1988


Lu Ann Brown

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INTRODUCTION

In a unanimous decision, the North Carolina Court of Appeals held that the doctrine of promissory estoppel cannot be used in construction bidding cases.1 The court grounded its opinion upon three reasons. First, the plaintiff's claim was not supported by law because it failed to allege the existence of any consideration for the defendant's promise. The law provides that a contract is enforceable only if supported by consideration.2 Second, since North Carolina courts have interpreted the doctrine of promissory estoppel as being independent of section 90 of the Restatement (Second) of Contracts, the "affirmative" use of promissory estoppel has been denied.3 Third, the court stated that allowing a cause of action based upon promissory estoppel in construction bidding cases would create the potential for injustice.4

This Note questions the North Carolina Court of Appeals decision in Home Electric Co. of Lenoir, Inc. v. Hall & Underdown Heating & Air Conditioning Co.5 This Note discusses sections 90 and 87(2) of the Restatement (Second) of Contracts and their corresponding comments and illustrations6; the North Carolina Supreme Court decision in Wachovia Bank and Trust v. Rubish7; and the rationale of the Fourth Circuit Court of Appeals in Allen M. Campbell Co. v. Virginia Metal Industries,8 which allowed the affirmative use of the promissory estoppel doctrine in a construction bidding case. This Note also examines the majority of other jurisdictions that have allowed promissory estoppel causes of ac-

2. Id. at 542, 358 S.E.2d at 540.
3. Id. at 543, 358 S.E.2d at 541.
4. Id. at 545, 358 S.E.2d at 542.
5. 86 N.C. App. 540, 358 S.E.2d 539.
8. 708 F.2d 930 (4th Cir. 1983).
tion in construction bidding cases and discusses their sound and logical reasoning.

**The Case**

Plaintiff Home Electric successfully bid on performing all the electrical, heating, and air conditioning work on a rest home construction project. The company alleged in its complaint that, before it submitted its prime bid, the defendant Hall affirmatively promised that it would perform the duct work on the rest home construction. Home Electric alleged that Hall orally bid $29,400 for the heating and air conditioning duct work. Home Electric allegedly relied on Hall's oral bid in submitting its prime bid. Home Electric was awarded the contract, but Hall refused to do the duct work. Thus, Home Electric had to obtain the same services from another subcontractor at a cost of $58,693.18. This amount was $29,293.18 more than the price quoted by Hall. Home Electric sued Hall for breach of contract.

Although Home Electric alleged that a contract existed between it and Hall, it failed to allege any consideration for the formation of the contract. Instead, Home Electric used the doctrine of promissory estoppel as a substitute for the necessary considera-


11. Id. at 540-41, 358 S.E.2d at 540.
12. Id at 541, 358 S.E.2d at 540.
13. Id.
14. Id.
15. Id.
16. Id. at 539.
17. Id. at 541-42, 358 S.E.2d at 540.
tion. This proved fatal. Hall moved to dismiss the case for failure to state a claim upon which relief could be granted, and the trial court granted its motion. The North Carolina Court of Appeals unanimously affirmed the trial court's judgment, thereby reaffirming prior North Carolina case law that disapproved use of the promissory estoppel doctrine.

BACKGROUND

Before the Home Electric Co. case, the North Carolina Supreme Court and the Court of Appeals addressed the issue of "promissory estoppel" six times. The courts supposedly applied this doctrine two times in defensive situations involving abandonment of a legal right by a plaintiff.

In 1949, the North Carolina Supreme Court decided Clement v. Clement, in which the plaintiff sued the defendant for recovery of a balance allegedly due on three notes. The defendant pled, inter alia, that sometime after the execution of the notes the plaintiff agreed not to charge any interest because the defendant's bank had collapsed during the Depression. The defendant alleged that the plaintiff had waived his right to any interest on the notes and therefore could not recover. The court found that the term "waiver" covers every conceivable right, and it can have the nature of either estoppel or contract. The court rejected the defendant's argument that the plaintiff's alleged waiver activated estoppel because the defendant did not detrimentally rely on it. Consequently, the court held that the plaintiff's waiver was contractual in nature and as such, it required consideration.

