CONTRACT LAW AND THEORY

Third Edition Volume 2

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Chapter 3

THE BARGAIN CONTEXT

A. INTRODUCTION

In this chapter, we examine those promises that are clearly made within a reciprocal, bargain context. We explore the dynamics of the exchange process, both through common law rules and through the statutory provisions of the Uniform Commercial Code (UCC). Our purpose here is similar to our purpose in Chapter 2: To discover why some exchange promises are binding and others are not, and to identify the variables that are important to that discovery.

The dynamics of the bargain context are governed by a number of rules grouped under the general heading of offer and acceptance. These rules function as defaults; they provide contracting parties a set of ready-made guidelines for determining the precise point during the bargaining process when legal liability attaches. They thus save contracting parties who adopt (either explicitly or implicitly) these ground rules the time-consuming process of specifying all the procedural requirements for reaching a legally-binding agreement. As with any default assumptions, atypical parties remain free to construct their own rules for regulating the sequence of negotiations, and (presumably) a court will enforce or not enforce their bargains accordingly.

We have already seen, however, examples of courts that appear reluctant to adopt the plain meaning of specially-designed terms and conditions that purport to contract around the state's default rules. Courts tend to presume that the state's implied terms are fair and may therefore look with disfavor on efforts to vary them. This presumption against the atypical party increases, along with the burden in contracting out of the ready-made rule, as the court's practice of implying terms to contracts becomes more refined.

Additional problems are associated with the default rules used to specify the steps typical parties take in reaching an agreement. Their communicative and directive qualities may deteriorate through rote usage or incrustation. This occurs when standardized formulations are used so frequently they lose much of their meaning. Or when so much legal jargon accumulates around a rule that it becomes barely understandable, and therefore unreliable as an indicator of the parties' intent. Contracting parties may nonetheless continue to invoke these terms, either because they fear that omitting them will somehow change the historic meaning of agreements, or they do not adequately attend to them.

Nevertheless, despite the difficulties associated with reliance upon legal default rules, there is a widespread belief that, in the bargain context, any rules at all are generally preferable to no rules. Why should this be so? In economic terms, the Coase Theorem provides an answer. (*See* Chapter 1, *supra.)* Recall that the Theorem stated that in the idealized bargaining

situation where (1) the legal rights of the parties are well-defined and marketable, (2) there are no transaction costs to bargaining, and (3) the parties are informed, the parties will bargain to the most efficient outcome (i.e., no further possibilities exist to enhance mutual gains), regardless of where the legal system places liability initially. Remember also that in contract law the Theorem focuses our attention on the key factor in bargaining—transaction costs. In the absence of predictable rules, parties must always build their own system or trust to luck; where procedural ground rules are in effect, parties can choose whether to contract around them. Under the assumptions of the Theorem, if contracting parties are not pleased with a judicially created rule, they will bargain between themselves until the optimal rule (and result) is achieved. Under these assumptions, then, it is quite plausible to assume that silence and/or passive acquiescence reflects the parties consent to the state-supplied rule.

If it is true that any rule is better than no rule at all, why are there not more rules concerning offer and acceptance, governing every possible situation? In fact, as we will see, the rules regulating bargaining conduct are quite extensive when compared to the rules of consideration, promissory estoppel, and unjust enrichment that govern enforcement of promises. Nonetheless, there is little doubt that more rules could be generated.

One argument for restraint in rule-making is that society bears much of the cost of formulating default rules. It takes an investment of resources for the judiciary or the legislature to formulate these procedural rules, to integrate them into the existing legal structure, and to resolve conflicts that inevitably arise over the impact and interpretation of the rules. Presumably, the state should undertake this investment only when it is confident that the costs to the state are lower than the costs to the parties of crafting their own arrangements.

For much the same reasons, the rules of offer and acceptance are seldom the subject of litigation. When the parties can devise alternatives fairly easily, only those rules which are significantly off-the-mark generate arguments for, and against, reform. Rather than the rules themselves being litigated, therefore, it is the application of offer and acceptance rules to a given fact situation that ends up on a court's docket.

B. OFFER AND ACCEPTANCE

1. SUBJECTIVE AND OBJECTIVE TESTS OF MUTUAL ASSENT

Read Restatement (Second) § 17. Before contractual obligations can be created, both parties to a contract must agree to the terms. In legal jargon, this agreement is known as a manifestation of mutual assent, and generally is reached as a result of offers made and acceptances given (see Restatement (Second) § 22).

