Morris v. Friedman: Detrimental Reliance and Statutory Writing Requirements

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1. INTRODUCTION

Plaintiff, upon resignation as president and chief executive officer of a bank, demanded that the bank's majority stockholder repurchase all shares of bank stock that plaintiff had acquired during his tenure with the bank. When the majority stockholder refused, plaintiff filed suit alleging detrimental reliance on the majority stockholder's oral promises to repurchase the shares in the event of plaintiff's resignation. These promises were allegedly made during contract negotiations before plaintiff was hired.¹

After a trial on the merits, the jury granted a verdict in favor of plaintiff which was affirmed by the appellate court.² The Louisiana Supreme Court, applying Louisiana's pre-1985 law of detrimental reliance, reversed. Held: the statutory requirement that a contract for the sale of securities be in writing precluded recovery based on detrimental reliance.³

Because the alleged promises of the majority stockholder were made in 1984, the Louisiana Supreme Court did not apply Louisiana Civil Code article 1967, which became effective January 1, 1985;⁴ rather, the court applied the pre-1985 Louisiana law of detrimental reliance.⁵

Article 1967, the first legislative recognition of the doctrine of detrimental reliance in Louisiana, expressly precludes recovery for reliance on gratuitous promises not made in the statutorily-required form.⁶ However, neither the text of Article 1967, nor its official comments, mentions the availability of recovery for a promisee's detrimental reliance on an onerous promise not made in the statutorily-required form.

The statutory writing requirement for the sale of securities cited by the Morris court, Louisiana Revised Statutes 10:8-319, stated in pertinent part:

A contract for the sale of securities is not enforceable by way of action or defense unless:

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1. Morris v. Friedman, 663 So. 2d 19, 21 (La. 1995).
5. Morris, 663 So. 2d at 24-26.

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.
(a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker, sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price. 7

This statute was subsequently amended and reenacted by the Louisiana Legislature in 1995, eliminating the requirement of a writing for contracts for the sale or purchase of securities. 8 However, Louisiana law still contains numerous provisions which require certain types of onerous contracts to be in writing in order to be enforceable. 9

Therefore, given the co-existence of Article 1967 and the statutory writing requirements for onerous contracts, the issue becomes whether an aggrieved promisee can recover, on the basis of Article 1967, for reliance on an onerous promise not made in the statutorily-required form.

This issue is not unique to Louisiana. For over a century, common law courts have wrestled with the same issue, though "couched" in common law terminology. That is, whether the common law doctrine of promissory estoppel can be invoked to overcome a Statute of Frauds defense.10

This paper discusses: (1) the law of detrimental reliance in Louisiana prior to the enactment of Article 1967; (2) the evolution of Article 1967; (3) the statutory writing requirements and their role in Louisiana law; (4) the common law courts' treatment of a similar issue; and (5) the Louisiana Supreme Court's decision in Morris v. Friedman.

This paper concludes with an analysis of the likely effect Article 1967 would have had on the Morris case. In this conclusion I contend, based on statutory interpretation, legislative intent, and existing case law, that recovery should be allowed to aggrieved promisees for their reasonable reliance on onerous promises of the promisor, despite the lack of a statutorily-required writing.

8. La. R.S. 10:8-319 (1983) was amended by 1995 La. Acts No. 884, § 1 and reenacted as La. R.S. 10:8-113 (1983), effective January 1, 1996. La. R.S. 10:8-113 (1983) states in pertinent part: "A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought."
9. See, e.g., La. Civ. Code art. 3038 on "suretyship" and art. 2440 on "sale of immovables."
10. See generally Michael B. Metzger and Michael J. Phillips, Promissory Estoppel and Section 2-201 of the Uniform Commercial Code, 26 Vill. L. Rev. 63 (1980).

The common law doctrine of "promissory estoppel" is very similar to, and is in fact the source of, Louisiana's detrimental reliance. See infra text accompanying notes 20-29.

The common law's Statute of Frauds is synonymous with Louisiana's statutory writing requirements. See infra text accompanying notes 30-44. Hence, a Statute of Frauds defense is one in which a party alleges the contract at issue is unenforceable for lack of a required writing.
II. PRE-1985 LAW OF DETRIMENTAL RELIANCE

Although the enactment of Article 1967 in 1984 was the first legislative recognition of the doctrine of detrimental reliance in Louisiana, Louisiana courts have, for nearly a century, enforced promises on the basis of that doctrine. For example, in an 1896 case, defendant promised plaintiffs that the remains of their ancestor would not be disturbed. Nevertheless, defendant subsequently attempted to remove the remains from the place of burial, and plaintiffs invoked the doctrine of detrimental reliance. The Louisiana Supreme Court granted a permanent injunction to prevent the removal of the remains and held that “[t]he principle of estoppel ... will not permit the withdrawal of promises or engagements on which another has acted.”

