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Extension of the Doctrine of Promissory Estoppel into Bargained-for Transactions

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NOTES

Extension of the Doctrine of Promissory Estoppel Into Bargained-for Transactions

In a written agreement, White promised to obtain or to furnish a loan for Wheeler to finance the construction of a shopping center on Wheeler's land. In return, Wheeler promised White $5,000 for his services, plus a five per cent commission on all rentals obtained by him (White). As to the loan, however, the agreement failed to provide the amount of monthly installments, the amount of interest due upon the obligation, the matter in which the interest would be computed, and the time when the interest would be paid. After the agreement had been signed by both parties, White assured Wheeler that the money would be available and urged him to demolish the buildings on the site so that it would be ready for the contemplated construction. Wheeler demolished his buildings, and when White failed to secure or furnish the loan, Wheeler brought a suit for damages for breach of contract. The court of civil appeals[1] affirmed the judgment of the trial court, which found that the contract was too indefinite to be enforced[2] and that White was not estopped from asserting such insufficiency. *Held, reversed* and *remanded:* The doctrine of promissory estoppel can be used to establish a valid and enforceable contract where one of the promises is too indefinite to serve as consideration for the return promise. *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965).

I. Basic Elements of Promissory Estoppel

Section 90 of the *Restatement of Contracts*[3] sets out the doctrine of promissory estoppel: "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." The doctrine provides a realistic three-part test, consisting of the following elements: (1) promise, (2) action-in-reliance, and (3) avoidance of injustice—all of which must be present to make the promise enforceable.[4]

[1] Wheeler v. White, 385 S.W.2d 619 (Tex. Civ. App. 1964), *rev'd,* 398 S.W.2d 93 (Tex. 1965).

[2] The amount of installments and interest and the manner in which the interest would be computed and the time when it would be paid were not specified.

[3] Restatement, Contracts § 90 (1932).

[4] Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. Pa. L. Rev. 459 (1950).

To establish the first element, it must be determined whether the words involved constitute a promise and whether that promise is of such a nature that the promisor should reasonably expect it to induce some action or forbearance by the promisee. The second element prescribes a limitation on the promisor's responsibility: that the promise most have induced or brought about action or forbearance of a definite and substantial character by the promisee. Thirdly, the promisee must demonstrate the injustice he will suffer if the promise is not enforced; the hardship to him must be evident so that the doctrine will not be loosely applied.

In *Wheeler*, the court had no difficulty finding the latter two elements, action-in-reliance and the avoidance of injustice. White's continued assurances and his urging Wheeler to proceed (as contemplated by the agreement) with the necessary task of demolishing the buildings then on the site speak for themselves as to Wheeler's reliance. Moreover, demolishing buildings worth $58,500 and with a rental value of $400 per month was action of a definite and substantial character. The court properly found that the only way to avoid injustice was to sustain Wheeler's cause of action upon the theory of promissory estoppel; otherwise, Wheeler would have had no remedy. He would have lost the value and use of his destroyed buildings plus the expectation of the income that the new buildings would have produced. The importance of the decision lies in the fact that the court found that the promise, although too indefinite to serve as consideration, was the type of promise to which promissory estoppel could be applied.

II. Gratuitous Promise or Bargained-for Promise

Traditionally, the doctrine of promissory estoppel has been invoked as a substitute for consideration, rendering a gratuitous promise enforceable as a contract.[5] In the *Restatement*, for example, it is part

[5] See Beale, *Gratuitous Undertakings*, 5 Harv. L. Rev. 222 (1891); Boyer, *Promissory Estoppel: Principle From Precedents*, 50 Mich. L. Rev. 639 (pt. I), 873 (pt. II) (1952); Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 Harv. L. Rev. 913 (1951). The doctrine of promissory estoppel grew out of at least five different fact situations: (1) charitable subscriptions, where the subscriber was not actuated by a desire to obtain an equivalent in exchange. Thompson v. McAllen Federated Woman's Bldg. Corp., 273 S.W.2d 105 (Tex. Civ. App. 1954) *error dism.*; Rouff v. Washington & Lee Univ., 48 S.W.2d 483 (Tex. Civ. App. 1932) *error ref.*; (2) parol promises to give land, where the promissor did not seek anything in return for his promise. Greiner v. Greiner, 131 Kan. 760, 293 P. 759 (1930); (3) gratuitous bailments, Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703); (4) gratuitous agency, Restatement (Second), Agency § 378 (1958); Travelers Indem. Co. v. Holman, 330 F.2d 142 (5th Cir. 1964); Maddock v. Riggs, 106 Kan. 808, 190 P. 12 (1920); and (5) a miscellany including gratuitous promises to give bonuses and pensions, Ricketts v. Scothern, 57 Neb. 51, 77 N.W. 365 (1898);

of a topic entitled *Informal Contracts Without Assent or Consideration.*[6] The intention of the drafters was to recognize certain instances where promises would be enforced despite the absence of consideration.[7] This prevailing attitude tended to exclude the context of bargaining and exchange, where consideration existed but was insufficient.[8]

