

# Exceptional Circumstances: The Material Benefit Rule in Practice and Theory

CLAY B. TOUSEY III\*

## I. INTRODUCTION

### A. *Valuable Business Advice, Poor Legal Advice?*

In the vertiginous world of technology start-ups, Dr. Eugene Starr was a respected scientific voice among the MBAs and financiers. In the late 1980s, Starr lent his expertise to Bernard Katz, contributing ideas for a bankrupt corporation Katz was attempting to turn around.<sup>1</sup> A grateful Katz sent Starr a letter, intending to thank him for the business advice and “give” him five percent of Katz’s holdings.<sup>2</sup> The linguistic clarity of the communication, however, belied two significant legal problems: (1) “gift promises” are not enforceable, since contracts must be supported by mutual consideration;<sup>3</sup> and (2) Starr’s past services cannot serve as consideration for Katz’s promise, since “past consideration is no consideration.”<sup>4</sup>

As expected, the court in *Starr v. Katz* quickly stated the above propositions. Speaking in black letter law, the court first found that “as a promise to make a gift, the letter is unenforceable,”<sup>5</sup> and then

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\* Clay B. Tousey III is an associate in the Corporate practice group at Helms Mulliss & Wicker in Charlotte, North Carolina. He is a graduate of Harvard University and the University of Virginia School of Law, where he was a member of the VIRGINIA LAW REVIEW editorial board.

1. *Starr v. Katz*, No. 91-3365, 1994 U.S. Dist. LEXIS 14437, at \*5 (D.N.J. Oct. 5, 1994). As is often the case in contractual disputes, purported agreements flew wildly between Starr and Katz. The following is a simplified account of one particular agreement.

2. *Id.*

3. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (outlining the basic “bargain theory” of contract); see also ROBERT E. SCOTT & JODY S. KRAUSE, CONTRACT LAW AND THEORY 132 (2002) (“The standard answer suggested by [Restatement (Second)] § 71 is that ‘bargained for’ promises are supported by consideration, but ‘gift promises’ are not.”). The rule is further incorporated in RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981), which is the focus of this article.

4. E.g., *Murray v. Lichtman*, 339 F.2d 749, 752 n.5 (D.C. Cir. 1964) (“It is, of course, well settled that past consideration is no consideration.”); see also 4 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 8:9 (4th ed. 1992).

5. *Starr*, 1994 U.S. Dist. LEXIS 14437, at \*35.

reminded the parties that “[i]t is common sense as well as a common law rule that performance completed before a promise is made cannot be a bargained-for exchange for that promise.”<sup>6</sup>

Before pushing Starr out the courtroom door, however, the court noted an intriguing section from the *Restatement (Second) of Contracts*. This exceptional rule appeared to “soften” the weight of the consideration doctrine pressing against Starr’s claim.<sup>7</sup> Enforcing Katz’s promise, which earlier stood in opposition to “common sense” and “common law,” gained new life when viewed through *Restatement (Second) of Contracts* Section 86: “A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.”<sup>8</sup> Looking at the facts anew, Starr rendered a past benefit to Katz through his valued business advice, Katz made a promise in recognition of that benefit, and it would seem unjust for Katz to ignore his promise and benefit without compensating Starr.

Section 86 thus provided hope to Starr’s moribund claim, but not only could the court find “no New Jersey case that applies this exception to the past consideration doctrine,” Starr’s lawyers did not even brief the issue.<sup>9</sup> Section 86 was thus an illusory glimmer of hope, temporarily reviving Starr’s claim but not carrying it to victory.

The collapse of Starr’s seemingly meritorious claim and the court’s interestingly inconsequential mention of Section 86 raise the motivating questions of this article. First, is Section 86 and the “material benefit rule” it embodies ever applied in court, and, if so, can a unifying theme be found between those cases in which courts choose to enforce the post-benefit promise and those in which they do not?

### B. *The Troubling and Rare Unorthodoxy*

As seen in *Starr*, Section 86 and the material benefit rule are puzzling intermeddlers to the consideration doctrine and its comparatively well-defined exceptions.<sup>10</sup> The pedagogical approach to the material benefit rule is generally to compare the enforced promise in

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6. *Id.* at \*39.

7. *Id.* at \*40-41.

8. RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981).

9. *Starr*, 1994 U.S. Dist. LEXIS 14437, at \*41-42.

10. *See, e.g.*, RESTATEMENT SECOND OF CONTRACTS § 90 (1981) (defining promissory estoppel as a means to enforce promises absent consideration). In response to draft versions of the *Restatement (Second)*, Professor Gilmore wondered whether material benefit rule cases would quickly multiply so as to make the acceptance of the exception similar to promissory estoppel. GRANT GILMORE, *THE DEATH OF CONTRACT* 76 (1974). As the investigation in this article will highlight, this has not occurred.

the old chestnut *Webb v. McGowin*<sup>11</sup> to the unenforced promise in the even older *Mills v. Wyman*,<sup>12</sup> and then move on.<sup>13</sup> Even during the American Law Institute proceedings on the *Restatement (Second)*, Professor Braucher noted the so-called “rule” “is more of a principle” and Section 86 “bristles with non-specific concepts.”<sup>14</sup>

### C. Investigative Summary

This article will therefore attempt to interpret the scarce and scattered modern case law applying, or claiming to apply, the material benefit rule in order to find a unifying principle and explanation for its limited application.<sup>15</sup> The argument will proceed as follows: (1) successful material benefit rule cases find a reasonable expectation of compensation by the promisee; (2) the business context presents the best conditions for an expectation of compensation through an implied promise of compensation; (3) the material benefit rule is necessary when the initial implied promise is for an indeterminable amount and thus not otherwise enforceable; (4) such implied indeterminable promises should be expected between unfamiliar trading partners and/or situations where a pre-performance bargain may be inefficient; and (5) the subsequent enforceable promise can be explained by the promisors’ interests in legal certainty and future goodwill, which also explain the paucity of reported cases.

These conclusions take the modern material benefit rule back to its historical and doctrinal foundation – a means to renew promises

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11. 168 So. 196 (Ala. Ct. App. 1935) (enforcing a promise to compensate an injured rescuer who saved the promisor’s life). *Webb* is used as the basis for an illustration to Section 86. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. d, illus. 7 (1981).

12. 20 Mass. (1 Pick.) 207 (1825) (refusing to enforce a promise made to compensate strangers who cared for the promisor’s dying son). For a thorough review of the actual background and facts of *Mills*, see Geoffrey Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 TUL. L. REV. 1749 (1997).

13. See MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 27 (1998) (“The decision in *Mills* can be (and always is) contrasted with that in *Webb v. McGowin* . . . .”); see also JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS 277-91 (2004); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 152-63 (2001); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 146-60 (2003); EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 112-28 (2003); ARTHUR ROSSET & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION 456-71 (1999); SCOTT & KRAUSE, *supra* note 3, at 224-35.

14. Proceedings at Forty-Second Annual Meeting, 42 A.L.I. Proc. 273-74 (1965).

15. Given this relative paucity of reported cases, the particular facts of each case are essential to this investigation. The reader must therefore forgive factual summaries that might otherwise seem unnecessary.

rendered unenforceable by operation of the law.<sup>16</sup> In the clearest post-benefit promise cases, positive legal rules such as bankruptcy discharge the initial promise, which is then revived by the subsequent enforceable promise. What remains for Section 86 are cases in which the previous promise has been extinguished by the common law indefiniteness doctrine. In these cases, the post-benefit promise is an enforceably definite echo of the parties' original bargain.

In order to trace this surprisingly straight path from the rule's historical foundation to today, it is first necessary to examine its doctrinal origins. This article will then consider three alternate explanations for enforcement of post-benefit promises and explain why these are unsatisfactory when viewed in light of actual material benefit rule case law. Finally, it will thoroughly examine the reported cases that enforce, or claim to enforce, post-benefit promises in order to substantiate the conclusions outlined above.

## II. BEHIND THE RULE: PAST DEVELOPMENTS AND THEORY

### A. *A Brief History of the Material Benefit Rule*

Rather than providing a musty tour of the material benefit rule's English pedigree, the rule's history is a useful introduction to its oft-questioned place in contract doctrine. This section outlines the supposed division of subsequent promise cases between the more accepted "extinguished by positive operation of the law" line of cases and the less clear "post-benefit promise" cases. Again, however, the conclusion of this article is that Section 86 case law never developed a bright-line separation between these two concepts. The post-benefit promises enforced by modern courts are still those made in recognition of earlier promises rendered unenforceable by other legal doctrines.

#### 1. *Mansfield's Idea and Its Reception*

The theory of enforcing promises made in recognition of past benefits begins with Lord Mansfield's eighteenth-century enunciation of consideration grounded in "moral obligation."<sup>17</sup> In *Hawkes v. Saunders*, Mansfield outlined, "Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the hon-

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16. See *infra* Part II.A.2.

17. For a more detailed examination of the very early history of the material benefit rule, tracing its origins back to the Roman legal principle of *negotiorum gestorio*, see Kevin M. Teeven, *Conventional Moral Obligation Principle Unduly Limits Qualified Beneficiary Contrary to Case Law*, 86 MARQ. L. REV. 701 (2003).

esty and rectitude of the thing is a consideration.”<sup>18</sup> The original “moral obligation,” in Mansfield’s view, was borne by a past benefit received by the promisor from the promisee.<sup>19</sup>

While nineteenth-century American courts quickly incorporated Mansfield’s departure from the strictures of consideration doctrine,<sup>20</sup> English response was not favorable. Echoing the fears of many, the court in *Eastwood v. Kenyon* argued that an approach centered upon moral binds and post-benefit promises “would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.”<sup>21</sup> *Eastwood* found its historical response to *Hawkes* in the early nineteenth-century case *Wennall v. Adney*.<sup>22</sup> The *Wennall* reporter attempted to rein in Mansfield’s creation by ruling “an express promise . . . can only revive a precedent good consideration which might have been enforced at law . . . had it not been suspended by some positive rule of law.”<sup>23</sup>

## 2. *The Rule Seemingly Divides*

By the start of the twentieth century, the doctrinal responses to Mansfield’s exception thus coalesced into two camps.<sup>24</sup> The first was

18. *Hawkes v. Saunders*, (1782) 98 Eng. Rep. 1091, 1091 (K.B.).

19. *Id.*

20. See, e.g., *Livingston v. Rogers*, Cole & Cai. Cas. 331, 334 (N.Y. Sup. Ct. 1804) (citing *Pillans v. Van Mierop*, (1765) 97 Eng. Rep. 1035, 1039 (K.B.) (including dictum that past consideration cases were “melting down into common sense”)); see also *Stevenson v. Reigart*, 1 Gill 1, 26 (Md. 1843) (quoting *Hawkes*, while emphasizing “promises”); *Clark v. Herring*, 5 Binn. 33 (Pa. 1812) (citing *Hawkes* for support). Interestingly, *Stevenson* is the oldest reported case from Maryland.

21. *Eastwood v. Kenyon*, (1840) 113 Eng. Rep. 482, 486 (K.B.). The *Eastwood* argument is still parroted and cited far into the twentieth century. E.g., *Manwill v. Oyler*, 361 P.2d 177, 178 (Utah 1961) (“The difficulty we see with the [moral obligation] doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to a vanishing point the necessity for finding a consideration.”).

22. *Wennall v. Adney*, (1802) 127 Eng. Rep. 137 (K.B.).

23. *Id.* at 138 (emphasis added). American treatise writers, seizing upon the morally harsh decision in *Mills*, also used *Wennall* and *Eastwood* to advance the theory that moral obligations constitute legal consideration only in cases of prior enforceable legal obligations. E.g., JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW \*465; see also Teeven, *supra* note 17, at 709-23 (noting that American treatise writers were more quick than American judges to adopt *Wennall*’s rejection of Mansfield).

24. *Drake v. Bell*, 55 N.Y.S. 945, 945-46 (N.Y. Sup. Ct. 1899). The court reviewed English and American precedents to find, “[T]he rule seems to be that a subsequent promise [post-benefit promise] founded on a former enforceable obligation, or on value previously had from the promisee, is binding.” *Id.* *Drake* is used as the basis for RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. c, illus. 4 (1981).

willing to accept Mansfield's more broad interpretation and enforce all post-benefit promises.<sup>25</sup> The second group preferred the relative rigidity of consideration doctrine and recognized a limited exception only when the post-benefit promise revived a legal obligation extinguished by operation of positive law.<sup>26</sup>

These two positions are not directly contradictory, and the second, more narrow exception was fully integrated in American law. In the 1932 *Restatement of Contracts*, Reporter Williston ignored general post-benefit promises, but specifically covered prior obligations extinguished by the most common positive laws: bankruptcy,<sup>27</sup> the statute of limitations,<sup>28</sup> and infancy.<sup>29</sup> In his treatise, Williston explained that enforcing more post-benefit promises would upset the sought-after certainty in contract law, an argument tracing back to the original "annihilation of consideration" line from *Eastwood v. Kenyon*.<sup>30</sup>

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25. E.g., *Park Falls State Bank v. Fordyce*, 238 N.W. 516, 519 (Wis. 1932) (citing *Hawkes v. Saunders*, (1782) 98 Eng. Rep. 1091, 1091 (K.B.)).

