Contract Law

Lawrence Kalevitch*
Abstract

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Promissory Estoppel

The grumbling acceptance of the doctrine of promissory estoppel by the Florida Supreme Court1 continued recently in the cases of W.R. Grace & Co. v. Geodata Services, Inc.2 and Crown Life Insurance Co. v. McBride.3 The court has never positively applied the doctrine,4 though lower courts have acted on the doctrine in a variety of contexts.5 Perhaps the court has simply not had the right or best cases to

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1. The Florida Supreme Court has decided only a few cases in which it expressly recognized that the doctrine of promissory estoppel might have application. The first of these cases was Hygema v. Markley, 137 Fla. 1, 187 So. 373 (1939), in which the court quoted the RESTATEMENT (FIRST) OF CONTRACTS provision on promissory estoppel, § 80, but held the promise insufficient (presumably under § 80) because "it was not definite but, on the contrary, was entirely indefinite as to terms and time." Id. at 19, 187 So. 2d at 380. Only recently has the supreme court approved the doctrine of promissory estoppel. However, as this article will explain, the court has done so only on a narrow basis and retains, inter alia, the definiteness-of-the-promise idea laid down in the seminal Hygema opinion. Prior to the recent cases W.R. Grace & Co. v. Geodata Servs., Inc., 547 So. 2d 919 (Fla. 1989), and Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987), the court had several opportunities to address the promissory estoppel doctrine. None clarified its status: South Inv. Corp. v. Norton, 57 So. 2d 1 (Fla. 1952), held the doctrine inapplicable where a promisee in default claimed to have relied on an oral promise of first-refusal rights; Tannenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777 (Fla. 1966), held promissory estoppel inapplicable to enforce an oral promise within the statute of frauds; Mount Sinai Hosp. of Greater Miami, Inc. v. Jordan, 290 So. 2d 484 (Fla. 1974), ruled promissory estoppel unsatisfied by a charitable pledge where the pledge specified neither a specific purpose stated in the pledge nor any specific reliance by the promisee.

2. 547 So. 2d 919 (Fla. 1989).

3. 517 So. 2d 660 (Fla. 1987).

4. In surveying the Florida Supreme Court's promissory estoppel opinions, Swygert and Smucker explained why these cases admit of different interpretations. Swygert & Smucker, Promissory Estoppel in Florida: Growing Recognition of Promissory Obligation, 16 Stetson L. Rev. 1, 32-45 (1986). As with previous cases, the recent Grace and Crown cases spoke in what appears to be dicta as though the doctrine were part of Florida case law.

5. See, e.g., Rosa v. Florida Coast Bank, 484 So. 2d 57 (Fla. 4th Dist. Ct. App.)
declare squarely its view one way or another; more likely, the court is deeply divided on the doctrine. The disposition of Grace does not suggest what the court might say in the best cases for the application of the doctrine. Geodata had a weak case under any doctrine of contract law and evidently relied on the estoppel theory because it thought that theory was the best hope. The court’s reasoning responded to the weakness of this particular case, rather than any perceived unsoundness in the doctrine itself, except with respect to the burden of proof in such cases. To that burden, we shall later return.

**Grace: Promissory Estoppel and Vague Promises**

In **Grace** the court was asked the following certified question by the Second District Court of Appeal:

Can the doctrine of promissory estoppel be applied to enforce oral promises when necessary to prevent injustice in situations not covered by the Statute of Frauds where a promisor makes affirmative representations which he reasonably should expect would induce the promisee into action or forbearance of a substantial nature if the promisee can show that he did in fact rely on the representations to his detriment?

The Supreme Court answered the question in the affirmative “where the promise is definite, of a substantial nature, and established by clear and convincing evidence.” However, the court continued, the evidence here failed to meet these criteria.

The facts in **Grace** revealed a continuing contractual relationship between a phosphate company, Grace, and a phosphate prospect hole digger, Geodata. The parties executed a written contract in October of 1980, under which plaintiff Geodata would drill approximately thirteen hundred holes for defendant Grace. The writing had three provisions of arguable application to the parties’ later dispute. The first governed changes in the scope of work which permitted Grace to order changes, and also provided Geodata with additional compensation for such work. The provision required the parties to negotiate such additional payments in good faith, and limited commencement of any changes to prior agreement thereon. The second provision of the writing gave Grace the right to terminate the contract at any time. The third provision required amendment or modification of the contract to be in writing.