In another early detrimental reliance case, an employer’s offer to plaintiff of a benefit plan at the employer’s expense was enforced on the basis of detrimental reliance when the employee to whom the offer was made remained in the employer’s service in reliance on the offer. Reliance was also the basis of a vessel owner’s recovery when he relied to his detriment on a pipeline owner’s promise of payment.

Although detrimental reliance has been applied in a variety of factual situations, “Louisiana courts have not been uniformly receptive to an aggrieved party’s invocation of detrimental reliance, particularly when it has been overtly characterized as the promissory estoppel of the Restatement of Contracts.” For example, in the landmark case of Ducote v. Oden, the Louisiana Supreme Court rejected the plaintiff’s claim of detrimental reliance, holding that promissory estoppel had no place in Louisiana law.

III. THE EVOLUTION OF LOUISIANA CIVIL CODE ARTICLE 1967

Although rejected by the Louisiana Supreme Court in Ducote, the common law doctrine of promissory estoppel is the primary source of detrimental reliance in Louisiana Civil Code article 1967. In fact, “promissory estoppel is the

13. Id. at 3218-19, 20 So. at 681.
14. Id. at 3218, 20 So. at 682.
17. Herman, supra note 11, at 716.
18. 59 So. 2d 130 (La. 1952).
19. Id. at 132.
doctrine the Louisiana State Law Institute asked the reporter to the revision of the Louisiana Civil Code on Obligations to incorporate into the Civil Code.\textsuperscript{21}

Professor Saul Litvinoff, the reporter and chief drafter of the revision, captured the essence of the common law doctrine of promissory estoppel in his original draft of Article 1967.\textsuperscript{22} Citing Section 90 of the Restatement Second of Contracts as a source, the original draft read in pertinent part as follows: "One party's reasonable reliance on a promise by the other may be valid cause for an obligation of the other if the latter knew or should have known that his promise could induce the former party to rely on it to his detriment.\textsuperscript{23}

At the request of other Law Institute members,\textsuperscript{24} however, the draft was significantly modified by the addition of a last sentence which stated: "Reliance on a promise made without required formalities is not reasonable."\textsuperscript{25} The draft was further modified by the addition of the word "gratuitous" to the last sentence.\textsuperscript{26} Accordingly, the last sentence stated: "Reliance on a gratuitous promise made without required formalities is not reasonable."\textsuperscript{27} Thus, the motive behind the addition of the last sentence was to make it "as clear as possible that reliance on a donation promised without proper form will not be protected."\textsuperscript{28}

Thus, Article 1967, adopted by the Law Institute and enacted by the Louisiana Legislature, now reads in pertinent part as follows:

A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.\textsuperscript{29}

IV. STATUTORY WRITING REQUIREMENTS IN LOUISIANA LAW

Like other Louisiana courts, the \textit{Morris} court referred to the statutory writing requirement for contracts for the sale or purchase of securities as a "Statute of
Frauds" requirement.\textsuperscript{30} Originating at early common law, the Statute of Frauds has evolved into a set of legal rules, varying in each jurisdiction, requiring that certain types of contracts be in writing to be enforceable.\textsuperscript{31} Thus, the "Statute of Frauds" requirement is synonymous with the term "statutory writing requirement" more commonly used in Louisiana.

The main policy behind a writing requirement is that of obviating perjury by the contracting parties.\textsuperscript{32} Another related policy is that of mitigating the effects of false testimony, as parties may fail to accurately recollect the terms of their agreement.\textsuperscript{33} This desire to mitigate the effects of false testimony is especially strong when much time has passed between the time of the disputed agreement and the time of trial.\textsuperscript{34} The requirement of a writing also encourages parties to give their pending agreements and the resulting legal obligations serious and deliberate thought prior to contracting.\textsuperscript{35}

Louisiana's writing requirements for onerous contracts presently consist of nine legislative acts: (1) Louisiana Civil Code article 1839\textsuperscript{36} ("transfer of immovable property"); (2) Louisiana Civil Code article 2440\textsuperscript{37} ("sale of immovables"); (3) Louisiana Revised Statutes 3:3414\textsuperscript{38} ("commodity dealer and warehouse law"); (4) Louisiana Revised Statutes 9:3572.10\textsuperscript{39} ("consumer loan brokers"); (5) Louisiana Civil Code article 3176\textsuperscript{40} ("antichresis"); (6) Louisiana Civil Code article 1847\textsuperscript{41} ("promise to pay debt of a third person or debt

