Promissory Estoppel's Avoidance of Injustice and Measure of Damages: The Final Frontier

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PROMISSORY ESTOPPEL'S AVOIDANCE OF INJUSTICE AND MEASURE OF DAMAGES: THE FINAL FRONTIER

By Tory A. Weigand

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1 The author is a Partner at Morrison Mahoney LLP.
I. INTRODUCTION

Promissory estoppel’s voyage has been transformative. Birthed as an equitable defensive rule of evidence and shield requiring willful intent, it migrated to an affirmative sword rendering certain discrete promises binding. Its fundamental essence, detrimental reliance, in turn, both predated and later provided relief from bargained-for exchange and its perceived restrictiveness. It is now a full-fledged independent cause of action applicable to any sufficient “promise.” It proclaims equal stature with bargained for obligation, yet remains unshackled from mutuality of bargain or assent and can provide relief from such venerable protections as the statute of frauds, 2 statute of limitations, and the parol evidence rule. 3 To some, it is appropriately poised to assume a plenary position providing affirmative relief based on reliance in the name of “fairness” and “justice.” 4 To others, it represents “an internal contradiction” 5 serving to wrongly obliterate the sanctity of bargain with its adoption and “aftershocks [leaving] us in theoretical chaos.” 6


3 See Michael B. Metzger, The Parol Evidence Rule: Promissory Estoppel’s Next Conquest?, 36 VAND. L. REV. 1383, 1403-08 (1983) (looking towards future of parol evidence); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280, 284 (7th Cir. 1972) (evaluating application of parol evidence and promissory estoppel), overruled by, Sunstream Express, Inc. v. Int’l Air. Serv. Co., 734 F.2d 1258 (7th Cir. 1984); Prudential Ins. Co. v. Clark, 456 F.2d 932 935-37, (5th Cir. 1972) (analyzing promissory estoppel’s effect on parol evidence rule); see also Weiss v. Smulders, 96 A.3d 1175, 1195 (Conn. 2014) (holding parol evidence rule did not apply to promissory estoppel claim).


5 Juliet Kotrinsky, The Rise & Fall of Promissory Estoppel or is Promissory Estoppel As Unsuccessful as Scholars Say It Is?, 37 WAKE FOREST L. REV. 531, 535 (2002).

6 Eric Alden, Rethinking Promissory Estoppel, 16 NEV. L. J. 659, 661, 666 (2016) (arguing promissory estoppel created uncertainty, and “introduced significant... unresolved theoretical instability into American contract law.”). Alden further stipulates that promissory estoppel must be severely limited and applicable only to limited categorical exceptions to the consideration requirement. Id.; see also 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
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Amidst the rancor, the applicable remedy, as well as the doctrine’s “avoidance of injustice” component, have received limited to no meaningful attention. The result has left open questions including whether avoidance of injustice is a substantive element separate and distinct from promise and reliance; whether it provides a limiting or robust remedial function; whether the applicable remedy is one of contractual expectation or reliance; and whether the injustice element and measure of damages are for the court or jury to determine. Underlying these issues is the ever present and fundamental tension between whether the doctrine should be centered on the enforcement of promises or the protection of reliance. Looming is the penultimate question of whether the doctrine’s evolution includes a final “pure equity phase” wherein the principles of estoppel, contract, and tort merge to rectify perceived wrongs based on “fairness” and “justice” or, to the contrary, the doctrine must be confined to the domain of extraordinary circumstances given the importance of freedom of contract and mutual assent. This article reviews the history and development of promissory estoppel in Massachusetts including the various views as to both the appropriate remedy and the meaning and implementation of the injustice element. It likewise proposes a construct for addressing these issues.

II. RELIANCE AND MUTUALITY

The term “promissory estoppel” first appeared in Professor Samuel Williston’s 1920 treatise on contracts. Williston intended the term to


7 See Holmes, supra note 4, at 56 (emphasizing fairness and justice); see also Michael B. Metzger & Michael J. Phillips, The Emergence of Promissory Estoppel as an Independent Theory of Recovery, 35 Rutgers L. Rev. 472, 509-11, 547 (1983) [hereinafter Metzger & Phillips] (defining promissory estoppel as tort-like remedy designed for compensation of reliance).

8 See Alden, supra note 6, at 704-06 (addressing future of contract law).

9 Professor Samuel Williston taught contracts at Harvard Law School from 1890 to 1938.

differentiate between reliance on a factual misrepresentation as a means of negating the denial of the truth of the representation from reliance on a gratuitous promise, which could be used offensively to create a binding promise. The notion evolved as a means to avoid results that were deemed unjust and harsh in certain cases lying on the outskirts of contract, such as gratuitous promises, charitable subscriptions, and intra-family gifts and other similar promises. The objective was to allow for reliance to substitute for consideration in such un-bargained for transactions. It provides relief from the perceived shortcomings of formal contract principles. Due to Williston’s influence, the principle made its way into the First and Second Restatement of Contracts, whose provision (Section 90) is one of the most widely cited sections of the seminal work.

Although “reliance” was the binding element of the doctrine, Williston viewed the fundamental purpose to protect and serve the underlying promise, not the activating reliance. Substantial reliance upon a promise reflected the seriousness and quality of the promise. Reliance had historically been one of two legs to consideration and thus justified enforcement to the same extent as bargained contracts. Notably, the drafters of the Restatement placed promissory estoppel in a separate section than the section governing bargain for consideration—entitled “informal Contracts Without Assent Or Consideration—and otherwise subjected both recovery and remedy to an interest of justice component fueling the promise and expectation versus reliance divide.

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11 See Epstein, supra note 10, at 405 (explaining Williston’s intention behind term “promissory estoppel”).
12 See Alden, supra note 6, at 683-704 (explaining evolution of promissory estoppel).
13 Restatement (First) of Contracts §90 (1932); Restatement (Second) of Contracts § 90 (1981).
15 See Boyer, supra note 10, at 459 n.4 (identifying Willison’s purpose behind reliance).
16 See Patrick S. Atiyah, An Introduction to The Law of Contract 53-54 (4th ed. 1989) (“[D]etrimental reliance seems to be the key to promissory estoppel and it is also one of the twin legs of the doctrine of consideration itself.”).
By the turn of the century, the remedial interests of contractual damages garnered attention and were deemed to reflect the fundamental and underlying purpose of contract law. The reliance interest was central to the analysis. At the same time reliance was weaving its way as a means of contractual enforcement, it was likewise considered a fundamental means of compensation. Reliance based damages were argued to serve the reliance interest and were separate and distinct from expectation damages— the otherwise usual and traditional remedial measure for breach of contract. The result pitted the view that promissory estoppel was a means of creating an enforceable contract, the breach of which requires expectation damages, against the view that reliance damages were the most appropriate remedy to protect the reliance interest that is so central to the doctrine and to provide a necessary demarcation between bargained for contracts and promises enforced through reliance.

The remedial debate between expectation and reliance underscores the larger conflict promissory estoppel engenders. Reliance as consideration ran counter to the bargained for mutuality of obligation conception of consideration, which grew in stature particularly at the turn of the century. For instance, Oliver Wendell Holmes was a staunch supporter
of bargain for consideration and rejected justifiable reliance as a means of rendering binding a business subscription. Holmes believed in the objectification of contract and that neither benefit nor detriment constituted consideration for a binding contractual obligation. Indeed, any such benefit or detriment must demonstrate the "relation of reciprocal conventional inducement" between "consideration and promise." Contract formation requires a bargain in which there is a "manifestation of mutual assent to the exchange." According to Holmes, "[i]t 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."

III. SECTION 90 OF RESTATEMENT

The First and Second Restatement cemented promissory estoppel's place in American jurisprudence. The First Restatement was published in 1932 with Williston as the primary reporter and drafter. Although both

defense has been that they were gratuitous and without consideration. The decisions, in some of the earlier cases, were strongly against the validity of such promises, while they constituted mere promises of future contribution, and nothing had been done, by way of expenditure, upon the faith of them.

Id.

24 See Martin v. Meles, 60 N.E. 397, 398-99 (Mass. 1901) (exemplifying Holmes' belief in bargain for consideration), see also Teeven, supra note 14, at 511-528 (discussing Holmes and Dean Langdell as leading proponents of bargained for contracts).

25 French v. Boston Nat'l. Bank, 60 N.E. 793, 795 (Mass. 1901) ("We quite agree that reliance upon a promise gives it no new validity when such reliance is not the conventional inducement of the promise, that is to say, when it is not contemplated by the terms of the bargain as the equivalent of the promise."); Wis. & M. Ry. v. Powers, 191 U.S. 379, 386-87 (1903) (same); see also Miller v. Cotter, 863 N.E.2d 537, 549 n.16 (Mass. 2007) ("[T]he reciprocal exchange of benefit and detriment constitutes consideration."); Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691, 692 (Mass. 1989) (holding promise lacked consideration where "no legal benefit to... promisor nor detriment to the promisee"); United Beef Co. v. Childs, 27 N.E.2d 962, 964 (Mass. 1940) ("[c]onsideration consists only of that which the contracting parties offer and accept"); Gishem v. Dura Corp., 285 N.E.2d 117, 123 (Mass. 1972) (finding fulfillment of a moral obligation alone is insufficient).


28 RESTATEMENT (SECOND) OF CONTRACTS, § 90 cmt. a. The Second Restatement, like the First Restatement, does not use the term promissory estoppel in the text of section 90 or in any other section. Id. The term is mentioned in Comment "a" as to the Second Restatement: "This Section is often referred to in terms of 'promissory estoppel,' a phrase suggesting an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation." Id.
treatises incorporated the bargain-for-exchange rule for consideration, they also, consistent with Williston’s promise based view, included section 90 which initially 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.” The remedy for promissory estoppel was to be the same as for breach of contract, thus permitting the recovery of full contract or expectation damages—which are usually a more generous measure than either restitution or reliance. The expectation remedy required not just any reliance, but only that which was of a “definite and substantial character.”

By the time of the Second Restatement in 1981, the importance of the reliance interest had gained traction. The drafters opted to remove the “definite and substantial character” element and otherwise added a “as justice requires” requirement for remedy. Both changes reflect an endorsement or emphasis on the reliance interest as opposed to promise and expectation. As revised and as existing today, Section 90 provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise 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.

This formulation makes no mention of either reliance or reasonableness, only “action or forbearance.” In providing that “breach may be limited as justice requires,” the Second Restatement backed off the

29 See Restatement (Second) Of Contracts § 71 (1981) (incorporating bargain-for-exchange). The Second Restatement defines a bargain as “an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.” Restatement (Second) Of Contracts § 3 (1981). Consideration is defined in section 71: “(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.” Id.
30 Restatement (First) Of Contracts § 90 (1932).
31 Id.
32 See Fuller 1, supra note, at 18 (discussing reliance interest underlying contract law); Knapp, supra note 22, at 1199 (discussing implication of reliance on promissory obligation).
34 Restatement (Second) Of Contracts § 90(1) (1981).
expectation measure in all cases and adopted a discretionary approach. Comment d states:

A promise is binding under this section as a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee’s reliance rather than by the terms of the promise.\(^{35}\)

Since its formal emergence in 1932, as well as its reformation in 1981, promissory estoppel is considered by some to be the Restatement’s “most notable and influential rule”\(^{36}\) having a “profound influence on the law of contracts.”\(^{37}\) Despite this prevalence and the prominent use of “justice” in the formulation, little guidance or attention has been provided.\(^{38}\) As will be seen, avoidance of injustice is seemingly a separate test yet, in application, is subservient if not subsumed by the factual components of “promise” and “action or forbearance.” The remedial “limited as justice requires” component, in turn, was to ensure discretionary flexibility for remedy in order to serve the purposes of expectation, reliance, or restitution in particular circumstances; however, the component also remains somewhat adrift in the disquieting sea of “justice” based grant of judicial discretion.

Many have voiced concerns as to promissory estoppel. The lament is that contract rules begin to “[dissolve] into tort-type notions of unfairness and injustice.”\(^{39}\) In the commercial context, there is always a measure of reliance as “people do not distinguish between promised deals and


\(^{36}\) Yorio & Thei, supra note 21, at 111.


\(^{38}\) William Burnett Harvey, Discretionary Justice Under the Restatement (Second) of Contracts, 67 CORNELL L. REV. 666, 675 (1982) (noting likely intent behind avoidance-of-injustice was to prevent enforcing promise if restitution available) (citing 4 A.L.I. PROCEEDINGS 91, 103-04 (1926)).

\(^{39}\) Susan Lorde Martin, Kill The Monster: Promissory Estoppel as an Independent Cause of Action, 7 WM & MARY BUS. L. REV. 1, 3 (2016). Martin’s article also references promissory estoppel as a “monster” as it imposes liability without mutual bargain or consent and injecting commercial uncertainty as a result. Id. at 3; see also Alden, supra note 6, at 661, 666 (contending insufficient investigation into policy and judgment allowing considerations of promissory estoppel in particular circumstances).
performed deals." Reliability is not agreement. To have contractual liability turn on what is or is not reasonable reliability provides unwarranted uncertainty. Reliability as justification for contractual enforcement is thus viewed as having no rightful place in commercial dealings and being improperly used beyond the limited circumstances (charitable subscriptions or certain other discrete gratuitous promises) in which it was birthed. Freedom of contract, which includes the power and right to be bound to an agreement voluntarily through bargain and exchange including the right to establish its form and terms, is deemed mortally wounded. According to one famous scholar nearly 42 years ago, bargain for exchange and reliability were "two contradictory propositions" which "cannot live comfortably together: in the end one must swallow the other up."

Others see the modern formulation of promissory estoppel as the result of the natural drift of the common law, with its presence and a robust role vitally important. "When the common law grew too stiff or narrow, equity often came to the rescue, allowing old doctrines to survive with changed names. Promissory estoppel is simply consideration, cloaked in a new name." While the doctrine reduces formal protection against nonconsensual bargains, reliance provides ample protection with the promisor otherwise free to condition, restrict, disclaim, or withdraw the

40 Gibson, supra note 6, at 672.
41 Id.; Alden, supra note 6, at 661, 666.
42 See Gibson, supra note 6, at 672 (criticizing notion of reliance protection in area of commercial contracting and noting it generates reliance); Sidney W. DeLong, The New Requirement of Enforcement Reliance In Commercial Promissory Estoppel: Section 90 as Catch-22, 1997 WIS. L. REV. 943, 945 (1997) ("The concerted effort by lawyers and judges to limit commercial promissory liability to formal contract commitments is returning the commercial world to its pre-Section 90 tranquility."); Martin, supra note 39, at 4 ("If contract rules are frequently displaced by ad hoc decision about unfairness, the predictability and reliability of business transactions will diminish to the detriment to all who engage in them."); Gibson, supra note 6, at 674 (finding consideration was traditionally problematic "because its technical requirements caused courts to ignore the existence of agreement between the parties, the solution is not to ignore the existence of agreement, by reliance.").
44 Kotitskey, supra note 5, at 109 (positing promissory estoppel remains "vital" to contract); Holmes, supra note 4, at 48, 56 (noting equitable importance of promissory estoppel); Metzger & Phillips, supra note 6, at 474 (same).
promise prior to any detrimental reliance. Under this view, promissory estoppel is a sui generis “super-hero” caped in both legal and equitable principles, filling necessary gaps left by the limits of bargain for consideration and providing a counter-balance to the weight of rigid legal rules based on equitable notions of fairness and good faith.

IV. THE MASSACHUSETTS EXPERIENCE

Massachusetts has a long history of recognizing estoppel in its various forms most notably equitable or estoppel in pais. Estoppel has historically been a defense or bar to recovery and otherwise based on representations (or conduct) as to past or present, but not future facts.

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47 See Knapp, supra note 22, at 1291-1331 (providing overview of promissory estoppel and identifying importance of reliance in contract law and liability).


[e]stoppel by deed occurs when . . . a grantor conveys property by deed which, unknown to the grantee, the grantor does not own at the time of the conveyance, but which the grantor later acquires. In such a case, the grantor (and anyone claiming under him) is estopped from asserting against the grantee a claim of title to the property conveyed.


50 See Loranger Const. Corp., 374 N.E.2d at 308 (finding subcontractor’s quote was relied upon by contractor in placing bid); Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 858 N.E.2d 699, 711 (Mass. 2006) (relying on theory of equitable estoppel); Boylston Dev. Group, Inc., v. 22 Boylston St., Corp., 591 N.E.2d 157, 163 (Mass. 1992) (discussing successful estoppel).
served as a defense to a cause of action, precluding the claimant from denying the truth of a prior position or statement.\footnote{Turner v. Coffin, 1866 Mass. LEXIS 112, at *1-3 (Mass. 1866) (using estoppel \textit{in pais} as a defense); see also 3 John N. Pomeroy, \textit{Equity Jurisprudence} § 802 (Spencer W. Symons, 5th ed. 1941) (asserting equitable estoppel is intended to promote "equity and justice."). Furthermore, Pomeroy's \textit{Equity Jurisprudence} declares that equitable estoppel's intent to promote "equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience." 3 John N. Pomeroy, \textit{Equity Jurisprudence} § 802 (Spencer W. Symons, 5th ed. 1941); Moran v. Gala, 845 N.E.2d 1170, 1175 (Mass. App. Ct. 2006) (noting application of \textit{estoppel in pais} in fraud cases).}

\textbf{A. FROM IN PAIS TO INDEPENDENT ACTION}


If a party willfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must show that there was a willful intent to make him act on the faith of the representation, and that he did so act.\footnote{Lyons, 1865 Mass. LEXIS 269, at *1-2 (quoting Howard v. Hudson, 2 El. & Bl. 10); see also Plumer, 1864 Mass. LEXIS 291, at *5 (stating "[t]here must also be shown a wilful intent to induce the party to act on the faith of the alleged statements or representations. This is the well settled rule of law"). A number of decisions rejected any effort to invoke the estoppel bar, finding the willful intent element not met. Connihan v. Thompson, 1873 Mass. LEXIS 234, at *5 (Mass.}
Estoppel soon shed any willful intent requirement and, with it, held that conduct and statements falling short of deceit or fraud could still form the basis of estoppel with the purpose to effectuate estoppel’s equitable and predominant concern of “fair dealing” and “good conscience.” Estoppel evolved to require only “words or conduct not consonant with fairness and designed to induce action by the plaintiff to his harm.” The early case law likewise held that estoppel did not apply to future promises. This was consistent with the understanding that the purpose and effect of “estoppel” is to “shut out a party from offering evidence in a court of justice, contrary

1873 (rejecting estoppel defense to sale of land where no evidence of intent); Nichols v. Arnold, 1829 Mass. LEXIS 37, at *6-7 (Mass. 1829) (finding no estoppel as declaration relied upon was made by mistake). But cf. Nickerson v. Massachusetts Title Ins., 59 N.E. 814, 815 (Mass. 1901) (concluding there was estoppel because omissions rising from negligence can constitute estoppel).

54 See McLearn v. Hill, 177 N.E. 617, 620 (Mass. 1931). According to the Supreme Judicial Court of Massachusetts:

[W]hile the doctrine of estoppel in pais rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; whether the author of a proximate cause may justly repudiate its natural and reasonably anticipated effect; fraud, in the sense of a court of equity, properly including all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another or by which an undue and unconscientious advantage is taken of another.

Id. It was held early on that there could be estoppel “by silence” where it constitutes a representation by consent. See Tracy v. Lincoln, 14 N.E. 122, 123-24 (Mass. 1887) (holding that plaintiff’s choice to remain silent estopped her from later claiming ownership against mortgagee); D’Almedia v. Boston M & R. R., 113 N.E. 187, 189 (Mass. 1916) (noting estoppel by silence well established).

55 McLearn, 177 N.E. at 620. According to the court in McLearn,

[f]acts falling short of [fraud] may constitute conduct contrary to general principles of fair dealing and to the good conscience which ought to actuate individuals and which it is the design of courts to enforce. It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law.


56 See Jackson v. Allen, 1875 Mass. LEXIS 129, at *28 (Mass. 1876) (“Mere disappointment in expectation, or breach of promise or covenant relating to the future, cannot constitute an estoppel in pais.”).
to his previous statements.”

