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**QUESTIONNAIRE II.A.4.**

**PROTECTING LEGITIMATE EXPECTATIONS AND ESTOPPEL**

**LA CONFIANCE LÉGITIME ET L'ESTOPPEL**

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**REPORT CONCERNING THE UNITED STATES OF AMERICA**

**by Gregory E. Maggs\***

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This report answers a set of questions posed by Professor Bénédicte Fauvarque Cosson, the general rapporteur on the subject of estoppel for the XVIIth Congress of the International Academy of Comparative Law, to be held in Utrecht, The Netherlands, on July 16-22, 2006.

## **I. How important is the concept of legitimate expectations or estoppel in your legal system?**

### *A. Definition of the concept and distinction from other concepts*

*Black's Law Dictionary* concisely defines estoppel as a “bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.”<sup>1</sup> The dictionary also separately defines dozens of different kinds of estoppel that the courts of law and equity traditionally have recognized.<sup>2</sup> As discussed below, some of

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<sup>1</sup>See BLACK'S LAW DICTIONARY 589 (Bryan A. Garner, ed., 8th ed. 2004).

<sup>2</sup>See, e.g., *id.* at 52, 142, 590-91 (defining adoption by estoppel, authority by estoppel, assignor estoppel, and many more types of estoppel).

these doctrines apply primarily to contract law. Others apply primarily to subjects other than contracts. And still others have a general application throughout the law.

Courts regularly conclude that parties in lawsuits are “estopped”—that is, involuntarily barred—from asserting claims and defenses, from seeking remedies, from presenting testimony or other evidence, or from making certain kinds of arguments.<sup>3</sup> The reasons for judicially imposed estoppel vary but most often the estoppel serves to prevent one party from taking a position that will cause an unjust harm to another.<sup>4</sup> For example, under the doctrine of “equitable estoppel,” a court might decide that a person who makes a statement on which someone else has relied is estopped from later taking a legal position that contradicts the statement.<sup>5</sup> The discussion below describes other typical instances of estoppel.

Estoppel differs from “waiver.” A person may lose rights and powers through either waiver or estoppel. But a person “waives” entitlements by choosing to give them up; by contrast, estoppel generally operates in an involuntary manner. As the Kentucky Supreme Court concisely has explained: “Waiver is bottomed on a voluntary and intentional relinquishment of a known, existing right or power. . . . Estoppel gives no effect to a presumed intention. . . . It offsets misleading conduct, acts, or representations which have induced a person entitled to rely thereon to change his position to his detriment.”<sup>6</sup>

Estoppel also differs from the canon of “reasonable expectations.” Many courts apply the canon of reasonable expectations when interpreting insurance policies. This canon, as the Alaska Supreme Court has neatly summarized it, says that the “the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”<sup>7</sup> In other words, courts sometimes will not follow the literal text of insurance contracts if that text differs from what policy holders expected.

Estoppel also differs from “unconscionability.” Both doctrines may prevent parties from asserting rights that they otherwise might have, but they operate in different ways. The doctrine of unconscionability says that a judge may refuse to enforce any contract or any term in a contract

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<sup>3</sup>*See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722 (U.S. 2002) (patent holder estopped from making claims regarding patent based on patent prosecution history); *In re Adoption of S.A.J.*, 838 A.2d 616 (Pa. 2003) (man who claimed he was not father of a child in child support proceedings was estopped from claiming he was the father of the child in attempting to block the child’s adoption).

<sup>4</sup>As one state supreme court has concisely stated: “Estoppel is a legal concept which bars a party from alleging or denying certain rights which might otherwise have existed because of the party’s voluntary conduct.” *Hoar v. Aetna Cas. and Sur. Co.*, 968 P.2d 1219, 1222 (Okla. 1998).

<sup>5</sup>*See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 894(1)(a) (1979) (“If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act that would not constitute a tort if the misrepresentation were true, the first person is not entitled . . . to maintain an action of tort against the other for the act . . .”).

<sup>6</sup>*Edmondson v. Pennsylvania Nat’l Mut. Cas. Ins.*, 781 S.W.2d 753, 755 (Ky. 1989).

<sup>7</sup>*State v. Underwriters at Lloyds, London*, 755 P.2d 396, 400 (Alaska 1988).

if the judge finds that the term was unconscionable at the time the contract was made.<sup>8</sup> Traditionally, courts have found terms unconscionable if they are oppressive or if they have resulted from unfair surprise.<sup>9</sup> Thus, a court might find unconscionable a term in a contract for the sale of a car that provides little or no remedy if some defect in the car causes a personal injury.<sup>10</sup>

And estoppel also differs from “public policy.” In the United States, courts may not enforce terms in a contract if those terms violate public policy.<sup>11</sup> The goal is to discourage certain kinds of conduct or to prevent parties from using courts for improper purposes.<sup>12</sup> For example, courts may refuse to enforce a promise to commit a tort or to pay for the commission of a tort.<sup>13</sup>

*B. What is the part played by the notion in your legal system?*

Judges created the numerous estoppel principles found in American law to prevent substantive and procedural injustices. Each principle accords with the general tendency of courts of equity to frown on inconsistency, self-serving conduct, and the passing of burdens from the persons who created them to those who did not. The use of estoppel principles is firmly established in the legal order; no one seriously contemplates doing away with what the United States Supreme Court has called the “venerable doctrine of estoppel.”<sup>14</sup>

The importance of estoppel can be seen in several ways. First, American law contains dozens of different estoppel principles.<sup>15</sup> Many of these principles are quite specialized. In patent law, for example, a specialized principle called “assignor estoppel” bars a person who has assigned a patent to an invention from later attacking the patent’s validity.<sup>16</sup> The large number of different estoppel principle suggests that the United States legal system has seen estoppel as a legal concept that is readily adaptable to many different contexts.

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<sup>8</sup>See RESTATEMENT (SECOND) CONTRACT § 208 (1991); U.C.C. § 2-302(1) (2002).

<sup>9</sup>See U.C.C. § 3-302 cmt. 1.

<sup>10</sup>See, e.g., *Matthews v. Ford Motor Co.*, 479 F.2d 399, 400 (4th Cir. 1973).

<sup>11</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 178 (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

<sup>12</sup>See *id.* ch. 8, intro note.

<sup>13</sup>*Id.* § 192.

<sup>14</sup>*Lear, Inc. v. Adkins*, 395 U.S. 653, 674 (1969).

<sup>15</sup>See *supra* note 2.

<sup>16</sup>See *Westinghouse Co. v. Formica Co.*, 266 U.S. 342, 349 (1924) (creating the doctrine). This rule serves an easily understood purpose. Suppose an inventor obtains a patent to an invention and then sells the patent to someone else. The inventor should not later have the ability to compete with the buyer in making the invention by claiming that the patent lacks validity. By selling the patent, the inventor represented the validity of the patent, and should have to live with that representation rather than cause the buyer to suffer a forfeiture.

Second, a very large number of cases concern estoppel. As addressed further below, one very commonly asserted estoppel doctrine may prevent a defendant from asserting a statute of limitations as a defense. (A statute of limitation sets a period of time, such as 3 years, in which a plaintiff has to assert a legal claim in court.) A computer search reveals that more than 10,000 judicial opinions have cited this estoppel doctrine since 1990.<sup>17</sup> So parties clearly find estoppel an important tool in litigation.

Third, courts use principles of estoppel to affect the application not just of common law rules, but also of statutes. This is significant because the United States operates under a general principle of legislative supremacy. This principle, among other things, says that statutes generally take precedent over judicially created doctrines. For example, legislatures may use enactments to alter the common law rules that traditionally have governed contracts.<sup>18</sup>

Yet, despite this general principle of legislative supremacy, courts regularly use principles of estoppel to create, in effect, unwritten exceptions to statutes. For example, they may prevent defendants from asserting their rights under the statute of limitations.<sup>19</sup> Recent scholarship has examined this tension between estoppel and legislative supremacy.<sup>20</sup>

C. *What is the part played by such a concept in contract law?*

As Part II below indicates, several different estoppel principles play a role in contract law. These principles address everything from the formation of contracts, to their interpretation, to their breach, and to their enforcement. But the various principles all have two basic factors in common.

First, they have a common origin. Some estoppel principles, like equitable estoppel, have existed for hundreds of years,<sup>21</sup> while other principles, like promissory estoppel, came fully into being only during the 20th century.<sup>22</sup> But almost without exception, judges rather than legislatures created all of the estoppel principles that affect contract law.

