THE MANY FACES OF PROMISSORY ESTOPPEL: AN EMPIRICAL ANALYSIS UNDER THE RESTATEMENT (SECOND) OF CONTRACTS

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This Article examines more than three hundred promissory estoppel cases decided between January 1, 1981, when the Restatement (Second) of Contracts was published, and January 1, 2008, when research for this project began, to explore the manner in which courts conceptualize, decide, and enforce promissory estoppel claims under § 90 of the Restatement (Second) of Contracts. Specifically, because the drafters of the Restatement (Second) made several important changes to § 90 of the Restatement (First) with the intent of making promissory estoppel more available, the role of reliance more prominent, and the remedies awarded to successful litigants more flexible, this Article investigates whether these changes have had their desired effect on promissory estoppel doctrine as reflected in the case law.

The research presented here can be interpreted to support three major claims. First, these data suggest that promissory estoppel is a much more significant theory of promissory recovery than has been previously thought and seems positioned to continue to grow in importance in the coming decades. Second, the data reveal that promissory estoppel cannot be understood exclusively in terms of "promise" or "reliance," as some scholars and judges have suggested. Instead, the data reveal that most judges require the existence of both promise and reliance before allowing a promissory estoppel claim to proceed, although surprisingly few judges require a plaintiff to show that the equitable principle of "justice" has been satisfied. Last, and most significantly, these data reveal that, with respect to remedies, courts tend to treat promissory estoppel actions as traditional breach of contract actions, in that courts generally tend to award the (usually) more generous expectation measure of damages, which is typical in ordinary breach of contract actions, over the (usually) less generous

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reliance measure of damages, which is often awarded where non-contractual obligations have been breached (such as in tort law). However, by replacing these conceptual labels (such as "expectation" and "reliance" damages) with a more functional classificatory scheme capturing whether a promissory estoppel plaintiff has obtained the highest recovery available under any other theory of promissory recovery, including a "traditional" breach of contract action, this Article argues that the extent to which courts have treated promissory estoppel claims as fully contractual has been underappreciated.

INTRODUCTION

Scholars have widely acknowledged that the drafters of the Restatement (Second) made several important changes to § 90 of the Restatement (First) with the intent of making promissory estoppel more available,[1] the role of reliance more prominent,[2] and the remedies awarded to successful litigants more flexible.[3]

But did these changes have their desired effect? This Article examines over three hundred promissory estoppel cases decided across all jurisdictions since the Restatement (Second) was published in 1981 to examine what effect, if any, these changes have had on the way judges have decided promissory estoppel cases. The results are surprising: They suggest that the way promissory estoppel cases are being decided has less to do with the language of the Restatement, and more to do with the way judges are conceptualizing the promissory estoppel cause of action.

Part I of this Article begins by providing a brief history of promissory estoppel. It then explores the numerous ways in which this cause of action has been conceptualized over time—for example, as a contractual theory of recovery, as a tort-based theory of recovery, as an equitable theory of relief, or as something else entirely. Finally, it reveals the importance of this conceptualization by discussing the conflicting work of other scholars writing in this area, many of whom disagree with each other regarding what, exactly, promissory estoppel is and how it should (and does) work in practice.

In an attempt to shed light on this debate, Part II examines over three hundred promissory estoppel cases decided since the Restatement (Second) of Contracts was published in 1981 to test (1) the significance of the promissory estoppel cause of action, (2) the normative basis upon which promissory

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1. Whereas the Restatement (First) of Contracts provided that "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise," RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932), the Restatement (Second) made recovery more available by removing the "definite and substantial" language. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); *see also* Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 658 (1982); *infra* text accompanying note 47.

2. Whereas promissory estoppel in the Restatement (First) "was conceived and drafted primarily in terms of *promise*," the drafters of the Restatement (Second) changed the language to "reflect an endorsement of *reliance*." Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 112 (1991) (emphasis added).

3. The drafters achieved this by adding to the end of the language of the Restatement (First) that "[t]he remedy granted for breach is to be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981); *see also infra* text accompanying note 42.

estoppel rests (that is, promise or reliance), and (3) the traditional remedies that have been awarded to successful promissory estoppel litigants. My research suggests, first, that promissory estoppel is a much more significant theory of promissory recovery than has been previously thought, and seems positioned to continue to grow in importance in the coming decades. Second, and contrary to the claims made by some scholars writing in this area, the data reveal that promissory estoppel cannot be simply understood in terms of "promise" or "reliance." Rather, most judges require the existence of both promise and reliance before allowing a promissory estoppel claim to proceed, although surprisingly few judges speak in terms of "equity" or "justice." And last, but most significantly for purposes of explaining how judges tend to conceptualize the promissory estoppel cause of action, the data reveal that courts tend to treat promissory estoppel actions as traditional breach of contract actions, in that courts often award the (usually) more generous expectation measure of damages, which is typical in ordinary breach of contract actions, over the (usually) less generous reliance measure of damages, which is often awarded where non-contractual obligations have been breached (for example, in tort law).

Part III of this Article critically examines the manner in which promissory estoppel remedies have been traditionally classified according to the conceptual "expectation" and "reliance" interests, and suggests that by focusing attention on the quantum of remedy received, rather than the label given to that remedy by a scholar or judge, it becomes clear that many judges are treating promissory estoppel causes of action as fully contractual. This means that the litigants are usually at least as well off (in terms of recovery) pursuing a promissory estoppel cause of action as opposed to a more traditional, consideration-based breach of contract claim.

However, because promissory estoppel is sometimes easier to prove than a traditional, consideration-based contract, and because defendants are often not protected by many of the doctrines protecting a traditional breach of contract defendant (for example, the Statute of Frauds and parol evidence rule), some plaintiffs are arguably better off pursuing a promissory estoppel claim because they are often able to obtain the most generous remedy available while remaining subject to the fewest constraints in obtaining this remedy.

Importantly, because a judge's conceptualization of the promissory estoppel cause of action is arguably the most important factor in determining not only whether the plaintiff will succeed, but also the remedy that will be awarded to the plaintiff should he or she succeed, different plaintiffs will fare differently according not to the facts of their case, nor to the elements that must be proven to establish a prima facie claim, but according to the way the judge

assigned to their case happens to conceptualize the promissory estoppel cause of action. This last point not only underscores the importance of contract theory for scholars, practitioners, and judges alike, but strongly suggests that even the most practical judges should be aware of the forces operating beneath the surface of their cases.

I. HISTORICAL BACKGROUND

A. Grant Gilmore and the Changing Face of Promissory Estoppel

In 1932, the American Law Institute[4] published the much-anticipated Restatement (First) of Contracts, which contained within its pages two completely different and, some would say, irreconcilable theories of contract law. On the one hand, the relatively innocuous § 75 endorsed the centuries-old, bargain-based theory of contracts in which a promise, to be enforceable, must be supported by "consideration," which was defined as "an act," "forbearance," or "return promise bargained for and given in exchange for the promise."[5] On the other hand, tucked away several pages later, the drafters of the Restatement enshrined in § 90 a completely different[6] and contradictory[7] theory of contractual obligation based on the normative principle of reliance, as opposed to the more settled[8] principle of bargain. This provision, which established what is today commonly referred to as "promissory estoppel," provided:

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4. This Institute was formed in 1923 to bring together the most prominent judges, lawyers, and academicians in America "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work." Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283, 285–86.

5. RESTATEMENT (FIRST) OF CONTRACTS § 75 (1932).

6. One court has said that the theories of consideration and promissory estoppel "are two different creatures of the law; they are not legally synonymous; the birth of one does not spawn the other." Duke Power Co. v. S.C. Pub. Serv. Comm'n, 326 S.E.2d 395, 406 (S.C. 1985).

7. *See, e.g.*, Commonwealth v. Scituate Sav. Bank, 137 Mass. 301, 302 (1884) (Holmes, J.) ("It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it.").

8. There is much debate as to just how "settled" this bargain-based principle was in the common law. According to some accounts, this "classical," bargain-based theory of contract law was concocted out of whole cloth and subsequently promulgated by the likes of Professor Christopher Langdell, in his famous casebook on the law of contracts (in 1871) and accompanying summary of the law of contracts (in 1880), Oliver Wendell Holmes, in his landmark *The Common Law* (in 1881), and Professor Samuel Williston in his groundbreaking treatise *The Law of Contracts* (in 1920) and his pioneering work as Reporter for the Restatement (First) of Contracts (in 1932). *See generally* GRANT GILMORE, THE DEATH OF CONTRACT 5–34 (1974); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1192–98 (1998); Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 532–34 (2002). Nevertheless, it is clear that

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[9]

Several generations later, it is difficult to appreciate how innovative these forty-six words were when they were first penned over seventy-five years ago, but one commentator neatly captured their revolutionary spirit when he wrote that the inclusion of § 90 in the Restatement (First) of Contracts was "the most important event in twentieth century American contract law."[10] These are strong words, to be sure. But despite the seemingly hyperbolic nature of these remarks, few commentators would disagree with this characterization.[11]

Similarly, it is no easy task to describe how different § 90 was from the prevailing bargain-based theory of consideration, or the challenge that it would, in time, pose to the dominant theory of contractual obligation. Professor Gilmore came close when he colorfully described the differences between § 75 and § 90 as analogous to "matter and anti-matter," "Restatement and anti-Restatement," and, most poignantly, "Contract and anti-Contract."[12] It was the more traditional, consideration-based view that played the starring role of "Contract" opposite the newer, tort-like theory of promissory estoppel, which was left to play the villainous role of "anti-Contract."[13] Professor Gilmore went on to predict that "these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up."[14] Surprisingly, Professor Gilmore predicted that the promissory estoppel underdog would prove victorious

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by 1932, when the Restatement (First) was drafted, the bargain-based theory of contracts had established itself as the dominant theory of contractual enforcement.

9. RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

10. PETER LINZER, A CONTRACTS ANTHOLOGY 221 (1989).

11. *See, e.g.*, Charles L. Knapp, *Reliance in the Revised* Restatement*: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981) (describing the inclusion of § 90 as "perhaps the most radical and expansive development of this century in the law of promissory liability").

12. GILMORE, *supra* note 8, at 61. The prescience of Professor Gilmore's insights are impressive when it is considered that by the end of 1974, when Professor Gilmore wrote these words, only 708 promissory estoppel cases had been decided, representing a small fraction of the 13,000 promissory estoppel decisions on the books today.

13. *See id.* at 87 (arguing that, through the doctrine of promissory estoppel, "'contract' is being reabsorbed into the mainstream of 'tort'"); *see also* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 777 (1979) (arguing that promissory estoppel as articulated under § 90 "indicates a resurgence of reliance-based liability at the expense of consensual liability"); Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 520 (1996) ("Gilmore's view that contract and tort were artificially separated and that contract would ultimately collapse into a reliance-based tort reflected the views of many enlightened contracts scholars of his day.").

14. *See, e.g.*, GILMORE, *supra* note 8, at 61.

by "swallow[ing] up" contract,[15] thereby merging these two fields of law into the single, unified subject of "Contorts," which would soon be taught to first year law students in place of the traditional (and soon to be obsolete) courses in Contracts and Torts.[16] Given Professor Gilmore's belief that promissory estoppel was originally intended to apply to noncommercial transactions that lay just beyond consideration's grasp,[17] his claim that promissory estoppel would soon operate as a general theory of obligation[18] must have come as quite a shock to his contemporaries. And, although Professor Gilmore's prophecy has not yet come to pass, the tension that he described has grown, and these doctrines continue to battle each other to this day.

But what exactly makes these two theories of promissory recovery so different from one another? Here is one explanation: Under the traditional, bargain-based theory of contract, a party who wishes to form a binding contract with another must offer something by way of performance or return promise *in exchange for* the desired promise.[19] Under this view, because each promisee

15. *Id.* at 72, 87 ("[T]he unresolved ambiguity in the relationship between § 75 and § 90 in the *Restatement (First)* has now been resolved in favor of the promissory estoppel principle of § 90 which has, in effect, swallowed up the bargain principle of § 75," such that "'contract' is being reabsorbed into the mainstream of 'tort.'").

16. *See id.* at 90 ("I have occasionally suggested to my students that a desirable reform in legal education would be to merge the first-year courses in Contracts and Torts into a single course which we would call Contorts.").

17. *See id.* at 66 ("In early judicial, and for that matter, academic, discussions of § 90, there was a general assumption that the principle of § 90, however it should be described, should find its application mostly, if not entirely, in what might be called non-commercial situations."); *see also* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) ("[A]n offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend [promissory estoppel to these situations] would be to hold the offeror regardless of the stipulated condition of his offer . . . . There is no room in such a situation for the doctrine of 'promissory estoppel.'"); Benjamin F. Boyer, *Promissory Estoppel: Principle From Precedents (pts. I & II)*, 50 MICH. L. REV. 639, 873 (1952); Warren L. Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908 (1937).

18. GILMORE, *supra* note 8, at 66, 72 ("The course of decision has, however, seen a gradual expansion of § 90 as a principle of decision in a good many types of commercial situations," and "the unresolved ambiguity in the relationship between § 75 and § 90 in the *Restatement (First)* has now been resolved in favor of the promissory estoppel principle of § 90 which has, in effect, swallowed up the bargain principle of § 75.").

19. Over two hundred years ago, Adam Smith powerfully captured this idea in words that continue to ring loudly over the centuries:

> 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* . . . 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. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. 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.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 19 (C.J. Bullock ed., P.F. Collier & Son 1909) (1776) (emphasis added). Oliver Wendell Holmes

has given something in exchange for the other's promised performance, when the other party breaches, the promisee may "feel that he has been 'deprived' of something" that belonged to him,[20] and can therefore justifiably demand as a remedy the very thing that was promised to him by way of specific performance or, where that remedy is unavailable, expectation damages.[21] The justification behind promissory estoppel, however, is entirely different. As one commentator explained, the wrong complained of in a promissory estoppel claim "is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment."[22] Therefore, because the right that the law seeks to protect in a bargain-based contract (the promised performance) is distinct from the right involved in a reliance-based contract (detrimental reliance), the remedies invoked to protect these rights should also be distinct. Thus, rather than protecting the promisee's expectation interest, as would be customary in a bargain-based contract, some commentators and judges have suggested that promissory estoppel damages "should not exceed the loss caused by the change of position, which would never be more in amount, but might be less, than the promised reward."[23] Stated differently, the remedy for promissory estoppel should never exceed what are frequently referred to as "reliance damages."[24]

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would later pick up on and formalize this strand of thought in 1881 in his famous *The Common Law*, in which he first promulgated his still influential theory of consideration, which required that a promise, to be enforceable, "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." OLIVER WENDELL HOLMES, THE COMMON LAW 293–94 (Boston, Little, Brown, & Co. 1881).

20. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 57 (1936). Ultimately, Fuller and Perdue rejected this "psychological" explanation of expectation damages in favor of a "juristic" explanation based on "some policy consciously pursued by courts and other lawmakers." *Id.* at 60. I am not convinced, but suffice it to say here that nothing in Fuller and Perdue's article precludes the psychological approach from forming a large part of the juristic explanation.

21. "Expectation damages" are those damages necessary to "put the [promisee] in as good a position as he would have occupied had the defendant performed his promise." *Id.* at 54.

22. Warren A. Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951).

23. *Id.*; *see also* Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 32 (1979) (Eisenberg argues that § 90(1) of the Restatement (Second) of Contracts, like § 90 of the Restatement (First) of Contracts, is "subject to a number of serious defects" including, among others, the facts that it "wrongly implies that expectation, not reliance, is the normal measure of damages in cases in which enforcement is based on the reliance principle." Professor Eisenberg would change the language to state that "[a] promise that is reasonably relied upon is enforceable to the extent of the reliance." Nevertheless, Professor Eisenberg considers the Second Restatement a marked improvement over the First Restatement.); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 785–98 (1982) (discussing applications of the bargain principal to executor contracts); Eisenberg, *supra* note 1, at 657–59.