As of the turn of the century, estoppel as a rule of evidence and bar required that “it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such consequence might follow.” This simplified, yet expansive, articulation has been applied and allowed to prevent the use of such legal bars as the statute of frauds, statute of limitations, and the parol evidence rule, as well as to substantive defenses. The doctrine was “not [to be] applied except when to refuse it

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58 See Raldne Realty Corp. v. Brooks, 183 N.E. 419, 420 (Mass. 1932); Cellucci v. Sun Oil Co., 320 N.E.2d 919, 924 (Mass. App. Ct. 1974), aff’d sub nom. Cellucci v. Sun Oil Co., 331 N.E.2d 813, 924 (Mass. 1975) (“Although as a general rule representations as to future events are not actionable, . . . an exception has been recognized ‘where the parties to the transactions are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the representations relate.’”); see also Moreira v. Citimortgage, Inc., No. 15-13720-LTS, 2016 U.S. Dist. LEXIS 121469, at *13-14 (Sept. 8, 2016) (“The difference between promissory estoppel and equitable estoppel claims centers around the temporal nature of the misrepresentation—the former concern misrepresentations of future intent, the latter past or present facts.”); Marquez v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 2727, at *10 (D. Mass. 2013) (noting distinction between promissory and equitable estoppel); Lawson v. Affirmative Equities Co., 341 F. Supp. 2d 51, 66 (D. Mass. 2004) (same).
59 See Boston & A.R.R. v. Reardon, 115 N.E. 408, 411 (Mass. 1917); see also McLearn, 177 N.E. at 619 (quoting the same statement in Boston & A.R.R. v. Reardon, 115 N.E. 408, 411 (Mass. 1917)); Stiff v. Ashton, 29 N.E. 203, 204 (Mass. 1891) (“[O]ne is responsible for the word or act which he knows, or ought to know, will be acted upon by another.”).
60 See RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981) (stating promise inducing detrimental reliance enforceable notwithstanding Statute of Frauds where justice so requires); see, e.g., Cellucci, 320 N.E.2d at 923 (“An estoppel, if appropriately applied in this case, would also preclude [the defendant] from asserting the affirmative defense of the Statute of Frauds.”), aff’d, 331 N.E.2d 813 (Mass. 1975); Barrie-Chivian v. Lepler, 34 N.E.3d 769, 771 (Mass. App. Ct. 2015) (holding promissory estoppel claim not barred by Statute of Limitations). The Lepler court further stipulates that, “[i]t would work a harsh injustice to permit the Statute of Frauds to bar recovery for the plaintiffs where the defendant admits he induced the plaintiffs’ reliance by promising to execute a written agreement, the absence of which he now seeks to use to avoid the debt.” Lepler, 34 N.E.3d at 772.; Goeken v. Kay, 751 F. 2d 469, 472-74 (1st Cir. 1985) (affirming Massachusetts law allowed recovery on reasonable reliance for oral contract notwithstanding Statute of Frauds); Palandjian v. Pahlavi, 614 F. Supp. 1569, 1581-82 (D. Mass. 1985) aff’d, 808 F. 2d 1513 (1st Cir. 1986) (holding that reasonable reliance on oral promise precluded Statute of Frauds defense).
62 See Espstein, supra note 10, at 416-32 (analyzing parol evidence rule in contract law).
63 See Cellucci, 320 N.E.2d at 926 (holding defendant stopped from denying contract was formed); Calkins v. Wire Hardware Co., 165 N.E. 889, 896-97 (Mass. 1929) (recognizing estoppel prevented defense of illegality).
would be inequitable" and likewise recognized that "the law does not regard estoppels with favor, nor extend them beyond [the requirements of] the transactions in which they originate." In addition to equitable estoppel, Massachusetts recognized that either benefit to the promisor or detriment to the promisee constituted consideration sufficient to enforce a promise. The two concepts merged to provide justification for enforcement of certain discrete promises. The most prominent of these cases were charitable subscription cases which allowed recovery on behalf of a charity where the charity had relied on the promise.
of a donation. Massachusetts, in fact, is considered one of the first jurisdictions to extend equitable estoppel principles to the donative setting and to otherwise expressly confirm that detrimental reliance was sufficient for consideration. In 1815, the Supreme Judicial Court extended reliance as consideration to the commercial, business subscription setting holding that a claimant was entitled to recovery where he was induced by the defendant’s subscription promise to advance money to establish a newspaper. Although the court did so under “equity and good conscience,” by 1827, the Supreme Judicial Court combined the equitable notion with reliance constituting sufficient consideration to find the subscriber “legally and equitably bound.”

The mutuality of obligation conception of consideration was also no stranger to contractual liability and gained force by the turn of the century. In 1881, Justice Holmes’ bargain theory took shape with it emphasized that the “the root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.”

Mutuality was not a new notion, and cases emerged rejecting reliance as sufficient to render enforceable a contractual undertaking—“reliance upon a promise gives it no new validity” absent mutuality. In a 1901 decision, for instance, Justice Holmes held, in a business subscription case, that there was no enforceable promise based on reliance unless the reliance was bargained for. It was only mutually bargained for and assented to

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68 See Kevin M. Teeven, A History of Promissory Estoppel: Growth In the Face of Doctrinal Resistance, 72 TENN. L. REV. 1111, 1123 (2005) (“Massachusetts introduced the concept of reliance relief for subscriptions in the United States, and its ground-breaking subscription precedents became the leading decisions on the subject in the country.”)


70 Bryant v. Goodnow, 1827 Mass. LEXIS 74, at *3-4 (Mass. Sept. 1, 1827). In 1932, Judge Learned Hand found that promissory estoppel was a form or species of consideration. See Porter v. Comm’n, 60 F. 2d 673, 675 (2d Cir. 1932).

71 See Teeven, supra note 14, at 545 (discussing the initial use of “mutuality”).

72 OLIVER WENDELL HOLMES, THE COMMON LAW 293-94 (1881).

73 See Wild v. Dean, 1862 Mass. LEXIS 102, at *3 (Mass. Jan. 1, 1862) (“[t]he fundamental principle on which all contracts rest is the mutual assent of the parties.”).


75 See Martin v. Meles, 60 N.E. 397, 398 (Mass. 1901) (“[t]here must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise.”); French, 60 N.E. at 795 (“reliance upon a promise gives it no new vitality when such reliance is not the conventional inducement of the promise, that is to say, when it is not contemplated by the terms of the bargain as the equivalent of the promise.”); see also
contractual undertakings that deserved enforcement in that they promoted “the increase of value in society.” Recent decisions have marked a material distinction between the donative promise and commercial promises with the Supreme Judicial Court stating that “we do recognize that the ‘meeting of the minds’ between a donor and a charitable institution differs from the understanding we require in the context of enforceable arm’s-length commercial agreements.” Regardless, contractual liability largely runs on two tracks—one track resting on bargain and the other on detrimental reliance.

The term “promissory estoppel” first emerged in Massachusetts in two 1933 decisions, one of which expressly relied upon Williston’s treatise. In both cases, the doctrine was invoked in an effort to prevent a defense and was rejected. In a 1935 case involving an oral realty contract, estoppel was used against a defendant’s reliance upon the Statute of Frauds. In 1974, the Appeals Court pushed the reach of the doctrine further when it applied equitable estoppel to a dispute over the sale of land and to what was essentially a promissory representation. In Cellucci v. Sun Oil, it was found that the detrimental reliance of the seller of a gas station, in breaking off the negotiations with a competing purchaser, was actionable. The original purchaser had given assurances that a deal for the sale of the gasoline station

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RESTATEMENT (SECOND) OF CONTRACTS § 71(1) ("to constitute consideration, a performance or a return promise must be bargained for."); Lamaster v. Sutherland, 14-P-165, 2015 Mass. App. Unpub. LEXIS 422, at *5-6 (Mass. App. Ct. 2015) (noting bargained for exchange in which a “return promise...sought by promisor in exchange for promise and is given by promisee in exchange for promise.”) (citing RESTATEMENT (SECOND) OF CONTRACTS § 71(2)). See generally, Lamaster v. Sutherland, 14-P-165, 2015 Mass. App. Unpub. LEXIS 422, at *5-6 n.4 (Mass. App. Ct. May 14, 2015) (stating “essence of bargained-for exchange, in which a return promise is ‘sought by promisor in exchange for...promise and is given by the promisee in exchange for that promise.’”) (quoting Restatement (Second) Of Contracts § 71(2)).

See Sheehan v. Commercial Travels Mut. Accident Ass’n, 186 N.E. 627, 630 (Mass. 1933) (utilizing promissory estoppel and relying on Williston’s Treatise); Danis v. Angelo, 186 N.E. 558, 559 (Mass. 1933) (utilizing promissory estoppel).

Danis, 186 N.E. at 559 (rejecting plaintiff’s reliance in action on promissory note). The court rejected the reliance on promissory estoppel to defeat the defendant’s claim of no liability, which was based on the statement “I won’t bother you no more,” as it was not shown to have been intended to make a gift of the promissory note. Id. See also Sheehan, 186 N.E. at 630 (rejecting plaintiff’s reliance on promissory estoppel to preclude insurer’s defense that condition was not met).


would go through and that it could not sell to the competing purchaser as the seller had signed a standard purchase and sale agreement, estopped the purchaser from asserting that there was no binding contract of sale. The estoppel applied not only to deny the enforceability of the agreement, but to preclude application of the statute of frauds (purchaser had not signed agreement) and any argument that many of the conditions of the sale applied and defeated any enforceability. The putative representations included a statement that was essentially a prediction that the sale would go through, as well as one of "law," since the purchaser informed the seller it could do nothing with the property because of the signed purchase and sale.

The Cellucci decision is notable not only as to the scope of the preclusive effect (i.e. barred application of the statute of frauds; denial of contract; and enforcement of various conditions) but that it was applied to what was essentially a promissory statement. Although representations as to future events are not usually actionable, it was held that an "exception" applied "where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentations relate." There is no explicit reference to promissory estoppel, but the court clearly found that both the statements and detrimental reliance worked an estoppel thus all but expressly merging equitable and promissory estoppel. The decision has since been routinely cited as a decision for promissory estoppel.

Four years later (in 1978), the Appeals Court formally adopted the First Restatement's formulation of "promissory estoppel" in a case addressing a contractor's asserted reliance on a subcontractor's bid—an area where courts had readily applied estoppel. There, the court noted the

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84 See id. at 924 (noting both factual and legal misrepresentations).
85 See id. at 924-25 (explaining misrepresentations of law).
86 See Cellucci, 320 N.E.2d at 924-25 (identifying misrepresentation of law).
87 Id. at 924 (quoting SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1496, 373-74 (3d ed. 1976)).
academic literature as to promissory estoppel and its adoption and incorporation into section 90 of the Restatement and that prior Massachusetts decisions had “elasticized the concept of consideration” based on detrimental reliance. It also noted that while Massachusetts had not formally accepted the theory of promissory estoppel by name, “its underlying principles have in effect been applied to reach equitable results” and has otherwise applied the estoppel theory to misrepresentation of future intent. The “theory of promissory estoppel” was officially adopted and applied to provide relief to a general contractor who bid for and was awarded a construction contract which bid included a subcontractor’s quote to provide certain materials and services which had been dishonored. The court found that there was no need for an offer in the contractual sense requiring only a “promise upon which the promisee would reasonably have placed reliance.” As to any conflict with the need for consensual bargains, the court held that the promisor was adequately protected by reliance and the ability to limit, restrict, or revoke the promise prior to any reliance.

Upon further appellate review to the Supreme Judicial Court, Justice Braucher—a Reporter to the Second Restatement—rejected the contention that promissory estoppel was novel, holding that reliance rendering a promise enforceable as a contract “antedat[ed]” the more recent advent of bargained for consideration. Justice Braucher thus eschewed the label “promissory estoppel” stating the expression “tends to confusion rather

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91 See Loranger, 374 N.E.2d at 309 (noting where Massachusetts uses promissory estoppel).
92 See Loranger Constr. Corp., 384 N.E.2d at 178 (finding reliance). It was found that the subcontractor knew the general was relying on the quote in submitting the bid and if awarded the contractor would be bound by the bid. Id. As a result of reneging on the quote, the general contractor had to secure another subcontractor for the services at a higher price. Id. The Court noted that as to the issue that the general contractor delayed in notifying the subcontractor of the acceptance of the quote (2.5 months) and otherwise bid shopped, it was a matter for the jury to consider. Id. at 178-79.
93 Loranger Constr. Corp., 374 N.E.2d at 310.
94 Id. at 308-11 (holding promisor protected by reliance).
96 Id. at 179 (stating promissory estoppel is not novel). The reference to promissory estoppel was essentially dicta as Justice Braucher found that the facts supported a finding of consideration. Id. at 179-80. He noted that there is a reciprocal relation between the promisee and the consideration in a typical bargain, and otherwise found that traditional consideration including implied in fact inference. Id. at 179. The Court found that the jury instructions never included any theory of liability based on promissory estoppel or detrimental reliance principles but on offer, acceptance, and consideration and thus, had to analyze the evidence based on the instructions given. Id. at 180. It proceeded to find that there was evidence to support that the bid was an offer and had been accepted by the general contractor. Id. As to consideration, the Court found there was a basis for consideration by virtue that the bid was intended to induce the general contractor’s action in the hope that the defendant would benefit, and that the general contractor action was induced by the defendant’s quote warranting a finding of a “typical bargain.” Id.
than clarity." The contractual basis was made clear: "when a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract,' and it is enforceable pursuant to a 'traditional contract theory.'" Cases have since routinely noted that detrimental reliance serves as the equivalent of consideration for a non-bargained for promise.

Following the formal recognition of section 90 and "promissory estoppel," the claim surfaced in a myriad of settings, largely as an alternative or adjunct to breach of contract and/or misrepresentation. As to "equitable" estoppel, traditionally a rule of evidence and a defense as opposed to an independent and affirmative cause of action, a number of decisions appear to treat, at least implicitly, equitable estoppel as a cause of action. Both this and the sometimes blurry distinction between representations of present and past facts versus future intent or promises bleeds the two notions together. The result was a singular "estoppel" or "detrimental reliance" doctrine that is now an independent cause of action for reliance on representations regarding past, present or future facts or

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97 Id. at 179. See C.M. McCauliff, supra note 45, at 864 ("Only its new, equitable name concealed its origins in consideration, perhaps to protect it from those in the ascendancy who denied its role in contract."). See also Teeven, supra note 14, at 526 ("the label was oxymoronic in combining a promise looking to future performance with an estoppel looking to past conduct.").

98 Loranger, 384 N.E.2d at 179.


101 See Low v. Bouvier [1891] 3 Ch. 82, 101 (L.J. Lindley) (establishing estoppel as an evidence rule, precluding someone from denying truths of statements previously made).


103 See Loranger Constr. Corp. v. E.F. Hauserman Co., 374 N.E.2d 306, 308-09 (Mass. App. Ct. 1978) ("Equitable estoppel differs from promissory estoppel primarily in that equitable estoppel permits recovery only where there has been reliance upon the misrepresentation of past or present facts whereas recovery may be had under the theory of promissory estoppel where reliance has been placed upon statements of future intent"); see also Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 858 N.E.2d 699, 711 (Mass. 2006) (asserting equitable or promissory estoppel principles in plaintiffs’ complaint); Boylston Dev. Grp., Inc., v. 22 Boylston St. Corp., 591 N.E.2d 157, 163-64 (Mass. 1992) (listing requirements of equitable estoppel); see also Hortman v. Miamisburg, 852 N.E.2d 717, 718 (Ohio 2006) (distinguishing equitable estoppel from promissory estoppel).
promises and actionable regardless of any lack of deceit. The view that estoppel was to be construed narrowly remains, but is no longer mentioned with some decisions—voicing that the fundamental policy and purpose behind estoppel is "broad."

The treatment of promissory estoppel, since Justice Braucher’s contract based proclamation and adoption of Section 90 into Massachusetts jurisprudence in 1978, remains difficult to pigeon hole or categorize. The claim has been asserted in various contexts eluding any generalization as to treatment. There is, however, a measure of unevenness in scope with certain decisions seeing promissory liability as more expansive under tort-like notions with others significantly curtailing the doctrine.

For instance, in a 1985 decision, Greenstein v. Flatley, the Appeals Court bestowed a strong tort connotation by virtue of the suggestion that the making of a promise and failing to inform that the promise may, or will, not be honored can be “tortious” or “unfair and deceptive” under the state’s consumer protection statute. In Greenstein, a landlord submitted a lease to a prospective tenant and then was found to have strung him along for a number of months before repudiating the lease. The court held that the conduct of the landlord “was calculated to misrepresent the true situation to the [tenant], keep him on a string, and make the [tenant] conclude—reasonably—that the deal had been made and that only a bureaucratic formality remained.” The conduct was deemed misleading and thus “[f]it comfortably ‘within at least the penumbra of some common-law, statutary,


105 Poor v. Poor, 409 N.E.2d 758, 762 n.5 (Mass. 1980) (“We have, however, indicated that the policy considerations underlying the use of estoppel are expansive rather than narrow. “It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law.””) (quoting McLearn v. Hill, 177 N.E. 617, 619 (Mass. 1931); but see Licata v. GNCS Malden Dexter LLC, 2 N.E.3d 840, 849 (Mass. 2014) (“The law does not regard estoppels with virtue, nor extend them beyond . . . the transactions in which they originate.”) (citing Boston & Albany R.R. v. Reardon, 115 N.E. 408, 411 (Mass. 1917)) (Tracy v. Lincoln, 14 N.E. 122, 124 (Mass. 1887)); see generally Corea v. Bd. of Assessors, 427 N.E.2d 925, 926 (Mass. 1981) (expressing application of estoppel against government in exercise of its official duties is disfavored). “In Massachusetts, . . . one relies at his peril on representations by a government official concerning legal requirements. [Citations omitted]. Particularly where misstatements about the effect of applicable rules and regulations relied upon are oral, reliance on them may not be regarded as reasonable.” Harrington v. Fall River Hous., Auth., 538 N.E.2d 24, 30 (Mass. App. Ct. 1980).


107 See id. at 1131-32 (discussing facts of case).

108 Id. at 1133 (characterizing defendant’s conduct).
or other established concept of unfairness." While the court in Greenstein stated that the case presented an identifiable application of promissory estoppel, it concluded that it was not necessary to fit the conduct "into a precise tort or contract niche" for relief to be appropriate. The court all but equated promissory estoppel liability with the liability under the state's consumer protection statute. This "dangling on a string" tort notion has since surfaced in other decisions as well.

By virtually equating promissory estoppel liability with unfair and deceptive conduct under the consumer protection statute, the doctrine's reach is significantly expanded beyond contract and even tort. This is particularly so in that it has long been held that neither negligence nor a claim for breach of contract, alone, can suffice to meet the level of "unfair and deceptive conduct" required under the statute. As such, reliance based contracts are elevated to a stature imposing more significant liability than contract based on mutual assent and consideration.

On the other side of the spectrum, there are cases curtailing the doctrine. In Rhode Island Trust v. Varadian, the Supreme Judicial Court, in overturning a jury's award under promissory estoppel, limited the scope of the doctrine. The claim for promissory estoppel was made against a bank for an alleged breach of an oral promise to lend $43.5 million as to a construction project. The jury answered a slew of special questions including, inter alia, whether (a) the bank did make the oral promise intending to induce reliance; (b) there was reasonable reliance upon that oral promise; and (c) the claimants knew that the bank intended to be bound to

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109 Id. (quoting PMP Assocs., Inc. v. Globe Newspaper Co., 321 N.E.2d 915, 917 (Mass. 1975)).
110 See id. at 1133 (broadening application of promissory estoppel).
111 See Dixon v. Wells Fargo Bank, 798 F. Supp. 2d 336, 344 (D. Mass. 2011) ("[t]ypically, where Massachusetts courts have applied the doctrine of promissory estoppel to enforce an otherwise unenforceable promise, 'there has been a pattern of conduct by one side which has dangled the other side on a string.'") (quoting Pappas Indus. Parks, Inc. v. Psarros, 511 N.E.2d 621, 622 (Mass. App. Ct. 1987)); see also Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 69–70 (1st Cir. 2009) (explaining that "stringing along a counterparty to induce detrimental reliance can constitute a Chapter 93A violation."). The court also observes that "[o]ther Massachusetts cases ... recognize a need to police negotiations—even those among relatively sophisticated parties—to ensure that they are not unfair or deceptive." Id. at 70; see also Full Spectrum Software, Inc. v. Forte Automation Sys., Inc., 858 F.3d 666, 674 (1st Cir. 2017) ("one business's stringing along of another to the other's detriment can satisfy [Chapter 93A, § 11]").
113 647 N.E.2d 1174 (Mass. 1995).
114 See id. at 1178-79 (applying promissory estoppel analysis to facts of case)
the loan only by an agreement in writing.\textsuperscript{115} Despite the jury’s finding of an intention to induce reliance and resulting reasonable reliance, the court held there could be no recovery given the finding that the claimants understood the bank’s intention not to be legally bound.\textsuperscript{116} Since the claimants were aware that the bank did not intend to be bound absent a writing governing the loan transaction, they could not have reasonably relied on the oral promise as a matter of law.\textsuperscript{117}

\textit{Varadian} significantly curtailed the reach of the doctrine in the commercial setting. It required all the elements of a contract except for bargained for consideration\textsuperscript{118} and, as such, made clear that the promise must be “unambiguous” equating to a “commitment” or “promise” in the contractual sense.\textsuperscript{119} The promise must demonstrate “an intention to act or refrain from acting in a specified way, so as to justify a promisee in understanding that a \textit{commitment} has been made.”\textsuperscript{120} Accordingly, the claimants could not have reasonably understood the bank’s statements as a “promise” in the sense of a “commitment” given the understanding and knowledge that the bank did not intend to be bound absent an agreed upon writing.\textsuperscript{121}

\textit{Varadian} represents a substantial limitation in that promissory estoppel liability cannot be found unless the promisor manifests an intention to be legally bound by something other than a promise intended to induce reliance and which does induce reliance.\textsuperscript{122} Liability is thus arguably limited to those instances in which the promisor expressly indicates an intention to be legally bound by the promise beyond the intentional reliance inducing promise. This is a substantial change from Section 90 which makes no reference of any requirement that the promisor manifest an intention to be bound or requiring such a showing through evidence other than the promise and reliance.

