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Promissory Estoppel Damages

Mary E. Becker

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PROMISSORY ESTOPPEL DAMAGES

*Mary E. Becker**

INTRODUCTION

The proper measure of damages in promissory estoppel cases is a traditional subject of controversy.[1] During the drafting of section 90 of the Restatement of Contracts,[2] Professor Williston maintained that once a promise was enforced because a promisee had reasonably relied upon it, expectation damages should be awarded, as in other contract actions.[3] Although the original section seemed to reflect this

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1. Courts and commentators have generally taken three approaches to measuring damages in promissory estoppel cases: the reliance measure, the expectancy measure, and a flexible or discretionary approach. For cases awarding reliance damages, see Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965); Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965). For cases granting expectation damages, see Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981); Signal Hill Aviation Co. v. Stroppe, 96 Cal. App. 3d 627, 158 Cal. Rptr. 178 (1979); Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958). For courts recognizing a flexible approach, see Farm Crop Energy, Inc. v. Old Nat'l Bank, 38 Wash. App. 50, 685 P.2d 1097 (1984) (awarding lost profits). *See also infra* notes 5-11 and accompanying text (the approaches taken by commentators).

2. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932), which in pertinent part states:

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

3. 4 A.L.I. PROCEEDINGS App. 97-106 (1926).

view,[4] other commentators disagreed, arguing that when a non-bargain promise is enforced because of the promisee's reliance, liability should be limited to the promisee's reliance loss.[5]

Promissory estoppel was initially limited to donative, non-commercial, situations.[6] With the expansion of promissory estoppel to commercial settings, some commentators argue that expectation damages are, or should be, generally available in commercial cases.[7] Other commentators note that a flexibile approach to damage awards has evolved in promissory estoppel cases.[8] According to these commentators, there are two sets of cases with different measures of damages: expectation damages in commercial settings and reliance damages in donative settings.[9] The Restatement (Second) of Contracts adopts a discretionary approach: "[t]he remedy granted for breach may be limited as justice requires."[10] Nonetheless most com-

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4. The first § 90 provided that the "promise" was "binding," presumably by its terms, once reasonably and forseeably relied upon. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932); *see* Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. CHI. L. REV. 559, 562-63 (1970).

5. *See* 1A A. CORBIN, CORBIN ON CONTRACTS § 205 (1963); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 490-91 (1950); Fuller & Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L. J. 52, 63-65 (1936)[hereinafter *Contract Damages: 1*]; Fuller & Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 401-06 (1937)[hereinafter *Contract Damages: 2*]; Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 942-43 (1937); Note, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 22-23 (1932).

6. *See, e.g.*, Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933). For a comprehensive analysis of the case law, see 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 139, 140 (3d ed. 1936); Boyer, *supra* note 5, at 461-70; Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 344 (1969); Note, *Promissory Estoppel-Measure Of Damages*, 13 VAND. L. REV. 705, 706 (1960); Comment, *supra* note 4, at 561.

7. Farber & Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 902, 945 (1985); Note, Farm Crop Energy v. Old National Bank: *A Meaningful Test For Damages Under Promissory Estoppel?*, 10 U. PUGET SOUND L. REV. 277, 294 (1987); Note, *supra* note 6, at 709; Comment, *supra* note 4, at 561, 568.

8. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 6-12, at 291 (3d ed. 1987); A. CORBIN, *supra* note 5, § 205, at 249; *Contract Damages: 2*, *supra* note 5, at 401-06; Comment, *supra* note 4, at 564.

9. *Contract Damages: 2*, *supra* note 5, at 401-06; Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 RUTGERS L. REV. 472, 545 (1983); Comment, *supra* note 4, at 560-65. For an analysis of damages in donative settings, see *infra* notes 29-51 and accompanying text. For an analysis of damages in commercial settings, see *infra* notes 51-82 and accompanying text.

10. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979), Comment d provides that "The same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy." *See* J. CALAMARI & J. PERILLO, *supra* note 8, §§ 6-12, at 273; Henderson, *supra* note 6, at 378-87.

mentators continue to view reliance damages as appropriate in many donative settings.[11]

Views on damages in promissory estoppel cases are linked to a more basic issue: Is the basis of liability in promissory estoppel cases contract or tort? Commentators who view promissory estoppel as more tort than contract consider reliance the appropriate measure of damages,[12] though in many commercial settings expectation damages may be the best measure of full reliance loss.[13] In contrast, those commentators who view promissory estoppel as more contract than tort view expectation damages as generally appropriate, at least in commercial settings.[14]

This article attempts to describe and explain damages in promissory estoppel cases. In doing so, I rely on an earlier article, which explained why liability is imposed in promissory estoppel cases.[15] That article suggested that in most promissory estoppel cases liability can be understood as contractual in the broad sense that the promisor intended to be legally bound under an objective standard, even though some traditional formal limit on contract liability—such as consideration or the Statute of Frauds — would bar enforcement.[16] There are a few promissory estoppel cases, however, in which liability can be understood only on the basis of tort notions.[17] In

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11. Henderson, *supra* note 6, at 379; Metzger & Phillips, *supra* note 9, at 545; Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979); Comment, *supra* note 4, at 563, 565, 568. *But see* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 140 (3d ed. 1936)(advocating expectation damages in donative settings); Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUDIES 413 (1977)(advocating expectation in donative settings).

12. *See Contract Damages: 2*, *supra* note 5, at 406-10; Posner, *supra* note 11, at 416.

13. *See Contract Damages: 1*, *supra* note 5, at 60 (observing that full reliance in a commercial setting is often best measured by expectation damages). *See also* Metzger & Phillips, *supra* note 9, at 545 (noting that expectation damages may be best remedy for full reliance since lost profits from forgone opportunities are not always included in reliance); Comment, *supra* note 4, at 566-70 (noting that within the commercial setting, the goal of proper compensation for gains prevented as well as opportunity costs may best be achieved by applying contract damage principles: expectation damages and mitigation rules).

14. *See, e.g.*, Farber & Matheson, *supra* note 7, at 945; Metzger & Phillips, *supra* note 9, at 545; Note, *supra* note 6, at 709.

15. Barnett & Becker, *Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 HOFSTRA L. REV. 443 (1987).

16. *Id.* at 496.

17. *Id.* at 485-97. *See* Greenstein v. Flatley, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985) (awarding compensatory and punitive damages: the defendant engaged in a pattern of conduct calculated to mislead plaintiffs into believing that a deal had been made). *See also* Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958) (awarding expectation and reliance damages in similar situation).

these cases, liability seems to be imposed because of misrepresentation, even though liability would not always lie under established tort standards for misrepresentation.

In this article, I explain promissory estoppel damages in terms of traditional contract and tort damage rules. I also consider whether the use of promissory estoppel as a basis of liability, rather than overtly changing traditional contract and tort limits on liability, has affected the measure of relief.[18] Section I analyzes the measure of relief afforded in promissory estoppel cases in which the imposition of liability can be understood as contractual in a very broad sense: the promise was made with apparently an intent to be legally bound. Although the absence of consideration or the informality of the promise would normally bar recovery under traditional contract doctrines,[19] in the vast majority of these cases, the relief awarded is consistent with traditional contract remedy rules. In donative settings, expectation damages[20] or specific performance[21] are often awarded by courts despite commentators' widely-shared doubts

18. Recent articles have not discussed damages in promissory estoppel cases in any depth. *See, e.g.*, Eisenberg, *supra* note 11, at 18-31 (discussing normative question of damages in donative cases). Farber & Matheson, *supra* note 7, at 944 (only very brief discussion of damages in article discribing liability extensively); Kostritsky, *A New Theory of Asset-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895 (1987)(discussing *only* liability, not damages). Metzger & Phillips, *supra* note 9, at 495-500, 544-45. A 1971 Comment is the most recent discussion of promissory estoppel damages in any depth, and it discusses damages in only a narrow set of commercial cases. *See* Comment, *supra* note 4, at 569-71, 582-603.

Although many commentators have assumed that tort damages would be limited to reliance losses, these commentators have not discussed in any depth how tort damage rules should apply in promissory estoppel cases. *See, e.g.*, Eisenberg, *supra* note 11, at 18-31; Henderson *supra* note 6, at 343-57; Metzger & Phillips, *supra* note 9, at 498-500; Posner, *supra* note 11, at 416; Comment, *supra* note 4, at 559-65.

19. See *infra* notes 29-50 and accompanying text for an analysis of damages in donative settings. For an analysis of damages in commercial settings, see *infra* notes 51-82 and accompanying text.

20. *In re* Estate of Bucci, 488 P.2d 216 (Colo. Ct. App. 1971); Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1969); *In re* Jamison's Estate, 202 S.W.2d 879 (Mo. 1947); Richetts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898).

21. *See* Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922), *aff'd sub nom.* Roberts-Horfield v. Gedicks, 96 N.J. Eq. 384, 124 A. 925 (1924)(enforcing a promise to convey land after the promisee took possession of the land and made substantial improvements). *See also* Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898)(enforcing a promissory note which grandfather had given grandaughter to induce her to abandon her lucrative position). When specific performance is awarded in a donative setting, the courts tend to use the equitable doctrine of part performance rather than promissory estoppel. *See infra* note 47; *see also* Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Seavey v. Drake, 62 N.H. 393 (1882); Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922), *aff'd sub nom.* Roberts-Horsfield v. Gedicks, 96 N.J. Eq. 304, 124 A. 925 (1924); Freeman v. Freeman, 43 N.Y. 34 (1870).

about such awards in these cases.[22] Similarly, when promissory estoppel is used in commercial settings, the remedy is consistent with traditional contract damage rules. Thus, courts routinely award expectation damages[23] unless those damages are too speculative, indefinite, or otherwise unavailable under traditional contract rules.[24] The many cases in which courts use both promissory estoppel and traditional contract analysis as alternative bases for relief[25] are not discussed because there is nothing novel or interesting about damages in such cases.

Section II analyzes the measure of damages in those promissory estoppel cases in which courts impose liability on the basis of tort notions: to remedy negligent or reckless promissory misrepresentations.[26] In these cases, courts have tended to impose expectation damages when expectation damages can be calculated.[27] In addition, punitive damages have been imposed in two cases in which the misrepresentation was intentional.[28] Whether the overt use of tort principles to impose liability would have resulted in a different measure of compensatory relief, limiting the plaintiff's compensation to reliance losses rather than expectation damages, is not clear.

I. DAMAGES IN CONTRACT CASES

A. *Promises in Donative Settings*

Most commentators agree that in donative settings, the case for expectation damages is weak.[29] In commercial settings a promisee may rely on a gratuitous promise by foregoing alternative opportunities; expectation damages may be the best (or only) available proxy

22. *See supra* note 11 and accompanying text.

23. *See, e.g.*, Bixler v. First Nat'l Bank, 49 Or. App. 195, 619 P.2d 895 (1980); Fretz Constr. Co. v. Southern Nat'l Bank, 626 S.W.2d 478, 483 (Tex. 1982); *Contract Damages: 2*, *supra* note 5, at 379.

