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Complementary Promises for Benefits Received: An Illustrated Supplement to Restatement (Second) of Contracts Section 86

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COMPLEMENTARY PROMISES FOR BENEFITS RECEIVED: AN ILLUSTRATED SUPPLEMENT TO RESTATEMENT (SECOND) OF CONTRACTS SECTION 86

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I. INTRODUCTION

Restatement (Second) of Contracts section 86 validates unbargained for promises that complete an exchange initiated by the promisor's previous receipt of a benefit from the promisee.

> § 86. PROMISE FOR BENEFIT RECEIVED
>
> (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
>
> (2) A promise is not binding under Subsection (1)
>
> > (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
> >
> > (b) to the extent that its value is disproportionate to the benefit.[1]

A promise that is binding under section 86 is a "contract"[2] without consideration.[3] Such a promise is "complementary" in the sense that it completes an exchange of a benefit the promisor previously received from the promisee for a binding promise the recipient eventually makes in recognition of that

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1. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981). *Compare* S.D.C.L. § 53-6-2 (Michie 1990) ("An existing legal obligation resting upon the promiser or a moral obligation originating in some benefit conferred upon the promiser or prejudice suffered by the promisee is also a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise"); CAL. CIVIL CODE § 1606 (West 1982) (substantially the same), MONT. CODE ANN. § 28-2-802 (1999) (substantially the same), N.D. CENT. CODE § 9-05-02 (1987) (substantially the same); OKLA. STAT. tit. 15, § 107 (1996) (substantially the same).

2. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

3. *Id.* §§ 82-94 ("Topic 2. Contracts Without Consideration"). The sections in Topic 2 state "exceptions to the general requirement of a bargain . . . ." *Id.* introductory note at 207. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.8, at 88 n.6 (2d ed. 1998).

benefit.[4] A "promise for benefit received" is not bargained for because it does not induce the promisee to furnish the benefit that the promisee previously conferred upon the promisor.[5] The promise instead commits[6] the promisor to compensate the promisee for conferring upon the promisor a previously uncompensated benefit[7] without donative intent.[8] Although such a compensatory promise does not induce the promisee to confer the prior benefit and therefore is not supported by "consideration" within the Restatement (Second)'s narrow definition of that basis for enforcement,[9] the making of such a promise does complete an exchange of the benefit for a binding compensatory commitment.[10]

Robert Braucher, the Chief Reporter of the Restatement (Second), observed that section 86 "states a principle rather than a rule and fairly bristles with unspecific concepts,"[11] including[12] the concepts of "benefit,"[13] "the *extent*

4. *See* Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115, 1158 (1971) ("[T]he net effect of a promise of a return [for a benefit the promisor previously received from the promisee] is to *conclude* a kind of *exchange*") (emphasis added).

5. *See* W. Jack Grosse, *Moral Obligation as Consideration in Contracts*, 17 VILL. L. REV. 1, 25 (1971) (noting that under "the bargain theory of consideration . . . the promisee must have given some *concurrent* exchange as the price for the promise") (emphasis added).

6. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a *commitment* has been made") (emphasis added).

7. *Id.* § 86 cmt. f (noting that section 86 is inapplicable to a promise to pay the promisee additional compensation for the promisee's past performance of a pre-existing bargain with the promisor or a third person).

8. *Id.* § 86(2)(a) (stating that a promise made in recognition of a benefit the promisor previously received from the promisee "is not binding . . . if the promisee conferred the benefit as a gift").

9. *Id.* § 71. Section 71 states: "(1) To constitute consideration, a performance . . . must be bargained for. (2) A performance . . . 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." A promise binding under section 86 is not made in order to induce the promisee to furnish the benefit of a performance the promisee has already rendered. Nor can the addressee of such a promise be said to have conferred the benefit in exchange for a promise that had not been made and was not sought as the price of the benefit.

10. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1311-12 (1980) (recognizing "the promise was made in a reciprocal context" on "the perimeters of exchange"); James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547, 598 (1995) ("Even though the parties did not agree in advance to [an] exchange, the promisee conferred a benefit at a cost to himself which was not intended to be a gift"); Grosse, *supra* note 5, at 32 (stating that a promise for benefit received is justly enforced despite "lack of contemporaneity" between the conferral of the benefit and the making of the subsequent promise); Henderson, *supra* note 4, at 1158 ("So long as the promisee acted originally with an expectation of compensation, . . . the net effect of a promise of return is to conclude a kind of exchange"); William W. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of the Law of Altruism*, 7 J. LEGAL STUD. 83, 116 (1992) (declaring that a promise made by a benefited party to compensate a rescuer may be viewed as "a value-maximizing exchange" of "rescue services for the promised sum").

11. Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 605 (1969). *Accord* GRANT GILMORE, THE DEATH OF CONTRACT 76 (1974) (noting section 86 "gives overt recognition to an important principle"); Henderson, *supra* note 4, at 1116 (referring to "the vague principle of Section [86]), 1184 (section 86 "describes a principle and not a rule").

12. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 5.4, at 229 (4th ed. 1998) ("unspecific concepts" include "'gift,' 'unjust enrichment,' and 'injustice'"); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 67, at 298 (3d ed. 1990) (listing the nonspecific

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[to which enforcement is] necessary to prevent *injustice*,"[14] "gift,"[15] "*other reasons* [why] the promisor has not been *unjustly enriched*,"[16] and "the *extent* to which [the] value [of the promise] is *disproportionate* to the [*value* of the] benefit."[17] Braucher correctly predicted[18] that section 86 would generate more scholarly attention[19] than judicial applications.[20] Although existing scholarly commentary provides enlightened analysis of section 86, its comments, and illustrations, the principle of the section and the unspecific concepts with which it bristles warrant further clarification. This article extrapolates from the section comments and proposes additional illustrations in order to clarify the principle of 86 and its constituent concepts.

Several questions regarding the applicability of section 86 remain unanswered. Are promises inferred from conduct as well as express promises for benefits received binding under section 86?[21] Is a promise binding under section 86 if the promisee reasonably *understands* it to have been made in recognition of a benefit the promisee previously conferred upon the promisor, or must the promise have been made in *actual* recognition of a benefit the promisor *knowingly* received from the promisee?[22] What is the nature of the

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concepts as including 'injustice,' 'unjust enrichment,' and 'gift').

13. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

14. *Id.* (emphasis added).

15. *Id.* § 86(2)(a).

16. *Id.* (emphasis added).

17. *Id.* § 86(2)(b) (emphasis added).

18. Braucher, *supra* note 11, at 604 (Section 86 "probably has more theoretical interest than practical significance").

19. *See, e.g.*, BRIAN BLUM, CONTRACTS EXAMPLES AND EXPLANATIONS § 9.7 (1998); CALAMARI & PERILLO, *supra* note 12, § 5.4; 1 FARNSWORTH, *supra* note 3, §§ 2.8, 2.20; CHARLES FRIED, CONTRACT AS PROMISE 32-33 (1981); GILMORE, *supra* note 11, at 74-76; 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS §§ 9.24-.27, 9.29 (rev. ed. 1996); ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 51-64 (1979); 4 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 8.8-.13, 8.20, 8.35, 8.36, 8.41, and 8.42 (4th ed. 1992); MURRAY, *supra* note 12, § 67; Braucher, *supra* note 11, at 604-05; Melvin A. Eisenberg, *Principles of Consideration*, 67 CORNELL L. REV. 640, 663-65 (1982); Goetz & Scott, *supra* note 10, at 1310-12; Gordley, *supra* note 10, at 597-98; Grosse, *supra* note 5; Henderson, *supra* note 4; Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992); Landes & Posner, *supra* note 10, at 115-16; Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 901-02 (1986); Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 519 (1998); Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045 (1992); Arthur T. Von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1035-38 (1959); J.E. Keefe, Jr., Annotation, *Moral Obligation as Consideration for Contract–Modern Trend*, 8 A.L.R.2D 787 (1949).

20. First Nat'l Bankshares, Inc. v. Gisel, 853 F. Supp. 1344, 1357 (D. Kan. 1994); Realty Ass'n v. Valley Nat'l Bank, 738 P.2d 1121, 1124 (Ariz. Ct. App. 1986); Knight v. Board of Admin. of Pub. Employees' Retirement., 273 Cal. Rptr. 120, 145 n.10 (Cal. Ct. App. 1990); McMurry v. Magnusson, 849 S.W.2d 619, 623 n.1 (Mo. Ct. App. 1993). *See* Maggs, *supra* note 19, at 520 n.112; 1 FARNSWORTH, *supra* note 3, § 2.8 at 96 (referring to "the negligible impact of these moral obligation cases on commercial life").

21. Section 4 states that "A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct." RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981).

22. *Cf. id.* § 19(3). Just as "[t]he conduct of a party may manifest assent even though he does not in fact assent," so a promise may manifest an apparent intention to recognize a benefit the promisor actually but unknowingly received from the promisee. *Id.*

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"benefit" in recognition of which a binding compensatory promise can be made under section 86? Is a promise made in recognition of an *intangible* benefit the promisor received from the promisee at the promisor's request ever binding under section 86, or must the promisee have conferred a *material* or *pecuniary* benefit upon the promisor in order for the promisor to be able to make a binding promise to compensate the promisee? Must the promisee have *intended* to confer a benefit upon the promisor in order for a promise made in recognition of that benefit to be binding? What is the relationship between subsections (1) and (2) of section 86? Which party has the burden of persuasion under subsection (2)? Must the promisor have intended to confer the benefit as a gift *to* the *promisee* in order for the promise to fall within the first clause of subsection (2)(a)?[23] If the promisee suffered no loss, injury, or detriment in conferring a benefit upon the promisor, is a promise made in recognition of that benefit binding to any extent, or is the promisor's enrichment by the receipt of such a benefit not properly regarded as "unjust" under the residual clause of subsection (2)(a)?[24] Can a promise made in recognition of a benefit the promisee *officiously* conferred upon the promisor ever be binding under § 86(1), or should the promisor be regarded as "not [having] been unjustly enriched" under the residual clause of subsection (2)(a) despite the promisor's having promised to pay for a benefit that the promisee officiously thrust upon the promisor? In addition to the examples suggested in the section comments and illustrations, under what circumstances should a promisor be regarded as not having been unjustly enriched under the residual clause of subsection (2)(a)? How should the value of the benefit be measured in deciding whether the promise should be enforceable only in part under the limiting language of subsection (1)[25] or (2)(b)?[26] To what extent can the promisor put an enforceable *subjective* value on the benefit the promisor previously received from the promisee?[27] To what extent is a promise binding under subsection (1) when the value of the promise is disproportionate to the loss, injury, or detriment the promisee suffered in conferring the benefit upon the promisor? Is partial enforcement warranted only when the value of the

23. Section 86(2)(a) states that "[a] promise is not binding under Subsection (1) . . . if the promisee conferred the benefit as a gift . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981).

24. *Id.* "A promise is not binding under Subsection (1) . . . if . . . for other reasons the promisor has not been unjustly enriched . . . ." *Id.*

25. *See id.* § 86(1). A promise is binding under subsection (1) only "to the *extent* necessary to prevent injustice" *Id.* (emphasis added).

26. According to section 86(2)(b), "[a] promise is not binding under Subsection (1) . . . to the *extent* that its value is disproportionate to the benefit" in recognition of which the promise was made. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(b) (1981).

27. *Cf. id.* § 371. Section 371 states:

> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Id.

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promise exceeds the value of the benefit under subsection (2)(b), or is partial enforcement also warranted under the limiting language of subsection (1) when the value of the promise exceeds any fair measure of the cost the promisee incurred in conferring the benefit upon the promisor? What is the relationship between section 86 and the other sections of the Restatement (Second) which validate unbargained for promises based upon a benefit the promisor previously received from the promisee?[28]

Section 86 appears to endorse a principle of "promissory restitution,"[29] a description that is supported by a section comment.[30] Whether promissory restitution fully captures the principle of section 86 is doubtful.[31] The case law and commentary suggest a host of satellite concepts, including promissory ratification or affirmance,[32] promissory adjustment of bargains fully performed on one side,[33] promissory acknowledgment, assumption, confession, or recognition of a compensatory obligation,[34] promissory resuscitation or revival of a barred obligation,[35] promissory 'waiver,' concession, or relin-

28. *See id.* § 82 (*Promise to Pay Indebtedness; Effect on the Statute of Limitations*), § 83 (*Promise to Pay Indebtedness Discharged in Bankruptcy*), § 84 (*Promise to Perform a Duty in Spite of Non-occurrence of a Condition*), and § 85 (*Promise to Perform a Voidable Duty*).

29. Henderson, *supra* note 4, at 1118 n.14 ("'[P]romissory restitution'... describes situations in which neither the law of contract nor restitution would ordinarily recognize liability, but a later promise to pay for unjust enrichment is binding as a contract if it removes quasi-contractual reasons for denial of the policy against unjust enrichment").

30. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981) ("Although in general a person who has been unjustly enriched at the expense of another is required to make restitution, restitution is denied in many cases in order to protect persons who have had benefits thrust upon them.... In other cases restitution is denied by virtue of rules designed to guard against false claims, stale claims, claims already litigated, and the like. In many such cases a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails"). *Accord* Eisenberg, *supra* note 19, at 663; Goetz & Scott, *supra* note 10, at 1310. Professors Thel and Yorio argue that promise rather than restitution is the animating principle that unifies all the cases in which courts have enforced promises on the basis of some perceived moral obligation resting on the promisor. Thel & Yorio, *supra* note 19, at 1052-53, 1100-01. They concede, however, that RESTATEMENT (SECOND) OF CONTRACTS section 86 endorses a "restitutionary approach to the moral obligation cases." *Id.* at 1067.

