

THE UNDERAPPRECIATED IMPORTANCE OF ISSUE SEQUENCING IN CONTRACT LITIGATION: THE “SIGNED OFFER” STATUTE OF FRAUDS CASES

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Judicial opinions rarely identify the sequence in which the court has addressed the different issues that were presented during the litigation. This is partly because the sequence in which the issues are addressed in a case is not generally regarded as a factor that can significantly influence its outcome. Persons seeking to understand the scope and significance of particular opinions consequently rarely attempt to ascertain this sequence, given that the task of obtaining litigation briefs and interviewing the parties involved in order to make this determination is difficult at best, and is often impossible, particularly for older cases.

It is my conjecture, however, that at least with regard to some issues that are presented in breach of contract litigation, the sequence in which they are addressed can be significant and may even at times be outcome-determinative. The importance under some circumstances of issue sequencing in contract litigation needs to be more widely recognized. Persons seeking to fully understand the opinions that address these issues should perhaps attempt to obtain litigation briefs and interview the key players that were involved, when such efforts are feasible. Unfortunately the claim that I am making as to the potential significance of the sequence in which issues are addressed for the outcomes of some cases would be extraordinarily difficult to test empirically.

As a particularly salient example of the potential importance of issue sequencing, consider the Statute of Frauds enforceability defense. The various Statutes of Frauds applicable to different contracts generally

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require that the party seeking enforcement provide a writing signed by the other party that is sufficient to indicate the existence of the contract at issue.¹ One area of Statute of Frauds jurisprudence where there is a major split of judicial authority is whether a signed offer is alone sufficient to satisfy the Statute of Frauds in those cases where the party seeking to enforce the contract alleges that they have orally accepted that offer.² A legally-trained person who is not familiar with the jurisprudence in this area would likely think that the courts would not regard a signed offer as being sufficient to indicate that a contract was formed, because many offers are not accepted. Such a person might conclude that to be sufficient to satisfy the applicable Statute of Frauds a signed writing would not only have to indicate the existence of an offer but would also have to indicate that this offer was accepted, thus effectuating the primary purpose of the Statute of Frauds by protecting the offeror from having to engage in a swearing contest regarding whether there had been an oral acceptance. Somewhat surprisingly, however, the majority of courts applying the Statutes of Frauds have held that signed offers are sufficient, although there are a substantial number of opinions holding otherwise.³ As a result,

¹ U.C.C. § 2-201(1) (2010); RESTATEMENT (SECOND) OF CONTRACTS § 131 (1979); RESTATEMENT OF CONTRACTS §§ 207, 209 (1932).

² Compare *Am. Nat'l Ins. Co. v. Warnock*, 114 S.W.2d 1161, 1164 (Tex. 1938) (“To form a binding contract . . . the acceptance must be in writing.”), with *Tymon v. Linoki*, 213 N.E.2d 661, 664 (N.Y. App. Div. 1965) (noting that an enforceable contract may be created by an oral acceptance of a written offer).

³ For a comprehensive listing of “signed offer” Statute of Frauds cases decided by the mid-twentieth century, see A. M. Swarthout, Annotation, *Memorandum Which Will Satisfy Statute of Frauds, as Predicable in Whole or Part Upon Writings Prior to the Oral Agreement*, 1 A.L.R.2d 841, 852-53 (1948) and E. LeFevre, Annotation, *Oral Acceptance of Written Offer by Party Sought to Be Charged As Satisfying Statute of Frauds*, 30 A.L.R.2d 972, 972-86 (1953). Later decisions have also approved of finding a signed offer sufficient to form a contract. See, e.g., *Kirschling v. Lake Forest Sch. Dist.*, 687 F. Supp. 927, 931-32 (D. Del. 1988); *Benya v. Stevens & Thompson Paper Co.*, 468 A.2d 929, 932 (Vt. 1983); see also 72 AM. JUR. 2D § 211 n.1 (2001) (citing additional cases in support of this position).

The two American Law Reports (“ALR”) annotations and the American Jurisprudence annotation cited above each take the position that the majority view of courts is that a signed offer is sufficient to satisfy the applicable Statute of Frauds. Even so, they each cite several cases holding that signed offers are not sufficient. But this is clearly not the situation for cases decided under Section 2-201 of the Uniform Commercial Code, which generally—although not uniformly—hold that signed offers are not sufficient. See Gregory Scott Crespi, *Is a Signed Offer Sufficient to Satisfy the Statute of Frauds?*, 80 N.D. L. Rev. 1, 2 (2004). Neither of the ALR annotations nor the American Jurisprudence annotation cited above addresses the possibility that issue sequencing may be relevant to the decisions reached in the cited cases.