18. Id. at 542, 358 S.E.2d at 540.
19. Id. at 541, 358 S.E.2d at 540.
20. See notes 23-59 infra and accompanying text.
24. Id. at 637, 55 S.E.2d at 459.
25. Id at 637, 55 S.E.2d at 459-60.
26. Id. at 639-40, 55 S.E.2d at 461.
27. Id. at 640, 55 S.E.2d at 461.
28. Id.
In 1971, the North Carolina Supreme Court decided *Sykes v. Belk.* The plaintiff sued the Mayor of Charlotte, North Carolina, and the City Council for alleged misrepresentation of a bond referendum. The court curtly discussed the doctrine of promissory estoppel and decided the case based upon the doctrine of equitable estoppel. The court held that the plaintiffs were not misled prejudicially because there was only a slight deviation from the proposed purpose of the bonds.

In 1976, the North Carolina Court of Appeals decided the case of *Tatum v. Brown.* The plaintiff sued the defendant on the basis of the defendant’s alleged breach of an employment offer. The plaintiff, using the doctrine of promissory estoppel, alleged that she detrimentally relied upon defendant’s promise to employ her. The court decided this case based upon the definition of “employment at will.” When a contract of employment contains no provisions regarding the duration or term of employment, or the means by which it may be terminated, it is terminable at the will of either party with or without cause. The plaintiff made no allegations regarding the duration or means of termination of the employment, and she was not entitled to relief because defendant’s offer was for employment at will. The last sentence of the court’s opinion merely set out the court’s agreement with the defendant that promissory estoppel did not apply in this particular action.

In 1979, the court of appeals decided *State v. Collins.* In this case, a criminal defendant appealed his conviction on the basis of the district attorney’s alleged breach of a plea agreement. The court held that the doctrine of promissory estoppel was not available to the defendant because he did not detrimentally rely on the plea agreement, since he was informed before trial that the agreement would not be honored. Based upon that information, he

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29. 278 N.C. 106, 179 S.E.2d 439.
30. Id. at 111, 179 S.E.2d at 439.
31. Id. at 122, 179 S.E.2d at 449.
32. 29 N.C. App. 504, 224 S.E.2d 698.
33. Id. at 504, 224 S.E.2d at 698.
34. Id. at 504-05, 224 S.E.2d at 698-99.
35. Id. at 505, 224 S.E.2d at 698-99.
36. Id. at 505, 224 S.E.2d at 698.
37. Id.
38. Id. at 505, 224 S.E.2d at 699.
39. 44 N.C. App. 141, 260 S.E.2d 650.
40. Id. at 142, 260 S.E.2d at 652.
41. Id. at 145, 260 S.E.2d at 653.
In 1982, the North Carolina Supreme Court decided the case of  \textit{Wachovia Bank \\& Trust v. Rubish}. \footnote{42} In this case, the plaintiff sued the defendant in a summary ejectment action to regain possession of premises that the defendant possessed as lessee. \footnote{43} The plaintiff lessor claimed that the defendant lessee did not give the required written notice of intent to exercise his option to extend the lease. \footnote{44} The defendant answered that the plaintiff's predecessor in interest had waived the written notice requirement. \footnote{45} The court held that:

\begin{quote}
\textbf{The use of 'estoppel' as a ground for 'waiver' sometimes leads to confusion as to exactly what must be proved by the party asserting the estoppel . . . . In order to prove a waiver by estoppel defendant need not prove all elements of an equitable estoppel, for which proof of actual misrepresentation is essential; neither need he prove consideration to support the waiver. Rather, he need only prove an express or implied promise by Wachovia [or its predecessor in interest] to waive the notice provision and defendant's detrimental reliance on that promise.}
\end{quote}