24. *See, e.g.*, Wheeler v. White, 398 S.W.2d 93 (Tex. 1965) (holding loan arrangement too vague and indefinite to be enforced under contract principles but using promissory estoppel to impose reliance damages); Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965)(compensating reliance on a promise when parties had not agreed upon specific terms of exchange).

25. *See, e.g.*, Litman v. Massachussetts Mut. Life Ins. Co., 739 F.2d 1549, 1558-59 (11th Cir. 1984); Glover v. Sayer, 667 P.2d 1198, 1202 (Ala. 1983).

26. *See infra* notes 121-54 and accompanying text.

27. *See infra* text accompanying notes 121-30.

28. *See* Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958); Greenstein v. Flatley, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985).

29. *See supra* note 5 and accompanying text.

for actual reliance loss.[30] When the promisor has promised to give a gift to a donee, the donee rarely passes up equivalent opportunities to receive equivalent gifts. The award of more than actual reliance loss may compensate the donee for disappointed hopes, rather than any actual loss.[31]

It is, therefore, surprising that courts have consistently and routinely awarded expectation damages when they enforce donative promises, either on the basis of promissory estoppel,[32] or by finding (fictional) consideration.[33] When the question is whether to enforce a formal promise to a charity, actual reliance is often not even required by many courts as a prerequisite to awarding full expectation damages.[34] In the context of family promises, reliance is generally required as a prerequisite for liability.[35] Yet once reliance has occurred, full expectation damages are awarded even when adequate reliance damages can be easily calculated.[36]

In the context of formal promises to charities, any link between reliance and enforcement either at the liability stage or the damage stage makes little sense. Whether a charity will rely on a formal subscription's legal enforceability depends entirely on whether the legal system enforces such promises. Charities are repeat players, and will learn the legal rule. If charitable subscriptions are legally en-

30. *See* Metzger & Phillips, *supra* note 9, at 545; *Contract Damages: 1*, *supra* note 5, at 60. Fuller & Perdue first observed that full reliance in commercial settings is often best measured by expectation damages. *Id.* at 61.

31. Eisenberg, *supra* note 11, at 29-30. Eisenberg would generally award only reliance damages in donative settings but would award expectation damages when adequate reliance loss cannot be calculated. Other commentators suggest that expectation damages or specific performance might be appropriate in some donative cases. *See Contract Damages: 2*, *supra* note 5, at 405; Posner, *supra* note 11, at 413; Metger & Phillips, *supra* note 10, at 545.

32. *See, e.g.*, Danby v. Osteopathic Hosp. Ass'n, 34 Del. Ch. 427, 104 A.2d 903 (1954); Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); Estate of Timko v. Oral Roberts Evangelistic Ass'n, 51 Mich. App. 662, 215 N.W.2d 750 (1974).

33. *See, e.g.*, First Presbyterian Church v. Dennis, 178 Iowa 1352, 161 N.W. 183 (1917); Congressional B'nai Sholom v. Martin, 382 Mich. 659, 173 N.W.2d 504 (1969); *In re* Upper Peninsula Dev. Bureau, 364 Mich. 179, 110 N.W.2d 709 (1961); Depaul Univ. v. Ankeny, 97 Wash. 451, 166 P. 1148 (1917); I. & I. Holding Corp. v. Gainsburg, 276 N.Y. 427, 12 N.E.2d 532 (1938); Allegheny College v. National Chautauqua County Bank, 246 N.Y. 369, 159 N.E. 173 (1927); E.A. FARNSWORTH, CONTRACTS § 2.19 (1982); Barnett & Becker, *supra* note 15, at 451-53.

34. *See, e.g.*, *In re* Darian's Estate, 311 Ill. App. 481, 36 N.E.2d 608 (1941); *In re* Stack's Estate, 164 Minn. 57, 204 N.W. 546 (1925); Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609 (Iowa 1974); RESTATEMENT (SECOND) OF CONTRACTS §90 comment f (1979). *See also* Becker & Barnett, *supra* note 15, at 451-53.

35. *See infra* note 42 and accompanying text; *see also* Becker & Barnett, *supra* note 15, at 453-55.

36. *See infra* note 49 and accompanying text.

forced, charities will rely upon them as such. If charitable subscriptions are not legally enforced, charities will not rely on them. Formal promises to charities should, therefore, either be enforced by their terms, because giving donors the ability to bind themselves by their promises to charities is desirable [37] — or should remain unenforced, regardless of reliance. Most American jurisdictions, however, have chosen to enforce charitable subscriptions despite the absence of meaningful reliance.[38]

In the context of family promises, linking reliance with liabilty or damages makes more sense because these donees are less likely to be repeat players. As a result, whether a particular family member relies on a particular promised gift may have nothing to do with whether the law would enforce such a promise. In *In Re Estate of Bucci*,[39] for example, a grandfather executed a formal "assignment" of $17,000 to his granddaughter; he planned to give her the money when certain real estate he owned was sold.[40] The granddaughter and grandfather had lived together for fifteen years. She had performed a variety of services for him and had helped care for him. The grandfather wanted to buy a house for her, and they agreed on a property with both a house and an apartment. The granddaughter was to live in the house, and the grandfather and his wife in the apartment. The granddaughter relied on his "assignment" by spending $2,000 to extend an option on the house.[41] Shortly thereafter, the grandfather died, and the question was whether the granddaughter could enforce the promise against his estate. Although full reliance damages could easily be calculated at $2,000, the court enforced the grandfather's promise to give his granddaughter the full $17,000.

In cases like *Bucci*, reliance may occur regardless of the legal rule on enforceability. Because the grandfather's promise was so formal — an "assignment" — the granddaughter may have assumed that the promise would be legally enforceable. She would be less likely than a charitable organization to know or learn the applicable law, and more likely to rely on the formal "legal" document as enforceable. If the grandfather's promise had been less formal, the

37. *See* Posner, *supra* note 11, at 411-12.

38. *See, e.g., In re* Drain's Estate, 311 Ill. App. 481, 36 N.E.2d 608 (1941); *In re* Stack's Estate, 164 Minn. 57, 204 N.W. 546 (1925); Salsbury v. Northwestern Bell Tel. Co., 221 N.W.2d 609 (1974); RESTATEMENT (SECOND) CONTRACTS § 90(2) (1979).

39. 488 P.2d 216 (Colo. App. 1971).

40. *Id.* at 217.

41. *Id.* at 217-18. Originally, the grandfather had given the granddaughter $1,000 to purchase the option. The $2,000 was paid to extend the option. *Id.*

granddaughter might have relied on it without ever considering whether the promise was legally enforceable. Again, her reliance might be independent of the legal rules on enforceability.

Thus, reliance by a donee in a family setting does increase the need for a remedy. In addition, reliance can be evidence that enforcement is appropriate. In *Bucci*, for example, the fact that the grandfather invited and observed his granddaughter's reliance, with no word of caution that reliance might be risky, is evidence that he intended to be legally bound. Had his promise been less formal, her reliance might have been crucial on this point.[42]

In the absence of reliance, a legal system might consider enforcement of such informal promises either inappropriate, because there may be too little evidence that the promisor intended to be legally bound, or not worth the costs of enforcement because there is little need for a remedy. Once there is reliance, however, an award of expectation damages is understandable for a number of reasons. First, many of the family-gift cases are actions against the promisor's estate.[43] In *Bucci*, for example, enforcement is appropriate not only to redress the granddaughter's $2,000 reliance loss, but also because the grandfather actually wanted her to have his $17,000, and he died before he could fulfill his promise.

Second, expectation damages are appropriate in *Bucci* because the transaction was probably, at least in part, an implicit bargain. The grandfather gave the granddaughter the note in exchange for her (perhaps implicit) agreement to share the property with him and his wife.[44] To the extent that the promise was part of a bargain,[45]

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42. When the promise is less formal, reliance invited or observed by the donor may be crucial as evidence that the donor intended to be legally bound. *See, e.g.*, Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954) (plaintiff bought land in reliance on defendant's promise that he would not build on his own land in such a way as to obstruct plaintiff's view); Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930) (in reliance on mother's promise of house and land, son gave up his own homestead, moved in with mother, and made improvements); Steele v. Steele, 75 Md. 477, 23 A. 959 (1892) (son purchased woolen mill in reliance on father's oral promise to give him $5000 of the purchase price); Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922), *aff'd sub nom.* Roberts-Horsfield v. Gedicks, 96 N.J. Eq. 384, 124 A. 925 (1924) (aunt and uncle promised neice to convey land, and neice made improvements); *See also* Barnett & Becker, *supra* note 15, at 453-55.

43. *See, e.g.*, Burch v. Burch, 145 Colo. 125, 358 P.2d 1011 (1960); Choppin v. Labranche, 48 La. Ann. 1217, 20 So. 681 (1896); Steele v. Steele, 75 Md. 477, 23 A. 959 (1892); *In re* Jamison's Estate, 202 S.W.2d 879 (Mo. 1947); Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898); Young v. Overbaugh, 145 N.Y. 158, 39 N.E. 712 (1895).

44. *Bucci*, 488 P.2d at 216. In *Bucci*, there may also have been an implicit understanding that the granddaughter would continue to care for the grandfather. *See also* Seavey v. Drake, 62 N.H. 393 (1882) (father may have promised son land next to his own so that son

the grandfather would have wanted to bind himself, thereby increasing the chances that the granddaughter would fulfill her part of the bargain in reliance on his promise. Once the granddaughter relied, the bargain was no longer wholly executory, and the case for enforcement stronger.

In other cases involving donative settings, expectation damages may be appropriate because reliance includes foregone opportunities which cannot be recaptured or quantified.[46] Indeed, full reliance, could it be quantified, would often be far greater than the value of what was promised. These points are illustrated by many of the cases in which the equitable doctrine of part performance is used to enforce (specifically) a promise to give land.[47] The donee moves on to the land, improves it, and lives his life differently because of the promise. At the time of the promise, alternatives may have been slightly more costly than the promised gift of land. However, after years of reliance, the value of the promised land may be much less than the promisee's reliance loss if the promise is not enforced. In addition, it may be impossible to calculate full reliance damages (including foregone opportunities); enforcing the promise may be the only way to protect reliance loss.[48] In some cases, both these reasons

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would be near him); Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922)(aunt promised and provided house on aunt's land to her neice), *aff'd sub nom.* Roberts-Horsfield v. Gedicks, 96 N.J. Eq. 384, 124 A. 925 (1924); Wells v. Davis, 77 Tex. 636, 14 S.W. 231 (1890) ("donor" lived with "donee" in house he had given her and performed many services for him while he lived with her). For a discussion of the basis of liability in such cases, see Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971).

45. Although lawyers commonly classify promises as either bargained-for or donative, promises in donative settings may be part bargain and part gift.

46. *See* Eisenberg, *supra* note 11, at 26-28. Eisenberg argues that some informal promises in donative settings should be fully enforced for this reason.