Illustration 2 to Section 207 of the RESTATEMENT OF CONTRACTS (1932) depicts a hypothetical situation which indicates that the drafters believed a published offer would be sufficient to satisfy the Statute of Frauds: “B publishes in a newspaper an offer to buy certain goods, stating the terms of his proposal, and his name is printed under the advertisement. A

the major contract law treatise writers are in some disagreement as to the law regarding the sufficiency of signed offers.⁴

The conventional explanation for this split of authority is that courts simply disagree about whether signed offers should suffice to satisfy the Statute of Frauds. In other words, they disagree whether such a minimal documentary requirement provides sufficient protection for parties against false allegations of contractual agreements.⁵ However, a better explanation

accepts the offer. The advertisement is a sufficient memorandum to charge *B*." Moreover, Illustration 3 to Section 209 also indicates that the drafters are of the view that a signed offer would be sufficient. Section 131 of the RESTATEMENT (SECOND) OF CONTRACTS (1979) goes even further and states that the writing will be sufficient if it indicates that a contract has been "offered by the signer to the other party." Additionally, Comment (f) to Section 131 also states that a "signed written offer to the public may be sufficient." Finally, Illustration 2 to Section 131 presents another hypothetical illustration indicating that a published offer would be sufficient: "A publishes in a newspaper an offer to buy certain goods, stating the terms of his proposal, and his name is printed under the advertisement: *B* accepts the offer. The advertisement is a sufficient memorandum to charge *A*."

Probably the best articulation of the rationale underlying the numerous cases that hold a signed offer is sufficient to satisfy the Statute of Frauds is given in CORBIN ON CONTRACTS:

Sometimes, however, *A* prepares and signs such a document and sends it to *B* as an offer, without requiring that *B* shall accept by signing it. . . . The written and signed offer of *A* is a sufficient memorandum of the contract making it enforceable against *A*, when *A* is the party to be charged in an action subsequently brought. This is the law, even though the writing was signed before any contract came into existence, and even though it has no probative value in proving that *B* ever accepted. . . . The document is indeed a written expression of the "offer"; it is not a memorial of a "contract." But it clearly authenticates the terms on which *A* was willing to make a contract; and it goes so far toward eliminating the danger of a successful fraud against *A* that the courts are fully justified in holding it to be a sufficient memorandum. Of course, it is possible for *B* to lie about having accepted. *B* may possibly have at first rejected, and then attempted to accept after the power of acceptance was ended. Or, *B* may have made a counter-offer on different terms, which has been accepted by *A*. But the danger of successful fraud of this sort is very slight. There is sufficient protection in *A*'s own testimony and in the fact that *B* has the burden of proof of an effective acceptance. At the very worst, *A* will be held to the very terms of *A*'s own proposal.

CAROLINE N. BROWN, CORBIN ON CONTRACTS: STATUTE OF FRAUDS § 22.8, at 739-41 (Joseph M. Perillo ed., Lexis Law Publishing rev. ed. 1997). The cases holding that a signed offer is not sufficient to satisfy the Statute of Frauds evidence, however, that not all courts are persuaded by the above rationale.

⁴ See BROWN, *supra* note 3; see also Crespi, *supra* note 3, at 1-2 (contrasting the positions taken by the MURRAY, FARNSWORTH, CALAMARI & PERILLO and WHITE & SUMMERS contract law treatises).

⁵ See BROWN, *supra* note 3 (articulating the view that a signed offer would provide sufficient protection).

for the divergence among courts may be that the Statute of Frauds issue was presented at a different stage in the litigation in the cases finding a signed offer to be sufficient than it was in the cases that found a signed offer to be insufficient.

Let me explain why this might be so. The way lawyers and judges approach the presentation of cases is of course influenced by their early legal training. Contract law is usually taught to first-year law students in the following general sequence. First, students study contract formation in some detail, initially covering the classical offer, acceptance, mutual assent, and consideration doctrines, and then the modern reliance-based promissory estoppel doctrines. They then study the numerous enforceability defenses, including the Statute of Frauds. Next, they consider the issues presented by contract formation and breach, including parole evidence and interpretation questions, followed by an examination of those issues raised by the doctrine of conditions-related justified non-performance defenses and the several excuse defenses. Finally, they turn to the issues relating to contractual remedies.⁶

This sequence of instruction makes great sense in that it provides a framework that assists students internalize an efficient analytical method for contract law questions that will help them to avoid later unnecessary efforts. All other potential contract law issues are obviously rendered moot if no contract has been formed, so contract-formation questions should logically be addressed at the outset of an inquiry and are therefore the first topics covered in the introductory course. In similar fashion, when a contract has been formed, but is unenforceable, this moots consideration of any performance, breach, or remedy issues. Furthermore, all possible remedy issues are meaningless if the defendant's nonperformance of her contractual obligations was justified or excused so that no remedy will be awarded. Therefore, the sequence in which these issues are covered in the first course is designed to encourage students to address them in this same efficient fashion later in their legal practice.

