THE UNCERTAIN ROLE OF RELIANCE IN THE ENFORCEMENT OF CHARITABLE SUBSCRIPTIONS

by
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In cases where charitable promises are made and later retracted, the Restatement (Second) of Contracts provides conflicting guidance as to how a court should factor in reliance by the charity when considering whether to enforce the promised donation by way of promissory estoppel. Specifically, the text of § 90(2) within the Second Restatement provides that a charitable subscription is binding "without proof that the promise induced action or forbearance." The adoption of this provision represented a departure from the requirement of reliance historically necessary for the enforcement of most types of promises by promissory estoppel. According to the Second Restatement, however, reliance remains relevant to the determination of whether enforcement of a promise is necessary to avoid injustice, which is a required element to enforce a charitable subscription pursuant to § 90(2). Namely, Comment b *to § 90, discussing the character of reliance protected, notes that enforcement of the promise must be necessary to prevent injustice, one factor of which is the nature and extent of reliance; such reliance "need not be of substantial character in charitable subscription cases." Comment* f *states that for charitable subscriptions where recovery is rested on reliance, "a probability of reliance is enough," although American courts "have found consideration in many cases where the element of the exchange was doubtful or nonexistent." Moreover, Illustration 17 to Comment* f *describes a situation where reliance does in fact support enforcement of a charitable subscription.*

This Article suggests that this discussion in these comments and this illustration of the continued role of reliance in the enforcement of charitable subscriptions by way of promissory estoppel may provide one reason as to why the rule set forth in § 90(2) is not more widely adopted across U.S. jurisdictions as the governing common law principle. Specifically, as these comments provide a discussion of how reliance can suffice to support the necessary element of unavoidable injustice absent enforcement, there may be less of a clear justification for courts to abandon the traditional rule that some form of reliance must be

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shown in order to justify such enforcement. The element of enforcing a promise only where injustice can be avoided thereby may serve as a back door to maintaining a sort of reliance requirement in the context of § 90(2), albeit somewhat loosened for charitable subscriptions compared with other types of promises.

The comments accompanying § 90(2) of the Restatement (Second) of Contracts should therefore be clarified to state that charitable subscriptions should, in fact, be enforced without regard to the presence of any action or forbearance taken by the charity in reliance on the promise. Such a clarification would align with the expressed intent of the drafters of the Second Restatement in creating the separate § 90(2) provision apart from the general doctrine of promissory estoppel. This Article also recommends that the text of § 90(2) itself be amended to clarify that a charitable subscription can be enforced without regard to whether injustice could be avoided only by enforcement of the promise. Rather, in the interests of promoting private philanthropy, the injustice element would be assumed to be satisfied by the fact that a charitable subscription had been made.

INTRODUCTION

Once a charitable donation has been promised, charities may still face the retraction of the donation before it has been made, often as a result of donor dissatisfaction with some action or policy of the charity. Indeed, donors increasingly have been seeking the return of donations that they feel have not been used appropriately.[1] This situation can also arise upon the death of a donor when the estate does not pay out a previously promised pledge; for example, in 2016, Duke University sought (and subsequently withdrew its claim for) the outstanding amount on a $18.75 million pledge from deceased donor Aubrey McClendon.[2] Though Duke, in this instance, did not ultimately pursue the enforcement of the unpaid pledge in court, in general, charitable organizations may in fact do so, most commonly by way of promissory estoppel. The Restatement (Second) of Contracts, however, contains some uncertainty over the exact role of reliance in that enforcement analysis.

Prior to the adoption of the Second Restatement, plaintiffs seeking to enforce charitable subscriptions pursuant to the doctrine of promissory estoppel were, according to the provisions of that doctrine, required to demonstrate that some reliance by the promisee had occurred. Because of the public policy interest in allowing charitable subscriptions to be enforced, courts often found that such reliance had occurred even where the reliance was minimal or was perhaps even fictitious. The drafters of the Second Restatement recognized this judicial reality and, as part of the changes made to the promissory estoppel provision in the Second Restatement, adopted Subsection 2 of § 90. The text of Subsection 2 made charitable subscriptions, along with marriage settlements, binding under the doctrine of promissory estoppel "without proof that the promise induced action or forbearance."[3]

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[1] Charlie Wells, *When Unhappy Donors Want Their Money Back*, WALL ST. J., (Dec. 14, 2014, 11:50 PM), https://www.wsj.com/articles/when-unhappy-donors-want-their-money-back-1418619048.

[2] Ryan Dezember & Kevin Helliker, *Duke University Makes Claim on Estate of Aubrey McClendon*, WALL ST. J. (Aug. 24, 2016, 5:30 AM), https://www.wsj.com/articles/duke-university-makes-claim-on-estate-of-aubrey-mcclendon-1472031001; Ryan Dezember, *Duke Withdraws Claim Against Aubrey McClendon's Estate*, WALL ST. J. (Aug. 29, 2016, 6:29 PM), https://www.wsj.com/articles/duke-withdraws-claim-against-aubrey-mcclendons-estate-1472509797.

[3] RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. L. INST. 1981).

The comments to the Second Restatement, however, do provide a continued role for reliance in cases decided pursuant to the rule articulated in § 90(2). Namely, reliance remains relevant to determining whether injustice can be avoided only by enforcement of the promise, which remains a required element to enforce a charitable subscription under § 90(2). A discussion of reliance in the context of charitable subscriptions appears in two comments to § 90, as well as in one illustration. Comment *b* discusses the nature of reliance protected, a factor which would seem to be entirely irrelevant to the analysis of the enforceability of promises under § 90(2) if the text of § 90(2) is considered alone.[4] That Comment, however, also discusses how enforcement, if granted, must be necessary to avoid injustice. Comment *b* notes that "[t]he force of particular factors varies in different types of cases," and "thus reliance need not be of substantial character in charitable subscription cases."[5] Therefore, even though reliance is disavowed within the text of § 90(2) as a necessary requirement, Comment *b* provides a mechanism whereby reliance can nevertheless continue to be used as a factor in informing whether or not a particular charitable subscription should be enforced. Likewise, Comment *f* describes how recovery for charitable subscriptions may in some cases be "rested on reliance," and how in such instances "a probability of reliance is enough."[6] Illustration 17 describes a situation where a promise to pay annual installments to a university is supported by "sufficient reliance to make the promise binding" on the promisor and his estate.[7] Comment *f* and Illustration 17, like Comment *b*, describe how reliance remains relevant to the enforcement of charitable subscriptions by way of promissory estoppel, even if reliance is no longer an independent required element pursuant to § 90(2).

The rule articulated in the text of § 90(2)—that charitable subscriptions are enforceable without proof that the promise induced any action or forbearance—has not been widely adopted by courts within the United States. Indeed, only New Jersey and Iowa seem to have made unqualified statements adopting this standard with respect to the enforcement of charitable subscriptions by promissory estoppel. The particular contrast of the text of the Second Restatement's § 90(2) with its relevant comments and illustration may provide one reason as to why more courts have not adopted that rule. The Restatement itself is unclear about how necessary or important reliance is to demonstrating that injustice cannot be avoided except by enforcement of a charitable subscription, especially where other factors relevant to that analysis might be minimal or absent, such as a promise made without a large degree of formality or one less obviously satisfying the evidentiary, cautionary, deterrent, or channeling functions of form. As such, there may be little incentive for courts to

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[4] *Id.* cmt. b.

[5] *Id.*

[6] *Id.* cmt. f.

[7] *Id.* cmt. f., illus. 17.

abandon their pre-Second Restatement judicial standards to instead find that charitable subscriptions can or should be enforced without any showing of reliance whatsoever.

This Article examines this thesis by first reviewing the type of reliance required before the issuance of the Second Restatement for enforcing charitable subscriptions under the doctrine of promissory estoppel. It then considers the context in which § 90(2) was added during the drafting of the Second Restatement. It also examines how scholars and courts have interpreted the interplay between § 90(2) and its relevant accompanying comments. This Article proposes that the disparity between the meaning of the text and comments is one reason (though not the only one) why § 90(2) has not been more widely adopted by courts across the United States. The text of the promissory estoppel doctrine and its comments might be amended to reflect either the current state of judicial interpretation, or alternatively, desired social policy. It is recommended that in the interest of conforming to broad scholarly opinion as to the intended effect of § 90(2), as well as in promoting the social policy of supporting private philanthropy, the comments and illustration relevant to § 90(2) should be rephrased in such a way as to clarify that § 90(2) calls for the enforcement of charitable subscriptions even in the absence of some action or forbearance taken by the charity in reliance on the promise.

I. BACKGROUND AND APPLICABLE LEGAL PROVISIONS

A. Enforcement of Charitable Subscriptions Pre-Restatement (Second) of Contracts, and Mechanisms of Enforcement

A charitable subscription has been defined as "an oral or written promise to do certain acts or to give real or personal property to a charity or for a charitable purpose."[8] "A 'subscription contract' or 'subscription,' as it is often called, is not a gift, but is a contract, oral or written, by which one engages to contribute a sum of money for a designated purpose, gratuitously, as in the case of subscribing to a charity."[9] A charitable subscription is "considered under contract principles" and therefore "there must be an offer or promise," rather than "a mere statement of intent."[10] This Article uses the terms "charitable subscription," "charitable pledge," and "charitable

[8] King v. Trs. of Bos. Univ., 647 N.E.2d 1196, 1199 (Mass. 1995) (quoting EDITH L. FISH, DORIS JONAS FREED & ESTHER R. SCHACTER, CHARITIES AND CHARITABLE FOUNDATIONS § 63, at 71 (1974)).

[9] Shadow Ridge Ltd. P'ship v. Ryan (*In re* Estate of Ryan), 925 N.W.2d 336, 341 (Neb. 2019).

[10] Milligan v. Mueller (*In re* Estate of Schmidt), Nos. 6-644, 06-0330, 2006 Iowa App. LEXIS 1056, at *6 (Sept. 7, 2006); Pappas v. Hauser, 197 N.W.2d 607, 611, 613 (Iowa 1972); Pappas v. Bever, 219 N.W.2d 720, 721 (Iowa 1974).

promise" generally interchangeably.[11]

Ensuring the enforceability of charitable subscriptions has long been recognized as a positive social policy. As one court has stated, "[t]he real basis for enforcing a charitable subscription is one of public policy—that enforcement of a charitable subscription is a desirable social goal."[12] Likewise, the Iowa Supreme Court noted that "the courts have generally striven to find grounds for enforcement, indicating the depth of feeling in this country that private philanthropy serves a highly important function in our society."[13] As another court opined, "[t]o lightly withhold judicial sanction from such [charitable] obligations would be to destroy millions of assets of the most benevolent institutions in our land, and to render such institutions helpless to carry out the purpose of their organizations."[14]

Recognizing the importance of private philanthropy, courts have widely enforced charitable promises. As one court noted in 1965, "[a] review of the authorities would indicate that the trend of judicial decision during the last century has been towards the enforcement of charitable pledges almost as a matter of public policy."[15] Similarly, a Massachusetts bankruptcy court noted that "[c]ourts, including those of Massachusetts, have striven to find grounds for enforcing charitable subscriptions, not without engaging in difficult legal reasoning."[16]

Courts have used a variety of conceptual approaches to justify and achieve the broad enforcement of charitable promises. Knapp noted that "[e]nforcement of charitable pledges has been justified sometimes by consideration, sometimes by assertions of reliance on the donee's part, and sometimes by virtually naked assertions of public policy."[17] Bachman explained:

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[11] *See King*, 647 N.E.2d at 1199 n.3 (citing RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 15.1, at 469 (3d ed. 1975) and defining pledge as "a bailment of personal property to secure an obligation of the bailor").

[12] Jewish Fed'n of Cent. N.J. v. Barondess, 560 A.2d 1353, 1354 (N.J. Super. Ct. Law Div. 1989).

[13] Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 612 (Iowa 1974).

[14] Woodmere Acad. v. Steinberg, 363 N.E.2d 1169, 1172 (N.Y. 1977) (quoting Brokaw v. McElroy, 143 N.W. 1087, 1089 (Iowa 1913)).

