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The Restatement (Second) of Contracts Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency

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The Restatement (Second) of Contracts' Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency

Daniel P. O'Gorman^{*}

The Restatement (Second) of Contracts ("Second Restatement") states that the formation of a contract requires that a bargain's terms be "reasonably certain." It seeks to make this vague standard clearer with the following test: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." The Second Restatement then provides comments and illustrations to help explain the test. This Article shows, however, that the test and its supporting comments and illustrations create more confusion than clarity.

The confusion stems from inconsistent signals as to whether indefiniteness is to be assessed as of the time of the bargain's formation or at the time of the lawsuit. These inconsistent signals cause further confusion about the answers to two more specific questions. First, if only the plaintiff's promise is too indefinite to enforce does this automatically mean no contract was formed, or is the defendant's sufficiently definite promise still enforceable as part of a contract as long as the plaintiff's promise is not relevant to the dispute that arises? Second, what is meant by an "appropriate" remedy, and, specifically, can a remedy be appropriate only if it protects a party's benefit of the bargain (the so-called expectation interest), or can a remedy be appropriate if the plaintiff seeks something less, such as damages to compensate for the plaintiff's reliance on the promise?

The answers to these questions will not only help answer the temporal question referenced above, but will reveal whether the entity that adopted and

^{*} Associate Professor, Barry University School of Law. The author presented on this Article's topic at the Eighth Annual International Conference on Contracts at Texas Wesleyan School of Law (now Texas A&M University School of Law) in February 2013. My thanks to Professor Franklin G. Snyder for organizing the conference, to the attendees at my presentation, and to those who discussed this Article's topic with me, including Charles Calleros, Enrique Guerra-Pujol, Hila Keren, Russell Korobkin, and Val Ricks. My thanks to Dean Leticia Diaz and Barry Law School for providing me with a research grant to assist with the research and writing of this Article, and to Samantha Castranova, Barry Law School Class of 2015, for her invaluable research and editing assistance.

promulgated the Second Restatement, the American Law Institute ("ALI"), views the reasonably certain terms requirement as a legal formality—a rule requiring a bargain to be in a certain form and that can have consequences contrary to the parties' intentions—or as simply a restatement of other doctrines designed to enable a court to resolve the dispute before it (or perhaps a bit of both). In other words, although it is clear that the Second Restatement sought to relax the traditional certainty requirement, did the ALI intend to simply minimize it or did it intend to abolish it? The answers to these questions are important because they will affect how often bargains fail to be contracts. And if more bargains fail to be contracts because of indefiniteness, more promisees will have to proceed under an alternative theory of enforcement, primarily promissory estoppel, a theory under which it is usually more difficult for promisees to prevail.

Though the answers are far from clear, the better interpretation of the Second Restatement's reasonably certain terms requirement is that even though it remains a formation doctrine, whether the bargain's terms enable a court to determine the existence of a breach should be assessed as of the time of the lawsuit, thus, it is not a requirement that the plaintiff's promise be sufficiently definite. However, only an award protecting the plaintiff's expectation interest is an appropriate remedy even if the plaintiff is only seeking something less, such as reliance damages. The test, therefore, has aspects of a legal formality while at the same time having aspects of simply enabling the court to resolve the dispute that arises. In this respect, the Second Restatement is a model of neoclassical contract law, retaining some of classical contract law's focus on the moment of contract formation while at the same time encouraging courts to look at post-formation events to reach a just outcome in individual cases. But because a formation doctrine cannot logically look at such events, it is also a model of inconsistency.

"[W]e have tried to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement]."¹

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I. INTRODUCTION

The Restatement (Second) of Contracts ("Second Restatement"), consistent with established law,² states as a black letter rule that the

² See RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932) ("An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain."); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 95, at 143 (One Vol. Ed. 1952) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract."); E. ALLAN FARNSWORTH, CONTRACTS 108 (4th ed. 2004) (stating that to have a contract, an agreement must be definite enough to be enforceable); JEFFREY FERRIELL, UNDERSTANDING CONTRACTS § 5.11, at 289 (2d ed. 2009) ("[T]he terms of an agreement must be reasonably definite in order for an agreement to be enforced. If the terms are so indefinite that the court would find it impossible to detect a breach, or, even if a breach could be identified, to frame a remedy, no contract can be

formation of a contract³ requires that a bargain's terms be "reasonably certain."⁴ "If this minimum standard of certainty is not met, there is no contract at all."⁵

The Second Restatement seeks to make this vague standard⁶ clearer⁷ by providing the following test, which, though not part of the Restatement (First) of Contracts ("First Restatement"),⁸ was modeled after a Uniform Commercial Code ("U.C.C.") provision:⁹ "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."¹⁰ The Second Restatement then provides comments and illustrations to help explain the test.¹¹

But if the Second Restatement's test and its supporting comments and illustrations are designed to spell out what is really meant by the reasonably

found." (footnote omitted)); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 39, at 93 (5th ed. 2011) ("It is commonly suggested that, although parties intend to form a contract, if the terms of their agreement are not sufficiently definite or reasonably certain, no contract will be said to exist."); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.9, at 43 (6th ed. 2009) ("[E]ven if the parties intend to contract, if the content of their agreement is unduly uncertain no contract is formed.").

³ Although the Second Restatement defines a contract as *any* legally enforceable promise, see RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."), including one enforceable as a result of the promisee's reliance, *id.* § 90(1), this Article uses the term *contract* to refer only to a legally enforceable bargain. See BLACK'S LAW DICTIONARY 394 (revised 4th ed. 1968) (defining *contract* as "[a] promissory agreement between two or more persons that creates, modifies, or destroys a legal relation[]" and "[a]n agreement, upon sufficient consideration, to do or not to do a particular thing." (emphases added)).

⁴ RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

⁵ *Id.* § 362 cmt. a.

⁶ See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976) (recognizing that the U.C.C.'s test for reasonably certain terms, which is the model for the Second Restatement's test, is a standard, not a rule).

⁷ See AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[W]e have tried to be a little more helpful in spelling out what is meant by that [standard].") (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain).

⁸ See Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 308 (1964) (noting that the test provided for the reasonably certain terms requirement is a new standard for the Second Restatement).

⁹ See *id.* (noting that the new standard follows the U.C.C.).

¹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981); see also Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1643 (2003) ("A contract . . . must be sufficiently complete such that a court is able to determine the fact of breach and provide an appropriate remedy.").

¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. & illus. (1981).

certain terms requirement,¹² they fall short of the mark. Despite the good intentions of the American Law Institute (“ALI”),¹³ the test and its supporting comments and illustrations result in more confusion than clarity.

The confusion stems from the ALI sending contradictory signals as to whether a court should assess indefiniteness as of the time the bargain was formed (and thus not consider post-formation events) or at the time of the lawsuit (and thus consider such events). These inconsistent signals make the answers to two more specific questions unclear. First, if only the plaintiff’s promise is too indefinite to enforce does this automatically mean that no contract was formed (the position taken in the First Restatement),¹⁴ or is the defendant’s sufficiently definite promise still enforceable under a contract theory as long as the plaintiff’s promise is not relevant to the dispute? Second, what is an “appropriate” remedy under the Second Restatement’s test? Specifically, can a remedy be appropriate only if it protects a party’s expectation interest, or can a remedy be appropriate if the plaintiff seeks something less, such as reliance damages?¹⁵

The significance of the answers to these questions can be illustrated with the following two hypotheticals:

A and *B* enter into a bargain under which *A*, an elderly woman, promises to *B*, a caregiver, the following: to pay *B* a specified amount of money; to provide room and board to *B* while *B* cares for *A*; and to reimburse *B* for the reasonable expenses incurred by *B* in caring for *A*. In exchange, *B* promises to “take care of” *A* for the next six months. The parties do not discuss what “take care of” means, and there is no relevant evidence to determine its meaning other than the express language used. Assume *B*’s promise is *not*

¹² See *supra* note 7.

¹³ See Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 150 (1969) (stating that the Restatements are “a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law”). Professor Wechsler was the ALI director from 1963 to 1984. Norman I. Silber, *Wechsler, Herbert*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 577, 578 (Roger K. Newman ed., 2009). The ALI promulgated and approved the Second Restatement of *Contracts*. RESTATEMENT (SECOND) OF CONTRACTS Foreword (1981) (foreword written by Herbert Wechsler).

¹⁴ See RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932) (“An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by *each party* are reasonably certain.” (emphasis added)).

¹⁵ The promisee’s expectation interest is “his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed” RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981). The promisee’s reliance interest is “his ‘interest’ in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made” *Id.* § 344(b); see generally Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 53-56 (1936) (explaining the distinction between expectation interest and reliance interest).

reasonably certain under the Second Restatement's test,¹⁶ but that *A*'s promises are sufficiently definite. Before the time *B* is to begin performing, *A* repudiates the bargain, without justification, for a reason other than the vagueness of *B*'s promise.¹⁷ *B* sues *A* for breach of contract and seeks expectation damages, not specific performance. Assume the amount of cost or other loss avoided by *B* from not having to perform can be determined to a reasonable certainty primarily because *A* was going to provide room and board to *B* and reimburse *B* for *B*'s reasonable expenses. *A* admits repudiating without justification, but defends on the ground that *B*'s promise to "take care of" *A* is vague, and, thus, no contract was formed due to the bargain lacking reasonably certain terms. *B* maintains that whether *B*'s promise is too vague is irrelevant because all the court must do is determine whether *A* breached (or repudiated) *A*'s promise and give an appropriate remedy to *B*, and *A*'s promise is sufficiently certain to do both of these things.¹⁸

If the court requires that both parties' promises be sufficiently definite, *A*'s defense will succeed and the court will conclude that no contract was formed.¹⁹ If *B* hopes to enforce the promise, then *B* will have to establish the elements of promissory estoppel.²⁰ If the court requires that only the defendant's promise be sufficiently definite, then *A*'s defense will fail and the court will find *A* liable for breach of contract.

Consider the next hypothetical, assuming that *A* and *B* entered into the same bargain as in the prior hypothetical:

After entering into the bargain, *A* expends money remodeling a portion of her house so that she can provide suitable living quarters for *B*. *B* was aware, at the time the parties entered into the bargain, that *A* would have to incur these expenses. Before *B* is to begin performance, but after *A* makes the expenditures, *B* repudiates the bargain, without justification, for a reason other than the vagueness of *B*'s promise. *A* sues *B* for breach of contract and seeks reliance damages, not expectation damages or specific performance. *B* admits repudiating without justification, but defends on the

¹⁶ See *Dombrowski v. Somers*, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase "take care of" was too vague to be enforced). But see *Brackenbury v. Hodgkin*, 102 A. 106, 107-08 (Me. 1917) (enforcing an agreement to maintain and care for one of the parties).

¹⁷ These two hypotheticals do not require that a party repudiate. Rather than repudiate, the party whose performance is due first could fail to perform when performance is due. See also RESTATEMENT (SECOND) OF CONTRACTS § 253 (1981).

¹⁸ Hypothetical and explanations provided by the author.

¹⁹ See *Dombrowski*, 362 N.E.2d at 258 (holding that the phrase "take care of" was too vague to be enforced).

²⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (setting forth the elements of promissory estoppel).

ground that “take care of” is vague and thus no contract was formed due to the bargain lacking reasonably certain terms. *A* maintains that whether *B*’s promise is too vague is irrelevant because all the court has to do is determine whether *B* breached (or repudiated) *B*’s promise (which *B* clearly did, irrespective of its vagueness), and although *B*’s promise might be too indefinite to protect *A*’s expectation interest, *A* is seeking only reliance damages.²¹

If the court considers an appropriate remedy to be limited to an award protecting the plaintiff’s expectation interest, and assuming the court concludes *B*’s promise is too indefinite to determine to a reasonable certainty the position *A* would have been in had *B* performed as promised, *B*’s defense will succeed, and the court will conclude that no contract was formed. If *A* hopes to enforce the promise, then *A* will have to establish the elements of promissory estoppel.²² If the court considers an appropriate remedy to be an award protecting the plaintiff’s reliance interest, then *B*’s defense will fail and the court will find *B* liable for breach of contract and award reliance damages to *A*.

The Second Restatement’s answers to these hypotheticals depend on when the court is to assess a bargain’s indefiniteness. If the test directs courts to assess indefiniteness as of the time of the bargain’s formation (and thus to not consider post-formation events), then both parties’ promises must be sufficiently definite because at the time of formation it would not be known which party will breach. Also, only an award protecting each party’s expectation interest could be considered an “appropriate” remedy because at the time of formation neither party will have relied upon the bargain.

If the test directs courts to assess indefiniteness at the time of the lawsuit (and thus consider post-formation events), then it would not be a requirement that the plaintiff’s promise be sufficiently definite because the plaintiff’s promise might not be relevant to determining whether the defendant breached or to giving the plaintiff a remedy. Also, an award protecting the plaintiff’s reliance interest might be considered an “appropriate” remedy if the plaintiff relied upon the bargain and is seeking such a remedy. Thus, without knowing whether under the Second Restatement’s test the court is to assess indefiniteness as of the time of the bargain’s formation or at the time of the lawsuit, an answer to these two hypotheticals cannot be provided.

An answer to this temporal question will not only provide answers to these more specific questions, but will help identify the underlying policies

²¹ Hypothetical and explanations provided by the author.

²² See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

served by the Second Restatement's test. If the test directs courts to assess indefiniteness as of the time of the bargain's formation, it views the reasonably certain terms requirement as a so-called legal formality—a requirement that a bargain be in a particular form to be a contract and which at times operates contrary to the parties' intentions.²³ But if it directs courts to assess indefiniteness at the time of the lawsuit, the test might be viewed as nothing more than a restatement of other doctrines designed to enable a court to resolve the dispute before it—such as the requirement that the plaintiff prove by a preponderance of the evidence that the defendant breached the contract²⁴—as well as to establish any requirements for the particular remedy being sought.²⁵

The ALI's contradictory signals on the temporal issue make it unclear, however, whether the requirement has just a “formal” aspect or just a “practical” aspect, or perhaps a bit of each. In other words, though it is well known that the Second Restatement sought to relax the traditional certainty requirement,²⁶ it is unclear whether the ALI intended to simply minimize it or to abolish it.

The answers to these questions are important because if the reasonably certain terms requirement has a formal aspect, more bargains will fail to be contracts than if it has just a practical aspect.²⁷ And if more bargains fail to

²³ See Kennedy, *supra* note 6, at 1691-92 (discussing legal formalities and noting that “they operate through the contradiction of private intentions” and that “the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored”); *id.* at 1692, 1698 (referring to the “sanction of nullity”); Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 41 n.22 (1974) (“[T]he term ‘form’ or ‘formality’ means any manner of expressing or memorializing an agreement other than oral or tacit non-ritual expression.”); Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1743 (2008) (“A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.”).

²⁴ See *Pisani v. Westchester Cnty. Health Care Corp.*, 424 F. Supp. 2d 710, 719 (S.D.N.Y. 2006) (stating that the plaintiff in a breach of contract action has the burden of proving by a preponderance of the evidence that the defendant breached the contract).

²⁵ See *Lands Council v. Packard*, No. CV05-210-N-EJL, 2005 WL 1353899, at *8 (D. Idaho June 3, 2005) (“The burden is on Plaintiffs to establish that the remedy requested is appropriate.”). Of course, the rules applicable to whether a particular remedy will be granted might include a legal formality, but that would not make the general rule requiring the plaintiff to establish the appropriateness of the requested remedy itself a legal formality.

²⁶ See Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 403 n.129 (1986) (recognizing that the Second Restatement “relaxed the traditional certainty requirement to provide for ‘reasonable’ certainty”).

²⁷ Of course, if parties are sufficiently aware of the requirement's status as a legal formality, more bargains might be saved due to parties setting forth their bargains in greater

be contracts because of indefiniteness, more promisees will have to proceed under an alternative theory of enforcement, primarily promissory estoppel,²⁸ a theory under which it is usually more difficult for promisees to prevail.²⁹

As will be shown, though the Second Restatement's treatment of the reasonably certain terms requirement is not a model of clarity, the best reading of it is that courts should assess definiteness at the time of the lawsuit (a practical aspect), but that the test also retains a formal aspect. With respect to a bargain's terms having to provide a basis for determining the existence of a breach, they are sufficiently definite as long as they enable a court to determine a breach in the dispute before it.³⁰ Thus, this portion of the test serves a practical purpose, and the plaintiff's promise being sufficiently definite is, therefore, not a requirement as long as it is not relevant to resolving the dispute. An "appropriate" remedy, however, is only one that protects the plaintiff's expectation interest (i.e., full enforcement of the defendant's promise) even if the plaintiff is seeking a

detail, thereby saving some bargains that would otherwise have failed under the requirement even if it were not a legal formality.

²⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (setting forth the elements of promissory estoppel). If the promisee conferred a benefit upon the promisor, the promisee could sue for restitution instead of seeking to enforce the promise. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31(1) (2011) ("A person who renders performance under an agreement that cannot be enforced against the recipient by reason of . . . indefiniteness . . . has a claim in restitution against the recipient as necessary to prevent unjust enrichment."); *id.* cmt. d ("If a contract cannot be enforced because the terms specified by the parties fail to yield 'a reasonably certain basis for giving an appropriate remedy' via damages or specific performance (U.C.C. § 2-204(3)), a performing party is entitled to restitution of a prepaid price, or to the value of a contractual performance for which the performer has not received the promised equivalent."); PERILLO, *supra* note 2, § 2.9, at 44 ("If . . . the agreement is fatally indefinite, any payments made for which a return performance has not been rendered must be disgorged and the value of any uncompensated performance can be recovered.").

²⁹ See Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580 (1998) (reporting a low success rate for promissory estoppel claims). *But see* Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 542 (2002) (disputing Hillman's conclusion and finding that "promissory estoppel claims succeed at significant rates when demonstrably weak claims are subtracted"). Even if "promissory estoppel claims succeed at significant rates when demonstrably weak claims are subtracted," *id.*, such a claim is still more difficult to establish than a claim for breach of contract because the promisee must establish reliance on the promise; that the reliance was sufficiently foreseeable; and that injustice would result if the promise was not enforced. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (listing elements of claim for promissory estoppel).

³⁰ See *infra* Part V.A.

remedy that would only partially enforce the defendant's promise (e.g., reliance damages).

Thus, the Second Restatement's test has both a practical and a formal aspect. In this respect, it is a model of neoclassical contract law,³¹ retaining some of classical contract law's focus on the moment of the bargain's formation, while at the same time encouraging courts to look at post-formation events to reach a just outcome in individual cases. But because a formation doctrine cannot logically look at such events, it is also a model of inconsistency.

Part II of this Article explains the different ways in which bargains are indefinite. Part III addresses why parties might enter into bargains with indefinite terms. Part IV provides an overview of the reasonably certain terms requirement, with a focus on the Second Restatement. Part V discusses the uncertainty in the Second Restatement's test for reasonably certain terms and attempts to remove the uncertainty. Part VI explains how the Second Restatement's test, as interpreted in Part V, is a model of neoclassical contract law, but also a model of inconsistency. The last part is a brief conclusion. Parts II, III, and IV are descriptive, and those familiar with the topics covered in those Parts might wish to proceed directly to Part V. For those unfamiliar with the topics, Parts II, III, and IV provide background information that will be helpful when reading the subsequent parts.

II. WAYS IN WHICH BARGAINS ARE INDEFINITE

An indefinite bargain is one in which the parties have failed to expressly or impliedly agree upon a matter within the bargain's scope.³² There are two principal ways in which a bargain might be indefinite.³³ First, the bargain might have a gap, which is when the bargain is incomplete because of an omitted term.³⁴ Second, the parties might have a misunderstanding

³¹ See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738 (2000) (referring to the law of the U.C.C. and the Second Restatement as neoclassical contract law "because it addresses the shortcomings of classical law rather than offering a wholly different conception of the law").

³² See PERILLO, *supra* note 2, § 2.9, at 43.

³³ *Id.* § 2.9, at 44-45. Professor Perillo identifies three categories (gaps, misunderstandings, and agreements to agree), but, as discussed below, an agreement to agree is simply a type of gap. *Id.*

³⁴ *Id.*

about what each party believes has been agreed upon.³⁵ Each type of indefiniteness is discussed in more detail below.³⁶

³⁵ *Id.* at 44.

³⁶ A bargain's incompleteness is sometimes divided into two other categories—patent (or intrinsic) ambiguities and latent (or extrinsic) ambiguities. A patent ambiguity is “[a]n ambiguity that clearly appears on the face of a document, arising from the language itself” BLACK’S LAW DICTIONARY 93 (9th ed. 2009); *see also* PERILLO, *supra* note 2, § 3.10, at 131 n.23 (“A patent ambiguity is apparent on the face of the document”). A latent ambiguity is “[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document’s terms are applied or executed.” BLACK’S LAW DICTIONARY, *supra*, at 93; *see also* PERILLO, *supra* note 2, § 3.10, at 131 n.23 (“[A] latent ambiguity exists when the term appears clear but extrinsic information makes it ambiguous.”).

In the categories identified in this Article, patent ambiguities generally include ambiguities of syntax, conflicting language, and gaps regarding matters essential to performance. *See* BLACK’S LAW DICTIONARY, *supra*, at 93 (providing as an example of a patent ambiguity when two different prices are expressed in a written agreement); *see* W. Way Builders, Inc. v. United States, 85 Fed. Cl. 1, 15 (2008) (stating that patent ambiguities include obvious drafting errors and gaps). Latent ambiguities generally include vague words, ambiguities of term, and gaps regarding matters that might not be essential to performance. *See* Williams v. Idaho Potato Starch Co., 245 P.2d 1045, 1048-49 (Idaho 1952) (holding that latent ambiguity existed when parties’ agreement referred to “pump” and the term could refer to different types of pumps); BLACK’S LAW DICTIONARY, *supra*, at 93 (providing as an example of a latent ambiguity when a written agreement for the sale of goods states that the goods will arrive on the ship *Peerless*, but two ships have that name); PERILLO, *supra* note 2, § 3.10, at 131 n.23 (referring to the case of the two ships named *Peerless* as “[t]he best known illustration of a latent ambiguity”); Riera v. Riera, 86 So. 3d 1163, 1167 (Fla. Dist. Ct. App. 2012) (“‘[I]f a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document.’ . . . This insufficiency is . . . considered a latent ambiguity” (quoting *Hunt v. First Nat’l Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. Dist. Ct. App. 1980))).

In some jurisdictions, the distinction is relevant to whether extrinsic evidence will be admitted to give meaning to an ambiguous word or phrase; extrinsic evidence is admitted to explain a latent ambiguity but not a patent ambiguity. *See* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:43, at 1197-98 (4th ed. 2012) (“[T]he distinction remains significant in a number of jurisdictions, the court[’]s ruling that while parol evidence is admissible to explain a latent ambiguity, it may not be admitted when the ambiguity is patent.”). “According to this view, a patent ambiguity must be removed by construction according to settled legal principles, and not by extrinsic evidence.” R.T.K., Annotation, *Rule that Latent Ambiguities may be Explained by Parol Evidence but that Patent Ambiguities may not*, 102 A.L.R. 287 (1936). But even for those jurisdictions that consider the distinction relevant, the practical effect might not be as significant as commonly thought. *See id.* (“Even a casual examination of the cases, however, discloses that such a statement of the rule is too broad. According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of the parties and all the relevant facts and circumstances surrounding them at the time of the execution of the instrument, for the purpose of explaining or

As the discussion proceeds, it is important to recognize the difference between indefiniteness *in fact* and indefiniteness *in law*. Indefiniteness in fact means there was a gap or a misunderstanding when considering the parties' states of mind.³⁷ But, as will be discussed below, as a result of legal rules that will apply in such situations (including so-called "gap fillers"³⁸ and the so-called "objective theory of contract"³⁹), the law might not consider the bargain indefinite even though there was indefiniteness in fact. In these situations, it can be said that even though there is indefiniteness in fact, there is not indefiniteness in law.

Also, it is possible to have a combination of the two forms of indefiniteness (a gap and a misunderstanding).⁴⁰ One party might believe the parties have impliedly reached an agreement on a particular issue, while the other party never gave the issue any thought. An example might be a usage of trade and a bargain between a well-established business and a new business. The well-established business might believe the usage of trade is impliedly part of the bargain while the new business, unaware of the usage of trade, never gave it any thought.

Further, it will sometimes be difficult to distinguish between a gap and a misunderstanding. The parties might reduce their bargain to a written document that includes a provision covering a particular topic, but the parties might not have given the particular provision any thought or have even been aware of the provision (this might be particularly true in the case of a form contract).⁴¹ Or the parties might have given the provision thought but not considered how the provision would apply to a particular situation that later arises.

resolving even a patent ambiguity.").

³⁷ Though it has been said that even "the devil himself knoweth not the mind of men," *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting), the situation referred to here is one in which the fact finder in a lawsuit concludes (or assumes) that the parties to the bargain had such a misunderstanding. Fact finders routinely make findings regarding a person's state of mind, particularly in criminal law cases and tort cases.

³⁸ A *gap-filler* is "[a] rule that supplies a contractual term that the parties failed to include in the contract." BLACK'S LAW DICTIONARY, *supra* note 36, at 749.

³⁹ The "objective theory of contract" is "[t]he doctrine that a contract is not an agreement in the sense of a subjective meeting of the minds but is instead a series of external acts giving the objective semblance of agreement." *Id.* at 1178.

⁴⁰ See, e.g., E. Allan Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 873 (1968) ("[S]ince at least two parties will be involved, and several persons may act on behalf of a single party, there may be several different reasons for the omission.").

⁴¹ See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 12 (2013) (explaining why consumers do not read boilerplate in form contracts); Perillo, *supra* note 23, at 60 ("The utilization of standardized printed contract forms by large industrial and commercial companies has resulted in a situation in which contracting parties are frequently uninformed as to the content of the printed form.").

A. Gaps (“Omitted Terms”)

A gap exists in a bargain when the parties, at the time the bargain is formed, do not expressly or impliedly address a particular matter within the bargain’s scope.⁴² Gaps tend to be more numerous in bargains formed through conduct (so-called “implied-in-fact contracts”);⁴³ the lack of a written document makes it likely the parties have not agreed, even implicitly, about numerous topics. But gaps also exist in express agreements (even express agreements that are evidenced by a written document).⁴⁴ Although often unintended,⁴⁵ gaps can even be intentional. For example, an intentional gap includes the so-called “agreement to agree,” which is when the parties to a bargain agree to work out the details of a particular matter within the bargain’s scope at a later time.⁴⁶ In such a situation, a gap exists at the bargain’s formation regarding the term to be agreed upon.⁴⁷

1. Types of gaps

Gaps are of two types. The first type—more significant but less common than the second type—is when the parties do not address at the time of the bargain’s formation something that must be known for one or both of the parties to perform.⁴⁸ Such a term may be called an “essential term.” The

⁴² Even if the bargain’s language appears to cover a particular matter, there is a gap if “neither party intended the language to cover the case.” Farnsworth, *supra* note 40, at 875.

⁴³ See BLACK’S LAW DICTIONARY, *supra* note 36, at 370 (defining an *implied-in-fact contract* as “[a] contract that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances”).

⁴⁴ See *id.* at 369 (defining an *express contract* as “[a] contract whose terms the parties have explicitly set out”).

⁴⁵ See *infra* Part III, for a discussion of why parties enter into bargains with indefinite terms.

⁴⁶ See BLACK’S LAW DICTIONARY, *supra* note 36, at 78 (defining an *agreement to agree* as an agreement that “leav[es] some details to be worked out by the parties”). For example, an agreement for the lease of an apartment might include a provision giving the tenant an option to extend the lease term upon a rate to be agreed upon by the parties.

⁴⁷ PERILLO, *supra* note 2, § 2.9, at 53.

⁴⁸ These gaps are less common than the first type because parties tend to pay more attention to the requirements of performance than other matters when forming a bargain. See Farnsworth, *supra* note 40, at 870-71 (“The most likely expectations to be selected for reduction to contract language are those that describe the performance of each party in the usual course of events. [Professor Stewart] Macaulay concluded that ‘businessmen pay more attention to describing the performances in an exchange than to planning for contingencies or defective performances or to obtaining legal enforceability of their contracts.’” (quoting Stewart Macaulay, *Non-Contractual Relations in Business: A*

second type—less significant but more common than the first type—is when the parties do not address at the time of the bargain's formation what the consequences will be if a particular fact exists (or does not exist) or if a particular event occurs (or does not occur).⁴⁹ Such a term may be called a “non-essential term.”

Examples of a gap regarding an essential term include a failure to address the services, land, or goods (or the amount of goods) to be exchanged for a promised price;⁵⁰ the price for the promised services, land, or goods;⁵¹ or the time, place, or manner for performance (such as the time or place for delivery of goods).⁵² These gaps are more serious than the second type because, as a result of the gap, it is certain that a party will not know how to perform at least part of his or her end of the bargain. These gaps will be apparent at the time the bargain is formed.⁵³

The second type of gap (a gap regarding a non-essential term) tends to involve a failure to qualify a party's duty to perform if an unknown fact exists at the time of the bargain's formation or a particular unanticipated event occurs after formation. Examples include the following: a bargain to buy and sell a cow believed to be infertile that does not address what will happen if the cow is in fact fertile;⁵⁴ a bargain for the use of a music hall that does not address what will happen if the hall burns down before the

Preliminary Study, 28 AM. SOC. REV. 55, 60 (1963))).

⁴⁹ See Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 533 (1998) (stating that a gap exists when “the terms are silent with respect to a contingency”).