The fundamental areas of substantive dispute remain over what is a sufficient promise and reasonable reliance. A representation of future, rather than present intention will not preclude recovery, so long as the promisor’s

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expectation to be legally bound is clear.\textsuperscript{123} Reasonableness, in turn, requires consideration of the sophistication of the parties\textsuperscript{124} and the existence or contemplation of controlling or contradictory documents or other formalities.\textsuperscript{125} While generally a question for the fact finder,\textsuperscript{126} it is many times found as a matter of law by the court.\textsuperscript{127}

To the extent case law does reference injustice, it fails to provide any meaningful explanation as to its substance and purpose with, at most, the decisions simply reciting, in rote fashion, that "[p]romissory estoppel is an equitable doctrine, and judges are to apply it flexibly to avoid injustice."\textsuperscript{128} In the limited cases that have touched on the element, some have found dispositive the availability of money damages,\textsuperscript{129} a countervailing policy

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{124} See Kennedy v. Josephthal & Co., Inc., 814 F.2d 798, 804 (1st Cir. 1987) (discussing factors used by courts in examining whether reliance or misrepresentation is justified); Cataldo Ambulance Serv. V. Chelsea, 688 N.E.2d 959, 962 (Mass. 1998) (examining when reasonable reliance can be question of law especially where parties are sophisticates).
\item \textsuperscript{125} See Trifiro v. New York Life Ins. Co., 845 F.2d 30, 33-34 (1st Cir. 1988) ("The conflicting content of [the defendant's] oral statement with [his] written statement ... should have placed [the plaintiff] on notice that he should not rely on either statement."); Kuwaiti Danish Comput. Co. v. Digital Equip., Corp., 781 N.E.2d 787, 795 (Mass. 2003) ("Reliance on any statement or conduct ... was unreasonable as a matter of law because it conflicted with the qualifying language [in a written document].").
\item \textsuperscript{126} See Danielczuk v. Ferioli, 388 N.E.2d 724, 725 (Mass. App. Ct. 1979) ("The assertion of an estoppel raises factual questions of reliance and reasonableness. ... that should have been left for resolution at trial."); McMahon v. Digital Equip. Corp., 162 F.3d 25, 39 (1st Cir. 1998) (holding recovery not possible when plaintiff chooses to believe on statement more appealing than other.); Trent Partners & Assocs., Inc. v. Digital Equip. Corp., 120 F. Supp. 2d 84, 104-05 (D. Mass. 1999) ("as a matter of law. ... an oral statement made in the face of a written contract was not a 'promise' or 'commitment' for promissory estoppel purposes because the existence of a written contract demonstrated the parties intention that it would govern their intricate transaction.").
\item \textsuperscript{127} See Harrington v. Fall River Hous. Auth., 538 N.E.2d 24, 30 (overturning finding of reasonable reliance and holding no such reliance as matter of law). The court further held that plaintiffs ought to have known of HUD's regulations which were otherwise published and publicly available, and one relies at his own peril on representations by government official concerning legal requirements. See id. See also Cataldo, 688 N.E.2d at 962 ("The question whether a party's reliance on a promise by another is reasonable is often a question of fact, but in an appropriate case can present an issue of law"); Farsheedv. Syed, 10 N.E.3d 672 (Mass. App. Ct. 2014) (finding reliance unreasonable as matter of law).
\end{itemize}
\end{footnotesize}
requiring non-enforcement, or that under the facts enforcement of the promise would not provide any relief.

The overwhelming majority of cases involving promissory estoppel are now commercial. The intra-familial and charitable subscription or donation cases, which first spawned the initial promulgation of Section 90, are virtually non-existent remnants of history. Promissory estoppel is otherwise commonly asserted with a breach of contract claim with it oft-repeated that there can be no promissory estoppel liability where there is an enforceable or applicable contract. Indeed, the subordination of Section 90 and promissory liability to a formal contract in a commercial setting reflects the preference (both among sophisticated businessmen and the judiciary) of formal contract in creating an enforceable obligation thus supporting a limiting principle function of the avoidance of injustice element.

B. Massachusetts Empirical Data

1. Trial Courts

Since Massachusetts' adoption of promissory estoppel in 1978 in *Loranger*, promissory estoppel has been raised or mentioned in numerous decisions. The resulting empirical data is as follows:

<table>
<thead>
<tr>
<th></th>
<th>MA Superior Court</th>
<th>Federal District Court (MA)</th>
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<tbody>
<tr>
<td>Motion to Dismiss</td>
<td>30</td>
<td>58</td>
</tr>
<tr>
<td>Prevailed on PE Claim</td>
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<td>20</td>
</tr>
<tr>
<td>Did Not Prevail on PE Claim</td>
<td>15</td>
<td>38</td>
</tr>
<tr>
<td>Promise Insufficient</td>
<td>6</td>
<td>12</td>
</tr>
</tbody>
</table>

130 See cases cited infra notes 150-53.

131 See Doe v. W. N.E. U., 228 F. Supp. 3d 154, 182 (D. Mass. 2016) (“Plaintiff’s failure to plausibly claim that the university’s decision was arbitrary or capricious or made in bad faith bars relief under the ‘basic fairness’ standard.”); see also, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 6-1, 273 (3d ed. 1987) (“[I]njury is what is required because without injury there would be no injustice in not enforcing the promise.”).

132 See Delong, supra note 42, at 972 (noting charitable donation and other pre-cursor cases to Section 90 now relegated to case studies).


134 See Delong, supra note 42 at 979 (“The subordination of promissory estoppel to formal, bargain contract reflects the preference of commercial promisors and promisees for certainty and flexibility.”).

135 The cases were identified through the Westlaw database and spanned from 1978 to December 1, 2017.
The survey reveals that a significant percentage of promissory estoppel claims fail to survive dispositive motions (i.e. motion to dismiss and/or summary judgment). As to the Massachusetts Superior Court decisions examined, 50% of the cases addressing promissory estoppel claims on a motion to dismiss were found insufficient to proceed, while over 80% of summary judgment decisions found the promissory estoppel claim insufficient. The lack of a sufficient promise and reasonable reliance were the predominant basis for finding the claim insufficient with both promise and reliance about equal in reference. The lack of a sufficient promise was the justification in 23 out of 107 total Superior Court decisions, while lack of reasonable reliance was found in 20 out of the 107 total decisions with 15

136 It is likely that a fair number of decisions denying summary judgment in an action including a claim for promissory estoppel claim are not reported in the Westlaw database.
decisions referencing both as the dispositive failure. As to post-jury trial motions or jury waived findings, promissory estoppel claims were found to have prevailed 50% (6/12) with the lack of a sufficient promise, lack of reasonable reliance, and the availability of alternative remedy as the prevailing justifications for denial of the claim.

The "avoidance of injustice" was not mentioned or listed as an element in 92 of the 119 total decisions surveyed. 23 of the 119 decisions reviewed mentioned avoidance of injustice with no application while only 4 of the 119 decisions both mentioning and applying the avoidance of injustice element.

The survey of decisions of the Federal District Court of Massachusetts revealed similar findings. Over 75% of all reported decisions addressing a promissory estoppel claim on a motion to dismiss or at summary judgment found the estoppel claim insufficient. Both promise and reliance were, again, about equal as the basis for rejecting the claim with 32 out of 80 decisions rejecting the claim based on the inadequacy of both elements. Over 70% of the total decisions surveyed (119) made no mention or recitation of avoidance of injustice as a required element, in addition to 30 of the 119 decisions mentioning or listing the "avoidance of injustice" as a required element, but not addressing it. Only 3 of the 119 decisions both mentioned and applied the "avoidance of injustice" element at least to some degree.137 Only two reported decisions contained any discussion of the measure of damages.138

2. Appellate Courts

<table>
<thead>
<tr>
<th></th>
<th>First Circuit</th>
<th>Supreme Judicial Court</th>
<th>Appeals Court</th>
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<tr>
<td>Court</td>
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The appellate court survey demonstrates that over 75% of all cases addressing a promissory estoppel claim on appeal were found to be insufficient. A lack of reasonable or detrimental reliance was found the primary reason for the failure of the claim constituting the reason for invalidity 52% of the time, while lack of sufficient promise was the justification 39% of the time. Less frequent grounds of denial included the existence of an adequate remedy and public policy.\textsuperscript{139} Examples of policy considerations considered in the injustice inquiry include the unenforceability of an oral promise pertaining to marital property rights—as Massachusetts has never recognized property rights in non-marital partners absent express written agreement;\textsuperscript{140} an implicit promise to not be forced to

\begin{table}[h]
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\begin{tabular}{|c|c|c|c|c|}
\hline
Did Not Prevail & 15 & 11 & 49 & 74 \\
\hline
Insufficient Promise & 7 & 3 & 17 & 26 \\
\hline
Insufficient Reliance & 9 & 4 & 26 & 39 \\
\hline
No Authority & 1 & 0 & 2 & 3 \\
\hline
Adequate Remedy & 0 & 0 & 2 & 2 \\
\hline
Public Policy & 0 & 4 & 4 & 8 \\
\hline
Court & 10 & 27 & 37 & \\
\hline
Jury & 1 & 0 & 1 & \\
\hline
Injustice Not Mentioned & 11 & 11 & 62 & 82 \\
\hline
Injustice Mentioned But Not Applied & 5 & 4 & 55 & 62 \\
\hline
Injustice Mentioned And Applied & 2 & 1 & 10 & 13 \\
\hline
Expectation & 3 & 1 & 1 & 5 \\
\hline
Reliance & 0 & 1 & 0 & 1 \\
\hline
Restitution & 0 & 0 & 0 & 0 \\
\hline
Specific Performance & 0 & 0 & 0 & 0 \\
\hline
\end{tabular}
\end{table}


take early retirement as a result of being asked to obtain federal documents in violation of federal law; an oral promise to gift to be enforced against an estate; and long-standing policy precluding application of estoppel to bind the government to contract of employment.

The need for an "unambiguous" promise in the nature of a "commitment" remains a formidable obstacle, as does the asserted reliance on verbal statements in the face of actual or intended documentation or agreements. To the extent the promise is "ambiguous" and not a "commitment," but rather an expression of hope, expectation, vagueness, or indefiniteness, Massachusetts courts, as a matter of law, have refused to find a viable claim. Claims have been found deficient where there is a lack of

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141 See Kiely v. Raytheon Co., 105 F.3d 734, 735-36 (1st Cir. 1997) (holding plaintiff's promissory estoppel claim unenforceable); see also Gonsalves v. Nissan Motor Corp., 58 P.3d 1196, 1213 (Haw. 2002) (finding promise of continued employment was not enforceable based on promissory estoppel).


143 See Dagastino v. Commissioner of Correction, 754 N.E.2d 150, 153-54 (Mass. App. Ct. 2001) ("Those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law ...."); see also Doherty v. Bartlett, 81 F.2d 920, 925 (1st Cir. 1936) ("[T]he doctrine of estoppel ... has no application to a contract ... which is void because it violates ... the dictates of public policy.") (quoting Colby v. Title Ins. & Trust Co., 117 P. 913, 918 (Cal. 1911)).


causative relationship to the promise; 147 lack of authority; 148 lack of any measurable detriment; 149 and/or an available alternative remedy. 150 No Massachusetts decision has addressed whether “silence” can be a basis for detrimental reliance151 with the bulk (albeit not complete unanimity) of the case law declaring that the “promise” meet all the requirements of a contractual offer. 152 Despite the substantial case law finding either or both of the elements of promise and reasonable reliance insufficient as a matter of law, Courts have stated, particularly as to reliance, that it is usually a decision for the fact-finder. 153 Courts have also referenced that liability for promissory estoppel is appropriate where “there has been a pattern of conduct by one

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152 Compare Kiely v. Raytheon, 914 F. Supp. 708, 712 (D. Mass. 1996) (“the putative promise must not only be definitive and certain in its terms, but also must be one that the promisor expecting to be legally bound by it, intends as a firm commitment.”), aff’d, 105 F.3d 734 (1st Cir. 1997); Cataldo Ambulance Serv., Inc. v. Chelsea, 688 N.E.2d 959, 963 n. 6 (Mass. 1998) (noting promise must be interchangeable with offer “in the sense of a commitment”), with Dixon v. Wells Fargo Banks, 798 F. Supp. 2d. 336, 343-44 (D. Mass. 2011) (“requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee.”) (quoting Hoffman Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965).

153 See Suominen v. Goodman Indus. Equities Mgmt. Grp., 941 N.E.2d 694, 702 n.12 (Mass. App. Ct. 2011) (“forbearance of a colorable legal claim alone can make out ‘legal detriment’ without having to demonstrate the ultimate viability of such a claim.”). Furthermore, the Suominen court found that, for purposes of promissory estoppel, “whether reliance was reasonable is more typically treated as a question of fact to be resolved by the jury.” Suominen, 941 N.E.2d at 703 n. 14 (citing Cannon v. Cannon, 868 N.E.2d 636, 644 (Mass. App. Ct. 2007) (reversing dismissal of promissory estoppel claim)).
side that has dangled the other side on a string." The decisions otherwise reflect the need to protect the cautionary and channeling function as to form because courts readily find un-actionable asserted reliance on verbal statements where there is contrary written documentation or statement, or where there is contradictory information.

The survey also confirms the scant reference or discussion of "avoidance of injustice." It was, in fact, not even mentioned in over 84% of all cases. It is otherwise mentioned and applied, at least to some degree, in only 13% of the total cases. Indeed, a vast majority of decisions, particularly from the Appeals Court, do not even mention the injustice component at all.

No Massachusetts decision has addressed the applicable measure of damages. Massachusetts cases reveal awards under both reliance and expectation measures without much discussion as to either. Expectation appears to be the presumptive measure although certain federal district court decisions, applying Massachusetts law, have found reliance to be more appropriate.

154 See Dixon, 798 F. Supp. 2d at 343 (citing Pappas Indus. Parks, Inc. v. Psarros, 511 N.E. 2d 621 (1987) and cases cited); see also Neves v. Neves, 15-P-99, 2017 Mass. App. Unpub. LEXIS 388, at *12 (Mass. App. Ct. Apr. 14, 2017) ("Frequently, when [promissory estoppel] has been applied, there has been a pattern of conduct by one side which has dangled the other side on a string.").


C. The Avoidance of Injustice

Although Section 90’s formulation of promissory estoppel requires a showing that “injustice can be avoided only by enforcement of the promise,” the reference has been labeled as “enigmatic” as well as “disquiet[ing],” given the limited guidance as to its meaning and application. Even Williston noted the “leeway” left by the use of “injustice,” ruminating that “in regard to [Section 90], if you bind up too closely with familiar mathematical rules as to the law of consideration, the boiler will burst.” Under one view, “the avoidance of injustice” element is all that prevents Section 90 from making all relied upon commercial promises enforceable, thereby eliminating mere performance reliance from the commercial world.

The overall lack of case law addressing, in any meaningful way, the avoidance of injustice element is striking. The primary focus remains on only promise and reliance with little mention of “injustice” or its equitable origin and purpose. Indeed, it may reflect an implicit understanding or rote acceptance that the element has no independent significance. It likewise may reflect resistance and dislike for amorphous standards such as “avoidance of injustice” or “injustice,” as well as the importance of freedom of contract. Regardless, the role and purpose of “injustice” seems to have been forgotten, lost, or ignored.

One fundamental discord that emerges is whether avoidance of injustice is a separate independent element or one of redundancy and underlying purpose. This includes the struggle over whether avoidance of

159 Harvey, infra note 230, at 678 (stating “the use of ‘justice’ as a crucial datum in the expression of rule or doctrine, a professional concern for certainty and predictability inevitably carries disquiet.”).

160 See Alden, supra note 6, at 676 n. 66 (citing Samuel Williston, Discussion of Tentative Draft, Contracts Restatement No. 2, 4 AM. LAW INST. PROC. APP. 61, 90 (1926) (remarks of Prof. Williston, reporter)) (stating “injustice” terms means “something indefinite”); see also Boyer, supra note 10, at 484 (noting term “injustice” is “indefinite” and would be “difficult to establish criteria”); Orit Gan, The Justice Element of Promissory Estoppel, 89 ST. JOHN’S L. REV. 55, 60 (2015) (noting injustice element has garnered little attention from courts); Jimenez, supra note 17, at 672 (finding in survey of cases on promissory estoppel “few judges speak in terms of ‘equity’ or ‘justice’”); Midwest Energy, Inc. Orion Food Sys. Inc., 14 S.W. 3d 154, 161 (Mo. Ct. App. 2000) (noting avoidance of injustice “is not cast with precision”).


162 See id. at 958.

163 Complicating the issue is that the text of Section 90 does not include any express reference to “reasonable reliance” only “action or forbearance,” which the promisor reasonably should foresee. As such, these phrases provide fodder that the reasonableness of the reliance falls within the “injustice” inquiry.
injustice is to ensure liability is limited to only extraordinary or exceptional circumstances or rather a tool for a more robust remedy and redistribution. There likewise remains the issue of whether the element is one for the court or jury. These issues are reviewed below.

1. Judge or Jury

No reported Massachusetts appellate case has yet to directly address whether a claimant has a right to a jury trial as to a promissory estoppel claim or, alternatively, whether such a right includes the avoidance of injustice element.\(^{164}\) The case law demonstrates that promissory estoppel has been tried both before a jury as well as jury waived with no mention of the issue.\(^{165}\)

Where the suit is “between two or more persons” or the matter is a “controvers[y] concerning property,” Article 15 of the Massachusetts Declaration of Rights\(^{166}\) accords a jury trial “except in cases in which it has heretofore been otherwise used and practiced.” This exception “sought to retain the ordinary forms and administration of the English common law (with which they were most familiar), while allowing future generations to create new forms of actions and proceedings which, for practical reasons, might not require, or be appropriate for, decision by a jury.”\(^{167}\) This inquiry requires consideration of whether the cause of action in question is “analogous” to some form of claim previously recognized at common law as opposed to being “a wholly new cause of action,” and whether the remedies sought are “predominantly legal” as opposed to “equitable.”\(^{168}\) As a result of

\(^{164}\) There was a vague intimation that a promissory estoppel claim was for the jury in Simon v. Simon, 625 N.E.2d 564, 568-69 (Mass. App. Ct. 1994), but the legal issue of whether or not the claim carries a right to a jury trial does not appear to have been raised. Id. A 1993 Federal District Court decision summarily held that a right to a jury trial applied to a promissory estoppel claim under Massachusetts law. See Charlton Memorial Hosp. v. Foxboro Co., 818 F. Supp. 456, 460 (D. Mass. 1993) (“plaintiff remains entitled to a jury trial for his claim of promissory estoppel ....”).


\(^{166}\) MASS. CONST. Pt. 1, art. XV (1780) provides: “In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been other ways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred ....”


this exception, the right to a jury does not apply to cases which traditionally would have fallen within the jurisdiction of a court of equity. 169

The application of this test to promissory estoppel is not particularly straightforward. 170 Promissory estoppel, in its present form, did not exist as of 1780, yet it is a direct descendant of equitable estoppel which was a principle of equity with reliance, in turn, a long-time basis for finding contractual consideration. 171 When used as a bar to prevent reliance on such impediments as Statute of Frauds, the doctrine is acutely analogous to equitable estoppel and more closely a creature of equity. When used as an affirmative action seeking enforcement of a promise for money damages, the issue is more difficult but the principle’s equitable nature arguably remains. 172 Money damages are only realized upon the equitable determination that the promise is binding. Promissory estoppel’s fundamental element of reasonable or good faith reliance is of equitable origins. It can be argued that regardless of whether the claim includes a request for damages or enforcement of an un-bargained for contract, its nature and character is one of honest good faith and reasonable reliance which was a pillar underlying equity cases at the time of the Constitution’s adoption. 173 The equitable nature and origin of promissory estoppel is further

All rights to a jury trial stem from Article 15 of the Declaration of Rights which provides a greater right to jury trial than that provided for by the Seventh Amendment under the Federal Constitution as to new actions (i.e., arising after 1780). As to such “new actions,” there is a presumption of a right to jury trial as the “right attaches to all new causes of action whatever their nature unless the relief permitted is other than penal and could have been granted by a Massachusetts court of equity.” In Re Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1010 n. 10 (D. Mass. 1989).

169 See Dalis, 636 N.E.2d at 214 (deciding if there is a right to jury trial in case); Donaldson v. Boston Herald-Traveler Corp., 197 N.E.2d 671, 674 (Mass. 1964) (noting this case is not one which would have been triable for jury in 1780). Further, recasting as equitable a remedy for which a right to jury trial existed at common law does not eradicate that right. See Dalis, 636 N.E.2d at 214-15.

170 See Sedghi v. PatchLink Corp., 823 F.Supp.2d 298, 302 (D. Md. 2011) (stating promissory estoppel defies easy classification for determining whether it carries right to jury trial); Nimrod Mktg. (Overseas), Ltd. v. Texas Energy Inv. Corp., 769 F. 2d 1076, 1078-79 (5th Cir. 1985) (finding no jury trial right on promissory estoppel under Seventh Amendment as equitable in nature); Merex A.G. v Fairchild Weston Sys., Inc., 29 F.3d 821, 824-26 (2d Cir. 1994) (holding promissory estoppel’s use in response to defense of statute of frauds was equitable.). The court further found that as such, there was no right to jury trial, implying form of promissory estoppel in section 90 of Restatement conferred right to jury trial. See Merex A.G., 29 F.3d at 824.

