative strategies designed to produce just results.[359] More recently, courts have bound parties to contracts even though their wills had not clearly converged[360] and have expanded the number and scope of the doctrines allowing parties to escape contractual obligations.[361]

These very familiar generalizations suggest at least two objections to the argument that promissory estoppel should not be used to enforce illusory

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354. Professor Slawson has argued that "[b]usinesses can draft their standard forms to create practically any legal implications they like." Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 25 (1984). Thus, "they not only can create implications that the consumer does not expect, but they can destroy or reverse the expectations that the consumer has already formed." *Id.* at 26. In a similar vein, Atiyah has said that "the 'small print,' which is so commonly seen in written consumer transactions, is nowadays usually regarded as something which must give way before the consumer's actual expectations which are nearly always in contradiction to the small print." PROMISES, MORALS, AND LAW, *supra* note 9, at 6-7.

355. *See, e.g,* Phillips, *supra* note 225, at 241.

356. *See, e.g.*, Kessler, *supra* note 13, at 632; Phillips, *supra* note 225, at 241.

357. Kessler argued that the weaker party's contractual intention "is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all." Kessler, *supra* note 13, at 632. Karl Llewellyn had this to say on the subject:

> Instead of thinking about "assent" to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.

K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960), quoted in Slawson, *supra* note 354, at 33.

358. Kessler argued that "freedom of contract must mean different things for different types of contracts." Kessler, *supra* note 13, at 642. Thus, he argued that "[i]n dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling,' and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." *Id.* at 637. Slawson has argued for a new meaning of contract that would embrace "the parties' reasonable expectations from whatever sources they may derive." Slawson, *supra* note 354, at 23. Under this new meaning the contract "may consist of more than just the parties' mutual manifestations of assent, and the manifestations of mutual assent may not be included in the contract at all." *Id.* Similarly, Llewellyn argued that:

> [F]ree contract presupposes free bargain, and that free bargain presupposes free bargaining: and. . .where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.

Llewellyn, *supra* note 173, at 704.

359. *See supra* notes 263-64 and accompanying text.

360. *See, e.g.*, U.C.C. sections 2-204, 2-207 (1978) (modifying traditional definiteness and "mirror image" rules).

361. The rise of the doctrine of unconscionability is perhaps the best example. *See supra* notes 256-67 and accompanying text. For some others, see, e.g., Metzger & Phillips, *supra* note 18, at 158.

promises because to do so is to deny freedom of contract. First, the general thrust of twentieth century contract law is to the contrary. Indeed, as the preceding section's discussion sets out, numerous *illusory promise* cases are to the contrary. Second, the movement in modern contract law away from laissez-faire principles is a justified response to the generally accurate perception that in today's world nineteenth century freedom of contract often lacks meaning for the weaker or less sophisticated contracting party. Where such principles *do* have meaning, where parties of relatively equal power and sophistication completely and knowingly negotiate the terms of their relationship, the policies and principles of classical contract law should assume greater importance. As we have noted,[362] in these situations it may be entirely proper for courts to reject the application of promissory estoppel. The broad injustice requirement of section 90 gives the courts ample latitude to do so.[363] We have also seen that the availability of reliance-based damages in promissory estoppel cases gives courts the flexibility to achieve a tolerable accommodation between protection of the promisee's reliance and the promisor's desire to escape an unwanted relationship.[364]

2. *Promissory Estoppel as an Expression of the Parties' Assent?*

The familiar freedom of contract arguments above do not exhaust promissory estoppel's relations with that concept. No discussion of promissory estoppel and freedom of contract would be complete without some mention of recent efforts to portray promissory estoppel as primarily consensual in nature. In support of this claim, it has been argued that the promisor's silence in the face of the promisee's reliance can be interpreted as a manifestation of consent,[365] that many promisors in promissory estoppel cases intended their promises to be binding at the time they were made,[366] and that promissory estoppel protects essentially consensual arrangements made in situations where there were significant barriers to (or persuasive explanations for the

362. *See supra* note 346 and accompanying text.

363. In fleshing out that requirement, RESTATEMENT (SECOND) OF CONTRACTS section 90 comment b (1981) notes that its satisfaction may depend "on the extent to which such other policies as the enforcement of bargains. . .are relevant." It also adds that "[t]he force of particular factors varies in different types of cases. . . ." *Id.*

364. *See supra* notes 242-50 and accompanying text.