47. Although my discussion is generally limited to cases in which promissory estoppel is used to afford relief, I include cases decided under the equitable doctrine of part performance because of the close relationship between this equitable doctrine and promissory estoppel. "Part performance" is a form of reliance, and the cases decided under the equitable doctrine were influential in the development of promissory estoppel. *See* E.A. FARNSWORTH, *supra* note 33, § 2.19, at 89-92. *See also* Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267, 272 (1954)(paren needed).

48. *See, e.g.*, Seavey v. Drake, 62 N.H. 393 (1882). For cases in which promissory estoppel or the equitable doctrine of part performance are used to enforce the promise, see Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954) (before buying home on a hill, buyer asks neighbor, a friend and the family doctor, whether he intends to stand by commitment not to obstruct view); Choppin v. Labranche, 48 La. Ann. 1217, 20 So. 681 (1896) (owner of tomb estopped from removing bodies after reliance on owner's legator's assurance that remains would rest there forever); Horsfield v. Gedicks, 94 N.J. Eq. 82, 118 A. 275 (1922) (niece moves on land promised her by aunt and uncle; with help of her husband and aunt, builds

argue for full enforcement.[49]

Finally, there is the advantage of simplicity in the routine award of expectation damages or specific performance when there has been observed or expected reliance on a gratuitous promise in a family situation. More finely tuned damage measures could be imagined for some situations, but they might not be worth the costs of case-by-case consideration of which damage rule to apply.[50] For all of these reasons, the willingness of courts to use promissory estoppel and related doctrines to fully enforce promises in family settings, once there has been reliance, is understandable.

Although promissory estoppel developed as a means of enforcing promises in donative settings, it is most often used today to enforce promises in commercial settings. I consider the award of damages in commercial cases next, beginning with those cases in which promissory estoppel is used because of the absence of a clear bargain.

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

The imposition of liability in many promissory estoppel cases can be explained by the fact that the promisor apparently intended to be legally bound by the promise, though enforcement would at

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house; after aunt's death, uncle retracts promise), *aff'd sub nom.* Roberts-Horsfield v. Gedicks, 96 N.J. Eq. 384, 124 A. 925 (1924).

49. *See, e.g.*, Seavey v. Drake, 62 N.H. 393 (1882) (father died without deeding land to son; son had lived on land promised him for twenty years and had built a house, a barn, a stable, and other improvements; enforcement appropriate because father died without retracting promise, there was possibly an implicit bargain, and reliance cannot be recaptured or quantified).

50. For example, consider the exceptions suggested by Eisenberg. As a general rule, Eisenberg considers reliance the appropriate measure of recovery for breach of informal donative promises in the family context; "expectation [damages] should be employed as a surrogate for measuring the costs of reliance only if those costs appear significant, difficult to quantify, and closely related to the full extent of the promise." *Id.* Additionally, he notes that it "might also be appropriate" to award expectation damages when the donee has become accustomed to the promised gift and would sustain a loss in losing it. *Id.* at 29-30. For formal promises in the family, Eisenberg concludes that the case for nonenforcement is (absent reliance) about as strong as the case for enforcement. *Id.* at 18. Eisenberg notes, however, that special treatment might be appropriate when the promisor has died without retracting a formal promise, but concludes that in most such cases enforcement would be inappropriate either because the promisor's failure to perform during life suggests that he had retracted it, or because the promise was intended to take effect only at death, and enforcement is therefore inappropriate because of rules governing wills. *Id.* at 18 n.57. It is not clear whether Eisenberg would allow expectation damages to be awarded, at least after reliance has occured, against the donor's estate when the formal promise could have been performed during life but was not, and the delay does not suggest any change of heart.

least be doubtful on the basis of traditional contract doctrines because of the absence of a clear bargain.[51] In these cases, promissory estoppel is routinely used as a basis for awarding full expectation damages provided that expectation damages would be awarded were a more conventional analysis used as the basis for recovery. Although these promises are not clearly bargained-for, expectation damages are nevertheless appropriate for the reasons that expectation damages are appropriate when consideration is clearly bargained-for: to protect the promisee's restitution and reliance interests, and because judicial preferences may favor full enforcement.[52]

1. The Restitution Interest.—As Fuller and Perdue note, the case for affording a remedy for breach of a promise is strongest when the promisee has conferred a bargained-for benefit on the promisor.[53] In these cases, the question is whether the promisor must pay for a benefit conferred by the promisee in reliance on the promisor's promise. An award of the promised price is appropriate to prevent unjust enrichment of the promisor and to protect the promisee's reliance.

Since promissory estoppel is usually regarded as a consideration substitute,[54] this justification for expectation damages seems inapplicable. In fact, however, most of the cases in which promissory estoppel is used in commercial settings as the sole basis for liability [55] are cases in which implicit (but real) bargains are enforced; in many of these, the promisee has conferred the bargained-for benefit on the promisor.[56]

In *United Electric Corp. v. All Service Electric, Inc.*,[57] for example, the court awarded expectation damages for breach of an implicit bargain when the promisor had received what he bargained

51. These cases are divided into five categories for purposes of that discussion: implicit bargains, firm offers, waiver-like contract modifications, assurances likely to be regarded as part of an overall bargain, and pension promised at or near retirement. *See* Barnett & Becker, *supra* note 15, at 455-69.

52. Other commentators have also argued that expectation damages are appropriate in commercial promissory estoppel cases to protect reliance. *See* Farber & Matheson, *supra* note 7, at 944; Comment, *supra* note 4, at 561, 568.

53. *Contract Damages: 1*, *supra* note 5, at 54-57.

54. *See, e.g.*, Farber & Matheson, *supra* note 7, at 904; Comment, *supra* note 4, at 560.

55. As previously noted this article does not discuss cases in which promissory estoppel is an alternative basis for relief.

56. When an implicit bargain is enforced though the promisee has not yet conferred a benefit on the promisor, the case for full enforcement is slightly weaker. All the other reasons for awarding expectation damages (other than as a form of restitution) apply. *See infra* notes 59-64 and accompanying text.

57. 256 N.W.2d 92 (Minn. 1977).

for.[58] A general contractor promised a materialman that checks to the subcontractor for electrical equipment would be jointly payable to the subcontractor and the materialman. The general contractor paid for electrical equipment with seven joint checks, but then issued four checks solely to the shaky subcontractor. [59] As a result, United Electric was not paid for some $8,000 worth of material.

The court used promissory estoppel to award expectation damages for breach of the implicit bargain.[60] An award of expectation damages protects reliance and serves as a remedy for unjust enrichment of the promisor. In reliance on the general's promise, the materialman transferred equipment worth $8,000 to the financially unstable subcontractor, and the materials were incorporated into a building being built by the prime contractor, thus fulfilling the general contractor's obligation to install such materials under the prime contract.[61]

This explanation of expectation damages holds only when the promisee's performance of an implicit bargain enriches the promisor. Why should expectation damages be awarded when a promise is not clearly bargained for and the promisor has not benefited by the promisee's performance?

2. The Reliance Interest.—Even when there is a clear bargain, the promisee's lost expectancy is the weakest of contract claims. Pure expectation damages represent only the promisee's disappointed hopes, whereas reliance damages represent real losses.[62] As Fuller and Perdue point out in discussing bargain promises, there are nevertheless stronger reasons for awarding expectation damages than pro-

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58. *Id.* at 96.

59. *Id.* at 94.

60. *Id.* at 95-96. The court used promissory estoppel, rather than bargain analysis, because the bargain was not express. *Id.* at 95. On its face, the general's promise to issue joint checks was gratuitous, rather than made in exchange for United supplying electrical equipment to the financially unstable subcontractor.

61. For other examples of cases in which promissory estoppel is used to enforce partially executed implicit bargains, and in which there is little difference between reliance, restitution, and expectation damages, see Peterson Tractor Co. v. Orlando's Snack-Mobile Corp., 270 Cal. App. 2d 787, 76 Cal. Rptr. 221 (1969); Day v. Mortgage Ins. Corp., 91 Idaho 605, 428 P.2d 524 (1967); Fretz Constr. Co. v. Southern Nat'l Bank of Houston, 626 S.W.2d 478 (Tex. 1982). In some instances, reliance damages might not be very close to expectation damages, but expectation damages may nevertheless be a good estimate of restitution damages and the only available measure of relief. *See, e.g.*, Mazer v. Jackson Ins. Agency, 340 So. 2d 770 (Ala. 1976) (enforcing, with order of specific performance, implicit bargain between developers, who promised buffer zone between plaintiffs' homes and office park in exchange for plaintiff's ceasing to oppose annexation of office park to another town).

62. *See Contract Damages: I*, *supra* note 5, at 53-60.

tecting disappointed hopes.[63] Fuller and Perdue give two related reasons, and these reasons hold when there is a problem with the formal requirement of a bargain. First, expectation damages are often equal to, or a good substitute for, reliance loss. Second, expectation damages protect reliance by awarding damages irrespective of a showing of reliance. Such protection is necessary because reliance is often difficult to show and to quantify.[64]

Many of the cases in which promissory estoppel is used to enforce firm offers illustrate these points; often expectation damages are either a good proxy for difficult-to-prove reliance loss or the only way to protect reliance.[65] In the typical "firm offer" case, promissory estoppel is used to enforce a subcontractor's bid, after the general contractor has relied by using it in preparing his bid on the prime contract. The general contractor is typically awarded the difference between the relied-upon bid and the price charged by another subcontractor to do the job.[66]

Actual reliance loss would be precisely this amount only if, absent reliance on the withdrawn bid, the general contractor would have increased his bid on the prime contract to reflect the increased price of the subcontract work and would have received the prime contract at the higher bid. But the general contractor might not have submitted a bid for precisely that amount or might not have received the prime contract. If the general did not receive the prime contract, he might have been able to bid on, and perform, another at a profit similar to that he would have enjoyed for this project but for the

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63. *Id.* at 60-64.

64. *Id.* at 60-62. Fuller and Perdue regarded these reasons as inapplicable to the proper measure of damages for non-bargain promises under promissory estoppel. *Id.* at 64-65. In the second part of their article, they argue for a flexible approach to damages in promissory estoppel cases. *Contract Damages: 2*, *supra*, note 5, at 405. They regard expectatation damages as appropriate in some promissory estoppel cases because expectation damages are equivalent to reliance damages or because "one would not be disposed to quarrel with this result in the charitable subscription cases, or in those cases where by granting specific performance of the promise all difficulties of evaluation can be avoided." *Id.* Fuller and Perdue wrote their classic article at a very early date and prior to the expansion of promissory estoppel into a broad range of commercial cases.

65. *See, e.g.*, People's Nat'l Bank v. Linebarger Constr. Co., 219 Ark. 11, 240 S.W.2d 12 (1951); Homestead Supplies, Inc. v. Executive Life Ins. Co., 81 Cal. App. 3d 982, 147 Cal. Rptr. 22 (1978); Peterson Tractor Co. v. Orlando's Snack-Mobile Corp., 270 Cal. App. 2d 787, 76 Cal. Rptr. 221 (1969); Farm Crop Energy, Inc. v. Old Nat'l Bank, 38 Wash. App. 50, 685 P.2d 1097 (1984).