[15] *In re* Estate of Lipsky, 256 N.Y.S.2d 429, 431 (Sur. Ct. 1965) (citing *In re* Kirby's Will, 240 N.Y.S.2d 214, 217 (Sur. Ct. 1963); Liberty Maimonides Hosp. v. Felberg, 158 N.Y.S.2d 913, 915 (Cnty. Ct. 1957); *In re* Estate of Lord, 25 N.Y.S.2d 747, 749 (Sur. Ct. 1941); First Methodist Episcopal Church of Mt. Vernon v. Estate of George Howard, 233 N.Y.S. 451 (Sur. Ct. 1929); Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 176–77 (N.Y. 1927); Barnes v. Perine, 2 N.Y. 18 (1854)).

[16] *In re* Morton Shoe Co., Inc., 40 B.R. 948, 950 (Bankr. D. Mass. 1984) (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 6–5, at 208–09 (2d ed. 1977)).

[17] Charles L. Knapp, *Reliance in the Revised* Restatement*: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 60 (1981).

> Subscription contracts for charitable organizations have been upheld by American courts on three distinct grounds: (1) as a bilateral contract, the promise of each subscriber being the consideration for the promise of the other; (2) as a unilateral contract, obligatory upon the commencement or completion of that for which the donation was offered; and (3) promissory estoppel, the theory being that the subscriber has made a gift promise which induced a forseeable change of position.[18]

Before the Second Restatement's textual elimination of the reliance requirement for the enforcement of charitable promises, each of these three mechanisms (bilateral contract, unilateral contract, and promissory estoppel) presented certain challenges to the enforcement of charitable promises. A major impediment to the enforcement of charitable pledges by way of the bilateral contract mechanism was the necessity of finding the existence of consideration to support such promises.[19] Where present, such consideration could be found "in an act done at the request, express or implied, of the subscriber."[20] One such example was *American University v. Collings*, in which a Maryland Court of Appeals found that a bilateral contract supported by consideration had been created where a donor had promised "a subscription to a scholarship fund, made upon the condition that the gift shall bear the donor's name and serve to perpetuate her memory."[21] However, where such consideration was lacking, bilateral contracts could not be found to exist and charitable subscriptions went unenforced, defeating the widely-accepted policy goal of enforcing such promises.[22]

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[18] Robert Bachman, Comment, *Enforceability of Charitable Subscriptions in Wisconsin*, 34 MARQ. L. REV. 17, 17 (1950). Likewise, the *Lipsky* court noted that "[i]n an effort to free charitable pledges or subscriptions from the traditional requirement that an enforceable promise must be supported by consideration," New York courts have "resorted to various theories," resulting in some "decisions [that] are predicated upon the existence and consummation of either a bi-lateral or uni-lateral contract," and others in which "the subscriptions have been upheld by application of the equitable principle of estoppel often referred to as promissory estoppel." *In re Estate of Lipsky,* 256 N.Y.S.2d at 431.

[19] Hugh Peter Mullen, Note, *The Law of the Charitable Subscription*, 13 ST. JOHN'S L. REV. 127, 130–31 (1938) ("Thus we see that the problem of consideration is of primary importance in the law of the charitable subscription.").

[20] *Id.* at 131.

[21] Am. Univ. v. Collings, 59 A.2d 333, 337 (Md. 1948).

[22] *See, e.g.*, Presbyterian Church v. Cooper, 20 N.E. 352, 353 (N.Y. 1889) ("We must reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate,—the money consideration,—because it had no basis in fact, and the mutual promise between the subscribers, because, as to their promises, there is no privity of contract between the plaintiff and the promisors."); Trs. of Hamilton Coll. v. Stewart, 1 N.Y. 581, 583 (1848) (finding that no consideration existed where "[t]he endowment of the college was, in legal contemplation, no benefit to the subscribers," since "[t]he public advantage arising from the diffusion of knowledge and the advancement of science, however important in themselves, have

Another conceptually similar theory was that of the multilateral contract. According to Mullen, this theory entailed the concept that "the subscribers make a multilateral contract among themselves, and their promises, each running to the charity, are consideration for each other."[23] Such a contractual theory was described in *Christian College v. Hendley*, where the court found that "[t]here was sufficient consideration to support the defendant's promise" to erect a college under church management.[24] The court in that case believed that the "correct rule" was that if "a number of subscribers promise to contribute money on the faith of the common engagement, for the accomplishment of an object of interest to all, and which cannot be accomplished save by their common performance, then it would seem that the mutual promises constitute reciprocal obligations."[25] However, as Mullen noted, "[t]his rule has been severely criticized," given the circularity of the multilateral contract theory.[26] Indeed, some courts have explicitly rejected this contractual theory as a way of understanding charitable contract obligations.[27]

Like the idea of a bilateral contract, the theory of a charitable pledge as a unilateral contract also poses certain challenges to the broad enforcement of such promises. Under the unilateral contract theory, "as soon as the promisee charity, relying on the subscription, does anything towards carrying out the project for which the

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not been held a sufficient consideration alone to uphold an agreement of this character," namely, a charitable promise); Twenty-Third St. Baptist Church v. Cornell, 23 N.E. 177, 177 (N.Y. 1890) (finding that "[i]t is an insuperable barrier to a recovery by the plaintiff that the subscription of [a decedent] to the fund for the erection of a new church building was merely an executory gift, unsupported by any consideration").

[23] Mullen, *supra* note, 19 at 131; *see also* T. C. Billig, *The Problem of Consideration in Charitable Subscriptions*, 12 CORNELL L. Q. 467, 474 (1927); Jordan v. Mt. Sinai Hosp., Inc., 276 So. 2d 102, 103–05 (Fla. Dist. Ct. App. 1973) (discussing that at that time, "[a] few jurisdictions have found and approved as consideration *the mutual promise of subscribers*. . . . Those jurisdictions which adhere to this proposition are approximately eleven in number (Arkansas, California, Georgia, Iowa, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, and Pennsylvania," and citing cases including *Congregation B'Nai Sholom v. Martin*, 173 N.W.2d 504 (Mich. 1969); *Helvering v. Safe Deposit & Trust Co.*, 95 F.2d 806, 812 (4th Cir. 1938); *Cotner College v. Hyland*, 299 P. 607 (Kan. 1931); *Brokaw v. McElroy*, 143 N.W. 1087 (Iowa 1913); *Irwin v. Lombard University*, 46 N.E. 63 (Ohio 1897)).

[24] Christian Coll. v. Hendley, 49 Cal. 347, 350 (1874).

[25] *Id.* (quoting Watkins v. Eames, 63 Mass. (9 Cush.) 537, 539 (1852)).

[26] Mullen, *supra* note 19, at 131.

[27] *See, e.g.*, Tioga Cnty. Gen. Hosp. v. Tidd, 298 N.Y.S. 460, 472 (Sup. Ct. 1937) ("It is well settled that the mutual promises of pledgors to pay contributions for a charitable purpose is not a sufficient consideration upon which the promisee may enforce liability."); *see also Jordan*, 276 So. 2d at 105–06 (citing Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528 (1877); Presbyterian Church v. Cooper, 20 N.E. 352 (N.Y. 1889); I. & I. Holding Corp. v. Gainsburg, 12 N.E.2d 532 (N.Y. 1938); Am. Univ. v. Todd, 1 A.2d 595 (Del. Super. Ct. 1938); Cutwright v. Preachers' Aid Soc'y, 27 Ill. App. 168 (1933); Furman Univ. v. Waller, 117 S.E. 356 (S.C. 1923)).

subscription was given, or 'spends money,' or 'incurs liability' in that connection, contractual legal relations arise."[28] The difficulty with the unilateral contract theory for charitable subscriptions, however, also lies in determining the action sought by the promisor. "If there is an express request by the subscriber for the act in question the court is faced with less difficulty. But such a fact situation is the exception, for generally the request must be implied."[29] Billig noted that such consideration, especially in New York cases, was sometimes creatively constructed: "In the more recent decisions from that jurisdiction the court is most ingenious in finding the necessary implication."[30]

Despite its shortcomings, the unilateral contract mechanism was used by courts to enforce charitable subscriptions, as in *I. & I. Holding Corp. v. Gainsburg*.[31] That court viewed a charitable subscription as "an offer to contract which becomes binding as soon as work has begun in reliance on the promise."[32] That opinion also contained a dissent which argued that the mere promise to aid and assist a hospital was insufficient to constitute consideration sufficient to form a unilateral contract.[33] This was because in prior cases where unilateral contracts were found to exist and a charitable promise thereby enforced, "the subscription or promise was to become effective only if in return the beneficiary promised or actually performed some act which it otherwise would not have been obligated to perform and would not have performed except for the inducement offered by the promisor."[34] The dissent thus articulated a more traditional view of a unilateral contract, and illustrated how the social policy calling for the broad enforcement of charitable promises could conflict with the requirements of the unilateral contract mechanism.[35]

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[28] Billig, *supra* note 23, at 469.

[29] *Id.* at 469–70.

[30] *Id.* at 470.

[31] *I. & I. Holding*, 12 N.E.2d at 534.

[32] *Id.*

[33] *Id.* at 534–36 (Lehman, J., dissenting).

[34] *Id.* at 535.

[35] *See id.* at 535–36; *see also* Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: I*, 50 MICH. L. REV. 639, 647 (1952) ("In a number of other instances, the promise to make the gift has been regarded as an offer for a unilateral contract. When the charity does the act which the court finds is requested in exchange for the subscription, there is said to be an acceptance which creates a binding obligation on the promisor. Provided the subscriber was seeking an exchange for his promise, there is no objection to such a result. But there are flaws in this solution—flaws which have been pointed out before. The charity is not engaged in a commercial transaction and the subscriber does nothing but promise to make a gift. He is trying to bestow a benefaction, not secure a price for his promise. To talk of the consideration for his gift-promise is to employ a paradox." (footnotes omitted)).

Enforcement of charitable subscriptions could also be achieved by an alternative to these various contractual theories: namely, by way of the doctrine of promissory estoppel, which is the primary focus of this Article. The particular nature of promissory estoppel in the context of charitable pledges has evolved over time to address the policy goal of supporting private philanthropy.[36] Unlike the Second Restatement, the original Restatement of Contracts did not contain a separate provision relating to charitable subscriptions within its articulation of the doctrine of promissory estoppel. The First Restatement's § 90 read much like the current formulation of that section, and stated: "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."[37] Unlike the Second Restatement, the First Restatement did not include any comments intended to clarify and illustrate the meaning of its text.[38]

Broadly, courts adopted and applied this First Restatement principle to enforce charitable pledges where the donee had taken definite and substantial action or forbearance in reliance on the promise.[39] For example, the Kansas Supreme Court quoted § 90 as set forth within the First Restatement to find for the enforcement of

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[36] As explained in *Corbin on Contracts*:

> In the famous 1927 charitable-promise case, *Allegheny College v. National Chautauqua County Bank of Jamestown*, Chief Justice Benjamin Cardozo in dictum positively advanced the stature of promissory estoppel in American law but theoretically limited it as a 'substitute for consideration' and 'an equivalent of consideration.' Subsequently, Circuit Judge Learned Hand likewise explained in 1932 that '"promissory estoppel" is now a recognized species of consideration (Restatement of Contracts, § 90)'. Then, in 1933 Hand added that it applies only to donative promises (citing *Allegheny College* as an example) . . . . Regarding its theoretical roots, the Empire State now recognizes that 'promissory estoppel' is a 'protean doctrine' that is neither entirely legal nor entirely equitable."

3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.12, at 150–51 (Joseph M. Perillo ed., rev. ed. 1996) (first quoting Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank, 159 N.E. 173, 175 (N.Y. 1927); then quoting Porter v. Comm'r, 60 F.2d 673, 675 (2d Cir. 1932); then citing James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933); and then quoting Merex A.G. v. Fairchild Weston Sys., Inc., 29 F.3d 821, 825 (2d Cir. 1994)).

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

[38] 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, 917 (2010).