The court found that there was evidence from which the jury could find that the plaintiff was estopped from demanding written notice upon the theory of promissory estoppel. \footnote{46} The plaintiff's predecessor in interest had waived two breaches of the condition of written notice, and the defendant had relied on the \textit{implied promise} that no written notice was thereafter required. \footnote{47} The court found that there was evidence from which the jury could find that the plaintiff was estopped from demanding written notice upon the theory of promissory estoppel. \footnote{48} The plaintiff's predecessor in interest had waived two breaches of the condition of written notice, and the defendant had relied on the \textit{implied promise} that no written notice was thereafter required. \footnote{49}

Before the sixth promissory estoppel case arose in North Carolina, the Fourth Circuit Court of Appeals decided \textit{Allen M. Campbell Co. v. Virginia Metal Industries}. \footnote{50} In this case, the plaintiff, a general contractor, sued the defendant for refusing to perform in accordance with its oral bid. \footnote{51} The plaintiff had received an oral bid from the defendant for metal doors in a construction project and used that bid in forming its prime bid on the project. After the

\begin{footnotes}
\item[42] Id. at 144, 260 S.E.2d at 652.
\item[43] 306 N.C. 417, 293 S.E.2d 749 (1982).
\item[44] \textit{Id.} at 418, 293 S.E.2d at 751.
\item[45] \textit{Id.}
\item[46] \textit{Id.}
\item[47] \textit{Id.} at 427, 293 S.E.2d at 755-56.
\item[48] \textit{Id.} at 430-31, 293 S.E.2d at 757-58.
\item[49] \textit{Id.} at 429, 293 S.E.2d at 757.
\item[50] 708 F.2d 930 (4th Cir. 1983).
\item[51] \textit{Id.} at 930.
\end{footnotes}
plaintiff was awarded the contract, the defendant refused to provide the doors.\textsuperscript{52} The plaintiff then had to purchase this material from another supplier at a higher cost.\textsuperscript{53} The plaintiff sued the defendant based upon the doctrine of promissory estoppel.\textsuperscript{54} The defendant alleged that the plaintiff did not promise to purchase the defendant's metal doors if the plaintiff became the successful bidder for the prime contract. The defendant insisted, therefore, that there was no contract between plaintiff and defendant.\textsuperscript{55}

The court stated that, although both parties at oral argument assumed there was no direct authority on whether or not the doctrine of promissory estoppel applies in North Carolina, the North Carolina Supreme Court in \textit{Wachovia} provided such authority.\textsuperscript{56} The court interpreted the \textit{Wachovia} decision to mean that promissory estoppel, as described in section 90 of the Second Restatement, applied in North Carolina because the \textit{Wachovia} court used the elements of section 90 to determine that the defendant had proved that an implied promise existed and that he detrimentally relied upon it.\textsuperscript{57} Relying upon the \textit{Wachovia} decision, the \textit{Campbell} court held for the plaintiff, determining that promissory estoppel does apply in this state.\textsuperscript{58} The \textit{Campbell} court, however, equated promissory estoppel with section 90, whereas North Carolina courts do not. Herein lies the controversy.

The North Carolina Court of Appeals responded to the \textit{Campbell} decision in \textit{Lee v. Paragon Group Contractors, Inc.}\textsuperscript{59} In \textit{Lee}, the implicit question was whether North Carolina applied the doctrine of promissory estoppel as described in section 90. The North Carolina Court of Appeals answered the question yes. The plaintiff, as a third-party beneficiary, sued the defendant for the breach of a contract that the defendant made with a third party.\textsuperscript{60} This contract provided that the defendant would make payments to the

\textsuperscript{52} \textit{Id.} at 931.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 934.
\textsuperscript{59} 78 N.C. App. 334, 337 S.E.2d 132.
\textsuperscript{60} The plaintiff asserted a third-party beneficiary claim under the doctrine of promissory estoppel which does allow a third party, not the promisee, to assert promissory estoppel as a substitute for consideration. See \textsc{Restatement (Second) of Contracts} § 90 and corresponding comments and illustrations.
plaintiff, thereby repaying plaintiff for a loan made to the third party. In denying the plaintiff's cause of action under the doctrine of promissory estoppel, the court stated that although section 90 had never been denominated as the "doctrine of promissory estoppel," it was an influential rule. The court stated, however, that, North Carolina courts recognized and applied the doctrine of promissory estoppel only in cases involving waiver by a promisee.