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<sup>17</sup>A computer search for “date(>1/1/1990) and estoppel and ‘statute of limitations’” in WestLaw’s ALLCASES database yields more than 10,000 cases.

<sup>18</sup>See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 444-45 & n. 84 (2005); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEORGETOWN L.J. 281, 283-94 (1989).

<sup>19</sup>See *infra* part II.B.3. for more detail on this point.

<sup>20</sup>See Gregory E. Maggs, *Textualism and Estoppel*, 54 AM. J. OF COMP. L. (forthcoming 2006).

<sup>21</sup>EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND, OR, A COMMENTARIE UPON LITTLETON § 667 (1628) (describing an estoppel where “a man’s owne Act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth”) (quoted in David Snyder, *Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction*, 15 ARIZ. J. INT’L & COMP. L. 695, 751 (1998)).

<sup>22</sup>See Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 271-297 (1996) (thoroughly describing the doctrinal history of promissory estoppel).

Second, all of the estoppel principles applicable to contract law strive to accomplish the same sort of goals. They attempt to prevent one party (usually the defendant) from using a technical legal argument to create an injustice where that party has taken some action that has harmed the other party. In general, they make it easier for the plaintiff to enforce a contract, and more difficult for the defendant to block enforcement.

## **II. The various applications of the concept of legitimate expectations or estoppel in contract law**

### *A. Identification of the various general applications in contract law (from the very beginning to the very end of the contractual process)*

1. Would it be possible, on the basis of legitimate expectation or estoppel, to force a person to enter into a contract when this person did not intend to do so, assuming that the obligation is not derived from the contract itself but from the relational background of what took place (“déclaration de volonté sans volonté de déclarer” ou “Willenserklärung ohne Erklärungswille”; règle d’imputation en droit suisse)?

As discussed more fully below, courts in the United States have used estoppel to make promises enforceable despite non-compliance with the formal requirements for enforcement. Among other things, they have estopped defendants from asserting that a lack of an effective offer and acceptance, the lack of a writing, or the lack of certainty can prevent the enforcement of a promise. But have the courts gone one step further, and used estoppel to create contract liability where the defendant has not made a promise?

The answer to this question is somewhat complicated. It is probably fair to say that, to date, courts in the United States have not use estoppel in so extreme a manner. A defendant incurs contractual liability only by making a promise,<sup>23</sup> and judges have not used estoppel to overcome this general rule. But this is not the complete story. Courts have found promises to exist in creative ways and then used estoppel or similar principles to enforce them.

First, and most commonly, courts sometimes find that a defendant made an implied promise. An implied promise is one that is not made expressly, but which can be inferred from the defendant’s conduct or other circumstances.<sup>24</sup> For example, suppose that a customer enters a barber shop and sits in the barber’s chair to receive a haircut. Even if the customer does not say anything, a reasonable observer would conclude that the customer implicitly has promised to pay for the haircut. And absent some defense, a court would conclude that the customer was liable for breach of contract if he did not pay.

Courts in the United States would not analyze this example in terms of estoppel. But functionally, the finding of an implied promise in the example would not differ much from a

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<sup>23</sup>The Restatement, in fact, defines a contract simply as a “promise or a set of promises for the breach of which the law gives a remedy . . . .”). RESTATEMENT (SECOND) OF CONTRACTS § 1 (1982).

<sup>24</sup>*See id.* § 4 (“A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.”).

finding of estoppel. The result would be the same if a court were to say that the customer should be estopped to deny that he had promised to pay for the haircut because the barber reasonably had inferred that the customer would pay. Thus, even though courts have not extended the doctrine of estoppel so far, they have accomplished the same result by other means.

Second, when two parties attempt to negotiate a contract, even if they never succeed in reaching the ultimate bargain that they desired, a court might find that they made express or implied assurances during negotiations. And sometimes a court might enforce these assurances. For example, in *Hoffman v. Red Owl Stores*,<sup>25</sup> a man named Hoffman wanted to enter into a franchise agreement with a grocery store chain. The grocery store chain made vague assurances to Hoffman about his ability to obtain a franchise agreement. In reliance on these assurances, Hoffman took various actions, including selling his bakery and moving his family.<sup>26</sup> But the parties never succeeded in concluding a franchise agreement. Eventually, Hoffman sued the grocery chain, claiming that he had relied on the assurances in various ways.<sup>27</sup> The Wisconsin Supreme Court held the franchise chain liable for breaching these assurances, citing principles of estoppel, and required it to pay for Hoffman's expenses in reliance.<sup>28</sup> So even though the court did not use estoppel to force the grocery chain to enter into a franchise agreement, it found another way to impose liability.

Third, in a related manner, even if two parties negotiate but never succeed in reaching an agreement, a court might find liability based on a breach of an enforceable promise to negotiate in good faith. For example, in *Channel Home Centers, Div. of Grace Retail Corp. v. Grossman*,<sup>29</sup> a landlord began discussions with a prospective tenant over a lease in a shopping center. At one point, the parties signed a letter of intent, saying among other things that they would continue to negotiate until they reached an agreement.<sup>30</sup> When the shopping center abruptly leased the property to another store and broke off negotiations, the prospective tenant sued. Although the court recognized that the parties had not actually formed a lease, it concluded that the prospective tenant could enforce the shopping center's promise to negotiate.<sup>31</sup> Thus, although the court did not actually use estoppel to force the parties into a lease, it protected the prospective tenant's reliance interest in another way.

Fourth, in some instances, a court may find that a defendant has liability not based on contract, but instead based on the alternative theory of restitution. As a general matter, a "person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>32</sup> For example, in the well-known case of *Cotnam v. Wisdom*,<sup>33</sup> a man was thrown from

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<sup>25</sup>133 N.W.2d 267 (Wis. 1965).

<sup>26</sup>*See id.*

<sup>27</sup>*See id.* at 274.

<sup>28</sup>*Id.* at 276-77.

<sup>29</sup>795 F.2d 291 (3d Cir. 1986).

<sup>30</sup>*See id.* at 293.

<sup>31</sup>*See id.* at 299.

<sup>32</sup>RESTATEMENT OF RESTITUTION § 1 (1937).

<sup>33</sup>104 S.W. 164 (Ark. 1907).

a street car and rendered unconscious. Bystanders summoned a physician to the scene, who administered medical care. When the physician was not paid, he brought a lawsuit. The court held that the physician was entitled to a reasonable payment for his services. Even though the accident victim could not have formed an actual contract, the court concluded that justice required payment for the services under a theory of quasi-contract (an old-fashioned name for “restitution”).<sup>34</sup> Although doctrinally, liability based on restitution differs from liability based on estoppel, the two theories often resemble each other. This case did not involve estoppel, but in the end the accident victim was involuntarily forced to pay for services that he had not agreed to pay for.

## 2. Contractual negotiations

Estoppel may play a role in the negotiation and formation of contracts. Under American contract law, a promise is enforceable only if there is a “basis for enforcement.”<sup>35</sup> The most common basis for enforcement is consideration.<sup>36</sup> Consideration for a promise is something bargained for (i.e., sought and given) in exchange for that promise.<sup>37</sup> For example, suppose that a painter and a homeowner agree that the painter will paint the homeowner’s house for \$10,000. The consideration for the painter’s promise to paint the house is \$10,000 because that payment was exchanged for the promise.

If the plaintiff alleges that a promise is enforceable on the basis of consideration because there was a bargained for exchange, the plaintiff has to show that the parties in fact made a bargain.<sup>38</sup> To prove the existence of a bargain, the plaintiff typically shows that one party made an “offer” and that other party “accepted” that offer.<sup>39</sup> An offer is a manifestation of willingness to enter into a bargain on particular terms, conditioned on the other party’s consent.<sup>40</sup> An acceptance is an expression of consent to the offer.<sup>41</sup>

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<sup>34</sup>*Id.* at 165.

<sup>35</sup>E. ALLAN FARNSWORTH *ET AL.*, *CONTRACTS: CASES & MATERIALS* 22 (6th ed. 2001).

<sup>36</sup>E. ALLAN FARNSWORTH, *CONTRACTS* § 2.2, at 47 (4th ed. 2004). Many of the cases cited in this report are discussed in this treatise.

<sup>37</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (“(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”).

<sup>38</sup>*See id.* § 17 (Except when enforced on a basis other than consideration, “the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

<sup>39</sup>*See id.* § 22(1) (“The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.”).

<sup>40</sup>*See id.* § 24.

<sup>41</sup>*See id.* § 50(1).