31. Thel & Yorio, *supra* note 19, at 1049-50 (arguing that promissory rather than a restitutionary principles support the enforcement of promises on grounds of a perceived "moral obligation").

32. *See, e.g.,* Webb v. McGowin, 168 So. 199 (Ala. 1936); RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 7 (1981); *Id.* § 85 (promise to perform a voidable duty); Henderson, *supra* note 4, at 1158 n.172 (analogizing the promise for benefit received to "[t]he new promise of a former infant or a discharged or statutorily protected debtor [as] a ratification of earlier events from which advantage was realized"); MURRAY, *supra* note 12, at 295-96.

33. *See, e.g.,* Old American Life Ins. Co. v. Biggers, 172 F.2d 495 (10th Cir. 1949); Henderson, *supra* note 4, at 1118 ("For all the reasons that bargains fail of fulfillment, promises are made to reimburse expenses and adjust gains that result from acts in furtherance of expectations which are ultimately disappointed").

34. *See, e.g.,* Henderson, *supra* note 4, at 1158, 1160 (noting the "fact that the advantaged party makes an assurance of compensation points to a conclusion that obligation is being recognized and assumed" and that the grounds for enforcing promises for benefits received are "enhanced when the enrichment factor is coupled with a promissory confession that it has created in the recipient a sense of moral obligation").

35. *See, e.g.,* RESTATEMENT (SECOND) OF CONTRACTS §§ 82, 83 (1981) (treating promises to pay indebtedness despite expiration of period of limitations governing the claim and promises to pay indebtedness discharged or dischargeable in bankruptcy proceedings).

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quishment of defenses,[36] promissory reciprocation,[37] and promissory valuation of unliquidated benefits."[38]

This article analyzes the elements and implications of Restatement (Second) section 86, its comments, and illustrations. The objective is to reduce the confusion which the section's many "unspecific concepts" has produced among bench, bar, and other students of the law. Those same concepts may be expected to inform courts in their interpretation and construction of statutes which make "moral obligation" a basis for enforcing promises.[39] Analysis proceeds by a series of propositions and supplementary illustrations which identify relevant factors in addition to those identified in the section comments and existing illustrations.

SUBSECTION (1)

The first and most basic element of Restatement (Second) section 86(1) is "[a] promise."[40] A promise binding under section 86(1) may be either express or inferred from conduct. According to Comment b, one of the facts that may be relevant in showing that no imposition would result from enforcement of a promise under the broad principle of section 86 is any "formality in the making of the promise."[41] Some of the cases on which the section is based make it clear, however, that a "promise for benefit received" may be binding even if it is oral.[42] It is also implicit in the Restatement

36. *See, e.g.,* Drake v. Bell, 55 N.Y.S. 945 (N.Y. Sup. Ct. 1899), *aff'd on other grounds,* 61 N.Y.S. 657 (N.Y. App. Div. 1899) (benefit conferred by mistake not compensable in quasi-contract); Booth v. Fitzpatrick, 36 Vt. 681 (1864) (recognizing that promise to compensate plaintiff for caring for defendant's escaped bull relinquishes statutory defense that plaintiff failed to publish required advertisements which would have entitled him to recover even in the absence of a promise of compensation); Muir v. Kane, 104 P. 153 (Wash. 1909) (promise to compensate for benefit conferred pursuant to contract that was unenforceable under Statute of Frauds); MURRAY, *supra* note 12, at (realizing a "new promise to perform a voidable duty may be viewed as . . . a waiver of a defense . . .").

37. *See, e.g.,* Henderson, *supra* note 4, at 1157 (referring to "obligors who react not out of altruism, but in response to the pull of reciprocity").

38. *See, e.g.,* In re Hatten's Estate, 288 N.W. 278 (Wis. 1939); RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. i, illus. 12 (1981); Gordley, *supra* note 10, at 598 ("[A]bsent the promise one cannot know how much the recipient would have paid for the benefit."); Grosse, *supra* note 5, at 20 ("The purpose served by the new promise is to quantify the unjust enrichment"); Henderson, *supra* note 4, at 1127 n.48 (suggesting that "[w]here the value of prior benefit is uncertain, a later promise to pay the reasonable value or a liquidated sum serves to fix the amount recoverable").

39. *See supra* note 1 for statutory examples. *Cf.* N.Y. GEN. OBLIG. L. § 5-1105 (McKinney 1989). Section 5-1105 provides that:

> [a] written and signed promise shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

Id.

40. Thel & Yorio, *supra* note 19, at 1085 (arguing that "the promise is what matters and that the underlying moral obligation is important only as a screen for identifying important promises to enforce").

41. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981).

42. *See, e.g.,* Webb v. McGowin, 168 So. 199 (Ala. 1936) (alleged promise to compensate promisee for saving promisor's life or health was apparently oral). *See also* RESTATEMENT

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(Second) sections defining a "promise"[43] and indicating how a promise can be made[44] that a promise binding under section 86(1) need not be express but may instead be inferred from conduct.[45] This proposition can be illustrated by varying the facts of existing Illustration 8.[46]

Supplementary Illustration 1

> A submits to B an unsolicited plan for advertising products manufactured by B. After any offer A may have made lapses, B uses the advertising plan to B's profit, knowing that A expects to be compensated for such use. B's promise to compensate A in recognition of the benefit B previously received from A's submission of the profitable plan may be inferred from B's use of that plan.[47]

A variation of existing Illustration 7[48] (and a possible variation of the facts of the case on which illustration 7 is based[49]) also supports the proposition that a compensatory promise may be inferred from the recipient's conduct.

Supplementary Illustration 2

> A saves B's life in an emergency and is totally and permanently disabled in so doing. When A's workers' compensation payments of $15 every two weeks run out, B continues to make the payments for 8 years until he dies. A promise by B that the biweekly payments

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(SECOND) OF CONTRACTS § 86 illus. 7 (1981).

43. RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981).

44. *Id.* § 4 ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct").

45. *See* Henderson, *supra* note 4, at 1183 (observing that under section 86 "a binding obligation can apparently be raised by a promise implied from conduct"). *But see* Keefe, *supra* note 19, at 789 (citing State ex rel. Bayer v. Funk, 105 Or. 146, 209 P. 113 (1929) for the proposition that "a moral obligation is not a sufficient consideration to support an executory promise unless ... the promisor has received an actual pecuniary or material benefit for which he subsequently *expressly* promised to pay") (emphasis added).

46. RESTATEMENT (SECOND) OF CONTRACTS § 86 illus. 8 (1981). Illustration eight states:

> A submits to B at B's request a plan for advertising products manufactured by B, expecting payment only if the plan is adopted. Because of a change in B's selling arrangements, B rejects the plan without giving it fair consideration. B's subsequent promise to reimburse A's expenses in preparing the plan is binding.

Id. According to the Reporter's Note, this Illustration is based on Haynes Chemical Corp. v. Staples & Staples, Inc., 112 S.E. 802 (Va. 1922). *Id.*

47. *Accord* 3 HOLMES, *supra* note 19, § 9.25, at 323-24 (suggesting that "[t]he use of [such a plan] by the dealer raises the implication of a promise to pay, one that may be binding").

48. RESTATEMENT (SECOND) OF CONTRACTS § 86 illus. 7 (1981) ("A saves B's life in an emergency and is totally and permanently disabled in so doing. One month later B promises to pay A $15 every two weeks for the rest of A's life, and B makes the payments for 8 years until he dies. The promise is binding").

49. Webb v. McGowin, 168 So. 199 (Ala. 1936). Professor Farnsworth reports that the defendant-executors maintained "McGowin had made no promise, but ... as president of the company that employed Webb, he had arranged out of gratitude to have the employer continue payments after Webb's workers' compensation payments ran out." 1 FARNSWORTH, *supra* note 3, at 93 n.26.

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> will be continued for the rest of A's life may be inferred from B's conduct in continuing to make those payments until he died.

B's continued payments to A in the same amount and at the same intervals as A's terminated workers' compensation payments also support an inference that B made the implied promise in recognition of the benefit he had previously received from A when A saved B's life at the workplace and suffered a disabling injury. B's representative may respond by arguing that any promise inferable from B's continuation of the workers' compensation payments would be that the payments will continue to be made only until *B* dies, *not* until *A* dies. The total and permanent nature of the disability A suffered in saving B's life seems, however, to support the competing inference that B sufficiently manifested an intention that the payments would continue to be made out of B's estate until *A* died.

In order for a promise to be binding under § 86(1), must it be made in *actual* recognition of a benefit the promisor realizes he or she previously received from the promisee, or can it be made in *apparent* recognition of a benefit the promisor actually but unknowingly received from the promisee? It may be implicit in the requirement that the promise is made in recognition of a benefit the promisor previously received from the promisee that the promisor was aware of that benefit and made the promise in conscious recognition that the promisee had previously conferred that benefit upon the promisor. A promise can hardly be made in recognition of a benefit the promisor previously received from the promisee if the promisor was unaware of that benefit when the promise is made. Yet application of the objective theory of assent[50] in resolving this (concededly artificial) question supports the proposition that a promise made in apparent as well as in actual recognition of a benefit the promisor previously received from the promisee may be binding under section 86(1). Consider the following illustration:

Supplementary Illustration 3

> A plans to drive a horse he owns in a race to be held on Saturday. B owns the dam of A's horse and is entitled to a prize if A's horse wins the race. On the Wednesday before the race, B writes and mails to A an undated letter in which B promises to pay A a bonus "for winning the race on Saturday." The letter is delayed in the mail. A wins the race on Saturday, but does not receive B's letter until the following Monday. A reasonably interprets the language of B's intended offer as making a promise to pay B the bonus in recognition of the benefit B received from A before A received the letter. The promise is binding.

50. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981) (defining a "promise" as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a *promisee* in *understanding* that a commitment has been made") (emphasis added); 1 FARNSWORTH, *supra* note 3, §§ 3.6, 7.9.

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An extension of the rule stated in section 93 would support a narrower interpretation of the section 86(1) requirement that the promise was made in recognition of a benefit the promisor previously received from the promisor. According to section 93, "[a] promise within the terms of §§ 82-85 is not binding unless the promisor knew or had reason to know the essential facts of the previous transaction to which the promise relates . . . ."[51] Even though sections 82 through 85 state specific applications of the broad principle of section 86 that a promise may be binding as a result of events which occurred before the promise was made,[52] the failure of section 93 to refer to a promise that may be binding under section 86 supports the proposition that a promise made in apparent recognition of a benefit the promisor previously but unknowingly received from the promisee may be binding. The making of such a promise demonstrates that the promisor considers the requested return performance beneficial and that compensating the promisee for rendering that performance is within the promisor's means.[53] The promisee enriched the promisor by conferring a benefit upon him or her without donative intent. Enforcement of the promise is necessary to prevent injustice, even though the promisor did not make the promise in conscious recognition of the benefit he or she had previously received from the promisee. This same impulse to secure compensation for one whose performance antedated the making of a promise explains the judicial predisposition narrowly to interpret the rule that "performance completed before [an] offer comes to the offeree's knowledge does not have reference to the offer, and the terms of the offer are not satisfied by such action."[54] Although the broad principle of § 86 "may not be applied if there is doubt whether [any] objections to restitution are fully met by the subsequent promise,"[55] the objections to restitution would seem to be fully met by the making of a promissory offer to compensate the promisee for a specified performance and when the promisee has previously conferred the acknowledged benefit of that performance upon the promisor before the promisee receives the intended offer.

What is the nature of the benefit in recognition of which a person can make a binding promise to compensate the promisee for conferring that benefit? Most of the existing authorities indicate that a promise binding under the principle of section 86 must have been made in recognition of "a pecuniary or material benefit" the promisor previously received directly from

51. RESTATEMENT (SECOND) OF CONTRACTS § 93 (1981).

52. *Id.* § 86 cmt. b ("Many of the cases governed by the rules stated in §§ 82-85 are within the broader principle stated in this Section"). *See infra* notes 21-38 and accompanying text for related discussion.

53. *Cf. id.* cmt. c (noting restitution is granted for the value of services the promisee conferred upon the promisor under a mistake when a subsequent promise of compensation shows the promisor can afford to pay the promised compensation).

54. *Id.* § 51 cmt. a. That predisposition is reflected in the text of section 51: "[a]n offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance." *Id.*

55. *Id.* § 86 cmt. b.

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the promisee.[56] Thus, Comment a to section 86 states that a promise made solely on the basis of "gratitude or sentiment" is not binding.[57] This narrow interpretation of the kind of benefit in recognition of which a binding promise can be made under section 86 is also supported by existing Illustration 1, which approves of the result reached in a notorious case from the nineteenth century.[58]

> A gives emergency care to B's adult son while the son is sick and without funds far from home. B subsequently promises to reimburse A for his expenses. The promise is not binding under this Section.[59]

Existing Illustration 2 is also consistent with the proposition that a promise made in recognition of an intangible or indirect benefit the promisor may have received from the promisee is not binding under section 86.

