CHAPTER 1

BASES FOR ENFORCING PROMISES

SECTION 1. ENFORCEABLE PROMISES: AN INTRODUCTION

Most people have an informal sense of contracts. Almost everyone of consenting age has entered into a contract, often with little hesitation or ceremony. Consider, for example, the arrangement you have with your cell phone company or the agreement established when you accepted the offer of admission from your law school. Yet while there may be a common sense notion of contracts and of contracting, this book provides more formal content to that general understanding. We are interested in what "contract" means as a matter of law.

The Restatement of Contracts, Second, defines contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement § 1. Not all promises are legally binding; the law does not provide a remedy for every broken promise. There may, of course, be moral or social sanctions for breaking a promise, but our primary inquiry here concerns the distinctive contributions of *law*. And how does the law determine which promises to enforce?

We take up that question with two cases that focus on the promise itself. The first considers whether a binding (or enforceable) promise was created by a doctor's assertion that he would make an injured hand "one hundred percent perfect." The second case queries whether an enforceable promise should be found in the printed materials of a boat manufacturer, stating that its boats could attain a "maximum speed of 30 miles per hour." These cases begin our exploration of why some promises are found to be enforceable and others not. We then turn to the issue of how law enforces promises, taking an initial look at remedies for breach.

Beyond the "why" and "how" of promissory enforcement, these opening materials also serve as an introduction to the question of "where" the law of promissory obligation is to be found: the basic sources and authorities that govern most contract cases. We have already mentioned the influential Restatement of Contracts, a comprehensive statement of general common law contract principles first promulgated by the American Law Institute (ALI) in 1932. The Restatement, Second, appeared in 1980. In this book, unless otherwise indicated, a reference to the "Restatement" refers to the Restatement, Second. While not enacted law itself, the Restatement has been aptly described by a former ALI director as "common law 'persuasive authority' with a high degree of persuasion." Herbert Goodrich, 241, 244–45 *Field Centenary Essays* (1949). For more on the history of the Restatements, see the Selections for Contracts.

In addition to the Restatement, statutes are a second important source of authority, particularly Article 2 of the Uniform Commercial Code, which, as we shall see in the next case, governs all cases involving the sale of goods. We highlight various sources of law as we encounter them below.

Of course, the primary sources relied on in this casebook are judicial opinions, or the common law, and we begin our investigation of promises with a well-known case, Hawkins v. McGee.

Hawkins v. McGee

New Hampshire Supreme Court, 1929.
84 N.H. 114, 146 A. 641.

■ BRANCH, J. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, ''How long will the boy be in the hospital?'' replied, ''Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand.'' Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, ''I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand.'' The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering ''into any contractual relation whatever,'' and that they could reasonably be understood only ''as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand.'' It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. ''whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation,'' but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon ''common knowledge of the uncertainty which attends all surgical operations,'' and the improbability that a surgeon would ever contract to make a damaged part of the human body ''one hundred per cent perfect,'' would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to ''experiment on skin grafting,'' in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

[The Court then discussed the proper measure of damages and, finding that the trial court's instructions regarding damages to the jury were erroneous, ordered a new trial. We take up the question of damages in Section 2.]

NOTES

(1) *One Hundred Percent*. Dr. McGee made a number of statements to the boy's father regarding the outcome of treatment, but it does not appear that Dr. McGee actually used the word ''promise.'' What makes a statement a promise? Consider the role of language, its context, and the nature of the transaction. See Restatement §§ 2 and 4. What result if a surgeon, before performing reconstructive knee surgery, tells the patient that ''the operation could give you a knee that was stronger than before'' and that the patient would, ''if committed, play basketball again''? See Anglin v. Kleeman, 665 A.2d 747 (N.H.1995).

(2) *Policy Considerations*. In a well-known case involving plastic surgery gone wrong, the court observed that ''[i]t is not hard to see why the courts should be unenthusiastic or skeptical about contract theory [in such a case].'' Sullivan v. O'Connor, 296 N.E.2d 183 (Mass.1973). Is judicial skepticism about recovery in contract warranted? Why? What other theories of recovery might an aggrieved plaintiff try? What factors might contribute to a decision to bring one sort of claim rather than another? The *Sullivan* case is presented on p. 14 below.

(3) *Statutory Override*. Common-law rulings by judges sometimes give way to opposing judgments by legislatures. In this regard, consider the following. In 1971, the Michigan Supreme Court affirmed a judgment for damages for breach of contract against a surgeon who, according to his patient's testimony, had said before a stomach operation, ''After this operation, you can throw your pillbox away'' and ''Once you have an operation it takes care of all your troubles.'' Guilmet v. Campbell, 188 N.W.2d 601 (Mich.1971). Three years later, the Michigan legislature enacted a statute providing that an ''agreement promise, contract, or warranty of cure relating to medical care or treatment'' is void unless evidenced by a signed

writing. 31 Mich.Comp.L.Ann. 566132(g). We note the interplay between courts and legislatures at various points throughout this book.

Bayliner Marine Corp. v. Crow

Supreme Court of Virginia, 1999.
257 Va. 121, 509 S.E.2d 499.

■ KEENAN, JUSTICE. In this appeal, the dispositive issue is whether there was sufficient evidence to support the trial court's ruling that the manufacturer of a sport fishing boat breached an express warranty and implied warranties of merchantability and fitness for a particular purpose.

In the summer of 1989, John R. Crow was invited by John Atherton, then a sales representative for Tidewater Yacht Agency, Inc. (Tidewater), to ride on a new model sport fishing boat known as a 3486 Trophy Convertible, manufactured by Bayliner Marine Corporation (Bayliner). During an excursion lasting about 20 minutes, Crow piloted the boat for a short period of time but was not able to determine its speed because there was no equipment on board for such testing.

When Crow asked Atherton about the maximum speed of the boat, Atherton explained that he had no personal experience with the boat or information from other customers concerning the boat's performance. Therefore, Atherton consulted two documents described as "prop matrixes," which were included by Bayliner in its dealer's manual.

Atherton gave Crow copies of the "prop matrixes," which listed the boat models offered by Bayliner and stated the recommended propeller sizes, gear ratios, and engine sizes for each model. The "prop matrixes" also listed the maximum speed for each model. The 3486 Trophy Convertible was listed as having a maximum speed of 30 miles per hour when equipped with a size "20x20" or "20x19" propeller. The boat Crow purchased did not have either size propeller but, instead, had a size "20x17" propeller.

At the bottom of one of the "prop matrixes" was the following disclaimer: "This data is intended for comparative purposes only, and is available without reference to weather conditions or other variables. All testing was done at or near sea level, with full fuel and water tanks, and approximately 600 lb. passenger and gear weight."

Atherton also showed Crow a Bayliner brochure describing the 1989 boat models, including the 3486 Trophy Convertible. The brochure included a picture of that model fully rigged for offshore fishing accompanied by the statement that this model "delivers the kind of performance you need to get to the prime offshore fishing grounds."

In August 1989, Crow entered into a written contract for the purchase of the 3486 Trophy Convertible in which he had ridden. The purchase price was $120,000, exclusive of taxes. The purchase price included various equipment to be installed by Tidewater including a generator, a cockpit cover, a "Bimini top," a winch, a spotlight, radar, a navigation system, an icemaker, fishing outriggers, an automatic pilot system, extra fuel gauges, a second radio, and air conditioning and heating units. The total weight of the added equipment was about 2,000 pounds. Crow did not test drive the boat after the additional equipment was installed or at any other time prior to taking delivery.

When Crow took delivery of the boat in September 1989, he piloted it onto the Elizabeth River. He noticed that the boat's speed measuring equipment, which was installed in accordance with the contract terms, indicated that the boat's maximum speed was 13 miles per hour. Crow immediately returned to Tidewater and reported the problem.

During the next 12 to 14 months, while Crow retained ownership and possession of the boat, Tidewater made numerous repairs and adjustments to the boat in an attempt to increase its speed capability. Despite these efforts, the boat consistently achieved a maximum speed of only 17 miles per hour, except for one period following an engine modification when it temporarily reached a speed of about 24 miles per hour. In July 1990, a representative from Bayliner wrote Crow a letter stating that the performance representations made at the time of purchase were incorrect, and that 23 to 25 miles per hour was the maximum speed the boat could achieve.

In 1992, Crow filed a motion for judgment against Tidewater, Bayliner, and Brunswick Corporation, the manufacturer of the boat's diesel engines. Crow alleged, among other things, that Bayliner breached express warranties, and implied warranties of merchantability and fitness for a particular purpose.

At a bench trial in 1994, Crow, Atherton, and Gordon W. Shelton, III, Tidewater's owner, testified that speed is a critical quality in boats used for offshore sport fishing in the Tidewater area of Virginia because of the distance between the coast and the offshore fishing grounds. According to these witnesses, a typical offshore fishing site in that area is 90 miles from the coast. Therefore, the speed at which the boat can travel to and from fishing sites has a major impact on the amount of time left in a day for fishing.

Crow testified that because of the boat's slow speed, he could not use the boat for offshore fishing, that he had no other use for it, and that he would not have purchased the boat if he had known that its maximum speed was 23 to 25 miles per hour. . . .

The trial court entered judgment in favor of Crow against Bayliner on the counts of breach of express warranty and breach of implied warranties of merchantability and fitness for a particular purpose. . . . On appeal, we review the evidence in the light most favorable to Crow, the prevailing party at trial.

Crow argues that the "prop matrixes" he received created an express warranty by Bayliner that the boat he purchased was capable of a maximum speed of 30 miles per hour. We disagree.

Code § 8.2–313 provides, in relevant part:

Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made a part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

The issue whether a particular affirmation of fact made by the seller constitutes an express warranty is generally a question of fact. See id., Official Comment 3; Daughtrey v. Ashe, 243 Va. 73, 78, 413 S.E.2d 336, 339 (1992). In Daughtrey, we examined whether a jeweler's statement on an appraisal form constituted an express warranty. We held that the jeweler's description of the particular diamonds being purchased as ''v.v.s. quality'' constituted an express warranty that the diamonds were, in fact, of that grade. Id. at 77, 413 S.E.2d at 338.

Unlike the representation in Daughtrey, however, the statements in the ''prop matrixes'' provided by Bayliner did not relate to the particular boat purchased by Crow, or to one having substantially similar characteristics. By their plain terms, the figures stated in the ''prop matrixes'' referred to a boat with different sized propellers that carried equipment weighing substantially less than the equipment on Crow's boat. Therefore, we conclude that the statements contained in the ''prop matrixes'' did not constitute an express warranty by Bayliner about the performance capabilities of the particular boat purchased by Crow.

Crow also contends that Bayliner made an express warranty regarding the boat's maximum speed in the statement in Bayliner's sales brochure that this model boat ''delivers the kind of performance you need to get to the prime offshore fishing grounds.'' While the general rule is that a description of the goods that forms a basis of the bargain constitutes an express warranty, Code § 8.2–313(2) directs that ''a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.''

The statement made by Bayliner in its sales brochure is merely a commendation of the boat's performance and does not describe a specific characteristic or feature of the boat. The statement simply expressed the manufacturer's opinion concerning the quality of the boat's performance and did not create an express warranty that the boat was capable of attaining a speed of 30 miles per hour. Therefore, we conclude that the evidence does not support the trial court's finding that Bayliner breached an express warranty made to Crow.

[The Court also found that Bayliner had not violated the ''implied warranty of merchantability'' provided in UCC § 2–314. Discussion of implied warranties is left to Chapter 5.]

Reversed and final judgment.

NOTES

(1) *Express Warranties*. According to Crow, what promise had Atherton broken? By what means had the supposed promise been made? What if Atherton had

told Crow during their negotiations that "in my opinion this boat will go 30 miles per hour no trouble"? See UCC § 2–313(2). Why should an express warranty result if the seller did not intend to make one?

(2) *UCC Primer*. Article 2 of the Uniform Commercial Code (UCC or "the Code") is the primary source of law for transactions involving the sale of goods. The Code itself is the product of the American Law Institute and the National Conference of Commissioners on Uniform State Laws (NCCUSL). Versions of the Code have been enacted across the country by state legislatures, and by Congress for the District of Columbia. Transactions covered by Article 2 include not only sales between merchants but also those between merchants and consumers, as in *Bayliner*. As we shall see, in a number of areas the Code provides special rules for merchants, who are assumed to be more sophisticated and more familiar with commercial practices than are consumers. Determining whether a party is a merchant is therefore an important preliminary question. Article 2 defines merchant to include not only "a person who deals in goods of the kind" but also one who "by his occupation holds himself out as having knowledge or skill peculiar to the goods involved in the transaction." UCC § 2–104(1). We return to the significance of a party's status as a merchant throughout the book.

What are "goods" under Article 2? The starting point is UCC § 2–105(1). What are "things ... which are movable"? Is land "goods"? Is a 10–ton printing press "goods"? What if in the case above, Crow had custom-ordered his boat so that at the time of the contract the boat had not been built? See UCC § 2–105(2). The application of Article 2 is often called into question in contracts that involve both goods and services. Article 2 does not apply, for example, to a contract to paint the exterior of a house, even though a small amount of paint (goods) will be transferred, because the goods component of the contract is incidental. Should Article 2 apply to a "hybrid contract"—that is, a contract involving both the sale of goods and the provision of services, or a contract involving both the sale of goods and the sale of property other than goods, such as real estate? What about a contract that includes both the sale and installation of an appliance such as a washing machine? What about a catering contract, in which the customer is both buying the food and paying for wait staff? We look more closely at the problem of hybrid contracts in Chapter 8.

Finally, it is important to keep in mind that the Code does not wholly supplant the common law. UCC § 1–103(b) states that "Unless displaced by the particular provisions of [the Code], the principles of law and equity ... supplement its provisions." UCC § 1–103(b) provides an lengthy list of principles of law and equity that may supplement the Code, including such principles as capacity to contract, duress, and mistake. For an interesting discussion of the concept of supplementation, see Comment 2 to UCC § 1–103.

(3) *Implied Warranties.* Suppose that another purchaser contracted with Bayliner for the sale of a speed boat and that, as in the principal case, the contract was silent with regard to the boat's speed. Assuming that there had been no brochure or other printed materials or any discussion of speed between the parties prior to the sale, would any promise have been broken if when the purchaser revved the engine of his new boat, it was able to achieve a maximum speed of only two miles per hour? See UCC § 2–314 (2). Which of the provisions of that subsection might apply? The matter of a seller disclaiming warranties is addressed in Chapter 6.

PROBLEM

Canine Conundrum. Melissa bought a puppy from Peter, a rancher whose dog had just had a litter, for $300. The next day Melissa took the puppy to a veterinarian for a check up. The vet diagnosed a minor urinary infection and prescribed a week-long course of antibiotics. Melissa has brought a claim against Peter in small claims court for breach of warranty. Is she likely to succeed? See Nuijens v. Novy, 543 N.Y.S.2d 887 (N.Y.Just.Ct., 1989). What if Melissa had bought the puppy from a kennel intending to breed it, and a week later her veterinarian accurately informed her, upon examining the puppy, that it was incapable of reproduction? Dempsey v. Rosenthal, 468 N.Y.S.2d 441 (N.Y. 1983). What additional facts might you want to know in determining whether or not a warranty had been breached?

SECTION 2. REMEDYING BREACH

We all know what it means to keep a promise. Simply put, it means doing what was promised. But what does it mean to *enforce* a promise? Restatement § 1 defines a contract in terms of both a legal duty to perform a promise and the provision of remedy if performance does not occur. How does the law determine the appropriate remedy? Although the answer is taken up in detail in Chapter 5, some consideration of remedies is useful at the outset to get a sense of what is at stake for the parties when a promise is broken.

The cases that follow introduce two fundamental assumptions made by courts in providing remedies. The first is that the law is primarily concerned with *relief* of aggrieved promisees and not with *punishment* of promisors. The second assumption is that the primary purpose of the remedy is to put the promisee in the position it would have been in had the promise been performed. The promisee is often said to receive "the benefit of the bargain" and the interest that is protected in this way is called the *expectation interest*. The complexities of figuring out just how to measure that interest are tested in *Naval Institute*, our next case.

NOTE

Theories of Enforcing Promises. Although the primary focus of this casebook is contract doctrine—that is, the basic rules and practices that comprise contract law—contract *theory* is not entirely unrelated to our endeavor and we will from time to time refer to it in order to illuminate aspects of contract law. A central concern of contract theory is the question of why law *should* enforce certain promises.

A number of theoretical justifications have been proposed to answer this question and each directs us to a set of underlying values served by contract doctrine. Some theories turn principally on protecting the promisee's reliance on the promise or on respecting the promisor's autonomy or will to make binding promises. Other theoretical justifications look to economic efficiency, predictability, fairness, social justice and morality. All of these concerns resonate in contract law although to some extent they take us out of the realm of positive contract law, or more commonly, doctrine. This has been a matter of concern for some, including Oliver Wendell Holmes[a] who unhappily noted that "[n]owhere is the confusion

a. Oliver Wendell Holmes, Jr. (1841–1935) practiced law in Boston, served briefly as professor of law at Harvard, and then for twenty years as justice and later chief justice between legal and moral ideas more manifest than in the law of contract.'' Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897). Still, as you read the cases going forward, it is worth bearing in mind the competing normative values that justify the legal enforcement of promises.

United States Naval Institute v. Charter Communications, Inc.

United States Court of Appeals, Second Circuit, 1991.
936 F.2d 692.

■ KEARSE, CIRCUIT JUDGE: This case returns to us following our remand in United States Naval Institute v. Charter Communications, Inc., 875 F.2d 1044 (2d Cir.1989) (''Naval I''), . . . for the fashioning of relief in favor of plaintiff United States Naval Institute (''Naval'') against defendant Charter Communications, Inc., and Berkley Publishing Group (collectively ''Berkley''), for breach of an agreement with respect to the publication of the paperback edition of The Hunt For Red October (''Red October'' or the ''Book''). On remand, the district court awarded Naval $35,380.50 in damages [and] $7,760.12 as profits wrongfully received by Berkley.... Naval appeals from so much of the judgment as failed to award a greater amount as profits.... Berkley cross-appeals from the judgment as a whole and from such parts of it as awarded moneys to Naval. For the reasons below, we reverse the award of profits; we affirm the award of damages....

I. Background

. . . Naval, as the assignee of the author's copyright in Red October, entered into a licensing agreement with Berkley in September 1984 (the ''Agreement''), granting Berkley the exclusive license to publish a paperback edition of the Book ''not sooner than October 1985.'' Berkley shipped its paperback edition to retail outlets early, placing those outlets in position to sell the paperback prior to October 1985. As a result, retail sales of the paperback began on September 15, 1985, and early sales were sufficiently substantial that the Book was near the top of paperback bestseller lists before the end of September 1985.

Naval commenced the present action when it learned of Berkley's plans for early shipment, and it unsuccessfully sought a preliminary injunction. After trial, the district judge dismissed the complaint. He ruled that Berkley had not breached the Agreement because it was entitled, in accordance with industry custom, to ship prior to the agreed publication date. On appeal, we reversed. Though we upheld the district court's finding that the Agreement did not prohibit the early shipments themselves, we concluded that if the ''not sooner than October 1985'' term of the Agreement had any meaning whatever, it meant at least that Berkley was not

of the Supreme Judicial Court of Massachusetts. In 1902 President Theodore Roosevelt appointed him to the Supreme Court of the United States, where the quality of his dissenting opinions won him the title of the ''Great Dissenter.'' He resigned because of his great age in 1932. His most famous work is *The Common Law* (1881), based on a series of lectures.

allowed to cause such voluminous paperback retail sales prior to that date, and that Berkley had therefore breached the Agreement. Naval I, 875 F.2d at 1049–51. Accordingly, we remanded for entry of a judgment awarding Naval appropriate relief.

On the remand, Naval asserted that it was entitled to recovery for copyright infringement, and it sought judgment awarding it all of Berkley's profits from pre-October 1985 sales of the Book; it estimated those profits at $724,300. . . . Berkley, on the other hand, [contended] that Berkley could not be held liable for copyright infringement . . .; it argued that Naval therefore had at most a claim for breach-of-contract [and] argued that the profits attributed to it by Naval were inflated. . . . [On remand, the district judge] concluded that Naval was entitled to recover damages for copyright infringement, comprising actual damages suffered by Naval plus Berkley's profits "attributable to the infringement," 17 U.S.C. § 504(b).

The court calculated Naval's "actual damages from Berkley's wrongful pre-October 'publication'" as the profits Naval would have earned from hardcover sales in September 1985 if the competing paperback edition had not then been offered for sale. July 17 Order at 8. Noting the downward trend of hardcover sales of the Book from March through August 1985, the court found that there was no reason to infer that Naval's September 1985 sales would have exceeded its August 1985 sales. The court calculated Naval's lost sales as the difference between the actual hardcover sales for those two months, and awarded Naval $35,380.50 as actual damages.

The district judge held that Berkley's profits "attributable to the infringement" were only those profits that resulted from "sales to customers who would not have bought the paperback but for the fact it became available in September." July 17 Order at 10. He found that most of the September paperback sales were made to buyers who would not have bought a hardcover edition in September, and therefore only those September sales that displaced hardcover sales were attributable to the infringement. Berkley's profit on the displacing copies totaled $7,760.12, and the court awarded that amount to Naval. . . .

II. Discussion

A. *Naval's Claim of Copyright Infringement*

[The court rejected this claim because an exclusive licensee cannot be liable for infringing the copyright conveyed to it, even though it is liable for breach of contract.]

B. *Contract Damages* . . .

Since the purpose of damages for breach of contract is to compensate the injured party for the loss caused by the breach, 5 Corbin On Contracts § 1002, at 31 (1964), those damages are generally measured by the plaintiff's actual loss, see, e.g., Restatement (Second) of Contracts § 347 (1981). While on occasion the defendant's profits are used as the measure of damages, see, e.g., Cincinnati Siemens–Lungren Gas Illuminating Co. v. Western Siemens–Lungren Co., 152 U.S. 200, 204–07 (1894), . . . this generally occurs when those profits tend to define the plaintiff's loss, for an award of the defendant's profits where they greatly exceed the plaintiff's loss and there has been no tortious conduct on the part of the defendant would tend to be punitive, and punitive awards are not part of the law of contract damages. See generally Restatement (Second) of Contracts § 356 comment *a* ("The central objective behind the system of contract remedies is compensatory, not punitive."); *id.* comment *b* (agreement attempting to fix damages in amount vastly greater than what approximates actual loss would be unenforceable as imposing a penalty); *id.* § 355 (punitive damages not recoverable for breach of contract unless conduct constituting the breach is also a tort for which such damages are recoverable).

Here, the district court found that Berkley's alleged $724,300 profits did not define Naval's loss because many persons who bought the paperback in September 1985 would not have bought the book in hardcover but would merely have waited until the paperback edition became available. This finding is not clearly erroneous, and we turn to the question of whether the district court's finding that Naval suffered $35,380.50 in actual damages was proper.

In reaching the $35,380.50 figure, the court operated on the premise that, but for the breach by Berkley, Naval would have sold in September the same number of hardcover copies it sold in August. Berkley challenges that premise as speculative and argues that since Naval presented no evidence as to what its September 1985 sales would have been, Naval is entitled to recover no damages. It argues alternatively that the court should have computed damages on the premise that sales in the second half of September, in the absence of Berkley's premature release of the paperback edition, would have been made at the same rate as in the first half of September. Evaluating the district court's calculation of damages under the clearly erroneous standard of review, . . . we reject Berkley's contentions.

The record showed that, though there was a declining trend of hardcover sales of the Book from March through August 1985, Naval continued to sell its hardcover copies through the end of 1985, averaging some 3,000 copies a month in the latter period.[a] It plainly was not error for the district court to find that the preponderance of the evidence indicated that Berkley's early shipment of 1,400,000 copies of its paperback edition, some 40% of which went to retail outlets and led to the Book's rising close to the top of the paperback bestseller lists before the end of September 1985, caused Naval the loss of some hardcover sales prior to October 1985.

As to the quantification of that loss, we think it was within the prerogative of the court as finder of fact to look to Naval's August 1985 sales. Though there was no proof as to precisely what the unimpeded volume of hardcover sales would have been for the entire month of September, any such evidence would necessarily have been hypothetical. But it is not error to lay the normal uncertainty in such hypotheses at the door of the wrongdoer who altered the proper course of events, instead of at the door of the injured party. See, e.g., Lamborn v. Dittmer, 873 F.2d 522,

a. It is unclear where Judge Kearse got the figure of only "some 3,000 copies a month" used in the paragraph after the next, but it might be a misprint for 30,000, an approximation of the August figure.

532–33 (2d Cir.1989); Lee v. Joseph E. Seagram & Sons, Inc., 552 F.2d 447, 455–56 (2d Cir.1977).... See generally ... Restatement (Second) of Contracts § 352 comment *a* (''Doubts are generally resolved against the party in breach.''). The court was not required to use as the starting point for its calculations Naval's actual sales in the first half of September, *i.e.,* those made prior to the first retail sale of the paperback edition. Berkley has not called to our attention any evidence in the record to indicate that the sales in a given month are normally spread evenly through that month. Indeed, it concedes that ''[t]o a large degree, book sales depend on public whim and are notoriously unpredictable....'' (Berkley brief on appeal at 31 n. 15.) Thus, nothing in the record foreclosed the possibility that, absent Berkley's breach, sales of hardcover copies in the latter part of September would have outpaced sales of those copies in the early part of the month. Though the court accurately described its selection of August 1985 sales as its benchmark as ''generous[ ],'' it was not improper, given the inherent uncertainty, to exercise generosity in favor of the injured party rather than in favor of the breaching party.

In all the circumstances, we cannot say that the district court's calculation of Naval's damages was clearly erroneous. ...

Conclusion

... For the foregoing reasons, we reverse so much of the judgment as granted Naval $7,760.12 as an award of Berkley's profits. In all other respects, the judgment is affirmed.

NOTES

(1) *Measuring Promisee's Loss.* How did the district court go wrong in awarding Berkley's profits on pre-October paperback sales to Naval Institute? How does that award square with protecting Naval's expectation interest? How does it square with assumption that the law's concern is with relief of promisees and not punishment of promisors?

(2) *Conceptualizing Disgorgement.* Are there any cases where ''the defendant's profits ... tend to define the plaintiff's loss,'' as Judge Kearse put it? Professor E. Allan Farnsworth[a] described cases like *Cincinnati Siemens–Lungren,* cited as an example, in the following way:

''Suppose that a seller of a business makes a valid contract not to compete with the buyer and then breaks the covenant by operating a competing business. If the buyer claims damages ..., the court will often receive evidence of the profits that the seller made from the competing business as evidence of the profit that the buyer lost as a result of the breach. But a court will not assume that the buyer could have made the same sales that the seller did....'' Your Loss or My Gain? The Dilemma

a. E. Allan Farnsworth (1928–2005) was an eminent contract law scholar. He taught for fifty years at the Columbia Law School, from which he graduated in 1952. He represented the United States in matters of international trade law at the United Nations and at UNIDROIT. In 1971, following Professor Robert Braucher, Farnsworth became the Reporter for the Restatement, Second, of Contracts. Now in its third edition, his treatise *Farnsworth on Contracts* is a standard text. Farnsworth was an editor on three editions of this casebook. In 2004, he published *Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions*.

of the Disgorgement Principle in Breach of Contract Cases, 94 Yale L.J. 1339, 1366 (1985).

In other words, where the breaching promisor's profits match the amount the promisee would have gained had the promise been performed, disgorgement may be ordered. In such a case disgorgement and expectation produce the same figure. Nonetheless, the purposes of the two measures of recovery are distinct. Protecting the promisee's expectation interest ''undoes'' the breach with regard to the promise; the effect of disgorgement is to ''undo'' the breach with regard to the promisor, who must forego the gains of the breach.

(3) *Disgorgement in Non–Contract Cases.* Disgorgement of profits is not uncommon in non-contract cases. Note that the district judge ''concluded that Naval was entitled to recover damages for copyright infringement, comprising actual damages suffered by Naval *plus Berkley's profits* 'attributable to the infringement.' 17 U.S.C. § 504(b).'' This provision of the Copyright Act requires the infringer to disgorge profits to prevent the infringer from unfairly benefiting from a wrongful act.

(4) *Puzzler.* Why was the transaction in *Naval Institute* not governed by Article 2 of the Code?

THE PURPOSE OF REMEDIES: THREE PROTECTED INTERESTS

The court in *Naval Institute* sought to compensate Naval by calculating the extent of profits it lost on account of Berkley's breach of promise. This amount, and no more, constituted Naval's expectation interest. As expressed in Restatement § 344(a), the goal or purpose of protecting a promisee's expectation interest is to put the promisee ''in as good a position as he would have been in had the contract been performed.''

One way to accomplish this is for courts to compel performance of what was promised, using the remedy known as specific performance. However, specific performance is often unavailable (promised goods may be no longer available) or undesired (would young Charlie Hawkins have wanted Dr. McGee to give it another try?). In addition, ordering a party to do what was promised might require continuing judicial supervision, a task courts are reluctant, and perhaps ill-equipped, to take on, especially when the performance involves a service or a performance that extends over time. These considerations lead to another assumption animating contract remedies in the United States: the appropriate form of relief is compensation for the breach, rather than requiring the promisor to perform. Courts order specific performance only sparingly, and in cases where compensation is ''inadequate.'' See Restatement § 359. The classic case for specific enforcement concerns the sale of land, since courts have traditionally regarded each tract of land as unique and therefore not susceptible to substitution.

If the law is to remedy breach by compensating the promisee, what amount of money should the promisor pay? We have already encountered one answer: whatever it takes to protect the promisee's expectation interest, or, as expressed in Restatement § 344(a), the amount necessary to put the promisee ''in as good a position as he would have been in had the contract been performed.'' On this account, the promisee's injury consists in being worse off than if the promise had been performed, and expectation damages ''undo'' the effect of breach on the promisee.

There are two other interests that damages may protect: reliance and restitution. A promisee has a reliance interest if it has changed its position to its detriment in reliance on the promise. The promisee may, for example, have incurred expenses in preparing to perform. The promisee's injury consists of being worse off than if the promise had not been made. Reliance damages protect the promisee's interest in ''being reimbursed for loss caused by reliance.'' Restatement § 344(b). As that section explains, reliance damages put the promisee ''in as good a position as he would have been in had the contract not been made.''

The promisee has a restitution interest to the extent that the promise conferred a benefit on the promisee. The promisee may, for example, have given the promisor a down payment or performed some work. Restatement § 344(c) describes the restitution interest as the promisee's ''interest in having restored to him any benefit that he has conferred on the other party.'' Judicial remedies that protect this interest have the effect of ''undoing'' the promise by putting the *promisor* in the position in which it would have been had the promise not been made. For more on the three interests, see the pioneering article cited by the court in the following case, Lon Fuller & William Perdue, Jr., The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 53–57 (1936). For criticism, see Richard Craswell, Against Fuller and Perdue, 67 U.Chi.L.Rev. 99 (2000).