⁵⁰ See RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. b (1932) (noting that “[p]romises may be indefinite . . . in the work or things to be given in exchange for the promise”); FARNSWORTH, *supra* note 2, at 201 (“Simple examples of agreements that do not meet the requirement are those in which the description of the subject matter is inadequate, as where the description or quantity of goods to be sold is lacking.”); 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 37, at 56-57 (1920) (“A lack of definiteness in an agreement may concern the . . . work to be done, [or the] property to be transferred . . .”).

⁵¹ See WILLISTON, *supra* note 50, § 37, at 56-57 (“A lack of definiteness in an agreement may concern . . . the price to be paid . . .”).

⁵² See RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (1981) (“Valid contracts are often made which do not specify the time for performance.”); RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. b (1932) (noting that “[p]romises may be indefinite in time or in place . . .”); WILLISTON, *supra* note 50, § 37, at 56-57 (“A lack of definiteness in an agreement may concern the time of performance . . .”).

⁵³ See Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 796 (1982) (“Some failures of agreement are apparent from the time the parties conclude the bargain. For example, the bargain may say nothing about price or may explicitly leave the price ‘to be agreed’ upon by the parties.”).

⁵⁴ *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), *overruled in part by* *Lenawee Cnty. Bd. of Health v. Messerly*, 331 N.W.2d 203, 208 (Mich. 1982).

date for its use;⁵⁵ a bargain to use an apartment to watch the king's coronation procession that does not address what will happen if the procession is cancelled because the king falls ill;⁵⁶ a bargain that fails to specify whether the parties are required to correct an obvious mistake by the other party regarding the bargain's terms;⁵⁷ and a bargain that does not specify the remedy for a breach,⁵⁸ including whether the non-breaching party will be excused from performing.⁵⁹

All bargains are incomplete in this second (non-essential term) sense because the future events that might have some impact on the parties' bargain are limitless, and foresight is imperfect.⁶⁰ This type of gap will not, however, necessarily have an effect on the parties' abilities to perform the bargain because the facts are probably as believed, and the unanticipated future event that is not addressed will likely never occur. The cow is probably barren (as believed); the music hall will probably not burn down before the concert; the king will probably not fall ill; the parties will probably not make a mistake about the bargain's terms; and the bargain will probably not be breached. Often, it will not even be apparent at the time the bargain is formed that there is a gap of this type.⁶¹ The older view was that in these situations there was not even a gap, based on the notion that a duty not expressly qualified is unqualified.⁶²

2. *Situations in which it appears the bargain has a particular gap, but it*

⁵⁵ Taylor v. Caldwell, (1863) 122 Eng. Rep. 309 (K.B.).

⁵⁶ Krell v. Henry, [1903] 2 K.B. 740 (appeal taken from Eng.).

⁵⁷ Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387 (N.J. 2005).

⁵⁸ See Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1386 (1992) ("[A]lthough it is relatively easy for contracting parties to specify the performances they want, it is often extremely difficult to specify remedies in advance of knowing the nature of the breach and the circumstances of the world at the time of the breach.").

⁵⁹ Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921).

⁶⁰ Scott, *supra* note 10, at 1641 ("All contracts are incomplete. There are infinite states of the world and the capacities of contracting parties to condition their future performance on each possible state are finite."); see also E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 956 (1967) ("The parties may simply not have foreseen the problem at the time of contracting."); FERRIELL, *supra* note 2, § 5.11, at 289 ("Even in large transactions, with both parties adequately represented, the parties and their lawyers might fail to successfully anticipate every matter upon which an agreement might be useful.").

⁶¹ See Speidel, *supra* note 53, at 796 ("[Some failures of agreement] become apparent as performance unfolds, new information is discovered, or circumstances change.").

⁶² See GRANT GILMORE, THE DEATH OF CONTRACT 49-53 (Ronald K. L. Collins ed., Ohio State Univ. Press 1995) (1974) (describing the idea of absolute contractual liability in England and in the United States).

does not (either in fact or in law)

There are three situations in which it might appear that a bargain has a particular gap, but it does not (either in fact or in law): a written document has a particular gap but the parties' bargain does not; the parties' express bargain has a particular gap but the gap is filled with an implied-in-fact term; and the parties' bargain in fact (including express and implied-in-fact terms) has a particular gap but the gap is filled by the court with an implied-in-law term. Each of these situations is discussed below.

a. Gap in written document only

First, the parties might make an effort to reduce the bargain's terms to a written document, yet fail to include in the document all of the terms that are part of the bargain.⁶³ As long as such terms are not excluded from their bargain under the parol evidence rule,⁶⁴ those terms are part of it and their exclusion from the written document would not mean the bargain has gaps regarding those matters; it would mean only that the written document is an incomplete expression of the bargain, a so-called "partially integrated agreement."⁶⁵ The term "agreement" (which is part of the definition of "bargain")⁶⁶ is not limited to the express terms in a written document; rather, it extends to all of the terms to which the parties manifested assent.⁶⁷ Thus, when referring to a bargain having a particular gap, one is referring to the parties' entire bargain, and not simply a written document providing evidence of the bargain.

⁶³ CORBIN, *supra* note 2, § 95, at 145.

⁶⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 213(1)-(2) (1981) (providing that "[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them" and "[a] binding completely integrated agreement discharges prior agreements to the extent that they are within its scope").

⁶⁵ See *id.* § 210(2). When the parties reduce their agreement to a written document but mistakenly omit a term agreed upon (a so-called mistake as to expression or mistake in integration), see JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 421 (10th ed. 2013) (referring to a drafting error as a "mistake in expression" or "mistake in integration"), "the court, at the request of a party, may reform the writing to express the agreement actually reached." FARNSWORTH, *supra* note 2, at 430-31; see also RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981). Reformation is also available if the parties mistakenly included a term not agreed upon or incorrectly stated a particular term. See FARNSWORTH, *supra* note 2, at 431.

⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

⁶⁷ See *id.* ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

b. Implied-in-fact terms

Second, the terms of a bargain include those that are implied in fact.⁶⁸ An implied-in-fact term is one upon which the parties impliedly manifested assent, as opposed to expressly manifesting assent, through the use of oral or written words.⁶⁹ Such terms are inferred by logical deduction from express terms⁷⁰ and from the surrounding circumstances,⁷¹ including “standard terms, trade or local usages, a course of dealing between the parties prior to the agreement, and a course of performance after it.”⁷² Similarly, the Second Restatement provides that “the word ‘promise’ is commonly and quite properly . . . used to refer to the complex of human relations which results from the promisor’s words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance.”⁷³ For example, in the celebrated case of *Wood v. Lucy, Lady Duff-Gordon*, the court, in an opinion by Judge Benjamin Cardozo, found that an agreement providing one party with the exclusive privilege to market the fashion designs of the other included an implied promise by the former to the latter to make reasonable efforts to market the designs.⁷⁴

A bargain’s express silence on a topic might mean, however, that the parties manifested an intention that the existence (or non-existence) of a particular fact or the occurrence (or non-occurrence) of a particular event would not have an effect on the parties’ legal rights and duties as expressed in the bargain. Because “contracts generally are a device for allocating risks,”⁷⁵ the issue will be whether a reasonable person would believe the

⁶⁸ See *id.* § 4 (“A promise . . . may be inferred wholly or partly from conduct.”); *id.* § 33 cmt. a (“Terms may be supplied by factual implication . . .”). It was not always so. See Farnsworth, *supra* note 40, at 862-63 (“Courts in the seventeenth century, with a literalism characteristic of their time, sought to confine themselves to the bare framework provided by the parties through the letter of their contract language.”).

⁶⁹ See Farnsworth, *supra* note 40, at 865 (stating that an implied-in-fact term is one that “was ‘intended’ by the parties and the intention [is] reasonably inferable from conduct other than words . . .”).

⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. c (1981).

⁷¹ See PERILLO, *supra* note 2, § 2.9, at 46-47.

⁷² *Id.* at 47; see also Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 836 (1964) (noting that under the doctrine of “practical construction,” the parties’ “conduct during the course of performance may support inferences . . . as to their intentions with respect to gaps and omissions in the contract”).

⁷³ RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. a (1981).

⁷⁴ *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917); see also *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 37 (8th Cir. 1975) (holding that a buyer impliedly promised to purchase all of its propane gas requirements from the seller).

⁷⁵ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 59

parties' silence on the topic meant they manifested an intention that the bargain's expressly stated rights and duties be left undisturbed by the fact or event.

The more likely it is that the particular fact exists or that the particular event will occur, the more likely a reasonable person would believe the parties impliedly manifested an intention that their expressly stated rights and duties be left undisturbed, and vice versa. For example, "[i]n a contract for future delivery [of goods] the seller takes on himself the risk that the goods will rise in price or that for some other reason it will become more burdensome for him to perform, and the buyer assumes reciprocal risks."⁷⁶ In this sense, the parties' silence regarding the consequences of the fact existing or the event occurring is no gap at all. But whether there has been an implied manifestation of an intention that a particular risk has been assumed is always a matter of interpreting the bargain, taking into account, along with any other relevant evidence, the bargain's language, whether the event was discussed during negotiations, the bargain's context, and how foreseeable the event was.⁷⁷

c. Implied-in-law terms

Third, even when there is a gap "in fact," the omitted term, if essential to a determination of the parties' rights and duties, is supplied by the court.⁷⁸ These terms are called implied-in-law terms,⁷⁹ constructive terms,⁸⁰ or

(1981).

⁷⁶ *Id.*

⁷⁷ For example, in the well-known case of *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), "the court found that the seller [of a cow] had not transferred nor had the buyer paid for the chance that [the] apparently barren prize cow was in fact pregnant." FRIED, *supra* note 75, at 59. But see *Wood v. Boynton*, 25 N.W. 42, 45 (Wis. 1885) (holding that the seller of a stone that the parties thought was probably a topaz assumed the risk that it was an uncut diamond).

⁷⁸ RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); see also *id.* § 33 cmt. a ("[I]n recurring situations the law often supplies a term in the absence of agreement to the contrary."); *id.* ch. 9 intro. note ("[R]ules of law must fill the gap when the parties have not provided for the situation which arises."); Farnsworth, *supra* note 40, at 864 ("Gradually, courts began to go beyond the parties' actual expectations as well as their contract language, and came to read into the contract what they themselves thought was fair or just, on the pretext that it was the parties' 'intention.'"); *id.* at 866 ("It was admitted that the agreement of the parties was not an exclusive source, but only one to be deferred to when it could be established.").

⁷⁹ See BLACK'S LAW DICTIONARY, *supra* note 36, at 823 (defining "implied in law" as "[i]mposed by operation of law and not because of any inferences that can be drawn from the facts of the case").

⁸⁰ Farnsworth, *supra* note 40, at 865.

default rules.⁸¹ As stated by Professor E. Allan Farnsworth, “A court, having determined that there is a contract, cannot refuse to decide a case on the ground that the parties failed to provide for the situation.”⁸² Courts may even supply a term when the gap is the result of a so-called “agreement to agree,” which is when the parties agree to work out the details of a particular matter at some point after the bargain is formed.⁸³ Although “[t]he traditional rule is that an agreement to agree as to a material term prevents the formation of a contract[,]”⁸⁴ under both the Second Restatement and the U.C.C., courts are to fill these gaps as well.⁸⁵ Professor Edwin W. Patterson aptly called gap-filling terms “aids for the ailing agreement.”⁸⁶

The court will supply a term as directed by a particular statute (such as the U.C.C.) or, in the absence of a statutory directive, a term that is “reasonable in the circumstances.”⁸⁷ In the absence of a statutory directive,

⁸¹ See BLACK’S LAW DICTIONARY, *supra* note 36, at 1446 (defining “default rule” as “[a] legal principle that fills a gap in a contract in the absence of an applicable express provision but remains subject to a contrary agreement”). See also RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981) (referring to such a term as a “term of a contract” as opposed to a “term of a promise or agreement”—the latter phrase referring to express and implied-in-fact terms).

⁸² Farnsworth, *supra* note 40, at 860 n.2; see also ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 67 (1st ed. 2004) (“Despite some decisions to the contrary, courts should make every effort to fill gaps and enforce agreements when the parties intended to contract.”); *id.* at 253 (“[C]ourts are inclined to fill gaps for the parties, rather than give up on the contract.”); *Rego v. Decker*, 482 P.2d 834, 837 (Alaska 1971) (“[C]ourts should fill gaps in contracts to ensure fairness where the reasonable expectations of the parties are fairly clear. The parties to a contract often cannot negotiate and draft solutions to all the problems which may arise.”).

⁸³ See BLACK’S LAW DICTIONARY, *supra* note 36, at 78 (defining “agreement to agree” as an agreement “leaving some details to be worked out by the parties”).

⁸⁴ PERILLO, *supra* note 2, § 2.9, at 53 (emphasis omitted); see also *Walker v. Keith*, 382 S.W.2d 198, 205 (Ky. Ct. App. 1964) (refusing to enforce an agreement to agree upon the rental price of a parcel of land).

⁸⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 8 (1981) (providing that when there is an agreement to agree on price and the parties do not ultimately agree on a price, but manifest an intent to be bound, the court should supply a reasonable price term); see also U.C.C. § 2-305(1)(b) (2013).

⁸⁶ STATE OF NEW YORK, 1 REPORT OF THE LAW REVISION COMMISSION FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE 275 (William S. Hein & Co. 1998) (remark by Professor Edwin W. Patterson).

⁸⁷ RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); see also MURRAY, *supra* note 2, § 91, at 485 (“When an omitted term is supplied by a court, it is not *interpreting* the contract, i.e., it is not discovering such a term by discerning the meaning of the parties’ expression of agreement. The process is one of judicial construction, in which courts supply an omitted term which is fair and reasonable under the circumstances.” (emphasis in original) (internal citations omitted)).

there are two different ways courts will decide which term to supply. First, under the traditional approach,⁸⁸ which has been referred to as the "hypothetical model of the bargaining process,"⁸⁹ the court supplies a term that it believes the parties would have agreed to had they considered the matter when forming the bargain.⁹⁰

Second, under the Second Restatement's approach (which rejects the hypothetical model of the bargaining process)⁹¹ a term is supplied that "comports with community standards of fairness and policy."⁹² This approach considers principles and policies, such as seeking "substantial equivalence in commercial exchanges[.]" "discourag[ing] litigation by promoting certainty[.]" "plac[ing] the risk in a way that is thought desirable from the point of view of a particular market or of society in general[.]"⁹³ encouraging due care by not having a prudent party pay for the loss of a careless party, and reducing problems of administration (including having default rules that will avoid the judicial expense involved with a systematic legal inquiry).⁹⁴ An example of using policy reasons to fill in a gap (and the antithesis of the hypothetical model of the bargaining process) is the so-called "penalty default," under which the term selected is "purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts)."⁹⁵

In most cases, the distinction between the hypothetical model of the bargaining process and supplying a term that "comports with community standards of fairness and policy" is likely insignificant because courts will, one expects, probably conclude that the parties would have agreed to a term that turns out to be consistent with community standards of fairness. The

⁸⁸ Farnsworth, *supra* note 40, at 891.

⁸⁹ RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981).

⁹⁰ See PERILLO, *supra* note 2, § 2.9, at 47; Farnsworth, *supra* note 40, at 865; see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 98 (8th ed. 2011) (advocating for such an approach to gap filling based on the belief it results in efficient terms).

⁹¹ See RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) ("[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.").

⁹² *Id.*; see also *id.* § 5 cmt. b ("Much contract law consists of rules which may be varied by agreement of the parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement. They often rest, however, on considerations of public policy rather than on manifestation of the intention of the parties.").

⁹³ Farnsworth, *supra* note 40, at 878-79 (citations omitted).

⁹⁴ FRIED, *supra* note 75, at 62-63.

⁹⁵ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

distinction would be relevant, however, if the court considers policy matters when supplying a term.

An important example of an implied-in-law term is the implied covenant of good faith and fair dealing.⁹⁶ When a party engages in conduct the legal consequences of which the parties did not expressly or impliedly agree upon (i.e., conduct that was not anticipated at the time of the bargain's formation), the court will consider such conduct a breach if it is not consistent with "community standards of decency, fairness or reasonableness."⁹⁷

Courts will usually only refuse to fill a gap when the omitted term is important⁹⁸ and relates to a matter that is particularly subjective (such that it is difficult or impossible to say what would be "reasonable in the circumstances"). Examples include, "where the parties have omitted from their agreement the kind or quantity of goods or the specifications of a building contract"⁹⁹ Unfortunately, however, because "[it] cannot be said that the legal system has adopted any . . . criteria [for gap filling] as exclusive . . . it is difficult to know, without research, when the courts will or will not supply a gap-filler, and, if they will, how the gap will be filled."¹⁰⁰

The legislatures and the courts have, though, established default rules for certain recurring gaps. For example, if the parties fail to agree on a price for a service or for goods, "a court will hold that the parties intended that a reasonable price should be paid and received."¹⁰¹ Similarly, if no time is specified for performance, performance is due within "a reasonable

⁹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

⁹⁷ *Id.* cmt. a.

⁹⁸ See FARNSWORTH, *supra* note 2, at 212 ("[A] court may be more willing to supply a term if the court regards the term as relatively unimportant."). In deciding the importance of a missing term, the Second Restatement encourages courts to take into account the dispute that has arisen. See RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981) ("It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought."). Such an approach seems inconsistent with classical contract law's focus on the time of formation.

⁹⁹ PERILLO, *supra* note 2, § 2.9, at 48 (internal citations omitted).

¹⁰⁰ *Id.* § 2.9, at 47.

¹⁰¹ *Id.* See also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981); U.C.C. § 2-305 (2013). For an argument that such a term is an implied-in-law term based on the policy against unjust enrichment, at least when goods have been delivered and accepted (or services provided and accepted), and not an implied-in-fact term, see Patterson, *supra* note 72, at 835 ("Yet if goods have been delivered and accepted, the context may show that no gift was intended, as the recipient knew, and the court will construe (imply) a duty to pay the reasonable value of the goods. The policy seems to be to prevent unjust enrichment, yet the duty construed is contractual, not quasi-contractual.").

time.”¹⁰² If the parties fail to agree on a place for the delivery of goods, the place for delivery is the seller's place of business.¹⁰³ If the parties fail to agree on a time for payment for goods, payment is due when the buyer receives them.¹⁰⁴ If the parties fail to specify the consequences of a party's non-performance, the other party is entitled to suspend its own performance if the non-performance is material,¹⁰⁵ and if the non-performance is a breach, it is entitled to recover damages to protect its expectation interest.¹⁰⁶ The courts have also established default rules for situations involving a mistake of fact at the time of contract formation,¹⁰⁷ involving an unanticipated event occurring after contract formation that makes a party's performance impossible or much more difficult than expected,¹⁰⁸

¹⁰² RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981); U.C.C. § 2-309(1) (2013); PERILLO, *supra* note 2, § 2.9, at 48.

¹⁰³ U.C.C. § 2-308(a).

¹⁰⁴ *Id.* § 2-310(a).

¹⁰⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981). Under the U.C.C.'s perfect tender rule, a buyer has the privilege to suspend performance under a non-installment contract if the goods fail to conform in any respect to the contract. U.C.C. § 2-601(a).

¹⁰⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981). A party's expectation interest is “his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.” *Id.* § 344(a).

¹⁰⁷ See *id.* § 152(1) (“Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . .”); *id.* § 153 (“Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . . and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.”). Of course, if the parties have expressly or impliedly agreed about the consequences of a mistake of fact, the default rule does not apply. See *id.* § 154(a) (providing that a party bears the risk of mistake when “the risk is allocated to him by agreement of the parties”).

¹⁰⁸ See *id.* § 261 (“Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”). The fact that the default rule regarding impracticability is considered an implied-in-law term and not an implied-in-fact term is shown by the Second Restatement's Introductory Note to the relevant Second Restatement chapter. See *id.* ch. 11, intro. note (“The rationale behind the doctrine[] of impracticability . . . is sometimes said to be that there is an ‘implied term’ of the contract that such extraordinary circumstances will not occur. This Restatement rejects this analysis . . .”); see also *id.* § 204 cmt. a (indicating that the default rule regarding impracticability is an implied-in-law term). Of course, if the parties have expressly or impliedly agreed about the consequences of an event making performance impracticable, the default rule does not apply. See *id.* § 261 (noting that discharge of the duty does not occur

and involving an unanticipated event occurring after contract formation that makes one party's performance meaningless (or virtually meaningless) to the other party.¹⁰⁹

As a result of implied-in-law terms, it is unusual that a bargain will be unenforceable because of a gap. As discussed above, such a result will occur only when there is no statutory or judicially-recognized default rule to fill the gap and the gap relates to an important and particularly subjective matter, such that it would be difficult or impossible to determine what would be a reasonable term in the circumstances.¹¹⁰

Importantly, however, it should be recognized that gaps might mean that a reasonable person would conclude that the parties did not even reach an agreement (and thus did not form a bargain).¹¹¹ As the Second Restatement provides, "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."¹¹² "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement."¹¹³ And gap filling with implied-in-law terms does not occur until it is determined that the parties have manifested assent to a bargain. If, however, the parties have manifested assent to a bargain, under

under the default rule if "the language or the circumstances indicate the contrary").

¹⁰⁹ See *id.* § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."). Like the impracticability doctrine, the fact that the default rule regarding frustration of purpose is considered an implied-in-law term and not an implied-in-fact term is shown in the introductory note of chapter 11 in the Second Restatement. See *id.* ch. 11, intro. note ("The rationale behind the doctrine[] of . . . frustration is sometimes said to be that there is an 'implied term' of the contract that such extraordinary circumstances will not occur. This Restatement rejects that analysis . . ."); see also *id.* § 204 cmt. a (indicating that the default rule regarding frustration of purpose is an implied-in-law term). Of course, if the parties have expressly or impliedly agreed about the consequences of an event that substantially frustrates a party's principal purpose, the default rule does not apply. See *id.* § 265 (noting that discharge of the duty does not occur under the default rule if "the language or the circumstances indicate the contrary").

¹¹⁰ See notes 98-100 and accompanying text.

¹¹¹ See PERILLO, *supra* note 2, at 43 ("Indefiniteness in a communication is some evidence of an intent not to contract. The more terms that are omitted in an agreement the more likely it is that the parties do not intend to contract." (internal citations omitted)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. d (2011) ("A transaction resulting in an indefinite [bargain] must not be confused with a failed negotiation producing no [bargain] at all.").

¹¹² RESTATEMENT (SECOND) OF CONTRACTS § 33(3) (1981).

¹¹³ *Id.* § 33 cmt. c.

modern contract law, a gap will rarely result in the bargain not being a contract because of indefiniteness.

B. Misunderstandings

The second type of indefiniteness—a misunderstanding—occurs when the parties to a bargain have expressly or impliedly addressed a particular matter (thus, there is no gap in the sense of an omitted term), but what each party intends the agreement to mean is different from what the other party intends it to mean, or the parties disagree about how the agreement is to apply to a particular situation.¹¹⁴ In other words, the parties have attached different meanings to some of the words or conduct that formed the bargain (thus there is a gap in understanding).

1. When language causes a misunderstanding

When a misunderstanding results despite the parties' agreement to use particular words as evidence of their bargain, it is often because of the use of either vague language or ambiguous language.¹¹⁵ Each is discussed below.

a. Vague language

A vague word is one that is "best depicted as forming not a neatly bounded class but a distribution about a central norm."¹¹⁶ It describes something that can be imagined on a continuum and covers a range of possible meanings, but with the range's boundary being unclear.¹¹⁷ Thus, "[a] word that may or may not be applicable to marginal objects [or events] is vague."¹¹⁸ For example, the word "red" is vague because a person might

¹¹⁴ See BLACK'S LAW DICTIONARY, *supra* note 36, at 1093 (defining "misunderstanding" as "[a] situation in which the words or acts of two people suggest assent, but one or both of them in fact intend something different from what the words or acts express").

¹¹⁵ See Farnsworth, *supra* note 40, at 860 ("Sometimes, because of vagueness or ambiguity in the language they have used, the parties will disagree over the meaning of what they said or over how their language applies to a situation for which they have provided."); see also Farnsworth, *supra* note 60, at 952-57 (explaining vagueness and ambiguity in the context of contract disputes).

¹¹⁶ Farnsworth, *supra* note 60, at 953 (quoting W. QUINE, WORD AND OBJECT 85 (1960)); see also BLACK'S LAW DICTIONARY, *supra* note 36, at 1689 (defining "vague" as "[i]mprecise; not sharply outlined; indistinct; uncertain").

¹¹⁷ See FERRIELL, *supra* note 2, § 6.03, at 330 (noting that vague words cover "a range of possible meanings").

¹¹⁸ Farnsworth, *supra* note 60, at 953.

or might not intend her use of that word to include crimson (i.e., exactly where red starts and stops is unclear).¹¹⁹ A party might promise to “take care of” another party, but it is unclear what tasks are encompassed with the range of that phrase.¹²⁰ A party might promise to make a “prompt” shipment, but it is unclear after exactly how many days the shipment is no longer prompt.¹²¹ Or a party might promise to deliver “chickens,” but it is unclear what kind of chickens are to be delivered.¹²²

Vague words, which are more common than ambiguous words,¹²³ also include those that form a distribution about a central norm because they are based on individual value judgments. The adjective “reasonable,” which is defined as “fair, proper, or moderate under the circumstances[.]”¹²⁴ is perhaps the most obvious example, but there are others. An employer might promise to pay an employee “a *fair* share of my profits” in addition to a salary.¹²⁵ As the court noted in that case, a “fair” share was “pure conjecture” and “may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered.”¹²⁶ Or a person might promise a “generous” reward for the return of lost property.¹²⁷ Of course, whether (or the extent to which) such words are vague depends upon what they are modifying. As previously noted, gaps are often filled with terms including the adjective “reasonable,”¹²⁸ presumably because such things as a reasonable

¹¹⁹ *Id.* at 952-53.

¹²⁰ See *Dombrowski v. Somers*, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase “take care of” was too vague to be enforced). But see *Brackenbury v. Hodgkin*, 102 A. 106, 107 (Me. 1917) (enforcing an agreement to maintain and care for one of the parties).

¹²¹ Farnsworth, *supra* note 60, at 956-57 (citing *Kreglinger & Fernau Ltd. v. Charles J. Webb Sons Co.*, 162 F. Supp. 695 (E.D. Pa. 1957), *aff’d*, 255 F.2d 680 (3d Cir. 1958)).

¹²² See *Frigalment Importing Co. v. B.N.S. Int’l Sales Corp.*, 190 F. Supp. 116, 118 (S.D.N.Y. 1960); see also FARNSWORTH, *supra* note 2, at 441, 451 (providing *Frigalment* as an example of vague language); Farnsworth, *supra* note 60, at 953.

¹²³ FERRIELL, *supra* note 2, § 6.03, at 331 (“Misunderstandings involving true ambiguity are rare; those involving a range of possible meanings are more common.”).

¹²⁴ BLACK’S LAW DICTIONARY, *supra* note 36, at 1379.

¹²⁵ *Varney v. Ditmars*, 111 N.E. 822, 823-24 (N.Y. 1916).

¹²⁶ *Id.* at 824.

¹²⁷ See *Greene v. Heinrich*, 300 N.Y.S.2d 236, 238-39 (N.Y. Civ. Ct. 1969) (enforcing the promise of a “generous” reward and concluding that 10% of the value of the returned property would be “generous”), *aff’d*, 319 N.Y.S.2d 275 (N.Y. App. Term 1971), *aff’d*, 327 N.Y.S.2d 996 (N.Y. App. Div. 1971).

¹²⁸ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (reasonable price); U.C.C. § 2-305 (2013); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (reasonable time for performance); U.C.C. § 2-309(1).

price or a reasonable time for performance would not be subject to a wide range of disagreement among reasonable persons.

Although parties reduce their bargains to written documents to decrease the likelihood of a misunderstanding, the inherent indefiniteness of most words means this risk can usually not be entirely eliminated. In a certain sense, all words are indefinite because "it is men who give meanings to words and [thus] words in themselves have no meaning"¹²⁹ As stated by Justice Roger Traynor, the "most prominent state court judge of his generation,"¹³⁰ If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry' The meaning of particular words or groups of words varies with the ' . . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' Accordingly, the meaning of a writing ' . . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.'¹³¹

Importantly, "the context of words and other conduct is seldom exactly the same for two different people, since connotations depend on the entire past experience and the attitudes and expectations of the person whose understanding is in question."¹³²

b. Ambiguous language

Ambiguous language comes in three varieties: ambiguity of term, ambiguity of syntax, and conflicting language. Each presents essentially the same problem: the bargain's language is capable of being interpreted in two entirely different ways.

Ambiguity of term occurs when the parties use an ambiguous word.¹³³ A word is ambiguous if it has "two [or more] entirely different connotations so that it may be applied to an object and be at the same time both clearly

¹²⁹ Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965).

¹³⁰ Benjamin Field, *Traynor, Roger J.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 548, 549 (Roger K. Newman ed., 2009).

¹³¹ *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644-45 (Cal. 1968) (ellipses in original) (citations omitted) (quoting *Pearson v. State Soc. Welfare Bd.*, 353 P.2d 33, 39 (Cal. 1960)); See also Corbin, *supra* note 124, at 187).

¹³² RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. b (1981).