Knowing precisely when mutual assent to a contract has been achieved is another problem altogether. Traditionally there have been two "tests" for

determining mutual assent (*See* Chapter 1, *supra.*). The subjective test, or "actual intent" theory, was dominant in the language of contract cases until about a century ago. That standard required that there be, in fact, a meeting of the minds between parties to a contract before a contract was legally binding. Although outward manifestations of the parties' intent were not completely irrelevant, their relative insignificance under the subjective theory could create difficulties.[1] Judge Frank explained the ramifications of the theory in a concurring opinion in *Ricketts v. Pennsylvania R. Co.,* 153 F.2d 757, 761 (2d Cir. 1946).

> Without doubt the [subjective intent] theory had been carried too far: Once a contract has been validly made, the courts attach legal consequences to the relation created by the contract, consequences of which the parties usually never dreamed — as, for instance, where situations arise which the parties had not contemplated. As to such matters, the "actual intent" theory induced much fictional discourse which imputed to the parties intentions they plainly did not have.

The objective test, in contrast, does not rely on the actual intentions of the parties. Instead, it relies on the outward manifestations of a party's intent: contractual obligation is imposed based on what a party reasonably believed was said and done rather than what was intended. Read § 20 of the Restatement of Contracts (1932). Comment a to § 20 is equally explicit:

> *Comment a.* Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested. Moreover, if the manifestation is at variance with the mental intent, . . . it is the expression which is controlling. Not mutual assent but a manifestation indicating such assent is what the law requires. Nor is it essential that the parties are conscious of the legal relations which their word or acts might give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not.

From an instrumentalist perspective, the objective theory has the attractive feature of putting liability on that party with the comparative advantage in preventing or minimizing the risk that this sort of a misunderstanding would occur in the first place. For example, assume *A* agrees orally to enter a contract with *B,* and finalizes the agreement with a nod of her head and a handshake. Suppose further that *A* thinks to herself that the deal will not be binding until *B* writes her a letter confirming the details, but *A* does not mention this further requirement to *B*. When the agreed-upon time of performance arrives, *A* refuses to go through with the bargain because *B* failed to send a written confirmation. Who should bear the liability here?

Under a strict subjective test, there is no deal because *A* did not intend that there be one. According to the objective test, however, *A* should bear the liability *if* most people similarly situated would reasonably believe that the deal was already concluded. Under these circumstances, *B* was justified in

[1] For an amusing case in which a promisor's outward manifestations were reinterpreted by the court, see *Higgins v. Lessig,* 49 Ill. App. 459 (1893).

believing the bargain was finalized because *A*'s words and actions were consistent with broadly accepted social norms governing human interactions. Presumably it is easier for *A*, as the atypical party, to either conform her behavior to the prevailing norms or to communicate her special requirements to *B*, than for *B* to think of and guard against every peculiar reaction which might keep *A* from believing that they had reached an agreement. In other words, *given the background assumption that there are widely prevalent norms for signaling assent, A* is better able to avoid the problem in the first place. Placing liability on *A* will thus provide incentives for future *A*s to either inform themselves of prevailing customs or explicitly disclose idiosyncratic behaviors that depart from those conventions.

The key to this analysis, therefore, is the claim of *B* that *A would have reason to know that B* would interpret the nod of the head and the handshake as a manifestation of assent. What should be the result if *A* is successfully able to claim to a fact finder that under prevailing conventions her behavior was ambiguous and thus she would have no reason to know that *B* attached a different meaning to her behavior? See Restatement (Second) § 20. Is the Restatement's solution to the problem of a genuine misunderstanding consistent with the analysis developed above?