In the following case, the Supreme Judicial Court of Massachusetts considered how these three interests—expectation, reliance, and restitution—play out in the context of an action brought against a cosmetic surgeon for his failure to improve the claimant's appearance as he had promised to do. Our focus in *Sullivan* is not on the promise, as it was in *Hawkins*, but on the nature of the remedy.

Sullivan v. O'Connor

Supreme Judicial Court of Massachusetts, 1973.
363 Mass. 579, 296 N.E.2d 183.

[Alice Sullivan alleged she had entered into a contract with Dr. James O'Connor for plastic surgery ''to enhance her beauty and improve her nose,'' but that her appearance had been worsened by surgery on her nose performed by Dr. James O'Connor. She charged him with negligence and with breach of contract. A jury awarded her $13,500 on the latter count, rejecting her charge of negligence. The evidence provided support for findings as follow. O'Connor had promised Sullivan that, in two operations, he would make her nose shorter and more pleasing in relation to her other features. Having failed in that, he performed a third operation. Sullivan remained disfigured; and her appearance could not be improved by further surgery. Sullivan had paid a fee to O'Connor, and hospital expenses, amounting to $622.65. She was a professional entertainer, as O'Connor had known. She failed to demonstrate, however, that she had lost employment by reason of her change of appearance.

O'Connor appealed, contending that the trial judge had erred in instructing the jury about the issue of damages. Sullivan had also objected to those instructions, on the ground that the judge had not instructed the jury that she was entitled to the difference between the value of her nose as promised and the diminished value of her nose after the operations. However, Sullivan indicated on appeal that she was willing to waive that objection if the appellate court denied O'Connor's appeal.

The opinion describes the instructions about damages given to the jury, and O'Connor's objections to them.]

■ KAPLAN, JUSTICE. . . . The judge instructed the jury, first, that the plaintiff was entitled to recover her out-of-pocket expenses incident to the operations. Second, she could recover the damages flowing directly, naturally, proximately, and foreseeably from the defendant's breach of promise. These would comprehend damages for any disfigurement of the plaintiff's nose—that is, any change of appearance for the worse—including the effects of the consciousness of such disfigurement on the plaintiff's mind, and in this connection the jury should consider the nature of the plaintiff's profession. Also consequent upon the defendant's breach, and compensable, were the pain and suffering involved in the third operation, but not in the first two. As there was no proof that any loss of earnings by the plaintiff resulted from the breach, that element should not enter into the calculation of damages.

By his exceptions the defendant contends that the judge erred in allowing the jury to take into account anything but the plaintiff's out-of-pocket expenses (presumably at the stipulated amount). The defendant excepted to the judge's refusal of his request for a general charge to that effect, and, more specifically, to the judge's refusal of a charge that the plaintiff could not recover for pain and suffering connected with the third operation or for impairment of the plaintiff's appearance and associated mental distress.

The plaintiff on her part excepted to the judge's refusal of a request to charge that the plaintiff could recover the difference in value between the nose as promised and the nose as it appeared after the operations. However, the plaintiff in her brief expressly waives this exception and others made by her in case this court overrules the defendant's exceptions; thus she would be content to hold the jury's verdict in her favor.

We conclude that the defendant's exceptions should be overruled . . .

[In an omitted part of the decision, the Court discussed whether a doctor's promise should be unenforceable on policy grounds, concluding that the law allows "actions based on alleged contract, but insist[s] on clear proof . . . that a given result was promised." The Court then turned to the question of damages.]

If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract—''compensatory'' (''expectancy'') damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, ''restitution'' damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See Restatement: Contracts § 329 and comment *a*, §§ 347, 384(1). Thus in Hawkins v. McGee, 84 N.H. 114, 146 A. 641, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not ''caused'' by the breach. But where the plaintiff by reason of the operation was put to more pain than he would have had to endure, had the doctor performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery. It may be noted that on an alternative count for malpractice the plaintiff in the *Hawkins* case had been nonsuited; but on ordinary principles this could not affect the contract claim, for it is hardly a defense to a breach of contract that the promisor acted innocently and without negligence. The New Hampshire court further refined the *Hawkins* analysis in McQuaid v. Michou, 85 N.H. 299, 157 A. 881, all in the direction of treating the patient-physician cases on the ordinary footing of expectancy. . . .

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to effect a cure, attain a stated result, or employ a given medical method. This measure is expressed in somewhat variant ways, but the substance is that the plaintiff is to recover any expenditures made by him and for other detriment (usually not specifically described in the opinions) following proximately and foreseeably upon the defendant's failure to carry out his promise. Robins v. Finestone, 308 N.Y. 543, 546, 127 N.E.2d 330. . . . This, be it noted, is not a ''restitution'' measure, for it is not limited to restoration of the benefit conferred on the defendant (the fee paid) but includes other expenditures, for example, amounts paid for medicine and nurses; so also it would seem according to its logic to take in damages for any worsening of the plaintiff's condition due to the breach. Nor is it an ''expectancy'' measure, for it does not appear to contemplate recovery of the whole difference in value between the condition as promised and the condition actually resulting from the treatment. Rather the tendency of the formulation is to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement. This kind of intermediate pattern of recovery for breach of contract is discussed in the suggestive article by Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 373, where the authors show that, although not attaining the currency of the standard measures, a "reliance" measure has for special reasons been applied by the courts in a variety of settings, including noncommercial settings. See 46 Yale L.J. at 396–401.[1]

For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly too meager, if the agreements are to be enforced at all. On the other hand, an expectancy recovery may well be excessive. The factors, already mentioned, which have made the cause of action somewhat suspect, also suggest moderation as to the breadth of the recovery that should be permitted. Where, as in the case at bar and in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh. We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder. As a general consideration, Fuller and Perdue argue that the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, when they have to do with the production or distribution of goods or the allocation of functions in the market place; they become weaker as the context shifts from a commercial to a noncommercial field. 46 Yale L.J. at 60–63.

There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unreceptive to the use of that formula in special situations. We have, however, had no previous occasion to apply it to patient-physician cases.[2]

1. Some of the exceptional situations mentioned where reliance may be preferred to expectancy are those in which the latter measure would be hard to apply or would impose too great a burden; performance was interfered with by external circumstances; the contract was indefinite. See 46 Yale L.J. at 373–386; 394–396.

2. In Mt. Pleasant Stable Co. v. Steinberg, 238 Mass. 567, 131 N.E. 295, the plaintiff company agreed to supply teams of horses at agreed rates as required from day to day by the defendant for his business. To prepare itself to fulfill the contract and in reliance on it, the plaintiff bought two "Cliest" horses at a certain price. When the defendant repudiated the contract, the plaintiff sold the horses at a loss and in its action for breach claimed the loss as an element of damages. The court properly held that the plaintiff was not entitled to this item as it was also claiming (and recovering) its lost profits (expectancy) on the contract as a whole. Cf. Noble v. Ames Mfg. Co., 112 Mass. 492. (The loss on sale of the horses is analogous to the pain and suffering for which the patient would be disallowed a recovery in Hawkins v. McGee, 84 N.H. 114, 146 A. 641, because he was claiming and recovering expectancy damages.) The court in the *Mt. Pleasant* case referred, however, to Pond v. Harris, 113 Mass. 114, as a contrasting situation where the expectancy could not be fairly determined. There the defendant had wrongfully revoked an agreement to arbitrate a

The question of recovery on a reliance basis for pain and suffering or mental distress requires further attention. We find expressions in the decisions that pain and suffering (or the like) are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed; he would be told, perhaps, that the asserted psychological injury was not fairly foreseeable by the defendant as a probable consequence of the breach of such a business contract. See Restatement of Contracts, § 341, and comment *a*. But there is no general rule barring such items of damage in actions for breach of contract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances. The point is explained in Stewart v. Rudner, 349 Mich. 459, 469, 84 N.W.2d 816. Cf. Frewen v. Page, 238 Mass. 499, 131 N.E. 475; McClean v. University Club, 327 Mass. 68, 97 N.E.2d 174. Again, it is said in a few of the New York cases, concerned with the classification of actions for statute of limitations purposes, that the absence of allegations demanding recovery for pain and suffering is characteristic of a contract claim by a patient against a physician, that such allegations rather belong in a claim for malpractice. See Robins v. Finestone, 308 N.Y. 543, 547, 127 N.E.2d 330; Budoff v. Kessler, 2 A.D.2d 760, 153 N.Y.S.2d 654. These remarks seem unduly sweeping. Suffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach. Indeed it can be argued that the very suffering or distress "contracted for"—that which would have been incurred if the treatment achieved the promised result—should also be compensable on the theory underlying the New York cases. For that suffering is "wasted" if the treatment fails. Otherwise stated, compensation for this waste is arguably required in order to complete the restoration of the status quo ante.[3]

dispute with the plaintiff (this was before such agreements were made specifically enforceable). In an action for the breach, the plaintiff was held entitled to recover for his preparations for the arbitration which had been rendered useless and a waste, including the plaintiff's time and trouble and his expenditures for counsel and witnesses. The context apparently was commercial but reliance elements were held compensable when there was no fair way of estimating an expectancy. See, generally, annotation, 17 A.L.R.2d 1300. A noncommercial example is Smith v. Sherman, 4 Cush. 408, 413–414, suggesting that a conventional recovery for breach of promise of marriage included a recompense for various efforts and expenditures by the plaintiff preparatory to the promised wedding....

3. Recovery on a reliance basis for breach of the physician's promise tends to equate with the usual recovery for malpractice, since the latter also looks in general to restoration of the condition before the injury. But this is not paradoxical, especially when it is noted that the origins of contract lie in tort. See Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Col.L.Rev. 576, 594–596; Breitel, J. in Stella Flour & Feed Corp. v. National City Bank, 285 App.Div. 182, 189, 136 N.Y.S.2d 139 (dissenting opinion). A few cases have considered possible recovery for breach by a physician of a promise to sterilize a patient, resulting in birth of a child to the patient and spouse. If such an action is held maintainable, the reliance and expectancy measures would, we think, tend to equate, because the promised

In the light of the foregoing discussion, all the defendant's exceptions fail: the plaintiff was not confined to the recovery of her out-of-pocket expenditures; she was entitled to recover also for the worsening of her condition,[4] and for the pain and suffering and mental distress involved in the third operation. These items were compensable on either an expectancy or a reliance view. We might have been required to elect between the two views if the pain and suffering connected with the first two operations contemplated by the agreement, or the whole difference in value between the present and the promised conditions, were being claimed as elements of damage. But the plaintiff waives her possible claim to the former element, and to so much of the latter as represents the difference in value between the promised condition and the condition before the operations.

Plaintiff's exceptions waived. Defendant's exceptions overruled.

NOTES

(1) *Applying the Interests.* Assign the following round numbers to Sullivan's claim: doctor's fee $300; hospital fee per operation $100; pain and suffering per operation $3,000; increase in value of appearance if enhanced as promised $20,000; loss in value of appearance due to disfigurement $10,000. What would be the amount of Sullivan's claim if based on her restitution interest? On her reliance interest? On her expectation interest? How did the trial court calculate her damages?

(2) *Lost Opportunities as Reliance.* It can be argued that by relying on O'Connor, Sullivan lost the opportunity to deal with another doctor, who would presumably have done a competent job so that she would have been in the same position as if O'Connor had performed as promised. What if Sullivan could prove she had lost professional engagements as a result of surgeries? Why not take such a loss into account in calculating Sullivan's reliance interest? Because it would deprive the court of a middle ground to avoid an "excessive" and "harsh" recovery? Because lost opportunities are too speculative? Keep your eyes open for the relatively rare instances where courts take account of lost opportunities.

(3) *The Case of the Request for Restitution*. Not all plaintiffs have shared the view of the court in *Sullivan* that "a recovery limited to restitution seems plainly too meager." When two oil companies sued the United States for its breach of lease contracts giving them rights to explore for and develop oil off the North Carolina coast, what they sought was restitution of $156 million that they had paid in return for the contracts. Their award of summary judgment was reversed by the Court of Appeals. The Supreme Court reversed and remanded.

The Court observed that when the United States makes contracts, its rights and duties are governed generally by the law applicable to contracts between private individuals, as reflected in the Restatement. "We agree that the Government broke its promise . . . and it must give the companies their money back. . . . And it must do so whether the contracts would, or would not, ultimately have

condition was preservation of the family status quo. . . .

It would, however, be a mistake to think in terms of strict "formulas." For example, a jurisdiction which would apply a reliance measure to the present facts might impose a more severe damage sanction for the wilful use by the physician of a method of operation that he undertook not to employ.

4. That condition involves a mental element and appraisal of it properly called for consideration of the fact that the plaintiff was an entertainer. Cf. McQuaid v. Michou, 85 N.H. 299, 303–304, 157 A. 881 (discussion of continuing condition resulting from physician's breach).

proved financially beneficial to the companies. The Restatement illustrates this point as follows:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B. . . .

If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back—whether or not he eventually would have won the lottery. And if one party to a contract . . . advances the other party money, principles of restitution normally require the latter, upon repudiation, to refund that money.'' Mobil Oil Exploration & Producing Southeast v. United States, 530 U.S. 604, 624 (2000) (Breyer, J.).

THE ECONOMICS OF REMEDIES: AN INTRODUCTORY NOTE

As noted on pp. 8–9, Oliver Wendell Holmes, Jr. expressed his concern about the confusion of law and morality in no uncertain terms. Holmes advocated an approach to contracts informed more by external legal sanctions than by moral intuitions: ''The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else.'' *The Path of the Law* at 458. The promisor's obligation under this approach was reduced to a choice between performing a specified act and paying for its non-performance.

Though often characterized as immoral, Holmes's ''perform-or-pay'' approach might be better understood as an *amoral* system, where ''[p]rices do the work of morals'' in guiding behavior.[a] Holmes joins a long line of political theorists—including Hobbes, Bentham and Adam Smith—all of whom understood sanctions as useful means of enlisting self-interested individual behavior to promote social welfare. Consider in this regard this excerpt from Adam Smith in *The Wealth of Nations*:

> [M]an has almost constant occasion for the help of his brethren, and it is vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self love in his favour, and shew them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. . . . We address ourselves, not to their humanity but to their self love, and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow citizens.

An Inquiry into the Nature and Causes of the Wealth of Nations 11 (1811 ed., bk. 1, ch. II).

Building on Smith's claim to mutual gain through self-interested motivations and Holmes's perform-or-pay vision of contracts, scholars from

a. Samuel Bowles, Policies Designed for Self-interested Citizens May Undermine ''The Moral Sentiments'': Evidence from Economic Experiments, 320 Science 1605 (2008).

a school of thought known as law and economics have developed a distinctive approach to contract remedies. This school of thought has achieved substantial influence in the last forty years, and has enabled scholars and jurists to examine the economic effects of legal remedies. Most notably, they have observed that a promisor will exercise an ''option'' to breach and pay expectation damages instead of performing when it is in her economic interest to do so. That is, she will breach when her gain from breaching exceeds the amount of damages she will have to pay to leave the promisee just as well off as he would have been had the promisor performed. In principle, then, breaches of this sort make promisors better off without making promisees worse off.

This observation, known as the ''efficient breach hypothesis,'' may be illustrated with a simple example. Say a promisor has promised to sell a piece of machinery to a promisee. The machinery will cost the promisor \$300 to produce and is worth \$1,000 to the promisee (the maximum amount the promisee is willing to pay for it). Exchange will produce \$700 of surplus since the promisee's value of the machinery (\$1,000) is greater than the promisor's costs to produce it (\$300). Say they agreed on a price of \$600. This means the promisor gets \$300 of the surplus (the \$600 price minus her costs of \$300) and the promisee gets \$400 (the \$1000 value to him of the machinery minus the \$600 price). At the time they enter into the contract, the performance is mutually advantageous.

Now the twist. Assume that at some date before performance a second buyer approaches the promisor and offers \$1200 for the machinery. The promisor has only one unit and cannot procure another. Suppose further that the promisee and the second buyer are unable to transact with each other, perhaps because neither knows of the other's existence and it would be too costly for them to identify each other. The question then becomes, should the promisor sell the machinery to the first buyer (the promisee) as agreed or should he sell the machinery to the second buyer at the higher price? The efficient breach hypothesis says the latter course is the better economic option for all parties involved. Why? The promisee will be fully compensated for his expectation by the payment of \$400 in damages (since that is the amount that the promisee would have gained from the promisor's full performance). The second buyer gets the machinery that she values at least as much as \$1200. Finally, if the promisor had performed the original contract she would have gained \$300 (\$600 sale price minus \$300 cost to produce), but by breaching the contract and selling to the second buyer the promisor is left with a gain of \$500, even after paying expectation damages to the promisee (\$1200 sale price minus \$300 cost to produce minus \$400 damages paid to the promisee). This suggests that, under the assumptions of this example, the promisor can break her promise and enjoy a gain, without leaving the promisee any worse off.

Transactions that make no one worse off, while making someone else better off, are called Pareto-improving, so named after the 19th century Italian economist Vilfredo Pareto. Pareto-improvement is an important measure of what economists identify as efficiency, but it is not the only one. Suppose that, in the example above, the promisor breaks her promise to the promisee and sells the machinery for \$1200. As we noticed, the machinery then ends up in the hands of the second buyer, who values it more than the promisee. At this point, even *without* compensating the promisee, the result satisfies another conception of efficiency known as Kaldor–Hicks efficiency.

Note, however, that unless the promisee receives at least his expectation damages, this outcome would not be Pareto-improving. Without this compensation, the promisee is worse off on account of the breach. Compensating the promisee for the breach is irrelevant under the Kaldor–Hicks approach, so long as the promisor's gains from the breach exceed the promisee's loss. Yet we should not lose sight of distinctions between economic theories and rules of law. The irrelevance of compensating the promisee may be a plausible feature of economic efficiency—it is certainly not irrelevant to law.

Our discussion of efficiency thus far has focused only on the moment when a party decides whether to breach. Economics, however, is the study of incentives broadly conceived and the question of whether parties have incentive to act efficiently will arise at every point where contracting parties make choices. These include searching for contractual partners, entering into a contract, relying on a contract, and so forth. Economic analysis cannot identify a single remedy, whether money damages or specific performance, that satisfies the demands of efficiency at all points concerning the transaction. This does not deprive economic analysis of value, however; it merely highlights the inevitable trade-offs that occur even within the singular perspective of efficiency.

The economics of remedies is essential to the study of contracts. Contract remedies provide incentives that guide behavior. At the same time, of course, other principles, such as morality and fairness, also guide contractual behavior. For example, the promisor who has been offered $1200 by the second buyer might decide that the harm to her reputation and self-esteem of breaking her promise to sell the machinery to the promisee is worth more to her than the $200 gain. On some accounts, this may be factored into her economic calculation of the cost to her of the breach. On other accounts, her decision is guided by independent moral considerations not reducible to an economic calculus. Happily, we need not choose one approach over the other; behavior is guided by many considerations. Whether economic efficiency is compatible with other normative objectives, like fairness, is a topic of debate. See Richard R.W. Brooks, The Efficient Performance Hypothesis, 116 Yale L.J. 568 (2006).

NOTES

(1) *Efficient Breach and the Bench.* How has the concept of efficient breach been received in practice by judges? Since the early 1980s, there have been a hundred or so cases that expressly employ the term. For example, Judge Richard Posner,[a] discussing efficient breach in relation to an award of punitive damages, observed that "if the promisor has discovered that his performance is worth more to someone else," then "efficiency is promoted by allowing him to break his promise, provided he makes good on the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about that result." Patton v. Mid–Continent Systems, Inc., 841 F.2d 742, 750 (7th Cir.1988).

a. Richard Allen Posner (1939–), after clerking for Justice William Brennan and occupying several legal positions in the federal government, taught briefly at Stanford University Law School and then for more than a decade at the University of Chicago Law School. In 1981 he was appointed to the United States Court of Appeals for the Seventh Circuit, where from 1993 to 2000 he served as Chief Judge. His many books include the influential Economic Analysis of Law. Judge Posner maintains a personal website, http://home.uchicago.edu/?rposner/.

Other courts have also taken account of the concept. In refusing to enforce a contract upon a finding that one company had struck too struck too hard a bargain with another, a California court stated: "Hard bargaining, 'efficient' breaches and reasonable settlements of good faith disputes are all acceptable, even desirable, in our economic system. That system can be viewed as a game in which everybody wins, to one degree or another, so long as everyone plays by the common rules. Those rules are not limited to precepts of rationality and self-interest. They include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of values. Such exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system." Rich and Whillock, Inc. v. Ashton Development, Inc., 157 Cal.App.3d 1154, 1159 (Ct.App.1984).

How should "notions of fairness and propriety" guide the law of remedies? Have you seen any examples of this in the cases so far?

(2) *The Economics of Naval Institute.* Suppose that in August Berkley, noting the downward trend in Naval's hardcover sales, had estimated that by jumping the gun and shipping its paperback edition early as it did, it would gain at least $100,000 from pre-October sales while the loss to Naval would be no more than $40,000. Assuming that its estimates were accurate, and that Naval receives an award for its expectation damages, what is the gain to Berkley by breaching its contract with Naval? What factors, financial and other, might affect Berkley's decision about whether or not to ship the paperbacks early and breach the contract?

PUNITIVE DAMAGES

White v. Benkowski

Supreme Court of Wisconsin, 1967.
37 Wis.2d 285, 155 N.W.2d 74.

[In 1962, Virgil and Gwynneth White bought a house that lacked its own water supply but was connected by pipes to a well on the adjacent property of Paul and Ruth Benkowski. The Whites entered into a written contract with the Benkowskis under which the Benkowskis promised to supply water to the Whites' home for ten years unless the municipality supplied it, the well became inadequate, or the Whites drilled their own well. In exchange, the Whites agreed to pay the Benkowskis $3 a month and half the cost of any future repairs or maintenance. Although the relationship between the neighbors began as a friendly one, by 1964 it had deteriorated and become hostile. During March and June, the Benkowskis shut off the water supply on nine occasions for periods in the late afternoon and early evening that were, according to Mrs. White's records, well under an hour. Mr. Benkowski claimed this was done either to allow accumulated sand in the pipes to settle or to remind the Whites that their water use was excessive. The Whites sued the Benkowskis for breach of contract, seeking compensatory and punitive damages. The jury found the Benkowskis has shut off the water maliciously in order to harass the Whites. It awarded the Whites compensatory damages of $10 and punitive damages of $2000. On motions after the verdict, the award was reduced to $1 in compensatory damages and no punitive damages. The Whites appealed.]

■ WILKIE, JUSTICE. Two issues are raised on this appeal.

1. Was the trial court correct in reducing the award of compensatory damages from $10 to $1?

2. Are punitive damages available in actions for breach of contract?

Reduction of Jury Award

The evidence of damage adduced during the trial here was that the water supply had been shut off during several short periods. Three incidents of inconvenience resulting from these shut-offs were detailed by the plaintiffs. Mrs. White testified that the lack of water in the bathroom on one occasion caused an odor and that on two other occasions she was forced to take her children to a neighbor's home to bathe them. Based on this evidence, the court instructed the jury that:

"... in an action for a breach of contract the plaintiff is entitled to such damages as shall have been sustained by him which resulted naturally and directly from the breach if you find that the defendants did in fact breach the contract. Such damages include pecuniary loss and inconvenience suffered as a natural result of the breach and are called compensatory damages. In this case the plaintiffs have proved no pecuniary damages which you or the Court could compute. In a situation where there has been a breach of contract which you find to have damaged the plaintiff but for which the plaintiffs have proven no actual damages, the plaintiffs may recover nominal damages.

"By nominal damages is meant trivial-a trivial sum of money."

Plaintiffs did not object to this instruction. In the trial court's decision on motions after verdict it states that the court so instructed the jury because, based on the fact that the plaintiffs paid for services they did not receive, their loss in proportion to the contract rate was approximately 25 cents. This rationale indicates that the court disregarded or overlooked Mrs. White's testimony of inconvenience. In viewing the evidence most favorable to the plaintiffs, there was some injury. The plaintiffs are not required to ascertain their damages with mathematical precision, but rather the trier of fact must set damages at a reasonable amount. Notwithstanding this instruction, the jury set the plaintiffs' damages at $10. The court was in error in reducing that amount to $1.

The jury finding of $10 in actual damages, though small, takes it out of the mere nominal status. The award is predicated on an actual injury. This was not the situation present in Sunderman v. Warnken.[1] Here there was credible evidence which showed inconvenience and thus actual injury, and the jury's finding as to compensatory damages should be reinstated.

Punitive Damages

"If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep."[2]

Over one hundred years ago this court held that, under proper circumstances, a plaintiff was entitled to recover exemplary or punitive damages.[3]

1. (1947), 251 Wis. 471, 29 N.W.2d 496.
2. Exodus 22:1.
3. McWilliams v. Bragg (1854), 3 Wis. 377 (*424).

In Wisconsin compensatory damages are given to make whole the damage or injury suffered by the injured party. On the other hand, punitive damages are given ". . . on the basis of punishment to the injured party not because he has been injured, which injury has been compensated with compensatory damages, but to punish the wrongdoer for his malice and to deter others from like conduct."[4]

Thus we reach the question of whether the plaintiffs are entitled to punitive damages for a breach of the water agreement.

The overwhelming weight of authority supports the proposition that punitive damages are not recoverable in actions for breach of contract. In Chitty on Contracts, the author states that the right to receive punitive damages for breach of contract is now confined to the single case of damages for breach of a promise to marry.[5]

Simpson states:

"Although damages in excess of compensation for loss are in some instances permitted in tort actions by way of punishment . . . in contract actions the damages recoverable are limited to compensation for pecuniary loss sustained by the breach."[6]

Corbin states that as a general rule punitive damages are not recoverable for breach of contract.[7]

In Wisconsin, the early case of Gordon v. Brewster[8] involved the breach of an employment contract. The trial court instructed the jury that if the nonperformance of the contract was attributable to the defendant's wrongful act of discharging the plaintiff, then that would go to increase the damages sustained. On appeal, this court said that the instruction was unfortunate and might have led the jurors to suppose that they could give something more than actual compensation in a breach of contract case. We find no Wisconsin case in which breach of contract (other than breach of promise to marry) has led to the award of punitive damages.

Persuasive authority from other jurisdictions supports the proposition (without exception) that punitive damages are not available in breach of contract actions. This is true even if the breach, as in the instant case, is willful.

Although it is well recognized that breach of a contractual duty may be a tort, in such situations the contract creates the relation out of which grows the duty to use care in the performance of a responsibility prescribed by the contract. Not so here. No tort was pleaded or proved.

Reversed in part by reinstating the jury verdict relating to compensatory damages and otherwise affirmed. Costs to appellant.

NOTES

(1) *Questions.* Why was only $10 awarded to the Whites as compensatory damages? What did that amount represent? How was it calculated? How did the jury come up with the $2000 punitive damage award?

4. Malco, Inc. v. Midwest Aluminum Sales (1961), 14 Wis.2d 57, 66, 109 N.W.2d 516, 521.

5. 1 Chitty, Contracts, (22d ed. 1961), p. 1339.

6. Simpson, Contracts, (2d ed. hornbook series), p. 394, sec. 195.

7. 5 Corbin, Contracts, p. 438, sec. 1077.

8. (1858), 7 Wis. 309 (*355).

Why shouldn't punitive damages be awarded in such a case? What effect would the availability of punitive damages have on parties tempted to breach their contracts? Would it make sense to award punitive damages in cases where the breach was malicious, as in *White*, or should the law be indifferent as to why a party fails to perform? How might the possibility of a punitive damage award affect a party's decision to *enter* into contract?

(2) *Nominal Damages.* A plaintiff who proves a breach of contract but fails to prove damages is traditionally awarded nominal damages (six cents or one dollar); as Judge Posner has observed, "for reasons we do not understand every victim of a breach of contract, unlike a tort victim, is [so] entitled." Chronister Oil Co. v. Unocal Ref. & Mktg., 34 F.3d 462, 466 (7th Cir.1994). Such an award may serve as a declaration of the plaintiff's rights and may also carry with it an award of court costs.

(3) *Flirting with Punitive Damages.* Although not traditionally granted for breach of contract, punitive or exemplary damages may be granted for tortious conduct that is sufficiently "outrageous." See Restatement, Second, of Torts § 908 (1979). Some courts have departed from the strict rule that denies punitive damages for breach of contract when the breach is accompanied by "fraudulent" conduct or by an "independent" tort sufficiently outrageous to justify such damages. See generally Restatement § 355; 3 *Farnsworth on Contracts* § 12.8 (2d ed.1998).

The trend in judicial decisions toward greater use of punitive damages has been most noticeable in connection with claims against insurers for vexatious refusal to settle insurance claims. See Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198 (Cal.1958); Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173 (Ind.1976). In 1984, the Supreme Court of California suggested that the new tort of "bad faith breach" might extend beyond insurance cases. In Seaman's Direct Buying Service v. Standard Oil Company of California, 686 P.2d 1158 (Cal.1984), a would-be oil dealer claimed punitive damages from an oil company that had refused to honor its contract. In remanding the case for erroneous jury instructions, the court in dictum defined a new tort where a party to a contract "in addition to breaching the contract . . . seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." But a tort action would be available for breach of contract, the court said, only where there was a "special relationship" similar to that between insurer and insured.

The suggestion that the tort of "bad faith breach" could occur outside the insurance field triggered much academic discussion and much litigation in California courts. In 1988, a differently composed Supreme Court of California dealt a severe blow to the new tort by denouncing the "uncritical acceptance" by some California courts "of the insurance model into the employment context, without careful consideration of the fundamental policies underlying the development of tort and contract law in general or of significant differences between the insurer/insured and employer/employee relationships." In Foley v. Interactive Data Corp., 765 P.2d 373 (Cal.1988), the court refused to apply *Seaman's* to an employer's discharge of an employee holding his job at the pleasure of his employer. In 1989, a Ninth Circuit opinion explained that *Foley* "solidly reaffirms the notion that the bad faith denial of the existence of contract is a cause of action wholly distinct from the breach of the covenant of good faith and fair dealing." Air–Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 187 (9th Cir.1989). *Seaman's* has had little impact in other states.

REMEDIES IN PRACTICE

In providing promisees relief through money damages, the law by and large ignores the costs of obtaining that relief. To be sure, the successful claimant may ordinarily recover its court costs, but these are typically quite modest. But in contrast to the situation in many countries, the successful claimant in the United States is usually not allowed to recover its attorney's fees from the losing party. Thus even winning parties are left to pay their own, often substantial, lawyers' fees, as well as the many other costs of litigation. These may include the cost of enforcing a judgment. This helps to explain why many disputes are settled out of court or not initiated in the first place.

Where the transaction is a substantial one between business people, the cost of litigation may not seem overwhelming in relation to the amount in dispute or in relation to the precedential value of a judicial decision. But what of the typical consumer transaction in which the stakes are often smaller, whether the aggrieved party is the merchant (often trying to collect) or the consumer (perhaps refusing to pay)?