¹³³ Farnsworth, *supra* note 60, at 954.

appropriate and inappropriate”¹³⁴ An example is the word “light,” which can refer to either color or weight,¹³⁵ or the word “ton,” which can refer to either a long ton (2,240 pounds) or a short ton (2,000 pounds).¹³⁶ Or a general contractor and a subcontractor might agree that the subcontractor will paint an apartment “unit,” but it is unclear whether the word “unit” was intended to refer to only the apartment’s interior or to both the interior and the exterior.¹³⁷

A type of ambiguity of term is proper name ambiguity, which is when two or more persons or things share the same name.¹³⁸ A famous example was involved in *Raffles v. Wichelhaus*, where the parties agreed to buy and sell cotton to be delivered on the ship *Peerless* sailing from Bombay, but there were two ships with that name sailing from that city.¹³⁹ Another example is *Kyle v. Kavanagh*, in which the parties agreed to buy and sell land on Prospect Street in Waltham, Massachusetts, but there were two streets in that city with that name.¹⁴⁰

An ambiguity of syntax, which is probably more common than an ambiguity of term, is an ambiguity caused by grammatical structure.¹⁴¹ An example is an insurance policy that covers any “disease of organs of the body not common to both sexes.”¹⁴² Does “not common to both sexes” qualify “disease” or “organs”? Thus, is it the disease or the organs that must not be common to both sexes to be covered (for example, is a fibroid tumor of the womb covered)?¹⁴³ Or the parties to a marriage settlement agree to “equally pay for the cost of [their] minor child’s college tuition,

¹³⁴ *Id.* at 953; see also MERRIAM-WEBSTER, INC., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 39 (11th ed. 2003) (defining “ambiguous” as “capable of being understood in two or more possible senses or ways”).

¹³⁵ See Farnsworth, *supra* note 60, at 953 (stating that an example of an ambiguous word is the use of the word “light” when referring to a feather; the speaker might use the word to refer to the feather’s color or its weight).

¹³⁶ *Id.* at 954.

¹³⁷ See *Flower City Painting Contractors v. Gumina Constr. Co.*, 591 F.2d 162 (2d Cir. 1979).

¹³⁸ Farnsworth, *supra* note 60, at 954.

¹³⁹ See *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch.).

¹⁴⁰ *Kyle v. Kavanagh*, 103 Mass. 356, 356-57 (1869). A similar ambiguity can result when there is no person or thing with the specified name, but two or more persons or things with names similar to the specified name. For example, the parties might refer to “the ship *Lady Adams* that is sailing from Nantucket,” when there is no ship with that name sailing from Nantucket, but one ship sailing from Nantucket named *Abigail Adams* and another sailing from Nantucket named *Mrs. Adams*.

¹⁴¹ Farnsworth, *supra* note 60, at 954.

¹⁴² *Id.*

¹⁴³ *Id.*

books, supplies and any and all other related expenses.”¹⁴⁴ Does “related expenses” refer to “college” or to just “tuition, books, [and] supplies”? Thus, are “related expenses” all those related to college or simply those related to “tuition, books, [and] supplies”?¹⁴⁵ Ambiguity caused by the use of the words “and” and “or” is also an example of ambiguity of syntax.¹⁴⁶

Another source of ambiguity is the use of conflicting language.¹⁴⁷ For example, a written document might provide in one provision that a buyer agrees to pay a specified rate per item provided; in another, the number of items the seller will provide; and in another, the total price to be paid. The amount owed according to the first two provisions might, however, conflict with the amount specified in the third.¹⁴⁸ Or the price to be paid might be identified in both words and numbers, with the amounts specified being different.¹⁴⁹ Many of these conflicts appear in form contracts that have conflicting language added by the parties.¹⁵⁰

2. *When a misunderstanding is rendered irrelevant under law—the effect of the objective theory of contract and other aids to interpretation and construction*

Just as the law will often supply omitted terms and, thus, render bargains sufficiently definite in law despite the inevitable gaps, under the so-called “objective theory of contract,” the court will give vague or ambiguous language the meaning attached to it by one of the parties if the other party was more at fault for the misunderstanding.¹⁵¹ Thus, if the first party knew or had reason to know of the meaning attached by the second party, and the second party did not know or have reason to know of the meaning attached by the first party, the second party’s meaning is used.¹⁵² This process is

¹⁴⁴ *Riera v. Riera*, 86 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2012).

¹⁴⁵ *Id.* at 1167.

¹⁴⁶ Farnsworth, *supra* note 60, at 955.

¹⁴⁷ *Id.* at 956.

¹⁴⁸ *See id.*

¹⁴⁹ *See* WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 401 (Arthur L. Corbin ed., 3d Am. ed. 1919).

¹⁵⁰ Farnsworth, *supra* note 60, at 956.

¹⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 201(2)(a) (1981).

¹⁵² *Id.* In deciding whether a party had reason to know of a meaning attached by the other party, courts disagree on the type of evidence that should be admitted when the parties have reduced their bargain to a written document and the language used is unambiguous on its face. There is the more restrictive plain meaning rule, which is the majority rule, and the more liberal “contextual” approach. *See also* FARNSWORTH, *supra* note 2, at 463-69 (explaining the difference between the restrictive view and liberal view). *See also* PERILLO, *supra* note 2, § 3.10, at 129-30 (explaining that, under the plain meaning rule, “if a writing,

really no different from the court filling a gap by supplying a term that is reasonable in the circumstances. The parties did not agree on the term's meaning, but the court will select one of the parties' meanings if that party was less at fault for the misunderstanding because it is reasonable to do so in the circumstances (recall that encouraging due care is a policy considered when filling gaps). Imposing liability on the party who was more at fault for the misunderstanding induces parties to learn what most persons mean when they use particular language, thereby reducing future misunderstandings.¹⁵³

Various guides to interpretation and construction have been recognized to implement this fault standard and to implement other policies. For example, one is that "[o]rdinarily a party has reason to know of meanings in general usage."¹⁵⁴ Thus, "[u]nless a different intention is manifested, . . . where language has a generally prevailing meaning, it is interpreted in accordance with that meaning . . ."¹⁵⁵ Also, specific terms are given greater weight than general terms,¹⁵⁶ and terms that are negotiated

or a term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind[.]" though some plain-meaning jurisdictions admit evidence of surrounding circumstances) Thus, if the court follows the plain meaning rule and the language is unambiguous on its face, no extrinsic evidence (other than perhaps surrounding circumstances) is admitted to determine which party was more at fault for the misunderstanding (the party who attached a meaning different from the plain meaning is deemed more at fault). This is true even if the extrinsic evidence would show that the parties attached the same meaning to the word, a meaning that is different from its plain meaning. Under the Second Restatement and U.C.C. approach, any relevant evidence is admitted to determine the meaning of contract language. RESTATEMENT (SECOND) OF CONTRACTS §§ 200-204 (1981); U.C.C. § 2-202 cmt. 2 (2013). There is considerable tension between the plain meaning rule and the rule followed in some jurisdictions that extrinsic evidence is admissible to give meaning to a latent ambiguity. *See, e.g.*, 21 STEVEN W. FELDMAN, 21 TENN. PRACTICE: CONTRACT LAW AND PRACTICE § 8:56 (2012) ("A major problem in Tennessee contracts jurisprudence, unacknowledged in the decisions, is the tension between the plain meaning rule and the latent ambiguity principle. When the contractual text contains no clue that the words might mean more than they say, the parties' litigation positions will be predictable. One party will say that the terms should receive their usual, ordinary, and plain meaning, limited by the four corners rule, and no need exists for further construction. The other party will respond that the rule of latent ambiguity entitles the party to present extrinsic evidence to clarify the meaning, even though the words are clear on their face. Many decisions support both viewpoints; some courts and commentators have acknowledged the difficulty of reconciling these principles.").

¹⁵³ POSNER, *supra* note 90, at 126.

¹⁵⁴ RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. b (1981). Professor Perillo refers to this as a "watered-down version of the plain meaning rule[.]" PERILLO, *supra* note 2, § 3.13, at 137.

¹⁵⁵ RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1981).

¹⁵⁶ *Id.* § 203(c).

between the parties are given greater weight than standardized terms.¹⁵⁷ Under the *ejusdem generis* canon (Latin for "of the same kind or class"),¹⁵⁸ "where a contractual clause enumerates specific things, general words following the enumeration are interpreted to be restricted to things of the same kind as those specifically listed."¹⁵⁹ Similarly, under the *noscitur a sociis* canon (Latin for "it is known by its associates"), "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."¹⁶⁰ Under the *expressio unius est exclusio alterius* canon (Latin for "expression of one thing is exclusion of another"), "to exclude one thing implies the exclusion of the other, or of the alternative."¹⁶¹

Another canon provides "that if two terms in a writing conflict, the first term controls."¹⁶² Also, under the "last antecedent rule," when it is unclear which word a qualifying phrase refers to, it is construed as applying to the last antecedent.¹⁶³ Because the party who chooses vague or ambiguous language is "more likely than the other party to have reason to know of uncertainties of meaning,"¹⁶⁴ vague or ambiguous language is usually construed against the party who chose it.¹⁶⁵ And "consistent with a policy of avoiding forfeiture and unjust enrichment,"¹⁶⁶ doubts are generally resolved in favor of construing the occurrence of an event as a promise and not an express condition.¹⁶⁷

Because courts apply a fault standard and other policies to determine meaning in the case of a misunderstanding and do not require that the parties attach the same meaning to the term, "the meaning of the words or other conduct of a party is not necessarily the meaning he expects or understands."¹⁶⁸ Thus, as a result of the objective theory of contract and

¹⁵⁷ *Id.* § 203(d).

¹⁵⁸ BLACK'S LAW DICTIONARY, *supra* note 36, at 594.

¹⁵⁹ PERILLO, *supra* note 2, § 3.13, at 137.

¹⁶⁰ BLACK'S LAW DICTIONARY, *supra* note 36, at 1160-61.

¹⁶¹ *Id.* at 661.

¹⁶² PERILLO, *supra* note 2, § 3.13, at 136.

¹⁶³ Wohl v. Swinney, 888 N.E.2d 1062, 1065 (Ohio 2008).

¹⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981).

¹⁶⁵ *Id.* § 206. "[T]he rule is in practice a makeweight rather than a tie breaker." Beanstalk Group, Inc. v. AM Gen. Corp., 283 F.3d 856, 859 (7th Cir. 2002) (Posner, J.). Most jurisdictions recognize an exception to this rule when the non-drafting party is a sophisticated party who was represented by an attorney during the drafting process. *Id.* at 858.

¹⁶⁶ RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. b (1981).

¹⁶⁷ *See id.* § 227(1).

¹⁶⁸ *Id.* § 200 cmt. b (1981). The party whose meaning does not apply might, however, avoid the contract under the doctrine of mistake. *Id.* § 20 illus. 4; § 153 illus. 5, 6. In such a situation, however, the mistaken party would have to demonstrate that "the effect of the mistake is such that enforcement of the contract would be unconscionable," since the

other aids to interpretation and construction, most misunderstandings *in fact* will not result in indefiniteness *in law*.

Also, where the evidence shows that “the parties have attached the same meaning to a promise or agreement or a term thereof [a so-called mutual understanding], it is interpreted in accordance with that meaning.”¹⁶⁹ And importantly, part performance after the bargain is formed may show a shared meaning of an indefinite term.¹⁷⁰ “The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.”¹⁷¹ Thus, an alleged misunderstanding by one party might turn out, according to the fact finder, to have not been a misunderstanding at all.

Similarly, conflicting language in a written document might simply have been a drafting error by the parties in reducing the bargain’s terms to written form (a so-called “mistake in expression” or “mistake in integration”).¹⁷² In such a situation, there is no misunderstanding regarding the bargain’s actual terms, just a drafting error, and if such an error is proven by clear, strong, and convincing evidence, the court may reform the written document to reflect the parties’ actual bargain.¹⁷³

mistake is considered a unilateral mistake, not a mutual mistake. *Id.* § 153(a); *see also id.* cmt. b.

¹⁶⁹ *Id.* § 201(1); *see also* Berke Moore Co. v. Phoenix Bridge Co., 98 A.2d 150, 156 (N.H. 1953). The Second Restatement uses the phrase “mutual understanding” for when the parties attach the same meaning to a term. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (1981). As previously discussed, in those jurisdictions that follow the plain meaning rule, extrinsic evidence showing that the parties attached the same meaning to a particular word might never be admitted into evidence, and the meaning used by the court might, therefore, be different from the meaning attached by the parties. *See* PERILLO, *supra* note 2, § 3.10, at 130.

¹⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

¹⁷¹ *Id.* § 202 cmt. g; *see also* U.C.C. § 2-208 cmt. 1 (1978) (repealed 2001) (“The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was.”); Patterson, *supra* note 72, at 836 (noting that under the doctrine of “practical construction,” the parties “conduct during the course of performance may support inferences as to the meaning of language in the contract”).

¹⁷² *See* DAWSON ET AL., *supra* note 65, at 421 (referring to a drafting error as a “mistake in expression” or “mistake in integration”).

¹⁷³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 & cmt. c (1981); Benyon Bldg. Corp. v. Nat’l Guardian Life Ins. Co., 455 N.E.2d 246, 253 (Ill. App. Ct. 1983); Hoffman v. Chapman, 34 A.2d 438, 439 (Md. 1943).

III. WHY PARTIES ENTER INTO INDEFINITE BARGAINS

There are many reasons why parties enter into bargains with indefinite terms. First, the parties might not have thought about a particular matter, particularly because it is difficult if not impossible for the parties to foresee all of the problems that might arise.¹⁷⁴ Second, the parties might not want to spend the time addressing particular matters, especially about events unlikely to occur or that seem unimportant at the time.¹⁷⁵ Even for problems that are foreseeable or even foreseen, persons have limited attention and "give [this] 'limited attention' only to a limited number of situations which they choose by some initial process of selection."¹⁷⁶ In particular, time might be of the essence and the parties do not have the opportunity to address all of the issues that they otherwise would. Third, the parties might not want to raise a troublesome issue that might cause delay or the deal to collapse, "perhaps in the hope that the problem may never arise or that if it does it can be better dealt with on a business basis after a specific dispute has arisen."¹⁷⁷ The parties might, therefore, not address the topic at all or agree upon a vague term, comfortable to let the matter be decided by the appropriate forum if necessary.¹⁷⁸

¹⁷⁴ See FARNSWORTH, *supra* note 2, at 202; see also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) ("The parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute . . ."); Farnsworth, *supra* note 40, at 871 ("Fate may outstrip even the most sybilline [sic] draftsman, with a probability that increases with the life of the contract.").

¹⁷⁵ See FARNSWORTH, *supra* note 2, at 202; see also RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) (noting that the parties might not address a matter because "the situation seems to be unimportant or unlikely" to occur); Ayres & Gertner, *supra* note 95, at 92-93 ("Scholars have primarily attributed incompleteness to the costs of contracting. Contracts may be incomplete because the transaction costs of explicitly contracting for a given contingency are greater than the benefits. These transaction costs may include legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred. Rational parties will weigh these costs against the benefits of contractually addressing a particular contingency. If either the magnitude or the probability of a contingency is sufficiently low, a contract may be insensitive to that contingency even if transaction costs are quite low." (citations omitted)).

¹⁷⁶ Farnsworth, *supra* note 40, at 869.

¹⁷⁷ *Id.* at 872; see also FARNSWORTH, *supra* note 2, at 202 ("Another common cause of indefiniteness is the parties' reluctance to raise difficult issues for fear that the deal might fall through."); Farnsworth, *supra* note 60, at 956 ("[O]ne or both [of the parties] may have foreseen the problem but deliberately refrained from raising it during the negotiations for fear that they might fail—the lawyer who 'wakes these sleeping dogs' by insisting that they be resolved may cost his client the bargain."); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) ("[D]iscussion of it might be unpleasant or might produce delay or impasse.").

¹⁷⁸ See Farnsworth, *supra* note 60, at 956. This often occurs when an employer and a

Fourth, the parties might raise the issue but not be able to agree on a term to cover the matter and, thus, leave a gap or agree to use a vague term.¹⁷⁹

Fifth, the parties might “have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious.”¹⁸⁰ Sixth, “it may be difficult to formulate orally or write down a term that would properly reflect” the parties’ agreement about the consequences of a particular event occurring.¹⁸¹

Seventh, the parties might reach an oral agreement or prepare a draft written agreement with the intention of preparing a more detailed written document, but before doing so, one of the parties repudiates, leaving behind an agreement with gaps.¹⁸² Eighth, it might be advantageous to avoid specificity, particularly when dealing with long-term agreements that might require flexibility.¹⁸³ Ninth, the drafters of a written contract might simply be clumsy or inept.¹⁸⁴

Tenth, the parties might not realize that they each attach a different meaning to a particular term.¹⁸⁵ Eleventh, a party with more information about a particular matter (a situation of so-called “asymmetric information”)¹⁸⁶ might strategically withhold that information to avoid having to pay a higher contract price that would result if the information were known to the other party.¹⁸⁷ Twelfth, an offeror might intentionally

union draft a collective bargaining agreement. See Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959) (“The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator’s ruling if decision is required.”).

¹⁷⁹ *Société Franco Tunisienne d’Armement v. Sidermar S.P.A.*, [1961] 2 Q.B. 278, 299 (1960); see also Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 37 n.128 (2007) (noting that the parties might have chosen a vague term because they could not agree on a more precise term).

¹⁸⁰ RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981).

¹⁸¹ Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 107 (2000).

¹⁸² A contract can be formed even though the parties manifested an intention to prepare a written document evidencing the bargain and then failed to do so. See RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981).

¹⁸³ MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 114-15 (6th ed. 2010).

¹⁸⁴ *Id.* at 101. This is the most likely cause of ambiguities of syntax and conflicting terms.

¹⁸⁵ See Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the “Just Result” Principle*, 31 LOY. L.A. L. REV. 557, 649-50 (1998) (“Parties may sometimes attach different meanings to the very same words or phrases, ignoring the other party’s understanding.”).

¹⁸⁶ Eggleston et al., *supra* note 181, at 109.

¹⁸⁷ See Ayres & Gertner, *supra* note 95, at 94. An example would be a consumer who

make the offer's terms vague to render the bargain unenforceable, while requiring the offeree to perform first, and, thus, potentially obtaining the benefit of the offeree's performance without having to himself perform.¹⁸⁸

IV. AN OVERVIEW OF THE REASONABLY CERTAIN TERMS REQUIREMENT

Despite the various rules of law that help make those bargains that are indefinite *in fact* become definite *in law* (such as through gap filling and the objective theory of contract), some bargains will remain indefinite *in law*. Thus, it is necessary for the law to have rules regarding the effect of indefiniteness on a bargain's enforceability.

The Second Restatement provides that "[e]ven though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."¹⁸⁹ Similarly, there is no manifestation of mutual assent if the parties attach materially different meanings to the bargain's terms (a misunderstanding) and neither party is more at fault than the other for the misunderstanding.¹⁹⁰

The Reporter's Note to the Second Restatement's misunderstanding section states that "[i]f a term is so vague that the court cannot interpret it, the court should decide enforceability as an issue of the requirement of reasonable certainty in contracts," and that "[a] contract should be held nonexistent under this Section only when the misunderstanding goes to conflicting and irreconcilable meanings of a material term that could have either but not both meanings."¹⁹¹ Accordingly, the reasonably certain terms requirement applies to indefiniteness caused by gaps and vague words, and

demands a warranty, signaling to the other party that the consumer places a high value on the requested performance. Eggleston et al., *supra* note 181, at 109.

¹⁸⁸ See Ayres & Gertner, *supra* note 95, at 105-06 (referring to this as the "perverse incentive" to offer an intentionally unenforceable bargain).

¹⁸⁹ RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

¹⁹⁰ *Id.* § 20(1); see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 242 (Mark DeWolf Howe ed., Belknap Press 1963) (1881) ("[E]ach [party] said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another."). Under the Second Restatement's test, the bargain fails to be a contract if neither party knew of the meaning attached by the other, but each had "reason to know" of the meaning attached by the other. See RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981). Thus, the Second Restatement adopts a contributory negligence standard, not a comparative negligence standard, which seems inconsistent with the Second Restatement's general preference for saving bargains. When there is no manifestation of mutual assent because of a material misunderstanding, the court does not replace the term that was the subject of the misunderstanding with what it considers a "reasonable term" in the circumstances. Speidel, *supra* note 53, at 802-03.

¹⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 20 reporter's note (1981).

the misunderstanding doctrine applies to indefiniteness caused by ambiguous language.¹⁹² Thus, this Article (which deals with the reasonably certain terms requirement) will not further address, in detail, the issue of ambiguous language.

The Second Restatement comment explains that the reasonably certain terms requirement “reflects the fundamental policy that contracts should be made by the parties, not by the courts”¹⁹³ But “[w]here the parties have intended to make a contract and there is a reasonably certain basis for granting a remedy, the same policy [that contracts should be made by the parties] supports the granting of the remedy.”¹⁹⁴ Thus, the doctrine is premised on the related ideas that contract law should enforce agreements made by the parties, but avoid imposing duties upon them that were not voluntarily assumed. This statement of the reasonably certain terms requirement’s policy is, however, somewhat misleading (and not particularly helpful) because of the Second Restatement’s position that courts should aggressively fill gaps with implied-in-law terms.¹⁹⁵

Under the Second Restatement’s test, a bargain’s terms are “reasonably certain” as long as “they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”¹⁹⁶ As noted by Professor Joseph Perillo, “an agreement must be sufficiently definite before a court can determine if either party breached it.”¹⁹⁷ Although the First

¹⁹² Although the reporter’s notes are not approved by the council or ALI, *see* Wechsler, *supra* note 13, at 150-51, reporter’s notes to uniform laws are given substantial weight. *See* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 669 n.272 (2001) (“Reporters’ notes for uniform laws . . . receive great weight.”).

¹⁹³ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981).

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* § 204 (“When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”). Although this black letter rule suggests that gap filling does not occur until after it is determined that a contract was formed, the comments to the Second Restatement’s section on reasonably certain terms suggests otherwise. *See id.* § 33 cmt. a (“[I]n recurring situations the law often supplies a term in the absence of agreement to the contrary.”); *id.* cmt. b (“It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought.”).

¹⁹⁶ *Id.* § 33(2). A comment to the Second Restatement refers to this as a “minimum standard of certainty.” *Id.* § 362 cmt. a.

¹⁹⁷ PERILLO, *supra* note 2, § 2.9, at 44; *see also* CORBIN, *supra* note 2, § 95, at 143 (“A court cannot enforce a contract unless it can determine what it is.”); RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981) (“If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.”).

Restatement required that the terms of an offer be sufficiently definite,¹⁹⁸ the current view is that the bargain, not the offer, must be sufficiently definite, which takes into account that some offers permit the offeree to select among different terms.¹⁹⁹ The Second Restatement's test was modeled after the U.C.C.'s reasonably certain terms provision,²⁰⁰ which provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."²⁰¹

The tolerated degree of indefiniteness has grown over time.²⁰² Classical contract law (the law that developed in the nineteenth century and that

¹⁹⁸ See RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

¹⁹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 34(1) (1981); PERILLO, *supra* note 2, § 2.9, at 44.

²⁰⁰ See AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[T]hese subsections are drawn from the language found in the Uniform Commercial Code." (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain)).

²⁰¹ U.C.C. § 2-204(3) (2013).

²⁰² The indefiniteness doctrine dates to at least the late sixteenth century. See A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 532 (1975) (referencing the 1594 decision of *Sackford v. Phillips*, Moo. K.B. 689 (1594)). By the seventeenth century, one of the recognized defenses to an assumpsit action was that the contract was not "clear and certain." KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 81, 83 (1990). In 1641, in William Sheppard's *Touchstone of Common Assurances*, which was an attempt "to impose some order upon the development of assumpsit[.]" it was stated that a requirement of a contract or a promise was that it be "clear and certain." SIMPSON, *supra*, at 506 (internal citation omitted). This requirement was related to the need to have certainty in the issue to be tried by the jury. See TEEVEN, *supra*, at 83 ("The requirement is associated with the need to plead to the issue in trial by jury by averring the promise with certainty."); SIMPSON, *supra*, at 532 ("If in the action of assumpsit this certainty in the issue was to be achieved, the promise must itself be averred with certainty . . ."). Importantly, though, "[t]he principle applied both to the promise sued upon and to a promise averred as a consideration, for the latter was not a good consideration unless itself actionable, and to be actionable it must be certain." *Id.* Thus, the definiteness requirement was premised on both the practical need to determine a breach as well as the requirement of mutuality. Early English decisions applying the definiteness requirement were somewhat inconsistent. For example, a promise to pay £100 within a "short time" in return for a promise to deliver two oxen within a "short time" was held too indefinite to enforce as was a promise to forbear from suing for a "little time." See TEEVEN, *supra*, at 83 n.74, (citing *Tolhurst v. Brickenden*, Cro. Jac. 250, 1 Rolle Rep. 5; 1 Bulst. 91 (1610)); see also SIMPSON, *supra*, at 532. In contrast, promises to forbear from suing for a "reasonable time" and a "great time" were held sufficiently definite. *Id.* (citing *Treford v. Holmes*, Hutton 108 (1628), and *Mapes v. Sir Isaac Sidney*, Hutton 46, Cro. Jac. 683 (1621)). Also, even when a promise to forbear was not limited to any time, the court would provide that it "be a total forbearance, or at least a forbearance for a convenient

dominated into the early twentieth century)²⁰³ was particularly concerned with a court not creating a bargain for the parties or creating the bargain's terms, as evidenced by rules making it difficult to form a contract while at the same time refusing to infer terms excusing non-performance.²⁰⁴ Classical contract law, therefore, also exhibited intolerance for indefiniteness.²⁰⁵

But in the twentieth century it was generally accepted that contract law went beyond merely implementing the parties' intentions and necessarily involved making policy choices.²⁰⁶ With such a concession, courts became more willing to risk error in determining the terms of the parties' bargain, and made saving the bargain a priority. Thus, so-called modern contract law,²⁰⁷ or neoclassical contract law,²⁰⁸ liberalized the formal rules regarding

time" SIMPSON, *supra*, at 451 (quoting *Mapes v. Sir Isaac Sidney*, Hutton 46, Cro. Jac. 683 (1621)). Similarly, "[a]ssumpsit permitted market values or a reasonableness standard to be read into a promise [to pay for services]." TEEVEN, *supra*, at 83. For example, "[i]n the late sixteenth century it came to be settled that the action of assumpsit would lie where the plaintiff averred a promise to pay an uncertain sum" SIMPSON, *supra*, at 65. Thus, even though "[w]ell before the nineteenth century, the common law had a certainty requirement associated with the need to plead a promise with certainty in trial by jury, . . . this did not stand in the way of market values and reasonable standards being read into promises in Assumpsit actions." TEEVEN, *supra*, at 238.

²⁰³ See Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 n.2 (1978) ("Classical contract law refers . . . to that developed in the 19th century and brought to its pinnacle by Samuel Williston in *THE LAW OF CONTRACTS* (1920) and in the *RESTATEMENT OF CONTRACTS* (1932).").

²⁰⁴ GILMORE, *supra* note 62, at 49-53.

²⁰⁵ See Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 817 (2000).

²⁰⁶ See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 577 (1933) ("When courts . . . proceed to interpret the terms of the contract they are generally not merely seeking to discover the actual past meanings (though these may sometimes be investigated), but more generally they decide the 'equities,' the rights and obligations of the parties, in such circumstances; and these legal relations are determined by the courts and the jural system and not by the agreed will of the contesting parties."); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1287 (1990) ("The problems of classical contract law quickly became apparent to judicial and scholarly commentators. Contractual liability, like all other legal liability, did not arise solely from the individual's choice but came from the court's imposition of legal obligation as a matter of public policy; a contract was binding because the court determined that imposing liability served social interests, not because the individual had voluntarily assumed liability through his manifestation of assent.").

²⁰⁷ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) ("It has become a commonplace observation among contract writers and teachers that American contract law underwent a major evolution during roughly the middle half of the last century, from the 'classical' contract law

formation and construction. For example, the U.C.C. provided that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract[.]"²⁰⁹ and provided that "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."²¹⁰ The U.C.C. even rejected "one of the sacred rubrics of classical contract law,"²¹¹ the mirror-image rule,²¹² which required that an acceptance match the offer's terms in order to form an agreement.²¹³

Likewise, the rules applicable to definiteness were liberalized²¹⁴ with indefinite bargains to be enforced if at all possible, as long as the parties had intended to make a contract (presumably still determined objectively).²¹⁵ As previously indicated, the U.C.C. provided that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."²¹⁶ The general purpose of this provision was "to prevent the courts from requiring strictly that everything be clearly and definitely settled before the Court will find that a contract was formed."²¹⁷ In fact, a "major innovation of Article 2 [was] its abandonment—or at least its minimization—of the common law requirements of certainty."²¹⁸ As stated by Chancellor Murray, "The Code standard, in effect, is indefiniteness be damned, as long as two critical

exemplified by the teaching and writings of Professors Langdell and Williston to what some of us at least are accustomed to calling 'modern' contract law.").

²⁰⁸ See Feinman, *supra* note 31, at 738 (referring to the law of the U.C.C. and the Second Restatement as neoclassical contract law "because it addresses the shortcomings of classical law rather than offering a wholly different conception of the law").

²⁰⁹ U.C.C. § 2-204(1) (2013).

²¹⁰ *Id.* § 2-204(2).

²¹¹ John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 888 (2002).

²¹² U.C.C. § 2-207.

²¹³ See Eggleston et al., *supra* note 181, at 114 ("The common-law mirror image rule holds that a contract is not formed unless the offer and acceptance are identical.").

²¹⁴ TEEVEN, *supra* note 202, at 261.

²¹⁵ The Official Comment to the U.C.C. recognized, however, that "[t]he more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite omissions." U.C.C. § 2-204 cmt. (2013).

²¹⁶ *Id.* § 2-204(3).

²¹⁷ STATE OF NEW YORK, *supra* note 86, at 274 (remark by Professor Edwin W. Patterson).