The objective theory is not immune from criticism, however. Judge Frank catalogued objections to the objective theory in the same concurring opinion, from *Ricketts v. Pennsylvania R. Co.*, 153 F.2d at 761-64:

> But the objectivists also went too far. They tried (1) to treat virtually all the varieties of contractual arrangements in the same way, and (2), as to all contracts in all their phases, to exclude, as legally irrelevant, consideration of the actual intention of the parties or either of them, as distinguished from the outward manifestation of that intention. The objectivists transferred from the field of torts that stubborn anti-subjectivist, the "reasonable man"; so that, in part at least, advocacy of the "objective" standard in contracts appears to have represented a desire for legal symmetry, legal uniformity, a desire seemingly prompted by aesthetic impulses. Whether (thanks to the "subjectivity" of the jurymen's reactions and other factors) the objectivists' formula, in its practical workings, could yield much actual objectivity, certainty, and uniformity may well be doubted. At any rate, the sponsors of complete "objectivity" in contracts largely won out in the wider generalizations of the Restatement of Contracts and in some judicial pronouncements.
>
> Williston, the leader of the objectivists, insists that, as to all contracts, without differentiation, the objective theory is essential because "founded upon the fundamental principle of the security of business transactions." . . . . It is little wonder that a considerable number of competent legal scholars have criticized the extent to which the objective theory, under Williston's influence, was carried in the Restatement of Contracts.

Do you agree with Williston's claim that the objective theory is "founded upon the fundamental principle of the security of business transactions"? What does that mean in any case?

2. OFFER

Professor Arthur Corbin articulated the principles underlying the rules of offer and acceptance in *Offer and Acceptance, and Some of the Resulting Legal Relations,* 26 Yale L.J. 169, 171 (1917). At this point, we are interested primarily in Corbin's conception of an offer, but you may want to keep his explanation of acceptance in mind for Subsection 3, *infra.*

> An *offer* is an act on the part of one person whereby he gives to another the legal power of creating the obligation called contract. An acceptance is the exercise of the power conferred by the performance of some act or acts. Both offer and acceptance must be acts expressing assent.
>
> The act constituting an offer and the act of constituting an acceptance may each consist of a promise. A promise is an expression of intention that the promisor will conduct himself in a specified way in the future, with an invitation to the promisee to rely thereon. If only one of the acts has this character, the contract is unilateral. If both acts have this character, the contract is bilateral. If neither of the acts has this character, the new set of legal relations, if any exists, is not called obligation . . . . In none of these cases will the expected legal relations be created unless the acts of the parties comply with the rules relating to mutual assent, consideration, form, capacity of parties, and legality of object.

Section 24 of the Restatement (Second) of Contracts defines offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."

Thus conceived, an offer is a specific kind of promise, one that is conditioned explicitly (or by implication) on a specified return. As such, it is distinct from a nonreciprocal promise of the sort we examined in Chapter 2 (e.g., I promise to give my son Adam $5,000 on his next birthday), and from a conditional statement of present intention that is not a promise (e.g., in response to your inquiry about whether a house is for sale, the owner responds he plans to sell it *if* he can receive $70,000 for it). This latter statement is commonly designated as an "invitation to negotiate." See Restatement (Second) § 26. At some point in the bargaining process, an invitation to negotiate matures into an offer. How does one determine when that point has been reached? Compare § 26 of the Second Restatement to § 25 of the Restatement of Contracts (1932) and then consider the following cases.

BAILEY v. WEST

See p. 5, *supra.*

LUCY v. ZEHMER

See p. 15, *supra.*

LEONARD v. PEPSICO, INC.

See p. 20, *supra.*

DYNO CONSTRUCTION COMPANY v. MCWANE, INC.

United States Court of Appeals, Sixth Circuit
198 F.3d 567 (1999)

QUIST, J.

Plaintiff, Dyno Construction Company, sued Defendant, McWane, Inc., alleging various breach of contract claims arising out of Dyno's purchase of ductile iron pipe from McWane that was later found to be defective. The district court denied the parties' cross-motions for summary judgment, and a jury returned a general verdict in favor of McWane. The district court denied Dyno's motion for a new trial. Dyno appeals the order denying its motion for summary judgment, the judgment entered after trial, and the order denying Dyno's motion for a new trial. We find no error and affirm.

Dyno is a company engaged in the business of constructing underground utility projects, specifically underground water and sewer lines. Dyno was purchased in the fall of 1995 by Frederick Harrah, Laymond Lewis, and a third party. Prior to purchasing Dyno, Harrah and Lewis were employees of Reynolds, Inc., a large underground pipeline construction company also in the business of installing underground water and sewer lines.

McWane is a manufacturer and seller of ductile iron pipe and fittings for underground utility projects. Harrah and Lewis frequently purchased pipe from McWane during their employment with Reynolds, as McWane was the exclusive supplier of certain types of ductile iron products to Reynolds.