In Texas, before *Wheeler,* the use of promissory estoppel in bargained-for transactions had been limited to enforcing gratuitous promises collateral to a valid contract.[9] Even *Goodman v. Dicker,*[10] the District of Columbia case relied on by the court in *Wheeler,* while dealing with a business transaction, did not involve a bargained-for exchange or an attempted one. The defendant, an agent for the Emerson Radio Co. had promised that a franchise would be granted the plaintiff. With the knowledge and encouragement of the defendant, the plaintiff had incurred various expenses in preparing to do business under the franchise. The court concluded that the defendant could not advance any defense inconsistent with his assurance that the franchise would be granted. But in *Goodman,* although the defendant probably would have profited under the franchise, there was no bargained-for exchange for the franchise.

III. The Extension of Promissory Estoppel

In *Hoffman v. Red Owl Stores, Inc.,*[11] a Wisconsin case decided just prior to *Wheeler* and one which the Texas court did not mention, the defendant agreed to build a store for the plaintiff to operate. In return, the plaintiff was to invest $18,000. After the plaintiff had

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waiver, Trexler's Estate, 27 Pa. A. & C. 4 (1936); Rancher v. Franks, 269 S.W.2d 926 (Tex. Civ. App. 1954); Richards v. Frick-Reid Supply Corp., 160 S.W.2d 282 (Tex. Civ. App. 1942) *error ref. w. m.;* Longbotham v. Tey, 47 S.W.2d 1109 (Tex. Civ. App. 1932) *error ref.*; Ross v. Issaacs, 54 S.W.2d 182 (Tex. Civ. App. 1932) *error dism.*; and rent reductions, Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938).

[6] Restatement, Contracts §§ 85-94 (1932).

[7] Restatement, Contracts, commentaries § 88 [§ 90] (tentative draft No. 2, 1926) " . . . but the cases in question are not cases of bargains; they are gratuitous promises on which justifiable reliance has been placed."

[8] James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

[9] See Hicks v. Smith, 330 S.W.2d 641 (Tex. Civ. App. 1959) *error ref. n.r.e.,* where, in the making of a new or modified contract, the plaintiff had yielded his probable right of forbearance to perform under the original contract. See also Evers v. Arnold, 210 S.W.2d 270 (Tex. Civ. App. 1948), where the defendant had agreed orally to procure a loan for the plaintiffs so that they could purchase at cash price certain real estate from the defendant. In reliance upon this promise, the plaintiffs entered into a written contract for the purchase of the real estate and deposited earnest money, which was forfeited when defendant failed to procure the loan. The court held, without reference to promissory estoppel but with reference to the reliance and injury of the plaintiffs, that there was sufficient consideration for the oral promise.

[10] 169 F.2d 684 (1948).

[11] 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

relied on the defendant's representations,[12] the defendant refused to carry out its part of the agreement.[13] The question facing the court was whether the promise could be enforced by applying the doctrine of promissory estoppel even though no agreement was reached on the essential elements necessary to establish a contract.[14] The court stated:

> If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendant's instant promises to Hoffman would not meet the test. However, Sec. 90 of the Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirement of an offer that would ripen into a contract if accepted by the promisee.[15]

The court concluded that injustice would result if the plaintiff were not granted some relief.

In *Hoffman,* as in *Wheeler,* clearly there was a bargain and exchange of "adequate" consideration, that is, a substantial obligation incurred by each party. Hoffman was to supply the capital and run the store; Wheeler was to pay White $5,000 plus five per cent interest on rentals acquired by him and was eventually to pay back the loan with interest. The problem in each case was that the promise which was to be the consideration was indefinite. The doctrine of promissory estoppel was used to prevent the defendants in both cases from attacking such possible "insufficiency" of the consideration. The courts in both *Wheeler* and *Hoffman* refused to limit promissory estoppel to the traditional gratuitous promise situations where there is, of course, no intent to strike a bargain. In doing so, the courts extended promissory estoppel beyond the boundaries intended by the drafters of the *Restatement*[16].

It must be noted that the court in *Wheeler* never mentioned that it was extending the doctrine of promissory estoppel into bargained-for situations. The court only stated that while many of the early Texas cases on promissory estoppel dealt with charitable subscription transactions or with waivers of pleading the statute of frauds,[17] it

[12] Plaintiff bought a small grocery store in order to gain experience, and, later, this business and a bakery that he had operated prior to negotiations were sold on defendant's advice. He then moved his family to the proposed city for the new store and purchased an option on a building site.

[13] Negotiations were ended when plaintiff refused to accept defendant's final proposal asking for a $34,000 investment.

[14] These included size, cost, design and layout of the store building and the terms of the lease with respect to rent, maintenance, renewal and purchase options.