171 See 3 JOHN N. POMEROY, Equity Jurisprudence § 802 (Spencer W. Symons 5th ed. 1941) (“The doctrine of equitable estoppel is pre-eminently the creature of equity.”); Hopkins v. Kedziorski, 170 Cal. Rptr. 3d 551, 557-59 (Cal. App. 2014) (finding no right to jury trial); see also Holmes, supra note 4, at 48 (“[T]he root basis of the doctrine is equity”).


173 See Merex A.G., 29 F. 3d at 825 (holding detrimental reliance has “legal roots” in assumpsit but doctrine as whole remains equitable); see also A-C Co., Inc. v. Sec. Pac. Nat’l. Bank, 219 Cal.
buttressed by the requirement that the promise underlying promissory estoppel is to be enforced only to the extent to prevent injustice with any remedy also determined "in the interest of justice:" Since the claim does not arguably present any quantifiable measure of damages, but requires a balancing of equities, it falls within the traditional province of an equity court. There is a substantial counter-argument that the right to a jury trial does attach. As a cause of action developed after 1780, the presumption of a right to a jury trial can be argued to apply. It is a new cause of action which, unlike equitable estoppel, applies to future promises and is not just a bar, but an affirmative cause of action allowing for monetary damages. Further, if promissory estoppel is a substitute for bargained for consideration rendering the promise enforceable as a contract, it is of a substantial legal character. The allowance of monetary damages particularly expectation damages underscores its kinship with contract and its legal nature. While good faith reliance has its origins in courts of Chancery, it also made its way into the


See C & K Eng'g v. Amber Steel Co., Inc. 587 P.2d 1136, 1141 (Cal. 1978) (“the ‘gist’ [of promissory estoppel] … is equitable. Both historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not by the jury.”). Further support for this position can be found by the determination that the right to a jury trial applies to quantum meruit or quasi contract claims. See Wendt v. Barnum, 2007 Mass. App. Div. 93, 95-96 (2007); Malonis v. Harrington, 816 N.E.2d 115, 120 (Mass. 2004) (“The underlying basis for this legal obligation [quantum meruit] is derived from principles of equity and fairness, to prevent unjust enrichment of one party (the windfall of free legal services to the client) at the expense of another (the discharged attorney who expended time and resources for the client’s benefit).”). Doherty v. Retirement Bd. of Medford, 680 N.E.2d 45, 50-51 (Mass. 1997) (finding no right to jury trial as to claim for restitution); Tull v. United States, 481 U.S. 412, 424 (1987) (finding restitution is an equitable remedy which does not require jury trial under Seventh Amendment).

common law courts through the law of assumpsit. Assumpsit provided for reliance based recovery for breach of a promise. Reasonable or justifiable reliance, in turn, was integral to assumpsit just as detrimental reliance was integral to equity. As an action at law, assumpsit was entitled to a jury trial for the purpose of making binding a promise.

Courts which have addressed the issue readily admit that “the protean doctrine of promissory estoppel eludes classification as either entirely legal or entirely equitable.” According to the Second Circuit, “both law and equity exert gravitational pulls on the doctrine, and its application in any particular case depends on the context in which it appears.” As such, a number of cases have determined that when used as a bar to such impediments as Statute of Frauds, it is equitable with no right to a jury, even if the claimant is seeking contract damages. When the doctrine is being used for purpose of seeking contract damages and a form of consideration, the analogy to assumpsit is compelling and likely to carry the right to a jury trial. Some courts have found a right to jury simply on the basis that the promissory estoppel claim sought money damages.

Not all courts agree. A number of held that promissory estoppel remains essentially equitable in nature with no concomitant right to a jury

177 See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (“enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise.”).
179 Merex AG v. Fairchild Weston Systems, Inc., 29 F.3d 821, 825 (2d Cir. 1994); InCompass IT, Inc. v. XO Commun’cns. Servs., Inc., 719 F.3d 891, 897 (8th Cir 2013) (finding that, with regards to a claim under promissory estoppel, “the nature of the remedy sought is 'the more important of the two' inquiries in determining whether a right to a jury trial exists under the Seventh Amendment.”); Holmes, supra note 4, at 45-48 (discussing promissory estoppel is neither exclusively contract, tort or equity).
They hold that seeking monetary damages through a claim of promissory estoppel is not dispositive because the controlling inquiry is whether the cause of action is equitable or not. Some have found that if only reliance damages are sought or available, this supports the finding of an equitable based claim. Further, the interest of justice component particularly as to the measure of damages has also been relied upon to find no right to a jury.

Some jurisdictions take a hybrid position. They allow promissory estoppel claims to be submitted for jury determination except for the avoidance of injustice element. Under the section 90 Restatement formulation, the underlying promise is to be enforced by virtue of reliance

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186 See Anderson, 351 P.3d 832, 841-42 (Utah 2015) (noting plaintiff must establish nature of claim, either legal or equitable); see also Reese v. IBEW Local 82 Pension Plan, No. 3:11-cv-242, 2012 U.S. Dist. LEXIS 32219, at *4 (S.D. Ohio Mar. 12, 2012) (rejecting argument that promissory estoppel claim, which included money damages, entitled plaintiff to jury trial.).

187 See InCompass IT, Inc. v. XO Com’ms Servs., Inc., 719 F.3d 891, 896 (8th Cir. 2013) (applying Minnesota law and holding “reliance damages place ... promissory estoppel claim in ... province of equity”).

188 See Kim, 135 P.3d at 983 (finding plaintiff’s claim purely equitable, thus had no right to jury trial).

189 See, e.g., Chrysler Corp. v. Chaplake Holdings Ltd., 822 A.2d 1024, 1034 (Del. 2003) ("[t]he avoidance of injustice element is, however, a legal concept and not a question of fact to be submitted to the jury."); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 275 (Wis. 1965) (holding injustice element of promissory estoppel case matter of policy and question of law); Tour Costa Rica v. Country Walkers, Inc., 758 A.2d 795, 801 (Vt. 2000) ("[w]hether injustice can be avoided only by enforcement of the promise is a question of law ...."); Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) (Hereinafter Cohen II) (holding promissory estoppel injustice case "is ... legal question for ... court, as it involves ... policy decision."); D & S Coal Co., Inc. v. USX Corp., 678 F. Supp. 1318, 1320–21 (E. D. Tenn. 1988) ("[t]he injustice requirement of promissory estoppel is an equitable consideration which must ultimately be determined by the Court, not the jury."); Pavel Enters. Inc., v. A. S. Johnson Co., Inc., 674 A.2d 521, 533 (Md. 1996) ("as to the fourth prima facie element, the trial court, and not a jury must determine that binding the [defendant] is necessary to prevent injustice."); Tour Costa Rica v. Country Walkers, Inc., 758 A.2d 795, 801 (Vt. 2000) (stating injustice element is question of law); Singer v. Lajaunie, 339 P.3d 277, 283 (Wyo. 2014) (finding injustice element of promissory estoppel is for court).
only if injustice can be avoided by enforcement. Courts have found this element to be an equitable and policy decision and, therefore, solely a matter for the court. Other courts submit the issue to the fact finder as with all other elements.

Given the presumption of a right to jury trial to new causes of action and that Massachusetts treats detrimental reliance as sufficient consideration, the right to a jury trial likely will be found to apply where promissory estoppel is being asserted as an independent cause of action for monetary damages. Where asserted as a defense or bar, it could be found not to carry a right to jury trial. Further, promissory estoppel is commonly asserted together with other claims including breach of contract, breach of the covenant of good faith and fair dealing, and misrepresentation—both negligent and intentional. Where claims are mixed, the trial judge has the choice of (1) letting the jury find the facts on both types of claims, (2) deciding himself/herself all aspects of the non-jury claims, or (3) asking the jury for nonbinding findings as to the non-jury claims. In exercising such discretion, the court must not infringe on the right to a jury trial on legal issues.

The legal/equitable divide is significant, despite the regular practice of submitting promissory estoppel claims to a jury. It is hard to deny the purely equitable nature of the avoidance of injustice element and that it carries no right to a jury trial. Given that avoidance of justice is largely one of policy based on the underlying circumstances, it remains more suitable for judicial treatment. As noted, “both historically and functionally, the task of weighing such equitable considerations is to be performed by the trial court, not the jury.” Courts in Minnesota, Wisconsin, District of Columbia, Vermont, Wyoming, and Minnesota have all held or intimated that the issue remains one for the court.

2. Independent or Redundant

Despite its unequivocal inclusion in Section 90’s black-letter formulation, there remains uncertainty over whether avoidance of injustice is a separate prima facie element and whether it provides any meaningful

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190 See Barrie-Chivian v. Lepler, 34 N.E.3d 769, 772 (Mass. App. Ct. 2015) (“[p]romissory estoppel is an equitable doctrine, and judges are to apply it flexibly to avoid injustice.”).
194 See Cohen II, 479 N.W.2d at 391 (deciding decision left for court); see also Hoffman, 133 N.W.2d at 275 (same); Tour Costa Rica, 758 A.2d at 799 (same); Singer, 339 P.3d at 277 (same).
substance beyond the elements of promise and reliance. 195 While the court in Loranger adopted Section 90’s formulation, 196 numerous Massachusetts appellate decisions do not even mention the injustice component in their prima facie recitation and, to the extent mentioned, provide little to no insight as to its substance. 197

a. The Separate Substantive Element View

Section 90’s formulation treats avoidance of injustice as a separate substantive component identifying the prima facie showing as follows: (1) a promise which the promisor should reasonably expect to induce action or forbearance; (2) the promise induced such action or forbearance by the promisee; and (3) injustice can be avoided only by enforcement of the promise. If a promise, which the promisor should foresee, would induce action or forbearance by the promisee and cause such action or forbearance, it is “binding.” The inquiry does not end, however, because—regardless of the action or forbearance resulting from the promise—the promise is binding only if “injustice can be avoided only by enforcement of the promise.” 198 A number of courts applying Massachusetts law do, in fact, recognize avoidance of injustice as a prima facie element. 199 Moreover, and at least as

195 See Boyer, supra note 10, at 482 (discussing avoidance of injustice by enforcement of promise).
to its black-letter formulation, the avoidance of injustice is the ultimate and necessary requirement before relief can be provided. Indeed, it has been dubbed, by some, "[t]he principal substantive check upon application." 200

Despite its standing, the role and content of "injustice" is far from self-evident or defining. While the "reasonableness" of the action or forbearance has been identified by some as falling within its purview, 201 its remaining constituents are unclear. Nonetheless, within this vacuum is the general recognition that "injustice" has long-standing roots in equity, reflecting the equity based origin behind promissory estoppel, and consistent with such principles as "clean hands," "unconscionability," "laches," and the notion that "he who seeks equity must do equity." 202 Section 90 otherwise does not provide much guidance, 203 although the concept and term is found in a number of other provisions of the Restatement, 204 with Comment b of section 90 providing the most insight as to operative criteria. 205 It provides:

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200 Alden, supra note 6, at 676.


203 See New England Merchants Nat'l Bank v. Kann, 294 N.E.2d 390, 393 (Mass. 1973). It has been repeatedly emphasized that the purpose of equitable estoppel is "to prevent one from benefiting from his own wrongdoing and to avoid injustice." Harrington v. Fall River Hous. Auth., 538 N.E.2d 24, 29 (Mass. App. Ct. 1989); see also Blanchard v. Ellis, 1854 Mass. LEXIS 28, at *8-9 (Mass. 1854) (noting doctrine of estoppel rests on "the prevention of wrong and injustice").

204 Jimenez, supra note 17, at 669 (noting over 300 cases demonstrating "surprisingly few judges require a plaintiff to show that the equitable principle of 'justice' has been satisfied."); Gan, supra note 160, at 61-62 (noting judges content that when promise and reliance met justice element properly satisfied).

205 See Restatement (Second) of Contracts § 158(2) (1981) (using term "injustice").

The principle of this section is flexible. The promisor is affected only by reliance which he does or should foresee to be enforceable and which must be enforced to avoid injustice. Satisfaction of the [injustice element] may depend on the reasonableness of the promisee’s reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.\(^{207}\)

Only a few jurisdictions (six to date) have referenced or relied upon these factors in implementing or discussing the avoidance of justice element.\(^{208}\) Vermont, Minnesota, and Wisconsin, in turn, have restated the Restatement factors as follows: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the

\(^{207}\) RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981). Courts have likewise turned to section 139 of the Restatement which sets out the detrimental reliance rule as a basis precluding a statute of frauds defense including “if injustice can be avoided only by enforcement of the promise.” RESTATEMENT (SECOND) OF CONTRACTS § 90(1). Furthermore, section 139(2) sets out certain “circumstances” that were identified as “significant” to the avoidance of injustice element which include:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;
(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
(d) the reasonableness of the action or forbearance;
(e) the extent to which the action or forbearance was foreseeable by the promisor.

RESTATEMENT (SECOND) OF CONTRACTS § 139(2) (1981). According to the accompanying Comment, “like section 90,” this section sets forth a “flexible principle” and that “[e]ach factor relates either to the extent to which reliance furnishes a compelling substantive basis for relief in addition to the expectations created by the promise or to the extent to which the circumstances satisfy the evidentiary purpose of the Statute and fulfill any cautionary, deterrent and channeling functions it may serve.” RESTATEMENT (SECOND) OF CONTRACTS § 139 cmt. b.

\(^{208}\) Wisconsin, Minnesota, Pennsylvania, Vermont, District of Columbia and Missouri. See Fifty State Survey and cases cited.
reasonableness of the action or forbearance; [and] (e) the extent to which the action or forbearance was foreseeable by the promisor. Courts in the District of Columbia have also referenced the Restatement factors emphasizing that the injustice inquiry centers on “evaluation of the formality of the promise, whether there is a commercial setting and its nature, and whether there is unjust enrichment.” The inquiry has been similarly referenced by Minnesota courts as involving “[n]umerous considerations … including the reasonableness of a promisee’s reliance and a weighing of public policies in favor of both enforcing bargains and preventing unjust enrichment.” All such courts treat the injustice inquiry as an independent element and one of fundamental policy.

Comment b’s reference to the “reasonableness” of reliance being a factor in the injustice inquiry is notable given that section 90’s black letter formulation does not include any “reasonableness” requirement, only an “action or forbearance.” By virtue of the express terms of section 90, the degree of objective reasonableness is arguably irrelevant similar to the rule as to contractual consideration with Massachusetts case law, otherwise making clear that the reliance must be both reasonable and detrimental. By utilizing the terms “enforcement of the promise,” the suggestion is one of specific performance of the promise, which is usually reserved for very few instances and only where money damages are not available. Compounding the issue is that the remedy is also governed by an interest of justice consideration which otherwise supports independency.

The Restatement further suggests that neither the reliance by the promisee nor the promisor’s reasonable expectations are, alone, determinative and that the particular circumstances must also be considered. This requires consideration of not just the existence of reliance by the promisee, but its degree and character, as well as the nature of the actions of,

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and impact upon, the promisor. In fact, such reliance must be of a substantial and definite nature. Similarly, it is not just whether there is a basis to find that there is a reasonable expectation of reliance given the promise, but the degree and extent of such foreseen by the promisor. As noted by one court, "[w]hile the threatened injustice to the promisee is equity's first consideration, it is proper to consider the possible harshness to defendant by enforcement of his promise." This would require consideration of the reasons for non-performance of the promise. The reliance, promise, and justice components are, in fact, interrelated:

The first two elements [reliance and promise] should be weighed in inverse to the third element [justice]. That is the more clear, definite, and unambiguous the promise, the less weight need be given to justice considerations. Similarly, the more the reliance is detrimental to the promisee, the lighter the burden of justice. And vice versa, if the two elements are weak, then the justice needs to be very meaningful. If the promise is not concrete enough and the reliance caused little or no loss, then the promisee needs to show significant justice considerations in order to enforce the promise. In other words, courts should delicately balance these three elements.

The injustice element likewise takes account of the relations between the parties, the nature of the interest or subject of the promise and reliance, and requires consideration of any applicable social policies favoring or disfavoring enforcement of the particular promise. Comment d not only identifies the need to consider the reasonableness of the promisee's reliance—and particularly whether it is of a definite and substantial character in relation to the remedy sought—but also applicable "policies" such as "the enforcement of bargains and the prevention of unjust enrichment" as well as "the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise."

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214 Miller v. Lawlor, 66 N.W. 2d 267, 274 (Iowa 1954).
215 Cohen II, 479 N.W.2d at 392 (explaining liability for breaking promises). "[I]n view of the defendants' concurrence in the importance of honoring promises of confidentiality, and absent the showing of any compelling need in this case to break that promise, we conclude that the resultant harm to Cohen requires a remedy here to avoid an injustice." Id. See also Cohen v. Cowles Media Co., 457 N.W.2d 199, 204 (Minn. 1999) [hereinafter Cohen I] (inquiring why promise was broken). "If the court applies promissory estoppel, its inquiry is not limited to whether a promise was given and broken, but rather the inquiry is into all the reasons why it was broken." Id.
216 Gan, supra note 160, at 76.
THE FINAL FRONTIER

The injustice component and the comment on criteria reflect the "equitable" nature of the doctrine and the power of the court "to do justice" in particular circumstances. According to one court, "this standard has 'the merit ... of invoking Justice and reminding the court that this particular rule cannot be applied by a mechanical process ... the clause is a suggestion that sometimes the answer should be No.'"

Whether this reflects a limiting or robust role, one is hard pressed to treat the injustice element as superfluous or pertaining solely to remedy. It is a discrete and fundamental substantive element with the key to provide it substance and discipline.

b. Lack of Independence View

Despite its prominence in Section 90's formulation, there are courts, including in Massachusetts, that do not include or recognize "avoidance of justice" as a separate element. It either receives no mention at all or is referenced only as the underlying guide, policy, or end result behind the application of the promise and reasonable reliance components. The injustice element is deemed meaningless in that once it is shown that a party justifiably relied to its detriment, which the promisor reasonably did or should have expected, the avoidance of the injustice element is met. If

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219 See Gan, supra note 160, at 83 (arguing courts should "affirmatively and explicitly consider justice as an independent element rather than be guided by a vague sense of justice.").


221 See Mann v. Robles, No. 13-14-00190-CV, 2016 WL 1274690, at *5 (Tex. Ct. App. 2016) (stating "while we agree that injustice may be a consideration, we disagree that it is an element of..."
there has been a sufficient promise and reasonable reliance, “injustice” has resulted.\textsuperscript{222} Stated differently, the doctrine “avoids injustice” by functioning solely as a substitute for consideration.\textsuperscript{223}

While Section 90’s formulation includes “reasonableness” of reliance under the avoidance of injustice component, most states, including Massachusetts, recite reasonable reliance as a single operative element.\textsuperscript{224} The inclusion of “reasonableness” of reliance in the “avoidance of injustice aspect—if a purely equitable element for the court and not the jury—would result in the Court determining whether the degree of reliance was sufficient and potentially rub against any jury right to determine the issue. The same concern applies to the reasonableness of the foreseeability to the promisor of the action or forbearance element. Under strict application, a jury would determine both the promise and action or forbearance, but the court would address the “reasonableness” of the action or forbearance, as well as the extent of the foreseeability of the promisee’s inducement. This rub militates against recognizing any true independency.

Similarly, most of the considerations set forth in comment b further inform the promise and reliance elements. The degree of the promisee’s reliance, including whether the reliance was of a substantial and definitive character, for instance, is a consideration easily placed under the reasonable reliance inquiry. Similarly, the formality and form of the promise and the channeling functions revealed in the circumstances go to the sufficiency of the promise (as well as reliance), as does the inquiry whether any policy consideration would require non-enforcement of the promise regardless of reliance. Consideration of the relation of the parties and their respective sophistication also can be deemed to inform both the promise and reasonable reliance elements leaving little, if anything, for any loose notion of avoidance of injustice. Finally, to the extent the lack of an adequate remedy must be

\begin{itemize}
\item Jimenez, supra note 17, at 703 (suggesting some judges may believe, where promise and reliance shown, “injustice” automatically met).
\item Edwards, infra note 233, at 231.
\item See Clawson v. Clawson, 15-P-58, 2016 Mass. App. Unpub. LEXIS 1000, at *9-12 (Mass. App. Ct. 2016) (utilizing reliance in analysis); Barrie-Chivian v. Lepler, 34 N.E.3d 769, 771 n. 8 (Mass. App. Ct. 2015) (requiring more than “mere” reliance; promissory estoppel requires a showing that promise was intended to induce reliance, and that such reliance was reasonable); Anzalone v. Admin. Office of Trial Court, 932 N.E.2d 774, 785-86 (Mass. 2010) (same). A common formulation incorporating the substitute for consideration view is: “Detrimental reliance on an offer or a promise (also known as promissory estoppel) is a substitute for consideration. Therefore, an offer that reasonably induces the other party to act is enforceable as a contract in the same manner as any other contract to the extent necessary to avoid injustice.” Johnny’s Oil Co. v. Eldayha, 978 N.E.2d 86, 94-95 (Mass. App. Ct. 2012).
\end{itemize}
shown, this would not require an additional or separate element of "injustice," but rather the acknowledgement that promissory estoppel has equitable origins and otherwise needs limited application so as not to undercut benefit of the bargain promises.