[39] *See* Boyer, *supra* note 35, at 650–51 ("Illustrative instances of action and reliance which have sufficed to bind the promisor include: making purchases connected with the erection of a church, contracting to erect a building, beginning the erection of a building, completing the erection of a building, and buying land, erecting a building thereon and thereafter operating a college for several years. . . . Even borrowing money to pay a pre-existing indebtedness has been held to be sufficient, as has paying money to charities. Consulting an architect and trying to raise funds with which to build a church, as well as holding an election are additional examples.").

a promise to donate funds to a college.[40] The court concluded that "[i]n this instance the estate pledge was solicited by the college in a campaign for funds. It appeared the college did rely on [the promisee's] promise to pay, in order to meet the specified needs, and of course it did."[41] In Kentucky, during the 1940s, "three charitable-pledge opinions expressly approved and adopted Section 90 of the first *Restatement*."[42] The Maryland Court of Appeals, in the *Maryland National Bank v. United Jewish Appeal Federation* case, found that "the law of Maryland with regard to the enforcement of pledges or subscriptions to charitable organizations" was the general principle of promissory estoppel as articulated in the First Restatement of Contracts § 90, including "action or forbearance of a definite and substantial character on the part of the promisee."[43] The court relied on several prior Maryland decisions to reach that conclusion.[44] Thus the First Restatement's promissory estoppel provision represented a mechanism of enforcing charitable promises, even in the absence of consideration. It was adopted and applied in multiple jurisdictions.

The First Restatement's requirements for promissory estoppel, however, still posed a challenge to the broad enforcement of charitable promises. Namely, the mechanism of promissory estoppel did technically require a charitable donee to show that it had taken some sort of action or forbearance from action as a result of the promise that the donor had made. Moreover, according to the First Restatement, the reliance had to be of a "definite and substantial character" in order to support enforcement. As a practical matter, a charity might not be able to show that such substantial action or forbearance had in fact occurred, especially with respect to actions taken in response to a single charitable promise rather than with respect to the effect on the sum total of their charitable receipts.[45]

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[40] Sw. Coll. of Winfield v. Hawley, 62 P.2d 850, 851 (Kan. 1936).

[41] *Id.*

[42] Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 384 (1996) (citing Lake Bluff Orphanage v. Magill, 204 S.W.2d 224 (Ky. 1947); Transylvania Univ., Inc. v. Rees, 179 S.W.2d 890 (Ky. 1944); Floyd v. Christian Church Widows & Orphans Home, 176 S.W.2d 125 (Ky. 1943)). Of note, the *Floyd* court found that the charities had not shown reliance on the subscription, and thus declined to enforce the charitable pledge. *Floyd*, 176 S.W.2d at 131 ("[W]e do not feel that our holding that an actual, rather than an illusory consideration, or at least an estoppel of the promisor to object, is necessary to render a charitable subscription enforceable, is injurious to the public welfare.").

[43] Md. Nat'l Bank v. United Jewish Appeal Fed'n, Inc., 407 A.2d 1130, 1134 (Md. 1979).

[44] *Id.* (citing Gittings v. Mayhew, 6 Md. 113 (1854); Erdman v. Trs. Eutaw Methodist Protestant Church, 99 A. 793 (Md. 1917); Sterling v. Victor Cushwa & Sons, Inc., 183 A. 593 (Md. 1936); and Am. Univ. v. Collings, 59 A.2d 333 (Md. 1948)).

[45] Indeed, Knapp provides the following explanation for the Second Restatement's approach of "what is essentially a fictional test of reliance":

> [O]ur society depends on private charity to carry on many necessary activities that would otherwise have to be performed by the government or not at all; charitable organizations rely from year to year on the likely performance *in the aggregate* of the promises of support they

The text of the First Restatement contained no explicit exception from the requirement of reliance in the context of charitable subscriptions. Despite this, before the adoption of the Second Restatement, many courts effectively applied at least a partial exception by finding charitable subscriptions to be enforceable through promissory estoppel, even where the actual reliance shown was minimal or of debatable existence. For example, a scholarly commentary examining Illinois cases in the 1930s and earlier considered the case of *Wheeler*, in which an Illinois appellate court found reliance by way of the continued operation of a charity, since "the charity, had it known of the future default, might have husbanded its resources and curtailed its operations so as to have sufficient funds for future expenses."[46] As the commentary pointed out, "[t]he court in the *Wheeler* case . . . thus suggested that there should be an inference of reliance in favor of any going charity," and predicted that "[t]his seed . . . may be expected to develop . . . so that soon the inference of reliance might well become an almost conclusive presumption."[47] Courts in other jurisdictions also found that reliance was demonstrated based on the continued operation of charitable functions—perhaps not the sort of "definite and substantial" reliance required in other contexts.[48]

This approach of allowing for the enforcement of charitable promises in the near-absence of reliance, however, was by no means universal. Some courts did, in fact, choose to look for actual reliance to apply promissory estoppel, instead of inferring the presence of reliance or accepting a less definite or substantial sort of reliance.[49]

> receive, and incur substantial contractual and other obligations in reliance on those promises; therefore, the law should enforce *all* such promises, despite the difficulty of showing that any particular promise produced substantial reliance, or of arguing that injustice would result if that promise alone were to go unperformed.

Knapp, *supra* note 17, at 60–61.

[46] Lewis C. Murtaugh, Comment, *Charitable Subscriptions in Illinois*, 4 U. CHI. L. REV. 430, 435–36 (1937) (citing *In re* Wheeler's Estate, 1 N.E.2d 425, 431 (Ill. App. Ct. 1936)).

[47] *Id.* at 436.

[48] *See* Neb. Wesleyan Univ. v. Griswold's Estate (*In re* Griswold's Estate), 202 N.W. 609, 616 (Neb. 1925).

[49] For example, in *Floyd v. Christian Church Windows & Orphans Home*, the court did not reject "the application of the doctrine of promissory estoppel in any case where the facts disclosed by the pleadings and proof justify its application," but refused to apply it where such reliance was not actually shown. 176 S.W.2d 125, 130 (Ky. 1943). The court noted that despite "the desirability, from the standpoint of public policy, of holding all subscriptions to charities enforceable":

> [T]he inquiry arises, whether, after all, it is beneficial to society to confer upon an institution, no matter how worthy, the rights of a creditor, and the consequent power to compel one who has promised to donate to its cause, to fulfil his pledge, irrespective of how large a portion of a diminished or insolvent estate it might consume, and regardless of whether the institution has changed its position for the worse in reliance upon the subscription.

Id. at 131; *see also* Danby v. Osteopathic Hosp. Ass'n, 104 A.2d 903, 907 (Del. 1954) ("[T]here

Requiring reliance to be shown in order to enforce charitable promises by way of promissory estoppel also presented certain conceptual challenges. For example, one later (post-Second Restatement) commentator noted a circularity problem that arose in such instances:

> Whether a charity will rely on a formal subscription's legal enforceability depends entirely on whether the legal system enforces such promises. Charities are repeat players, and will learn the legal rule. If charitable subscriptions are legally enforced, charities will rely on them as such. If charitable subscriptions are not legally enforced, charities will not rely on them. Formal promises to charities should, therefore, either be enforced by their terms, because giving donors the ability to bind themselves by their promises to charities is desirable—or should remain unenforced, regardless of reliance.[50]

This conflict between the widely-accepted goal of enforcing charitable promises and the technical requirements of the promissory estoppel doctrine, as well as the judicial reality of courts often ignoring the technical requirements of the doctrine in favor of honoring the policy goal of enforcing charitable subscriptions, often led, in practice, to the enforcement of charitable pledges supported by some lesser amount of reliance than that required for other types of promises. Although many courts did not formally dispense with the reliance requirement in terms of the conceptual framework of § 90, they often essentially did so by dispensing with a robust reliance requirement.[51] As such, before the drafting of the Second Restatement, some commentators argued that "charitable subscriptions [should] be recognized as a special class of promises enforceable without consideration."[52] Similarly, some courts found "that consideration [was] not necessary and [allowed] the charity to recover on the ground of public policy."[53] Essentially, this was the approach that the Second Restatement would take, by eliminating the requirement of reliance for

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can be no doubting the general American rule that while a bare promise to a charity is at first revocable, it does not remain so after the charity, in reliance upon that promise, has put itself into a legal position from which it cannot be expected to extricate itself without substantial injury.").

[50] Mary E. Becker, *Promissory Estoppel Damages*, 16 HOFSTRA L. REV. 131, 136–37 (1987).

[51] *See* More Game Birds in Am., Inc. v. Boettger, 14 A.2d 778 (N.J. 1940). Although this case "was not tried upon the theory of a promissory estoppel," and was "tried on the theory that the subscription agreement constituted a legally binding obligation," this court articulated its policy position that charitable promises should, as a rule, be enforced. *Id.* at 781. As the court stated, "[n]ow it seems to us . . . that in principle the issue involved is necessarily of great concern to the public welfare. It is a question of public policy, public welfare. Such a sound policy indeed requires that one who, as defendant here, has voluntarily made a valid and binding subscription to a charity of his choice should not be permitted to evade it." *Id.* at 780–81.

[52] J. Arna Gregory Jr., Comment, *Contracts—Enforceability of Charitable Subscriptions in Kentucky*, 42 KY. L.J. 487, 492 (1953).

[53] Mullen, *supra* note 19, at 133 n.32 (citing Garrigus v. Home, Frontier & Foreign Missionary Soc'y, 28 N.E. 1009 (Ind. App. 1891); Hooker v. Wittenburg Coll., 13 Ohio Dec. Reprint 946 (Super. Ct. 1873); Caul v. Gibson, 3 Pa. 416 (1846)).

the enforcement of charitable subscriptions through promissory estoppel. However, as discussed later within this Article, the Second Restatement's approach of entirely discarding reliance as an independently required element has, to date, been explicitly adopted in only a few jurisdictions, unlike the earlier wider adoption of the First Restatement standard.

B. Restatement (Second) of Contracts Language

The Second Restatement of Contracts was begun in 1964 and completed in 1979.[54] Several tentative drafts were completed (including a second tentative draft, in 1965, that is mentioned in several cases described within this Article).[55] As part of the changes to the original Restatement, the general principle of promissory estoppel was set forth in § 90(1) and eliminated the requirement that the action or forbearance induced by the promise be of a definite and substantial character (although that remained a factor in determining whether injustice could be avoided only by enforcement of the promise). Further, promissory estoppel could be invoked on the basis of action or forbearance taken by a third party, in addition to the possibility of such action or forbearance being taken by the promisee.

In addition to the modifications to the general principle of promissory estoppel set out in § 90(1), § 90(2) was added to the Restatement.[56] Specifically, § 90(2) states: "A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance."[57]

The comments to the new § 90, however, indicate that reliance remains a relevant factor to determine whether enforcement of a promise is necessary to avoid injustice. This element of unavoidable injustice absent enforcement must still be shown in order to obtain a remedy by way of promissory estoppel, even in the context of charitable subscriptions where the independent reliance element has itself been eliminated.

Specifically, Comment *b* notes:

> *Character of reliance protected.* The principle of this Section is flexible. The promisor is affected only by reliance which he does or should foresee, and

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[54] Peter A. Alces & Chris Byrne, *Is It Time for the Restatement of Contracts,* Fourth*?*, 11 DUQ. BUS. L.J. 195, 195 (2009).

[55] John E. Murray, Jr., *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785, 786 n.6 (1968).

[56] Knapp discussed the history of the development of § 90(2), noting:

> Originally the principle expressed in § 90(2) was not stated in revised § 90 itself, but only in comment c thereto. . . . In the final version of the revised Restatement, that comment (redesignated 'f') is retained without substantial change, but the principle it advances has also been incorporated into the text of § 90.

Knapp, *supra* note 17, at 59 n.51.

[57] RESTATEMENT (SECOND) OF CONTRACTS § 90(2) (AM. L. INST. 1981).

> **enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought**, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant. . . . The force of particular factors varies in different types of cases: **thus reliance need not be of substantial character in charitable subscription cases**, but must in cases of firm offers and guaranties.[58]

Likewise, Comment *f* mentions the possibility that reliance can inform the availability of promissory estoppel, even if the reliance need not be of the same character in charitable subscription cases as is required in cases governed by § 90(1) rather than § 90(2). Namely, Comment *f* provides, in part, as follows:

> American courts have traditionally favored charitable subscriptions and marriage settlements, and have found consideration in many cases where the element of exchange was doubtful or nonexistent. **Where recovery is rested on reliance in such cases, a probability of reliance is enough**, and no effort is made to sort out mixed motives or to consider whether partial enforcement would be appropriate.[59]

Illustration 17 to Comment *f* discusses a charitable subscription case in which reliance is present and helps to make a promise binding through promissory estoppel.