Under American law, a person who makes an offer (the “offeror”) ordinarily may revoke the offer at any time.<sup>42</sup> Unlike in other legal systems, the offeror generally does not have to keep the offer open a reasonable time.<sup>43</sup> But this general rule is subject to exceptions.

For example, if the offeror makes a binding promise to keep an offer open (traditionally called an “option contract”) for a particular period, the offeror cannot revoke the offer prior to the expiration of that period.<sup>44</sup> For example, suppose that a seller offers to sell his home to a buyer for \$250,000. Ordinarily, the seller would have the freedom to revoke the offer at any time. But suppose that the seller and the buyer agreed that the buyer would pay the seller \$500 in consideration for the seller’s promise to keep the offer open for a week. In that case, because the promise to keep the offer open has a basis for enforcement (i.e., the \$500), the seller could not revoke the offer prior to the end of the week.

This example does not involve estoppel, but estoppel could play a role on slightly different facts. For example, suppose that the seller offers to sell his house for \$250,000 and then gratuitously promises to keep the offer open for a week. Ordinarily, a gratuitous promise is not enforceable because it lacks consideration. But if the buyer relied on the seller’s promise to keep the offer open, the doctrine of “promissory estoppel” could make the promise enforceable even though it lacks consideration. This doctrine, which is discussed more fully in the next section of this report, makes certain promises enforceable if they induce the promisee to take actions in reliance.<sup>45</sup> And it applies to all kinds of promises, including promises to keep an offer open.<sup>46</sup>

A further modification of the facts illustrates another, more extreme, example of how estoppel may apply to negotiations. Suppose that the seller in the previous hypothetical offers to sell the house for \$250,000 and suppose further that the buyer reasonably relies on this offer even though the seller has not promised to keep the offer open. Traditionally, this reliance on an offer, as opposed to reliance on a promise to keep an offer open, would not suffice to make an offer irrevocable.<sup>47</sup> On the contrary, as mentioned previously, offers generally are revocable at any time unless the seller has made a binding promise to keep them open.<sup>48</sup>

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<sup>42</sup>*See id.* § 42 (“An offeree’s power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.”).

<sup>43</sup>*See* UNIDROIT Principles of International Commercial Contracts art. 2.1.4(2)(a) (2004); United Nations Convention on Contracts for the International Sale of Goods art. 16(2)(a) (1980).

<sup>44</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 25 (defining these kinds of contracts as “option” contracts).

<sup>45</sup>*See id.* § 90(1) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

<sup>46</sup>*See, e.g.,* Taylor v. Eagle Ridge Developers, 29 S.W.3d 767, 770 (Ark. App. 2000) (enforcing a seller’s gratuitous promise to keep an offer open on the basis of promissory estoppel because the buyer relied on the promise).

<sup>47</sup>*See* FARNSWORTH, *supra* note 36, § 3.25, at 199.

<sup>48</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 42.

But in some jurisdictions, courts might use a new form estoppel to prevent the seller from revoking an offer even though the seller did not promise to keep the offer open. They might follow a rule from the *Restatement (Second) of the Law of Contracts*, which says: “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”<sup>49</sup>

The classic example is *Drennan v. Star Paving*.<sup>50</sup> In that case, a general contractor was bidding to construct a new school. A subcontractor made an offer to the general contractor to do the paving work. The general contractor relied on this offer in preparing its bid, even though the subcontractor had not promised to keep the offer open. After the general contractor submitted the bid and obtained the contract to build the school, the subcontractor attempted to withdraw its offer, and the general contractor could not find anyone else to do the work for the same price. The general contractor then sued the subcontractor for breach of contract.

Most courts would hold that the subcontractor had the right to revoke the offer at any time before its acceptance because the subcontractor had not made a binding promise to keep it open.<sup>51</sup> They would reason that, because the subcontractor had not promised to keep the offer open, no option contract existed. But the California Supreme Court rejected this position. It held that an offeror cannot revoke an offer if the offeror knew that the offeree would rely on it.<sup>52</sup> A small number of other jurisdictions would follow this approach.<sup>53</sup>

### 3. Validity

#### a. *Basis for Enforcement*

As explained above, courts in the United States generally will not enforce a promise unless the promise has a basis for enforcement.<sup>54</sup> A basis for enforcement is something showing that a promise belongs to a class of promises that the law considers worthy of legal recognition.<sup>55</sup> The requirement of a basis for enforcement is controversial from a policy perspective. But possible justifications for enforcing only promises that have a basis for enforcement (instead of simply enforcing all promises) include the argument that certain kinds of promises lack sufficient societal importance to justify the burden of enforcement and the argument that certain kinds of promises are often falsely alleged and therefore should not be enforced.

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<sup>49</sup>*Id.* § 87(2).

<sup>50</sup>333 P.2d 757 (Cal. 1958) (in banc). For further discussion of this case, see Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 520-21 (1988).

<sup>51</sup>See FARNSWORTH, *supra* note 36, § 3.25, at 199 (arguing that the California Supreme Court “made a dramatic departure from this traditional analysis” in *Drennan*).

<sup>52</sup>333 P.2d at 760.

<sup>53</sup>See Maggs, *supra* note 50, at 512.

<sup>54</sup>See *supra* part II.A.2.

<sup>55</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 72 cmts. b & c (describing theories that might explain why the law recognizes consideration as a basis for enforcement).

“Consideration” long has been the most commonly asserted basis for enforcement.<sup>56</sup> Consideration is something bargained for (i.e., sought and given) in exchange for the promise.<sup>57</sup> For example, in a contract to paint a house, the promise to pay the painter is consideration for the painter’s promise to do the painting. In fact, until the 20th century, the law formally recognized only a few kinds of promises that could be enforced without consideration. For instance, courts would enforce promises made under seal (written, signed, and sealed with wax).<sup>58</sup> They also would enforce promises made in recognition of certain so-called “moral” obligations, like new promises to pay debts previously discharged by the statute of limitations or previously discharged in bankruptcy.<sup>59</sup> As a formal matter, courts did not recognize reliance as a basis for enforcement.<sup>60</sup>

Yet, despite what the legal doctrines said, 20th century observers recognized that courts in fact were enforcing contracts that did not have consideration and that did not fit into any of the recognized exceptions when the plaintiff reasonably had relied on the defendant’s promise.<sup>61</sup> As a result, when the American Law Institute published an influential treatise called the *Restatement of the Law of Contracts* in 1932, they included a rule recognizing reliance as an alternative basis for enforcement.<sup>62</sup> This rule, as it now appears in § 90 of the updated *Restatement (Second) of the Law of Contracts*, says:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>63</sup>

Restatement § 90 commonly is said to state the rule of “promissory estoppel.” The typically-given justification for this appellation is that the defendant, having made a promise on which the plaintiff relied, is estopped to deny the existence of a basis for enforcement (such as consideration). But an observer could just as easily say that § 90 simply recognizes reliance as an alternative basis for enforcement — a substitute for consideration.<sup>64</sup>

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<sup>56</sup>See FARNSWORTH, *supra* note 36, § 1.6, at 18.

<sup>57</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 71.

<sup>58</sup>See *id.* § 95(1) (“a promise is binding without consideration if (a) it is in writing and sealed” and certain other requirements are met).

<sup>59</sup>See *id.* § 82(1) (statute of limitations); *id.* § 83 (bankruptcy).

<sup>60</sup>See FARNSWORTH, *supra* note 36, § 2.19, at 90-91.

<sup>61</sup>See, e.g., *Ricketts v. Scothorn*, 77 N.W. 365, 367 (Neb. 1898) (enforcing a promise of a grandfather to pay his granddaughter a sum of money, with interest, after the granddaughter quit her job in reliance on the promise).

<sup>62</sup>See FARNSWORTH, *supra* note 36, § 2.19, at 93.

<sup>63</sup>RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

<sup>64</sup>See *id.* ch. 5, topic 2, intro. note (describing reliance as an alternative basis for enforcement).

Scholarly studies have concluded that the courts in nearly all of the American states have adopted the doctrine of promissory estoppel as expressed in § 90. Many hundreds of cases cite the provision each year.<sup>65</sup> But scholars nonetheless have questioned the actual importance of the doctrine of promissory estoppel. Reviewing empirical evidence, they have repeatedly concluded that most plaintiffs who ask courts to enforce promises based on the doctrine do not prevail because they cannot make the necessary showing.<sup>66</sup> Consideration therefore remains the dominant basis of enforcement.<sup>67</sup>

b. *Statute of Frauds*

All American jurisdictions have legislation saying that certain classes of promises are not enforceable unless evidenced by a signed writing.<sup>68</sup> Any statute of this kind is generically called a “statute of frauds,” after the famous “Act for the Prevention of Frauds and Perjuries” enacted by Parliament in 1677.<sup>69</sup> In most states, statutes of frauds cover promises to buy or sell goods for a price of \$500 or more,<sup>70</sup> promises that cannot possibly be completed within one year,<sup>71</sup> promises to buy or sell land,<sup>72</sup> and so forth.<sup>73</sup>

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<sup>65</sup>A computer search of Westlaw’s “allcases” database reveals that 677 case reports mentioned “promissory estoppel” in 2004.