> A lends money to B, who later dies. B's widow promises to pay the debt. The promise is not binding under this Section.[60]

Almost all of the promises which the existing Illustrations indicate would be binding under section 86 were made in recognition of either a pecuniary[61] or a material[62] benefit the promisor previously received directly from the promisee. Illustration 8, however, suggests a broader interpretation of the kind of benefit which will make a subsequent promise to pay for that benefit binding, at least when the promisee conferred the benefit upon the promisor at the latter's request.

> A submits to B at B's request a plan for advertising products manufactured by B, expecting payment only if the plan is adopted. Because of a change in B's selling arrangements, B rejects the plan without giving it fair consideration. B's subsequent promise to reimburse A's expenses in preparing the plan is binding.[63]

B does not appear to have made the promise in recognition of a pecuniary or material benefit B previously received from A. B's rejection of the plan without giving it fair consideration makes it impossible to know whether adoption of the plan would have produced a pecuniary or material benefit for B, and

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56. Keefe, *supra* note 19, at 798.

57. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a (1981) ("Nor are moral obligations based solely on gratitude or sentiment sufficient of themselves to support a subsequent promise").

58. Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825). *Accord* Dawson v. Dawson, 12 Iowa 512 (1861); Peters v. Poro's Estate, 117 A. 244 (1922).

59. RESTATEMENT (SECOND) OF CONTRACTS § 86 illus. 1 (1981). *See* Grosse, *supra* note 5, at 6 (acknowledging the judicial position that "the support was intended as a gratuity and, even though a material benefit was rendered, it is not sufficient as consideration because the benefit ran to someone other than the promisor").

60. *Id.* cmt. a, illus. 2.

61. *Id.* cmt. c, illus. 4 (promisee repaired promisor's house), illus. 5 (promisee twice paid a debt to promisor), cmt. d, illus. 6 (promisee fed and cared for promisor's escaped bull), cmt. e, illus. 9 (promisee contributed capital to promisor insurance company), cmt. f, illus. 10 (promisee dug valuable well on promisor's land), cmt. g, illus. 11 (promisee procured purchaser of promisor's land), cmt. i, illus. 12 (promisee rendered household services for promisor), and illus. 13 (promisee rendered household services for promisor).

62. *Id.* cmt. d, illus. 7 (promisee saved promisor's life in an emergency).

63. *Id.* cmt. d, illus. 8.

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the temporary license B had to consider and perhaps to adopt the plan was only an intangible benefit to B. The beneficial nature of A's service to B is nevertheless implied from A's having submitted the plan at B's request.

The Comments and Illustrations to section 86, as well as the precedents on which the section is based, reveal that a person can make a binding promise in recognition of a benefit the promisor previously received from the promisee even when the promisee did not confer that benefit at the *request* of the promisor.[64] Existing Illustration 8, however, supports the proposition that a promise made in recognition of an intangible (a non-pecuniary or non-material) benefit the promisor previously received from the promisee may be binding under section 86 when the promisee conferred the intangible benefit at the promisor's request. The point may be illustrated by varying the facts of existing Illustration 1.

Supplementary Illustration 4

> A gives emergency care to B's unconscious adult son who is far from home at B's request and on B's assurance that his son will undoubtedly pay for the care when he regains consciousness. B's son dies without regaining consciousness and there are no assets in his estate. B subsequently promises to reimburse A for his expenses. The promise is binding.[65]

Unlike the promisor-father in *Mills v. Wyman* and existing Illustration 1, the promisor in *Supplementary Illustration 4* did not make the promise to reimburse the promisee solely on the basis of gratitude or sentiment.[66] The promisor also made the promise because the promisee had given the emergency care to the promisor's adult son at the promisor's request and on the promisor's assurance that the promisee would be compensated for his efforts.[67]

Existing Illustration 3 indicates that a promise made in recognition of a loss or injury the promisee suffered as an incident to some previous relationship with the promisor is not binding under section 86.

A has immoral relations with B, a woman not his wife, to her injury.

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64. *Id.* cmt. c, illus. 5; cmt. e, illus. 8 and 9; cmt. g, illus. 11 (promisees conferred benefits at request or instance of promisors), and cmt. c, illus. 4; cmt. d, illus. 6-7; cmt. f, illus. 10 (promisees conferred unrequested benefits upon promisors).

65. *See* Worner Agency, Inc. v. Doyle, 479 N.E.2d 468, 473 (Ill. App. Ct. 1985) (listing cases in which "the consideration was rendered at the request of the promisor" as one exception to the general rule that "if the alleged consideration for the promise has been conferred prior to the promise upon which alleged agreement is based, there is no valid contract"); 4 LORD, *supra* note 19, § 8.9, at 211 (listing as one exception to the general rule "subsequent promises in consideration of some act previously done by the promisee at the request of the promisor").

66. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a (1981).

67. *Cf.* Henderson, *supra* note 4, at 1120 n.19 (discussing the history of English law and noting that "[i]f services were performed at the recipient's request, but without express promise of payment, the past act rendered at request was judged sufficient reason to enforce a latter promise of payment"). *But see* Grosse, *supra* note 5, at 20 (arguing that "the application of [section 86] . . . is restricted to those situations in which a material benefit has been received by the promisor in an antecedent relationship with the promisee").

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> A's subsequent promise to reimburse B for her loss is not binding under this Section.[68]

But a promise made in recognition of both a benefit the promisor previously received from the promisee and of any loss or injury the promisee suffered in conferring that benefit *is* binding, as indicated by the following variation of existing Illustration 3.

Supplementary Illustration 5

> A exploits B both to A's benefit and to B's injury. A's subsequent promise to compensate B for the benefit A received from exploiting B is binding under this Section.

By material contrast, a promise made in recognition of a benefit the promisee attempted but failed to confer upon the promisor is not binding under section 86, even if the promisee suffered loss or injury in making that unsuccessful attempt.

Supplementary Illustration 6

> A attempts but fails to save B from injury in an emergency situation and A is totally and permanently disabled in so doing. B nonetheless promises to pay A for his heroic efforts on B's behalf. The promise is not binding under this Section.

Although the promisee suffered severe injury in a selfless attempt to save the promisor from injury, the failure of that attempt forecloses a finding that the promisor received a pecuniary or material benefit such as will alone support a promise to compensate the promisee for the unrequested effort. B appears to have made the promise solely on the basis of gratitude or sentiment, which are insufficient motivations to make the promise binding under section 86.[69] Nor is a promise to compensate another for injury the other suffers in lending assistance that the promisee erroneously thought the promisor needed binding under § 86.

Supplementary Illustration 7

> A dives into shallow waters in order to rescue B, who A reasonably but erroneously thinks is drowning, and A is totally and permanently disabled in so doing. B promises to pay A $15 every two weeks for the rest of A's life in recognition of A's heroic though needless efforts on B's behalf. The promise is not binding under this Section.

A's unrequested intervention on B's behalf did not confer a pecuniary or ma-

68. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. a, illus. 3 (1981).

69. *Id.* § 86 cmt. a ("Nor are moral obligations based solely on gratitude or sentiment sufficient of themselves to support a subsequent promise.").

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terial benefit upon B, because B was not actually in need of A's assistance. As in *Supplementary Illustration 6*, B may have felt some "moral obligation" to compensate A for the injury A suffered in attempting to provide life-saving assistance to B, but the sole basis of that perceived obligation was gratitude or sentiment, not any pecuniary or material benefit A attempted to confer upon B by A's unrequested efforts.

Even though the promisor must have received a benefit from the promisee in order for a promise made in recognition of that benefit to be binding under section 86, the promise is not binding if the promisee suffered no injury, loss, or detriment in conferring the benefit upon the promisor.[70] Enforcement of a promise made in recognition of a benefit the promisee previously conferred upon the promisor at no cost to the promisee is not necessary to prevent injustice.[71]

Supplementary Illustration 8

> A saves B's life in an emergency by shouting for B to get out of the way of a plummeting pine block that was about to hit and kill B. B heeds A's warning and dodges the pine block. A suffers no injury, loss, or detriment by shouting the warning. B subsequently promises to pay A $100 for saving B's life. The promise is not binding to any extent under this Section.[72]

A court would undoubtedly conclude under section 86(1) that, although B received a material benefit from A, B's promise need not be binding in order to prevent injustice. Applying the subsection (2)(a) refinement of the final element of subsection (1)'s validating rule, "the promisor has not been *unjustly* enriched"[73] by the receipt of emergency assistance which the promisee suffered no loss in providing.[74]

The subsection (1) limitation that a promise for benefit received is binding only "to the *extent* necessary to prevent injustice" also implies that partial

70. *Cf.* S.D.C.L. § 53-6-2 ("Moral obligation originating in some benefit conferred upon the promiser *or* prejudice suffered by the promisee is . . . a good consideration for a promise . . . ") (emphasis added).

71. *Cf.* Thel & Yorio, *supra* note 19, at 1070 n.125 (speculating that "[p]erhaps plaintiffs cannot make out a case for restitutionary relief if they are not out anything in conferring benefit").

72. *See* 3 HOLMES, *supra* note 19, § 9.22, at 307 (noting that in cases where the promise to compensate a rescuer was enforced, "the transaction that induced the subsequent promise involved economic as well as physical detriment to the [promisee] and like benefit to the [promisor]"); Henderson, *supra* note 4, at 1178-79 (suggesting that "[m]ost often it is the loss incurred which is drawn on for the purposes of establishing the reality of gain and a sense of injustice sufficient to call for liability" and that "the benefit rationale is a convenient way of saying that serious losses reasonably incurred ought to be paid for, particularly when an undertaking to do so is made").

73. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981) (emphasis added).

74. *But cf.* Eisenberg, *supra* note 19, at 664 (arguing that a person who makes a promise to compensate another for having rescued the promisor's life or property has not been unjustly enriched without considering the possibility that the rescuer may have suffered injury as a result of the rescue efforts).

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enforcement may be warranted when the value of the promise is *clearly* disproportionate to any loss, injury, or detriment the promisee did suffer in conferring that benefit. This proposition is illustrated by the following variation on existing Illustrations 7, 12, and 13.

Supplementary Illustration 9

> A saves B's life in an emergency, as a result of which A both suffers physical pain and incurs medical bills in the amount of $600. B promises to pay A $2500 for saving B's life. The promise is binding.[75]

Although the $2500 value of B's promise is clearly disproportionate to the $600 medical expenses A incurred as a result of having conferred the benefit of the life-saving assistance upon B, it cannot be said that an award of $2500 would *clearly* overcompensate A for saving B's life when account is taken of the physical pain and suffering A also endured as a result of that intervention. The intangible nature of A's pain and suffering supports a finding that full enforcement of the promise would not clearly overcompensate the promisee. Consider by way of contrast the following variation on the facts of existing Illustrations 7 and 13:

Supplementary Illustration 10

> A saves B's life in an emergency. The only loss A suffers in giving the life-saving assistance consists of damage to A's watch, and the reasonable cost to repair that watch is $60. B promises to pay A $2500 for saving B's life. A cannot recover more than the $60 cost to repair the watch.

In this Illustration, the party resisting enforcement can establish that full enforcement of the $2500 promise would *clearly* overcompensate the promisee, considering the comparatively modest loss the promisee suffered in conferring the benefit upon the promisor, a tangible loss that is worth only $60. Observe, however, that the promise is not partially enforceable under the subsection (2)(b) limitation, because the $2500 value of the promise is *not* "disproportionate to the *benefit*" A conferred upon B by saving B's life.[76]

SUBSECTION (2)

What is the relation between subsections (1) and (2) of section 86? Subparts (2)(a) and (2)(b) do not state exceptions to the subsection (1) principle

75. *See* Henderson, *supra* note 4, at 1149 (arguing that "the concept of unjust enrichment is influenced [to some extent] by plaintiff's outlay rather than by an identifiable increase in defendant's assets" and that "detriment may in many instances prove to be more compelling than gain" in applying section 86).

76. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(b) (1981) (emphasis added).

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that a promise made in recognition of a benefit the promisor previously received from the promisee is binding to the extent necessary to prevent injustice. The preamble to subsection (2) instead introduces situations in which "[a] promise is not binding *under Subsection (1)*."[77] Subparts (2)(a) and (2)(b) partially amplify the vague limitation of subsection (1) under which a promise for benefit received is binding only "to the extent necessary to prevent injustice."[78] Subpart (2)(a) of section 86 identifies situations in which enforcement of the promise is not necessary to prevent injustice;[79] subpart (2)(b) identifies one situation in which only partial enforcement of the promise is warranted.[80] Subsection (2) analyzes the validating principle stated in subsection; it does not prescribe exceptions to that principle.

Subparts (2)(a) and (2)(b) are nevertheless analogous to exceptions in at least one sense. The party resisting enforcement of the promise has the burden of persuasion under subsection (2), just as the party urging application of an exception to a rule has the burden of persuading the court or trier of fact that the exception applies. Section 86 allocates the respective burdens of persuasion as follows: The party urging enforcement of a promise must establish that "[a] promise [was] made in recognition of a benefit previously received by the promisor from the promisee . . . ."[81] Any such promise is prima facie binding to the full extent of the promisee's expectation interest under subsection (1). The party resisting enforcement of the promise then has the burden of persuading the court[82] either (a) that no injustice would result from a refusal to enforce the promise to any extent because the promisee conferred the benefit gratuitously[83] or for certain other reasons the promisor has not been unjustly enriched despite having received an uncompensated benefit from the promisee, or (b) that the promise should be binding only to the extent that the value of the promise corresponds with the value of the benefit in recognition of which the promise was made.

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77. *Id.* § 86(2) (emphasis added).