24. "Reliance damages" are those damages required to "to put [the promisee] in as good a position as he was in before the promise was made." Fuller & Perdue, *supra* note 20, at 54. Whereas expectation

Although many commentators think about the difference between consideration-based contracts and promissory estoppel in these terms today, as an historical matter, this was simply not true. Instead, "the original *Restatement* was conceived and drafted primarily in terms of *promise*," rather than reliance.[25] Therefore, because promissory estoppel was originally conceived of as a promise-based theory of recovery (that also required reliance), rather than a reliance-based theory of recovery (that just so happened to require a promise), it should come as no surprise that Professor Samuel Williston, the Reporter and primary drafter of the Restatement (First) of Contracts, thought that the remedy awarded in promissory estoppel cases should be the same as the remedy awarded for an ordinary breach of contract action. In other words, they should both be protected with the (usually) more generous expectation remedy.

This point can be seen most clearly in a famous debate over promissory estoppel that took place in 1926 on the floor of the American Law Institute (ALI) between Professor Williston and Frederick Coudert, a New York attorney. In this debate, which took place six years before promissory estoppel was officially adopted by the ALI, Williston was asked about an Uncle's liability if Uncle promised his nephew Johnny $1000 to buy a car, Johnny went out and purchased a car for $500, and Uncle refused to pay. Professor Williston stated that he thought Uncle should be liable for $1000, the amount he promised to pay, rather than the $500 that Johnny had spent in reliance on his Uncle's promise. Professor Williston's response provoked a strong reaction from several members of the ALI, including Mr. Coudert. Their exchange, part of which has been excerpted below, has been immortalized in the contract law canon:

> MR. COUDERT: Please let me see if I understand it rightly. Would you say, Mr. Reporter, in your case of Johnny and the uncle, the uncle promising the $1000 and Johnny buying the car—say, he goes out and buys the car for $500—that uncle would be liable for $1000 or would he be liable for $500?
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> MR. WILLISTON: If Johnny had done what he was expected to do, or is acting within the limits of his uncle's expectation, I think the uncle would be liable for $1000; but not otherwise.
>
> MR. COUDERT: In other words, substantial justice would require that uncle should be penalized in the sum of $500.
>
> MR. WILLISTON: Why do you say "penalized"?
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> . . . .

damages look forward in time by trying to give the promisee what he or she would have received had the promisor performed the contract, reliance damages look backwards in time and try to put the promisee in the position he or she was in before the contract was made and before the promisee detrimentally relied on the promise.

25. Yorio & Thel, *supra* note 2, at 112 (emphasis added).

> MR. COUDERT: Because substantial justice there would require, it seems to me, that Johnny get [sic] his money for his car, but should he get his car and $500 more? I don't see . . . .
> . . . .
> MR. WILLISTON: Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made.[26]

As the Reporter and primary drafter of the Restatement, it is not surprising that Professor Williston's view, even if controversial, initially won out. In spite of this, forty-two years later Professor Grant Gilmore predicted that promissory estoppel would eventually swallow up the traditional, consideration-based theory of contract to form a single theory of promissory enforcement based on *reliance*. Professor Gilmore's claim seemed to suggest that, at its core, the normative basis of promissory estoppel law had shifted over the years from one initially based on *promise* to one based on *reliance*. Indeed, so powerful was Professor Gilmore's belief that the reliance principle now undergirded cases in this area that he would argue, as early as 1974, that even "the 'probability of reliance' may be a sufficient reason for enforcement" of a promise.[27]

The disparity between Professor Williston's original intent and Professor Gilmore's descriptive claims[28] begged the obvious normative question: *How should* promises be enforced under a theory of promissory estoppel? If one were inclined to look to history as a guide, then one might conclude that, because promissory estoppel was initially conceived of as a distinctly *contractual* theory of recovery,[29] plaintiffs who prevailed under this theory of promissory recovery ought to be awarded full contractual damages[30] (that is, expectation damages), as the drafters of the Restatement originally intended.[31] If, on the

26. *Discussion of the Tentative Draft, Contracts Restatement No. 2*, 4 A.L.I. PROC. 61, 98–103 (1926) [hereinafter *Discussion of the Tentative Draft*].

27. GILMORE, *supra* note 8, at 72. This was considerably different from the way promissory estoppel cases were originally conceived. *See, e.g.*, *Discussion of the Tentative Draft*, *supra* note 26, at 90 (Williston: "[T]here is the danger that the inference will be drawn that wherever a promise is reasonably relied upon it becomes binding. That would go farther than Section [90].").

28. Professor Gilmore claimed that (1) promissory estoppel was a significant theory of promissory recovery and that (2) reliance was the normative principle underlying this theory. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974).

29. *Discussion of the Tentative Draft*, *supra* note 26, at 94–95 (Williston: "I should say anything was truly contractual where a promisor makes a promise and that promise is enforced. A contract to my mind is a binding promise . . . . The definition of contract in the first part of the section [of the Restatement (First) of Contracts] is a binding promise. If any law in any state says that a promise is binding under certain circumstances, then that promise is a contract.").

30. *See Discussion of the Tentative Draft*, *supra* note 26 and accompanying text (regarding debate on the floor of ALI between Mr. Coudert and Professor Williston).

31. *See generally* Eisenberg, *supra* note 1, at 656–59 (noting that Williston had an unstated axiom concerning remedies: in contract law, any promise that is legally enforceable at all must be

other hand, one looked to contemporary evidence as a guide, one might be tempted to follow Professor Gilmore and view promissory estoppel as a tort-like theory of recovery, which would suggest that the damages that ought to be awarded should reflect tort-like reliance damages, rather than contract-like expectation damages.[32]

To summarize, Professor Gilmore made three important but controversial claims regarding promissory estoppel that continue to impact the case law and influence scholars, lawyers, and judges to this day. First, Professor Gilmore believed that promissory estoppel was an increasingly significant cause of action that would eventually swallow up the entire field of contract law. Second, he thought that the normative principle underlying promissory estoppel was, and ought to be, reliance, not promise. And third, because he viewed promissory estoppel as more akin to tort than contract law, he thought that the remedy that ought to be awarded to successful litigants ought to reflect reliance damages rather than expectation damages.

Although Professor Gilmore's provocative work was not supported by the sort of empirical data one would expect to see today, his views had an enormous impact on (and continues to influence) the way that many people think about promissory estoppel to this day.[33]

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enforceable to its full extent through the award of expectation damages rather than merely to the extent of the promisee's reliance).

32. GILMORE, *supra* note 8, at 88 ("We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed. When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one."). Gilmore's views were shared by the drafters of the Restatement (Second) of Contracts, who, in their introductory comment to § 90, stated that "[o]bligations and remedies based on reliance are not peculiar to the law of contracts . . . . Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution . . . . In some cases those rules and this Section [90] overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to prevent injustice." RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tentative Draft No. 2 165, 1965); *see also* Barnett, *supra* note 13, at 518–19 (arguing that a reliance-based theory of contract "is conceptually indistinguishable from tort law," and because the normative basis of the contract could be found in reliance, rather than mutual assent, "the normal expectation measure of recovery was . . . suspect—justified, if at all, as an indirect way to protect what Fuller and Perdue labeled the 'reliance interest'").

33. *See* Barnett, *supra* note 13, at 520 ("All the professors who taught today's law professors Contracts . . . accepted the view that promissory estoppel was a reliance-based doctrine that should either supplement . . . or supplant . . . the bargain theory of consideration.").

B. An Empirical Challenge to the Gilmorian View

1985 can be said to be the year when the reliance-based edifice of the promissory estoppel cathedral began to crumble, or at least show numerous cracks in its foundation. In their extremely influential (and still controversial) article, Professors Daniel A. Farber and John H. Matheson examined more than two hundred promissory estoppel cases decided between 1975 and 1985 and concluded that many of the claims reached by Professor Gilmore were simply wrong.[34]

Unlike Professor Gilmore, who believed that the normative basis underlying promissory estoppel rested on the principle of reliance, Professors Farber and Matheson found no support for this view in the case law.[35] Rather, they argued that, based on their reading of the cases, promissory estoppel rested four-square on the normative principle of promise, and that even those decisions in which judges "purportedly" denied recovery to promissory estoppel claimants on the principle of reliance could "be readily explained on other grounds."[36] They went on to claim that:

> Based on our survey of recent promissory estoppel cases, we believe that promissory estoppel is losing its link with reliance. In key cases promises have been enforced with only the weakest showing of any detriment to the promisee. Reliance-based damages are the exception, not the rule. With the decline of reliance, promissory estoppel is moving away from tort law.[37]

Professors Farber and Matheson's argument amounted to the claim that the traditional elements making up the promissory estoppel cause of action were a mere subterfuge concealing the manner in which judges *really* decided promissory estoppel cases. Instead, Farber and Matheson postulated that judges actually enforce "any promise made in furtherance of an economic activity."[38]

As astonishing as this claim was, Farber and Matheson were just getting warmed up. In what bordered on promissory estoppel heresy at the time, they

34. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 904 (1985).

35. *Id.* at 903. So prevalent was the view that reliance was the theory undergirding promissory estoppel cases that Professors Farber and Matheson were able to begin their article, as though it were a matter of common knowledge, with these words: "As every law student knows promissory estoppel is based on detrimental reliance. Law students share this idea with the American Law Institute and with treatise writers." *Id.* The rest of their article would present data that called this view into question. *See id.* at 904.

36. *Id.*

37. *Id.* at 945.

38. *Id.* at 905.

claimed that, among plaintiffs who tend to prevail in their promissory estoppel actions, "reliance plays little role in the determination of remedies."[39] According to their study, judges tended to award full expectation damages[40] in five-sixths, or 83 percent, of the cases, relegating reliance damages[41] (which were thought, at that time, to be *de rigueur* in promissory estoppel actions) to plug the remedial gap in the remaining one-sixth of cases.[42]

They did, however, agree with Professor Gilmore in one respect: they too thought that promissory estoppel was "no longer merely a fall-back theory of recovery" left to play second fiddle to traditional, consideration-based contracts, but was now being used by courts "as a primary basis of enforcement."[43]

Professors Farber and Matheson's work was followed up by another article by Professors Edward Yorio and Steve Thel that echoed many of the same findings. For instance, Professors Yorio and Thel wrote that "the prominence of reliance in the text of Section 90 and in the commentary on the section does not correspond to what courts do in fact," and further claimed that, "[r]ather than using Section 90 to compensate promisees for losses suffered in reliance, judges use it to hold people to their promises by granting specific performance or by awarding expectation damages."[44]

C. A Methodological Challenge to the Empirical View

After the publication of these two articles, it appeared as though the promissory estoppel landscape really had changed.[45] But had it? As important

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39. *Id.* at 909.

40. *See supra* note 21.

41. *See supra* note 24.

42. Farber & Matheson, *supra* note 34, at 909 n.24. These results were foreshadowed by Professor Jay Feinman the previous year, who, after "canvass[ing] . . . the case law of promissory estoppel over the past fifteen years," found that "the current case law demonstrates that the remedial flexibility once attributed to promissory estoppel, if it ever existed, has been replaced by the application of remedies similar to those available in bargain cases," or expectation damages. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 679, 687 (1984).

43. Farber & Matheson, *supra* note 34, at 908.

44. Yorio & Thel, *supra* note 2, at 111–12. Professors Yorio and Thel went on to note that "[c]ases granting less than expectancy relief are relatively rare," *id.* at 112–13, and that "the remedy routinely granted [per § 90] is either specific performance or expectation damages. Those rare instances in which courts award reliance damages involve either a problem with the promise or a difficulty in assessing expectation damages . . . . That courts enforce promises rather than compensate reliance under Section 90 is powerful evidence that the basis of the section in the courts is promise." *Id.* at 130.

45. Other authors also argued that the normative basis of promissory estoppel had moved away from—or never was based on—reliance. *See, e.g.*, Barnett, *supra* note 13, at 524 ("Like Farber and Matheson, [Mary E. Becker and I] argued that promissory estoppel was used to enforce serious promises when the formality of a bargain was lacking." (citing Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443

as these articles were, the methodologies employed by each of them were flawed in potentially significant ways. First, with respect to the Farber and Matheson piece, the authors' research relied on data obtained from cases decided between the years 1975 and 1985. This was, however, an unfortunate choice in dates because the Restatement (Second) of Contracts was published in 1981 (right in the middle of their survey) and made several important alterations to § 90 with the specific purpose of changing the way judges decided promissory estoppel cases. If these changes had their desired effects, then the data gathered from the pre-1981 cases would differ significantly from the data obtained from the post-1981 cases, and draw into question any conclusions reached from this mixed data set.

What, specifically, were these significant changes? Although a thorough discussion of the differences between the two Restatements has been explored elsewhere,[46] the two most significant changes are worth a brief mention. First, the Restatement (Second) of Contracts dropped the requirement that a promisee's reliance must be of "a definite and substantial character."[47] According to Professor Melvin Eisenberg, the reason for this limitation in the original Restatement rested on "an unstated axiom" of Professor Williston, who believed that "as a matter of contract law any promise that is legally enforceable at all must be enforceable to its full extent (through the award of expectation damages), rather than merely to the extent of the promisee's reliance."[48] Because the expectation remedy was so drastic, Williston reasoned, it should not be lightly awarded to anyone who relied on a promise, but should instead be limited only to those persons whose reliance was of "a definite and substantial character."[49]

(1987))); Juliet P. Kostritsky, *A New Theory of Assent-Based Liability Emerging Under the Guise of Promissory Estoppel: An Explanation and Defense*, 33 WAYNE L. REV. 895, 908 (1987) ("[P]romissory estoppel remains an assent-based theory despite the common perception of promissory estoppel as a tort-like doctrine.").

46. *See generally* Eisenberg, *supra* note 1, at 656–59; Knapp, *supra* note 11, at 55–61.

47. The Restatement (Second) of Contracts provides instead that

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

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

48. *See* Eisenberg, *supra* note 1, at 658; *see also supra* text accompanying note 26.

49. *See, e.g.*, L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages (pt. 2)*, 46 YALE L.J. 373, 401–02 (1937) ("In a discussion before the American Law Institute, . . . the Reporter took the position that the promise, if enforced at all, must be enforced to the full extent of the expectation interest . . . . Furthermore, [because] Section 90 itself states that the reliance which makes the promise 'binding' must be of a 'definite and substantial character,' . . . the natural inference is that the reliance must be so 'definite and substantial' as to justify an enforcement of the

Second, the drafters of the Restatement (Second) added a sentence to the end of § 90 that specifically allowed judges, for the first time ever, and in no uncertain terms, to award *less* than full expectation damages to successful promissory estoppel claimants. Thus, as revised, the Restatement (Second) of Contracts § 90(1) now reads:

> 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*.[50]

Some commentators have argued that the intended effect of these two important changes was to shift the normative basis underlying promissory estoppel from one that "was conceived and drafted primarily in terms of promise"[51] to one that "reflect[ed] an endorsement of reliance."[52] If this is correct, and if these changes had their desired effect, then it is logical to presume that the cases decided after 1981 would reflect these differences and bear the imprimatur of reliance, just as one would expect those cases decided prior to 1981 to bear the imprimatur of promise. Therefore, the conflation of these two data sets, each of which potentially rests upon a distinct normative principle, would suggest that the conclusions drawn by Professors Farber and Matheson would not (unless accidentally) accurately account for the way judges were *actually* deciding promissory estoppel cases under the Restatement (Second) today.

A similar criticism can be lodged against the methodology employed by Professors Yorio and Thel. In their article, Professors Yorio and Thel reviewed twenty-nine cases cited by the Restatement (Second) § 90 "in which the promisee was afforded relief" and found that twenty-four of those cases awarded expectation damages, while "only five cases . . . awarded reliance damages or restitution."[53] Drawing on these cases, Professors Yorio and Thel concluded that the normative "basis of [§ 90] is promise."[54]

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whole promise. If the intention had been merely that the reliance should be 'definite and substantial' enough to justify a law suit, one would expect to find that meaning made explicit.").

50. RESTATEMENT (SECOND) CONTRACTS § 90(1) (1981) (emphasis added).

51. *See Discussion of the Tentative Draft*, *supra* note 26, at 94–95 (Williston: "I should say anything was truly contractual where a promisor makes a promise and that promise is enforced. A contract to my mind is a binding promise . . . . The definition of contract in the first part of the section [of the Restatement (First) of Contracts] is a binding promise. If any law in any state says that a promise is binding under certain circumstances, then that promise is a contract.").

52. Yorio & Thel, *supra* note 2, at 112; *cf. Discussion of the Tentative Draft*, *supra* note 26, at 89–90 (Williston: "[T]here is the danger that the inference will be drawn that wherever a promise is reasonably relied upon it becomes binding. That would go farther than Section [90].").