<sup>66</sup>See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998); Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943(1997); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985). *But see* Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or is Promissory Estoppel Really as Unsuccessful as Scholars Say it is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 542 (2002) (arguing that promissory estoppel claims “succeed at significant rates” when “demonstrably weak claims” are not considered).

<sup>67</sup>See FARNSWORTH, *supra* note 36, § 1.6, at 18.

<sup>68</sup>See RESTATEMENT (SECOND) OF CONTRACTS ch. 5, stat. note (listing examples of these statutes from all of the states).

<sup>69</sup>29 Charles II, c. 3 (1677).

<sup>70</sup>See U.C.C. § 2-201(1) (2002). In 2003, the National Conference of Commissioners on Uniform State Laws and the American Law Institute recommended raising this figure to \$5000, but no state has yet adopted this revision. *See id.* § 2-201(1) (2003).

<sup>71</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 130(1) (“Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.”).

<sup>72</sup>See *id.* § 125 (“(1) A promise to transfer to any person any interest in land is within the Statute of Frauds. (2) A promise to buy any interest in land is within the Statute of Frauds, irrespective of the person to whom the transfer is to be made.”).

<sup>73</sup>See *id.* ch. 5, stat. note (listing classes of promises typically covered).

Here is an example: Suppose that the buyer claims that a seller orally promised to sell a machine to a buyer for \$6000. The statute of frauds requires a signed writing for this sale of goods because the price exceeds \$500.<sup>74</sup> So if the seller never signs a writing showing that the promise was made, a court would not allow the buyer to enforce the seller's promise (unless some exception applies).<sup>75</sup>

The goal of the statute of frauds is to prevent plaintiffs from falsely alleging the existence of promises that were not in fact made.<sup>76</sup> The usual justification given for this rule is that the creation of a signed writing will help to establish that the defendant actually made the promise. But sometimes the statute of frauds has a regrettable unintended consequence. In particular, the statute of frauds may prevent the enforcement of oral promises that actually were made but which were never memorialized in a writing. As one judge has put it, the statute of frauds unfortunately may cause "honest men [to] lose the benefit of their bargains because they neglected to reduce them to writing."<sup>77</sup>

Courts have used various doctrines to address this unintended result. Many of these doctrines do not involve estoppel,<sup>78</sup> but two of them do. The first is the traditional and widely accepted doctrine of "equitable estoppel." This doctrine, which applies in many contexts, prevents a speaker from using false statements to take advantage of another party.<sup>79</sup> Under this doctrine, if a speaker makes a statement upon which another party reasonably relies, the speaker is subsequently estopped from contradicting his statement.<sup>80</sup>

Courts often have used the doctrine of "equitable estoppel" to bar a defendant from denying the existence of a signed writing. For example, suppose that the buyer makes an offer to buy land from the seller, and the seller orally accepts the offer. The seller's promise falls within the

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<sup>74</sup>See U.C.C. § 2-201(1) (2002).

<sup>75</sup>See *id.*

<sup>76</sup>See RESTATEMENT (SECOND) OF CONTRACTS ch. 5, intro. note.

<sup>77</sup>*Lovely v. Dierkes*, 347 N.W.2d 752, 755 (Mich. App. 1984).

<sup>78</sup>For example, the courts creatively have interpreted the marriage provision not to apply to contracts that consist only of mutual promises to marry each other. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 124 & cmt. a. But note that some judicially-created exceptions are very similar to estoppel but are not called "estoppel." See, e.g., *id.* § 128 ("A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.")

<sup>79</sup>See BLACK'S LAW DICTIONARY, *supra* note 1, at 590.

<sup>80</sup>The elements of equitable estoppel typically are listed as follows: "(1) there was a false representation or concealment of material facts, (2) the representation was known to be false by the party making it, or the party was negligent in not knowing its falsity, (3) it was believed to be true by the person to whom it was made, (4) the party making the representation intended that it be acted on, or the person acting on it was justified in assuming this intent, and (5) the party asserting estoppel acted on the representation in a way that will result in substantial prejudice unless the claim of estoppel succeeds." *Id.*

typical statute of frauds concerning the sale of real property. So unless the seller signed some writing evidencing the promise to sell, the buyer could not force the seller to keep the promise.

But change the facts slightly and suppose that the seller had told the buyer that “I have signed the offer that you sent me.” If the buyer relies on the seller’s statement, the doctrine of equitable estoppel would prevent the seller from arguing in court that no signed writing exists, even if the seller had not in fact signed any document.<sup>81</sup> As a result, the seller could not assert the statute of frauds; for the purpose of the case, the court would conclude that a signed writing satisfying the statute of frauds does exist. By a slight extension of this example, most courts also would hold the statute of frauds satisfied if the seller had told the buyer that no writing was required or that he or she would not rely on the statute of frauds.<sup>82</sup>

The second estoppel doctrine used to overcome unintended applications of the statute of frauds is promissory estoppel. Some courts hold that a plaintiff’s reliance on the defendant’s oral promise is enough to make the promise enforceable, notwithstanding the statute of frauds. The *Restatement (Second) of the Law of Contracts* expresses this rule as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise.<sup>83</sup>

Here is an example. Again suppose that the seller promises to sell land to the buyer but does not sign a writing to that effect. But now assume that the seller never makes any statement indicating the existence of a signed writing. In this situation, the statute of frauds ordinarily would bar enforcement of the promise; the doctrine of equitable estoppel would not prevent the statute of frauds from applying because the seller never said a writing existed.<sup>84</sup> Yet, some courts would hold that the plaintiff’s reliance on the promise itself makes the promise enforceable, notwithstanding the statute of frauds.

This application of promissory estoppel is controversial. Some courts have reasoned that, while estoppel may prevent a party from denying the existence of certain facts, the doctrine cannot create exceptions to statutes. For example, in *C.G. Campbell & Sons, Inc. v. Comdeq Corp.*,<sup>85</sup> the court considered whether a plaintiff could use promissory estoppel to overcome the statute of frauds in Uniform Commercial Code § 2-201. The court observed that § 2-201 lists

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<sup>81</sup>*See* *Monarco v. Lo Greco*, 220 P.2d 737, 740 (Cal. 1950) (in bank) (describing how equitable “estoppel to plead the statute of frauds can . . . arise when there have been representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied upon as a defense”).

<sup>82</sup>*See id.*

<sup>83</sup>RESTATEMENT (SECOND) OF CONTRACTS § 139(1).

<sup>84</sup>*See, e.g.,* *McIntosh v. Murphy*, 469 P.2d 177, 181 (Hawaii 1977); “Moore” *Burger, Inc. v. Phillips Petroleum Company*, 492 S.W.2d 934, 940 (Tex. 1972).

<sup>85</sup>586 S.W.2d 40 (Ky. Ct. App. 1979).

several exceptions to the writing requirement, but does not have one related to reliance.<sup>86</sup> So the court concluded that the legislature did not desire additional exceptions.<sup>87</sup>

At this time, generalizations about whether promissory estoppel can overcome the statute of frauds are not possible. The answer depends on the particular jurisdiction and the particular statute of frauds at issue. Various journal articles recently have reported the results of these specific examinations.<sup>88</sup>

### c. *Indefiniteness*

American contract law has a requirement of “definiteness” (sometimes called “certainty”). This requirement says that, unless the terms of an offer are reasonably certain, the offer cannot be accepted, and any purported acceptance of the offer is ineffective.<sup>89</sup> The terms of an offer lack reasonable certainty if a court would have no basis for determining whether a violation of the terms had occurred or what remedy to give for a breach.<sup>90</sup>

For example, in the noted case of *Varney v. Ditmars*, an employer promised to pay an employee “a fair share of the profits” if the employee would work additional hours.<sup>91</sup> Although the employee accepted—or attempted to accept this offer—the court later held that the offer was not enforceable because it lacked definiteness.<sup>92</sup> The court said that it had no basis for judging what would constitute a “fair share” of the profits; it could have been, in the words of the courts, anything from “a nominal sum to a material part.”<sup>93</sup>

But a court may use estoppel to overcome the requirement of definiteness. In *Hoffman v. Red Owl Stores*,<sup>94</sup> a case described above, a grocery store chain made vague assurances to a prospective franchisee named Hoffman. When no franchise agreement resulted, Hoffman sued the chain, claiming that he had relied on the assurances in various ways. The chain argued that

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<sup>86</sup>*See id.* at 41. Section § 2-201(2) creates an exception for a confirmation sent from one merchant to another; section 2-201(3) establishes additional exceptions for specially manufactured good, admissions, and goods or payment accepted. *See* U.C.C. § 2-201(2) & (3).