26. E.g., *Stebbins v. County of Crawford*, 92 Pa. 289, 289 (Pa. 1879) ("A moral obligation is sufficient to support an express promise, where there has been a pre-existing obligation which has become inoperative by positive law.").

27. RESTATEMENT (FIRST) OF CONTRACTS § 87 (1932). Today, see RESTATEMENT (SECOND) OF CONTRACTS § 83 (1981). Note, however, that Congress has limited the common law rule by statute, 11 U.S.C. § 524(c)-(d) (2000).

28. RESTATEMENT (FIRST) OF CONTRACTS § 86 (1932). Today, see RESTATEMENT (SECOND) OF CONTRACTS § 82 (1981).

29. RESTATEMENT (FIRST) OF CONTRACTS § 89 (1932).

30. See WILLISTON & LORD, *supra* note 4, § 148 ("However one may wish to extend the number of promises which are enforceable by law, it is essential that the classes of promises which are enforceable shall be clearly defined.") (referring to *Eastwood v. Kenyon*, (1840) 113 Eng. Rep. 482 (K.B.)). For further explanation and criticism of Williston's approach, see Teeven, *supra* note 17, at 722-24.

Outside the *Restatement (First) of Contracts*, early doctrinal support for material benefit rule promises could be found in a series of American Law Reports notations. Annotation, *Moral Obligation as a Consideration for an Executory Promise*, 17 A.L.R. 1299 (1922); J.E. Keefe, Jr., Annotation, *Moral Obligation as Consideration for Contract - Modern Trend*, 8 A.L.R.2d 787 (1949 & Supp. 1997).

A series of moderately efficacious state laws also attempted to address the past-benefit issue. Georgia, Pennsylvania, New Mexico, New York, California, Oklahoma, Montana, North Dakota, and South Dakota all purport to have legislation which bears upon the past consideration and/or moral obligation issues.

Of these, only California's law (which was adopted by Montana, North Dakota, Oklahoma, and South Dakota) has given rise to a significant amount of case law which will be examined, and its vague language provides no better guidance than Section 86: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor or prejudice suffered by the promisee is also a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise." CAL. CIV. CODE § 1606

### 3. *Section 86 and Beyond*

Going forward, what remains to be considered is how Section 86 has changed the landscape. Has the material benefit rule allowed post-benefit promise cases to “flower like Jack’s bean stalk”?<sup>31</sup> Does Section 86 buckle under its own “schizophrenic” drafting?<sup>32</sup> And, most importantly, can sufficiently clear lines be drawn through the positive and normative applications of the material benefit rule to assuage the certainty-based fears continually raised by *Wennall*, *Eastwood*, and Professor Williston?

#### B. *Previous Theories for Enforcement*

The answers to these questions have sent relatively few scholars chasing down relatively few reported cases. Since the release of Section 86 in 1981, only five reported cases have purportedly enforced post-benefit promises, and only one of those cases actually cited the *Restatement (Second)*.<sup>33</sup> Looking back another two decades, during which Section 86 was drafted, one finds another three cases success-

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(West 1982 & Supp. 2006); see also MONT. CODE ANN. § 28-2-802 (LEXIS through 2005 Spec. Sess.); N.D. CENT. CODE § 9-05-02 (LEXIS through 2005 Sess.); OKLA. STAT. ANN. tit. 15, § 107 (West, Westlaw through Chap. 1, 2005 Extraordinary Sess.); S.D. CODIFIED LAWS § 53-6-2 (LEXIS through 2005 legislation).

New York and New Mexico law attempt to remedy issues of timing between the promise and the consideration but do not contribute to the investigation on the material benefit rule’s application. See N.M. STAT. ANN. § 38-7-2 (LexisNexis, LEXIS through First Spec. Sess. of 47th Legislature); N.Y. GEN. OBLIG. LAW § 5-1105 (McKinney 2004).

Pennsylvania law attempts to replicate the “document under seal” doctrine for all written contracts, and is hence unrelated to the explicit material benefit rule issue. 33 PA. CONS. STAT. § 6 (LEXIS through Act 63, 2005 Legislative Sess.). The statute was promulgated in 1925 as the Uniform Written Obligations Act, but only Pennsylvania and Utah adopted it and Utah repealed the statute in 1933. Joseph Siprut, Comment, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration Is Not Binding, But Should Be*, 97 NW. U. L. REV. 1809, 1813-14 n.28 (2003).

Georgia’s statute has been relatively effective in rendering “moral obligation” as sufficient consideration in some cases. See *Trs. of Jesse Parker Williams Hosp. v. Nisbet*, 7 S.E.2d 737, 741-43 (Ga. 1940) (citing GA. CODE ANN. § 13-3-41 (LEXIS through 2005 Reg. Sess.) (formerly GA. CODE ANN. § 20-303 (1933))). Since this law is anomalous, however, it is not explored in detail.

31. GILMORE, *supra* note 10, at 76.

32. *Id.* at 75.

33. *In re Prejean*, 994 F.2d 706 (9th Cir. 1993); *Yale Sec. Inc. v. Freedman Sales, Ltd.*, No. 96C6501, 1997 U.S. Dist. LEXIS 1098 (N.D. Ill. Jan. 31, 1997); *Realty Assoc. v. Valley Nat’l Bank*, 738 P.2d 1121 (Ariz. Ct. App. 1986); *Shaffer v. Ricci*, 603 So. 2d 566 (Fla. Dist. Ct. App. 1992); *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468 (Ill. App. Ct. 1985).

fully applying the rule.<sup>34</sup> Before fully examining these cases, it is helpful to consider the explanatory theories previously offered and why the case law does not support these views.

### 1. Pure “Moral Obligation”

Once separated from the body of cases enforcing past promises extinguished by positive law, Section 86 seemingly rests upon rare direct case law and multifarious “moral obligation” rulings. While the “moral obligation” to compensate others for benefits received is undoubtedly part of our cultural heritage, modern case law presents no consistent guide concerning the particular meaning or relevance of the term. In some cases, moral obligation is direct support for upholding the promise.<sup>35</sup> In others, moral obligation is just one factor examined in the decision to uphold a post-benefit promise.<sup>36</sup> Finally, a third line of cases uses the existence of a “mere moral obligation” as the very reason to deny enforcement.<sup>37</sup>

The focus of this piece is *legal* obligations, be they supported by, concomitant with, or unrelated to, *moral* obligations.<sup>38</sup> The highly variable use of “moral obligation” is therefore a woefully insufficient

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34. *Slayton v. Slayton*, 315 So. 2d 588, 590 (Ala. Civ. App. 1975); *Stuart v. Coldwell Banker & Co.*, 552 S.W.2d 904 (Tex. App. 1977); *Snow v. Nellist*, 486 P.2d 117 (Wash. Ct. App. 1971).

35. *E.g.*, *Kaiser v. Fadem*, 280 P.2d 728, 731 (Okla. 1955) (finding for the plaintiffs when “[t]here can be no question but that the defendant was under a moral obligation to compensate plaintiffs for their service . . .”).

36. *E.g.*, *Snow v. Nellist*, 486 P.2d 117, 119 (Wash. Ct. App. 1971) (giving a four-part test for material benefit rule claims, one of which is “that the circumstances were such as to create a moral obligation on the part of the promisor”).

37. *E.g.*, *Dow v. River Farms Co.*, 243 P.2d 95, 98 (Cal. Ct. App. 1952).

38. Recall, for example, the sternly worded differentiation between moral and legal obligation in *Manwill v. Oylor*: “The difficulty we see with the [moral obligation] doctrine is that if a mere moral, as distinguished from a legal, obligation were recognized as valid consideration for a contract, that would practically erode to the vanishing point the necessity for finding a consideration.” 361 P.2d 177, 178 (Utah 1961).

For an interestingly paternalistic argument that courts should enforce post-benefit promises made in recognition of moral obligations merely because the post-benefit promises *should* be made, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 821-22 (1941) (“The court’s conviction that the promisor ought to do the thing, plus the promisor’s own admission of his obligation, may tilt the scales in favor of enforcement where neither standing alone would be sufficient.”).

As indicated by Fuller’s piece and others directly cited in this article, promises grounded in “moral obligation” have received much greater academic attention than the material benefit rule. *See also* Jean Fleming Powers, *Rethinking Moral Obligation as a Basis for Contract Recovery*, 54 ME. L. REV. 1 (2002); Randy Sutton, Annotation,

guide for which post-benefit promises will be enforced. In response, two theories have emerged from the academy: (1) the promise-based view of Professors Steve Thel and Edward Yorio; and (2) the benefit-based view of Professor Stanley Henderson.

## 2. *The Promise-Based View*

Scholars favoring the promissory nature of contract hoped Section 86 would turn courts away from the promisee's initial benefit and toward the post-benefit promise.<sup>39</sup> In this view, the seemingly contradictory decisions in *Mills v. Wyman*<sup>40</sup> and *Webb v. McGowin*<sup>41</sup> are reconciled by the extended time for contemplation that preceded Webb's promise, along with Webb's performance on the promise during his lifetime.<sup>42</sup> Professor Melvin Eisenberg adds that focusing on the post-benefit promise alleviates concerns that beneficiaries will be forced to accept benefits they do not desire and resolves valuation problems for the benefit received.<sup>43</sup> This view also highlights how the traditional evidentiary and cautionary functions of consideration are served in the material benefit rule cases; the post-benefit promise and past consideration exist to prove the benefit rendered, and the time allowed before the post-benefit promise gives room for cautionary contemplation.<sup>44</sup>

Section 86, however, maintains a focus away from the promise and toward the underlying benefit. By excluding gifts, the provisions explicitly invite an examination of the promisee's motivation in conferring the initial benefit.<sup>45</sup> Further, the command to enforce post-benefit

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*Moral or Natural Obligation as Consideration for Contract*, 98 A.L.R.5th 353 (2002 & Supp. 2003).

39. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 837 (1997). Eisenberg compares Section 86 to the more-often-used Section 90 promissory estoppel doctrine, saying it "established a new principle under which a donative promise to compensate for past benefit is enforceable." *Id.*

40. 20 Mass. (1 Pick.) 207 (1825).

41. 168 So. 196 (Ala. Ct. App. 1935), *cert. denied with opinion*, 168 So. 199 (Ala. 1936).

42. See Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1072 (1992) (finding that *Mills* and *Webb* "may simply show that courts are willing to enforce serious, well-considered promises, but not rash and ill-considered promises. . . . [A] theory based on promise reconciles these cases as well").

43. Eisenberg, *supra* note 39, at 837; see also Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 663 (1982) (giving the same scenario supporting post-benefit promises for past benefits). The problem of selfish motives and valuation will be considered *infra* in Parts III.B.1 and IV.B.1.

44. Thel & Yorio, *supra* note 42, at 1072.

45. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981).

promises “to the extent necessary to prevent injustice,”<sup>46</sup> and in cases where the promisor has been unjustly enriched,<sup>47</sup> necessitates a contextual investigation beyond the mere act of making a promise. Even while endorsing a promise-based view of the material benefit rule cases,<sup>48</sup> Professors Thel and Yorio must conclude “the defendant is not held to her underlying moral obligation because of her promise, but is held to her promise because of her underlying moral obligation.”<sup>49</sup>

Case law supports the view that promises alone cannot make a binding contract, even under Section 86. Aside from the multiple cases thrown out under the “gift” rubric,<sup>50</sup> courts have not upheld promises in situations where a promise-based view would find it persuasive to do so. In *Harrington v. Taylor*, for example, Harrington caught an axe descending toward Taylor’s head, thus “mutilating . . . [her hand] badly, but saving defendant’s life.”<sup>51</sup> Taylor subsequently promised to pay for the good deed and after paying a small amount, failed to fulfill the promise.<sup>52</sup> In a one-page decision, the court found the defendant’s “common gratitude” for a “humanitarian act of this kind” was not sufficient consideration for the post-benefit promise.<sup>53</sup> In a similarly grim case involving a paralyzed student gymnast, the court refused to enforce the school’s promise to pay her medical bills, even after it had done so for three and a half years.<sup>54</sup> Both of these cases present factors that the promise-based view would highlight for

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

47. The most thorough pre-Section 86 examination of the material benefit rule case law devoted much attention to untangling the “unjust enrichment” issue. See Stanley D. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts*, 57 VA. L. REV. 1115 (1971).