Recognizing that section 90 allows a third person to assert promissory estoppel, this court refused to do so because "under the current state of the law [in North Carolina] only the promisee may assert promissory estoppel as a substitute for consideration." This assertion is what makes the Lee opinion so remarkable. It flies in the face of the statement by the Home Electric Co. court that such recognition of promissory estoppel has never been made by North Carolina courts. What is more profound is that the Lee and Home Electric Co. decisions were decided by the same court—the North Carolina Court of Appeals.

Finally, in 1987, the North Carolina Court of Appeals heard the case of Home Electric Co. The court's unanimous decision in this case may forever "estop" the use of promissory estoppel. The North Carolina Supreme Court, however, has allowed the plaintiff's petition for discretionary review. It is now up to the supreme court to try to make sense out of a very confused area of law.

**ANALYSIS**

The majority of jurisdictions that allow a promissory estoppel cause of action cite to section 90 of the Restatement (Second) of Contracts as presenting the necessary elements to establish promissory estoppel. The North Carolina Court of Appeals in *Home Electric Co.* recognized this interpretation of section 90 but pointed out differing interpretations of this particular section:

It [§ 90] appears to be intended as a substantive rule of law to be used as a sword under which a promisee can bring an action and,

61. Lee, 78 N.C. App. at 335, 337 S.E.2d at 133.
62. Id. at 338-39, 337 S.E.2d at 135.
63. Id. at 340, 337 S.E.2d at 136.
64. Id. citing Clement, 230 N.C. at 640, 55 S.E.2d at 461.
65. Home Electric Co., 86 N.C. App. at 543, 358 S.E.2d at 541.
66. Id. at 540, 358 S.E.2d at 539.
if he proves the elements set out in § 90, enforce the promise. By supplying the missing elements to the contract it appears to give the promisee an enforceable right of action in contract against his promisor. In effect, if a complaint is patterned after § 90 it anticipates the defenses of lack of assent and lack of consideration, and thus precludes, at least as a matter of law, the promisor's reliance on such defenses. . . . Apparently not all legal scholars equate promissory estoppel with § 90 of the Restatement. The position has been taken that promissory estoppel applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee.68

The Home Electric Co. court endorsed the second interpretation based on prior North Carolina case law, which does not equate promissory estoppel of section 90 with the submitted exceptions of Wachovia and Lee.69 The Home Electric Co. court also looked at Clement,70 Wachovia,71 and Campbell72 in seeking to justify its allegiance to a separate and independent doctrine of promissory estoppel.

The court stated that Clement, which involved a waiver of a legal right, was properly decided because promissory estoppel, though generally applicable in waiver situations, cannot be applied in two situations: first, where there is a waiver of interest on a loan and, second, when there is no detrimental reliance by the promisee in that case.73 The Home Electric Co. court noted that, in Wacho-

68. 86 N.C. App. at 542-43, 358 S.E.2d at 541.
69. Home Electric Co. reinforced prior North Carolina decisions which have held that the doctrine of promissory estoppel in North Carolina is allowed only in "waiver" cases. It is submitted, however, that "waiver" cases involve the application of a "waiver by estoppel" doctrine, not the promissory estoppel doctrine. While a "waiver" can always be retracted, a promise that has induced detrimental reliance cannot.

The Wachovia case was really an "waiver by estoppel" case, but it is well known as a promissory estoppel case because in holding for the defendant it used the elements of promissory estoppel under § 90. North Carolina courts supposedly never do this. See supra note 65 and accompanying text.

The Lee case involved a promissory estoppel cause of action. Although the court denied the right of action to the plaintiff because he was a third-party beneficiary, the court asserted, as a rationale, that only a promisee can use promissory estoppel as a substitute for consideration. This rationale alone is profound.