The parties operated under the contract until June of 1982, when Grace terminated the contract. During the course of performance, nine amendments to the contract were made, usually increasing the scope of the work. Three critical conversations between Geodata and Grace regarding the former’s solicitation of additional work occurred during the performance period. In the first, Geodata received assurance of additional work and acquired additional equipment for its operation shortly after it entered into the contract. In the second, a year later, Geodata had another conversation in which the defendant’s employees stated that, “I would be down in Manatee area probably three to five years drilling options.” Six months later, and two months prior to Grace’s termination, Geodata expressed anxiety about the economic situation to Grace. Its president testified that Grace’s employees told him that he did not need to worry, that they would have work for him for fifteen to twenty years.

The dispute occurred a month later when Geodata by letter requested additional compensation for drilling deeper than one hundred fifty feet. By memo, an employee of Grace approved this request for work which had already been completed, not for future work as the changes clause anticipated. The following week, the approval was rejected by a Grace superior. A few weeks later Grace terminated “[d]ue to the current economic situation.” The slump in the phosphate market during this latter period was unfurled.

Other facts before the court included Geodata’s testimony that it had declined a fifteen million dollar contract in Peru in December of 1981 because of the work it was doing for Grace, although it did not
declare squarely its view one way or another; more likely, the court is deeply divided on the doctrine. The disposition of Grace does not suggest what the court might say in the best cases for the application of the doctrine. Geodata had a weak case under any doctrine of contract law and evidently relied on the estoppel theory because it thought that theory was the best hope. The court’s reasoning responded to the weakness of this particular case, rather than any perceived unsoundness in the doctrine itself, except with respect to the burden of proof in such cases. To that burden, we shall later return.

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6. The court declared the evidentiary standard as “clear and convincing evidence,” buttressing its previous pronouncements that estoppel lies to defeat fraud or other injustice. The clear and convincing standard once applied in fraud cases, see infra note 63 and accompanying text, while the traditional civil test of preponderance of the evidence applies in contract cases. Grace, 547 So. 2d at 920.

7. Id.

8. Id.

9. Id.

10. Id. at 920-21.

11. Grace, 547 So. 2d at 921.

12. Id. at 922.
claim that as an item of damage, GeoData went out of business shortly after Grace's termination. At trial, an expert accounting witness testified that GeoData's assets and liabilities each amounted to $433,000 at the time of termination. The jury awarded GeoData $433,000 in compensatory and $300,000 in punitive damages, but the trial court struck the latter. On appeal, the district court affirmed (as relevant here) and held the jury's damages award sustainable on the theory of promissory estoppel. The supreme court quashed the judgment for the plaintiff and directed the lower court to enter judgment for the defendant.18

The Court's Analysis

The supreme court began its analysis with a brief review of the authorities: the promissory estoppel section of the Restatement (Second) of Contracts14 and three of the court's own precedents on promissory estoppel. Much discussion has occurred about the status of promissory estoppel in Florida. Because some of the cases have recited or quoted the restatements, there is a tendency to assume that the court approves the doctrine even as it has uniformly disapproved its application to the facts before it. The court in Grace did likewise. It is, of course, analytically erroneous to assume judicial approval of a concept or doctrine just because the court has recited or quoted the doctrine. Such recitations mean only that the court has considered the doctrine in some manner. Where, as in this matter, the court has steadfastly rejected application of the doctrine to its cases, all that may be properly stated is that the court considered the application of the doctrine.

On the other hand, one might fairly suppose that a court would not consider the application of a doctrine to a case unless it took an affirmative view of the doctrine itself. As Grace proclaims, in answer to the certified question, the court approves a doctrine of promissory estoppel: "[w]here the promise is definite, of a substantial nature, and established by clear and convincing evidence."15 If this finally suffices for one to believe promissory estoppel is recognized in Florida, it does not suffice to suppose that this recognized doctrine is that defined in the restatements or in cases from other jurisdictions.