\textsuperscript{30} Morris v. Friedman, 663 So. 2d 19, 23 (La. 1995).
\textsuperscript{31} See generally John D. Calamari and Joseph M. Perillo, Contracts 774-76 (3d ed. 1987).
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} La. Civ. Code art. 1839 states in pertinent part: "A transfer of immovable property must be made by authentic act or by act under private signature. Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath." 1984 La. Acts No. 331, § 1, effective January 1, 1985.
\textsuperscript{40} La. Civ. Code art. 3176 states in pertinent part: "The antichresis shall be reduced to writing." An antichresis is a species of mortgage of immovables and is of civilian origin. More specifically, it is an agreement by which the debtor gives to his creditor the fruits or income from the immovable property which he has pledged, in lieu of the interest on his debt. The antichresis is an antiquated contract and is used in Louisiana only in rare circumstances. Black's Law Dictionary 92-93 (6th ed. 1990).
\textsuperscript{41} La. Civ. Code art. 1847 states: "Parol evidence is inadmissible to establish a promise to pay the debt of a third person or a promise to pay a debt extinguished by prescription." 1984 La. Acts No. 331, § 1, effective January 1, 1985.
extinguished by prescription"); (7) Louisiana Civil Code article 2331 ("matrimonial agreement"); (8) Louisiana Civil Code article 3038 ("suretyship"); and (9) Louisiana Revised Statutes 9:1752 ("inter vivos trust").

There is no mention either in the texts of these provisions or in their official comments of the availability of detrimental reliance as an "estoppel" to the promisor's invocation of the lack of a writing requirement to deny enforceability of an oral agreement. Thus, to resolve the issue of whether an aggrieved promisee can recover on the basis of Article 1967 for reliance on an onerous promise not made in the statutorily-required form, one must consult other sources, such as jurisprudence, statutory interpretation, and legislative intent.

V. THE COMMON LAW EXPERIENCE

As previously noted, common law courts have wrestled with the same issue (couched in common law terminology) of whether promissory estoppel may be invoked to overcome a Statute of Frauds defense.

Jurisdictions opposed to the recognition of promissory estoppel as a means of circumventing the Statute of Frauds have contended that such recognition would result, in effect, in the abrogation of the statute. In addition, other courts have expressed the related concern that allowing promissory estoppel to circumvent the Statute of Frauds would amount to a usurpation of legislative power.

However, in spite of such concerns, a landmark opinion from the Supreme Court of California provided the catalyst for the development of promissory estoppel as a judicially-created means by which to circumvent the Statute of Frauds. In _Monarco v. LoGreco_, Justice Traynor, writing for the court, rejected the notion that recovery under estoppel can be based only on representations by a party that he will execute a writing to satisfy the Statute of Frauds; or that a writing is not necessary for enforceability; or that he will not rely on the Statute of Frauds as a defense. Justice Traynor stated that courts should instead focus on the promise and the promisee's substantial reliance on that promise.

42. La. Civ. Code art. 2331 states: "A matrimonial agreement may be executed by the spouses before or during marriage. It shall be made by authentic act or by an act under private signature duly acknowledged by the spouses." 1979 La. Acts No. 709, § 1, effective January 1, 1980.
44. La. R.S. 9:1752 (1991) states: "An inter vivos trust may be created only by authentic act or by act under private signature executed in the presence of two witnesses and duly acknowledged by the settlor or by the affidavit of one of the attesting witnesses." 1964 La. Acts No. 338, § 2.
45. See generally Metzger, _supra_ note 10, at 78-91; John E. Murray Jr., Murray on Contracts 359 (3d ed. 1990); Calamari and Perillo, _supra_ note 31, at 841-44.
46. Metzger, _supra_ note 10, at 82.
47. Id.
49. Id. at 740-41.
promise. Though the Monarco court clearly invited the application of promissory estoppel to overcome a Statute of Frauds defense, "its emphasis upon unconscionable injury or unjust enrichment which could not be adequately remedied through restitution" has proven to be an effective deterrent to some courts' willingness to allow the invocation of promissory estoppel to overcome a Statute of Frauds defense.

The trend toward allowing promissory estoppel as a means of circumventing the Statute of Frauds gained additional momentum from the promulgation of section 139 of the Restatement Second of Contracts. Section 139 essentially provides that a promise, which the promisor should foresee will induce reliance on the part of the promisee and which does in fact induce reliance of the promisee, is "enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise." Section 139 has found support from a number of courts addressing the issue.

Furthermore, a number of decisions recognize promissory estoppel as an independent theory of recovery; i.e., as a separate and additional basis of recovery in addition to recovery under contract. These decisions suggest that promissory estoppel claims are not barred by the Statute of Frauds because promissory estoppel is not contractually-based and thus is beyond the scope of the Statute of Frauds.

However, some courts have refused to adopt promissory estoppel as a means of overcoming the writing requirements of the Statute of Frauds. In addition,
some courts have adhered to the analysis set forth by Justice Traynor in *Monarco.* For example, in a recent decision, an Indiana appellate court refused to adopt section 139 of the Restatement Second of Contracts and, instead, adhered to the requirement of "an unjust and unconscionable injury and loss" in order to remove a contract from the operation of the Statute of Frauds. Another recent opinion suggests that a party seeking to use promissory estoppel in order to take a contract "out" of the Statute of Frauds "must demonstrate that the circumstances are such as to render it unconscionable to deny the oral promise." Hence, the prevailing view among common law jurisdictions seems to be one of allowing promissory estoppel as a means of overcoming a Statute of Frauds defense. However, to paraphrase two commentators on the issue, the promissory estoppel/Statute of Frauds jurisprudence is a remarkably incoherent body of case law and, therefore, it may be premature to suggest the common law's general acceptance of promissory estoppel as a means of overcoming or circumventing the Statute of Frauds.

