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## HOW SHOULD THE STATUTE OF FRAUDS APPLY TO RELIANCE-BASED CONTRACTS?

*By Gregory Scott Crespi\**

### ABSTRACT

The “sufficient writing” requirements of the Statute of Frauds were formulated with bargain-based contracts in mind. It is often difficult if not impossible for persons to meet those requirements for reliance-based contracts, since this would require them to produce a writing signed by the promisor that not only sufficiently evidenced the promise, but also provided sufficient evidence of the other elements of such reliance-based contracts: the foreseeability of their subsequent reliance upon the promise, the fact of their reliance, and that failure to enforce the promise would be unjust.

There are several ways that courts can avoid the harsh results of applying the usual Statute of Frauds sufficient writing criteria to reliance-based contracts: (1) regard promises made binding through reliance as not constituting “contracts” subject to the Statute of Frauds, (2) relax the sufficient writing requirement for reliance-based contracts to require only evidence that the promise was made, or (3) estop the promisor from asserting a Statute of Frauds defense, under appropriate circumstances. This short article argues that the third approach is the best one for courts to pursue, and that sufficient guidance for courts as to when to apply estoppel is provided by Section 139 of the Restatement (Second) of Contracts.

### INTRODUCTION

There are a large number of state and federal statutes, collectively referred to by lawyers as the “Statute of Frauds,” which bar enforcement of certain specified

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classes of contracts unless those contracts are evidenced by a writing sufficient to indicate that a contract has been formed, and that is signed by the person against whom enforcement is sought. There is an extensive body of law relating to the application of the Statute of Frauds requirements to ordinary contracts formed by a bargaining process. In this short article I would like to briefly consider how the Statute of Frauds should be applied to those contracts formed instead through promissory estoppel—through the reliance of a promisee upon a promise—rather than through a bargaining process of offer and acceptance.

The elements of a reliance-based contract, as articulated in Restatement (Second) of Contracts Section 90, are that a promise was made by a promisor who should reasonably expect that the promisee will rely upon that promise, that there was subsequent reliance upon that promise by the promisee, and that injustice to the promisee will result if that promise is not enforced.<sup>1</sup> If the Statute of Frauds is applied to such a contract in the usual fashion, requiring for enforcement of the contract that the promisee produce a writing signed by the promisor which is sufficient to indicate that a contract has been formed, it would not be enough for the promisee to produce a writing signed by the promisor that only shows that the promisor has made the promise at issue. To be sufficient to indicate the formation of a contract in this instance, the writing would also have to evidence the several other elements of a reliance-based contract. It would also have to show that it was foreseeable to the promisor that their promise would subsequently be relied upon by the promisee, that the promise was subsequently relied upon, and that enforcement of the promise is necessary to avoid injustice to the promisee.

These requirements would often be much more difficult for a promisee to satisfy than are the Statute of Frauds requirements for enforcing ordinary bargain-based contracts, where a signed copy of the contract itself, or a signed acceptance of the offer, or even only a later signed reference to the essential terms of the contract by the promisor would alone suffice to meet those requirements. One can envision many instances where all of the elements of a reliance-based contract could be sufficiently demonstrated by evidence proffered by the promisee, but where the only writings signed by the promisor that the promisee can produce provide only evidence that the promise was made, and not that the promisor could foresee that the promisee would rely on this promise, nor that the promisee had subsequently relied upon the promise, nor that injustice to the promisee would result from not enforcing the promise. So, the “sufficient writing” requirement of the Statute of Frauds as it is applied in the usual bargain-based contract context would often bar enforcement of reliance-based contracts, particularly in the many instances where the promisor has not in writing later recognized the promisee’s reliance upon the promise. This is a

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1. SECTION 90. PROMISE REASONABLY INDUCING ACTION OF FORBEARANCE

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

RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981).

seemingly unjust result that would undercut the widely accepted rationale for recognizing and enforcing such reliance-based contracts.