It is not clear which of several problems raised by the court led to its decision. The court clearly doubted the wisdom of protecting the plaintiff's claimed expectation of continuing work when the contract had given Grace the power to terminate without cause. Moreover, the assurances of continuing work were given orally in the face of a contract provision requiring amendment and modifications to be in writing. The court's concluding remarks return to its notion of this written amendment provision: "The law of written contracts, including the statute of frauds, would be substantially changed if we approved the application of promissory estoppel under the facts of this case. It would also become extremely difficult for parties to be advised of their rights and obligations under written contracts."16

Whether courts should enforce relatively informal oral promises in the context of prior and subsisting written agreements requiring modification or amendment of the written agreement to be in writing seems always to split courts,17 as does, arguably, the U.C.C.18 No doubt this

15. Grace, 547 So. 2d at 920.
16. Id. at 923.
17. See King Partitions & Drywall, Inc. v. Donner Enters., Inc., 446 So. 2d 715 (Fla. 4th Dist. Ct. App. 1985) (written contract may be altered or modified by oral agreement if the latter has been accepted and acted upon despite provision prohibiting its alteration except in writing); Linnea Corp. v. Standard Hardware Co., 423 So. 2d 966 (Fla. 1st Dist. Ct. App. 1983) (promise may modify oral agreement despite requirement of a writing in order to modify). But see Crossland Properties, Inc. v. Universal Crossland Trace, Ltd., 316 So. 2d 320 (Fla. 2d Dist. Ct. App. 1978) (written contracts may be modified by subsequent oral agreement, but the court remanded to determine if such circumstances really existed in the case); Commercial Nat'l Bank v. Van Denburgh, 252 So. 2d 267 (Fla. 4th Dist. Ct. App. 1971) (no testimony would indicate that the conduct of the parties manifested an intent to create an oral agreement); Long Key Corp. v. Willis-Burch, Inc., 133 So. 2d 655 (Fla. 3d Dist. Ct. App. 1961) (sufficient facts were not alleged that would take oral agreement at modification out of the rule that prohibits such modifications).
18. U.C.C. § 2-209 (1978) requires the enforcement of an agreement to put modifications in writing (§ 2-208(3)), but it follows that rule with the principle of
claim that as an item of damage. Geodata went out of business shortly after Grace's termination. At trial, an expert accounting witness testified that Geodata's assets and liabilities each amounted to $433,000 at the time of termination. The jury awarded Geodata $433,000 in compensatory and $300,000 in punitive damages, but the trial court struck the latter. On appeal, the district court affirmed (as relevant here) and held the jury's damages award sustainable on the theory of promissory estoppel. The supreme court quashed the judgment for the plaintiff and directed the lower court to enter judgment for the defendant.13

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13. Id. at 925.
14. Section 90(1)(1979) states:
A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90(1) (1979).

Further, the court quoted § 90 comment (b) discussing the character of the reliance protected by the section. The gist of the discussion is that the reliance must be foreseeable and that enforcement is necessary to prevent injustice. As to the latter, the "character of the reliance" commentary is interesting because the court reversed on the ground that the promises here provided no inducement to reliance sufficient to recover.

That is, the promises in Grace were defective.

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reflects uncertainty about what the parties in a given case had intended. It is quite difficult to know why a party might disobey, as it were, its own governing document which requires changes to be agreed upon in writing. Yet, we do have some reason to believe that parties in contracts frequently do disregard this and other terms. Parties to a contract are conceived as bound only by their intentions which may change. And if their intent is no longer to be bound to the contract, then the contract usually ends. This should also be true of particular terms in a contract. So, the typical exasperation of one who observes the parties acting in disregard of the contract is perhaps offset by the reminder that the contract is theirs to abandon, in whole or part, on their mutual agreement.

Courts have disagreed about whether the contracting parties have implicitly abandoned the common term requiring changes to be in writing. One line of thought believes the rescission of the writing requirement that is implied by the other line of thought. The quarrel may become unduly burdensome when, as is usual, the parties also disagree about whether there had been any changes—a allegedly oral—at all. In those instances, courts might do well to smother the factual issues presented with a rule of law telling contracting parties in general that their written words will be strongly construed against any claim of oral changes in the contract. If the court were to announce such a strong policy, it might be supported by the notion that once people get the message, this untidy behavior will cease. The problem with this line of thought is, of course, that contracting parties do not spend their time poring over the advance sheets in order to decide whether to rest comfortably with oral changes they have made in contracts bearing a "no change without a writing" clause.

The split in the courts regarding the validity of such oral changes surely exhibits more than a matter of judicial taste; it shows that sometimes parties do intend to rescind, if only ad hoc, clauses like this. To bar any investigation of this factual question risks giving the parties a bargain different from what they may have intended at the time of the events in dispute. This would be as bad as enforcing everything or anything parties have said, or written, during the term of the contract.