48. See Thel & Yorio, *supra* note 42, at 1052 (“The thesis of this article, however, is that when courts give a remedy for the breach of a promise based on felt moral obligation they do not act to give the promisee her due, but instead to enforce a promise that is important to the promisor.”).

49. *Id.*

50. See *infra* Part III.A.1-2.

51. 36 S.E.2d 227, 227 (N.C. 1945).

52. *Id.*

53. *Id.*

54. *Cardamone v. Univ. of Pittsburgh*, 384 A.2d 1228 (Pa. Super. Ct. 1978). *Cardamone* was explicitly decided under “past consideration” grounds (which may involve a benefit or detriment) rather than “material benefit.” *Id.* at 1232. The case raises the interesting question of who is benefiting whom in the student-athlete/university relationship, but the court’s choice to disregard the university’s well-reasoned and ratified promise is a blow to the promissory theory either way. See also *Pascali v. Hempstead*, 73 A.2d 201, 202 (N.J. Super. Ct. App. Div. 1950) (deeming a promise in a commercial detriment case “a mere moral obligation or conscientious duty arising wholly from ethical motives” and refusing to enforce).

enforcement: persuasive moral obligations, time for contemplation, and partial performance by the promisor. However, in neither case was the post-benefit promise enforced.

The reported cases therefore do turn on the promises themselves.<sup>55</sup> All material benefit rule cases involve a post-benefit promise, but only some are enforced. A promise is necessary to invoke the rule, but never sufficient to create a valid claim.

### 3. *The Benefit-Based View*

The competing model advanced by earlier commentators is a restitution theory under the auspices of “unjust enrichment.”<sup>56</sup> Here, the focus is not the post-benefit promise, but rather the nature of the benefit provided and the circumstances of receipt. As Professor Henderson argues, “[T]he importance of cautionary safeguards (in the traditional promissory view of contract) is lessened in proportion to the degree to which a peculiar benefit, with peculiar costs incurred in conferring it, causes a particular case to stand out from the common pack.”<sup>57</sup>

While Henderson’s view extends into guarantees not later affirmed, these assertions do not hold in regard to material benefit rule cases. For example, consider the cases *Dementas v. Estate of Tallas*<sup>58</sup> and *Walsh v. Parker*.<sup>59</sup> Each involves personal services rendered to the promisor, yet the courts find for the plaintiff in *Walsh*<sup>60</sup> and against the plaintiff in *Dementas*.<sup>61</sup> This is despite the fact that *Dementas* involved a longer period of service and a more costly claim, and would therefore appear a more attractive case of “unjust enrich-

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55. Eisenberg’s theory therefore presents a normatively “compelling case” rather than a descriptive principle. Eisenberg, *supra* note 39, at 837. Thel & Yorio focus primarily on the promise as an explanation of damages. Thel & Yorio, *supra* note 42.

56. See, e.g., Henderson, *supra* note 47, at 1184 (“Once it is understood that objections to a remedy in quasi-contract are supported primarily by slender assumptions about intervention and neighborliness, a following promise ought on many occasions to tip the scales in favor of the policy of unjust enrichment.”); see also 3 ERIC MILLS HOLMES & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 9.24 n.3 (rev. ed. 1996) (citing Thel & Yorio and Henderson as the competing arguments concerning whether a material benefit claim is valid because “the promise is enforceable or that the restitutionary interest of the promisee is what courts ought to enforce”).

57. Henderson, *supra* note 47, at 1161.

58. 764 P.2d 628 (Utah Ct. App. 1988).

59. 106 P.2d 925 (Cal. Ct. App. 1940).

60. *Id.*

61. *Dementas*, 764 P.2d at 632.

ment” by the promisor.<sup>62</sup> Likewise, comparing *Haynes Chemical Corp. v. Staples*<sup>63</sup> and *In re Estate of McConnell*,<sup>64</sup> one finds that although all the cases share a business context, the promise supported by a great duration and value of benefit is not the promise upheld by the respective courts.<sup>65</sup> Therefore, a focus on the benefit alone proves an equally ineffective means by which to sort the material benefit rule cases.<sup>66</sup>

### III. REASONABLE EXPECTATION OF REASONABLE COMPENSATION

Dismissing these past theories and considering the reported cases, one finds the essential characteristic of a successful material benefit rule claim is an expectation of compensation by the promisee when the original benefit is rendered. The necessity is most clearly stated in multiple cases highlighting “[t]hat the promisee expected to be compensated therefor, and did not intend it as a mere gift or gratuity”<sup>67</sup> as an essential requirement for a material benefit rule claim.<sup>68</sup>

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62. *Id.* at 629. The promise in *Dementas* was to compensate fourteen years of service for \$50,000. *Id.* The promise in *Walsh* was for \$2,000 and six years of service. *Walsh*, 106 P.2d at 926.

63. 112 S.E. 802 (Va. 1922).

64. 58 P.2d 639 (Cal. 1936).

65. *Haynes*, 112 S.E. at 803 (involving a one-time transaction for \$707.09); *McConnell*, 58 P.2d at 640 (involving a twelve-year partnership and promise of \$5,000).

Henderson sees *McConnell* as “deny[ing] generally that a moral obligation will support a promise.” Henderson, *supra* note 47, at 1130. While the term “moral obligation” obfuscates the intent of this point, it has already been shown that *McConnell* did not abrogate enforcement of post-benefit promises in California. See, e.g., *Walsh*, 106 P.2d 925 (post-dating *McConnell* by four years).

66. In fairness to Henderson, his restitutionary view of the material benefit rule cases does not focus solely on the benefit and recognizes the expectation of compensation by the promisee as an important factor in the cases. See Henderson, *supra* note 47, at 1158-59.

67. *Carrington v. Smithers*, 147 P. 225, 227 (Cal. Ct. App. 1915).

68. See, e.g., *id.* at 226-27; *Marnon v. Vaughan*, 194 P.2d 992, 1009 (Or. 1948); *Snow v. Nellist*, 486 P.2d 117, 119 (Wash. Ct. App. 1971). The other features in this common test are an actual benefit, moral obligation, and absence of another promise for which the benefit is consideration. The actual benefit requirement is definitional. The moral obligation requirement, as previously explained, is a distracting tautology (either positively or negatively). The absence of a previous promise is a general rule highlighted in *First Nat’l Bankshares, Inc. v. Geisel*, 853 F. Supp. 1344 (D. Kan. 1994). See *infra* Part IV.A.2.

The focus of Section 86, and thus this piece, is cases where the post-benefit promise is made solely in recognition of a benefit for which there has been no prior compensation. This excludes promises made upon the retirement or workplace disability of an employee, which introduce their own complexities. See *Grady v. Appalachian Elec. Power Co.*, 29 S.E.2d 878, 883 (W. Va. 1944) (using a “liberal rule”

Courts have since relied on the expectation of compensation in cases enforcing and ignoring the post-benefit promise. *Kaiser v. Fadem*, for example, found:

There can be no question but that the defendant was under a moral obligation to compensate plaintiffs for their services . . . especially when . . . such services were rendered with the intention and expectation of both parties to the controversy, that they would be paid for it.<sup>69</sup>

*Old America Life Insurance v. Biggers*, also affirming the promise, relied largely on the fact that “Biggers expected that, if the Insurance Company prospered . . . he would eventually be indirectly repaid.”<sup>70</sup> In the alternative, when ruling against the post-benefit promise in *Manwill v. Oyler*, the court argued: “The circumstances must be such that it is reasonably to be supposed that the promisee (plaintiff) expected to be compensated in some way therefor.”<sup>71</sup>

Noting that material benefit rule cases are decided based on expectation of compensation does not, however, create a definitive guide concerning which claims are and should be successful. All plaintiffs can assert a subjective expectation of compensation. What must be considered are situations in which courts have consistently found the expectation of compensation and what this means concerning the theoretical underpinnings of the rule. For this investigation, it is necessary to consider the possible motivations for conferring a benefit. Most generally, these can be described as either selfless or selfish.

#### A. *Selfless Motives*

Stating the converse of the reasonable expectation of compensation rule, the early *Irons Investment Co. v. Richardson* decision stated: “A past consideration, even though of benefit to the promisor, is insufficient when the services rendered are intended and expected to be

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to uphold promises of compensation made to a retiring disabled employee). Compare *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (enforcing a promise made to a retiring employee) with *Hayes v. Plantation Steel Co.*, 438 A.2d 1091 (R.I. 1982) (declining to enforce the retirement benefits promise).

The issue of pre-existing agreements is central to the most ridiculous recent case raising Section 86, *Bauco v. Dominello*, No. CV920333175S, 1995 Conn. Super. LEXIS 1553 (Conn. Super. Ct. May 18, 1995). In the case, the plaintiff attempted to use his payment of \$5,000 on a prior promissory note as the past “benefit” supporting a subsequent promissory note extracted from the defendant under duress. *Id.* at \*4. While it was kind enough to cite Section 86 for the plaintiff, the court tossed out the claim for lack of consideration and duress. *Id.* at \*4, \*9.

69. 280 P.2d 728, 731 (Okla. 1955).

70. 172 F.2d 495, 499 (10th Cir. 1949).

71. 361 P.2d 177, 179 (Utah 1961).

gratuitous. To say that there is a moral obligation to pay for services intended as a gratuity, is in itself inconsistent and contradictory.<sup>72</sup> Subsequent cases echo this bright line, striking down promises where the original benefit is deemed “a gift”<sup>73</sup> or service “performed gratuitously.”<sup>74</sup> Section 86 also clearly excludes benefits originally conferred as “gifts” from the enforcement scheme of the material benefit rule.<sup>75</sup>

Again, using the term “gift” or “gratuity” alone does little good. Where the defendant sees an altruistic benefit, the plaintiff will present an expectation of compensation.

### 1. Gifts Between Family Members

Looking at the cases, a clear guide for establishing where courts will find “gifts,” and thus deny enforcement, emerges in the line between affective relationships and business relationships. For example, the material benefit rule could not uphold a “loan” between family members in *Kennedy v. Marshall*.<sup>76</sup> Instead, “the money transferred by Kennedy to his sister-in-law, Ella Rogers, was a gift. Miss Rogers was not under either legal or moral obligation to return the same or portion thereof . . . .”<sup>77</sup>

An even richer family context can be found in *Foltz v. First Trust & Savings Bank*, where the plaintiff interceded in a dispute between his second cousin and the cousin’s affluent mother.<sup>78</sup> The mother subsequently did not carry through with her threat to disinherit the son, and he thanked his cousin with a written promise.<sup>79</sup> The court contrasted the facts with prior California cases involving business and employment.<sup>80</sup> Whereas the past consideration rendered in those cases was “good and valuable,” a family member’s help with a maternal squabble could not support enforcement of the post-benefit promise.

Some courts have laid bare this implied presumption against expected compensation in family cases. A recent case from North Carolina, for example, outlined, “Services performed by one family mem-

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72. 50 P.2d 42, 44 (Wash. 1935) (citations omitted).

73. *Kennedy v. Marshall*, 160 P.2d 397, 399 (Okla. 1945).

74. *Dementas v. Estate of Tallas*, 764 P.2d 628, 633 (Utah Ct. App. 1988).

75. RESTATEMENT (SECOND) OF CONTRACTS § 86(2)(a) (1981).

76. 160 P.2d at 399.

77. *Id.*

78. 194 P.2d 135, 136 (Cal. Ct. App. 1948).

79. *Id.*

80. *Id.*

ber for another, within the unity of the family, are presumptively ‘rendered in obedience to a moral obligation and without expectation of compensation.’”<sup>81</sup> Other courts have similarly ruled that “[t]he existence of a family relationship, once it is established, gives rise to a presumption that services rendered were intended to be gratuitous.”<sup>82</sup>

## 2. Gifts Between Close Friends

Interestingly, the court in *McMurry v. Magnusson* sent the case back to the jury to weigh whether a “family relationship” existed between the plaintiff and her sister, the promisee and promisor.<sup>83</sup> The affective relationship courts use to presume an expectation of compensation, or lack thereof, is thus not based on consanguinity alone.