VI. **Morris v. Friedman**

In 1984, Sam Friedman ("Friedman") recruited Huey Morris ("Morris") as the president and chief executive officer of People's Bank & Trust Company of Natchitoches, Louisiana ("the Bank"). Friedman was the majority stockholder of the Bank. After extensive negotiations between Friedman, Morris, and the Bank, Morris agreed to a three-year contract by which he was to serve as president and CEO.

Morris requested that an attorney draft the agreement in the form of an employment contract. The first draft of the contract contained a provision obligating Morris to sell any Bank stock he acquired back to the Bank upon his resignation or the expiration of his employment contract. Morris requested an additional provision imposing on the Bank a reciprocal obligation to repurchase, upon his departure, any shares he held. Both provisions were included in the final draft of the employment contract.

At trial, Morris alleged that during these contract negotiations Friedman verbally promised to repurchase, in his individual capacity, any Bank stock...
Morris acquired during his employment with the Bank. These promises were not reduced to a writing and Friedman denied their existence. During his employment with the Bank, Morris purchased approximately $400,000 of stock in the Bank and its subsequently-formed parent company, "Bancshares." In 1987, upon the expiration of his employment agreement, Morris declared his intent to resign from the Bank. Morris offered his shares to Friedman, the Bank, and/or Bancshares. Negotiations between Morris and Friedman for Friedman's purchase of the shares failed to produce a sale of the stock. In 1988, Morris resigned and requested that arrangements be made for the repurchase of his stock shares in accordance with the terms of the employment contract. The Bank refused on the basis that such a purchase would violate Louisiana law. In 1989, Morris filed suit against the Bank, Bancshares, and Friedman. Seeking specific performance of the employment contract as well as damages, Morris alleged breach of contract and detrimental reliance against the Bank, Bancshares, and Friedman. In addition, Morris claimed breach of an oral contract based on the failed 1987 repurchase negotiations between him and Friedman. Prior to trial, the Bank was declared insolvent and the Federal Deposit Insurance Corporation was appointed as its receiver. A default judgment in Morris' favor was entered against the receiver. Morris voluntarily dismissed Bancshares. Morris and Friedman subsequently proceeded to a trial on the merits of Morris' claim of detrimental reliance based on Friedman's alleged oral promises to repurchase Morris' shares. The trial jury found that (1) Friedman personally promised to purchase the Bank shares owned by Morris; (2) the promises were made before Morris acquired any shares; (3) Morris reasonably relied to his detriment upon Friedman's promises in purchasing Bank stock; and (4) Morris sustained damages of approximately $400,000.

68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id. at 22.
74. Id.
75. Id. The Bank cited La. R.S. 6:416 (1986), which prohibits a bank from purchasing or owning its own stock, in support of its refusal to repurchase Morris' stock.
76. Morris, 663 So. 2d at 22.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id.
In affirming the trial jury's ruling, the Louisiana Third Circuit Court of Appeal relied on the Louisiana Civil Code's detrimental reliance provision contained in Article 1967. The court noted that "La. C.C. art. 1967 does not require the existence of a formal, valid, or enforceable contract in order for detrimental reliance to occur." Therefore, the court was not persuaded by Friedman's argument that the Statute of Frauds requirement, as contained in Louisiana Revised Statutes 10:8-319(a), prevented recognition of Morris' claim. In recognizing that this Statute of Frauds provision regulated the enforceability of contracts, the court emphasized that Friedman's oral promises did not establish the existence of a contract, though it was sufficient to support a claim of detrimental reliance. Thus, the court concluded that Louisiana Revised Statutes 10:8-319 did not bar Morris' recovery on the basis of detrimental reliance.

The Louisiana Supreme Court granted certiorari to determine the correctness of the third circuit's ruling in light of Article 1967's detrimental reliance provision and the requirements of Louisiana Revised Statutes 10:8-319.

Justice Kimball, writing for the majority, began the court's analysis by determining the applicable law. Noting that Friedman allegedly made the promises in 1984 and that Article 1967 became effective January 1, 1985, the court first had to determine whether Article 1967 should be applied retroactively. The court recognized the well-settled rule of law that, absent extraordinary circumstances, substantive law is to apply prospectively only, whereas procedural and interpretive laws may be applied retroactively. As the Louisiana Legislature did not express any intent as to whether Article 1967 should be applied retroactively or prospectively, the court had to classify Article 1967 as substantive, procedural, or interpretive. The court determined that "it is clear that La. C.C. art. 1967 is a substantive law.