66. *See, e.g.*, Allen M. Campbell Co. v. Virginia Metal Indus., Inc., 708 F.2d 930 (4th Cir. 1983); Janke Constr. Co. v. Vulcan Materials Co., 527 F.2d 772 (7th Cir. 1975); Loranger Constr. Corp. v. E.F. Hauserman Co., 376 Mass. 757, 384 N.E.2d 176 (1978).

subcontractor's failure to stand by his bid.

Given these uncertainties, it would be difficult or impossible to calculate the general's full reliance loss. But the difference between the withdrawn bid and the cost of substitute performance by another subcontractor may be a good substitute for full reliance loss. Perhaps the general contractor would have received this contract at a price close to his original bid plus the differential; if so, full reliance damages are close to expectation damages. Perhaps the general contractor would have lost this contract, but would have received and performed a similar prime contract for a profit close to the profit he would have enjoyed on this one had the subcontractor stuck to its bid. If so, awarding the general the differential is again a good estimate of full reliance loss.[67] Even if the differential is not a very good proxy of the general's reliance loss, expectation damages are the only effective way to protect the general contractor's reliance given the difficulty of determining what would have happened and assigning a monetary value to it. [68]

3. Judicial Preferences.—In some cases, reliance damages are probably minimal or nominal, yet expectation damages are routinely given. Perhaps even in these cases, expectation damages may be awarded to protect possible reliance, but other policy concerns appear to explain full enforcement. For example, in some of the cases in which courts use promissory estoppel to enforce waiver-like contract modifications, reliance damages may be very low or nominal. Yet the strong judicial hostility to forfeiture may argue for enforcement of the modification by its terms. In *Brewer v. Universal Credit Co.*,[69] the plaintiff purchased a car on credit, and the conditional sales contract was assigned to the defendant credit company.[70] When the plaintiff defaulted on two payments, the credit company demanded possession, but later agreed that the car would be stored for thirty days at the plaintiff's expense, and that the plaintiff would be

67. This analysis of the bidding cases was first presented in Comment, *supra* note 4, at 569-70.

68. For other cases illustrating these points, see the cases in which courts use promissory estoppel to enforce non-bargain promises likely to be regarded as part of an overall bargain transaction. *See, e.g.*, Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 394 P.2d 571, 39 Cal. Rptr. 731 (1964); Sanders v. United Distrib. Inc., 405 So. 2d 536 (La. Ct. App. 1981); Hetchler v. American Life Ins. Co., 266 Mich. 608, 254 N.W. 221 (1934); Abelson v. Genesco, 58 A.D.2d 774, 396 N.Y.S.2d 394 (1977); East Providence Credit Union v. Geremia, 103 R.I. 397, 239 A.2d 725 (1968); Green v. Helmcamp Ins. Agency, 499 S.W.2d 730 (Tex. Civ. App. 1973).

69. 191 Miss. 183, 192 So. 902 (1940).

70. *Id.* at 185, 192 So. at 902.

able to pay the overdue installments during that period to recover his car.[71] The plaintiff tendered the money due within the thirty days, but the credit company had sold the car. It seems likely that the plaintiff received full expectation damages on remand: compensation for the costs of recovering "his" car after the resale.[72]

The plaintiff's reliance may have been quite minimal; there was no evidence that he spent much time or effort finding funds to pay the overdue payments. Nor was there any evidence that he would have suffered any substantial loss had he repaid any additional loan when the credit company withdrew its promise. Common law courts are, however, hostile to forfeiture,[73] and nonenforcement of the credit company's promise would result in forfeiture. An award of full expectation damages is therefore understandable apart from the need to protect the plaintiff's probably minimal reliance.[74]

4. The Restitution Interest, the Reliance Interest, and Judicial Preferences.— Expectation damages may be appropriate for all of the reasons discussed above. In *Hessler Inc. v. Farrell*,[75] for example, the court applied the notion of promissory estoppel to a retired employee who had been promised $12,000 a year for five years as a pension.[76] The promise was made to induce Farrell to retire voluntarily. After his retirement, his employer attempted to withdraw the promise.[77] If one focuses on Farrell and his retirement, there is little need for a promissory estoppel remedy. It is unlikely that Farrell

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71. *Id.* at 186, 192 So. at 902.

72. The Mississippi Supreme Court did not precisely indicate what the plaintiff could recover in the way of damages, but its remand suggests that the plaintiff was entitled to more than just the expenses of reliance between the time the promise was made and the time the promise was retracted. The plaintiff does not seem to have been asking for reliance losses, i.e., costs incurred in borrowing the overdue money and tendering it. Instead, as noted in the text, he was seeking the costs of actually recovering his car after he learned that the credit company's promise had been withdrawn.

73. *See e.g.*, Elizabeth Lodge No. 596, Loyal Order of Moose v. Ellis, 391 Pa. 19, 137 A.2d 286 (1958); Wallis v. Smith, 21 Ch. D. 243 (1882).

74. *See, e.g.*, Dairyland County Mut. Ins. Co. v. Estate of Basnight, 557 S.W.2d 597 (Tex. Civ. App. 1977) (enforcing insurer's promise to extend due date on premium, though there was no reason to think that insured would have paid the premium before her death had ther been no extension of time). In other cases in which promissory estoppel is used to enforce waiver-like contract modifications, reliance may have been substantial, and expectation damages may be appropriate as a proxy for reliance or to protect reliance. *See, e.g.*, Veasey v. Layton, 42 Del. Ch. 55, 206 A.2d 505 (1964); Perry Publications, Inc. v. Bankers Life & Casualty Co., 246 So. 2d 604 (Fla. Dist. Ct. App. 1971); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982).

75. 226 A.2d 708 (Del. 1967).

76. *Id.* at 710.

77. *Id.* at 710-11.

relied very substantially or detrimentally by retiring. He was a terminable-at-will employee, and his employer wanted him to retire. Had Farrell refused "voluntary retirement," he could (and might) have been fired.

Enforcement with expectation damages is nevertheless understandable for the reasons identified above. First, there was a partially performed implicit bargain. Whether or not Farrell's retirement was very substantial or detrimental as reliance, it conferred an implicitly bargained-for benefit on the promisor.[78] As in other implicit bargain cases, having enjoyed the benefits of the bargain, the promisor should not be able to avoid paying the promised price.[79]

Second, although Farrell's retirement might not be very substantial as reliance, he may have relied in other ways which would be difficult to prove or to quantify. For example, but for the promised pension, he might have looked for another job while he was still employed. Once unemployed, substitute employment is more difficult to find. Perhaps he would have made different financial arrangments and plans for the future. Due to the difficulty of showing or quantifying such reliance, expectation damages are the only way to protect it.

Third, it is likely that a judicial preference for legally enforceable pension rights helps explain the award of full expectation damages though Farrell may have suffered little loss by retiring voluntarily.[80] Courts do not expressly mention such a preference, but such a preference seems likely given the many legal rules favoring legally enforceable pension rights.[81]

C. *Other Formal Bars to Enforcement*

Often, promissory estoppel is used to enforce a promise that is clearly part of a bargain, but which would not be enforceable under traditional rules because of some formal flaw, such as the

78. For a fuller discussion of the basis of liability in these cases, see Barnett & Becker, *supra* note 15, at 467-69.

79. *See supra* notes 53-61 and accompanying text.

80. *See also* Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959)(enforcing employer's promise to pay employee a monthly sum for life); Abelson v. Genesco, Inc., 58 A.D.2d 774, 396 N.Y.S.2d 394 (1977)(enforcing employer's promise to pay retirement benefits).

81. *See, e.g.*, I.R.C. § 501(a) (1986) (providing tax exempt status for certain legally enforceable pension funds); *In re* Inland Steel Co., 21 L.R.R.M. (BNA) 1310 (1948) (holding that pension and retirement plans are part of the subject matter of mandatory bargaining for union contracts).

absence of a non-illusory and definite promise, or compliance with the Statute of Frauds and the parol evidence rule.[82] Because similar reasons explain the full enforcement of all these promises, this article discusses in depth only one of these groups: promises barred by the Statute of Frauds. The case for limited enforcement is stronger, in several respects, when enforcement is barred by the Statute of Frauds, rather than by the parol evidence rule or by the requirements that an enforceable promise be definite and not illusory.[83]

The decision to afford a remedy for breach of a parol promise under the Statute of Frauds depends, inter alia, on a court's assessment of the costs and benefits of this formal limit on contract liability. Traditionally, both common law courts and courts of equity have afforded some remedies to protect reliance and to prevent unjust enrichment.[84] Restitution is generally available when one party has conferred goods or services on the other in accordance with a contract under the Statute.[85] In these cases, recovery has been limited to the market value of the goods or services rather than the price orally promised.[86] In most jurisdictions, the equitable doctrine of part performance has afforded specific enforcement to promises under the land provision of the Statute when the vendee has relied on the promise.[87] Most jurisdictions have adopted a similar exception to the

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82. For a further discussion of the use of promissory estoppel as a basis for enforcement when other formal defects bar enforcement, see Barnett & Becker, *supra* note 15, at 470-85.

83. First, the Statute of Frauds is a legislative decision, rather than a product of common law judgments. Second, most Statutes of Fraud draw clear, sharp lines and are therefore more reliable as formal limits on liability (and hence more valuable as formalities) than are the parol evidence rule and the requirements that a promise be definite and not illusory. *See, e.g.*, CAL. CIV. PROC. CODE § 1971 (West Supp. 1987); FLA. STAT. ANN. § 725.01 (West Supp. 1987); ILL. ANN. STAT. ch. 59, ¶1 (Smith-Hurd 1972); IND. CODE ANN. § 32-2-1-1 (West 1979); IOWA CODE ANN. § 622.32 (West 1950); MASS. GEN. LAWS ANN. ch. 259, §§ 1-5 (West 1976); TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987).

84. For sales of goods under the U.C.C., the Statute of Frauds is itself limited by the need to provide a remedy for reliance and to prevent unjust enrichment. *See* U.C.C. § 2-201 (1978). Thus, for example, a seller who has manufactured goods for which there is no market can enforce the parol contract when the circumstances "reasonably indicate that the goods are for the buyer." U.C.C. § 2-201(3)(a)(1978). The contract is enforceable to the extent goods are "received and accepted" by the buyer. U.C.C. § 2-201(3)(c)(1978).

85. *See, e.g.*, Blank v. Rodgers, 82 Cal. App. 35, 255 P. 235 (1927); Dale v. Fillenworth, 282 Minn. 7, 162 N.W.2d 234 (1968); Rick v. Sumler, 179 Va. 571, 19 S.E.2d 889 (1942).

86. *See* E. A. FARNSWORTH, *supra* note 33, § 6.11, at 431-432. Often the promised price is used as evidence of market value. *See, e.g.*, Oxborough v. St. Martin, 169 Minn. 72, 210 N.W. 854 (1926); Bennett Leasing Co. v. Ellison, 15 Utah 2d 72, 387 P.2d 246 (1963); Cochran v. Bise, 197 Va. 483, 90 S.E.2d 178 (1955).