53. Yorio & Thel, *supra* note 2, at 130–31.

54. *Id.* at 130.

Even in spite of this limited data set, these conclusions are problematic because all of the cases relied upon by Professors Yorio and Thel were *cited* in the Restatement (*Second*) of Contracts, which was published in 1981, and therefore were necessarily decided *prior* to 1981. Despite this, these cases were used to support their conclusion that the *current*, post-1981 basis for recovery in § 90 actions was promise, rather than reliance, and that expectation damages, rather than reliance damages, was *currently* the preferred remedy awarded by the courts.[55] These claims, quite simply, cannot be supported by their data,[56] which, at best, could only speak to the manner in which judges once decided promissory estoppel cases under the Restatement (First), but must necessarily remain silent regarding the way in which judges were deciding promissory estoppel cases *since* the Restatement (Second) was published in 1981.

D. The Vindication of Grant Gilmore?

It is significant that two other promissory estoppel articles relying exclusively on post-1981 data have reached sharply different conclusions than the previously discussed articles. In *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*,[57] Professor Robert Hillman looked at 362 promissory estoppel cases that were decided during a two-year period from July 1, 1994, through June 30, 1996, and found that, despite claims of the growing importance and dominance of promissory estoppel as a theory of promissory enforcement, there was little need to worry about the "Death of Contract," or about the field of torts swallowing up the field of contracts via "the magic gate of § 90,"[58] as Professor Gilmore once prophesied. There were several reasons for this, according to Professor Hillman. First, "the theory [of promissory

55. For instance, Professors Yorio and Thel take issue with commentators who "read the *Second Restatement*—in particular the language allowing courts to limit the remedy as justice requires—as an endorsement of remedial flexibility," because "[t]he claim for remedial flexibility sometimes goes beyond the normative argument that courts *ought* to devise flexible remedies to the descriptive proposition that courts *have in fact* adopted a flexible approach to remedies in Section 90 cases." *Id.* at 136.

56. At best, their data could only support the claim that, prior to 1981, the primary basis of promissory estoppel was promise rather than reliance. But if this was their only claim it may well be much ado about nothing because one of the driving factors behind the revised § 90 was, by Professor Yorio and Professor Thel's own admission, to *shift* the basis of enforcement from promise to reliance and to endorse, in certain instances, a *reduction* of the remedy (from expectation to reliance damages) available to successful litigants. *See id.* at 112–13.

57. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998).

58. GILMORE, *supra* note 8, at 90.

estoppel] seldom leads to victory in reported decisions,"[59] and is therefore a rather insignificant theory of promissory recovery. Second, in sharp contrast to the claims made by Professors Farber, Matheson, Yorio, and Thel, Professor Hillman found that, where the doctrine of promissory estoppel was successful, the promise principle did not serve as the exclusive, or even primary, normative basis for enforcement.[60] This not only "underscore[d] the immense importance of *reliance* as a substantive element of the theory,"[61] but, according to Professor Hillman, demonstrated "the crucial role reliance plays in courts' decisions either to deny or affirm a promissory estoppel claim at a preliminary motion or final judgment stage of a litigation."[62] Last, Professor Hillman called into question the claim that "courts 'invariably' award expectancy damages in successful promissory estoppel cases," and found, in sharp contradiction to the previous two articles, that expectation damages were only awarded in seven of the twenty-nine cases that were successful on the merits in his data set, a paltry 24 percent of the time.[63]

Professor Hillman's claims were echoed by Professor Sidney DeLong who, in a survey of promissory estoppel cases decided between 1995 and 1996, similarly found that "courts rigorously enforce Section 90's requirement that the promise induce actual reliance by the promisee,"[64] and therefore found little merit in the claim made by Professors Farber and Matheson that "courts . . . enforce serious promises made in the course of commercial activity

59. Hillman, *supra* note 57, at 580; *see also* Phuong N. Pham, Note, *The Waning of Promissory Estoppel*, 79 CORNELL L. REV. 1263, 1263 (1994) ("[C]ourts, rather than enthusiastically embracing promissory estoppel theory, in fact severely limit its application. Courts' extreme reluctance to grant recovery under promissory estoppel indicates a continued adherence to traditional contract principles of bargained-for exchange."). Mr. Pham looked at the cases decided since Restatement (Second) Contracts was published in 1981 and found that "[d]espite the widespread perception of promissory estoppel's proliferation, recent empirical evidence points to the contrary. A broad survey of all reported state court cases decided between 1981 and 1992 reveals only twenty-eight successful promissory estoppel cases in which courts granted relief." Pham, *supra* at 1271.

60. *See supra* notes 35–44 and accompanying text.

61. Hillman, *supra* note 57, at 580–81 (emphasis added).

62. *Id.* at 583.

63. *Id.* at 601–02. According to Professor Hillman's study, reliance damages were also awarded in 24.24 percent of the cases, specific performance was awarded in 3.45 percent of the cases, no damages were awarded in 17.24 percent of the cases, and in 31.03 percent of the cases it was "[u]nclear what was awarded." *Id.*

64. Sidney W. DeLong, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22*, 1997 WIS. L. REV. 943, 948. Professor DeLong went on to note that "[m]any of the 1995–96 cases, however, denied promissory estoppel claims on the *sole* ground that plaintiff had not demonstrated actual, detrimental reliance. The absence of actual reliance was decidedly determinative, not merely make-weight, in these cases. The need to prove actual detrimental reliance was also emphasized in the relatively few Section 90 decisions in plaintiffs' favor." *Id.* at 986–87.

without requiring proof of actual reliance."[65] Furthermore, Professor DeLong also agreed with Professor Hillman that "plaintiffs rarely succeed" in their promissory estoppel claims,[66] thereby supporting the notion that promissory estoppel was a rather impotent form of promissory recovery. Surprisingly, however, Professor DeLong did find, contrary to Professor Hillman's study, that there was good evidence for the expectation hypothesis put forth by Farber and Matheson, in that, when plaintiffs did succeed in their promissory estoppel claims, courts tended to award expectation damages rather than reliance damages.[67]

However, although the Hillman and DeLong articles avoided some of the methodological difficulties discussed earlier—both studies relied exclusively on cases decided since the Restatement (Second) of Contracts was published in 1981—their articles still only offered suggestive evidence against the theories advanced by Professors Farber, Matheson, Yorio, and Thel. This is because both the Hillman and DeLong articles provided only a snapshot of promissory estoppel law at a specific moment in time and, by an unfortunate coincidence (although not attributable to the fault of either author), both authors focused on roughly the *same* moment in time. Therefore, given the conflict between the conclusions reached by Professors Hillman and DeLong, on the one hand, and the conclusions reached by Professors Farber, Matheson, Yorio, and Thel, on the other, it remains an open question as to how judges *actuall*y decide promissory estoppel cases today.

Some of the questions that are still in need of resolution include: How viable is promissory estoppel as a cause of action? On average, does it tend to fail or succeed? Why do promissory estoppel actions succeed and/or fail when they do? What is the normative basis upon which judges base their promissory estoppel decisions—promise, reliance, or something else? Do courts tend to award expectation damages, reliance damages, or something else

65. *Id.* at 969. "[A] commercial promise is not alone sufficient to ground a claim under Section 90." *Id.* at 981. Professor DeLong also rejects Yorio and Thel's "contention that actual reliance is unnecessary if the promise is one that is likely to induce reliance," noting that courts have instead "affirmed the Restatement requirement that the plaintiff actually rely, some of them adding that the reliance must be 'substantial' as in the first Restatement version." *Id.* at 984.

66. *But see* Kostritsky, *supra* note 8, at 539–40 (examining five years (1990–1994) of promissory estoppel cases and arguing that Professor Hillman's data is "based on win ratios that do not control for various characteristics" that, once controlled for, reveal that "promissory estoppel win rates are substantial"). More specifically, Professor Kostritsky argues that because "promissory estoppel claims succeed at significant rates *when demonstrably weak claims are subtracted*," Professors "Hillman and DeLong are wrong in claiming that promissory estoppel is a dead letter." *Id.* at 542.

67. DeLong, *supra* note 64, at 979 ("While much of the evidence is equivocal, contemporary case law moderately supports th[e] conclusion" that "'reliance plays little role in the determination of remedies,' with courts typically awarding expectation damages or equitable relief such as specific performance or injunction.").

entirely? How, if at all, have the answers to these questions changed over time? And, most importantly, *why* do judges decide the cases the way they do? My research seeks to provide new and more complete answers to these questions, many of which have not been addressed elsewhere.

II. AN EMPIRICAL ANALYSIS OF PROMISSORY ESTOPPEL UNDER THE RESTATEMENT (SECOND) OF CONTRACTS: 1981–2007

A. Methodology

This Article is interested in how judges have decided promissory estoppel cases since the important changes to the Restatement (Second) of Contracts have taken effect.[68] It thus examines 383 promissory estoppel cases—representing every promissory estoppel case decided since 1981, when the Restatement (Second) was published, through the end of 2007, when research on this Article began—in which a court has cited the newly added language of the Restatement (Second) allowing a judge to limit the remedy "as justice requires."[69] Because the drafters of the Restatement (Second) made several important changes to the language of § 90 with the explicit intent of making promissory estoppel more

68. *See supra* text accompanying notes 39–44.

69. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 90(1) (1981). Specifically, the cases used were compiled by first accessing the "All Cases" database on Westlaw, and then searching for limit! /2 justice /2 require! & da (aft 12/31/1980 & bef 1/1/2008). This initial search yielded 383 cases. I then created a chart that systematically organized all of the data, including, for example, columns for case name, citation, court, date, facts, holding, whether the promissory estoppel action was successful or not, why it succeeded and/or failed, what remedy was awarded, how this remedy differed (if at all) from what was requested by the promisee, what remedy would have been awarded under traditional contract law principles, and how the judge conceptualized the promissory estoppel action (for example, as a consideration substitute, a quasicontractual cause of action, or an independent theory of promissory recovery). Organizing the data in such a manner was important because it allowed me to analyze the data from various perspectives, to observe trends over time, and to test whether certain courts tended to decide promissory estoppel cases in certain ways. This data is on file with the author.

Once these columns were created, my research assistants first went through and read each case individually, entering the data into the Microsoft Excel spreadsheet. Some of the cases, it turns out, were not promissory estoppel cases at all, but, for example, equitable estoppel cases, or cases in which a dissenting judge cited promissory estoppel as a cause of action that should have been brought by the plaintiff. Similarly, some cases discussed promissory estoppel but did not mention § 90 of the Restatement (Second) of Contracts, being decided instead, for example, under § 139 of the Restatement (Second) of Contracts dealing specifically with the Statute of Frauds. Once we pruned these cases, there remained a total of 339 § 90 promissory estoppel cases, the data for which I relied on in writing this Article. Next, I reread each of these cases to ensure that they were properly coded and included in the spreadsheet any additional data I thought relevant. Finally, I had two research assistants go through the data one final time to make some further distinctions that I thought would be helpful and to pull from the cases other information I thought would be useful in writing this Article.

available,[70] the role of reliance more prominent,[71] and the remedies awarded to successful litigants more flexible,[72] I wanted to test whether these changes had their intended effect on promissory estoppel doctrine as reflected in the case law.[73]

The data and methodology presented here, as will be seen, differ in many important respects from the methodology employed by previous articles in this area. First, by focusing exclusively on cases decided under the Restatement (Second) of Contracts, this Article attempts to isolate what effect, if any, the substantive changes that were made to the Restatement (First) have had on current case law.

And second, this Article takes two different approaches to examining the remedies that courts award to promissory estoppel litigants. Like past articles on promissory estoppel, it also classifies each remedy according to the traditional "conceptual" approach employed by most academics, practitioners, and judges—describing the remedies as "expectation" or "reliance" damages. In addition, however, this Article also employs a "functional" approach by carefully examining the quantum of remedy actually awarded in each case and comparing it to the remedy that *would have been* awarded had the claim been based on a traditionalbreach of contract action rather than a promissory estoppel cause of action (in other words, as "contractual" or "non-contractual" damages). This approach is useful because reliance damages are, in many instances, also awarded to plaintiffs who prevail in traditional, consideration-based contract claims, and where this is so, it hardly makes sense to classify such a remedy as "non-contractual." This is especially true where reliance damages

70. The drafters accomplished this by removing the "definite and substantial" language. *See* Eisenberg, *supra* note 1, at 658; text accompanying *supra* note 47.

71. *See supra* note 2 and accompanying text.

72. The drafters achieved this by adding the "remedy granted for breach may be limited as justice requires" language. *See supra* text accompanying notes 42 and 47.

73. There existed another more pragmatic reason for limiting the search in this manner. As discussed previously, since 1981 there have been over 13,000 cases that used the term "promissory estoppel" (the search term that yields this result in Westlaw is "promissory estoppel" & da(aft 12/31/1980 & bef 1/1/2008)), and it was simply impractical to read all of these cases.

There are, of course, some limitations to the methodology employed in this Article. First, and most importantly, the main limitation of this research is that the only promissory estoppel cases captured in the data set are those cases in which the court cited the "limited as justice requires" language of § 90. This means that there are likely other promissory estoppel cases that have been decided since 1981 that were not captured in this search because they did not mention the newly added § 90 language. Second, Westlaw is continually adding new cases to its database, and it is possible that there are promissory estoppel cases that have been decided but not yet added to the database that would have been captured by my search terms. Third, there is always the possibility of human error, both in the execution of the searches and in the interpretation of the cases, although I have tried my best to eliminate this by double and triple checking the results.

result in a higher recovery than expectation damages would have, merely because of the way the remedy is labeled by a court. Indeed, to treat reliance damages as non-contractual when awarded to promissory estoppel claimants, while treating them as contractual when awarded to plaintiffs bringing traditional breach of contract actions, is to obscure the more important question of how promissory estoppel remedies differ, if they differ at all, from traditional, breach of contract remedies. Thus, by reclassifying the remedies as "contractual" or "non-contractual," the data presented here more accurately captures the *actual* differences between remedies awarded under traditional, bargain-based contracts and those remedies awarded under promissory estoppel doctrine.

B. The Significance of Promissory Estoppel: Success or Failure?

As discussed in Part I of this Article, promissory estoppel was originally conceptualized as a relatively insignificant form of promissory recovery—an "unwanted stepchild"[74] of the Restatement intended to supplement, rather than compete with, the traditional bargain-based theory of contracts in mostly non-commercial situations.[75] This view was challenged by Professor Gilmore, who argued that promissory estoppel had grown in importance since that time, not only becoming "a basic principle" of the Restatement (Second) of Contracts,[76] but actually threatening to swallow up the entire field of Contract. This position, in turn, was subsequently tested, but met with mixed empirical results.[77]

The empirical research presented below suggests that Professor Gilmore, while certainly overstating his case, was more right than wrong. Promissory estoppel cases have indeed grown—both in number and in importance—since the Restatement (Second) of Contracts was published in 1981. And, more significantly, plaintiffs pursuing promissory estoppel actions tend to prevail at a much greater rate than has been previously thought. These data, when viewed

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74. *See, e.g.*, GILMORE, *supra* note 8, at 72 (describing § 90 dealing with promissory estoppel as the "unwanted stepchild of [the] *Restatement (First)*").

75. *See supra* note 17 and accompanying text.

76. *See supra* note 17 and accompanying text.

77. For example, this claim was supported by the empirical research of Professors Farber, Matheson, Yorio, and Thel, but was challenged by, among others, Professors Hillman and DeLong, who argued that promissory estoppel was a relatively insignificant form of promissory recovery and asserted that most promissory estoppel actions failed. *See infra* Part I; *see also* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1192 (1998) (noting that, since 1980, "a succession of articles has called into question virtually every aspect of [promissory estoppel, including] . . . its viability as a part of the living law of contact"); E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 219 (1990) (noting that "[t]he expansion of the role of reliance, and the simultaneous erosion of the role of [consideration], did not continue in the 1980s").

collectively, indicate that promissory estoppel has emerged as a significant source of promissory recovery that will likely continue to grow in importance in the coming years.