With respect to this issue, the court concluded as follows:

Since La.C.C. art. 1967 works a substantive change in the law which cannot be applied retroactively, and the alleged promise by Friedman upon which Morris' claim is based occurred prior to the effective date of La.C.C. art. 1967, both the trial court and the court of appeal committed legal error in applying Article 1967 to Morris' claim.

85. Morris, 642 So. 2d at 232 (citing its earlier decision in Morris v. People's Bank & Trust Co. of Natchitoches, 580 So. 2d 1029, 1036 (La. App. 3d Cir.), writ denied, 588 So. 2d 101 (1991)).
86. For the text of the statute, see supra text accompanying note 7.
87. Morris, 642 So. 2d at 233.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 23-24. Note that the alleged promises were made in 1984.
Therefore, the issue facing the court was whether, under the law in effect prior to January 1, 1985, a detrimental reliance claim would lie where a writing is statutorily-required for the enforcement of the promise.\footnote{Id. at 24.} Beginning its analysis with the pre-1985/pre-Article 1967 law of detrimental reliance, the court noted that prior to the enactment of Article 1967 few Louisiana cases were framed in terms of detrimental reliance.\footnote{Id.} Of the cases that were, the court noted that most of them involved gratuitous promises which were unenforceable due to lack of form.\footnote{Id.} Nevertheless, the courts in these cases held the seemingly gratuitous and unenforceable promises to be enforceable by construing the promises as onerous.\footnote{Id.} The court emphasized that of the Louisiana cases framed in terms of detrimental reliance, none involved "the application of detrimental reliance where there was the additional consideration of a statutorily required writing requirement for the promise or agreement at issue to be enforceable, and we have been unable to locate any Louisiana case squarely presenting that issue."\footnote{Id.}

The court concluded:

We are confident, however, that had such a situation been encountered, plaintiff's detrimental reliance on an onerous promise not made in the statutorily required form would have been held, as in the case of a gratuitous promise which did not meet the form requirements, entirely unenforceable, even to the extent of plaintiff's reliance interest. This is so because there is no logical distinction between the courts' absolute unwillingness to enforce a gratuitous promise not made in the required form and the enforcement of an onerous promise not made in the required form. In both cases, a positive legal form requirement has been imposed by legislation, and it has long been the rule that equity will not lie where a positive legal requirement, not adhered to, exists.\footnote{Id.}

\footnote{95. Id. at 24. Prior to January 1, 1985, claims for losses due to reasonable reliance on another's representations were based on theories of detrimental reliance, equitable estoppel, and promissory estoppel. Id.} 
\footnote{96. Id.} 
\footnote{97. Id. (citing Louisiana College v. Keller, 10 La. 164 (1836) and Baptist Hospital v. Cappel, 129 So. 425 (La. App. 2d Cir. 1930)).} 
\footnote{98. Id. The courts in these cases construed the promises to be onerous by identifying some benefit or advantage that the promisor would possibly receive by fulfilling the promise. For example, in Louisiana College v. Keller, 10 La. 164 (1836), the defendant/promisor had made a promise of a gift to a local university. In finding the promise to be onerous in nature, the court noted that the promisor might have expected the benefit of having a university near his home at which to educate his children.} 
\footnote{99. Morris, 663 So. 2d at 25.} 
\footnote{100. Id. (citing Palermo Land Co. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482 (La. 1990) and Packard Florida Motors Co. v. Malone, 24 So. 2d 75 (La. 1945)).} 
\footnote{101. Id. In a footnote that the addition of Article 1967 "may very well alter this analysis." Id. at n.11. However, as Article 1967 was not the applicable law in the case at bar, the court did not reach this issue. Id.} 
\footnote{The court also concluded that Morris could not recover on the bases of equitable estoppel and promissory estoppel. Id. at 25-26. As to the denial of recovery under equitable estoppel, the court}
Thus, the court, in an 8-1 decision, held that "there can be no recovery on the basis of equity where . . . a positive statutory writing requirement, not adhered to, exists." 101

VII. ARTICLE 1967 AND ONEROUS PROMISES LACKING A WRITING

Article 1967 makes it clear that "reliance on a gratuitous promise made without required formalities is not reasonable." 102 However, as previously noted, the Louisiana Supreme Court, in applying pre-1985 law to the facts of Morris, left unanswered the question of whether an aggrieved promisee can recover, under Article 1967, for reliance on an onerous promise not made in the statutorily-required form. Stated alternatively in the language of Article 1967, is reliance on an onerous promise made without required formalities "reasonable" or "unreasonable" reliance?

I contend that recovery should be allowed to an aggrieved promisee who reasonably relies on an onerous promise, despite the lack of a statutorily-required writing. This view is supported by three items: (1) existing jurisprudence interpreting Article 1967; (2) a logical interpretation of Article 1967; and (3) the intent of the Louisiana State Law Institute and the Louisiana Legislature in enacting Article 1967.

