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## Contracts—Expanded Application of Promissory Estoppel in Restatement of Contracts Section 90—*Hoffman v. Red Owl Stores, Inc.*

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**CONTRACTS—Expanded Application of Promissory  
Estoppel in Restatement of Contracts Section 90  
—*Hoffman v. Red Owl Stores, Inc.*\***

Plaintiff sought a franchise for a Red Owl supermarket and was told by an agent of the defendant that \$18,000 would be sufficient to finance such a venture.<sup>1</sup> Acting on the advice of the agent, plaintiff purchased a small grocery store so that he could gain experience in food store management. Having been assured that "there would be no problems in establishing him in a bigger operation,"<sup>2</sup> plaintiff sold this store after three months of doing business and realized a net profit of approximately \$500 on the purchase and sale. In further preparing for the franchise, plaintiff sold a bakery which he and his wife had operated for five years,<sup>3</sup> secured an option to purchase land for the proposed supermarket,<sup>4</sup> and rented a home close to the proposed site. Subsequently the defendant insisted that plaintiff make an initial investment of \$34,000—a substantial increase from the \$18,000 figure originally quoted. The plaintiff terminated negotiations and brought suit to recover the damages he had sustained in reliance on the defendant's representations. The trial court awarded the plaintiff damages for the loss on the sale of his bakery, his rental and moving expenses, and the cost of the land option. Plaintiff's claims for losses resulting from the sale of the

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\* 26 Wis. 2d 683, 133 N.W.2d 267 (1965) [hereinafter cited as principal case].

1. Since the defendant was located and incorporated in Minnesota, its negotiations with the plaintiff in Wisconsin were conducted by various representatives. There being nothing in the case to suggest that the agents exceeded their authority, no mention will be made of the agency relationships.

2. Principal case at 688, 133 N.W.2d at 269.

3. The defendant's agent told plaintiff and his wife that "they would have to sell their bakery business and bakery building, and that their retaining this property was the only 'hitch' in the entire plan." Principal case at 688, 133 N.W.2d at 270.

4. The option was taken after the defendant's agents represented that everything was all set. Principal case at 688, 133 N.W.2d at 270. The presence of such unequivocal statements in the principal case, see notes 2 & 3 *supra* and accompanying text, was important in establishing that plaintiff's reliance was reasonable and foreseeable.

grocery store were allowed in part, for the court permitted recovery of the difference between the sales price and the market value of the store, but refused to award future profits. The Supreme Court of Wisconsin, endorsing for the first time the principle of promissory estoppel incorporated in section 90 of the Restatement of Contracts, *held*, affirmed. Notwithstanding its conclusion that the defendant had acted in good faith, that is, defendant's original representations had not been made with an intent not to perform, the court found the plaintiff's reasonable and foreseeable reliance on defendant's representations was of such a nature that injustice could be avoided only by protecting that reliance interest.

The protection of reliance interests is not a modern concept; it is substantially coincident with the old action of *assumpsit* which provided for the enforcement of promises in order to avoid injury to a promisee.<sup>5</sup> However, as consideration evolved as the basis of contract law, the emphasis placed on the bargain aspects of agreements relegated concern with reliance interests to secondary importance. Only in those cases in which a plaintiff had relied, with justification, to his detriment on a promise for which consideration was lacking, would the courts protect his reliance by enforcing the promise.<sup>6</sup> However, by the 1920's a sufficient body of case law existed to warrant recognition of promissory estoppel in section 90 of the Restatement of Contracts. That section provided:

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.<sup>7</sup>

Ironically, the inclusion of section 90 in the Restatement inhibited the further development of the doctrine of promissory estoppel. No explanatory comments accompanied the provision and no theory of damages was suggested for use in conjunction with section 90. The lack of attention to remedies led the courts, and many commentators, to conclude that only full contract damages were appropriate in cases in which promissory estoppel was invoked. Unfortunately, those who so concluded could find considerable support for their position.<sup>8</sup> First, in the Restatement's extensive treatment of damages, it is nowhere suggested that contracts resulting from promises enforced under section 90 require special handling.<sup>9</sup> Second, it is apparent

5. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 15 (1888).