<sup>87</sup>*See* 586 S.W.2d at 41.

<sup>88</sup>*See, e.g.,* Philip H. Wile *et al.*, *Estoppel to Avoid the California Statute of Frauds*, 35 MCGEORGE L. REV. 319 (2004); Henry F. Luepke III, *Promissory Estoppel and the Statute of Frauds in Missouri*, 58 J. MO. B. 132 (2002); David J. Gass, *Michigan’s UCC Statute of Frauds and Promissory Estoppel*, 74 MICH. B.J. 524 (1995).

<sup>89</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (“Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.”)

<sup>90</sup>*See id.* § 33(2).

<sup>91</sup>111 N.E. 822, 823 (N.Y. 1916).

<sup>92</sup>*See id.* at 822.

<sup>93</sup>*Id.*

<sup>94</sup>133 N.W.2d 267 (1965).

its assurances could not be enforced under contract law because they were too uncertain.<sup>95</sup> The court fully agreed that contracts ordinarily require definiteness,<sup>96</sup> but it enforced the assurances anyway. The court explained, simply, “this is not a breach of contract action”;<sup>97</sup> instead, according to the court, Hoffman was bringing an action based on promissory estoppel. And the court said the same requirements of definiteness did not apply.<sup>98</sup>

#### 4. Interpretation of contract

##### a. *Construction against the Draftsman*

In the United States, when interpreting a written contract, many courts follow the simply stated *contra proferentem* canon of construction. This canon says that if a disputed term in a contract has more than one reasonable meaning, the court should choose the meaning that disfavors the party who drafted the contract and favors the other party.<sup>99</sup> For example, in *Motor Coils Manufacturing Co. v. American Insurance Co.*,<sup>100</sup> an insurance company agreed to insure vehicles “operated by” the insured.<sup>101</sup> A question arose whether the term “operated by” included rented trucks driven by rented drivers. The insurer argued that it did not, while the insured argued the opposite. The court found both interpretations to be reasonable.<sup>102</sup> But because the insurer had drafted the contract, the court interpreted the term to favor the insured.<sup>103</sup>

American courts do not use the term “estoppel” to describe or explain this canon of construction. But the canon appears to rest on policies very similar to those underlying estoppel doctrines. The commentary to the *Restatement (Second) of the Law of Contracts* explains:

Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what

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<sup>95</sup>*See id.* at 275.

<sup>96</sup>*See id.*

<sup>97</sup>*Id.* at 276.

<sup>98</sup>*See id.* at 275 (“If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants’ instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.”).

<sup>99</sup>*See* RESTATEMENT (SECOND) CONTRACTS § 206 (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

<sup>100</sup>454 A.2d 1044 (Pa. Super. 1982).

<sup>101</sup>*Id.* at 1046.

<sup>102</sup>*See id.* at 1048.

<sup>103</sup>*See id.*

meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.<sup>104</sup>

Although this explanation does not use the term “estoppel,” the principle is very similar. A court might just as easily say that the draftsman, having introduced an ambiguity into the contract, is estopped to contest a reasonable meaning asserted by the other party.

Hundreds of cases have cited and followed the *contra proferentem* canon of construction.<sup>105</sup> But some courts have questioned its wisdom, noting that the rule comes at a cost. For example, in *Hall v. Life Insurance Company of North America*,<sup>106</sup> a woman became ill and could not work. She had a disability insurance policy through her employer and another disability insurance policy through a professional association. The policy that she had through her employer said that she would receive a percentage of her salary minus her other “benefits,” which it defined to include payments under “group” insurance policies.<sup>107</sup> Based on this provision, the insurer subtracted the coverage she had from her other insurance policy. The insured argued against this interpretation, contending that the term “group” was ambiguous and that the court should interpret the term not to cover her other policy based on the *contra proferentem* canon.<sup>108</sup>

The court disagreed. In a thoughtful opinion, Judge Frank Easterbrook explained the problem of using the *contra proferentem* canon whenever any ambiguity exists. He said:

English does not contain words for all complex economic arrangements; whenever the language lacks a one-to-one mapping of words to ideas (or words to things) there is a potential for ambiguity and confusion. This potential is not enough to justify a pro-insured decision in every case, however; if it did, the cost of insurance would skyrocket and policies would become even longer, more complex, and less digestible, as insurers tried to define every term (and then define the words used in the definitions).<sup>109</sup>

In other words, the canon not only gives the drafter of a contract the intended incentive to reduce ambiguities, but also creates an unintended incentive to make contracts long and complicated.

#### b. *Reasonable Expectations*

In the area of insurance contracts, many courts apply the canon of “reasonable expectations” when interpreting insurance policies.<sup>110</sup> But these courts do not fully agree upon what the

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<sup>104</sup>RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a.

<sup>105</sup>Westlaw’s KeyCite tool lists more than 200 cases that have cited § 206 of the *Restatement (Second) of the Law of Contracts*. Many more surely apply the canon, citing precedent or other sources.

<sup>106</sup>317 F.3d 773 (7th Cir. 2003).

<sup>107</sup>*Id.* at 775.

<sup>108</sup>*See id.* at 776.

<sup>109</sup>*Id.*

<sup>110</sup>*See supra* part I.A. (distinguishing reasonable expectations from estoppel).

doctrine means.<sup>111</sup> Some courts simply equate the reasonable expectations canon with the *contra proferentem* canon; they say that it does nothing more than resolve ambiguities in favor of the insured.<sup>112</sup> But in most jurisdictions, the reasonable expectations canon goes much further: indeed, it says that “the reasonable expectations of the insured should be honored even if those expectations are *unambiguously contradicted* by fine-print provisions in the policy.”<sup>113</sup>

The reasonable expectations canon sometimes appears to rest on principles of estoppel. Professor Robert Jerry, for instance, has argued that this is true “[w]hen the insured’s expectation comes from the insurer’s invitation to the insured to place trust in the insurer that the insured’s coverage needs will be satisfactorily met.” He cites *Barth v. Coleman* as an example.<sup>114</sup> In that case, the owner of a bar bought insurance to cover his establishment. Later, he made a claim for liability arising out of a fistfight that took place on the premises.<sup>115</sup> Although the insurance policy’s text did not provide for such coverage, the court held coverage existed based on the reasonable expectations doctrine.<sup>116</sup> The owner of the bar had relied on his broker to select the proper policy, and “[t]hroughout this transaction, [he] was left uninformed about the nature of what he was purchasing, how the policy was being procured, and which company he was purchasing the policy from.”<sup>117</sup>

But the reasonable expectations canon does not always rest on principles of estoppel. On the contrary, the doctrine finds support in other contexts in principles like mistake, misrepresentation, and unconscionability.<sup>118</sup> In the end, the doctrine necessarily involves a tradeoff between certainty (i.e., the insurers knowing exactly what risks they are covering) and fairness (i.e.,

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<sup>111</sup>See ROBERT H. JERRY, UNDERSTANDING INSURANCE LAW § 25D, at 141-147 (2d ed. 1996) (describing the different approaches that courts use).

<sup>112</sup>See 43 AM. JUR. 2D *Insurance* § 307 (2004) (discussing the doctrine in general).

<sup>113</sup>Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 Mich. L. Rev. 531, 532 (1996).

<sup>114</sup>878 P.2d 319 (N.M. 1994).

<sup>115</sup>See *id.* at 322-23.

<sup>116</sup>*Id.* at 323.

<sup>117</sup>*Id.* at 324.