Sometime shortly before November 6, 1995, Dyno submitted a bid to the City of Perrysburg, Ohio, for a multimillion dollar water and sewer system project. In order to prepare the bid, Lewis contacted various suppliers, including McWane, to obtain quotes for necessary materials. On November 6, 1995, Dyno learned that it was the low bidder on the project and would be awarded the contract.

On November 8, 1995, McWane's district sales manager, Kevin Ratcliffe, faxed Dyno a document containing quantities and prices for the materials Dyno requested for the Perrysburg Project. Ratcliffe sent a second fax to Lewis on November 13, 1995, which included handwritten prices and notes next to each item. On the fax cover sheet, Ratcliffe asked Lewis to "please call."

On or prior to November 22, 1995, Lewis phoned Ratcliffe and told him to order the materials. Lewis testified at his deposition that he thought that there was a "done deal" when he got off the phone with Ratcliffe. However, after the phone call, Ratcliffe prepared and sent a package to Lewis via

Federal Express. The Federal Express package included a purchase order, a credit application, and a cover letter in which Ratcliffe asked Lewis to review and sign the purchase order and credit application and return the originals to Ratcliffe. The purchase order and credit application each stated that the sale of the materials was subject to the terms and conditions printed on the reverse sides of those documents. The reverse side of each document contained additional terms and conditions, including a provision which limited McWane's liability for defective materials. The Federal Express invoice kept in McWane's files showed that Dyno received the package on November 24, 1995, at 8:53 a.m.

Lewis called Ratcliffe on December 1, 1995, to inquire about the status of Dyno's order. Lewis testified that Ratcliffe told him that "you have to sign our forms." Lewis indicated both in his deposition and at trial that he was not surprised when Ratcliffe told him that the purchase order and credit application would have to be signed before McWane would ship the materials. Lewis told Ratcliffe that he had not received the forms Ratcliffe sent via Federal Express and could not find the package in his office. At Lewis' request, in order to expedite the transaction, Ratcliffe faxed Lewis copies of the documents that were sent on November 22, 1995. However, Ratcliffe did not fax the back sides of the documents which included, among other things, this provision limiting McWane's liability:

> SELLER SHALL NOT BE LIABLE FOR EXEMPLARY, PUNITIVE, SPECIAL, INCIDENTAL, CONSEQUENTIAL DAMAGES OR EXPENSES, INCLUDING BUT NOT LIMITED TO, LOSS PROFIT REVENUES, LOSS OF USE OF THE GOODS, OR ANY ASSOCIATED GOODS OR EQUIPMENT, DAMAGE TO PROPERTY OF BUYER, COST OF CAPITAL, COST OF SUBSTITUTE GOODS, DOWNTIME, LIQUIDATED DAMAGES, OR THE CLAIMS OF BUYER'S CUSTOMERS FOR ANY OF THE AFORESAID DAMAGES . . .

Dyno signed the faxed pages without the quoted damages limitation provision and returned them to Ratcliffe later that day.

Dyno had substantial problems with the pipes it purchased from McWane. Although McWane repaired and reinstalled the pipe to the satisfaction of Dyno, it refused to pay Dyno for consequential damages suffered as a result of the defects in the pipes on the basis of the limitation of damages provision on the back of the purchase order. Dyno filed this suit in an attempt to recover its consequential damages.

Both parties moved for summary judgment with respect to the question of whether the quoted provision limiting McWane's liability for consequential damages was a part of the Dyno/McWane contract. In denying the motions, the district court rejected Dyno's contention that the two written quotations which Ratcliffe sent to Lewis were offers that Dyno accepted when Lewis informed Ratcliffe that Dyno wished to purchase the pipe from McWane because the quotations were part of preliminary negotiations between the parties. Instead, the court concluded that the contract was formed or, alternatively, modified, when Lewis signed the documents he received from Ratcliffe by fax on December 1, 1995 . . . . Thus, the district court framed the issue for the jury with respect to the limitation of damages provision as whether

Lewis knew or should have known about McWane's terms and conditions at the time he signed the fax copy.

At trial, during the conference on jury instructions, the district court rejected Dyno's proposed instruction number 7, which would have allowed the jury to find that the contract had been formed on or before November 22, 1995, on the basis of its ruling with respect to the summary judgment motions that the contract was formed on December 1, 1995. At the conclusion of trial, the jury returned a verdict in favor of McWane. . . .