A court that wanted to avoid barring enforcement of a reliance-based contract on Statute of Frauds grounds, in cases where there is credible evidence presented by the promisee that the requirements of such a contract have been met, but where some or all of this evidence is not contained in a writing signed by the promisor, would appear to have a choice of three possible approaches to take. First, at the opposite extreme from requiring that the usual sufficient writing requirements that apply to all elements of bargain-based contracts also be satisfied for enforcement of reliance-based contracts, a court could reason that when a promise is made binding only on the basis of reliance by the promisee, the situation does not really create a “contract.” That term would be reserved for bargain-based agreements and not used to describe promises made binding through foreseeable reliance. In other words, a promise enforced on the basis of promissory estoppel would be regarded as not constituting a “contractual” obligation at all, so that the Statute of Frauds simply would not apply to the promise, allowing for its enforcement.

A more measured, intermediate approach would be to apply the Statute of Frauds to reliance-based promises made binding through foreseeable reliance, regarding them as constituting contractual obligations, but significantly relax the “sufficient writing” requirement for reliance-based contracts to require written and signed evidence only that the promise had been made. Thus, this approach would *not* also require further written and signed evidence that reliance on that promise had taken place, and was foreseeable, and that injustice to the promisee would result if the promise was not enforced.

Another possible intermediate approach would be to regard binding reliance-based promises as again constituting contractual obligations for Statute of Frauds purposes, therefore requiring that all of the elements of such obligations be evidenced by a signed writing, but then in appropriate instances to estop the promisor seeking to invoke the Statute of Frauds to bar enforcement of those promises, as is articulated by Restatement (Second) of Contracts Section 139.<sup>2</sup>

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## 2. SECTION 139. ENFORCEMENT BY VIRTUE OF ACTION IN RELIANCE

(1) a promise which the promisor should reasonably expect to induce action or forbearance on the part of a promisee or a third person and which does induce such action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

Let me briefly compare the merits of applying the Statute of Frauds to promises made binding through foreseeable reliance in the conventional manner that is generally done for bargain-based contracts, with the merits of each of these three alternative approaches. My conclusion is that the approach of estopping promisors from raising the Statute of Frauds defense in the context of a reliance-based contract is the best way to proceed, but only when a balancing of the several factors set forth in Section 139 of the Restatement (Second) of Contracts<sup>3</sup> indicates that such an estoppel is justified.

#### CONVENTIONAL APPLICATION OF THE STATUTE OF FRAUDS TO RELIANCE-BASED CONTRACTS

The problem here, as I have briefly discussed, is that the “sufficient writing” requirements of the Statute of Frauds were formulated with bargain-based contracts in mind, where signed writings evidencing the existence of all of the elements of such a contract are often available. The very different requirements for the formation of a reliance-based contract obviously do not lend themselves nearly as well to incorporation in a writing signed by the promisor. For a promisee to satisfy those criteria for a reliance-based contract, they would have to produce a writing signed by the promisor that not only demonstrated the making of the promise, but also demonstrated that the promisor reasonably expected the promisee to rely on their promise, that this reliance by the promisee has subsequently taken place, and that it would be unjust for the court to not enforce that promise. It would be a relatively rare case where a promisee would be able to produce such a comprehensive document signed by the promisor, given that the writing would necessarily have to have been created after the promisee had relied on the promise to demonstrate that reliance. The Statute of Frauds requirements applied in the usual way that they are applied to bargain-based contracts would thus deny enforcement to most reliance-based contracts, an unjust result that is not consistent with the expansive modern use of the promissory estoppel doctrine.

#### DENYING “CONTRACT” STATUS TO RELIED-UPON PROMISES FOR STATUTE OF FRAUDS PURPOSES

One approach to avoid the result discussed above would be to regard promises that are binding under Restatement (Second) of Contracts Section 90 on the basis of promisee reliance to *not* constitute “contracts,” and therefore *not* governed by the Statute of Frauds. There are a number of cases that have enforced relied-upon promises but where the courts were insistent that those promises did not constitute “contracts,”<sup>4</sup> and therefore were not subject to Statute of Frauds

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(e) the extent to which the action or forbearance was foreseeable by the promisor.

RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. L. INST. 1981).

3. *Id.*

4. *See, e.g., Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267, 275 (Wis. 1965) (“[I]t would be a mistake to regard an action based on promissory estoppel as the equivalent of a breach of

requirements. In my opinion, the primary problem those courts faced if they *did* regard those promises as constituting contracts, at least before the promulgation of the Restatement (Second) of Contracts in the early 1970s, was that Section 90 of the Restatement (First) of Contracts did not explicitly invite courts to limit the award for the failure to perform those relied-upon promises to reliance damages.<sup>5</sup> Some courts were reluctant to award the more generous expectation damages rather than reliance damages in such situations, and they may have believed that this was essentially required of them if they determined that a “contract” promise had been breached.<sup>6</sup> So, they were motivated to regard promises enforceable only on the basis of promise reliance as non-contractual obligations.

The Restatement (Second) of Contracts formulation of Section 90 now has been modified from the earlier Restatement (First) of Contracts version so as to explicitly invite courts to limit the remedy for not keeping a relied-upon promise to reliance damages, if they deem this limitation appropriate. This modification has therefore removed any possible argument that courts will need to avoid a “contract” characterization of an enforceable reliance-based promise if they want to award reliance damages rather than expectation damages as the remedy for breach. But courts could continue to characterize relied-upon promises as not constituting “contracts” for the different purpose of evading the restrictive Statute of Frauds requirements, as they apply to reliance-based contracts, if they choose to do so. As I have noted above, there is some precedential support in earlier case law for such a characterization of relied-upon promises as not constituting contracts.<sup>7</sup> However, precedents that call into question the definition of a settled core legal term such as “contract” are jurisprudentially disfavored

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contract action.”). *See also* *Duke Power Co. v. S.C. Pub. Serv. Comm’n*, 326 S.E.2d 395, 406 (S.C. 1985) (“A contract and promissory estoppel are two different creatures of the law; they are not legally synonymous . . .”); *Eagle Metal Prods., LLC v. Kermark Enters.*, 651 F.Supp.2d 577, 592 (N.D. Tex. 2009) (“Promissory estoppel is a quasi-contract theory . . .”); *Brandeis Lofts, L.L.C. v. Great Western Bank (In re Brandeis Lofts, L.L.C.)*, Bankr. No. BK 07-80482-TLS, Adv. No. A07-8048-TLS, 2009 WL 2501113, at \*6 (Bankr. D. Neb. July 21, 2009) (“[T]he statute of frauds does not bar a claim of promissory estoppel in a situation where a contract never arose.”); *cf.* *Collins v. Ace Mortg. Funding*, No. 08-cv-01709-REB-KLM, 2009 WL 1796067, at \*8 (D. Colo. July 23, 2009) (“[S]tatute of frauds has been found to bar promissory estoppel claims . . .”). *See also* David G. Epstein, Ryan D. Starbird & Joshua C. Vincent, *Reliance on Oral Promises: Statute of Frauds and “Promissory Estoppel,”* 42 TEX. TECH. L. REV. 913, 925 (2010) (“Cases are also on both sides of the questions whether the statute of frauds applies to a cause of action based on promissory estoppel . . .”); Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1, 19–28 (2016) (citing numerous cases holding that the Statute of Frauds does not apply to reliance-based agreements).

5. SECTION 90. PROMISE REASONABLY INDUCING DEFINITE AND SUBSTANTIAL ACTION

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. L. INST. 1932).

6. *See Hoffman*, 133 N.W.2d at 276, implicitly taking this position (“Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor’s promise, they should be only such as in the opinion of the court are necessary to prevent injustice.”).

7. *See* cases cited *supra* note 4.

because they can cause interpretive difficulties in later cases arising in different contexts.