This view of avoidance of injustice is that it provides no operative substance to the inquiry. It is the very use and reliance on such general notions, such as "injustice," "good conscience," or "fairness," that, in application, provide no meaningful means of principled or accountable decision-making. "While doing justice is indeed a lofty goal, in a system of stare decisis an exhortation to do justice, without more, contributes little to the development, the certainty, or the predictability of legal rules." Not only is such a notion difficult if not impossible to define for purposes of certainty and predictability, but it poses the potential that while both promise and reliance are questions for a jury, avoidance of injustice is entirely equitable and is to be addressed solely by the court—resulting in a potential court/jury bifurcation as to a single cause of action. This view eliminates any need for balancing of hardships or consideration of "fairness," as the inquiries into the sufficiency of the promise and reasonable reliance are the activating principles and should not be further constrained or cluttered by inchoate notions of "injustice" or balancing of hardships.

3. Limiting Principle or Robust Remedy

Even if independent, there remains the issue of the element's substance and overarching purpose. There is a divide between whether the injustice component portends a limiting or robust remedial function. This division can be seen despite the relatively scant case law and the very few jurisdictions which have provided any substance to the avoidance of injustice component.

For instance, courts in Wisconsin, while expressly referencing the "injustice" component to be one of "policy," otherwise import an expansive breath stating that when "determining whether an injustice can be avoided by enforcing the promise—a court 'must remember all of its powers derived from equity, law merchant, and other sources, as well as the common law.'" Indeed, Wisconsin does not require a promise that is a commitment in the contractual sense and may include indefinite promissory representations.

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California, in turn, has been found to have “overt[ly] recogniz[ed] . . . promissory estoppel as an equitable theory evidencing and providing correlative equitable rights, duties, and remedies” unconstrained by any notion of limitation. 228 Others, like Minnesota, have referenced “avoidance of injustice” as a limiting principle, observing that “[t]he test is not whether the promise should be enforced to do justice, but whether enforcement is required to prevent an injustice. As has been observed elsewhere, it is easier to recognize an unjust result than a just one, particularly in a morally ambiguous situation.” 229

Based on the wording and equitable origins of Section 90, there is a substantial argument that the injustice component is not only an independent element, but a limiting principle. “Enforcement of the promise” through promissory estoppel is limited in that the promise is “only” to be enforced to avoid injustice. 230 It is not an inquiry whether the promise should be enforced to do justice. 231 As worded, enforcing promises “should only be used as a last resort.” 232 “[I]f the court can achieve this goal [of enforcement] by another means or if no injustice is expected, then the promise should not be enforced.” 233 The criteria listed in comment “b” all serve to restrict or whittle down the circumstances in which the injustice element permits redress. This is consistent with the view that estoppels are disfavored and applied cautiously. 234 The limitation function of the injustice element is also in

229 Cohen II, 479 N.W.2d at 391.
230 See William Harvey, Discretionary Justice Under the Restatement (Second) of Contracts, 67 CORNELL L. REV. 666, 675 (1982) (explaining injustice element, “Professor Williston probably accorded it the sole function of cautioning against any enforcement of the promise if restitutionary relief in quasi-contract would be adequate”).
231 See Gan, supra note 160, at 60 n.21 (citing Cohen II) (noting this distinction court states: “it is easier to recognize an unjust result than a just one . . . ”); Davis v. Davis, 855 P. 2d 342, 349 (Wyo. 1993) (“[t]he doctrine of promissory estoppel can only be invoked when it is necessary to avoid injustice”).
232 See Gan, supra note 160, at 60.
233 See id. (concluding § 90 indicates “only a limited notion of equity and justice into the contracting process”); see also Carolyn Edwards, Promissory Estoppel and The Avoidance of Injustice, 12 OKL. L. REV. 223, 226 (1987) (“[T]he concept of avoiding injustice, invoked as measure of contract liability and remedies, has become an important tool in the law.”).
THE FINAL FRONTIER

keeping with the long-standing recognition that equitable relief is largely reserved for “extraordinary” circumstances, and that reliance based promises are subordinate to existing bargained for contracts. As a limiting principle, it serves to maintain a meaningful demarcation between consensual bargained for contracts, and those seeking enforcement through reliance.

Despite the paucity of case law, there are decisions that both meaningfully apply the element and reflect its necessary limiting nature. One example is *Thatcher’s Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, where the Supreme Court of Pennsylvania addressed a claim for promissory estoppel by a shopping center pharmacy against the supermarket anchor store that had plans to open a pharmacy. The claim hinged on the assertion that the supermarket had given prior “oral assurance[s]” that it did “not intend to operate [a competing] pharmacy.” The pharmacy’s lease provided it was prohibited from selling food, and the shopping center would not have a competing pharmacy. At some point, the pharmacy began selling milk and the supermarket responded by posting a sign announcing that a pharmacy was coming soon. When the pharmacy inquired regarding the sign, the supermarket informed the pharmacy “[y]ou get out of the dairy business and we won’t open a pharmacy.” The pharmacy ceased selling the milk, and the supermarket removed the sign. Subsequently, and prior to renewing its lease, the pharmacy sought assurances from the supermarket that it would not open a competing pharmacy with it again—representing that the supermarket had no intention of opening one. The pharmacy proceeded to renew its ten-year lease. Ultimately, the supermarket decided it would operate a retail pharmacy on its premises.

The court in *Thatcher* expressly noted the avoidance of justice factors identified in the Restatement and found that they required denial of relief. It was assumed that there was both a promise and reliance with the dispositive issue being whether enforcement of the promise was necessary to avoid injustice. The court found that lack of meaningful reliance, lack of


636 A.2d 156 (Pa. 1994).

*Thatcher’s Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, 636 A.2d 156, 159 (Pa. 1994) [Hereinafter *Thatcher’s*].

Id. at 163 (describing pharmacy’s lease).

Id.

Id. at 157 (quoting the pharmacy).

Id. at 158.

*Thatcher’s*, 636 A.2d at 158-61.
formalization, and lack of evidentiary, cautionary, and channeling functions controlled.\textsuperscript{242}

As to reliance, the court found that the terms of the respective leases of the pharmacy and supermarket expressly reserved the right of the supermarket to operate a pharmacy. According to the court, "[u]nder the circumstances of this case, where [the pharmacy] sought ten years of protection from a source of potential competition with whom it had a less than amicable relationship, it was unreasonable for [pharmacy] to proceed on the basis of indefinite oral assurances."\textsuperscript{243} The court explained:

In view of the relationship between the parties and the nature and duration of the promise, any agreement not to compete should have been formalized. Proceeding in such a manner would have memorialized the occasion and reduced the possibility that the terms of the agreement would be misunderstood. As a business entity operating in the commercial setting, Thatcher's showed poor judgment when it decided to renew its ten-year lease and forgo its opportunity to relocate on the basis of an indefinitely worded promise uttered in an informal conversation with a potential competitor.\textsuperscript{244}

The court likewise found the informality in which the promise was asserted also militated against any injustice in not enforcing the promise:

[The circumstances] fail[] to reflect the degree of formality one would expect when business rivals operating in a commercial setting have rights at stake as important as the freedom to enter a new line of business and the choice of where to locate for a ten-year period of time. Despite the gravity of these matters, the record fails to reveal that the parties even so much as shook hands to formalize their agreement.\textsuperscript{245}

The lack of any measurable formalities "prevented the parties from exercising the caution demanded by a situation in which each had significant rights at stake" and, as such, the parties were not "able to appreciate the seriousness of their actions," or "deterred from making ill-considered

\textsuperscript{242} Id. at 160-61.
\textsuperscript{243} Id. at 160.
\textsuperscript{244} Id. at 160-61.
\textsuperscript{245} Id. at 161.
promises. 246 The court also found that the circumstances demonstrated a credibility contest between two individuals and involved a vague agreement "at risk of being misunderstood." 247

There was a dissent. While the majority emphasized the pharmacy's lack of enforcement reliance, the dissenting opinion emphasized the reasonableness of the pharmacy's performance reliance in light of the supermarket's history of performing its promises with the pharmacy. 248

Another more recent example is found in *Walshe v. Zabors.* 249 There, the claimant (Walshe), a subcontractor of a utility consultant firm, asserted a promissory estoppel claim against the consultant firm seeking to "estop" it from treating him as an employee rather than a partner entitled to compensation over and above salary and benefits. 250 Although a proposed letter agreement was drafted, but never signed by Walshe, he otherwise joined and worked for the defendant. 251 The claim included the assertion that the defendant firm was unjustly enriched by receiving revenue from Walshe's largest client which he had transferred to the firm, and that the firm had wrongly delayed in consummating an equity agreement for more than a year while Walshe generated revenues. 252

The Federal District Court of Colorado found the evidence sufficient to support an actionable promise, reasonable foreseeability and reliance. The reliance consisted of Walshe joining the firm, transferring his largest client, and generating over $400,000 in revenue for the firm. 253 Walshe never received any additional compensation or distribution either before or after his departure. 254 There was evidence that Walshe, had he stayed with his own company and not joined the defendant, would have earned approximately $17,000 more a month. 255

Despite the strength of the evidence as to promise, foreseeability, and reasonable reliance, the court denied the claim based on the injustice element. 256 The court proceeded to identify the claimed additional bonus and compensation as the operative loss and promise based on the revenues Walshe and his client generated. Nonetheless, there was no evidence that

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246 *Thatcher's*, 636 A.2d at 161.
247 *Id.*
248 *Id.* at 161-64 (Papadakos, J. dissenting) (dissenting against the majority's assertion that the pharmacy had a lack of enforcement reliance).
250 *Id.* at *1-4.
251 *Id.*
252 *Id.* at *1
253 *Id.* at *5-6.
255 *Id.* at *6.
256 *Id.*
Walshe was treated differently from other partners and directors of the firm. To the extent there was evidence that there was a subsequent promise to treat Walshe differently, it was found to be prospective, not retrospective, and thus not operative as to the $400,000 in revenues relied upon.\textsuperscript{257} Enforcement of the promise was found not necessary to avoid injustice as there was no evidence that any other director or partner was paid anything beyond their salary and benefits, and because the firm provided no one any such compensation as to the year at issue, given low overall revenues.\textsuperscript{258}

While the application in \textit{Thatcher's} and \textit{Walshe} represent the view that avoidance of injustice is a limiting principle and otherwise accentuate enforcement reliance over performance reliance, there is support for the view that the injustice component should have a "robust" role and serve as a tool to effect "distributive justice that goes beyond [the] considerations of the interests of the parties."\textsuperscript{259} Under this view, the "injustice" component empowers the doctrine to "serve both to protect the reliance of the underprivileged parties and to empower underprivileged parties" so that, in the end, "the contracting process [is] more flexible, egalitarian, and conscionable" as well as renders "contract law more inclusive and pluralist."\textsuperscript{260}

There are, arguably, seeds in Massachusetts case law supporting such a "robust" view. As early as 1931, it was noted that "[i]t is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated."\textsuperscript{261} Not only did the decision in Greenstein v. Flatley\textsuperscript{262} equate promissory estoppel with a statutory consumer protection violation, but in a 1995 decision, the Appeals Court upheld a promissory estoppel award for a claimant in the employment setting where a corporation promised to issue shares to an employee in return for future services, although this practice was expressly prohibited by statute.\textsuperscript{263} In a spacious view of promissory estoppel, and with no mention of avoidance of injustice, the court allowed the employee to enforce his right to receive the shares based on future services.\textsuperscript{264} More recently, in a dispute

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See id.
\item See Gan, supra note 160, at 72.
\item See id.
\item McLearn v. Hill, 177 N.E. 617, 619 (Mass. 1931).
\item See id. at 51-52.
\end{enumerate}
\end{footnotesize}
over the validity of a marriage, it was stated "that the policy considerations underlying the use of estoppel are expansive rather than narrow."

As revealed by the survey above, Massachusetts case law has given little to no treatment to the avoidance of justice element with it not even mentioned as a required element in a significant portion of decisions. The idea of "injustice" has, however, long been a fundamental reference in Massachusetts equity jurisprudence including as to such equitable bull-dogs as restitution, specific performance, injunction, piercing the corporate veil, and subrogation. It represents court formed relief necessitated by unique hardships posed by rigid application of normal rules and, as such, requires a showing of something more than prima facie elements to invoke relief. Indeed, "[t]he project of equity is the making of exceptions to usual rules." As to restitution, for example, not only must there be a benefit incurred, but it must be "unjust" to merit recovery.

In the end, "the great and primary use of a court of equity is to give relief in extraordinary cases." Moreover, while the "exercise of a court’s equity powers . . . must be made on a case-by-case basis," equity "must [still] be governed by rules and precedents no less than the courts of law." As such, equitable relief is usually reserved for "extraordinary" circumstances.

265 Poor v. Poor, 409 N.E.2d 758, 760 n.5 (Mass. 1980).
266 Econ. Grocery Stores Corp. v. McMenamy, 195 N.E. 747, 748 (Mass. 1935) (noting specific performance is an equitable remedy which should not be granted when requesting party engaged in conduct "savored with injustice touching the transaction").
with fraud, bad faith, or deceit as its center stones. In short, the incorporation of the purely equitable notion of “avoidance of injustice” can be seen as ensuring that any relief is only available in limited instances and is a narrow exception to the usual rule necessitating exceptional circumstances for its invocation. Estoppel has, in fact, been often referenced as only applying in “extraordinary” circumstances. Even where there is a reliance inducing promise, it remains the exceptional circumstance that enforcement of the promise will be necessary to avoid injustice. Promissory estoppel remains the exception to the usual bargain for exchange contractual obligation and, as such, must also be reserved for exceptional circumstances as reliance is not agreement. While inter-familial and donative transfers may well represent such unique circumstances, transactions and dealings in commercial settings, and particularly among sophisticates, usually do not.

4. Remedial Measure

a. Expectation, Reliance or Discretionary

As with the avoidance of injustice element, limited attention has been afforded to the issue of remedy. There remains discordance among jurisdictions as to the appropriate remedy which centers around three


See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814-15 (1945) (“[W]hile 'equity does not demand that its suitors shall have led blameless lives', as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.”) (quoting Loughran v. Loughran, 292 U.S. 216, 229 (1934)).


primary views: expectation, reliance, and a flexible or discretionary approach. This divergence reflects the competing views as to the purpose and scope of promissory estoppel.

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278 Waters v. Marathon Oil Co., 642 F.2d 1098, 1100-01 (7th Cir. 1981) (holding promissory estoppel, as equitable doctrine, allowed recovery where party had proven "the amount of the lost profits . . . with reasonable certainty"); Gutteridge v. J3 Energy Grp., Inc., No. 3397 EDA 2013, 2015 WL 7253671, at *6 (Pa. Super. Ct. 2015) (noting promissory estoppel should be value of promise unless equity dictates otherwise); ZBS Indus., Inc. v. Anthony Cocca Videoland, Inc., 637 N.E.2d 956, 960 (Ohio App. Ct. 1994) ("[W]e find that a plaintiff may recover expectancy damages, including lost profits, in a promissory estoppel action where . . . the promise relied upon obligates the promisor into the future and those damages are demonstrated with reasonable certainty."); Seattle First Nat'l Bank, N.A. v. Siebol, 824 P.2d 1252, 1256 (Wash. Ct. App. 1992) (noting "[l]ost profits are recoverable in promissory estoppel cases as long as there is a substantial and sufficient factual basis supporting the amount awarded.").


280 See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981) (noting flexibility of section 90); see also Walscr v. Toyota Motor Sales, U.S.A., Inc., 43 F.3d 396, 402 (8th Cir. 1994) (holding promissory estoppel damages properly limited to reliance damages where lost profits were "far from a certainty"); Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 826 (2d Cir. 1994) ("[i]f successful [on a promissory estoppel claim], the plaintiff is not entitled, as of right, to expectation damages; the court retains the discretion to award relief to avoid 'injustice,' and can mold that relief 'as justice requires.'"); Chedd-Angier Prod. Co. v. Omni Publ’n Int., 756 F.2d 930, 937 (1st Cir. 1985) (allowing expectation damages on promissory estoppel claim and finding recovery amount in discretion of court); Green v. Interstate United Mgmt. Serv. Corp., 748 F.2d 827, 831 (3d Cir. 1984) (limiting recoverable damages on promissory estoppel claim to reliance damages given the promise’s “manifestly contingent nature.”); Weitz v. Hands, Inc., 882 N.W.2d 659, 672 (Neb. 2016) (finding no single measure of damages applies in promissory estoppel and damages dictated by justice); Grouse v. Grp. Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) (using section 90 of the Restatement (Second) of Contracts); Toscano v. Greene Music, D043281, 2004 Cal. App. LEXIS 2029, at *10, *15 (Cal. Ct. App. Dec. 2, 2004) (explaining because promissory estoppel is rooted in equity, trial courts can “fashion remedies in the interests of justice” and award damages “proven with reasonable certainty”); Hunter v. Hayes, No. 74-239, 1975 Colo. App. LEXIS 109, *4 (Colo. Ct. App. Mar. 25, 1975) ("When a plaintiff’s recovery is predicated on findings of a promise and detrimental reliance thereon, there is no fixed measure of damages to be applied in every case. Rather, the amount of damages should be tailored to fit the facts of each
The argument for an expectation measure of damages is that reliance serves as consideration, and that a contractual binding obligation is formed entitling promisee to all the same remedies available to those where there has been a breach of a mutually bargained for contract.281 “Promissory estoppel is simply consideration, cloaked in a new name.”282 The “wrong” remains the failure to perform the promise not in the making of the promise or the reliance undertaken. Promissory estoppel thus remains contractual in that it seeks to address injuries occasioned by the breaking of commitments. “[T]he role of contract law is not reliance protection, it is bargain enforcement.”283

While there appears symmetry between the activating reliance, rendering the promise enforceable and a reliance measure of damages, it is argued to be without substance. Under this view, promissory estoppel is not a tort as it “rightfully belongs to the domain of promise-enforcement ... it should neither be exiled nor shanghaied across the border.”284 Expectation damage—placing the party in the position they would have been had the promise been honored—is considered the best means of protecting the bargain including the reliance interest.285 Unlike a reliance measure, the expectation measure allows for compensation of lost opportunities and provides more accurate and complete compensation for the harm caused. Expectancy relief, likewise, promotes beneficial economic activity. Under this view, ordinary contractual remedial rules apply and, as such, absent a

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281 See Restatement (Second) of Contracts § 347 cmt. a (1981) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.”); see also VMark Software Inc. v. EMC Corp., 642 N.E.2d 587, 590 n.2 (Mass. App. Ct. 1994) (“[t]he long-established general rule for breach of contract recovery in Massachusetts is that the wronged party should receive the benefit of his bargain, i.e., be placed in the same position as if the contract had been performed”) (citing John Hetherington & Sons, Ltd. v. William Firth Co., 95 N.E. 961, 962 (Mass. 1911)).


283 See Knapp, supra note 22, at 1211.

284 Id. at 1333.

showing that benefit of the bargain damages were not foreseeable or too uncertain or speculative, the expectation measure applies.\textsuperscript{286}

The reliance proponents view the "wrong" as the plaintiff's reliance and change of position, not the denial of the expectation of the actual promise. It is the reliance interest underlying the promise that is important. Where a contract has failed to be formed, the promisee can be fairly deemed to be partially responsible for not forming a mutually binding contract and, as such, justice and equity require no more than to put the promisee in the position he or she would have been had there been no action or forbearance.\textsuperscript{287} Reliance, in turn, allows for the recognition that there remains a viable distinction between bargained for contracts and those imposed unilaterally through reliance. A reliance remedial approach thus allows the doctrine to not fully unmoor contractual bargains.\textsuperscript{288}

It has been argued, as well, that if there is no binding contract but only a promise which causes reasonable reliance, benefit of the bargain damages chills the incentive for, and freedom to, negotiate.\textsuperscript{289} This reliance view is thus a more "tort" or "equitable" view of promissory estoppel as opposed to a contractual view.\textsuperscript{290} The "tort" like nature of promissory estoppel is revealed by the element that a party has a duty not to make promises which it does or should understand will cause reasonable reliance.\textsuperscript{291} By providing relief by reliance, promissory estoppel—as with the tort of misrepresentation—more appropriately seeks to punish or deter those who mislead or cause those to act to their detriment.\textsuperscript{292} Finally, there is an

\textsuperscript{286} Seattle First Nat'l Bank, N.A., 824 P. 2d at 1256.


\textsuperscript{288} See D&G Stout, Inc. v. Bacardi Imports, Inc., 923 F.2d 566, 569 (7th Cir. 1991) ("the line Indiana draws is between expectation damages and reliance damages ... Indiana will not grant relief based on promissory estoppels to compensate and aggrieved party for ... expectancy damages."); Wyatt v. BellSouth Inc., 18 F. Supp. 2d 1324, 1327 (M.D. Ala. 1998) (using Alabama law, reliance is appropriate measure of damages for promissory estoppel); Wilder v. Cody Cty. Chamber of Commerce, 933 P. 2d 1098, 1107 (Wyo. 1997) (striking award of lost profits for promissory estoppels claims).


\textsuperscript{290} See VMark Software, Inc. v. EMC Corp., 642 N.E.2d 587, 588-90 n. 2 (Mass. App. Ct. 1994) (finding measure of contract reliance damages "similar to the tort standard of actual, or out-of-pocket, loss proximately suffered.").