78. *Id.* § 86(1). *See* GILMORE, *supra* note 11, at 136 n.183 (assuming "that as a matter of statutory construction, subsection (2) is to be taken on [*sic*] a gloss on 'to the extent necessary to prevent injustice' in subsection (1)").

79. *Id.* § 86(2)(a) ("A promise is not binding under Subsection (1) . . . if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched . . . .").

80. *Id.* § 86(2)(b) ("A promise is not binding under Subsection (1) . . . to the extent that its value is disproportionate to the benefit.") *But see* Grosse, *supra* note 5, at 20 (arguing that "[i]n a case where the court . . . find[s] that the new promise was disproportionate to the value of the benefit previously received, the new promise should be *completely* unenforceable under [subsection (2)(b)]") (emphasis added).

81. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981).

82. Consistent with judicial and scholarly interpretations of the final element of the rule stated in the first sentence of RESTATEMENT (SECOND) OF CONTRACTS § 90(1), reference to the prevention or avoidance of "injustice" suggests that the question is to be resolved by the court rather than by a jury. *See, e.g.*, R.S. Bennett & Co. v. Econ. Mechanical Indus., 606 F.2d 182 (7th Cir. 1979); 1 FARNSWORTH, *supra* note 3, § 2.19, at 160 n.27 ("All of the elements of § 90, *except* the matter of avoidance of injustice, are matters of fact") (emphasis added).

83. *See* Henderson, *supra* note 4, at 1159 (suggesting that the making of a promise for benefit received ought to negate any assumption that the benefit was conferred gratuitously).

These allocations of the burdens of persuasion under Restatement (Second) section 86 are materially distinguishable from the burden of persuasion which the claimant alone bears in a quasi-contractual cause of action. If the recipient of a benefit makes no express or inferred promise to compensate, reward, or reimburse the supplier for conferring that benefit, the supplier cannot maintain an action for breach of contract and must instead seek restitutionary relief in quasi-contract. The claimant-supplier who seeks restitutionary relief in any such action has the burden of establishing, among other things, that he or she conferred a benefit upon the recipient non-gratuitously–with an expectation of compensation–and that the recipient would be unjustly enriched if he or she were permitted to retain the benefit without having to compensate the claimant for conferring it.[84] The claimant in quasi-contract also has the burden of establishing that the benefit is measurable in terms of its value to the recipient, at least when the recipient was guilty of no fault in receiving that benefit.[85] By material contrast, if the recipient of a benefit makes a promise to compensate or to reimburse the supplier for having previously conferred that benefit upon the promisor, the promisee is prima facie entitled to recover the full value of the promise in an action for breach of contract under Restatement (Second) of Contracts section 86(1). The party resisting enforcement (either the promisor-recipient, or the promisor's representative or successor in interest) has the burden of establishing under section 86(2)(a) that the promise is *not* binding, either because the promisee conferred the benefit gratuitously[86] or because "for other reasons the promisor has *not* been unjustly enriched."[87] In the alternative, the party resisting enforcement has the burden of establishing under subsection (2)(b) that the value of the promise exceeds the value of the benefit which the promisor received from the promisee, and that recovery for breach of the promise should therefore be limited to the value of the benefit in recognition of which the promise was made. Moreover, the value of the benefit "may as justice requires be measured by *either* (a) the reasonable value to the [promisor-recipient] in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the [promisor-

84. *See* 1 FARNSWORTH, *supra* note 3, § 2.20.

85. RESTATEMENT OF RESTITUTION § 155(1) (1937). Section 155(1) provides:

> Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, limited, if the recipient was not at fault or was no more at fault than the claimant, to its value in advancing the purposes of the recipient . . . .

Id. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 371(b) (1981) ("If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by . . . the extent to which the other party's . . . interests [have been] advanced.").

86. *Id.* § 86 cmt. d (1981) (stating that a promise to pay for "necessaries furnished to a person under disability and for emergency services . . . may remove doubt as to the reality of the benefit and as to its value, and may negate the danger of imposition or false claim. A positive showing that payment was expected is not then required; an intention to make a gift must be shown to defeat restitution"); BLUM, *supra* note 19, § 9.7 (reading comment d to support the proposition that "the later promise shifts the burden of showing gratuitous intent to the recipient").

87. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981) (emphasis added).

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recipient's] property has been increased in value or his other interests advanced."[88] When a claimant has conferred a benefit upon a recipient, the recipient's making of a promise in recognition of that benefit or the recipient's failure to make any such promise will often determine not only whether recovery is possible in quasi-contract or in an action for breach of contract but also which party will bear the burden of persuasion on the questions of (1) whether the benefit was conferred with an expectation of compensation or was instead conferred gratuitously, (2) whether for other reasons the recipient has or has not been unjustly enriched by having received a benefit for which the recipient has not paid the party who provided that benefit, and (3) whether the value of the benefit received should be measured *subjectively* in terms of the recipient's actual gain or *objectively* in terms of the reasonable or market value of the benefit.

Because the recipient's making or withholding of a "trailing promise"[89] controls allocation of the burden of persuasion on these issues, the results in close cases are likely to depend upon whether conferral of the benefit induced the recipient to make a compensatory promise. In *Webb v. McGowin*,[90] for example, Webb probably would not have recovered had McGowin made no promise in recognition for Webb's having diverted the course of the falling pine block, an act that both saved McGowin from death or grievous bodily injury and that left Webb totally and permanently disabled. If McGowin had made no promise in recognition of Webb's heroic intervention on McGowin's behalf and Webb had therefore been obliged to bring suit in quasi-contract, Webb could not have met his burden of proving that he acted with an intention to charge for his efforts.[91] "In general, if one's life . . . is imperiled by impending disaster and another renders assistance in the emergency, the law presumes, in accordance with the mores of society, that the services were intended to be gratuitous."[92] Webb could not have rebutted the presumption that he rendered the emergency assistance gratuitously given the brief duration of that assistance and the fact that Webb was not in the business of rendering such assistance.[93] If Webb could prove in an action for breach of a promise binding under Restatement (Second) section 86(1), however, that

88. *Id.* § 371 (emphasis added).

89. Henderson, *supra* note 4, at 1135 n.87, 1159.

90. 168 So. 199 (Ala. 1936).

91. *See* KRONMAN & POSNER, *supra* note 19, at 60 (distinguishing the physician who renders emergency assistance from "the nonprofessional rescuer [who] is presumed not to intend to charge").

92. 1 FARNSWORTH, *supra* note 3, § 2.20, at 175. "[R]ecovery in [quasi-contract] would have been precluded for this reason . . . [in] *Webb v. McGow[i]n* . . . ." *Id.* n.31. *Accord* RESTATEMENT OF RESTITUTION § 116 (1937) ("A person who has supplied . . . services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if (a) he acted unofficiously and *with intent to charge therefor* . . . .") (emphasis added); Henderson, *supra* note 4, at 1156 n.167 (noting that "even where the unsolicited conferring of benefit is held not to be officious, but justified and to be encouraged, as in the familiar emergency cases, restitutionary relief is often denied to non-professionals on the assumption that the services furnished were gratuitous").

93. 1 FARNSWORTH, *supra* note 3, § 2.20, at 175-76.

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McGowin made the alleged promise in recognition of the benefit he had previously received from Webb, the defendant would have had the burden of proving by a preponderance of the evidence under section 86(2)(a) that Webb acted with gratuitous intent when he leapt on the pine block in order to divert its course and save McGowin from death or injury.[94] It appears that Webb simply reacted instinctively to an emergency situation with no provable intent either to charge for his assistance or to confer the benefit of that assistance gratuitously. The defendant could not have established under the first clause of subsection (2)(a) that Webb conferred the benefit of his assistance gratuitously, any more than Webb could have established in a quasi-contract action that he acted with a formed intention to charge for his assistance. Nor could the defendant have established under the second clause of section 86(2)(a) that "for other reasons the promisor [has] not been unjustly enriched," because Webb suffered serious injury in conferring a material benefit upon McGowin.[95]

II. SUBSECTION (2))(a) - FIRST CLAUSE

A person is not regarded as having been *unjustly* enriched by the receipt of a gift[96] or any other benefit that was conferred gratuitously,[97] and the first clause of Restatement (Second) section 86(2)(a) accordingly provides that "[a] promise is not binding under Subsection (1) . . . if the promisee conferred the benefit as a gift . . . ."[98] The party resisting enforcement of a promise for benefit received may be able to carry the burden of establishing the benefit was conferred as a gift if there was a family or other close relationship between the promisor and promisee which raises a presumption that the benefit was conferred gratuitously.[99] Thus, the party resisting enforcement may be able to establish that the promisee conferred a benefit upon the promisor with donative intent even if the benefit was conferred at the promisor's request,[100]

94. MURRAY, *supra* note 12, § 67, at 297 ("[B]ecause the recipient of the benefit has made a promise to pay for the benefit, the RESTATEMENT 2d removes the normal requirement of the rescuer's expectation of payment and places the burden of establishing a gratuitous intention on the promisor").

95. *See supra* notes 70-74 and accompanying text for related discussion.

96. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e (1981) ("In the absence of mistake or the like, there is no element of unjust enrichment in the receipt of a gift.").

97. *Cf.* RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 7.1, at 76 (3d ed. 1975) (defining a "gift" as "a voluntary transfer of . . . property by one to another without any consideration or compensation therefor"). The reference in RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) to benefits conferred as a "gift" is underinclusive if the word is restricted to donative transfers of interests in property and does not include the gratuitous conferral of other kinds of benefits.

98. *Id.* § 86(2)(a). Comment e affirms that "the rule of this Section has no application to a promise to pay for a past gift." *See, e.g.,* St. Johns First Lutheran Church v. Storsteen, 84 N.W.2d 725 (S.D. 1957); Irons Inv. Co. v. Richardson, 50 P.2d 42 (Wash. 1935).

99. *See* Henderson, *supra* note 4, at 1162-62 (stating that "a relationship of blood or familiarity sustains a presumption of gratuity" in claims by providers of services to elderly or potentially incapacitated persons to recover for breach of promises by such recipients to compensate the providers for those services).

100. *See* CALAMARI & PERILLO, *supra* note 12, § 5.4, at 226 (stating that "if A requests B to

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especially if there was a family or other close relationship between the promisor and the promisee. If a favor is requested and done, the supplier of the requested benefit may be found to have acted without expectation of compensation in doing the favor, and a subsequent promise by the recipient to pay for the favor is not binding under section 86.

Supplementary Illustration 11

> A, an adult, has rendered household services without compensation over a period of years for her father, B, at B's request and as a favor to him. B subsequently promises to pay A the reasonable value of her services. The promise is not binding.

Even though A conferred a material and measurable benefit upon B at B's request, B's promise to compensate or to reimburse A for the benefit of the services B requested is not binding under section 86(2)(a) because A must have understood from B's request that he was asking her for a favor and A should therefore be found to have conferred the benefit of her services upon B gratuitously– "as a gift."

It is also possible that a person may confer a benefit with gratuitous intent but the recipient refuses to accept this service as a gift by making a promise to pay for it. In any such case, the party resisting enforcement cannot establish under section 86(2)(a) that "the promisee conferred the benefit as a gift."[101]

Supplementary Illustration 12

> A pays a debt of B's with donative intent as a favor to B. When B learns of the payment, he refuses to accept the benefit of A's generosity and promises to repay A. B's promise is binding even though A attempted to confer the benefit as a gift.

The party resisting enforcement does not satisfy the first clause of subsection (2)(a) by proving that the promisee conferred the benefit with mixed

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perform services, *unless the services were understood to be gratuitous*, A will be liable on the implied promise to pay the reasonable value of the services") (emphasis added); 3 HOLMES, *supra* note 19 § 9.25, at 318 (subsequent promise to compensate person for rendering performance as a gift is not enforceable "even though the gift performance was rendered at the request of the recipient"). Holmes states:

> Especially when family members reside together, services are often rendered by one person to another with the mutual understanding that no compensation need be forthcoming. This may be true even though in various instances the services are expressly requested by the person benefitted. In such cases, there is no implied or constructive promise to pay. If the person benefitted subsequently makes an express promise to pay, that promise will not be made enforceable by the fact that the services were rendered at the request of the promisor.

Id. § 9.24, at 315.

101. *See* Grosse, *supra* note 5, at 39 (noting that "[t]he intention of the [intended] donee is just as important in effectuating a gift as is the intention of the [would-be] donor").

motives–that the promisee both expected some modest compensation and intended to make a gift of the difference between that expected compensation and the reasonable value of the benefit.[102]

Supplementary Illustration 13

> A renders household services for several months for B, a friend of A's who was injured in an accident and is convalescing at home for those months. A expects to be reimbursed for the expenses she incurs in rendering the services, but she does not otherwise expect B to pay her the reasonable value of those services. B subsequently promises to reimburse A for her expenses. The promise is binding.

Even though A conferred the benefit of her household services upon B with an intention of making him a gift of the difference between the reasonable value of those services and the amount that would be required to reimburse A for her incidental expenses, A's intent was not *exclusively* gratuitous. A cannot be said to have conferred *all* of the benefit as a gift, and enforcement of B's promise to reimburse A is therefore necessary to prevent injustice.

Proof that the promisee conferred the benefit with an intention of making a gift to someone other than the promisor does not satisfy the first clause of § 86(2)(a).