70. 230 N.C. 636, 55 S.E.2d 459.
71. 306 N.C. 417, 293 S.E.2d 749.
72. 708 F.2d 930.
73. Home Electric Co., 86 N.C. App. at 543, 358 S.E.2d at 541.
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via, section 90 was never mentioned per se and that it was the defendant in Wachovia who attempted to use promissory estoppel as a defense.74 Possibly, however, the court missed the significance of Wachovia. Although the words "section 90" were never explicitly mentioned, the Wachovia court applied that section's elements, albeit in a waiver situation.75 The significance of the Wachovia decision can be interpreted — and properly so — to mean that section 90 has finally been equated with the doctrine of promissory estoppel. Consequently, the full intended application — defensive and affirmative usage — of promissory estoppel must be recognized. Indeed, in Campbell, the Fourth Circuit interpreted Wachovia to mean exactly that.76

Unfortunately, the Home Electric Co. court found that the Campbell court misinterpreted Wachovia because Wachovia did not explicitly assert that promissory estoppel could be applied in an affirmative manner.77 The court also found that, in Clement and Wachovia, the parties were only trying to modify an existing contract, whereas in Campbell and Home Electric Co., the parties sought to create a contract by using promissory estoppel.78 The court deemed this a significant distinction because North Carolina courts have never allowed promissory estoppel to be used as a substitute for the necessary contractual element of consideration.79 However, since promissory estoppel is an equitable remedy accepted under contract law, in particular situations equity requires the use of promissory estoppel as a substitute for consideration.

Section 90 sets forth the doctrine of promissory estoppel as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.80

As one author noted, "[N]othing in the above language of § 90 lim-

74. Id. at 544, 358 S.E.2d at 541.
75. Wachovia, 306 N.C. at 425-26, 293 S.E.2d at 754.
76. Campbell, 708 F.2d at 933.
77. Home Electric Co., 86 N.C. App. at 544, 358 S.E.2d at 542.
78. Id.
79. See supra note 69, discussing the assertion made by the Lee court.
its application to defensive situations whereby the promisor seeks to assert a legal right which he promised to abandon." Furthermore, in the previous six "promissory estoppel" cases heard by North Carolina courts, the courts never specifically limited the applicability of the doctrine of promissory estoppel. Section 90 makes explicit referrals to the affirmative use of the doctrine of promissory estoppel, and the Wachovia and Campbell courts displayed a willingness to allow someone the opportunity to try proving the elements of a promissory estoppel. In light of this, no longer does any valid justification for denying a promissory estoppel cause of action in North Carolina exist. It is time for the North Carolina courts to equate promissory estoppel with section 90.

The facts of Home Electric Co. concerned construction bidding. The construction industry desperately needs uniformity in

81. See Note, Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases, 63 N.C.L. Rev. 387, 391 (1985). Also, Restatement (Second) of Contracts § 90 provides in its comments "a" and "b" the following illustrations which show the application of promissory estoppel:
Comment a, illustration 1 states:
1. A, knowing that B is going to college, promises B that A will give him $5,000 on completion of his course. B goes to college, and borrows and spends more than $5000 for college expenses. When he has nearly completed his course, A notifies him of an intention to revoke the promise. A's promise is binding and B is entitled to payment on completion of the course without regard to whether his performance was 'bargained for' under § 71.
Comment b, illustrations 2-4 state:
2. A promises B not to foreclose, for a specified time, a mortgage which A holds on B's land. B thereafter makes improvements on the land. A's promise is binding and may be enforced by denial of foreclosure before the time has elapsed.
3. A sues B in a municipal court for damages for personal injuries caused by B's negligence. After the one year statute of limitations has run, B requests A to discontinue the action and start again in the superior court where the action can be consolidated with other actions against B arising out of the same accident. A does so. B's implied promise that no harm to A will result bars B from asserting the statute of limitations as a defense.
4. A has been employed by B for 40 years. B promises to pay A a pension of $200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding.