Rather, cases involving “close personal friend[s]” appear equally likely to fail.<sup>84</sup> Hence, the promisor in *Dementas v. Estate of Tallas* made a strategic mistake by beginning his post-benefit promise with a paean to the promisee: “PETER K. DEMENTAS, is my best friend [sic] I have in this country and since he came to United States he treats me like a father and I think of him as my own son.”<sup>85</sup> The court had little problem affirming that the services performed by the “son” for the “father” “were not rendered with the expectation of being compensated, but were performed gratuitously.”<sup>86</sup> Similarly, the court in *Jensen v. Anderson* refused to enforce a promise based upon prior personal services rendered by the “bachelor friend of [the] decedent.”<sup>87</sup>

Compare these results with *Walsh v. Parker*, the only case to uphold a post-benefit promise made as a will substitute.<sup>88</sup> Rather than outline any special personal relationship with the promisee, the promisor in *Walsh* duly noted that “James H. Walsh has *worked for me* for

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81. *Estate of Graham v. Morrison*, 576 S.E.2d 355, 359 (N.C. Ct. App. 2003) (quoting *Jones v. Saunders*, 119 S.E.2d 789, 793 (N.C. 1961)).

82. *McMurry v. Magnusson*, 849 S.W.2d 619, 622 (Mo. Ct. App. 1993).

83. *Id.* at 623.

84. *Dementas v. Estate of Tallas*, 764 P.2d 628, 629 (Utah Ct. App. 1988).

85. *Id.* at 631.

86. *Id.* at 633.

87. 468 P.2d 366, 369 (Utah 1970). An even more basic case, *Odell v. Smith*, struck down a promissory note between father and daughter where it was stipulated that the only consideration given was “love and affection.” 277 N.W. 141, 142 (Wis. 1938). But compare the peculiar statutory framework for “love and affection” in Georgia, which does not provide theoretical insight for the reported cases nationwide. *See supra* note 30.

88. *Walsh v. Parker*, 106 P.2d 925 (Cal. Ct. App. 1940).

the past six years, staying in nights and attending to me.”<sup>89</sup> Mr. Walsh was not a relative or close friend, but rather the promisor’s “personal attendant” and thus received his due under the material benefit rule.<sup>90</sup>

### 3. Exceptions

The few cases applying the material benefit rule between affectively related parties can be factually differentiated from those establishing the general presumption in favor of gratuitous service. *Slayton v. Slayton*, as a first example, boldly claims, “[I]t is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit.”<sup>91</sup> *Slayton* actually deals with, however, a gross violation of guardianship duties. The promisor, the promisee’s uncle and guardian, misappropriated funds held on the promisee’s behalf.<sup>92</sup> The “benefit” of the “loan,” made without the plaintiff’s knowledge, thus supported the promise to repay with interest.<sup>93</sup> The court perhaps chose the material benefit rule for its simplicity, but the facts are vastly different from *Kennedy v. Marshall*,<sup>94</sup> *Foltz v. First Trust & Savings Bank*,<sup>95</sup> and other cases in the family context.

Two cases, *In re Prejean*<sup>96</sup> and *Snow v. Nellist*,<sup>97</sup> upholding loans between closely related parties appear more difficult to reconcile, yet

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89. *Id.* at 926 (emphasis added). Walsh had a day job as a gardener for one of the promisor’s neighbors. It is therefore plausible that the reasonable expectation of future compensation would be sufficient motivation to keep him reporting to work for six years.

90. *Id.* Perhaps tellingly, the promisor’s nephew and son lived in her home and were not compensated for any services they provided her.

91. 315 So. 2d 588, 590 (Ala. Civ. App. 1975) (citing *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935)). In fact, *Slayton* is the only Alabama case that cites *Webb* to support a material benefit rule claim. The old chestnut primarily lives on in academic circles, having been cited in only seven cases, but forty-four law review articles.

92. *Id.* at 589.

93. *Id.* For those more interested in the sordid facts, the defendant was appointed guardian of the plaintiff, Vernon Slayton, when Vernon was six years old. Vernon’s father was killed in a workplace accident and he was thus entitled to worker’s compensation benefits, which were paid to his uncle and guardian, the defendant Eddie Slayton. Eddie subsequently frittered the money away in business ventures, but promised to pay Vernon interest on the money once Vernon became aware of the account in his favor at age twenty-four. It was this promise for previous benefit that the court upheld using the material benefit rule.

94. 160 P.2d 397 (Okla. 1945).

95. 194 P.2d 135 (Cal. Ct. App. 1948).

96. 994 F.2d 706 (9th Cir. 1993).

97. 486 P.2d 117 (Wash. Ct. App. 1971).

can also be separated from the presumption of gratuitous lending seen in *Kennedy v. Marshall*.<sup>98</sup> *In re Prejean* challenged the promisor's transfer of a security interest in his home to his sister as a fraudulent transfer to avoid bankruptcy creditors.<sup>99</sup> The note was made in recognition of money the promisor received in order to attend medical school, and the promisee's service caring for the promisor's children.<sup>100</sup> The undisputed facts stipulated the "benefit" conferred on the promisee, primarily the money for medical school, to be a "loan" enforceable from the time of lending.<sup>101</sup> The court therefore viewed the case not as a material benefit rule situation, but rather a renewal "of an antecedent obligation, arising from cash loans and valuable services, that, but for the statute of limitations, was enforceable."<sup>102</sup>

Beyond the factual bases for the presumption that benefits conferred by family members or close friends are done so gratuitously, *Prejean* highlights that courts may be skeptical of material benefit rule claims in the affective context due to the risks to third-parties. In *Production Credit Ass'n of Mandan v. Rub*, for example, Duane Rub executed a security interest in his livestock to Jeffrey Rub just two days before filing for bankruptcy.<sup>103</sup> The note was supported by Jeffrey's "love and affection," along with some past farm work.<sup>104</sup> It was not, however, listed in Duane's first bankruptcy filing, "the Rubs were evasive about the consideration given by Jeffrey" and "[t]he Rubs's documentation of the lien indicates serious discrepancies about the amount Duane owed Jeffrey."<sup>105</sup>

Rather than find an enforceable post-benefit promise, the appeals court thus reiterated the vituperative trial judge: "I do know this, both Mr. Rub's, that I think the transaction between you two is completely fraudulent. I think it's a hoax upon the court."<sup>106</sup> Since the material benefit rule bypasses consideration's established channeling function, *Rub* thus displays an additional anti-fraud justification for the presumption against applying it in the context of affective relationships.

The final case to be reconciled with the presumption of gratuitous benefit in the affective context, *Snow v. Nellist*,<sup>107</sup> can be done on

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98. 160 P.2d at 399.

99. 994 F.2d at 706.

100. *Id.*

101. *Id.* at 706, 709.

102. *Id.* at 709.

103. 475 N.W.2d 532, 533 (N.D. 1991).

104. *Id.* at 535.

105. *Id.* at 535-36.

106. *Id.* at 535.

107. 486 P.2d 117 (Wash. Ct. App. 1971).

grounds similar to *Prejean*. In *Snow*, Harry Richmond loaned his close friend Herald Snow \$12,000 to build a house on Richmond's land, which Snow would occupy, but Richmond would own.<sup>108</sup> Snow then repaid the loan for ten years, while also tending Richmond's land, under the mutual expectation of receiving the house.<sup>109</sup> After ten years, Richmond instructed Snow to stop repaying the loan and executed a promissory note for the \$7,200 already repaid, which Snow was to bring against Richmond's estate if Snow did not ultimately get the house.<sup>110</sup> When Richmond died intestate, Snow tendered the note, which the court upheld under the material benefit rule.<sup>111</sup>

Again, the facts are far from *Kennedy* and the other selfless acts of close friends and family members. While Snow and Richmond were friends, their arrangement resembles a business deal which ultimately left all parties whole: Richmond's estate received the house, presumably worth at least the \$12,000 "loaned" to Snow to build it, and Snow received the \$7,200 he paid "in reliance upon the promise of Richmond to eventually vest title to the property in him."<sup>112</sup> Viewed through the lens of expected compensation, it is clear that the "benefit" conferred on Richmond (the monthly payments) was made in expectation of future compensation (the house), not gratuitously.

#### 4. *Altruism Outside Family and Friends*

While the courts read a presumption of gratuitous service between affectively related parties, they do not automatically apply a reverse presumption of selfish service between strangers. In fact, the case law is quite heartening in its repeated finding of benefits conferred by strangers for altruistic motives.

The paradigmatic case of an altruistic stranger is the rescuer.<sup>113</sup> Unless the rescuer has read and can recall *Webb v. McGowin* in the split second before acting, he is acting without clear expectation of compensation. Given the emphasis on the promisee's expectations, the court's decision in *Harrington v. Taylor*, putting aside *Webb*, should thus come

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108. *Id.* at 118.

109. *Id.*

110. *Id.*

111. *Id.* at 119.

112. *Id.* The only thing missing from this equation is rent paid by Snow. This is immaterial to the discussion at hand, but can be explained by either the parties' friendship, Snow's farm work, or Snow's efforts to construct the house.

113. For an interesting economic analysis of the rescuer cases that, contrary to this case-based analysis, supports enforcing post-benefit promises for compensation, see Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 418-19 (1977).

as little surprise.<sup>114</sup> Harrington performed a noble “humanitarian act” when she caught the axe blow intended for Taylor, but the act was “voluntarily performed” and without expectation of compensation.<sup>115</sup>

Harrington is the only reported material benefit rule rescue case to follow *Webb* and its result clearly supports the expectation-based theory, rather than a promissory or restitutionary approach.<sup>116</sup> Under these competing views, Harrington should recover due to Taylor’s promise, which he affirmed and performed for a short time, or the life-savingly “peculiar” benefit that Taylor received. The lack of rescuer claims in court may reflect external social factors,<sup>117</sup> but the dearth of reported cases evidences that the material benefit rule and Section 86 have not opened the floodgates for rewarding selfless strangers.<sup>118</sup>

Though not voluntary rescuers, the strangers in the post-Section 86 case *Schoenfeld v. Ochsenhaut* were acting under similar moral, rather than selfish, motivations.<sup>119</sup> After consulting their rabbi, the Schoenfelds paid for the proper Jewish burial of their neighbor, Alexander Ochsenhaut, since it appeared Alexander had no living relatives to perform this important service. When Alexander’s brother unexpectedly arrived, promised to repay the benefit conferred,<sup>120</sup> and did

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114. *Harrington v. Taylor*, 36 S.E.2d 227, 227 (N.C. 1945).

115. *Id.*

116. As previously noted for *Webb*, *Harrington* lives on in the pages of academia rather than the halls of justice. In the sixty-one years since its decision, *Harrington* has never been cited in another reported case, but turns up in eleven law review articles and one American Law Reports notation.

117. One would think the moral duty to keep one’s promise would perhaps reach its apogee when the promise is made to the person who saved your life.

118. A student comment on the law of rescuers, for example, argued that “[t]he modern trend is to reject the *Harrington* court’s adherence to the common law disfavor with the claims of rescuers. Most modern courts have adopted the *Webb* contract exception, which represents a favorable attitude toward the claims of rescuers.” Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85, 97 (1986). Unfortunately for Albert, his only evidence for this argument is the material benefit case law collected in the American Law Reports, 8 A.L.R.2d 787 (1949), and Section 86. As our investigation shows, rescuer cases are limited to *Webb* and *Harrington*, and the theoretical heft of the remaining cases point in favor of the *Harrington* court’s ruling.

119. 452 N.Y.S.2d 173 (N.Y. Civ. Ct. 1982). The court did not cite or consider Section 86 in its decision. It is not known whether this was due to questionable lawyering (recall *Starr v. Katz*, No. 91-3365, 1994 U.S. Dist. LEXIS 14437 (D.N.J. Oct. 5, 1994) discussed in Part I.A) or Section 86’s lack of any direct precedential effect.

120. *Schoenfeld*, 452 N.Y.S.2d at 174. The testimony differed as to whether he promised to directly repay the Schoenfelds or make a donation to the synagogue. *Id.* Even viewing the testimony in the light most favorable to the Schoenfelds, the express promise would have done little good.

not keep his promise, the Schoenfelds were left with a *mitzvah*,<sup>121</sup> but no legal ground to uphold the post-benefit promise. The belief that no family member would ever pay for the burial (and/or compensate them for doing so) was the very reason the Schoenfelds conferred the benefit.<sup>122</sup>

A final example of gratuitous service outside the affective context can be found in *Dow v. River Farms Co.*<sup>123</sup> Doctrinally, *Dow* recognizes the expectation-based view, noting that promises are upheld “where the person rendering [services] reasonably may expect to be paid,” but declining enforcement “if there was no expectation of payment by either party.”<sup>124</sup> Since *Dow* takes place in the business context, it would also appear favorable for enforcement.<sup>125</sup> Factually, however, the resolution granting Dow \$50,000 for serving as president and general manager of the corporation made clear, “Whereas, E.L. Dow has never requested nor has he ever indicated that he expected any payment for said services . . . .”<sup>126</sup> Moreover, Dow twice refused the remuneration, including a letter which reiterated that his past services were rendered without expectation of compensation.<sup>127</sup> Rather than impugn the material benefit rule’s application in the business context, *Dow* therefore stands for the simple proposition that a post-benefit promise is not enforceable when both parties agree there was no expectation of future compensation, and when the promisee repeatedly refuses to accept the promise.