Supplementary Illustration 14

> A, a professional house painter, paints a vacant house in the erroneous belief that it is still owned by A's daughter B, who is out of town and to whom A intends to make a gift of his services. A does not know that B previously sold the house to C, who is also out of town. C returns and is so pleased with the paint job that she promises to pay A an amount equal to the increased market price of the house resulting from its having a new coat of paint. The promise is binding.

Even though A "conferred the benefit as a gift," the intended donee was his daughter B, not B's successor in interest. To satisfy the first clause of subsection (2)(a), the party resisting enforcement of the promise must show that the promisee meant to confer the benefit as a gift *to* the promisor, not to the promisor's successor in interest or to some other person.

Comment e treats a creditor's binding agreement to discharge a debt on the debtor's payment of less than is due as equivalent to a gift of the unpaid balance by the creditor to the debtor; a subsequent promise by the former

102. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. b (1981) ("Even in the typical commercial bargain, the promisor may have more than one motive, and . . . [u]nless both parties know that the purported consideration is mere pretense, it is immaterial that the promisor's desire for the consideration is incidental to other objectives and . . . the other party knows this to be so").

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debtor to pay the difference between the payment the creditor agreed to receive and the higher amount of the discharged debt is not binding under subsection (1). The rationale is that "when a debt is discharged by a binding agreement, the transaction is closed even though full payment is not made."[103] The point may be illustrated as follows:

Supplementary Illustration 15

> A owes B a liquidated debt of $10,000. A becomes insolvent and the parties enter into a binding agreement under which B releases A from the debt in exchange for A's payment of $7,500 to B. A's financial position later improves and he promises to pay B the $2,500 balance on the former debt. The promise is not binding under this Section.

Even though A was enriched to the extent of the $2,500 difference between the $10,000 debt and the $7,500 payment in exchange for which B agreed to discharge that debt, B's forgiveness of one-fourth of the debt is regarded as a gift to A, and A's subsequent promise to repay B for making that gift does not resuscitate the discharged debt.[104] Comment e cautions, however, that "marginal cases arise in which both parties understand that what is in form a gift is intended to be reimbursed indirectly, or in which a subsequent promise is pay is expressly contemplated.... Enforcement of the subsequent promise is proper in some such cases."[105] Existing Illustration 9[106] exemplifies the first such marginal case, and existing Illustration 8[107] exemplifies the second.

III. SUBSECTION (2)(b) - RESIDUAL CLAUSE

If the party resisting enforcement of a promise for benefit received cannot show that "the promisee conferred the benefit as a gift,"[108] avoiding enforcement requires a showing that "for other reasons the promisor has not

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103. *Id.* § 86 cmt. e (1981).

104. *See id.* § 83 cmt. b ("[A] promise to pay a debt discharged without bankruptcy by voluntary action of the creditor such as a ... release by the particular creditor" is not binding under the rule of § 83").

105. *Id.* § 86 cmt e.

106. *Id.* illus. 9. Illustration 9 states:

> A contributes capital to B, an insurance company, on the understanding that B is not liable to reimburse A but that A will be reimbursed through salary and commissions. Later A withdraws from the company and B promises to pay him ten percent of premiums received until he is reimbursed. The promise is binding.

Id.

107. *Id.* illus. 8. Illustration 8 states:

> A submits to B at B's request a plan for advertising products manufactured by B, expecting payment only if the plan is adopted. Because of a change in B's selling arrangements, B rejects the plan without giving it fair consideration. B's subsequent promise to reimburse A's expenses in preparing the plan is binding.

Id.

108. *Id.* § 86(2)(a) (first clause).

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been unjustly enriched . . . ."[109] The party seeking to enforce a promise for benefit received does not have to prove that the promisor *has* been unjustly enriched. If that burden were imposed on the claimant, section 86 would be largely superfluous, because proof that the defendant has been unjustly enriched would entitle the claimant to recover restitutionary relief in quasi-contract. Just as a not guilty verdict in a criminal proceeding does not establish that the accused is innocent of the crime charged, so a defendant's failure to show that "the promisor has not been unjustly enriched" does not imply that the promisor *has* been unjustly enriched. A claimant who could not recover in quasi-contract for having conferred a benefit upon another person may nonetheless recover under Restatement (Second) section 86 if the claimant can prove that the other person made a promise to compensate the claimant for conferring that benefit. In the absence of such a trailing promise,

> restitution is denied . . . in order to protect persons who have had benefits thrust upon them . . . [or] is denied by virtue of rules designed to guard against false claims, stale claims, claims already litigated, and the like. In many such cases a subsequent promise to make restitution removes the reason for the denial of relief, and the policy against unjust enrichment then prevails.[110]

The determinative inquiry seems to be whether there is any doubt that "the objections to restitution are fully met by the subsequent promise."[111] If a subsequent promise of compensation by the recipient of the benefit removes all such doubt, the promise is binding under section 86 even though under the law of restitution the recipient would not be regarded as having been unjustly enriched in the absence of such a promise.

Although the principle of section 86 has been labeled promissory restitution, it appears that a promise made in recognition of a benefit the promisee *officiously* conferred upon the promisor may be binding, notwithstanding the general restitutionary principle that "where a person has officiously conferred a benefit upon another, the other . . . is not considered to be unjustly enriched."[112] Stated in terms of section 86(2)(a)'s residual clause, the party resisting enforcement of a promise for benefit received does not necessarily show that "the promisor has not been unjustly enriched" by proving that the promisee conferred the benefit officiously. Comment b to section 86 includes among "cases in which a subsequent promise to make restitution removes the reasons for the denial of relief" those in which "persons . . . have had benefits thrust upon them."[113] The Comment invites comparison with a section of the Restatement (Second) of Agency governing the effect of ratification: "Upon

109. *Id.* (second clause).
110. *Id.* § 86 cmt. b.
111. *Id.*
112. RESTATEMENT OF RESTITUTION § 2 cmt. a (1937). *See* Thel & Yorio, *supra* note 19, at 1100 (arguing that promissory restitution does not take account of many cases in which courts enforce promises on grounds of moral obligation "despite the absence of restitutionary interests").
113. *Id.* cmt. b.

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ratification, an agent or other person who without power to bind the principal . . . has purported to do so is entitled to the same rights against the principal as if the act had been authorized . . . ."[114] Just as a principal can ratify the previously unauthorized act of a person who purported to bind that principal, so the recipient of an officiously conferred benefit can ratify the supplier's conduct by making a voluntary and informed promise of compensation.[115] The point may be illustrated as follows:

Supplementary Illustration 16

> A, a professional house painter, paints B's house with an expectation of compensation but without authorization or invitation from B, who is out of town, thereby increasing the market value of B's house by $500. B returns and learns that A has thrust the benefit of the service upon B. B nevertheless voluntarily promises to pay A $500 for the work. The promise may be binding even though A conferred the benefit officiously.

A court will scrutinize the circumstances surrounding the making of such a promise in order to assure itself that the promise was not induced by misrepresentation, mistake, duress, undue influence, or other invalidating cause. But if the court is convinced that the promise was knowingly and voluntarily made, it should be binding under section 86 even though the claimant-supplier would not have been entitled to restitutionary relief in the absence of the compensatory promise.[116] The point may be reinforced by a further illustration.

Supplementary Illustration 17

> A pays a debt that her best friend B owes to C in order to stop the running of interest. A acts without authorization or invitation from B, but A expects to be reimbursed by B. B subsequently promises to reimburse A for paying B's debt to C. The promise is binding even though A acted officiously and did not obtain an assignment of the

114. RESTATEMENT (SECOND) OF AGENCY § 462 (1958).

115. *See* Henderson, *supra* note 4, at 1172-73 (arguing that "[a] promise reasonably made, and reasonable in its terms, should itself be effective to remove the fear of imposition resulting from uninvited performances rendered with a business purpose in mind," and that cases in which courts have enforced promises to compensate promisees for having furnished unsolicited business ideas show that a promisee who conferred a benefit officiously might be able to recover for breach of a promise made in recognition of that benefit); BLUM, *supra* note 19, at 223-24 (suggesting that "clear and voluntary ratification of [a] benefit [that was officiously conferred upon the promisor] acts as a counterweight to the meddling and changes the equities in favor of enforcement").

116. *Cf.* RESTATEMENT OF RESTITUTION § 112 cmt. a, illus. 3 (1937). Illustration 3 states:

> During A's absence and in the belief that A will be willing to pay for the work, B improves A's land, which is worth and is offered for sale at $5000, to such an extent that upon A's return he sells the land for $8000. B is not entitled to restitution from A.

Id.

debt from C.[117]

Enforcement of B's promise to reimburse A seems necessary to prevent injustice even though A thrust the benefit of the payment upon B and would not have been entitled to reimbursement in the absence of the recognizing promise.[118] Even the Restatement of Restitution endorses this notion of promissory ratification of a supplier's previous conferral of such an unrequested benefit upon the recipient: "[A] person who officiously pays the debt of another may be entitled to recover the amount of such payment if the other affirms the payment."[119]

Like a promise made in recognition of a benefit the promisee *officiously* conferred upon the promisor, a promise made in recognition of a benefit the promisee *mistakenly* conferred upon the promisor is binding under Restatement (Second) section 86(1); proof that the promisor neither knew nor had reason to know of the promisee's mistake when the promisee conferred the benefit does not satisfy the residual clause in subsection (2)(a). "One who makes a mistake in the conferring of a benefit is commonly entitled to restitution regardless of any promise."[120] Thus:

> A person who has rendered services to another or services which have inured to the benefit of another or who has affixed chattels to the land or chattels of another is entitled to restitution therefor if the services were rendered or the chattels were affixed . . . (c) in the mistaken belief, *of which the other knew or had reason to know*, that the services would inure to the benefit of the one giving them or of a third person, or that the other promised to pay for them . . . .[121]

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117. *See* 3 HOLMES, *supra* note 19, § 9.25, at 321 (observing that although "one who voluntarily pays the debt of another to a third person [generally] has no right to reimbursement by the debtor . . . it has been held that an express promise of reimbursement by the debtor is enforceable").

118. RESTATEMENT OF RESTITUTION § 112, cmt. a, illus. 1 (1937). The illustration reads:

> Being pressed for money, A fails to pay bills owed by him and . . . B, a friend, pays the amount of such bills to the creditors, in order to protect A's good name. B is not entitled to restitution from A, even though upon paying the bills he believed himself entitled to reimbursement, intended to claim it and, had he received an assignment from the creditors, he could have obtained it.

Id.

119. *Id.* cmt. c.

120. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. c (1981).

121. RESTATEMENT OF RESTITUTION § 40(c) (1937) (emphasis added). Comment d states:

> Although the recipient of services is ordinarily not liable for their value, even to the extent that he has benefited thereby *if he does not know of their receipt*, he cannot retain a benefit which knowingly he has permitted another to confer upon him by mistake. A landowner who has knowledge that another, in the mistaken belief of ownership, is making improvements upon the land is liable to the other for the value of improvements made after the landowner has had a reasonable opportunity to notify the other of his mistake and fails to do so. The same result follows where a person accepts services from another, having reason to know that the other is under a belief that the recipient or a third person has promised compensation or is otherwise under a duty to pay for them. In both cases the recipient is liable for the reasonable value of the services irrespective of their value to him.

Id. § 40 cmt. d (emphasis added).

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Yet when the recipient neither knows nor has reason to know that a benefit is being conferred by the supplier under such a mistake, "restitution is . . . denied to avoid prejudice to the recipient of the benefit."[122] In such cases, restitution of the value of services[123] or of the value of improvements to land or chattels[124] "may require a payment which the recipient cannot afford . . . .[[125]] Where a subsequent promise shows that the usual protection is not needed in the particular case, restitution is granted to the extent promised."[126]

As previously noted, a promise made in recognition of emergency assistance that a non-professional promisee previously supplied to the promisor is binding under Restatement (Second) section 86(1),[127] even though the supplier would not have been entitled to recover a restitutionary award in quasi-contract had the recipient made no complementary promise.[128]

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122. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. c (1981).

123. RESTATEMENT OF RESTITUTION § 41 (1937) ("When Restitution for Services Is Not Granted"). Section 41 states in pertinent part:

> A person who has rendered services to another or services which have inured to the other's benefit, is not entitled to compensation therefor if the services were rendered (a) without the other's knowledge or reason to know of them, solely because of a mistaken belief (i) that they would inure to the benefit of the one rendering the services . . . ; (ii) that the person rendering the services or a third person had a duty to the other or to a third person so to perform; or (iii) that the other or a third person had contracted to pay therefor or that a duty by the other would result therefrom, or that by performance he would acquire an interest in the thing benefited by the service; or (iv) that a relationship existed by virtue of which such services are customarily rendered, with or without compensation; (b) with the other's knowledge, solely because of one of the mistaken beliefs stated in Clause (a), where the other had no reason to know of the mistake or that he was expected to pay therefor and had made no manifestation of a promise to pay.

Id.

124. *Id.* § 42 ("Improvements Upon Land or Chattels). Section 42 states in pertinent part:

> (1) . . . [A] person who, in the mistaken belief that he or a third person on whose account he acts is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements . . . . (2) A person who, in the mistaken belief that he or a third person on whose account he acts is the owner, adds value to the chattels of another, is not thereby entitled to restitution from the owner for the value of his services or the increased value given to the chattels . . . .

Id.

125. *See id.* § 41 cmt. a. Comment a states:

> The rule stated in this Section which . . . is harsh to a person who performs the service, results from the fact that many times it would be still more harsh to require a recipient to pay for services which he did not want or for which he could not afford to pay although he may have been glad to have them.