Of the two, the merchant is in the better position. The merchant is likely to have enough disputes to have them handled in bulk by specialists in collection. The merchant engages professionals such as lawyers or trade associations to write the contract, which may provide for liquidated damages and for attorney's fees; such provisions are likely to be sustained so long as the fees are reasonable. The merchant may also be able to provide for security, as by taking a deposit where goods have not been delivered or by preserving the right to repossess goods that have been delivered. Indeed, the law's concern has been not that the merchant can do too little but too much in disputes with consumers.

In contrast, the consumer is unlikely to know or to afford a lawyer. The consumer could not have changed the contract's terms or even known what changes were desirable. Depending on how trusting the merchant has been, the consumer may be able to stop payment on a check or to refuse to pay for goods delivered on credit, but even here the consumer risks action by the merchant's specialists in collection. It is not that "the customer is always right." Customers may be wrong. The problem is that the consumer and the merchant stand on an unequal footing in attempting to show who is right.

A variety of solutions, many procedural in nature, have attempted to even out disparities in a consumer's ability to bring or to defend claims. One solution is to "sweeten the pot" by increasing the successful consumer's recovery through statutes that allow civil penalties, multiple (*e.g.*, treble) damages, or attorney's fees. Another solution is to facilitate the representation of consumers by providing free or inexpensive legal services, by allowing them to join with claimants in class actions, or by having a public agency handle the claim and distribute any recovery to the aggrieved consumers.

Still other mechanisms for reducing the costs and complexities of litigation for consumers focus on the forum. For example, small claims courts and non-judicial forms of dispute resolution such as arbitration are generally cheaper and offer more flexible and informal procedures than those applied in standard litigation. Whether arbitration *always* favors "the little guy" is a question we take up in Chapter 6, Limits on the Bargain.

NOTES

(1) *Efficient Breach and the Costs of Enforcements.* The efficient breach hypothesis ignores the cost to the parties of enforcing rights. How might taking those costs into account change the analysis? For example, what if it is very costly for the promisee to pay for an attorney, to prove the performance was defective, or to prove the amount of its damages?

(2) *Arbitration Primer.* An arbitration tribunal is typically constituted for a single dispute, and is discharged upon making an award. Commonly the tribunal has either one or three members. Many institutions, notably trade associations and chambers of commerce, engage in the administration of arbitrations, including promulgation of procedural rules and the appointment of arbitrators. Two of the most important of these are the International Chamber of Commerce in Paris and the American Arbitration Association (AAA) in New York.

The AAA recommends the following arbitration clause for insertion in all commercial contracts: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

As mandated by the Federal Arbitration Act and widespread state statutes, courts commonly grant specific performance to provisions like this, dismissing claims within the description, and enforcing, within wide limits, arbitration awards.

(3) *The Costs of Justice.* In one respect, the cost of obtaining relief in court is subsidized by the availability of the public machinery of justice. Litigants are not charged, except as tax payers, for the services of judges or juries in resolving their disputes. In contrast, arbitration is paid for by the parties themselves. A number of states have also authorized the practice of "private judging," in which the parties agree to choose and pay for a private adjudicator, typically a retired judge, to hear the case. See Cal.Civ.Proc. Code §§ 638–645.2. Sometimes referred to as "rent-a-judge," private judging combines aspects of arbitration with the judicial authority of the courts. While alternative adjudicatory fora are mainly a subject for procedure courses, we consider the costs of justice in Chapter 6 in connection with mandatory arbitration clauses and class actions.

(4) *The "Work of the Law Machine at the Margin."* Professor Karl Llewellyn[a] concluded "that the real major effect of law will be found not so much in the cases in which law officials actually intervene, nor yet in those in which such intervention is consciously contemplated as a possibility, but rather in contributing to, strengthening, stiffening attitudes toward performance as what is to be expected and what 'is done'. . . . This work of the law machine at the margin, in helping keep the level of social practice and expectation up to where it is, as against slow canker, is

a. Karl Nickerson Llewellyn (1893–1962) practiced law in New York for two years, and taught law at Yale, Columbia, and Chicago law schools. He was well-known for his contributions to the field of jurisprudence, as one of the school of "legal realists," and also to the fields of commercial law and contracts. He was Chief Reporter of the Uniform Commercial Code, and the author of many books, including The Bramble Bush: On Our Law and Its Study, which was written especially for first-year law students.

probably the most vital single aspect of contract law. For in this aspect each hospital case is a case with significance for the hundreds of thousands of normal cases.'' Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 725 n. 47 (1931). For a discussion of the nonlegal sanctions that may encourage promisors to keep their promises, see David Charny, Nonlegal Sanctions in Commercial Relationships, 104 Harv.L.Rev. 373 (1990).

SECTION 3. CONSIDERATION AS A BASIS FOR ENFORCEMENT

(A) FUNDAMENTALS OF CONSIDERATION

What promises should the law enforce? In a well known article, legal philosopher Morris Cohen suggested that

> [t]he simplest answer is that of the intuitionists, namely, that promises are sacred per se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this.... There can be no doubt that from an empirical or historical point of view, the ability to rely on the promises of others adds to the confidence necessary to social intercourse and enterprise.

At the same time, Cohen thought it very doubtful that ''many of us would want to live in an entirely rigid world in which one would be obliged to keep all one's promises instead of the present more viable system, in which a vaguely fair proportion is sufficient. Many of us indeed would shudder at the idea of being bound by every promise, no matter how foolish, without any chance of letting increased wisdom undo past foolishness. Certainly, some freedom to change one's mind is necessary for free intercourse between those who lack omniscience.'' Morris Cohen, The Basis of Contract, 46 Harv.L.Rev 553, 571–74, 580–583 (1932). Courts have agreed. As noted in Mills v. Wyman, p. 50 below, ''[g]eneral rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform.''

If we accept the argument that not all promises should be legally enforceable, we are left with the question of which ones are. We begin here with an historical perspective, for the question of enforceability under early English law was closely tied to the common law actions of covenant, debt, and assumpsit, and even today no adequate answer can ignore this aspect of legal history.

The first of these actions, *covenant*, was used to enforce contracts made under seal. Once a written promise was sealed and delivered, the action of covenant was available to enforce it, and it made no difference whether the promisor had bargained for or received anything in exchange for the promise, or whether the promisee had in any way changed position in reliance on it. In medieval England, the seal was a piece of wax affixed to the document and bearing an impression identifying the person who had executed it. At first its use was confined to the nobility, but later it spread to commoners. With the growth of literacy and the use of the personal signature as a means of authentication, the requirement of formality was so eroded that a seal could consist of any written or printed symbol intended to serve as a seal. The word "Seal" and the letters "L.S." (*locus sigilli*) were commonly used for this purpose.

Two functions performed by such legal formalities as the seal have been described by Professor Lon Fuller[a] as "evidentiary," that is, providing trustworthy evidence of the existence and terms of the contract in the event of controversy, and "cautionary," that is, bringing home to the parties the significance of their acts—inducing "the circumspective frame of mind appropriate in one pledging his future." Fuller, Anatomy of the Law 36–37 (1968); Fuller, Consideration and Form, 41 Colum.L.Rev. 799, 800 (1941). With the erosion of the solemnity of the seal, it became doubtful that it performed either of these functions well. Consequently, the distinctive effect of the seal on the enforceability of promises has been abolished in roughly half of the states of the United States and has been seriously curtailed in the rest. The most recent of these assaults on the seal came with the enactment of the Uniform Commercial Code, which "makes it clear that every effect of the seal which relates to 'sealed instruments' as such is wiped out insofar as contracts for sale are concerned." Comment 1 to UCC § 2–203. Where the seal still retains some effect, it is often limited to raising a rebuttable presumption of consideration or making applicable a longer period of limitations. What supplanted the seal as the primary criterion of the enforceability of a promise was the circumstance that the promise was, or was not, given in exchange for something, or consideration. The contours of the criterion are featured below. At this point it is enough to say that an uncle's promise to his nephew to pay the nephew's way through law school is not one supported by consideration; not, that is, if the only reward for the uncle's promise is a warm glow of satisfaction.

The criterion of consideration has been partially supplanted, in its turn, by other criteria of enforceability, such as reliance. These too are developed in the following sections.

The second of the three common law actions—debt—was used to enforce some types of unsealed promises to pay a definite sum of money. These included a promise to repay money that had been loaned and a promise to pay for goods that had been delivered or for work that had been done. Since these were situations in which the contemplated exchange was completed on one side, they appealed to the primitive notion that the promisor (or debtor) had something belonging to the promisee (or creditor) that the former ought to surrender. The proprietary element present in

a. Lon L. Fuller (1902–1978) had a long teaching career at Oregon, Illinois, Duke, Columbia, and, for the last three decades of his life, at Harvard, where he taught contracts and jurisprudence. In philosophical works he presented alternatives to positivist attitudes toward law, sometimes using partly-fanciful cases in imaginary and contrasting opinions. See, e.g., Fuller, The Case of the Speluncean Explorers, 62 Harv.L.Rev. 616 (1949). His article, with one of his students, William Purdue, on the reliance interest in contracts prompted an extensive reexamination of the subject. It is cited on p. 14 below.

this notion is reflected in the popular expression that a depositor who is owed money by a bank "*has* money in the bank." What the promisee had given the promisor was sometimes called the "*quid pro quo*" and, as the underlying principles of contract law developed, the promisor's obligation in debt was considered to rest upon receipt of a *benefit* from the promisee.

The third and ultimately the most important common law action, *assumpsit*, grew out of cases in which the promisee sought to recover damages for physical injury to person or property on the basis of a consensual undertaking. In one such case a ferryman who undertook to carry the plaintiff's horse across a river was held liable when he overloaded the boat and the horse drowned. In another a carpenter who undertook to build a house for the plaintiff was held liable when he did so unskillfully. The underlying theme of these decisions was that of misfeasance—the promisor, having undertaken (*assumpsit*) to do something, had done it in a manner inconsistent with that undertaking to the detriment of the promisee. The decisions did not go so far as to impose liability for nonfeasance—where the promisor had done *nothing* in pursuance of the undertaking—for example, where the carpenter in the case just put had failed to build the house at all. It was not until the latter half of the fifteenth century that the common-law courts began to make this extension. When they did, they imposed a requirement, analogous to that in the misfeasance cases, that the promisee must have incurred a *detriment* in reliance on the promise—as where the owner had changed position by selling an old house in reliance on the carpenter's promise to build a new one.

Finally, by the end of the sixteenth century, the courts made a second major extension of the action of assumpsit and held that a party that had given only a promise in exchange for the other's promise had incurred a detriment by having its freedom of action fettered, since it was bound in turn by its own promise. By this circular argument, the common law courts began to enforce exchanges of promises. Here is the opinion in what is said to be the earliest case recognizing that a promise, not even partly performed, could be consideration for a return promise:

> Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give me £10 on such a day, I promise to give you £10 such a day after.

Strangborough v. Warner, 4 Leo. 3 (Queen's Bench 1588). See Holdsworth, Debt, Assumpsit and Consideration, 11 Mich.L.Rev. 347, 351 (1913).

Eventually, the action of assumpsit was allowed to supplant that of debt for the enforcement of promises that would previously have been enforced only in the latter action. By the beginning of the seventeenth century, the common law courts had succeeded in developing the action of assumpsit as a general basis for the enforcement of promises. By that time, the term "consideration" had come to be used as a word of art to express the sum of the conditions necessary for such an action to lie. It was therefore a tautology that a promise, if not under seal, was enforceable only where there was "consideration," for this was to say no more than that it was enforceable only where the action of assumpsit would lie. Bound up in the concept of consideration were several elements. Most important, from the *quid pro quo* of debt came the idea that there must have been an exchange arrived at by way of bargain. To the extent that debt inspired the concept of consideration, there was the notion that there must be a *benefit* to the promisor. To the extent that assumpsit inspired it, there was the notion that there must be a *detriment* to the promisee.

The cases that follow refine our understanding of the doctrine of consideration and of its development into this century. The concept of benefit and detriment have receded but the centrality of a bargained-for exchange between the parties remains, lending at least some support to the claim of the English legal historian, F.W. Maitland, that ''The forms of action we have buried, but they still rule us from their graves.'' Frederic W. Maitland, *The Forms of Action at Common Law 2* (1936 ed.). For a thorough treatment of this historical background, see A.W. Brian Simpson, *A History of the Common Law of Contract* (1975). See also Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Colum.L.Rev. 576 (1969). In any event, consideration has long been a fundamental feature of a contractual relationship; decades ago it was called ''the glue that binds the parties to a contract together.'' In re Owen, 303 S.E.2d 351 (N.C.App.1983).

TYPICAL CATEGORIES OF AGREEMENTS

Throughout the nineteenth century, text writers on contract law devoted considerable attention to specific types of agreements, such as contracts with common carriers, innkeepers, and for pawns and pledges, that were on the periphery of general contract law. When, in 1920, Samuel Williston[a] launched the first edition of his magisterial contracts treatise, he announced that he sought to ''treat the subject of contracts as a whole, and to show the wide range of application of its principles.'' Not surprisingly, this conception of a body of contract law generally applicable to agreements of all sorts was confirmed in 1932, when the ALI promulgated its original Restatement of Contracts, for which Williston served as Reporter. A federal court of appeal has most recently affirmed this view. In response to a party's plea to limit an earlier holding to cases involving software, the judge responded, ''Where's the sense in that? ProCD is about the law of contracts, not the law of software.'' ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir.1996). (The case appears at p. 211 below.) Consistent with this concep-

a. Samuel Williston (1861–1963) joined the faculty of the Harvard Law School in 1890, after practicing law for a short period in Boston, and taught there until his retirement in 1938. His principal fields were contracts and sales. His multi-volume work, A Treatise on the Law of Contracts, was first published in 1920 and became one of the most widely used legal treatises in the United States. He was the Reporter for the Restatement of Contracts and the draftsman of several uniform laws, including the Uniform Sales Act.

tion, this book seeks to show how such principles apply to a wide variety of transactions.

At the same time, many transactions fall into recognizable categories, in which lawyers sometimes specialize and which sometimes develop distinctive rules and practices. We note five such categories here: contracts for sales of goods, real estate transactions, construction contracts, employment agreements, and family contracts. In this book, when a case involving one of these five categories appears, it is preceded by a description of some of the features that characterize such agreements and some of the common questions that they raise. To be sure, other types of agreements appear throughout the book; these include franchise and distributorship contracts, publishing contracts, government contracts, and consumer contracts. You may want to observe and organize distinctive features of these categories as well.

But now to the first of our five typical categories: Family Contracts.

FAMILY CONTRACTS

The agreement in the following venerable case—an uncle's promise to a nephew made during a family celebration—is typical of agreements between relatives and others in close personal relationships. Unlike most commercial agreements, family agreements are frequently oral, may not be preceded by significant bargaining, and are often informal and lacking in detail. They may not be of great economic moment except, of course, to the parties themselves. Family agreements often involve matters and relationships long understood to be outside the proper scope of judicial intervention. An initial question is therefore whether a promise made between family members is enforceable at all, a question that explains the presence of a number of such cases in this chapter.

The traditional answer has been No. Goods or services provided from one family member to another were assumed to be gifts motivated by altruism, not bargains motivated by gain. Furthermore, as an English court explained in denying a wife recovery on her husband's promise of a stated monthly allowance, "[I]t would be the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts," for "each house is a domain into which the King's writ does not run and to which his officers do not seek to be admitted." Balfour v. Balfour, [1919] 2 K.B. 571, 579 (Court of Appeal 1919). An American court justified a similar decision by declaring that to enforce such a promise would "open an endless field for controversy and bickering." Graham v. Graham, 33 F.Supp. 936 (E.D.Mich.1940).

In recent years, the differences between family agreements and commercial ones have narrowed as contractual relationships among intimates have found increasing legal acceptance. Sophisticated contracts, now often drafted by lawyers, are used to order matters once considered wholly unsuited for private agreement or public enforcement. Thus parties, married and unmarried, now arrange aspects of their relationships from start to finish through pre-nuptial agreements, cohabitation contracts, and divorce and property settlements. People also contract with one another to create families through surrogacy contracts, open adoption agreements, and the sale of genetic material. We explore several such agreements in later chapters, but begin here with a relatively straightforward promise from uncle to nephew.

Hamer v. Sidway

Court of Appeals of New York, 1891.
124 N.Y. 538, 27 N.E. 256.

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought.

It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter:

Buffalo, Feb. 6, 1875.

"W.E. STORY, JR.:

"DEAR NEPHEW—Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work.... It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop....

Truly Yours,
"W.E. STORY.

"P.S.—You can consider this money on interest."

The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

■ PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William S. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, ... William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration, a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: "A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Con. 63.

"In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Parsons on Contracts, 444.

"Any damage, or suspension or forbearance of a right, will be sufficient to sustain a promise." Kent, Vol. 2, 465, 12th Ed.[a]

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, says: "The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In Shadwell v. Shadwell, 9 C.B.N.S. 159, an uncle wrote to his nephew as follows:

"MY DEAR LANCEY—I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.

"Your affectionate uncle,
"CHARLES SHADWELL."

It was held that the promise was binding and made upon good consideration.

a. James Kent (1763–1847) began practice after three years as an apprentice and was active in Federalist politics. Hamilton introduced him to the writings of European authors on the civil law, which were to influence his later work. In 1793, largely through his Federalist connections, he was made Professor of Law in Columbia College. He attracted few students, and soon resigned to become a judge on the New York Supreme Court, then the highest court in the state. In 1814 he became Chancellor. Upon his retirement in 1823, he lectured again at Columbia for three years. Out of these lectures grew the "Commentaries on American Law," in four volumes, which became one of the most important American law books of the century. (It is the source of the quotation above.) Kent lived to prepare six editions; subsequent ones were revised by others. For his work on the Court of Chancery, he has been called the creator of equity in the United States.

In Lakota v. Newton, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that "if you (meaning plaintiff) will leave off drinking for a year I will give you $100," plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In Talbott v. Stemmons, 89 Ky. 222, the step-grandmother of the plaintiff made with him the following agreement: "I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother." The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that "the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health; nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise." Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point. . . .

[In an omitted part of the opinion the court held that the action was not barred by the statute of limitations because under the uncle's letter he held the money in trust and not merely as a debtor.] Order reversed and judgment of special term affirmed.

NOTES

(1) *Benefit, Detriment, and Bargain*. What was the consideration for the uncle's promise to pay $5,000? How did the court's definition of detriment differ from that urged by the defendant? What role do benefit and detriment play under Restatement §§ 71 and 79? Was there consideration for the uncle's promise under those sections? How clear is it that there was consideration for promise of the affectionate uncle in Shadwell v. Shadwell ("My dear Lancey . . .")?

(2) *Holmes and the "Bargain Theory" of Consideration*. Oliver Wendell Holmes, Jr., an early advocate of the "bargain theory" of consideration later espoused in the Restatement, spoke of "reciprocal conventional inducement": "It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and

accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.'' Holmes, *The Common Law* 293–94 (1881).

Holmes reaffirmed this when he went on the bench: ''[T]he promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.'' Holmes, J., in Wisconsin & Michigan Railway Co. v. Powers, 191 U.S. 379 (1903). Compare Restatement § 71(2) with § 81(1).

(3) *''Sufficiency'' of Consideration.* The term ''sufficient consideration'' appears at several points in Hamer v. Sidway. The Restatement, First, embodied a concept of the ''sufficiency'' of consideration. Although consideration did not have to be ''adequate,'' it had to be ''sufficient.'' See the Restatement, First, §§ 76–81. The Restatement, Second, abandoned this concept. Under its terminology the question is simply whether there is ''consideration,'' with no qualifying adjective. See Restatement § 79. In declining to assess whether a particular lease provision was inadequate, one court relied on the ''time-honored principle'' that an informed decision by a party ''that what it is receiving is worth what it is giving may not later be second-guessed by that party, nor may the party ask a court to engage in such post-hoc revisionism.'' GLS Development v. Wal–Mart Stores, 944 F.Supp. 1384 (N.D.Ill. 1996). Whether or not consideration can ever be so paltry as to suggest impermissible overreaching by one of the parties is taken up in Chapter 4.

(4) *Peppercorn.* Under the bargain theory of consideration, can a gratuitous promise be made enforceable by a mere token payment, arranged by the parties for the sole purpose of satisfying the requirement of consideration? Holmes concluded that since courts would not in general ''inquire into the amount of such consideration . . . , consideration is as much a form as a seal.'' Krell v. Codman, 28 N.E. 578 (Mass.1891). The term ''peppercorn'' is often used to deride consideration that is of trifling value.

Will such a device be given effect? There is some authority, most of it old, that it will be. *E.g.*, Thomas v. Thomas, 2 Q.B. 851, 114 Eng.Rep. 330 (1842). Illustration 1 to the Restatement, First, § 84 reads:

> A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth $5,000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for $1. B accepts. B's promise to pay $1 is sufficient consideration.

The Restatement, Second, takes the opposite view. Illustration 5 to § 71 reads:

> A desires to make a binding promise to give $1,000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1,000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay $1,000.

For a case in support of this illustration, see Fischer v. Union Trust Co., 101 N.W. 852 (Mich.1904).

(5) *Promise for Performance or Promise for Promise?* In the principal case, the uncle promised to pay his nephew in exchange for his nephew's *refraining* from various vices, and not for his nephew's *promise* to refrain. See Restatement § 71(1). Why might the uncle have sought actual performance rather than his nephew's promise? Distinctions between contracts in which the promise is exchanged for

performance and those in which two promises are exchanged are discussed at p. 67 below and again in Chapter 2 in connection with contract formation. Agreements in which only one party makes a promise are often called *unilateral* contracts; agreements in which each party makes a promise to the other are often called *bilateral*. Bilateral contracts are much more common and economically significant than unilateral contracts. Why might this be?

(6) *Hamer Lives.* In Dahl v. HEM Pharmaceuticals, 7 F.3d 1399, 1404 (9th Cir.1993), a drug company promised a year's free supply of an experimental drug to subjects who participated in a one-year clinical trial to test the drug's efficacy. Dahl participated for the full year, at which time HEM refused to supply the drug any further, claiming its promise to do so was unsupported by consideration. On appeal, the court said: "Somehow the category of unilateral contracts appears to have escaped HEM's notice. The deal was, 'if you submit to our experiment, we will give you a year's supply of Ampligen at no charge.' This form of agreement resembles that in the case taught in the first year of law school, Hamer v. Sidway ..."

PROBLEM

Discounting Retirement. Thomas Hurley has worked as general superintendent for Marine Contractors for eight years, during which time Marine has made annual payments into an Employee Retirement Plan and Trust Fund, a legally separate entity whose sole trustee is also the president of Marine. Hurley now plans to leave Marine, and is entitled under the terms of the trust to payment of his vested share after a five year waiting period. Marine wants Hurley to make a binding promise to Marine not to compete with it after he leaves its employ. In return, Marine's president, as trustee, is willing to have the trust pay Hurley his vested share immediately. Will payment by the trust to Hurley be consideration for Hurley's promise to Marine? Does the answer depend on whether you are looking for a benefit, a detriment, or a bargain? See Marine Contractors Co., Inc. v. Hurley, 310 N.E.2d 915 (Mass.1974).

GRATUITOUS PROMISES

Suppose that the uncle in *Hamer* had given his nephew $5,000 in cash at the golden wedding anniversary and had told him that it was a gift that he could keep on condition that he refrain from drinking, smoking, swearing, and gambling until he was twenty-one. Surely the nephew, having met the condition, could have kept the money if the uncle's executor had attempted to get it back. Why, if the law recognizes gratuitous *transfers*, with or without strings attached, should it not recognize gratuitous *promises*? Why did the court have to find that there was consideration? What explains the reluctance to create a regime of enforceable gift promises? We have already seen the suggestion that social cooperation might best be achieved by a system of "free enterprise." Is it the fact that gratuitous promises serve no useful economic function? Do gift promises raise dangers as to proof?

What sorts of rules would you suggest if it were thought desirable to enable promisors to make enforceable gratuitous promises? To what extent should those rules take account of such factors as the promisor's motives, the social utility of the promise, the formality with which it was made and the availability of alternate means of making gifts?

NOTES

(1) *Sweetheart Stadium?* A group of taxpayers in Washington State sought to enjoin a bond ordinance enacted to raise money for a new stadium for the Seattle Mariners, a baseball team. They argued that the consideration received by the city under the terms of the stadium lease between the city and the team was so "grossly inadequate" as to make the lease a gift, one prohibited under the state constitution, which forbids gifts of public monies to private organizations. The taxpayers pointed to such provisions as profit-sharing (with little expectation of profit), nominal rent, and easy-out terms for the team.

Noting that "courts do not inquire into the adequacy of consideration," the Washington Supreme Court found consideration in the Mariners' obligations to play home games, maintain the stadium, and share profits. It affirmed the trial court's declaratory order validating the bonds. King County v. Taxpayers of King County, 949 P.2d 1260 (Wash.1997).

Is the traditional contract standard for consideration appropriate in the context of a constitutional challenge? A dissent in the stadium case argued that the traditional standard failed to accomplish the objective of the constitutional prohibition: "If a public official may transfer $100 of the taxpayer property for a $5 return to the taxpayer, they are $95 poorer. The return is inadequate regardless of the legal sufficiency of the consideration. The purpose of the [constitutional] provision is to avoid transactions which plunder the public purse to the benefit of private corporate wealth." *Id*. at 1278. Dissenting justices would have required a trial on the question of the adequacy of the return.

(2) *Changing One's Mind*. One argument against enforcing gratuitous promises is that enforcement leaves no room for a promisor's regret or for changed circumstances. But might not some reasons for changing one's mind be anticipated and accommodated? French and German laws, for example, permit the revocation of *gifts* by means of implied conditions in cases where the donor is subsequently impoverished (German law), or cases of "donee ingratitude" (French law). See John P. Dawson, *Gifts and Promises* (1980) at 53, 140–141. Consider also an Israeli rule that permits revocation of a gift *promise*, even after reliance by the promisee, "if the retraction is warranted by disgraceful conduct towards the [promisor or the promisor's family]," 22 Laws of State of Israel 113. Is it significant in these latter cases that the promisee appears to have had some responsibility for the promisor's regret? For a thorough investigation of the subject, see Farnsworth, *Changing One's Mind: The Law of Regretted Decisions* (2000).

Fiege v. Boehm

Court of Appeals of Maryland, 1956.
210 Md. 352, 123 A.2d 316.

■ DELAPLAINE, JUDGE. This suit was brought in the Superior Court of Baltimore City by Hilda Louise Boehm against Louis Gail Fiege to recover for breach of a contract to pay the expenses incident to the birth of his bastard child and to provide for its support upon condition that she would refrain from prosecuting him for bastardy.

Plaintiff alleged in her declaration substantially as follows: (1) that early in 1951 defendant had sexual intercourse with her although she was unmarried, and as a result thereof she became pregnant, and defendant acknowledged that he was responsible for her pregnancy; (2) that on September 29, 1951, she gave birth to a female child; that defendant is the father of the child; and that he acknowledged on many occasions that he is its father; (3) that before the child was born, defendant agreed to pay all her medical and miscellaneous expenses and to compensate her for the loss of her salary caused by the child's birth, and also to pay her ten dollars per week for its support until it reached the age of 21, upon condition that she would not institute bastardy proceedings against him as long as he made the payments in accordance with the agreement; (4) that she placed the child for adoption on July 13, 1954, and she claimed the following sums: Union Memorial Hospital, \$110; Florence Crittenton Home, \$100; Dr. George Merrill, her physician, \$50; medicines \$70.35; miscellaneous expenses, \$20.45; loss of earnings for 26 weeks, \$1,105; support of the child, \$1,440; total, \$2,895.80; and (5) that defendant paid her only \$480, and she demanded that he pay her the further sum of \$2,415.80, the balance due under the agreement, but he failed and refused to pay the same.

Defendant demurred to the declaration on the ground that it failed to allege that in September, 1953, plaintiff instituted bastardy proceedings against him in the Criminal Court of Baltimore, but since it had been found from blood tests that he could not have been the father of the child, he was acquitted of bastardy. The Court sustained the demurrer with leave to amend.

Plaintiff then filed an amended declaration, which contained the additional allegation that, after the breach of the agreement by defendant, she filed a charge with the State's Attorney that defendant was the father of her bastard child; and that on October 8, 1953, the Criminal Court found defendant not guilty solely on a physician's testimony that "on the basis of certain blood tests made, the defendant can be excluded as the father of the said child, which testimony is not conclusive upon a jury in a trial court." Defendant also demurred to the amended declaration, but the Court overruled that demurrer.

Plaintiff, a typist, now over 35 years old, who has been employed by the Government in Washington and Baltimore for over thirteen years, testified in the Court below that she had never been married, but that at about midnight on January 21, 1951, defendant, after taking her to a moving picture theater on York Road and then to a restaurant, had sexual intercourse with her in his automobile. She further testified that he agreed to pay all her medical and hospital expenses, to compensate her for loss of salary caused by the pregnancy and birth, and to pay her ten dollars per week for the support of the child upon condition that she would refrain from instituting bastardy proceedings against him. She further testified that between September 17, 1951, and May, 1953, defendant paid her a total of \$480.

Defendant admitted that he had taken plaintiff to restaurants, had danced with her several times, had taken her to Washington, and had brought her home in the country; but he asserted that he had never had sexual intercourse with her. He also claimed that he did not enter into any agreement with her. He admitted, however, that he had paid her a total of $480. His father also testified that he stated "that he did not want his mother to know, and if it were just kept quiet, kept principally away from his mother and the public and the courts, that he would take care of it."

Defendant further testified that in May 1953, he went to see plaintiff's physician to make inquiry about blood tests to show the paternity of the child; and that those tests were made and they indicated that it was not possible that he could have been the child's father. He then stopped making payments. Plaintiff thereupon filed a charge of bastardy with the State's Attorney.

The testimony which was given in the Criminal Court by Dr. Milton Sachs, hematologist at the University Hospital, was read to the jury in the Superior Court. In recent years the blood-grouping test has been employed in criminology, in the selection of donors for blood transfusions, and as evidence in paternity cases. The Landsteiner blood-grouping test is based on the medical theory that the red corpuscles in human blood contain two affirmative agglutinating substances, and that every individual's blood falls into one of the four classes and remains the same throughout life. According to Mendel's law of inheritance, this blood individuality is an hereditary characteristic which passes from parent to child, and no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents. The four Landsteiner blood groups, designated as AB, A, B, and O, into which human blood is divided on the basis of the compatibility of the corpuscles and serum with the corpuscles and serum of other persons, are characterized by different combinations of two agglutinogens in the red blood cells and two agglutinins in the serum. Dr. Sachs reported that Fiege's blood group was Type O, Miss Boehm's was Type B, and the infant's was Type A. He further testified that on the basis of these tests, Fiege could not have been the father of the child, as it is impossible for a mating of Type O and Type B to result in a child of Type A.