### B. *Selfish Motives*

Beyond the selfless acts of strangers, the expectation of future compensation will be more likely outside of the affective context and

121. The rabbi told the Schoenfelds, “[B]urying a deceased Jew who died without surviving family was either a duty or the highest form of kindness - a ‘mitzvah.’” *Id.*

122. The *Schoenfeld* decision appears to contradict the much earlier case of *McGuire v. Lawton*, where the court upheld a post-benefit promise to repay the plaintiff for expenses surrounding the health care and burial of the defendant’s wife. 9 Pa. D. & C. 730 (1926). This case, from a low court and different era, also involved questions of agency between the parties. *Id.*

123. 243 P.2d 95 (Cal. Ct. App. 1952).

124. *Id.* at 99 (citing *Old Am. Life Ins. Co. v. Biggers*, 172 F.2d 495 (10th Cir. 1949); *Marnon v. Vaughan Motor Co.*, 194 P.2d 992 (Or. 1948); 8 A.L.R.2d 798 (1949)).

125. See *infra* Part III.B.3.

126. *Dow*, 243 P.2d at 96. The fact that Dow held these positions without compensation differentiates the matter from the previously discussed retirement cases.

127. Dow’s letter could not have been more harmful to his widow’s claim: “I wish to state that whatever services I may have rendered this company in the past has not been with any idea that I was to receive payment for the same.” *Id.* at 97.

among those engaged in selfishly motivated commercial transactions. Ruling against the post-benefit promise, for example, the court in *Jensen v. Anderson* found, “There is no evidence to indicate that [plaintiff’s] services were rendered at request as a matter of business . . . .”<sup>128</sup> Likewise, in *Reece v. Reece*, the court found a benefit was conferred with expectation of compensation in part because “[t]he services rendered were of a business nature.”<sup>129</sup> The vast majority of the modern cases upholding the promise in material benefit rule cases therefore involve business relationships.<sup>130</sup>

### 1. *Paradox of Selfish Motives*

Within this “selfish” context, courts still require the expectation of compensation to be objectively reasonable under the circumstances. This guards against the problem of contractual imposition, where one party confers a benefit upon another in the selfish hope, not reasonable expectation, of future compensation. As found in *Worner Agency, Inc. v. Doyle*, “[N]o consideration is deemed to exist where a benefit is imposed against another’s will . . . .”<sup>131</sup>

The line between imposition and expectation can become quite gray, however, and Professor Henderson provides a good description of this paradox of selfish motives: “While self-interest must be emphasized in order to overcome the ordinary assumption of officiousness, too much unsolicited promotion of self-interest runs headlong into the policy against imposition . . . . If restitution can muster almost total lack of sympathy for Good Samaritans, it is capable of doing as much for promoters.”<sup>132</sup>

### 2. *Promisor’s Request Rule*

A simple means to prevent imposition is to look for cases in which the benefit has been conferred at the promisor’s request. Indeed, courts have recognized that “[i]t is a well-settled principle of contract law, supported by ample authority, that a promise is enforceable if supported by a past consideration rendered at the promisor’s

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128. *Jensen v. Anderson*, 468 P.2d 366, 369 (Utah 1970). See discussion *supra* Part A.2.

129. 212 A.2d 468, 474 (Md. 1965).

130. The four outlying cases (*Slayton*, *Prejean*, *McMurry*, and *Snow*) have been previously explained. See *supra* notes 91-93, 99-102, 82-83, 107-12 and accompanying text.

131. 479 N.E.2d 468, 473 (Ill. App. Ct. 1985) (citations omitted).

132. Henderson, *supra* note 47, at 1171.

request.”<sup>133</sup> However, this doctrine represents a set of past-consideration cases that cannot account for the full sweep of the material benefit rule.

First, the doctrine does not account for services gratuitously rendered, but still done at the promisor’s request. Consider the case of *Dementas v. Estate of Tallas*.<sup>134</sup> The fourteen years of service rendered by Dementas, for example, which included acts ranging from picking up Tallas’s mail to “assisting with the management of Tallas’s rental properties,” must have included some act performed at Tallas’s request.<sup>135</sup> Yet, recovery was still denied. Likewise, the mere fact that Dow’s years of service were performed at the request of River Farms Company was insufficient to uphold the company’s post-benefit promise.

Additionally, the promisor’s request rationale cannot account for cases such as *Worner*, where a benefit was clearly conferred and the promise upheld, yet it is factually difficult to find when and if the promisor requested the benefit.<sup>136</sup> The *Worner* court thus listed as separate exceptions to the consideration doctrine cases where: “(1) the consideration was rendered at the request of the promisor; [and] (2) the alleged consideration was of a ‘beneficial’ or ‘meritorious’ nature . . . .”<sup>137</sup> Finding a reasonable expectation of compensation in material benefit rule cases can therefore not be a search merely to find if the services were rendered at the promisor’s request. While this is a helpful guide, it is both overly broad and narrow.

### 3. Mutual Expectation in the Business Context

More generally, the cases suggest the expectation of compensation must be implicitly mutual when the original benefit is conferred. As found in *Kaiser v. Fadem*, the “services were rendered with the intention and expectation of *both parties* to the controversy, that they would be paid for it.”<sup>138</sup> Likewise in *Worner*, the plaintiff testified: “[W]e seem to have a common understanding between builders and

133. *Sargent v. Crandall*, 352 P.2d 676, 677 (Colo. 1960).

134. 764 P.2d 628 (Utah Ct. App. 1988).

135. *Id.* at 629.

136. This situation especially holds for the idea cases, which are discussed at length *infra* Parts IV(B)(1), (D).

137. *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468, 473 (Ill. App. Ct. 1985) (citing *Carson v. Clark*, 2 Ill. 113, 114-15 (Ill. 1833)); *see also* *Yale Security, Inc. v. Freedman Sales, Ltd.*, No. 96C6501, 1997 U.S. Dist. LEXIS 1098, at \*12 (N.D. Ill. Jan. 31, 1997) (repeating the separate categorizations from *Worner*).

138. 280 P.2d 728, 731 (Okla. 1955) (emphasis added) (citing *Old Am. Life Ins. Co. v. Biggers*, 172 F.2d 495 (10th Cir. 1949)).

ourselves that, if we bring them a buyer – a finder’s fee – we get paid . . . .”<sup>139</sup> In the alternative, recall *Dow v. River Farms Co.*, where the business context was not sufficient to uphold a post-benefit promise when both parties agreed the services were rendered without expectation of compensation.<sup>140</sup> The reasonability of expected compensation is thus largely a product of context (business relationships rather than personal relationships), but also depends on signals from both parties when the original benefit is conferred.

### C. Implied Promises

The necessity of mutuality raises another crucial paradox noted by courts applying the material benefit rule: if the original benefit is conferred under a reasonable expectation of compensation, based on context and actions, why is there not an implied or express contract at the time of initial performance that renders the post-benefit promise irrelevant for enforcement?<sup>141</sup> Or, as explained more simply in *Dementas*, “[I]f [the] services were rendered with the expectation of payment, an implied contract was probably created.”<sup>142</sup>

#### 1. Cases Outside of the Material Benefit Rule – Determinable Compensation

It is therefore not surprising that some cases decided under the material benefit rule can actually stand independently as express or implied contracts for future performance. As seen in *Slayton v. Slayton*, the presence of a post-benefit promise makes the material benefit rule

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139. *Worner*, 479 N.E.2d at 471.

140. 243 P.2d 95, 96-97 (Cal. Ct. App. 1952).

141. Part of the argument between Henderson and Thel & Yorio therefore does not concern enforcement, but rather damages, and whether the remedy should be measured by the expectancy interests created by the promise or the restitutionary and reliance interests created by the benefit. Thel & Yorio, for example, argue, “[t]he consistent award of expectation damages seems at odds with the commentators’ and the Restatement’s explanation of the moral obligation cases.” Thel & Yorio, *supra* note 42, at 1087. They continue, “The restitutionary explanation figures prominently in the argument that contract law in general is concerned only with protecting promisees’ restitutionary and reliance interests.” *Id.* at 1101.

142. *Dementas v. Estate of Tallas*, 764 P.2d 629, 633 n.9 (Utah Ct. App. 1988) (citing *Manwill v. Oyler*, 361 P.2d 177, 179 (Utah 1961)). The *Dementas* court credited the earlier finding in *Manwill* that “if the circumstances were such that the parties reasonably expected [the plaintiff] was to be paid, there may have been an implied contract . . . .” *Manwill*, 361 P.2d at 179. See also *Evans v. Pickett Bros. Farms*, in which the parties put their understanding in a written document after performance, but the promise to pay was implied from mutual conduct before performance. 499 P.2d 273 (Utah 1972).

an attractive alternative to more difficult factual and legal investigations.<sup>143</sup>

For example, the court in *Yale Security, Inc. v. Freedman Sales, Ltd.* fell back upon the material benefit rule rather than examining whether, as was likely the case, the contract was made in recognition of future benefits.<sup>144</sup> The agreement between Yale and Freedman, two relatively sophisticated trading partners, stipulated it was made “[i]n consideration of the services rendered *and to be rendered* by Freedman . . . .”<sup>145</sup> Freedman had indeed performed valuable services for Yale in the past, but was also going to do so in the future and his compensation relied on those future services.<sup>146</sup> Upholding the judgment below, the court chose to rest on the material benefit rule and *Worner*, finding “[e]ven without a provision regarding future consideration, the court would not be precluded from finding an enforceable agreement based on past consideration . . . .”<sup>147</sup>

Similarly, the trial court in *Shaffer v. Ricci* saw past benefits conferred by one business partner and a post-benefit promise made by the other, and ruled for the promisee using the material benefit rule.<sup>148</sup> This was done despite the lack of any clear Florida precedent on the matter.<sup>149</sup> The appeals court later noted that the payments were not made in recognition of the past benefits, but rather in exchange for typical present consideration.<sup>150</sup>

Even the promisee in *Haynes Chemical Corp. v. Staples & Staples*, used as illustration eight for Section 86, likely did not need the post-benefit promise for victory.<sup>151</sup> *Staples & Staples* submitted an advertising plan to Haynes with the understanding that they “would be entitled to nothing, provided . . . a decision in good faith was made on the

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143. 315 So. 2d 588 (Ala. Civ. App. 1975).

144. No. 96C6501, 1997 U.S. Dist. LEXIS 1098 (N.D. Ill. Jan. 31, 1997).

145. *Id.* at \*12 (emphasis added).

146. Freedman was to receive a 10% commission on sales made to an important customer, W.W. Grainger, which he had earlier recruited to Yale. *Id.* at \*2.

147. *Id.* at \*12 (relying on *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468 (Ill. App. Ct. 1985)).

148. 603 So. 2d 566, 567 (Fla. Dist. Ct. App. 1992).

149. The case, as reported, is an appellate decision. It is therefore not known if the trial court used Section 86 or any other grounds for invoking the material benefit rule.

150. *Id.* at 568 (“[T]he record contained substantial, uncontradicted evidence of valid consideration for this agreement.”). The promise was made while the partners’ accounting practice was being sold under a contract contingent upon Ricci, the promisee, remaining with the firm. *Id.* The appeals court therefore saw the promise as consideration for Ricci’s agreement to continue serving the new owners and transfer his client base to the new practice. *Id.*

151. *Haynes Chem. Corp. v. Staples & Staples, Inc.*, 112 S.E. 802 (Va. 1922).

merits of the plan.”<sup>152</sup> After a satisfactory presentation, Haynes’s president abruptly switched course and decided the company needed a New York agency, giving Staples & Staples “the rough end of the poker.”<sup>153</sup> Since a post-benefit promise to repay Staples & Staples was made, the court considered the past consideration doctrine, but primarily based its ruling on the decision that “there was an implied promise to pay the amount expended at . . . [Haynes’s] request.”<sup>154</sup>

The *Haynes* decision danced between theories of contracts implied in law<sup>155</sup> and implied in fact,<sup>156</sup> but a post-benefit promise is not necessary for enforcement in either case. Staples & Staples could recover based on the implied promise either way. The crucial feature of the expectation of compensation under either theory in *Haynes* is that it was for the determinable amount of the funds expended to create the presentation. Staples & Staples, it can thus be said, had a reasonable expectation of *determinable* compensation.<sup>157</sup>

## 2. Cases Where Material Benefit Rule Is Necessary - Reasonable Compensation

In the cases for which recovery truly depends on the material benefit rule, the expectation of compensation must be more nebulous than determinable compensation. In these cases, context and minimal signals from the trading partner are sufficient to create only reasonable expectation of *reasonable* compensation.