82. See supra notes 23-59 and accompanying text.
83. For detailed information on the problems of construction bidding, see Schultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237 (1952); Note, supra note 81; Note, Once Around the Flag Pole: Construction Bidding and Contracts to Formation, 39
the law of construction bidding. However, courts hearing this type of case are of two different camps. Unfortunately, the North Carolina Court of Appeals, in hearing this case of first impression, decided to follow the minority of jurisdictions that consider a sub-bid as merely an offer to enter a bilateral contract that can be withdrawn without liability any time before formal acceptance. Construction bidding is a bargained transaction, and, thus, the courts in the minority refuse to allow the assertion of promissory estoppel. Today, however, "the principal application of the doctrine [of promissory estoppel] is no longer in the limited area of gratuitous promises but is in the much broader field of bargain transactions."

Nevertheless, the courts in the minority rely on a 1933 decision, James C. Baird Co. v. Gimbel Bros., which was ultimately decided by the United States Court of Appeals for the Second Circuit. Judge Learned Hand, in writing the Baird decision, reasoned that the subcontractor, by submitting his sub-bid, is attempting to bargain for the general contractor's promise that the subcontractor will be awarded the subcontract if his bid is low. Therefore, since neither action by the offeree nor receipt of money is bargained for, the offer is revocable until the offeree accepts it. In Baird, the court denied the plaintiff a remedy based on the traditional rules of offer and acceptance. The plaintiff asked the court to hold the

N.Y.U. L. REV. 816 (1964); Comment, Construction Bidding Problem: Is There A Solution Fair to Both the General Contractor and Subcontractor?, 19 ST. LOUIS U.L.J. 552 (1975); Note, "Firm Offer" Problems in Construction Bids and the Need for Promissory Estoppel, 10 WM. & MARY L. REV. 212 (1969);
84. See generally Comment, supra note 83.
85. The majority of jurisdictions allow recovery on the basis of Drennan v. Star Paving Co., 51 Cal. App. 2d 409, 333 P.2d 757 (1958), and section 87(2) of the RESTATEMENT (SECOND) OF CONTRACTS (1979). The minority of jurisdictions deny recovery on the basis of James C. Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933), and refuse to apply sections 90 and 87(2) of the Restatement (Second) of Contracts (1979).
87. Id.
89. 64 F.2d 344 (2d Cir. 1933).
90. Id. at 345-46.
91. Id. at 346.
92. For a more detailed discussion on the traditional rules of offer and acceptance and how they apply to construction bidding cases, see Comment, supra
defendant liable under the doctrine of promissory estoppel because he had revoked his offer after the plaintiff detrimentally relied on it. Judge Hand, however, rejected the applicability of promissory estoppel to bargain transactions.

Despite the eminence of Judge Learned Hand, the Baird decision has been greatly criticized over the years. The majority of jurisdictions hearing construction bidding cases recognize the precarious position of the general contractor when the subcontractor, whose bid has been used in figuring the prime bid refuses to perform at the price he originally offered. Therefore, these courts began using the doctrine of promissory estoppel to protect the general contractor. The leading case applying this doctrine is Drennan v. Star Paving Co. The facts of Drennan were very similar to the facts of Home Electric Co. The Drennan court decided that the use of a bid is not acceptance. Thus, the court held that the plaintiff could not win under the traditional rules of offer and acceptance. However, unlike the Baird court, the Drennan court allowed recovery based on promissory estoppel.

In Drennan, the court determined that the subcontractor

note 83, at 552.
93. Baird Co., 64 F.2d at 346.
94. Id.
95. See Comment, supra note 83, at 552.
96. The general contractor is bound to the prime contract. As such, should a subcontractor renege on its offer, the general contractor must obtain the same services/goods from another supplier at, more than likely, a higher cost, which will come directly from any profit the general contractor initially hoped to obtain.
98. In both cases, the plaintiff sought to recover damages from the defendant who had refused to perform according to its oral bid.
99. Drennan, 51 Cal. 2d at 413, 333 P.2d at 759. The court gave several reasons why the rules of offer and acceptance did not apply:
(1) there was no evidence that the general contractor's use of the bid was an acceptance binding him to the contract with the subcontractor if he were awarded the prime contract;
(2) there was no option supported by consideration; and
(3) there was no bilateral contract binding both parties.