Id.

126. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. c (1981). As for the possibility of only partial enforcement if the value of the promise exceeds the value of the benefit or the promisee's loss in conferring that benefit, *see infra* notes 159-186 and accompanying text.

127. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d illus. 7 (1981).

128. RESTATEMENT OF RESTITUTION § 112 cmt. b (1937). Comment b states, "compensation for benefits conferred is denied . . . to persons who . . . manifest no desire to have compensation for their services." Moreover, a person who renders emergency assistance to another is not entitled to restitution from the other:

> [I]f there is no intent to charge anyone; a person who acts entirely from motives of humanity is not entitled to restitution. The fact that the person acting is in the business of supplying the things or is acting in the course of his profession . . . is evidence of an intent to charge. On the other hand, a non-professional person who gives a comparatively small amount of service normally would be considered as having no intent to charge for the services, in the absence of evidence of such intent.

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> A subsequent promise in such a case may remove doubt as to the reality of the benefit and as to its value, and may negate any danger of imposition or false claim. A positive showing that payment was expected is not then required; an intention to make a gift must be shown to [prevent enforcement].[129]

By making a promise in recognition of the benefit the recipient previously received from the promisee's provision of emergency assistance, the promisor effectively ratifies the promisee's prior conduct and thereby voluntarily undertakes an obligation the recipient could have avoided by refraining from making the promise.[130]

"Similarly, if a third person receives a benefit as a result of the performance of a bargain, . . . [a] subsequent promise of the third person . . . to pay in substitution for the return performance called for by the bargain may be binding under . . . Section [86],"[131] even though the benefited third person would not likely have had a quasi-contractual obligation to pay the supplier for the benefit had the third person made no such promise.[132] Proof that the promisee conferred the benefit in the performance of an agreement with someone other than the promisor does not satisfy the residual clause of § 86(2)(a) if the agreed upon return performance is not forthcoming.[133]

Section 86 thus sanctions promissory ratifications of the supplier's prior conduct when the supplier conferred a benefit upon the promisor officiously,[134] mistakenly,[135] without donative intent,[136] or in the performance of a bargain with a third person who is unable to pay as agreed.[137] If the recipient of any such benefit makes no complementary promise to compensate the supplier, recovery in quasi-contract *is not possible* because the claimant-supplier cannot prove the defendant-recipient *has been* unjustly enriched. If the recipient makes a promise to pay the supplier for a benefit previously received by the promisor, recovery for breach of contract *is possible* under section 86(1). The party resisting enforcement will be unable to prove that the promisor has not been unjustly enriched despite having received an uncom-

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Id. § 114 cmt. c.

129. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d (1981).

130. GILMORE, *supra* note 11, at 74 ("[T]he ungrateful recipient may keep whatever he has received without paying for it so long as he is clever enough to avoid making a 'promise' to repay").

131. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. f (1981).

132. RESTATEMENT OF RESTITUTION § 110 (1937) ("A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person"). *See, e.g.,* Callano v. Oakwood Park Homes Corp., 219 A.2d 332 (N.J. Super. Ct. App. Div. 1966).

133. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. f, illus. 10 (1981) ("A digs a well on B's land in performance of a bargain with B's tenant C. C is unable to pay as agreed, and B promises to pay A the reasonable value of the well. The promise is binding."). *Cf.* Edson v. Poppe, 124 N.W. 441 (S.D. 1910) (no indication that lessor made promise because of lessee's inability to pay).

134. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981).

135. *Id.* cmt. c.

136. *Id.* cmt. d.

137. *Id.* cmt. f.

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pensated benefit from the promisee.

Section 86 states a residual principle of validation governing "promise[s] grounded in the past."[138] Sections 82, 83, 84, and 85 state specific applications of section 86's broad principle that events which occurred before a promise is made may provide a basis for its enforcement.[139] Thus, section 82 sanctions the promissory extension or revival of "an antecedent contractual or quasi-contractual indebtedness owed by the promisor" notwithstanding the impending or actual expiration of the period of limitations governing that indebtedness;[140] section 83 sanctions the promissory preservation or revival of "all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made . . . .";[141] section 84 sanctions the promissory relinquishment by an obligor of the defense that a condition which qualifies the obligor's duty of performance under an antecedent contract has not occurred or cannot occur;[142] and section 85 sanctions the promissory relinquishment of a power to avoid an antecedent contract of the promisor on grounds such as infancy, misrepresentation, duress, or mistake.[143] Section 86 validates promises to honor other benefit -supported obligations that would be unenforceable by reason of some other rule of law in the absence of a recognizing promise.[144]

The comments to section 86 suggest two applications of this residual principle. According to comment g, "[a] promise to pay a debt unenforceable under the Statute of Frauds . . . is binding if the policy of the Statute is satisfied."[145] Although the question rarely arises, because "part performance often renders the Statute inapplicable . . . [and] if it does not, the contract can be made enforceable by a subsequent memorandum,"[146] existing Illustration 11 shows how section 86's residual principle of validation may be applied to overcome a Statute of Frauds defense.

> By statute, an agreement authorizing a real estate broker to sell land for compensation is void unless the agreement or a memorandum thereof is in writing. A, a real estate broker, procures a purchaser for B's land without any written agreement. In the written sale agreement, signed by B, B promises to pay A $200, the usual com-

138. Henderson, *supra* note 4, at 1115.

139. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981) ("Many of the cases governed by the rules stated in §§ 82-85 are within the broader principle stated in this Section").

140. *Id.*§ 82(1) ("A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations").

141. *Id.* § 83.

142. *Id.*§ 84(1) ("[A] promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur . . . ").

143. *Id.*§ 85 ("[A] promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise, is binding").

144. *See* KRONMAN & POSNER, *supra* note 19, at 51 (referring to such cases as ones in which "debts [are] barred by a technicality").

145. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. g (1981).

146. *Id.*

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mission, "for services rendered." The promise is binding.[147]

By making the subsequent written and signed promise to pay the broker's usual commission for having previously procured a purchaser of the promisor's land, B relinquished the statutory defense and conceded a liability B might have avoided by refusing to make the promise. Comment h suggests another example of a binding promissory concession. "If a promise is unenforceable because it is usurious, . . . a promise to pay the original debt with interest that is not usurious in substitution for the usurious interest is enforceable" under section 86. The rule may be illustrated as follows:

Supplementary Illustration 18

> A lends money to B at a usurious rate of interest. Violation of the usury statute forecloses the lender from recovering both principal and interest. B subsequently promises to pay the principal debt at a lawful rate of interest. The promise is binding.[148]

By making the subsequent promise B relinquished the statutory defense, thereby conceding or assuming a liability B would have avoided had B refrained from making that promise. The promise is properly regarded as having been made in recognition of the benefit B previously received from A's loan of the money to B, and enforcement of the promise is necessary to prevent injustice under § 86(1).

If an obligation arising from the receipt of a benefit is unenforceable for reasons other than those identified in Restatement (Second) sections 82 through 85 and in comments g and h to section 86, a promise made in recognition of that benefit is binding under the residual principle of section 86. Consider the following refinement of existing Illustration 6:[149]

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147. *Accord* Realty Assoc. of Sedona v. Valley Nat'l Bank, 738 P.2d 1121 (Ariz. Ct. App. 1986); Muir v. Kane, 104 P. 153 (Wash. 1909); Coulter v. Howard, 262 P. 751 (Cal. 1927); 3 HOLMES, *supra* note 19, § 9.29; Keefe, *supra* note 19, at 797-98.

148. *Accord* 3 HOLMES, *supra* note 19, § 9.27, at 329-30; 4 LORD, *supra* note 19, §§ 8.12, 8.13, at 242-43, 264-66, 269, and 270.

149. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 6 (1981) ("A finds B's escaped bull and feeds and cares for it. B's subsequent promise to pay reasonable compensation to A is binding."). Although the Reporter's Note to section 86 indicates that this illustration is based on Boothe v. Fitzpatrick, 36 Vt. 681 (1864), the Illustration fails to indicate that recovery of a restitutionary award in quasi-contract was foreclosed by the plaintiff's failure to comply with a statute which required the finder of such an estray to advertise in specified publications in order to be entitled to reimbursement for keeping the animal. Absent such a statute, the owner of the bull would have had a quasi-contractual duty to make restitution to the party who fed and cared for the animal; RESTATEMENT OF RESTITUTION § 117(1) (1937). Section 117 states:

> A person who, although acting without the other's knowledge or consent, has preserved things belonging to another from damage or destruction, is entitled to restitution for services rendered or expenditures incurred therein, if (a) he was in lawful possession or custody of the things or if he lawfully took possession thereof, and the services or expenses were not made necessary by his breach of duty to the other, and (b) it was reasonably necessary that the services should be rendered or the expenditures incurred before it was possible to communicate with the owner by reasonable means, and (c) he had no reason to believe that the owner did not desire him so to act, and (d) he intended to charge for such services or to retain the things as his own if the identity of the owner were not discovered

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Supplementary Illustration 19

> A finds B's escaped bull and feeds and cares for it. A fails to comply with a statute which requires a finder of an estray to advertise in specified publications in order to be entitled to recover for keeping the animal, and A is therefore not entitled to restitution in quasi-contract. B's subsequent promise to pay reasonable compensation to A is binding.

A's failure to comply with the statute was a defense to any action in quasi-contract A might have brought against B to recover restitution. By making the promise in recognition of the benefit B received from A's preservation of the bull, B relinquished the statutory defense and thereby assumed a liability B might otherwise have avoided. The recipient of a benefit can also relinquish the defense that an agreement is unenforceable on grounds of indefiniteness by making an effective promissory valuation under section 86. A supplementary illustration based on Illustration 9 to Restatement (Second) section 71 substantiates this proposition:

Supplementary Illustration 20

> A promises B, his nephew aged 16, that A will pay B "a handsome reward" when B becomes 21 if B does not smoke before then. B is induced by A's promise to so forbear, but A's promise is unenforceable on grounds of indefiniteness. See Section 33. A subsequently promises to pay B $500 for his forbearance. The promise is binding.

A's promise to pay B "a handsome reward" for his abstinence was bargained for but is unenforceable on grounds of indefiniteness. By making the subsequent promise to pay B $500 for the intangible benefit B conferred upon A at A's request, A relinquished that defense and undertook a definite obligation.[150]

Having considered promises that do not fall within the residual clause of Restatement (Second) section 86(2)(a), it remains to consider those that do. The section comments suggest only three examples of promises that are not binding under subsection (1) because the promisor has not been unjustly enriched for reasons other than because the benefit was conferred as a gift.

As previously noted, "when a debt is discharged by a binding agreement, the transaction is closed even though full payment is not made";[151] a subsequent promise by the former debtor to pay the balance that had been

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> or if the owner should disclaim, and (e) the things have been accepted by the owner.

Id.

150. *Accord,* Henderson, *supra* note 4, at 1118-19 (suggesting that "the theory of promissory restitution is potentially relevant to . . . bargains void for indefiniteness and the like").

151. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. e (1981).

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due on the discharged debt is not binding under subsection (1) because a debtor is not considered to have been unjustly enriched when the debt is discharged for less than full payment by a binding agreement with the creditor.[152]

Comment f identifies two other situations in which the recipient of a benefit is not regarded as having been unjustly enriched and whose subsequent promise made in recognition of that benefit is therefore not binding. First, "[b]y virtue of the policy of enforcing bargains, the enrichment of one party as a result of an unequal exchange is not regarded as unjust, and this Section has no application to a promise to pay or perform more or to accept less than is called for by a pre-existing bargain between the same parties."[153] The proposition may be illustrated as follows:

Supplementary Illustration 21

> A hires B to work A's gold mine for a salary substantially below the reasonable value of B's services. In performing his job duties, B discovers a new lode that quadruples the value of A's mine. A promises to pay B a modest bonus for having discovered the new lode. The promise is not binding under this Section.

Although B's discovery of the new lode may have conferred an unexpected benefit upon A, that is a risk which B is regarded as having borne under the employment contract. Observe, however, that if the contract was not fully performed on either side, a promise by A to increase B's salary for future work on account of increased efforts that discovery of the new lode might require A to expend in working the mine would be binding under Restatement (Second) § 89(a): "A promise modifying a duty under a contract not fully performed on either side is binding ... if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made ...."[154] In *Supplementary Illustration 21,* by material contrast, A's promise to pay B a modest bonus was made in recognition of the benefit A had previously received as a result of B's having discovered the new lode; it was not made in order to secure A's entitlement to the benefit of B's future services under the employment contract. A promise to adjust the parties' rights and duties under an on-going transaction may thus be binding under section 89(a),[155] whereas a promise made solely in recognition of a benefit the

152. *See* Grosse, *supra* note 5, at 9 (suggesting that in such cases, "the requisite moral obligation is found to be lacking, presumably on the theory that moral obligation cannot be found where the parties themselves did not recognize any further obligation on the original debt at the time of the discharge"); Henderson, *supra* note 4, at 1133; 3 HOLMES, *supra* note 19, § 9.17; 4 LORD, *supra* note 19, § 8.20, at 339.

153. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. f (1981). *Accord* Plowman v. Indian Refining Co., 20 F. Supp. 1 (E.D. Ill. 1937); Shear v. Harrington, 266 S.W. 554, (Tex. Civ. App. 1924); Meginnes v. McChesney, 160 N.W. 50 (Iowa 1916); Grosse, *supra* note 5, at 7; 3 HOLMES, *supra* note 19, § 9.26, at 325. *But see* Henderson, *supra* note 4, at 1174-76 (questioning the justice of the comment f rule).

154. RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981).

155. *Id.* § 89 cmt. a.

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promisor previously received from the promisee under an on-going transaction is not binding under section 86(1) and (2)(a).[156]

Just as the enrichment of the promisor resulting from an unequal exchange with the promisee is not regarded as unjust, so a promisor is not regarded as having been unjustly enriched by the receipt of a benefit incident to the promisee's performance of a bargain with a third person.[157] A promise by such an incidental beneficiary to pay additional compensation to the performing party is not binding under § 86(1) and (2)(a).

Supplementary Illustration 22

> A digs a well on B's land in performance of a bargain with B's tenant C, under the terms of which C pays A an agreed upon fee of $200. Installation of the well increases the market value of B's land by $300, which is also the reasonable value of A's services. B's subsequent promise to pay A an extra $100 in recognition of the benefit B previously received from A's digging of the well is not binding.

B's promise is not binding even though B received a direct and measurable benefit from A's performance of services which A appears to have sold too cheaply to C.

Similarly, a promise made in recognition of a benefit the promisor received as an unintended incident of the promisee's unbargained for and self-interested conduct is not binding under section 86(1), because the promisor is not properly regarded as having been unjustly enriched by the receipt of a benefit the promisee did not intend to confer upon the promisor.

Supplementary Illustration 23

> A drills an oil well on his land. The well produces oil, thereby increasing the market price of adjoining land owned by B. B subsequently promises to reimburse A for a small fraction of A's drilling expenses, an amount that is far less than the increase in the market value of B's land resulting from A's efforts. The promise is not binding under this Section.

Although B received a pecuniary benefit as a result of A's having dug the well, B has not been unjustly enriched as the incidental beneficiary of A's self-interested conduct;[158] the promise B made in recognition of having received that benefit from A is therefore regarded as gratuitous and is not binding under § 86(1) and (2)(a).

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156. *Id.* § 86(2)(a) cmt. f.

157. *Id.* cmt. f.

158. RESTATEMENT OF RESTITUTION § 1 cmt. c (1937) ("The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent . . . [but is not] entitled to restitution").

IV. PARTIAL ENFORCEMENT UNDER SUBSECTION (2)(b)

A promise for benefit received is binding under Restatement (Second) section 86(1) only "to the *extent* necessary to prevent injustice."[159] Subsection (2)(b) elaborates on this authorization of partial enforcement as follows: "A promise is not binding under Subsection (1) . . . to the extent that its value is disproportionate to the benefit" in recognition of which the promise was made.[160] Subsection (2)(b) enjoins partial enforcement of a promise for benefit received when the value of the promise *exceeds* the value of the benefit.[161] If the value of the benefit equals the value of the promise, the promise is fully enforceable; if the value of the benefit exceeds the value of the promise, recovery is limited to the value of the promise.[162]

Supplementary Illustration 24

> A is employed by B to repair a vacant house. By mistake A repairs the house next door, which belongs to C. The value of the repairs is $200. A subsequent promise by C to pay A only $150 for the repairs is binding, but A is not entitled to recover from C the $50 balance on the value of the repairs.

Comment i to section 86 provides a clear example of a case in which partial enforcement is appropriate under subsection (2)(b): "[W]here a benefit received is a liquidated sum of money, a promise is not enforceable under this Section beyond the amount of the benefit." The point is easily illustrated:

Supplementary Illustration 25

> A pays B a liquidated debt of $500 and gets a signed receipt. Later B obtains a default judgment against A for the amount of the debt, and A pays B $500 again. B's subsequent promise to repay A $1,000 is only binding to the extent of $500 plus interest.

Section 86 validates promissory valuations made in recognition of the promisor's receipt of an intangible benefit.[163] Comment i provides that

159. RESTATEMENT (SECOND) OF CONTRACTS § 86(1) (1981) (emphasis added).

160. *Id.* § 86(2)(b). *Cf.* S.D.C.L. § 53-6-2 ("[A] moral obligation originating in some benefit conferred upon the promiser or prejudice suffered by the promisee is also a good consideration for a promise *to an extent corresponding with the extent of the obligation*, but no further or otherwise") (emphasis added).

161. *See, e.g.*, In re Gerke's Estate v. Desimowich, 73 N.W.2d 506 (Wis. 1955). *But see* CALAMARI & PERILLO, *supra* note 12, § 5.4, at 228 (reporting that "the holdings of the cases appear unanimously to grant full enforcement or none"); Grosse, *supra* note 5, at 20.

162. *Cf.* 1 FARNSWORTH, *supra* note 3, § 2.8, at 89 (recovery for breach of promise to pay debt barred by statute of limitations "limited to the terms of that promise"); Thel & Yorio, *supra* note 19, at 1092-93 (pointing out that "[w]hen the debtor promises to pay less than the amount of the barred debt, . . . courts consistently respond by enforcing the promise according to its terms rather than reviving the debt").

163. Thel & Yorio, *supra* note 19, at 1087 n.194 (arguing that an award of expectation damages may be dictated by "difficulty in measuring the value of the benefit conferred").

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"[w]here the value of the benefit is uncertain, . . . a promise to pay a liquidated sum may serve to fix the amount due if in all the circumstances it is not disproportionate to the benefit." A promissory valuation is fully binding in cases such as *Webb v. McGowin*,[164] where the court assumed that the defendants' decedent had promised to make bi-weekly payments of fifteen dollars in recognition of the promisor's having received emergency assistance from a promisee who suffered permanent and totally disabling injuries in conferring that assistance. The promise is fully binding, both because the subjective value the promisor realized from having his life or health saved is uncertain, and because there is no objective or market-measured value of the emergency assistance that the promisee provided.[165] Section 86 sustains the autonomous power of the promisor to make an enforceable appraisal or valuation of a material benefit the promisor previously received from the promisee.[166]

Existing Illustration 12 appears to support the proposition that partial enforcement of a promise for benefit received is appropriate under subsection (2)(b) *only* when the value of the promise *clearly* exceeds *both* the *subjective* value of the benefit to the promisor *and* the *objective*, market-measured, or reasonable value of the benefit to the promisee. Scholars have observed that the result endorsed under the facts of Illustration 12 seems inconsistent with the text of subsection (2)(b)[167] and with the suggestion in comment i that "[a] promise which is excessive may sometimes be enforced [only] to the *extent* of the benefit . . . ."[168] Existing Illustration 12 appears to present a situation in which the value of the promise exceeds the value of the benefit in recognition of which the promise was made, and yet the promise is fully binding.

> A, a married woman of sixty, has rendered household services without compensation over a period of years for B, a man of eighty living alone and having no close relatives. B has a net worth of three million dollars and has often assured A that she will be well paid for her services, whose reasonable value is not in excess of $6,000. B executes and delivers to A a written promise to pay A $25,000 "to be taken from my estate." The promise is binding.[169]

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164. 168 So. 199 (Ala. 1936).

165. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 illus. 7 (1981).

166. *Cf.* RESTATEMENT OF RESTITUTION § 155(1) (1937). Section 155(1) states:

> Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, limited, if the recipient was not at fault or was no more at fault than the claimant, to its value in advancing the purposes of the recipient . . . .

Id. Henderson, *supra* note 4, at 1141 ("[U]nless the recipient of another's performance is guilty of fault, a recovery in quasi-contract is limited to the amount by which the recipient is benefited, even though the cost or value of the performance may be greater"). Henderson notes "[t]he problem yet to be worked out in case law is whether the conventional unjust enrichment notion of net benefit will act as a limitation on a subsequent promise to make restitution." *Id.* at 1182.

167. 1 FARNSWORTH, *supra* note 3, § 2.8 at 95-96, n.35; Thel & Yorio, *supra* note 19, at 1087-89; MURRAY, *supra* note 12, § 67, at 298.

168. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. i (1981) (emphasis added).

169. *Id.* illus 12. According to the Reporter's Note, existing Illustration 12 is based on In re Hatten's Estate, 288 N.W. 278 (Wis. 1939). The recipient had promised the claimant that she would be "paid well" for her services. *See* 1 FARNSWORTH, *supra* note 3 § 2.8, at 93 (suggesting that the claimant would not have been entitled to recover on the decedent's promise that the

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A promise of $25,000 is clearly "disproportionate"[170] to the "reasonable value"[171] of the household services A rendered for B. It seems consistent with the qualification imposed by subsection (2)(b) that B's promise should be binding only to the extent of $6,000, the market-measured or objective value of the benefit the promisor previously received from the promisee. Although "the formality in the making of the promise"[172] as well as the promisor's wealth and lack of close relatives are relevant factors supporting enforcement, they do not appear to justify full enforcement of a promise whose value so clearly exceeds the reasonable value of the benefit the promisor received from the promisee.

It is possible to reconcile the result under existing Illustration 12 that the promise is fully binding with the limitation imposed by subsection (2)(b) if the promisor has the power to decide that the net enrichment or subjective value he derived from his receipt of the household services exceeds the $6,000 reasonable or market-valued measure of those services. Although Illustration 12 recites only that the promisee "rendered household services," the claimant in *In re Hatten's Estate* rendered services, furnished meals, and extended the privileges of her home and the use of her automobile to the promisor at his express request.[173] Even though it is possible to ascertain the reasonable value of the household services, the meals, and the use of the claimant's automobile, the value the promisor derived from enjoying the privileges of the claimant's home is uncertain, and the court stressed the indeterminate value of much of the benefit the promisor received from the claimant.[174] If the case had been decided under Restatement (Second) section 86, the promise would have been binding in full because the defendant could not have established that the $25,000 value of the promise was necessarily or clearly disproportionate to the subjective value of the benefit the promisor received from the promisee's rendition of services, provision of meals, bailment of her automobile, and extension of the privileges of her home to the promisor. Even if the reasonable value of the services, the meals, the use of the car, and the lodging was only $6,000, as the claimant initially alleged,[175] the value of the other household privileges that the promisee extended to the promisor was so uncertain that the promisor was able to exercise a power of self-appraisal by making the promise.[176]

A promise for benefit received should be fully enforceable under section 86(1) if the party resisting enforcement cannot establish under section 86(2)(b) that the value of the promise clearly exceeds both the objective,

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claimant would be "paid well" because that promise was too indefinite to be enforced).

170. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(b) (1981).

171. *Id.* illus. 12.

172. *Id.* cmt. b.

173. In re Hatten's Estate, 288 N.W. at 285 (Wis. 1939).

174. *Id.* at 285-86.

175. *Id.* at 279.

176. *See* 4 LORD, *supra* note 19, § 8.11, at 240 (suggesting that a promise is fully enforceable under section 86 unless "it is *grossly* disproportionate to the benefit received") (emphasis added).

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market-measured, or reasonable value of the benefit to the promisor, as well as the subjective value of the benefit to the promisor or the net enrichment the promisor received from the promisee.

Existing Illustration 13, by material contrast, exemplifies cases in which the value of the promise clearly exceeds both the reasonable or market-measured value of some or all the benefits the promisor received from the promisee as well as even the most generous subjective value or net enrichment the promisor received from the promisee.

> The facts being otherwise as stated in Illustration 12, B's promise is made orally and is to leave A his entire estate. A cannot recover more than the reasonable value of her services.[177]

The three million dollar net value of B's entire estate clearly exceeds even the most generous subjective valuation that B might have made of the benefits he received from A, though the value of some of those benefits may have been uncertain, as was the value of the privileges of the claimant's home that the claimant extended to the promisor in *In re Hatten's Estate.* Because the value of the promise is so clearly disproportionate to both the objectively measured and the subjectively measured value of the benefit the promisor received from the promisee, and because it is otherwise impossible to appraise the subjective value of the benefit to the promisor, enforcement of the promise is properly limited to the objective value of the benefit under section 86(2)(b).

Two supplementary illustrations support the proposition that a promise for benefit received is fully binding under subsection (1) of section 86 unless the party resisting enforcement can persuade the court that the value of the promise clearly exceeds both any objective value of the benefit and any plausible subjective value the benefit may have had to the promisor.

Supplementary Illustration 26

> A finds and adopts B's lost dog in the reasonable but erroneous belief that the dog is unowned. The dog is of a mixed breed and has no market value. A provides the dog with loving care for a year and then learns that B is the dog's true owner. A reluctantly returns the dog to B at B's request. B subsequently promises to pay A $500 for having cared for and returned the dog to B. The reasonable value of the care A provided the dog is only $250. The promise is binding to the full extent of $500.

Even though a veterinarian or the operator of a commercial kennel would have charged only $250 to care for the dog for a year, the party resisting enforcement of B's promise cannot carry the burden of persuading the court that $500 is clearly disproportionate to the subjective value B received in having the dog cared for and returned. *Supplementary Illustration 26* is thus analogous to existing Illustration 12. If the value of the promise in *Supple-*

177. RESTATEMENT (SECOND) OF CONTRACTS § 86, cmt. 1, illus. 13 (1981).

mentary Illustration 26 were sharply increased, it would produce a supplementary illustration analogous to existing Illustration 13.

Supplementary Illustration 27

> The facts being otherwise as stated in *Supplementary Illustration 26*, B instead promises to pay A $10,000 for having cared for and returned the dog to B. The promise is binding, but only to the extent of $250, the reasonable value of A's services.

