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**Forbearance To Sue On An Invalid Claim As
Consideration For A Contract**

*Fiege v. Boehm*¹

Plaintiff accused defendant of being the father of her illegitimate child. To induce plaintiff to forebear bringing bastardy proceedings, defendant orally promised to pay plaintiff's medical expenses, loss of wages from her job, and a fixed sum for the support of the child. After paying for a short time, defendant had blood tests made which conclusively showed that he was not the father. Defendant, therefore, refused to pay plaintiff any further sums. Plaintiff subsequently brought bastardy proceedings in the Criminal Court of Baltimore City. Upon defendant's being acquitted, plaintiff brought this action for damages in the Superior Court of Baltimore City alleging breach of the agreement. That court entered judgment for plaintiff. On appeal, the Court of Appeals affirmed, reasoning that forbearance to press a claim that is in fact invalid may still be consideration for a promise when the claim is made in good

¹ 210 Md. 352, 123 A. 2d 316 (1956).

faith and is reasonable. There was no basis in fact for plaintiff's claim that defendant was the father of the child, but plaintiff was allowed to recover because at the time of the making of the contract, both parties believed that a genuine legal duty on defendant's part to pay plaintiff for support existed. For recovery on the contract, it was immaterial whether defendant was in fact the father of the child. It can be said the defendant got what he bargained for at the time of contracting, i.e., freedom from a bastardy proceeding in exchange for his promise to perform his part of the contract.

The Court specifically reaffirmed the Restatement rule² as the law in Maryland, saying, "[w]e combine the subjective requisite that the claim be *bona fide* with the objective requisite that it must have a reasonable basis of support".³ This standard for determining when forbearance to prosecute a claim is consideration for a promise represents a stand midway between the early common law position that forbearance to assert a groundless claim could never be consideration for a promise and the view, taken in a few jurisdictions, discarding the requirement of reasonableness and asking only that the claim forborne be one honestly held and asserted in good faith.⁴

Assuming that the claim forborne as consideration for a promise is one held in good faith, the Maryland rule requires a further examination to determine if the claim had "a reasonable basis of support". Neither courts nor scholars have been particularly successful in articulating a "test" of reasonableness to be applied or even in isolating and describing the factors which prompt them to decide that a claim is or is not reasonably asserted in a given case.⁵

² 1 RESTATEMENT, CONTRACTS (1932), Sec. 76 (b).

³ *Supra*, n. 1, 360.

⁴ A few jurisdictions hold that the claim must be doubtful in the opinion of the court, not the individual claimant, e.g., *Throckmorton v. Robinson*, 83 S. W. 2d 696 (Tex. Civ. App. 1935); *Gunning v. Royal*, 59 Miss. 45 (1881), possibly overruled by *Stanley v. Sumrall*, 167 Miss. 714, 147 So. 786 (1933). Others have discarded the reasonableness test entirely and sustain consideration where the claim is honest and *bona fide*, e.g., *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624 (1913); *Henderson v. Kendrick*, 82 Fla. 110, 89 So. 635 (1921); *Sherman v. Werby*, 280 Mass. 157, 182 N. E. 109 (1932). The remaining view, that of the Maryland Court and the RESTATEMENT, may be said to represent the weight of authority, e.g., *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466 (1901); *In re Miller's Estate*, 279 Pa. 30, 123 A. 646 (1924); *Simons v. Yoho*, 92 W. Va. 703, 115 S. E. 851 (1923).

⁵ "The claim forborne must be neither absurd in fact from the standpoint of the reasonable man in the position of the claimant, nor obviously unfounded in law to one who has an elementary knowledge of legal principles."

