Welcome to this podcast on Reliance (Promissory Estoppel) brought to you by CALI. I am Professor Jennifer S. Martin. The topic of this podcast is when agreements that are not enforceable as contracts because they are not supported by consideration are nevertheless enforceable due to reliance on the promise, often referred to as promissory estoppel.

We don’t enforce all agreements as contracts just because the parties mutually assented. In forming a contract, we require a bargain comprised of a manifestation of mutual assent and consideration or some other justification for enforcing the parties’ promises. For purposes of this podcast, presume that the mutual assent aspect of formation is satisfied, but consideration is lacking. Oftentimes, consideration is lacking because the promise was to make a gift. While a promisee does not ordinarily take substantial action in response to a gift promise, sometimes the promisee does engage in substantial action in reliance on the promise. Yet, the actions are not consideration because the reliance was not bargained for by the promisor.

In the well-known case of *Kirksey v. Kirksey*, 8 Ala. 131 (1845), Isaac Kirksey wrote a letter to his brother's widow Antillico stating, “If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well." Antillico moved to the residence offered by Isaac, but after two years Isaac asked her to leave. She brought suit and the trial court awarded $200 to Antillico. On appeal, Judge Ormond stated that he thought the “loss and inconvenience, which the [she] sustained in breaking up, and moving . . . , a distance of sixty miles, is a sufficient consideration to support the promise, to furnish her with a house, and land to cultivate, until she could raise her family.” However, Judge Ormond was outvoted by the other judges and the judgment of the lower court was reversed. Antillico did not prevail, despite some indication that she may have relied on the promise of Isaac.

Fifty years later, the Nebraska Supreme Court took up the case of *Ricketts v. Scothorn*, 57 Neb. 51 (1898). In *Ricketts*, a grandfather hoped his granddaughter, Katie, would be able to give up her employment as a bookkeeper. The grandfather wrote a promissory note to Katie for $2,000, with 6% interest and Katie quit her job. After the grandfather was unable to keep up the payments, Katie went back to work. After the grandfather died, Katie claimed the amount of the promissory note from his estate. When the executor failed to pay, Katie brought suit. The court held that there was no consideration as the grandfather gave the note as a gift to Katie, even though he hoped she would be able to give up her bookkeeping position. The court nevertheless enforced the promise of the grandfather, finding it would be “inequitable” to permit the refusal of payment on the note where the grandfather had influenced Katie to alter her position for the worse. As such, “equitable estoppel” applied and the estate could not refuse to pay on the grounds of lack of consideration.

The modern rule permitting enforcement of such promises is set forth in Restatement (Second) of Contracts § 90. A promisee can prevail on a claim of “promissory estoppel” where: (i) there is a promise; (ii) the promisor should reasonably expect to induce reliance of the promisee or a third party; (iii) the promisee or a third party does rely; and (iv) justice requires enforcement of the promise. Illustration 1 to Restatement § 90 is helpful. “A, knowing that B is going to college, promises B that A will give him $5,000 on completion of his course. B goes to college and borrows and spends more than $5,000 for college expenses. When he has nearly completed his course, A notifies him of an intention to revoke the promise. A’s promise is binding and B is entitled to payment on completion of the course without regard to whether his performance was “bargained for” under § 71.”

In order to prevail on “promissory estoppel,” there must be a promise that the promisee actually relies on. For instance, Employer promises a pension of $200 per month to Employee who has worked for Employer for 40 years, payable when she retires. If Employee later retires in reliance on the promise of the pension, the Employer’s promise would be binding under Restatement § 90. However, if Employee announces her retirement and Employer makes a promise of a pension after the announcement, the case is not the same. That is because Employee did not retire in reliance on the promise of Employer, as the promise of the pension came later.

Of course, recovery in an action based upon “promissory estoppel” is not a certainty and is likely to be disputed. In the case of *Bouton v. Byers*, 321 P.3d 780 (Kan. Ct. App. 2014), Father owned substantial tracts of ranchland, which included a parcel with a family ranch. Father and Son managed the ranch, but Father became concerned about Son’s management in the business. Father asked Daughter, who was a law professor, to help assess the business, which Daughter did and uncovered embezzlement by Son. Father asked Daughter to come live at the ranch, and allegedly told her not to worry about money as Father will leave Daughter the ranch when he dies. Daughter resigned from her law professor job and moved her family to the ranch. Daughter worked at the ranch for several years until a dispute developed and Father told Daughter she was no longer needed at the ranch. Daughter could not get her full-time faculty position back. Father sold the ranch and left the proceeds to a charitable trust, disinheriting Daughter. Daughter would be unable to bring suit here for breach of contract as there is no bargained-for consideration. Father did not seek Daughter’s moving to the ranch in exchange for a promise to leave the ranch to her on his death. Yet, should the court enforce the promise by Father due to the reliance by Daughter? The trial court granted summary judgment to Father, but the court of appeals reversed, concluding “a factfinder could conclude she reasonably relied on [Father’s] . . . promise and [Father] reasonably could have anticipated that reliance.” Of course, Daughter would need to prove her case at trial.

Sometimes, a question arises regarding promises of charitable donations. For instance, if Alumna promises to pay School $50,000, it is doubtful that there is consideration here in the absence of some indication that there is anything bargained for. The $50,000 is simply a promise to make a gift to School. If School relies on the promise and creates a garden, however, School might be able to assert recovery based on promissory estoppel. Notably, Restatement § 90(2) validates a promise of a charitable subscription without the need for the promisee to prove reliance. Accordingly, if a court adopted that provision (and not all have), then the promise of Alumna for the $50,000 to School would be enforceable even in the absence of reliance by School.

Before concluding, let’s briefly address the form of remedy permitted in cases based upon reliance. Restatement § 90 directs that the remedy in a case based upon reliance “may be limited as justice requires.” In the *Ricketts* case, the Supreme Court of Nebraska enforced the promise of the grandfather in full and awarded Katie the $2,000 under the promissory note. In the *Bouton* case, however, the court explained that if Daughter prevailed on her claim, the proper measure of damages would be the amount to which she relied on the promise of Father. That is, the amount of her lost employment as a law professor. Recall Illustration 1 from earlier, but with a change. A, knowing that B is going to college, promises B that A will give him $5,000 on completion of his course. B goes to college and spends $3,000 for college expenses. Under these facts, the promise to pay will likely only be enforced to the extent of the amount spent in reliance, here $3,000. Whether a court will award a full measure of damages or only an amount based on the reliance on the promise can differ “as justice requires.”

At this point, you should be able to explain that in order for there to be a contract, there must be consideration or another justification for enforcing the agreement. You should be able to explain that promises that are not supported by consideration may be enforceable based upon reliance. You should be able to explain and apply the rule for promissory estoppel, which requires: (i) a promise; (ii) the promisor should reasonably expect to induce reliance of the promisee or a third party; (iii) the promisee or the third party does rely; and (iv) justice requires enforcement of the promise. You should be able to apply this rule to cases involving charitable promises, but also recognize that some courts may not require reliance in order to enforce charitable subscriptions. Finally, you should be able to explain that the remedy in promissory estoppel cases may be either the full amount that was promised or damages based upon the reliance, depending upon the facts of the case.

I hope you’ve enjoyed this podcast on Reliance (Promissory Estoppel).

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