<sup>118</sup>Professor Jerry comprehensively explains: “When the insured’s expectation is created by some kind of ambiguity or vagueness in the policy’s language, syntax, or organization, something like the doctrine of *contra proferentem* . . . is operating. When the insured’s expectation comes from some assertion by an agent of the insurer or through the insurer’s advertising, something like the doctrine of misrepresentation or deceit is operating. When the insured’s expectation is grounded in an assumption that coverage for the loss in question would exist given the amount of premium charged, something like the doctrine of unconscionability is operating. When the insured’s expectation is part and parcel of the insured’s sudden surprise and dismay at the absence of coverage, something like the doctrine of mistake is operating.” JERRY, *supra* note 111, § 25D at 144-45 (footnotes omitted).

providing coverage to the insured who, for innocent reasons, may not have understood their coverage).<sup>119</sup>

c. *Misunderstandings*

Parties sometimes seek to introduce extrinsic evidence (traditionally called “parol evidence”) to prove the meaning of the terms of a written contract. For example, they may call the persons who drafted the contract to testify about what they intended the contract to mean. Or they may call experts to explain the usage of words in the particular trade that the contract concerns.

When parties offer to introduce testimony about the meaning of terms in a contract, courts must confront two issues. First, they must decide whether to consider the extrinsic evidence at all. In most jurisdictions, courts will ignore extrinsic evidence if the written contract has a “plain meaning.”<sup>120</sup> In other jurisdictions, courts may consider extrinsic evidence even if the contract does not appear ambiguous.<sup>121</sup>

Second, if a court decides to consider extrinsic evidence, the court next must determine what meaning this extrinsic evidence shows. Sometimes this inquiry is not difficult; if the intrinsic evidence shows that both parties agreed that a term had a particular meaning, the court will interpret that term in accordance with that meaning.<sup>122</sup> But what if the extrinsic evidence shows that two parties attached different meanings to a term? In that case, there has been a “misunderstanding” and the court will look to see whether one party is at fault for this misunderstanding.

The exact statement of the rule regarding misunderstandings is complicated.<sup>123</sup> But a simple example shows how it works. Suppose that there are two parties, A and B, and that they disagree about the meaning of the word “light” in a contract. Party A understood the term to mean light in weight while party B understood it to mean light in color. If party A knew or should have known the meaning attached by party B, and party B had no reason to know of the meaning attached by party A, the court will interpret the term in accordance with the meaning attached by

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<sup>119</sup>*See id.* § 25D, at 147.

<sup>120</sup>5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.7, at 34 (Joseph M. Perillo ed., 1998). But courts may consider evidence of usage of trade in determining whether a writing has a plain meaning. *See Hurst v. W.J. Lake & Co.*, 31 P.2d 168, 169-170 (Or. 1934).

<sup>121</sup>*See, e.g.*, *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 568-569 (9th Cir. 1988). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (“Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . (c) the meaning of the writing, whether or not integrated . . .”).

<sup>122</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

<sup>123</sup>“Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.” *Id.* § 201(2).

party B. Party A is at fault for the misunderstanding because party A could have clarified the matter with party B.

In one case, *Frigalment Importing Co. v. B.N.S. International Sales Corp.*,<sup>124</sup> a seller agreed to sell “chicken” to a buyer. The seller sent chicken to the buyer, but the buyer rejected the shipment.<sup>125</sup> The buyer contended that the shipment was defective because the chicken was fit only for stewing and that the word “chicken” in the contract meant chicken suitable for broiling.<sup>126</sup> The defendant argued that no breach had occurred because the word “chicken” in the contract meant any kind of chicken.<sup>127</sup>

Finding the term “chicken” ambiguous, the court considered the extrinsic evidence offered to support the meanings argued by the parties.<sup>128</sup> From this evidence, the court concluded that the buyer knew or should have known the meaning attached by the seller because government regulations and usage of trade indicated that the term “chicken” could have a broad meaning and could include any kind of chicken.<sup>129</sup> It therefore concluded that the seller had not breached the contract.<sup>130</sup>

In the United States, courts do not use the term “estoppel” to describe these rules regarding misunderstandings. But the rules rest on ideas similar to those underlying estoppel doctrines. If a person is at fault for a misunderstanding regarding the meaning of a term, it would be self-serving and unfair for the person to insist on a favorable interpretation.

#### 5. Performance or non-performance

In many contracts, a party may subject his or her promise of performance to a condition. The condition may be either express or constructive. Express conditions are stated in the terms of the bargain, while constructive conditions are implied. Ordinarily, the non-occurrence of a condition is a defense to performance. But policies related to estoppel may prevent a defendant from asserting this defense.

Consider express conditions first. Suppose that a buyer makes an offer to a seller by saying, “I will buy your home for \$200,000 if I can obtain a loan from a bank at 5% interest.” If the seller accepts, the parties have a contract. But the buyer does not necessarily have to perform (i.e., pay for the house) because the buyer’s promise is conditioned on the buyer’s obtaining a 5% loan. If the buyer cannot find such a loan, the buyer could assert non-occurrence of the condition as a justification for not performing.<sup>131</sup>

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<sup>124</sup>190 F. Supp. 116 (S.D.N.Y. 1960).

<sup>125</sup>*See id.* at 117.

<sup>126</sup>*See id.*

<sup>127</sup>*See id.*

<sup>128</sup>*See id.* at 118.

<sup>129</sup>*See id.* at 121.

<sup>130</sup>*See id.*

<sup>131</sup>*See Luttinger v. Rosen*, 316 A.2d 757 (Conn. 1972) (case presenting similar facts).

But in some circumstances, a court may refuse to allow the defendant to assert the defense of non-occurrence of an express condition. The *Restatement (Second) of the Law of Contracts* says that if the defense would cause a “disproportionate forfeiture,” the court may excuse the non-occurrence of the express condition “unless its occurrence was a material part of the agreed exchange.”<sup>132</sup> For example, suppose that a homeowner hires a construction contractor to make repairs on his or her home, promising to pay “\$10,000 on the condition the work is completed in 30 days.” If the contractor takes 31 days to do the work, the condition is not satisfied. But a court might find the condition excused in order to avoid a forfeiture.<sup>133</sup> Although the court would not use the term “estoppel” to describe its ruling, the policy seems very similar.

Constructive conditions exist in many contracts even though they are not stated expressly. For example, suppose that a vehicle owner hires a mechanic to make repair on his or her vehicle. The owner promises to pay the mechanic, and the mechanic promises to repair the vehicle. If the mechanic does not do the work, must the owner pay? Courts in the United States would say no, explaining that the owner’s duty to perform (i.e., to pay the mechanic) is constructively conditioned on the prior performance of the mechanic.<sup>134</sup> When the mechanic committed a material breach by not repairing the vehicle, his non-performance excused the vehicle owner.<sup>135</sup>

Courts considering cases of this type must address two issues. The first is whether a constructive condition exists. Here the law has not changed much since Lord Mansfield declared in the famous case of *Kingston v. Preston* that the answer must come from the “evident sense and meaning” of the contract.<sup>136</sup> In other words, courts must look to see whether it is reasonable to conclude that a material non-performance by one party would excuse the other.

The other issue is whether a material breach has occurred. In deciding whether a failure in performance is “material,” American courts typically consider a number factors.<sup>137</sup> One of these factors is “the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.”<sup>138</sup> For example, in some instances, a

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<sup>132</sup>RESTATEMENT (SECOND) OF CONTRACTS § 228.

<sup>133</sup>*See id.* illus. 3.

<sup>134</sup>*See id.* § 237 (“Except as stated in § 240, it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.”).

<sup>135</sup>*See id.*

<sup>136</sup>99 Eng. Rep. 437, 438 (K.B. 1773).

<sup>137</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 241 (“In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.”).

<sup>138</sup>*Id.*

court might conclude that a willful breach was material, while an inadvertent breach would not have been material.<sup>139</sup> Courts do not describe the application of this last factor as a matter of “estoppel.” But again it closely resembles estoppel principles in its operation and rationale.

#### 6. Termination by breach of contract

When one party breaches a contract, the other party often has a choice of treating the breach as terminating the contract or not terminating the contract. This choice may affect the non-breaching party’s remedies. But once the non-breaching party makes a choice, the doctrine of “election by estoppel” may prevent a different decision at a later time. This doctrine says that a person who makes a choice among possible benefits cannot subsequently insist on benefits that an alternative choice would have afforded.<sup>140</sup>

For example, in a contract for the sale of goods, suppose that the seller sends the buyer defective merchandise. The buyer has two choices. On one hand, the buyer may reject the goods,<sup>141</sup> cancel the contract and recover any payments made,<sup>142</sup> and also recover damages for non-performance.<sup>143</sup> Alternatively, the buyer can accept the goods despite the breach,<sup>144</sup> and then claim damages with respect to the accepted goods.<sup>145</sup> If the buyer chooses the second course of action, the buyer still must pay the purchase price for the goods accepted,<sup>146</sup> unlike a buyer who has rejected, he or she cannot cancel the contract and cannot withhold or recover payment.