365. *See* Barnett, *supra* note 325, at 318-19, 362. "[I]n most [promissory estoppel] cases liability can be understood as contractual in the broad sense that the promisor apparently intended to be legally bound by the promise." Barnett & Becker, *supra* note 96, at 449.

366. *See generally* Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987). Professor Kostritsky argues that if courts find natural barriers to explicitly reciprocal or formalized contracting they are likely to embrace a promissory estoppel claim, but that if such barriers are not in existence they are likely to be more rigorous in their insistence upon proof of all of the elements of a promissory estoppel claim. *Id.* at 931. In deciding whether such barriers exist, she suggests that courts look at the relative status and knowledge of the parties, the involvement of the parties in some broader relationship, and the existence of a relation of trust and confidence between the parties. *Id.* at 906. From our point of view, these factors easily are embraced by promissory estoppel's foreseeability-of-reliance and "injustice" standards.

absence of) more formalized traditional contracting.[367] Further support for such characterizations might be found in the tendency of some courts to award expectation damages in promissory estoppel cases,[368] and in instances where the doctrine is applied without clear proof of reliance.[369]

To the extent that this characterization of promissory estoppel is accurate, it might at first blush appear to support this Article's contention that the doctrine should find application in the illusory and de facto illusory promise context. If promissory estoppel is basically consensual in nature, how can its use violate the principle of freedom of contract? In the final analysis, however, a consent-based view of promissory estoppel is antithetical to this Article's position. The authors' argument, that promissory estoppel should be used to protect reliance on illusory promises, rests in large part on the many cases protecting such reliance under various other doctrines. But if promissory estoppel is no longer about reliance, how can it be employed for this purpose? More importantly, if promissory estoppel is mainly consensual, how can it be used to bind promisors who have clearly manifested an intent *not* to be bound to their illusory promise?

Reliance is and remains the core of promissory estoppel: reliance was its genesis and in reliance it finds its justification. In support of this hopefully uncontroversial view,[370] we first consider the last two arguments characterizing promissory estoppel as a creature of assent. The Article has discussed the judicial tendency to award expectation damages even though the *raison*

367. Farber & Matheson, *supra* note 157, at 909. *See also supra* notes 65-79 and accompanying text.

368. Farber & Matheson, *supra* note 157, at 910-13. Farber and Matheson argue that reliance is "no longer the key to promissory estoppel." *Id.* at 904. Instead, they assert that promissory estoppel "is being transformed into a new theory of distinctly contractual obligation." *Id.* at 905. They propose a new theory of contract under which "any promise made in furtherance of economic activity is enforceable." *Id.* at 904-05. In support of their position they argue that courts are more likely to enforce promises when the promisor has made the promise with the expectation of receiving some economic benefit from the promisee. *Id.* at 922.

We do not find this last contention surprising, since the prospect of promisor benefit raises the spectre of unjust enrichment, thereby implicating the restitution interest. Of the three contract interests protected by contract damage rules, the restitution interest has long been thought to have the greatest moral claim to protection. *See supra* note 15. We would also note that in at least some of the case types in which promissory estoppel originated one must strain to find an "economic benefit" to the promisor. *See supra* note 39 (mentioning, *inter alia*, gratuitous agencies and gratuitous bailments). In sum, while we have no problem with treating the fact that a promise was made in furtherance of economic activity as *an* important factor militating in favor of its enforcement, we cannot accept it as the *only* such factor, and would find it strange indeed if promissory estoppel were to be severed from its origins in such a fashion.

369. *See, e.g.*, P. ATIYAH, *supra* note 9, at 777 (huge increase in promissory estoppel actions since the first *Restatement* "indicates a resurgence of reliance-based liability at the expense of consensual liability"); Boyer, *supra* note 39, at 898 (saying of the cases from which promissory estoppel originated that "[t]he thread that runs through all the cases is reliance" and that "[i]n this reliance, the doctrine of promissory estoppel has its justification"); Henderson, *supra* note 29, at 361-62 (suggesting that overriding purpose of promissory estoppel is protection of reliance, not enforcement of promises); Speidel, *supra* note 246, at 178 (saying of section 90 that "[h]ere the promisee may have reasonable expectations, but it is his reliance that justifies enforcement"). *See also* the italicized portion of the quotation from Henderson reproduced in *supra* note 167.