#### RELAXING THE “SUFFICIENT WRITING” REQUIREMENT OF THE STATUTE OF FRAUDS FOR RELIED-UPON PROMISES

Another approach I have noted that courts could follow in applying the Statute of Frauds requirements to reliance-based contracts in a more permissive manner would be to be more expansive regarding what writings signed by the promisor they determine to be sufficient to indicate that a contract was made. For example, they could regard a signed writing that embodied the promise to be sufficient even though that writing did not evidence either the foreseeability of promisee reliance on that promise, the fact of reliance, or the injustice to the promisee of not enforcing the promise.

This approach of expansively and counterintuitively defining sufficiency may at first appear untenable, given that the existence of several of the necessary elements of a reliance-based contract may not be evidenced at all by such a writing. How could evidence only of the making of the promise, without more, possibly suffice to indicate that a reliance-based contract has been formed, given those other necessary elements? But as a close analogy here, there are a number of cases that find a written and signed offer made in the bargaining context to be sufficient under the Statute of Frauds to enforce the promises made by the offeror, even though a signed offer alone is obviously insufficient to indicate that a contract has been formed since many offers are never accepted.<sup>8</sup> This embrace of the position that a signed offer alone may be sufficient to satisfy the Statute of Frauds may even be the majority rule, at least at common law if not under the Uniform Commercial Code.<sup>9</sup>

One could credibly argue that a written promise alone is just as sufficient a basis for satisfying the Statute of Frauds for a reliance-based contract as is a signed offer regarding satisfying these requirements for a bargain-based contract. Once again, however, precedents that call into question the definition of an important and relatively settled term such as “sufficient” are

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8. In a 2004 article, I cited and discussed a number of cases holding that signed offers are sufficient to satisfy the Statute of Frauds, both at common law and under the Uniform Commercial Code, as well as several cases holding signed offers to not be sufficient. *See generally* Gregory Scott Crespi, *Is a Signed Offer Sufficient to Satisfy the Statute of Frauds?*, 80 N.D.L. REV. 1 (2004). That principle of the sufficiency of a signed offer may even be the majority rule, at least at common law if not under the UCC. *Id.* at 8.

I offered in that article my speculation that in many of those cases holding a signed offer to be sufficient to satisfy the Statute of Frauds, the court did not reach that issue until after it had ruled in favor of the plaintiff's claim that a contract had been formed, and having done so the court was then understandably reluctant to let the defendant escape liability for their non-performance on the technical basis that the evidence that had convinced the court that a contract had probably been formed was not embodied in a writing signed by the defendant. *See id.* at 5, 7–8. One could of course argue that a more candid, estoppel-type articulation of the result reached in those cases, enforcing the promise at issue notwithstanding the Statute of Frauds, would be jurisprudentially preferable to such a strained interpretation of the phrase “sufficient to indicate that a contract has been formed,” given that such obviously result-oriented interpretations undermine the clarity of what are intended to be the relatively bright-line criteria of the Statute of Frauds.

9. *Id.* at 8.

jurisprudentially disfavored because they can cause interpretive difficulties in later cases arising in other contexts.

#### ESTOPPING THE PROMISOR FROM ASSERTING A STATUTE OF FRAUDS DEFENSE WITH REGARDS TO A RELIANCE-BASED CONTRACT

Another approach that courts could follow to avoid the enforceability problem posed for reliance-based contracts by the Statute of Frauds is to estop the promisor from asserting the Statute of Frauds defense. This principle is articulated in the Restatement (Second) of Contracts at Section 139 which enumerates a comprehensive list of factors for courts to consider in determining whether to deny a promisor the usual right to raise a Statute of Frauds defense.<sup>10</sup> These factors include, among others: other evidence outside of signed writings relating to the foreseeability of the reliance, or corroborating the making of the promise; the extent of promisee reliance; and the availability of other possible remedies for the promisee for the non-performance of the promise, such as quasi-contractual restitution of the value of any benefits conferred upon the promisor should the action be barred by the Statute of Frauds.<sup>11</sup>