\textsuperscript{291} See Alden, supra note 6, at 671-73 (describing promissory estoppel as a tort).

\textsuperscript{292} See, e.g., Twin Fire Inv. LLC. v. Morgan Stanley Dean Witter & Co., 837 N.E.2d 1121, 1135-36 (Mass. 2005) (noting benefit of bargain is general rule for fraud claim although, court can limit damages). "Limiting recovery to reliance damages where the plaintiffs have suffered no loss of value in the subject of the transaction is consistent with the purpose of tort law ‘to compensate for loss sustained and to restore the plaintiff to his former position, and not to give him the benefit
argument that to reject reliance and award benefit of the bargain is to elevate innocent, albeit serious, promises to the same stature as intentional misrepresentations.\textsuperscript{293}

The flexible or discretionary approach adopted by the Second Restatement, in turn, permits the Court to identify the appropriate measure based on the circumstances and in the “interest of justice.”\textsuperscript{294} It has been held that while affording discretion based on the doctrine’s equitable nature, the discretion must be “limited as justice requires.”\textsuperscript{295} Some courts have found that the language and intent of section 90 suggests specific performance or expectation as the presumed remedy, subject to the discretion of the court to award something else (usually reliance) when the circumstances so dictate.\textsuperscript{296} Comment d of the Second Restatement supports this view:

of any contract he has made with the defendant.”’ \textit{Id. See also} David v. Belmont, 197 N.E. 83, 85 (Mass. 1935) (“the rule of damages is one to compensate the party for the loss suffered by the wrong which has been done’’); Greenstein v. Flatley, 474 N.E.2d 1130, 1134 (Mass. App. Ct. 1985) (awarding compensatory and punitive damages, finding defendant mislead plaintiffs into believing deal was made).

\textsuperscript{293} \textit{See} Twin Fires, 837 N.E.2d at 1135 (noting benefit of bargain is general rule for fraud claim although, court can limit damages). While statements as to future intention are not always actionable, they are actionable when the parties are not on “equal footing” or the promise-making party is deemed to have superior knowledge. \textit{See also} Cellucci v. Sun Oil Co., 320 N.E.2d 919, 920-24 (Mass. App. Ct. 1974); Alden, \textit{supra} note 6, at 673 (discussing promissory estoppel as an intentional tort).

\textsuperscript{294} \textit{See}, e.g., Walser v. Toyota Motor Sales, U.S.A., 43 F.3d 396, 402 (8th Cir. 1994) (limiting promissory estopells damage to reliance damages where lost profits were “far from a certainty’’); Merex A.G. v. Fairchild Weston Sys., 29 F.3d 821, 826 (2nd Cir. 1994) (“If successful [in a promissory estoppel claim], the plaintiff is not entitled, as or right, to expectation damages; the court retains the discretion to award relief to avoid ‘injustice’ and can mold that relief ‘as justice requires’’’); Chedd-Angier Prod. Co. v. Omni Publ’n Int’l, Ltd., 756 F.2d 930, 936-37 (1st Cir. 1985) (allowing expectation damages, and stating, “whether to charge full contract damages, or something less, is a matter of discretion delegated to the district court.’’); Newton Tractor Sales, Inc. v. Kubota Tractor Corp., 906 N.E.2d 520, 524, 528 (Ill. 2009) (using discretionary approach); Cambridge Savs. Bank v. Boersner, 597 N.E.2d 1017, 1023 n. 13 (Mass. 1992) (finding plaintiff may be entitled to range of damages and recovery “may be limited as justice requires’’); Gold v. Dubish, 549 N.E.2d 660, 666 (Ill. App. Ct. 1989) (“an award of damages based on lost profits may be appropriate in a promissory estoppels case when such an award is necessary in order to do complete justice.’’); Toscano v. Greene Music, D043281, 2004 Cal. App. LEXIS 2029, at *10 (Cal. Ct. App. Dec. 2, 2004) (seeing as promissory estoppels is rooted in equity, trial court free to “fashion remedies in the interests of justice’’); Hunter v. Hayes, 533 P.2d 952, 954 (Colo. App. 1975) (“no fixed measure of damages to be applied in every case; damages should be tailored to fit the facts of each case and should only be that amount which justice requires’’).

\textsuperscript{295} \textit{See} C & K Eng’g Contractors v. Amber Steel Co., 587 P.2d 1136, 1139 (Cal. 1978); \textit{see also} Harvey, \textit{supra} note 38, at 675 (explaining drafters of § 90 “wanted to assure remedial flexibility under a grant of discretion to protect expectancy, reliance or restitution interests as deemed appropriate’’).

\textsuperscript{296} \textit{See} Jackson v. Morse, 871 A.2d 47, 51-52 (N.H. 2007) (stating expectation damages is presumed remedy for promissory estoppel unless awarding would be inequitable); Gutteridge v. J3 Energy Grp., Inc., No. 3397 EDA 2013, 2015 WL 7253671, at *5-6 (Pa. Super. Ct. 2015) (noting general rule to award “value of the defendant’s promises unless equity dictates otherwise’’); \textit{see also} Lobolito, Inc. v. N. Pocono Sch. Dist., 755 A.2d 1287, 1292 n. 10 (limiting promissory
A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise.\textsuperscript{297}

Others make no mention of any presumption and emphasize that the remedy is flexible and determined by the specific circumstances.\textsuperscript{298}

The treatment of reliance as consideration, as well as the frequent emphasis that a promise enforceable through reliance is considered a contractual obligation, suggests rather strongly that full contractual or expectation damages are an appropriate remedy where otherwise not precluded.\textsuperscript{299} Not surprisingly, a number of decisions reflect expectation estoppel remedy as justice requires); Walser, 43 F. 3d at 402 (finding damages properly limited to reliance damages where lost profits were “far from a certainty”); Merex, 29 F.3d at 826 (“If successful [on promissory estoppel claim], the plaintiff is not entitled, as of right, to expectation damages; the court retains the discretion to award relief to avoid ‘injustice,’ and can mold that relief ‘as justice requires.’”); Chedd-Angier Prod. Co., 756 F. 2d at 937 (holding plaintiff properly allowed to recover expectation damages on promissory estoppel claim; “whether to charge full contract damages, or something less, is a matter of discretion delegated to the district court.”); Green v. Interstate United Mgmt. Servs., 748 F. 2d 827, 831 (holding promissory estoppel damages properly limited to reliance damages given “manifestly contingent nature” of promises); Toscano, 2004 Cal. App. LEXIS 2029, at *10, *15 (Cal. Ct. App. Dec. 2, 2004) (explaining because promissory estoppel is rooted in equity, courts can “fashion remedies in the interests of justice” and award damages “proven with reasonable certainty”); Hunter, 533 P. 2d at 954 (“When a plaintiff's recovery is predicated on findings of a promise and detrimental reliance thereon, there is no fixed measure of damages to be applied in every case. Rather, the amount of damages should be tailored to fit the facts of each case and should be only that amount which justice requires.”).

\textsuperscript{297} \textsc{Restatement (Second) Of Contracts} § 90 cmt. d; see also Kiely v. Raytheon Co., 105 F.3d 734, 736 (1st Cir. 1997) (relying on comment b of Restatement for holding Massachusetts authorizes expectation damages under promissory estoppel).

\textsuperscript{298} Weitz, Co. v. Hands, Inc., 882 N.W.2d 659, 673 (Neb. 2016) (noting flexibility “is consistent with promissory estoppel’s equitable roots”).

awards. For instance, in the contractor bidding cases (Loranger), the measure of damages was the difference between the sub-contractor’s dishonored bid and the substitute bid the contractor had to obtain. Other courts have affirmed the award of lost profits—a consummate expectation damage. In a 1985 case, the Appeals Court intimated that where there could be no recovery under a contract due to public policy ground, but that an otherwise viable claim under promissory estoppel existed for a subsidiary promise, damages should be limited to reliance “as it would be improper to accomplish, in the guise of compensation for breach of the subsidiary promise, what could not be done directly because of the policy reasons.”

There are likewise a number of decisions which reference the Restatement’s flexible approach and limit damages to reliance. For instance, certain federal court decisions applying Massachusetts law have suggested that the reliance measure is the governing rule. In Palandjian v. Pahlavi, for example, it was held that “[w]here recovery rests solely upon the justified reliance of the promisee, without any suggestion of fraud, it would seem equitable that such recovery be measured by the extent of the reliance interest, i.e. restitution, rather than by conferring the benefit of the bargain.” Further, in Dixon v. Wells Fargo, the reliance measure was likewise found to be the operative measure as to an oral modification to a


301 Loranger, 374 N.E.2d at 308. It is difficult to categorize this measure as either reliance or expectation, although many treat it as expectation as it places the contractor in the same position it would have been in if the subcontractor had honored the bid. See Edward Yorio & Steve Thel, The Promissory Basis of Section 90, 101 YALE L. J. 111, 146-48 (1991) (noting ambiguity in case law with respect to classifying this measure of damages). Scholars appear to agree, however, that the Drennan of damages is, in fact, expectation damages. See id. at 146 (concluding that this measure represents expectation damages, even if occasionally labeled “reliance damages”); W. David Slawson, The Role of Reliance in Contract Damages, 76 CORNELL L. REV. 197, 220-22 (1990) (discussing impossibility of proving reliance damages in subcontract-bidding, and indicating Drennan measure of damages represents expectation damages); Knapp, supra note 37, at 57 n. 35 (noting ambiguity in case law on this issue). Knapp further states that an award of damages, based upon difference between nonperforming subcontractor’s bid and amount paid to replacement subcontractor, is a “classic expectation remedy.” Id.

302 See Chedd-Angier Prod. Co. v. Omni Publ’n Intern., Ltd., 756 F.2d 930, 936 (1st Cir. 1985) (holding benefit of bargain jury charge for promissory estoppel is proper).

303 McAndrew v. Sch. Comm. of Cambridge, 480 N.E.2d 327, 333 (Mass. App. Ct. 1985). In McAndrew, the assertion was that the Plaintiff moved from Georgia to Cambridge and served as a band leader and teacher for three and one-half weeks, pursuant to an offer for a one-year permanent position as a music director; however, he was fired and never provided the opportunity. Id. at 329.


line of credit and in the context of a promise in the midst of negotiation and on-going relationship.\textsuperscript{308} There, the court held the reliance measure of damages applied to a claim made by a borrower against a lender and which promise arose during negotiations.\textsuperscript{309} The court believed reliance was appropriate, as to hold otherwise would serve to restrict the parties' freedom to contract.\textsuperscript{310}

5. Fifty State Survey

A survey of the fifty states informs that both the avoidance of injustice element, as well as remedy, have not received significant attention by the courts. While Section 90 is either adopted or relied upon in almost all jurisdictions, the majority of courts have not provided any meaningful guidance or substance to the injustice element and otherwise disagree as to the measure of damages. Only 9 of the 50 jurisdictions have provided any identifiable substance as to the "injustice" element with it uncertain in a majority of decisions as to whether the element has any independent significance beyond promise and reliance. Only Wisconsin, Minnesota, Vermont, Missouri, Pennsylvania, and the District of Columbia have specifically referenced and relied upon the factors or considerations identified in the Restatement as to the injustice element. As to remedy, the jurisdictions are divided although at least 14 jurisdictions have made clear that the damage remedy is discretionary or dependent on the "interests of justice."

As to independency, 21 states have indicated, at least implicitly, that avoidance of injustice is independent of both promise and reliance. 13 states have indicated no such independence while 17 jurisdictions appear to have not addressed the issue.

The issue as to whether promissory estoppel or the injustice element is for the court or jury has also received fairly scant attention. Indeed, 40 jurisdictions have yet to directly address the issue with promissory estoppel claims otherwise being routinely submitted for jury determination. Of the jurisdictions that have addressed the issue, six have found no right to a jury trial as to either the claim or the injustice element while four have found a

\textsuperscript{308} See id. at 347 (finding promise to complete HAMP loan modification can create estoppel claim, limited to reliance damages). The court states, "to negotiate a loan modification would give the borrower the right to stay in his or her home — the doctrine of promissory estoppel is properly invoked under Massachusetts law to provide at least reliance based recovery." \textit{Id.} at 352.

\textsuperscript{309} \textit{Dixon}, 798 F. Supp. 2d at 347-48 (finding reliance damages appropriate for estoppel claim for promises during negotiation between borrower and lender).

\textsuperscript{310} \textit{Id.} at 347 (asserting reliance is appropriate to avoid restricting parties from the freedom to contract).
right to a jury trial. As to federal decisions decided under the federal common law, four circuits (Second, Fifth, Eighth, and Ninth) addressing the issue have held no right to jury based on the circumstances presented. The Federal District Court decisions that have addressed the issue are about evenly split. The result of the review is as follows:

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<tr>
<th>States</th>
<th>Adopts Section 90</th>
<th>Right to Jury Trial</th>
<th>Injustice Independent</th>
<th>Injustice Court/Fact-Finder</th>
<th>Damages (R, E, or D)</th>
<th>Explanation of the Injustice Element</th>
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<td>Y(^{317})</td>
<td>Y(^{318})</td>
<td>Y</td>
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<td>Y(^{320})</td>
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\(^{311}\) See InCompass IT, Inc. v. XO Commc’n. Servs., 719 F.3d 891, 899 (8th Cir. 2013) (holding no right to jury trial); Merex A.G. v. Fairchild Weston Sys., 29 F.3d 821, 826 (2d Cir. 1994) (holding no jury); Nimrod Marketing, Ltd. v. Texas Energy Inv. Corp., 769 F.2d, 1076 1079 (5th Cir. 1985) (finding plaintiff’s complaint not triable); Wyler, 235 F.3d 1184, 1194 (distinguishing cases allowing trial).


\(^{313}\) NYA=Not yet addressed; Y=Yes; N=No; C= Court; FF=Fact-Finder; E= Expectation; R=Reliance; D=Discretionary.

\(^{314}\) See Cantrell v. City Fed. Sav. & Loan Ass’n, 496 So. 2d 746, 751 (Ala. 1986).

\(^{315}\) See Graddick First Farmer’s & Merchants Nat’l Bank of Troy, 453 So. 2d 1305, 1210 (Ala. 1984); see also Wyatt v. BellSouth, Inc., 18 F. Supp. 2d 1324, 1327 (M.D. Ala. 1998) (applying Alabama law, “reliance damages are the appropriate measure of damages for a promissory estoppel claim”).

\(^{316}\) Smith v. Norman, 495 So. 2d 536, 537-38 (Ala. 1986).


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<th>Arizona</th>
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322 But see Big Bear Imp. Brokers, Inc. v. LAI Game Sales, Inc., No. CV–08–2256–PHX–DGC, 2010 WL 729208, at *5 n. 4 (D. Ariz. Mar. 2, 2010) (“It is not clear that [plaintiff] is entitled to a jury trial on its promissory estoppel claim... The parties should address this issue in their proposed final pretrial order.”).
329 See Kinzli v. City of Santa Cruz, 539 F. Supp. 887, 901-02 (N.D. Cal. 1982) (noting court had choice in granting remedy under Restatement (Second) of Contracts, § 90).
336 See id.
339 Id.
341 Harmon, 62 A.3d at 1202.
has the discretion to fashion the remedy needed to avoid injustice based on a promissory estoppel. The court concludes that under federal common law, the court and/or the jury no simple answer to the question of what type of damages are appropriate as a remedy for reliance damages only....

Lawrenceburg, 934 limited to damages actually resulting from the detrimental reliance.

court further held that where doctrine of promissory estoppel may be available the remedy "is


*See D & G Stout, Inc. v. Bacardi Imps., Inc., 923 F.2d 566, 569 (7th Cir. 1991) ([T]he line Indiana draws is between expectation damages and reliance damages... Indiana will not grant relief based on promissory estoppel to compensate an aggrieved party for... expectancy damages.); Jarboe v. Landmark Community. Newspapers, 644 N.E.2d 118, 122 (Ind. 1994) (noting Indiana draws line between expectation damages and reliance damages), reh'g denied. The court further held that where doctrine of promissory estoppel may be available the remedy "is limited to damages actually resulting from the detrimental reliance." *Id.*; Hrezo v. City of Lawrenceburg 934 N.E.2d 1221, 1231 (Ind. Ct. App. 2010) (A successful party is entitled to reliance damages only...). *But see Burton, 2008 WL 3853329, at *19 (Hamilton, J.) ("There is no simple answer to the question of what type of damages are appropriate as a remedy for promissory estoppel. The court concludes that under federal common law, the court and/or the jury has the discretion to fashion the remedy needed to avoid injustice based on a promissory estoppel

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*352 See Brown v. City of Pocatello, 229 P.3d 1164, 1169-70 (Idaho 2010).


*354 See R.S. Bennett & Co. v. Econ. Mech. Indus., Inc., 606 F. 2d 182, 186 (7th Cir. 1979) (noting injustice might be question of law, citing Wisconsin law).


*358 See D & G Stout, Inc. v. Bacardi Imps., Inc., 923 F.2d 566, 569 (7th Cir. 1991) ([T]he line Indiana draws is between expectation damages and reliance damages... Indiana will not grant relief based on promissory estoppel to compensate an aggrieved party for... expectancy damages.); Jarboe v. Landmark Community. Newspapers, 644 N.E.2d 118, 122 (Ind. 1994) (noting Indiana draws line between expectation damages and reliance damages), reh'g denied. The court further held that where doctrine of promissory estoppel may be available the remedy "is limited to damages actually resulting from the detrimental reliance." *Id.*; Hrezo v. City of Lawrenceburg 934 N.E.2d 1221, 1231 (Ind. Ct. App. 2010) (A successful party is entitled to reliance damages only...). *But see Burton, 2008 WL 3853329, at *19 (Hamilton, J.) ("There is no simple answer to the question of what type of damages are appropriate as a remedy for promissory estoppel. The court concludes that under federal common law, the court and/or the jury has the discretion to fashion the remedy needed to avoid injustice based on a promissory estoppel..."
claim, which can include either expectation damages or reliance damages. Indiana law is essentially the same in a case like this.”).


361 See National Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889 (Iowa 1989) (citing In re Estate of Graham, 295 N.W.2d 414, 418 (Iowa 1980); Johnson v. Pattison, 185 N.W.2d 790, 795 (Iowa 1971); Miller v. Lawlor 66 N.W.2d 267, 273 (Iowa 1954)) (“The essential elements of promissory estoppel are well established: (1) a clear and definite agreement; (2) proof that the party urging the doctrine acted to its detriment in reasonable reliance on the agreement; and (3) a finding that the equities support enforcement of the agreement.”); accord Matter of Graham’s Estate, 295 N.W.2d 414, 418 (Iowa 1980) (alteration in original) (quoting In re Estate of Newsen, 219 N.W. 305, 307 (Iowa 1928)) (“It is the agreement to, and mutual understanding of, the existence of an obligation assumed by one of the parties to the other, that . . . is the essential element of a contract.”); Allen, 2017 WL 1055970, at *6 (citing Johnson v. Pattison, 185 N.W.2d 790, 795 (Iowa 1971)) (“We have set forth the following elements as essential for recovery under a theory of promissory estoppel: (1) a clear and definite oral agreement; (2) proof that plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle the plaintiff to this relief.”); But see Kallich v. N. Iowa Anesthesiology Assocs., P.C., 179 F. Supp. 2d 1043, 1053 (N.D. Iowa 2002) (noting reliance and injustice element not met).


363 See Bouton v. Byers, 321 P.3d 780, 787 (Kan. App. 2014) (citing Mohr v. State Bank of Stanley, 770 P.2d 466 (Kan. 1989); Walker v. Irton, 559 P.2d 340, 346 (Kan. 1977)) (“The Kansas Supreme Court has recognized promissory estoppel to be applicable when: (1) a promisor reasonably expects a promisee to act in reliance on a promise; (2) the promisee, in turn, reasonably so acts; and (3) a court’s refusal to enforce the promise would countenance a substantial injustice.”).


365 See Sawyer v. Mills, 295 S.W.3d 79, 89 (Ky. 2009) (citation omitted) (quoting Meade Constr. Co. v. Mansfield Com. Elec., 579 S.W.2d 105, 106 (Ky. 1979)) (“The doctrine of promissory estoppel provides . . . ‘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.’


367 See Harris, 993 F. Supp. 2d at 692 (applying the injustice element).

368 See L.A. CIV. CODE ANN. art. 1967 (1985) (providing a cause of action for detrimental reliance). Louisiana had never adopted Section 90, but does have a cause of action for detrimental

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370 See Bowden v. Grindle, 651 A.2d 347, 349-50 (Me. 1994) (finding no right to jury trial on legal defenses to equitable claim); Strong, 474 A.2d at 179-80 (holding due to circumstances of case, submitting equitable claim to jury was prejudicial error); see also Berry v. WorldWide Language Res., Inc., 811 F. Supp. 2d 523, 528 (D. Me. 2011) (resolving promissory estoppel claim by jury trial, but with plaintiff's breach of contract claim).

371 See Harvey v. Dow, 11 A.3d 303, 308 (Me. 2011) (approving doctrine of promissory estoppel as set forth in Section 90); Daigle Com. Grp. v. St. Laurent, 734 A.2d 657, 674-75 (Me. 1999) (citation omitted) ("[under section 90] "[a] promise binding under [promissory estoppel is a contract, and full-scale enforcement by normal remedies is often appropriate.").