370. *See supra* notes 65-79 and accompanying text.

d'etre of promissory estoppel is the protection of reliance,[371] and cases exist in which courts have been less than rigorous in demanding proof of reliance.[372] Because it involves *remedial* considerations, the former tendency is tangential to the concern here: the basis on which liability is imposed. In addition, a number of plausible explanations remain for expectation awards in promissory estoppel cases,[373] the most straightforward of which is simply the language of section 90 itself.[374] Other considerations include the way an expectation award can serve as a proxy for a reliance recovery where reliance is present, but is difficult to prove.[375] Similarly, at least some of the cases appearing to relax the reliance requirement can be explained by judicial perceptions that reliance, and perhaps promisor benefit from reliance, were probably present but not amenable to proof with any degree of certainty.[376] In any event, such cases do not upset the contentions of this Article. Even if promissory estoppel is gradually acquiring a broader application,

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371. *See, e.g.*, the discussion of the *Jones* case in *supra* note 132. Note also that the RESTATEMENT (SECOND) deletes the requirement that the promisee's reliance be "definite and substantial" before it will trigger liability, but note further that this change is linked to the new *Restatement*'s recognition of reliance-based damages. *See supra* notes 153-155 and accompanying text.

372. *See supra* notes 73-77 and accompanying text.

373. Promises that satisfy section 90's tests are "binding," and one of those tests is that "injustice can be avoided only by *enforcement of the promise*." RESTATEMENT (SECOND) OF CONTRACTS section 90(1) (1981) (emphasis added). Also worth mention here is the traditional tendency to regard promissory estoppel as a "substitute" for various elements of a contract, especially consideration. When promissory estoppel operates in this way, the plaintiff's recovery is naturally regarded as contractual, and contract damages are just as naturally deemed appropriate. *See supra* note 74 and accompanying text.

374. *See supra* notes 69-70, 72, 77, 130 and accompanying text. For a case in which an expectation award served as a proxy for "opportunity cost" reliance losses, see Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981). There, the plaintiffs purchased a vacant service station site and made improvements to it in reliance on promises of a franchise made by Marathon's representatives during negotiations. *Id.* at 1099. Prior to acceptance of the plaintiffs' proposal, Marathon placed a moratorium on consideration of all new dealer applications. *Id.* The trial court found for the plaintiffs on the theory of promissory estoppel, awarding damages equal to the lost profits they would have earned on their first year's gasoline allotment had the franchise been awarded. *Id.* at 1100. On appeal, Marathon contested the damage award, arguing that the proper measure of damages "should have been the amount of [the plaintiffs'] expenditures in reliance on the promise, measured by the difference between their expenditures and the present value of the property," a standard that would have resulted in no award because the value of the improved property slightly exceeded the plaintiffs' total expenditures. *Id.* The Seventh Circuit disagreed, observing that:

> [I]n reliance upon appellant's promise to supply gasoline supplies to them, appellees purchased the station, and invested their funds and their time. It is unreasonable to assume that they did not anticipate a return of profits from this investment of time and funds, but, in reliance upon appellant's promise, they had foregone the opportunity to make the investment elsewhere.

Id.

375. *See, e.g.*, the discussion of the *Jones* case in *supra* note 132. *See also* the discussion of *Grouse* in *supra* note 130; Hillman, *supra* note 70, at 640 (underlying factor in contract cessation cases where courts grant expectation awards despite liability decision apparently grounded in reliance loss may be dependent party's foregone opportunities which, although too uncertain to be remedied themselves, are nonetheless compelling).

376. Of course, we too are reconceptualizing cases in our treatment of the many decisions using manipulation of the agreement, good faith, and unconscionability to protect reliance. *See* our explicit discussion of our method at *supra* text accompanying and following notes 171-172. We will address this point in the last paragraph of this section.

reliance is still at its core. So long as this is true, the doctrine remains potentially available to protect reliance on illusory promises.