Although defendant was acquitted by the Criminal Court, the Superior Court overruled his motion for a directed verdict. In the charge to the jury the Court instructed them that defendant's acquittal in the Criminal Court was not binding upon them. The jury found a verdict in favor of plaintiff for $2,415.80, the full amount of her claim.

Defendant filed a motion for judgment n.o.v. or a new trial. The Court overruled that motion also, and entered judgment on the verdict of the jury. Defendant appealed from that judgment.

Defendant contends that, even if he entered into the contract as alleged, it was not enforceable, because plaintiff's forbearance to prosecute was not based on a valid claim, and hence the contract was without consideration. . . .

It was originally held at common law that a child born out of wedlock is *filius nullius,* and a putative father is not under any legal liability to contribute to the support of his illegitimate child, and his promise to do so is unenforceable because it is based on purely a moral obligation. . . .

However, where statutes are in force to compel the father of a bastard to contribute to its support, the courts have invariably held that a contract by the putative father with the mother of his bastard child to provide for the support of the child upon the agreement of the mother to refrain from invoking the bastardy statute against the father, or to abandon proceedings already commenced, is supported by sufficient consideration. Jangraw v. Perkins, 77 Vt. 375, 60 A. 385; Beach v. Voegtlen, 68 N.J.L. 472, 53 A. 695; Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553, 39 A.L.R. 428.

In Maryland it is now provided by statute that whenever a person is found guilty of bastardy, the court shall issue an order directing such person (1) to pay for the maintenance and support of the child until it reaches the age of eighteen years, such sum as may be agreed upon, if consent proceedings be had, or in the absence of agreement, such sum as the court may fix, with due regard to the circumstances of the accused person; and (2) to give bond to the State of Maryland in such penalty as the court may fix, with good and sufficient securities, conditioned on making the payments required by the court's order, or any amendments thereof. Failure to give such bond shall be punished by commitment in the jail or the House of Correction until bond is given but not exceeding two years. Code Supp.1955, art. 12, § 8.

Prosecutions for bastardy are treated in Maryland as criminal proceedings, but they are actually civil in purpose. . . . Accordingly a contract by the putative father of an illegitimate child to provide for its support upon condition that bastardy proceedings will not be instituted is a compromise of civil injuries resulting from a criminal act, and not a contract to compound a criminal prosecution, and if it is fair and reasonable, it is in accord with the Bastardy Act and the public policy of the State.

Of course, a contract of a putative father to provide for the support of his illegitimate child must be based, like any other contract, upon sufficient consideration. . . .

In 1867 the Maryland Court of Appeals, in the opinion delivered by Judge Bartol in Hartle v. Stahl, 27 Md. 157, 172, held: (1) that forbearance to assert a claim before institution of suit, if not in fact a legal claim, is not of itself sufficient consideration to support a promise; but (2) that a compromise of a doubtful claim or a relinquishment of a pending suit is good consideration for a promise; and (3) that in order to support a compromise, it is sufficient that the parties entering into it thought at the time that there was a *bona fide* question between them, although it may eventually be found that there was in fact no such question.

We have thus adopted the rule that the surrender of, or forbearance to assert an invalid claim by one who has not an honest and reasonable belief in its possible validity is not sufficient consideration for a contract. 1 Restatement, Contracts, sec. 76(b). We combine the subjective requisite that the claim be *bona fide* with the objective requisite that it must have a reasonable basis of support. Accordingly a promise not to prosecute a claim which is not founded in good faith does not of itself give a right of action on an agreement to pay for refraining from so acting, because a release from mere annoyance and unfounded litigation does not furnish valuable consideration.

Professor Williston was not entirely certain whether the test of reasonableness is based upon the intelligence of the claimant himself, who may be an ignorant person with no knowledge of law and little sense as to facts; but he seemed inclined to favor the view that "the claim forborne must be neither absurd in fact from the standpoint of a reasonable man in the position of the claimant, nor, obviously unfounded in law to one who has an elementary knowledge of legal principles." 1 Williston on Contracts, Rev. Ed., sec. 135. We agree that while stress is placed upon the honesty and good faith of the claimant, forbearance to prosecute a claim is insufficient consideration if the claim forborne is so lacking in foundation as to make its assertion incompatible with honesty and a reasonable degree of intelligence. Thus, if the mother of a bastard knows that there is no foundation, either in law or fact, for a charge against a certain man that he is the father of the child, but that man promises to pay her in order to prevent bastardy proceedings against him, the forbearance to institute proceedings is not sufficient consideration.

On the other hand, forbearance to sue for a lawful claim or demand is sufficient consideration for a promise to pay for the forbearance if the party forbearing had an honest intention to prosecute litigation which is not frivolous, vexatious, or unlawful, and which he believed to be well founded. Snyder v. Cearfoss, 187 Md. 635, 643, 51 A.2d 264; Pullman Co. v. Ray, 201 Md. 268, 94 A.2d 266. Thus the promise of a woman who is expecting an illegitimate child that she will not institute bastardy proceedings against a certain man is sufficient consideration for his promise to pay for the child's support, even though it may not be certain whether the man is the father or whether the prosecution would be successful, if she makes the charge in good faith. . . .

Another analogous case is Thompson v. Nelson, 28 Ind. 431. There the plaintiff sought to recover back money which he had paid to compromise a prosecution for bastardy. He claimed that the prosecuting witness was not pregnant and therefore the prosecution was fraudulent. It was held by the Supreme Court of Indiana, however, that the settlement of the prosecution was a good consideration for the payment of the money and it could not be recovered back, inasmuch as it appeared from the evidence that the prosecution was instituted in good faith, and at that time there was reason to believe that the prosecuting witness was pregnant, although it was found out afterwards that she was not pregnant. [The court's summary of a similar decision on similar facts in Illinois is here omitted. Heaps v. Dunham, 95 Ill. 583, 590.]

In the case at bar there was no proof of fraud or unfairness. Assuming that the hematologists were accurate in their laboratory tests and findings, nevertheless plaintiff gave testimony which indicated that she made the charge of bastardy against defendant in good faith. For these reasons the

Court acted properly in overruling the demurrer to the amended declaration and the motion for a directed verdict.

As we have found no reversible error in the rulings and instructions of the trial court, we will affirm the judgment entered on the verdict of the jury.

Judgment affirmed, with costs.

NOTES

(1) *The Objective Requisite.* What was the consideration for Fiege's promise? Boehm's forbearance to press a claim that later turned out to be invalid? According to the Restatement, First, § 76, "forbearance to assert an invalid claim . . . by one who has not an honest and reasonable belief in its possible validity" is not consideration. Examine Restatement § 74(1). What has happened to the requirement of the Restatement, First, that the forbearing party have a reasonable belief in its position? On a close reading of *Fiege*, does it appear that the Restatement, Second, rule is substantially identical to the rule of the case?

(2) *Nondisclosure.* What important information did Boehm fail to disclose to Fiege when he made his promise? Is it arguable that her failure amounted to a misrepresentation? Misrepresentation by non-disclosure is dealt with at p. 352 below. Could Boehm have enforced promises for child support against two promisors? What facts might warrant her belief in the "possible validity" of claims against both?

(3) *Legal Claims and Legal Ethics. Fiege* concerned the issue of forbearance on a claim in a personal context. The settlement of doubtful claims is of significant economic importance in connection with nuisance litigation or "strike suits." These are defined as lawsuits with a sufficiently low chance of prevailing at trial that they would not have been brought but for the prospect of settlement. Why are frivolous suits not always met with blanket refusals to negotiate? A legal economist has observed that "since refusing to take a valid claim seriously can be quite costly, a frivolous plaintiff may be able to take advantage of the defendant's uncertainty regarding the claim's validity to extract a substantial settlement." Avery Katz, The Effect of Frivolous Lawsuits on the Settlement of Claims, 10 Intl.Rev.L. & Econ.3,4 (1990).

What is a lawyer's responsibility with regard to filing dubious pleadings? Rule 11(b) of the Federal Rules of Civil Procedure provides that by presenting a pleading to a court, an attorney certifies that to the best of his or her knowledge, after a reasonable inquiry, the pleading "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." An attorney further certifies, by virtue of a pleading, that there is evidentiary support for any fact it asserts. Courts may order sanctions against attorneys who violate Rule 11(b). Comparable rules about state court pleadings are prevalent.

PROBLEM

Stairway to Heaven. Ralston was injured when she fell on a negligently maintained church stairway. An adjuster for the church's insurance company called on her and promised that it would pay all her expenses if she would refrain from suing the church or the insurer. When the insurer failed to pay, she sued the company on its promise. The insurer argued that because under existing law churches and charitable organizations are immune from liability for their torts, Ralston could not have won a judgment against the church. The trial court agreed and sustained the insurer's demurrer to the Ralston's complaint. What result on Ralston's appeal? How does the insurer's argument resemble that of Fiege in the main case? How does it differ? Should this distinction matter? See Ralston v. Mathew, 250 P.2d 841 (Kan.1952).

(B) The Requirement of Exchange: Action in the Past

Feinberg v. Pfeiffer Co.

Saint Louis Court of Appeals, Missouri, 1959.
322 S.W.2d 163.

Action on alleged contract by defendant to pay plaintiff a specified monthly amount upon her retirement from defendant's employ. The Circuit Court, City of St. Louis, rendered judgment for plaintiff, and defendant appealed.

■ Doerner, Commissioner. This is a suit brought in the Circuit Court of the City of St. Louis by plaintiff, a former employee of the defendant corporation, on an alleged contract whereby defendant agreed to pay plaintiff the sum of $200 per month for life upon her retirement. A jury being waived, the case was tried by the court alone. Judgment below was for plaintiff for $5,100, the amount of the pension claimed to be due as of the date of the trial together with interest thereon, and defendant duly appealed.

The parties are in substantial agreement on the essential facts. Plaintiff began working for the defendant, a manufacturer of pharmaceuticals, in 1910, when she was but 17 years of age. By 1947 she had attained the position of bookkeeper, office manager, and assistant treasurer of the defendant, and owned 70 shares of its stock out of a total of 6,503 shares issued and outstanding. Twenty shares had been given to her by the defendant or its then president, she had purchased 20, and the remaining 30 she had acquired by a stock split or stock dividend. Over the years she received substantial dividends on the stock she owned, as did all of the other stockholders. Also, in addition to her salary, plaintiff from 1937 to 1949, inclusive, received each year a bonus varying in amount from $300 in the beginning to $2,000 in the later years.

On December 27, 1947, the annual meeting of the defendant's Board of Directors was held at the Company's offices in St. Louis, presided over by Max Lippman, its then president and largest individual stockholder. The other directors present were George L. Marcus, Sidney Harris, Sol Flammer, and Walter Weinstock, who, with Max Lippman, owned 5,007 of the 6,503 shares then issued and outstanding. At that meeting the Board of Directors adopted the following resolution, which, because it is the crux of the case, we quote in full:

"The Chairman thereupon pointed out that the Assistant Treasurer, Mrs. Anna Sacks Feinberg, has given the corporation many years of long and faithful service. Not only has she served the corporation devotedly, but with exceptional ability and skill. The President pointed out that although all of the officers and directors sincerely hoped and desired that Mrs. Feinberg would continue in her present position for as long as she felt able, nevertheless, in view of the length of service which she has contributed provision should be made to afford her retirement privileges and benefits which should become a firm obligation of the corporation to be available to her whenever she should see fit to retire from active duty, however many years in the future such retirement may become effective. It was, accordingly, proposed that Mrs. Feinberg's salary which is presently $350.00 per month, be increased to $400.00 per month, and that Mrs. Feinberg would be given the privilege of retiring from active duty at any time she may elect to see fit so to do upon a retirement pay of $200.00 per month for life, with the distinct understanding that the retirement plan is merely being adopted at the present time in order to afford Mrs. Feinberg security for the future and in the hope that her active services will continue with the corporation for many years to come. After due discussion and consideration, and upon motion duly made and seconded, it was—

''Resolved, that the salary of Anna Sacks Feinberg be increased from $350.00 to $400.00 per month and that she be afforded the privilege of retiring from active duty in the corporation at any time she may elect to see fit so to do upon retirement pay of $200.00 per month, for the remainder of her life.''

At the request of Mr. Lippman his sons-in-law, Messrs. Harris and Flammer, called upon the plaintiff at her apartment on the same day to advise her of the passage of the resolution. Plaintiff testified on cross-examination that she had no prior information that such a pension plan was contemplated, that it came as a surprise to her, and that she would have continued in her employment whether or not such a resolution had been adopted. It is clear from the evidence that there was no contract, oral or written, as to plaintiff's length of employment, and that she was free to quit, and the defendant to discharge her, at any time.

Plaintiff did continue to work for the defendant through June 30, 1949, on which date she retired. In accordance with the foregoing resolution, the defendant began paying her the sum of $200 on the first of each month. Mr. Lippman died on November 18, 1949, and was succeeded as president of the company by his widow. Because of an illness, she retired from that office and was succeeded in October, 1953, by her son-in-law, Sidney M. Harris. Mr. Harris testified that while Mrs. Lippman had been president she signed the monthly pension check paid plaintiff, but fussed about doing so, and considered the payments as gifts. After his election, he stated, a new accounting firm employed by the defendant questioned the validity of the payments to plaintiff on several occasions, and in the Spring of 1956, upon its recommendation, he consulted the Company's then attorney, Mr. Ralph Kalish. Harris testified that both Ernst and Ernst, the accounting firm, and Kalish told him there was no need of giving plaintiff the money. He also stated that he had concurred in the view that the payments to plaintiff were mere gratuities rather than amounts due under a contractual obligation, and that following his discussion with the Company's attorney plaintiff was sent a check for $100 on April 1, 1956. Plaintiff declined to accept the reduced amount, and this action followed. Additional facts will be referred to later in this opinion. . . .

Appellant's next complaint is that there was insufficient evidence to support the court's findings that plaintiff would not have quit defendant's employ had she not known and relied upon the promise of defendant to pay her $200 a month for life, and the finding that, from her voluntary retirement until April 1, 1956, plaintiff relied upon the continued receipt of the pension installments. The trial court so found, and, in our opinion, justifiably so. Plaintiff testified, and was corroborated by Harris, defendant's witness, that knowledge of the passage of the resolution was communicated to her on December 27, 1947, the very day it was adopted. She was told at that time by Harris and Flammer, she stated, that she could take the pension as of that day, if she wished. She testified further that she continued to work for another year and a half, through June 30, 1949; that at that time her health was good and she could have continued to work, but that after working for almost forty years she thought she would take a rest. Her testimony continued:

"Q. Now, what was the reason—I'm sorry. Did you then quit the employment of the company after you—after this year and a half? A. Yes.

"Q. What was the reason that you left? A. Well, I thought almost forty years, it was a long time and I thought I would take a little rest.

"Q. Yes. A. And with the pension and what earnings my husband had, we figured we could get along.

"Q. Did you rely upon this pension? A. We certainly did.

"Q. Being paid? A. Very much so. We relied upon it because I was positive that I was going to get it as long as I lived.

"Q. Would you have left the employment of the company at that time had it not been for this pension? A. No.

"Mr. Allen: Just a minute, I object to that as calling for a conclusion and conjecture on the part of this witness.

"The Court: It will be overruled.

"Q. (Mr. Agatstein continuing): Go ahead, now. The question is whether you would have quit the employment of the company at that time had you not relied upon this pension plan? A. No, I wouldn't.

"Q. You would not have. Did you ever seek employment while this pension was being paid to you—A. (interrupting): No.

"Q. Wait a minute, at any time prior—at any other place? A. No, sir.

"Q. Were you able to hold any other employment during that time? A. Yes, I think so.

"Q. Was your health good? A. My health was good."

It is obvious from the foregoing that there was ample evidence to support the findings of fact made by the court below.

We come, then, to the basic issue in the case. While otherwise defined in defendant's third and fourth assignments of error, it is thus succinctly stated in the argument in its brief: ''. . . whether plaintiff has proved that she has a right to recover from defendant based upon a legally binding contractual obligation to pay her $200 per month for life.''

It is defendant's contention, in essence, that the resolution adopted by its Board of Directors was a mere promise to make a gift, and that no contract resulted either thereby, or when plaintiff retired, because there was no consideration given or paid by the plaintiff. It urges that a promise to make a gift is not binding unless supported by a legal consideration; that the only apparent consideration for the adoption of the foregoing resolution was the ''many years of long and faithful service'' expressed therein; and that past services are not a valid consideration for a promise. Defendant argues further that there is nothing in the resolution which made its effectiveness conditional upon plaintiff's continued employment, that she was not under contract to work for any length of time but was free to quit whenever she wished, and that she had no contractual right to her position and could have been discharged at any time.

Plaintiff concedes that a promise based upon past services would be without consideration, but contends that there were two other elements which supplied the required element: First, the continuation by plaintiff in the employ of the defendant for the period from December 27, 1947, the date when the resolution was adopted, until the date of her retirement on June 30, 1949. And, second, her change of position, i.e., her retirement, and the abandonment by her of her opportunity to continue in gainful employment, made in reliance on defendant's promise to pay her $200 per month for life.

We must agree with the defendant that the evidence does not support the first of these contentions. There is no language in the resolution predicating plaintiff's right to a pension upon her continued employment. She was not required to work for the defendant for any period of time as a condition to gaining such retirement benefits. She was told that she could quit the day upon which the resolution was adopted, as she herself testified, and it is clear from her own testimony that she made no promise or agreement to continue in the employ of the defendant in return for its promise to pay her a pension. Hence there was lacking that mutuality of obligation which is essential to the validity of a contract. . . .

Consideration for a promise has been defined in the Restatement of the Law of Contracts, Section 75, as:

''(1) Consideration for a promise is

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification or destruction of a legal relation, or

(d) a return promise,

bargained for and given in exchange for the promise.''

As the parties agree, the consideration sufficient to support a contract may be either a benefit to the promisor or a loss or detriment to the promisee. . . .

[The rest of the opinion is set out at p. 94, below. There Feinberg prevails on her contention that the defendant's promise resulted in a "change of position" on her part.]

NOTES

(1) *The Missing Ingredient.* Feinberg conceded "that a promise based on past services would be without consideration." Why was it so clear to everyone that her 37 years of service, prior to the resolution of December 27, 1947, could not be consideration for Pfeiffer's promise?

(2) *Drafting.* Suppose that Max Lippman had called in his lawyer in December, 1947, and said, "I want you to draw up a resolution that will make sure that Mrs. Feinberg will get a pension of $200 a month as long as she lives." How might the lawyer have drafted such a document? Would it have helped to include the words, "*in consideration of* her many years of long and faithful service"?

MORAL OBLIGATION

Mills v. Wyman

Supreme Judicial Court of Massachusetts, 1825.
3 Pick. 207, 20 Mass. 207.

[Levi Wyman, age 25, fell ill on his return from a sea voyage and, being poor and in distress, was cared for by Daniel Mills for about two weeks. A few days later, after all Mills's expenses had been incurred, Seth Wyman, Levi's father, wrote Mills promising to pay those expenses. When Seth Wyman decided not to pay, Mills sued him. From a direction of nonsuit, Mills appealed.]

■ PARKER, C.J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiae* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported . . .

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity . . .

[T]here seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

NOTES

(1) *The Case Against "Moral Obligation."* Mills v. Wyman accurately reflects the traditional common law view that a promise made in recognition of a "moral obligation" arising out of a benefit previously received is not enforceable. A benefit conferred before a promise is made can hardly be said to have been given in "exchange" for the promise. Williston noted further that "it is essential that the classes of promises which are [enforceable by law] shall be clearly defined. The test of moral consideration must vary with the opinion of every individual. Indeed, as has been said, since there is a moral obligation to perform every promise, it would seem that if morality was to be the guide, every promise would be enforced and if the existence of a past moral obligation is to be the test, every promise which repeats or restates a prior gratuitous promise would be binding." 1 Williston, *Treatise on the Law of Contracts* § 148 (1st ed. 1920).

(2) *Recognized Exceptions.* As the court acknowledged in *Mills*, in certain exceptional situations the common law does enforce certain promises made in recognition of what could be viewed as a "moral obligation." These include a promise to pay a debt no longer legally enforceable because the statutory period of limitations has run, and a promise by an adult reaffirming a promise made when the promisor was a minor and that could have avoided on that ground. A promise to pay a debt that has been discharged in bankruptcy constitutes a third exception. See Restatement §§ 82 and 83. What appears to explain these exceptions? (The enforceability of a promise to pay a debt unenforceable because of the promisor's discharge

in bankruptcy is now subject to additional requirements under the Bankruptcy Code. 11 U.S.C. § 524(c), (d).) On reaffirmation by minors, see Note 2, p. 314 below.

Webb v. McGowin

Court of Appeals of Alabama, 1935.
27 Ala.App. 82, 168 So. 196.

Action by Joe Webb against N. Floyd McGowin and Joseph F. McGowin, as executors of the estate of J. Greeley McGowin, deceased. From a judgment of nonsuit, plaintiff appeals.

■ BRICKEN, PRESIDING JUDGE. This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

"On the 3d day of August, 1925, appellant while in the employ of the W.T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of Mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts." . . .

The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit. . . .

1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. . . .

In Boothe v. Fitzpatrick, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents.

Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. [Cases cited.]

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature.... Here the promisor received a material benefit constituting a valid consideration for his promise.

3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made....

4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promissor's agreement to pay....

5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary....

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

■ SAMFORD, JUDGE (CONCURRING). The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in Hoffman v. Porter, Fed.Cas. No. 6,577, 2 Brock. 156, 159, where he says, ''I do not think that law ought to be separated from justice, where it is at most doubtful,'' I concur in the conclusions reached by the court.

[Part of the short opinion of the Supreme Court of Alabama, denying certiorari, is set out next.]

■ FOSTER, JUSTICE.... The opinion of the Court of Appeals here under consideration recognizes and applies the distinction between a supposed moral obligation of the promisor, based upon some refined sense of ethical duty, without material benefit to him, and one in which such a benefit did in fact occur. We agree with that court that if the benefit be material and substantial, and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered.

Writ denied.

NOTES

(1) *The Case for ''Moral Obligation.''* ''Courts have frequently enforced promises on the simple ground that the promisor was only promising to do what he ought to have done anyway. These cases have either been condemned as wanton departures from legal principle, or reluctantly accepted as involving the kind of compromise logic must inevitably make at times with sentiment. I believe that these decisions are capable of rational defense. When we say the defendant was morally obligated to do the thing he promised, we in effect assert the existence of a substantive ground for enforcing the promise.... The court's conviction that the promisor ought to do the thing, plus the promisor's own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient. If it be argued that moral consideration threatens certainty, the solution would seem to lie, not in rejecting the doctrine, but in taming it by continuing the process of judicial exclusion and inclusion already begun in the cases involving infants' contracts, barred debts, and discharged bankrupts.'' Fuller, Consideration and Form, 41 Colum.L.Rev. 799, 821–822 (1941).

(2) *Reform by Statute.* New York law does not recognize ''moral obligation'' as an equivalent of consideration, but a New York statute enacted in 1941 and now found in General Obligations Law § 5–1105 provides: ''A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.''

How would the New York statute have affected the preceding cases? Would the common recital ''for value received'' satisfy the New York statute? Would you favor the adoption of that statute by other states? What about the adoption of a statute enacting Restatement § 86?

(C) THE REQUIREMENT OF BARGAIN

Kirksey v. Kirksey

Supreme Court of Alabama, 1845.
8 Ala. 131.

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega County, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present.... I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for $200, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

■ ORMOND, J. The inclination of my mind is that the loss and inconvenience which the plaintiff sustained in breaking up and moving to the defendant's, a distance of sixty miles, is a sufficient consideration to support the promise to furnish her with a house, and land to cultivate, until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach. The judgment of the court below must therefore be reversed, pursuant to the agreement of the parties.

NOTES

(1) *Conditional Gift or Bargained–For Exchange?* How did the court read the words, "If you will come down and see me, I will let you have a place to raise your family"? As words of bargain for an exchange or as a condition to a gratuitous promise? What factors (language, circumstances, indications of intent) make the sentence appear more like the promise of a gift? More like a proposal of a bargain?

(2) *Lunchtime at Tiffany's.* A father and his daughter became estranged after her mother divorced the father, and the daughter refused to see her father. The father then wrote to his daughter: "If you will meet me at Tiffany's next Monday at noon, I will buy you the emerald ring advertised in this week's *New Yorker*." The daughter met her father at Tiffany's, but he did not buy her the promised ring. Bargained-for exchange or conditional gratuitous promise?

Williston put this case: "If a benevolent man says to a tramp, 'If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit,' no reasonable person would understand that the short walk was requested as the consideration for the promise; rather, the understanding would be that in the event of the tramp going to the shop the promisor would make him a gift." This first appeared in 1 Williston, *A Treatise on the Law of Contracts* § 112 (1st ed.1920). Is the situation of the daughter distinguishable from that of the tramp?

(3) *The Million Dollar Swipe.* While vacationing at Atlantic City, New Jersey, Rena Gottlieb went to a promotional booth at the Tropicana Casino and joined the Tropicana's Diamond Club by filling out a simple application. She received a card that club members swipe before playing any machine. The swipe provides information about members' gambling habits, which is then used by the casino's marketing department to tailor its promotions. Diamond Club members are entitled to one free spin daily of the Fun House Million Dollar Wheel. After swiping in, Gottlieb spun the wheel, which landed on the million dollar mark. Tropicana refused to pay on the ground that there was no consideration for her participation in the Diamond Club promotion. She sued the Tropicana Casino and Resort for $1,000,000. *Held*: For plaintiff. Gottlieb v. Tropicana Hotel and Casino, 109 F.Supp.2d 324 (E.D.Pa.2000):

"Ms. Gottlieb had to go to the casino to participate in the promotion. She had to wait in line to spin the wheel. By ... allowing her [Diamond Club card] to be swiped into the casino's machine, she was permitting the casino to gather information about her gambling habits. Additionally, by participating in the game, she was a part of the entertainment that casinos, by their very nature, are designed to offer to all of those present. All of these detriments ... were 'the requested detriment[s] to the promisee induced by the promise' of Tropicana to offer her a chance to win $1 million. Tropicana's motives in offering the promotion were 'in nowise altruistic.' Tropicana offered the promotion in order to generate patronage of and excitement within the casino. In short, Ms. Gottlieb provided adequate consideration to form a contract with Tropicana." The case was remanded to determine the factual question of whether the marker firmly landed on the million-dollar mark, or immediately fell off, as the Casino claimed.

PROBLEM

Jailhouse Rock. Steve Jennings, a prisoner in Texas, was a faithful listener to radio station KSCS, which regularly broadcast that it played "at least three-in-a-row, or we pay you $25,000. No bull, more music on KSCS." Jennings sued KSCS, alleging that each time it played "five-in-a-row" it played only three songs, followed by a brief commercial, and then only *two* songs, but that when he notified KSCS on specific occasions of this they refused to pay him $25,000. He also alleged that he then stopped listening to KSCS. KSCS has moved to dismiss on the ground that there was no consideration for its promise. What decision? See Jennings v. Radio Station KSCS, 96.3 FM, Inc., 708 S.W.2d 60 (Tex.App.1986).

EMPLOYMENT AGREEMENTS

The next case introduces the category of personal service or employment agreements. For more than six centuries, important aspects of the employment relationship, such as the period of service, were governed by statute. For example, the Statute of Laborers, 23 Edw.III (1349), imposed a duty to work on most able-bodied adults, and later Elizabethan enactments established a minimum one-year duration for all employment contracts. Agreements between master and servant, as the parties were then called, shifted to a contractual model as industrialization and the philosophy of *laissez faire* took hold. A detailed account of the rise of bargaining, including collective bargaining, and of current statutory regimes such as minimum-wage, safety, or anti-discrimination law, is left to courses on labor and employment law.

Our concern here is how basic contract principles play out in the circumstances of employment, including decisions about hiring and firing. We focus particularly on ''at-will'' employees, those whose employment agreements are terminable by either party at any time and for any reason, or no reason at all. As you read the employment cases that follow, consider how background policies regarding the right to work or the prevention of idleness have influenced the development of common law contract doctrine.

We begin with the problem of bargained-for exchange between employers and employees when, as is often the case, the terms of the agreement are not entirely settled at a single moment. Determining these terms is crucial to deciding whether an employee has been wrongfully fired. In our first case, however, the shoe is on the other foot, and it is the employer who seeks to enforce the promise of an at-will employee. The term at issue concerns post-employment conduct, specifically the employee's broken promise not to compete with his former employer.

Lake Land Employment Group of Akron, LLC v. Columber

Supreme Court of Ohio, 2004.
101 Ohio St.3d 242, 804 N.E.2d 27.

■ MOYER, C.J. Lake Land Employment Group of Akron, LLC (''Lake Land''), appellant, initiated this action by filing a complaint asserting that its ex-employee, appellee Lee Columber, had breached a noncompetition agreement the parties had executed. The agreement provided that for a period of three years after his termination of employment Columber would not engage in any business within a 50–mile radius of Akron, Ohio, that competed with the business of Lake Land. Lake Land further claimed that Columber's employment with Lake Land terminated in 2001 and that he thereafter violated the terms of the noncompetition agreement. Lake Land sought money damages and an order prohibiting Columber from engaging in any activities that violated the noncompetition agreement.

Columber answered and admitted that he had been employed by Lake Land from 1988 until 2001. He further admitted that he had signed the noncompetition agreement and that following his discharge from Lake Land he had formed a corporation that is engaged in a business similar to that of Lake Land. Columber pled lack of consideration in his answer. Columber moved for summary judgment, claiming that the noncompetition agreement was unenforceable ... and that the restrictions in the agreement were overly restrictive and imposed an undue hardship on him.

Columber could remember very little about the presentation or execution of the noncompetition agreement. He could not remember whether he had been told that his continued employment was dependent upon execution of the agreement or whether he had posed questions about the restrictions it contained. He testified that he vaguely remembered signing the agreement after his employer presented it to him and told him to read and sign it. He acknowledged that he had read the agreement, but had not talked to an attorney or anybody else about it. The at-will relationship of the parties continued for ten years thereafter.

The trial court granted summary judgment in Columber's favor. It found no dispute that Columber had been employed by Lake Land beginning in 1988 and that Columber signed the agreement in September 1991. It further found no dispute that there "was no increase of salary, benefits, or other remunerations given as consideration for Columber signing the non-competition agreement" and "no change in his employment status in connection with the signing of the noncompetition agreement." The trial court concluded that the noncompetition agreement lacked consideration, and was unenforceable. The trial court therefore found it unnecessary to determine the reasonableness of the temporal and geographical restrictions in the noncompetition agreement.

The court of appeals affirmed. It certified a conflict, however, between its decision and [those of other Ohio districts courts]. The certified issue is "Is subsequent employment alone sufficient consideration to support a covenant-not-to-compete agreement with an at-will employee entered into after employment has already begun?"