6. 1A CORBIN, CONTRACTS §§ 206-07 (1963).

7. For a thorough discussion of promissory estoppel and its incorporation in § 90 of the Restatement of Contracts, see Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

8. See 59 DICK. L. REV. 163 (1955); 13 VAND. L. REV. 705 (1960).

9. RESTATEMENT, CONTRACTS §§ 327-46 (1932).

that Professor Williston, the Reporter for the Restatement of Contracts, believed that full contract damages was the proper remedy under section 90.<sup>10</sup> Finally, in the vast majority of cases in which the doctrine of promissory estoppel had previously been invoked, the relief granted was full enforcement of the promise.<sup>11</sup>

Although adherence to full contract damages was a tenable position, it evoked strong criticism because it prevented the extension of promissory estoppel to new, meritorious situations.<sup>12</sup> The restriction on the use of the doctrine can be demonstrated by adding a hypothetical element to the factual setting of the principal case: assume that in addition to the damages suffered in reliance (\$3,000), the plaintiff could establish that had he executed a contract with the defendant, he would have received a one-year franchise and that his profits for that period would have been \$20,000. Consider the position of the court faced with plaintiff's claim under section 90. If relief were measured by full contract damages—which attempt to put the promisee in the same financial position he would have been in had the promise been fulfilled—to sustain the plaintiff's cause of action would be to hold the defendant, who had neither exhibited bad faith nor become contractually bound, liable not merely for the \$3,000 loss incurred through reliance, but for the lost profits of \$20,000 as well.<sup>13</sup> If the cause of action is dismissed, plaintiff's \$3,000 damages would go uncompensated. This "all-or-nothing" approach, which necessarily follows from the use of full contract damages, understandably made the courts hesitant to apply section 90 in such situations.

In the principal case, however, the court departed from the theory of damages traditionally associated with section 90 and employed a theory of damages that would appear to make promissory estoppel useful in many situations not heretofore considered to be within its ambit. In lieu of full contract damages, the court, attempting to return the promisee to his pre-promise status, awarded

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10. 4 ALI PROCEEDINGS app. 98-99 (1926).

11. The doctrine of promissory estoppel has been used primarily in the following settings: charitable subscriptions, parol promises to give land, gratuitous bailments, gratuitous agencies, bonus and pension plans, waivers, and rent reductions. Only in cases involving gratuitous bailments and agencies was the promisor held liable for the losses caused by reliance, rather than the value of his promised performance. See Shattuck, *Gratuitous Promises—A New Writ?*, 35 MICH. L. REV. 908, 915-18 (1937). For a discussion of the application of promissory estoppel to the above areas see Boyer, *Promissory Estoppel: Principle From Precedent*, 50 MICH. L. REV. 639 (1952).

12. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 492-96 (1950); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 373, 420 (1936); Shattuck, *supra* note 11, at 941-45. This is not to suggest, however, that the Restatement misrepresented the existing state of the law. See RESTATEMENT, CONTRACTS, Explanatory Notes § 90 (Off. Draft 1928). Rather, in attempting to correlate the diverse cases in which promissory estoppel had been employed, the Restatement unwittingly produced its deterrent effect.

13. The award for lost profits would, of course, be mitigated by the projected amount of plaintiff's earnings for the year in a different position.

damages measured solely by plaintiff's reliance.<sup>14</sup> This expanded use of section 90 is not based upon a new approach to reliance nor upon a sophisticated appreciation of "justice," but rather on the court's willingness to adapt the relief to the situation at hand and ignore the "all-or-nothing" approach previously read into section 90. As the *Hoffman* court aptly stated:

Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided.<sup>15</sup>

Utilization of this flexible approach to damages would enable a court confronted with the example described above to employ section 90 to recompense the plaintiff for his reliance losses, while obviating the necessity of granting future profits as well.