The first three arguments sketched above raise different considerations. The proponents of these arguments do not allege that reliance is absent in the bulk of the cases where promissory estoppel is used to impose liability. Rather, they assert that due to factors such as the promisor's silence when confronted with reliance or the promisor's initial intent that the promise be binding, some form of consent is also present in such cases. For this reason, they suggest, cases of this kind should be viewed as instances where consent is the true basis for imposing liability. This reconceptualization[377] ignores the explicit basis on which the promisor has been bound in promissory estoppel cases. Surely the drafters of the first and second RESTATEMENTS[378] and the innumerable courts and commentators who have regarded reliance as central to promissory estoppel would be surprised to learn that the doctrine is really about consent, not reliance. Such reasoning could even render *Hoffman*[379] a consent case. There, Red Owl's inducement of Hoffman's reliance might conceivably be regarded as a manifestation of its assent, and it is possible that Red Owl initially intended to grant Hoffman a franchise on some set of terms. Yet reliance, not consent, was the rationale for the Wisconsin Supreme Court's decision to bind Red Owl.[380]

Admittedly, in some of the cases under discussion the courts may have

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377. Although we hope that this exercise is unnecessary, we note again that RESTATEMENT OF CONTRACTS section 90 (1932) makes a promise "binding" if, among other things, it "does induce such action or forbearance," the word "such" referring to "action or forbearance of a definite and substantial character on the part of the promisee." *See supra* text accompanying note 44. And RESTATEMENT (SECOND) OF CONTRACTS section 90(1) (1981) similarly makes a promise "binding" if, among other things, it "does induce such action or forbearance," the "such" in this case referring to "action or forbearance on the part of the promisee or a third person." *See supra* note 152.

378. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). *See supra* notes 89-104 and accompanying text.

379. The court decided the case under section 90 of the first RESTATEMENT, *see* 26 Wis. 2d at 694-96, 133 N.W.2d at 273-74, and concluded that there was ample evidence to support the jury's special verdict that Hoffman had relied in the exercise of ordinary care, *id.* at 696-97, 133 N.W.2d at 274. Indeed, it explicitly stated that Hoffman's promissory estoppel claim was not a breach of contract action. *Id.* at 698, 133 N.W.2d at 275; *see supra* note 94 and accompanying text. And it awarded Hoffman his reliance losses. *See id.* at 699-01, 133 N.W.2d at 275-77; *see also supra* note 92.

380. Such expectations, however, are contextual and do not arise from either the language of the agreement or the traditional legal rules governing the relationship. Consider, for example, a case in which two law firms interview third-year law students. Both firms are located in the same city, enjoy equally excellent reputations, offer equally attractive compensation packages, and are in all other respects on an equal footing. Firm A, however, has each student read and sign a waiver that says:

> I understand that in the event that I am offered and accept a position with Firm A, the firm reserves the right to terminate my employment at any time, for any reason, without notice. I also understand that such termination may occur after acceptance, but before I have actually reported for work.

Firm B does not employ such a waiver, and A and B make offers to the same group of students. Although law students (if anyone) may be presumed to know that both firms are offering employment-at-will and that A's waiver merely states the traditional rule of such employment, *see supra* notes 121-122 and accompanying text, we suspect that B will get more acceptances because A's waiver serves to negate the actual expectations that most students been striving, consciously or subconsciously, to enforce the parties' true agreement by rewarding contextual expectations not reflected by the agreement's language. In particular, we concede that in some illusory promise cases, the imposition of liability on the promisor rewards the actual expectations of the promisee.[381] (Indeed, such expectations have probably motivated reliance in illusory promise cases, and promissory estoppel has served to protect those expectations.[382]) But a consent-based theory of liability presumably requires that both the promisor and the promisee share some common set of expectations, and it is difficult to see how the promisor's expectations match the promisee's in illusory or de facto illusory promise cases. Here, as suggested above, the language of a contract manifests either the promisor's intent not to be bound or his desire to be bound under very limited circumstances. Even if one could argue that such language does not reflect the promisor's actual intent at the time of agreement,[383] it certainly reflects the legal position he will take in the event of termination. For these

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probably harbor about offers of employment. Enforcing B's promise despite its illusory nature protects those expectations.

Similarly, a franchisor whose franchise agreements contain a provision explicitly warning prospective franchisees that their franchise may be terminated despite acceptable performance and without any reimbursement of reliance losses, and who requires franchisees to read and separately sign the provision, is likely to sign up fewer franchisees than a competitor who does not follow similar practices. We suspect that most franchisees' expectations concerning termination probably mirror the expectation of nonarbitrary termination alleged by the franchisee in *Corenswet*. *See supra* note 227 and accompanying text. Again, enforcing the franchisor's promise where he has not disclosed the promise's nonbinding nature protects the franchisee's expectations.