Id.
100. Id. at —, 333 P.2d at 760.
101. The court held that "[t]he very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.' (See 1 Corbin, Contracts 634 et seq. [sic]) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding." 51 Cal. 2d at 414, 333 P.2d at 760.
could expect the general contractor to use the low bid and that this expectation justified the *implication* of a promise by the subcontractor.\(^{102}\) This implication, subsidiary to his sub-bid offer, was not to revoke the offer until the general contractor had been allowed a "reasonable time" to accept.\(^{103}\) The court also held that the general contractor's reasonable reliance resulting in foreseeable prejudicial change in position afforded a strong basis for implying a subsidiary promise not to revoke.\(^{104}\) Consequently, the *Drennan* court held for the plaintiff general contractor. The *Drennan* decision, though not directly on point, is in line with the North Carolina Supreme Court's *Wachovia* decision. The *Wachovia* court held, *inter alia*, that implied promises followed by detrimental reliance can result in recovery.\(^{105}\)

The North Carolina Court of Appeals in *Home Electric Co.* also denied the plaintiff's promissory estoppel cause of action because of the potential injustice in construction bidding if a court allows the plaintiff to recover.\(^{106}\) However, this potential injustice is not a necessary result. Even though the *Drennan* decision is followed by the majority of jurisdictions hearing construction bidding cases, it left many unanswered questions in light of the possible misdeeds by the general contractor.

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102. *Id.*
103. *Id.* (discussing "subsidiary promise").
104. The court stated:
When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on the defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

51 Cal. 2d at 415, 333 P.2d at 760.
105. 306 N.C. at 431, 293 S.E.2d at 758.
106. 86 N.C. App. at 545, 358 S.E.2d at 542.
The circuit court in *N. Litterio & Co. v. Glassman* clarified the doctrine of promissory estoppel as applied in construction bidding cases.\(^{107}\) That court held that, before a subcontractor can be liable to the general contractor under the doctrine of promissory estoppel, four conditions must be met. First, the subcontractor must have promised affirmatively to do something.\(^{108}\) Second, the subcontractor could have reasonably foreseen the likelihood of reliance by the general contractor.\(^{109}\) Third, the general contractor must have relied justifiably on the subcontractor’s offer.\(^{110}\) Fourth, the general contractor must have experienced substantial detriment as a result of his justifiable reliance.\(^{111}\)

These four conditions are, in essence, the elements contained in section 87(2) of the Restatement (Second) of Contracts. This section has provided an impetus for allowing promissory estoppel to be used in construction bidding cases in the majority of jurisdictions that have heard this type of case. Section 87(2) states:

> An offer which the offeror should reasonably expect to induce reliance or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.\(^{112}\)

The *Home Electric Co.* court disregarded the plaintiff’s reliance on this crucial Restatement section. If the court had recognized section 87(2) as applying promissory estoppel to construction bidding cases, then it could have remanded the case for trial to determine several factors. The trial court or jury could determine the subcontractor’s foreseeability of reliance by ascertaining whether, under local custom, subcontractors themselves expect the general contractors to rely on their sub-bids and whether they expect to be bound by their sub-bids.\(^{113}\) The factfinder, in determining justifiable reliance, could stress the fact that the general contractor was required to submit a bid bond forfeitable in the event

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108. *Id.* at 738-40.
109. *Id.* at 739.
110. *Id.*
111. *Id.* at 739.
112. [*Restatement (Second) of Contracts* § 87(2) (1979)].
113. The *N. Litterio* court looked to this factor to determine the subcontractor’s foreseeability regarding the likelihood of the general contractor’s reliance.
that he was awarded the prime contract and failed to perform. 114 Finally, since the doctrine of promissory estoppel is an equitable remedy recognized in contract law, the court or jury could deny recovery if the equities lie against the plaintiff contractor. 115