The reliance damages approach advocated in the principal case parallels the approach taken in the Tentative Draft of the Restatement of Contracts Second in which section 90 has been redefined<sup>16</sup> and explanatory comments have been added. As the Reporter's Note points out, the principal difference between the original Restatement and the Tentative Draft is the latter's recognition of "partial enforcement."<sup>17</sup> In a discussion of this change, it is explained that the same factors which bear on the propriety of giving any relief, should also affect the nature of the relief. The Tentative Draft continues: "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 terms of the promise.*"<sup>18</sup>

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14. For a general discussion of reliance damages see Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936).

15. Principal case at 701, 133 N.W.2d at 276.

16. RESTATEMENT (SECOND), CONTRACTS § 90 (Tent. Draft No. 2, 1965) [hereinafter cited as Tentative Draft] 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.

17. Tentative Draft § 90. It should be noted that the use of the phrase "partial enforcement" may perpetuate the misunderstanding surrounding the use of § 90. In awarding reliance damages, the terms of the promise are not important except in determining whether reliance was justified. To award less than full contract damages is not necessarily to partially enforce the terms of the promise. The promise is the foundation for an action based on § 90, but once shown, it is not thereafter considered in awarding damages—plaintiff's reliance, not the terms of defendant's promise, are the measure of recovery. To attempt to reconcile the recovery in the principal case with the ill-chosen language on the Tentative Draft, one would have to describe the award made to the plaintiff as the granting of a partial franchise—defendant's promise having called for an entire franchise.

18. *Id.* § 90, comment *e* at 170. (Emphasis added.)

The Tentative Draft also recognizes that the extent of reliance which is sufficient to serve as a basis for a cause of action for recovery may vary according to the type of situation involved. It suggests, for example, that promissory estoppel need not be applied in the same fashion in charitable subscription cases, where only minimal reliance is required and full contract damages are commonly awarded, and in situations like the principal case where more substantial reliance is requisite and reliance damages may fully compensate the plaintiff.<sup>19</sup>

In conjunction with the expanded use of promissory estoppel, there are several reasons why reliance damages should not be merely a possibility but should, in fact, be the favored form of relief with full contract damages the exception. First, the only basis for an estoppel action is the plaintiff's detrimental reliance, not his expectation of the promised performance. In other words, if the plaintiff in the principal case had not undergone a change of position no cause of action would have arisen, despite identical conduct by the defendant. Second, since the comments to section 90 of the Tentative Draft explicitly state that the section is based on a reliance theory, an award measured by reliance would seem to be indicated.<sup>20</sup> When a party is compensated for damages incurred through reasonable reliance, it would seem that, in theory, the action coincides with one founded in tort;<sup>21</sup> the underlying rationale is that plaintiff's financial injury is the foreseeable result of the defendant's representations. The same theory which operates in parallel tort cases, where damages are awarded to the extent of plaintiff's reliance on defendant's misrepresentations, should therefore be applicable in cases where the representations are made in the course of contract negotiations. Third, the equities in cases like the principal case do not warrant recovery in excess of reliance damages. The plaintiff could have insisted upon a binding bilateral

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19. *Id.* § 90, comment *b* at 166. The Tentative Draft also explicitly states that third parties are eligible for relief under § 90. Thus, in *Hoffman*, the court's decision to permit the husband and wife to recover as joint tenants of the bakery store is in accord with the theory of the Tentative Draft.

20. Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913, 926 (1951). *But see* Comment, 48 YALE L.J. 1036 (1939).