87. *See* Burns v. McCormick, 233 N.Y. 230, 135 N.E. 273 (1922). There is some varia-

one-year provision of the statute: when one party to a contract under the one-year provision has fully performed her part of the bargain, the bargain is enforced by its terms.[88]

There is a strong case for allowing at least a restitution remedy. If no remedy were available, the Statute would be an invitation for fraud; promisors could enjoy with impunity goods or services given in return for parol promises under the Statute. On the other hand, the Statute represents a legislative decision that certain promises should be legally unenforceable unless in writing. Allowing only restitution claims at the market rate rather than the contract rate seems a reasonable balance between the need to guard against the use of the Statute to perpetrate fraud and the appropriate judicial deference to the legislature.

A similar case can be made for the full performance exception to the one-year provision of the Statute. When one party has fully performed in the bargained-for way, a restitution remedy would usually be available.[89] The only issue remaining is how to value the goods or services conferred. When the party claiming the protection of the Statute has allowed the other party to perform fully, the use of the contract price simply eliminates the need to inquire into market price. In addition, the contract price will usually be a good substitute for the market price. Thus, the full performance exception to the one-year provision can be regarded as a restitution remedy tailored to a particular factual setting.

In contrast, promissory estoppel and the equitable doctrine of part performance afford a remedy when there has been reliance, though the promisee may have conferred no bargained-for benefit on the promisor. In these cases, one might expect damages to be limited to reliance loss. If full expectation damages (or specific performance) were available once there had been reliance, there would be little left of the statutory bar. The promisor cannot plan her affairs in reliance

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tion among jurisdictions as to what acts of reliance are sufficient for the equitable doctrine of part prformance, but in most jurisdictions, a promise to transfer an interest in land is specifically enforced if the vendee has, for example, moved onto the land and made substantial improvements to it. *See, e.g.,* Seavey v. Drake, 62 N.H. 393 (1882).

88. *See, e.g.,* Trimmer v. Short, 492 S.W.2d 179 (Mo. Ct. App. 1973); Coker v. Richter Corp., 261 S.C. 402, 200 S.E.2d 231 (1973). In some jurisdictions, performance must take place within a year in order to come within the exception to the Statute. *See* Emerson v. Universal Prods. Co., 35 Del. 277, 162 A. 779 (Del. Super. Ct. 1932).

89. In some cases a restitution remedy might not be available. If the breaching party has partially paid for the bargained-for benefit, restitution will afford a remedy only if the nonbreaching party can show that there is a difference between the partial payment and the market rate. *See supra* note 86 and accompanying text.

on the Statute, i.e., cannot act with confidence that she will only be subject to full contract liability for certain promises if they are in writing.[90] Instead, whether the promise is legally enforceable would be at the option of the promisee: by relying, he can remove the promise entirely from the operation of the Statute. Yet courts using promissory estoppel and the equitable doctrine of part performance to enforce parol promises under the Statute of Frauds routinely award full expectation damages or even specific performance.[91] There is some variation among jurisdictions with respect to judicial willingness to afford these remedies.[92] When a court is willing to use promissory estoppel or the equitable doctrine of part performance to afford a remedy, however, the relief afforded is consistent with that available in other contract actions.[93]

For courts interested in affording a remedy beyond restitution, all of the points made in the preceding section argue for full enforcement. When the contract has been partially performed, expectation damages are appropriate. Restitution is too narrow a remedy to prevent all unjust enrichment.[94] In addition, expectation damages are often appropriate to protect reliance,[95] or judicial preferences favor

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90. Although even an award of reliance losses weakens the effectiveness of the Statute as a formal limit on liablity, if only reliance damages were available, the promisor could at least rely on not being held to such a promise by its terms unless she had signed a writing.

91. Monarco v. LoGraco, 35 Cal. 2d 621, 220 P.2d 737 (1950); McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177 (1970); Alpark Distrib., Inc. v. Poole, 95 Nev. 605, 600 P.2d 229 (1979).

92. *See* Barnett & Becker, *supra* note 15, at 470-75 (promissory estoppel); *supra* notes 87-88 (the equitable doctrine of part performance).

93. For cases in which promissory estoppel is used to award expectation damages, see *infra* note 95. For examples of cases using the equitable doctrine of part performance to enforce specifically promises under the Statute, see, Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976); Seavey v. Drake, 62 N.H. 393 (1882).

94. In an action for compensation for benefits conferred under a contract covered by the Statute of Frauds, restitution affords a remedy only if the goods or services are bargained-for or when the promisor was obviously enriched by reliance. *See* E.A. FARNSWORTH, *supra* note 33, § 6.11, at 430-33. Non-bargained for acts of reliance may benefit the promisor though restitution would afford no remedy. *Cf.* Lacy v. Wozencraft, 188 Okla. 119, 105 P.2d 781 (1940) (using "estoppel" to avoid the Statute of Frauds in case in which restitution is inadequate). In addition, restitution may be unavailable when the receiver of goods or services partially pays as promised. In such cases, restitution affords a remedy only if the promisee can establish that there is a difference between the partial payment and the market price. *Cf.* Vastoler v. American Can Co., 700 F.2d 916 (3d Cir. 1983); Remilong v. Crolla, 576 P.2d 461 (Wyo. 1978) (using "estoppel" to avoid Statute of Frauds when restitution inadequate because of partial payment).

95. *See, e.g.*, Lucas v. Whittaker Corp., 470 F.2d 326 (10th Cir. 1972) (awarding expectation damages when reliance losses were significant but not quantifiable); Monarco v. LoGreco, 35 Cal. 2d 621, 220 P.2d 737 (1950); Wilk v. Vencill, 30 Cal. 2d 621, 180 P.2d 351

full enforcement.[96] Similar reasons explain why expectation damages are available when promissory estoppel is used to enforce indefinite or illusory promises[97] or promises barred by the parol evidence rule.[98]

Vastoler v. American Can Co. [99] illustrates all these points. In order to induce Vastoler to accept a promotion to a supervisory position in 1963, his employer promised that he would receive full credit for past service for all fringe-benefit purposes, including pension rights. [100] Under the provisions of the pension plan, he was entitled only to credit for post-1958 service. He was given full credit for all other purposes (such as vacation time) until he retired in 1978, when the company notified him that he would receive credit for only post-1958 service for pension purposes. [101] The court never identified the formal flaw, but it is likely that the plaintiff sued using promissory estoppel, rather than breach of contract,[102] because of a percieved problem (or problems) with the Statute of Frauds, the parol evidence rule, or with the requirements that a promise be definite and non-illusory.[103]

Regardless of the formal flaw, the court's award of expectation

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(1947) (holding specific performance best way to protect reliance since alternative equivalent transactions not available). For cases in which "estoppel" is used to avoid the Statute of Frauds and in which expectation damages are probably equal to, or a good proxy for, reliance loss, see Le Blond v. Wolfe, 83 Cal. App. 2d 282, 188 P.2d 278 (1948); Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 1 A.2d 146 (1938); Jamestown Terminal Elevator, Inc., v. Hieb, 246 N.W.2d 736 (N.D. 1976).

96. For examples of cases in which courts did not discuss formal flaws, but in which there may have been both a Statute of Frauds problem and a judicial preference for enforcement, see Vastoler v. American Can Co., 700 F.2d 916 (3d Cir. 1983); Van Hook v. Southern Cal. Waiters Alliance, Local 17, 158 Cal. App. 2d 556, 323 P.2d 212 (1958).

97. *See, e.g.*, Goldstick v. ICM Realty, 788 F.2d 456, 463 (7th Cir. 1986) (awarding minimum expectation damages "simply on grounds of simplicity" for breach of an indefinite contract). In some of the cases in which promissory estoppel is used to enforce illusory promises, only reliance damages can be calculated because of the illusory nature of the promise. *See infra* note 113 and accompanying text. In other cases, full enforcement may be possible though the promise is somewhat illusory. *See infra* notes 99-106 and accompanying text.

98. *See, e.g.*, Ehret Co. v. Eaton, Yale, & Towne, Inc., 523 F.2d 280 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). There are, however, only a few cases in which promissory estoppel is used to enforce promises barred by the parol evidence rule. *See* Barnett & Becker, *supra* note 15, at 474-75; Metzger & Phillips, *supra* note 9, at 493-494.

99. 700 F.2d 916 (3d Cir. 1983).

100. *Id.* at 917.

101. *Id.* at 918.

102. The plaintiff did sue for breach of contract, but only for breach of the formal pension plan (whose language defeated his claim) rather than for breach of the 1963 agreement reached prior to his accepting the supervisory position. *Id.* at 918.

103. *See* Barnett & Becker, *supra* note 15, at 481-85.

damages is understandable for several reasons.[104] First, there is the problem of unjust enrichment. If Vastoler were given no relief, his employer would be able to enjoy his services without paying the promised price. Restitution would not remedy this unjust enrichment, since Vastoler would have to prove that he received less than the market wages because of the pension promise.[105] Such a showing would almost certainly be impossible to make. In addition, expectation damages are appropriate to protect reliance, and the only available way to protect reliance; reliance damages could not possibly be calculated. Finally, judicial preference for legally enforceable pension plans may explain full enforcement independent of the problems of unjust enrichment and reliance.[106] Although the initial promise might have been indefinite or illusory because the pension plan was subject to change, these problems either no longer existed in 1978, or could be made irrelevant by fashioning appropriate relief. There was a plan in effect; the only question was how to calculate years of service. If the plan was subject to change, declaratory relief could be given with respect to the future, and monetary relief limited to past-due amounts.

D. *Limits on Expectation Damages in Commercial Cases*

Although expectation damages are awarded in most promissory estoppel cases enforcing promises in commercial settings, there are a number of commercial cases where only reliance damages are

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104. The court determined that the trial court erred in granting defendant's motion for summary judgment. *Vastoler*, 700 F.2d at 917.

105. Whether Vastoler could take advantage of the full performance exception to the one-year provision of the Statute is not clear. New Jersey appears to recognize the full performance exception to the one-year provision, but the decisions so noting involve contracts not under the one-year provision at all. *See, e.g.*, Dennis v. Thermoid Co., 19 N.J. Misc. 614, 22 A.2d 535 (Mercer County Ct. 1941), *aff'd* 128 N.J.L. 303, 25 A.2d 886 (1942) (holding that Statute applies only if neither side can perform within one year). In addition, New Jersey courts have been rather reluctant to find the Statute inapplicable in the employment context. *See, e.g.*, Deevy v. Porter, 11 N.J. 594, 95 A.2d 596 (1953) (holding that oral agreement of employment for more than a year is within the Statute even though employees alleged that under terms of agreement they were free to terminate relationship at any time). Thus, plaintiff's lawyer in Vastoler may have used promissory estoppel because of uncertainty about whether the New Jersey Statute of Frauds would bar a contract action. *Cf.* Advocat v. Nexus Industries, Inc., 497 F. Supp. 328, 333 (D. Del. 1980) (applying Maryland or New York law and refusing to enforce promised pension because of Statute of Frauds though plaintiff seems to have performed fully; "an oral contract of employment cannot be taken out of the Statute of Frauds by part performance").