²¹⁸ Snyder, *supra* note 179, at 36.

elements are present: a manifested intention to make a contract and a reasonably certain basis from which a court may afford a remedy.”²¹⁹

The Second Restatement followed suit, stating in a comment that if “the actions of the parties . . . show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon . . . courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.”²²⁰ As noted by Professor Robert Braucher (the Reporter for the Second Restatement section dealing with formation),²²¹ the Second Restatement’s test, “harmonizing with the Uniform Commercial Code and with a growing body of authority, tends toward greater toleration of indefiniteness and more readiness to enforce agreements where the parties intended to be bound.”²²²

However, because the line between enforcing the parties’ bargain and creating a different bargain will often be fuzzy, “it will always be difficult to draw lines between definite and indefinite promises.”²²³ Of course, if there is a gap that relates to an important matter, and the gap relates to a particularly subjective matter for which there is no statutory or judicially-recognized default rule to fill in the gap, then the contract is too indefinite to enforce.

With respect to vague language, “uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract.”²²⁴ Thus, vague language threatens to prevent the formation of a contract only when the language relates to an important term of the bargain. It appears likely that the Second Restatement implicitly adopts the approach it takes to contracts that have a term that is against public policy: that the rest of the bargain would remain enforceable as long as the promise that is too indefinite to enforce “is not an essential part of the agreed exchange.”²²⁵

Promises will usually be considered too vague to enforce when they are “subject to a broad range of equally-plausible interpretations” such “that the

²¹⁹ John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 742 (1982).

²²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981).

²²¹ Professor Braucher served as the Reporter from 1962 to 1971, at which time he was appointed to the Supreme Judicial Court of Massachusetts. Herbert Wechsler, RESTATEMENT (SECOND) OF CONTRACTS foreword (1981).

²²² Braucher, *supra* note 8, at 307.

²²³ ERIC A. POSNER, CONTRACT LAW AND THEORY 119 (2011); *see also* PERILLO, *supra* note 2, § 2.9, at 44 (“The rule does not supply a precise standard. Indefiniteness is a matter of degree.”).

²²⁴ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981); *see also id* § 201 cmt. d (“There may be a binding contract despite failure to agree as to a term, if the term is not essential . . .”).

²²⁵ *Id.* § 184(1).

intention of the parties cannot be ascertained.”²²⁶ Stated another way, a promise will be considered too indefinite because of vagueness if the language chosen makes it a meaningless expression of what the parties intended.²²⁷ Or, to take account of the objective theory of contract, a promise will be considered too indefinite because of vagueness if the language chosen makes it too difficult to determine what a reasonable person would believe it to mean.

The difficult question, of course, is how broad the range of plausible meanings must be before one cannot ascertain, within an acceptable margin of error, what a reasonable person would believe the vague language means. Deciding when the range is too broad necessarily involves: (1) deciding how broad the usual range may be (the typical acceptable range), which requires the court to decide whether to err on the side of over-enforcement or under-enforcement (the Second Restatement erring on the side of over-enforcement); (2) adjusting the typical acceptable range based on the importance to the bargain of the particular term (the adjusted acceptable range),²²⁸ and (3) then comparing the adjusted acceptable range to the court's view on how broad a reasonable person would consider the range of plausible meanings to be in the particular bargain based on the bargain's language and context (the bargain's range of vagueness). If the bargain's range of vagueness exceeds the adjusted acceptable range, the bargain should be considered too indefinite to enforce. If the bargain's range of vagueness does not exceed the adjusted acceptable range, the bargain should be considered sufficiently definite.

For example (and to take the cases at the far ends), if a court believes the typical acceptable range is broad because it errs on the side of over-enforcement, the court views the term as not particularly important, and the vague language is not subject to a particularly broad range of plausible meanings, the court will find that the bargain is not too indefinite. To the contrary, if a court believes the typical acceptable range is narrow because it errs on the side of under-enforcement, the court views the term as

²²⁶ *Lenihan v. Boeing Co.*, 994 F. Supp. 776, 802 (S.D. Tex. 1998).

²²⁷ See *Patterson*, *supra* note 72, at 835 (“An action has been brought upon an alleged contract which has vague and meaningless expressions of what would normally be important terms; e.g., the quality and quantity of goods are vague, and so is the price. In such a case the symbolic conduct will ordinarily be adjudged to be too indefinite to be enforced. ‘The court cannot make a contract for the parties,’ is the basic policy.”).

²²⁸ See RESTATEMENT (SECOND) OF CONTRACTS ch. 3, topic 3, § 33 cmt. a (1981) (“Where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract. If the *essential* terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.” (emphasis added)).

important, and the vague language is subject to a particularly broad range of plausible meanings, the court will find that the bargain is too indefinite.

Promises of vague services, or promises conditioned on the performance of vague services, are often considered too indefinite. For example, a promise to convey land “for services to be rendered” was held too indefinite.²²⁹ A promise to leave a business to the promisee if the promisee would “attend” to it was held too indefinite.²³⁰ A promise to provide employment, without specifying its nature, is considered too indefinite to enforce.²³¹ Vague promises to care for or help out the promisee tend to be too indefinite for the courts. For example, a promise to “help” the promisee was found too indefinite.²³² Qualifying the type of service with a vague adjective often does not help. For example, a promise to an employee of “fair” treatment was considered too indefinite,²³³ as was a promise to give a sibling “a good education.”²³⁴ A promise to “take care of [the promisee] in a very comfortable way” was held too vague to enforce.²³⁵ Whether a promise to use “best efforts” is too indefinite depends largely on the circumstances of the bargain.²³⁶

Promised payments of an unspecified amount (which would be a gap) or an amount qualified by a vague adjective (which would be the use of a vague word) also tend to be too indefinite, if the court believes the range of the possible amount under a reasonable interpretation would be too broad. Thus, an employer’s promise to an employee of “reasonable salary increases” and “reasonable annual bonuses” was held too indefinite.²³⁷ A promise to another party for the opportunity to obtain more funds from the promisor in the future without specifying an amount (or a time period within which to provide them) was too indefinite.²³⁸ Promises of

²²⁹ 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing *Sherman v. Kitsmiller*, 17 Serg. & Rawle 45, 1827 WL 2754 (Pa. Oct. 19, 1827)).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Mooney v. Mooney*, 538 S.E.2d 864, 867 (Ga. Ct. App. 2000).

²³³ *Rood v. Gen. Dynamics Corp.*, 507 N.W.2d 591, 607-08 (Mich. 1993).

²³⁴ 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing *Bumpus v. Bumpus*, 19 N.W. 29 (Mich. 1884)).

²³⁵ *Cohn v. Levy*, 725 N.Y.S.2d 376, 376 (App. Div. 2001); *see also Dombrowski v. Somers*, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase “take care of” was too vague to be enforced). *But see Brackenbury v. Hodgkin*, 102 A. 106, 107 (Me. 1917) (enforcing a promise to maintain and care for the promisee).

²³⁶ E. Allan Farnsworth, *On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1, 8 (1984).

²³⁷ *Rochlis v. Walt Disney Co.*, 23 Cal. Rptr. 2d 793, 799 (1993), *overruled on other grounds by Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022 (Cal. 1994).

²³⁸ *Jensen v. Oliver*, No. 97 C 1018, 1998 WL 673829, at *3 (N.D. Ill. Sept. 23, 1998).

employment without identifying the compensation have also been held too indefinite to enforce.²³⁹ Although the U.C.C. and the Second Restatement direct courts to supply a price term if the parties intended to conclude a bargain (a reasonable price at the time the goods are to be delivered or the services are to be provided), this only applies when “nothing is said as to price,” “the price is left to be agreed by the parties and they fail to agree,” or “the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.”²⁴⁰

But presumably because the reasonable range for time for performance tends to be narrow (and presumably not as an important matter as the services to be provided or the price to be paid), vague references to the time for performance tend not to be too indefinite to enforce. Thus, a promise to perform “immediately,” “at once,” “promptly,” “as soon as possible,” or “in about one month” are not too indefinite.²⁴¹

The indefiniteness doctrine is narrowed somewhat by the doctrines of cure-by-concession (a type of waiver) and modification. Under the cure-by-concession doctrine, indefiniteness will be removed if one of the parties, after the bargain’s formation, concedes to the meaning attached by the other party (or to the most favorable meaning possible for the other party).²⁴²

²³⁹ 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing *Lester v. Pet Dairy Products Co.*, 246 F.2d 747 (4th Cir. 1957)). But a promise to pay a “generous” reward for the return of lost property was considered sufficiently definite. See *Greene v. Heinrich*, 300 N.Y.S.2d 236, 239 (N.Y. Civ. Ct. 1969) (enforcing the promise of a “generous” reward and concluding that 10% of the value of the returned property would be “generous”), *aff’d*, 319 N.Y.S.2d 275 (App. Term), *aff’d*, 372 N.Y.S.2d (App. Div. 1971).

²⁴⁰ U.C.C. § 2-305(1) (2013); see also RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. e (1981) (adopting rule set forth in U.C.C. § 2-305(1)).

²⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 3 (1981).

²⁴² See FARNSWORTH, *supra* note 2, at 212; see also Omri Ben-Shahar, “*Agreeing to Disagree*”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 393 (“[T]here is a substantial line of cases in which the parties left the payment terms open ‘to be agreed upon,’ where courts applied the doctrine of ‘cure by concession’ and allowed the buyer to enforce the deal if she agrees to make a full payment in cash and with no delay, namely, in a manner most favorable to the seller.”). The cure-by-concession doctrine is impliedly accepted by the Second Restatement’s use of the doctrine in an illustration and its reference in a comment. See RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 2 (1981) (“*A* agrees to sell and *B* to buy a specific tract of land for \$10,000, \$4,000 in cash and \$6,000 on mortgage. *A* agrees to obtain the mortgage loan for *B* or, if unable to do so, to lend *B* the amount, but the terms of loan are not stated, although both parties manifest an intent to conclude a binding agreement. The contract is too indefinite to support a decree of specific performance against *B*, but *B* may obtain such a decree if he offers to pay the full price in cash.” (emphasis added)); see also *id.* § 201 cmt. d. (“In some cases a party can waive the misunderstanding and enforce the contract in accordance with the understanding of the other party.”).

Similarly, “part performance . . . may have the effect of eliminating indefinite alternatives by . . . modification.”²⁴³

An indefinite offer of a bilateral contract might be construed as also offering a unilateral contract that is incorporated within, but divisible from, the offer of the bilateral contract.²⁴⁴ The Second Restatement provides the following illustration:

A says to *B*: “I will employ you for some time at \$10 a day.” An acceptance by *B* either orally or in writing will not create a contract. But if *B* serves one or more days with *A*’s assent *A* is bound to pay \$10 for each day’s service.²⁴⁵

Further, “[a]n express or implied promise may be found to reimburse expenses incurred pursuant to the indefinite agreement.”²⁴⁶ The Second Restatement provides the following illustration:

A agrees to sell and *B* to buy a specific house and lot for \$10,000, mortgage terms to be agreed. At *B*’s request, reinforced by a threat not to perform, *A* makes certain alterations in the house, which add nothing to its value. *B* then repudiates the agreement without reference to mortgage terms. *A* may recover the cost of alterations.²⁴⁷

Recovery could presumably be had under a bargain theory, based on an offer of a unilateral contract that was accepted by making the alterations.

²⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

²⁴⁴ *Id.* cmt. d.

²⁴⁵ *Id.* illus. 4 (emphasis added).

²⁴⁶ *Id.* cmt. d.

²⁴⁷ *Id.* illus. 5 (emphasis added). The illustration was based on the well-known case of *Kearns v. Andree*, 139 A. 695 (Conn. 1928), a case that permitted recovery under quasi-contract (not an actual contract). See *id.* reporter’s note, cmt. d (“Illustration 5 is based on *Kearns v. Andree*, 107 Conn. 181, 139 A. 695 (1928) . . .”); see also *Kearns*, 139 A. at 698. Professor Braucher believed that a restitution remedy would not be appropriate in such a situation, presumably because no benefit was received by the promisor, and thus the remedy had to flow from a promise. See AMERICAN LAW INSTITUTE, *supra* note 1, at 326-27 (“We have tried to distinguish in the new [section on “certainty”] between those cases where the part performance of the contract eliminates the uncertainty and thus forms a contract and those cases, of which there are some, where the part performance does not eliminate the uncertainty, but nevertheless makes a contractual remedy appropriate, particularly in cases where there would be unjust enrichment otherwise. In such cases the *Restatement of Restitution* provides that there may be recovery of benefits conferred under a contract which is too indefinite to be enforced, but the restitutionary remedy is not always the appropriate remedy, and we have stated that in subsection (3), and the illustrations drawn from actual cases make it clear that courts do sometimes give contractual remedies after part performance, even though the contract would be too indefinite if it were entirely executory on both sides.” (remark by Reporter Robert Braucher regarding the “certainty” section of the Second Restatement) (emphasis added)).

Also, the Second Restatement takes the position that a promisee can assert a claim under promissory estoppel when a bargain did not result in the formation of a contract because it lacked reasonably certain terms.²⁴⁸ Of course, if it is the defendant's promise that is indefinite, and such indefiniteness prevents the plaintiff from proving a breach, the claim would fail.²⁴⁹ Also, even if the plaintiff can establish a breach, she would have to establish promissory estoppel's demanding standards, including the requirement of reliance and the requirement that "injustice can be avoided only by enforcement of the promise."²⁵⁰ If a plaintiff is suing for breach of contract, the plaintiff does not have to show actual reliance on the bargain to prevail.²⁵¹

Under promissory estoppel, not only does the promisee have to establish reliance on the promise,²⁵² the reasonableness of the reliance and whether it was of a definite and substantial character are factors to be considered in deciding whether injustice can be avoided only by enforcing the promise.²⁵³ Also, the promise's formality is taken into account.²⁵⁴ Thus, whereas promises made as part of a bargain usually do not require any particular form to be enforceable, a promise's informal nature could result in the court refusing to enforce it under a promissory estoppel theory.

Further, when the promise is enforced under promissory estoppel, "[t]he remedy granted for breach may be limited as justice requires."²⁵⁵ Thus, although full-scale enforcement by protecting the promisee's expectation interest is often appropriate in a promissory estoppel case, the same factors that bear on whether the promise should be enforced will be considered by the court in deciding whether a lesser remedy is appropriate.²⁵⁶ Accordingly, in some instances the court will decide that protecting the

²⁴⁸ See *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 344 (D. Mass. 2011) ("[T]he Restatement 'has expressly approved' promissory estoppel's use to protect reliance on indefinite promises." (citing Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 842 (1990))).

²⁴⁹ See Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1440 n.178 (2009) ("[I]n some jurisdictions, a promissory estoppel claim is available to recover expenses made in reliance on an indefinite agreement if the indefiniteness does not preclude a finding of breach.").

²⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

²⁵¹ See *id.* § 19 cmt. c ("[N]o . . . change of position . . . is necessary to the formation of a bargain [T]he law must take account of the fact that in a society largely founded on credit bargains will be relied on in subtle ways, difficult or incapable of proof.").

²⁵² *Id.* § 90(1).

²⁵³ *Id.* § 90 cmt. b.

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 90(1).

²⁵⁶ *Id.* § 90 cmt. d.

promisee's reliance or restitution interest is justified in lieu of protecting the promisee's expectation interest.²⁵⁷

V. REMOVING THE UNCERTAINTY FROM THE SECOND RESTATEMENT'S TEST FOR REASONABLY CERTAIN TERMS

Despite trying to spell out what is really meant by the reasonably certain terms requirement,²⁵⁸ the Second Restatement fails to expressly address two important questions about its test: (1) must the plaintiff's promise be sufficiently definite; and (2) what is an "appropriate" remedy? The answers to these questions depend primarily on whether the Second Restatement directs the court to assess indefiniteness as of the time of the bargain's formation (thus directing courts to ignore post-formation events) or at the time of the lawsuit (thus directing courts to consider such events).

If assessed as of the time of formation, both parties' promises must be sufficiently definite because at the time of formation it would not have been known which party would breach. Also, only an award protecting the parties' expectation interests would be an appropriate remedy because at the time of formation neither party would have yet relied on the bargain. In such a case, the Second Restatement would treat the reasonably certain terms requirement as a so-called "legal formality," which, as previously noted, is a requirement that a bargain be in a particular form to be a contract and which at times operates contrary to the parties' intentions.²⁵⁹

If assessed at the time of the lawsuit, it would not be a requirement that the plaintiff's promise be sufficiently definite because the plaintiff's promise will not always be relevant to resolving the dispute before the court. Also, a remedy short of protecting the plaintiff's expectation interest might be an appropriate remedy because the plaintiff might have relied on the bargain and might be seeking only reliance damages. In such a case the

²⁵⁷ *Id.* The promisee's restitution interest "is his interest in having restored to him any benefit that he has conferred on the other party." *Id.* § 344(c).

²⁵⁸ See AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[W]e have tried to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement]" (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain)).

²⁵⁹ See Kennedy, *supra* note 6, at 1691-94 (discussing legal formalities and noting that "they operate through the contradiction of private intentions" and that "the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored"); *id.* at 1692, 1698 (referring to the "sanction of nullity"); Perillo, *supra* note 23, at 41 n.22 ("[T]he term 'form' or 'formality' means any manner of expressing or memorializing an agreement other than oral or tacit non-ritual expression."); Klass, *supra* note 23, at 1743 ("A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.").

Second Restatement would not treat the reasonably certain terms requirement as a legal formality and would treat it as simply having a practical aspect (i.e., its purpose would be to enable the court to resolve the dispute before it).

The language of the Second Restatement's rule in section 33 (no contract is formed),²⁶⁰ along with the rule's placement in the chapter titled "Formation of Contracts—Mutual Assent,"²⁶¹ suggests that the ALI intends indefiniteness to be assessed as of the time of the bargain's formation.²⁶² This would mean the court should ignore post-formation events and that the requirement has only a formal aspect. But the Second Restatement sends mixed signals and thereby creates confusion because the supporting comment b. and its illustrations suggest that indefiniteness should be assessed at the time of the lawsuit and, thus, has a practical aspect. For example, the supporting comment states that "the degree of certainty required may be affected by the dispute which arises and by the remedy sought. Courts decide the disputes before them, not other hypothetical disputes which might have arisen."²⁶³

²⁶⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

²⁶¹ See *id.* ch. 3 (titled "Formation of Contracts—Mutual Assent").

²⁶² The rule's language even suggests that an apparent offer without reasonably certain terms is no offer at all. See *id.* § 33(1) (referring to "a manifestation of intention [that] is intended to be understood as an offer" (emphasis added)).

²⁶³ *Id.* § 33 cmt. b. Leading contracts scholars generally accept that the Second Restatement test has solely a practical purpose, and has lost any role as a legal formality. See, e.g., Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 475-76 (1987) ("Under both the Uniform Commercial Code (UCC) and more modern case law in some jurisdictions [as well as the Second Restatement's test] it is sufficient that the terms have been worked out with sufficient certainty to support a conclusion that the parties intended to be bound provided that the indefiniteness is not *relevant to the remedy requested by the plaintiff*." (emphasis added) (citations omitted)); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 693 (1969) (describing the U.C.C. provision that the Second Restatement's test was modeled on as posing the following question: "Is there a reasonably certain basis for giving an appropriate remedy to *this plaintiff*, against *this defendant*, in the circumstances of *this breach* of the agreement?"). Professor Edwin W. Patterson's analysis of U.C.C. § 2-204(3) for the New York Law Revision Commission reveals that he might have agreed with professor Knapp's analysis of the U.C.C. provision. STATE OF NEW YORK, *supra* note 86, at 275 (remark by Professor Edwin W. Patterson). He provided three different possible interpretations of that provision, and for one of the interpretations he provided a rephrased provision that would have, in his opinion, better implemented that interpretation. *Id.* In the rephrased provision, he made reference to "the remedy sought by the aggrieved party." *Id.* Different courts applying or referencing the

In an attempt to remove the uncertainty created by the Second Restatement's mixed signals, an analysis of the two requirements of the Second Restatement's test—that the terms “provide a basis [1] for determining the existence of a breach and [2] for giving an appropriate remedy”²⁶⁴—is undertaken below. The discussion relating to “determining the existence of a breach” will focus on whether there are any clues in the Second Restatement as to whether the bargain's terms must be sufficiently definite such that a court would be able to determine the existence of a breach by the plaintiff, even if that is not an issue in the lawsuit. The discussion about an “appropriate remedy” will focus on whether there are any clues in the Second Restatement as to whether the bargain's terms must be sufficiently definite such that a court would be able to determine the

Second Restatement's test have suggested or hinted at different interpretations. For example, some courts have addressed the indefiniteness of the plaintiff's promise. *See Ass'n Benefit Servs., Inc. v. Caremark RX, Inc.*, 493 F.3d 841, 849-52 (7th Cir. 2007) (citing Second Restatement section 33 and holding, under Illinois law, that the bargain's failure to identify with specificity the plaintiff's obligations meant that a contract had not been formed due to the reasonably certain terms requirement, but also referencing a “lack of mutual assent”); *Bus. Sys. Eng'g, Inc. v. Int'l Bus. Machs. Corp.*, 547 F.3d 882, 888-90 (7th Cir. 2008) (applying Illinois law and the Second Restatement's test and holding that a contract had not been formed due to the reasonably certain terms requirement because it was not clear what work plaintiff promised to do); *Kottke v. Scott*, No. 03-10-00071-CV, 2011 WL 1467194, at *4-5 (Tex. App. Apr. 14, 2011) (citing the Second Restatement's test and ruling that a promise by the defendants to sell their home to the plaintiffs did not result in a contract because, among other reasons, the plaintiffs' promise to pay the purchase price was not reasonably certain since “[t]he record contain[ed] no evidence as to whether or how often the interest was to be compounded, how payments were to be made, or any other terms of a purchase or financing agreement”). Other courts, while not explicitly addressing the definiteness of the plaintiff's promise (or its lack of definiteness), have suggested the same view by using phrases such as “each party's obligation” or “the promises made” when discussing the terms needed to make the bargain reasonably certain. *See, e.g., Big M, Inc. v. Dryden Advisory Grp.*, No. 08-3567(KSH), 2009 WL 1905106, at *14 (D.N.J. June 30, 2009) (applying New Jersey law, and referencing the Second Restatement's test, and stating that “[a] court must be able to accurately determine with reasonable certainty *each* party's obligation to enforce the contract” (emphasis added)); *McLinden v. Coco*, 765 N.E.2d 606, 613 (Ind. Ct. App. 2002) (referencing “the promises made” and citing the Second Restatement's test within the discussion). At least one court refused to award reliance damages for breach when the defendant's promise was too indefinite, which would suggest the court believes the test is assessed as of the time of formation and is thus a legal formality. *Kottke*, 2011 WL 1467194, at *6 (reversing the trial court's award of reliance damages when the alleged bargain was too indefinite to create a contract). On the other hand, another court that cited the Second Restatement's test suggested that the court might be concerned only with the definiteness of the defendant's promise because the court's task is “to ascertain the scope of the duty it is asked to enforce.” *Schwarzkopf v. Int'l Bus. Machs., Inc.*, No. C 08-2715 JF (HRL), 2010 WL 1929625, at *5 (N.D. Cal. May 12, 2010).

²⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

plaintiff's expectation interest, even if the plaintiff is not seeking a remedy that protects that interest (such as seeking only reliance damages).

A. Determining the Existence of a Breach

For a bargain to have reasonably certain terms under the Second Restatement's test, the terms must provide a basis for determining the existence of a breach.²⁶⁵ Obviously, this means that at a minimum the bargain's terms must be sufficiently definite to enable the court to determine if the defendant breached,²⁶⁶ and in this respect the requirement serves a purely practical purpose. But does it do so only incidentally? Is there more to the requirement than simply enabling a court to resolve the dispute before it? Specifically, must the plaintiff's promise also be sufficiently definite such that a court would be able to determine a breach by that party, even when the definiteness of the plaintiff's promise is not relevant to resolving the dispute before it?

The first section of this Part will address classical contract law's position (as set forth in the First Restatement) that the plaintiff's promise must be sufficiently definite and discuss the possible reasons classical contract law might have adopted such a position. The second section will address the Second Restatement's confused treatment of this issue and conclude that the best interpretation of the Second Restatement's test is that it rejects the First Restatement's position, and that it is not necessary that the plaintiff's promise be sufficiently definite if it is not an issue in the dispute before the court.

1. Classical contract law's treatment of the plaintiff's promise

Classical contract law (the law that developed in the nineteenth century and that dominated into the early twentieth century),²⁶⁷ as set forth in the First Restatement of Contracts,²⁶⁸ required that for an offer to be valid, the

²⁶⁵ *Id.*

²⁶⁶ See, e.g., *Schwarzkopf*, 2010 WL 1929625, at *5 (citing the Second Restatement test and stating that "[t]he court must be able to ascertain the scope of the duty it is asked to enforce").

²⁶⁷ See Macneil, *supra* note 203, at 855 n.2 ("Classical contract law refers . . . to that developed in the 19th century and brought to its pinnacle by Samuel Williston in *THE LAW OF CONTRACTS* (1920) and in the *RESTATEMENT OF CONTRACTS* (1932).").

²⁶⁸ See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1749 (2000) (stating that classical contract law found its central expression in the First Restatement). The First Restatement has been described as the high-water mark of classical contract law. See Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 678-79 (1984); see also Robert A. Hillman, *The Crisis in Modern*

promises and performances to be rendered by *each* party must be reasonably certain.²⁶⁹ Professor Samuel Williston, the Reporter for the First Restatement²⁷⁰ and the “[a]rchitect of the fundamental concepts of classical contract law,”²⁷¹ provided the following rationale for the reasonably certain terms requirement: “[T]he rule . . . is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties.”²⁷² But this does not explain why the plaintiff’s promise would need to be sufficiently definite if its definiteness was not relevant to the dispute before the court. There are three possible reasons, each of which are discussed below.

a. Deduction from the requirement’s status as a formation doctrine

Classical contract law’s requirement that both parties’ promises be sufficiently definite was likely deduced from the proposition that a contract cannot be formed unless its terms are reasonably certain.²⁷³ If this doctrinal proposition is accepted, it can be deduced that both parties’ promises must be sufficiently definite because it would be illogical for a formation doctrine to take account of post-formation events. As stated by Professor Melvin Eisenberg, “The rules of classical contract law concerning indefiniteness tended to be static, because generally speaking the determination whether an agreement was sufficiently definite to be enforceable focused on the terms of the agreement at the time that it was made.”²⁷⁴

This basis for requiring both parties’ promises to be reasonably certain is not, of course, normatively sustainable unless the doctrinal proposition

Contract Theory, 67 TEX. L. REV. 103, 123 n.136 (1988) (noting that classical contract law “reached its pinnacle in the early twentieth century with the *Restatement (First) of Contracts*”).

²⁶⁹ RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

²⁷⁰ See Wm. Draper Lewis, RESTATEMENT (FIRST) OF CONTRACTS intro. (1932) (identifying Professor Williston as the Reporter).

²⁷¹ Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 208 (2005).

²⁷² RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. a (1932). In Williston’s 1920 *Contracts* treatise, he simply wrote that “[i]t is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to fix an exact meaning upon it.” WILLISTON, *supra* note 50, § 37, at 56.

²⁷³ Under the First Restatement, an indefinite offer was not a “valid offer,” and thus prevented a manifestation of mutual assent. RESTATEMENT (FIRST) OF CONTRACTS § 32 & cmt. a (1932).

²⁷⁴ Eisenberg, *supra* note 268, at 1795.

from which it flows—that a contract is not formed unless the bargain's terms are reasonably certain—is itself normatively sustainable.²⁷⁵ And classical contract law had a habit of deducing rules from propositions that were taken to be axiomatic.²⁷⁶

b. Mutuality of obligation

Classical contract law's requirement that both parties' promises be reasonably certain was likely also deduced from another doctrinal proposition—the rule that neither party should be bound to a bargain unless both parties were bound, the so-called requirement of mutuality of obligation.²⁷⁷ From this doctrinal proposition, it can be deduced that both parties' promises must be sufficiently definite because if the plaintiff's promise is too indefinite to enforce, then the plaintiff is not bound.

For example, at early English common law, the definiteness requirement “applied both to the promise sued upon and to a promise averred as consideration, for the latter was not a good consideration unless itself actionable, and to be actionable it must be certain.”²⁷⁸ Williston, in his famous 1920 Contracts treatise,²⁷⁹ stated that “[t]he indefiniteness of promises is important not simply because of the inherent difficulty of enforcing a promise to which no exact meaning can be attached, but also because such a promise is insufficient consideration for another promise.”²⁸⁰ The First Restatement, with Williston as its Reporter,²⁸¹ adopted this view, providing that “a promise which is neither binding nor capable of becoming binding by acceptance of its terms is insufficient consideration” (except under limited circumstances).²⁸² Williston explained that “[t]he ultimate basis of the legal requirement of sufficient consideration

²⁷⁵ Melvin A. Eisenberg, *The Theory of Contracts*, in *THE THEORY OF CONTRACT LAW* 206, 213 (Peter Benson ed., 2001).

²⁷⁶ *Id.* at 208.

²⁷⁷ See FARNSWORTH, *supra* note 2, at 109 (discussing the doctrine of mutuality of obligation).

²⁷⁸ SIMPSON, *supra* note 202, at 532.

²⁷⁹ See E. Allan Farnsworth, *Williston, Samuel*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 593 (Roger K. Newman ed., 2009) (referring to Williston's four-volume treatise, *The Law of Contracts*, as “one of the great textbooks of Anglo-American law”).