Dyno contends that the district court erred when it found that the contract was formed on December 1, 1995, rather than on November 22, 1995 . . . . Dyno continues to argue to this Court that the contract was actually entered into on November 22, 1995, when Lewis told Ratcliffe to go ahead and order the materials that Ratcliffe had listed in his November 8 and November 13 faxes. Dyno claims that the parties agreed to the essential terms of price, quantity, and description, and any other terms to the contract could be supplied by the "gap-filler" provisions of the Uniform Commercial Code, which do not limit the seller's liability for consequential damages.

In order to prove the existence of a contract, a plaintiff is required to demonstrate the essential requirements of an offer, acceptance, and consideration. A valid and binding contract comes into existence when an offer is accepted. Dyno contends that the written price quotations Ratcliffe faxed to Lewis on November 8, 1995, and November 13, 1995, constituted the offer, which Lewis accepted on behalf of Dyno on or about November 22, 1995, when Lewis told Ratcliffe to order the materials listed on the price quote.

"Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract." White Consol. Indus., Inc. v. McGill Mfg. Co., 165 F.3d 1185, 1190 (8th Cir. 1999). Instead, a buyer's purchase agreement submitted in response to a price quotation is usually deemed the offer. However, a price quotation may suffice for an offer if it is sufficiently detailed and it "reasonably appears from the price quotation that assent to that quotation is all that is needed to ripen the offer into a contract." Quaker State Mushroom Co. v. Dominick's Finer Foods, Inc., of Illinois, 635 F. Supp. 1281, 1284 (N.D. Ill. 1986). While the inclusion of a description of the product, price, quantity, and terms of payment may indicate that the price quotation is an offer rather than a mere invitation to negotiate, the determination of the issue depends primarily upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances. Thus, to constitute an offer, a price quotation must "be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract." Maurice Elec. Supply, 632 F. Supp. at 1087.

In Interstate Industries, Inc. v. Barclay Industries, Inc., 540 F.2d 868 (7th Cir. 1976), the court determined that a letter sent by the defendant to the plaintiff stating that the defendant would be able to manufacture fiberglass panels for the plaintiff pursuant to specified standards at certain prices did not constitute an offer. Among other things, the court found that the letter's use of the term "price quotation," lack of language indicating that an offer was being made, and absence of terms regarding quantity, time of delivery,

or payment terms established that the letter was not intended as an offer. See id. at 873. Thos. J. Sheehan Co. v. Crane Co., 418 F.2d 642 (8th Cir. 1969), cited by the court in Interstate Industries, concluded that a price list for copper tubing which a supplier furnished to a subcontractor in connection with the latter's bid on a job was merely an invitation to engage in future negotiations. The court observed:

> Prices and price factors quoted by suppliers to contractors for the purposes of aiding contractors to make bid estimates, without more specific terms, do not obligate the supplier to comply with any purchase order upon whatever terms and conditions the contractor may choose to offer at some undetermined date in the future. The fact that the prices quoted are not withdrawn or that a withdrawal of them is not communicated to the contractor is immaterial. No duty exists to revoke terms which without words of commitment merely quote an existing price at which a contract of purchase might be negotiated.

Thos. J. Sheehan, 418 F.2d at 645-46.

Similarly, in Day v. Amax, Inc., 701 F.2d 1258 (8th Cir. 1983), the Seventh Circuit affirmed the district court's grant of a directed verdict to the defendant on the issue of whether the defendant's description of mining equipment and a quotation of prices constituted an offer, reasoning that "although questions of intent are usually for the jury to decide . . . the record discloses no evidence that any of the defendants manifested an intent to enter into a contract with [the plaintiff]." Id. at 1263. Thus, the plaintiff's evidence that the defendant had given the plaintiff signed writings containing detailed descriptions of the mining equipment and the terms of sale and had set up an escrow account were insufficient to demonstrate the defendant's intent to enter into a contract.

In contrast to the cases discussed above, the court in Bergquist Co. v. Sunroc Corp., 777 F. Supp. 1236 (E.D. Pa. 1991), found that the question of whether the price quotation at issue constituted an offer was a question of fact for the jury. Some of the factors cited by the court as creating an issue for the jury were: (i) the price quotation was developed by the defendant after the parties had engaged in substantial negotiations; (ii) the quotation included a description of the product, a list of various quantities at various prices, terms of payment, and delivery terms; (iii) the quotation contained the statement "This quotation is offered for your acceptance within 30 days"; and (iv) the price which the purchaser paid was the price listed in the price quotation rather than the price listed in the purchaser's subsequent purchase order. See id. at 1249.