I Legal Background

Generally, courts look upon noncompetition agreements with some skepticism and have cautiously considered and carefully scrutinized them. Ingram, Covenants Not to Compete (2002), 36 Akron L.Rev. 49, 50. Under English common law, agreements in restraint of trade, including noncompetition agreements, were disfavored as being against public policy, although partial restraints supported by fair consideration were upheld ... In a society in which working men entered skilled trades only by serving apprenticeships, and mobility was minimal, restrictive covenants precluding an ex-employee from competing with his ex-employer "either destroyed a man's means of livelihood, or bound him to his master for life.'' *Raimonde v. Van Vlerah* (1975), 325 N.E.2d 544.

Modern economic realities, however, do not justify a strict prohibition of noncompetition agreements between employer and employee in an at-will relationship. ''The law upholds these agreements because they allow the parties to work together to expand output and competition. If one party can trust the other with confidential information and secrets, then both parties are better positioned to compete with the rest of the world.... By protecting ancillary covenants not to compete, even after an employee has launched his own firm, the law 'makes it easier for people to cooperate productively in the first place.' '' KW Plastics v. United States Can Co. (Feb. 2, 2001), M.D. Ala. Nos. Civ. A. 99–D–286–N and 99–D–878–N, 2001 WL 135722, quoting Polk Bros., Inc. v. Forest City Ent., Inc. (C.A.7, 1985), 776 F.2d 185, 189....

Jurisdictions throughout the country are split on the issue presented by the certified question. See, generally, Annotation, Sufficiency of Consideration for Employee's Covenant Not to Compete, Entered into after Inception of Employment (1973), 51 A.L.R.3d 825. As summarized by the Supreme Court of Minnesota, ''cases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced. By signing a noncompetition agreement, the employee gets no more from his employer than he already has,[1] and in such cases there is a danger that an employer does not need protection for his investment in the employee but instead seeks to impose barriers to prevent an employee from securing a better job elsewhere. Decisions in which continued employment has been deemed a sufficient consideration for a noncompetition agreement have focused on a variety of factors, including the possibility that the employee would otherwise have been discharged, the employee was actually employed for a substantial time after executing the contract, or the employee received additional compensation or training or was given confidential information after he signed the agreement.'' (Citations omitted.) *Davies & Davies Agency, Inc. v. Davies* (Minn. 1980) 298 N.W.2d 127, 130.

More recently, some courts have found sufficient consideration in an at-will employment situation where a *substantial* period of employment ensues after a noncompetition covenant is executed, especially when the continued employment is accompanied by raises, promotion, or similar tangible benefits. 6 Lord, Williston on Contracts (4th Ed.1995), Section 13:13. These courts thereby implicitly find that the execution of a noncompetition agreement changes the prior employment relationship from one purely at will. Id. at 577–584. In effect, these courts infer a promise on the part of the employer to continue the employment of his previously at-will employee for an indefinite yet substantial term. Under this approach,

1. Note, however, that an at-will employee does not already have a right to come to work in the future at all, let alone under past terms of employment. Although both parties may very well contemplate continuation of the relationship, either may terminate it at any time.

however, neither party knows whether the agreement is enforceable until events occur after its execution.

This diversity of approach to the issue is reflected in opinions of the courts of appeals of this state....

II Formation of Binding Contract

[In a passage omitted here the court reviewed some elementary characteristics of contract law, and of at-will employment agreements.]

... [E]ither an employer or an employee in a pure at-will employment relationship may legally terminate the employment relationship at any time and for any reason. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103, 19 OBR 261, 483 N.E.2d 150. In the event that an at-will employee quits or is fired, he or she provides no further services for the employer and is generally entitled only to wages and benefits already earned.

It follows that either an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time. If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit. Similarly, if the employee proposes to the employer that he deserves a raise and will no longer work at his current rate, the employer may either negotiate an increase or accept the loss of his employee. In either event the employee is entitled to be paid only for services already rendered pursuant to terms to which they both have agreed. Thus, mutual promises to employ and to be employed on an ongoing at-will basis, according to agreed terms, are supported by consideration: the promise of one serves as consideration for the promise of the other.

The presentation of a noncompetition agreement by an employer to an at-will employee is, in effect, a proposal to renegotiate the terms of the parties' at-will employment. Where an employer makes such a proposal by presenting his employee with a noncompetition agreement and the employee assents to it, thereby accepting continued employment on new terms, consideration supporting the noncompetition agreement exists. The employee's assent to the agreement is given in exchange for forbearance on the part of the employer from terminating the employee.

We therefore hold that consideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause.

III Caveat

We concur in the view that in cases involving noncompetition agreements, "as in other cases, it is still believed to be good policy to let people make their own bargains and their own valuations." 15 Corbin on Contracts (Interim Ed.2002) 96–97, Section 1395. Professor Corbin suggests that courts should inquire into the sufficiency of consideration in cases involving noncompetition agreements by examining the extent and character of the consideration received by the promisor-employee, "even though we do not do so in ordinary contract cases." Id. at 94–95.

Our decision today does no more than recognize that consideration exists where an at-will employer and an at-will employee continue their employment relationship, rather than terminate it, after the employer imposes a new requirement for employment, i.e., execution of a noncompetition agreement by the employee. While we are not prepared to abandon our long-established precedent that courts may not inquire into the adequacy of consideration, we do not disagree with Corbin's conclusion that the validity of a restraining contract such as a noncompetition agreement should be "determined by weighing as best we can the sum-total of all factors standing together." Id. at 97. We simply recognize that weighing of these factors should not be performed in the context of an inquiry concerning the sufficiency of consideration. That balancing instead should occur in the context of our established precedent recognizing that only reasonable noncompetition agreements are enforceable. . . .

Our refusal to sanction judicial inquiry into the adequacy of consideration in cases similar to the one at bar does not exclude consideration of other requisites of a contract. It remains the law that noncompetition agreements, like other purported contractual arrangements, may be voidable or unenforceable for reasons other than lack of consideration. . . .

IV Disposition

Both Columber and his employer had a legal right to terminate their at-will employment relationship when Columber was presented with the noncompetition agreement in 1991. Neither party exercised that legal right to terminate the employment relationship, and, in fact, Columber continued working for the appellant for an additional ten years. Accordingly, the noncompetition agreement is not void for lack of consideration, and summary judgment in Columber's favor should not have been entered on that basis.

Although the trial court erred in entering summary judgment based on its determination that the noncompetition agreement lacked consideration, it must yet determine whether the noncompetition agreement is reasonable pursuant to controlling precedent. We therefore reverse the judgment of the court of appeals and remand the cause for further proceedings.

Judgment reversed and cause remanded.

■ Resnick, J., dissenting. Courts everywhere are sharply divided on the present certified issue. However, I adhere to the principle that continued employment in an at-will situation does not by itself constitute consideration. I respectfully dissent.

As the majority confirms, "a contract is not binding unless supported by consideration," which is generally defined as "a detriment to the promisee or a benefit to the promisor." Thus, in order for the September 1991 noncompetition agreement executed between appellant, Lake Land Employment Group of Akron, LLC, and appellee, Lee Columber, to be binding, either Lake Land must have given something for it or Columber must have received something in return. Yet, when all is said and done, the only difference in the parties' employment relationship before and after September 1991 is the noncompetition agreement.

The majority's holding that "[c]onsideration exists to support a noncompetition agreement when . . . the employer continues an at-will employment relationship . . ." belies itself. If the same at-will employment relationship continues, where is the consideration? The employer has relinquished nothing, since it retains exactly the same preexisting right it always had to discharge the employee at any time, for any reason, for no reason, with or without cause. The employee has gained nothing, for he has not been given or promised anything other than that which he already had, which is "employment which need not last longer than the ink is dry upon [his] signature." *Kadis v. Britt* (1944), 224 N.C. 154, 163, 29 S.E.2d 543. It is precisely because the same at-will employment relationship continues that there is no consideration.

In fact, the majority endeavors to transform this mutual exchange of nothing into consideration by formulating such artful euphemisms as "forbearance on the part of an at-will employer from discharging an at-will employee," "mutual promises to employ and to be employed on an ongoing at-will basis," and "a proposal to renegotiate the terms of the parties' at-will employment." But in the end, the employer simply winds up with both the noncompetition agreement and the continued right to discharge the employee at will, while the employee is left with the same preexisting "nonright" to be employed for so long as the employer decides not to fire him. The only actual "forbearance," "proposal," or "promise" made by the employer in this situation is declining to fire the employee until he executes the noncompetition agreement.

Moreover, the majority's holding and supporting rationale would allow the enforcement of a noncompetition agreement that was exacted from an employee who, at the time of execution, had already acquired all the knowledge his or her position affords and who was fired the day after affixing his or her signature to the document. In cryptic fashion, the majority is essentially holding that a restrictive covenant may henceforth be exacted from an at-will employee without any supporting consideration . . .

Since the noncompetition agreement in this case lacked consideration and therefore was unenforceable, I would affirm the judgment of the court of appeals.

■ PFEIFER, J., DISSENTING. I concur with Justice Resnick's dissent—an employer's agreement not to terminate an employee if the employee signs a noncompetition agreement does not constitute consideration. It constitutes coercion.

But the majority has found otherwise. In doing so, the majority must acknowledge that the execution of a noncompetition agreement for which forbearance from discharge is the consideration alters the at-will nature of the employment relationship. Any promise of continued employment removes the employment from the realm of an at-will relationship. For some undefined time, the employer must continue to employ the signer of the agreement. How long a period is enough? The absence of a specified term for the forbearance from discharge will leave courts to determine what period is reasonable.

NOTES

(1) *Questions*. What is the significance of Columber's status as an at-will employee in the court's determination that his promise not to compete was supported by consideration? Do you agree with Judge Moyer or Justice Resnick (a "mutual exchange of nothing")? Does the majority opinion rest on policy considerations, the straightforward application of doctrine, or both? What policy considerations weigh in favor of Columber? In favor of Lake Land Employment?

(2) *Dueling Dissents*. Although Justice Pfeifer professed to agree with Justice Resnick, the two dissents appear to disagree with regard to the effect of the court's ruling. Justice Resnick concludes that "in the end, the employer simply winds up with both the noncompetition agreement and the continued right to discharge the employee at will." Contrast Justice Pfeifer's understanding that "the execution of the noncompetition agreement ... alters the at-will nature of the employment relationship." How does it do so? If Judge Pfeifer is right, how would a court go about deciding what period of time is reasonable? If these are opposing views, which is the more favorable to employees?

(3) *Opposing Decisions*. The Supreme Court of Minnesota has held that "where no raises or promotions resulted, where other employees with similar access were not asked to sign, the mere continuation of employment ... is not enough." Jostens, Inc. v. National Computer Systems, Inc., 318 N.W.2d 691, 703–04 (Minn. 1982). The decision, and others, reflect judicial hostility to promises not to compete. Only a few months after *Jostens*, the same court said: "We look upon restrictive covenants with disfavor, carefully scrutinizing them because they are agreements in partial restraint of trade." National Recruiters, Inc. v. Cashman, 323 N.W.2d 736, 740 (Minn.1982). Judicially imposed constraints on such agreements are discussed further in the materials on public policy in Chapter 4.

EMPLOYEE HANDBOOKS

In *Lake Land Employment*, the question was whether or not the *employee's* promise not to compete was supported by consideration. Questions about the term of employment also arise with regard to the enforceability of *employers'* promises, often in the context of employee handbooks. Typically, and often some time after they have been hired, employees receive handbooks setting out company policies on matters ranging from vacation schedules to job security. Is the employer bound by these policies? Most employees do not bargain for the policies, and many may not have read or in some cases even received a handbook. The following case is illustrative.

Mettille, a loan officer and at-will employee at the Pine River State Bank, was fired by the bank president, Griffith, for serious deficiencies in processing over $600,000 worth of loans. Griffith had earlier prepared and distributed a printed Employee Handbook with information on various bank policies including "job security" and "disciplinary policy." In firing Mettille, Griffith failed to follow Handbook rules relating to "disciplinary policy." Mettille argued that Griffith was bound by those policies. Griffith countered that the handbook was intended only as a source of information for employees on bank procedures and that, in any case, it could not be part of an employee's employment contract because it was unsupported by consideration. In an action by Mettille against the bank, he won a money judgment.

The Supreme Court of Minnesota affirmed the judgment, stating: "An employer's offer of a unilateral contract may very well appear in a personnel handbook as the employer's response to the practical problem of transactional costs. Given these costs, an employer, such as the bank here, may prefer not to write a separate contract with each individual employee. . . . Mettille's continued performance of his duties despite his freedom to quit constitutes an acceptance of the bank's offer and affords the necessary consideration for that offer, with the bank gaining the advantages of a more stable and, presumably, more productive work force." Pine River State Bank v. Mettille, 333 N.W.2d 622, 627–30 (Minn.1983).

The Court compared this approach with its cases holding that employee noncompete covenants signed after the initial employment contract "are not enforceable absent a showing of independent consideration involving something more than just continued services." The Court noted that, with regard to the covenants not to compete, "a different public policy is at play, namely, the law's disfavor with restraints on trade, so that noncompete covenants are treated as a special circumstance and, therefore, these cases are not decided strictly according to the principles of contract formation."

NOTES

(1) *Promise or Policy?* Not all representations in a handbook become terms of an at-will employee's contract. The court found that Pine River State Bank's statements about job security, as distinguished from its disciplinary policy, were "no more than a general statement of policy" in contrast to the "definite language" used to set out the disciplinary policy.

(2) *Modifications of Employee Handbooks*. To the extent that the terms of an employee handbook become part of an employment contract, can an employer unilaterally change or modify its terms so as to reduce the employee's rights? Several courts have answered No. "If the disclaimer modifies an existing employment contract requiring termination for cause, the employer must provide consideration to make the disclaimer effective." Worley v. Wyoming Bottling Company, Inc., 1 P.3d 615, 621 (Wyo.2000); see also Doyle v. Holy Cross Hospital, 708 N.E.2d 1140 (Ill.1999). The modification of contract terms is examined more generally in Chapter 4.

(3) *An Administrative Law Model?* In re Certified Question (Bankey v. Storer Broadcasting), 443 N.W.2d 112 (Mich.1989), the court held that an employer *may* alter the terms of employment for existing employees by unilaterally changing its written policy statements even without prior notification to the employees that it has reserved the right to do so. In that case the employer had replaced an existing "discharge for cause" provision with a term providing for employment "at the will of the company." The court held that as long as the new policy was applied

consistently, the employees were bound. Explaining that the purpose of the change was "to promote an environment conducive to collective productivity," the court stated that it is "[t]he benefit to the employer of promoting such an environment, rather than the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance, [that] gives rise to a situation 'instinct with obligation.' "

In answer to a similar certified question from the Ninth Circuit, the Arizona Supreme Court held that an employer *cannot* unilaterally change a handbook provision. The Arizona court rejected *Bankey* as using an "administrative law model." The court stated: "We do not agree that a party to a contract containing a term that proves to be inconvenient, uneconomic, or unpleasant should have the right, like an administrative agency, 'to change the rules prospectively through proper procedures.' " Demasse v. ITT Corp., 984 P.2d 1138, 1149 (Ariz.1999).

REWARDS

The sheriff of Dallas County, A.H. Ledbetter, offered a reward of $500 for the capture and return of an escaped convict, one Vann. After capturing Vann and bringing him in, S.H. Broadax sued for the reward. The trial court dismissed the petition, believing that it omitted a fact essential to the claim. On appeal, this question was certified to the Texas Supreme Court: "Was notice or knowledge to plaintiff of existence of the reward when the recapture was made essential to his right to recover?" The answer given was Yes: A reward offer "may be accepted by anyone who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise." Broadnax v. Ledbetter, 99 S.W. 1111 (Tex.1907). Put in terms of Restatement § 71(2), the service that Broadnax rendered was not given by him in exchange for Ledbetter's promise. Although the details of offer and acceptance are not taken up until the next chapter, it may help to know now that it is often possible to express the same principle either in terms of "consideration" or of "offer and acceptance." Offer and acceptance can be understood as the mechanism by which consideration is exchanged.

Could Broadnax have recovered if he had captured Vann while ignorant of the reward but had learned of it before returning him to jail? Is his solution to release Vann and recapture him? See Restatement § 51. Could Broadnax have recovered if he had known of the reward but had captured Vann and turned him in because he was a close friend and wished to save him from mob violence? See Restatement § 81(2). For a case where three sets of claimants—including the attorney with whom the outlaw had conferred—sought unsuccessfully to recover the same reward, see Taft v. Hyatt, 180 P. 213 (Kan.1919).

NOTES

(1) *Comparative Perspective*. Under the law of some countries, such as Germany, a promise of reward is treated "not as an offer which would require acceptance in order to ripen into a contract, but as a unilateral jural act which as such is effective and binding without acceptance." 1 Rudolf B. Schlesinger (ed.), *Formation*

of Contracts: A Study of the Common Core of Legal Systems 101–02 (1968). Would such a concept be a desirable one in our law? See Choice v. City of Dallas, 210 S.W. 753 (Tex.Civ.App.1919).

(2) *Employment Cases As Analogous?* As pointed out earlier, an employee may not have read, or even received, the employer's handbook. Is that fatal to a claim by the employee based on a provision in the handbook? Reviewing the general requirement of reward cases that the promise must induce the performance, the Supreme Court of Iowa declined to follow it in a case in which the employee had received but not read the handbook provisions in question: "Although this holding is a departure from the traditional 'bargain-theory' contract analysis, we think it produces 'the salutary result that all employees, those who read the handbook and those who didn't, are treated alike.' Farnsworth, Developments in Contract Law During the 1980's: The Top Ten, 41 Case W.Res.L.Rev. 203, 209 (1990)." Anderson v. Douglas and Lomason Co., 540 N.W.2d 277, 285 (Iowa 1995). What if the employee had not received the handbook?

PROBLEM

The One that Didn't Get Away. Diamond Jim III, a rockfish, was tagged and placed in the Chesapeake Bay in June by the American Brewery in connection with its Third Annual American Beer Fishing Derby. Under the Derby's well-publicized rules, the person who caught Diamond Jim III would receive a cash prize of $25,000. In August, William Simmons went fishing in the Bay. He had heard of the contest, but did not have it in mind on that day. He caught Diamond Jim III and, although at first Simmons took little notice of the tag, he realized upon reexamining it a half hour later that he had caught the prize fish. Is Simmons entitled to the prize? See Simmons v. United States, 308 F.2d 160 (4th Cir.1962). Note that Simmons, not the brewery, contended that the prize was a gift. Does the identity name of the other party suggest a reason for that?

(D) PROMISES AS CONSIDERATION

The cases presented so far have focused on contracts in which the promisor has sought performance in exchange for a promise. As mentioned in Note 5, pp. 38–39 above, these are called unilateral contracts. Yet we have already seen courts come to recognize that the consideration for a promise could be found in a return promise, even in one not even partly performed. Contracts where both parties make promises are called bilateral contracts. See Restatement § 71. Indeed, Comment *a* to Restatement § 75 informs us that "the promise is enforced by virtue of the fact of the bargain, without more."

This raises an underlying question regarding enforceability. What rationale lies behind the enforcement of a promise when it has not been shown that the promisee has conferred a benefit upon the promisor or done anything in reliance on the promise? If one of the parties to an exchange of promises has second thoughts about the transaction the instant after the exchange has occurred, why should that party not be allowed to retract its promise? Consider again the various theories of enforcement described above at p. 8.

We now look more closely at the question of what constitutes a promise, pausing for a moment to introduce some contract terminology.

NOTES

(1) *Conditional Promises.* A promisor who seeks a *promise* in return is not, to be sure, unconcerned with the *performance* of the return promise. Suppose for example, that a buyer promises to pay $100,000 in exchange for a seller's promise to convey a tract of land. The difference between this buyer's situation and that of a promisor such as Sheriff Ledbetter in Broadnax v. Ledbetter, p. 66 above, is that this promisor wants a return promise in *addition* to the transfer of land. Ledbetter's assurance that he would not have to pay the reward unless Vann is returned to captivity follows from the doctrine of consideration itself. His promise to pay the reward was not enforceable unless Vann was captured and returned: that is what he bargained for. How can one who bargains for a return promise, as the buyer above has done, be assured that its performance (paying the money in this instance) will not be due until the other party has performed (executing a deed in this instance)? The solution to this problem is considered in detail in Chapter 8, but a brief explanation may be helpful now.

The solution involves the concept of a *condition.* A promise is conditional if its performance will become due only if a particular event, known as a ''condition,'' occurs. This does not mean that the promise is not binding until the event occurs, but only that the event must occur before the promisor must perform. Insurance contracts provide good examples of *express* conditions. If a home owner pays $1,000 to an insurance company in exchange for the company's promise to pay the owner $100,000 if the owner's house suffers serious fire damage, the company has made an enforceable promise. But the company will owe nothing unless the house suffers serious fire loss within the year. Fire damage to the house is a condition of the company's promise to pay.

When a party makes a promise in exchange for a return promise, it can be protected by making its promise conditional on performance by the other party. Even if the contract does not so provide, the court may impose a condition by implication. Under such a ''constructive condition of exchange,'' one party's duty to perform is not triggered until the other party has performed. For example, where promises are not typically performed at the same time, as in personal service contracts, the usual rule is that the work is made a condition of payment.

(2) *Rights and Duties.* The relationships between the parties in unilateral and bilateral contracts can be analyzed in terms of *right* and *duty.* A is said to have a *right* that B shall do an act when, if B does not do the act, A can initiate legal proceedings against B, and B in such a situation is said to have a *duty* to do the act. *Right* and *duty* are correlatives. In this strict sense there can never be a *right* without a *duty,* nor a *duty* without a *right.* The *right-duty* relationship is one between two parties. The *right* describes the relationship from one end and the *duty* from the other. Since, in a ''unilateral'' contract, there is a promise on one side only, there is a *duty* on one side only, and a *right* on the other side; and since in a ''bilateral'' contract there is a promise on each side, there is a *right* and a *duty* on each side.

For the precise use of terms such as *right* and *duty* the legal profession is indebted to the work of Professor Wesley Newcomb Hohfeld,[a] whose system of

a. Wesley Newcomb Hohfeld (1879–1918) practiced law briefly in San Francisco before joining the Stanford law faculty in 1905. In 1914 he left Stanford to teach at

''Hohfeldian terminology'' is set forth in *Fundamental Legal Conceptions* (1923). Review the language of Restatement § 1. How does it incorporate the language of right and duty?

WHAT CONSTITUTES A PROMISE?

It has long been clear that the consideration for a promise can be found in a return promise. The Restatement informs us that, with some exceptions, ''a promise that is bargained for is consideration if the promised performance would be consideration.'' Restatement § 75. But what exactly counts as a promise? The following cases explore how courts determine from language and context whether a performance has in fact been promised or whether only the *illusion* of performance has been held out.

Strong v. Sheffield

Court of Appeals of New York, 1895.
144 N.Y. 392, 39 N.E. 330.

[Action on a promissory note. A judgment for plaintiff, Benjamin B. Strong, against defendant, Louisa A. Sheffield, was reversed by the General Term of the Supreme Court.

Benjamin Strong brought this action against Louisa Sheffield, his niece. Strong had sold a business to her husband, Gerardus (''Rard''), on credit. Later, the buyer's debt was embodied in a promissory note, payable on demand. Mrs. Sheffield endorsed the note, an act which the law treats as a promise to pay if her husband, the ''maker'' of the note, did not. What, if anything, she got in exchange for that was a matter in issue.

The trial court gave judgment for Strong. That was reversed on a first appeal. Then Strong appealed.]

■ ANDREWS, C.J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is nudum pactum. The law governing commercial paper which precludes an inquiry into the consideration as against bona fide holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past

Yale until his death at the age of thirty-nine. He made a lasting contribution to legal literature through his development of the eight terms of ''Hohfeldian terminology'' in his book Fundamental Legal Conceptions. Corbin wrote, ''He was a severe taskmaster, requiring his students to master his classification of 'fundamental conceptions' and to use accurately the set of terms by which they were expressed. They found this, in the light of the usage of the other professors [at Yale], almost impossible.'' Their resistance resulted in a petition to the President of Yale that Hohfeld's appointment not be extended. The petition was ignored and generations of law students have continued to master Hohfeld's terms.

due at the time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note.

[According to the record in the case, Mrs. Sheffield was reluctant to endorse the note. Strong testified that he has said: "Rard, I will give you my word as a man . . . that if you will give me a note, with your wife's endorsement . . . I will not pay that note away; I will not put it in any bank for collection, but I will hold it until such time as I want my money. . . ." Strong testified also that Gerardus had said, on delivering the note, "You won't pay this note away?", and that Strong answered, "No, I will keep it until such time as I want it." An example of "paying the note away" would have been for Strong to sell the note, giving the buyer the right to collect it on demand.]

There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. . . . The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. . . .

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection . . . [The court then quoted Strong's testimony as recited above.] Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

Ordered accordingly.

NOTES

(1) *Questions*. Restatement § 77 mentions the "illusory" or "apparent" promise as a type that is not consideration. Did Strong make any promise of substance? Could he have been held liable for breach of contract in any circumstances?

(2) *Drafting*. Suppose that Louisa Sheffield had written to Strong: "I will be responsible for my husband's debt if you will not bother him about it for two years." Would she have been liable to Strong if he had done nothing about the note for that period? What difference is there between this situation and the case as it stands? The precise rule of this case is reversed by UCC § 3–303(b).

(3) *Sexually Transmitted Debt*. Why might Louisa have agreed to endorse Gerardus' note in the first place? Empirical studies suggest that spouses, and perhaps particularly wives, commonly co-sign or otherwise act as sureties for the debts of the other spouse, and many of them may be less experienced in financial matters than Louisa Sheffield was. For a study of surety spouses in England, see Belinda Fehlberg, *Sexually Transmitted Debt* (1997), suggesting that spousal promises to act as sureties should be subject to special scrutiny. Do you agree? See also Barclay's Bank v. O'Brien, 4 All E.R. 417 (House of Lords, 1993). We return to the question of pressuring in bargaining in Chapter 4.

PROBLEM

The Case of the Unexpected Heir. Under the terms of their divorce settlement agreement, Gerald kept the family farm and Nancy took mortgages on the farm to secure periodic payments that Gerald was to make to her. Gerald later had financial difficulties and sought to refinance previous bank loans, but he found that he could not do so because of Nancy's mortgages. Nancy agreed to give up her right to any additional payments and to satisfy the mortgages in return for Gerald's promise to make a will leaving the farm to their son Ronn, reserving the right to sell a portion of the land in order to continue farming if "future economic exigencies require." Although Gerald made a will and obtained refinancing as promised, Nancy began foreclosure proceedings. She argued that Gerald's promise was illusory because he had reserved a right to convey the farm. Should Nancy prevail? See Harrington v. Harrington, 365 N.W.2d 552 (N.D.1985).

CONTRACTS FOR THE SALE OF REAL ESTATE

Sales of land and other real estate transactions, including leases, are often of considerable complexity. The following case, in which a developer sought to buy land in order to construct a shopping center, is an example. A commercial transaction of this kind typically involves not only the buyer (often called "purchaser") and at least one seller (often called "vendor") and their agents, but also third parties such as lenders, title companies, and potential lessees of the completed development. Each contributes to the intricacy of the transaction.

Real estate transactions are of great moment not only to the economy but also to the individual parties, such as homeowner and prospective homeowner. For many, the most financially significant transaction of a lifetime is the purchase or sale of a home. Certainly as an historical matter, land has been regarded as a uniquely valuable form of wealth. For these reasons, contracts for the sale of real estate are characterized by more formality than, say, contracts for the sale of goods. Even in residential sales, the parties are frequently represented by lawyers and the required documents are lengthy and detailed.

After an initial agreement of sale, a number of other events commonly take place before the formal "closing," at which a deed is exchanged for the payment of the price. The intervening activities involve the development of information, including a check of the seller's title to the property, the buyer's obtaining financing, and—as in the case that follows—lining up enough satisfactory tenants to make the prospective shopping center viable. It is not uncommon for a deal to fall apart during the period (formally called the executory interval) between the contract signing and the closing.

Mattei v. Hopper

Supreme Court of California, 1958.
51 Cal.2d 119, 330 P.2d 625.

■ SPENCE, JUSTICE. Plaintiff [Mattei] brought this action for damages after defendant [Hopper] allegedly breached a contract by failing to convey her real property in accordance with the terms of a deposit receipt which the parties had executed. After a trial without a jury, the court concluded that the agreement was "illusory" and lacking in "mutuality." From the judgment accordingly entered in favor of defendant, plaintiff appeals.

Plaintiff was a real estate developer. He was planning to construct a shopping center on a tract adjacent to defendant's land. For several months, a real estate agent attempted to negotiate a sale of defendant's property under terms agreeable to both parties. After several of plaintiff's proposals had been rejected by defendant because of the inadequacy of the price offered, defendant submitted an offer. Plaintiff accepted on the same day.

The parties' written agreement was evidenced on a form supplied by the real estate agent, commonly known as a deposit receipt. Under its terms, plaintiff was required to deposit $1,000 of the total purchase price of

$57,500 with the real estate agent, and was given 120 days to "examine the title and consummate the purchase." At the expiration of that period, the balance of the price was "due and payable upon tender of a good and sufficient deed of the property sold." The concluding paragraph of the deposit receipt provided: "Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser." This clause and the 120–day period were desired by plaintiff as a means for arranging satisfactory leases of the shopping center buildings prior to the time he was finally committed to pay the balance of the purchase price and to take title to defendant's property.

Plaintiff took the first step in complying with the agreement by turning over the $1,000 deposit to the real estate agent. While he was in the process of securing the leases and before the 120 days had elapsed, defendant's attorney notified plaintiff that defendant would not sell her land under the terms contained in the deposit receipt. Thereafter, defendant was informed that satisfactory leases had been obtained and that plaintiff had offered to pay the balance of the purchase price. Defendant failed to tender the deed as provided in the deposit receipt.

Initially, defendant's thesis that the deposit receipt constituted no more than an offer by her, which could only be accepted by plaintiff notifying her that all of the desired leases had been obtained and were satisfactory to him, must be rejected. Nowhere does the agreement mention the necessity of any such notice. Nor does the provision making the agreement "subject to" plaintiff's securing "satisfactory" leases necessarily constitute a condition to the existence of a contract. Rather, the whole purchase receipt and this particular clause must be read as merely making plaintiff's performance dependent on the obtaining of "satisfactory" leases. Thus a contract arose, and plaintiff was given the power and privilege to terminate it in the event he did not obtain such leases. (See 3 Corbin, Contracts (1951), § 647, pp. 581–585.) This accords with the general view that deposit receipts are binding and enforceable contracts. (Cal.Practice Hand Book, Legal Aspects of Real Estate Transactions (1956), p. 63.)

However, the inclusion of this clause, specifying that leases "satisfactory" to plaintiff must be secured before he would be bound to perform, raises the basic question whether the consideration supporting the contract was thereby vitiated. When the parties attempt, as here, to make a contract where promises are exchanged as the consideration, the promises must be mutual in obligation. In other words, for the contract to bind either party, both must have assumed some legal obligations. Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created.... Or, if one of the promises leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration.... Whether these problems are couched in terms of mutuality of obligation or the illusory nature of a promise, the underlying issue is the same—consideration....