²⁸⁰ WILLISTON, *supra* note 50, § 49, at 81. Unfortunately, Williston did not provide any cases to support this proposition, and although he stated that the matter would be discussed more in another section (§ 104), that section does not address the issue directly, discussing only illusory promises. *Id.* at 81-83.

²⁸¹ See Wm. Draper Lewis, *RESTATEMENT (FIRST) OF CONTRACTS* intro (1932) (identifying Professor Williston as the Reporter).

²⁸² *RESTATEMENT (FIRST) OF CONTRACTS* § 80 (1932).

for promises is the belief not only that something should be given in exchange for a promise in order to make it binding, but that what is given should have value”²⁸³ Even anti-classicist Professor Arthur Corbin stated that “[a] promise can be so vague and indefinite in its expression that it cannot be enforced and is therefore not a sufficient consideration.”²⁸⁴ And this appears to remain the general rule.²⁸⁵

Thus, classical contract law’s requirement that both parties’ promises be sufficiently definite was likely based on notions of mutuality of obligation, either as a formalistic deduction from that doctrine and the related doctrine of consideration or based on the substantive concern that a promise should usually only be enforced if given for something of value.

c. Plaintiff’s inability to prove it was ready, willing, and able to perform

Some courts require that a plaintiff, to establish a claim for breach of contract, prove that he either performed or that he was ready, willing, and able to perform.²⁸⁶ This requirement is presumably based on the notion that if the defendant is held liable for breach despite a plaintiff not having been ready, willing, and able to perform, the plaintiff will be put in a better position than if the defendant had not breached. If the plaintiff’s promise is too indefinite, the plaintiff presumably could not establish that it was ready, willing, and able to perform its end of the bargain, unless the indefiniteness had been removed under cure-by-concession or modification. Classical contract law’s requirement that the plaintiff’s promise be sufficiently definite might have been premised, at least in part, on the belief that a plaintiff whose promise is indefinite cannot prove that he either performed or that he was ready, willing, and able to perform.

²⁸³ *Id.* § 80 cmt. a.

²⁸⁴ CORBIN, *supra* note 2, § 143, at 208.

²⁸⁵ See 1 WILLISTON & LORD, *supra* note 36, § 4:32, at 883-84 (“Indefinite promises give rise not only to the inherent difficulty of enforcing a promise to which no exact meaning can be attached but also to a problem of insufficiency of consideration. A promise too indefinite to be enforced will, for that very reason, be insufficient consideration for a counterpromise. If one promise of a bilateral agreement is too indefinite, neither promise will be enforceable. The indefinite promise cannot be enforced because of its uncertainty, and the counterpromise, even though in itself definite, cannot be enforced because of lack of consideration.”).

²⁸⁶ See *Winkleblack v. Murphy*, 811 So. 2d 521, 529 (Ala. 2001); *Singarella v. City of Boston*, 173 N.E.2d 290, 291 (Mass. 1961).

d. The requirement's status as a legal formality

Classical contract law's requirement that both parties' promises be sufficiently definite can also be attributed to its status as a so-called legal formality. Although it was not described as such at the time, Professor Duncan Kennedy has recognized that the requirement was (and perhaps still is) a legal formality.²⁸⁷ In contract law, a legal formality is a rule providing that a party's (or parties') failure to express or memorialize a bargain or promise in a particular manner or form will have a specified legal consequence, even if that consequence is contrary to the party's (or parties') actual or manifested intention(s).²⁸⁸ Requirements of form "operate through the contradiction of private intentions."²⁸⁹ As explained by Professor Kennedy:

[T]he formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored. The reason for ignoring them, for applying the sanction of nullity, is to force them to be self conscious and to express themselves clearly, not to influence the substantive choice about whether or not to contract, or what to contract for.²⁹⁰

²⁸⁷ Kennedy, *supra* note 6, at 1691-92.

²⁸⁸ See Perillo, *supra* note 23, at 41 n.22. Following Professor Perillo, this Article does not consider the requirement of a manifestation of mutual assent to be a requirement of form. See *id.* ("Even a simple oral contract made with no particular ritual words has a 'form.' . . . Throughout this Article, however, the term 'form' or 'formality' means any manner of expressing or memorializing an agreement *other than oral or tacit non-ritual expression.*" (emphasis added) (citation omitted)). Although a manifestation of mutual assent must have a form in the sense that the assent must be manifested, the manifestation need not take any particular form. See RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *id.* cmt. a (1981) ("Where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. Purely negative conduct is sometimes, though not usually, a sufficient manifestation of assent."). Accordingly, this Article limits the term "legal formality" to a requirement that a particular act have a certain form and does not extend it to an act simply because the act itself has a form. To do so would expand the definition of "legal formality" to such an extent that it would no longer be a useful concept. Also, this Article does not consider it to be a requirement of form that an act be in a form sufficient to permit a fact finder to conclude, based on a preponderance of the evidence, that the act occurred. To treat this as a requirement of form would mean that every act that must be proven to establish a claim is a requirement of form and would likewise expand the definition of "legal formality" to such an extent that it would no longer be a useful concept.

²⁸⁹ Kennedy, *supra* note 6, at 1691.

²⁹⁰ *Id.* at 1692.

Although formalities “will lead to many instances in which the judge is obliged to disregard the real intent of the parties,”²⁹¹ the hope is that if parties generally comply with the formalities, the benefits derived from their use will outweigh the occasional miscarriages of justice.

Contract law has numerous legal formalities. For example, if the relevant jurisdiction recognizes the seal as a basis for rendering a promise enforceable,²⁹² even when a party intends a promise of a gift to be legally binding, if the promisor does not make the promise under seal, then the failure to use the proper form might result in a legal consequence contrary to the party’s intention at the time of making the promise. Similarly, if a promisor intends a bargain to be legally binding, but it is oral and within the Statute of Frauds,²⁹³ then the failure to evidence the bargain with the proper form (a signed writing with the essential terms)²⁹⁴ might result in a legal consequence contrary to the party’s intention. The common law’s mirror image rule²⁹⁵ is a legal formality²⁹⁶ because even if the parties intended to conclude a deal, no contract was formed if the acceptance deviated from the terms of the offer.²⁹⁷

²⁹¹ *Id.* at 1697.

²⁹² See RESTATEMENT (SECOND) OF CONTRACTS ch. 4, topic 3, statutory note (1981) (“In many of the jurisdictions . . . recognizing the seal there seems to be no statute or decision depriving the seal of its common-law effect as a substitute for consideration.”); Klass, *supra* note 23, at 1762-63 (“While the seal is no longer a condition of contractual liability, many jurisdictions still recognize it as a substitute for consideration or as triggering a longer statute of limitations.”).

²⁹³ See RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (describing which classes of contract are covered by the Statute of Frauds).

²⁹⁴ *Id.* § 131.

²⁹⁵ *Id.* § 59. See also Weisz Graphics Div. v. Peck Indus., Inc., 403 S.E.2d 146, 149 (S.C. Ct. App. 1991) (stating that restatement section 59 is known as the “mirror image” rule).

²⁹⁶ See Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1231 (1982) (“[T]he mirror-image rule was a paradigm of legal formality . . .”).

²⁹⁷ *Id.* at 1231-32. Even though Professor Lon Fuller famously argued that the consideration requirement might be a legal formality, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941), the modern view that sham consideration is not consideration, see RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981) (“[A] mere pretense of bargain does not suffice, as . . . where the purported consideration is merely nominal. In such cases there is no consideration . . .”), means that the consideration requirement can no longer be considered a legal formality, if it ever could have been. See generally Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is Not Binding, But Should Be*, 97 NW. U. L. REV. 1809, 1817-21 (2003) (surveying the cases purportedly holding that nominal consideration was sufficient and concluding they can be explained on other grounds). Parties can no longer deliberately make a transaction appear to be a bargain so as to render it legally enforceable. Also,

It should be recognized that failure to use a legal formality does not always mean the promise does not have any legal effect, despite Professor Kennedy's reference to the "sanction of nullity"²⁹⁸ and Professor Lon Fuller's statement that the "sanction of the invalidity . . . is the means by which requirements of form are normally made effective"²⁹⁹ For example, even though it is often stated that a failure to satisfy the Statute of Frauds' requirement of a signed writing renders a promise within one of the Statute's categories unenforceable,³⁰⁰ this is not always true. There are exceptions to the Statute's writing requirement, including detrimental reliance (at least according to the *Second Restatement* and some courts).³⁰¹ Accordingly, the failure to use the Statute's required form is not automatically a sanction of nullity. Rather, it simply means that an exception to the Statute will have to be used. Likewise, for those jurisdictions that still consider a promise under seal to be enforceable, the failure to use the seal does not automatically render the promise unenforceable.³⁰² Rather, it simply means that the promisee will have to identify an alternative basis for rendering the promise enforceable.³⁰³

whether the parol evidence rule is a legal formality depends on one's approach to the rule. If it is simply used to determine whether the parties intended the promise to be part of the bargain, then it is not a legal formality because its goal is to implement the parties' intentions, not to operate (in some instances) contrary to their intentions. If, however, it is designed to discharge promises that were not included in a subsequent written document, even if it is believed the parties intended the prior promise to be legally enforceable, then it is a legal formality. Similarly, with respect to interpreting the text of a bargain, the plain meaning rule is a legal formality because it presumably operates contrary to the parties' intentions in certain situations (the legal formality being the use of language that clearly describes the parties' intentions), whereas the contextual approach to interpretation is not a legal formality because any relevant evidence is admissible. In fact, many of the disputes over how contract law rules should be applied are disputes over whether the rules should be legal formalities.

²⁹⁸ Kennedy, *supra* note 6, at 1692.

²⁹⁹ Fuller, *supra* note 297, at 803.

³⁰⁰ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 110(1) (1981).

³⁰¹ See *id.* § 139(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise."); *McIntosh v. Murphy*, 52 Haw. 29, 36-37, 469 P.2d 177, 181-82 (1970) (holding that the plaintiff's reliance on the defendant's promise of employment for a definite term was sufficient to overcome the Statute of Frauds). *But see Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 74-75 (Me. 1991) (rejecting the use of detrimental reliance to overcome the Statute of Frauds with respect to promises of employment). For a recent and thorough treatment of the issue, see generally Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73 (2011).

³⁰² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 95 cmt. a (1981) (noting that the

Of course, there are some situations in which a legal formality truly is a *requirement* of form in the sense that the failure to use it will result in the sanction of nullity. For example, under the federal Older Workers Benefit Protection Act of 1990,³⁰⁴ an employee's release of a federal age discrimination claim is of no effect unless certain formalities are complied with (including the release being written in a manner calculated to be understood by the employee; having the waiver specifically refer to claims under the federal age discrimination statute; having the employer advise the employee in writing to consult with an attorney prior to executing the release; and providing the employee at least twenty-one days to consider the release),³⁰⁵ and there are no exceptions.³⁰⁶

A legal formality can serve a variety of functions. The most widely recognized functions are the three identified by Professor Lon Fuller.³⁰⁷ First, a legal formality can serve an evidentiary function, by providing evidence of the bargain and its terms.³⁰⁸ Although a court could determine what occurred without the use of a legal formality (by admitting and considering any relevant evidence, irrespective of its form), a requirement of form (if complied with) reduces the time and expense involved in this determination. Also, if the formality is well known, one would expect that it will reduce the error rate involved in the court's factual determination (if it is well known, a failure to use the form is good evidence that the alleged transaction did not occur). The evidentiary function also benefits the parties because it enables them to more reliably predict what the court will conclude if the dispute is litigated, thereby giving them greater knowledge of their legal rights, which in turn leads to better decision making.

nonexistence of one of the requirements for a sealed contract "does not preclude the formation of a contract binding as a bargain").

³⁰³ *Id.*

³⁰⁴ Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621-626 (2006)).

³⁰⁵ Older Workers Benefit Protection Act § 201(f)(1)(A), (B), (E), (F), 104 Stat. at 983, (codified at 29 U.S.C. § 626(f)(1)(A), (B), (E), (F) (2006)).

³⁰⁶ See *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427-28 (1998) (holding that an employee's release that fails to comply with the requirements of the Older Workers Benefit Protection Act is ineffective and cannot be ratified under common-law ratification doctrines).

³⁰⁷ See Fuller, *supra* note 297, at 800-03.

³⁰⁸ See *id.* at 800 ("The most obvious function of a legal formality is . . . that of providing evidence of the existence and purport of the contract, in case of controversy." (internal quotation omitted)); Perillo, *supra* note 23, at 64 ("A primary function of contractual formalities is, of course, to supply and preserve evidence of the contract."); Kennedy, *supra* note 6, at 1691 n.14 ("The evidentiary function includes both providing good evidence of the existence of a transaction and providing good evidence of the legal consequences the parties intended should follow.").

Second, a legal formality can serve a cautionary function, in the sense of "acting as a check against inconsiderate action,"³⁰⁹ and "making the parties think twice about what they are doing and making them think twice about the legal consequences."³¹⁰ The requirement that a party formalize her promise, by reducing it to a signed writing for example, will cause the transaction to take more time, thereby increasing the likelihood of deliberation and likely impressing upon the promisor the seriousness of the matter. For example, "[t]he seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future."³¹¹ Thus, by inducing parties to spend more time thinking before they act, the cautionary function helps reduce the number of inefficient exchanges caused by hasty and inconsiderate action.

Third, a legal formality can serve a channeling function by offering "a legal framework into which the party may fit his actions,"³¹² so that the party knows how to accomplish a desired end. In other words, "it enables the parties to search out and find the appropriate device to accomplish their intent to create an obligation."³¹³ For example, a seal permits a person to accomplish the objective of making a promise legally enforceable.³¹⁴

In addition to the famous tripartite evidentiary, cautionary, and channeling functions set forth by Fuller, Professor Joseph Perillo has identified many other purposes a legal formality can serve.³¹⁵ Importantly for this Article, Perillo recognized that a formality can serve a clarifying function by leading parties to uncover points of disagreement during a bargain's formation, which enables them to work the issues out prior to finalizing the bargain.³¹⁶ By doing so, the parties will reduce the number of post-formation disputes caused by gaps and misunderstandings.³¹⁷

Legal formalities do, however, have at least two harmful effects apart from occasionally defeating the parties' expectations. First, because legal formalities take time to comply with, they slow the pace of business.³¹⁸

³⁰⁹ Fuller, *supra* note 297, at 800; *see also* Perillo, *supra* note 23, at 53 (noting that one of the functions of a legal formality "is to caution the promisor that he is entering into a binding relationship").

³¹⁰ Kennedy, *supra* note 6, at 1691 n.14.

³¹¹ Fuller, *supra* note 297, at 800.

³¹² *Id.* at 801.

³¹³ Perillo, *supra* note 23, at 49.

³¹⁴ *See* Fuller, *supra* note 297, at 802.

³¹⁵ Perillo, *supra* note 23, at 43-69.

³¹⁶ *Id.* at 56-58.

³¹⁷ *See id.*

³¹⁸ *Id.* at 70.

Second, they enable a party to use noncompliance to avoid a bargain because the deal has become undesirable.³¹⁹ The less well known a legal formality is, the more often the latter effect is likely to occur.

The best legal formality is one that is adopted when the following conditions exist: the transaction type to which it is applied is in the normal course (i.e., without the legal formality) in some sense deficient in accomplishing the goals of legal formalities (i.e., there is a need for the formality);³²⁰ compliance with the legal formality is not so time-consuming that the transaction costs involved in complying with it outweigh the benefits to be received from the bargain (and thus have the effect of discouraging what would otherwise be a mutually beneficial exchange);³²¹ and the legal formality is well known so that it is made use of;³²² and miscarriages of justice (i.e., results contrary to the parties' intentions) are kept to a minimum.³²³

The consequence of treating the reasonably certain terms requirement as a legal formality is that more bargains will fail to be contracts than if the requirement was treated simply as a doctrine to implement the parties' intentions, and as a restatement of other doctrines designed to enable the court to resolve the dispute before it. Also, treating the requirement as a legal formality has the strange effect of permitting a plaintiff to proceed on a contract theory even though the plaintiff lacks evidence to prove expectation damages to a reasonable certainty,³²⁴ but prohibiting the plaintiff from proceeding on a contract theory if the bargain's *terms* (as opposed to the evidence) in regard to the plaintiff's expectation interest, are not reasonably certain.³²⁵ The question that needs answering, then, is why

³¹⁹ *Id.*; see also *Snyder, supra* note 179, at 37 (referencing the possibility that a party will rely on the indefiniteness doctrine to escape a bargain that is no longer beneficial to her).

³²⁰ See *Fuller, supra* note 297, at 805 ("The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises" (emphasis omitted)).

³²¹ See *Fuller, supra* note 297, at 805 ("Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.").

³²² If a formality is not well known, the benefits of the formality will be reduced, and its harmful effects will be increased.

³²³ See *Perillo, supra* note 23, at 70 (noting that formalities enable a party to use them to avoid a bargain that has become undesirable).

³²⁴ A party can only recover loss up to an amount that the evidence establishes with reasonable certainty. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

³²⁵ The former concept appears applicable to situations in which the contract terms are sufficiently definite, but there is insufficient evidence to determine the amount of loss caused by the breach of the definite term. These tend to be situations in which the promised performance (which is sufficiently definite) was simply a means to an end for the promisee,

classical contract law might have considered contractual invalidity an appropriate sanction for entering into a bargain with indefinite terms, even when the court has before it all that is needed to implement the parties' manifested intentions and to resolve the dispute that has arisen.

as opposed to being the end in itself. Although the promised performance is clear, the value of the performance is not. An example would be a contract between a promoter and a boxer for the boxer to fight a particular opponent and the parties to share the profits. *See, e.g.*, *Chi. Coliseum Club v. Dempsey*, 265 Ill. App. 542 (1932). The boxing match is simply a means to an end for the parties—the end being revenue. Accordingly, although the contract's terms are sufficiently definite (it is clear what each party is to do), the loss from a breach of the contract might be difficult to prove, and, thus, the value of the promise to box is uncertain. Another example would be the breach of a contract to publish a novel. *See, e.g.*, *RESTATEMENT (SECOND) OF CONTRACTS* § 352 cmt. a, illus. 1 (1981); *Freund v. Wash. Square Press, Inc.*, 314 N.E.2d 419 (N.Y. 1974). The promise to publish the novel might be definite, but the evidence might not permit the loss caused by the failure to publish (including lost royalties and loss to reputation) to be established to a reasonable certainty. As the court in *Freund* noted, "the value to [the] plaintiff of the promised performance—publication—was a percentage of sales of the books published and not the books themselves." *Id.* at 422. A further example is a landowner who breaches a promise to sell land to a prospective buyer, when the buyer plans to build a drive-in theater on the land. *RESTATEMENT (SECOND) OF CONTRACTS* § 352 cmt. a, illus. 2 (1981). In such a situation, even though the parties' promises are sufficiently definite, the prospective buyer might not be able to prove the lost profits to a reasonable certainty. *Id.* In these cases, it is simply the loss that is uncertain and not any of the contract's terms.

The latter concept deals with a situation in which the difficulty of proving the promisee's expectation interest is caused by the vagueness of the promise that was breached. An example is the well-known case of *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973). In that case, the patient alleged that a surgeon "promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance . . ." *Id.* at 184. There seemed to be little doubt that the promise was breached: the patient alleged that the result of the surgeries was to leave her with a nose that "had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was [sic] flattened and broadened, and the two sides of the tip had lost symmetry." *Id.* at 185. One of the reasons the court only awarded reliance damages was because, in cases involving a doctor's promise to a patient regarding the results of a medical procedure, "to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder." *Id.* at 188. Presumably, it would be too difficult to prove with reasonable certainty the position the plaintiff would have been in had the defendant performed as promised.

A related situation is when the promise is definite and the promised performance was an end in itself, such that it is clear the position the non-breaching party would have been in had there been performance, but it is difficult to put a dollar value on that position. For example, in the famous case of *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), what the doctor promised the patient was arguably not vague ("a hundred per cent perfect hand or a hundred per cent good hand"), *id.* at 643, but it might be difficult to put a dollar value on a 100% perfect or good hand.

To identify the purposes served, it is important to identify the harm caused by bargains lacking reasonably certain terms, beyond making it difficult for a court to resolve the dispute before it. Indefinite bargains make it difficult for the parties to know their legal rights and duties arising from the bargain, which increases the likelihood of misunderstandings, and which in turn increases the likelihood of post-formation disputes. When the bargain has a gap and the unanticipated event occurs, the parties might disagree as to which gap-filling term is “reasonable in the circumstances” or, more importantly, which gap-filling term a court will conclude is “reasonable in the circumstances.”³²⁶

Similarly, when the bargain has a vague term, and it is unclear whether an event that occurs is within or outside the term’s range of meaning, the parties might disagree as to how a court would interpret the term. The likelihood of these disagreements is increased by each party having an *ex post* incentive to advocate for the meaning that is now most favorable to itself. A post-formation dispute not only results in lost time and inefficient expenditures during the dispute, it presumably also increases the likelihood that the parties’ post-formation, pre-dispute, reliance expenditures will be wasted if the parties cannot resolve it. Also, such disputes would likely disrupt the plans of third parties who relied on the expected performance of the bargain.

Further, if one party’s promise is not reasonably certain, and the other party’s performance is due first, one would expect that there is an increased chance the latter party will repudiate the bargain before performing. The latter party will understandably be reluctant to perform when the contours of the performance to be received in exchange are uncertain and when there is an incentive for the first party to construe the indefinite return performance narrowly. Although the latter party entered into the bargain even when the other party’s promised performance was not reasonably certain, the latter party might have done so without sufficient deliberation or attention to the lack of certainty—and only at the time for its own performance, came to recognize that it was unclear exactly what it had bargained for. If the court requires a plaintiff, when seeking expectation damages, to prove its cost or loss avoided from not having to perform, this will provide a further incentive.

Misunderstandings arising from indefinite bargains also increase the chance the exchange is not beneficial for one of the parties, and thus run counter to one of contract law’s principal aims, which is to encourage

³²⁶ See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

mutually beneficial exchanges.³²⁷ Indefinite bargains are also likely to have been entered into without careful deliberation, further increasing the chance the exchange is not mutually beneficial.

There is an increased chance these problems will be avoided if the reasonably certain terms requirement is treated as a legal formality, is applied at the time of the bargain's formation, and requires both parties' promises to be sufficiently definite. A sanction of contractual invalidity that applied only if the promise sought to be enforced is indefinite would only enhance, at the time of the bargain's formation, each party's interest in ensuring that the promise of the other party was sufficiently definite. The promisee would have an incentive to ensure that the other party's promise was sufficiently definite because if it was not, the promisee would not acquire a contract right to performance by the promisor. A rule that did not require the plaintiff's promise to be sufficiently definite would not itself provide an incentive for a party to ensure that its own promise was sufficiently definite because indefiniteness would not affect the party's acquisition of a contract right to performance by the promisor. The other party would, of course, have an incentive under the rule to make sure the first party's promise was sufficiently definite, but for each promise there would only be an incentive under the rule for one of the two parties to make sure the promise is reasonably certain.

There would, of course, be incentives originating from sources other than the rule for a party, at the time of the bargain's formation, to ensure its own promise is sufficiently definite. A party whose promise is indefinite runs the risk of a post-formation dispute with the other party, something the party will want to avoid.³²⁸ And worse still, the post-formation dispute might lead to a lawsuit with the indefinite promise being construed against the party. Also, if a party's promise is indefinite, it may be difficult for the party to determine its cost of performance, which would thereby make it difficult to determine if the exchange is beneficial to her.

These incentives to enter into bargains with reasonably certain terms might suggest that there is no need for the reasonably certain terms requirement to be treated as a legal formality. As previously noted, a legal formality is best reserved for those situations in which the transaction type is, in the normal course (i.e., without the legal formality), deficient in accomplishing the goals of legal formalities (i.e., there is a need for the formality).³²⁹ These incentives, however, might be considered insufficient

³²⁷ See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 783 (1999) (noting that one of contract law's principal aims is to promote mutually beneficial exchanges).

³²⁸ See Perillo, *supra* note 23, at 57.

³²⁹ See Fuller, *supra* note 297, at 805 ("The need for investing a particular transaction

to avoid indefinite bargains. As previously discussed, there are a host of reasons why the parties might enter into a bargain that lacks reasonably certain terms.³³⁰ These circumstances will lead to indefinite bargains despite the incentives to avoid indefinite bargains, and in turn lead to all of the problems caused by such bargains.

The court might, therefore, consider it advisable to add an extra incentive for the parties to make the terms of their bargain reasonably certain. Imposing the sanction of contractual invalidity when the plaintiff's promise is indefinite might provide such an incentive. If the party is aware of the rule, it will know that if a court determines its promise is not reasonably certain, it will be unable to enforce (under a contract theory) the other party's promise.³³¹ This increases the likelihood that both parties will have an incentive to make sure that all of the promises in the bargain are reasonably certain. Under this approach, the reasonably certain terms requirement operates as a deterrent to entering into an indefinite bargain, even if it turns out that the way in which the bargain is indefinite is irrelevant to resolving the dispute that ends up before the court.³³²

So what functions of form might the reasonably certain terms requirement serve if it is treated as a legal formality and used as a sanction for entering into an indefinite bargain? The evidentiary function would not be served in the respect of providing the court with evidence of the bargain and its terms because that function would already be served by treating the requirement as nothing more than a restatement of other rules needed by the court to resolve the dispute before it.³³³ The evidentiary function would also not be served with respect to gaps in the bargain. The evidentiary function is designed to provide evidence of the bargain and its terms,³³⁴ and if there is a gap, there was no manifested agreement on a particular issue, and thus, there is no term of which to provide evidence.

with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises" (emphasis omitted)).

³³⁰ See *supra* Part III.

³³¹ See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981)(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

³³² Cf. Ayres & Gertner, *supra* note 95, at 97 (discussing the Uniform Commercial Code's zero-quantity default rule as a potential penalty for both parties).

³³³ The evidentiary function would, however, be served in this respect if the reasonably certain terms requirement provided that the terms of the defendant's promise must be more definite than simply enabling the plaintiff to prove, by a preponderance of the evidence, that the defendant's promise was breached.

³³⁴ Fuller, *supra* note 297, at 800; see also Perillo, *supra* note 23, at 64; Kennedy, *supra* note 6, at 1691 n.14.

But the evidentiary function would be served by providing evidence to the parties that they attached the same meaning to a vague term, preventing one of the parties from later denying that shared meaning.³³⁵ By offering an additional incentive for a party to ensure its own promise is reasonably certain, the parties are more likely to avoid vague terms and are more likely to draft them in a way that reflects their mutual understanding of the term's meaning. This will then eliminate the ability of a party, after the bargain's formation, to take advantage of the vague term and deny that there was a mutual understanding.

Treating the reasonably certain terms requirement as a legal formality also serves the cautionary function of form. Providing an additional incentive for a party to ensure that its own promise is sufficiently definite will increase that party's deliberation about her promise, thus encouraging the party to think carefully about whether it desires to enter into the bargain.³³⁶ This will reduce the number of bargains that are not beneficial to one of the parties.

And, perhaps most importantly, treating the reasonably certain terms requirement as a legal formality serves the clarifying function of form. Providing an additional incentive for a party to ensure that her own promise is sufficiently definite will result in parties uncovering points of disagreement during a bargain's formation, which thereby enables them to work issues out prior to finalizing the bargain.³³⁷

By treating the reasonably certain terms requirement as a legal formality, the requirement would be, as argued by Professors Ian Ayres and Robert Gertner, a "penalty default."³³⁸ It would penalize the parties (or a party) for not affirmatively specifying the details of the bargain, and thereby encourage them to be more specific.³³⁹ And although treating the reasonably certain terms requirement as a legal formality was not a policy referenced by Williston in the First Restatement,³⁴⁰ it seems likely that this rationale contributed, at least in part, to classical contract law's requirement that both parties' promises be sufficiently definite to form a contract.

³³⁵ This would be important because where the evidence shows that "the parties have attached the same meaning to a promise or agreement or a term thereof [a so-called mutual understanding], it is interpreted in accordance with that meaning." RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981); *see also* Berke Moore Co. v. Phoenix Bridge Co., 98 A.2d 150, 155-56 (N.H. 1953).

³³⁶ *See* Perillo, *supra* note 23, at 53-56 (discussing the cautionary function of formalities).

³³⁷ *See id.* at 56-58 (discussing the clarifying function of formalities).

³³⁸ Ayres & Gertner, *supra* note 95, at 97.

³³⁹ *See id.* at 99.

³⁴⁰ *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

2. The Second Restatement's treatment of the plaintiff's promise

The Second Restatement “completely reformulated” the First Restatement’s rule on reasonably certain terms,³⁴¹ and part of its reformulation included replacing the First Restatement’s reference to “the promises and performances to be rendered by each party”³⁴² in the black letter rule with the requirement that “the terms of the contract [be] reasonably certain.”³⁴³ The Second Restatement then provided that the “terms” are reasonably certain “if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”³⁴⁴ Intentionally or not, an express statement of whether the plaintiff’s promise must be sufficiently definite was left out of the black letter rule’s reformulation.³⁴⁵

With respect to the doctrinal proposition that a contract is not formed unless the bargain’s terms are reasonably certain (a basis upon which the First Restatement’s position regarding the plaintiff’s promise having to be sufficiently definite was likely based), the Second Restatement’s black letter rule maintains the reasonably certain terms requirement as a formation doctrine.³⁴⁶ The rule expressly provides that unless the bargain’s terms are reasonably certain, an offer cannot be accepted “so as to form a contract.”³⁴⁷

Though the doctrines of cure-by-concession and modification (which focus on post-formation events and render an otherwise indefinite bargain sufficiently definite)³⁴⁸ might suggest that the reasonably certain terms requirement cannot possibly be a formation doctrine, a Second Restatement comment states that in situations such as these “it may be impossible to identify offer or acceptance or to determine the moment of formation.”³⁴⁹ Thus, subsequent action by one party removing the indefiniteness could be viewed as an acceptance of the other party’s original offer (which might have been an acceptance, not an offer, at the time of formation of the first unenforceable bargain), with the understanding that the otherwise indefinite

³⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter’s note (1981).