In this case, the facts before the district court furnished a sufficient basis for it to conclude as a matter of law that the contract was formed when Lewis signed the fax from Ratcliffe on December 1, 1995, rather than when Lewis told Ratcliffe to order the materials on November 22, 1995. In particular, neither the November 8 nor the November 13 price quotations contained words indicating that Ratcliffe intended to make an offer to Dyno. The word "Estimate" was printed at the top of the document faxed on November 8, and the message "Please call" was printed on the cover sheet for the document faxed on November 13. These words are indicative of an invitation to engage

in future negotiations rather than an offer to enter into a contract. Although both price lists set forth descriptions of the materials, prices, and quantities, nothing was stated about the place of delivery, time of performance, or terms of payment. . . . Finally, the fact that Lewis voluntarily signed the December 1 fax demonstrated that he understood that a binding contract had not been formed as a result of the previous price quotations sent by Ratcliffe. In light of these facts, we agree with the district court that McWane's price quotations did not constitute offers and that the contract was formed on December 1, 1995.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

LEFKOWITZ v. GREAT MINNEAPOLIS SURPLUS STORE, INC.

Supreme Court of Minnesota
251 Minn. 188, 86 N.W.2d 689 (1957)

MURPHY, J.

This is an appeal from an order of the Municipal Court of Minneapolis denying the motion of the defendant for amended findings of fact, or, in the alternative, for a new trial. The order for judgment awarded the plaintiff the sum of $138.50 as damages for breach of contract.

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on April 6, 1956, the defendant published the following advertisement in a Minneapolis newspaper:

SATURDAY 9 A.M. SHARP
3 BRAND NEW FUR COATS

Worth To $100.00

First Come First Served

$1 Each

On April 13, the defendant again published an advertisement in the same newspaper as follows:

SATURDAY 9 A.M.
2 BRAND NEW PASTEL
MINK 3-SKIN SCARFS

Selling for $89.50

Out they go

Saturday. Each $1.00

1 BLACK LAPIN STOLE

Beautiful

worth $139.50 . . . . . $1.00

FIRST COME

FIRST SERVED

The record supports the findings of the court that on each of the Saturdays following the publication of the above-described ads the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a "house rule" the offer was intended for women only and sales would not be made to men, and on the second visit that plaintiff knew defendant's house rules.

The trial court properly disallowed plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were "Worth to $100.00," how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the "1 Black Lapin Stole . . . worth $139.50 . . . " the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the $1 quoted purchase price.

The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price . . . may be withdrawn without notice. He relies upon authorities which hold that, where an advertiser publishes in a newspaper that he has a certain quantity or quality of goods which he wants to dispose of at certain prices and on certain terms, such advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. Such advertisements have been construed as an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms . . . .

There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract . . . .

The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, *Contracts* (Rev. ed.) § 27.

The authorities . . . emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. The most recent case on the subject is Johnson v. Capital City Ford Co., La. App., 85 So. 2d 75, in which the court pointed out that a newspaper advertisement relating to the purchase and sale of automobiles may constitute an offer, acceptance of which will consummate a contract and create an obligation in the offeror to perform according to the terms of the published offer.

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of

the parties and the surrounding circumstances. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.

The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. Affirmed.

NOTES

1. ***Offers and Risk Aversion.*** One way of characterizing the transformation from invitation to negotiate to offer is in terms of relative degrees of certainty. Recall that in Chapter 2 we analyzed the willingness of parties to incur liability in terms of their relative certainty (or uncertainty) about the prospects of a mutually beneficial deal materializing.[2] If you assume that most parties are averse to taking risks, generally they will prefer to forego uncertain gains rather than incur equally uncertain losses of the same magnitude. One way to think about it is to picture the bargaining context as a continuum with complete uncertainty at one pole and absolute certainty at the other. Invitations to negotiate would fall along the continuum toward uncertainty. Under these conditions, risk averse parties would prefer nonenforcement of such preliminary promises. While such a rule would jeopardize the prospect of gain from the deal, it would also reduce each bargainer's potential liability if the deal turned sour. One reason why we might imagine that many (most) bargainers would prefer to walk away at this point is that each bargainer can regulate his own reliance (take precautions, make fewer plans) more readily than he can control the reliance of the promisee.