373 See Sedghi v. PatchLink Corp., 823 F. Supp. 2d 298, 307 (D. Md. 2011) (finding right to jury trial on promissory estoppel claim); Ver Brycke v. Ver Brycke, 843 A.2d 758, 775 (Md. 2004) (finding unjust enrichment and promissory estoppel claims "were claims at law because they [sought] restitution..."); see also Nimrod Mktg. (Overseas), Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076, 1080 (5th Cir. 1985) ("Promissory estoppel is an equitable form of action in which equitable rights alone are recognized... Defendants had no right to trial by jury ....").


375 See Pavel, 674 A.2d at 533-34 (applying test of Section 90).


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384 See Grouse, 306 N.W.2d at 116 (“‘(t)he remedy granted for breach may be limited as justice requires.’ Relief may be limited to damages measured by the promisee’s reliance.”).

385 See Faimon, 540 N.W.2d at 883 (“Numerous considerations enter into a judicial determination of injustice, including the reasonableness of a promisee’s reliance and a weighing of public policies in favor of both enforcing bargains and preventing unjust enrichment.”).

386 See Brewer v. Universal Credit Co., 192 So. 902, 904 (Miss. 1940) (discussing Restatement Section 90).


388 See InCompass IT, Inc. v. XO Commc'ns Servs. 719 F.3d 891, 898 (8th Cir. 2013) (asserting no right to jury trial under federal law).

389 See Midwest Energy, Inc. v. Orion Food Sys., Inc., 14 S.W.3d 154, 161 (Mo. Ct. App. 2000) (finding “injustice” element not appropriate in summary judgment when other elements of Section 90 are present); Zipper v. Health Midwest, 978 S.W.2d 398, 412 (Mo. Ct. App. 1998) (determining under Restatement factors, adequacy and availability of remedy at law is most significant).

390 See Midwest Energy, Inc., 14 S.W.3d at 160 (“The last sentence of Section 90(1) provides ‘[t]he remedy granted for breach may be limited as justice requires.’ Damages are measured by the reliance and should be limited to those naturally flowing from the reliance.”).

391 See Geisinger v. A & B Farms, Inc., 820 S.W.2d 96, 99-100 (Mo. Ct. App. 1991) (discussing Section 139 of Restatement and whether injustice is only avoided by enforcement of promise).


393 See Turner v. Wells Fargo Bank, 291 P.3d 1082, 1089 (Mont. 2012) (discussing equitable estoppel claims); Trad Indus., LTD v. Brogan, 805 P.2d 54, 59 (Mont. 1991) (“When a promisee reasonably and foreseeably relies on a promise to his detriment the promise is binding if injustice can be avoided only by enforcement of the promise.”).

394 See Rosnick v. Dinsmore, 457 N.W.2d 793, 799 (Neb. 1990) (noting one distinction contrary to Restatement view). The law in Nebraska is that a promissory estoppel action may be based on an alleged promise that is insufficiently definite to form a contract, but upon which the promisee’s reliance is reasonable and foreseeable. Id.


398 See Wyler Summit P’ship v. Turner Broad. Sys., 235 F.3d 1184, 1194 (9th Cir. 2000) (stating as to federal law, promissory estoppel is “a cause of action cognizable only in courts of equity.”).


400 See Dynalectric Co., 255 P.3d at 289 (discussing proper remedy for promissory estoppel claims).

401 See Panto v. Moore Bus. Forms, Inc., 547 A.2d 260, 266 (N.H. 1988) (relying on theory of promissory estoppel); see also Rockwood v. SKF USA Inc., 687 F.3d 1, 9 (1st Cir. 2012) (“The New Hampshire Supreme Court has adopted the definition of promissory estoppel from Section 90 of the Restatement (Second) of Contracts.”).


404 See Toll Bros., Inc. v. Bd. of Chosen Freeholders, 944 A.2d 1, 19 (N.J. 2008) (analyzing the four elements of promissory estoppel); Hillsborough Rare Coins, LLC v. ADT LLC, 2017 WL 1731695, at *6 (D.N.J May 2, 2017) (suggesting that injustice was essential justification behind promissory estoppel rather than separate element).


408 See Eavenson, 730 P.2d at 466 n. 1 (analyzing what should happen if elements of promissory estoppel were proven in court).


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²⁴³ See Olympic Holding Co., L.L.C. v. ACE Ltd., 909 N.E.2d 93, 100-01 (Ohio 2009) (analyzing promissory estoppel as an action for damages).


²⁴⁷ See id. (discussing elements of promissory estoppel). Instead of “injustice,” the court refers to this aspect as “hardship or unfairness” in the enforcement of the promise. Id.

²⁴⁸ See F.D.I.C. v. Frates, 44 F.Supp.2d 1176, 1223 (N.D. Okla. 1999) (“[t]he remaining element of the promissory estoppel doctrine would require a finding that it was reasonable, given the totality of the circumstances, for State’s board of directors to rely on the indemnity promise alleged in this case.”).

²⁴⁹ See Cocchiara v. Lithia Motors, Inc., 297 P.3d 1277, 1283 (Or. 2013) (adopting Restatement formulation of promissory estoppel); Schafer v. Fraser, 290 P.2d 190, 200 (Or. 1955) (applying Restatement).


²⁵⁴ See Thatcher’s Drug Store, 636 A.2d at 160 (applying doctrine of promissory estoppel and using Restatement).


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434 See Alden v. Presley, 637 S.W.2d 862, 864 (Tenn. 1982) (finding Court of Appeals relied on definition of promissory estoppel found in Restatement Section 90).


438 See Richards v. Brown, 222 P.3d 69, 83 (Utah Ct. App. 2009) (stipulating damages must be proven before prevailing on promissory estoppel claim); Andreason, 848 P.2d at 176 (“An award of damages [on promissory estoppel] requires that a plaintiff prove the fact of damages by a preponderance of the evidence ....”).


440 See Nimrod Mktsg. (Overseas), Ltd., v. Texas Energy Inv. Corp., 769 F.2d 1076, 1079–80 (5th Cir. 1985) (observing under federal law no right to jury trial on promissory estoppel claim).


See Foote v. Simmonds Precision Prods. Co., 613 A.2d 1277, 1280 (Vt. 1992) (noting promissory estoppel may modify at-will employment relationship and provide remedy for discharge).


See id. at 802-04 (evaluating damages under promissory estoppel).

See id. at 802 (quoting Remes v. Nordic Group, Inc., 726 A.2d 77, 79-80 (Vt. 1999) (“With regard to the availability and adequacy of other remedies, we have previously stated that, ‘[w]hile a full range of legal damages may be available, promissory estoppel plaintiffs are not necessarily entitled to them as of right.’”).


See W.J. Schaefer Assocs., Inc. v. Cordant, Inc., 493 S.E.2d 512, 516 (Va. 1997) (providing background on case and award of promissory estoppel by jury trial); Virginia Sch. of Arts v. Eichelbaum, 493 S.E.2d 510, 511 (Va. 1997) (affirming rejection of application of promissory estoppel); Ward’s Equip., Inc. v. New Holland N. Am., 493 S.E.2d 516, 520 (Va. 1997) (“There is no merit to the dealer’s contention that a ‘claim of promissory estoppel can be made under Virginia law.’ This Court has not recognized the doctrine, and today we decide that it should not be adopted in the Commonwealth.”).


See Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 273 (Wis. 1965) (“Many courts of other jurisdictions have seen fit over the years to adopt the principle of promissory estoppel, and the tendency in that direction continues.”).


See Hoffman, 133 N.W. 2d at 273 (discussing requirements of promissory estoppel claim).

See Tynan v. JBVBB, LLC, 743 N.W.2d 730, 735 (Wis. Ct. App. 2007) (establishing three elements from Hoffman to prevail on promissory estoppel claim).

See Hoffman, 133 N.W.2d at 275 (finding promissory estoppel unavailable to plaintiff).
D. Potential Approach

No Massachusetts appellate court has expressly addressed either the avoidance of injustice element or the measure of damages. Set forth below is a potential approach to the issues, which treats the avoidance of injustice as an identifiable element informed by the criteria identified in comment b and related considerations.

1. The Injustice Element and Measure of Damages are Questions of Law for the Court Based on Applicable Policy

This approach opts to give substantive recognition to the fact that no matter its legal origins, promissory estoppel has substantial equitable roots with the “necessary to avoid injustice” component, an otherwise long-standing equitable notion. If a jury finds a sufficient premise which the

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462 See Bear v. Volunteers of Am., Wyo., 964 P.2d 1245, 1253 (Wyo. 1998) (finding court could not further consider issue of promissory estoppel); but see Romberger v. VFW Post 1881, 918 P.2d 993, 995 (Wyo. 1996) (“The amount of recovery is a question intertwined with the equities of the transaction, necessarily creating a policy question to be decided by the court in the exercise of its discretion.”).

463 See Loghry, 927 P.2d at 711 (“Promissory estoppel is not available to [plaintiff] because of the specific disclaimer language.”).

promisor should have foreseen would cause reasonable reliance by the promisee, then it remains for the court to determine the issue of whether the promise is to be enforced to "avoid injustice." As such, based on the equities of the transaction, the ultimate enforcement of the promise is one of policy for the court.

This approach deviates from the express terms of Section 90 to the extent Section 90 suggests that the "reasonableness" of reliance is to be considered under avoidance of the injustice element. The proposed approach deems "reasonable reliance" a singular and separate element that should be for the fact-finder and jury absent circumstances demonstrating that no reasonable minds could differ. This is consistent with established Massachusetts law. It also allows for courts to delineate the limits and boundaries of the injustice element, and to do so without usurping supportable factual findings on promise and reliance made by the jury as to the first two elements. It necessitates written findings by the court serving to inform and provide accountability. It otherwise allows *stare decisis* to provide a measure of guidance and certainty in case law moving forward.465

As with the substantive avoidance of injustice element, the issue of whether to limit the remedy as "justice requires" is also an equitable notion with the appropriate measure of damages for the court to determine as a matter of law.466 The measure would have to be determined prior to any instructions to the jury as to its actual determination of any damages if a right to jury trial attaches.

**Illustration A:** A brings a breach of contract and promissory estoppel claim. If there is no right to a jury trial as to promissory estoppel, the jury would determine the breach of contract and the trial judge would either submit the promissory estoppel claim to the jury for an advisory opinion; reserve the decision to itself; or allow, in its discretion, the jury to decide the claim. The same approach would apply to the "avoidance of injustice" element if a right to a jury otherwise applied to promissory estoppel. The findings and determination of the court as to "avoidance of injustice" would need to be in writing, articulating the basis, and on any appeal subject to review for abuse of discretion.

**Illustration B:** A brings a breach of contract, promissory estoppel, and negligent and intentional misrepresentation claim based on essentially

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*465 See Lonchar v. Thomas, 517 U.S. 314, 323 (1996) ("[C]ourts of equity must be governed by rules and precedents no less than the courts of law.") (citations omitted).

the same facts and representations. Assuming there is no right to a jury trial as to the promissory estoppel claim, the Court would allow a jury to hear the breach of contract and misrepresentation claims. Since reasonable reliance is an element common to the estoppel and misrepresentation claims, the jury would decide the reasonable reliance as to all three claims or the court would be bound by the finding on reliance as to the misrepresentation claim and disposition of the estoppel claim.

Illustration C: A brings action against B for breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, and misrepresentation. A and B disagree over whether the measure of damages is expectation or reliance. Following the close of evidence and prior to final argument and charge, the Court will have to decide, based on briefing, which measure is most appropriate and proceed to charge the jury accordingly.

Illustration D: A brings action against B based on negligent and intentional misrepresentation as well as promissory estoppel. A seeks specific performance and, alternatively, expectation damages as to the estoppel claim, as well as expectation damages as to the intentional misrepresentation claim. B disputes that A is entitled to specific performance or is otherwise entitled to expectation as opposed to reliance damages. Whether plaintiff is entitled to specific performance is for the court to decide. The Court will likewise need to decide before closing arguments and charge whether the measure of damages for intentional misrepresentation and promissory estoppel is reliance or expectation.

2. Informative Considerations as to Both Avoidance of Injustice and Remedy

a. Applicable Social Policies Pertaining to the Promise or the Parties' Relation

This consideration focuses primarily on the larger social context and policies at play in the particular circumstances. It is consistent with those instances where otherwise binding contracts have been found unenforceable due to certain public policies. It is a logical, initial consideration because regardless of other equitable factors, if the enforcement of the promise would violate or be inconsistent with a viable social policy, either generally or in the specific circumstances, it would likely end the inquiry. As set forth above, there are instances when such or similar policies are implicated in the circumstances of the particular promise, no different than where a bargained
for contract is at issue. These policies include legislative directives and the
public welfare or interest. It could also include the policies for and against
more formalized promises for purposes of any enforceability. The analysis
also requires identifying any policies served in enforcing the promise.
Absent a countervailing public policy, the policy served in enforcing the
promise would be considered a factor favoring enforcement.

Illustration A: A was terminated from employment after it was
determined by investigation that A had sexually harassed another employee.
A claims that he was promised by his supervisor, who had him terminated
following receipt of the results of the investigation, that he would be able to
keep his job regardless of the outcome of the investigation. A relied on the
promise in turning down another job. A cannot recover as to enforce the
promise because it would be against public policy.

Illustration B: A claims a bank promised to loan it $3 million, with
the bank intending to obtain participants as its lending limit was $1 million
under applicable federal regulations. It was foreseeable to the bank that the
promise and its circumstances would cause A to reasonably rely and take
action to its detriment which A did. The bank’s claim that the promise cannot
be enforced due to the lending limit fails and A is entitled to recover.

Illustration C: A agrees to interview with B, a newspaper doing a
story with B, agreeing that it would not reveal A’s identity. A gives the
interview and provides highly private and personal information. B later
publishes the story with many highly personal details, effectively disclosing
the identity of A. The policies behind the First Amendment do not preclude
enforcement of the promise.

467 See Beacon Hill Civic Ass’n v. Ristorante Toscano, Inc., 662 N.E.2d 1015, 1018-19 (Mass. 1996) (finding contract unenforceable because public policy of open public participation in discussions before licensing officials); Capazzoli v. Holtwasser, 490 N.E.2d 420, 421 (1986) (‘‘[P]romise to support a woman made in consideration of the woman’s abandonment of her marriage, or promise to abandon her marriage, to another man violates public policy and is unenforceable.’’).

468 See Beacon Hill Civic Ass’n at 1019 (‘‘The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the dominant purpose’ of those provisions.’’).

469 See Gan, supra note 160, at 88 (discussing Gonsalves v. Nissan Motor Corp., 58 P. 3d 1196, 1213 (Haw. 2002)).

470 See Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (‘‘[T]he doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.’’); see also Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992) [hereinafter Cohen I] (anonymity promise to news source not sufficiently important to require invalidation based on public policy).
b. Availability of Other Remedies

Promissory estoppel is an equitable remedy, unavailable where there are other remedies. If there are alternative remedies outside of those associated with enforcement of the promise (i.e. specific enforcement and/or expectation damages), the injustice element requires refusal to enforce the promise.\(^{471}\) If monetary remedy under an alternative legal claim for the same injury is available, the injustice element would not be met.\(^{472}\) This is consistent with the element's limiting rule and the primacy of bargained for exchange contracts.

While promissory estoppel may be pled and pursued in the alternative to a breach of contract claim, it is only viable if the breach of contract claim fails for lack of consideration. If it is otherwise subsumed within the contract, there can be no independent claim.\(^{473}\) If there is a right to seek a breach of contract, then there would be no injustice in failing to enforce the promise through promissory estoppel.\(^{474}\) Additionally, where restitution can be made is a consideration militating against enforcement of the promise or otherwise providing the limits of any remedy.

There is no reason not to apply the same logic to parallel misrepresentation claims. If there is both misrepresentation and promissory estoppel claims, and they are both based on the same or significantly overlapping representations and/or promise, the legal remedy applicable to misrepresentation should control.

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Specific performance of the promise "is neither precluded nor disfavored as a remedy for promissory estoppel." Particularly with promises related to land, division of property, other such unique subjects, or otherwise included within the terms of the promise, specific performance may be obtained. Specific performance is appropriate not only where there is no adequate remedy at law, but also where the advantage gained will not be disproportionate to the "practical burdens of enforcement." Circumstances where the remedies of expectation or reliance damages would not be an adequate protection for the injured party have been found to include those where it is difficult to prove damages with reasonable certainty or where damages would not be a suitable substitute performance or where it is likely that damages could not be collected.

**Illustration A:** A sues B under a promissory note. B seeks certain off-setting credits as B provided A certain accommodations on B's property for a horse related business of A. The credits sought included certain fees and expenses B claimed to have paid for A's horse and monthly rental fees for various horse stalls. B sought to enforce oral promise to pay for the credits on detrimental reliance as B claimed he had evicted a tenant to allow for A's use of the stalls. Court refused to enforce promise asserting that B had adequate remedy at law available as evidenced by separate action B had pending for owing rents on use of stalls.

**Illustration B:** A sells a group of cars to B pursuant to written agreements. B defaults and A sues B as well as C (B's wife), as A claims C promised to pay for cars if B failed to pay. Even assuming C reasonably relied, avoidance of injustice element is not met as A had an available remedy against B under agreement.

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475 Skebba v. Kasch, 724 N.W.2d 408, 413-14 (Wis. Ct. App. 2006). Here, the jury found no contract, but did find in favor of the promissory estoppel claim. Id. at 410. The appellate court determined that the trial court erred in ruling that the promise could not be specially enforced. Id. at 414. The court went on to state “specific performance is neither precluded nor disfavored as a remedy for promissory estoppel; preventing injustice is the objective.” Id. See also Cellucci v. Sun Oil Co., 320 N.E.2d 919, 926-27 (Mass. App. Ct. 1974) (ordering conveyance of land subject of promise); Tour Costa Rica v. Country Walkers, Inc., 758 A.2d 795, 804 n.2 (Vt. 2000) (rejecting suggestion that section 90 is limited to specific performance).

476 See MASS. ANN. LAWS ch. 214, § 1A (LexisNexis, Lexis Advance through Act 109 of the 2017 Legislative Session) (“The fact that the plaintiff has a remedy in damages shall not bar an action for specific performance of a contract, other than one for purely personal services ....”).


478 See Clawson v. Clawson, No. 15–P–58, 2016 WL 6093597, at *1, *3 (Mass. App. Ct. Oct. 19, 2016). The court further found enforcement to be properly denied as B had unclean hands when he asserted the horse stall rental accommodation was a scheme devised by B to avoid making payments on the promissory note, while also reducing his taxable income. Id. at 15.
c. Fairness and Hardship

If there are no controlling general or specific policies prohibiting or militating against enforcement or other available and suitable remedies, then an equitable balancing of the hardships to both parties as to enforcement should be considered. The fundamental question is whether failing to specifically enforce the promise or to award expectation damages results in undue hardship and injustice to the promisee. While this factor has primacy, the court should also consider the possible harshness to defendant by enforcement of his promise. Indeed, “injustice” can just as easily result from enforcement of a promise unsupported by consideration as from non-enforcement. This factor includes a review of the reasons the promisor did not honor the promise. Moreover, it includes whether the promisee could meet its obligation under the promise.

The injustice element is significantly informed by the extent the promisor may have benefited from the promisee’s reliance. The existence and degree of any such benefit supports enforcement of the promise, as allowing the promisor to obtain such a benefit would be unjust. The existence and definitive degree of any such benefit, enrichment, or advantage would also potentially support the award of expectation based damages—particularly if the circumstances supports that the promise was intended to be legally binding. Conversely, the lack of any significant benefit or the speculative nature of any asserted benefit would be a consideration militating against enforcement, and a factor to consider in determining whether justice would be served by limiting any remedy to reliance or restitution.

Furthermore, if the promise or its enforcement involves discretion, injustice may well not be present with any enforcement absent a clear showing of abuse of that discretion.479

Illustration A: A claimed B promised to modify existing credit agreement. There was a clear oral promise made upon which A reasonably and detrimentally relied. There was no evidence that A could meet the obligation under the asserted modification. There is no injustice in not enforcing the promise. A had no ability to make the payment obligations under the claimed modification with there being a state policy discouraging litigation against lenders based on oral promises concerning financing.