Despite the pall that might be cast by the court's significant consideration of the need for a writing, the court was surely right to have been skeptical about the validity of what had been alleged in Grace.

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In so ruling the court restated the critical language used in its first explicit consideration\textsuperscript{84} of the doctrine of promissory estoppel: 	extit{"indefinite as to terms and time."}\textsuperscript{85} The promise element of promissory estoppel requires definiteness.

Reliance: Crown

The second recent promissory estoppel case of the Florida Supreme Court arose from a certified question of the Fourth District Court of Appeal: \"May the theory of equitable estoppel be utilized to prevent an insurance company from denying coverage?\textsuperscript{86}\" The court gave a qualified affirmative response.\textsuperscript{87}

McBride inquired of Crown whether certain health insurance of his new employment would cover his son, the plaintiff, who had special health problems and was financially dependent on the father.\textsuperscript{88} Discussions with Crown allegedly led McBride to believe the plaintiff would be covered. In reliance on these discussions, McBride alleged that he let his prior coverage lapse.\textsuperscript{89} A jury trial on oral contract and promissory estoppel produced judgment on these theories which the Fourth District affirmed.\textsuperscript{90}

The supreme court quashed the decision below and remanded \textit{"for proceedings consistent with this opinion."}\textsuperscript{91} Crown produced four written opinions. Three justices dissented in part from the official court opinion. None of the opinions attracted a majority of the court. Harmony in the court's disposition of the case was, however, unanimously: the district court decision was quashed and the case was remanded \textit{"for proceedings consistent with this opinion."}\textsuperscript{91}

The court ruled that the record did not support the judgment under the doctrine of promissory estoppel because the plaintiff had not shown action of a definite or substantial character in reliance. It has long been thought that aside from the special cases of promises to charities,\textsuperscript{92} the promisee must show substantial conduct in reliance on a promise to succeed on a claim in promissory estoppel.\textsuperscript{93} Otherwise, it is thought, the promisee has not established the classic change of position that estoppel generally requires.\textsuperscript{94} Moreover, to permit enforcement of a promise for which neither consideration was given, nor a change of position shown, would have the effect of authorizing, or seeming to authorize, the enforcement of all promises. Because so many promises made in the ordinary course of life have nothing or little to do with expectations of legal enforcement, such a course would risk enforcement as obligations of matters too plainly beyond the pale of obli-

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35. In Crown, the court took the view that the absence of any evidence in the record showing prior coverage meant the plaintiff had shown neither the classic detriment of reliance nor the sanctioning of fraud by nonenforcement of the alleged promise. 517 So. 2d at 660.
tion. Although nobody should say that the factors elicited as material by the doctrines of consideration and promissory estoppel express the only legitimate expectations of obligation in everyday life, they do capture realms of behavior in which obligation exists very likely exists, and they salutarily exclude behavior in which such expectations are likely absent.

Crown, said the court, lacked substantial reliance by the promise on the alleged promise. The reliance factor does tend to show a likely expectation of obligation-laden promissory behavior. It is true that sometimes we rely on promises even though we believe their makers have no mind to create an obligation thereby. Dinner invitations typify this class of promises. Reliance alone does not make any promise binding. Nor is reliance reasonable because we may have more reason to count on certain dinner invitations than bargain promises. But, reliance does signify something important in promissory matters generally, and particularly in promissory estoppel it provides a reason for taking a claim of promise-enforcement seriously. The absence of reliance could mean the promise lacked any characteristic of contractual or obligational intent. The question in Crown was whether there was reliance.

The court, in Crown held that the plaintiff had failed to meet his burden of proving his detrimental reliance on Crown Life's representations of insurance coverage. The only evidence of reliance was the plaintiff's father's testimony that he had the option of converting a health insurance policy which offered coverage of his son, the plaintiff. The testimony was not supported by either documents or other witnesses. Further, the father admitted that he did not know what benefits were offered under the conversion coverage. Nor was there "evidence as to the duration or extent of this alleged prior coverage." From this, the opinion of Justice Shaw, in which Justice Kogan concurred, concluded that plaintiff failed to show detrimental reliance in the laping of the prior coverage.

Where Grace suggests that the court regards definiteness as critical to a promise to which promissory estoppel applies, the reliance anal-

ysis in Crown likewise teaches that specific detrimental reliance must be proved. Presumably, the plaintiff in the latter case will on remand have the opportunity to satisfy the heightened standard of proof required by the court. That is what the mandate "quash[ed] and remanded for proceedings . . . ." appears to have meant. What was lacking in the plaintiff's case was the aforementioned documentary or other supporting evidence that there was a conversion option, what the coverage afforded the plaintiff by that option was, and the duration of coverage provided by the option.