While contracts making the duty of performance of one of the parties conditional upon his satisfaction would seem to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such ''satisfaction'' clauses have been given effect. They have been divided into two primary categories and have been accorded different treatment on that basis. First, in those contracts where the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously ..., and the standard of a reasonable person is used in determining whether satisfaction has been received.... However, it would seem that the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable man standard as envisioned by this line of cases. Illustrative of some of the factors which would have to be considered in this case are the duration of the leases, their provisions for renewal options, if any, their covenants and restrictions, the amounts of the rentals, the financial responsibility of the lessees, and the character of the lessees' businesses.

This multiplicity of factors which must be considered in evaluating a lease shows that this case more appropriately falls within the second line of authorities dealing with ''satisfaction'' clauses, being those involving fancy, taste, or judgment. Where the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract.... Although these decisions do not expressly discuss the issues of mutuality of obligation or illusory promises, they necessarily imply that the promisor's duty to exercise his judgment in good faith is an adequate consideration to support the contract. None of these cases voided the contracts on the ground that they were illusory or lacking in mutuality of obligation. Defendant's attempts to distinguish these cases are unavailing, since they are predicated upon the assumption that the deposit receipt was not a contract making plaintiff's performance conditional on his satisfaction. As seen above, this was the precise nature of the agreement. Even though the ''satisfaction'' clauses discussed in the above-cited cases dealt with performances to be received as parts of the agreed exchanges, the fact that the leases here which determined plaintiff's satisfaction were not part of the performance to be rendered is not material. The standard of evaluating plaintiff's satisfaction—good faith—applies with equal vigor to this type of condition and prevents it from nullifying the consideration otherwise present in the promises exchanged.

Moreover, the secondary authorities are in accord with the California cases on the general principles governing ''satisfaction'' contracts.... ''A promise conditional upon the promisor's satisfaction is not illusory since it means more than that validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine.'' (Restatement, Contracts (1932), § 265, comment *a.*)

If the foregoing cases and other authorities were the only ones relevant, there would be little doubt that the deposit receipt here should not be deemed illusory or lacking in mutuality of obligation because it contained the ''satisfaction'' clause. However, language in two recent cases led the trial court to the contrary conclusion. The first case, Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856, 858, stated that the following two conditions placed in an offer to buy an apartment building would have made the resulting contract illusory: ''O.P.A. Rent statements to be approved by Buyer'' and ''Subject to buyer's inspection and approval of all apartments.'' These provisions were said to give the purchaser ''unrestricted discretion'' in deciding whether he would be bound to the contract and to provide no ''standard'' which could be used in compelling him to perform. 123 Cal.App.2d at pages 308–309, 266 P.2d at pages 861–862. However, this language was not necessary to the decision. . . .

The other case, Pruitt v. Fontana, 143 Cal.App.2d 675, 300 P.2d 371, 377, presented a similar situation. The court concluded that the written instrument with a provision making the sale of land subject to the covenants and easements being ''approved by the buyers'' was illusory. It employed both the reasoning and language of *Lawrence Block Co.* in deciding that this clause provided no ''objective criterion'' preventing the buyers from exercising an ''unrestricted subjective discretion'' in deciding whether they would be bound. 143 Cal.App.2d at pages 684–685, 300 P.2d at page 377. But again, this language was not necessary to the result reached. The buyers in *Pruitt* refused to approve all of the easements of record, and the parties entered into a new and different oral agreement. The defendant seller was held to be estopped to assert the statute of frauds against this subsequent contract, and the judgment of dismissal entered after the sustaining of demurrers was reversed.

While the language in these two cases might be dismissed as mere dicta, the fact that the trial court relied thereon requires us to examine the reasoning employed. Both courts were concerned with finding an objective standard by which they could compel performance. This view apparently stems from the statement in *Lawrence Block Co.* that ''The standard 'as to the satisfaction of a reasonable person' does not apply where the performance involves a matter dependent on judgment.'' 123 Cal.App.2d at page 309, 266 P.2d at page 862. By making this assertion without any qualification, the court necessarily implied that there is no other standard available. Of course, this entirely disregards those cases which have upheld ''satisfaction'' clauses dependent on the exercise of judgment. In such cases, the criterion becomes one of good faith. Insofar as the language in *Lawrence Block Co.* and *Pruitt* represented a departure from the established rules governing ''satisfaction'' clauses, they are hereby disapproved.

We conclude that the contract here was neither illusory nor lacking in mutuality of obligation because the parties inserted a provision in their contract making plaintiff's performance dependent on his satisfaction with the leases to be obtained by him.

The judgment is reversed.

NOTE

Satisfied? If, after signing the deposit receipt, Mattei had changed his mind about the purchase, could he have avoided liability simply by saying that he was "dissatisfied" with the deal? Would Hopper have been bound if Mattei had inserted a clause permitting him to do this? The meaning of "good faith" is explored further in later chapters.

After negotiations, parties often leave some matters for their lawyers. Do you see a difference in legal effect between a provision that says "subject to my lawyer's approval of our agreement" and one that says "subject to my lawyer's approval of documents tendered when the deal is closed"?

CONTRACTS FOR THE SALE OF GOODS

You have already been introduced, preliminarily, to this category of Contracts in the *Bayliner* case on p. 4 above. The next case involves a contract for the sale of a different sort of goods—jet fuel. Such contracts have long been regarded as distinctive, as evidenced by the reduction of the common law of sales to statutory form in England in 1893 by the Sale of Goods Act and in the United States in 1906 by the Uniform Sales Act, later replaced by the UCC. The law of international sales has now also been codified in the United Nations [Vienna] Convention on the International Sale of Goods (CISG). (The Convention is also found in Selections for Contracts.)

Article 2 of the Code, the statutory authority for all domestic sale of goods cases, reflects the characteristics of commercial sales transactions in a number of ways. In contrast to contracts for the sale of real estate, agreements to buy and sell goods are often made quickly and informally, increasingly electronically or by telephone, so that the requirements for contract formation tend to be less demanding. The parties are often "repeat players" who have dealt with similar goods and often with each other over time, so that their particular understandings as well as customs and practices within the trade may give added content to their agreements. Terms and entire forms are standardized. The nature of goods themselves is significant. In contrast to real property, goods are considered fungible, one item of a particular sort understood to be as good as any other. There is a general assumption that goods of all sorts are available on the market. Market price therefore plays an important role in the calculation of damages in Article 2. In reading the following case, consider which of the characteristics just described plays a role in the decision.

Eastern Air Lines, Inc. v. Gulf Oil Corporation

United States District Court, Southern District of Florida, 1975.
415 F.Supp. 429.

■ JAMES LAWRENCE KING, DISTRICT JUDGE. Eastern Air Lines, Inc., hereafter Eastern, and Gulf Oil Corporation, hereafter Gulf, have enjoyed a mutually advantageous business relationship involving the sale and purchase of aviation fuel for several decades.

This controversy involves the threatened disruption of that historic relationship and the attempt, by Eastern, to enforce the most recent contract between the parties. On March 8, 1974 the correspondence and telex communications between the corporate entities culminated in a demand by Gulf that Eastern must meet its demand for a price increase or Gulf would shut off Eastern's supply of jet fuel within fifteen days.

Eastern responded by filing its complaint with this court, alleging that Gulf had breached its contract and requesting preliminary and permanent mandatory injunctions requiring Gulf to perform the contract in accordance with its terms. By agreement of the parties, a preliminary injunction preserving the status quo was entered on March 20, 1974, requiring Gulf to perform its contract and directing Eastern to pay in accordance with the contract terms, pending final disposition of the case.

Gulf answered Eastern's complaint, alleging that the contract was not a binding requirements contract, was void for want of mutuality, and, furthermore, was "commercially impracticable" within the meaning of Uniform Commercial Code § 2–615; Fla.Stat. §§ 672.614 and 672.615.

The extraordinarily able advocacy by the experienced lawyers for both parties produced testimony at the trial from internationally respected experts who described in depth economic events that have, in recent months, profoundly affected the lives of every American.

The Contract

On June 27, 1972, an agreement was signed by the parties which, as amended, was to provide the basis upon which Gulf was to furnish jet fuel to Eastern at certain specific cities in the Eastern system. Said agreement supplemented an existing contract between Gulf and Eastern which, on June 27, 1972, had approximately one year remaining prior to its expiration.

The contract is Gulf's standard form aviation fuel contract and is identical in all material particulars with the first contract for jet fuel, dated 1959, between Eastern and Gulf and, indeed, with aviation fuel contracts antedating the jet age. It is similar to contracts in general use in the aviation fuel trade. The contract was drafted by Gulf after substantial arm's length negotiation between the parties. Gulf approached Eastern more than a year before the expiration of the then-existing contracts between Gulf and Eastern, seeking to preserve its historic relationship with Eastern. Following several months of negotiation, the contract, consolidating and extending the terms of several existing contracts, was executed by the parties in June, 1972, to expire January 31, 1977.

The parties agreed that this contract, as its predecessor, should provide a reference to reflect changes in the price of the raw material from which jet fuel is processed, i.e., crude oil, in direct proportion to the cost per gallon of jet fuel.

Both parties regarded the instant agreement as favorable, Eastern, in part, because it offered immediate savings in projected escalations under the existing agreement through reduced base prices at the contract cities; while Gulf found a long term outlet for a capacity of jet fuel coming on stream from a newly completed refinery, as well as a means to relate anticipated increased cost of raw material (crude oil) directly to the price of the refined product sold. The previous Eastern/Gulf contracts contained a price index clause which operated to pass on to Eastern only one-half of any increase in the price of crude oil. Both parties knew at the time of contract negotiations that increases in crude oil prices would be expected, were "a way of life", and intended that those increases be borne by Eastern in a direct proportional relationship of crude oil cost per barrel to jet fuel cost per gallon.

Accordingly, the parties selected an indicator (West Texas Sour); a crude which is bought and sold in large volume and was thus a reliable indicator of the market value of crude oil. From June 27, 1972 to the fall of 1973, there were in effect various forms of U.S. government imposed price controls which at once controlled the price of crude oil generally, West Texas Sour specifically, and hence the price of jet fuel. As the government authorized increased prices of crude those increases were in turn reflected in the cost of jet fuel. Eastern has paid a per gallon increase under the contract from 11 cents to 15 cents (or some 40%).

The indicator selected by the parties was "the average of the posted prices for West Texas sour crude, 30.0–30.9 gravity of Gulf Oil Corporation, Shell Oil Company, and Pan American Petroleum Corporation". The posting of crude prices under the contract "shall be as listed for these companies in Platts Oilgram Service—Crude Oil Supplement . . ."

"Posting" has long been a practice in the oil industry. It involves the physical placement at a public location of a price bulletin reflecting the current price at which an oil company will pay for a given barrel of a specific type of crude oil. Those posted price bulletins historically have, in addition to being displayed publicly, been mailed to those persons evincing interest therein, including sellers of crude oil, customers whose price of product may be based thereon, and, among others, Platts Oilgram, publishers of a periodical of interest to those related to the oil industry.

In recent years, the United States has become increasingly dependent upon foreign crude oil, particularly from the "OPEC" nations most of which are in the Middle East. OPEC was formed in 1970 for the avowed purpose of raising oil prices, and has become an increasingly cohesive and potent organization as its member nations have steadily enhanced their equity positions and their control over their oil production facilities. Nationalization of crude oil resources and shutdowns of production and distribution have become a way of life for oil companies operating in OPEC nations, particularly in the volatile Middle East. The closing of the Suez Canal and the concomitant interruption of the flow of Mid–East oil during the 1967 "Six–Day War", and Libya's nationalization of its oil industry during the same period, are only some of the more dramatic examples of a trend that began years ago. By 1969 "the handwriting was on the wall" in the words of Gulf's foreign oil expert witness, Mr. Blackledge.

During 1970 domestic United States oil production "peaked"; since then it has declined while the percentage of imported crude oil has been steadily increasing. Unlike domestic crude oil, which has been subject to price control since August 15, 1971, foreign crude oil has never been subject to price control by the United States Government. Foreign crude oil prices, uncontrolled by the Federal Government, were generally lower than domestic crude oil prices in 1971 and 1972; during 1973 foreign prices "crossed" domestic prices; by late 1973 foreign prices were generally several dollars per barrel higher than controlled domestic prices. It was during late 1973 that the Mid–East exploded in another war, accompanied by an embargo (at least officially) by the Arab oil-producing nations against the United States and certain of its allies. World prices for oil and oil products increased.

Mindful of that situation and for various other reasons concerning the nation's economy, the United States government began a series of controls affecting the oil industry culminating, in the fall of 1973, with the implementation of price controls known as "two-tier." In practice "two-tier" can be described as follows: taking as the bench mark the number of barrels produced from a given well in May of 1972, that number of barrels is deemed "old" oil. The price of "old" oil then is frozen by the government at a fixed level. To the extent that the productivity of a given well can be increased over the May, 1972, production, that increased production is deemed "new" oil. For each barrel of "new" oil produced, the government authorized the release from price controls of an equivalent number of barrels from those theretofore designated "old" oil. For example, from a well which in May of 1972, produced 100 barrels of oil; all of the production of that well would, since the imposition of "two-tier" in August of 1973, be "old" oil. Increased productivity to 150 barrels would result in 50 barrels of "new" oil and 50 barrels of "released" oil; with the result that 100 barrels of the 150 barrels produced from the well would be uncontrolled by the "two-tier" pricing system, while the 50 remaining barrels of "old" would remain government price controlled.

The implementation of "two-tier" was completely without precedent in the history of government price control action. Its impact, however, was nominal, until the imposition of an embargo upon the exportation of crude oil by certain Arab countries in October, 1973. Those countries deemed sympathetic to Israel were embargoed from receiving oil from the Arab oil producing countries. The United States was among the principal countries affected by that embargo, with the result that it experienced an immediate "energy crises".

Following closely after the embargo, OPEC (Oil Producing Export Countries) unilaterally increased the price of their crude to the world market some 400% between September, 1973, and January 15, 1974. Since the United States domestic production was at capacity, it was dependent upon foreign crude to meet its requirements. New and released oil (uncontrolled) soon reached parity with the price of foreign crude, moving from approximately $5 to $11 a barrel from September, 1974 to January 15, 1974.

Since imposition of "two-tier", the price of "old oil" has remained fixed by government action, with the oil companies resorting to postings reflecting prices they will pay for the new and released oil, not subject to government controls. Those prices, known as "premiums", are the subject of supplemental bulletins which are likewise posted by the oil companies and furnished to interested parties, including Platts Oilgram.

Platts, since the institution of "two-tier" has not published the posted prices of any of the premiums offered by the oil companies in the United States, including those of Gulf Oil Corporation, Shell Oil Company and Pan American Petroleum, the companies designated in the agreement. The information which has appeared in Platts since the implementation of "two-tier" with respect to the price of West Texas Sour crude oil has been the price of "old" oil subject to government control.

Under the court's restraining order, entered in this cause by agreement of the parties, Eastern has been paying for jet fuel from Gulf on the basis of the price of "old" West Texas Sour crude oil as fixed by government price control action, i.e., $5 a barrel. Approximately 40 gallons of finished jet fuel product can be refined from a barrel of crude.

Against this factual background we turn to a consideration of the legal issues.

I

The "Requirements" Contract

Gulf has taken the position in this case that the contract between it and Eastern is not a valid document in that it lacks mutuality of obligation; it is vague and indefinite; and that it renders Gulf subject to Eastern's whims respecting the volume of jet fuel Gulf would be required to deliver to the purchaser Eastern.

The contract talks in terms of fuel "requirements".[1] The parties have interpreted this provision to mean that any aviation fuel purchased by Eastern at one of the cities covered by the contract, must be bought from Gulf. Conversely, Gulf must make the necessary arrangements to supply Eastern's reasonable good faith demands at those same locations. This is the construction the parties themselves have placed on the contract and it has governed their conduct over many years and several contracts.

In early cases, requirements contracts were found invalid for want of the requisite definiteness, or on the grounds of lack of mutuality. Many such cases are collected and annotated at 14 A.L.R. 1300.

As reflected in the foregoing annotation, there developed rather quickly in the law the view that a requirements contract could be binding where the purchaser had an operating business. The "lack of mutuality" and "indefiniteness" were resolved since the court could determine the volume of goods provided for under the contract by reference to objective evidence of the volume of goods required to operate the specified business. Therefore, well prior to the adoption of the Uniform Commercial Code, case law generally held requirements contracts binding. See 26 A.L.R.2d 1099, 1139.

1. "Gulf agrees to sell and deliver to Eastern, and Eastern agrees to purchase, receive and pay for their requirements of Gulf Jet A and Gulf Jet A–1 at the locations listed. . . ."

The Uniform Commercial Code, adopted in Florida in 1965, specifically approves requirements contracts in F.S. 672.306 (U.C.C. § 2–306(1)).

> "(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded."

The Uniform Commercial Code Official Comment interprets § 2–306(1) as follows:

> "2. Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. Reasonable elasticity in the requirements is expressly envisaged by this section and good faith variations from prior requirements are permitted even when the variation may be such as to result in discontinuance. A shut-down by a requirements buyer for lack of orders might be permissible when a shut-down merely to curtail losses would not. The essential test is whether the party is acting in good faith. Similarly, a sudden expansion of the plant by which requirements are to be measured would not be included within the scope of the contract as made but normal expansion undertaken in good faith would be within the scope of this section. One of the factors in an expansion situation would be whether the market price has risen greatly in a case in which the requirements contract contained a fixed price. Reasonable variation of an extreme sort is exemplified in Southwest Natural Gas Co. v. Oklahoma Portland Cement Co., 102 F.2d 630 (C.C.A.10, 1939)."

Some of the prior Gulf–Eastern contracts have included the estimated fuel requirements for some cities covered by the contract while others have none. The particular contract contains an estimate for Gainesville, Florida requirement.

The parties have consistently over the years relied upon each other to act in good faith in the purchase and sale of the required quantities of aviation fuel specified in the contract. During the course of the contract, various estimates have been exchanged from time to time, and, since the advent of the petroleum allocations programs, discussions of estimated requirements have been on a monthly (or more frequent) basis.[2]

2. A requirements contract under the U.C.C. may speak of "requirements" alone, or it may include estimates, or it may contain maximums and minimums. In any case, the consequences are the same, as Official Comments 2 and 3 indicate. Comment 2 is set out in the text above. Comment 3 provides:

> "If an estimate of output or requirements is included in the agreement, no quantity unreasonably disproportionate

The court concludes that the document is a binding and enforceable requirements contract.

II

Breach of Contract

[The court determined that Eastern's performance under the contract "did not constitute a breach of its agreement with Gulf" and was "consistent with good faith and commercial practices as required by U.C.C. § 2–306."

III

Commercial Impracticability

[The court concluded that Gulf was not excused on the ground of commercial impracticability. See p. 848 below.]

IV

Remedy

Having found and concluded that the contract is a valid one, should be enforced, and that no defenses have been established against it, there remains for consideration the proper remedy.

The Uniform Commercial Code provides that in an appropriate case specific performance may be decreed. This case is a particularly appropriate one for specific performance. The parties have been operating for more than a year pursuant to a preliminary injunction requiring specific performance of the contract and Gulf has stipulated that it is able to perform. Gulf presently supplies Eastern with 100,000,000 gallons of fuel annually or 10 percent of Eastern's total requirements. If Gulf ceases to supply this fuel, the result will be chaos and irreparable damage.

Under the U.C.C. a more liberal test in determining entitlement to specific performance has been established than the test one must meet for classic equitable relief. U.C.C. § 2–716(1). . . .

It has previously been found and concluded that Eastern is entitled to Gulf's fuel at the prices agreed upon in the contract. In the circumstances, a decree of specific performance becomes the ordinary and natural relief rather than the extraordinary one. The parties are before the court, the issues are squarely framed, they have been clearly resolved in Eastern's favor, and it would be a vain, useless and potentially harmful exercise to declare that Eastern has a valid contract, but leave the parties to their own devices. Accordingly, the preliminary injunction heretofore entered is made a permanent injunction and the order of this court herein.

NOTES

(1) *Drafting and Price Fluctuations.* Under a fixed-price requirements contract, the seller runs a risk that if the market price rises, the buyer's requirements will

to it may be tendered or demanded. Any minimum or maximum set by the agreement shows a clear limit on the intended elasticity. In similar fashion, the agreed estimate is to be regarded as a center around which the parties intend the variation to occur."

escalate. (Part II of the court's opinion discusses the limited protection that the concept of good faith affords against this risk.) Does the Code suggest any drafting techniques that a seller might use to reduce this risk? Did Gulf succeed in avoiding this risk by making a flexible-price requirements contract?

(2) *Output Contracts.* In contrast to a "requirements" contract, an "output" contract is one that calls on the seller to deliver and the buyer to take all of the goods, or all of a certain sort, that may be produced by the seller. Output contracts are often bracketed with requirements contracts in discussion as presenting problems common to arrangements in which exclusivity is part of the bargain.

INTRODUCTION TO *WOOD v. LUCY*

The cases so far have focused on statements that at least one of the parties regarded as an express promise. The following case concerns a promise that the court agrees was not "expressed in so many words" but instead, was "fairly to be implied." What was it implied from? In the discussion of Hawkins v. McGee in Note 1, p. 3 above, you were asked to consider the language, context, and nature of the transaction in determining whether Dr. Hawkins's statement was a promise. As you read Judge Cardozo's famous opinion below, consider again how those factors contribute to the court's decision that despite the absence of an explicit statement or promise, the writing is nonetheless "instinct with obligation"?

Wood v. Lucy, Lady Duff–Gordon

Court of Appeals of New York, 1917.
222 N.Y. 88, 118 N.E. 214.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Otis F. Wood against Lucy, Lady Duff–Gordon. From a judgment of the Appellate Division (177 App.Div. 624, 164 N.Y.Supp. 576), which reversed an order denying defendant's motion for judgment on the pleading, and which dismissed the complaint, plaintiff appeals. Reversed.

■ CARDOZO, J.[a] The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She

a. Benjamin Nathan Cardozo (1870–1938) practiced in New York City after law school. He served as judge and later chief judge of the New York Court of Appeals, for which most of his significant opinions were written. President Hoover appointed him to Supreme Court of the United States in 1932, upon Holmes's retirement. Cardozo's best known jurisprudential work is a series of lectures entitled *The Nature of the Judicial Process* (1921).

placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.[b]

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App.Div. 62, 117 N.Y.S. 775; Moran v. Standard Oil Co., 211 N.Y. 187, 198, 105 N.E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. Phoenix Hermetic Co. v. Filtrine Mfg. Co., 164 App.Div. 424, 150 N.Y.S. 193; W.G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N.W. 918; Mueller v. Mineral Spring Co., 88 Mich. 390, 50 N.W. 319. We are not to suppose that one party was to be placed at the mercy of the other. Hearn v. Stevens & Bro., 111 App.Div. 101, 106, 97 N.Y.S. 566; Russell v. Allerton, 108 N.Y. 288, 15 N.E. 391. Many other terms of the agreement point the same way. We are told at the outset by way of recital that:

"The said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff–Gordon, has approved."

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficacy, as both parties must have intended that at all events it should have." Bowen, L.J., in The Moorcock, 14 P.D. 64, 68. But

b. In dismissing the complaint, the Appellate Division explained that "the plaintiff by this contract promises to collect the revenues derived from the indorsements, sales and licenses and to pay the cost of collecting them out of his half thereof, and to account to the defendant each month. But this promise on his part is not binding on him unless he places indorsements, makes sales or grants licenses, and nowhere in the contract has he bound himself to get these indorsements, or make the sales or grant the licenses.... It is quite apparent that in this respect the defendant gives everything and the plaintiff nothing and there is a lack of mutuality in the contract.... In fact the plaintiff in the nature of the case could not perform any of his various dependent agreements unless he placed indorsements, made sales or granted licenses to manufacture. And as the contract did not bind him to do any of these things, there is no provision of the contract which the defendant could enforce against him." 164 N.Y.S. at 577.

the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trademarks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion the authorities are ample....

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

[Three of the four judges dissented.]

NOTES

(1) *Questions.* What is the rationale for the implication of a promise? To what extent does it turn on the fact that Lady Duff–Gordon gave Wood "an exclusive privilege"? On other of the "many circumstances" referred to by Cardozo? How does the statement of the rule in UCC § 2–306(2) guide your analysis? (Would the UCC, if enacted at the time, have applied to the case?)

(2) *Corbin and Llewellyn on Cardozo.* Professor Arthur Linton Corbin[a] wrote this of Cardozo: "It cannot be said that he made any extensive changes in the existing law of contract. To state the facts of the cases, the decision, and the reasoning of the opinion will not show the overthrow of old doctrine or the establishment of new. Instead, it will show the application of existing doctrines with wisdom and discretion; an application that does not leave those doctrines wholly unaffected, but one that carries on their evolution as is reasonably required by the new facts before the court. When Cardozo is through, the law is not exactly as it was before, but there has been no sudden shift or revolutionary change." Mr. Justice Cardozo and the Law of Contracts, 39 Colum.L.Rev. 56, 56–57, 52 Harv. L.Rev. 408, 408–09, 48 Yale L.J. 426, 426–27 (1939).

Professor Karl Llewellyn used Wood v. Lucy to illustrate Cardozo's mastery in presenting the facts of a case. "You must remember that Cardozo was a truly great advocate, and the fact that he became a great judge didn't at all change the fact that he was a great advocate. And if you will watch, in the very process of your listening to the facts, you will find two things happening. The one is that ... you arrive at the conclusion that the case has to come out one way. And the other is, that it fits into a legal frame that says, 'How comfortable it will be, to bring it out that way. No trouble at all. No trouble at all.' " Llewellyn quoted the first five sentences of the opinion, noting how the defendant "is subtly made into a nasty person," and then

a. Arthur Linton Corbin (1874–1967) practiced law in Colorado for four years after his graduation from law school in 1899. He taught at the Yale Law School from 1903 until his retirement in 1943, and became a leading authority on the law of contracts. His eight-volume treatise, *Corbin on Contracts*, which began to appear in 1950, ranks as one of the great legal treatises. He also served as Special Advisor, and as Reporter for the Chapter on Remedies, for the First Restatement of Contracts.

continued: "Does this sound . . . like a business deal? Does a business deal sound like a legally enforceable view? Nothing is being said about that. But watch it grow on you. And if I hadn't stopped to tell you about it, it would have grown until you just took it, without a word." Llewellyn, A Lecture on Appellate Advocacy, 29 U.Chi.L.Rev. 627, 637–38 (1962). Can you give a similar reading to other parts of the opinion?

A copy of the contract in Wood v. Lucy is found in *Selections*. Might Cardozo have drawn his characterization of the defendant from the contract drafted by Lady Duff–Gordon's lawyer?

(3) *Termination Clauses.* Parties often use termination clauses to reduce the risks that they assume by contracting. The contract in Wood v. Lucy was, for example, terminable by either party without liability after one year. (As Judge Richard Posner has noted, "a year can be a long time in the fashion business." Posner, *Cardozo: A Study in Reputation* 96 (1990).)

If a termination clause is read as giving a party the power to terminate at any time at will, without more, that party's promise will be held to be illusory. For example, a license agreement for the manufacture of Orange Crush gave the licensee the exclusive right and the duty to manufacture the soft drink in a specified territory, but provided that the licensee could terminate the contract at any time. In a suit by the licensee against the licensor, the court held that the licensee's promise was not consideration for the licensor's because the licensee "did not promise to do anything and could at any time cancel the contract." Miami Coca–Cola Bottling Co. v. Orange Crush Co., 296 F. 693 (5th Cir.1924).

If, however, a termination clause is read as requiring that notice be given some period of time before the termination becomes effective, or be given in writing, or in some other way restricts the right of termination, the promise will not be held to be illusory.

(4) *Termination Under the Code.* UCC § 2–309(3) requires "reasonable notification" for termination, except on the happening of an agreed event. What if a termination clause explicitly negates any duty of notification? As to this, Comment 8 to the section says: "An agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs." Termination clauses are considered again in later chapters.

SUBSTITUTES FOR CONSIDERATION

The doctrine of consideration has been subjected to attacks for more than two centuries. Why, critics ask, should a promisor not be able to make a binding promise without receiving something in return from, and without reliance by, the promisee? Attempts at reform have focused on this problem, particularly with regard to gratuitous promises, and various substitutes have been suggested.

As long ago as 1765, in a case involving past consideration, Lord Mansfield[a] declared that a writing might substitute for consideration: "The

a. William Murray, first Earl of Mansfield (1705–1793), was a rival of William Pitt the Elder in school, in Parliament and in politics. He favored strict measures with the ancient notion about the want of consideration was for the sake of evidence only: for when it is reduced into writing ... there was no objection to the want of consideration.... In commercial cases amongst merchants, the want of consideration is not an objection.'' Pillans and Rose v. Van Mierop and Hopkins, 97 Eng.Rep. 1035 (Kings Bench 1765). His rule was short lived, for thirteen years later it was rejected by the House of Lords, which concluded that, ''All contracts are, by the laws of England, distinguished into agreements by specialty [*i.e.*, agreements under seal], and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.'' Rann v. Hughes, 101 Eng.Rep. 1014 (House of Lords 1778). Nonetheless, the view that the formality of putting a promise in writing should operate as an alternative to consideration continued to have appeal, and gained new vitality—particularly in connection with gratuitous promises—when the abolition of the seal raised the doctrine of consideration to even greater prominence.

A few states have general statutes that facilitate the making of binding gratuitous promises by recognizing some form of writing as a substitute for consideration. (Hark back to the seal on pp. 29–30.) One such statute, the Model Written Obligations Act, proposed by the National Conference of Commissioners on Uniform State Laws, provides:

> A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.

Only Pennsylvania and Utah adopted this act, and Utah later repealed it. According to one of Utah's code commissioners, there was ''no more vicious statute in the written laws of any civilized nation'' since it would ''enable confidence men and swindlers to enforce written promises ... which they may obtain from the unwary.'' See Report to the Governor (1933), quoted in Note, 3 Utah L.Rev. 73, 95 n.166 (1952). A 1937 recommendation of the English Law Revision Commission that a similar statute be adopted was also rejected. What explains legislative reluctance to recognize written gratuitous promises as binding?

A more common variety of general legislation is typified by a California statute that makes a writing presumptive evidence of consideration. Cal. Civ.Code § 1614 (West 2001). In addition, Article 2 of the Uniform Commercial Code dispenses with the requirement of consideration in certain

American rebels. His friend Alexander Pope helped him practice advocacy and later praised his eloquence in verse. Dr. Johnson said of him, ''much can be made of a Scot if caught young.'' Mansfield achieved greatness as a judge, being Lord Chief Justice from 1756 to 1788. One of his chief services was in rationalizing mercantile law. In commercial cases he made effective use of special ''juries'' of merchants, whose advice about their practices was sometimes instrumental in transforming custom into law.

limited circumstances, as indicated on p. 176 and Note 2, pp. 327–328 below.