One would expect that in contract litigation the issues raised by a dispute might often be addressed in this same sequence, given the (perhaps largely subconscious) lingering effect of the law school instruction to which the attorneys and judges were once exposed. If so, the judge would not have to rule on any Statute of Frauds issues unless the

⁶ This is the sequence I use when I teach introductory contract law at Southern Methodist University. Most other contract law professors that I know also proceed in this general manner. However, some introductory contract law casebooks present material relating to remedies before they address other issues and that may be the sequence that these authors and some of their devotees follow in their courses. *See, e.g.*, E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 8 (7th ed. 2008) (providing some case materials regarding remedies in Chapter One).

plaintiff first succeeds in establishing, by a preponderance of the evidence, that the alleged contract was formed. If the plaintiff is not able to satisfy this burden of proof, then the case will be dismissed before the Statute of Frauds issues can be addressed.

Contract-formation disputes, however, can sometimes involve a considerable amount of evidence, and may also require difficult judicial determinations regarding the veracity of testimony. In contrast, a Statute of Frauds dispute can often be easily resolved simply by considering the sufficiency of a single document. In addition, if a Statute of Frauds issue is resolved against the party seeking enforcement, this ruling will likely be outcome-determinative.⁷ Under these circumstances, it may be in the interest of judicial economy to first resolve any Statute of Frauds questions before turning to the contract-formation issues, even though it is contrary to the “logical” sequence in which these issues are taught in law school. As a result, courts seeking to expedite matters may direct the parties to first litigate any Statute of Frauds questions presented so that potentially more difficult contract-formation issues can be avoided if the party asserting the Statute of Frauds defense prevails.

Now consider a situation where a Statute of Frauds defense is raised, and the only signed writing that the party seeking to enforce the contract can produce is an offer signed by the other party. A court that has initially addressed any contract-formation issues presented will already have determined that the plaintiff has met his burden of showing that a contract was formed before addressing the Statute of Frauds issue. Having concluded that a contract was formed—i.e., the offer was accepted⁸—a court will understandably be reluctant to allow the defendant to escape liability for breach of contract on the basis of a Statute of Frauds defense. The purpose of the Statute of Frauds defense—to protect a party from having to defend itself against false allegations of an oral contract—would appear to be inapplicable where the plaintiff has already established that a contract was formed. For the case to then be dismissed on Statute of Frauds grounds would honor legal technicalities over substantive justice. Under such circumstances, a court might be inclined to regard a signed offer alone as sufficient to satisfy the Statute of Frauds, so as to allow the case to proceed, even though a signed offer alone necessarily leaves in question whether that offer was ever accepted.⁹

⁷ A party whose breach-of-contract claim is defeated on Statute of Frauds grounds may, however, still occasionally be able to obtain a remedy based on a quasi-contractual claim for restitution of benefits conferred, so as to prevent unjust enrichment. *See, e.g.,* *Monarco v. Lo Greco*, 220 P.2d 737, 739 (Cal. 1950) (en banc).

⁸ A promissory-estoppel-based contract may also be formed if an offer was foreseeably relied upon. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

⁹ *See* 4 CAROLINE N. BROWN, CORBIN ON CONTRACTS § 22.8 (Joseph M. Perillo ed., Lexis Law Publ'g 1997).

On the other hand, a court that addresses any Statute of Frauds issues raised at the outset of the litigation will probably have more of an open mind on this enforceability issue because it has not yet determined whether there is sufficient evidence to establish that a contract was formed.¹⁰ Under such circumstances a court may be somewhat more inclined to interpret the requirements of the Statute of Frauds more stringently in order to adequately protect the defendant against false allegations of contract formation. Consequently, the court may be more inclined to conclude that a signed offer, absent evidence that it was later accepted, is alone insufficient.

If one were to take a large sample of “signed offer” Statute of Frauds cases that also raised contract-formation issues and then perform the detailed research necessary to determine the sequence in which the contract-formation issues and Statute of Frauds issues were addressed, he or she would probably find that there is a greater chance, perhaps significantly so, that a court will find a signed offer sufficient to satisfy the applicable Statute of Frauds if the court has first addressed and resolved in favor of the plaintiff the contract-formation issues prior to turning to the Statute of Frauds inquiry.¹¹ If so, such a finding would present a significant strategic consideration relevant for the parties to the litigation. The party seeking to enforce the contract on the basis of a signed offer should attempt to have the court first address the contract-formation issues before turning

¹⁰ See *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 165 (Ind. Ct. App. 2005) (“The statute of frauds does not govern the formation of a contract but only the enforceability of contracts that have been formed.”).