³⁴² RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

³⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

³⁴⁴ *Id.* § 33(2).

³⁴⁵ *See id.* § 33(1)-(3).

³⁴⁶ *See id.* § 33(1) (“Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain.” (emphasis added)).

³⁴⁷ *Id.*

³⁴⁸ *See supra* Part IV.

³⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

offer would be construed by a reasonable person as impliedly including within it an offer to contract on the terms most favorable to the offeror.³⁵⁰ If both parties manifest assent to the subsequent action as a method of performance, then the subsequent action would be a modification of the bargain's terms with the bargain becoming enforceable upon formation of the modified bargain.³⁵¹ Thus, the Second Restatement's reference to these doctrines is not inconsistent with it treating the reasonably certain terms requirement as a formation doctrine.

Its treatment of the requirement as a formation doctrine would logically lead to the conclusion that under the Second Restatement's test, both parties' promises must be sufficiently definite.³⁵² If the Second Restatement's supporting comment points in the other direction, the language of the Second Restatement's black letter rule and its supporting comment must be in conflict.

In contrast to carrying forward classical contract law's treatment of the reasonably certain terms requirement as a formation doctrine, the Second Restatement does not appear to retain the mutuality of obligation rationale as a basis for the reasonably certain terms requirement. For example, concern for mutuality of obligation is not referenced in the Second Restatement comment as a basis for the definiteness requirement. Instead, the only policy referenced is the policy against a court making a contract for the parties,³⁵³ which would only implicate the court's concern with resolving the dispute before it. Also, mutuality of obligation is, in general, downplayed in the Second Restatement.³⁵⁴ For example, under the Second Restatement, as long as an agreement has consideration, there is no additional requirement of mutuality of obligation,³⁵⁵ and a promise is consideration as long as it was bargained for and is legally sufficient.³⁵⁶

³⁵⁰ The subsequent action would not be a counter-offer because a counter-offer proposes "a substituted bargain *differing* from that proposed by the original offer." *Cf. id.* § 39 (emphasis added). The offeror repudiating prior to the offeree's concession would, however, terminate the power to accept the incorporated offer, *see id.* § 36(1)(c) (providing that revocation terminates the offeree's power of acceptance), unless an option contract had arisen, perhaps through reliance. *See id.* § 87(2) (offer rendered irrevocable as a result of foreseeable and substantial reliance by offeree).

³⁵¹ *Cf. id.* § 39.

³⁵² *See id.* § 33.

³⁵³ *Id.* § 33 cmt. b.

³⁵⁴ *See* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1933 (2001) (noting that the Second Restatement "relaxed the doctrine [of mutuality of obligation] in several areas of application").

³⁵⁵ RESTATEMENT (SECOND) OF CONTRACTS § 79(c) (1981). Clause (c) of Second Restatement section 79, which expressly rejects a requirement of mutuality of obligation as long as consideration exists, did not have a counterpart in the First Restatement. *See id.* § 79

Importantly, the Second Restatement does not state that an indefinite promise is legally insufficient (other than an illusory promise, of course, which is no promise at all).³⁵⁷ In fact, merely because one of the parties' promises is voidable or unenforceable does not affect the enforceability of the other party's promise.³⁵⁸ Rather, the only bargained-for promises that are legally insufficient are promises to perform a legal duty owed to the promisee,³⁵⁹ promises to forbear from asserting a clearly invalid claim or defense when the promisor does not believe "the claim or defense may be fairly determined to be valid,"³⁶⁰ conditional promises when the promisor knows the condition cannot occur;³⁶¹ and promises where the promisor reserves a choice of alternative performances and one of the alternatives is not consideration.³⁶²

In fact, a Second Restatement comment strongly suggests that a bargained-for indefinite promise (indefinite in the sense of being vague, not illusory) is consideration by stating as follows:

The value of a promise does not necessarily depend upon the availability of a legal remedy for breach, and bargains are often made in consideration of promises which are voidable or unenforceable. Such a promise may be consideration for a return promise. But it is sometimes suggested that a promise is not consideration if it is not binding, or if it is "void." The examples used commonly involve . . . indefinite promises (see §§ 33-34)³⁶³

The comment goes on to state that the examples provided are *not* exceptions to the Second Restatement's general rule that a promise is consideration as long as it is bargained for.³⁶⁴

Thus, whereas the Second Restatement's treatment of the reasonably certain terms requirement as a formation doctrine is evidence that it is necessary that the plaintiff's promise be sufficiently definite (even if not

reporter's note (1981) ("Clause (c) is new.").

³⁵⁶ *Id.* § 71(1) & cmt. b.

³⁵⁷ *See id.* § 77 (addressing the issue of illusory promises).

³⁵⁸ *See id.* § 78 (stating that a voidable or unenforceable promise can still be valid consideration).

³⁵⁹ *Id.* § 73.

³⁶⁰ *Id.* § 74(1)(b).

³⁶¹ *Id.* § 76(1).

³⁶² *See id.* § 72 ("Except as stated in §§ 73 [legal duty rule] and 74 [settlement of claims rule], any performance which is bargained for is consideration."); *id.* § 75 ("Except as stated in §§ 76 [conditional promises] and 77 [illusory and alternative promises], a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.").

³⁶³ *Id.* § 75 cmt. d (internal citations omitted).

³⁶⁴ *Id.*

relevant to the dispute), its apparent treatment of bargained-for indefinite promises (again, indefinite in the sense of being vague, not illusory) as consideration is evidence that it is not necessary that the plaintiff's promise be sufficiently definite. This does not mean, of course, that a court could not still consider the imbalanced nature of an exchange when the defendant received an indefinite promise from the plaintiff that cannot be enforced.³⁶⁵ The Second Restatement, however, does not appear to consider such imbalance as a reason to always require that the plaintiff's promise be sufficiently definite (which would, in fact, be in keeping with the Second Restatement's famous shift from rules to standards).³⁶⁶

Additional evidence points away from the Second Restatement requiring that the plaintiff's promise be sufficiently definite. As previously noted, the Second Restatement comment states: "[T]he degree of certainty required may be affected by the dispute which arises . . . Courts decide the disputes before them, not other hypothetical disputes which might have arisen."³⁶⁷ The comment's emphasis on the dispute brought before the court suggests that the indefiniteness of the plaintiff's promise will not automatically render the bargain unenforceable under the reasonably certain terms requirement.

For example, with respect to determining whether the defendant breached, it would only be relevant that the plaintiff's promise is too indefinite if the defendant asserts that the plaintiff breached his promise first and uses this as an excuse for the defendant's non-performance.³⁶⁸ But when the defendant was to perform first, or if the defendant repudiated before the plaintiff's performance was due, the indefiniteness of the plaintiff's promise is irrelevant to the court's ability to determine the existence of a breach. There is also no suggestion within the Second Restatement comment that the indefiniteness doctrine is premised, at least in part, on the requirement that the plaintiff be able to prove that she performed her end of the bargain or that she was ready, willing, and able to perform.³⁶⁹

³⁶⁵ To consider the First Restatement as having a greater concern than the Second Restatement for imbalanced exchanges would, of course, be a surprising position.

³⁶⁶ See generally E. Allan Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634, 634-35 (1982) (discussing the Second Restatement's move from rules to standards). For explanations of the differences between rules and standards, see Kennedy, *supra* note 6, at 1687-1701; Baird & Weisberg, *supra* note 296, at 1227-31.

³⁶⁷ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981).

³⁶⁸ See *id.* § 237 ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

³⁶⁹ See *id.* § 33 cmts. a-f.

Further, the Second Restatement comment states that when a court is deciding whether to fill a gap in the bargain, it is more likely to do so if the gap is one that is not important with respect to the dispute that has arisen.³⁷⁰ If gap-filling takes into account the dispute that has arisen (as opposed to assessing the perceived importance of a term as of the time of the bargain's formation), it would be consistent to assess indefiniteness at the same point in time, in which case a plaintiff's indefinite promise should be ignored if it is irrelevant to resolving the dispute. The comment further states that "[w]here the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract."³⁷¹ Consistent with the Second Restatement's approach to gap-filling, the comment likely contemplates an assessment of whether a matter is "incidental or collateral" based on the dispute that arises.³⁷²

Considering the importance of a vague or omitted term to the dispute that has arisen is likely designed to prevent parties from taking advantage of the indefiniteness doctrine when their non-performance was due to other reasons (such as wanting to avoid a bad bargain). For example, Professor Franklin Snyder has recognized that this concern most likely caused the U.C.C. drafters to relax the reasonably certain terms requirement,³⁷³ and also likely motivated (at least in part) the Second Restatement drafters. For example, Professor Joseph Perillo has stated that:

The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than indefiniteness. In such instances, the court should not be too fussy to determine how the gaps should have been filled.³⁷⁴

This is consistent with Perillo's assertion that the indefiniteness doctrine "is designed to prevent, where it is at all possible, a contracting party who is dissatisfied with a bargain from taking refuge in the doctrine to wriggle out of an agreement."³⁷⁵ And Perillo expressly links this concern to the Second Restatement's statement that the degree of certainty required is affected by

³⁷⁰ See *id.* § 33 cmt. b ("It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought.").

³⁷¹ *Id.* § 33 cmt. a.

³⁷² See *id.* § 33 cmts. a-b.

³⁷³ See Snyder, *supra* note 179, at 37-38.

³⁷⁴ ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, 1 CORBIN ON CONTRACTS § 4.1, at 535-36 (rev. ed. 1993).

³⁷⁵ PERILLO, *supra* note 2, at 55 (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981)).

the dispute that arises.³⁷⁶ This in turn suggests that the plaintiff's promise being sufficiently definite is not a requirement because doing so would not permit the court to consider whether the defendant is simply using the requirement as an afterthought to avoid liability.

The first illustration in the Second Restatement's section on reasonably certain terms provides further evidence that the indefiniteness of the plaintiff's promise does not automatically render the bargain unenforceable.³⁷⁷ The illustration is loosely based on, and intended to repudiate, the 1940 House of Lords decision in *G. Scammell & Nephew, Ltd. v. Ouston*.³⁷⁸ In that case, the House of Lords reversed the court of appeal and the trial court and held that a bargain to sell a new motor-van on hire-purchase terms over a two-year period³⁷⁹ was too indefinite to be enforced by the buyers because the details of the hire-purchase terms were not agreed upon.³⁸⁰ There was no suggestion in *Scammell* that the defendant's promise was too indefinite to enforce,³⁸¹ and the defendant apparently repudiated before any reliance by the plaintiffs on the bargain.³⁸² The defendant repudiated because he objected to the condition of a trade-in van that the plaintiffs promised to give to the defendant as part of the exchange³⁸³ (a position found to be unjustified),³⁸⁴ and not because the hire-purchase terms had not been agreed upon.³⁸⁵

The decision included an opinion by Lord Wright,³⁸⁶ who has been described as an "innovative traditionalist,"³⁸⁷ and his opinion in the case has been used as an example of his reluctance at times to "follow his argument that courts should be willing, in commercial law matters, to see the law play second fiddle to established business practices."³⁸⁸ Lord Wright believed

³⁷⁶ CORBIN & PERILLO, *supra* note 374, § 4.1, at 536 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981)).

³⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1 (1981).

³⁷⁸ [1941] A.C. 251 (H.L.) (Eng.). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note cmt. b (1981) (stating that illustration 1 repudiates the reasoning of *Scammell*).

³⁷⁹ *G. Scammell & Nephew Ltd.*, [1941] A.C. at 251.

³⁸⁰ *Id.* at 254, 257, 261, 273.

³⁸¹ There was apparently no dispute as to the type of motor-van the seller promise to provide to the buyer. *See id.* at 258 (Lord Russell) (setting forth the specifications of the motor-van); *id.* at 261-62 (Lord Wright).

³⁸² *See id.* at 252.

³⁸³ *Id.* at 263 (Lord Wright).

³⁸⁴ *See id.* at 267.

³⁸⁵ *See id.*

³⁸⁶ *Id.* at 261-73.

³⁸⁷ Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 265, 265 (2009).

³⁸⁸ *Id.* at 302. In this respect Lord Wright's opinion is reminiscent of Judge Benjamin

that the defendant's unjustified motive in repudiating the bargain did not prevent him from relying on the bargain's indefiniteness as a defense:

It is true that when the [defendant] broke off the affair [he] gave reasons for doing so which [he] could not justify. But when [he was] sued for breach of contract [he was] entitled to resist the claim on any good ground that was available, regardless of reasons which [he] had previously given. . . . [I]f a party repudiated a contract giving no reasons at all, all reasons and all defences in the action, partial or complete, would be open to him. Equally would this be so, I think, if he gave reasons which he could not substantiate. If there never was a contract, they could not be made liable for breach of contract.³⁸⁹

The House of Lords' decision in *Scammell* was a model of classical contract law's approach to indefiniteness (though decided during the time classical contract law was waning). Because the vague term had nothing to do with the reason the defendant repudiated, the court's focus was necessarily on the definiteness of the bargain as of the time of formation, and not at the time of the lawsuit. The plaintiff's promise was held too indefinite to form a contract, without any discussion of whether such indefiniteness would affect the ability of the court to determine the existence of a breach by the defendant or to give an appropriate remedy to the plaintiff (though its indefiniteness would presumably have made it difficult to determine the cost avoided by the plaintiff from not having to perform).³⁹⁰ Also, the defendant's motive in repudiating the bargain was

Cardozo's controversial opinion in *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923), in which he held a bargain too indefinite to enforce. *Id.* at 471-72. With respect to the controversial nature of the opinion, see Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995):

Many have observed that it was peculiar for Cardozo, widely regarded as a "contract maker," to have refused to find a contract worth enforcing in *Sun Printing*. For example, Cardozo could have accepted the buyer's argument that the parties had entered into one or more option contracts and enforced the contract in these terms very easily. Accordingly, something else must have led Cardozo to act as a "contract breaker." Corbin hinted at one possibility: "Was Cardozo less moved to cure defects in the work of the well-paid lawyers of two rich corporations?"

Id. at 1394 n.77 (citations omitted). The Second Restatement and the U.C.C. each reject Cardozo's rationale in *Sun Printing* (that the bargain was too indefinite because the parties failed to agree on a price). See RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (stating that the court should fill in the gap with a reasonable price); U.C.C. § 2-305 (2013) (same); Cunningham, *supra* at 1407 (recognizing that "the received understanding of *Sun Printing*—holding that a contract that does not fix a price term is unenforceable—had been reversed by section 2-305 of the Uniform Commercial Code").

³⁸⁹ *G. Scammell & Nephew Ltd.*, [1941] A.C. at 267-68 (Lord Wright).

³⁹⁰ See generally *id.*

considered irrelevant.³⁹¹ The House of Lords' permitted range of indefiniteness was also narrower than that used by the lower courts with the House of Lords concluding that there were simply too many different terms of the indefinite hire-purchase agreement that would be reasonable in the circumstances.³⁹²

The *Scammell* decision caught Professor Arthur Corbin's attention when Professor Lon Fuller included it in a draft of the mutual assent portion of a casebook they were collaborating on at the time.³⁹³ In a December 1941 letter to Fuller discussing Fuller's selection of cases for that portion, Corbin told him that "[m]y impression was generally good, although the opinion in *Scammell v. Ouston* did not impress me very well."³⁹⁴ Fuller was apparently not impressed by the opinion either (despite including it in the draft casebook), referring to it in his famous 1958 *Harvard Law Review* article, replying to H.L.A. Hart,³⁹⁵ as an "outstanding example"³⁹⁶ of the British courts, in recent years in the field of commercial law, falling "into a 'law-is-law' formalism that constitutes a kind of belated counterrevolution against all that was accomplished by Mansfield."³⁹⁷

In his famous 1950 Contracts treatise, Corbin explained that the Court of Appeal's reasoning that the parties should "be bound to perform according to some reasonable and customary 'hire-purchase' agreement" was one that he believed "seem[ed] reasonable."³⁹⁸ Thus, Corbin considered the House of Lords' decision to be incorrectly decided because the terms of the hire-purchase agreement could be supplied by industry custom, and thus the

³⁹¹ See *id.* at 267-68 (Lord Wright) (stating that if there was never a contract, the repudiating party could not be made liable for breach, regardless of the reason given for the repudiation).

³⁹² See *id.* at 256 (Viscount Maugham) ("[A] hire-purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth."); *id.* at 260-61 (Lord Russell) ("An alleged contract which appeals for its meaning to so many skilled minds in so many different ways, is undoubtedly open to suspicion [The contemplated hire-purchase agreement] could be brought about in various ways, and by documents containing a multiplicity of different terms."); *id.* at 268 (Lord Wright) (basing his decision not only "on the actual vagueness and unintelligibility of the words used, but . . . the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was").

³⁹³ See generally Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595 (2003) (discussing the collaboration).

³⁹⁴ *Id.* at 622.

³⁹⁵ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 637 n.5 (1958).

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 637.

³⁹⁸ ARTHUR L. CORBIN, 1 CORBIN ON CONTRACTS § 95, at 293 n.10 (1950).

buyer's promise was not too indefinite.³⁹⁹ Corbin was a consultant on the Second Restatement until his death in 1967,⁴⁰⁰ and his distaste for the decision perhaps played a role in the inclusion of an illustration loosely based on the case—an illustration that, according to Professor Braucher, the Reporter, “repudiates the reasoning of *G. Scammell & Nephew v. Ouston*”⁴⁰¹

If the illustration was designed simply to repudiate the House of Lords' reasoning in *Scammell*, then the illustration would have little relevance to determining whether the Second Restatement requires the plaintiff's promise to be sufficiently definite. In such a case, the illustration would simply stand for the unremarkable proposition that the Second Restatement's tolerance for vague language is greater than classical contract law's tolerance for such language. The illustration, however, throws a curveball by including within the bargain's terms a liquidated damages provision that did not exist in the bargain in *Scammell* and then suggesting that it is the liquidated damages provision (not industry custom) that results in the bargain's terms being sufficiently definite. The illustration provides as follows:

A agrees to sell and B to buy goods for \$2,000, \$1,000 in cash and the “balance on installment terms over a period of two years,” *with a provision for liquidated damages*. If it is found that both parties manifested an intent to conclude a binding agreement, the indefiniteness of the quoted language does not prevent *the award of the liquidated damages*.⁴⁰²

Although the illustration does not indicate which party allegedly breached, if the illustration is loosely based on *Scammell*, one can assume that *A*, the seller, repudiated.

The strange inclusion of a liquidated damages provision in the bargain suggests that the illustration's drafters considered the bargain's terms, in the absence of that provision, to be too indefinite because important details of the plaintiff's promise to pay off the balance were not agreed upon (e.g., the number of installments, how much per installment, and how much interest). The inclusion of a liquidated damages provision (and presumably a plaintiff's request to be awarded the liquidated damages) is apparently what

³⁹⁹ *Id.* One wonders if Corbin also believed that a liberal approach to gap filling was appropriate in the case because the defendant's motive for repudiating was not related to the indefiniteness of the plaintiff's promise.

⁴⁰⁰ Herbert Wechsler, *RESTATEMENT (SECOND) OF CONTRACTS* foreword (1981); *see generally* Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755 (1993) (describing some of Corbin's work as a consultant on the Restatement).

⁴⁰¹ *RESTATEMENT (SECOND) OF CONTRACTS* § 33 reporter's note cmt. b (1981).

⁴⁰² *Id.* § 33 cmt. b, illus. 1 (emphasis added).

makes the bargain's terms sufficiently definite (which, making things stranger, would not, in fact, repudiate the House of Lords' reasoning in *Scammell*, as stated by Braucher⁴⁰³). This in turn suggests that as long as the plaintiff can prove that the defendant breached (which the plaintiff can in the hypothetical if it is based on *Scammell* because there was a repudiation not based on the indefiniteness of the plaintiff's promise), the indefiniteness of the plaintiff's promise is irrelevant because it does not affect the ability of the court to give an appropriate remedy (here, liquidated damages).

This does not mean that the indefiniteness of the plaintiffs' promise could not become relevant to the dispute before the court if the facts were different; if, for example, the defendant alleged that the plaintiffs breached first, thereby excusing the defendant's non-performance; or if there were no liquidated damages provision, and the plaintiffs sought expectation damages and the indefiniteness of the plaintiffs' promise made it difficult to determine the plaintiffs' cost avoided from not having to perform. But this illustration suggests that the reasonably certain terms requirement does not *require* that the plaintiff's promise be sufficiently definite. Thus, it does seem to repudiate the decision in *Scammell* to the extent the House of Lords took the position that the plaintiff's promise must be sufficiently definite, but not for the reason that made the decision objectionable to Corbin.

Further evidence in support of the conclusion that the Second Restatement's "determining the existence of a breach"⁴⁰⁴ requirement is assessed at the time of the lawsuit is provided by the rule's requirement that the terms be sufficiently definite to determine both the existence of a breach *and* to give an appropriate remedy. If the time for assessing definiteness is as of the time of formation, and if the terms are sufficiently definite to determine the existence of a breach, they necessarily must be sufficiently definite for purposes of giving an appropriate remedy. For example, if the terms are sufficiently definite at the time of formation to determine the existence of a breach, the court will necessarily be able to identify the position the promisee would have been in had there been performance, and thus will be able to protect the promisee's expectation interest. There would be no reason to have two requirements; a single requirement providing that the terms must be sufficiently definite to determine the existence of a breach would be sufficient.

Conversely, if the time for assessing definiteness is at the time of the lawsuit, the two requirements could serve different functions. At the time of the lawsuit, a court might be able to determine the existence of a breach

⁴⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note cmt. b (1981).

⁴⁰⁴ *Id.* § 33(2).

because the defendant's actions (or inaction) were beyond the scope of a vague promise's range of plausible meanings, which would surely be the case if there was a repudiation or no attempt at performance, as was the case in *Scammell*.⁴⁰⁵ Yet the terms of the vague promise might not be sufficient to protect the promisee's expectation interest because, even though it is clear there has been a breach (or repudiation), the promise's vagueness makes it impossible to determine the position the promisee would have been in had there been performance. The vagueness of the plaintiff's promise might also make it impossible to determine the position the plaintiff would have been in had there been performance because the "cost or other loss" avoided by the plaintiff in not having to perform might be impossible to determine.⁴⁰⁶ Alternatively, a promised performance might be sufficiently definite to protect the promisee's expectation interest, but the duty to perform might be subject to a vague condition. In such a situation, the terms would not be sufficiently definite to determine the existence of a breach, though they would be sufficiently definite to determine the position the promisee would have been in had there been performance.

Also, in general, "[t]here has been movement to weaken or eliminate formal requirements for contract."⁴⁰⁷ An interpretation that does not require the plaintiff's promise to be sufficiently definite is in keeping with this movement. Similarly, such an interpretation is consistent with a modern desire, when assessing the indefiniteness of a bargain, to look past the time the bargain was formed, even while paying homage to the requirement's status as a formation doctrine. Professor Larry DiMatteo described this tendency at work, relying on a 1979 California appellate decision and quoting from the opinion:

The modern trend toward enforceability and the notion of fairness plays a role in the court's "forward-looking" or result-oriented rationale. The formalism of classical contract law is discarded in favor of the "norm of enforcement": "The modern trend of the law is to favor the enforcement of contracts [and] to lean against their unenforceability because of uncertainty" "[I]f it is possible [for a court] to reach a fair and just result," then the uncertainty norm of classical contract should not hold sway. In place of the contract voiding rationales of uncertainty, liberal rules of construction and gap-filling

⁴⁰⁵ See *G. Scammell & Nephew, Ltd. v. Ouston*, [1941] A.C. 251 (H.L.) 264 (Eng.) (Lord Wright) (stating that at trial there was found to have been a repudiation of the contract).

⁴⁰⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 347(c) (1981) (providing that in measuring the plaintiff's expectation interest for purposes of awarding expectation damages, the amount must be reduced by "any cost or other loss that [the plaintiff] has avoided by not having to perform").

⁴⁰⁷ Gergen, *supra* note 249, at 1440 n.178.

devices should be utilized to salvage contracts that show a reasonable modicum of contractual intent.⁴⁰⁸

In the end, what supports a conclusion that the Second Restatement's reasonably certain terms requirement requires the plaintiff's promise to be sufficiently definite is the inclusion of the requirement in the formation section⁴⁰⁹ and the black letter statement that unless the bargain's "terms" are reasonably certain a contract is not formed.⁴¹⁰ The reference to "terms" is not, however, particularly significant. The requirement that the "terms" be reasonably certain is defined in the black letter rule as requiring that "they provide a basis for determining the existence of a breach and for giving an appropriate remedy,"⁴¹¹ and the supporting comment and illustrations strongly suggest that being able to determine the existence of a breach is assessed at the time of the lawsuit, not at the time of formation.⁴¹²

Although the Second Restatement retaining the requirement as a formation doctrine is strong evidence that the "determining the existence of a breach"⁴¹³ analysis is assessed at the time of the bargain's formation, the substantial evidence to the contrary leads, on balance, to the conclusion that the requirement is assessed at the time of the lawsuit, and therefore does not *require* that the plaintiff's promise be sufficiently definite. This in turn suggests that the Second Restatement's requirement that a bargain's terms be sufficiently definite to determine the existence of a breach serves a purely practical purpose, and not a formal purpose.

A formal aspect would be retained, however, if the court required that the terms' definiteness be greater than that which would be necessary to establish the existence of a breach by a preponderance of the evidence.⁴¹⁴ If

⁴⁰⁸ Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"*—A Nonunified Theory, 24 HOFSTRA L. REV. 349, 413 (1995) (quoting *Larwin-Southern Cal., Inc. v. JGB Inv. Co.*, 162 Cal. Rptr. 52, 60 (Cal. Ct. App. 1979)).

⁴⁰⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (which is placed in Chapter 3 titled "Formation of Contracts—Mutual Assent").

⁴¹⁰ *Id.* § 33(1).

⁴¹¹ *Id.* § 33(2).

⁴¹² See, e.g., *id.* § 33 cmt. b ("[T]he degree of certainty required may be affected by the dispute which arises and by the remedy sought." (emphasis added)).

⁴¹³ *Id.* § 33(2).

⁴¹⁴ A somewhat similar issue is involved with respect to whether the Second Restatement's requirement that "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." *Id.* § 352. The Second Restatement does not make it clear whether this standard is designed to make it more difficult to recover contract damages than under a preponderance of the evidence standard that would apply irrespective of the black letter rule. See, e.g., *MindGames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (Posner, J.) (stating that the requirement in a contract action that lost profits be proven to a reasonable certainty is simply the rule that is

the court applied a narrow acceptable range for indefiniteness,⁴¹⁵ the rule would presumably result in decisions contrary to the manifested intentions of the parties. For example, even though the evidence before the court was sufficient to enable one to conclude, based on a preponderance of the evidence standard, that the defendant had breached a vague promise, a court applying a narrow acceptable range might consciously decide that the reasonably certain terms requirement demands greater certainty for finding a breach.

Although the Second Restatement does not address this issue, the use of the phrase “provide a basis for determining the existence of a breach”⁴¹⁶ suggests that the court is not to apply a standard more demanding than whether the terms are sufficiently definite to determine the existence of a breach by the preponderance of the evidence standard. This is further supported by the comment’s statement that “[t]he test is not *certainty* as to what the parties were to do”⁴¹⁷

A final argument against the conclusion that the Second Restatement’s requirement that the terms be sufficiently definite to determine the existence of a breach serves a purely practical purpose must be considered—namely, that if it serves a purely practical purpose, it is no more than a restatement of the general requirement that the plaintiff prove a breach of contract by a preponderance of the evidence.⁴¹⁸ And if this is so, why include it as a black letter rule?

It is likely that the drafters desired to have a black letter rule and a section on “certainty” that encompassed various issues involving indefiniteness.⁴¹⁹ And one of those issues is that the indefiniteness of a bargain’s terms (as opposed to the indefiniteness of what occurred after formation, which is likely what one usually means when referring to proving a breach by the preponderance of the evidence) might prevent the plaintiff from proving that the defendant breached the bargain.

Although it might have been better to place this doctrine in Chapter 10 of the Second Restatement (dealing with “Performance and Non-Performance”),⁴²⁰ there is evidence that the drafters included in the “Certainty” section doctrines that are, in fact, simply restatements of other

applicable to the recovery of damages in general).

⁴¹⁵ See *supra* Part IV.

⁴¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

⁴¹⁷ *Id.* § 33 cmt. b (emphasis added).

⁴¹⁸ See *Pisani v. Westchester Cnty. Health Care Corp.*, 424 F. Supp. 2d 710, 719 (S.D.N.Y. 2006) (stating that the plaintiff in a breach of contract action has the burden of proving by a preponderance of the evidence that the defendant breached the contract).

⁴¹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (titled “Certainty”).

⁴²⁰ See *id.* §§ 231-260.

doctrines. For example, the comment's discussion of the greater degree of certainty needed to obtain an award of specific performance⁴²¹ shows that this doctrine, which is not a formation doctrine,⁴²² is encompassed within the Second Restatement's "Certainty" section and is within the black letter rule's reference to the terms having to be sufficiently definite to give an appropriate remedy.⁴²³ Also, the "Certainty" section's third subsection addresses the issue of whether indefiniteness means that the parties have not manifested assent to a bargain,⁴²⁴ an issue that is analytically distinct from the requirement that a bargain's terms be reasonably certain and is in fact a particular application of the black letter rule on preliminary negotiations.⁴²⁵ Thus, the "Certainty" section, including its comment and illustrations, although placed in the formation chapter, appears to be a hodgepodge of analytically distinct issues (some of which have nothing to do with contract formation) whose only commonality is that they involve whether a bargain's terms are indefinite.