A. Jurisprudence

In Morris, the Louisiana Third Circuit Court of Appeal held that Article 1967 "does not require the existence of a formal, valid, or enforceable contract in order for detrimental reliance to occur." 103 The third circuit further stated that "detrimental reliance is not really contractual in nature"; thus, the pertinent inquiry is not whether an enforceable contract exists, but rather "whether the promise was made in such a manner that the promisor knew or should have known that the promisee would rely on it, and if so, whether the promisee has in fact reasonably relied upon the promise and been damaged thereby." 104

101. Morris, 663 So. 2d at 26.
104. Id. (citing Adcock, supra note 20, at 765-66).
As previously noted, the Louisiana Supreme Court, in granting certiorari, did not analyze the case under the provisions of Article 1967; rather, the court applied the pre-1985 law of detrimental reliance. In a footnote, the court acknowledged that Article 1967 may alter its analysis; however, since it decided the case under pre-Article 1967 law, it expressed no opinion as to whether Article 1967 would yield a different result under the Morris facts.\footnote{105}

Therefore, while the court held that both the trial and appellate courts committed "legal error" in applying Article 1967 to the facts of Morris,\footnote{106} it did not express an opinion (and expressly chose not to do so) on the correctness of the third circuit's holding that recovery under Article 1967 detrimental reliance does not require the existence of a formal, valid, or enforceable contract.\footnote{107}

One might assert that an implicit overruling of the third circuit's holding occurred in the supreme court's statement that "[e]quitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law."\footnote{108} It should be noted, however, that with the enactment of Article 1967, detrimental reliance also became "positive law" which should be accorded status equal to that of the statutory writing requirements.\footnote{109} The official comments to Article 1967, which state that detrimental reliance is an "additional ground for enforceability" of obligations, support this view.\footnote{110}

Therefore, the third circuit's reasoning in Morris appears to remain viable. Furthermore, its holding has received support from at least one other Louisiana court. Although not a case involving a statutory writing requirement, the United States Federal District Court for the Middle District of Louisiana applied Article 1967 in Percy J. Matherne Contractor, Inc. v. Grinnel Fire Protection Systems Co.\footnote{111} The Matherne court cited the third circuit in holding that a "cause of action for detrimental reliance does not depend upon the existence of a valid, enforceable contract."\footnote{112} Rather, the court stated, recovery under Article 1967 requires only "the existence of a promise and a reasonable reliance on that

\footnote{105. Morris v. Friedman, 663 So. 2d 19, 25 n.11 (La. 1995). In this footnote, the court stated: The addition of La.C.C. art. 1967 in the Civil Code as an additional ground for enforceability of obligations may well alter this analysis. However, since this case is decided under the law existing prior to the effective date of La.C.C. art. 1967, we need not decide, and express no opinion herein, whether the existence of La.C.C. art. 1967 would yield a different result under the facts presented in this case were it applicable.}

\footnote{106. Morris, 663 So. 2d at 24.}

\footnote{107. See supra note 105 for footnote 11 of the court's opinion, in which the court refuses to rule on the correctness of the third circuit's holding as to recovery under Article 1967.}

\footnote{108. Morris, 663 So. 2d at 26 (citing Palermo Land Co. v. Planning Comm'n of Calcasieu Parish, 561 So. 2d 482, 488 (La. 1990)).}

\footnote{109. Per La. Civ. Code art. 1 and the official comments thereto, legislation is a primary source of law and is superior to any other source of law. Thus, as Article 1967 and the statutory writing requirements are both "legislation" and are "superior" sources of the law, they should be accorded equal status.}

\footnote{110. See La. Civ. Code art. 1967 cmt. a.}

\footnote{111. 915 F. Supp. 818 (M.D. La. 1995), aff'd, 102 F.3d 550 (5th Cir. 1996).}

\footnote{112. Id. at 824.}
promise to one's detriment." These are the same requisites set forth by the 
Morris court. The Morris and Matherne courts' delineation of the requirements 
for recovery under Article 1967 detrimental reliance have been echoed in other 
Louisiana decisions as well.114

Therefore, applying the interpretation of Article 1967 as set forth by 
Louisiana appellate courts and a federal district court, a promisee who reasonably 
relies to his detriment on an onerous promise should be allowed to recover, 
despite the lack of a statutorily-required writing.