21. See generally Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964), which explains that the genesis of tort analogy in contract negotiation settings is found in a paper published by Jhering in 1861 which discusses the German law on this subject. The article further points out that an action to recover damages suffered through reliance upon representations made during contract negotiations is classified as contractual in Germany because there the negligent causing of pecuniary harm is not recognized as the basis of an action in tort. Although in this country the trend has been toward allowing the type of tort action that Germany does not recognize, a history of reluctance on the part of the American judiciary to entertain such actions might account for their continuing contractual categorization here.

agreement before he changed position; instead, he relied on representations made by the defendant in the negotiation stage when neither he nor the defendant were contractually bound. Unlike the plaintiff in a true breach of contract case, the plaintiff here did not subject himself to any contractual liabilities and therefore he seems far less deserving of full contract damages. Finally, reliance damages are free from the punitive element which might inhere in the full contract damages approach. With reference again to the hypothetical example described above, it would indeed smack of inequity if a defendant who without bad faith had induced \$3,000 of reliance losses were held liable for \$20,000 in full contract damages.

While reliance damages should therefore generally be the measure of relief, the presence of certain factors might justify the award of full contract damages. Some of the factors that should be considered in ascertaining the appropriate relief in a particular situation are the disparity between the amounts of recovery under the respective remedies, the substantiality of the plaintiff's reliance, the relative bargaining strengths of the parties, and the reasonableness of the reliance in light of the custom and form of the particular commercial setting. Professor Corbin goes so far as to recommend that

[T]he relative economic needs and capacities of the parties and the needs and interests of the promisor's dependents and creditors should be taken into consideration, particularly in determining the form of the remedy and the extent of the relief.<sup>22</sup>

Precedent seemingly exists for the award of full contract damages when bad faith on the part of the promisor is established. The importance of this element is highlighted in a comment in the Tentative Draft, in which *Goodman v. Dicker*<sup>23</sup> is contrasted with *Chrysler Corp. v. Quimby*.<sup>24</sup> In *Goodman*, the defendant mistakenly, but in good faith, advised plaintiff that he had been granted a franchise to sell radios and that an initial delivery of at least thirty radios was forthcoming. Without referring to section 90, the court permitted recovery of the money expended by the plaintiff, but disallowed the plaintiff's claim for lost profits on the sale of thirty radios.<sup>25</sup> On the other hand, in *Chrysler*, where the plaintiff was promised renewal of an automobile franchise if he purchased all the outstanding stock in the franchise, the plaintiff was awarded lost profits as well as his reliance expenses, that is, full contract

22. 1A CORBIN, CONTRACTS § 200, at 216-17 (1964 ed.); see Tentative Draft § 90, comment *b*.

23. 169 F.2d 684 (D.C. Cir. 1948).

24. 51 Del. 264, 144 A.2d 123, *petition for reargument denied*, 51 Del. 295, 144 A.2d 885 (1958).

25. *Cf. Terre Haute Brewing Co. v. Dugan*, 102 F.2d 425 (8th Cir. 1939); *Burridge v. Ace Storm Window Co.*, 69 Pa. D. & C. 184 (C.P. 1949).

damages, upon defendant's breach of his promise. While the two cases might appear inconsistent, a very real distinction exists; in *Chrysler* the promisor never intended to fulfill his promise, whereas in *Goodman* the element of deceit was lacking. Although Corbin makes no reference to the promisor's bad faith in his approbation of the *Chrysler* result,<sup>26</sup> the Tentative Draft emphasizes the fact that the promisee was deliberately misinformed.<sup>27</sup> Albeit *Chrysler* may not represent unassailable authority that full contract damages will necessarily follow a demonstration of bad faith; neither does it fortify the proposition that full contract damages are appropriate in good faith settings.<sup>28</sup>