Another way to think about why parties would prefer that preliminary negotiations not be binding is to focus on the distinction between binding commitments which change the opportunities for both parties and non-binding statements which merely alter their expectations. Economists call the latter "cheap talk." "Cheap talk" is a valuable means of bringing the parties together, even though one cannot "rely" upon it. *See* Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation,* 85 Va. L. Rev. 385 (1999).

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[2] *See generally* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract,* 89 Yale L.J. 1261, 1293-97 (1980). *See also* Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation,* 89 Mich. L. Rev. 215 (1990); Richard Craswell, *Offer Acceptance and Efficient Reliance,* 48 Stan. L. Rev. 481 (1996).

If self-protection is generally preferred to the risk of liability for another's disappointed reliance, then why would anyone ever agree voluntarily to become legally obligated to perform his promise? One answer to this question is that the promisor places greater value on the return promise of the promisee than he fears regret for his own promise. As parties bargain with each other, reaching tentative understandings over key issues such as price, quality of goods, quantity to be ordered, etc., the outlines of the potential exchange become well-defined. When the prospect of gain measurably outweighs the risk of regret, even risk averse parties would then prefer mutual enforcement, thus enhancing the benefits each side expects to receive. At this point the respective representations are relabeled "offer" and "acceptance," thereby signaling that legal liability attaches.

An offer is easy to recognize when a deal is proposed in which all terms are dickered and are clear and definite. Often, however, it is harder to know if an offer has been made. For example, many cases have held that the quotation of a price when selling goods does not constitute an offer. Yet other cases have decided that quoting a price is an offer. The two variables that seem to matter to courts are the language used by the parties (see, e.g., the use of the word "ESTIMATE" in *Dyno Construction*) and the context in which the language is used (e.g., how far along are the parties in the sequence of negotiation). In general, courts resolve doubtful cases with a presumption that the communication is an invitation to negotiate and not an offer. Why do you suppose that is so?

2. ***Newspaper Advertisements.*** Consider the classified ads of your local newspaper. When a person places a for-sale ad in the classifieds, ought a court to rule that she intended to make an offer to sell? If so, what would the result be in the following case:

> Christy advertises her Honda Civic for sale in the local paper for $3000. The first day that the advertisement appears, Steve buys the car. In the late afternoon of that day, Adam calls Christy. When Christy answers "Hello," Adam says, "I accept your offer to sell the Honda for $3000."

Suppose that you decide, on the basis of the example, that people do not intend to be making an offer in these circumstances, but you observe that the legal rule in your state is that classified ads are binding offers. How do you expect that people will adjust to this rule?

Would your analysis differ if the advertisement was a half-page ad by a retail store?

3. ***Advertising Circulars and Price Quotations.*** Even if they contain price and quantity terms, unsolicited advertising circulars do not necessarily constitute offers to sell. Often, other essential terms are unstated, thus precluding a court from construing such an advertisement as an offer.

For an illustration of this principle, see *Rhen Marshall, Inc. v. Purolator Inc.*, 211 Neb. 306, 318 N.W.2d 284 (1982). In this case, Purolator sent Rhen Marshall an advertisement listing prices for their oil filters. Rhen Marshall placed an order, but sought a special truckload discount as well as discounted

prices for timely payment. The Supreme Court of Nebraska ruled that no offer was made, noting:

> Rhen Marshall set forth conditions in its order that were not previously discussed by the parties. The sales promotion circular by Purolator did not contain terms with regard to discounts or billing. Rhen Marshall's order requested a 5 percent truckload discount and a 30-60-90-day billing. Rhen Marshall had attached conditions in its order which were usual in its previous dealings with Purolator, but the discounts offered by the promotion were substantial and it could not be assumed by Rhen Marshall that Purolator would also give other, additional discounts. . . . We hold that the brochure was not an offer by Purolator, but that Rhen Marshall's order was itself an offer which Purolator did not accept.