106. *See supra* notes 69-72 and accompanying text.

given.[107] Even when a promise is part of a traditionally enforceable bargain, however, there are a number of rules limiting the availability of expectation damages.[108] These rules explain why only reliance damages are awarded (or requested by the plaintiff) in these cases. For example, speculative damages cannot be recovered as expectation damages[109] and expectation damages are not normally available for breach of a promise to loan money.[110]

Occasionally a court states that promissory estoppel damages are always limited to reliance losses, although in the case at bar, the availability of expectation damages is not an issue.[111] In other cases,

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107. *See* Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Wheeler v. White, 398 S.W.2d 93 (Tex. 1965); Hoffman v. Red Owl Stores, 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

108. In addition to the general limits on expectation damages discussed in the text, the appropriate measure of damages may depend on the scope of a statutory obligation. *See* Swinerton & Walberg Co. v. City of Inglewood-Los Angeles County Civic Center Auth., 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (1974). In *Swinerton*, the court limited the plaintiff to reliance damages, though expectation damages would probably have been available under general damage rules for defendant's "breach" of a promise to accept the lowest responsible bidder. Liability depended, however, on the meaning of a statutory mandate that defendant accept the lowest responsible bidder. *Id.* at 104, 114 Cal. Rptr. at 838. In City of Inglewood-Los Angeles City Civic Center Auth. v. Superior Court, 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972), the Supreme Court of California had held that the statute required more than that the defendant-authority consider each bid and the bidder's responsibility in good faith, though that obligation is all one can reasonably infer as a matter of contract from a promise to take the lowest responsible bid.

109. *See, e.g.*, Oxley v. Ralston Purina, Co., 349 F.2d 328 (6th Cir. 1965) (holding that plaintiff can recover lost profits if reasonably certain after reliance on promise under Statute of Frauds); Kaye v. Melzer, 87 Cal. App. 2d 299, 197 P.2d 50 (1948) (using promissory estoppel to avoid the Statute of Frauds and awarding only reliance damages because, apparently, expectation damages would be speculative); Young v. Johnston, 475 So. 2d 1309 (Fla. Dist. Ct. App. 1985) (holding that promissory estoppel limited plaintiff to reliance damages for breach of promise to build home for a certain amount of money; difference between defendant's bid and what another contractor would charge speculative as a measure of plaintiff's damage because plaintiff had not engaged another contractor to build home).

110. *See, e.g.*, Bixler v. First National Bank, 49 Or. App. 195, 619 P.2d 895 (1980) (holding that in promissory estoppel, plaintiff could only recover reliance damages for the defendant's breach of a firm commitment to loan money because of traditional limits on damages in such situations). For breach of a promise to loan money, only reliance damages, costs of searching for a substitute loan, and the interest-rate differential are available. *See generally* E.A. FARNSWORTH, *supra* note 33, § 12.14-.18, at 878-99 (1982).

111. *See, e.g.*, Sun Oil Co. v. Madeley, 626 S.W.2d 726, 734 (Tex. 1982) (so stating though court ruled for defendant; no "estoppel"); Wheeler v. White, 398 S.W.2d 93, 97 (1965) (so stating though plaintiff only requested reliance losses; expectation damages would be speculative and inappropriate because the promise was to loan money); Okemah Constr. Inc. v. Barkley-Farmer, Inc., 583 S.W.2d 458 (Tex. Civ. App. 1979) (so stating though court holds for defendant; no promissory estoppel); E.F. Hutton & Co. Inc. v. Fox, 518 S.W.2d 849, 853 (Tex. Civ. App. 1974) (so stating though court holds that there is no basis for imposing any liability on defendant). *See also* Fretz Construction Co. v. Southern Nat'l Bank, 626

the same court will award expectation damages when expectation damages would normally be available.[112] In some cases, there is a close link between the use of promissory estoppel and the inability to calculate expectation damages under normal damage rules. When promissory estoppel is used to afford a remedy for breach of an indefinite or illusory promise, it is sometimes impossible to calculate expectation damages for the very reason that promissory estoppel is used to afford relief: the promise is illusory or indefinite.[113]

For example, several courts have used promissory estoppel to award reliance damages for breach of a promise of employment when the employer changes its mind prior to the scheduled starting date.[114] Once employment started, it would have been terminable at will.[115] There is no way to determine how long, but for the preemployment breach, employment would have lasted; expectation damages are therefore speculative, and the courts' award of reliance damages understandable under traditional damage rules. Out-of-pocket reliance damages can, of course, be calculated with relative ease.[116] This result may seem strange and inconsistent with contract

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S.W.2d 478, 483 (Tex. 1981) (so stating though no difference between reliance loss and expectation damages).

112. *See, e.g.*, Dairyland County Mut. Ins. Co. v. Estate of Basnight, 557 S.W.2d 597 (Tex. Civ. App. 1977) (awarding full expectation damages by using waiver and promissory estoppel to enforce promise to extend time for paying insurance premium); Green v. Helmcamp Ins. Agency, 499 S.W.2d 730 (Tex. Civ. App. 1973) (using promissory estoppel to bind insurance company to coverage period as represented to the insured, and awarding full expectation damages); Southwest Water Services, Inc. v. Cope, 531 S.W.2d 873 (Tex. Civ. App. 1975) (enforcing promised water rates using promissory estoppel to avoid defendant's arguments that agreement unenforceable because too indefinite and because no mutuality of obligation); Retama Manor Nursing Centers, Inc. v. Cole, 582 S.W.2d 196 (Tex. Civ. App. 1979) (awarding expectation damages, including lost profits, with promissory estoppel an alternative basis of liability).

113. As already suggested in text in the discussion of Vastoler v. American Can, 700 F.2d 916 (3rd Cir. 1983), *see supra* notes 99-106 and accompanying text, this is not always true. In some situations involving the enforcement of illusory or indefinite promises, the promisee's expectancy may be the only available measure of relief. *See supra* notes 62-68 and accompanying text.

114. *See* Hunter v. Hayes, 533 P.2d 952, 953 (1975); Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883, 887 (1983); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981). For a similar case in another factual setting, see Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900, 904-05 (Colo. 1982) (holding reliance damages appropriate when expectation damages would have been speculative because promise illusory; defendant promised to negotiate for 90 days and then broke off negotiations for reasons unrelated to negotiations).

115. The liability imposed because of the employer's pre-employment change of heart may nevertheless be consistent with the parties' understanding of the allocation of this risk. *See* Barnett & Becker, *supra* note 15, at 478-81.

116. In Hunter v. Hayes, 533 P.2d 952 (Colo. Ct. App. 1975) for example, the court

notions: awarding reliance damages may overcompensate the non-breaching party by giving her more than she would have enjoyed had there been no breach. For instance, the employee may have lost $3,000 in reliance on a promise of employment breached prior to the starting date. Had the employer not changed its mind prior to the starting date, the employee might have been fired within a month for incompetence or because of staff cut backs, and damages might have been much less than $3,000.

In analogous situations, however, common law courts routinely award reliance damages unless the breaching party can make the often impossible showing that the contract would have been unprofitable for the non-breaching party.[117] The breaching party is unlikely to be able to show that the contract would have been unprofitable for the same reason that the non-breaching party is limited to reliance damages: expectation damages are speculative.[118] There is nothing anomolous about awarding known reliance losses when expectation damages cannot be calculated.

E. *Conclusion*

In general, when promissory estoppel is used to enforce promises in donative or commercial settings, expectation damages are available as in other contract actions. There are several reasons for awarding expectation damages in the commercial cases: to prevent unjust enrichment, to protect reliance, and because of judicial preferences. When plaintiffs are limited to reliance damages in commercial cases, only reliance loss would be recoverable under ordinary contract rules.[119]

In donative cases, expectation damages are also generally available, even when reliance damages could easily be calculated.[120] There are a number of reasons for awarding expectation damages for breach of a promise apparently made with an intent to be legally bound in a donative setting, especially once there has been reliance: to protect reliance, to enforce a possible partially-executed bargain; to fulfill the promisor's intent, and to aviod complex rules about the

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awarded $700 "based on Hunter's monthly wages at the telephone company [her prior employer], namely $350 per month, and on the period of her unemployment." *Id.* at 954.

117. *See, e.g.*, Dade County v. Palmer & Baker Eng'rs, 339 F.2d 208 (5th Cir. 1964); L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949).

118. *See* E.A. FARNSWORTH, *supra* note 33, § 12.16, at 890.

119. *See supra* notes 107-10 and accompanying text.

120. *See supra* notes 28-49 and accompanying text.

appropriate measure of damages.

II. DAMAGES FOR MISREPRESENTATION

There are only a few promissory estoppel cases whose results (including the measure of damages) cannot be entirely understood as based on contract principles.[121] This section describes and explains the awards of monetary damages in these cases and considers whether the use of promissory estoppel rather than tort as the basis of liability has affected the measure of relief.[122]

The courts award expectation damages when expectation damages would be available under normal contract rules. Thus, when the misrepresentation was early in the negotiating process and expectation damages are therefore speculative, the courts award only reliance damages.[123] In other cases in which the negligent or reckless misrepresentation occurred later, expectation damages are awarded.[124] In the cases in which the misrepresentation was intentional, the measure of damages seems to include a punitive element.[125] In one of these cases, the court expressly indicates that it is awarding an amount equal to expectation damages as punitive damages.[126]

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121. In an earlier article, I discussed or noted six cases in which promissory estoppel might have been used to remedy a factual or promissory misrepresentation. *See* Barnett & Becker, *supra* note 15, at 485-95. These cases fall into into three factual patterns. In one pair of cases, there is a reckless or negligent misrepresentation so early in the negotiating process that it it is unlikely that either party thought a legally-binding commitment had been made. *Id.* at 487-89. For a discussion of these cases see *infra* notes 129-32 and accompanying text. In a second pair of cases, there is an intentional misrepresentation at a later point in the negotiating process, when the key terms of the transaction have been worked out: expectation damages can be calculated. *Id.* at 489-91. For a discussion of these cases see *infra* notes 133-48 and accompanying text. The third pair of cases is like the second (expectation damages can be calculated), but the misrepresentation may have been reckless or negligent rather than intentional. *Id.* at 491 n.221. For a discussion of these cases see *infra* notes 149-55 and accompanying text.

122. In tort, recission would also be available and is often the remedy preferred by plaintiffs. *See, e.g.*, Sharkey v. Burlingame Co., 131 Or. 185, 282 P. 546 (1929); McLean v. Southwestern Casualty Ins. Co., 61 Okla. 79, 159 P. 660 (1916).

123. *See infra* notes 127-30 and accompanying text.

124. *See* Greenstein v. Flately, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985); Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958). In Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), however, there was no difference between reliance and expectation damages, *see infra* note 151 and accompanying text. In Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981), the court awarded expectation damages as a proxy for full reliance. *See infra* note 152 and accompanying text.

125. *See infra* notes 131-42 and accompanying text.