Nevertheless, one may be sensibly skeptical about yet another of this court's abstract approvals of promissory estoppel and its reluctance to find the doctrine applicable to the case before it. This is what the Florida Supreme Court has done in each of the decisions it has made on the matter. That so much reservation exists about the validity of promissory estoppel in this state comes, no doubt, from the court's obvious equivocation. Unlike the previously discussed Grace decision, and more like other less recent promissory estoppel cases, Crown had a good claim which the court should have recognized, as had the lower courts. On analysis, the court opinion finding fault with the record and requiring remand is superfluous petitifogery. Perhaps that opinion came about as an effort to satisfy all the views on the bench. It did induce some harmony, but surely less than would have been sought had that been its purpose.

The court thought plaintiff failed to show detrimental reliance on Crown's representations, holding:

[the sole evidence submitted in proof of this essential element was McBride's testimony that [the plaintiff] had been previously covered under McBride's group coverage offered through his prior employment and that he had the option of converting that coverage to an individual policy. [The plaintiff] offered no written policy, memorandum, witnesses, or other evidence to support this testimony. Further, [the plaintiff] admitted that he did not know what benefits were offered under the conversion coverage. The record reveals no evidence as to the duration or extent of this alleged prior coverage. In short, [plaintiff] did not prove that the lapsing of the prior coverage was to his detriment or that refusal to enforce the alleged promise would sanction the perpetuation of fraud."

36. Id. at 662.
37. Id.
38. Id.
39. Id.
40. Crown, 517 So. 2d at 660.
41. Id. at 662.
42. Id.
43. Id.
44. Id.
ion. Although nobody should say that the factors elicited as material by the doctrines of consideration and promissory estoppel express the only legitimate expectations of obligation in everyday life, they do capture realms of behavior in which obligation expectations very likely exist, and they salutarily exclude behavior in which such expectations are likely absent.

*Crown*, said the court, lacked substantial reliance by the promise on the alleged promise. The reliance factor does tend to show a likely expectation of obligation-laden promissory behavior. It is true that sometimes we rely on promises even though we believe their makers have no mind to create an obligation thereby. Dinner invitations typify this class of promises. Reliance alone does not make any promise binding. Nor is reliance reasonable because we may have more reason to count on certain dinner invitations than bargain promises. But, reliance does signify something important in promissory matters generally, and particularly in promissory estoppel it provides a reason for taking a claim of promise-enforcement seriously. The absence of reliance could mean the promise lacked any characteristic of contractual or obligational intent. The question in *Crown* was whether there was reliance.

The court, in *Crown* held that the plaintiff “had failed to meet his burden of proving his detrimental reliance on *Crown Life’s representations* of insurance coverage.” The only evidence of reliance was the plaintiff’s father’s testimony that he had the option of converting a health insurance policy which offered coverage of his son, the plaintiff. The testimony was not supported by either documents or other witnesses. Further, the father admitted that he did not know what benefits were offered under the conversion coverage. Nor was there “evidence as to the duration or extent of this alleged prior coverage.” From this, the opinion of Justice Shaw, in which Justice Kogan concurred, concluded that plaintiff did not show detrimental reliance in the lasing of the prior coverage.

Where *Grace* suggests that the court regards definiteness as critical to a promise to which promissory estoppel applies, the reliance analysis in *Crown* likewise teaches that specific detrimental reliance must be proved. Presumably, the plaintiff in the latter case will on remand have the opportunity to satisfy the heightened standard of proof required by the court. That is what the mandate “quash[ed] and remanded for proceedings . . . .” appears to have meant. What was lacking in the plaintiff’s case was the aforementioned documentary or other supporting evidence that there was a conversion option, what the coverage afforded the plaintiff by that option was, and the duration of coverage provided by the option.