It is not the unsolicited nature of the advertisement that renders it ineffective as an offer; instead, the very nature of a price quotation has consistently led courts to conclude that the mere act of providing a price does not independently create an offer where none existed before. In *Audio Visual Associates, Inc. v. Sharp Electronics Corporation,* 210 F.3d 254 (4th Cir. 2000), the court observed:

> Audio Visual cannot maintain that upon its receipt of a price quotation from Sharp, it could have formed a binding contract to purchase, for example, 1.5 million units — a proposition yet more untenable if it turned out that Sharp were unable to deliver 1.5 million units. Price quotations are a daily part of commerce by which products are shopped and commercial transactions initiated. Without more, they amount to an invitation to enter into negotiations, but generally they are not offers that can be accepted to form binding contracts . . . It would bring an end to the competitive practice of shopping products if every quotation exposed the "quoter" to an enforceable contract on whatever terms the "quotee" chose, regardless of product availability.

Typically, a seller's price quotation is an invitation for an offer, and the offer usually takes the form of a purchase order, providing product choice, quantity, price, and terms of delivery. The UCC provides that the seller can accept such an offer in any of several ways, often determined by custom and practice. See §§ 2-204(1), 2-206(1), 2-208. Frequently, the seller accepts the offer of a purchase order by a written acknowledgment, which also provides a shipping date for the product. The seller may also accept simply by performance and delivery of the goods. A seller, however, is also free to reject the terms of the purchase order and/or to propose alternative terms.

4. *Two Coats and a Killer.* Do you see why the *Lefkowitz* court might have held that the there was an offer to sell Lefkowitz the first coat but not the second? In that connection, how would you decide this case:

> Taft Hyatt, remorseful after numerous sessions with the priest in his church, turned himself in and confessed to a series of murders. The courts found Hyatt guilty and sentenced him to life in prison. Hyatt, seeking money to support his wife and children, now claims

reward money that a local newspaper advertised that it would give in exchange for any information leading to the arrest of the murderer.

What issues and result?

5. *Indefiniteness.* In *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,* 99 Yale L. J. 87, 107 (1989), Professors Ian Ayres and Robert Gertner write about the *Lefkowitz* case:

> Ask yourself the simple question: What kind of ad is the Great Minneapolis Surplus Store going to run the week following the court's decision? By lending its imprimatur to the indefinite ad, the court allows retailers to induce inefficient consumer reliance with impunity. The *Lefkowitz* case dramatically illustrates that only by enforcing indefinite offers against the offeror can one drive out indefinite offers.
>
> *Lefkowitz* was wrongly decided. The defendant's offer was intentionally vague to induce inefficient reliance on the part of the buyer (Lefkowitz incurred the "shoe leather" costs of traveling to the store). Courts can retain the common law's general reluctance to enforce indefinite contracts so that both parties will have an incentive to make the contracts more definite. But *Lefkowitz* illustrates an exception to this general rule. When the indefiniteness is clearly attributable to one party and induces inefficient reliance from the other party, punitive enforcement may be efficient to drive out inefficient offers.

6. *Self-Service.* Many stores feature displays where consumers pick up the merchandise and take it to the checkout counter. Only when they exchange payment for the merchandise is a contract formed between the consumer and the seller. But what rules should govern the interim period between the time the consumer takes the item from the store shelf and when she pays for it?

The Supreme Court of Oklahoma explored this question in *Barker v. Allied Supermarket,* 596 P.2d 870 (Okla. 1979). In this case, a Dr. Pepper bottle exploded as the plaintiff placed it in his shopping cart. The court found that there was an implied warranty on the bottle, and that the warranty period did not merely commence upon payment. Instead, the court noted, "A merchant who utilizes the self-service shopping method thereby makes an open invitation to the public to enter his store and to inspect and take possession of any item so displayed. The merchant's act of stocking these self-service displays with goods thereby makes an offer to the shopper to enter a contract for their sale."

7. *Problem.* On September 21, 2000, Seed Co. of Culpeper, Va. mailed a sample to various persons, including Brown, a grain dealer. On the face of the sample appeared the following words:

> "Red Clover — 50,000 lbs. like sample. I am asking 24 cents per, f.o.b.[3] Culpeper."

On October 4, Brown wired Seed Co.:

> "Sample Received. Your price too high. Will go 21. Wire firm offering naming absolutely lowest f.o.b."

[3] [Eds] F.o.b. Is a shipping term that means "free on board." *See* UCC § 2-319(1).