Civil law countries commonly have procedures by which a promisor may appear before a notary, a lawyer who holds an appointment from the state and who has no counterpart in common law countries, and make an irrevocable gratuitous promise. See Arthur T. von Mehren, Civil Law Analogues to Consideration: An Exercise in Comparative Analysis, 72 Harv.L.Rev. 1009, 1057–62 (1959). One explanation offered for the refusal by the American legal system to provide a similar mechanism is paternalism, the view that a promisor's preferences regarding the enforceability of the promise should be disregarded for the promisor's own good. See Farnsworth, Promises and Paternalism, 41 Wm. & Mary L.Rev.385 (2000). We consider the general question of whether legal constraints on a party's ability to contract are better understood as paternalism or protection in Chapters 4 and 6.

NOTE

''Furthering Economic Activity.'' In a provocative article, Professors Daniel Farber and John Matheson proposed a rule that would enforce any promise ''made in furtherance of an economic activity;'' See Beyond Promissory Estoppel: Contract Law and the Invisible Handshake, 52 Chi.L.Rev. 903, 929 (1985); see also Edward Yorio and Steve Thel, The Promissory Basis of Section 90, 101 Yale L.Rev. 111 (1991). Farber and Matheson argued that because firms commonly make promises for which they expect economic benefits—the promise to keep a plant open, for example—without receiving any specific bargained-for exchange but with the expectation of eventual economic benefit, such promises should be enforced. They concluded that a ''rule that enforces promises designed 'to induce the creation of economic activity' simply 'reinforces the traditional free-will basis of promissory liability, albeit in an expanded context of relational and institutional interdependence.' '' Farber and Matheson suggest that courts are already implementing the proposed rule using reliance to enforce commercial promises in cases where the plaintiff has shown little or no reliance at all; see Vastoler v. American Can Co., cited in Note 3, p. 96 below. For criticism of the empirical basis of their argument, see Robert Hillman, Questioning the New Consensus on Promissory Estoppel: An Empirical and Theoretical Study, 98 Colum.L.Rev. 580 (1998).

In their proposal Farber and Matheson drew a clear line between gratuitous promises that further economic activity and those that don't. ''Unlike promises made in an economic setting, [non-commercial gratuitous promises] are not generally made to coordinate activities or generate reliance beneficial to the promisor. The presumption of utility that underlies our proposed enforcement of promises in furtherance of economic activity thus does not apply . . .'' Why is it that non-commercial gift promises find no haven, even among proposals that would abandon consideration in commercial dealings?

PROBLEM

Reviewing the Situation. Grateful for various forms of personal assistance (driving, shopping, and so on) received from a close friend over the years, Jack Tallas, a retired businessman, wrote out a memorandum stating his intention to change his will to make the friend ''an heir for the sum of $50,000.'' Tallas had the memorandum notarized and gave a notarized copy of the memo to his friend to keep. When Tallas died never having changed his will, the friend sued his estate for $50,000. Assuming, as the court did, that there was no fraud, duress, or misrepresentation, is there any legal basis to support the friend's claim? Consideration?

Moral obligation? The writing? The notarization? If your answer is "None of the above," why should the promise not be enforced? Is the concern that the cautionary or evidentiary functions performed by consideration, p. 30 above, have not been met? What more could Tallas have done? See DeMentas v. Tallas, 764 P.2d 628 (Utah 1988).

SECTION 4. RELIANCE AS A BASIS OF ENFORCEMENT

This section examines the role of reliance on a promise as a basis for the enforcement of the promise separate and distinct from consideration. We have already considered reliance as one interest a court might protect when providing a remedy to an aggrieved promisee. The focus here, however, is not on reliance as a form of relief, but rather as a theory for enforcing promises in the first place. As we shall see, to recognize this function of reliance may ameliorate injustices that would otherwise result from a want of consideration. At the same time, recognizing reliance also risks unfair or unsatisfactory outcomes. In reading the following cases, compare the advantages and limitations offered by reliance as a ground for enforcing promises with those offered by consideration.

Ricketts v. Scothorn

Supreme Court of Nebraska, 1898.
57 Neb. 51, 77 N.W. 365.

■ SULLIVAN, J. In the District Court of Lancaster county, the plaintiff, Katie Scothorn, recovered judgment against the defendant, Andrew D. Ricketts, as executor, of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy: "May the first, 1891. I promise to pay to Katie Scothorn on demand, $2,000 to be at 6 per cent. per annum. J.C. Ricketts." In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros., and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the administrator.

The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May—presumably on the day the note bears date—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses: "A. Well, the old gentleman came in there one morning about nine o'clock, probably a little before or a little after, but early in the morning, and he unbuttoned his vest, and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, 'I have fixed out something that you have not got to work any more.' He says, 'none of my grandchildren work, and you don't have to.' Q. Where was she? A. She took the piece of paper and kissed him, and kissed the old gentleman, and commenced to cry.'' It seems Miss Scothorn immediately notified her employer of her intention to quit work, and that she did soon after abandon her occupation. The mother of the plaintiff was a witness, and testified that she had a conversation with her father, Mr. Ricketts, shortly after the note was executed, in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked, and he did not think she ought to. For something more than a year the plaintiff was without an occupation, but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation.

We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do, or refrain from doing, anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros., and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity, and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle, as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note.

The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable, even when put in the form of a promissory note.... But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration.... In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee on the faith of the promise constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration....

Under the circumstances of this case, is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel in pais is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." . . . According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment, and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial, they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right, and is

Affirmed.

NOTES

(1) *Questions.* What if, during the brief exchange between Ricketts and Scothorn, Ricketts had not mentioned work at all, but had simply handed his granddaughter the promissory note? (Note that Ricketts's promise to Scothorn is found in the promissory note, not in the conversation between them.) What result if the conversation took place as it did, and Scothorn decided to keep on working but relied on the promise by buying a horse so that she could get to work more conveniently? Might another court have found a bargained-for exchange and so have enforced Ricketts's note as a promise supported by consideration? Compare, particularly, Hamer v. Sidway, p. 34 above. How might Ricketts have structured his promise so as to ensure its enforcement?

(2) *Kirksey Revisited*. Would the reasoning of the court in *Ricketts* support a recovery by the sister-in-law, the promisee, in *Kirksey,* above?

THE DEVELOPMENT OF PROMISSORY ESTOPPEL

Holmes said, "It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it." Commonwealth v. Scituate Savings Bank, 137 Mass. 301, 302 (1884). Nevertheless, a number of 19th and early 20th century cases, including *Ricketts,* recognized reliance as a basis for the enforcing of promises. For the most part, these cases fall into the following four categories.

Family Promises. As in *Ricketts*, a promise is made by one family member to another, on which the other relies. Many such cases have involved a promise to leave the family farm to the son who stays and works the property, or to the daughter who doesn't marry but cares for her aging parents instead. For a catalogue of reasons why such promises traditionally failed as enforceable contracts, see Hendrik Hartog, Someday This Will All Be Yours: Inheritance, Adoption, and Obligation in Capitalist America, 79 Ind.L.J. 345 (2004).

Promises to Convey Land. The recipient of a promise to convey land relied on it by moving onto the land and making improvements. An early example is Freeman v. Freeman, 43 N.Y. 34 (1870). Would the facts in *Kirksey*, above, have brought that case within this category?

Promises Coupled with Gratuitous Bailments. A person to whom the owner of something entrusts its possessions makes a promise to the owner respecting the property, on which the owner relies. The leading case is Siegel v. Spear & Co., 138 N.E. 414 (N.Y.1923). Siegel bought furniture on credit from Spear, giving Spear a mortgage on it and agreeing not to remove it from his apartment without Spear's consent until it was paid for. When he decided to leave the city for the summer, Siegel saw Spear's credit man, McGrath, who agreed to store the furniture free of charge. When Siegel stated that he would first have to get some property insurance, McGrath responded that it wouldn't be necessary: "I will do it for you; it will be a good deal cheaper; . . . when you get the next bill—you can send a check for that with the next installment." Siegel then sent the furniture to Spear's storehouse, where, a month later it was destroyed by fire. It had not been insured. Siegel sued Spear, won, and Spear appealed. The Court of Appeals affirmed. Although the gratuitous bailment itself imposed no duty on Spear to insure the furniture, such a duty arose from McGrath's promise followed by the delivery of the furniture by Siegel.

Charitable Subscriptions. A person promises to contribute to a not-for-profit organization. In that case enforcement may be regarded as particularly desirable as a means of allowing decisions about the distribution of wealth to be made at an individual level. As one court put it, "This promise was made to a charitable corporation, and for that reason we are not confined to the same orthodox concepts which once were applicable to every situation arising within a common law jurisdiction. There can be no denying that the strong desire on the part of the American courts to favor charitable institutions has established a doctrine which once would have been looked upon as legal heresy." Danby v. Osteopathic Hosp. Ass'n of Delaware, 104 A.2d 903, 904 (Del.Ch.1954). It is sometimes possible to enforce a promise of charitable contribution by finding an exchange among subscribers of promises for the benefit of (and enforceable by) the charitable organization, especially when one subscriber appears as the "bellwether" of the flock and has promised a large sum on condition that other subscribers raise a specified amount. See Congregation B'Nai Sholom v. Martin, 173 N.W.2d 504 (Mich.1969). (How could you draft a pledge form to help your favorite charity take advantage of this possibility?) Courts have also enforced such a promise by finding that the charity has done or has promised to do something in exchange for the subscriber's promise.

The most widely known and influential decision on charitable subscriptions rests on this last ground and contains only dictum concerning the effect of reliance. The case is Allegheny College v. National Chautauqua County Bank of Jamestown, 159 N.E. 173 (N.Y.1927). Mary Yates Johnston promised to pay $5,000 to Allegheny College by a writing denoted an "Estate Pledge" that stipulated that "this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry." The sum was not payable until 30 days after her death, but $1,000 was paid while she was alive and set aside by the college for the specified purpose. She later repudiated her promise, and after her death, the college brought an action against her executor for the unpaid balance. Writing for the New York Court of Appeals, Cardozo found consideration for her promise in the return promise of the college to set up the memorial fund which arose "by implication" from its acceptance of the $1,000. "The college could not accept the money and hold itself free thereafter from personal responsibility to give effect to the condition." In the course of his opinion, Cardozo went out of his way to speak to the effect of reliance. "[T]here has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled 'a promissory estoppel'.... Whether the exception has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as Siegel v. Spear & Co.... may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions." For a detailed account of the case, see Alfred S. Konefsky, How to Read, or at Least Not Misread, Cardozo in the *Allegheny College* Case, 36 Buffalo L.Rev. 645 (1987).

RESTATEMENT, FIRST, § 90

Cardozo's dictum in *Allegheny College* was surely influenced by what was to become Restatement, First, § 90, the text of which had been considered at the annual meeting of the American Law Institute in 1926. It reads:

§ 90. Promise Reasonably Inducing Definite and Substantial Action

> 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.

Although the section avoids the use of the term "promissory estoppel," it states in general terms the principle that had been applied in the four categories of cases just described. Its remarkable impact is suggested by its role in the following cases.

During the discussion of Restatement, First, § 90 on the floor of the American Law Institute, Samuel Williston, as Reporter, stated: "Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made. As I said to Mr. Coudert, I could leave this whole thing to the subject of quasi contracts so that the promisee under those circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the status quo." 4 American Law Institute Proceedings, Appendix, 103–04 (1926).

Do you agree with Williston?

Feinberg v. Pfeiffer Co.

Saint Louis Court of Appeals, Missouri, 1959.
322 S.W.2d 163.

[The facts and the first part of the opinion in this case are at p. 46 above. The court there rejected Mrs. Feinberg's contention that her continuation in the employ of Pfeiffer Co. from December 27, 1947, the date of the resolution, until the date of her retirement, June 30, 1949, was consideration for Pfeiffer's promise to pay her $200 per month for life upon her retirement. In this portion of the opinion, the court considered Mrs. Feinberg's second contention, that the promise was enforceable because of her reliance on it, "*i.e.,* her retirement, and the abandonment by her of her opportunity to continue in gainful employment."]

■ DOERNER, COMMISSIONER. . . . But as to the second of these contentions we must agree with plaintiff. By the terms of the resolution defendant promised to pay plaintiff the sum of $200 a month upon her retirement.

[The court quoted Restatement, First, § 90.] Was there such an act on the part of plaintiff, in reliance upon the promise contained in the resolution, as will estop the defendant, and therefore create an enforceable contract under the doctrine of promissory estoppel? We think there was. One of the illustrations cited under Section 90 of the Restatement is: "2. A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding." This illustration is objected to by defendant as not being applicable to the case at hand. The reason advanced by it is that in the illustration B became "disqualified" from obtaining other employment *before* A discontinued the payments, whereas in this case the plaintiff did not discover that she had cancer and thereby became unemployable until *after* the defendant had discontinued the payments of $200 per month. We think the distinction is immaterial. The only reason for the reference in the illustration to the disqualification of A is in connection with that part of Section 90 regarding the prevention of injustice. The injustice would occur regardless of when the disability occurred. Would defendant contend that the contract would be enforceable if the plaintiff's illness had been discovered on March 31, 1956, the day before it discontinued the payment of the $200 a month, but not if it occurred on April 2nd, the day after? Furthermore, there are more ways to become disqualified for work, or unemployable, than as the result of illness. At the time she retired plaintiff was 57 years of age. At the time the payments were discontinued she was over 63 years of age. It is a matter of common knowledge that it is virtually impossible for a woman of that age to find satisfactory employment, much less a position comparable to that which plaintiff enjoyed at the time of her retirement.

The fact of the matter is that plaintiff's subsequent illness was not the ''action or forbearance'' which was induced by the promise contained in the resolution. As the trial court correctly decided, such action on plaintiff's part was her retirement from a lucrative position in reliance upon defendant's promise to pay her an annuity or pension. [The court quoted from *Ricketts v. Scothorn*, p. 89 above.]

The Commissioner therefore recommends, for the reasons stated, that the judgment be affirmed.

■ PER CURIAM. The foregoing opinion is adopted as the opinion of the court. The judgment is, accordingly, affirmed.

PROBLEM

Parallel Pension Promise? In January, 1972, Edward J. Hayes announced his intention to retire from Plantations Steel the following July after 25 years of continuous service. About a week before his retirement, he had a conversation with a Plantations Steel officer who said that, though Hayes was not eligible for a pension, the company ''would take care'' of him. Hayes retired and sought no other employment, and the company paid him $5,000 a year through 1976. When payments were discontinued on the ground that the promise was unsupported by consideration, Hayes sued, relying on *Feinberg*. What result? Do the facts in Hayes's case differ significantly from those in Feinberg's? Hayes v. Plantations Steel Co., 438 A.2d 1091 (R.I.1982).

RESTATEMENT, SECOND, § 90

In view of the great influence that § 90 of the Restatement, First, has had, § 90 of the Restatement, Second, set out below, merits a particularly careful reading. Note the addition of the second sentence of Subsection (1) and the deletion in the first sentence of the requirement that the reliance be of ''a definite and substantial character.'' How might these two changes be related? Note also the liberalization in Subsection (2) of the rule as to charitable subscriptions.

§ 90. Promise Reasonably Inducing Action or Forbearance

(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. The remedy granted for breach may be limited as justice requires.
>
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

NOTES

(1) *Measure of Recovery.* Fuller and Perdue posed the following hypothesis:

> An uncle promises his nephew $1,000 as a gift. The nephew decides to go into business, and, reserving the promised sum for use in paying his rent, spends a large sum of money laying in a stock of goods. The uncle declines to perform his promise; the nephew is forced to abandon his plans, and sells his stock of goods at a sacrifice of $2,000.

See Lon L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 80 (1936).

How much should the nephew recover in the preceding hypothetical case?

(2) *Charitable Subscriptions Revisited.* How does the rule of Restatement, Second, § 90(2) differ from Cardozo's dictum in *Allegheny College*, at p. 93 above? Several courts have refused to apply § 90(2) and continue to require a showing of reliance. One such case involved the ownership of the papers of Dr. Martin Luther King Jr. In a 1964 letter, Dr. King named the Boston University Library as the repository of his papers, and authorized their removal to Boston University on a yearly basis. His letter stated further that "In the event of my death, all such materials deposited with the University shall become from that date the absolute property of Boston University." Coretta Scott King, Dr. King's widow, later sought to recover his papers on the ground that his statement was at best a gratuitous promise. A Massachusetts jury found for the University and King appealed. *Held*: Affirmed.

The court held that either consideration or reliance was required and that the jury could have concluded that the University's efforts in caring for the papers constituted reliance on Dr. King's promise to transfer ownership of the papers at the time of his death. King v. Trustees of Boston University, 647 N.E.2d 1196 (Mass.1995). What other forms of reliance might the University have shown? Advertising itself to scholars as the repository of the King papers? For a case in which the same court found no injustice in declining to enforce an oral promise to give $25,000 to a synagogue, see Congregation Kadimah Toras–Moshe v. DeLeo, 540 N.E.2d 691 (Mass.1989)

(3) *Detriment.* In discussing Section 90, courts often speak of detriment, as if reliance were not sufficient. Does Section 90 mention "detriment"?

In Vastoler v. American Can Co., 700 F.2d 916 (3d Cir.1983), Vastoler sued his employer for breach of a promise of greater pension benefits, on which he claimed he had relied in taking a promotion from an hourly lithographer to a salaried supervisor. The trial court granted summary judgment for the employer on the ground that, because the promotion had been to Vastoler's financial advantage, there was a "complete absence of any detriment, let alone a substantial one." The Court of Appeals reversed, concluding that there was "a genuine issue of material fact ... concerning Vastoler's detrimental reliance upon the Company's promise." The court noted that Vastoler "asserted that he remained with [the] Company because of his pension benefits." It also found "that the trial judge erred in failing to recognize that absorption of the stress and anxiety inherent in supervisory positions could be one of the factors that constitutes detrimental reliance.'' This explains, the court said, ''why some qualified people do not want to be President of Fortune 500 corporations, nominee for the Presidency of the United States, or foreman of their plants.''

Was the court, in effect, applying a rule similar to that of Restatement, Second, § 90(2)? The court in *Vastoler* used reliance to enforce a promise where the plaintiff seemed to show little or no reliance. Does the case suggest that courts may in fact be implementing the Farber and Matheson proposal discussed in the Note on p. 88?

(4) *Decline and Fall.* In the provocatively titled *The Death of Contract*, Professor Grant Gilmore[a] described the ''decline and fall'' of ''the general theory of contract,'' as espoused by Langdell, Holmes, and Williston. He referred to ''the Restatement's schizophrenia'' and quoted from the Restatement, First, § 75 (found in Feinberg v. Pfeiffer Co. at p. 49 above), and Restatement, First, § 90 (p. 93 above).

''Perhaps what we have here is Restatement and anti-Restatement or Contract and anti-Contract.... The one thing that is clear is that these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up.... Clearly enough the unresolved ambiguity in the relationship between [the two sections] has now been resolved in favor of the promissory estoppel principle of § 90 which has, in effect, swallowed up the bargain principle of § 75. The wholly executory exchange where neither party has yet taken any action would seem to be the only situation in which it would be necessary to look to § 75—and even there, as the Comment somewhat mysteriously suggests, the 'probability of reliance' may be a sufficient reason for enforcement without inquiring into whether or not there was any 'consideration.' ... Speaking descriptively, we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.' '' Gilmore, *The Death of Contract* 61–65, 72, 87 (1974).

Gilmore's remark about the ''wholly executory exchange where neither party has yet taken any action'' has not gone unnoticed. An English contracts scholar, Professor Patrick Atiyah, has argued that the case for enforcing such exchanges is not compelling and that ''there are signs of an increasing reluctance to impose liability in wholly executory contracts, that is, on promises which have neither been paid for, nor relied upon.'' Patrick S. Atiyah, *Promises, Morals and Law* 5–6 (1981). Can you find any of those signs? See Melvin Eisenberg, The Bargain Principle and Its Limits, 95 Harv.L.Rev. 741 (1982).

PROBLEM

Applied Measures of Recovery. Assuming that each of the following plaintiffs were allowed to recover under the rule stated in Restatement § 90, which of them might appropriately be limited to recovery based on the reliance interest? Katie Scothorn? Anna Feinberg? Antillico Kirksey?

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a. Grant Gilmore (1910–1982), once a teacher of French, practiced law in New York for two years before teaching law at Yale and for some years at Chicago. He was a principal architect of Article 9 of the Uniform Commercial Code, which deals with secured transactions, and wrote a two-volume work on that subject as well as shorter works on admiralty, contracts, and legal history.

COHEN v. COWLES MEDIA COMPANY, 479 N.W.2d 387 (Minn.1992) (en banc). [Dan Cohen, an associate of a gubernatorial candidate, informed reporters for the Minneapolis Star and the Pioneer Press Dispatch of the arrest for unlawful assembly and the conviction for shoplifting of the opposing candidate for lieutenant governor. Although the reporters promised to keep Cohen's identity confidential, the newspapers' editors overruled those promises. When the stories were published, Cohen was fired by his advertising firm, and he sued the publishers of the papers for breach of contract.

The jury awarded Cohen $200,000 in compensatory damages, but the Minnesota Supreme Court held that, though the papers may have had a moral and ethical commitment to keep their source anonymous, the parties were not thinking in terms of a legally binding contract. It also held that to allow Cohen to recover under the doctrine of promissory estoppel would violate the papers' First Amendment rights. The Supreme Court of the United States granted certiorari and held that the First Amendment was not offended by use of the doctrine to enforce confidentiality agreements because it had only "incidental effects" on news gathering and reporting. It remanded the case to the Supreme Court of Minnesota.

Citing Restatement § 90(1), that court affirmed the jury's $200,000 verdict on the grounds of promissory estoppel, concluding that the promise must "be enforced to prevent an injustice."]

■ SIMONETT, JUSTICE.... It is perhaps worth noting that the test is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent an injustice. As has been observed elsewhere, it is easier to recognize an unjust result than a just one, particularly in a morally ambiguous situation. Cf. Edmond Cahn, The Sense of Injustice (1964). The newspapers argue it is unjust to be penalized for publishing the whole truth, but it is not clear this would result in an injustice in this case. For example, it would seem veiling Cohen's identity by publishing the source as someone close to the opposing gubernatorial ticket would have sufficed as a sufficient reporting of the "whole truth."

Cohen, on the other hand, argues that it would be unjust for the law to countenance, at least in this instance, the breaking of a promise. We agree that denying Cohen any recourse would be unjust. What is significant in this case is that the record shows the defendant newspapers themselves believed that they generally must keep promises of confidentiality given a news source. The reporters who actually gave the promises adamantly testified that their promises should have been honored. The editors who countermanded the promises conceded that never before or since have they reneged on a promise of confidentiality. A former Minneapolis Star managing editor testified that the newspapers had "hung Mr. Cohen out to dry because they didn't regard him very highly as a source." The Pioneer Press Dispatch editor stated nothing like this had happened in her 27 years in journalism. The Star Tribune's editor testified that protection of sources was "extremely important." Other experts, too, stressed the ethical importance, except on rare occasions, of keeping promises of confidentiality. It was this long-standing journalistic tradition that Cohen, who has worked in journalism, relied upon in asking for and receiving a promise of anonymity.

Neither side in this case clearly holds the higher moral ground, but in view of the defendants' concurrence in the importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid an injustice. In short, defendants are liable in damages to plaintiff for their broken promise. . . .

NOTE

Questions. The case above was the second time the Supreme Court decided the matter. In its initial decision (*Cohen I*), the Court concluded that although "the newspapers may have had a moral and ethical commitment to keep their sources anonymous, . . . this was not a situation where the parties were thinking in terms of a legally binding commitment." Do you agree? A dissenting judge in *Cohen I* argued that "the news media should be compelled to keep their promises like anyone else" and should therefore be liable "on either a contract or promissory estoppel theory." If, as the majority suggested in *Cohen I,* the newspapers's commitment was only "moral and ethical," was Cohen justified in relying on it?

A context of bargaining for many problems gives some assurance that the promisors made them with serious intent. Reliance on a promise may well give some assurance that the recipient took it seriously, but does not demonstrate that the promisor *meant* it so. Is there anything in Section 90 that warrants a court taking account of the degree of circumspections that accompanied the making of a promise? As to the reporters concerned in Cohen's case, can it be doubted that both he and they took seriously their promise of confidentiality? With only a little strain, one might suppose that they struck a bargain about the matter.

PROBLEM

The Ear of the Beholder. In 1977, the Township of Ypsilanti, Michigan, created an industrial development district for General Motors' Willow Run plant and subsequently gave it a series of property tax abatements. Prior to the 1988 abatements, Harvey Williams, the plant manager, made the following statement as part of General Motors' presentation.

> Good evening, my name is Harvey Williams and I am the plant manager of the Buick Oldsmobile Cadillac group's Willow Run plant. We are pleased to have this opportunity to appear before the Ypsilanti Township Board of Trustees. This application for an industrial facilities exemption certificate is for an investment totalling $75,000,000.00 for machinery and equipment. This will enable our plant to assemble a new full size car in the 1991 model year. This new rear wheel drive car is substantially larger than our current model. And specifically it will generate major booth, oven and conveyor changes in the paint shop and assembly line process, changes in the body, trim and chassis department. This change will also provide additional flexibility at our assembly plant. Essentially we would now have the capability to produce either front or rear wheel drive cars with minimum modifications to our facility. Upon completion of this project and favorable market demand, it will allow Willow Run to continue production and maintain continuous employment for our employees. I would like to introduce Russell Hughes, our controller, who will review pertinent charts pertaining to our request.

In 1991, General Motors announced that, because of record losses, it had decided to consolidate the work done at Willow Run with that done at Arlington, Texas, and to close the Willow Run plant. The Township sought and obtained an injunction barring General Motors from transferring production from the Willow Run plant, and General Motors appealed.

How would you argue the case for the Township? For General Motors? Where in Williams's speech do you find a promise? See Charter Township of Ypsilanti v. General Motors Corp., 506 N.W.2d 556 (Mich.App.1993). See also Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir.1980).

D & G Stout, Inc. v. Bacardi Imports, Inc.

United States Court of Appeals, Seventh Circuit, 1991.
923 F.2d 566.

■ CUDAHY, CIRCUIT JUDGE. D & G Stout, Inc., operating at all relevant times under the name General Liquors, Inc. (General), was distributing liquor in the turbulent Indiana liquor market in 1987. When two of its major suppliers jumped ship in early 1987, General faced a critical dilemma: sell out at the best possible price or continue operating on a smaller scale. It began negotiating with another Indiana distributor on the terms of a possible sale. Bacardi Imports, Inc. (Bacardi), was still one of General's remaining major suppliers. Knowing that negotiations were ongoing for General's sale, Bacardi promised that General would continue to act as Bacardi's distributor for Northern Indiana. Based on this representation, General turned down the negotiated selling price it was offered. One week later, Bacardi withdrew its account. Realizing it could no longer continue to operate, General went back to the negotiating table, this time settling for an amount $550,000 below the first offer. The question is whether General can recover the price differential from Bacardi on a theory of promissory estoppel. The district court believed that as a matter of law it could not, and entered summary judgment for defendant Bacardi. We disagree, and so we remand for trial.

I.

General was (and D & G Stout, Inc., is) an Indiana corporation with its main place of business in South Bend. Bacardi is a corporation organized in New York and doing business primarily in Miami, Florida. General served at Bacardi's will as its wholesale distributor in Northern Indiana for over 35 years. During the 1980s, liquor suppliers in Indiana undertook an extensive effort to consolidate their distribution, the effect of which was to reduce the number of distributors in the state from approximately twenty in 1980 to only two in 1990.

General weathered the storm until April 1987, when two of its major suppliers withdrew their lines, taking with them the basis of more than fifty percent of General's gross sales. By June, General recognized that it must choose between selling out and scaling back operations in order to stay in business. Despite the recent setbacks, General calculated that remaining operational was possible as long as it held on to its continuing two major suppliers, Bacardi and Hiram Walker.

About this time (and probably in connection with the same forces concentrating distribution) Bacardi lost its distributor in Indianapolis and southern Indiana. Bacardi decided to convene a meeting on July 9, 1987, of applicants for the open distributorship. General's president, David Stout, attended the meetings as an observer, with no designs on the new opening. Stout did intend to seek assurances from Bacardi about its commitment to General in Northern Indiana. While in Indianapolis, Stout was approached by National Wine & Spirits Company (National), which expressed an interest in buying General. Stout agreed to begin negotiations the following weekend. Stout also received the assurances from Bacardi he sought: after listening to Stout's concerns and hearing about his contemplated sale of General, Bacardi emphatically avowed that it had no intention of taking its line to another distributor in Northern Indiana. This promise was open-ended—no one discussed how long the continuing relationship might last.

During the ensuing two weeks, General carried on negotiations with National to reach a price for the purchase of General's assets. Bacardi kept in close contact with General to find out whether it would indeed sell. The negotiations yielded a final figure for Stout to consider. On July 22 and again on July 23—with negotiations concluded and only the final decision remaining—Stout again sought assurances from Bacardi. The supplier unequivocally reconfirmed its commitment to stay with General, and Stout replied that, as a result, he was going to turn down National's offer and would continue operating. Later on the 23rd, Stout rejected National's offer. That same afternoon, Bacardi decided to withdraw its line from General.

General learned of Bacardi's decision on July 30. The news spread quickly through the industry, and by August 3, Hiram Walker had also pulled its line, expressing a belief that General could not continue without Bacardi on board. By this time, sales personnel were abandoning General for jobs with the two surviving distributors in Indiana (one of which was National). General quickly sought out National to sell its assets, but National's offer was now substantially reduced. The ensuing agreement, executed on August 14 and closed on August 28, included a purchase price $550,000 lower than the one National offered in mid-July. Stout's successor company brought suit under the diversity jurisdiction against Bacardi, claiming that the supplier was liable by reason of promissory estoppel for this decline in the purchase price. Judge Miller entered summary judgment for Bacardi, holding that the promises plaintiff alleged were not the type upon which one may rely under Indiana law. Plaintiff appeals.

II.

We have generally stated General's version of the facts, many of which are undisputed. On appeal, Bacardi does not argue the facts and is apparently willing to rest on Judge Miller's legal analysis. Both parties also agree with Judge Miller that Indiana law governs this case and we do not question this conclusion. Before us then is the legal question whether the plaintiff has alleged any injury which Indiana's law of promissory estoppel redresses.

Indiana has adopted the Restatement's theory of promissory estoppel:

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

Restatement (Second) of Contracts § 90(1) (1981); Eby v. York–Division, Borg–Warner, 455 N.E.2d 623, 627 (Ind.App.1983); Pepsi–Cola General Bottlers, Inc. v. Woods, 440 N.E.2d 696, 698 (Ind.App.1982). The district judge dismissed the complaint on the ground that Bacardi's alleged promise was not one on which it should reasonably have expected General to rely.