Even conceding B's power to put a subjective value on the benefit B received from A's loving care and return of the dog, the $10,000 promise appears clearly to exceed even the most generous subjective value B might be said to have received from A. Because it is impossible to measure the subjective value of that benefit to B, other than to conclude that it is clearly less than the $10,000 B promised to pay for having received it, the promise is binding only to the extent of the benefit's objective value–$250.

A promise for benefit received should thus be binding in full when its subjective value to the promisor does not clearly exceed the reasonable or market-measured value of the benefit and when the promisee conferred the benefit at the promisor's request or the promisee had reason to believe the promisor would have requested the benefit if it had been possible to do so.[178] On the other hand, when the promisee conferred the benefit officiously or under a mistake, and when the value of the promise exceeds *either* the subjective *or* the objective value of the benefit, the promise should be binding only to the extent of the less generous measure of the value of the benefit.[179]

First consider a situation in which the reasonable value of beneficial services the promisee conferred upon the promisor officiously or under a mistake exceeds the subjective value of those services to the promisor or the net enrichment the promisor realized from having received them.

Supplementary Illustration 28

> A is employed by B to repair a vacant house. By mistake A repairs the house next door, which belongs to C. The repairs increase the market value of C's house by $500, but C promises to pay A $1000, which is the reasonable value of A's repair services. C's promise is binding, but only to the extent of the $500 increase in the market value of C's property resulting from the repairs A made.

The same result would be appropriate if A conferred the benefit of the repair

178. *See* Henderson, *supra* note 4, at 1151 (suggesting that the value of the benefit should be "measured by the reasonable value of a performance rendered at the request of [the promisor] . . .").

179. *See* Eisenberg, *supra* note 19, at 664 (arguing that "the promisee's recovery should ordinarily be limited to the lower of (1) the amount promised or (2) compensation that is fair in light of the underlying obligation, the value of the benefit, and the promisee's cost").

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services on C officiously. Although in many cases of benefits conferred by mistake or officiously, "a subsequent promise to make restitution removes the reason for the denial of relief,"[180] *full* enforcement of the promise is not "necessary to prevent injustice" when the value of the promise clearly exceeds the subjective value of the benefit to the promisor.

Next consider a situation in which the net enrichment the promisee realized from beneficial services the promisee conferred upon the promisor officiously or under a mistake exceeds the reasonable value of those services.

Supplementary Illustration 29

> The facts being otherwise as stated in *Supplementary Illustration 28,* the repairs increase the market value of C's house by $1000, but $500 is the reasonable value of A's repair services. C's promise is binding, but only to the extent of the $500 reasonable value of A's services.

Again, the same result would be appropriate if A conferred the benefit of the repair services upon C officiously. Although the value of the promise does not exceed the subjective value of the benefit C received from A, enforcement beyond an amount necessary to compensate A for the reasonable value of the services is not necessary to prevent injustice when the benefit was conferred under a mistake or officiously, rather than at the request of the promisor or under circumstances in which the promisee was justified in believing the promisor would have requested the services but was unable to do so.

Just as the court exercises discretion in deciding under Restatement (Second) section 371 whether to apply an objective or subjective measure of a promisee's restitution interest depending upon what "justice requires,"[181] so the court should be able to exercise discretion under section 86(2)(b) in measuring the value of the benefit the promisor received from the promisee. A less generous measure of that benefit which results in partial enforcement of the promise seems appropriate when the promisee conferred the benefit either officiously or under a mistake. A more generous measure which results in full enforcement of the promise seems appropriate when the promisee conferred the benefit at the promisor's actual or constructive request. If the party resisting enforcement cannot show under section 86(2)(b) that the value of the promise exceeds either the objectively or subjectively measured value of a benefit that was conferred officiously or under a mistake, then the promise should be binding in full.

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180. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. b (1981).

181. *Id.* § 371. Section 371 states:

> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Id.

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Supplementary Illustration 30

> A tries but fails to talk her friend B out of attempting to commit suicide. B jumps off a bridge into a river. A jumps into the river after B and saves him from drowning. B subsequently repents of his determination to commit suicide and promises to pay A $100 for saving his life. The promise is binding.

Because A knew B wanted to commit suicide, A thrust the benefit of her life-saving services upon B against his will–A conferred the benefit officiously. If B subsequently refused to perform the promise and A brought suit against B for breach of contract, B could not prove under Restatement (Second) section 86(2)(b) that the $100 value of the promise "is disproportionate to" or clearly exceeds the value of the benefit B received from A. Emergency services rendered by a non-professional such as A have no market value, and the best evidence of their subjective value to the promisor is the amount he promised to pay for them.

V. PARTIAL ENFORCEMENT NOT UNDER SUBSECTION (2)(b)

Partial enforcement of a promise for benefit received may sometimes be appropriate even in cases that do not fall within Restatement (Second) section 86(2)(b)–cases in which the value of the promise is not "disproportionate to the benefit" but in which partial enforcement of the promise is all that is necessary in order to prevent injustice under section 86(1).[182] As previously discussed, partial enforcement is warranted whenever the party resisting enforcement can establish that the value of the promise clearly exceeds the loss, injury, or detriment the promisee suffered in conferring the benefit upon the promisor.[183]

Cases in which the promisee conferred the benefit under a mistake may also warrant partial enforcement of any subsequent promise the recipient makes in recognition of that benefit.

Supplementary Illustration 31

> A is employed by B to repair B's vacant house for a reduced fee of only $250. By mistake A repairs the house next door, which belongs to C. The repairs increase the market value of C's house by $500, and $500 is also the reasonable value of A's services. C subsequently promises to pay A $500 for having repaired C's house. The promise is binding, but only to the extent of the $250 fee A expected to earn in making the repairs.

182. See BLUM, *supra* note 19, § 9.7.4, at 223 (suggesting that a court has the discretion to consider not only "the relationship between the value of the benefit and the amount promised," but also "whatever other factors bear upon the appropriate extent of relief").

183. *See supra* note 76 and text accompanying *Supplementary Illustration* 10.

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The $500 value of the promise is not disproportionate to the value of the benefit in recognition for which that promise was made, however that benefit may be measured. Nevertheless, full enforcement of the $500 promise is not necessary to prevent injustice. A performed the repairs in the mistaken belief that he would thereby be entitled to the $250 fee A agreed to accept from B. If C had made no promise to compensate A for the repairs A made on C's house by mistake, A would not be entitled to recover a restitutionary award in an action of quasi-contract. Even though C's promise shows that C can afford to pay A the value of the benefit A conferred upon C, the value of the promise exceeds the amount A expected to receive for repairing the house, and enforcement of C's promise to the extent of only $250 is therefore all that is necessary to prevent injustice. An award of $250 will fully compensate A and will deprive C of any unjust enrichment.[184]

Similarly, if the value of the benefit a third person receives from the promisee's performance of a bargain with another person exceeds the price the promisee agreed to accept for that performance from the other person, a promise by the benefited third person to pay the value of the benefit in substitution for the return performance called for by the bargain is binding only to the extent of the price the promisee agreed to accept for the performance.

Supplementary Illustration 32

> A digs a well on B's land in performance of a bargain with B's tenant C and under the terms of which A agrees to accept a fee of only $200. C is unable to pay as agreed, and B promises to pay A $250, which is both the amount by which installation of the well increased the market value of B's land and the reasonable value of A's services. The promise is binding, but only to the extent of $200.

Just as in *Supplementary Illustration 31*, full enforcement of the promise is not necessary to prevent injustice even though the value of the promise does not exceed the value of the benefit, however the value of that benefit may be measured. A dug the well in performance of a bargain under which A expected to be paid $200. If B had made no promise to pay in substitution for C, A would not have been entitled to recover anything from B in quasi-contract. B did not "promise to pay in substitution for the return performance called for by the bargain . . . ."[185] B instead promised to pay A *more* than A was entitled to be paid under the terms of A's bargain with C. A is not entitled to recover from B more than the $200 A agreed to accept from C for doing the work; full enforcement of B's promise to pay A $250 would leave A with a $50 windfall, a result that is not necessary to prevent injustice.

184. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 373(2) (1981) ("[An] injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.").

185. *Id.* § 86 cmt. f.

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Finally, "if a third person receives a benefit as a result of the performance of a bargain,"[186] the third party's "promise to pay in substitution for the return performance called for by the bargain"[187] is binding only to the *extent* of any deficiency in that return performance.

Supplementary Illustration 33

> The facts being otherwise as stated in *Supplementary Illustration 32*, C is able to pay only $100 of A's $200 fee, and B promises to pay A the reasonable value of the well. The promise is binding only to the extent of the $100 difference between what A expected to receive from C and what A actually received from C.

Even though the value of B's promise does not exceed the value of the benefit B received from A's performance of the bargain with C, full enforcement of B's promise is not necessary to prevent injustice. A dug the well with an expectation of receiving $200 from C for the work. A received only $100 from C. Full enforcement of B's promise to pay any amount above the $100 balance that C owes A under their bargain is not necessary to prevent injustice.

VI. CONCLUSION

A promise is prima facie binding under Restatement (Second) of Contracts section 86 if the claimant proves the promise was made in recognition of a benefit previously received by the promisor from the promisee. The party resisting enforcement of the promise then has the burden of persuading the court that no injustice will result if the court refuses to enforce the promise or only partially enforces it. A promise for benefit received is wholly unenforceable if the promisor has not been unjustly enriched despite having received a benefit for which the promisor has not paid the promisee-supplier. The comments to section 86 indicate that a promisor should not be regarded as having been unjustly enriched if the promisee conferred the benefit upon the promisor gratuitously or in performance of a bargain with either the promisor or a third person. It is submitted that the promisor should also be found not to have been unjustly enriched if the promisee suffered no legally cognizable injury, loss, or detriment in conferring the benefit upon the promisor. A promise for benefit received is only partially enforceable if the party resisting enforcement establishes that the value of the promise clearly exceeds both the reasonable value of the benefit and the subjective value of the benefit to the individual promisor. Partial enforcement may also be warranted if the value of the promise clearly exceeds any plausible measure of the loss the promisee suffered in conferring the benefit upon the promisor.

According to Comment b, the rationale for enforcing a promise to pay

186. *Id.*
187. *Id.*

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for a benefit the promisor previously received from the promisee is that the promise often removes the reason for denying restitution. The promise is not binding, however, "if there is doubt whether the objections to restitution are fully met by the subsequent promise."[188] The only factors the comment identifies as being potentially relevant in determining whether enforcement would cause the promisor to suffer unfair imposition are "the definite and substantial character of the benefit received, formality in the making of the promise, part performance of the promise, reliance on the promise or the probability of such reliance . . . ."[189] Although these factors may have some influence upon the court in deciding whether enforcement of the promise is necessary to prevent injustice, other factors are even more relevant.

Among the relevant factors which the text of section 86 and comments fail adequately to acknowledge is whether the promisee conferred the benefit at the promisor's request, or at least with the promisor's assumed acquiescence. The comments and existing illustrations indicate that a promise may be binding under the section when the promisee conferred an unsolicited benefit upon the promisor, as well as when the promisee conferred the benefit at the promisor's request or with the promisor's consent. Nevertheless, whether the promisee rendered unsolicited services or instead rendered them at the request of the promisor may be relevant in determining whether the promisor received the requisite "benefit" from the promisee, as well as in determining the extent to which enforcement of the promise is necessary to prevent injustice. The enforceability of such a promise may also depend at least in part upon the nature and extent of any injury, loss, or detriment the promisee suffered in conferring the benefit upon the promisor. The party resisting enforcement may be able to convince the court that the promisor has not been unjustly enriched and that enforcement is therefore not necessary to prevent injustice if the promisee suffered no appreciable loss in conferring the benefit upon the promisor. The character and extent of any injury, loss, or detriment that the promisee suffered in conferring the benefit upon the promisor should also be relevant in determining the extent to which enforcement is necessary to prevent injustice. If the party resisting enforcement can establish that the value of the promise clearly exceeds any measure of the loss the promisee suffered in conferring the benefit, the promise may only be binding to an extent necessary to compensate the promisee for that loss. Similarly, the court may be expected to take account of whether and to what extent the promisee has already received any expected compensation for conduct that resulted in the promisor's receipt of a benefit from the promisee. A promise is not binding if it is made in recognition of an incidental benefit the promisor received as a result of the promisee's having engaged in self-interested conduct. When the promisor received a benefit from the promisee's performance of duties under a contract with a third person and prom-

188. *Id.* cmt. b.
189. *Id.*

ises to pay in substitution for that person, the promise should not be binding beyond the amount the promisee expected to receive from the third person. The court's determination of the extent to which enforcement is necessary to prevent injustice may also be dependent upon how it decides to measure the benefit that the promisor previously received from the promisee. If the promisee conferred the benefit non-officiously, without mistake, or at the promisor's request, full enforcement may be warranted unless the party resisting enforcement can establish that the value of the promise clearly exceeds both the "cost avoided" and the "net enrichment" measures of the benefit that the promisor received from the promisee. If the promisee conferred an unsolicited benefit upon the promisor either officiously or by mistake, partial enforcement may be warranted when the value of the promise clearly exceeds either the objective or the subjective measure of the benefit that the promisor received from the promisee.

An appreciation of the relevance of the foregoing factors in any determination of whether and to what extent enforcement of a promise for benefit received is warranted may be expected to produce more principled applications of section 86. Consideration of all these relevant factors makes the section's many unspecific concepts more accessible and facilitates amoral analysis of whether a promise should be binding on grounds of "a moral obligation."

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