381. For example, we believe the promisee's expectations were accurately captured by the Minnesota Supreme Court in the *Grouse* case, where liability was based on promissory estoppel. *See supra* notes 123-130 and accompanying text, especially *supra* text accompanying note 129. For a case where such expectations were frustrated by a denial of recovery, see the discussion of the *Forrer* decision in *supra* note 133. To digress a bit, what about the promisee's prospects for a promissory estoppel recovery in the first of each pair of hypotheticals set out in *supra* note 380—the situations where the promisor made some sort of disclosure? To the extent that the promisee has been effectively informed of legal rules and contract provisions or promisor interpretations that run counter to his natural expectations, and also had available effective alternative courses of action, the "injustice" requirement of promissory estoppel presumably would not be met and any reliance losses in the face of such warnings would remain unrecoverable. But effective warnings provided by a promisor with sufficiently superior bargaining power to dictate the terms of the transaction present a more difficult problem. We are inclined to suggest that the outcome in such situations should depend on the reasonableness of the promisor's justification for terminating the parties' relationship or refusing to go through with the transaction. The more justifiable the promisor's action, the less inclined we would be to protect promisee reliance at the expense of private autonomy. As the justification for the promisor's actions loses force, our willingness to protect reliance would increase. Even here, however, we would be inclined to afford some deference to notions of private autonomy by awarding reliance-based damages instead of either an expectation award or the imposition of an unwanted relationship on the promisor.

382. In many cases, we believe, the contract's language reflects the promisor's intent all too well. For example, the actual intent of many employers offering an at-will employment could probably be expressed as: "You'll have a job as long as you perform acceptably, but our need for your services is subject to economic conditions that could have a negative impact on our ability to operate profitably at current levels of employment and at this location."

383. For example, promissory estoppel cannot explain the enforcement of the promises contained in a wholly executory bilateral contract, because no reliance could have occurred in such situations. *See* Metzger & Phillips, *supra* note 3, at 535, 550.

reasons, it is difficult to argue that a promisor who has made an illusory or de facto illusory promise consented to some true agreement or some subtext whose terms incorporate the promisee's expectations. Yet many courts have protected the promisee's expectations by basing liability on such promises—often, as argued at length, because of the promisee's reliance. In other words, a consent-based theory of promissory liability cannot explain many of the judicial opinions discussed in this Article.

Thus, the argument that promissory estoppel is consensual fails because it ignores the express basis on which innumerable promissory estoppel decisions have proceeded, and because the consent-based theory of promissory liability it presupposes cannot account for the courts' tendency to enforce illusory promises. But are not this Article's own arguments subject to analogous objections? In contending that promissory estoppel should apply to illusory promises because any number of underground cases have protected such reliance under other legal rubrics, we de-emphasize the rationales under which those cases actually proceeded. And if a consent-based theory of promissory liability fails because it cannot explain every instance where such liability has been imposed, promissory estoppel likewise fails.[384] In response to the first objection one can at least point to cases where the promisee's reliance was expressly made a factor in the decision to enforce an illusory promise, even though the court formally proceeded under some doctrine other than estoppel. As for the second, the argument is merely that promissory estoppel should be used to enforce illusory promises where the doctrine's elements are satisfied; the authors are not propounding some general theory of promissory liability.[385] While they would not go so far as to embrace Arthur Leff's statement that "even in the best of circumstances there probably is no coherent, understandable explanation for anything,"[386] they can live with the idea that there need not be a single, unifying explanation for everything. Contract law may well have "too many rooms to unlock with one key,"[387] and no reason exists why reliance, bargain, and restitution principles cannot continue their longstanding, if somewhat uneasy, coexistence.[388] The authors do, however, believe that in the illusory promise cases

384. *See, e.g.*, *supra* notes 217-18, 282-83 and accompanying text.

385. In fact, though, attempts have been made to unify contract law around the theme of reliance. *See* Metzger & Phillips, *supra* note 3, at 534-36 (criticizing such efforts).