The district court first noted that the relationship between General and Bacardi had always been terminable at will. Because Bacardi's promises that it would continue to use General as its distributor contained no language indicating that they would be good for any specific period,[1] the court reasoned that the relationship remained terminable at will. It then concluded that the promise was not legally enforceable, and thus was not one on which General reasonably might rely. We agree with each of these conclusions but the last. Notwithstanding the continuation of an at-will relationship between Bacardi and General, the promises given between July 9 and July 23 were not without legal effect.

In Indiana, as in many states, an aspiring employee cannot sue for lost wages on an unfulfilled promise of at-will employment. Pepsi–Cola, 440 N.E.2d 696; accord Ewing v. Board of Trustees of Pulaski Memorial Hosp., 486 N.E.2d 1094, 1098 (Ind.App.1985) (employment contract for indefinite tenure is unenforceable for future employment). Because the employer could have terminated the employee without cause at any time after the employment began, the promise of a job brings no expectation of any determinable period of employment or corresponding amount of wages. The promise is therefore unenforceable under either a contract or a promissory estoppel theory in an action for lost wages. Nevertheless, lost wages are not the only source of damages flowing from a broken promise of employment, enforceable or not. Indiana courts acknowledge certain damages as recoverable when the employer breaks a promise of employment, even if the employment is to be terminable at will. For example, in Eby v. York–Division, Borg–Warner, 455 N.E.2d at 627, a plaintiff who gave up a job and moved from Indiana to Florida on a promise of employment sued for recovery of preparation and moving expenses incurred on the basis of the promise. The Indiana appellate court reversed the lower court's summary judgment for the defendant employer, holding that the plaintiff employee had stated a cause of action for promissory estoppel. The court found that the defendant could have expected the plaintiff and his wife to move in reliance on the promise of employment and therefore might be liable for

1. Given the context of the promise, we see a plausible argument that the promise was one for a term, namely that Bacardi would stay on at least until the rush toward consolidation passed. But the district judge found differently, and we need not question his factual conclusion in light of our legal analysis.

reneging. See also Pepsi–Cola, 440 N.E.2d 696; accord Lorson v. Falcon Coach, 214 Kan. 670, 522 P.2d 449 (1974).

Our review of Indiana law thus leaves us a simple if somewhat crude question: are the damages plaintiff seeks here more like lost future wages or like moving expenses? We can better answer the question if we determine why Indiana draws this distinction. Unlike lost wages, moving expenses represent out-of-pocket losses; they involve a loss of something already possessed. It would be plausible, although not very sophisticated, to distinguish between the loss of something yet to be received and the loss of something already in hand. But this is not precisely where Indiana draws the distinction, nor where we would draw it if it were our choice to make. *Eby* itself involved not only moving expenses, but wages lost at plaintiff's old job during the few days plaintiff was preparing to move. 455 N.E.2d at 625. Those wages were not out-of-pocket losses: plaintiff had no more received those wages than he had received wages from his promised employment.

In fact, the line Indiana draws is between expectation damages and reliance damages. In future wages, the employee has only an expectation of income, the recovery of which promissory estoppel will not support in an at-will employment setting. In wages forgone in order to prepare to move, as in moving expenses themselves, the employee gave up a presently determinate sum for the purpose of relocating. Both moving expenses and forgone wages were the hopeful employee's costs of positioning himself for his new job; moving expenses happen to be out-of-pocket losses, while forgone wages are opportunity costs. Both are reliance costs, not expectancy damages.

Thus, the question has become whether the loss incurred from the price drop was attributable to lost expectations of future profit or resulted from an opportunity forgone in reliance on the promise. At first blush, the injury might seem more like the loss of future wages. Bacardi was a major supplier whose business was extremely valuable to General. While the loss of this ''asset'' might cause a decline in General's market value as measured by the loss of future income from the sale of Bacardi's products, this loss is not actionable on a promissory estoppel theory. Those damages would presumably be measured by the present value of General's anticipated profit from the sale of Bacardi's products, and Indiana will not grant relief based on promissory estoppel to compensate an aggrieved party for such expectancy damages. Lost future income expected from an at-will relationship, whether from wages or from profits, is not recoverable on a theory of promissory estoppel, and neither is the present value of such losses.

But the fact is that recovery of lost profits is not a question before us. Bacardi's account was never an ''asset'' that National could acquire by purchasing General. As counsel for the defendant candidly but carefully explained, National never assumed that it would retain the Bacardi account by buying General; in fact, National assumed the opposite. Bacardi's major competitor in the rum distilling business distributed through National, and the two top distillers in a given category of liquor would not choose the same distributor. Both before and after Bacardi decided to withdraw its products, all National wanted from General were its assets other than the Bacardi account. But Bacardi's repudiation of its promise ostensibly affected the price of General's business so drastically because, as everyone in the industry understood, General's option to stay in business independently was destroyed by Bacardi's withdrawal of its account. Thus, through its repudiation, Bacardi destroyed General's negotiating leverage since General no longer had the alternative of continuing as an independent concern. Presumably, after Bacardi's withdrawal General's only alternative to selling to National was to liquidate. Thus, Bacardi's repudiation turned General's discussions with National from negotiations to buy a going concern into a liquidation sale. Instead of bargaining from strength, knowing it could reject a junk-value offer and carry on its business, General was left with one choice: sell at any price.

Under these facts, General had a reliance interest in Bacardi's promise. General was in lively negotiations with National and it repeatedly informed Bacardi of this fact. A price was agreed upon, and based on that figure, Stout had to decide whether to close his doors or continue operating. General had a business opportunity that all parties knew would be devalued once Bacardi announced its intention to go elsewhere. The extent of that devaluation represents a reliance injury, rather than an injury to General's expectation of future profit. The injury is analogous to the cost of moving expenses incurred as a result of promised employment in *Eby* and *Pepsi–Cola*.

Nor were these promises merely meaningless restatements of an understood at-will relationship. With its current business opportunity, General stood at a crossroads. Circumstances foreshadowed a costly demise for the company, but it was able to negotiate an alternative. Far from confirming the obvious, Bacardi wrote its assurances on a clean slate with full knowledge that General was just as likely to reject the offered relationship as embrace it. That this was the situation is indicated most clearly by Bacardi's repeated calls to check on Stout's impending decision. Bacardi reassured Stout of its commitment in full knowledge that he planned to reject National's offer and with the reasonable expectation that an immediate pull out would severely undermine General's asking price. Like the plaintiffs in *Eby* who moved based on the promise of a job, General incurred a cost in rejecting the deal that was non-recoverable once Bacardi's later decision became known.

There may always exist the potential for a quandary in a promissory estoppel action based on a promise of at-will employment. When could Bacardi terminate the relationship with General without fear of liability for reliance costs, once it made the assurances in question? Obviously we do not hold that General and Bacardi had formed a new, permanent employment relationship. How long an employee can rely on the employer's promise is not a matter we can decide here. The issue is one of reasonable reliance, and to the extent that there might be questions, they should be for trial.

III.

We have, of course, reviewed this case in the posture of summary judgment. General's allegations still must be proven at trial. However, under Indiana law, we think that Bacardi's promise was of a sort on which General might rely, with the possibility of damages for breach. For that reason the judgment of the district court is

Reversed and remanded.

NOTES

(1) *Questions.* What exactly was the promise on which General relied? What was the nature of General's reliance? Was Bacardi's statement that ''it had no intention of taking its line to another distributor'' a promise? Why did the at-will doctrine not make any reliance by General unreasonable from the start?

(2) *Outcome on Remand.* Judge Cudahy recited General's claim that ''Bacardi emphatically avowed that it had no intention of taking its line to another distributor in Northern Indiana.'' On remand, however, the district court found as a fact that Bacardi's promise had been ''contingent on future events'' since it was ''subject to the conditions that General would continue to meet Bacardi's expectation in sales and no market changes would occur.'' Nevertheless, the district court held that ''the conditional nature of Bacardi's commitment does not make General's reliance unreasonable.'' The court awarded General ''damages incurred in reliance on Bacardi's promise'' equal to ''the difference between National's initial offer and the final sale price''—a total of $394,050. The damages awarded look suspiciously like the ''lost opportunities'' denied to the plaintiff in Sullivan v. O'Connor; see Note 2, p. 19 above. Can you distinguish the two cases with regard to the availability of lost opportunities in one, but not the other?

SECTION 5. RESTITUTION AS AN ALTERNATIVE BASIS FOR RECOVERY

To this point, we have been concerned with recovery based on the enforcement of promises. We turn now to an entirely different basis of recovery—the prevention of unjust enrichment even when there has been no promise. This area of law is called restitution, and the subject of restitution is vast. Indeed restitution has its own Restatement and is often taught as a separate course. Yet because restitution problems are often inseparable from contract problems, a few basics are indispensable.

The underlying premise is this: ''gains produced through another's loss are unjust and should be restored.'' John P. Dawson, The Self–Serving Intermeddler, 87 Harv.L.Rev. 1409 (1974). For example, if a person overpays a bill by mistake, the recipient owes restitution in the amount of the excess payment. Liabilities like that are often predicated on ''contracts implied in law.'' A limiting principle, however, is that one who acts officiously in conferring a benefit cannot get restitution from the recipient. One so acting is often called a *volunteer*, or *intermeddler*.

According to Professor Dawson, that precept ''is often stated with more than the needed vigor, perhaps in an effort to neutralize the beguiling effect of the unjust enrichment principle...." An illustration to the Restatement of Restitution § 112 gives this rather obvious example:

> During A's absence and in the belief that A will be willing to pay for the work, B improves A's land, which is worth and is offered for sale at $5000, to such an extent that upon A's return he sells the land for $8000. B is not entitled to restitution from A.

No one, that is, "should be required to pay for benefits that were 'forced' upon him." Dawson, as quoted above.

According to Professor Dawson, that precept "is often stated with more than the needed vigor, perhaps in an effort to neutralize the beguiling effect of the unjust enrichment principle, which postulates that gains produced through another's loss are unjust and should be restored." The following cases pose difficult problems in drawing the line between deserving claimants on one hand, and the intermeddlers on the other.

Further attention must be paid to vocabulary. Sometimes, as in the opinion that follows, the term "quasi contract" is used to describe a ground for recovering money in an action at common law, when the claim is not based on a true contract but instead seeks redress for unjust enrichment. "Quantum meruit" (as much as he deserved) describes a type of action used for centuries in enforcing duties of payment for services. A related action for the worth of goods was "quantum valebant" (as much as they were worth). The term "quantum meruit" is often used interchangeably (if inexactly) with "quasi-contract." "Restitution" is a broader term used to embrace all of the grounds for recovery based on unjust enrichment. Recall that "restitution" is also used in contract cases to describe one measure of damages. See discussion on p. 14 above.

Cotnam v. Wisdom

Supreme Court of Arkansas, 1907.
83 Ark. 601, 104 S.W. 164.

Action by F.L. Wisdom and another against T.T. Cotnam, administrator of A.M. Harrison, deceased, for services rendered by plaintiffs as surgeons to defendant's intestate. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

Instructions 1 and 2, given at the instance of plaintiffs, are as follows: "(1) If you find from the evidence that plaintiffs rendered professional services as physicians and surgeons to the deceased, A.M. Harrison, in a sudden emergency following the deceased's injury in a street car wreck, in an endeavor to save his life, then you are instructed that plaintiffs are entitled to recover from the estate of the said A.M. Harrison such sum as you may find from the evidence is a reasonable compensation for the services rendered. (2) The character and importance of the operation, the responsibility resting upon the surgeon performing the operation, his experience and professional training, and the ability to pay of the person operated upon, are elements to be considered by you in determining what is a reasonable charge for the services performed by plaintiffs in the particular case.''

■ HILL, C.J. . . . The first question is as to the correctness of [the first] instruction. . . . [T]he facts are that Mr. Harrison . . . was thrown from a street car, receiving serious injuries which rendered him unconscious, and while in that condition the appellees were notified of the accident and summoned to his assistance by some spectator, and performed a difficult operation in an effort to save his life, but they were unsuccessful, and he died without regaining consciousness. The appellant says: ''Harrison was never conscious after his head struck the pavement. He did not and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power. However merciful or benevolent may have been the intention of the appellees, a new rule of law, of contract by implication of law, will have to be established by this court in order to sustain the recovery.'' Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called ''implied contracts.'' More properly they should be called ''quasi contracts'' or ''constructive contracts.'' See 1 Page on Contracts, sec. 14; also 2 Page on Contracts, sec. 771.

The following excerpts from Sceva v. True, 53 N.H. 627, are peculiarly applicable here: ''We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of an accident or disease may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any deductions which a refined logic may make from the circumstances that in such cases there can be no contract or promise, in fact, no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances by the jury—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as a matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law. Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence. It is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligations quasi ex contractu of the civil law which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu or actions ex delicto. . . .''

In its practical application it sustains recovery for physicians and nurses who render services for infants, insane persons, and drunkards. . . . And services rendered by physicians to persons unconscious or helpless by reason of injury or sickness are in the same situation as those rendered to persons incapable of contracting, such as the classes above described. . . . The court was therefore right in giving the instruction in question. . . .

There was evidence in this case proving that it was customary for physicians to graduate their charges by the ability of the patient to pay, and hence, in regard to that element, this case differs from the Alabama case [Morrisette v. Wood, 123 Ala. 384, 26 So. 307]. . . . This could not apply to a physician called in an emergency by some bystander to attend a stricken man whom he never saw or heard of before; and certainly the unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. In order to admit such testimony, it must be assumed that the surgeon and patient each had in contemplation that the means of the patient would be one factor in determining the amount of the charge for the services rendered. While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service, and skill. It was therefore error to admit this evidence, and to instruct the jury in the second instruction that in determining what was a reasonable charge they could consider the ''ability to pay of the person operated upon.''

It was improper to let it go to the jury that Mr. Harrison was a bachelor and that his estate was left to nieces and nephews. This was relevant to no issue in the case, and its effect might well have been prejudicial. While this verdict is no higher than some of the evidence would justify, yet it is much higher than some of the other evidence would justify, and hence it is impossible to say that this was a harmless error.

Judgment is reversed, and cause remanded.

■ BATTLE and WOOD, JJ., concur in sustaining the recovery, and in holding that it was error to permit the jury to consider the fact that his estate would go to collateral heirs; but they do not concur in holding that it was error to admit evidence of the value of the estate, and instructing that it might be considered in fixing the charge.

NOTES

(1) *Questions*. Would the result have been different if Dr. Wisdom had treated Harrison in response to a call from Harrison's daughter, who had said, "Give him the best care you can and I will pay you for it"? What fee would Dr. Wisdom have been entitled to from the daughter under those circumstances? For a case rejecting Cotnam v. Wisdom on the issue of the admissibility of the patient's ability to pay, see In re Agnew's Estate, 231 N.Y.S. 4 (Surrogate's Ct.1928). Are there grounds, policy or otherwise, for admitting such evidence?

(2) *Gratuitousness*. Ordinarily, when a bystander renders first aid, or another service, to an accident victim, or when someone acts to protect another's property from loss by fire or other casualty, courts assume that the services were intended to be gratuitous. Thus if a passing motorist finds an injured pedestrian on the highway, administers first aid and takes the injured person to a hospital, there is a presumption of gratuity which will ordinarily bar recovery. However, the presumption may be rebutted if the services are excessively expensive or burdensome to the person rendering them, as when one goes out of one's way a hundred miles to take an injured person to a hospital. The presumption may also be overturned if the person rendering them does so in a business or professional capacity, as in *Cotnam*, when a passing physician treats an injured person.

(3) *Webb v. McGowin Revisited*. Recall the court's argument in *Webb* that saving life has "material, pecuniary" value, supported by the fact that "physicians practice their profession charging for services rendered in saving life." Would Webb have had a claim against McGowin on the authority of *Cotnam* and other like cases?

Recall, too, the Alabama court's reliance on Boothe v. Fitzpatrick, the case of the promise "to pay for the past keeping of a bull which had escaped . . . and been cared for." Aside from the promise by the owner of the bull, would the keeper of the bull have had a claim against its owner? Might the keeper's *belief* in such a claim have helped to justify enforcement of the owner's promise to pay a reasonable amount? Might Webb's *belief* in a claim against McGowin (even if he had no such claim) help to justify enforcement of McGowin's promise to pay $15 every two weeks? See Fiege v. Boehm, p. 40 above.

(4) *Comparative Recompense*. Consider the doctrine known to civil law systems (those derived from Roman law) as *negotiorum gestio* ("management of the affairs [of another]"). It provides that a person who, without invitation but in compelling circumstances takes charge of the affairs of another, is entitled to compensation for services rendered in the other's interest. How does this doctrine differ from that in Cotnam v. Wisdom? What problems do you see in the application of such a doctrine? See Samuel J. Stoljar, Negotiorum Gestio § 251 (1984), in 10 International Encyclopedia of Comparative Law.

PROBLEM

The Suggestion Box. Schott, an employee of Westinghouse, twice submitted an idea concerning the construction of circuit breaker panels pursuant to a Westinghouse program inviting its employees to submit suggestions for cash awards. On the suggestion form, above the line for the employee's signature, appeared the stipulation, "I agree that the decision of the local Suggestion Committee on all matters pertaining to this suggestion ... will be final." The Committee twice rejected Schott's suggestion, stating that it would require heavy preliminary expenditures but would be reconsidered if circuit breaker redesign was undertaken for other reasons. Within a year, however, Westinghouse had made the suggested change but refused to pay Schott, explaining that it had been made as "the result of independent action taken without knowledge of your suggestion." What factors weigh in Schott's favor in an action against Westinghouse for unjust enrichment? What facts favor Westinghouse? Might Schott have a claim for breach of contract? In Schott v. Westinghouse Electric Corp., 259 A.2d 443 (Pa.1969), two judges answered the last question with a "Yes."

Callano v. Oakwood Park Homes Corp.

Superior Court of New Jersey, 1966.
91 N.J.Super. 105, 219 A.2d 332.

■ COLLESTER, J.A.D. Defendant Oakwood Park Homes Corp., (Oakwood) appeals from a judgment of $475 entered in favor of plaintiffs Julia Callano and Frank Callano in the Monmouth County District Court.

The case was tried below on an agreed stipulation of facts. Oakwood, engaged in the construction of a housing development, in December 1961 contracted to sell a lot with a house to be erected thereon to Bruce Pendergast, who resided in Waltham, Massachusetts. In May 1962, prior to completion of the house, the Callanos, who operated a plant nursery, delivered and planted shrubbery pursuant to a contract with Pendergast. A representative of Oakwood had knowledge of the planting.

Pendergast never paid the Callanos the invoice price of $497.95. A short time after the shrubbery was planted Pendergast died. Thereafter, on July 10, 1962 Oakwood and Pendergast's estate cancelled the contract of sale. Oakwood had no knowledge of Pendergast's failure to pay the Callanos. On July 16, 1962 Oakwood sold the Pendergast property, including the shrubbery located thereon, to Richard and Joan Grantges for an undisclosed amount.

The single issue is whether Oakwood is obligated to pay plaintiffs for the reasonable value of the shrubbery on the theory of *quasi*-contractual liability. Plaintiffs contend that defendant was unjustly enriched when the Pendergast contract to purchase the property was cancelled and that an agreement to pay for the shrubbery is implied in law. Defendant argues that the facts of the case do not support a recovery by plaintiffs on the theory of *quasi*-contract.

Contracts implied by law, more properly described as *quasi* or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice. They rest solely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy, and the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity. Courts employ the fiction of *quasi* or constructive contract with caution. 17 C.J.S. Contracts § 6, pp. 566–570 (1963).

In cases based on *quasi*-contract liability, the intention of the parties is entirely disregarded, while in cases of express contracts and contracts implied in fact the intention is of the essence of the transaction. In the case of actual contracts the agreement defines the duty, while in the case of *quasi*-contracts the duty defines the contract. Where a case shows that it is the duty of the defendant to pay, the law imparts to him a promise to fulfill that obligation. The duty which thus forms the foundation of a *quasi*-contractual obligation is frequently based on the doctrine of unjust enrichment. It rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and on the principle of whatsoever it is certain a man ought to do, that the law supposes him to have promised to do. St. Paul Fire, etc., Co. v. Indemnity Ins. Co. of No. America, 32 N.J. 17, 22, 158 A.2d 825 (1960).

The key words are *enrich* and *unjustly*. To recover on the theory of *quasi*-contract the plaintiffs must prove that defendant was enriched, *viz.,* received a benefit, and that retention of the benefit without payment therefor would be unjust.

It is conceded by the parties that the value of the property, following the termination of the Pendergast contract, was enhanced by the reasonable value of the shrubbery at the stipulated sum of $475. However, we are not persuaded that the retention of such benefit by defendant before it sold the property to the Grantges was inequitable or unjust.

Quasi-contractual liability has found application in a myriad of situations. See Woodruff, Cases on Quasi–Contracts (3d ed. 1993). However, a common thread runs throughout its application where liability has been successfully asserted, namely, that the plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from defendant, at the time the benefit was conferred. See Rabinowitz v. Mass. Bonding & Insurance Co., 119 N.J.L. 552, 197 A. 44 (E. & A. 1937); Power–Matics, Inc. v. Ligotti, 79 N.J.Super. 294, 191 A.2d 483 (App.Div.1963); Shapiro v. Solomon, 42 N.J.Super. 377, 126 A.2d 654 (App.Div.1956). It is further noted that *quasi*-contract cases involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit.

In the instant case the plaintiffs entered into an express contract with Pendergast and looked to him for payment. They had no dealings with defendant, and did not expect remuneration from it when they provided the shrubbery. No issue of mistake on the part of plaintiffs is involved. Under the existing circumstances we believe it would be inequitable to hold defendant liable. Plaintiffs' remedy is against Pendergast's estate, since they contracted with and expected payment to be made by Pendergast when the benefit was conferred.... A plaintiff is not entitled to employ the legal fiction of *quasi*-contract to "substitute one promisor or debtor for another." Cascaden v. Magryta, 247 Mich. 267, 225 N.W. 511, 512 (Sup.Ct. 1929).

Plaintiffs place reliance on De Gasperi v. Valicenti, 198 Pa.Super. 455, 181 A.2d 862 (Super.Ct.1962), where recovery was allowed on the theory of unjust enrichment. We find the case inapposite. It is clear that recovery on *quasi*-contract was permitted there because of a fraud perpetrated by defendants. There is no contention of fraud on the part of Oakwood in the instant case.

Recovery on the theory of *quasi*-contract was developed under the law to provide a remedy where none existed. Here, a remedy exists. Plaintiffs may bring their action against Pendergast's estate. We hold that under the facts of this case defendant was not unjustly enriched and is not liable for the value of the shrubbery.

Reversed.

NOTES

(1) *Questions.* Which, if any, of the players in the case was enriched by the transaction? Did the Callanos suffer a loss? Why did the Callanos not sue Pendergast's estate? Why not the Grantges? What other things might the Callanos have done differently?

(2) *The Case of the Contractor's Claim.* Paschall's built a bathroom onto the Doziers' house at the request and on the credit of their daughter, Mrs. Best, who lived with them, and with the knowledge and consent of the Doziers. Paschall's was unsuccessful in collecting from Mrs. Best, who was subsequently adjudicated a bankrupt, and sued the Doziers on a theory of restitution. The trial court sustained the Doziers' demurrer and dismissed the complaint, and Paschall's appealed. *Held:* Reversed and remanded "to the trier of facts to determine whether or not the defendant has been so unjustly enriched at the detriment of the complainant so as to require him to make compensation therefore."

The court granted that it may be "the general rule" that "an implied undertaking cannot arise against one benefitted by the work performed, where the work is done under a special contract with another.... However, the situation is dissimilar where a person furnishes materials and labor under a contract for the benefit of a third party, and that contract becomes unenforceable or invalid.... [W]e think that before recovery can be had against the landowner on an unjust enrichment theory, the furnisher of the materials and labor must have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services." Paschall's, Inc. v. Dozier, 407 S.W.2d 150 (Tenn.1966). See also Idaho Lumber, Inc. v. Buck, 710 P.2d 647 (Idaho App.1985).

Can this case be distinguished from *Callano*? One writer suggests: "Where benefit is conferred on a stranger through performance of one's own contract various intermediate solutions could be thought of. The most plausible would be to permit restitution of the benefit to the stranger when the remedy of the gain-producer against his own obligor had failed or was certain to fail. Restitution would then serve as a surrogate, being held in reserve to insure the gain-producer against deficits in the return promised him." John P. Dawson, The Self–Serving Intermeddler, 87 Harv.L.Rev. 1409, 1457–58 (1974). To what extent are *Callano* and *Paschall's* consistent with this suggestion? For an analysis in economic terms, see Anthony Kronman and Richard Posner, *The Economics of Contract Law* 59–64 (1979).

(3) *Measure of Recovery.* If recovery is allowed in cases like *Callano* and *Paschall's*, how should it be measured? The Restatement offers two alternatives:

"the reasonable value to the [defendant] of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position" and "the extent to which the [defendant's] property has increased in value or his other interests advanced." See Restatement § 371. Which measure would be more generous? Do we know that on selling the lot to the Grantges, Oakwood got a price enhanced by the value of the shrubbery? Should it matter?

(4) *Mechanics' Liens*. *Callano* introduces a problem of great practical importance: the rights of subcontractors on construction jobs. Commonly in such cases, two contracts are involved, one between an owner and a general contractor, and another between the general contractor and a subcontractor. It is clear that if, after the subcontractor has performed, it is not paid by the general contractor, it has no contractual right to payment from the owner. It is also clear, under reasoning like that of *Callano*, that even though it has no right to restitution from the owner, even thought its work has conferred a benefit on the owner.

Every state legislature has addressed the situation in statutes commonly called "mechanics' lien" laws. They protect laborers, materialmen, contractors and others who make improvements on real property, by giving them a lien on that property to secure payment for those improvements.

Why did the Callanos and Paschall's not have mechanics' liens on the properties concerned? Although a New Jersey statute provides for a lien on property for improvements, including "planting thereon any shrubs," it applies only to "debts contracted by the owner." N.J. Stat.Ann. § 2A:44–66(g). Oakwood, not Pendergast, was the "owner" of the property. Similarly, a Tennessee statute provides for a lien where improvements have been made on a house, but only by "contract with the owner or his agent." Tenn.Code Ann. § 66–11–102(a).

(5) *Wrestling With Unjust Enrichment*. The court in *Callano* observed that Oakwood might have been accountable if it had perpetrated a fraud. Compare Ventura v. Titan Sports, Inc., 65 F.3d 725 (8th Cir.1995). Jesse Ventura, in 1987 a wrestler and "heel commentator," hired Barry Bloom to negotiate his contract with Titan Sports, owners of The World Wrestling Federation. (According to the court, "[a] heel commentator is a color commentator who plays the role of 'the bad guy.' ") Bloom asked for royalties for any videotape sales in which Ventura appeared but was told that only "feature" performers got royalties. Wanting to secure the job with Titan, Ventura agreed to waive any claim to royalties. When Ventura found out that other non-feature performers were getting royalties, he brought an action for fraud, misappropriation of publicity rights, and unjust enrichment. The jury awarded Ventura $800,000 on the latter claim. On appeal, Titan argued that the express contractual provision waiving royalties barred Ventura's claim for unjust enrichment. *Held*: Affirmed. The court said: "Had Ventura known that Titan did not abide by its stated policy, he would not have accepted a deal which did not compensate him for [the sale of his likeness].... The fraud rescinded or set aside the contract, opening the door to his quantum meruit claim."

PYEATTE v. PYEATTE, 661 P.2d 196 (Ariz.App.1982) [Charles Pyeatte and Margrethe Pyeatte were married in 1974. The couple agreed that Margrethe would "put Charles through law school without his having to work" and that when he had graduated, he would put her through graduate school on the same terms. Thus Charles attended law school and Margrethe worked to pay the bills. (Sometime during Charles's third year, Margrethe lost her job and the couple lived on their savings for that period.) Charles was graduated in 1977, passed the bar, and became an associate at a law firm. In April, 1978, Charles informed Margrethe that he wanted a divorce. She had not yet started graduate school. She sued for breach of their agreement to put one another through school.

The trial court found that the couple's agreement was a valid contract and awarded Margrethe $23,000. On appeal, Charles argued that the agreement was too indefinite to be enforceable. Margrethe countered that she was entitled to recover in restitution. The Arizona Court of Appeals granted her claim for restitution and Charles appealed.]

■ CORCORAN, JUDGE: ... Although we found that the spousal agreement failed to meet the requirements [of definiteness] of an enforceable contract, the agreement still has importance in considering appellee's claim for unjust enrichment because it both evidences appellee's expectation of compensation and the circumstances which make it unjust to allow appellant to retain the benefits of her extraordinary efforts.

[The court then addressed the question "whether restitution on the basis of unjust enrichment is appropriate in the context of the marital relationship."] No authority is cited to the court in support of the proposition that restitution as a matter of law is inappropriate in a dissolution proceeding. In Wisner [v. Wisner, 631 P.2d 115, 123 (Ariz.App.1981)], we observed that "[i]n our opinion, unjust enrichment, as a legal concept, is not properly applied in the setting of a marital relationship." ... Our observation was directed to the wife's claim in that case for restitution for the value of her homemaking services during the couple's 15–year marriage and for the couple's reduced income during the husband's lengthy training period. Where both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of these activities. Ibid. Where, however, the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution, the remedy of restitution is appropriate....

The portion of the judgment in the amount of $23,000 is reversed and remanded for proceedings in accordance with this opinion.

NOTES

(1) *Questions*. What did the lower court's award of $23,000 represent? How should the lower court calculate Margrethe's recovery for unjust enrichment? Suppose that the Pyeattes had not divorced until ten years after Charles' graduation from law school, during which time Margrethe had lived as the wife of a successful law firm partner. Would such facts affect her restitutionary claim? How?

(2) *Restitution Between Spouses*. Restitutionary claims between spouses have traditionally failed because the services of each are presumed to be gratuitous. As the Supreme Court of North Carolina explained, the rule denying restitution "is particularly applicable where a husband makes improvements to his wife's land because of the presumption that the improvements constitute a gift." Wright v. Wright, 289 S.E.2d 347 (N.C.1982). The assumption of a gift extends to other family relationships as well. The Pennsylvania Supreme Court refused to grant restitution

to an adult son despite evidence of his father's promise to pay for the son's labor, observing that "we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association...." Hertzog v. Hertzog, 29 Pa. 465, 468 (Pa.1857).

(3) *Restitution Without Benefit of Clergy*. When a sexual relationship between unmarried cohabitants is included among the benefits bestowed, courts have generally refused to grant restitution on public policy grounds. See Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill.1979). Restitution has been permitted when sexual services were found to be severable from other forms of enrichment, such as improvements to property. In Watts v. Watts, 405 N.W.2d 303 (Wis.1987), the Supreme Court of Wisconsin held that "unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationship where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both." It has been suggested that unmarried cohabitants may have greater success than married ones in recovering in restitution because the background assumption of marital gratuitousness is absent.