> A orally promises to pay B, a university, $100,000 in five annual installments for the purposes of its fund-raising campaign then in progress. The promise is confirmed in writing by A's agent, and two annual installments are paid before A dies. **The continuance of the fund-raising campaign by B is sufficient reliance to make the promise binding on A and his estate.**[60]

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[58] *Id.* cmt. b (emphasis added).

[59] *Id.* cmt. f (emphasis added).

[60] *Id.* cmt. f., illus. 17 (emphasis added). Per the Reporter's Notes to the Second Restatement, Illustration 17 is based on *In re Estate of Field*, 172 N.Y.S.2d 740 (Sur. Ct. 1958). RESTATEMENT (SECOND) OF CONTRACTS § 90, at 250 (AM. L. INST. 1981). That court found that under Illinois law, reliance on a charitable subscription resulted in consideration and thus an enforceable contract. There was "ample undisputed evidence" that the hospital, "in reliance on such promise" of the decedent, "together with others, continued to proceed with the construction of a hospital pavilion at a cost of about $7,500,000, was obligated to pay the cost thereof, and that at the time of the decedent's death, this work was approximately twenty percent completed." *In re Estate of Field*, 172 N.Y.S.2d at 745.

Therefore, while the text of § 90(2) itself allows a charitable subscription to be binding "without proof that the promise induced action or forbearance," the relevant comments indicate that some modicum of reliance can at least be used by the court to weigh whether it would be unjust not to enforce the charitable subscription. The accompanying illustration does not clarify the issue, as it provides a description of a situation where reliance is present, and the discussion contains a conclusion that sufficient reliance justifies the enforcement of the promise. The comments and the illustration do not address how the injustice element may be fulfilled where reliance is absent but where the promise is made with a certain degree of formality; where the evidentiary, cautionary, deterrent, and channeling functions of form are met; or where other policies are relevant, such as the prevention of unjust enrichment. Nor do they clarify how a court should determine if the unavoidable injustice element is satisfied when reliance is absent and the presence of those other factors is weaker as well.

The wording of § 90(2) and the relevant comments and illustration thereby suggest that despite the elimination of reliance as a required element for charitable subscriptions enforced through promissory estoppel, reliance can nevertheless weigh in favor of the enforcement of charitable subscriptions where it can be demonstrated. Therefore, although reliance is no longer technically *required* to enforce charitable subscriptions by way of promissory estoppel, reliance is still *helpful* for enforcing such promises. As discussed later in this Article, at least one court has noted the difference in wording between the text of § 90(2) itself and that of these pertinent comments to conclude that reliance can play some role in a court's determination of whether to enforce a charitable provision by applying § 90(2). This Article suggests that this continued role of reliance, made possible by the Second Restatement through the comments to § 90(2), might lessen the motivation of various courts to eliminate the independent reliance requirement in the manner of § 90(2). The justification for eliminating that requirement is not as clear when reliance is still acknowledged in the Second Restatement as a useful factor in considering the availability of promissory estoppel to enforce charitable subscriptions.

C. Drafting and Later Interpretation of § 90(2)

The drafting history of § 90(2) and later scholarly interpretations of that subsection are both useful to understanding how the changes to the doctrine of promissory estoppel as applied to charitable subscriptions were intended to modify the role of reliance in that analysis. Accounts of the drafting history of § 90(2) indicate that those who proposed the revisions intended to dispense entirely with the requirement of reliance in this context. Scholarly interpretations of the text of § 90(2) for the most part also opine that the text of § 90(2) eliminates the need for reliance, notwithstanding the text of the relevant comments and illustration. However, at least some scholarly commentary focuses on the continued, though not strictly necessary, role of reliance in the enforcement of charitable promises through promissory

estoppel. Namely, these sources indicate that where reliance cannot be shown, a court might weigh other factors in deciding whether to enforce a charitable promise. These sources suggest that while enforcing a charitable subscription in the absence of reliance might be possible, enforcement might not be readily granted in the absence of reliance in the way that the drafters of the Second Restatement seemingly intended it to be.

1. Evidence Emphasizing that No Reliance Is Required to Enforce a Charitable Subscription

Much of the evidence describing the origins of § 90(2) emphasizes that its drafters intended charitable subscriptions to be binding even in the absence of reliance. Numerous scholarly interpretations agree, and indicate that such is the practical import of § 90(2).

Yorio and Thel provided the following account of the development of § 90(2), including the elimination of the "definite and substantial" requirement that had appeared in § 90 of the original Restatement:

> Braucher gave a second reason for dropping the requirements of definiteness and substantiality. Because courts often enforce marriage settlements and charitable subscriptions in the absence of definite and substantial reliance, it seemed necessary to drop those requirements. . . . After Braucher gave his reasons for dropping the words "definite and substantial," a member of the audience pointed out that in the contexts of marriage settlements, charitable subscriptions, and other gifts, courts often do not require any reliance whatsoever. He proposed, therefore, that Section 90 be revised to reflect the absence of a requirement of actual reliance in the cases. Braucher conceded that there was a "certain fictitious quality" about the reliance in the cases and thought the proposal "worth consideration."[61]

This account described how the reliance requirement was often satisfied through essentially fictitious means.

According to Farnsworth, in connection with the drafting of the Second Restatement:

> Professor T.C. Billig of Cornell suggested in criticism of section 90 [of the First Restatement] that a charitable subscription should be binding without consideration or reliance if evidenced by a signed writing. His suggestion is accepted and carried a step further in *Restatement (Second)* section 90(2), which states that a charitable subscription is binding without consideration or reliance, even in the absence of a signed writing.[62]

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[61] Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 127–29 (1991) (citing Robert Braucher, *Continuation of Discussion of the Restatement of the Law, Second, Contracts*, 42 A.L.I. PROC. 273, 289, 297–98 (1965)).

[62] E. Allan Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts,

Scholarly examinations of § 90(2) have also discussed how the text of that provision departs from the traditional doctrine of promissory estoppel as applied to non-charitable cases. Namely, such scholars have focused on the fact that § 90(2) does not require any element of reliance to be shown in order for a charitable subscription to be considered binding. Thus, the effect of § 90(2) appears to at least greatly diminish the role of reliance in determining whether charitable promises should be enforced, and perhaps to eliminate the role of reliance entirely in these types of cases.

Farnsworth emphasized § 90(2)'s elimination of the reliance requirement, noting that § 90(2) "dispenses with any requirement of reliance in the case of charitable subscriptions."[63] Farnsworth noted that "[i]n contrast to the law during the heyday of the seal, the rule for charitable subscriptions does not require a formality to serve a cautionary function."[64] He also noted that whereas the enforcement of promises interpreted under the general doctrine of promissory estoppel in non-charitable cases is limited by "the magnitude of the moral obligation or the extent of the reliance," no such limit exists with respect to the enforcement of charitable subscriptions.[65] Farnsworth thus considered the effect of § 90(2) to allow charitable subscriptions to be freely enforced even in the absence of reliance.

Likewise, Brody commented that "section 90 of the Restatement (Second) of Contracts provides that all charitable subscriptions are enforceable, without any required showing of detrimental reliance."[66] Barnett and Becker similarly noted that "Iowa and the Restatement (Second) of Contracts have dispensed entirely with the requirement of reliance."[67] Murray also noted that § 90(2) does not require any showing of reliance, and discussed the public policy justifications for the elimination of reliance in the enforcement of charitable promises:

> [T]he high values of predictability and certainty long ago suggested the desirability of a candid recognition that [charitable subscription] promises, though typically gratuitous, should be enforceable simply because the institutions such as charities, schools and the institution of marriage are socially useful and desirable and the promises made to benefit and help perpetuate them should be enforced. The Restatement 2d has adopted this candid approach by recognizing charitable subscription . . . promises to be enforceable though there is no evidence that they induced any action or forbearance (much less

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81 COLUM. L. REV. 1, 2 (1981) (discussing Billig, *supra* note 23, at 480–81).

[63] E. Allan Farnsworth, *Promises and Paternalism*, 41 WM. & MARY L. REV. 385, 403 (2000).

[64] *Id.* at 404.

[65] *Id.*

[66] Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 513 (2005).

[67] Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 452 (1987).

> bargained-for action or forbearance) on the part of the promisee. They are enforced simply because it is desirable, as a matter of public policy, to enforce them.[68]

Other scholarly commentary has focused on the same capacity of § 90(2) to allow for the enforcement of a charitable subscription in the absence of reliance. *Corbin on Contracts* stated that the Second Restatement provides that "charitable subscriptions . . . are binding without proof of reliance."[69] Barnett and Becker stated that such enforcement "is understandable on contract grounds even though there may have been no real reliance . . . provided that the wording, signing, and delivery of the formal document indicates that the signor intended to assume a legal obligation," and given "the enforcement of promises to charities as sound public policy"; as such, "the case for enforcement is strong even in the absence of any real detrimental reliance by the promisee."[70]

Likewise, Ferriell noted that some courts "have taken Restatement (Second) § 90 up on its suggestion that charitable pledges should be enforced without regard to whether there is consideration or reliance."[71] American Law Reports, much like all of these other sources, stated that "in recent years, the Restatement (2d) of Contracts has embraced the idea that no consideration or substitute therefor should be required for the enforceability of an otherwise valid charitable pledge or subscription."[72]

Thus both the drafting history and later commentary regarding § 90(2) focus on the intent and effect of § 90(2) to eliminate the reliance requirement for charitable subscriptions enforced through promissory estoppel. While the text of the comments to § 90(2) indicates that reliance can remain relevant to the analysis, the focus of the drafting history and most scholarly commentary indicates that the primary purpose of § 90(2) was to allow for the enforcement of charitable subscriptions without the need for a showing of reliance. Indeed, as these sources indicate, § 90(2) was adopted to make this change and conform the text of the Restatement to the reality of those cases that had allowed for the enforcement of such promises where reliance was doubtful or even fictitious.

2. Evidence that Some Reliance Might Be Preferred in Enforcing Charitable Subscriptions by Way of Promissory Estoppel

Thus, the seemingly near-universal view, according to these sources, is that the

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[68] JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 63 (5th ed. 2011).

[69] 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.10, at 150–51 (Joseph M. Perillo ed., rev. ed. 1996).

[70] Barnett & Becker, *supra* note 67, at 453.

[71] JEFFREY FERRIELL, UNDERSTANDING CONTRACTS, § 3.03[E] (4th ed. 2018).

[72] Russell G. Donaldson, *Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription—Modern Cases*, 86 A.L.R.4TH 241, § 2a (1991).

intended purpose and resulting effect of § 90(2) is to eliminate the role of reliance entirely from the enforcement analysis. At least some scholarly commentary, however, discusses how the continued mention of reliance within the comments of § 90(2) allows for reliance to remain relevant. Most notably, Knapp discussed both the text of the § 90(2) provision itself and also the role that Comment *f* plays in the interpretation and effect of that subsection.

Namely, with respect to the effect of the text of § 90(2) and Comment *f* together, Knapp stated that "[t]o maximize the enforceability of charitable subscriptions, the *Restatement* proposes what is essentially a fictional test of reliance—the mere 'probability' of reliance will suffice, and no proof of actual action or forbearance will be demanded as a predicate to enforcement."[73] Further, these provisions, as phrased, "suggest that enforcement of charitable-donation promises should be easy to obtain in most cases."[74] Thus, in almost all instances, the application of § 90(2), according to Knapp's analysis, would have the same effect as interpreting § 90(2) to eliminate a requirement of reliance for the enforcement of charitable subscriptions. As Knapp noted, a probability of reliance "should be easy to obtain in most cases."[75] Indeed, the body of cases issued pre-Second Restatement indicated that courts would not be hesitant to find some sort of reliance in the type of action or forbearance that might be insufficient to support promissory estoppel in other contexts, such as through the continued operation of an organization.