Even though the Home Electric Co. court feared the potential for injustice if it allowed a promissory estoppel cause of action for the general contractor, it should not have barred such a cause of action. Promissory estoppel has tended to increase the ability of the general contractor to engage in post-award negotiations. 116 However, the courts can protect the subcontractor by refusing to apply promissory estoppel whenever conclusive evidence establishes that the general contractor tried to have the subcontractor cut his price, the general contractor shopped for a lower price, or the general contractor actively negotiated for a better contract. 117

The subcontractors are protected, albeit indirectly, by the fact that a general contractor's justifiable reliance is difficult to prove. This justifiable reliance must be established by business custom in the particular locality and by testimony concerning the practices that a general contractor is required to know about his trade. 118 Courts have also refused to apply the doctrine of promissory estoppel in cases where the equities lie with the subcontractor. For example, if the subcontractor's bid was so "glaringly low" as to put the general contractor on notice that a mistake had been made, then the general contractor has no case. 119

Another form of protection for the subcontractor is application of the doctrine of promissory estoppel against the general contractor. 120 As one author commented:

In order for promissory estoppel to be applicable, all the requirements of section 90 must be met. Thus, there must be a promise that was relied upon . . . [There must be the finding] of an implied promise to award the contract to the subcontractor whose bid was used in preparing the estimate [if known] which won the prime contract . . . . Such a promise should be implied in many

114. This is another factor the N. Litterio court looked at in determining "justifiable reliance" by the general contractor.
115. See Note, supra note 81, at 387.
116. See Comment, supra note 83, at 565.
117. Id.
118. Id. at 565-66.
119. See Note, supra note 81, at 394.
cases—to paraphrase Drennan—to preclude the injustice that would result if the general contractor could use the bid of the subcontractor in winning the prime contract and then permitted to shop for lower sub-bids. Once that promise has been implied, the issue would then be whether or not the promisor (general) should reasonably expect its implied promise to induce reliance on the part of the promisee (subcontractor). This would be a factual determination depending upon the circumstances of the particular case and the common practices within the trade. 121

The Home Electric court's fear of potential injustice in construction bidding is unfounded in light of the above analysis. In reality, the general contractor may choose to perform a misdeed because the subcontractor is bound and he is not. However, common practice shows this is the exception and not the rule. 122 Therefore, the majority of jurisdictions rightfully afford the general contractor the benefit of the doubt. If the equities do not lie with the general contractor, the court should rule accordingly.

CONCLUSION

In its review of the Home Electric Co. case, the North Carolina Supreme Court should equate North Carolina's doctrine of promissory estoppel with sections 90 and 87(2) of the Restatement for the following reasons. First, section 90 allows the affirmative use of promissory estoppel. Recovery is limited as justice requires. 123 Second, section 87(2) adds support to applying promissory estoppel to construction bidding cases. 124 Third, the Wachovia court applied the elements of section 90 and the case is well known as a "promissory estoppel" case, as opposed to a "waiver by estoppel" case (which it really is). 125 Fourth, the Lee court, quoting Clement, found that the current state of the law allows a promisee to use promissory estoppel as a substitute for consideration. 126 Fifth, the Campbell court interpreted Wachovia to mean that promissory estoppel, as described in section 90, applied in North Carolina. 127 Finally, the majority of jurisdictions not only allow the promissory estoppel causes of action in general, they allow them in

121. Id.
122. See Schultz, supra note 83, at 237.
123. See Note, supra note 81.
124. See supra notes 112-15 and accompanying text.
125. 306 N.C. 417, 293 S.E.2d 749.
126. 78 N.C. App. at 340, 337 S.E.2d at 136.
127. 708 F.2d at 933-34.
construction bidding situations based upon *Drennan* and section 87(2).\textsuperscript{128}

The message to the North Carolina Supreme Court is loud and clear. The court should consider the reasons set forth for allowing the use of promissory estoppel as described in sections 90 and 87(2) of the Restatement and afford the plaintiff in *Home Electric Co.* the opportunity to attempt to prove its case.

*Lu Ann Brown*

\textsuperscript{128} See supra notes 107-15 and accompanying text.