B. Statutory Interpretation

A "plain reading" of the terms of Article 1967 further supports the view that 
Article 1967 requires only a "promise" and "reasonable reliance" in order for an 
aggrieved promisee to recover and does not require a valid and enforceable 
contract.115 Article 1967 speaks in terms of a "promise" and not of a "con-
tract."116 Furthermore, though the comments to Article 1967 are not part of 
the law,117 comment (a) is additional "persuasive" authority for the statement 
that Article 1967 provides a basis for the enforceability of obligations in addition 
to contract.118

Further statutory support of this view is found in Louisiana Civil Code 
article 9 which states: "When a law is clear and unambiguous and its application 
does not lead to absurd consequences, the law shall be applied as written and no 
further interpretation may be made in search of the intent of the legislature."119

Article 1967 provides an exception for reliance on a gratuitous promise not made 
in the statutorily-required form; it does not, however, provide such an exception 
for onerous promises not made in the statutorily-required form. Hence, it seems 
"clear and unambiguous" that an aggrieved promisee reasonably relying on such 
an onerous promise should be allowed to recover. Such a result would not lead 
to "absurd consequences," for our common law cousins would likely allow 
recovery in such a scenario.120

113. Id.
114. See, e.g., Carter v. Huber & Heard, Inc., 657 So. 2d 409, 411 (La. App. 3d Cir.), writ 
denied, 661 So. 2d 471 (1995) (stating "[r]ecovery of damages therefore requires (a) the existence 
of a promise and (b) reasonable reliance on that promise to one's detriment"); South Central Bell 
Telephone Co. v. Rouse Co. of Louisiana, 590 So. 2d 801, 804 (La. App. 4th Cir. 1991) (stating "[t]o 
recover under the theory of detrimental reliance it must be proven that: 1) a representation was 
made; 2) there was justifiable reliance on that representation; 3) a change in position to one's 
detriment because of that reliance").
116. Id.
120. See generally Restatement (Second) of Contracts § 90 and § 139 (1979). See also the 
discussion of the common law's treatment of this issue at supra text accompanying notes 45-61.
Furthermore, there should be nothing "absurd" in the recognition of two distinct bases of recovery: one in contract, and one in detrimental reliance. Stated otherwise, why not allow the two bases of recovery, both legislative pronouncements, to coexist? Official comment (a) to Article 1967 provides a form of legislative support for this proposition in noting that Article 1967 is "an additional ground for enforceability" of promises. Of course, the strongest evidence of legislative support would be the Louisiana Legislature's decision to incorporate both bases of recovery into the Civil Code.

By way of analogy, one can also find judicial support for the proposition that the contractual and detrimental reliance bases should be allowed to coexist. In *Tedesco v. Gentry Development, Inc.*, the Louisiana Supreme Court recognized that in a sale of immovable property written authority is required for an agent to execute either an agreement to sell or a contract of sale on behalf of his principal. However, the court noted that in an appropriate case a principal may be estopped from asserting the defense of lack of written authority if the third person can show a change of position in reliance on the principal's oral representation of the agent's authority. That is, if the third person can prove the elements of "agency by estoppel," a judicially-created basis of recovery, then the third person may enforce the contract against the principal despite the lack of a written grant of authority to the agent.

Thus, the *Tedesco* court recognized that there are two distinct bases of recovery for an aggrieved party in the agency scenario: (1) contract; and (2) agency by estoppel. The court saw "no absurdity" in allowing the two to coexist. I concede that the analogy to *Tedesco* is not a perfect one, as *Tedesco* involved a judicial theory modifying a legislative rule and the proposition herein set forth involves two legislative pronouncements. However, a court wishing to recognize contract and Article 1967 detrimental reliance as distinct, coexisting bases of recovery would seem to be in a stronger position than the *Tedesco* court, as both bases are legislative pronouncements and legislation is the superior source of law in Louisiana.

Therefore, by way of a "plain reading" of the terms of Article 1967, a promisee who reasonably relies to his detriment on an onerous promise should be allowed to recover, despite the lack of a statutorily-required writing. Furthermore, because the terms of Article 1967 are clear and unambiguous, the Civil Code mandates that Article 1967 be applied as written and that no further interpretation be made. Finally, the proposition that there should be two distinct bases of recovery available to the aggrieved promisee (contract and detrimental

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122. 540 So. 2d 960 (La. 1989).
123. Id. at 964 (citing La. Civ. Code arts 2996, 2997, and 2440).
124. Id.
125. Id. at 964-65.
reliance) is supported by: (1) the Civil Code and the official comments thereto; and (2) Louisiana Supreme Court jurisprudence.

C. Legislative Intent

As legislation is the superior source of law in Louisiana, perhaps the most persuasive support for allowing recovery to the aggrieved promisee who relied on an onerous promise lacking in form is that of legislative intent.

As previously noted, the common law theory of promissory estoppel is the doctrine the Louisiana State Law Institute asked the chief drafter of the 1984 revision to incorporate into the Civil Code. However, the essence of promissory estoppel captured in the chief drafter’s first draft was abrogated when other Law Institute members requested the addition of a last sentence to Article 1967. This last sentence, part of the final draft enacted by the Louisiana Legislature, states: “Reliance on a gratuitous promise made without required formalities is not reasonable.” The motive behind the addition of the last sentence was to make it “as clear as possible that reliance on a donation promised without proper form will not be protected.”