Further support for the conclusion that the "determining the existence of a breach"⁴²⁶ requirement is simply a restatement of the requirement that the plaintiff prove a breach is the Second Restatement's downplaying of the former requirement in favor of the "appropriate remedy" requirement.⁴²⁷ Although the comment, when discussing the reasonably certain terms requirement in general, states that "[i]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or

⁴²¹ See *id.* § 33 cmt. b ("In some cases greater definiteness may be required for specific performance than for an award of damages . . .").

⁴²² See *id.* § 362 cmt. a:

One of the fundamental requirements for the enforceability of a contract is that its terms be certain enough to provide the basis for giving an appropriate remedy. See § 33. If this minimum standard of certainty is not met, there is no contract at all. It may be, however, that the terms are certain enough to provide the basis for the calculation of damages but not certain enough to permit the court to frame an order of specific performance or an injunction and to determine whether the resulting performance is in accord with what has been ordered. In that case there is a contract[,] but it is not enforceable by specific performance or an injunction.

Id.

⁴²³ See *id.* § 33(2) (referring to the need for terms to be sufficiently definite to enable the court to give an appropriate remedy).

⁴²⁴ *Id.* § 33(3).

⁴²⁵ See *id.* § 33 cmt. c ("The rule stated in Subsection (3) is a particular application of the rule stated in § 26 on preliminary negotiations."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. d (2011) ("A transaction resulting in an indefinite [bargain] must not be confused with a failed negotiation producing no [bargain] at all.").

⁴²⁶ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

⁴²⁷ *Id.*

broken, there is no contract,”⁴²⁸ the comment heading for the discussion of the subsection listing the two requirements is simply titled “Certainty in basis for remedy.”⁴²⁹ Also, there are no references in that particular comment to the requirement that the terms be definite enough to provide a basis for determining the existence of a breach.⁴³⁰ Further, Professor Braucher, when discussing the two requirements, simply referred to there having to be “a reasonably certain basis for granting a remedy.”⁴³¹ The test was also modeled after U.C.C. § 2-204(3),⁴³² which refers only to “a reasonably certain basis for giving an appropriate remedy.”⁴³³ All of this suggests that the “determining the existence of a breach” requirement was simply a restatement of the general requirement that a plaintiff prove a breach of contract and that the “appropriate remedy” requirement was the true test for the reasonably certain terms rule (at least to the extent it exists as a rule separate from others). We will now turn to that requirement.

B. An “Appropriate” Remedy

For a bargain to have reasonably certain terms under the Second Restatement’s test, not only must the terms be sufficiently definite to provide a basis for determining the existence of a breach, they must also provide a basis for giving an “appropriate” remedy.⁴³⁴ This language was not used in the First Restatement, and was modeled after a U.C.C. provision.⁴³⁵ The Second Restatement does not indicate, however, which remedies are “appropriate.”⁴³⁶ In particular, the Second Restatement fails to state whether protecting the plaintiff’s reliance interest is an appropriate remedy or whether appropriate remedies are limited to those protecting the plaintiff’s expectation interest.⁴³⁷

⁴²⁸ *Id.* § 33 cmt. a.

⁴²⁹ *See id.* § 33 cmt. b (titled “Certainty in basis for remedy”).

⁴³⁰ *See id.*

⁴³¹ Braucher, *supra* note 8, at 308.

⁴³² *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 (“[T]hese subsections are drawn from the language found in the Uniform Commercial Code.”) (remark by Reporter Robert Braucher regarding the Second Restatement’s provisions on reasonably certain terms).

⁴³³ U.C.C. § 2-204(3) (2013).

⁴³⁴ *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

⁴³⁵ Braucher, *supra* note 8, at 308 (noting that the test provided for the reasonably certain terms requirement is based on U.C.C. section 2-204(3)).

⁴³⁶ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981) (defining “expectation interest,” “reliance interest,” and “restitution interest”); *id.* § 33 (not explaining what constitutes an “appropriate” remedy).

⁴³⁷ The promisee’s expectation interest is “his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been

If the ability of a court to give an appropriate remedy is assessed as of the time of the bargain's formation, an appropriate remedy is presumably limited to the protection of the parties' expectation interests. If the requirement is assessed as of this time, considering reliance damages to be an appropriate remedy would be nonsensical because there cannot be reliance on a bargain until after the bargain's formation.⁴³⁸ One would either have to take the position that the possibility of reliance means that the bargain's terms are always sufficiently definite to provide a basis for giving of an appropriate remedy (which would defeat the purpose of including an "appropriate remedy" requirement) or that the possibility of reliance should not be considered (which would defeat the purpose of concluding that reliance damages are an appropriate remedy).

But if the ability of a court to give an appropriate remedy is assessed at the time of the *lawsuit*, an appropriate remedy presumably could include the protection of the plaintiff's reliance interest, provided the plaintiff has relied on the bargain and seeks such a remedy.⁴³⁹ Whether the bargain's terms are sufficiently definite to provide an appropriate remedy for the defendant would be irrelevant as long as the defendant is not asserting a counterclaim for breach of contract.

The Second Restatement's comments include portions that suggest partial enforcement of a promise, such as through an award of reliance damages, might be considered an appropriate remedy for purposes of an indefiniteness analysis. For example, the comments state that there must be "a reasonably certain basis for granting a remedy," that "uncertainty may preclude one remedy without affecting another," and that "the degree of certainty required may be affected . . . by the remedy sought."⁴⁴⁰ Another Second Restatement black letter rule states that "[a]ction in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed."⁴⁴¹ The rule's reference to reliance making a

performed" *Id.* § 344(a).

⁴³⁸ Reliance damages protect the promisee's reliance interest. The promisee's reliance interest is "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made" *Id.* § 344(b).

⁴³⁹ See *id.* (defining the reliance interest).

⁴⁴⁰ *Id.* § 33 cmt. b. Even when a plaintiff has suffered no loss or cannot prove any loss, the plaintiff is entitled to recover nominal damages. See *id.* § 346(2). Because this is just "a small amount," it would be difficult to argue that an award of nominal damages is an appropriate remedy. See BLACK'S LAW DICTIONARY, *supra* note 36, at 447 (defining *nominal damages* as "[a] small amount fixed as damages for breach of contract without regard to the amount of harm"). Also, this would render the adjective "adequate" irrelevant.

⁴⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1981).

remedy “appropriate” suggests that reliance damages are, in fact, an “appropriate remedy” under the indefiniteness test.

This language is consistent with statements by Professor E. Allan Farnsworth in his hornbook that suggest that the plaintiff’s choice of remedy, including a request for reliance damages, could render an otherwise indefinite bargain sufficiently definite.⁴⁴² He states that “[e]ven where damages [as opposed to specific performance] are sought, the effect of indefiniteness on the ability to estimate loss depends on the measure of damages involved. It is usually easier to estimate damages based on the *reliance* interest than on the expectation interest.”⁴⁴³

But another portion of the Second Restatement suggests otherwise. With respect to the Second Restatement’s black letter rule stating that “[a]ction in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed,”⁴⁴⁴ the supporting comment suggests that the reliance might not make an award of reliance damages an appropriate remedy.⁴⁴⁵ The comment states that because of a promisee’s reliance, “partial or full enforcement through an award of damages for breach of contract or a decree of specific performance may become appropriate,” and then cites to section 90 for support,⁴⁴⁶ which is the section dealing with promissory estoppel.⁴⁴⁷ Here, it is important to remember that the Second Restatement considers a promise enforceable as a result of reliance to be a contract,⁴⁴⁸ thus showing that the reference to a remedy for “breach of contract” could have been intended to refer to a claim for promissory estoppel. Professor Joseph Perillo seems to agree that the claim here would be under promissory estoppel and not for breach of contract.⁴⁴⁹ Further, the premise that any award protecting less than the expectation interest is not an appropriate remedy is supported by any such award being an inadequate remedy at law for purposes of obtaining an equitable remedy.⁴⁵⁰

⁴⁴² See FARNSWORTH, *supra* note 2, at 207.

⁴⁴³ *Id.* (emphasis added).

⁴⁴⁴ RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1981).

⁴⁴⁵ See *id.* § 34 cmt. d.

⁴⁴⁶ *Id.*

⁴⁴⁷ See *id.* § 90.

⁴⁴⁸ See *id.* § 1 (defining *contract* as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”).

⁴⁴⁹ PERILLO, *supra* note 2, at 56 & n.112 (stating that a discussion of Restatement section 34 comment d and detrimental reliance on an indefinite bargain is discussed in the hornbook’s chapter 6, which deals with promissory estoppel).

⁴⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981).

Similarly, Professor Farnsworth, in his hornbook, uses *Kearns v. Andree*⁴⁵¹ and *Wheeler v. White*⁴⁵² as examples of courts protecting the reliance interest when the terms are too indefinite to give an expectation damages award.⁴⁵³ The former was based on an implied-in-law contract theory⁴⁵⁴ and the latter a promissory estoppel theory.⁴⁵⁵ Also, Professor Farnsworth, when explaining the rationale for the definiteness requirement, stated that the requirement:

[I]s implicit in the premise that contract law protects the promisee's *expectation interest* [because] [i]n calculating the damages that will put the promisee in the position in which the promisee would have been had the promise been performed, a court must determine the scope of that promise with some precision.⁴⁵⁶

Professor Kevin M. Teeven suggests the same, stating that "[i]n order for a court to decide on expectation damages, a court must know the scope of the promise"⁴⁵⁷ One court also explained that the reason a claim for promissory estoppel does not require reasonably certain terms is because the usual remedy (according to that court) is not expectation damages:

The reason for the distinction between the contract requirement of reasonable definiteness and the promissory estoppel requirement of reasonable and foreseeable reliance is the nature of the remedy available. Promissory estoppel only provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. The usual measure of damages under a theory of promissory estoppel is the loss incurred by the promisee in reasonable reliance on the promise, or "reliance damages." Reliance damages are relatively easy to determine, whereas the determination of "expectation" or "benefit of the bargain" damages available in a contract action requires more detailed proof of the terms of the contract.⁴⁵⁸

⁴⁵¹ 139 A. 695 (Conn. 1928).

⁴⁵² 398 S.W.2d 93 (Tex. 1965).

⁴⁵³ See FARNSWORTH, *supra* note 2, at 214-15.

⁴⁵⁴ See *Kearns*, 139 A. at 698.

⁴⁵⁵ See *Wheeler*, 398 S.W.2d at 96-97.

⁴⁵⁶ FARNSWORTH, *supra* note 2, at 108 (emphasis added) (internal footnote omitted); see also *id.* at 201 ("We have seen that the requirement of definiteness is implicit in the principle that the promisee's expectation interest is to be protected.").

⁴⁵⁷ TEEVEN, *supra* note 202, at 238.

⁴⁵⁸ *Rosnick v. Dinsmore*, 457 N.W.2d 793, 800 (Neb. 1990). Many jurisdictions award expectation damages in promissory estoppel cases if such damages can be proven to a reasonable certainty. See also Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 147 (2000) ("[C]ourts today often award expectation damages even in promissory estoppel cases, at least when the expectation damages are measurable.").

Also, considering reliance damages to be an appropriate remedy under the Second Restatement's test would render "appropriate" a virtually meaningless qualification to "remedy" because most contracts will induce reliance.⁴⁵⁹ Also, considering reliance damages to be an appropriate remedy would leave only the restitution interest and nominal damages as candidates for the label "inappropriate." Further, if a remedy was appropriate as long as it was sought by the plaintiff, all remedies would be appropriate, and the Second Restatement, rather than referring to "appropriate remedy," would have stated that the bargain's terms are sufficiently definite as long as they enable the court to give the remedy sought by the plaintiff.

The Second Restatement section on certainty provides only two illustrations with respect to the definiteness necessary to enable the court to give an appropriate remedy, and neither deals with a plaintiff seeking reliance damages.⁴⁶⁰ The first illustration is loosely based on *Scammell and Nephew, Ltd. v. Ouston*⁴⁶¹ and shows that an award of liquidated damages is an appropriate remedy.⁴⁶² The second is used to show that a plaintiff seeking specific performance can waive or remove the indefiniteness within the plaintiff's promised performance (which would be relevant to the remedy sought because an order of specific performance will make the plaintiff's performance a condition of the remedy) by offering to perform in the manner most favorable to the defendant.⁴⁶³ These illustrations do, however, suggest that a bargain's indefiniteness is only relevant if it precludes an award of the specific remedy sought by the plaintiff. This in turn would suggest that a request for reliance damages would be an appropriate remedy as long as the indefiniteness of either party's promise does not make it difficult to determine whether a particular act was in reliance on the bargain.

But such a conclusion drawn from these two illustrations is contradicted by the previously discussed citation to section 90 (the promissory estoppel section) in the Second Restatement comment, when it states that in many cases reliance on an indefinite bargain will make partial or full enforcement appropriate.⁴⁶⁴ So how can the differing treatment be reconciled?

⁴⁵⁹ See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 4 (1979) (stating that except for situations in which the promisor has made some mistake and quickly attempts to withdraw the promise, "the probability is that some action in reliance (or some payment) will soon be performed by the promisee").

⁴⁶⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1, 2 (1981).

⁴⁶¹ [1941] A.C. 251 (H.L.) (Eng.).

⁴⁶² See RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1 (1981).

⁴⁶³ See *id.* § 33 cmt. b, illus. 2.

⁴⁶⁴ See *id.* § 34 cmt. d.

The Second Restatement's rule is that the bargain's *terms* must "provide a basis for . . . giving an appropriate remedy,"⁴⁶⁵ and the supporting comment explains that the requirement "reflects the fundamental policy that contracts should be made by the parties, not by the courts, and hence that remedies for breach of contract must have a basis *in the agreement of the parties*."⁴⁶⁶ With respect to a party conceding to a meaning that is most favorable to the opposing party via the cure-by-concession doctrine,⁴⁶⁷ or the court granting liquidated damages,⁴⁶⁸ the bargain's *terms* provide a basis for giving the requested remedy. The cure-by-concession doctrine essentially alters the terms and permits full enforcement of the promise. The liquidated damages provision is part of the original bargain.

A remedy of reliance damages, however, has no basis in the parties' agreement.⁴⁶⁹ Also, when it is a party's reliance that makes an agreement enforceable, the plaintiff is usually required to proceed under a promissory estoppel theory.⁴⁷⁰ Thus, the comment's citation to section 90 and the illustrations can be reconciled by recognizing that reliance does not result in the bargain's terms enabling the court to provide an appropriate remedy, whereas the cure-by-concession doctrine and a liquidated damages provision do result in the bargain's terms enabling the court to provide an appropriate remedy. Of course, part performance can remove uncertainty,⁴⁷¹ but the issue here is whether mere reliance is sufficient to make an award of reliance damages an appropriate remedy, even if the reliance does not remove the indefiniteness. In fact, the black letter rule's reference to reliance making a contractual remedy appropriate "even though uncertainty is not removed,"⁴⁷² suggests that the bargain remains too indefinite to be enforced as a contract.

For those who find such reconciliation objectionable as being based solely on word parsing, the different treatment of the cure-by-concession doctrine and liquidated damages on the one hand, and reliance damages on the other, makes practical sense. The first two situations are ones that involve conduct that should be encouraged. Rewarding a cure-by-

⁴⁶⁵ *Id.* § 33(2).

⁴⁶⁶ *Id.* § 33 cmt. b (emphasis added).

⁴⁶⁷ See Ben-Shahar, *supra* note 242, at 421 ("Under the doctrine of 'cure by concession,' when the contract is silent over a material term the indefiniteness is overcome by granting the plaintiff the option to concede the missing term in accordance with the defendant's most favorable arrangement.").

⁴⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

⁴⁶⁹ Reliance damages are defined as an "interest in being reimbursed for loss caused by *reliance* on the contract . . ." *Id.* § 344(b) (emphasis added).

⁴⁷⁰ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

⁴⁷¹ *Id.* § 34(2).

⁴⁷² *Id.* § 34(3).

concession by permitting a claim on the contract encourages a party to resolve a dispute by conceding to the meaning of a bargain that is most favorable to the other party. Rewarding the inclusion of a liquidated damages provision encourages parties to use such clauses, and such a provision “saves the time of courts, juries, parties and witnesses and reduces the expense of litigation.”⁴⁷³ In contrast, reliance on indefinite bargains (at least to the extent the reliance does not remove the bargain’s uncertainty) should be discouraged because it will often be inefficient behavior. Indefinite bargains often lead to disputes with the result being that one or both of the parties’ reliance expenditures are wasted.

Also, if a bargain’s terms simply had to be sufficiently definite to provide the plaintiff with the remedy being sought (and assuming, as previously discussed, that it was not necessary for the plaintiff’s promise to be sufficiently definite if not relevant to the dispute), the reasonably certain terms requirement would be designed solely to enable the court to resolve the dispute before it. While this might not be objectionable from a normative standpoint, it would render irrelevant a separate doctrine involving reasonably certain terms, and thus destroy it. By treating the plaintiff’s expectation interest (or liquidated damages) as the only appropriate remedies, it explains the survival of the reasonably certain terms requirement as a separate doctrine.

Accordingly, the Second Restatement’s comments and illustrations support the conclusion that an “appropriate” remedy is only one that permits full enforcement of the parties’ bargain (i.e., an award protecting the expectation interest or an award of liquidated damages) as opposed to partial enforcement (e.g., an award protecting the reliance interest or the restitution interest, or an award of nominal damages).⁴⁷⁴

What then, is to be made of the comment’s statement that “the degree of certainty required may be affected by . . . the remedy sought”?⁴⁷⁵ The most likely explanation is that the comment refers to the higher degree of certainty needed to award specific performance as opposed to expectation damages. Shortly after this statement, the first statement after two sentences addressing how the degree of certainty required may be affected by the dispute which arises (as opposed to the remedy sought), in the

⁴⁷³ *Id.* § 356 cmt. a.

⁴⁷⁴ If protecting the reliance interest is not an appropriate remedy, an award protecting the restitution interest would not be an appropriate remedy because the restitution interest is usually smaller than the reliance interest. *See id.* § 344 cmt. a (“Although [the restitution interest] may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party’s lost profit nor that part of his expenditures in reliance that resulted in no benefit to the other party.”).

⁴⁷⁵ *Id.* § 33 cmt. b.

comment notes that “[i]n some cases greater definiteness may be required for specific performance than for an award of damages”⁴⁷⁶ Shortly thereafter, a citation is given to the Second Restatement sections on specific performance and injunctions.⁴⁷⁷ The statement might also be referring to a plaintiff who is only seeking liquidated damage. Although the comment includes a statement that “[p]artial relief may sometimes be granted when uncertainty prevents full-scale enforcement through normal remedies,”⁴⁷⁸ this statement most likely refers to the following section dealing with reliance on an indefinite bargain, which, as previously discussed, cites to section 90, the promissory estoppel section.⁴⁷⁹

Thus, on balance the evidence supports the conclusion that the Second Restatement’s test only considers a remedy to be appropriate if it has a basis in the parties’ agreement, which means either a remedy protecting the plaintiff’s expectation interest, including an award of specific performance or expectation damages, or an award of liquidated damages (i.e., so-called full enforcement).⁴⁸⁰ Anything less, such as reliance damages, restitution, or nominal damages (so-called partial enforcement),⁴⁸¹ would not be considered an appropriate remedy. Accordingly, if one assumes parties intend bargains to be enforceable in the sense of protecting the parties’ expectation interests, then the appropriate remedy requirement (by not considering partial enforcement to be an appropriate remedy) has a formal aspect to it, and thus, at least in part, serves the various functions of form that were served by classical contract law’s requirement that the plaintiff’s promise be sufficiently definite, even if not relevant to the dispute.

Before moving to the next topic, the effect this conclusion has on the previously discussed issue—whether the plaintiff’s promise must be sufficiently definite even if it is not relevant to the dispute—must be recognized. By concluding that the bargain’s terms must be sufficiently definite to enable the court to fully enforce the defendant’s promise, the indefiniteness of the plaintiff’s promise, although not a *requirement* under

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* (citing *id.* §§ 357-62).

⁴⁷⁸ *Id.*

⁴⁷⁹ See *supra* notes 444-45 and accompanying text.

⁴⁸⁰ See Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 114 n.16 (1991) (stating that expectation damages constitute a full enforcement of the promise); Larry A. Dimatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 630 (2001) (stating that if a liquidated damages clause is part of the bargain, then full enforcement of the clause will be consistent with the parties’ intentions).

⁴⁸¹ See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (discussing “partial enforcement”).

the reasonably certain terms test, will often make the court unable to fully enforce the defendant's promise.⁴⁸²

If the plaintiff's promise is indefinite (and that indefiniteness has not been removed under the cure-by-concession doctrine or by modification), and the plaintiff's cost or other loss avoided from not having to perform is too difficult to determine as a result of the indefiniteness of the plaintiff's promise, then the bargain's terms are too indefinite for the court to give an appropriate remedy unless the bargain included a liquidated damages provision. The court cannot award specific performance because an order directing the plaintiff to perform cannot be framed. The court cannot award expectation damages because it cannot determine the position the plaintiff would have been in had the bargain been performed.⁴⁸³

Thus, if the only appropriate remedy is full enforcement of the defendant's promise, the indefiniteness of the plaintiff's promise (though irrelevant to the "determining the existence of a breach" analysis) often will render the bargain too indefinite under the "appropriate remedy" analysis. This would be the case even if the court, after concluding that a contract had been formed, places the burden on the defendant to prove the plaintiff's savings from not having to perform.⁴⁸⁴

VI. THE SECOND RESTATEMENT'S TEST: NEOCLASSICAL CONTRACT LAW (TO A FAULT)

With the help of supporting comments and illustrations, a drawing of the Second Restatement's vague black letter rules on the definiteness doctrine has been sketched above, bringing the rule's contours more into focus. And

⁴⁸² See, e.g., *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965), discussed *infra* notes 520-25 and accompanying text.

⁴⁸³ See RESTATEMENT (SECOND) OF CONTRACTS § 347(c) (1981) (providing that in measuring the plaintiff's expectation interest for purposes of awarding expectation damages, the amount must be reduced by "any cost or other loss that [the plaintiff] avoided by not having to perform").

⁴⁸⁴ See generally *Kearsarge Computer, Inc. v. Acme Staple Co.*, 366 A.2d 467, 470 (N.H. 1976).

The general rule is:

If the plaintiff's required expenditures are of cash or material, the tendency is to put the burden of allegation and proof of the amount thereof on him, but if his expenditures would be of time or labor, the burden is normally placed on the defendant. The court usually decides whether the plaintiff's performance requires an outlay of money or material from the nature of the contract, without a specific raising of the point by the parties.

Id. at 470 (quoting R.F. Martin, Annotation, *Burden of Proving Value of Relief From Performing Contract in Suit Based on Defendant's Breach Preventing or Excusing Full Performance*, 17 A.L.R.2d 968, 972 (1951)).

the image revealed is unmistakably that of a work of neoclassical contract law.

Neoclassical contract law is the name given to the law that started to develop in the 1920s in response to classical contract law, and which produced the U.C.C. in the middle of the century and the Second Restatement in the latter part of the century.⁴⁸⁵ Whereas classical contract law was the law of Langdell, Holmes, and Williston,⁴⁸⁶ neoclassical contract law is the law of Corbin and Llewellyn.⁴⁸⁷ “[T]he rules of classical contract law were centered . . . on a single moment in time, the moment of contract-formation,”⁴⁸⁸ whereas neoclassical contract law is willing to take account of post-formation events to ensure a just outcome.⁴⁸⁹ Neoclassical contract law has been described as follows:

[It] attempts to balance the individualist ideals of classical contract with communal standards of responsibility to others. The core remains the principle of freedom of contract, distinguishing contract from tort and other areas, but this principle is “tempered both within and without [contract’s]

⁴⁸⁵ See Curtis Nyquist, *Single-Case Research and the History of American Legal Thought*, 45 NEW ENG. L. REV. 589, 594 (2011) (“Neoclassical contract law begins to come into focus in the 1920s and 1930s and still dominates the practice of law.”); Hillman, *supra* note 268, at 123 n.136 (noting that “[n]eoclassical contract law [is] evidenced by the Restatement (Second) of Contracts and article 2 of the Uniform Commercial Code”).

⁴⁸⁶ See Eisenberg, *supra* note 268, at 1749 (“In the late nineteenth and early twentieth centuries, the school of thought now referred to as classical contract law, which found its central inspiration in Langdell, Holmes, and Williston, and its central expression in the Restatement (First) of Contracts . . . held virtually absolute sway over contract theory.”).

⁴⁸⁷ Knapp, *supra* note 207, at 766-67.

⁴⁸⁸ Eisenberg, *supra* note 268, at 1748. See generally Macneil, *supra* note 203, at 863-65 (describing classical contract law’s focus on the moment of formation with respect to the rights and duties that arise between the parties).

⁴⁸⁹ See generally Murray, Jr., *supra* note 211, at 881-82 (explaining neoclassical contract law’s willingness to consider post-formation events); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 320 (1997). On the other side of neoclassical contract law (i.e., moving further away from classical contract law and its emphasis on the time of formation) is so-called relational contract theory, which places more emphasis on post-formation events than neoclassical contract law. See generally Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139 (1988) (describing the characteristics of relational contract theory). Relational contract theory has not, however, had a significant impact on the rules of contract law. See Eisenberg, *supra* note 205, at 805.

The identification of relational contracts as a critical construct and an important field of study has led to important insights concerning the economics and sociology of contracting. It has not, however, led to a body of relational contract law: that is, we do not have a body of meaningful and justified contract law rules, either in place or proposed, that apply to, and only to, relational contracts.

Id.

formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements." In deciding the scope of contractual liability, courts weigh the classical values of liberty, privacy, and efficiency against the values of trust, fairness, and cooperation, which have been identified as important by post-classical scholars.⁴⁹⁰

Also, whereas classical contract law favored inflexible, abstract rules that did not take into account the particular parties involved or the circumstances (beyond determining if the rule applied),⁴⁹¹ neoclassical contract law is more willing to adopt flexible standards to enable a court to reach what it believes is a fair result based on the particular facts before it.⁴⁹²

The Second Restatement's treatment of the reasonably certain terms requirement is quintessentially neoclassical contract law. It keeps one foot in the formalism of classical contract law by maintaining the reasonably certain terms requirement as a formation doctrine⁴⁹³ and by seemingly rejecting reliance damages (and anything less) as an "appropriate" remedy.⁴⁹⁴ It puts the other foot squarely in modern contract law by modeling its test for reasonably certain terms on the U.C.C.'s provision, by stating that "the degree of certainty required may be affected by the dispute which arises and by the remedy sought"⁴⁹⁵ and by stating that "[c]ourts decide the disputes before them, not other hypothetical disputes which might have arisen"⁴⁹⁶ (and by apparently not requiring the plaintiff's promise to be sufficiently definite).

⁴⁹⁰ Feinman, *supra* note 206, at 1287-88 (internal footnote omitted).

⁴⁹¹ See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20 (1965) ("[T]he 'pure' law of contract [of the nineteenth century] is an area of what we can call abstract relationships. 'Pure' contract doctrine is blind to details of subject matter and person."); Macneil, *supra* note 203, at 863 ("[Classical contract law] treats as irrelevant the identity of the parties to the transaction.").

⁴⁹² See James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 6 (2003) ("[W]here classical contract law was rule-based, neoclassical contract law is more willing to adopt standards."). For explanations of the differences between rules and standards, see Kennedy, *supra* note 6, at 1687-1701; Baird & Weisberg, *supra* note 296, at 1227-31.

⁴⁹³ See RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (placed in the chapter on "Formation of Contracts—Mutual Assent"); *id.* § 33(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

⁴⁹⁴ See *id.* § 34 cmt. d ("In some cases partial or full enforcement through an award of damages for breach of contract or a decree of specific performance may become appropriate. See § 90 [promissory estoppel].").

⁴⁹⁵ *Id.* § 33 cmt. b.

⁴⁹⁶ *Id.*; see also Macneil, *supra* note 203, at 873 (discussing neoclassical contract law's

The drafters seemed unwilling to let go of the past and jettison the idea of the reasonably certain terms requirement being a formation doctrine, while at the same time wanting to take account of and apparently approve of courts' propensities to take into consideration post-formation events so that justice can be done in individual cases.⁴⁹⁷ Unlike classical contract law, the Second Restatement's test seems to encourage courts to peek at post-formation events when deciding if a contract was formed at an earlier time: Did the indefinite term turn out to be unimportant to the dispute that arose? Is the defendant simply using indefiniteness as an afterthought to avoid what turned out to be a bad bargain?

But this compromise approach comes at an intellectual price. The reasonably certain terms requirement cannot be both a formation doctrine and a doctrine that assesses definiteness based on the dispute that arises. It is either a formation doctrine, or it is not. If it is a formation doctrine, no peeking should be permitted. The only conceivable way to make these positions consistent would be to maintain that a contract—defined as “a promise or a set of promises for the breach of which the law *gives* a remedy, or the performance of which the law in some way *recognizes* as a duty”⁴⁹⁸—is never really formed until a court gives a remedy or recognizes a duty between specific parties. But the Second Restatement rejects this approach, indicating that a legal duty to perform as promised arises from operative acts occurring prior to a court recognizing such a duty.⁴⁹⁹

How and why the Second Restatement's treatment of the reasonably certain terms requirement ended up lacking clarity and containing apparent inconsistencies is unclear, but it was perhaps due to one or more of the following: a belief that the reasonably certain terms requirement is rarely invoked by modern courts and was thus not worthy of substantial attention;⁵⁰⁰ the combining of related, yet analytically distinct, concepts within a single Second Restatement section dealing with “certainty,” resulting in perfunctory and unfocused treatment of the reasonably certain

treatment of the reasonably certain terms requirement).