1. Promissory Estoppel Success Rates (Overall)

To test the overall success rate of promissory estoppel claims, I have counted as a promissory estoppel "success" each instance in which a promissory estoppel claim has prevailed, independent of whether the claim was asserted affirmatively by the plaintiff or defensively by the defendant, and independent of whether the claim was decided on the merits.[78]

As indicated in Table II.A,[79] promissory estoppel claims tended to succeed much more often than has been previously reported.[80] In fact, the data reveal that promissory estoppel cases decided under the Restatement (Second) of Contracts are successful about 53 percent of the time.[81] This, coupled with the extraordinary growth of promissory estoppel cases over the past decades,[82]

78. Thus, for instance, if a defendant brought a motion to dismiss a plaintiff's promissory estoppel claim, and a judge denied that motion, I would categorize this denial as a promissory estoppel "success," even though the plaintiff's promissory estoppel action may, for example, have subsequently gone on to lose on the merits. Although this success rate will differ from the success rate of promissory estoppel cases decided on the merits, it is important to discuss both categories because both represent instances in which a judge found the law to allow or disallow a promissory estoppel claim to go forward. *See infra* text accompanying note 85.

79. The data presented in this table are organized chronologically (by year), and reports the aggregate success rates for all promissory estoppel claims decided at the trial, appellate, and state supreme court levels. In subsequent tables (Tables II.B, II.C, and II.D), the data are broken down further to report the various promissory estoppel success rates according to each type of motion before the court and whether the court's decision was ultimately on the merits.

80. See *supra* notes 59, 64–65, and accompanying text, in which Hillman, DeLong, and Pham indicated that promissory estoppel claims were not that successful.

81. This figure, of course, is significantly at odds with the 23.75 percent success rate reported by Professor Hillman, obtained using similar methodology. The 23.75 percent success rate was arrived at by adding together, from Table 1.1 of Professor Hillman's article, the percentage of cases that succeeded on the merits (8.01 percent) and the percentage of claims that survived an opposing motion (15.74 percent). *See* Hillman, *supra* note 57, at 589–90.

82. For instance, Table I.A (below) organizes by decade every promissory estoppel case that has been reported in the Westlaw database as of March 10, 2008. These data were obtained by using the following search terms in the Westlaw All Cases database: "TE("PROMISSORY ESTOPPEL") & DA(AFT 12/31/1899 & BEF 1/1/1910)," where the date terms were changed for each decade of data generated, so that, for example, the search terms used to generate data for the 1950–1959 decade would be as follows: "TE("PROMISSORY ESTOPPEL") & da(aft 12/31/1949 & bef 1/1/1960)."

TABLE I.A. PROMISSORY ESTOPPEL CASES DECIDED BY DECADE

Decade	# *of Cases*
1900–1909	0

including the particularly impressive explosion of promissory estoppel cases since the Restatement (Second) was published in 1981,[83] supports the conclusion that promissory estoppel is a growing and increasingly significant form of promissory recovery.

TABLE II.A. PROMISSORY ESTOPPEL SUCCESS RATES (ALL CASES)

Year	*Success*	*Failure*	*N/A*[84]	*% Success*
1981	3	2	1	60%
1982	6	5	0	55%
1983	4	3	0	57%
1984	6	4	3	60%
1985	8	4	2	67%
1986	3	5	0	38%
1987	6	7	0	46%
1988	5	6	2	45%
1989	4	5	1	44%
1990	6	7	1	46%
1991	8	8	0	50%

1910–1919	0
1920–1929	8
1930–1939	41
1940–1949	64
1950–1959	87
1960–1969	189
1970–1979	415
1980–1989	1688
1990–1999	4883
2000–present	6100
Totals	*13,475*

83. To put matters into perspective, at the time Professor Gilmore published his book in 1974, only about eight hundred cases mentioning the term "promissory estoppel" had been decided. Yet, of the more than 13,000 cases on the books today mentioning the term "promissory estoppel," over 12,671 of these cases have been decided *since* 1980, indicating that over 94 percent of all cases using the term "promissory estoppel" have been decided since the Restatement (Second) of Contracts was promulgated in 1981!

84. I have marked cases with an "N/A" if the judge's language did not find the promissory estoppel action to either succeed or fail, but, for example, if the judge decided the case (or remanded the case to a lower court) on a cause of action unrelated to the promissory estoppel cause of action.

1992	5	6	0	45%
1993	9	6	0	60%
1994	8	5	0	62%
1995	6	3	0	67%
1996	9	3	0	75%
1997	8	6	0	57%
1998	6	3	0	67%
1999	5	8	0	63%
2000	7	2	0	78%
2001	3	1	0	75%
2002	4	7	1	57%
2003	10	8	0	56%
2004	8	5	0	62%
2005	12	16	0	43%
2006	7	11	0	64%
2007	7	9	1	44%
Totals	*173*	*155*	*12*	*53%*

It may, of course, be argued that the data presented in Table II.A (above), by including the success rates of *all* promissory estoppel claims, does not accurately reflect the "true" success rates of promissory estoppel claims, which would only include those cases that ultimately succeeded on the merits. Therefore, one could argue, it is possible that my data (reporting a success rate of 53 percent) inflates the "true" success rate of promissory estoppel claims.[85]

As such, I address this concern in Tables II.B through II.D. In these tables, I break down each of the cases included in Table II.A by the court deciding the dispute and by the procedural posture of the case in each court, and compare the overall success rates of promissory estoppel claims with the success rates of only those promissory estoppel claims that were decided on the merits. Surprisingly, and as discussed below, the results show that promissory estoppel cases decided on the merits were even *more* successful than the overall win rates would have suggested.

85. *See* Hillman, *supra* note 57, at 590 (noting that counting the cases in which a plaintiff survives on a preliminary motion, such as a motion to dismiss, could inflate the true overall win rate of promissory estoppel actions).

2. Success Rates in Trial Courts

As indicated in Table II.B, the overall success rate of promissory estoppel claims decided by trial courts is similar to the overall success rate of promissory estoppel claims decided by all courts.

TABLE II.B. SUCCESS RATES OF PROMISSORY ESTOPPEL CLAIMS DECIDED BY TRIAL COURTS

Procedural Posture of Plaintiff's Promissory Estoppel Claim	*Success*	*Failure*	*N/A*	*% Success*
Claim Survived Motion to Dismiss[86]	16	16	0	50%
Claim Survived Motion for Summary Judgment[87]	28	34	1	45%
Claim Survived Miscellaneous Motion[88]	0	2	0	0%
Claim Prevailed at Trial[89]	18	9	0	67%
Totals	*62*	*61*	*1*	*50%*

Although Table II.B reveals that promissory estoppel claimants survived an opposing motion to dismiss or motion for summary judgment about 50 percent of the time, which one might expect given the figures presented in Table II.A, the number of cases in which plaintiffs were successful on the merits of their promissory estoppel claims is more surprising. Indeed, the data reveal

86. The data in this row include cases in which the plaintiff's promissory estoppel claim survived (or failed) an opposing motion to strike. There were five such cases—three in which the promissory estoppel claim prevailed, and two in which the promissory estoppel claim failed.

87. The data in this row include cases in which the plaintiff's promissory estoppel claim survived (or failed) an opposing Motion for Judgment on the Pleadings or Motion for Judgment as a Matter of Law.

88. The data in this row include one case in which the court denied the plaintiff's request to remand the case to state court because the court found that promissory estoppel could not apply to an agent working on behalf of a disclosed principal, *Linville v. ConAgra, Inc.*, No. 1:04-CV-00004-WRW, 2004 WL 3167119 (E.D. Ark. May 19, 2004), and another case in which the court denied the plaintiff's motion to amend her complaint to add a promissory estoppel claim because such a claim would be "futile" as the plaintiff did not originally allege any reliance damages, which the court stated were the only damages available under Arizona law, *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033 (D. Ariz. 2003).

89. The data in this row include cases in which the plaintiff's promissory estoppel claim prevailed (or failed) at a bench or jury trial, or where the judge rendered a Judgment Notwithstanding the Verdict (JNOV) in favor of (or against) the claimant, or where the *plaintiff* obtained a judgment on the basis of his own motion for summary judgment.

that eighteen of the twenty-seven promissory estoppel disputes that made it to trial were resolved in favor of the plaintiff, representing a staggering 67 percent win rate—odds that any plaintiff's attorney would be sure to love![90] Notably, these data are remarkably different from the figures reported by Professor Hillman, which indicated that only 5.45 percent of promissory estoppel claims succeeded on the merits at the trial court level.[91]

It is remarkable to compare these data to the 54.77 percent success rate reported for traditional breach of contract claims decided at the federal district court level,[92] suggesting that, contrary to the claims made by Professors Hillman and DeLong, claimants bringing promissory estoppel actions not only fare far better than expected, but have even better chances of prevailing on the merits of their promissory estoppel claims than do similarly situated plaintiffs bringing traditional breach of contract claims!

3. Success Rates in Appellate Courts

Similar results can be seen in the appellate courts, as shown in Table II.C.

90. To put this 67 percent success rate in perspective, I cannot improve on the description given by Professor Hillman: "One way of comprehending the meaning of the promissory estoppel win rates is to consider the prediction of theorists studying win rates that each side should win about 50% of the time. This is because parties should settle claims heavily favoring one of them to save costs, and litigate close cases where the parties cannot predict the outcome." Hillman, *supra* note 57, at 590. The remedies that were awarded in each of these eighteen cases will be discussed at length in Part II.D, *infra*.

91. *See* Hillman, *supra* note 57, at 591 tbl.1.3; *see also* DeLong, *supra* note 64, at 943 (reporting that his data showed promissory estoppel claims did not tend to be very successful). It is important to point out, however, that when I first began this project, I was more interested in studying the remedies awarded to successful litigants (looking at reliance vs. expectation damages) than in exploring the overall success rates of promissory estoppel claims, and my methodology, which restricts the data set to those cases in which judges used the "justice requires" language of the Restatement (Second) of Contracts, reflects this bias. As Professor Hillman has insightfully pointed out to me in personal correspondence, it may be the case that courts are more (or less) likely to use the "justice requires" language in decisions that are successes (or failures) than would otherwise be the case. If this is so, then my use of the "justice requires" language may have filtered the cases in such a way as to yield more (or less) successes than would have otherwise been the case. Therefore, readers should be aware that my results may over- or under-reflect the true success rate of promissory estoppel cases, and do not provide a direct apples-to-apples comparison with other articles in this area that directly examined this issue. That being said, however, when my results are combined with the dramatic increase of promissory estoppel cases since the Restatement (Second) was published in 1981, I think this Article strongly suggests (though it does not prove) that promissory estoppel cases are more prevalent and successful than has been previously thought, but I leave it to other scholars to examine the extent to which this is, or is not, the case. *See supra* Part II.B.1–II.B.2.

92. *See* Hillman, *supra* note 57, at 591 tbl.1.3.

TABLE II.C. SUCCESS RATES OF PROMISSORY ESTOPPEL CLAIMS DECIDED BY APPELLATE COURTS

Procedural Posture of Plaintiff's Promissory Estoppel Claim	*Success*	*Failure*	*N/A*	*% Success*
Claim Prevailed on Appeal After a Trial Court Ruling on a Motion to Dismiss	14	10	0	58%
Claim Prevailed on Appeal After a Trial Court Ruling on a Summary Judgment Motion[93]	33	41	3	45%
Claim Prevailed on Appeal After a Trial Court Judgment on the Merits[94]	55[95]	35[96]	7	61%
Miscellaneous Appeals[97]	1	2	0	33%
Totals	*103*	*88*	*10*	*54%*

Table II.C reveals that the overall success rate of promissory estoppel claims decided by appellate courts (54 percent) is similar to the overall success

93. The data in this row include appeals from cases in which plaintiff's promissory estoppel claim survived (or failed) an opposing Motion for Summary Judgment, Motion for Judgment on the Pleadings, or other similar motion.

94. The data in this row include appeals from cases in which the plaintiff's promissory estoppel claim prevailed (or failed) at a bench or jury trial, where the judge rendered a JNOV in favor of (or against) the claimant (five cases), where the trial court entered an order granting or denying injunctive relief (one case), where the trial court entered a default judgment (one case), and where the trial court entered a declaratory judgment (one case).

95. Of the fifty-five claims that prevailed on appeal from a trial court judgment on the merits, forty-seven of these cases were instances in which the court of appeals affirmed the lower court's decision, whereas in only eight of the remaining cases did the plaintiff lose at the trial level but win on appeal.

96. Of the thirty-five cases that ultimately lost on appeal, in nineteen of these cases the plaintiff also lost in the trial court, whereas in the other sixteen cases the plaintiff's promissory estoppel action succeeded at the trial court but lost on appeal.

97. The data in this column include an original appeal to the Hawai'i Supreme Court challenging a decision entered by the Board of Certified Shorthand Reporters (*In re Herrick*, 922 P.2d 942 (Haw. 1996)), and two appeals from bankruptcy courts to US district courts acting in their appellate capacity (*In re Babcock & Wilcox Co.*, Nos. 00-10992, 00-10993, 00-10994, 00-10995, 2002 WL 1874836 (E.D. La. Aug. 13, 2002), and *International Travel Arrangers v. Frontier Airlines, Inc.* (*In re Frontier Airlines, Inc.*), 121 B.R. 386 (D. Colo. 1990)).

rate of promissory estoppel claims decided by all courts (53 percent),[98] and the 50 percent success rate of promissory estoppel claims decided by trial courts.[99]

Most remarkable, however, is the third row of data, which reveals that where a plaintiff's promissory estoppel action succeeded *on the merits* at the trial level, as it did nearly 67 percent of the time (Table II.B), the plaintiff was *also* more likely than not to prevail on appeal (61 percent of the time). This shows that trial courts are not simply misapplying promissory estoppel law, and then subsequently getting reversed. Instead, it reveals the remarkable resiliency of promissory estoppel claims.[100]

4. Success Rates in State Supreme Courts

Together with the data already presented, Table II.D reveals no real difference in the way judges decide promissory estoppel cases at the trial, appellate, and state supreme court levels. In all such instances, claimants have, at worst, a 50 percent chance of prevailing on their promissory estoppel cases; in many cases, however, the percentage is much higher.

98. *See supra* p. 691 tbl.II.A.

99. *See supra* p. 693 tbl.II.B.

100. To be sure, of the fifty-five cases in which the plaintiff's promissory estoppel claim prevailed on appeal, forty-seven of these cases were instances in which the court of appeals affirmed the lower court's decision, while in the remaining eight cases, the plaintiff lost at the trial court level but still managed to win on appeal. Of the thirty-five cases in which the plaintiff ultimately lost on appeal, nineteen of these were instances in which the plaintiff also lost in the trial court below, whereas sixteen of these cases were instances in which the plaintiff's promissory estoppel action succeeded at the trial court, but, to their misfortune, lost on appeal. By a sort of reverse-engineering process, we can see that, based *exclusively* on the appellate court decisions, plaintiffs tended to win at the trial level about 70 percent of the time, which can be arrived at by adding together the number of appellate court victories that were also trial court victories (forty-seven) and the number of appellate court losses that were nonetheless trial court victories (sixteen) and dividing by the total number in the data set (ninety). This percentage matches up favorably with the 67 percent win rate discussed in Table II.B, indicating, once again, the viability of promissory estoppel as a cause of action.

TABLE II.D. SUCCESS RATES OF PROMISSORY ESTOPPEL CLAIMS DECIDED BY STATE SUPREME COURTS

Procedural Posture of Plaintiff's Promissory Estoppel Claim	*Success*	*Failure*	*N/A*	*% Success*
Claim Prevailed on Appeal to State Supreme Court after an Appellate Court Judgment on the Merits[101]	5	5	2	
Totals	*5*	*5*	*2*	*50%*

5. Conclusions

Taken as a whole, what do these data signify? These data weigh heavily against the idea that promissory estoppel is an insignificant theory of promissory recovery,[102] and instead show that promissory estoppel, as applied by courts under the Restatement (Second) of Contracts, is a significant form of promissory recovery.[103] Indeed, it is worth emphasizing that promissory estoppel plaintiffs litigating the merits of their dispute do no worse (61.4 percent win rate)[104]—and may even fare better—than plaintiffs litigating the merits of traditional

101. Oddly, five of these ten cases were decided by the Washington Supreme Court, which denied recovery on the promissory estoppel claim in three cases, and did not reach resolution on the other two. If we omit the cases from Washington, which did not seem to be favorably inclined to promissory estoppel claims, we would get a success-to-failure ratio of 5–2, for a success-rate of 71 percent.