In *Kaiser v. Fadem*, for example, the promisee’s expectation of compensation was grounded in both his business relationship with the

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152. *Id.* at 803.

153. *Id.* at 804 (quoting Haynes’s general manager).

154. *Id.* at 805.

155. *Id.* at 804 (explaining that under a theory of contract implied in law, an implied promise was made by Haynes that Staples & Staples would be compensated if not given a fair assessment based on the suitability of the proposal).

156. *Id.* at 805 (indicating that a quasi-contractual reading depends primarily on Staples & Staples rendering its valuable performance non-gratuitously and at Haynes’s request). Now more commonly known as “quasi-contracts,” these are imposed by courts when the circumstances of performance mandate equitable restitution to the performer. See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987) (giving a succinct analysis of quasi-contract theory); see also *Desny v. Wilder*, 299 P.2d 257, 267-68 (Cal. 1956) (providing a more wide-ranging discussion of the issue).

157. See also *Evans v. Pickett Bros. Farms*, 499 P.2d 273 (Utah 1972). As noted previously, the court chose to enforce the implied initial promise in that situation rather than rely on the subsequent writing. *Id.* In *Evans*, the promisee plaintiff tendered a sufficiently definite estimate of final charges before performance commenced. *Id.* at 275. His reasonable expectation was thus for a determinable compensation - the estimated price (granting reasonable variation). *Id.*

promisor and the pre-performance assurance that “you will be taken care of . . . .”<sup>158</sup> The initial implied promise may therefore fail under the classic indefiniteness doctrine.<sup>159</sup> As the Second Circuit noted in a recent, unpublished opinion, “[A]n implied-in-fact contract is unenforceable for vagueness when its terms are too indefinite to allow a court to determine with reasonable certainty what each party has promised to do.”<sup>160</sup> In such cases, the subsequent post-performance promise stands as a sufficiently definite, enforceable clarification of the original indefinite, unenforceable bargain.

Importantly, this takes the modern applications of the material benefit rule back to the rule’s most secure historical foundation—renewing past promises extinguished by operation of the law.<sup>161</sup> Wiliston’s fear of an unencumbered material benefit rule is thus answered by *Wennall v. Adney*’s original clarification to Mansfield’s exception.<sup>162</sup> Even today, successful post-benefit promise cases are limited to those where the initial promise “might have been enforced at law . . . had it not been suspended by some . . . rule of law.”<sup>163</sup>

The only substantive difference between the material benefit rule cases and those covered by *Wennall* and its progeny is that the original implied promises in Section 86 cases have been rendered inoperable by common law rather than statutory “positive law.”<sup>164</sup> It is the indefiniteness doctrine rather than, for example, the statute of limitations that extinguishes the past promise, but the practical effect is the same.<sup>165</sup> As long as courts must search for an original implied promise of reasonable compensation, an effective limit to Section 86’s span exists.

Beyond the mere numerical rarity of reported cases, one can therefore see that courts have not used Section 86 and the material benefit rule to annihilate the consideration doctrine. Rather, they have looked to those cases where an implied promise of compensation was origi-

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158. 280 P.2d 728, 731 (Okla. 1955).

159. *See, e.g.*, *Canet v. Smith*, 159 N.Y.S. 593, 594 (N.Y. App. Div. 1916) (striking down a promise to pay “a reasonable amount from the profits”). *But see* *Corthell v. Summit Thread Co.*, 167 A. 79 (Me. 1933) (upholding a promise to pay “reasonable recognition” and citing some of the contrary case law on the topic).

160. *Bergin v. Century 21 Real Estate Corp.*, No. 00-7381, 2002 U.S. App. LEXIS 28028, at \*4 (2d Cir. Nov. 8, 2000).

161. *See supra* Part I.C.

162. *Wennall v. Adney*, (1802) 127 Eng. Rep. 137 (K.B.).

163. *Id.* at 138.

164. *Id.*

165. *Id.*

nally made by the promisor, but it was rendered unenforceable by the indefiniteness doctrine.

#### IV. THE MATERIAL BENEFIT RULE'S IDEAL CONTEXT

##### A. *Unfamiliar Trading Partners*

With the implied promise for reasonable compensation as the starting point for successful material benefit rule cases, it is interesting to consider where this should be expected, and where the material benefit rule naturally follows. First, the indefinite implied promise will likely be seen among unfamiliar trading partners. This is due to the fact that “[c]ourts will, if possible, ‘attach a sufficiently definite meaning to the terms of a bargain to make it enforceable’ and in doing so may refer to ‘commercial practice or other usage or custom.’”<sup>166</sup> The Uniform Commercial Code, for example, allows courts to supplement the understanding of the parties with assumptions from the course of dealing between those parties and usages of trade.<sup>167</sup> Parties dealing with each other for this first time in a particular commercial context will not have the experience that can provide such gap-fillers.

##### 1. *Affective Context*

It is therefore unsurprising that many material benefit rule cases arise between family members and close friends. The intervening cousin in *Foltz* and helpful friend in *Dementas* may have had vague expectations of future compensation, grounded in equally vague implied promises from the beneficiaries that they would be rewarded for their altruism.<sup>168</sup> Given the unique and non-commercial settings of each situation, however, the terms of such an implied promise, much less the certainty of its existence, are clearly lacking.<sup>169</sup> There is no course of dealing to augment these interactions, and the judicial pre-

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166. *Bergin v. Century 21 Real Estate Corp.*, No. 00-7381, 2002 U.S. App. LEXIS 28028, at \*4 (2d Cir. Nov. 8, 2000) (quoting *Lynch v. New Deal Delivery Serv. Inc.*, 974 F. Supp. 441, 458 (D.N.J. 1997) and *Paley v. Barton Sav. & Loan Ass'n*, 196 A.2d 682, 685 (N.J. 1964)).

167. U.C.C. § 2-202 (1998); see, e.g., *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971) (construing a relatively clear minimum quantity term in light of the course of dealing and usage of trade between two familiar commercial partners). This is not to suggest that U.C.C. § 2-202 applies to all material benefit rule cases, the vast majority of which involve personal services and intangibles rather than goods, but an analogous theory is sometimes applied.

168. *Foltz v. First Trust & Sav. Bank*, 194 P.2d 135 (Cal. Ct. App. 1948); *Dementas v. Estate of Tallas*, 764 P.2d 628 (Utah Ct. App. 1988).

169. While friends and family members conferring benefits upon each other is not unusual, the facts of each case are unique. The promisee in *Foltz* had never previously

sumption of gratuitous service can be seen to apply a gratuitous “usage of trade” upon them.

## 2. Business Context

For those cases upholding the material benefit rule in the business context, the expectation of finding unfamiliar parties generally holds true. *Worner* explicitly states that a third party brought the defendant, “of whom [the plaintiff] had no personal knowledge,” into the deal.<sup>170</sup> The sale of idea cases, *Marnon v. Vaughan*<sup>171</sup> and *Desny v. Wilder*,<sup>172</sup> discussed in greater detail in Part IV(D), show no evidence that the parties had previously transacted, and given the unique nature of the ideas, this is unlikely. Only in *Kaiser v. Fadem* do the facts indicate past interactions between the promisor and promisee, though the parties made a vague initial promise.<sup>173</sup>

Following this observation, when courts refuse to uphold post-benefit promises in the business context, the transactions are often between familiar, sophisticated trading partners. *Estate of McConnell*, for example, has been cited as “the decisive California authority” severely limiting the applicability of the material benefit rule.<sup>174</sup> In practice, the case did not truncate the rule to apply only in cases involving positive statutory law,<sup>175</sup> but rather elected not to employ the material benefit rule between very familiar parties.

In *McConnell*, one partner rendered additional service to the partnership and received a will-substitute promissory note from his friend and colleague after they amicably parted ways.<sup>176</sup> Ruling against the promisee, the court focused on the twelve-year business relationship and “cordial social relationship” between the two men.<sup>177</sup> Had they wanted to provide extra compensation for the harder-working partner,

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intervened to prevent his cousin’s disinheritance, nor had Dementas ever been compensated for services to Tallas.

170. *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468, 470 (Ill. App. Ct. 1985).

171. 194 P.2d 992 (Or. 1948).

172. 299 P.2d 257 (Cal. 1956).

173. *Kaiser v. Fadem*, 280 P.2d 728, 731 (Okla. 1955).

174. *Henderson*, *supra* note 47, at 1130 (“[T]he technique of the decisive California authority, *In re McConnell’s Estate*, was to deny generally that a moral obligation will support a promise.”); *see In re Estate of McConnell*, 58 P.2d 639 (Cal. 1936).

175. *Id.*; *see also Desny v. Wilder*, 299 P.2d 257 (Cal. 1956) (reconsidering issues of past benefit in great depth just twenty-three years after *McConnell*, but not citing the “decisive” case); *Dow v. River Farms Co.*, 243 P.2d 95 (Cal. Ct. App. 1952) (taking a hard look at the wholly unfavorable facts before denying the material benefit rule claim).

176. *McConnell*, 58 P.2d 639.

177. *Id.* at 640.

the decision implied, they could have done so at any time by amending the partnership agreement or providing for him upon the dissolution of the partnership.<sup>178</sup> Unlike in *Marnon v. Vaughan*<sup>179</sup> or *Worner Agency, Inc. v. Doyle*,<sup>180</sup> the parties stood at arms length for years, yet did not take any action to substantiate the reasonable expectation of compensation, if it ever existed.<sup>181</sup>

Three more recent cases between sophisticated parties further outline the limits of the material benefit rule in the business context. In *Guaranty Bank v. National Surety Corp.*, Guaranty attempted to uphold the promise of a charitable trust's agent, supported by National Surety, which contributed to Guaranty's decision to advance additional funds to an unsuccessful construction project.<sup>182</sup> While Guaranty recognized the trust, and National Surety "might have had no legal obligation to reimburse the bank," it advanced a theory based on moral obligation and past benefit.<sup>183</sup> As between these two sophisticated parties, certainly familiar with the norms of banking and construction loans, the court could not find that the benefit of an unsecured loan created a quasi-security interest upon the trust's surety.

Similarly, the parties in *Lantec v. Novell* were multinational corporations familiar to each other and with the strictures of modern contract law.<sup>184</sup> While the court could stretch to find both parties "expected . . . [Lantec] would receive *some* compensation,"<sup>185</sup> it chose

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178. *Id.* The fact that the parties *could* have crafted a typical bargain for present consideration is important to the normative vision of the material benefit rule, explained *infra* Part IV(B), (D). In this view, courts will uphold the post-benefit promises not just in cases where it is expected and necessary, but also where it is an efficient means of doing business.

179. 194 P.2d 992 (Or. 1948).

180. 479 N.E.2d 468 (Ill. App. Ct. 1985).

181. *See also* *Passante v. McWilliam*, 53 Cal. App. 4th 1240 (Cal. Ct. App. 1997) (refusing to uphold a \$33 million promise made in recognition of a \$100,000 loan). To make a long, painful story short, the court's decision can be linked in part to the fact that the attorney/lender/promisee could have easily sought a bargained-for promise from the corporation at the time he made the loan. As in *McConnell*, the parties stood at arms-length in a relationship built upon crafting definite business agreements. It was therefore not a situation where indefinite pre-performance agreements should have been expected or encouraged.

182. 508 S.W.2d 928 (Tex. App. 1974).

183. *Id.* at 930.

184. 306 F.3d 1003 (10th Cir. 2002). *Lantec* is thus the highest hearing concerning the material benefit rule in a court since Justice Washington ruled in *Lonsdale v. Brown*, 15 F. Cas. 852 (E.D. Pa. 1821), while riding circuit.

185. *Lantec*, 306 F.3d at 1013 (emphasis added). The court found mutual expectation only when the evidence was "[v]iewed in the light most favorable to [Lantec]." *Id.* at 1011.

not to enforce Novell's post-benefit promise. It cited the basic proposition that "[g]enerally, past services cannot serve as consideration for a subsequent promise."<sup>186</sup> The court could find no real evidence of terms between the two sophisticated and frequent trading partners, and therefore did not allow the post-benefit promise to fill the gaps.<sup>187</sup> Doing so would arguably invite such parties to engage in a continued vague and indeterminate trading relationship.