126. *See* Greenstein v. Flately, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985); Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958)(punitive damages implicit in the

Whether these results are consistent with the results these courts would reach using tort damage rules is impossible to say. There is a great deal of uncertainty and confusion about the proper measure of damages in tort for misrepresentation in these kinds of cases.

The results in the cases in which the misrepresentation is early in the negotiating process are clearly consistent with the measure of damages in tort. In *Hoffman v. Red Owl Stores*,[127] for example, the court awarded the plaintiff's actual losses sustained in reliance on the defendant's agents' misrepresentations that $18,000 cash would be enough money for the plaintiff to become a Red Owl franchisee.[128] The defendants offered this assurance in order to induce Hoffman to take a number of actions in preparation for becoming a franchisee, such as selling the bakery he had been operating and running a small grocery to gain experience in the grocery business.[129] In a tort action for misrepresentation, a plaintiff can recover as special damages any actual losses, provided that she shows that the losses were the natural and proximate result of the misrepresentation.[130] Hoffman's reliance losses were the natural and proximate result of the misrepresentations. The defendant's agents made the representations to induce precisely these acts, and Hoffman would not have taken these actions but for the misrepresentation.

In the cases in which deliberate misrepresentation occurred later in the negotiating process, it is not clear whether expectation damages would have been available in tort. In *Greenstein v. Flatley*,[131] for example, the defendants led the plaintiffs to think that they would lease office space in a building owned by a defendant until shortly before the lease was to begin and the plaintiffs' current lease in another office building expired.[132] The court used promissory estoppel to award expectation damages and punitive damages[133] (of

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recovery awarded); *infra* note 148.

127. 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

128. *Id.* at 703, 133 N.W.2d at 277. *See also* Werner v. Xerox Corp., 732 F.2d 580 (7th Cir. 1984)(holding similar to *Hoffman*).

129. *Hoffman*, 26 Wis. 2d at 687, 133 N.W. 2d at 269.

130. *See, e.g.*, W. PROSSER & W. KEETON, THE LAW OF TORTS, § 110, at 766-67 (1984).

131. 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985).

132. *Id.* at 352, 474 N.E.2d at 1132. *See also* Chrysler Corp. v. Quimby, 15 Del. 264, 144 A.2d 123 (1958)(defendants led plaintiff to believe franchise would be granted if plaintiff would buy out other stockholders and thereafter transfer 51% of stock to person named by defendant).

133. It might have been possible to award expectation damages on the basis of contract

an equal amount) because the owner's conduct "was an intentional course of action, taken to maintain his options despite plaintiffs' predictable reliance on the existence of a deal."[134]

Traditionally, two measures of general damages had been used in tort for misrepresentation in the context of bargain transactions or negotiations:[135] benefit-of-the-bargain and out-of-pocket damages. Usually, the tort issue arises when there is misrepresentation of the quality or nature of what is being traded.[136] In such cases, the benefit-of-the-bargain measure is equal to expectation damages, and is the difference between the value as represented and the actual value of the thing traded. The other general damage measure, out-of-pocket damages, is more like a reliance measure, and is defined as the difference between the contract price and the actual value of the thing traded.[137]

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principles, since the owner's agent had signed a letter offering to "amend" the lease (the plaintiffs had submitted a signed copy of the lease prepared by the defendants to the defendants). The plaintiffs accepted the amendment. As the appellate court noted in discussing, without reaching, the issue of apparent authority, this instrument "signed on behalf of The Flatley Company, written on a letterhead of The Flatley Company and bearing the home office address, would present some difficulty for the defendant. The test for apparent authority is how the person dealing with the agent reasonably interprets the agent's authority." *Greenstein*, 19 Mass. at 355, 474 N.E.2d at 1133. But contract principles cannot explain the court's award of punitive damages in addition to expectation damages.

134. 19 Mass. App. at 358; 474 N.E.2d at 1134. The defendants' misrepresentations were intentional, though the misrepresentations might not have been actionable in tort in Massachusetts. At the time the promissory misrepresentations were made, the defendants had not decided not to deliver occupancy to the plantiffs. Had no more attractive alternative presented itself, the plaintiffs would have eventually received a signed lease and occupancy. *See* McCusker v. Geiger, 195 Mass. 46, 80 N.E. 648 (1907) (holding promise actionable as fraud only when made after an "affirmative" decision not to perform; mere absence of intent to perform insufficient).

135. Most promissory estoppel commentators have assumed that only reliance damages would be available in tort. *See, e.g.*, Farber & Matheson, *supra* note 7, at 945; Metzger & Phillips, *supra* note 9, at 544-545. *But see Contract Damages: 2*, *supra* note 5, at 406-10 (noting that despite this widely-held assumption, most jurisdictions award contract-like remedy for fraud or misrepresentation in context of bargain transaction). Instead of monetary damages, the victim of misrepresentation can also seek recission, *see, e.g.*, Collins v. Lindsay, 25 S.W.2d 84 (Mo. 1930), and sometimes reformation, *see, e.g.*, Layh v. Jonas, 96 Idaho 688, 535 P.2d 661 (1975).

136. The majority rule is benefit-of-the-bargain; the minority rule out-of-pocket losses. *See* W. PROSSER & W. KEETON, *supra* note 130, § 110, at 767-68. Many courts have wavered between the two, rather than applying either consistently. *Id.* at 768. Often, there is no difference between the two measures. Whenever the contract price is equal to the fair market value of the property as represented, the two measures are identical: the contract price (or the value of the property as represented) less the actual value of the property. *Cf.* Pao Ch'en Lee v. Gregoriou, 50 Cal. 2d 502, 326 P.2d 135 (1958) (using purchase price as evidence of value of property as represented).

137. *See* W. PROSSER & W. KEETON, *supra* note 130, § 110, at 766-68.

Traditionally, jurisdictions have purported to apply one of these two measures of general damages in misrepresentation cases (in the absence, of course, of any claim of special damages).[138] The modern trend, however, is toward a flexible approach, awarding those damages appropriate on the facts of the particular case. Under the flexible approach, the plaintiff usually has her choice of seeking out-of-pocket damages or benefit-of-the-bargain damages, provided that the latter can be proven with sufficient certainty.[139] When these general measures do not apply — because there was no misrepresentation of the quality of something traded — the plaintiff can recover special damages by showing actual losses which are the natural and proximate result of the misrepresentation.[140]

Neither of these measures of general damages would determine the damages in *Greenstein*. The benefit-of-the-bargain formula measures the difference between the value that the property traded would have had if it had been as represented and its actual value. When there has been misrepresentation about whether the parties have a reliable agreement, the benefit-of-the-bargain formula is not equivalent to expectation damages; indeed, the formula cannot be applied. The out-of-pocket measure is also inapplicable since it too refers to the value of something traded. Traditionally, courts have limited plaintiffs in such situations to actual losses.[141]

Some recent decisions suggest that some modern courts might use expectation damages as a proxy for actual loss when, as in *Greenstein*, forgone opportunites are a significant component in the plaintiff's reliance loss.[142] In *Greenstein*, when the plaintiffs learned that they would not be getting space in the defendants' building, they had only a few weeks in which to find substitute space prior to the termination of their current lease. Because of the defendants'

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138. *See supra* note 136.

139. The leading case is Selman v. Shirley, 161 Or. 582, 85 P.2d 384 (1938), *aff'd*, 161 Or. 582, 91 P.2d 312 (1938). *See also* Hinkle v. Rockville Motor Co., 262 Md. App. 502, 278 A.2d 42 (1941) (holding that under flexible approach, $800 proper measure of damages where defect about which seller lied could be fixed for that amount). *See generally* W. PROSSER & W. KEETON, *supra* note 130, § 110, at 768-69.

140. *See* W. PROSSER & W. KEETON, *supra* note 130, § 110, at 766-67.

141. *See, e.g.*, Morrison v. Glickman, 119 N.Y.S.2d 136 (N.Y Civ. Ct. 1936); Welch v. Lawson, 32 Miss. 170 (1856); W. PROSSER & W. KEETON, *supra* note 130, § 110, at 766-67 ("When the defendant's fraudulent conduct does not involve the transfer of property, the plaintiff necessarily proves his claim by proving special or consequential damages if he can do so.").

142. *See infra* notes 131-34 and accompanying text. *See also* Crummer v. Zalk, 248 Cal. App. 2d 794, 57 Cal. Rptr. 185 (1967).

misrepresentations, the plaintiffs were limited to the thin market for almost immediate occupancy. Expectation damages — the difference between the rent promised by the defendants and rent on substitute space found at the last minute — are a good proxy for full reliance loss. Courts adopting the flexible modern approach stress the need to apply the most appropriate damage measure in light of the factual situation and the inadequacy of other damage measures.[143] Courts in these jurisdictions might, therefore, be likely to award expectation damages in a situation like that in *Greenstein* as a proxy for full reliance loss.[144] Courts in out-of-pocket or benefit-of-the-bargain jurisdictions, however, might also be willing to use expectation damages in these situations to measure actual losses.[145] Even the out-of-pocket measure of general damages (which cannot be applied in this situation) compensates the plaintiff for forgone opportunities.[146]

It is, however, impossible to state with certainty what measure

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143. *See, e.g.*, Weitzel v. Jukich, 73 Idaho 301, 308, 251 P.2d 542, 546 (1953) (Porter, J. concurring in part and dissenting in part)("The underlying principle is that the victim of fraud is entitled to compensation for every wrong which is the natural and proximate result of the fraud. The measure of damages which should be adopted under the facts of a case is the one which will effect such result.").

144. Cellucci v. Sun Oil Co., 2 Mass. App. 722, 320 N.E.2d 919 (1974), *aff'd*, 368 Mass. 811, 331 N.E. 2d 813 (1975) (in flexible jurisdiction, court affirms award of specific performance in tort); Rokowsky v. Gordon, 531 F. Supp. 435 (D. Mass 1982), *aff'd*, 705 F.2d 439, *cert. denied*, 462 U.S. 1120 (1983)(court would prefer actual losses, but uses expectation damages because of difficulty of determining losses caused by forgone opportunities).

145. *See, e.g.*, Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981) (using expectation damages as a proxy for reliance loss in promissory estoppel case); Stephenson v. Capano Development Inc., 462 A.2d 1069 (Del. 1983)(awarding interest rate differential as special damages for fraudulent offer of low interest rate on mortgage; stressing that the plaintiff might not have bought property but for defendant's fraudulent offer). *But see* Gray v. Don Miller & Associates, Inc., 35 Cal. 3rd 498, 647 P.2d 253, 198 Cal. Rptr. 551 (1984) (limiting plaintiff to actual out-of-pocket loss caused by misrepresentation as to whether there was a deal with a third party in jurisdiction with statute prescribing out-of-pocket rule for misrepresentation in purchase, sale, or exchange of property); Newkirk v. United Fed. Sav. & Loan Ass'n, 165 Ga. App. 311, 299 S.E.2d 183 (1983) (allowing only actual reliance loss in out-of-pocket jurisdiction for fraud when neither general damage formula would apply); Kensington Publishing Corp. v. Kable News Co., 100 A.D.2d 802, 474 N.Y.S.2d 574 (1984) (denying plaintiff's claim based on lost opportunities in out-of-pocket jurisdiction); Traylor v. Gray, 547 S.W.2d 644, 656-58 (Tex. Civ. App. 1977) (awarding less than either expectation damages or reliance damages for fraud in case in which neither general damage formula would apply).