102. *See, e.g.*, DeLong, *supra* note 64, at 949–50 ("The rarity of successful claims for promissory estoppel in the sample demonstrates a systematic exclusion of promissory estoppel from the commercial world," and promissory estoppel "has itself been virtually extinguished from much of the commercial landscape by the reactive adaptation of the bar and the bench." Professor DeLong goes on to write: "I contend that there is little reason to regret [promissory estoppel's] demise."); Hillman, *supra* note 57, at 580, 588 (noting that promissory estoppel "seldom leads to victory in reported decisions" and that "[t]he data show a very low success rate of promissory estoppel claims").

103. *See, e.g.*, Farber & Matheson, *supra* note 34, at 905 ("In our view, the expansion of promissory estoppel is not, as some have argued, proof that contract is in the process of being swallowed up by tort. Rather, promissory estoppel is being transformed into a new theory of distinctly *contractual* obligation."); Knapp, *supra* note 11, at 53 (describing the inclusion of promissory estoppel in the Restatement of Contracts as "perhaps the most radical and expansive development of this century in the law of promissory liability"); Yorio & Thel, *supra* note 2, at 111 (noting that § 90 "has had a profound influence on the law of contracts").

104. I arrived at this figure by adding together all of the promissory estoppel cases that were successful on the merits as taken from Tables II.B (18), II.C (55), and II.D (5), and dividing by the total number of promissory estoppel cases decided on the merits as taken from Tables II.B (27), II.C (90), and II.D (10).

breach of contract claims (54.77 percent win rate),[105] regardless of the court hearing the claim.[106]

Although Professor Gilmore, writing in 1974, was undoubtedly premature in announcing that promissory estoppel may "ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation,"[107] there is little question that the explosion of promissory estoppel cases since the publication of the Restatement (Second) of Contracts in 1981,[108] along with the favorable success rates described above, indicates that promissory estoppel is a healthy, vibrant, and significant cause of action that seems to be showing no signs of disappearing in the near future.

C. The Normative Basis of Promissory Estoppel: Promise or Reliance?

Having already examined the success rates of promissory estoppel actions, this section takes a closer look at the data to determine *why* litigants prevailed or failed when they did. To research this issue, I looked at each judicial decision to ascertain, using only the language contained within the judicial opinion, the reasons the judges themselves provided for allowing or denying promissory estoppel claims. The results, as will soon be seen, cut against the "promise hypothesis" advanced by Professors Farber and Matheson, who argued that judges tend to enforce any promise made in furtherance of an economic activity, and instead reveal that judges tend to rely upon a wide variety of factors to determine whether a promissory estoppel action will ultimately succeed or fail.[109]

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105. *See* Hillman, *supra* note 57, at 591 (stating that "win rates of contract claims in federal district courts" is 54.77 percent).

106. *See supra* p. 693 tbl.II.B, p. 695 tbl.II.C, p. 697 tbl.II.D.

107. GILMORE, *supra* note 8, at 90.

108. *See supra* note 83 (discussing how over 12,000 of the more than 13,000 promissory estoppel cases, or 94 percent of *all* promissory estoppel cases, have been decided by courts *since* the Restatement (Second) of Contracts was published in 1981).

109. Cases where the plaintiffs' promissory estoppel claims are unsuccessful are more useful in determining what factors are important to judges than are successful claims. This is because, as the data below will show, many courts that permitted promissory estoppel claims to proceed, despite defendant's attempt to dismiss the action, say something to the effect that the plaintiff has alleged sufficient issues of material facts, without providing specific reasons as to what, particularly, the plaintiff has alleged. Presumably, the judge must have been satisfied that the claimant successfully pled all of the promissory estoppel elements, but without any supporting language, it is difficult to see whether a judge considered one element (such as the promise) more important than another (for example, reliance). Where judges have denied the claimant's promissory estoppel claim, on the other hand, the judge was usually specific as to what, in particular, the court found defective about the plaintiff's allegation. This provides some insight into what that particular judge thought was important about the promissory estoppel claim. To be sure, a court could refuse to allow a case to go forward because the promise, for example, was in some way defective, even though, had the court considered the issue of reliance, it would have found it to be defective as well. Be that as it may, it is still important to look at the reasons

1. Promise vs. Reliance

Table II.E and Chart II.E (below) show, over the entire sample size, all of the reasons the judges in my data set gave for denying promissory estoppel claims.[110] Consistent with the claims made by Professors Farber, Matheson, Yorio, and Thel, these data reveal that the existence of a promise is an important factor that judges often take into account in deciding promissory estoppel cases. More importantly, the data also indicate that other, non-promissory factors play a substantial role in the court's determination of this difficult issue.

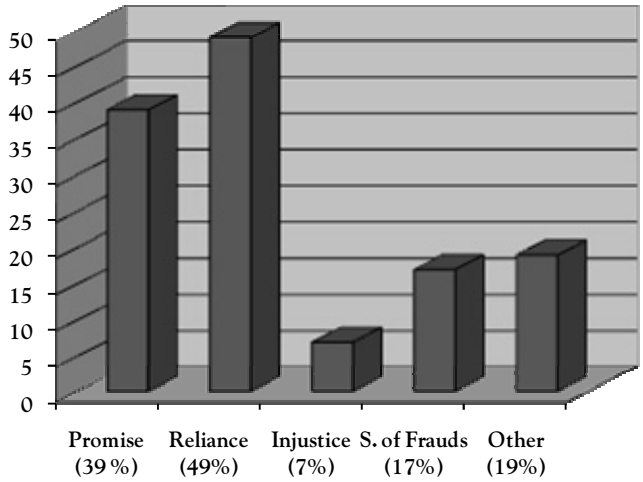
TABLE II.E. REASONS GIVEN FOR DENYING PROMISSORY ESTOPPEL CLAIMS (ALL COURTS)

Reason Given for Denying Promissory Estoppel Claim	*Number of Cases*	*% of Total (155 total failures)*
Promise was defective	60	39%
Reliance was defective	76	49%
There was no injustice	11	7%
Statute of Frauds	26	17%
Other	30	19%

given by the judges themselves for allowing or denying a promissory estoppel claim, because if, as argued by Professors Farber and Matheson or by Professors Yorio and Thel, reliance is a relatively unimportant element in any given promissory estoppel action, whereas the existence of a promise is crucial, then when we examine the judges' decisions, we should expect to see numerous promissory estoppel claims denied because the promise was in some way defective, but very few denied because the reliance was in some way defective. In short, even though judicial language is only one indicator of what was going on in the judge's mind, it is perhaps the most important indicator we have.

110. If a court gave more than one reason for denying a promissory estoppel claim, I have listed each reason in Table II.E and Chart II.E, which is why the total number of reasons given (203) exceeds the total number of cases in which the promissory estoppel claim was ultimately denied.

CHART II.E. REASONS GIVEN FOR DENYING PROMISSORY ESTOPPEL CLAIMS (ALL COURTS)



Looking first at the role of promise, it seems clear that Professor Gilmore was premature in announcing the "Death of Contract" through the strong arm of reliance, which he claimed was so significant that it allowed judges to enforce promissory estoppel claims on the mere "probability of reliance."[111] Rather, these data reveal the considerable importance judges attach to the "promise" prong of the promissory estoppel test.[112] In fact, judges not only cited the existence of a "defective promise" as one of the reasons for denying recovery in 39 percent of all promissory estoppel cases, but, more significantly, in nearly half of these instances judges cited the defective promise as the *exclusive* reason for denying relief.[113]

It is one thing to emphasize the importance of promise in a court's resolution of a promissory estoppel dispute, but it is another thing altogether to suggest that promise is the *only* important element in a court's resolution of

111. GILMORE, *supra* note 8, at 72.

112. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

113. Of the sixty cases in which a defective promise was cited as one of the reasons for denying relief, in twenty-seven instances it was cited as the *exclusive* reason for denying recovery, in twenty-six instances it was cited, along with defective reliance, as the reason for denying recovery, and in the remaining seven instances it was cited, along with another reason (besides defective reliance), as the reason for denying relief.

these disputes, or to claim that courts simply disregard the reliance prong of the promissory estoppel test and enforce "any promise made in furtherance of an economic activity."[114] My data do not support these claims. Rather, the data presented here suggest that both promise and reliance are quite important to most courts deciding promissory estoppel disputes, but that the role played by reliance is slightly more significant than the role of played by promise. As shown in Table II.E, judges cited defective reliance as a reason for denying relief in nearly half of all promissory estoppel cases—more than any other single factor! And, more significantly, these data reveal that, in over half of *these* cases, the court cited defective reliance as the *exclusive* reason for denying recovery.[115]

Therefore, although it may have been true prior to the publication of the Restatement (Second) of Contracts in 1981, it is no longer correct to say, as Professors Farber and Matheson argued, that judges disregard reliance and simply enforce "any promise made in furtherance of an economic activity,"[116] or, as Professors Yorio and Thel argued, that "the basis of [§ 90] *is* promise."[117] By the same token, it is also incorrect to assert, as Professor Gilmore argued, that the principles of promissory estoppel rest so firmly upon the normative bedrock of reliance that even the "probability of reliance" is a sufficient reason to enforce a promise.[118] Rather, the data paint a much more complex and nuanced picture in which certain judges may appear to focus on either promise or reliance as the exclusive reason for denying relief to a promissory estoppel claimant, but where, by and large, most judges seem to take a more balanced approach and ensure that, at a minimum, both promise and reliance are present before granting promissory estoppel relief to a plaintiff.[119]

However, one must be cautious in interpreting these data. It is possible, for example, that a judge may have only cited defective reliance as the exclusive reason for denying relief, not because that particular judge believed the

114. Farber & Matheson, *supra* note 34, at 905, 914 (arguing that judges tend to enforce "any promise made in furtherance of an economic activity" and that "[p]romise making is the linchpin of liability under both traditional contract doctrine and promissory estoppel").

115. Of the seventy-six cases in which defective reliance was cited as one of the reasons for denying relief, it was cited as the *exclusive* reason in forty cases, while in twenty-six instances it was cited, along with a defective promise, as one of the reasons for denying recovery. In the remaining ten cases, defective reliance and some other reason (besides a defective promise) were cited as reasons for denying relief.

116. *See supra* note 114.

117. Yorio & Thel, *supra* note 2, at 114–15.

118. GILMORE, *supra* note 8, at 72 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (1979)).

119. With respect to this finding, Professor Hillman and I are in substantial agreement. *See* Hillman, *supra* note 57, at 618 ("The promise theorists' assertion of the relative unimportance of reliance seems much less persuasive after reviewing the cases and arguments used to support it . . . . An alternative reading of the sample cases suggests the importance of both promise and reliance.").

reliance prong of promissory estoppel to be more important than the promise prong of the test, but because, perhaps, the promise was so obviously present (or, conversely, so obviously absent) from the transaction that it did not need to be addressed by the court, or perhaps because the issue was not itself presented by the parties litigating the dispute.

What we *can* tell from these data, however, is that if a court ultimately denied a promissory estoppel claim *because* a particular prong of the promissory estoppel test—for example, the promise, reliance, or injustice prong—was defective or absent, then that particular prong of the test clearly *must have been* important to *that* particular court. And, interpreting these data in this light, it seems clear that, as a whole, courts did not attach exclusive importance to the promise prong of the promissory estoppel test (as suggested by Professors Farber, Matheson, Yorio, and Thel),[120] nor to the reliance prong of the test (as was suggested by Professor Gilmore),[121] but gave roughly equal weight to each of these factors. This reveals that courts have often taken a much more balanced approach to deciding promissory estoppel claims than they have been given credit for.

2. Injustice

My findings on the rather insignificant role played by the "injustice" prong of the test are even more surprising than the relatively important roles played by the promise and reliance prongs of the promissory estoppel test.[122] This is so because, historically, some founding members of the American Law Institute thought that the injustice prong would play a prominent role in a judge's decision to allow or disallow a promissory estoppel claim.[123] Moreover,

120. The "promise studies" of Professors Farber and Matheson and Professors Yorio and Thel, it will be recalled, announced that "courts enforce 'serious' promises regardless of whether the promisee relied on them." *Id.* at 581–82.

121. See GILMORE, *supra* note 8, at 72, in which Gilmore stated that the mere "'probability of reliance' may be a sufficient reason for enforcement" of a promise.

122. One court thought the "injustice" prong so insignificant that, immediately after citing (in full) § 90(1) of the Restatement (Second) of Contracts, which explicitly includes language stating that a promise should be enforced "if injustice can be avoided only by enforcement of the promise," it nevertheless went on to formulate the test in the following way: "A cause of action based upon the doctrine of promissory estoppel has two elements. The plaintiff must prove that there actually was a promise and that the plaintiff in reliance upon that promise took action to his detriment." Martin-Senour Paints v. Delmarva Venture Corp., 1988 WL 25376, at *2 (Del. Super. Ct. Mar. 14, 1988) (citing Haveg Corp. v. Guyer, 226 A.2d 231, 236–37 (Del. 1967); Metro. Convoy Corp. v. Chrysler Corp., 208 A.2d 519, 521 (Del. 1965)).

123. *See, e.g.*, *Discussion of the Tentative Draft*, *supra* note 26, at 94–95 (relating an exchange between Mr. Coudert and Professor Williston, in which Mr. Coudert claimed that the "true" reason the

even today, many commentators believe that promissory estoppel's roots lie in the equitable doctrine of estoppel,[124] in which justice and a balancing of the equities are of paramount importance.

It is difficult to say why the injustice prong of the promissory estoppel test has played such a limited role for judges deciding these cases.[125] Perhaps some judges simply ignored the Restatement and refused to consider the injustice element at all because they believed that the promise and reliance prongs of the test were much more important.[126] Perhaps some judges believed that, where promise and/or reliance could be shown, the injustice prong of the test would automatically be satisfied because injustice would follow a court's refusal to allow recovery. Or perhaps judges simply felt more at ease, on the whole, with legal terms with which they were comfortable, such as "promise" and "reliance," than with philosophical terms, such as "justice," which have confounded philosophers for millennia. Whatever the reason, for a cause of

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court enforces the promise in the case in which Uncle promised Nephew $1000 to buy a new car "is because justice requires it," and "not because it is a rule of contract law").

124. *See, e.g.*, Midamar Corp. v. Nat'l-Ben Franklin Ins. Co. of Ill., 898 F.2d 1333, 1338 (8th Cir. 1990) ("Since promissory estoppel is an equitable doctrine, the remedy may be such as is necessary to make the injured party whole or 'to secure complete justice.'" (quoting Walters v. Marathon Oil Co., 642 F.2d 1098, 1100 (7th Cir. 1981))); Green v. Interstate United Mgmt. Serv. Corp., 748 F.2d 827, 831 (3d Cir. 1984) ("Section 90 is, of course, an extension of the equitable doctrine of estoppel, 'a flexible doctrine, to be applied . . . as the equities between the parties preponderate.'" (citation omitted) (quoting Straup v. Times Herald, 423 A.2d 713, 720 (Pa. Super. Ct. 1980))); Double AA Builders, Ltd. v. Grand State Constr. L.L.C., 114 P.3d 835, 843 (Ariz. Ct. App. 2005) (noting that "a promissory estoppel claim is not the same as a contract claim," and therefore "provides an equitable remedy" rather than a "theory of contract liability"); BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 323 (2d ed. 2008) (stating that some legal scholars "argue that [promissory estoppel] . . . is (or should be) an independent theory of recovery more akin to tort law or general equitable principles than to contract law"); Knapp, *supra* note 8, at 1334 (describing promissory estoppel as an "equitable doctrine" that can and should be used to "counter-balance the weight of legal rules").

125. The limiting role played by the "injustice" prong is even more surprising when it is recalled that the term "injustice" was specifically included in the search terms used to generate this project's data set, meaning that every judge in every case in this data set had the "injustice" language of § 90 firmly before his or her mind, as they explicitly indicated as much in their written opinions. Nevertheless, only eleven (out of 155) courts that denied a promissory estoppel claim did so for the stated reason that enforcement was not necessary to prevent an injustice!