Finally, the plaintiff in *First National Bankshares v. Geisel* attempted to enforce a minority shareholder's sale agreement based on the benefit the bank's employees conferred on the shareholder before her promise was made.<sup>188</sup> This claim was denied and the defendants were granted summary judgment for numerous reasons, including the employees' pre-existing duties to the bank and the accrual of direct benefit to the bank rather than the promisor.<sup>189</sup> Again, the essential point is that if the material benefit rule applies in cases of reasonable expectation of indeterminable, reasonable compensation, these conditions will not likely be seen between familiar parties transacting under typical business conditions.<sup>190</sup>

#### B. *Efficient Indefiniteness*

Beyond the simple rubric of familiar and unfamiliar trading partners, one would expect to see the indeterminable implied promise of reasonable compensation in those situations where it may be too inefficient to craft another type of bargain. In these cases, the guarantee of "you will be taken care of," explicitly or implicitly, is a necessary and efficient means of doing business. Cases of this type present the most favorable conditions for utilizing the material benefit rule.

Such a scenario is presented in many cases involving the sale of ideas, relationships, or other intellectual property. Here, the value of the benefit may range dramatically; while, in contrast, a commercial good or service typically has a value within an observable and verifi-

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186. *Id.* at 1012 (citing *Jensen v. Anderson*, 468 P.2d 366, 368 (Utah 1970); *Dementas v. Estate of Tallas*, 764 P.2d 628, 633 (Utah Ct. App. 1988)).

187. *Id.*

188. 853 F. Supp. 1344, 1356 (D. Kan. 1994).

189. *Id.*; see also *Thel & Yorio*, *supra* note 42, at 1070 (explaining that the material benefit rule is inapplicable to incidentally-benefited third parties and affirming the explanation scholars have given to reconcile the holdings in *Mills* and *Webb*). Just as the direct benefit was to Mills's son, the direct benefit here was to the bank. *First Nat'l Bankshares*, 853 F. Supp. at 1356.

190. Or, as is perhaps reflected in *Lantec*, courts are not likely to apply the material benefit rule to sophisticated, familiar trading partners engaging in such behavior.

ble range.<sup>191</sup> In *Marnon v. Vaughan*, for example, Marnon's idea for the "Mobile Load-Lift Truck" could have been entirely useless or extremely lucrative.<sup>192</sup> In either event, it was impossible to value the idea until it had been conferred on Vaughan and he could assess its manufacturing and marketing practicalities.<sup>193</sup> If Marnon knew this information on his own, he would not have needed Vaughan, but Vaughan did not know these key details until he had Marnon's idea.<sup>194</sup>

The situation is a simple paradox wherein an idea has no real value until it is revealed, yet once it is revealed, it has no formal, contractual value. As argued in *Desny v. Wilder*, if the seller of an idea says, "I won't tell you what my idea is until you promise to pay me for it," it takes no Sherlock Holmes to figure out what the answer will be!"<sup>195</sup>

### C. The "Broker Line" of Cases

Examining the case law, the line of "idea cases" is not only the most theoretically rich for the material benefit rule, but also the most frequent application. The line begins with cases involving real estate brokers. Here, once the idea of a beneficial property to purchase has been revealed, it loses value to the broker/seller. Therefore, an implied promise of reasonable compensation, leading to an expectation of reasonable compensation, and later affirmed by an explicit promise of determinable compensation, is a relatively rational means of doing business.

#### 1. Statutes of Brokers

The roots of the broker line of cases begin with the most historically solid application of the material benefit rule - "precedent good consideration which might have been enforced at law . . . had it not been suspended by some positive rule of law."<sup>196</sup> Similar to a statute of frauds, many states have a "statute of brokers," which mandates agreements to employ real estate agents and brokers be memorialized

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191. A car, for example, will always have a market value, as will the service of washing a car. The concept or idea for a new type of car or car engine, however, may be worth anywhere from \$0 (a useless idea) to an inappreciably large amount (an innovative replacement for the internal combustion engine).

192. *Marnon v. Vaughan*, 194 P.2d 992 (Or. 1948).

193. *Id.*

194. *Id.*

195. 299 P.2d 257, 280 (Cal. 1956) (Carter, J., concurring in part and dissenting in part).

196. *Wennall v. Adney*, (1802) 127 Eng. Rep. 137, 140 (K.B.) See discussion *supra* Part I.C.

in writing.<sup>197</sup> Using the *Wennall v. Adney* foundation, an otherwise enforceable oral contract could thus be made, rendered inoperable by the statute of brokers positive law, and then revived by a post-benefit promise.

Using California's statute of brokers, therefore, the court in *Carrington v. Smithers* could have made a quick ruling by analogizing the case to promises discharged by statutes of fraud or limitations.<sup>198</sup> Instead, the court set out the key factor for material benefit rule cases, "[t]hat the promisee expected to be compensated therefore, and did not intend [the benefit] as a mere gift or gratuity."<sup>199</sup> *Carrington* required that the post-benefit promise support a prior "invalid contract," but did not specify the range of situations to which the exception may apply.<sup>200</sup> The window created by statute of brokers cases thus opened wide enough for other "invalid" pre-performance guarantees, such as an impermissibly vague implied promise of reasonable compensation.

The statute of brokers' application of the material benefit rule is seen repeatedly and continues to near the present.<sup>201</sup> The most recent case, *Realty Associates of Sedona v. Valley National Bank*, was a case of first impression for Arizona, and the appellate court thus examined precedent nationwide.<sup>202</sup> Citing the same cases found in this examination and Section 86, the court found that a written agreement for a real

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197. See, e.g., IDAHO CODE ANN. § 9-508 (1915) ("No contract for the payment of any sum of money or thing of value, as and for a commission or reward for the finding or procuring by one person of a purchaser of real estate of another shall be valid unless the same shall be in writing, signed by the owner of such real estate, or his legal, appointed and duly qualified representative."). These statutes leave open the question whether the writing must be executed before the services for which the broker is being compensated are rendered.

198. 147 P. 225, 226 (Cal. Ct. App. 1915). Here, California Civil Code stipulated that "[a]n agreement authorizing or employing an agent or broker to purchase real estate" is "invalid, unless [the contract], or some note or memorandum thereof, is in writing . . ." CAL. CIV. CODE § 1624. Note again the indefinite language concerning the timing of the promise. The court specifically notes the promise could thus be "executed after plaintiff's services were performed but before the exchange was fully consummated." *Carrington*, 147 P. at 226.

199. *Carrington*, 147 P. at 227.

200. *Id.* at 226-27.

201. In addition to the cases discussed, see, for example, *Isaguirre v. Echevarria*, 534 P.2d 471 (Idaho 1975) and *Homefinders v. Lawrence*, 335 P.2d 893 (Idaho 1959).

202. 738 P.2d 1121 (Ariz. Ct. App. 1986).

estate commission executed after the services have been rendered is supported by valid consideration.<sup>203</sup>

Another relatively recent case, *Stuart v. Coldwell Banker*, highlights two interesting facets of the statute of brokers cases.<sup>204</sup> First, the court moved quickly beyond the past consideration issue, demonstrating the judicial willingness to accept post-benefit promises in certain circumstances.<sup>205</sup> Second, the broker seeking to uphold the past-performance promise in this case was far from an unsophisticated player.<sup>206</sup>

Together, these factors indicate that the reported cases likely represent the tip of an industry-wide iceberg for real estate brokers. As a transaction for an idea between unfamiliar parties in a commercial context, the service of providing real estate information is well-suited to a reasonable expectation of compensation later affirmed by an explicit promise.<sup>207</sup> As evidenced, the natural tendency of the transaction to operate in this manner is strong enough to overcome specific statutes attempting to regulate its operation.

## 2. From Brokers to Other Intangibles

*Worner* and *Kaiser*, both involving real estate transactions, provide a useful bridge between the specific statute of broker situations and the material benefit rule's more general theoretical foundation in transactions for ideas.<sup>208</sup> In neither of these cases is a legal writing requirement implicated. Rather, both present the prototypical situa-

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203. *Id.* at 1124-25. RESTATEMENT (SECOND) OF CONTRACTS § 86 cmt. g, illus. 11 (1981), is based on the broker case *Muir v. Kane*, 104 P. 153 (Wash. 1909), which preceded *Carrington v. Smithers*, 147 P.2d 225 (Cal. Ct. App. 1915).

204. *Stuart v. Coldwell Banker & Co.*, 552 S.W.2d 904 (Tex. Civ. App. 1977).

205. The court did not require the broker to prove the "writing was in existence at the time it first rendered services on [the promisor's] behalf," and the bulk of the ink spilled in this case concerned the terms and descriptions of the contract itself. *Id.* at 908-09.

206. Coldwell Banker has 4,000 real estate agents working in 500 offices worldwide, and is the worldwide sales leader for franchised real estate corporations. See Coldwell Banker Company Milestones, available at <http://www.coldwellbankercommercial.com/content/companymilestones.html> (last visited Feb. 8, 2006).

207. Especially for residential real estate, the broker and buyer are not involved in repeated, iterative transactions.

208. *Worner Agency, Inc. v. Doyle*, 479 N.E.2d 468, 472 (Ill. App. Ct. 1985) ("[A] finder's fee was the subject matter of the dispute. There is no evidence in the record which would sustain a finding of a real estate commission."); *Kaiser v. Fadem*, 280 P.2d 728, 731 (Okla. 1955) ("This is not a case where a broker who has been employed by the owner of a property is suing him for a regular broker's commission, as such.").

tion of an implied promise of reasonable compensation affirmed by a post-benefit specific guarantee of compensation.<sup>209</sup>

The information sold in *Kaiser* was the availability of a gasoline plant, while Worner sold a construction company information about the needs of another firm seeking a new building. In each case, the value of the information was drastically reduced after revelation, since either defendant could have pursued the lead without the plaintiff's help.<sup>210</sup> The value of the information, however, was also impossible to discern before its revelation. *Kaiser* may have had no interest in the Depew gas plant. Likewise, the IPAT construction job may have drawn little interest from Doyle Construction Company in *Worner*. Even assuming a baseline level of interest, this does not alleviate the problem of adequate valuation. The availability of an enforceable post-benefit promise thus allowed for each promisor "himself [to] recognize [the] value."<sup>211</sup>

#### D. *Idea Sales*

These difficulties of the idea-sale paradox are familiar to many cases involving the sale of information. For example, while the court in *Bergin v. Century 21 Real Estate Corp.* could stretch to find an implied promise of compensation for the plaintiff's advertising concept, it could find "no evidence of an implicit agreement on the price of the idea."<sup>212</sup> Century 21 promised it would "pay for" Bergin's idea, but neither party attempted to structure a promise for determinable compensation before the concept was revealed.<sup>213</sup> In the fog of pre-revelation, the idea may well have constituted Century 21's next blockbuster campaign, or it may have been worthless. Unlike a typical transaction for goods and services, the court could not refer to any

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209. In *Kaiser*, the initial promise of reasonable compensation was made in the defendant's statement that the plaintiff would be "taken care of." 280 P.2d at 730. In *Worner*, the implied promise is more contextually inferred. The promisee testified that finder's fees were a "common understanding" in the industry, and the customer who matched the parties also "understood throughout that Worner would be compensated." *Worner*, 479 N.E.2d at 470-71.

210. In *Kaiser*, in fact, the promisor seemingly abandoned the transaction after receiving the information and guaranteeing compensation "[i]f I ever buy the deal." 280 P.2d at 730. Eight months later, the promisor purchased the gasoline plant after no further consultation with the promisee. *Id.*

211. *Id.* at 731.

212. No. 00-7381, 2002 U.S. App. LEXIS 28028, at \*5 (2d Cir. Nov. 8, 2002).

213. *Id.* at \*2.

market measure of the benefit's value, since its entire value was the subjective provenance of Century 21.<sup>214</sup>

Hollywood, a land where ideas are often the currency of choice, produced a compelling statement of the material benefit rule's place in *Desny v. Wilder*.<sup>215</sup> Here, Victor Desny, a screenwriter, told his cinematic idea to Billy Wilder's secretary after receiving vague assurances that he would receive reasonable compensation for its worth. These promises were never subsequently affirmed, and thus the case does not present a classic application of Section 86. The California Supreme Court, however, after its supposed truncation of the material benefit rule in *Estate of McConnell*, provided direct support for the material benefit rule's application in the context of idea sales:

Furthermore, where an idea has been conveyed with the expectation by the purveyor that compensation will be paid if the idea is used, there is no reason why the producer who has been the beneficiary of the conveyance of such an idea, and who finds it valuable and is profiting by it, may not then for the first time, although he is not at that time under any legal obligation so to do, promise to pay a reasonable compensation for that idea - that is, for the past service of furnishing it to him - and thus create a valid obligation.<sup>216</sup>

The court thus recognized the same elements identified herein: a reasonable but unenforceable expectation of compensation before the benefit is conferred, subsequently affirmed by an enforceable promise of determinable compensation.