[15] Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267, 275 (1965).

[16] See note 7 *supra* and accompanying text.

[17] See note 5 *supra.*

was readily apparent that the equities involved in those situations were applicable to the instant case.

The court was a bit more explicit in liberalizing the type of promise to which the doctrine could be applied. In *Murphy v. Stell*,[18] an early case decided before the development of promissory estoppel, the Texas Supreme Court had stated that the terms and conditions of a promise must be free from all ambiguity and doubt before a contract can be enforced. Moreover, even after the doctrine of promissory estoppel had been developed, one leading case had held that the doctrine could not be used to enforce a promise that was indefinite.[19] Professor Corbin had stated, "An 'illusory promise' [*e.g.*, an indefinite promise] is not turned into a promise by action in reliance, and the rule stated in sec. 90 [of the *Restatement of Contracts*] has no application."[20] In *Wheeler* the court disregarded these authorities and concluded that promissory estoppel could properly be used to establish a contract where one of the promises was too indefinite to serve as consideration for the return promise.

It is also interesting to note that the court made a definite choice as to the measure of damages. It concluded that the promisee (Wheeler) could recover no more than reliance damages measured by the detriment sustained, *i.e.*, the loss he actually suffered.[21] This conclusion was based on two reasons: (1) promissory estoppel acts only defensively so as to prevent an attack upon the enforceability of the

[18] 43 Tex. 123 (1875). See also Johnson v. Breckenridge-Stephens Title Co., 257 S.W. 223 (Tex. Comm. App. 1924). The court stated that where the defendants entered into an agreement to pay on a percentage basis for the use of the plaintiff's abstract indexes, but did not agree to use these indexes or make any specified number of abstracts, they were charged with the knowledge of the law that their contract was a *nudum pactum* for the essential lack of consideration (since they did not agree to use the indexes). Moreover, where they purchased equipment at a substantial expense, the purchase was a mere hazard which they took on the assumption that the plaintiff would continue to allow them the privilege of using the indexes without exercising its right to terminate the agreement.

[19] Spooner v. Reserve Life Ins. Co., 47 Wash. 2d 454, 287 P.2d 735 (1955). The court said that before § 90 of the *Restatement of Contracts* could be applied there must be a real promise to be enforced. Action in reliance upon a supposed promise (*e.g.*, an indefinite promise) creates no obligation on an individual or corporation whose only promise is wholly illusory.

[20] 1A CORBIN, CONTRACTS § 201 (1963).

[21] Shattuck, *Gratuitous Promises: A New Writ*, 35 MICH. L. REV. 908 (1937). Shattuck contended that this measure adequately compensates the promisee, but does not unduly penalize the promisor where no contract has been formed. *Cf.* 5 WILLISTON, CONTRACTS § 1338 (rev. ed. 1937). Williston contended that while reliance on a promise may be a reason for enforcing a promise, the measure of recovery must normally be the value of the promised performance. See RESTATEMENT (SECOND), CONTRACTS § 90, comment at 170 (tentative draft No. 2, 1965) "A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy. In particular, relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise."

contract; and (2) the promisee is partially responsible for the failure to bind the promisor to a legally sufficient contract. By this reasoning, the court concluded that justice is achieved by putting the promisee in the position he would have been in had he not acted in reliance upon the promise.[22]

IV. Conclusion

Wheeler v. White is important because it broadens the application of promissory estoppel. One noted writer concluded an article on promissory estoppel with the following words:

> Obvious also is the compartmentalization which has existed in the application of the doctrine. So long as it is applied only when the fact situation fits a preconceived pattern, such as a gratuitous promise to give land, or a gratuitous bailment, its possibilities will not be completely utilized. The restraints of compartmentalization must be overcome if the courts are to recognize that the doctrine of promissory estoppel is one of universal application.[23]

In effect, the Texas Supreme Court took a major step towards realizing the full potential of the doctrine. This full potential is limited only by the court's narrow choice of damages. If the purpose of the doctrine is to enforce the promise (and thereby the contract), then the measure of damages should normally be the value of the promised performance.[24]

Even though the doctrine of promissory estoppel was originally created to enforce gratuitous promises where there was no bargained-for exchange and where consideration was completely lacking, the doctrine should be extended to all situations where the requisites are met. Under any circumstances it is unjust to allow a promissor, who has aroused the expectations of a promisee and induced him to act or to forbear from acting, to withdraw from the promise.

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[22] Because of the limited scope of this Note, the measure of damages cannot be adequately analyzed. For further references see: Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (pt. I), 373 (pt. II) (1937); Note, 59 DICK. L. REV. 163 (1954); Note 13 VAND. L. REV. 705 (1960).

[23] Boyer, *Promissory Estoppel: Principle From Precedents: I*, 50 MICH. L. REV. 639, 674 (1952).

[24] See note 21 *supra* and accompanying text.