126. Of the eleven cases that mention the fact that there would be no resulting "injustice" by denying relief, in only three of these cases was the injustice prong cited as the *only* reason for denying relief. *See* State v. First Nat'l Bank of Ketchikan, 629 P.2d 78, 81 (Alaska 1981) (denying relief because enforcement of the promise was not "necessary in the interest of justice"); *In re* Babcock & Wilcox Co., Nos. 00-10992, 00-10993, 00-10994, 00-10995, 2002 WL 1874836, at *6 (E.D. La. Aug. 13, 2002) (noting that the promisee "cannot establish one of the essential elements of promissory estoppel, that the enforcement of [the] promise is necessary to avoid injustice"); Worlds v. Natl. R.R. Passenger Corp., No. 90-C-0643, 1990 WL 129346, at *5 (N.D. Ill. Aug. 24, 1990) (noting simply that relief must be denied because "no injustice resulted").

action that is often thought of as having its roots in equity,[127] it seems somewhat puzzling that judges rarely seem to deny relief on this ground.

3. Statute of Frauds (and Other Contract-Based Defenses)

In some instances, even where all of the elements of promissory estoppel have been satisfied, judges have nevertheless refused to enforce promissory estoppel claims on the grounds that doing so would circumvent some other contract-related defense. For example, the Statute of Frauds requires that certain agreements, such as contracts for the sale of land,[128] service contracts that take longer than one year to perform,[129] and contracts for the sale of goods over $500,[130] be put in writing. Notably, even though the drafters of the Restatement (Second) adopted § 139 to specifically deal with this issue by allowing the enforcement of non-written promises under a theory of promissory estoppel, where the non-enforcement would otherwise lead to an "injustice,"[131] the courts themselves are split on this important issue.[132]

Why is this significant? Back in 1974, Professor Gilmore noted that some of the then-recent cases were "beginning to suggest that liability under § 90 . . . is somehow different from liability in contract," and pointed out that certain contract-based defenses, such as the Statute of Frauds and the parol evidence rule, would not be available in promissory estoppel actions if the promissory estoppel action itself was not thought to be "contractual."[133] In other words, Gilmore was suggesting that, so long as judges were conceptualizing promissory estoppel claims as essentially *contractual* causes of action, it was natural to suppose that traditional, contract-based defenses (such as the Statute of Frauds and the parol evidence rule) would continue to apply (as would

127. *See, e.g.*, Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45, 52 (1996) ("Promissory estoppel's ancient genealogy in equity and common law evidences that the doctrine is an ancient form of consideration predating the modern bargain theory of consideration by about five centuries.").

128. RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(d) (1981).

129. *Id.* § 110(1)(e).

130. *Id.* § 110(2)(a); *see also* U.C.C. § 2-201 (2007).

131. RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only be enforcement of the promise. The remedy granted for breach is to be limited as justice requires.").

132. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 19.48, at 693–95 (6th ed. 2009).

133. GILMORE, *supra* note 8, at 66.

traditional contract-based remedies, such as expectation damages).[134] However, once judges began conceptualizing promissory estoppel actions as non-contractual causes of action, then the entire normative basis upon which promissory estoppel rested would shift, so that traditional contract-based defenses, along with traditional contract-based remedies, would no longer be available. Here, as in other areas, Professor Gilmore's prophesying proved to be extraordinarily prescient.

The data reveal that in twenty-six (or 17 percent) of the cases, relief was denied to a promissory estoppel claimant where he or she was unable to show that the promise being relied upon complied with the strictures of the Statute of Frauds (the relied-upon promise was not in writing). This result only makes sense if promissory estoppel is conceptualized as a "contractual" cause of action, but would defy logic if it is viewed as a distinct, non-contractual theory of recovery.

Notably, in about 8 percent of the cases, the Statute of Frauds was raised as a defense to the enforcement of a promissory estoppel claim, but the defense was found inapplicable, and the action was nevertheless allowed to proceed, in large part because the judge deciding the dispute did not conceptualize the promissory estoppel cause of action as a contractual action.[135] This, of course, indicates that there is something much deeper going on in these cases and that the promissory estoppel action is, in many instances, succeeding (or failing) *not* because the litigants are able (or unable) to satisfy the black-letter prongs of the promissory estoppel test, but because the judge is conceptualizing promissory estoppel in a way that favors (or disfavors) the parties to the litigation before the judge has ever had a chance to hear the litigant's promissory estoppel claim! In short, the seemingly academic questions "*what*, really, is a contract"

134. Professor Gilmore himself noted that this trend could have "interesting ramifications in the development of damage rules." *Id.*

135. *See, e.g.*, Allen M. Campbell Co., Gen. Contractors, Inc. v. Va. Metal Indus., Inc., 708 F.2d 930 (4th Cir. 1983); McCloskey v. Novastar Mortg., Inc., No. 05-1162, 2007 WL 2407103 (E.D. Pa. Aug. 21, 2007); School-Link Tech., Inc. v. Applied Res., Inc., 471 F. Supp. 2d 1101 (D. Kan. 2007); Medesco, Inc. v. LNS Int'l, Inc., 762 F. Supp. 920 (D. Utah 1991); Van Dyke v. Glover, 934 S.W.2d 204 (Ark. 1996); Taylor v. Eagle Ridge Developers L.L.C., 29 S.W.3d 767 (Ark. Ct. App. 2000); Sun-Pacific Enter., Inc. v. Girardot, 553 S.E.2d 638 (Ga. Ct. App. 2001); Hurowitz v. Prime Commc'n, Inc., No. Civ. A. 91-06694, 1994 WL 561834 (Mass. Super. Ct. Apr. 4, 1994); Midwest Energy, Inc. v. Orion Food Sys., Inc., 14 S.W.3d 154 (Mo. Ct. App. 2000); Mazza v. Scoleri, 701 A.2d 723 (N.J. Super. A.D. 1997); Engenius Entm't, Inc. v. Herenton, 971 S.W.2d 12 (Tenn. Ct. App. 1997); Greaves v. Med. Imaging Sys., Inc., 862 P.2d 643 (Wash. Ct. App. 1993); B & W Glass, Inc. v. Weather Shield Mfg., 829 P.2d 809 (Wyo. 1992).

and "*why* should we enforce them" turn out to be of much more practical importance than may have been previously supposed.[136]

This finding not only illustrates the extraordinary role that is (or should be) played by contract theory in what might otherwise be thought of as a traditional, run-of-the-mill case, but highlights the importance of judges coming to grips with this reality in their decisions and acknowledging that their answers to seemingly theoretical questions like "what is a contract" play a significant role in their decisions.[137]

This finding is also relevant because, if this trend continues, courts may be slowly creating a new strain of "super contracts" capable of obtaining for the promisee a more extensive, contract-like remedy for an essentially easier-to-prove promissory estoppel action. In addition to the damage that such an action may inflict on a promisor, in those instances in which a court conceptualizes the promissory estoppel action as non-contractual, the promisor will be without the protection of traditional, contract-based defenses, thus making his or her immunity to this super contract all the more alarming.[138] Although

136. This point was beautifully captured by Professors Blum and Bushaw, who noted that some legal scholars

> argue that [promissory estoppel] is (or should be) a substitute for consideration—that is, an alternative means of determining if a promise is worthy of enforcement as a contract. Others argue that it is (or should be) an independent theory of recovery more akin to tort law or general equitable principles than to contract law. This debate is long-standing, and continues to the current day. This is not simply an academic exercise, fascinating to scholars alone; it potentially has profound real-world implications. If the elements of promissory estoppel merely substitute for consideration, once they are present a contract should be present. This means that all of the trappings that go along with a contract should be present as well. So if particular procedures apply to contract actions but not to others, they should apply to promissory estoppel actions. If certain defenses are available in contract actions but not in others, they should be available in promissory estoppel actions. Or if certain remedies lie in contract actions but not in others, they should lie in promissory estoppel actions. If, on the other hand, promissory estoppel is a separate theory of recovery related to but independent from contract, the trappings of contract law do not necessarily carry over and rules from other areas of law might apply.

BLUM & BUSHAW, *supra* note 124, at 323–24.

137. The important role played by contract theory, and the manner in which judges conceptualize promissory estoppel actions ex ante, will also be illustrated in the next section when I discuss promissory estoppel remedies.

138. *See, e.g.*, Cmty. Bank of N. Ark. v. Tri-State Propane, 203 S.W.3d 124 (Ark. Ct. App. 2005) (rejecting the defendant's argument that the court should only award reliance damages, and affirming the trial court's $12,000 judgment for plaintiff, representing compensatory damages, attorney's fees, and costs). Interestingly, recovery was only allowed here because the court did *not* conceptualize the promissory estoppel action as contractual. Here, the defendant was arguing that the plaintiff should not recover because the condition precedent was not satisfied, which is an absolute bar to recovery under traditional notions of contract law. But the court rejected this argument, noting that "this case was based upon the theory of detrimental reliance," not contract, and that because "[n]either party contended that a contract existed . . . these contract principles [conditions precedent, excuse, and waiver were] irrelevant." *Id.* at 128.

this Article does not take a position on whether, after reasoned reflection and deliberation, such a cause of action might (or might not) be in the best interest of contract law, I do believe that such a change *should* be the product of reasoned reflection and deliberation, rather than being left to the ad hoc and inconsistent conceptualization we are currently witnessing in our courts.

D. A Look at Promissory Estoppel Remedies: Expectation or Reliance?

Last, we turn to remedies. In their 1985 article, Professors Farber and Matheson prominently stated that cases "are heavily weighted towards the award of full expectation damages,"[139] and noted that, of the 72 cases in their data group, in only one-sixth of the cases was "recovery limited explicitly to reliance damages," whereas "[f]ull expectation recovery was granted in the remaining five-sixths of the cases."[140] Professors Yorio and Thel similarly stated that judges do not use § 90 "to compensate promisees for losses suffered in reliance," but to "hold people to their promises by granting specific performance or by awarding expectation damages."[141] As mentioned earlier,[142] however, those previous studies relied on, either in large part (Professors Farber and Matheson) or exclusively (Professors Yorio and Thel), cases decided under the Restatement (First) of Contracts, under which expectation damages were *supposed* to be the default remedy.[143] However, given the significant changes made to the Restatement (Second) of Contracts,[144] and the fact that more than 94 percent of all promissory estoppel cases have been decided since the Restatement (Second) was published in 1981,[145] these early empirical articles may no longer accurately reflect the way judges decide promissory estoppel cases today.

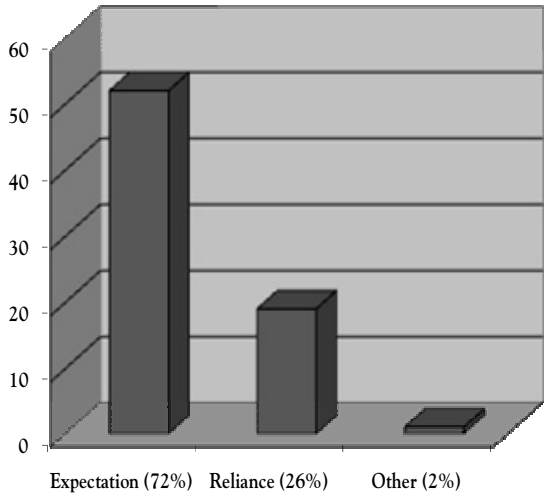
Indeed, the more recent empirical studies examining the remedies awarded under the Restatement (Second) of Contracts have cast a dark shadow over these earlier claims. Professor DeLong, for instance, did not enthusiastically endorse the "expectation hypothesis" of Professors Faber, Matheson, Yorio, and Thel, but instead argued that, according to his research, the evidence in support of expectation damages was, at best, "equivocal."[146] He did state, however, that his research "moderately support[ed the] conclusion" that courts tended to

139. Farber & Matheson, *supra* note 34, at 909.
140. *Id.* at 909 n.24.
141. Yorio & Thel, *supra* note 2, at 112.
142. *See supra* Part I.C.
143. *See supra* note 23 and accompanying text.
144. *See supra* text accompanying notes 46–52.
145. *See supra* note 82.
146. DeLong, *supra* note 64, at 979.

award to successful promissory estoppel litigants "expectation damages or equitable relief such as specific performance or injunction."[147] Professor Hillman, on the other hand, found that "the evidence was not so clear," and noted that his data "tend[ed] to show that from 1994 to 1996 courts were flexible in their awards, sometimes awarding expectancy in the form of damages[148] or specific performance,[149] and sometimes awarding reliance damages."[150]

These conflicting conclusions, of course, beg the following questions: Who is correct? Do courts, following Professors Farber and Matheson, tend to award expectation damages to successful promissory estoppel litigants? Or, following Professor Gilmore, do courts tend to protect the reliance interest instead? As indicated by Chart II.F and Table II.F (below), the data in this study not only strongly support the expectation hypothesis, but indicate, for reasons that will soon be discussed, that these earlier studies may have underestimated the extent to which judges award full contractual damages.

CHART II.F. PROMISSORY ESTOPPEL REMEDIES AWARDED BY ALL COURTS



147. *Id.*

148. Courts awarded expectancy damages 24.14 percent of the time. Hillman, *supra* note 57, at 602.

149. Courts awarded specific performance 3.45 percent of the time. *Id.*

150. Courts awarded reliance damages 24.14 percent of the time. *Id.* In 31.03 percent of Professor Hillman's cases, it was "[u]nclear what was awarded." In 17.24 percent of the cases, no damages were awarded. *Id.* In these instances either the court awarded injunctive relief, or else promissory estoppel was used defensively. *Id.*

Chart II.F graphically represents the type of damages awarded, based on an examination of every promissory estoppel case in the data set in which a remedy was awarded. Expectation damages were the remedy of choice, having been awarded in preference to reliance damages by a fifty-two to nineteen margin, or 72 percent of the time.

Furthermore, Table II.F (below) shows a breakdown of these remedies by the various courts deciding the dispute. These data reveal that trial courts were slightly more willing to award expectation damages than appellate courts, but that, overall, all courts tended to favor awarding expectation damages to reliance damages by a significant margin.

TABLE II.F. PROMISSORY ESTOPPEL REMEDIES AWARDED BY COURT

Court	*Expectation*	*Reliance*	*Other*	*% Expectation*
Trial Court	16	3	0	84%
Court of Appeals	36	14	1	70%
Supreme Court	0	2	0	0%
Totals	*52*	*19*	*1*	*72%*

At first glance, these data seem to support (a slightly weaker version of) the expectation hypothesis advanced by Professors Farber and Matheson, in that these data show that expectation damages were awarded in about seven out of ten cases, or 72 percent of the time, as compared to the figures presented by Professors Farber and Matheson, which indicated that expectation damages were awarded in about five-sixths, or 83 percent, of all cases.

However, I submit that the data presented here not only provide an even stronger endorsement of the expectation hypothesis than first meets the eye, but even provides a stronger justification for contractual damages than was suggested by Professors Farber and Matheson. How? First, as previously discussed, the specific search terms used to generate this Article's data set have been specifically limited to those cases in which judges actually cited, and were therefore aware of, the provision of the Restatement (Second) of Contracts § 90 allowing them to reduce the remedy "as justice requires" and award reliance damages instead of expectation damages. Indeed, not only does such limiting language *not* appear in the original Restatement, but it should be recalled that Professor Williston himself, the Reporter and primary drafter of the Restatement (First) of Contracts, thought that "as a matter of contract law any promise that is legally enforceable at all must be enforceable

to its full extent (through the award of expectation damages), rather than merely to the extent of the promisee's reliance."[151] Therefore, because their data included numerous cases decided under the Restatement (First), it is not surprising that Professors Farber and Matheson found a large number of courts awarding expectation damages. What is surprising, however, is the large number of courts continuing to award expectation damages under the Restatement (Second) of Contracts § 90, in spite of that provision's language specifically allowing judges to limit the remedy "as justice requires."[152]

Second, all of the cases in this data set were decided under the Restatement (Second) of Contracts. This is significant because, as discussed earlier,[153] the Restatement (Second) changed the language of the original Restatement with the specific intent of enhancing the ease with which promissory estoppel plaintiffs would recover[154] and the availability of reliance damages.[155] Therefore, it is somewhat surprising to see that, even under the revised language of the Restatement (Second), and in spite of the fact that every judge in this data set was clearly aware of the fact that reliance damages could (and perhaps *should*, based on the Restatement (Second) of Contract's own limiting language) have been awarded in favor of expectation damages, over 70 percent of all judges *still* awarded expectation damages to successful litigants.