Even when reliance damages are granted, a problem might arise with respect to the amount of the award. In the principal case, it will be remembered, the plaintiff sought recovery of the future profits he allegedly lost on the sale of his grocery store. Such profits are not identical to those awarded in the *Chrysler* case, for in *Chrysler* the profit was that which would have resulted had the defendant performed his promise, whereas in the principal case the grocery store profits were obviously unrelated to what the plaintiff would have realized had he acquired a Red Owl franchise. Since both parties in the principal case contemplated that the grocery store would be operated only on an interim basis, and that experience rather than profit was the motive, the court's decision to disallow future profits is seemingly correct. However, the court's allowance of recovery for the difference between the sales price and the market value of the store is questionable. Properly viewed, the purchase and sale of the store constitute a single transaction in preparation for the franchise. The consequence of the transaction was a net gain of \$500 and, therefore, no loss was incurred. Indeed, it is arguable that the \$500 should properly be deducted from plaintiff's final award.<sup>29</sup> The purpose of reliance damages—to put the plaintiff in a position comparable to the one he would have been in had there been no promise—is not served by awarding the plaintiff the difference between the sales price and market value of the

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26. 1A CORBIN, CONTRACTS § 205, at 248-49 (1964 ed.).

27. Tentative Draft § 90, comment *c*, at 171.

28. In 51 CORNELL L.Q. 351 (1966), the commentator in explaining the court's unique application of § 90, stated that the court "apparently felt that Red Owl's negotiations had not been carried on in good faith." *Id.* at 356. That the plaintiff's reliance, not the defendant's state of mind, motivated the use of § 90 in *Hoffman* can be seen in the principal case where the court stated:

Here, there is no evidence that would support a finding that Lukowitz (the Red Owl representative) made any of the promises, upon which plaintiff's claim is predicated, in bad faith with any present intent that they would not be fulfilled by Red Owl.

Principal case at 695, 133 N.W.2d at 273.

29. See 51 CORNELL L.Q. 351 n.1 (1966).

grocery store any more than it would have been served by awarding him the future profits.

This discussion is not meant to suggest that reliance damages need be measured solely by out-of-pocket expenditures. Assuming that the plaintiff in the principal case was induced to sell his bakery and spend two months without compensation in preparation for the franchise, a court, upon breach of the defendant's promise, would not be doing violence to the rationale underlying the theory of reliance damages in awarding the plaintiff the profits he would have realized from the bakery during this period. Likewise, had the plaintiff expended money in his preparations, he could properly be awarded interest on the sum.<sup>30</sup> Both of the aforementioned awards would be consistent with the policy of the Tentative Draft that courts may modify the relief to the facts at hand.

Because the principal case did not involve a gratuitous promise, but rather pre-contractual bargaining, it has been referred to as an unwarranted and unprecedented application of section 90.<sup>31</sup> This criticism would appear to be unfounded for two reasons: (1) section 90 has been employed in similar factual settings in the past;<sup>32</sup> and (2) as suggested in the above discussion, section 90, as applied here, was a proper means of resolving the issue presented. It would seem that its novel approach to damages enabled the court to bring the principal case within the purview of section 90 and reach an equitable result. Although the above discussion has been limited to situations such as those in the principal case, it is suggested that, in light of the approach taken in that case and recommended by the Tentative Draft, courts are now presented with the opportunity to employ section 90 in many situations where full contract damages would have formerly precluded its use.<sup>33</sup>

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30. *Burridge v. Ace Storm Window Co.*, 69 Pa. D. & C. 184 (C.P. 1949).

31. 51 CORNELL L.Q. 351 (1966).

32. *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); *Chrysler Corp. v. Quimby*, 51 Del. 264, 144 A.2d 123, *petition for reargument denied*, 51 Del. 295, 144 A.2d 885 (1958).

33. Nothing in this article should be taken as discrediting the approach of those decisions in which the court recognized a cause of action based directly on a breach of promise and reliance, without resorting to general contract law or the Restatement § 90. *E.g.*, *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948). In fact, such an approach is logically appealing in that it avoids the somewhat tenuous reasoning in the Tentative Draft, that is, that a promisee's reliance may give rise to a binding contract although full contract damages might not be appropriate. In view of the strong impact of the Restatement of Contracts, however, it is submitted that the Tentative Draft and *Hoffman* will allow expanded use of promissory estoppel by those courts which have paralleled their use of the doctrine to that suggested in the Restatement § 90.