479 See Doe v. W. New Eng. Univ., 228 F. Supp. 3d 154, 182 (D. Mass. 2016) (“[D]ue to the [conduct review board’s] discretion regarding witnesses and their testimony, Plaintiff cannot plead sufficient facts to demonstrate that the failure to enforce general counsel’s promise resulted in injustice.”). The court in this case found that the discretion afforded over witnesses and testimony at a school hearing precluded a finding that enforces the alleged oral promise that all of plaintiff’s witnesses would be allowed at hearing. Id.
Illustration B: A agrees to interview with B, a newspaper doing a story, with B agreeing that it would not reveal A’s identity. A gives interview and provides highly private and personal information. B later publishes story with many highly personal details, effectively disclosing the identity of A. B’s explanation for not honoring promise was that disclosure of identity of a confidential source is valuable to the story. As this was not hardship, and as the payment of compensatory damages is “a cost of acquiring newsworthy material to be published at a profit. . . .” there was no injustice in enforcing the promise. 480

d. Extent of Foreseeability and Intent to be Bound

The greater the extent the detrimental reliance by the promisee was either known or foreseeable to the promisor, the more it would be unjust not to enforce the promise or otherwise award expectation damages. Where there is evidence of not just a reliance inducing promise, but a promise that evinces an intention to be legally bound, then enforcement would be permissible. There is a measurable difference between a reasonable belief in the legal enforceability of the promise and a reasonable belief that the promise will be performed. 481

Actual knowledge of the reliance, evidence as to an intent to be bound, and evidence of the promisor’s inaction or silence in the face of knowing reliance would militate that the promise be enforced. The more the promisor knows or should know of the seriousness of the promise in light of the potential consequences, the more injustice would result absent enforcement of the promise. This includes examination of the words and conduct at issue and whether they indicate substantial planning or understanding of the significance of the consequence. Stated differently, if there are facts and circumstances indicating that the promisor had reason to expect reliance even if not specifically sought, enforcement of the promise should be considered. Similarly, evidence or circumstances indicating the promisor’s understanding of the consequences of making the promise, and evidence that the promisee, after the promise was made, informed the promisor of the promisee’s intention to act, would also favor enforcement. The absence of such circumstance would weigh against enforcement.

The clearer and more detailed the promise, such as with essential terms, the more “justice” and fairness allow for the enforcement of the

481 See DeLong, supra note 42, at 1021 (“[I]t is not unjust to deny enforcement to a commercial promisee who relied without a reasonable expectation of a legal remedy for breach.”).
promise as well as the award of non-speculative expectation damages—particularly if such circumstances support an intent to be bound. Although the definitiveness and clarity is of primacy and covered in the promise in the form of the commitment element under Massachusetts law, it remains that the degree of such definitiveness and clarity is particularly informative in the injustice inquiry, including where the issue involves whether to enforce such impediments as the statute of frauds. Similarly, where the promisor has no actual knowledge of the reliance, or no knowledge that the reliance is based on a reasonable belief the promise is binding, or where only remotely foreseeable under an objective standard, the less injustice in enforcing the promise, or the more likely the remedy should be limited to reliance damages.

This factor includes evaluation of any and all evidence as to the presence or absence of the promisor's intent to be bound. Conversely, if the promisee was or should have been aware that the promise was not intended to be legally binding, enforcement should be denied. Indeed, "[t]he intention to be bound and the likelihood of reliance go hand in hand." Evidence of any intent or understanding of being bound is highly probative of the injustice element as it brings the reliance based enforcement closer to enforcement of a bargain for exchange; thus, supporting enforcement of the promise and award of expectation damages.

Illustration A: A, father of B, executes a formal assignment of $25,000 to B, his son, wherein A planned to provide the monies to B when certain real estate he owned was sold. A and B lived together for 17 years where B provided various services including care for A. B relied on the assignment by spending $5,000 to extend option on house both A and B had agreed to buy. A died and his estate failed to honor the assignment. Avoidance of injustice would not be avoided unless the promise was enforced and the $25,000 found owing and due, as it was likely that the promise was intended to be legally binding by the nature of it being a formal assignment and B having reasonably and detrimentally relied upon the promise based on the understanding it was binding. A also knew and observed B's reliance and provided no warning, caution, or retraction. Enforcement is justified not just as to the $5,000, but for the entire $25,000, because promise was intended to be binding.

482 See 10 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 27:14 (4th ed. 2011) ("The less clear an agreement, the less likely the plaintiff’s reliance will be reasonable and foreseeable, and the less probable will be the injustice from refusing to enforce the agreement ... ").

483 Knapp, supra note 22 at 1216.

484 See Becker, supra note 6, at 453-54 (discussing Estate of Bucci, 488 P. 2d 216 (Colo. App. 1971)).
e. Degree and Nature of Reliance and any Foregone Opportunities

While the fact finder assesses whether there was reasonable reliance under the reliance prong, it is appropriate for the court to consider the degree and nature of the reliance on the issue of injustice as well as the remedy determination. The reliance must not only be reasonable, but be of a definitive and significant nature so that it reflects an understanding of a legally binding commitment.\footnote{See Gerald Reidy, Note, \textit{Definite and Substantial Reliance: Remedying Injustice Under Section 90}, 67 \textit{FORDHAM L. REV.} 1217, 1254 (1998) ("[Definite and substantial reliance] is a necessary component in determining whether a promise must be enforced to avoid an injustice.").}

Further, actual harm that is co-extensive with definite and substantial reliance is essential as is recognition that there may always be some measure of reliance in the commercial setting.\footnote{See Hellenbrand v. Goodman, No. 01-3437, 2003 WL 21284513, at *11-12 (Wis. App. Ct. June 5, 2003) (concluding injustice element unmet due to no evidence that failure to honor promise caused harm).} The more extensive, expensive, and identifiable the reliance is, separate and distinct from the expectation under the promise, the more justice would militate toward enforcing the promise and/or awarding non-speculative expectation damages. If what the promisee claims to have given up or endured in reliance is no different, or of little difference, from what he otherwise would have done, the injustice element would militate against enforcement and/or limit the remedy to reliance damages.

The amount of expenditures or the degree of non-monetary reliance, including the foregoing of other opportunities, should be considered. If the degree or amount of reliance is trivial or pales compared to the expectation amount being sought, the court is free to either find that it would not be unjust to deny enforcement or to otherwise limit damages to the reliance remedy. This factor would include the duration of reliance and any evidence of repudiation or retraction after the giving of the promise, as well as any knowledge or lack of knowledge of the promisor as to the reliance by the promisee.

This factor also includes consideration of whether, if the promise was performed, the promisee would have received any benefit or less than reliance damages. This goes to both enforcement and remedy and is consistent with the established contract liability/remedy principle:

where full performance of a contract would have given claimant no benefit, or at least less than the reliance damages claimed, this fact may justify limiting or
disallowing reliance damages. The notion is that claimant should on no account get more than would have accrued if the contract had been performed.  

**Illustration A:** A, a sophisticate, enters into oral agreement to purchase airplane from B, which oral agreement would otherwise be barred by statute of frauds. A claims that as a result of reliance, A lost the opportunity to acquire another airplane. A did not expend any significant resources or expenditures based on the promise including obtaining of any financing with interest charges; did not increase warehouse space in anticipation of any purchase; did not make or lose any deposit; and that lost opportunity to acquire another plane was lost prior to any promise by B. The asserted reliance was not of sufficient significance to result in any injustice in not enforcing the promise or estopping reliance on statute of frauds.

**Illustration B:** A, an employer, agreed to pay B, an employee, a monthly retirement benefit for life upon B's retirement. The promise was included in a formal resolution of the Board of Directors of A. B retires earlier than she would have otherwise based on the promise and proceeds to receive from A monthly benefits for a period of five years before A stops the payments. Enforcement of the promise (specific performance) was necessary to avoid injustice, as promise was sufficiently definite and reliance was reasonable and substantial including that B did not look for other employment and was, after five years in retirement, in a difficult position to find comparable work.

**Illustration C:** A and B are two long time employees of C. C states that he would like A and B to take over business upon C's retirement. A, in reliance on promise, performs work beyond his normal duties. A and B begin negotiating with C about purchasing business. B agreed with A that he would negotiate with C on both A and B's behalf and during negotiations an actual closing date was scheduled, but no agreement as to material terms could be reached with C cancelling closing after believing that A was seeking unreasonable terms as to purchase. B proceeds to negotiate with C independently, without notice to A that he is doing so, and C agrees to sell business to B. Even assuming sufficient promise and reliance, avoidance of injustice was not met as there was no evidence or showing that breach of

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488 See Aircraft Inventory Corp. v. Flacon Jet Corp., 18 F. Supp. 2d 409, 417 (D. N.J. 1998) (finding "no evidence that plaintiff expended significant resources in reliance on the promise.").
promise caused harm. There was no evidence that if B had not promised to negotiate on A’s behalf—or if B had timely informed A that he was pursuing purchase of the business on his own—A could have done anything to prevent the sale. There was also no evidence that C would have ever sold business to A alone, and therefore, breach of B’s promise did not cause A’s failure to obtain ownership interest in business.

\[f.\] **Party Relation, Form and Setting**

The relationship of the parties as well as the form and setting of the promise are vital to application of the avoidance of injustice element. Their importance derives from the recognition that contractual consideration, at its core, is a fundamental tool for identifying those promises intended as legally binding.\(^{489}\) Form, in turn, has long been recognized as serving important functions of evidence, caution, and channeling.\(^ {490}\) Both consideration and form satisfy an evidentiary function by producing tangible and trustworthy evidence that an enforceable agreement has been reached and in the event of controversy.\(^ {491}\) The cautionary function is that which demonstrates the weightiness or deliberateness of the transaction; i.e. the parties’ agreement or understanding that it is an enforceable transaction.\(^ {492}\) The channeling function, in turn, is that there is a usual process that creates an enforceable agreement (i.e. presence of consideration and particular form).\(^ {493}\) In short, “legally aware commercial actors prefer formal contract as the exclusive mode of creating enforceable obligations.”\(^ {494}\)

Although claims for promissory estoppel arise in the absence of consideration, these overlapping functions remain important criteria as to avoidance of injustice. The party relation, as well as the form and setting, serve as the default surrogate for consideration’s evidentiary, cautionary, and channeling function. They provide a means to patrol the edges of promissory liability—beyond just promise and reliance. They allow for judicial evaluation and concern as to: (1) potential mistaken and even false testimony; (2) impulsivity and lack of deliberateness or weightiness as to the

\(^{489}\) See Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 779, 800-01 (1941) (discussing importance of circumstances surrounding formation of promise in determination of promissory estoppel).

\(^{490}\) See id. (finding form of promise relevant for enforceability).


\(^{492}\) Fuller, supra note 490 (analyzing the cautionary function involved for both promisor and promise).

\(^{493}\) Id. (discussing channeling function as it relates to routine interactions).

\(^{494}\) DeLong, supra note 42, at 979.
promise; (3) the specific business, legal, or transaction category and its norms; (4) and repetition or ratification or lack thereof. As such, the focus is on whether the setting, form, and circumstances make apparent the consequences of both the promise and reliance, particularly the understanding that an enforceable obligation has been formed. The court, through the implementation of the avoidance of injustice element, can seek to ensure that the relation, setting, and form provide a measurable and sufficient degree of evidentiary, cautionary, and channeling function—as similarly served by consideration and form in the bargain for exchange context.

As to form, the lack of formality of the asserted promise is a consideration in determining whether injustice will result if the promise is not enforced. The inquiry includes identification and evaluation of impediments to a formal or more formal bargain under the circumstances and the reasonableness of any failure to more formalize the promise. It asks whether the nature and context of the interaction or general industry specific standards or practices usually require or involve more formalized agreements before being enforceable. The opportunity to bargain and include or not include terms, or provisions limiting liability or excluding responsibility for certain kinds of losses, is a consideration. The more extensive, elaborate, or time spanning the subject of or the promise entails, the more it would be expected that the promise be formalized unless they are circumstances explaining or excusing such formality. Similarly, the more the parties were on notice, or should have been on notice, that a more formalized agreement was the norm, there is no injustice in not enforcing the promise regardless of the existence of a promise and reliance. Likewise, the more likely the transaction and circumstances of the promise could be misunderstood militates that a more formal and complete agreement is necessary to require enforcement.

The setting, to the extent the circumstances indicate measurable deliberateness or considerate action as opposed to impulsivity or hastiness, would favor enforcement. Again, fundamental is whether the setting and/or form indicate that the promise and reliance occurred in circumstances revealing an intent to be bound versus no intent to be bound.

As to evidentiary function, it is reasonable to inquire as to the source of the predicate facts of the promise and its terms (as well as the reliance and its degree). For instance, to the extent it is based solely on the credibility of witnesses, particularly where there is any measure of reasonable expectation of more formality, the setting and form lack evidentiary function and
injustice would not be avoided by enforcing the promise. This would be particularly so where there is any measure of vagueness or risk of misunderstanding as to the asserted terms of the promise and obligation.

An examination of the relations between the parties, including as to the issue of form, is important to the injustice evaluation. While the sophistication of the parties informs the reasonable reliance element, it likewise informs the avoidance of injustice element. Even if a jury were to find that the promisee’s reliance was reasonable, the court may, under the injustice element, consider the reliance against the back-drop of the transaction and the sophistication of the parties and their relation. If the promisee and promisor are relatively equal in sophistication and as to knowledge or access to knowledge, and are at arm’s length, it would militate against enforcement and certainly against an expectation award as such parties can readily fit their transaction into the binding type in which normal rules of contract would control.

Where there is a disparity in sophistication and/or knowledge, or access to knowledge as to the subject of or the binding nature of the promise, it can militate for enforcement. Similarly, contractual flexibility tends to be more important as to an on-going relationship. Where the parties have a long-standing relationship or course of dealing, or otherwise situated in a confidential relationship or other relationship of trust and confidence, there may be less reason to expect conventional means of formalizing a contractual obligation, and thus militates toward enforcing the promise and/or awarding expectation damages. This is particularly so if the promisor does or should know the trust or confidence being placed by the promisee. This consideration overlaps with the sophistication and length of relationship between the parties which would also support an intent to be bound without formality.

Illustration A: A, a pharmacy was considering relocating its business or to renew lease of space owned by B and adjacent to B’s supermarket. The lease agreement did not restrict supermarket from operating a pharmacy. Before renewing lease, A obtained oral assurances from B that it had no intention of operating a competing pharmacy in that location. Soon after A renewed lease, A began preparing to operate a pharmacy. Injustice not avoided by enforcement of promise. Not only was reliance questionable given the commercial sophistication of the parties and essentially equal bargaining power, but the agreement not to compete could

495 See Rhode Island Hosp. Tr. Nat’l Bank v. Varadian, 647 N.E.2d 1174, 1176-77 (Mass. 1995) (finding no promissory estoppel liability as matter of law). The court found no promissory estoppel even though jury found sufficient promise and reliance as it was undisputed that parties did not intend to be bound absent a signed writing. See id. at 1179.
have been easily formalized and would prevent any misunderstanding. A more formalized agreement would be expected in the circumstances given the parties were business rivals operating in a business setting and having important rights at stake, including a new line of business and choice of where to locate for a ten-year period of time. Enforcement of such an oral promise would not advance evidentiary, cautionary, and deterrent function normally served by a writing in this context.

Illustration B: A is a lender and B is a sophisticated real estate developer with numerous prior development loans with various lenders. Neither A nor B had ever done business before. B has always signed a letter of intent, attended a closing, and signed various loan documents setting out the details of the loan for any of its prior developments before obtaining the funds from the bank. B had been informed of various conditions of the loan including that there could be no disbursement absent acceptance and execution of the loan documents by A. B claims A agreed to provide multimillion-dollar loan and told him the project was a go, but there was no finalized and executed letter of intent, closing, or negotiated and completed loan documents at the time, so it was clear no loan could be made. Even assuming a definitive enough promise and detrimental reliance, the sophistication of the parties, lack of prior or on-going relation, the usual formalization of the promise or contract, and the nature of the relation and transaction militate against any injustice in failing to enforce the promise.

g. State of Mind, Opportunism, or Dishonesty

The state of mind of the promisor and his or her conduct in terms of the presence or absence of unfairness or dishonesty in the circumstance of the promise informs the injustice element and/or remedy.496 The more unfair the circumstances surrounding the promise and interaction between the parties, the more "justice" dictates that the promise be enforced, and/or that expectation as opposed to reliance be awarded. The more there is evidence of a deliberate, opportunistic, and/or dishonest intention of the promisor as to the knowledge of the expected or actual reliance and the dishonor of the promise, the more circumstances approximate or equate to deceit where expectation damages can be considered.

Similarly, the lack of any opportunistic behavior or dishonesty or bad faith (i.e. imperfect or looseness in negotiations, inadvertence, human error or poor judgment) would militate that the promisor should not be punished or that, at least, the remedy be limited to the reliance measure. This factor would include consideration of the promisor’s state of mind, including

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496 See Feinman, supra note 18, at 313 (reevaluating promissory estoppel).
whether the promisor understood or believed that the promise was not binding or enforceable under applicable law and, if so, whether he knew or believed that the promisee was also aware of unenforceability.

It would be important for the court not to usurp or lessen the standard and measure of damages underlying negligent and/or intentional misrepresentation. Negligent misrepresentation is associated with reliance damages, not expectation. Even with intentional misrepresentation, the Court retains discretion to limit damages to reliance as opposed to expectation.\(^\text{497}\)

**Illustration A:** B solicited quote from A for construction of a rugged specialized computer system to be used in a military vehicle and began dealing exclusively with A. While A and B were negotiating a formal contract where B was delaying as to finalization, B informed A that an agreement would be worked out and exerted pressure upon A to begin production. Due to the specialized nature of the production process, A expended significant costs and efforts including over $200,000 in costs. B never finalized the agreement and entered into a contract with another vendor having confirmed that the system could be manufactured. Despite absence of agreement, avoidance of injustice would be met by enforcement of the promise since B gave assurances that agreement would be reached, delayed finalizing agreement without any reasonable explanation, and obtained and used valuable information from A’s efforts, including manufacturing process, feasibility, and timeline, and used the information in obtaining another vendor.

**h. Foreseeability, Certainty and/or Speculation as to Any Expectation Remedy (remedy only)**

This factor is largely the application of the fundamental rules pertaining to contractual damages. All such damages must be foreseeable and not otherwise be contingent or uncertain to the point of being impermissibly speculative. As a remedy for the uncertainty of business losses including any lost profits, Massachusetts law permits a reasonable approximation of compensatory damages. The principle of reasonable approximation applies with particular force in circumstances of indefiniteness caused by the wrongdoer’s fault.\(^\text{498}\) To the extent reasonable minds could differ, and thus an issue for the jury if expectation was the applicable measure, the degree of foreseeability and/or certainty (or lack


thereof) would need to be balanced against the other factors underlying the “interest of justice” inquiry as to the appropriate measure of damages. Where reasonable minds could not differ, then expectation damages are not appropriate. Foreseeability, certainty, or speculation would also apply to the reliance measure with any reasonable dispute to be resolved by the jury or court as fact finder for amount.

Illustration A: A claims loss of future wages based on B’s promise of employment. Expert for A testified that he was unaware that A’s employment with B had a specific tenure and agreed that A could have quit or been fired from that job from the time he resigned to the present, thereby assuming that A would have continued employment with B or comparable employer. Lost future wages until retirement age was speculative, as promise of employment was employment at will and there was no evidence that B would have continued to employ A until retirement.

Illustration B: Based on certain promises of B, a lender, A commenced certain preparatory construction site work in anticipation of loan to construct a casino. A was informed sixty days later that there could be no loan given the failure to meet certain loan conditions. A and B understood their rights and liabilities were to be controlled by various loan documents and satisfaction of certain loan conditions. A’s claim for lost profits of casino was speculative and not causally related to putative promises with any damages limited to the reliance damages expended during the sixty days between promises, and when informed there could be no loan due to failure to meet conditions.

V. CONCLUSION

For better or for worse, promissory estoppel in Massachusetts, as elsewhere, appears here to stay. Whether it ultimately assumes super hero status providing a tort like remedy in the name of “injustice”; is beaten back into a use for only exceptional circumstances in order to preserve the importance of mutual assent and bargain; or lands somewhere in between remains to be seen. Both the “avoidance of injustice” element and the appropriate remedy may well be the key to its future and direction.

The proposed construct offered above has shortcomings. There remains limited judicial treatment of the avoidance of injustice element and the measure of damages including whether they are matters of policy and equitable discretion for the court as opposed to a jury to resolve. Further, it can be argued that the construct overly complicates and overruns the elements of promise and reliance. It could be argued that the injustice element is more of a “guide” than a required element, with the identified
considerations set forth in the proposed construct all able to be subsumed
and included in the promise and reasonable reliance components. It may
well be argued that the sole criterion for “avoidance of injustice” should
simply be whether there are any policy reasons militating against
enforcement, and whether there are any available alternative remedies. The
approach otherwise accepts the notion that promissory estoppel is
“disfavored” and that reliance based promises are not and should not be
placed on equal footing in all circumstances as mutually bargained and
consensual contracts.

The proposed construct is, at least, a modest attempt to give some
flesh to the bones. Even if avoidance of injustice is found not to be a separate
element, the identified considerations provide potentially helpful criteria to
apply and use in assessing the issues of promise, foreseeability, reliance, and
harm. To determine ultimate enforceability and the appropriate measure of
damages based on close inspection and evaluation of the particular
circumstances, as well as through discrete articulation, can only serve to
promote consistent and principled decision-making. By treating the injustice
element as one of law and policy for the court, the construct seeks to
recognize the equitable origins and function of the doctrine. It allows
categorizations or classifications to be of less importance with the primary
aim to drill down and identify what promises merit enforcement and what
remedial measure should apply. Without substantive and principled
application, the “avoidance of injustice” and “flexible” remedy are
rudderless in both a sea of discretion and the grey of just promise and reliance
alone. Properly viewed, both are intended to remind that promissory estoppel
is a limited doctrine allowing for enforcement of mutual assent lacking
promises in only limited and extraordinary circumstances, and otherwise
requiring a remedy that fits the particular circumstances.