Last, and most significantly, there are important reasons for believing that the traditional classification of promissory estoppel remedies into "expectation" and "reliance" damages does not capture the more important reality concerning whether these remedies are "contractual" or "non-contractual." This is because a plaintiff bringing a cause of action (under any theory of recovery) is little concerned with the label slapped on their remedy by a court or academic commentator. What they *are* concerned about, however, is the total quantum of their recovery, and whether this quantum is maximized. They would happily accept their desired recovery under any label served up by a court. Therefore, the relevant analysis should not focus on the conceptual label ("expectation" or "reliance") attached to a specific remedy, but on the functional manner in which the remedy differs (if at all) from the maximum recovery allowable under any *other* theory of promissory recovery. For reasons that will be discussed in Part III, this Article argues that most judges treat promissory estoppel claims as essentially

151. Eisenberg, *supra* note 1, at 658; *see also supra* notes 25–26 and accompanying text.
152. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).
153. *See supra* text accompanying notes 46–52.
154. The ALI achieved this by dropping the "definite and substantial" language. *See supra* text accompanying note 47.
155. The ALI did this by adding language to the effect that the remedy may be limited as justice requires. *See supra* note 50.

contractual causes of action. This has important implications, not only for the remedies awarded to successful litigants but, as discussed above,[156] for the continued viability of the promissory estoppel cause of action and the types of defenses that may be available.

III. UNMASKING THE EXPECTATION INTEREST: REVEALING PROMISSORY ESTOPPEL'S NEW FACE

As I have argued above, there are better ways of classifying promissory estoppel remedies than by employing the conceptual "expectation" and "reliance" damage labels if we are interested in seeing how promissory estoppel remedies differ, if at all, from traditional contract remedies. This Part develops a new approach by reclassifying each remedy awarded in the data set along functional lines. By doing so, this Article will show that promissory estoppel shares much more in common with traditional contract than is often supposed. But before proceeding, it is important to understand why the traditional conceptual labels do such a poor job of capturing the extent to which promissory estoppel remedies differ from traditional breach of contract remedies.

Although it is *generally* true that an award of expectation damages will exceed an award of reliance damages, there are several instances in which this assumption does not hold.[157] And, where it does not, the classification of a remedy as constituting an award of "reliance" damages, rather than "expectation" damages, is not only a juxtaposition without a difference, but actually obfuscates the true nature of the remedy actually awarded.

Indeed, if we turn to the data, we find numerous cases in which courts awarded successful promissory estoppel litigants with what is described as "reliance" damages. However, in many of these cases, these so-called "reliance" damages can be shown to be identical to, or greater than, the "expectation" damages that would have been awarded as a matter of course to a plaintiff who prevailed under a traditional, consideration-based breach of contract action. Where this is so, it is misleading to follow the court's labeling of these as "reliance" damages because this classification implies that the plaintiff somehow received less than what he or she was entitled to. To be

156. *See supra* Part II.C.3.

157. As early as 1936, in one of the most influential law review articles ever written, Fuller and Perdue recognized that "distinguishing between the reliance and expectation interests" is not always so easy, in that there is "a miscellaneous group of cases which seem equally happy in either category." Fuller & Perdue, *supra* note 20, at 73. Fuller and Perdue went on to note that "in a hypothetical society in which all values were available on the market and where all markets were 'perfect' in the economic sense . . . there would be no difference between the reliance interest and the expectation interest." *Id.* at 62.

sure, were we to interview this plaintiff shortly after the court's decision awarding her "reliance" damages, and were we to ask her if she was satisfied with her remedy, the plaintiff would excitedly explain to us her pleasure at having received the highest remedy available (under any theory of promissory recovery).[158] Indeed, we must never lose sight of the fact that a plaintiff does not sue to obtain a remedy classified in a certain way by a court, an academician, or their lawyer. Just as a rose by any other name would smell as sweet, so too would a plaintiff find her remedy by any other name just as bountiful.[159]

A. Reconceptualizing Promissory Estoppel Remedies

There are at least three situations in which it makes sense to reclassify, along functional lines (that is, as "contractual" or "non-contractual" damages), the manner in which promissory estoppel remedies are currently classified (that is, as "expectation" or "reliance" damages). In each of these instances, the key inquiry is whether the remedy awarded to the promissory estoppel plaintiff differed in any relevant way from the remedy that would have been awarded to this same plaintiff had he or she recovered under a traditional breach of contract action.

1. Where Reliance Damages Are the Only Damages Available

First, there are some instances in which the only damages available to a litigant are "reliance" damages. In such cases, because there is only a single remedy available to the plaintiff, and because this remedy is equal to the remedy the plaintiff would have received under traditional principles of contract law, it makes little difference to the plaintiff how this remedy is labeled by a court. Therefore, in trying to account for the differences between promissory estoppel and traditional breach of contract remedies, we ought to treat such a remedy as every bit as "contractual" as if it had been awarded to a plaintiff recovering under a traditional, breach of contract claim.

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158. Professor Michael Kelly argues that courts appear to protect the reliance interest in many situations in which expectation damages were simply not available because they could not be proven with reasonable certainty. According to Professor Kelly, however, even in those cases courts are really protecting the expectation interest because, when damages cannot be proven with reasonable certainty, courts are presuming a profit of zero. *See* Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755.

159. *See* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, ll. 43–44 ("What's in a name? that which we call a rose / By any other name would smell as sweet.").

Consider, for instance, *Paoli v. Whispering Pines*,[160] in which the remedy originally awarded by the court was classified as constituting an award of "reliance" damages, but where there were no identifiable "expectation" damages to speak of, and where the plaintiff recovered the most she could have recovered under *any* theory of promissory recovery, including a traditional, breach of contract action. In *Paoli*, the plaintiff purchased a mobile home from a third party who had failed to pay rent to the defendant, the owner of the lot on which the mobile home sat. Prior to the plaintiff's purchase, a court found that the plaintiff did not have the right to keep her mobile home on the defendant's lot. The plaintiff then met with an agent of the defendant, who, after consulting with an attorney, assured her that she would be given a reasonable amount of time in which to enter the defendant's property to remove her mobile home. Pursuant to this agreement, the plaintiff then paid a third party, Mr. Edwards, $275 to enter defendant's property to remove the mobile home. However, just three days after the plaintiff reached her agreement with the defendant, the defendant, without notice, removed the plaintiff's mobile home, and the plaintiff filed suit to recover the $275.

In its decision, the court began by acknowledging that "recovery under promissory estoppel 'may be limited as justice requires,'"[161] and that "the Court may grant damages based on either the aggrieved party's expectation or reliance interest,"[162] which dramatically set the stage by indicating that the court was preparing to choose between these two measures of damages. The court went on to note that, here, "the equities of this case do not justify an award of expectation damages"[163] and, as a consequence, that "the Plaintiff's damages are limited to her reliance interest."[164] Based on the court's own language, this case seems, at first glance, to illustrate a clear situation in which a judge is being confronted with a choice between expectation and reliance damages and is opting for the latter over the former. As a researcher deciding whether to label this case as one in which the judge has awarded expectation or reliance damages, one would be hard pressed, in light of the court's own language, to argue that this case should be classified under the expectation measure of damages, and so, in Table II.F, I classify this case under the heading "reliance damages." However, such a classification does not squarely address the issue with which we should *really* be concerned: Are these damages *contractual*, or are they something else?

160. No. 01-06-102, 2006 WL 2165690 (Del. Com. Pl. July 31, 2006).

161. *Id.* at *3 (quoting Ramone v. Lang, No. Civ.A. 1592-N, 2006 WL 905347, at *16 (Del. Ch. Apr. 3, 2006)).

162. *Id.*

163. *Id.* at *4.

164. *Id.*

Although the court noted "that the equities of this case do not justify an award of expectation damages and the Plaintiff's damages are limited to her reliance interest,"[165] this language is misleading for several reasons. First, the plaintiff got exactly the $275 that she sought.[166] And, from her perspective, it was irrelevant whether the court classified these damages as "expectation" or "reliance" damages, or described them with any other label; the only thing that would matter to her is the *amount* of her recovery, and not the *label* used by the court to describe this recovery.

Second, and more importantly for purposes of the analysis here, the amount of damages that the plaintiff received could not have been greater under any other theory of promissory recovery, and would have been identical to the amount she would have received had there been a valid, written, consideration-based contract between her and the defendant.[167] Stated differently, had the landlord's promise to allow her to remove her mobile home been in writing, rather than oral, and had the plaintiff brought her claim under traditional breach of contract principles, her damages, however labeled by the court, would have still been $275. For this reason, these damages are better classified *not* as "reliance" damages, which is a conceptual label used by courts suggesting that the plaintiff somehow got something less than her full expectancy, but as "contractual" damages, a more functional label indicating that the damages awarded were not only identical to the damages she desired, but also identical to the damages she would have been awarded had there been a traditional, consideration-based contract. In short, the damages received by the plaintiff could have been no greater under any other theory of recovery. And this, to the plaintiff, is the most important fact.

2. Where Reliance Damages Equal Expectation Damages

Second, there are some cases in which the remedy that would have been awarded under an expectation measure of damages is identical to the remedy that was actually awarded under a reliance measure of damages.[168] In such a

165. *Id.*

166. The plaintiff also received post-judgment interest on the $275 and court costs. *Id.*

167. The plaintiff also brought a claim against the defendant for breach of contract, but this claim was denied by the court because there was no consideration to support the promise, in that the promisor/defendant did not receive "a benefit in exchange for its promise to permit her to enter the lot," and the promisee/plaintiff did not "incur[ ] a detriment at the Defendant's request." *Id.* at *3.

168. Professors Farber and Matheson recognized this possibility as early as 1985 but did not further develop their analysis in the manner it has been presented in this Article. *See* Farber & Matheson, *supra* note 34, at 909 n.24 ("Depending on how the expectation and reliance interests are conceptualized, the two measures may tend to produce the same results. The reliance and expectation measures converge, for example, in the typical subcontract-bidding case." (citations omitted)).

case, it again makes little sense to classify such a remedy for research purposes as "reliance" damages simply because the court classified the remedy in such a manner. Here, as before, the remedy actually awarded should be thought of as "contractual" in every sense of the word because the remedy awarded by the court is identical to the remedy that would have been awarded to a similarly situated plaintiff bringing a traditional breach of contract action.

Consider, for example, *Construction Coordinators Unlimited Inc. v. Cmiel*,[169] in which a development company hired the plaintiff, a construction management company, for a construction project that was never completed. The developers did not pay the plaintiff for services rendered, so the plaintiff took out a mechanic's lien on the developers. The parties then entered a structured settlement agreement, pursuant to which the developers made the first payment. However, although the plaintiff subsequently removed the mechanic's lien, the developers never made the second payment. The plaintiff then brought suit, asking the court for damages for the pre-construction management and land planning services. The court denied the plaintiff's request, awarding them the amount due from the settlement agreement, but not the potential expectation damages they could otherwise rationalize under the terms of the original agreement. In dicta, the court noted that expectation damages under the original agreement could not be based upon speculative figures.

Nevertheless, despite the court's language, the damages actually awarded here were fully contractual. Although, it is true, the damages actually awarded did not reflect the expectation measure of damages, the relevant inquiry ought to focus instead on whether the damages actually awarded differed from the remedy that would have been awarded had there been a traditional, bargain-based contract. In this case, the answer is clearly no. The court said in its opinion that expectation damages were inappropriate under *any* theory of promissory recovery because "the damages claimed [were] speculative and based on conjecture."[170] Stated differently, such damages would have been inappropriate, even under traditional principles of contract law, due to the requirement that damages be foreseeable[171] and certain.[172] As a result, the

169. Constr. Coordinators Unlimited Inc. v. Cmiel, No. CV-90-0439047-S, 1994 WL 506689 (Conn. Super. Ct. Aug. 26, 1994).

170. *Id.* at *3.

171. As explained by E. Allan Farnsworth:

> The Second Restatement states: "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." It adds that loss may be foreseeable if, as under the first rule of *Hadley v. Baxendale*, it follows "in the ordinary course of events" or if, as under the second rule, it follows "as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."

maximum remedy the plaintiff could have recovered had there been a traditional, bargain-based contract would have been the exact amount of damages recovered here, under a theory of promissory estoppel. Therefore, in this case, and in others like it, it makes sense to analyze the remedy according to whether it is "contractual" or "non-contractual," as opposed to whether the court happened to classify it as an award reflecting "expectation" or "reliance" damages.

3. Where Reliance Damages Exceed Expectation Damages

Finally, where reliance damages exceed expectation damages, a rational plaintiff will request the more generous remedy. This is true whether she brought her action under traditional, bargain-based contract principles or under a theory of promissory estoppel. Therefore, where reliance damages exceed expectation damages, we ought to pay little attention as to how such a remedy is initially labeled by a court, and should ask instead whether the remedy was or was not the most that could have been awarded to the plaintiff under any theory of recovery. Where this is so, one ought to classify such a remedy as fully contractual.

Consider, for instance, *Conradi v. Eggers Consulting Co.*,[173] in which the plaintiff brought a promissory estoppel cause of action against the defendant, seeking damages for detrimental reliance on a promise of employment. Here, the plaintiff met the defendant's president while working at her job in Seattle, during which the president offered to bring her to Nebraska to work for his company. Before accepting, the plaintiff told the president that she would like to first have the offer put in writing, and, pursuant to this request, the president subsequently sent her a written offer indicating that her salary would be $50,000 per year, with a change to commission after one year. The plaintiff subsequently accepted the offer, leaving her job in Seattle, and passing up an opportunity to be a manager at a higher salary than she was previously making.

On her first day at her new job in Nebraska, however, the trainer presented her with several different forms to sign, including a non-compete agreement that would force her to sign a $85,000 promissory note, as well as a commission

E. ALLAN FARNSWORTH, CONTRACTS § 12.14, at 794–95 (4th ed. 2004) (footnote omitted) (quoting RESTATEMENT (SECOND) CONTRACTS § 351 (1981)).

172. *See, e.g.*, *id.* § 12.15, at 800 ("[T]he doctrine [of certainty] required damages for breach of contract to 'be shown, by clear and satisfactory evidence, to have been actually sustained' and to 'be shown with certainty, and not left to speculation or conjecture.'" (citing Griffin v. Colver, 16 N.Y. 489, 491 (1858))). This requirement of certainty imposes severe limitations on the recovery potential of lost profits on collateral transactions. *Id.* § 12.14, at 797–98.

173. No. A-02-852, 2004 WL 51208 (Neb. Ct. App. Jan. 13, 2004).

agreement, neither of which had been discussed during her original negotiations with the president. She refused to sign both documents, and was told that she could not work there if she did not sign them. The plaintiff still refused and was forced to find work elsewhere. Although there was not a written contract, the plaintiff brought suit under a theory of promissory estoppel for wages lost as a result of her reliance on the president's promise in the letter. After a jury trial, she was awarded $24,600—representing her lost wages until the time of trial, which was, significantly, calculated by determining the amount she would have made as a manager (the promotion she would have gotten) at her previous job, less the "mitigating wages" she earned at her subsequent jobs—and the appellate court affirmed.

At first glance, one could argue that the reliance-based figure actually awarded represents non-contractual reliance damages, in that here an award of expectation damages would have given her the difference between the salary she would have made not at her old job, but at her new job (less her salary from whatever substitute employment she was able to find). This was the reasoning of the appellate court, which stated that promissory estoppel provides for "damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain."[174] The court also noted that "[t]he usual measure of damages under a theory of promissory estoppel is the loss incurred by the promisee in reasonable reliance on the promise, or 'reliance damages.'"[175] On this reasoning, the court affirmed the jury award of $24,600.

Why, then, is it misleading to characterize the remedy here as "reliance" damages? Because, as will be shown, the plaintiff could not have done better under *any other theory* of promissory recovery, and she received $24,600, exactly equal to the amount she requested.

Recall that her Nebraska job offer was an offer for an at-will position, meaning that, had she ultimately been hired, she could have been fired the next day.[176] In such a case, her expectation damages would have been her lost salary for this single day of work. More formally, the amount of money she could obtain under an expectation measure of damages would have been the amount of money she would have made at her new job, calculated with a reasonable degree of certainty, less any amount she could have made by finding

174. *Id.* at *8.