Knapp thus suggested that a probability of reliance, without any proof of actual action or forbearance taken on the part of the charity, would be readily found by courts in most instances and would suffice to allow enforcement of a charitable subscription. However, he did raise the possibility that, at least in some instances, reliance would not actually exist and could not be inferred even from a tenuous connection to evidence of reliance. He stated that "the fiction of reliance suggests that charitable promises should be cautiously enforced."[76] He suggested also that where reliance cannot be shown, "it may be entirely appropriate for a court to place somewhat greater weight on other factors specified in comment b to section 90," which "might be achieved by insisting on either a writing or other credible evidence to show the genuineness and the deliberateness of the promise in question."[77]

Knapp's analysis, and specifically his admonition that "charitable promises should be cautiously enforced," does not foreclose the possibility that a court might choose to decline to enforce a charitable subscription where a probability of reliance cannot be established, and where the court decides that the other relevant factors—such as the evidentiary, cautionary, deterrent, and channeling functions—do not

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[73] Knapp, *supra* note 17, at 60 (1981).

[74] *Id.* at 61.

[75] *Id.*

[76] *Id.*

[77] *Id.*

warrant enforcement of the charitable subscription. Whereas the text of § 90(2) itself sets forward a clear directive, Knapp's examination of the role of reliance undercuts that clear directive and leaves open the possibility that a court might purport to apply the rule set forth in § 90(2) and still decline to enforce a charitable subscription based at least in part on the absence of a showing of reliance.

Powers also noted that the relevant comments to § 90 suggest a continued role for reliance in the context of § 90(2) (although somewhat modified from the traditional doctrine of promissory estoppel articulated in the First Restatement).[78] Powers pointed out that although the Second Restatement § 90(2) "states that the reliance is suspended" in cases involving charitable subscriptions or marriage settlements, "the two on-point illustrations indicate scenarios in which the requirement is in fact *met*."[79] Powers concluded that "[t]he implication, then, is not so much that it is the reliance that is unnecessary, but the *proof* of the reliance."[80] In a footnote, Powers quoted Comment *f*'s statement that "'a probability of reliance is enough' for application of the rule," and concluded that this phrase "essentially creat[es] a presumption when the probability is high."[81]

Thus, Knapp and Powers both suggested that in some cases, the enforcement of charitable promises in the absence of at least some sort of reliance is not or should not be always automatically granted by courts. Knapp suggested that where reliance cannot be found, courts should look to the other factors contained within Comment *b* to § 90 to justify enforcement of the charitable promise. Powers suggested that the effect of § 90(2) is not to dispense with the necessity of reliance altogether, but instead with the proof of that reliance. These discussions indicate that perhaps even if a court chooses to adopt the approach of § 90(2), there might still be some continued role for reliance to be considered as a factor in deciding whether to enforce a charitable subscription.

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[78] Jean Fleming Powers, *Promissory Estoppel and Wagging the Dog*, 59 ARK. L. REV. 841, 867–70 (2007).

[79] *Id.* at 868.

[80] *Id.*

[81] *Id.* at 868 n.150. Powers moreover concluded that "consideration can generally be found in charitable subscription cases," and notes that "one might question the reluctance to find an enforceable agreement and the need for a special rule." *Id.* at 869–70. She stated that "[l]ikely, the donative aspect of charitable subscriptions creates a reflexive concern that consideration must be lacking, and thus a substitute must be found," a concern which she finds to be "misplaced, and likely borne out of an unwarranted preoccupation with the motive behind the bargain." *Id.* at 870.

II. TREATMENT BY COURTS OF CHARITABLE SUBSCRIPTIONS AND PROMISSORY ESTOPPEL

This Part examines how and whether, since the issuance of the Second Restatement, courts have either chosen to reject or adopt the rule enunciated in § 90(2) that no reliance is required for the enforcement of charitable subscriptions on the basis of promissory estoppel. This Part also examines how the courts that have chosen to adopt the reasoning of § 90(2) have applied that rule, especially with respect to the role of reliance in the analysis. As Farnsworth noted, "[t]he exception for charitable subscriptions has played to mixed reviews," which is in fact a generous characterization of the extent of acceptance of § 90(2) across jurisdictions.[82] Brody has commented that "the position enunciated" in § 90(2) "that charitable subscriptions are enforceable without proof of consideration or reliance may be the more enlightened view, as de facto recognition of courts' creative efforts to find such promises binding, but at present it remains a minority view."[83] Indeed, Murray noted that the Second Restatement's comment that "a probability of reliance is enough" for enforcement of charitable subscriptions is a view that "has yet to be generally accepted as courts continue to insist upon a definite showing of reliance by charities."[84] Section 90(2), while articulated in the Second Restatement and intended to align with the judicial reality of courts using creative or fictitious reliance to enforce charitable subscriptions by way of promissory estoppel, has not in fact achieved its intended purpose of allowing courts to rely on the Second Restatement formulation of law and dispense altogether with the need for reliance.

To illuminate the continued role of reliance in the enforcement of charitable subscriptions, this Part considers how courts that have explicitly considered this issue and maintained the requirement for some evidence of reliance have explained their reasoning. It also explores their concerns about allowing charitable promises to be enforced through promissory estoppel without any showing of reliance. This Part contrasts with these jurisdictions those few courts that have explicitly adopted § 90(2), and examines why they have chosen to do so. In doing so, this Part seeks to clarify why reliance is still considered of key importance by many courts in enforcing charitable subscriptions by way of promissory estoppel.

A. Courts Adopting § 90(2) Without a Reliance Requirement, or Otherwise Eliminating Any Showing of Reliance Necessary to Justify Enforcement

Relatively few courts have explicitly adopted the Second Restatement's § 90(2)

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[82] Farnsworth, *supra* note 63, at 404.

[83] Brody, *supra* note 66, at 514.

[84] JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 67[A][4] (5th ed. 2011) (citing RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. f (AM. L. INST. 1981)).

or the stated approach of its text allowing for the enforcement of charitable subscriptions through promissory estoppel in the absence of reliance. One of those courts was the Iowa Supreme Court, which was an early adopter of § 90(2); it viewed that provision as entirely eliminating the need for a showing of reliance in the context of charitable subscriptions. The Iowa Supreme Court first approved of the new promissory estoppel principle for charitable subscriptions in *Salsbury v. Northwestern Bell Telephone Company,* in which it examined the tentative draft of the Second Restatement's § 90. The court found that "public policy supports [the] view" set out in that draft provision, namely, that "[i]t is more logical to bind charitable subscriptions without requiring a showing of consideration or detrimental reliance."[85] The Iowa Supreme Court later reiterated its approval and this characterization of the Second Restatement rule in *P.H.C.C.C., Inc. v. Johnson*. In that case, the court stated that in *Salsbury*, it had "opted to follow the rule now stated in Restatement (Second) of Contracts, section 90(2) (1979) that charitable subscriptions are binding without proof of action or forbearance."[86] Applying that rule to the *P.H.C.C.C.* case at hand, the court found that the promise at issue did "contain strong evidence of reliance on the part of the grantee of the subscription," but that such reliance was "not necessary under the standard adopted in *Salsbury*."[87] The Iowa Supreme Court therefore focused on the plain text of § 90(2), rather than the effect of the comments to that section discussing reliance, to interpret that provision and apply that meaning to these cases under its consideration.

Likewise, a New Jersey Superior Court in *Jewish Federation of Central New Jersey v. Barondess* also espoused the view that reliance was not a necessary element to finding a charitable subscription to be binding. The court did not directly characterize the language of § 90(2) as having no reliance requirement. It referenced § 90 only generally for the provision that "a charitable pledge constitutes an enforceable contract" and the section's Comment *f* that "American courts have traditionally favored charitable subscriptions . . . and have found consideration in many cases where the element of exchange was doubtful or non-existent."[88] Instead, the court noted the public policy reasons for enforcing a charitable subscription in the absence of reliance, commenting that "[r]eliance is . . . a questionable basis for enforcing a charitable subscription. That is because, in reality, a charity does not rely on a particular subscription when planning its undertakings." Moreover, the court went on, "[t]he real basis for enforcing a charitable subscription is one of public policy—that enforcement of a charitable subscription is a desirable social goal. The New Jersey

[85] Salsbury v. Nw. Bell Tel. Co., 221 N.W.2d 609, 613 (Iowa 1974).

[86] P.H.C.C.C., Inc. v. Johnston, 340 N.W.2d 774, 776 (Iowa 1983) (citing *Salsbury,* 221 N.W.2d at 613).

[87] *Id.*

[88] Jewish Fed'n. of Cent. N.J. v. Barondess, 560 A.2d 1353, 1353–54 (N.J. Super Ct. Law Div. 1989).

Supreme Court has in fact recognized public policy as the rationale of enforcement of charitable subscriptions."[89] The court also cited Calamari and Perillo for a description of what the court characterized as "the wobbly underpinnings of the reliance concept."[90] The court therefore declined to apply the Statute of Frauds as a defense to the enforceability of a charitable pledge (since "[t]he purpose of the Statute of Frauds is to prevent the enforcement of unfounded or fraudulent claims," "[i]t would be absurd therefore to permit the Statute of Frauds to be used as a defense to an admitted charitable pledge which the Court has only characterized as a contract in order to insure that it is enforced").[91]

The various Iowa cases, and the *Jewish Federation of Central New Jersey* case, are therefore among the few jurisdictions to have either explicitly adopted the approach of the text of § 90(2) or to have strongly indicated that they dispense with the need for reliance to justify the enforcement of charitable subscriptions by way of promissory estoppel. As discussed within the next section of this Article, many other courts take a different approach and continue to require a showing of some sort of reliance in order to enforce charitable promises.[92]

B. Courts Rejecting § 90(2) and Characterizing § 90(2) as Requiring No Reliance for the Enforcement of Charitable Subscriptions

Many courts continue to apply a common standard that existed prior to the adoption of the Second Restatement with respect to the enforcement of charitable subscriptions pursuant to the doctrine of promissory estoppel: namely, that some evidence of reliance is required for the enforcement of such promises, even if in practical application that standard of reliance is less than that required in other contexts. In some instances, these courts choose to do so because they identify § 90(2) as setting forth a no-reliance standard for charitable subscriptions, and explicitly choose to reject that principle and require a showing of reliance under the law of their own jurisdiction. Thus, although these courts decline to adopt § 90(2), they characterize that rule much as broad scholarly opinion has done: as eliminating the need for a showing of reliance to enforce charitable subscriptions through promissory estoppel.

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[89] *Id.* at 1354 (citing More Game Birds in Am., Inc. v. Boettger, 14 A.2d 778, 780 (N.J. 1940)).

[90] *Id.* (citing CALAMARI & PERILLO, *supra* note 16, at 208–09).

[91] *Id.* at 1354–55.

[92] *See, e.g.*, Nat'l Fed'n of Republican Assemblies v. U.S., 218 F. Supp. 2d 1300, 1319–20 (S.D. Ala. 2002), *vacated sub nom*, Mobile Republican Assembly v. United States, 353 F.3d 1357 (11th Cir. 2003) ("Even in the context of charitable contributions, as to which the public policy of upholding pledges is at its zenith, most jurisdictions require consideration or detrimental reliance in order to render them enforceable.").

One case representative of this category was *Arrowsmith v. Mercantile-Safe Deposit & Trust Co.*, decided by the Maryland Court of Appeals.[93] In *Arrowsmith*, a principal issue considered by the court was whether "Maryland law [should] be changed to recognize pledges to make charitable contributions as enforceable contracts where there is no consideration, including estoppel."[94] The children of a decedent argued that "this case presents an appropriate vehicle for changing the Maryland law of contracts by holding that pledges to contribute to charity are per se enforceable."[95]

In considering this question, the *Arrowsmith* court noted that in 1979, the Maryland Court of Appeals had previously decided the case of *Maryland National Bank v. United Jewish Appeal Federation,* which "concluded that Maryland law required at least reliance under the rule set out in § 90 of the Restatement of Contracts (1932)."[96] The *United Jewish Appeal* court reached this conclusion, notwithstanding its consideration of Tentative Draft No. 2 (1965) of the Second Restatement, including Comment *c* to § 90, which contained language noting that courts found consideration in the context of charitable subscriptions where the element of exchange was doubtful or nonexistent.[97] Thus, according to the *Arrowsmith* court, the *United Jewish Appeal* court had "fully recognized that some courts, on a pure public policy basis, enforced charitable subscriptions, but this Court would not carve out an exception to the established law of contracts in order to give a privileged position to promises made to charities."[98] The *Arrowsmith* court stated that this—essentially, the elimination of the reliance requirement—"is what Restatement (Second) of Contracts § 90(2) does."[99]

Ultimately, the Maryland Court of Appeals found that *Arrowsmith* was an inappropriate vehicle to enact a change in the law as articulated in *United Jewish Appeal*, given that the real adversary in the case (the IRS) was a nonparty to the suit.[100] The court declined to change the existing law and eliminate the requirement of reliance for the enforcement of charitable subscriptions by way of promissory estoppel.[101] The *Arrowsmith* court specifically articulated its interpretation of § 90(2) as eliminating the reliance requirement for the enforcement of charitable subscriptions, focusing on the modification to the promissory estoppel doctrine described

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[93] Arrowsmith v. Mercantile-Safe Deposit & Tr. Co., 545 A.2d 674 (Md. 1988).