146. An out-of-pocket damage award is the difference between the price paid by the plaintiff for what was traded (e.g., $10,000) and the market value of what was traded (e.g., $8,000). This compensates the plaintiff for forgone opportunites since, but for defendant's misrepresentation, the plaintiff could have purchased the goods elsewhere for $8,000. Benefit-of-the-bargain damages do more than compensate the plaintiff for forgone alternative opportunities; they give him the promised benefit though no honest seller would have promised so much for so little.

of damages would be imposed in tort for intentionally misleading conduct about whether there will be a bargain. In *Greenstein* (and the other promissory estoppel case dealing with intententional misrepresentation[147]), it is possible — but by no means certain — that the relief afforded is consistent with the relief that would have been available in tort.[148]

In cases in which misrepresentation is made negligently or recklessly at a late point in the negotiating process, courts have awarded either expectation or reliance damages.[149] Again, as in the inten-

147. Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958). In this case, the defendant's agent told Quimby that he would be awarded a terminable-on-ninety-days-notice franchise if he bought the stock of the recently-deceased franchisee's widow. *Id.* at 269-70, 144 A.2d at 128. The promise was a lie when made. The agent never intended to award Quimby the franchise but did want to satisfy Chrysler's "moral obligation" to the widow. *Id.* at 278, 144 A.2d at 134. The court awarded both the lost profits for the ninety days and the cost of the stock (net of the value realized by selling the assets of the dealership). Thus, the court awarded both expectation damages and reliance damages, a double recovery since the profit could not have been enjoyed without buying the stock. Given that the defendant's agent deliberately and intentionally misled the plaintiff, the double recovery might include a punitive element. It is impossible to know whether this case would have come out differently had tort rules been used because we do not know what amount the court considered compensatory. (Indeed, we do not even know whether the court realized that it was doing more than compensating the plaintiff.) Delaware is, however, a benefit-of-the-bargain jurisdiction, *see, e.g.*, Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (1931). In *Chrysler*, unlike *Greenstein*, the benefit-of-the-bargain measure could be applied because Chrysler's agent's misrepresentation affected the value of the stock Quimby purchased from the widow. *See, e.g.*, Hartwell Corp. v. Bumb, 345 F.2d 453 (9th Cir.), *cert. denied*, 382 U.S. 891 (1965) (general damages in the form of benefit-of-the-bargain awarded for misrepresentation by trustee in bankruptcy to purchaser of a division of a bankrupt corporation).

148. *See, e.g.*, Rokowsky v. Gordon, 531 F. Supp. 435, 439 (D. Mass. 1982), *aff'd*, 705 F.2d 439, *cert. denied*, 462 U.S. 1120 (1983) (awarding expectation damages as proxy for full reliance loss); Cellucci v. Sun Oil Co., 2 Mass. App. 722, 320 N.E.2d 919 (1974), *aff'd*, 368 Mass. 811, 331 N.E.2d 813 (1975) (affirming award of specific performance in tort). *Greenstein* was decided in Massachusetts which is a "flexible" jurisdiction. *See* Rice v. Price, 340 Mass. 502, 164 N.E.2d 891 (1960).

149. *See* Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981); Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948). In both cases, the award of expectation damages might have been imposed on the basis of contract and agency principles, though the courts based liability on "estoppel" and "promissory estoppel." *See* Barnett & Becker, *supra* note 15, at 487. On the other hand, liability might have been appropriate only in tort, not in contract. In *Walters*, contract liability would lie only if the agents with whom the plaintiff dealt had apparent authority to bind the defendant with oral assurances prior to approval of plaintiff's application by the Marathon home office. (The lower court decision can be read as imposing liability on the basis of such (or quite similar) findings). *See* Barnett & Becker, *supra* note 15, at 489 n.215. In contrast, in tort, a principal is liable for misrepresentations by an agent during negotiations if the agent is authorized to negotiate, the other party had no warning that the representations were unauthorized, and the representations concerned matters that the principal should expect to arise during negotiations. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 258 (1958). Thus, it is possible that though contract liability would be inappropriate because

tional misrepresentation cases discussed above, it is not clear whether different measures of relief would have been available in tort. For example, in two cases, agents of a franchisor told a franchise applicant to go ahead and spend money necessary to begin the franchise operation because only formalities remained before he would be officially given a franchise; final affirmative decisions had already been made within the franchisor's organization.[150] The agents were wrong, and the plaintiffs sued. In one of these cases, the court's award of reliance losses was consistent with tort damage rules, as compensation for actual losses, and with contract damage rules, for breach of an indefinite-term contract.[151] In the other case, the court awarded expectation damages for the minimum franchise period as a proxy for full reliance losses, including forgone opportunities.[152] Whether the court would have been as willing to use expectation damages as a proxy for actual losses in tort is not clear for the reason given in the preceding section: neither measure of general damages applies in this situation, and there are too few modern cases to know whether courts would award expectation damages as a

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the agents lacked apparent authority to bind the principal by an oral assurance, the principal might be liable in tort for misrepresentations made by the agents during negotiations. In Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), the defendants could be held liable on the basis of contract and agency doctrines only if the defendants (the franchisor's local distributor) led the plaintiffs reasonably to believe that the defendants were authorized agents of the franchisor with power to enter into a contract on behalf of the franchisor, and the defendants did agree to give them this franchise in the name of the franchisor. The defendants would then be liable in contract for breach of the indefinite term contract because of their implied warranty of agency. *See* Restatement (Second) of Agency § 329 comment g, j, illustration 8 (1958); *See* Barnett & Becker, *supra* note 15, at 488. But the defendants would be liable in tort for negligent or reckless misrepresentation of fact (that the franchisor had made a decision), even though the plaintiffs did not think that the defendants were purporting to accept their application in the name of the franchisor.

150. Walters v. Marathon Oil Co., 642 F.2d 1098 (7th Cir. 1981); Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948).

151. In Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948) the franchise, if awarded, would have been for an indefinite term. The franchise application stated: "Emerson Radio [the franchisor] shall have the right to revoke the Franchise Certificate, if, at any time after the issuance thereof, the dealer fails to comply with the above requirements." Joint Appendix at 10, *Goodman.* Modern courts have construed indefinite-term franchises as terminable only after a reasonable time when the franchisee invests in beginning operations. These courts have construed "a reasonable time" as the time necessary to give the franchisee the opportunity to recoup her investment. *See, e.g.*, Whorral v. Drewry's Ltd. U.S.A., Inc., 214 F. Supp. 269, 271 (S.D. Io. 1963). There is, therefore, no difference between expectation damages and reliance damages, and the *Goodman* court's award of $1150 in reliance losses was proper in tort as compensation for actual losses. The court denied an additional recovery of expectation damages, but such a recovery would have been over-compensation in either contract or tort.

152. Walters v. Marathon Oil Company, 642 F.2d 1098 (7th Cir. 1981).

proxy for actual losses when there has been no transfer of property.[153]

In addition, in these cases, the misrepresentations appear to have been negligent rather than intentional.[154] Some courts have awarded benefit-of-the-bargain damages only in cases in which the misrepresentation is intentional, i.e., cases in which the defendant knows that there is a discrepency between what he knows and what he is telling the plaintiff.[155] On the other hand, courts often impose benefit-of-the-bargain damages without any discussion of this issue or finding of intentional misrepresentation.[156] But some courts might be unwilling to use expectation damages as a proxy for actual losses unless the misrepresentation was intentional. As in the previous set of cases, one cannot be sure whether the use of promissory estoppel might affect the measure of relief.

As indicated at the beginning of this section, there are only a handful of cases in which it seems likely that courts used promissory estoppel to impose liability for misrepresentation rather than on the basis of broad contract notions.[157] In these cases, courts have awarded expectation damages when expectation damages would be available under ordinary contract damage rules. In addition, courts have awarded punitive damages when the misrepresentation is deliberate and intentional.

When only reliance damages are available under normal contract rules, the use of promissory estoppel (rather than tort) has not affected the measure of relief.[158] When expectation damages are awarded in promissory estoppel misrepresentation cases, the use of promissory estoppel may affect the measure of relief. But there is much uncertainty about the measure of damages in tort for misrepresentation in the context of an exchange transaction when there is no transfer of property. When reliance includes passing up other opportunities, an award of expectation damages is consistent with the

153. *See supra* notes 141-46 and accompanying text.

154. There are no relevant factual findings, and based on the reported facts one could argue either way. Walters v. Marathon Oil Company, 642 F.2d 1098 (7th Cir. 1981); Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948).

155. *See, e.g.*, Danca v. Taunton Sav. Bank, 385 Mass. 1, 429 N.E.2d 1129 (1982); Anzalone v. Strand, 14 Mass. App. Ct. 45, 436 N.W.2d 960 (1982); RESTATEMENT (SECOND) OF TORTS §§ 526 comment d, 549, 552B (1976).

156. Hessler Inc. v. Farrell, 226 A.2d 708 (Del. 1967); Chrysler Corp. v. Quimby, 51 Del. 264, 144 A.2d 123 (1958); Farm Crop Energy, Inc. v. Old Nat'l Bank, 38 Wash. App. 50, 658 P.2d 1097 (1984).

157. *See supra* notes 121-26 and accompanying text.

158. *See supra* notes 127-30 and accompanying text.

general purpose of tort remedies: compensating the victim for her actual losses.

III. CONCLUSION

In this article, I have described and explained the measure of damages in promissory estoppel cases, building on a prior article in which I described and explained the basis of liability in promissory estoppel cases.[159] In most promissory estoppel cases, the measure of damages, as well as the question of liability, can be understood on the basis of traditional contract principles. Even in donative cases, courts routinely afford full enforcement.[160] In commercial contract-based cases, expectation damages are similarly available provided that expectation damages would be available under normal limits on expectation damages.[161]

In the very few remaining cases, courts seem to use promissory estoppel to afford a tort remedy for misrepresentation. In these cases, courts award expectation damages when expectation damages can be calculated.[162] When the misrepresentation occurs early during negotiations, there is only one possible remedy (reliance damages), under either tort or contract damage rules.[163] When the misrepresentation occurs at a later point in negotiations and expectation damages can be calculated, courts award expectation damages;[164] such awards are neither clearly consistent nor clearly inconsistent with tort damage rules. Consistent with tort damage rules, courts awarding damages for intentional and deliberate misrepresentation in promissory estoppel cases have included a punitive element.[165]

159. *See* Barnett & Becker, *supra* note 15.
160. *See supra* notes 29-50 and accompanying text.
161. *See supra* notes 51-118 and accompanying text.
162. *See supra* notes 121-23 and accompanying text.
163. *See supra* notes 127-30 and accompanying text.
164. *See supra* notes 131-34 and accompanying text.
165. *See supra* notes 131-42 and accompanying text.