1 WILLISTON ON CONTRACTS (Rev. Ed., 1936), Sec. 135.

Reasonableness is rarely a "yes" or "no" proposition. The quality of any given claim must be evaluated according to a scale which presumably ranges from clearly reasonable to clearly unreasonable with all intermediate shades and degrees. The difficult cases fall near the middle of this scale in what one court has described as the "'twilight zone' of doubtfulness".⁶

Cases in which the alleged consideration for a promise is forbearance to contest a will perhaps offer the clearest illustration of a "scale of reasonableness". Approaching the clearly reasonable end of the scale are the will contest cases where the caveat is forborne by an heir-at-law, one who would recover by operation of the laws of intestate succession if the will were set aside. Cited by the Court in the *Fiege* case was the Maryland case of *Hartle v. Stahl*,⁷ where heirs-at-law who forbore to contest the will of their deceased father in exchange for a promise of the administrator to pay them one thousand dollars were allowed to recover, it not being necessary that they affirmatively show they would have succeeded in having the will set aside. The court there applied only the good faith test, *i.e.*, whether the parties at the time of contracting believed a *bona fide* question was raised. Another case involving a will, cited by the Court, was *Snyder v. Cearfoss*,⁸ where the Court cited *Hartle v. Stahl* and reiterated the test that forbearance to sue is sufficient consideration for a promise to pay for the forbearance, "if the party forbearing had an honest intention to prosecute litigation, which is not frivolous, vexatious or unlawful, and which he believed to be well founded, even though it may in fact be unfounded".⁹ Of course, the belief in the claim can become more or less reasonable in any given case as additional evidence as to the age, mental state, etc., of the testator is discovered.

At the clearly unreasonable end of the scale would be a case where the forbearance of persons, not heirs-at-law, to contest a will would not be deemed sufficient consideration for a promise from the named devisee to divide the estate.¹⁰ A threat by such persons to contest a will where they could get nothing if the will were set aside, is nonsense.

⁶ *Conran v. White & Bollard*, 24 Wash. 2d 619, 167 P. 2d 133, 138 (1946). It was held there that the claimant had not given valid consideration where he gave up his right of redemption of property bought in at a tax sale, since such right, which was given by statute had expired.

⁷ 27 Md. 157 (1867).

⁸ 187 Md. 635, 51 A. 2d 264 (1947).

⁹ *Ibid.*, 643.

¹⁰ *Cf. Bloom v. Bloom*, 336 Ill. App. 352, 83 N. E. 2d 619 (1949).

It is submitted as an hypothesis that in determining whether a claim asserted in good faith also satisfies the *objective* requisite that it must have a reasonable basis of support, courts are inclined to look at the claim rather than at the claimant. Granting that the intelligence and knowledge of the claimant will always be material in determining the good faith of the claimant, the reasonableness of his belief in the validity of his claim appears to turn principally on the type and source of the claim itself.

Applying this hypothesis to the whole scale of reasonableness and judging the varied cases against it, certain guides appear. A claim may be said to be reasonably doubtful when the only reliable way of determining its validity is by actually adjudicating it. This would be true of most tort claims¹¹ as it is of will contests by heirs-at-law. It might be said that in these cases there is no source of information as to validity except in the precedents and equally obscure places. In the Maryland case of *Pullman Co. v. Ray*,¹² an employee of the Pullman Company, not covered by workman's compensation at that time, was injured during the course of his employment. It was said that he need only have had a reasonable and honest belief in the possible validity of a claim against the company to support a promise of lifelong employment in exchange for foregoing his common law right to sue.

But, where there is some identifiable source of the claim which can be examined by the prospective claimant, which is usually a *written* source, the claim will not be reasonably doubtful unless the claimant can show that his claim was reasonably asserted under or in the terms of the writing. He must further show that he was reasonably intelligent in reading and interpreting the writing. In *DiPaula v. Green*¹³ and *Strohecker v. Schumacher, etc.*,¹⁴ for example, the stricter standard was applied. In the *Dipaula* case, the claimant was a materialman who alleged that the owner of a building had promised to pay what the builder owed him if the claimant forbore to attach a materialman's lien on the building. The affixing of the lien

¹¹ *Plunkett v. O'Conner*, 162 Misc. 839, 295 N. Y. S. 492 (1937), where the plaintiff's wife was negligently injured by the defendant's son on a bicycle. Although the plaintiff's claim was unfounded in law, it was asserted in good faith; therefore, the Court held that a promise to forbear to bring a suit was good consideration for the defendant's promise to pay, since there was a *bona fide* dispute between the parties at the time of contracting, and the compromise should be enforced in the absence of fraud.