[94] *Id.* at 675.

[95] *Id.* at 677.

[96] *Id.* at 684.

[97] Md. Nat'l Bank v. United Jewish Appeal Fed'n, Inc., 407 A.2d 1130, 1136–37 (Md. 1979).

[98] *Arrowsmith*, 545 A.2d at 685.

[99] *Id.*

[100] *Id.* at 684.

[101] *Id.* at 685.

in the text of § 90(2) instead of considering any continued role of reliance possible through the language of the related comments. The *Arrowsmith* court chose to reject that no-reliance approach and continue to require the element of reliance for charitable subscriptions enforced by way of promissory estoppel.

C. Courts Declining to Adopt § 90(2) but Suggesting that § 90(2) Allows for Some Continued Role of Reliance in the Enforcement of Charitable Subscriptions

Some courts, unlike those discussed in previous sections of this Article, have suggested that § 90(2) does not entirely eliminate the role of reliance with respect to charitable promises enforced by way of promissory estoppel. While these courts refuse to eliminate a requirement of reliance, they do not do so by characterizing such a rule as in opposition to the text of § 90(2). Instead, they discuss the way reliance still plays a role in § 90(2) through the required element of unavoidable injustice absent enforcement of the relevant promise.

Like Maryland, Massachusetts has rejected eliminating the requirement of reliance for the enforcement of charitable subscriptions by way of promissory estoppel. However, unlike Maryland, Massachusetts has done so while indicating that § 90(2) itself might still allow for some continued role of reliance in the enforcement of charitable subscriptions. For example, in the case of *Congregation Kadimah Toras-Moshe v. DeLeo*, the Massachusetts Supreme Judicial Court considered an action filed by a synagogue to compel the enforcement of an oral promise by the estate of a decedent.[102] The court found that the synagogue's allocation of funds in its budget for the purpose of renovating a storage room did not constitute reliance.[103] Specifically, the court found that "[t]he inclusion of the promised $25,000 in the budget, by itself, merely reduced to writing the Congregation's expectation that it would have additional funds. A hope or expectation, even though well founded, is not equivalent to legal detriment or reliance."[104] The court therefore insisted on some real presence of reliance, rather than a legal fiction, if the element of reliance were to be satisfied.[105]

Of particular note, the *Congregation Kadimah Toras-Moshe* court also discussed

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[102] Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691 (Mass. 1989).

[103] *Id.*

[104] *Id.* at 693.

[105] *Id.* The court also distinguished the facts of the case at hand from other cases in which the promises at issue were written, rather than oral, and "also involved substantial consideration or reliance." *Id.* These included *Trustees of Amherst Academy v. Cowls*, 23 Mass. (6 Pick.) 427, 434 (1828) and *Trustees of Farmington Academy v. Allen*, 14 Mass. (13 Tyng) 172, 176 (1817). The court also cited an early case where it had "refused to enforce a promise in favor of a charity where there was no showing of any consideration or reliance." *Congregation Kadimah Toras-Moshe*, 540 N.E.2d at 693 (citing Cottage St. Methodist Episcopal Church v. Kendall, 121 Mass. 528 (1877)).

the Second Restatement's § 90(2), questioning the view that this provision would entirely eliminate the role of reliance in the enforcement of charitable subscriptions by way of promissory estoppel were it to be adopted by Massachusetts.[106] The court stated that "[a]lthough § 90 dispenses with the absolute requirement of consideration or reliance, the official comments illustrate that these are relevant considerations."[107] The court concluded that as "[t]he promise to the Congregation [was] entirely unsupported by consideration and reliance," and because "it is an oral promise sought to be enforced against an estate," "[t]o enforce such a promise would be against public policy."[108] The court therefore concluded that "in this case there [was] no injustice in declining to enforce the decedent's promise."[109] The court thus indicated that the language of the comments to § 90 provided for a continued role of reliance with respect to the factor of unavoidable injustice absent enforcement.

In *King v. Trustees of Boston University*, the Massachusetts Supreme Judicial Court again declined to adopt § 90(2).[110] Also, as in *Congregation Kadimah Toras-Moshe*, the court considered how reliance, although eliminated as an independent requirement within § 90(2), still played a role in the enforcement analysis through the element of unavoidable injustice. In *King,* the court considered the enforceability of a statement by Dr. Martin Luther King, Jr., as it related to the disposition of certain of his papers, and whether that statement constituted a promise to make a gift to Boston University that could be enforced.[111] The court concluded that there was sufficient evidence of donative intent to submit the question to the jury of whether a promise had been made to transfer ownership of the papers to the university.[112] The court then considered the issue of whether it had been properly submitted to the jury to decide whether the promise was enforceable by way of consideration or reliance.[113] The court noted that "[t]o enforce a charitable subscription or a charitable pledge in Massachusetts, a party must establish that there was a promise to give some property to a charitable institution and that the promise was supported by consideration or reliance," and cited the case of *Congregation Kadimah Toras-Moshe* for support.[114]

In a footnote, the court specifically noted that it "declined to adopt the standard for enforceable charitable subscriptions set forth in the Restatement (Second) of

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[106] *Congregation Kadimah Toras-Moshe*, 540 N.E.2d at 693.

[107] *Id.*

[108] *Id.* at 693–94.

[109] *Id.* at 693.

[110] King v. Trs. of Bos. Univ., 647 N.E.2d 1196, 1199–1200 (Mass. 1995).

[111] *Id.* at 1199.

[112] *Id.* at 1202.

[113] *Id.* at 1203.

[114] *Id.* at 1199 (citing Congregation Kadimah Toras-Moshe v. DeLeo, 540 N.E.2d 691 (Mass. 1989)).

Contracts § 90 (1981)."[115] The court also stated that "although § 90 . . . dispenses with a strict requirement of consideration or reasonable reliance for a charitable subscription to be enforceable, the official comments to the Restatement make clear that consideration and reliance remain relevant to whether the promise must be enforced to avoid injustice."[116] Thus, while the court declined to eliminate the independent reliance element, the court did so while noting that reliance still remained a relevant part of the § 90(2) analysis with respect to the enforcement of charitable promises. The Massachusetts Supreme Judicial Court therefore, in both *King* and *Congregation Kadimah Toras-Moshe*, interpreted the effect of § 90(2) on the role of reliance in somewhat of a different manner than did the courts described in the previous section of this Article. Namely, instead of making a blanket assertion that § 90(2) acted to abolish the requirement of reliance in cases involving charitable subscriptions enforced by promissory estoppel, the Massachusetts Supreme Judicial Court noted the continued importance of reliance in the enforcement analysis, albeit through the element of preventing injustice through enforcement of the promise.[117]

This view has not always been uniformly articulated in Massachusetts jurisprudence. A Massachusetts bankruptcy court in an earlier case (*In re Morton Shoe Co.*) did not have the binding precedent in place or the reasoning available of these Supreme Judicial Court opinions when it was decided. Therefore, instead of discussing the continued role of reliance, the *In re Morton Shoe Co.* court took a more common view of § 90(2) as articulated in other jurisdictions when it noted simply that § 90 "provides that a charitable subscription is enforceable without proof of reliance."[118] The court discussed the policy reasons that would justify the wholesale elimination of the role of reliance in the enforcement analysis. Specifically, the *In re Morton Shoe Co.* court noted that it might "be more expeditious and appropriate to eliminate the technical requirements and simply enforce pledges as a desirable social policy," and as such "the Restatement position is an improvement over the current need to satisfy the technical requirement."[119] Ultimately, however, the difference between the *In*

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[115] *Id.* at 1199 n.4.

[116] *Id.*

[117] A federal district court in Massachusetts has commented that, based on its interpretation of the *King* decision, "a *different* (rather than lower) standard should be applied, acknowledging the unique circumstances presented by charitable subscriptions versus traditional contracts and analyzing consideration and reliance issues in light of those circumstances." Mass. Eye & Ear Infirmary v. Eugene B. Casey Found., 417 F. Supp. 2d 192, 196–97 (D. Mass. 2006). That court went on to note, however, that "the case law in Massachusetts is neither clear nor particularly developed with respect to what constitutes reliance in the context of a charitable contribution." *Id.* at 197.

[118] *In re* Morton Shoe Co., Inc., 40 B.R. 948, 950–51 (Bankr. D. Mass. 1984).

[119] *Id.*

re Morton Shoe Co. court and the later Massachusetts Supreme Judicial Court commentary about the continued role of reliance with respect to the enforcement of charitable subscriptions made no practical difference in the outcome of the *In re Morton Shoe Co.* case itself. First, the bankruptcy court noted that Massachusetts had not adopted § 90(2) as the applicable law within that jurisdiction, and Massachusetts law instead followed the older approach of requiring a charitable subscription to be enforceable only in the presence of consideration or reliance. Moreover, the bankruptcy court found that "sufficient consideration to support the promise" existed, and also that the promisee "substantially relie[d] on the amount of pledged subscriptions in developing operating budgets, in making commitments to beneficiaries, and in borrowing funds to make payments to recipients."[120] The court therefore allowed the enforcement of the charitable subscription.

The Massachusetts Supreme Judicial Court is not the only court that has noted that the comments to § 90 still allow reliance to play a role in a court's determination of whether a charitable subscription should be enforced by way of promissory estoppel. In *In re Bashas' Inc.*, an Arizona bankruptcy court considered the enforceability of the full amount of a charitable pledge made by debtors prior to their declaring bankruptcy. [121] The pledge was for $250,000, to be made in ten annual $25,000 payments, to a capital campaign fund drive to support the expansion and renovation of a medical campus and the construction of a new neuroscience institute.[122] According to the court, the debtor's letter making the pledge "did not state a specific use of the funds."[123] The debtors paid $40,000 towards their promised pledge before filing for bankruptcy.[124] The charity argued that it had relied on the debtors' pledge to construct a tower, but the court rejected that argument as "not credible," since the tower had already been built at the time the case was considered and "[d]ebtors have only contributed a fraction of their pledged amount."[125] The charity further argued that the debtors' pledge should be enforced even in the absence of reliance.[126] Like the Massachusetts Supreme Judicial Court in *King*, the Arizona bankruptcy court noted the language of Comment *f* to § 90 in attempting to articulate the extent of reliance required under § 90(2).[127] The court in *In re Bashas' Inc.* declined to dispense with the requirement of reliance in the context of

[120] *Id.* at 951.

[121] *In re* Bashas' Inc., Nos. 2:09-BK-16050-JMM, 2:09-bk-16051-JMM, 2:09-bk-16052-JMM, 2011 Bankr. LEXIS 5510, at *3 (Bankr. D. Ariz. Sept. 29, 2011) *aff'd sub nom.* St. Joseph's Found. v. Bashas' Inc., 468 B.R. 381 (D. Ariz., Mar. 27, 2012).

[122] *Id.*

[123] *Id.*

[124] *Id.* at *3–4.

[125] *Id.* at *6–7.

[126] *Id.* at *7.