¹¹ I believe that my conjecture here as to the importance of issue sequencing in the “signed offer” Statute of Frauds context is facially plausible. However, given the lack of explicit judicial recognition of the importance of this factor, it would be a good idea to subject this conjecture to an empirical test to see if it can be confirmed (or disconfirmed). I gave some serious thought to carrying out such an undertaking as part of the preparation of this Article, but I ultimately determined that an empirical investigation that might prove to be sufficient to resolve the question simply would not be feasible. Such an inquiry would involve a great deal of work, perhaps more effort than this interesting but relatively narrow issue merits. As I have noted, the judicial opinions rarely reveal the sequence in which the legal issues were addressed, so litigation briefs would have to be obtained and lawyer and/or judicial interviews taken for a large number of cases in many different jurisdictions in order to have an adequate sample of cases for which the litigation sequence of contract-formation issues and Statute of Frauds issues is known from which to draw statistically meaningful conclusions. Moreover, many of the “signed offer” Statute of Frauds cases in the reporters were decided many years ago and litigation briefs and detailed trial records or clear attorney or judicial recollections of the sequence in which the issues were addressed may simply no longer exist for a number of these cases. I will therefore limit this Article to simply presenting my conjecture with regard to the significance of the order in which these issues are addressed for the “signed offer” Statute of Frauds cases and leave it to others with more imagination or ambition to determine whether my speculations are well-grounded.

to the Statute of Frauds issue, so as to attempt to undercut any judicial inclination to apply the Statute of Frauds requirements stringently. By contrast, the party seeking to block enforcement of the contract should instead press to have the Statute of Frauds issue addressed at the outset of the case before any contract-formation arguments have been advanced and resolved adversely to that party.

Let me conclude this brief Article by making a larger point. It is important to recognize that the “signed offer” Statute of Frauds context that I have discussed is only one area of contract litigation where the sequencing of issues may be significant for the case outcomes. It may also matter in some other contexts as well. It does not appear that the other commonly raised enforceability defenses—such as lack of capacity, fraud, duress, illegality, or bankruptcy—would be significantly influenced by whether those defenses are addressed before or after the contract-formation issues, because those defenses relate primarily to the bargaining process or other concerns that are not as directly related to contract formation as is the Statute of Frauds. However, as is strongly suggested by the well-known California opinion of *Monarco v. Lo Greco*,¹² the sequence in which contract-formation issues and quasi-contractual issues are addressed in a dispute, which raises both kinds of questions, may be significant for the outcome.

As *Monarco* indicates, a court may be less sympathetic to a party raising an enforceability defense if it has first determined that a quasi-contractual recovery of the value of the benefits conferred, an alternative remedy sometimes allowed when no remedy is available under contract law, will provide the plaintiff with an inadequate recovery under the circumstances.¹³ In other words, whether a court allows a defendant to prevail with an enforceability defense may be influenced by whether the court has already “peeked ahead” to consider the possibility of awarding a quasi-contractual remedy to the plaintiff, and the adequacy of such a remedy. If so, this again presents a similar strategic consideration for litigants as to their optimal issue presentation sequence with regard to the Statute of Frauds defense, or for that matter with regard to any enforceability defense. The plaintiff seeking to overcome an enforceability defense should first seek to demonstrate the inadequacy of any quasi-contractual recovery to which he may be entitled, if the enforceability

¹² 220 P.2d 737, 737 (Cal. 1950) (permitting estoppel of a Statute of Frauds defense so as to enforce an oral real-estate contract).

¹³ “Those cases, however, that have refused to find an estoppel [of the Statute of Frauds] have been cases where the court found . . . that the remedy of quantum meruit for services rendered was adequate. . . . It is settled that neither the remedy of an action at law. . . nor the quasi-contractual remedy for the value of services rendered is adequate for breach of a contract to leave property by will in exchange for services . . .” *Id.* at 740-41.

defense is allowed. In sharp contrast, the defendant should argue that the enforceability issue be resolved first, prior to consideration of any possible alternative quasi-contractual claims (i.e., the usual sequence in which these issues are presented in law school instruction).

Once again, however, any speculation regarding the significance of issue sequencing here will be difficult or impossible to empirically confirm or disconfirm given the difficulty of determining the precise issue sequencing followed in each case. Nevertheless, the *Monarco* case demonstrates that at least one prominent judge was willing to consider the adequacy of a quasi-contractual award before deciding a Statute of Frauds issue and was thereby influenced to resolve the enforceability issue in the favor of the party seeking to enforce the contract so that this person would not be limited to quasi-contractual relief.¹⁴

¹⁴ *Id.*