¹² 201 Md. 268, 94 A. 2d 266 (1953).

¹³ 116 Md. 491, 82 A. 205 (1911).

¹⁴ 185 Md. 144, 43 A. 2d 208 (1945).

was controlled by statute, and the claimant clearly did not come within its provisions.¹⁵ The Court held that since no lien could legally attach, the promise to forbear from doing something the claimant had no legal right to do was not sufficient consideration for the owner's promise to pay. In the more recent *Strohecker* case, the Court quoted from the *Dipaula* case, saying, "[w]here no lien could legally be filed, abstention from the attempt was not a good consideration for a personal promise".¹⁶ It is interesting to note that this case and the *Snyder*¹⁷ case were decided within two years of each other, suggesting that the Court does apply a different standard for forbearance of a common law action, e.g., contesting of a will by the heirs-at-law, as opposed to the standard applied when the right of action can arise only by being within the confines of a writing. Similar results have been reached in cases where the claim was based upon such identifiable sources as statute,¹⁸ insurance policy,¹⁹ or contract.²⁰

In cases upholding the sufficiency of consideration of a forbearance to sue if the statute upon which the unpursued claim was based appears ambiguous on its face,²¹ or is one which had not been authoritatively construed at the time of

¹⁵ Md. Code (1904), Art. 63, Sec. 1.

¹⁶ *Supra*, n. 14, 151.

¹⁷ *Supra*, n. 8.

¹⁸ *Tozier v. Woodworth*, 135 Me. 46, 188 A. 771 (1936), tax collection warrant had expired; *Hooff v. Paine*, 172 Va. 481, 2 S. E. 2d 313 (1939), materialman's lien, criticized in 26 Va. L. Rev. 121 (1939).

¹⁹ *Soevyn v. Ruhl*, 104 N. Y. S. 2d 771 (1951), where husband's father failed to allege that he had any right to the proceeds of an insurance policy on the lives of husband and wife who died in the same fire, the forbearance to press such a claim was not consideration for the promise of the wife's mother to share said proceeds with the husband's father.

²⁰ *Zanphir v. Bonnie Meadows, Inc.*, 127 N. Y. S. 2d 269 (1953), where there was a claim based on a contract made at the same time a deed was passed, forbearance to sue on such a contract was not sufficient consideration to support a promise to do an act, since the contract was merged in the deed. The Court said, at 271, that it would be unreasonable to hold, in the face of the escrow agreement which was to survive the deed's delivery, that the plaintiff had any right to sue on the original contract, or even reasonably believed that he had any such right. But, see *Melotte v. Tucci*, 319 Mass. 490, 66 N. E. 2d 357 (1946), where an additional agreement was entered into before the plaintiff would agree to buy the defendant's house. *Held*, that the plaintiff had surrendered his right to litigate his contentions based on the defendant's promise to do an act. This was forbearance to press a claim made in good faith, not frivolous, or vexatious, and was therefore valid consideration.

²¹ *Ruckel v. Baston*, 252 S. W. 2d 432 (Ky., 1952), where a statute that controlled the case was vague in its application, therefore the plaintiff and the defendant, by making their agreement, traded possibility for actuality. A compromise was struck between the parties when their rights under the statute were vague, and the surrender of possibility was held to be good consideration.

making the agreement to forbear,²² there is little question that the claim is "doubtful", that surrender of the right to assert it is sufficient consideration. The claim surrendered in the instant case meets this characterization. The right to bring bastardy proceedings is conferred by statute,²³ there being no common law paternal obligation to support illegitimate children. But the statute does not state who shall have the right to bring the action, primarily because such a proceeding is a criminal action brought by the state. As well as failing to define or limit the class of persons who may commence such proceedings, it does not specify any type, quality, or amount of evidence necessary to the successful prosecution of the case. The principles applicable to this statute are the same as those imposed upon the naturally ambiguous or unconstrued enactments.

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²² *United States v. American Trading Co. of San Francisco*, 138 F. Supp. 536 (D. C. N. D. Cal., 1956).

²³ Md. Code (1951), Art. 12, Sec. 2.