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Even if one assumed that McBride’s testimony was insufficient to make the point that permitting the prior coverage to lapse created detrimental reliance, this puts the case before the court in a peculiar manner. There was no doubt that the plaintiff lacked insurance coverage under the policy Crown issued. If the jury had found that Crown had misled McBride into believing otherwise, a point the jury must have found in light of its verdict, surely the existence or lack of conversion coverage under the prior policy is immaterial. McBride’s reliance was not simply letting any conversion option expire. Faced with assurance of coverage under the Crown policy, the McBrides may not have looked elsewhere for insurance protection of any sort. It might be true that looking elsewhere, such as by investigating the conversion option under the old policy, would have been unavailing. Indeed, the McBrides might have discovered that the son’s particular condition rendered him wholly uninsurable. But, that does not preclude detrimental reliance on the record. The McBrides did not look elsewhere; they did not set aside funds from their own income or other sources to meet this foreseeable need. This, the jury evidently thought, they did not do because of their supposed coverage with Crown, a belief the jury evidently found Crown induced. Their detrimental reliance was just what Crown should have supposed and just what any promisor should suppose: that the promisee will do something, including nothing, in reasonable reliance on the promise. Failure to investigate alternatives which might be offered by the marketplace is reliance. More obviously, a case like Crown would not arise unless the insured incurred putatively covered treatment which itself may fulfill the reliance element as in a more recent case. If positive action in reliance on a promise is necessary, a doubtfully sound position, it will be available by re-characterizing the facts, as Crown might have regarded the medical treatments which the plaintiff was led to believe were covered.

Nevertheless, the Crown analysis may derive from another distinction which would seem to limit the doctrine of promissory estoppel. The court there reiterated a formulation stated in one of its earlier promissory estoppel decisions, South Investment Corporation v. Norton:

“[T]he abandonment of existing rights.” Whether such a requirement of the promisee’s abandoning existing rights would limit the doctrine depends on what the expression means. As applied to Crown, the case would depend on whether the insured had any rights which it had abandoned. If this means legal rights, such as the contractual right to continue the prior coverage with another insurer, then the court correctly opined the absence in the record of any such effective legal rights. On the other hand, the line between rights, legal rights, and opportunities, is dim. For this purpose, is it an existing right that the plaintiff had to seek other insurance which it abandoned because of the defendant’s assurance of coverage? The plaintiff had the opportunity to do so, the power or privilege to do so, but is that an existing right?

For this purpose the court appears to require a specific right which differentiates legal rights which are specific or definite and general rights or opportunities. This is the so-called “limited view” of promissory estoppel. The previously discussed issue of whether forbearance can suffice as reliance in Florida misses the specificity or definiteness point. Forbearance may be sufficiently specific and definite. But, the forbearance must be of the exercise of some specific or definite right, not generally forbearing from taking reasonably alternative opportunities.

Indeed, what emerges most clearly from the Florida Supreme Court’s cases is the requirement of specificity. That court rejected the application of promissory estoppel in the most appealing and traditional

45. Why that testimony was insufficient may be explained by superior rebuttal evidence, though existence of such rebuttal is not mentioned. Perhaps the court’s point goes instead to the elevated standard of proof it has set for promissory estoppel actions: the test of clear and convincing evidence. The rule that may emerge on this from Grace and Crown may be that clear and convincing evidence of either a promise or detrimental reliance cannot arise from the testimony of one interested party.


47. The Restatements recognize action or forbearance as sufficient reliance for the doctrine. The Supreme Court of Florida had previously, in Mount Sinai Hosp., Inc. v. Jordan, 290 So. 2d 484 (Fla. 1974), expressed the doctrine as including action or forbearance, a formulation repeated in Crown, 517 So. 2d at 662.
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48. 57 So. 2d 1 (Fla. 1952).

49. Crown, 517 So. 2d at 662.

50. South Inv. Corp. v. Norton, from which the “existing rights” expression comes, suggests that the rights must be legal rights. There the court reversed a trial court decree of specific performance for an optionee under a realty lease because the lessor/optionee had defaulted prior to the alleged waiver by the lessee, and so could not have detrimentally relied on alleged subsequent representations. The lessee no longer had rights under the lease which it might abandon in reliance. South Inv. Corp., 57 So. 2d at 1.


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No (rmal) Promissory Estoppel?