Therefore, given the motive of the Law Institute (as expressed in the reporter’s notes) and the pattern of modifications made to the last sentence of Article 1967, it appears that the Law Institute intended to allow recovery for reasonable reliance on an onerous promise lacking a statutorily-required writing. The Law Institute had the opportunity to treat onerous and gratuitous promises that lack form equally (and deny recovery to aggrieved promisees relying on either) when it was presented with the preliminary draft containing the last sentence: “Reliance on a promise made without required formalities is not reasonable.” It chose to distinguish between the two types of promises, however, by adding the word “gratuitous” to the last sentence.

Thus, it seems reasonable to conclude that it was the intent of the Louisiana Legislature, in drafting and enacting Article 1967, to allow a promisee who reasonably relied on an onerous promise, despite the lack of a statutorily-required writing, to recover.

VIII. RESULT OF MORRIS UNDER ARTICLE 1967?

Under the law in effect today, promisee Morris should be allowed to recover under Article 1967 detrimental reliance, in spite of the lack of a statutorily-requiring writing...

128. Adcock, supra note 20, at 754.
129. See supra notes 22-25.
131. Litvinoff, supra note 22, at 1.
132. Litvinoff, supra note 22.
133. Law Institute Minutes, supra note 26.
required writing, if he were able to prove: (1) that a promise existed; (2) that the promisor Friedman knew or should have known that the promise would induce him to rely on it to his detriment; and (3) that he was reasonable in so relying on the promise. 134

Requisites (1) and (2) are present in the facts of Morris. Therefore, the pivotal issue would be whether Morris was “reasonable” in relying on Friedman’s promises. This is obviously a question of fact for the fact finder to resolve. In a recent Louisiana case that attempted to give meaning to the phrase “reasonable reliance,” the court held that the promisee’s business knowledge and expertise are factors to be considered in determining the reasonableness of the promisee’s reliance on a promise. 135

Although the promisee’s failure to have the onerous promise put into writing should not automatically disqualify the promisee from recovery under Article 1967, Friedman could still allege that Morris “unreasonably relied” on his oral promises by not having the promises reduced to a writing as required by statute. Two facts support such an allegation of “unreasonable reliance”: (1) Morris’ status as bank president and chief executive officer, and his education, training, and expertise resulting from such experience; and (2) Morris’ insistence that the reciprocal purchase/sell agreement between him and the bank be reduced to writing and incorporated into their employment contract.

As these two facts indicate that Morris knew or should have known of the statutory writing requirement for sales of securities, I conclude that Morris was “unreasonable” in relying on Friedman’s promises and should therefore be denied recovery. 136

IX. CONCLUSION

With the enactment of Louisiana Civil Code article 1967 in 1984 came the first legislative recognition of the doctrine of detrimental reliance in Louisiana. While expressly disallowing recovery for reliance on a gratuitous promise not made in the statutorily-required form, Article 1967 leaves unanswered the question of whether an aggrieved promisee can recover for reasonable reliance on an onerous promise not made in the statutorily-required form.

I contend that recovery should be granted to such a promisee for reasonable reliance on an onerous promise, despite the lack of a statutorily-required writing. A “plain reading” interpretation of Article 1967 supports this view. This view is further supported by an examination of the intent of the Louisiana Legislature in drafting and enacting Article 1967. Such an examination reveals that the

136. Note that Morris’ reliance would likely be deemed “reasonable” if there were no statutory writing requirement for the sale or purchase of securities, as is the law in Louisiana today. For the text of La. R.S. 10:8-113 (1983), see supra note 8.
legislature considered disallowing recovery to a promisee relying on either a gratuitous or onerous promise lacking form. However, as the enacted version of Article 1967 shows, the legislature chose to disallow recovery to only those promisees relying on gratuitous promises lacking form. Finally, the decisions of Louisiana appellate courts and a federal district court support the view that recovery under Article 1967 requires only the existence of an onerous promise and reasonable reliance thereon.

Given the frequency and volume of contracts in commerce and the unfortunate tendency of parties to conduct their affairs via "handshake" deals and oral contracts, the issue left unanswered by Article 1967, and which the Morris court chose not to address, will certainly arise again. What will not be certain is the proper result in a Morris-type situation where the onerous contract has not been reduced to a statutorily-required writing, one party has reasonably relied to its detriment on the other party's promise of performance, and the promising party renegs. Should the injured promisee recover? Or should the promisor be able to assert the lack of a statutorily-required writing as a defense to liability?

This uncertainty should be resolved in favor of the aggrieved promisee. The terms of Article 1967 as presently written, the jurisprudence interpreting Article 1967, and an examination of the legislature's intent in enacting Article 1967 all support this view. Of course, the Louisiana Legislature could eliminate the uncertainty it created by amending Article 1967 so as to expressly allow or disallow recovery to promisees relying on onerous promises lacking a statutorily-required form.

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