Once the buyer makes this choice, the buyer may lose the ability to change his or her mind at a later time. For instance, if the buyer sues the seller for breach of contract and seeks specific performance, a court might conclude that the buyer is thereby estopped to seek rescission of the contract.<sup>147</sup> Simple justice precludes taking inconsistent positions. Specific performance is a remedy that a plaintiff may have only if the contract has not been terminated. Rescission is an incompatible remedy because rescission necessarily involves terminating the contract.

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<sup>139</sup>Jacob & Youngs v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (Carozo, J.) (“The willful transgressor must accept the penalty of his transgression. . . . For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.”).

<sup>140</sup>See Cruz-Lovo v. Ryder System, Inc., 2003 WL 23150113, \*3 (11th Cir. 2003) (“The doctrine of estoppel by election provides that, when a party adopts a certain position that affects the relationship between that party and the adverse party, i.e., a position pertaining to a contractual agreement between the parties, the party is equitably estopped from impeaching its position to the detriment of the adverse party.”).

<sup>141</sup>See U.C.C. § 2-601(a).

<sup>142</sup>See *id.* § 2-711(1).

<sup>143</sup>See *id.* § 2-711(1)(a) & (b).

<sup>144</sup>See *id.* § 2-601(b).

<sup>145</sup>See *id.* § 2-714(1).

<sup>146</sup>See *id.* § 2-709(1)(a).

<sup>147</sup>See Eldridge v. Burns, 142 Cal. Rptr. 845, 870 (Cal. App. 1978).

7. Could legitimate expectations or estoppel create contractual obligations to the benefit of third parties? (comp. Vertrag mit Schutzwirkung für Dritte).

American contract law generally recognizes the right of the “intended third-party beneficiaries” of a promise to enforce that promise.<sup>148</sup> A third-party beneficiary of a promise is someone other than the two parties who made the promise and who stands to gain from the enforcement of the promise.<sup>149</sup> An “intended” third-party beneficiary is someone whom the parties intended to have the right to enforce the promise or someone who otherwise should have the right to enforce the promise to effectuate the intention of the parties (i.e., that the promise would be kept).<sup>150</sup>

For example, in one famous case, an uncle promised his wife that, in exchange for certain consideration, he would change his will to leave property to their niece.<sup>151</sup> After the uncle died, the niece discovered that the uncle had not kept his promise. Although the niece was not a party to the contract between her aunt and uncle, the court allowed her to enforce her uncle’s promise.<sup>152</sup> In modern terms, a court would say that the niece was an intended third-party beneficiary of her uncle’s promise to her aunt. She would benefit from the promise, and giving her the right to enforce it was necessary to effectuate the intention of the parties. Her aunt, having died, could not enforce the promise herself, and her aunt’s estate would have no incentive to enforce the promise because enforcement would not bring the estate any benefit.

This example involves the enforcement of a promise that was enforceable on the basis of consideration (i.e., what the wife gave in exchange for her husband’s promise). But third-party beneficiaries also may enforce promises on the basis of promissory estoppel. Section 90 of the *Restatement (Second) of the Law of Contracts*, which contains the standard statement of the promissory estoppel doctrine, expressly provides for third-party enforcement. It says: “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”<sup>153</sup>

Pursuant to this rule, even if the husband in the preceding example had gratuitously promised his wife that he would leave property to his niece (i.e., even if he had made the promise without consideration), his niece might be able to enforce the promise. Under § 90, she would be a “third

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<sup>148</sup>See FARNSWORTH, *supra* note 36, § 10.3, at pp. 657-64.

<sup>149</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. a.

<sup>150</sup>See *id.* § 302(a) (“(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”).

<sup>151</sup>*Seaver v. Ransom*, 120 N.E. 639, 639-40 (N.Y. 1918).

<sup>152</sup>See *id.* at 641.

<sup>153</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (emphasis added).

person” and could enforce if she took some action in reliance on the promise that the uncle could reasonably expect and if injustice could be avoided only by enforcement of the promise. For example, the niece may have given away some of her own property, assuming that she would receive property from her uncle. But research reveals only a few reported cases in which third-parties have attempted to enforce promises based on promissory estoppel.<sup>154</sup>

B. *Identify some specific applications in specific contracts (contrats « spéciaux ») or as regard some specific parts of the law*

1. Specific applications in specific contracts

- a. *Agency (Mandat and the use of the « théorie de l'apparence » or the distinction, in some legal orders, between « mandat fondé sur un accord normatif et l'acte de complaisance »)*

“Authority by estoppel” is a doctrine that says that one person (the principal) may not deny that another person (the agent) has authority to act for him after giving a third party reason to believe such authority exists.<sup>155</sup> For example, if a business owner sends a salesperson to make a contract with a client, the business owner cannot later back out of the contract by claiming that the salesperson lacked authority.<sup>156</sup> Allowing the business owner to change positions on the issue of authority would work a hardship on the customer.

- b. *Is there a specific use of estoppel in maritime law?*

The doctrine of “collateral estoppel” generally prevents a party from relitigating an issue that a court already has resolved.<sup>157</sup> For example, suppose that a landlord sues a tenant for failing to pay the rent and a court rules that the tenant’s breach terminated the lease. The landlord subsequently evicts the tenant. If the tenant later sued the landlord for breaching its obligations under the lease by the eviction, the court would deny relief. Under the doctrine of collateral estoppel, the court’s determination in the previous lawsuit that the lease was terminated would bind the tenant.<sup>158</sup>

The doctrine of collateral estoppel has a special application in maritime law. Federal admiralty law permits plaintiffs in disputes involving a vessel to seek relief in two different kinds

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<sup>154</sup>See, e.g., *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996); *Lee v. Paragon Group Contractors, Inc.*, 337 S.E.2d 132, 135-136 (N.C. App. 1985). See also Note, *Should a Beneficiary Be Allowed to Invoke Promisee’s Reliance to Enforce Promisor’s Gratuitous Promise?*, 6 VAL. U. L. REV. 352 (1972).

<sup>155</sup>See BLACK’S LAW DICTIONARY, *supra* note 1, at 142 (“Authority that a third party reasonably believes an agent has, based on the third party’s dealings with the principal, even though the principal did not confer or intend to confer the authority.”). This type of authority is also known as “apparent authority.” See *id.*

<sup>156</sup>See, e.g., *Herrera v. Gibbs*, 499 S.W.2d 912, 915 (Tex. Civ. App. 1973).

<sup>157</sup>See BLACK’S LAW DICTIONARY, *supra* note 1, at 279.

<sup>158</sup>See, e.g., *Pizzuti v. Miner*, WL 356361, \*1-2 & n.2 (N.D. Cal. 2000) (finding collateral estoppel on these facts).

of lawsuits. One is an *in personam* action against another party in connection with the vessel.<sup>159</sup> The other is an *in rem* action against the vessel itself.<sup>160</sup> Some cases have held that, in maritime law, collateral estoppel does not prevent a party who has brought one kind of action from subsequently bringing the other kind of action and relitigating issues. For example, in one case, the charterer of a vessel dragged an anchor in a river, damaging an electric power line.<sup>161</sup> The owner of the power line first brought an *in rem* action against the vessel and then brought an *in personam* action against the charterer. Citing the special admiralty rules, the court held that collateral estoppel did not apply to the subsequent *in personam* action.<sup>162</sup>

2. Specific applications in other parts of the law linked to contract law : competition law, franchising (distribution), partnerships

A doctrine closely related to “agency by estoppel”<sup>163</sup> is “partnership by estoppel.” Under the doctrine of partnership by estoppel, a court may find a “partnership implied by law when one or more persons represent themselves as partners to a third party who relies on that representation.”<sup>164</sup> The doctrine has significance because each partner of a general partnership is generally liable for all of the debts of the partnership.<sup>165</sup> Thus, a person who is estopped to deny that he or she is a partner is liable for any debts of the partnership. For example, in *Lazarus v. Goodman*, two partners operated an insurance agency.<sup>166</sup> A dispute subsequently arose over an employee’s contract with the insurance agency. The employee brought a lawsuit against the father-in-law of one of the two partners, claiming that the father-in-law was their partner by estoppel.<sup>167</sup> The court upheld the claim, based on the actions of the two partners and the father-in-law in hiring the employee.<sup>168</sup>

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<sup>159</sup>An action *in personam* determines the personal rights of the parties to a lawsuit. See BLACK’S LAW DICTIONARY, *supra* note 1, at 32.