[127] *Id.*

charitable subscriptions in the absence of guidance from an Arizona state court or the Ninth Circuit Court of Appeals doing so.[128]

In the district court opinion that followed, the court found that although "subsection 2 dispenses with subsection 1's requirement of reliance, the element of injustice still must be satisfied."[129] The court found that the "[a]ppellants have not shown that injustice can only be avoided by enforcement of this promise" as appellants' "existence was not threatened because the pledge was not paid, nor did they enter into binding contracts or suffer liabilities in reliance on the pledge."[130] Moreover, "[t]here [was] no evidence that other donors made pledges in consideration of the debtors' promise."[131] *Corbin on Contracts* provided commentary on this district court case, noting that "[i]n addition to the requirement of injustice that remains in subsection (2), the court may have also mentioned comment f to § 90 indicating that proof of actual reliance is not required if there is a probability of reliance. Apparently, no such probability of reliance existed herein."[132]

These courts suggest that the effect of § 90(2), when considered in connection with its relevant comments and illustration, is not entirely to eliminate the role of reliance in the enforcement analysis for charitable subscriptions. These opinions, when juxtaposed with the cases discussed previously in this Article, suggest that the precise role of reliance relevant to § 90(2) remains somewhat unclear. These cases as a whole therefore indicate that § 90 might be revised in the Restatement to further clarify this issue of reliance.

D. Courts Not Reaching a Conclusion as to the Intended Effect of § 90(2)

Finally, some other courts still continue to require the presence of at least some reliance for charitable subscriptions enforced by way of promissory estoppel. The opinions described in this Section do not reach a definitive conclusion as to the intended effect of § 90(2) on the part of the drafters of the Second Restatement, but they indicate that reliance still plays some kind of role in the enforcement analysis.

Namely, a Florida Court of Appeals, like the Maryland and Massachusetts courts described in the previous section, indicated that the enforcement of charitable subscriptions by way of promissory estoppel still requires a showing of reliance.[133] Unlike those other cases, however, the Florida court did not directly address the enactment of § 90(2). In *Friends of Lubavitch/Landow Yeshiva v. Northern Trust*

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[128] *Id.* at *8–9.

[129] St. Joseph Found. v. Bashas' Inc., 468 B.R. 381, 384 (D. Ariz. 2012).

[130] *Id.*

[131] *Id.*

[132] 3 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 8.10(4) (Joseph M. Perillo ed., rev. ed. 2021).

[133] Friends of Lubavitch/Landow Yeshivah v. N. Tr. Bank, 685 So. 2d 951, 952–53 (Fla. Dist. Ct. App. 1996).

Bank, a charity filed a complaint against the personal representative of the estate of the deceased promisee, seeking to enforce the remainder of a charitable subscription that had been orally promised.[134] The court limited its review of the case to the appealable issue of venue and considered the elements of promissory estoppel to determine where the cause of action had accrued.[135] In discussing the elements of promissory estoppel, the court quoted the text of the Second Restatement's § 90(1), instead of the text of § 90(2) that would on its face be more applicable to the context of a charity seeking to enforce a charitable promise.[136] The court also cited an earlier Florida Supreme Court case that had found that "the donee must affirmatively show actual reliance of a substantial character in furtherance of the specified purpose set forth in the pledge instrument" before the charitable pledge would be considered binding.[137] In addition, the Florida Court of Appeals quoted the earlier case's excerpt from *Williston on Contracts* that "[t]he view most commonly held is that such a subscription is an offer to contract which becomes binding as soon as the work towards which the subscription was promised has been done or begun, or liability incurred in regard to such work on the faith of the subscription."[138] The Florida Court of Appeals, then, did not acknowledge the existence of § 90(2), and described promissory estoppel as requiring an independent reliance requirement even in the charitable context.

In a 2004 case, a New York court also noted the presence of reliance when it chose to enforce dues owed to a temple by members of its congregation.[139] This court made no pronouncement as whether § 90(2) was the operative legal standard within its jurisdiction, or what the intended meaning of § 90(2) in fact was. Instead, the court cited a 1965 case describing the trend "toward the enforcement of charitable pledges almost as a matter of public policy."[140] The 2004 court also described that "[i]n an effort to free charitable pledges or subscriptions from the traditional requirement that an enforceable promise must be supported by consideration," New York courts variously chose to enforce such promises by way of bilateral or unilateral contract, or promissory estoppel.[141] The court noted that the "charity entered into contracts and incurred liability in reliance upon the pledge made by this decedent

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[134] *Id.* at 952.

[135] *Id.*

[136] *Id.*

[137] *Id.* (citing Mt. Sinai Hosp. of Greater Mia., Inc. v. Jordan, 290 So.2d 484, 485 (Fla. 1974)). Quotation from *Mt. Sinai Hospital*, 290 So.2d at 487.

[138] *Friends of Lubavitch/Landow Yeshivah*, 685 So.2d at 952 (quoting 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 116, at 250–51 (1st ed. 1920)).

[139] Temple Beth AM v. Tanenbaum, 789 N.Y.S.2d 658 (Dist. Ct. N.Y. 2004).

[140] *Id.* at 660.

[141] *Id.*

and others."[142] Specifically, the court concluded that defendants became bound to pay dues to the temple, because "the Temple budgets its expenses based upon the membership of the organization. . . . Since plaintiff relies upon the defendants' membership as of the time of budgeting, and the dues being billed, defendants are estopped from refusing to pay plaintiff congregation."[143] Thus, although the court did not even articulate whether the relevant promises were being enforced by way of a contractual obligation or theoretical promise, in practice the court did in fact examine the element of reliance in analyzing whether to enforce the charitable promises made.[144] This case therefore left open the possibility that it might consider some form of reliance to be in some way relevant to the analysis of whether a charitable subscription could be enforced through promissory estoppel.

III. HOW THE ROLE OF RELIANCE DESCRIBED IN THE COMMENTS TO § 90(2) MIGHT AFFECT THE ADOPTION OF § 90(2) ACROSS JURISDICTIONS

As described previously, much scholarly opinion and some case law holds that the intended effect of § 90(2) was to eliminate the requirement of a showing of reliance to enforce charitable subscriptions through promissory estoppel, notwithstanding the phrasing of the relevant accompanying comments and illustration. Other courts (most notably the Massachusetts Supreme Judicial Court) have disagreed, stating that the effect of § 90(2) might in fact be to require some lesser degree of reliance (i.e., something akin to the stated *probability* of reliance, or a *showing* of reliance) but that § 90(2) might not eliminate the requirement of reliance altogether even in the context of charitable subscription cases. This Part considers how the text of the comments and illustrations to § 90 might affect courts' willingness to adopt a no-reliance standard with respect to the enforceability of charitable subscriptions. In turn, the holdings of those decisions might slow the adoption of § 90(2) in other jurisdictions when they are first confronted, post-Second Restatement, with a charitable subscription case in which enforcement is sought by way of promissory estoppel.

Section 90(2), by itself, does not represent a radical departure from the approach of many courts to enforcing charitable subscriptions by way of promissory estoppel that existed before the drafting of the Second Restatement. Indeed, the drafting of § 90(2) was intended to reflect the reality that courts often found the reliance element to be satisfied even where such reliance was minimal or virtually nonexistent. The inclusion of § 90(2) in the Second Restatement was intended to make the incremental change of allowing such a result in additional similar cases.

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[142] *Id.* at 661 (quoting *In re* Estate of Lipsky, 256 N.Y.S.2d 429, 432 (Sur. Ct. 1965)).

[143] *Id.*

[144] *Id.*

The addition of § 90(2) was also intended to promote the enforcement of charitable promises, which had already been widely acknowledged as a desirable social policy.

The Massachusetts Supreme Judicial Court, in both the *King v. Trustees of Boston University* and *Congregation Kadimah Toras-Moshe v. DeLeo* cases, has been the most prominent court to note that § 90(2) may still allow reliance to play a role in the determination of whether charitable subscriptions should be enforced by way of promissory estoppel, through the element of avoiding injustice only through enforcement of the promise. In contrast, the Maryland Court of Appeals in *Arrowsmith v. Mercantile-Safe Deposit & Trust Co*. declined to eliminate the requirement of reliance in such cases, but made it clear that it was choosing to do so in opposition to the Second Restatement's carve-out for charitable subscription cases from the requirement of reliance in promissory estoppel cases more generally. The Massachusetts Supreme Judicial Court in *King* and *Congregation Kadimah Toras-Moshe* questioned the very view that the Second Restatement intended that reliance should be entirely eliminated from the analysis of charitable subscription cases, by pointing to the comments that indicate that "consideration and reliance remain relevant to whether the promise must be enforced to avoid injustice." By allowing reliance to remain relevant as to whether the promise should be enforced to avoid injustice, there is perhaps a back door for a continued role of reliance in the analysis of whether a charitable pledge should be enforced.

The *King* and *Congregation Kadimah Toras-Moshe* cases, therefore, change the debate over whether a particular jurisdiction should adopt the rule articulated in the text of § 90(2) into more than a simple determination of whether charitable subscriptions should be enforced without a showing of reliance needed. As a result, the debate is not merely about whether a court should choose to adopt the rule articulated in the text of § 90(2). Instead, a court may first examine what the precise impact of § 90(2) is on that issue, and how the drafters of § 90(2) intended that provision to be interpreted. The fact that scholarly opinion largely holds § 90(2) to dispense with the independent reliance requirement did not prevent the Massachusetts Supreme Judicial Court, on two separate occasions, from focusing on the considerations similar to those discussed by Knapp and contending that reliance may still play a role in the analysis of whether a charitable subscription should be enforced through promissory estoppel.

This possible reframing of an enforcement analysis pursuant to § 90(2) might therefore slow the adoption of § 90(2) by various jurisdictions. Where the impact of § 90(2) is itself less than clear, courts might have less of a motivation to dispense entirely with the examination of reliance in charitable subscription cases. Where the comments themselves seem to indicate the continued role of reliance through the avoidance of injustice element, the practical effect of the creation of § 90(2) appears limited.

IV. RECOMMENDATIONS AND OTHER POSSIBLE REVISIONS TO § 90(2) AND/OR ITS COMMENTS

This Part examines whether and how § 90(2) should be revised to clarify or otherwise modify the role of reliance with respect to the enforcement of charitable subscriptions by way of promissory estoppel. Such a determination requires making several decisions. First, one must decide what the drafters of the Second Restatement meant when they decided to supplement the general principle of promissory estoppel with § 90(2). Did they intend a wholesale elimination of the reliance requirement, or did they intend, as the *King* court suggested, to have "reliance remain relevant to whether the promise must be enforced to avoid injustice"? Next, the drafters of a revised § 90(2), after deciding the intended and/or effective meaning of the current § 90(2), will have to consider whether they wish to continue with that approach or to modify it in the future, a question that raises policy issues of how broadly charitable subscriptions should be enforced even in the absence of reliance. This will also necessarily entail a determination of whether the Restatement should articulate the current state of law, or some ideal state of law as judged by the drafters themselves. Finally, the drafters of a revised § 90(2) will have to consider whether and how they would like to clarify the text of § 90(2) and its accompanying comments and illustrations to clarify their approach to the role of reliance.

A. Role of the Restatement and Possible Textual Changes to § 90(2), Comments, and Illustrations

Drafters of a revised § 90(2) will have the power to remove the continued role of reliance relevant to the injustice element, as articulated in the relevant comments to § 90(2). In order to do so, however, they will have to decide on their preferred approach to the enforceability of charitable subscriptions. One approach they might adopt is to modify the language of the comments to be explicit that no showing of reliance is required for charitable subscriptions to be enforced. Mechanically, such an approach could be accomplished by amending the language of Comment *b* to indicate that the requirement that enforcement must be necessary to avoid injustice can be assumed to be satisfied in the charitable context. Reliance would therefore no longer be relevant to the enforcement analysis. This would bring the text of the comments in conformity with the text of § 90(2) itself. This approach is also consistent with the interpretation of the majority of scholars as to the import of § 90(2). This approach would also have the advantage of promoting what has been articulated by many courts and commentators as the optimal social policy of allowing charitable subscriptions to be enforced to the greatest extent possible and thereby maximizing charitable funds that have already been promised.