386. Speidel, *supra* note 246, at 163 (citing Leff, *Law and*, 87 YALE L.J. 989, 1010 (1978)).

387. Eisenberg, *supra* note 333, at 1109.

388. Professor Feinman has observed that the "[t]heoretical problems concerning the relation of reliance and bargain have never been satisfactorily resolved, but theoretical incoherence has not kept lawyers and judges from using the [reliance] doctrine extensively." Feinman, *supra* note 1, at 1374-75. Professor Speidel, in commenting on the "shift from rules to standards in contract law," observed that contract doctrine "seems to have shifted from a system of structured rules existing 'out there' to be applied with ineluctable logic to particular disputes to a group of overlapping standards that have precise meaning only when they are particularized in each case." Speidel, *supra* note 246, at 176. To the extent that such a shift has taken place, it may reflect the triumph of the realist critique of classical contract doctrine, which questioned whether important questions arising in actual cases could be answered by "a priori theorizing or by tacit assumptions," and argued that a better method is to classify cases by their factual patterns rather than by doctrine. Speidel, *supra* note 83, at 788-89 (citing Cook, *Williston on Contracts*, 33 ILL. L. REV. 497, 502, 511 (1939)).

the prospect of reliance losses often creates a compelling claim for relief, and that promissory estoppel is the best basis for providing such relief. But where no such losses are in evidence, and no suggestion of untoward promisor benefit tips the scales in favor of enforcement,[389] the authors would be content to defer to what remains of the principle of private autonomy by denying recovery.[390]

V. CONCLUSION

This Article began by asking whether the camel of promissory estoppel should be allowed to intrude into the corner of the contract tent occupied by illusory promises. Certainly it has so intruded, as some courts have explicitly used the doctrine to protect reliance on illusory promises.[391] More importantly, many cases currently decided under the rubrics of good faith and unconscionability are better explained as exemplars of the reliance principle. In those cases, the prospect of promisee reliance losses—sometimes coupled with benefit to the promisor from that reliance—provided a major impetus for the courts' actions. In taking such action, the courts have imposed definite limits on the promisor's freedom of action, and evidently have been unimpressed by the notion that it is unreasonable to rely on a hitherto unenforceable promise.

Historically, the protection of promissory reliance has sometimes proceeded under more traditional doctrines before being reconceptualized as an application of promissory estoppel.[392] Such a reconceptualization would be salutary in the illusory promise context. The law's development and application are better effected when the real bases of decision are fully acknowledged and articulated. Also, reliance-based damage awards seem particularly appropriate to many of the situations where a promisee's reliance on an illusory promise raises compelling claims for relief.[393] Such awards can strike an appropriate balance between adequate protection of the promisee's reliance interest and respect for the autonomy of a promisor who has consciously sought to avoid a binding commitment.

Although the RESTATEMENT (SECOND) OF CONTRACTS sends inconsistent (but largely negative) signals on the illusory promise issue,[394] it nonetheless provides a basis for promissory estoppel's extension to this area. The second RESTATEMENT specifically recognizes almost all of the new applications for the doctrine over the past fifty years. In particular, it unequivocally authorizes both the protection of reliance on indefinite promises and awards

389. On benefit to the promisor as a factor militating in favor of the promisee's recovery, see, e.g., *supra* notes 368, 380.

390. *See, e.g.*, *supra* notes 346, 362-63 and accompanying text (arguing deference to conventional contract principles where promisor and promisee bargained on a relatively equal basis).

391. *See supra* notes 123-32 and accompanying text.

392. This is most true of the doctrine's original formulation. *See supra* notes 35-43 and accompanying text.

393. *See supra* notes 242-50 and accompanying text.

394. *See supra* notes 162-67 and accompanying text.

of reliance-based damages.[395] The line between indefinite promises and illusory promises is often quite difficult to draw; and, like illusory promises, indefinite promises have traditionally been regarded as improper subjects for the ministrations of the reliance principle.[396] Also, reliance-based damage awards remove one traditional objection to protecting reliance on both indefinite and illusory promises: the contention that in neither case was there a promise capable of enforcement.[397] For all these reasons, it is somewhat anomalous that the authors of the second RESTATEMENT stopped short of endorsing promissory estoppel's application to illusory promises. Should a third RESTATEMENT OF CONTRACTS ever appear, expect this deficiency to be remedied.

395. *See supra* notes 155, 159-60 and accompanying text.
396. *See supra* notes 82-87, 111-14 and accompanying text.
397. *See supra* notes 82-85, 111-12 and accompanying text.