#### V. THE POST-BENEFIT PROMISE

Even given the favorable environment for post-benefit promises seen in the unfamiliar-partner and idea cases, the final question is why the promise is actually made. The availability of the material benefit rule gives the promisee comfort that his reasonable expectation of reasonable compensation may later be enforceably affirmed, but it pro-

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214. Note that while the availability of an enforceable post-performance promise gave Bergin greater assurance before rendering the idea, it did not guarantee compensation in all circumstances. Here, Century 21 did not like the idea, did not use it, and no post-benefit promise was made. *Id.* at \*2-9. Again, the necessity of the post-benefit promise differentiates these cases from contracts implied in law or fact.

215. 299 P.2d 257 (Cal. 1956).

216. *Id.* at 269. In his opinion concurring in judgment but dissenting in methodology, Justice Carter refers to this portion of the opinion as when the court "finally comes down to earth." *Id.* at 280 (Carter, J., dissenting in part, concurring in the judgment).

vides no guarantees that the post-benefit promise will occur.<sup>217</sup> As explained, the post-benefit promise is necessary to renew an implied promise of reasonable compensation that would not otherwise be enforceable. Why, then, would the promisor create a binding promise for a benefit already received when the cases acknowledge “he is not at that time under any legal obligation so to do?”<sup>218</sup>

#### A. *Gift Exchanges*

For those cases deciding to not uphold the material benefit rule, the reason to deny enforcement and to explain the post-benefit promise are one and the same - the promise, like the benefit, was a gift. Between family and friends, the benefits and promises were connected through networks of gratuitous exchanges. In the reported cases, we only see the few instances where the extra-legal underpinnings went awry.

The grieving brother in *Schoenfeld*, for example, altruistically desired to pay for his brother’s funeral.<sup>219</sup> That is why he made the post-benefit promise in the first place. When his magnanimity disappeared, he did not expect to find himself legally bound, and he was not. Similarly, Dementas’s promise of \$50,000 to Tallas likely exceeded the reasonable value of the services performed between the close friends.<sup>220</sup> The extravagance merely reflects the detachment from market consideration in what was properly deemed a gift exchange.

#### B. *Legal Certainty*

The business context cases upholding the post-benefit promises indicate that a more interesting answer stems from their unsettled factual and legal circumstances. In hindsight, it is relatively simple to separate the cases between those where the post-benefit promise was necessary<sup>221</sup> and those where it was not.<sup>222</sup> Given the availability of

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217. See, e.g., *Bergin v. Century 21 Real Estate Corp.*, No. 00-7381, 2002 U.S. App. LEXIS 28028 (2d Cir. Nov. 8, 2002).

218. *Desny*, 299 P.2d at 269.

219. See *supra* note 119 and accompanying text.

220. Dementas recited twice-weekly dinners, rides to the grocery store, post office, and doctor, and help collecting rent and managing properties as the services performed by his “son.” *Dementas v. Estate of Tallas*, 764 P.2d 628, 631 (Utah Ct. App. 1988).

221. These range from the traditional cases renewing past promises extinguished by operation of positive laws to the more theoretically interesting cases such as *Kaiser v. Fadem*, 280 F.2d 728 (Okla. 1955), and *Marnon v. Vaughan*, 194 P.2d 992 (Or. 1948), where the initial implied promise fails for vagueness.

implied-in-fact and implied-in-law contractual remedies, however, the parties may find their legal status much more opaque: did Kaiser bind himself when he promised Fadem that he would be “taken care of”? Would Vaughan have to pay Marnon for the Mobile Load-Lift Truck idea no matter what he later said?

In the context of idea cases, the situation is further blurred by special doctrines that have evolved to alleviate the information-sharing paradox. Even without any implied or express promise of compensation, an idea seller may recover under the “idea misappropriation” theory given: “(1) the idea was novel; (2) it was made in confidence, [sic] and (3) it was adopted and made use of.”<sup>223</sup> The standards perform a simultaneous factual investigation into whether the plaintiff had any right in his idea and whether the defendant wrongly benefited from the idea “under such circumstances that the law will impose a duty of compensation therefor.”<sup>224</sup>

Given these uncertainties, the parties may rationally prefer to settle the matter and attach a value to the benefit through a post-benefit promise, rather than chance an expensive and risky legal dispute.<sup>225</sup> Given the probability that Marnon could recover for conferring the idea and the unknown extent of the Mobile Load-Lift Truck’s success, Vaughan’s post-benefit promise of determinable compensation therefore appears rational. Likewise, by promising Fadem \$5,000, Kaiser eliminated any risk of the broker attaching himself to the future success of “his idea,” the Depew gasoline plant. Finally, recalling an earlier case, the testator in *Walsh v. Parker* could have reasonably sought to relieve her family of the expense and distraction of settling her per-

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222. These are cases such as *Slayton v. Slayton*, 315 So. 2d 588 (Ala. Civ. App. 1975), and *Haynes Chem. Corp. v. Staples & Staples, Inc.*, 112 S.E. 802 (Va. 1922), where the post-benefit promise merely ices the contractual cake and makes enforcement under the material benefit rule an appealingly easy alternative for the courts.

223. *Fleming v. Ronson Corp.*, 258 A.2d 153, 157 (N.J. Super. Ct. Law Div. 1969); see also *Stevens v. Cont’l Can Co.*, 308 F.2d 100, 104 (6th Cir. 1962) (recognizing the same factors).

224. *Thomas v. R.J. Reynolds Tobacco Co.*, 38 A.2d 61, 63 (Pa. 1944). *Thomas*, concerning a Depression-era idea for advertising Camel cigarettes, is foundational in this field.

225. In *Lantec v. Novell, Inc.*, for example, the court appeared willing to enforce the post-benefit promise if it could be deemed an accord and satisfaction. 306 F.3d 1003, 1013 (10th Cir. 2002). The specific requirements of accord and satisfaction do not need to be examined, since we are merely seeking to understand why the post-benefit promise is made.

sonal attendant's claim by making the determinable post-benefit promise.<sup>226</sup>

### C. *Goodwill*

The third explanation for the post-benefit promise is also tied to the exigencies of business relationships. As seen in *Yale Security, Inc. v. Freedman Sales, Ltd.*,<sup>227</sup> a case involving promises for both past and future services may use the material benefit rule as an attractive alternative for enforcement. While the promises in that case were explicitly linked to future benefit, even promises that relate to the past alone may be made in contemplation of a continuing relationship. Especially among unfamiliar trading partners, the initial exchange can lay the foundation for a profitable future. The promisee has already conferred one benefit worthy of compensation on the promisor, and thus it may be hoped he will do the same in the future. Without the post-benefit promise for the benefit already conferred, which merely ratifies the promisee's reasonable expectations, it is unlikely such goodwill will be built.

Looking at the cases, Marnon's continuing help with the sales and production of the Mobile Load-Lift Truck would only further Vaughan's purposes in building and selling the machine. Similarly, an idea-buyer in Wilder's shoes would value the continuing input of the person who created the concept. While the initial idea loses its value upon revelation, it does not exist in a vacuum, and its originator may be called on to provide future assistance.<sup>228</sup>

### D. *Support Through No Support*

Neither the avoidance of litigation rationale nor the goodwill rationale can explain the reported cases, of course. They stand ready for analysis because the subsequent promisor chose to not uphold his guarantee, were it ever made; litigation was not avoided and goodwill was not built.

The dearth of reported cases surrounding Section 86 and the material benefit rule therefore provide telling circumstantial support for these two explanations. If the goal is to avoid litigation, then the

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226. See *supra* notes 88-90 and accompanying text.

227. No. 96C6501, 1997 U.S. Dist. LEXIS 1098 (N.D. Ill. Jan. 31, 1997).

228. Granted, this explanation cannot apply to *Walsh*, since it is a will-substitute case and the promisor therefore sought no future benefits. The majority of will-substitute cases, however, fail as gratuitous promises among family or close friends. Similarly, in *Estate of McConnell*, the will-substitute promise made in the business context was also struck down. 58 P.2d 639 (Cal. 1936).

lack of litigation can only favor this point. Similarly, if the goal is to build goodwill between unfamiliar trading partners, then the lack of litigation suggests that goodwill has been built.

## VI. CONCLUSION

The material benefit rule thus serves as an effective bridge to remedy pre-performance impasses between commercial parties. This breakdown in the bargaining process may be due to their unfamiliarity and/or the nature of the exchange. In either case, an implied promise of reasonable compensation, while likely unenforceable, is sufficient to begin the transaction. The implied promise can be later affirmed through an enforceably explicit guarantee, which the promisor finds is in his best interests to make. The fewer cases one sees in court, the better job the material benefit rule has done.

### A. *Revisiting Starr v. Katz*

Given this investigation of the material benefit rule's applications and proper place in the set of consideration exceptions, it is interesting to recall the troubled claim of Dr. Eugene Starr.<sup>229</sup> Starr, it may be remembered, provided useful business advice to a corporation controlled by Bernard Katz. After the advice was given, Katz rewarded Starr with a letter promising to "give" him a significant holding in the company he advised.<sup>230</sup> The court refused to uphold the promise, since it was either a gift from Katz or supported only by Starr's inconsequential past consideration.<sup>231</sup> While the court chose to mention Section 86, it could find no New Jersey case law on the topic and the issue was not briefed by Starr's counsel.<sup>232</sup>

Considering the conclusions reached in this article, the unwillingness of the court and Starr's lawyers to dig into the material benefit rule is unfortunate, since Starr's claim appears to have many of the qualities displayed by successful promisees. First, Starr and Katz were engaged in a commercial, rather than affective, relationship, and both parties could reasonably assume Starr would be compensated for his services. Within this business context, however, the two men were relatively unfamiliar trading partners. They first met less than a year before Katz's promise, and this was the first time Starr lent his expertise to the particular Katz-controlled corporation.<sup>233</sup> The parties and

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229. *Starr v. Katz*, No. 91-3365, 1994 U.S. Dist. LEXIS 14437 (D.N.J. Oct. 5, 1994).

230. *Id.* at \*4-5.

231. *Id.* at \*3, \*5, \*37.

232. *Id.* at \*41-44.

233. *Id.* at \*34-43.

the court would therefore have no historical gap-fillers to augment Starr's reasonable expectation of reasonable compensation.

Moreover, Starr's "benefit" to Katz was a series of business recommendations, which were very difficult to value until given to Katz. Starr could have held the bankrupt corporation's panacea, or could have just been a physicist with little business acumen. Given this wide range of possibilities, it may have been inefficient for the men to craft a definite bargain valuing Starr's services. The mutual understanding that he would be reasonably compensated through a later agreement thus provided sufficient security for them to move forward.

In the end, it is impossible to know whether the *Starr* court could have been persuaded by scant foreign case law and academic commentary such as this. In zealous advocacy for one's client, however, there cannot be too many potential arguments. Section 86 therefore stands today as a largely-forgotten arrow in the quiver of contracts lawyers, and an attractive alternative to courts seeking to uphold commercial promises but stymied by the past consideration doctrine.

#### B. Summary

The history of the material benefit rule reaches back to Lord Mansfield's attempt to bind promisors based upon the "moral obligation" of their word and debt to the promisee.<sup>234</sup> From the beginning, however, other legal experts feared this exception to the bargain theory of contract would eviscerate the need for mutual consideration and render all promises liable for enforcement. By the start of the twentieth century, the need for a limiting principle left material benefit rule cases divided between promises reviving past agreements upset by positive law and other promises made in recognition of past benefits received. All could agree that the former should be enforced, but the latter were not recognized until a vaguely worded, controversial, and largely-ignored section in the *Restatement (Second) of Contracts*.

An examination of the modern reported cases, however, finds that the material benefit rule has been raised in an expanded set of circumstances, but enforcement has never truly exceeded the foundation of renewing past promises extinguished by operation of the law. First, one finds that successful material benefit rule cases depend on a reasonable expectation of compensation by the promisee. These expectations can then be tied back to an implied promise of reasonable compensation by the subsequent promisor. Since this initial promise is unenforceable for vagueness, the post-benefit promise is necessary

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234. See *supra* Part II.A.

to affirm its guarantees and the material benefit rule is necessary to substantiate enforcement.

Such promises should be expected between unfamiliar trading partners and/or those dealing in goods that are difficult to value before the benefit has been rendered. Most notably, such cases are found surrounding the sale of ideas. The post-benefit promise then becomes a rational means by which to build goodwill between the unfamiliar parties and/or provide certainty to the parties' unsettled legal relationship.

These conclusions are drawn from a relatively small number of cases in the twentieth century. Granting the usefulness of the material benefit rule in the previously explained situations, this may be very good news. Parties that optimally apply the rule's dictates should never see the inside of a courtroom. Rather, they should continue to apply this useful exception to consideration doctrine in everyday business. The rule has a lengthy and complicated legal pedigree, but it points toward the needs of swift and simple daily business.