Together these cases and the prior holdings of the supreme court mean that promissory estoppel does apply in Florida, but in a most rigorous manner. Alternatively, the rhetoric notwithstanding, promissory estoppel will not hold in Florida. Four justices appear, from the Crown decision, to recognize the doctrine of promissory estoppel. Three justices appear in the case to regard equitable estoppel as the law of Florida, find no proper application of equitable estoppel in the case, and characterize the majority's use of promissory estoppel in the particular matter "totally unconvinced." However, as one member of the court majority has retired, the remainder of the bench may be evenly split on promissory estoppel. Moreover, the likelihood of even that much support for a "normal" doctrine of promissory estoppel is doubtful because of the seeming acquiescence by the court as a whole in an elevated proof standard for promissory estoppel. That standard is articulated in Crown in the Willis concurrence, and repeated in the more recent Grace court opinion by Justice Overton as "clear and convincing evidence." Because the general literature about promissory estoppel contains little suggestion that a more rigorous quantum of proof applies to promissory estoppel claims, the adoption of that standard in Grace means that Florida's promissory estoppel doctrine may differ from the approach of other jurisdictions. It thus seems fair to say that there is no doctrine of promissory estoppel in Florida to the extent that the converse would mislead people generally conversant with the common law of the states to understand promissory estoppel to carry the normal civil litigation burden of proof by a preponderance of the evidence. Also, for those who have an understanding of the reluctance of the Florida Supreme Court to broaden its view of promissory estoppel, we might fairly say that the court's recent cases have finally put promissory estoppel into a sidestream of Florida case law. Promissory estoppel in Florida will not be the alternative to bargained-for consideration elsewhere. In Florida, promissory estoppel will be useful for cases in which the fraud-like burden of proof standard of clear and convincing evidence may be met.

Extrapolating from these recent cases, we may say that Florida promissory estoppel requires clear and convincing evidence of (1) a definite or specific promise—one which might have been enforced had bargained-for consideration been exchanged for the promise; and (2) detrimental reliance—proven by specific action in reliance or forbearance of exercise of specific existing rights.

Modern literature on promissory estoppel and even occasional cases suggest the true basis of the law of that field lies in torts. If it indeed in some important way belongs to torts, it should not then be surprising to discover, if one day American law takes that turn, promissory estoppel as no more than a species of misrepresentation. In that event generally, one may notice how common law contract might thereby return to its apparent misrepresentational origin in Slade's Case.

Although events around the country may not support such a broad characterization now of promissory estoppel, that seems to be the most accurate statement one might make concerning the slow flowering of promissory estoppel in Florida. Promissory estoppel in Florida is no more than what torts might call "promissory fraud." The Florida Supreme Court has taken the "if injustice can be avoided only by enforcement of the promise" view. The injustice of leaving a plaintiff who has neither promised nor given bargained-for consideration remediless may be appreciated in different ways. Two general approaches are available: the first would focus on the general consequences of nonenforcement of the promise. This regards the effect of the promisor's failure to perform and is the traditional ground for remedies of bargain

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52. Mount Sinai Hosp., 290 So. 2d at 487.
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59. Restatements (First & Second) Contracts, § 90.
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promise breaches. Courts might find injustice in promissory estoppel claims because non-enforcement of the promise leaves the parties in the wrong wealth distribution based on economically rooted principles. Enforcement on that view of the promise would prevent the injustice produced by the post-reliance status quo. Under a second approach, injustice might derive from the nature of a particular promise, rather than its consequence.

The morally worst promise would be that which was never intended to be performed by the promisor. Although the law once ruled promissory fraud of that sort not actionable because it was not a lie about a fact, the position generally taken today appears to regard such a promise as actionable fraud. Likewise, in promissory estoppel one might focus on the matter of promissory falsehood to determine whether the "injustice" element is present.

Also, even in the absence of true deceit in the making of the promise, courts might regard the gravity of the promise as the critical aspect of the injustice element of promissory estoppel.

The development of the law of promissory fraud and the development of promissory estoppel both derive from the same unhealthy field: the law of promises. Promising law, or contract law, retarded the development of both tort and contract theories of promissory liability because of the core concept of consideration. Where gratuitous promises were shirked by contract for lack of consideration, promissory fraud was slowly developing because of the same basic assumption: if the promises were actionable, consideration would provide the answer. As misrepresentations in the form of a promise were seemingly comparable to honest gratuitous promises in the lack of intention to be bound thereby, the same substantive answer was given for declining to recognize liability, though the forms of the answer were different.