Alternatively, § 90(2) could be revised to reflect the existing state of law of many jurisdictions—namely, that some showing of reliance by the promisee is nec-

essary to enforce charitable subscriptions. This approach would have the disadvantage of enshrining language through which existing promises to charities might be enforced less frequently, given the difficulty of charities demonstrating reliance on any one individual promise. As discussed earlier within this Article, declining to enforce charitable subscriptions has been widely recognized by courts as generating sub-optimal policy outcomes. Moreover, this approach might also have the disadvantage of encouraging courts to find the reliance element to be satisfied even where there is only minimal or even fictitious reliance, thus reverting to the state of affairs that existed before the Second Restatement and which § 90(2) was intended to address. This approach, however, might create one benefit. Namely, mandating some showing of reliance might be able to promote the making of *future* promises to charities, if the promisor is aware of the governing policy within the relevant jurisdiction and the ability to retract a charitable subscription is important to the charitable decision-making process of the promisor.

A third approach is also possible. The text of § 90(2) currently indicates that a charitable subscription *is* binding under the doctrine of promissory estoppel without proof that the promise induced action or forbearance. An approach to § 90(2) perhaps closer to that suggested by Knapp could be made clearer by amending the text of § 90(2) to state that a charitable subscription *could* be binding under the doctrine of promissory estoppel without proof of reliance. Such an approach would allow a court to decline to enforce a promise where not even a "probability of reliance" can be found. At the same time, the court would be free to enforce the promise without engaging in finding the presence of reliance on the basis of what ultimately would be largely a legal fiction. With respect to the language of Comment *b*, this effect could be achieved by indicating that where reliance is completely absent from a charitable context, a court should rely on the other factors currently listed in that Comment, including "the formality with which the promise is made on the extent of which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise." Thus, enforcement of charitable promises would not be automatic, but would instead require some other justification. Charitable promises would be enforced only where injustice could not be avoided otherwise, and the fact that a promise was one made to a charity or for a charitable purpose would not be enough, under this formulation, to demonstrate that unavoidable injustice would result from non-enforcement.

Which approach is selected depends, in part, on what the purpose of the Restatement of Contracts is intended to be. The 1987 comments of Michael Greenwald, a deputy director of the American Law Institute (ALI), suggested that the Restatement could indicate the direction in which the law was developing so that more jurisdictions *could* adopt Restatement rules in the future:

> Although the Restatements were clearly not intended to be radical reformulations of the law . . . the founding Committee envisioned something more than mere restatement of existing uncertainty and confusion. Indeed, one of

> the most significant contributions of the Restatements has been the extent to which they have anticipated the direction in which the law is tending and suggested salutary avenues of development, consistent with established principles, in areas in which there have been few or no decided cases.[145]

If the Restatement of Contracts is intended to serve as an articulation of what the law *should* be, from the standpoint of optimal social policy, clarity of text, ease of application, and other relevant factors, the comments to § 90 should be revised to clearly state that no reliance is required for charitable subscriptions to be enforced. Such a view of the purpose of the Restatement would likely also call for the comments to § 90(2) to be amended to eliminate any suggestion of a role for reliance. Indeed, as discussed within this Article, the drafters of the Second Restatement and subsequent scholars have emphasized the role of § 90(2) in eliminating the reliance requirement, suggesting that that was the primary intended effect of that provision. If the Restatement is interpreted as a statement of an idealized form of law, then the intent of the drafters of the Second Restatement should be honored by clarifying the elimination of the role of reliance in the enforcement analysis.

There is another possibility, however, for what the role served by the Restatement is or should be. The Restatement could in fact be meant to be a summary of *existing* law as articulated by a majority of courts. A scholarly article, reviewing the language found on the ALI's website, notes language that suggests that this might, in fact, be one goal of the Restatement:

> The ALI has published a reporter's handbook . . . . According to the Handbook's formulation, "Restatements are addressed to courts and others applying existing law" and reflect current law, but "Principles [are] addressed to courts, legislatures, or governmental agencies." They express "the law as it should be," and not necessarily how the law currently is. The ALI, on its website, differentiates among Restatements, model laws, and Principles of Law as follows: "Restatements are addressed to courts and others applying existing law. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement black-letter formulations assume the stance of describing the law as it is."[146]

Indeed, in the particular context of § 90(2), one source has noted:

> By completely eliminating the need to show reliance by the charity on the promise, the Restatement (Second) adopts a position which deviates dramatically from the goal of the Restatement Committee, which is merely to state

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[145] Shirley S. Abrahamson, Address, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 22 (1995) (quoting Michael Greenwald, *Professional Associations Related to Law Librarians: American Law Institute*, 79 L. LIBR. J. 297, 301 (1987) (discussing the Restatements)).

[146] Alces & Byrne, *supra* note 54, at 204–05.

> what the current law is and not what the committee might want the law to be.[147]

If such is the case and the Restatement is also intended at least in part to be a summary of existing law, then that particular goal might be better served by amending the text of § 90(2) to more clearly indicate that some level of reliance is required to find charitable subscriptions to be binding under the doctrine of promissory estoppel, even if the amount of reliance required is less than that needed in other contexts and may in fact be only minimal. Such a textual revision might add language stating that the injustice element, which might include a review of any relevant reliance, remains pertinent to the enforcement analysis.

The purpose of the Restatement, however, likely lies somewhere in the middle of these conceptions, or attempts to strike a balance between the two. Alces and Byrne noted that "[t]he distinctions are blurred in practice," as "[Restatements] not only state the law as it exists, but also express changes in the law or suggest better common law rules that have not been adopted yet by courts."[148] Thus the purpose of the Restatement is not fully clear. The competing purposes of the Restatement are at odds with respect to the issue of reliance on charitable subscriptions, and call for two separate visions of a reframing of the § 90(2) text and relevant comments and illustration.

On the balance, it seems that the drafters of the Second Restatement, with respect to this particular issue, made the conscious choice to reflect the preferred state of the law, rather than to fully reflect the existing state of law. The drafters identified a social policy of promoting private philanthropy, as well as the reality that courts often depended on fictitious or minimal reliance in order to enforce charitable promises under the doctrine of promissory estoppel. In eliminating the reliance requirement from § 90(2), the drafters apparently sought to clarify existing doctrine and provide a clearer theoretical framework in the future for the enforcement of charitable subscriptions.

B. Enforcement Without Regard to Reliance

This Article therefore recommends changes to § 90(2) to reflect and build upon the intent of the drafters of the Second Restatement. Namely, it is recommended that this provision be amended to remove the suggestion in the comments

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[147] MARY FRANCES BUDIG, GORDON T. BUTLER & LYNNE M. MURPHY, PLEDGES TO NON-PROFIT ORGANIZATIONS: ARE THEY ENFORCEABLE AND MUST THEY BE ENFORCED? 30–31 (1993), https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/Monograph/Monograph1993Pledges.pdf.

[148] Alces & Byrne, *supra* note 54, at 205.

that some probability of reliance remains relevant to the decision to enforce a charitable promise.[149] To accomplish this, the comments of § 90(2) should be revised to clarify that charitable subscriptions should, in fact, be enforced without regard to the presence of any action or forbearance taken by the charity in reliance on the promise. Further, the text of § 90(2) should itself be amended to clarify that a charitable subscription can be enforced without regard to whether injustice could be avoided only by enforcement of the promise. Rather, in the interests of promoting private philanthropy, the injustice element would be assumed to be satisfied by the sole fact that a charitable subscription had been made.

Such a move would be consistent with the apparent intent of the drafters of the Second Restatement to eliminate the reliance requirement. Indeed, as the proponents of the draft § 90(2) noted, many pre-Second Restatement courts enforced charitable subscriptions that had only a tenuous connection to actual action or forbearance taken by a charity in reliance on a promise. This change would also align the comments to § 90 with how most scholars have interpreted § 90(2). This change would focus the enforcement analysis on the integrity of the promise as described by the factors listed in Comment *b*, and would clarify the analysis by removing the suggestion that reliance is also relevant to that analysis.

This revision would promote the positive social policy of allowing charities the flexibility to take actions or positions they deem appropriate, without the risk that donors will be allowed to freely revoke the charitable subscriptions they have already made. Charities could also engage in strategic planning without needing to immediately spend donations in order to ensure their irrevocability. The administrative burden on charities might also be reduced if charities did not have to demonstrate reliance on each particular donation in order to guarantee its payment in the case of attempted donor revocation.

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[149] It is, of course, possible that individual jurisdictions could choose to make charitable pledges enforceable by way of legislative action, rather than the judiciary changing the standard by which charitable pledges are enforced. For example, in 2009 a legislative proposal was considered in California "to provide clear guidance on when a charitable pledge is enforceable." *See* Legislative Proposal from Lani Meanley Collins, Chair, Bus. L. Section, Nonprofit & Unincorporated Org. Comm., State Bar of Cal., to Off. of Governmental Affs. (July 31, 2009), http://www.calbarjournal.com/portals/0/documents/legislation/BLS-2010-03-charitable_pledges.pdf. This proposal, however, was ultimately not adopted. *See* Johnathan H. Park, *Enforceability of Charitable Pledges*, HOLLAND & KNIGHT: PRIV. WEALTH SERVS. BLOG (Sept. 24, 2015), https://www.hklaw.com/en/insights/publications/2015/09/enforceability-of-charitable-pledges. Given that the issue of the enforceability of charitable pledges has not been successfully addressed or clarified by means of legislative action, this Article focuses on revising the text of § 90 as the best possible means to clarify the approach of § 90(2) and to enable jurisdictions to decide if they choose to adopt the approach set forth therein.

Courts may, of course, continue to decline to apply the standard that no reliance need be taken in order to enforce charitable subscriptions, much as the Massachusetts Supreme Judicial Court did in *King* and *Congregation Kadimah Toras-Moshe*. With the revision of the Restatement in this manner, however, courts will be less likely to reject the § 90(2) standard based on any uncertainty as to what the effect of that provision with respect to reliance actually is.

CONCLUSION

Despite the apparent textual directive of § 90(2) that eliminates the required independent element of reliance for the enforcement of charitable promises by way of promissory estoppel, there seems (at least in some jurisdictions) to be some continued possibility for reliance to play a role in the enforcement analysis through the element of avoiding injustice only through enforcement of the promise. Those cases that explicitly point to this possibility, however, do not provide much detail about what a modified role for reliance might actually entail. What, for example, might be a different, as opposed to a lower, standard of reliance, as has been suggested by one court? What is the nature of a "probability of reliance," as referenced in Comment *f*? How does this differ in practice from the "proof of reliance" eliminated as an independent requirement by way of the text of § 90(2)? Where the force of the types of other factors described in Comment *b* is low (such as indicia of evidentiary, cautionary, deterrent, and channeling functions), must reliance be demonstrated, and what sort of reliance, in order to satisfy the unavoidable injustice element? These are all open questions that neither relevant case law nor the comments to the Restatement have yet explored.

The language of § 90(2) and that of the corresponding comments have not, for the most part, sparked direct judicial commentary about the continued role of reliance relevant to the determination of whether a charitable subscription should be enforced. The most prominent exception is the Supreme Judicial Court of Massachusetts, which in at least two cases noted the role of the comments in at least partly suggesting a negation of the apparent directive of § 90(2) that charitable subscriptions may be enforced without any showing of charitable reliance. Nor has this continued role of reliance, as reflected in the comments to § 90(2), led any court to expressly decline to adopt the standard set forth in § 90(2) as a result of that conflict. The relevant comments, however, do seem to undercut § 90(2)'s textual directive and the most common scholarly interpretation that charitable subscriptions can be enforced, if the authority of § 90(2) is adopted, without a showing of reliance on the part of the promisee. Courts might have less of a motivation to adopt the standard set forth in § 90(2) where the text of the Restatement as a whole seems to equivocate on the appropriate role of reliance in connection with the enforcement of charitable subscriptions through promissory estoppel.

If the drafters of a revised § 90(2) decide that charitable subscriptions should, as a matter of policy, be enforceable without a showing of reliance, then they would do well to revise the language of § 90's comments as they pertain to § 90(2) to clarify that no showing of reliance by the promisee is required to justify enforcement of the promise. Such an approach would seem to be in line with the intent of the drafters of the Second Restatement to eliminate the requirement of reliance. Moreover, this approach is clearly in line with the stated social policy that courts have reiterated, both pre- and post-Second Restatement, that broad enforcement of charitable promises is desirable for supporting private philanthropy in this country. Thus, this Article recommends that the comments and illustration relevant to § 90(2) be amended to indicate that charitable subscriptions should be enforced even in the absence of any action or forbearance taken by the charity in reliance on that subscription.