<sup>160</sup>An action *in rem* is an action to determine “the status of a thing, and therefore the rights of persons generally with respect to that thing.” *Id.*

<sup>161</sup>*See, e.g.,* Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 353 (2d Cir. 1995).

<sup>162</sup>*See id.* at 366.

<sup>163</sup>*See supra* part II.B.1.a.

<sup>164</sup>BLACK’S LAW DICTIONARY, *supra* note 1, at 1153. *See also* Unif. Partnership Act § 308(a) (1997) (“If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership.”).

<sup>165</sup>*See, e.g.,* Unif. Partnership Act § 306(a) (1997) (“all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law”).

<sup>166</sup>195 A.2d 90, 91 (Pa. 1963).

<sup>167</sup>*See id.* at 91-92.

<sup>168</sup>*See id.*

The law of unfair competition protects certain intangibles that may have value to persons and companies in their business or in their professional activities. These intangibles include trademarks,<sup>169</sup> trade secrets,<sup>170</sup> the right of publicity,<sup>171</sup> and the commercial value of a person's identity.<sup>172</sup> For example, the owner of a trade secret may ask a court to enjoin a competitor from using the trade secret.<sup>173</sup> But principles of estoppel might preclude an injunction.<sup>174</sup> In one case, a plaintiff sued to enjoin a former employee from using its trade secrets in operating a competing chemical plant.<sup>175</sup> The former employee argued that the plaintiff should be estopped from claiming a trade secret.<sup>176</sup> He asserted that he and the plaintiff had corresponded before the defendant built the plant. In this correspondence, the plaintiff had "made no mention of trade secrets, and defendant corporation went ahead and built its plant, believing plaintiff had stated all its" objections.<sup>177</sup>

### 3. Limitation of action

A "statute of limitations" applies to most legal claims in the United States. This type of statute says that a plaintiff has a set number of years in which to bring a lawsuit.<sup>178</sup> Most statutes of limitations contain no express exceptions relating to the conduct of the defendant. But courts nonetheless sometimes do not permit a defendant to assert the expiration of a period of limitations as a defense, citing the judge-made doctrine of "equitable estoppel."<sup>179</sup>

In the context of the statute of limitations, equitable estoppel allows a plaintiff to assert a claim against the defendant, even if the statute of limitations has expired, when the "defendant takes active steps to prevent the plaintiff from suing on time."<sup>180</sup> These active steps may include

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<sup>169</sup>RESTATEMENT (THIRD) OF UNFAIR COMPETITION ch. 3 (1995).

<sup>170</sup>*See id.* at §§ 44-45.

<sup>171</sup>*See id.* § 46.

<sup>172</sup>*See id.* § 48.

<sup>173</sup>*See id.* § 44 ("injunctive relief may be awarded to prevent a continuing or threatened appropriation of another's trade secret").

<sup>174</sup>*See id.* § 28 cmt. a; *id.* § 44 cmt. c (trade secret); *id.* § 46 cmt. h (publicity); *id.* § 48 cmt. b (commercial value of person's identity).

<sup>175</sup>*Dow Chemical Co. v. American Bromine Co.*, 177 N.W. 996 (Mich. 1920).

<sup>176</sup>*See id.* at 1004.

<sup>177</sup>*Id.*

<sup>178</sup>*See, e.g.*, U.C.C. § 2-725(1) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.").

<sup>179</sup>*See, e.g.*, *In re International Administrative Services, Inc.*, 408 F.3d 689, 699 (11th Cir. 2005) (concluding that the period of limitations in the Bankruptcy Code for bringing avoidance actions is subject to tolling by equitable estoppel); *Rauscher v. City of Lincoln*, 691 N.W.2d 844, 851-852 (Neb. 2005) (city estopped from asserting statute of limitations to block claim for unpaid wages).

<sup>180</sup>*Sharp v. United Airlines, Inc.*, 236 F.3d 368, 372 (7th Cir. 2001).

fraudulently concealing the injury that the defendant has caused or assuring the plaintiff that the statute of limitations will not be asserted as a defense.<sup>181</sup>

### III. What kind of remedies?

1. Specific performance: Is the author of the representation forced to enter into the contract, to execute the contract, to maintain it?

When a court grants the remedy of “specific performance” in a contracts case, it orders the defendant to perform the promise that he or she made to the plaintiff instead of paying money damages.<sup>182</sup> For example, in enforcing a contract for the sale of a house, the court might grant specific performance by ordering the seller to convey the property to the buyer. A court may hold a defendant who fails to comply with an order of specific performance in contempt of court, and then fine or even jail the defendant.<sup>183</sup>

Specific performance requires greater judicial resources to enforce than do judgments of money damages. For this reason, and for other historic reasons, specific performance is viewed as a secondary remedy.<sup>184</sup> A court will not order specific performance if money damages would adequately compensate the plaintiff.<sup>185</sup> In determining the adequacy of money damages as a remedy, courts consider a variety of factors, including “(a) the difficulty of proving damages with reasonable certainty, (b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and (c) the likelihood that an award of damages could not be collected.”<sup>186</sup> Courts also have discretion to deny specific performance for other reasons.

Because of these rules and restrictions, courts grant specific performance as a remedy in only a small percentage of contract cases. The promises in most of the cases in which courts order specific performance are enforceable on the basis of consideration. But nothing prohibits a court from granting specific performance of a promise enforceable on the basis of promissory estoppel. For example, in *Taylor v. Eagle Ridge Developers*,<sup>187</sup> a developer sued a landowner for breaking a promise to sell certain real estate. The court held that the promise was enforceable on the basis of promissory estoppel because the developer had taken various actions in reliance on the

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<sup>181</sup>Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946).

<sup>182</sup>See BLACK’S LAW DICTIONARY, *supra* note 1, at 1435.

<sup>183</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 362 cmt. b.

<sup>184</sup>See FARNSWORTH, *supra* note 36, § 12.4, at 739-43.

<sup>185</sup>See RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”).

<sup>186</sup>See *id.* § 364(1) (“Specific performance or an injunction will be refused if such relief would be unfair because (a) the contract was induced by mistake or by unfair practices, (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.”).

<sup>187</sup>29 S.W.3d 767 (Ark. App. 2000).

promise.<sup>188</sup> And the court granted specific performance as a remedy, ordering the landowner to convey the property.<sup>189</sup> But reported cases of this kind are rare.

2. Damages only? What sort of damages (expectation and reliance interests)?

If a plaintiff proves that a promise is enforceable, the plaintiff ordinarily is entitled to “expectation damages” as a remedy. Expectation damages are damages that strive to put the plaintiff in approximately the same position that the plaintiff would have been in if the defendant had kept the broken promise.<sup>190</sup> Subject to certain limitations such as uncertainty and unforeseeability, expectation damages equal “(a) the loss in the value to [the plaintiff] of the other party’s performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform.”<sup>191</sup>

But an important rule may restrict the availability of expectation damages in promissory estoppel cases. Most courts follow the standard expression of the promissory doctrine found in § 90 of the *Restatement (Second) of the Law of Contracts*. This section says that when a court enforces a promise based on reliance instead of consideration, “[t]he remedy granted for breach may be limited as justice requires.”

Pursuant to this section, courts often award reliance damages instead of expectation damages when they enforce a promise based on promissory estoppel. Reliance damages are damages designed to put the plaintiff in the position that the plaintiff would have been in if the defendant had not made the promise.<sup>192</sup> Reliance damages include “expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.”<sup>193</sup>

Some courts have said that reliance damages are the usual remedy in promissory estoppel cases.<sup>194</sup> But other courts have a different view, saying that “a single measure of damages is not applicable to every promissory estoppel case.”<sup>195</sup> They will grant expectation damages, reliance damages, or some other measure of damages, depending on the facts of the case.<sup>196</sup>

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<sup>188</sup>*See id.* at 770.

<sup>189</sup>*See id.*

<sup>190</sup>*See* RESTATEMENT (SECOND) OF CONTRACTS § 344(a).

<sup>191</sup>*Id.* § 360.

<sup>192</sup>*See id.* § 344(b).

<sup>193</sup>*Id.* § 349.

<sup>194</sup>*See, e.g.,* *Rosnick v. Dinsmore*, 457 N.W.2d 793, 800 (1990).

<sup>195</sup>*Jackson v. Morse*, 871 A.2d 47, 51-52 (N.H. 2005).

<sup>196</sup>*See id.*