To the promissory fraud claim, the answer was not "no consideration" as it was to gratuitous promises, but rather the answer was no misrepresentation of a fact. The law of misrepresentation required a factual, not a speculative, false assertion. Of course, modern misrepresentation has overtaken the fact/opinion distinction in great measure. But history informs us that the nonactionability of the promise qua opinion was rooted in the idea that one could not incur liability for a gratuitous, as opposed to a compensated, opinion. Then, as now, a compensated opinion falsely or negligently given was actionable. The liability of the latter rests on traditional contract theory: having bought the opinion, like the goods, absent a warranty disclaimer, a buyer is in a different legal position than a donee of the opinion. In short, consideration and not any fact/opinion dichotomy rooted the law of promissory fraud or misrepresentation.

The demise of the consideration doctrine is of course in some measure attributable to the rise of promissory estoppel as Gilmore believed and predicted. But, that is to attribute the effect to the cause of the development. The true cause of the taming of the consideration beast lies in the acceptance of the new social order premise under which liability for promises and many other activities (products liability, for example) fell: the notion of social responsibility beyond the minimal uncompromised crash or burn contexts and compensated expectations.

"One has a right not to be lied to" used to apply only if one paid for the promise. Now, it applies both if one paid or if one foreseeably and justifiably relied on the promissory falsehood. Liability for either holds today regardless of the subjective intention of the promisor. Absorbing promissory estoppel into the promissory fraud doctrine merely requires softening the longstanding intent-to-defraud element of the latter.

The consequence of promissory fraud as the true basis of promissory estoppel in Florida is the elevated standard of proof required in the Florida promissory estoppel action. The standard of clear and convincing evidence derives from fraud actions. The traditional preponderance of the evidence applies to promise actions. In this sense one might well regard promissory estoppel in Florida as a tort action for fraud. Although no statute of limitations case law has yet occurred enforcing a choice between the fraud or contract characterization, the courts might well apply the fraud statute of limitations to promissory estoppel actions.

In attributing to promissory estoppel this historical kinship with fraud and deceit actions, policy should not be overlooked. There are modern, not merely historical, reasons for regarding promissory estoppel and promissory fraud as alike. The supreme court has reiterated the higher burden of proof (clear and convincing evidence) in promissory

61. G. GILMORE, supra note 57, at 87-103.
62. The essential element of intent to defraud means that in promissory fraud actions the promisor must have either intended not to perform the promise when made or made the promise with a reckless disregard as to whether it would be performed. HARPER & JAMES, supra note 60, at § 7.10 n.13.
promise breaches. Courts might find injustice in promissory estoppel claims because non-enforcement of the promise leaves the parties in the wrong wealth distribution based on economically rooted principles. Enforcement on that view of the promise would prevent the injustice produced by the post-reliance status quo. Under a second approach, injustice might derive from the nature of a particular promise, rather than its consequence.

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estoppel cases which derive from fraud actions historically. The sense seems to be that like fraud, promissory estoppel is a special matter deserving special rules of proof.

Had the supreme court not squarely ruled that fraud actions shall be governed by the lesser preponderance of the evidence test earlier in the decade, 1 the court's renewal of the clear and convincing test for promissory estoppel would have been less startling. If the lesser test is sufficient to make a case of fraud, it should suffice for the promissory estoppel matters. As indicated, fraud and promissory estoppel are different windows into the same room. Yet, the lesson for lawyers on the evidentiary test is simple: when possible, couch one's claim alternatively in fraud and present ample evidence of the promise and the reliance on the promissory estoppel claim.

Criminal Law

Pamela Cole Bell*

I. Introduction

This article is a survey of substantive criminal law cases decided by the Florida Supreme Court between December 1, 1988 and December 1, 1989. Areas surveyed include criminal offenses, defenses, sentencing guidelines, and death penalty.

II. Criminal Offenses

A. DUI Manslaughter

In Magaw v. State, the Florida Supreme Court addressed the issue of whether or not the 1986 amendment to the DUI statute created an element of causation in DUI manslaughter charges. 1 Prior to the amendment, the court held that it was not necessary to prove causation in order to convict one of manslaughter by intoxication. 2 Manslaughter by intoxication was chargeable under section 316.193 of the Florida Statutes. 3 The 1986 amendment renumbered the manslaughter charge to section 316.193. 4 In determining whether or not the amendment created an element of causation, the supreme court analyzed the legislative history and the Senate debate pertinent to the amendment. 5 The court found that the legislative intent was clear and that causation was introduced as an element of DUI manslaughter. 6

B. Armed Burglary

In Hardee v. State, the supreme court resolved conflict between


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1. 537 So. 2d 564 (Fla. 1989).
5. Magaw, 537 So. 2d at 564.
6. Id.