175. *Id.*

176. *See, e.g.*, MARK A. ROTHSTEIN, ANDRIA S. KNAPP & LANCE LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 738 (1987) ("[A]ny hiring is presumed to be 'at will;' that is, the employer is free to discharge individuals 'for good cause, or bad cause, or no cause at all,' and the employee is equally free to quit, strike, or otherwise cease work.").

substitute employment elsewhere.[177] Because her employment was at-will, however, the amount she could prove she would have made with a reasonable degree of certainty would have been $0, less the amount she would have made elsewhere (presumably greater than $0), resulting in a net recovery of $0.

Here, then, the reliance measure of damages exceeded the expectation measure by a significant amount. For this reason, any rational plaintiff would have done what the plaintiff did here and request the higher amount. This case demonstrates how misleading it can be to treat such a remedy, for the purposes of this study, as one in which a court awards "reliance" damages, because such a label would lead the reader to believe that the plaintiff somehow got less than she would have under traditional contract law principles. In reality, however, nothing could be further from the truth, as the plaintiff would actually do *better* by obtaining what would, at first glance, appear to be a smaller remedy. Further, because a plaintiff with similar facts bringing a traditional breach of contract action would have also requested reliance damages in lieu of expectation damages, such a remedy is, in every meaningful sense of the word, "contractual," and ought to be labeled as such. Thus, we have yet one more instance[178] in which it is more accurate to classify the remedy as a contract equivalent.[179]

177. *See, e.g.*, Toscano v. Greene Music, 124 Cal. App. 4th 685, 689 (Ct. App. 2004) (holding that the plaintiff may recover lost future wages from a former at-will employer under promissory estoppel only if such damages are not speculative and can be proven with a reasonable degree of certainty; but not affirming the damages award based on future wages to be earned from the at-will employer because such damages were speculative).

178. There are many other cases that fall under this category. While I will explore this issue in greater depth in the next section, one more case should suffice to show how misleading it may be to classify the remedies in cases as constituting "reliance damages" or "expectation damages" rather than "contractual damages" or "non-contractual damages." In *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981), a pharmacist brought an action against a health clinic that had offered him employment but revoked the offer before he began and requested damages that were caused as a result of him quitting his previous job and turning down other employment in reliance on the clinic's offer. Although the case was ultimately reversed and remanded for a new trial on the issue of damages, the appellate court stated that "the measure of damages [to be awarded on remand] is not so much what he would have earned from respondent as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere." *Id.* At first glance, the remedy that will be awarded on remand will reflect the reliance measure of damages, and this case was therefore originally classified in Table II.F as one in which reliance damages were awarded. However, for reasons that have just been discussed, because this is an at-will-employment case, the plaintiff would be much better off requesting reliance damages under any theory of recovery, and an award of such damages would constitute a contract equivalent.

179. This will usually be the case whenever the employment at issue is at-will. A similar point was made by Professors Farber and Matheson, who stated that, where the employment is at-will, "the reliance measure of damages is the best approximation of the parties' expectations." Farber & Matheson, *supra* note 34, at 909 n.24.

4. Conclusion

In each of the previously discussed cases we have seen that the court's classification of the remedies awarded as "reliance" damages was misleading because each classification suggested that the plaintiff recovered something less than full contractual damages, even though, upon closer reflection, that simply was not the case. Indeed, in such instances, the remedy actually awarded to the successful plaintiff was every bit as "contractual" as the remedy that would have been awarded to that plaintiff had there been a traditional, bargain-based contract.[180] Therefore, we need a new method for classifying the data in order to see the manner in which plaintiffs recovering under a theory of promissory estoppel compare to those plaintiffs recovering under traditional, breach of contract principles. The results, as will be seen in the next section, indicate that plaintiffs often fare just as well under a theory of promissory estoppel than they would have under traditional, consideration-based contracts.

B. A Second Look at Promissory Estoppel Remedies: Contractual or Non-Contractual?

As discussed above, because many remedies initially classified by courts and commentators as constituting "reliance" damages are, in fact, equivalent to or greater than the "expectation" damages a promisee would have received under traditional contract law principles, it seems appropriate, in such instances, to reclassify these remedies not according to the traditional labels "expectation" damages and "reliance" damages, but according to the more functional labels

180. Both Professors Farber and Matheson and Professor Hillman also acknowledged the fact that, in many cases, expectation and reliance damages may converge, but never took account of this fact in their data to determine how judges actually awarded damages.

> Depending on how the expectation and reliance interests are conceptualized, the two measures may tend to produce the same results. The reliance and expectation measures converge, for example, in the typical subcontract-bidding case. The argument can also be made that the reliance interest may often best be protected by an expectation measure of damages. Conversely, there are cases in which the reliance measure of damages is the best approximation of the parties' expectations. This is the case, for example, when a promise to hire an employee on a terminable-at-will basis is breached.

Id. at 909 n.24 (citations omitted); *see also* Hillman, *supra* note 57, at 601 (noting that his data reporting the rates at which courts awarded expectation damages might be "inconclusive" because: (1) "it is often difficult to determine the nature of the remedy awarded"; (2) "courts often talk expectancy or reliance in situations where the remedies are identical"; (3) "some appellate decisions affirm promissory estoppel claims, but the remedies granted appear to be based on another theory of recovery"; and (4) "the remedial approach of the courts is inconclusive because courts sometimes appear to restrict the recovery to that requested by the claimant, either reliance or expectancy").

"contractual" and "non-contractual" damages.[181] By doing so, one can gain a better understanding of the way in which promissory estoppel remedies differ, if they differ at all, from traditional contract remedies. Accordingly, I have gone through each case and reclassified the remedies in this manner by comparing the remedy that was actually awarded to the remedy that would have been awarded had there been a traditional, consideration-based contract. As discussed below, the results reveal that contractual recovery is available to successful promissory estoppel litigants much more frequently than has been previously thought. This challenges the notion that promissory estoppel remedies are somehow different than traditional, breach of contract remedies, and also calls into question the idea that the promissory estoppel cause of action is somehow distinct from traditional notions of contract law.[182]

Turning first to the trial courts, of the nineteen cases in which a trial court awarded a remedy, "expectation" damages were awarded in sixteen of those cases,[183] and "reliance" damages were awarded in the remaining three.[184] However, in one case,[185] the court initially classified a remedy as constituting an award of "reliance" damages that would have been better classified as "contractual."[186] If we reclassify the remedies according to whether they were contractual or not, the actual number of cases in which contractual damages were awarded is seventeen, rather than sixteen, and the percentage of cases in which contractual damages were awarded constitutes an impressive 89 percent of the cases.

Similarly, turning to the appellate courts, judges used language suggesting an award of expectation damages in thirty-six cases and reliance damages in fourteen cases; in one case, it was difficult to determine what remedy was awarded by the court.[187] However, if we jettison the court's "expectation" vs. "reliance" classification, and instead seek to understand these remedies functionally, according to whether they are "contractual" or "non-contractual," we find that, of the fourteen cases that initially appeared to award reliance damages,

181. *See, e.g.*, Constr. Coordinators Unlimited Inc. v. Cmiel, No. CV-90-04390470-S, 1994 WL 506689 (Conn. Super. Ct. Aug. 26, 1994) (discussed *supra* in text accompanying notes 169–172); Paoli v. Whispering Pines, No. 01-06-102, 2006 WL 2165690 (Del. Com. Pl. July 31, 2006) (discussed *supra* in text accompanying notes 160–167); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981) (discussed *supra* in text accompanying note 178); Conradi v. Eggers Consulting Co., No. A-02-852, 2004 WL 51208 (Neb. Ct. App. Jan. 13, 2004) (discussed *supra* in text accompanying notes 175–180).

182. Whether the default measure of damages for promissory estoppel actions *ought* to be contractual, however, will be examined in a future Article.

183. *See supra* p. 709 tbl.II.F.

184. *See supra* p. 709 tbl.II.F.

185. *See Paoli*, 2006 WL 2165690.

186. *See supra* text accompanying notes 160–167.

187. *See supra* p. 709 tbl.II.F.

nine[188] actually awarded a "contract" equivalent. In fact, when looked at as a percentage of all cases decided by the appellate courts, the data reveal that in 90 percent of the cases the court awarded the same or greater remedy to a promissory estoppel plaintiff than it could have awarded to a similarly situated plaintiff bringing a traditional breach of contract action!

And last, although there were only two cases decided at the state supreme court level, in each of these cases the court initially classified the remedy as constituting an award of reliance damages. However, in one of these cases,[189] the remedy actually awarded can be better classified as a contract equivalent, bringing the percentage of cases in which a contract equivalent was awarded from 0 percent to 50 percent.

The reclassified data, reported below in Table II.G, puts into sharp focus the extent to which promissory estoppel remedies, and perhaps the promissory estoppel cause of action itself, is treated by courts as "contractual."

TABLE II.G. NUMBER OF CASES IN WHICH A "CONTRACTUAL" REMEDY WAS AWARDED TO THE PROMISSORY ESTOPPEL LITIGANT (ALL COURTS)

Court	*Contractually Equivalent Remedy*	*Non-Contractual Remedy*	*Other*	*% of Contractual Remedies*
Trial Court	17	2	0	89%
Court of Appeals	45	5	1	90%
Supreme Court	1	1	0	50%
Totals	*63*	*8*	*1*	*89%*

When I initially discussed these data in Part II.D, I said that the cases offered strong evidence in support of the expectation hypothesis, especially because, unlike the original studies performed by Professors Farber, Matheson, Yorio, and Thel, all of the cases in my data set were pulled from cases decided under the Restatement (Second) of Contracts.[190] However, once reclassified,

188. Midamar Corp. v. Nat'l Ben Franklin Ins. Co. of Ill., 898 F.2d 1333 (8th Cir. 1990); State Mech. Contractors, Inc. v. Vill. of Pleasant Hill, 477 N.E.2d 509 (Ill. Ct. App. 1985); Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644 N.E.2d 118 (Ind. 1994); Ritchie Paving, Inc. v. City of Deerfield, Kan., 67 P.3d 843 (Kan. 2003); Grouse v. Group Health Plan, Inc., 306 N.W.2d 114 (Minn. 1981); Board v. Simmons Indus., Inc., No. C3-94-116, 1994 WL 454738 (Minn. Ct. App. Aug. 23, 1994); Conradi v. Eggers Consulting Co., No. A-02-852, 2004 WL 51208 (Neb. Ct. App. Jan. 13, 2004); Arasi v. Neema Med. Serv., Inc., 595 A.2d 1205 (Pa. Ct. App. 1991); Andreasaon v. Aetna Cas. & Sur. Co., 848 P.2d 171 (Utah Ct. App. 1993).

189. Wilson v. L.A. County Metro. Trans. Auth., 1 P.3d 63 (Cal. 2000).

190. *See supra* text accompanying notes 151–155.

these data paint an even more convincing portrait of the expectation hypothesis than that suggested by Professors Farber and Matheson themselves. The data above reveal that the number of instances in which a "contractual" remedy was awarded to a successful promissory estoppel litigant, across all courts, approaches 90 percent! These data then suggest that most judges think of, and therefore treat, promissory estoppel actions as *contractual* causes of action, even under the Restatement (Second) of Contracts.

CONCLUSION

So what do these data, viewed collectively, tell us about the action of promissory estoppel? First, the prevalence and viability of promissory estoppel has grown in recent decades, both in regard to the number of cases that are being brought and in terms of the success rates of the promissory estoppel actions themselves. Promissory estoppel is, to borrow a phrase from Professors Farber and Matheson, "no longer a fallback theory of recovery."[191]

Second, promissory estoppel cannot be thought of exclusively as either a promise-based or reliance-based theory of recovery. Instead, courts have been much more even handed in their approach, usually making sure that a promissory estoppel plaintiff has satisfied both the promise and reliance prongs of the test, although they have been much more hesitant in requiring a showing of injustice before enforcing the promise. The reasons for this, while uncertain, are fascinating: They reveal that, even if the roots of promissory estoppel were once embedded in the older doctrine of equitable estoppel, promissory estoppel has now freed itself from this equitable chrysalis and emerged as a fully independent—and distinct—theory of promissory recovery.

Third, consistent with the claims made by Professors Farber and Matheson, the percentage of claimants who receive full contractual damages is much higher than has been previously thought. This reveals that, for better or worse, many judges are conceptualizing promissory estoppel actions as fully contractual causes of action. However, because promissory estoppel actions are generally easier to prove than traditional breach of contract claims, such a move seems to be creating a new type of "super contract" capable of prevailing more frequently and easily than traditional contracts, extracting from defendants a higher (contractual) amount of recovery and avoiding traditional contract-based defenses, such as the Statute of Frauds and the parol evidence rule.

However, the fact that this is not always so points to an even darker side of this research. A court's tendency to conceptualize promissory estoppel in a

191. *See* Farber & Matheson, *supra* note 34, at 908.

certain way ex ante (that is, as contractual or non-contractual), before having ever heard the facts of the case, seems to have a pronounced effect on the way judges ultimately decide such cases. However, there does not seem to be any rhyme or reason as to why a judge conceptualizes a promissory estoppel case one way or another. And this, of course, is troubling, because promissory estoppel has an uncanny ability to disguise itself as "contractual" in some instances and "non-contractual" in others. This means that a judge's ex ante conceptualization of this chameleon-like cause of action has a marked effect on the ex post remedies available to the promissory estoppel litigant, and on whether such traditional, contract-based defenses will apply to preclude the action from going forward.

Although this conclusion is troubling, it does dramatically highlight the important role played by contract theory, which is always operating just beneath the surface of these cases, whether or not judges are willing to grapple with it, or even acknowledge its existence. Indeed, if anything, these data suggest that our law would be much the better if this conceptualization was directly acknowledged so that its inner workings could be made more transparent and, in the process, more just. Until this is done, however, our justice system must be content with the troubling fact that similarly situated plaintiffs with similar facts may obtain vastly different outcomes based not on the merits of their case, nor on the black letter law, but on the way a judge conceptualizes a promissory estoppel cause of action before having ever heard the case. This method of deciding cases is not only unfair to litigants; it is bad for the integrity of our law.

Because of this, important theoretical work still needs to be done in this area, and judges need to be made aware of such work, if only so that they are cognizant of the assumptions many are themselves bringing with them to the bench.[192] This theoretical work must begin with the simple but profound question: Is the action of promissory estoppel, at its core, an essentially contractual or non-contractual cause of action?[193] However, the answer to this question

192. Knapp, *supra* note 8, at 1334 ("For our contract law system to work properly, it cannot consist only of law, any more than it could consist only of equity. Equity without law would be tyranny indeed—shapeless, unpredictable, reflecting nothing more than the judge's personal predilections. But in the contract area . . . law without equity can be tyranny, too . . . . With the aid of equitable doctrines like promissory estoppel to counter-balance the weight of legal rules, the courts in this area can continue the never-ending process of tightrope-walking that is contract decision-making. Without them, we are back where we were a century ago.").

193. I have posed this question to many of my colleagues and am always struck by the rich diversity of the answers given, ranging from "definitely yes," to "definitely no," to the ubiquitous "it depends." A survey of the leading contracts casebooks reflects a similar trend, and if scholars who devote their lives to contract law cannot agree on a shared definition of promissory estoppel, it should come

will, by and large, be determined by the answer to an even more profound question: What is a contract?[194] If we define a contract as an enforceable promise, as do both Restatements of Contracts,[195] then clearly the action of promissory estoppel is contractual, as it provides a method by which a court may enforce the promise(s) of one or more parties. But if we define a contract as something else, perhaps as many first-year law students in America are taught, as constituting an offer plus acceptance plus consideration, then promissory estoppel clearly seems to fall outside of the contours of contract law. Indeed, it is not the purpose of this Article to examine such questions,[196] but they must still be raised. After all, the way in which a judge asks these questions will likely change the way he or she reads, and decides, his or her next promissory estoppel case.

as little surprise that judges, who cannot afford to specialize in a particular area of the law, but must be familiar with the entire body of law as a whole, exhibit similar confusion.

194. For great entertainment, ask this question to a group of contract law scholars and observe the ensuing chaos. It is remarkable to note that, even for those of us who teach in this area, it is nearly impossible to reach an agreement on this most basic definition.

195. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 1 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (defining a contract as "a promise or a 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").

196. I plan to examine both questions in a future article.