⁴⁹⁷ See, e.g., Macneil, *supra* note 203, at 870 (stating with respect to neoclassical contract law's treatment of the reasonably certain terms requirement that the “system may be seen as an effort to escape partially from such rigorous [focus on the time of formation], but since its overall structure is essentially the same as the classical system it may often be ill-designed to raise and deal with the issues”).

⁴⁹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (emphasis added).

⁴⁹⁹ See *id.* cmt. d (discussing the operative acts necessary to create a legal duty to perform).

⁵⁰⁰ See Scott, *supra* note 10, at 1651 (“The contemporary presumption toward filling gaps in incomplete contracts has led commentators to assume that the common law indefiniteness doctrine is no longer a serious impediment to legal enforcement.”).

terms requirement;⁵⁰¹ an apparent desire to deemphasize classical contract law's focus on the moment of contract formation,⁵⁰² even with respect to the reasonably certain terms requirement⁵⁰³ without recognizing the confusion this might cause; simply relying on the reasonably certain terms provision in the U.C.C.,⁵⁰⁴ which was itself not explained in any detail and refers only to gaps, not vague terms;⁵⁰⁵ a desire to have the requirement left

⁵⁰¹ Second Restatement section 33 is simply titled "Certainty" and incorporates the related, yet analytically distinct, concepts of whether a reasonable person would construe an apparent offer with gaps as mere preliminary negotiations and not a manifestation of assent, *see* RESTATEMENT (SECOND) OF CONTRACTS § 33(3) & cmt. c (1981), the requirement that a bargain have reasonably certain terms to be a contract, *see id.* § 33(1)-(2), and the requirement that greater definiteness is usually required for an order of specific performance than an award of damages. *See id.* § 33 cmt. b ("In some cases greater definiteness may be required for specific performance than for an award of damages . . .").

⁵⁰² *See* Eisenberg, *supra* note 268, at 1749 ("[T]he rules of classical contract law were centered . . . on a single moment in time, the moment of contract-formation.").

⁵⁰³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981) ("[T]he degree of certainty required may be affected by the dispute which arises and by the remedy sought.").

⁵⁰⁴ *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[T]hese subsections are drawn from the language found in the Uniform Commercial Code.") (remark by Reporter Robert Braucher regarding the Second Restatement's provisions on reasonably certain terms).

⁵⁰⁵ *See* U.C.C. § 2-204(3) (2013) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."). All that the Official Comment provides regarding the reasonably certain terms requirement is the following:

Subsection (3) states the principle as to "open terms" underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damage due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

U.C.C. § 2-204 cmt. (2013); *see also* PERILLO, *supra* note 2, at 55 ("What is not clear is when a court will find that 'there is a reasonably certain basis for giving an appropriate remedy.'"). Professor Edwin W. Patterson, as part of his analysis of § 2-204(3) for the New York Law Revision Commission, stated that while the section's "general purpose [was] . . . to prevent the courts from requiring strictly that everything be clearly and definitely settled before the Court will find that a contract was formed[,] then provided the following cautionary note: "[T]he ways in which this general purpose is to be implemented are not clear. While the comment to this subsection indicates that only 'a reasonably certain basis for granting a remedy' is requisite, no illustrations are given." STATE OF NEW YORK,

vague so that courts would be able to apply it flexibly;⁵⁰⁶ a desire to completely strip the reasonably certain terms requirement of its formal aspect without wanting to say so explicitly; or simply describing what they saw (courts considering the requirement as a formation doctrine, but often unable to bite the bullet and ignore post-formation events).⁵⁰⁷

No matter the reason, the result is unfortunate. As stated by Herbert Wechsler, ALI director from 1963 to 1984,⁵⁰⁸ the Restatements are "essential aid[s] in the improved analysis, clarification, unification, growth and adaptation of the common law."⁵⁰⁹ It is well known that the Restatements often seek to move the law in a particular direction,⁵¹⁰ but the result should not be a black letter rule and supporting comments and illustrations that cause confusion and create inconsistencies. If the ALI desired to jettison the reasonably certain terms requirement as a formation doctrine, it should have done so expressly. And if it desired to retain it as a formation doctrine, it should have removed comments referencing post-

supra note 86, at 274 (remark by Professor Edwin W. Patterson). The leading treatise on the U.C.C. does not provide much explanation of the Code's reasonably certain terms requirement, simply stating that Article 2 "makes contracts easier to form," then setting forth, as one example, the text of § 2-204(1) and lastly noting that "Article 2 itself helps provide this 'reasonably certain basis' through numerous provisions which fill gaps in an agreement that might otherwise fail for indefiniteness." JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 29 (6th ed. 2010). The authors direct the reader to chapter 4 of the book, which deals with filling in gaps in an incomplete contract. *Id.* at ch. 4. It is clear that Professors White and Summers consider the reasonably certain terms requirement to be a dead letter under the U.C.C.

⁵⁰⁶ My thanks to Professor Stephen Leacock for suggesting this motive.

⁵⁰⁷ The official comment to the U.C.C. provision on unconscionability recognized the tendency of courts to manipulate unfavorable doctrines to reach just results. *See* U.C.C. § 2-302 cmt. 1 (2013).

This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

Id. Karl Llewellyn, the principal drafter of Article 2 of the U.C.C., *see* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 712 (1999), famously referred to this as the use of "covert tools." K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939). Professor Grant Gilmore colorfully referred to this as "courts avoid[ing] practicing on weekdays what they so eloquently preached on Sundays." GILMORE, *supra* note 62, at 52.

⁵⁰⁸ Silber, *supra* note 13, at 578.

⁵⁰⁹ Wechsler, *supra* note 13, at 150.

⁵¹⁰ *See* Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1665 (1995) (book review) ("[A] restatement seeks improvement of the law through simultaneous ordering and change.").

formation events, except with respect to cure-by-concession and modification. What it left us, however, is a treatment of the reasonably certain terms requirement that provides something for everyone and that permits a reader to construe it whichever way she wants.

Also, the ALI's apparent desire for courts to consider post-formation events when assessing indefiniteness is puzzling when one considers that promissory estoppel is available as an alternative claim. Under the Second Restatement, the sanction for failing to have a bargain with reasonably certain terms is not the sanction of nullity, but the sanction of *contractual* invalidity.⁵¹¹ By making the requirement one for contract formation, a promisee is not precluded from seeking to enforce an indefinite bargain under an alternative theory. Importantly, the Second Restatement, like the First Restatement,⁵¹² expressly recognizes promissory estoppel,⁵¹³ and the Second Restatement even recognizes promissory estoppel as an alternative claim when a bargain's terms are too indefinite to form a contract.⁵¹⁴ This doctrine, with its emphasis on a promisee's reliance and its goal of avoiding injustice,⁵¹⁵ enables a court to consider post-formation events to ensure a just outcome in a particular case.

This does, of course, still operate as a sanction for entering into a bargain with indefinite terms because it is more difficult for a promisee to enforce a promise under the doctrine of promissory estoppel than to enforce a promise within a contract.⁵¹⁶ But relegating a promisee to a promissory estoppel claim when the bargain's terms are too indefinite to form a contract seems to be an appropriate compromise between enforcement of the promise under a contract theory (no sanction) and automatic non-enforcement (the sanction of nullity). This is so because even though there are benefits to encouraging parties to have their bargains include reasonably certain terms, there might be situations in which the benefits of enforcement outweigh the benefits of non-enforcement, reinforcing the requirement's formal aspect. The flexibility given to the court by promissory estoppel's injustice element makes it an ideal device for the court to weigh the

⁵¹¹ See RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) (“[A manifestation of intention] *cannot be accepted so as to form a contract* unless the terms of the contract are reasonably certain.” (emphasis added)).

⁵¹² RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

⁵¹³ RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

⁵¹⁴ See *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 344 (D. Mass. 2011) (“[T]he Restatement ‘has expressly approved’ promissory estoppel’s use to protect reliance on indefinite promises.” (quoting Metzger & Phillips, *supra* note 242, at 842)).

⁵¹⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

⁵¹⁶ See Hillman, *supra* note 29, at 580 (1998) (reporting a low success rate for promissory estoppel claims).

competing benefits of enforcement versus non-enforcement. As stated by one court, promissory estoppel "supplies a needed tool which courts may employ in a proper case to prevent injustice."⁵¹⁷

For example, in deciding whether the injustice from not enforcing the promise would outweigh the benefit from reinforcing the legal formality, the court might take into consideration, among any other relevant circumstances, the following, many of which are post-formation events: how reasonable it was for the plaintiff to rely on the indefinite bargain (which would presumably require a comparison of the amount of reliance to the degree of indefiniteness and the bargain's informality);⁵¹⁸ whether the plaintiff's reliance was definite and substantial;⁵¹⁹ whether the defendant encouraged the plaintiff to rely on the bargain because the reliance benefited the defendant;⁵²⁰ the degree of fault on the part of the plaintiff in failing to specify the bargain's terms with greater definiteness, including the "relative competence and the bargaining position of the parties;"⁵²¹ whether the defendant in the lawsuit is simply trying to take advantage of the reasonably certain terms requirement to avoid what has become a bad bargain;⁵²² and whether the defendant intentionally drafted indefinite terms to have an excuse for non-performance.⁵²³

Thus, an example of when the court might conclude that the benefit to enforcement outweighs the benefit of reinforcing the legal formality through the sanction of nullity would be when one party encourages the other to take substantial action in reliance on the indefinite bargain because such reliance benefits the promisor, then refuses to perform for a reason unrelated to the bargain's indefiniteness, and then relies on the bargain's indefiniteness as a defense to the lawsuit.⁵²⁴ In fact, as previously

⁵¹⁷ *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 274 (Wis. 1965).

⁵¹⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981) (noting that factors to consider in deciding whether injustice will occur from not enforcing the promise include "the reasonableness of the promisee's reliance" and "the formality with which the promise is made").

⁵¹⁹ See *id.* (noting that a factor to consider in deciding whether injustice will occur from not enforcing the promise includes the "definite and substantial character [of the reliance] in relation to the remedy sought").

⁵²⁰ See, e.g., *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336 (D. Mass. 2011), discussed *infra* notes 539-49 and accompanying text.

⁵²¹ RESTATEMENT (SECOND) OF CONTRACTS § 87 cmt. e (1981).

⁵²² See CORBIN & PERILLO, *supra* note 374, § 4.1, at 535-36 ("The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than indefiniteness.").

⁵²³ See, e.g., *Dixon*, 798 F. Supp. 2d at 336, discussed *infra* notes 539-49 and accompanying text.

⁵²⁴ The rule in the Second Restatement that provides that an option contract arises when

discussed, parties taking advantage of indefiniteness to escape a bargain for an unrelated reason was the most likely reason the U.C.C. relaxed the reasonable certainty requirement.⁵²⁵

The well-known cases of *Wheeler v. White*⁵²⁶ and *Hoffman v. Red Owl Stores, Inc.*⁵²⁷ are perhaps examples of such a situation. In those cases, the plaintiffs' reliance on the indefinite bargain was substantial, and in each case the defendant encouraged the plaintiff to rely on the indefinite bargain and then used its indefiniteness as a defense.

In *Wheeler*, the parties entered into a bargain under which the defendant promised to secure a loan for the plaintiff (or, if unable to secure it from a third party, to provide the loan himself) so that the plaintiff could build a commercial building or shopping center on his land, and in exchange he promised to pay the defendant a specified sum of money.⁵²⁸ The bargain's terms with respect to the promised loan, however, "failed to provide the amount of monthly installments, the amount of interest due upon the obligation, how such interest would be computed, [and] when such interest would be paid."⁵²⁹ The parties also agreed that the defendant would receive a commission on the rent received from any tenants he obtained for the commercial building or shopping center.⁵³⁰ Thus, the defendant presumably had an incentive for the plaintiff to proceed with the plans to build the commercial building or shopping center before the defendant secured the loan, so that it would be easier for the defendant to secure the loan in the first place and so that the defendant could begin earning commissions on rent sooner.

The plaintiff alleged that the defendant, before securing a loan from a third party, urged the plaintiff to demolish the existing buildings on the land and to otherwise prepare the land for the commercial building or shopping center, which the plaintiff did, only to have the defendant then tell him there would be no loan.⁵³¹ When the plaintiff sued the defendant for breach of contract, the defendant argued that the bargain lacked reasonably certain

an offeree foreseeably and substantially relies on an offer and injustice would result if the offeror were able to revoke the offer before acceptance, would not apply because this rule results in the formation of a contract (though "[f]ull-scale enforcement of the offered contract is not necessarily appropriate in such cases"). *Id.* § 87 cmt. e. No contract can be formed if the terms are not reasonably certain. *Id.* § 33(1).

⁵²⁵ Snyder, *supra* note 179, at 37-38.

⁵²⁶ 398 S.W.2d 93 (Tex. 1965).

⁵²⁷ 133 N.W.2d 267 (Wis. 1965).

⁵²⁸ See *Wheeler*, 398 S.W.2d at 94 n.1, 95.

⁵²⁹ *Id.* at 95.

⁵³⁰ *Id.*

⁵³¹ *Id.*

terms and therefore no contract was formed.⁵³² The court held that although the complaint did not state a claim for breach of contract because the terms of the promised loan were indefinite, the complaint stated a claim for promissory estoppel.⁵³³

In *Hoffman*, the plaintiffs (husband and wife) alleged that the defendant, Red Owl Stores, promised the plaintiff husband that he only needed \$18,000 in capital to start up a Red Owl grocery store,⁵³⁴ but the bargain (if one had been reached)⁵³⁵ did not specify "the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options."⁵³⁶ The plaintiffs alleged that after making this promise, the defendant encouraged them, among other things, to sell their bakery building and business, to buy the inventory and fixtures of a small grocery store to gain experience, to then sell the small grocery store, and to obtain an option to buy land on which to build the Red Owl store.⁵³⁷ Professor Robert Scott has suggested that the defendant had an incentive to encourage the plaintiffs to undertake these actions in reliance on the defendant's promise of a Red Owl store: "All these actions gave Red Owl some further indication of the kind of franchisee that Hoffman was likely to be—was he enterprising and resourceful, or was he a bit of a doofus?"⁵³⁸

After these actions in reliance on the promise, the defendant raised the required amount of capital investment to \$34,000.⁵³⁹ When the plaintiffs sued the defendant for breaching the promise, the defendant argued that the terms were insufficiently definite.⁵⁴⁰ The court held, however, that the facts supported enforcing the promise under promissory estoppel, even though the promise was insufficiently definite to form a contract.⁵⁴¹

In these cases the defendant is perhaps primarily responsible for the harm (the wasted reliance) caused by the indefinite bargain. Thus, permitting the

⁵³² *Id.* at 94-95.

⁵³³ *Id.* at 97.

⁵³⁴ *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 268 (Wis. 1965).

⁵³⁵ It is unlikely that a bargain was entered into in *Hoffman* because there was likely no offer and, if there was an offer, no acceptance. *See id.* at 274-75. The promise in *Hoffman* seems to have been a promise by the defendant to make an offer to the plaintiffs and to have the promise within the offer conditional on a promise by the plaintiffs of a capital contribution of not more than \$18,000. *See id.*

⁵³⁶ *Id.* at 274.

⁵³⁷ *Id.* at 268-70.

⁵³⁸ Robert E. Scott, *Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71, 93 (2007).

⁵³⁹ *Hoffman*, 133 N.W.2d at 271.

⁵⁴⁰ *See id.* at 274.

⁵⁴¹ *Id.* at 275.

promise to be enforced under promissory estoppel in these instances will have the beneficial effect of deterring such behavior. A party will no longer have an incentive to encourage the other party to rely on the contract to the benefit of the promisor and then use the indefiniteness of its own promise as a defense. Of course, if, as argued by Professor Scott, the dispute in *Hoffman* arose because of a misunderstanding regarding the amount of financing,⁵⁴² then perhaps the sanction of nullity (as opposed to simply the sanction of contractual invalidity) would have been warranted.

A recent example is *Dixon v. Wells Fargo Bank, N.A.*,⁵⁴³ which arose out of the subprime mortgage crisis.⁵⁴⁴ The plaintiffs alleged that the defendant promised to consider their eligibility for a mortgage loan modification if they took certain steps, including defaulting on their mortgage loan payments and submitting certain financial information to the defendant.⁵⁴⁵ The plaintiffs alleged that they did these things, but that the defendant refused to modify their mortgage loan and instead proceeded to foreclose on their home.⁵⁴⁶ The plaintiffs then sued the defendant, asserting a claim for promissory estoppel.⁵⁴⁷ The defendant moved to dismiss the complaint, asserting, among other things, that any promise it made was insufficiently definite.⁵⁴⁸

The court seemingly recognized that the defendant's promise to negotiate a mortgage loan modification was not enforceable as part of a contract because (in addition to not being supported by consideration) the parties had not "elaborate[d] on the boundaries of that duty to negotiate" and the duty was thus too indefinite.⁵⁴⁹ The court held, however, that the complaint stated a claim for promissory estoppel.⁵⁵⁰ The court noted that the doctrine of promissory estoppel is well suited for situations in which the defendant's conduct was "designed to take advantage of the promisee,"⁵⁵¹ and when "there has been a pattern of conduct by one side which has dangled the

⁵⁴² See Scott, *supra* note 540, at 97; see also Robert E. Scott, *Hoffman v. Red Owl Stores and the Limits of the Legal Method*, 61 HASTINGS L.J. 859, 863 (2010) ("[T]he best inference to be drawn from the record was that the breakdown in the negotiations between Joseph Hoffmann [the court misspelled Hoffmann's name, see *id.* at 861 n.5] and Red Owl officials was primarily attributable to a fundamental misunderstanding between the parties as to the amount and nature of Hoffmann's capital contribution to the franchise operation.").

⁵⁴³ 798 F. Supp. 2d 336 (D. Mass. 2011).

⁵⁴⁴ See *id.* at 360.

⁵⁴⁵ *Id.* at 339.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 338-39.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 343.

⁵⁵⁰ *Id.* at 348.

⁵⁵¹ *Id.* at 344.

other side on a string.”⁵⁵² The court stated that “[w]hile there is no allegation that its promise was dishonest, [the defendant] distinctly gained the upper hand by inducing the [plaintiffs] to open themselves up to a foreclosure action.”⁵⁵³

A particularly egregious form of this behavior (which would occur at the time of formation) is when an offeror *intentionally* makes an indefinite offer to induce reliance that benefits the offeror, planning from the outset on refusing to perform based on the bargain's lack of certainty. For example, Professors Ian Ayres and Robert Gertner argue that an exception to the general rule that indefinite bargains should not be enforced should be “[w]hen the indefiniteness is clearly attributable to one party and induces inefficient reliance from the other party”⁵⁵⁴ They use the well-known case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*⁵⁵⁵ as an example of the suggested exception.⁵⁵⁶

In *Lefkowitz*, the defendant published two advertisements in the newspaper.⁵⁵⁷ In the first, the defendant stated that it was selling three brand new fur coats “[w]orth to \$100” for one dollar, “[f]irst [c]ome [f]irst [s]erved.”⁵⁵⁸ In the second, published one week later, the defendant stated it was selling a stole “[w]orth \$139.50” for one dollar, also “[f]irst [c]ome [f]irst [s]erved.”⁵⁵⁹ The plaintiff was the first person at the appropriate counter of the store on each day, but the store refused to sell to him because he was a man.⁵⁶⁰ The court held that the advertisements were offers and that the defendant breached a contract to sell the stole for one dollar,⁵⁶¹ but held that the trial court properly disallowed the plaintiff's claim for breach of contract to sell a fur coat because “the value of these articles was speculative and uncertain.”⁵⁶² The court stated that “[t]he only evidence of value was the advertisement itself to the effect that the coats were ‘Worth to \$100.00,’ how much less being speculative especially in view of the price for which they were offered for sale.”⁵⁶³

⁵⁵² *Id.* (quoting *Pappas Indus. Parks, Inc. v. Psarros*, 511 N.E.2d 621, 622 (Mass. App. Ct. 1987)).

⁵⁵³ *Id.* at 346.

⁵⁵⁴ Ayres & Gertner, *supra* note 95, at 106.

⁵⁵⁵ 86 N.W.2d 689 (Minn. 1957).

⁵⁵⁶ Ayres & Gertner, *supra* note 95, at 105-06.

⁵⁵⁷ *Lefkowitz*, 86 N.W.2d at 690.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 691.

⁵⁶² *Id.* at 690.

⁵⁶³ *Id.*

Professors Ayres and Gertner argue that a situation like *Lefkowitz* should be an exception to the general rule that indefinite offers will not be enforced.⁵⁶⁴ They argue that the penalty of non-enforcement will in fact encourage sellers to create indefinite (and hence unenforceable) offers that induce inefficient reliance by offerees because the inefficient reliance is in fact beneficial for the offeror.⁵⁶⁵ The seller in *Lefkowitz* was not interested in the sale of the fur coats or the stole, he wanted to induce persons to come to the store with the hope they would make other purchases.⁵⁶⁶ Thus, there will be some cases in which the offeror has an incentive to make indefinite (and hence unenforceable) offers because the offeror will obtain the desired performance from the offeree without having to himself perform.⁵⁶⁷

The *Lefkowitz* problem, however, is solved not by relaxing the reasonably certain terms requirement for the formation of a contract but by permitting the plaintiff to proceed under a promissory estoppel theory. If the offeror made an intentionally indefinite promise to obtain performance from the offeree with the expectation of not having to perform his end of the bargain (because no contract will be formed), that motive will support the conclusion that “injustice can be avoided only by enforcement of the promise.”⁵⁶⁸ Even if many cases like *Lefkowitz* (including *Lefkowitz* itself) do not involve reliance of a definite and substantial character, reliance of that character is not a requirement for a recovery under promissory estoppel,⁵⁶⁹ but is simply a factor that weighs in favor of enforcement.⁵⁷⁰ If the plaintiff could prove that the defendant made an intentionally indefinite offer to encourage reliance that was beneficial to the defendant with the expectation that he would not have to perform his end of the bargain, this would be sufficient to conclude that injustice would result from non-enforcement irrespective of the character of the reliance.

Thus, because of situations like *Wheeler*, *Hoffman* (assuming it was not simply a case of a misunderstanding), *Dixon*, and *Lefkowitz* (assuming the defendant had a bad motive), the sanction of contractual invalidity, and not

⁵⁶⁴ Ayres & Gertner, *supra* note 95, at 106.

⁵⁶⁵ *Id.*

⁵⁶⁶ *See id.*

⁵⁶⁷ *See id.*

⁵⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

⁵⁶⁹ Compare RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932) (“A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance . . .”) (emphasis added), with RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (“A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance . . .”).

⁵⁷⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) cmt. b (1981).

the sanction of nullity, would seem appropriate. The flexible nature of promissory estoppel's injustice element will permit courts to balance the benefits of enforcing the promise against the benefit of reinforcing the legal formality. This flexibility will permit courts to conduct that balancing on a case-by-case basis, and there will likely be situations other than those such as *Wheeler*, *Hoffman*, *Dixon*, and *Lefkowitz* in which courts will conclude that enforcement under promissory estoppel is warranted.

The flexible nature of promissory estoppel will also permit those courts that favor legal formalities more than other courts to assign greater weight to the benefits from reinforcing the legal formality.⁵⁷¹ Thus, a court would be able to deny enforcement under promissory estoppel in a particular case if it believes it would ultimately be more harmful to protect a party to a commercial transaction who did not protect himself.⁵⁷² The court will also be able to enforce the promise but only award reliance damages. For example, in *Wheeler*, the court, although enforcing the promise under promissory estoppel, concluded that an award of reliance damages, not expectation damages, was appropriate because the plaintiff was partly at fault for the bargain's indefiniteness.⁵⁷³ If, however, the defendant's behavior was egregious, an award of expectation damages might be appropriate, assuming the bargain's terms and the evidence permit such an award. Although punitive damages are usually not recoverable for the breach of a contract,⁵⁷⁴ the character of the defendant's conduct is sometimes taken into account when determining the amount of damages to award.⁵⁷⁵

Thus, a court has three options when confronted with a promissory estoppel claim based on a promise within a bargain whose terms are too indefinite to create a contract. These options are as follows: enforce the promise under promissory estoppel and award expectation damages (for those cases in which the injustice from not enforcing the promise substantially outweighs the benefit from reinforcing the legal formality, and

⁵⁷¹ See *id.* ("The principle of this Section is flexible.").

⁵⁷² See, e.g., *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) ("[I]n commercial transactions it does not in the end promote justice to . . . aid . . . those who do not protect themselves.").

⁵⁷³ *Wheeler v. White*, 398 S.W.2d 93, 97 (Tex. 1965).

⁵⁷⁴ RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

⁵⁷⁵ See *id.* § 352 cmt. a (stating that with respect to the requirement that a plaintiff prove damages to a reasonable certainty, "[a] court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty . . ."); Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 509 (2002) ("[I]n construction contracts, the degree of willfulness of a contractor's breach helps courts determine whether to grant expectancy damages measured by the cost of repair or the diminution in value caused by the breach, the latter often a smaller measure.").

the indefiniteness does not prevent the expectation interest from being determined); enforce the promise under promissory estoppel but award only reliance damages (for those cases in which the injustice from not enforcing the promise substantially outweighs the benefit from reinforcing the legal formality, but the expectation interest cannot be determined either because the breached promise is indefinite or the evidence does not permit the expectation interest to be proved to a reasonable certainty, and those cases in which the injustice from not enforcing the promise only moderately or slightly outweighs the benefit from reinforcing the legal formality); or refuse to enforce the promise under promissory estoppel (when the benefit from reinforcing the legal formality outweighs the injustice from not enforcing the promise).

This flexibility provided by promissory estoppel makes it puzzling that the Second Restatement's test encourages courts to consider post-formation events when determining whether a bargain's terms were sufficiently definite to form a contract. A solution to the ALI's desire to maintain the reasonably certain terms requirement as a formation doctrine while at the same time encouraging courts to consider post-formation events to achieve a just outcome in a particular case was just down the road in section 90. So what happened?

One possibility for the ALI's failure to rely on promissory estoppel as a way to consider post-formation events was through an uncritical reliance on the U.C.C. provision. The U.C.C. was drafted at a time when promissory estoppel was not well received with respect to commercial transactions,⁵⁷⁶ and it is, therefore, understandable that the U.C.C. would not have relied on promissory estoppel as a device for relaxing the certainty requirement. Another possibility is that the ALI itself believed the goal of relaxing the certainty requirement and encouraging courts to focus on post-formation events would suffer if relegated to the Second Restatement's promissory estoppel section, a section setting forth a controversial doctrine.⁵⁷⁷ In other words, the ALI might not have wanted its goal of relaxing the certainty requirement to be jeopardized by throwing its lot in with promissory estoppel. Or perhaps the ALI was concerned that injustice would still occur in some situations in which the plaintiff could not establish any reliance

⁵⁷⁶ The U.C.C. was drafted in the 1940s and 1950s. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799-804 (1958). During this time, courts were reluctant to use promissory estoppel in commercial transactions. Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499, 604-05 (2004).

⁵⁷⁷ See Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1039-40 (2010) ("[M]ost commentators have seen promissory estoppel as controversial . . .").

(though without reliance it would seem unlikely injustice would occur). Or maybe the ALI simply wanted to abolish the certainty requirement. In any event, the suitability of promissory estoppel for taking into account post-formation events makes it puzzling that the ALI incorporated such concerns into a doctrine dealing with the formation of a contract.

VII. CONCLUSION

The ALI, in the Second Restatement of Contracts, sought to make the reasonably certain terms requirement clearer, but its effort fell short. Despite providing a test for reasonably certain terms—whether the terms “provide a basis for determining the existence of a breach and for giving an appropriate remedy”⁵⁷⁸—the ALI failed to make clear whether the plaintiff’s promise must be sufficiently definite and whether an award protecting the plaintiff’s reliance interest is an appropriate remedy.

This Article has shown that, though the answer is far from clear, the better interpretation of the Second Restatement’s test is that it is not necessary that the plaintiff’s promise be sufficiently definite, but (somewhat paradoxically) only an award protecting the plaintiff’s expectation interest (or an award of liquidated damages) is an appropriate remedy. Thus, while the Second Restatement retains the reasonably certain terms requirement as a doctrine of contract formation, it also encourages courts to consider some post-formation events (but not others, such as the remedy sought). Thus, the test has a practical aspect but retains a formal aspect as well. In this respect, it is a model of neoclassical contract law. But because a formation doctrine cannot logically consider post-formation events, it is also inconsistent. The drafters therefore failed in their goal “to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement].”⁵⁷⁹

The issue is, of course, just one piece of the larger struggle over whether the better model for contract law is one where parties are expected to comply with established rules and suffer the consequences if they do not, or whether courts should seek a just outcome in individual cases. An unwillingness to take a firm position on this issue, at least with respect to the reasonably certain terms requirement, is perhaps what led the ALI to give us a test for reasonably certain terms that is not only a

⁵⁷⁸ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

⁵⁷⁹ AMERICAN LAW INSTITUTE, *supra* note 1, at 326 (remark by Reporter Robert Braucher regarding the Second Restatement of Contract’s provision on the requirement that a contract’s terms be reasonably certain).

model of neoclassical contract law, but a model of confusion and inconsistency.