While the application of Section 139 to estop assertion of a Statute of Frauds defense for reliance-based contracts is far from universal,<sup>12</sup> the use of estoppel in this fashion is increasingly popular<sup>13</sup> and is perhaps now the most common approach courts use to enforce reliance-based contracts when they have concluded that the elements of such a contract have been met, and where they have also determined that estopping the promisor from asserting and prevailing with a Statute of Frauds defense when the promisee cannot satisfy the sufficient writing requirement would be a just result under the circumstances. The limited literature discussing estoppel of the Statute of Frauds defense regarding reliance-based contracts is generally supportive of the approach articulated by Section 139,<sup>14</sup> although at least one commentator has expressed concern that courts may go too far in circumscribing the availability of the Statute of Frauds defense for reliance-based contracts on estoppel grounds.<sup>15</sup>

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10. See RESTATEMENT (SECOND) OF CONTRACTS § 139 (AM. L. INST. 1981).

11. See *id.*

12. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 694 (6th ed. 2009) (“The widespread use of [Restatement (Second) of Contracts Section 139] is in its infancy.”).

13. Jeffrey G. Steinberg, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114, 114 (1975) (“An increasing number of cases . . . have demonstrated a willingness to employ the [promissory estoppel] theory to defeat the operation of the Statute of Frauds . . . . The trend has culminated in the codification of this new exception to the Statute in [Restatement (Second) of Contracts Section 139].”).

14. See Epstein, Starbird & Vincent, *supra* note 4, at 941–42. See also Steinberg, *supra* note 13, at 128–29; Martin, *supra* note 4, at 19–28 (citing numerous cases allowing estoppel of the Statute of Frauds for reliance-based contracts).

15. Steven J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73, 131–32 (“[Judicial] reluctance [to not apply the Statute of Frauds to reliance-based contracts] is motivated by the fear that unrestrained use of promissory estoppel to bar the defense of the Statute of Frauds will undermine the statute . . . would subvert the goal of the statute: the prevention of fraud.”).



## CONCLUSION

The “sufficient writing” requirements of the Statute of Frauds were formulated with bargain-based contracts in mind and are too demanding for most promisees in reliance-based contracts to satisfy. Some modification of the protections offered to promisors by the Statute of Frauds against false allegations is therefore called for with regard to reliance-based contracts. I have briefly described above three alternatives that courts might choose to take in this regard: (1) regarding relied-upon promises as not constituting “contracts” subject to the Statute of Frauds enforceability requirements, (2) relaxing the Statute of Frauds sufficient writing requirement to require only evidence that the relied-upon promises were made, or (3) estopping promisors from asserting a Statute of Frauds defense for reliance-based contracts when the circumstances justify doing so.

Among these three alternatives I strongly favor the estoppel approach, which I am pleased to note is increasingly used and is now probably the approach most often followed by courts in these situations. The other two approaches have serious shortcomings. Either embracing a counter-intuitively broad definition of what would be “sufficient” to indicate that the elements of a contract are present or taking an unduly constrained position regarding when binding obligations constitute “contractual” obligations would, as I have noted, each have some precedential support, but in my opinion would be unwise approaches to follow.

Each of these two other approaches would potentially upset settled definitions of core legal terms that are important in many other contexts. They are therefore both jurisprudentially inferior alternatives to candidly admitting that justice may not be served in some instances by allowing a promisor to assert a Statute of Frauds defense in the usual manner in the context of a reliance-based contract, at least when there is other convincing evidence available outside of signed writings as to the elements of such a contract, and when other possible remedies for the promisee, such as a quasi-contractual recovery of the value of benefits conferred, would be inadequate. Moreover, the comprehensive factor list presented in Section 139 of the Restatement (Second) of Contracts gives the courts sufficient flexibility to still allow the assertion of a Statute of Frauds defense in the reliance-based contract context under those circumstances where the defense may be needed to protect a person against false allegations as to promises they have purportedly made and have purportedly been relied upon. The estoppel approach is therefore the one that I believe that courts should follow when conventional application of the sufficient writing requirement of the Statute of Frauds in the context of a reliance-based contract would lead to a result that is unjust to the promisee.